Summary of findings

The Crown appeal jurisdiction

The right of the Crown to appeal against sentence for matters dealt with on indictment was created in New South Wales in 1924 and is found in s 5D of the *Criminal Appeal Act* 1912. The substantive text of s 5D, particularly:

> "the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper"

has remained unchanged since 1924.

However, the principles upon which the Court of Criminal Appeal should exercise its jurisdiction were only clearly settled by the High Court in 1977, in *Griffiths v The Queen*.[i] Previously, the Court of Criminal Appeal repeatedly declared[ii] that it had an "unfettered discretion," based on a reading of the High Court decision of *Whittaker v The King*.[iii] That view of the meaning of s 5D and *Whittaker* was emphatically rejected by the High Court in *Griffiths*.

Griffiths was a clear departure from the past. The statements in the case that Crown appeals should be:

- "a rarity, brought only to establish some matter of principle,"[iv]
- an "extraordinary remedy, intended to be invoked rarely … and then only for reasons of great public importance"[v] and that the
- "incorrectness of the [first instance] sentence must be manifest"[vi]

were new.

Legal principles governing Crown appeals

The High Court described the Crown appeal jurisdiction in *Bond v The Queen*[vii] as "exceptional" and recently affirmed that the restriction upon appellate review of the exercise of a discretion applies to Crown appeals against sentence.[viii] The Court of Criminal Appeal will only intervene where error is shown.[ix] Moreover, it has a discretion to refuse to intervene even if error is established. A primary consideration is the double jeopardy that a convicted person faces as a result of the Crown appeal.[x] If the Court of Criminal

i (1977) 137 CLR 293.
ii *R v Gosper* (1928) WN (NSW) 165 at 166; *R v Geddes* (1936) 36 SR (NSW) 554 at 555; *R v Herring* (1956) 73 WN (NSW) 206; *R v Evans* (1961) 78 WN (NSW) 1135 and *R v Cuthbert* (1967) 2 NSWR 329 at 330.
iii (1928) 41 CLR 230.
iv (1977) 137 CLR 293 Barwick CJ at 310.
v (1977) 137 CLR 293 Murphy J at 330.
vi (1977) 137 CLR 293 Jacobs J at 327.
vii (2000) 201 CLR 213 at [27].
viii *Markarian v The Queen* [2005] HCA 25 at [25].
ix ibid.
x *R v Allpass* (1993) 72 A Crim R 561 at 562–563.

Appeal decides to intervene and re-sentence it does so in the light of all the facts and circumstances as at the time of re-sentencing.[xi] The element of double jeopardy involved in successful Crown appeals usually results in the substituted sentence being discounted and less than that which should have been imposed by the first-instance sentencing judge.[xii]

The overall picture

The Crown appealed in 2.5% of all first instance sentencing matters for the period January 2001–September 2004. It is a matter of opinion whether this figure suggests that Crown appeals are "rare." What is clear, however, is that the DPP appeals mostly to correct sentences in individual cases — Crown appeals are not, as Barwick CJ put it in *Griffiths*,[xiii] "brought only to establish some matter of principle."

Between 2001–2004 there were 310 Crown appeals lodged against sentence.[xiv] This study focused on 293 of these 310 cases.[xv] Of the 293 Crown appeals in our study, 43 cases (14.7%) involved Commonwealth offences and 250 (85.3%) involved State offences. The Court of Criminal Appeal allowed the Crown appeal in 160 cases (54.6%). In 211 cases (72% of all Crown appeals) an error was identified by the court. In 151 cases multiple errors were committed. The study sought to record the type and frequency of particular errors found in the 211 cases.

When the errors were grouped into the categories referred to in *House v The King*,[xvi] it was revealed that:

- in 91% (192 of 211) of the error cases, the error established was a failure to apply a sentencing principle correctly,
- 9% (19 of the 211 cases) involved errors of a factual kind, and
- in 9% (19 of the 211 cases) no specific error was found but the sentence was held to be plainly unjust or manifestly inadequate.

Error in the application of sentencing principle

In 65.4% of the 211 appeals where error was found, the principle transgressed was the principle of proportionality; that is, a failure to reflect the objective gravity of the offence in the sentence and ensure that there was a reasonable proportionality between the

xi *R v Warfield* (1994) 34 NSWLR 200.

xii *R v Salameh* (unrep, NSWCCA, 9 June 1994); *R v Wall* [2004] NSWCCA 42 at [70].

xiii (1977) 137 CLR 293 at 310.

xiv This time period was selected because first instance data to the end of 2004 was not finalised at the time of publication.

xv In 12 of the 310 appeals the convicted person lodged a successful conviction appeal and the question of the quantum of sentence did not arise. In five of the cases the appeal was under s 5DA, where the only issue was that the convicted person had failed to provide promised assistance. Those five cases were discussed separately.

xvi (1936) 55 CLR 499, as explained in *Markarian v the Queen* [2005] HCA 25 at [25].

objective seriousness of the offence and the subjective circumstances.[xvii] In 39.3% (83) of these cases there was an error in relation to the short length of the non-parole period,[xviii] while in 25.1% (53) of these cases there were totality errors, where the case of *Pearce v The Queen*[xix] was not properly applied; and in 10.4% (22) of these cases the sentencing judge misapplied a guideline judgment.

Residual discretion

In 51 (24.2%) of the 211 appeals where error was discovered, the court exercised its residual discretion and declined to intervene to increase the sentence. There was often more than one reason cited why the court chose not to intervene despite finding error. Rehabilitation of the offender was the most common reason cited for the court declining to intervene (16 of the 51 cases, or 31.4%), followed by delay in hearing the appeal (15 of the 51 cases, or 29.4%). In nine of the 51 cases (17.6%) the court declined to intervene because the offender had been released from custody or the release date for the offender was imminent. In six of these cases (11.8%) the need for parity of sentence between an accused and co-offender was cited. In five of these cases (9.8%) the court declined to intervene because the Crown acquiesced and did not advance the ground relied upon on appeal at first instance and in one other case (2%) it declined to intervene because the Crown led the court into error at first instance.

Re-sentencing

It is often assumed that the sentences imposed following a successful Crown appeal fall at the bottom of the range of the population of sentences for any given offence. This is not necessarily the case. Ordinarily, the substituted sentence falls at the lower end of the range for the particular case before the court — not the population of sentences for a given offence.

This study selected Crown appeals for the offences of murder, manslaughter, malicious wounding with intent to inflict grievous bodily harm, aggravated sexual assault and armed robbery where the court re-sentenced. The analysis revealed that the first instance sentences appealed by the Crown were sometimes above the median of the population of sentences for a given offence. Similarly, the substituted sentences imposed by the Court of Criminal Appeal frequently fell above the median of the population of sentences. These findings emphasise the complexity of sentencing and the limitations of relying heavily upon statistical concepts such as "population," "average" and "medians" in explaining sentencing results.

Hugh Donnelly

Manager, Research & Sentencing
14 June 2005

xvii See *R v Geddes* (1936) 36 SR (NSW) 554; *Veen v The Queen* No 2 (1988) 164 CLR 465; *R v Dodd* (1991) 57 A Crim R 357.

xviii See *Power v The Queen* (1974) 131 CLR 623 and *Bugmy v The Queen* (1990) 169 CLR 525 at 531.

xix (1998) 194 CLR 610.