12. Appeals

Appeals against court orders

Note: References to sections in this part are to sections of the *Criminal Appeal Act* 1912 (NSW) unless otherwise stated.

The *Criminal Appeal Act* provides for a number of appeals against findings in the District and Supreme Court in relation to unfitness to be tried and special verdicts.

Appeal against a finding by a court that a person is unfit to be tried for an offence

A conviction is defined in s 2 to include a finding that a person is unfit to be tried: see ss 5(1)(a), 6A(a); see also *AG of New South Wales v X [2013] NSWSC 1392* at [67].

Appeal against a finding at a special hearing that the offence has been committed

A conviction is defined in s 2 to include a finding of a court following a special hearing: see also ss 5(1)(a), s 6A(b) and *AG of New South Wales v X [2013] NSWSC 1392* at [67].

Appeal against a special verdict of act proven but not criminally responsible

See s 5(1)(a), (2). The appeal is only available where the defence was not raised by the accused: s 5(2), applied in *Foy (1922) 39 WN (NSW) 20*, followed in *R v Grieg (1996) 89 A Crim R 254*, *Peterson v R [2007] NSWCCA 227*.

As to cases considering whether the defence was raised by the accused person see *R v Williams [2004] NSWCCA 224*; *Dezfouli v R [2007] NSWCCA 86* at [32]-[41]; *R v Minani [2005] NSWCCA 226; (2005) 63 NSWLR 490; (2005) 154 A Crim R 349* at [37]-[40].

Appeal against a limiting term of imprisonment or any other order or penalty after a special hearing:

A sentence is defined in s 2 to include a limiting term or any other order or penalty made or imposed after a special hearing: see also ss 5(1)(c), s 6A(c).

Appeal against any order made following a special verdict of act proven but not criminally responsible:

A sentence is defined in s 2 to include any order made in respect of a person following a special verdict of act proven but not criminally responsible: see also ss 5(1)(c), s 6A(d)

Raising fitness on appeal for the first time

If there is material on appeal that raises a question about fitness at the time of the trial, the Court should quash the conviction unless satisfied that the trial court, acting reasonably, must have found that the appellant was fit to stand trial: *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1* at [86]-[87] per Gaudron J and [319] – [320] per Hayne J; applied in *R v RTI [2003] NSWCCA 283; (2003) 58 NSWLR 438* at [31]; *R v Rivkin [2004] NSWCCA 7*; (2004) 59 NSWLR 284 at [294] – [295]; *JM v R [2017] NSWCCA 138* at [135] – [138]. This includes cases where the question of fitness was raised but not determined at trial: *RE v R [2022] NSWCCA 73* at [7].

This test continues to apply under the new Act: *Roberts v R [2023] NSWCCA 187* per Yehia J at [151]-[177]; Davies J agreeing at [145]-[148]; Kirk JA, dissenting at [13]-[65].

Finding of special verdict on appeal

Under s 7(4) the Court of Criminal Appeal may quash a conviction and sentence and make its own finding of a special verdict of act proven but not criminally responsible in relation to an appellant.

The appeal court does not need to first find error but must make its own evaluation of the evidence at trial in considering whether the person is mentally ill, giving due respect to the verdict at first instance: *Carter v R [2019] NSWCCA 11* at [2]–[14] per Payne JA; at [25]–[27] per Schmidt J and at [256]–[282] per Button J.

The Court may also consider cogent, additional evidence: *TA v R [2019] NSWCCA 145* at [13]–[14].

Appeals against refusal of Local Court to make a diversionary order

An appeal to the District Court against a refusal by a magistrate to make a diversionary order under Part 2 Div 2 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) or s 20BQ of the *Crimes Act* 1914 (Cth) is to be conducted as an appeal against conviction under s.11 *Crimes (Appeal and Review) Act* 2001 (NSW) and not as a severity appeal: *Application by Serge Zhura pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) [2024] NSWSC 198* at [101] per Hamill J; *Huynh v R [2021] NSWCCA 148*.

Appeals against Mental Health Review Tribunal orders

Note: References to sections in this part are to sections of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) unless otherwise stated.

Decisions of the Forensic Division of the Tribunal can be appealed to the Supreme Court or the Court of Appeal, depending on the nature of the Tribunal decision: Pt 7, Div 2.

The right of appeal is broad, allowing the person the subject of the Tribunal's order and the Minister for Health the opportunity to appeal on a question of law or any other question: s 150(1) and (2). Appeals by the person the subject of the order require leave: ss 150(1) and 151(1).

Registered victims who have made submissions regarding leave or release may similarly appeal on a question of law or any other question: ss 145 and 150(3).

Most appeals are heard in the Supreme Court. Appeals against release decisions are made directly to the Court of Appeal: s 151. The President of the Tribunal is usually a judge (as are some other presiding members). Appeals from a Tribunal decision presided over by a District or Supreme Court judge need to be taken directly to the Court of Appeal.

The nature of an appeal under the identical provisions of the former Act were considered by Johnson J in *A by his Tutor Brett Collins v MHRT* *[2010] NSWSC 1363*. Section 75A of the *Supreme Court Act* 1970 applies to appeals under the Act, so that an appeal to the Supreme Court is a rehearing: at [38]. If errors of law or wrong findings of fact have occurred below, the court will determine the appeal, and make such order as is appropriate: at [33].

Appeals by a forensic patient, a correctional patient or a person on bail who is a party to a proceeding before the Tribunal require leave: ss 150(1) and 151(1). This issue was also considered in *A by his Tutor Brett Collins v MHRT* by Johnson J. His Honour held that in considering whether leave should be granted the Court should bear in mind that the Tribunal holds specialist expertise in the subject matter: at [59]. For leave to appeal to be granted, the Court must be satisfied not merely that there is a reasonably arguable case of error, but also that there is a reasonable prospect of substantive relief being obtained: at [61].

There is 28 days from the Tribunal's determination to file an appeal: s 152. The Tribunal has an obligation to give written reasons for its decision and it is arguable that the 28 days run from the date of those reasons: *Minister for Mental Health v A* *[2017] NSWCA 288* per Beazley P at [56].

A forensic or correctional patient requires a tutor to be appointed (*Civil Procedure Act* 2005 (NSW) s 3 definition of 'person under legal incapacity' and *Uniform Civil Procedure Rules* 2005 (NSW) cl 7.14*)* unless the Court orders otherwise.

Judicial Review of Mental Health Review Tribunal determinations

Decisions of the Forensic Division of the Mental Health Review Tribunal can also be the subject of judicial review proceedings before the Supreme Court or the Court of Appeal: s 69 *Supreme Court Act* 1970 (NSW). This jurisdiction is based on the legality, rather than the merits, of the decision: *Attorney General (NSW) v Quin* *[1990] HCA 21; (1990) 170 CLR 1* at 35-37 per Brennan J.

Judicial review should only be used if statutory appeal mechanisms have been exhausted: see for example *Rodger v De Gelder* *[2011] NSWCA 97; (2011) 80 NSWLR 594* at [84] per Beazley JA.