THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

Criminal appeals (Question Paper 1)

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Submission

NSW Law Reform Commission
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Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to the terms of reference given to the NSW Law Reform Commission (“the Commission”) on 1 March 2013 on improving and consolidating legislative provisions dealing with criminal appeals. The Committee has structured its submission by reference to the Commission’s Question Paper 1.

NSW Young Lawyers, a division of the Law Society of NSW, is made up of legal practitioners and law students, who are under the age of 36 or in their first five years of practice. Our membership is made up of some 13,000 persons.

The Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

Contributors

The Committee is indebted to the following members for their work on this submission:

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Summary

The current criminal appeal regime in NSW is generally satisfactory. However, the Committee argues that the Commission ought to recommend, in particular, that the NSW Parliament:

- **create a single, consolidated statute relating to criminal appeals in NSW;**
- **give consideration to an avenue of judicial review of Parole Authority decisions;**
- **increase the time-limits applicable to most appeals to 3 months;**
- **allow the Court of Appeal to refer criminal judicial review matters to the CCA;**
- **replace the case stated procedure with appeal with leave to the CCA on a question of law; and**
- **expand the scope of "slip" powers to correct technical errors.**

1. Achieving the aims of the terms of reference

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

The Commission ought to recommend that the NSW Parliament:

- create a single, consolidated statute relating to criminal appeals in NSW;
- give consideration to an avenue of judicial review of Parole Authority decisions;
- increase the time-limits applicable to most appeals to 3 months;
- allow the Court of Appeal to refer criminal judicial review matters to the CCA;
- replace the case stated procedure with appeal with leave to the CCA on a question of law; and
- expand the scope of "slip" powers to correct technical errors.

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

In addition to the stated objectives, all of which the Committee endorses, principles of equality, impartiality and fairness must always be the central focus of any reform to the criminal law before considerations of efficiency and utility become relevant.

The Committee acknowledges the desire for consistency and transparency in the appeals process. However, for a number of reasons, which will be detailed in this submission, a desire for consistency should not override the objectives of ensuring fairness and due process. There are different features of the appeals process at different stages, some of which exist for historical reasons and others that are very deliberate. Throughout the Committee's submission we consider these and argue both for and against particular features of the appeals system.

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

See response to Question 1.1.

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

As a general observation, the current appeals framework works well and should not be drastically changed. But particular aspects of the framework are not ideal, and these discrete issues need to be addressed. The Committee stresses that simplification for the sake of simplification will not yield just outcomes or a more effective appeals process.

District Court Appeals

The cornerstone of the present framework is the right of appeal from the Local Court to the District Court. In 2012 in the District Court there were 1,487 conviction appeals lodged and 1,529 finalisations, and 5,065 sentence appeals lodged and 5,049 finalised. 100% of conviction appeals were completed within 12 months and 100% of sentence appeals were completed within 6 months (see District Court of New South Wales, *Annual Review 2012* (2012), 26-27). The District Court, and the legislative framework that confers its appellate jurisdiction, are doing an outstanding job.

Other effective pathways

Two other avenues that deliver consistently high standards of appellate justice are appeals to the Supreme Court from the Local Court on questions of law, and appeals to the Court of Criminal Appeal ("CCA") from the District Court. But, attendant to these two pathways are procedural hurdles and inefficiencies that need to be overcome.

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

The biggest practical problem in consolidating and simplifying the criminal appeals framework is the fact that uniformity is not achievable throughout the appeals hierarchy nor, in the opinion of the Committee, should it be sought to be achieved.

Different roles

Different types of appeal involve different processes and different approaches. Appeals from the Local Court to the District Court generally involve minor offences, short sentences and brief reasons. Appeals from the District Court to the CCA not only involve more serious matters and questions of law, but also invoke the law-making role of the CCA as an Australian intermediate appellate court.

Different experience

In general, practitioners appearing in District Court appeals are less experienced in appellate advocacy than practitioners appearing in the CCA. Some of the specialised types of appeal, such as from the Land and Environment Court to the CCA, involve practitioners of vastly different expertise than most criminal practitioners.

Different practices

The different jurisdictions operate in particular ways that are consistently distinct beyond the narrow view of criminal appellate pathways.

Further, certain appellate procedural requirements are contained in Practice Notes promulgated by the Chief Judge of the District Court or the Chief Justice of the Supreme Court, and these influence the manner in which the relevant legislation is applied in the particular court.

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

b. Children's Court

c. District Court

d. Supreme Court

e. Land and Environment Court

f. Drug Court

g. Industrial Court

The Committee endorses, generally, the position of the Law Society of NSW in response to Question 2.1 (with the exception of the comment below) as outlined by the diagram at Question 1.3 of the Law Society of NSW's response.

Parole Authority

Parole decisions are not referred to in the Question Paper, probably because of the overlap between the subjects of the 1 March 2013 terms of reference. Nevertheless, the Committee believes that the Commission ought to give consideration to an avenue of judicial review of Parole Authority decisions.

2. What arrangements should be made for judicial review?

The Committee presumes this question refers to appeal to the Supreme Court under the *Crimes (Appeal and Review) Act* ("CARA") and s 69 of the *Supreme Court Act*.

We submit that it may be more appropriate that matters invoking the criminal aspect of the Supreme Court's supervisory jurisdiction be dealt with by the CCA. This accords with the process proposed by the Law Society of NSW.

The Committee notes that disposition by single judges of the CCA is not presently provided for in the *Criminal Appeal Act*, except with respect to certain convictions and sentences for summary offences. The Commission should consider what form any amendment would take, and whether it would involve single judges exercising the power of the CCA, or constituting it in certain respects. The latter would be a more radical change.

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

It is the experience of the Committee that these appeals are few and far between. Caselaw NSW produces 46 case results for appeals of the Local Court directly to the Supreme Court for the period of 1 January 2012 to 22 July 2013. Of these 46 results, the Committee can identify 11 criminal matters.

Nonetheless, these appeals:

- provide useful precedents for practitioners;
- provide guidance for magistrates; and

- allow the Supreme Court to exercise a law-making role where it is otherwise unable to do so.

The Committee notes that these appeals are generally conducted in a timely and efficient manner and would not support the proposal to abolish criminal decisions of the Local Court being appealed directly to the Supreme Court.

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

Yes, with the exception of a to the current case stated procedure. As identified at 2.2, there should be a direct right of appeal from the Local Court to the CCA in respect of certain questions of law.

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

The Court of Criminal Appeal.

6. What changes, if any, should be made to avoid the Court of Appeal and the Court of Criminal Appeal having jurisdiction over the same criminal matter?

The CCA could be vested with the same jurisdiction as the Court of Appeal in respect of matters involving questions of criminal law.

How would this work?

Drafting legislation defining exactly what matters are ones that involve "criminal" law could result in more complexities. Discretionary referral may prove a more effective system.

The Committee understands that where appeals from the Supreme Court involving criminal matters are heard in the Court of Appeal, it is sometimes the practice of the President of the Court of Appeal to appoint a judge with criminal experience as an Acting Judge of Appeal. In a similar fashion, an amendment to the *Criminal Appeal Act* could give the CCA jurisdiction over any matter that could be heard in the Court of Appeal on referral by that court. This would preserve the ability of the Court of Appeal to decide non-criminal questions arising from judicial review applications, while allowing deferral to the more specialised CCA where the question is decidedly one of criminal law.

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?

Yes.

The current distinctions are satisfactory and necessarily acknowledge that the grounds for appeal to the CCA are wide-ranging.

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 legislative approach to the types of matters that can be appealed is effective.

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

The present categories are appropriate.

Acquittals

An exception to Crown's availability of appellate relief is the decision of a jury to acquit an accused person after they have heard all the evidence, been properly addressed by counsel and directed by the trial judge without error in a criminal trial. The Committee submits that this exception is an essential distinction for policy reasons; namely, the presumption of innocence. Furthermore, the Committee observes that the Crown already has the ability to appeal against an acquittal to the Supreme Court on a question of law. The Committee also notes the exceptions provided under the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act* 2006, but does not submit that these rights of appeal should be extended any further.

This same rationale applies to the decision of Local Court magistrates to acquit accused persons where there is no demonstrable error of law.

The Committee also notes unavailability of a Crown right of appeal from a decision of a magistrate not to commit an accused for trial applies the same reasoning and notes that ex officio indictments can be filed in these situations.

Sentence

In general, Crown appeals on sentence ought to be pursued only where the punishment is so materially in error that it could be seen to support public confidence in the justice system. The Committee endorses the current legal principles governing Crown appeals.

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?

A defendant should be able to appeal an interlocutory order made in criminal proceedings where the ruling was made pre-trial. This is so because the outcome of an appeal could potentially result in a plea or a withdrawal of charges and hence avoid the need for trial.

The Committee notes the imbalance in s 5F of the *Criminal Appeals Act 1912* (NSW) and suggests that, in principle, the rights of both the prosecution and the defence ought be the same in terms of appealing interlocutory orders.

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?

Local Court to District Court

The Committee suggests that the Commission investigate the possibility of imposing a mandatory requirement that, prior to lodging an appeal of a Local Court decision, the parties must satisfy the Registrar of the District Court that all other avenues have been exhausted - i.e. if the appeal relates to a sentencing error (e.g. Local Court imposed a penalty greater than the maximum available) the parties have complied with s 43 of the *Crimes (Sentencing Procedure) Act* and so on. The Registrar should have the discretion to case manage the foreshadowed appeal to ensure this is done.

To properly facilitate this, the Committee suggests amendment to the 28 day limit in s 11 CARA and the appeal procedures of sub-ss 43(4) and (5) *Crimes (Sentencing Procedure) Act*. An extension to the time limit to 3 months is proposed in the response below to Question 6.1.

District Court to Court of Criminal Appeal

The Committee supports the current system whereby Notices of Appeal are filed within 28 days.

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

None.

Given the significant time and resource constraints faced by magistrates, it would be inexpedient and prohibitive to place any limits on the ability to appeal as of right.

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 case stated procedure should be replaced. It is confusing for judges and leads to guesswork on the part of the CCA to fill in gaps in reasons that are, at times, terse. Case law is replete with examples of cases not stated to the satisfaction of the CCA.

The Committee has endorsed the chart promulgated by the Law Society of NSW in respect of its proposed appeal framework. But the form of appeal to replace the case stated procedure has not been fleshed out. The Committee suggests it be replaced with appeal with leave on a question of law to the CCA.

Appeal with leave to the CCA

Appeal with leave to the CCA would help to achieve consolidation and simplification of criminal appeals in NSW as it would bring the review of District and Land and Environment Court decisions on appeals from the Local Court within the same framework as other appeals heard by the CCA. This would simplify the CCA's task and erase much of the difficulty surrounding the process of having a case stated to the CCA.

An obvious concern arising from this approach is that it may promote a greater number of appeals, thus obviating the principle of finality. Given this concern, the following requirements are recommended:

- any such appeal be confined to questions of law only;
- appellants be required to obtain the leave of the Court; and
- a strict time limit be retained.

If such an avenue of appeal were confined in the above manner, it would not render nugatory the narrow scope according to which such decisions are currently reviewed.

Amendment of the case stated procedure

Alternatively, if the legislature were not disposed to replace the case stated mechanism altogether, it is submitted that the appropriate course would be to amend the procedure by which cases are stated to the CCA. The following amendments are recommended:

- Extension of the current time limit of 28 days under ss 5B(2) and 5BA(2) respectively to 3 or 6 months. This would preclude the present difficulty in obtaining transcripts in time.
- The inclusion of a requirement that the matter come before the lower court Judge for a directions hearing prior to the case being stated to the CCA. This would ensure that both parties have the opportunity to be heard on the issue of the precise formulation of the case and the questions to be posed.
- Amendment of the CCA Practice Note and the Criminal Appeal Rules to more clearly define the steps to be taken in stating the case (including rules for the filing of submissions and their contents), and the relevant material that is to be furnished on the CCA.

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 time limit should be 3 months, with a maximum time limit of 2 years with leave where the court is satisfied that:

   - the delay is explained by exceptional circumstances; and
   - it would be in the interests of justice to grant leave

   In the alternative, the Committee would suggest allowing at least 6 months for appeal with leave.

   The time limit should be the same between courts, with the caveat that appeals from the District Court to the CCA should still commence by way of Notice of Intention filed within 28 days. (That jurisdiction is not characterised by the same issues, particularly a lack of representation, that require that the current appeal time limits be increased.)

   The Committee notes that in the truly exceptional circumstances where cause emerges for the filing of an appeal beyond two years, appellants have recourse to Part 7 of the CARA and, theoretically at least, the prerogative of mercy. See for instance the recent case *A reference by the Attorney General for the State of New South Wales under s 77(1)(b) of the Crimes (Appeal and Review) Act 2001 re the conviction of Frederick Lincoln McDermott* [2013] NSWCCA 102.

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?**

   See above.

3. **What should the time limit be for a prosecution appeal against:**

   a. **costs order imposed by the Local Court?**

   The time limit should be 28 days (with leave required thereafter).

   b. **the leniency of a sentence imposed by the District Court or the Supreme Court?**

   The time limit should be 28 days (with leave required thereafter).

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?**

   The Committee adopts the position of the Law Society of NSW in response to this question.

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?**

   No.

   Error is often demonstrated in the course of such an appeal anyway, but really District Court judges should be scrutinising the application of the law to the facts of the particular case and/or considering whether the available facts support the findings ultimately made by the magistrate.

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?**

   Conviction

   The test should remain the same regarding conviction.

   However, the Committee concedes that grounds for arguing that a verdict was not reasonable on the evidence should be better particularised than at present. It is an easy ground to argue and, because of the strict guidance of the High Court, tends to result in lengthy judgments, representing much judges' time, from the CCA. This might be best addressed by a Practice Note.

   Sentence

   See below.

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 Committee does not express a view in response to this question.

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

   Yes

   But the Committee assumes this question should be read as "should the test for a directed acquittal be the same as the test for an appeal against conviction *on the basis that the jury verdict was unreasonable or not supported by the evidence*". (Since a conviction may also be appealed on the basis of errors in fact or law or because of a miscarriage of justice.)

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.

See generally the Committee's responses to Question 1.

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?

The Committee argues in favour of the retention of the current system in the District Court, whereby leave is required to adduce fresh evidence in relation to a conviction appeal, but fresh evidence can be adduced as of right in relation to appeals against sentence.

Furthermore, the Committee endorses the wide test currently used by the CCA in relation to both appeals against conviction and sentence and would argue for its retention.

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

Again, this depends on whether the appeal is against sentence or conviction. When considering appeals against sentence, it is generally not inconvenient or contentious for further documentary and/or oral evidence to be adduced if there are good reasons for doing so. When considering appeals against conviction, allowing fresh evidence without leave could be abused by appellants and in any event the current test – 'in the interests of justice' – strikes an appropriate balance in practice.

Appeals against sentence

There should be no limit on fresh evidence in appeals against sentence.

Because of the time constraints in the Local Court and the large numbers of self-represented defendants, the Local Court often does not have the benefit of evidence that is very useful in sentencing hearings including:

- sworn evidence of the defendant and/or character witnesses;
- reports by psychiatrists/psychologists; and
- in the case of self-represented defendants – a relevant and articulate explanation of the defendant's circumstances.

The argument discussed in the question paper that "the need to introduce fresh evidence on a sentencing appeals should rarely arise, because both the prosecution and defence are under an obligation to provide all relevant material to the first instance court" does not reflect the reality of practice in the Local Court. By way of example, it is unusual for practitioners to speak for longer than 10 minutes in a sentencing hearing in the Local Court.

Appeals against sentence in the District Court are short, usually 15 to 45 minutes, despite fresh evidence being given in the majority of them. There would be little efficiency benefit to limiting fresh evidence.

Appeals against conviction

The current test of 'in the interests of justice' works well and should be retained.

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?

The current powers that the different courts have on appeal are suitable. It is appropriate that different courts have different powers and that the higher the court the more expansive the power.

Powers of court below

The Commission ought to consider extending the provisions of sub-s 28(2) CARA to the CCA in respect of the Local and District Courts. This would allow, in particular, the CCA to resolve questions of law referred from the Local Court without remittal. (See generally the Committee's response to Question 5.)

A related point is that the Commission ought to consider relaxing the designated ways in which the District Court may determine appeals (s 20 CARA) to allow more flexible use of sub-s 28(2).

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?

Overarching discretionary remittal

The District Court should have a discretionary power to remit where it is not possible to fairly determine the proceedings for itself. This power should be exercised only where necessary, the preferable course being to finalise the matter.

If the power is defined so broadly, there would be no sensible reason to differentiate between a power to remit for conviction or sentence appeals. It is true that most appeals against sentence in the District Court are dealt with very quickly and to have such matters remitted to the Local Court would cause unnecessary delay. Since that is the case, a discretionary remittal power would only be used in the rarest, most exceptional, circumstances.

An example could be where the appeal process was protracted; Crown witnesses have passed away, left the country or are otherwise unavailable; and as a result it is in the interests of justice that the matter be remitted to the magistrate who heard the case below.

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

The Committee supports a limited power for the CCA to be able to impose a substituted *conviction* (there being no verdict, cf. *Griffiths v R* (1977) 137 CLR 293) where a plea has been entered to avoid having to remit the matter to a lower court.

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

What powers should courts have to award costs on appeal?

It is desirable to maintain the discretion to make cost orders under ss 28(3) and 49(4) CARA in relation to the District Court.

The Committee does not have a firmly decided view on extending the existing provisions or amending s 17 of the *Criminal Appeal Act*, partly because costs on appeal in criminal cases would involve, in most cases, the judicial redistribution of government funds between government agencies, and impecunious appellants. It is also the experience of the Committee that the Crown is not known for bringing frivolous appeals. But where an accused is privately legally represented this issue does become very important. In the event that Parliament considers extending a similar power to ss 28(3) and 49(4) to the CCA, it should also consider extending the availability of certificates under the *Suitors' Fund Act 1951* to proceedings in the CCA.

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?**

   The present regime is appropriate.

   The fact that a similar provision to s 63 CARA does not apply to appeals from the District Court is a reflection of the very different nature of that class of appeals (being, mostly, consonant with a jury's verdict). It is one of the differences that the Committee argues should be retained.

   The Committee observes that the question of bail and presumptions may be overtaken by the incoming *Bail Act 2013*.

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

   Section 69 ought to be amended to make clear that a good behaviour bond pending an appeal will be stayed in accordance with s 63.

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?**

   Section 43 CARA is a useful recourse for patent errors of law in respect of sentencing.

   However, in the interests of reducing appeals intended to correct technical slips, the breadth of this remedy ought to be expanded. Provision should made in the Local and District Courts for a similar procedure to that applicable to the CCA under r 50C of the Criminal Appeal Rules.

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

   All criminal courts should have similar powers to reopen proceedings to correct technical errors of law or fact.

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

   Infrequently.

   It is often the case, if the slip is patent, that practitioners bring errors to magistrates' or judges' attention at the time mistakes are made so the error can be remedied instanter.

   The use of s 43 might increase if the Committee's suggestion for a leave requirement that other avenues be exhausted before the bringing of an appeal were adopted.

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?**

   Not infrequently.

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

   Section 4 CARA is adequate, subject to the following comments.

   Same day applications

   The Committee supports there being provision made for same-day oral applications, or for another form of streamlined process.

   Time limits

   In accordance with the responses above, the Committee proposes that the current 28-day time limit for appeals against refusal of annulment by the Local Court be extended to 3 months.

   Guidance to self-represented accused

   The entitlement or right to elect to annul a conviction is not common knowledge and is often not brought to the accused's attention unless they are legally represented. More guidance in this area would enable self-represented litigants to adequately understand when an application is required to be made and what would constitute 'unjust' circumstances. (The Court of Appeal's decision in *Miller v Director of Public Prosecutions* [2004] NSWCA 90; (2004) 145 A Crim R 95 clearly evidences the uncertainty surrounding applications for annulment.)

The Committee thanks the Commission for the opportunity to comment.

If you have any questions in relation to the matters raised in this submission, please contact:

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Yours faithfully,

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