THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/EErg:1645856

28 February 2019

Mr Paul McKnight
Executive Director, Policy and Reform
Department of Justice
Level 3, Henry Deane Building
20 Lee Street
Sydney NSW 2000

By email: policy@justice.nsw.gov.au

Dear Mr McKnight,

Consultation paper: criminal appeals

Thank you for seeking the Law Society's comments on reforms to criminal appeals.

The Law Society has reviewed the Department's consultation paper. Our comments on the Law Reform Commission recommendations are contained in the attached document, with particular focus on the 12 extracted recommendations as requested. We have also included two additional suggestions for the Department's consideration.

We would like to emphasise the Law Society's strong support for the status quo in respect of sentence appeals to the District Court from the Local Court. The imposition of the Law Reform Commission's recommendation could have real and problematic consequences for the workflow of the Local and District Courts of NSW. The recommendation would likely result in dramatic increases in the time taken to undertake work in Local and District Courts, which will inevitably increase delays.

We look forward to further consultation with the Department on this important area of reform.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who is available on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

Encl.

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Law Council
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CONSTITUENT BODY

	Law Reform Commission (LRC) Report No 140: Recommendation	Law Society Position
4	A New Criminal Appeal Act	
4.1	**Consolidate criminal appeal legislation** (1) The *Criminal Appeal Act 1912* and *Crimes (Appeal and Review) Act 2001* should be repealed and replaced with a new Criminal Appeal Act that would: (a) consolidate the provisions governing appeals from criminal proceedings (b) give effect to the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.	The Law Society supports the consolidation of the criminal appeal legislation into a single Act. We note that section 48 of the *Supreme Court Act 1970 (NSW)* ('SCA') and the ordinary allocation of work can be reasonably reflected in a consolidated Act.
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*. (2) Consequential amendments should be made to Part 3 of the *Supreme Court Act 1970* to assign to the Court of Criminal Appeal criminal appeal and review business, including judicial review proceedings as outlined in Recommendation 4.3.	The Law Society supports the inclusion of the Court of Criminal Appeal ('CCA') as a part of the Supreme Court. It would usefully become the ultimate intermediate Court of Appeal for criminal matters.
4.3	**Assign judicial review applications to 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 Law Society supports the referral of judicial review proceedings in criminal and application proceedings. A statutory transfer power held by the Chief Justice is suitable where the interests of justice require transfer. The notes in the Appendix table suggest that the CCA hear review proceedings from "lower court criminal matters". The CCA should hear reviews from the District Court of NSW (consistent with the principle in section 48 SCA of allocating appeals from a judge to a bank of judges). Review of Magistrate's decisions should be heard consistently with the current Part 5 of the *Crimes (Appeal and Review) Act 2001* (NSW) ('CARA') appeals, before a single judge of the Supreme Court (in the Common Law

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	the power to transfer judicial review proceedings between the Court of Appeal and the Court of Criminal Appeal.	Division).
5	**Appeals from the Local Court to the District Court**	
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.	The Law Society strongly supports the status quo in respect of sentence appeals to the District Court from the Local Court. The imposition of the recommendation could have real and problematic consequences for the workflow of the Local and District Courts of NSW. 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. Practitioners would need to prepare and run sentence hearings that are longer, more detailed and exhaustive. Additionally, many Magistrates may feel compelled to provide District Court style judgments, which may be a more complete expression of the legal and factual foundations for the decisions made. The reform would also likely result in a very significant increase in motions for leave to adduce additional evidence. Implementing this recommendation would create significant risk that the Local and District Court lists would become unworkable. Both Courts continue to comment on the high current levels of work in their jurisdictions. A likely result would be a significant increase in the time taken to undertake work in Local and District Courts. This will inevitably lead to delay and inefficiency.
5.2	**Abolish case stated from the District Court to the Court of Criminal Appeal** (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	The Law Society supports the abolition. It may be worth considering the continued existence of a stated case mechanism <u>*before* a final determination</u> for exceptional matters where the Court finds that there is a clear legal ambiguity

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	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.	which can be properly described as a question of law by the Court (on either its own motion or on the application of a party). In light of the other recommendations, such a mechanism serves no purpose after final determination of a proceeding or an appeal. The most significant problem with the mechanism is the use of it as a back-end appeal (to avoid the privative clause in section 176 of the *District Court Act 1973*). Where there is a clear question of statutory interpretation or a legal lacuna, it may be sensible to have a power for a question to be referred *before* final determination if it is a critical issue in proceedings. Such a mechanism could be (albeit infrequently) utilised to trigger the settlement of legal ambiguities without the need for either party to lose proceedings before initiation. A stated case mechanism could be similarly useful from the Local Court to the Supreme Court of NSW.
6	**Appeals from the Local Court to the Supreme Court**	
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	Continuing appeals from the Local Court to the Supreme Court on limited bases is supported by the Law Society. It is reasonable to narrow appeals to exclude errors of fact. It is virtually impossible to conceive a question of fact appeal which would appropriately be dealt with in an appeal for error of fact, rather than an appeal for rehearing, as Howie J suggests in *Kapral v Bunting* [2009] NSWSC 749. Some factual scenarios and judicial decisions may be mixed questions of fact and law – and the discretion to hear an appeal on a mixed question should be retained.

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	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.	The leave mechanism on mixed question appeals is adequately functional in the jurisdiction and from time to time leave is declined. It is not clear if a *House* error - in a failure of discretion - is a pure question of law, or a mixed question. For abundant caution, appeals regarding mixed questions with leave should be retained. It is essential to allow the mixed question so that a pure question of law, which has a related arguable *House* error of discretion, can be heard together in one proceeding. To limit the statutory appeal would unnecessarily increase the number of review filings where "error on the face of the record" suffices and includes an error of discretion. We submit that the mixed question appeal from the Local Court to the Supreme Court should be retained. The question of fact appeal can be excluded.
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.	The retention of a second appeal on a question of law is supported by the Law Society. The appropriate appeal is to the Court of Criminal Appeal. Similar to 6.1, an appeal on a mixed question of fact and law with leave allows a *House* error and prevents a review application to seek relief.
7	**Appeals from the Local Court – other issues**	
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	The Law Society is not opposed to the change.

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	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** (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.	Item 7.2 is strongly supported by the Law Society. (1) Oral applications on the day are strongly supported. Oral applications should be possible if the interests of justice support applications in that form. (2) Applications should be able to be lodged at any place.
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.	This amendment is strongly opposed by the Law Society. It will reduce access to justice. The ultimate test in the current CARA section 8 (for annulment) is the interests of justice. This is a fundamental and clear affirmation of justice as being the paramount concern over administrative convenience or efficiency. The use of sections 190(1) and 196 of the *Criminal Procedure Act 1986* as a means to "efficiently manage" the Court's case load is evenly balanced in the current legislation whereby a wide discretion is invested in the Court to do justice. To place a procedural limitation on access to justice will limit access for the most vulnerable and needy – those who often fail to appear for genuine and unavoidable reasons.
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.	An annulment power for absence not at the error of the defendant is supported by the Law Society. Such a power should not be limited to the Court's own motion, but should be a general power invested in the Court which prosecution or defence could apply for if warranted. An additional power is recommended. It is possible that a broader power should be invested in the Local Court in the form of a general slip rule correction (an equivalent to section 43 *Crimes (Sentencing Procedure) Act 1999*).

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		This would allow the proper correction of errors, in the form of orders or the entry of orders on Justice Link for all orders, particularly interlocutory orders and application proceedings where no conviction or sentence is imposed. This would also allow the limited re-opening of orders rather than an annulment of final orders. Annulment sets aside the orders for all purposes. As an example, using such a power, orders for bonds could be reasonably amended without affecting dates.
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.	The Law Society strongly supports this amendment. The content of procedural fairness is guided by the statutory foundation for a power. An affirmation of the principle will clarify and simplify the position. A judicial explanation provision for unrepresented appellants should be drafted requiring an easily understandable explanation of the direction.

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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.	The expansion of powers is generally supported by the Law Society. The expansion to allow for remittal for denial of procedural fairness is strongly supported. The District Court was found to have no power to remit in *DPP v Burns* [2010] NSWCA 265. This has presented a significant gap in the District Court's appeal power and capacity. Item 7.6(e) is not supported in its current form. The Law Society supports alternative verdicts being substituted, **only** where consistent with the prosecution of the hearing or appeal and not amounting to a denial of procedural fairness to a defendant. The Law Society proposes the inclusion of an (e)(iii) in those terms. See *James v The Queen* (2014) 88 ALJR 427; and, in particular, *R v Cameron* (1983) 2 NSWLR 66 on included offences. See *R v Pureau* (1990) 19 NSWLR 372 on the prosecution being limited to the case it runs and limited where an unfair forensic prejudice would be occasioned to the defendant. See *Sinden v Director of Public Prosecutions* [2017] NSWSC 179 for a clear error in a backup without notice.
7.7	**Extend District Court appeal period from 28 days to 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 grant leave to appeal if it is satisfied that it is in the interests of justice to do so.	The Law Society supports a tiered system with the following qualifications. From 28 days to 3 months the test should be maintained as the current simple leave test. From 3 months the application should be on the basis of leave in special circumstances. The proposed tests are drawn too narrowly and will reduce access to justice for the most vulnerable people facing the justice system. In addition, a narrower test will potentially create an increase in appeals to the

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	(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.	Supreme Court when access is denied to efficient District Court proceedings.
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.	The Law Society believes that the time for filing a Supreme Court appeal should be 3 months, not 28 days. Such a time period avoids the confusion of different filing times for review proceedings (3 months under *Uniform Civil Procedure Rules* ('UCPR') rule 59.10). The 28 day period often does not allow for the transcript to be considered before filing a Supreme Court appeal. The Local Court extension function found in Supreme Court Rules Part 51B rule 6 is functional and valuable – it should be preserved in appeals. It also typically results in an extension of time by the Court below to enable transcription and filing within a 3 month period. If the 3 month filing was codified such a provision would not be required. This matter can be adequately dealt with in the Rules, rather than in the new Act.
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.	The proposal to allow statutory costs is not opposed by the Law Society.
7.10	**Clarify effect of sentence pending 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),	This proposal is supported by the Law Society.

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	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** 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.	This proposal is supported by the Law Society. However, the proposed provision could be simplified for clarity.
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.	This proposal is not required following *Lewis v Sergeant Riley* (2017) 96 NSWLR 274 where section 70(1)(b) of the *Local Court Act 2007* (NSW) was found to apply to forensic procedure applications. The Law Society does not believe that codification is required. This appeal is consistent with other Part 4 *Local Court Act 2007* (NSW) application proceedings.
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. (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	<u>7.13(1)</u> The Law Society supports this proposal. <u>7.13(2)</u> The Law Society does not support this proposal. UCPR Form 84 is entirely suitable and meets the regulatory requirements. UCPR forms should be used. Rules should be broadly consistent with the Judicial Review provisions under UCPR Rule 59 (see 7.13(4)). <u>7.13(3)</u> The Law Society supports this proposal. Criminal appeals are usually of a particular complexity (around half a day) which is likely less than average appeal

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	rules and forms for applications for judicial review under s 69 of the *Supreme Court Act 1970* (NSW) should be consistent.	duration and fees might be reduced for criminal matters where financial reward is not in issue. The number of appeals is very low (less than 25 per year, mostly filed by the DPP). <u>7.13(4)</u> We support this proposal as it relates to procedural rules.
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.	The Law Society is neutral with respect to this recommendation. This will be a rare appeal if utilised.
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.	This is not opposed by the Law Society on its terms.
8	**Appeals from conviction and sentence on indictment**	
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.	The Law Society is content with the current appeal structure. The current provision for appeals is well settled based on extensive case law over many years. Reform is not necessary in our view.
8.2	**Retain grounds for defendant sentence appeals** There should continue to be provisions governing defendant appeals against	The Law Society strongly supports the current system.

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	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** 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).	The Law Society does not recommend any change.
9	**Appeals against acquittal and similar orders**	
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 discretion to order a new trial.	The Law Society does not support the expansion. The appeals should be limited to questions of law alone and leave should be required.
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.	The Law Society is not opposed to the correction of an inconsistency.
9.3	**Crown need not be a party for**	The Law Society is not opposed to this

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	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.	proposal.
9.4	**Introduce appeal from acceptance of plea in bar** 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.	This is not opposed by the Law Society presuming that the defence's right to appeal the opposing order is mirrored in interlocutory appeals.
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 for 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 by a judge sitting alone at a special hearing.	The Law Society does not oppose the amendment.
10	**Appeals from higher courts – other issues**	
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*	The Law Society does not oppose codification.

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	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** All appeals to the Court of Criminal Appeal should require leave.	The Law Society opposes this proposal. The use of a leave provision in an appellate structure without separated leave hearings (such as the Court of Criminal Appeal) is not warranted. A leave provision is valuable where it is used as a preliminary filter to prevent long appeals where leave should not be granted. The CCA consistently hears applications for leave and the appeal proper concurrently. Therefore, we consider that the mechanism is unnecessary and complicated.
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.	The Law Society believes it is appropriate to legislate rule 4 subject to the comments made above in 10.2.
10.4	**Abolish trial judge certificate** The power of the trial judge to certify that a case is fit for appeal should be abolished.	The Law Society is of the view that the certificate should be preserved for factual issues alone. There have been notable cases where the trial judge considered that the verdict may have been unsafe but did not meet the threshold for a directed verdict. See, for instance, the successful appeal in *Regina v Cao* [2004] NSWCCA 61.
10.5	**Change time limits for appeals to the Court of Criminal Appeal**	The Law Society does not oppose the 28 day Notice of Intention to Appeal ('NIA').

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	(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.	The Law Society strongly opposes the shortening of the period of the NIA. Currently there are everyday delays in the provision of transcript and materials for appeal. Consideration of merit requires a complete brief. Merit filters out the majority of potential appeals. In addition, the time to get senior appellate lawyers to consider merit is not insignificant.
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).	This variation is not opposed by the Law Society.
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.	This change is not opposed by the Law Society.
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	This clarification is not opposed by the Law Society.

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	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** 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.	See comments on a stated case mechanism above at 5.2. The Law Society is of the view that there is utility in this mechanism for settling the law prior to expending the full cost on a complete trial. There is some utility in retaining the mechanism for referral during (but not after) proceedings.
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).	This retention and updating is supported by the Law Society. The Law Society suggests consideration of an amendment to allow a single Judge of the CCA to hear a CCA bail application following the first listing at callover. This change would prevent a three judge bench from being required. Even in the case of a Supreme Court trial, a single judge review of merits in a bail context is suitable in a related but not determinative proceeding.
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.	The Law Society supports this change.
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.	The Law Society supports this change.
10.13	**Clarify the effect of time spent on release pending appeal on the sentence** (1) The requirement that the time during	The blanket proposal for exclusion is not supported by the Law Society. A discretion should be drafted to enable the consideration of the time on bail. Onerous bail is considered quasi custody

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	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.	and should be open for consideration by the Court in determining the sentence.
11	**Interlocutory appeals and appeals from committal proceedings**	
11.1	**Interlocutory appeals in summary jurisdiction** 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 Industrials Relations Commission in Court Session.*	This retention and extension is supported by the Law Society.
11.2	**All interlocutory appeals by leave** Interlocutory appeals by all parties should be by leave.	Subject to leave being maintained this is not opposed by the Law Society.
11.3	**Time limits for interlocutory appeals** 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.	The Law Society supports these time limits.
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.	This abolition is supported by the Law Society.
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 order or judgment made in committal proceedings. (2) The avenue of appeal to the Supreme Court against an order made in	This recommendation is supported by the Law Society. Confirming orders relating to witnesses, adjournments, briefs, and dismissal should be open in this form.

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	relation to a person in committal proceedings should be retained	
12	**Appeals to and from specialist courts**	
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.	This retention is supported by the Law Society.
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.	This extension of the recommendations is not supported by the Law Society. The Law Society does not oppose different procedures in Land and Environment Court and District Court appeals. If the Land and Environment Court uses a transcript and error model, the specialised legislation and practice can accommodate the difference.
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.	The Law Society does not oppose differentiation in the appeal process. Broad consistency is supported where suitable to the complexities in each jurisdiction.
12.4	**Apply District Court procedural**	The proposals in 7.5, 7.6, 7.7 and 7.9 are

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	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.	rational and supported as above. The application to Land and Environment Court proceedings is not opposed, subject to local procedural issues.
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.	This retention is supported by the Law Society
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.	See our comments above at 5.2.
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.	The Law Society supports this recommendation, and agrees that provisions applying to appeals from the NSW Local Court should continue to apply to criminal appeals from the Children's Court, as they currently stand. The Law Society does not support a change to appeal provisions that relate to an appeal against sentence requiring leave before fresh evidence can be given (as in recommendation 5.1(2)).
12.8	**Align appeals from the President of the Children's Court with appeals from magistrates**	The Committee supports this recommendation. 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. At present, section 22A of the *Children's Court Act 1987* (NSW) and clauses 5 and 6 of the *Children's Court Regulation 2014* (NSW) provide that appeals from

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		decisions of the President of the Children's Court are to be made to the Supreme Court, rather than to the District Court. As a result of this arrangement, a young person appearing before the Children's Court can have different appeal rights depending on which judicial officer makes the determination. A rehearing appeal in the Supreme Court (the current model) has greater delays and procedural complexities in filing and provision of evidence than a District Court Appeal. Where District Court appeals are commonly run by solicitors, it is uncommon for solicitors to appear in the Supreme Court. The cost and preparation is significantly increased. Proceedings involving children should not impose greater procedural issues than those involving adults. Matters that could be dealt with on appeal to the District Court in a number of weeks if determined by a Children's Court Magistrate, can take months to make their way to the Supreme Court if determined by the President of the Children's Court. We submit, therefore, that all criminal appeals from the NSW Children's Court should be dealt with in the same way. The Chief Magistrate currently holds a commission as a District Court Judge similar to the President of the Children's Court (as did the former Chief Magistrate). The Local Court is constituted by any Magistrate and the Chief Magistrate makes determinations as the Court. The Court's determination is appealed to the District Court where a fellow District Court judge hears the appeal. This is normal practice and not unusual. The President's standing and appeal differentiation was based on the Wood Report into child protection services. It is important in care practice for the

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		presidential role to be precedent leading. In criminal law, this function is not as important and is not recommended by the Law Society. If it were maintained, it presents a difference in children's criminal practice which creates a marked procedural imposition on matters involving children. The Law Society strongly supports the alignment of presidential appeals with those of the Chief Magistrate, that is, appeals should lie to the District Court.
12.9	**Retain appeals from the Drug Court** 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.	The Law Society supports this retention.
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.	We note that the Industrial Relations Commission in Court Session was abolished in 2016. This recommendation is no longer applicable.
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	The Law Society is not of the view that amendment is required in relation to CARA appeals. It may be warranted in Land and Environment Court or CCA matters. In CARA matters, there is no constraint on appeals being brought by an interested party. CARA appeals refer to a prosecutor in general terms throughout. Part 51B of the *Supreme Court Rules 1970* (NSW) requires an informant to be joined. The UCPR requires any interested person to be joined.

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	authority. (3) For the purposes of paragraph (2), "public authority" should include 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).	It appears that the current requirements should be sufficient. Any extension of the DPP's appeal rights would interfere with their residual right to take over proceedings. Ultimately, this could be used as an appropriate brake on a fraudulent prosecution by a person in another public agency.
13	**Other Areas for reform**	
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.	The Law Society supports the consolidation of rules. It is important that the Rules Committee be informed not simply by legal practitioners with expertise, but to also include consultation with legal practitioners who possess experience and expertise in rules in the jurisdiction.
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.	The Law Society supports the harmonisation of the provisions. The principle that rights should not be lost should be a guiding principle.

	ADDITIONAL SUGGESTIONS	Law Society
A	***Rehearing appeals should be defined by statute to require no error***	The original report of the Law Reform Commission ("LRC") affirmed the current system for conviction appeals as being suitable. The system at that stage did not in any way require error. Report 140 recognised this (at para 2.20 on page 17 and para 5.79 at page 71). The current common law, while not completely settled, tends to suggest that error is required. The Law Society submits that this approach should not be preferred. The most comprehensively considered and argued decision (between Simpson and Basten JJA in the Court of Appeal) is *AG v Director of Public Prosecutions (NSW)* [2015] NSWCA 218 ('*DPP v AG*'). In that decision, the parties did not raise the issue. Basten JA considered error was required while Simpson JA was of the view that error was not required. Sackville AJA firmly declared that the question had not been argued and thus should not fall for decision. Other cases have suggested that error is not required. However, none of the decisions have been on full argument between the parties; or with complete consideration of the arguments of Simpson JJA in *DPP v AG*. These decisions include: *Dyason v Butterworth* [2015] NSWCA 52; *Bandana v Director of Public Prosecutions* [2016] NSWCA 140 at [10] and *Englebrecht v Director of Public Prosecutions* [2016] NSWCA 290 at [91]. We recommend a provision be drafted in the new Part for Appeals from the Local to the District Court of NSW, which states that the appeal is "by rehearing" and affirming the original recommendation of the LRC that "the Court does not need to find error to uphold the appeal" (at [2.20] on page 17).
B	***A complete definition of Criminal Proceedings should be considered***	There is no complete definition of 'Criminal Proceedings' in the *Criminal*

		Procedure Act 1986 (NSW) or the current criminal appeal Acts. Appeals typically lie from Criminal and Part 4 Local Court application proceedings. Application proceedings – albeit civil – are often regulatory and quasi criminal. Appeals from the Local Court lie based on a referral provision in section 70 of the *Local Court Act 2007* (NSW) (and its predecessor provisions).