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Attorney-General's references for New Zealand?

Introduction

1. This paper concerns a proposal to enable the Attorney-General to refer questions of law arising in criminal cases to the Court of Appeal and then, if necessary, to the Supreme Court. This form of appeal would not affect an acquittal.
2. The reference procedure (sometimes referred to as a “without prejudice appeal”) is available to the Attorney-General in the United Kingdom where it has been in existence since 1972. It is also available in a variety of forms in other jurisdictions as discussed below.
3. The purpose of the Attorney-General's reference is to enable errors in law, of significance beyond the immediate case, to be addressed in circumstances where an acquittal should not be challenged. Generally prosecution rights of appeal are more limited than those available to defendants.¹ This can mean that the higher courts do not have the opportunity to consider and determine points of law of general application.

Background

4. *Gordon-Smith v The Queen*² is a decision of the Supreme Court on an application for leave to appeal on a point of law relating to jury vetting. The applicant had been convicted in the High Court, where the point of law on appeal to the Court of Appeal had been decided favourably to her. At the request of the Crown the High Court had reserved the question of law for the Court of Appeal pursuant to s 380 of the Crimes Act 1961. In the Court of Appeal the Crown was successful.

¹ For a discussion of the historical reasons behind this distinction see *Consultation Paper on Prosecution Appeals in Cases Brought on Indictment* Law Reform Commission, Ireland, 2002. LRC CP 19 – 2002. For a discussion of the principles underpinning rights of appeal in criminal cases see *Prosecution Appeals against Judges' Rulings* Consultation Paper 158, Law Commission, England and Wales 2000. In the New Zealand context for discussion of the double jeopardy rule see the Law Commission's *Preliminary Paper 42 Acquittal Following Perversion of the Course of Justice: a Response to R v Moore* (2000) and the subsequent report *Acquittal Following Perversion of the Course of Justice* (2001) Report 70.

² [2008] NZSC 56.

5. The applicant/convicted person appealed the Court of Appeal's decision even though it could have no effect on her conviction.³ One of the issues for the Court was whether to grant leave in circumstances where the issue is moot. In granting leave to appeal, the Supreme Court agreed that the issue was one of public importance potentially affecting every criminal jury trial.
6. In discussion the Court noted that the Law Commission had previously recommended that consideration be given to adoption of the Attorney-General reference procedure available in the United Kingdom under s. 36 of the Criminal Justice Act 1972.
7. The purpose of this issues paper is to consider whether there is a gap in prosecution rights of appeal that could be addressed by an Attorney-General reference procedure like that in the United Kingdom. We also consider what form the provision could take in New Zealand.

Attorney-General's reference in other jurisdictions

8. In this section of the paper we outline the Attorney-General's reference procedure as established in England. We will also briefly outline the provisions in other jurisdictions to demonstrate the range of options available.

England and Wales

9. The Attorney-General's reference procedure is essentially a prosecution right of appeal. Information on the Attorney-General's website describes the reference procedure as follows:

Under section 36 of the Criminal Justice Act 1972, where a person tried on indictment has been acquitted, the Attorney General may seek the opinion of the Court of Appeal on a point of law which has arisen in the case. It is usual, but not essential, that the point of law should have been crucial to the outcome of the case. The ruling by the Court of Appeal does not affect the acquittal and the procedure is not used as an appeal against the acquittal. The purpose of the procedure is to clarify important points of law.⁴

10. The Court of Appeal may, having given their opinion, refer the matter to the House of Lords, either of their own motion or on an application. The

³ There was another applicant for leave to appeal. This applicant had been discharged in the High Court pursuant to s 347 of the Crimes Act 1947. The Crimes Act has now been amended to enable a Crown right of appeal in these circumstances but that provision was not operative at the time of the Supreme Court's decision. No question of law could be reserved to the Court of Appeal in relation to these applicants. Accordingly, leave to appeal to the Supreme Court was declined.

⁴ <http://www.attorneygeneral.gov.uk/attachments/AGsReferencesonaPointofLaw.doc> (Last accessed on 17 October 2008).

Court of Appeal may make such a reference *if it appears to the court that the point ought to be considered by that House*⁵.

11. Under s 36 the Attorney-General also has the power, with the leave of the Court, to refer a case to the Court of Appeal to review a sentence which appears to the Attorney-General to be “unduly lenient”. We are not concerned with that provision in this discussion. In New Zealand the Solicitor-General may, with the leave of the Court appealed to, appeal against a sentence.⁶
12. The Attorney-General’s reference procedure in England and Wales was introduced by the Criminal Justice Act 1972 and first used in 1975. In a frequently cited decision, *Attorney-General’s reference (No.1 of 1975)* [1975] 1 Q.B. 773 at 778 Lord Wigery CJ described the purpose of the power: “*to enable the Attorney-General to obtain a ruling on a point of law which is not capable of being investigated by the normal appellate procedure because the case in which the point of law arose resulted in an acquittal*”.
13. Lord Wigery CJ further commented that the power should not be used only for “*very heavy questions of law*” but should on the contrary be “*used extensively for short but important points which require a quick ruling of this court before a potentially false decision of law has too wide a circulation in the courts*” (at 778).
14. Arguably, the need for an Attorney-General’s reference procedure has been greater in the United Kingdom than in New Zealand. It was introduced in 1972⁷ when prosecution rights of appeal available there were more proscribed than they are now. Even following recent additions, prosecution rights of appeal remain narrower than in New Zealand.
15. A general right of appeal against sentence was not available until 1988.⁸ A narrower equivalent of New Zealand’s case stated procedure (s 380 of the Crimes Act 1961) was introduced in England and Wales in 2003.⁹ It applies only to “terminating rulings” such as a stay of proceedings or a ruling of no case to answer. This is because at the outset of the appeal the prosecution must concede that if the appeal fails the defendant must be acquitted. There is also a right of appeal in relation to “evidentiary rulings” but this provision is not yet in force.¹⁰

⁵ Section 36(3) Criminal Justice Act 1972 (UK).

⁶ Section 383 Crimes Act 1961.

⁷ Criminal Justice Act 1972.

⁸ Criminal Justice Act 1988 section 36.

⁹ By section 58 of the Criminal Justice Act 2003

¹⁰ Section 62 of the Criminal Justice Act 2003.

Variations in other jurisdictions

16. A number of other jurisdictions have a reference provision, although there are variations in the detail.
17. For example, in Scotland the Lord Advocate may refer a point of law to the High Court of Justiciary for its opinion following either acquittal or conviction.¹¹ There is no effect on the outcome of the case.
18. Some jurisdictions allow referrals for both indictable and summary offences (or the equivalent). Examples of this approach are found in Ireland¹² and Queensland, Australia.¹³
19. New South Wales and Victoria, Australia¹⁴ are also examples of provisions allowing references to be made by a person other than the Attorney-General, i.e. the office responsible for public prosecutions.
20. The provision for the Australian Capital Territory¹⁵ sets a time limit on making the reference – 6 weeks or otherwise with leave. It also covers concerns about representation of the defendant/acquitted. Persons either charged at the trial or affected by a decision in the trial may be heard in the reference appeal. If an interested party is not represented, the applicant must instruct counsel to argue the reference appeal on the party's behalf.
21. These variations provide options for consideration. If the reference procedure is to be adopted in New Zealand, it should be in a form that provides the maximum benefit consistently with the principles underpinning the provisions for prosecution appeals.

Prosecution rights of appeal in New Zealand

22. In this next section we briefly outline the prosecution rights of appeal available in New Zealand to determine whether there is a gap that might be addressed by the availability of a reference procedure.

Prosecution right of appeal against sentence

23. In New Zealand the prosecution's general right of appeal is limited to appeals against sentence under section 383(2) of the Crimes Act 1961 (the Act). This is the equivalent to the power in the United Kingdom for the

¹¹ Section 123(1) of the Criminal Procedure (Scotland) Act 1995.

¹² Section 34 of the Criminal Procedure Act 1967

¹³ Section 669A of the Criminal Code.

¹⁴ Section 450A Crimes Act 1958 (VIC).

¹⁵ Section 37S of the Supreme Court Act 1933 (ACT).

Attorney-General to refer under s 36 of the Criminal Justice Act 1972 an “unduly lenient” sentence to the Court of Appeal for review.

Appeal on interlocutory matters

24. Section 379A of the Act provides for appeals against certain pre-trial orders including orders relating to quashing or amending an indictment, disclosure and discharge of the accused.

“Case stated” procedure under s 380 of the Crimes Act

25. There is also the right during the trial to seek to have a question of law reserved under s 380 of the Act – the case stated procedure. During the trial the prosecutor (or accused) may apply to the Court to reserve a question of law for the Court of Appeal. The Court may reserve such a question either during or after the trial but the prosecutor must apply during the trial.¹⁶ The Court of Appeal’s decision on the question of law may result in a retrial.
26. Section 380 only applies to those trials which run their course and result in a conviction or acquittal. If a trial comes to an end or is not completed for other reasons, such as a guilty plea at an early stage or if the jury is discharged, then s 380 is not available.
27. A recent amendment to the Act, inserting s 381A, partially closes that gap. It provides that, where there has been a discharge under s 347¹⁷, or for any reason a prosecution has been stayed, questions of law arising out of that discharge or stay may be referred to the Court of Appeal.

Summary jurisdiction

28. Prosecution rights of appeal in the summary jurisdiction largely mirror those for the indictable jurisdiction described above. Part 4 of the Summary Proceedings Act 1957 deals with summary appeals. As in indictable cases, an informant has no general right of appeal but may appeal the sentence (see s 115A) and may appeal on a question of law by way of case stated (see s 107).

Potential gap?

29. These provisions do potentially leave a gap in the means available to address errors of law. Possible instances are discussed below.

29.1 *Where a ruling has been made adverse to the prosecution but a conviction has occurred in any case.* In this instance the problem of mootness arises as discussed in *Gordon-Smith v The Queen*.

¹⁶ Section 380(3).

¹⁷ Section 347 confers a broad discretion for a Judge to grant a discharge.

In that case, the Supreme Court was able to set aside the question of the mootness of the appeal because the test for leave to appeal includes that the matter is one of general or public importance.¹⁸ At the Court of Appeal level that criterion is not available. A reference procedure modelled on the English provision would not address this gap because it is only available for acquittals.

- 29.2 *Where the defendant has been acquitted but the prosecution does not wish to disturb the acquittal or the point in issue is not relevant to the acquittal.* There may nevertheless be a point of law that requires clarification because of its potentially broad impact. There is some anecdotal evidence that s 380 appeals are used in circumstances where the likelihood of a retrial is low and the appeal is brought largely to address the point of law which is disputed.
- 29.3 *In circumstances where an accused has been discharged under s 347.* The new right to appeal a point of law under s 381A concerns points of law relating to the discharge. If the point of law is not related to the discharge then there is no ability to pursue it by appeal.¹⁹
- 29.4 *In situations where the Court invokes its inherent jurisdiction to discharge an accused person.* Section 381A is not available in those instances.
- 29.5 *In situations where questions of law arise in other circumstances.* An application under s 380 is not available because the trial has not resulted in a conviction or an acquittal. One example is where the Attorney-General has stayed proceedings where a jury has been unable to agree in two hearings. There may be other instances where the jury is discharged or fails to agree and a decision is taken not to commence the proceedings afresh. That may leave outstanding a point of law with relevance to the criminal law more generally.

30. The incidence of the gap and the potential usefulness in New Zealand of an amendment similar to the Attorney-General's reference are difficult to assess. In the United Kingdom it appears that the Attorney-General's reference is exercised on only a few occasions each year. We would anticipate that the same would be the case in New Zealand.

Other considerations

31. The key argument in favour of the reference procedure is that it enables errors of law to be addressed in circumstances where they might

¹⁸ Section 13 Supreme Court Act 2003.

¹⁹ As noted in *Gordon-Smith v R* [2008] NZSC 56 at 59 para 11

otherwise have a considerable impact on the criminal law. It does so in a way that manages any risk of unfairness to the defendant by providing that it is not to affect the acquittal of that person. The discussion above confirms that there is a gap that could lead to errors that may not otherwise be addressed.

32. A further consideration arises out of New Zealand's smaller population base. This has an effect on the number of criminal cases meaning that many years may elapse before a decision on a point of law can be reconsidered in another case (for example?). Hence while the broader prosecution rights of appeal in New Zealand may suggest that an Attorney-General's reference procedure is less useful than in the United Kingdom, the reduced opportunities to reconsider the law in New Zealand may mean that the procedure is equally useful here.
33. The contrary arguments relate to resources and the theoretical nature of such appeals. Resource implications arise for the courts, prosecution and potentially the defendant. We estimate that the costs would be no less than for an ordinary criminal appeal. It is possible, as discussed below, that the Crown would be required to bear the defendant's costs.²⁰
34. In 2002 the Advisory Group on replacing the Privy Council recommended against a Supreme Court with jurisdiction to issue advisory opinions or deal with references.²¹ There was discussion of the procedure in Canada whereby the Supreme Court may provide advisory opinions and questions referred directly to the Court by the Governor and council. These are theoretical legal questions referred to the Court rather than questions of law arising in a factual setting.
35. The advisory group noted that it has been a common complaint that some of the opinions rendered in references have been too general and abstract to provide a satisfactory rule. To a certain extent the same risk arises with the proposed Attorney-General reference procedure but it is minimised as the question put to the Court will not be purely hypothetical. It has been held that there is no power for the Attorney-General under s 36 of the Criminal Justice Act in the United Kingdom to refer a purely hypothetical point of law.²²
36. It is also important to consider the potentially negative effect on public confidence in the criminal justice system that may arise from an Attorney-General's reference. If the Court of Appeal determines that a point of law was wrongly decided and the acquittal is not affected there is the risk of a

²⁰ In effect, the Crown often bears the defendant's costs via legal aid funding in any criminal proceeding.

²¹ Report of the Advisory Group *Replacing the Privy Council: and New Supreme Court*. A report to Hon. Margaret Wilson, Attorney-General and Associate Minister of Justice April 2002 at page 48.

²² *Attorney-General's reference* (No 4 of 1979) (1980) 71CR App R 341.

public perception that the defendant has escaped conviction on a technicality.

Q1 Should a provision be introduced in New Zealand enabling the Attorney-General or Solicitor-General to refer points of law in criminal cases to the Court of Appeal without affecting an acquittal?

Options for a reference procedure in New Zealand

37. Assuming the proposal is accepted in principle there are a number of options and associated issues which require further consideration.

When should power of referral be available?

38. Judges in different jurisdictions appear to have taken different approaches to the question of when it is appropriate to use the reference procedure. As noted above, in England it is not necessary that a “heavy” point of law be at issue, provided that it is important.

39. The Supreme Court of Victoria, in *Director of Public Prosecutions' Reference (No.1 of 1984)*²³ suggested that the reference procedure should be used sparingly. The New South Wales Court of Criminal Appeal in *R v J* had stated:

The purpose of [the Attorney-General's reference] is to provide a procedure whereby the Court can pronounce upon a question of law raised that is or may be of importance in the conduct of criminal trials in this State. The mere fact that a trial judge has made an error of law will not be sufficient. The question of law should be one of substance, the significant of which to the criminal law does not come to an end when the trial in which it arose concludes.”²⁴

40. While it should not be necessary that the question of law at issue affects every criminal trial or the criminal law as a whole, it is preferable that the reference procedure is reserved for matters likely to have a wide impact. Overall, the criminal law should continue to develop through its application in particular cases. The reference procedure should not be a substitute for appeals.

41. None of the legislative provisions examined contain any guidance about the nature of the cases which should be referred by the Attorney-General. Nor do any of the provisions require that leave is sought from the court that made the decision or from the court to which the question is referred.

²³ [1984] VR 727.

²⁴ (1987) 9 NSWLR 615 at 616.

It is left to the referring authority's judgement assisted, no doubt, by the judicial pronouncements referred to above.

42. It may be desirable to draft a provision which captures the intent that the reference procedure is reserved for matters likely to have a wide impact. However, capturing that in a legislative provision would be challenging. Alternatively, the Solicitor-General's Prosecution Guidelines could outline the circumstances in which the procedure is to be used.

Q2 Do you agree with the proposition that the reference procedure should be used only for questions of law likely to have wide impact? Should the legislative provision include guidance to that effect or are the Solicitor-General's Prosecution Guidelines the proper place for guidance?

Available on acquittal only?

43. A related question is whether the procedure should be available only in cases of acquittal or also in relation to convictions. As noted above, a point of law can be decided against the Crown but the case may proceed to a conviction. There are instances, such as *Gordon-Smith v The Queen*, where it would be useful to have the point of law considered by the Court of Appeal. In Queensland the procedure is available in both instances. The relevant provision is reproduced below:

The Attorney-General may refer any point of law that has arisen at the trial upon indictment of a person in relation to any charge contained therein to the Court for its consideration and opinion thereon if the person charged has been—

(a) acquitted of the charge; or

(b) discharged in respect of that charge after counsel for the Crown, as a result of a determination of the court of trial on that point of law, has duly informed the court that the Crown will not further proceed upon the indictment in relation to that charge; or

(c) convicted, following a determination of the court of trial on that point of law—

(i) of a charge other than the charge that was under consideration when the point of law arose; or

(ii) of the same charge with or without a circumstance of aggravation.²⁵

44. As discussed above,²⁶ there are potential gaps where a point of law could be referred in circumstances of acquittal and conviction but also in cases where there is neither acquittal nor conviction (e.g. due to discharge of the

²⁵ Section 669A (2) of the Criminal Code (Queensland).

²⁶ See paragraph 29

jury or stay of proceedings). Provided that the criteria referred to in the previous section (wide impact) is adhered to the argument for error correction applies in all of these circumstances.

Q3 Should the reference procedure apply to only to acquittals or also to convictions and in other instances?

Categories of cases in which it should be available

45. In the United Kingdom the reference procedure is available only in respect of indictable offences. In other jurisdictions it is also available in respect of summary offences.
46. In his review of the Criminal Courts of England and Wales²⁷ Lord Justice Auld commented that the purpose of the Attorney-General's reference procedure is to clarify the law for future cases. He noted that its limitation to indictable cases is no doubt in recognition of the ability to appeal a summary acquittal by way of case stated to the divisional court, a right of appeal not then available for indictable cases.
47. As discussed above the existence of the case stated procedure nevertheless leaves a gap in appeal rights that could be addressed by a without prejudice appeal. As well, an appeal by case stated requires a willingness on the part of the informant or the prosecutor to begin the trial again.
48. Important questions of law arise in both summary and indictable cases. Summary proceedings can throw up complicated points, particularly in the quasi-criminal/regulatory field. Indeed, given the higher number of summary prosecutions an error in law in a summary case may have a more significant impact.
49. On the other hand, the aim of the summary procedure regime is the efficient dispatch of proceedings which may tell against the proposal. Although the outcome of the prosecution is not affected by an Attorney-General's reference procedure it may be considered to delay the final conclusion of the proceedings.
50. Resource concerns will also need to be considered in determining whether to extend the procedure to both summary and indictable prosecutions. This is particularly so if, as proposed below, the Court of Appeal is to determine all references.
51. Whichever approach is taken will need to fit with the Law Commission's proposals for new categories of offences. To reflect that proposal it may be preferable to provide that the reference procedure is available in any

²⁷ Lord Justice Auld, *Review of the Criminal Courts of England and Wales* September 2001.

indictable or electable offence or alternatively, only in purely indictable offences.

Q4 Should the reference procedure apply to purely indictable offences only or to electable offences as well?

Court of Appeal to hear all references

52. A related question is which court should consider references arising out of trials in the District Court (whether summary or indictable). It may be preferable that all references are heard by the Court of Appeal (with the option of referral to the Supreme Court). In the case of District Court jury trials in indictable jurisdiction this matches the appeal arrangements.
53. This approach would ensure that there are not reference decisions from two courts with different precedent value. In addition the expertise of New Zealand's primary criminal appeal court would be applied.
54. The contrary point of view is that this would effectively provide a "leap frog" appeal, overriding normal appeal arrangements. The question is whether Attorney-General's references are sufficiently different from an appeal so as to justify the departure.

Q5 Should the Court of Appeal consider all references?

Referral by the Attorney-General

55. Although in the United Kingdom the power of reference is exercised by the Attorney-General that may be inconsistent with the convention in New Zealand, as stated by a former Solicitor-General, that matters of criminal law are increasingly left to the Solicitor-General.²⁸
56. It is notable that the right to appeal against sentence (with leave) is, in New Zealand, conferred on the Solicitor-General by s 383 of the Crimes Act. It may be preferable to adopt that approach in respect of the proposed right of appeal as well. While it is referred to as a power of reference it is in effect a right of appeal. It would be consistent with the Solicitor-General's role to confer that right on that office.
57. Even where there are statutory exceptions to the arrangement that the Solicitor-General is responsible for matters of criminal law, these are generally delegated to the Solicitor-General by virtue of section 9A of the Constitution Act 1986. For example, the Attorney-General's consent is required for certain prosecutions, generally those with an international aspect. Conferring the power to make a referral on the Attorney-General may signal the importance of the issue but does not, and should not in this

²⁸ JJ McGrath "Principles for sharing Law Officer power: the role of the New Zealand Solicitor-General" (1998) NZULR Vol 18 197 at 204.

instance, prevent the Attorney-General delegating the function to the Solicitor-General.

Q6 Should the power of referral be exercised by the Attorney-General (with power to delegate to the Solicitor-General) or to the Solicitor-General?

Role of the defendant/accused

58. It is also necessary to consider what role the defendant/acquitted person would take in the appeal. The Supreme Court of Victoria, in *Director of Public Prosecutions' Reference (No.1 of 1984)* [1984] VR 727, observed:

“It seems likely that a respondent will often have no legal interest in the Court's expression of opinion on a point of law raised under the section and the Court may accordingly be placed in the position of giving advisory opinions after hearing argument on one side only. Such a situation would not be wholly remedied by hearing argument from counsel as *amicus curiae* as appears sometimes to be done in England. These considerations suggest that the power granted by [Victoria's reference procedure provision] should be used sparingly.”

59. As noted in that decision an acquitted person will have no further interest in the issue before the courts. Even if legal aid or other funding were made available the defendant is unlikely to be motivated to participate and would have no real ability to give instructions on a matter which is moot in respect of that defendant.

60. It will be necessary for the court to appoint an amicus. As a matter of practice we anticipate that the court would wish to consider appointing as an amicus the person who represented the defendant but that is a matter that should be left to the court's discretion.

Q7 What steps should be taken to ensure that the point of law is fully argued before the court?

Timeliness

61. In the United Kingdom there are no time limits on the Attorney-General's reference. However, the desirability of a timely referral is recognised to prevent an erroneous decision being followed in other cases.²⁹ The Australian Capital Territory sets a time limit of 6 weeks for a referral to be made.³⁰

²⁹ See the guidance provided by the English Crown Prosecution Service: *Attorney-General's References on a Point of Law under Section 36 of The Criminal Justice Act 1972* http://www.cps.gov.uk/legal/a_to_c/criminal_justice_act/ (last accessed 11 February 2009)

³⁰ Section 37S(3) of the Supreme Court Act 1933 (ACT).

62. While a time limit is not necessary because the question is one of law only, it may assist to emphasise the purpose of the referral to prevent the consequences of an incorrect decision. If a referral can be delayed indefinitely, it seems likely that it is not one of significant impact on other cases. However, six weeks seems unnecessarily short. A time limit of 3 months may be workable.

Q8 Should the legislative provision for the references include a time limit? What length of time is reasonable? Is there any reason to depart from the time limits that apply to appeals?

COMMENTS

Please provide written comments on this paper by 25 September 2009 to either:

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