



The law

The law on appeals from the Local Court to the District Court is primarily contained in statute. The law is covered in Part 3 of the Crimes (Appeal and Review) Act 2001 - 'CARA'. This information sheet will not deal with appeals against the making of an AVO or ADVO or other applications like appeals against the making of Forensic Procedure Orders.

There are three common types of appeal to the District Court, these are all appeals as of right:

1. Appeals against sentence (severity appeals). CARA has a broad definition of 'sentence' in section 3. The definition includes ancillary orders such as licence disqualification and compensation.
2. Appeals against conviction (conviction appeals).
3. Appeals where an application for annulment of conviction made in the defendant's absence has been refused by the Local Court under section 4 of CARA.

There are two less common types:

1. An appeal against conviction despite having pleaded guilty in the Local Court (plea traversal appeals).
2. Prosecution appeals. The prosecution has an automatic right of appeal against sentence (inadequacy appeals) and also against the awarding of costs awarded to the defendant during committal or summary proceedings.

Filing District Court appeals

First and foremost, remember to advise the client of their rights to appeal and advise them on prospects following sentence or conviction, especially if you are doing duty work.

Appeals must be made from the Local Court to the District Court within 28 days (see ss11, 11A, 12 & 23 of CARA).

For sentence appeals this means within 28 days from when the sentence was imposed (s11 of CARA).

For conviction appeals this also means 28 days from when the sentence was imposed. Note that you are unable to appeal against conviction until you have been sentenced (see s11(2) CARA). It is good practice to lodge an appeal against sentence at the same time, if this is required, should the conviction appeal fail.

For appeals against refusal of annulment application the 28 day time limit applies from the date when the decision to refuse the annulment application was made (s11A of CARA).

Leave is required to appeal outside of the 28-day time limit and this can only be granted if it is within the three months from the date of sentence or date of decision to refuse an annulment application (s13 CARA). There is no right of appeal to the District Court if this three-month period has lapsed, so it is very important to be aware of these timeframes.

An appeal must be made in writing on the appropriate form to a Registrar of the Local Court or is to be given to the person in charge of where the appellant is in custody (s14 CARA). The appeal form is available at the Registry or online. There is a fee for lodging an appeal but an application to waive this fee can be made if the person is assisted by Legal Aid NSW or ALS or has a grant of Legal Aid.

District Court Appeals

For an appeal requiring leave, such as missing the 28 day limit or where the appellant entered a plea of guilty in the Local Court the application is to be accompanied by a written application for leave (s14 CARA). The Local Court also has a form for this. This application for leave will be heard by the Judge assigned to hear the matter. You need to write in general terms the reason leave is required.

The prosecution only has 28 days to lodge an appeal unless an offender has agreed to an undertaking to assist the authorities under s23 of the Crimes Sentencing Procedure Act 1999 and they have not done so (s23(4) CARA). Prosecution appeals to the District Court are very rare.

When the appeal is lodged, the Local Court will generally contact the relevant District Court at the time of lodgment and provide a date. If you are appearing on a duty day it can be lodged the same day.

What happens with the sentence or bail when an appeal is lodged?

When an appeal is lodged, s63 of CARA provides that the sentence and any consequential orders will be stayed pending the final determination of the appeal, except where:

- There is an application for leave to appeal, in which case the stay will operate from the date when leave to appeal is granted.
- The defendant is sentenced to a term of imprisonment when the appeal is lodged or when leave to appeal is granted, in which case there will be a stay only if bail is granted or dispensed with (NB a term of imprisonment includes an ICO s63(5) CARA).

Generally speaking, any suspension will be stayed for driving offences unless the licence was disqualified before the order was made by the Magistrate for example when an on the spot disqualification was issued for drive over 45km/h above the speed limit.

An application for bail pending an appeal can be made as soon as the appeal is lodged. It is usually made before the Magistrate who imposed the order, the only additional factor to be considered in assessing bail concerns is whether there are arguable prospects of success for the appeal. Appeals bail can also be granted by the District Court (NB s74 of the Bail Act does not apply to a new application in the District Court).

Severity appeals

An appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings. (s17 CARA). It is not necessary to demonstrate any error on the part of the Magistrate.

The prosecution will tender all of the material before the Local Court in an appeal bundle. This includes, the bench papers, the court attendance notice, any sentencing assessment reports and material filed by the appellant in the Local Court. Fresh evidence can be put on by the appellant as is required.

As it is a rehearing of the evidence the transcript of the Magistrates reasons is not ordered and is not before the District Court however the District Court will be aware of the orders made by the magistrate. However, if the sentence was after hearing or a disputed facts hearing, then the transcript will be required.

It is usually conducted like a plea in mitigation would be done in the Local Court, however some Judges may cut directly to the point and ask what you are seeking and invite discussion this way. For further discussion about presenting appeals against severity I would recommend *Appeals to the District Court: Practical Matters*, Craig Smith SC – August 2015 available [here](#).

District Court Appeals

The District Court can set aside the sentence, vary the sentence or dismiss the appeal (s20 (2) CARA).

The District Court has the power to reduce or increase the sentence. Before the court makes an order to increase the sentence, they must give a Parker warning indicating that they are considering increasing the penalty:

Parker v DPP (1992) 28 NSWLR 282. The appellant can at this point seek leave to withdraw the appeal (s67(1) of CARA) and it usually granted but technically leave does not have to be granted (Roos v DPP (1994) 34 NSWLR 254 at 259-260). Sometimes an appellant may wish to proceed even though the penalty has increased such as where the Judge is considering increasing the length of sentence but reducing it to an ICO from a jail sentence as they are both are custodial sentences.

The District Court is able to exercise the same powers as the Local Court so an application under s32 or s33 of the Mental Health Provisions Act can be made at the District Court during a severity appeal.

Conviction appeals

A conviction appeal is brought pursuant to s18 of CARA. An appeal against conviction is a rehearing based on the transcript and exhibits in the court below.

- A s18(1) appeal is not an appeal de novo: Charara v Queen (2006) NSWCCA 244 at [16]-[24], Dyason v Butterworth [2015] NSWCA 52 at [26].

The approach to be taken on a s18(1) appeal is that the judge is to form his or her judgment of the facts recognising the advantage enjoyed by the magistrate who heard and saw the witnesses in the lower court: Dyason at [27].

The powers of the District Court on a s 18(1) rehearing are exercisable where the appellant demonstrates that the order, the subject of the appeal, is the result of a legal, factual or discretionary error in which event the appellate court can substitute its own decision based on the facts and law as they then stand: Dyason at [28].

Fresh evidence can be given by either party if the court is satisfied it is in “the interests of justice” s18(2). There is no guidance elsewhere in the legislation as to this definition.

The court can also direct a person to attend to give evidence; in the case of a victim witness of violence there must be special reasons to do so, in any other case there must be substantial reasons to do so. This is the same test, that is ‘special’ and ‘substantial reasons’, as the previous s91/93 and current s82/84 committal provisions of the Criminal Procedure Act so the court would be assisted by cases on those points.

A Notice of Motion and Affidavit will be necessary for application to call a witness or elicit fresh evidence. This should be filed before the hearing proper.

The District Court can set aside the conviction or dismiss the conviction appeal (s20 (1) of CARA).

Prosecution appeals

Any appeal against sentence or a costs order is an appeal of right by the prosecutor. Prosecution appeals to the District Court are rare.

An appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings, but only by leave of the District Court (S26 (1) CARA). Leave to give fresh evidence may be granted to the prosecution only in exceptional circumstances.

The Court must not dismiss an inadequacy appeal or impose a less severe penalty than is warranted because of any element of double jeopardy (s68A CARA). The prosecutor can also appeal against the awarding of costs to the defendant during committal or summary proceedings (s26 (2) of CARA).

District Court Appeals

Appeals against the refusal of an annulment application

This is an appeal as of right where an appellant has been convicted in their absence and had an application to set aside the conviction in the Local Court refused (s11A CARA). The test under s6 of CARA applies, that is, is it in the interests of justice to overturn the conviction? Former Magistrate David Heilpern produced an informative paper on this 'interests of justice' test, for the Reasonable Cause Conference it can be accessed [here](#).

An appeal to the District Court cannot be made unless they have exhausted their appeal rights in the Local Court by making an application under s4 of CARA in the Local Court (s12(2) CARA).

No more than one appeal may be made under s11A with respect to the same conviction (s11A(3) of CARA).

The District Court may determine the appeal by dismissing it or remitting the matter back to the Local Court to be dealt with afresh.

The Local Court transcript will need to be ordered and complete before the appeal can be determined.

Pending the determination of the application, the District Court may stay the execution of any sentence relating to the conviction concerned subject to such terms and conditions as it thinks fit (s16A CARA).

Plea traversal pleas

This type of appeal can only be made with leave of the District Court, so it would require a NOM and affidavit (see S12 CARA). Evidence from the lawyer who entered the plea in the form of an affidavit would also be required or evidence from the appellant if they were self-represented. The District Court in these circumstances can dismiss the application or remit the matter to the Local Court to be dealt with afresh.

Legal Aid NSW availability

See [here](#) for the full Legal Aid NSW policy relating to appeals to the District Court.

As you will see, appeals are subject to the usual tests and also to merit test A. Note there must be reasonable prospects of success.

For sentence appeals, a term of imprisonment must have been received (full time gaol or ICO).

For all appeals, it must be the kind of matter for which legal aid is available in the Local Court proceedings. Therefore, if we would not have appeared in the LC (traffic policy, defended hearing policy etc), we will not appear in the appeal.

For conviction appeals there is a two-tier system:

1. If legal aid was granted in the Local Court the ultimate penalty is irrelevant and the matter is subject to the merit test.
2. If there was no grant of aid in the Local Court (self, private) the applicant must have received a sentence of imprisonment as the penalty:
 - a. If not - they are outside policy.
 - b. If they did - the merit test applies.

The above is subject to the [exceptional circumstances policy](#).