NEW SOUTH WALES

The Chief Magistrate of the Local Court

13 September 2013

The Hon James Wood AO QC
Chairperson
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Chairperson

Criminal Appeals – Question Paper 1

I am writing on behalf of the Local Court in response to the Commission's invitation to provide a submission on the issues raised in the above Question Paper. My comments are limited to the following areas of the paper that are of relevance to the Local Court of New South Wales:

1. Limits upon appeals as of right from Local Court decisions to the District Court

As the Commission is aware, s 11 of the *Crimes (Appeal and Review) Act 2001* ('CARA') presently allows for an unconstrained right of a person sentenced by the Local Court to appeal to the District Court against their conviction or sentence (or both), without any requirement to obtain leave or to show error on the part of the magistrate. An appeal is to be dealt with by way of rehearing in accordance with s 17 (in the case of an appeal against sentence) or s 18 (in the case of an appeal against conviction).

When considered in the context of the Local Court's annual criminal caseload, relatively few appeals are made against sentence and/or conviction. Statistics published by the NSW Bureau of Crime Statistics and Research (BOCSAR) indicate that in 2012, the District Court finalised 4,733 appeals against the severity of a sentence, 1,385 appeals against conviction and sentence, and 30 appeals against the inadequacy of a sentence.[1] In the same period, the Local Court determined 239,858 charges in respect of 108,528 individuals.[2]

However, this is still a considerably higher proportion of appeals from the decisions of a magistrates' court in criminal proceedings than that of any other Australian jurisdiction. This appears to be a product of the expansive nature of the present right of appeal - with the exception of Victoria, all other jurisdictions require an appellant to identify grounds for an appeal and/or demonstrate error in the making of the original decision. The enclosed table (Attachment A) summarises briefly the appeal avenue from magistrates' court decisions across Australia, together with data from the Productivity Commission's

[1] NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics 2012*, Table 3.16
[2] Note 1 above, Table 1.1

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2013 *Report on Government Services* as to the criminal caseloads of magistrates' courts and the number of criminal appeals.

I do not propose to comment on the right to appeal to the District Court against a conviction imposed in the Local Court, other than to note the conclusion of the 2008 statutory review of the CARA that such an avenue of appeal should not be restricted. However, I am firmly of the view that the right to appeal a sentence should be subject to appropriate limitations, as the breadth of the current right of appeal undoubtedly impacts upon the efficiency of the criminal justice system but moreover has the potential to undermine its integrity. In both respects, a number of aspects of the nature of appeal mechanism itself, as well as its application in practice, are of concern.

The nature of the current appeal mechanism

Foremost among these is that the unlimited right of appeal against sentence, the determination of which is by way of a rehearing, enables an offender to pursue an appeal on a purely strategic basis in the hope of obtaining a less onerous outcome. As was noted in the report on the 2008 statutory review of the CARA:

> The absence of any requirement to establish that a sentence is manifestly excessive or that there was error on the part of the magistrate may encourage speculative and unmeritorious appeals.[3]

Under the current system an appellant is afforded the opportunity to gain a more favourable outcome while having nothing to lose in doing so. If the judge in the exercise of their discretion is minded to impose a lesser sentence upon a rehearing of the matter, that decision is simply substituted for that of the magistrate. However, if the judge is minded to impose an increased sentence, the practice of giving a *Parker* direction[4] enables the appellant to withdraw their appeal without adverse consequence to them.

The prospect of there being a different result on appeal is heightened insofar as the determination of the appeal is by way of rehearing. In this regard, the Court of Criminal Appeal has described the task of a District Court judge hearing an appeal from a Local Court decision as being to:

> ... decide for himself 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 should either reduce or increase the penalty imposed by the magistrate; it is also inappropriate to consider only whether he should interfere with that penalty. He must in every case proceed to consider for himself in the exercise of his own discretion what penalty should be imposed. That is not to say that he cannot agree with what the magistrate has done, but he may do so only if such penalty imposed by the magistrate accords with his own independent assessment of the circumstances of the case.[5]

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[3] NSW Attorney General's Department, *Statutory Review of the Crimes (Appeal and Review) Act 2001* (August 2008), 31

[4] That is, a warning that the judge is contemplating an increase of the sentence under appeal, in accordance with an established practice of the District Court that should rarely, if ever, be departed from: *Parker v DPP* (1992) 28 NSWLR 282 at 295

[5] *Budget Nursery Pty Ltd v Commissioner of Taxation* (1989) 42 A Crim R 81 at 87. The decision specifically relates to an appeal under the predecessor to the CARA, the *Justices Act 1902*, the nature of which was effectively the same.

The corollary is that the judge on appeal, in the exercise of their discretion, may impose a different sentence notwithstanding that the sentence originally imposed was within the range of sentences that may be appropriate for the offence in question. In this regard, the current appeal process under s 11 does not accord with repeated statements by the High Court that, in the absence of legislative pronouncement, there is no single correct sentence for a given offence but a spectrum across which a sentence may appropriately range.[6] However, unlike the mechanism governing appeals from the District Court to the Court of Criminal Appeal, there is no limitation preventing intervention simply on the basis the appeal court would have imposed a different sentence - indeed, the judge on appeal is required to "consider for himself in the exercise of his own discretion what penalty should be imposed".

The Court's preliminary submission to the Commission's Sentencing reference noted the historical reasons why this approach was utilised in the days of the Courts of Petty Sessions, and drew attention to the lack of a compelling rationale for maintaining an approach based on circumstances that have since changed. Those comments are equally pertinent to this reference.

Trends in appeals against sentence

In circumstances where the nature of the appeal mechanism does not turn upon the correctness of the magistrate's original decision on sentence but involves a fresh exercising of the sentencing discretion, it is therefore not surprising that the majority of appeals against the severity of sentence (in 2012, 60.8%)[7] result in the offender being re-sentenced. More significant to the efficiency and integrity of the appeal process is the question of what sentences are being imposed when a severity appeal is upheld.

For that purpose, this office obtained data on 2012 appeal results for selected offences[8] from BOCSAR, a summary of which is enclosed (Attachment B). Also enclosed is a summary of earlier BOCSAR data for the financial year 2010/11 in relation to appeals against sentences for certain domestic violence offences (Attachment C).

Absent instances of patent sentencing error, the data, of itself, cannot identify whether a particular sentence (whether imposed in the Local Court or the District Court) is within the range of sentences that may be appropriate for a given offence. However, the observation may be made that within the results there is a cohort of matters in which the new sentence imposed on appeal was not significantly different to that original imposed in the Local Court. For example:

- In relation to domestic violence offences (Attachment C), there were 155 matters where a custodial sentence was imposed in the Local Court and a new custodial sentence was substituted on appeal. The sentence imposed on appeal in 54 (34.8%) of those effectively amounted to a reduction of the original Local Court sentence of 30 percent or less.

- In relation to driving with a low-range PCA (Attachment B), 181 of 244 appeal matters (74.2%) resulted in the imposition of a new sentence despite the offence

[6] See for example *Pearce v R* [1998] HCA 57 at [46]; *Markarian v R* [2005] HCA 25 at [27]
[7] Note 1 above
[8] Due to the detailed nature of the request, it was not feasible to obtain data on a wider basis. See Attachment B as to the selection of particular offences.

being a fine-only offence with a limited sentencing scope, the maximum available penalty being $1,100 for a first offence or $2,200 for a second or subsequent offence. Of those 181 matters, 42 involved a change to the fine amount.

As a result, it seems reasonable to surmise that if an avenue of appeal based upon manifest excess or inadequacy was to be adopted, there would be a significant class of matters that presently may result in a different outcome on appeal where appellate intervention would not likely be warranted.

It is also apparent from the data that in many instances, the result on appeal was significantly different to the sentence originally imposed. Again, in view of the nature of the task on appeal, this does not necessarily indicate error on the part of the original decision maker; rather, in some instances the overall trends apparent in the results for some offences are difficult to reconcile with applicable legislative provisions or case law. For instance:

- PCA offences: There is a perception amongst magistrates that the use of s 10 of the *Crimes (Sentencing Procedure) Act 1999* is almost routine in severity appeals for low- and mid-range PCA offences, despite factors such as:
  - The limits set out in s 10(3) as to the circumstances in which such an order will be appropriate;
  - The legislative intention that those convicted of a PCA offence are to be subject to a mandatory minimum period of licence disqualification; and
  - The generally instructive statements of the Court of Criminal Appeal as to the seriousness of PCA offences in its Guideline Judgment on high range PCA offences,[9] which was handed down in circumstances where concerns had been raised as to the over-utilisation of s 10 for PCA offences.

  The data on low- and mid-range PCA offences set out in Attachment B clearly reflects the perceived pattern of the regular application of s 10 on appeal, this being the result in:

  - 110 matters (52.4% of all appeals, or 60.8% of all appeals where a new sentence was imposed) for low-range PCA offences, and
  - 97 matters (24.3% of all appeals, or 33.2% of all matters where a new sentence was imposed) for mid-range PCA offences.

  The most likely explanation for such a trend is that mandatory provisions in the road transport legislation for a period of licence disqualification for such offences are avoided by a finding of guilt without conviction. However, if that is the case, it does not accord well with general statement of Howie J in the Guideline Judgment that:

  > ... the disqualification of a person from driving may have a very significant impact upon the offender's ability to obtain or retain employment or may interfere with the offender's capacity to function in the community.... However, if a conviction is warranted because of the seriousness of the offence, the court can rarely refuse to take that course simply because of its impact upon the offender's licence.[10]

[9] [2004] NSWCCA 303
[10] Note 9 above at [145]

- Approach to custodial sentences: observationally, while the term of a sentence of imprisonment imposed in the Local Court will often be reduced on appeal, another not uncommon practice is for the judge on appeal to increase the term (sometimes significantly) and then utilise an alternative custodial order, most often a suspended sentence. The basis for such an approach may be that an increase to the term has the effect of counteracting the leniency involved in suspending a sentence. Another possibility is that the outcome is framed as a 'last chance' for an offender at a 'crossroads' in their life to avoid serving a gaol sentence provided that they comply with a good behaviour bond for an extended period of time.[11]

  Whatever the rationale, such an outcome can on its face be difficult to reconcile with the approach to imposing a custodial sentence set out by the Court of Criminal Appeal in *R v Zamagias* [2002] NSWCCA 17, which requires the length of a sentence of imprisonment to be determined prior to the manner in which it is to be served. Thus, the "term of the sentence cannot be influenced by what order might be made after the sentence has been imposed"[12], such as by increasing the term because it is to be suspended. The importance of first determining that no sentence other than one of imprisonment is appropriate then fixing the term prior to a decision to suspend the sentence is apparent in that, although such a course may seem to have an inherent degree of mercy to it, the prospective consequence in the event of a breach is that the offender will be required to spend more time in prison than they would have if the original sentence had remained in place.

  The data for the selected offences in Attachments B and C lends support to the observation that it is not uncommon for a severity appeal to result in the imposition of an increased term of imprisonment that is suspended or to be served by way of an alternative order such as an ICO, in contrast to the other common outcome of a reduction of the term where the form of custody remains the same as was originally imposed.

  This trend was most marked in the case of appeals against sentence for reckless wounding offences, although the number of such matters was relatively small. There were 21 matters where a custodial sentence was imposed in the Local Court and a new custodial sentence was substituted on appeal. These were almost equally split between the judge on appeal reducing the term of imprisonment and requiring it to be served in full-time custody (11 matters), and increasing the term of imprisonment but suspending the sentence or requiring it to be served by way of an ICO (10 matters). Interestingly:

  - In matters where the term of a custodial sentence was reduced, the average total term originally imposed in the Local Court was 14.9 months and the average total term substituted by the District Court was 8.8 months; whereas
  - In matters where the term of imprisonment was increased but an alternative to full-time custody was imposed, the results were almost the opposite. The average total term originally imposed in the Local Court was 7.3 months and the average total term substituted by the District Court was 15 months.

- Standard non-parole period offences: As the Commission is aware, a number of offences to which the standard non-parole period scheme applies are also Table matters capable of being dealt with to finality in the Local Court. As has been the

[11] For example, see *Durante v R* [2008] NSWDC 350
[12] *R v Zamagias* [2002] NSWCCA 17 at [28]

case for some years, the majority of such matters are determined to finality in the Local Court[13] and magistrates regularly encounter offences that are assessed upon sentencing as being at least at the middle of the range of objective seriousness. To the extent that the Local Court's general jurisdictional limit of two years for a single offence does not allow for a non-parole period even approaching the SNPP to be imposed, any sentence imposed in the Local Court necessarily amounts to a significant departure from the SNPP of three years.

Although the scheme does not apply to matters dealt with summarily, and even where an offence is not at the middle of the range of objective seriousness, the existence of a standard non-parole period for an offence is instructive as to the seriousness with which the legislature intended instances of such offences to be regarded. Upon the introduction of the scheme, the then-Attorney General described it as "a regime of standard non-parole periods for a specified number of serious offences" in order to "ensure not only greater consistency in sentencing but also that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime."[14]

Against that background, it is interesting to observe the results of severity appeals for sentences imposed in the Local Court for reckless wounding offences. The majority were successful (26 of 35, or 74.3%), resulting in the substitution of an often considerably more lenient sentence. Of the successful appeals, eleven involved the imposition of a lesser term of imprisonment ranging from a minimum of 3 months to a maximum of 15 months imprisonment. A further three offenders received a good behaviour bond in place of a custodial sentence and one matter recorded the result of 'penalty varied – no penalty' in place of a sentence of imprisonment.

The role of the appeal process in informing sentencing practice

To the extent that there can be a disparity between outcomes on appeal and applicable legislative provisions or case law, the clarity of sentencing practice (and more generally, the integrity of the criminal justice system itself) is not assisted. Moreover, to the extent that the current mechanism requires a judge's independent assessment of the circumstances of a matter without consideration of the appropriateness of the magistrate's original sentence, there is little instructive value in, or guidance provided by, the current appeal process.

When a magistrate is informed of the outcome of an appeal, ordinarily the only detail provided is the new sentence imposed (where applicable). Limited (if any) reasons are made available, although a transcript may be obtained. Even then, the lack of educative value in the process itself can be compounded by a lack of articulation of cogent reasons for imposing a particular sentence. By way of example, the following extract is from a transcript the hearing of a severity appeal in respect of a sentence of home detention imposed on an offender in the Local Court, where a suspended sentence was substituted but the term of the sentence remained the same:

> ... 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.

[13] Data from BOCSAR indicates that in 2012, the Local Court finalised 2,113 of 2,993 (70.6%) Table offences where a SNPP applies if dealt with on indictment.
[14] *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5815 (B Debus)

> 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 that I make is I allow the appeal against sentence.

Options for limiting appeals as of right

In light of the above observations, I am of the view that the current right to appeal to the District Court against a sentence imposed in the Local Court should be limited and the preferable manner for doing so is to amend the CARA to require a demonstration that a sentence is manifestly excessive (or inadequate).

As described recently by the Court of Criminal Appeal in *Pattalis v R*,[15] restating what was said in *Vuni v Regina*,[16] this would entail:

- A demonstration by the appellant that the sentence was "unreasonable or plainly unjust" in a context where "there is no single correct sentence and... judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle"; and
- Recognition that an appellate court may not intervene to substitute its own decision merely because it would have exercised its discretion differently.

There would be several benefits for moving to an appeal mechanism based upon consideration of manifest excess or inadequacy of sentence, rather than maintaining the current approach or alternatively limiting the right of appeal in another way such as requiring the identification of particular or more technical errors. Such an approach would:

- Require the ultimate focus of the appeal to be directed to the result of the original proceedings (that is, the patent details of the sentence originally imposed), rather than at establishing particular errors that might result in the exercise of discretion to make a comparatively minor adjustment to a sentence;
- In practical terms, be inherently better adapted to avoiding undue complexity in the appeal process. As the High Court commented in *Hili v R; Jones v R*, a finding of manifest excess or inadequacy of sentence as one that "does not admit of lengthy exposition", but is drawn from a consideration of all matters relevant to the fixing of a sentence and warrants intervention only where "in all the circumstances, the appellate court concludes that there must have been some misapplication of principle".[17] This may assist in addressing any concern that defendants in the Local Court who are not legally represented may face barriers in pursuing an appeal due to

[15] [2013] NSWCCA 171 at [20]
[16] Note 15 above at [33]
[17] [2010] HCA 45 at [59]-[60]

difficulties in identifying and framing arguments in relation to the contended misapplication of specific sentencing principles;

- Reasonably be expected to promote greater efficiency in the criminal justice system insofar as it would limit the capacity for "speculative and unmeritorious appeals" to be pursued, while still appropriately maintaining an appellant's ability to obtain relief where a sentence falls outside the parameters of the range of sentences properly available for a given offence; and
- Be more consistent with the appeal mechanisms that lie from decisions of higher courts and magistrates' courts in other Australian jurisdictions than the current unfettered right of appeal.

2. Appeals from decisions of the Local Court to the Supreme Court

Section 53(1) of the CARA provides that a person convicted or sentenced in the Local Court may, with leave of the Supreme Court, appeal to the Supreme Court on a ground that involves a question of fact or a mixed question of fact or law, thus overlapping with the route of appeal to the District Court under s 11.

As far as I am aware, s 53(1) is not frequently used but appears to have been carried over from a similar provision in the *Justices Act 1902*. I am not in a position to comment upon its utility, although the then-Deputy Senior Public Defender Andrew Haesler SC has noted that such an appeal may be pursued in circumstances including where a party may wish to seek a decision that will establish a precedent or bring a decisive end to protracted proceedings.[18]

However, as a matter of practicality, if amendment to the avenue of appeal in s 11 in respect of an appeal against sentence is contemplated in a manner such as that suggested above, it would seem sensible to give consideration to the nature and extent of the appeal mechanism in s 53(1), particularly insofar as it allows for an appeal against sentence on a question of fact.

3. Annulment of conviction or sentence in the Local Court

The Question Paper also raises the issue of the circumstances in which the Local Court should be required to annul a conviction or sentence under s 4 of the CARA.

The Court has encountered some difficulties in the operation of s 4 and recently raised with the Attorney General several concerns in regard to the circumstances in which an application is available. As a result, proposed amendments to s 4 have been included in the Crimes and Courts Legislation Amendment Bill 2013, which is expected to come before the Parliament in the near future. These will:

- Clarify subsection (1) to indicate that an application for the annulment of a conviction or sentence by a defendant may only be made if (a) in the case of a conviction - the defendant was not in appearance when the conviction was made or (b) in the case of a sentence – the defendant was not in appearance when the sentence was imposed; and

[18] A Haesler SC, 'Appeals from the Local Court to the Supreme Court' (August 2005), available at http://www.publicdefenders.lawlink.nsw.gov.au/pdo/public_defenders_appeals_lc_to_sc.html

- Add a new subsection (1B) that precludes the making of an annulment application in respect of a conviction or sentence in circumstances where the defendant has elected to submit a written notice of pleading and have the matter finalised in their absence.

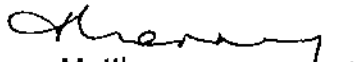
One further issue is the effectiveness of subsection (3) in relation to the making of a second or subsequent annulment application. It presently provides that a person may not make more than one application under s 4 in relation to the same matter, except with the leave of the Court.

The difficulty is that, in practice, the requirement to obtain the leave of the court does not act as a filter that operates to limit unmeritorious applications. There is no legislative guidance as to what is to be considered when determining the question of leave, although the equivalent provision under the *Justices Act 1902* provided simply that leave could be granted where the Court was "of the opinion that there are sufficient grounds for the application". The current approach is essentially the same insofar as consideration of whether to grant leave effectively requires consideration of the matters in support of the application itself, with the result that the Court may as well be determining the substantive application.

In view of the observed frequency with which repeat annulment applications are made, this has both the potential to increase the procedural complexity of individual matters[19] and the timeliness with which they are able to be finalised, as well more generally impacting the efficient management of the Court's criminal caseload. It would thus be of assistance for consideration to be given to possible measures that more effectively limit the making of unmeritorious repeat applications.

Thank you for the opportunity to make a submission to this reference. Should the Commission require any further information or wish to discuss any of the above issues further, please do not hesitate to contact this office.

Yours sincerely,



Jane Mottley
Acting Chief Magistrate

[19] For example, see *R v Parker* [2012] NSWDC 259

Attachment A

Appeals from decisions of magistrates' courts in criminal proceedings – Australian States and Territories, 2011-12

	Nature of appeal	Magistrates' court criminal matters[1]		Criminal appeals[2]	
		Lodged	*Finalised*	*Lodged*	*Finalised*
NSW	A person convicted by the Local Court may appeal to the District Court against the conviction or sentence or both: s 11(1) *Crimes (Appeal and Review) Act 2001* **Conviction**: Leave to appeal is required if the conviction was imposed in the person's absence or following a plea of guilty, and cannot be made if the person is entitled to make an application for annulment under s 4: s 12	146,451	153,646	6,729	6,916
Vic	A person convicted by the Magistrates' Court of an offence in criminal proceedings may appeal to the County Court against the conviction and sentence, or the sentence alone: s 254 *Criminal Procedure Act 2009*	172,323	180,754	2,697	2,794
Qld	A person may appeal to the District Court by filing a notice of appeal that sets out the appeal grounds: s 222 *Justices Act 1886* **Sentence**: where the defendant pleaded guilty to or admitted the truth of the complaint, they can only appeal a sentence on the ground it was excessive or inadequate: s 222(2)(c)	183,717	183,963	529	441
SA	A person may appeal a judgment given in criminal proceedings in accordance with the rules of the appellate court: s 42(1) *Magistrates Court Act 1991* A notice of appeal must state in detail the grounds of appeal: r 282(2)(c) Supreme Court Civil Rules 2006 [being the applicable 'rules of court']	54,826	55,516	296	311

[1] Productivity Commission, *Report on Government Services* 2013, Table 7A.1 – Criminal lodgements and Table 7A.5 – Criminal finalisations, magistrates' courts only
[2] Note 1 above, Table 7A.1 – Criminal lodgements and Table 7A.5 – Criminal finalisations, supreme courts appeals or district/county appeals (as applicable according to jurisdiction). Note this includes all lodgements for a given court thus in some instances may capture other appeals in addition to those from a magistrates' court.

	Nature of appeal	Magistrates' court criminal matters		Criminal appeals	
		Lodged	*Finalised*	*Lodged*	*Finalised*
WA	A person aggrieved by a decision of a court of summary jurisdiction may appeal to the Supreme Court against the decision: s 7(1) *Criminal Appeals Act 2004* **Conviction**: An appeal may be made on the ground that the court of summary jurisdiction made an error of law or fact, or of both law and fact and even if the decision was made after a plea of guilty or an admission of the truth of any matter: s 8 **Sentence**: An appeal may be made on the ground that the court of summary jurisdiction imposed a sentence that was inadequate or excessive: s 8 However, the leave of the Supreme Court is required for each ground of appeal, which is not to be given unless it is satisfied the ground has a reasonable prospect of succeeding: s 9	86,303	88,845	405	366
Tas	A person aggrieved by an order of a justice may move the Supreme Court to review the order, by way of a notice that indicates an error or mistake on a matter of fact or law or both: s 107 *Justices Act 1959*	19,756	19,223	28	26
ACT	A person convicted of an offence by the Magistrates Court may appeal against the conviction to the Supreme Court or the sentence or penalty imposed: s 208 *Magistrates Court Act 1930* The notice of appeal is to briefly specify the grounds of appeal, including any grounds on which it is claimed there is an error of law: r 5101(1) Court Procedure Rules 2006	5,429	5,635	115	119
NT	A person may appeal to the Supreme Court from a conviction or order of the Magistrates Court on a ground which involves sentence or an error or mistake on a question of fact or law or both: s 163 *Justices Act* There is to be a written notice of appeal that states the nature and grounds of the appeal: s 172	13,743	15,123	21	24

Attachment B

Appeal results 2012 – selected offences

The following is a collation of data obtained from the NSW Bureau of Crime Statistics and Research on the number of appeals finalised in the District Court in 2012 relating to sentences imposed in the Local Court for particular offences:

- Reckless wounding – s 35(4) *Crimes Act 1900*
- Possession/use of a prohibited firearm/pistol – s 7 *Firearms Act 1996*
- Dangerous driving occasioning grievous bodily harm – s 52A(3) *Crimes Act 1900*
- Negligent driving occasioning grievous bodily harm – s 42(1)(b) *Road Transport (Safety and Traffic Management) Act 1999*
- Drive with a low range PCA – s 9(2) *Road Transport (Safety and Traffic Management) Act 1999*
- Drive with a mid range PCA – s 9(3) *Road Transport (Safety and Traffic Management) Act 1999*

Each offence was selected on the basis that:

- It is frequently dealt with in the Local Court;
- A standard non-parole period applies if dealt with on indictment; or
- A guideline judgment applies in relation to sentencing for the offence (or a similar offence with common characteristics).

Results for each offence are grouped on a per person rather than per offence basis to take account of the overall sentence in instances where a person was sentenced for more than one count of the same offence.

However, as the data relates only to appeals against sentence for specific offences, it will not indicate where an offender may have appealed against sentences imposed for multiple offences including offences other than the selected offences. This might be a factor in some results, such as where the commencement date of a sentence has been varied on appeal.

The following categories are used:

LC	Local Court
DC	District Court
Custodial	Full time imprisonment
	Home detention
	Intensive Correction Order
	Section 12 suspended sentence
Non-custodial	Community Service Order
	Section 9 Good Behaviour Bond (GBB)
	Fine
Non-conviction/ nominal penalty	Section 10 bond
	Section 10 dismissal
	Section 10A conviction without further penalty
	Rising of the court
	Matters recorded as 'Penalty varied' where 'no penalty' indicated

Reckless wounding – s 35(4), *Crimes Act 1900*

Maximum penalty: 7 years
SNPP: 3 years
Local Court jurisdictional limit: 2 years

Appeals against sentence

Severity	35
Inadequacy	0
TOTAL	**35**

Appeal outcomes

Penalty confirmed	6	17.1%
Penalty confirmed - commencement date varied	3	8.6%
Penalty varied	26	74.3%
TOTAL	**35**	**100.0%**

Varied outcomes

		% of varied outcomes (n = 26)	% of all outcomes (n = 35)
LC custodial – DC custodial	21	80.8%	60.0%
LC custodial - DC non-custodial	3	11.5%	8.6%
LC custodial – DC non-conviction/nominal penalty	1	3.8%	2.9%
Subtotal	*25*	*96.2%*	*71.4%*
LC non-custodial - DC non-custodial	1	3.8%	2.9%
TOTAL	**26**	**100.0%**	**74.3%**

Data source: NSW Bureau of Crime Statistics and Research

Reckless wounding – s 35(4), *Crimes Act 1900*

Varied outcomes – custodial sentence imposed in Local Court

DC custodial		**% LC custodial outcomes (n = 25)**	**% all varied outcomes (n = 26)**
Form same, term lower	11	44.0%	42.3%
Form lower, term higher - suspended sentence - ICO	10 *9* *1*	40.0% *36.0%* *4.0%*	38.5% *34.6%* *3.8%*
Subtotal	*21*	*84.0%*	*80.8%*
DC non-custodial			
GBB (with or without supervision)	3	12.0%	11.5%
DC non-conviction/nominal penalty	*1*	*4.0%*	*3.8%*
TOTAL	**25**	**100.0%**	**96.2%**

LC custodial to DC custodial

Form same, term lower
Average LC total term – 14.9 months
Average DC revised total term – 8.8 months
Average reduction in total term – 39.3%

LC sentence	*DC sentence*	*% reduction*
9	8	11.1%
14	12	14.3%
18	15	16.7%
12	9	25.0%
18	12	33.3%
10	6	40.0%
24	14	41.7%
6	3	50.0%
12	5	58.3%
17	7	58.8%
24	6	75.0%

Form lower, term higher
Average LC total term – 7.3 months
Average DC revised term – 15 months
Average increase in term – 126.3%

LC sentence	*DC sentence*	*% increase*
9	12	33.3%
12	18	50.0%
13.5	24	77.8%
5	9	80.0%
6	12	100.0%
5	12	140.0%
5	12	140.0%
9	24	166.7%
4	12	200.0%
4	15	275.0%

Data source: NSW Bureau of Crime Statistics and Research

Unauthorised possession/use of prohibited firearm/pistol - s7, *Firearms Act 1996*

Maximum penalty: 14 years
SNPP: 3 years
Local Court jurisdictional limit: 2 years

Appeals against sentence

Severity	18
Inadequacy	0
TOTAL	**18**

Appeal outcomes

Penalty confirmed	7	38.9%
Penalty varied	11	61.1%
TOTAL	**18**	**100.0%**

Varied outcomes

		% of varied outcomes (n = 11)	% of all outcomes (n = 18)
LC custodial – DC custodial	8	72.7%	44.4%
LC custodial - DC non-custodial	1	9.1%	5.6%
LC custodial – DC non-conviction/nominal penalty	1	9.1%	5.6%
Subtotal	*10*	*90.9%*	*55.6%*
LC non-custodial - DC non-conviction/nominal penalty	1	9.1%	5.6%
TOTAL	**11**	**100.0%**	**61.2%**

Data source: NSW Bureau of Crime Statistics and Research

Unauthorised possession/use of prohibited firearm/pistol - s7, *Firearms Act 1996*

Varied outcomes – custodial sentence imposed in Local Court

DC custodial		% LC custodial outcomes (n = 8)	% all varied outcomes (n = 11)
Form same, term lower	3	37.5%	27.3%
Form lower, term higher	3	37.5%	27.3%
- suspended sentence	*3*	*37.5%*	*27.3%*
Other[1]	2	25.0%	18.2%
Subtotal	*6*	*75.0%*	*54.5%*
DC non-custodial			
GBB (with or without supervision)	1	12.5%	9.1%
DC non-conviction/nominal penalty			
Rising of the court	1	12.5%	9.1%
TOTAL	**8**	**100.0%**	**72.7%**

LC custodial to DC custodial

Form same, term lower
Average LC total term – 16 months
Average DC revised total term – 11 months
Average reduction in total term – 30.6%

LC sentence	*DC sentence*	*% reduction*
24	18	25.0%
12	9	25.0%
12	7	41.7%

Form lower, term higher
Average LC total term – 7 months
Average DC revised term – 11 months
Average increase in term – 81.7%

LC sentence	*DC sentence*	*% increase*
10	12	20.0%
6	12	100.0%
4	9	125.0%

[1] District Court custodial appeal outcomes listed as 'Other' - (a) No change apparent despite result being listed as 'varied' (b) Offender's appeal related to two concurrent sentences of imprisonment: 1st offence - term of imprisonment was not varied; 2nd offence - good behaviour bond substituted for term of imprisonment.

Data source: NSW Bureau of Crime Statistics and Research

Dangerous driving occasioning grievous bodily harm – s 52A(3), *Crimes Act 1900*

Maximum penalty: 7 years
Local Court jurisdictional limit: 18 months [up to 20/3/2012]/ 2 years [from 21/3/2012]
Guideline judgment in *R v Whyte* (2002) 55 NSWLR 252:

> "A custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgment": at [214].
>
> "Where the offender's moral culpability is high, a full-time custodial head sentence of less than … two years (in the case of grievous bodily harm) would not generally be appropriate": at [229].

Appeals against sentence

Severity	9
Inadequacy	1
TOTAL	**10**

Appeal outcomes

Severity		
Penalty confirmed	1	10.0%
Penalty varied	8	80.0%
Inadequacy		
Penalty confirmed	1	10.0%
TOTAL	**10**	**100.0%**

Varied outcomes

		% of varied outcomes (n = 8)	% of all outcomes (n = 10)
LC custodial – DC custodial	7	87.5%	70.0%
LC custodial - DC non-custodial	1	12.5%	10.0%
TOTAL	**8**	**100.0%**	**80.0%**

Data source: NSW Bureau of Crime Statistics and Research

Dangerous driving occasioning grievous bodily harm – s 52A(3), *Crimes Act 1900*

Varied outcomes – custodial sentence imposed in Local Court

DC custodial		% LC custodial outcomes (n = 8)	% all varied outcomes (n = 8)
Form lower, term higher	4	50.0%	50.0%
- suspended sentence	*1*	*12.5%*	*12.5%*
- ICO	*3*	*37.5%*	*37.5%*
Form lower, term same - FTI to ICO	1	12.5%	12.5%
Commencement date varied	1	12.5%	12.5%
Other - Penalty recorded as 'varied' but no change apparent	1	12.5%	12.5%
Subtotal	*7*	*87.5%*	*87.5%*
DC non-custodial			
CSO	1	12.5%	12.5%
TOTAL	**8**	**100.0%**	**100.0%**

LC custodial to DC custodial

Form lower, term higher
Average LC total term – 9 months
Average DC revised total term – 16.5 months
Average increase in total term – 167.5%

LC sentence	*DC sentence*	*% increase*
15	18	20.0%
6	12	50.0%
12	18	50.0%
3	18	500.0%

Data source: NSW Bureau of Crime Statistics and Research

Negligent driving occasioning grievous bodily harm – s 42(1)(b), *Road Transport (Safety and Traffic Management) Act 1999*

Maximum penalty: $2,200 fine or 9 months imprisonment or both [first offence]/$3,300 fine or 18 months imprisonment or both [second/subsequent offence]

Appeals against sentence

Severity	46
Inadequacy	1
TOTAL	**47**

Appeal outcomes

Severity		
Penalty confirmed	6	12.8%
Penalty varied	40	85.1%
Inadequacy		
Penalty confirmed	1	2.1%
TOTAL	**47**	**100.0%**

Varied outcomes

		% of varied outcomes (n = 40)	% of all outcomes (n = 47)
LC custodial – DC custodial	2	5.0%	4.3%
LC custodial - DC non-custodial	2	5.0%	4.3%
LC non-custodial - DC non-custodial	16	40.0%	30.0%
LC non-custodial - DC non-conviction/nominal penalty	20	50.0%	42.6%
TOTAL	**40**	**100.0%**	**81.2%**

Data source: NSW Bureau of Crime Statistics and Research

Negligent driving occasioning grievous bodily harm – s 42(1)(b), *Road Transport (Safety and Traffic Management) Act 1999*

Varied outcomes – custodial sentence imposed in Local Court

DC custodial		% LC custodial outcomes (n = 4)	% all varied outcomes (n = 40)
Form same, term lower	1	25.0%	2.5%
Form lower, term higher - suspended sentence	1	25.0%	2.5%
Subtotal	*2*	*50.0%*	*5.0%*
DC non-custodial			
GBB (with or without supervision)	2	50.0%	5.0%
TOTAL	**4**	**100.0%**	**10.0%**

LC custodial to DC custodial

Form same, term lower

LC sentence	*DC sentence*	*% reduction*
15	6	60.0%

Form lower, term higher

LC sentence	*DC sentence*	*% increase*
6	9	50.0%

Varied outcomes – non-custodial sentence imposed in Local Court

DC non-custodial		% LC non-custodial outcomes (n = 36)	% all varied outcomes (n = 40)
CSO – hours reduced	2	5.6%	5.0%
CSO to GBB	2	5.6%	5.0%
CSO to fine	1	2.8%	2.5%
GBB to fine	3	8.3%	7.5%
GBB - commencement date varied	1	2.8%	2.5%
Change to fine amount	4	11.1%	10.0%
Other	3	8.3%	7.5%
Subtotal	*16*	*44.4%*	*40.0%*
DC non-conviction/nominal penalty			
GBB to s 10 bond	7	19.4%	17.5%
GBB to s 10 dismissal	2	5.6%	5.0%
Fine to s 10 bond	8	22.2%	20.0%
Fine to s 10 dismissal	3	8.3%	7.5%
Subtotal	*20*	*55.6%*	*50.0%*
TOTAL	**36**	**100.0%**	**90.0%**

Data source: NSW Bureau of Crime Statistics and Research

Low-range PCA – s 9(2), *Road Transport (Safety and Traffic Management) Act 1999*

Maximum penalty: $1,100 fine [first offence]/$2,200 fine [second/subsequent offence]

Appeals against sentence

Severity	244
Inadequacy	0
TOTAL	**244**

Appeal outcomes

Penalty confirmed	62	25.4%
Penalty varied	181	74.2%
Other (appellant deceased)	1	0.4%
TOTAL	**244**	**100.0%**

Varied outcomes

		% of varied outcomes (n = 181)	% of all outcomes (n = 244)
LC fine – DC fine	42	23.2%	17.2%
LC fine - DC non-conviction/nominal penalty	135	74.6%	55.3%
- Fine to s 10A	*1*		
- Fine to s 10 bond	*75*		
- Fine to s 10 dismissal	*53*		
- Fine to 'no penalty'	*6*		
LC non-conviction/nominal penalty - DC non-conviction/nominal penalty	4	2.2%	1.6%
- S 10A to s 10 dismissal	*2*		
- S 10 bond to s 10 dismissal	*2*		
TOTAL	**181**	**100.0%**	**74.2%**

Data source: NSW Bureau of Crime Statistics and Research

Mid-range PCA – s 9(3), *Road Transport (Safety and Traffic Management) Act 1999*

Maximum penalty: $2,200 fine or 9 months imprisonment or both [first offence]/$3,300 fine or 12 months imprisonment or both [second/subsequent offence].

Appeals against sentence

Severity	397
Inadequacy	2
TOTAL	**399**

Appeal outcomes

Severity		
Penalty confirmed	106	26.6%
Penalty varied	291	72.9%
Inadequacy		
Penalty confirmed	1	0.25%
Penalty varied	1	0.25%
TOTAL	**399**	**100.0%**

Varied outcomes

		% of varied outcomes (n = 292)	**% of all outcomes (n = 399)**
LC custodial – DC custodial	57	19.52%	14.29%
LC custodial - DC non-custodial	21	7.19%	5.26%
LC custodial – DC non-conviction/ nominal penalty	1	0.34%	0.25%
LC non-custodial - DC non-custodial	111	38.01%	27.82%
LC non-custodial - DC non-conviction/nominal penalty	102	34.93%	25.56%
TOTAL	**292**	**100.00%**	**73.18%**

Data source: NSW Bureau of Crime Statistics and Research

Varied outcomes – custodial sentence imposed in Local Court

DC custodial		**% LC custodial outcomes (n = 79)**	**% all varied outcomes (n = 292)**
Form same, term lower	14	17.72%	4.79%
Form same, term higher	2	2.53%	0.68%
Form lower, term lower	3	3.80%	1.03%
Form lower, term same	5	6.33%	1.71%
Form lower, term higher	18	22.78%	6.16%
- Suspended sentence	*17*	*21.52%*	5.82%
- ICO	*1*	*1.27%*	0.34%
Commencement date varied	10	12.66%	3.43%
Other[1]	5	6.33%	1.71%
Subtotal	*57*	*72.15%*	*19.52%*
DC non-custodial			
FTI to CSO	5	6.33%	1.71%
FTI to GBB	15	18.99%	5.14%
ICO to GBB	1	1.27%	0.34%
Subtotal	*21*	*26.58%*	*7.19%*
DC non-conviction/nominal penalty			
S 10A	1	1.27%	0.34%
TOTAL	**79**	**100.00%**	**27.05%**

[1] This includes 3 matters recorded as 'penalty varied' where no change is apparent; 1 matter where a custodial sentence was imposed and the appeal result is recorded as 'Habitual Traffic Offender disqualification'; and 1 matter where an ICO was imposed in place of a sentence of imprisonment but no details as to the length of the ICO are recoded.

Data source: NSW Bureau of Crime Statistics and Research

Mid-range PCA – s 9(3), *Road Transport (Safety and Traffic Management) Act 1999*

LC custodial to DC custodial

Form lower, term higher
Average LC total term – 4 months
Average DC revised total term – 8.5 months
Average increase in total term – 107.9%

LC sentence	*DC sentence*	*% increase*
6	8	33.3%
4	6	50.0%
4	6	50.0%
6	9	50.0%
6	9	50.0%
6	9	50.0%
4	7	75.0%
3	6	100.0%
3	6	100.0%
4	8	100.0%
4	8	100.0%
4.5	9	100.0%
6	12	100.0%
6	12	100.0%
3	7	133.3%
4	12	200.0%
2	7	250.0%
3	12	300.0%

Form same, term lower
Average LC total term – 6 months
Average DC revised term – 3.5 months
Average reduction in total term – 48.1%

LC sentence	*DC sentence*	*% reduction*
4	3	25.0%
8	6	25.0%
7	5	28.6%
9	6	33.3%
9	6	33.3%
7.8	5	35.9%
4	2	50.0%
12	6	50.0%
2	0.95	52.5%
6	2.5	58.3%
6	2	66.7%
6	2	66.7%
4	1.1	72.5%
4	1	75.0%

Form lower, term lower

LC sentence	*DC sentence*	*% reduction*
6	5.2	13.3%
4	3	25.0%
5	3	40.0%

Form same, term higher

LC sentence	*DC sentence*	*% increase*
5	6	20.0%
3	6	100.0%

Data source: NSW Bureau of Crime Statistics and Research

Mid-range PCA – s 9(3), *Road Transport (Safety and Traffic Management) Act 1999*

Varied outcomes – non-custodial sentence imposed in Local Court

DC non-custodial		**% LC non-custodial outcomes (n = 213)**	**% all varied outcomes (n = 292)**
CSO – hours reduced	6	5.4%	2.1%
CSO to GBB	6	5.4%	2.1%
CSO to fine	4	3.6%	1.4%
GBB - period increased	1	0.9%	0.3%
GBB – commencement date varied	6	5.4%	2.1%
GBB to fine	6	5.4%	2.1%
Fine to GBB	1	0.9%	0.3%
Change to fine amount	60	54.1%	20.5%
Disqualification period varied	2	1.8%	0.7%
Other	19	17.1%	6.5%
Subtotal	*111*	*52.1%*	*38.0%*
DC non-conviction/nominal penalty			
Fine to s 10 bond	56	54.9%	19.2%
Fine to s 10 dismissal	36	35.3%	12.3%
Fine to s 10A	3	2.9%	1.0%
GBB to s 10 bond	4	3.9%	1.4%
GBB to s 10 dismissal	1	1.0%	0.3%
Other	2	2.0%	0.7%
Subtotal	*102*	*47.9%*	*34.9%*
TOTAL	**213**	**100.0%**	**72.9%**

Data source: NSW Bureau of Crime Statistics and Research

Attachment C

Appeal results for domestic violence offences
By offender, FY2011/12

Overall confirmed & varied

Penalty confirmed	229	38.17%
Penalty confirmed - commencement date varied	34	5.67%
Penalty varied	329	54.83%
Recorded as penalty varied - no change apparent	8	1.33%
TOTAL	**600**	**100.00%**

Varied

LC custodial – DC custodial	206	34.33%
LC custodial - DC non-custodial	46	7.67%
LC custodial - DC 'no penalty'	8	1.33%
Subtotal	*260*	*43.33%*
LC non-custodial - DC custodial	1	0.17%
LC non-custodial - DC non-custodial	62	10.00%
LC non-custodial - DC 'no penalty'	6	1.00%
Subtotal	*69*	*11.50%*
TOTAL	**329**	**54.83%**

Data source: NSW Bureau of Crime Statistics and Research

LC custodial

DC custodial		% LC custodial outcomes (n = 260)	% all varied outcomes (n = 329)
Form same, term higher	1	0.38%	0.30%
Form same, term lower	155	59.62%	47.11%
Form lower, term higher	30	11.54%	9.12%
- FTI to s 12	*26*	*10.00%*	*7.90%*
- HD to s 12	*1*	*0.38%*	*0.30%*
- PD to 12	*3*	*1.15%*	*0.91%*
Form lower, term same	16	6.15%	4.86%
Form lower, term lower	4	1.54%	1.22%
Subtotal	*206*	*79.23%*	*62.61%*
DC non-custodial			
CSO	7	2.69%	2.13%
GBB (with or without supervision)	35	13.46%	10.64%
Section 10A	3	1.15%	0.91%
Section 10 dismissal	1	0.38%	0.30%
Subtotal	*46*	*17.69%*	*13.98%*
No penalty recorded	*8*	*3.08%*	*2.43%*
TOTAL	**260**	**100.00%**	**79.03%**

Data source: NSW Bureau of Crime Statistics and Research

LC custodial to DC custodial

Form same, term reduced

Average LC total sentence: 9.1 months
Average DC total sentence: 5.5 months

Extent of reduction		
0 to 10%	4	2.58%
> 10 to 20%	19	12.26%
> 20 to 30%	31	20.00%
> 30 to 40%	41	26.45%
> 40 to 50%	22	14.19%
> 50 to 60%	6	3.87%
> 60 to 70%	17	10.97%
> 70 to 80%	8	5.16%
> 80 to 90%	7	4.52%
> 90 to 100%	0	0.00%
Total	**155**	**100.00%**

Average	**40.2%**
Highest	**89.0%**
Lowest	**7.7%**

Form lower, term higher

Average LC total sentence: 5.6 months
Average DC total sentence: 10.1 months

LC sentence	*DC sentence*	*% increase*
2.00	9.00	350.00%
6.00	24.00	300.00%
5.00	18.00	260.00%
2.00	7.00	250.00%
4.00	12.00	200.00%
3.00	7.00	133.33%
8.00	18.00	125.00%
4.00	9.00	125.00%
6.00	12.00	100.00%
6.00	12.00	100.00%
3.00	6.00	100.00%
4.00	8.00	100.00%
2.00	4.00	100.00%
6.00	11.00	83.33%
4.00	7.00	75.00%

LC sentence	*DC sentence*	*% increase*
7.43	12.00	61.62%
6.00	9.00	50.00%
6.00	9.00	50.00%
4.00	6.00	50.00%
4.00	6.00	50.00%
4.00	6.00	50.00%
12.00	16.00	33.33%
9.00	12.00	33.33%
6.00	8.00	33.33%
6.00	8.00	33.33%
6.00	8.00	33.33%
13.50	18.00	33.30%
6.00	7.00	16.67%
6.00	7.00	16.67%
8.00	9.00	12.50%

Data source: NSW Bureau of Crime Statistics and Research

LC non-custodial

DC custodial		% LC non-custodial outcomes (n = 69)	% all varied outcomes (n = 329)
CSO to suspended sentence	1	1.45%	0.30%
DC non-custodial (same penalty)			
CSO – hours reduced	1	1.45%	0.30%
GBB – duration increased	1	1.45%	0.30%
GBB – duration reduced and/or supervision removed	4	5.80%	1.22%
Fine varied (LC amount not specified)	4	5.80%	1.22%
Subtotal	*11*	*15.94%*	*3.34%*
DC non-custodial (different penalty)			
GBB to fine	1	1.45%	0.30%
GBB to s 10 bond	21	30.43%	6.38%
GBB to s 10 dismissal	9	13.04%	2.74%
Fine to GBB	1	1.45%	0.30%
Fine to s 10 bond	15	21.74%	4.56%
Fine to s 10 dismissal	5	7.25%	1.52%
Subtotal	*52*	*75.36%*	*15.81%*
No penalty recorded	*6*	*8.70%*	*1.82%*
TOTAL	**69**	**100.00%**	**20.97%**

Notes
Results are categorised by offender. Some offenders had multiple charges (there were 1078 in total). Where the same type of penalty was imposed across all offences (e.g. multiple sentences of imprisonment), the total sentence has been used. Where different penalties were imposed for different offences, the offender's most serious penalty has been used.

Offences included were contravene Apprehended Domestic Violence Order, common assault (DV) and assault occasioning actual bodily harm (DV).

'No penalty recorded' refers to instances where either:
- An order was apparently made by the District Court under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (the notes from BOCSAR indicate there were 8 in total), or
- The District Court order was recorded on the Local Court proceeding instead of the District Court proceeding (overriding the original result).

Of 600 matters, all but two were inadequacy appeals by the DPP. Both inadequacy appeals were apparently unsuccessful despite one being recorded as 'allowed'.

Of offenders who had the manner of custody was reduced but the term of the sentence increased, all but one were varied to suspended sentences.

Data source: NSW Bureau of Crime Statistics and Research