CRIMINAL APPEALS: PRELIMINARY ISSUES

QUESTION PAPER 1

Legal Aid NSW submission

to the New South Wales Law Reform Commission

30 August 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice spans all criminal jurisdictions, with solicitors represent clients in appeals in all criminal courts in which an application for appeal can be made, including the District Court, the Supreme Court and the Court of Criminal Appeal.

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Annmarie Lumsden by email at Annmarie.Lumsden@legalaid.nsw.gov.au or by phone on 9219 6324.

Introduction

The criminal appeals framework in NSW is particularly complex and in need of simplification, clarification and consolidation. The current framework is contained in three separate pieces of legislation, namely the *Crimes (Appeal and Review) Act 2001* (NSW), the *Criminal Appeal Act 1912* (NSW) and the *Supreme Court Act 1970* (NSW). Legal Aid NSW supports the aim of the Criminal Appeals Review to 'create, as far as is possible, a single consolidated statue for criminal appeals in NSW.'[1]

Many of the reforms contemplated in this review are not controversial. They are focused on developing a clearer, more streamlined and modernised appeals process. There are however some very significant reforms being considered in the course of the review. In particular, the appropriate test for appeals from the Local Court to the District Court and for appeals from the District Court and the Supreme Court.

The Attorney General has asked the NSW Law Reform Commission to review current avenues of appeals in all criminal matters with regard to 'the balance between the need for finality and the need to provide fair opportunity for appeal' and 'the need to provide for timely resolution of criminal appeal matters.'[2] Legal Aid NSW considers that the current tests and processes in place to appeal a decision of the Local Court to the District Court provide an appropriate balance between the need for fairness and access to justice, and the need for efficiency and finality in the criminal justice system. There is a general right of appeal from the Local Court to the District Court and more stringent tests for appeals to the higher courts. This process is working effectively and efficiently. Introducing a requirement to establish error on appeal to the District Court would create significant delays in the finalisation of Local Court matters and the finalisation of matters on appeal in the District Court. Furthermore, to introduce a test that the District Court should only intervene where 'the sentence is manifestly excessive or manifestly inadequate' would significantly curtail current appeal rights, lead to unfairness and injustice in the appeal process and add complexity to the appeal process. In the absence of any evidence that the current appeal process is inefficient and ineffective, Legal Aid NSW considers that the current appeal process from the Local Court to the District Court should be retained.

Legal Aid NSW considers that the current test for an appeal against sentence from decisions of the District and Supreme Court is appropriate. Legal Aid NSW is of the view that introducing a single test for appeals to the Court of Criminal Appeal, namely that 'the sentence is manifestly excessive or manifestly inadequate' would significantly curtail current appeal rights and lead to unfairness and injustice in the appeal process. A single test would remove important avenues of appeal that are currently available, such as parity, lead to an increase in Crown appeals and limit the extent to which the Court of Criminal Appeal can oversee consistency in sentencing and provide authoritative judgments on questions of principle.

Legal Aid NSW makes the following priority recommendations in relation to reforming the criminal appeals framework:

Recommendation 1: Consolidate the criminal appeals framework in NSW into a single statute.

Recommendation 2: Make the Court of Criminal Appeal the ultimate appellate court in criminal matters.

[1] NSW Law Reform Commission, *Criminal Appeals: Preliminary Issues,* Question Paper 1 (2013) (1.16)
[2] NSW Law Reform Commission, *Criminal Appeals: Preliminary Issues,* Question Paper 1 (2013) (1.3)

Recommendation 2: Abolish the current 'stated case' procedure and make provision in the new consolidated criminal appeals statute to seek leave to appeal to the Court of Criminal Appeal on limited grounds.

Recommendation 3: Retain the current avenues of appeal from criminal proceedings in the Local Court to the District Court and retain an avenue of appeal from the Local Court to the Supreme Court or the Court of Criminal Appeal on questions of law.

Recommendation 4: Introduce a different avenue of appeal for summary matters in the Drug Court Program and introduce appeal rights following an adverse determination regarding particular Drug Court decisions such as eligibility and appropriateness, potential to progress and risk resulting in refusal of entry or termination from the Drug Court Program.

Recommendation 5: Bring the leave requirements for prosecution appeals into line with those that apply to defence appeals.

Recommendation 6: Retain the current test for an appeal against sentence from decisions of the District and Supreme Courts and adopt the submission made by the National Criminal Law Liaison Committee of the Law Council to SCAG in 2010 in relation to an appeal against conviction from the District Court and Supreme Court.

1. Achieving the aims of our terms of reference

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

The criminal appeals framework should be consolidated into a single statute that is simple and straightforward to follow and apply. Simply amalgamating the existing legislation into a single statue will not necessarily address the complexities of the current criminal appeals framework. The new statute should be logically organised and include aids such as flow charts.

Many of the reforms Legal Aid NSW proposes throughout this submission are likely to have a significant impact on consolidating and simplifying the criminal appeal process, such as making the Court of Criminal Appeal the ultimate court for all criminal appeals, abolishing the 'case stated' procedure and incorporating certain rights to seek prerogative relief into the one criminal appeals statute.

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

The main object of any reform to the criminal appeals framework in NSW should be to create a clear and concise criminal appeals statute that is simple to follow and use. Fairness and access to justice should be central tenets of the appellate framework. Finality and the efficient allocation of court resources are also important objectives of any appeals process, particularly in relation to appeals to the higher courts.

The appeals process from the Local Court should be more accessible than appeals from the higher courts to take into account the practical realities of the environment in which decisions are made and sentences are imposed in the Local Court, as well as the circumstances of defendants.

The appellate framework should ensure that the higher courts continue to have a supervisory and guiding function in relation to questions of law in the lower courts.

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

The appeals framework should be consolidated into one statute that draws together the relevant appeal rights currently set out in the *Criminal Appeal Act 1912* (NSW), the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) and the *Supreme Court Act 1970*. The Court of Criminal Appeal should be the ultimate court for all criminal appeal matters in NSW and it should be vested with the powers of the Court of Appeal in relation to criminal matters. The 'stated case' procedure should be abandoned and provision made in a new consolidated statute to seek leave to appeal on a question of law alone to the Court of Criminal Appeal.

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

The current system for appeals from the Local Court to the District Court is a highly efficient regime. There is no sound evidence base to support a departure from the current appeal process. The Local Court deals with a very large number of matters each year - a total of 108, 528 matters were finalised in the Local Court in 2012.[3] A very small number, approximately one percent, of these matters are appealed.[4]

Changing the test for appeals from the Local Court to the District Court may at first glance seem to offer cost savings and greater efficiency but on closer consideration will inevitably lead to increased costs and a decrease in efficiency. If an error needs to be demonstrated for an appeal to succeed from the Local Court to the District Court, the appeal process would become much more cumbersome and costly for all stakeholders in the process. Legal Aid NSW anticipates that any such change would result in significant delays in the Local Court and in finalising appeals in the District Court, particularly if written pleadings are required to be filed with a Notice of Appeal. Legal Aid NSW expands on its reasons in the response to Question 7 of the question paper.

Appeals from the Local Court to the Supreme Court on questions of law are also working well. This is an important avenue for Crown appeals, as there is no provision for the Crown to appeal to the District Court against an acquittal in the Local Court. It is also an important mechanism to enable a higher court to guide, supervise and correct the Local Court in appropriate circumstances.

Appeals to the Court of Criminal Appeal on conviction and sentence are working well and we propose that the Court of Criminal Appeal should be the ultimate court for all criminal appeal matters in NSW.

[3] NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statstics 2012* (2013) iii
[4] NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statstics 2012* (2013) 130

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

Legal Aid NSW does not foresee any practical problems in consolidating the criminal appeals framework if the new consolidated statute is clear, concise and easy to navigate.

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

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

(a) Local Court

Legal Aid NSW strongly supports retaining the current appeal rights from the Local Court to the District Court. Legal Aid NSW considers that the current system strikes an appropriate balance between efficiency and fairness, as discussed in the response to question 7.

There is significant value in retaining the supervisory jurisdiction of a higher court, either the Supreme Court or the Court of Criminal Appeal, on questions of law. This enables a higher court to guide and correct the lower courts in appropriate circumstances.

(b) Children's Court

The current process of appealing matters from the Children's Court is broadly appropriate. However, Legal Aid NSW draws to the Commission's attention the operation of s22A of the *Children's Court Act* which provides that appeals in relation to decisions of the President of the Children's Court are to be determined by the Supreme Court, rather than the District Court.

In practice, this means that young people who are sentenced by the President of the Children's Court and appeal their matter have their appeal heard by the Supreme Court, while children who appear in front of any other Children's Court Magistrate have their appeal determined in the District Court. Legal Aid NSW appreciates that the President of the Children's Court is a District Court Judge which impacts on the appropriate avenue of appeal. However, this process potentially gives rise to questions of fairness and the appropriate allocation of court resources. The Commission may wish to consider whether this current process is appropriate.

(c) District Court

` The current regime works well and should be retained.

(d) Supreme Court

The current regime works well and should be retained.

(e) Land and Environment Court

Legal Aid NSW is not in a position to comment.

(f) Drug Court

Broadly speaking, the current appeal provisions for the Drug Court are appropriate. However, consideration should be given to introducing a different avenue of appeal for summary matters in the Drug Court Program (DCP). At present, the process for all appeals from the Drug Court, even in summary matters, is to the Court of Criminal Appeal.

The Drug Court has jurisdiction over certain eligible indictable matters normally dealt with in the District Court, as well as summary matters. In general, it is only the actual sentences (initial and final) that are subject to review by way of appeal. It is appropriate for sentencing decisions in indictable matters to be heard by the Court of Criminal Appeal. However, Legal Aid NSW is of the view that it is not appropriate for summary matters determined by the Drug Court to go on appeal, by leave only, to the Court of Criminal Appeal.

Legal Aid NSW acknowledges that it is not appropriate for a Drug Court sentencing decision in a summary matter to be appealable to another District Court Judge. One possible avenue of reform may be to allow an appeal to a combined bench of Drug Court Judges. The Commission may wish to consider other options for reform in this area.

Consideration should also be given to introducing appeal rights following a determination regarding major matters such as eligibility and appropriateness, potential to progress (PTP) and risk resulting in refusal of entry or termination from the DCP. At present, there are no appeal rights in relation to these major decisions.

An adverse decision may be made by the Drug Court Judge in a number of circumstances, including:

(a) The decision to remove a person's name from the Drug Court ballot.[5]

(b) The decision that a person is or is not an eligible and an appropriate person.[6]

(c) The imposition of the initial sentence of imprisonment which is to be suspended.

(d) The imposition of sanctions during the course of participation in the DCP.[7]

(e) The determination that a person does not have potential to progress (PTP) on the DCP and thus should have their DCP terminated.[8]

(f) The determination that a person is of excessive risk to the community.[9]

(g) The imposition of the final sentence of imprisonment which frequently entails a period of imprisonment.

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[5] See Drug Court of NSW, Policy 12, selection of participants
[6] *Drug Court Act 1998* (NSW) s 7A(2)(a) and (c); *Drug Court Regulation 2010* (NSW) reg 4
[7] *Drug Court Act 1998* (NSW) s 10(1)(a)
[8] *Drug Court Act 1998* (NSW) s 10(1)(b)
[9] *Drug Court Act 1998* (NSW) s 10(1)(b)

There are also numerous other detailed issues that arise in the course of the supervision of a participant's DCP which call for judicial determination. It is appropriate that there is no avenue of appeal in relation to the imposition of sanctions. However, a number of the other decisions outlined above can have a significant bearing on the opportunities presented to a defendant for rehabilitation and the ultimate outcome of their matter.

There should be an avenue of appeal available in relation to major decisions of the Drug Court. The current general avenue of appeal to the Supreme Court pursuant to section 69 of the *Supreme Court Act 1970* is not sufficient (see for example, *Director of Public Prosecutions v Hilzinger & Drug Court of New South Wales* [2011] NSWCA 106). There should also be an avenue of appeal for questions of mixed fact and law.

There are a range of practical questions that would arise in considering potential reforms in this area, such as whether a defendant would remain at liberty pending the hearing of an appeal. Legal Aid NSW would welcome the opportunity to contribute to further consideration of these issues.

(g) Industrial Court?

Legal Aid NSW is not in a position to comment.

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

There should continue to be an avenue to enable the Supreme Court or Court of Criminal Appeal to review decisions of the Local Court. The provisions contained in sections 69 and 75 of the *Supreme Court Act 1970* should be retained in a consolidated criminal appeals statute. It is important to retain the supervisory and corrective function of a higher court, although the process should be clarified and simplified in a new criminal appeals statute.

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

In our experience, very few matters are appealed directly to the Supreme Court. However, this does not diminish the importance of this avenue of appeal. It is a particularly important avenue for the Crown which cannot appeal against conviction/acquittal from the Local Court to the District Court.

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

The current scheme for appeals from the Local Court contained in CARA is broadly appropriate. In particular, there is considerable value in retaining an avenue whereby questions of law can be determined by the Supreme Court as provided for in sections 52, 53, 56 and 57 of CARA. It is preferable for these provisions, as well as a provision for judicial review, to be included in any new consolidated appeals statute rather than having the District Court 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?

Appeals from a decision of the Supreme Court on appeal from the Local Court should be heard by the Court of Criminal Appeal. As noted above, the current avenue to the Court of Appeal should be removed.

(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 new consolidated appeals statute should vest the current powers of the Court of Appeal in the Court of Criminal Appeal and make the Court of Criminal Appeal the ultimate appeal court in NSW. It is anomalous and unnecessary to have criminal appeals determined 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 questions of law and questions of fact or mixed fact/law. In particular, appeals against sentence and conviction on questions of fact should continue to be determined by the District Court. In the view of Legal Aid NSW, changing the current regime to require an error of law to be established before leave is granted to appeal, will result in significant delay in the finalisation of appeals and introduce unnecessary complexity to the appeal process. Legal Aid NSW expands on its reasons in more detail in the response to Question 7.

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

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

The current regime for appeals works well and should be continued. Legal Aid NSW notes that given the definition of 'sentence' in section 3 of CARA, it is arguable that questions of law arising from a bail determination made in the Local Court cannot be appealed to the Supreme Court. Legal Aid NSW is of the view there should be a clear avenue of appeal to a higher court to determine questions of law in relation to a bail decision in the Local Court.

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

The current regime that limits prosecution appeals from criminal proceedings should be retained.

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

The current regime works well and should be retained.

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

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

Legal Aid NSW supports the retention of the current leave provisions and recommends the introduction of leave requirements in relation to prosecution appeals to bring them into line with a defendants requirement to seek leave. The current approach whereby the same type of appeal has different leave requirements depending upon who is bringing the appeal is inconsistent and unnecessary.

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

There should not be any limits placed on the current avenues of appeal from the Local Court to the District Court. The current regime should be retained. Legal Aid NSW is of the view that the current system is working efficiently and limiting the avenues of appeal to the District Court would in fact create significant delays in the finalisation of appeal matters in the District Court. Legal Aid NSW expands on its reasons for this in the response to Question 7.

5. What changes should be made to the case stated procedure?

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 'stated case' process is extremely complex and has limited utility in its current, cumbersome form. Legal Aid NSW is aware of this avenue of appeal being utilised successfully in only a very small number of matters. It is the view of Legal Aid NSW that the provision should be abolished and a limited right to appeal from a decision of the District Court be introduced in its place. Legal Aid NSW acknowledges that the principal of finality is particularly important in this context but consider that aspects of the stated case procedure and rights to seek prerogative relief should be retained in a consolidated criminal appeals statute. Accordingly, Legal Aid NSW endorses the NSW Bar Association submission on this point which recommends a right to seek leave to appeal to the Court of Criminal Appeal on the following limited grounds:

- Denial of procedural fairness
- Apprehended bias
- Ultra Vires
- Failure to exercise jurisdiction
- Error of law on the face of the record

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

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

The current time limit imposed on filing an application for appeal to the District Court is appropriate in most circumstances. However, if the current test for an appeal against sentence and conviction from the Local Court were to be altered, Legal Aid NSW anticipates that this would have a significant bearing on the time required to file an appeal. For example, if error needs to be demonstrated to succeed in an appeal from the Local Court to the District Court, it is likely that a transcript would need to be ordered for all possible appeal matters. In the experience of Legal Aid NSW, the average wait for a transcript is approximately three months. If significant changes were made to the test for an appeal from the Local Court to the District Court, the timeframes for filing an application for appeal would need to be extended significantly.

The current time limit imposed upon offenders seeking to file a Notice of Intention to Appeal in the CCA is appropriate. Legal Aid NSW submits that the same time limit should be imposed upon the prosecution in relation to appeals against inadequacy of sentence in the CCA. The Court's power to grant an extension of time or to dispense with the time limit for filing an appeal overcomes any unfairness to those unable to comply with the 28 day requirement.

(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?

Consideration should be given to extending the timeframe to six months after the Local Court decision was made in a range of limited circumstances. For example, there may be strong policy grounds to allow an unrepresented defendant who was not aware of the strict time frames longer to file their application for appeal. A provision allowing courts to grant leave to appeal outside the three month period in 'exceptional circumstances' may not capture examples such as this, given the number of unrepresented defendants that appear before a Local Court. A new statute could set out in clear terms the particular, limited, circumstances in which an appeal will be allowed within six 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?

Crown appeals against cost orders should be lodged within 28 days.

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

Crown appeals alleging inadequacy of sentence should comply with a 28 day time limit on filing the Notice of Appeal.

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

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

Refer to the combined response to questions 7(1) and 7(2) below.

(2) Should there be a need to demonstrate error to succeed in an appeal from the Local Court to the District Court or to the Land and Environment Court?

The current appeals process from the Local Court is highly efficient. The test for an appeal to the District Court should not change to require error to be demonstrated in order to succeed in an appeal from the Local Court to the District Court. If this test is introduced, it will cause significant delays in the Local Court and in finalising appeals in the District Court.

While magistrates are now legally qualified judicial officers, it is widely acknowledged by the Higher Courts that the Local Court is an extremely busy environment in which decisions and submissions on sentence are made under significant time pressures. The difference between the practical realities and pressures of finalising matters in the Local Court and the District Court is immediately apparent to anyone who has observed the operation of the Sydney Central Local Court in comparison to the Downing Centre District Court for example. Further, the jurisdiction of the Local Court has expanded over time to include a range of serious offences which can attract significant penalties. It is appropriate that this ambit of authority should have attached to it significant review measures.

Only a very small proportion of matters are appealed from the Local Court. In 2012, there were 1,385 appeals against conviction and sentence in contrast to a total of 108,528 matters finalised in the Local Court.[10] This represents slightly more than 1% of matters.

There is no evidence that the current system is causing unnecessary delays or is being abused by defendants. The majority of severity appeals (60.8%) were upheld in 2012 and over a quarter of appeals against conviction and sentence (26.5%) were upheld in 2012.[11] The proportion of successful appeals is an indication of the frequency with which the District Court has determined that it was necessary to intervene and alter a decision of the Local Court.

In all other states and Territories apart from Victoria, error is required to be established before an appeal is allowed from the Local or Magistrates Court.[12] In 2013, NSW higher appeal courts had the lowest percentage (2.4%) of lodgements pending completion in the District/Country courts,[13] and the second lowest 'cost per finalisation' in the District/County courts.[14] There is

[10] NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statstics 2012* (2013) iii, 130
[11] NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statstics 2012* (2013) 130
[12] NSW Attorney General's Department, *Report on the Statutory Review of the Crimes (Appeal and Review) Act 2001,* August 2008, 30-31
[13] SCRGSP (Steering Committee for the Review of Government Service Provision) 2013, *Report on Govenrment Services 2013*, Productivity Commission, Canberra, c.33
[14] SCRGSP (Steering Committee for the Review of Government Service Provision) 2013, *Report on Govenrment Services 2013*, Productivity Commission, Canberra, c.37

insufficient information available regarding 'efficiency indicators' from each of the States and Territories to draw a meaningful conclusion about the efficiency and clearance rates of appeals in the District Court in NSW in comparison to other states and territories.[15]

While it is unclear to what extent these statistics are attributable to the current appeal process, they certainly support the proposition that the NSW appeal process is efficient, if not the most efficient in the country.

If it became necessary to demonstrate error to succeed in an appeal from the Local Court to the District Court this would have far reaching ramifications for the way in which matters are managed in the Local Court. The rigour currently required in the District Court for sentence matters would need to be applied in the Local Court.

Defence lawyers would be likely to take a far more cautious and thorough approach to the preparation of pleas in mitigation. For example, they would be more likely to call evidence from their client on sentence and call character evidence rather than simply tendering references. Defence lawyers would also be more likely to seek adjournments to obtain all relevant information, such as a custodial print out, before proceeding to make submissions on sentence. This could lead to defendants spending more time in custody awaiting finalisation of their matter, which in turn has cost implications for the courts and correctional services.

When a plea in mitigation was ultimately made, it would likely be far lengthier than the current 'standard' Local Court plea, as lawyers would be careful to ensure that they address all matters of law and the personal circumstances of their client in considerable detail. Similarly, magistrates would need to give more detailed reasons on sentence and would be more likely to reserve their decision in a hearing matter.

In the experience of Legal Aid NSW, District Court appeals are currently dealt with in a very efficient manner. For example, in some circumstances, severity appeals can be dealt with in a period of ten to fifteen minutes. In some courts, it is not uncommon for severity appeals to be finalised on a duty basis on the day that a client appears in custody. It is unlikely that the process could function as expeditiously if the test were to change. Further, if this new test were to be introduced, submissions would need to be made regarding sentencing errors in addition to the other grounds of appeal. Self represented defendants are likely to have difficulty identifying and articulating an error in their appeal application.

Furthermore, to introduce a test that the District Court should only intervene where 'the sentence is manifestly excessive or manifestly inadequate' would significantly curtail current appeal rights, lead to unfairness and injustice in the appeal process and add complexity to the appeal process. Legal Aid NSW anticipates any such change would result in significant delays in the Local Court for the reasons detailed above. In the District Court, the time that would be required to finalise appeals would be considerably lengthened. The Court would be required in the first instance to be satisfied that the sentence imposed in the Local Court was 'manifestly excessive or inadequate' before it

[15] SCRGSP (Steering Committee for the Review of Government Service Provision) 2013, *Report on Govenrment Services 2013*, Productivity Commission, Canberra, c.36

then considered an apprpopriate sentence. This would add additional time to the finalisation of appeals.

Additional time and cost would be imposed on Legal Aid NSW if a person (appellant) is required to file written pleadings with a Notice of Appeal that address why the appellant believes the sentence imposed was manifestly excessive. This would particularly impact on people who are sentenced to a period of imprisonment and who wish to lodge a Notice of Appeal from prison and people who are self represented.

As noted in response to question 6(2), a change to the test for an appeal from the Local Court would mean that transcripts would need to be ordered for every possible appeal matter, whether conviction or sentence. In the experience of Legal Aid NSW, it may be possible to get a copy of a transcript in one month where a hearing was extremely short, but usually, a transcript will take approximately three months to be prepared. This factor alone will have a significant impact on the time taken to finalise appeals in the District Court if the new test is introduced.

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

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

Legal Aid NSW submits that the test for an appeal against sentence from decisions of the District and Supreme Courts should not be changed. The current provision in section 6(3) of the *Criminal Appeal Act* 1912 provides the court with a broad discretion to determine the appeal.

In relation to an appeal against conviction, Legal Aid NSW adopts the submission and supporting arguments made by the National Criminal Law Liaison Committee of the Law Council to SCAG 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 ss(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 laws whatsoever, there was a miscarriage of justice.

(3) If the Court is satisfied of a matter in ss(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 ss(2)(a) or (b) had not occurred.

(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?

The prospect of a single test for appeals to the Court of Criminal Appeal, namely that "the sentence is manifestly excessive or manifestly inadequate" is opposed. As currently understood the proposed test would disallow all appeals where (a) the appeal demonstrates material error, and (b) overcomes the hurdle imposed by section 6(3) that the new sentence is otherwise warranted in law, but does not display manifest excess.

It is not every error that will give rise to an appeal. Error must be sufficiently material[16] to satisfy the test in *House v The King* (1936) 55 CLR 499 at 505.

Sentences where there has been demonstrated error and where the court if it applied the correct principle would have itself applied a different sentence will no longer be appellable if not manifestly excessive. It is submitted that this is unjust.

Courts have a wide sentencing discretion. Assuming a penalty which was otherwise "within range" the proposed test would result in parity appeals, and appeals relating to procedural unfairness where a sentence has been increased without notice from that which had been previously indicated (e.g. *Button v R* [2010] NSWCCA 48), failing. It is suggested that the proposed test in these circumstances is demonstrative of unfairness and inconsistency.

To the extent that the proposal raises a single test it raises the prospect of increased Crown appeals. This is inconsistent with the stated aim of reducing appeals generally. In the opinion of Legal Aid NSW, discretionary factors allowing for the dismissal of Crown appeals should be retained.

The proposed change risks:

- Unfairness in the sense that cases with demonstrated error would not have that error corrected. This includes particular categories of appeal currently available (e.g. parity), and
- An increase in Crown appeals.

The Court of Criminal Appeal provides a mechanism for a measure of consistency in sentencing, and authoritative judgments on questions of principle. The proposed change reduces these aspects of the Court's jurisdiction.

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

Since at least the decision in *Doney v R* (1990) 171 CLR 207, it has been held in NSW that the trial judge does not have a power to direct the jury to enter a verdict of not guilty on the ground that, in his or her view, a verdict of guilty would be unsafe or unsatisfactory (to use the phrasing applicable at that time). In that case the evidence of an unreliable witness was corroborated by another piece of evidence. The jury was given a warning in relation to the witness. Both the Court of Criminal Appeal and the High Court found that the conviction of Mr Doney for being knowingly concerned in an importation was not unsafe and unsatisfactory.

[16] *Baxter v R* (2007) 173 A Crim R 284 at 83

By way of contrast the conviction of Darren Smith for murder was recently overturned by the Court of Criminal Appeal (*Smith v The Queen* [2013] NSWCCA 64). An application for a directed verdict to the trial judge was refused. The Crown case was a circumstantial evidence case. The application was not granted, because while a reasonably available hypothesis consistent with innocence existed, the evidence at its highest also allowed an hypothesis consistent with guilt.

The CCA found that "*the medical evidence decisively favoured the existence of a reasonable scenario consistent with innocence"* (para [78]). In particular, it could not be conclusively determined that the deceased died as a result of the actions of another person. Moreover, if the actions of another person contributed to his death, they may have been the actions of another identified assailant, and not of Mr Smith. The Crown had not removed a reasonable scenario consistent with innocence. It is submitted that in a circumstantial case in which competing hypotheses are available consistent with guilt or innocence, then it is inappropriate for the trial judge not to direct a verdict. Mr Smith spent 18 months in custody as a direct result of the different tests applicable at the 'directed verdict' level and at the 'unreasonable jury' level on appeal.

It is submitted in a circumstantial case where the Crown is unable to remove a reasonable hypothesis consistent with innocence then the decision to leave the verdict to a jury is inappropriate because ultimately the evidence is not capable of supporting a guilty verdict.

9. Should the tests for appeal be consistent between different courts?

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

No. Legal Aid NSW refers you to the responses to questions 7 and 8 above. In summary there should be no change to the current operation of appeals from the Local Court to the District Court; nor from the higher courts to the Court of Criminal Appeal.

10. Should fresh evidence be available on appeal?

(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?

Refer to the combined response for questions 10(1) and 10(2) below.

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

The current provisions for tendering evidence on appeal from the Local Court are appropriate. In the experience of Legal Aid NSW, leave applications are not made frequently in a conviction appeal and when they are, leave is often sought in relation to a very limited issue. For example, a solicitor may seek leave to tender a blank criminal record to prove good character. Requiring the leave of the District Court to give fresh evidence in an appeal against sentence would significantly delay the appeal process which currently takes approximately ten to fifteen minutes. The opportunity to bring fresh evidence is particularly important where a defendant was self represented in the Local Court.

In relation to the current provisions regulating the receipt of fresh evidence by the CCA, Legal Aid NSW submits the current provisions work well in respect of sentence and conviction appeals and do not need to be changed. The Court has generous discretion to receive this evidence once satisfied proper grounds exist.

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

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

Legal Aid NSW supports the retention of current powers vested in courts to determine appeals. Where courts have different powers, this should be regarded as an appropriate acknowledgement of the Court's place within the hierarchy.

(2) In what circumstances, if any, should the District Court have the power on appeal to remit the matter to the Local Court? Should the power differ depending on whether the appeal is against conviction or against sentence?

The current powers the District Court has to remit matters to the Local Court are appropriate. In particular, the power for the District Court to set aside a conviction and remit a matter following an appeal made with leave under sections 12(1) and 20(1)(c) of the *Crimes (Appeal and Review) Act 2011* should be retained. It is appropriate to conduct a hearing of the merits in the Local Court at first instance so that appeal rights to the District Court are preserved.

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

Legal Aid NSW supports the creation of a power within the *Criminal Appeal Act* enabling the Court to substitute a verdict, for an equal or lesser offence, in circumstances where the court determines that the conviction consequent upon a plea of guilty for an offence should be set aside.

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

What powers should courts have to award costs on appeal?

Costs should not be recoverable in criminal matters.

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

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

Legal Aid NSW does not recommend any change to the current regime regarding the operation of a sentence pending determination of an appeal; noting the provisions appropriately vary depending upon the original sentencing court.

(2) Are there any problems with the interaction between s63 and s69 of the *Crimes (Appeal and Review) Act 2001* (NSW)?

There are no problems with the interaction of sections 63 and s 69 of the *Crimes (Appeal and Review) Act 2001* (NSW). In practice, the provisions work well. The main question regarding the interaction of these sections arises when a further, fresh offence is committed while a sentence is stayed. However, this question is easily resolved. Any fresh offending that occurred while a sentence was stayed does not give rise to a breach.

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

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

Legal Aid NSW submits that the circumstances in which section 43 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) applies is unclear and that clarification is required. There is uncertainty as to what is captured by the phrase "imposed a penalty that is contrary to law" in section 43(1)(a).

Legal Aid NSW is aware that an application for special leave is presently pending determination before the High Court in relation to the CCA's decision in *Achurch v The Queen* (No 2) [2013] NSWCCA 117. The decision confines the scope of section 43 more generally than previously understood. At [66] the CCA construed section 43 in narrow terms: it will be available where the error in question is apparent from the sentence itself, not from an analysis of the legal reasoning that underpins the sentence. This appears to be inconsistent with decisions in other jurisdictions. The CCA found error in *Achurch* but concluded the penalty was not contrary to law as the same sentence could have been lawfully imposed if the original court had applied correct sentencing principles. This reasoning seems to be introducing a new test ('could') to determine the application. This reasoning will be relevant to the consideration of all future section 43 applications.

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

No. However, the CCA in *Achurch* appears to be setting up a different criteria for the operation of section 43 depending upon where an applicant's case has reached in the criminal court hierarchy. At [67] the Court stated that section 43 would be available to applicants who had previously been erroneously sentenced by the CCA but not to those offenders who had not yet sought to appeal to the CCA. The CCA was keen to impress that section 43 is not a substitute appeal provision, nor should it be used to usurp the role of appellate courts. Legal Aid NSW submits it may not be appropriate to consider any significant review of the provision until the application for special leave and any appeal to the High Court is resolved.

(3) How often is an application made to a court under s43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to reopen proceedings?

Legal Aid NSW does not have access to statistics about the frequency with which section 43 applications are made but anecdotal evidence suggests that they are infrequent. One reason for this may be a lack of clarity about the circumstances in which a section 43 application would be the appropriate remedy.

Although the provision is only used infrequently, it is an incredibly valuable tool to correct straightforward sentencing errors, such as where a court makes orders for community work or imposes a term of imprisonment that exceeds the maximum penalty prescribed in the legislation, particularly when an appeal would be out of time.

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

(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?

Section 4 applications are made on a daily basis by Legal Aid NSW lawyers across NSW. Many Legal Aid NSW clients have high and complex needs, such as mental health conditions, drug and alcohol problems and health problems which often impact on their court attendance. Legal Aid NSW lawyers frequently apply to have a conviction or sentence made in a client's absence annulled.

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

Section 4(1) of the *Crimes (Appeal and Review) Act 2001* currently requires an application for annulment to 'be made to the Local Court sitting at the place at which the original Local Court proceedings were held'. In uncontentious applications it would assist with the efficient administration of justice if applications could be made before any court once the original papers were obtained. In many situations, a person intends to plead guilty after having the conviction overturned, to preserve the discount for the plea of guilty. In these circumstances, there is no need for the matter to go back before the original court. Applications should only need to be heard by the original court if the defendant intended to plead not guilty and required all witnesses for the hearing.

Section 4(4) of the *Crimes (Appeal and Review) Act 2001* currently requires an application for an annulment to be made 'in writing' and 'lodged with a registrar of the Local Court'. In straightforward matters, for example, where a defendant attended court with a valid medical certificate, it would be far more efficient if the application could be made orally in the first instance.

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

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

In the experience of Legal Aid NSW the process of ordering and waiting to receive a transcript of proceedings is a cause of significant delay in the District and Supreme Courts criminal appeal process. Legal Aid NSW suggests that consideration be given to recommending additional resources to ensure that transcripts can be provided in a timely manner.