



24 October 2011

C62, 79.1  
RB;rp

The Honourable John Rau MP  
Attorney-General  
DX 336  
ADELAIDE SA

Dear Mr Attorney

### **Possible reform of Criminal Appeals Law**

I refer to your letter of 3 August 2011 and thank you for inviting the Society to comment on the Discussion Paper of the Standing Committee of Attorneys-General, Harmonisation of Criminal Appeals Legislation. The Paper has been considered by the Society's Criminal Law Committee. Accordingly, we provide the following comments.

With possibly one exception (interlocutory appeals and case stated – see Question 5 below), we do not favour amending the appeal legislation because appeals in this State in practice work well. Our experience is that attempts to, in effect, codify the common law cause other problems. South Australia is a common law State and, at least in the area of appeals, the law is settled and does not require amendment. We now comment on the specific questions.

#### **Q1 Appeals against conviction**

*Should the common form provision be replaced by a new provision in the terms set out below?*

*That the relevant appeal court be required to allow the appeal against conviction if the appellant satisfies the court that –*

- (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence;*
- (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or*
- (c) for any other reason there has been a substantial miscarriage of justice; and that, in any other case, the relevant appellate court must dismiss the appeal.*

**Answer:** No. Refer our comments above.

We understand the technical arguments concerning the proviso. However, the application of the proviso in this State works well and, therefore we are against any amendment affecting it. Our major concern is that the onus of establishing the proviso in appeals must remain with the Crown and must not shift to the appellant.

In relation to the terms of the proposed provision we comment as follows:

- we oppose an express requirement that the appellant must satisfy the court. It is unduly and unnecessarily restrictive. Section 353 is presently worded in neutral terms in that respect. This permits the flexibility of the court being satisfied by either party to an appeal. It is not uncommon for the Crown to present arguments on questions of law/fact in a manner in favour of allowing an appeal or even positively submitting that the appeal be allowed. This is particularly so if the appellant is unrepresented;
- in (b) and (c), the term “*substantial*” should be deleted. Its inclusion has the effect of reversing the onus of establishing the proviso, which we strongly oppose; and
- consistent with our expressed views, the proviso should be retained.

## **Q2 Offender appeals against sentence**

*Should the current provisions related to offender appeals against sentence be amended as set out below? That the House principle (that appellate courts deal with sentence appeals on an error correction basis) be retained and that this principle be set out in a new section which provides that the relevant appeal court must allow the appeal if the appellant satisfies the court that -*  
 (a) *there is an error in the sentence first imposed; and that*  
 (b) *a different sentence should be imposed.*

**Answer:** No. Refer our comments above.

We, in particular, oppose the terms of the proposed provision. It potentially restricts the scope of sentence appeals by inclusion of the term “error”. In *House*, an error need not be identified. The sentence itself can manifest error if it is unreasonable or plainly unjust. The error, if it can be described as such, could be in the exercise of the sentencing discretion.

For the reasons expressed in response to Question 1, we also oppose the express requirement that the appellant must satisfy the court.

## **Q3 Warning if more severe sentence may be imposed**

*Should any new offender appeals against sentence regime contain a provision that, if the appellate court is considering imposing a more severe sentence than the sentence first imposed, it must warn the appellant, as early as possible during the hearing of the appeal, that the appellant faces the possibility that a more severe sentence may be imposed than that first imposed?*

**Answer:** No. Refer our comments above.

## **Q4 Prosecution appeals against sentence**

*Should the current provisions related to prosecution appeals against sentence be amended as set out below? That the House principle (that appellate courts deal with sentence appeals on an error correction basis) be retained and that this principle be set out in a new section which provides that the relevant appeal court must allow the appeal if the prosecution satisfies the court that -*  
 (a) *there is an error in the sentence first imposed; and that*  
 (b) *a different sentence should be imposed.*

**Answer:** No. Refer our comments above generally and to Question 2.

We are concerned that such an amendment may in some way be taken to mean that greater onus for prosecution appeals is abrogated. In this regard we firmly oppose the removal of the consideration of double jeopardy on Crown appeals.

**Q5 *Interlocutory appeals and cases stated***

*Should an interlocutory appeals regime be introduced in the terms of Division 4 of Part 6.3 of the Criminal Procedure Act 2009 (Vic) and should a case stated regime be introduced in the terms of Division 5 of Part 6.3 of the Criminal Procedure Act 2009 (Vic)?*

**Answer:** Yes, generally.

In relation to interlocutory appeals, we query the requirement for permission from the Full Court where a certification procedure is provided for (as it is in Victoria). It seems that the trial judge is in the best position to assess the importance to the trial of the impugned decision.

The requirement for permission to appeal is an additional layer that may adversely affect the efficiency of the process. In this regard we note that in South Australia the only scenario which attracts the need for permission is when the DPP appeals on an issue antecedent to trial on any ground other than one involving a question of law. We suggest that requirement for permission here be maintained.

I trust these comments are of assistance. Please do not hesitate to contact me, should you wish to discuss any aspect of this response.

Yours sincerely



Ralph Bönig  
**PRESIDENT**