NSW GOVERNMENT

New South Wales
Law Reform Commission

Report
140

# Criminal appeals

March 2014
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Law Reform Commission
Attorney General & Justice

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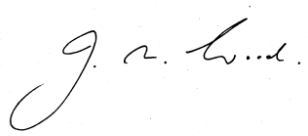
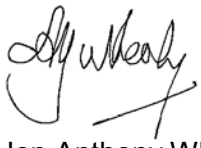
Dear Attorney

**Criminal appeals**

We make this report pursuant to the reference to this Commission received 1 March 2013.



The Hon James Wood AO QC
Commissioner



The Hon Anthony Whealy QC
Commissioner

March 2014

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- Court Services, NSW Department of Attorney General and Justice;
- Judicial Commission of NSW;
- NSW Bureau of Crime Statistics and Research; and
- Reporting Services Branch, NSW Department of Attorney General and Justice.

# Terms of reference

Refer to the Law Reform Commission an inquiry, pursuant to section 10 of the *Law Reform Commission Act* 1967, aimed at improving and consolidating legislative provisions dealing with criminal appeals.

Specifically, the Commission is to review current avenues of appeals in all criminal matters, with a view to simplifying and streamlining appeal processes, and consolidating criminal appeal provisions into a single Act.

In undertaking this review the Commission should have regard to:

- the balance between the need for finality and the need to provide fair opportunity for appeal
- the need to provide for timely resolution of criminal appeal matters
- the characteristics and needs of the courts from and to which appeals lie
- any related matters the Commission considers appropriate.

[Received 1 March 2013]

# Abbreviations

| | |
|---|---|
| ALRC | Australian Law Reform Commission |
| AVO | apprehended violence order |
| CAA | *Criminal Appeal Act 1912* (NSW) |
| CAR | *Criminal Appeal Rules* (NSW) |
| CARA | *Crimes (Appeal and Review) Act 2001* (NSW) |
| CCA | Court of Criminal Appeal |
| CCRC | Criminal Cases Review Commission |
| CDPP | Commonwealth Director of Public Prosecutions |
| CFPA | *Crimes (Forensic Procedures) Act 2000* (NSW) |
| CPA | *Criminal Procedure Act 1986* (NSW) |
| CSPA | *Crimes (Sentencing Procedure) Act 1999* (NSW) |
| DPP | Director of Public Prosecutions |
| EPA | Environment Protection Authority |
| HDO | home detention order |
| ICO | intensive correction order |
| IRCiCS | Industrial Relations Commission in Court Session |
| LEC | Land and Environment Court |
| MHRT | Mental Health Review Tribunal |
| NGMI | not guilty by reason of mental illness |
| NIA | notice of intention to apply for leave to appeal |
| NSW ODPP | NSW, Office of the Director of Public Prosecutions |
| PCA | prescribed concentration of alcohol |
| RSB | Reporting Services Branch |
| SCA | *Supreme Court Act 1970* (NSW) |
| SCAG Working Group | Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General |

| | |
|---|---|
| SCR | *Supreme Court Rules 1970* (NSW) |
| SCRC | Supreme Court Rules Committee |
| UCPR | *Uniform Civil Procedure Rules 2005* (NSW) |
| UNA | unfit and not acquitted |
| WHS | work health and safety |
| WorkCover | WorkCover Authority of NSW |

# Executive Summary

## Introduction and current law (Chapters 1, 2 and 3)

0.1 We have been asked to review the avenues of appeal in all criminal matters, with a view to simplifying and streamlining appeal provisions, and consolidating them into a single Act. In doing so, we are mindful to balance the considerations of finality, efficiency and fairness, and to further the goal of building confidence in the criminal justice system.

0.2 Two principal Acts govern criminal appeals in NSW: the *Criminal Appeal Act 1912* (NSW) (CAA) and the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). Judicial review is also available in some criminal proceedings under the *Supreme Court Act 1970* (NSW) (SCA).

0.3 For the most part, CARA deals with appeals from the Local Court, and the CAA deals with appeals from the higher courts to the Court of Criminal Appeal (CCA). However, the limits of each Act are not well defined, and in some cases there is overlap. The CCA sits at the top of the criminal appeals hierarchy in NSW, although anomalously some criminal appeals currently lie to the Court of Appeal.

0.4 Criminal appeal provisions have been amended over the last century in a piecemeal manner, without fundamental review. This has resulted in a criminal appeals system which is at times complicated, inconsistent and outdated. We aim to update, simplify and streamline the criminal appeal provisions where possible.

0.5 We have been fortunate to benefit from the considerable expertise of stakeholders. The majority of our recommendations have been exposed to stakeholders for comment, including the courts.

## A new Criminal Appeal Act (Chapter 4)

0.6 Having two separate Acts creates a criminal appeals framework that is disjointed and complicated. Consolidating the CAA and CARA into a single Act will improve efficiency, clarity and accessibility. We recommend that the CAA and CARA be abolished and replaced with a single, new Criminal Appeal Act. (Recommendation 4.1)

0.7 Two aims of our terms of reference are to simplify and streamline appeal processes. To this end, we considered whether the criminal appeal provisions could be consistent across all courts in NSW. Ultimately, however, we have concluded that the differences between the courts mean that separate regimes of appeal remain practically unavoidable.

0.8 The CCA is constituted under the CAA. In contrast, the Court of Appeal and the Divisions of the Supreme Court are provided for under the SCA. This difference seems to be an historical anomaly. We recommend that the CCA be recognised in the SCA as a part of the Supreme Court. (Recommendation 4.2)

0.9 Judicial review from decisions in criminal matters currently lies to the Court of Appeal. Although this may be because the CCA is not formally a part of the Supreme Court, it means that both the CCA and the Court of Appeal have jurisdiction over criminal matters. If the CCA becomes a part of the Supreme Court, we also recommend that it should be assigned to hear judicial review applications arising out of criminal proceedings. (Recommendation 4.3)

## Appeals from the Local Court to the District Court (Chapter 5)

0.10 A conviction or sentence imposed in the Local Court may be appealed to the District Court. Only a small proportion of Local Court convictions and sentences are appealed, although in sentence appeals the success rate is quite high – on average about 60%.

0.11 The provision for conviction appeals works well and we do not recommend any change. However, sentence appeals are problematic in that the District Court exercises the sentencing discretion afresh, and may impose a different sentence on appeal even if the original sentence was within the range of acceptable options. It also does not usually have access to the Local Court's remarks on sentence or any exchange between the magistrate and the bar table, and does not know why the Local Court chose a particular sentence over others.

0.12 In our view the current basis for determining sentence appeals does not assist with clarity or consistency in sentencing practice, or in promoting finality in criminal proceedings.

0.13 Ideally sentence appeals from the Local Court to the District Court should require error in order to succeed. However, the less formal nature of proceedings in the Local Court – necessary due to the high volume of cases and time pressures – means that an error based appeal is likely to be impractical. We instead recommend that appeals against sentence be by way of rehearing, on the basis of the material that was before the Local Court and the reasons of the magistrate. Fresh evidence should only be given by leave where it is in the interests of justice. (Recommendation 5.1)

0.14 The resources required for transcript production are a significant constraint in the hearing of appeals from the Local Court. We recommend that the Department of Attorney General and Justice investigate alternatives to the production of typed transcript in these appeals. (Recommendation 5.1)

0.15 In an appeal from the Local Court, the District Court judge may state a case on a question of law to the CCA. The case stated is an outdated and cumbersome method of reviewing a matter. We recommend that it be abolished and replaced with an avenue of appeal with leave on a ground involving a question of law. (Recommendation 5.2)

## Appeals from the Local Court to the Supreme Court (Chapter 6)

0.16 Appeal also lies to the Supreme Court from certain Local Court decisions. Although there are few such appeals, they play an important role in allowing the Supreme Court to determine questions of law authoritatively.

0.17 We recommend that the current avenues of appeal to the Supreme Court be retained, except that the ability to appeal against conviction or sentence on a question of fact or mixed fact and law should be removed. An appeal to the District Court can adequately deal with these factual questions. (Recommendation 6.1)

0.18 Where the Supreme Court hears an appeal from the Local Court, a further appeal lies to the Court of Appeal with leave. We recommend that this be abolished and replaced with an avenue of appeal to the CCA. (Recommendation 6.2) The CCA should have jurisdiction over all criminal appeals.

## Appeals from the Local Court – other issues (Chapter 7)

0.19 The Local Court, on application by either the prosecutor or defendant, can annul a conviction or sentence. We make some recommendations to increase the flexibility of this power, while at the same time balancing the need for finality. (Recommendations 7.1, 7.2, 7.3 and 7.4)

0.20 There is an established requirement in case law that a *Parker* direction must be given where a District Court judge is contemplating increasing a defendant's sentence on appeal. We recommend including the requirement for a *Parker* direction in legislation. (Recommendation 7.5)

0.21 The District Court has limited powers in an appeal against conviction, and this has caused some problems in practice. We recommend that it be given some additional powers. (Recommendation 7.6)

0.22 A defendant cannot appeal to the District Court more than 3 months after the conviction or sentence. This can cause injustice, and we recommend that the District Court be able to grant leave to file an appeal more than 3 months after the conviction or sentence where exceptional circumstances are made out. We also recommend consistent time limits for appeals by defendants and the Director of Public Prosecutions (DPP). (Recommendation 7.7) The time limit for appealing to the Supreme Court is currently contained in procedural rules. We recommend it be moved into legislation. (Recommendation 7.8)

0.23 Where a forensic procedures order under the *Crimes (Forensic Procedures) Act 2000* (NSW) is made, the order may be appealed to the Supreme Court as if it were a sentence. This is inconsistent with the avenues of appeal given to other decisions of the Local Court. We recommend that a forensic procedures order be subject to the same avenues of appeal and review as a conviction. (Recommendation 7.12)

0.24 There are no comprehensive procedural rules that apply to criminal appeals from the Local Court to the Supreme Court. This results in a gap in procedure, and criminal appeals have sometimes been treated as being subject to the *Uniform Civil*

*Procedure Rules 2005* (NSW). We recommend that specific procedural rules, forms and fees be developed. (Recommendation 7.13)

0.25 We also recommend that particular provisions be clarified, including the award of costs, the effect of a sentence pending appeal and the power to deal with a good behaviour bond imposed on appeal. (Recommendations 7.9, 7.10, 7.11, 7.14 and 7.15)

## Appeals from conviction and sentence on indictment (Chapter 8)

0.26 The grounds for an appeal against conviction on indictment have remained unchanged since their introduction in 1912. The wording of the provision is antiquated and its structure is unwieldy. The provision uses an outdated drafting style that is difficult to follow and apply. Judicial interpretation has not comprehensively clarified how the three grounds of appeal and the accompanying proviso should be applied. We conclude that there is scope for improving the provision.

0.27 Stakeholders agreed that the grounds for appeal against conviction should be reformed. We developed seven different options for reform, based on alternatives in other jurisdictions and suggestions arising from our consultations. These options were put to stakeholders.

0.28 We recommend a new formulation for the grounds of appeal against conviction. (Recommendation 8.1) Having considered the wide range of options, we recommend a formulation of the grounds for appeal against conviction that adopts the best features of those models with the most stakeholder support, and that provides a simple and clear framework.

0.29 In appeals against sentence for proceedings on indictment by the defendant and the Crown, the CCA is given a broad discretion in the legislation to impose any different sentence it thinks fit. However, the case law establishes that an error or miscarriage of justice must be demonstrated before the appeal can succeed.

0.30 We recommend retaining the current legislative provisions. (Recommendations 8.2 and 8.3) Stakeholders did not support codifying the case law as it risks constraining the discretion of the CCA and inadvertently restricting the grounds of appeal.

## Appeals from acquittal and similar orders (Chapter 9)

0.31 We recommend that where a defendant is acquitted in a judge alone trial for proceedings on indictment, the appeal should be available on questions of both law and fact, not just on a question of law. (Recommendation 9.1)

0.32 In a judge alone trial the judge is required to give reasons, which include the findings of fact relied upon – something not available in a jury trial. Factual and legal errors can be discerned from the judge's reasons. We expect this avenue of appeal will be rarely used. However, where there is a clearly identifiable error, community confidence in the criminal justice system is better served by having a method to

review and correct those errors. Consistent with this policy position the appeal should be decided on the ground that there was an error of law or fact that was material to the outcome. (Recommendation 9.1)

0.33 We recommend, by majority, that this expanded basis of appeal be available only where the offence for which the defendant was acquitted is punishable by 15 years imprisonment or more. (Recommendation 9.1) This is consistent with the threshold that applies to an order for a retrial under CARA where there has been a "tainted acquittal".

0.34 We recommend expanding the avenue of appeal from an acquittal in the summary jurisdiction of the higher courts. (Recommendations 9.2 and 9.3)

0.35 No appeal lies from a decision of a judge to accept a plea in bar – a plea that the defendant has been convicted or acquitted of the same offence. The acceptance of the plea operates to discharge the defendant. We recommend that the DPP be able to appeal the acceptance of a plea in bar to the CCA. (Recommendation 9.4)

0.36 A person found not guilty by reason of mental illness may only appeal that verdict where he or she did not set up the defence. We reiterate the recommendations made in Report 138 that an appeal should be available regardless of who set up the defence. We also recommend that where a defendant is acquitted at a special hearing, the same avenues of appeal for an acquittal in an ordinary trial for proceedings dealt with on indictment should apply. (Recommendation 9.5)

## Appeals from higher courts – other issues (Chapter 10)

0.37 The legislation does not specify the basis on which a conviction or sentence appeal from the summary jurisdiction of the higher courts is to be decided. The CCA has held that these appeals should be decided the same way as appeals from proceedings dealt with on indictment. For clarity, we recommend including this basis in legislation. (Recommendation 10.1)

0.38 Most defendant appeals to the CCA require leave. In a conviction appeal, whether or not leave is required depends on whether the ground raises a question of law alone, a difficult classification. For simplicity, and to give the CCA greater control over the cases that come before it, we recommend that all appeals to the CCA should require leave. (Recommendation 10.2) We also recommend repealing r 4 of the *Criminal Appeal Rules* (NSW) and including its substance in legislation as one factor the CCA must consider in deciding whether to grant leave. (Recommendation 10.3). The ability for the trial judge to certify that a matter is appropriate for appeal is unnecessary and should be abolished. (Recommendation 10.4)

0.39 We recommend shortening the time limit for filing a notice of appeal with the CCA from 6 months to 4 months, in order to better serve the interests of finality. We also recommend that the Chief Justice develop a practice note for granting extensions of the notice of intention to appeal. Extensions of time are sometimes sought due to delays in obtaining transcripts and other material from the trial court, and we recommend that the head of each jurisdiction conduct a review of the processes for

the release of this material. (Recommendation 10.5) For consistency we recommend that, except in certain cases, prosecution appeals be subject to the same time limits as those that apply to defendants. (Recommendation 10.6)

0.40 In certain proceedings the trial judge may submit a question of law arising during or after the hearing for determination by the CCA .The current avenues of appeal and our recommendations for change make this power unnecessary. We recommend that it be repealed. (Recommendation 10.9)

0.41 We also recommend clarifying and updating other parts of the appeals process, including the powers of the CCA following disposal of a conviction appeal, costs, supplemental powers and the effect of time spent on release pending a sentence appeal. (Recommendations 10.7, 10.8, 10.10, 10.11, 10.12 and 10.13)

## Interlocutory appeals and appeals from committal proceedings (Chapter 11)

0.42 The current interlocutory appeal rights work well. We recommend retaining them in their current form and expanding them to apply to the summary jurisdiction of all higher courts. (Recommendation 11.1) We also make some recommendations to update and streamline these provisions, including by imposing a time limit and a requirement for leave for all parties. (Recommendations 11.2, 11.3 and 11.4)

0.43 There are currently two alternate avenues of appeal from an interlocutory order made in committal proceedings – to the CCA under the CAA, and to a single judge of the Supreme Court under CARA. We consider that dual avenues are unnecessary. We recommend abolishing the appeal to the CCA. (Recommendation 11.5)

## Appeals to and from specialist courts (Chapter 12)

0.44 The Land and Environment Court (LEC) hears appeals from the Local Court relating to environmental offences. Although only a small number of appeals are made to the LEC each year, we recommend retaining this avenue of appeal. (Recommendation 12.1) There are benefits in having a specialist court deal with environmental offences. We recommend some changes to align appeals to the LEC with appeals to the District Court and Supreme Court. (Recommendations 12.2, 12.3 and 12.4)

0.45 Appeals relating to environmental offences may be made from the Local Court to the Supreme Court if the threshold for granting leave is met. We recommend this be retained. (Recommendation 12.5)

0.46 The Industrial Relations Commission in Court Session (IRCiCS) hears appeals from the Local Court for certain work health and safety offences. The provisions of CARA will apply. We do not make any specific recommendations for this avenue of appeal.

0.47 In an appeal from the Local Court to both the LEC and the IRCiCS, the judge hearing the appeal may state a case on a question of law to the CCA. Similar to our

recommendation for the case stated from the District Court, we recommend abolishing these provisions and replacing them with an avenue of appeal with leave on a ground involving a question of law. (Recommendations 12.6 and 12.10)

0.48 The provisions of CARA relating to criminal appeals from the Local Court apply to the Children's Court. These avenues of appeal work well and we recommend retaining them. (Recommendation 12.7)

0.49 Appeals from decisions of the President of the Children's Court lie to the Supreme Court instead of the District Court. This appears to be because the President must be a judge of the District Court. However, this creates an unnecessary anomaly and means a young person's right of appeal can be different because the matter happens to be heard by a different judicial officer. We recommend that the President's decisions be subject to the same avenues of criminal appeal as Children's Court magistrates. (Recommendation 12.8)

0.50 Certain decisions of the Drug Court may be appealed to the CCA. These work well and we recommend that they be retained. (Recommendation 12.9)

0.51 Most prosecution appeals may be made only by the DPP or the Attorney General. The Environment Protection Authority (EPA) and the WorkCover Authority of NSW are specialist prosecutors. We recommend that they have the same criminal appeal rights as the DPP where they prosecuted the original proceedings. We also recommend that the EPA be given appeal rights for environmental offences where the original proceedings were prosecuted by or on behalf of a public authority. (Recommendation 12.11)

## Other areas for reform (Chapter 13)

0.52 The *Criminal Appeal Rules* (NSW) apply to appeals to the CCA, and the *Supreme Court Rules 1970* (NSW) govern criminal appeals from the Local Court to the Supreme Court. There is no clear rationale for having separate sets of rules. We recommend that the Supreme Court Rules Committee conduct a review of these rules with a view to consolidating and updating them. (Recommendation 13.1)

0.53 The Supreme Court Rules Committee makes rules for a number of different types of proceedings. We recommend that consideration be given to ensuring that criminal law expertise is available to the Committee when making criminal appeal rules. (Recommendation 13.1)

0.54 In criminal appeals from the Local Court to the Supreme Court it is not uncommon for there to be an application for judicial review in the alternative. However, there are some inconsistencies between the provisions applying to appeals and those that apply to judicial review. We recommend that the Attorney General instigate a review of the provisions of the SCA and other rules relating to judicial review, with a view to harmonising those provisions with similar provisions applying in criminal appeals. (Recommendation 13.2)

# Recommendations


| 4 | A new Criminal Appeal Act | page |
|---|---|---|
| **4.1** | **Consolidate criminal appeal legislation** | **37** |
| | (1) The *Criminal Appeal Act 1912* (NSW) and *Crimes (Appeal and Review) Act 2001* (NSW) should be repealed and replaced with a new Criminal Appeal Act that would: | |
| | (a) consolidate the provisions governing appeals from criminal proceedings | |
| | (b) give effect to the recommendations made in this report, and | |
| | (c) use modern language and drafting styles. | |
| | (2) A new Criminal Appeal Act should contain a note stating that judicial review under s 69 of the *Supreme Court Act 1970* (NSW) may also be available as an alternative to appeal. | |
| **4.2** | **Court of Criminal Appeal to be part of Supreme Court** | **42** |
| | (1) The Court of Criminal Appeal should be recognised as a part of the Supreme Court under s 38 of the *Supreme Court Act 1970* (NSW). | |
| | (2) Consequential amendments should be made to Part 3 of the *Supreme Court Act 1970* (NSW) to assign to the Court of Criminal Appeal criminal appeal and review business, including judicial review proceedings as outlined in Recommendation 4.3. | |
| **4.3** | **Assign judicial review applications to the Court of Criminal Appeal** | **44** |
| | (1) If Recommendation 4.2 is adopted, the Court of Criminal Appeal should be assigned to hear: | |
| | (a) applications for judicial review from decisions or orders of: | |
| | (i) the District Court, the Land and Environment Court and the Industrial Relations Commission in Court Session in their original and appellate criminal jurisdictions, and | |
| | (ii) the Drug Court | |
| | (b) appeals from a single judge of the Supreme Court hearing a judicial review application from the Local Court or the Children's Court in their criminal jurisdiction. | |
| | (2) The Chief Justice should be given the power to transfer judicial review proceedings between the Court of Appeal and the Court of Criminal Appeal. | |
| **5** | **Appeals from the Local Court to the District Court** | **page** |
| **5.1** | **Change sentence appeals to the District Court** | **84** |
| | (1) Appeals against conviction from the Local Court to the District Court should continue to be by way of rehearing as currently set out in s 18 and s 19 of the *Crimes (Appeal and Review) Act 2001* (NSW). | |
| | (2) Appeals against sentence from the Local Court to the District Court should be by way of rehearing on the basis of the material before the Local Court and the magistrate's reasons. Fresh evidence should be given only with leave of the District Court, if it is in the interests of justice. | |
| | (3) The NSW Department of Attorney General and Justice should investigate alternatives to producing typed transcripts in criminal appeals from the Local Court. | |
| **5.2** | **Abolish case stated from the District Court** | **86** |
| | (1) The case stated procedure under s 5B of the *Criminal Appeal Act 1912* (NSW) should be abolished. | |
| | (2) When the District Court determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law. | |

| 6 | Appeals from the Local Court to the Supreme Court | page |
|---|---|---|
| **6.1** | **Retain Local Court appeals to the Supreme Court** | **91** |
| | (1) The defendant should be able to appeal from the Local Court to the Supreme Court against a conviction or sentence on a ground involving a question of law. | |
| | (2) The prosecution should be able to appeal from the Local Court to the Supreme Court on a ground involving a question of law against: | |
| | (a) a sentence | |
| | (b) an order staying or dismissing summary proceedings, or | |
| | (c) an order for costs made against the prosecutor in either committal or summary proceedings. | |
| | (3) Either party should be able to appeal from the Local Court to the Supreme Court, with leave on a ground involving a question of law, against: | |
| | (a) an interlocutory order, or | |
| | (b) an order made in relation to a person in committal proceedings. | |
| | (4) It should not be possible to appeal from the Local Court to the District Court against a decision that is or has been the subject of an appeal or application for leave to appeal to the Supreme Court. | |
| | (5) Paragraph (4) should not prevent an appeal to the District Court where the Supreme Court remitted the matter to the Local Court, and the Local Court redetermined the matter. | |
| **6.2** | **Second appeals from the Supreme Court to the Court of Criminal Appeal** | **92** |
| | (1) Section 101(2)(h) of the *Supreme Court Act 1970* (NSW), allowing an appeal to the Court of Appeal from an order of the Supreme Court under Part 5 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be abolished. | |
| | (2) When the Supreme Court determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law. | |

| 7 | Appeals from the Local Court – other issues | page |
|---|---|---|
| **7.1** | **Annulment not to be available where defendant advised of intention not to attend** | **96** |
| | A defendant should not be able to apply to annul a conviction or sentence if the defendant had informed the Local Court in writing of his or her intention not to attend the proceedings in which the defendant was convicted or sentenced. | |
| **7.2** | **Increase flexibility to make annulment applications** | **97** |
| | (1) A party should be able to apply orally to annul a conviction or sentence on the same day that the conviction or sentence was made or imposed. | |
| | (2) The Local Court sitting at any place should be able to accept an application for annulment, not just at the place where the original proceedings were held. | |
| **7.3** | **Leave for second or subsequent annulment application to be granted in exceptional circumstances** | **98** |
| | The Local Court should only grant leave to make a second or subsequent annulment application if there are exceptional circumstances. | |
| **7.4** | **Local Court to have power to annul for administrative error** | **98** |
| | The Local Court should have the power to annul a conviction or sentence of its own motion where it has convicted or sentenced an absent defendant, and the absence was due to an administrative error or irregularity that was not caused by the defendant. | |
| **7.5** | ***Parker* direction to be contained in legislation** | **100** |
| | A new Criminal Appeal Act should provide that, in an appeal by a defendant from the Local Court to the District Court against a sentence, if the judge is contemplating imposing a sentence that may be more onerous than the original sentence, the judge must tell the defendant and provide the opportunity to seek leave to withdraw the appeal. | |

**7.6 Expand powers of the District Court in conviction appeals** 105

The District Court should, in an appeal against a conviction, have the power to:

(a) set aside the conviction

(b) dismiss the appeal

(c) set aside the conviction and remit the matter to the Local Court to redetermine in accordance with any directions of the District Court, where the defendant:

(i) pleaded guilty in the Local Court

(ii) was absent before the Local Court, or

(iii) did not receive procedural fairness in the Local Court

(d) vary the sentence if the defendant was properly convicted on some other count, on a similar basis to s 7(1) of the *Criminal Appeal Act 1912* (NSW), and

(e) substitute a guilty verdict for a different offence and pass sentence, where the substituted offence:

(i) was originally charged by the prosecutor, and was either dismissed by the Local Court or withdrawn by the prosecutor as a result of plea negotiations, or

(ii) is a common law or statutory alternative to the offence the subject of the appeal.

**7.7 Allow District Court appeals to be filed after 3 months** 107

In appeals from the Local Court to the District Court, by both the defendant and the Director of Public Prosecutions:

(a) The time limit for filing an appeal should be 28 days after the original decision.

(b) If a party wishes to appeal more than 28 days after the original decision, the party must apply for leave.

(c) Where an application for leave to appeal is filed after 28 days but not more than 3 months after the original decision, the District Court may grant leave to appeal if it is satisfied that it is in the interests of justice to do so.

(d) Where an application for leave to appeal is filed more than 3 months after the original decision, the District Court may grant leave to appeal only where it is satisfied that exceptional circumstances exist which justify the appeal being heard.

**7.8 Legislate for time limits in appeals to the Supreme Court** 108

A new Criminal Appeal Act should provide that the time limit for filing an appeal from the Local Court to the Supreme Court should be 28 days from the date of the original decision, although the Supreme Court may grant leave to appeal out of time.

**7.9 Retain costs in appeals from the Local Court** 110

(1) The District Court and the Supreme Court should have the power to award costs on an appeal from the Local Court where it is considered just.

(2) The limitation on costs awarded against a public prosecutor, currently contained in s 70 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be retained.

**7.10 Clarify effect of sentence pending prosecution appeal from the Local Court** 111

Provisions concerning stay of a sentence pending appeal from the Local Court, currently in s 63 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be retained. It should be made clear that this provision applies only to appeals by defendants.

**7.11 Clarify Local Court can deal with a bond imposed on appeal** 112

Section 98 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so as to clarify that where the District Court imposes or varies a good behaviour bond on an appeal from the Local Court, "the court with which the offender has entered into the bond" in s 98(1)(a) should be read as a reference to the Local Court.

**7.12 Align appeals from forensic procedure orders with appeals from conviction** 114

(1) An order authorising a forensic procedure under the *Crimes (Forensic Procedures) Act 2000* (NSW) should be subject to the same appeal rights and right to seek annulment as a conviction imposed in the Local Court.

(2) An order refusing a forensic procedure under the *Crimes (Forensic Procedures) Act 2000* (NSW) should be subject to the same appeal rights as an order dismissing summary proceedings in the Local Court.

**7.13 Develop procedural rules for appeals to the Supreme Court** **116**

(1) The Supreme Court Rules Committee should develop procedural rules which cover all aspects of criminal appeals from the Local Court to the Supreme Court.

(2) Specific forms should be developed and approved for use in criminal appeals from the Local Court to the Supreme Court.

(3) Specific provision should be made for the fees that apply to criminal appeals from the Local Court to the Supreme Court.

(4) The procedural rules and forms for criminal appeals from the Local Court to the Supreme Court and the procedural rules and forms for applications for judicial review under s 69 of the *Supreme Court Act 1970* (NSW) should be consistent.

**7.14 Refusal to revoke a good behaviour bond** **117**

The definition of "sentence", currently contained in s 3 of the *Crimes (Appeal and Review) Act 2001* (NSW), should include a refusal to revoke a good behaviour bond, in order to allow the prosecution to appeal such a refusal.

**7.15 Limit on further appeals applies only to same party** **118**

It should be clarified that a party can appeal from the Local Court to the District Court even though another party has filed an appeal or sought leave to appeal from the same decision.

**8 Appeals from conviction and sentence on indictment** **page**

**8.1 New provision for conviction appeals** **136**

The provision for appeals against conviction on indictment should be to the following effect:

The Court of Criminal Appeal must allow an appeal against conviction if the court is satisfied that:

(a) the verdict, on the evidence before the court at the time of the verdict, is unreasonable

(b) there has been an incorrect decision on a question of law or other miscarriage of justice that, in the opinion of the court, deprived the accused of a real possibility of acquittal, or

(c) the accused did not receive a fair trial.

**8.2 Retain grounds for defendant sentence appeals** **146**

There should continue to be provisions governing defendant appeals against sentence to the effect of s 5(1) and s 6(3) of the *Criminal Appeal Act 1912* (NSW).

**8.3 Retain grounds for Crown sentence appeals** **148**

There should continue to be provisions governing Crown appeals against sentence to the effect of s 5D and s 5DA of the *Criminal Appeal Act 1912* (NSW).

**9 Appeals from acquittal and similar orders** **page**

**9.1 Expand acquittal appeals in judge alone trials** **163**

(1) The avenues of appeal against an acquittal that are currently contained in s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) should be retained.

(2) The Attorney General or the Director of Public Prosecutions should also be able to appeal to the Court of Criminal Appeal on any ground against an acquittal for an offence:

(a) punishable by 15 years or more imprisonment

(b) tried on indictment, and

(c) tried by a judge without a jury.

The basis of the appeal should be that there was an error of law or fact that was material to the outcome.

(3) All appeals against acquittal should require the leave of the Court of Criminal Appeal.

(4) If the Court of Criminal Appeal finds that an acquittal should be quashed, it should continue to have a

discretion to order a new trial.

**9.2 Expand acquittal appeals in summary jurisdiction of higher courts** 164

The avenue of appeal against an acquittal by the Supreme Court or the Land and Environment Court in their summary jurisdiction, currently contained in s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW), should also be available for an acquittal by the District Court and the Industrial Relations Commission in Court Session in their summary jurisdiction.

**9.3 Crown need not be a party for acquittal appeals in summary jurisdiction of higher courts** 165

The availability of the avenue of appeal against an acquittal by the higher courts in their summary jurisdiction should not depend on the Crown being a party to the original proceedings.

**9.4 Introduce appeal from acceptance of plea in bar** 166

The Director of Public Prosecutions should be able to appeal to the Court of Criminal Appeal against a judge's acceptance of a plea of autrefois convict or autrefois acquit under s 156 of the *Criminal Procedure Act 1986* (NSW), with leave on a ground involving a question of law.

**9.5 Expand appeals following special hearing or finding of not guilty by reason of mental illness** 174

(1) Recommendations 7.6 and 7.7 of Report 138, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, should be implemented in a new Criminal Appeal Act.

(2) The avenues of appeal from an acquittal by a judge sitting alone or by the jury at the direction of the judge, in proceedings dealt with on indictment, should also apply to an acquittal at a special hearing.

**10 Appeals from higher courts – other issues** page

**10.1 Clarify grounds of appeal from summary jurisdiction of the higher courts** 179

A new Criminal Appeal Act should clarify that an appeal against a conviction or sentence imposed in the summary jurisdiction of the:

(a) Supreme Court

(b) District Court

(c) Land and Environment Court

(d) Drug Court, and

(e) Industrial Relations Commission in Court Session

should be decided on the same grounds that apply to an appeal from proceedings dealt with on indictment.

**10.2 Require leave for all appeals to the Court of Criminal Appeal** 182

All appeals to the Court of Criminal Appeal should require leave.

**10.3 Include rule 4 of the *Criminal Appeal Rules* (NSW) in legislation** 184

Rule 4 of the *Criminal Appeal Rules* (NSW) should be repealed. Instead a new Criminal Appeal Act should provide that in determining whether to grant leave to appeal, one of the factors the Court of Criminal Appeal must consider is whether the party applying for leave objected at the trial to:

(a) a direction

(b) an omission to direct, or

(c) the admission or rejection of evidence

that forms the basis of a ground of appeal.

**10.4 Abolish trial judge certificate** 186

The power of the trial judge to certify that a case is fit for appeal should be abolished

**10.5 Change time limits for appeals to the Court of Criminal Appeal** 190

(1) A defendant should file a notice of intention to appeal (or to apply for leave to appeal) to the Court of Criminal Appeal against conviction or sentence within 28 days of the conviction or sentence.

(2) The notice of intention to appeal (or to apply for leave to appeal) should have effect for 4 months rather

than 6 months.

(3) The Chief Justice should issue a practice note which deals with the procedure for granting an extension of the notice of intention to appeal (or to apply for leave to appeal), including consequential case management.

(4) The head of jurisdiction of each court should review the causes of delay and the process for the release of transcripts, summing up, remarks on sentence and judgment when an appeal is filed with the Court of Criminal Appeal.

**10.6 Time limits for prosecution appeals** **191**

(1) Prosecution appeals against sentence should be subject to the same time limits as appeals by defendants.

(2) There should be no time limit for:

(a) contingent prosecution appeals against sentence, and

(b) prosecution appeals against sentence where the sentence was reduced for assistance to authorities and the person failed to provide the assistance, as currently provided in s 5DA of the *Criminal Appeal Act 1912* (NSW).

**10.7 Expand the Court of Criminal Appeal's power to substitute a guilty verdict for a different offence** **193**

The Court of Criminal Appeal's power to substitute a verdict of guilty for an alternative offence, currently contained in s 7(2) of the *Criminal Appeal Act 1912* (NSW), should apply to all guilty verdicts, not just to findings of guilt by a jury.

**10.8 Clarify Court of Criminal Appeal's power to order a new trial** **195**

The Court of Criminal Appeal should have the power to order a new trial following a successful appeal against conviction where it is in the interests of justice to do so.

**10.9 Repeal submission of questions of law to the Court of Criminal Appeal** **197**

The provisions allowing the trial judge to submit a question of law arising during or after proceedings to the Court of Criminal Appeal, currently contained in s 5A, s 5AE, s 5B, s 5BA and s 5BB of the *Criminal Appeal Act 1912* (NSW), should be repealed.

**10.10 Retain the Court of Criminal Appeal's supplemental powers** **201**

(1) The language of s 12(1)(a)-(e) of the *Criminal Appeal Act 1912* (NSW) should be updated using modern language and drafting styles.

(2) The Chief Justice should issue a practice note which deals with the procedure for referring a question for inquiry or appointing an assessor to the court under the provisions currently contained in s 12(1)(d) and (e) of the *Criminal Appeal Act 1912* (NSW).

**10.11 Abolish trial judge's notes and opinion** **203**

Section 11 of the *Criminal Appeal Act 1912* (NSW), which allows for the trial judge to provide his or her notes on the trial and opinion on the appeal, should be repealed.

**10.12 *Costs in Criminal Cases Act 1967* (NSW) should allow recovery of costs on appeal** **205**

Legislative amendment should be made to ensure that the procedure under the *Costs in Criminal Cases Act 1967* (NSW) for the defendant to apply for a certificate and recover the costs of trial where the prosecution is found to be unreasonable, should also allow the costs of the appeal to be recovered.

**10.13 Clarify the effect of time spent on release pending appeal on the sentence** **206**

(1) The requirement that the time during which a person is released on bail pending the determination of that person's appeal to the Court of Criminal Appeal or the High Court does not count as part of any term of imprisonment, currently contained in s 18 and s 25A of the *Criminal Appeal Act 1912 (*NSW), should be extended to prosecution appeals.

(2) Recommendation 9.3 of Report 133, Bail, should be implemented in a new Criminal Appeal Act.

**11 Interlocutory appeals and appeals from committal proceedings** **page**

**11.1 Interlocutory appeals to summary jurisdiction of the higher courts** **214**

The avenues of interlocutory appeal currently contained in s 5F of the *Criminal Appeal Act 1912* (NSW),

should be retained and extended to proceedings heard in the summary jurisdiction of the Supreme Court, District Court and Industrial Relations Commission in Court Session.

**11.2 All interlocutory appeals by leave** **215**

Interlocutory appeals by all parties should be by leave.

**11.3 Time limits for interlocutory appeals** **217**

The time limits for the filing of an interlocutory appeal should be 14 days for all parties, including the Director of Public Prosecutions and the Attorney General, subject to a discretion in the Court of Criminal Appeal to extend the time period for good cause.

**11.4 Abolish trial judge's certificate** **217**

The power of the trial judge or magistrate to certify that an interlocutory judgment or order is a proper one for appeal should be abolished.

**11.5 Committal proceedings should be appealed to Supreme Court only** **219**

(1) There should be no appeal to the Court of Criminal Appeal from an interlocutory judgment or order made in committal proceedings.

(2) The avenue of appeal to the Supreme Court against an order made in relation to a person in committal proceedings should be retained

**12 Appeals to and from specialist courts** **page**

**12.1 Retain appeals from the Local Court to the Land and Environment Court** **229**

The avenues of appeal from the Local Court to the Land and Environment Court in respect of environmental offences, currently contained in Part 4 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be retained.

**12.2 Apply District Court sentence appeal recommendations to the Land and Environment Court** **231**

Recommendation 5.1 should apply to appeals from the Local Court to the Land and Environment Court.

**12.3 Resolve inconsistencies between Land and Environment Court appeals and other types of appeals** **232**

(1) A person convicted of an environmental offence by the Local Court in the person's absence or following a plea of guilty should be able to appeal against the conviction to the Land and Environment Court with leave on any ground (not just on a ground involving a question of law).

(2) The prosecutor should be able to appeal from the Local Court to the Land and Environment Court, with leave on a ground involving a question of law, against:

(a) an order made in relation to a person in any committal proceedings with respect to an environmental offence, and

(b) an interlocutory order with respect to an environmental offence.

(3) The District Court and the Land and Environment Court should have the power to transfer appeals to each other where appeals are filed in the wrong jurisdiction.

**12.4 Apply District Court procedural recommendations to the Land and Environment Court** **233**

Recommendations 7.5, 7.6, 7.7 and 7.9 should also apply to appeals from the Local Court to the Land and Environment Court.

**12.5 Retain environmental offence appeals from the Local Court to the Supreme Court** **234**

The avenues of appeal from the Local Court to the Supreme Court with respect to environmental offences, including the current grounds for leave, should be retained.

**12.6 Abolish case stated from the Land and Environment Court** **235**

(1) The case stated procedure under s 5BA of the *Criminal Appeal Act 1912* (NSW) should be abolished.

(2) When the Land and Environment Court determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law.

**12.7 Apply Local Court appeal provisions to Children's Court** **238**

The provisions applying to criminal appeals from the Local Court should continue to apply to criminal appeals from the Children's Court.

**12.8 Align appeals from the President of the Children's Court with appeals from magistrates** **239**

The avenues of appeal from criminal proceedings heard by the President of the Children's Court should be the same as from criminal proceedings heard by magistrates of the Children's Court.

**12.9 Retain appeals from the Drug Court** **242**

The avenues of appeal to the Court of Criminal Appeal from the decisions of the Drug Court referred to in s 5AF and s 5DC of the *Criminal Appeal Act 1912* (NSW) should be retained.

**12.10 Abolish case stated from the Industrial Relations Commission in Court Session** **246**

(1) The case stated procedure under s 5BB of the *Criminal Appeal Act 1912* (NSW) should be abolished.

(2) When the Industrial Relations Commission in Court Session determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law.

**12.11 Expand the appeal rights of prosecutors** **251**

(1) The Environment Protection Authority and the WorkCover Authority of NSW should be given the same criminal appeal rights as the Director of Public Prosecutions where they prosecuted the original proceedings.

(2) The Environment Protection Authority should be given the same rights as the Director of Public Prosecutions to appeal in respect of an environmental offence where the original proceedings were conducted by or on behalf of a public authority.

(3) For the purposes of paragraph (2), "public authority" should include a local authority.

(4) The Director of Public Prosecutions and the Environment Protection Authority should develop administrative arrangements about how they will exercise the appeal rights set out in paragraph (2).

**13 Other areas for reform** **page**

**13.1 Consolidate rules regarding criminal appeals** **255**

(1) The Supreme Court Rules Committee should conduct a review of the *Criminal Appeal Rules* (NSW) and the criminal appeals parts of the *Supreme Court Rules 1970* (NSW) with a view to consolidating and updating those rules.

(2) The rules recommended in Recommendation 7.13 should be included in the consolidated rules.

(3) Consideration should be given to legislative change to ensure that criminal law expertise is available to the Supreme Court Rules Committee when making criminal appeal rules.

**13.2 Harmonise similar judicial review and criminal appeals provisions** **258**

The Attorney General should instigate a review of s 69A – s 69D of the *Supreme Court Act 1970* (NSW) and other rules in relation to judicial review proceedings, with a view to harmonising those provisions with similar provisions applying in criminal appeals.

# 1. Introduction

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## Aims of the review

### Our terms of reference

1.1 This report responds to terms of reference given to us by the Attorney General on 1 March 2013. Those terms of reference ask us to undertake:

> an inquiry, pursuant to section 10 of the *Law Reform Commission Act* 1967, aimed at improving and consolidating legislative provisions dealing with criminal appeals.
>
> Specifically, the Commission is to review current avenues of appeals in all criminal matters, with a view to simplifying and streamlining appeal processes, and consolidating criminal appeal provisions into a single Act.
>
> In undertaking this review the Commission should have regard to:
>
> - the balance between the need for finality and the need to provide fair opportunity for appeal
> - the need to provide for timely resolution of criminal appeal matters
> - the characteristics and needs of the courts from and to which appeals lie
> - any related matters the Commission considers appropriate.

1.2 This is an area of law of considerable importance to the community. A proper system of criminal appeals enables the review of lower court decisions by higher courts. It aims to correct errors, protect against flaws in procedure and ensure that statute and common law is interpreted and applied consistently across the court system. Appellate courts develop a body of case law that provides guidance for lower courts in undertaking their task, while recognising the proper scope of judicial discretion. While the common law did not originally provide for appeals, a well regulated system of appeals has come to be regarded as a fundamental feature of the rule of law.

### What should a good criminal appeals system look like?

1.3 There are two main purposes of appeals. The first is the private one of doing justice in individual cases by correcting wrong decisions. The second is the public one of

engendering public confidence in the administration of justice by making those corrections and in clarifying and developing the law.[1]

1.4 Lord Justice Auld, in his 2001 review of the Criminal Courts of England and Wales, said:

> it seems to me that the main criteria of a good criminal appellate system are that:
>
> - it should do justice to individual defendants and to the public as represented principally by the prosecution;
> - it should bring finality to the criminal process, subject to the need to safeguard either side from clear and serious injustice and such as would damage the integrity of the criminal justice system;
> - it should be readily accessible, consistently with a proper balance of the interest of individual defendants and that of the public;
> - it should be clear and simple in its structure and procedures;
> - it should be efficient and effective in its use of judges and other resources in righting injustice and in declaring and applying the law; and
> - it should be speedy.[2]

## Achieving the aims of our terms of reference

1.5 As set out in our terms of reference, the overarching aim of our review is to consolidate and simplify the law relating to criminal appeals in NSW. Our recommendations seek to balance finality and efficiency on the one hand, with fairness on the other.

1.6 An efficient appeals system requires that the rules governing appeals contribute to the timely resolution of criminal matters at a reasonable cost to the parties and the state. Finality is an important aspect. The defendant, the victim and the public legitimately expect criminal proceedings will come to an end at some point (although there may be safeguards for later reopening and review for cases of miscarriage of justice).

1.7 Fairness is important in ensuring the integrity of the criminal justice system. Fairness requires that adequate appeal rights are available to both the defendant and the prosecution to review and correct errors of fact and law. It also requires that due regard be had to principles of good process. Efficiency and fairness are sometimes in conflict, but not always. Undue delay in resolving matters can compromise fairness. Inefficiency and lack of finality can raise the cost of justice and therefore restrict access.

1.8 We consider that the rules relating to criminal appeals should be clear and easy to understand, not only by lawyers and judges, but also by members of the public. A

1. H Woolf, *Access to Justice*, Final Report (1996) 153.
2. R E Auld, *Review of the Criminal Courts of England and Wales,* Report (2001) 611.

criminal appeals process that is not clear and simple might not be as accessible, efficient or effective as it could be. This could have a detrimental effect on the fair administration of justice and public confidence in the criminal justice system.[3]

1.9 We believe that the recommendations contained in this report will contribute to the achievement of Goal 18 in the NSW Government's *NSW 2021* plan, namely to increase community confidence through an efficient court system, and to increase victims' and community understanding of the justice system.

## The current situation in NSW

1.10 Criminal appeals under NSW law are provided for in two main Acts: the *Criminal Appeal Act 1912* (NSW) (CAA), and the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). The landscape is complex. The scope of these two acts is not well defined. In the main the CAA applies to appeals to the Court of Criminal Appeal (CCA), while CARA deals with appeals from the Local Court to the District Court, Supreme Court and Land and Environment Court (LEC). However, there is overlap - for example, CARA deals with appeals to the CCA from an acquittal. Provisions of the *Supreme Court Act 1970* (NSW) also provide for judicial review to either the Supreme Court or the Court of Appeal from lower court decisions in some criminal proceedings.

1.11 The provisions of the CAA, in particular, have slowly accreted over time. The main rights of appeal are contained in 20 sections between s 5 and s 6 (there are 8 sections between s 5 and s 5A alone). It is clear from our review that the Acts have not kept pace with modern conditions. For example, second appeals from the District Court to the CCA are by way of "case stated" – a procedure widely criticised as cumbersome and which we consider to be a relic from a bygone era. The CAA also contains references to outdated and obsolete provisions – for example, it still provides for an avenue of appeal from the Court of Coal Mine Regulation, despite that court being abolished in 2006.

1.12 Part of the reason for the complex and unwieldy legislation lies in the fact that there has been no comprehensive fundamental review of criminal appeal legislation in NSW. This review follows our description of the rights of appeal set out in our *Bail* report.[4] In that inquiry, our description of the system of criminal appeals was incidental to our consideration of bail on appeal. Nonetheless, the complexity was so apparent that we recommended consideration of consolidation of the criminal appeal legislation.

## Moving to a new criminal appeals framework

1.13 The case for consolidation of the current criminal appeal legislation is discussed more fully in Chapter 4. We believe the case to be overwhelming. Modernisation of

3. Alberta Law Reform Institute, *Criminal Appeal Procedures: Queen's Bench and Court of Appeal,* Final Report 101 (2012) 1.

4. NSW Law Reform Commission, *Bail,* Report 133 (2012) ch 9.

the structure and nature of criminal appeals will, in our view, add to public confidence in the criminal justice system. We also believe that it will increase efficiency and improve access to justice.

1.14 Recommendation 4.1 proposes that the CAA and CARA be abolished and replaced with a new Criminal Appeal Act. This starting point has influenced the development of the recommendations contained in the remainder of this report. If consolidation is not implemented, we are of the view that the existing legislation should still be amended in the ways that we propose.

1.15 In recommending that the existing legislation be rebuilt, we have considered how to best design the criminal appeals structure to achieve consistency and simplicity. We propose some changes to the current law which we consider will contribute to these aims – for example, we recommend that all appeals to the CCA should require leave, so as to avoid the need for the CCA to consider the often technical distinction between questions of law and questions of fact. However, we have not suggested consistency simply for consistency's sake. We recommend that appeals from the Local Court to the LEC be retained, despite the complexity entailed, due to strong stakeholder support for the retention of the appellate jurisdiction of the LEC and its specialist expertise.

1.16 Our inquiry has considered closely the situation of NSW courts in 2014. Strong support was expressed by stakeholders for the retention of the CCA as a specialist criminal court. NSW is rare nowadays in having an appellate court specialising in criminal jurisdiction, and this was widely regarded as a strength of our system. We also found strong support for the work of the Local Court and the Children's Court. The Local Court and the Children's Court are the engine rooms of our criminal justice system - dealing with 97% of all criminal cases in 2012.[5] In our view, these courts deliver high quality justice notwithstanding their time pressured environment.

1.17 We have drawn on developments in other jurisdictions widely in this review. In particular, we have considered the discussion paper, issued in 2010, of the Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General (as it then was).[6] This paper explored the value of a nationally consistent approach to criminal appeals. There may well have been considerable value in such an approach, particularly in the prosecution of federal offences. However, this work did not result in agreement on recommendations for reform, and the item was removed from the reform agenda in November 2011.[7]

## Scope and process

1.18 Our review focuses on criminal appeals. We have not considered the provisions of CARA that deal with the review of concluded criminal trials, including:

5. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013) iii.
6. Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010).
7. Standing Council on Law and Justice, *Communiqué: Summary of Out of Session Decisions*, (November 2011).

- review of convictions and sentences under Part 7 of CARA, which deal with issues that typically arise following trial and appeal, sometimes a considerable time afterwards, and
- retrial following acquittal under the double jeopardy provisions of Part 8 of CARA, with the exception of Division 3 which deals with prosecution appeals proper.

1.19 Those provisions have an important place as review mechanisms to provide for those cases where the criminal justice system may have not functioned properly. However, they are not properly considered "appeals" and are not within our terms of reference.

1.20 That said, we have looked at annulment of Local Court convictions because they are closely related in practice to appeals, and typically occur before any appeal.

1.21 Our review of this area of law draws on the extensive expertise in the legal profession and amongst other stakeholders.

1.22 We issued a Question Paper on criminal appeals in July 2013 that canvassed the main aspects of the law and the areas that could be reformed. This drew from the existing proposals for change that had previously been identified by stakeholders, including the courts. The Question Paper was released publicly and we received 17 submissions. Though relatively small in number, these submissions were comprehensive and came from the stakeholders who deal with the criminal appeal system on a daily basis.

1.23 From these submissions we formulated some initial proposals for reform and conducted roundtable discussions with key stakeholders on our proposals and their workability. We also discussed them with the courts. A specialised paper on proposals in relation to the LEC was developed and circulated for comment to that court and interested stakeholders. Lists of contributors to the reference and meetings are provided in Appendices A, B and C.

1.24 The recommendations in this report have, for the most part, been exposed to comment by these stakeholders. The majority of the recommendations in this report have the broad support of stakeholders. Some, however, are contentious. There are areas where views are divergent. In these areas we have endeavoured to chart a way forward that is practical and responds to 21st century conditions, mindful of the basic aims of our review.

1.25 We did not consider that it would be productive or useful to include a section by section analysis of the provisions of the current legislation. Where we consider that the current law needs to be changed, we have made recommendations to this effect. It should be assumed, then, that the current law should be retained in those areas which are not canvassed in this report, or which are discussed but not the subject of recommendations for change. Of course, given that the CAA in particular has not been fundamentally altered in the last century, a new Criminal Appeal Act would benefit from a modern approach to language and drafting.

# 2. Criminal appeals in NSW - present and past

**In brief**

The provisions for criminal appeals in NSW are contained in two separate Acts. There are numerous avenues of appeal from the Local Court, and separate provisions that apply to specialist courts. The separate legislative schemes are a result of the difference in historical developments.


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2.1 In this chapter we explain the current avenues of criminal appeal in NSW, and we provide a brief overview of the history of NSW criminal appeals.

## Avenues of criminal appeal in NSW

### Matters prosecuted in the Local Court

2.2 There are numerous avenues of criminal appeal from decisions of the Local Court, depending on the type of offence appealed from and the type of appeal being sought. The *Crimes (Appeal and Review Act) 2001* (NSW) (CARA) governs criminal appeal and review from the Local Court. Table 2.1 summarises these avenues of appeal. For the purposes of CARA, a reference to the Local Court includes the Children's Court.[1]

1. *Crimes (Appeal and Review) Act 2001* (NSW) s 3 (definition of "Local Court").

### Table 2.1: Avenues of criminal appeal and review from decisions of the Local Court

| | Defendant | Prosecution |
|---|---|---|
| **Local Court → Local Court** | Annulment of the conviction or sentence, where the defendant did not appear when the conviction was made or the sentence imposed. (CARA s 4(1)) | Annulment of the conviction or sentence. (CARA s 4(1)) |
| **Local Court → District Court** | As of right, against conviction or sentence or both, or against the refusal of the Local Court to annul a conviction.<br>With leave, against a conviction made in the defendant's absence or following a plea of guilty.<br>(CARA s 11, s 11A, s 12(1)) | The DPP may appeal as of right, against a sentence imposed in proceedings for:<br>(a) an indictable offence dealt with summarily<br>(b) a prescribed summary offence, or<br>(c) a summary offence that has been prosecuted by or on behalf of the DPP.<br>The prosecutor[2] may appeal as of right, against:<br>(a) any order for costs made by a magistrate against the prosecutor in respect of committal proceedings, or<br>(b) any order for costs made by the Local Court against the prosecutor in respect of summary proceedings.<br>(CARA s 23) |
| **Local Court → Land and Environment Court** (for environmental offences[3]) | As of right, against conviction or sentence.<br>With leave, against:<br>(a) a conviction made in the defendant's absence or following a plea of guilty, or<br>(b) an order made in committal proceedings or an interlocutory order,<br>but only on a ground that involves a question of law alone.<br>(CARA s 31-32) | As of right, against sentence, by:<br>(a) the DPP, where the proceedings were prosecuted by or on behalf of a public authority (other than the Environment Protection Authority (EPA))<br>(b) the EPA, where it prosecuted the Local Court proceedings, or<br>(c) the prosecutor, but only on a ground that involves a question of law alone.<br>As of right, by the prosecutor (including the DPP and the EPA) against:<br>(a) an order staying summary proceedings<br>(b) an order dismissing a matter the subject of summary proceedings, or<br>(c) an order for costs against the prosecutor in summary proceedings,<br>but only on a ground that involves a question of law alone.<br>With leave, against an order made in committal proceedings or an interlocutory order, but only on a ground that involves a question of law alone, by:<br>(a) the DPP, where the proceedings were prosecuted by or on behalf of a public authority (other than the EPA), or<br>(b) the EPA, where it prosecuted the Local Court proceedings.<br>(CARA s 42-43) |

2. Defined as the person responsible for the conduct of the prosecution in proceedings from which an appeal or application for leave to appeal is made: *Crimes (Appeal and Review) Act 2001* (NSW) s 3.
3. As defined in *Crimes (Appeal and Review) Act 2001* (NSW) s 3.

| | Defendant | Prosecution |
|---|---|---|
| **Local Court → Supreme Court** | As of right on a question of law alone, against conviction or sentence.<br>With leave, against:<br>(a) conviction or sentence, where the ground involves a question of fact or mixed fact and law, or<br>(b) an order made in committal proceedings, an interlocutory order or a conviction or sentence for an environmental offence, on a question of law.<br>The Supreme Court must not grant leave to appeal in relation to an application concerning an environmental offence unless it is satisfied that the appeal is likely to require the resolution of a matter of constitutional law or a matter of general application.<br>(CARA s 52-54)<br>Judicial review of the Local Court's decision. (SCA s 69) | By the prosecutor, as of right, against:<br>(a) a sentence imposed by the Local Court in summary proceedings<br>(b) a stay by the Local Court of summary proceedings<br>(c) an order of the Local Court dismissing summary proceedings, or<br>(d) an order for costs made against the prosecutor in either committal or summary proceedings,<br>but only on a ground that involves a question of law alone.<br>By the prosecutor, with leave, against:<br>(a) a sentence imposed for an environmental offence,<br>(b) an order made in committal proceedings, or<br>(c) an interlocutory order,<br>but only on a ground that involves a question of law alone.<br>The Supreme Court must not grant leave to appeal in relation to an application concerning an environmental offence unless it is satisfied that the appeal is likely to require the resolution of a matter of constitutional law or a matter of general application.<br>(CARA s 56-58)<br>Judicial review of the Local Court's decision. (SCA s 69) |

2.3 For certain work health and safety offences prosecuted in the Local Court, an appeal from that decision will lie to the Industrial Relations Commission in Court Session (IRCiCS).[4] The provisions of CARA dealing with appeals to the District Court and Supreme Court will apply to that appeal.[5]

2.4 In appeal proceedings heard by the District Court, Land and Environment Court (LEC) or IRCiCS, a judge of that court may submit a question of law arising on the appeal to the Court of Criminal Appeal (CCA) for determination.[6] This is known as a "case stated". In an appeal to the District Court, either party may request the judge to state a case to the CCA. In an appeal to the LEC or the IRCiCS, only the appellant may request the judge to state a case. A stated case may be referred to the CCA either before or after disposition of the appeal.[7]

2.5 The Court of Appeal can also judicially review decisions of the District Court, LEC and IRCiCS in relation to appeals brought from the Local Court.[8] In the case of the

4. *Work Health and Safety Act 2011* (NSW) s 229B(6); *Industrial Relations Act 1996* (NSW) s 197; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 245(4). See Chapter 12.
5. *Industrial Relations Act 1996* (NSW) s 197(2).
6. *Criminal Appeal Act 1912* (NSW) s 5B(1), s 5BA(1), s 5BB(1).
7. *Criminal Appeal Act 1912* (NSW) s 5B(2), s 5BA(2), s 5BB(2).
8. *Supreme Court Act 1970* (NSW) s 48, s 69.

District Court and the IRCiCS, the review is limited to questions of whether the court committed a jurisdictional error in dealing with the Local Court appeal.[9]

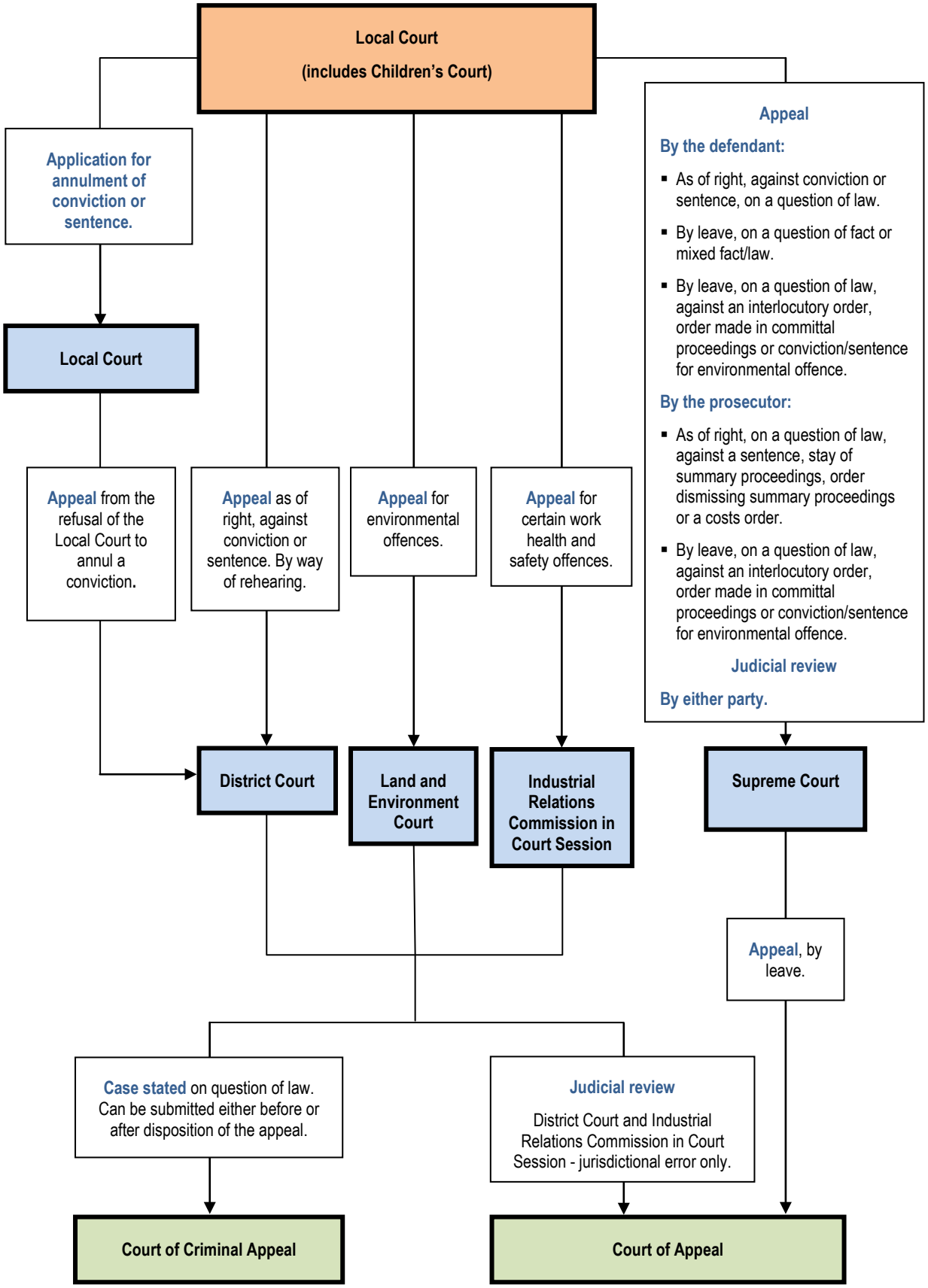
2.6 Decisions of the Supreme Court dealing with appeals from the Local Court, whether under the provisions of CARA or by way of judicial review, can be further appealed to the Court of Appeal, subject to a grant of leave.[10]

2.7 Figure 2.1 shows the current avenues of appeal from the Local Court.

9. For District Court, see *District Court Act 1973* (NSW) s 176; *Spanos v Lazaris* [2008] NSWCA 74 [15]. For Industrial Relations Commission in Court Session, see *Industrial Relations Act 1996* (NSW) s 179.

10. *Supreme Court Act 1970* (NSW) s 101(2)(h).

## Figure 2.1: Avenues of criminal appeal and review from matters prosecuted in the Local Court



## Matters prosecuted in the District Court and the Supreme Court

2.8 Decisions of the District Court and the Supreme Court in criminal matters may be appealed to the CCA. The *Criminal Appeal Act 1912* (NSW) (CAA) largely governs these appeals, although CARA contains provisions dealing with an appeal from an acquittal. Table 2.2 summarises these appeal provisions.

### Table 2.2: Criminal appeals from decisions of the District Court and Supreme Court to the Court of Criminal Appeal

| | Defendant | DPP / Attorney General |
|---|---|---|
| **Offences dealt with on indictment** | Following conviction on indictment:<br>(a) against the conviction, as of right, on a ground that involves a question of law<br>(b) against the conviction, on any other ground, with leave of the CCA or a certificate of the trial judge, or<br>(c) against the sentence, with leave.<br>(CAA s 5(1)) | As of right, against:<br>(a) any sentence imposed by the trial court[11] (CAA s 5D(1), s 5DA(1))<br>(b) an order quashing an information or indictment, or any count thereof (CAA s 5C)<br>(c) an acquittal:<br>(i) by a jury at the direction of the trial judge, or<br>(ii) by a judge of the Supreme Court or District Court in proceedings for an indictable offence tried without a jury,<br>on a question of law alone. (CARA s 107) |
| **Offence dealt with in summary jurisdiction** | As of right, against conviction or sentence.<br>As of right, against an order to pay costs, or dismissal of an application for an order for costs.<br>With leave, if an order for costs is made in the defendant's favour.<br>(CAA s 5AA)<br>Also applies to conviction for a related summary offence in a criminal case dealt with by the Supreme Court or District Court. (CAA s 5AD) | As of right, against:<br>(a) any sentence (CAA s 5D(1), s 5DB(1))<br>(b) an order quashing an application or any charge specified in the application under *Criminal Procedure Act 1986* (NSW) s 246(1) in any proceedings to which the Crown was a party (CAA s 5C), or<br>(c) an acquittal by the Supreme Court in its summary jurisdiction in any proceedings in which the Crown was a party, on a question of law (CARA s 107). |
| **Interlocutory orders** | With leave or upon the certificate of the trial judge or magistrate, in respect of an interlocutory judgment or order made in the proceedings.[12] (CAA s 5F(3)) | As of right, against:<br>(a) an interlocutory judgment or order made in the proceedings, or<br>(b) a decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case. (CAA s 5F(2), (3A)) |
| **Habitual criminal order** | With leave, against a pronouncement or sentence made against the defendant under the *Habitual Criminals Act 1957* (NSW). (CAA s 5E) | |

11. The Environment Protection Authority may also appeal against any sentence pronounced in the Supreme Court in respect of an environmental offence: *Criminal Appeal Act 1912* (NSW) s 5D(1A).

12. Applies to proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme Court or District Court and proceedings under *Criminal Procedure Act 1986* (NSW) ch 3, pt 2, div 5: *Criminal Appeal Act 1912* (NSW) s 5F(1).

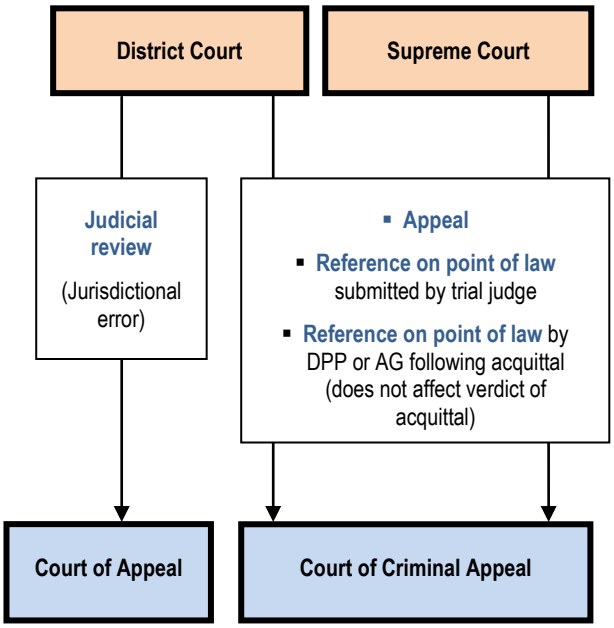
| | Defendant | DPP / Attorney General |
|---|---|---|
| **Discharge of jury** | With leave, against a decision by the court to discharge the jury. (CAA s 5G) | With leave, against a decision by the court to discharge the jury. (CAA s 5G) |
| **Referral following acquittal** | | Submit for determination any question of law arising at or in connection with an acquittal:<br>(a) in any proceedings tried on indictment, or<br>(b) in any proceedings tried by the Supreme Court in its summary jurisdiction in which the Crown was a party.<br>Does not affect the verdict of acquittal. (CARA s 108) |
| **Submission of question of law** | After trial and conviction on indictment, the trial judge can submit any question of law that arises at or in reference to the trial or conviction to the CCA. The CCA will deal with the submission as if it were an appeal. (CAA s 5A)<br>A question of law may also be submitted to the CCA (and *must* be submitted if requested by the Crown) for determination during the course of proceedings before the Supreme Court or District Court in their summary jurisdiction. The CCA may make any order or give any direction it thinks fit. (CAA s 5AE) | |

2.9 The Court of Appeal can judicially review an order made by the District Court in its original criminal jurisdiction.[13] However it appears that, at least for proceedings dealt with on indictment, judicial review would be limited to the ground of jurisdictional error.[14] Furthermore, it has been suggested that the Court of Appeal's supervisory jurisdiction should only be invoked where appeal to the CCA is not available.[15] In practice, therefore, it seems that judicial review is rarely used.

2.10 Figure 2.2 shows the current avenues of criminal appeal from the District Court and Supreme Court.

13. *Supreme Court Act 1970* (NSW) s 48, s 69.
14. The provisions of the *Supreme Court Act 1970* (NSW) do not apply to proceedings for the prosecution of offenders on indictment in the Supreme Court or District Court: *Supreme Court Act 1970* (NSW) s 17, Third Schedule. However, this would not prevent review on the ground of jurisdictional error: see *Kirk v Industrial Court of NSW* [2010] HCA 1; 239 CLR 531.
15. *Fairfax Digital Australia and New Zealand Pty Ltd v District Court of NSW* [2012] NSWCA 172 [8]; see also *R v Swansson* [2007] NSWCCA 67; 69 NSWLR 406 [45] (Spigelman CJ).

**Figure 2.2: Avenues of criminal appeal and review from matters prosecuted in the District Court and Supreme Court**




## Matters prosecuted in specialist courts

2.11 The LEC, the IRCiCS and the Drug Court operate as specialist courts in NSW.

2.12 The LEC has summary jurisdiction to hear proceedings for certain environmental offences (known as its "Class 5 jurisdiction").[16] The IRCiCS is the name for the Industrial Relations Commission sitting in its judicial capacity. The IRCiCS has summary jurisdiction to hear work health and safety "category 3 offences", which are the least serious breaches of work health and safety duties.[17]

2.13 The Drug Court is a specialist court that oversees a diversionary program for drug dependent offenders. The offender is sentenced following acceptance into the Drug Court program, but the sentence is suspended during their participation in the program. At the end of the program the Drug Court imposes a final sentence, which takes into account the offender's participation in the program.

2.14 Table 2.3 provides a brief overview of the avenues of appeal from these courts. These provisions are discussed in detail in Chapter 12.

16. See *Land and Environment Court Act 1979* (NSW) s 21 for a list of proceedings that fall within the Land and Environment Court's summary criminal jurisdiction.
17. *Work Health and Safety Act 2011* (NSW) s 229B(2); for a definition of "Category 3 offence" see s 33.

## Table 2.3: Avenues of criminal appeal from specialist courts in NSW

| | Defendant | Prosecution |
|---|---|---|
| **Land and Environment Court → Court of Criminal Appeal** | As of right, against conviction or sentence.<br>As of right, against an order to pay costs, or dismissal of an application for an order for costs.<br>With leave, if an order for costs is made in the defendant's favour.<br>(CAA s 5AB)<br>With leave of the CCA or upon the certificate of the trial judge, against an interlocutory judgment or order made in the proceedings.<br>(CAA s 5F) | By the DPP or Attorney General, as of right:<br>(a) against sentence, in any proceedings to which the Crown was a party (CAA s 5D(1))<br>(b) against an acquittal on a ground that involves a question of law, in any proceedings in which the Crown was a party (CARA s 107)<br>(c) against a decision by the Land and Environment Court to quash an application, or a charge specified in an application, for an order for the apprehension of a person charged with a summary offence (CAA s 5C)<br>(d) an interlocutory judgment or order made in the proceedings (CAA s 5F(2)), or<br>(e) a decision or ruling on the admissibility of evidence, where the decision or ruling eliminates or substantially weakens the prosecution's case (s 5F(3A)).<br>By the EPA:<br>(a) against sentence, as of right, in any proceedings for an environmental offence which have been instituted or carried on by, or on behalf of, the EPA (CAA s 5D(1A)), or<br>(b) an interlocutory judgment or order made in the proceedings, with leave of the CCA or the certificate of the trial judge (CAA s 5F(3)).<br>The DPP or Attorney General may submit for determination any question of law arising at or in connection with an acquittal in any proceedings in which the Crown was a party. Does not affect the verdict of acquittal. (CARA s 108) |
| | A question of law may also be submitted to the CCA (and *must* be submitted if requested by the Crown) for determination during the course of the proceedings. (CAA s 5AE) | |
| **Drug Court → Court of Criminal Appeal** | As of right, against:<br>(a) final sentence<br>(b) sentence imposed where the offender was referred to the Drug Court but not accepted into the program<br>(c) sentence imposed for breach of a good behaviour bond, where the offender was referred to the Drug Court following call up for the breach but not accepted into the program, or<br>(d) sentence imposed by the Drug Court in the exercise of the criminal jurisdiction of the Local Court or District Court.<br>(CAA s 5AF, s 5DC; *Drug Court Act 1998* (NSW) s 7D, s 7E, s 12, s 24(1)(a)-(b)) | |

| | Defendant | Prosecution |
|---|---|---|
| **Industrial Relations Commission in Court Session → Court of Criminal Appeal** | As of right, against conviction or sentence.<br>As of right, against an order to pay costs, or dismissal of an application for an order for costs.<br>With leave, if an order for costs is made in the defendant's favour.<br>(CAA s 5ABA)<br>As of right, against conviction or sentence, where the defendant is convicted of an offence under *Occupational Health and Safety Act 2000* (NSW) s 32A and sentenced to a term of imprisonment. (CAA s 5AG) | By the DPP or Attorney General, as of right, against sentence. (CAA s 5D) |
| | A question of law may also be submitted to the CCA (and *must* be submitted if requested by the Crown) for determination during the course of the proceedings. (CAA s 5AE) | |

2.15 The Court of Appeal may also exercise supervisory jurisdiction over decisions of the LEC, the Drug Court and the IRCiCS.[18] For decisions of the IRCiCS, judicial review is only available on questions going to the court's jurisdiction.[19]

## Appeals to the High Court

2.16 Appeals from decisions of the Court of Appeal and the CCA lie to the High Court of Australia. Special leave is required.[20]

2.17 In considering whether to grant special leave to appeal, the High Court will have regard to:

(a) whether the proceedings involve a question of law that is of general public importance or in respect of which the High Court is required to resolve differences in opinion between State level courts, and

(b) whether the interests of justice, either generally or in the particular case, require the High Court to consider the appeal.[21]

2.18 Only a small proportion of cases Australia wide are heard by the High Court, and special leave is refused in many applications. This means that the CCA and the Court of Appeal are, for the majority of matters, the final courts of appeal in NSW.

2.19 Because appeals to the High Court are governed by federal law, review of this avenue of appeal is outside the scope of our reference.

18. *Supreme Court Act 1970* (NSW) s 48, s 69. Review of a decision of the Drug Court will be available where the decision is made by a judge of the District Court: see *Drug Court Act 1998* (NSW) s 20; *Supreme Court Act 1970* (NSW) s 48(1)(a)(iv).
19. *Industrial Relations Act 1996* (NSW) s 179.
20. *Judiciary Act 1903* (Cth) s 35.
21. *Judiciary Act 1903* (Cth) s 35A.

## Basis for determining criminal appeals

2.20 Criminal appeals are decided in a different way depending on the court hearing the appeal. In conviction and sentence appeals from the Local Court to the District Court and LEC, the appeal is decided by way of rehearing. That is, the appellate court considers the evidence that was before the Local Court, and any fresh evidence that is given on appeal, and comes to its own decision. There is no need to show that the Local Court made an error before the appeal can succeed. In Chapter 5 we discuss in detail appeal by rehearing in criminal appeals from the Local Court to the District Court.

2.21 In contrast, appeals to the Supreme Court and to the CCA will usually require error to be demonstrated before the court will intervene and allow the appeal. In Chapter 8 we look at the specific grounds that the CCA considers in deciding appeals against conviction and sentence.

## History of criminal appeals in NSW

2.22 The evolution of NSW courts and criminal appeals legislation explains the difference between appeals from the Local Court and appeals from higher courts, and why criminal appeals are governed by two separate Acts.

2.23 Upon their inception, the Supreme Court and the Courts of General or Quarter Sessions (now the District Court) adopted many of the procedures and formalities of the English court system, including trial by jury. On the other hand, minor criminal charges and disciplinary offences could be tried by justices of the peace who often lacked formal legal training. Over time the magistracy moved to a more formal process of conducting hearings,[22] however it was not until 1955 that new magistrates were required to be legally qualified.[23] It has generally been considered that the lack of formality and formal legal training of magistrates was the reason why there were more expansive appeal rights from the Local Court level.

### Appeals from the higher courts (Quarter Sessions and Supreme Court)

2.24 Initially, the right of appeal against decisions of the higher courts adopted the common law position that prevailed in England: strictly speaking, no appeal was available. The only possibility for review of a criminal conviction was the Crown's grant of prerogative mercy. There was a view that the criminal law would lose its force if higher court decisions were not regarded as final.[24]

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22. For example the *Offenders Punishment and Justices Summary Jurisdiction Act 1832* (NSW) 3 Will No 3, s 16 provided that two or more justices assembled should be known as the Court of Petty Sessions.
23. *R v Longshaw* (1990) 20 NSWLR 554, 560.
24. J F Stephen, *A General View of Criminal Law of England* (Macmillan, 2nd ed, 1890) 173; R Pattenden, *English Criminal Appeals 1844-1994* (Clarendon Press, 1996) 23.

2.25 While there was no general right of appeal from the higher courts in NSW until 1912, two avenues that provided for a form of review were the prerogative writs and cases reserved.

### *The prerogative writs*

2.26 The prerogative writs of mandamus, prohibition and certiorari could be used to review decisions from both justices and the Court of Quarter Sessions. Although not appeals in the strict sense, they allowed the Supreme Court to exercise supervisory jurisdiction over lower courts and helped to establish modern principles of criminal law. For example, the Supreme Court had jurisdiction to correct by certiorari errors of fact in matters not appearing on the record for a conviction of a felony at the Court of Quarter Sessions.[25] However, if the application was successful, the only power available to the Supreme Court was to quash the conviction. It could not order a new trial.[26]

### *Cases reserved*

2.27 The trial judge could also "state a case" on a question of law to the judges of the Supreme Court. This was a process that originated in England and was enacted in statute in NSW in 1849.[27]

2.28 The question of law had to be reserved before sentence was imposed. The judgment of the trial judge could be reversed, arrested or avoided in cases where there was deemed to have been a substantial wrong or other miscarriage of justice.

2.29 However, whether to refer a matter was at the discretion of the judge at first instance and was usually only invoked where there were unsettled or difficult questions of law. As such, it was not an appeal by the person convicted, even though it could operate to quash the conviction if error was established. Although limited to questions of law, a case stated represented a convenient alternative that bypassed the often cumbersome formality required under the prerogative writs. It also served a useful purpose at a time when access to legal resources was not as easy as it is today. The case stated process has been included in s 5A of the CAA, although with the introduction of rights of appeal it is rarely used.[28]

### *Enactment of the Criminal Appeal Act 1912*

2.30 In England, introduction of an avenue of criminal appeal which encompassed factual questions was strongly opposed by the judiciary.[29] Notwithstanding this fact, the *Criminal Appeal Act 1907* (UK) was enacted following a number of high profile

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25. *R v Hodges* (1844) 4 SCR App 26; 1 Legge 201.
26. *R v Evans* (1857) 1 SCR App 48; 2 Legge 1005.
27. NSW, *Parliamentary Debates,* Legislative Council, 23 May 1849 (*Sydney Morning Herald*, 24 May 1849, 3); *Reserved Criminal Cases Act 1849* (NSW) 13 Vic No 8, s 1-3 (rep), carried over into *Criminal Law Amendment Act 1883* (NSW) 46 Vic No 17 s 422, then *Crimes Act 1900* (NSW) s 428, then repealed by *Criminal Appeal Act 1912* (NSW) s 23(2).
28. See para 10.84.
29. R Pattenden, *English Criminal Appeals 1844-1994* (Clarendon Press, 1996) 22-25.

wrongful convictions, which aroused public and media concern about the fallibility of the jury verdict.[30]

2.31 The English Act was adopted almost in its entirety in NSW in 1912, although with a key difference. The CAA allowed the CCA to order a retrial where a conviction was quashed on appeal;[31] a power that was not granted in England until much later.[32]

2.32 In the following years the avenues of criminal appeal in NSW were gradually expanded. In 1924 the Crown was given a right of appeal against sentence.[33] In 1987 appeals against interlocutory orders were introduced,[34] and in 2003 the prosecution was given the ability to appeal an evidentiary decision or ruling that destroyed or substantially weakened the prosecution's case.[35] In 2006 the prosecution was given a limited right of appeal against an acquittal.[36] Although the rights of appeal have gradually expanded, in particular to accommodate the creation of specialist courts, the substantive provisions of the CAA have remained virtually unchanged for the last century.

2.33 The key legislative amendments to the CAA are set out in more detail in Appendix D.

## Appeals from magistrates

### *Appeals to the Court of Quarter Sessions*

2.34 Unlike the higher courts, as early as 1833 a wide variety of statutes provided limited legislative rights for defendants to appeal from the Court of Petty Sessions (now the Local Court) to the Court of Quarter Sessions. However, the terms of such appeals depended on the individual statute that created the offence.[37]

2.35 The *Justices Summary Jurisdiction Act 1835* (NSW) set out the procedures that applied to any right of appeal to the Court of Quarter Sessions arising under any Act. It clarified that the decision of the Court of Quarter Sessions was final and

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30. R Pattenden, *English Criminal Appeals 1844-1994* (Clarendon Press, 1996) 28-30; P McClellan and C Beshara, *A Matter of Fact: The Origins and History of the NSW Court of Criminal Appeal,* Education Monograph 5 (Judicial Commission of NSW, 2013) 1-3.
31. *Criminal Appeal Act 1912* (NSW) s 8.
32. In 1964 a power to order a retrial was introduced, but available only where the appeal was allowed because of fresh evidence admitted in the Court of Criminal Appeal: *Criminal Appeal Act 1964* (UK) s 1. In 1988 the power was expanded to be available where the "interests of justice so require": *Criminal Appeal Act 1968* (UK) s 7, as amended by *Criminal Justice Act 1988* (UK) s 43.
33. *Criminal Appeal Act 1912* (NSW) s 5D, inserted by *Crimes (Amendment) Act 1924* (NSW) s 33.
34. *Criminal Appeal Act 1912* (NSW) s 5F, inserted by *Criminal Appeal (Amendment) Act 1987* (NSW) sch 1 (2).
35. *Criminal Appeal Act 1912* (NSW) s 5F(3A), inserted by *Crimes Legislation Further Amendment Act 2003* (NSW) sch 3 [8].
36. *Crimes (Appeal and Review) Act 2001* (NSW) s 107, inserted by *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) sch 1 [2].
37. For example, a person convicted of an offence under the *Sydney Police Act 1833* (NSW) had a right of appeal but only if the penalty imposed was above £5 and the potential appellant could provide surety of double the amount of the penalty incurred: *Sydney Police Act 1833* (NSW) 4 Will No 7, s 70.

conclusive, and closed off the possibility of review of the appellate decision by certiorari.[38]

2.36 In 1891 the Court of Quarter Sessions was given power to reduce or vary a sentence on appeal.[39] Prior to this amendment the court could not amend a defect in the sentence when a judgment was reversed.[40]

### *Appeals to the Supreme Court*

2.37 Review by the Supreme Court was also available in limited circumstances. For instance, the *Imperial Acts Adoption and Application Act 1850* (NSW) allowed a person aggrieved by a summary conviction to apply to the Supreme Court for an order of prohibition in respect of error but only if there was a prima facie case of mistake or error on the part of the justice or justices.[41]

2.38 The *Justices Appeal Act 1881* (NSW) allowed a justice to state a case to the Supreme Court, in addition to the previously existing remedy of prohibition. The amendment arose out of concerns that there was no ability to seek review of a decision of a justice to dismiss proceedings.[42]

### *Consolidation of the avenues of appeal*

2.39 The *Justices Acts Amendment Act 1900* (NSW) introduced uniformity by providing for the right of appeal against any order of a justice or justices for any offence,[43] and the provisions regulating the business of the Court of Petty Sessions were then consolidated in the *Justices Act 1902* (NSW).

2.40 The *Justices Act 1902* (NSW) provided for four avenues of appeal from a decision of a justice: appeal to the Supreme Court by way of stated case; an order for prohibition to the Supreme Court; special provisions regarding appeals to the Supreme Court by way of writ of habeas corpus or certiorari; and appeal to the Court of Quarter Sessions by way of *de novo* hearing. In 1924 the appeal court was given the power to increase a sentence on appeal,[44] although it was not until 1988 that the Crown had the ability to appeal a sentence imposed by a magistrate.[45]

2.41 In 1967 magistrates were given the power to annul a conviction or sentence, and the availability of this power was expanded by a number of subsequent

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38. *Justices Summary Jurisdiction Act 1835* (NSW) 5 Will No 22, s 3. A similar provision is now contained in *District Court Act 1973* (NSW) s 176, although it is accepted that this does not prevent review on the ground of jurisdictional error: *Spanos v Lazaris* [2008] NSWCA 74 [15].
39. *Criminal Law and Evidence Amendment Act 1891* (NSW) 55 Vic No 5, s 26.
40. *Hume v R* [1888] 9 NSWLR 168.
41. *Imperial Acts Adoption and Application Act 1850* (NSW) 14 Vic No 43 s 12-13.
42. NSW, *Parliamentary Debates*, Legislative Assembly, 9 September 1881, 1033.
43. *Justices Acts Amendment Act 1900* (NSW) s 9(1).
44. *Justices Act 1902* (NSW) s 125(1), inserted by *Crimes Amendment Act 1924* (NSW) s 30.
45. *Justices Act 1902* (NSW) s 131AB, inserted by *Justices (Appeals) Amendment Act 1988* (NSW) sch 1 (1).

amendments.[46] In 1998 significant changes were made to the provisions in the *Justices Act 1902* (NSW) dealing with appeals. The process of stating a case to the Supreme Court was abolished and replaced with an avenue of appeal.[47] The provisions allowing for a *de novo* hearing before the District Court were also repealed and replaced with an appeal by rehearing, of the form which still exists today.[48]

2.42 In 2001 the *Justices Act* was repealed and the provisions dealing with appeals were substantially re-enacted in CARA. The original name for CARA was the *Crimes (Local Court Appeal and Review) Act 2001* (NSW), although the name was changed in 2006 when additional provisions were inserted, meaning it no longer dealt exclusively with Local Court appeals.[49]

2.43 The key legislative amendments to the *Justices Act* and CARA are set out in more detail in Appendix D.

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46. *Justices Act 1902* (NSW) Part IVA, inserted by *Justices (Amendment) Act 1967* (NSW) s 4. See also *Justices (Further Amendment) Act 1971* (NSW) s 3(k); *Justices (Amendment) Act 1978* (NSW) sch 1 (8); *Justices Amendment (Procedure) Act 1997* (NSW) sch 1 [6].
47. *Justices Act 1902* (NSW) s 104, inserted by *Justices Legislation Amendment (Appeals) Act 1998* (NSW) sch 1 [2].
48. *Justices Act 1902* (NSW) s 132, inserted by *Justices Legislation Amendment (Appeals) Act 1998* (NSW) sch 1 [2].
49. *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) sch 2 (2.1).

# 3. Criminal appeals in other jurisdictions

**In brief**

Criminal appeal provisions are generally similar throughout Australia. In many respects NSW has more expansive appeal rights than in other states and territories. Criminal appeals in Australia are significantly different to those in the UK, Canada and NZ.


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3.1 In this chapter we discuss the criminal appeals framework that exists in other Australian jurisdictions, as well as the other common law countries that based their criminal appeals framework on the *Criminal Appeal Act 1907* (UK) – England and Wales, Northern Ireland, Scotland, Canada and New Zealand. Appendix E provides further detail of the criminal appeals framework in each of these jurisdictions.

## Criminal appeals in other Australian jurisdictions

### Structure of the criminal appeals framework

3.2 Like NSW, the other Australian states and territories inherited their criminal justice system from England. Consequently, all Australian jurisdictions maintain a distinction between appeals from summary courts (that is, Local Court or equivalent), and appeals from proceedings dealt with on indictment in the higher courts. In most jurisdictions this difference is still manifested in different Acts for the different avenues of appeal.

3.3 NSW, Tasmania and the NT have a Court of Criminal Appeal. In other jurisdictions the highest court in criminal matters is the Court of Appeal or the full court of the Supreme Court, which has a general appeals jurisdiction.

3.4 The jurisdiction to hear prosecutions for federal offences is vested in the state and territory courts,[1] and they hear almost all of them. The criminal appeals legislation applicable in those courts applies in the ordinary way to appeals in federal cases. In 2009 the Federal Court was given indictable criminal jurisdiction to hear prosecutions for serious cartel offences, and an avenue of criminal appeal to the full court of the Federal Court was subsequently created.[2]

3.5 Most criminal appeal legislation in Australia remains based on the 1907 English legislation. WA and Victoria are the only Australian jurisdictions to have modernised and updated their criminal appeal legislation, in 2004 and 2009 respectively.[3]

## Criminal appeals from summary courts

3.6 Most jurisdictions in Australia have dual avenues of appeal from summary courts – a broader appeal encompassing questions of fact and law, and an appeal to the Supreme Court on a question of law only. This is perhaps a reflection of the Supreme Court's original role of supervising the exercise of power by magistrates and justices.

### *Appeals on errors of fact and law*

3.7 In NSW, an appeal from the Local Court lies primarily to the District Court, by way of rehearing.[4]

3.8 A similar but somewhat broader approach is followed in Victoria. There an appeal lies to the County Court (the equivalent of the District Court) by way of rehearing.[5] However, the defendant is not bound by the plea he or she entered before the Magistrates' Court. If the appeal is upheld, the sentence, and the conviction in the case of a defendant appeal, must be set aside and the County Court may impose any sentence it considers appropriate.[6]

3.9 In Queensland, the appeal is by way of rehearing to the District Court.[7] However, if the defendant pleads guilty he or she can only appeal against sentence on the ground that the punishment was excessive.[8]

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1. *Judiciary Act 1903* (Cth) s 68.
2. *Federal Court of Australia Act 1976* (Cth) pt III div 2A, inserted by *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth). See also Explanatory Memorandum, Federal Court of Australia (Criminal Jurisdiction) Bill 2008 (Cth) 1-2.
3. *Criminal Appeals Act 2004* (WA); *Magistrates Court Act 2004* (WA); *Criminal Procedure Act 2009* (Vic).
4. *Crimes (Appeal and Review) Act 2001* (NSW) s 17-18.
5. *Criminal Procedure Act 2009* (Vic) s 256(1), s 259(1).
6. *Criminal Procedure Act 2009* (Vic) s 256(2), s 259(2).
7. *Justices Act 1886* (Qld) s 223.
8. *Justices Act 1886* (Qld) s 222(2)(c).

3.10 In the ACT, the Supreme Court hears the appeal on the evidence in the Magistrates Court, with a discretion to receive further evidence.[9] It has the power to draw its own inferences of fact. There is no need to show error on the part of the magistrate before the discretion to receive further evidence can be exercised.[10]

3.11 In SA, appeal to the Supreme Court is conducted by way of rehearing.[11] However, for appeals against sentence the Supreme Court has held that error must be demonstrated and the court cannot simply impose any other sentence that it considers appropriate.[12]

3.12 In all other jurisdictions, appeals from summary courts are made directly to the Supreme Court on the more limited basis of error:

- In WA, an appeal lies on the grounds of error of law or fact, excess of jurisdiction, miscarriage of justice or that the sentence was excessive or inadequate.[13] However, the Supreme Court may dismiss the appeal if it is satisfied that no substantial miscarriage of justice has occurred.[14]
- In Tasmania, an appeal lies on the grounds of an error of law or fact, or lack of jurisdiction.[15] The Supreme Court may dismiss the appeal if it is satisfied that no substantial miscarriage of justice has occurred.[16] Alternatively, it may order that the appeal be heard by *de novo* hearing where the interests of justice require it.[17]
- In the NT, an appeal lies against sentence, or otherwise on the grounds that there was an error of law or fact.[18] The Supreme Court may dismiss the appeal if it is satisfied that no substantial miscarriage of justice has actually occurred.[19]

3.13 NSW, although not having the highest volume of cases prosecuted, has the highest rate of appeal from decisions of courts of summary jurisdiction in Australia.[20]

### *Appeals to the Supreme Court on questions of law*

3.14 All jurisdictions except Queensland provide for a separate avenue of appeal to the Supreme Court to determine questions of law, even where the broader avenue of appeal also lies to the Supreme Court.[21]

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9. *Magistrates Court Act 1930* (ACT) s 214(3).
10. *Campbell v Fortey* (1987) 85 FLR 462, 465.
11. *Magistrates Court Act 1991* (SA) s 42; *Supreme Court Civil Rules 2006* (SA) r 286.
12. *Wittwer v Police* [2004] SASC 226 [16]-[17].
13. *Criminal Appeals Act 2004* (WA) s 8(1).
14. *Criminal Appeals Act 2004* (WA) s 14(2).
15. *Justices Act 1959* (Tas) s 107(4).
16. *Justices Act 1959* (Tas) s 110(2)(ab).
17. *Justices Act 1959* (Tas) s 111.
18. *Justices Act* (NT) s 163(1).
19. *Justices Act* (NT) s 177(2)(f).
20. See Table 5.5.
21. Although in Queensland, as with other states, an application for judicial review may be brought before the Supreme Court: *Judicial Review Act 1991* (Qld) s 43-44.

3.15 In Victoria, a party may appeal to the Supreme Court on a question of law from a final order of the Magistrates' Court.[22] In SA, Tasmania and the NT, the magistrate or justice may reserve a question of law for determination by the Supreme Court.[23] In WA and the ACT a party may appeal to the Supreme Court for a "review order". In WA, the grounds for such an order are a failure by the court to carry out a mandatory duty, an excess of jurisdiction, or a decision that constitutes an abuse of process.[24] In the ACT a review appeal may be made on the grounds of error, lack of jurisdiction, a wrong decision in law or, where the application is made by the prosecution, the sentence was manifestly inadequate.[25]

## Criminal appeals from proceedings dealt with on indictment

3.16 In each of the Australian states and territories including NSW, the criminal appeals framework for proceedings dealt with on indictment originated from the *Criminal Appeal Act 1907* (UK). Until recently there was a great deal of uniformity between the states and territories as to the provisions governing conviction and sentence appeals.

### *Appeal grounds*

3.17 With the recent exception of Victoria, the grounds for determining a conviction appeal are virtually identical throughout Australia.[26] This has led to the grounds for a conviction appeal being described as the "common form provision".

3.18 The legislative provision for sentence appeals are similarly uniform throughout Australia, again with the recent exception of Victoria (although it does not appear that the Victorian amendments have changed the substantive law significantly).[27] The grounds for appeal against conviction and sentence, and the different approach that has been taken in Victoria, are discussed in greater detail in Chapter 8.

### *Leave requirements*

3.19 NSW has retained the original English distinction between questions of law and fact in the requirement for leave in conviction and sentence appeals: a defendant may appeal against conviction as of right on a question of law, but leave is required for

22. *Criminal Procedure Act 2009* (Vic) s 272(1).
23. *Magistrates Court Act 1991* (SA) s 43(1); *Justices Act 1959* (Tas) s 114(1); *Justices Act* (NT) s 162(1).
24. *Magistrates Court Act 2004* (WA) s 36(1).
25. *Magistrates Court Act 1930* (ACT) s 219D.
26. *Criminal Appeal Act 1912* (NSW) s 6(1); *Criminal Code* (Qld) s 668E(1)-(1A); *Criminal Appeals Act 2004* (WA) s 30(3)-(4); *Criminal Code* (Tas) s 402(1)-(2); *Criminal Code* (NT) s 411(1)-(2); *Criminal Law Consolidation Act 1935* (SA) s 353(1); *Supreme Court Act 1933* (ACT) s 37O(2)-(3); *Federal Court of Australia Act 1976* (Cth) s 30AJ(1)-(2). Cf *Criminal Procedure Act 2009* (Vic) s 276.
27. *Criminal Appeal Act 1912* (NSW) s 5D, s 6(3); *Criminal Code* (Qld) s 668E(3), s 669A(1); *Criminal Appeals Act 2004* (WA) s 31(4)-(5); *Criminal Code* (Tas) s 402(4); *Criminal Code* (NT) s 411(4), s 414(1); *Criminal Law Consolidation Act 1935* (SA) s 353(4); *Supreme Court Act 1933* (ACT) s 37O(7); *Federal Court of Australia Act 1976* (Cth) s 30AJ(3). Cf *Criminal Procedure Act 2009* (Vic) s 281; s 289.

an appeal on any other ground, and for an appeal against sentence.[28] Queensland, SA, Tasmania and the NT have similarly retained this distinction.[29]

3.20 However, in Victoria and WA leave is required for all conviction and sentence appeals.[30] In these states the question of leave is usually determined by a single judge in a separate hearing prior to any hearing of the merits of the appeal.[31] This is in contrast to NSW, where the question of leave and the merits of the appeal are heard at the same time, and the Court of Criminal Appeal rarely refuses leave to appeal after a hearing on the merits. We discuss the requirement for leave, including the approach taken in other jurisdictions, in Chapter 10.

### *Prosecution appeals*

3.21 The prosecution appeal rights in NSW are in many ways more expansive than those in other Australian jurisdictions. NSW and Tasmania were the first jurisdictions to give the Director of Public Prosecutions a right of appeal against sentence, in 1924,[32] although all other states and territories subsequently followed suit.[33]

3.22 NSW is one of five Australian jurisdictions that provide for an avenue of appeal against an acquittal. Tasmania permitted an appeal from an acquittal on a question of law as far back as 1924 when its criminal appeals legislation was introduced.[34] NSW introduced a limited avenue of appeal against an acquittal in 2006.[35] WA and SA expanded their avenues of appeal against an acquittal in 2008, and both have appeal rights that are broader than those in NSW.[36] A limited right of appeal against acquittal was included in the federal legislation in 2009.[37] We discuss the avenues of appeal against an acquittal in NSW and other states in Chapter 9.

### *Interlocutory appeals*

3.23 Only NSW, Victoria, the ACT and the Commonwealth provide for a general right of appeal against interlocutory decisions made during the course of a trial.[38] Some

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28. *Criminal Appeal Act 1912* (NSW) s 5(1).
29. *Criminal Code* (Qld) s 668D(1); *Criminal Law Consolidation Act 1935* (SA) s 352(1); *Criminal Code* (Tas) s 401(1); *Criminal Code* (NT) s 410. However, appeals against sentence in Tasmania do not require leave.
30. *Criminal Procedure Act 2009* (Vic) s 274, s 278; *Criminal Appeals Act 2004* (WA) s 27(1).
31. See Supreme Court of Victoria, *Practice Direction No 2 of 2011 - Court of Appeal: Criminal Appeals*, 26 July 2012,14-15; *Supreme Court (Court of Appeal) Rules 2005* (WA) r 43(2)(c).
32. *Crimes (Amendment) Act 1924* (NSW) s 33; *Criminal Code* (Tas) s 401(2)(c).
33. *Criminal Code Amendment Act 1939* (Qld) s 4; *Criminal Appeals Act 1970* (Vic) s 2; *Criminal Code Amendment Act 1975* (WA) s 3; *Criminal Law Consolidation Act Amendment Act 1980* (SA) s 9; *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth) sch 1, cl 3. Crown appeals in NT and ACT were introduced with the operation of the Federal Court: *Federal Court of Australia Act 1976* (Cth) s 24(1)(b), s 28(5).
34. *Criminal Code* (Tas) s 401(2)(b), although amended in 1987. See Chapter 9.
35. *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) sch 1 [2].
36. *Criminal Law Consolidation Act 1935* (SA) s 352(1)(ab); *Criminal Appeals Act 2004* (WA) s 24(2)(da), (e).
37. *Federal Court of Australia Act 1976* (Cth) s 30AA(1)(c).
38. *Criminal Appeal Act 1912* (NSW) s 5F; *Criminal Procedure Act 2009* (Vic) s 295; *Supreme Court Act 1933* (ACT) s 37E(4); *Federal Court of Australia Act 1976* (Cth) s 30AA(4).

other states have appeal rights, but only in respect of specific interlocutory decisions.[39] We discuss these differences in greater detail in Chapter 11.

## Criminal appeals in overseas jurisdictions

### England and Wales

#### *Appeals from the Magistrates' Courts*

3.24 A conviction or sentence imposed in a Magistrates' Court may be appealed by the defendant to the Crown Court.[40] If the defendant pleaded guilty, he or she can only appeal against sentence. The appeal is by rehearing and the parties may call any evidence they wish, regardless of whether that evidence was called before the Magistrates' Court.[41] This is broader than the appeal by rehearing that applies in NSW. Surprisingly, the rate of appeal is very low – in 2012 only about 1% of the 1.1 million defendants found guilty in the Magistrates' Courts appealed to the Crown Court.[42] The appeal was successful in 44% of cases.[43] However, the prosecution has no avenue of appeal to the Crown Court.

3.25 A case may also be stated to the Divisional Court of the Queen's Bench Division of the High Court, on the ground that the decision is wrong in law or is in excess of jurisdiction.[44] A stated case is only available where following an exercise of the court's jurisdiction, it has reached a final decision and agreed to state a case. If the magistrate did not reach a final decision, or does not agree to state a case, then an application for judicial review can be brought before the High Court.[45]

#### *Appeals from the Crown Court*

3.26 As discussed above, the criminal appeals framework in Australia essentially replicated the *Criminal Appeal Act 1907* (UK), which had been introduced in England and Wales a few years earlier. However, that Act has now been repealed, and the criminal appeals framework in England and Wales looks quite different to the one that existed in 1907.

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39. *Criminal Law Consolidation Act 1935* (SA) s 352(1)(b), (c); *Criminal Appeals Act 2004* (WA) s 24(2), s 26(1), (3); *Criminal Code* (Qld) s 668A.
40. *Magistrates' Courts Act 1980* (UK) s 108(1), (2).
41. *Senior Courts Act 1981* (UK) s 79(3) preserves the customary practice and procedure with respect to appeals to the Crown Court, in particular any practice as to the extent to which an appeal is by way of rehearing.
42. England and Wales, Ministry of Justice, *Criminal Justice Statistics Quarterly Update to December 2012* (2013) Table A3.13; England and Wales, Ministry of Justice, *Court Statistics Quarterly July to September 2013* (2013) Table 3.2. The Criminal Justice Statistics and Court Justice Statistics are not directly comparable due to differences in counting rules, but if anything the percentage is likely to be overstated. The rate of appeal in NSW is discussed in Chapter 5.
43. England and Wales, Ministry of Justice, *Court Statistics Quarterly January to March 2013* (2013) 39.
44. *Magistrates' Courts Act 1980* (UK) s 111(1).
45. *Senior Courts Act 1981* (UK) s 31. See also RE Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 618.

3.27 First, England and Wales no longer has a Court of Criminal Appeal. Rather, the Court of Appeal now has a criminal division which hears appeals from criminal proceedings dealt with on indictment in the Crown Court. Secondly, England and Wales has not retained the distinction, which still applies in NSW, between conviction appeals on a question of law, which may be made as of right, and conviction appeals on any other ground, for which leave is required. Instead, all appeals require leave.[46]

3.28 Finally, the grounds for a conviction appeal are now significantly different to those in place in 1907, which still apply in most Australian jurisdictions. In 1907, the grounds provided that the court shall allow an appeal against conviction if it thinks:

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence

(b) the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law, or

(c) on any other ground there was a miscarriage of justice.

3.29 The proviso permitted the court to dismiss the appeal if, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, the court considered that no substantial miscarriage of justice had actually occurred.[47]

3.30 In 1966 these grounds were amended, so that the court was required to consider whether:

(a) the verdict of the jury was "unsafe or unsatisfactory"

(b) the judgment of the court should be set aside on the ground of a wrong decision of a question of law, or

(c) there was a material irregularity in the course of the trial.

3.31 The proviso still applied.[48] The move away from the "unreasonable verdict" ground contained in the 1907 Act was influenced by the need to provide a remedy for cases of mistaken identity – where witnesses honestly, but incorrectly, identified the defendant as the person who committed the crime. Where the evidence was credible on its face, it was considered that a wrongly convicted person would have no ability to appeal their conviction under the former test.[49]

3.32 The grounds of appeal in England and Wales now provide that:

> … the Court of Appeal-

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46. *Criminal Appeal Act 1968* (UK) s 1(2), s 11(1), (1A).
47. *Criminal Appeal Act 1907* (UK) s 4(1), as enacted.
48. *Criminal Appeal Act 1966* (UK) s 4(1), amending *Criminal Appeal Act 1907* (UK) s 4(1). This section later became *Criminal Appeal Act 1968* (UK) s 2(1) when the legislation was consolidated.
49. Great Britain, Lord Chancellor's Office, *Report of the Interdepartmental Committee on the Court of Criminal Appeal,* Cmnd 2755 (1965) 32-4.

(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and

(b) shall dismiss such an appeal in any other case.[50]

3.33 The present formulation was introduced in 1995.[51] It was intended to simplify the formula, rather than change the substantive law.[52] However, there is some ambiguity about whether the 1995 amendments did in fact represent a departure from the previous law, and in what circumstances an unfair trial will result in a conclusion that the conviction is unsafe.[53]

3.34 In regards to appeals from other decisions, England and Wales introduced a procedure for holding a preparatory hearing in serious or complex fraud cases and in other complex, lengthy or serious cases, where the admissibility of evidence and preliminary questions of law may be determined.[54] An appeal lies against a ruling made in such a hearing, with leave.[55] The prosecution may also appeal against:

- a ruling made by the trial judge relating to an offence in the indictment prior to the summing up to the jury,[56] and
- an evidentiary ruling made by the trial judge before the opening of the case for the defence, where the ruling significantly weakens the prosecution's case.[57]

3.35 These are broader than the prosecution appeal rights in interlocutory decisions available in NSW. However, in other areas the prosecution appeal rights are still very limited. There is no ability for the prosecution to appeal against an acquittal. Furthermore, the prosecution does not have a right of appeal against sentence in itself. Rather the Attorney General can "refer" to the Court of Appeal, with leave, a sentence that appears to have been "unduly lenient".[58]

## Northern Ireland

3.36 The provisions in Northern Ireland are substantially similar to those in England and Wales, although the hierarchy of courts is different.[59]

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50. *Criminal Appeal Act 1968* (UK) s 2(1).
51. *Criminal Appeal Act 1995* (UK) s 2(1), amending *Criminal Appeal Act 1968* (UK) s 2(1).
52. R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 613.
53. See R E Auld, *Review of the Criminal Courts of England and Wales*, Report (2001) 613-4; S Roberts, "'Unsafe' Convictions: Defining and Compensating Miscarriages of Justice" (2003) 66 *The Modern Law Review* 441, 448-450; H Quirk, "Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer" (2007) 70 *The Modern Law Review* 759, 762-4.
54. *Criminal Justice Act 1987* (UK) s 7(1); *Criminal Procedure and Investigations Act 1996* (UK) s 29.
55. *Criminal Justice Act 1987* (UK) s 9(11); *Criminal Procedure and Investigations Act 1996* (UK) s 35(1).
56. *Criminal Justice Act 2003* (UK) s 58.
57. *Criminal Justice Act 2003* (UK) s 62-63.
58. *Criminal Justice Act 1988* (UK) s 36(1).
59. See *Criminal Appeal (Northern Ireland) Act 1980* (UK) s 1, s 2, s 10; *Magistrates' Courts (Northern Ireland) Order 1984* (UK) art 140, art 146; *Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988* (UK) art 8(11); *Criminal Justice (Northern Ireland) Order 2004* (UK) art 16, art 21-22. *Criminal Justice Act 1988* (UK) s 36 applies to Northern Ireland: see s 36(9).

## Scotland

3.37 The criminal appeal provisions in Scotland are significantly different to those in England and Wales.

3.38 Appeals from a conviction, sentence or acquittal in summary proceedings lie to the High Court of Justiciary.[60] The test on appeal is whether a miscarriage of justice has occurred.[61] The High Court may admit fresh evidence where there is a reasonable explanation why the evidence was not heard at first instance, or the evidence was not admissible at the time of the original proceedings but is admissible at the time of the appeal, and it is in the interests of justice to do so.[62]

3.39 An appeal from proceedings dealt with on indictment may be appealed to the appellate division of the High Court of Justiciary.[63] Either party may appeal a decision made at a preliminary hearing, with leave of the trial court.[64] The prosecution may also appeal from a finding that prosecution evidence is inadmissible, or from an acquittal where the judge was satisfied the prosecution evidence was insufficient to justify a conviction.[65]

3.40 Differently from England and Wales, and Australian jurisdictions, in Scotland the ground for determining an appeal against conviction and sentence is whether there has been a miscarriage of justice. This may include a miscarriage based on:

- the existence and significance of evidence which was not heard at the original proceedings, and
- the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.[66]

3.41 The single "miscarriage of justice" ground was introduced in Scotland in 1980, and amended to its present form in 1997.[67] The single ground of appeal was thought to be the best way of providing flexibility, but it appears that in practice it has been narrowly interpreted by the High Court.[68]

## Canada

3.42 Canadian criminal law, including appeals, lies within federal jurisdiction. The *Criminal Code* RSC 1985 (Can) provides for federally consistent appeal rights and

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60. *Criminal Procedure (Scotland) Act 1995* (UK) s 175(2)-(3).
61. *Criminal Procedure (Scotland) Act 1995* (UK) s 175(5), (5E).
62. *Criminal Procedure (Scotland) Act 1995* (UK) s 175(5A)-(5B).
63. *Criminal Procedure (Scotland) Act 1995* (UK) s 106(1), s 108.
64. *Criminal Procedure (Scotland) Act 1995* (UK) s 74(1).
65. *Criminal Procedure (Scotland) Act 1995* (UK) s 107A(1).
66. *Criminal Procedure (Scotland) Act 1995* (UK) s 106(3).
67. *Criminal Justice (Scotland) Act 1980* (UK) sch 2 cl 1; *Crime and Punishment (Scotland) Act 1997* (UK) s 17. For an overview of the historical developments see M Scott, "New Criminal Appeal Provisions: Back to the Future?" (1997) 30 *Scots Law Times* 249, 249-50.
68. See M Scott, "New Criminal Appeal Provisions: Back to the Future?" (1997) 30 *Scots Law Times* 249, 250; F Leverick, "The Return of the Unreasonable Jury: *Rooney v HM Advocate*" (2007) 11 *Edinburgh Law Review* 426, 426-7; F Stark, "A Perfectly Unreasonable Decision: *Jenkins v HM Advocate*" (2012) 16 *Edinburgh Law Review* 86, 86-7.

the grounds for appeal, although appeals are to be made to the provincial courts. Procedural issues, such as the time limit for filing appeals, are dealt with at a provincial level.

3.43 The appeal provisions of the *Criminal Code* were similarly based on the *Criminal Appeal Act 1907* (UK), and there are many areas of similarity with NSW.

3.44 Similarly to NSW, Canada retains the distinction between conviction appeals on a question of law as of right, and conviction appeals on any other ground with leave.[69] The grounds for an appeal against conviction are substantially the same as those that apply in NSW.[70] In an appeal against sentence the Court of Appeal is to consider the fitness of the sentence appealed against.[71] The Attorney General may appeal against an acquittal on a question of law alone.[72] There is no right of appeal against interlocutory decisions.

3.45 However, appeals from summary courts are dealt with quite differently than in NSW. There are two avenues of appeal to the superior court – a broader avenue of appeal on any ground, and an avenue of appeal limited to errors of law or jurisdictional error.[73] The former type of appeal is to be determined on the basis that applies to appeals for proceedings dealt with on indictment, including the rules that govern the receipt of fresh evidence.[74] However, either party may apply for the appeal to be heard *de novo*, which the appellate court may order if it is in the interests of justice.[75] Even in a *de novo* appeal against sentence, the court is still required to consider the fitness of the sentence appealed against, in the same way that sentence appeals for proceedings dealt with on indictment are determined.[76]

## New Zealand

3.46 On 1 July 2013 the *Criminal Procedure Act 2011* (NZ) came into effect, which represented a simplification and modernisation of criminal procedure in NZ, including a significant reworking of the criminal appeals structure.

3.47 There is no longer any distinction between appeals from summary courts and appeals from proceedings dealt with on indictment. Rather, the appeal provisions are uniform across all courts. The Act simply makes provision for "first level appeals", and "second level appeals". Although the avenues of appeal and the grounds for appeal are the same, the court hearing the appeal will differ.

3.48 First level defendant conviction appeals and prosecution and defendant sentence appeals can be made as of right.[77] Leave is required to appeal certain pre trial

69. *Criminal Code*, RSC 1985 (Can) s 675(1).
70. *Criminal Code*, RSC 1985 (Can) s 686(1).
71. *Criminal Code* RSC 1985 (Can) s 687.
72. *Criminal Code*, RSC 1985 (Can) s 676(1)(a).
73. *Criminal Code*, RSC 1985 (Can) s 813, s 830(1).
74. *Criminal Code*, RSC 1985 (Can) s 822(1).
75. *Criminal Code*, RSC 1985 (Can) s 822(4).
76. *Criminal Code*, RSC 1985 (Can) s 822(6); see also s 687.
77. *Criminal Procedure Act 2011* (NZ) s 229, s 244, s 246.

decisions, and to appeal on a question of law.[78] In the case of the prosecution, this can include questions of law arising from an acquittal, other than an acquittal from a jury verdict.

3.49 Second level appeals require leave. Leave is not to be granted unless:

(a) the appeal involves a matter of general or public importance, or

(b) a miscarriage of justice may have occurred, or may occur, unless the appeal is heard.[79]

3.50 Second level appeals are to be determined on the same basis as first level appeals.[80]

3.51 NZ has also reformulated its grounds of appeal for conviction and sentence appeals, and as a result of the new structure these apply to both summary courts and proceedings dealt with on indictment.[81] We discuss the new NZ approach to conviction and sentence appeals in greater detail in Chapter 8.

78. *Criminal Procedure Act 2011* (NZ) s 215, s 217, s 218, s 296.
79. See *Criminal Procedure Act 2011* (NZ) s 223, s 237, s 253, s 303.
80. See *Criminal Procedure Act 2011* (NZ) s 240, s 256.
81. *Criminal Procedure Act 2011* (NZ) s 232, s 250.

# 4. A new Criminal Appeal Act

**In brief**

A specific aim of our terms of reference is to consolidate criminal appeal provisions into a single Act. Consolidation will make the legislation simpler and clearer and is strongly supported by stakeholders. We recommend that the *Criminal Appeal Act 1912* (NSW) and the *Crimes (Appeal and Review) Act 2001* (NSW) be repealed and replaced with a single Criminal Appeal Act. We also recommend that the Court of Criminal Appeal be formally established as a part of the Supreme Court and be assigned to hear judicial review applications in criminal proceedings.


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4.1 In this chapter we recommend some overarching structural changes to criminal appeals in NSW.

## Consolidating criminal appeal legislation

### *A single, new Criminal Appeal Act should be enacted*

4.2 One of the specific aims of our terms of reference is to consolidate criminal appeal provisions into a single Act.

4.3 Three primary pieces of legislation govern criminal appeals and reviews in NSW:

- *Criminal Appeal Act 1912* (NSW) (CAA)
- *Crimes (Appeal and Review) Act 2001* (NSW) (CARA), and
- *Supreme Court Act 1970* (NSW) (SCA).

4.4 The current legislation creates a framework which is disjointed and complicated. In Report 133, *Bail*, we observed this and we recommended that consideration be given to amalgamating the CAA and CARA into a single statute.[1]

4.5 As we discuss in Chapter 2, the separation of the criminal appeals framework into different pieces of legislation is an historical remnant and reflects the piecemeal way in which criminal appeals have developed over the last two centuries. There is no longer a justification for having separate pieces of legislation, if one ever existed.

4.6 There are strong reasons weighing in favour of consolidation. It will improve the clarity and accessibility of the law, particularly for those who may be unfamiliar with the criminal justice system generally and criminal appeals in particular. It will increase efficiency, as all of the relevant criminal appeals legislation will be located in one place. It will avoid practitioners and judges having to review multiple pieces of legislation in order to know what the law is.

4.7 Stakeholders strongly supported consolidation and identified it as a key measure to improve the current system of criminal appeals.[2] We cannot identify any disadvantages of consolidation, other than an initial period of transition where judges and practitioners will need to familiarise themselves with the new legislation.

4.8 We therefore recommend that the CAA and CARA be abolished and replaced with a single, new Criminal Appeal Act.

### *Judicial review should be referenced in a new Criminal Appeal Act*

4.9 Criminal proceedings may also be reviewed through the use of prerogative relief provided for in s 69 of the SCA. The NSW Bar Association has suggested that there should be a "code" containing all types of appeals in criminal matters.[3] We are of the view that the existing right to seek prerogative relief should be retained. However, because s 69 of the SCA is not confined to criminal proceedings, we do not recommend that it be transferred into a new Criminal Appeal Act. We are also reluctant to recommend any duplication of s 69 of the SCA in a new Criminal Appeal Act.

4.10 Prerogative relief is often sought in criminal proceedings, particularly those conducted in the Local Court. It is not immediately apparent from reading CARA that this avenue of review is available. Accordingly, unrepresented defendants and legal practitioners unfamiliar with the Supreme Court's supervisory jurisdiction may not know that they can also bring an application for judicial review to challenge an order made in criminal proceedings in courts other than the Supreme Court.[4]

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1. NSW Law Reform Commission, *Bail,* Report 133 (2012) rec 9.3.
2. Police Association of NSW, *Submission CA3,* 6; NSW Bar Association, *Submission CA5,* 1; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 1; Legal Aid NSW, *Submission CA12,* 2; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 5; Commonwealth Director of Public Prosecutions, *Submission CA15,* 7.
3. NSW Bar Association, *Submission CA5*, 1.
4. See para 4.35 – 4.39 for the availability of judicial review in criminal proceedings.

4.11 For clarity we recommend that a new Criminal Appeal Act contain a note, which does not form part of the legislation, that s 69 of the SCA may also be available as an alternative to an appeal.

4.12 We have expressly excluded from the ambit of this reference Part 7 of CARA, which deals with the review of convictions and sentences, and Part 8 of CARA, which deals with retrial following acquittal (other than Division 3 of Part 8, which deals with appeals from acquittals). In recommending that CARA be abolished, we are not suggesting that these provisions be repealed.[5] Rather, consideration will need to be given to retaining them, preferably as part of a new Criminal Appeal Act. We do not make any specific recommendations in this regard, but we note it as a matter requiring further consideration.

**Recommendation 4.1: Consolidate criminal appeal legislation**

(1) The *Criminal Appeal Act 1912* (NSW) and *Crimes (Appeal and Review) Act 2001* (NSW) should be repealed and replaced with a new Criminal Appeal Act that would:

(a) consolidate the provisions governing appeals from criminal proceedings

(b) give effect to the recommendations made in this report, and

(c) use modern language and drafting styles.

(2) A new Criminal Appeal Act should contain a note stating that judicial review under s 69 of the *Supreme Court Act 1970* (NSW) may also be available as an alternative to appeal.

## Simplifying and streamlining criminal appeals

4.13 Further aims of our terms of reference are to simplify and streamline appeal processes. In pursuing these aims, we have considered whether the structure for appeals from the Local Court and appeals from higher courts should be better aligned.

4.14 Seemingly for historical reasons, the two types of appeals have developed on completely different tracks. Most appeals under the CAA from proceedings heard on indictment require leave, and specified grounds must be made out before the appeal can succeed.[6] On the other hand, appeals from summary proceedings in the Local Court under CARA are primarily as of right to the District Court, by way of a broad appeal by rehearing, where the judge reconsiders the evidence and comes to his or her own decision on the facts.[7] There are also different provisions in the CAA and CARA concerning the time limits that apply, the powers of the appeal court, the making of costs orders and the effect of the pending appeal on the sentence.

5. The DNA Review Panel established under *Crimes (Appeal and Review) Act 2001* (NSW) pt 7 div 6 was abolished effective 23 February 2014: see *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013* (NSW).

6. *Criminal Appeal Act 1912* (NSW) s 5, s 6. This is discussed further in Chapter 8.

7. *Crimes (Appeal and Review) Act 2001* (NSW) s 17-18. This is discussed further in Chapter 5.

4.15 Other jurisdictions have aligned their appeal processes. In NZ the *Criminal Procedure Act 2011* (NZ), the relevant parts of which came into force on 1 July 2013, simply provides for a "first appeal" and a "second appeal". The appeal provisions are the same, regardless of which court the appeal originated from. Similarly, in WA the *Criminal Appeals Act 2004* (WA) has made appeals from summary proceedings and appeals from proceedings heard on indictment more consistent. Leave is required for both types of appeals, and the grounds of appeal against conviction and sentence are error based. There is also a simple provision for the receipt of fresh evidence that applies to all appeals.[8]

### *Our view: separate regimes of appeal remain unavoidable*

4.16 The approaches taken in other jurisdictions are advantageous in their simplicity. However, after taking into account the views of stakeholders, we have concluded that it would not be desirable to unify the appeal processes for summary proceedings and proceedings heard on indictment in NSW. The nature of proceedings in the Local Court, and the significant volume of cases dealt with in that court, when compared with the higher courts, persuades us that separate appeal regimes remain unavoidable.

4.17 The Local Court deals with the bulk of criminal matters in NSW. For reasons of efficiency and prompt disposition, it commonly hears matters with a degree of informality and without formal insistence upon some requirements of the *Evidence Act 1995* (NSW). There are also a high number of unrepresented defendants. This suggests that there is a need for a system of appeals which mirrors, to an extent, the degree of informality that occurs in the Local Court. Any kind of formal appeal process which requires parties to identify specific error may give rise to valid practical concerns.

4.18 On the other hand, trials in the District Court and the Supreme Court are conducted in a formal manner, for the most part before a jury. They are far fewer in number and, particularly where the defendant pleads not guilty, almost always involve legal representation. These factors, in contrast, weigh in favour of adopting a formal and more rigorous error based process of appeal.

4.19 We have also considered whether procedural provisions, such as those relating to time limits, powers of the appeal court and costs, could be more consistent between courts. We have made some recommendations in this regard – for example, we suggest that the District Court be given more of the powers that are available to the Court of Criminal Appeal (CCA) on appeal.[9] However, for the most part we accept that the different types of appeal justify maintaining different procedural provisions. For example:

- **Costs**: Traditionally no costs have been awarded in criminal trials, and this longstanding position has been reflected in the notion that no costs are to be awarded in an appeal from proceedings dealt with on indictment.[10] By

8. See Appendix E.
9. Recommendation 7.6.
10. *Criminal Appeal Act 1912* (NSW) s 17.

comparison, private prosecutions may be brought in the Local Court, suggesting that a greater power to award costs is appropriate.

- **Time limits**: Appeals to the CCA require the formulation of specific grounds of appeal, and often counsel's advice is required before an appeal can be filed. There may also be a need to obtain transcripts and evidence from the trial court in order to determine whether an appeal should proceed. This suggests that a longer time limit may be appropriate. On the other hand, because appeals to the District Court are by rehearing, there is no need to identify any grounds of appeal. The large number of Local Court matters and the interests of finality suggest that there should be a shorter time limit for filing an appeal in the District Court.

- **Effect of sentence pending appeal**: The CCA deals with more serious indictable offences, for which terms of imprisonment are often imposed. The fact that it can take many months for an appeal to proceed to hearing weighs in favour of the sentence continuing to have effect pending appeal (although bail can be granted). On the other hand, appeals to the District Court concern less serious offences where the imposition of a non-custodial sentence is more frequent. The District Court can deal with an appeal relatively quickly, and these factors suggest there should be a stay of the sentence pending appeal.

4.20 Therefore, while we have regarded the possibility of unifying the appeal processes across all courts, we consider that the fundamental differences between the two levels of criminal jurisdiction mean that a single appeals structure would not improve overall efficiency, fairness or finality.

## Maintaining the distinction between questions of law and fact

4.21 In a number of areas the criminal appeals system in NSW is predicated on the distinction between questions of law on the one hand, and questions of fact or questions of mixed fact and law on the other. This distinction is used for determining the breadth of an appeal right, the court to which an appeal should be directed and whether leave is required for an appeal. For example:

- many decisions of the Local Court may be appealed to the Supreme Court only on a question of law, such as interlocutory orders or orders made in committal proceedings

- a defendant in the Local Court may appeal against a conviction or sentence to the Supreme Court as of right on a question of law, but with leave on a question of fact or mixed fact and law

- a defendant in proceedings dealt with on indictment may appeal against a conviction to the CCA as of right on a question of law, but with leave on a question of fact or mixed fact and law

- the prosecution's right of appeal against an acquittal extends only to questions of law alone, and

- appeals from the Local Court to the Land and Environment Court (LEC) may be made by the Director of Public Prosecutions or the Environment Protection Authority on any ground, but by any other prosecutor only on a question of law.

4.22 We have considered whether the distinction between questions of law, and questions of fact or mixed fact and law, should continue to be maintained. The distinction is not an easy one to apply in practice. The High Court has stated that:

> Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions [of fact and law], no satisfactory test of universal application has yet been formulated.[11]

4.23 Chief Justice Spigelman has noted that whether a question is one of law "will depend on the scope, nature and subject matter of the statute, including the nature of the body making the relevant decision".[12]

4.24 Additionally, it may be unlikely in a criminal appeal that isolated questions of law will arise with any degree of frequency. For example, the exercise of a judicial discretion, such as that which is required for sentencing, will usually involve questions of fact as well as law.[13] An allegation that the verdict of the jury (or the judge, in a judge alone trial) was unreasonable will also involve questions of fact as well as questions of law.[14] As Justice Rothman has noted:

> where it is alleged that there is *no* evidence of an element of an offence, that is a question of law alone … Where, however, there is some evidence of the element, but the evidence is unbelievable, improbable, against the weight of the totality of evidence or so slender as not to satisfy the criminal onus, the question is of fact (or at least mixed fact and law).[15]

4.25 Notwithstanding the difficulty in establishing a bright line test, stakeholders supported retaining the distinction between questions of law and questions of fact. It was felt that it does not cause significant difficulties in practice. Particularly for appeals from the Local Court to the Supreme Court, stakeholders considered it important that the distinction be maintained so as to reserve the Supreme Court's jurisdiction for questions of law.[16]

### *Our view: distinction between law and fact should be maintained to demarcate an appeal court's jurisdiction*

4.26 We support maintaining the distinction between questions of law and other types of questions as a way of delineating the limits of an appeal court's jurisdiction. However, where the distinction between questions of law and questions of fact is used solely for the purpose of determining whether leave is necessary, we have recommended that these distinctions be removed. In such cases the distinction

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11. *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 394. See also M Beazley, "The Distinction Between Questions of Fact and Law: A Distinction Without an Answer?" (2013) 11 *The Judicial Review* 279.
12. *AG (NSW) v X* [2000] NSWCA 199; 49 NSWLR 653 [28].
13. *Williams v R* (1986) 161 CLR 278, 301-2.
14. *M v R* (1994) 181 CLR 487, 492.
15. *Krishna v DPP (NSW)* [2007] NSWCCA 318; 178 A Crim R 220 [51].
16. NSW Bar Association, *Submission CA5,* 4; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 5; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 10; Legal Aid NSW, *Submission CA12,* 8; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 8; Commonwealth Director of Public Prosecutions, *Submission CA15,* 7.

serves only to add unnecessary complexity without impacting upon the appeal court's jurisdiction to determine the merits of the appeal.

4.27 We address the specific issues relating to this distinction as they arise in the report.

## Constituting the Court of Criminal Appeal

4.28 The SCA continues the Supreme Court as formerly established as the superior court of record in NSW.[17] It also provides for the more convenient dispatch of the court's business by dividing the court into the Court of Appeal and two Divisions, Common Law and Equity.[18] However, the SCA is silent in relation to the CCA.

4.29 Section 3 of the CAA provides that the "Supreme Court shall for the purposes of this Act be the Court of Criminal Appeal, and the court shall be constituted by such three or more judges of the Supreme Court as the Chief Justice may direct". The CCA is therefore not formally established as a part of the Supreme Court.

4.30 The establishment of the CCA in the CAA appears to be an historical anomaly as the result of NSW substantially adopting the *Criminal Appeal Act 1907* (UK).

### *Our view: CCA should be recognised as a part of the Supreme Court*

4.31 We consider that the CCA should be recognised as a separate part of the Supreme Court under the SCA. Stakeholders support this approach.[19] It would place the CCA on equal footing with the Court of Appeal and remove any residual issues as to its place in the hierarchy of the court, and as to precedence. It could also simplify the process of assigning judges to sit on the court.

4.32 It would mean the CCA could assume the responsibility as the intermediate court of appeal and review (within the Supreme Court) for all criminal matters, including the jurisdiction to entertain judicial review applications from criminal proceedings brought in the lower courts. We discuss the issue of judicial review applications from criminal proceedings in para 4.40 – 4.44.

4.33 Bringing the CCA into the SCA would also rectify the current anomaly that the *Criminal Appeal Rules* (NSW) have been made and amended under the SCA by the Supreme Court Rules Committee, despite the fact that the CCA is not formally established as part of the Supreme Court.

4.34 In making this recommendation, we do not intend to make any change to the kinds of judges who can sit on the CCA, or to the process for constituting a bench of the CCA. We consider that the current practice, which depends on assignment by the Chief Justice, can and should continue.

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17. *Supreme Court Act 1970* (NSW) s 22.
18. *Supreme Court Act 1970* (NSW) s 38.
19. Appeals from higher courts roundtable, *Consultation CA5*.

**Recommendation 4.2: Court of Criminal Appeal to be part of Supreme Court**

(1) The Court of Criminal Appeal should be recognised as a part of the Supreme Court under s 38 of the *Supreme Court Act 1970* (NSW).

(2) Consequential amendments should be made to Part 3 of the *Supreme Court Act 1970* (NSW) to assign to the Court of Criminal Appeal criminal appeal and review business, including judicial review proceedings as outlined in Recommendation 4.3.

## Judicial review in criminal matters

### *Judicial review applications are currently heard by the Court of Appeal*

4.35 Section 48 of the SCA provides that proceedings from a "specified tribunal" are assigned to the Court of Appeal. The definition of "specified tribunal" includes the District Court or a judge of the District Court, the LEC, and the Industrial Relations Commission. This means that applications under s 69 of the SCA for judicial review of decisions of the District Court, LEC, Drug Court[20] and Industrial Relations Commission in Court Session (IRCiCS) are heard by the Court of Appeal, even where the decisions are criminal in nature. This can have the effect of splitting the avenues of appeal: appeals under the CAA are heard by the CCA, whereas applications for judicial review are heard by the Court of Appeal.

4.36 This may not be a significant problem in practice. Where an appeal and an application for judicial review are filed in the same criminal proceedings, the Chief Justice is able to constitute a bench of judges so that it can hear both matters simultaneously.[21]

4.37 Further, there are unlikely to be very many applications for judicial review from the District Court. The privative clause contained in s 176 of the *District Court Act 1973* (NSW) applies to the Court's appellate jurisdiction, and provides that "[n]o adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". The effect of this section is to prevent relief in the nature of certiorari based on error of law on the face of the record, but it does not prevent relief based on grounds of jurisdictional error.[22]

4.38 Section 17 and the Third Schedule of the SCA provide that the SCA does not apply to proceedings for the prosecution of offenders on indictment in the Supreme Court or District Court, suggesting that relief under s 69 may not be available for criminal proceedings dealt with on indictment. However, again this would not restrict judicial review on the ground of jurisdictional error.[23]

20. In circumstances where the judge of the Drug Court is a District Court judge: see *Drug Court Act 1998* (NSW) s 20.
21. See *R v King* [2003] NSWCCA 399; 59 NSWLR 472 [21] (Spigelman CJ).
22. *Spanos v Lazaris* [2008] NSWCA 74 [15].
23. *Kirk v Industrial Court of NSW* [2010] HCA 1; 239 CLR 531.

4.39 There is no privative clause that applies to decisions of the LEC, or the decisions in the summary jurisdiction of the District Court. A privative clause prevents appeal or review from a decision of the IRCiCS, but this does not apply to issues going to the court's jurisdiction.[24]

### *Our view: CCA should hear judicial review applications in criminal matters*

4.40 We consider that the CCA should be the ultimate appellate court for criminal proceedings in NSW, whether the matter comes before it by way of appeal or judicial review. This proposal has the strong support of stakeholders.[25] It would help to achieve one of the aims of our terms of reference - to streamline appeal processes.

4.41 We therefore recommend that the CCA be assigned to hear judicial review applications arising out of the criminal jurisdiction in the District Court, the LEC and the IRCiCS, as well as decisions of the Drug Court. By using the phrase "criminal jurisdiction", we intend to encompass both first instance criminal proceedings in those courts, and criminal appeals from lower courts (in the case of the District Court, LEC and IRCiCS). We do not intend to encompass proceedings which are quasi criminal in nature, for example, the refusal of a judge to direct an inquiry under Part 7 of CARA.[26]

4.42 Following the High Court's decision in *Kirk v Industrial Court of NSW,*[27] it is not possible to oust the jurisdiction of the Supreme Court to review for jurisdictional error. However, if the CCA is constituted as a part of the Supreme Court, as we propose in Recommendation 4.2, then there should be no difficulty in assigning particular judicial review proceedings to it. The CCA will be placed on the same footing as the Court of Appeal, which currently hears judicial review proceedings from the courts that we have described above.

4.43 Following on from this recommendation, we also suggest that the Chief Justice be given the power to transfer judicial review proceedings between the CCA and the Court of Appeal. This will prevent a rigid distinction between "criminal proceedings" and "non-criminal proceedings" developing, and allow the Supreme Court the flexibility to deal with individual cases in the way it considers best.

4.44 Judicial review proceedings for orders or decisions made in the Local Court or Children's Court should continue to be determined, in the first instance, by a single judge of the Supreme Court sitting in the Common Law Division. Appeals from that decision currently lie to the Court of Appeal.[28] We consider that, for consistency, an appeal from a single judge of the Supreme Court should also lie to the CCA in respect of applications for judicial review in criminal proceedings.

---

24. *Industrial Relations Act 1996* (NSW) s 179.
25. Appeals from the Local Court roundtable, *Consultation CA3*; Appeals from higher courts roundtable, *Consultation CA5*; NSW Bar Association, *Submission CA5,* 2; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 1; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 9; Legal Aid NSW, *Submission CA12*, 2; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 7.
26. See *Sinkovich v AG (NSW)* [2013] NSWCA 383.
27. *Kirk v Industrial Court of NSW* [2010] HCA 1; 239 CLR 531.
28. *Supreme Court Act 1970* (NSW) s 101.

**Recommendation 4.3: Assign judicial review applications to the Court of Criminal Appeal**

(1) If Recommendation 4.2 is adopted, the Court of Criminal Appeal should be assigned to hear:

(a) applications for judicial review from decisions or orders of:

(i) the District Court, the Land and Environment Court and the Industrial Relations Commission in Court Session in their original and appellate criminal jurisdictions, and

(ii) the Drug Court

(b) appeals from a single judge of the Supreme Court hearing a judicial review application from the Local Court or the Children's Court in their criminal jurisdiction.

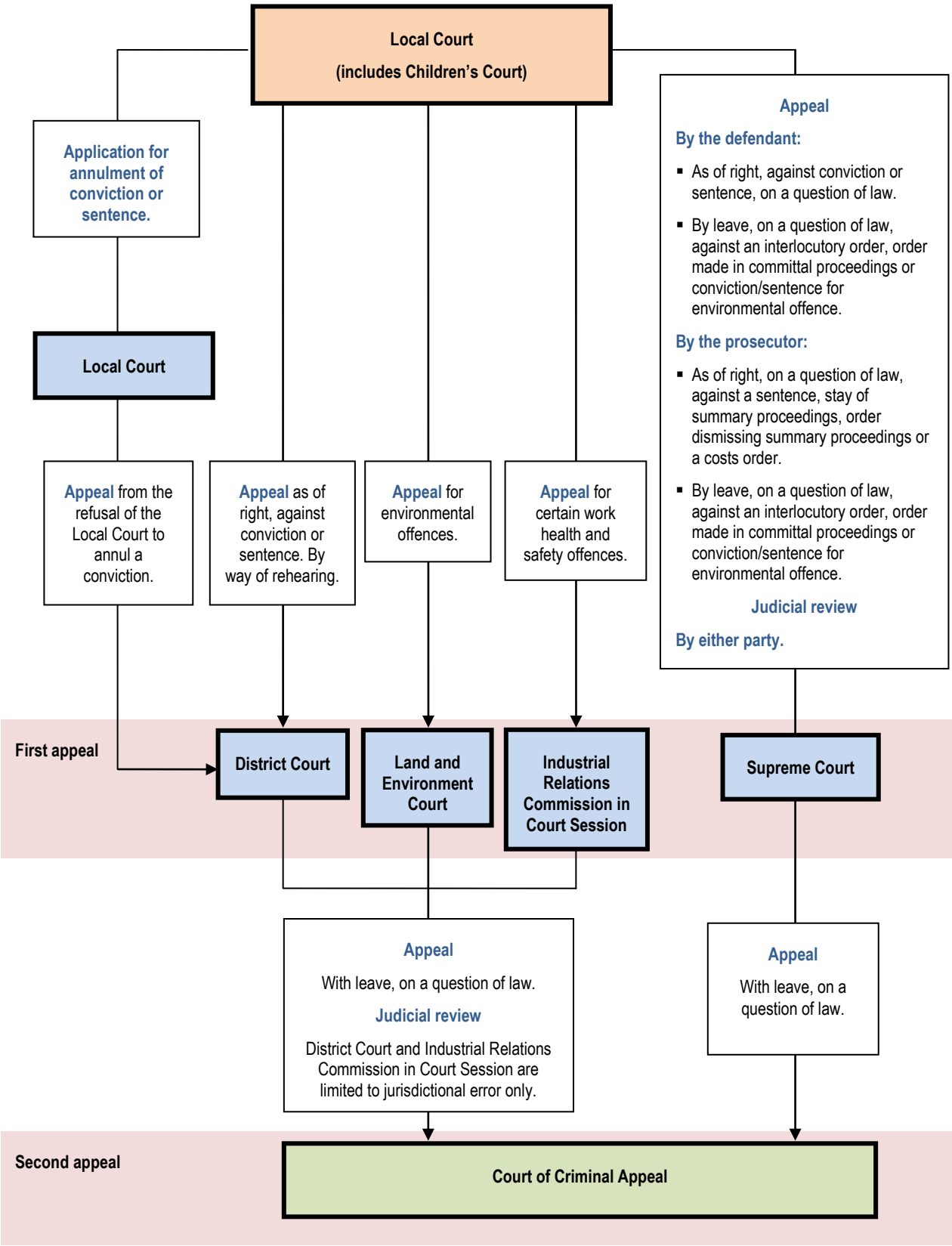
(2) The Chief Justice should be given the power to transfer judicial review proceedings between the Court of Appeal and the Court of Criminal Appeal.

## A new criminal appeals structure

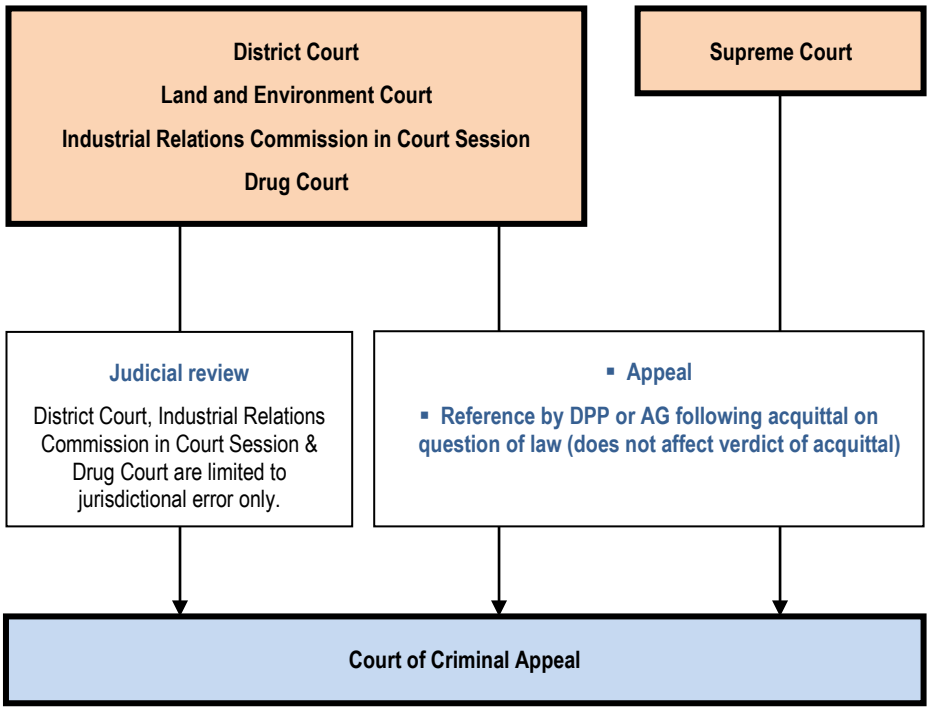
4.45 In Figures 4.1 and 4.2 below we set out our recommended structure of criminal appeals in NSW. We have not proposed wholesale changes to the system - in our view this was unnecessary. Rather, we have recommended some more modest changes to address identified problems or gaps in the current system.

4.46 We discuss this structure, and our recommended changes, in the remainder of this report.

## Figure 4.1: Recommended structure of criminal appeals from the Local Court



### Figure 4.2: Recommended structure of criminal appeals from higher courts



# 5. Appeals from the Local Court to the District Court

**In brief**

Criminal appeals from the Local Court to the District Court are conducted by way of rehearing, and in an appeal against sentence fresh evidence may be given as of right. Problems with the basis for sentence appeals include that the District Court does not have access to the magistrate's reasons and may impose a different sentence even where the original sentence was within the range of acceptable options. Sentence appeals should be confined to the material before the Local Court and the magistrate's reasons. The case stated procedure for decisions of the District Court should be abolished and replaced with an avenue of appeal.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5.1 In this chapter we consider appeals to the District Court from criminal proceedings originating in the Local Court, and the case stated process from appeal decisions of the District Court to the Court of Criminal Appeal (CCA).

## Background

### Current law

5.2 Appeals from the Local Court to the District Court are heard under the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) by way of rehearing on the basis of the evidence given in the original Local Court proceedings.[1] There are different rules for giving fresh evidence, depending on whether the appeal is against conviction or against sentence:

- in an appeal against conviction, fresh evidence may only be given with the District Court's leave, and only if it is satisfied that it is in the interests of justice that the fresh evidence be given[2]
- in a defendant's appeal against sentence, fresh evidence may be given as of right,[3] and
- in an appeal by the Director of Public Prosecutions (DPP) against sentence, fresh evidence may only be given with the District Court's leave, and only in exceptional circumstances.[4]

5.3 "Fresh evidence" is evidence in addition to or in substitution for the evidence given in the proceedings from which the appeal has arisen.[5]

5.4 Appeal by rehearing means that the judge will consider the evidence that was before the Local Court, and any fresh evidence given in the appeal, and come to his or her own decision. There is no need to show that the Local Court made an error before the appeal can succeed.

1. *Crimes (Appeal and Review) Act 2001* (NSW) s 17-18.
2. *Crimes (Appeal and Review) Act 2001* (NSW) s 18(1)-(2).
3. *Crimes (Appeal and Review) Act 2001* (NSW) s 17.
4. *Crimes (Appeal and Review) Act 2001* (NSW) s 26.
5. *Crimes (Appeal and Review) Act 2001* (NSW) s 3.

5.5 Prior to 1998, the *Justices Act 1902* (NSW) provided that appeals against conviction or an order of a justice were by way of a *de novo* hearing. Witnesses were recalled and required to give evidence again. There was no distinction between conviction appeals and sentence appeals. Strictly speaking, every appeal was against conviction, even if only the sentence was in issue.[6]

5.6 The *Justices Legislation Amendment (Appeals) Act 1998* (NSW) largely implemented the recommendations of a 1992 steering committee review of the *Justices Act*. The amendments provided for the current form of conviction and sentence appeals contained in CARA.[7]

5.7 In *Charara v R,* Justice Mason noted that the 1998 amendments altered the manner in which conviction appeals from the Local Court to the District Court are to be conducted, apparently more significantly than may generally have been appreciated. He held that the District Court is now precluded from hearing the appeal *de novo*. Instead, the District Court is to apply the principles governing appeals from a judge sitting without a jury. The District Court judge is to form his or her own judgment of the facts so far as he or she is able, recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called in the Local Court.[8]

5.8 The Victorian Parliament Law Reform Committee, in its 2006 review of *de novo* appeals to the County Court, received evidence from NSW witnesses as to the effect of the 1998 amendments in NSW. The evidence suggested that the changes resulted in significant reductions in the number of conviction appeals and in the time taken to hear them. However, the Committee noted that there was now a prevailing practice of conducting conviction appeals by review, rather than rehearing, and that many judges required the identification of error before allowing the conviction appeal.[9]

5.9 The 1998 amendments were intended only to modify conviction appeals. No explanation was given as to why sentence appeals were not similarly amended, although it seems to have been based on an understanding that the existing practice in sentence appeals was to review the sentence imposed by the Local Court, without the need for further evidence or for a transcript of the proceedings.[10]

5.10 Sentence appeals in the District Court proceed on the basis of the bench papers, which typically include the police facts, the defendant's criminal history, reports and any other documentary material that was tendered to the Local Court on behalf of the defendant. Transcripts are not obtained, except in rare cases.[11] Fresh evidence is often also handed up on appeal, and/or the appellant is called to give evidence. The District Court will not usually have access to the magistrate's reasons.

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6. See Justices Act Review Steering Committee, *Justices Act Review*, Report (1992) 60.
7. Although subsequent minor amendments have been made.
8. *Charara v R* [2006] NSWCCA 244; 164 A Crim R 39 [14]-[18].
9. Victorian Parliament Law Reform Committee, *De Novo Appeals to the County Court,* Report (2006) 74-97.
10. See the second reading speech to the Justices Legislation Amendment (Appeals) Bill 1998 (NSW): NSW, *Parliamentary Debates,* Legislative Council, 17 September 1998, 7595.
11. Shopfront Youth Legal Centre, *Submission CA2,* 3.

5.11 The CCA has described the task of a District Court judge in deciding a sentence appeal from the Local Court by way of rehearing as being to:

> decide for himself [or herself] what penalty is to be imposed, not whether that (or those) imposed by the magistrate was (or were) appropriate. It is not like a sentence appeal to this Court. It is certainly inappropriate for the judge to consider only whether he [or she] should either reduce or increase the penalty imposed by the magistrate; it is also inappropriate to consider only whether he [or she] should interfere with that penalty. He [or she] must in every case proceed to consider for himself [or herself] in the exercise of his [or her] own discretion what penalty should be imposed. That is not to say that he [or she] cannot agree with what the magistrate has done, but he [or she] may do so only if such penalty imposed by the magistrate accords with his [or her] own independent assessment of the circumstances of the case.[12]

## Trends in appeals to the District Court

### *Rate of appeal*

5.12 Appeals from the Local Court to the District Court are unusual in that only a small number of Local Court matters are appealed, yet appeals make up a significant proportion of District Court hearings.

5.13 In 2012 there were 6148 appeals from the Local Court finalised in the District Court; while 96 250 people were found guilty in finalised Local Court matters.[13] This means that only about 6.4% of guilty findings in the Local Court were appealed to the District Court.[14]

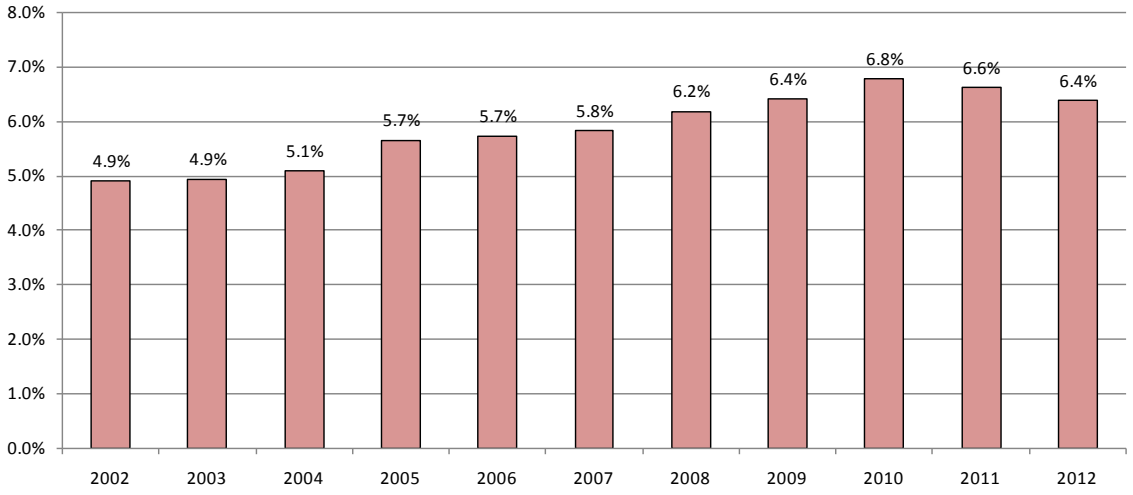
5.14 By way of contrast, in 2012 the District Court heard 3152 finalised matters in its original criminal jurisdiction.[15] This means that the District Court finalised almost twice as many Local Court appeals as it did original criminal proceedings.

5.15 Figure 5.1 shows the rate of appeal to the District Court. Although the rate of appeal has risen between 2002 and 2010, it is still quite low, at less than 7% of finalised Local Court matters every year. Since 2010 the rate of appeal has been declining.

---

12. *Budget Nursery Pty Ltd v Commissioner of Taxation* (1989) 42 A Crim R 81, 87. The decision was concerned with an appeal under the *Justices Act 1902* (NSW), the precursor to the *Crimes (Appeal and Review) Act 2001* (NSW).
13. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013) Table 1.7; Table 3.16 (excludes appeals against apprehended violence orders).
14. A direct comparison is not possible, given that appeals finalised by the District Court in 2012 will not necessarily have been determined by the Local Court in 2012.
15. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013) Table 3.6.

**Figure 5.1: Appeals to the District Court as a percentage of Local Court matters where defendant found guilty, 2002-2012**




*Source: NSW Bureau of Crime Statistics and Research, NSW Local Criminal Courts January-December 2002-2012: Number and Percentage of Persons Charged in Finalised Local Court Appearances by Year and Outcome of Appearance; NSW Higher Criminal Courts January-December 2002-2012: Number of Finalised Appeal Cases in the District Court by Outcome of Appeal and Type of Appeal (HcLcCc13/11553dg)*[16]

5.16 Sentence severity appeals make up the bulk of the District Court's criminal appeal work. There are fewer conviction appeals, and only a very small number of sentence inadequacy appeals brought by the DPP. The latter may be explained by the principle that prosecution appeals ought to be rare, a principle which is enshrined in the DPP's Prosecution Guidelines.[17]

16. These percentages are approximations only, as the District Court appeal will not necessarily be heard in the same year as the finalised Local Court matter. The graph excludes appeals against apprehended violence orders.

17. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 29.

### Table 5.1: Finalised appeal cases in the District Court 2012, by outcome of appeal and type of appeal

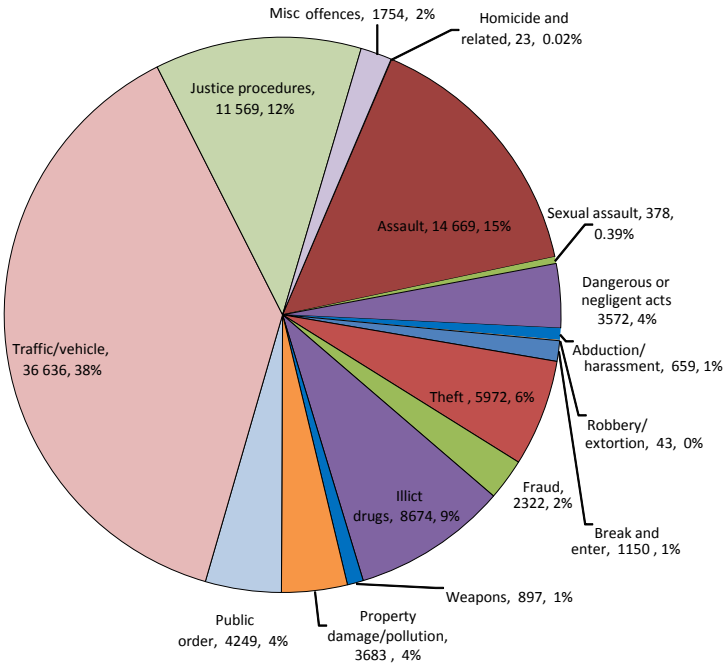
| | Appeals against severity of sentence | | Appeals against conviction and sentence | | Appeals against inadequacy of sentence | | Appeals against apprehended violence orders | | Total | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Outcome of appeal** | **No** | **%** | **No** | **%** | **No** | **%** | **No** | **%** | **No** | **%** |
| Appeal upheld for all matters | 2880 | 60.8 | 367 | 26.5 | 15 | 50.0 | 70 | 28.5 | 3332 | 52.1 |
| Appeal dismissed/withdrawn all matters | 1362 | 28.8 | 899 | 64.9 | 14 | 46.7 | 172 | 69.9 | 2447 | 38.3 |
| Appeal upheld for some matters | 471 | 10.0 | 114 | 8.2 | 1 | 3.3 | 4 | 1.6 | 590 | 9.2 |
| Other (did not appear, died etc) | 20 | 0.4 | 5 | 0.4 | - | - | - | - | 25 | 0.4 |
| **Total** | **4733** | **100.0** | **1385** | **100.0** | **30** | **100.0** | **246** | **100.0** | **6394** | **100.0** |

*Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics Report 2012 (2013) Table 3.16*

### *Types of offences appealed*

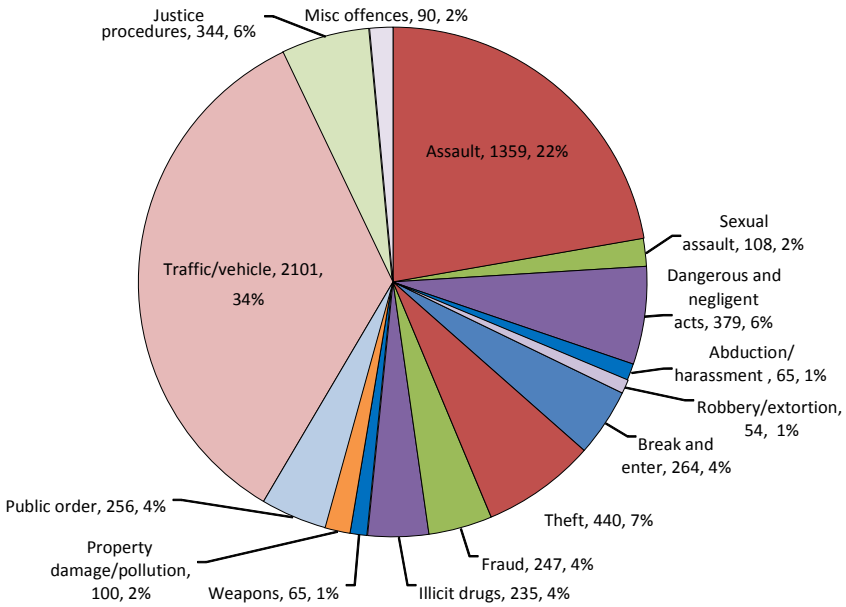
5.17 Figures 5.2, 5.3 and 5.4 show the types of offences that defendants were found guilty of in the Local Court, and the types of offences appealed to the District Court in 2012. The charts are not directly comparable due to differences in counting rules, but they give a general indication of the types of offences that are dealt with at first instance and then on appeal.

## Figure 5.2: Finalised Local Court matters, defendant found guilty 2012, by offence type




*Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics 2012 (2013) Table 1.7*

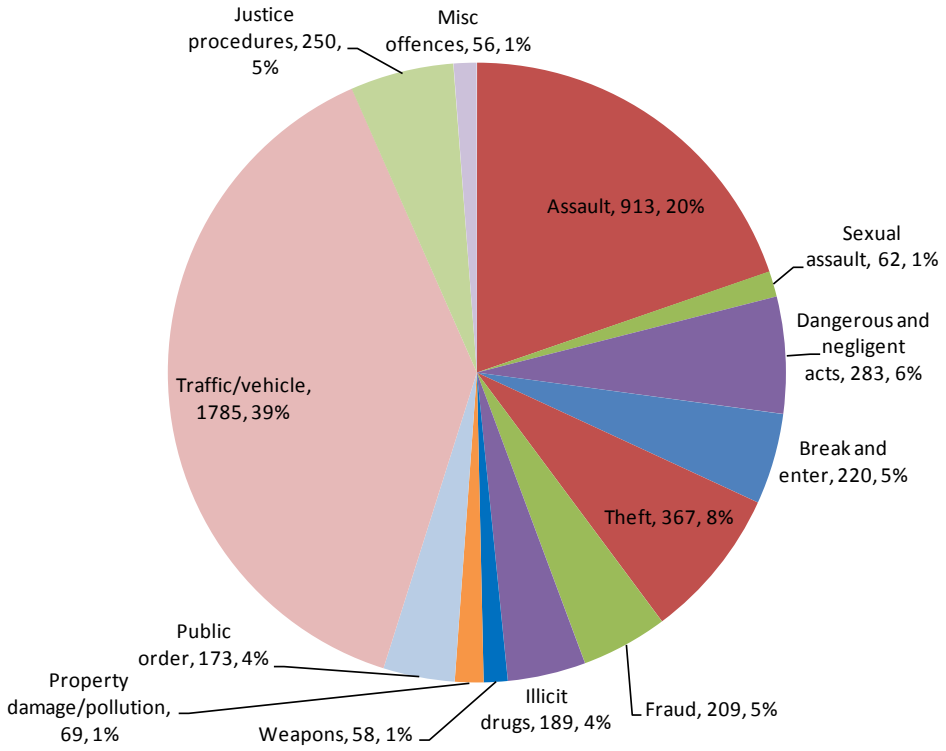
## Figure 5.3: Conviction and sentence appeals to the District Court 2012, by offence type




*Source: NSW Bureau of Crime Statistics and Research, NSW Higher Criminal Courts January-December 2012: Number of Finalised Appeal Cases in the District Court by Type of Offence, Outcome of Appeal and Type of Appeal (HcLcCc13/11553dg)*[18]

18. Excludes manslaughter and dangerous driving causing death (5 appeals), and appeals where the offence was unknown (36 appeals). "Sexual assault" includes non-assaultive sexual offences.

**Figure 5.4: Sentence severity appeals to the District Court 2012, by offence type**



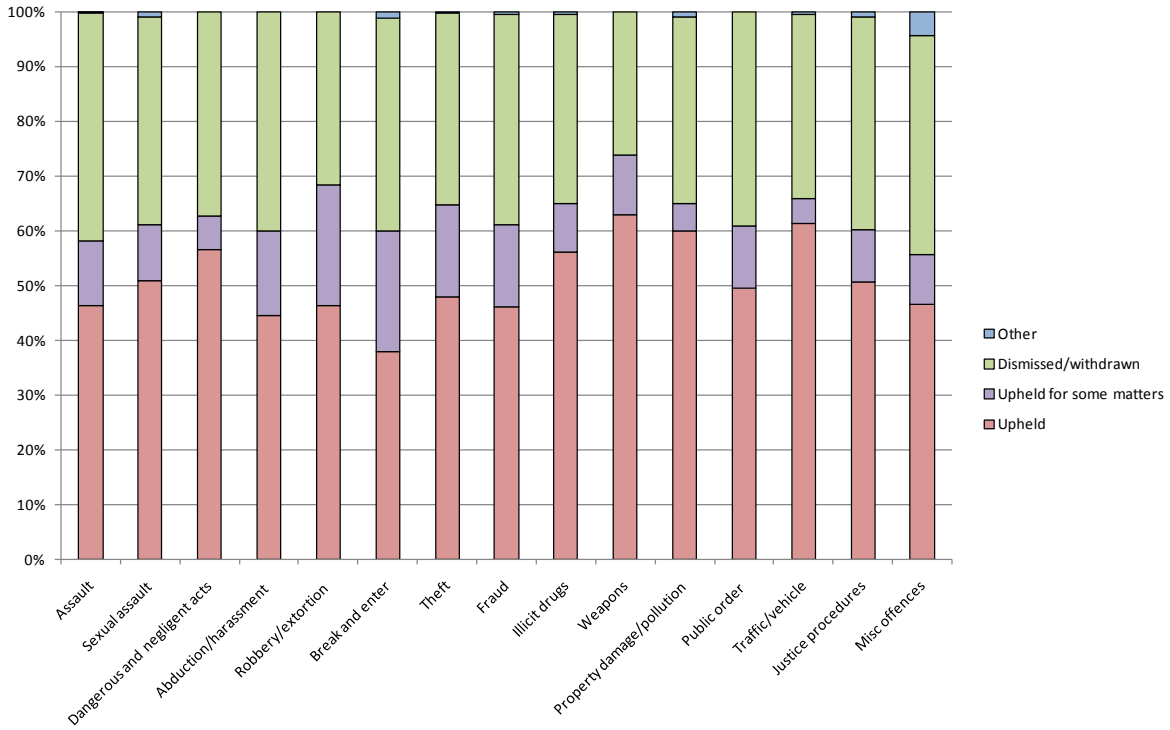

*Source: NSW Bureau of Crime Statistics and Research, NSW Higher Criminal Courts January-December 2012: Number of Finalised Appeal Cases in the District Court by Type of Offence, Outcome of Appeal and Type of Appeal (HcLcCc13/11553dg)*[19]

5.18 Traffic and vehicle offences make up over one third of the offences that are heard both in the Local Court and on appeal in the District Court. The next most common offence type was assault. The data suggests that there is a slightly higher proportion of assault offences finalised on appeal than at first instance.

5.19 Figure 5.5 shows the success rate of appeals to the District Court in 2012, by offence type. Appeals were upheld on at least one ground in more than half of the cases for each type of offence.

19. Excludes manslaughter and dangerous driving causing death (2 appeals), abduction and harassment offences (49 appeals) and robbery and extortion offences (48 appeals). "Sexual assault" includes non-assaultive sexual offences.

**Figure 5.5: Outcomes of all appeals to the District Court 2012, by offence type**




*Source: NSW Bureau of Crime Statistics and Research, NSW Higher Criminal Courts January-December 2012: Number of Finalised Appeal Cases in the District Court by Type of Offence, Outcome of Appeal and Type of Appeal (HcLcCc13/11553dg)*[20]

### *Success rates on appeal*

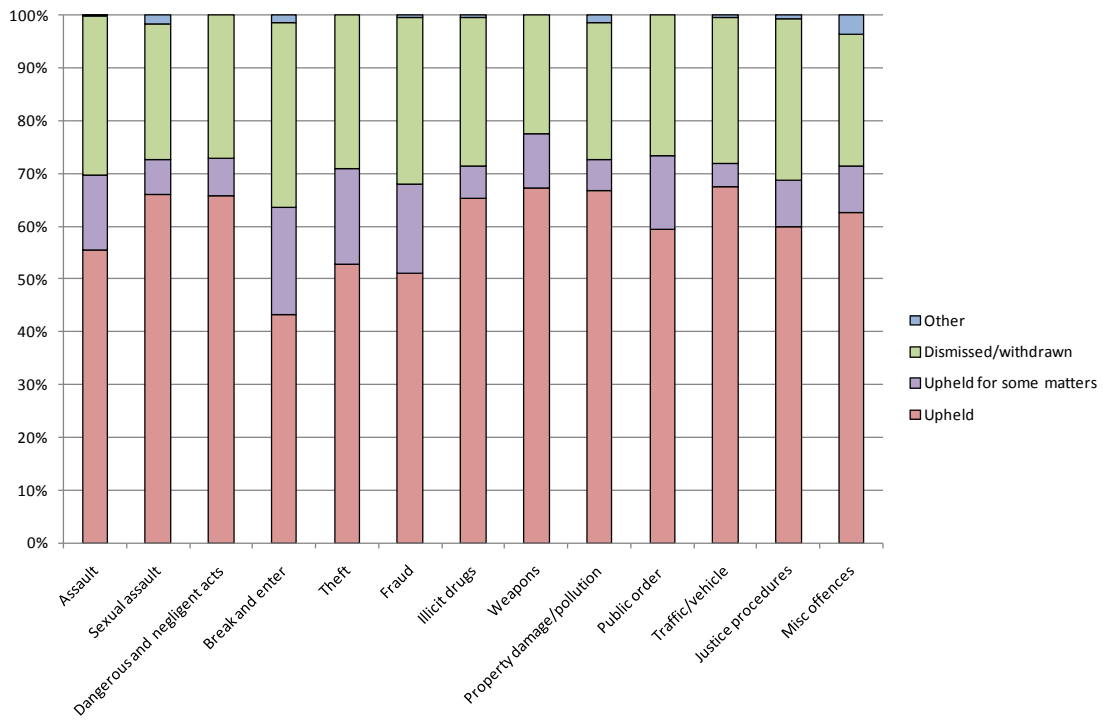
5.20 A striking feature of District Court sentence appeals is that they have high success rates. In 2012, 60.8% of severity appeals to the District Court were upheld on all grounds.[21] It is not clear whether this high success rate is due to the frequency of magistrate error; to the inherent nature of the sentencing discretion; or to the provision of fresh evidence in the District Court that places a different complexion on the case.

5.21 As Figure 5.6 shows, sentences for break and enter offences had the lowest success rate on appeal, but even then over 40% of appeals were successful. Offences with a success rate of over 60% were sexual assault, dangerous and negligent acts, illicit drugs, weapons and traffic and vehicle offences.

20. Includes appeals against conviction, severity appeals against sentence and inadequacy appeals against sentence. Excludes appeals against apprehended violence orders. Appeals for manslaughter and dangerous driving causing death (5 appeals), and appeals where the offence was unknown (36 appeals) are also excluded.

21. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013) Table 3.16.

**Figure 5.6: Outcomes of sentence severity appeals to the District Court 2012, by offence type**




*Source: NSW Bureau of Crime Statistics and Research, NSW Higher Criminal Courts January-December 2012: Number of Finalised Appeal Cases in the District Court by Type of Offence, Outcome of Appeal and Type of Appeal (HcLcCc13/11553dg)*[22]

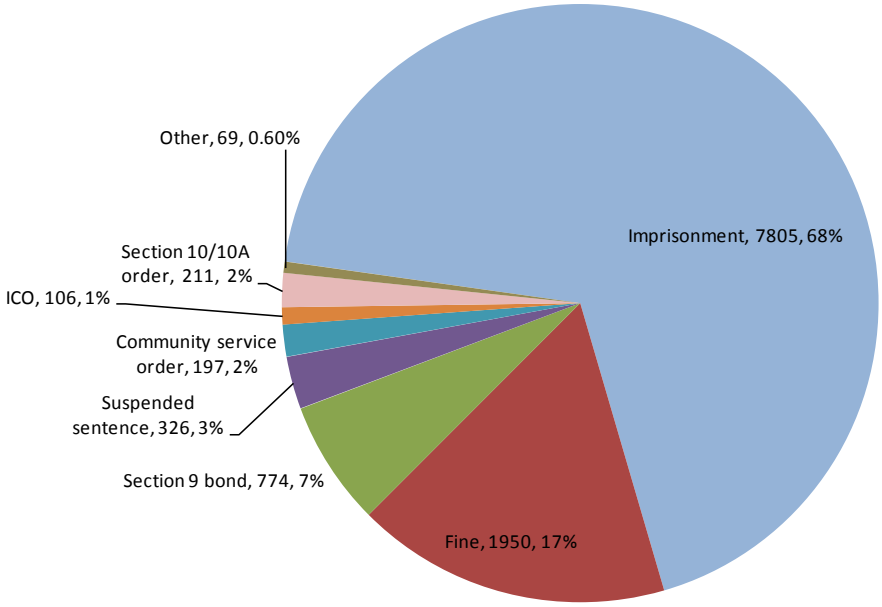
### *Types of penalties appealed from*

5.22 Perhaps not surprisingly, imprisonment was the most common type of penalty appealed in 2012. This made up a large proportion of sentence appeals. The next most common type of penalty appealed was a fine, followed by a good behaviour bond imposed under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). In 977 (50%) of the fines appealed, a driver licence disqualification or suspension was attached.[23] The types of penalties appealed are shown in Figure 5.7.

22. Excludes manslaughter and dangerous driving causing death (2 appeals), abduction and harassment offences (49 appeals) and robbery and extortion offences (48 appeals).

23. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals* (HcLcCc13/11553dg).

**Figure 5.7: Types of penalties appealed to the District Court 2012, by principal penalty**




*Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals (HcLcCc13/11553dg)*[24]

5.23 Terms of imprisonment were commonly appealed for driving related offences, assault, fraud and breach of violence orders.[25] Fines and s 9 bonds were commonly appealed for driving related offences: that is, driving while licence disqualified or suspended, exceeding the prescribed concentration of alcohol (PCA), and regulatory driving offences.[26]

### *Change in sentence on appeal*

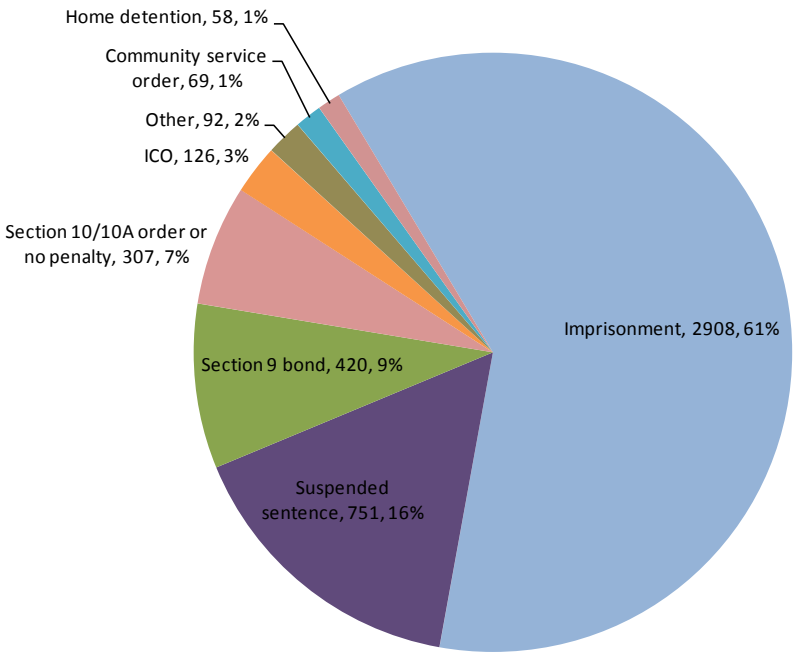
5.24 There were 4731 successful appeals from a term of full-time imprisonment in 2012. The majority of these (2908, 61%) resulted in the imprisonment being maintained on appeal. Where imprisonment was maintained on appeal, 1066 cases (37%) had a reduction in the term of imprisonment of an average of 3.9 months, 751 cases (26%) had a change to the non-parole period, and 819 cases (28%) had a change to the start date of the sentence.[27]

5.25 The next most common penalty imposed on appeal against a term of full-time imprisonment was a suspended sentence, although this occurred in only 16% of cases. Figure 5.8 shows the change in penalty for terms of full-time imprisonment.

---

24. These numbers are higher than the number of appeal cases in Table 5.1 because they measure the principal penalty per offence appealed to the District Court. One appeal may deal with more than one offence. "Other" includes: home detention; periodic detention; and orders under *Crimes Act 1914* (Cth) s 20(1)(a)-(b). Excluded are 60 appeals from a finding of no penalty or a nominal sentence.
25. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals* (HcLcCc13/11553dg).
26. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals* (HcLcCc13/11553dg).
27. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals* (HcLcCc13/11553dg).

**Figure 5.8: New penalty where period of full-time imprisonment successfully appealed from, 2012**




*Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals (HcLcCc13/11553dg)*[28]

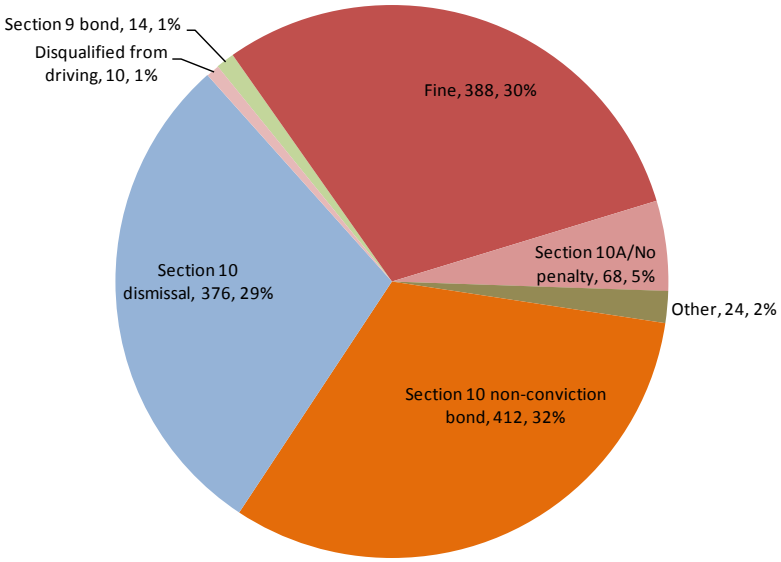
5.26 At the opposite end of the spectrum, appeals from fines and s 9 bonds frequently resulted in the penalty being downgraded to a lesser type.

5.27 There were 1950 appeals from fines, and 1292 (66%) were successful.[29] Where an appeal against a fine was successful, the new penalty was almost equally divided between a reduced fine, a dismissal order under s 10(1)(a) of the CSPA or a non-conviction good behaviour bond under s 10(1)(b) of the CSPA. Where a reduced fine was imposed, the attached driver licence disqualification was also reduced by an average of 4.7 months.

28. "Other" includes: fines; disqualification from driving; rising of the court; dismissal under *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32 or s 33; and orders under *Crimes Act 1914* (Cth) s 19(1)(b) and s 20(1)(a)-(b).

29. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals* (HcLcCc13/11553dg).

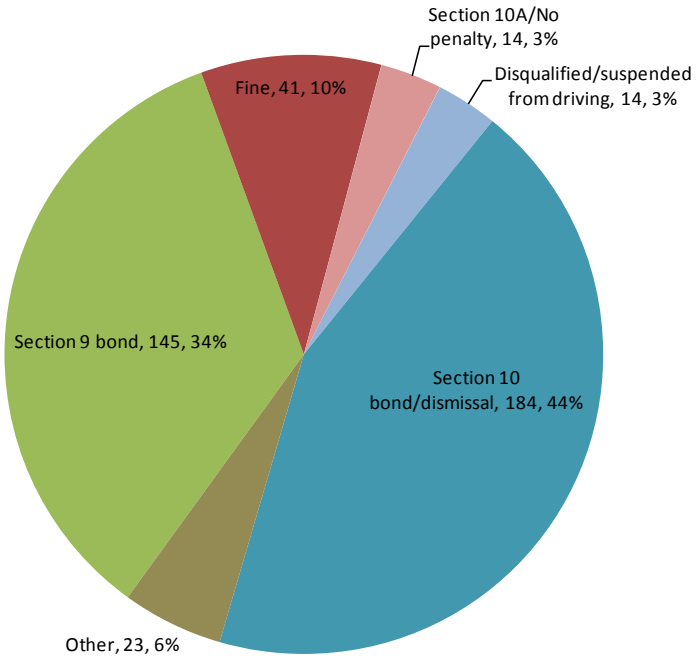
### Figure 5.9: New penalty where fine successfully appealed, 2012




*Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals (HcLcCc13/11553dg)*[30]

5.28 There were 774 appeals from a s 9 bond, and 421 (54%) were successful. Where a s 9 bond was successfully appealed against, the new penalty was most commonly a s 10(1)(b) non-conviction bond (44%), followed by a new s 9 bond (34%).

### Figure 5.10: New penalty where s 9 good behaviour bond successfully appealed, 2012




*Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals (HcLcCc13/11553dg)*[31]

30. "Other" includes: community service orders; suspended sentence; dismissal under *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32 or s 33; and orders under *Crimes Act 1914* (Cth) s 19 or s 20(1)(a).

5.29 The Local Court drew attention to its perception of a trend of the District Court increasing the length of a custodial sentence on appeal but then ordering that it be served by way of suspended sentence.[32] The Local Court provided examples for the following types of offences, which shows this happens with some frequency.

**Table 5.2: Severity appeals where custodial sentence maintained on appeal, selected offences, 2012**

| Type of offence | Number of severity appeals | Number of successful appeals | Number of successful appeals against custodial sentence imposed in Local Court | Number of successful appeals against custodial sentence where custodial sentence maintained on appeal | Number of appeals where term of sentence reduced | Number of appeals where term of sentence increased but form of sentence downgraded to ICO/ suspended sentence | % of successful appeals where custodial term increased but form downgraded |
|---|---|---|---|---|---|---|---|
| Reckless wounding | 35 | 26 | 25 | 21 | 11 | 10 | 48% |
| Unauthorised possession/ use of firearm | 18 | 11 | 10 | 6 | 3 | 3 | 50% |
| Mid-range PCA offences | 397 | 291 | 79 | 57 | 17 | 18 | 32% |
| Domestic violence offences[33] | 600 | 329 | 260 | 206 | 159 | 30 | 15% |

*Source: Local Court of NSW, Submission CA14, Appendixes B and C, citing NSW Bureau of Crime Statistics and Research*

### *Appeals in driving related offences*

5.30 The information we have obtained tends to show that appeals from driving related offences:[34]

- make up a significant proportion of sentence severity appeals to the District Court (over one third)
- have higher than average success rates, and
- are significantly represented in those categories of penalties that are frequently substituted on appeal (imprisonment, fines and s 9 good behaviour bonds).

31. "Other" includes: imprisonment, suspended sentence; community services orders; and dismissal under *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32 or s 33.
32. Local Court of NSW, *Submission CA14,* 5.
33. Includes contravene apprehended domestic violence order, common assault (DV) and assault occasioning actual bodily harm (DV).
34. We refer here to drive while licence disqualified or suspended; exceed the prescribed concentration of alcohol (PCA); and regulatory driving offences.

5.31 Statistics obtained by the Local Court also indicate that appeals against sentences imposed for PCA offences in particular frequently result in the sentence being substituted on appeal.

5.32 In low-range PCA offences, the maximum penalty is a $1100 fine, or a $2200 fine for a subsequent offence.[35] In 2012, there were 244 appeals against sentence severity, for which 181 (74.2%) resulted in a variation to the sentence. Of those successful appeals, 135 (74.6%) resulted in the District Court downgrading the fine to a dismissal under s 10 or s 10A of the CSPA, or to no penalty being recorded. In 42 successful low-range PCA appeals (23.2%), the District Court reduced the amount of the fine on appeal.[36]

5.33 In mid-range PCA offences, the maximum penalty is a $2200 fine or 9 months imprisonment (or both) for a first offence, or a $3300 fine or 12 months imprisonment (or both) for a subsequent offence. In 2012 there were 397 appeals against sentence severity, of which 291 (73.3%) were successful. Of those successful appeals, 213 (73.2%) were against non-custodial sentences imposed in the Local Court. The change to the penalties is shown in Table 5.3.

### Table 5.3: Change in penalty for mid-range PCA offences where non-custodial sentence imposed in the Local Court, 2012

| Local Court penalty | District Court penalty | No | % of successful appeals against non-custodial penalties |
|---|---|---|---|
| Community Service Order | Community Service Order – hours reduced | 6 | 2.8% |
| | s 9 good behaviour bond | 6 | 2.8% |
| | Fine | 4 | 1.9% |
| Good behaviour bond | Increase in period of bond | 1 | 0.47% |
| | Commencement date of bond varied | 6 | 2.8% |
| | Fine | 6 | 2.8% |
| | s 10(1)(b) bond | 4 | 1.9% |
| | s 10(1)(a) dismissal | 1 | 0.47% |
| Fine | s 9 good behaviour bond | 1 | 0.47% |
| | Change to fine amount | 60 | 28.19% |
| | s 10(1)(b) bond | 56 | 26.3% |
| | s 10(1)(a) dismissal | 36 | 16.9% |

35. *Road Transport Act 2013* (NSW) s 110(4). A penalty unit is currently $110: see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

36. Local Court of NSW, *Submission CA14*, Appendix B citing NSW Bureau of Crime Statistics and Research.

| Local Court penalty | District Court penalty | No | % of successful appeals against non-custodial penalties |
|---|---|---|---|
| | s 10A conviction order | 3 | 1.4% |
| Driver licence disqualification | Disqualification period varied | 2 | 0.94% |
| Other | Other | 21 | 9.86% |
| **Total** | | **213** | **100%** |

*Source: Local Court of NSW, Submission CA14, Appendix B citing NSW Bureau of Crime Statistics and Research*

5.34 It seems that fines and other non-custodial sentences imposed in the Local Court, for low and mid-range PCA offences, are regularly downgraded to non-conviction orders. The Local Court noted a perception amongst magistrates that the use of s 10 of the CSPA is almost routine in severity appeals for low and mid-range PCA offences.[37]

5.35 This may be explained by the fact that a period of licence disqualification for PCA offences may be avoided by a finding of guilt without conviction, and by an awareness of the increasingly severe consequences for disqualified drivers who continue to drive. However, in the Guideline Judgment on high-range PCA offences, Justice Howie noted that a court should not refuse to record a conviction where the seriousness of the offence warrants it, simply because of its impact on the offender's licence.[38]

5.36 In our view, a review of the system of criminal appeals from the Local Court to the District Court cannot be properly conducted without an appreciation of the significant impact that driving related offences have on the appeal workload. This suggests to us that reform should not concentrate solely on the procedural mechanism for appealing to the District Court, but also on the current structure of offences and penalties for driving related offences.

5.37 In our report on sentencing, we recommended that the government conduct a review into driver licence disqualification, suspension and cancellation. We also identified some options for dealing with those consequences, while acknowledging the need for adequate punishment of those who drive with a PCA.[39] We suggest that the ongoing review of the motor traffic legislation consider the frequency of successful sentencing appeals to the District Court for driving related offences, and whether this is fulfilling of the aim of the legislation.

37. Local Court of NSW, *Submission CA14,* 4.

38. *Application By The Attorney General Under Section 37 Of The Crimes (Sentencing Procedure) Act For A Guideline Judgment Concerning The Offence Of High Range Prescribed Concentration Of Alcohol Under Section 9(4) Of The Road Transport (Safety And Traffic Management) Act 1999 (No 3 Of 2002)* [2004] NSWCCA 303; 61 NSWLR 305 [145].

39. NSW Law Reform Commission, *Sentencing,* Report 139 (2013) rec 20.1.

## Previous reviews of appeals to the District Court

5.38 A number of previous reviews have considered the nature of an appeal from the Local Court to the District Court and whether any change is needed.

### *1991-1992: Steering committee review*

5.39 As discussed at para 5.6, a steering committee conducted a review of the *Justices Act 1902* (NSW) in the early 1990s. The committee's discussion paper outlined two alternatives to appeal by *de novo* hearing:

(1) A review of the magistrate's decision on stated grounds alleging error. This could be based on procedures similar to those under the *Criminal Appeal Act 1912* (NSW), where the appellant must specify grounds of appeal alleging error in law by the magistrate, or that the verdict cannot be supported by the evidence. Fresh evidence would only be allowed in very exceptional cases.

(2) Appeal by way of rehearing on the depositions of the Local Court. Fresh evidence could only be given with leave.[40]

5.40 The discussion paper suggested that advantages of an appeal based on error were that it:

- gives full effect to the Local Court hearing and acknowledges the status of magistrates and their decisions
- ensures that witnesses need only be called before the Local Court and that both the prosecution and defence cases are presented properly, and
- gives finality to the magistrate's decision, subject to review if it is erroneous.[41]

5.41 However, the discussion paper also noted that there were both pragmatic and in principle arguments against such an approach:

- The District Court has never had the function of reviewing the decisions of the Local Court. The District Court has no binding authority over the Local Court, since neither are a court of record. Such an appeal would change their status and relationship.
- Review of the magistrate's exercise of jurisdiction is the province of the Supreme Court.
- While this approach may diminish the number of appeals and the time taken to hear them, it would require magistrates to give more reasons. Although this may ensure magistrates give sufficient weight to relevant matters and perhaps increase the quality of decision making, it would result in more technical appeals to the District Court and slow down the hearing of matters in the Local Court.
- It may result in prosecutions failing for technical reasons. It is extremely unlikely that the District Court would order a retrial after a successful appeal.

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40. Justices Act Review Steering Committee, *Justices Act Review*, Discussion Paper (1991) 38-9.
41. Justices Act Review Steering Committee, *Justices Act Review*, Discussion Paper (1991) 39.

- No other appeal from a summary hearing in NSW is in this form, even where the summary trial is in the Supreme Court.[42]

5.42 In its report the steering committee recommended retaining *de novo* appeals and rejected the two options identified in its discussion paper. The committee recognised that this position was not ideal, but that it was preferable to any alternative suggested.[43] In coming to this conclusion, the committee was particularly concerned with the effect that an appeal based on error would have on the length of time required to complete Local Court proceedings. It noted that a procedural change which is likely to add to delay in a court where most decisions are made ex tempore should be recommended only where a clear need is shown.[44]

### *1997: Draft exposure bill*

5.43 Due to the lapse of time between the 1992 review and the subsequent legislation implementing that review, a draft exposure bill was tabled in 1997 for consultation.

5.44 Following consultation with the judiciary and the legal profession, the government decided to adopt the second option that the steering committee had rejected: that is, to limit conviction appeals to the District Court to a rehearing on the depositions of the Local Court, with fresh evidence to be given by leave. The Chief Judge of the District Court had expressed concern about the amount of time then required to hear appeals from decisions of magistrates. Others also expressed concern that the delay in dealing with *de novo* appeals meant that the prosecution often had difficulty requiring witnesses to reappear and repeat the evidence given in the Local Court.[45]

### *2004: Sentencing Council report*

5.45 In 2004 the NSW Sentencing Council produced a report, *How Best to Promote Consistency in Sentencing in the Local Court.* It suggested that the current system of sentence appeals from the Local Court to the District Court was a significant barrier to promoting consistency in sentencing.[46]

5.46 The report recommended that appeals to the District Court be by way of rehearing on the record of proceedings in the Local Court, including the reasons of the sentencing magistrate. Provision could be made for fresh evidence to be introduced in qualified circumstances. It was said that this could assist in promoting transparency in reasoning.[47]

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42. Justices Act Review Steering Committee, *Justices Act Review*, Discussion Paper (1991) 39.
43. Justices Act Review Steering Committee, *Justices Act Review*, Report (1992) 65.
44. Justices Act Review Steering Committee, *Justices Act Review*, Report (1992) 64.
45. See the second reading speech to the Justices Legislation Amendment (Appeals) Bill 1998 (NSW): NSW, *Parliamentary Debates,* Legislative Council, 17 September 1998, 7595.
46. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 45.
47. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 58.

### *2008: Statutory review of CARA*

5.47 In 2008 the NSW Attorney General's Department conducted a statutory review of CARA.

5.48 The review considered whether conviction appeals to the District Court should be confined to errors of law. However, the review recommended against this approach. It considered that many defendants would be unable to frame questions of law on appeal to the District Court without the aid of a legal practitioner. As a result, it was thought this proposal could raise the cost of appeals and create a barrier for unrepresented defendants. It considered that the unrestricted right of appeal protects against a potential wrongful conviction.[48]

5.49 The review also considered whether sentence appeals to the District Court should be restricted to the ground that the sentence was manifestly excessive or inadequate. The report considered a number of factors weighing for and against such a requirement, including the comparatively high rates of appeal, success rates on appeal, impacts on the complexity of the appeal process, length of time required to hear proceedings in the Local Court and the impact on financially and socially disadvantaged defendants. The review concluded that this proposal would represent a substantial shift in defendants' rights, and that there should be further stakeholder consultation before any legislative amendment could be considered.[49]

## Arguments in favour of change

5.50 There are factors which suggest that appeal by rehearing may no longer be an appropriate way for the District Court to decide conviction and sentence appeals from the Local Court.

### *The historical justification for appeal by rehearing no longer applies*

5.51 A broad avenue of appeal was justified historically because magistrates were not legally trained and there was a greater need for judicial review of their decisions. However, now that magistrates are legally qualified, hold office as judicial officers and conduct formal hearings, that justification no longer applies.[50] As Justice McHugh has previously noted:

> Now that the Local Court comprises highly qualified, professional magistrates, the necessity to retry the case afresh on new evidence seems dubious. Indeed the advantages of an appeal from a qualified magistrate to a single judge of the District Court on questions of fact are not entirely self-evident.[51]

48. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 30-1.
49. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 31-3.
50. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 17; Chief Magistrate of the Local Court of NSW, *Submission PSE5,* 6.
51. *Goldfinch v R* (1987) 30 A Crim R 212, 219.

### *The current provisions are different to appeals from higher courts and in other jurisdictions*

5.52 Appeals against conviction and sentence for proceedings heard on indictment are error based. That is, before it can allow an appeal, the CCA must be satisfied that the original conviction or sentence was affected by error.

5.53 Changing the current position for appeals from the Local Court to the District Court could allow for appeals from summary proceedings and appeals from proceedings dealt with on indictment to be better aligned. This would contribute to our objective of streamlining appeal processes.

5.54 Queensland, SA, WA, Tasmania, NT, ACT, Canada and NZ have error based appeals from summary criminal proceedings.[52] Victoria is the only jurisdiction that retains *de novo* appeals as of right.[53] Perhaps as a result of these differences, NSW has the highest rate of appeal from decisions of courts of summary jurisdiction in Australia.[54]

### *Appeal by rehearing is inconsistent with finality and efficiency*

5.55 Appeal by rehearing runs counter to the objective of finality, in that it allows appellants the chance to remake their case before the District Court without needing to demonstrate error at first instance.[55]

5.56 The breadth of the current right of appeal also potentially impacts upon the efficiency of the criminal justice system, and has the potential to undermine its integrity. Under the current system an appellant is afforded the opportunity to gain a more favourable outcome while in practice normally having nothing to lose in doing so.[56]

5.57 In appeals against sentence, the District Court exercises the sentencing discretion afresh. As Justice McHugh explained in relation to an appeal under the *Justices Act 1902* (NSW):

> An appeal to the District Court … is not an appeal in the sense that lawyers now use that term. It is an election to have the case retried on new materials.[57]

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52. *Criminal Appeals Act 2004* (WA) s 8(1); *Justices Act* (NT) s 163(1); *Magistrates Court Act 1930* (ACT) s 219D; *Justices Act 1959* (Tas) s 107(4); *Criminal Procedure Act 2011* (NZ) s 232(1), s 250(2); *Criminal Code,* RSC 1985 (Can) s 822(1). In Queensland, where the defendant pleaded guilty, appeal against sentence can only be made on the ground that it was excessive or inadequate: *Justices Act 1886* (Qld) s 222(2)(c). In SA, appeal is conducted by rehearing, although in appeals against sentence the demonstration of error is required before the court will intervene: *Magistrates Court Act 1991* (SA) s 42; *Wittwer v Police* [2004] SASC 226.
53. *Criminal Procedure Act 2009* (Vic) s 256(1), s 259(1). In Canada and Tasmania the court may order that the appeal be heard de novo if it is in the interests of justice: *Criminal Code,* RSC 1985 (Can) s 822(4); *Justices Act 1959* (Tas) s 111.
54. See Table 5.5.
55. Local Court of NSW, *Submission CA14,* 2.
56. Local Court of NSW, *Submission CA14,* 2. The District Court is required to give a *Parker* direction if it is contemplating increasing an offender's sentence on appeal: see Chapter 7.
57. *Goldfinch v R* (1987) 30 A Crim R 212, 218.

5.58 The High Court has emphasised that sentencing is a discretionary task which involves weighing up and balancing a number of different and sometimes competing factors. It is a process in which there can be more than one correct answer.[58] It is therefore possible for the District Court to come to a different view about an appropriate sentence even where the sentence imposed in the Local Court was "correct" in law. Given that the District Court is not provided with a copy of the magistrate's reasons, and does not know why the magistrate preferred the sentence imposed over others, this does not seem to be a desirable outcome.

5.59 This is not merely a theoretical point. The statistics in Figure 5.6 suggest that, particularly at the lower end of seriousness, sentences imposed in the Local Court are frequently replaced by different sentences on appeal, even though error below was not identified. Often only small changes are made.

5.60 The Local Court gave the following example of a District Court judge's reasons for intervening on appeal, even though it appears that the sentence originally imposed was accepted to be a "correct" sentence in law:

> … there have been other cases before the court and I know that I determined one case where [the offending conduct] was more serious than this matter and in that matter I imposed a suspended sentence.
>
> In my view, bearing in mind [the offender's] age and lack of prior criminal history and the history of this matter, the magistrate was correct in assessing that it was a matter that required the imposition of a gaol sentence, because there does have to be a general deterrence aspect to these sorts of offences because they are offences that are easy to commit and can have a significant impact so far as the victim is concerned.
>
> The magistrate, having correctly come to that conclusion, then decided that the matter should be dealt with by way of home detention. In my view the matter can *equally* be dealt with by way of a suspended sentence.
>
> Accordingly the order I make is that I allow the appeal against sentence.[59]

5.61 The NSW Sentencing Council in its 2004 report noted two submissions that suggested some District Court judges appear to consider that all appellants ought "to leave with some benefit" for the trouble of appealing, even if only a minor decrease in sentence.[60] We do not know if these submissions correctly reflect the facts either at the time of the Sentencing Council report or now. In our view, the fact that the defendant has chosen to appeal should not be regarded as a sufficient or valid reason by itself for appellate intervention. Nor do we consider that efficiency and fairness in the criminal justice system is promoted if a lesser sentence is imposed on appeal, notwithstanding the District Court accepting that the sentence imposed by the Local Court was appropriate.

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58. *Pearce v R* [1998] HCA 57; 194 CLR 610 [46]; *Markarian v R* [2005] HCA 25; 228 CLR 357 [27].
59. Local Court of NSW, *Submission CA14,* 6-7 (emphasis added).
60. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 55.

### *The District Court is only partially informed of the information that led to the sentence in the Local Court*

5.62 The District Court does not have before it any record of the submissions made in the Local Court, or of any exchange between the bar table and the magistrate, or of the magistrate's reasons. This is despite the fact that most of the information that is relevant to the exercise of the sentencing discretion is given orally from the bar table in the Local Court.

5.63 The NSW Sentencing Council noted, as a consequence, that:

(1) The DPP lawyer who appears in the District Court (who will not be the police prosecutor who conducted the Local Court proceedings) is likely to be unaware of the appellant's previous version of events or of the submissions made on his or her behalf from the bar table. If the appellant gives evidence in the appeal, this makes effective cross-examination difficult.[61]

(2) If the magistrate took into account factors relating to a need for general deterrence, in the light of a local crime wave of a particular nature, then the magistrate's reasons could be particularly important in substantiating the original sentencing decision.[62]

(3) Where the magistrate imposes a sentence of imprisonment of 6 months or less, under s 5(2) of the CSPA the magistrate is specifically required to provide reasons for this decision. It is anomalous that in an appeal against such a sentence, the District Court will not normally have access or regard to those reasons.[63]

5.64 Giving reasons in judicial decision making is important because it facilitates the appellate process, and enhances the accountability of individual judges.[64] Arguably under the current practice that applies to sentence appeals to the District Court, the giving of reasons in the Local Court does not serve either of these purposes. In fact, the NSW Sentencing Council has suggested that it may actually serve to discourage magistrates from giving reasons.[65]

5.65 In *Charara v R* Justice Mason, discussing whether the District Court can have regard to the reasons of the magistrate in deciding an appeal against conviction, said:

> The Local Court reasons will doubtless include an explanation why the conviction was entered at first instance, including an assessment of the credibility issues touching any factual dispute. Without reference to the reasons

61. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 49.
62. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 54.
63. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 54.
64. J Spigelman, "Reasons for Judgment and the Rule of Law" (Paper delivered at the National Judicial College, Beijing, 10 November 2003 and the Judge's Training Institute, Shanghai, 17 November 2003) 3.
65. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 54.

> the District Court would be driven to speculation or deciding the issue entirely afresh. Neither such course would be consonant with the statutory scheme. In civil appeals, the court of appeal is not entitled to ignore the reasons in which findings based on credibility are to be found. There is no basis in principle for a different approach in the criminal law.[66]

5.66 Although these observations were made in the context of conviction appeals, where the District Court is confined to the evidence given in the Local Court unless leave is granted, they would seem equally applicable to sentence appeals.

### *The current form of appeal arguably does not assist in maintaining clarity or consistency in sentencing practice*

5.67 The current form of appeal from the Local Court arguably does not assist with maintaining clarity or consistency in sentencing practice. This is because:

- The District Court judge undertakes his or her own independent assessment of the circumstances, without considering the reasons for the original sentence.
- When the Local Court is informed of the outcome of an appeal, usually the only detail provided is the new sentence. Limited reasons are available, although the Local Court can request a copy of the District Court transcript.[67]
- As the District Court is not required to establish error in the original sentence, its judgments are of little value to magistrates as precedents. The magistrate does not know why the sentence has been varied on appeal, and is not provided with any guidance for sentencing in future cases.[68]

5.68 The NSW Sentencing Council addressed this issue in its 2004 report. It found that "[t]he structure of the current appeal mechanism was widely thought to impede consistency in sentencing, and even to promote *in*consistency".[69]

5.69 Although the decisions of the District Court are not binding on the Local Court,[70] this would not be necessary for improved consistency in sentencing practice. Rather, having District Court decisions which are directed towards identifying error in the Local Court and made available to the Local Court would contribute towards maintaining consistent sentencing practice. That is particularly important since, save for limited circumstances, the decision of the District Court is a final decision.

## Reforming conviction appeals

5.70 As a result of the 1998 legislative amendments, conviction appeals are now confined to the evidence before the Local Court, with fresh evidence requiring leave.

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66. *Charara v R* [2006] NSWCCA 244; 164 A Crim R 39 [24].
67. Local Court of NSW, *Submission CA14*, 6.
68. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 54.
69. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 45 (emphasis in original).
70. See *Valentine v Eid* (1992) 27 NSWLR 615, 622.

5.71 Stakeholders did not raise any issues with the current conviction appeal process. Even stakeholders who supported moving away from appeal by rehearing for sentence appeals did not support changing the basis for conviction appeals.[71]

5.72 The NSW Office of the Director of Public Prosecutions (NSW ODPP) noted that a requirement for error in conviction appeals would not be desirable because of the additional time and complexity that an error test would involve. It also considered that an error based appeal would need to include some sort of "unreasonable verdict" ground in order to allow factual errors to be appealed. The NSW ODPP did not consider that such an approach would greatly reduce the number of appeals.[72] We agree that it would be difficult to frame appropriate grounds for error in convictions in the Local Court and to apply these in the District Court.

5.73 There are relatively few conviction appeals when compared with sentence appeals, and they have much lower success rates.[73] In 2012 the success rate for conviction appeals was 26.5%, a figure which is more or less consistent with the success rate for appeals against conviction to the CCA for proceedings heard on indictment.[74]

5.74 Despite the general problems with appeal by rehearing which we have identified above, we do not propose to change the way conviction appeals are heard. Conviction appeals are concerned with binary decisions of the Local Court; that is, the defendant is either guilty or not. Unlike sentencing appeals, they are not concerned with discretionary decisions where there can be more than one correct answer. For these reasons, we are not inclined to impose any additional restrictions on the way that the District Court determines conviction appeals.

## Reforming sentencing appeals

5.75 Unlike conviction appeals, we consider that the current system for sentence appeals has a number of problems that may affect the quality of the criminal justice system in NSW.

5.76 In particular, we consider it to be a problem that the District Court can exercise the sentencing discretion afresh, without regard to all the material which was before the Local Court and the magistrate's reasons, and without the need to consider whether the Local Court's sentence was within the range of acceptable options.

5.77 In the remainder of this section we consider whether the provisions for appeals against Local Court sentences should be changed and, if so, how. We have regard to the matters identified above and the need for timely disposition of the high volume of criminal cases in the Local Court.

71. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 17; Local Court of NSW, *Submission CA14,* 2.
72. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 17.
73. See Table 5.1.
74. See Table 8.1.

## Opposition to change

5.78 The majority of stakeholders suggested that the current system for deciding sentence appeals worked well and strongly opposed any change.[75] Only the Local Court, the NSW ODPP and the NSW Police Force were in favour of change.

5.79 The relatively low volume of appeals, in the context of the Local Court's workload as a whole, was also given as a reason not to depart from the current system.[76] There was a strong view, particularly amongst defence lawyers, that the Local Court gets it right most of the time. In their view, the high success rate of appeals to the District Court indicates that only those sentences where the Local Court erred are being appealed; and the fact that the District Court does not need to find error before it can impose a different sentence does not operate as an incentive of itself to appeal.[77]

5.80 The practical reality of proceedings in the Local Court was also given as a reason in favour of maintaining the current position. The Local Court deals only with summary matters, and with a greater degree of informality and expedition than the higher courts.[78] Magistrates deal with a busy court list, under considerable time pressures, and often with a high number of unrepresented defendants.[79] Particularly in cases where the defendant pleads guilty, the hearing in the Local Court may last only a few minutes. In sentencing matters, information of relevance is regularly given from the bar table, unopposed, rather than being presented as formal or sworn evidence.

5.81 Those who oppose change argued that the current form of appeal by rehearing provides a "safety net". The District Court has more time to consider the matter, and it may demand more exacting standards: for example, it may require the formal admission of evidence.

5.82 These were all arguments which the Victorian Parliament Law Reform Committee found compelling in concluding that de novo appeals should be retained in Victoria.[80]

5.83 Stakeholders also suggested that even minor variations to sentences can have a significant impact for appellants. For example, a small adjustment to a sentence can mean the defendant is eligible for a rehabilitation program, or can retain Housing

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75. Shopfront Youth Legal Centre, *Submission CA2*, 2; NSW Bar Association, *Submission CA5,* 9; Legal Aid NSW, *Submission CA12,* 2; Appeals from the Local Court roundtable, *Consultation CA3*.

76. Appeals from the Local Court roundtable, *Consultation CA3*; NSW Bar Association, *Submission CA5,* 9; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 7; Legal Aid NSW, *Submission CA12,* 4; Chief Judge of the District Court of NSW, *Response CA5*.

77. Appeals from the Local Court roundtable, *Consultation CA3*.

78. Appeals from the Local Court roundtable, *Consultation CA3*.

79. Legal Aid NSW, *Submission CA12,* 11-13; Shopfront Youth Legal Centre, *Submission SE37*, 3; Chief Judge of the District Court of NSW, *Response CA5*. In 2012, 37 791 out of 107 004 people charged in finalised Local Court appearances (35%) appeared without legal representation: NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013) 26 (Table 1.5).

80. Victorian Parliament Law Reform Committee, *De Novo Appeals to the County Court,* Report (2006) 100-15.

NSW accommodation.[81] Driver licence disqualifications can also have serious consequences on employment and other activities.[82]

5.84 In essence, stakeholder opposition to change centred around the following potential impacts:

(1) impact on Local Court proceedings

(2) impact on transcript services

(3) impact on District Court hearings, and

(4) impact on access to justice.

### *Impact 1: Local Court proceedings would take longer*

5.85 Stakeholders argued that Local Court proceedings would take longer to finalise if an appeal were to be confined to the material before the Local Court and the reasons of the magistrate. This is because:

(1) Defence lawyers would need to make lengthier submissions on sentence and may need to seek adjournments in order to obtain all relevant information, on the assumption that on appeal their client would be bound by the submissions and information given in the Local Court.[83]

(2) It may require evidence to be formally placed before the Local Court if an appeal was to be confined to that evidence. Local Court proceedings, it was suggested, would "grind to a halt" if formal evidence had to be given.[84]

(3) Magistrates may need to prepare more detailed remarks on sentence, and reserve their judgment, if their reasons were to be scrutinised on appeal.[85]

5.86 The Chief Magistrate took particular issue with the third argument. In his view, magistrates are already aware, as a matter of practical reality, of the need to give adequate yet concise reasons for decision when giving ex tempore judgments in the context of a voluminous caseload.[86]

5.87 Practitioners seem to have accepted the less formal and speedier way in which Local Court proceedings are conducted on the assumption that a broad avenue of appeal lies to the District Court if something goes wrong. Stakeholders were concerned that restrictions on the right of appeal would require defence lawyers in particular to "front load" more issues in the Local Court in order to preserve their client's right of appeal.

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81. NSW, Public Defenders, *Consultation CA6*.
82. Appeals from the Local Court roundtable, *Consultation CA3*. See also NSW Law Reform Commission, *Sentencing,* Report 139 (2013) [20.17].
83. Legal Aid NSW, *Submission CA12,* 12.
84. Appeals from the Local Court roundtable, *Consultation CA3*.
85. Shopfront Youth Legal Centre, *Submission CA2,* 3; NSW Bar Association, *Submission CA5,* 9; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 7.
86. See Chief Magistrate of the Local Court of NSW, *Submission SE35,* 6-7.

### *Impact 2: Increased transcript production*

5.88 There was significant concern that changing the current form of sentence appeals would require a transcript of the Local Court proceedings to be obtained.[87] At present, transcripts are only requested as a matter of course in conviction appeals. We have been informed that the current time required to obtain a transcript for a conviction appeal to the District Court is about 6 to 8 weeks.

5.89 Presumably, if the number of appeals requiring transcripts were to increase, then without additional resources the time required to produce a transcript would also increase.

5.90 Defendant appeals to the District Court are lodged with the Local Court registry where the proceedings were heard.[88] Upon filing a conviction appeal, the registry will lodge a request with the Reporting Services Branch (RSB) for a transcript.[89] Local Court registry staff consult with the District Court registry and set a time for hearing the appeal, allowing enough time to obtain the transcript. Usually, this will mean the appeal is listed for hearing 6 to 8 weeks after the appeal is lodged.[90] In sentence only appeals, because there is no transcript required, the average time for an appeal to be listed for hearing is 4 to 5 weeks (although the exact time will vary depending on the workload of the District Court). Where the appellant is in custody pending appeal, this time frame can be expedited.[91]

5.91 During the 2012-13 financial year, RSB's compliance with delivery timeframes for transcripts in non-daily matters was 51%.[92] In the same period, the volume of requests for transcripts in criminal appeals and the turnaround rate were as follows:

**Table 5.4: Transcript requests for criminal appeals from the Local Court, 2012-2013**

| Appeal | Number of transcript applications | Average requested turnaround (in working days) | Average actual turnaround (in working days) | Pages provided |
|---|---|---|---|---|
| Defendant in custody | 402 | 13 | 14 | 9039 |
| Defendant on bail | 2069 | 20 | 23 | 51 191 |

*Source: Information provided by Reporting Services Branch, NSW Department of Attorney General and Justice (24 September 2013)*[93]

87. Legal Aid NSW, *Submission CA12,* 13; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 7; Appeals from the Local Court roundtable, *Consultation CA3*; Chief Judge of the District Court of NSW, *Response CA5.*
88. *Crimes (Appeal and Review) Act 2001* (NSW) s 14. Prosecution appeals are lodged with the Local Court registry at the Downing Centre, Sydney: *District Court Rules 1973* (NSW) r 2A(2).
89. *District Court Rules 1973* (NSW) r 2C.
90. Information provided by Court Services, NSW Department of Attorney General and Justice (17 October 2013).
91. Information provided by Court Services, NSW Department of Attorney General and Justice (21 November 2013).
92. Information provided by Reporting Services Branch, NSW Department of Attorney General and Justice (24 September 2013). "Daily matters" refers to ongoing trials where a transcript is required at the end of each sitting day. "Non-daily matters" refers to all other types of transcripts.

5.92 As Table 5.4 demonstrates, RSB provided transcripts, on average, between 1 and 3 working days later than the requested date.

5.93 RSB prioritises transcripts for criminal appeals over other, less urgent transcript requests. However, the need for daily transcripts in ongoing criminal trials is its first priority and this can prevent RSB from providing transcripts more promptly in criminal appeals.[94] We understand that a review of civil transcript production is currently underway, and this may have some impact on the resources that are available for criminal transcript production.

5.94 There is another issue of cost which must be taken into account. Currently in an appeal against conviction, the parties to an appeal are each entitled to one free copy of the transcript of evidence relevant to the appeal.[95] If the law is changed so that sentence appeals are determined on the basis of the evidence before the Local Court, then in the interests of fairness it may also be necessary to provide the parties with a copy of the relevant transcript of evidence free of charge. This is a cost which would be borne by the government.

5.95 Stakeholders were of the view that any change to the system of sentence appeals which is going to require the provision of a transcript is likely to result in delays in the disposal of appeals.[96] This would be a highly undesirable outcome and we do not advocate moving to a system which will in fact increase inefficiency.

5.96 However, we also consider that an entire criminal appeals structure should not be predicated on the resources available for transcript production. Consideration should be given to whether District Court appeals can use an alternative record of the Local Court proceedings that does not require the production of a transcript. For example, the parties could be given a copy of the sound recording, or if notes of the reasons for sentence are made these could be included with the court file. We understand that about 50% of transcripts currently produced for appeals come from Local Court locations with digital sound recording technology.[97] This may allow for easier distribution of the sound recording. It should not be unduly onerous to require the parties and the District Court to work from the sound recording of a sentencing hearing rather than wait for the written transcript, particularly in those cases where the Local Court hearing is very brief.

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93. The "defendant on bail" category would appear to encompass matters where bail was not required (ie, where a non-custodial sentence was imposed). Each day of a hearing is ordered as a separate application, meaning that the number of transcript applications will not necessarily correspond to the number of appeals.

94. Information provided by Reporting Services Branch, NSW Department of Attorney General and Justice (9 October 2013).

95. *Crimes (Appeal and Review) Act 2001* (NSW) s 18(3).

96. Appeals from the Local Court roundtable, *Consultation CA3*; Chief Judge of the District Court of NSW, *Response CA5*.

97. Information provided by Reporting Services Branch, NSW Department of Attorney General and Justice (7 February 2014).

### *Impact 3: Hearings in the District Court would take longer*

5.97 The District Court currently finalises Local Court appeals in a very efficient manner. In 2012 about 70% of those appeals were disposed of within 2 months from the date of filing, with over 95% disposed of within 6 months.[98]

5.98 In fact, even though the District Court hears more criminal appeals than its equivalent counterparts in other jurisdictions, the following figures suggest that it disposes of those appeals much more quickly.

**Table 5.5: Criminal matters in Australian courts, 2012-2013**

| | NSW | Vic | Qld | WA | SA | Tas | ACT | NT |
|---|---|---|---|---|---|---|---|---|
| Magistrates Court lodgments (incl Children's Court) (Number) | 163 105 | 196 161 | 200 245 | 90 814 | 59 712 | 17 443 | 5527 | 17 507 |
| Appeal lodgments (Number) | District Court 6544 | County Court 2891 | District Court 405 | Supreme Court 448 | Supreme Court 239 | Supreme Court 22 | Supreme Court 108 | Supreme Court 29 |
| Appeal finalisations (Number) | 6492 | 2664 | 1101[99] | 440 | 238 | 25 | 132 | 15 |
| Pending case load for appeals (Number) | 1297 | 1080 | 161 | 241 | 71 | 14 | 60 | 18 |
| Cases > 12 months (%) | 1.3 | 6.4 | 8.7 | 5.0 | 1.4 | - | 11.7 | - |
| Cases > 24 months (%) | - | 1.7 | 3.7 | 0.4 | 1.4 | - | 5.0 | - |

*Source: Steering Committee for the Review of Government Service Provision, Report on Government Services 2014 (Productivity Commission, 2014) Table 7A.1 (Lodgments, criminal), Table 7A.6 (Finalisations, criminal), Table 7A.19 (Backlog indicator (as at 30 June), criminal).*[100]

5.99 If there is a change to the way sentence appeals are heard, because of the need for a transcript of the Local Court proceedings, this will slow down the District Court hearing process. Given that there is currently an average 6 to 8 week wait for a transcript, it is unlikely that the District Court would be able to finalise very many sentence appeals within 2 months - the period during which 70% of sentence appeals are currently finalised.

98. District Court of NSW, *Annual Review* (2012) 27.

99. This number was unusually high in 2012-2013 due to a pending higher court appeal being resolved, which set a precedent for those appeals pending in the District Court which were then finalised together: see Steering Committee for the Review of Government Service Provision, *Report on Government Services 2014* (Productivity Commission, 2014) Table 7A.6 note (d).

100. Criminal appeals from the Magistrates Court are to the District Court or equivalent in NSW, Victoria and Queensland. Criminal appeals from the Magistrates Court in WA, SA, Tasmania, ACT and NT are to the Supreme Court, meaning that the number of appeals shown in this table will include appeals from other courts as well.

5.100 Further, the District Court presently hears sentence appeals in a very short period of time, usually 15 - 45 minutes. The District Court hearing may take longer if the judge is required to review the transcript and come to a view about the correctness of the magistrate's decision.[101] NSW Young Lawyers suggested that there was no efficiency gain to be had in limiting the type of material that can be taken into account on appeal in the District Court.[102] However, we do not support a practice in which defendants defer presenting their case on sentence to the appeal stage.

### *Impact 4: Access to justice may be restricted*

5.101 Stakeholders raised a number of impacts relating to accessibility for appellants.

5.102 First, any change to the nature of an appeal to the District Court is likely to curtail appeal rights when compared with the current position. This is not in itself a reason for maintaining the current system of appeal, provided that appellants with a justifiable basis for appeal are not unfairly excluded. However, in cases where the Local Court's sentence was within the range of acceptable options, there is less justification for retaining a broad avenue of appeal as the District Court would only be tinkering with the sentence.

5.103 Secondly, if delays in the Local Court and/or the District Court are increased, this may have an adverse effect on appellants, particularly those who are in custody pending the appeal. Unrepresented appellants may also be disadvantaged if there is a move to an error based appeal.[103] The Law Society of NSW noted that unrepresented defendants in the Local Court often obtain representation for the District Court appeal, and should not be bound by the case that was put forward at first instance.[104]

5.104 Legal Aid NSW submitted that it would incur additional time and cost if an appellant is required to file written pleadings addressing the nature of the error alleged.[105] The majority of the representation that Legal Aid NSW provides or funds in severity appeals to the District Court is for appellants who were sentenced to a term of imprisonment in the Local Court.[106] Currently, it can assess whether a severity appeal is likely to succeed within a very short period of time. This may change if it is required to consider the case more closely and to prepare detailed submissions for the appeal.[107]

## Options for change

5.105 We identified four possible options for reform of sentence severity appeals from the Local Court to the District Court:

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101. Shopfront Youth Legal Centre, *Submission CA2,* 3; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 7; Legal Aid NSW, *Submission CA12,* 12-3.
102. NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 16.
103. Shopfront Youth Legal Centre, *Submission CA2,* 3; Legal Aid NSW, *Submission CA12,* 12.
104. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 8. See also Chief Judge of the District Court of NSW, *Response CA5*.
105. Legal Aid NSW, *Submission CA12,* 13.
106. See Legal Aid NSW, *Criminal Law Matters – When Legal Aid is Available* (2010) [4.6.1].
107. Appeals from the Local Court roundtable, *Consultation CA3*.

(1) An appeal against sentence should be heard on the same basis that currently applies to appeals against conviction under s 18 of CARA. That is, an appeal against sentence should be by way of rehearing on the basis of the evidence given in the Local Court proceedings (and possibly the reasons given by the magistrate). Fresh evidence may be given only with leave of the District Court, if it is in the interests of justice.

(2) An appeal against sentence should be by way of rehearing, similar to the way in which appeals by rehearing are conducted under s 75A of the *Supreme Court Act 1970* (NSW) (SCA).

(3) An appeal against sentence should be determined according to the *House v R*[108] principles. That is, the appeal should be allowed where:

(a) the magistrate:

(i) acted on a wrong principle

(ii) allowed irrelevant or extraneous matters to guide the decision

(iii) mistook the facts

(iv) did not take into account a material consideration, or

(b) on the facts, the sentence was unreasonable or plainly unjust,

with fresh evidence received only with leave of the District Court, if it is in the interests of justice.

(4) An appeal against sentence should only be allowed where the sentence was manifestly excessive or manifestly inadequate.

### *Option 1: Sentence appeals to be determined on material before magistrate*

5.106 The first option seeks to align sentence appeals with the way that conviction appeals are currently heard. Both the NSW Sentencing Council and the NSW Attorney General's Department have previously put forward this suggestion.[109] There could be an additional requirement that the District Court also consider the magistrate's reasons.

5.107 This option would not change the current avenue of appeal. Rather, it would change the material on which the District Court reaches its decisions. It retains most of the flexibility of appeal by rehearing.

5.108 Most stakeholders, although not in favour of any change, considered that aligning sentence appeals with conviction appeals would be the least onerous course. However, they were not convinced that this option would necessarily reduce the number of appeals or the time taken to hear an appeal.

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108. *House v R* (1936) 55 CLR 499. These principles are discussed in greater detail in Chapter 8.

109. NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court,* Report (2004) 58; NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 31-3.

5.109 Concern was also expressed about the suggestion to limit the evidence that can be relied on in a District Court appeal.[110] It was suggested that:

- A requirement for leave to bring fresh evidence would require a transcript in order to determine whether the evidence was "fresh".
- This approach could lead to a large number of applications for leave to bring fresh evidence, because fresh evidence is now regularly received in sentence appeals.
- The informality in receiving material in Local Court proceedings and the brief reasons that are customarily provided means there is very little "record" that could be relied on in an appeal. This option may result in Local Court proceedings being conducted differently, in order to ensure that relevant evidence is placed "on the record".

5.110 Although some additional time may be required in determining whether leave to adduce fresh evidence should be granted, we do not anticipate that this would call for substantial argument. We expect that the District Court would more readily grant leave for fresh evidence where the evidence relates to matters occurring post sentence, as opposed to evidence which could have been put before the Local Court but was not.

5.111 The NSW Attorney General's Department in the 2008 statutory review of CARA was of the view that the need to give "fresh evidence" in appeals against sentence should be exceptional, as both the prosecutor and defence lawyer are under an obligation to provide all relevant material to the original sentencing court.[111] However, stakeholders informed us that the volume of work and time pressures in the Local Court means that this does not always occur in practice, even though lawyers try to do the best for their client.

5.112 In our view any problems arising from the informality of the Local Court proceedings could be overcome by an amendment that requires the District Court to have regard to the "material or information" before the magistrate, rather than the "evidence". The latter expression tends to suggest that what is envisaged is matter received as part of a formal record of evidence akin to that required in the higher courts.

### *Option 2: Appeal by rehearing similar to s 75A of the Supreme Court Act 1970 (NSW)*

5.113 Section 75A of the SCA applies to appeals to the Court of Appeal (excluding appeals under CARA and certain other types of proceedings). It provides for an appeal by rehearing, but it operates differently to an appeal by rehearing under CARA.

5.114 Section 75A relevantly states:

> (5) Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing.

110. Appeals from the Local Court roundtable, *Consultation CA3*.

111. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 29.

(6) The Court shall have the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning:

(a) amendment,

(b) the drawing of inferences and the making of findings of fact, and

(c) the assessment of damages and other money sums.

(7) The Court may receive further evidence.

(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.

(9) Subsection (8) does not apply to evidence concerning matters occurring after the trial or hearing.

(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires.

5.115 In a rehearing under s 75A of the SCA:

- The appellant carries the onus of showing that the decision appealed from should be reversed.
- Subject to the statutory power to receive further evidence, the appeal is conducted on the transcript of the evidence taken at the trial.
- The court conducts its own independent review of the facts and gives effect to its own conclusions about them, giving due allowance to the trial judge's advantage in hearing the case.
- It assumes that the court is in as good a position as the trial judge to decide on the proper inferences to be drawn from unchallenged findings of fact.
- The court may receive "fresh evidence" (that is, evidence about matters that occurred after the trial) without any requirement to show special grounds.
- Where there has been a hearing on the merits, special grounds must exist to justify the reception of "further evidence" (that is, evidence about matters that occurred before the trial but which was not adduced at trial). Generally this means that the evidence must have been unavailable pre-trial, have credibility, and must be highly probative.
- Where the appeal involves a challenge to the exercise of judicial discretion, the *House v R* principles apply.[112]

5.116 This type of rehearing would narrow the scope of current appeals to the District Court, as it requires close consideration of the original decision. However, the District Court's powers on appeal would be broad, and it would be permitted to make its own findings of fact and to draw its own interferences from those facts. It is

112. See commentary in LexisNexis Butterworths, *Richie's Uniform Civil Procedure NSW* (at 27 February 2014) [SCA s 75A.10]-[SCA s 75A.80].

also a familiar type of appeal, as it is already used in appeals to the Court of Appeal. The exercise of the sentencing discretion would be subject to the *House v R* principles, but it would also allow the District Court to intervene where there has been a factual error or where the District Court disagrees with the inference the Local Court drew from those facts.

5.117 It appears that a conviction appeal under s 18 of CARA may already be conducted in a similar manner to a rehearing under s 75A of the SCA, although the position is not clear.[113]

5.118 There was some support for moving to a rehearing similar to that under s 75A of the SCA, particularly from stakeholders who were in favour of restricting the current breadth of sentence appeals.

### *Option 3: Demonstration of House v R error*

5.119 The third option is to require sentence appeals to be determined according to the *House v R* grounds of error. These are currently the grounds of appeal that apply in sentence appeals from proceedings dealt with on indictment.[114] They encompass errors of principle as well as sentences that are manifestly excessive or inadequate. This option would align sentence appeals to the District Court with sentence appeals to the CCA.

5.120 There was very little support amongst stakeholders for introducing a *House v R* test for error, on the basis that this option would be too onerous.[115]

5.121 We recognise it is likely that this option would increase the complexity of District Court proceedings, as it might require a greater focus on arguments of law. We also recognise that it may lengthen the hearing time for District Court appeals. However, it would probably reduce the number of sentence appeals filed.

### *Option 4: Appeal allowed only where sentence manifestly excessive or manifestly inadequate*

5.122 Each of the stakeholders who favoured changing the current form of District Court sentence appeals - the Local Court, the NSW ODPP and the NSW Police Force - supported a single test based on the sentence being manifestly excessive or manifestly inadequate.[116]

5.123 The Local Court considered that the advantage of this approach over others was that it would:

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113. In *Spanos v Lazaris* [2008] NSWCA 74 [36], Basten JA held that "it does not follow that the nature of the rehearing will necessarily be the same as in an appeal under s 75A of the *Supreme Court Act* in this Court". However, in *McKellar v DPP (NSW)* [2011] NSWCA 91 [8], Basten JA held that "[t]he approach to be adopted by the District Court is thus analogous to a civil appeal under s 75A of the *Supreme Court Act 1970* (NSW)".

114. See Chapter 8.

115. Appeals from the Local Court roundtable, *Consultation CA3*.

116. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 1; Local Court of NSW, *Submission CA14,* 7; NSW Commissioner of Police, *Response CA6.*

- require the ultimate focus of the appeal to be directed on the result of the original proceedings, rather than on establishing particular errors that might result in the exercise of a discretion to make a comparatively minor adjustment to sentence
- be inherently better adapted to avoiding undue complexity in the appeal process
- promote greater efficiency in the criminal justice system, as it would limit the capacity for speculative and unmeritorious appeals
- be more consistent with appeal mechanisms that lie from decisions of higher courts and magistrates' courts in other jurisdictions.[117]

5.124 The NSW ODPP also noted that a ground of manifest excess may not require the production of a transcript if the original sentencing material was available.[118]

5.125 This approach is potentially advantageous in that it sets a threshold for intervention by the District Court without imposing an overly legalistic test. The High Court has held that a finding of manifest excess or inadequacy is one that "does not admit of lengthy exposition", but is drawn from a consideration of all matters relevant to the fixing of a sentence, without the need to identify a specific error.[119]

5.126 This option is also unlikely to require much change to the existing practice in the Local Court or the District Court. The District Court could continue to hear sentence appeals with the option of allowing fresh evidence to be given as of right, and, as the NSW ODPP suggests, it may be possible for this to be done without a transcript of the proceedings.

5.127 However, some stakeholders suggested that a single test of manifest excess or inadequacy would fail to provide redress for errors in the exercise of the sentencing discretion, in cases where the sentence was not manifestly excessive overall.[120]

5.128 We are concerned that this approach could result in an inconsistency between an appeal to the District Court and a second appeal to the CCA. We recommend that a second appeal lie from the District Court to the CCA, with leave on a question of law.[121] The appeal will be concerned with whether the District Court judge made an error of law in deciding the appeal. It is difficult to see how an appeal of that kind could operate if the first appeal to the District Court is confined to the ground of manifest excess or inadequacy.

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117. Local Court of NSW, *Submission CA14,* 7-8.
118. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 17.
119. *Hili v R* [2010] HCA 45; 242 CLR 520 [58]-[61].
120. NSW Bar Association, *Submission CA5,* 12; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 8; Legal Aid NSW, *Submission CA12,* 14; Commonwealth Director of Public Prosecutions, *Submission CA15,* 3. Cf NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 18.
121. Recommendation 5.2.

## Our conclusion on sentence appeals to the District Court

### *Competing policy considerations*

5.129 This area of the review has been a difficult one. There are compelling arguments both for and against retaining the current form of sentence appeals to the District Court. There was no stakeholder consensus on the most desirable approach; in fact, stakeholders were diametrically opposed on the question of what should be done in this area.

5.130 In undertaking this review we have looked at how best the criminal appeals system should be designed. Ideally, we would like to see a system of error based appeal introduced in appeals from the Local Court to the District Court. The problems inherent in a system of appeal by rehearing have been repeatedly identified since the steering committee review in 1992.

5.131 More specifically, we find it difficult to endorse a system of appeal where the District Court does not have any regard to the reasons of the Local Court, and where any new evidence can be tendered as the appellant sees fit. While the District Court will usually have before it the sentencing material provided to the Local Court, it will not have the benefit of the magistrate's reasons or a record of any exchange between the bar and the bench. In effect, the current system allows appellants a second sentencing hearing that is unrestricted by the previous determination, and we think it is undesirable to design a system of appeals in this way.

5.132 We also consider that the development of a legally trained, qualified magistracy that is required to give reasons for decisions no longer justifies such a broad avenue of appeal. We are concerned that the current system can result in unnecessary adjustments to sentences in circumstances where the sentence imposed by the Local Court was within the range of acceptable options. We do not consider that this approach contributes to finality in the criminal justice system or to the promotion of consistency in sentencing practice.

5.133 However, weighing against the introduction of an error based appeal is that the current form of appeal to the District Court is a quick and relatively inexpensive way of reviewing Local Court sentences which are often imposed following a less formal and speedier hearing. The nature of Local Court proceedings suggests that an overly formalistic appeals system may not be appropriate, least of all because there is often not a formal record of the proceedings which can be relied on. We are wary of recommending any change which is likely to slow down proceedings at first instance or on appeal.

5.134 Moreover, appeals to the District Court represent only a small proportion of the total number of matters dealt with by the Local Court - less than 7% of those convicted, and this proportion is even smaller compared to the overall number of matters heard by the Local Court. The relatively low appeal rate raises a question about whether there is a pressing need for change.

### *Our view: sentence appeals to be heard on material before the Local Court and reasons of the magistrate*

5.135 Ultimately, for pragmatic reasons we have decided not to recommend the introduction of error based appeals. In coming to this conclusion we have taken into account the views of a majority of stakeholders who opposed any restriction to the current avenue of appeal.

5.136 After carefully considering the competing arguments, we have decided to recommend that appeals against sentence should be by way of rehearing on the basis of the material before the Local Court and the reasons given by the magistrate. Fresh evidence should be given only with leave of the District Court, if it is in the interests of justice. As we discuss in para 5.74, we are not making any recommendations for change to the way conviction appeals are heard.

5.137 Our recommendation represents a compromise between the type of error based appeal that we would ideally like to see introduced, and the practical reality of proceedings in the Local Court and District Court. We note the views of stakeholders that it may not result in much change to the current position. However, we consider that it will require placing greater emphasis on the magistrate's reasons and the material before the Local Court, both of which we consider to be important benefits.

5.138 We appreciate that this recommendation may have implications for the length of time taken to finalise the appeal in the District Court and on resources required to produce a transcript or other record. As we discuss in para 5.96, the possible alternatives to the production of a typed transcript, such as use of the sound recording, should be investigated. However, we are not inclined to recommend maintaining current arrangements, which we consider to be highly unsatisfactory, simply because of the current time required to obtain a transcript.

5.139 The issue of transcript production and timeliness is a significant issue, not just for sentence appeals to the District Court, but for the criminal justice system generally. In our view urgent reforms need to be made to the system of transcript production in criminal matters. This would assist with implementing our recommendations.

5.140 We recommend that District Court sentence appeals be determined on the basis of the "material" before the Local Court and the magistrate's reasons. This is a change from the current provision for sentence appeals in s 17 of CARA, which requires the appeal to be heard on the "evidence" given in the original Local Court proceedings. In our view, "material" is a more appropriate phrase because it encompasses material both formally and informally provided during the Local Court proceedings. It is not confined to the formal record of "evidence", when there may be none. Some stakeholders have suggested that the magistrate's reasons on sentence are commonly brief and would not be particularly helpful for an appeal. Even if that is the case, it is surely better that the District Court have regard to those reasons, however brief they may be, than not to consider them at all.

**Recommendation 5.1: Change sentence appeals to the District Court**

(1) Appeals against conviction from the Local Court to the District Court should continue to be by way of rehearing as currently set out in s 18 and s 19 of the *Crimes (Appeal and Review) Act 2001* (NSW).

(2) Appeals against sentence from the Local Court to the District Court should be by way of rehearing on the basis of the material before the Local Court and the magistrate's reasons. Fresh evidence should be given only with leave of the District Court, if it is in the interests of justice.

(3) The NSW Department of Attorney General and Justice should investigate alternatives to producing typed transcripts in criminal appeals from the Local Court.

## Case stated from the District Court to the Court of Criminal Appeal

5.141 In this section we consider the current process for decisions of the District Court, determining an appeal from the Local Court, to be reviewed by the CCA.

### Current law

5.142 A judge of the District Court may submit a question of law, arising on an appeal from the Local Court, to the CCA for determination.[122] This is known as a "case stated". Either party may ask the judge to state a case to the CCA. It is the only method of questioning the District Court's determination of an appeal from the Local Court. There is no secondary avenue of appeal, not even an appeal on a question of law in such a case.[123]

5.143 In a case stated the judge must state the facts found in the proceedings and the question/s of law for the CCA to consider. This process has been described as "to a high degree formalistic and technical".[124] As the CCA may not, strictly speaking, have regard to matters outside the case stated, its form is particularly important.[125]

122. *Criminal Appeal Act 1912* (NSW) s 5B. This also applies to the Land and Environment Court and the Industrial Relations Commission in Court Session under s 5BA and s 5BB: see Chapter 12.

123. See *Lavorato v R* [2012] NSWCCA 61; 82 NSWLR 568 [5]-[6] (Basten JA). However, a party may be able to bring a claim for judicial review in the Court of Appeal, limited solely to jurisdictional error: see *Spanos v Lazaris* [2008] NSWCA 74 [15].

124. *Talay v R* [2010] NSWCCA 308 [64] (Howie AJ).

125. *Talay v R* [2010] NSWCCA 308 [17] (Simpson J).

## Reforming the case stated procedure

### *Case stated has been widely criticised*

5.144 The CCA has criticised the case stated procedure as being difficult and time consuming. Justice Schmidt has described it as "cumbersome, unwieldy and ... ultimately unjust and unnecessarily expensive".[126]

5.145 Problems with the case stated have long been recognised. In 1986, Chief Justice Street observed:

> It should be recognised at the outset that a stated case is well-known as a cumbersome and often unsatisfactory means of bringing a matter up for consideration on appeal. There are occasionally issues of law which can conveniently be dealt with through this appellate procedure. In general, however, it is a procedure which is fraught with difficulties ...[127]

5.146 The case stated procedure from the Local Court to the Supreme Court was abolished in 1998 and replaced with an appeal on the steering committee's recommendation. The committee's reasons for this were that the case stated procedure was "cumbersome and unwieldy", unpopular as a means of review for a convicted person and "has few supporters amongst the judiciary or practitioners".[128] In our view the same criticisms apply to the case stated procedure from decisions of the District Court.

5.147 The recent Court of Appeal decision in *Landsman v DPP*[129] further highlights the cumbersome nature of the case stated. The defendant appealed against his Local Court conviction to the District Court. The judge granted the prosecution's application for leave to give fresh evidence relating to statements the defendant made following his conviction. The defendant sought to have a case stated to the CCA on whether giving that evidence was in the interests of justice. The judge refused to state a case on the basis that no question of law was disclosed. The defendant then sought judicial review in the Court of Appeal of the judge's refusal to state a case. The Court of Appeal held that a question of law did in fact arise and that the judge had committed jurisdictional error in failing to state the case. The matter was remitted back to the District Court for a case to be stated to the CCA. A right of appeal could have circumvented this complicated and lengthy process.

### *Our view: case stated should be abolished*

5.148 The case stated procedure is no longer an acceptable mechanism for reviewing or correcting error in criminal appeals in the District Court. We recommend that the case stated procedure be abolished and replaced with a second appeal from the District Court to the CCA where the District Court has determined an appeal from the Local Court. That right of appeal should be subject to a leave requirement and

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126. *Lavorato v R* [2012] NSWCCA 61; 82 NSWLR 568 [72].See also *Talay v R* [2010] NSWCCA 308 [64] (Howie AJ).
127. *Collins v State Rail Authority of NSW* (1986) 5 NSWLR 209, 211.
128. Justices Act Review Steering Committee, *Justices Act Review*, Report (1992) 51.
129. *Landsman v DPP* [2013] NSWCA 369.

confined to a question of law. There was strong support amongst stakeholders for this proposal.[130]

5.149 The NSW Bar Association suggested that second appeals from the District Court to the CCA be confined to grounds such as denial of procedural fairness, apprehended bias, *ultra vires*, failure to exercise jurisdiction, and error of law on the face of the record.[131] The Bar Association considered it desirable for legislation to contain a specified list of the grounds of appeal. We consider that the grounds of appeal suggested by the Bar Association would fall within the ambit of a "question of law".

5.150 Given that second appeals from the District Court are relatively infrequent, we do not intend to limit the availability of appeal beyond a requirement for leave and the need for the appeal to involve a question of law.

**Recommendation 5.2: Abolish case stated from the District Court**

(1) The case stated procedure under s 5B of the *Criminal Appeal Act 1912* (NSW) should be abolished.

(2) When the District Court determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law.

130. Appeals from the Local Court roundtable, *Consultation CA3*; NSW Bar Association, *Submission CA5,* 7; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 6; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 14; Legal Aid NSW, *Submission CA12,* 9; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 11.

131. NSW Bar Association, *Submission CA5,* 7.

# 6. Appeals from the Local Court to the Supreme Court

**In brief**

Appeals from the Local Court to the Supreme Court are infrequent and mostly brought by the prosecution. Stakeholders support an avenue of appeal to the Supreme Court to allow questions of law to be authoritatively determined. Appeals to the Supreme Court should be retained but confined to questions of law. Further appeals from the Supreme Court should lie to the Court of Criminal Appeal.


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6.1 In this chapter we consider appeals from criminal proceedings in the Local Court to the Supreme Court (other than judicial review), and second appeals from the Supreme Court.

## Appeals from the Local Court to the Supreme Court

### Current law

6.2 Appeals from the Local Court to the Supreme Court are available as of right on a ground involving a question of law, against:

- conviction, by the defendant
- sentence, by the prosecutor or defendant
- an order staying summary proceedings, by the prosecutor
- an order dismissing a matter the subject of summary proceedings, by the prosecutor, and
- an order for costs made by the Local Court against the prosecutor in summary proceedings or committal proceedings.[1]

6.3 The defendant may appeal to the Supreme Court against a conviction or sentence on a ground involving a question of fact or mixed fact and law, with leave. Either party may appeal to the Supreme Court, with leave, on a ground involving a

1. *Crimes (Appeal and Review) Act 2001* (NSW) s 52, s 56.

question of law, against an interlocutory order or an order made by a magistrate in the course of committal proceedings.[2]

6.4 An order made by a magistrate authorising or refusing to authorise a forensic procedure under the *Crimes (Forensic Procedures) Act 2000* (NSW) may also be appealed to the Supreme Court as if the order were a sentence or an order dismissing proceedings respectively.[3]

6.5 Previously, a magistrate's decision could be reviewed in the Supreme Court by way of case stated.[4] However in 1998, following the recommendation of the steering committee, the case stated process was abolished and replaced with an appeal on a question of law.[5]

## Frequency of appeals to the Supreme Court

6.6 Appeals from the Local Court to the Supreme Court appear to be infrequent. Our caselaw database search indicates that the Supreme Court determines between 15 and 25 appeals each year under Part 5 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). This is consistent with the experience of many stakeholders, who describe Supreme Court appeals as uncommon.[6]

### Table 6.1: Appeals from the Local Court to the Supreme Court under the *Crimes (Appeal and Review) Act 2001* (NSW), 2011-2013

| Year | Type of appeal | Number of appeals | Number successful | % successful |
|---|---|---|---|---|
| 2013 | Prosecution appeal against dismissal of charge | 8 | 6 | 75% |
| | Defendant appeal against conviction and/or sentence | 5 | 2 | 40% |
| | Prosecution appeal against interlocutory order | 1 | 0 | 0% |
| | Defendant appeal against interlocutory order | 1 | 0 | 0% |
| | Appeal from order made under *Crimes (Forensic Procedures) Act 2000* (NSW) | 3 | 1 | 33% |
| | Appeal from order made under the Local Court's special jurisdiction | 1 | 0 | 0% |
| | **Total** | **19** | **9** | **148%** |

2. *Crimes (Appeal and Review) Act 2001* (NSW) s 53, s 57.
3. *Crimes (Forensic Procedures) Act 2000* (NSW) s 115A. This issue is discussed further in Chapter 7.
4. *Justices Appeal Act 1881* (NSW) s 1, later *Justices Act 1902* (NSW) s 101.
5. *Justices Legislation Amendment (Appeals) Act 1998* (NSW) sch 1 [2]; Justices Act Review Steering Committee, *Justices Act Review*, Report (1992) 56.
6. NSW Bar Association, *Submission CA5,* 3; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 4; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 9; Legal Aid NSW, *Submission CA12,* 7; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 7; Local Court of NSW, *Submission CA14,* 8.

| Year | Type of appeal | Number of appeals | Number successful | % successful |
|---|---|---|---|---|
| 2012 | Prosecution appeal against dismissal of charge | 15 | 11 | 73% |
| | Defendant appeal against conviction and/or sentence | 3 | 0 | 0% |
| | Prosecution appeal against costs order | 1 | 1 | 100% |
| | Defendant appeal against interlocutory order | 1 | 0 | 0% |
| | Appeal from order made under *Crimes (Forensic Procedures) Act 2000* (NSW) | 3 | 2 | 66% |
| | Appeal from order made under the Local Court's special jurisdiction | 1 | 1 | 100% |
| | **Total** | **24** | **15** | **55%** |
| 2011 | Prosecution appeal against dismissal of charge | 3 | 3 | 100% |
| | Prosecution appeal against stay of proceedings | 1 | 1 | 100% |
| | Prosecution appeal against costs order | 1 | 1 | 100% |
| | Defendant appeal against conviction and/or sentence | 3 | 2 | 66% |
| | Defendant appeal against interlocutory order | 1 | 0 | 0% |
| | Appeal against order made in committal proceedings | 1 | 1 | 100% |
| | Appeal from order made under *Crimes (Forensic Procedures) Act 2000* (NSW) | 1 | 1 | 100% |
| | Appeal from order made under the Local Court's special jurisdiction | 1 | 1 | 100% |
| | **Total** | **12** | **10** | **83%** |
| **Total for all years** | | **51** | **32** | **62%** |

*Source: NSW Law Reform Commission search of online case databases*[7]

6.7 Prosecution appeals against the dismissal of charges make up a large proportion of appeals to the Supreme Court, and Supreme Court appeals generally have high success rates. This may indicate that only those cases that raise a genuine dispute on a question of law are appealed to the Supreme Court.

6.8 We also note that in many of these cases prerogative relief under s 69 of the *Supreme Court Act 1970* (NSW) was sought in the alternative.

7. We searched NSW Caselaw, LexisNexis CaseBase and FirstPoint. These numbers exclude unpublished Supreme Court decisions; appeals which were filed but did not proceed to judgment; and cases where an appeal under *Crimes (Appeal and Review) Act 2001* (NSW) was filed but the case was determined on other grounds.

## Reforming appeals to the Supreme Court

### *Our view: appeals to the Supreme Court should be retained*

6.9 Appeal to the Supreme Court rather than to the District Court may be desirable where:

(a) the error cannot be corrected in the District Court, for example where it involves an interlocutory order

(b) the appellant wishes to establish a precedent, or

(c) the appellant wishes to bring a quick end to protracted or clearly unmeritorious proceedings.[8]

6.10 Submissions generally supported the retention of a direct avenue of appeal to the Supreme Court.[9] The NSW Bar Association noted that it provides a mechanism by which the Supreme Court can declare and clarify the law, for the guidance of other courts.[10] The NSW Office of the Director of Public Prosecutions similarly suggested that it can help promote consistency and certainty in Local Court decisions.[11] Legal Aid NSW also pointed out that it was the only way in which the prosecution could appeal an erroneous acquittal in the Local Court.[12] NSW Young Lawyers noted that Supreme Court decisions provided useful precedents for practitioners.[13]

6.11 We agree for the reasons given by stakeholders that direct appeals to the Supreme Court should be retained. Currently an appeal to the District Court cannot be made against a decision that is or has been the subject of an appeal to the Supreme Court.[14] The appellant is effectively required to elect between a Supreme Court appeal and a District Court appeal where both avenues are available. In our view, these avenues of appeal should continue to operate as alternatives.

### *Our view: appeals to the Supreme Court should be confined to questions of law*

6.12 We recommend removing the ability for the defendant to appeal with leave against conviction or sentence on a question of fact or mixed fact and law. The removal of appeals to the Supreme Court had the support of some stakeholders.[15]

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8. A Haesler, "Appeals from the Local Court to the Supreme Court" (Paper presented at the Public Defenders Conference, August 2005).
9. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 4; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 7-8.
10. NSW Bar Association, *Submission CA5,* 2.
11. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 9.
12. Legal Aid NSW, *Submission CA12,* 4.
13. NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 7.
14. *Crimes (Appeal and Review) Act 2001* (NSW) s 29(1)(c). However, this does not prevent an appeal to the District Court where the Supreme Court remitted the matter to the Local Court, and it has been redetermined by the Local Court: s 29(2)(a).
15. Appeals from the Local Court roundtable, *Consultation CA3*; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 10. See also Local Court of NSW, *Submission CA14,* 8.

6.13 The District Court has the capacity on appeal to determine cases that involve questions of fact as well as questions of law. The Supreme Court's status as a superior court means its jurisdiction in this context should be confined to questions of law. It is unnecessary to duplicate the avenues of appeal, and the District Court should otherwise be the primary appeal court for Local Court matters. We also note that there have been very few appeals against conviction and sentence to the Supreme Court, indicating that the current avenue of appeal to the Supreme Court on questions of fact is rarely used.

6.14 We also considered whether all appeals to the Supreme Court should be by leave. However, the small number of appeals to the Supreme Court each year suggests that the current avenues of appeal as of right are not being abused and a requirement for leave for all appeals is unlikely to be useful.

**Recommendation 6.1: Retain Local Court appeals to the Supreme Court**

(1) The defendant should be able to appeal from the Local Court to the Supreme Court against a conviction or sentence on a ground involving a question of law.

(2) The prosecution should be able to appeal from the Local Court to the Supreme Court on a ground involving a question of law against:

(a) a sentence

(b) an order staying or dismissing summary proceedings, or

(c) an order for costs made against the prosecutor in either committal or summary proceedings.

(3) Either party should be able to appeal from the Local Court to the Supreme Court, with leave on a ground involving a question of law, against:

(a) an interlocutory order, or

(b) an order made in relation to a person in committal proceedings.

(4) It should not be possible to appeal from the Local Court to the District Court against a decision that is or has been the subject of an appeal or application for leave to appeal to the Supreme Court.

(5) Paragraph (4) should not prevent an appeal to the District Court where the Supreme Court remitted the matter to the Local Court, and the Local Court redetermined the matter.

## Second appeals from the Supreme Court

6.15 Under the present law a decision of the Supreme Court on appeal from the Local Court may be further appealed to the Court of Appeal, with leave.[16] In our view it does not make much sense for the Court of Appeal to hear these appeals, given that they are criminal in nature. We consider that the Court of Criminal Appeal

16. *Supreme Court Act 1970* (NSW) s 101(2)(h).

(CCA) should be the sole appellate court for criminal proceedings. Stakeholders support this position.[17]

6.16 We therefore recommend that second appeals from the Supreme Court should lie to the CCA, with leave, on a question of law. This is a narrower avenue of appeal than the current appeal to the Court of Appeal, which may be made on any ground. However, as this is a second appeal, we consider it appropriate that the appeal be restricted to a question of law, and be subject to a leave requirement.

**Recommendation 6.2: Second appeals from the Supreme Court to the Court of Criminal Appeal**

(1) Section 101(2)(h) of the *Supreme Court Act 1970* (NSW), allowing an appeal to the Court of Appeal from an order of the Supreme Court under Part 5 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be abolished.

(2) When the Supreme Court determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law.

17. Appeals from the Local Court roundtable, *Consultation CA3*; NSW Bar Association, *Submission CA5,* 4; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 4; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 9; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 8.

# 7. Appeals from the Local Court – other issues

**In brief**

In this chapter we deal with a number of issues in appeals from the Local Court. We recommend some amendments to the Local Court's annulment power to increase flexibility but also to limit the scope for multiple applications for the same conviction or sentence. The requirement to give a *Parker* direction should be contained in legislation. The District Court's powers in a conviction appeal should be expanded, and the time limit for appealing to the District Court should be extended in exceptional circumstances. We also make some recommendations to clarify and update other provisions.


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7.1 In this chapter we consider some additional issues that arise in relation to appeals from and review of Local Court criminal proceedings.

## Annulment of conviction or sentence by the Local Court

### Current law

7.2 The Local Court, on application by either the prosecutor or defendant, can annul a conviction or sentence imposed in that court.[1] A defendant can make an annulment application if he or she was "not in appearance before the Local Court when the conviction was made" (in the case of an application for an annulment of a conviction) or was "not in appearance before the Local Court when the sentence was imposed" (in the case of an application for an annulment of a sentence). The time limit is two years after the relevant conviction or sentence is made or imposed.

7.3 A defendant can also make an application for annulment to the Minister at any time after the date of the conviction or sentence. If the Minister is satisfied that a question or doubt exists as to the defendant's guilt or liability for a penalty, he or she may refer the application to the Local Court.[2]

7.4 The Local Court must grant an application for annulment by the prosecutor if, having regard to the circumstances of the case, there is just cause for doing so.[3]

7.5 The Local Court must grant the defendant's application for annulment if satisfied:

1. *Crimes (Appeal and Review) Act 2001* (NSW) s 4(1).
2. *Crimes (Appeal and Review) Act 2001* (NSW) s 5.
3. *Crimes (Appeal and Review) Act 2001* (NSW) s 8(1).

(a) that the defendant was not aware of the original Local Court proceedings until after the proceedings were completed

(b) that the defendant was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the original Local Court proceedings, or

(c) that, having regard to the circumstances of the case, it is in the interests of justice to do so.[4]

7.6 Paragraphs (b) and (c) are to be widely interpreted.[5] "Hindered" in paragraph (b) should be read as being something less than prevention, namely making attendance more difficult but not impossible.[6]

7.7 The "interests of justice" consideration in paragraph (c) could potentially encompass a wide range of circumstances and effectively turns an annulment application into a quasi appeal. This is particularly so because a defendant who was absent when convicted by the Local Court must first apply for annulment before he or she can appeal to the District Court or the Land and Environment Court.[7] This may, in effect, treat annulment as the first step in the appeals process.

7.8 The annulment power was introduced in 1967 and initially limited to a discrete set of circumstances. Prior to 1967, if a person was convicted in their absence before what was then the Court of Petty Sessions but did not become aware of their conviction within the 28 day period for filing an appeal, the only remedy available was to petition the Governor for a pardon.[8] The annulment provision was significantly recast in 1997.[9] The 1997 amendments were intended to broaden the circumstances in which a person could be convicted in their absence in the Local Court, but with a corresponding widening of the grounds on which the Local Court could annul the conviction and subsequent sentence.[10]

## Our views on the issues raised

### *Written advice of intention not to attend should constitute "appearance"*

7.9 A defendant can only apply for annulment if he or she was not "in appearance" before the Local Court when the conviction was made or the sentence was imposed.[11]

7.10 Recent amendments have clarified that where a defendant files a written plea that complies with the requirements of s 182 of the *Criminal Procedure Act 1986* (NSW)

4. *Crimes (Appeal and Review) Act 2001* (NSW) s 8(2).
5. *Miller v DPP* [2004] NSWCA 90; 145 A Crim R 95 [39].
6. *Miller v DPP* [2004] NSWCA 90; 145 A Crim R 95 [40].
7. *Crimes (Appeal and Review) Act 2001* (NSW) s 12(2), s 32(3).
8. *Miller v DPP* [2004] NSWCA 90; 145 A Crim R 95 [33].
9. *Justices Amendment (Procedure) Act 1997* (NSW) sch 1 [6].
10. NSW, *Parliamentary Debates,* Legislative Assembly, 15 October 1997, 817. See also *Miller v DPP* [2004] NSWCA 90; 145 A Crim R 95 [21].
11. *Crimes (Appeal and Review) Act 2001* (NSW) s 4(1A).

(CPA), he or she cannot make an application for annulment.[12] This is because the defendant will be taken to have attended court on the required date.[13] The Local Court has, however, informed us that defendants will sometimes provide a letter stating that they wish the proceedings to be determined in their absence, in a way which does not comply with s 182(2) of the CPA.[14] In those circumstances, they will be able to make an application for annulment because they were not deemed to be "in appearance" for the purposes of s 4 of *Crimes (Appeal and Review) Act 2001* (NSW) (CARA), even though they were aware of the proceedings and had informed the court that they had elected not to attend. The Local Court suggested that informal written advices of this kind should also be taken to constitute an "appearance" for the purpose of s 4.

7.11 We agree with this suggestion. Where the defendant has agreed that the matter can be dealt with in their absence but has not complied with the requirements of s 182 of the CPA, it would seem inconsistent with the legislative scheme that they are later able to apply for an annulment.

**Recommendation 7.1: Annulment not to be available where defendant advised of intention not to attend**

A defendant should not be able to apply to annul a conviction or sentence if the defendant had informed the Local Court in writing of his or her intention not to attend the proceedings in which the defendant was convicted or sentenced.

### *Local Court should have greater flexibility in dealing with annulment applications*

7.12 Some stakeholders suggested that provision should be made for an oral application for annulment on the same day as the hearing.[15] We agree that this proposal would increase timeliness and efficiency in dealing with annulment applications for those people who arrive at court after their matter is dealt with. This is a reasonably common occurrence for a variety of reasons, including illness, transport delays and simple unpunctuality.

7.13 We also note that s 4(1) of CARA provides that an application for annulment is to be made "to the Local Court sitting at the place at which the original Local Court proceedings were held". Legal Aid NSW has suggested that it should be possible to make uncontentious applications for annulment at any Local Court once the original papers are obtained.[16] We understand that, in practice, any Local Court registry will accept an application for annulment, but it will be listed at the Local Court location

12. *Crimes (Appeal and Review) Act 2001* (NSW) s 4(1B), inserted by *Crimes and Courts Legislation Amendment Act 2013* (NSW) sch 2 [1].
13. *Criminal Procedure Act 1986* (NSW) s 182(3).
14. Information provided by Deputy Chief Magistrate, Local Court of NSW (30 October 2013).
15. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 10; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 21. Legal Aid NSW supported a broader power to make an oral application in uncontentious cases: Legal Aid NSW, *Submission CA12,* 18.
16. Legal Aid NSW, *Submission CA12,* 18.

where the conviction or sentence was initially made or imposed.[17] For clarity, we suggest that the annulment provision be amended to reflect current practice, and to assist defendants who may reside some distance from the Local Court which initially dealt with the matter.

**Recommendation 7.2: Increase flexibility to make annulment applications**

(1) A party should be able to apply orally to annul a conviction or sentence on the same day that the conviction or sentence was made or imposed.

(2) The Local Court sitting at any place should be able to accept an application for annulment, not just at the place where the original proceedings were held.

### *Local Court should grant leave for subsequent annulment applications only in exceptional circumstances*

7.14 Section 4(3) of CARA provides that, except by leave of the Local Court, a person may not make more than one application for annulment in relation to the same matter. The Local Court noted that repeat annulment applications are frequently made, and that the requirement for leave does not limit unmeritorious applications.[18] It submitted that the ability to make repeat annulment applications has the potential both to increase the time taken to dispose of individual matters, as well as impacting upon the efficient management of the court's criminal caseload.[19]

7.15 However, other stakeholders were not in favour of limiting a defendant's ability to make subsequent annulment applications. It was suggested that annulment applications are frequently made on behalf of defendants with mental health conditions, drug or alcohol problems or health conditions.[20] Limiting the circumstances in which a subsequent annulment application can be made would only further disadvantage those defendants. The breadth of the Local Court's power to convict someone in their absence was also cited as a reason in favour of maintaining a broad annulment scheme.[21]

7.16 In the interests of finality, we consider that there should be limits on the circumstances in which a subsequent application for annulment can be made. We therefore propose restricting the Local Court's ability to grant leave for a subsequent annulment application to exceptional circumstances. We note that an appeal lies to the District Court as of right against a refusal to annul a conviction,[22] and so a defendant would still have an avenue of redress where a subsequent annulment

17. Information provided by Court Services, NSW Department of Attorney General and Justice (2 December 2013).
18. Local Court of NSW, *Submission CA14,* 9.
19. Local Court of NSW, *Submission CA14,* 9.
20. Legal Aid NSW, *Submission CA12,* 18.
21. Appeals from the Local Court roundtable, *Consultation CA3*.
22. *Crimes (Appeal and Review) Act 2001* (NSW) s 11A. However, only one appeal against a refusal to annul a conviction may be made in respect of any particular conviction: s 11A(3).

application was unjustly refused. We consider that this strikes an appropriate balance between fairness to the defendant and finality in Local Court proceedings.

**Recommendation 7.3: Leave for second or subsequent annulment application to be granted in exceptional circumstances**

The Local Court should only grant leave to make a second or subsequent annulment application if there are exceptional circumstances.

### *Local Court should be able to annul for administrative error*

7.17 The Local Court has suggested that it would be useful for it to be able to annul a conviction or sentence of its own motion to correct an administrative error.[23] For example, a situation may arise where the defendant has filed a written notice of appearance, but the notice is inadvertently omitted from the court file, resulting in the magistrate proceeding to hear the matter as if the defendant had failed to appear. At present, if such a situation occurs, the Local Court registry will write to the defendant and invite him or her to make an application for annulment,[24] but that then uses up the defendant's only annulment application as of right when they were not at fault for the error.

7.18 We agree with the Local Court that it would be sensible for it to be able to annul convictions or sentences on its own motion to correct an administrative error or irregularity of this kind. We consider that such a power should be framed narrowly, to make it clear that it only applies in limited circumstances. Therefore, we recommend that the Local Court should have the power to annul a conviction or sentence of its own motion where the defendant's absence was due to an administrative error that has occurred through no fault of the defendant.

**Recommendation 7.4: Local Court to have power to annul for administrative error**

The Local Court should have the power to annul a conviction or sentence of its own motion where it has convicted or sentenced an absent defendant, and the absence was due to an administrative error or irregularity that was not caused by the defendant.

## Giving of *Parker* directions by the District Court

7.19 There is an established practice in District Court appeals against sentence that a judge, who is contemplating the possibility of increasing an offender's sentence on appeal, will signify this to the appellant. This gives the appellant an opportunity to seek leave to withdraw the appeal without risking an increased penalty. This practice is known as the giving of a *Parker*[25] direction. The practice originated as a

23. Local Court of NSW, *Response CA1.*
24. Information provided by Deputy Chief Magistrate, Local Court of NSW (30 October 2013).
25. *Parker v DPP* (1992) 28 NSWLR 282.

species of the double jeopardy principle. It has been endorsed by the Court of Appeal, which has observed that it should rarely, if ever, be departed from.[26]

7.20 The *Parker* principle is one of fair procedure and is designed to avoid unnecessary exposure to a risk of double jeopardy. It is not a rigid principle. It ensures that the judge alerts an appellant to the risk that proceeding with an appeal may result, not in relief from the sentence, but in an increase to it.[27]

7.21 The consequences for the appellant of the new sentence appear to determine whether or not that sentence is taken to have been increased, thereby requiring a *Parker* direction. A change in the character of a sentence can warrant a *Parker* direction where the new sentence is or could be more onerous than the previous one.[28] A *Parker* direction has been held to be necessary where:

- a term of periodic detention is being replaced with a term of full time imprisonment, despite the length of the sentence remaining the same, due to the more disruptive nature of full time imprisonment[29]
- a fine is being replaced with a recognisance, due to the risk of imprisonment if the recognisance is not complied with,[30] and
- a term of imprisonment (to be served concurrently with other terms) is being replaced with a recognisance, without the appellant being warned of the risk of further imprisonment if the recognisance is not complied with (although this was expressed to be at the "limits" of the *Parker* principle).[31]

### *Our view: Parker directions should be retained and legislated*

7.22 Giving a *Parker* direction ensures fairness in sentence appeals, particularly in circumstances where the appeal is by way of rehearing. It is a well established practice that is not confined to appeals from the Local Court.[32] Stakeholders supported maintaining the practice of giving a *Parker* direction.[33] We consider that it should be retained.

7.23 We recommend that, for clarity, the giving of a *Parker* direction should be provided for in legislation. At the moment it is simply an established practice in criminal appeals. While stakeholders were in favour of retaining the *Parker* direction, some considered that it was not necessary to provide for it in legislation.[34] In our view, it is important that it is made clear, particularly for unrepresented appellants, that their

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26. *Parker v DPP* (1992) 28 NSWLR 282, 295 (Kirby P).
27. *Ho v DPP* (1995) 37 NSWLR 393, 398.
28. *Jones v DPP* (1994) 76 A Crim R 422, 425.
29. *Jones v DPP* (1994) 76 A Crim R 422, 424.
30. *Relic v DPP* [2000] NSWCA 84 [19]-[20].
31. *Baker v DPP* [1996] NSWCA 39.
32. In an appeal against sentence imposed for proceedings on indictment, the Court of Criminal Appeal has held that it would be inappropriate for it to increase the sentence without first providing the applicant with an opportunity to withdraw his or her application: *Arnaout v R* [2008] NSWCCA 278; 191 A Crim R 149 [15] (Basten JA).
33. Appeals from the Local Court roundtable, *Consultation CA3.*
34. Appeals from the Local Court roundtable, *Consultation CA3*; Chief Judge of the District Court of NSW, *Response CA5*.

sentence cannot be increased without prior warning that they have an opportunity to seek leave to withdraw their appeal. Further, some judges may give vaguely worded *Parker* directions,[35] and having a requirement in the legislation to give a *Parker* direction may assist with avoiding ambiguity as to what is required.

**Recommendation 7.5: *Parker* direction to be contained in legislation**

A new Criminal Appeal Act should provide that, in an appeal by a defendant from the Local Court to the District Court against a sentence, if the judge is contemplating imposing a sentence that may be more onerous than the original sentence, the judge must tell the defendant and provide the opportunity to seek leave to withdraw the appeal.

## Powers of the District Court on appeal

### Current law

7.24 Table 7.1 shows the current powers available to the District Court when determining an appeal from the Local Court.

**Table 7.1: Powers of the District Court on appeal from the Local Court**

| Type of appeal | Powers |
|---|---|
| Conviction | ▪ Set aside conviction.<br>▪ Dismiss appeal.<br>▪ In the case of a person who pleaded guilty or was convicted in their absence – set aside the conviction and remit the matter to the Local Court for determination.<br>(CARA s 20(1)) |
| Refusal of the Local Court to annul a conviction | ▪ Grant the application, in which case the District Court *must* remit the matter to the Local Court.<br>▪ Dismiss the appeal.<br>(CARA s 16A) |
| Sentence, by both defendant and Director of Public Prosecutions | ▪ Set aside sentence.<br>▪ Vary sentence. (This includes varying the severity of the sentence; setting aside the sentence and imposing some other sentence of a more or less severe nature; and the power to make an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), including setting aside the conviction to allow the order to be made: CARA s 3(3), (3A))<br>▪ Dismiss appeal.<br>(CARA s 20(2), s 27(1)) |
| Appeal by prosecutor against making of a costs order | ▪ Set aside the order and make such other order as it thinks just.<br>▪ Dismiss appeal.<br>(CARA s 27(2)) |

35. Appeals from the Local Court roundtable, *Consultation CA3*.

7.25 The powers of the District Court in an appeal against conviction are limited. If the appeal is successful the only option available to the District Court is to set aside the conviction. By way of contrast, the Court of Criminal Appeal (CCA) has a wide range of powers in an appeal against conviction under the *Criminal Appeal Act 1912* (NSW) (CAA).

7.26 The power to "set aside" the conviction is not the same as formally dismissing the charge or finding the appellant not guilty, although in allowing an appeal against conviction that would no doubt be the intention of the District Court.[36] An order setting aside the conviction would theoretically allow the prosecutor to lay the charge again in the Local Court, although the defendant may be able to submit a plea in bar in order to give effect to the principle of double jeopardy.[37]

7.27 Previously when the District Court heard conviction appeals *de novo*, it had very broad powers in determining an appeal. It could confirm, quash, vary or set aside the conviction, and make such other orders as it thought just.[38]

## Power to substitute a verdict of guilty for a different offence

### *Lack of power to substitute is restrictive*

7.28 The NSW Office of the Director of Public Prosecutions (NSW ODPP) suggested that, in a successful conviction appeal, the District Court should have the power to substitute a verdict of guilty for another offence that would have been available at first instance.[39]

7.29 The CCA can substitute a verdict of guilty for a different offence and pass sentence when hearing an appeal against conviction for proceedings dealt with on indictment. The power is contained in s 7(2) of the CAA, which provides:

> Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

7.30 This power has been held to be available to substitute a guilty verdict where the "other offence" is wholly within the ultimate facts of the offence on which the defendant has been convicted and which the court has set aside in the appeal.[40] The classic case is a conviction for assault occasioning grievous bodily harm, where the appeal court is of the view that the prosecution failed to prove grievous bodily

36. *DPP v Burns* [2010] NSWCA 265; 207 A Crim R 362 [42].
37. *DPP v Burns* [2010] NSWCA 265; 207 A Crim R 362 [47].
38. *Justices Act 1902* (NSW) s 133A (repealed).
39. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 20.
40. *Spies v R* [2000] HCA 43; 201 CLR 603 [23].

harm. In such a case a conviction for common assault could be substituted under s 7(2).[41]

7.31 The absence of the power suggested by the NSW ODPP seems to cause a particular problem where a back up charge was before the Local Court but not dealt with because of the conviction. If the defendant is found guilty of the more serious charge but then appeals that conviction, the only option available to the District Court in a successful appeal is to set aside the conviction. It cannot enliven the back up charge that was before the Local Court. While this does not prevent another charge being brought again in the Local Court, it would result in delay and inefficiency in court processes. It may also mean that the 6 month time limit for bringing proceedings for the back up or lesser offence has expired.[42]

7.32 The NSW ODPP gave the example of a person who is convicted in the Local Court of assault occasioning bodily harm in company, with assault occasioning bodily harm as a back up charge. If, on appeal, the District Court is satisfied that the defendant committed the assault but was not "in company" at the time of the offence, the judge has no alternative but to set aside the conviction.[43]

7.33 It may also be desirable for the District Court to be able to substitute an offence for a statutory or common law alternative. The *Crimes Act 1900* (NSW) contains a number of statutory alternative verdicts. For example, the offence of receiving is a statutory alternative to stealing.[44] An alternative offence may also be available at common law where the lesser offence is an ingredient in the more serious offence charged.[45] An example of a common law alternative would be a charge of assault occasioning actual bodily harm, with common assault as the lesser alternative.[46]

7.34 Stakeholders generally supported empowering the District Court to substitute a verdict of guilty for another offence, so long as it did not result in the District Court appeal being run on a substantially different basis to the Local Court proceedings.[47]

### *Our view: District Court should be able to substitute verdict for back up or alternative offence*

7.35 Our view is that the District Court should be able to substitute a guilty verdict for another offence, particularly where the appeal turns on the existence of an aggravating factor (for example, whether the defendant was "in company" or whether an assault occasioned actual bodily harm). In such a case it seems fair that the lesser offence should be available to the District Court in the alternative. Otherwise the District Court must set aside the conviction, even where it is clear that the lesser offence has been committed.

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41. *Spies v R* [2000] HCA 43; 201 CLR 603 [23].
42. *Criminal Procedure Act 1986* (NSW) s 179.
43. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 21.
44. *Crimes Act 1900* (NSW) s 121.
45. *R v Cameron* [1983] 2 NSWLR 66, 68; *Winner v R* (1989) 39 A Crim R 180, 181.
46. See *Crimes Act 1900* (NSW) s 59(1), s 61.
47. Appeals from the Local Court roundtable, *Consultation CA3*.

7.36 We consider that the District Court's power to substitute a verdict should apply to statutory or common law alternative offences, back up offences charged in the Local Court or other offences that were withdrawn as the result of plea negotiations. In our view there is no unfairness to the defendant in such cases. The defendant will have either already been charged with the offence, or the offence is an alternative that would have been available at law in the Local Court.

## Power to resentence where some convictions set aside

7.37 The NSW ODPP also suggested that consideration be given to conferring in the District Court the power to intervene and resentence of its own initiative, in circumstances where some but not all convictions have been set aside.[48] This is similar to the power given to the CCA in s 7(1) of the CAA, which provides:

> If it appears to the court that an appellant … though not properly convicted on some count … has been properly convicted on some other count … the court may either affirm the sentence passed at the trial or pass such sentence whether more or less severe in substitution therefor as it thinks proper …

### *Our view: District Court should be able to resentence where some convictions are set aside*

7.38 Stakeholders did not have any objection to conferring such a power[49] and we agree that it would be a useful reform.

## Power to remit to the Local Court

### *Lack of remittal power is a problem*

7.39 The District Court does not have an express general power to remit the matter to the Local Court if a conviction appeal is successful.[50] The Court of Appeal recognised the difficulty that this may cause in some circumstances in *DPP v Emanuel.*[51]

7.40 In *Emanuel*, the Local Court denied the defendant procedural fairness in the hearing of an offence for which he was subsequently convicted. On appeal, the District Court quashed the conviction on the basis that the Local Court had no jurisdiction to make the original order, and remitted the matter to the Local Court. The Director of Public Prosecutions (DPP) sought judicial review of the District Court's decision in the Court of Appeal. The Court of Appeal concluded that the District Court was in error, as it had no power to remit the matter to the Local Court.[52] The Court of

48. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 22.
49. Appeals from the Local Court roundtable, *Consultation CA3*.
50. It has a power of remittal where the defendant pleaded guilty or was convicted in their absence, and it *must* remit in a successful appeal against the Local Court's refusal to annul a conviction: *Crimes (Appeal and Review) Act 2001* (NSW) s 16A(3), s 20(1)(c).
51. *DPP v Emanuel* [2009] NSWCA 42; 193 A Crim R 552.
52. *DPP v Emanuel* [2009] NSWCA 42; 193 A Crim R 552 [16]-[17].

Appeal quashed the District Court's order, set aside the conviction and sentence and remitted the matter to the Local Court.[53]

7.41 The Court of Appeal recognised that it would have been difficult for the District Court to determine the matter finally itself. An appeal against conviction in the District Court is by way of rehearing, and fresh evidence can only be given by leave.[54] It would be difficult for there to be a "rehearing" on appeal where there had not been a properly defended hearing in the Local Court. Furthermore, there is no general right of appeal from an appeal decision of the District Court. It would be anomalous for a defendant to be convicted at a first proper hearing conducted according to law in the District Court, without a right of appeal from any decision then given.[55]

7.42 Justice Basten considered that there are two possible ways to resolve the problem. The first is to require the defendant to appeal directly to the Supreme Court alleging an error of law, or to apply for judicial review, on the ground that the original proceedings were invalid. However, this course of action may increase delay and expense, and may provide for divided avenues of appeal in circumstances where the defendant seeks to appeal on more than one ground.[56] The second alternative is for the District Court to have a power of remittal. He would not rule out the possibility that the District Court might already have this power, although the point was not argued in that case.

7.43 The NSW ODPP submitted that situations where de facto summary hearings take place in the District Court on appeal should be avoided. They are unduly costly and restrict the subsequent appeal rights of the parties.[57] The 2008 statutory review also referred to the undesirability of having a defended hearing in the District Court without the issues first being fully litigated in the Local Court.[58] Stakeholders generally supported a power to remit the matter to the Local Court, in limited circumstances.[59]

### *Our view: District Court should have power to remit for denial of procedural fairness*

7.44 Currently the District Court can remit a matter to the Local Court in a conviction appeal where the defendant pleaded guilty in the Local Court, or was absent at first instance.[60] Presumably the rationale behind this approach is that the District Court itself would not be in a position to decide the defendant's guilt, given the lack of

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53. The Court of Appeal considered that it would be unsatisfactory to remit the matter to the District Court, and invited Mr Emanuel to file an appeal under *Crimes (Appeal and Review) Act 2001* (NSW) s 53, to allow the matter to be remitted to the Local Court: *DPP v Emanuel* [2009] NSWCA 42; 193 A Crim R 552 [6]-[7].
54. *Crimes (Appeal and Review) Act 2001* (NSW) s 18.
55. *DPP v Emanuel* [2009] NSWCA 42; 193 A Crim R 552 [57].
56. *DPP v Emanuel* [2009] NSWCA 42; 193 A Crim R 552 [58]-[59].
57. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 22.
58. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 25.
59. Appeals from the Local Court roundtable, *Consultation CA3*; Chief Judge of the District Court of NSW, *Response CA5*.
60. *Crimes (Appeal and Review) Act 2001* (NSW) s 16A(3), s 20(1)(c).

material from the Local Court on which to base its decision. The limited appeal rights available from the District Court suggest that it is not the proper place for a defendant to effectively have a first hearing according to law.

7.45 In our view, the power to remit should be extended to circumstances where there has been a denial of procedural fairness in the Local Court. In such cases the defendant will not have received a proper hearing in the Local Court and it would therefore be difficult for the District Court to rehear the matter on appeal. We do not expect that this will occur frequently.

7.46 We have considered whether a power to remit should be more broadly available, for example, in any appeal where the interests of justice so require. However, at this stage we are reluctant to recommend a broad power to remit. The denial of procedural fairness in *Emanuel* is the only case we are aware of where the lack of a power to remit caused practical difficulty. At this stage there is no evidence to suggest that a broader power is necessary. This is something that could be revisited at a later date if different circumstances arise.

**Recommendation 7.6: Expand powers of the District Court in conviction appeals**

The District Court should, in an appeal against a conviction, have the power to:

(a) set aside the conviction

(b) dismiss the appeal

(c) set aside the conviction and remit the matter to the Local Court to redetermine in accordance with any directions of the District Court, where the defendant:

  (i) pleaded guilty in the Local Court

  (ii) was absent before the Local Court, or

  (iii) did not receive procedural fairness in the Local Court

(d) vary the sentence if the defendant was properly convicted on some other count, on a similar basis to s 7(1) of the *Criminal Appeal Act 1912* (NSW), and

(e) substitute a guilty verdict for a different offence and pass sentence, where the substituted offence:

  (i) was originally charged by the prosecutor, and was either dismissed by the Local Court or withdrawn by the prosecutor as a result of plea negotiations, or

  (ii) is a common law or statutory alternative to the offence the subject of the appeal.

## Time limits

### Current law

7.47 The current time limits for filing an appeal from a Local Court decision are:

(a) For defendant appeals to the District Court – 28 days after the Local Court's decision. An appeal may be filed up to 3 months after the Local Court's decision, but leave is required between 28 days and 3 months.[61]

(b) For DPP appeals to the District Court – 28 days after the sentence is imposed (or the order for costs is made, in the case of an appeal against a costs order).[62] There is no provision in CARA allowing for appeals to be filed outside of this time frame.

(c) For appeals to the Supreme Court – 28 days after the Local Court's decision. The Supreme Court may grant an extension of time.[63]

7.48 Section 16(2) of CARA provides that the District Court must not grant leave to the defendant to file an appeal between 28 days and 3 months unless "it is in the interests of justice that leave be granted". The phrase "interests of justice" has the widest possible scope and enlivens the court's discretion.[64]

7.49 The consequence of the current provisions is that the defendant cannot appeal to the District Court more than 3 months after the Local Court decision, and the DPP cannot appeal more than 28 days after the sentence or costs order.

7.50 The NT is the only other Australian jurisdiction which prescribes an outer time limit for filing appeals from summary proceedings.[65] In all other jurisdictions, there is provision allowing an appeal to be filed out of time where the court grants leave or extends the time limit.

## Changing the time limits for Local Court appeals

### *Mixed stakeholder views on extending the time limit*

7.51 Stakeholders recognised that the current provisions can lead to injustice, in that a person who has genuine grounds of appeal but who has not made an application within 3 months will have no recourse. However, they generally opposed removing the outer time limit. They considered that this would significantly decrease the finality of Local Court proceedings. It might also increase the burden placed on Legal Aid NSW, which would have to consider the merits of many more applicants who wished to appeal outside of 3 months.[66]

7.52 The NSW ODPP considered that 3 months provides sufficient opportunity to appeal, particularly given that the appeals are generally as of right and there is no need to identify any specific grounds of appeal.[67] It noted that removing the 3 month limit

61. *Crimes (Appeal and Review) Act 2001* (NSW) s 11(2), s 11A(2), s 12(3), s 13.
62. *Crimes (Appeal and Review) Act 2001* (NSW) s 23(3).
63. *Crimes (Appeal and Review) Act 2001* (NSW) s 52(2), s 53(4), s 56(2); *Supreme Court Rules 1970* (NSW) pt 51B r 5-6.
64. *Herron v AG (NSW)* (1987) 8 NSWLR 601, 613.
65. *Justices Act* (NT) s 171(2).
66. Appeals from the Local Court roundtable, *Consultation CA3*.
67. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 15.

would result in leave being sought in more matters.[68] The Chief Judge of the District Court did not have a problem with an extension of the current time limit, but did not support a removal of the time limit altogether, for reasons of finality.[69]

7.53 Some submissions supported allowing appeals to be filed outside 3 months where "exceptional circumstances" existed.[70] Legal Aid NSW suggested that the time limit should be extended to 6 months in limited circumstances, such as where an unrepresented defendant was not aware of the time frames for filing the appeal. It considered that an "exceptional circumstances" requirement would not adequately capture the circumstances of unrepresented defendants, who were not "exceptional" in the Local Court.[71]

### *Our view: appeals to the District Court should be possible after 3 months*

7.54 We appreciate that strong reasons of finality weigh in favour of setting a definite time limit for appeals to the District Court. However, we also consider that the interests of fairness require a defendant to be able to bring an appeal outside of the time limit where this is truly justified. We do not believe that defendants should be completely denied the opportunity to appeal their conviction or sentence outside of the time limit, particularly given that 3 months is not very long. We therefore recommend that the District Court have the power to grant leave to appeal beyond 3 months where exceptional circumstances are made out. We expect that this power to grant leave would be sparingly used, and only in those cases where it is clear that injustice would occur if the appeal could not be brought.

7.55 We also consider that the DPP should have the same rights regarding time limits as the defendant. At present the DPP cannot file an appeal after 28 days. In our view, the ability to grant an extension of time is particularly important for the DPP. The NSW ODPP will not have been involved in the Local Court proceedings, and under its Prosecution Guidelines it must first consider a number of factors to determine whether an appeal against sentence is appropriate.[72]

**Recommendation 7.7: Allow District Court appeals to be filed after 3 months**

In appeals from the Local Court to the District Court, by both the defendant and the Director of Public Prosecutions:

(a) The time limit for filing an appeal should be 28 days after the original decision.

(b) If a party wishes to appeal more than 28 days after the original decision, the party must apply for leave.

(c) Where an application for leave to appeal is filed after 28 days but not more than 3 months after the original decision, the District Court may

68. NSW, Director of Public Prosecutions, *Response CA4*.
69. Chief Judge of the District Court of NSW, *Response CA5.*
70. NSW Bar Association, *Submission CA5,* 8; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 6.
71. Legal Aid NSW, *Submission CA12,* 10.
72. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 29.

grant leave to appeal if it is satisfied that it is in the interests of justice to do so.

(d) Where an application for leave to appeal is filed more than 3 months after the original decision, the District Court may grant leave to appeal only where it is satisfied that exceptional circumstances exist which justify the appeal being heard.

### *Our view: legislate time limit for appeals to the Supreme Court*

7.56 The current time limit for appeals to the Supreme Court should be retained. We appreciate that this creates a difference between the time limit for appeals to the Supreme Court and appeals to the District Court. However, in our view this difference is justified by the more limited basis for bringing a Supreme Court appeal and the much lower number of appeals.

7.57 The time limit for appeal to the Supreme Court is currently provided for in the *Supreme Court Rules 1970* (NSW) (SCR). In our view an important restriction on an appeal such as the time limit should be contained in legislation. We do not object to more procedural requirements, such as the procedure for applying for an extension of the time limit, being contained in rules or regulations.

**Recommendation 7.8: Legislate for time limits in appeals to the Supreme Court**

A new Criminal Appeal Act should provide that the time limit for filing an appeal from the Local Court to the Supreme Court should be 28 days from the date of the original decision, although the Supreme Court may grant leave to appeal out of time.

## Costs in appeals from the Local Court

### *Current law*

7.58 On an appeal from the Local Court, the District Court may make any order as to costs that it considers just.[73]

7.59 There is no express provision in CARA allowing the Supreme Court to award costs in relation to an appeal from the Local Court. In *ACP v Munro*, Justice Button concluded that he had the power to order costs in an appeal before the Supreme Court, despite the absence of an explicit statutory power to do so, but suggested that parliament should consider filling this possible gap in the costs power.[74]

7.60 However, s 70 of CARA limits the award of costs in appeals to both the District Court and Supreme Court, where a public prosecutor conducted the Local Court prosecution. Section 70 states that the appeal court should not award costs in favour of an appellant whose conviction is set aside unless it is satisfied of one of the following:

73. *Crimes (Appeal and Review) Act 2001* (NSW) s 28(3).
74. *ACP v Munro* [2012] NSWSC 1510 [106].

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner

(b) that the proceedings in the Local Court were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter:

(i) that the prosecutor was or ought reasonably to have been aware of, and

(ii) that suggested that the appellant might not be guilty or that, for any other reason, the proceedings should not have been brought, or

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs in favour of the appellant.

7.61 This provision has been construed as also applying to appellants whose sentence has been set aside.[75] Most appeals to the District Court are defendant appeals against conviction and sentence, and s 70 sets a high threshold for the award of costs in such appeals. This means that, for the vast majority of cases, costs are not recoverable in appeals from the Local Court to the District Court.

7.62 However, the position is different in the Supreme Court. There are few conviction and sentence appeals to the Supreme Court. Most appeals heard by the Supreme Court are prosecution appeals against the dismissal of charges or appeals against other types of orders such as interlocutory orders.[76] The limitation on costs in s 70 of CARA will not apply to these appeals.

7.63 We understand that the Supreme Court applies the rule that costs usually follow the event,[77] and so it does regularly award costs in appeals from the Local Court.[78] In some of the Supreme Court decisions that we review in Chapter 6, the DPP did not seek costs in the event that the appeal was successful. Where the DPP does seek costs, often the Supreme Court will issue an indemnity certificate under s 6 of the *Suitors' Fund Act 1951* (NSW).

### *Our view: retain power to order costs in appeals from the Local Court where considered just*

7.64 It appears that orders for costs are only made in a small number of appeals compared with the total number of appeals from the Local Court. We are not aware of any problems resulting from the current provisions about costs on appeal. We therefore recommend that the current position be maintained. For clarity, we also

75. *Castlebar Holding v Riley* [2005] NSWCCA 105; 138 LGERA 338 [10].

76. See Table 6.1.

77. *Cunningham v Cunningham (No 2)* [2012] NSWSC 954 [19]; *Evans v Powell* [2012] NSWSC 1384 [80]. See also *Uniform Civil Procedure Rules 2005* (NSW) r 42.1.

78. See *Cunningham v Cunningham (No 2)* [2012] NSWSC 954 [7]: "It is true that costs have been ordered, against both parties, in many such appeals".

recommend that the Supreme Court's power to award costs be expressly included in legislation.

**Recommendation 7.9: Retain costs in appeals from the Local Court**

(1) The District Court and the Supreme Court should have the power to award costs on an appeal from the Local Court where it is considered just.

(2) The limitation on costs awarded against a public prosecutor, currently contained in s 70 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be retained.

## Effect of a pending appeal on sentence

7.65 Section 63 of CARA provides that the execution of any sentence or penalty imposed in the Local Court is stayed pending final determination of the appeal. The stay will take effect:

(a) when the notice of appeal is lodged

(b) in the case of an appellant whose appeal is the subject of an application for leave, when leave to appeal is granted, or

(c) in the case of an appellant who is in custody when the notice of appeal is lodged or leave to appeal is granted, when the appellant enters into a bail undertaking or bail is dispensed with.[79]

### Effect on good behaviour bonds

7.66 There is some uncertainty about the effect of a good behaviour bond between the time of lodgment of an appeal in relation to the sentence imposing the bond, and the determination of the appeal. Section 69 of CARA provides:

> If an appeal court confirms a sentence on appeal, any good behavior bond that the appellant entered into as a consequence of the original sentence continues to have effect according to its terms, except to the extent to which the appeal court otherwise directs and despite any stay of execution that has been in force in respect of the sentence.

7.67 It is not entirely clear what the effect of this section is. Under s 63 of CARA a good behaviour bond is stayed pending determination of the appeal. Section 69 seems to suggest that, where the bond is confirmed on appeal, the bond will continue to run from the date it was first imposed in the Local Court. However, the appellant will have received a "free pass" for the period before the appeal was determined, as the bond will be stayed and he or she will not be prosecuted for any breaches of the bond that occurred during that time.

79. *Crimes (Appeal and Review) Act 2001* (NSW) s 63(2).

7.68 The NSW ODPP has suggested that, if the bond is confirmed on appeal, then the period of the bond should be extended by the period of the stay.[80] Section 69 contains the proviso "except to the extent to which the appeal court otherwise directs". The appeal court may order that a sentence confirmed or varied on appeal is to take effect, or recommence, on and from the date specified in the order.[81] This means that the District Court can order the bond to have effect from the date of the appeal. We are informed that this does happen in practice.[82]

7.69 As a matter of policy, we consider it undesirable that a good behaviour bond is stayed during the period pending an appeal, but that if the bond is confirmed on appeal the period of the bond is not extended unless the District Court specifically makes an order to this effect. It provides an incentive for a defendant to appeal against a good behaviour bond because even if the appeal is unsuccessful, the defendant will not be prosecuted for breaches of the bond which occurred in the period pending the appeal.

### *Our view: existing provisions sufficient*

7.70 We do not make any recommendations for change in this area. The District Court already has the power to vary the start date of the bond, and we consider this to be sufficient to address the problem. We do, however, consider that the wording of s 69 could be improved as currently the meaning of the section is not clear.

## Effect of prosecution appeals

7.71 The NSW ODPP noted that it is not clear under the current s 63 whether the prosecution lodging an appeal results in the sentence being stayed. Section 63 is expressed to apply to sentences (and other penalties) "in respect of which an appeal or application for leave to appeal is made under this Act".

### *Our view: clarify that sentence not stayed pending prosecution appeal*

7.72 We doubt that it would have been intended that the lodgment of a prosecution appeal would result in a stay of the sentence, nor do we consider that this would be appropriate. We therefore recommend that the wording of s 63 be amended to expressly state that it applies only to defendant appeals.

**Recommendation 7.10: Clarify effect of sentence pending prosecution appeal from the Local Court**

Provisions concerning stay of a sentence pending appeal from the Local Court, currently in s 63 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be retained. It should be made clear that this provision applies only to appeals by defendants.

80. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 26.
81. *Crimes (Appeal and Review) Act 2001* (NSW) s 68(1).
82. Appeals from the Local Court roundtable, *Consultation CA3*.

## Enforcing good behaviour bonds imposed or varied on appeal

7.73 Section 71(3) of CARA provides that any sentence varied or imposed by an appeal court has the same effect and may be enforced in the same manner as if it were made by the Local Court. Section 98(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) provides that a suspected failure to comply with a good behaviour bond is to be dealt with by:

- the court with which the offender has entered into the bond
- a court of like jurisdiction, or
- another court of superior jurisdiction, with the offender's consent.

7.74 We understand that there is some confusion regarding the interaction between these two sections. Section 71(3) of CARA suggests that where the District Court imposes a good behaviour bond on appeal, the Local Court can deal with any subsequent proceedings for breach of that bond. We understand that the current practice of the Local Court is to deal with breaches of good behaviour bonds imposed by the District Court on appeal. However, a reading of s 98(1) of the CSPA in isolation could give the impression that the District Court must deal with the breach where it imposed the bond on appeal.

7.75 Section 71(3) of CARA demonstrates a legislative intention that any subsequent proceedings relating to a sentence imposed by the District Court on appeal should be dealt with by the Local Court. This would include proceedings for breach of a good behaviour bond under s 98(1) of the CSPA. However, this is not clear from the terms of the CSPA itself.

### *Our view: clarify the Local Court's power to enforce a good behaviour bond imposed or varied by the District Court on appeal*

7.76 In our view s 98(1) of the CSPA should reflect the current practice of the Local Court. It is important to address this issue given the frequency with which good behaviour bonds are imposed on appeal.[83]

7.77 We therefore recommend that s 98(1) of the CSPA be clarified so as to provide that where a good behaviour bond is imposed by the District Court on appeal, "the court with which the offender has entered into the bond" should be read as a reference to the Local Court.

**Recommendation 7.11: Clarify Local Court can deal with a bond imposed on appeal**

Section 98 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so as to clarify that where the District Court imposes or varies a good behaviour bond on an appeal from the Local Court, "the court with which the offender has entered into the bond" in s 98(1)(a) should be read as a reference to the Local Court.

83. See Chapter 5.

## Appeal from orders under the *Crimes (Forensic Procedures) Act 2000* (NSW)

7.78 Currently an order of a magistrate authorising the carrying out of a forensic procedure on a person under the *Crimes (Forensic Procedures) Act 2000* (NSW) (CFPA) can be appealed to the Supreme Court. Part 5 of CARA applies as if the order were a sentence. Conversely, where a magistrate refuses to make an order authorising a forensic procedure, this may be appealed to the Supreme Court under CARA as if it were an order dismissing proceedings.[84]

7.79 It is not immediately apparent why an order authorising a forensic procedure should be treated on appeal as if the order were a sentence. The two are not analogous. Similarly, it is not clear why an order authorising a forensic procedure is to be treated as a sentence on the one hand, and a refusal to make an order should be treated as an order dismissing proceedings on the other.

7.80 Orders made under the Local Court's special jurisdiction can be appealed as if the order were a conviction – that is, an application for annulment may be made to the Local Court, and appeal lies to both the District Court and Supreme Court.[85] Previously appeals from orders made under the Local Court's special jurisdiction were treated in the same way as an appeal against sentence. However, the 2008 statutory review of CARA recommended that appeals from the Local Court's special jurisdiction be treated in the same way as appeals against conviction.[86] It is not apparent why appeals from orders made under the CFPA were not similarly amended.

7.81 The Law Society of NSW suggested that, as the making of forensic procedure orders are quasi criminal proceedings, appeals from such orders should go to the District Court in the first instance.[87]

### *Our view: appeals from forensic procedure orders should be aligned with appeals from conviction*

7.82 We recommend that, for consistency, appeals against decisions under the CFPA should be subject to the same avenues of appeal as a conviction or order dismissing proceedings. We do not consider it appropriate that the Supreme Court is the only venue in which a forensic procedure order can be challenged.

7.83 We acknowledge this means that an order authorising a forensic procedure can be appealed to either the District Court or the Supreme Court, whereas a refusal to make an order can only be appealed to the Supreme Court. However, we consider that this distinction is appropriate. A forensic procedures order can have significant consequences for a person, not least of all an intrusion into their privacy. Where an application for an order is refused, a subsequent application can be made if there is

84. *Crimes (Forensic Procedures) Act 2000* (NSW) s 115A.

85. *Local Court Act 2007* (NSW) s 70.

86. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 25.

87. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 11.

additional information which justifies making a further application.[88] Where the refusal was erroneous in law, then it is appropriate that there is an avenue to the Supreme Court to challenge that decision.

**Recommendation 7.12: Align appeals from forensic procedure orders with appeals from conviction**

(1) An order authorising a forensic procedure under the *Crimes (Forensic Procedures) Act 2000* (NSW) should be subject to the same appeal rights and right to seek annulment as a conviction imposed in the Local Court.

(2) An order refusing a forensic procedure under the *Crimes (Forensic Procedures) Act 2000* (NSW) should be subject to the same appeal rights as an order dismissing summary proceedings in the Local Court.

## Procedure in appeals to the Supreme Court

### Current law

7.84 Currently the procedure that applies in appeals from the Local Court to the Supreme Court under Part 5 of CARA is contained in Part 51B of the SCR.

7.85 The rules in Part 51B of the SCR are not exhaustive, which means there is a gap in the procedure to be applied in appeals to the Supreme Court. The rules that have been made are primarily concerned with the process for instituting an appeal – such as time limits, the process for seeking leave where leave to appeal is required, and filing and serving the necessary documents. The rules do not provide for how to conduct the appeal or for any consequential procedures following the appeal.

### Resolving the gap in procedure

#### *It is unclear whether the UCPR applies in criminal appeals to the Supreme Court*

7.86 Because Part 51B of the SCR does not cover all of the procedural aspects of an appeal to the Supreme Court under CARA, we understand that there may be some confusion as to whether the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) will apply to fill the gap. This is exacerbated by the fact that it is not entirely clear that criminal appeals to the Supreme Court under CARA are excluded from the ambit of the UCPR.

7.87 The UCPR applies to "civil proceedings" in the Supreme Court.[89] "Civil proceedings" is defined to mean any proceedings other than criminal proceedings.[90] "Criminal

88. *Crimes (Forensic Procedures) Act 2000* (NSW) s 26(3).
89. *Uniform Civil Procedure Rules 2005* (NSW) sch 1.
90. *Civil Procedure Act 2005* (NSW) s 3.

proceedings" in turn is defined to mean proceedings against a person for an offence (whether summary or indictable), and includes the following:

(a) committal proceedings,

(b) proceedings relating to bail,

(c) proceedings relating to sentence,

(d) proceedings on an appeal against conviction or sentence.[91]

7.88 Therefore, it seems as though an appeal to the Supreme Court which is not concerned with conviction or sentence may not fall within the definition of criminal proceedings, such as an appeal against an order staying or dismissing summary proceedings, or an appeal against an interlocutory order. The definition given to "criminal proceedings" would not appear to encompass these types of appeals, even though they are undoubtedly criminal in nature.

7.89 Further, the SCR provides that an appeal is to be instituted by filing a summons.[92] However, no approved form has been prepared for use in these appeals. We understand that the summons form approved under the UCPR is usually used,[93] which is not ideal as it has been designed for use in civil proceedings and needs to be adapted to meet the requirements of Part 51B of the SCR. There are also no approved forms that apply to other aspects of the appeal – for example, notices of motion.

### *Applying the UCPR in criminal appeals is problematic*

7.90 The treatment of criminal appeals to the Supreme Court as civil proceedings under the UCPR, regardless of whether this is intended by the legislative scheme, has a number of consequences.

7.91 First, the institution of civil proceedings in the Common Law Division of the Supreme Court requires the applicant to pay a filing fee of $999, and a hearing allocation fee of $1995.[94] This is significantly more than the fees for filing criminal appeals in other courts. In an appeal from the Local Court to the District Court under CARA, the filing fee is $105 for a single offence or $162 for more than one offence.[95] In both the District Court and the Supreme Court there is a general power to waive these fees, and a specific power for fees to be postponed or waived where the appellant is legally aided.[96]

7.92 Secondly, under the UCPR, the Supreme Court may order a party to pay costs incurred by the other party as a result of the first party's failure to comply with the

91. *Civil Procedure Act 2005* (NSW) s 3.
92. *Supreme Court Rules 1970* (NSW) pt 51B r 7.
93. Information provided by Supreme Court of NSW Registry (4 February 2014).
94. *Civil Procedure Regulation 2012* (NSW) sch 1.
95. *Criminal Procedure Regulation 2010* (NSW) sch 2.
96. *Civil Procedure Regulation 2012* (NSW) cl 11, cl 13; *Criminal Procedure Regulation 2010* (NSW) cl 14-15.

UCPR.[97] In the case of criminal appeals to the Supreme Court, this could be detrimental given the uncertainty that exists as to whether the UCPR applies to these proceedings in the first place.

### *Our view: specific rules, fees and forms should be developed for criminal appeals to the Supreme Court*

7.93 In our view it is highly undesirable that there is a gap in the procedure that is to apply in appeals from the Local Court to the Supreme Court. It is also undesirable that there is uncertainty about whether or not the UCPR applies in these appeals. As we note in Chapter 6, appeals to the Supreme Court are infrequent, there being only about 15 - 25 such appeals each year. We consider this makes it even more important that there are clear procedural rules to govern these appeals, as they are unlikely to form part of the core business of the Supreme Court, the NSW ODPP or defence lawyers.

7.94 There are a number of ways to rectify this gap in procedure, including by:

- amending the UCPR to include criminal appeals from the Local Court to the Supreme Court within its scope
- "deeming" certain parts of the UCPR to apply to criminal appeals to the Supreme Court, or
- creating a completely separate set of procedural rules.

7.95 We will not identify which of these options is best, other than to note that not all of the provisions of the UCPR may apply appropriately to criminal appeals. In any event, Part 51B of the SCR requires review. It still contains a number of references to other parts of the rules which have since been repealed.

7.96 We further recommend that specific approved forms and a separate fee structure for criminal appeals from the Local Court to the Supreme Court should be developed.

7.97 Finally, it should be borne in mind that a large number of criminal appeals from the Local Court to the Supreme Court include, as an alternative ground for relief, an application for judicial review under s 69 of the *Supreme Court Act 1970* (NSW). To increase efficiency and avoid unnecessary duplication of work, the procedural rules that are developed for criminal appeals to the Supreme Court should be as consistent as possible with the procedural rules that apply to applications for judicial review.

**Recommendation 7.13: Develop procedural rules for appeals to the Supreme Court**

(1) The Supreme Court Rules Committee should develop procedural rules which cover all aspects of criminal appeals from the Local Court to the Supreme Court.

97. *Uniform Civil Procedure Rules 2005* (NSW) r 42.10.

(2) Specific forms should be developed and approved for use in criminal appeals from the Local Court to the Supreme Court.

(3) Specific provision should be made for the fees that apply to criminal appeals from the Local Court to the Supreme Court.

(4) The procedural rules and forms for criminal appeals from the Local Court to the Supreme Court and the procedural rules and forms for applications for judicial review under s 69 of the *Supreme Court Act 1970* (NSW) should be consistent.

## Other minor amendments

7.98 Two other technical amendments have been raised by the NSW ODPP, which we consider should be implemented.

### Definition of "sentence"

7.99 The NSW ODPP noted that the definition of "sentence" in s 3 of CARA included the revocation of a good behaviour bond. However, the refusal to revoke a good behaviour bond is not included as a sentence. This means that a defendant may appeal against the Local Court's decision to revoke a good behaviour bond, but that the DPP may not appeal against the Local Court's refusal to revoke a good behaviour bond.[98]

#### *Our view: the definition of "sentence" should include refusal to revoke a good behaviour bond*

7.100 The NSW ODPP suggested that, for consistency, the definition of "sentence" be expanded to include the refusal to revoke a good behaviour bond.[99] We agree that this would be a sensible amendment.

**Recommendation 7.14: Refusal to revoke a good behaviour bond**

The definition of "sentence", currently contained in s 3 of the *Crimes (Appeal and Review) Act 2001* (NSW), should include a refusal to revoke a good behaviour bond, in order to allow the prosecution to appeal such a refusal.

### Limit on further appeal to the District Court

7.101 Section 29(1)(b) of CARA provides that no appeal may be made to the District Court against a decision of the Local Court "that is or has previously been the subject of an appeal or application for leave to appeal to the District Court". Presumably this section is intended to prevent multiple appeals by a defendant to the District Court in respect of the same conviction or sentence.

98. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 11.

99. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 11.

7.102 However, a literal interpretation of the section suggests that a party cannot appeal to the District Court where another party has lodged an appeal or an application for leave to appeal. For example, it is not clear that the DPP can appeal against the inadequacy of a sentence to the Local Court where the defendant has also appealed against the severity of the sentence.

7.103 The NSW ODPP suggested that s 29(1)(b) be amended by inserting "by that party". It noted that this is how the District Court currently appears to interpret the provision, but that clarification would be desirable to avoid any question arising in future cases.[100]

### *Our view: limit on further appeal to the District Court should only apply to the same party*

7.104 We consider that the NSW ODPP's suggestion would assist with clarity and avoid ambiguity as to the operation of the section. We recommend that it be adopted.

| **Recommendation 7.15: Limit on further appeals applies only to same party** |
| --- |
| It should be clarified that a party can appeal from the Local Court to the District Court even though another party has filed an appeal or sought leave to appeal from the same decision. |

100. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 29.

# 8. Appeals from conviction and sentence on indictment

**In brief**

The grounds of appeal against conviction on indictment are antiquated, ambiguous and difficult to apply. We recommend a formulation that is clearer and simpler. The provisions for appeals against sentence confer a broad discretion to vary a sentence, although this is significantly restricted by the case law. In order to preserve desirable flexibility for the Court of Criminal Appeal to determine sentence appeals, we do not recommend any change.


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8.1 In this chapter we discuss the avenues of appeal from a conviction and sentence in proceedings dealt with on indictment in the District and Supreme Courts.

## Appeals against conviction

### Current law

8.2 Section 5(1) of the *Criminal Appeal Act 1912* (NSW) (CAA) outlines the rights of appeal to the Court of Criminal Appeal (CCA) where a person has been convicted of a criminal offence that was tried on indictment. Section 5(1) provides that a person convicted on indictment may appeal against their conviction:

- as of right, on any ground involving a question of law alone, or
- with leave of the CCA, or upon the certificate of the judge of the trial court that it is a fit case for appeal, on any ground involving a question of fact alone or a question of mixed law and fact, or any other ground which appears to the CCA to be a sufficient ground of appeal.

8.3 The grounds for an appeal against conviction are currently outlined in s 6(1) of the CAA as follows:

> The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

8.4 In summary, the CCA may allow an appeal if it is of the opinion that:

- the jury's verdict should be set aside on the ground that it is "unreasonable, or cannot be supported, having regard to the evidence" (**ground 1 - unreasonable verdict**)
- the trial court's judgment should be set aside on the ground of the "wrong decision of any question of law" (**ground 2 - wrong decision**), or
- "on any other ground whatsoever there was a miscarriage of justice" (**ground 3 - miscarriage of justice**).

8.5 If any of the above grounds are established, the appeal may still be dismissed if the CCA considers that "no substantial miscarriage of justice has actually occurred". This part of s 6(1) is commonly referred to as "**the proviso**".

8.6 Section 6(1) of the CAA is based on the *Criminal Appeal Act 1907* (UK) as originally enacted. Most Australian jurisdictions have similar provisions,[1] despite the fact that the original UK provision has since been amended. It is regularly referred to as the "**common form provision**".

## Number of conviction appeals

8.7 The number of appeals to the CCA against conviction has decreased over the past decade. The number of appeals has ranged between 74 (in 2009 and 2011) and 190 (in 2002). Generally, the number has been much lower than its 2002 peak and has remained at less than 100 over the past 4 years. The success rate of appeals against conviction has ranged between 22.9% (in 2005) and 40.5% (in 2002).

### Table 8.1: Appeals against conviction, NSW and Commonwealth offences, 2002-2012

| Year | Total appeals against conviction | Dismissed | | Allowed | |
|---|---|---|---|---|---|
| **2012** | 83 | 54 | 65.1% | 29 | 34.9% |
| **2011** | 74 | 49 | 66.2% | 25 | 33.8% |
| **2010** | 80 | 54 | 67.5% | 26 | 32.5% |
| **2009** | 74 | 54 | 73% | 20 | 27% |
| **2008** | 101 | 76 | 75.2% | 25 | 24.8% |
| **2007** | 103 | 78 | 75.7% | 25 | 24.3% |
| **2006** | 125 | 90 | 72% | 35 | 28% |
| **2005** | 96 | 74 | 77.1% | 22 | 22.9% |
| **2004** | 135 | 87 | 64.4% | 48 | 35.6% |
| **2003** | 123 | 77 | 62.6% | 46 | 37.4% |
| **2002** | 190 | 113 | 59.5% | 77 | 40.5% |

*Source: Judicial Commission of NSW, Monograph 35: Conviction appeals in New South Wales (June 2011); Information provided by Judicial Commission of NSW (16 September 2013).*

## Interpretation of the grounds of appeal against conviction

8.8 There is a substantial body of case law from the High Court which seeks to elucidate what the common form provision means. In the past, appellate courts tended to look at whether the guilty verdict was "unsafe or unsatisfactory" in determining an appeal against conviction. This expression refers to an amendment of the original UK provision and was commonly used to indicate that the jury ought to have experienced reasonable doubt despite there being evidence to support a

1. Victoria is the only Australian jurisdiction to have departed from the common form provision: see para 8.43 - 8.51.

guilty verdict.[2] The use of this term to encompass several elements of the common form provision was criticised by the High Court in *Fleming v R* as "potentially confusing" and "liable to mislead".[3] Consequently, courts have abandoned this and similar formulations and now pay closer attention to the language of the legislation when deciding whether the grounds of appeal are made out.

### *Ground 1: Unreasonable verdict*

8.9 This ground requires the CCA to examine whether the verdict was "unreasonable or cannot be supported having regard to the evidence". The CCA must independently assess the evidence, subject to the limitations of proceeding on the trial record, and determine whether it was "open to the jury" to be satisfied of guilt beyond reasonable doubt.[4]

### *Ground 2: Wrong decision of any question of law*

8.10 This ground requires an examination of whether there has been a wrong decision of any question of law. It directs attention to the trial judge's decisions made during the trial.[5] In *Simic v R* the High Court held that the "wrong decision" ground includes cases where there has been "a misdirection as to the law or in which evidence has been improperly admitted or rejected".[6]

8.11 The High Court has also held that there can be no "wrong decision" about the admissibility of evidence where the appellant did not object to the admission of the evidence during the trial.[7] A similar approach has been followed for jury directions. If it is alleged that the judge failed to direct the jury properly but the appellant did not ask the judge to direct or redirect the jury, there will be no "wrong decision" for the purposes of ground 2.[8] In these circumstances, as the trial judge was not required to rule on the approach to be taken, it could not be said that a wrong "decision" had been made.[9] The focus is on whether the trial judge made a decision. If there was no relevant decision by the trial judge, the appeal may nonetheless be dealt with under ground 3.[10]

### *Ground 3: Miscarriage of justice*

8.12 This ground requires the CCA to examine whether there has been a miscarriage of justice on any other ground. This has been described as a "dragnet" provision.[11] According to Justices Gummow and Hayne, a miscarriage of justice "may

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2. *Gipp v R* [1998] HCA 21; 194 CLR 106 [17] (Gaudron J).
3. *Fleming v R* [1998] HCA 68; 197 CLR 250 [12].
4. *M v R* (1994) 181 CLR 487, 493; *SKA v R* [2011] HCA 13; 243 CLR 400 [21].
5. *Gipp v R* [1998] HCA 21; 194 CLR 106 [119] (Kirby J).
6. *Simic v R* (1980) 144 CLR 319, 327.
7. *R v Soma* [2003] HCA 13; 212 CLR 299 [11], [42] (Gleeson CJ, Gummow, Kirby & Hayne JJ), [79] (McHugh J); *Bounds v R* [2006] HCA 39; 80 ALJR 1380 [12]; *Carlton v R* [2010] NSWCCA 81; 199 A Crim R 591 [19].
8. *Dhanhoa v R* [2003] HCA 40; 217 CLR 1 [49] (McHugh & Gummow JJ).
9. *R v Soma* [2003] HCA 13; 212 CLR 299 [42].
10. *R v Soma* [2003] HCA 13; 212 CLR 299 [11].
11. *TKWJ v R* [2002] HCA 46; 212 CLR 124 [72] (McHugh J).

encompass any of a very wide variety of departures from the proper conduct of a trial".[12] However, it may also occur where there is no irregularity, for example, where the ground relies on the discovery of fresh evidence that was not available at the trial, or where counsel failed to call or elicit evidence.[13]

8.13 A miscarriage of justice may also be found where there was a misdirection or insufficient direction on the law, a misstatement of the facts by the judge to the jury,[14] an unbalanced summing up,[15] juror misconduct,[16] misconduct by a prosecutor, an invalid indictment[17] or, in exceptional circumstances, where a guilty plea should not have been entered.[18] The ultimate question for the CCA is whether an act or omission during the trial resulted in a miscarriage of justice.[19]

### *Proviso*

8.14 Even if the appellant has successfully made out a ground of appeal, the proviso allows the CCA to dismiss the appeal if it is satisfied that no substantial miscarriage of justice has actually occurred. The expression "substantial miscarriage of justice" was intended to distinguish the proviso from a "miscarriage of justice" under the old Exchequer rule, which would allow a new trial to be ordered where there "was *any* departure from trial according to law, regardless of the nature or importance of that departure".[20]

8.15 The policy idea behind the proviso was relatively straightforward: an appeal should not be allowed where the error in question was merely technical in nature and did not make any difference to the outcome of the trial. However, the application of this policy in practice has proved far more difficult. The proviso is the most controversial and discussed aspect of s 6(1) of the CAA.

8.16 Until the High Court's decision in *Weiss v R*[21] there were essentially two tests for determining whether the proviso should apply:

- The **fundamental error** test: where the defect in the trial involved a fundamental departure from the requirements of due process the proviso cannot be used to dismiss an appeal. Where such a flaw was so fundamental as to go to the root of the proceedings, then, without considering its effect on the verdict, it can be said that the accused has not had a proper trial and there has been a substantial miscarriage of justice.[22]

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12. *Nudd v R* [2006] HCA 9; 80 ALJR 614 [24] (Gummow & Hayne JJ).
13. *TKWJ v R* [2002] HCA 46; 212 CLR 124 [29] (Gaudron J).
14. *Simic v R* (1980) 144 CLR 319, 328.
15. *R v Meher* [2004] NSWCCA 355.
16. *R v Skaf* [2004] NSWCCA 37; 60 NSWLR 86.
17. *R v Halmi* [2005] NSWCCA 2; 62 NSWLR 263; *R v Janceski* [2005] NSWCCA 281; 64 NSWLR 10.
18. *R v Hura* [2001] NSWCCA 61; 121 A Crim R 472 [32]-[33].
19. *TKWJ v R* [2002] HCA 46; 212 CLR 124 [30]-[31] (Gaudron J).
20. *Weiss v R* [2005] HCA 81; 224 CLR 300 [13], [18].
21. *Weiss v R* [2005] HCA 81; 224 CLR 300.
22. *Wilde v R* (1988) 164 CLR 365, 373; *S v R* (1989) 168 CLR 266, 277-8 (Dawson J).

- The **lost chance of acquittal** test: if there was no fundamental error, courts looked to whether the conviction was inevitable, that is, whether the accused lost a chance of acquittal that was fairly open. The focus was on whether there was a "lost chance", with reference to what the actual jury or a reasonable hypothetical jury would have concluded had there been no flaw in the trial.[23]

8.17 In *Weiss*, the High Court held that these kinds of statements may mask the nature of the appellate court's task in considering the application of the proviso. They must not be taken as substitutes for the language of the proviso itself.[24]

8.18 The High Court held that the task of the appellate court is to determine if a substantial miscarriage of justice has actually occurred, having regard to the whole of the record of trial, including the guilty verdict.[25] The appellate court must make an independent assessment of the trial evidence while making due allowance for the limitations of the record of trial, particularly in not having an opportunity to see and hear witnesses.[26] The task given to the appellate court is not to be determined by predicting what the jury at trial or some hypothetical jury might decide.[27]

8.19 The High Court declined to lay down any "absolute rules or singular tests" to be applied by the appellate court when determining whether a substantial miscarriage of justice has actually occurred, beyond noting three "fundamental propositions":

(1) the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred

(2) the task of the appellate court is an objective task not materially different from other appellate tasks, to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of trial, and

(3) the standard of proof of criminal guilt is beyond reasonable doubt.[28]

8.20 In determining whether or not a substantial miscarriage of justice has occurred it will be necessary to consider the nature of the error, including the possible effect that the error may have had on the outcome of the trial.[29] It is also necessary to take account of the various grounds of appeal that have been made out and which, but for the engagement of the proviso, would require the appellate court to allow the appeal.[30]

8.21 The High Court noted that no single universally applicable definition of "substantial miscarriage of justice" can be given, although one negative proposition may be offered – it cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly

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23. *Mraz v R* (1955) 93 CLR 493, 514 (Fullagar J).
24. *Weiss v R* [2005] HCA 81; 224 CLR 300 [33]. See also *Baiada Poultry Pty Ltd v R* [2012] HCA 14; 246 CLR 92 [23].
25. *Weiss v R* [2005] HCA 81; 224 CLR 300 [39]-[41].
26. *Weiss v R* [2005] HCA 81; 224 CLR 300 [41].
27. *Weiss v R* [2005] HCA 81; 224 CLR 300 [35].
28. *Weiss v R* [2005] HCA 81; 224 CLR 300 [39], [42].
29. *Gassy v R* [2008] HCA 18; 236 CLR 293 [34] (Gummow & Hayne JJ).
30. *AK v WA* [2008] HCA 8; 232 CLR 438 [55] (Gummow & Hayne JJ).

admitted at trial proved, beyond reasonable doubt, the accused's guilt.[31] The High Court subsequently clarified in *Baiada Poultry Pty Ltd v R* that satisfaction of the accused's guilt beyond reasonable doubt is "a necessary but not sufficient condition for applying the proviso".[32]

8.22 In *Weiss* the High Court also noted that there are circumstances which may prevent the application of the proviso despite the appellate court being satisfied of the appellant's guilt beyond a reasonable doubt - for example, where there has been a significant denial of procedural fairness.[33] Again there is no "single universally applicable criterion" that can be developed to identify such cases.[34]

8.23 The High Court left open the related question of "whether some errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso".[35] Subsequently Justices Gummow and Hayne suggested that applying the "negative proposition" given in *Weiss* will often resolve the question of whether the proviso should apply where there has been a radical departure from the requirements of a fair trial. This is because it will be more difficult for an appellate court to conclude that guilt is established beyond reasonable doubt.[36]

8.24 Where the appellate court finds that no substantial miscarriage of justice has actually occurred, it has no discretion as to the outcome - it must dismiss the appeal.[37]

## Problems with the current law

8.25 There are a number of problems inherent in the current grounds of appeal against conviction. The wording of s 6(1) is antiquated and its structure is unwieldy. The provision uses an outdated drafting style which makes it difficult to follow and apply. Judicial interpretation has not comprehensively clarified how the three grounds of appeal and the proviso should be applied. As the Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General (SCAG Working Group) observed in its discussion paper, "the law in this area has developed in a rather piecemeal fashion."[38]

8.26 In our view there are three significant problems with the common form provision as encapsulated in s 6(1) of the CAA.

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31. *Weiss v R* [2005] HCA 81; 224 CLR 300 [44].
32. *Baiada Poultry Pty Ltd v R* [2012] HCA 14; 246 CLR 92 [29].
33. *Weiss v R* [2005] HCA 81; 224 CLR 300 [45]. See also *AK v WA* [2008] HCA 8; 232 CLR 438; *Gassy v R* [2008] HCA 18; 236 CLR 293; *Ayles v R* [2008] HCA 6; 232 CLR 410.
34. *Weiss v R* [2005] HCA 81; 224 CLR 300 [45].
35. *Weiss v R* [2005] HCA 81; 224 CLR 300 [46]. See also *Ayles v R* [2008] HCA 6; 232 CLR 410 [44]-[45].
36. *Evans v R* [2007] HCA 59; 235 CLR 521 [42] (Gummow & Hayne JJ).
37. *Baiada Poultry Pty Ltd v R* [2012] HCA 14; 246 CLR 92 [25].
38. Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010) 45.

### *Overlapping and vague grounds*

8.27 Distinguishing between the three appeal grounds can be challenging. In many cases it is difficult to determine which ground is applicable. The extent of the overlap is problematic because it is no longer acceptable to conflate the grounds using expressions such as "unsafe and unsatisfactory", and an appellant must establish at least one ground.[39]

8.28 The Judicial Commission of NSW points out that the breadth of the concept "miscarriage of justice", when considered in its procedural sense as an irregularity in the trial, can result in overlap between ground 2 (a wrong decision of a question of law) and ground 3 (a miscarriage of justice on any other ground).[40] Whether a procedural irregularity will be considered under ground 2 or ground 3 will depend on whether it concerns a decision made by the trial judge.[41] Grounds 2 and 3 are "expressed in very general terms and it is sometimes difficult to draw a clear distinction between them".[42]

8.29 There are also questions as to whether the general "miscarriage of justice" ground constitutes a ground of appeal in its own right, or involves an element of the other two grounds, or whether the first two grounds must themselves involve a miscarriage of justice. The SCAG Working Group highlighted that the use of the word "other" in the NSW provision ("on any *other* ground whatsoever there was a miscarriage of justice") could indicate either that there must be a miscarriage of justice in order to establish either ground 1 or 2, or alternatively suggests that a miscarriage of justice is not inherently an element of these grounds.[43]

### *Interaction between the grounds of appeal and the proviso is unclear*

8.30 Justices Gummow and Hayne have noted that the common form provision presents "what, on its face, is a conundrum": an appeal is to be allowed if any of three kinds of error is shown, but on the hypothesis that such an error has occurred the appeal may be dismissed if the proviso is satisfied.[44]

8.31 The common form provision does not expressly exclude an application of the proviso to appeals where ground 1 (unreasonable verdict) is established. It is however difficult to see how the proviso could be applied where an appellant has established that the verdict is unreasonable or cannot be supported by the evidence. In such a case, there should be no other conclusion than that a substantial miscarriage of justice has *actually* occurred. It appears that the proviso is not applied in practice to successful ground 1 appeals;[45] however there has not

39. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 34-5.
40. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 34.
41. *R v Soma* [2003] HCA 13; 212 CLR 299 [11].
42. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 29.
43. Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010) 57-8.
44. *Evans v R* [2007] HCA 59; 235 CLR 521 [40] (Gummow & Hayne JJ).
45. H Donnelly, R Johns and P Poletti, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011) 35.

been a definitive statement from the High Court that the proviso does not apply in such a case.[46]

8.32 The use of the expression "miscarriage of justice" in ground 3 and the expression "substantial miscarriage of justice" in the proviso does not help in determining the point at which a miscarriage becomes "substantial". As Stephen Odgers writes, "the use of the adjective 'substantial' offers desirable flexibility, but no guidance".[47] In *R v Konstandopoulos* Justice Callaway observed that there is a difference between a "miscarriage of justice" and a "substantial miscarriage of justice", the latter expression being one which "invites attention to whether there has been a fundamental irregularity or whether ... the appellant has been deprived of a chance which was fairly open to him of being acquitted".[48] The High Court appeared to apply this distinction in *Fleming*;[49] however, it did not provide a definitive statement on the distinction between the two phrases.

### *Following Weiss, the application of the proviso is uncertain*

8.33 The High Court's focus on the words of the proviso in *Weiss* and subsequent cases has highlighted uncertainty about how the proviso is to be applied. The actual test for applying the proviso remains unclear. The task of the appellate court and the threshold that applies for establishing a substantial miscarriage of justice are not well defined.

8.34 In *Weiss* the High Court effectively did away with the "lost chance of acquittal" test, because the use of such a test masks the nature of the statutory task to be undertaken – a consideration of whether a substantial miscarriage of justice has actually occurred. There is no "single universally applicable description" of what constitutes a substantial miscarriage of justice,[50] and there is a "very wide diversity of circumstances in which the proviso falls for consideration".[51] Whether a substantial miscarriage of justice has actually occurred is an indeterminate question turning on matters of fact and degree.[52]

8.35 All of this means that it is not possible to prescribe any hard and fast rules for when the proviso will apply. However, the ambiguity inherent in the phrase "substantial miscarriage of justice" makes it difficult for the appellate court to know when to apply the proviso. This is particularly problematic because whether a substantial

46. See the dissent of Gageler J in *Baini v R* [2012] HCA 59; 246 CLR 469 [48].
47. S Odgers, "The Criminal Proviso: A Case for Reform?" (2008) 26 *Law in Context* 103, 126.
48. *R v Konstandopoulos* (1997) 99 A Crim R 36, 47.
49. *Fleming v R* [1998] HCA 68; 197 CLR 250 [38]-[39].
50. *Weiss v R* [2005] HCA 81; 224 CLR 300 [42], [45]; *Gassy v R* [2008] HCA 18; 236 CLR 293 [17] (Gummow & Hayne JJ); *Handlen v R* [2011] HCA 51; 245 CLR 282 [47]. See also *Baini v R* [2012] HCA 59; 246 CLR 469 [26].
51. *Weiss v R* [2005] HCA 81; 224 CLR 300 [42]. See also *AK v WA* [2008] HCA 8; 232 CLR 438 [54] (Gummow & Hayne JJ).
52. *Baiada Poultry Pty Ltd v R* [2012] HCA 14; 246 CLR 92 [47] (Heydon J). See also *Gassy v R* [2008] HCA 18; 236 CLR 293 [17] (Gummow & Hayne JJ), [62] (Kirby J).

miscarriage of justice has actually occurred is something the appellate court must decide for itself,[53] but there are no criteria for undertaking that task.

8.36 Furthermore, following *Baida Poultry Pty Ltd v R,*[54] it is now plain that satisfaction of guilt beyond reasonable doubt alone is not enough to apply the proviso, but it is uncertain what else may be required.

## Reforming the common form provision

8.37 We consider that s 6(1) of the CAA needs to be changed because of the problems identified with the common form provision. Stakeholders agree that change is needed.[55]

8.38 We have identified seven different options for reformulating the grounds of appeal against conviction, which we presented to stakeholders for comment.

### *Options 1 and 2: WA and Commonwealth provisions*

8.39 Section 30 of the *Criminal Appeals Act 2004* (WA) provides:

> (1) This section applies in the case of an appeal against a conviction by an offender.
>
> (2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.
>
> (3) The Court of Appeal must allow the appeal if in its opinion
>
> (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or
>
> (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
>
> (c) there was a miscarriage of justice.
>
> (4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

8.40 Section 30AJ of the *Federal Court of Australia Act 1976* (Cth) provides:

> (1) The Court must allow an appeal under section 30AA from a judgment convicting the accused if the Court is satisfied:
>
> (a) that the verdict of the jury (if any) should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) that the judgment should be set aside on the ground of a wrong decision of any question of law; or

53. *Weiss v R* [2005] HCA 81; 224 CLR 300 [42]; *Baiada Poultry Pty Ltd v R* [2012] HCA 14; 246 CLR 92 [21], [23].
54. *Baiada Poultry Pty Ltd v R* [2012] HCA 14; 246 CLR 92.
55. Appeals from higher courts roundtable, *Consultation CA5.*

> (c) that there has been a substantial miscarriage of justice.
>
> (2) However, if the Court is satisfied of a matter in paragraph (1)(a) or (b), the Court may dismiss the appeal if the Court is satisfied that there has not been a substantial miscarriage of justice.

8.41 The grounds of appeal in WA and the Commonwealth have substantially maintained the common form provision but simplified the language and structure. The WA provision maintains the distinction between "miscarriage of justice" as a ground of appeal and "substantial miscarriage of justice" in the proviso. The Commonwealth provision, on the other hand, consistently uses "substantial miscarriage of justice" throughout. It also clarifies that the proviso only applies to the first two grounds, thereby avoiding any interaction between the miscarriage of justice ground and the proviso. However, it seems to suggest that the proviso will apply to the unreasonable ground verdict.

8.42 The wording of s 6(1) of the CAA could be simplified along the lines of the WA or Commonwealth provisions. However, these provisions do not address all of the problems inherent to the common form provision. Specifically, both options retain the proviso. As we discuss above, the proviso itself has been a significant source of confusion and our view is that we should move away from this structure if possible. Therefore, we consider that we should go further and reformulate the grounds of appeal rather than simply restructuring the common form provision.

### *Option 3: Victorian provision*

8.43 Section 276 of the *Criminal Procedure Act 2009* (Vic) provides:

> (1) … the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—
>
> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
>
> (c) for any other reason there has been a substantial miscarriage of justice.
>
> (2) In any other case, the Court of Appeal must dismiss an appeal …

8.44 The Victorian provision was introduced following *Weiss.* It was seen as an attempt to circumvent the High Court's interpretation of the common form provision in *Weiss* by removing the two stage structure. Under this provision the appellant must demonstrate that a substantial miscarriage of justice has occurred, thereby removing the difficulty caused by the use of the phrase "miscarriage of justice" in the grounds of appeal and the phrase "substantial miscarriage of justice" in the proviso.

8.45 The High Court recently interpreted the Victorian provision in *Baini v R.*[56] The majority judgment again noted there was no single universally accepted definition of

56. *Baini v R* [2012] HCA 59; 246 CLR 469.

"substantial miscarriage of justice", but that a substantial miscarriage of justice may occur where:

- the jury arrived at a result that cannot be supported (currently part of ground 1 of the common form provision and the Victorian provision)
- there has been an error or irregularity in, or in relation to, the trial and the court cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial, or
- there is an error affecting the result of the trial or a serious departure from trial processes, whether or not the impact of the departure in issue can be identified.[57]

8.46 The High Court interpreted the Victorian provision as allowing the appellate court to find that a substantial miscarriage of justice did not occur if the conviction was "inevitable". This, it observed, could only be determined by the appellate court reviewing the material itself and being satisfied of the appellant's guilt beyond reasonable doubt[58] - a formulation in terms almost identical to the *Weiss* requirement which the Victorian provision sought to avoid. Nonetheless, the Victorian Court of Appeal has noted that it may be more difficult for the prosecution to uphold a conviction now that "substantial miscarriage of justice" appears as a ground of appeal, than it did when the phrase appeared only in the proviso.[59]

8.47 The Victorian provision places the onus on the appellant to establish the grounds of appeal. However, the High Court held that as a practical matter few, if any, appeals will turn on which party bears the onus of proof.[60]

8.48 In our view, the advantage of the Victorian provision is that it incorporates the language of the proviso into the grounds of appeal, thereby avoiding a two stage inquiry. Its adoption in NSW would have the additional benefit of being consistent with Victoria. Maintaining consistency with other Australian jurisdictions is particularly desirable for the prosecution of Commonwealth offences.[61]

8.49 However, the High Court has interpreted the Victorian provision in a similar manner to the common form provision. For this reason, we are not convinced that moving to the Victorian approach would rectify the problems with the common form provision that we have identified.

8.50 In particular, the Victorian provision continues to use, as the grounds of appeal in subparagraphs (b) and (c), the ambiguous phrase "substantial miscarriage of justice". No definition is given to this phrase, which means that it does not provide any more legislative guidance than the common form provision.

8.51 The NSW Bar Association was not in favour of adopting the Victorian model as it does not significantly depart from the common form provision and preserves the

57. *Baini v R* [2012] HCA 59; 246 CLR 469 [26].
58. *Baini v R* [2012] HCA 59; 246 CLR 469 [33].
59. *Andelman v R* [2013] VSCA 25 [104].
60. *Baini v R* [2012] HCA 59; 246 CLR 469 [23].
61. Commonwealth Director of Public Prosecutions, *Submission CA15,* 2.

language of the proviso.[62] Support for the Victorian provision was not strong amongst other stakeholders.

### *Option 4: Law Council of Australia proposal*

8.52 The Law Council of Australia proposed an alternative form of grounds of appeal against conviction in response to the 2010 SCAG Working Group discussion paper on harmonising criminal appeals legislation. It suggested:

> (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 basis 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.[63]

8.53 The Law Council proposal simplifies the language of the three grounds of appeal and clarifies that the proviso does not apply to unreasonable verdicts. It also reformulates the proviso. The first limb of the reformulated proviso, that the trial was fair, reflects a policy position that an appeal court should never dismiss an appeal where the appellant did not receive a fair trial. The second limb of the proviso, that the verdict would not have been different if the identified miscarriage of justice had not occurred, was said to adopt the pre *Weiss* interpretation of the proviso.[64]

8.54 Most stakeholders were in favour of adopting the Law Council's suggestion.[65] In particular, stakeholders considered it desirable to simplify the grounds of appeal and move away from the concept of a "substantial miscarriage of justice".[66] The Commonwealth Director of Public Prosecutions (CDPP) submitted that the Law Council proposal was succinct and easy to understand and uses terminology largely consistent with the common form provision.[67]

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62. NSW Bar Association, *Submission CA5*, 11-12; Appeals from higher courts roundtable, *Consultation CA5.*
63. Law Council of Australia, *Submission, SCAG Discussion Paper on Harmonisation of Criminal Appeals Legislation* (2010) 4-6.
64. Law Council of Australia, *Submission, SCAG Discussion Paper on Harmonisation of Criminal Appeals Legislation* (2010) 4-6.
65. NSW Bar Association, *Submission CA5*, 10-12; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6*, 7-8; Legal Aid NSW, *Submission CA12*, 13; Commonwealth Director of Public Prosecutions, *Response CA11*; Appeals from higher courts roundtable, *Consultation CA5.*
66. NSW Bar Association, *Submission CA5*, 11; Appeals from higher courts roundtable, *Consultation CA5.*
67. Commonwealth Director of Public Prosecutions, *Response CA11.*

8.55 The Law Council's proposal is attractive because it does not use the concept of a "substantial miscarriage of justice" and it attempts to avoid the uncertainty in the application of the proviso following *Weiss*. In addition, the three grounds of appeal largely reflect those in the current s 6(1) of the CAA.

8.56 However, the use of the two stage proviso structure, which has been confusing and difficult to apply, makes us reluctant to adopt this proposal in its entirety. The NSW Office of the Director of Public Prosecutions (NSW ODPP) submitted that key terms, such as "the trial was fair", require definition otherwise the proposed provision risks becoming circular and broad.[68]

### *Option 5: NZ provision*

8.57 Section 232 of the *Criminal Procedure Act 2011* (NZ) provides:

> (2) The ... appeal court must allow a[n] ... appeal under this subpart if satisfied that,—
>
> (a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or
>
> (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
>
> (c) in any case, a miscarriage of justice has occurred for any reason.
>
> (3) The ... appeal court must dismiss a[n] ... appeal under this subpart in any other case.
>
> (4) In subsection (2), **miscarriage of justice** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

8.58 The NZ provision came into effect on 1 July 2013 and was influenced by the Victorian provision.

8.59 Initially NZ had intended to adopt the new Victorian provision. However, prior to the passing of the NZ legislation two key changes were made:

(a) "Substantial" was dropped from the phrase "substantial miscarriage of justice". This followed a submission by the Chief Justice of NZ that "miscarriage of justice" was likely to be better understood by the public. It was suggested that the general public would consider that anything called a miscarriage of justice should result in the overturning of a conviction.[69]

(b) The NZ Law Commission and the Ministry of Justice recommended that the clause could be made simpler and clearer by amalgamating the second and

68. NSW, Office of the Director of Public Prosecutions, *Response CA15.*

69. Chief Justice of Supreme Court of NZ, *Submission to Criminal Procedure (Reform and Modernisation) Bill,* 25 February 2011, 2.

third limbs of the Victorian test and giving a separate definition to "miscarriage of justice". The definition of "miscarriage of justice" was said to align with existing NZ case law concerning the proviso.[70]

8.60 NSW Young Lawyers did not support adopting this provision as it uses terms, such as "nullity", for which there is no equivalent in NSW criminal appeals law. The NSW ODPP noted that removing the proviso has the advantage of simplifying the provision, but expressed concern that it could result in appeals being upheld despite overwhelming evidence indicating the guilt of the accused. Although the NSW ODPP did not nominate a preferred provision overall, it did favour this model over option 6 if the proviso is to be abolished, except for the reference to "nullity".[71]

8.61 The NZ approach has the advantage both of avoiding the proviso and of defining the phrase "miscarriage of justice". Both of these features could enhance clarity and assist with interpretation. However, we consider that there are problems with the NZ provisions which make us reluctant to adopt it.

8.62 The grounds of appeal are separated into different grounds for jury trials and judge-alone trials, which we see as being unnecessary and confusing. In addition, the definition of "miscarriage of justice" seems to invite a process of circular reasoning. Subsection (4) defines miscarriage of justice as meaning:

> any error, irregularity, or occurrence in or in relation to or affecting the trial that-
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.[72]

This, in effect, could be a ground of appeal in itself, rather than a definition. It is particularly difficult to see how this definition fits into subsection (2)(b), which is engaged where the judge errs in her or his assessment of the evidence to such an extent that a miscarriage of justice has occurred. In our view, the way that miscarriage of justice is defined may create unnecessary interpretative work for the courts.

8.63 Although the NZ Supreme Court had interpreted the common form provision in much the same way as the Australian High Court, it appears that there may have been a difference in approach as to whether an error made at trial had to be capable of affecting the outcome in order for there to have been a miscarriage of justice.[73] In *Weiss*, the High Court considered that "*any* departure from trial according to law, regardless of the nature or importance of that departure" constitutes a miscarriage of justice.[74] The NZ Supreme Court in *Matenga v R* disagreed and held that a miscarriage of justice will involve more than "an inconsequential or immaterial mistake or irregularity"; noting that it must be capable

70. Crime Prevention and Criminal Justice Unit, Ministry of Justice, *Departmental Report for the Justice and Electoral Committee: Criminal Procedure (Reform and Modernisation) Bill* (2011) 194-7.
71. NSW, Office of the Director of Public Prosecutions, *Response CA15*.
72. *Criminal Procedure Act 2011* (NZ) s 232(4).
73. *Matenga v R* [2009] NZSC 18; 3 NZLR 145 [30].
74. *Weiss v R* [2005] HCA 81; 224 CLR 300 [18] (emphasis in original).

of affecting the outcome of the trial.[75] Therefore, the definition of "miscarriage of justice" in the NZ provision may not reflect current Australian law, particularly insofar as it requires a causal connection between the error and the effect on the trial.

### *Option 6: Amalgamating the Law Council and NZ provisions*

8.64 Options 6 and 7 arose in the course of consultations with stakeholders.

8.65 Option 6 combines elements of the Law Council and NZ models as follows:

> The Court of Criminal Appeal must allow an appeal against conviction if the court is satisfied that:
>
> (1) the verdict of the jury (or the judge in a judge alone trial) is, on the evidence before the court at the time of the verdict, unreasonable, or
>
> (2) there has been an incorrect decision on a question of law or other miscarriage of justice that:
>
> (a) creates a real risk that the outcome of the trial was affected, or
>
> (b) has resulted in an unfair trial.

8.66 It uses the grounds for appeal currently contained in s 6(1), but removes the proviso and incorporates the idea that an appeal should not be dismissed where there has been an unfair trial. It envisages that an incorrect decision on a question of law or other form of miscarriage of justice will only result in a successful appeal where the trial was unfair or resulted in a real risk that the outcome of the trial was affected. This standard offers a clearer threshold than that which applies under the proviso in the common form provision. It is similar to the way that the Law Council proviso is drafted, except that it requires a positive finding before the appeal can be allowed.

8.67 Stakeholders did not support option 6. The NSW Bar Association did not support this option on the basis that it shifts the onus from the prosecution to the appellant and there is no apparent reason for making such a change.[76] The NSW ODPP expressed concerns similar to those raised about the NZ provision regarding the removal of the proviso. The CDPP submitted that the standard of "a real risk" introduces a new and untested concept to appeals against conviction.[77] We agree that the use of the "real risk" standard may introduce a new element not reflected in the Australian case law.

### *Option 7: Reformulating the WA provision*

8.68 Option 7 draws on the WA provision with an amended proviso:

> (1) This section applies in the case of an appeal against a conviction by an offender.
>
> (2) Unless under subsection (3) the Court of Criminal Appeal allows the appeal, it must dismiss the appeal.
>
> (3) The Court must allow the appeal if in its opinion:

75. *Matenga v R* [2009] NZSC 18; 3 NZLR 145 [30]-[31].
76. NSW Bar Association, *Response CA12*.
77. Commonwealth Director of Public Prosecutions, *Response CA11*.

(a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported, or

(b) the conviction should be set aside because of a wrong decision on a question of law by the judge, or

(c) there was a miscarriage of justice.

(4) Despite subsection (3)(b), the Court may dismiss the appeal if it considers either:

(a) that the wrong decision on a question of law by the judge was immaterial to the verdict, or

(b) that the Court is satisfied that the evidence properly admitted at trial established beyond reasonable doubt the guilt of the appellant.

8.69 Despite retaining the two stage structure of the common form provision, the proviso only applies where there has been a wrong decision on a question of law. In such cases the appeal may be dismissed if the error was immaterial to the verdict, or the court is satisfied of guilt beyond reasonable doubt.

8.70 The unqualified nature of the miscarriage of justice ground means that an appeal cannot be dismissed where a miscarriage of justice has been established. This is similar to the position in NZ and reflects a policy position that anything constituting a miscarriage of justice should result in a conviction being set aside.

8.71 The provision does not use the term "substantial miscarriage of justice", avoiding the need to distinguish between this concept and that of miscarriage of justice. The current jurisprudence on the concept of a miscarriage of justice in conviction appeals is attached to the corresponding idea of "substantial miscarriage of justice". "Miscarriage of justice" is used in a new and different way in this provision. Consequently, the CCA may need to develop a new body of jurisprudence if this approach were to be adopted.

8.72 Only NSW Young Lawyers preferred option 7 as it does not attempt to define "miscarriage of justice" and prevents the application of the proviso to that ground of appeal.[78] The NSW Bar Association opposed this model and submitted that it creates uncertainty as to the meaning of miscarriage of justice, and allows the CCA to dismiss an appeal where it considers that the appellant is guilty despite there having been an unfair trial or a wrong decision by the judge on a question of law.[79] Similarly, the NSW ODPP thought the proviso was worded too widely and removes other existing considerations that need to be taken into account when applying the proviso.[80]

78. NSW Young Lawyers, Criminal Law Committee, *Response CA16*.

79. NSW Bar Association, *Response CA12*.

80. NSW, Office of the Director of Public Prosecutions, *Response CA15*.

## Our proposed model: merging different ideas for reform

**Recommendation 8.1: New provision for conviction appeals**

The provision for appeals against conviction on indictment should be to the following effect:

The Court of Criminal Appeal must allow an appeal against conviction if the court is satisfied that:

(a) the verdict, on the evidence before the court at the time of the verdict, is unreasonable

(b) there has been an incorrect decision on a question of law or other miscarriage of justice that, in the opinion of the court, deprived the accused of a real possibility of acquittal, or

(c) the accused did not receive a fair trial.

8.73 Having considered the wide range of options, we have decided to recommend a formulation of the grounds for appeal against conviction that adopts the best features of those models with the most stakeholder support, and provides a simple and clear framework.

8.74 We consider that our proposal has the following benefits:

- **Provides clarity:** Our proposal offers a clear and simple statement of when the CCA should allow an appeal against conviction. Its structure and language assists in drawing clearer distinctions between each ground of appeal.
- **Removes the proviso:** This simplifies the structure of the decision making process.
- **Avoids distinction between "miscarriage of justice" and "substantial miscarriage of justice"**: By dispensing with the concept of a "substantial miscarriage of justice", this formulation circumvents the confusion regarding the meaning of that term and its relationship with "miscarriage of justice".
- **Encapsulates "lost chance of acquittal" test**: The second ground requires that there be an incorrect decision on a question of law or other miscarriage of justice that deprived the accused of a real possibility of acquittal. It establishes a causal connection between the wrong decision or miscarriage of justice and the conviction. The similar "lost chance of acquittal" test was in regular use prior to *Weiss* and there is an established body of case law on its meaning. It focuses the enquiry on whether the outcome could have been different, a concept which has significant stakeholder support.
- **Makes unfair trial an explicit ground of appeal:** By making an unfair trial a standalone ground of appeal, our proposal incorporates the idea that a conviction should not be allowed to stand where there has been a significant error of process resulting in an unfair trial.

8.75 Our proposed model draws key elements from the Law Council proposal, which was the model preferred by most stakeholders. In particular, grounds 1 and 2 are closely aligned with paragraphs (1) and (2) of the Law Council proposal. The requirement in our ground 2 that the accused be deprived of a real possibility of acquittal is similar to the second limb of the Law Council's proviso that the outcome of the trial would not have been different. However, instead of having fair trial considerations as part

of the proviso, as the Law Council has suggested, we have made it a ground of appeal in its own right. This is consistent with the Law Council's policy position that an appeal should never be dismissed where the accused did not receive a fair trial. We also consider that it will avoid the problem of circularity with which the NSW ODPP was concerned.[81]

8.76 In the remainder of this section we expand upon these benefits and discuss how each of our proposed grounds of appeal will operate.

### *Ground 1: Unreasonable verdict*

8.77 The first ground provides a clearer and more succinct formulation of the existing unreasonable verdict ground. It avoids repetition by removing the reference to a verdict that cannot be supported by the evidence, which would necessarily be unreasonable. It also makes it clear that the CCA is examining the evidence that was before the court at the time of the verdict, implicit in the nature of this ground of appeal.

8.78 Similar to the way it has been interpreted in the common form provision, the test for determining this ground of appeal is whether the CCA, after assessing the evidence, considers that it was "open to the jury" to be satisfied of the appellant's guilt beyond reasonable doubt.[82] There is no scope for dismissing an appeal where it is established that the verdict was unreasonable, unlike the current position, where it is not clear whether the proviso applies to the unreasonable verdict ground.

### *Ground 2: Incorrect decision on a question of law or other miscarriage of justice*

8.79 This ground merges the wrong decision on a question of law and miscarriage of justice grounds of the existing provision. This will prevent the confusion caused by these two similar concepts currently existing in separate grounds of appeal.

8.80 Similar to its current interpretation, an incorrect decision on a question of law includes circumstances where there was a misdirection or insufficient direction as to the law or where evidence was wrongly admitted or rejected.[83] This may still only include those decisions that were objected to during the trial.[84] Any decisions that were not objected to during the trial could still be considered if they constitute a miscarriage of justice.[85]

8.81 The wrong decision or miscarriage of justice must have "deprived the accused of a real possibility of acquittal". This is similar to the "lost chance of acquittal" test previously used in applying the proviso. It directs the attention of the CCA to the impact a wrong decision or other miscarriage of justice had on the outcome of the trial. It provides the CCA with the necessary flexibility to dismiss an appeal where

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81. NSW, Office of the Director of Public Prosecutions, *Response CA15*.
82. *M v R* (1994) 181 CLR 487, 493.
83. *Simic v R* (1980) 144 CLR 319, 327.
84. *R v Soma* [2003] HCA 13; 212 CLR 299 [11], [42] (Gleeson CJ, Gummow, Kirby and Hayne JJ), [79] (McHugh J); *Bounds v R* [2006] HCA 39; 80 ALJR 1380 [12]; *Carlton v R* [2010] NSWCCA 81; 199 A Crim R 591 [19].
85. *R v Soma* [2003] HCA 13; 212 CLR 299 [11].

the error was inconsequential to the outcome, without a two stage reasoning process.

8.82 We consider that this formulation will assist in removing some of the uncertainty surrounding the application of the proviso that emerged following *Weiss.* Currently, guilt beyond reasonable doubt is a necessary, but not determinative, condition for a finding that no substantial miscarriage of justice has actually occurred. Our proposed formulation refocuses the task of the CCA to consider, in effect, if there is a causal link between the wrong decision or miscarriage of justice and the conviction. The CCA may still be required to assess the significance of the error against the trial as a whole. However, in our view this test gives the CCA a much clearer and more specific task to undertake, rather than the more ambiguous process of considering whether a substantial miscarriage of justice actually occurred. It more clearly reflects the policy behind the proviso, namely that errors of this nature should only result in a successful appeal where, without them, there was a real possibility that the outcome of the trial would have been different.

### *Ground 3: Accused did not receive a fair trial*

8.83 Every accused is entitled to a fair trial.[86] Under the current law, errors or miscarriages of justice in some cases are said to undermine the very fairness of the trial in a basic way. In such cases, the issue is so basic that whether or not the outcome of the trial is affected is speculative or even not relevant.

8.84 This is consistent with the limitations on the use of the proviso in *Weiss*.[87] Our proposed ground 3 is intended to provide a simpler, clearer focus for appealing a decision, rather than a significant change to the outcomes of cases on appeal under the current law.

8.85 We view the circumstances where the accused did not receive a fair trial as those that go to issues such as:

- the validity of the trial
- the fundamental elements of the trial, including the proper exercise of the roles of judge and jury, and
- the ability of the accused to know the charge and properly participate in the trial.

8.86 There should be a high threshold for applying this ground. An appellant would need to demonstrate a substantial event or circumstance that rendered the trial unfair. It would be insufficient to show that there was some unfair step or event which did not render the trial as a whole unfair. This approach effectively extends the standard that has been applied to civil trials that, for a trial to be fair, it need not be perfect or ideal.[88] In the criminal context, for example, the High Court has observed that a

86. *Dietrich v R* (1992) 177 CLR 292.
87. *Weiss v R* [2005] HCA 81; 224 CLR 300 [45]-[46].
88. *Holt v Wynter* [2000] NSWCA 143; 49 NSWLR 128 [79]-[83] (Priestly JA); *McLean v Sydney Water Corporation* [2001] NSWCA 122.

requirement to determine issues of fact upon less than all of the material which could relevantly bear upon the matter did not necessarily make the trial unfair.[89]

8.87 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam,* Chief Justice Gleeson observed:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[90]

Although this statement was made in the context of an application for judicial review, we consider that it is equally applicable to an allegation that the accused did not receive a fair trial.

8.88 This is a process ground and there is no requirement to prove a causal link between the circumstances that deprived the accused of a fair trial and the conviction. We are of the view that this is appropriate as it may be difficult in most of the cases that fall within the scope of this ground to predict if the unfairness could have affected the outcome. It also gives effect to the idea that every accused is entitled to a fair trial.

8.89 The unfair trial ground of appeal is intended to capture particularly egregious departures from ordinary trial requirements. We expect that the concept of an unfair trial may encompass cases where there has been:

- a denial of procedural fairness[91]
- a serious procedural irregularity – for example, the accused was denied legal representation or access to an interpreter, or the accused's trial counsel was incompetent[92]
- judicial error – for example, the judge was excessively involved in or interfered with the conduct of the trial, or the judge gave a *Black* direction[93] prematurely and not in accordance with the *Jury Act 1977* (NSW).
- prosecution misconduct – for example, material was not disclosed that should have been disclosed,[94] or
- jury misconduct – for example, jurors were in contact with the parties or witnesses,[95] or accessed material not received as exhibits.

8.90 Whether the court will characterise the issue as one to be determined under ground 2, which requires a causal connection between the irregularity and the outcome, or ground 3, which does not require a causal connection, will depend on a

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89. *R v Edwards* [2009] HCA 20; 83 ALJR 717 [31] (where evidence had been permanently lost). See also *Webb v R* [2012] NSWCCA 216 [68].
90. *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 [37] (Gleeson CJ).
91. *Weiss v R* [2005] HCA 81; 224 CLR 300 [45].
92. *Dietrich v R* (1992) 177 CLR 292; *Nudd v R* [2006] HCA 9; 80 ALJR 614.
93. *Black v R* (1993) 179 CLR 44, 51-2.
94. *Grey v R* [2001] HCA 65; 75 ALJR 1708.
95. *Webb v R* (1994) 181 CLR 41.

view of the nature of the irregularity. The notion of a fair trial goes to the nature of the trial as a fair, legal process where accused people can answer charges brought against them. Issues arising under ground 2 are less fundamental. In these cases, an appeal depends on whether the error has compromised the outcome to the extent that an accused has lost a possibility of acquittal. Whether a case falls within the scope of ground 2 or ground 3 will depend on its particular circumstances.

## Defendant appeals against sentence

### Current law

8.91 Section 5(1)(c) of the CAA provides that a person convicted on indictment may appeal to the CCA with the leave of the court against the sentence that was passed on the conviction.

8.92 The powers of the CCA in such a case are as provided under s 6(3) of the CAA:

> On an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

8.93 Similarly to the provision for appeals against conviction, s 6(3) is based on the *Criminal Appeal Act 1907* (UK). Similar provisions exist in most Australian jurisdictions, except Victoria.

#### *Case law requires the identification of an error*

8.94 The apparently broad discretion in s 6(3) has been interpreted as requiring the identification of an error by the sentencing court before the CCA can intervene and vary the sentence. Appeals against sentence for offences dealt with on indictment are not rehearings. It is not sufficient for the CCA to allow an appeal against sentence merely because it disagrees with the sentence imposed.[96] In *House v R* the High Court held that the sentencing court will have erred:

(a) where the judge:

(i) acts on a wrong principle

(ii) allows irrelevant or extraneous matters to guide the decision

(iii) mistakes the facts

(iv) does not take into account a material consideration, or

(b) where, on the facts, the sentence is unreasonable or plainly unjust.[97]

96. *Lowndes v R* [1999] HCA 29; 195 CLR 665 [15].
97. *House v R* (1936) 55 CLR 499, 505.

8.95 In *Wong v R* Justices Gaudron, Gummow and Hayne described *House* as outlining two types of error: specific errors of principle (subparagraphs (a)(i)-(iv) above) and a "residuary category of error" (paragraph (b) above), more commonly described as manifest excess (or manifest inadequacy, in the case of Crown appeals).[98]

8.96 Section 6(3) adds an additional hurdle, by requiring the court to be satisfied that a different sentence is warranted and should have been imposed by the sentencing court. In *R v Simpson*, the CCA held that this is an "essential pre-condition" for exercising its discretion to impose a different sentence.[99] However, where error has been established, the sentence imposed at first instance need not be manifestly excessive for the appellate court to resentence the offender.[100]

8.97 Appellate intervention is only justified in cases concerning manifest excess (or manifest inadequacy) where the appellate court concludes that there must have been some "misapplication of principle", even though it is not readily apparent in the reasons for sentence.[101]

### *Appeal may otherwise be allowed where a miscarriage of justice occurred*

8.98 Appeals against sentence may also be allowed where a miscarriage of justice has occurred, even though error cannot be demonstrated. This may be relevant where there is fresh evidence concerning circumstances that were in existence at the time of sentencing that were not discovered, or the significance of which was not appreciated, until after the sentence was passed.[102] Cases in which the CCA will intervene and resentence on the basis of fresh evidence are exceptional, for example where they involve matters regarding the health of the offender that were not known or fully understood at the time of sentencing.[103]

8.99 A miscarriage of justice may also be established where there was incompetent legal representation[104] or where there is a disparity of sentence with a co-offender.[105] In a case of disparity, a sentence that might have otherwise been appropriate may be reduced, so as to avoid a legitimate sense of grievance, but not to the extent to which it is disproportionate to the criminality involved.[106]

8.100 A lack of procedural fairness accorded by the sentencing court may also provide grounds for an appeal against sentence.[107]

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98. *Wong v R* [2001] HCA 64; 207 CLR 584 [58].
99. *R v Simpson* [2001] NSWCCA 534; 53 NSWLR 704 [79].
100. *R v Johnson* [2005] NSWCCA 186; *R v Price* [2005] NSWCCA 285.
101. *Wong v R* [2001] HCA 64; 207 CLR 584 [58] (Gaudron, Gummow & Hayne JJ).
102. A comprehensive list of examples of the types of fresh evidence that may be considered in an appeal against sentence can be found in *Springer v R* [2007] NSWCCA 289; 177 A Crim R 13 [3] (McClellan CJ at CL).
103. *Springer v R* [2007] NSWCCA 289; 177 A Crim R 13.
104. *R v Birks* (1990) 19 NSWLR 677; *Munro v R* [2006] NSWCCA 350.
105. *Lowe v R* (1984) 154 CLR 606.
106. *Lowe v R* (1984) 154 CLR 606; *Green v R* [2011] HCA 49; 244 CLR 462 [32].
107. *Pantorno v R* (1989) 166 CLR 466.

## Number of defendant appeals against sentence

8.101 The number of defendant appeals against sentence has fallen between 2002 and 2012. The success rate has ranged from 34.3% to 49.5% over that period.

### Table 8.2: Defendant appeals against sentence, NSW and Commonwealth offences, 2002-2012

| Year | Total appeals against sentence | Allowed | |
|---|---|---|---|
| **2012** | 168 | 65 | 38.7% |
| **2011** | 188 | 93 | 49.5% |
| **2010** | 216 | 84 | 38.9% |
| **2009** | 230 | 78 | 34.3% |
| **2008** | 216 | 83 | 38.4% |
| **2007** | 242 | 94 | 38.8% |
| **2006** | 259 | 106 | 40.9% |
| **2005** | 318 | 141 | 44.3% |
| **2004** | 285 | 131 | 46% |
| **2003** | 272 | 109 | 40.1% |
| **2002** | 331 | 148 | 44.7% |

*Source: Judicial Commission of NSW, Sentencing Bench Book – Release 25 – October 2013; Information provided by Judicial Commission of NSW (16 September 2013).*

## Reforming defendant sentence appeals

8.102 There have been criticisms of the grounds for defendant appeals against sentence. For example, the frequently quoted passage from *House v R* has been referred to as "elliptical and elusive and impenetrable",[108] while others have found particular difficulty with the concept of manifest excess.[109] However, the case law is largely settled and the appeal grounds are otherwise largely uncontroversial.

8.103 The current process for sentence appeals appears to work efficiently. It is well understood and stakeholders identified no problems. The existing provision confers a very broad discretion for the CCA to determine appeals against sentence. Its breadth has allowed the CCA and the High Court to develop effective guidance and restrictions on the exercise of this discretion while retaining desirable flexibility.

108. H Donnelly, "Sentence Appeals in New South Wales: Success Rates and Recent Law" (Paper presented at the Sentencing Conference, Canberra, 8-10 February 2008) 7.

109. S Krasnostein and A Freiberg, "Manifest Error: Grounds for Review?" (2012) 36 *Australian Bar Review* 54.

8.104 The primary reason for considering reform of sentence appeals is to improve accessibility and transparency by incorporating the common law into the legislation, rather than changing the substantive law. The legislation does not reflect the task undertaken by the CCA in determining appeals against sentence for offences dealt with on indictment. As the SCAG Working Group highlights, the non statutory test requiring a demonstration of error is well established by the case law.[110] As legislation has established the ability to appeal against sentence, it is arguable that the legislation should also contain the basis on which the appeal is decided.

8.105 However, many stakeholders favoured maintaining the current position.[111]

## Options for reform

8.106 We have identified three options for reform of the current statutory formulation for appeals against sentence.

### *Option 1: Include an express reference to error*

8.107 Our first option is to make it clear in the legislation that the CCA must establish error before it can move on to impose a different sentence. The Victorian provision for defendant appeals against sentence provides that:

> (1) On an appeal [against sentence], the Court of Appeal must allow the appeal if the appellant satisfies the court that—
>
> (a) there is an error in the sentence first imposed; and
>
> (b) a different sentence should be imposed.
>
> (2) In any other case, the Court of Appeal must dismiss an appeal.[112]

8.108 Victoria introduced this provision in order to embed the error principle in the legislation, as the previous provision suggested that there was an unfettered discretion regarding sentence appeals that did not exist in practice.[113] A similar provision exists in NZ.[114]

8.109 The advantage of such an approach is that it clarifies the current legislative provision to reflect the way the court actually approaches sentence appeals, while giving the court sufficient flexibility to determine what kind of error is required.

8.110 However, because the Victorian provision does not specify the basis for error, it may not actually provide any greater guidance to those unfamiliar with the case law

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110. Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010) 131.
111. NSW Bar Association, *Submission CA5,* 12; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 7; Legal Aid NSW, *Submission CA12,* 13; Commonwealth Director of Public Prosecutions, *Submission CA15,* 2-3; Appeals from higher courts roundtable, *Consultation CA5*.
112. *Criminal Procedure Act 2009* (Vic) s 281.
113. Explanatory Memorandum, Criminal Procedure Bill 2008 (Vic) cl 281.
114. *Criminal Procedure Act 2011* (NZ) s 250.

surrounding sentence appeals. The court will still need to have regard to the case law in order to determine the appeal.

8.111 Furthermore, there is concern that a requirement for error may not capture miscarriages of justice where there is no specifically identifiable error – for example, fresh evidence or disparity with a co-offender.

### *Option 2: Codification of the House v R grounds*

8.112 The second option is to incorporate the *House v R* principles expressly into a legislative test. The SCAG Working Group proposed this in its discussion paper.[115]

8.113 The Law Council of Australia, in its submission to the SCAG Working Group, supported incorporating the *House* principles into the provision. However, it considered that the particular formulation proposed in the Group's discussion paper did not accurately capture those principles.[116]

8.114 The NSW Bar Association submitted that s 6(3) leaves the CCA with a very broad discretion and that codification of the general error principles would constrain its discretion to adapt those principles to the circumstances of each sentence appeal.[117] It may also result in non *House* grounds being excluded from the scope of the appeal, such as grounds relating to procedural fairness, the conduct of counsel or the discovery of fresh evidence.

8.115 Including the grounds of appeal in the legislation may enhance clarity and accessibility. However, it may unnecessarily constrain the CCA if it considers that it cannot move outside the legislated grounds of error.

### *Option 3: Single ground of manifest excess or inadequacy*

8.116 The Chief Judge of the District Court and the NSW ODPP were in favour of moving to a single test of manifest excess or inadequacy.[118] Under this approach, the CCA would not need to review the decision of the sentencing judge to determine whether any patent error existed. Its task would be to review the sentence in its entirety and reach a conclusion about whether the sentence was outside the range of acceptable penalties for the offence.

8.117 It was argued that this would require less detailed consideration of the remarks of the sentencing judge, and may result in appeals against sentence being finalised more quickly. It may also avoid sentencing judges spending an unnecessary amount of time preparing reasons for sentence in order to demonstrate lack of error.[119]

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115. Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010) 132-3.
116. Law Council of Australia, *Submission, SCAG Discussion Paper on Harmonisation of Criminal Appeals Legislation* (2010) 6-7.
117. NSW Bar Association, *Submission CA5,* 12.
118. District Court of NSW, *Submission PSE3*, 3; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 1.
119. District Court of NSW, *Submission PSE3*, 3.

8.118 However, most other stakeholders were opposed to introducing a single test of manifest excess or inadequacy.[120] The main concern was that it would fail to provide redress for errors in the exercise of the sentencing discretion, in cases where the sentence was not manifestly excessive overall. The NSW Bar Association strongly opposed introducing a test of this kind, arguing that it could produce injustice as an error disadvantaging the offender that did not result in a manifestly excessive sentence would not be corrected.[121]

8.119 Legal Aid NSW argued that this risked reducing the CCA's role in ensuring consistency in sentencing and providing authority on questions of principle. It also submitted that such a change would increase the rate of Crown appeals against sentence.[122]

8.120 It has also been argued that the manifest excess ground of appeal improperly obscures errors that should be highlighted, fails to provide guidance to sentencing courts, is "conceptually unconvincing", and prioritises individualised justice over consistency.[123]

8.121 We agree that the introduction of a single test of manifest excess or inadequacy is inappropriate. Few appeals are currently determined on this ground alone. The CCA has an important role to play in overseeing sentencing practice in NSW, both by correcting individual sentences that are unjust but also by establishing general sentencing principles and ensuring that these are consistently applied. A critical part of the CCA's role in ensuring consistency in the law would be significantly diminished if a single test of manifest excess or inadequacy were adopted.

## Our view: retain the existing position

8.122 The question of whether to retain the current legislative basis for sentence appeals, or to include the requirement to establish error in the legislation, is finely balanced.

8.123 Greater specification of the appeal grounds would enhance clarity and transparency by making clear the basis on which the CCA decides these appeals.

8.124 However, attempting to specify the need for error or to codify the *House* test may inadvertently narrow the law and constrain judicial discretion in this area. As outlined at para 8.98 – 8.100 above, not all grounds for appeals against sentence involve the identification of error. In particular, it is unclear how the miscarriage of justice or parity grounds could be accommodated by a provision that expressly refers to error or the *House* principles.

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120. NSW Bar Association, *Submission CA5,* 12; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 8; Legal Aid NSW, *Submission CA12,* 14; Commonwealth Director of Public Prosecutions, *Submission CA15,* 3. Compare with NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 18.
121. NSW Bar Association, *Submission CA5,* 12.
122. Legal Aid NSW, *Submission CA12*, 14.
123. S Krasnostein and A Freiberg, "Manifest Error: Grounds for Review?" (2012) 36 *Australian Bar Review* 54, 55.

8.125 Any attempt to articulate the case law in legislation risks adversely restricting the grounds on which a defendant can appeal against sentence. As no problems have been raised regarding the way in which the common law operates, we consider that any additional limitations would be undesirable. We therefore do not recommend that any change be made to the grounds for defendant appeals against sentence for an offence tried on indictment. In coming to this conclusion we have had regard to the views of many stakeholders that change is unnecessary.

**Recommendation 8.2: Retain grounds for defendant sentence appeals**

There should continue to be provisions governing defendant appeals against sentence to the effect of s 5(1) and s 6(3) of the *Criminal Appeal Act 1912* (NSW).

## Crown appeals against sentence

### Current law

8.126 Section 5D of the CAA provides that the Attorney General or the Director of Public Prosecutions (DPP) may appeal to the CCA against:

> any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

8.127 This provision has been interpreted as requiring the demonstration of latent or patent error by the sentencing court in accordance with the *House v R* approach.[124] Before the CCA can exercise its discretion under s 5D it must be satisfied that the sentence under appeal was manifestly inadequate because of a latent or patent error made by the primary judge.[125] It is not sufficient that the CCA would have itself imposed a more severe sentence had it been the original sentencing court.[126] In *Bugmy v R*, the High Court considered that the CCA's power to substitute a sentence could only be engaged where it was satisfied the discretion of the trial judge miscarried because the sentence was "below the range of sentences that could be justly imposed for the offence consistently with sentencing standards."[127]

8.128 In Crown appeals against sentence the CCA has a "residual discretion" to dismiss the appeal, despite the inadequacy of the sentence. Alternatively, if the appeal is allowed, the CCA may use its residual discretion to impose a sentence that is lower than the one that may have been justified at first instance.[128] Reasons for exercising the residual discretion include whether allowing the appeal will provide only limited

124. *Markarian v R* [2005] HCA 25; 228 CLR 357; *Carroll v R* [2009] HCA 13; 83 ALJR 579; *Green v R* [2011] HCA 49; 244 CLR 462.
125. *Cranssen v R* (1936) 55 CLR 509, 519; *Whittaker v R* (1928) 41 CLR 230; *R v Janceski* [2005] NSWCCA 288 [25].
126. *R v Hallocoglu* (1992) 29 NSWLR 67, 78.
127. *Bugmy v R* [2013] HCA 37; 87 ALJR 1022 [24].
128. *Green v R* [2011] HCA 49; 244 CLR 462 [35].

guidance to sentencing courts, whether allowing the appeal would cause injustice, and the conduct of the prosecution, including any delay in instituting the appeal.[129]

8.129 In *Griffiths v R*, Chief Justice Barwick stated that an appeal against sentence by the Crown should be "a rarity, brought only to establish some matter of principle and ... lay down principles for the governance and guidance of courts".[130] This statement has been influential in developing the principles of rarity and restraint for Crown appeals against sentence,[131] which is reflected in the DPP's Prosecution Guidelines.[132]

8.130 The Attorney General or the DPP may also appeal against a sentence where it was reduced because the offender undertook to assist law enforcement authorities and then failed to fulfil that undertaking.[133] The CCA may vary the sentence if it is satisfied that the person "fails wholly or partly to fulfil the undertaking".

## Number of Crown appeals against sentence

8.131 The number and success rate of Crown appeals against sentence has fluctuated significantly in the past 10 years. The number of appeals ranged between 101 (in 2004) and 32 (in 2012). The success rate of these appeals also ranged widely, between 37.5% (in 2012) and 71% (in 2010).

### Table 8.3: Crown appeals against sentence for NSW and Commonwealth offences, 2002-2012

| Year | Total appeals against sentence | Allowed | |
|---|---|---|---|
| **2012** | 32 | 12 | 37.5% |
| **2011** | 34 | 15 | 44.1% |
| **2010** | 69 | 49 | 71% |
| **2009** | 48 | 31 | 64.6% |
| **2008** | 62 | 32 | 51.6% |
| **2007** | 59 | 35 | 59.3% |
| **2006** | 76 | 47 | 61.8% |
| **2005** | 58 | 34 | 58.6% |
| **2004** | 101 | 52 | 51.5% |
| **2003** | 65 | 32 | 49.2% |

129. *Green v R* [2011] HCA 49; 244 CLR 462 [43].
130. *Griffiths v R* (1977) 137 CLR 293, 310 (Barwick CJ).
131. See S Thomson, "Griffiths and the 'Spike': 'Rarity' and 'Restraint' in Crown Sentencing Appeals Re-assessed" (2011) 85 *Australian Law Journal* 761.
132. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 29.
133. *Criminal Appeal Act 1912* (NSW) s 5DA.

| Year | Total appeals against sentence | Allowed | |
|---|---|---|---|
| **2002** | 80 | 49 | 61.3% |

*Source: Judicial Commission of NSW, Sentencing Bench Book – Release 25 – October 2013; Information provided by Judicial Commission of NSW (16 September 2013).*

## Reforming Crown sentence appeals

8.132 The same options for reform of defendant appeals against sentence[134] would also apply to Crown appeals sentence. However, any proposal for change would need to take into account the fact that Crown appeals against sentence involve an additional residual discretion on the part of the CCA, above the ordinary discretion involved in defendant appeals. That residual discretion would need to be captured accurately in any recommendation for reform.

8.133 The Law Council of Australia in its submission to the SCAG Working Group considered that a statutory formulation of the *House* principles would not reflect the discretion the appeal courts have at present to dismiss a Crown appeal notwithstanding the existence of error.[135]

8.134 The Victorian provision for Crown appeals against sentence is substantially the same as that for defendant appeals against sentence.[136] The Victorian Court of Appeal has held that this provision preserves the court's residual discretion, through the requirement that the court be satisfied that a different sentence should be imposed.[137]

## Our view: retain the existing position

8.135 For the same reasons as we do not propose any change to the provision for defendant appeals against sentence, we similarly do not recommend any change to Crown appeals against sentence. It is particularly important in Crown appeals that the CCA's discretion not be unnecessarily restrained.

**Recommendation 8.3: Retain grounds for Crown sentence appeals**

There should continue to be provisions governing Crown appeals against sentence to the effect of s 5D and s 5DA of the *Criminal Appeal Act 1912* (NSW).

134. See para 8.106 - 8.121.
135. Law Council of Australia, *Submission, SCAG Discussion Paper on Harmonisation of Criminal Appeals Legislation* (2010) 6-8.
136. *Criminal Procedure Act 2009* (Vic) s 289.
137. *DPP v Karazisis* [2010] VSCA 350; 31 VR 634.

# 9. Appeals from acquittals and similar orders

**In brief**

An appeal from an acquittal is available in limited circumstances on a question of law. Where a defendant is acquitted following a hearing by a judge sitting alone, the availability of the judge's reasons weighs in favour of allowing an appeal based on factual errors. An appeal from an acquittal should be available in a judge alone trial where the offence is punishable by 15 years imprisonment or more, and there was an error of law or fact that was material to the outcome. We also recommend expanding the availability of appeal from an acquittal in the summary jurisdiction of the higher courts, from a decision of the judge to accept a plea in bar and from an acquittal at a special hearing.


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9.1 In this chapter we consider the avenues of appeal for three different types of acquittals:

- appeals from a verdict of acquittal following a trial (both on indictment and in the summary jurisdiction of the higher courts)
- appeals from a judge's decision to accept a plea in bar, and
- appeals from a finding of not guilty by reason of mental illness (NGMI) or a finding at a special hearing.

## Appeals against acquittal in proceedings on indictment

### Current law

9.2 In NSW there was traditionally no avenue through which the prosecution could appeal an acquittal in proceedings dealt with on indictment. This was an extension of the common law principle against double jeopardy, that no person should be tried again for an offence for which he or she has already been acquitted or convicted.[1]

9.3 However, there is a distinction between remedying on appeal a legal error by a trial judge, and rejecting the jury's verdict of acquittal. The double jeopardy rule, according to a recent commentator, only captures the second situation.[2] Until recently, appeals against an acquittal were not provided for in NSW.

9.4 Community attitudes towards the finality of a verdict of acquittal began to shift about a decade ago, following some high profile cases[3] which demonstrated that injustice can be caused where an acquittal is subsequently undermined by new material.[4] In 2006 a range of double jeopardy reforms were introduced in NSW. They allowed the retrial of a defendant following an acquittal in certain circumstances. As a corollary of this, a limited avenue of appeal against an acquittal was also created.[5]

9.5 Section 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) provides that the Attorney General or the Director of Public Prosecutions (DPP) may appeal to the Court of Criminal Appeal (CCA), on any ground that involves a question of law alone, against an acquittal:

(a) by a jury at the direction of the trial judge

1. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code*, Discussion Paper (2003) 1.
2. See C Corns, *Public Prosecutions in Australia* (LawBook, 2014) [10.130].
3. See, eg, *R v Carroll* [2002] HCA 55; 213 CLR 635.
4. See N Cowdery, "Prosecution Appeals in NSW" in C Corns and G Urbas, *Criminal Appeals 1907-2007: Issues and Perspectives* (Federation Press, 2008) 75, 92.
5. *Crimes (Appeal and Review) Act 2001* (NSW) pt 8.

(b) by a judge of the Supreme Court or the District Court in criminal proceedings for an indictable offence tried by the judge without a jury, or

(c) by the Supreme Court or the Land and Environment Court (LEC) in its summary jurisdiction, in any proceedings in which the Crown was a party.

9.6 This right of appeal does not extend to non directed acquittals by a jury, or to any ground involving a question of fact or a question of mixed fact and law. On appeal, the CCA is limited to affirming or quashing the acquittal. If the acquittal is quashed, the CCA may order a new trial. It cannot proceed to convict or sentence the defendant.[6]

9.7 According to the NSW Office of the Director of Public Prosecutions, it has used this avenue of appeal only three times since it was introduced in 2006 and all three appeals have been successful.[7]

9.8 In *R v PL*,[8] the only published appeal under s 107, the CCA upheld a prosecution appeal against a directed acquittal for murder and manslaughter. The CCA found that the trial judge had erred in the assumption that the prosecution needed to establish the precise act that had caused the death of the deceased in order to prove the elements of manslaughter and murder beyond reasonable doubt.[9] The CCA also held that, in the context of a statute which overturns a fundamental principle of the criminal law like the principle against double jeopardy, an appeal under s 107 must be confined to a question of law alone. There is no scope for consideration of questions of mixed fact and law.[10]

9.9 The CCA further noted that its power to order a new trial following a successful appeal was discretionary and, in an appeal against a directed acquittal, it:

> should exercise its discretion not to order a new trial if it is satisfied that a conviction would be overturned as unreasonable, or on any other basis which would not result in a new trial on a successful conviction appeal.[11]

As the CCA considered that the *mens rea* element of this case was particularly weak, it affirmed the acquittal on the charge of murder and ordered a new trial limited to a charge of manslaughter.[12]

## Appeals against acquittal in other jurisdictions

9.10 WA, SA and Tasmania have an avenue of appeal against an acquittal. The NSW provision is narrower in scope than all of these corresponding provisions.

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6. *Crimes (Appeal and Review) Act 2001* (NSW) s 107(5)-(7).
7. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 12.
8. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199.
9. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199 [68]-[69].
10. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199 [24]-[25].
11. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199 [90].
12. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199 [96].

9.11 In 2008, both SA and WA introduced amendments broadening the scope of their respective provisions for acquittal appeals. Currently in SA, the DPP may appeal against an acquittal by a jury at the direction of a judge or by a judge sitting alone, on any ground with leave.[13] In WA, the prosecutor may appeal with leave against an acquittal:

- following a jury verdict where the offence is punishable by more than 14 years imprisonment, on the grounds that the judge made an error of fact or law before or during the trial in relation to the charge
- where a judge decides the defendant has no case to answer, or
- where the trial judge was sitting alone.[14]

9.12 In Tasmania, the Attorney General may appeal against an acquittal with leave on a question of law.[15] This avenue of appeal was introduced in 1924 with the original *Criminal Code* (Tas). The original provision allowed an appeal against acquittal "on a question of law alone". The provision was amended in 1987 to remove the word "alone" after the High Court strictly interpreted "question of law alone" as not encompassing a question of mixed fact and law.[16] Judge alone trials cannot be held in Tasmania, meaning this avenue of appeal is effectively limited to acquittals by a jury.

9.13 The ACT Court of Appeal may hear an appeal from an "order" of the Supreme Court.[17] However, the court has held that the general words of this provision cannot supersede the common law rule against double jeopardy.[18] Hence, for the purposes of an appeal, an "order" does not include an order of acquittal.

9.14 The Full Court of the Federal Court may hear an appeal from an acquittal in the Federal Court, where the judge found that the defendant had no case to answer.[19] The appeal may be made as of right on a question of law, or with leave on any other ground.[20] However, the Federal Court's indictable criminal jurisdiction is very limited and as far as we are aware there have been no appeals under this provision.

9.15 The Australian Law Reform Commission (ALRC) is currently undertaking an inquiry into Commonwealth laws that encroach upon traditional rights, freedoms and privileges. The terms of reference specifically identify laws permitting an appeal against acquittal as being within the scope of the review. The inquiry will focus on commercial and corporate regulation, environmental regulation and workplace relations. The report of the ALRC is due by 1 December 2014.[21]

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13. *Criminal Law Consolidation Act 1935* (SA) s 352(1)(ab).
14. *Criminal Appeals Act 2004* (WA) s 24(2).
15. *Criminal Code* (Tas) s 401(2).
16. *Williams v R* (1986) 161 CLR 278.
17. *Supreme Court Act 1933* (ACT) s 37E(2).
18. *R v Ardler* [2004] ACTCA 4; 144 A Crim R 552 [39].
19. *Federal Court of Australia Act 1976* (Cth) s 30AA(1)(c).
20. *Federal Court of Australia Act 1976* (Cth) s 30AB(1).
21. G Brandis, "New Australian Law Reform Inquiry to Focus on Freedoms" (Media Release, 11 December 2013).

## Judge alone trials in NSW

9.16 In criminal proceedings tried on indictment in the District Court or the Supreme Court, the defendant or the prosecutor may apply to the court for an order that the defendant be tried by a judge alone.[22] An application must not be made in a joint trial unless all other defendant persons also apply with respect to all the charges.[23] The court *must* make the order where the parties agree to the trial being conducted by a judge alone.[24] It must *not* make the order if a defendant does not consent.[25]

9.17 The court *may*:

- make the order where the prosecution does not consent but the court considers it is in the interests of justice to do so[26]
- regardless of the other provisions, make the order if it is of the opinion that there is a substantial risk of criminal interference with any jury or juror that cannot be reasonably mitigated by other means,[27] or
- refuse to make the order if the trial will involve factual issues requiring the application of objective community standards.[28]

9.18 Before making an order for a judge alone trial, the court must be satisfied that the defendant has sought and received legal advice regarding the effect of a trial by judge alone.[29]

9.19 The statistics in Table 9.1 indicate that in NSW the number of cases that proceed to a judge alone trial is relatively small. However, this number has increased in recent years, particularly in the District Court. This increase is perhaps as a result of 2010 amendments which removed the DPP's right to veto a judge alone trial.[30]

### Table 9.1: Judge alone and jury trials in NSW higher courts, 2002-2011

| Year | Supreme Court | | | | District Court | | | |
|---|---|---|---|---|---|---|---|---|
| | Judge alone | | Jury trials | | Judge alone | | Jury trials | |
| | Total | Acquitted of all charges | Total | Acquitted of all charges | Total | Acquitted of all charges | Total | Acquitted of all charges |
| **2012** | 6 | 0% | 67 | 9% | 89 | 36% | 435 | 46% |
| **2011** | 12 | 0% | 27 | 37% | 71 | 50.7% | 473 | 45% |

22. *Criminal Procedure Act 1986* (NSW) s 132(1).
23. *Criminal Procedure Act 1986* (NSW) s 132A(2).
24. *Criminal Procedure Act 1986* (NSW) s 132(2).
25. *Criminal Procedure Act 1986* (NSW) s 132(3).
26. *Criminal Procedure Act 1986* (NSW) s 132(4).
27. *Criminal Procedure Act 1986* (NSW) s 132(7). The offences relevant to this section are contained in *Crimes Act 1900* (NSW) pt 7 div 3.
28. *Criminal Procedure Act 1986* (NSW) s 132(5).
29. *Criminal Procedure Act 1986* (NSW) s 132(6).
30. *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) sch 12.2 [2].

| Year | Supreme Court | | | | District Court | | | |
|---|---|---|---|---|---|---|---|---|
| | Judge alone | | Jury trials | | Judge alone | | Jury trials | |
| | Total | Acquitted of all charges | Total | Acquitted of all charges | Total | Acquitted of all charges | Total | Acquitted of all charges |
| **2010** | 8 | 12.5% | 45 | 17.8% | 47 | 46.8% | 499 | 45.9% |
| **2009** | 10 | 10% | 32 | 34.4% | 42 | 19% | 542 | 44.5% |
| **2008** | No data | - | - | - | - | - | - | - |
| **2007** | 1 | 100% | 38 | 15.8% | 34 | 55.9% | 459 | 43.6% |
| **2006** | 10 | 80% | 50 | 22% | 27 | 51.9% | 497 | 39.4% |
| **2005** | 5 | 100% | 53 | 18.9% | 24 | 50% | 576 | 42.7% |
| **2004** | 5 | 100% | 63 | 38.1% | 30 | 53.3% | 536 | 44.4% |
| **2003** | 3 | 66.7% | 55 | 21.8% | 23 | 56.5% | 586 | 41.6% |
| **2002** | 9 | 100% | 48 | 18.8% | 33 | 63.6% | 581 | 42.9% |

*Source: NSW Bureau of Crime Statistics and Research, NSW Higher Criminal Courts January 1993 – December 2007, January 2009 – December 2012: Number of Judge Alone and Jury Trials for Persons Finalised in Appearances that Proceeded to Trial by Year, Method of Finalisation and Jurisdiction (mai13/11716hc)*[31]

## Expanding the current law to non directed verdicts of acquittal

9.20 The current avenues of appeal against an acquittal share a common characteristic: the proceedings have been disposed of by the judge without a jury decision.[32] In these cases, where it is alleged there is judicial error, it is defensible that there be an avenue of appeal to address such errors.[33]

9.21 However, the position is different in the case of a verdict of acquittal by a jury, which is a determination of fact. The finality of a jury verdict of acquittal has long been accepted as one of the fundamental principles of the criminal justice system.[34]

### *Our view: a non directed acquittal by a jury should not be capable of appeal*

9.22 An avenue of appeal against a non directed acquittal by a jury would represent a significant inroad into the traditional criminal justice system. Compelling reasons would be needed for such a change, and we do not consider that there is sufficient justification for it. We therefore do not make any recommendations for change to the provisions for appeal against a non directed jury verdict of acquittal.

31. The figures for judge alone trials exclude special hearings conducted under the *Mental Health (Forensic Provisions) Act 1990* (NSW).
32. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199 [75].
33. C Corns, *Public Prosecutions in Australia* (LawBook, 2014) [10.130].
34. See *R v Snow* (1915) 20 CLR 315, 322-3 (Griffith CJ).

## Expanding the current grounds of appeal from acquittals by a judge sitting alone

9.23 Some stakeholders supported expanding the grounds of appeal against an acquittal in a judge alone trial from a question of law alone to include questions of fact and questions of mixed fact and law.[35] This would be consistent with the provisions that apply to appeals against an acquittal by a judge sitting alone in SA and WA.

9.24 However, other stakeholders opposed broadening the grounds on which a prosecutor may appeal an acquittal in matters tried by a judge alone.[36] Of some weight in this respect was the fact that the existing avenue for appeals against acquittal has rarely been used since its introduction.[37] The NSW Bar Association identified the importance of finality in the trial verdict, and the imbalance of power between the defendant and the prosecution, as further reasons why the current position should not be altered.[38]

### *Our view: an acquittal by a judge sitting alone should be capable of appeal on errors of law and fact*

9.25 We have closely considered the views of stakeholders in this contentious area. It is our view that there is sufficient justification for expanding the breadth of an appeal against an acquittal in a judge alone trial, and we make a recommendation to this effect for a number of reasons.

9.26 First, there are a number of key differences between a trial by jury and a trial by judge alone that would allow judge alone trials to be more amenable to appeal, and make such an appeal desirable. A judge sitting without a jury on a matter tried by indictment is required to provide reasons. These must include the principles of law applied and the findings of fact on which the judge relied.[39] Unlike a jury verdict, the judge's findings and reasoning process are transparent. As Justice Heydon stated in *AK v WA*:

> It is much easier for an appellate court to detect appellable error where reasons for the verdict at trial must be provided than it is when the appellate court is limited only to the record of the proceedings before a jury.[40]

9.27 In the relatively rare case where error can be shown from the judge's reasons, providing an avenue through which such error can be corrected could help to ensure community confidence in the criminal justice system.

9.28 We accept that the occasion for this form of appeal will be uncommon as judges are well trained in coming to factual conclusions, and are used to ensuring that their

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35. NSW, Office of the Director of Public Prosecutions, *Response CA17*; NSW Police Force, *Response CA18*.
36. Legal Aid NSW, *Response CA10*; NSW Bar Association, *Response CA12*; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Response CA14;* NSW Young Lawyers, Criminal Law Committee, *Response CA16*.
37. Legal Aid NSW, *Response CA10*; NSW Bar Association, *Response CA12*.
38. NSW Bar Association, *Response CA12*.
39. *Criminal Procedure Act 1986* (NSW) s 133(2).
40. *AK v WA* [2008] HCA 8; 232 CLR 438 [104].

reasoning can withstand rigorous scrutiny. In our view, however, public confidence in the criminal justice system is better supported when obvious errors, including errors of fact, can be appealed and fixed – rather than left to stand. We do not expect the avenue of appeal to be frequently used, and it does not need to be in order to further this goal.

9.29 Secondly, the types of matters that are heard in judge alone trials may justify a more expansive avenue of appeal in the event of an acquittal. Other than in cases where both parties consent, the court can make an order for a judge alone trial where the defendant consents and it is in the interests of justice to do so.[41] This will include cases where the evidence is likely to be highly complex or technical.[42] In these types of cases there is arguably a greater public interest in allowing factual errors at trial to be corrected on appeal than there is in other types of trials.

9.30 Thirdly, amendments in 2010 have made it easier for proceedings to be heard by a judge alone, as the DPP no longer has a right of veto. Table 9.1 shows that the number of judge alone trials in the District Court increased dramatically in 2011 and 2012. There seems to be a perception, held by at least some in the community, that it is more likely that an defendant will be acquitted in a judge alone trial than before a jury.[43] In our view this perception does not reflect the evidence. Since 2009, the rate of acquittal in judge alone trials has been similar to or less than the rate of acquittal in jury trials. Notwithstanding these figures, the increase in the number of judge alone trials and the existence of a perception that a judge alone trial is more favourable to a defendant, suggests that a broader avenue of appeal against an acquittal may assist in ensuring community confidence in the criminal justice system.

9.31 Finally, the judgment in *R v PL*[44] demonstrated the narrowness of the current avenue of appeal in NSW on a question of law alone. A broader avenue of appeal would dispense with the need to categorise specific appeal grounds into questions of fact or law, or of mixed fact and law, a distinction that is not always easy to draw.[45]

9.32 The detriment to the defendant in this proposal is limited. The defendant's consent is required before a trial can be heard by a judge alone instead of by a jury,[46] meaning a defendant can elect trial by jury if he or she does not want to accept the risk of a broader avenue of appeal in the event of an acquittal.

9.33 We therefore recommend that an appeal from an acquittal in a judge alone trial on indictment be available on a question of fact, question of law or question of mixed fact and law.

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41. *Criminal Procedure Act 1986* (NSW) s 132(4).
42. *R v Belghar* [2012] NSWCCA 86 [112].
43. See, eg, M Whitbourn, "Court Verdicts: More Found Innocent If No Jury Involved", *Sydney Morning Herald,* 23 November 2013.
44. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199.
45. See Chapter 4.
46. Other than where the court is of the opinion that there is a substantial risk of criminal interference with a jury or juror that cannot be reasonably mitigated by other means: *Criminal Procedure Act 1986* (NSW) s 132(7).

9.34 It is in our view unnecessary to expand the ground of appeal in directed acquittal cases. We deal more extensively below with acquittal in the summary jurisdiction of the higher courts, the third area where appeal against an acquittal is currently available.

## Basis for deciding acquittal appeal from a judge sitting alone

9.35 An appeal against an acquittal in a judge alone trial on questions of both fact and law raises the further question of the basis on which such an appeal should be determined.

### *Basis of appeal in other jurisdictions*

9.36 In *State of WA v Rayney*, the WA Court of Appeal and both parties accepted that in the particular appeal, against an acquittal in a judge alone trial, the appeal was to be by way of rehearing in the same way that other appeals to the Court of Appeal are conducted.[47] In *obiter dicta* the Court of Appeal accepted that the doctrine in *Warren v Coombes,*[48] ordinarily applicable to civil proceedings, could apply to a criminal appeal grounded on factual error in a judge alone trial.[49] *Warren v Coombes* established that where the grounds of appeal concern a question of fact, the appeal court must determine for itself the proper inference to be drawn from those facts which are undisputed or established by the findings of the trial judge, giving weight to the conclusions and advantages of the trial judge, and the limitations of the appeal court.[50]

9.37 In Tasmania, the common form provision for appeals against conviction is expressed to apply to all appeals. That is:

> (1) On an appeal the Court shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment or order of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (2) The Court may, notwithstanding that it is of the opinion that the point raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.[51]

9.38 In *R v Jenkins*[52] the Tasmanian Attorney General appealed against an acquittal to the Tasmanian Court of Criminal Appeal on the basis that the judge had wrongly rejected admissible evidence. The court found that the judge had been in error and

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47. *State of WA v Rayney* [2013] WASCA 219 [329]-[330]. *Supreme Court (Court of Appeal) Rules 2005* (WA) r 25 provides that: "An appeal to the Court of Appeal will be by way of a rehearing unless another written law provides otherwise".
48. *Warren v Coombes* (1979) 142 CLR 531.
49. *State of WA v Rayney* [2013] WASCA 219 [417].
50. *Warren v Coombes* (1979) 142 CLR 531, 551-552.
51. *Criminal Code* (Tas) s 402(1)-(2).
52. *R v Jenkins* [1970] Tas SR 13.

was asked to consider how the proviso should apply to a prosecution appeal against an acquittal. The prosecution submitted that the test should be the converse of the test that applies in a conviction appeal – that is, a substantial miscarriage of justice will have occurred unless a reasonable jury, properly directed, would on the evidence properly admissible, without doubt acquit.[53] In response to this argument Justice Neasey stated:

> For myself I think a different test should be applied when the Crown is the appellant entitled to succeed subject to this proviso. This is the case in which a citizen, to whom the presumption of innocence applies, unless and until he is proven guilty, has been acquitted by a jury after a trial in which the prosecution has failed to persuade them beyond reasonable doubt of his guilt. Such a verdict of acquittal should not be disturbed on the ground of rejection of admissible evidence, in my opinion, unless as a minimum condition the effect of the rejected evidence, considered with the remainder of the evidence against the accused, is to add materially and substantially to the strength of the prosecution case.[54]

9.39 In NSW, appeals to the Court of Appeal in civil proceedings are conducted by way of rehearing.[55] On the other hand, although conviction appeals to the CCA do extend to assessments of factual findings, they are not rehearings. Similar to the position taken in Tasmania, it could be possible for the grounds of appeal against acquittal to be similar to the grounds of appeal against a conviction.[56]

### *Our view: appeal should be allowed where there are errors of fact or law that were material to the outcome*

9.40 In our view, an appeal against acquittal by a judge alone should focus on errors of fact or law (or mixed fact and law) that were material to the outcome of the trial. Because the judge is required to provide reasons which include the principles of law applied and the findings of fact on which the judge relied, we expect that it will be possible to discern any material errors from those reasons.

9.41 This ground of appeal reflects the idea that an appeal from an acquittal in a judge alone trial should only succeed where there was a clear error of law or fact that was material to the acquittal verdict. Given the importance of finality and the fact that appeals against acquittal on questions of fact represent a change to the existing law, we consider that a fairly high threshold is appropriate.

9.42 The CCA already applies a level of materiality in determining appeals against an acquittal on questions of law. In *R v PL*, the error of law identified was found to have been given "determinative significance" by the trial judge.[57] While we do not expect that our proposed ground of materiality will require this level of causal relationship, the error will need to have contributed to the outcome in a significant way to justify overturning the acquittal.

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53. *R v Jenkins* [1970] Tas SR 13, 24.
54. *R v Jenkins* [1970] Tas SR 13, 24-5.
55. *Supreme Court Act 1970* (NSW) s 75A.
56. *Criminal Appeal Act 1912* (NSW) s 6(1).
57. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199 [68].

9.43 Although the acquittal appeal in *Rayney*[58] was conducted by way of rehearing, we do not suggest that this should be the ordinary basis for deciding an appeal against an acquittal by a judge alone. An appeal by rehearing provides a much broader basis for determining an appeal than that which exists for appeals against conviction. Such a distinction would not seem justifiable. Furthermore, following *Rayney*, there is uncertainty about conducting appeals against acquittal by way of rehearing, and it is not clear how this would work in practice.

9.44 It would also be problematic for an appeal against acquittal by a judge alone to proceed on a similar basis as that which applies to an appeal against conviction. Although there may be some benefit in appeals against conviction and acquittal being dealt with on a similar footing, such an approach would likely create difficulty. For example, although it appears possible to apply an "unreasonable verdict" ground to an acquittal, this would be difficult to reconcile with the only power available to the CCA in a successful acquittal appeal – a discretion to order a new trial. In a conviction appeal the CCA will not exercise its discretion to order a new trial where the evidence at trial was not sufficiently cogent to justify a conviction,[59] as would be the case where the CCA has found that the verdict was unreasonable. Likewise in an appeal against acquittal, there is difficulty with ordering a new trial when the CCA has already concluded that on the evidence the verdict of acquittal was unreasonable.

9.45 Furthermore, our reformulated grounds of appeal against conviction outlined in Recommendation 8.1 require, as one ground of appeal, that there be a wrong decision on a question of law or miscarriage of justice that deprived the accused of a real possibility of acquittal. The idea of the prosecution being deprived of a real possibility of conviction suggests there needs to be a real possibility of a finding of guilt beyond reasonable doubt, a conceptually awkward and potentially unworkable formulation.

## Limiting acquittal appeals from a judge sitting alone to serious offences

### *Competing policy considerations*

9.46 The justification for expanding the avenue of appeal against an acquittal in a judge alone trial lies in the availability of the judge's reasons, and the need to retain confidence in the criminal justice system by correcting errors that become apparent on a reading of those reasons where they have led to an unjustified acquittal. This justification, taken broadly, applies to all judge alone trials.

9.47 However, we have considered whether acquittal appeals on this expanded basis should be confined to more serious cases. This is an approach which balances the traditional concern to ensure finality of an acquittal against issues of ensuring public confidence. It recognises that public confidence concerns are more acute in more serious cases.

58. *State of WA v Rayney* [2013] WASCA 219.
59. *King v R* (1986) 161 CLR 423, 433 (Dawson J).

9.48 For example, the provisions of CARA which allow for a retrial following a "tainted" acquittal[60] apply only to a retrial for an offence punishable by imprisonment for 15 years or more. For consistency with these provisions, an expanded avenue of appeal against acquittal could similarly be limited to these offences.

9.49 The Law Society of NSW and NSW Young Lawyers, while opposed to expanding the scope of the current appeal against acquittal, considered that any widening of the current law should be subject to this limitation.[61]

### *Our view: limit the appeal to serious offences*

9.50 The views of the Commission on this issue are not unanimous. The majority of the Commission are in favour of adopting a threshold for this broader basis of appeal, which limits the appeal to serious offences. For consistency with the tainted acquittal provisions in CARA, the threshold should be set at offences punishable by imprisonment for 15 years or more.

9.51 The majority considers that the significance of introducing an appeal against acquittal on errors of fact justifies restricting the scope of the appeal. In the case of serious offences, there is a sharper public interest in having factual errors resulting in an acquittal being corrected on appeal. If this broader basis of appeal is shown to work well for serious offences, consideration could be given at a later date to expanding it to all types of offences dealt with on indictment.

9.52 However, a minority of the Commission are not in favour of imposing any threshold. The minority highlights that a serious offence threshold does not presently exist with respect to appeals against directed jury acquittals, and appeals against an acquittal in a judge alone trial that are limited to questions of law.[62] Instead of setting a threshold, the requirement for leave could be used to filter appeals sought for minor offences. The minority also doubted whether it is appropriate to use maximum penalties in this way following the introduction of standard non-parole periods and mandatory minimum sentences, which also serve as sentencing yardsticks.[63] Finally, it was noted that a threshold of imprisonment for 15 years or more would exclude offences such as:

- culpable driving offences[64]
- sexual intercourse without consent[65]
- basic kidnapping[66]
- production, dissemination or possession of child abuse material[67]

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60. *Crimes (Appeal and Review) Act 2001* (NSW) s 101.
61. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Response CA14*; NSW Young Lawyers, Criminal Law Committee, *Response CA16*.
62. *Crimes (Appeal and Review) Act 2001* (NSW) s 107(1)(a)-(b).
63. *Magaming v R* [2013] HCA 40; 87 ALJR 1060 [48].
64. *Crimes Act 1900* (NSW) s 52A.
65. *Crimes Act 1900* (NSW) s 61I.
66. *Crimes Act 1900* (NSW) s 86(1).

- blackmail[68]
- membership of a terrorist organisation,[69] and
- public justice offences.[70]

9.53 The arguments on this issue are finely balanced, as reflected by our division of views. However, ultimately we recommend that an expanded avenue of appeal in judge alone acquittals should be confined to offences punishable by 15 years imprisonment or more.

## Requirement for leave in acquittal appeals from a judge sitting alone

9.54 Appeals against an acquittal by a judge alone on a question of law currently lie as of right.

9.55 Stakeholders supported a requirement for leave if the provision for appeal against acquittal was to be expanded.[71] In SA and WA leave is required to appeal from an acquittal in a judge alone trial, although in both jurisdictions leave is generally required for all types of appeals.

9.56 In Chapter 10 we recommend that all appeals to the CCA should require leave. For consistency, this should include appeals from an acquittal.

9.57 However, it is arguable that a higher threshold for the granting of leave should be imposed in acquittal cases – especially where the appeal is based on factual errors.

9.58 The requirement for special leave to appeal to the High Court provides an example of a higher threshold. In considering whether to grant special leave to appeal, the High Court will have regard to:

(a) whether the proceedings involve a question of law that is of general public importance or in respect of which the High Court is required to resolve differences in opinion between State level courts, and

(b) whether the interests of justice, either generally or in the particular case, require the High Court to consider the appeal.[72]

9.59 The Tasmanian Court of Criminal Appeal has held that in order for leave to be granted to appeal against an acquittal in that jurisdiction, something more than simply an error of law is required. This is because, without more, there would be no practical difference between an appeal against acquittal and an appeal against

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67. *Crimes Act 1900* (NSW) s 91H.
68. *Crimes Act 1900* (NSW) s 249K.
69. *Crimes Act 1900* (NSW) s 310J.
70. *Crimes Act 1900* (NSW) s 314-337.
71. Legal Aid NSW, *Response CA10*; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Response CA14*; NSW Young Lawyers, Criminal Law Committee, *Response CA16*; NSW, Office of the Director of Public Prosecutions, *Response CA17*.
72. *Judiciary Act 1903* (Cth) s 35A.

conviction, which lies as of right on a question of law.[73] This interpretation was informed by the view of Chief Justice Dixon in *Vallance v R*[74] that, in Tasmania, an appeal against acquittal stands on a different footing to an appeal against conviction. The concern of the legislature regarding the former type of appeal was the operation of the criminal law more broadly.[75] Consequently, an appeal against an acquittal should have a "wider and deeper significance in the administration of the criminal law" than its application to the particular case, in order for the court to exercise its discretion to grant leave.[76]

9.60 Legal Aid NSW submitted that, while it was opposed to a wider ground of appeal, if the provision were expanded there should be a threshold that any appeal be one of public importance.[77]

### *Our view: different leave requirement unnecessary*

9.61 We do not consider that it is necessary to have a more stringent leave threshold for appeals on a question of fact from an acquittal in a judge alone trial.

9.62 First, a stricter leave requirement would add a layer of complexity to the appeals process. We recommend in Chapter 10 that the circumstances in which leave should be granted should be left to the CCA to determine. This is equally applicable to appeals from acquittals, and no doubt the CCA would have regard to factors such as the need for finality in determining whether to grant leave in such an appeal.

9.63 Secondly, the existing avenue of appeal against an acquittal has rarely been used, suggesting that an additional filter might not be necessary to prevent the filing of unmeritorious appeals.

9.64 Finally, it would be difficult to formulate an appropriate higher threshold for the granting of leave. Considerations such as public importance or the significance of the appeal to the criminal law are more relevant to questions of law. Where questions of fact are concerned, they are less likely to be of general importance, and more likely to be concerned with correcting error in the particular case (although this in turn may be important in ensuring public confidence in the criminal justice system).

9.65 It is expected that the CCA would exercise the leave discretion flexibly. There may be occasions when, for example, notwithstanding a clearly arguable error in the judge's reasoning, it is obvious that sufficient evidence to convict is not available. In such cases, leave may not be granted. Our proposed grounds of appeal, that there was an error of law or fact that was material to the outcome, may inform the decision to grant leave.

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73. *R v Pawsey* (1989) 44 A Crim R 282, 284.
74. *Vallance v R* (1961) 108 CLR 56.
75. *R v Pawsey* (1989) 44 A Crim R 282, 283.
76. *R v Jenkins* [1970] Tas SR 13, 16.
77. Legal Aid NSW, *Response CA10*.

### Discretion to order a new trial

9.66 Where the CCA has established an error of law in an acquittal it must go on to determine whether to exercise its discretion to order a new trial.[78] We do not intend to disturb this law, and consider it is desirable to leave the exercise of this discretion to the CCA to develop as circumstances arise. As noted in *PL*, there is little point in ordering a new trial if no reasonable jury could convict, since any conviction returned in a new trial is inevitably going to be overturned on appeal. There are a variety of other circumstances in which a new trial may be contrary to the interests of justice. For instance, a new trial might be futile because the evidence is no longer available, or a fair trial is no longer possible. Generally speaking, we consider the new trial should be ordered only if a new trial could reasonably result in a conviction.

**Recommendation 9.1: Expand acquittal appeals in judge alone trials**

(1) The avenues of appeal against an acquittal that are currently contained in s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) should be retained.

(2) The Attorney General or the Director of Public Prosecutions should also be able to appeal to the Court of Criminal Appeal on any ground against an acquittal for an offence:

(a) punishable by 15 years or more imprisonment

(b) tried on indictment, and

(c) tried by a judge without a jury.

The basis of the appeal should be that there was an error of law or fact that was material to the outcome.

(3) All appeals against acquittal should require the leave of the Court of Criminal Appeal.

(4) If the Court of Criminal Appeal finds that an acquittal should be quashed, it should continue to have a discretion to order a new trial.

## Appeals against acquittal in summary jurisdiction of the higher courts

9.67 Currently appeal is available, on a question of law alone, from an acquittal by the Supreme Court or the LEC in its summary jurisdiction in any proceedings in which the Crown was a party.[79]

9.68 We do not propose to expand the breadth of appeals from an acquittal by a judge in summary proceedings to questions of fact. To do so would be inconsistent with our view that an expanded appeal based on factual errors should be confined to serious offences.

78. *R v PL* [2009] NSWCCA 256; 199 A Crim R 199 [74].

79. *Crimes (Appeal and Review) Act 2001* (NSW) s 107(1)(c).

## Expanding the avenue of appeal to other courts

9.69 It is not clear why appeals from acquittals in summary jurisdiction apply only to the Supreme Court and LEC. Possibly it was considered that their status as superior courts of record justified introducing this avenue of appeal, or because they were the only higher courts that regularly exercised a summary jurisdiction.

9.70 Both the District Court and the Industrial Relations Commission in Court Session (IRCiCS) have a summary jurisdiction. As a result of recent workplace health and safety reforms, the District Court is now charged with hearing the majority of summary prosecutions for certain work health and safety offences.[80] The breadth of its summary jurisdiction has therefore increased significantly.

9.71 The IRCiCS has a summary jurisdiction to hear prosecutions for work health and safety offences,[81] and recent amendments mean that decisions of the IRCiCS are subject to appeal to the CCA.[82]

9.72 It is anomalous that acquittals in the summary jurisdiction of the Supreme Court and LEC are capable of appeal, whereas acquittals in the summary jurisdiction of the District Court or IRCiCS are not. In addition, the prosecutor can appeal the dismissal of proceedings in the Local Court on a question of law.[83]

### *Our view: appeal from acquittal in summary jurisdiction should apply to all higher courts*

9.73 In our view, the need for consistency across all courts suggests that there should be an avenue of appeal against an acquittal made in the summary jurisdiction of the District Court and IRCiCS. It is just as important to be able to rectify errors of law in an acquittal made in the summary jurisdiction of these courts as it is for acquittals in the Local Court, LEC or Supreme Court.

**Recommendation 9.2: Expand acquittal appeals in summary jurisdiction of higher courts**

The avenue of appeal against an acquittal by the Supreme Court or the Land and Environment Court in their summary jurisdiction, currently contained in s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW), should also be available for an acquittal by the District Court and the Industrial Relations Commission in Court Session in their summary jurisdiction.

## Requirement for the Crown to be a party to proceedings

9.74 It is also not clear why an avenue of appeal against an acquittal in summary proceedings is only available from proceedings in which the Crown was a party. The intention may have been to exclude appeals where the prosecution was privately

80. See *Work Health and Safety Act 2011* (NSW) s 229B(1).
81. See *Work Health and Safety Act 2011* (NSW) s 229B(2)(b).
82. See Chapter 12.
83. See *Crimes (Appeal and Review) Act 2001* (NSW) s 42(2B), s 56.

conducted, but such prosecutions in the summary jurisdiction of the higher courts would be rare, if ever.

9.75 Particularly for offences prosecuted in the LEC, there are many entities which are responsible under the relevant legislation for prosecuting environmental offences, but which do not represent the Crown.[84] In Chapter 10 we note that often these entities will use the submission power under s 5AE of the *Criminal Appeal Act 1912* (NSW) (CAA) to ask the trial judge to submit a question of law to the CCA where the defendant is to be acquitted.[85] This is because the prosecutor cannot currently appeal under s 107 of CARA, as it does not represent the Crown. The NSW Office and Environment and Heritage raised this limitation as an issue in proceedings in the LEC.[86]

### *Our view: remove requirement for Crown to be a party*

9.76 In our view, the requirement for the Crown to be a party to the original proceedings operates as an unnecessary restriction on the availability of the appeal right, with no identifiable benefit. A requirement for leave[87] is a better way of filtering unmeritorious appeals than a requirement that the Crown be a party to the first instance proceedings.

**Recommendation 9.3: Crown need not be a party for acquittal appeals in summary jurisdiction of higher courts**

The availability of the avenue of appeal against an acquittal by the higher courts in their summary jurisdiction should not depend on the Crown being a party to the original proceedings.

## Appeals against a plea in bar

9.77 The common law doctrines of *autrefois convict* and *autrefois acquit*, recognised in s 156 of the *Criminal Procedure Act 1986* (NSW) (CPA), provide that no person tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence, or any other offence which he or she could have been convicted at trial.[88] A plea of autrefois convict or autrefois acquit is an alternative to a plea of guilty or not guilty. If the plea is not accepted by the judge, the defendant is required to plead again. If the plea is accepted, there is no trial. Acceptance of the plea operates to discharge the defendant, similar to a verdict of acquittal.[89]

9.78 In *R v Stone*[90] the CCA held that the judge's acceptance of a plea in bar was a final decision which disposed of the proceedings, amounting to an acquittal. It could not

84. See para 12.93 - 12.109.
85. See para 10.85.
86. NSW Office of Environment & Heritage, *Response CA19*.
87. See Recommendation 10.2.
88. *R v Stone* [2005] NSWCCA 344; 64 NSWLR 413 [23].
89. *R v Stone* [2005] NSWCCA 344; 64 NSWLR 413 [64].
90. *R v Stone* [2005] NSWCCA 344; 64 NSWLR 413.

be appealed under the provisions for appeals against interlocutory orders in s 5F of the CAA because it was not interlocutory in nature.[91] There was no other avenue for appeal, even though the CCA expressly found in that case that the trial judge had erred in accepting the plea.

9.79 Prior to the CPA, the decision whether or not to accept a plea in bar was determined by a jury. However, a plea in bar is now considered by a judge sitting alone. The vast number of offences that now exist, and what can often amount to technical differences between them, means that the decision whether to accept a plea in bar is more complicated. Unsurprisingly the case law in this area is ambiguous, with the CCA in *Stone* noting that there were divergent High Court views with no clear majority.[92]

### *Our view: introduce appeal from acceptance of plea in bar*

9.80 For these reasons, our view is that the DPP should be given a right to appeal against the trial judge's decision to accept a plea in bar, on a question of law. The law has evolved in such a way that it requires a judge, sitting alone, to carry out a potentially complex comparison of the circumstances that would differentiate between a series of similar and sometimes overlapping offences. Given the technical questions involved in determining whether the defendant has previously been convicted or acquitted of the same offence, we consider that the trial judge's decision should be open to review. Stakeholders did not raise any concerns with this proposal.[93]

| **Recommendation 9.4: Introduce appeal from acceptance of plea in bar** |
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| The Director of Public Prosecutions should be able to appeal to the Court of Criminal Appeal against a judge's acceptance of a plea of autrefois convict or autrefois acquit under s 156 of the *Criminal Procedure Act 1986* (NSW), with leave on a ground involving a question of law. |

## Appeals following verdict of NGMI or finding at a special hearing

9.81 In addition to an order of conviction or acquittal, a verdict that the defendant was not guilty by reason of mental illness (NGMI) is also available. Where the defendant is found to be unfit to be tried, a special hearing will usually be held, which can result in a finding that, on the limited evidence available, the defendant committed the offence (commonly referred to as "unfit and not acquitted" or UNA).[94] Both of these

91. *R v Stone* [2005] NSWCCA 344; 64 NSWLR 413 [71].
92. *R v Stone* [2005] NSWCCA 344; 64 NSWLR 413 [54].
93. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 12; Appeals from higher courts roundtable, *Consultation CA5*.
94. We have previously recommended that both of these findings also be available in summary proceedings heard in the Local Court and Children's Court: see NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) ch 12.

findings will usually result in the defendant being supervised as a forensic patient by the Mental Health Review Tribunal (MHRT).

## Effect of a verdict of NGMI

9.82 A special verdict of NGMI is available where:

> If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.[95]

9.83 Where a special verdict of NGMI is returned, the court may:

- order that the person be detained in such place and in such manner as the court thinks fit until released by due process of law, or
- may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the court considers appropriate.[96]

Where the court makes an order of detention or conditional release, the person becomes a forensic patient subject to the supervision of the MHRT.[97]

9.84 If the court orders unconditional release, the effect is the same as a discharge following an ordinary acquittal. However, the court can only order conditional or unconditional release where satisfied, on balance, that the safety of the person or any member of the public will not be seriously endangered if the person is released.[98]

## Effect of a finding that the defendant is unfit to be tried

9.85 A person's fitness to be tried can be raised at any point in the proceedings and by any party.[99] Once raised, the court holds an inquiry to determine if the defendant is unfit to stand trial.[100] Fitness is determined by the judge alone and, while the defendant is to have legal representation, the inquiry is of a non-adversarial

95. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 38.
96. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 39(1).
97. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 42(a)(i).
98. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 39(2).
99. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 5, s 7(1)-(2).
100. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 10. Fitness is determined in accordance with the *Presser* criteria: see NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) ch 2.

nature.[101] If the court finds the defendant fit to stand trial, criminal proceedings recommence and continue in the ordinary way.[102]

9.86 If the court finds the defendant unfit to stand trial three procedural events occur. The court adjourns proceedings, the court refers the unfit person to the MHRT and, if remanded in custody, the unfit person is classified a "forensic patient".[103]

9.87 If the MHRT determines that an unfit person will not or has not become fit within 12 months, and the DPP advises that proceedings against that person are to continue, then the court conducts a special hearing.[104] The special hearing is to be conducted by a judge alone unless the defendant, the defendant's legal representative or the prosecution elect for the special hearing to be heard before a jury.[105]

9.88 Special hearings are to be as close to a normal trial as is practicable.[106] The prosecution must prove guilt beyond reasonable doubt.[107] The defendant may raise any defence available in criminal proceedings, is entitled to give evidence, and is to have legal representation.[108]

9.89 However, by definition and design, "special" hearings are different from normal criminal trials, and this is reflected in the court's procedures. A defendant in a special hearing is presumed to plead not guilty, and the legislation creates particular verdicts and disposition options.[109]

9.90 Where the special hearing is conducted by a judge alone, as commonly occurs, the reasons for any determination must include a statement of the principles of law applied by the judge and the findings on fact on which the judge relied.[110] The verdict of a judge in such a case has, for all purposes, the same effect as the verdict of a jury.[111]

9.91 At the conclusion of a special hearing, a judge (or jury) can find that the defendant is:

(a) not guilty of the offence charged

(b) not guilty on grounds of mental illness (NGMI), or

(c) that on the limited evidence available, the defendant committed the offence charged or an alternative to the offence (UNA).[112]

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101. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 11, s 12.
102. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 13.
103. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 14, s 42.
104. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 16, s 19, s 47(5)(b).
105. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21A.
106. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(1).
107. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19(2).
108. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(2), (3).
109. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(3)(a), s 22, s 23.
110. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21B(2).
111. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21B(1).
112. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22.

9.92 Where the defendant is found not guilty, the person is dealt with as if they had been acquitted at a normal trial.[113] Where there is a finding of NGMI, the subsequent process is the same as a finding of NGMI at a normal criminal trial.[114] A finding of UNA constitutes a finding of "qualified guilt".[115] A conviction cannot be recorded against the finding, yet it constitutes a bar to further prosecution, and is to be taken as a conviction for the purpose of victim compensation.[116]

9.93 When the court finds the defendant to be UNA, and the court, in a normal criminal trial, would have imposed a custodial sentence, the court can nominate a limiting term.[117] The limiting term is the maximum period for which the person can be a forensic patient and is based on the court's best estimate of the sentence the court would have imposed if the person had been found guilty of the offence at an ordinary trial.[118] An defendant who is subject to a limiting term becomes or remains a forensic patient and is referred to the MHRT which makes determinations, on periodic review, about care, treatment and possible release.[119]

9.94 If the court indicates that it would not have imposed a sentence of imprisonment in a normal trial, the court may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in a normal trial.[120]

## Current avenues of appeal

9.95 In the absence of specific provision, the CAA would not apply to cases where the person is found UNA or NGMI because neither the finding of UNA nor a verdict of NGMI is a "conviction" in law. Similarly, an order made by the court about a person who is UNA or NGMI is not a "sentence". Accordingly, there are special provisions for appeals for people found UNA or NGMI.

9.96 The CAA empowers the CCA to review cases where the person is UNA or NGMI by equating those findings and consequent orders with a conviction and/or sentence.[121] As a result, other provisions of the CAA which specify the manner in which ordinary appeals are to be determined also apply to appeals in cases involving people who are UNA or NGMI.[122]

9.97 Table 9.2 shows the current appeal options from a verdict of NGMI or following a special hearing. These are discussed in greater detail below.

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113. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 26.
114. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(2), s 38, s 39(1), s 39(2): The defendant remains or becomes a forensic patient and is generally detained in such "manner as the Court thinks fit until released by due process of law".
115. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(3)(a).
116. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(3)(a), (b) and (d).
117. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23.
118. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b).
119. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 24, s 27, s 46, s 47.
120. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(2).
121. *Criminal Appeal Act 1912* (NSW) s 2(1) (definitions of "sentence" and "conviction"), s 5(2).
122. See *Criminal Appeal Act 1912* (NSW) s 6; see also s 6A, s 7(4).

### Table 9.2: Avenues of appeal following verdict of NGMI or where defendant unfit to be tried

| Verdict | Defence appeal rights | Prosecution appeal rights |
|---|---|---|
| Not guilty by reason of mental illness | Where the defence is not set up by the person, the verdict may be appealed as if it were a conviction.<br>Order made following verdict of NGMI may be appealed as if it were a sentence.<br>(CAA s 2(1)(e), s 5(2)) | Order made following verdict of NGMI may be appealed as if it were a sentence.<br>(CAA s 2(1)(e)) |
| Finding that person is unfit to be tried | May be appealed as if the finding were a conviction.<br>(CAA s 2(1), definition of "conviction") | No appeal rights. |
| **Finding following special hearing** | | |
| Acquittal | N/A. | No appeal rights. |
| Not guilty by reason of mental illness | Treated as if verdict had been returned at normal trial (see above). | Treated as if verdict had been returned at normal trial (see above). |
| Qualified finding of guilt (that is, a finding that on the limited evidence available the person committed the offence charged). | May be appealed as if the finding were a conviction.<br>(CAA s 2(1), definition of "conviction")<br>Order imposing a limiting term or any other order or penalty made following the hearing may be appealed as if it were a sentence.<br>(CAA s 2(1)(d)) | Order imposing a limiting term or any other order or penalty made following the hearing may be appealed as if it were a sentence.<br>(CAA s 2(1)(d)) |

### *Current avenues of appeal from verdict of NGMI*

9.98 Section 5(2) of the CAA provides:

> For the purposes of this Act a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

9.99 A person found NGMI may, therefore, appeal against the finding of NGMI in the same manner as an appeal against conviction, but may do so only if he or she did not set up the defence. A verdict of NGMI, where the defence has not been set up, is a special form of acquittal against which an appeal would ordinarily be incompetent.[123]

9.100 The CCA has adopted a broad interpretation of s 5(2), drawing a distinction between cases in which the defence is "set up" *for* the person by their legal representatives, and cases where it is set up *by* the person. A defence may be "set up" *for* the defendant, for example, where the defence was raised without, or

123. *R v Foy* (1922) 39 WN (NSW) 20, 21; *Greig v R* (1996) 89 A Crim R 254.

contrary to, the defendant's instructions, or where the defendant was unfit to provide instructions.[124]

9.101 However, the availability of an appeal only where the defence was not set up by the person concerned may have the following apparently unintended consequence. An defendant who set up the defence of mental illness and is found NGMI might wish to appeal against a "sentence", that is an order made by the trial court for detention or for release subject to conditions. However, s 5(2) appears to mean that such a person has no avenue of appeal because the verdict of NGMI in such a case is not deemed to be a "conviction".[125]

9.102 In s 2(1)(e) of the CAA, "sentence" is defined as:

> any order made by the court of trial in respect of a person under section 39 of the *Mental Health (Forensic Provisions) Act 1990.*

9.103 On one view, this might suggest that an order for detention or release following a finding of NGMI is a "sentence" and can be the subject of an appeal, regardless of whether or not the defence of mental illness was set up by the defendant. However, in *Peterson v R* it was found that as the defendant set up the defence of mental illness :

> Accordingly, this Court has no jurisdiction to entertain the foreshadowed appeal ... The appeal against sentence is similarly incompetent.[126]

### *Our previous recommendations to expand appeals from verdict of NGMI*

9.104 In Report 138, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* we recommended that a defendant be able to appeal a verdict of NGMI regardless of whether he or she set up the defence. We also recommended that both the prosecution and the defendant be able to appeal any consequent orders following a finding of NGMI.[127]

9.105 We continue to endorse these recommendations and now make the additional recommendation that they be included in a new Criminal Appeal Act.

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124. An appellant may lead evidence to establish that the defence was raised without, or contrary to his or her instructions. For examples of where this was successful, see *R v Williams* [2004] NSWCCA 224 [16]-[20]; *Dezfouli v R* [2007] NSWCCA 86 [39]. Compare the unsuccessful outcomes in *R v Logan* [2004] NSWCCA 101 [31]-[36], [55]-[56], [59]-[60]; *Peterson v R* [2007] NSWCCA 227 [11]-[12]; *R v Foy* (1922) 39 WN (NSW) 20, 21. The fact that defendants in such cases are or may be unfit to give instructions and may be acutely mentally ill at the time of the special hearing, is a relevant consideration and may displace the ordinary rule that a party is bound by the course taken by his or her legal representatives: see *R v Riddell* (2003) 140 A Crim R 549, [21]-[22]; *Dezfouli v R* [2007] NSWCCA 86 [37], [46]; but contrast *Greig v R* (1996) 89 A Crim R 254.

125 *Peterson v R* [2007] NSWCCA 227; 73 NSWLR 134 [15]-[17].

126. *Peterson v R* [2007] NSWCCA 227; 73 NSWLR 134 [17].

127. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) rec 7.6-7.7. See also K Eagle & J Adams, *Submission CA1*.

### *Current avenues of appeal where defendant unfit to be tried*

9.106 For the purposes of the CAA, the definition of "conviction" includes a finding that a person is unfit to be tried, and a limited finding of guilt at a special hearing.[128] "Sentence" is defined to include a limiting term or other order made in respect of a person who is UNA.[129] "Other order" relates to orders or penalties where a person would not have been imprisoned at a normal trial.

9.107 A person who is found UNA may therefore appeal against that finding, and/or against the limiting term or other order made by the court, in the same manner as if the person had been convicted and sentenced at an ordinary trial.[130] Similarly, the Crown may appeal as of right against the insufficiency of any such limiting term or order.[131]

## Expanding prosecution appeals from special hearing or verdict of NGMI

9.108 We did not address in Report 138 the question of whether the prosecution should be able to appeal a verdict of NGMI or a finding following a special hearing.

### *Our view: retain current appeal rights from verdict of NGMI at ordinary trial*

9.109 Where a verdict of NGMI is returned at an ordinary trial, the prosecution has no avenue of appeal against that finding. This is because a verdict of NGMI is treated like a conviction for the purposes of the CAA.[132]

9.110 An order for unconditional release following a verdict of NGMI has effect in the same way as an acquittal. The CAA provides that "any order" made by the court following a verdict of NGMI may be appealed as if it were a sentence, suggesting that the prosecution could appeal an order for unconditional release. However, such an order would be made rarely, if ever. The defence of mental illness is almost always used in relation to very serious offences and in relation to people who have serious cognitive and mental health impairments, and so it will rarely be appropriate for the court to release a defendant unconditionally.[133]

9.111 We do not propose that the prosecution should be permitted to appeal against a verdict of NGMI. A verdict of NGMI, although it may represent a special type of acquittal, does not result in an acquittal in practice. It results in the court making an order for the disposition of the person, which will usually be an order for detention. As the prosecution may already appeal against an order made following a verdict of NGMI, we consider this to be sufficient.

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128. *Criminal Appeal Act 1912* (NSW) s 2(1). See also *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(3)(c).
129. *Criminal Appeal Act 1912* (NSW) s 2(1)(d).
130. See, eg, *R v Mailes (No 2)* (2004) 62 NSWLR 181.
131. *Criminal Appeal Act 1912* (NSW) s 2(1)(d), s 5D(1), s 6A. See, eg, *R v Adams* [2002] NSWCCA 448.
132. *Criminal Appeal Act 1912* (NSW) s 5(2).
133. See NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) [7.12].

### *Our view: no prosecution appeal from finding that defendant unfit to be tried*

9.112 The defendant can appeal a finding by a judge that he or she is unfit to be tried as if that finding were a conviction.[134] However, the prosecution has no avenue of appeal against such an order.

9.113 We do not propose allowing the prosecution to appeal against a finding that a defendant is unfit to be tried. Fitness is continually assessed by the MHRT and the defendant may later be brought back to court for an ordinary trial if he or she becomes fit to be tried. If not found fit the defendant can still be tried, albeit via a special hearing. The judge's finding of fitness therefore does not act as a final order.

### *Our view: prosecution should be able to appeal acquittal at special hearing*

9.114 There are no prosecution appeal rights against an order made following a special hearing. As discussed in para 9.91, three findings may be returned at a special hearing: a finding of UNA, a verdict of NGMI or an acquittal. The prosecution may appeal against a limiting term imposed following a finding of UNA, or an order made following a verdict of NGMI, but it cannot appeal against those findings themselves.

9.115 Special hearings are conducted by a judge sitting alone unless one of the parties elects for a jury. The DPP currently has appeal rights against an acquittal:

(a) by a jury at the direction of the trial judge, and

(b) by a judge sitting without a jury in proceedings for an indictable offence,

on a question of law alone.[135]

9.116 In Recommendation 9.1 we propose that an appeal from an acquittal by a judge sitting alone be expanded to include questions of fact as well as questions of law.

9.117 In our view, the DPP should have a similar right of appeal against a finding of acquittal at a special hearing. That is, an acquittal at a special hearing by a judge sitting alone, or by the jury at the direction of the judge, should be capable of appeal. This will align avenues of appeal from an acquittal at a special hearing with appeals from an acquittal in an ordinary trial.

9.118 However, we do not consider that the prosecution should be able to appeal against a finding of NGMI or UNA following a special hearing.

9.119 A finding of UNA or NGMI will operate, in most cases, to impose a period of detention as a forensic patient upon the defendant, not by way of punishment but in order to protect the defendant and the community. In this way neither of these findings are really like an acquittal (even though they are not the same in law as a conviction). The prosecution already has the ability to appeal against the length of detention or the imposition of any other penalty following a finding of UNA or NGMI. We consider that the existing appeal rights are sufficient for the prosecution in

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134. *Criminal Appeal Act 1912* (NSW) s 2(1). See also *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(3)(c).

135. *Crimes (Appeal and Review) Act 2001* (NSW) s 107(1)(a)-(b).

circumstances where the defendant has been found NGMI or UNA at a special hearing.

9.120 Finally, we draw attention to s 21B of the *Mental Health (Forensic Provisions) Act 1990* (NSW), which provides that a verdict by a judge at a special hearing has the same effect as a verdict by a jury. A non directed acquittal by a jury is currently not subject to appeal. If our recommendation to allow the prosecution a limited right of appeal against a verdict of acquittal at a special hearing is adopted, then consequential amendments would be necessary.

**Recommendation 9.5: Expand appeals following special hearing or finding of not guilty by reason of mental illness**

(1) Recommendations 7.6 and 7.7 of Report 138, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, should be implemented in a new Criminal Appeal Act.

(2) The avenues of appeal from an acquittal by a judge sitting alone or by the jury at the direction of the judge, in proceedings dealt with on indictment, should also apply to an acquittal at a special hearing.

# 10. Appeals from higher courts – other issues

**In brief**

This chapter covers a range of issues concerning appeals to the Court of Criminal Appeal. We make a number of recommendations to clarify and streamline the criminal appeals process. These include specifying the basis for appeals from the summary jurisdiction of the higher courts in legislation, requiring leave for all appeals, shortening the time period for filing a notice to appeal and introducing a time limit for prosecution appeals. We also recommend updating several other provisions.


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10.1 In this chapter we consider some supplementary issues that arise in relation to appeals to the Court of Criminal Appeal (CCA) from the higher courts – the Supreme Court, District Court, Land and Environment Court (LEC), Drug Court and the Industrial Relations Commission in Court Session (IRCiCS).

## Appeals from the summary jurisdiction of the higher courts

### Current law

10.2 Section 5AA of the *Criminal Appeal Act 1912* (NSW) (CAA) makes specific provision for appeals from the summary jurisdiction of the Supreme Court. That section relevantly provides:

> (1) A person:
>
> (a) convicted of an offence, or
>
> (b) against whom an order to pay any costs is made, or whose application for an order for costs is dismissed, or
>
> (c) in whose favour an order for costs is made,
>
> by the Supreme Court in its summary jurisdiction may appeal under this Act to the Court of Criminal Appeal against the conviction (including any sentence imposed) or order.
>
> (1A) An appeal against an order referred to in subsection (1)(c) may only be made with the leave of the Court of Criminal Appeal.
>
> …
>
> (4) The Court of Criminal Appeal, in proceedings before it on appeal under this section, may confirm the determination made by the Supreme Court in its summary jurisdiction or may order that the determination made by the Supreme Court in its summary jurisdiction be vacated and make any determination that the Supreme Court in its summary jurisdiction could have made on the evidence heard on appeal.

10.3 In 2011 this provision was extended to apply to the District Court in its summary jurisdiction, as a result of the conferral of jurisdiction on it to hear summary prosecutions for work health and safety offences.[1]

10.4 Section 5AA is also applied to:

(a) criminal cases heard by the LEC in its summary jurisdiction[2]

(b) criminal cases heard by the IRCiCS in its summary jurisdiction[3]

(c) related summary offences heard by the District Court or the Supreme Court,[4] and

(d) sentences imposed in the Drug Court.[5]

Section 5AA applies to these appeals by reading a reference to the "Supreme Court" as a reference to the court from which the appeal lies.

10.5 Previously s 5AA(3) of the CAA required an appeal to the CCA under that section to be determined by way of rehearing. This was removed in 2000 following a recommendation by the CCA to this effect in *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service*.[6] The CCA was of the view that appeals from the summary jurisdiction of the Supreme Court (or the LEC, in that case) should be conducted as appeals in the "strict sense". It noted that having an appeal by rehearing created an anomaly in that appeals for summary offences were determined on a broader basis than appeals for indictable offences.[7] It also referred to the increased resources of the CCA that would be required for it to decide appeals by rehearing.[8]

## Deciding appeals from summary jurisdiction

10.6 Appeals from the summary criminal jurisdiction of the higher courts are no longer conducted by way of rehearing. However, the legislation does not specify on what basis they are now to be decided. The CCA treats them as appeals from proceedings dealt with on indictment under s 5(1) of the CAA, that is, the demonstration of error is required.[9]

---

1. *Criminal Appeal Act 1912* (NSW) s 5AA(7), inserted by *Work Health and Safety Legislation Amendment Act 2011* (NSW) sch 4.5 [1].
2. *Criminal Appeal Act 1912* (NSW) s 5AB.
3. *Criminal Appeal Act 1912* (NSW) s 5ABA.
4. *Criminal Appeal Act 1912* (NSW) s 5AD.
5. *Criminal Appeal Act 1912* (NSW) s 5AF.
6. *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661.
7. *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661, 665 (Spigelman CJ).
8. *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661, 664 (Spigelman CJ).
9. *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280; 115 LGERA 304 [3]; *Gilmour v Environment Protection Authority* [2002] NSWCCA 399; 55 NSWLR 593 [19].

10.7 The CCA has held that an appeal against a conviction in the LEC can include the ground that a miscarriage of justice has occurred. This is because the conferral of summary criminal jurisdiction on the LEC is expressed in terms of "proceedings for an offence". Such proceedings must be proceedings in accordance with law. Any proceedings attended by a miscarriage of justice, including issues of both outcome and process, are not proceedings according to law.[10] The jurisprudence on what constitutes a miscarriage of justice, which has developed with regard to the statutory formulation of appeals from conviction on indictment, is equally applicable to appeals from summary criminal proceedings.[11]

10.8 Similarly, the CCA has held that its discretion to uphold or dismiss the appeal in s 5AA(4) (it "*may*" confirm the determination, or order that it be vacated and make any other determination) allows it to dismiss an appeal against conviction where no substantial miscarriage of justice has actually occurred, similar to the proviso that applies to conviction on indictment in s 6(1) of the CAA.[12] In reaching this conclusion the CCA referred to the longstanding common law position that an appeal court may dismiss an appeal if the error could not, on any reasonable hypothesis, have influenced the result. Section 5AA is to be interpreted having regard to this common law position.[13]

10.9 In appeals against sentence in summary proceedings, the CCA applies the same error based test that it does for sentence appeals under s 6(3) of the CAA. That is:

> [i]t is accordingly necessary that the appellant establish error … It is not enough that this Court would itself have imposed a different sentence. The Court will intervene if an error of principle of a mistake of fact or law is established whereby [the sentencing court's] sentencing discretion miscarried, or if the sentence is so excessive that the exercise of the discretion must have been affected by error. Conversely, even if error is established the sentence will not be varied unless the Court considers that some other sentence was warranted.[14]

## Our view: legislation should specify the basis on which appeals are decided

10.10 Unlike appeals from proceedings dealt with on indictment, the legislation does not specify on what basis appeals from the summary jurisdiction of the higher courts are to be determined. The CCA treats these types of appeals, for the most part, in the same way that appeals for proceedings dealt with on indictment are conducted.

10.11 Our view is that the basis for an appeal from the summary jurisdiction of the higher courts should be specified in a new Criminal Appeal Act. If new legislation is introduced, it is desirable for the grounds of appeal to be expressly stated. This is particularly important because the summary jurisdiction of the District Court has

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10. *Hakim v Waterways Authority (NSW)* [2006] NSWCCA 376; 149 LGERA 415 [38].
11. *Hakim v Waterways Authority (NSW)* [2006] NSWCCA 376; 149 LGERA 415 [40].
12. *Gilmour v Environment Protection Authority* [2002] NSWCCA 399; 55 NSWLR 593 [27].
13. *Gilmour v Environment Protection Authority* [2002] NSWCCA 399; 55 NSWLR 593 [24], [27], citing *Conway v R* [2002] HCA 2; 76 ALJR 358.
14. *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280; 115 LGERA 304 [5] (Giles JA).

expanded following the introduction of the new workplace health and safety scheme in 2011.

10.12 We therefore recommend that a new Criminal Appeal Act provide that appeals from the summary jurisdiction of the higher courts be decided on the same basis as appeals from proceedings dealt with on indictment. That is, the present law should be codified. This will provide greater clarity and certainty in the law, as well as continuing to provide for consistency between appeals to the CCA from summary proceedings and from proceedings dealt with on indictment. If our recommendation in Chapter 8 proposing a reformulation of the grounds of appeal against conviction is adopted, then this should also apply to convictions in summary proceedings.

**Recommendation 10.1: Clarify grounds of appeal from summary jurisdiction of the higher courts**

A new Criminal Appeal Act should clarify that an appeal against a conviction or sentence imposed in the summary jurisdiction of the:

(a) Supreme Court

(b) District Court

(c) Land and Environment Court

(d) Drug Court, and

(e) Industrial Relations Commission in Court Session

should be decided on the same grounds that apply to an appeal from proceedings dealt with on indictment.

## Leave to appeal

### Current law

#### *A requirement for leave applies to most, but not all, appeals*

10.13 There is no right to appeal at common law.[15] Consequently, the CCA will have no jurisdiction to hear an appeal unless it falls within the scope of the statute.[16] There are varying requirements for leave but in practice most appeals require leave.

10.14 In proceedings dealt with on indictment, most defendant appeals require a grant of leave. The only appeals that do not require leave are against:

- conviction on a ground that involves a question of law alone[17]
- conviction or sentence for an offence dealt with in the summary jurisdiction of the Supreme Court, District Court, LEC or IRCiCS,[18] or

15. *R v Durham Justices* [1945] KB 33, 37 (Humphreys J).
16. *Felstead v R* [1914] AC 534, 539 (Lord Reading).
17. *Criminal Appeal Act 1912* (NSW) s 5(1)(a).
18. *Criminal Appeal Act 1912* (NSW) s 5AA-5ABA, s 5AD.

- a sentence imposed by the Drug Court.[19]

10.15 Defendant appeals from the summary jurisdiction of the higher courts are currently as of right but make up only a small part of the CCA's work. Where proceedings are dealt with on indictment, it would be extremely rare for a defendant to appeal solely against a conviction on a question of law alone. In reality almost all defendant appeals from proceedings dealt with on indictment will involve an appeal against conviction on some other ground or an appeal against sentence and, as a consequence, require a grant of leave.

10.16 Prosecution appeals are less frequent, and do not require leave. The Attorney General and the Director of Public Prosecutions (DPP) may appeal to the CCA without leave against any sentence imposed:

- by the court of trial, in any proceedings to which the Crown was a party[20]
- where a person received a discounted sentence for undertaking to assist law enforcement authorities and failed to fulfil that undertaking[21]
- for related summary offences dealt with by the Supreme Court or the District Court,[22] or
- by the Drug Court.[23]

10.17 The Attorney General and the DPP may also appeal, without leave, against the quashing of an indictment,[24] and against an acquittal by a jury as directed by a trial judge, or where the trial was conducted by a judge without a jury, on any ground that involves a question of law alone.[25]

### *The approach to leave has changed over time, but is not onerous*

10.18 The approach of the CCA to the question of leave to appeal against conviction has not been entirely consistent. In some cases, the leave requirement has been applied strictly.[26] In *R v Ion*, Justice Hunt noted that the leave requirement in s 5(1) of the CAA originated from the *Criminal Appeal Act 1907* (UK) and that "very little has ever been said about the provision, and the requirement of the grant of leave has, in general, simply been ignored in this State in the past."[27]

10.19 Until recently the common approach was for parties to remain silent on the question of leave and for the appeal to be determined on its merits without consideration of leave. However, the CCA has observed that the requirement for leave should not be treated as a mere formality and that determining whether leave should be granted

19. *Criminal Appeal Act 1912* (NSW) s 5AF.
20. *Criminal Appeal Act 1912* (NSW) s 5D.
21. *Criminal Appeal Act 1912* (NSW) s 5DA.
22. *Criminal Appeal Act 1912* (NSW) s 5DB.
23. *Criminal Appeal Act 1912* (NSW) s 5DC.
24. *Criminal Appeal Act 1912* (NSW) s 5C.
25. *Crimes (Appeal and Review) Act 2001* (NSW) s 107.
26. *R v Smith* [1982] 2 NSWLR 608, 609.
27. *R v Ion* (1996) 89 A Crim R 81, 85.

requires an assessment of the arguability of the grounds relied upon by the applicant.[28] A consequence of the more rigorous approach by the CCA has been that parties have been more regularly addressing the question of leave to appeal in conviction appeals. In practice the CCA hears applications for leave to appeal at the same time that it hears the merits of the appeal, and makes the decision about leave after hearing the argument on the merits. It rarely refuses leave to appeal.

10.20 The High Court has held that refusing leave does not result in a final disposition or foreclose a further leave application,[29] although second leave applications are seldom made, if ever.

## Extending the requirement for leave

10.21 Both the NSW Office of the Director of Public Prosecutions (NSW ODPP) and the Commonwealth Director of Public Prosecutions (CDPP) raised leave as an area for reform. The introduction of a leave requirement for all appeals to the CCA may help promote the objective of achieving simplification and consistency in criminal appeals. The CCA has recently noted that the maintenance of unmeritorious appeals delays the hearing of other conviction appeals with real prospects of success.[30] More robust leave requirements may also help the CCA filter such unmeritorious appeals and increase its ability to manage appeals.

10.22 Currently whether or not leave is required in a conviction appeal depends upon whether the grounds of appeal involve a question of law alone, or a question of fact or mixed fact and law. This is not always an easy distinction to draw.[31] Introducing a consistent requirement for leave for appeals no matter what the ground will avoid the need for the CCA to spend time considering these kinds of distinctions.

10.23 However, a number of stakeholders favoured retaining the current system.[32] The NSW Bar Association supported the current "broad approach" to leave and considered that the legislation adequately reflects the need for finality.[33] Legal Aid NSW favoured the current system subject to bringing the leave requirements for prosecution appeals into line with those in place for defendant appeals.[34]

10.24 Some stakeholders questioned the necessity of introducing a requirement for leave to appeal against a conviction on a question of law.[35] The argument was made that the gravity of being convicted of an offence tried on indictment is such that defendants should have access to one appeal against that conviction as of right, particularly where they were erroneously convicted due to an error of law.

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28. *Rasic v R* [2009] NSWCCA 202 [12]; *RWB v R* [2010] NSWCCA 147; 202 A Crim R 209 [128].
29. *Postiglione v R* (1997) 189 CLR 295.
30. *Richardson v R* [2013] NSWCCA 218 [100] (Latham J).
31. See Chapter 4.
32. NSW Bar Association, *Submission CA5,* 6; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6*, 5; Legal Aid NSW, *Submission CA12*, 9; Chief Judge of the District Court of NSW, *Response CA5;* Appeals from higher courts roundtable, *Consultation CA5.*
33. NSW Bar Association, *Submission CA5,* 6.
34. Legal Aid NSW, *Submission CA12*, 9.
35. Appeals from higher courts roundtable, *Consultation CA5.*

Additionally, around 75% of appeals to the CCA are legally aided and Legal Aid NSW applies merit based criteria in determining aid applications. The grant of legal aid itself acts as a filter.

### *Our view: all appeals to the CCA should require leave*

10.25 In the interests of consistency and simplification we recommend that all appeals should require a grant of leave. Because the majority of defendant appeals realistically already require leave, we consider that this will better streamline the appeal process and allow the CCA to have greater control over the management of its work. The leave hurdle does not in practice impose a significant hurdle for those appeals that have arguable merit.

10.26 Prosecution appeals currently can be made as of right. Although the prosecution exercises its appeal rights sparingly, we are of the view that introducing a leave requirement for prosecution appeals will contribute to the objectives of consistency and simplification. As the NSW ODPP will only file an appeal that it believes has merit, a requirement for leave should not operate as a significant hurdle.

**Recommendation 10.2: Require leave for all appeals to the Court of Criminal Appeal**

All appeals to the Court of Criminal Appeal should require leave.

## Providing legislative guidance on when leave should be granted

10.27 The CAA currently provides no guidance as to when the CCA should grant leave to appeal. Case law is to the effect that leave should be granted if there is a "sufficiently arguable case".[36] By way of contrast, in WA the legislation is more specific in providing that the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied that the ground has a reasonable prospect of success.[37]

10.28 We sought views from stakeholders on whether the legislation should include a non exhaustive list of criteria for determining leave. This could include factors such as whether the grounds of appeal have reasonable prospects of success, similar to the current requirement in WA, and whether the point was raised by the party during the trial.[38]

10.29 In general terms, the NSW ODPP thought that the appellant should at least be required to demonstrate an arguable case.[39] Legal Aid NSW submitted that legislative guidance regarding the determination of whether leave to appeal should be granted risks creating "a rigid regime that will unnecessarily circumscribe the

36. *Bailey v DPP* (1988) 34 A Crim R 154, 155.
37. *Criminal Appeals Act 2004* (WA) s 27.
38. See para 10.31 - 10.34.
39. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 13.

court's discretion".[40] There was no strong support amongst other stakeholders for legislative criteria for leave.

### *Our view: leave should be decided by the CCA on a case by case basis*

10.30 In our view, it is important that the CCA has flexibility to decide when to grant leave to ensure the particular circumstances of each case are dealt with appropriately. Other than a limited exception for r 4 of the *Criminal Appeal Rules* (NSW) (CAR) which we discuss next, we are of the view that the legislation should not include a list of non exhaustive criteria for determining leave. Such a list may unduly fetter the CCA's discretion in this area.

## Leave to appeal a ground not objected to at trial

10.31 Rule 4 of the CAR provides that no direction or omission to direct, or decision as to the admission or rejection of evidence, shall be allowed as a ground for appeal or application for leave to appeal if the party did not take objection to it during the trial. The CCA takes this requirement for leave into account, and has repeatedly stressed trial counsel's duty to take objections or to seek a redirection.[41]

### *Our view: rule 4 should be included in legislation as a relevant factor*

10.32 Rule 4 serves a purpose in encouraging counsel to give proper attention to the issues that need to be dealt with at trial and should be retained. However, because it is a substantive restriction on the right of appeal rather than a procedural rule, it is not clear why it is contained in the Rules instead of in the CAA.

10.33 We are therefore of the view that r 4 of the CAR should be retained and included in the legislation. Rule 4 has the ability to restrict an appellant's right of appeal and its codification would avoid the situation whereby a procedural rule could effectively limit a right of appeal contained in the CAA. It would also better underline the importance of trial counsel giving proper assistance to the trial judge in ensuring that the trial is conducted according to law. Stakeholders supported this approach.[42]

10.34 However, simply copying r 4 into the legislation would create an anomalous two tiered leave process, given our recommendation that all appeals should require leave. We consider that the best way of incorporating r 4 into a new Criminal Appeal Act is by making it a factor the CCA must consider when determining whether or not to grant leave to appeal. This is not intended to alter the way in which r 4 has been used in practice, but it will move the substance of r 4 into the legislation in a way that sits comfortably with our other proposals.

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40. Legal Aid NSW, *Response CA3.*
41. *R v Abusafiah* (1991) 24 NSWLR 531, 536; *R v Roberts* [2001] NSWCCA 163; 53 NSWLR 138 [55]-[57] (Howie J); *R v ITA* [2003] NSWCCA 174; 139 A Crim R 340.
42. Appeals from higher courts roundtable, *Consultation CA5.*

**Recommendation 10.3: Include rule 4 of the *Criminal Appeal Rules* (NSW) in legislation**

Rule 4 of the *Criminal Appeal Rules* (NSW) should be repealed. Instead a new Criminal Appeal Act should provide that in determining whether to grant leave to appeal, one of the factors the Court of Criminal Appeal must consider is whether the party applying for leave objected at the trial to:

(a) a direction

(b) an omission to direct, or

(c) the admission or rejection of evidence

that forms the basis of a ground of appeal.

## Determining leave separately to the merits

10.35 Section 22 of the CAA allows a single judge to exercise the power to grant or refuse leave to appeal, but we understand that this rarely occurs in practice.

10.36 By contrast, in Victoria, SA and WA applications for leave to appeal are routinely determined by a single judge, either on the papers or with oral argument.[43] The prosecution is not necessarily involved at this stage of the appeal process. If leave is refused, an applicant may ask the full court to reconsider that decision. The prosecution does not have a reciprocal right to request a reconsideration of a decision to give leave.

10.37 In England and Wales a single judge also hears leave applications, usually in chambers.[44] If leave is granted, the Court of Appeal has the power to make a representation order granting the applicant legal aid in the appeal.[45] If leave is refused, the applicant may renew his or her application before the full court, but legal aid is not available for that application.

10.38 The NSW ODPP suggested reforming the leave requirements in accordance with those implemented in WA. These reforms were said to promote the objective of controlling the work of the WA Court of Appeal.[46] The NSW ODPP considered that the WA approach of holding a separate leave hearing without prosecution involvement would "filter out unmeritorious appeals and preserve prosecutorial resources".[47]

10.39 The CDPP was also in favour of amending the requirements for leave to ensure that separate leave hearings occur as a matter of course rather than leave being decided as part of the appeal hearing.[48] It submitted that the models in Victoria, SA

43. See Supreme Court of Victoria, *Practice Direction No 2 of 2011 - Court of Appeal: Criminal Appeals*, 26 July 2012; *Supreme Court Criminal Appeal Rules 1996* (SA) r 15; *Supreme Court (Court of Appeal) Rules 2005* (WA) r 43(2)(c).
44. *Criminal Appeal Act 1968* (UK) s 31.
45. *Criminal Defence Service (General) (No 2) Regulations 2001* (UK) reg 10.
46. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 1-2.
47. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 5.
48. Commonwealth Director of Public Prosecutions, *Submission CA15*, 6.

and WA have the benefit of limiting the number of appeals overall as well as the grounds on which an appeal against conviction may be heard. It would also help to ensure that appeal grounds are properly articulated from the outset, thereby discouraging the parties from raising additional grounds at the hearing.[49]

10.40 Other stakeholders were concerned that the introduction of separate hearings for determining leave would result in increased legal costs and resource constraints, due to the multiple court appearances that such a system could require.[50] Concern was expressed that there would be no efficiency savings if the refusal of leave by a single judge could be appealed to a full bench. Rather, it may result in a duplication of work and delay. However, it is possible that Legal Aid NSW would not continue to provide support for an application where it had already been refused leave by a single judge, and so it may in fact act as a filter for clearly unmeritorious cases.

10.41 A separate determination concerning leave to appeal could have the benefit of allowing the CCA to examine the grounds of appeal in advance. Consequently, even where leave is granted, the CCA could filter out those grounds that have no reasonable prospects of success, refining the issues under consideration and possibly shortening the hearing of the appeal. This, in turn, could conserve the resources of the CCA and other bodies such as the NSW ODPP, CDPP, Legal Aid NSW and the Aboriginal Legal Service.

10.42 However, the CCA may need in some cases to delve into the application in reasonable detail in order to determine whether to grant leave, and by that stage there may not be much additional work involved in deciding the appeal. The High Court has held that a refusal to grant leave on the basis of a lack of merit must be accompanied by reasons,[51] giving further incentive for the CCA to simply proceed to hear leave questions and the merits of the appeal together. Additionally, if a separate leave hearing becomes simply an additional step in the process rather than acting as a useful filter, then it could have the effect of increasing the work involved in hearing an appeal.

### *Our view: CCA should be left to manage the process for deciding leave*

10.43 We are of the view that no legislative change is required in this area. Legislation should continue to give a single judge the power to determine leave applications, and should not provide for the manner in which leave is determined. The CCA is best placed to manage the process for determining leave.

## Certificate of the trial judge as an alternative to leave

10.44 Under s 5(1)(b) of the CAA a trial judge may certify that a matter is an appropriate case for an appeal against conviction. The certification may be used as an alternative for leave where the ground of appeal relied on involves a question of fact, or a question of mixed fact and law. Section 5F(3)(b) also allows a judge or

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49. Commonwealth Director of Public Prosecutions, *Submission CA15*, 5.
50. Legal Aid NSW, *Response CA3;* Appeals from higher courts roundtable, *Consultation CA5.*
51. *Bailey v DPP* (1988) 34 A Crim R 154, 154-5.

magistrate of the trial court to certify that an interlocutory judgment or order is an appropriate one for appeal.[52] The certificate is not binding on the CCA.

10.45 Most stakeholders supported removing the trial judge's ability to issue a certificate.[53] The NSW Bar Association noted that the question of whether a case is appropriate for determination on appeal is a matter for the CCA.[54] Legal Aid NSW similarly agreed that the availability of certification by a trial judge is unnecessary.[55] It was, however, suggested that certificates can be useful in explaining the trial judge's assessment of the evidence, particularly in relation to matters that turn on witness credibility where the trial judge, having heard the witnesses, may be in a better position than the CCA in evaluating their account.[56]

### *Our view: certificate of the trial judge should be abolished*

10.46 We do not consider that it is necessary or appropriate for a trial judge to be able to certify under CAA s 5(1)(b) that a matter is appropriate for appeal. Such a certificate has no binding effect on the CCA. It potentially blurs the proper role of the trial judge, risks giving an impression that the trial judge has entered into the appeal arena and may give rise to an unjustifiable expectation as to the prospects of success. This could be unfair to the appellant and confusing for victims. We recommend that this provision be removed.

| **Recommendation 10.4: Abolish trial judge certificate** |
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| The power of the trial judge to certify that a case is fit for appeal should be abolished |

## Time limits for filing an appeal

### Current law

10.47 Section 10(1)(a) of the CAA requires that a notice of intention to appeal or a notice of intention to apply for leave to appeal (NIA) against conviction or sentence must be filed within 28 days after the conviction or sentence. The CCA may extend the time period or, if the rules of court permit, dispense with the requirement for the NIA.[57] An NIA has effect for 6 months after the date of filing, although the CCA may

52. See also *Criminal Appeal Act 1912* (NSW) s 5F(3AB)(b) concerning appeals, made by a person who is not a party to proceedings, against a decision that a document or evidence does not contain a protected confidence in the context of *Criminal Procedure Act 1986* (NSW) ch 6 pt 5 div 2.
53. NSW Bar Association, *Submission CA5*, 6; Legal Aid NSW, *Response CA3*; Appeals from higher courts roundtable, *Consultation CA5.*
54. NSW Bar Association, *Submission CA5*, 6.
55. Legal Aid NSW, *Response CA3.*
56. Appeals from higher courts roundtable, *Consultation CA5.*
57. *Criminal Appeal Act 1912* (NSW) s 10(1)(b).

extend this period before or after it expires.[58] The appellant must file a notice of appeal or application for leave to appeal before the NIA expires.

10.48 Where an NIA has not been filed, an appeal may be lodged up to 3 months after the conviction or sentence, although this time may be extended before or after it expires.[59]

10.49 A notice of appeal or an application for leave to appeal must be accompanied by:

- a statement of the grounds for appeal
- written submissions in support of the appeal
- a certificate confirming that a transcript of the proceedings and the exhibits in the court of trial are available from the proper officer of the court of trial,[60] and
- a statement nominating the solicitor and counsel acting for the appellant.[61]

10.50 In 2002, legislative amendments altered the procedure for lodging an appeal with the CCA. Prior to the amendments, the appeal process began with the lodgment of a notice to appeal within 28 days of the conviction or sentence. A hearing date was allocated and a timetable was created for the filing of submissions. Now a hearing date will not ordinarily be allocated until all the relevant paperwork is filed. Whereas the old process was managed by the CCA, the current process is driven by the appellant.[62]

10.51 There is currently no time limit for the filing of prosecution appeals against sentence.[63] The CCA can however take into account any delay in the institution of a prosecution appeal, or in advising the respondent of its intention to appeal, in the exercise of the court's discretion whether or not to intervene.[64] An appeal against acquittal, in the limited circumstances where this is currently available, must be made within 28 days after the acquittal, although the CCA may grant leave to appeal after that period has expired.[65]

## Time limit for filing a defence notice of appeal

### *Current process allows 7 months to file an appeal from conviction or sentence*

10.52 The CDPP was of the view that the current time limits perhaps do not encourage matters being dealt with as efficiently or quickly as possible.[66] The CDPP noted that

58. *Criminal Appeal Rules* (NSW) r 3A.
59. *Criminal Appeal Rules* (NSW) r 3B.
60. "Proper officer" is defined as the person having custody of the records of the trial court: *Criminal Appeal Rules* (NSW) r 1. This will usually be the registrar.
61. *Criminal Appeal Rules* (NSW) r 23C.
62. C Craigie, *Advising on Merit Appeals: The Reasonable Prospect of Success* (Paper presented at NSW Bar Association seminar, Sydney, 15 September 2004) 3.
63. *R v Ohar* [2004] NSWCCA 83; 59 NSWLR 596.
64. *R v Pham* (1991) 55 A Crim R 128, 136 (Lee J), 138 (Gleeson CJ).
65. *Crimes (Appeal and Review) Act 2001* (NSW) s 107(3).
66. Commonwealth Director of Public Prosecutions, *Submission CA15*, 6.

the NIA procedure effectively gives appellants 7 months from the date of conviction or sentence to prepare their appeal, which was considerably longer than that permitted in most other Australian jurisdictions.

10.53 However, other stakeholders were largely in favour of retaining the current time limits in which to lodge an appeal to the CCA.[67] Concerns were raised about the practical difficulties that may be encountered if the time in which the NIA has effect is shortened. In particular, stakeholders submitted that its reduction may not provide sufficient time for the production of a transcript or receipt of relevant evidence from the trial court.[68]

10.54 Legal Aid NSW has a detailed process for granting legal aid that involves briefing counsel to advise on whether the appeal has reasonable prospects of success, and then making a decision on whether legal aid should be granted.[69] This process adds to the time required to prepare a notice of appeal, however it acts as an important filter.

### *Extensions of NIAs are frequently sought and granted*

10.55 We understand that extensions of NIAs are often sought and regularly granted by the registrar of the CCA, sometimes retrospectively, most often in writing. In some cases there may be multiple extensions. Consequently, it is not uncommon for a notice of appeal to be lodged more than 7 months after the date of the conviction or sentence.

10.56 Extensions are frequently sought on the basis of delays in obtaining a transcript of the proceedings at trial, particularly of the evidence and summing up, and any relevant exhibits. It is also common for different representatives to be retained for appeal proceedings, making the transcript essential for the development of the appeal grounds and submissions. The CDPP has experienced instances where extensions of time were granted for periods of 6 months or more. This can then place pressure on the CCA to expedite the hearing so that sentence severity appeals can be heard before the earliest release date of the offender.[70]

10.57 The process of granting extensions of time is managed by the CCA registrar, usually without appearance before or reference to a judge. There was some stakeholder support for greater case management by the CCA once the NIA period had expired. The lack of a clear framework in the rules or a practice note for extensions of time was highlighted as an issue.

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67. NSW Bar Association, *Submission CA5*, 7; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6*, 6; NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 14; Legal Aid NSW, *Submission CA12*, 10; Legal Aid NSW, *Response CA3.*
68. Legal Aid NSW, *Response CA3*; Appeals from higher courts roundtable, *Consultation CA5.*
69. Legal Aid NSW, *Criminal Law Matters – When Legal Aid is Available* (2010) [4.13.1].
70. Commonwealth Director of Public Prosecutions, *Submission CA15,* 6.

### *There are delays in obtaining transcripts and other material from the trial*

10.58 Stakeholders raised concerns that the time taken to receive a transcript of proceedings and the summing up, remarks on sentence and any judgment could make it difficult to comply with a shorter time period.[71]

10.59 Where the transcript of proceedings was not prepared on a daily basis during the trial, there may be a delay while the Reporting Services Branch (RSB) transcribes the trial proceedings after the NIA has been filed. The average wait time for a transcript is 4 weeks from the date of request.[72] We understand that some initiatives have been adopted to improve the turnaround time for transcript production. As we note in Chapter 5, the issue of transcript production and timeliness is an important issue for the criminal justice system that requires urgent attention.

10.60 The provisions surrounding the release of the summing up, remarks on sentence and any judgment (which are the responsibility of the trial judge) are unclear. Rule 8A(1) of the CAR provides that the CCA and the parties cannot be given access to a copy of any summing up, remarks on sentence or judgment until it has been revised by the trial judge. RSB provides an uncorrected copy of the summing up, remarks on sentence and any judgment to the trial judge for revision. If the trial judge does not return a revised copy within 3 weeks, RSB may release the uncorrected summing up, remarks on sentence or judgment to the proper officer of the court of trial.[73]

10.61 Rule 8A(4) of the CAR allows the CCA to grant access to an uncorrected summing up, remarks on sentence or judgment for "special cause". However, we understand that this power is virtually never used.

10.62 It is problematic that there is no clear process for the release of the trial judge's summing up, remarks on sentence or judgment when an NIA has been filed. The process contained in the CAR does not mandate the release of either the revised or unrevised material to the parties, but instead permits the CCA to release an unrevised copy only where there is "special cause". In the event that there is a delay in the trial judge revising the transcript, there is no ability for a party to require that the transcript be released. We have not been able to locate any other published policy dealing with the procedure for the release of material by the trial court. The CCA expects that an advice on prospects will not be sought until after the material from the trial court has been received,[74] suggesting that the timely release of this material is all the more important.

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71. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 7; Legal Aid NSW, *Submission CA12*, 10; Commonwealth Director of Public Prosecutions, *Submission CA15,* 6; Legal Aid NSW, *Response CA3.*
72. NSW District Court, "Transcripts" (20 December 2013) <http://www.districtcourt.lawlink.nsw.gov.au/districtcourt/transcripts.html>.
73. *Criminal Appeal Rules* (NSW) r 8A(2)-(3).
74. NSW Court of Criminal Appeal, *Practice Note No SC CCA 1 – Court of Criminal Appeal – General,* 30 September 2013 [8].

10.63 Some stakeholders supported a broadening of r 8A(4) of the CAR so as to allow the release of uncorrected summing up, remarks on sentence or judgment where the revised copy has not been released within a reasonable time.[75]

### *Our view: shorten time period for filing notice of appeal and review process for release of trial material*

10.64 In our view, there should be a move towards tightening the time period for the NIA. The interests of finality are not served by allowing a long period to file a notice of appeal. The long time period between the filing of an NIA and setting the appeal down for hearing (in some cases, upwards of 6 months) can cause problems for the management of the CCA's work, as well as uncertainty for prosecutors, victims and offenders. The delay may also adversely affect a retrial if it becomes necessary for one to be ordered.

10.65 We therefore recommend that the period for filing a notice of appeal following lodgment of an NIA be shortened from 6 months to 4 months.

10.66 We also recommend that the Chief Justice issue a practice note identifying the circumstances in which an NIA will be extended. It might usefully include a requirement for the appellant to appear before the registrar, or on referral before a judge of the Supreme Court, if an extension of time is sought (or if more than one extension of time is sought) to allow for the process to be case managed.

10.67 We appreciate that the need for an extension of the NIA can sometimes be the result of a delay in obtaining material from the trial court. However, these problems are better addressed through measures that deal with the root cause rather than by allowing a lengthy filing period to accommodate current delays.

10.68 To this end, we suggest that the head of each jurisdiction review the causes for delay and the process for the release of transcripts, summing up, remarks on sentence and judgment when an appeal is filed with the CCA. This could assist in addressing the current gap in the CAR as to when uncorrected summing up, remarks on sentence and judgment can and should be released for the purposes of an appeal.

**Recommendation 10.5: Change time limits for appeals to the Court of Criminal Appeal**

(1) A defendant should file a notice of intention to appeal (or to apply for leave to appeal) to the Court of Criminal Appeal against conviction or sentence within 28 days of the conviction or sentence.

(2) The notice of intention to appeal (or to apply for leave to appeal) should have effect for 4 months rather than 6 months.

(3) The Chief Justice should issue a practice note which deals with the procedure for granting an extension of the notice of intention to appeal (or to apply for leave to appeal), including consequential case management.

75. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 7; Legal Aid NSW, *Response CA3.*

(4) The head of jurisdiction of each court should review the causes of delay and the process for the release of transcripts, summing up, remarks on sentence and judgment when an appeal is filed with the Court of Criminal Appeal.

## Time limits for prosecution appeals

10.69 There was some support from stakeholders for introducing a time limit for prosecution appeals against sentence that is consistent with the time limit that applies to defendant appeals.[76] However it was acknowledged that it may not be appropriate to impose a time limit for sentence appeals that are commenced after a defendant has failed to fulfil an undertaking for which he or she received a reduced sentence.[77]

10.70 The DPP files a number of prosecution appeals which are contingent upon whether the defendant, having filed an NIA, elects to proceed with the appeal and upon its likely success. In these cases often it will not be clear whether the prosecution should lodge an appeal until after the appellant's grounds of appeal and submissions are received. For this reason, the NSW ODPP submitted that there should not be a time limit specified for prosecution appeals against sentence.[78]

### *Our view: prosecution appeals should be treated consistently with defendant appeals*

10.71 We consider that the prosecution should be subject to the same time limits as a defendant in filing an appeal against sentence. The time limit should not, however, apply to contingent prosecution appeals. It should also not apply to prosecution appeals under s 5DA of the CAA, where a person was given a reduced sentence for assisting law enforcement authorities but failed to fulfil that undertaking. The failure may not occur until some time after the sentence was imposed.

**Recommendation 10.6: Time limits for prosecution appeals**

(1) Prosecution appeals against sentence should be subject to the same time limits as appeals by defendants.

(2) There should be no time limit for:

(a) contingent prosecution appeals against sentence, and

(b) prosecution appeals against sentence where the sentence was reduced for assistance to authorities and the person failed to provide the assistance, as currently provided in s 5DA of the *Criminal Appeal Act 1912* (NSW).

76. NSW Bar Association, *Submission CA5*, 8; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6*, 6; Legal Aid NSW, *Submission CA12*, 10; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 12.

77. Legal Aid NSW, *Response CA3.*

78. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 16.

## Powers of the CCA in a conviction appeal

### Power to substitute a verdict of guilty for a different offence

10.72 In a successful appeal against a conviction, s 7(2) of the CAA allows the CCA to substitute a verdict of guilty for a different offence and pass sentence. That section provides:

> Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

10.73 This power has been held to be available to substitute a guilty verdict where the "other offence" is wholly within the ultimate facts of the offence on which the defendant has been convicted and which the court sets aside in the appeal.[79]

10.74 The wording of s 7(2) suggests that it only applies to findings of guilt by a jury, and does not apply to findings of guilt by a judge sitting alone,[80] or to a guilty plea. However, the right of appeal against conviction is not confined to where the defendant was convicted after a trial. Where the defendant pleaded guilty, the CCA may still intervene and allow the conviction appeal if it is satisfied that a miscarriage of justice has occurred.[81]

#### *Our view: expand the CCA's power to substitute a guilty verdict for a different offence*

10.75 We do not expect that there are very many cases where a defendant succeeds in having a guilty plea set aside on appeal, and where the most appropriate order would be to substitute a verdict of guilty for an equal or lesser offence. However, in these rare circumstances it would be more efficient to allow the CCA to substitute a verdict of guilty for an equal or lesser offence, rather than to remit the matter to the trial court. It also makes sense for the CCA to have the power to substitute a verdict where the finding of guilt was made by a judge sitting alone. Stakeholders supported this proposition.[82]

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79. *Spies v R* [2000] HCA 43; 201 CLR 603 [23].
80. *Criminal Procedure Act 1986* (NSW) s 133 provides that a finding by a judge on the question of guilt has the same effect as the verdict of a jury, but it is not expressly stated that this extends to the powers of the CCA under the *Criminal Appeal Act 1912* (NSW).
81. See *Van v R* [2002] NSWCCA 148; 129 A Crim R 229 [48] for a list of circumstances where the court may set aside a guilty plea.
82. Police Association of NSW, *Submission CA3*, 16; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 9; Legal Aid NSW, *Submission CA12,* 16; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 17; Appeals from higher courts roundtable, *Consultation CA5.*

**Recommendation 10.7: Expand the Court of Criminal Appeal's power to substitute a guilty verdict for a different offence**

The Court of Criminal Appeal's power to substitute a verdict of guilty for an alternative offence, currently contained in s 7(2) of the *Criminal Appeal Act 1912* (NSW), should apply to all guilty verdicts, not just to findings of guilt by a jury.

## Power to order a new trial

10.76 Section 8(1) of the CAA provides:

> On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make.

10.77 Section 8(1) confers a very broad discretion in the CCA to order a new trial after a conviction on indictment has been set aside.[83] Where the CCA allows an appeal against conviction, the "default order" will be to quash the conviction and enter a verdict of acquittal pursuant to s 6(2) of the CAA.[84] The prosecution must demonstrate to the CCA that a new trial, as opposed to a verdict of acquittal, is the most appropriate remedy.[85] The appropriate approach is to weigh the competing considerations of each case in deciding whether or not to order a new trial.[86]

10.78 A new trial should not be ordered where there was insufficient evidence at the original trial so as to make the guilty verdict unreasonable, or where there would be insufficient evidence in a new trial to support a conviction. In these circumstances the defendant is entitled to be acquitted.[87] A new trial should also not be ordered to allow the prosecution to improve a case that on appeal was found to be defective, or to make a new case that was not made at first instance.[88] However, there would need to be a substantial difference between the case relied on in the first trial and the case sought to be relied on in a new trial for that difference to prevent an order for a new trial.[89]

10.79 Other discretionary considerations relevant to determining whether to order a new trial include:

83. *Gerakiteys v R* (1984) 153 CLR 317; *King v R* (1986) 161 CLR 423.
84. *Justins v R* [2010] NSWCCA 242; 79 NSWLR 544 [114] (Spigelman CJ).
85. *King v R* (1986) 161 CLR 423, 426 (Murphy J), 428 (Deane J), 433 (Dawson J).
86. *King v R* (1986) 161 CLR 423, 427 (Murphy J).
87. *Gerakiteys v R* (1984) 153 CLR 317, 322 (Murphy J); *DPP (Nauru) v Fowler* (1984) 154 CLR 627, 630; *King v R* (1986) 161 CLR 423, 427 (Murphy J), 433 (Dawson J); *R v Taufahema* [2007] HCA 11; 228 CLR 232 [52].
88. *King v R* (1986) 161 CLR 423, 429-30 (Deane J), 433 (Dawson J).
89. *R v Taufahema* [2007] HCA 11; 228 CLR 232 [67].

- "the public interest in the due prosecution and conviction of offenders"[90]
- the objective seriousness of the offence and the likely penalty that would be imposed if the defendant was again convicted[91]
- the proportion of the sentence served by the defendant[92]
- the time that has lapsed between the offence and the new trial,[93] and
- the expense of a new trial.[94]

### *Our view: amend criteria for exercise of power to order a new trial*

10.80 Section 8(1) is unnecessarily long and complicated, and requires simplification. Under the current provision only the appellant may apply to the CCA for a new trial. It is unclear why a person whose conviction has been quashed would seek a second trial. It is anomalous that the provision does not similarly provide for the prosecution to make such an application. The case law suggests that it is the responsibility of the prosecution to demonstrate that an order for a new trial is the most appropriate order, despite the prosecution not having a legislative right to seek an order for a new trial.

10.81 The wording of the provision could also potentially narrow the circumstances in which the CCA may order a new trial. Currently the CCA must be satisfied that a miscarriage of justice has occurred and such a miscarriage would be better remedied by a new trial than by any other order. "Miscarriage of justice" is used as a specific ground of appeal against conviction under s 6(1), and its corresponding use in s 8 may suggest that a new trial can only be ordered where this particular ground of appeal is successful. The use of "miscarriage of justice" could create difficulty in cases concerning other types of error, such as a wrong decision on a question of law, or where there is post conviction evidence indicating the guilt of the appellant.[95]

10.82 We are of the view that the provision should be amended so that the CCA may make an order for a new trial where it is in the interests of justice to do so. We do not consider that this will alter the circumstances in which a new trial may be ordered, as the types of considerations the CCA currently examines in deciding whether to order a new trial are, in effect, "interests of justice" considerations. Rather, it would ensure that the CCA retains desirable flexibility to order a new trial when appropriate.

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90. *R v Anderson* (1991) 53 A Crim R 421, 453 (Gleeson CJ); *R v Taufahema* [2007] HCA 11; 228 CLR 232 [49].
91. *DPP (Nauru) v Fowler* (1984) 154 CLR 627, 630.
92. *R v Taufahema* [2007] HCA 11; 228 CLR 232 [55].
93. *R v Taufahema* [2007] HCA 11; 228 CLR 232 [55].
94. *R v Taufahema* [2007] HCA 11; 228 CLR 232 [55].
95. See 10.107 - 10.114

**Recommendation 10.8: Clarify Court of Criminal Appeal's power to order a new trial**

The Court of Criminal Appeal should have the power to order a new trial following a successful appeal against conviction where it is in the interests of justice to do so.

## Submission of question of law

10.83 The CAA presently allows both the trial judge and the DPP or Attorney General to submit a question of law to the CCA for determination.

### Submission by trial judge

10.84 Table 10.1 shows the circumstances in which a trial judge may submit a question of law to the CCA for determination. It appears that these submission powers are infrequently used. A case law search reveals only two instances where a submission has been made by the trial judge following conviction under s 5A(1).[96] Furthermore, as Table 10.1 shows, in many cases where the trial judge may submit a question of law, there is a coexisting avenue of appeal available to the parties.

**Table 10.1: Provisions in the *Criminal Appeal Act 1912* (NSW) allowing the trial judge to submit a question of law to the Court of Criminal Appeal**

| Provision | Alternative avenues of appeal |
|---|---|
| Where a person is tried and convicted on indictment, the trial judge may submit a question of law arising at or in reference to the trial or conviction to the CCA for determination. The submission is to be dealt with as if it were an appeal. (CAA s 5A(1)) | Appeal by the convicted person against conviction or sentence (CAA s 5).<br>Appeal by the Attorney General or the DPP against sentence (CAA s 5D, s 5DA). |
| At any time before the completion of proceedings in the summary jurisdiction of the Supreme Court, District Court, IRCiCS or LEC, the judge may, or if requested by the Crown must, submit a question of law arising at or in reference to the proceedings to the CCA for determination. The CCA may make any order or give any direction it thinks fit. (CAA s 5AE) | Appeal against conviction (including any sentence imposed) or order for costs. (CAA s 5AA, s 5AB, s 5ABA, s 5AD)<br>Appeal against an interlocutory judgment or order made by the LEC in its summary jurisdiction (CAA s 5F).<br>Appeal against acquittal in the summary jurisdiction of the Supreme Court or the LEC, in proceedings where the Crown was a party. (CARA s 107)<br>We recommend (in recommendation 11.1) that appeals against interlocutory judgments or orders be expanded to include proceedings in the summary jurisdiction of the District Court, Supreme Court and IRCiCS.<br>We recommend (in recommendations 9.2 and 9.3) that appeals from an acquittal be expanded to include an acquittal in the summary jurisdiction of the District Court and IRCiCS, and that it not be restricted to cases involving the Crown. |

96. *R v MAJW* [2007] NSWCCA 145; 171 A Crim R 407; *R v Davy* [1964-5] NSWR 40.

| Provision | Alternative avenues of appeal |
|---|---|
| A judge of the District Court, LEC or IRCiCS, hearing an appeal from the Local Court, may submit any question of law arising on the appeal to the CCA for determination. The CCA may make any order or give any direction to the Court as it thinks fit. (CAA s 5B(1), s 5BA(1), s 5BB(1))<br>At the request of a person who was a party to the appeal proceedings in the District Court, or at the request of the appellant in the LEC or IRCiCS, such a question can be submitted even though the proceedings have been disposed of. (CAA s 5B(2), s 5BA(2), s 5BB(2)) | We recommend (in recommendations 5.2, 12.6 and 12.10) replacing the case stated with an avenue of appeal from the District Court, LEC and IRCiCS to the CCA, with leave on a question of law. |

10.85 In prosecutions for environmental offences in the LEC, the prosecutor has used the submission power under s 5AE to ask the judge to refer a question of law to the CCA where the defendant is to be acquitted.[97] Presumably this is because the prosecutor has no right to appeal against the acquittal - only the DPP or the Attorney General may appeal against an acquittal, and only in cases where the Crown was a party to the original proceedings.[98] From a prosecutor's perspective, a submission under s 5AE is not a particularly desirable way of seeking a review of an acquittal. The prosecutor is bound by the question of law submitted by the trial judge, and cannot suggest to the CCA that some other question might appropriately have been submitted.[99]

### *Our view: repeal power for trial judge to submit question of law*

10.86 Our view is that the provisions allowing for the trial judge to submit a question of law to the CCA, set out in Table 10.1, should be repealed. They are adequately covered by other avenues of appeal.

10.87 In Chapter 9 we recommend that the right of appeal against an acquittal be expanded.[100] If our recommendations are implemented, the need to rely on the submission power in the event of an acquittal is likely to no longer be necessary. Furthermore, it is questionable whether a procedure which relies on the trial judge submitting a question of law for the CCA is the most appropriate way for matters to be brought up for review.

10.88 If the provisions in Table 10.1 are repealed, the only place where the current avenues of appeal may not provide an adequate alternative is in relation to the power under s 5AE of the CAA – that is, during proceedings in the summary jurisdiction of the Supreme Court, District Court, LEC and IRCiCS. We recommend that an interlocutory appeal under s 5F of the CAA be expanded to apply to these proceedings.[101] Some of the questions of law which are currently submitted under

97. *Environment Protection Authority v Land and Environment Court (NSW)* [2004] NSWCA 50; 134 LGERA 140.
98. *Crimes (Appeal and Review) Act 2001* (NSW) s 107(1)(c).
99. *Director General, Department of Trade and Investment, Regional Infrastructure and Services v Glennies Creek Coal Management Pty Ltd* [2013] NSWCA 371.
100. Recommendation 9.1.
101. Recommendation 11.1.

s 5AE could therefore be dealt with as an interlocutory appeal where they constitute an "interlocutory judgment or order".[102] Other questions of law relating to the admissibility of evidence (particularly when raised by the defendant) may not be covered by the scope of s 5F. However, the defendant would retain an appeal against conviction if an evidentiary ruling was decided unfavourably to him or her.

10.89 Therefore, if our other recommendations are implemented, we consider that these submission powers will no longer be necessary. Stakeholders were generally in support of abolishing submission by the trial judge.[103]

**Recommendation 10.9: Repeal submission of questions of law to the Court of Criminal Appeal**

The provisions allowing the trial judge to submit a question of law arising during or after proceedings to the Court of Criminal Appeal, currently contained in s 5A, s 5AE, s 5B, s 5BA and s 5BB of the *Criminal Appeal Act 1912* (NSW), should be repealed.

## Submission by DPP or Attorney General following acquittal

10.90 Where a person is acquitted in any proceedings tried on indictment, or in any proceedings before the Supreme Court or the LEC in their summary jurisdiction in which the Crown was a party, the Attorney General or the DPP may submit for determination by the CCA any question of law arising at or in connection with the trial. The CCA is to hear and determine the question, but it does not affect or invalidate the verdict of acquittal.[104]

10.91 The intention of this provision was to allow the prosecution to test erroneous rulings, and to avoid "a wall of bad precedent" from building up.[105] At the time there was no other avenue for the prosecution to seek an appeal or review of an acquittal.

### *Our view: retain power for DPP or Attorney General to submit question of law following acquittal*

10.92 The prosecution's referral power has not been frequently used,[106] and appears to have been used even less following the introduction of the limited right of appeal against acquittal conferred under s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). However, we consider that it serves a useful purpose in allowing the CCA to rectify any errors of law, thereby avoiding the development of unfavourable precedent.

102. See Recommendation 11.1. *Criminal Appeal Act 1912* (NSW) s 5F already applies to proceedings in the summary jurisdiction of the Land and Environment Court.

103. Appeals from higher courts roundtable, *Consultation CA5.*

104. *Crimes (Appeal and Review) Act 2001* (NSW) s 108.

105. See *Crimes (Amendment) Act 1951* (NSW) s 7; NSW, *Parliamentary Debates*, Legislative Assembly, 26 September 1951, 3232.

106. Our case law search indicates only about 10 referrals have been made since the introduction of the provision in 1951.

10.93 Stakeholders did not raise any concerns about this proposal.[107]

## Receiving additional evidence on appeal

10.94 The CCA has power to permit additional evidence to be given on appeal. This does not depend upon an express statutory power, but rather is a component of the general appellate jurisdiction. It derived from the traditional common law power for correcting error and miscarriage, which allowed for a new trial based on fresh evidence.[108]

10.95 The CCA has established different threshold tests for exercising its discretion to admit additional evidence in conviction and sentence appeals.[109] In appeals against conviction, the CCA will consider whether the evidence could have been available to the defendant at the time of trial and the cogency of the evidence. The question for the court is whether the absence of the evidence at the trial has resulted in a miscarriage of justice.[110]

10.96 In a sentence appeal the CCA cannot interfere with a sentence unless it identifies an error.[111] This means that evidence of matters arising since the sentence cannot be taken into account in the appeal. If the facts did not exist at the time of sentencing, it is not an error not to have taken them into account.[112] On the other hand, where the facts or circumstances existed at the time of sentencing, even if not known or properly understood at the time, the CCA may admit the additional evidence where it is in the interests of justice. Although there is no error by the sentencing judge, in these circumstances it is said that the sentencing proceeded upon an erroneous view of the factual circumstances.[113] The power to admit additional evidence is a discretionary one, and proper grounds must be established.[114]

### *Our view: no change required*

10.97 Stakeholders were in favour of retaining the current powers to admit additional evidence.[115] The NSW Bar Association also suggested that it may be useful to set out the principles established by the case law in the legislation.[116] However, we do not consider it desirable to attempt any codification or to introduce a legislative

107. Appeals from higher courts roundtable, *Consultation CA5.*
108. *Mickelberg v R* (1989) 167 CLR 259, 279 (Deane J).
109. *R v Abou-Chabake* [2004] NSWCCA 356; 149 A Crim R 417 [63] (conviction appeals); *Khoury v R* [2011] NSWCCA 118; 209 A Crim R 509 [104]-[121] (sentence appeals).
110. *R v Abou-Chabake* (2004) 149 A Crim R 417 [63].
111. *House v R* (1936) 55 CLR 499. See Chapter 8.
112. *Khoury v R* [2011] NSWCCA 118; 209 A Crim R 509 [110].
113. *Khoury v R* [2011] NSWCCA 118; 209 A Crim R 509 [113].
114. *Khoury v R* [2011] NSWCCA 118; 209 A Crim R 509 [113].
115. NSW Bar Association, *Submission CA5,* 14; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 9; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 20; Legal Aid NSW, *Submission CA12,* 16; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 16; Commonwealth Director of Public Prosecutions, *Submission CA15,* 8.
116. NSW Bar Association, *Submission CA5,* 14.

statement of the relevant principles. Given that the current powers work well, we do not recommend any change in this area.

## Supplemental powers of the CCA

10.98 Section 12(1) of the CAA gives the CCA a broad range of supplemental powers. It may, if considered necessary or expedient in the interests of justice:

(a) order the production of any document, exhibit or other thing connected with the proceedings

(b) order any person who would have been a compellable witness at the trial to attend and be examined before the court (or before any judge or officer of the court or other person appointed by the court) and admit the deposition so taken as evidence

(c) receive the evidence, if tendered, of any witness who is a competent but not compellable witness (including the appellant)

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the court, be conveniently conducted before the court, the court or any judge may refer the question for inquiry and report to a commissioner appointed by the court, and act upon the report of any such commissioner so far as the court thinks fit, and

(e) appoint any person with special expert knowledge to act as assessor to the court in any case in which it appears to the court that such special knowledge is required for the determination of the case.

10.99 However, the CCA cannot increase a sentence by reason or in consideration of any evidence that was not given at the trial.[117] The CCA may exercise any other powers which can be exercised by the Supreme Court on appeals or applications in civil matters.[118] It may also remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made.[119]

10.100 Section 12 has not been significantly amended since its introduction in 1912, and not all of its provisions may still be relevant. We understand that the powers in s 12(1)(d) and (e) are rarely, if ever, used. We have been unable to identify a case in which they have been used, and no example was brought to our notice. It is not entirely clear how they are to operate in practice. For example, it is not clear what opportunity the parties would be given to participate in or challenge the report of a commissioner or assessor.

117. *Criminal Appeal Act 1912* (NSW) s 12(1).
118. *Criminal Appeal Act 1912* (NSW) s 12(1).
119. *Criminal Appeal Act 1912* (NSW) s 12(2).

10.101 Under the CAR, when the CCA refers a question for inquiry and report, it shall make an order which specifies the question referred and the commissioner appointed. The Court may also, in the order, direct whether the appellant or respondent may be present at or represented at the examination or investigation; specify the powers to be conferred upon the commissioner; require the commissioner to make interim reports; and direct the registrar as to whether copies of the report are to be furnished to the appellant and respondent.[120]

10.102 In *Weiss v R* the High Court used the existence of the broad powers in the Victorian equivalent of s 12 to justify an interpretation of the common form provision for conviction appeals that required the appeal court to make its own inquiry about whether the defendant was in fact guilty.[121]

10.103 Similar, and in some cases identical, supplementary powers exist across other Australian jurisdictions.[122] In WA, the Court of Appeal is not required to consider whether using its supplemental powers is "necessary or expedient in the interests of justice"[123] and the Victorian Court of Appeal need only consider if doing so is "in the interests of justice".[124] Both WA and Victoria have retained the powers to appoint commissioners and assessors, despite recently revising their criminal appeals framework.[125] The WA provision is broad and would appear to encompass the Court of Appeal's power to admit additional evidence as well as its supplemental powers.[126] In the ACT the Court of Appeal has broad discretion to receive further evidence by oral examination, audio link, affidavit or in any other way the court may receive evidence.[127]

10.104 Some stakeholders considered that the powers in s 12 should be retained just in case they are necessary in future cases.[128]

### *Our view: retain and update supplemental powers*

10.105 We can see benefit in the retention of s 12(1)(a) – (c). Although s 12(1)(d) and s 12(1)(e) are infrequently used to the point where their relevance is questionable, we recognise that they may have some utility in complex cases, for example those that involve extensive consideration of financial documents, or explanation of foreign legislation, or contentious areas of scientific knowledge. This might save considerable time in the hearing of the appeal and allow the court to be better informed.

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120. *Criminal Appeal Rules* (NSW) r 68-69.
121. *Weiss v R* [2005] HCA 81; 224 CLR 300 [23]. See the discussion about *Weiss* in Chapter 8.
122. *Criminal Code* (Qld) s 671B; *Criminal Law Consolidation Act 1935* (SA) s 359; *Criminal Code* (Tas) s 409; *Criminal Code* (NT) s 419.
123. *Criminal Appeals Act 2004* (WA) s 40.
124. *Criminal Procedure Act 2009* (Vic) s 317-320.
125. *Criminal Appeals Act 2004* (WA) s 40(1)(e)-(f); *Criminal Procedure Act 2009* (Vic) s 320 (commissioners); *Supreme Court Act 1986* (Vic) s 77 (assessors).
126. *Criminal Appeals Act 2004* (WA) s 40.
127. *Supreme Court Act 1930* (ACT) s 37N.
128. Appeals from higher courts roundtable, *Consultation CA5.*

10.106 On one view, where additional evidence or some further investigation of an expert kind is required, this should be left to the parties to adduce, or for an inquiry to be directed under Part 7 of CARA, rather than giving the CCA the power to collect that evidence or information of its own initiative. However, there does not seem to be a pressing need for reform at this time, and on balance we do not recommend removal of these provisions. We do see utility in the Chief Justice developing a Practice Note as to the way in which a reference under s 12(1)(d) or (e) is to be conducted. The language of s 12 should also be updated to use modern language and adopt contemporary drafting styles.

**Recommendation 10.10: Retain the Court of Criminal Appeal's supplemental powers**

(1) The language of s 12(1)(a)-(e) of the *Criminal Appeal Act 1912* (NSW) should be updated using modern language and drafting styles.

(2) The Chief Justice should issue a practice note which deals with the procedure for referring a question for inquiry or appointing an assessor to the court under the provisions currently contained in s 12(1)(d) and (e) of the *Criminal Appeal Act 1912* (NSW).

## Post conviction admissions as evidence on appeal

10.107 A number of recent cases have raised the question of what use can be made in a conviction appeal of post conviction evidence that tends to demonstrate the guilt of the appellant. Neither the High Court nor the CCA has been required to conclusively determine how to use such evidence. In *Cesan v R*,[129] *Raumakita v R*[130] and *TDP v R*[131] each defendant made admissions following their conviction that were included in documents submitted to the trial judge for the purpose of sentencing. In each case, the defendant later appealed against their conviction on the ground that the verdict was unreasonable.

10.108 In an appeal against conviction on the ground that the verdict was unreasonable or could not be supported by the evidence,[132] the CCA will only have regard to the material that was before the jury at the time of the conviction. The question for the court in such a case is whether it thinks, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.[133] The CCA will also have regard to the trial evidence when applying the proviso in s 6(1) of the CAA.[134]

10.109 It is currently unclear whether the prosecution can adduce post conviction evidence which tends to demonstrate the guilt of the appellant. If the evidence is received and

129. *Cesan v R* [2008] HCA 52; 236 CLR 358.
130. *Raumakita v R* [2011] NSWCCA 126; 210 A Crim R 326.
131. *TDP v R* [2013] NSWCCA 303.
132. See the discussion of this ground of appeal in Chapter 8.
133. *M v R* (1994) 181 CLR 487, 493.
134. *Weiss v R* [2005] HCA 81; 224 CLR 300 [39]-[41].

is cogent, a subsequent question arises as to whether it can be used in applying the proviso to dismiss the appeal (on the basis that no substantial miscarriage of justice has actually occurred), or alternatively whether the outcome should be an order for a retrial instead of an acquittal.

10.110 The High Court in *Cesan* allowed the appeal against conviction but placed no weight on the appellant's post conviction admission of guilt when determining whether or not to apply the proviso. Justices Hayne, Crennan and Kiefel (with Justice Heydon agreeing) noted that the majority of the CCA had given "some weight" to the letter containing the admission in dismissing the appeal. However, they considered that it was written for the "evident purpose of mitigating the sentence that was then to be passed". If the appellant had done anything other than accept the verdict of the jury it would have aggravated the sentence.[135]

10.111 In *Raumakita* and *TDP* the CCA ultimately dismissed each appeal on the basis that the grounds of appeal were not made out. Consequently, it was not required to determine how it may use the post conviction admissions in the context of either applying the proviso or ordering a retrial. However, in both cases the CCA made observations regarding how such admissions could be used in future cases.

10.112 In *Raumakita* Justice Johnson noted that precedent suggested that the court would exercise considerable caution in receiving a post conviction admission. Both the CCA and the High Court have emphasised the finality that must be given to a jury verdict. This justification however may no longer be as compelling as it once was, given that, as Justice Johnson noted, the finality of a jury verdict has been eroded by the availability of a limited avenue of appeal against an acquittal and by the ability for the CCA to order a retrial.[136] In *TDP* Justice Hoeben expressed doubt that such an admission could influence the application of the proviso, but considered it may be relevant to determining whether to order a retrial or a verdict of acquittal.[137]

10.113 In *Landsman v DPP*[138] the District Court permitted the prosecution to lead evidence of an "admission" in the defendant's appeal against conviction. The defendant had admitted his guilt to a Corrective Services officer in the course of an assessment of his suitability for an Intensive Correction Order following his conviction in the Local Court. The District Court refused to state a case to the CCA at the request of the defendant,[139] on the basis that granting the prosecution leave to adduce a post conviction confession on appeal was not a question of law. In proceedings for judicial review of the District Court's refusal to state a case, the Court of Appeal quashed the order and remitted the matter to the District Court to formulate the question to be referred to the CCA. However, it was not required to determine whether the District Court should have received evidence of the "admission".

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135. *Cesan v R* [2008] HCA 52; 236 CLR 358 [131]. In *Raumakita v R* [2011] NSWCCA 126 [57] it was noted that this does not "appear to conform with the principle that a defendant who contests the trial, whilst not entitled to mitigation for a plea of guilty, may not be punished for the manner in which the defence was conducted". See *Siganto v R* [1998] HCA 74; 194 CLR 656.
136. *Raumakita v R* [2011] NSWCCA 126 [54], [61].
137. *TDP v R* [2013] NSWCCA 303 [128].
138. *Landsman v DPP* [2013] NSWCA 369.
139. Under *Criminal Appeal Act 1912* (NSW) s 5B.

### *Our view: use of post conviction evidence should be left to CCA to decide*

10.114 We are inclined to the view that evidence of a post conviction admission should be relevant to the CCA's discretion whether to dismiss an appeal, or to order a retrial, so long as it is cogent and otherwise satisfies the requirements for the admissibility of an admission under Part 3.11 of the *Evidence Act 1995* (NSW). However, we consider that any legislative guidance regarding how the CCA may use post conviction evidence is premature and this is a question best left to the CCA to determine. We therefore do not make any recommendations for reform in this area.

## Trial judge's notes and opinion of the case

10.115 Section 11 of the CAA provides that in the case of an appeal or application for leave to appeal, a trial judge may, and if requested by the Chief Justice must, submit the judge's notes of the trial and a report giving the judge's opinion on the case.

10.116 This section appears to have been introduced at a time when a transcript of the proceedings at trial was not available, and is now only used in exceptional cases.[140] The weight given to the judge's report will vary according to the circumstances, and is most useful when expressing views about matters not readily apparent from the written record. It is less useful where the judge's opinion is based almost wholly upon the assessment of the evidence which the appellate court is required to undertake for itself.[141]

### *Our view: abolish trial judge's notes and opinion*

10.117 It is questionable whether the provision of the opinion of the trial judge in relation to the merits of the appeal, that is formed without reference to or input from the parties, is either desirable or likely to serve any useful purpose. We recommend that this provision should be abolished. This proposal was supported by stakeholders.[142]

| **Recommendation 10.11: Abolish trial judge's notes and opinion** |
| --- |
| Section 11 of the *Criminal Appeal Act 1912* (NSW), which allows for the trial judge to provide his or her notes on the trial and opinion on the appeal, should be repealed. |

## Costs

10.118 Section 17 of the CAA provides that no costs shall be allowed on either side on the hearing or determination of an appeal to the CCA or in any proceedings preliminary or incidental to an appeal under the CAA.

140. *SKA v R* [2011] HCA 13; 243 CLR 400 [110], [112] (Crennan J), citing *R v Sloane* [2001] NSWCCA 421; 126 A Crim R 188 [13].
141. *SKA v R* [2011] HCA 13; 243 CLR 400 [112] (Crennan J).
142. Appeals from higher courts roundtable, *Consultation CA5.*

10.119 Several stakeholders submitted that costs should not be recoverable in criminal matters.[143] The NSW ODPP agreed with this position in respect of prosecution appeals as they have a public interest element, but suggested that the possibility of an award of costs against a defendant may assist in filtering unmeritorious appeals.[144] The NSW Bar Association suggested that there should be one general rule as to costs across all appeal courts, being that costs should not be recoverable unless exceptional circumstances apply.[145]

10.120 We agree that costs should not be recoverable in appeals to the CCA. Criminal appeals serve a public purpose in ensuring community confidence in first instance criminal proceedings. The consequences of a conviction in the higher courts (commonly a term of imprisonment) also suggest that a defendant should not run the risk of an adverse costs order if he or she wishes to appeal the conviction or the severity of the sentence. Additionally, because the prosecution is publicly funded and as around 75% of appeals by defendant are legally aided, there may be little benefit in a power to award costs.

10.121 There seems, however, to be a complication regarding the interaction between s 17 of the CAA and the *Costs in Criminal Cases Act 1967* (NSW). The *Costs in Criminal Cases Act* allows a certificate to be granted for the payment of costs out of the Consolidated Fund where:

- a defendant's conviction is quashed on appeal and the defendant is discharged, and
- in the opinion of the court granting the certificate, if the prosecution had been in possession of all the relevant facts before the proceedings were instituted, it would not have been reasonable to institute the proceedings.[146]

10.122 The restriction on the award of costs in s 17 of the CAA means that a certificate can be granted for the costs of the trial where the conviction is quashed on appeal, but not for the costs of the appeal itself.[147]

### *Our view: Costs in Criminal Cases Act 1967 (NSW) should allow recovery of costs on appeal*

10.123 The current barrier to recovery of costs on appeal in situation of unreasonable prosecution is anomalous and unfair. Amendment should be made to s 17 of the CAA or the *Costs in Criminal Cases Act* so that the certification procedure under the *Costs in Criminal Cases Act* allows recovery of costs of appeal in appropriate cases.

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143. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 9; Legal Aid NSW, *Submission CA12,* 16; Commonwealth Director of Public Prosecutions, *Submission CA15*, 8.
144. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 22.
145. NSW Bar Association, *Submission CA5,* 15.
146. *Costs in Criminal Cases Act 1967* (NSW) s 2-4. The court must also be satisfied that that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances: s 3(1)(b).
147. *R v Manley* [2000] NSWCCA 196; 49 NSWLR 203 [19]; see also *Cittadini v R* [2010] NSWCCA 291.

10.124 It is unlikely that this type of situation would arise regularly. It would be an exceptional case where a defendant was convicted at trial but acquitted on appeal, and it was not reasonable for the prosecution to have instituted the proceedings in the first place. It may be more likely to arise where relevant facts later come to light which make the original prosecution unreasonable.

**Recommendation 10.12: *Costs in Criminal Cases Act 1967* (NSW) should allow recovery of costs on appeal**

Legislative amendment should be made to ensure that the procedure under the *Costs in Criminal Cases Act 1967* (NSW) for the defendant to apply for a certificate and recover the costs of trial where the prosecution is found to be unreasonable, should also allow the costs of the appeal to be recovered.

## Effect of time spent on release pending appeal on sentence

10.125 Sections 18 and 25A of the CAA provide that the time during which a person is at liberty on bail pending the determination of that person's appeal to the CCA or the High Court does not count as part of any term of imprisonment under their sentence.[148] The court may make any order it thinks fit to give effect to s 18 and s 25A, including adjusting the sentence to take into account the time spent on bail.[149] These provisions only apply to defendant appeals and there are no equivalent provisions for prosecution appeals.

10.126 This anomaly was highlighted in *Khazaal v R (No 2)*.[150] In that case the defendant was found guilty of making a document connected with assistance in a terrorist act. The conviction was quashed by the CCA and a new trial ordered. The prosecution appealed this decision to the High Court and the defendant was released on conditional bail pending the determination of the prosecution's appeal. The High Court allowed the appeal and the conviction was upheld. The matter was remitted to the CCA for consideration and determination of the defendant's appeal against sentence.

10.127 The CCA ultimately dismissed the defendant's appeal against sentence. During those proceedings, the prosecution contended that the date of expiration of the original non-parole period should be increased by the length of time the defendant spent on bail, a total period of 399 days. While the CCA considered there to be logic in the prosecution's submission, it found it was unable to increase the defendant's sentence to account for the time he spent on bail without an express statutory power enabling it to do so.[151] In effect, the 399 days spent on bail formed part of the sentence served.

148. *Criminal Appeal Act 1912* (NSW) s 25A.
149. *Criminal Appeal Act 1912* (NSW) s 28A.
150. *Khazaal v R (No 2)* [2013] NSWCCA 140.
151. *Khazaal v R (No 2)* [2013] NSWCCA 140 [83].

### *Our view: clarify the effect of time spent on release pending appeal on the sentence*

10.128 In our view, it is undesirable for a sentence to continue to run where a defendant has been conditionally released pending the determination of an appeal. Where a conviction and sentence is confirmed on appeal, the appellate court should have the power to give full effect to the sentence imposed by the trial court. We are of the view that the requirement that time spent on bail not be counted as part of a defendant's sentence should apply to both defendant and prosecution appeals, to avoid the situation that arose in *Khazaal*.

10.129 We also addressed several issues concerning release pending appeal in our 2012 report on bail. In particular, we recommended that the relevant appeal provisions should be clarified to ensure that, where an offender has been released on bail pending an appeal, the appeal court has sufficient power to order the commencement or recommencement of the original sentence.[152] In light of the emergence of this discrepancy between defendant and prosecution appeals we reiterate the recommendation we made in that report.

**Recommendation 10.13: Clarify the effect of time spent on release pending appeal on the sentence**

(1) The requirement that the time during which a person is released on bail pending the determination of that person's appeal to the Court of Criminal Appeal or the High Court does not count as part of any term of imprisonment, currently contained in s 18 and s 25A of the *Criminal Appeal Act 1912* (NSW), should be extended to prosecution appeals.

(2) Recommendation 9.3 of Report 133, *Bail,* should be implemented in a new Criminal Appeal Act.

152. NSW Law Reform Commission, *Bail*, Report 133 (2012) rec 9.3.

# 11. Interlocutory appeals and appeals from committal proceedings

**In brief**

Any party may appeal an interlocutory judgment or order to the Court of Criminal Appeal, and the prosecution may also appeal certain evidentiary rulings. Stakeholders support the breadth of the current interlocutory appeal rights. We recommend some procedural adjustments, including a general requirement for leave, time limits for all parties and an expansion of the appeal rights to interlocutory decisions made in summary proceedings. There are dual avenues of appeal from orders made in committal proceedings to both the Supreme Court and the Court of Criminal Appeal. We recommend that the latter avenue be abolished.


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11.1 In this chapter we consider the avenues of appeal from interlocutory judgments or orders, other than interlocutory orders made in the Local Court,[1] and appeals against orders made in committal proceedings.

## Appeals from interlocutory judgments or orders

### Current law

11.2 Section 5F of the *Criminal Appeal Act 1912* (NSW) (CAA) relevantly provides:

> (1) This section applies to:
>
> (a) proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme Court or District Court, and
>
> (b) proceedings under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*,[2] and
>
> (c) proceedings in Class 5 of the Land and Environment Court's jurisdiction (as referred to in section 21 of the *Land and Environment Court Act 1979*).[3]
>
> (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which this section applies.
>
> (3) Any other party to proceedings to which this section applies may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in the proceedings:
>
> (a) if the Court of Criminal Appeal gives leave to appeal, or
>
> (b) if the judge or magistrate of the court of trial certifies that the judgment or order is a proper one for determination on appeal.
>
> …
>
> (3A) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.
>
> …
>
> (6) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.

1. This is dealt with in Chapter 6.
2. Where a defendant pleads guilty in committal proceedings.
3. Summary criminal proceedings under environmental planning and protection legislation.

### History of amendments to s 5F

11.3 Section 5F was introduced in 1987 to effect a jurisdictional adjustment. Reviews of an interlocutory judgment or order in criminal proceedings in the District Court, such as the refusal of a stay of proceedings, were being brought before the Court of Appeal as applications for prerogative relief. They were leading to the disruption of trials and to anomalies in criminal proceedings. It was considered appropriate for these types of matters to be heard in the Court of Criminal Appeal (CCA) on the same basis that applied to interlocutory judgments made in the Supreme Court.[4]

11.4 Subsection (3A) was introduced in 2004. Prior to this the CCA had held that a decision by the trial judge to exclude the entirety of the prosecution evidence could be appealed under s 5F(2) as it was, in substance, a refusal to permit the prosecution to seek to make a case against the defendant.[5] However, there was no ability to appeal a decision on the admissibility of particular pieces of evidence, this being held not to constitute a judgment or order within the meaning of s 5F(2). The rationale behind the amendment was to allow the prosecution to test the correctness of evidentiary rulings, and to ensure that the defendant did not derive the benefit of an acquittal obtained because of an erroneous evidentiary ruling. It was expected that the prosecution would exercise this power sparingly.[6]

### NSW has a comparatively broad rate of appeal

11.5 The extent of interlocutory appeals in other jurisdictions varies. In the ACT an appeal may be brought against an "interlocutory order", with leave.[7] In WA either party may appeal, with leave, against an order for or refusal of separate trials, and the prosecutor may also appeal against an adjournment.[8] In SA interlocutory appeals are limited to the question of whether proceedings should be stayed on the ground that they are an abuse of process.[9] In Queensland the defendant can only appeal a pre-trial direction following conviction or sentence, whereas the Attorney-General may refer a point of law that has arisen in respect of a pre-trial direction or ruling to the Court of Appeal.[10] In the federal jurisdiction, an appeal lies, with leave, from a judgment or decision made in indictable primary proceedings before the making of a judgment to acquit, discharge, convict or sentence the defendant.[11] Tasmania and the NT do not have specific avenues of interlocutory appeal. Victoria has a broader avenue of interlocutory appeal than NSW, which is discussed below.

### There are relatively few appeals under s 5F

11.6 Appeals under s 5F of the CAA are not particularly frequent. In the last 10 years the number of appeals has ranged from 4 in 2009, to 21 in 2012. Table 11.1 shows the number of appeals.

---

4. See *Criminal Appeal (Amendment) Act 1987* (NSW) sch 1 and the second reading speech for the Bill: NSW, *Parliamentary Debates*, Legislative Assembly, 17 November 1987, 16 087-9.
5. *R v Bozatsis* (1997) 97 A Crim R 296, 304 (Gleeson CJ).
6. See *Crimes Legislation Further Amendment Act 2003* (NSW) and the second reading speech for the Bill: NSW, *Parliamentary Debates*, Legislative Council, 20 November 2003, 5428.
7. *Supreme Court Act 1930* (ACT) s 37E(4).
8. *Criminal Appeals Act 2004* (WA) s 24, s 26(1), (3).
9. *Criminal Law Consolidation Act 1935* (SA) s 352(1)(b)-(c).
10. *Criminal Code* (Qld) s 590AA(4), s 668A.
11. *Federal Court of Australia Act 1976* (Cth) s 30AA(4).

**Table 11.1: Number of appeals under *Criminal Appeal Act 1912* (NSW) s 5F, 2003-2013**

| Year | Appeals under s 5F(2) | Appeals under s 5F(3), leave granted | Appeals under s 5F(3), leave refused | Appeals under s 5F(3A) | Total |
|---|---|---|---|---|---|
| 2013 | 1 | 6 | 2 | 6 | **15** |
| 2012 | 3 | 8 | 4 | 6 | **21** |
| 2011 | 5 | 6 | 7 | 1 | **19** |
| 2010 | 3 | 2 | 1 | 7 | **13** |
| 2009 | 0 | 2 | 0 | 2 | **4** |
| 2008 | 3 | 1 | 3 | 5 | **12** |
| 2007 | 0 | 8 | 2 | 4 | **14** |
| 2006 | 1 | 2 | 4 | 3 | **10** |
| 2005 | 1 | 2 | 3 | 2 | **8** |
| 2004 | 0 | 5 | 3 | 5 | **13** |
| 2003 | 6 | 4 | 3 | 0 | **13** |
| **Total** | **23** | **46** | **32** | **41** | **142** |

*Source: NSW Law Reform Commission search of online case databases*[12]

## Defining "interlocutory judgment or order"

11.7 The CAA does not define "interlocutory judgment or order". Although s 5F was initially interpreted quite narrowly as being limited to orders for which prerogative relief would have been available in the Court of Appeal,[13] the CCA subsequently held that s 5F was not confined to these types of decisions and should be interpreted more broadly.[14]

11.8 The CCA determines whether or not a particular decision constitutes an interlocutory judgment or order on a case by case basis, by reference to the character and effect of what is decided. For a decision to constitute a judgment or order, there must be a measure of finality, which would require an appellate court to reverse it.[15] Rulings on the admissibility of evidence are not interlocutory judgments or orders, because they can be changed during the course of the proceedings.[16]

12. We searched AustLII for cases that considered *Criminal Appeal Act 1912* (NSW) s 5F. The figures exclude unpublished decisions and appeals that were filed but did not proceed to a final determination. They also exclude appeals under *Criminal Appeal Act 1912* (NSW) s 5F(3AA), for which there were only 2, in 2012.
13. *R v Edelsten* (1989) 18 NSWLR 213, 219.
14. *R v Bozatsis* (1997) 97 A Crim R 296, 303.
15. *R v Bozatsis* (1997) 97 A Crim R 296, 303.
16. *R v Steffan* (1993) 30 NSWLR 633, 639.

However, there is no bright line between judgments and orders on the one hand, and rulings on the other.[17]

11.9 The fact that "interlocutory judgment or order" is not defined can be problematic, because it is not easy for the parties to determine whether a particular interlocutory decision falls within the scope of s 5F. While there was some support from stakeholders for providing a definition in the legislation, there was also concern as to whether one can be accurately framed.[18]

### *Our view: "interlocutory judgment or order" should not be defined*

11.10 While it may be desirable to provide greater clarity in the legislation about what "interlocutory judgment or order" means, our view is that the CCA should retain the flexibility to determine on a case by case basis whether a particular decision qualifies as such and is amenable to appeal under s 5F. We consider that it would be too difficult to devise a comprehensive legislative definition.

## Expanding the types of appealable interlocutory decisions

11.11 Currently only the Director of Public Prosecutions (DPP) and the Attorney General can appeal against decisions or rulings on the admissibility of evidence, and then only where the decision or ruling eliminates or substantially weakens the prosecution's case.

11.12 The rationale for not extending this type of appeal to a defendant is that the defendant has the ability to challenge unfavourable evidentiary rulings in an appeal against conviction.[19] The DPP and the Attorney General have limited options for appeal if the defendant is acquitted. As Justice McClellan has stated, "the proper administration of justice requires that … the trial process is not fragmented by applications during the trial when ultimately, if an injustice occurs, it can be corrected on appeal".[20]

11.13 Allowing a defendant to appeal against evidentiary rulings during the course of the trial would, we expect, lead to more trials being delayed while an interlocutory appeal is determined. However, in circumstances where the evidentiary ruling will be determinative of whether or not the trial proceeds, there may be efficiency gains in having the matter dealt with early and preventing a later appeal against conviction and a possible need for a retrial.

11.14 Recent amendments in NSW to the case management provisions for indictable proceedings, including the introduction of mandatory pre trial disclosure,[21] may increase the number of decisions that are made at an interlocutory stage. This is relevant to deciding whether to expand the availability of interlocutory appeals.

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17. *R v Lethlean* (1995) 83 A Crim R 197, 202 (Sheller JA); *R v Bozatsis* (1997) 97 A Crim R 296, 303. See also *R v Lavender* [2002] NSWCCA 511 [8]: "there is no easy test for whether or not a judicial act is an interlocutory judgment or order".
18. Appeals from higher courts roundtable, *Consultation CA5.*
19. *Kocer v R* [2006] NSWCCA 328 [19] (Rothman J).
20. *Kocer v R* [2006] NSWCCA 328 [2].
21. See *Criminal Procedure Act 1986* (NSW) ch 3, pt 3, div 3, and in particular s 141.

11.15 In Victoria, any party to a proceeding may appeal an "interlocutory decision" with leave.[22] "Interlocutory decision" is broadly defined, to mean a decision made by a judge in proceedings for the prosecution of an indictable offence, whether before or during the trial, and includes a decision to grant or refuse to grant a permanent stay of the proceeding.[23]

11.16 However, the appeal right is restricted by requiring that the trial judge certify the importance of the interlocutory decision, and that the Court of Appeal also grant leave to hear the appeal. Leave to appeal against an interlocutory decision cannot be sought unless the trial judge certifies:

> (a) if the interlocutory decision concerns the admissibility of evidence, that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case; and
>
> (b) if the interlocutory decision does not concern the admissibility of evidence, that the interlocutory decision is otherwise of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and
>
> (c) if the interlocutory decision is made after the trial commences, either—
>
> (i) that the issue that is the subject of the proposed appeal was not reasonably able to be identified before the trial; or
>
> (ii) that the party was not at fault in failing to identify the issue that is the subject of the proposed appeal.[24]

11.17 In Victoria, the trial judge can only certify an appeal from a decision about the admissibility of evidence where it would eliminate or substantially weaken the prosecution case. However, either party can appeal against such a ruling. That is, the defendant can appeal against a decision to admit prosecution evidence which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case.

11.18 The disadvantage of the Victorian approach is that the requirements for trial judge certification and leave from the Court of Appeal follow the filing of an application for leave, and this of itself can lead to some disruption in the progress of the trial. Furthermore, a trial judge's refusal to issue a certificate is itself capable of appeal to the Court of Appeal.[25] This can result in additional disruption to the trial proceedings, even if leave is ultimately refused. Justice Weinberg of the Victorian Court of Appeal prefers the NSW provision:

> In my view, the New South Wales approach is greatly to be preferred because it accords due weight to the need to prevent fragmentation of the criminal trial process. Moreover, the narrower formulation provides a significantly greater hurdle for those who might be minded to seek forensic advantage merely through delay. To allow those accused of indictable offences (as distinct from the Crown, which has no other recourse) to bring interlocutory appeals against evidentiary rulings of a kind which are routinely made every day provides a

22. *Criminal Procedure Act 2009* (Vic) s 295.
23. *Criminal Procedure Act 2009* (Vic) s 3.
24. *Criminal Procedure Act 2009* (Vic) s 295(3).
25. *Criminal Procedure Act 2009* (Vic) s 296.

> strong incentive to systemic abuse, and is in no way beneficial to the public interest. While it is true that such appeals can only be brought with the leave of this Court, that filter may well be more illusory, in many cases, than real.[26]

11.19 In England and Wales, preparatory hearings (that is, pre trial hearings) may be held in serious or complex fraud cases and in other complex, lengthy or serious cases.[27] Rulings on the admissibility of evidence made at a preparatory hearing are capable of appeal, with leave.[28] Presumably the rationale behind this approach is to improve efficiency in the criminal justice system, in circumstances where an admissibility ruling may be determinative of whether the complex case proceeds, or on what basis.

11.20 Stakeholders were generally content with the current breadth of interlocutory appeals, including the distinction between prosecution and defence appeal rights.[29] Concern was expressed about the delays that would be experienced if a defendant could routinely appeal against rulings on the admissibility of evidence during the course of the trial.[30] The NSW Office of the Director of Public Prosecutions (NSW ODPP) noted that it uses s 5F(3A) sparingly, and extending this provision to a defendant would most likely result in the unnecessary disruption of trial proceedings.[31]

### *Our view: the types of appealable interlocutory decisions should not be expanded*

11.21 We agree with the views of stakeholders that it would not be desirable to expand the scope of interlocutory appeals. It would be inimical to the objective of effective case management if interlocutory appeals were themselves to become a significant source of delay. A defendant retains the ability to appeal following conviction if an adverse ruling is made during the course of the trial. Furthermore, we are not convinced that adopting a model similar to Victoria would lead to efficiency gains when compared with the current NSW provision.

## Interlocutory appeals from summary jurisdiction

11.22 Section 5F applies only to the prosecution of offenders on indictment, and to criminal proceedings heard in the Land and Environment Court. There is currently no ability to appeal against an interlocutory judgment or order made by the Supreme Court, District Court or Industrial Relations Commission in Court Session (IRCiCS) in their summary jurisdiction.

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26. *Wells v R (No 2)* [2010] VSCA 294 [46].
27. *Criminal Justice Act 1987* (UK) s 7; *Criminal Procedure and Investigations Act 1996* (UK) s 29.
28. *Criminal Justice Act 1987* (UK) s 9(3); *Criminal Procedure and Investigations Act 1996* (UK) s 31(3), s 35.
29. NSW Bar Association, *Submission CA5,* 6; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 5; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 13; Legal Aid NSW, *Submission CA12,* 8; Commonwealth Director of Public Prosecutions, *Submission CA15,* 8. Cf NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 9.
30. Appeals from higher courts roundtable, *Consultation CA5*.
31. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 13.

11.23 This would appear to be more of an anomaly rather than an intentional omission. Interlocutory orders made in summary proceedings in the Local Court can be appealed to the Supreme Court, with leave on a question of law.[32]

11.24 In proceedings before the District Court, Supreme Court or IRCiCS in their summary jurisdiction, the prosecution can require the trial judge to submit a question of law arising in the course of those proceedings,[33] but this is not the same as a right of appeal against an interlocutory order.

### *Our view: interlocutory appeals should be available against decisions made in summary jurisdiction*

11.25 This anomaly between courts should be rectified. We recommend that proceedings heard by the District Court, Supreme Court and IRCiCS in their summary jurisdiction be included within the scope of s 5F.

**Recommendation 11.1: Interlocutory appeals to summary jurisdiction of the higher courts**

The avenues of interlocutory appeal currently contained in s 5F of the *Criminal Appeal Act 1912* (NSW), should be retained and extended to proceedings heard in the summary jurisdiction of the Supreme Court, District Court and Industrial Relations Commission in Court Session.

## Requiring leave for an interlocutory appeal

11.26 The DPP and the Attorney General may appeal an interlocutory judgment or order as of right, whereas any other party requires the leave of the CCA or a certificate of the trial judge. This difference may be explained by the more serious consequences for the DPP and the Attorney General of an erroneous interlocutory decision than for a defendant.

11.27 The CCA has noted that the DPP's appeal right under s 5F(3A) should be exercised with restraint, to avoid the undesirable situation of trials being aborted,[34] and it does not appear that this right is being abused. However, at the moment the CCA cannot decline to hear an interlocutory appeal from the DPP or the Attorney General, notwithstanding the impact that the appeal might have on the trial.

### *Our view: appeals by the DPP and Attorney General should require leave*

11.28 In our view, the leave requirement for interlocutory appeals should apply to all such appeals, including those from the DPP and the Attorney General. A general requirement for leave would allow the CCA to have greater control over the interlocutory appeals that come before it. We have recommended that leave be

32. *Crimes (Appeal and Review) Act 2001* (NSW) s 53(3), s 57(1).
33. *Criminal Appeal Act 1912* (NSW) s 5AE. We recommend that this provision be abolished: see Recommendation 10.9.
34. *R v NKS* [2004] NSWCCA 144 [18]; *R v Lameri and Cohen* [2004] NSWCCA 214 [47]-[54]; *R v ELD* [2004] NSWCCA 219 [27]-[28].

required for conviction and sentence appeals to the CCA,[35] and a leave requirement for interlocutory appeals would be consistent with our intended scheme. The DPP and the Attorney General's lack of recourse following the trial would continue to be relevant to the court's discretion in determining whether to grant leave.

**Recommendation 11.2: All interlocutory appeals by leave**

Interlocutory appeals by all parties should be by leave.

## Defining the criteria for granting leave to appeal

11.29 The CAA does not specify when the CCA should grant leave in an interlocutory appeal. However, the principles that the CCA applies in determining leave are "not in dispute" and include:

- leave should not readily be granted unless an appropriate case is made out, showing an error of principle that is apt to cause an irregularity or injustice
- where the order involves the exercise of a discretion, the usual restraint and limitation placed upon an appellate court's intervention will apply, and
- leave will only be granted where the decision which is the subject of the application is attended with sufficient doubt so as to warrant the matter being argued on appeal, or where the interests of justice otherwise require the intervention of the court at this stage of the proceedings.[36]

11.30 The Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General noted that the CCA appeared to have been able to avoid interfering with the orderly conduct of trials by taking a firm and pragmatic approach to granting or refusing leave to appeal.[37]

11.31 We have considered whether a non exhaustive list of criteria for granting leave in interlocutory appeals could be usefully included in the legislation, or whether the basis for granting leave should be left to the discretion of the CCA.

11.32 The Victorian legislation includes a list of criteria to be considered by the court in deciding whether to grant leave in interlocutory appeals, which is said to have been informed by NSW case law on s 5F.[38] The Victorian Court of Appeal is to grant leave where it is in the interests of justice, having regard to:

(a) the extent of any disruption or delay to the trial process that may arise if leave is given;

(b) whether the determination of the appeal against the interlocutory decision may—

35. Recommendation 10.2.
36. *Queanbeyan City Council v Environment Protection Authority* [2011] NSWCCA 108 [24]-[27] (Whealy JA).
37. Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010) 145.
38. Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010) 165.

(i) render the trial unnecessary; or

(ii) substantially reduce the time required for the trial; or

(iii) resolve an issue of law, evidence or procedure that is necessary for the proper conduct of the trial; or

(iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial; and

(c) any other matter that the court considers relevant.[39]

### *Our view: the criteria for leave should not be in legislation*

11.33 In Chapter 10, we consider whether a new Criminal Appeal Act should contain a non exhaustive list of criteria to be applied by the CCA in deciding applications for leave in appeals against conviction and sentence. We have recommended against such an approach, on the basis that it would be better to allow the CCA to develop its own principles for granting and refusing leave on a case by case basis.

11.34 We consider that the same justification applies in the case of appeals from interlocutory judgments or orders. There is well established case law on when leave should be granted in these types of appeals. The CCA's approach to leave has worked well in avoiding unnecessary disruptions to trials and we consider that it would be undesirable to constrain its discretion in this area.

## Time limit for filing an interlocutory appeal

11.35 A party appealing under s 5F(3) must do so within 14 days of the date of the interlocutory judgment or order, although the CCA may extend this time period.[40] No time limit applies to appeals by the DPP or the Attorney General under s 5F(2) or (3A).

11.36 There is a greater incentive for the DPP to file an interlocutory appeal promptly than there is for a defendant, and imposing a time limit on it may therefore be unnecessary. Furthermore, it may be difficult for the Attorney General to effectively intervene within a short time period. The DPP may also need to give detailed consideration as to whether to file an interlocutory appeal, given its limited appeal rights if the defendant is acquitted.

### *Our view: time limit of 14 days for all parties*

11.37 We recommend that the DPP and the Attorney General be subject to the same time limit as any other party. This is consistent with the need to minimise delay in trial proceedings, and with our recommendations regarding time limits in sentence appeals.[41] The nature of an interlocutory appeal requires that it be brought as quickly as possible. We also note that the CCA has the power to extend this time limit. Any genuine difficulty encountered by the DPP or the Attorney General in

39. *Criminal Procedure Act 2009* (Vic) s 297(1).
40. *Criminal Appeal Rules* (NSW) r 5B.
41. Recommendation 10.6.

complying with the time limit can be remedied by an extension of time in appropriate cases.

**Recommendation 11.3: Time limit for interlocutory appeals**

The time limit for the filing of an interlocutory appeal should be 14 days for all parties, including the Director of Public Prosecutions and the Attorney General, subject to a discretion in the Court of Criminal Appeal to extend the time period for good cause.

## Ability of trial judge to certify a matter as appropriate for appeal

11.38 Section 5F(3) and (3AA) of the CAA allows the trial judge to certify that the interlocutory judgment or order is a proper one for determination on appeal. Justice Basten has commented that the power of a trial judge to certify that a matter is appropriate for an interlocutory appeal should be exercised with caution, as it deprives the CCA of the opportunity to determine whether a grant of leave is appropriate.[42] It may hold out an unjustified expectation and would seem to add little to the process since the ultimate judgment is the responsibility of the CCA.

### *Our view: trial judge's certificate should be abolished*

11.39 In our view the certification process should be abolished. Stakeholders were in favour of this recommendation.[43]

**Recommendation 11.4: Abolish trial judge's certificate**

The power of the trial judge or magistrate to certify that an interlocutory judgment or order is a proper one for appeal should be abolished.

## Effect of an interlocutory appeal on a subsequent conviction appeal

11.40 Section 5F(6) of the CAA provides that, if leave to appeal against an interlocutory judgment or order is refused, this does not preclude an appeal following conviction on the same matter. However, the CAA does not specify the effect on a conviction appeal when leave in an interlocutory appeal is granted. There is a difference in judicial opinion as to whether matters determined on appeal from an interlocutory order could be reconsidered in an appeal following conviction.

11.41 In *DAO v R*, Chief Justice Spigelman expressed the view that s 5F(6) should be regarded as having been introduced as a matter of caution, and that a decision by the CCA under s 5F does not preclude further consideration of the issue in an appeal following conviction.[44] However, Justice Simpson was of the view that "a real question exists" as to whether, if leave is granted and the appeal is dismissed, the issue raised in the appeal is foreclosed from any appeal against conviction. This is because the issue will have already been determined. The defendant could still appeal against their conviction, but the appellate review would be on the basis of a

42. *Pellegrino v DPP (Cth)* [2008] NSWCCA 17 [6].
43. Appeals from higher courts roundtable, *Consultation CA5*.
44. *DAO v R* [2011] NSWCCA 63; 81 NSWLR 568 [15].

miscarriage of justice, and not on the basis of the CCA reconsidering its own decision.[45] Justice Schmidt observed that should the same issue be raised in a conviction appeal that has already been decided in an interlocutory appeal, considerations relating to issue estoppel may be relevant.[46] Justice Allsop left open the consideration of the relationship between reasons in dismissing an interlocutory appeal and the disposition of a final appeal against conviction.[47]

### *Our view: effect should be left to CCA to resolve*

11.42 Where leave is granted in an interlocutory appeal, then as a matter of policy the same grounds raised in an interlocutory appeal should not be reargued in their same form in an appeal against conviction. Section 5F is meant to ensure proceedings run efficiently by dealing with potentially contentious or unclear rulings in advance of the trial, avoiding the need for a subsequent appeal. However, whether the same circumstances could form the basis for both an interlocutory appeal and a conviction appeal would largely depend on how the trial progressed, and the significance given to the interlocutory decision in the context of the trial as a whole. Where, for example, the matter the subject of the interlocutory appeal has, in the context of the trial as a whole, resulted in a miscarriage of justice, then it should be possible for the same issue to be raised in a conviction appeal. However, that would be a different basis for appellate intervention, rather than simply rearguing the grounds of the interlocutory appeal.

11.43 We do not propose to make any recommendation on this issue. In our view the matter is best left for the CCA to resolve as and when it falls squarely for determination.

## Appeals from committal proceedings

### *Dual avenues of appeal are unnecessary*

11.44 Section 53(3) and s 57(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) allow the defendant or the prosecutor to appeal to the Supreme Court with leave on a question of law against "an order that has been made by a Magistrate in relation to a person in any committal proceedings". This applies to any order in relation to committal proceedings, including an interlocutory order or an order of committal for trial.[48]

11.45 Section 5F of the CAA, which allows an appeal to the CCA against an interlocutory judgment or order, is expressed to apply to "proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme Court or in the District Court".

45. *DAO v R* [2011] NSWCCA 63; 81 NSWLR 568 [207].
46. *DAO v R* [2011] NSWCCA 63; 81 NSWLR 568 [213].
47. *DAO v R* [2011] NSWCCA 63; 81 NSWLR 568 [107].
48. *Potier v Maloney* [2005] NSWSC 336 [45]; R Howie and P Johnson, LexisNexis, *Criminal Practice and Procedure NSW*, vol 1 (at Service 124) [4-s 53.5].

11.46 There is a potential for overlap between these two sections, as it would seem that an interlocutory order made in committal proceedings could be appealed both to the CCA and to a single judge of the Supreme Court. A person cannot appeal to the CCA against an interlocutory judgment or order if he or she already instituted an appeal to the Supreme Court against the interlocutory judgment or order under CARA.[49] Likewise, a person cannot appeal to the Supreme Court under Part 5 of CARA against a decision of the Local Court that is or has been the subject of an appeal or application for leave to appeal to the CCA under the CAA.[50]

### *Our view: there should be one avenue of appeal to the Supreme Court*

11.47 It seems unnecessary to have these dual avenues of appeal from committal proceedings, particularly given that the appellant must elect one avenue or the other. We do not consider it to be an efficient use of resources for an appeal from an interlocutory order made in committal proceedings to be heard by a full bench of the CCA. It would be more appropriate for this appeal to be heard by a single judge of the Supreme Court.

11.48 We therefore recommend that the avenue for appeal against orders made in committal proceedings should lie to a single judge of the Supreme Court, with leave on a question of law, instead of to the CCA in the first instance. We make a recommendation to this effect in Recommendation 6.1. This approach was supported by stakeholders.[51] In Recommendation 6.2 we also recommend that there should be a second appeal, again with leave on a question of law, to the CCA from a single judge of the Supreme Court hearing an appeal from the Local Court. This would include appeals in relation to orders made in committal proceedings.

11.49 It has been suggested that appeals from committal proceedings are unnecessary, given the DPP's ability to lay an ex officio indictment if an order for committal is not made, and the ability for jurisdictional error in committal proceedings to be corrected by way of judicial review.[52] However, in our view, decisions of magistrates in committal proceedings, as with all other criminal proceedings, should be capable of appeal and correction where an error of law has occurred.

**Recommendation 11.5: Committal proceedings should be appealed to Supreme Court only**

(1) There should be no appeal to the Court of Criminal Appeal from an interlocutory judgment or order made in committal proceedings.

(2) The avenue of appeal to the Supreme Court against an order made in relation to a person in committal proceedings should be retained.

49. *Criminal Appeal Act 1912* (NSW) s 5F(7).

50. *Crimes (Appeal and Review) Act 2001* (NSW) s 60.

51. Appeals from higher courts roundtable, *Consultation CA5*; NSW Bar Association, *Submission CA5,* 5.

52. Appeals from higher courts roundtable, *Consultation CA5*; NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 11.

# 12. Appeals to and from specialist courts

**In brief**

The Land and Environment Court, Children's Court, Drug Court and Industrial Relations Commission in Court Session are specialist courts with criminal jurisdiction. There was general support for retaining the avenues of criminal appeal to and from these courts, and we recommend aligning these provisions with those applying to the mainstream courts. The Environment Protection Authority and the WorkCover Authority of NSW should be given the same appeal rights as the Director of Public Prosecutions.


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*Our view: WorkCover and EPA should have same appeal rights as the DPP* ..... *250*

12.1 In this chapter we consider the avenues of appeal that should lie to and from specialist courts in NSW – the Land and Environment Court (LEC), the Children's Court, the Drug Court and the Industrial Relations Commission in Court Session (IRCiCS). We also consider the appeal rights of specialist prosecutors.

## Land and Environment Court

### Current law

12.2 The *Protection of the Environment Operations Act 1997* (NSW) establishes three tiers of environmental offences:

(1) Tier 1 – where there is wilful or negligent harm to the environment. The maximum penalty for an individual is 7 years imprisonment or a fine of $1 million (or both) for an offence committed wilfully, or 4 years imprisonment or $500 000 (or both) for an offence committed negligently. For a corporation the maximum penalty is $5 million for an offence committed wilfully or $2 million for an offence committed negligently.[1]

(2) Tier 2 – all other offences provided for under the Act or the regulations.[2] These offences will usually involve strict liability,[3] and many are punishable by fine only.[4]

(3) Tier 3 – Tier 2 offences that may be dealt with by way of penalty notice.[5] These offences will usually involve absolute liability.[6]

1. *Protection of the Environment Operations Act 1997* (NSW) pt 5.2.
2. *Protection of the Environment Operations Act 1997* (NSW) s 114(2).
3. See B Preston, "Principled Sentencing for Environmental Offences – Part 2: Sentencing Considerations and Options" (2007) 31 *Criminal Law Journal* 142, 144.
4. See *Protection of the Environment Operations Act 1997* (NSW) pt 5.3-5.9.
5. *Protection of the Environment Operations Act 1997* (NSW) s 114(3); *Protection of the Environment Operations (General) Regulation 2009* (NSW) sch 6.

12.3 Tier 1 offences may be dealt with on indictment in the Supreme Court, or summarily in the LEC. If proceedings are brought in the LEC, the maximum period of imprisonment that can be imposed is 2 years.[7]

12.4 Proceedings for a Tier 2 offence may be brought summarily before the LEC or the Local Court. If proceedings are brought in the Local Court, the maximum monetary penalty that can be imposed is 1000 penalty units.[8]

12.5 Proceedings may be prosecuted by the Environment Protection Authority (EPA), a local authority, a water supply authority,[9] a marine authority or a police officer.[10] Where the EPA prosecutes, its policy is to commence Tier 1 proceedings in the LEC, except where it intends to submit that the appropriate penalty will exceed 2 years imprisonment. For Tier 2 offences, it will consider the jurisdictional limit of the Local Court compared with the LEC when deciding which court to bring proceedings in.[11]

12.6 Table 12.1 outlines the avenues of appeal from proceedings for environmental offences.

### Table 12.1: Avenues of appeal for environmental offences

| | Defendant | Prosecution |
|---|---|---|
| **Local Court → Land and Environment Court**<br>(For environmental offences[12]) | As of right, against conviction or sentence.<br>With leave, against:<br>▪ a conviction made in the defendant's absence or following a plea of guilty, or<br>▪ an order made in committal proceedings or an interlocutory order,<br>but only on a ground that involves a question of law alone.<br>(CARA s 31-32) | As of right, against sentence, by:<br>▪ the DPP, where the proceedings were prosecuted by or on behalf of a public authority (other than the EPA)<br>▪ the EPA, where it prosecuted the Local Court proceedings, or<br>▪ the prosecutor, but only on a question of law alone.<br>As of right, on a question of law alone, by the prosecutor against:<br>▪ an order staying summary proceedings,<br>▪ an order dismissing a matter the subject of summary proceedings, or<br>▪ an order for costs against the prosecutor in summary proceedings.<br>With leave, against an order made in committal proceedings or an interlocutory order, but only on a ground that involves a question of law, by:<br>▪ the DPP, where the proceedings were prosecuted by or on behalf of a public authority (other than the EPA), or |

6. See B Preston, "Principled Sentencing for Environmental Offences – Part 2: Sentencing Considerations and Options" (2007) 31 *Criminal Law Journal* 142, 144.
7. *Protection of the Environment Operations Act 1997* (NSW) s 214.
8. *Protection of the Environment Operations Act 1997* (NSW) s 215.
9. As defined in *Water Management Act 2000* (NSW) sch 3.
10. *Protection of the Environment Operations Act 1997* (NSW) s 217-218.
11. NSW, Environment Protection Authority, *EPA Prosecution Guidelines* (2013) Guideline 6.
12. Defined in *Crimes (Appeal and Review) Act 2001* (NSW) s 3 to mean an offence for which summary proceedings may be taken before the Land and Environment Court, including any offence arising under the environment protection legislation within the meaning of the *Protection of the Environment Administration Act 1991* (NSW).

| | Defendant | Prosecution |
|---|---|---|
| | | ▪ the EPA, where it prosecuted the Local Court proceedings.<br>"Prosecutor" is defined as the person responsible for the conduct of proceedings from which an appeal or application for leave to appeal is made. (CARA s 42-43) |
| **Local Court → Supreme Court** | With leave, against:<br>▪ a conviction or sentence for an environmental offence<br>▪ an order made in committal proceedings, or<br>▪ an interlocutory order,<br>but only on a ground that involves a question of law alone.<br>The Supreme Court must not grant leave to appeal in relation to an application concerning an environmental offence unless it is satisfied that the appeal is likely to require the resolution of a matter of constitutional law or a matter of general application.<br>(CARA s 53-54) | By the prosecutor, with leave, against:<br>▪ a sentence imposed for an environmental offence<br>▪ an order made in committal proceedings, or<br>▪ an interlocutory order,<br>but only on a ground that involves a question of law alone.<br>The Supreme Court must not grant leave to appeal in relation to an application concerning an environmental offence unless it is satisfied that the appeal is likely to require the resolution of a matter of constitutional law or a matter of general application.<br>(CARA s 57-58) |
| **Land and Environment Court → Court of Criminal Appeal** | As of right against conviction or sentence.<br>As of right against an order to pay costs, or dismissal of an application for an order for costs.<br>With leave, if an order for costs is made in the defendant's favour.<br>In respect of an interlocutory judgment or order made in the proceedings, with leave of the CCA or upon the certificate of the trial judge.<br>(CAA s 5AB, s 5F) | By the DPP or Attorney General, as of right:<br>▪ against sentence, in any proceedings to which the Crown was a party (CAA s 5D)<br>▪ against an acquittal on a ground that involves a question of law, in any proceedings in which the Crown was a party (CARA s 107)<br>▪ against a decision by the Land and Environment Court to quash an application, or a charge specified in an application, for an order for the apprehension of a person charged with a summary offence (CAA s 5C)<br>▪ an interlocutory judgment or order made in the proceedings (CAA s 5F(2)), or<br>▪ a decision or ruling on the admissibility of evidence, where the decision or ruling eliminates or substantially weakens the prosecution's case (s 5AF(3A)).<br>By the EPA:<br>▪ against sentence, as of right, in any proceedings for an environmental offence which have been instituted or carried on by, or on behalf of, the EPA (CAA s 5D), or<br>▪ an interlocutory judgment or order made in the proceedings, with leave of the CCA or the certificate of the trial judge (CAA s 5F(3)). |
| | A question of law may also be submitted to the CCA (and *must* be submitted if requested by the Crown) for determination during the course of summary proceedings. (CAA s 5AE)<br>A judge may submit a question of law arising on appeal to the Land and Environment Court in its environmental offences appeals jurisdiction to the CCA for determination. At the request of the appellant, a question of law may be submitted even though the appeal proceedings have been disposed of. (CAA s 5BA) | |

## Appeals from the Local Court to the Land and Environment Court

12.7 The avenue of appeal from the Local Court to the LEC for environmental offences was created in 1990.[13] The rationale was said to be the specialised nature of the LEC and its relevance to the adjudication and resolution of environmental offences. In addition, it was considered that the penalties imposed for environmental offences by the Local Court were too lenient. Directing appeals to the LEC, in conjunction with increased penalties for environmental offences, was intended to ensure that these offences would be taken more seriously.[14]

12.8 The *Land and Environment Court Act 1979* (NSW) defines appeals as of right[15] as being the LEC's Class 6[16] jurisdiction and appeals requiring leave[17] as Class 7.[18]

### *Land and Environment Court receives very few appeals from the Local Court*

12.9 The LEC receives very few appeals in its Class 6 and Class 7 jurisdictions. Table 12.2 outlines the number of appeals filed from 2002 onwards.

**Table 12.2: Appeals from the Local Court to the Land and Environment Court, 2002-2012**

| | Class 6 appeals | | | Class 7 appeals |
|---|---|---|---|---|
| | Registrations | Pre trial disposals | Disposed by hearing | |
| **2012** | 9 | 2 | 7 | 1 |
| **2011** | 8 | 3 | 4 | 0 |
| **2010** | 9 | 6 | 5 | 0 |
| **2009** | 7 | 2 | 14 | 0 |
| **2008** | 17 | 7 | 9 | 0 |
| **2007** | 20 | 6 | 9 | 0 |
| **2006** | 12 | 6 | 12 | 0 |
| **2005** | 14 | 3 | 6 | 0 |
| **2004** | 7 | 3 | 4 | 0 |
| **2003** | 5 | 1 | 4 | 1 |
| **2002** | 1 | 0 | 2 | 0 |

*Source: Land and Environment Court of NSW, Annual Reviews 2002-12*

13. *Environmental Offences and Penalties (Amendment) Act 1990* (NSW) sch 2 (4).
14. NSW, *Parliamentary Debates*, Legislative Assembly, 20 November 1990, 10 039.
15. *Crimes (Appeal and Review) Act 2001* (NSW) s 31, s 42.
16. *Land and Environment Court Act 1979* (NSW) s 21A.
17. *Crimes (Appeal and Review) Act 2001* (NSW) s 32, s 43.
18. *Land and Environment Court Act 1979* (NSW) s 21B.

### *Sentence severity appeals have high success rates*

12.10 Information collated by the Judicial Information Research System indicates that only 14 appeals were decided between 2010 and 2013.[19] Of these 14 cases, 11 were defendant appeals as of right against conviction and/or sentence, and 3 were prosecution appeals against dismissed charges. Six appeals were dismissed, 5 were allowed, and 2 were allowed in part. All of these appeals were in the Class 6 jurisdiction.

12.11 Table 12.3 demonstrates that sentence severity appeals have had a high rate of success.

**Table 12.3: Outcome of published Land and Environment Court appeals, 2010-2013**

| Type of appeal | Number of appeals | Allowed | Allowed in part | Dismissed |
|---|---|---|---|---|
| Defendant appeal against conviction and sentence | 3 | 1 | 1 | 1 |
| Defendant appeal against sentence only | 8 | 5 | 0 | 3 |
| Prosecution appeal against dismissal of charges | 3 | 0 | 1 | 2 |
| **Total** | **14** | **6** | **2** | **6** |

*Source: Information extracted from the Judicial Commission of NSW, Judicial Information Research System: Criminal Appeals from the Local Court to the Land and Environment Court –* Crimes (Appeal and Review) Act 2001*: 28/5/1999 – 30/9/2013 at January 2014.*

12.12 The appeals generally concerned various offences relating to developments carried out either without consent or in breach of the conditions of the development consent. There were also some matters concerning air or water pollution. Two offenders received a custodial sentence in the Local Court which was reduced to a fine on appeal.[20] The remainder of penalties appealed against were fines. On appeal, offenders received fines ranging from $1000[21] to $30 000.[22]

### *Separate framework for environmental offences adds a layer of complexity*

12.13 Stakeholders supported the work of the LEC as a specialist appellate jurisdiction for environmental offences.[23] The only potential problem, then, is that having a

19. Information extracted from the Judicial Commission of NSW, Judicial Information Research System: Criminal Appeals from the Local Court to the Land and Environment Court – *Crimes (Appeal and Review) Act 2001*: 28/5/1999 – 30/9/2013 at January 2014. The difference between this figure and the figures provided in Table 12.2 may be explained by the fact that a published decision may deal with more than one appeal.
20. *Betland v Environment Protection Authority* [2010] NSWLEC 183; 175 LGERA 317; *Lee v Office of Environment and Heritage* [2012] NSWLEC 9.
21. *Terrey v Department of Environment, Climate Change and Water* [2011] NSWLEC 141.
22. *Kavanagh & Sons Custom Made Homes Pty Ltd v Larsen* [2011] NSWLEC 187.
23. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; Law Society of NSW, Environmental Planning and Development Committee, *Response CA8*; NSW Bar Association, *Response CA9*; NSW Office of Environment & Heritage, *Response CA19*; Chief Judge of the Land and Environment Court of NSW, *Response CA20*.

separate avenue of appeal to the LEC adds a layer of complexity to the appeals structure.

12.14 One of the complicating factors is the LEC's status as a superior court. As a result, the LEC has been given a combination of powers that have been given to both the District Court and the Supreme Court in respect of other offences.

12.15 For example, the LEC hears appeals against conviction and sentence by rehearing, much like the District Court does for other offences. However it also has jurisdiction to hear appeals from orders made in committal proceedings, interlocutory orders and orders dismissing charges, which are otherwise heard by the Supreme Court. The LEC is intended to be the primary recipient of all environmental criminal appeals from the Local Court, because the Supreme Court may only grant leave to hear an appeal in respect of an environmental offence where the matter raises a constitutional issue or a point of general application.[24] This puts environmental offences on a different footing to other types of offences heard by the Local Court.

12.16 There are also a number of differences between appeals for environmental offences and appeals for other offences. The justification for these differences is not always clear. For example:

(1) If the defendant pleaded guilty in the Local Court or was convicted in his or her absence, he or she can appeal with leave to the District Court. In the case of environmental offences, however, an appeal to the LEC is with leave but limited to a question of law alone. It is not clear why there is this difference, but it operates to restrict the appeal rights of defendants convicted of an environmental offence compared with other defendants.

(2) The prosecutor may appeal to the Supreme Court against a sentence imposed for an environmental offence, with leave on a question of law. This gives the prosecutor dual avenues of appeal against sentence on a question of law – as of right to the LEC, and with leave to the Supreme Court. Again this is to be contrasted with appeal rights for other offences, where the prosecutor may only appeal to the Supreme Court. However, this distinction may be more theoretical than real, as we understand that prosecution appeals to the Supreme Court for environmental offences are almost never made.[25]

(3) The Director of Public Prosecutions (DPP) and the EPA may appeal to the LEC against an order made in committal proceedings or an interlocutory order, with leave on a question of law. However, the prosecutor may also appeal to the Supreme Court against the making of either of these orders, with leave on a question of law. The Supreme Court may only grant leave in limited circumstances. It is not clear why only the DPP and EPA are entitled to appeal to the LEC from these types of orders, whereas the prosecutor who conducted the Local Court prosecution may only appeal to the Supreme Court. Again this distinction may not be significant, as there are virtually no committal

24. *Crimes (Appeal and Review) Act 2001* (NSW) s 54(2), s 58(2).

25. Chief Judge of the Land and Environment Court of NSW, *Response CA20*. Our review of appeals to the Supreme Court in Chapter 6 did not reveal any appeals relating to environmental offences.

proceedings for environmental offences, and appeals from interlocutory orders are very rare.[26]

12.17 As there are so few appeals from environmental offences, it may not be immediately apparent to a defendant or to the Local Court registry that an appeal must be filed with the LEC instead of with the District Court. This may have detrimental effects for the defendant, since the LEC currently has no power to accept appeals filed more than 3 months after the Local Court's decision.[27] However, this may not be a great problem in practice. Where an appeal was filed within time but with the District Court, the LEC has treated this as a defect that can be amended under s 62 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA).[28]

### *Our view: retain separate appeals to the Land and Environment Court*

12.18 Stakeholders overwhelmingly supported retaining appeal to the LEC for environmental offences.[29] The specialist jurisdiction and expertise of the LEC was considered to be a significant advantage.[30] NSW Young Lawyers noted that appeals to the LEC have resulted in the statement of important general principles to be followed by the Local Court.[31] The NSW Bar Association submitted that the LEC is better equipped to achieve consistency and transparency in sentencing for environmental offences.[32] Efficiency and cost effectiveness were also seen as benefits of retaining the separate avenue of appeal.[33]

12.19 There is a different legislative framework that applies to environmental offences. For example, there are additional factors that must be taken into account in sentencing for environment offences,[34] and there are additional orders available to the court consequent upon a conviction.[35]

12.20 The Chief Judge of the LEC advised that the court has adopted a principled approach to sentencing for environmental offences. This approach has been publicised to all courts in NSW, including the Local Court.[36] It has also led to the

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26. Chief Judge of the Land and Environment Court of NSW, *Response CA20*. Table 12.2 indicates that only two appeals in the Land and Environment Court's Class 7 jurisdiction have been filed between 2002 and 2012.
27. *Crimes (Appeal and Review) Act 2001* (NSW) s 32-33. We recommend that this be changed: see Recommendation 12.4.
28. *Denning v Department of Environment and Conservation* [2007] NSWLEC 258; 153 LGERA 200 [44].
29. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; Law Society of NSW, Environmental Planning and Development Committee, *Response CA8*; NSW Bar Association, *Response CA9*; NSW Office of Environment & Heritage, *Response CA19*; Chief Judge of the Land and Environment Court of NSW, *Response CA20*.
30. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; Law Society of NSW, Environmental Planning and Development Committee, *Response CA8*; NSW Bar Association, *Response CA9*.
31. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*.
32. NSW Bar Association, *Response CA9*.
33. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; NSW Bar Association, *Response CA9*.
34. *Protection of the Environment Operations Act 1997* (NSW) s 241.
35. *Protection of the Environment Operations Act 1997* (NSW) ch 8 pt 8.3.
36. See B Preston, "Sentencing for Environmental Crime" (2006) 18 *Judicial Officers' Bulletin* 41.

establishment of an environmental crime sentencing database in conjunction with the Judicial Commission of NSW.[37] The Chief Judge suggested that the benefits of this principled approach would be lost if environmental appeals from the Local Court no longer went to the LEC.[38]

12.21 On the other hand, if the separate appeal to the LEC was removed this would help to achieve two objectives of our review: to simplify and streamline appeal processes. The very low number of appeals from the Local Court to the LEC suggests that having a dedicated avenue of appeal may not be cost effective. In addition, the seemingly high success rate of sentence severity appeals could mean that the policy objective underlying the introduction of this avenue of appeal, namely more severe penalties for environmental offences, is not being realised.

12.22 Notwithstanding the small number of appeals from the Local Court that come before the LEC, we agree there is merit in retaining this avenue of appeal. The LEC's specialist jurisdiction means that it is well equipped with the knowledge of the relevant environmental legislation and the specific principles that apply to environmental offences. It will also assist in ensuring consistency in sentencing for environmental offences, as the LEC has its own summary criminal jurisdiction. We therefore recommend that the avenue of appeal from the Local Court to the LEC for environmental offences be retained.

**Recommendation 12.1: Retain appeals from the Local Court to the Land and Environment Court**

The avenues of appeal from the Local Court to the Land and Environment Court in respect of environmental offences, currently contained in Part 4 of the *Crimes (Appeal and Review) Act 2001* (NSW), should be retained.

### *Our view: Land and Environment Court should continue to hear all appeals for environmental offences*

12.23 As we discuss in para 12.14 - 12.15, the LEC has a combination of powers that are otherwise exercised by both the District Court and Supreme Court in appeals for other types of offences. This complicates the criminal appeals structure. A different type of reform, therefore, would be to retain conviction and sentence appeals concerning environmental offences to the LEC, but to require all other types of appeals to go to the Supreme Court. That is, the LEC would be placed on an equal footing with the District Court in respect of criminal appeals from the Local Court.

12.24 Stakeholders were opposed to changing the avenues of appeal in this way. They submitted there is simplicity in having all environmental appeals dealt with by the same court.[39] They also noted the small, almost non existent, number of appeals under the LEC's Class 7 jurisdiction (that is, appeals which would otherwise go to

37. See B Preston and H Donnelly, "The Establishment of an Environmental Crime Sentencing Database in New South Wales" (2008) 32 *Criminal Law Journal* 214.
38. Chief Judge of the Land and Environment Court of NSW, *Response CA20*.
39. NSW Office of Environment & Heritage, *Response CA19*.

the Supreme Court under this proposal) as being a reason not to change the current position.[40]

12.25 While in our view the structure of appeals to the LEC is slightly confusing, a compelling case for change has not been made out. The LEC has heard only 2 appeals in its Class 7 jurisdiction in the last 10 years. Therefore, any change is likely to have only a negligible impact on the current position in practice. Stakeholders supported having the LEC as the primary jurisdiction for all environmental offences, regardless of the type of appeal.

12.26 Accordingly, we make no recommendation for change to the structure of appeals from the Local Court to the LEC.

### *Our view: adopt recommendation for sentence appeals in the District Court*

12.27 CARA does not specify the way in which defendant appeals against sentence in the LEC are to be conducted, leaving a gap in the current legislative scheme. The Act specifically provides that defendant appeals against conviction and prosecution appeals against sentence are to be conducted by rehearing.[41] There is no provision dealing with defendant appeals against sentence.

12.28 Despite this gap in the legislation, the LEC has determined that the correct approach to defendant appeals against sentence is by way of rehearing, with fresh evidence given as of right.[42] This is consistent with the way that defendant appeals against sentence are conducted in the District Court.[43]

12.29 In Chapter 5 we discuss the problems inherent in the current method for determining sentence appeals from the Local Court to the District Court. Some problems, such as the District Court not having access to the magistrate's reasons, are not applicable in appeals to the LEC. We understand that even in sentence appeals, the LEC will often have access to the reasons of the magistrate in determining the appeal.[44] Furthermore, the LEC provides a detailed written judgment in the appeal which is published online and also provided to the relevant magistrate,[45] thus providing greater clarity and consistency than is currently the case for District Court appeals.

12.30 In Recommendation 5.1 we propose that appeals against sentence from the Local Court to the District Court be by way of rehearing on the basis of the material before the Local Court and the reasons given by the magistrate. Fresh evidence may only be given with leave, if it is in the interests of justice. In our view, this

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40. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; NSW Office of Environment & Heritage, *Response CA19*.
41. *Crimes (Appeal and Review) Act 2001* (NSW) s 37, s 43.
42. *Terrey v Department of Environment, Climate Change and Water* [2011] NSWLEC 141 [51]; *JJ and ABS Investments Pty Ltd v Environment Protection Authority* [2011] NSWLEC 199 [15].
43. *Crimes (Appeal and Review) Act 2001* (NSW) s 17.
44. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; Chief Judge of the Land and Environment Court of NSW, *Response CA20*.
45. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; NSW Office of Environment & Heritage, *Response CA19*; Chief Judge of the Land and Environment Court of NSW, *Response CA20*.

recommendation should apply equally to sentence appeals from the Local Court to the LEC. There was some stakeholder support for consistent treatment between appeals to the District Court and appeals to the LEC.[46]

12.31 We consider that this recommendation is even more appropriate for appeals to the LEC, since the LEC already has access to the magistrate's reasons as a matter of course in sentence appeals. Additionally the small number of sentence appeals in the LEC means that a change to the way they are heard is unlikely to result in any significant delay in finalising them.

**Recommendation 12.2: Apply District Court sentence appeal recommendations to the Land and Environment Court**

Recommendation 5.1 should apply to appeals from the Local Court to the Land and Environment Court.

### *Our view: resolve inconsistencies with appeals to the District Court and Supreme Court*

12.32 As we discuss in para 12.16, there are a number of differences between appeals to the District Court and appeals to the LEC, where the justification for the difference is not clear. We consider that two of these possible inconsistencies should be rectified.

12.33 First, a defendant who pleads guilty in the Local Court should be entitled to appeal to the LEC on any ground with leave, rather than just on a question of law. It is not clear why there should be a difference between appeals to the LEC and appeals to the District Court. In any event, we consider that it is unfair to restrict the appeal rights of a defendant who has pleaded guilty to an environmental offence to a question of law only. The requirement to obtain leave is sufficient.

12.34 Secondly, the prosecutor should be able to appeal to the LEC in its own name from an interlocutory order or an order made in committal proceedings, rather than having the DPP appeal on its behalf. Because the LEC is to be the primary jurisdiction for environmental appeals, the prosecutor should have its own appeal rights to the LEC. This gives prosecutors similar appeal rights to other types of offences prosecuted in the Local Court, where the prosecutor may appeal to the Supreme Court with leave.

12.35 We also recommend that there should be a provision allowing for the transfer of proceedings between the District Court and the LEC, where an appeal is commenced in the wrong jurisdiction. The lack of such a power was highlighted in *Denning v Department of Environment and Conservation*.[47] The appellant had incorrectly filed an appeal with the District Court. The District Court sought to transfer the proceedings to the LEC, but the LEC noted that there was no power to do so.[48] The time limit for the appeal had passed so the appellant could not file a

46. NSW Office of Environment & Heritage, *Response CA19*.
47. *Denning v Department of Environment and Conservation* [2007] NSWLEC 258; 153 LGERA 200.
48. *Denning v Department of Environment and Conservation* [2007] NSWLEC 258; 153 LGERA 200 [23].

fresh notice of appeal with the LEC. The LEC treated filing in the District Court as a defect which it could amend pursuant to the power contained in s 62 of CARA.[49] While this had the result that the appeal ended up in the LEC, we consider it would be much simpler and more efficient to allow appeals to be transferred between courts where the appeal was commenced in the wrong jurisdiction.

**Recommendation 12.3: Resolve inconsistencies between Land and Environment Court appeals and other types of appeals**

(1) A person convicted of an environmental offence by the Local Court in the person's absence or following a plea of guilty should be able to appeal against the conviction to the Land and Environment Court with leave on any ground (not just on a ground involving a question of law).

(2) The prosecutor should be able to appeal from the Local Court to the Land and Environment Court, with leave on a ground involving a question of law, against:

(a) an order made in relation to a person in any committal proceedings with respect to an environmental offence, and

(b) an interlocutory order with respect to an environmental offence.

(3) The District Court and the Land and Environment Court should have the power to transfer appeals to each other where appeals are filed in the wrong jurisdiction.

### *Our view: apply procedural recommendations for District Court to Land and Environment Court*

12.36 In Chapter 7 we make a number of other recommendations for appeals from the Local Court, which we consider should be applied to appeals to the LEC:

(1) ***Parker* direction**: The Court of Criminal Appeal (CCA) has not expressly held that the requirement to give a *Parker* direction applies to appeals to the LEC, but the LEC considers itself bound by the practice of giving a *Parker* direction.[50] We therefore propose that Recommendation 7.5, enshrining the *Parker* principle in legislation, extend to the LEC. Stakeholders support this extension.[51]

(2) **Powers of the Land and Environment Court**: The LEC has the same powers as the District Court when hearing an appeal against conviction or sentence.[52] In Recommendation 7.6 we recommend that in a successful appeal against conviction the District Court should have additional powers to:

(a) substitute a verdict of guilty for a different offence

49. *Denning v Department of Environment and Conservation* [2007] NSWLEC 258; 153 LGERA 200 [44].

50. *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242; 145 LGERA 189 [207]-[213]; *Mouawad v The Hills Shire Council* [2013] NSWLEC 165 [202].

51. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; Law Society of NSW, Environmental Planning and Development Committee, *Response CA8*; NSW Bar Association, *Response CA9*.

52. *Crimes (Appeal and Review) Act 2001* (NSW) s 39(1)-(2), s 48(1).

(b) vary the sentence if the appellant was properly convicted on some other count, and

(c) remit the matter back to the Local Court if the appellant was denied procedural fairness.

We recommend also giving these additional powers to the LEC.

(3) **Time limits**: The time limit for filing an appeal to the LEC is 28 days from the Local Court's decision.[53] The defendant may appeal between 28 days and 3 months after the Local Court's decision with leave of the LEC.[54] In Recommendation 7.7 we propose that both parties be able to appeal between 28 days and 3 months with the court's leave, and that leave to appeal may be granted outside of the 3 month time period only where the court is satisfied that exceptional circumstances exist which justify the appeal being heard. We consider that this recommendation should equally apply to appeals from the LEC. The potential for confusion over which jurisdiction the appeal should be filed in weighs in favour of a more flexible approach to time limits.

(4) **Costs**: On an appeal from the Local Court, the LEC may make any order as to costs that it considers just.[55] In the cases we have looked at, it is not uncommon for the LEC to award costs on an appeal from the Local Court. In Recommendation 7.9 we propose that the current power to award costs be maintained, including the limit on costs that may be awarded against a public prosecutor under s 70 of CARA. We therefore recommend that this extend to the LEC. Stakeholders supported this extension.[56]

**Recommendation 12.4: Apply District Court procedural recommendations to the Land and Environment Court**

Recommendations 7.5, 7.6, 7.7 and 7.9 should also apply to appeals from the Local Court to the Land and Environment Court.

## Appeals from the Local Court to the Supreme Court

12.37 In proceedings for an environmental offence an appeal lies from the Local Court to the Supreme Court with leave. The Supreme Court must not grant leave unless it is satisfied that the appeal is likely to require the resolution of a constitutional question or a question of general application.[57]

12.38 We understand that appeals to the Supreme Court for environmental offences are rarely, if ever, made. The limitation on the granting of leave serves a valid purpose in ensuring that appeals are primarily filed with the LEC unless the matter is so important as to require resolution by the Supreme Court. Because we recommend

53. *Crimes (Appeal and Review) Act 2001* (NSW) s 31(2), s 32(4), s 42(4), s 43(2).
54. *Crimes (Appeal and Review) Act 2001* (NSW) s 33.
55. *Crimes (Appeal and Review) Act 2001* (NSW) s 49(4).
56. Law Society of NSW, Environmental Planning and Development Committee, *Response CA8*; NSW Bar Association, *Response CA9*; NSW Office of Environment & Heritage, *Response CA19*.
57. *Crimes (Appeal and Review) Act 2001* (NSW) s 54(2), s 58(2).

that the LEC be retained as the primary court for environmental appeals from the Local Court, we do not recommend any change to the provisions for appeal to the Supreme Court.

**Recommendation 12.5: Retain environmental offence appeals from the Local Court to the Supreme Court**

The avenues of appeal from the Local Court to the Supreme Court with respect to environmental offences, including the current grounds for leave, should be retained.

## Appeals from the Land and Environment Court's summary jurisdiction to the Court of Criminal Appeal

12.39 Section 5AA of the *Criminal Appeal Act 1912* (NSW) (CAA), which applies to appeals from the summary jurisdiction of the Supreme Court, applies to appeals from the summary jurisdiction of the LEC by virtue of s 5AB.

12.40 In Chapter 10 we discuss appeals from the summary jurisdiction of higher courts to the CCA. We recommend that a new Criminal Appeal Act specify the basis on which these types of appeals are to be decided, and this extends to appeals from the summary jurisdiction of the LEC.

12.41 Section 107 of CARA allows the DPP or the Attorney General to appeal an acquittal by the LEC in its summary jurisdiction in any proceedings in which the Crown was a party, on a ground involving a question of law alone. We make recommendations elsewhere in this report to change this avenue of appeal – by removing the requirement that the Crown be a party, and by giving the EPA a right to appeal under this provision.[58]

## Appeals from the Land and Environment Court's appellate jurisdiction to the Court of Criminal Appeal

12.42 Currently when an appeal from the Local Court is heard in the LEC, the appellant may request that the judge state a case on a question of law for the opinion of the CCA.[59]

12.43 In Chapter 5 we note that the case stated procedure is cumbersome and time consuming, and is no longer an acceptable mechanism for bringing a matter up for review. We recommend that the case stated procedure be abolished and instead replaced with an appeal to the CCA, with leave on a question of law.

### *Our view: abolish case stated from Land and Environment Court*

12.44 In our view the justification for abolishing the case stated from the District Court applies equally to the case stated from the LEC, and we make a similar recommendation. Although the present law allows only the appellant in the LEC

58. Recommendations 9.3 and 12.11.

59. *Criminal Appeal Act 1912* (NSW) s 5BA(2).

appeal to request that a case be stated, in our view an appeal to the CCA should be available to both parties. Stakeholders supported this approach.[60]

**Recommendation 12.6: Abolish case stated from the Land and Environment Court**

(1) The case stated procedure under s 5BA of the *Criminal Appeal Act 1912* (NSW) should be abolished.

(2) When the Land and Environment Court determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law.

## Children's Court

### Current law

12.45 The Children's Court has jurisdiction to hear proceedings for an offence, other than a "serious children's indictable offence", and committal proceedings for any offence, where the offence is alleged to have been committed by a person under the age of 18 years.[61] "Serious children's indictable offence" includes homicide, offences punishable by imprisonment for life or 25 years and sexual assault offences.[62]

12.46 The Children's Court does not have jurisdiction to hear traffic offences except in limited circumstances, including where it arose out of the same circumstances as another offence to which the young person is charged before the Children's Court.[63]

12.47 The result of this is that the Children's Court has jurisdiction to hear a very wide range of offences – much wider than the Local Court's jurisdiction.

12.48 Section 3 of CARA provides that the definition of "Local Court" includes the Children's Court. This means that the same avenues of criminal appeal from the Local Court apply to the Children's Court.

### Rates of appeal

12.49 Compared to appeals from the Local Court, there are few appeals from criminal proceedings in the Children's Court to the District Court – in 2012, there were only 246. These also tend to have much lower success rates than appeals from the Local Court.

60. NSW Young Lawyers, Environment and Planning Law Committee, *Response CA7*; Law Society of NSW, Environmental Planning and Development Committee, *Response CA8*; NSW Bar Association, *Response CA9*.

61. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1).

62. *Children (Criminal Proceedings) Act 1987* (NSW) s 3.

63. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(2).

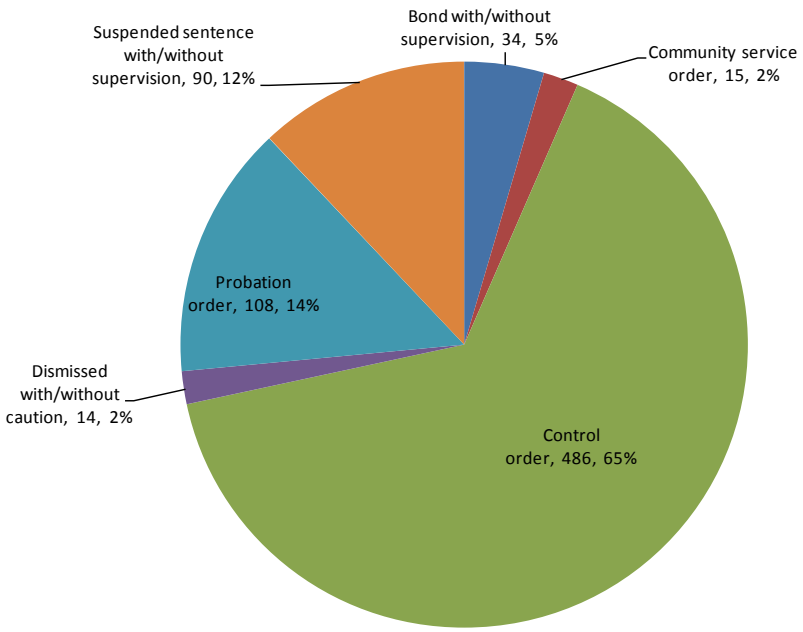
### Table 12.4: Finalised appeal cases from the Children's Court in the District Court 2012, by outcome of appeal and type of appeal

| | Appeals against severity of sentence | | Appeals against conviction and sentence | | Total | |
|---|---|---|---|---|---|---|
| **Outcome of appeal** | **No** | **%** | **No** | **%** | **No** | **%** |
| Appeal upheld for all matters | 88 | 44 | 13 | 28.3 | 101 | 41.1 |
| Appeal dismissed/withdrawn all matters | 70 | 35 | 26 | 56.5 | 96 | 39 |
| Appeal upheld for some matters | 41 | 20.5 | 7 | 15.2 | 48 | 19.5 |
| Other (did not appear, died etc) | 1 | 0.5 | 0 | 0 | 1 | 0.4 |
| **Total** | **200** | **100** | **46** | **100** | **246** | **100** |

*Source: NSW Bureau of Crime Statistics and Research, NSW Higher Criminal Courts January-December 2012: Number of Finalised Appeal Cases from the Children's Court in the District Court by Outcome of Appeal and Type of Appeal (HcLcCc13/11553dg)*

12.50 In 2012 a control order under s 33(1)(g) of the *Children (Criminal Proceedings) Act 1987* (NSW) (that is, a period of detention) was the most common penalty appealed against from the Children's Court.

### Figure 12.1: Types of penalties appealed from Children's Court to District Court 2012

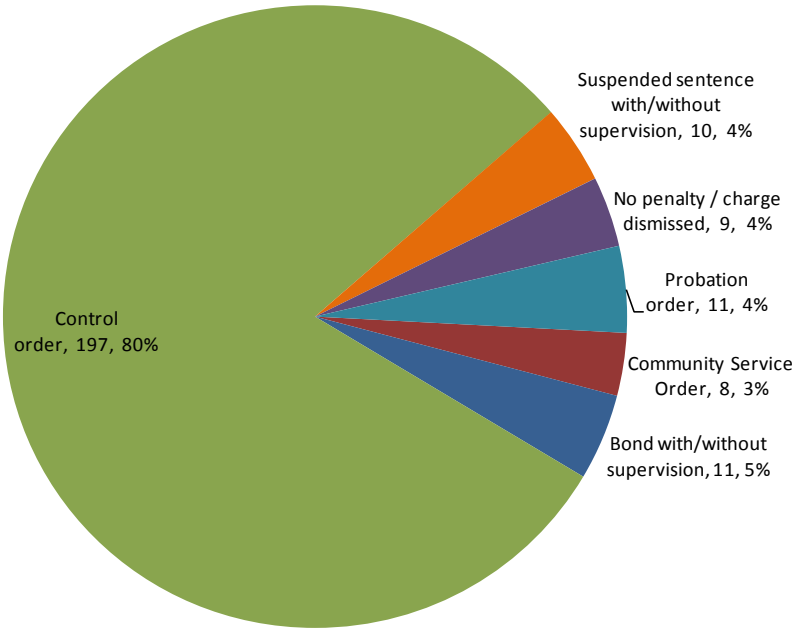



*Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals (HcLcCc13/11553dg)*[64]

64. These numbers are higher than the number of appeal cases in Table 12.4 because they measure the principal penalty per offence appealed to the District Court. One appeal may deal with more than one offence.

12.51 Appeals from control orders were successful in about 50% of cases.[65] Figure 12.2 shows the penalties substituted in successful appeals. In the majority of cases, the control order was upheld on appeal but the length of the order was reduced.

**Figure 12.2: New penalty imposed where control order successfully appealed to District Court 2012, by penalty type**




*Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals (HcLcCc13/11553dg)*[66]

## Application of Local Court appeal provisions

12.52 Stakeholders did not identify any problems in applying the Local Court appeals structure to the Children's Court.

12.53 In Recommendation 5.1 we propose that sentence appeals from the Local Court to the District Court be conducted by way of rehearing on the basis of the material before the Local Court and the reasons of the magistrate. Fresh evidence may only be given with leave, if it is in the interests of justice. Under the current law fresh evidence may be given as of right, and regard does not need to be had to the magistrate's reasons.

12.54 This recommendation will also affect the way appeals from the Children's Court to the District Court are conducted. There are a number of distinctive features of Children's Court proceedings that are particularly relevant in this context:

(a) The court, being a specialist jurisdiction, is required to apply the provisions of the *Children (Criminal Proceedings) Act 1987* (NSW) as well as general

65. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts January-December 2012: Unit Records for Severity of Sentence Appeals* (HcLcCc13/11553dg).

66. Figure 12.2 counts the number of penalties appealed against, rather than the number of appeals, which is why the numbers are larger than those in Table 12.4.

sentencing principles. It may be particularly desirable for the District Court to be informed of the Children's Court's reasons, since the District Court has a general criminal jurisdiction and does not deal with young offenders as regularly as the Children's Court.

(b) Almost all defendants in the Children's Court are legally represented,[67] suggesting that concerns about the impact that changing the avenue of appeal could have on legally unrepresented defendants in the Local Court[68] are unlikely to apply.

(c) We are told that sentencing remarks in the Children's Court are often delivered quite informally and, at least where a non-custodial sentence is to be imposed, represent more of a dialogue between the bench and the bar.[69]

(d) It has been suggested that a sentence imposed in the Children's Court can often be the tipping point in a young person's life, and an appeal against sentence provides an incentive to rehabilitate.

### *Our view: apply Local Court appeal provisions (as amended) to the Children's Court*

12.55 In light of stakeholder support, we recommend that avenues of criminal appeal from the Local Court continue to apply to the Children's Court.

12.56 Taking into account the distinctive features of the Children's Court jurisdiction, we remain of the view that Recommendation 5.1 should apply to appeals from the Children's Court to the District Court. We consider that any lack of structured sentencing remarks when handing down non-custodial sentences in the Children's Court is not fatal to imposing a requirement that the District Court have regard to the reasons at first instance. Further, where there is evidence of a young person's rehabilitative efforts following imposition of the original sentence, this could constitute fresh evidence which the District Court could admit in its discretion.

**Recommendation 12.7: Apply Local Court appeal provisions to Children's Court**

The provisions applying to criminal appeals from the Local Court should continue to apply to criminal appeals from the Children's Court.

## Appeals from decisions of the President of the Children's Court

12.57 Section 22A of the *Children's Court Act 1987* (NSW) and cl 6 of the *Children's Court Regulations 2009* (NSW) provide that appeals from decisions of the President of the Children's Court are to be made to the Supreme Court, rather than to the District Court.

67. Children's Court, *Consultation CA4.*
68. See para 5.103.
69. Children's Court, *Consultation CA4.*

12.58 This was introduced in 2009 following a recommendation of the Wood Commission of Inquiry that the President of the Children's Court be a judge of the District Court.[70] Presumably, in implementing that recommendation, it was considered undesirable for a District Court judge to be subject to an appeal to another District Court judge.

12.59 There are currently no procedural rules in place which regulate the way an appeal to the Supreme Court under this provision is to be conducted. Legal Aid NSW suggested that this process raises questions about fairness and the appropriate allocation of court resources.[71]

### *Our view: President's decisions should be subject to the same appeal provisions as Children's Court magistrates*

12.60 In terms of the impact on a young person convicted of a crime, the current arrangements mean that he or she is required to appeal to the Supreme Court simply because of the status of the person who heard their charge. We consider that this may have unfavourable consequences for the young person. We also note the concerns of Legal Aid NSW.

12.61 We therefore recommend that criminal appeals from the President of the Children's Court be treated in the same manner as appeals from Children's Court magistrates – that is, they proceed to the District Court in the first instance. We consider that the importance of young people being treated equally in appeals from the Children's Court outweighs any concerns about having the President's decision reviewed by another District Court judge. We find this particularly compelling because appeal to the District Court is by rehearing, and there is no need to identify error on the part of the original decision maker. Stakeholders and the Children's Court itself support this recommendation.[72]

12.62 Our recommendation applies only to decisions of the President sitting in the criminal jurisdiction of the Children's Court. We do not make any recommendations regarding appeals from decisions of the President sitting in the court's care jurisdiction.[73]

**Recommendation 12.8: Align appeals from the President of the Children's Court with appeals from magistrates**

The avenues of appeal from criminal proceedings heard by the President of the Children's Court should be the same as from criminal proceedings heard by magistrates of the Children's Court.

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70. *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW) sch 2.2 [12]; J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) rec 13.9.
71. Legal Aid NSW, *Submission CA12,* 5.
72. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 3; Legal Aid NSW, *Submission CA12,* 5; Appeals from the Local Court roundtable, *Consultation CA3*; Children's Court, *Consultation CA4*.
73. See *Children's Court Regulation 2009* (NSW) cl 5.

## Drug Court

### Current law

12.63 The Drug Court is a specialist court that oversees a diversionary program for drug dependent offenders. To be eligible for referral to the Drug Court an offender must, among other things:

- have pleaded guilty or intend to plead guilty
- be highly likely to serve a sentence of full time imprisonment if convicted
- appear to be dependent on the use of prohibited drugs, and
- be willing to participate in the program.[74]

12.64 When a person is accepted into the Drug Court program, the Drug Court sentences him or her, but also makes an order suspending the sentence.[75] At the completion of the program, the Drug Court imposes a final sentence on the person which takes into account his or her degree of participation in the program.[76] The Drug Court may reduce the initial sentence imposed, but cannot increase it.

12.65 There is no appeal from a decision of the Drug Court to refuse to admit a person into the program or against the initial sentence imposed. The final sentence may be appealed to the CCA, by both the offender and the Crown.[77]

12.66 An appeal also lies to the CCA against a sentence imposed by the Drug Court in the following circumstances:

- Where the offender is referred to the Drug Court but not accepted into the program, the Drug Court may, with the offender's consent, sentence that person for the offence.[78]
- Where the offender was referred to the Drug Court following call up for a breach of a good behaviour bond but not accepted into the program, the Drug Court can deal with the breach as if it were the sentencing court.[79]
- Where the Drug Court exercises the criminal jurisdiction of either the District Court or the Local Court.[80]

12.67 The final circumstance was introduced as a basis of appeal in 2008 following a CCA decision that it had no jurisdiction to hear an appeal from a sentence imposed by

74. *Drug Court Act 1998* (NSW) s 5(1), s 6(2)(b), s 7(2)(b). See also *Drug Court Regulation 2010* (NSW) cl 4 for other eligibility requirements.
75. *Drug Court Act 1998* (NSW) s 7A(5)(b).
76. *Drug Court Act 1998* (NSW) s 12.
77. *Criminal Appeal Act 1912* (NSW) s 5AF, s 5DC.
78. *Drug Court Act 1998* (NSW) s 7D.
79. *Drug Court Act 1998* (NSW) s 7E.
80. *Drug Court Act 1998* (NSW) s 24(1)(a)-(b).

the Drug Court for further offending during the program – that is, a sentence for offending which was not dealt with as part of the initial sentence.[81]

12.68 Section 5AA of the CAA, which provides for appeals from the summary jurisdiction of the Supreme Court, will apply to an appeal by an offender as if the Drug Court were the Supreme Court.[82] Section 5DC of the CAA provides for Crown appeals against a sentence imposed in the Drug Court and was introduced in 2006.[83] Prior to this the CCA had held that Crown appeals against sentences imposed in the Drug Court fell to be determined under the general avenue for Crown appeals under s 5D, which allows the Crown to appeal a sentence imposed by a "court of trial".[84]

12.69 Where the sentence is for an indictable offence, the appeal is to be heard by such two or three judges of the Supreme Court as the Chief Justice may direct.[85] Where the sentence is for a summary offence, the appeal is to be heard by a single judge of the Supreme Court, unless the appeal raises matters of principle or it is otherwise in the interests of justice for the matter to be dealt with by the full court. In such a case it can be heard before a bench of three or more judges.[86]

12.70 Although the Drug Court cannot impose a final sentence that is more severe than the initial sentence, this does not preclude the CCA from passing a more severe sentence on appeal.[87]

12.71 There seem to be very few appeals from sentences imposed in the Drug Court. Our searches uncovered only one decision of the CCA after 2008 which had considered an appeal from the Drug Court.[88] This may be due to the low number of Drug Court participants (around 150 each year), and the fact that in 2009 and 2010 over half of these participants receive a non-custodial sentence as their final sentence, providing less of an incentive to appeal.[89]

12.72 The Court of Appeal may also exercise supervisory jurisdiction over decisions of the Drug Court.[90]

## Basis for determining appeals from the Drug Court

12.73 The CAA does not specify the basis on which sentence appeals from the Drug Court are to be conducted. In accordance with its practice for determining other appeals to which s 5AA applies (either directly or by extension), the CCA hears

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81. *Bell v R* [2007] NSWCCA 369. See also *Courts and Crimes Legislation Further Amendment Act 2008* (NSW) sch 6 [1]-[3]; NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11975.
82. *Criminal Appeal Act 1912* (NSW) s 5AF. See the discussion of s 5AA in Chapter 10.
83. *Crimes and Courts Legislation Amendment Act 2006* (NSW) sch 1.10 [4].
84. *R v Rice* [2004] NSWCCA 384; 150 A Crim R 37 [88].
85. *Criminal Appeal Act 1912* (NSW) s 5AF(3)(a), s 5DC(2)(a).
86. *Criminal Appeal Act 1912* (NSW) s 5AF(3)(b), s 5DC(2)(b).
87. *Criminal Appeal Act 1912* (NSW) s 5AF(4); s 5DC(3).
88. *Anastasiou v R* [2010] NSWCCA 100.
89. See NSW Law Reform Commission, *Sentencing – Patterns and Statistics,* Companion Report 139-A (2013) Figure 8.5.
90. *Supreme Court Act 1970* (NSW) s 69; see also s 48(1)(a)(vi).

sentence appeals from the Drug Court in the same way that it hears sentence appeals for proceedings heard on indictment. That is, it considers whether there has been an error of the type described in *House v R*,[91] or whether the sentence is otherwise manifestly excessive.[92]

12.74 The Senior Judge of the Drug Court noted that the court deals with a wide range of offending when imposing both an initial sentence and a final sentence. An initial sentence may include offences for indictable matters, summary matters, and old bonds or community service orders that have been breached. During the program offenders may abscond and commit fresh offences before the final sentence is imposed. This means that in sentencing at the end of the program the Drug Court may be required to consider both the initial sentence and fresh offences which have never been the subject of an initial sentence. The Senior Judge submitted that it is essential that the CCA continue to have the power to deal with a sentence imposed by the Drug Court which may relate to a mixture of offences.[93]

### *Our view: no change to basis for determining appeal*

12.75 We are not recommending any change to the way that the CCA determines sentence appeals for summary proceedings and proceedings dealt with on indictment.[94] Accordingly, we do not propose to make any recommendations for change to the way sentence appeals from the Drug Court are heard. We consider that the CCA's current jurisdiction is broad enough to allow it to review the various types of sentences that may be imposed by the Drug Court. Under Recommendation 10.1 the basis for deciding appeals from the Drug Court would be explicitly stated in legislation.

| **Recommendation 12.9: Retain appeals from the Drug Court** |
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| The avenues of appeal to the Court of Criminal Appeal from the decisions of the Drug Court referred to in s 5AF and s 5DC of the *Criminal Appeal Act 1912* (NSW) should be retained. |

## Expanding appealable decisions

12.76 Legal Aid NSW submitted that the types of appealable Drug Court decisions should be expanded to include determinations about major matters such as eligibility and appropriateness, potential to progress, and risk to the community. Legal Aid NSW suggested that a number of these decisions can have a significant bearing on the opportunities presented to a defendant for rehabilitation and the ultimate outcome of the matter. Judicial review under s 69 of the *Supreme Court Act 1970* (NSW) may be available in relation to major decisions of the Drug Court, but Legal Aid submits that this is not sufficient.[95] Judicial review does not permit appeal or review on

91. *House v R* (1936) 55 CLR 499.
92. See, eg, *Lapa v R* [2008] NSWCCA 331; 192 A Crim R 305; *R v Henare* [2005] NSWCCA 366; *R v Pavicevic* [2004] NSWCCA 80; 144 A Crim R 163; *R v Ohar* [2004] NSWCCA 252.
93. Senior Judge of the Drug Court of NSW, *Response CA13*.
94. See Chapters 8 and 10.
95. See Legal Aid NSW, *Submission CA12,* 6-7.

questions of fact. Legal Aid NSW considered this to be a priority recommendation for reforming the criminal appeals framework.[96]

12.77 No other stakeholders raised concerns about the current avenues of appeal against Drug Court decisions.

### *Our view: no change to types of appealable decisions*

12.78 In our view, the nature of the Drug Court as a therapeutic jurisdiction weighs against expanding the avenues of appeal. Participation in the Drug Court program is voluntary and the Drug Court has no power to increase a person's sentence as a result of participation in the program. Giving rights of appeal over intermediate steps in the Drug Court program may undermine its therapeutic objective and distract from the focus of participation in the program. We accordingly do not make any recommendations for change to the types of decisions that may be appealed.

## Industrial Relations Commission in Court Session

### Current law

12.79 The IRCiCS is the name for the Industrial Relations Commission sitting in its judicial capacity.[97] The IRCiCS exercises summary criminal jurisdiction primarily over prosecutions for breach of work health and safety (WHS) offences.

12.80 In 2011 the WHS legislation in NSW was overhauled. One of the changes was to transfer prosecutions for WHS offences to the "mainstream criminal courts".[98] Prosecutions for summary WHS offences are now heard by the Local Court or the District Court in its summary jurisdiction, and more serious offences are tried on indictment.[99] The IRCiCS retained jurisdiction to hear prosecutions for WHS "category 3 offences".[100] These are the least serious breaches of WHS obligations.[101]

12.81 Until recently, the full bench of the IRCiCS heard:

- Appeals from the Local Court for category 3 WHS offences[102] and for other WHS related offences.[103] The provisions of CARA concerning appeals from the Local Court to the District Court and Supreme Court applied.[104]

96. Legal Aid NSW, *Submission CA12,* 2-3.
97. Prior to the enactment of the *Industrial Relations Amendment (Industrial Court) Act 2013* (NSW), the Industrial Relations Commission sitting in its judicial capacity was referred to as the Industrial Court.
98. See the second reading speech to the Work Health and Safety Bill 2011 (NSW): NSW, *Parliamentary Debates,* Legislative Assembly, 5 May 2011, 227.
99. *Work Health and Safety Act 2011* (NSW) s 229B.
100. *Work Health and Safety Act 2011* (NSW) s 229B(2).
101. See *Work Health and Safety Act 2011* (NSW) s 33.
102. *Work Health and Safety Act 2011* (NSW) s 229B(6); *Industrial Relations Act 1996* (NSW) s 197.

- Appeals from a single judge of the IRCiCS. The provisions of the CAA applied.[105]

12.82 On 20 December 2013 the *Industrial Relations Amendment (Industrial Court) Act 2013* (NSW) came into effect. The Act effected the following jurisdictional changes to criminal appeals:

- An appeal from a single judge of the IRCiCS now lies to the CCA, in the same way as an appeal from the Supreme Court in its summary jurisdiction under s 5AA of the CAA.[106]
- An appeal from the Local Court now lies to a single judge of the IRCiCS. The provisions of CARA continue to apply to the appeal.[107]
- A single judge of the IRCiCS, hearing an appeal from the Local Court, may state a case for the consideration of the CCA in respect of a conviction for an offence by the Local Court.[108]
- A judge of the IRCiCS may, at any time before the completion of proceedings, submit a question of law to the CCA for determination.[109]

## Appeals from the Local Court to the Industrial Relations Commission in Court Session

12.83 A criminal appeal lies from the Local Court to a single judge of the IRCiCS in respect of:

- Category 3 WHS offences[110]
- an offence under the *Industrial Relations Act 1996* (NSW) or relevant regulations,[111] or
- an offence under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), *Workers Compensation Act 1987* (NSW) or relevant regulations.[112]

12.84 We do not expect that there will be very many of these types of appeals. The Industrial Relations Commission recorded that no new appeals from the Local Court had been filed with the Commission in 2012.[113] We could only locate two published

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103. *Industrial Relations Act 1996* (NSW) s 197(1)(a) (prior to amendment by *Industrial Relations Amendment (Industrial Court) Act 2013* (NSW) sch 1 [23]). For other WHS related offences see *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 245(4).
104. *Industrial Relations Act 1996* (NSW) s 197(2).
105. *Industrial Relations Act 1996* (NSW) s 196, repealed by *Industrial Relations Amendment (Industrial Court) Act 2013* (NSW) sch 1 [22].
106. *Criminal Appeal Act 1912* (NSW) s 5ABA.
107. *Industrial Relations Act 1996* (NSW) s 197(1)-(2).
108. *Criminal Appeal Act 1912* (NSW) s 5BB.
109. *Criminal Appeal Act 1912* (NSW) s 5AE.
110. *Work Health and Safety Act 2011* (NSW) s 229B(6).
111. *Industrial Relations Act 1996* (NSW) s 197(1).
112. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 245(4).
113. Industrial Relations Commission of NSW, *Annual Report* (2012) 53.

decisions of the IRCiCS dealing with an appeal from the Local Court since 2011, both of which were concerned with prosecutions under the now repealed *Occupational Health and Safety Act 2000* (NSW).[114]

12.85 There are no specific legislative provisions that apply to criminal appeals from the Local Court to the IRCiCS. Rather, CARA is said to apply.[115] We therefore do not make any specific recommendations for reform of appeals to the IRCiCS. We note that the recommendations made elsewhere in this report dealing with appeals from the Local Court to the District Court and Supreme Court will have a consequential effect on the very small number of appeals to the IRCiCS.

## Appeals from the Industrial Relations Commission in Court Session in its summary jurisdiction to the Court of Criminal Appeal

12.86 Elsewhere in this report we make recommendations for reform of criminal appeal provisions which apply, directly or indirectly, to appeals from the IRCiCS to the CCA:

- in Chapter 9, we recommend that the prosecutor's ability to appeal against an acquittal be extended to apply to an acquittal in the summary jurisdiction of the IRCiCS
- in Chapter 10, we discuss the basis for appeals from the summary jurisdiction of higher courts (including the IRCiCS) to the CCA, and recommend that the current position be maintained
- in Chapter 10, we recommend the repeal of s 5AE, which allows a judge of the IRCiCS to submit a question of law arising during the course of proceedings to the CCA, and
- in Chapter 11, we recommend that the avenue of appeal against interlocutory judgments or orders be expanded to include an interlocutory judgment or order made in the summary jurisdiction of the IRCiCS.

12.87 We therefore do not consider it necessary to make any other specific recommendations for appeals from the IRCiCS.

## Appeals from the Industrial Relations Commission in Court Session in its appellate jurisdiction to the Court of Criminal Appeal

12.88 Recent amendments to the CAA now allow the IRCiCS to state a case to the CCA when it is determining an appeal from the Local Court.[116] We have already recommended abolishing the case stated procedure for appeals heard by the District Court and the LEC.[117]

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114. *Geo Group Australia Pty Ltd v WorkCover Authority of NSW (No 3)* [2012] NSWIRComm 34; *Inspector Ankucic v Chalhoub* [2013] NSWIRComm 93.
115. *Industrial Relations Act 1996* (NSW) s 197(2).
116. *Criminal Appeal Act 1912* (NSW) s 5BB.
117. Recommendations 5.2 and 12.6.

### *Our view: abolish case stated from Industrial Relations Commission in Court Session*

12.89 Consistent with our recommendations about abolishing the case stated procedure for appeals heard by the District Court and the LEC, we recommend that the provision allowing the IRCiCS to state a case to the CCA in determination of an appeal from the Local Court be abolished and replaced with an avenue of appeal to the CCA on a question of law. Although the present law allows only the appellant in an appeal to the IRCiCS to request that a case be stated, in our view an appeal to the CCA should be available to both parties.

**Recommendation 12.10: Abolish case stated from the Industrial Relations Commission in Court Session**

(1) The case stated procedure under s 5BB of the *Criminal Appeal Act 1912* (NSW) should be abolished.

(2) When the Industrial Relations Commission in Court Session determines a criminal appeal from the Local Court, either party should be able to appeal the decision to the Court of Criminal Appeal, with leave on a ground involving a question of law.

## Reforming the avenues of appeal for work health and safety prosecutions

12.90 The WorkCover Authority of NSW (WorkCover) noted that it may commence prosecutions for offences under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and *Workers Compensation Act 1987* (NSW) in either the IRCiCS or the Local Court. It is possible for WorkCover to prosecute workers compensation fraud by laying charges in the Local Court under these Acts along with charges under the *Crimes Act 1900* (NSW), and conduct the prosecutions as one set of proceedings. An appeal for an offence under the *Crimes Act* would lie to the District Court, whereas an appeal for the other types of offences currently lies to the IRCiCS.[118] WorkCover submitted that all of these appeals should lie to the District Court.[119]

12.91 Currently less serious work health and safety offences can be heard in the Local Court and then appealed to the IRCiCS, or heard in the IRCiCS and then appealed to the CCA. This reflects a legislative policy that the IRCiCS should be involved in the prosecution of these types of offences. Amending the avenues of appeal in the way that WorkCover has suggested would create a third avenue of appeal, namely to the District Court for workers compensation fraud offences. This would add to the complexity of the current scheme.

12.92 While we see there is merit in aligning all appeals for WHS offences to the District Court, consistent with the previously stated government objective to "mainstream" these kinds of prosecutions, we do not propose to make a recommendation to this effect. We consider that this is better dealt with by way of a review of the policy for the prosecution of WHS offences.

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118. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 245(4).

119. WorkCover Authority of NSW, *Submission CA16,* 2-3.

# Appeals by specialist prosecutors

## Current law

12.93 The entities that may commence prosecution appeals are set out in Table 12.5. For most prosecution appeals, an appeal must be instituted by the DPP or the Attorney General (AG). Only in limited circumstances are appeal rights given to other prosecutors.

### Table 12.5: Entities that may file a prosecution appeal

| Avenue of appeal | Who may institute the appeal |
|---|---|
| **Appeal from the Local Court to the District Court** | |
| Appeal against inadequacy of sentence (CARA s 23) | DPP |
| **Appeal from the Local Court to the Supreme Court** | |
| Appeal against: sentence; order dismissing or staying proceedings; order for costs against the prosecutor; interlocutory order; order in committal proceedings (CARA s 56, s 57) | The prosecutor<br>(Defined as the person responsible for the conduct of the prosecution: CARA s 3) |
| **Appeal from the Local Court to the Land and Environment Court** | |
| Appeal against sentence (CARA s 42) | DPP, where the proceedings were prosecuted by or on behalf of a public authority (other than the EPA)<br>EPA, where it prosecuted the Local Court proceedings<br>The prosecutor, but only on a question of law alone |
| Appeal against an order staying dismissing or summary proceedings, or an order for costs against the prosecutor (CARA s 42) | The prosecutor |
| Appeal against an order made in committal proceedings or an interlocutory order (CARA s 43) | DPP, where the proceedings were prosecuted by or on behalf of a public authority (other than the EPA)<br>EPA, where it prosecuted the Local Court proceedings |
| **Appeal to the CCA** | |
| Appeal against quashing of an indictment (CAA s 5C) | DPP or Attorney General |
| Appeal against an order quashing an application or any charge specified in the application under *Criminal Procedure Act 1986* (NSW) s 246(1) | DPP or Attorney General, in any proceedings to which the Crown was a party |
| Appeal against a decision by the LEC to quash an application, or a charge specified in an application, for an order for the apprehension of a person charged with a summary offence (CAA s 5C) | DPP or Attorney General, in any proceedings to which the Crown was a party |
| Appeal against sentence (CAA s 5D) | DPP or Attorney General, in any proceedings to which the Crown was a party<br>EPA, if the proceedings were instituted or carried on by, or on behalf of, the EPA |

| Avenue of appeal | Who may institute the appeal |
|---|---|
| Appeal against reduced sentence for assistance to authorities (CAA s 5DA) | DPP or Attorney General |
| Appeal against sentence for related summary offences in criminal cases dealt with by Supreme Court or District Court (CAA s 5DB) | DPP or Attorney General |
| Appeal against sentence imposed by Drug Court (CAA s 5DC) | DPP or Attorney General |
| Appeal against interlocutory judgment or order (CAA s 5F(2)) | DPP or Attorney General<br>(Another prosecutor can appeal, with leave, under s 5F(3) as "any other party to proceedings") |
| Appeal against decision or ruling on the admissibility of evidence that eliminates or substantially weakens the prosecution's case (CAA s 5F(3A)) | DPP or Attorney General |
| Appeal against acquittal (CARA s 107) | DPP or Attorney General<br>(In the case of proceedings in the summary jurisdiction of the Supreme Court or Land and Environment Court, only where the Crown was a party) |

12.94 In an appeal to the CCA from the IRCiCS "in respect of a conviction of a person for an offence", a reference to the DPP in the CAA is to be construed as a reference to the prosecutor in proceedings before the IRCiCS.[120] However, it appears that this applies only to conviction appeals filed by the defendant. It would not seem to extend to prosecution appeals, which are not an appeal "in respect of a conviction of a person for an offence".

## Changing the current law

### *Specialist prosecutors cannot appeal in their own name*

12.95 Specialist prosecutors do not have the same appeal rights as the DPP – either they cannot appeal in their own name at all, or their appeal rights are more limited than those given to the DPP.

12.96 WorkCover is an independent prosecutor responsible for bringing proceedings for work health and safety offences.[121] It has no ability to bring an appeal to the CCA in its own name. If it wishes to appeal it must request either the DPP or the AG to institute an appeal on its behalf.[122] WorkCover submitted that it should be permitted to initiate criminal appeals in its own name.[123]

120. *Criminal Appeal Act 1912* (NSW) s 2(4)(b).
121. *Work Health and Safety Act 2011* (NSW) s 230, s 4 (definition of "regulator").
122. WorkCover Authority of NSW, *Submission CA16*, 2. See, eg, *AG (NSW) v Built NSW Pty Ltd* [2013] NSWCCA 299.
123. WorkCover Authority of NSW, *Submission CA16,* 2.

12.97 The lack of a broad right of appeal for prosecutors was also identified as a problem in the environmental offences context. In prosecutions for environmental offences before both the Local Court and the LEC, the prosecution will regularly be conducted by local authorities, the EPA or other state government departments or instrumentalities. This reflects the prosecutorial authority given under the relevant environmental legislation. The DPP almost never prosecutes for environmental offences, yet it is charged with instituting most criminal appeals arising out of these prosecutions.

12.98 As Table 12.5 demonstrates, prosecutors for environmental offences have a limited ability to bring an appeal in their own name. This is particularly pronounced in appeals to the CCA. The EPA may appeal against sentence if it brought the original proceedings,[124] but other environmental prosecutors must rely on the DPP or the AG to bring an appeal on their behalf. Furthermore, s 5C of the CAA allows for an appeal against the quashing of an application by the LEC under s 41(1) the *Land and Environment Court Act 1979* (NSW), but only the AG or the DPP may initiate such an appeal.

12.99 We note in para 10.85 that the EPA currently uses the submission power under s 5AE of the CAA to require the trial judge to submit a question of law to the CCA where the defendant is to be acquitted. This is because the EPA does not have the ability to bring a prosecution appeal against an acquittal in its own name, despite an appeal being expressly available from an acquittal by the LEC.

12.100 The DPP supported the idea of WorkCover and the EPA having powers in relation to appeals within their specialist areas that mirror his own. The Director noted that the NSW Office of the Director of Public Prosecutions (NSW ODPP) does not have the resources or the expertise to take on appeals in specialist jurisdictions.[125] The NSW Office of Environment and Heritage submitted that appeal rights should be extended to state agencies that prosecute environmental offences.[126]

### *Some appeals are only available where the Crown was a party to the original proceedings*

12.101 Prosecution appeals to the CCA from a sentence, the quashing of an indictment or an acquittal are only available where the Crown was a party to the original proceedings.[127] In Chapter 9 we recommend that, in an appeal against an acquittal from the summary jurisdiction of the higher courts, the requirement for the Crown to be a party to the proceedings be removed.

12.102 For sentence appeals, "proceedings to which the Crown was a party" is defined as proceedings instituted by or on behalf of the Crown, an authority within the meaning of the *Public Finance and Audit Act 1983* (NSW) or an officer or employee of such an authority.[128] This definition would appear to exclude a local authority - suggesting

124. *Criminal Appeal Act 1912* (NSW) s 5D(1A).
125. NSW, Director of Public Prosecutions, *Response CA4*.
126. NSW Office of Environment & Heritage, *Response CA19*.
127. *Criminal Appeal Act 1912* (NSW) s 5C, s 5D(1); *Crimes (Appeal and Review) Act 2001* (NSW) s 107(1)(c).
128. *Criminal Appeal Act 1912* (NSW) s 5D(2).

that any prosecutions commenced by a local authority in the LEC would have no appeal against sentence.

12.103 A similar problem arises in appeals from the Local Court to the LEC. The DPP may appeal against a sentence for an environmental offence where the Local Court proceedings were prosecuted by or on behalf of a public authority.[129] The same definition of "public authority" appears in s 3 of CARA, and again would seem to exclude prosecutions by local authorities from its scope.

### *The DPP is responsible for filing environmental appeals on behalf of a public authority*

12.104 The NSW ODPP was concerned that the DPP was responsible for filing sentence appeals in the LEC where the offence was prosecuted by or on behalf of a public authority.[130] It suggested that the EPA, rather than the DPP, would be better placed to conduct those appeals given its specialist experience in environmental prosecutions.[131]

### *Our view: WorkCover and EPA should have same appeal rights as the DPP*

12.105 In our view the rights of appeal referred to in Table 12.5 should be expanded in the following way:

- WorkCover and the EPA should be given the same rights as the DPP to initiate a criminal appeal for an offence they prosecuted, and
- the EPA should be given the right to initiate a criminal appeal for an environmental offence where the prosecution was conducted by or on behalf of a public authority.

12.106 Giving the DPP the sole right of appeal may have been appropriate when Crown appeals were initially introduced and prior to the development of specialist courts. However, because WorkCover and the EPA are established under legislation as independent prosecuting agencies, we consider that they should be entitled to appeal in their own name from decisions arising out of their prosecutions. To require the DPP or the AG to take on the appeal on behalf of WorkCover or the EPA seems to be unnecessarily cumbersome and inefficient.

12.107 We are also of the view that the EPA should be given the right to appeal in respect of an environmental offence, both to the LEC and the CCA, where the prosecution was conducted by or on behalf of a public authority. We considered whether all prosecutors should have the right to initiate a criminal appeal in their own name. However, we decided against this approach. In our view the best course of action is to give the EPA, a specialist environmental prosecutor, the ability to file an environmental appeal on behalf of a public authority. We also recommend that the definition of "public authority" be expanded to include a local authority.

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129. *Crimes (Appeal and Review) Act 2001* (NSW) s 42(1).
130. *Crimes (Appeal and Review) Act 2001* (NSW) s 42(1). The prosecutor may also appeal, but only on a question of law: s 42(2A).
131. NSW, Office of the Director of Public Prosecutions, *Submission CA7,* 30.

12.108 Given the EPA's role as a specialist prosecutor, we consider that it is better placed to conduct appeals in environmental matters than the DPP. However, we propose that the DPP retain its current rights of appeal on behalf of public authorities. Arrangements should be entered into between the DPP and the EPA so as to clarify the role of each prosecutor where a public authority seeks an appeal in respect of an environmental offence.

12.109 There may be a concern that giving prosecution appeal rights to entities other than the DPP would result in a significant increase to the number of prosecution appeals. However, our recommendation that all appeals to the CCA should require leave will mitigate this concern.[132] We also note that the EPA and WorkCover have prosecution guidelines which mirror the DPP's, and which extend to the filing of appeals.[133] Any prosecution appeals without reasonable prospects of success, which we expect would be few in number, could be filtered out through a refusal to grant leave.

**Recommendation 12.11: Expand the appeal rights of prosecutors**

(1) The Environment Protection Authority and the WorkCover Authority of NSW should be given the same criminal appeal rights as the Director of Public Prosecutions where they prosecuted the original proceedings.

(2) The Environment Protection Authority should be given the same rights as the Director of Public Prosecutions to appeal in respect of an environmental offence where the original proceedings were conducted by or on behalf of a public authority.

(3) For the purposes of paragraph (2), "public authority" should include a local authority.

(4) The Director of Public Prosecutions and the Environment Protection Authority should develop administrative arrangements about how they will exercise the appeal rights set out in paragraph (2).

132. Recommendation 10.2.

133. WorkCover Authority of NSW, *Compliance Policy and Prosecution Guidelines* (2012); NSW Environment Protection Authority, *EPA Prosecution Guidelines* (2013).

# 13. Other areas for reform

**In brief**

In this chapter we deal with a number of issues related to criminal appeals that arose during our review. We recommend that a review be undertaken of criminal appeal rules with a view to consolidating and updating those rules. We highlight several areas of inconsistency between judicial review and criminal appeals and recommend that a review be conducted to harmonise these avenues as much as possible. We also note several other issues that were raised with us but are not within our terms of reference.


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13.1 In this chapter we discuss some discrete areas of the criminal appeals process and related areas which were raised as being in need of reform.

## Criminal Appeal Rules

13.2 The *Criminal Appeal Rules* (NSW) (CAR) deal with the procedure for appeals to the Court of Criminal Appeal (CCA). They are currently made under the *Supreme Court Act 1970* (NSW) (SCA) pursuant to the power conferred by s 28(1) of the *Criminal Appeal Act 1912* (NSW) (CAA).

13.3 Rules for appeals from the Local Court to the Supreme Court are also made under the SCA[1] and are contained in Part 51B of the *Supreme Court Rules 1970* (SCR). The rules concerning appeals to the District Court and the Land and Environment Court are made under the Act for each court.[2]

1. *Crimes (Appeal and Review) Act* (NSW) s 61.
2. *Crimes (Appeal and Review) Act 2001* (NSW) s 30 provides that rules for the jurisdiction conferred to the District Court under pt 3 of that Act may be made under the *District Court Act 1973* (NSW); *Crimes (Appeal and Review) Act 2001* (NSW) s 51 provides that rules for the

13.4 In Chapter 7 we note that there are some deficiencies in the content of the rules under Part 51B of the SCR, and we recommend that procedural rules be developed which cover all aspects of criminal appeals from the Local Court to the Supreme Court.[3]

13.5 Section 123 of the SCA provides for the establishment of a Rules Committee. This Rules Committee is responsible for both the CAR and the SCR.

13.6 Under s 123(1) of the SCA, the Rules Committee consists of:

(a) the Chief Justice

(b) the President of the Court of Appeal or a Judge of Appeal appointed on the nomination of the President of the Court of Appeal

(c) one other appointed Judge of Appeal

(d) four other appointed judges, and

(e) an appointed barrister and an appointed solicitor.

13.7 All appointments are made by the Chief Justice.

13.8 The Supreme Court Rules Committee (SCRC) develops rules for the Supreme Court in all areas not encompassed by the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR).[4] Given the breadth of jurisdiction given to the SCRC, it is not a requirement that members of the Committee have specific expertise in criminal law.

13.9 In our view there is benefit in having criminal appeal rules made by a committee with judges and practitioners with criminal expertise. There would be a range of options to achieve this end:

- The Chief Justice could ensure that the SCRC includes judges and practitioners with criminal expertise.
- The legislation could be changed to create a separate committee for criminal rules, including criminal appeal.
- The legislation could be changed to give the Chief Justice the power to appoint additional or alternate members when the SCRC is making criminal rules.

13.10 The last option would appear to be a practical way forward, and further consideration should be given to this issue in consultation with the SCRC.

13.11 A further complicating factor is that despite being created by the same Rules Committee, the rules for criminal appeals to the Supreme Court and CCA are split

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jurisdiction conferred to the Land and Environment Court under pt 4 of that Act may be made under the *Land and Environment Court Act 1979*.

3. Recommendation 7.13.

4. The *Uniform Civil Procedure Rules 2005* (NSW) are developed by the Uniform Rules Committee pursuant to *Civil Procedure Act 2005* (NSW) s 8.

between the CAR and the SCR. This appears to be largely due to historical developments resulting in the rule making power being conferred by different Acts. There is no clear rationale for separating the rules for appeals to the Supreme Court and appeals to the CCA. This separation would be particularly anomalous if our recommendation that the CCA be formally recognised as a part of the Supreme Court is adopted.[5]

13.12 We are also of the view that the rules for appeals to the CCA could benefit from being updated and simplified. The current CAR were first gazetted in 1952 and some rules have not been amended for some time. In addition, the CAR will likely require revision if other recommendations in this report are implemented.

13.13 In Chapter 4, we recommend consolidating the CAA and *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) into a new Criminal Appeal Act for reasons of improved clarity, efficiency and accessibility. We consider that these objectives would be further enhanced by consolidating the CAR and Part 51B of the SCR (or the new procedural rules developed pursuant to Recommendation 7.13). Consolidation may also assist with streamlining the processes for appealing to the Supreme Court and the CCA. Given the different nature of appeals from the Local Court to the District Court and Land and Environment Court, and as we recommend maintaining the different structures for appeals from higher and lower courts, we do not propose that rules for criminal appeals be merged more broadly.

13.14 That said, there may be a case for a single set of consolidated rules of court applying in criminal cases developed by a Uniform Criminal Rules Committee. A review of criminal procedure is outside the scope of this review, and we have not investigated the relative merits of such an approach. Even under such an approach it is likely there would still be differences of procedure applying to criminal appeals at different levels.

**Recommendation 13.1: Consolidate rules regarding criminal appeals**

(1) The Supreme Court Rules Committee should conduct a review of the *Criminal Appeal Rules* (NSW) and the criminal appeals parts of the *Supreme Court Rules 1970* (NSW) with a view to consolidating and updating those rules.

(2) The rules recommended in Recommendation 7.13 should be included in the consolidated rules.

(3) Consideration should be given to legislative change to ensure that criminal law expertise is available to the Supreme Court Rules Committee when making criminal appeal rules.

## Judicial review

13.15 As we discuss in Chapter 2, it is possible for matters prosecuted in the Local Court to be both appealed to the Supreme Court, and subject to an application for judicial

5. Recommendation 4.2.

review. Stakeholders identified two areas of inconsistency between judicial review under the SCA and appeals under the CARA.

## Tutor arrangements

13.16 Rule 7.14 of the UCPR provides:

> (1) A person under legal incapacity may not commence or carry on proceedings except by his or her tutor.
>
> (2) Unless the court orders otherwise, the tutor of a person under legal incapacity may not commence or carry on proceedings except by a solicitor.

13.17 The term "person under legal capacity" includes a child under the age of 18 years.[6]

13.18 In contrast, s 113 of CARA provides:

> (1) An application or appeal in respect of a child may be made under this Act either by the child or, on behalf of the child:
>
> (a) by the child's legal representative, or
>
> (b) except as provided by paragraph (c), by a person having parental responsibility for the child, or
>
> (c) if the Director-General of the Department of Community Services or a designated agency has the care responsibility for the child, by the Director-General.

13.19 This difference means a child requires a tutor to apply for judicial review under s 69 of the SCA but a child, or specified person on behalf of the child, can appeal to the District Court or Supreme Court under CARA.

## Operation of s 69C of the *Supreme Court Act 1970* (NSW)

13.20 The NSW Office of the Director of Public Prosecutions (NSW ODPP) raised concerns about uncertainties regarding the staying of a sentence pending judicial review under s 69C of the SCA.[7] The provision relevantly provides:

> (1) This section and section 69D apply to proceedings in the Court for judicial review of a determination made by the District Court in appeal proceedings relating to a conviction or order made by the Local Court (or part of such a conviction or order) or sentence imposed by the Local Court.
>
> (2) The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when proceedings seeking judicial review are commenced.
>
> (3) Subsection (2) does not apply to a person (the *claimant*) who is in custody when proceedings seeking judicial review are commenced unless and

6. *Civil Procedure Act 2005* (NSW) s 3.
7. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 23-5.

> until the claimant enters into a bail undertaking in accordance with the *Bail Act 1978*, or bail is dispensed with.
>
> (4) The stay of execution continues until the proceedings for judicial review are finally determined, subject to any order or direction of the Court …

13.21 The NSW ODPP submitted that it is presently unclear if the reference to "any other order" in s 69C(2) applies to an apprehended violence order (AVO) when it becomes the subject of an application for judicial review to the Court of Appeal after being made or varied by the District Court on appeal.[8]

13.22 This is a concern that does not arise regarding appeals against the making of an AVO under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).[9] Section 85(1) of that Act provides that lodging a notice of appeal does not have the effect of staying the AVO concerned. Instead, the defendant must apply to the court for the operation of the AVO to be stayed.[10] This section has effect despite the application of CARA to these appeals and CARA's equivalent provision for staying a sentence pending appeal.[11]

13.23 The NSW ODPP considered that it would be desirable to clarify that a stay of the execution of an order upon the commencement of judicial review proceedings does not apply to AVOs.[12]

13.24 The NSW ODPP also highlighted an inconsistency between CARA and the SCA regarding the scope of the term "in custody" with respect to a stay of execution of a sentence. People sentenced to an intensive correction order (ICO) or a home detention order (HDO) are not "in custody" for the purpose of s 69C(3) of the SCA. This means that their sentence will be stayed when proceedings for judicial review are commenced. However, CARA provides that the term "in custody" includes a person who is the subject of an ICO or HDO for the purpose of staying a sentence pending appeal.[13] As a consequence, these sentences will not be stayed under CARA until bail is granted or the requirement for bail is dispensed with.

## Outdated references

13.25 More generally, the provisions of the SCA relating to judicial review of convictions and sentences (s 69A – s 69D) are in need of a review and update. The sections contain references to legislation or particular provisions which have now been repealed or updated under other legislation. For example:

- the SCA still contains references to the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW), despite its name being changed to CARA in 2006, and

8. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 24-5.
9. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 84.
10. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 85(2).
11. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 84(4), s 85(4); *Crimes (Appeal and Review) Act 2001* (NSW) s 63.
12. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 24-5.
13. *Crimes (Appeal and Review) Act 2001* (NSW) s 63(5).

- s 69A(2) uses the phrase "special treatment" to describe a claimant who is in custody pending determination of their application for judicial review, even though that phrase was removed from the equivalent provision in the CAA in 1999.[14]

### Our view: harmonise processes for judicial review and criminal appeals

13.26 Discrepancies between the processes for judicial review and criminal appeal have the potential to create confusion for appellants and legal practitioners, particularly where the provisions concerned are substantially similar. They can also result in additional work for the parties and for the court. In Chapter 7 we observe that many appeals to the Supreme Court under CARA are accompanied by an application for judicial review in the alternative.[15] In the interests of simplification and consistency, we are of the view that the provisions of the SCA and other rules concerning judicial review, and a new Criminal Appeal Act should be harmonised as much as possible. We recommend that the Attorney General initiate a review that seeks to achieve greater consistency in this area.

**Recommendation 13.2: Harmonise similar judicial review and criminal appeals provisions**

The Attorney General should instigate a review of s 69A – s 69D of the *Supreme Court Act 1970* (NSW) and other rules in relation to judicial review proceedings, with a view to harmonising those provisions with similar provisions applying in criminal appeals.

## Reopening sentence

13.27 Section 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows a court to reopen criminal proceedings, including those on appeal, where it has imposed a penalty that was contrary to law, or where it failed to impose a penalty that was required to be imposed by law, whether or not a person was convicted of an offence during those proceedings.[16] Upon reopening the proceedings, and after providing the parties with an opportunity to be heard, the court may:

- impose a penalty in accordance with the law, and
- amend any relevant conviction or order, if necessary.[17]

Criminal proceedings may be reopened by the court on its own initiative or on application by a party to the proceedings.[18]

14. See *Criminal Appeal Act 1912* (NSW) s 18(3), as amended by *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 4.12 [7]-[8].
15. See para 7.97.
16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(1).
17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(2).
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(2).

13.28 The power to reopen proceedings has largely been used to correct minor errors of law in sentencing so as to ensure that the intended purpose of the decision is carried into effect, although it has been held to have a broader reach.[19]

13.29 The CCA recently considered the scope of s 43 in *Achurch v R (No 2)*.[20] In that case, the prosecution had successfully appealed to the CCA against the defendant's sentence. Following that decision, the High Court delivered judgment in *Muldrock v R*,[21] overturning the approach to sentencing for offences with a standard non-parole period outlined in *R v Way.*[22] The defendant applied to reopen the CCA proceedings on the basis that the sentence imposed by the CCA was contrary to law, as it used the principles later held to be incorrect in *Muldrock*.[23]

13.30 The CCA dismissed the defendant's application on the basis that the penalty imposed was appropriate and therefore not contrary to law.[24] It considered that the jurisdiction of a court to reopen a sentence would only be enlivened where an identified error is shown to have led to a penalty that was not open to the court to impose.[25] The use of the discretion to reopen proceedings should be confined to cases of manifest error, that is, where the error is apparent from the sentence itself, rather than from an analysis of the legal reasoning underpinning the sentence.[26] It is not to be treated as an alternative to an appeal, as this may lead to a lack of finality in criminal proceedings and "potentially bring the administration of justice into disrepute".[27]

13.31 The CCA also noted that the discretion to reopen proceedings in s 43 has been given a wide interpretation.[28] However, as the previous case law was not challenged by either party, the CCA declined to employ a narrower interpretation.[29] Justice Johnson observed that the provision has been given a broader construction than that intended at the time of enactment and he suggested that the matter be referred to the Attorney General for possible reform.[30]

13.32 In Question Paper 1 we asked when a court should be able to reopen its own proceedings.[31] However, in the intervening period the High Court granted special leave to the defendant in *Achurch*. At the time of writing this report the appeal has

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19. *Meakin v DPP* [2011] NSWCA 373; 216 A Crim R 128 [29]-[31]; *Erceg v District Court of NSW* [2003] NSWCA 379; 143 A Crim R 455 [104]-[109].
20. *Achurch v R (No 2)* [2013] NSWCCA 117.
21. *Muldrock v R* [2011] HCA 39; 244 CLR 120.
22. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.
23. *Achurch v R (No 2)* [2013] NSWCCA 117 [10].
24. *Achurch v R (No 2)* [2013] NSWCCA 117 [99] (Bathurst CJ & Garling J), [110] (McLellan JA).
25. *Achurch v R (No 2)* [2013] NSWCCA 117 [63].
26. *Achurch v R (No 2)* [2013] NSWCCA 117 [66] (Bathurst CJ & Garling J), [108] (McLellan JA), [118] (Johnson J).
27. *Achurch v R (No 2)* [2013] NSWCCA 117 [66].
28. *Achurch v R (No 2)* [2013] NSWCCA 117 [60] (Bathurst CJ & Garling J), [105] (McClellan JA), [113] (Johnson J).
29. *Achurch v R (No 2)* [2013] NSWCCA 117 [61] (Bathurst CJ & Garling J), [106] (McClellan JA), [117] (Johnson J).
30. *Achurch v R (No 2)* [2013] NSWCCA 117 [117], [135], [160].
31. NSW Law Reform Commission, *Criminal Appeals: Preliminary Issues,* Question Paper 1 (2013) Question 14.

been heard and the High Court has reserved its judgment. The correct construction of s 43 is among the issues to be determined by the High Court.[32] We do not consider it appropriate to make any recommendations for reform before the High Court has clarified how this provision should be interpreted.

## Reviews following appeal

13.33 Our inquiry has been focused on criminal appeals and we have not considered mechanisms for review following appeal. Nonetheless a number of issues have been brought to our attention concerning reviews after appeal, and we note them here for completeness.

### Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW)

13.34 Part 7 of CARA provides a scheme for post appeal review of convictions and sentences under certain circumstances. The origins of Part 7 date back to the 1800s. As a way of dealing with a large number of petitions for mercy containing claims of factual error, a procedure developed whereby a justice of the peace would review petitions involving questions of fact and report back to the Governor.[33] This procedure was codified in 1883 and has since evolved into Part 7.[34]

13.35 Under Part 7 a convicted person, or another on behalf of a convicted person, may:

- petition to the Governor for a review of a conviction or sentence or the exercise of the Governor's pardoning power,[35] or
- apply to the Supreme Court for an inquiry into a conviction or sentence.[36]

13.36 Where a petition is made to the Governor and it appears there is a doubt or question as to the convicted person's guilt, any mitigating circumstances or any part of the evidence in the case:

- the Governor may direct that an inquiry be conducted by a judicial officer into the conviction or sentence
- the Minister may refer the whole case to the CCA to be dealt with as an appeal under the CAA, or
- the Minister may request the CCA to provide an opinion on any point arising in the case.[37]

32. See *Achurch v R* [2013] HCATrans 278 (8 November 2013); *Achurch v R* [2014] HCATrans 15 (13 February 2014).
33. G Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (The Federation Press, 2002) 254-5.
34. *Criminal Law Amendment Act 1883* (NSW) s 383. An amended version of this provision was included in *Crimes Act 1900* (NSW) s 474A-474H. In 1993 these provisions were transferred to *Crimes (Appeal and Review) Act 2001* (NSW) pt 7.
35. *Crimes (Appeal and Review) Act 2001* (NSW) s 76.
36. *Crimes (Appeal and Review) Act 2001* (NSW) s 78.
37. *Crimes (Appeal and Review) Act 2001* (NSW) s 77(1)-(2).

13.37 Where an application for an inquiry is made to the Supreme Court and it appears there is a doubt or question as to the convicted person's guilt, any mitigating circumstances or any part of the evidence in the case, the Supreme Court may:

- direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or
- refer the whole case to the CCA to be dealt with as an appeal under the CAA.[38]

13.38 The NSW Court of Appeal recently considered the scope of an inquiry under Part 7 in *Sinkovich v AG (NSW).*[39] In that case, the defendant had been sentenced in accordance with the approach to standard non-parole period offences outlined in *R v Way*.[40] This approach was overruled by the High Court after the defendant's appeal rights had been exhausted.[41] Consequently, an application for an inquiry was made to the Supreme Court on the basis that an error of law on the part of the sentencing judge (although correct at the time of sentencing) constituted a doubt or question as to mitigating circumstances in the case.[42]

13.39 The Supreme Court refused the application on the basis that "mitigating circumstances" cannot encompass situations where the law has changed between conviction and sentence, and appeal.[43] The defendant sought review of this refusal by way of the supervisory jurisdiction of the Court of Appeal or declaratory relief.[44]

13.40 The Court of Appeal held that the term "mitigating circumstances" could include errors of law, stating:

> Any procedural error which possibly gave rise to a more severe sentence than should properly have been imposed, may found a doubt or question as to a mitigating circumstance; that is, the failure to sentence the prisoner on a basis that would have led to a less severe sentence than that imposed.[45]

13.41 This decision could be regarded as broadening the circumstances in which the Supreme Court may direct that an inquiry be conducted, though the case is recent and the impact in practice is not clear. Proceedings under Part 7 of CARA are not judicial proceedings,[46] nor are they a form of criminal appeal. We have not considered the operation or scope of Part 7 in this review.

## Criminal Cases Review Commission

13.42 The NSW Bar Association suggested that consideration should be given to the establishment of an independent Criminal Cases Review Commission similar to that

38. *Crimes (Appeal and Review) Act 2001* (NSW) s 79(1)-(2).
39. *Sinkovich v AG (NSW)* [2013] NSWCA 383.
40. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.
41. *Muldrock v R* [2011] HCA 39; 244 CLR 120.
42. *Crimes (Appeal and Review) Act 2001* (NSW) s 79(2).
43. *Sinkovich v AG (NSW)* [2013] NSWCA 383 [8]-[11].
44. *Supreme Court Act 1970* (NSW) s 69, s 75.
45. *Sinkovich v AG (NSW)* [2013] NSWCA 383 [31].
46. *Crimes (Appeal and Review) Act 2001* (NSW) s 79(4).

which exists in England, Wales and Northern Ireland.[47] The Bar Association suggested that this could replace the DNA Review Panel, which was abolished in February 2014.[48] Civil Liberties Australia also supported the introduction of a Criminal Cases Review Commission.[49]

13.43 The Criminal Cases Review Commission (CCRC) in England, Wales and Northern Ireland may review and refer to the Court of Appeal a conviction or sentence (or both) imposed by a criminal court in those jurisdictions for cases dealt with summarily or on indictment.[50] A reference may be made with or without an application being made by or on behalf of the defendant.[51] The CCRC has the power to obtain documents and appoint investigating officers in the exercise of its functions.[52]

13.44 To make a reference, the CCRC must consider that:

- there is a "real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made"[53]
- in the case of a conviction, verdict or finding, there is an argument or evidence not raised in the trial proceedings or appeal or application for leave to appeal,[54] or in the case of a sentence, there is an argument on a point of law, or information that was not previously raised,[55] and
- an appeal has been determined or leave to appeal has been refused.[56]

13.45 From the date of its establishment in March 1997 to 31 January 2013, the CCRC received 17 356 applications. Of these, 512 cases were heard by the Court of Appeal; 353 of which were quashed and 148 of which were upheld.[57]

13.46 In 2012 the Law Council of Australia adopted a Policy Statement recommending a Commonwealth Criminal Cases Review Commission. Similarly to the CCRC, this would be an independent government funded body that would receive applications from defendants claiming to have been wrongfully convicted and sentenced. It would be able to investigate their claims and refer matters to the appeal court where there is a "real possibility" of success.[58]

13.47 We have not evaluated this proposal or considered whether there are merits in establishing an independent public body similar to the CCRC. It is not clear whether

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47. NSW Bar Association, *Submission CA5*, 17; NSW Bar Association, *Submission CA17*, 3.
48. NSW Bar Association, *Submission CA17*, 3-4.
49. Civil Liberties Australia, *Submission CA8*, 2.
50. *Criminal Appeal Act 1995* (UK) s 9-12.
51. *Criminal Appeal Act 1995* (UK) s 14(1).
52. *Criminal Appeal Act 1995* (UK) s 17-22.
53. *Criminal Appeal Act 1995* (UK) s 13(1)(a).
54. *Criminal Appeal Act 1995* (UK) s 13(1)(b)(i).
55. *Criminal Appeal Act 1995* (UK) s 13(1)(b)(ii).
56. *Criminal Appeal Act 1995* (UK) s 13(1)(c).
57. Ministry of Justice, "About the Criminal Cases Review Commission" (2013) <http://www.justice.gov.uk/about/criminal-cases-review-commission>.
58. Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (2012) 3.

this approach would add significantly to the longstanding provisions of Part 7 of CARA.

## Second appeal where new and compelling evidence

13.48 In May 2013, provisions were introduced in SA providing for a second or subsequent defendant appeal against conviction after the usual right of appeal has been exhausted.[59] This procedure applies to convictions imposed by any court in SA.[60]

13.49 The new provisions allow a court to which a conviction appeal lies to hear a second or subsequent appeal where it is satisfied that there is "fresh and compelling evidence that should, in the interests of justice, be considered on appeal".[61] Evidence is "fresh" if it was not adduced at the trial and could not have been adduced "even with the exercise of reasonable diligence".[62] It will be "compelling" if it is reliable, substantial and highly probative in the context of the issues in dispute at the trial.[63]

13.50 The court may allow such an appeal where it is satisfied there was a "substantial miscarriage of justice".[64] The court possesses all of the powers it usually has on a first appeal against conviction, allowing it to quash the conviction and direct a judgment and verdict of acquittal, or a new trial.[65]

13.51 Prior to the introduction of these provisions the only avenue for redressing a wrongful conviction after an unsuccessful appeal in SA was to submit a petition of mercy to the Governor, who in practice acts on the advice of the Attorney General.[66]

13.52 The SA amendments were highlighted by stakeholders as a potential reform for consideration in NSW.[67] Civil Liberties Australia considered that these provisions help address issues relating to appeal procedures and Australia's human rights obligations under the International Covenant on Civil and Political Rights.[68] However, it was concerned that the test for leave to appeal may be more demanding than the threshold applied upon hearing the appeal, and that this may improperly exclude cases that should be heard.[69] Civil Liberties Australia was also concerned that these provisions are too narrow. They do not provide for cases

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59. *Criminal Law Consolidation Act 1935* (SA) s 353A; *Magistrates Court Act 1991* (SA) s 43A.
60. SA, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3951.
61. *Criminal Law Consolidation Act 1935* (SA) s 353A(1); *Magistrates Court Act 1991* (SA) s 43A(1).
62. *Criminal Law Consolidation Act 1935* (SA) s 353A(6)(a); *Magistrates Court Act 1991* (SA) s 43A(6)(a).
63. *Criminal Law Consolidation Act 1935* (SA) s 353A(6)(b); *Magistrates Court Act 1991* (SA) s 43A(6)(b).
64. *Criminal Law Consolidation Act 1935* (SA) s 353A(3); *Magistrates Court Act 1991* (SA) s 43A(3).
65. *Criminal Law Consolidation Act 1935* (SA) s 353(2); *Magistrates Court Act* (SA) s 42(5).
66. SA, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3951.
67. Civil Liberties Australia, *Submission CA8*, 1; R Moles, *Submission CCA9* (confidential submission).
68. Civil Liberties Australia, *Submission CA8*, 1.
69. Civil Liberties Australia, *Submission CA8*, 4.

where there was no "fresh and compelling evidence", such as where there was a defect in the trial.[70]

13.53 Unlike SA, NSW already provides mechanisms for post appeal review of convictions and sentences in Part 7 of CARA. While Part 7 does not provide a further right of appeal as such, we are of the view that it is broad enough to deal with instances where new evidence comes to light following an unsuccessful appeal against conviction. We also note that it extends to a review of a sentence where there is new evidence, which is not covered by the new SA provision.

## Directed acquittals

13.54 Recent case law has highlighted the differences between the test for a directed acquittal and the test for overturning a conviction on appeal. At trial, a judge may only direct the jury to enter a verdict of acquittal where the evidence, at its highest, is not capable of supporting a verdict of guilty.[71] The test on appeal against conviction, however, appears to be lower and asks whether the jury verdict is unreasonable, or cannot be supported, having regard to the evidence.[72] The CCA has held that there is no power to direct a verdict of acquittal where the trial judge assesses that the evidence is such that a verdict of guilty would be unsafe or unsatisfactory.[73] The difference in tests may lead to a situation where a trial judge cannot direct an acquittal, but on appeal the CCA can overturn the conviction.

13.55 This occurred in *Smith v R*,[74] where the appellant was convicted of murder. The trial judge could not direct the jury to acquit as there was some evidence suggesting that the appellant was responsible for the deceased's death. However, on appeal the CCA held that there was a reasonable scenario consistent with the appellant's innocence, which made the jury's verdict unreasonable.[75] Although the appellant was ultimately acquitted, having to appeal the conviction resulted in the appellant spending a significant amount of time in prison and additional costs and delays for both parties, as well as for the courts.

13.56 In England and Wales, the test for a directed acquittal was changed to align with the test for appeal against conviction introduced by the *Criminal Appeal Act 1966* (UK). The judge may direct an acquittal if a verdict of guilty would be unsafe or unsatisfactory.[76] However, the High Court of Australia has decided not to adopt this test.[77]

13.57 In Question Paper 1 we asked whether the threshold for directing a verdict of acquittal should be aligned with the threshold for allowing an appeal against

70. Civil Liberties Australia, *Submission CA8*, 4.
71. *Doney v R* (1990) 171 CLR 207, 214-5.
72. *Criminal Appeal Act 1912* (NSW) s 6(1).
73. *R v R* (1989) 18 NSWLR 74.
74. *Smith v R* [2013] NSWCCA 64.
75. *Smith v R* [2013] NSWCCA 64 [82].
76. *Doney v R* (1990) 171 CLR 207, 213.
77. *Doney v R* (1990) 171 CLR 207, 213-5.

conviction.[78] Stakeholders had a mixed response. The NSW Bar Association was in favour of retaining the existing test for a directed acquittal, on the basis that a change to the test would encroach upon the role of the jury. However, a significant minority of members of the criminal law committee of the Association considered that there is merit in moving to the UK approach, given that the trial judge has the benefit of seeing the witnesses testify.[79]

13.58 The NSW ODPP also opposed the change, because aligning the tests would undermine the role of the jury as the trier of fact.[80] The Commonwealth Director of Public Prosecutions was similarly opposed.[81]

13.59 The Law Society of NSW and NSW Young Lawyers were both in favour of the change, although neither provided a reason for their position.[82] Legal Aid NSW submitted that "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".[83]

13.60 Any change to the existing law would require a change to the threshold for directing a verdict of acquittal, rather than a change to the grounds of appeal against conviction. As such, it is not a "criminal appeal" issue and is not strictly relevant to our terms of reference. In any event, noting the conflicting stakeholder views, we are of the view that the case for reform in this area has not been made.

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78. NSW Law Reform Commission, *Criminal Appeals: Preliminary Issues,* Question Paper 1 (2013) Question 8.
79. NSW Bar Association, *Submission CA5,* 13.
80. NSW, Office of the Director of Public Prosecutions, *Submission CA7*, 19.
81. Commonwealth Director of Public Prosecutions, *Submission CA15,* 3.
82. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission CA6,* 8; NSW Young Lawyers, Criminal Law Committee, *Submission CA13,* 14.
83. Legal Aid NSW, *Submission CA12,* 15.

# Appendix A
## Submissions

**CA1** Dr Kerri Eagle and Dr Jonathon Adams, 16 July 2013
**CA2** The Shopfront Youth Legal Centre, 15 August 2013
**CA3** Police Association of NSW, 16 August 2013
**CA4** Justice Action, 16 August 2013
**CA5** NSW Bar Association, 20 August 2013
**CA6** Law Society of NSW, Criminal Law and Juvenile Justice Committees, 21 August 2013
**CA7** NSW, Office of the Director of Public Prosecutions, 23 August 2013
**CA8** Civil Liberties Australia, 26 August 2013
**CCA9** Dr Bob Moles, 30 August 2013 (confidential submission)
**CCA10** P Gill, 2 September 2013 (confidential submission)
**CA11** Aboriginal Legal Service (NSW/ACT) Limited, 2 September 2013
**CA12** Legal Aid NSW, 30 August 2013
**CA13** NSW Young Lawyers, Criminal Law Committee, 3 September 2013
**CA14** Local Court of NSW, 13 September 2013
**CA15** Commonwealth Director of Public Prosecutions, 13 September 2013
**CA16** WorkCover Authority of NSW, 11 September 2013
**CA17** NSW Bar Association, 15 November 2013

# Appendix B
# Consultations

## Local Court (CA1)

**16 July 2013**

His Honour Judge Graeme Henson, Chief Magistrate
Her Honour Deputy Chief Magistrate Jane Mottley
Her Honour Deputy Chief Magistrate Jane Culver
Ms Alison Passé-de Silva, Policy Officer

## Supreme Court (CA2)

**2 September 2013**

Chief Justice T F Bathurst
The Hon Justice Margaret Beazley, President of the Court of Appeal
The Hon Justice John Basten
The Hon Justice Clifton Hoeben, Chief Judge at Common Law
The Hon Justice Carolyn Simpson
The Hon Justice Peter Johnson
The Hon Justice Megan Latham
The Hon Justice R A Hulme

## Appeals from the Local Court roundtable (CA3)

**18 October 2013**

Mr Ian Bourke SC, NSW Bar Association
Inspector Duane Carey, NSW Police Force
Mr Michael Day, NSW Office of the Director of Public Prosecutions
Mr Alex Edwards, NSW Young Lawyers
Mr Robert Hoyles, NSW Young Lawyers
Mr Paul Johnson, Legal Aid NSW
Ms Ellen McKenzie, Commonwealth Director of Public Prosecutions
Mr Stephen Odgers SC, NSW Bar Association
Ms Johanna Pheils, NSW Office of the Director of Public Prosecutions
Ms Rebekah Rodger, Legal Aid NSW
Ms Jane Sanders, Shopfront Youth Legal Centre/Law Society of NSW
Inspector Brendan Searson, NSW Police Force
Mr Jeremy Styles, Aboriginal Legal Service (NSW/ACT) Ltd / Law Society of NSW

## Children's Court (CA4)

**23 October 2013**

The Hon Judge Peter Johnstone, President
His Honour Magistrate Paul Mulroney
Her Honour Magistrate Joanne Keogh
Ms Rosemary Davidson, Executive Officer
Ms Paloma Mackay-Sim, Research Associate

## Appeals from higher courts roundtable (CA5)

**25 October 2013**

Senior Sergeant Marco Carlon, NSW Police Force
Mr Alex Edwards, NSW Young Lawyers
Mr George Galanis, NSW Office of the Director of Public Prosecutions
Ms Jennie Girdham SC, NSW Office of the Director of Public Prosecutions
Mr David Giddy, Law Society of NSW
Mr Mark Ierace SC, Senior Public Defender, NSW Public Defenders
Ms Ellen McKenzie, Commonwealth Director of Public Prosecutions
Mr Stephen Odgers SC, NSW Bar Association
Mr Thomas Spohr, NSW Young Lawyers
Mr Jeremy Styles, Aboriginal Legal Service (NSW/ACT) Ltd / Law Society of NSW

## NSW Public Defenders (CA6)

**4 November 2013**

Mr Richard Wilson, Public Defender

## Supreme Court registry (CA7)

**13 November 2013**

Ms Linda Murphy, CEO and Principal Registrar
Mr Michael Crompton, Registrar of the Court of Criminal Appeal

## Supreme Court (CA8)

**25 November 2013**

Chief Justice T F Bathurst
The Hon Justice Clifton Hoeben, Chief Judge at Common Law
The Hon Justice Carolyn Simpson
The Hon Justice Peter Johnson

# Appendix C
## Responses to proposals papers

**CA1** Local Court of NSW, 30 October 2013
**CA2** WorkCover Authority of NSW, 11 November 2013
**CA3** Legal Aid NSW, 15 November 2013
**CA4** NSW, Director of Public Prosecutions, 14 November 2013
**CA5** Chief Judge of the District Court of NSW, 14 November 2013
**CA6** NSW Commissioner of Police, 22 November 2013
**CA7** NSW Young Lawyers, Environment and Planning Law Committee, 25 November 2013
**CA8** Law Society of NSW, Environmental Planning and Development Committee, 27 November 2013
**CA9** NSW Bar Association, 2 December 2013
**CA10** Legal Aid NSW, 3 December 2013
**CA11** Commonwealth Director of Public Prosecutions, 5 December 2013
**CA12** NSW Bar Association, 5 December 2013
**CA13** Senior Judge of the Drug Court of NSW, 5 December 2013
**CA14** Law Society of NSW, Criminal Law and Juvenile Justice Committees, 9 December 2013
**CA15** NSW, Office of the Director of Public Prosecutions, 10 December 2013
**CA16** NSW Young Lawyers, Criminal Law Committee, 10 December 2013
**CA17** NSW, Office of the Director of Public Prosecutions, 12 December 2013
**CA18** NSW Police Force, 12 December 2013
**CA19** NSW Office of Environment & Heritage, 16 December 2013
**CA20** Chief Judge of the Land and Environment Court of NSW, 10 January 2014

# Appendix D
# History of legislative amendments

## Table D.1: Key legislative amendments to appeals from summary proceedings

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| ***Justices Act 1902* (NSW)** | | | |
| 1924 | Introduced a power for the appeal court to increase a sentence. | Possibly as a way of counteracting the inability of the prosecution to appeal against sentence. (Prosecution appeals against sentence in proceedings tried on indictment were introduced in same year.) | *Crimes Amendment Act 1924* (NSW)<br>Extrinsic material unavailable. |
| 1951 | Introduced an avenue for non criminal questions of law arising on an appeal in the Court of Quarter Sessions to be referred to the Supreme Court for determination. | Recommended by judges of Quarter Sessions, Bar Association and others. | *Crimes (Amendment) Act 1951* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 26 September 1951, 3232. |
| 1965 | Introduced a right of appeal from decisions of the Supreme Court (determining case stated from Court of Petty Sessions) to the Court of Appeal. | Recommended by appeal judges recently appointed. | *Law Reform (Miscellaneous Provisions) Act 1965* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 1 December 1965, 2660. |
| 1967 | Introduced a power for magistrates to annul a conviction and sentence where the conviction was heard and determined in the defendant's absence. | The Act also relaxed the requirements for service by police of certain summonses. Annulment was a safeguard introduced for the protection of persons served other than by personal delivery or delivery by post to place of abode. | *Justices (Amendment) Act 1967* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 14 March 1967, 4065, 4392. |
| | Enabled the Minister to refer to the court in which a conviction was determined or a penalty was imposed, a question or doubt as to a person's guilt or liability for a penalty. The court may annul the conviction or penalty and rehear the matter. | Intended to account for difficult cases in which an appeal is made to the Minister for prerogative of mercy. | |
| 1971 | Extended the magistrates' annulment power to circumstances where the defendant was not aware that the matter had been set down for hearing. | Addressed circumstances in which a letter advising a defendant of an adjourned date was not received, or the defendant was given an incorrect hearing date. | *Justices (Further Amendment) Act 1971* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 30 November 1971, 3496-7. |
| 1978 | Extended the time limit for annulment applications from 6 to 12 months. | Previous procedure was said to be unduly restrictive. Intended to widen the avenues of appeal available to persons who are dissatisfied with the convictions or orders of magistrates. | *Justices (Amendment) Act 1978* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 15 March 1978, 13 140-3. |

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 1978 | Introduced the ability for a defendant to seek leave of the District Court to file an appeal against conviction outside of the (then) 21 day time limit but within 3 months of the conviction. | Previously, there was no provision to extend the 21 day period. This was also considered to be unduly restrictive. | *Justices (Amendment) Act 1978* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 15 March 1978, 13 140-3. |
| 1985 | Extended the time limit for filing a case stated in Supreme Court from 21 to 35 days. | Recognised the difficulty in obtaining a transcript of the proceedings and briefing legal advisers as to whether a case should be stated in 21 days. | *Justices (Penalties and Procedure) Amendment Act 1985* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 26 November 1985, 10 611-3. |
| | Introduced an avenue of appeal to the District Court by a person who has been ordered by a justice to pay the costs of the defendant. | "Doubtful" that such a right of appeal already existed, although it was possible to bring a writ of mandamus in the Supreme Court. A *de novo* hearing in the District Court was considered to be a simpler and more cost effective way of conducting the review. Given that a costs order was enforceable by way of imprisonment, it was considered important that there be a right of appeal. | |
| 1986 | Introduced the ability of magistrate to reopen proceedings where a conviction or other order was made that was contrary to law. | Previously a magistrate could not reopen the matter where there was a sentencing error. These errors had to be corrected on appeal to the District Court, but they were often only discovered after the time for appeal had expired. This left the defendant with only one avenue of relief – application to Supreme Court to quash the order and refer the matter back to the magistrate.<br>This amendment was intended to provide a quick, efficient remedy of technical errors without imposing further costs on the parties. | *Justices (Amendment) Act* 1986 (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 1 May 1986, 3592-3. |
| 1988 | Introduced an avenue for the DPP to appeal to the District Court against the leniency of a sentence.<br>New evidence may be adduced by the DPP only in exceptional circumstances. | Gave effect to a pre election promise. Jurisdiction of Local Court was expanded to reduce the workload of District Court and Crown appeals against sentence were intended to ensure that adequate guidelines could be set for magistrates.<br>The nature of the appeal was intended to be a review of the sentence (consistent with Crown appeals in proceedings tried on indictment), rather than a rehearing of the whole matter. | *Justices (Appeals) Amendment Act 1988* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 10 November 1988, 3171. |
| 1990 | Introduction of an avenue of appeal from the Local Court to the Land and Environment Court regarding environmental offences. | Recognised the specialised jurisdiction of Land and Environment Court. Also intended to send a clear message to the magistracy that the punishment regimes for environmental offences were inadequate and out of step with community and parliamentary expectations. | *Environmental Offences and Penalties (Amendment) Act 1990* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 20 November 1990, 10 039. |

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 1997 | Amendments to magistrates' annulment power:<br>▪ Time limit for filing applications extended from 12 months to 24 months.<br>▪ Grounds for annulment were widened to include situations where a person was not aware of proceedings before they were completed; a person was hindered by an accident, misadventure, illness, or other cause from taking action in relation to proceedings; or where there was other just cause why the application should be granted. | Existing avenues were considered too restrictive.<br>If the person was aware of the listing of the case, but was otherwise prevented from attending, the only avenue of redress was to appeal to the District Court – an unnecessary and costly use of judicial resources. | *Justices Amendment (Procedure) Act 1997* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 15 October 1997, 817. |
| 1998 | Appeals against conviction to the District Court to be by way of rehearing.<br>Additional evidence given only with leave of the District Court. | Recommendations from the 1992 review of the *Justices Act 1902* (NSW), by the Justices Act Review Steering Committee.<br>Concerns were expressed about the amount of time required for *de novo* hearings and the difficulty in arranging witnesses to give evidence again, as well as the trauma for victims of crime required to give evidence twice. | *Justices Legislation Amendment (Appeals) Act 1998* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 17 September 1998, 7594-7.<br>Justices Act Review Steering Committee, *Justices Act Review*, Report (1992). |
| | Introduced a leave requirement for appeals against conviction to the District Court where the defendant was absent before the Local Court or pleaded guilty. | To avoid situations where the defendant was convicted in absence in the Local Court only to receive a full de novo hearing on appeal to the District Court. This was particularly problematic in relation to defendants involved in traffic offences. | |
| | Three existing avenues of review to the Supreme Court (case stated, prohibition and mandamus) were abolished and replaced with an appeal as of right on question of law or with leave on any other ground. | The case stated procedure as a means of review was unpopular as it was regarded as being cumbersome and unwieldy, protracted and costly.<br>Leave requirement was introduced to ensure that matters were not being appealed to the Supreme Court instead of the District Court unnecessarily. | |
| 1999 | Appeal against severity of sentence to be by way of rehearing. New evidence may be given on appeal. | General amendments to improve the operation of courts. | *Courts Legislation Amendment Act 1999* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 2 June 1999, 762. |
| | Clarified that an appeal to the Supreme Court may be brought in relation to interlocutory orders and orders made in committal proceedings in the Local Court. | | |
| | Conferred on the Land and Environment Court the same jurisdiction as the Supreme Court in respect of environmental offences. Appeals in relation to environmental offences to be heard only with leave of the Supreme Court where the appeal concerns a constitutional question or matter of general importance. | | |
| 2000 | Introduced an avenue of appeal to the Supreme Court from a magistrate's order or refusal to make an order under the *Crimes (Forensic Procedures) Act 2000* (NSW). | Consequent upon the introduction of the *Crimes (Forensic Procedures) Act 2000* (NSW). | *Crimes (Forensic Procedures) Act 2000* (NSW) |

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 2001 | Introduced an avenue for the Crown to appeal to the Supreme Court against a costs order made in committal proceedings. | To correct an apparent oversight. | *Courts Legislation Amendment Act 2001* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 17 October 2001, 17 522. |
| ***Crimes (Appeal and Review) Act 2001* (NSW)** | | | |
| 2001 | *Justices Act 1902* (NSW) was repealed and replaced with three separate pieces of legislation, including the *Crimes (Local Court Appeal and Review) Act 2001* (NSW). | Almost a century of amendments and attempts to "graft contemporary practices and procedures onto the original structure" of the *Justices Act 1902* (NSW) resulted in "antiquated rules and practices that are difficult to adapt to accommodate technological and social change".<br>The *Crimes (Local Court Appeal and Review) Act 2001* (NSW) was intended to consolidate and simplify the appeal and review provisions of the *Justices Act 1902* (NSW), and improve consistency. | *Crimes (Local Court Appeal and Review) Act 2001* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 4 December 2001, 19427-9. |
| 2004 | Introduced an appeal against a refusal of Local Court to annul a conviction or sentence. Where the defendant is successful in District Court, the matter *must* be remitted to the Local Court. | Intended to free up the resources of the District Court, rather than requiring the District Court to conduct a rehearing. | *Courts Legislation Amendment Act 2004* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 2004, 8628-9. |
| 2006 | Introduced a right for the Crown to appeal against acquittal for proceedings dealt with on indictment or in the summary jurisdiction of the Supreme Court or Land and Environment Court, in limited circumstances. | Part of the government's double jeopardy reforms. | *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1811. |
| | Moved s 5A(2) of the *Criminal Appeal Act 1912* (NSW) (CAA) to s 108(2) of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA). This provision allows the DPP or the Attorney General to submit a question of law which does not affect the verdict of acquittal to the Court of Criminal Appeal (CCA),. | | |
| | Name changed to *Crimes (Appeal and Review) Act 2001* (NSW). | | |
| 2009 | Provided an avenue of appeal against sentence where the Local Court refuses to annul a sentence (previously the appeal was against the refusal). Removed the need to remit the matter to the Local Court if the appeal is successful. | Gave effect to NSW Attorney General's Department 2008 statutory review.<br>Allows the District Court to finally determine an appeal against sentence. | *Crimes (Appeal and Review) Amendment Act 2009* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 4 March 2009, 12961.<br>NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008). |
| | Ability for District Court to remit matter to Local Court where defendant pleaded guilty at first instance or was convicted in their absence. | Ensured that the District Court does not conduct an original summary defended hearing in where there has been no defended hearing in the Local Court. | |

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 2009 | Introduced s 68A: An appeal court must not dismiss a prosecution appeal against sentence or impose a less severe penalty that would otherwise be considered appropriate because of any element of double jeopardy involved in the respondent being sentenced again. | Gave effect to proposals included in the recommendations of the Double Jeopardy Law Reform Working Group, which reported to the Council Of Australian Governments.<br><br>Intended to remove the principle of sentencing double jeopardy. In Crown appeals against sentence, appeal courts had traditionally declined to exercise their discretion to resentence, or had imposed a lesser sentence than would otherwise have been warranted, by taking into account the double jeopardy occasioned to the offender by being sentenced a second time. | *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009* (NSW)<br><br>NSW, *Parliamentary Debates*, Legislative Assembly, 2 September 2009, 17122-3. |

## Table D.2: Key legislative amendments to the *Criminal Appeal Act 1912* (NSW)

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 1924 | Introduced:<br>▪ s 5A - Judge before whom a person is tried and convicted may submit a question of law to the CCA for determination, to be dealt with as if it were an appeal.<br>▪ s 5B - Court of Quarter Sessions may submit any question of law arising on appeal before it to the CCA for determination.<br>▪ s 5C - Where Supreme Court or Court of Quarter Sessions quashes an indictment, the Attorney General may appeal to the CCA. If the appeal is sustained, the CCA may make orders for the prosecution of the trial as necessary.<br>▪ s 5D – Attorney General may appeal to the CCA against any sentence pronounced by the Supreme Court or Court of Quarter Sessions. The CCA may vary the sentence and impose a sentence it considers proper. | Revision of NSW criminal law.<br>Case stated procedure (s 5B) inserted in order to permit questions of law arising in appellate jurisdiction to be determined more authoritatively by a higher court. | *Crimes (Amendment) Act 1924* (NSW) |
| 1929 | Introduced s 5E, allowing an appeal by a person pronounced to be a habitual criminal. | Part of an extensive revision of NSW criminal laws. | *Crimes (Amendment) Act 1929* (NSW) |
| 1951 | Introduced the ability for the Crown to request that a question of law be reserved for determination by the CCA following an acquittal, without affecting the verdict. | Intended to ensure that the Crown retains the opportunity to test a ruling that it considers wrong, to avoid a build up of bad precedent. | *Crimes (Amendment) Act 1951* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 26 September 1951, 3232. |
| 1977 | Introduced the ability for the Attorney General to submit any question of law for the CCA arising at or in connection with a trial on indictment at which the defendant is acquitted. | Previously only the trial judge could reserve a question of law, which could cause problems if the judge died or retired from office.<br>Modelled on a similar provision in the UK. | *Criminal Appeal (Amendment) Act 1977* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 23 November 1977, 10182-3. |
| 1979 | Inserted s 5AA, giving the CCA jurisdiction to hear and determine appeals against decisions made by a judge of the Supreme Court exercising summary jurisdiction. Defendant appeals only, by way of rehearing.<br>Enabled the Supreme Court in its summary jurisdiction to reserve a question of law for the CCA. | The primary purpose of the bill was to enable the summary prosecution of certain offences in the Supreme Court, to allow for more efficient determination of the issues. This was a necessary ancillary amendment. | *Criminal Appeal (Crimes) Amendment Act 1979* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 28 March 1979, 3321. |
| | Inserted s 5AB, extending the jurisdiction of the CCA to hear appeals from the summary jurisdiction of Supreme Court to the summary jurisdiction of Land and Environment Court. | Contained in miscellaneous amendments Bill. | *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979* (NSW) |
| 1987 | Inserted s 5F, introducing appeals against interlocutory orders. | Stays of proceedings and other interlocutory matters in criminal cases were previously brought before the Court of Appeal as applications for prerogative relief. This Act ensured that these decisions relating to criminal law were made by the CCA. | *Criminal Appeal (Amendment) Act 1987* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 17 November 1987, 16 088-9. |

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 1990 | Inserted s 5AD, giving a right of appeal to the CCA where the Supreme Court or District Court disposes of related summary offences in proceedings dealt with on indictment. | Part of a package of reforms to criminal procedure to promote fairness and efficiency. | *Criminal Procedure Legislation (Amendment) Act 1990* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 24 October 1990, 9161. |
| 1991 | Time limit for filing notice of appeal extended from 10 to 28 days. | No justification given in the extrinsic material. | *Statute Law (Miscellaneous Provisions) Act 1991* (NSW) |
| 1992 | Inserted s 5DA, giving the DPP or Attorney General the right of appeal against a sentence that was reduced because the person upon whom it was imposed undertook to assist law enforcement authorities, where that person wholly or partly fails to fulfil the undertaking. | Need to ensure that there is no incentive for people to falsely claim that they will assist the authorities in order to receive a reduced sentence. | *Criminal Legislation (Amendment) Act 1992* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 25 February 1992, 68-9. |
| 1995 | Amended s 18, so that time spent in custody pending appeal would count as part of appellant's sentence. | Previously there was a presumption that time spent in custody pending appeal would not count towards sentence, although the court could order otherwise. Seemed that there developed a practice where the CCA would make an order that time was to count in most cases. | *Courts Legislation Further Amendment Act 1995* (NSW)<br>NSW, Explanatory Note, *Courts Legislation Further Amendment Bill 1995.* |
| 1997 | Inserted s 5DB, giving the Crown a right of appeal against sentence for related summary offences dealt with by the Supreme Court or District Court. | DPP had drawn attention to the anomaly that there was no existing right of appeal for the Crown. | *Crimes Legislation Amendment Act 1997* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 24 September 1997, 390. |
| 1998 | Inserted s 5AE, giving the ability for a question of law to be referred to CCA by judge hearing proceedings before Supreme Court in its summary jurisdiction or Land and Environment Court. Moved from s 5A(1A). | Corrected an anomaly that established a different procedure for questions of law from these courts to be heard before the CCA. | *Crimes Legislation Amendment Act 1998* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 3 June 1998, 5586. |
| | Allowed case stated to be submitted from the District Court or Land and Environment Court to the CCA *after* proceedings had been finalised, as well as before. | Previously case stated had to be requested prior to the making of final orders disposing of the appeal. Intended to avoid hardship and to remove an unreasonable restriction on having a question of law properly determined by the CCA. | *Justices Legislation Amendment (Appeals) Act 1998* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 17 September 1998, 7594-7. |
| | Inserted s 25A, providing that any time a person spends on bail pending an appeal to the High Court from a CCA determination does not count as part of the person's sentence. | Corrected an anomaly in appeals from the CCA to the High Court, relative to appeals from the District Court and Supreme Court to the CCA. | *Crimes Legislation Further Amendment Act 1998* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 25 November 1998, 10 643-4. |
| 2000 | Removed the requirement in s 5AA that an appeal to the CCA be by way of rehearing of the original evidence given in summary proceedings before the Supreme Court, Land and Environment Court, Drug Court or District Court. Rather, must be by way of appeal in the strict sense. | The CCA in *Histollo Pty Ltd v Director-General of the National Parks and Wildlife Service* (1998) 45 NSWLR 661 recommended the correction of an anomaly whereby persons convicted in the summary jurisdiction of the courts were entitled to wider appeal by way of rehearing than was available in respect of significant indictable offences. | *Courts Legislation Amendment Act 2000* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2000, 6107. |

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 2000 | Introduced appeal from interlocutory orders of the Land and Environment Court. | | *Courts Legislation Amendment Act 2000* (NSW) |
| 2001 | Introduced s 7(1A), giving CCA the ability to, in an appeal against sentence, to quash or vary a sentence imposed for any other count or part of the indictment, even if not the subject of the appeal. | Enables the Court to adjust sentences imposed on an offender sentenced for multiple offences, to ensure that the totality of the sentences adequately reflects the criminality of the offender's conduct. Suggested by CCA in *R v Itamua* [2000] NSWCCA 502. | *Criminal Legislation Amendment Act 2001* (NSW)<br>NSW, Explanatory Note, *Criminal Legislation Amendment Bill 2001*. |
| 2003 | Inserted s 5F(3A), extending Crown rights of appeal against interlocutory judgments or orders to decisions or rulings on the admissibility of evidence that "eliminates or substantially weakens the prosecution's case". | Prior to this amendment, the DPP's appeal rights included decisions by the trial judge that effectively excluded the entire Crown case. They did not, however, extend to rulings that weakened, but did not destroy, the Crown case. This amendment ensured that a defendant did not derive the benefit of an acquittal secured as a result of an erroneous evidentiary ruling. | *Crimes Legislation Further Amendment Act 2003* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 20 November 2003, 5426. |
| | Extended right of appeal against decisions as to costs in summary proceedings before the Supreme Court or Land and Environment Court to any person whose application for a costs order is dismissed, or in whose favour an inadequate costs order is made. | Followed a recommendation made by the CCA in *Willtara Constructions Pty Ltd v Owen* [1999] NSWCCA 390, in which the CCA held that Willtara could not appeal against a dismissed costs order because the company had not been convicted of an offence, and had not been ordered to pay costs. Sperling J specifically recommended an amendment to allow appeal against the dismissal of an application for costs. | |
| 2006 | On case stated from the District Court, introduced the ability for the CCA to quash any acquittal, conviction, or sentence of the District Court. | Part of the double jeopardy reforms. | *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1811. |
| | Inserted s 5DC, giving the Crown a separate right of appeal against sentence imposed in the Drug Court. | Previously Crown appeals against sentence imposed in the Drug Court had been dealt with under the general avenue of appeal in s 5D. Intended to correct practical anomalies. | *Crimes and Courts Legislation Amendment Act 2006* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 2006, 3666 |
| | Amended s 5AF, to expand the types of sentences imposed by the Drug Court that can be appealed under that section. | Previously only the final sentence could be appealed, heard by a single Supreme Court judge. Expanded the types of sentences that could be appealed, and allowed for some of these to be heard by a full bench of the CCA. | |
| 2008 | Inserted s 5G, providing for an appeal to the CCA where a trial judge has decided to discharge an entire jury. | Followed the NSW Law Reform Commission's *Jury Selection* report. Intended to avoid unnecessary retrials, and thereby enhance the efficiency and effectiveness of the justice system. | *Jury Amendment Act 2008* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 15 May 2008, 7681.<br>NSW Law Reform Commission, *Jury Selection*, Report 117 (2007). |

| Year | Amendment | Justification | Reference |
|---|---|---|---|
| 2008 | Conferred jurisdiction on the CCA to deal with appeals (by both offenders and the Crown) against sentences imposed by the Drug Court when exercising the summary criminal jurisdiction of the District Court or Local Court. | Rectified an anomaly in the appeal process from the Drug Court, highlighted by the CCA in *Bell v R* [2007] NSWCCA 369. Appeals against sentences imposed by the Drug Court when exercising the summary jurisdiction of the Local Court previously could not be brought before the CCA, and had to be brought before the District Court. | *Courts and Crimes Legislation Further Amendment Act 2008* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11 974. |
| 2010 | Amended s 5F, to give standing to appeal an interlocutory judgment or order to a subpoenaed person or protected confider, who is not a party to the proceedings. | Part of a package of reforms designed to strengthen sexual assault communications privilege. | *Courts and Crimes Legislation Further Amendment Act 2010* (NSW)<br>NSW, *Parliamentary Debates*, Legislative Council, 24 November 2010, 28 065. |
| 2013 | Inserted s 5ABA, giving convicted person right of appeal from the summary jurisdiction of the Industrial Relations Commission in Court Session to the CCA.<br>Amended s 5AE, extending ability for question of law to be referred to CCA to include summary proceedings before the Industrial Relations Commission in Court Session.<br>Inserted s 5BB, giving ability for Industrial Relations Commission in Court Session, hearing an appeal from the Local Court, to submit a question of law arising in the appeal to the CCA. | Part of a package of reforms to the operation of the Industrial Relations Commission. Previously appeals from a single judge of the Commission went to the full bench of the Commission. Following the downsizing of the Commission, there were no longer enough judicial officers of the Commission to constitute a full bench. | *Industrial Relations Amendment (Industrial Court) Act 2013* (NSW)<br>NSW, *Parliamentary Debates,* Legislative Assembly, 16 October 2013, 24 109. |

# Appendix E
# Criminal appeals in other jurisdictions

## Table E.1: Criminal appeals in other Australian jurisdictions

| | Appeals from summary proceedings in the lower courts |
|---|---|
| **Vic** | To **County Court**:<br>By the defendant against conviction and sentence, as of right.<br>The DPP may appeal against the sentence imposed, as of right, if satisfied that the appeal should be brought in the public interest.<br>*Criminal Procedure Act 2009* (Vic) s 254, s 257. |
| **Qld** | To **District Court**:<br>"A person aggrieved by an order of a justice" may appeal.<br>If the defendant pleads guilty he or she can only appeal on the ground that the punishment was excessive.<br>For indictable offences heard summarily, the prosecution can only appeal against sentence or an order for costs.<br>*Justices Act 1886* (Qld) s 222. |
| **WA** | To **Supreme Court**:<br>"A person aggrieved by a decision of a court of summary jurisdiction" may appeal. Leave is required.<br>The Supreme Court cannot grant leave unless it is satisfied that the ground/s of appeal have a reasonable prospect of succeeding.<br>*Criminal Appeals Act 2004* (WA) s 7, s 9. |
| **SA** | To **Supreme Court**:<br>"A party to a criminal action may appeal against any judgment given in the action."<br>An appeal against an interlocutory judgment is only available if the judgment stays proceedings or destroys or substantially weakens the prosecution case.<br>*Magistrates Court Act 1991* (SA) s 42. |
| **Tas** | To **Supreme Court**:<br>A person who is aggrieved by an order of justices may move the Supreme Court to review that order. "Order" includes conviction, dismissal of a complaint, determination, and adjudication.<br>*Justices Act 1959* (Tas) s 107, s 116. |
| **NT** | To **Supreme Court**:<br>A party to proceedings before the court of summary jurisdiction may appeal a conviction, order or adjudication (excluding an order dismissing a complaint).<br>An order dismissing complaint for indictable offence heard summarily may be appealed.<br>*Justices Act* (NT) s 163. |
| **ACT** | To **Supreme Court**:<br>By the defendant against conviction or sentence.<br>No appeal is available to the prosecution. (Although the prosecution can file a review appeal – see below)<br>*Magistrates Court Act 1930* (ACT) s 208. |
| **Cth** | N/A |

| | Type of appeal |
|---|---|
| **Vic** | *De novo* hearing. The sentence (including conviction, in the case of a defendant appeal) must be set aside and the County Court may impose any sentence it considers appropriate.<br>*Criminal Procedure Act 2009* (Vic) s 256, s 259. |
| **Qld** | By way of rehearing of original evidence. District Court may give leave to adduce fresh evidence if satisfied there are special grounds for granting leave.<br>*Justices Act 1886* (Qld) s 223. |
| **WA** | On grounds of:<br>▪ error of law or fact, or both<br>▪ court acted without or in excess of jurisdiction<br>▪ sentence was inadequate or excessive, or<br>▪ there has been a miscarriage of justice.<br>Supreme Court may dismiss the appeal if it considers that no substantial miscarriage of justice occurred.<br>Appeal is to be decided on the original evidence. However, the Supreme Court has the power to receive additional evidence.<br>*Criminal Appeals Act 2004* (WA) s 8, s 14. |
| **SA** | Appeal is by way of rehearing. The court may determine an appeal as the justice of the case requires. This includes rehearing any witnesses or receiving fresh evidence.<br>For appeals against sentence, error must be demonstrated. The court cannot simply impose any other sentence that it considers appropriate: *Wittwer v Police* [2004] SASC 226. |
| **Tas** | On grounds of:<br>(a) error of fact, law or both, or<br>(b) the justices had no jurisdiction to make the order.<br>Supreme Court may dismiss the motion if it considers that no substantial miscarriage of justice has occurred.<br>Supreme Court to consider evidence and materials adduced before the justices, and such further evidence (if any) that it thinks fit.<br>Either party may apply for the appeal to be heard *de novo* (not available where defendant pleaded guilty). Supreme Court may grant de novo hearing where it is in the interests of justice to do so.<br>*Justices Act 1959* (Tas) s 107(4), s 110, s 111. |
| **NT** | On grounds of:<br>(a) sentence, or<br>(b) error or mistake, on the part of the Justices whose decision is appealed against, of fact, law or both.<br>Supreme Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.<br>Appeal is to be determined on transcript of evidence and exhibits before Magistrates Court. Supreme Court may admit additional evidence if it is credible and admissible, and there is a reasonable explanation for the failure to adduce it at first instance.<br>*Justices Act* (NT) s 163, s 176, s 176A, s 177. |
| **ACT** | Appeal by way of rehearing using the evidence in the Magistrates Court, with a discretion to receive further evidence. Supreme Court has the power to draw its own inferences of fact.<br>Fresh evidence may be given if it is credible and there is a reasonable explanation for the failure to adduce it at first instance.<br>*Magistrates Court Act 1930* (ACT) s 214; *Campbell v Fortey* (1987) 85 FLR 462. |
| **Cth** | N/A |

| | Second level appeal from summary proceedings | Summary proceedings- appeal to Supreme Court on question of law |
|---|---|---|
| **Vic** | Appeal to the Court of Appeal, with leave, but only where the person was sentenced to imprisonment by the County Court after receiving a non-custodial sentence from the Magistrates' Court.<br>*Criminal Procedure Act 2009* (Vic) s 283.<br>County Court may reserve a question of law for the Court of Appeal where it is satisfied it is in the interests of justice to do so.<br>*Criminal Procedure Act 2009* (Vic) s 302A. | A party may appeal to the Supreme Court on a question of law from a final order of the Magistrates' Court.<br>*Criminal Procedure Act 2009* (Vic) s 272. |
| **Qld** | Appeal to the Court of Appeal, with leave.<br>*Justices Act 1886* (Qld) s 227.<br>Case stated to the Court of Appeal on a question of law.<br>*District Court of Queensland Act 1967* (Qld) s 118. | No appeal to the Supreme Court is available. (Although an application for judicial review may be made.) |
| **WA** | Appeal to the Court of Appeal, by person aggrieved by a decision of Supreme Court. Leave is required.<br>Conducted same way as first instance appeal before Supreme Court.<br>*Criminal Appeals Act 2004* (WA) s 16-18. | A party aggrieved by the failure of the court to carry out a mandatory duty, or a decision or proposed decision which is in excess of jurisdiction or constitutes an abuse of process may apply to Supreme Court for a review order.<br>*Magistrates Court Act 2004* (WA) s 36. |
| **SA** | Appeal to the Full Court of the Supreme Court, with leave.<br>*Supreme Court Act 1935* (SA) s 50(4)(a). | The Magistrates Court may reserve a question of law arising in a criminal action (except a preliminary examination of a charge of an indictable offence) for determination by the Supreme Court.<br>*Magistrates Court Act 1991* (SA) s 43. |
| **Tas** | Appeal to the Full Court of the Supreme Court, on a point of law or the rejection or admission of evidence.<br>*Justices Act 1959* (Tas) s 123. | Justices may state a case for the Supreme Court where there is a question of law of public and general importance that should be decided by the Supreme Court. The hearing may be adjourned pending the Supreme Court's decision.<br>Statutory mandamus lies to the Supreme Court for an order requiring a justice to do an act.<br>*Justices Act 1959* (Tas) s 114-115. |
| **NT** | Appeal to the Court of Appeal.<br>*Supreme Court Act* (NT) s 51. | Court of Summary Jurisdiction may reserve a question of law for the consideration of the Supreme Court, and state a special case for the opinion of the Supreme Court.<br>*Justices Act* (NT) s 162. |
| **ACT** | Appeal to the Court of Appeal. No leave required.<br>*Supreme Court Act 1933* (ACT) s 37E(2). | Either party may file a review appeal in the Supreme Court on grounds of error, lack of jurisdiction, decision wrong in law or (for prosecution) sentence manifestly inadequate.<br>*Magistrates Court Act 1930* (ACT) s 219B. |
| **Cth** | N/A | N/A |

| | Proceedings dealt with on indictment - defendant appeals |
|---|---|
| **Vic** | Against conviction, with leave.<br>Against sentence, with leave. The Court of Appeal may refuse to grant leave if there is no reasonable prospect that it would impose a less severe sentence, or reduce the total effective sentence.<br>Against interlocutory decisions, with leave.<br>*Criminal Procedure Act 2009* (Vic) s 274, s 278, s 280, s 295. |
| **Qld** | Against conviction, as of right on a question of law. With leave on any other ground.<br>Against sentence, with leave.<br>No appeal against interlocutory orders, but this may form a ground of appeal against conviction or sentence.<br>*Criminal Code* (Qld) s 668D; see also s 590AA(4). |
| **WA** | Against conviction or sentence, with leave.<br>The Court of Appeal must not give leave unless it is satisfied that the ground/s have a reasonable prospect of succeeding.<br>*Criminal Appeals Act 2004* (WA) s 23, s 27. |
| **SA** | Against conviction, as of right on a question of law. With leave on any other ground.<br>Against sentence, with leave.<br>Against an interlocutory decision regarding whether proceedings should be stayed as an abuse of process, with the permission of the trial court.<br>*Criminal Law Consolidation Act 1935* (SA) s 352(1). |
| **Tas** | Against conviction, as of right on a question of law. With leave on any other ground.<br>Against sentence, as of right.<br>*Criminal Code* (Tas) 401(1). |
| **NT** | Against conviction, as of right on a question of law. With leave on any other ground.<br>Against sentence, with leave.<br>*Criminal Code* (NT) s 410. |
| **ACT** | Against an "order" of the Supreme Court, as of right. This includes a conviction or sentence.<br>Against interlocutory order, with leave.<br>*Supreme Court Act 1933* (ACT) s 37E. |
| **Cth** | Against conviction or sentence as of right on a question of law, with leave on any other ground.<br>Against an interim judgment or decision, with leave.<br>*Federal Court of Australia Act 1976* (Cth) s 30AA. |

| | Proceedings dealt with on indictment – prosecution or Attorney General appeals |
|---|---|
| **Vic** | Against sentence, if the DPP:<br>▪ considers that there is an error in the sentence imposed and that a different sentence should be imposed, and<br>▪ is satisfied that an appeal should be brought in the public interest.<br>Against interlocutory decisions, with leave.<br>*Criminal Procedure Act 2009* (Vic) s 287, s 291, s 295. |
| **Qld** | Against sentence or an order staying proceedings, as of right.<br>The Attorney General may refer a question of law arising in relation to a direction or ruling made at a pre trial hearing.<br>*Criminal Code* (Qld) s 668A, s 669A. |
| **WA** | With leave, against:<br>▪ sentence<br>▪ a decision adjourning or staying proceedings<br>▪ acquittal following a jury verdict where the offence is punishable by more than14 years imprisonment, where the trial judge made an error of law or fact, or<br>▪ acquittal by a directed verdict or by a judge sitting alone.<br>The Court of Appeal must not give leave unless it is satisfied that the ground/s have a reasonable prospect of succeeding.<br>*Criminal Appeals Act 2004* (WA) s 24, s 27. |
| **SA** | Against sentence, with leave.<br>Against acquittal, with leave, if the acquittal was by a judge sitting alone or a directed acquittal.<br>Against an interlocutory decision regarding whether proceedings should be stayed as an abuse of process, as of right on a question of law. With leave on any other ground.<br>*Criminal Law Consolidation Act 1935* (SA) s 352(1). |
| **Tas** | The Attorney General may appeal against:<br>▪ sentence<br>▪ an order arresting judgment<br>▪ an acquittal on a question of law, with leave, or<br>▪ an order staying proceedings, quashing an indictment or upholding a demurrer, with leave.<br>*Criminal Code* (Tas) 401(2). |
| **NT** | Crown Law Officer may appeal against:<br>▪ sentence, or<br>▪ a stay of proceedings or quashing of indictment.<br>*Criminal Code* (NT) s 414. |
| **ACT** | Against an "order" of the Supreme Court, as of right. This includes a sentence, but excludes a verdict of acquittal.<br>*Supreme Court Act 1933* (ACT) s 37E; *R v Ardler* [2004] ACTCA 4; 144 A Crim R 552. |
| **Cth** | Against sentence or acquittal by a judge on the basis that the accused has no case to answer. As of right on a question of law, with leave on any other ground.<br>Against an interim judgment or decision, with leave.<br>*Federal Court of Australia Act 1976* (Cth) s 30AA. |

## Table E.2: Criminal appeals in overseas jurisdictions

| | Appeals from summary proceedings | Type of appeal |
|---|---|---|
| **England and Wales** | To **Crown Court:**<br>By the defendant against conviction or sentence, as of right. If the defendant pleaded guilty, appeal against sentence only.<br>No appeal available to prosecution.<br>*Magistrates' Court Act 1980* (UK) s 108. | Appeal by rehearing. The parties are not limited to, or bound to call all, the evidence called before the Magistrates' Court.<br>*Senior Courts Act 1981* (UK) s 79(3). |
| **Northern Ireland** | To **County Court**:<br>By the defendant against conviction or sentence, as of right. If the defendant pleaded guilty, appeal against sentence only.<br>No appeal available to prosecution.<br>*Magistrates' Courts (Northern Ireland) Order 1984* (UK) art 140. | Appeal by rehearing. |
| **Scotland** | To **High Court**:<br>By the defendant against conviction or sentence, with leave. Leave to be granted if there are arguable grounds of appeal.<br>By the prosecution against sentence or against acquittal, on a question of law.<br>*Criminal Procedure (Scotland) Act 1995* (UK) s 175. | Appeal against conviction to proceed by way of case stated.<br>The test on appeal is whether a miscarriage of justice has occurred. High Court may admit fresh evidence where there is a reasonable explanation as to why the evidence was not heard at first instance, or the evidence was not admissible at the time of the original proceedings but is admissible at the time of the appeal, and it is in the interests of justice to do so.<br>*Criminal Procedure (Scotland) Act 1995* (UK) s 175-176. |
| **Canada** | To **superior court** (equivalent of NSW Supreme Court):<br>By the defendant against conviction or sentence, as of right.<br>By the prosecution, as of right, against:<br>▪ order staying proceedings or dismissing information, or<br>▪ sentence.<br>*Criminal Code*, RSC 1985 (Can) s 813. | Tests for appeal in indictable proceedings apply, as do the rules regarding the admission of fresh evidence.<br>Either party may apply for the appeal to be heard de novo. Court may grant a de novo hearing where in the interests of justice.<br>In a de novo appeal against sentence, the appeal court shall consider the fitness of the sentence appealed against.<br>*Criminal Code*, RSC 1985 (Can) s 822. |
| **New Zealand** | By the defendant against conviction, as of right.<br>By either party against:<br>▪ sentence, as of right<br>▪ certain pre trial decisions, with leave, or<br>▪ on a question of law, with leave (for the prosecution this includes questions of law arising from an acquittal).<br>*Criminal Procedure Act 2011* (NZ) s 215, s 217, s 218, s 229, s 244, s 246, s 296. | Tests for appeal against conviction and sentence are the same for summary and indictable proceedings. (See below) |

| | Second level appeal from summary proceedings | Summary proceedings - appeal to superior court on a question of law |
|---|---|---|
| **England and Wales** | Appeal from Crown Court to High Court by way of case stated, on the ground that a decision is wrong in law or is in excess of jurisdiction.<br>An application may also be made to the High Court for a quashing order.<br>*Senior Courts Act 1981* (UK) s 28. | Stated case from Magistrates' Court to High Court, on ground that decision is wrong in law or is in excess of jurisdiction.<br>*Magistrates' Court Act 1980* (UK) s 111. |
| **Northern Ireland** | Appeal from County Court to Court of Appeal, by way of case stated on a question of law.<br>*County Courts (Northern Ireland) Order 1980* (UK) art 61. | Stated case from Magistrates' Court to Court of Appeal, on a point of law or issue or jurisdiction.<br>*Magistrates' Courts (Northern Ireland) Order 1984* (UK) art 146. |
| **Scotland** | No further avenue of appeal. | Appeal to High Court by bill of suspension or advocation against sentence, conviction or acquittal. Used for procedural irregularities. (Similar to judicial review)<br>*Criminal Procedure (Scotland) Act 1995* (UK) s 191. |
| **Canada** | Appeal to the court of appeal, with leave on a question of law.<br>*Criminal Code*, RSC 1985 (Can) s 839. | Appeal to superior court against conviction, judgment, verdict of acquittal or other final order on ground of:<br>(a) error of law<br>(b) excess of jurisdiction, or<br>(c) refusal or failure to exercise jurisdiction.<br>*Criminal Code*, RSC 1985 (Can) s 830. |
| **New Zealand** | Appeal, with leave. The appeal court must not grant leave unless:<br>(a) the appeal involves a matter of general or public importance, or<br>(b) a miscarriage of justice may have occurred, or may occur, unless the appeal is heard.<br>*Criminal Procedure Act 2011* (NZ) s 223, s 237, s 253, s 303. | No specific avenue of appeal, but there is an ability to appeal on a question of law (see above). |

| | Proceedings dealt with on indictment - defendant appeals | Proceedings dealt with on indictment – prosecution or Attorney General appeals |
|---|---|---|
| **England and Wales** | Against conviction and sentence, with leave.<br>*Criminal Appeal Act 1968* (UK) s 1, s 11.<br>Against a ruling made in a preparatory hearing conducted for the purpose of determining the admissibility of evidence or questions of law in complex cases, with leave.<br>*Criminal Justice Act 1987* (UK) s 9(3); *Criminal Procedure and Investigations Act 1996* (UK) s 31(3), s 35. | With leave, against:<br>▪ a ruling made by the trial judge prior to summing up to the jury<br>▪ an evidentiary ruling made by the trial judge before the opening of the case for the defence, or<br>▪ a ruling made in a preparatory hearing conducted for the purpose of determining the admissibility of evidence or questions of law in complex cases.<br>*Criminal Justice Act 1987* (UK) s 9(3); *Criminal Procedure and Investigations Act 1996* (UK) s 31(3), s 35.<br>*Criminal Justice Act 2003* (UK) s 58, s 62-63.<br>The Attorney General can, with leave, refer a sentence that appears to have been "unduly lenient", including one that was not authorised or required by law. The Court of Appeal can increase the sentence.<br>*Criminal Justice Act 1988* (UK) s 36. |
| **Northern Ireland** | Against conviction and sentence, with leave.<br>*Criminal Appeal (Northern Ireland) Act 1980* (UK) s 1, s 8.<br>Against ruling made in a preparatory hearing conducted for the purpose of determining the admissibility of evidence or questions of law in complex cases, with leave.<br>*Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988* (UK) s 8. | |
| **Scotland** | Against conviction or sentence, with leave. Leave to be granted if there are arguable grounds of appeal.<br>Against a decision made at a preliminary hearing, with leave.<br>*Criminal Procedure (Scotland) Act 1995* (UK) s 74, s 106-107. | Against:<br>▪ acquittal, where judge was satisfied that prosecution evidence insufficient in law to justify conviction<br>▪ an order that indictment be amended because there is no evidence to support some of the charges contained in the indictment<br>▪ sentence, on a point of law, or on a ground that the sentence was unduly lenient or the order was inappropriate<br>▪ a finding that prosecution evidence is inadmissible, with leave of the trial court, or<br>▪ a decision made at a preliminary hearing, with leave of the trial court.<br>*Criminal Procedure (Scotland) Act 1995* (UK) s 107A, s 108. |
| **Canada** | Against:<br>▪ conviction, as of right on a question of law. With leave on any other ground<br>▪ sentence, with leave, or<br>▪ summary conviction or sentence, with leave.<br>*Criminal Code*, RSC 1985 (Can) s 675. | Attorney General may appeal against:<br>▪ an order quashing indictment or staying proceedings<br>▪ sentence, with leave, or<br>▪ acquittal, on a question of law alone.<br>*Criminal Code*, RSC 1985 (Can) s 675. |
| **New Zealand** | Against conviction and sentence, as of right.<br>Against certain pre trial decisions, with leave.<br>On a question of law, with leave (excludes questions arising from a jury verdict).<br>*Criminal Procedure Act 2011* (NZ) s 215, s 217, s 218, s 229, s 244, s 296. | Against certain pre trial decisions, with leave.<br>Against sentence, as of right.<br>On a question of law, with leave (includes questions arising from an acquittal, but not a jury verdict).<br>*Criminal Procedure Act 2011* (NZ) s 215, s 217, s 246, s 296. |

| | Grounds for appeal against conviction | Grounds for appeal against sentence |
|---|---|---|
| **England and Wales** | The Court of Appeal shall allow the appeal against conviction if they think the conviction is unsafe, and shall dismiss the appeal in any other case.<br>*Criminal Appeal Act 1968* (UK) s 2.<br>*Criminal Appeal (Northern Ireland) Act 1980* (UK) s 2. | If the Court of Appeal considers that the defendant should be sentenced differently, the court may quash any sentence or order which is the subject of the appeal, and in place of it pass such sentence or make such other order as it thinks appropriate and which the court below had power to make.<br>*Criminal Appeal Act 1968* (UK) s 11(3).<br>The Attorney General can, with leave, refer a sentence that appears to have been "unduly lenient", including one that was not authorised or required by law. The Court of Appeal can increase the sentence.<br>*Criminal Justice Act 1988* (UK) s 36. |
| **Northern Ireland** | | If the Court of Appeal considers that the defendant should be sentenced differently, the court may quash the sentence passed by the Crown Court and pass such other sentence authorised by law (whether more or less severe) in substitution.<br>*Criminal Appeal (Northern Ireland) Act 1980* (UK) s 10.<br>The Attorney General can, with leave, refer a sentence that appears to have been "unduly lenient", including one that was not authorised or required by law. The Court of Appeal can increase the sentence.<br>*Criminal Justice Act 1988* (UK) s 36. |
| **Scotland** | Miscarriage of justice, which may include:<br>▪ the existence and significance of evidence which was not heard at the original proceedings, and<br>▪ the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.<br>*Criminal Procedure (Scotland) Act 1995* (UK) s 106. | Miscarriage of justice (see grounds for appeals against conviction).<br>If the High Court thinks that, having regard to all the circumstances, including any additional evidence, a different sentence should have been passed, it may quash the sentence and in substitution pass a less or more severe sentence.<br>*Criminal Procedure (Scotland) Act 1995* (UK) s 106, s 118. |
| **Canada** | The grounds for appeal against conviction are similar to those in NSW. However, the proviso only applies to errors of law by the trial judge, and not to other grounds of appeal.<br>*Criminal Code*, RSC 1985 (Can) s 686(1). | The Court of Appeal shall consider the fitness of the sentence appealed against, and may vary the sentence, or dismiss the appeal.<br>*Criminal Code*, RSC 1985 (Can) s 687. |
| **New Zealand** | The court must allow an appeal if satisfied that—<br>(a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable;<br>(b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or<br>(c) in any case, a miscarriage of justice has occurred for any reason.<br>"Miscarriage of justice" means any error, irregularity, or occurrence in or in relation to or affecting the trial that—<br>(a) has created a real risk that the outcome of the trial was affected; or<br>(b) has resulted in an unfair trial or a trial that was a nullity.<br>*Criminal Procedure Act 2011* (NZ) s 232. | The court must allow the appeal if satisfied that—<br>(a) for any reason, there is an error in the sentence imposed on conviction; and<br>(b) a different sentence should be imposed.<br>*Criminal Procedure Act 2011* (NZ) s 250. |

# Bibliography


Alberta Law Reform Institute, *Criminal Appeal Procedures: Queen's Bench and Court of Appeal*, Final Report 101 (2012).

Auld, RE, *Review of the Criminal Courts of England and Wales*, Report (2001).

Beazley, M, "The Distinction Between Questions of Fact and Law: A Distinction Without an Answer?" (2013) 11 *The Judicial Review* 279.

Chief Justice of Supreme Court of NZ, *Submission to Criminal Procedure (Reform and Modernisation) Bill*, 25 February 2011.

Corns, C, *Public Prosecutions in Australia* (LawBook, 2014).

Cowdery, N, "Prosecution Appeals in NSW" in Corns C and Urbas G, *Criminal Appeals 1907-2007: Issues and Perspectives* (Federation Press, 2008) 75.

Craigie, C, *Advising on Merit Appeals: The Reasonable Prospect of Success* (Paper presented at NSW Bar Association seminar, Sydney, 15 September 2004)

Crime Prevention and Criminal Justice Unit, Ministry of Justice, *Departmental Report for the Justice and Electoral Committee: Criminal Procedure (Reform and Modernisation) Bill* (2011).

Donnelly, H, "Sentence Appeals in New South Wales: Success Rates and Recent Law" (Paper presented at the Sentencing Conference, Canberra, 8-10 February 2008).

Donnelly, H, Johns, R and Poletti, P, *Conviction Appeals in New South Wales*, Monograph 35 (Judicial Commission of NSW, 2011).

England and Wales, Ministry of Justice, Court Statistics Quarterly July to September 2013 (2013).

England and Wales, Ministry of Justice, *Court Statistics Quarterly January to March 2013* (2013).

England and Wales, Ministry of Justice, *Criminal Justice Statistics Quarterly Update to December 2012* (2013).

Great Britain, Lord Chancellor's Office, *Report of the Interdepartmental Committee on the Court of Criminal Appeal*, Cmnd 2755 (1965).

Haesler, A, "Appeals from the Local Court to the Supreme Court" (Paper presented at the Public Defenders Conference, August 2005).

Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation*, Discussion Paper (2010).

Howie, R and Johnson, P, LexisNexis, *Criminal Practice and Procedure NSW*, vol 1 (at Service 124).

Industrial Relations Commission of NSW, *Annual Report* (2012).

Justices Act Review Steering Committee, *Justices Act Review*, Discussion Paper (1991).

Justices Act Review Steering Committee, *Justices Act Review*, Report (1992).

Krasnostein, S and Freiberg, A, "Manifest Error: Grounds for Review?" (2012) 36 *Australian Bar Review* 54.

Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (2012).

Law Council of Australia, Submission, *SCAG Discussion Paper on Harmonisation of Criminal Appeals Legislation* (2010).

Legal Aid NSW, *Criminal Law Matters – When Legal Aid is Available* (2010).

Leverick, F, "The Return of the Unreasonable Jury: Rooney v HM Advocate" (2007) 11 *Edinburgh Law Review* 426.

LexisNexis Butterworths, *Richie's Uniform Civil Procedure NSW* (at 27 February 2014) [SCA s 75A.10]-[SCA s 75A.80].

McClellan, P and Beshara, C, *A Matter of Fact: The Origins and History of the NSW Court of Criminal Appeal*, Education Monograph 5 (Judicial Commission of NSW, 2013).

Ministry of Justice, "About the Criminal Cases Review Commission" (2013) <http://www.justice.gov.uk/about/criminal-cases-review-commission>.

Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code*, Discussion Paper (2003).

NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008).

NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013).

NSW Court of Criminal Appeal, *Practice Note No SC CCA 1 – Court of Criminal Appeal – General,* 30 September 2013.

NSW District Court, "Transcripts" (20 December 2013) <http://www.districtcourt.lawlink.nsw.gov.au/districtcourt/transcripts.html>.

NSW Environment Protection Authority, *EPA Prosecution Guidelines* (2013).

NSW Law Reform Commission, *Bail*, Report 133 (2012).

NSW Law Reform Commission, *Criminal Appeals: Preliminary Issues*, Question Paper 1 (2013).

NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013).

NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Companion Report 139-A (2013).

NSW Law Reform Commission, *Sentencing*, Report 139 (2013).

NSW Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court*, Report (2004).

NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007).

Odgers, S, "The Criminal Proviso: A Case for Reform?" (2008) 26 *Law in Context* 103.

Pattenden, R, *English Criminal Appeals 1844-1994* (Clarendon Press, 1996).

Preston, B and Donnelly, H, "The Establishment of an Environmental Crime Sentencing Database in New South Wales" (2008) 32 *Criminal Law Journal* 214.

Preston, B, "Principled Sentencing for Environmental Offences – Part 2: Sentencing Considerations and Options" (2007) 31 *Criminal Law Journal* 142.

Preston, B, "Sentencing for Environmental Crime" (2006) 18 *Judicial Officers' Bulletin* 41.

Quirk, H, "Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer" (2007) 70 *The Modern Law Review* 759.

Roberts, S, "'Unsafe' Convictions: Defining and Compensating Miscarriages of Justice" (2003) 66 *The Modern Law Review* 441.

Scott, M, "New Criminal Appeal Provisions: Back to the Future?" (1997) 30 *Scots Law Times* 249.

Spigelman, J, "Reasons for Judgment and the Rule of Law" (Paper delivered at the National Judicial College, Beijing, 10 November 2003 and the Judge's Training Institute, Shanghai, 17 November 2003).

Standing Council on Law and Justice, *Communiqué: Summary of Out of Session Decisions*, (November 2011).

Stark, F, "A Perfectly Unreasonable Decision: Jenkins v HM Advocate" (2012) 16 *Edinburgh Law Review* 86.

Steering Committee for the Review of Government Service Provision, *Report on Government Services 2014* (Productivity Commission, 2014).

Stephen, J F, *A General View of Criminal Law of England* (Macmillan, 2nd ed, 1890).

Supreme Court of Victoria, *Practice Direction No 2 of 2011 - Court of Appeal: Criminal Appeals*, 26 July 2012.

Thomson S, "Griffiths and the 'Spike': 'Rarity' and 'Restraint' in Crown Sentencing Appeals Re-assessed" (2011) 85 *Australian Law Journal* 761.

Victorian Parliament Law Reform Committee, *De Novo Appeals to the County Court*, Report (2006).

Wood, J, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008).

Woods, G, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (The Federation Press, 2002).

Woolf, H, *Access to Justice*, Final Report (1996).

WorkCover Authority of NSW, *Compliance Policy and Prosecution Guidelines* (2012).

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