DPP

Commonwealth Director of Public Prosecutions

13 September 2013

The Director
Criminal Law Review
NSW Department of Justice and Attorney-General
GPO Box 5199
SYDNEY NSW 2001

Dear Director

REVIEW OF NSW CRIMINALS APPEALS PROCESS

Thank you for the opportunity to comment in relation to the NSW Law Reform Commission's review of the criminal appeals process.

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecution service established by Parliament to prosecute alleged offences against Commonwealth law. The role of the CDPP is to prosecute offences against Commonwealth law and in some circumstances confiscate the proceeds of crime. We are also responsible for prosecuting offences against the laws of Jervis Bay and Australia's external territories, other than Norfolk Island.

Our comments are made in the context of the CDPP's work across Australia and our interest in national consistency as a federal prosecuting service. The CDPP has a wide and varied practice ranging from the prosecution of offences for the importation of serious drugs, fraud on the Commonwealth (including tax and social security fraud) and commercial prosecutions to counter-terrorism, money laundering, human trafficking, slavery and servitude, child exploitation including on-line sexual exploitation, offences impacting upon the environment, and safety prosecutions. As Commonwealth criminal activity continues to evolve and expand so does the variety of offences incorporated into Commonwealth criminal law.

CDPP prosecutors appear in all levels of the courts from Magistrates Courts to the High Court and we are involved at all stages of the prosecution process including mentions, bail, summary matters, committals, trials and appeals. The CDPP appears in appeals in NSW Courts in matters ranging from counter-terrorism, child exploitation and insider trading to money laundering and tax offences. The prosecution of such offences regularly involves lengthy trials, extensive evidence and voluminous exhibits and therefore appeals in these matters are complex particularly when involving an appeal against conviction.

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In relation to the series of questions posed in the paper entitled *'Criminal Appeals: Preliminary Issues Question Paper 1'*, the CDPP would like to make the following comments:

1. While the paper addresses criminal appeals from all levels, the following focuses a number of those questions which relate to appeals from the District Court/Supreme Court to the Court of Criminal Appeal (which forms the basis of the CDPP appellate practice) and raises other issues for consideration in relation to reform.

2. At the outset it is important to recognise that the NSWCCA is a court of error.[1] Any changes to the provisions and processes should be consistent with that.

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

Appeal Test

3. Currently the basis of appeals against conviction and sentence to the NSWCCA appears in the *Criminal Appeals Act* 1912. The core provisions are section 5 (the right to appeal) and section 6 (determination of appeals), with the latter provision being what is referred to as the *"common form"* provision.[2] The provisions (or provisions in very similar terms) appear in equivalent legislation in each State/Territory.[3] These provisions (and those in relation to Crown appeals) provide the bulk of the work of the NSWCCA.

4. From the CDPP perspective, as it strives to achieve consistency of approach across jurisdictions in relation to the conduct and outcomes of its matters, it is preferable that the core provisions remain consistent. That is, there is merit in the basis upon which a person is able to appeal against his/her sentence/conviction being consistent (or a least similar) throughout the Commonwealth.

5. Question 8 in the paper raises the issue of whether the current tests in relation to appeals against sentence and conviction in sections 5 and 6 should be changed. It is the CDPP's view that they should not.

Appeals against Sentence

6. In relation to appeals against sentence it is suggested in the Question Paper at 1.58 – 1.61 that there should be a single test of whether a sentence is manifestly excessive or manifestly inadequate. Part of the rationale behind that appears to be that the current sentencing process can lead to judges spending an unnecessary amount of time preparing reasons for the sentence to demonstrate a lack of error. It is also suggested that the current appellate approach takes attention away from whether the sentence imposed was appropriate overall.

7. Currently, if a specific error is demonstrated in imposing a sentence an appeal will only be allowed if the court is satisfied that a lesser sentence is warranted and should have been passed (a more severe sentence on a Crown appeal).[4] It follows that error alone does not equate to success on an appeal. However, if an error is established and the court is satisfied that some other sentence is warranted, the court can resentence. Depending on the nature of the error, it can have a significant impact on the sentence which should have been imposed. That is a different issue from whether a sentence is manifestly excessive or inadequate. Simplifying the process to one test ignores that difference.

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[1] *Abbosh v R* [2011] NSWCCA 265 at [70]; *Potts v R* [2012] NSWCCA 229 at [67]
[2] *Weiss v The Queen* (2005) 224 CLR 300 (this case provides a history of the development of the appeal provisions)
[3] In 2010 Victoria amended their provisions which now appear in Part 6.3 of the *Criminal Procedure Act* 2009
[4] S 6(3) *Criminal Appeal Act* 1912

8. Further, if the concern is in reality the complexity of the sentencing provisions, there may be merit in simplifying the sentencing provisions.

9. An accused and the prosecution are entitled to expect that sentences are passed according to law. If there is demonstrable error, that should not be ignored. By approaching the issue by only considering whether a sentence is manifestly excessive or inadequate does this. If the demonstrable error has led to a sentence that is greater/lesser than would otherwise have been imposed, the accused is entitled to be resentenced (or the prosecution have the accused resentenced). The identification of error involves an appropriate process of analysis and provides for a more disciplined appellate process.

10. While the CCA spends much time on sentence appeals this could be better addressed by an appropriate leave to appeal process where appeals with no merit are refused leave to appeal before the matter is before a Full Bench of CCA (see below).

Appeals against Conviction

11. In relation to an appeal against conviction, question 8 raises the issue of whether the test on a directed acquittal at the end of the Crown case should be changed to something akin to an unsafe test on appeal. This suggestion is made on the basis that some accused are convicted but ultimately the CCA overturns the verdict on the ground that it is unsafe (at 1.62 – 1.64). That change should not occur.

12. Firstly, the suggestion ignores that two different questions are being addressed. At the end of the Crown case the issue is whether, as a matter of law, the accused has a case to answer. On appeal, the test to be applied to determine whether a verdict is unsafe is whether an independent examination of the evidence by the Court establishes that it was open to the jury to be satisfied of the guilt of the appellant beyond reasonable doubt in relation to the offence with which they were convicted.[5] It is a matter of fact having regard to all the evidence (including any presented by the defence) and paying due regard to the position of the jury and the advantage it had in seeing and hearing the witnesses. The High Court in *Doney v The Queen*[6] rejected the suggestion that is now being made.

13. Secondly, the suggestion fails to recognise the differing roles of the judge and jury. For a trial judge to direct an acquittal where in his/her view a verdict of guilty would, on the facts, be unsafe (even though there is a case for the accused to answer) would be to usurp the jury function. This raises issues regarding the possible application of section 80 of the Constitution that requires trial by jury.

14. It is to be noted that a trial judge currently has the power to give a jury a *Prasad direction.*[7] Any time after the end of the Crown case the trial judge may, if he/she sees fit, advise the jury to stop the case and bring in a verdict of not guilty. The difference between that direction and the suggestion in question 8 is that the jury retains the role of assessing the evidence and bringing in the verdict. A jury of course can, and does, reject such invitations.

15. In so far as question 8(1) raises whether the appeal against conviction tests could be altered or simplified, there is no advantage in so doing. The Court of Criminal Appeal is a court of error; in order to succeed, the moving party must establish error, and an adverse consequence thereof.

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[5] Section 6(1) *Criminal Appeal Act* 1912, *M v The Queen* (1994) 181 CLR 487 at 492 – 493, 494 – 495 (citing *Chidiac v The Queen* (1991) 171 CLR 432 at 443 – 444, 451, 458, 461 – 462); *The Queen v Hillier* (2007) 228 CLR 618; *MFA v The Queen* (2002) 213 CLR 606; *The Queen v Nguyen* (2010) 242 CLR 491 at [33]; *SKA v The Queen* (2011) 243 CLR 400 at [11] – [14]

[6] (1990) 171 CLR 207

[7] (1979) 23 SASR 161

An appeal is not an avenue to simply re-argue the case rejected below, or to argue the case again on a different basis.[8]

16. Section 6 of the *Act* involves a two stage process. The appellant must establish one of three circumstances:

    (i) the verdict was unreasonable or cannot be supported by the evidence (in which case a verdict of acquittal is entered); or

    (ii) there was a wrong decision on a question of law; or

    (iii) there was, for any other reason, a miscarriage of justice.

    If either (ii) or (iii) is established, the issue of the proviso arises: the court may dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.

17. There is no need to alter the three limbs of section 6. To the contrary, to do so may result in an appeal failing to focus on the need for error. Whether altering the two stage process would simplify the procedure is a moot point.

18. It is to be noted that Victoria no longer has the common form appeal provision; it was replaced by section 276 of the *Criminal Procedure Act* 2009. While that provision alters the process, it nonetheless still requires the appellant to establish one of three types of errors/irregularities (the verdict of the jury is unreasonable and cannot be supported by the evidence; as a result of an error or irregularity or in relation to the trial there has been a substantial miscarriage of justice and for any other reason there has been a substantial miscarriage of justice).

19. As can be seen the difference between section 276 and section 6 is in the proviso. In section 6 the onus is on the Crown to establish that no substantial miscarriage of justice has occurred. In relation to section 276, for two of the limbs the appellant must establish that a substantial miscarriage of justice has resulted from the error/irregularity. The CDPP considers this appropriate but notes that as the High Court in *Baini v The Queen* noted when considering section 276, in practical terms few, if any, appeals will turn on who bears the onus.[9] However the terms of section 276 *"there has been a substantial miscarriage of justice"* as opposed to *"no substantial miscarriage of justice has occurred"* (section 6) focusses the inquiry on whether the verdict of guilty was inevitable.[10] It focuses on whether the irregularity would have made a difference. That is different to the approach required to apply the proviso.[11] The amendments in Victoria were designed to simplify the appeal provision. Whether that has been achieved only time and its application will tell. What is clear is that if there is to be any amendment the terms of the statutory language will be critical to its application.

Question 4 (and Question 1(3) and (16)) – What should the leave requirements be for filing a criminal appeal?

20. An issue which should be addressed is establishing a leave to appeal process. Under section 5 of the *Criminal Appeal Act*, a person may appeal against their conviction if it involves a *"question of law alone"* but otherwise leave of the Court is required.

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[8] *Gately v The Queen* (2007) 232 CLR 208 at [77]; *Crampton v The Queen* (2000) 206 CLR 161 at [14] – [20][156] – 163]; *Heron v The Queen* (2003) 77 ALJR 908 at [5][10][60]

[9] (2012) 246 CLR 469 at [23]

[10] *Baini v The Queen* (supra) at [32]

[11] *Weiss v The Queen* (2005) 224 CLR 300 at [31] – [35][42]; *Cesan v The Queen* (2008) 236 CLR 358 at [123]; *Gassy v The Queen* (2008) 236 CLR 293 at [34]

21. *"A question of law alone"* is a question that can be answered without reference to the facts.[12] That is very rare; most appeal grounds involve mixed questions of law and fact or questions of fact. In NSW, unlike some other jurisdictions, the issue of leave to appeal is addressed (if at all) in the hearing of the appeal. While the necessity to address the issue of leave has been the subject of remarks by the Court in circumstances where there has been a failure to do so,[13] and the Court has stated that it considers that the requirement for leave should not be treated as a mere formality, in reality the issue is merely subsumed in the appeal hearing.

22. In at least South Australia,[14] Victoria[15] and Western Australia[16] there are separate hearings/procedures that address the question of leave. While the procedures vary in each State, ordinarily the process involves the matter being listed before a single judge who will either consider it on its papers or where counsel for an applicant argues briefly why leave should be granted. If listed for oral argument a number of such matters are ordinarily listed on the same occasion. There may be a time limit imposed for the hearing. At the time of the hearing in some States the applicant will have filed submissions but not the respondent.

23. The benefit of such a system is (whichever model is considered), that if properly used, the appeals (or some grounds of appeal) which are not reasonably arguable will be refused leave. This limits the number of appeals ultimately to be heard by the CCA. The NSWCCA hears many sentence appeals. In a significant number there is no real matter of principle but the issue is about the particular sentence and whether there is error. Whether there is any reasonable argument about that which would/could lead to a different sentence should be fairly readily ascertainable.

24. In relation to the conviction appeals, even if leave is granted, the leave process might limit the grounds of appeal. A further benefit of the procedure is that it should ensure that from the applicant's viewpoint the matter is ready to proceed. That is, the Court can ensure the grounds are properly articulated, and in relation to an allegation that a verdict is unsafe, the ground particularised to highlight the basis of the ground. This would limit the occasions where at the hearing of an appeal additional grounds are added or the basis of the argument is changed. If used effectively a conviction appeal before the NSWCCA would be confined to those grounds which are reasonably arguable.

25. In the States where such a system exists it is open to the applicant if they are refused leave to apply to the CCA for leave. Usually this involves a limited argument/or potentially argument on the papers.

26. I note that last year in *WC v R*[17], the Chief Justice directed McClellan CJ at CL as a judge of the Court of Criminal Appeal to hear an application for leave to appeal pursuant to section 5G of the *Criminal Appeal Act*. McClellan CJ at CL refused the application for leave. This no doubt avoided an unmeritorious appeal being listed before three judges at a full hearing. This illustrates the

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[12] For discussions as to what amounts to a question of law alone see: *Rasic v R* [2009] NSWCCA 202 at [12]; *Williams v The Queen* (1986) 161 CLR 278; *R v Bunting and Wagner* (2005) 92 SASR 215 at [171] (the Court of Criminal Appeal adopted the reasons in this regard of Perry J: *R v Bunting and Wagner* (2004) 92 SASR 146 at [671] – [698]); *R v Vaughan* (2009) 105 SASR 532 at [29]-[30]

[13] *Rasic v R* (supra) ; *Carlton v R* [2008] NSWCCA 244 at [10] – [12]; *Krishna v DPP* (2007) 178 A Crim R 220

[14] Supreme Court Criminal Appeal Rules 1996 (SA) Rule 15

[15] Practice Direction No 2 of 2011 (section 1); R 2.06 and 2.07 *Supreme Court (Criminal Procedure) Rules* 2008 (Vic) (the procedure is conducted by a single judge on the papers but a party can request an opportunity to make oral submissions)

[16] *Criminal Appeals Act* 2004 (WA) such applications are routinely dealt with by a single judge on the papers. If the judge is of the view that leave should be refused the matter is then listed for oral argument (ex parte) to give the applicant an opportunity to convince the Court the matter has merit. At the time of this hearing the applicant has filed submissions but not the respondent. That does not occur unless leave is granted.

[17] [2012] NSWCCA 231

benefits of a leave system. The legislation/procedure ought to be altered to accommodate this process as a matter of course.

27. It is to be noted that currently Rule 4 of the *Criminal Appeal Rules* requires the grant of leave where the ground of appeal complains about a direction or the admissibility of evidence where no objection was taken below. Much more emphasis during appeal hearings appears to be placed on this leave requirement in contrast to that in section 5. In that context there is no reason why Rule 4 is confined to directions and admissibility. There are other types of matters that occur in a trial which do not fall within Rule 4.

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

28. Section 10 of the *Criminal Appeal Act* provides for a 28 day time limit for filing a "*notice of intention*" to appeal in the NSWCCA. Rule 3A of the *Criminal Appeals Rules* then provides that the notice of intention lasts for 6 months. Both time limits can be extended. It follows that if a notice of intention is filed the applicant has a further 6 months to file the notice of appeal (and submissions in support thereof) subject to any extension. As a consequence appeals are sometimes listed for hearing a very long time after the trial/sentence. The notice of intention system has the practical effect of extending the time to appeal to 7 months from the conviction/sentence. That is much longer than in other jurisdictions. In most the time period is 28 days (some are 21 days). In many the filing of the submissions is a further 28 days from the filing of the notice of appeal. Generally there is a power to extend or excuse the time periods. While there are some trials which, because of their length and complexity, will take some considerable time to prepare, there are many matters (for example appeals against sentence) which do not. The current system may not be encouraging matters to be dealt with in the most efficient way possible. It has the result of appeals being listed and heard at a time, in some instances, well removed from the trial/sentence.

29. The CDPP has experienced a number of instances where a notice of intention to appeal has not been filed within 28 days after the conviction or sentence and extensions of time sometimes for periods of 6 months or more have been granted. Delays in the appeal process through extensions of time can place unrealistic pressures on the Court of Criminal Appeal to expedite hearings so that appeals against severity of sentence can be determined before the earliest release date of the offender.

30. If the time limit is to be shortened steps would need to be in place to ensure that the parties had the relevant transcript and settled sentencing remarks/summing up in a timely manner. There are often difficulties in obtaining the transcripts necessary to prepare appeals. Rule 8A restricts the provision of transcript until it has been revised. Consideration should be given to provision of unrevised summing up/sentencing remarks/rulings etc where the process is causing delay.

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

Electronic Appeal Books

31. An issue that should be addressed in any discussion of reform in this area is the practical running of appeals. In NSW generally an appeal in the CCA is conducted using hardcopy appeal books. Recently, an appeal in relation to a CDPP matter was conducted using electronic appeal books (it was the first such appeal). However, the CDPP was required to provide equipment in the court to enable all the parties to see what was being displayed. In some other States electronic appeals

are a matter of course, or used in large matters.[18] Currently, in State matters the appeal books are provided to the court with an index to the parties. It follows that in court the parties are not all working off the same material. In some states there is a hardcopy appeal book that contains only limited material (for example the notice of appeal, summing up and sentencing remarks) with the transcript being provided to the parties on disc.

32. The CDPP recently appeared in the NSWCCA in a counter-terrorism appeal in which both electronic appeal books and paper appeal books were provided to the court. The court was highly appreciative of the effort that the CDPP put into the preparation for the appeal, especially in terms of the assembly of the materials, the electronic appeal books and all the necessary link ups.

Possible time limitation on an application to the Supreme Court under section 78 Crimes (Appeal and Review) Act 2001

33. Section 78 of the *Crimes (Appeal and Review) Act 2001* permits an application for an inquiry into a conviction or sentence to be made to the Supreme Court by a convicted person or by another person, on behalf of the convicted person, but places no limitation period on any such application.

34. The CDPP is currently involved in two such applications, the first involving a trial that was conducted in 2001 and the second involving a trial conducted in 1989.

35. One of the issues that has arisen in reviews is that the CDPP has experienced difficulties given the passage of time as relevant material may have been destroyed in accordance with normal archival requirements.

Threshold test or grounds to obtain leave to appeal out of time

36. The CDPP is of the view that the NSW criminal appeals process would benefit from requiring appellants to meet a threshold test or specific grounds in making an application for leave to appeal out of time.

Other questions

37. In response to some of the other specific questions:

    (1) Question 1 (1) - the relevant appeal provisions in NSW are in different statutes. There is merit in consolidating the provisions.

    (2) Question 1 (3) – the principal change to the criminal appeals' framework should be the introduction of a leave to appeal system.

    (3) Question 2 (6) – the Court of Appeal has supervisory jurisdiction in relation to the Supreme and District courts and therefore there are a number of applications in which it has jurisdiction in criminal matters. If the Court of Appeal is not dealing with criminal appeals (which is different from a number of other jurisdictions), the CCA should be vested with the jurisdiction to deal with the supervisory matters.

    (4) Question 2 (7) – the distinction between questions of law alone, question of fact and mixed questions should be maintained.

    (5) Question 3 (1) – the matters currently able to be the subject of appeal should be retained.

[18] For example Qld has an e-book which is used during the trial (and accessed from the Court website via a code provided to the parties). This e-book has all the proceedings in relation to a particular matter. On appeal the written submissions are added and the e-book is used in the appeal proceedings.

(6) Question 3 (3) – the current provisions should be retained in relation interlocutory appeals. From the Crown perspective they are used sparingly. To extend the jurisdiction in relation to an accused has the potential to lead to unnecessary disruption of trials.

(7) Question 4 (1) – this is addressed above. In general leave should be required with an applicant being required to demonstrate that a matter is reasonably arguable.[19]

(8) Question 10 – the current provisions in relation to fresh evidence should remain.

(9) Question 12 – there should be no power to award costs. Criminal matters have a public interest aspect. Traditionally in the superior courts (including in the High Court) costs are not awarded. That should be retained.

(10) Question 13 – sentences should not be stayed if an appeal is filed. In some jurisdictions that had previously been the position. No doubt this was seen to deter applications. However, if there is a basis to appeal there is no logical reason why a sentence should be stayed pending appeal, particularly given the delays often experienced between sentence and the appeal.

Conclusion

38. In our view, the most significant issue for consideration which would have a practical effect on the appeal process is a separate leave to appeal procedure with an option to grant leave to appeal on the papers.

We trust these comments are of assistance. Please contact Penny McKay on (02) 6206 5624 if the CDPP can be of any further assistance.

Sincerely,

James Carter
Deputy Director

[19] For example: *R v Bunting and Wagner* (2004) 92 SASR 146 at [699]; *Fallah v R* [2010] NSWCCA 212 at [3]; *RWB v R* (2010) 202 A Crim R 209 at [128]