

**STATUTORY REVIEW: AMENDMENTS TO THE *CRIMINAL APPEALS ACT 2004*
MADE BY PART 4 OF THE *CRIMINAL LAW AND EVIDENCE AMENDMENT ACT*
2008**

I. Introduction

Part 4 of the *Criminal Law and Evidence Amendment Act 2008* (the CLEA Act) made a number of amendments to the *Criminal Appeals Act 2004* (the CA Act), the most significant and controversial of which was the introduction of a limited right of appeal by the prosecution against acquittals in trials by jury.

During the parliamentary process, a number of concerns were raised about the Criminal Law and Evidence Amendment Bill 2006 (the Bill). As a result, the Bill was referred to the Standing Committee on Legislation (the Standing Committee) with a request that the Bill and its policy be inquired into. The Standing Committee made two recommendations in respect of Part 4 of the Bill (subsequently Part 4 of the CLEA Act), namely:

1. that the Government amend clause 41 of the Criminal Law and Evidence Amendment Bill 2006 to expressly enable the Court of Appeal to take into account any materially changed circumstances of an offender; and
2. that the proposed amendments to the *Criminal Appeals Act 2004* in Part 4 of the Criminal Law and Evidence Amendment Bill 2006 be reviewed within five years.

Both of these recommendations were adopted, with recommendation 6 leading to the insertion of section 51 into the CA Act.

II. Terms of Reference and stakeholders consultation

The statutory review of the amendments to the CA Act made by Part 4 of the CLEA Act, inquired into the extent to which the relevant provisions have been used and the nature of such use.

Without detracting from the generality of the reference, the review focused on the issues raised by the Standing Committee, particularly:

1. that the grounds for appeal may be too broad; and
2. that the lack of limit on the number of new trials allowed may lead to repeated appeals against the same acquittal.

With these terms of reference in mind, stakeholders were asked to comment on five issues:

1. Have the primary amendments providing a limited right of appeal against acquittal (i.e. sections 24(2)(da) and 25(3)(aa) of the CA Act as inserted by sections 32 and 33 of the CLEA Act) been used since their amendment?
2. Have the amendments to sections 26(5) and (6) of the CA Act (as made by section 34 of the CLEA Act) been used? Have the amendments resolved the contradiction and ambiguity of the previous provisions?
3. Has section 33(2a) been used? If so has it been used only in the context of appeals under sections 24(2)(da) and 25(3)(a)? Or has it been used to dismiss other prosecution appeals?
4. Has the amendment to section 34(1) of the CA Act (as made by section 37 of the CLEA Act) clarified the section?
5. Has the amended section 41(4) of the CA Act affected the imposition and variation of sentences by appeal Courts? In particular, has it achieved its purpose of eliminating the application of the double jeopardy principle in prosecution appeals against sentence.

Process of the review

The Department sought comment from the following stakeholders:

- The Chief Justice of Western Australia
- The Chief Judge of the District Court;
- The Chief Magistrate;
- The Director of Public Prosecutions;
- The Law Society of Western Australia;
- The Criminal Lawyers' Association of Western Australia;
- Legal Aid WA; and
- The Aboriginal Legal Service.

The consultation period was intended to run from January 2014 to April 2014, however, delays in responses from some stakeholders meant that final consultation was completed in June 2014.

The following stakeholders provided either comment or a submission to the review:

- The Chief Justice of Western Australia;
- The Chief Judge of the District Court;
- The Chief Magistrate;
- The Director of Public Prosecutions;
- The President of the Law Society of Western Australia; and
- The Director of Legal Aid WA.

III. Stakeholder Consultation

Heads of Jurisdiction

Given the exclusive application of these provisions to appellate matters both the Chief Magistrate and the Chief Judge of the District Court declined to comment further on the amendments.

The Chief Justice declined to make a submission but did make some comments on the review. In his view, the issues raised by the review related to questions of fact which would be better addressed by other stakeholders given the Court's limited ability to undertake rigorous quantitative analysis based on the data that the court had to hand. His Honour also noted that any qualitative consideration of individual appeals or judgements could only be undertaken by a body external to the Court, given the potential for those judgements to become subject to further judicial consideration in the future.

The Director of Public Prosecutions

The Office of the Director of Public Prosecutions (ODPP) noted that the provisions in sections 24(2)(da) and 25(3)(aa) have not been used since the commencement of the CLEA Act. In the view of the Director of Public Prosecution (DPP) the amendments to sections 26(5) and (6) have resolved the contradiction and ambiguity of the provisions of the CA Act.

The DPP also made special mention of an issue relating to the use of the residual discretion of the Court of Appeal in dealing with State appeals. He noted that if the intent of Parliament was to have both State and defence appeals to be treated the same, then this has not proved to be the case because of the residual discretion of the Court of Appeal. In any event the DPP noted that the Court of Appeal has not

relied upon this discretion, since the reform to dismiss a state appeal. The ODPP did not propose that any legislative changes are required.

In the view of the ODPP the amendments made to the CA Act by Part 4 of the CLEA Act have achieved their purpose. The amendments have assisted and improved the administration of criminal justice in this state. The Court of Appeal has given full recognition to the abolishment of the double jeopardy principle and this has successfully ensured that State appeals have been allowed and further, at resentencing the new sentence is not reduced because of that principle.

Legal Aid Western Australia

Legal Aid noted that the provisions in sections 24(2)(da) and 25(3)(aa) have not been used since the commencement of the CLEA Act. The provisions in sections 26(5) and (6) of the CA Act have been used, and in the view of Legal Aid have resolved any ambiguity in the previous positions. Section 33(2a) has been raised in three cases, but the Court has given no substantial consideration to the provision in two of these cases.

From the case law it appears that the amended section 41(4) of the CA Act has achieved its purpose of eliminating the application of the double jeopardy in prosecution appeals against sentence. It has also allowed appeal courts to impose aggregate sentences which, in their view, more accurately reflect the total criminality involved.

Law Society of WA

The Law Society of WA noted the general lack of judicial consideration of these provisions. In any event, it was the view of the society that the prosecution's right to appeal was not being abused and was generally satisfied that there was no need for further amendments to the prosecution's right of appeal provisions.

VI. Conclusion

Insofar as the terms of reference are concerned, it would appear that the appeal provisions are not being overused. The provisions in sections 24(2)(da) and 25(3)(aa) have not been used since the commencement of the CLEA Act. The provisions in section 33(2a) have only been raised in three cases.

Concerns about repeated appeals appear to not have been borne out, as no instances were identified. It would appear that the prosecution's right of appeal is not being abused.

Both accused persons and the State have sought to bring appeals against separate trial decisions made by a superior court judge subject to the provisions of sections 26(5) and (6) of the CA Act. The amendments appear to be functioning as intended, resolving the ambiguity in that provision.

All stakeholders who responded were satisfied that the amendments to section 34(1) had reduced the ambiguity of that section and clarified its operation.

Stakeholders were satisfied that section 41(4) of the CA Act has achieved its purpose of eliminating the application of the double jeopardy principle in prosecution appeals against sentence.

It would appear from the submissions that were received that the amendments to the CA Act appear to be functioning as intended. Overall, stakeholder's views appeared to be unanimous that the provisions have achieved their aim. No further legislative changes have been recommended by this review.