

1. EXECUTIVE SUMMARY

Appeals against conviction

Background, purpose and structure (Chapter 2)

- 1.1. Chapter 2 sets out the origins and structure of this Discussion Paper.
- 1.2. This Discussion Paper arose out of a review of Victoria's criminal procedure laws. The review involved extensive research and consultation with key stakeholders in the criminal justice system. The questions posed in this Paper have been informed by that process. The Victorian reforms were included in the *Criminal Procedure Act 2009* (Vic).
- 1.3. The Discussion Paper examines three main areas of criminal appeals legislation, namely: (1) appeals against conviction; (2) appeals against sentence (offender appeals and DPP/Attorney General appeals); and (3) interlocutory appeals and cases stated.

Introduction to appeals against conviction (Chapter 3)

- 1.4. Chapter 3 introduces the relevant statutory provision for appeals against conviction. It notes that, with the exception of Victoria, all Australian jurisdictions have substantially the same provision relating to appeals against conviction.
- 1.5. The common form provision contains three grounds of appeal and a proviso.¹
 - **[First limb]** The verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence;
 - **[Second limb]** That the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of a question of law; or
 - **[Third limb]** That on any ground there was a miscarriage of justice; and
 - **[the 'proviso']** Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
- 1.6. The common form provision is widely regarded as unclear, internally inconsistent, complex and outdated. In 1998 *Brooking JA*, a senior judge of the Victorian Court of Appeal, summed up this widely held view when he said that, ever since he had encountered the provision, he had wondered what it meant. He continued that it was 'extraordinary that, 90 years after the legislation providing for appeals in criminal cases was first enacted, doubt should exist about its effect'.²

¹ Although most Acts do not actually use the words 'provided that,' the term 'proviso' is in common use: see further Chapter 3). The wording of the proviso here is taken from the now repealed s.568(1) of the *Crimes Act 1958* (Vic).

² *R v Gallagher* [1998] 2 VR 671, 672-673.

Original purpose of the provision (Chapter 4)

- 1.7. Chapter 4 looks at the history behind the introduction of the common form provision and how this assists our understanding of the provision.
- 1.8. Before the common form provision was enacted, appeal courts were very reluctant to look behind a jury verdict and to impinge on the jury's role of weighing the evidence in the case. In particular, it was not possible to appeal on a ground of fact.
- 1.9. However, if there had been a legal mistake or irregularity in the trial, the law was very strict: the accused was entitled to a retrial even if the error or irregularity was merely technical in nature.
- 1.10. Two key features of the common form provision were that:
 - it enabled appeals on questions of fact (see the first limb of the provision); and
 - it took a more pragmatic approach to errors and irregularities in the trial (see the proviso).

Both these reforms required courts of intermediate appeal to examine the substantive merits of the case.

Relevant Principles (Chapter 5)

- 1.11. Chapter 5 of the Discussion Paper sets out the purposes and principles of an effective appeal system and introduces some of the main policy considerations relevant to the common form appeals against conviction provision.
- 1.12. Appeals serve two main purposes: a private purpose, which is to achieve justice for individuals by correcting wrong decisions in individual cases; and a public purpose, which is to ensure public confidence in the administration of justice by correcting and clarifying the law.
- 1.13. Closely related to the public and private purposes of appeals are the twin goals of ensuring that the accused was afforded a fair trial and that the verdict represents the truth (in the sense that it is correct).
- 1.14. These goals are closely linked, but favouring one over the other can lead to different results. If there was an error or irregularity in the trial, giving weight to the goal of ensuring a fair trial may mean that the appellate court will order a retrial, even if the appellate court considers that the appellant is guilty of the offence. If the appellate court gives greater weight to the accuracy of the verdict, the court will be more likely to dismiss the appeal, even though the fairness of the trial was tainted.
- 1.15. Another theme which is relevant to many cases on the common form appeal against conviction provision is the extent to which appellate courts are willing to substitute their own views for the views of a jury. Recent case law suggests that the traditional reluctance of appellate courts to undertake the task of weighing evidence and determining guilt for themselves is being overcome and the so called 'right' to trial by jury is not absolute.

The Effect of Human Rights Charters (Chapter 6)

- 1.16. Chapter 6 of the Discussion Paper looks at the effect of Human Rights legislation. In Australia, only Victoria and the ACT have specific human rights legislation. However, the rights enshrined in these Acts also to a large extent apply in other Australian jurisdictions as common law principles. They reflect and reinforce fundamental rights in the criminal process that have been developed by the courts over a long period of time.
- 1.17. The chief human rights which are relevant to appeal provisions are the right to a fair hearing and the right to appeal. As discussed in Chapter 5 of the Paper, fair trial considerations are one of the two key competing policy goals behind any system of appeals (the other being the correctness or truth of the verdict). For this reason, fair trial principles are frequently mentioned in cases considering the common form provision, including, but not limited to, those with human rights legislation.
- 1.18. In particular, a consideration of human rights principles has been an important element of many decisions as to whether there has been a 'substantial miscarriage of justice' in a particular case.

Judicial interpretation of the common form provision for appeals against conviction

- 1.19. Chapters 7, 8 and 9 examine the judicial interpretation of the current common form provision relating to appeals against conviction. In particular, they set out the current law on the grounds of appeal (Chapter 7), the proviso (Chapter 8) and the relationship between the grounds of appeal and the proviso (Chapter 9).
- 1.20. These Chapters analyse the interpretation of the common form provision in considerable detail. The purpose of this is to highlight the areas of complexity, confusion and debate which justify the reform of the provision.
- 1.21. The uncertainty, complexity and lack of transparency of the law on the common form provision has led to a situation where many pages of judgments are taken up with an analysis of what the common form provision means in addition to the substantive issues in the appeal under consideration, thus wasting valuable judicial resources. Moreover, unclear and complex provisions are often ineffective and can lead to unfair and inconsistent results. All these factors support the case for reform.
- 1.22. It is also important to understand the current law in order to determine which aspects of the current provision are working and which are not. This in turn assists the formulation of reform options.
- 1.23. For instance, the analysis of the common form provision in these Chapters reveals that one of the major problems is the two-pronged structure of the grounds and the proviso, and particularly the double appearance of the term 'miscarriage of justice.' Therefore, the model which is the subject of Question 1, adopts a simpler structure and, by removing the proviso, eliminates the confusion around the difference between 'miscarriage of justice' and 'substantial miscarriage of justice'.
- 1.24. Similarly, the examination of the law reveals that the first ground of appeal is generally sound. For this reason, the model in Question 1 retains the wording of the first ground of appeal.

- 1.25. In short, as the above examples illustrate, these three Chapters lay important groundwork for Chapter 11 which examines reform options.

Judicial interpretation of the grounds of appeal (Chapter 7)

- 1.26. The judicial interpretation of the three grounds of appeal in the common form provision is analysed in detail in Chapter 7 of the Discussion Paper.
- 1.27. The law in this area has developed in a piecemeal fashion. Until recently, judges rarely analysed the grounds in the common form provision, instead preferring alternate formulations such as whether a verdict was ‘unsafe or unsatisfactory.’ This has made it difficult to determine what the three grounds actually mean.
- 1.28. The third ground of appeal, namely whether on any ground there has been a miscarriage of justice, is arguably the most problematic of the three limbs of the common form provision. There is debate around whether this limb is a ground in its own right to be considered separately from other grounds or whether it is a relevant consideration in determining the other grounds of appeal.
- 1.29. The content of the ground has also been the subject of uncertainty. For instance, some judges have pointed out that not all miscarriages of justice involve error whereas others seem to regard this as a necessary element of the ground.
- 1.30. The confusion surrounding the meaning of the grounds and their relationship to each other (and the proviso – see further Chapter 9) indicates that the provision is in need of reform.

Judicial interpretation of the proviso (Chapter 8)

- 1.31. The judicial interpretation of the proviso is the subject of Chapter 8 of the Discussion Paper. This Chapter examines the leading High Court decision in *Weiss* in 2005 as well as High Court jurisprudence since *Weiss*.
- 1.32. In *Weiss*, the High Court criticised the use of the lost chance of acquittal test in relation to the proviso. The lost chance of acquittal test was one of the two tests Courts used prior to the *Weiss* case in considering whether to apply the proviso to dismiss the appeal (the other being the fundamental error test which has continued relevance).
- 1.33. Under the lost chance of acquittal test, the Crown had to persuade the court that the error of law did not deprive the accused of a ‘real’ chance of acquittal or a chance of an acquittal that was ‘fairly open to the accused.’ The test involved considering the likely effect that the error of law had on the jury in the trial (or on a hypothetical reasonable jury).
- 1.34. The High Court in *Weiss* rejected the lost chance of acquittal test and sought instead to focus attention on the statutory test of ‘substantial miscarriage of justice’.
- 1.35. In determining this question, the appellate court must make an independent assessment of the evidence, while making allowance for the natural limitations of appeal courts. While the High Court declined to attempt to lay down absolute rules, it did draw attention to several matters which appeal courts should consider.

- 1.36. First, the appeal court must consider the whole of the record of trial, including the guilty verdict, the accusatorial character of criminal trials and the criminal standard of proof. By requiring appellate courts to undertake their own independent assessment of evidence the judgment in *Weiss* seemed to herald a more active role for appellate courts in determining the facts of a case or the ‘truth’ of a verdict. Since *Weiss*, there has been uncertainty about what an independent assessment of the evidence actually involves. (See, further Chapter 8).
- 1.37. Secondly, the appellate court must be satisfied of the appellant’s guilt in order to apply the proviso. However, the High Court foreshadowed that there may be some cases in which it would be proper for an appellate court to decline to apply the proviso even though it is persuaded of the appellant’s guilt. Such cases could include cases where there had been a significant denial of procedural fairness at the trial. The High Court did not further elaborate on this point, a factor which has led to ongoing debate in the cases since the *Weiss* decision.

Developments since Weiss

- 1.38. A study of mainly High Court cases since *Weiss* indicates that courts have sometimes been prepared to modify or reinterpret the *Weiss* test in a number of ways, including by:
- determining that the jury’s verdict of guilty will not be a relevant consideration in all cases;
 - emphasising that the test of considering whether a person is in fact guilty should not be treated as an exhaustive explanation of the statutory test; and
 - sometimes being prepared to examine the impact that the error had on the outcome of the case (related to the old lost chance of acquittal test) in deciding whether to apply the proviso.
- 1.39. Overall, High Court jurisprudence since *Weiss* seems to indicate that the High Court has adopted a somewhat more flexible, case-by-case approach to the proviso than appeared to be the case in *Weiss*.
- 1.40. There is ongoing debate about the balance that must be achieved between the competing principles of truth (or accuracy of the verdict) and procedural fairness. Recent High Court cases do not reveal any particular pattern to the approach to these competing considerations.
- 1.41. As mentioned above, there is also confusion about the extent to which an appeal court must make its own independent assessment of the evidence. For instance, does this involve going through the transcript ‘from page 1 to the bitter end’ as one commentator surmised?³
- 1.42. The ever-changing focus of the High Court decisions on the proviso and the fact that, since *Weiss*, they have all been split judgments, indicates that *Weiss* has not adequately clarified or settled the law.

³ See Chapter 8. This comment was made by Bill Pincus QC, ‘Appellate Court Cannot Dismiss Convicted Person’s Appeal Unless Satisfied of Guilt Beyond Reasonable Doubt,’ (2006) 80 *Australian Law Journal* 169.

Interrelationship between the proviso and the grounds of appeal (Chapter 9)

- 1.43. Chapter 9 of the Discussion Paper explores the vexed relationship between the three grounds of appeal and the proviso. It examines the extent to which the proviso can apply to each of the grounds of appeal.
- 1.44. Under the first limb, the appellant needs to persuade the appeal court that the verdict was unreasonable or is not supported by the evidence at the trial. The way the subsection is drafted suggests that it was intended that the proviso could apply to the first limb. However, the proviso makes little sense in relation to that limb: if a verdict is unreasonable and cannot be supported by the evidence, how can a court conclude that no substantial miscarriage of justice actually occurred? Accordingly, courts have generally concluded that the proviso does not apply to the first limb.
- 1.45. The relationship between the third ground of appeal (that on any ground there was a miscarriage of justice) and the proviso has attracted much comment and controversy. Much of the debate concerns the difference (if any) between the double appearance of the term ‘miscarriage of justice.’
- 1.46. Some judges have taken the view that there is no difference between a ‘miscarriage of justice’ and a ‘substantial miscarriage of justice’, so that the proviso does not apply to this limb. On this view, the appellant has to persuade the appeal court not just that there was an error or irregularity, but also that it really mattered (i.e. that the miscarriage was ‘substantial’). Under this approach the burden of persuasion is wholly on the appellant and the proviso is rendered redundant.
- 1.47. However, the majority of judges have taken the view that there is a difference between the two phrases. On this view, the burden is on the appellant to show that there was a miscarriage of justice in the narrow sense of an error or irregularity. The burden then shifts to the Crown to establish that it was not a substantial miscarriage of justice.
- 1.48. There is also debate surrounding how the different meanings of the term ‘miscarriage of justice’ (discussed in Chapter 7) relate to the proviso.
- 1.49. The application of the proviso to the third ground of appeal therefore depends on the elusive distinction between the following three types of cases:
 - Cases in which there was no miscarriage of justice (meaning that the third ground of appeal is not established and the proviso cannot be considered);
 - Cases in which there was a miscarriage of justice but it was not substantial (meaning that the third ground of appeal is established but the appellate court can apply the proviso to dismiss the appeal); and
 - Cases in which there was a substantial miscarriage of justice (meaning that the third ground of appeal is established but the Court cannot apply the proviso and must therefore allow the appeal).
- 1.50. Exactly where the distinction is drawn in cases involving the process element of the miscarriage of justice ground (see, further, Chapter 7) will to a large extent depend on value judgments about the relative importance of the competing policy considerations of truth and fair trial or outcome and process.

- 1.51. Once again Brooking JA perhaps best captured the pragmatic approach adopted by judges on the question as to whether the proviso applied to the third ground of appeal when he observed that:

[c]ourts have been able to apply this legislation for almost a century without, as it seems to me, finding it necessary to decide what, if anything is the difference between a miscarriage of justice and a substantial miscarriage of justice, and I intend to follow their example.⁴

- 1.52. The fact that a senior appeal judge, after spending many pages analysing the provision in depth, was unable to reach a concluded view as to how it operates in practice, once again highlights the need for reform.

The law in other jurisdictions (Chapter 10)

- 1.53. Chapter 10 introduces the law relating to appeals against conviction in comparable jurisdictions. It is related to Chapter 11 (models for reform). The difference between the two Chapters is that Chapter 10 describes the law in various jurisdictions (the ACT, Canada, New Zealand and the UK) whereas Chapter 11 assesses the benefits and drawbacks of the former ACT model and the current UK provision (the other two being too similar to the common form provision to be useful comparators). Chapter 11 also considers the merits of minimalist models for reform (such as those adopted recently in Western Australia and the Commonwealth) and the recently introduced Victorian model.

Models for reform (Chapter 11)

- 1.54. The reform models discussed in Chapter 11 fall into two categories:

- The first involves simplifying the wording of the provision, but retaining the basic two-stage structure of the statutory grounds of appeal and proviso.
- The second category involves a simpler structure which dispenses with the proviso.

- 1.55. The Discussion Paper sets out the potential significance of the structural difference between the two categories. In particular, it examines whether there should be a shifting burden of persuasion and the practical consequences of changing the structure of the provision.

Category 1 – no structural change

Western Australian Model

- 1.56. An example of a minimalist reform option is s.30(4) of the *Criminal Appeals Act 2004* (WA). That section enumerates the three grounds of appeal and incorporates minor amendments to the language and grammar.
- 1.57. As it is substantively identical to the current common form appeal provision, the advantage of the minimalist approach is that it would reduce the likelihood that new and unforeseen questions about the interpretation of the provision would arise.

⁴ *R v Gallagher* [1998] 2 VR 671, 679.

- 1.58. This approach would not resolve the many problems identified with the common form provision, such as the overlapping grounds of appeal, the lack of clarity as to which of the grounds of appeal the proviso applies and the difference between the terms ‘miscarriage of justice’ and ‘substantial miscarriage of justice’.

Federal Court Model

- 1.59. Section 30AJ(1) of the *Federal Court of Australia Act 1976* (Cth) was recently introduced by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth). It contains the familiar three grounds of appeal and proviso. However, it contains some differences from the common form provision. First, the proviso only applies to the first and second grounds. Secondly, the third ground refers to a ‘substantial miscarriage of justice’ rather than a miscarriage of justice.
- 1.60. By removing the term ‘miscarriage of justice’ from the third ground, the Federal Court model avoids the confusion surrounding the difference (if any) between ‘miscarriage of justice’ and ‘substantial miscarriage of justice.’
- 1.61. However, like the common form provision, the Federal Court model does not involve structural change to the appeal provisions. As such, the criticisms that can be made of the common form provisions can also be made of this model.

Category 2 – structural change

Former ACT Model

- 1.62. The former ACT model allowed the Court of Appeal to ‘give any order it considers appropriate’ and to grant a new trial ‘on any ground upon which it is appropriate to grant a new trial’.
- 1.63. A key advantage of this reform model is its simplicity. For instance, it circumvents the difficulties with the interpretation of, and interrelationship between, the grounds of appeal and the interaction between the proviso and the grounds of appeal.
- 1.64. On the other hand, the provision is very broad and does not provide courts with guidance as to which appeals to allow and which to deny. This may be why the High Court has held that the interpretation of this provision is effectively the same as the test applying to the common form provision.
- 1.65. The ACT has recently changed its law to be in line with most other Australian jurisdictions.

The United Kingdom model

- 1.66. The United Kingdom model reduces the grounds of appeal to the single ground of unsafeness and removes the proviso. As with the former ACT model, this has the advantage of avoiding many of the problems with the current common form provision.
- 1.67. On the other hand, this approach could create as many problems as it solves. The UK experience has shown that, although the UK Parliament merely intended to clarify and restate the existing law, in practice the provision has been the subject of considerable and ongoing judicial and academic debate and confusion.

New Victorian Model

- 1.68. Section 276(1) of the new *Criminal Procedure Act 2009* (Vic) provides that the Court of Appeal must 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; or
 - (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.
- 1.69. Section 276(2) provides that in any other case, the Court of Appeal must dismiss an appeal.
- 1.70. The reform refines the current provision in a way which recognises that many of the problems that have plagued the appeal grounds and the proviso have resulted from different understandings of the phrase ‘miscarriage of justice’.
- 1.71. Specifically, the revised grounds of appeal take into account the following conclusions:
- There is no need for a two-stage proviso structure if the grounds of appeal are more appropriately worded. A single-tiered test removes much of the complexity of the current provision.
 - There is duplication and linguistic difficulty in requiring initial consideration of whether there has been a miscarriage and then separate consideration of whether there has been a substantial miscarriage.
 - There should be a presumption that, until the contrary is shown, a trial before judge and jury was fair and in accordance with law. It follows that the onus to persuade the court of the matters required for a successful appeal should be on the appellant.
 - Errors or irregularities in the trial should result in appeals being allowed if the problem could have reasonably made a difference to the trial outcome or if the error was of a fundamental kind depriving the appellant of a fair trial or amounting to an abuse of process.
- 1.72. The change of focus about when a court considers whether there has been a substantial miscarriage of justice (as the test rather than as the second part of a test) does not alter the fundamental meaning of the words but it does impact on the appropriateness of the *Weiss* approach.
- 1.73. Currently, it is commonly thought that the burden of persuading the court that no substantial miscarriage of justice actually occurred is on the Crown. In effect, the Crown must satisfy the court that the person is guilty.
- 1.74. Under the new provision, the onus is on the appellant to show that there was a substantial miscarriage of justice. If the *Weiss* test were simply reversed, it could require the convicted person to persuade the court that he or she was not guilty. However, this would clearly infringe the presumption of innocence.

- 1.75. In other words, the *Weiss* test would have to be modified. The Victorian model does not propose an alternative test to *Weiss* because it was considered that it was undesirable to formulate a test in legislation that would have the necessary flexibility to deal with the wide range of situations in which a miscarriage of justice may occur.
- 1.76. It is important, however, to approach the interpretative task in light of the statement by *Weiss* that the test to be applied is the test described in the statute. Other tests should not be used as a substitute for the ultimate test, namely in relation to the second and third limbs, whether there was a substantial miscarriage of justice.

Question 1 (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.

Offender appeals against sentence (Chapter 12)

- 1.77. Chapter 12 of the Discussion Paper introduces offender appeals against sentence.
- 1.78. As with appeals against conviction provisions, offender appeals against sentence are in largely common form and were enacted throughout Australia, in the United Kingdom and New Zealand in the early twentieth century.
- 1.79. The current provision in most jurisdictions requires the intermediate court of appeal to quash the sentence and substitute a different sentence if ‘it thinks that a different sentence should have been passed’. Alternatively, if it thinks it ‘appropriate and in the interests of justice to do so’ it may quash the sentence and remit the matter to the trial court for re-sentencing.
- 1.80. The discretion given to intermediate appeal courts is, on the face of the provision, unfettered. It appears to require appellate re-sentencing rather than appellate review for the purpose of error correction.
- 1.81. However, the High Court made it clear in the decision in *House* that appellate courts must deal with sentence appeals on an error correction basis. This is consistent with long-standing principles concerning the review of judicial discretion.
- 1.82. One of the goals of any review of criminal procedure should be to improve the clarity of the law. Given the extent to which the threshold test is settled, the clarity of the law

would be improved by expressing the statutory test in a way that incorporates and embeds long-standing judicial authority.

- 1.83. Hence, the test outlined in Question 2 reflects the test which the courts actually apply in practice. It requires appeal courts to allow the appeal if the appellant satisfies the court that there is error in the sentence first imposed.
- 1.84. The model in Question 2 also requires the relevant appeal court to be satisfied that a different sentence should be imposed. This requirement was added because, if there is an error but the Court is not satisfied that a different sentence should be imposed, there is no need to interfere with the original sentence.

Question 2 (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.

- 1.85. Question 3 raises an additional component 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.
- 1.86. This warning is consistent with judicial authority that, as a prima facie rule, applicants should not be required to run the risk of suffering a heavier sentence as a result of a successful appeal. It reflects the policy that it is in the public interest that errors in sentencing be identified and corrected.

Question 3 (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?

Prosecution appeals against sentence (Chapter 12)

- 1.87. The focus of this part of Chapter 12 is on the rules courts apply when deciding whether to allow an appeal against sentence brought by the DPP or the Attorney-General and whether these are in need of reform.
- 1.88. There are some differences in the provisions of the various Australian jurisdictions which are set out in Chapter 12. Like the offender appeals against sentence provisions (and it should be noted that sometimes offender and Crown appeals are covered in the

one provision), they seem to give Courts a wide discretion but the discretion seems wider in some cases than others.

- 1.89. However, in practice, the two-stage test in *House* (requiring a threshold finding of error before re-sentencing) has been applied to all of the existing provisions with one exception.⁵ In Queensland, the Court of Appeal has recently rejected the *House* test and emphasised that the word ‘unfettered discretion’ in the Queensland legislation means just that: there is no ‘judicial fetter’ requiring the court to be satisfied that there was an error before exercising its discretion.
- 1.90. The provisions on Crown appeals against sentence should be amended for the same reasons as for offender appeals against sentence.
- 1.91. The approach in *House* is more consistent with the general approach to appellate review of judicial discretion and is so well-settled and accepted in most jurisdictions that it should be enshrined in legislation. This would improve the clarity of the law.
- 1.92. With respect to the Queensland approach, it is not clear what the Queensland provision would cover that needs to be covered, that the error correction approach (and removal of the consideration of ‘double jeopardy’ on sentencing as recommended by COAG – see Chapter 12) does not. If the sentence is manifestly inadequate, this constitutes an error. Therefore the Queensland approach is broader than the error correction model because it enables re-sentencing of sentences which are not manifestly inadequate. It is not necessary to have a power to appeal in this situation. In conclusion, there is no reason to depart from the error correction approach.
- 1.93. The model outlined in Question 4 therefore closely follows the model for offender appeals against sentence.

Question 4 (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.

Interlocutory appeals (Chapter 13 and Chapter 15)

- 1.94. In Australia, New South Wales, South Australia, Western Australia, the ACT and the Commonwealth have some form of interlocutory appeals regime.

⁵ The *House* test will also apply to the new Victorian provision because this provision specifically embeds the error correction test.

- 1.95. Chapter 13 contains a discussion of interlocutory appeal regimes generally as well as a comparative analysis of selected Australian jurisdictions, New Zealand and the United Kingdom. The interlocutory appeals model put forward for discussion in this Paper is examined in more detail in Chapter 15.
- 1.96. These Chapters highlight the relationship between interlocutory appeals and case stated processes. They then set out the main benefits and risks of introducing an interlocutory appeals regime. Finally, they consider three of the main features of interlocutory appeals regimes with reference to the model put forward for discussion in this Paper.
- 1.97. Interlocutory appeals and case stated regimes are interrelated processes. In most jurisdictions, either the interlocutory appeals process is broad and the case stated process is more limited or vice versa. The model presented for discussion in this Paper and recently adopted in Victoria has a broad interlocutory appeals process and a narrower case stated regime.
- 1.98. The Model Criminal Code Officers Committee (MCCOC) Discussion Paper on Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals briefly discussed interlocutory appeals and supported the introduction of interlocutory appeals based on the type of approach adopted by New South Wales. This Paper discusses the New South Wales approach in detail and the new Victorian approach which draws on the New South Wales approach.
- 1.99. Interlocutory appeals can have a number of benefits. For example, interlocutory appeals can:
- reduce trial time;
 - avoid the need for trials altogether (because the resolution of a key issue may result in a plea or a withdrawal of charges); and
 - prevent the fortuitous acquittal of an accused due to an error in the trial.
- 1.100. However, introducing an interlocutory appeals regime also carries with it certain risks, such as the risk of:
- fragmenting trial proceedings; and
 - increasing delays due to the time taken to hear appeals.
- 1.101. The model presented for discussion in this Paper is designed to achieve an appropriate balance between ensuring that trials are conducted correctly the first time and interfering as little as is reasonably possible with pre-trial and trial processes.
- 1.102. Due to the greater risk of delay and fragmentation if an interlocutory appeal is heard after the trial has started, the model presented in this Discussion Paper requires stronger reasons to justify an interlocutory appeal being heard during a trial.
- 1.103. In deciding on an interlocutory appeals model, a number of questions need to be considered. Three of the most important of these are:
- Which types of interlocutory decisions should be appealable?

- Should trial judge certification be required (and, if so, what must the trial judge certify?)
 - On what basis should the court give leave to appeal?
- 1.104. With respect to the first question, some jurisdictions limit interlocutory appeals to certain types of decision. In New South Wales, for instance, only ‘interlocutory judgments and orders’ can be the subject of an interlocutory appeal. This has resulted in technical arguments about what constitutes an interlocutory judgment or order.
- 1.105. In contrast, the model in Question 5, which was recently introduced in Victoria, adopts a broader approach. It provides that any ‘interlocutory decision’ can be appealed. This is so that the decision on whether to grant leave can be based on whether it is in the interests of justice to do so, rather than on technical issues.
- 1.106. On the question of trial judge certification, the model put forward for comment makes certification a necessary precondition to obtaining leave to appeal an interlocutory decision. However, it limits certification to specific threshold issues which the certifying judge is best placed to decide, namely:
- With respect to decisions during the trial, that the issue was not reasonably able to be identified before the trial or (if it could have been identified) that the party seeking leave was not at fault for not identifying the issue;
 - With respect to evidential rulings, that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case; and
 - With respect to all proposed appeals, that the issue is of sufficient importance in the trial to warrant an appeal.
- 1.107. Finally, regarding the question of leave to appeal, the question as to whether the test for leave should be unconstrained or whether it should require the appeal court to have regard to particular considerations is considered.
- 1.108. The approach put forward for discussion is that, while the appellate court’s jurisdiction should not be limited, it would be useful to include a list of mandatory considerations. This approach has the benefit of signalling the situations in which interlocutory appeals will be appropriate, without constraining the appeal court’s discretion.
- 1.109. The considerations in the model presented for discussion in this Paper were informed by New South Wales case law and are designed to reflect the desired balance between allowing appeals to be heard that are genuinely likely to reduce overall delays while not allowing appeals which will overly fragment trials and delay proceedings.
- 1.110. The factors which the appeal court must consider are whether determining the interlocutory appeal could:
- render the trial unnecessary; or
 - substantially reduce the time required for trial; or
 - resolve an issue of law or procedure necessary for the proper conduct of the trial;
- or

- reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.

1.111. Once again there is an additional requirement for granting leave after the trial has started, namely that the appellate court must not grant leave after the trial has commenced unless the reasons for doing so clearly outweigh the disruption to the trial process.

Case stated regime (Chapter 14 and Chapter 15)

1.112. Some form of case stated procedure exists in every Australian jurisdiction. For the purposes of this Discussion Paper, given the similarities between a number of jurisdictions, only selected jurisdictions are examined.

1.113. The model presented for discussion for cases stated complements the interlocutory appeals model. Hence, the cases stated regime is designed to capture those cases:

- that fall outside the interlocutory appeals regime (for instance because a question of law has arisen without there having been an interlocutory decision); or
- where the parties do not wish to appeal but the trial judge considers that there is an important issue that the appeal court should review.

1.114. The benefits and risks of the case stated procedure are the same as those for interlocutory appeals. As with interlocutory appeals, for a case stated procedure to be useful, it needs to:

- focus on issues which might reduce trial time (or avoid a retrial);
- not fragment trial proceedings (i.e. if a jury is empanelled, very good reasons are needed to interrupt those proceedings); and
- be able to be heard quickly and not be used as a delay tactic.

1.115. With these goals in mind, the key features of the case stated regime put forward for discussion in this Paper are that:

- a question can be reserved before or during trial;
- a court may reserve a question of law of its own motion or on the application of either party;
- the court must have regard to the same factors as for granting leave in interlocutory appeals when deciding whether to state a case; and
- once the trial has started, the court must not reserve a question of law unless the reasons for doing so clearly outweigh the disruption to the trial process.

Question 5 (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)*?