NSW Law Reform Commission

Criminal Appeals – Preliminary Issues - Question Paper 1

Submission by the Criminal Law and Juvenile Justice Committees of the Law Society of New South Wales ("the Committees").

The Committees support the need for reform in this area of law. The Committees make the following submissions in response to the questions raised for comment in "Question Paper 1" issued by the NSWLRC.

1. Achieving the aims of our terms of reference

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

The Committees submit that appeal provisions should be codified. This can be done in a single Act or a number of Acts. There should also be a clear distinction made between appeals from Summary matters and appeals from Indictable matters.

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

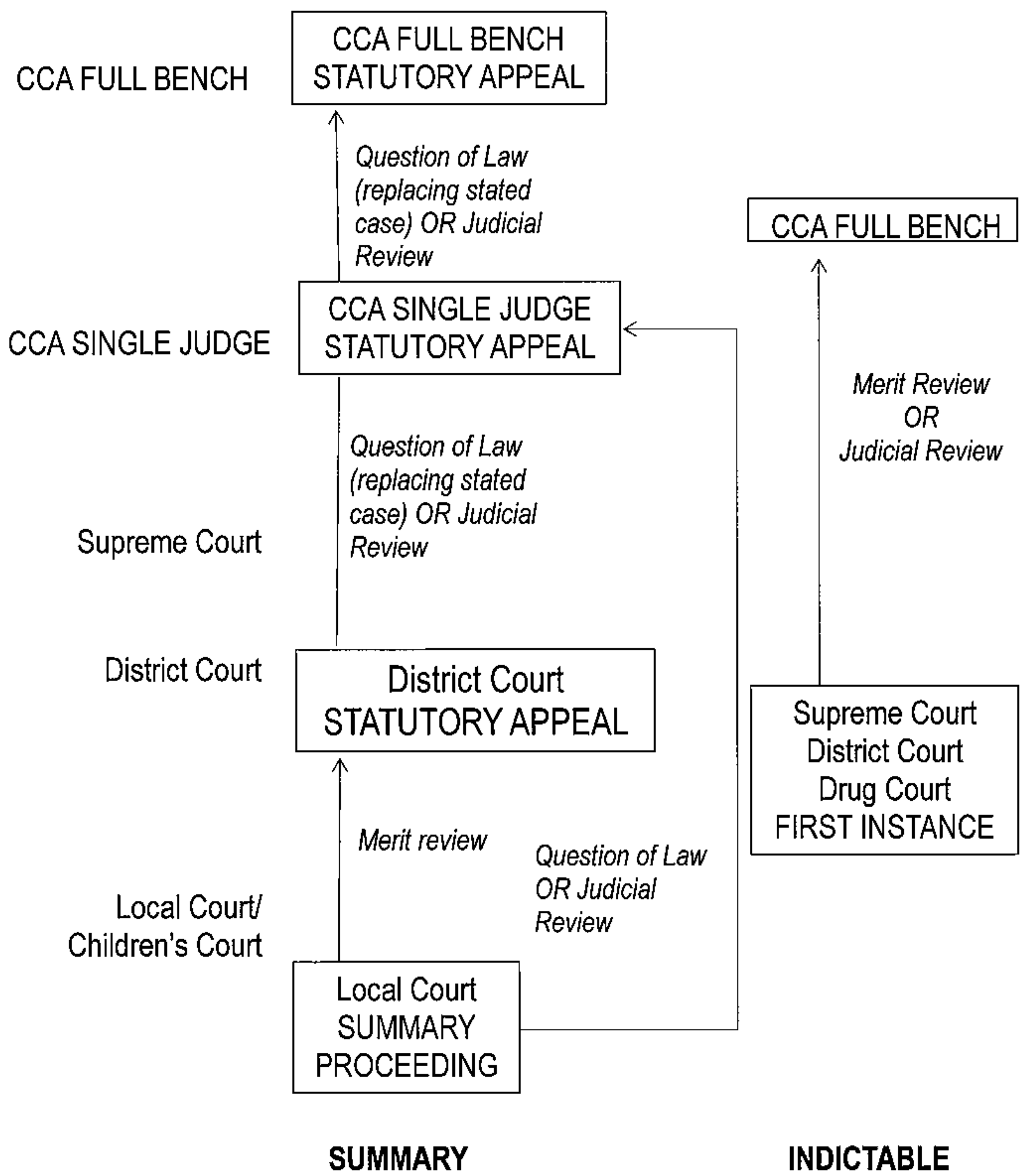
The focus should be on simplicity of process and fairness to parties.

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

Any changes made should be to simplify and consolidate the process.

There is a need to change the current anomalous situation in which both the Court of Appeal ("COA") and the Criminal Court of Appeal ("CCA") hear appeals relating to criminal matters. The Committees submit that the ultimate intermediary appellate court in criminal matters in NSW should be the NSW CCA. The Committees attach a diagram ("the diagram") which they submit may be a more rational and efficient regime for reasons set out in more detail in the Committees' response to Question 2.

The Committees suggest that Local Court appeals on merit are heard in the District Court and certain questions of law are heard by a single judge of the CCA.


CCA FULL BENCH
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CCA SINGLE JUDGE
CCA SINGLE JUDGE
STATUTORY APPEAL
Merit Review
OR
Judicial Review
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Review
Supreme Court
District Court
District Court
STATUTORY APPEAL
Supreme Court
District Court
Drug Court
FIRST INSTANCE
Merit review
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OR Judicial
Review
Local Court/
Children's Court
Local Court
SUMMARY
PROCEEDING
SUMMARY
INDICTABLE

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

The Committees submit that there are a number of aspects of the current criminal appeals framework that work well.

It is the Committees' view that aspects currently working well include the following:

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

However, while these aspects should be retained, there is a need for refinement and consolidation into a single statute.

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

The Committees do not anticipate problems arising in consolidating or simplifying the criminal appeals framework.

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

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

(a) Local Court

(b) Children's Court

(c) District Court

(d) Supreme Court

(e) Land and Environment Court

(f) Drug Court, and

(g) Industrial Court?

In response to Question 2(1) generally, the Committees support the vertical integration of all criminal appeals culminating in having the ultimate appeal heard in the CCA. The Committees refer to the diagram provided in response to Question 1(3).

In response to Question 2(1)(b), the Committees note the disparity in appeal processes in the Children's Court when the President is the sentencing judge. The Committees recommend this be changed to be consistent with any sentence ordered by the Chief Magistrate of the Local Court.

In relation to the Land and Environment Court and Industrial Court, the Committees are not in a position to make a comment.

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

The Committees submit that the law in relation to judicial review contains some complexities.

The Committees refer to the diagram provided in response to Question 1(3) regarding the structure the Committees seek for the courts to adopt in respect to judicial review.

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

In the Committees' experience this occurrence is highly uncommon having regard to the overall number of matters finalised in the Local Court.

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

No. For certain questions of law there should be a direct avenue of appeal to a single Judge of the CCA as set out in the diagram provided in response to Question 1(3).

With respect to District Court appeals (and Local Court appeals), in the Committees' view it is important that that there be a direct avenue for certain questions of law to be determined by a single Judge of the CCA. This is particularly so because it clarifies and declares the law and is binding on inferior Courts. See *Valentine v Eid* (1992) 27 NSWLR.

It is the view of the Committees that the current regime should be retained whereby appeals against conviction and sentence (on the merits) are heard in the District Court. There should remain, however, an avenue of appeal to the Supreme Court where a question of law is involved. The Committees submit that the current regime of such appeals found in the *Crimes (Appeal and Review) Act* ("*CARA*") (which sets out appeals as of right and appeals requiring leave) is broadly appropriate. This should be retained, but should also appear in a single statute.

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

These appeals should be heard by the CCA and the Committees refer to the diagram provided in response to Question 1(3).

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

The CCA should be invested with the current jurisdiction of the Court of Appeal with respect to criminal matters. This is consistent with the obiter of Chief Justice Spigelman in *R v King* [2003] NSWCCA 399 at [21].

(7) **In determining the avenues of appeal, should distinctions continue to be made between questions of law and questions of fact or mixed fact/law? If not, what alternatives are there?**

The Committees' view is that the common law currently operating is an appropriate analysis of the distinction between the current structures in place.

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

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

The Committees submit that criminal proceedings currently subject to the appellate process are broadly appropriate and should be retained.

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

The Committees submit that the current regime in place should be retained.

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

The Committees submit that the current regime in place should be retained.

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

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

The Committees submit that leave requirements are appropriate as they currently stand.

The Committees consider that the current certification procedure should be retained, although it sees merit in considering changes to s 5F (of the *Criminal Appeals Act 1912*) certification appeals.

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

The Committees support the current regime and are of the view that no limits (other than the current leave requirements) should be placed on the ability to appeal as of right from the Local Court to the District Court.

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

Should the case stated procedure from decisions of the District Court and the Land and Environment Court be changed or replaced? If so, how?

Yes. The "case stated" procedure should be replaced by a limited right of appeal on certain questions of law and certain issues of judicial review. The Committees refer to the diagram in response to Question 1(3).

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

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

In broad terms, the current time limits are appropriate. However, it should be noted that there is no time limit on appeals by the prosecution from local court determinations. Those appeals should be made consistent with time limits for current appeals generally.

(2) Should the District Court and the Land and Environment Court have the power to accept an application for appeal filed more than three months after the Local Court decision was made?

Yes. However, the Committees submit that if the application for appeal is filed more than three months after the Local Court decision was made, the appellant would have to demonstrate exceptional circumstances.

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

(a) a costs order imposed by the Local Court?

28 days (with the court's leave if after 28 days).

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

28 days (with the court's leave if after 28 days).

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

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

In relation to the test for an appeal against sentence from Local Court decisions, the Committees' position has not changed since it was invited to make submissions on the review of the *Crimes (Sentencing Procedure) Act 1999* (see Law Society submissions of 30 May, 6 August and 17 September 2012[1]). The Committees note that their position was the same as the position taken by a number of other stakeholders at the time in that the test for an appeal against sentence should not change.

[1] Law Society submission NSW Law Reform Commission Sentencing Review – Question Papers 1-4 dated 30 May 2012; Law Society submission NSW Law Reform Commission Sentencing Review – Question Papers 5-7 dated 6 August 2012; and Law Society submission NSW Law Reform Commission Sentencing Review – Question Papers 8-12 dated 17 September 2012

In relation to the test for an appeal against conviction from Local Court decisions, the Committees note that the regime was changed to allow conviction appeals based on the use of transcripts with leave given for fresh evidence. It is the Committees' view that the current regime is working well and should not be changed.

The Committees' view is that there is no evidence to support a change to the current approach to appeals from the Local Court to the District Court. Only a very small percentage of matters are appealed from the Local Court to the District Court, notwithstanding the huge volume of cases heard in the Local Court on a daily basis.

Statistics from BOCSAR (page 15 of the New South Wales Criminal Court Statistics 2012) indicate that the District Court dealt with approximately 6000 appeals, which represents only 5% of the total number of matters dealt with by the Local Court.

The statistics further indicate that the percentage of successful appeals to the District Court in 2012 was significant: over 60% of severity appeals, and over 25% of appeals against conviction and sentence. The Committees submit that these statistics indicate that the percentage of appeals is not large. Further, they indicate that a significant number of them lead to a successful result for the appellant.

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

No. The Committees' position is the same as that set out in the Committee's submissions to the review of the *Crimes (Sentencing Procedure) Act 1999* (see Law Society submissions of 30 May, 6 August and 17 September 2012). The Committees note that it would be impractical because of the much greater time that would be required from Magistrates and District Court Judges in crafting remarks on sentence and judgments on questions of law.

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

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

The test for an appeal against sentence and against conviction from decisions of the District and Supreme Courts should remain the same.

The Committees support the submission made by the National Criminal Law Liaison Committee of the Law Council to SCAG (as it was then) in 2010[2], which proposed the following provision:

[2] SCAG Discussion Paper on Harmonisation of Criminal Appeals Legislation to Department of Justice Victoria November 2010

Appeals against conviction

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

(2) Subject to ss(3), the Court must allow an appeal against a conviction if the Court is satisfied that:
   a. there was an incorrect decision on a question of law; or
   b. on any other laws whatsoever, there was a miscarriage of justice.

(3) If the Court is satisfied of a matter in ss(2) the Court may dismiss the appeal if the Court is satisfied that:
   a. the trial was fair; and
   b. the verdict would not have been different if the identified miscarriage of justice under ss(2)(a) or (b) had not occurred.

(2) Should the test for an appeal against sentence be changed to a single test of whether the sentence is manifestly excessive or manifestly inadequate?

No.

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

Yes.

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

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

No. The Committees refer to their responses to questions 7 and 8 above. The Committees are opposed to a single test including manifest excessiveness or leniency as it may result in unfairness and procedural problems.

10. Should fresh evidence be available on appeal?

(1) What should the powers of an appellate court be to receive fresh evidence or other material on the hearing of an appeal? Does this depend on the type of decision being appealed from?

The Committees' view is that in relation to sentence appeals from the Local Court to the District Court, appellants should be allowed to tender fresh evidence. The Committees submit that a significant number of matters in the Local Court involve persons who are unrepresented. These same persons then obtain representation on appeal. The opportunity to bring fresh evidence should therefore exist.

In relation to conviction appeals, the current regime is working well with leave being required to receive fresh evidence.

Having regard to District Court and Supreme Court matters being appealed to the CCA, the Committees are satisfied with the current regime.

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

The Committees are satisfied with the current regime and suggest it remains the same.

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

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

The Committees submit that in broad terms, the current powers of appeal are appropriate. The variation in powers is appropriate and consistent with the status of the superior Courts.

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

The Committees submit that in broad terms, the current limited rights are appropriate, particularly the rights found in s 11A, s 12 and s 20 of the *CARA*.

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

The Committees support the consideration for the limited right of the CCA to substitute a verdict (for an equal or less serious offence) with further consideration if the matter is to be submitted back to the District Court for sentencing.

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

What powers should courts have to award costs on appeal?

Costs should not be recoverable in a criminal matter.

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

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

With regard to matters on appeal from the Local Court to the District Court, s 63 of the *CARA* should apply. The Committees note that with appeals from the Local Court to the District Court, the execution of any

sentence or penalty imposed is stayed pending the final determination of the appeal.

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

The Committees are of the view that there does not appear to be a problem with s 63 and s 69 of the *CARA*. However, there is a need for recognition of what occurs when appeals are finalised in regional/country NSW.

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

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

The Committees' view is that s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) may be too narrow in its terms. It is the Committees' view also that there should be a comprehensive examination of the 'slip rule' for all criminal courts.

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

It is the Committees' view that all courts should have the power to reopen proceedings when patent errors have been established.

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

The Committees submit that relevant statistics are required to properly answer this question. While these statistics are not available to the Committees, they are aware that in the Local Court an application to reopen proceedings can be made both formally (written application) or informally (on the day of sentencing) when the error is recognised.

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

(1) How often is an application made to the Local Court under s 4 of the *Crimes (Appeal and Review) Act 2001* (NSW) for annulment of a conviction or sentence?

Applications to the Local Court under s 4 of the *CARA* for annulment of a conviction or sentence are made regularly.

The Committees are satisfied with s 4 of the *CARA*, however submit that there should be a provision to allow an oral application to be made without the need for a written application. There should be provision made to allow an oral application on the same day that a conviction is entered.

The current terms of s 8 in CARA are supported by the Committees. The Committees submit that the interests of justice play an important role in the fair and reasonable determination of s 4 applications.

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

The Committees refer to their answer to Question 15(1) above in that the interests of justice are an important consideration for s 4 applications.

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

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

Appeals under the *Crimes (Forensic Procedures) Act 2000* currently proceed only directly to the Supreme Court. The Committees' view is that as quasi criminal proceedings they should proceed from the Local Court to the District Court as set out in the diagram in response to Question 1(3).