LAW REFORM COMMITTEE

De Novo Appeals to the County Court

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Parliament of Victoria

Law Reform Committee

De Novo Appeals to the

County Court

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FUNCTIONS OF THE COMMITTEE

Parliamentary Committees Act 2003

12. Law Reform Committee

(1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—

(a) legal, constitutional or parliamentary reform;

(b) the administration of justice;

(c) law reform.

TERMS OF REFERENCE

The Governor in Council, under section 12 of the Parliamentary Committees Act 2003, requests that the Law Reform Committee of Parliament inquire into and report to Parliament on County Court Appeals with a particular regard to the following:

1. the historical justifications for appeals from the Magistrate's Court to the County Court being heard de novo and whether such justifications continue to exist;
2. the effects of the 1999 changes to County Court Appeals and the extent to which the procedures are applied in practice;
3. the desirability or otherwise of any change having regard to any changes to the seriousness of offences heard by the Magistrates' Court;
4. the effect on the number of appeals should the current rights of appeal be changed;
5. if that number would be reduced, the savings to the County Court which would follow;
6. whether any proposed change would affect the way in which hearings in the Magistrates Court are conducted;
7. if so, whether any anticipated gains in the County Court from the proposed change would be outweighed by additional costs in the Magistrates Court;
8. in general, how the Magistrates Court and the County Court operate as one system, and what if any changes to that system will produce the best outcomes for the justice system.

This will be with a view to making recommendations on whether appeals from the Magistrate's Court to the County Court should continue to be hearings de novo, or whether they should be heard in some other way, and if so, what.

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FOREWORD

In Victoria, the right of appeal is regarded as a key human right. In practice, this right is one which must carefully balance the interests of victims in seeing the swift application of justice, whilst minimising the possibility of miscarriages of justice because of errors at law or in fact. In essence, it is a key safeguard to ensure justice is done.

The use of de novo appeals from the Magistrates' to the County Court has a long history in the common law system, and is closely tied to the use of summary justice within the Magistrates' court.

As the primary court of the judicial system, the Magistrates' Court undertakes an incredible workload, with 98 per cent of all matters dealt with in this jurisdiction. The speed at which matters, once in train, are brought to resolution by our Magistrates is only matched by the diversity of matters adjudicated, and the range of professional skills required by today's judiciary.

While there are a number of strong arguments for moving away from the de novo appeals system, the implications of changing the existing appeals system is not straightforward. While the implications of hearing appeals 'afresh' may involve an additional workload for the County Court, the Committee was not convinced that the potential efficiency gains would be realised in the whole justice system. Nor was the Committee convinced that alternative forms of appeal provide the same level of protection against errors made in rulings of the lower court. In addition, the Committee was concerned about issues of access to a fair appeals system.

The importance of a fair and robust appeals system is increasingly important as more criminal matters are dealt with in the Magistrates' Court. This said, the Committee notes areas of practice that should be modified that would assist in the administration of appeals.

In undertaking the inquiry, the Committee received extremely valuable contributions from the range of bodies involved in the prosecution of criminal matters, non-government organisations, police, and judges in the Magistrates', County and Supreme Courts of Victoria.

The Committee considered evidence on the performance of the Victorian court system and compared it with other relevant jurisdictions, interstate and overseas. It also directly collected evidence about recent changes to the appeals system in New South Wales, which provided an excellent opportunity for the Committee to consider the likely implications of any changes to the appeal system.

I would like to thank my fellow Committee members for their time and participation in the development of this final report of the Law Reform Committee of the 55th Parliament. This report represents the conclusion of a very productive term for the Committee, and is a tribute to the work of both the Members of the Committee and the Staff in the Secretariat.

On behalf of the Members I would like to extend my thanks to the staff responsible for the development of this report. In particular, I would like to thank Mr Nathan Bunt, as the principal Research Officer responsible for this inquiry. Nathan demonstrated considerable skill and dedication to the work of the Committee and the issues raised in this report, and continued to assist the Committee to finalise the report following his move to other work for the Parliament of Victoria.

In addition, I would like to thank the Executive Officer, Ms Merrin Mason, for her considerable efforts in helping to finalise this report during a very busy period for the Committee. Similarly, thanks are also due to Ms Sallyann Webster, who provided research assistance in the collection of key statistics used in the report, Ms Jaime Cook for analysis and administrative support for the research team, and Dr Peter Chen who assisted as Acting Executive Officer at the conclusion of the Parliament.

This report presents a detailed and considered evaluation of the performance and appropriateness of the existing system of appeals from the Magistrates' to the County Court, and the Committee hopes that its recommendations will serve to strengthen and improve the performance of our judicial system, and the confidence it commands from the people of Victoria.

Rob Hudson MP

Chair

RECOMMENDATIONS

Recommendation 1. That the *Magistrates' Court Act 1989* be amended to require the County Court judge hearing an appeal under section 83 of the Act to give an appellant a warning, as early as possible during the hearing, that she or he faces the possibility of receiving a more severe sentencing order than was originally imposed by the Magistrates' Court. 45

Recommendation 2. That clause 6 of Schedule 6 of the *Magistrates' Court Act 1989* be repealed so that an appellant is not required to seek the County Court's leave and to demonstrate 'exceptional circumstances' in order to abandon an appeal. 48

Recommendation 3. The Committee recommends that audio tapes of the proceedings in the Magistrates' Court be retained for six months. 167

Recommendation 4. That de novo appeals from the Magistrates' Court to the County Court be retained in their current form, subject to the minor procedural modifications recommended by the Committee. 203

EXECUTIVE SUMMARY

This report focuses on the existing right of appeal from the Magistrates' Court to the County Court in Victoria. The terms of reference received by the committee asked a number of questions: Is the current use of the de novo appeal — a new hearing heard afresh — still justified given the range of changes to the administration of justice in Victoria; should the government of Victoria consider alternatives to the de novo appeal; and how would these alternatives work within the wider system of courts in this State?

As a result of its research and the extensive evidence received from a range of witnesses, the Committee concluded that the existing right of de novo appeal from a 'sentencing order' made in the Magistrates' Court should remain unchanged. In other words, the Committee decided that appeals from a conviction or sentence imposed in the Magistrates' Court should continue to be heard de novo.

In broad terms, the Committee reached this decision after finding that hearing appeals de novo maximises both the fairness and the efficiency of the Victorian criminal justice system (discussed in chapters four and five respectively). Also central to this conclusion was the Committee's finding in chapter six that de novo appeals contribute to the operation of the Magistrates' Court and the County Court as a holistic system of justice.

As a preliminary step to its assessment of the fairness and efficiency of de novo appeals and their contribution to a single criminal justice system, the Committee looked in detail at alternative methods of hearing appeals from summary trial. These included models suggested by witnesses to the inquiry, models of appeal in other Australian states and territories, and those in operation overseas (chapter three). The Committee also looked at changes made to de novo appeals in Victoria in 1999 and their impact on appellants and the criminal justice system (chapter two).

In examining alternatives to the Victorian approach, the Committee gave particular consideration to the system of appeal that operates in New South Wales. Appeals in NSW were previously also heard de novo, but legislative reforms dating from 1999 changed the way in which appeals against conviction are now heard. NSW now provides for appeals against conviction by way of a rehearing on the transcript of evidence heard in the original court.

The Committee received evidence from a number of NSW witnesses regarding the effect of those changes on the efficiency and fairness of appeals and the criminal justice system in that state. On balance, the Committee was persuaded by this evidence that the 1999 changes in NSW have detracted from the accessibility, and therefore the fairness, of the right to appeal against conviction in that state. Moreover,

while the changes may be seen as having increased the efficiency with which conviction appeals are handled in NSW (the number of conviction appeals has declined and the speed with which they are heard has apparently increased) the Committee was not persuaded that this had not also led to a more than commensurate decline in the efficiency of summary justice in that state.

In brief, this comparative analysis of alternative forms of appeal, including the NSW model, convinced the Committee that Victoria's system of de novo appeal is both comparatively efficient — when seen in the wider context of its place within the criminal justice system — and comparatively fair. In the Committee's view, Victoria's system of de novo appeal achieves a remarkable synthesis of justice and value for money.

Historical and contemporary justifications

The right to a de novo appeal from summary trial originated in 17th-century England. As the Committee discusses in chapter two, de novo appeals arose at around the same time as (and apparently at least partly in recognition of) the decline in the right to trial by jury.[1] Victoria inherited de novo appeals from Britain in the same way that it inherited Britain's system of summary justice presided over by magistrates: at or around the time of its establishment as a separate colony in 1851.

Despite the popular view today of trial by jury as a predominant feature of the criminal justice system, the vast majority of criminal offences are heard by way of summary trial before a single magistrate in the Magistrates' Court. Matters heard at this level of the criminal justice system are determined without a jury. Moreover, while the Magistrates' Court has historically had responsibility for hearing comparatively less serious criminal matters, recent years have seen a steady increase in the seriousness of the matters that may be dealt with at this level of the court hierarchy. The Committee found that this trend, which is discussed in chapter six, is a further justification for retaining a form of appeal that maximises the basis on which a person who is dissatisfied with a magistrate's decision may seek a reconsideration of their case.

Recent factors — such as the shift from the former lay status of the magistracy and its earlier constitution as an arm of the executive — challenge the historical justifications for de novo appeals. The Committee also found, however, that de novo appeals perform a similar role today as when they originated; that is, they provide a counterbalance or 'safety net' for the summary justice system.

[1] As the Committee discusses in chapter two, the first known instance of a de novo appeal is in the *Conventicle Act* of 1671. Notably, just one year earlier, *Bushel's Case* (1670) had, in broad terms, established the independence of the jury from the judiciary. *Bushel's Case* effectively upheld a decision by a jury not to convict two Quakers of unlawful assembly under an earlier version of the *Conventicle Act*.

As the Committee discusses in chapter four, this is of particular importance to the criminal justice system given the qualitatively different pressures under which magistrates must operate compared to those faced by judges. These pressures include the comparatively limited time available to hear an individual case and a case load that is significantly greater than that of judges in the higher courts.

The Committee began this inquiry with no fixed views as to the form of appeal from summary trial that would be most appropriate for Victoria. However, having carefully weighed all of the available evidence, the Committee believes that the existing right of de novo appeal to the County Court from conviction or sentence in the Magistrates' Court should be left unchanged.

CHAPTER ONE – INTRODUCTION

Background to the inquiry

On 22nd September 2005 the Victorian Parliament Law Reform Committee ('the Committee') received terms of reference from the Governor-in-Council to inquire into, and report on, appeals from the Magistrates' Court to the County Court.

These terms of reference requested that the Committee consider the historical justifications for de novo[2] appeals, whether those justifications continue to exist and the desirability or otherwise of any change to the appeal system.[3]

This reference was preceded by the *Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004–2014*, which was released in May 2004. The *Justice Statement* identified a number of options for reform of the Victorian justice system and for the protection of individual rights, and it raised the following questions about de novo appeals:

> A right of appeal to the County Court is also available on criminal matters where the appeal hearing proceeds by way of a re-hearing of the case.
>
> Some people are critical of the breadth of the County Court appeal rights, arguing that they are derived from the period when the Magistrates' Court was a very different court with justices of the peace sitting on the bench and when not all magistrates were legally qualified. The County Court's criminal appeals jurisdiction is quite onerous, with over 1,500 matters being initiated each year. Potentially, each case can be argued as a full re-hearing, although some are abandoned and others only proceed on sentencing issues. With the changing nature of the magistracy, it is argued that it may be appropriate to restrict appeals to the County Court on the basis that the right of a full re-hearing is unnecessarily repetitive.
>
> Arguments in favour of retaining the right to a full re-hearing include the need for a widely based procedure to counterbalance the speed and volume of the Magistrates' Court's caseload and to

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[2] The term 'de novo' is Latin, meaning afresh or anew: *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998), 113. As discussed in chapter two, a de novo appeal is a type of appeal in which the case is heard again as though for the first time. Strictly, a de novo appeal is an appeal against both a finding of guilt and the penalty imposed. However, in Victoria — as in other Australian states and territories — a person may choose to appeal solely against the severity of their sentence. In practical terms, sentence appeals are also heard de novo when — as is the case in Victoria — the appellant is not restricted to the evidence heard in the original court proceedings, and the decision of the appellate judge is made without reference to the sentence imposed by the original judge. Unlike other types of appeal, a judge may increase a person's sentence in a de novo appeal.

[3] The full terms of reference are provided at the front of this report.

> smooth out inconsistencies between the many different cases and venues of the Magistrates' Court. This consideration is particularly relevant if the Magistrates' Court's jurisdiction is increased to hear more serious matters. The Government will consider reviewing the County Court appeal process after analysing the current profile of the appeal caseload.[4]

The *Justice Statement* also recognised that some Victorians, due to personal or community disadvantage, may face greater challenges in attaining recognition of their human rights and in fully realising their potential:[5]

> Addressing disadvantage is also integral to genuine equality of opportunity and equality under the law. Special measures are needed to ensure that the promise of equality is not destroyed by social and economic disadvantage. Disadvantage should not operate to deny people their rights or the ability to seek redress when those rights are breached. The justice system has not always protected the vulnerable and disadvantaged, but it operates to curtail the excessive abuse of power and provides a shield for those who are most vulnerable in our community.[6]

In assessing the system of de novo appeal, the Committee gave particular consideration to accessibility and the extent to which this form of appeal contributes to equality of opportunity, especially for those whose disadvantage might be compounded by alternative forms of appeal.

Another central criterion by which the Committee assessed the current system of de novo appeal was its inherent efficiency and its contribution to the efficiency of the wider criminal justice system. This issue is discussed further below.

Conduct of the inquiry

In view of the relatively short time originally envisaged for the completion of this inquiry, the Committee decided to proceed without a discussion paper.

Evidence gathering

In response to newspaper advertisements and letters inviting submissions from stakeholders within the Victorian criminal justice system, the Committee received 13 written submissions, including a minority submission from the Magistrates' Court of Victoria. Details of these submissions are listed at Appendix 1 of this report — limited details are provided for two of the submissions, as these were received in confidence. The public submissions were placed on the Committee's website.[7]

The Committee held public hearings in Melbourne on 13th February 2006, 14th February 2006 and 6th March 2006. The Committee heard from a total of 22

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[4] Department of Justice, Victoria, *Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004–2014* (May 2004) 28.

[5] Ibid 52.

[6] Ibid.

[7] See http://www.parliament.vic.gov.au/lawreform/.

witnesses in Victoria, representing nine organisations as well as private individuals. A list of witnesses and their affiliations is provided at Appendix 2. The transcripts of the public hearings were placed on the Committee's website.[8]

The Committee also gave careful consideration to reforms to the right of appeal against conviction introduced in New South Wales in 1999. The Committee obtained first-hand evidence regarding the effect of those changes at hearings held with eight NSW stakeholders on 10th April 2006 in Sydney. The NSW stakeholders are listed at Appendix 2.

The Committee obtained statistics relevant to the operation of de novo appeals in Victoria from five main sources:

- publicly available material, such as that in the various annual reports of relevant agencies, as well as the Australian Bureau of Statistics;
- data provided by the County Court:
    - the Committee created several databases covering recent years from a sample of County Court appeal files held in the Court's Registry;
    - County Court judges in Melbourne and on circuit provided the Committee with responses to a pro-forma questionnaire that they completed for each of their appeals during a designated period in the first half of 2006;
    - the County Court also provided the Committee with the results of its own sample of appeals heard in Melbourne and on circuit (this sample included appeals heard during a period of several months during 2006 as well as a number of appeals from earlier years)
- statistics from the Department of Justice regarding the types of matters appealed from the Magistrates' Court during 2004–05.

Report

This report will be tabled in the Victorian Parliament in October 2006. The government is required to respond to the Committee's recommendations within six months of the tabling date.[9]

De novo appeals in context

The Magistrates' Court deals with both criminal and civil matters (as well as matters that are not criminal but may be seen as related to that jurisdiction).[10] While appeals

[8] Ibid. The transcripts do not include the evidence of three witnesses who appeared in camera.

[9] *Parliamentary Committees Act 2003* s 36.

from criminal and related cases decided in the Magistrates' Court are heard de novo in the County Court, appeals from civil matters are heard differently. Accordingly, this inquiry looked solely at criminal and related matters that are originally heard in the Magistrates' Court and subsequently appealed to the County Court.

The vast majority of criminal offences in Victoria are heard and determined in the Magistrates' Court. The Magistrates' Court has jurisdiction in relation to relatively less serious criminal matters. However, increasingly serious offences are now being heard in the Magistrates' Court, with the consent of the defendant and the accused, as a result of changes to the Court's jurisdiction in recent years. Each matter is heard by a single magistrate who sits without a jury. As the sole decision maker in criminal and related matters, the magistrate is responsible for making relevant findings of fact,[11] interpreting and applying the law, determining and imposing any sentence, and exercising any discretion involved in those tasks in a particular case.[12]

The majority of criminal matters heard in the Magistrates' Court are resolved by a plea of guilty. In other words, the charges are not 'contested' by the defendant, and the magistrate's task is limited to reaching a decision regarding sentence, which can be a factually and legally complex process in itself. However, where the charges are contested by the defendant, the magistrate is also responsible for reaching the primary finding of fact — that is, whether a person is guilty or innocent.

Relatively more serious criminal matters, including the most serious offences, are heard in Victoria's higher courts: the County Court and the Supreme Court. The hearing of a 'contest' in these courts contrasts with a 'contest' in the Magistrates' Court.

In the higher courts a 'contest' is heard by a judge and jury sitting together. In such cases the jury is responsible for making findings of fact, including the finding of guilt or innocence. For uncontested matters heard in the higher courts, there is no jury and the judge's role is limited to determining and passing sentence. This can be a task that, depending on the particular case, may involve greater factual and legal complexity than in the Magistrates' Court.

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[10] At the time of writing, there were around thirty Acts conferring appellate jurisdiction on the County Court. Examples of non-criminal matters that are regularly appealed from the Magistrates' Court to the County Court include certain traffic offences and matters involving Intervention Orders.

[11] Since criminal justice systems in Australia are 'adversarial', the magistrate's fact finding is not an investigative function but involves reaching conclusions of fact on the basis of the evidence presented by the defence and the prosecution.

[12] Since both the law and findings of fact can be matters of interpretation, the exercise of discretion in relation to both may be unavoidable in a given case.

Efficiency and fairness

As noted above, an important criterion by which the Committee assessed the current appeal system was that of efficiency, as required by the terms of reference.

In relation to those terms, the Committee found that a change in the current right of appeal would almost certainly lead to a reduction in the number of appeals. The size of that reduction would obviously depend on the nature of any change, including whether the change related to both conviction and sentence appeals or to only one of those.

The option for change that the Committee considered most closely was that of altering appeals against conviction from a 'de novo hearing' to a 'rehearing'.[13] This is the system that was introduced in NSW in 1999. The evidence regarding sentence appeals in Victoria established that, although these represent the majority of appeals from the criminal and related jurisdiction of the Magistrates' Court,[14] they impose a relatively light burden on the resources of the County Court. Evidence received by the Committee from NSW witnesses established that sentence appeals in that state are also relatively undemanding of the appellate court's resources. It is presumably for this reason that sentence appeals were unaffected by the 1999 changes and continue to be heard de novo in that state. In Victoria a likely explanation as to why sentence appeals generally take much less time to hear is that the County Court judge may decide to hear the appeal on an agreed outline of the facts where these are not contested.[15]

In relation to term of reference five, the Committee found that a reduction in appeal numbers due to any change to the current system would not necessarily produce savings for the County Court and would almost certainly reduce the efficiency of, and increase costs for, the Magistrates' Court.

The Committee found that any restriction of the current right of appeal would affect hearings in the Magistrates' Court by making them longer and more complex. The Committee also found that 'any anticipated gains in the County Court from the proposed change would be outweighed by additional costs in the Magistrates' Court'. These matters are the subject of chapter five.

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[13] As discussed in chapter two, a 'rehearing' is a particular type of appeal. Like a 'de novo appeal' and a 'strict appeal', a 'rehearing' is a procedural definition rather than a purposive definition. In purposive terms, an appeal may be seen as belonging to one of two categories — an *appeal* or a *review*, both of which are discussed in detail in chapter two.

[14] Sentence appeals represented 73.7 per cent of all County Court appeals in 2005–06: County Court of Victoria, *2005–06 Annual Report*, 17. Appeals against sentence have averaged close to 75 per cent of appeals commenced in recent years: County Court of Victoria, *Statistics of the County Court of Victoria*, 13 December 2005, at www.countycourt.vic.gov.au.

[15] Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (12th ed, 2005) 422.

Chapter Two — De Novo Appeal and Criminal Justice in Victoria

In this chapter the Committee outlines the system of de novo appeal from Victoria's Magistrates' Court to the County Court. The Committee also considers the historical justifications for de novo appeals and the purposes of appeals generally. In the final section of the chapter, the Committee addresses the current performance of the de novo system and the effects of changes made to the system in 1999.

Types of appeal

In simple terms, an appeal is a reconsideration by a higher authority of the decision of, or the matter or matters decided by, a court, tribunal or other decision maker. In Australia the way in which an appeal is heard varies between criminal, civil and administrative legal systems, between the higher and lower levels of each system and between the Australian states and territories. Despite these differences, there are three broad types of appeal.[16]

Ranging from the broadest to the narrowest form of appeal, these may be described as:

- an appeal by way of de novo hearing;
- an appeal by way of rehearing; and
- an appeal in the strict sense.[17]

The following definitions of each of these types of appeal are given from the perspective of the criminal law. For each type of appeal, it should be noted that a person may generally appeal against their conviction or sentence, or against both.

De novo appeal

De novo – a Latin term meaning 'afresh' or 'anew' – describes a form of appeal in which a decided case is heard again from the beginning. A de novo appeal is a form of rehearing, but one that operates as an entirely new trial without reference to the

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[16] LexisNexis, *Halsbury's Laws of Australia* (at 15 September 2006). [125–410].

[17] An appeal by way of de novo hearing is technically known as an 'appeal de novo'. For the sake of clarity and consistency, the Committee uses the terms 'de novo appeal', 'strict appeal' and 'rehearing' respectively for the remainder of the report.

decision of the lower court or the evidence that it heard.[18] Accordingly, the prosecution is required to recommence its case and both the charge(s) and evidence are presented as though for the first time.[19] In a de novo appeal fresh evidence may also be presented as of right.

An appeal will be heard de novo if so defined in the authorising statute, or if the statute describes it as a rehearing but a correct construction requires that it be heard de novo.[20]

In strict legal terms, this definition does not include appeals against sentence alone (that is, appeals where a person accepts their conviction but appeals the severity of their sentence). However, the Committee notes that, in a practical sense, such appeals are also heard de novo when conducted by way of a rehearing in which new evidence may be presented as of right[21] and in which the appellate court does not rely on a transcript of evidence or other material heard in the original court. Appeals against sentence heard in this way comprise the majority of appeals from the Magistrates' Court to the County Court in Victoria.

Rehearing

An appeal by way of rehearing, like a de novo appeal, is a new trial by a higher court or tribunal in which issues of fact and law may be reconsidered.[22]

In practice, reconsideration of the facts may be more limited than in a de novo appeal because the appeal judge is required to consider and give full weight to any advantages the trial judge may have had.[23] Moreover, a rehearing is a more limited retrial than a de novo appeal – new or additional evidence cannot be presented 'as of right' but is subject to the court's leave.[24] The appeal court generally has before it a transcript of the evidence heard by the original court. The appeal court applies the law

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[18] *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6; 101 FLR 175, see *Halsbury's*, above n 16, [125–430].

[19] *Sweeney v Fitzhardinge* (1906) 4 CLR 716 728–30 (Griffith CJ), 733–4 (Barton J); *R v Longshaw* (1990) 20 NSWLR 554, cited in *Halsbury's*, above n 16, [130–13925].

[20] *Tsintris v Roads and Traffic Authority of New South Wales* (1991) 25 NSWLR 68; 15 MVR 249, cited in *Halsbury's*, above n 16, [125–410].

[21] That is, without the leave of a court.

[22] *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6; 101 FLR 175, cited in *Halsbury's*, above n 16, [125–425].

[23] *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588. As Justice Kirby noted in that case, where a disputed finding of fact turns purely on the opposing testimony of witnesses, an assessment of credit based on demeanour may be the only way of reaching a conclusion, and an appeal judge will not have that advantage if a rehearing does not require a witness to reappear.

[24] *Ex parte Currie; Re Dempsey* [1968] 2 NSWR 378; (1968) 70 SR (NSW) 1; 88 WN (NSW) (Pt 2) 193, CA(NSW); *O'Hara v Rochford* (1885) 11 VLR (L) 100; 6 ALT 219; *Re Farrar; Ex parte Foucauld* (1895) 16 LR (NSW) B & P 3; 5 BC (NSW) 88 (dicta), cited in *Halsbury's*, above n 16, [125–425].

in existence at the time the appeal is determined[25] and may also take into account events up to the time of the rehearing.[26]

As the Committee notes in chapter three, an appeal system that is defined in legislation as a rehearing may operate in practice more like a strict appeal.

Strict appeal

An appeal in the strict sense is one in which a higher court reconsiders a lower court's decision on the grounds that it contains an error.[27]

The right of appeal may be available in relation to a question of law, or for mistakes of fact or law.[28] The appeal is determined by reference to the evidence heard by the original court and the law at that time.[29] New evidence cannot be presented in a strict appeal.[30]

The appellate court's decision may take one of three forms: the appeal may be dismissed and the decision of the lower court affirmed; it may be upheld and the decision of the lower court reversed or altered; or the case may be remitted for reconsideration by the lower court according to principles explained by the higher court.[31]

The Victorian criminal justice system

The Committee outlines the Victorian criminal justice system here, for the purposes of context, before detailing the system of de novo appeal from the Magistrates' Court to the County Court.

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[25] *Edwards v Noble* (1971) 125 CLR 296, 304; [1972] ALR 385; (1971) 45 ALJR 682 (Barwick CJ); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 112; 5 ALJ 241 sub nom *Meakes v Dignan* [1932] ALR 22, 36 (Evatt J); *Shaw v Costerfield Gold & Antimony Mining Co* (1870) 1 VR (M) 7; 1 AJR 17, cited in *Halsbury's*, above n 16, [125–425].

[26] *Ex parte Currie; Re Dempsey* [1968] 2 NSWR 378, 380; (1968) 70 SR (NSW) 1, 4–5; 88 WN (NSW) (Pt 2) 193, 196 (Wallace J), CA(NSW), cited in *Halsbury's*, above n 16, [125–425].

[27] *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 109 (Dixon J), 122–3 (Evatt J); 5 ALJ 241, cited in *Halsbury's*, above n 16, [125–420].

[28] *Halsbury's*, above n 16, [125–420]; Howie, R N, *Butterworths Australian Criminal Law Dictionary* (1997) 13.

[29] *Edwards v Noble* (1971) 125 CLR 296, 304; [1972] ALR 385, 389; (1971) 45 ALJR 682, 685 (Barwick CJ); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 112 (Full Court); 5 ALJ 241.

[30] *Quilter v Mapleson* (1882) 9 QBD 672, 676, cited in *Butterworths Australian Criminal Law Dictionary*, above n 28, 13.

[31] *Butterworths Concise Australian Legal Dictionary* (2nd edition, 1998), 26.

Court hierarchy

The Victorian court system is composed of a hierarchy of three separate courts, each of which has jurisdiction to hear successively serious criminal matters.

The *Magistrates' Court* forms the first tier of Victoria's court system. It has criminal jurisdiction in relation to relatively less serious offences, which are known as 'summary offences'. Where the defendant consents and the court considers it is appropriate,[32] the Magistrates' Court also hears intermediate-level offences, which are known as 'indictable offences triable summarily'. In addition, the Magistrates' Court deals with matters that are not generally considered criminal, such as minor traffic offences and disputes over parking fines.[33] However, such matters are increasingly dealt with by a direct fine imposed by an enforcement agency and only proceed to a hearing in the Magistrates' Court if the person charged with the offence or issued with the fine elects to do so.[34]

The *County Court* sits immediately above the Magistrates' Court and forms the intermediate tier of Victoria's court system. In addition to hearing appeals from the Magistrates' Court, the County Court is responsible for hearing more serious criminal matters at first instance. These include indictable offences (with the exception of treason and murder, which must be heard in the Supreme Court)[35] as well as 'indictable offences triable summarily'.

The superior criminal court in Victoria is the *Supreme Court*, which has jurisdiction to hear all indictable offences. The Supreme Court also has an appellate division – the Court of Appeal – which hears appeals from the County Court and appeals on questions of law from the Magistrates' Court. The final court of appeal in criminal matters is the High Court of Australia. Each of these courts also has a civil jurisdiction.

Offence classification

Victoria

As noted above, criminal offences in Victoria are grouped into three levels of seriousness:

- summary offences (less serious matters);
- indictable offences triable summarily (intermediate-level offences); and

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[32] *Magistrates' Court Act 1989* s 53(1).

[33] *Magistrates' Court Act 1989* s 53(1).

[34] *Magistrates' Court Act 1989* s 53(1).

[35] Fitzroy Legal Service, *The Law Handbook* (2003) 15.

- indictable offences (the most serious category of criminal offence).[36]

Indictable offences

The distinction between indictable and summary offences is set out in the *Sentencing Act 1991*, which defines indictable offences as follows:

> An offence that is described in a provision of an Act (other than the *Crimes Act 1958* or the *Wrongs Act 1958*), subordinate instrument or local law as being level 1, 2, 3, 4, 5 or 6 or as being punishable by level 1, 2, 3, 4, 5 or 6 imprisonment or fine or both is, unless the contrary intention appears, an indictable offence.[37]

The corresponding offence and penalty levels are given in Table 1 and Table 2 of s 109 of the *Sentencing Act 1991*.

Table 1 gives the maximum term of imprisonment for all offence levels from level 1 (life) down to level 9 (six months). Table 2 gives the maximum penalty units (ie maximum fines) that apply for level 1 offences (more than 3000 penalty units) down to level 12 offences (one penalty unit). The value of a penalty unit in 2006–07 is $107.43. Section 109 (including these tables) is reproduced at Appendix 3.

Indictable offences include all common law offences that are not enshrined in legislation, as well as nearly all offences in the *Crimes Act 1958*.[38] A number of indictable offences are created under statutes such as the *Wrongs Act 1958* and the *Drugs, Poisons and Controlled Substances Act 1981* (such as drug trafficking).[39] Some examples of indictable offences under the *Crimes Act 1958*:

- murder (s 3);
- unintentional killing in the course or furtherance of a crime of violence (s 3A);
- manslaughter (s 5);
- defensive homicide (s 9AD);
- treason (s 9A);
- child destruction (s 10);[40]

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[36] A similar categorisation of offences exists in each of the Australian states and territories, in England and Wales and in other common law jurisdictions.

[37] *Sentencing Act 1991* s 112.

[38] Richard Fox, *Victorian Criminal Procedure: State and Federal Law*, (12th ed, 2005), 10.

[39] Ibid.

[40] The offence refers to abortion in certain circumstances, particularly late-term abortion. See: Ewin Hannan, ‘Doctors cleared over late abortion’, *The Australian*, 16 September 2006, 3.

- intentionally causing serious injury (s 16 – this is one example of a variety of statutory offences commonly referred to as 'aggravated assaults');[41]
- a number of more serious sexual offences, including rape;
- dealing with the proceeds of crime (s 194); and
- perjury (s 314).

Summary offences

Summary offences are also defined in the *Sentencing Act 1991* as follows:

> Any other offence under an Act (other than the *Crimes Act 1958* or the *Wrongs Act 1958*), subordinate instrument or local law is, unless the contrary intention appears, a summary offence.[42]

In other words, an offence is a summary offence if described as such in the Act under which it is created (see for example the *Summary Offences Act 1966*)[43] or if created under an Act that is silent regarding the relevant prosecution or enforcement procedures (unless the Act describes the offence as indictable or the offence is created under the *Crimes Act 1958* or the *Wrongs Act 1958*).[44]

Summary offences include Table 1 offences from level 7 (two-year maximum term of imprisonment) down to level 9 (six-month maximum term of imprisonment) and Table 2 offences from level 7 (240 penalty units maximum) down to level 12 (one penalty unit maximum).

Examples of summary offences created under the *Summary Offences Act 1966*:

- offences relating to the 'good order of towns etc' (s 4);[45]
- wilful destruction, damage etc of property (s 9);
- posting bills etc and defacing property (s 10);
- public drunkenness (ss 13, 14);

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[41] For further discussion of the common assault / aggravated assault distinction, see: L Waller and C R Williams, *Criminal Law, Texts and Cases* (10th edition, 2005), 41-47.

[42] *Sentencing Act 1991* s 112(2).

[43] *Interpretation of Legislation Act 1984* s 52 and *Sentencing Act 1991* s 112(2); Fox, above n 38, 10.

[44] Fox, above n 38, 10. See for example *Dangerous Goods Act 1985*, *Occupational Health and Safety Act 2004* and *Equipment (Public Safety) Act 1994*.

[45] These offences include burning rubbish in a public place and flying a kite or playing a game 'to the annoyance of any person' in a public place.

- obscene, threatening, insulting or abusive language or behaviour (s 17);
- obscene exposure (s 19);
- common assault (s 23 – these include assaults that are generally of a less serious nature than aggravated assaults, such as the indictable offence of intentionally causing serious injury noted above);[46]
- aggravated assault (s 24);
- taking or using a vehicle without the consent of the owner (s 38);
- begging or gathering alms (s 49A);
- loitering with intent to commit an indictable offence (s 49B); and
- escaping from lawful custody (s 49E).[47]

All summary offences are heard in the Magistrates' Court by a single magistrate who sits without a jury. Examples of summary offences that are commonly dealt with in the Magistrates' Court include drunk and disorderly behaviour, offensive behaviour, wilful damage, resisting police, and loitering.[48]

Indictable offences triable summarily

Indictable offences triable summarily are defined in the *Magistrates' Court Act 1989* and include offences:

- listed in Schedule 4 of that Act[49] (see Appendix 3); and
- described by an Act as a level 5 or level 6 offence; or as punishable by level 5 or 6 imprisonment or level 5 or 6 fine, or both.[50]

Examples of indictable offences that may be heard summarily in the Magistrates' Court:[51]

- common law assault;[52]

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[46] The law relating to assault is complex. For a helpful discussion of the Victorian situation, the reader is referred to: L Waller and C R Williams, *Criminal Law, Texts and Cases* (10th edition, 2005), Chapter Two.

[47] This list is not exhaustive. Among the more unusual summary offences created under the Act are offences in relation to homing pigeons, tattooing of juveniles and possessing or offering to sell property taken from a ship wreck.

[48] Fitzroy Legal Service, *The Law Handbook 2006*, 12.

[49] *Magistrates' Court Act 1989* s 53(1).

[50] *Magistrates' Court Act 1989* s 53(1A).

[51] Fitzroy Legal Service, *The Law Handbook 2006*, 12.

- recklessly causing serious injury;
- theft, robbery or burglary where the value does not exceed $25,000 (however, at the time of writing, the limit was set to increase to $100,000 on or before 1 July 2007);
- obtaining property by deception, or obtaining financial advantage by deception or false accounting, where the amount does not exceed $25,000 (also set to increase to a limit of $100,000 on or before 1 July 2007);
- intentionally or recklessly causing injury;
- threats to inflict serious injury;
- assaults;
- indecent assault; and
- a number of sexual offences.[53]

A notable trend in recent years has been the reclassification of certain indictable offences as indictable offences triable summarily, effectively allowing an increasing number of such offences to be heard in the Magistrates' Court. This issue is discussed in detail in chapter six.

Commonwealth

The Magistrates' Court has jurisdiction in relation to criminal offences under both state and Commonwealth law. Under s 68(1) of the *Judiciary Act 1903*, state courts are required to apply state laws regarding arrest, bail, custody, summary conviction, trial and conviction on indictment, and appeal to persons charged with Commonwealth offences.[54] Accordingly, a person convicted of and/or sentenced for a Commonwealth offence in the Magistrates' Court has the same right to a de novo appeal in the County Court as a person convicted of a state offence.

Commonwealth criminal law also distinguishes between summary and indictable offences, and the Magistrates' Court has jurisdiction to hear:

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[52] *Courts Legislation (Jurisdiction) Act 2006* s 22. See also the discussion of offence reclassification in chapter six below.

[53] These are set out in the *Crimes Act 1958* and include 'indecent act with child under the age of 16' (s 47(1)); 'act of sexual penetration with a 16 or 17 year old child to whom the offender is not married and who is under his or her care, supervision or authority' (s 48(1)); 'indecent act with or in the presence of a 16 year old child' (s 49(1)); 'sexual offences against people with impaired mental functioning' (s 51(2)); 'sexual offences against residents of residential facilities' (s 52(2)); 'procuring sexual penetration of a child under the age of 16' (s 58); and bestiality (s 59).

[54] *De Vos v Daly* (1947) 73 CLR 509; *Peel v The Queen* (1971) 125 CLR 447, cited in Fox, above n 38, 5–6.

- all Commonwealth summary offences, which are generally those punishable by imprisonment of up to 12 months or which are not punishable by imprisonment;[55] and
- generally, all indictable Commonwealth offences punishable by a maximum of 10 years' imprisonment or involving property up to a value of $5,000, with the consent of the defendant and the prosecutor.[56]

The Magistrates' Court

The criminal jurisdiction of the Magistrates' Court accounts for around 98 per cent of all criminal sentences imposed in Victoria each year — the remainder are imposed for indictable offences heard in the County and Supreme Courts.[57] In a given year approximately 95,000 defendants are sentenced in the Magistrates' Court, compared with around 1,500 defendants in the County and Supreme Courts.[58] This is typical of the situation throughout the Australian states and territories, in which the vast majority of offences are heard and determined summarily.[59]

In 2004–05 the five most common charges heard in the Magistrates' Court were traffic offences (approximately 20 per cent); theft (11.4 per cent); obtaining property by deception (5.3 per cent); being drunk in a public place (3.6 per cent); and unlawful assault (2.8 per cent). For a list of the 50 most common charges heard during the same period, see Appendix 5.

The Magistrates' Court currently has 54 locations in metropolitan, suburban and regional areas throughout Victoria.[60] Magistrates sit alone without a jury when hearing and determining criminal matters.[61] This is the defining characteristic of a summary trial: a hearing in which a magistrate, rather than a jury, makes findings of fact, including the ultimate finding of guilt or innocence.[62]

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[55] *Crimes Act 1914* (Cth) s 4H.

[56] *Crimes Act 1914* (Cth) s 4J.

[57] See Fox, above n 38, 83. On the figures provided by Fox, just over 98 per cent of all defendants sentenced in Victoria each year are sentenced in the Magistrates' Court. The percentage of all criminal matters in Victoria that are actually heard by the Magistrates' Court may be slightly lower, owing to the higher rate of acquittal in the higher courts.

[58] Ibid. As Fox also notes, approximately 250,000 sentences for summary offences are imposed in the Magistrates' Court, compared with around 6,200 sentences imposed by the Supreme and County Courts. The difference between the number of sentences and the number of persons convicted in each court is due to the fact that the majority of cases involve a number of charges.

[59] John Willis, 'The Processing of Cases in the Criminal Justice System', *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 142.

[60] Magistrates' Court of Victoria, *2004–05 Annual Report*, 6.

[61] Fox, above n 38, 83.

[62] *Butterworths Australian Criminal Law Dictionary*, above n 28, 193.

As the Committee notes below, before the rise of statute-defined summary jurisdiction in 17th-century Britain, nearly all trials were conducted before a jury under the common law.[63]

De novo appeal in Victoria

Right of appeal

The right to a de novo appeal from the Magistrates' Court to the County Court may arise in a number of circumstances. The vast majority of such appeals, however, are lodged by persons convicted of and/or sentenced[64] for a criminal offence. This right of appeal is contained in s 83 of the *Magistrates' Court Act 1989*, which provides that a person may appeal any 'sentencing order' made against them in a criminal proceeding.[65] A sentencing order is any order made following a finding of guilt and includes the recording of a conviction alone; it also includes any order made under Part 3, 3A, 4 or 5 of the *Sentencing Act 1991*.[66]

A de novo appeal from the Magistrates' Court is also available where a person is subject to a driver licence cancellation, suspension or disqualification;[67] where an order is made relating to breach or variation of an existing sentence;[68] or where a person is affected by a decision in relation to an intervention order or counselling order under the *Crimes (Family Violence) Act 1987*.[69]

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[63] Ibid.

[64] A magistrate can decide not to record a conviction despite being satisfied that a person is guilty beyond reasonable doubt. Non-conviction orders include adjournment and dismissal of the charge(s) against a person, and a magistrate has the discretion not to record a conviction when a community-based order or fine is imposed. See *Sentencing Act 1991* ss 7(e), (f), (i), (j), 8; Fox, above n 38, 186.

[65] Notably, this right of appeal may be exercised by persons other than a defendant; for example, where a restitution order is directed against another person: Fox, above n 38, 420.

[66] *Magistrates' Court Act 1989* s 3. Broadly, the orders that may be made under Part 3 of the *Sentencing Act 1991* include custodial orders, community-based orders, fines, dismissals, discharges and adjournments. Part 3A deals with superannuation orders. Part 4 provides for orders in relation to compensation, restitution, recovery of assistance paid under the *Victims of Crime Assistance Act 1996*, recovery of costs incurred by emergency-service agencies, cancellation or suspension of a driver licence and alcohol interlock orders. Part 5 provides for hospital orders that include diagnosis, assessment and treatment relating to mental illness.

[67] *Road Safety Act 1986* s 29; Fox, above n 38, 419.

[68] *Sentencing Act 1991* s 105; Fox, above n 38, 419.

[69] *Crimes (Family Violence) Act 1987* ss 20, 21. At the time of writing, there were around thirty Acts conferring appellate jurisdiction on the County Court.

The Director of Public Prosecutions (DPP) may also appeal to the County Court, on a de novo basis, against a sentence imposed in the Magistrates' Court if the DPP is satisfied that it is 'in the public interest' to do so.[70]

While the terms of reference for this inquiry ask the Committee to consider whether appeals from the Magistrates' Court to the County Court should continue to be heard de novo, the Committee notes that the County Court also hears de novo appeals from the criminal and the *Crimes (Family Violence) Act 1987* jurisdictions of the Children's Court.[71] The Committee notes that such appeals comprise a relatively small proportion of de novo appeals heard by the County Court.[72] The Committee is not aware of any reason why its ultimate findings in relation to de novo appeals from the Magistrates' Court should not also apply to de novo appeals from the Children's Court.

The right to a de novo appeal is subject to restrictions. A person forfeits their right of appeal to the County Court if they have already lodged an appeal to the Supreme Court on a question of law.[73] An appellant is also required to lodge their notice of appeal within 30 days of the sentencing order of the Magistrates' Court.[74] If the notice of appeal is lodged after this time, it is treated as an application for leave to appeal, which may be granted if the County Court finds that the failure to lodge within time was due to 'exceptional circumstances' and is satisfied that the respondent's case would not be 'materially prejudiced' because of the delay.[75]

Because the appeal is heard de novo, the appellant is not required to set out detailed grounds or to identify a specific error in the original decision when lodging the appeal. The Notice of Appeal form simply requires the appellant to choose from two general grounds for the appeal: that he or she is not guilty and/or that the punishment is excessive.[76] A copy of the form is included as Appendix 4.

As noted below, the majority of appeals are against sentence only.

How the appeal is heard

De novo appeals to the County Court are heard by a single judge who sits without a jury.[77] Since the evidence for the prosecution and defence is called anew, additional

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[70] *Magistrates' Court Act 1989* ss 84, 85.

[71] *Crimes (Family Violence) Act 1987* ss 20, 21. However, if the original decision was made under the *Crimes (Family Violence) Act 1987* by the President of the Children's Court, the appeal is heard de novo in the Supreme Court. The Children's Court is a separate court established under s 8 of the *Children and Young Persons Act 1989*.

[72] See the recent annual reports of the Magistrates' Court.

[73] *Magistrates' Court Act 1989* s 83(2).

[74] *Magistrates' Court Act 1989* sch 6, clause 1.

[75] *Magistrates' Court Act 1989* sch 6, clause 1.

[76] *County Court Miscellaneous Rules 1999*: Form 2-2A.

[77] *County Court Act 1958* s 53(A).

evidence may be provided as of right.[78] The appellant also pleads anew, so he or she is not bound by the original plea made in the Magistrates' Court[79] — an appellant who pleaded guilty in the Magistrates' Court may therefore plead not guilty on appeal. The hearing procedure is essentially the same as for the original hearing in the Magistrates' Court.[80]

The requirement that an appeal be heard de novo is not stated in the *Magistrates' Court Act 1989*, which states that an appeal is to be conducted as a rehearing.[81] However, the courts have held that the form of rehearing required under the Act is a full de novo hearing.[82] The County Court must set aside the decision of the Magistrates' Court in the course of reaching its own decision, even though it may also find the accused guilty or decide to impose an identical sentence.[83]

Where the appeal is against sentence only, the judge may refer to an outline of facts that has been accepted by the appellant.[84] The outline of facts may be the result of a prior agreement between the parties, evidence provided by police witnesses, or the court's own summary based on statements in the brief of evidence.[85] However, if the facts are contested in an appeal against sentence, a more complete rehearing will be likely.[86]

A further defining feature of the de novo appeal is that the County Court must set aside the order of the Magistrates' Court before proceeding to make any order that it 'thinks just and which the Magistrates' Court made or could have made'.[87]

Historically, if the County Court was considering increasing an appellant's sentence, procedural fairness was seen to require the provision of a warning and the opportunity to make submissions in response.[88] In 1999 the *Magistrates' Court Act 1989* was amended to state that no such warning is required. This issue is discussed below with

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[78] As noted above, the provision of new evidence on appeal may be subject to the court's leave in a strict appeal or a rehearing.

[79] *Magistrates' Court Act 1989* s 85.

[80] Fox, above n 38, 422.

[81] *Magistrates' Court Act 1989* s 85.

[82] See the Full Court of the Court of Appeal decision in *Director of Public Prosecutions and Another v His Honour Judge Fricke* [1993] 1 VR 369, 374 (Fullagar, Tadgell and Phillips JJ). As noted above, an appeal will be heard de novo if the statute provides that it is to be heard by way of rehearing but a correct construction requires that it be heard de novo.

[83] By contrast, in a strict appeal or an appeal by way of rehearing, the appeal court affirms, varies or sets aside the decision of the original court.

[84] Fox, above n 38, 422.

[85] Ibid.

[86] Ibid.

[87] *Magistrates' Court Act 1989* s 86.

[88] *Brand v Parson* [1994] 1 VR 252; Fox, above n 38, 423.

the other 1999 changes, including the circumstances in which a person may abandon an appeal.

In most cases the decision of the County Court on appeal is final.[89] However, if a sentence of imprisonment is substituted for any other sentence, the person sentenced may, by leave, appeal to the Court of Appeal.[90] Imprisonment for these purposes includes detention in a youth training centre but does not include imprisonment in default of a fine payment.[91]

Appeals by the DPP are also generally final,[92] however, if a person is acquitted of some or all of the charges on appeal, the DPP can refer a point of law to the Court of Appeal.[93] The Court of Appeal will give an opinion to clarify the law but cannot alter the acquittal.[94]

The historical justifications for de novo appeals

> The rules which govern the jurisdiction and the procedure of the courts are the substantive part of early bodies of law. As these courts increase in power and enlarge their jurisdictions, the law which they apply gradually becomes more important than the courts which administer it and the procedure by which it is administered …
>
> But a body of law which has thus grown up bears upon it many marks of its origins. Its leading divisions, and the contents of many of its most characteristic doctrines, can often be explained only by a reference to events in the history of the courts and their procedure.
>
> The historian of any legal system must begin his tale in the days before the law courts have made much law. Legal history must always begin with the history of the courts.[95]
>
> … many times in the history of the … law the survival of archaic ideas has helped forward the cause of the liberty of the subject.[96]

English origins

The origin of Victoria’s de novo appeal system is closely connected to the office of justice of the peace,[97] which arose in medieval England and subsequently developed

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[89] *Dunn* [1966] VR 31; Fox, above n 38, 423.

[90] *Magistrates’ Court Act 1989* s 91. Currently, this includes a suspended sentence (*Sentencing Act 1991* ss 27(8), (9)) but, as the Committee notes below, these are to be phased out.

[91] *Magistrates’ Court Act 1989* s 91(1); Fox, above n 38, 424.

[92] *Magistrates’ Court Act 1989* s 84(2).

[93] *Crimes Act 1958* s 450A; Fox, above n 38, 424.

[94] *Crimes Act 1958* s 450A(4); Fox, above n 38, 424.

[95] W S Holdsworth, *A History of English Law* (1922) vol I, 1.

[96] Ibid 320.

[97] Holders of the office were also referred to simply as ‘justices’.

into the modern Australian magistracy. In this section the Committee traces the evolution of that office and of the courts in which these justices sat.

The office of justice of the peace originated in England between the final years of the 12th century and the middle of the 14th century.[98] Following a proclamation of 1195, a number of knights were appointed to preserve the king's peace throughout the counties of England.[99] These officials were originally responsible for holding arrested persons in custody before they could be transferred to the sheriff,[100] but their powers and duties were gradually expanded in the following years.[101] They were first given the power to hear and determine felonies and trespasses in 1361[102] and became known as 'justices of the peace' from around 1363.[103]

Courts of Quarter Sessions also date from 1363, when justices of the peace were first ordered to hear cases four times each year.[104] Quarter Sessions sat in each county and in the more populous towns and cities, and they were also known as Courts of General Sessions when required to sit at additional times during the year.[105] Whether sitting as General or Quarter Sessions, the composition and jurisdiction of the court was the same.[106] It generally comprised two or more justices of the peace and a jury and originally had jurisdiction over all crimes except treason.[107]

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[98] Holdsworth, above n 95, 286.

[99] Ibid.

[100] The office of sheriff had become the primary executive agency of the king within each county by the time of the Norman conquest in 1066: David M Walker, *The Oxford Companion to Law* (1980) 299. The sheriff's importance within the county waned from the middle of the 12th century with the increase in the jurisdiction of the justices of the peace and the increasing importance of the King's courts: ibid 1139.

[101] For example, during the reign of Edward III these 'conservators of the peace' or 'keepers of the peace', as they were then known, were empowered to punish offenders (in 1328), receive presentments and send those presented for trial (in 1330), and hear and determine felonies and trespasses in the county (in 1344): Holdsworth, above n 95, 286.

[102] Holdsworth, above n 95, 286–8. An act of 1361 provided for the assignment in every county of England of a lord and 'three or four of the most worthy in the county with some learned in the law' to keep the peace, make arrests, and hear and decide felonies and trespasses in the county, although office holders were at this time referred to as keepers or conservators of the peace: ibid.

[103] Ibid 288.

[104] 36 Edward III, St. I c. 12 (i.e. the 12th chapter enacted in the 36th year of the reign of King Edward III); Holdsworth, above n 95, 288, 292; John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond — Part 1' (2000) 74 *Australian Law Journal* 510, 528.

[105] Holdsworth, above n 95, 292–3; Alex C Castles, *An Australian Legal History* (1982) 147.

[106] Charles L Attenborough, *Principles of the Criminal Law* (12th ed, 1912) 306–7.

[107] However, complex cases were sent to the Assizes, effectively a separate court that was also held four times a year but was presided over by judges who travelled on circuit to the main towns of the country: Holdsworth, above n 95, 293; Walker, above n 100, 87–8. Holdsworth also notes that the custom of sending cases punishable by death to the Assizes became entrenched in the 18th century, which led to a decline in the jurisdiction of the

Courts of Quarter and General Sessions continued to hear the majority of criminal offences until the 17th century, when it first became common for justices of the peace to hear and determine a range of less serious charges by sitting 'out of sessions'; that is, individually and without a jury.[108]

This form of summary hearing later became known as the Courts of Petty Sessions.[109] Prior to the introduction of the summary jurisdiction, justices of the peace had been required to assemble jurors for the trial of the vast majority of cases so that a person could have his or her 'trial by the country'.[110]

The establishment of the summary jurisdiction was apparently an administrative necessity due to the significant increase in statutory offences during the 17th century:

> In order, therefore, to avoid the inconvenience of postponing the trial of small offences to the quarter sessions, and in very many cases of committing the party for the intermediate time, - or, on the other hand, of making too frequent calls upon the country, in assembling a jury at shorter intervals, - there seems to have been no alternative, as those offences became more numerous, than that of entrusting to the justices, out of sessions, a power to hear and determine the matters themselves.[111]

To summarise, justices of the peace exercised a judicial role from the early 1360s. Although it was unusual for justices to exercise summary jurisdiction before the 1600s,[112] the practice had become 'insensibly moulded into the jurisprudence of the country' before the end of that century.[113] Questions of fact, most fundamentally the determination of a person's guilt or innocence, had largely been the province of the jury before this time. In relation to a range of statutory offences, however, this was

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Quarter Sessions as capital offences increased. That jurisdiction was further narrowed in 1842, when legislation removed the jurisdiction of the Quarter Sessions in relation to a number of other offences, including murder and felonies punishable by lifetime penal servitude for a first offence: ibid 293.

[108] Paley, William and Deacon, Edward E (ed), *The Law and Practice of Summary Convictions on Penal Statutes by Justices of the Peace* (3rd ed, 1838) 12; Castles, above n 105, 69. Trials by justices of the peace sitting 'out of sessions' were unusual before the reigns of Charles I (1603–25) and Charles II (1660–85 de facto; 1649–85 de jure), both of whom passed a number of statutes conferring summary jurisdiction on justices of the peace: at 12. The power to fine or imprison without a jury had been provided by the legislature in four or five instances during the reign of Elizabeth I, and a statute passed during the reign of Henry VII (1485–1509) had also empowered justices to hear a range of less serious matters summarily, primarily as a revenue-raising exercise, but this was one of the first acts to be abolished by Henry VIII: at 9–10.

[109] Strictly speaking, the term petty sessions was not in regular use until the early to mid-nineteenth century: Holdsworth, above n 95, 293–4.

[110] Paley, et al, above n 108, 3, 7.

[111] Ibid 5, 12.

[112] Ibid 12.

[113] Ibid.

replaced by the ‘more arbitrary and discretionary [summary] jurisdiction’.[114] As the Committee discusses below, de novo appeals also date from the late 17th century and apparently originated in response to the new summary jurisdiction of the justices of the peace.

Before exploring the evidence in support of this conclusion, the Committee first outlines the history of the magistracy and of de novo appeals in Australia and Victoria.

Australian origins

Establishment of the magistracy, the Magistrates’ Court and the County Court

Justices of the peace were central to the administration of colonial justice from the arrival of the First Fleet.[115] The British Parliament’s 1787 *Charter of Justice* specifically provided for the appointment of justices of the peace with identical powers to those of justices of the peace in England.[116]

The Charter also provided for the establishment of a limited version of the English court system.[117] Benches of up to three magistrates, as justices of the peace were also known from this time, began sitting within weeks of the arrival of the First Fleet.[118] Both civilians and military officers were appointed as magistrates, who were primarily

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[114] Ibid 9.

[115] Castles, above n 105, 67. Although British law came to Australia with the arrival of the First Fleet in 1788, this land had been continuously occupied for millennia by indigenous peoples who, until that time, had lived according to their own laws. According to some scholars, indigenous people have lived in Australia for around 47,000 years, see: Tim Flannery, ‘The Passing of Birrarang’, *The Birth of Melbourne* (2002) 1–5. However, other scholars suggest that the indigenous occupation of Australia dates from a minimum of 60,000-70,000 years ago and possibly as long ago as 100,000 years, see: Frank G Clarke, *Australia in a Nutshell: A Narrative History* (2003), 14. In *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141, Blackburn J said the following of the country’s original laws:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws and not of men”, it is that shown in the evidence before me.

The continuation of indigenous laws was further acknowledged in the High Court’s landmark decision of *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014, which recognised the preservation, in certain circumstances, of the ‘native title’ rights of Indigenous people. For a discussion of Indigenous customary methods of dispute resolution, see Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) vol 2, ch 28.

[116] Ibid 44–45, 68.

[117] Ibid.

[118] Ibid 69.

responsible for dealing with breaches of the peace, petty theft, prisoners accused of neglecting work, and other minor complaints.[119]

Courts of Quarter and General Sessions were first introduced to the colonies of New South Wales (NSW) and Van Dieman's Land in 1823.[120] The right to a de novo appeal in Australia apparently also dates from this time, since the first Courts of Quarter and General Sessions were provided with the same jurisdiction and powers as their equivalents in Britain.[121] It follows that de novo appeals were very likely operating in the Port Phillip District of NSW prior to the establishment of Victoria as a separate colony in 1851.[122] In any case, the right to a de novo appeal from the summary jurisdiction of the magistracy was apparently confirmed by Victoria's colonial legislature soon after separation from NSW.[123]

The first magistrate was appointed to the settlement that later became the City of Melbourne in October 1836 when Captain Lonsdale was appointed as Police Magistrate for the territory of Port Phillip.[124] A Court of Petty Sessions was established in Melbourne in 1838 and, subsequently, throughout the towns of Victoria.[125] Melbourne's first Court of Quarter Sessions was established in 1839 and renamed the Court of General Sessions in 1852. Like the Courts of Petty Sessions, it soon became established throughout Victoria.[126] By 1850 Courts of Quarter Sessions had become

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[119] Ibid 69. More serious offences were heard by the Court of Criminal Jurisdiction from 1788 to 1823, which sat without a jury and was presided over by a Judge-Advocate and six military officers: at 46–66.

[120] Ibid 69.

[121] *New South Wales Act 1823* s 19; see Castles, above n 105, 146–7, 372.

[122] Under the *Justices of the Peace (Jurisdiction) Act 1832*, an appellant was not required to base his or her appeal on a claim of error in the original decision (see s III).

[123] See the *Justices of the Peace (Jurisdiction) Act 1852*, which did not require an appellant to base his or her appeal on a claim of error in the original decision (s XIII) and provided for an appeal to the Supreme Court by way of stated case as an alternative avenue of review (s XXIII). Subsequently, see: *Justices of the Peace Act 1865* (ss 139–143); *Justices Act 1928*; *Justices Act 1958*; *Magistrates' Court Act 1971*; *Magistrates' Court (Jurisdiction) Act 1973*; and *Magistrates (Summary Proceedings) Act 1975*. In common with the *Magistrates' Court Act 1989* of today, these earlier acts refer to an appeal by way of 'rehearing' rather than to a 'de novo' appeal. However, it is important to note that the criminal justice system of England and Wales has apparently always used the term 'rehearing' in a broader sense, to describe de novo appeals, while also using the term in a narrower sense synonymous with its Australian usage (see chapter three).

[124] Thomas A Weber, 'The Origins of the Victorian Magistracy' (1980) 13 ANZ Journal of Criminology, 142; Magistrates' Court of Victoria, *History of the Magistrates' Court* (2005) (at http://www.magistratescourt.vic.gov.au). As noted below, Port Phillip was then a district of New South Wales.

[125] *History of the Magistrates' Court*, above n 105. See also Weber, above n 124, 143–4.

[126] Castles, above n 105, 236, 372

an important part of the Colonial legal system[127] and during the 1850s came to be constituted by professional judges rather than justices of the peace.[128]

Victorian Courts of Petty Sessions were renamed Magistrates' Courts in 1970.[129] The Court of General Sessions was abolished in 1968 when its criminal jurisdiction was transferred to the County Court, which until that time had exercised purely civil jurisdiction.[130]

Evolution of the magistracy in Victoria

The history of the Australian magistracy is punctuated by a number of overlapping and frequently concurrent processes shaping, defining and redefining the office of magistrate:

- transition of magistrates from honorary justices of the peace to paid magistrates;
- transformation of a paid magistracy from 'police magistrates' to 'stipendiary magistrates';
- transformation of a lay, untrained and unqualified magistracy into a professional, legally trained and competent body of judicial officers;
- transmutation of the magistracy as a powerful and autonomous governmental agency into a subordinate arm of the civil or public service;
- expansion of the jurisdiction of courts presided over by magistrates and the increasing complexity of that jurisdiction;
- separation of the magistracy from the public service; and
- extension of the requirement or protection of 'judicial independence' to the inferior courts presided over by magistrates.[131]

It is beyond the scope of this inquiry to explore in detail all of the above phases in the evolution of the magistracy. Instead, the Committee provides here a broad outline of the key developments in the evolution of the Victorian magistracy.

Paid magistrates, known as police magistrates, soon became more important in hearing summary criminal matters than justices of the peace in the colony of Victoria.[132] This was the trend throughout the colonies of Australia after 1850, with the

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[127] Ibid 129, 146–7, 152, 205. Notably, however, juries were initially composed of military officers, and the use of military jurors was not finally abolished until 1840: at 203.

[128] Ibid 236, 372

[129] *History of the Magistrates' Court*, above n 106.

[130] Website of the County Court of Victoria: www.countycourt.vic.gov.au.

[131] John Lowndes, above n 86, 510.

[132] Weber, above n 124, 144.

adoption of paid magistrates becoming a distinctive feature of the early Australian magistracy.[133]

Perhaps in recognition of this shift, justices of the peace sitting in Petty Sessions also came to be known as honorary magistrates.[134] Police magistrates were government officials who generally had formal training as clerks of courts[135] and were authorised to sit alone as a Court of Petty Sessions.[136]

In the early years of the Port Phillip District it had been more common for a Court of Petty Sessions to be composed of two or more honorary magistrates or justices of the peace than presided over by a police magistrate.[137] However, Victoria's separation from NSW in 1851 and the gold rush both led to a dramatic increase in the number of police magistrates[138] and a link between the history of the police and the magistracy that continued for many years:

> When viewing the early history of the office of Magistrate in the State of Victoria, the links with police history must not be understressed. Our early stipendiary magistrates were called "police magistrates" and they lived up to their name. They were both policemen and magistrates (as were the early justices of the peace), their job combining the functions of preservation of the peace, detection of crime, the apprehension of offenders, as well as the duties of sentencing and punishing.[139]

The magistracy was incorporated into the public service at a relatively early stage, the process beginning in Victoria with the *Civil Service Act 1862*.[140] In the following years magistrates increasingly came to be seen as judicial officers, a shift attributed to the decline in their administrative duties following the creation of a centralised police force and local governments.[141] However, the close association between the magistracy and the police force continued for many years, particularly in country areas, a fact reflected in the retention in Victoria of the title of 'police magistrate' until 1948.[142]

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[133] Lowndes, above n 104, 514.

[134] Ibid 513. The appointment of police magistrates had also begun in NSW from 1832: at 514.

[135] *History of the Magistrates' Court*, above n 124.

[136] Ibid. Police magistrates were also responsible for supervising the police in their district: ibid.

[137] Ibid. For example, there were only five police magistrates in the newly separated colony by 1851, but the number had reached 58 by 1861: Weber, above n 124, 144.

[138] Weber, above n 124, 144.

[139] Ibid 142.

[140] Lowndes, above n 104, 515, 530; Weber, above n 106, 145–7.

[141] See Castles, above n 105, 374, who notes that this trend was occurring throughout the Australian colonies during this period.

[142] *History of the Magistrates' Court*, above n 124.

The Victorian magistracy achieved structural independence from the public service with the passage of the *Magistrates' Court Act 1989*[143] and judicial independence under s 12 of that Act.[144]

The *Magistrates' Court Act 1989* preserves the office of justice of the peace,[145] but the role of the office is now limited to issuing criminal processes under federal law in Victoria and swearing affidavits.[146]

Historical justifications for de novo appeals

With the history of the Australian and British summary justice systems in mind, the Committee now turns to historical justifications for de novo appeals.

A number of witnesses cited the former lay status of magistrates, as well as the former standing of the magistracy, as the historical justifications for de novo appeals.[147] These witnesses noted that magistrates and justices of the peace were previously not required to hold legal qualifications and that the magistracy was not always seen to operate with the same judicial independence as the higher courts.[148] While the history outlined above confirms these facts, whether they amount to historical justifications for the de novo system is a separate question.

Magistrate Maurice Gurvich, arguing on behalf of the majority of the Magistrates' Court, put the argument in the following terms:

> appeals de novo are anachronistic; they are out of harmony with current circumstances. They are a throwback to the 19th century courts of petty sessions presided over by lay justices of the peace and stipendiary magistrates who came up through the ranks of the clerks of court system, never having practised as lawyers or acted for a party. The concern then was that in criminal …

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[143] Prior to this time, magistrates were appointed subject to the *Public Service Act 1958* — see s 7 of the former *Magistrates' Court Act 1971*. Similar developments occurred throughout the Australian jurisdictions around this time.

[144] Section 12 provides that a magistrate can only be removed from office on the same basis as a judge of the higher courts under Part IIA of the *Constitution Act 1975* or if his or her office is abolished by or under an Act. Acting magistrates are appointed for a period of five years and may only be removed during that time on the same basis as a non-acting magistrate: *Magistrates' Court Act 1989* s 9.

[145] See *Magistrates' Court Act 1989* s 115.

[146] Fox, above n 36, 84.

[147] Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 13 February 2006, 21 (Superintendent Stephen Leane, Victoria Police); Victoria Police, *Submission No. 10*, 1; Evidence to the Committee, Melbourne, 14 February 2006, 81 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria); Director of Public Prosecutions, *Submission No. 12*, 1.

[148] Evidence to the Committee, Melbourne, 14 February 2006, 81 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria). In relation to the latter point, the Committee has outlined above the connections between the magistracy and the police and, subsequently, the public service, which preceded its transition to structural independence as part of the judicial arm of government.

> cases due to the isolation of the courts [and] the relationship between the bench and police … there was involved a risk that injustice can occur and the safeguard was appeal de novo … These concerns continued until the removal of the justices hearing cases and the requirement that magistrates be qualified lawyers about 30 years ago.[149]

McHugh J in *Goldfinch v Attorney-General of NSW*[150] noted essentially the same reasons when suggesting the abolition of de novo appeals from the summary criminal jurisdiction of NSW:

> Now that the Local Court comprises highly qualified professional magistrates, the necessity to retry the case afresh on new evidence seems dubious.[151]

In its submission to the inquiry, however, the Victorian Bar and the Criminal Bar Association of Victoria rejected these arguments as historical justifications for de novo appeals.

The association observed that, in Britain, appeals from justices of the peace sitting in Petty Sessions were originally heard by justices of the peace sitting in Quarter Sessions.[152] As noted above, the same system was adopted in Australia soon after British colonisation, although professional judges began sitting in Australian Courts of Quarter Sessions during the 1850s.[153] In other words, de novo appeals originated and continued to operate for many years in a system in which both the original and appellate decision makers were lay persons. It follows that the issue of magistrates' qualifications and standing does not explain the origins of de novo appeals.

The Law Institute of Victoria (LIV) and Youthlaw told the Committee that the true historical justification for de novo appeals is the same as its modern justification: 'the need to balance competing interests in achieving justice'.[154] According to LIV, de novo appeals originated to:

> ensure that public confidence in a just and equitable dealing with criminal matters dealt with summarily [is] balanced with the need to produce efficient and timely results for victims, the accused and the community.[155]

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[149] Ibid.

[150] *Goldfinch v Attorney-General of NSW* (1987) 30 A Crim R 212.

[151] *Goldfinch v Attorney-General of NSW* (1987) 30 A Crim R 212, 219 (McHugh J), quoted in David Brown, David Neal, David Farrier and David Weisbrot, *Criminal Laws* (1990) 345.

[152] Victorian Bar and Criminal Bar Association of Victoria, *Submission No. 11*, 2.

[153] In England and Wales, lay justices continued to hear appeals in Quarter Sessions until 1972, when Quarter Sessions were replaced by the Crown Court, comprised of professional judges: Her Majesty's Courts Service, 'The History of the Justices of the Peace (Magistrates)', at www.hmcourts.

[154] Youthlaw, *Submission No. 4*, 1.

[155] Law Institute of Victoria, *Submission No. 5*, 1.

The Committee's research essentially supports this view. The Committee acknowledges, however, that the former status and qualifications of the magistracy can be seen as more recent justifications for de novo appeals, albeit justifications which have since ceased to apply.

As the Committee has outlined above, summary criminal jurisdiction did not become a regular feature of the English criminal justice system until the 17th century. Significantly, de novo appeals also date from this time. As the High Court of Australia noted in the case of *Sweeney v Fitzhardinge*,[156] the first example of an appeal to justices of the peace sitting without a jury in the Quarter Sessions dates from English legislation of 1671:

> The earliest instance of an appeal from a conviction by justices of peace was in Statute 22 Car. 2 c. 1, called the *Conventicle Act*,[157] and the author[158] says:- "That act, after authorizing a summary examination and recovery of penalties before any two justices, gave to the party convicted the privilege of an appeal in writing, to the judgement of the justices of the peace in their next quarter-sessions, upon which 'he may plead and make his defence, and have his trial by a jury thereupon.'" It is obvious that if the appeal was to Quarter Sessions with a jury the case must be heard *de novo*, and it would have to be heard in the ordinary way; by the taking of evidence and the jury giving a verdict.[159]

In other words:

> the idea of controlling the jurisdiction of individual justices seems originally to have been by allowing an appeal to the verdict of a jury …[160]

The practice of hearing such appeals before a jury was, however, short-lived. An Act[161] passed in the following session of parliament provided for appeals to be heard de novo but without a jury:[162]

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[156] *Sweeney v Fitzhardinge* (1906) 4 CLR 716.

[157] A conventicle is a secret religious meeting – in England, the term came to refer to the meetings of 'Noncomformists' or 'dissenters' who belonged to the Protestant Church but did not follow the doctrines of the Church of England. A number of Acts were passed in Britain from 1593 onwards forbidding or penalising conventicles, and a number of other Acts are known by the same title: *Brewer's Dictionary of Phrase and Fable* (17th ed, 2005) 310, 978.

[158] His Honour was quoting from: William Paley, *Paley's Law and Practice of Summary Convictions Under Summary Jurisdiction Acts*, *1848-1884* (7th edition, 1892), 12.

[159] *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 728 (Griffith CJ). See also Isaacs J at 728–9.

[160] Paley, above n 108, 12.

[161] Relating to the regulation of hunted animals.

[162] This development seems only logical. If the original form of the de novo appeal to justices sitting in Quarter or General Sessions with a jury had not been replaced by an appeal to justices sitting without a jury, it would have undermined the new summary jurisdiction, the rationale of which was the determination of such matters without a jury.

> from that time down to the present it appears that it has been the uniform practice at Quarter Sessions in England to hear appeals from justices by way of rehearing[163] and without a jury.[164]

The Committee is not able to state with certainty why appeals from justices of the peace sitting out of sessions continued to be heard de novo from this time. However, it seems likely that this was in recognition of the fact that the relatively new summary jurisdiction had replaced the centuries-old institution of trial by jury.[165] As the Australian legal historian Alex Castles has noted:

> It was one of the ironies involved in the operation of nineteenth-century criminal law, with roots deep in English tradition, that while the most serious crimes might be subject to no effective review, at the lower levels of the court system reviews were increasingly possible …[166]

Conversely, the preservation of the jury's role in more serious criminal matters is apparently an important explanation of why appeals from such matters have always been heard on a more restricted basis:

> criminal law appeals are generally conducted on the basis that the convicted person is in a position quite different from that of an accused before a jury. The fact of his conviction by the jury which may indeed be the matter in issue on the appeal is generally taken to modify his status from a person heavily protected against the Crown to one who must justify carrying a heavy burden of proof that there was error or other defect in the verdict or judgement.[167]

The Committee concludes this section by noting that the apparent historical justification for de novo appeals has continuing relevance today. A number of witnesses made this point in the context of the ongoing reclassification of certain indictable offences as indictable offences triable summarily. That is, the reclassification of offences so that they may be heard by a magistrate rather than by a judge and jury.[168]

As the Victorian Bar stated in its submission to the inquiry:

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[163] That is, a de novo appeal, not a "rehearing" in the more limited sense defined at the beginning of this chapter. As the Committee explains in chapter three, the term 'rehearing' has apparently always been used in two senses in England and Wales. The broader of these refers to what is effectively a de novo hearing. The narrower sense is synonymous with a rehearing as defined at the beginning of this chapter.

[164] *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 728 (Griffith CJ). Griffith CJ notes that this change was brought about by the *Conventicle Act* of 1671 (i.e. act 22 & 23 Car. 2 c.25).

[165] Interestingly, the famous *Bushel's Case* (1670) dates from just one year before the first known instance of a de novo appeal in the *Conventicle Act* of 1671. In broad terms, *Bushel's Case* established the independence of the jury from the judiciary. The case upheld a decision by a jury not to convict two Quakers with unlawful assembly under an earlier Conventicle Act: Brown et al, above n 151, 305-306.

[166] Castles, above n 105, 339 (references omitted)

[167] Des O'Connor, 'Criminal Appeals' in D Chappell and P Wilson (eds) *The Australian Criminal Justice System* (1972) 504, quoted in Brown et al, above n 151, 345.

[168] The Committee discusses this issue in detail in chapter six.

> Defendants charged with indictable offences triable summarily, in consenting to the matter being heard in the Magistrates' Court, give up their right to a jury trial.[169]

Justice Tim Smith of the Supreme Court supported this view in the following terms:

> I thought another point [the Victorian Bar] made which was of some significance, if I might say so, was the point that accused persons charged in indictable offences triable summarily give up their right to jury trial by choosing to be heard in the Magistrates' Court. I think implicit in that was a suggestion by the Victorian Bar that there is, as it were, a sort of trade off — that if you trade off your right to a jury trial you can have at least the protection of a rehearing de novo.[170]

The Committee's research into the historical origins of the de novo appeal suggests that it also arose as a 'trade off' for the decline in the right to trial by jury in 17th-century England. Whether this trade off remains a justification for de novo appeals from all summary convictions can only be answered by an assessment of the fairness and efficiency of the current system – the subjects of chapters four and five – and of the modern jury system, which is discussed in chapter six.

Finally, while the decline of the right to trial by jury may have provided the original justification for de novo appeals, the Committee notes that this is of limited relevance today for appeals which are against sentence only.[171] As the Committee notes below, these comprise close to three quarters of appeals today. However, witnesses to the inquiry cited a number of current justifications for the de novo system, some of which are relevant to both sentence and conviction appeals. These arguments are also explored in chapters four and five.

The purposes of appeal

Academic J A Jolowicz has argued that there are essentially two types of appeal: an *appeal*, which serves a private purpose, and a *review*, which serves a public purpose.[172] In an *appeal*, an appellant is effectively provided with a second hearing and the emphasis is on ensuring justice in the individual case. In a *review*, the emphasis is on correcting any errors of the original court and on preventing courts from exceeding their power.[173] The public purpose of a *review* also includes the clarification and development of precedent, which promotes consistency in the administration of justice.

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[169] Victorian Bar and the Criminal Bar Association of Victoria, *Submission No. 11*, 3.

[170] Evidence to the Committee, Melbourne, 6 March 2006, 101 (Justice Tim Smith, Supreme Court of Victoria).

[171] In a sentence appeal, the appellant has effectively accepted the verdict of the magistrate.

[172] J A Jolowicz, 'Appeal and Review in Comparative Law: Similarities, Differences and Purposes', Southey Memorial Lecture, *Melbourne University Law Review* (December 1986) vol 15, 618. Although Jolowicz's argument was directed mainly to appeals in civil cases, he also suggested that much of it would apply to appeals in criminal cases: ibid.

[173] Ibid.

The de novo appeal clearly meets the definition of an *appeal* within this model, since it allows the whole matter to be reconsidered and for the appellate court to reach its own conclusion regarding the facts and the law.[174] Conversely, strict appeals operate as a *review* and, as the Committee finds in chapter three, rehearings can also operate in this way.

The distinction between the private purposes of an *appeal* and the public purposes of a *review* is, however, a qualified one. Clearly, the de novo appeal promotes the private interest of an appellant because it does not limit the grounds on which he or she may appeal a wrongful conviction or an excessive sentence.

Preventing such outcomes, however, also serves the important public purpose of maintaining confidence in the criminal justice system. That confidence is therefore also affected by the accessibility of the right to appeal and, as the Committee has already noted, a de novo appeal is the most accessible form of appeal.[175] In short, the de novo appeal, although best understood as an *appeal*, also serves a public purpose that is arguably just as important as that served by more restricted types of appeal.[176]

A fundamental question for the current inquiry, however, is whether de novo appeals from the criminal jurisdiction of the Magistrates' Court achieve the appropriate balance between the public and private purposes of an appeal system.

To answer this question, in the following chapters the Committee considers whether that balance would be better achieved by a strict appeal or by a rehearing. The distinction between appeal systems that, respectively, prioritise public and private purposes also mirrors the distinction between efficiency and fairness. When seen in these terms, it is clear that a preferable appeal system is one that strikes the appropriate balance between these purposes.

A key measure of fairness is whether a system treats everyone equally and, as the Committee has noted in previous reports, this is a fundamental principle of the rule of law.[177]

In broad terms, a legal system operates according to the rule of law when it upholds the principles of certainty, generality and equality.[178] Certainty requires that the law

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[174] Brown et al, above n 151, 345.

[175] That is, it is more accessible than a strict appeal or a rehearing. As the Committee argues below, a rehearing may in practical terms require an appellant to demonstrate the existence of error in the original decision. In addition, the presentation of additional evidence may be subject to the court's leave in a rehearing.

[176] The Committee discusses the place of precedent in the Magistrates' Court and the appeal system in chapter five below.

[177] See for example Law Reform Committee, Parliament of Victoria, *Warrant Powers and Procedures* (2005) 413.

[178] Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law', *Macquarie Law Journal* (2004) vol 4, 137, citing Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review*, 135, 137.

should be prospective, clear and stable.[179] Generality requires that the law should be impersonal in its treatment of different classes.[180] Equality requires that everyone should be equally subject to the law but, more broadly, it requires an 'equality of concern and respect' that ensures not only that 'like cases be treated alike but that different cases should be treated differently'.[181]

As the Committee notes in chapter four, the de novo appeal is particularly calibrated to promoting equality in this sense because it enables an appellate court to take account of individual circumstances.[182] Moreover, a de novo appeal maximises the opportunity of the individual to appeal, regardless of financial means or other personal circumstances.

Conversely, it may be argued that strict and rehearing appeal systems favour the principle of certainty over equality. An *appeal* and a *review* may therefore be seen as promoting different aspects of the rule of law.

The Committee concludes this section by noting that, while the right to an appeal is a court procedure entirely dependent upon statute, few would argue against the right to an accessible and fair appeal system. Indeed, the right to an appeal is now enshrined in Victoria's *Charter of Human Rights and Responsibilities Act 2006*, s 25(4) of which provides:

> Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.[183]

In the chapters that follow, the Committee assesses the extent to which this right is maximised by de novo appeals and whether its realisation would be diminished by their abolition.

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[179] Ibid.

[180] Ibid.

[181] Ibid.

[182] It is interesting to speculate whether a person would naturally choose a legal system in which appeals are heard de novo rather than strictly or by way of rehearing if operating behind a hypothetical 'veil of ignorance' as to their own capacities and position in society – a notable basis for testing the fairness of a law devised by the legal philosopher John Rawls; see John Rawls, *A Theory of Justice* (1972). For a recent summary of Rawls's work, see: 'He wanted justice and fairness for all: John Rawls, Philosopher 1921–2002', *The Sydney Morning Herald* (Sydney), 3 December 2002, at http://www.smh.com.au/.

[183] The *Charter of Human Rights and Responsibilities Act 2006* was passed by the Victorian Parliament on 20 July 2006. The main provisions of the Charter will commence on 1 January 2007.

Performance of the de novo appeal system

Appeal numbers

The great majority of de novo appeals dealt with in the County Court are from the criminal jurisdiction of the Magistrates' Court. During the 2005–06 financial year, a total of 2,666 appeals were commenced in the County Court,[184] 1,966 of which were lodged following conviction or sentence in the Magistrates' Court.[185]

Appeal grounds

Of the 2,666 appeals commenced in 2005–06, 73.7 per cent were against sentence, 19.2 per cent were against sentence and conviction, and 7.1 per cent were 'against the order made'.[186] A significant proportion of appeals in the final category involved intervention orders under the *Crimes (Family Violence) Act 1987*,[187] which the Committee considers in detail in chapter six.

Rates of abandonment

It is important to note that a significant proportion of appeals commenced in the County Court are finalised without proceeding to hearing. A total of 25.5 per cent of appeals did not proceed to a hearing in 2004–05. These appeals were commenced but subsequently abandoned before the Registrar (7.4 per cent), abandoned before the Court (9.5 per cent) or struck out because the appellant failed to appear (8.6 per cent).[188] The Committee discusses the rate of abandonment below in its assessment of the 1999 changes to the right of appeal.

The rate of appeal

It is difficult to determine the precise rate of appeal from the Magistrates' Court to the County Court. This is partly due to the fact that de novo appeals are not restricted to criminal matters.

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[184] County Court of Victoria, *2005–06 Annual Report*, 17.

[185] Magistrates' Court of Victoria, *2004–05 Annual Report*, 27. The terms 'commenced' and 'lodged' are apparently used to refer to the same thing in the annual reports of the Magistrates' Court and the County Court respectively. The 2,561 appeals commenced in the County Court include appeals 'against the order made' in the Magistrates' Court (for example, intervention orders) and appeals from the Children's Court.

[186] County Court of Victoria, *2005–06 Annual Report*, 17. In previous years, appeals against sentence have averaged close to 75 per cent of commencements and appeals against conviction have averaged closer to 21 per cent: County Court of Victoria, *Statistics of the County Court of Victoria*, 13 December 2005, at www.countycourt.vic.gov.au.

[187] Appeals against the order made also include appeals from licence cancellation, disqualification and suspension, and orders for compensation or restitution.

[188] County Court of Victoria, *Statistics of the County Court of Victoria*, at www.countycourt.vic.gov.au.

The rate of appeal can also be measured in two different ways. When measured as a proportion of all criminal cases finalised in the Magistrates' Court, the current rate of appeal is around 2 per cent.[189] When measured as a proportion of finalised cases in which a person was 'proven guilty'[190] and therefore had a right of appeal, the current rate of appeal from the criminal jurisdiction of the Magistrates' Court is closer to 3 per cent.[191]

The Committee notes that these figures are broadly consistent with those cited by nearly all of the Victorian witnesses, who estimated the proportion of appeals from cases heard by the Magistrates' Court in a given year at approximately 2 to 3 per cent.[192]

Calculating the rate of appeal by reference to the proportion of finalised Magistrates' Court cases in which a person was 'proven guilty' also enables the Committee to

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[189] According to the Magistrates' Court, the rate of appeal from its criminal jurisdiction in 2004–05 was approximately 1.6 per cent, based on a total of 130,680 finalised criminal cases: Magistrates' Court of Victoria, *Annual Report 2004/2005*, 23, 27. However, that total apparently includes finalised PERIN Court revocations, from which there is no right of appeal to the County Court, and which comprise nearly 15 per cent of lodgements in the criminal jurisdiction.

[190] The totals given for defendants 'proven guilty' in the publications of the Australian Bureau of Statistics (ABS) exclude matters that are withdrawn by the prosecution or in which the accused is acquitted: see Australian Bureau of Statistics, *Criminal Courts, Australia, 2004-05*, 20. While the ABS uses a principal counting unit of 'defendants', this is defined as 'a person or organisation against whom one or more criminal charges have been laid and which are heard together as the one unit of work by a court at a particular level' and is therefore consistent with the way in which the Magistrates' Court defines a finalised case. See Australian Bureau of Statistics, *Criminal Courts, Australia, 2004-05*, 45.

[191] According to the ABS, the total number of criminal cases in which a defendant was 'proven guilty' in the Magistrates' Court in 2004–05 was 79,921: Australian Bureau of Statistics, *Criminal Courts, Australia, 2004-05*, 20. The total number of criminal appeals lodged against conviction or sentence from the Magistrates' Court totalled 2,133 during the same period: Magistrates' Court of Victoria, *2004–05 Annual Report*, 27. This yields an appeal rate of around 2.7 per cent. The combined appeal rate from the criminal jurisdiction of the Magistrates' Court and the Children's Court, calculated on the same basis, is slightly higher at 2.8 per cent; see Australian Bureau of Statistics, *Criminal Courts, Australia, 2004-05*, 20, 54, and County Court of Victoria, *2004–05 Annual Report*, 31.

[192] Evidence to the Committee, Melbourne, 13 February, 9 (Mr Paul Coghlan, QC, Director of Public Prosecutions); Evidence to the Committee, Melbourne, 13 February, 5 (Mr Rob Melasecca, Law Institute of Victoria); Evidence to the Committee, Melbourne, 13 February, 6 (Sergeant Kyle McDonald, Victoria Police); Evidence to the Committee, Melbourne, 13 February, 2 (Dr David Neal, SC, Victorian Bar Council); Evidence to the Committee, Melbourne, 13 February, 3 (Dr Greg Lyon, Secretary, Criminal Bar Association of Victoria); Evidence to the Committee, Melbourne, 14 February, 6 (Ms Anna Radonic, Principal Lawyer, Youthlaw); Evidence to the Committee, Melbourne, 14 February, 3 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid); Evidence to the Committee, Melbourne, 6 March, 6, 7 (Justice Tim Smith, Supreme Court of Victoria). The Magistrates' Court of Victoria estimated a lower figure of between 1.6 per cent and 2 per cent: Evidence to the Committee, Melbourne, 14 February, 8 (Magistrate Caitlin English, Magistrates' Court of Victoria); Evidence to the Committee, Melbourne, 14 February, 9 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

compare rates of appeal in recent years. Table 1 provides such a comparison for the years 2001–02 to 2004–05.

Table 1 — Rate of Appeal from the Criminal Jurisdiction of the Magistrates' Court: 2001–02 to 04–05[193]

	2001–02	2002–03	2003–04	2004–05
Appeals lodged against conviction or sentence	2,149	2,327	2,167	2,133
Total 'proven guilty' in Magistrates' Court	63,370	79,196	75,370	79,921
Appeal rate194	3.4%	2.9%	2.9%	2.7%

Appeals by principal offence

To determine the nature of appeals by type of offence, the Committee analysed a sample of 153 sentence and conviction appeals lodged in the County Court in 2005.

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[193] **Explanatory Notes:**

Note 1: The figures for 'Appeals lodged against conviction or sentence' are taken from the annual reports of the Magistrates' Court for the corresponding years.

Note 2: The appeal rate for each year is calculated by dividing the number of appeals commenced by the number of cases 'proven guilty' in the Magistrates' Court for that year.

Note 3: The totals for cases 'proven guilty' for 2001–02 is taken from the *Magistrates' Court of Victoria Sentencing Statistics 1996/97 — 2001/02*, 68. For subsequent years, these totals are taken from the ABS annual publication, *Criminal Courts, Australia*, at www.abs.gov.au. The figures extracted from both sources represent 'consolidated' matters; that is, cases are counted by defendant rather than by charge. As noted in the *Magistrates' Court of Victoria Sentencing Statistics 1996/97 — 2001/02*, 4 (see also 58):

> Some defendants face criminal charges that relate to more than one separate course of conduct. For example, a defendant may be charged with a burglary on one day, the theft of a motor vehicle on another day and possession of drugs on another day. A different police informant may lay each of these charges, and they may initially be listed to appear in different Magistrates' Court venues on different days. Under these circumstances, all three cases may be consolidated so that a single Magistrate hears them at the same time.

This is consistent with the approach adopted in the ABS' *Criminal Courts, Australia* publications; see for example Australian Bureau of Statistics, *Criminal Courts, Australia, 2002-03*, 44, 64. Both sources count the 'principal offence' for each defendant in order to achieve this consolidation of charges.

[194] The estimated appeal rates in this table vary from those cited in Table 3 below because the tables use data drawn from different sources.

The sample represents approximately 7 per cent of the 2,300 appeals lodged in that calendar year.[195]

Table 2 — 2005 All Appeals[196]

Principal offence	No.	Percentage
Rape	0	
Sex (non-rape)	0	
Robbery	2	1.3%
Assault	9	5.9%
Abduction/kidnapping	0	
Criminal damage by fire	1	0.7%
Property damage	2	1.3%
Burglary	15	9.8%
Deception	4	2.6%
Handling stolen goods	5	3.3%
Theft	24	15.7%
Cultivation, manufacturing, trafficking drugs	1	0.7%
Possessing, using drugs	4	2.6%
Behaviour in public	0	
Going equipped to steal	0	
Harassment	0	
Justice procedures	0	
Regulated public order	1	0.7%
Traffic	61	39.9%
Transit	0	
Weapons/explosives	0	
Other*	17	11%
Intervention order	7	4.6%
Total	153	100%[197]

[195] All cases in the sample are from the Melbourne County Court; ie no cases from appeals heard on circuit were included.

[196] **Explanatory Notes:**

Note 1: The margin of error for this table is 7.66 per cent at a 95 per cent confidence level.

Note 2: Actual total is slightly greater than 100 per cent due to rounding.

The two most common categories of appeal by principal offence[198] in the sample were traffic offences (38.85 per cent) and theft (15.28 per cent), which were also the two most common categories of charge heard in the Magistrates' Court (see Appendix 5). Table 2 shows the breakdown for all appeals in the sample by principal offence.

Relationship between appeal numbers and workload

Although appeals make up around half of all criminal cases commenced in the County Court each year,[199] they account for only around 11 per cent of the total allocation of judges within the court's criminal jurisdiction.[200]

As noted above, sentence appeals account for the majority of County Court appeals — in recent years as much as 75 per cent of all appeals. Moreover, the Committee heard that sentence appeals generally take significantly less time to hear than conviction appeals – on average, between 30 and 60 minutes, compared to half a day to a day for a conviction appeal.[201] It follows, however, that the total hearing time for conviction appeals in a given year may be around twice that of sentence appeals.[202]

This was a significant factor in the Committee's decision to investigate the recent changes to the hearing of conviction appeals in NSW. According to Chief Judge Reginald Blanch of the District Court of New South Wales, those changes have reduced the time that it takes to hear conviction appeals in his court to between 30

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[197] This figure has been rounded down from a total of 100.1%, which was the result of rounding in the preceding subtotals.

[198] An appellant may face a number of charges.

[199] In 2004–05 a total of 2,537 criminal trials and pleas, and a total of 2,561 appeals, were commenced in the County Court: County Court of Victoria, *2004–05 Annual Report*, 30, 31.

[200] This estimate is based on the allocation of judges within the Melbourne County Court where, on an average daily basis during 2004–05, 12 judges sat hearing trials, five judges heard pleas and two judges heard appeals: County Court of Victoria, *2004–05 Annual Report*, 28.

[201] These figures are necessarily an approximation; see Evidence to the Committee, Melbourne, 13 February 2006, 45–6, (Associate Professor John Willis, School of Law, La Trobe University); Evidence to the Committee, Melbourne, 6 March 2006, 104 (Justice Tim Smith, Supreme Court of Victoria). As noted in chapter three, the relative hearing times for sentence and conviction in NSW were similar to the above prior to the changes it introduced in 1999; see Evidence to the Committee, Sydney, 10 April 2006, 167–8 (Chief Judge Reginald Blanch, District Court of New South Wales).

[202] It is difficult to estimate such a figure precisely but it follows from the hearing times cited above that, while conviction appeals represent around one third of the number of sentence appeals, on average they take around seven to eight times longer to hear. On the other hand, in its sample of County Court appeals heard in 2005, the Committee found that conviction appeals were apparently abandoned at around double the combined abandonment rate for sentence and conviction appeals.

and 60 minutes.[203] The effects of the NSW changes are discussed further in chapter three.

The 1999 changes to the right of appeal

Part three of the *Magistrates' Court (Amendment) Act 1999*, which came into effect on 1st July 1999, introduced the following changes to the right of appeal from the Magistrates' Court to the County Court:

- A prospective appellant at the time the notice of appeal is completed is informed that the severity of the sentence may be increased on appeal.[204] Thus no warning is required to be given by the judge hearing the appeal that such an event may occur (see *Magistrates' Court Act 1989* s 861AA);
- An appellant can only abandon an appeal without the leave of the Court within 30 days of giving notice of the appeal. Thereafter, the leave of the Court is required and the appellant must demonstrate exceptional circumstances;
- An appeal may be heard in the absence of an appellant. The Court may order a rehearing of such a matter only if it is satisfied that the failure to appear was not due to the fault or neglect of the appellant; and
- The Court can order costs against an appellant if satisfied that the appeal was brought vexatiously or frivolously or in abuse of process.

The above changes are contained in the *Magistrates' Court Act 1989* at Division 4 of Part 4 and at Schedule 6 — see Appendix 3.

The intention of the 1999 changes was to discourage the bringing of appeals thought to be unmeritorious and/or frivolous. It was noted at the time that a significant number of appeals were lodged in the County Court but abandoned at or close to the time of the hearing.[205] The rationale for the changes was expressed by the then Minister for Education Phil Gude, on behalf of the then Attorney-General Jan Wade, in the following terms:

> Appeals from the Magistrates' Court to the County Court in criminal proceedings:

[203] Evidence to the Committee, Sydney, 10 April 2006, 167 (Chief Judge Reginald Blanch, District Court of New South Wales).

[204] The appellant is required to sign a statement to this effect on the notice of appeal form; see Form 2-2A at Appendix 4.

[205] See for example County Court of Victoria, *Annual Report* (2001–02), 17; Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 888 (Phil Gude, Minister for Education) — second reading speech on the *Magistrates' Court (Amendment) Bill*.

An appeal can currently be lodged at the County Court by a defendant or the prosecution against a decision imposed by the Magistrates' Court. An appeal is lodged against either conviction or sentence and most appeals are against sentence.

The objectives of the appeal amendments are to alter the system of appeals in criminal cases to bring about a fairer and more efficient appeals system in which an appellant will be genuinely at risk when he or she appeals from the Magistrates' Court to the County Court. The bill also discourages frivolous appeals. Public concerns about utilising court resources effectively are addressed by promoting the most efficient use of prosecutorial and judicial resources in County Court appeals.

Currently, a person who appeals against a conviction and/or sentence handed down by a magistrate enjoys significantly inappropriate advantages that bring this appeal system into disrepute. On appeal, the appellant has the opportunity to re-run the case often presenting new or additional material to the County Court judge that has not been placed in front of the magistrate.

Currently it is not unusual for a County Court judge on any one day to have, for instance, 10 to 12 appeals listed for hearing and then have a significant number, if not all, abandoned by appellants at the door of the court. This demonstrates an unacceptable lack of thought, preparation and assessment of the merits of a case by appellants and their legal practitioners. The high levels of abandonment indicate that many appeals are lodged in an unmeritorious attempt to have two bites of the cherry as the appellant currently has nothing to lose from lodging an appeal. The collapsing of court lists is an inefficient use of court time and resources which this bill addresses.

After an appeal has commenced and the County Court judge has heard some of the evidence and is considering imposing a greater sentence than that handed down by the magistrate, the judge usually warns the appellant that he or she is considering increasing the magistrate's sentence. When the County Court judge gives such a warning it nearly always leads to the appeal being withdrawn. In 1997, 27 per cent of appeals (628 cases) were abandoned by the appellant at various stages of the appeal.

In practice, therefore, the appellant does not receive a higher sentence. This means that there is no disincentive to lodging an appeal against a sentence in an attempt to improve the outcome, given that there is nothing to lose from doing so. This may be considered as giving the appellant two bites of the cherry -- that is, presenting their case in two courts without the risk of a greater sentence being imposed.

Valuable court resources, time and effort has been wasted that could otherwise have been used to deal with other matters.

The bill provides a number of measures to address these problems. The court will have a discretionary power to award costs against an appellant where the application is frivolous, vexatious or an abuse of process. Appeal application documents will advise that the sentence imposed by the Magistrates' Court may be increased by a County Court judge, thus ensuring that once an appeal has commenced there will be a genuine risk of an increased sentence being

> imposed. Once a notice of appeal has been lodged with the County Court, the appeal may be withdrawn in the 30 days which are available to lodge an appeal notice. If an appellant seeks to abandon after this time the court will need to be satisfied that exceptional circumstances exist which warrant abandonment.
>
> The bill provides that where an appellant was charged with multiple charges in the Magistrates' Court, related to one event, all the charges that led to the sentence imposed by the magistrate will be included in the appeal to ensure that the judge re-hearing the charge appealed has a more comprehensive version of the facts.
>
> Currently if an appellant fails to appear, the County Court will strike out the appeal. The bill gives the County Court the ability to determine an appeal in the absence of the appellant. A re-hearing will be permissible where an application for re-hearing is lodged within 30 days of the appellant receiving notification of the appeal determination. The applicant will also need to demonstrate that the initial failure to appear was not due to their fault or neglect.
>
> If an application is lodged outside that time frame, the court is only to grant the application if satisfied that the failure to apply for a re-hearing within the 30-day period was due to exceptional circumstances, and if satisfied that the respondent's case would not be materially prejudiced because of the delay.
>
> The bill will have the effect of making appellants and legal advisers fully consider the merits of an application to appeal and the consequences of lodging an appeal. This will change the system from one of no risk to the appellant to one where the appellant must assume a real degree of risk.[206]

The Committee examines the effect of the 1999 changes on the appeal rate and the abandonment rate before turning to the evidence provided by witnesses regarding the 1999 changes.

Effect on appeal numbers and the rate of appeal

It is difficult to assess precisely the impact of the 1999 changes on appeal numbers and the appeal rate due to differences in the data available for the years prior to 2001–02.[207] However, the Committee sets out an estimate of the appeal rate using data from the Office of Public Prosecutions for the period 1997–98 to 2004–05 in Table 3.[208]

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[206] Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 888-889 (Phil Gude, Minister for Education) — second reading speech on the *Magistrates' Court (Amendment) Bill*.

[207] Before this period, the annual reports of the County Court provided figures for the total number of appeals 'initiated' in the Melbourne court only; that is, the totals did not include appeals initiated in the circuit courts.

[208] The Office of Police Prosecutions data refers to the total number of County Court appeals 'completed' during those years rather than to appeals 'commenced' or 'lodged'. However, the difference between the former and the latter is relatively small and has a negligible effect on calculating the appeal rate.

Table 3 — Estimated Appeal Rate for the Years 1996–97 to 2004–05[209]

	1997–98	1998–99	1999–2000	2000–01	2001–02	2002–03	2003–04	2004–05
County Court appeals completed in Melbourne	2,308	2,192	1,497	1,424	1,398	1,645	1,565	1,620
County Court appeals completed in circuit courts	718	691	521	469	442	577	640	628
Total	3,026	2,883	2,018	1,893	1,840	2,222	2,205	2,248
Total defendants convicted and/or sentenced in Magistrates' Court	83,115	74,743	71,167	65,021	63,370	79,196	75,370	79,921
Estimated appeal rate (%)[210]	3.6%	3.9%	2.8%	2.9%	2.9%	2.8%	2.9%	2.8%

The above figures suggest that there was a decline in the appeal rate following the 1999 changes, but that it has since remained stable at just under 3 per cent. Unfortunately, it is not possible to determine whether this decline can be attributed to a fall in the number of appeals that might be described as unmeritorious or whether the changes have also discouraged appellants who had a sound basis for an appeal. The Committee returns to this issue below.

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[209] **Explanatory Notes:**

Note 1: The figures in the table for 'County Court appeals completed in Melbourne', 'County Court appeals completed in circuit courts' and the corresponding totals are taken from Office of Public Prosecutions, *Annual Report 2004*, Appendix A.

Note 2: The figures for 'Total defendants convicted and/or sentenced in Magistrates' Court' are taken from: Attorney-General's Department, *Victorian Magistrates' Court Sentencing Statistics 1996/97 — 2001/02*, 68, for the corresponding years and from ABS *Criminal Courts, Australia* publications for the subsequent years.

[210] The estimated appeal rates in this table vary from those cited in Table 1 above because the tables use data drawn from different sources.

Effect on appeals abandoned and non-appearances

Prior to the introduction of the 1999 changes, the historical rate at which appeals were abandoned and in which appellants failed to appear were around 15 per cent and 6 per cent of matters lodged, respectively.[211] According to the County Court's *Annual Report* for 2000–01, the 1999 changes had the effect of reducing the abandonment rate to 8 per cent and the non-appearance rate to 1 per cent.[212] Whether or not this initial decline was due to the changes introduced in 1999, the effect has not been sustained. In 2004–05 the percentage of appeals abandoned was 16.9 per cent and the percentage of appeals in which the appellant failed to appear was 8.6 per cent.[213] The brief decline in abandonments and in cases struck out due to the non-appearance of the appellant is demonstrated in Table 4. Around one quarter of all appeals lodged are now abandoned or struck out due to the non-appearance of the appellant.

Table 4 — Appeals Abandoned or Struck Out Due to Non-Appearance Pre-1999 to 2004–05[214]

	pre-1999[215]	2000–01216	2001–02217	2002–03	2003–04	2004–05
Abandoned before Registrar	-	-	-	7.4%	7.0%	7.4%
Abandoned before Court	-	-	-	5.6%	8.1%	9.5%
Subtotal of abandoned appeals	15%	8%	11%	13.0%	15.1%	16.9%
Struck out/no appearance	6%	1%	2%	3.9%	7.1%	8.6%
Total of abandoned and struck out	21%	9%	13%	16.9%	22.2%	25.4%

[211] County Court, *Annual Report* (2000–01) 21

[212] County Court, *Annual Report* (2000–01) 21

[213] *Statistics of the County Court of Victoria*, at http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Publications_Reports/$file/County%20Court%20Statistics_2005.pdf, 13 December 2005. Note that the abandonment rate is the total of appeals abandoned before the Registrar and appeals abandoned before the court.

[214] The figures for the years 2002–03 to 2004–05 are from *Statistics of the County Court of Victoria*, at http://www.countycourt.vic.gov.au, 13 December 2005. The earlier figures are taken from the annual reports of the County Court as cited below.

[215] County Court of Victoria, *Annual Report* (2000–01) 21.

[216] County Court of Victoria, *Annual Report* (2000–01) 21.

[217] County Court of Victoria, *Annual Report* (2001–02) 17.

A notable feature of the above figures is the increase in recent years in the rate of appeals abandoned before the court rather than before the Registrar. Such a change may be explained by the requirement to obtain the court's leave to abandon out of time. If this is the case, it would appear to support the argument, noted below, of those witnesses who argued for the amendment or abolition of this provision on the grounds that it is administratively inefficient.

Evidence provided by witnesses

Judicial warnings

The central witness argument against the warning provision was that it undermines procedural fairness and double jeopardy principles.[218] Victoria Legal Aid (VLA) cited the Victorian Supreme Court decision of *Brand v Parsons,*[219] in which Coldrey J held that there is a denial of procedural fairness when a County Court judge fails to indicate the likelihood of an increased custodial sentence on appeal, because the appellant is not made aware of their position of jeopardy.

VLA noted that the principle was also discussed in *Parker v DPP and Anor*, in which Kirby J stated:

> There is an established practice or convention in District Court appeals under section 122 that a judge, contemplating an increase in the sentence under appeal, will signal that possibility to the appellant ... Although it is not a rule of law, it is an established practice. It should rarely, if ever, be departed from. The basis for the practice is to be found in a species of the double-jeopardy principle.[220]

The Committee also heard from VLA that the 1999 changes to judicial warnings have had the unintended effect of discouraging meritorious appeals, the very opposite of the stated intention of the changes:

> Unfortunately, the 1999 changes mean that those cases where there are grounds for an appeal, but there is some risk that the appeal will fail, are much less likely to be appealed because of the potential adverse consequences for the appellant. This is in effect a restriction on appeal rights. The current system means that two different defendants may in practice receive very different rights of appeal as a result of the way that the system operates.[221]

The Committee agrees that s 86(1AA) of the *Magistrates' Court Act 1989* has the potential to undermine the principles of procedural fairness. While the Committee notes evidence that it is rare for the County Court to increase an appellant's sentence

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[218] See for example Law Institute of Victoria, *Submission No. 5*, 1–2; Victoria Legal Aid, *Submission No. 9*, 3–4.

[219] *Brand v Parsons* (1994) 1 VR, 257 (Coldrey J); Victoria Legal Aid, *Submission No. 9*, 3–4.

[220] *Parker v DPP and Anor* (1992) 28 NSWLR, 282 (Kirby J); Victoria Legal Aid, *Submission No. 9*, 4.

[221] Victoria Legal Aid, *Submission No. 9*, 4.

without providing a warning, the Committee is mindful of evidence that the 1999 changes to judicial warnings may discourage meritorious appeals.

The Committee also notes that the changes to the judicial warning provisions have not achieved the stated intention of reducing the proportion of appeals that are abandoned. As the Director of Public Prosecutions, Paul Coghlan QC, told the Committee:

> For my own part I do not know that I would worry too much about having the 30 day rule, I must say, because I do not think in practice you are going to stop people abandoning. That was a scheme that really did want to try to emphasise the possibility of increasing sentences, but in practice it does not really happen, and I doubt very much whether judges refuse leave to abandon in any event.[222]

For these reasons, the Committee considers that s 86(1AA) of the *Magistrates' Court Act 1989* should be amended so that judges are required to provide an appellant with a warning if considering an increase in an appellant's sentence. In the Committee's view, the form (Form 2-2A; see Appendix 4) is useful and does not contribute to the complexities of the current appeal abandonment processes. Moreover, the Committee believes that the provision of a warning regarding the possibility of an increase in sentence at this stage of an appeal serves the important purpose of informing the appellant that she or he is assuming a real element of risk in an appeal. The Committee concludes that the warning contained on Form 2-2A should be retained.

The Committee was unable to obtain statistics regarding the proportion of appeals that are abandoned subsequent to a judicial warning regarding the possibility of a higher sentence.[223] However, the Committee understands that, since the 1999 changes, it is apparently quite rare for judges to give such warnings and therefore, for appeals to be abandoned in this way. The Committee also understands that these appeals are generally abandoned on the initiative of the appellant at the commencement of proceedings, often because she or he has had the opportunity to obtain legal advice, for the first time, following the lodgement of an appeal.

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[222] Evidence to the Committee, Melbourne, 13 February 2006, 8 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[223] As noted above, 9.5 per cent of appeals in 2004/05 were described as 'abandoned before Court': County Court of Victoria, *Statistics of the County Court of Victoria*, at www.countycourt.vic.gov.au. In other words, 9.5 per cent of appeals were abandoned at a court hearing. However, the proportion of these which were abandoned within thirty days (and therefore without the need to demonstrate exceptional circumstances), as opposed to the proportion which abandoned beyond thirty days (and which were therefore subject to the Court's leave and the demonstration of exceptional circumstances) is unknown. The County Court also provided the Committee with a sample of recent appeals for the purposes of the current inquiry – this yielded a slightly higher figure of 11 per cent for appeals abandoned before the Court.

Recommendation 1. That the *Magistrates' Court Act 1989* be amended to require the County Court judge hearing an appeal under section 83 of the Act to give an appellant a warning, as early as possible during the hearing, that she or he faces the possibility of receiving a more severe sentencing order than was originally imposed by the Magistrates' Court.

Abandonment

The Committee turns now to the requirement introduced in 1999 that an appellant may only abandon an appeal by the court's leave and after demonstrating 'exceptional circumstances'.

On this matter Mr Michael Wighton of VLA told the Committee that the provision is both administratively inefficient and fails to recognise the circumstances in which many appeals are lodged:

> On the issue of abandonment and how the 1999 reforms have or have not worked, most defendants who abandon we see as an efficiency not as a nuisance because when you decide to appeal at the door of the court as you are leaving in the hurly burly of the Magistrates' Court, it is often done without thinking and without the lawyer having the chance to advise their client properly because the next client is waiting to be seen. On quiet reflection the defendant might decide not to pursue it, where the lawyer might advise the client that it does not have sufficient merit to run the risk of getting an increased sentence or the defendant, to use the example earlier, is able to digest and accept the penalty. When they abandoned under the old rules it was by letter or fax. If you were looking at a jail sentence, you presented yourself to an officer of the court to go into custody. Now it requires a hearing if it is more than 30 days after the appeal is lodged. To us that is a fairly serious inefficiency given that in most cases leave is actually granted. You have replaced a letter or a fax with a full hearing before a judge with a prosecutor present in the County Court.[224]

VLA also made this point in its submission to the inquiry, where it described the burden that the requirement to establish exceptional circumstances imposes on appellants, particularly indigent appellants:

> The insertion of this requirement in the legislation has made the appeal process cumbersome and more time consuming as the appellant must now argue his or her case for abandonment before a Judge – a hearing to avoid a hearing.
>
> This process is contrary to good case management principles and causes prejudice to indigent appellants who have sought considered legal advice, conceded that an appeal would fail, yet

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[224] Evidence to the Committee, Melbourne, 14 February 2006, 68 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

> must face the court unrepresented to argue their case for abandonment. A grant of legal aid is not available for this process. [225]

However, the Committee heard from a number of witnesses that County Court judges readily allow the abandonment of appeals and rarely require the demonstration of exceptional circumstances.

Dr Greg Lyon of the Criminal Bar Association of Victoria told the Committee that, in practical terms, appellants can readily abandon their appeal on the day of the hearing and that judges encourage them to do so if they consider an appellant's case to be weak.[226]

Mr Rob Stary of Criminal Defence Lawyers Association made the same point:

> In practice there are few judges who will disallow a person a right to abandon an appeal and ask them to discharge their onus to show exceptional circumstances. The reality is that most judges will say, "Now that you have had an opportunity to obtain further legal advice, or in the interests of justice, I now determine that you can abandon an appeal".[227]

Ms Anna Radonic of Youthlaw also told the Committee that the abandonment provisions are not strictly enforced.[228]

The Committee also heard from the Director of Public Prosecutions, Paul Coghlan QC, that the 1999 changes to the abandonment provisions had not achieved the stated intention of emphasising the possibility of an increased sentence on appeal:

> I am not sure if we know of a single case in the state of Victoria where a sentence has been increased in circumstances where somebody has applied for leave to abandon the appeal and not been granted that leave. I do not know of any case. It is unusual for sentences to be increased on appeal separate from a director's appeal …[229]

VLA submitted that it would be more effective to allow an appellant to abandon his or her appeal up to three weeks before the day of the hearing without restriction or penalty.[230]

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[225] Victoria Legal Aid, *Submission No. 9*, 4.

[226] Evidence to the Committee, Melbourne, 13 February 2006, 43 (Dr Greg Lyon, Secretary, Criminal Bar Association of Victoria).

[227] Evidence to the Committee, Melbourne, 14 February 2006, 77 (Mr Rob Stary, President, Criminal Defence Lawyers Association).

[228] Evidence to the Committee, Melbourne, 14 February 2006, 55 (Ms Anna Radonic, Principal Lawyer, Youthlaw).

[229] Evidence to the Committee, Melbourne, 13 February 2006, 8 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[230] Victoria Legal Aid, *Submission No. 9*, 4.

This proposal was supported by the Director of Public Prosecutions:

> That would be a pretty practical way of approaching it. I do not think courts are that interested in doing unnecessary work, really, so if somebody comes along and says, "I want to abandon", I think most judges are going to say that is fine.[231]

The Committee agrees that the abandonment requirements introduced in 1999 are administratively inefficient and fail to acknowledge that a level of abandonment is inevitable given the circumstances in which many appeals are lodged. The inevitability of a certain level of abandonment is also suggested by the fact that the current overall abandonment rate is comparable to the pre-1999 rate. The Committee also notes that no such provision exists in comparable states.[232] Finally, the Committee notes the argument that there is a connection between the absence of legal representation and the abandonment of an appeal.

That argument was explained in a 1998 letter to all Members of Parliament in by the Victorian Aboriginal Legal Service in response to the changes proposed by the Bill that introduced the 1999 changes:

> a significant number of people may be represented by duty solicitors or in some cases by no solicitor at all.
>
> If they receive a heavy punishment (such as gaol) then quite often they will appeal. The decision to appeal may be made without legal advice in the case of people who are sent to prison or with advice that is flawed.
>
> In a similar way receiving a term of imprisonment is something which causes shock and often means that a person will for a time have trouble taking in information. In those circumstances it is not surprising that appeals are put in that are later withdrawn.
>
> That is not surprising. People who represent themselves at court will get a shock if a term of imprisonment is imposed on them. Such people will be locked in the local watch-house not knowing where they are and will have no opportunity to contact family or friends. They will see the local copper at the police station and that is often where they will receive their first advice about what they can and cannot do. They will be advised that they can lodge an appeal, and they will do so because they want to get out of the place or speak to a family member.[233]

For these reasons, the Committee concludes that the requirement that an appellant must seek leave to abandon an appeal and demonstrate 'exceptional circumstances'

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[231] Evidence to the Committee, Melbourne, 13 February 2006, 8 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[232] See for example *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 67.

[233] Letter from James Christian, Chief Executive Officer, Victorian Aboriginal Legal Service, to members of parliament, 5 November 1998, quoted in Victoria, *Parliamentary Debates*, Legislative Assembly, 23 March 1999, 21 (Rob Hulls, Shadow Attorney-General) — second reading debate on *Magistrates' Court (Amendment) Bill 1998*.

more than 30 days after lodging an appeal should be repealed. While noting the suggestion by VLA that abandonment should be allowed up until three weeks before the hearing date without the need to show exceptional circumstances, the Committee believes that such a provision would be likely to suffer from the same inefficiencies as the existing restriction.

Given that abandonments seem to have been unaffected by the existing requirements, the Committee does not believe that there is sufficient evidence that a three-week threshold, as suggested by VLA, would be worthwhile, either from the perspective of administrative efficiency or from the perspective an appellant. Accordingly, the Committee concludes that clause 6 of Schedule 6 of the *Magistrates' Court Act 1989* should be repealed so that an appellant is not required to seek the Court's leave and to demonstrate 'exceptional circumstances' in order to abandon an appeal.

> Recommendation 2. That clause 6 of Schedule 6 of the *Magistrates' Court Act 1989* be repealed so that an appellant is not required to seek the County Court's leave and to demonstrate 'exceptional circumstances' in order to abandon an appeal.

Costs and failure to appear

The Committee received very little evidence regarding the provision that allows the County Court to order costs against an appellant if satisfied that the appeal was brought vexatiously or frivolously or in abuse of process. It would appear, however, that the provision is rarely enforced.

Mr Michael Wighton of VLA told the Committee he was not aware of a single case in which a costs order had been imposed against an appellant on this basis.[234] The Criminal Bar Association of Victoria also told the Committee that it was not aware of any such cases.[235] The Committee notes, however, that costs provisions of this nature are common to appeal systems in other Australian jurisdictions and, in the Committee's opinion, they provide an appropriate measure for the discouragement of unmeritorious appeals.

Last, the Committee did not receive any evidence regarding the provision that the Court may order a rehearing of an appeal heard in the absence of an appellant only if satisfied that the failure to appear was not due to the fault or neglect of the appellant. The Committee makes no finding in relation to this requirement.

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[234] Evidence to the Committee, Melbourne, 14 February 2006, 68 (Mr Michael Wighton, Manager, Regional Divisions, Legal Aid Victoria).

[235] Victorian Bar and Criminal Bar Association of Victoria, *Submission No. 11*, 5.

CHAPTER THREE — THE ALTERNATIVES TO DE NOVO APPEAL

The terms of reference request that the Committee consider making recommendations on whether appeals from the Magistrates' Court to the County Court should continue to be hearings de novo, or whether they should be heard in some other way, and if so, how. Witnesses to the inquiry who proposed the abolition of de novo appeals suggested a number of alternative approaches. These included tests that currently apply for appeals from matters heard by way of indictment in the higher courts.

The first part of this chapter provides an assessment of these suggested alternatives.

In the second part of the chapter the Committee explores the operation of the appeal systems in other Australian states and territories, with the exception of New South Wales (NSW). The Committee also considers the nature of appeals for matters heard in the lower criminal courts of England and Wales, New Zealand and Canada.

The third part of the chapter provides a detailed consideration of the operation of the NSW system of appeal. NSW and Victoria are the two most populous Australian states and, until 1999, all appeals from magistrates' decisions in NSW were also heard de novo.[236] The experience of NSW therefore provides an opportunity for an assessment of the way in which the abolition of de novo appeals might affect the Victorian criminal justice system.

The case for change

The Committee heard from a number of witnesses that appeals from the Magistrates' Court should no longer be heard de novo. The arguments cited by these witnesses are assessed in chapters four and five but may be summarised as follows:

- appointees to the office of magistrate are now required to hold legal qualifications and are often experienced legal professionals;
- summary justice is not 'second-rate justice' — its procedures have evolved to provide appropriate safeguards against wrongful conviction and sophistication in sentencing;

[236] As discussed below, appeals against conviction are now by way of rehearing on the transcript of evidence heard in the Local Court, while the hearing of sentence appeals remains unchanged.

- the importance of the principle of finality in judicial proceedings and the anomalous nature of de novo appeals in this context;
- de novo appeals are inconsistent with the doctrine of precedent because they do not result in detailed written reasons for decision;
- de novo appeals represent unnecessary duplication and costs;
- de novo appeals are open to abuse of process by appellants in the presentation of evidence; and
- the effect on witnesses, including victims of crime, of having to present their evidence twice.[237]

Alternatives suggested by witnesses

Those witnesses to the inquiry who argued for the abolition of de novo appeals suggested alternatives to the current system that varied in detail. Broadly, however, they called for appeals from the Magistrates' Court to be heard in the same way as appeals involving more serious criminal offences that are currently heard in the higher courts.[238] The Committee outlines each of these proposals in turn.

Magistrates' Court of Victoria

The majority submission of the Magistrates' Court of Victoria, prepared by the Committee of Magistrates, recommended that appeals should be based on errors of law and should be heard by the Supreme Court.[239]

Chief Magistrate Ian Gray, who recommended that appeals should continue to be heard by the County Court but otherwise agreed with the majority submission, argued that error of law is not an inappropriately narrow ground of appeal and would not make appeals inaccessible:

> Error of law is not a ridiculously narrow ground. If you make an error because you fail to take something into account or you have made a demonstrable error — you can get into the question of what is an error and what should be an error, because an error is a genuine, real ground; it is not going to be eye of the needle stuff where just a few get through. If there is an error, there is an error — if you have left something out, if you fail to take something into account and so on and so forth. I do not think of that as a ground that is shutting people out in a material sense

[237] This issue is discussed in chapter six.

[238] That is, indictable offences and indictable offences triable summarily, which are heard at first instance in the County Court and the Supreme Court.

[239] Magistrates' Court of Victoria (Committee of Magistrates), *Submission No. 8*, 2. The minority submission of the Magistrates' Court of Victoria recommended that the current system of de novo appeals be retained: Magistrates' Court of Victoria (minority submission), *Submission No. 8*, 1–4.

> because provided you have a court that is professional, efficient and competent and is likely to get it right …[240]

Chief Magistrate Gray also argued that an appeal system based on error would not unduly restrict sentence appeals because such matters would continue to be appellable on the grounds that the sentence imposed by the Magistrates' Court was 'manifestly excessive'.[241]

The appeal ground of manifest excess is discussed below in the context of appeals from the higher courts, but the Committee notes here the argument of Magistrate Caitlin English, who represented the minority view of the Magistrates' Court, that manifest excess is a high threshold that may only be applicable in relation to sentences that involve significant terms of imprisonment.[242]

Victoria Police

Victoria Police recommended that an individual's right of appeal from the Magistrates' Court to the County Court should be based on the model employed within South Australia.[243]

The South Australian system is discussed in detail below. The particular features of this system recommended by Victoria Police are the requirement that the appellant identify the grounds of their appeal in detail and that appeals be heard by the Supreme Court.[244]

In making this recommendation, however, Victoria Police acknowledged the greater financial costs to an appellant in arguing his or her case in the Supreme Court and suggested that its preferred model would work equally well if appeals continued to be heard by the County Court.[245] As the Committee notes below, while the South Australian system is described as a rehearing, in practice it operates as a strict appeal based on the demonstration of error.

A further change to the right of appeal suggested by Victoria Police was the introduction of a 'gatekeeper' who would assess the grounds of an appeal to decide whether it should be allowed to proceed to a hearing before a judge.

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[240] Evidence to Law Reform Committee, Parliament of Victoria ('the Committee'), Melbourne, 14 February 2006, 89 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

[241] Ibid 93.

[242] Evidence to the Committee, Melbourne, 14 February 2006, 93 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[243] Victoria Police, *Submission No. 10*, 2.

[244] Ibid.

[245] Evidence to the Committee, Melbourne, 13 February 2006, 29 (Superintendent Stephen Leane, Victoria Police).

Victoria Police cited the example of the Masters in the Supreme Court but argued that the role could also be fulfilled by a judge prior to the court hearing:

> Essentially the Masters [in the Supreme Court] deal with all the preliminary matters as they proceed through the interim stages before a matter actually goes to a trial with a full appeal …
>
> The other thing they do is provide a gatekeeper screening process where they look at the material that has been filed by affidavit where the parties say, "Here is what we claim went wrong", and the opposition says, "We say it was right for these reasons". They essentially make a judgment about whether it is on the cards that there is a dispute that deserves to be aired in the Supreme Court and to take that amount of time and money out of the public purse. That, in very simple terms, is what they do. They are judicially qualified themselves …
>
> Essentially they are a form of quality control: "Will we let everything come through or will we allow only those things that deserve consideration?". The higher one goes up the appellate hierarchy, the more rigorous that process is.
>
> The argument we are suggesting is that one could have it performed by the new form of judicial registrar now available in the Magistrates' Court, or have some form of a judicial registrar in the County Court or use the Masters in the Supreme Court, or have the judges do it themselves. Our suggestion is that in the Supreme Court you have the Masters there already; they are tailor made to do that function and indeed that is what they do already, anyway …[246]

Victoria Police also argued that the right to appeal against a manifestly excessive sentence or a miscarriage of justice should 'remain' in any replacement system of appeal and that it would be appropriate for such appeals to proceed by way of rehearing depending on the circumstances.[247]

The Committee notes that manifest excess and miscarriage of justice are important avenues of appeal against sentence and conviction respectively for indictable matters heard in the County Court or Supreme Court. These avenues of appeal are discussed further below.

Finally, Victoria Police suggested that the right to a de novo appeal should be retained where a person is convicted and sentenced in their absence because, in such cases, the appellant has not had the opportunity of testing the evidence in the original proceedings.[248]

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[246] Evidence to the Committee, Melbourne, 13 February 2006, 28 (Sergeant Kyle McDonald, Victoria Police).

[247] Evidence to the Committee, Melbourne, 13 February 2006, 22 (Superintendent Stephen Leane, Victoria Police).

[248] Victoria Police, *Submission No. 10*, 4–5.

Director of Public Prosecutions

Mr Paul Coghlan, QC, Director of Public Prosecutions, also recommended the abolition of de novo appeals and the introduction of appeal rights essentially identical to those recommended by the Committee of Magistrates and Victoria Police.

In other words, the Mr Coghlan recommended that appeals to the County Court should be on the basis of error and should include manifest excess as a basis for sentence appeals.[249]

Other avenues of appeal from the Magistrates' Court

Although de novo appeals are the most common type of appeal from the criminal jurisdiction of the Magistrates' Court, there are two alternatives.

First, any party — an individual or the prosecution — may also appeal to the Supreme Court on a question of law from a final order in a criminal proceeding. This right of appeal is contained in s 92(1) of the *Magistrates' Court Act 1989*.

Second, an appeal to the Supreme Court is also available by application for an order in the nature of one of the prerogative writs under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005*. These include orders in the nature of:

- *certiorari* — quashing the decision of an inferior court due to non-jurisdictional error of law on the face of the record, jurisdictional error, or denial of procedural fairness;
- *mandamus* — an order compelling a public official to fulfil a public duty or to use a statutory discretionary power;
- prohibition — an order to prevent an inferior court proceeding with an action held to be in excess of its jurisdiction; and
- *quo warranto* — a writ that requires a person to demonstrate by what warrant they hold office or exercise a particular function.[250]

Strictly speaking, an application for prerogative relief is not an appeal but a request that a superior court exercise its supervisory jurisdiction over a lower court.[251]

Related supervisory remedies include applications for a writ of habeas corpus (an order for immediate release from unlawful custody or other restraint)[252] or for a

[249] Paul Coghlan, QC, Director of Public Prosecutions, *Submission No. 12*, 2; Evidence to the Committee, Melbourne, 13 February 2006, 2, 4 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[250] Definitions are based on those in *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998).

[251] Ian Freckelton, *Criminal Law Investigation and Procedure Victoria* [3.3.40].

[252] *Supreme Court (General Civil Procedure) Rules 2005* O 57; Richard Fox, *Victorian Criminal Procedure: State and Federal Law*, (12th ed, 2005), 430.

declaration (a statement of the legal situation, which, although lacking coercive force, is issued in expectation of compliance).[253] Each of these remedies is effectively an application to the Supreme Court to exercise its supervisory jurisdiction to require an inferior court to act lawfully and within the scope of its powers.[254]

As Professor Richard Fox notes, however, the supervisory remedies are now rarely used due to the availability of statutory rights of appeal from the Magistrates' Court[255] (including de novo appeals) and because they are significantly narrower in scope than such rights of appeal.[256]

The Committee also heard from Justice Tim Smith of the Victorian Supreme Court that both alternatives to de novo appeal — s 92 and the O 56 appeals — involve significant legal preparation and costs:

> if you look at what is involved in preparing a section 92 appeal, an order 56 review or an appeal to the Court of Appeal you are talking about preparation of a significant body of documents, all of which require legal input. In the section 92 appeal or the order 56 review you have to have the initiating documents prepared and you have to have the affidavits, exhibits and the like. Normally — I have not mentioned it here — the practice these days is for counsel to prepare a written argument, which is also paid for. Similarly in the court of appeal procedures you have got a lot of material.[257]

The Committee notes, however, that the witnesses who recommended the abolition of de novo appeals (as outlined above) also recommended the creation of a new right of appeal effectively on the same basis as appeals from indictable matters to the Victorian Court of Appeal. It is this form of appeal to which the Committee now turns.

Appeals in indictable matters

Historical basis

Until the early 20th century a person convicted of an indictable offence had only very limited avenues by which she or he might challenge the decision.[258] These were essentially limited to the supervisory remedies outlined in the previous section.

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[253] Ibid 430–1.

[254] Ibid 427.

[255] The Court's discretion to grant a prerogative writ will ordinarily not be exercised if another remedy is equally available to the applicant: *Stefanovski v Murphy* [1996] 2 VR 442; see Fox, above n 36, 427.

[256] Fox, above n 36, 427.

[257] Evidence to the Committee, Melbourne, 6 March 2006, 103 (Justice Tim Smith, Supreme Court of Victoria).

[258] Alex C Castles, *An Australian Legal History* (1982) 339; Brown et al, above n 151, 347.

In the words of legal historian Alex Castles:

> it was not until the twentieth century, and then only after a major overhaul of the English system for the review of criminal proceedings, that the Australian legislatures finally moved to institute more broadly-based rights of appeal with respect to the most serious criminal offences. The *English Criminal Appeal Act*, 1907, provided for appeals of fact as well as of law for major offences and established a new body called the Court of Criminal Appeal. At the same time, it abolished the remaining highly technical, legalistic ways in which the review of criminal proceedings had sometimes been possible. One by one, the Australian legislatures followed suit to provide for modern style criminal appeals for the first time. The full courts of the Supreme Courts were constituted as Courts of Criminal Appeal.[259]

Despite these developments, the Committee notes that, nearly a century later, appeals continue to be described as 'a highly technical, practitioners' domain par excellence'.[260]

Right of appeal

A person found guilty and sentenced for an indictable offence may appeal against their conviction or sentence under s 567 of the *Crimes Act 1958*.[261]

There are four separate categories under which an appeal may be lodged. The first three categories relate to appeals against conviction; the fourth relates to appeals against sentence. Notably, only appeals against conviction on a question of law are available as of right — the other three categories are subject to the Court of Appeal's leave or a certificate of the trial judge.

The four categories are:[262]

- an appeal against conviction on a question of law as of right, although the Court of Appeal has the discretion to insist that a case be stated;
- an appeal against conviction, subject to a certificate of the trial judge, on a ground involving a question of fact only or of mixed fact and law;
- an appeal against conviction, by leave of the Court of Appeal, on a ground involving a question of fact only or of mixed fact and law or on any other ground to which the Court of Appeal agrees; and

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[259] Castles, above n 105, 339–40 (references omitted). These changes occurred in Victoria with the passage of the *Criminal Appeal Act 1914*: at 340.

[260] Brown et al, above n 151, 345.

[261] However, the Court will usually only consider an appeal against conviction where the person originally pleaded guilty if it considers that the appellant did not fully appreciate the nature of the charge or did not intend to plead guilty, or if the admitted facts do not support a conviction for the charge: *Murphy* [1965] VR 187; *Kardogerous* [1991] 1 VR 269; *Parsons* [1998] 2 VR 478; *Cheng* (1999) 107 ACrimR 460, 462–3, cited in Fox, above n 36, 437.

[262] Fox, above n 36, 433–5.

- an appeal against sentence, with the Court of Appeal's leave, provided the sentence is not one fixed by law.[263]

Conviction appeals

Section 568 of the *Crimes Act 1958* sets out the grounds under which an appeal from a conviction in the County Court or Supreme Court may succeed — in any other case, the appeal must be dismissed.

The appeal must be allowed if the Court of Appeal concludes that:

- the jury's verdict was unreasonable or was not supported by the evidence; or
- the judgment of the court involved a wrong decision on any question of law; or
- there was a miscarriage of justice on any ground.

This section also contains a 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.[264]

The test set out in s 568 exists in similar form in all Australian jurisdictions.[265] There is also an extensive body of case law dealing with the operation of the proviso in criminal appeals.

As noted above, a miscarriage of justice test was suggested by a number of witnesses as an alternative to a de novo hearing in the case of conviction appeals. A miscarriage of justice is a legal test that is satisfied when an accused person is deprived of a chance of being acquitted, which was fairly open, because a court failed to apply the rules of evidence or procedure or the relevant law.[266]

The Committee does not consider that such a test would be appropriate in the context of matters heard summarily, as it would be likely to lead to more complex and longer hearings in the Magistrates' Court.

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[263] The outline set out above draws upon the summary provided in Fox, above n 36, 435.

[264] *Crimes Act 1958* s 568(1).

[265] See *Criminal Appeal Act 1912* (NSW) s 6(1), *Criminal Code 1899* (Qld) s 668E, *Criminal Law Consolidation Act 1935* (SA) s 353(1), *Criminal Code Act 1924* (Tas) s 402(2), *Criminal Code* (WA) s 689(1), *Criminal Code Act* (NT) s 411(2). The same power applies in the Federal Court in relation to appeals from Territory Supreme Courts despite the absence of a statutory provision: *Chamberlain v R* (No 2) (1984) 153 CLR 521; 51 ALR 225; 58 ALJR 133: LexisNexis, *Halsbury's Laws of Australia* (17 October 2006) [130-13985].

[266] Howie, R N, *Butterworths Australian Criminal Law Dictionary* (1997) 129.

Sentence appeals

It is important to note that an appeal against sentence on the grounds that it is manifestly excessive or manifestly inadequate amounts to a claim of error. It does not involve a re-exercise of the sentencing discretion by the appellate court.[267]

The basis for the appellate court's consideration of such an appeal was stated in the leading High Court case of *House v The King*:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. **It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed** and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.[268]
>
> (emphasis added)

It is also clear from the above that an appeal against sentence on the basis that it was manifestly excessive is conducted by reference to the evidence that was presented to the court at the time of the original decision, although s 574 of the *Crimes Act 1958* does provide separate grounds for a sentence appeal on the basis of new evidence.

While there may, therefore, be some capacity for the admission of additional evidence in a sentence appeal on the basis of manifest excess, it does not provide the same scope for the preventative and rehabilitative purposes of the de novo appeal (discussed by the Committee in chapter four).

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[267] *House v The King* (1936) 55 CLR 499.

[268] *House v The King* (1936) 55 CLR 499 (Dixon, Evatt and McTiernan JJ), at http://www.austlii.edu.au.

It is also important to note that appeals against sentence on the basis of manifest excess or inadequacy are not concerned with promoting consistency in sentencing. As the High Court noted in the recent decision of *Wong v The Queen*:

> Reference is made in *House* to two kinds of error. First, there are cases of specific error of principle. Secondly, there is the residual category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case **appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons**.[269]
>
> (emphasis added)

Discussion

The Committee notes that the tests of miscarriage of justice for conviction appeals and manifest excess for sentence appeals have evolved in a different context — that of trial by jury — to appeals from summary matters. Moreover, both tests, as with the grounds of appeal from matters heard in the higher courts generally, are inherently more complex than de novo appeals.

As the Committee finds in chapter five, the uncomplicated nature of the de novo system supports the comparative simplicity and efficiency of criminal proceedings in the Magistrates' Court.[270] This is of particular importance given the very high volume of matters that magistrates are required to hear.

The Committee is concerned that the adoption in the summary jurisdiction of tests which have evolved for appeals in relation to indictable offences could undermine the efficiency of the Magistrates' Court and of the criminal justice system as a whole. The Committee concludes that neither the miscarriage of justice test for conviction appeals nor the manifest excess test for sentence appeals would provide appropriate grounds of appeal from the Magistrates' Court.

Other jurisdictions

Australia

A common feature of each of the Australian states and territories discussed in this section is that, although appeals from summary criminal or related matters are

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[269] *Wong v The Queen* (2001) 207 CLR 584, 605, (Gaudron, Gummow and Hayne JJ observed).

[270] A number of witnesses who opposed the abolition of de novo appeals told the Committee that placing appeals on a more restricted basis could lead to magistrates slowing down their decision making in order to guard against errors that may afford grounds for appeal and lengthier argument from lawyers in the Magistrates' Court in order to preserve points for appeal. These arguments are assessed in chapter five.

described as rehearings,[271] they apparently function more in the nature of strict appeals.[272] The NSW appeal system is discussed separately in the final section of this chapter.

In the summary jurisdictions of Western Australia, Tasmania and the Northern Territory, an appellant must base her or his appeal on one or more defined grounds similar to those required for appeals involving more serious criminal offences originally heard in the higher courts.[273] This amounts to a strict appeal because the appellant is required to base his or her appeal on a claim of error in the magistrate's decision. The appeal is a 'rehearing' only in the sense that the appellate court relies on a record of the evidence heard in the original court.

In South Australia, Queensland and the Australian Capital Territory, in contrast, the grounds under which a person may appeal are not specified. Despite this, it appears that appellants in these jurisdictions are required to base their appeals on grounds similar to those in the jurisdictions noted above in practice. Accordingly, appeals in South Australia, Queensland and the Australian Capital Territory are apparently also heard strictly.

Two additional factors appear to contribute to appeals being heard strictly in these jurisdictions.

First, with the exception of Queensland, appeals in all of the above jurisdictions are heard by the superior court.[274] As the Committee discusses in chapter five, it is the superior court in a state or territory that has responsibility for making precedent. Accordingly, since the interpretation of the law is the primary function of courts at this level, it follows that they are more likely than a lower court to conduct an appeal as a *review* than as an *appeal*.

Second, in each of these jurisdictions, an appellant may only present fresh or additional evidence[275] if granted leave by the court.[276] Moreover, the majority of

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[271] That is, in each of these jurisdictions, primary or delegated legislation states that the appeal is to proceed by a 'rehearing' of the evidence heard in the original court.

[272] A number of these jurisdictions also allow for an 'appeal' on an alternative basis, such as by way of stated case to the superior court.

[273] That is, appeals in these jurisdictions must be based on similar grounds to those for appeals from matters heard before a jury in the Victorian County and Supreme Courts.

[274] However, Tasmania, the Australian Capital Territory and the Northern Territory each have two-tier court systems.

[275] Additional evidence may include facts that were not presented to the magistrate. As noted in chapter two, this may occur because of the relatively short time available for hearing summary matters and the high proportion of unrepresented defendants.

[276] While this restriction is stated in the relevant provisions for these jurisdictions, it is also a logical requirement of an appeal by way of rehearing because it is defined as a rehearing on the evidence heard in the original court.

appeals apparently proceed solely on the record of the evidence heard by the magistrate.[277]

Finally, the more restricted basis on which appeals from summary matters are heard in these jurisdictions is apparently also reflected in rates of appeal that are significantly lower than in Victoria or NSW.[278]

In summary, although by *definition* there are three basic models of appeal from summary criminal and related matters in Australia,[279] it may be argued that there are just two models by *function*: an *appeal* and a *review* in the sense outlined in Chapter Two.

South Australia

The South Australian criminal court system has three levels: the Magistrates' Court, the District Court and the Supreme Court, in ascending order of seniority. Unlike in Victoria, criminal and related matters heard in the Magistrates' Court are appealed to the state's superior court: the Supreme Court.[280]

As in Victoria, criminal offences are divided into three categories: summary (or simple) offences, minor indictable offences and major indictable offences, in ascending order of seriousness. The South Australian Magistrates' Court hears summary offences and, with the consent of the accused, minor indictable offences.[281]

The sentencing power of the South Australian Magistrates' Court is similar to that of the Victorian Magistrates' Court. A magistrate has the power to impose a sentence of imprisonment of up to two years or a fine of up to $150,000.[282]

Appeals against both conviction and sentence are by way of rehearing:[283] the Magistrates' Court must provide the Supreme Court with copies of its judgement and

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[277] This is supported by the NSW evidence to the inquiry, discussed below, that leave to present fresh or additional evidence in an appeal against conviction is granted only in a minority of appeals. NSW conviction appeals were heard de novo until 1999 but are now by way of rehearing.

[278] However, as noted below, the Committee was not able to determine rates of appeal for all of these jurisdictions.

[279] The third model is of course the de novo appeal. As discussed below, de novo appeals continue to operate in England and Wales, in New Zealand (albeit by way of a de novo hearing in the original court) and in NSW (albeit in relation to sentence appeals only).

[280] *Magistrates' Court Act 1991* (SA) s 42(1)(b); however, the judge may refer the appeal to the Full Court if he or she considers it is appropriate to do so.

[281] Legal Services Commission of South Australia, *Online Law Handbook of South Australia*, at http://www.lawhandbook.sa.gov.au (revised 1 November 2005).

[282] *Criminal Law (Sentencing) Act 1988* (SA) s 19.

[283] *South Australia Supreme Court Rules 1987* r 97. As in Victoria, the Magistrates' Court may also state a case (ie refer a question of law arising during proceedings for the determination of the Supreme Court): *Magistrates Court Act 1991* (SA) s 43.

of the transcript of evidence heard,[284] but the Court may also rehear witnesses or receive fresh evidence if the 'interests of justice so require'.[285]

Unlike in Victoria, an appellant in South Australia is required to set out the grounds of her or his appeal 'in sufficient detail to enable the Court to know what points are being relied on in support of each ground'.[286] According to the Legal Services Commission of South Australia, an appeal:

> often means the arguing of legal principles, [and] it is difficult for appellants who do not have some legal training to conduct their own appeals.
>
> An appeal is not a re-hearing to see if someone else will come to a different decision. It is not usually possible to re-argue questions of fact on appeal. In most cases, the appeal must be based on some question of law. A person who wants to appeal against a magistrate's decision should seek legal advice as quickly as possible.[287]

In summary, an appeal in South Australia is heard strictly, despite being described in legislation as a 'rehearing'. Moreover, appeals are generally restricted to questions of law. It follows that this form of appeal would rarely allow consideration of changes in an appellant's circumstances or of relevant, and potentially mitigating, facts that were not raised in the Magistrates' Court.[288] The same may also be said, perhaps to varying degrees, of the remaining Australian jurisdictions discussed in this section.

As the Committee noted above, the South Australian model was suggested by Victoria Police as an alternative to the Victorian system of appeal. The Committee therefore provides a brief assessment of its accessibility and efficiency here.

The rate of criminal appeals from the Magistrates' Court in South Australia is significantly lower than in Victoria. Although a precise figure is not available, the Committee estimates that the rate for each of the periods 2002–03, 2003–04 and 2004–05 was apparently no higher than 0.7 per cent.[289]

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[284] *South Australia Supreme Court Rules 1987* r 96.

[285] *Magistrates Court Act 1991* (SA) s 42(4).

[286] *South Australia Supreme Court Rules 1987* rr 96C.03 and 97.03.

[287] Legal Services Commission of South Australia, *Online Law Handbook of South Australia*, at http://www.lawhandbook.sa.gov.au (revised 1 November 2005).

[288] As the Committee discusses in chapter four, the failure to draw such facts to the attention of a magistrate may occur because of the qualitatively heavier case load of summary jurisdictions, the speed with which matters are heard and the high proportion of unrepresented defendants. As the Committee also notes in chapter four, this is an issue common to all Australian jurisdictions.

[289] According to the South Australian Courts Administration Authority's *Annual Report 2004-2005*, there were 216 single-judge appeals instituted in the Supreme Court in 2002–03, 242 in 2003–04 and 248 in 2004–05. The total number of criminal cases 'adjudicated' and 'proven guilty' (ie finalised by a decision following a guilty plea or by a finding of guilt) in the South Australian Magistrates' Court for each of those periods was 33,871, 32,692 and

An important criticism made by those witnesses opposed to changing the system of appeal was that it would slow the process of dealing with matters in the Magistrates' Court. Comparisons between the states are difficult and should be treated with caution, especially due to differences in offence classification. However, some indication of differences with respect to court efficiency can be obtained from the Productivity Commission's *Report on Government Services 2006*.

The court backlog data provided in the commission's report goes some way towards suggesting that matters are currently dealt with more efficiently in the Magistrates' Court of Victoria than in the Magistrates' Court of South Australia.

For the period 2004–05 South Australia's Magistrates' Court had 1.5 times the Victorian percentage of matters pending for more than six months and nearly three times the Victorian percentage of matters pending for more than 12 months.[290]

The significant difference in the backlog of cases awaiting summary hearing in the two states would no doubt be due to a range of factors. One possible factor may be the difference in appeal systems — the issue that most concerned those Victorian witnesses who opposed any restriction to the existing right of appeal from the Magistrates' Court was the argument that it would lead to a lengthening of the time taken to hear criminal matters in the Magistrates' Court. The Committee can only speculate as to whether the South Australian data supports this conclusion.

Western Australia

The Western Australian criminal court system has three levels. In ascending order of seniority these are the Magistrates' Court, the District Court and the Supreme Court.

Offences are categorised as 'simple' offences, which are relatively less serious and are heard in the Magistrates' Court (these are broadly equivalent to summary matters in Victoria); indictable offences, which are more serious criminal matters that must be heard in the District or Supreme Court; and 'either way' offences that are of intermediate seriousness and may be heard by consent in the Magistrates' Court (these are broadly equivalent to indictable offences triable summarily in Victoria).[291]

35,218: Australian Bureau of Statistics, *Criminal Courts, Australia, 2002-03*, 64, *Criminal Courts, Australia, 2003-04*, 15 and *Criminal Courts, Australia, 2004-05*, 20. This yields an appeal rate for each of those periods of 0.6 per cent, 0.7 per cent and 0.7 per cent; however, as the figures for single-judge appeals instituted include both civil and criminal cases, the appeal rate for criminal matters alone may be significantly lower.

[290] Productivity Commission, *Report on Government Services 2006* [6.25].

[291] See the website of the Department of the Attorney General of Western Australia at http://www.justice.wa.gov.au/.

As in South Australia, appeals are heard by the Supreme Court.[292] Appeals must be based on one or more of the following grounds:

(a) that the court of summary jurisdiction –

(i) made an error of law or fact, or of both law and fact;

(ii) acted without or in excess of jurisdiction;

(iii) imposed a sentence that was inadequate or excessive;

(b) that there has been a miscarriage of justice.[293]

The leave of the Supreme Court is required for each ground of appeal.[294]

Appeals are by way of rehearing on the evidence heard by the original court, although fresh evidence may be admitted by leave of the court.[295]

The right of appeal is the same regardless of whether the person originally pleaded guilty or not.[296]

The rate of appeal from the summary jurisdiction of the Magistrates' Court in Western Australia is small by comparison to the rate in Victoria at less than 0.1 per cent of matters in which a person was 'proven guilty' in the Magistrates' Court.[297]

Queensland

The Queensland criminal court system has three levels: the Magistrates' Court, the District Court and the Supreme Court, in ascending order of seniority. As in Victoria, less serious matters are heard in the Magistrates' Court while more serious offences are heard in the higher courts.

Appeals from matters determined summarily in the Magistrates' Court are heard by a single judge of the District Court.[298] However, for indictable offences heard in the

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[292] *Criminal Appeals Act 2004* s 7.

[293] *Criminal Appeals Act 2004* (WA) s 8(1).

[294] *Criminal Appeals Act 2004* (WA) s 9.

[295] *Criminal Appeals Act 2004* (WA) ss 39-40.

[296] *Criminal Appeals Act 2004* (WA) s 8(2).

[297] There were 57 appeals heard by a single judge of the Supreme Court of Western Australia in 2005: David K Malcolm, *2005 Annual Review of Western Australian Courts* (2005); a total of 55 140 criminal matters were decided in the Magistrates' Court in 2004–05 in which a person was 'proven guilty': Australian Bureau of Statistics, *Criminal Courts. Australia, 2004-05*, 20.

[298] *Justices Act 1886* (Qld) s 222.

Magistrates' Court, a person may only appeal against his or her sentence.[299] Appeals are also restricted to sentence if the person pleaded guilty in the Magistrates' Court.[300]

The appeal is generally by way of rehearing on the evidence heard by the Magistrates' Court, but the District Court may give leave to present additional or new evidence if satisfied that there are special grounds.[301] The appellant is also required to set out the grounds of her or his appeal.[302] Although little formal guidance is given as to the detail in which the grounds of appeal should be set out, they are apparently subject to similar limitations as appeals in South Australia:

> the appeal must be about questions of law. The court will not re-examine the evidence or conduct the trial again.[303]

The rate of appeal for summary matters in Queensland is significantly lower than that in Victoria. While it is not possible to provide a precise figure, the rate is almost certainly less than 0.5 per cent.[304]

Australian Capital Territory

The criminal court system of the Australian Capital Territory has two levels: the Magistrates' Court and the Supreme Court.[305] Offences also classified as summary or indictable, with less serious indictable offences able to be heard summarily.[306]

A person may appeal, as of right, from the Magistrates' Court to the Supreme Court against conviction, sentence or the order made.[307] Appeals are by way of rehearing:

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[299] *Justices Act 1886* (Qld) s 222(2).

[300] *Justices Act 1886* (Qld) s 222(2).

[301] *Justices Act 1886* (Qld) s 223.

[302] *Justices Act 1886* (Qld) s 222(8).

[303] Department of Justice and Attorney-General of Queensland, 'The Magistrates Court — In Brief' (25 September 2006), at http://www.justice.qld.gov.au.

[304] In 2004–05 there were 119,152 criminal cases in which a person was 'proven guilty' in the Magistrates' Court of Queensland and 307 appeals from that court to the District Court. This represents an appeal rate of 0.26 per cent. However, the figure of 307 appeals apparently does not include appeals heard on circuit (ie it includes appeals heard in Brisbane and in regional centres only), and the effect of including such appeals would be to increase the appeal rate. On the other hand, while a significant proportion of those 307 appeals may have been from criminal matters, the figure also incudes civil appeals and appeals from tribunals and other bodies. It is therefore not possible to determine whether the true rate of appeal in 2004–05 was higher or lower than 0.26 per cent, but it reasonable to conclude that it was below 0.5 per cent. See Australian Bureau of Statistics, *Criminal Courts, Australia*, *2004-05*, 20 and District Court of Queensland, *Annual Report 2004-2005,* 4, 50.

[305] The Supreme Court has an original jurisdiction and an appellate jurisdiction, which is known as the Court of Appeal.

[306] LexisNexis, *Halsbury's Laws of Australia* (at 24 September 2006) [130-13005], [130-13010].

the Supreme Court 'must have regard to the evidence given in the proceeding out of which the appeal arose'.[308] However, further evidence may be admitted if the Supreme Court 'considers it necessary or expedient to do so in the interests of justice'.[309]

At the time of writing, the rate of appeal in the ACT could not be determined from publicly available data.

Tasmania

The criminal court system of Tasmania has two tiers: the Court of Petty Sessions (which sits in the Magistrates' Court) and the Supreme Court.

Appeals from a magistrate are heard in the Supreme Court by a single judge.[310] Appeals may be heard on the ground of error or mistake on a matter or question of fact, or of law, or of fact and law, or on the ground that the magistrate had no jurisdiction to make the order.[311]

Appeals are generally by way of rehearing; however, a party may apply to have the matter heard de novo, provided the decision was not made ex parte (unless an application has first been made to have it set aside), on the applicant's plea of guilty, or by two or more justices.

The Supreme Court may decide to hear a matter de novo if required to do so by the interests of justice,[312] which may be the case in the absence of a sufficient record of the original proceedings, where the applicant was not represented by counsel and evidence available at that time amounting to a substantial ground of defence was not presented, or if the parties consent.[313] Where the original decision was heard by a justice of the peace, the appeal may be heard de novo by a magistrate.[314]

At the time of writing, the rate of appeal in Tasmania could not be determined from publicly available data.

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[307] *Magistrates Court Act 1930* (ACT) s 208 (compare civil appeals from the Magistrates' Court, which may be brought only with the Supreme Court's leave under s 274).

[308] *Magistrates Court Act 1930* (ACT) s 214.

[309] *Magistrates Court Act 1930* (ACT) ss 207 and 214. See also *Campbell v Fortey* (1987) 85 FLR 462; 24 A Crim R 386, cited in *Halsbury's Laws of Australia* (17 October 2006) [125-1750].

[310] *Justices Act 1959* (Tas) s 110(1).

[311] *Justices Act 1959* (Tas) s 107(4).

[312] *Justices Act 1959* (Tas) 111(4).

[313] *Justices Act 1959* (Tas) 111(5).

[314] *Justices Act 1959* (Tas) 113(A).

Northern Territory

The criminal court system of the Northern Territory has two tiers: the Magistrates' Court and the Supreme Court, in ascending order of seniority.

Appeals from matters dealt with summarily in the Magistrates' Court are heard by a single judge in the Supreme Court by way of a rehearing on the transcript of evidence from the Magistrates' Court.[315] New evidence may be admitted with the court's leave if it considers that it would provide a ground for allowing the appeal.[316]

The grounds of appeal against sentence are unspecified, but appeals against conviction must be on the grounds of an error or mistake of fact or of law, or of mixed fact and law, in the magistrate's decision.[317]

At the time of writing, the rate of appeal in the Northern Territory could not be determined from publicly available data.

International jurisdictions

England and Wales

As noted in the previous chapter, the right to a de novo appeal from the Victorian Magistrates' Court originated in England. In this section the Committee considers the modern right of appeal in the summary criminal justice system of England and Wales.[318]

As in the Australian criminal jurisdictions, offences in England and Wales are divided into three categories. These are described in ascending order of seriousness as 'summary', 'either way' and 'indictable'.

Courts of Petty Sessions and Quarter/General Sessions have been replaced by magistrates' courts and the Crown Court respectively, which now deal with all criminal matters at first instance. Magistrates' courts form the first tier of the criminal justice system and deal summarily with an estimated 95 per cent of all criminal cases,[319] including all 'summary' offences and, where the defence consents, 'either way' offences.[320]

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[315] *Justices Act 1928* (NT) ss 173 and 175.

[316] *Justices Act 1928* (NT) s 176A.

[317] *Justices Act 1928* (NT) s 163.

[318] The Committee does not consider appeals in the separate criminal justice systems of Scotland and Northern Ireland.

[319] Robin Auld, *Review of the Criminal Courts of England and Wales* (September 2001), 71.

[320] Ibid.

Where the defence does not consent, 'either way' offences are heard by a judge and jury in the Crown Court, which is the next tier in the criminal court hierarchy.[321] 'Indictable' offences, such as murder, rape and robbery, are also heard by a judge and jury in the Crown Court.[322]

Magistrates' Courts are composed of lay magistrates (who also continue to be known as justices of the peace)[323] and district judges. Lay magistrates, who sit part time and usually in benches of three, deal with around 91 per cent of the criminal cases heard in magistrates' courts.[324] They are generally not lawyers but are assisted by a legal adviser.[325] Lay magistrates are unpaid but receive an allowance for expenses.[326]

District judges, legally qualified as barristers or solicitors with a minimum of seven years' experience, sit alone and full time.[327] They account for the remaining nine per cent of criminal cases heard in magistrates' courts.[328] District judges have jurisdiction to hear the same range of criminal matters as magistrates but often hear more difficult and complex matters and 'either-way' offences.[329]

A person may appeal as of right against her or his conviction (provided she or he did not plead guilty in the magistrates' court) or against her or his sentence (regardless of plea) from a magistrates' court to the Crown Court.[330] Appeals against sentence are heard by a single judge. Appeals against conviction are heard by a judge sitting with two lay magistrates;[331] where a question of law arises the lay magistrates are required to take a ruling from the presiding judge.[332]

An appeal from a magistrates' court to the Crown Court is effectively heard de novo. This kind of appeal is referred to as a 'rehearing' and described in the authorising statute as such,[333] but the term has two distinct meanings in the legal system of England and Wales. In the broader sense, a rehearing equates with a de novo appeal

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[321] Ibid. Courts of Quarter Sessions and Assizes were replaced by the Crown Court in 1971: at 74.

[322] Ibid 72. See also Her Majesty's Court Service, *The Crown Court*, at http://www.hmcourts-service.gov.uk.

[323] Criminal Justice System of England and Wales, *Glossary of Terms*, at http://www.cjsonline.gov.uk.

[324] Auld, above n 319, 71.

[325] Ibid.

[326] Ibid.

[327] Ibid 73.

[328] Ibid.

[329] Ibid.

[330] *Magistrates' Court Act 1980* (UK) s 108. However, the Crown Court regularly hears applications from persons seeking to appeal their conviction following a plea of 'guilty' on the basis that their plea was 'equivocal': (P J Richardson, ed) *Archbold: Criminal Pleading, Evidence and Practice* (2006) [2-194].

[331] Auld, above n 319, 74.

[332] *Archbold*, above n 330, [2-201].

[333] *Supreme Court Act 1981* (UK) s 79(3).

since it is a 'second hearing' in which all the evidence is reheard and either side is free to introduce fresh evidence without the court's leave.[334]

Appeals from magistrates' courts to the Crown Court are heard in this way.[335] In its narrower sense, a rehearing is broadly equivalent to a rehearing in the Australian context.[336] In this narrower form of rehearing, the court relies on a transcript of the trial for its consideration of the evidence and generally will not allow fresh evidence to be given or overturn findings of fact by the trial judge.[337]

As in Victoria, the prosecution must re-argue its case and it may do so on a different basis to the way the case was put in the magistrates' court.[338] It is also open to the Crown Court to find the case proved on a different basis.[339] Statements tendered by the prosecution to the magistrates' court must be either re-served or read during the appeal if the appellant's solicitor agrees.[340] The Crown Court is not bound by the facts found in the magistrates' court but where it decides not to accept those facts it must make this clear to the appellant, who must also be provided with an opportunity to challenge the Crown Court's view of the facts.[341]

Notably, there is no limitation on the presentation of fresh evidence in an appeal against conviction.[342] An appellant is also required to set out the grounds of his or her appeal in writing, but the required detail is unclear.[343]

Where the appeal is against sentence, the Crown Court is required to reach its own decision as to the correct sentence rather than review the decision of the magistrates' court.[344] The Crown Court may increase or reduce the sentence or leave it unchanged.[345]

The de novo nature of the appeal is reinforced by the *Criminal Procedure Rules 2005*, under which there is no requirement that a rehearing occur on a transcript or other

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[334] Elizabeth A Martin (ed), *A Dictionary of Law* (5th ed, 2003) Oxford University Press, 419.

[335] *Procurator Fiscal, Kirkcaldy v Kelly (Scotland)* [2003] UKPC D1 (5 March 2003) [8] (Lord Bingham of Cornhill). See also Eurolegal Services, *The English Court System*, at www.eurolegal.org; Criminal Justice System for England and Wales, *Appeals*, at http://www.cjsonline.gov.uk.

[336] See the outline of appeal types in chapter two.

[337] *A Dictionary of Law*, above n 334, 419.

[338] *Hingley-Smith v DPP* [1998] 1, *Archbold News 2, DC*, cited in *Archbold*, above n 330, [2-184].

[339] Ibid.

[340] Crown Prosecution Service, *Appeals to the Crown Court*, at www.cps.gov.uk.

[341] *Stephen Patrick Bussey v DPP* [1998] EWHC Admin 485 (5 May 1998) [12] (Smedley J).

[342] *R v Swindon Crown Court, ex parte Murray* 162 JP 36 DC, cited in *Archbold*, above n 330, [2-192].

[343] Supreme Court of England and Wales and Magistrates' Courts, England and Wales, *The Criminal Procedure Rules 2005,* No. 384 (L.4) r 63.2(4).

[344] *R v Swindon Crown Court, ex parte Murray* 162 JP 36 DC, cited in *Archbold*, above n 330, [2-192].

[345] Criminal Justice System for England and Wales, *Appeals*, at http://www.cjsonline.gov.uk.

record of the evidence heard in the magistrates' court.[346] Moreover, the Magistrates' Court is apparently not required to provide the Crown Court with any notes of evidence made by the justices' clerk.[347]

Although the Crown Court is under a duty to give reasons on appeal, it is not required to provide written reasons and, depending on the circumstances, its reasons may be as brief as a sentence or two.[348]

An appeal may be abandoned up to the third day on which the appeal is listed for hearing.[349] There is no right of appeal for the prosecution from the Magistrates' Court to the Crown Court.[350]

The Crown Court received 12,600 appeals against conviction and sentence in 2004, representing 0.8 per cent of all defendants convicted in the magistrates' courts.[351] This rate of appeal is lower than in Victoria (but higher than in a number of the other Australian jurisdictions, as discussed above). However, this may be partly explained by jurisdictional differences and by the restrictions on the right of appeal following a guilty plea.

One such jurisdictional difference is the fact that magistrates' courts in England and Wales are responsible for sentencing relatively less serious matters than in Victoria. In England and Wales, magistrates' courts cannot normally impose a sentence of imprisonment that exceeds six months (or 12 months for consecutive sentences), or a fine exceeding £5,000 (approximately AU$12,500).[352] A magistrates' court can also commit a person following conviction for an 'either-way' offence to be sentenced in the Crown Court if it considers that a higher sentence is warranted.[353]

As in Victoria, a person may also appeal a magistrates' decision by way of stated case (ie on the basis that the decision was wrong in law or in excess of jurisdiction) or

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[346] Where the appeal is against conviction, the Magistrates' Court must send any admission of facts made during the summary trial to the Crown Court: ibid r 63.3(5); where the appeal is against a custodial sentence the Magistrates' Court must send the Crown Court a statement as to whether it obtained a pre-sentence report: ibid r 63.3(6).

[347] *Archbold*, above n 330, [2-190].

[348] Ibid [2-202].

[349] Supreme Court Of England and Wales and Magistrates' Courts, England and Wales, *The Criminal Procedure Rules 2005*, No. 384 (L.4) r 63.5.

[350] Crown Prosecution Service, *Appeals to the Crown Court*, at www.cps.gov.uk.

[351] Office for Criminal Justice Reform, *Home Office Statistical Bulletin: Criminal Statistics 2004, England and Wales, 19/05* (2nd edition, November 2005) 25–6.

[352] Her Majesty's Court Service, *Magistrates and Magistrates' Courts*, at http://www.hmcourts-service.gov.uk.

[353] Ibid.

by way of judicial review.[354] In each case, the appeal lies to the High Court,[355] which is the court immediately above the Crown Court.[356]

New Zealand

The court system of New Zealand has four levels. In ascending order of seniority, these are: the District Court, the High Court, the Court of Appeal and the Supreme Court.

As the lowest court in the hierarchy, the District Court deals with relatively less serious criminal matters at first instance. More serious criminal cases (including murder) are heard by the High Court. In common with the Magistrates' Court of Victoria, the District Court of New Zealand hears the majority of criminal cases.

A notable difference between the Victorian and New Zealand criminal court systems is that the District Court can hear matters summarily or on indictment. In other words, New Zealand's court of summary criminal jurisdiction also has jurisdiction to hear certain indictable matters with a jury. A defendant in the District Court may also elect to be tried by jury for certain summary offences.

Justices of the peace continue to exercise judicial power in New Zealand. They have jurisdiction in relation to minor summary offences,[357] which are heard without a jury and generally by two or more justices of the peace.[358]

More serious matters are generally heard by a District Court judge. The maximum penalty that may be imposed on summary conviction for an indictable offence is a term of imprisonment not exceeding five years or a fine not exceeding $10,000, or both.[359]

Generally, any person charged with an offence for which a prison term of three or more months may be imposed has a right to trial by jury.[360] In practice, whether a matter is heard by a jury is determined by the procedural rules relating to summary

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[354] For the former avenue of appeal see *Magistrates' Court Act 1980* (UK) s111(1); for the latter, see: *Supreme Court Act 1981* (UK) s 31.

[355] *Archbold*, above n 330, [2-159].

[356] Beyond the High Court, the next tier in the criminal court hierarchy is the Court of Appeal and, finally, the House of Lords and the Judicial Committee of the Privy Council. Appeals from the Crown Court lie to the Court of Appeal.

[357] Generally, an offence not punishable by imprisonment or by a fine of $500 or more: *Summary Proceedings Act 1957* s 20A(12).

[358] Justices of the peace are laypersons chosen for their standing in the community: Gail Jansen, 'Justices of the Peace', in Butterworths, *The Laws of New Zealand* (1993) vol 15A, 1.

[359] *Summary Proceedings Act 1957* s 7.

[360] *New Zealand Bill of Rights Act 1990* s 24(e). There are two exceptions: common assault and assault on a police, prison or traffic officer: *Summary Offences Act 1981* (NZ) ss 9 and 10; see New Zealand Law Commission, Report 69, *Juries in Criminal Trials* (February 2001) 8.

and indictable offences.[361] The District Court was given jurisdiction to hear a range of indictable offences in 1979 and, since that time, defendants have also had the option of applying for trial by judge alone for indictable matters carrying a maximum penalty of less than 14 years' imprisonment.[362]

As in Victoria, whether a matter is heard summarily or on indictment also depends on the nature of the offence, whether the accused consents to the summary hearing of an indictable offence, and whether the court considers it is appropriate for the matter to be heard summarily.[363]

A person convicted, or the subject of an order made, in relation to a matter heard summarily in the District Court has three primary avenues by which she or he may challenge the decision: an application for a rehearing in the District Court, a 'general appeal' to the High Court, or a right of appeal on a question of law to the High Court (ie an appeal by way of case stated).[364]

The first two of these avenues are relevant for the purposes of comparison with the right to a de novo appeal from Victoria's Magistrates' Court. The Committee outlines each in turn.

Rehearing

A person convicted on summary proceedings in the District Court may apply for a 'rehearing' in the District Court. An application for a rehearing is made to the original decision maker who presided over the Court and may be made in relation to the whole matter or the sentence alone.[365] Notably, the rehearing is conducted de novo and the defendant may elect to have it proceed before a jury (where it is an offence for which there is a right to trial by jury) even if she or he waived that right for the original hearing:

> On any rehearing the Court shall have the same powers and shall follow the same procedure as if it were the first hearing; and in particular, on the rehearing as to the whole matter of any

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[361] *Juries in Criminal Trials*, above n 360, 8.

[362] *Crimes Act 1961* (NZ) ss 361B-C, cited in *Juries in Criminal Trials*, above n 360, 8.

[363] For a detailed consideration of these factors the reader is referred to Grant Burston, 'Criminal Procedure' in Butterworths, *The Laws of New Zealand* (reissue 1, 2002) vol 9.

[364] As to an appeal by way of case stated, see *Summary Proceedings Act 1957* (NZ) ss 107 and 114(b). As noted above, criminal offences may also be heard by way of indictment in the District Court. Appeals against conviction or sentence from matters heard on indictment, whether heard in the District Court or in the High Court, are heard on a basis that is broadly analogous to appeals from matters heard on indictment in the Victorian County Court or Supreme Court; see: Burston, above n 363, 297–9, 302–4.

[365] *Summary Proceedings Act 1957* (NZ) s 75(1).

information for an offence to which section 66 of this Act applies, the defendant shall be entitled to elect to be tried by a jury in accordance with the provisions of that section.[366]

General appeal

A general appeal by a person summarily convicted in the District Court is heard in the High Court unless the original decision was made by a Community Magistrate, in which case the appeal is heard in the District Court by a District Court judge.[367] A person may appeal against conviction and sentence, conviction alone or sentence alone.[368]

A general appeal is described in the *Summary Proceedings Act 1957* (NZ) as a rehearing.[369] However, the Committee notes that in practice it operates as a strict appeal in the sense defined at the beginning of Chapter Two:

> The essence of an appeal is that on appeal the actual decision of the Court is reviewed. In a general appeal, the onus is on an appellant to satisfy the Court that the decision below was wrong and that the appeal should be allowed …[370]
>
> …
>
> On a rehearing the appellate Court can come to its own decisions on questions of fact and law; however, the onus still lies on the appellant to satisfy the appellate Court that the decision given in the Court below was wrong.[371]

Where the appellant cannot show a link between the conviction and a wrong decision of law, she or he will only succeed if able to show that there was a miscarriage of justice.[372]

An important ground for a general appeal is a claim of deficiency in the original District Court proceedings that led to the conviction. This basis of appeal illustrates the strict nature of a general appeal. An appeal lodged on this ground requires an appellant to show both a connection between the deficiency and the conviction and

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[366] *Summary Proceedings Act 1957* (NZ) s 75(5).

[367] *Summary Proceedings Act 1957* (NZ) s 115(1), cited in Burston, above n 363, 268. See also 'Service' in Butterworths, *The Laws of New Zealand* (21 April 2005) [190,027].

[368] *Summary Proceedings Act 1957* s 115(2) and s 114(A), cited in Burston, above n 363, 269. See also 'Service', above n 367, [190,028].

[369] *Summary Proceedings Act 1957* s 119(1), s 114(A) and sch 2A, cited in Burston, above n 363, 275–6.

[370] Burston, above n 363, 269 — Burston cites in support of his argument: the *Summary Proceedings Act 1957*, s 119(1), s 114(A) and sch 2A; *Davies v Ministry of Transport* [1989] 3 NZLR 300; and *Westpark Marina Ltd v Auckland Regional Water Board* (1989) 5 CRNZ 18. See also 'Service' [190,027–190,028].

[371] Burston, above n 363, 275 — Burston cites in support of his argument: the *Summary Proceedings Act 1957*, s 119(1), s 114(A) and sch 2A; and *Herewini v Minister of Transport* [1992] 3 NZLR 482, 489.

[372] Burston, above n 363, 270.

that the deficiency was sufficient to raise a real risk that the appellant was wrongly convicted.[373] However, the appellate court will only intervene if it reaches the conclusion that the conviction is unsafe or if there is 'some lurking doubt in our minds which makes us wonder whether an injustice has been done'.[374]

An appeal against conviction following a plea of guilty will only be heard in exceptional circumstances.[375]

A general appeal against the severity of a sentence requires the appellate court to be reasonably satisfied that the sentence is manifestly excessive or wrong in principle, otherwise the appellant must show exceptional circumstances that call for its revision.[376]

Where the appeal involves any question of fact the appellate court usually refers to the evidence heard in the District Court.[377] Evidence given orally in the District Court is provided to the appellate court by way of a copy of any note made in the original court. The appellate court has discretion to hear and receive additional evidence where in the circumstances it could not have reasonably been presented at the original hearing.[378] The appellate court also has discretion to rehear the whole or any part of the evidence and must rehear the evidence of any witness if it 'has reason to believe that any note of the evidence of that witness … is or may be incomplete in any material particular'.[379]

While the High Court can make any order it thinks fit, it may also confirm, set aside or amend a conviction, or confirm, quash or vary a sentence.[380]

In summary, a general appeal from the District Court to the High Court operates in a way that is broadly analogous to the right of appeal from summary conviction in South Australia, Queensland and the Australian Capital Territory. Conversely, a rehearing in the District Court of New Zealand is analogous to a de novo appeal in Victoria, with the notable difference that it may be heard before a jury.

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[373] Ibid.

[374] *Herewini v Minister of Transport* [1992] 3 NZLR 482, 489, quoting *R v Cooper* [1969] 1 QB 267, cited in Burston, above n 363, 275–6.

[375] Burston, above n 363, 270.

[376] Ibid.

[377] *Summary Proceedings Act 1957* s 119.

[378] *Summary Proceedings Act 1957* (NZ) s 119(3).

[379] *Summary Proceedings Act 1957* (NZ) 119(2).

[380] *Summary Proceedings Act 1957* (NZ) s 121. Note that in a de novo appeal the decision of the lower court must be set aside even if the appellate court subsequently convicts the appellant or imposes an identical sentence.

Canada

The main form of appeal from a criminal matter heard summarily in Canada is by way of summary rehearing in a higher court.[381] The rehearing is conducted on the basis of a transcript of proceedings in the original court.

In Canada, however, the appeal may be heard de novo in exceptional circumstances. Examples of these circumstances are where the transcript is found to be inadequate or if the court otherwise considers it is in 'the interests of justice to do so'.

A person may appeal against a conviction or order or against the sentence imposed.[382]

Summary appeals in New South Wales

Until 1999 all appeals from summary matters in New South Wales were heard de novo, whether against sentence or conviction. Since this time, appeals against conviction have been conducted by way of a rehearing on the transcript of evidence heard in the Local Court, while appeals against sentence continue to be heard de novo.

The Committee decided to consider the NSW system of appeal in detail both because it was broadly similar to Victoria's de novo appeal system before 1999 and because the NSW changes to conviction appeals were originally seen as having retained some elements of a de novo appeal. Owing to inevitable differences in the terminology used in the two jurisdictions, the reader is referred to the definitions of the different types of appeal in Chapter Two, including the purposive definitions of an *appeal* and a *review*.

The Committee notes that at the time of writing the NSW government is considering whether sentence appeals should continue to be heard de novo.[383]

NSW court structure and offence classification

The criminal court system of NSW has three tiers: the Local Court, the District Court and the Supreme Court, in ascending order of seniority. A person may appeal as of right from a summary matter decided by a magistrate in the Local Court to a single judge of the District Court.

As in Victoria, offences in NSW are divided into three main categories: summary offences, indictable offences and indictable offences triable summarily. Summary

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[381] Curt T Griffiths and Simon N Verdun-Jones, *Canadian Criminal Justice* (2nd ed, 1994) 250. Canada abolished de novo appeals in 1976: at 250.

[382] Ibid 250–2.

[383] The New South Wales Sentencing Council's 2004 report, *How Best to Promote Consistency in Sentencing*, including its recommendation that sentence appeals be conducted by way of rehearing on the record of proceedings in the Local Court and the reasons of the sentencing magistrate (recommendation 3) is currently under consideration by the New South Wales Attorney-General.

offences are heard in the Local Court. Indictable offences triable summarily may also be heard in the Local Court (some with consent and some without consent) or in the District Court. Indictable offences other than murder or treason may be heard in the District Court. The most serious indictable offences, including murder and treason, are heard in the Supreme Court.[384]

NSW has also followed a trend of expanding the categories of offences that may be dealt with summarily by the Local Court.[385]

Right of appeal and appeal process

An appeal from conviction in a criminal matter decided in the Local Court is conducted as a rehearing in the sense defined in Chapter Two. That is, an appeal against conviction is conducted as a rehearing on the transcripts of evidence heard in the Local Court, although fresh evidence may be allowed by leave if the court considers that it is in the interests of justice to do so.[386] However, as the Committee notes in its discussion of the evidence received in NSW below, a number of NSW witnesses gave evidence suggesting that, although conducted as a rehearing, appeals against conviction may now operate in a way that is analogous to a strict appeal.

An appeal against sentence is essentially heard de novo — as the Committee notes in its discussion of the evidence received in NSW below, there has been no practical change to the way in which sentence appeals are heard since 1999.[387]

Both appeals against conviction and appeals against sentence are generally available as of right.[388] However, the court's leave is required if the person:

- was convicted in his or her absence; or
- was convicted following a plea of guilty; or
- failed to appeal within 28 days of the sentence being imposed or of disposal by the Local Court of an application for annulment of the conviction where the person was convicted in his or her absence.[389]

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[384] See http://www.lawlink.nsw.gov.au/lawlink/district_court/ll_districtcourt.nsf/pages/dc_criminaljurisdiction.

[385] Brown et al, above n 151, 174. Brown et al cite 1974 as the year in which the trend began.

[386] *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 18. Each party has a right to one free copy of the certified transcripts of evidence from the Local Court, as well as one free copy of the transcript of the fresh evidence: s 18.

[387] Although s 17 of the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) provides that appeal is by way of a rehearing of the evidence heard in the Local Court, there is no requirement to use transcripts of that evidence and, as noted below, a number of witnesses informed the Committee that sentence appeals continue to be heard de novo.

[388] *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) ss 11 and 11A.

[389] *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) ss 11 and 12.

A person convicted by the Local Court in her or his absence is required to obtain leave from the District Court, unless he or she has first sought a review of the decision by the Local Court.[390]

This contrasts with the situation in Victoria. In Victoria, although a person convicted in her or his absence by the Magistrates' Court may apply to the Magistrates' Court for the sentencing order to be set aside and for the matter to be reheard by the Magistrates' Court, the courts are not required to do so.[391]

As in Victoria, the appellant is not required to set out detailed grounds for their appeal. The Notice of Appeal form requires the appellant to indicate the grounds of his or her appeal by selecting one or more of three pre-printed grounds:

- that the appellant is not guilty;
- that the penalty is too severe;
- that the appellant contests the apprehended violence order made in the proceedings.

A copy of the form is attached at Appendix 4.

The Committee notes the similarity between NSW and Victoria in regard to this requirement as well as in relation to their respective forms (the Notice of Appeal form used in Victoria is also attached at Appendix 4). The Committee also notes the marked contrast between the simplicity of the NSW and Victorian forms and the requirement in other Australian jurisdictions that appeal grounds be set out in detail.[392] As noted above, the Committee considers this is an important explanation as to why the right of appeal in those other jurisdictions apparently operates as a *review* rather than an *appeal*.

As in Victoria, the Director of Public Prosecutions in NSW can appeal only against the sentence imposed.[393]

NSW appeals case load and rate of appeal

The NSW District Court dealt with around two and a half times as many appeals as the Victorian County Court in 2005. There were 6,614 criminal appeals initiated in the District Court in 2005, compared with 2,666 in the County Court in the 2004–05

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[390] See *Crimes (Local Courts Appeal and Review) Act 2001* ss 4 and 12(1) — the review is in the form of an 'application for annulment' of the conviction.

[391] *Magistrates' Court Act 1991* (Vic) s 93.

[392] See for example the South Australian notice of appeal form at Appendix 4.

[393] *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 23.

financial year.[394] As noted in the table below, the appeal rate has averaged approximately 5 per cent in recent years.

Despite its historically higher rate of appeals, since the abolition of de novo appeals in 1999 NSW has experienced a significant reduction in:

- appeal numbers;
- the appeal rate; and
- the average time taken to dispose of appeals.

Each of these is discussed below.

NSW experienced a significant decline in the total number of appeals following the introduction of the 1999 changes. This decline was apparently due in large part to a fall in the number of appeals against conviction (also described as an appeal on 'all grounds' in NSW). The decline in appeal numbers was greatest in 2000, when there was a 19 per cent decrease in appeals registered in the District Court between 1999 and 2000 (from 6,689 in 1999 to 5,441 in 2000).[395]

The District Court cited the abolition of de novo appeals as one of the possible causes for the decline in the number of appeals.[396]

While the District Court also noted that it was too soon to determine whether the reduction in appeals would be sustained, Table 5 suggests that it has been. Although the most recent figures for 2004 suggest that the actual number of appeal registrations has almost recovered to its pre-1999 levels, the lower appeal rate since 1999 has largely persisted (ie while the number of appeals registered since 1999 has increased, there has been a corresponding increase in the number of matters in which a person was found guilty by the Local Court).

There has, however, been a gradual increase in the rate of appeals since 2002 and this may represent a trend towards a return to the pre-1999 levels.

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[394] District Court of New South Wales, *Annual Review 2005*, 27-28; County Court of Victoria, *Annual Report* (2004–05) 17.

[395] District Court of New South Wales, *Annual Report 2000*, 45, 56.

[396] Ibid. The other causes cited included the earlier involvement of the Director of Public Prosecutions and the Legal Aid Commission and 'greater satisfaction in the manner in which Magistrates are handling the increase in their jurisdiction'.

Table 5 — New South Wales Rate of Appeal 1999–2004

Year	Total appeals registered[397]	Number of persons 'proven guilty' in Local Court[398]	Appeal rate
1996	6,305	95,992	6.6%
1997	6,260	95,623	6.5%
1998	6,564	100,934	6.5%
1999	6,689	116,806	5.7%
2000	5,441	109,218	4.7%
2001	5,370	117,317	4.6%
2002	5,658	112,965	5%
2003	5,629	112,487	5%
2004	6,346	117,624	5.4%
2005	6,614	113,291	5.8%

There has also been a significant reduction in the time taken to dispose of conviction appeals — the time from registration of the appeal to finalisation — since 1999, as indicated in Table 6. Disposal times for sentence appeals have not significantly changed (see Table 7).

The figures show, however, that this time reduction occurred in the 2001 statistics. A change brought about by the 1999 amendments is likely to have appeared much more strongly in the 2000 statistics and it would therefore be unwise to assume a direct causal connection.

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[397] Totals taken from: the *Annual Reviews* of the District Court of New South Wales for the corresponding years.

[398] Totals taken from Statistical Services Unit, New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics*, published 1997 to 2005 inclusive, at http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats03. For 1996–99, see the 1997 to 1999 publications, xii, 11 (Table 1.3). For 2000, see the 2000 report, 3, 18 (Table 1.3). For 2001, see the 2001 publication, 18 (Table 1.3) and the 2002 publication, 3. For 2002, see the 2002 publication, 3, 22 (Table 1.3). For 2003, see the 2003 report, 22, and the 2004 report, 3. For 2004, see the 2004 report, 3, 22. For 2005, see the 2005 report, 25-27.

Table 6 — All-Ground Appeals: Case Disposal Times for NSW 1998–2004[399]

% of cases disposed of within	1998	1999	2000	2001	2002	2003	2004
Four months	25%	30%	31%	54%	53%	56%	50%
Six months	56%	55%	59%	77%	78%	79%	76%
12 months	88%	86%	89%	94%	97%	97%	97%
More than 12 months	13%	15%	11%	6%	3%	3%	3%

Table 7 — Sentence Appeals: Case Disposal Times for NSW 1998–04[400]

% of cases disposed of within	1998	1999	2000	2001	2002	2003	2004
Two months	51%	42%	51%	60%	59%	56%	60%
Six months	90%	89%	91%	95%	95%	95%	95%
More than six months	10%	12%	10%	5%	5%	5%	5%

The 1999 changes coincided with a significant and continuing decline in conviction appeals overall and as a proportion of all appeals, as indicated in Table 8.

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[399] District Court of New South Wales, *Annual Review 2000*, 59 (for 1998–2000); District Court of New South Wales, *Annual Review 2003*, 39 (for 2001); District Court of New South Wales, *Annual Review 2003*, 44 (for 2002–04). Percentages for each disposal period are cumulative. The figures for 1998 and 1999 total 101 per cent — this is apparently due to rounding. Note also that for 1998 to 2000 the *Annual Review 2000* uses 'less than 112 days' as the shortest of the disposal periods, which is slightly less than the disposal period of 'four months' used in subsequent years.

[400] Ibid. Percentages for each disposal period are cumulative. As with the figures for all-grounds appeals above, the figures for some years — 1999 and 2000 — total to 101 per cent; again, this is apparently due to rounding.

Table 8 — Conviction Appeals as a Proportion of All Appeals Since 1999[401]

	1998	1999	2000	2001	2002	2003	2004
Total conviction appeals	2,004	1,932	1,560	1,251	1,140	1,200	1,145
Total all appeals	6,564	6,689	5,441	5,370	5,658	5,629	6,346
Conviction appeals as % of total	30.5%	28.9%	28.7%	23.3%	20.1%	21.3%	18.0%

Evidence received from NSW witnesses

The Committee turns now to the evidence that it received from witnesses in NSW. As noted above, witnesses in NSW confirmed that the 1999 changes to the appeal system have had a practical effect only in relation to the hearing of appeals against conviction.[402] In other words, appeals against sentence in NSW continue to be heard in a way that is essentially the same as in Victoria — de novo. Accordingly, the evidence discussed in this section focuses on the way in which the 1999 changes have affected the hearing of conviction appeals.

Efficiency and fairness

While the NSW witnesses from whom the Committee heard generally agreed that the 1999 changes had produced significant cost and time savings for the District Court,[403] the Committee also heard that the changes had made conviction appeals less accessible, particularly for poorer and unrepresented appellants.

On the efficiency side, the Committee heard that the 1999 changes had brought about significant reductions in the number of conviction appeals and in the time taken to hear them.[404] The Committee also heard that this had produced corresponding cost

[401] See the annual reviews of the District Court of New South Wales for the corresponding years.

[402] Evidence to the Committee, Sydney, 10 April 2006, 168 (Chief Judge Reginald Blanch, District Court of New South Wales); Evidence to the Committee, Sydney, 10 April 2006, 127 (Mr Michael Day, Managing Lawyer, Office of the Director of Public Prosecutions, New South Wales).

[403] See for example Evidence to the Committee, Sydney, 10 April 2006, 143, 144, 148 (Mr Roland Bonnici, Barrister); Evidence to the Committee, Sydney, 10 April 2006, 124 (Mr Michael Day, Managing Lawyer, Office of the Director of Public Prosecutions, New South Wales); Evidence to the Committee, Sydney, 10 April 2006, 111 (Judge Derek Price, Chief Magistrate, Local Court of New South Wales).

[404] As noted in the previous section, these reductions were confirmed by the Committee's own research.

and time savings for the District Court.[405] On the other hand, the Committee also heard that the changes may have contributed to a slowdown in the hearing of criminal and related matters in the Local Court (this is discussed further below).

On the access side, however, NSW criminal law barrister Roland Bonnici told the Committee that the changes have also made it more difficult for people to appeal, particularly if they are unable to afford legal representation.[406] The Committee also heard that the changes had led to increased delays in the time between the lodgement and hearing of an appeal.[407] As the Committee notes in chapter four, this is a particular concern for people who are in prison while awaiting the hearing of their appeal.

The Committee found the evidence of Mr Bonnici to be of particular assistance in assessing the effect of the 1999 changes to conviction appeals. Mr Bonnici's experience as a NSW criminal lawyer spans a number of decades. During the 1980s Mr Bonnici was in charge of the Liverpool Legal Aid office, which dealt with a high number of appeals from the Local Court. Mr Bonnici was also a member of a New South Wales Legal Aid task force in the mid-1980s at the time of its merger with the Australian Legal Aid Office.[408] Mr Bonnici was therefore able to provide the Committee with a practitioner's perspective of the NSW appeal system both before and after the 1999 changes.[409]

Mr Bonnici told the Committee that appellants now faced increased costs when appealing their conviction, due to increased time spent on out-of-court preparation:

> But from my point of view I have no doubt that if some of these aspects that I have brought up are looked at, you will find that people have been disadvantaged, particularly those from socioeconomic levels where they cannot afford legal representation. I think they have gone by the wayside, in a sense.[410]

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[405] See above n 403.

[406] Evidence to the Committee, Sydney, 10 April 2006, 148 (Mr Roland Bonnici, Barrister).

[407] Ibid 143.

[408] The ALAO was established by the Commonwealth government in 1974 and provided legal aid for Commonwealth matters such as family law and bankruptcy. It also assisted members of the armed forces and war veterans. The ALAO was the forerunner of the existing national network of Commonwealth and state-funded legal aid commissions, see: Daryl Williams, Attorney-General for Australia 1996–2003, 'Access to Justice: Past, Present and Future' (Address to the National Conference of Community Legal Centres, 3 September 2001), at http://www.nationalsecurity.gov.au.

[409] See Evidence to the Committee, Sydney, 10 April 2006, 140 (Mr Roland Bonnici, Barrister).

[410] Ibid 148.

Mr Bonnici acknowledged that there had been improvements in magistrates' training and in the courts' technology in recent years, but he suggested that appellants' access to justice had declined despite such changes:

> there is more training and there is more access to computers, so everybody is better qualified. But the other side of the coin is: how about the people who are representing them and the people who cannot afford it? That gap, I think, is there, more so than it ever was in the 1980s and the 1990s.[411]

The Committee also heard evidence that conviction appeals are now conducted in a way that resembles a strict appeal rather than a rehearing. While this issue is the subject of the following section, the Committee notes here that such an outcome would also reduce the accessibility of the appeal system.

***Appeal* or *review*?**

The Committee heard differing views from witnesses in NSW regarding the conduct of conviction appeals since 1999.

Justice Reginald Blanch, Chief Judge of the District Court of New South Wales, told the Committee that he continues to hear appeals against conviction by way of rehearing.[412] However, the Committee heard from other witnesses that, while individual judges may approach the hearing of conviction appeals differently, there is now a prevailing practice of hearing such matters as a *review* rather than an as *appeal*. In other words, conviction appeals are often heard strictly.

Consistent with an appeal by way of rehearing, Justice Blanch described his own approach to hearing conviction appeals as one of carefully reassessing the case against the appellant:

> What you are looking at is whether or not the evidence is sufficient to satisfy you beyond a reasonable doubt of the guilt of the appellant. And that amounts to weighing up the various pieces of evidence and seeing whether you can come to that conclusion. Very often it's a question of the number and types of witnesses who are giving evidence. Whether they are police witnesses or lay witnesses, just the usual gamut of things that you look at in terms of prejudice, accuracy as well as honesty, identification issues, opportunities of identification and so forth. **It's really in most cases just a reassessment of the various bits of evidence**.[413]
>
> (emphasis added)

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[411] Ibid 149.

[412] Evidence to the Committee, Sydney, 10 April 2006, 167 (Chief Judge Reginald Blanch, District Court of New South Wales).

[413] Ibid 170 [uncorrected].

However, Justice Blanch acknowledged that his own approach to conviction appeals may not be the norm,[414] and this point was reiterated by a number of witnesses.[415] As Mr Bonnici told the Committee, it is more usual for the District Court judge to place an onus on the appellant to establish an error in the way the Local Court matter was heard or decided.[416]

Mr Bonnici told the Committee that the prevailing judicial practice is to use the transcripts to conduct a 'review'[417] rather than a 'rehearing' of the case against an appellant. Mr Bonnici said that appeals against conviction are typically heard on the basis of a claim of error in the conduct of the trial and, to a lesser degree, in the decision of the magistrate:[418]

> Now it is more like, as I said, a review — and it is a review, because you are actually reviewing everything that happened before the magistrate and making a decision then whether sufficient evidence was called, whether more witnesses should have been called, or whether the tactical decision was wrong, which caused an injustice. So you are really taking to the full the test of the miscarriage of justice, which before you did not really have to worry about as much because you were going to get another shot at it …[419]

The evidence the Committee received from Ms Sophia Beckett, Senior Legal Officer with the Inner City Local Court Section of the Legal Aid Commission of NSW, on these issues was broadly consistent with Mr Bonnici's views. Ms Beckett said that having to run an appeal on the Local Court's transcript of evidence can make it difficult to construct an argument for leave to recall a witness when the reason for appealing is the appellant's dissatisfaction with the overall conduct of the Local Court hearing rather than a specific error.[420]

Ms Beckett also agreed that it would be difficult to devise an appeal system by way of a rehearing on the evidence heard in the original court that also treated that evidence in a 'de novo' way.[421] Moreover, she effectively acknowledged that the 1999 changes had failed to achieve this because conviction appeals from the Local Court are now

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[414] Ibid 170–1 [uncorrected].

[415] See for example evidence to the Committee, Sydney, 10 April 2006, 158 (Mr Paul Johnson, Senior Legal Officer, Ms Sophia Beckett, Senior Legal Officer and Mr John Mulder, Solicitor in Charge, Legal Aid Commission of New South Wales).

[416] Evidence to the Committee, Sydney, 10 April 2006, 142 (Mr Roland Bonnici, Barrister).

[417] Again, the Committee notes that this is synonymous with a strict appeal as defined in chapter two.

[418] However, as explained below, the changes have also had unintended consequences for appeals on the basis of an error in the magistrate's decision — District Court judges increasingly refuse to hear such appeals and insist that they be referred to the Court of Appeal for a hearing on the basis that the magistrate made an error of law.

[419] Evidence to the Committee, Sydney, 10 April 2006, 147 (Mr Roland Bonnici, Barrister).

[420] Evidence to the Committee, Sydney, 10 April 2006, 154 (Ms Sophia Beckett, Senior Legal Officer, Legal Aid Commission of New South Wales).

[421] That is, as though the evidence was being presented to the appeal court for the first time.

heard on a similar basis to appeals involving more serious criminal matters originally heard in the higher courts:[422]

> that makes it similar to the grounds of an appeal between the District Court and the Supreme Court in the first instance up to the Court of Criminal Appeal where you have to point to something specific, a miscarriage of justice, and you are as an advocate tied to the manner in which somebody has called evidence in that first instance. It is a de novo appeal, as it is at the moment under the new legislation, but it is not really because you are tied to the tactical way that first advocate has run the hearing.[423]

This view was echoed by Mr Bonnici:

> I think the test has got harder now, simply because you have to decide, almost like in the Court of Criminal Appeal, whether all evidence was called, whether it was properly done, competency of counsel. Really the test is very similar now; I am finding it [so] anyway. When I do a Court of Criminal Appeal matter and when I do an all grounds appeal, I do not look at it that much differently, apart of course from looking at whether an error has been made by the magistrate.[424]
>
> … the test now is a very strong test; it is a leave to appeal test, and you only have to go to the law on that to see that it is a fairly stringent test.[425]

Ms Beckett noted that this change in the conduct of appeals from the Local Court is apparently contrary to the legislative intention of the 1999 reforms:

> However, it is meant to be a de novo hearing,[426] you look at it afresh, and I think it is difficult to look at something afresh where you are running the matter on somebody else's transcript and they have conducted the hearing in a manner that you perhaps would not have chosen to conduct it. It is meant to be, under the legislation, a de novo hearing [rehearing] and yet the fact that it is on transcript …[427]

Ms Beckett also noted the contrast between the approach of the District Court to fact-finding in conviction appeals on the one hand and sentence appeals on the other since the 1999 changes. She said that in sentence appeals, which continue to be

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[422] Evidence to the Committee, Sydney, 10 April 2006, 154 (Ms Sophia Beckett, Senior Legal Officer, Legal Aid Commission of New South Wales).

[423] Ibid.

[424] Evidence to the Committee, Sydney, 10 April 2006, 144 (Mr Roland Bonnici, Barrister).

[425] Ibid 147.

[426] Although Ms Beckett used the term 'de novo hearing' here it is fairly clear that in this context she was referring to what the Committee defines as a 'rehearing' in chapter two.

[427] Evidence to the Committee, Sydney, 10 April 2006, 155 (Ms Sophia Beckett, Senior Legal Officer, Legal Aid Commission of New South Wales).

heard de novo, it is still possible to object to the facts found by the magistrate because the appellant is not tied to the evidence heard in the Local Court.[428]

Conversely, the Committee notes that restricting conviction appeals to the Local Court's transcript of evidence could in many cases make it quite difficult to object to the facts as found by the magistrate.

The Committee notes that an appeal in which the facts are treated as established by the trial court is fundamentally a *review* rather than an *appeal*. Accordingly, it may be argued that, in practical terms, the 1999 changes to the NSW system have gone some way towards placing conviction appeals in that state on a similar footing to appeals from the summary jurisdictions of the other Australian states and territories discussed earlier in this chapter.

Ms Beckett outlined for the Committee two further factors which she said had contributed to appeals against conviction being conducted more in the nature of a strict appeal than by way of rehearing.[429] First, Ms Beckett said that District Court judges hearing appeals had apparently often read the Local Court transcript of evidence before the day of the hearing:[430]

> The problem with it happening that way is it then ceases to be a de novo [hearing] and becomes more of a question of what was wrong with the finding of the Local Court magistrate. It becomes more of a review of the first instance decision rather than a de novo hearing. That is an administrative problem.[431]

Second, Ms Beckett told the Committee that when a judge has read the transcript of evidence prior to the hearing it can nullify attempts by the defence to object to the admissibility of evidence heard in the Local Court.[432]

On balance, the Committee was persuaded that, although appeals from conviction in the NSW Local Court are now conducted by way of a rehearing (as defined in chapter two), it is fair to say that they now amount to a *review* of the Local Court proceedings (also defined in chapter two). Moreover, while the legislative intention of the 1999 changes may have been to preserve de novo hearings for conviction appeals — albeit, in the majority of cases, on the transcript of evidence heard in the Local Court — the evidence suggests that an appeal against conviction is in fact now heard in a way that bears some similarity to a strict appeal (also defined in chapter two).

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[428] Ibid 161.

[429] Although Ms Beckett used the term 'review', as noted in chapter two the term is synonymous with a strict appeal.

[430] Evidence to the Committee, Sydney, 10 April 2006, 156–7 (Ms Sophia Beckett, Senior Legal Officer, Legal Aid Commission of New South Wales).

[431] Ibid 156. Ms Beckett noted that this problem is particularly due to the practice of judges reading the transcript prior to the hearing.

[432] Ibid.

Leave to present evidence

Mr Bonnici told the Committee that the requirement to obtain the District Court's leave to present fresh or additional evidence, or to call or recall a witness, is a strict test that requires a significant amount of additional work for legal practitioners:

> If you want to cross examine further, for example, you are going to have to put on a notice of motion, ask for leave for the person to be called and explain why you want that person further cross examined.[433]

The Committee heard from Justice Blanch that such leave is granted in only a small proportion of appeals:

> It is still as you know a rehearing of the case but it's a rehearing of the case on the papers and no other evidence can be called, no witnesses can be re-called unless there is an application made to the court for that to occur and it is fairly seldom that leave is granted for further evidence to be called.[434]

Justice Blanch said that applications are made in approximately only 10 per cent of appeals and that leave is granted in approximately half of these.[435] Accordingly, in Justice Blanch's estimation additional evidence is allowed in around 5 per cent of all conviction appeals.[436] Justice Blanch told the Committee that, in his view, the low rate of leave applications and their high rate of success reflects the success of the system in screening out 'frivolous' applications:

> The legislation is framed so that there is a presumption that it will be dealt with on the papers. Practitioners understand and accept that that's the case so they don't generally come along and make really frivolous applications. So that if an application is made then generally speaking there is some reason behind it. Sometimes it's a good reason, sometimes it's not. But that is why the percentage of cases that succeed with that application is as high as that.[437]

The Committee notes that the additional work required of legal practitioners in preparing a leave application would lead to increased legal costs and could further reduce the accessibility of appeals for people of limited financial means.

The Committee also notes that the small proportion of appeals in which leave is granted to present fresh or additional evidence, or to call or recall a witness, may also contribute to the trend of such appeals being effectively restricted to the fact-finding of the magistrate.

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[433] Evidence to the Committee, Sydney, 10 April 2006, 144 (Mr Roland Bonnici, Barrister).

[434] Evidence to the Committee, Sydney, 10 April 2006, 167 (Chief Judge Reginald Blanch, District Court of New South Wales) [uncorrected].

[435] Ibid 168.

[436] Ibid.

[437] Ibid.

Decline of the all-grounds appeal

The Committee heard varying evidence regarding the treatment of conviction appeals that involve a claim of error, including errors of law, since 1999. Justice Blanch said that he continues to deal with appeals that involve an error of law:

> It may be you are looking for errors of law, if you come across an error of law then that certainly assists the process.[438]

On the other hand, the Committee heard from Mr Bonnici that, while appeals against conviction continue to be described as 'all–grounds' appeals, judges now often refuse to hear an appeal that involves an error of law on the basis that it should be heard by the Court of Appeal:

> Under the old system you put appeal on all grounds. You could actually tick a box and appeal on law, which meant that the judge — I do not know if His Honour told you this — could actually look at the decision of the magistrate — his reasons for deciding. Guess what? — under the new system the judge does not look at the reasons for deciding on an appeal.[439]
>
> I think the way the legislation is now, if there is only an error of law some judges take the view that they have got to go the Court of Appeal. If in your legislation you are going to go that way that is something that should be clarified, because here we have the chief judge even saying that it is a discretionary thing. But if you think about it and take it to its logical conclusion, if you are running a de novo hearing, then because you are not appealing it as an error of law per se, it really does not matter what the magistrate decided …[440]

According to Mr Bonnici, the conduct of a defendant's case in the Local Court is now doubly important because judges increasingly refuse to exercise their discretion to consider the decision of the magistrate.[441] Mr Bonnici identified the use of the Local Court transcript of evidence as the reason for this development.

In other words, for most judges the terms of reference of an appeal are now effectively limited to the transcripts of evidence, such that the magistrate's decision, and any claim of error in that decision, is seen to fall outside the scope of the appeal. Mr Bonnici noted that this significantly increases the importance of the Local Court proceedings:

> Now you are getting a fairly restricted bite at the cherry in that you are really tied in to what has been done in the Local Court. That has taken away one avenue as a matter of fairness to the appellant and put a lot more pressure on it being done correctly in the Local Court …

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[438] Ibid 170 [uncorrected].

[439] Evidence to the Committee, Sydney, 10 April 2006, 142 (Mr Roland Bonnici, Barrister).

[440] Ibid 142

[441] Ibid 142, 144.

> You really have to look at the way it has been conducted by the practitioner in the Local Court. That was never part of the system before. I think that is a bit of a disadvantage in a sense — not that things should not be done well. I think that is the reason most judges — because that is the view taken — will not look at the decisions of the magistrate, whereas in the past I think they used to read everything. It is a bit of a problem.[442]

Mr Bonnici explained that the flexibility of an 'all-grounds' appeal under the former system had enabled the District Court to address appeals involving points of law without the difficulty of practitioners having to make out the grounds in strict legal terms:

> The way I would run it, and this may help you, was to say, "Look, the magistrate has made this decision and, for example, he applied the wrong onus of proof". The way to get around that technically, you would say, "Had he applied the right onus of proof and because it is a de novo, he would have had to acquit". It was a way of getting over that strict technical point. Now I am not sure you can do it because you are not allowed to go directly to the magistrate's decision per se.[443]

Mr Bonnici also told the Committee that it was this flexibility of the former 'all-grounds' appeal that had previously enabled the majority of such appeals to be dealt with by way of de novo hearing in the District Court rather than by way of stated case:

> That was a definite decision, and 99 out of 100 times I would always go to the District Court on an all grounds appeal. It really was an all grounds appeal because if there was a strict point of law — this is like a third bite of the cherry — most of the time the judge would pick it up. However, if it was a point which had not been picked up or had not been canvassed before, you could still go [to the District Court] — on a stated case it is restricted. As I say, I am finding that judges are not looking, and in fact are refusing to look, at the magistrate's decision, even if invited to. I am only telling you my experience. I can see why — because they are trying to run it really de novo on the evidence and not to be influenced at all by the magistrate's decision.[444]

Finally, Mr Bonnici told the Committee that such appeals were previously dealt with more quickly and cheaply.[445]

The Committee notes that the decline in the all-grounds appeal has apparently further reduced the accessibility of the appeal system in NSW. Appellants who are refused a hearing in the District Court must now take their case to the Court of Appeal or abandon their appeal if they cannot afford the greater cost of arguing their case in that

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[442] Ibid 144.

[443] Ibid 146.

[444] Ibid 145.

[445] Ibid 146.

jurisdiction.[446] Appellants would also face delays in the hearing of their appeals when required to take their case to the Court of Appeal.

The Committee is mindful of the possibility that abolishing de novo appeals in Victoria could have similar implications for the accessibility of the appeal system. In some cases, this could lead to appellants abandoning their appeal.[447] The transfer of appeals involving questions of law from the Victorian County Court to the Supreme Court could also significantly increase the workload of the Supreme Court and the overall costs to the criminal justice system. Matters that are currently dealt with relatively quickly in the County Court would instead take longer to hear in a more expensive jurisdiction.

Effect on the Local Court

A number of Victorian witnesses told the Committee that one effect of abolishing de novo appeals would be to increase the time required to hear defence practitioners in the Magistrates' Court (this is discussed further in chapter five).

The Committee received evidence from Judge Derek Price, Chief Magistrate of the Local Court of New South Wales, that supports this argument. Judge Price told the Committee that, as a result of the 1999 changes, criminal proceedings in the Local Court are now conducted with 'greater rigour than they may have been previously'.[448] Judge Price told the Committee that this had been one of the reasons for the changes:

> A fundamental principle behind this [the 1999 changes] is to ensure that parties adduce all of the evidence that they intend to adduce in the Local Court, and that is usually the case.[449]

Judge Price noted that, if Victoria were to adopt a similar form of appeal, it would necessitate a corresponding increase in the comprehensiveness of Magistrates' Court proceedings:

> the hearing in the Magistrates' Court of Victoria, if you adopt this process, should be better conducted, so that people do the work the first time around and ensure that all the evidence is adduced that ought to be adduced, whereas if you have a de novo hearing as of right, you can

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[446] Those costs would be greater due to higher court fees and more expensive legal representation, and because such proceedings are more protracted and complex.

[447] Indeed, it may be part of the explanation for the decline in the rate of conviction appeals in NSW since the 1999 changes.

[448] Evidence to the Committee, Sydney, 10 April 2006, 112 (Judge Derek Price, Chief Magistrate, Local Court of New South Wales).

[449] Ibid.

> do a sloppy job the first time around and second time around you have another bite at the proverbial cherry.[450]

An obvious consequence of hearing a matter more comprehensively is that it takes a correspondingly longer time for it to be heard. Judge Price stated that, although he was unable to point to specific data, in his view the NSW Local Court had experienced an increase in the time required to hear criminal and related matters because of the 1999 changes:

> What that means of course is that the hearings in the Local Court will be longer, and that has been our experience.
>
> …
>
> It is hard without any actual research to say categorically that it has slowed down proceedings in New South Wales; again I making an educated guess on it.[451]

Judge Price also told the Committee that there had been an increase in the number of defended matters in the Local Court (which the Committee notes would also contribute to an increase in average hearing times), although in his view this was not due to the changes in the appeal system alone:

> The number of defended hearings in New South Wales is increasing. We have gone up from about 18 per cent of our case load to around about 23 per cent of our case load in New South Wales by way of defended hearings.
>
> There are a lot of reasons for that. I would suspect that the appellate process is purely one of many different reasons. That has an implication of course. The more defended hearings you have, the harder it is to reach the time standards and get through your case load, and then one looks to further resources.[452]

Interestingly, Judge Price said that the 1999 changes had not led to an increase in the number of defendants facing indictable offences triable summarily electing to have their charges heard in the District Court; he said that this had been contained because of the charging policies of the Director of Public Prosecutions:

> The Director of Public Prosecutions is electing to retain work in the Local Court rather than put it out to the District Court. There could be a number of different reasons to the situation in Victoria … We are finding the election rate is decreasing over time, and more work is being dealt with to finalisation in the Local Court of New South Wales.[453]

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[450] Ibid.

[451] Ibid 112–3.

[452] Ibid 113.

[453] Ibid.

The Committee heard similar evidence of an increase in the time taken to hear matters in the Local Court from the Legal Aid Commission of New South Wales. Ms Beckett suggested that the 1999 changes may have contributed to an increase in the time taken by some practitioners to defend a matter in the Local Court:

> I think because you know that you are confined to the transcript unless you can satisfy the tests under section 11, then perhaps a little more time is put into ensuring … you run it in the full and proper way at the first instance.[454]

Mr John Mulder, Solicitor in Charge, Penrith Legal Aid Office, agreed with this point, noting that the time taken by a practitioner in the Local Court may depend on the individual magistrate.[455] Ms Beckett noted that it may also depend on the individual practitioner.[456]

Mr Paul Johnson, Senior Legal Officer, Inner City Local Court Section, provided the Committee with a particular example of the way in which the 1999 changes may have contributed to increases in the time taken to hear Local Court matters — practitioners are now more likely to call their client as a witness in the Local Court:

> apparently in the old days you would often not call your client [to give evidence in the Local Court]. You would hope to cause some inroads in the prosecution case, but you would not call your client, and you would be very well aware that if the magistrate did not agree with you, you were able to call your client in the appeal. Now, given that you were legally represented, you would possibly have a bit more difficulty asking for that fresh evidence to be called, because they were legally represented and they made some sort of tactical decision.[457]

The Committee did not hear definitive evidence of an increase in the average time taken to hear criminal and related matters in the NSW Local Court. However, the evidence of a slowdown in Local Court hearings and of an increase in defended matters strongly suggests that an increase in average hearing times has occurred.

This is a finding of some significance since it is consistent with the view of those Victorian witnesses who argued that one undesirable outcome of the abolition of de novo appeals would be an increase in the average time taken to hear matters in the Magistrates' Court. As those Victorian witnesses also argued, such an outcome would be likely to result in increased costs for the criminal justice system as a whole, given that the majority of criminal matters are heard in the Magistrates' Court.

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[454] Evidence to the Committee, Sydney, 10 April 2006, 161 (Ms Sophia Beckett, Senior Legal Officer, Legal Aid Commission of New South Wales).

[455] Evidence to the Committee, Sydney, 10 April 2006, 161 (Mr John Mulder, Solicitor in Charge, Legal Aid Commission of New South Wales).

[456] Ibid. See also evidence to the Committee, Sydney, 10 April 2006, 161 (Mr Paul Johnson, Senior Legal Officer, Legal Aid Commission of New South Wales).

[457] Evidence to the Committee, Sydney, 10 April 2006, 161 (Mr Paul Johnson, Senior Legal Officer, Legal Aid Commission of New South Wales).

As with the discussion earlier in this chapter regarding the relative backlog of criminal cases in the Magistrates' Courts of South Australia and Victoria, the Committee is unable to conclude that there is a direct causal connection between the changes to the NSW appeal system and the apparent slowdown in Local Court criminal proceedings. On balance, however, the Committee considers that there is a strong possibility of such a connection.

Assessing credit

The Committee heard from a number of witnesses that restricting the hearing of appeals to the Local Court transcript of evidence had increased the difficulty of assessing questions of credit. Since the majority of appeals are now heard solely on the transcripts, neither the appellant nor other witnesses are examined or cross-examined on appeal.

As Ms Beckett told the Committee:

> My view is that conducting an appeal on the transcript is in some respects second best, particularly when it comes to assessing the credit of a witness. There is nothing better — you cannot replace the evidence of the person sitting in the chair giving evidence. So that is lost, and it is lost not just to the accused but to justice as a whole when you do not get to see and assess the demeanour of somebody while they are giving evidence.[458]

Mr Johnson agreed with this view:

> There is no supporting evidence, there are no admissions, there is no real corroboration, and you have a case where it is one person's word against the other. All of the people I have spoken to and the judges comment, "Well, it is a credibility thing; I have not seen them, I cannot assess the credibility".
>
> My personal view is that the inclination may be towards leaving the decision as was found by the magistrate. I do not know if that is true or not; that is my feeling. In those types of cases I certainly have in the past known that it would have been better to have seen the victim or seen the witness, or whatever it is, and for myself and for the judge to make a determination on that single person's evidence and cross examination against the appellant.[459]

Notably, the Committee heard the same view from the prosecution side of the legal profession. As Mr Day told the Committee:

> The problem with that is, of course, that especially in oath-on-oath–type cases, or any cases where credibility is a matter in issue, the judge in the District Court, from a bare reading of a transcript, simply cannot possibly come to a view about the comparison of person A's evidence

[458] Evidence to the Committee, Sydney, 10 April 2006, 153 (Ms Sophia Beckett, Senior Legal Officer, Legal Aid Commission of New South Wales).

[459] Evidence to the Committee, Sydney, 10 April 2006, 157 (Mr Paul Johnson, Senior Legal Officer, Legal Aid Commission of New South Wales).

> with person B's evidence, for the simple reason that they have not seen the red rash that I think I scored a couple of minutes ago.[460]

On the other hand, the Committee notes Justice Blanch's view that assessments of credit can be unreliable:

> The answer to it as far as I am concerned is this – that if magistrates or judges for that matter make decisions based on the demeanour of witnesses in the witness box in court rooms, then their judgement is very likely to be very much astray because I think there is a fairly general acceptance, certainly I accept it, that demeanour of witnesses is a very, very unreliable measure to use.[461]

The Committee agrees that assessments of credit, particularly when based on demeanour, can prove wrong. On balance, however, the Committee was persuaded by the evidence of those NSW witnesses who argued that the decline in the opportunity to conduct such assessments has reduced the overall forensic capacity of the appeal system.

In the Committee's view, the continuing relevance of credit assessments was well explained by the High Court in *State Rail Authority of New South Wales v Earthline Constructions Pty Limited (in Liq)*,[462] in which Kirby J found:

> But because trials remain public procedures for the resolution of disputes, it is inescapable that, in some cases at least, credibility assessments will be required where there is no documentary, electronic or other incontrovertible evidence to resolve the conflict presented for decision. In such cases it will remain the fact that, try as it might, the appellate court cannot procure from the printed record exactly the same materials on which to base the judicial decision as the trial judge had.[463]

The Committee also heard that the decline in the opportunity for credit assessment was a factor in the increased success rate of conviction appeals, in part because of the relative difficulties it had created for the prosecution. Mr Bonnici explained the issue in the following terms:

> Put it this way: it is a good thing if you are acting for the appellant … The advantage, from the appellant's point of view, is that I prepare submissions off the paper. That takes longer to do, but the advantage of that is that reasonable doubt can stand up off a paper … The judge

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[460] Evidence to the Committee, Sydney, 10 April 2006, 124 (Mr Michael Day, Managing Lawyer, Office of the Director of Public Prosecutions, New South Wales).

[461] Evidence to the Committee, Sydney, 10 April 2006, 169 (Chief Judge Reginald Blanch, District Court of New South Wales).

[462] *State Rail Authority of New South Wales v Earthline Constructions Pty Limited (in Liq)* [1999] HCA 3 (9 February 1999).

[463] *State Rail Authority of New South Wales v Earthline Constructions Pty Limited (in Liq)* [1999] HCA 3 (9 February 1999), 91 (Kirby J).

> appreciates it because obviously it is done in a way where he can read it quickly, and from my point of view it certainly helps the appellant to win his case. In fact it is something like a 95 per cent success rate … It is certainly a bit of a disadvantage for the Crown because most of the time they do not have the time to do the same written submissions because they have 20 matters and you have one.[464]

Transcription

The Committee heard from a number of NSW witnesses that the use of the transcripts of evidence heard in the Local Court is not without problems. Primarily, these are issues of costs and delay.

As Justice Blanch told the Committee:

> Transcription is one of the bugbears of any legal system both as to cost and efficiency. It generally takes six weeks to two months for transcripts to become available and that of course is the cost, because that is a cost that you don't have if there is no transcript. But I think your system now is probably as ours was.[465] They usually prepare the transcripts anyway because when they call the witnesses again they would want to cross examine them on what they have said in the Magistrates' Court. So that I think is the way your system would operate and on that basis there is no extra cost in getting transcript.[466]

Mr Johnson also noted the problem of delay associated with transcription:

> I think the most important thing is to have the supporting administrative network run well and efficiently. The greatest delay at the moment is the ordering of the transcripts and the delays in getting the transcripts of the Local Court all ready to be given to both parties and to have the matter listed, because nothing is listed until that happens. It can take months and months, especially if the matter has been part heard on a number of different days. It is all right if the hearing was concluded in one day, but the greatest delay is waiting for all of the transcripts to be obtained.[467]

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[464] Evidence to the Committee, Sydney, 10 April 2006, 143 (Mr Roland Bonnici, Barrister).

[465] As the Committee notes below, this is not the case. Victoria does not routinely produce transcripts of evidence heard in the Magistrates' Court.

[466] Evidence to the Committee, Sydney, 10 April 2006, 168 (Chief Judge Reginald Blanch, District Court of New South Wales).

[467] Evidence to the Committee, Sydney, 10 April 2006, 160 (Mr Paul Johnson, Senior Legal Officer, Legal Aid Commission of New South Wales).

This was confirmed by Mr Day:

> The only inhibition to the listing of these things is the preparation of Local Court transcripts, which in many cases can take quite a while, given the lack of resources to the transcription services …[468]

Unlike NSW, which routinely transcribed Local Court proceedings prior to the 1999 changes, matters heard before a magistrate in Victoria are not routinely transcribed. As the Committee notes in chapter five, an audio recording is made of Magistrates' Court proceedings in Victoria, but transcripts are only produced (by authorised private transcription companies) if sought by the appellant or prosecution.

The Committee notes that transcription services for criminal proceedings in the Victorian Magistrates' Court are currently provided by the Victorian Government Reporting Service (VGRS). While transcripts of summary proceedings could be produced from the available audio tapes, the Committee understands that this could involve significant delays in the hearing of matters.[469]

The Committee also understands that, if VGRS were to assume responsibility for the transcription of summary proceedings in the Magistrates' Court, it would involve significant costs, including installation of new technology, staff training and ongoing system maintenance.[470]

The Committee also notes that real net recurrent expenditure per criminal finalisation in the Victorian Magistrates' Court is 41 per cent lower than in the NSW Local Court.[471] While a number of factors may contribute to this difference, it seems likely that the cost of producing transcripts in the NSW Magistrates' Court would be one such factor.

On balance, the Committee was not persuaded that the significant expansion in transcription services that would be required by the introduction of appeals by way of rehearing would contribute to the overall efficiency of the Victorian criminal justice system.

Ultimately, the Committee was not convinced that any reduction in the number of conviction appeals likely to result from the abolition of the de novo system would outweigh the increased costs to the system of producing transcripts of evidence heard in the Magistrates' Court.

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[468] Evidence to the Committee, Sydney, 10 April 2006, 124 (Mr Michael Day, Managing Lawyer, Office of the Director of Public Prosecutions, New South Wales).

[469] Letter from Rob Hulls MP, Attorney-General of Victoria, to Rob Hudson MP, Chair, Law Reform Committee, Parliament of Victoria, 27 July 2006.

[470] Ibid.

[471] Productivity Commission, *Report on Government Services 2006*, Table 6A.23.

Conclusion

The Committee gave serious consideration to the system of conviction appeals introduced in NSW in 1999 as an option for change in Victoria. On the evidence heard by the Committee in NSW, the introduction of a similar model — that is, an appeal to the County Court by way of a rehearing on the transcript of evidence heard in the Magistrates' Court — might bring some benefits.

Chief among the possible benefits of such a change would be a likely increase in the efficiency of County Court hearings for conviction appeals. The evidence also suggests that such a change to conviction appeals would lead to a reduction in the number of appeals — a matter of direct relevance to the current terms of reference — but the Committee does not consider that such an outcome would be beneficial to the administration of justice if it also entailed the discouragement of deserving appellants.

On the other hand, the Committee also heard evidence of a possible negative impact on the efficiency of the Local Court as a result of a slowdown in Local Court proceedings following the 1999 changes.

Given the significantly greater number of matters heard in the Magistrates' Court, the Committee was unable to conclude that any corresponding reduction in the number of appeals to the County Court, or in the time taken to hear such appeals were such a system to be introduced in Victoria, would contribute to the efficiency of the criminal justice system as a whole.

Moreover, the Committee could not rule out the possibility that such a change might detract from that efficiency. In addition, it is likely that significant costs and delay would be incurred in the transcription of evidence heard in the Magistrates' Court if appeals against conviction were to be conducted by way of rehearing in Victoria.

The NSW evidence also suggested that the 1999 changes to conviction appeals may have led to a significant decline in the fairness and accessibility of conviction appeals, as a result of:

- a change in the nature of an appeal against conviction from an appeal to a review (see the purposive definitions of an appeal introduced in chapter two);
- the imposition of significant restrictions on the right of an appellant to introduce fresh or additional evidence during the hearing of an appeal; and
- a greater likelihood of the appellate court refusing to consider appeals raising questions of law (ie an insistence that the appellant take his or her case to the Supreme Court and thereby incur greater cost and delay).

A final disadvantage of the 1999 changes to conviction appeals was the evidence of the decline in the court's capacity to assess an appellant's credit. In the Committee's view, this is a matter of central importance to the administration of justice — that is,

the public interest in an appeal system that is able to adequately assess the question of a person's guilt or innocence.

CHAPTER FOUR — THE IMPACT ON APPELLANTS

In this chapter the Committee considers the evidence regarding the likely impact of abolishing de novo appeals on those most reliant on the appeal system — people convicted and sentenced in the Magistrates' Court.

The Committee first looks at whether the nature of the summary criminal jurisdiction justifies the continuation of de novo appeals. In the second part of the chapter the Committee assesses the argument that the de novo system serves as a necessary safety net for persons convicted and sentenced in the Magistrates' Court. In considering this argument the Committee addresses a number of issues: legal representation in the Magistrates' and County Courts; the argument that de novo appeals perform a preventative function; the cost and accessibility of non–de novo appeal; the potential for miscarriages of justice; and the impact on imprisonment and time spent on remand.

The Committee also received evidence that the de novo appeal performs a safety net function by providing magistrates and practitioners with the confidence to deal expediently and efficiently with the great volume of summary cases heard by the Magistrates' Court. This aspect of the safety net argument is assessed in chapter five.

The nature of summary justice

> The nature of the case load of Magistrates is of course different from that of Judges in County, District and Supreme Courts. One is a high volume Court: the others are not. The overall pressures on Magistrates are different but no less than those on Judges. In many ways, the pressures on Magistrates are greater. The lists are often long and when they are the pressure can be relentless … [but] there is the daily interaction with the fascinating passing parade of humanity and the opportunity to do a measure of justice in dealing with the infinitely varying individual circumstances of those whose lives we often profoundly influence. In my opinion we are privileged to have this opportunity.[472]

> Magistrates' Courts still tend to be seen as different from, and inferior to, other courts. This perception has had its advantages. Magistrates' Courts have been less bound by tradition and traditional ways and have been more responsive to changing needs and new demands placed

[472] Ian L Gray, Chief Magistrate of Victoria, 'The People's Court — Into the Future' (AIJA Oration delivered at the AIJA Magistrates' Conference, Brisbane, September 2002).

> on them. They have also been innovative in a number of interesting and important ways … paradoxically, the very failure to acknowledge the contribution and status of Magistrates' Courts may well have been one of the major reasons for their efficiency and vitality.[473]

Introduction

In this section the Committee considers whether the nature of summary justice provides a continuing justification for de novo appeals.

As the Committee noted in chapter two, a number of witnesses identified the fact that magistrates were formerly not required to hold professional legal qualifications as the main historical reason for de novo appeals. While the Committee concluded that this was not the original historical justification for de novo appeals, the requirement that all new magistrates be qualified legal professionals[474] is today a central feature of summary justice. An important question for the Committee's determination, therefore, is whether the legal professionalism of the magistracy today would offset any negative impact on appellants if de novo appeals were abolished. This question can only be adequately addressed by assessing the nature of summary justice in Victoria today.

The Committee notes at the outset that the quality of justice delivered by the Magistrates' Court is a function both of the qualifications, training and professionalism of the modern magistracy on the one hand, and of the inherent limitations of summary justice on the other. Summary criminal proceedings are distinct from proceedings in more serious matters in their relative absence of legal formalities and in the absence of a jury.[475] The Committee also heard from the Magistrates' Court that it is now much more interventionist and inquisitorial and increasingly adopts a problem-solving approach.[476]

Workload and time pressures

Witnesses to the inquiry were polarised between those who advocated the abolition of de novo appeals on the basis that summary justice in Victoria is of a very high

[473] Associate Professor John Willis, 'The Magistracy: The Undervalued Work-horse of the Court System' (2001) 18(1) *Law in Context*, 129, quoted in Gray, 'The People's Court', above n 472.

[474] The Committee has set out the professional qualifications required of Victorian magistrates in chapter two above.

[475] The Committee acknowledges that the term 'summary justice' may be used to describe a spectrum of possible systems — at the more extreme end of the spectrum it may mean the absence of due process and trial without a judge, magistrate or legal representation (in addition to the absence of a jury). Summary justice in this form has generally been seen as a form of control used in totalitarian regimes. See *Butterworths Australian Criminal Law Dictionary*, above n 28, 193. The Committee is mindful that, in the Victorian context, the form of summary justice that operates is significantly more limited.

[476] Evidence to Law Reform Committee, Parliament of Victoria ('the Committee'), Melbourne, 14 February 2006, 97 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria); Evidence to the Committee, Melbourne, 14 February 2006, 92 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

standard, and those who opposed their abolition on the basis that there are a number of shortcomings inherent in the system.

Those witnesses in the latter category generally noted the professionalism and skill of the magistracy as a whole, although a number also argued that a minority of magistrates can make idiosyncratic decisions — a point that was acknowledged by the Magistrates' Court.[477] Their critique was largely restricted to the limitations of summary justice as a system of prosecuting and sentencing offenders rather than of the magistracy.

The Committee notes that the limitations of summary justice have historically been recognised by restricting the jurisdiction to less serious matters. As the High Court has stated:

> There is however, a great distinction in history, in substance, and in present practice between summary proceedings and trial upon indictment. Proceedings upon indictment, presentment, or *ex officio* information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solely determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which the subject may be exposed. The latter are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society … the defendant … is dealt with by those assigned to keep the peace, who judge both the law and fact. "There is", says *Blackstone*, "no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution provided professedly for the greater ease of the subject, by doing him speedy justice".[478]

As Dixon J notes in the extract from *Munday v Gill*[479] above, a defining feature of summary justice is that it is 'speedy justice'. The Committee is mindful that the Magistrates' Court deals with the vast majority of people who appear before a court in Victoria — it accounts for 90 per cent of Victorian court appearances and finalises 86 per cent of criminal matters.[480]

In the view of Magistrate Caitlin English (and, presumably, of the magistrates represented by the Court's minority submission to the inquiry), the capacity of the

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[477] See for example evidence to the Committee, Melbourne, 14 February 2006, 92 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

[478] *Munday v Gill* (1930) 44 CLR 38, 86 (Dixon J), (references omitted), quoted in David Brown, David Farrier, Luke McNamara, Sandra Egger and Alex Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4th ed, 2006) , 145–6.

[479] *Munday v Gill* (1930) 44 CLR 38, 86 (Dixon J).

[480] Evidence to the Committee, Melbourne, 14 February 2006, 86 (Magistrate Caitlin English, Magistrates' Court of Victoria).

court to deal with such a heavy caseload while remaining a 'timely and accessible and economic forum for justice' is 'safeguarded' by the right to a de novo appeal.[481]

Magistrate English highlighted the reliance of the criminal justice system on the speed and efficiency of the Magistrates' Court by noting that, while a whole day may be devoted to hearing a plea in the County Court, a hearing in the Magistrates' Court may take as little as five minutes.[482] By way of example, Magistrate English provided the Committee with a mention list for a busy suburban court on a typical day. The list contained 80 matters and, as Magistrate English noted:

> because of those numbers there is a really important emphasis on case management … There is an emphasis for magistrates to engage in swift decision making; speed and efficiency are required. … the majority of matters of people who appear before the court would appear in a mention list such as this …
>
> The majority of decisions are given without even adjourning and are on an extempore basis.[483]

The Committee acknowledges that even for many relatively simple matters, a time frame of five minutes or less may often prove challenging. Moreover, as Magistrate English highlighted, the pressure on the magistrate to meet such time frames is exacerbated by the fact that many cases involve multiple charges and by the significant range in the nature and seriousness of the charges:

> If you have a look at this mention list … [t]he first charge that is noted is just the main charge or the first charge listed on the system. So for each of those people they might be facing one charge; more often they are facing a few charges, and in some instances there could be 50 or more charges. The pressure of the list means that magistrates are making numerous decisions and they need to be speedy, efficient and fair. As I said, you can see from this mention list that there is an incredible range of cases that magistrates deal with. As Mr Gurvich pointed out, some will take longer than others. You will notice that the second matter is that of recklessly causing serious injury, which is the most serious assault matter that can be heard in the Magistrates' Court. Contrary to that is perhaps a theft matter, which might be a shop theft matter or a charge of being drunk in a public place or careless driving, so there is this incredible range of matters that are appearing in our court.[484]

The Committee notes that, as the list provided by Magistrate English represents a typical day for a Victorian magistrate, it follows that some days would involve an even heavier workload. This was confirmed by Mr Michael McNamara of the Law Institute

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[481] Ibid.

[482] Ibid 94.

[483] Ibid 86.

[484] Ibid.

of Victoria (LIV), who told the Committee that a magistrate may hear as many as 100 cases in a single day.[485]

As a magistrate interviewed for the recent Magistrates Research Project conducted by Flinders University explained:

> so an average general day is meant to be 70 cases maximum and we've had some very long days … in the 101-day we had 34 unrepresented pleas – just to give you an idea of the kind of work we do. I mean it is not always like that but it is not uncommon for it to be like that … as to how many minutes per person that is, there are not a lot of minutes, which means that first of all there is a huge workload and secondly you have to focus on what the important things are and you're not able to put more time in to other things that might be issues.[486]

The crucial importance of speed and efficiency in the criminal jurisdiction of the Magistrates' Court was noted by nearly all Victorian witnesses, including:

- Mr Rob Melasecca, Mr James Dowsley and Mr Michael McNamara of LIV, who also cited the role of the de novo system as central to maintaining the speed and efficiency of the Magistrates' Court;[487]
- Sergeant Kyle McDonald of Victoria Police, who acknowledged that summary justice is both 'fast' and 'furious' but argued that magistrates have the skills and professionalism to maintain the system in the absence of de novo appeals;[488]
- Mr Michael Wighton of Victoria Legal Aid (VLA), who referred to the Court's 'fast turnover'[489] and told the Committee that '[e]verything is fast and quick. No one has time to think about things too carefully. That is supported by the safety net of the de novo process';[490]
- Dr David Neal of the Victorian Bar Council, who told the Committee that:

> these are summary proceedings and you do not have to sit for very long in any of the major Magistrates' Courts in this state to see that a lot of the cases that are dealt with there are dealt with in a very speedy manner, and it is speedy in terms not only of the hearing before the court

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485 Evidence to the Committee, Melbourne, 13 February 2006, 14 (Mr Michael McNamara, Deputy Chair, Law Institute of Victoria).

486 Sharyn Roach Anleu and Kathy Mack, 'Magistrates' Everyday Work and Emotional Labour', 32(4) *Journal of Law and Society* (December 2005) 610.

487 Evidence to the Committee, Melbourne, 13 February 2006, 13, 14, 15, 17 (Mr Rob Melasecca, Law Institute of Victoria).

488 Evidence to the Committee, Melbourne, 13 February 2006, 25 (Sergeant Kyle McDonald, Victoria Police).

489 Evidence to the Committee, Melbourne, 14 February 2006, 62 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

490 Ibid 67.

> but also speedy in terms of the amount of time that the practitioners — in particular the defence practitioners — have to prepare the cases;[491]

- Dr Greg Lyon of the Criminal Bar Association of Victoria, who noted that it is the simplicity of proceedings in the Magistrates' Court, for both lawyers and magistrates, that allows it to operate so efficiently compared to the other levels of the criminal justice system;[492] and
- Justice Tim Smith of the Supreme Court of Victoria.[493]

Emotional labour

The Committee did not receive any evidence from witnesses regarding the extent to which the work required of magistrates, and its effects on them, differs from judicial work in the higher courts. However, this issue has been the subject of recent research of relevance to the current inquiry, in the view of the Committee.

Chief Magistrate Ian Gray has expressed his agreement with Associate Professor John Willis that the Magistrates' Court is 'more accessible to the general community' than the higher courts and his agreement with other commentators who have described the summary jurisdiction as 'eighty per cent people and twenty per cent law'.[494] Chief Magistrate Gray has spoken of the:

> unique, robust and close connection between the Magistrate and the people – all of those in the passing parade of humanity through the Court … [and of the] … particular appeal … in the immediacy of the eyeball to eyeball justice that we do as Magistrates. We preside over a "Court of the people."[495]

As highlighted by Chief Magistrate Gray in the quote at the beginning of this section, magistrates face a workload which can be relentless and pressures which differ from those faced by judges in the higher courts because, in the summary jurisdiction, the human element is regularly more demanding than the law. The uniqueness of the judicial work undertaken by magistrates has been described as having a strong component of 'emotional labour' by Sharyn Roach Anleu and Kathy Mack in their recent study of Australian magistrates:

> Daily, lower courts face the human consequences of broader changes in socio-economic conditions and government policies. The criminal offending or debt, for example, is often only one component of a much wider cycle of social and economic deprivation. These courts are not just dealing with technical legal arguments but with many people who have ended up in contact

[491] Evidence to the Committee, Melbourne, 13 February 2006, 35 (Dr David Neal, SC, Victorian Bar Council).

[492] Evidence to the Committee, Melbourne, 13 February 2006, 36–7 (Dr Greg Lyon, Secretary, Criminal Bar Association of Victoria).

[493] Evidence to the Committee, Melbourne, 6 March 2006, 106 (Justice Tim Smith, Supreme Court of Victoria).

[494] Gray, 'The People's Court' above n 472.

[495] Gray, 'The People's Court' above n 472 (reference omitted).

> with the criminal justice system as a result – perhaps not directly – of the failure of other (for example, welfare, education, employment, and mental health) systems. The judicial officer must interact with these citizens and their emotional states.[496]

Anleu and Mack note that emotional labour is defined as work that involves the management of one's emotions to maintain a public persona for the benefit of others.[497]

For magistrates, this labour involves maintaining a public face to ensure public confidence in the court.[498] They acknowledge that the main role of the magistrate is to decide cases in accordance with the law and the evidence, but that 'complying with the ethical principles of impartiality, fairness, and decorum depends on the management of the magistrate's own emotions and those of court users'.[499] In a survey of Australian magistrates conducted by the authors, 66 per cent responded that they considered managing the emotions of court users as at least a very important skill.[500]

One magistrate interviewed for the Magistrates Research Project essentially confirmed Chief Magistrate Gray's description of the work of the Magistrates' Court as being:

> 80 per cent dealing with people, 20 per cent law, maybe not quite that configuration, but so much of the law will look after itself: the evidence is there, the established case law is there, that will look after itself, we just put that into place. It's taking into account the individuals you're dealing with in doing that, that gives it the human aspect of it … I do enjoy the human interaction and I believe I can cut off to a certain degree but I think you carry some of it with you, even unwittingly, and it builds up.[501]

The Magistrates Research Project also found that more than half of Victoria's magistrates experience 'moderate to high levels of emotional exhaustion' and that such levels increase in proportion to age and the number of years spent on the bench (although it should be noted that Victorian magistrates apparently also reported higher levels of satisfaction with some areas of their work compared to magistrates in other states and territories).[502]

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[496] Roach Anleu and Mack, 'Magistrates' Everyday Work', above n 486, 591.

[497] Ibid 595–6.

[498] Ibid.

[499] Ibid 603.

[500] In fact, 23 per cent described it as essential and 43 per cent as very important: Roach Anleu and Mack, 'Magistrates' Everyday Work' above n 486, 603.

[501] Ibid 608. The comments of magistrates quoted in the article are anonymous.

[502] Sharyn Roach Anleu and Kathy Mack, 'The Magistrates Research Project: Job Satisfaction, Workload and Stress', *The Mag: The Victorian Magistrates Journal* (2003) 28–9.

Nationally, 80 per cent of magistrates reported finding their work often or occasionally emotionally draining and more than 50 per cent reported that they experience stress in making quick decisions.[503]

Roach Anleu and Mack conclude that emotional labour is peculiar to the Magistrates' Court because magistrates are closer to the 'coalface' and because it is a jurisdiction in which a significantly higher proportion of defendants appear without legal representation.[504]

The Committee concludes this section by noting that magistrates face a unique set of pressures generally not found in the higher levels of the criminal justice system:

- a significantly higher case load;
- limited time in which to reach a decision (in some cases, as little as 5 minutes);
- decision making which is driven more by the relevant facts and the application of discretion than by the consideration of legal principle; and,
- a significantly greater exposure to emotional labour than in the higher courts.

Two tiers of justice?

Academic Doreen McBarnet has described the distinction between summary courts and those that hear indictable offences as representing 'two tiers' of justice:

> One, the higher courts, is for public consumption, the arena where the ideology of justice is put on display. The other, the lower courts, deliberately structured in defiance of the ideology of justice, is concerned less with subtle ideological messages than with direct control. The latter is closeted from the public image by the ideology of triviality, so the higher courts alone feed into the public image of what the law does and how it operates. But the higher courts deal with only 2 per cent of the cases that pass through the criminal courts. Almost all criminal law is acted out in the lower courts *without* traditional due process … The traditional ideology of justice can thus survive the contradiction that the summary courts blatantly ignore it every day – and that they were set up precisely for that purpose.[505]
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> …

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[503] Ibid 27.

[504] Roach Anleu and Mack, 'Magistrates' Everyday Work' above n 486, 607, 613–14.

[505] Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981) 152–3, quoted in David Brown, David Farrier, Luke McNamara, Sandra Egger and Alex Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4th ed, 2006), 160.

> Due process was and is ruled out of the lower courts as unnecessary on two grounds: first, both the offences and the penalties are too trivial; second, the issues and processes are such that the niceties of law and lawyers are irrelevant.[506]

As McBarnet argues, lawyers have tended to regard offences dealt with summarily as 'trivial'[507] such that:

> The ideology of legal irrelevance prevails: questions of law are not identified because defence lawyers do not look for them, not because they are not there … On top of this, in practice adequate legal aid is much less likely to be available in these situations than where offences such as murder and rape are concerned.[508]

The Committee agrees with McBarnet's central insight that the criminal justice system is composed of 'two tiers' defined by their different modes of operation. However, the Committee is also strongly of the view that this description must be seen as subject to a number of qualifications in the current Victorian context.

First, McBarnet was describing the criminal justice system in England and Wales around 25 years ago, a jurisdiction in which magistrates even today are not required to hold professional legal qualifications.

Second, the Committee has heard from the Victorian Magistrates' Court that a higher degree of due process is observed in sentencing more serious matters and in hearing contested matters.[509]

Third, it is important to recall that the majority of criminal matters heard summarily involve a guilty plea so that the presumption of innocence, and the various legal formalities which would otherwise operate to protect the presumption, has no application in such cases.

Fourth, the difference between the legal formalities and due process observed in the summary and higher jurisdictions of the Victorian criminal justice system should be seen as a matter of degree. This is confirmed by witnesses' evidence, and from the Magistrates' Court in particular, as to the high standards of judicial inquiry to which the Victorian magistracy is dedicated.

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[506] Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981) 143, quoted in Brown et al, *Materials and Commentary*, above n 505, 158.

[507] However, the Committee does not consider that this would be the case for lawyers working in that jurisdiction, particularly in relation to the more serious indictable offences which may be heard summarily. Moreover, this perception is no doubt changing as increasingly serious matters are heard in the Magistrates' Court.

[508] Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981) [3.3.12], quoted in Brown et al, *Materials and Commentary*, above n 505, 18.

[509] See the discussion regarding the hearing of contested matters outside of the mention list.

In summary, the Committee agrees with those witnesses who described the Magistrates' Court as subject to a lesser degree of legal formality than the higher courts. Moreover, the observation that the Magistrates' Court necessarily operates as a qualitatively different tier of justice is consistent with the concerns of those witnesses who opposed the abolition of de novo appeals on the basis that proceedings in the Magistrates' Court would become more legalistic and significantly slower, as in the higher courts.

The Committee emphasises, however, that none of the above should be taken to suggest that summary justice is 'substandard justice' and the Committee strongly agrees with those witnesses who rejected such a characterisation.[510] Rather, summary justice involves an abbreviation of due process to the extent necessary to deal with a much heavier case load of generally less serious matters. It remains to be seen how the summary justice system will evolve to accommodate the shift of increasingly serious matters to the summary jurisdiction.[511] This issue is discussed further in the final chapter of the report, but the Committee notes here that it appears likely that the Magistrates' Court will develop dedicated lists to deal with particular types of serious offences.

The Committee is aware that there are a number of further issues relevant to an appreciation of the nature of summary justice. Although relevant to the scope of the current inquiry, these are not matters on which the Committee received significant evidence or which the Committee is able to explore in detail. However, the Committee briefly summarises these issues here and refers the reader to the relevant literature.

The process as punishment[512]

A number of commentators have noted the variety of 'informal sanctions' that may apply as part of the pre-trial process:

> For many, punishment, in the form of arrest (sometimes forcible), detention, denial of bail, prolonged pre-trial custody in police cells or prison, does not wait on but *precedes* formal legal adjudication of guilt. Indeed in relation to summary justice where the penalty for many offences is likely to be a monetary one in the form of a fine, the pre-trial processes are a far more significant form of punishment than the potential legally adjudicated penalty.[513]

For example, police custody has been found to be most often used in relation to relatively minor offences such as drunkenness and other public-order offences and,

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[510] See for example evidence to the Committee, Melbourne, 13 February 2006, 25 (Sergeant Kyle McDonald, Victoria Police).

[511] The Committee has heard for example that more serious contested matters are rarely dealt with in the mention list of the Magistrates' Court.

[512] See Brown et al, *Materials and Commentary*, above n 505, 121, 165–78.

[513] Ibid 121. The authors cite Malcolm Feeley, *The Process is the Punishment* (1979) as a major development in the articulation of this view.

therefore, as having a disproportionate impact on particular groups, particularly the marginalised and disadvantaged.[514] Bail is also more likely to be refused for minors, the unemployed and those without legal representation.[515] Any changes which would slow the appeal system would extend the time spent in custody where bail is refused.

The invisibility of the pre-trial processes[516]

Many commentators have noted the discretion that police possess in the pre-trial procedure for summary offences, particularly the potential for conflict in their role as both investigator and prosecutor. Notably, Australia and New Zealand are the only common law countries in which the police are responsible for prosecuting the majority of criminal matters in the lower courts. In other common law countries, as in most European jurisdictions, independent prosecution authorities are responsible for prosecuting summary matters.[517]

A second aspect of the pre-trial process that is generally not open to public scrutiny is the range of pressures which an accused may face to plead guilty.[518] A major driver of the 'pressure to plead guilty' is plea bargaining, which may take a variety of forms but is often characterised as either charge bargaining or sentence bargaining:

- *Charge bargaining* occurs where the accused agrees to plead guilty after negotiating with the prosecution or police regarding the charge and it typically involves agreeing to plead guilty to a less serious charge.
- *Sentence bargaining* occurs where the accused changes their plea to guilty following an indication of the probable sentence or type of sentence from the judge.[519]

A guilty plea is a mitigating factor in sentencing and is given more weight if offered early under s 5(2)(e) of the *Sentencing Act 1991*.[520] Charge bargaining has been approved by the Victorian Court of Criminal Appeal in *Marshall* [1981] VR 725.[521]

A guilty plea also has obvious benefits for the efficiency of the criminal justice system and:

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[514] See Russell Hogg, 'Policing and Penality' in K Carrington and B Morris (eds) *Journal for Social Justice Studies: Politics, Prisons and Punishment — Royal Commissions and 'Reforms'* (1991) 2–5, quoted in Brown et al, *Materials and Commentary*, above n 505, 165–8.

[515] Brown et al, *Materials and Commentary*, above n 505, 168–9.

[516] Ibid 121–2, 179–218.

[517] Chris Corns, 'Police Summary Prosecutions in Australia and New Zealand: Some Comparisons' (2000) 19(2) *University of Tasmania Law Review* 280, 280, cited in Brown et al, *Materials and Commentary*, above n 505, 182.

[518] Ibid. The reader is referred to the above reference for a discussion of these pressures.

[519] Brown et al, *Materials and Commentary*, above n 505, 186–7.

[520] Ibid.

[521] Ibid 188.

> [p]lea bargaining (of whatever sort) is usually justified by reference to administrative efficiency, time saving, reducing lists and delays, saving money, sparing witness trauma and inconvenience, and obtaining information about other offences.[522]

On the other hand, those opposed to charge bargaining point to the possibility of an accused being 'overcharged', the absence of transparency and accountability, the dangers of pre-judging a case and the possibility of an innocent person feeling compelled to plead guilty.[523]

A further criticism is the reduction of public confidence in the criminal justice system.[524] Finally, the much greater resources and capacity of the state has been recognised as a powerful pressure to plead guilty:

> Legal advice, representation in court, the search for witnesses, the taking of statements, all have a price attached. It is market forces, tempered at the margins by legal aid, that count in the preparation of a defence case, not the merits of the situation. But even with the best of lawyers and unlimited funds the accused could not stand in the same position as the Crown. Defence agents do not have forensic laboratories and teams of experts at their disposal, or the legal powers of search and detention available to the police.[525]

The decline of the presumption of innocence

The Committee also notes the observation that an increasing number of matters triable summarily can be regarded as ignoring the traditional presumption of innocence. Brown et al cite a study in England which found that 40 per cent of offences capable of being heard in the Crown Court (the jurisdictional equivalent of the Victorian County Court) apparently infringe the presumption of innocence.[526]

As one of the authors of the study noted in a later article:

> The bulk of new offences are characterised by three features – strict liability, omissions liability, and reverse onus provisions for exculpation. All those features lie a considerable distance from the conception of criminal laws held by many university teachers and criminal practitioners. Indeed, they are inconsistent with prominent elements of the rhetoric of English criminal law – that there is a presumption that mens rea is a prerequisite of criminal liability, that liability for

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[522] Ibid.

[523] Ibid 196.

[524] Ibid.

[525] Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981) 85–6, quoted in Brown et al, *Materials and Commentary*, above n 505, 197.

[526] See Ashworth and Blake, 'The Presumption of Innocence in English Criminal Law' (1996) *Criminal Law Review* 306, cited in Brown et al, *Materials and Commentary*, above n 505, 10.

> omissions is exceptional, and that "one golden thread" running through English criminal law is that the prosecution bears the burden of proving guilt.[527]

Brown et al suggest that a survey of offences triable in the Magistrates' Courts of Australia would be likely to find a similar proportion of offences which deviate from the presumption of innocence.[528]

Blurring the boundaries of criminal law

Brown et al also note that connected with the above trend is a blurring of the boundaries between criminal and regulatory law as well as between criminal and civil law[529] and that new criminal offences are increasingly adopting the standards of regulatory offences rather than criminal law.[530]

Brown et al also note that, while an investigation into the defendant's state of mind at the time of an alleged crime may remain important for common law offences:

> the reality is that statutory definitions of criminal offences are regularly making use of concepts which bypass the issue of the defendant's state of mind and require us to ask questions about the state of mind of the *reasonable* person – concepts such as "negligence", "reasonable mistake of fact" and "due diligence". The agenda here is that those who fail to appreciate what a reasonable person would have appreciated will be held criminally responsible. To this extent, the scope of individual criminal responsibility is being expanded beyond the limits acknowledged by the common law.[531]

The Committee notes that, given the relatively less serious matters that are dealt with summarily, it is at this level that such blurring is most likely to occur. Accordingly, it is at the summary justice level that the decline in the traditional focus of the criminal law upon mens rea as a necessary element for proving an offence is most likely to occur.[532]

The Committee also notes that decision making in relation to regulatory offences (with an emphasis on such subjective standards as 'reasonableness') is inherently more discretionary than the test of guilt beyond reasonable doubt. By way of comparison,

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[527] A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 228, quoted in Brown et al, *Materials and Commentary*, above n 505, 10.

[528] Brown et al, *Materials and Commentary*, above n 505, 10. It is also interesting to speculate about the extent to which the high rate of guilty pleas in the summary jurisdiction, particularly in relation to less serious offences, may reflect the increasing number of such strict liability offences.

[529] A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 253, quoted in Brown et al, *Materials and Commentary*, above n 505, 13.

[530] Brown et al, *Materials and Commentary*, above n 505, 11.

[531] Ibid.

[532] However, this is clearly less likely to be the case for more serious indictable offences which are triable summarily.

Commonwealth regulatory jurisdictions, in which comparatively subjective legal tests allow for more discretionary decision making, such as social security and migration, have de novo appeal mechanisms.

Conclusion

In the view of the Committee, such developments as those outlined above highlight the need for the maintenance of an appeal system that maximises the capacity of an individual to appeal both the facts and the law. In essence this is the argument, presented in more detail below, that de novo appeals operate as an essential ‘safety net’ that allows the Magistrates’ Court to operate efficiently and effectively while providing sufficient safeguards to protect the rights of the accused.

De novo appeal as a safety net

Introduction

In the previous section the Committee discussed the essentially unanimous view of witnesses to the inquiry that the Magistrates’ Court operates subject to great pressures of speed and volume. Those witnesses who opposed the abolition of de novo appeals told the Committee that some degree of error is inevitable in such a system, and this was also acknowledged by a number of witnesses who argued for the abolition of de novo appeals.

In this section the Committee considers the role of de novo appeals as a form of quality control for the correction of errors in the summary jurisdiction. The Committee heard that de novo appeals perform a safety net function from the perspectives of both appellants and the criminal justice system.

In relation to the former, the Committee heard that de novo appeals are a simple, efficient and accessible means of correcting errors that may occur in the Magistrates’ Court. In relation to the latter, the Committee heard that de novo appeals provide each of the players in the Magistrates’ Court with the confidence to operate effectively in a very fast-paced jurisdiction. The former aspect of the safety net argument is the subject of this section — the Committee addresses the latter aspect in the following chapter.

An assessment of the safety net argument requires the consideration of a number of factors, including the quality of legal representation in the summary jurisdiction, the preventative potential of de novo appeals, the cost and accessibility of an appeal and the potential for miscarriages of justice to go uncorrected.

The argument that de novo appeals operate as a safety net from the perspective of appellants relates both to magistrates’ decisions and to the difficulties an accused may face in presenting their case. In relation to magistrates’ decisions, the Committee heard that the speed and relative brevity of procedure in the Magistrates’ Court carry a greater potential for wrongful conviction than in higher levels of the criminal justice system and for sentencing to occur in a way that is more intuitive and less bound by

the application of legal principle and case law. In relation to the accused, the Committee heard that some appellants, including those who are legally represented, are unable to obtain and present all the evidence that would otherwise be considered as part of the sentencing process.

Magistrate Caitlin English acknowledged the legal qualifications and professionalism of the Victorian magistracy today but told the Committee that the 'pressure of the list' is such that some level of error is inevitable:

> I agree there is certainly no dispute in the fact that magistrates are well qualified. They are often experienced practitioners when they come to the court, and certainly there has been a tendency to appoint magistrates from a very diverse range of backgrounds in the legal profession. There is no question as to the professionalism and competency of the magistrates, but if you look at the way in which the court operates, at the speed we are required to work at and the degree of efficiency with which we are required to do our duties and give our decisions, inevitably there can be mistakes. The appeal de novo safeguards that process.[533]

The safety net feature of the de novo system was explained by Mr Rob Stary of the Criminal Defence Lawyers Association (CDLA), who told the Committee that it provides an important opportunity to present a person's case more fully than may have been possible in the Magistrates' Court:

> [A] case that is presented in the County Court on appeal often bears no resemblance to the case that is presented in the Magistrates' Court. That is so particularly in cases where you are on the cusp of your client's receiving a term of imprisonment. In the Magistrates' Court it is less likely for character witnesses to be called. It is less likely that there will be arguments as to law and the application of the various sentencing authorities. Those things are fleshed out much more in the County Court in an appeal process. There is a much more exhaustive examination of the case than in the Magistrates' Court.[534]

Mr Michael Wighton of VLA also highlighted the safety net role played by de novo appeals:

> A civil society cannot expect a citizen to face a single magistrate sitting in a busy, overworked court, electing to give up their right to a trial by a judge and jury — a right that they still have — to be dealt with in a speedy fashion, and then have no right to take a grievance about the way a magistrate has dealt with the case before a judge — no right in the sense that a de novo appeal is an "as of right" appeal as opposed to an appeal where a point of law has to be established before the appeal can be heard.

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[533] Evidence to the Committee, Melbourne, 14 February, 87 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[534] Evidence to the Committee, Melbourne, 14 February 2006, 73–4 (Mr Rob Stary, President, Criminal Defence Lawyers Association).

> Magistrates are entitled to be proud of the institution of the court and their work within it. As you have already heard, only 2 per cent of cases are ever appealed each year; 2 per cent of nearly 120,000 cases is a significant vote of confidence in the work of the Magistrates' Court. The magistrates get it right most of the time, but not always. Mistakes are made; memories can be faulty, especially in long hearings.[535]

The capacity of the de novo system to provide a simple and accessible means of correcting errors in the Magistrates' Court was illustrated by Mr Michael McNamara of LIV:

> To be fair to the magistrates … [i]f we presume that they are all perfect at their jobs and that no magistrates have bad weeks and bad months but occasionally have a bad day, and if we do not have the proper right of appeal to the County Court — and it is not relatively easy to fix up mistakes — all sorts of injustice will be done when they make mistakes.
>
> Magistrates would not sit here and say they do not make mistakes; clearly they make mistakes by virtue of the volume if nothing else. If we had all day to do each case, then terrific, things would probably be more perfect — if that is grammatically correct. The bottom line is that they do make mistakes; and if we cannot fix it, there is going to be a lot of injustice. We have all done appeals where we have all shaken our heads and said, "This is a ridiculous decision". Whether you think it is because a magistrate is having a bad day or is a bad magistrate does not really matter. Having proper appeal processes gives us a chance to fix things when they are wrong.[536]

Dr David Neal of the Victorian Bar Council highlighted the volume, speed and increasing seriousness of matters dealt with by the Magistrates' Court as justifications for the safety net of de novo appeals:

> If we move straight to the central rationale for our position, it is this: the volume of work that is done in the Magistrates' Court and the increasing seriousness of that work in many areas of the criminal law necessarily means that there is going to be some degree of slippage in the quality of the decision making that occurs in the Magistrates' Court. That is not really to reflect adversely on the quality of the magistracy at all …
>
> Or in the press of business in the Magistrates' Court, the magistrates will be hurried on certain things and will not have the opportunity to hear submissions on trickier points or possibly simply will not even hear crucial, factual things because the client did not think that this was a significant feature, but it turns out if you had the time to explore the case, you would find that it is.[537]

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[535] Evidence to the Committee, Melbourne, 14 February 2006, 61 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

[536] Michael McNamara, Law Institute of Victoria, *Minutes of Evidence*, 13 February 2006, 14.

[537] Evidence to the Committee, Melbourne, 13 February 2006, 35 (Dr David Neal, SC, Victorian Bar Council).

Associate Professor John Willis also illustrated the potential for error due to the speed with which the Magistrates' Court operates:

> It is an important part of the system which expects magistrates — I am amazed sometimes when I hear a summary. I have had from 8 to 10 to 12 pages of prior convictions. It might take me half an hour to go through them, to work out what is relevant and what is not relevant. The magistrate is expected to get through it quickly and form a view, and they can get it wrong.[538]

The safety net argument carried less weight with those witnesses who advocated the abolition of de novo appeals. Victoria Police argued that errors in the Magistrates' Court could be more efficiently addressed through increased training for magistrates.[539]

The Director of Public Prosecutions, Paul Coghlan QC, acknowledged that some sentence appeals are made on the basis that the appellant failed to present all relevant evidence to the Magistrates' Court. However, he suggested that ensuring the presentation of all relevant evidence at first instance would be preferable to maintaining de novo appeals:

> the question arises as to why the magistrate, being the primary sentencer, should not have that material in the first place. Why do people not simply get their work ready better and earlier? Why depend upon the fact that you are going to get two tries as being the way that you conduct your business? I am driven by the general philosophy that you should not do things twice if you can do it once.[540]

Mr Coghlan also acknowledged that the right to appeal from the Magistrates' Court may operate as a safety valve for the speed with which decisions are made in the Magistrates' Court, but he questioned whether this function required appeals to be heard de novo. He commented:

> I suppose, though, we have treated County Court appeals as being a bit of a safety valve — that is, we have magistrates who work constantly and under pressure and do things quickly, and we do have a safety valve which consists of being a County Court appeal. But whether or not that needs to be a de novo appeal is quite another matter, in my submission.[541]

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[538] Evidence to the Committee, Melbourne, 13 February 2006, 51 (Associate Professor John Willis, School of Law, La Trobe University).

[539] Victoria Police, *Submission No. 10*, 4. In its submission Victoria Police argued that continuous legal education specifically tailored to the needs of magistrates would be a more effective and efficient way of achieving consistency in decision making and of counterbalancing the speed and volume of the Magistrates' Court than de novo appeals.

[540] Evidence to the Committee, Melbourne, 13 February 2006, 2 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[541] Ibid.

The contrary view was also put by Chief Magistrate Ian Gray, who told the Committee that the de novo appeal provides a safety net for only a very small number of appeals involving an unforeseen oversight that cannot be characterised as an appellable error:

> The safety net issue is psychological. Sure, it is psychologically attractive to have a safety net, but is it a legally real proposition? You have a ground of appeal. You have already tiny numbers of appellants. You have a highly qualified court getting it right in the overwhelming majority of cases. What does a safety net really mean? It means that in the odd case where something might have gone wrong in the way that nobody could have identified at the time and somebody wants to have another crack at it. You might think justice is best [served] by the de novo system … in a few, if not a tiny number of cases, where there is no demonstrable error. However, it has no other real function. To me the safety net argument does not displace the arguments that [Magistrate] Maurice [Gurvich] and I broadly adopt.[542]

Sentence appeals

As noted in chapter two, the Committee decided at a relatively early stage that de novo hearings should be retained for appeals against sentence. However, the Committee also received a significant amount of evidence regarding sentence appeals, which is directly relevant to the safety net argument. The Committee discusses that material here and considers the implications of the safety net argument for conviction appeals in the following section.

It follows from the Committee's discussion of other Australian jurisdictions in chapter three that a likely impact of abolishing the de novo system would be a significant decline in sentence appeals. This is suggested by the comparatively low rate of appeal in those jurisdictions in which sentence appeals are not heard de novo.

Magistrate Maurice Gurvich effectively argued that the safety net argument has limited application to de novo sentence appeals and he emphasised the proactive approach adopted by the Magistrates' Court towards obtaining the evidence necessary for effective and fair sentencing:

> Where appropriate it is the court which will seek appropriate reports as aids to sentencing — for example, pre sentencing psychological and drug and alcohol reports. We do that all the time where we are not satisfied the material before us is sufficient, whether the people are represented or not.[543]

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[542] Evidence to the Committee, Melbourne, 14 February 2006, 89 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

[543] Evidence to the Committee, Melbourne, 14 February 2006, 83 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

Magistrate Gurvich told the Committee that he finds pre-sentencing reports:

> very, very helpful. You can spend a bit more time and find out some history. You find out really interesting things which help you no end. The person may have come to terms with the issue and got it out of their system. Not in all cases, but certainly in the case to which I referred.[544]

Chief Magistrate Gray agreed with this assessment of the value of pre-sentencing reports and noted their increasing use by magistrates:

> I think that is right. Increasingly sentencing in Victoria, as in other places, is better and better informed by pre-sentence reports. So we have what we call problem solving jurisprudence coming into the whole equation of how we run the business of the court. That means you are tackling both the problem of the punishment and the offender's problems because it is in the interests of the community to resolve those as well as punish the offender, all in the same sentencing package. So the short answer is that increasingly sentencing is informed by pre sentencing reports — assessments which are sometimes oral, sometimes written. Maurice is right; they are an increasingly preferable feature of sentence.[545]

Magistrate Gurvich also emphasised that the Magistrates' Court takes additional time to sentence more serious matters:

> As for serious offences, such as robbery and burglary, they rarely come on for plea hearing in mention courts, and when they do they can be adjourned for a longer hearing to take place. It is beyond my experience and knowledge that opportunity is not given for pleas to be made as fully as required.[546]

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[544] Ibid 92. The case to which Magistrate Gurvich referred was a recent matter in which he sentenced an elderly man who, until six years earlier, had no previous convictions but who pleaded guilty to a charge of shoplifting. Magistrate Gurvich said that in that case it was apparent that simply imposing a fine without an assessment of the defendant's circumstances would not be sufficient. As Magistrate Gurvich noted, '[t]hat is just not good enough. Here is a man in his late 60s who starts offending in his early 60s. There is something wrong. I was not going to act on that. This man may need assistance. He is plainly not a terrible criminal who deserves to be locked up or run the risk of breaching a suspended sentence so I simply ordered a pre-sentence report': ibid 91–2.

[545] Evidence to the Committee, Melbourne, 14 February 2006, 92 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

[546] Evidence to the Committee, Melbourne, 14 February 2006, 83 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

However, the Committee also heard from Magistrate English that there is the potential in the summary justice system for some defendants to be incorrectly sentenced to imprisonment due to shortcomings in the presentation of their case. Such shortcomings might be due to the absence of, or limitations in, the person's legal representation or a lack of time to sufficiently prepare:

> even if you have a tiny number of people who are in jail when they should not be, but they cannot demonstrate an error of law and the psychological or the mental illness has not been diagnosed or there is no report, that is a[n] incredible incursion on people's rights.[547]

> The fundamental problem is that there could be a situation where someone appears before a magistrate and they are unrepresented, or they are being represented by the duty lawyer, or there has not been a proper opportunity for them to prepare their case; but for some reason — whether it be the imperatives of case management, or the efficiency of the court of getting through the list — the matter is called on and dealt with and someone is sentenced to a period of imprisonment. You can see the serious nature of the charges we are dealing with. A lot of them have imprisonment — they are indictable matters and very serious. There is a possibility in that situation for errors to occur in the system: where matters have not been properly put before the court and someone ends up in jail. What you are suggesting is that unless an error of law can be demonstrated in respect of what is said, then there are no appeal rights. It is often the people who are unrepresented — not poorly represented but represented with very limited resources — who are likely to suffer in that particular scenario. It is a tiny end of the spectrum, and as you can see from the appeal numbers it is very sparingly used.[548]

As the Committee also outlined in chapter three, a number of witnesses who proposed the abolition of de novo appeals suggested that sentence appeals should instead be heard on the basis that a sentence was manifestly excessive.

The Director of Public Prosecutions cited manifest excess as a particularly appropriate basis for sentence appeals given that sentencing is an 'intuitive or instinctive synthesis'.[549] Victoria Police also argued that sentence appeals should be heard on this basis,[550] as did Chief Magistrate Gray.[551]

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[547] Evidence to the Committee, Melbourne, 14 February 2006, 89 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[548] Evidence to the Committee, Melbourne, 14 February 2006, 90 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[549] Evidence to the Committee, Melbourne, 13 February 2006, 2, 4 (Mr Paul Coghlan QC, Director of Public Prosecutions).

[550] Evidence to the Committee, Melbourne, 13 February 2006, 22 (Superintendent Leane, Victoria Police).

[551] Evidence to the Committee, Melbourne, 14 February 2006, 93 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

On the other hand, Associate Professor Willis told the Committee that, in practical terms, manifest excess already forms the basis for sentence appeals in the County Court but that it is 'implicit' rather than stated.[552]

Mr Wighton of VLA made the same argument:

> A lot of time is spent in the Court of Appeal deliberating on what manifest excessiveness means, but if you strip away all of the pomp and ceremony of the Court of Appeal, the arguments of the lawyers and the complexity of the arguments, you are left simply with a lawyer saying, "My client got too long", or, "too much" or, "the penalty was too harsh". That is exactly the nature of a de novo appeal in the County Court. My point is if you abolish de novo appeals and replace them with appeals on points of law, with the largest category of appeals being sentence appeals, all you have to say is, "I got too much", you have a point of law and you go to appeal in the County Court.[553]

The Committee has noted in chapter three that manifest excess is a legal test and does not allow an appellate court to simply substitute a more lenient sentence if it considers that the original sentence was comparatively severe. Appeal from the County Court or the trial division of the Supreme Court on this basis under s 567 of the *Crimes Act 1958* is also subject to the Court's leave. Moreover, in such an appeal, fresh evidence cannot be presented as of right but is effectively subject to the Court's leave under s 574.

Magistrate English confirmed that an appeal against sentence on the basis of manifest excess would not be a realistic option for many summary appellants, both because of the difficulty of the test and because it is often not considered for non-custodial sentences:

> When you are talking about manifestly excessive, that is a very high threshold. When we are looking at the sentencing hierarchy, the final point of which is jail, there are a multitude of options within that hierarchy of which jail is the last and perhaps the first is a dismissal or an adjourned undertaking. Often the manifestly excessive sentencing decisions that the Court of Appeal is involved in relate to very significant imprisonment decisions. I am not convinced that that is an argument you can apply if someone is given a sentencing order that is way up the hierarchy and does not involve imprisonment, although it might, on a shop theft. Perhaps they have been before the courts and have been given an order like an intensive corrections order or a community based order. If they are not going to be able to demonstrate that it is manifestly excessive or that there is an error of law, then they are not going to be able to challenge it.[554]

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[552] Evidence to the Committee, Melbourne, 13 February 2006, 49 (Associate Professor John Willis, Law School, La Trobe University).

[553] Evidence to the Committee, Melbourne, 14 February 2006, 62–3 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

[554] Evidence to the Committee, Melbourne, 14 February 2006, 93 (Magistrate Caitlin English, Magistrates' Court of Victoria).

The Committee concludes that replacing the current right to a de novo sentence appeal with an appeal on the basis of manifest excess would make such appeals significantly more difficult. Moreover, as such a change would be highly likely to reduce the number of sentence appeals from the Magistrates' Court, the Committee does not consider that such a change would provide the same degree of quality control or safety net as the current system.

Conviction appeals and miscarriages of justice

> perhaps all appeals should be de novo hearings. No one has asked that question: should we look at the other systems of appeal and whether they are wrong? Perhaps we should have a de novo hearing for everybody.[555]

The Committee turns now to the safety net argument as it relates to conviction appeals.

The Committee heard from a number of witnesses that abolishing de novo appeals would make it more difficult to remedy miscarriages of justice in the summary jurisdiction.[556] A miscarriage of justice occurs when an accused person is deprived of a chance of being acquitted, which was fairly open, because a court failed to apply the rules of evidence or procedure or the relevant law.[557]

The Committee has already heard that the rules of evidence and procedure have more limited application in the summary jurisdiction than in the higher courts and it considers that a miscarriage at this level refers simply to the wrongful conviction of an innocent person, for whatever reason.

The Committee has discussed the miscarriage test in chapter three above as it relates to appeals for matters heard on indictment and in the context of witnesses' arguments that it may provide an alternative to de novo hearings for conviction appeals. The Committee also notes in chapter five the implications for the integrity of the criminal justice system if a greater number of summary miscarriages were to go uncorrected.

In this section the Committee considers whether the abolition of de novo appeals would increase the potential for miscarriages of justice to go uncorrected as well as the proposals of those witnesses who suggested miscarriage as an alternative to de novo conviction appeals. The Committee also refers to the argument that the nature of summary proceedings may actually increase the risk of miscarriages occurring in the first section of this chapter.

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[555] Evidence to the Committee, Melbourne, 14 February 2006, 105–6 (Justice Tim Smith, Supreme Court of Victoria).

[556] This is also the logical implication of the unifying argument of witnesses who opposed the abolition of de novo appeals on the basis that they are the most efficient means of remedying any errors in the Magistrates' Court.

[557] *Butterworths Australian Criminal Law Dictionary* (1997) 129.

The Committee notes that, on first consideration, the proportion of cases in which a wrongful conviction could occur appears to be very small. As Magistrate Gurvich told the Committee, around 95 per cent of cases heard by the Magistrates' Court begin with a guilty plea, and that figure rises to between 97 per cent and 98 per cent once an accused has been through the Court's preliminary procedures.[558]

However, even 2 per cent of Magistrates' Court decisions in which a person is found guilty represents around 1,600 decisions in any given year.[559] In addition, as the Committee noted above, an accused may face a number of pressures to plead guilty and a proportion of guilty pleas at first instance may be entered by innocent people. Similarly, the Committee notes that conviction appeals represent nearly a quarter of all appeals despite the significantly lower rate of not guilty pleas in the Magistrates' Court. Moreover, it is apparently rare for a person to appeal against his or her conviction following a guilty plea in the Magistrates' Court: in the Committee's sample of County Court appeals heard in 2005, these represented only around 4 per cent of the total.[560]

The view that de novo hearings provide a safety net for wrongful conviction in the Magistrates' Court was opposed by Magistrate Gurvich. He emphasised that magistrates spend additional time when hearing contested matters, particularly more serious contested matters, and that these are rarely heard in the mention list of the Magistrates' Court.[561]

On the other hand, the Committee heard from Magistrate English that the majority of matters are dealt with in the mention list.[562] The Committee also notes that even matters heard outside of the mention list are dealt with in a comparatively speedy fashion. The Committee concludes that, while the distinction between matters heard within and outside the mention list is an important one, the comparatively less time spent on such matters may contribute to a greater risk of miscarriages occurring in the summary jurisdiction.

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[558] Evidence to the Committee, Melbourne, 14 February 2006, 95 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

[559] As noted in chapter two, a total of 79,921 defendants were 'proven guilty' in the Victorian Magistrates' Court in 2004–05: Australian Bureau of Statistics (ABS), *Criminal Courts, Australia, 2004-05*, 20.

[560] There were six such cases out of a total of 152 cases in the Committee's sample.

[561] Evidence to the Committee, Melbourne, 14 February 2006, 82 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria). The mention list deals mainly with matters in which the accused intends to plead guilty, matters which can be concluded by a plea bargain, and estimates of the probable court time and hearing dates for contested matters. See Richard Fox, *Victorian Criminal Procedure: State and Federal Law*, (12th ed, 2005), 85.

[562] Evidence to the Committee, Melbourne, 14 February 2006, 86 (Magistrate Caitlin English, Magistrates' Court of Victoria).

Justice Tim Smith of the Supreme Court of Victoria identified an increase in miscarriages of justice as a possible consequence of abolishing de novo appeals:

> it would need to be demonstrated that there is a clear case for change [the abolition of de novo appeals], that it will lead to improvement and will not increase the risk of a miscarriage of justice. I think that is difficult to satisfy if you formulate it in that way. There may be an issue as to whether that is a reasonable formulation, but we are talking about limiting rights of appeal, so that makes it difficult to satisfy the test that I have formulated.[563]

The role of the de novo appeal in overturning an incorrect finding of guilt by the Magistrates' Court was also identified by Mr Michael Wighton of VLA. Although he was not able to provide figures as to the proportion of appeals against conviction which succeed, Mr Wighton told the Committee that the majority of such appeals represented by legal aid are successful.[564]

There was a 20 per cent success rate for conviction appeals that proceeded to hearing in the Committee's sample of County Court appeals lodged in 2005.[565] In the Committee's view, this is a significant finding, which underlines the importance of ensuring that any change to the appeal system should enhance, rather than reduce, a person's capacity to overturn a wrongful conviction.

As the Committee noted in chapter three, the New South Wales (NSW) changes have resulted in conviction appeals being heard on a similar basis to appeals involving indictable offences. That is, they are now effectively subject to a miscarriage of justice test, which means that the appellant is required to demonstrate an error in the Local Court proceedings.[566]

As the Committee also noted in chapter three, the success rate for conviction appeals in NSW has increased since the 1999 changes.[567] However, in the Committee's view, this is not inconsistent with its finding that the abolition of de novo appeals would be likely to result in an increase in miscarriages of justice overall. There are essentially two reasons for this conclusion.

First, Mr Roland Bonnici was citing the experience of people who can afford private legal representation. For those who cannot, and who do not qualify for legal aid, the stricter test would make lodging an appeal far more onerous.

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[563] Evidence to the Committee, Melbourne, 6 March 2006, 103–4 (Justice Tim Smith, Supreme Court of Victoria).

[564] Evidence to the Committee, Melbourne, 14 February 2006, 63–4 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

[565] The figure was 9 per cent for all conviction appeals in the sample, but 54.5 per cent of conviction appeals were abandoned. The Committee's sample comprised 152 appeals heard in 2005, 33 of which were against conviction and sentence (112 were against sentence only, and 7 were against the order made). Of the 33 appeals against conviction and sentence, 18 were abandoned, 12 resulted in a guilty finding and three resulted in an acquittal.

[566] Evidence to the Committee, Sydney, 10 April 2006, 96 (Mr Roland Bonnici, Barrister).

[567] See chapter three.

Second, Mr Bonnici informed the Committee that such appeals now involve far more preparation by legal practitioners. The Committee notes that, especially in light of the funding constraints faced by Victoria Legal Aid, this factor is likely to have reduced the number of appellants it is able to assist.

The Committee turns now to the miscarriage of justice test as an alternative basis for conviction appeals. The Committee begins by noting that this basis of appeal has been the subject of some criticism for the narrow way in which it has been applied by appeal courts, which have often refused to entertain it in the absence of identifiable error.

As Gregor Urbas notes, Australian Courts of Appeal have always been more willing to entertain appeals based on a claim of error of law than on the 'miscarriage of justice' limb of s 568 of the *Crimes Act 1958*.[568] Moreover, Urbas notes that courts at this level may be reluctant to overturn a conviction in the absence of a specific and identifiable error in the court below.[569] According to Urbas, it can be argued that this is contrary to the very purpose of the legislation that first established courts of Criminal Appeal:

> If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.[570]

As Urbas notes, the more limited way in which the miscarriage ground has been applied in practice is illustrated by the High Court's decision in the *Chamberlain* appeal (noted further below).[571] In that case, the High Court held that the miscarriage of justice ground should be limited to particular categories of appeal. As Brennan J explained, it:

> confers on the court a power, to be exercised with discrimination and caution, to set aside some verdicts which the court could not otherwise set aside as unreasonable or not supportable having regard to the evidence.
>
> The special cases in which this power may be exercised are those in which "long curial experience" has led appellate courts to view certain special categories of evidence as "apparently safe to act upon, but frequently unsafe in fact": identification evidence; the testimony

[568] This is the third limb of s 568 and is also described as the 'common form' of appeal for indictable matters, as the legislative provisions are essentially the same throughout the Australian jurisdictions. See Gregor Urbas, 'DNA Evidence in Criminal Appeals and Post-Conviction Inquiries: Are New Forms of Review Required?' (2002) 6 *Macquarie Law Journal*, at http://www.austlii.edu.au/au/journals/MqLJ.

[569] Ibid.

[570] *Hargan v The King* (1919) 27 CLR 13, 23 (Isaacs J); *Chidiac v The Queen* (1991) 171 CLR 432, 462–3 (McHugh J).

[571] Ibid.

> of a prosecutrix in sexual assault cases; and, on occasions which "must be rare indeed", circumstantial evidence. However, "scientific evidence is not such a category".[572]

A significant reason cited by defence lawyers for providing appeal courts with broader powers, such as the power to reach their own conclusions on the facts, to take further evidence and to conduct a rehearing, is the argument that narrower forms of appeal increase the risk of miscarriages of justice, particularly wrongful convictions.[573]

As Brown et al have noted, there have been a number of high-profile cases in various Australian jurisdictions in which 'inquiries have led to pardons and release from lengthy prison terms, raising questions about the adequacy of the formal appeal system as a mechanism for preventing miscarriages of justice'.[574] According to Brown et al, cases such as *Chamberlain*, *Anderson*, *Alister and Dunn*, and *Splatt* 'raise serious questions concerning the adequacy of the appeal processes and the narrow approach adopted by some appellate judges, stemming partly from a reluctance to overturn jury verdicts'.[575]

In *Chamberlain*, Lindy Chamberlain was convicted of murdering her daughter in the Northern Territory in 1982 and served four years in prison (her husband was convicted as an accessory). A Royal Commission of Inquiry subsequently concluded that the Chamberlains were innocent, leading to Lindy Chamberlain's release from prison, compensation and unconditional pardon.[576]

In *Anderson* and *Alister and Dunn*, the three men known as the Ananda Marga Trio (Paul Alister, Ross Dunn and Timothy Anderson) were convicted of conspiracy to murder. They each served seven years in prison prior to a 1985 judicial inquiry into their convictions by Justice Wood. The inquiry found that the men were innocent and led to their release from prison and unconditional pardons.[577] The inquiry also found that the convictions had relied in large part on the evidence of the police prosecutor, about whose credibility the report raised serious doubts.[578]

In *Splatt* a Victorian man was released, after spending six years in prison, following the recommendation of a Royal Commission.[579]

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[572] *Chamberlain v The Queen [No.2]* (1984) 153 CLR 521, 604, 608 (Brennan J).

[573] Brown et al, above n 151, 347.

[574] Ibid.

[575] Ibid 383.

[576] See Bernie Matthews, 'The Hangman and the Electric Chair — Part 2', *Online Opinion: Australia's e-Journal of Social and Political Debate*, at www.onlineopinion.com.au.

[577] Ibid.

[578] Brown et al, *Criminal Laws*, above n 151, 383.

[579] Ibid. For a number of other examples of wrongful convictions, see Matthews, above n 576. Cases cited include Johann Ernst Siegfried (Ziggy) Pohl, who was convicted of his wife's murder and served more than 10 years in

For a recent example of the difficulty of remedying miscarriages of justice through the formal appeal system, see the West Australian case of Andrew Mallard. Mr Mallard was unsuccessful in a number of appeals against a murder conviction. He was finally granted a right to a retrial for his 11-year-old conviction by the High Court in November 2005 and the charges were subsequently dropped by the Western Australia Director of Public Prosecutions.[580]

A number of high-profile miscarriages in the United Kingdom, including those of the Guildford Four, the Birmingham Six, the Maguire Seven, Judith Ward and the Tottenham Three, led to a Royal Commission and the creation of a Criminal Cases Review Commission in 1997.[581]

Brown et al highlight that the appeal system for indictable offences contains a number of shortcomings as a method of correcting miscarriages of justice. Two of these that would be of particular relevance if such a system were introduced into the summary jurisdiction are:

- all the three limbs on which an appeal may be based (under s 568 of the *Crimes Act 1958*[582]) ‘heavily favour showing an error of law’ and this ‘can tend to be a formalistic process which can often miss the totality of prejudice or unfairness complained of’;

- appeal courts are often unwilling to consider fresh evidence[583] (although the Victorian Court of Appeal does have the discretion to consider fresh evidence under s 12 of the *Crimes Act 1958*).

Conclusion

The Committee notes that the consequences of a miscarriage of justice in the Magistrates’ Court can be very serious. For instance, a person may be sentenced to a term of imprisonment of up to five years if convicted of one of a number of offences. Moreover, as the Committee discusses in chapter six, the offence reclassification process means that increasingly serious matters may be heard in the Magistrates’ Court.

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prison before another man confessed to police that he had committed the murder. A special judicial inquiry cleared Ziggy Pohl of the murder and he was subsequently freed and granted an unconditional pardon.

[580] See ABC Television, *The 7.30 Report*, 15 November 2005; ABC Television, *Saving Andrew Mallard*, 4 May 2006. The program summary is available at http://www.abc.net.au/.

[581] Brown et al, *Materials and Commentary*, above n 505, 293. The CCRC of the UK is an independent public body that reviews possible miscarriages of justice to decide whether they should be referred to an appeal court; see http://www.ccrc.gov.uk.

[582] Ibid.cite s 6 of the *Criminal Appeal Act 1912* (NSW), but this is essentially identical to s 568 and the other ‘common form’ provisions throughout the Australian jurisdictions.

[583] M Kirby, ‘Black and White Lessons for the Judiciary’ (2002) *Adelaide Law Review* 195, 206, quoted in Brown et al, *Materials and Commentary*, above n 505, 296.

In the Committee's view, the longstanding arguments regarding the shortcomings of the formal appeal system are significant. The Committee is mindful that the abolition of de novo appeals could result in a right of appeal from summary conviction that would be subject to similar, if not identical, shortcomings. Accordingly, it seems likely that the abolition of de novo appeals would produce an appeal system in which it would be more difficult to correct miscarriages of justice.

The Committee considers that this is a strong argument against restricting the current right of appeal from the Magistrates' Court. The Committee also notes the potential complexity of the miscarriage test in practice and is not persuaded that it could be readily adapted to apply in the summary jurisdiction.

Legal representation

> An entitlement to legal aid would be an important safeguard of fairness in the administration of criminal justice. A society which secures its peace and good order by the administration of criminal justice should accept, as one of the costs of providing a civilised society, the cost of providing legal representation where it is needed to guarantee the fairness of a criminal trial.[584]

Legal representation in the Magistrates' Court

The Committee heard from a number of witnesses that the nature of legal representation in the Magistrates' Court is an important reason for retaining de novo appeals. First, an apparently significant proportion of people appearing in the Magistrates' Court are unrepresented.[585] Second, the quality of legal representation is often compromised by the sheer volume of cases heard by the Magistrates' Court, the speed at which they are heard and, ultimately, by constraints on legal aid funding.

Qualifying for legal aid

The Committee notes that Commonwealth funding for legal aid in Victoria per person remains significantly lower compared with other Australian states.[586] Generally, VLA does not provide a grant of assistance for representation to persons prosecuted for a criminal matter in the Magistrates' Court unless it considers that the applicant has 'a

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[584] *Dietrich v The Queen* (1992) 177 CLR 292, 320 (Brennan J).

[585] While it is not possible to provide a precise measure of the proportion of unrepresented defendants, the Committee notes that it may be higher than 50 per cent – in 2004–05 Victoria Legal Aid provided 40,585 duty lawyer services at the Magistrates' Court and, as the Committee noted in chapter two, the court sentences approximately 95,000 defendants in a given year. See Victoria Legal Aid, *Submission No. 9*, 2; Fox, above n 36, 83. Interestingly, the proportion of appellants who are unrepresented in the Magistrates' Court is apparently significantly lower: it was just 4.6 per cent in the Committee's sample of 2005 appeals. This suggests, perhaps unsurprisingly, that the likelihood of an appeal to the County Court is significantly greater if an accused was legally represented in the Magistrates' Court.

[586] Victoria Legal Aid, *Annual Report 2004–05*, 7.

reasonable prospect of acquittal on the most serious charge or charges arising out of the one set of facts'.[587]

However, assistance may be provided if it is considered likely that conviction will result in:

- imprisonment; or
- an Intensive Correction Order; or
- a suspended term of imprisonment; or
- VLA assistance may also be provided in serious or complex matters in which there is a likelihood that:
    - the magistrate will impose a community-based order with conviction requiring more than 200 hours of unpaid community work; or
    - the magistrate will impose a community-based order with conviction and the defendant will have difficulty communicating his or her needs in respect of the rehabilitative aspects of the order to the court by reason of psychiatric or intellectual disability (as defined below), lack of education, or difficulties in understanding the English language.[588]

The Committee notes, however, that where a grant of assistance is not made available a person may access the duty lawyer service described by Dr Neal and Dr Lyon above. On the other hand, the Committee has noted above the limitations faced by the duty lawyer service and that a significant proportion of people represent themselves.

An important limitation in relation to qualifying for legal aid applies to indictable matters which may be tried summarily. The *VLA Handbook* provides:

> In the absence of compelling reasons assistance will not be provided for the hearing of charges in the County or Supreme Courts where such charges could be and normally are heard and disposed of in the Magistrates' Court.[589]

In such cases a person will only receive legal aid where they agree to have the matter heard summarily in the Magistrates' Court. It is also important to note that, even where a person qualifies for assistance from Legal Aid, a ceiling may be placed on the amount of money available for the case.[590]

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[587] Victoria Legal Aid, *VLA Handbook*, July 2001, 28, at http://www.legalaid.vic.gov.au.

[588] Ibid Appendix 2C, 28.

[589] Ibid Appendix 2C, 29.

[590] Fox, above n 36, 77.

The quality of legal representation

Dr Neal provided the Committee with an example of the constraints faced by a Legal Aid duty solicitor on an apparently typical day:

> I have sat at Ringwood court, for example, and watched a duty lawyer deal with a large number of cases by 10.00 a.m. when I knew that he had only had about an hour at the court previous to that to see the people who were coming before the court, some of whom were up for quite significant penalties, including potentially custodial penalties, or others of the range of penalties that can apply. That really does mean that he is seeing 10 people in an hour — that is, for 6 minutes each — on matters that are fairly significant and, with the best will in the world and the most experienced practitioner in the world doing the duty court work, there is going to be some slippage, and that is to say nothing of what occurs in court when those cases are heard where matters of some significance may be omitted.[591]
>
> We have not got, and do not claim to have, empirical evidence, but when you watch the ways in which the cases are done and you know because of the cases you have done, you wonder whether the record of interview on which a plea is based could actually be admitted because the person was young or "This person is clearly mentally disabled" or for whatever other range of reasons you say, "I could bet my life on this one, this one and that one". The duty lawyer simply has not got time to even read the transcript of the record of interview if they are only spending 6 minutes with them before court.[592]

Dr Neal also told the Committee that the lawyers acting as duty solicitors for Legal Aid are increasingly junior,[593] and the Committee heard that various other constraints may affect the quality of private legal representation in the Magistrates' Court.

Dr Lyon told the Committee that solicitors appearing for clients in the Magistrates' Court may also be acting outside their area of specialisation because the work is perceived as easier.[594] Moreover:

> There are specialist firms that make their income from a high volume turnover of work by employing junior solicitors and by requiring them to go to court usually with more than one, sometimes many more than one, case.[595]

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[591] Evidence to the Committee, Melbourne, 13 February 2006, 35 (Dr David Neal, SC, Victorian Bar Council).

[592] Ibid 42.

[593] Ibid 39.

[594] Evidence to the Committee, Melbourne, 13 February 2006, 42 (Dr Greg Lyon, Secretary, Criminal Bar Association of Victoria).

[595] Ibid.

Magistrate English summarised the limitations on the quality of legal representation as a problem of 'under-representation':

> There is a lot of under representation in the court, where someone has a legal practitioner who is perhaps not as full and comprehensive as they could be, and a magistrate takes a proactive role in terms of finding things out. A lot of junior practitioners, of course, appear in the Magistrates' Court on a regular basis and a lot of young barristers cut their teeth in the Magistrates' Court. But there are ways in which the court can properly inform itself. Unfortunately the court does not keep statistics on the number of unrepresenteds appearing before the court, but that is perhaps something we should look at for our next report.[596]

The Committee also notes that Jennifer Taylor, who argued for the abolition of de novo appeals in favour of a system based on error, also recommended that such a change would require increased Legal Aid funding.[597]

Conclusion

The Committee is concerned by the evidence regarding legal representation in the Magistrates' Court, both as to the proportion of persons who are unrepresented and the quality of representation for those who are.

The Committee considers that persons facing serious charges, including the possibility of a prison sentence, should have the right to adequate legal representation. The Committee acknowledges, however, that funding for Legal Aid has been restricted for some time and is likely to remain available only for more serious cases.

The Committee concludes that the limitations on legal representation in the Magistrates' Court are a further reason for ensuring that any changes to the appeal system do not reduce a person's capacity to appeal.

Legal representation in the County Court

Legal representation, or lack thereof, for summary matters is also a significant issue in the County Court.

Victoria Legal Aid told the Committee that it funded between 700 and 800 County Court appeals in the 2004–05 financial year.[598] The Committee notes that this is

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[596] Evidence to the Committee, Melbourne, 14 February 2006, 98 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[597] Jennifer Taylor, *Submission No. 1*, 68, 70.

[598] Evidence to the Committee, Melbourne, 14 February, 68 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

around 42 per cent of the appeals heard during that 12-month period.[599] It follows that the majority of appeals heard by the County Court in 2004–05 involved appellants who either paid for legal representation or appeared unrepresented.

Based on its sample of County Court appeals, the Committee was able to estimate the proportion of appeals in which an appellant appears unrepresented at approximately 13 per cent to 14 per cent.[600] The Committee acknowledges that this figure does not provide an indication of the proportion of appellants who may have abandoned their appeal because they did not qualify for legal aid or could not afford private representation.

The Committee notes that ending de novo appeals would be very likely to increase the level of self-represented appellants because legal representation, whether provided privately or by Legal Aid, would be more expensive. The greater cost to potential appellants was acknowledged by Victoria Police, who suggested that such costs could be minimised by ensuring that appeals continued to be heard by the County Court rather than by the Supreme Court.[601] However, in the Committee's view this would not prevent a substantial increase in the cost of legal representation.

Mr Wighton told the Committee that Victoria Legal Aid performs a gatekeeper role in relation to unmeritorious appeals:

> [Legal Aid] Guidelines for the County Court and Court of Appeal matters use relatively similar language. You effectively have to have a reasonable case to argue, an arguable case. There have to be reasonable grounds of appeal — a case that on an objective reading has an argument and a prospect of success. It is a gatekeeper role. … There are a number of fetters on unmeritorious appeals. One is our guidelines because most people need legal aid to go to the criminal courts.[602]

As the Committee notes below, a number of witnesses argued that private lawyers and Legal Aid effectively screen appeals for those in which reasonable grounds

[599] This percentage is based on a figure of approximately 1,911 appeals that were actually heard by the County Court in the 2004–05 financial year (ie of the 2,561 appeals lodged, around 25.4 per cent were abandoned or struck out due to the failure of the appellant to appear).

[600] Based on the Committee's sample of cases heard in 2004, the proportion was 14 per cent; in the 2005 sample it was around 13 per cent. Both figures are based on the number of appeals that proceeded to hearing, as opposed to lodgements (around 26 per cent of appeals were abandoned in the 2004 sample and around 32 per cent in the 2005 sample).

[601] Evidence to the Committee, Melbourne, 13 February, 29 (Superintendent Stephen Leane, Victoria Police). Chief Magistrate Ian Gray and Magistrate Caitlin English also noted that hearing appeals in the Supreme Court would significantly increase the costs faced by appellants: Evidence to the Committee, Melbourne, 14 February 2006, 81 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria); Evidence to the Committee, Melbourne, 14 February 2006, 87 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[602] Evidence to the Committee, Melbourne, 14 February 2006, 68 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

exist.[603] The Committee also heard from Victoria Police that there is a need for a gatekeeper function to be introduced in relation to County Court appeals but it notes that, according to Associate Professor Willis and Mr Wighton, this purpose is already served by the legal profession, including Legal Aid. The Committee also notes that restrictions in Legal Aid funding are such that a proportion of deserving, albeit less serious cases, are also screened out. It therefore seems reasonable to query whether an additional 'gatekeeper' function for County Court appeals is required.

In its submission to the inquiry the CDLA told the Committee that a system of appeal based on error would prove too daunting for many unrepresented people, who would simply decide not to proceed. While not able to provide statistics, CDLA told the Committee that self-representation in the County Court is a reality for some clients and would prove significantly more difficult in an appeal system based on the demonstration of error.[604]

CDLA cited appeals from the County Court to the Court of Appeal to support this argument, noting that a significant number of such appellants are currently unrepresented[605] — a fact confirmed by the annual reports of the Supreme Court, which express concern about the level of unrepresented criminal appellants.[606]

Professor Richard Fox also notes that it is unusual for applicants to the Court of Appeal to have obtained legal advice before lodging their appeal,[607] so that Court of Appeal judges regularly feel compelled to discuss with prisoners the prospects of their application under s 582 of the *Crimes Act 1958*.

CDLA also told the Committee that those cases in which a person is entitled to legal aid to appeal to the County Court are currently limited. In addition to the general requirements of the merit and means tests, Legal Aid funding is subject to other criteria:

> which includes, for instance, if you are convicted whether you will receive a penalty of more than 200 hours on a community based order. So it is not a right of appeal without qualification —

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[603] Evidence to the Committee, Melbourne, 13 February 2006, 17 (Mr Michael McNamara, Deputy Chair, Law Institute of Victoria); Evidence to the Committee, Melbourne, 13 February 2006, 17 (Mr James Dowsley, Deputy Chair, Criminal Law Section, Law Institute of Victoria). See also Associate Professor John Willis, *Submission No. 6*, 3. Associate Professor Willis notes that in his own criminal practice he is careful to indicate the possibility of a higher sentence on appeal when advising prospective clients. Presumably, and as seems likely for barristers advising on County Court appeals generally, this would entail advice as to the relative likelihood of success. It is therefore likely that such advice does contribute to the screening out of unmeritorious appeals.

[604] Evidence to the Committee, Melbourne, 14 February 2006, 74–5 (Mr Rob Stary, President, Criminal Defence Lawyers Association).

[605] Evidence to the Committee, Melbourne, 14 February 2006, 74 (Mr Bill Doogue, Public Officer, Criminal Defence Lawyers Association).

[606] Fox, above n 36, 434.

[607] Ibid.

> eligibility without qualification, leaving aside the means test issue. So you might have someone, for instance, who has been convicted of motor vehicle theft, a relatively serious offence, and the consequences of conviction for a serious dishonesty offence might have implications for a person's future employability — if they are convicted in the Magistrates' Court, and they receive a monetary penalty or a penalty of less than 200 hours on a community based order, generally speaking there will be no right to or eligibility for legal aid on appeal. You might have an argument that that person has been wrongly convicted — let us use car theft because it is a common offence in the Magistrates' Court. They may have been a passenger in a car. The argument might be as to their knowledge as to whether the motor vehicle was stolen. They have been picked up by a friend, for instance, and they will have an argument that they had no knowledge at the time they entered the vehicle that it was stolen, and that is rejected by the magistrate. But the magistrate might say, "I will give you the benefit of the doubt by imposing a lesser penalty", and that person will have no right or eligibility [to Legal Aid funding for an appeal].[608]

Ms Anna Radonic, Principal Lawyer with Youthlaw, also told the Committee that many appellants who would be unable to afford legal representation would also find it more difficult to present their case in a system that operates on the basis of error:

> Our concern is that the vast majority of clients, not just in our legal centre but in the other 49 legal centres spread across Victoria, have no means to pay for legal representation. Members would be aware from the submission that Victoria Legal Aid has tight guidelines as to income and merit in terms of appeal. So the worry we have in community legal centres is how those clients who are perhaps not eligible to legal aid — because a percentage are not eligible to legal aid — represent themselves in a County Court appeal before a judge. How will it be explained to them that if the system were to change that they could make comments on legal decisions when they have no experience in law? So that is one of the major worries. I suppose I am really saying that it is an access to justice issue and that the principles of natural justice should apply, and in our submission that is the basis on which de novo hearings should continue.[609]

When assessing a person's eligibility for a grant of legal assistance for legal representation on appeal, Victoria Legal Aid is required to apply both a means test and a 'reasonableness' test.[610]

Under the means test, VLA may provide legal assistance only if it decides that the person cannot afford the full cost of legal services from a private practitioner.[611] Under the 'reasonableness' test, Legal Aid is required to consider the merit of the applicant's case; that is, whether a favourable outcome is likely for the applicant. In the case of

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[608] Evidence to the Committee, Melbourne, 14 February 2006, 74–5 (Mr Rob Stary, President, Criminal Defence Lawyers Association).

[609] Evidence to the Committee, Melbourne, 14 February 2006, 53 (Ms Anna Radonic, Principal Lawyer, Youthlaw).

[610] Victoria Legal Aid, *VLA Handbook* (July 2001), chapter 2, at http://www.legalaid.vic.gov.au. Chapter 2 cites the *Legal Aid Act 1978* and the guidelines.

[611] *Legal Aid Act 1978* s 24(3). See also Victoria Legal Aid, *VLA Handbook* (July 2001), Appendix 2A, at http://www.legalaid.vic.gov.au.

criminal appeals, the Act also requires VLA to consider whether there are reasonable grounds for the appeal.[612]

Where the applicant qualifies under the means test but does not meet the additional qualification criteria, VLA may provide a grant of assistance in the following special circumstances:

- the applicant is under the age of 18 years;
- the applicant has a language or literacy problem;
- the applicant has an intellectual or psychiatric disability.[613]

The qualification criteria imposed by Legal Aid therefore ensure that appellants merely seeking a 'second bite of the cherry' by appealing to the County Court are unlikely to receive legal aid.

Conclusion

While the Committee is concerned about the level of unrepresented appellants in the County Court, it acknowledges that self-representation is likely to remain a reality for a significant number of appellants. In this context, the Committee considers that a preferable system of appeal is one in which the opportunity for successful self-representation is maximised.

In the Committee's view, the de novo system fulfils that purpose. In reaching this conclusion the Committee notes that self-representation on appeal is a more realistic possibility in a de novo system because the hearing is more likely to involve a simple reconsideration of the facts and because the appeal is effectively a second summary hearing. It is therefore the de novo system which makes self-representation in summary appeals possible, albeit certainly not preferable.

In contrast, in an appeal system based on error (including those described as a rehearing but which in reality turn on the demonstration of error) self-representation would be an extremely difficult prospect.

The rehabilitative and preventative effect of de novo appeals

> It is often taken for granted that if leniency for the purpose of rehabilitation is extended to a prisoner when the judge is passing sentence, that this leniency bestows a benefit on the individual alone. Nothing, in my opinion, is further from the truth. Reformation should be the

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[612] *Legal Aid Act 1978* s 24(4)(c). See also Victoria Legal Aid, *VLA Handbook* (July 2001), Appendix 2A, at http://www.legalaid.vic.gov.au. Notably, the criteria for a grant of legal aid in Commonwealth criminal matters is stricter, both in relation to trial in the Magistrates' Court and in relation to appeals to the County Court; see Australian Government, *Commonwealth Legal Aid Priorities and Guidelines*, at http://www.ag.gov.au.

[613] Victoria Legal Aid, *VLA Handbook* (July 2001), 20, at http://www.legalaid.vic.gov.au.

> primary objective of the criminal law. The greater the success that can be achieved in this direction, the greater the benefit to the community.[614]
>
> Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of his wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen. It is not confined to those who fall into wrongdoing by reason of physical or mental infirmity or a disadvantaged background. It applies equally to those who, while not suffering such disadvantages, nevertheless lapse into wrongdoing. The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community. Very often a person who is not disadvantaged and whose character has been formed by a good upbringing, but who has lapsed into criminal behaviour, will be a good subject for rehabilitative measures precisely because he possesses the physical and mental qualities and, by reason of his upbringing, the potential moral fibre to provide a sound basis for rehabilitation. It would be a great mistake to put considerations of rehabilitation aside in fashioning a sentence for such a person.[615]

The Committee heard from Associate Professor Willis that many appellants take important steps towards rehabilitation during the time between their conviction in the Magistrates' Court and their hearing in the County Court. According to Associate Professor Willis, the circumstances of such appellants have often changed significantly by the time their appeal is heard.[616]

Associate Professor Willis also told the Committee that rehabilitation in the period prior to the County Court hearing, and the potential for its recognition by the justice system, has an important preventative effect on crime. The Committee notes that this would be of particular value for first-time and young offenders. The Committee notes here that the rehabilitative and preventative effect of the de novo appeal suggested by Associate Professor Willis relates solely to sentence appeals, but, as these comprise nearly three quarters of appeals each year, this impact cannot be underestimated.

The preventative effect identified by Associate Professor Willis is also known as 'specific deterrence' and is an important sentencing purpose, recognised in the *Sentencing Act 1991* and in the *Victorian Sentencing Manual*.[617] The manual provides:

> Specific deterrence refers to deterring the particular offender being sentenced from repeated criminal conduct. General deterrence refers to deterring potential offenders from committing like offences, by making an example of that particular offender. Specific deterrence relies on the

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[614] *Williscroft & Ors* [1975] VR 292, 303 (Starke J), cited in Judicial College of Victoria, *Victorian Sentencing Manual* (3rd ed, 2005) [7.7.1], at www.judicialcollege.vic.edu.au.

[615] *Vartzokas v Zanker* (1989) 44 A Crim R 243 (SC SA), 245 (King CJ), cited in Judicial College of Victoria, *Victorian Sentencing Manual* (3rd ed, 2005) [7.7.1], at www.judicialcollege.vic.edu.au.

[616] Evidence to the Committee, Melbourne, 13 February 2006, 50 (Associate Professor John Willis, School of Law, La Trobe University).

[617] See *Sentencing Act 1991* s 5(1)(b).

> experience of actual punishment upon the offender, whilst general deterrence relies upon the potential offender's fear of anticipated punishment.[618]

As an illustration of the preventative and rehabilitative effect that the de novo appeal can have on a person following their conviction in the Magistrates' Court, Associate Professor Willis cited cases where the accused is convicted and sentenced to a period of imprisonment:

> Then they get sent to gaol and it gives them a serious fright. They are given appeal bail. You get them outside and you metaphorically beat them around the ears and tell them, "First, get a job; two, I want you to go and see someone, and in two months time I want you with six clean urine analyses. Now, get on, and I will ring you in a week …"
>
> There is a fair bit of blunt talking of this kind. In some cases — I have had them — they get their act together. You stand before the County Court judge and say, "He has done three burglaries, he was drug addicted … I now hand up to you six clean urine analyses. He has a girlfriend who is here, he has been to counselling and to drug rehabilitation, he has a job and is doing well, and he is 19".
>
> None of that was true in the Magistrates' Court. It is now true. From a community point of view I see that as absolutely to the good. He may reoffend but at least for the moment he has a whole series of important supports, and that is sometimes best achieved by giving him a hell of a fright and then getting him to do something, for what it is worth.[619]

The rehabilitative and preventative potential of the appeal system was also recognised by the Director of Public Prosecutions:

> you never know whether you are almost sentencing the same person. You can have something happen in front of a magistrate and nothing much is put … somebody then turns their mind to the proposition that perhaps this can be done better. Then somebody gets a psychiatric report; the kid gets a job in the meantime, and so on, and a whole lot of things happen, so the County Court judge is sentencing, as it were, a different person to the person before the magistrate. I guess that is one of the good things about County Court appeals.[620]

The Committee notes that in cases of the kind described by Associate Professor Willis, the appellant is effectively given a second chance rather than simply a 'second bite of the cherry'. In other words, the appellant is provided with the incentive to

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[618] Judicial College of Victoria, *Victorian Sentencing Manual* (3rd ed, 2005) [7.4.1]. The manual is available at http://www.judicialcollege.vic.edu.au.

[619] Evidence to the Committee, Melbourne, 13 February 2006, 50 (Associate Professor John Willis, School of Law, La Trobe University).

[620] Evidence to the Committee, Melbourne, 13 February 2006, 9 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

pursue the rehabilitation that is an important purpose of the justice system[621] rather than simply basing his or her appeal on the possibility of receiving a more lenient sentence.

The Committee recognises that, in many cases, the desire for a second bite of the cherry may provide the incentive for an appeal to the County Court. However, the Committee also considers that the preventative effect of the de novo appeal should not be underestimated, particularly for first offenders, young offenders and offenders who have received a prison sentence for the first time, as in the example above.

Associate Professor Willis' evidence to the Committee also suggested that the preventative and rehabilitative potential inherent in the de novo appeal is recognised by some magistrates:

> The other thing that has to be said, and I have certainly had a magistrate say it, "You have just got six months jail. You talk to Mr Willis. He will tell you how you can appeal". That has been said on more than one occasion.[622]

According to Associate Professor Willis, an appeal de novo is the only form of appeal which can provide this incentive for the immediate commencement of the rehabilitation process. No such incentive exists for appeals based on error, which in the case of sentence appeals amounts to a claim that a sentence was manifestly excessive, nor for appeals by way of rehearing.

As the Committee found above, appeals by way of rehearing tend in practice to operate as appeals restricted to a claim of error, and appellants are more likely to be restricted to the evidence heard by the original court in both error appeals and rehearings. The Committee notes that appeal systems that operate by way of rehearing do allow fresh or additional evidence to be presented with the court's leave, but, as the discussion of such systems in other Australian jurisdictions has highlighted, it is rare for such leave to be granted.[623]

The Committee is aware that additional incentives for rehabilitation may exist after a person has been convicted and sentenced, but it is the opportunity for earlier intervention in the rehabilitation process that is unique to the de novo hearing as a form of appeal. For these reasons, the Committee agrees with Associate Professor Willis that the role of the de novo appeal in the prevention of crime should not be underestimated.

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[621] As recognised in Judicial College of Victoria, *Victorian Sentencing Manual* (3rd ed, 2005) at [7.7]. The manual is available at http://www.judicialcollege.vic.edu.au.

[622] Evidence to the Committee, Melbourne, 13 February 2006, 49 (Associate Professor John Willis, School of Law, La Trobe University).

[623] The likely impact of imposing a leave requirement on the provision of fresh or additional evidence in sentence appeals is also suggested by the evidence the Committee received as to how rarely such leave is granted for conviction appeals in NSW since the 1999 changes in that state.

The Committee referred earlier to sentence appeals on the basis of a manifestly excessive sentence and noted that such appeals are subject to a much narrower test than a de novo appeal. The appellant must generally show that the judge acted upon a 'wrong principle', was guided or affected by 'extraneous or irrelevant matters', made a mistake of fact or failed to take into account 'some material consideration'.[624] The appeal is therefore largely restricted to the evidence that was before the original court and is not designed to take account of changes in the appellant's circumstances between the time of the original decision and the time of the appeal.[625]

Associate Professor Willis noted that a further feature of the de novo appeal is that it provides appellants with the additional time needed to obtain evidence that was not available at the time of the original court hearing. This enables the County Court to more fully consider a person's circumstances than may have been possible in the Magistrates' Court. In many cases, such evidence will either not have been available in the limited time prior to the Magistrates' Court hearing, while in other cases its relevance may simply not have been anticipated.

Associate Professor Willis noted that the opportunity of additional time in which to obtain or prepare evidence is particularly important in cases where an appellant is experiencing some form of vulnerability and/or disadvantage. By way of example, Associate Professor Willis cited the scenario of an appellant convicted and sentenced to prison following an assault on his girlfriend:

> By the time you get to the County Court you have a psychiatrist's report which states that he might be intellectually handicapped. His girlfriend is convinced he is doing much better. She jumps in the witness box and says so, and he has got work. A lot of those things need to be thought about. It is six months since it happened and he has not done anything since.[626]

The Committee notes that the capacity of a person with an intellectual disability or mental illness to gather and present relevant evidence in the Magistrates' Court may in many cases be quite limited. More generally, members of marginalised and disadvantaged groups form a disproportionate category of defendants appearing before the courts.[627] As the *Attorney-General's Justice Statement* has noted:

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[624] *House v The King* (1936) 55 CLR 499.

[625] However, as the Committee has also noted above, the Court of Appeal may give leave to present fresh evidence in indictable matters under s 574 of the *Crimes Act 1958*.

[626] Evidence to the Committee, Melbourne, 13 February 2006, 50 (Associate Professor John Willis, School of Law, La Trobe University).

[627] Department of Justice, Victoria, *Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004–2014* (May 2004) 59.

- Members of the Victorian Koori community are six times as likely to be arrested as non-Koories, and 13 times as likely to be imprisoned;[628]
- Approximately two thirds of prisoners in Victorian gaols reported that their offences were related to drug use;
- Research has found high levels of over-representation of people with intellectual disabilities and acquired brain injuries in the criminal justice system — such people may be overwhelmed by court proceedings, and find it difficult to communicate with police, lawyers and the courts;
- In 2001–02, nine per cent of those on community-based orders required a plan for psychiatric treatment; and
- Representation of the mentally ill in the corrections system is estimated at between three and five times the rate of mental illness in the general community.

Given the highly streamlined nature of summary proceedings, it may often be the case that the evidence presented by defendants, especially vulnerable and disadvantaged defendants, will be very limited compared to evidence they may later be able to present in the County Court. This would be particularly so in cases where the person is not legally represented or is represented by a duty solicitor who has had only limited time to consider their case. The de novo appeal therefore has an important remedial potential in addition to its rehabilitative and preventative roles. That is, it can remedy shortcomings in the fact finding that has occurred at the summary justice level.

The Committee notes that the opportunity to present further evidence following summary conviction in an appeal based on error or by way of rehearing is significantly more limited than in a de novo appeal. In such appeal systems the possibility of more comprehensively assessing a person's circumstances is more likely to be lost. This is of particular concern in cases of vulnerable and disadvantaged persons whose circumstances may not otherwise be revealed. Notably, where vulnerable and disadvantaged persons are tried in the County or Supreme Courts, a fuller consideration of their circumstances is more likely precisely because the court procedures are not abbreviated as in the Magistrates' Court.

The opportunity for an appellant to have their case reheard on the basis of evidence that was not available at the time of the hearing in the Magistrates' Court can therefore operate as a safeguard to ensure that appellants' circumstances are more

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[628] The *Justice Statement* acknowledges that the situation is due to 'endemic disadvantage as a result of dispossession, removal of children from their families and discriminatory attitudes' and that 'in relation to most socio-economic and health indicators indigenous people are significantly below the levels for the general population': ibid.

fully considered, which is a particular concern regarding vulnerable and disadvantaged appellants.

While the Committee considers that the decision whether to appeal is essentially a question for each individual, it is concerned that a significant number of people may decide not to appeal primarily because of their vulnerability and disadvantage. The Committee notes here that in a more restricted system of appeal, such as an appeal based on error, or a rehearing in which appeals effectively turn on the demonstration of error, the capacity of such persons to appeal would be further reduced.

The Committee acknowledges that the Magistrates' Court has developed a range of programs for identifying and assisting people facing various forms of vulnerability and disadvantage. Nevertheless, the Committee is particularly mindful of the role that the de novo system may play in maximising access to an appeal for such persons.

Appeal and imprisonment

Imprisonment

Victoria consistently records the lowest rates of imprisonment in Australia, currently around 40 per cent below the national average.[629] Victoria's imprisonment rate is 94.2 per 100,000 adults, whereas the national average is around 162.5.[630] By way of comparison, the rate in the other Australian jurisdictions is as follows:

Table 9 — Imprisonment Rate per 100,000 Adults, Australia 2005[631]

New South Wales	187.6
Queensland	176.7
South Australia	123.2
Western Australia	229.3
Tasmania	149.9
Northern Territory	575.5
Australian Capital Territory	110.4

[629] Department of Justice, Victoria, *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004* (2005) 10.

[630] Australian Bureau of Statistics, *Prisoners in Australia* (2005) 14.

[631] Australian Bureau of Statistics, *Prisoners in Australia* (2005) 14.

The low rate of imprisonment in Victoria has been explained as a reflection of the state's overall crime rate, which was 20 per cent below the national average in 2004 and the lowest in Australia for the 10th year running.[632] It follows from these figures that, while significant, Victoria's overall crime rate cannot provide a complete explanation for its comparatively low rates of imprisonment. In this section the Committee explores the extent to which the de novo appeal may contribute to Victoria's low rate of imprisonment.

Despite Victoria's low imprisonment rates, there has been a significant increase in the prison population in recent years. Between 30th June 2000 and 30th June 2004 the total prison population increased by 15 per cent, from 3,153 to 3,624. Notably, the female prison population increased by 33.3 per cent over the same period, from 183 to 244. This increase was nearly two and a half times that of the male prison population's increase of 13.8 per cent.[633]

The Committee heard from the CDLA that abolishing de novo appeals would lead to an increase in the number of people serving terms of imprisonment and associated financial and social costs:

> Any change to appeals which results in the lessening of appeals will just reduce the quality of justice and move the costs somewhere else. Logically, as just one example, it will result in more people being placed in gaol. The consequential cost of this financially and socially has not been calculated as far as we are aware.[634]

The Committee recalls here the evidence of Magistrate English that the pressures under which the Magistrates' Court operates creates the possibility for an accused to receive a custodial sentence that may not be warranted in all the circumstances even though the decision may be free from legal error.[635]

The Director of Public Prosecutions, Mr Paul Coghlan QC, also acknowledged that it is not unknown for a custodial term to be imposed in the Magistrates' Court as a result of the way a case is presented rather than its merits.[636] Mr Coghlan identified the limitations under which duty solicitors often work as a reason for this.[637]

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[632] Department of Justice, Victoria, *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004* (2005) 10.

[633] Department of Justice, Victoria, *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004* (2005) 10.

[634] Criminal Defence Lawyers Association, *Submission No. 3*, 3.

[635] Evidence to the Committee, Melbourne, 14 February 2006, 90 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[636] Evidence to the Committee, Melbourne, 13 February 2006, 9 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[637] Ibid.

On the other hand, the Committee agrees with Victoria Police that it is unlikely that a simple cause-and-effect relationship exists between Victoria's low rates of imprisonment on the one hand and appeals by way of de novo hearing on the other.[638] As Sergeant McDonald told the Committee:

> Appeal rights are not really about rates of imprisonment. In the prosecutions division, and I think the wider police force, we have long moved past the idea of saying justice is all about locking them up and throwing away the key. We are a little bit more sophisticated than that, and even if we were not the rest of the justice system has moved on and we have to keep up. It is about being able to ensure that the right outcome has occurred as frequently as we are able to obtain it in a system staffed and populated by humans with all the errors that come up.[639]

Nevertheless, the Committee's own research suggests that the de novo appeal does contribute to Victoria's low rate of imprisonment, although it is difficult to quantify that contribution with any precision.

An estimate of the number of Victorians who would otherwise have served a period of imprisonment in a given year may provide some indication of the relationship between the summary appeal system and imprisonment.[640] In a sample of appeals lodged in the County Court in 2005, the Committee found that 23 per cent resulted in the substitution of a prison sentence with a non-custodial sentence.[641] The proportion of appeals in the sample in which a prison sentence had been imposed by the Magistrates' Court was 33.3 per cent and, of those, 69 per cent resulted in the substitution of the prison sentence with a non-custodial sentence.[642]

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[638] See evidence to the Committee, Melbourne, 13 February 2006, 30–2.

[639] Evidence to the Committee, Melbourne, 13 February 2006, 31 (Sergeant Kyle McDonald, Victoria Police).

[640] A limitation of the imprisonment rate and of the prison population as measures in the summary criminal jurisdiction is that only persons in gaol on 30th June in a given year are counted. This limitation is particularly important in the summary criminal jurisdiction, in which the majority of prison terms are shorter than 12 months. In the sample discussed by the Committee below, of those appeals that resulted in the substitution of a custodial sentence with a non-custodial sentence, 94.4 per cent involved prison sentences of no more than six months.

[641] This is 23 per cent of all appeals lodged and includes appeals abandoned, withdrawn etc.

[642] The Committee's sample comprised 78 appeals lodged in the County Court in 2005. Of those:

- 18 appeals resulted in the substitution of a prison sentence with a non-custodial sentence — this may have come about in a number of ways: the prison term imposed by the Magistrates' Court may have been reduced by 100 per cent, the original term may have been retained but wholly suspended, or the term may have been reduced by less than 100 per cent but wholly suspended;
- one appeal resulted in the term of imprisonment imposed by the Magistrates' Court being reduced by more than 50 per cent but less than 100 per cent;
- one appeal resulted in the term of imprisonment imposed in the Magistrates' Court being reduced by less than 50 per cent;
- five appeals resulted in the effective term of imprisonment imposed in the Magistrates' Court remaining unchanged;

The Committee notes that, if the above sample is representative of all County Court appeals lodged in 2005, somewhere in the order of 430 appeals may have resulted in the substitution of a prison sentence with a non-custodial sentence in that year.[643]

It is difficult to state with any certainty what proportion of these would have succeeded under a system other than de novo. However, it seems likely that the number would have been significantly lower, since, as the Committee has noted above, it is simply much more difficult to appeal against sentence on a basis other than de novo.

Jennifer Taylor's submission to the inquiry included a similar study of County Court appeals heard during the 1998-99 financial year.[644] The results were presented differently, with that study giving the proportion of all sentences increased or reduced on appeal (ie it included appeals from non-custodial as well as custodial sentences).

In a random sample of sentence appeals, Taylor found that 82 per cent resulted in some kind of sentence reduction. However, that figure included sentences that were 'insignificantly reduced' (a reduction of 25 per cent or less) as well as those that were 'significantly reduced' (a reduction of more than 25 per cent and/or the substitution of a custodial sentence with a non-custodial sentence). Of the 82 per cent of appeals in which there was some degree of sentence reduction, 26 per cent were found to have been 'insignificantly reduced' and 56 per cent were found to have been 'significantly reduced'.[645]

The Committee notes that, while an appeal success rate of 69 per cent for the substitution of a prison sentence with a non-custodial sentence may appear high, it is important to bear three factors in mind.

First, in many cases a suspended sentence was imposed on appeal (which means the person convicted is subject to strict conditions to avoid imprisonment).

Second, the majority of the prison sentences that were substituted with a non-custodial sentence in the Committee's sample were of relatively short duration — the

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- one appeal resulted in the term of imprisonment imposed by the Magistrates' Court being increased; and
- 52 appeals involved a Magistrates' Court sentence other than a term of imprisonment — these cases included appeals struck out due to no appearance, cases in which a non-custodial sentence was imposed both in the Magistrates' Court and in the County Court (including wholly suspended sentences imposed in the Magistrates' Court), abandoned appeals (which included a number of cases in which the Magistrates' Court had imposed a prison sentence), adjourned appeals, cases in which the County Court refused to hear an appeal that was out of time, Intervention Orders, and appeals dismissed due to an absence of jurisdiction.

[643] This estimate is based on the approximately 1,910 appeals that were actually heard by the County Court in 2005 (a total of 2,561 appeals were commenced, but around 25.4 per cent of these were abandoned or struck out): County Court of Victoria, *Annual Report* (2004–05).

[644] Jennifer Taylor, *Submission No. 1*, 41–3.

[645] Ibid.

median sentence was three months.[646] In a number of cases such sentences had been imposed for relatively less serious driving offences.

Third, where a prison sentence was replaced with a non-custodial sentence, it was not uncommon for a Community Based Order or Intensive Correction Order of longer duration than the original sentence to be imposed, which often contained conditions tailored to the offender. For example, in one appeal a sentence of six months' imprisonment was replaced by an 18-month Community Based Order, under the supervision of a community corrections officer. In that case, and in a number of the appeals that resulted in the substitution of a non-custodial sentence, the County Court required the person to undergo assessment and treatment for alcohol or drug addiction or submit to medical, psychological or psychiatric treatment, and to participate in programs to reduce the risk of re-offending. In the Committee's view, the more individualised sentencing represented by such appeals can be argued to be of greater benefit to both the accused and society.

As noted earlier, the Committee has found that de novo appeals serve an important rehabilitative and preventative function and it notes in that context that imprisonment is apparently strongly related to education levels and employment status.

The education levels achieved by male prisoners — who make up approximately 93 per cent of the Victorian prison population[647] — are relatively low. As at 30th June 2004 only around 10 per cent reported having completed secondary, trade or tertiary education before entering prison. About 61 per cent of male prisoners as at 30th June for each of the years 2000 to 2004 were unemployed or outside the paid labour force prior to imprisonment.[648]

By way of comparison, Victorian males had an official unemployment rate of 4.8 per cent as at May 2006,[649] 38 per cent had completed schooling to year 12 or equivalent and a further 16.7 per cent to year 10 or equivalent.[650]

Education levels attained by women prisoners appear to be significantly higher than for male prisoners but are still lower than for the general community. About 27 per cent of Victorian women in prison at 30th June 2004 had completed secondary, tertiary or other post-secondary education, and an additional 66 per cent had some secondary-level schooling. Nearly 80 per cent of women prisoners were unemployed

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[646] The average was slightly higher at 4.3 months, but the median is more typical of the sample — only one third of the sample originally faced sentences of more than three months. In one case a sentence of 21 days imposed by the Magistrates' Court for the possession of a dangerous article was substituted with a fine by the County Court.

[647] Department of Justice, Victoria, *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004* (2005) 11.

[648] Department of Justice, Victoria, *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004* (2005) 11.

[649] Australian Bureau of Statistics, *Labour Force Australia* (May 2006) 17.

[650] Australian Bureau of Statistics, *2001 Census Data: Victoria*, Basic Community Profile, B12.

or outside the paid labour force prior to entering prison.[651] By way of comparison, 39 per cent of Victorian females had completed schooling to year 12 or equivalent, a further 15 per cent to year 10 or equivalent,[652] and, as at May 2006, Victorian women had an official unemployment rate of 5.3 per cent.[653]

The Committee has discussed above the evidence provided by a number of witnesses who opposed the abolition of de novo appeals that the capacity to reconsider the personal circumstances of an accused is a feature peculiar to an appeal by way of novo hearing. Moreover, the significant disparity between the personal circumstances of the prison population and those of the general population on such measures as education and employment underscores the importance of a strong commitment to the rehabilitative function of the criminal justice system.

In the Committee's view, the de novo appeal plays an important role in that rehabilitative function by providing a check that helps to ensure that sentencing is calibrated to account for a person's circumstances.

The Committee acknowledges the evidence provided by the Magistrates' Court that great care is exercised by magistrates in sentencing, but it has balanced that against the evidence that the time available to fully consider a case is not always sufficient. The Committee also recalls the evidence of Magistrate English that, despite the professionalism and diligence of the Victorian magistracy, it is not always possible for the personal circumstances of an accused to be fully considered in the Magistrates' Court.[654]

Remand

Prisoners on remand are those who have yet to be sentenced. They may be unconvicted prisoners awaiting a court hearing or trial, convicted prisoners awaiting sentencing, or persons awaiting deportation.[655]

At 30th June 2005 there were 5,133 unsentenced prisoners in Australian prisons — 20 per cent of the total prisoner population (the proportion was also 20 per cent in

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[651] Department of Justice, Victoria, *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004* (2005) 12.

[652] Australian Bureau of Statistics, *2001 Census Data: Victoria*, Basic Community Profile, B12.

[653] Australian Bureau of Statistics, *Labour Force Australia* (May 2006) 17.

[654] Evidence to the Committee, Melbourne, 14 February 2006, 87–8 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[655] Australian Bureau of Statistics, *Prisoners in Australia* (2005) 10.

2004).[656] The proportion of the total prison population on remand in Victoria as at 30th June 2005 was below the national average at 17.6 per cent.[657]

The Committee believes that the expression 'justice delayed is justice denied' is particularly relevant to the scenario of a person awaiting the hearing of a summary appeal while held on remand, especially if they are subsequently acquitted. The Committee is aware of the impact of such delay on the poor and on other groups who may already spend disproportionate amounts of time on remand, such as Aboriginal Australians and Torres Strait Islanders.

Ms Penny Armytage, Secretary to the Department of Justice, has commented on the vulnerability of people on remand:

> Our experience is that people on remand are particularly vulnerable and many are at high risk of suicide and self harm.[658]

As the Committee noted above in chapter three, the introduction of hearings on the transcript for conviction appeals in NSW has led to delay and increased time on remand for some appellants.

Dr Lyon of the Criminal Bar Association of Victoria illustrated the current situation for the Committee, highlighting the fact that there is often a disparity in the length of time spent on remand, depending on ability to pay for private legal representation:

> I was in the Magistrates' Court on Friday doing a bail application. I received my brief late the night before and had the opportunity to work it up. I had the experience to work it up and I had the focus of working up one case.
>
> One of the co accused was represented by the VLA duty lawyer who had 13 bail cases [and] pleas and he did not have the instruction or the wherewithal to do a bail application on that day. The difficulty was I got bail for my client and my client was the head of this supposed criminal ring. A solicitor was briefed for another; his client got off. The client who was represented by an experienced VLA solicitor but someone who had 13 cases is going up for bail on Wednesday so he languishes in custody all that time.[659]

Notably, the jurisdiction with the highest proportion of unsentenced prisoners of all the states and territories is South Australia. The Committee considers that a comparison

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[656] Australian Bureau of Statistics, *Prisoners in Australia* (2005) 10.

[657] Australian Bureau of Statistics, *Prisoners in Australia* (2005) 28. Only Western Australia and the Northern Territory had lower proportions than Victoria, at 16 per cent each.

[658] Ms Penny Armytage, Secretary, Department of Justice, speaking at the commissioning ceremony for the Metropolitan Remand Centre, quoted in Department of Justice, Victoria, *Justice Review*, vol 3, No. 2 (May 2006) 11.

[659] Evidence to the Committee, Melbourne, 13 February, 42 (Dr Greg Lyon, Secretary, Criminal Bar Association of Victoria).

with South Australia is useful here because, as noted in chapter three, it is the state in which both conviction and sentence appeals operate most like appeals based on error.

As 33.7 per cent of its prison population was on remand as at 30th June 2005,[660] South Australia's rate is nearly double that of Victoria's. The Committee has referred above to the significantly slower case processing times in South Australia's summary jurisdiction compared to that of Victoria and observes here that this may be a significant factor in explaining that state's high remand rate.

As the Australian Bureau of Statistics notes, the time spent on remand is influenced by a number of factors, but the time it takes for a case to come before a court is obviously central.[661] While the time spent on remand and the proportion of the prison population held on remand are separate measures, it seems likely that the former would be a major determinant of the latter.

As the Committee has noted above, it is difficult to demonstrate a clear causal relationship between the form of appeal that operates in South Australia and the slower processing of summary cases in that state. But, on the balance, the Committee is satisfied that such a link exists.[662]

The co-existence of an appeal that is restricted in practice to a demonstration of error with a significantly slower summary procedure is clearly consistent with the view of those witnesses who opposed the abolition of de novo appeals in Victoria on that very basis. The Committee is therefore satisfied as to the link not only between the form of appeal and the efficiency of summary proceedings at the first instance but also, albeit less directly, between the form of appeal and the duration and rates of remand.

Under-appeal

Dr Neal of the Victorian Bar Council told the Committee that the rate of error in the Magistrates' Court may in fact be significantly higher than the rate of appeal. Dr Neal was not able to provide statistics to support this view, referring to the rate of under-appeal as 'the dark figure', but he told the Committee that it was based on observation of the quality of legal representation in many Magistrates' Court hearings and he estimated that it may be significant.[663]

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[660] Australian Bureau of Statistics, *Prisoners in Australia* (2005) 28.

[661] Australian Bureau of Statistics, *Prisoners in Australia* (2005) 10. The ABS also identifies eligibility for bail and the availability of bail within the jurisdiction as factors in the time spent on remand.

[662] In repeating this finding the Committee does not suggest that the form of appeal in South Australia is the only cause of the slower case-processing times in that state's summary jurisdiction, but merely that it is likely to be one of the causes.

[663] Evidence to the Committee, Melbourne, 13 February, 40–2 (Dr David Neal, SC, Victorian Bar Council).

Ms Anna Radonic of Youthlaw also told the Committee that Youthlaw had advised a number of clients to appeal who had chosen not to do so:

> There have been a number of cases, probably at least a dozen cases, where we have advised our clients, young people, to appeal because it has been a harsh sentence — not a jail sentence, but still in the circumstances a harsh sentence. For instance, the young person has thought, “No, I’ve got a suspended jail sentence”, and their view is, “I’m not immediately in jail. I’ve got a suspended jail sentence. I’m not going to jail today. I’m not going back to court”. They do not have the understanding or maturity as to the impact of what a sentence is.[664]

Ms Radonic agreed that, in her seven or eight years of experience with Youthlaw, most clients had been accepting of the sentence imposed by the Magistrates’ Court but that in many cases this was because they did not fully appreciate the implications of their sentence and the difficulties they may have complying with it.

Ms Radonic cited two examples of clients who had been advised to appeal but chose not to do so:

> I think both had drug addictions, and their charges were burglaries and thefts. One of our clients had a mental health breakdown; the [Crisis Assessment and Treatment] team had seen her twice and she had not even attended her community based order. She got a [Community Based Order] initially for approximately 20 charges of burglary and theft. She followed the boyfriend, who had introduced her to heroin. She had had a perfectly clean record before then. She had not done anything on a community based order. One of her drug and alcohol workers had contacted corrections to say that she was currently an inpatient at a hospital and she could not comply with her order. She had had two admissions over six months. Her concentration was not on when she would start to get better and go to do work on a community based order. It was more, “I’m out, let’s cope with all the support services” that she was getting. She was then breached for non compliance. It was not for reoffending, it was for non compliance; she had not done anything on her order.
>
> We got legal aid and briefed a barrister. She received an eight month term of imprisonment suspended for two years. This was a young woman who had just turned 20 a couple of days before her court case. My advice to her over the phone a number of times or in writing was, “You really should consider appealing.” She was lucky enough not to get a conviction initially, but she is looking at an eight month sentence if she goes into Coles and steals a can of coke. She had no contemplation of that. I had spoken to a number of her co workers, and they had also advised her that she should consider appealing. But her view was, “I’m out. I was told I could go to jail. I’m too old for a youth training centre” — that is right; she had just turned 21 so she was too old for a youth training centre — “I’m not going to jail; I’m happy”. It did not matter that her mother …

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[664] Evidence to the Committee, Melbourne, 14 February, 56 (Ms Anna Radonic, Principal Lawyer, Youthlaw). Ms Radonic pointed out that breach of a suspended gaol sentence results in automatic imprisonment.

> her workers and her lawyer were advising her. This is unfortunate, and it is not really the fault of the young person; they just cannot look ahead.[665]

The second case cited by Ms Radonic involved a male client facing:

> many lesser charges — they were mainly of shop theft … He actually received an ICO, an intensive corrections order, which we felt he probably would have been unlikely to be able to comply with because of other issues that were going on. We recommended that he appeal and that maybe the thrust of the appeal would be that there be a [Community Based Order], where he would have more chance, just because of — I do not need to explain the differences with an ICO; it is much more intensive and just does not work with young people. He was under 20, so he was not even one of our older clients.[666]

Associate Professor Willis also told the Committee that he regularly sees clients who decide not to appeal despite the existence of good grounds:[667]

> First of all, there are clients who do not appeal. You can tell them. I did a case up in the country where in my opinion the magistrate was "Wrong, wrong, wrong", and I thought, "The defendant should appeal, but he is not going to" … [a] significant number of these people are intellectually handicapped, with mental illness problems. You would be surprised how many there are. I keep on being amazed at how many people you appear for who are functionally illiterate. They cannot read the stuff.[668]

The Committee acknowledges that, while the issue of under-appeal is relevant to the quality control of magistrates' decisions, it is clear that an individual who decides not to appeal cannot be said to be relying on the safety net of the de novo system. However, the Committee has noted above that an individual may face a variety of obstacles to lodging an appeal apart from the appeal system itself, such as time, money, uncertainty and a range of personal circumstances that may include vulnerability and disadvantage. In relation to the latter category, the Committee is particularly mindful of the examples provided by Ms Radonic of individuals whose decision not to appeal may have been at least partly attributable to drug addiction, youth or lack of life experience.

In this context, the Committee believes that, of the available alternatives, it is the de novo system that maximises an individual's capacity to appeal. Moreover, while the Committee has not been able to quantify the contribution of the de novo system to minimising the level of under-appeal, it considers that its potential in this regard should not be underestimated. It should also be recalled that the appeal system is important to individuals other than appellants because it has the potential to affect any

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[665] Evidence to the Committee, Melbourne, 14 February, 56–7 (Ms Anna Radonic, Principal Lawyer, Youthlaw).

[666] Ibid 57.

[667] Evidence to the Committee, Melbourne, 13 February, 50 (Associate Professor John Willis, School of Law, La Trobe University).

[668] Ibid.

member of society. As noted in the above discussion regarding the purpose of the appeal system, a fair appeal system is one that maximises the capacity of all persons to appeal, regardless of their particular advantages or disadvantages.

Finally, the issue of under-appeal may also suggest that, whatever the precise contribution of the de novo system to quality control, it is apparently insufficient to fully address the level of 'error' (for want of a better word) in the Magistrates' Court. In the Committee's view it would appear that, while the safety net provided by de novo appeals is not entirely sufficient, it remains very necessary.

CHAPTER FIVE — IMPACT ON THE CRIMINAL JUSTICE SYSTEM

> [I]n the budget allocation process the major pressure on the courts, like other parts of the public sector, is to increase throughput without increased resources. No doubt that can be achieved to some extent without compromising the performance of the function by qualitative, and not merely quantitative standards. There are however, limits which are difficult to define … some things take time, justice is one of them …[669]

Introduction

The Committee believes that the form of appeal in summary matters should be one that ensures the most efficient use of public resources possible in a criminal justice system dedicated to fairness. Of at least equal importance to the goal of efficiency is an appeal system that promotes the integrity of, and public confidence in, the criminal justice system. It is therefore crucial that the appeal system also reinforces the rule of law.

Witnesses who proposed the abolition of de novo appeals argued that the abolition of de novo appeals would promote the second of the above aims, and they made the central claim that such a change would enhance the integrity of the criminal justice system. The Committee addresses these arguments in the first part of this chapter.

In the second part of the chapter the Committee assesses the efficiency of the de novo system and its contribution to the efficiency of the criminal justice system as a whole. In this section the Committee considers whether abolishing de novo appeals would enable the appeal system, and the wider criminal justice system, to operate more efficiently and with less expense or whether existing efficiencies would be lost and summary justice would become more expensive.

Integrity

The quality of summary justice and the modern magistracy

As the Committee has noted in chapter four, all Victorian magistrates are now required to hold tertiary qualifications in law and to be admitted as a legal practitioner of an Australian court. This development, which dates from the 1980s, was cited as a justification for the abolition of de novo appeals by the following witnesses:

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[669] James Spigelman, Chief Justice, Supreme Court of New South Wales, 'Economic Rationalism and the Law', 14th Lionel Murphy Memorial Lecture, *University of NSW Law Journal* (2001) 200, 203–4, quoted in Brown et al, above n 505, 19.

- Superintendent Stephen Leane and Sergeant Kyle McDonald of Victoria Police;[670]
- Chief Magistrate Ian Gray of the Magistrates' Court of Victoria, who told the Committee:

> My view … is, that it is time to change the system, that the history and status of the court and the experience of those who are appointed to the court, the commonality between those qualifications and those of judges, the same for appointment and the same for dismissal and the thorough professionalisation of the court in recent years — in fact over the last 5, 10 or 15 years I think — does put it on a footing now where there ought to be a change from de novo;[671]

- Magistrate Maurice Gurvich;[672]
- The Director of Public Prosecutions (DPP), Mr Paul Coghlan QC;[673] and
- Ms Jennifer Taylor, who stated in her submission to the inquiry:

> the courts now known as the Magistrates' Courts have evolved from courts of somewhat "rough justice" to those whose arbiters are as fully qualified in a legal and professional sense as those in superior tribunals, and where the jurisdiction is now far-reaching. The changes have been most marked in the last decade or so.[674]

> given the enormous experience of the magistrates in relation to their particular jurisdiction as well as their legal training it could now be safely said that any mistakes could be properly picked up on appeal by way of review rather than de novo.[675]

These witnesses also argued that the continuation of the de novo system can be seen as perpetuating an outdated view within the community of summary justice as substandard justice.[676]

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[670] Evidence to Law Reform Committee, Parliament of Victoria ('the Committee'), Melbourne, 13 February 2006, 21–2 (Superintendent Stephen Leane, Victoria Police); Evidence to the Committee, Melbourne, 13 February 2006, 30 (Sergeant Kyle McDonald, Victoria Police).

[671] Evidence to the Committee, Melbourne, 14 February 2006, 81 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

[672] Evidence to the Committee, Melbourne, 14 February 2006, 81 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[673] Evidence to the Committee, Melbourne, 13 February 2006, 4 (Mr Paul Coghlan QC, Director of Public Prosecutions).

[674] Jennifer Taylor, *Submission No. 1*, 65.

[675] Ibid 67.

[676] See for example evidence to the Committee, Melbourne, 13 February 2006, 25 (Sergeant Kyle McDonald, Victoria Police).

Magistrate Gurvich told the Committee that the de novo system reduces the status of the court within the community and may detract from specific and general deterrence:

> The Magistrates' Court, it is submitted, should not be regarded as an ersatz court — that is, a substitute or imitation court. When magistrates are appointed they take an oath or affirmation of office to do equal justice to all. They act responsibly, with care, mindful of their responsibility in exercising judgment. It is clear that appeals de novo render their decisions to be of no consequence. They are irrelevant and meaningless. The court is rendered impotent in such cases.[677]
>
> Some magistrates find this impacts on their own self confidence. I doubt if there were no magistrate who, on being informed of an appeal verdict where this has happened, has not experienced some degree of surprise. There may well be an impact on specific and general deterrence.[678]

On the other hand, Justice Tim Smith of the Supreme Court of Victoria suggested that such a view may be a matter of perspective and may not be shared by the community or practitioners and judges outside the magistracy:

> Perspectives are tricky things, and I suppose you heard from me on a Supreme Court perspective. I cannot comment on the extent to which it could be demonstrated that the hearing in a Magistrates' Court is simply used as a rehearsal. I would be surprised if that were the case. … [t]hat may be their feeling about it. Whether people looking on would see it that way I do not know. I must say when I read that, it had not occurred to me that it would be seen that way.[679]

On balance, the Committee believes that the de novo system neither detracts from the status of the Magistrates' Court nor renders irrelevant those decisions that are appealed. As noted above, a number of witnesses opposed to the abolition of de novo appeals told the Committee that it is rare for appellants to proceed in the absence of an arguable case, a fact that is confirmed by the low rate of appeal. Moreover, to take the example of sentence appeals, the Committee also heard that an appellant is in practice required to argue why the original sentence should be changed.

The Committee also heard that such appeals often turn on the provision of evidence that was not available at the time of the original hearing, including evidence of changed circumstances. In the Committee's view, all of these matters are unrelated to the professionalism and status of the Magistrates' Court.

The Committee is particularly mindful of the comparatively low rate of appeal in summary matters and of the finding that ending de novo appeals — whether sentence

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[677] Evidence to the Committee, Melbourne, 14 February 2006, 82 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[678] Ibid 83–4.

[679] Evidence to the Committee, Melbourne, 6 March 2006, 104–5 (Justice Tim Smith, Supreme Court of Victoria).

appeals, conviction appeals or both — would significantly reduce that rate. As noted above, the rate of appeal in South Australia is almost negligible.

In this context, the Committee agrees with Justice Smith that:

> It is terribly important for the system that a reasonable system of appeals is available because frankly every judge and magistrate benefits from the reality that their decision could be reviewed. We need to know that what we are doing is subject to review. If we were in a situation where what we decided was not subject to any review, I think that would be a bad thing.[680]

The Committee concludes that summary justice in Victoria is not substandard justice and that the de novo system should not be seen as reflecting such a view. Rather, as the Committee found in chapter four, summary proceedings are qualitatively different from those in the higher levels of the court system. Proceedings in the Magistrates' Court are necessarily abbreviated and speedy in comparison to the higher courts because they must deal with a very high volume of matters within short time frames.

Due to these factors, summary proceedings carry an inherently greater risk of error and oversight. In the Committee's view, these features of the summary justice system cannot be entirely counterbalanced by a legally qualified magistracy.

The importance of finality and the anomaly of de novo appeals

> A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept "that it is better that ten guilty persons escape, than that one innocent suffer" may find its roots in these considerations.[681]

Superintendent Stephen Leane of Victoria Police told the Committee that a particular shortcoming of the present appeal system is that it offends against the principle of finality in judicial proceedings without adequate justification.[682] Victoria Police referred to the principle of *res judicata* as the basis for this proposition.

In the broadest terms, *res judicata*, which translates as 'a judicially decided matter' is the principle that a court's judgment is final and conclusive regarding the rights and duties of the parties involved.[683]

Witnesses who argued for the abolition of de novo appeals also emphasised that the system is anomalous compared to:

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[680] Ibid 105.

[681] *R v Carroll* [2002] HCA 55 [21] (Gleeson CJ and Hayne J), (reference omitted).

[682] Evidence to Law Reform Committee, Parliament of Victoria ('the Committee'), Melbourne, 13 February 2006, 22 (Superintendent Stephen Leane, Victoria Police). See also Victoria Police, *Submission No. 10*, 2.

[683] *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998), 378.

- appeals from higher levels of the criminal justice system;[684]
- the prosecution's appeal rights in summary matters;[685] and
- appeals in the civil jurisdiction.[686]

These witnesses highlighted the fact that appeals in each of the above require the demonstration of error and therefore place a greater value on the finality of judicial proceedings.[687]

The Committee deals with each of the above in turn.

The argument that de novo appeal is anomalous compared to appeals from higher levels of the criminal justice system was not contested. The response to this point by witnesses who opposed the abolition of de novo appeals was that de novo appeal is necessarily anomalous in order to provide a safety net both for appellants and for magistrates and practitioners in a jurisdiction that is unique for the speed and volume with which it operates.

The argument that an individual's right to a de novo appeal is anomalous compared to the prosecution's right of appeal effectively applies only to the question of conviction since the prosecution is only limited to a claim of error when appealing a decision to acquit the accused.[688] Notably, the prosecution has the same right as an individual to a de novo hearing when appealing against the sentence imposed in the Magistrates' Court.[689] The only restriction on such an appeal is that the DPP must be satisfied that the appeal is 'in the public interest'.

Magistrate Gurvich explained the argument that de novo appeals are anomalous compared to appeals in civil matters, which rely on the demonstration of error:

> Let me refer to what I call the civil case anomaly. The law in civil cases is no less complex than in criminal cases. In many respects it may be more complex. It is a large part of the magistrate's work, and yet there is no right of appeal de novo. Our jurisdiction is now $100,000. Counterclaims are often involved. Our jurisdiction is unlimited if the parties consent.

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[684] Victoria Police, *Submission No. 10*, 1–2, 4.

[685] Ibid 5.

[686] Evidence to the Committee, Melbourne, 14 February 2006, 83 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[687] See for example Victoria Police, *Submission No. 10*, 1–2, 4, 5; Evidence to the Committee, Melbourne, 14 February 2006, 83 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[688] That is, an appeal on a question of law under s 92 of the *Magistrates' Court Act 1989* or an Order to Review under O 56 of the *Supreme Court (General Civil Procedure) Rules 1996*.

[689] See *Magistrates' Court Act 1989* ss 84, 85 and 86.

> The consequences to the litigants of our decisions can be far reaching. Is it appropriate that there is no right of appeal de novo from a civil judgment, but there is in a summary offence? Not all criminal penalties involve liberty of the subject; most involve financial penalties. Why is it that the law permits de novo appeals in the criminal sphere only? It cannot be said that we are capable of getting it right in civil cases but not in criminal cases. In civil cases appeal is to a single judge of the Supreme Court. It must be based on error of law. This has always been the case.[690]

However, as Chief Magistrate Gray acknowledged, a significantly greater amount of time is spent on a typical civil matter in the Magistrates' Court:

> Inevitably and almost invariably civil matters take longer than the average criminal plea. So there is your first starting point. A civil contest is always longer. A crash and bash, a simple driving accident motor vehicle insurance claim might be over in 1, 2 or 3 hours — and many are. Anything more complex than that of a commercial nature will take between half a day to two or three days.[691]

The Committee also notes that a civil case in the Magistrates' Court will invariably involve a contest, whereas the Committee heard that between 95 per cent and 98 per cent of criminal matters are uncontested.

As the Committee also noted above, this figure may reflect in part the pressures faced by an accused to plead guilty — in such cases, there simply may not be an error for the accused to point to on appeal.

Finally, the Committee notes that an accused who consents to a summary contest for an indictable matter effectively gives up the right to a jury trial. In summary, the Committee does not consider that the procedures for dealing with civil and criminal matters are comparable.

The Committee turns now to the argument that the de novo system offends against the principle of finality without adequate justification.

The Committee notes that, in the criminal jurisdiction, the principle of finality has historically received greater weight in relation to prosecution by the state than in relation to appeals by the citizen.

This is illustrated by the principle against double jeopardy: A person faces double jeopardy if placed in danger of being convicted of the same crime for the same conduct more than once.[692] The principle is recognised both at common law and in

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[690] Evidence to the Committee, Melbourne, 14 February 2006, 83 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[691] Evidence to the Committee, Melbourne, 14 February 2006, 95 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria.

[692] *Butterworths Australian Criminal Law Dictionary* (1997) 68.

legislation, and an important aspect of it is the limitation on the power of the Crown to appeal against an acquittal.[693]

The rationale for the double jeopardy principle was expressed in *R v Carroll* by McHugh J in the following terms:

> It is a fundamental rule of the criminal law "that no man is to be brought into jeopardy of his life, more than once, for the same offence". If the prosecution attempts to do so, the accused may plead that he has already been convicted (*autrefois convict*) or acquitted (*autrefois acquit*) of the same matter. The rule is an aspect or application of the principle of double jeopardy whose "main rationale ... is that it prevents the unwarranted harassment of the accused by multiple prosecutions". Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system reinforce this rationale. Judicial determinations need to be final, binding and conclusive if the determinations of courts are to retain public confidence. Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct. As Lord Halsbury LC said in *Reichel v Magrath*, "it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." In addition, the double jeopardy principle "conserves judicial resources and court facilities".[694]

The primary purpose of the principle of finality in criminal proceedings is to protect the citizen from double jeopardy or an abuse of process. The Committee acknowledges that a secondary purpose of finality in criminal proceedings is that it 'conserves judicial resources and court facilities', as noted above by McHugh J.

However, the precedence of the former purpose is demonstrated by the asymmetry between the appeal rights of the accused and the state at each level of the criminal justice system. Importantly, the protection against double jeopardy applies equally in relation to summary and indictable proceedings.[695]

Finally, the Committee notes that the principle of *res judicata* is generally regarded as having a narrower application in criminal proceedings than in civil proceedings. In criminal cases, *res judicata* is an extension of the protection against double jeopardy and applies to prevent the prosecution from relying on evidence that would only be relevant if the accused were assumed to be guilty of an offence of which he or she has previously been acquitted.[696]

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[693] *Butterworths Australian Criminal Law Dictionary* (1997) 19.

[694] *R v Carroll* [2002] HCA 55, [128] (McHugh J), (references omitted).

[695] See *R v Gamble; Ex parte Cleary* [1947] VLR 491, cited in L Waller and C R Williams, *Criminal Law: Texts and Cases* (10th ed, 2005) 25.

[696] *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458; *Garrett v The Queen* (1977) 139 CLR 437, 18 ALR 237, 52 ALJR 206; *R v Storey* (1978) 140 CLR 364, 22 ALR 47, 52 ALJR 737, cited in *Halsbury's Laws of Australia* (17 October 2006) [130–45].

As Professor Fox highlights, the principle of *res judicata* in the context of criminal law serves to ensure that the parties accept the finality of an acquittal rather than the finality of the decision per se.[697] The principle behind allowing a person to appeal from a summary conviction or sentence (and from conviction and sentence for an indictable offence) is clearly the converse of the general principle that there should be finality in criminal prosecution.

Further evidence for the conclusion that the law does not place the same level of importance on the finality of criminal proceedings as it does on the finality of civil proceedings is provided by the observation that the 'companion doctrine' of issue estoppel in civil proceedings does not apply in criminal cases.[698]

Victoria Police noted that, while an appeal operates as an exception to the broad principle of *res judicata*, all other forms of appeal from Victorian courts are on the basis of 'some form of error', suggesting that an exception to the principle is only justified where there is an error.

Strictly speaking, *res judicata* operates in civil proceedings as a bar to a 'subsequent suit for the same cause of action',[699] whereas in criminal proceedings it operates to protect the accused from being tried again on evidence that would only be relevant if he or she were assumed to be guilty of an offence of which he or she had previously been acquitted.

Returning to the broader question of finality, the Committee recognises that it is legitimate to ask why there should not be the same degree of finality in summary criminal proceedings as in other matters. In other words, why should the decision of the Magistrates' Court not be treated as final in the absence of error?

In the Committee's view, the answer is that de novo appeal in the summary jurisdiction reflects the striking of a balance between finality on the one hand and the rights and liberties of the citizen on the other. As the Committee discussed in chapter four, the speed and volume of summary procedure is such that a more limited application of the principle of finality is required to strike that balance than in higher levels of the criminal jurisdiction.

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[697] Richard Fox, *Victorian Criminal Procedure: State and Federal Law*, (12th ed, 2005), 259, citing *R v Carroll* [2002] HCA 55.

[698] Fox, above n 36, 259, citing *Rogers v The Queen* [1994] HCA 42, (1994) 181 CLR 251. Relevantly, issue estoppel applies where a particular matter has been determined by a court so that a party attempting to raise the same issue in later court proceedings is barred (or estopped) from doing so: *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998), 244. Issue estoppel also applies where a court has directly determined a question of law or fact with the effect that it has been finally disposed of and cannot be raised again by the parties before that court: *Halsbury's*, above n 16, [130–45], [195–2460]—[195–2495]; Fox, above n 36, 259.

[699] *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998), 378.

A further aspect of the finality argument is that de novo appeals simply duplicate proceedings in the Magistrates' Court. A number of witnesses illustrated this argument by suggesting that, in many cases, a de novo appeal serves no other purpose than to give appellants a 'second bite of the cherry'.[700] The central argument is that the system supports, or arguably encourages, appeals that have no real merit.

As the Director of Public Prosecutions told the Committee:

> The appellate process of its nature ought to be that you have really got to have something to complain about, just not that you are allowed to come and ask for a second opinion. If it is heard and it is a fair and a reasonably just result, why do you, [have the chance to ask for a second opinion] as against some proper complaint, except in a system that is even beyond Rolls Royce now? We understood why we had that [previously] because we had untrained people hearing cases, but we do not have that any more.[701]

However, the 'second bite of the cherry' argument was rejected by a number of those witnesses who opposed the abolition of de novo appeals. For example, Associate Professor John Willis told the Committee that the majority of sentence appeals that proceed to a hearing are those that have been judged by the legal profession to be outside the normal range for that type of offence.[702] The argument that appeals are effectively screened on the basis of merit before being lodged was echoed by the Criminal Defence Lawyers Association (CDLA):

> There is a strong filtering process that occurs with experienced practitioners as to whether an appeal has merit. That would seem to be confirmed by what we understand is the high success rate of appeals.[703]

Mr Michael McNamara of the Law Institute of Victoria also made this point:

> the tone reflected in, "Just have a second go" is that you are just having a second go. But the reality is — and it is proven — that it is only 2 per cent. We do not just give all of these a second go — it is not just open slather. Very few go on a second time to have another go, if you want to use that language, because of the costs, the time and everything else involved. All those costs and so on have stopped ridiculous appeals.

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[700] See for example evidence to the Committee, Melbourne, 13 February 2006, 22 (Superintendent Stephen Leane, Victoria Police); Evidence to the Committee, Melbourne, 13 February 2006, 30 (Sergeant Kyle McDonald, Victoria Police); Evidence to the Committee, Melbourne, 14 February 2006, 84 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria)*;* Evidence to the Committee, Sydney, 10 April 2006, 112 (Judge Derek Price, Chief Magistrate, Local Court of New South Wales); Evidence to the Committee, Sydney, 10 April 2006, 123–4 (Mr Michael Day, Managing Lawyer, Office of the Director of Public Prosecutions, New South Wales).

[701] Evidence to the Committee, Melbourne, 13 February 2006, 11 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[702] Evidence to the Committee, Melbourne, 13 February 2006, 49 (Associate Professor John Willis, School of Law, La Trobe University).

[703] Criminal Defence Lawyers Association, *Submission No. 3*, 3.

> I am sure there are a few and they often involve people appearing in person, but the percentages of people just having a go for the sake of it are small. It is usually for a very good reason, otherwise they cannot afford it. Legal aid does not lightly let people do it, and people's pockets will not let them privately pay for it, if there is no good reason.[704]

On balance, the Committee was persuaded that most appeals do not simply represent a 'second bite of the cherry'. The Committee agrees that the 'second bite' argument is contradicted by the low rate of appeal, as well as by the proportion of appeals that are abandoned or struck out due to non-appearance, which is currently around one quarter of lodgements.[705]

Accordingly, the Committee agrees with those witnesses who argued that the de novo rehearing does require, in practical terms, a demonstration of error in the sense of a wrongful conviction or an excessive sentence. Moreover, the Committee notes that, while the de novo system is not concerned with the correction of errors that may or may not have been made by the original court, it is nevertheless particularly suited to the efficient correction of any errors that may arise from the limitations of summary proceedings in the Magistrates' Court, such as:

- insufficient time for the presentation or consideration of all relevant evidence;
- insufficient time to fully consider the circumstances of the accused, including the possibility that a person may be vulnerable and/or disadvantaged; and
- the general absence of written reasons for the decision of the Magistrates' Court, which might otherwise facilitate an appeal based on error (and, as the Committee has noted above, imposing a requirement to give reasons would significantly slow proceedings in the Magistrates' Court).

In summary, the Committee agrees with the general point made by Victoria Police that the decisions of judges and magistrates should provide the appropriate degree of finality. However, the Committee also recognises that the nature of summary jurisdiction has historically provided the need for an exception to that principle by way of de novo hearing.

As the Committee discussed in chapter two, summary justice was described at the time of its origins in England as an 'extraordinary jurisdiction' because the entire process was presided over by an officer of the state rather than by a jury and, in more recent times, because of the absence of many legal formalities, which allows the court to hear a much greater number of cases. In the Committee's view, these characteristics remain a defining point of difference between the summary and non-

[704] Evidence to the Committee, Melbourne, 13 February 2006, 17 (Mr Michael McNamara, Deputy Chair, Law Institute of Victoria).

[705] The issue of abandoned appeals is discussed in detail in chapter two.

summary jurisdictions, which justifies the relatively greater departure from the principle of finality in the summary jurisdiction.

Reasons for decision and the doctrine of precedent

> [I]t is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his private judgment, but according to the known laws of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[706]

> The law is not open to re-argument in every case; indeed in the lower courts it is not seriously open to re-argument in *any* case, and the cases in which it is possible to mount even a half-respectable argument as to distinguishing or "re-interpreting" an earlier case are really quite rare.[707]
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> (emphasis in the original)

Victoria Police and Magistrate Gurvich cited the general absence of detailed written reasons for the County Court's decisions on appeal as a particular shortcoming of the de novo system;[708] accordingly, the Court does not contribute to the creation of legal precedent. As a result, magistrates are left with little guidance, particularly when the County Court reaches a different decision.

Victoria Police cited the importance of reasons for the decision of the appeal court as a benefit of its proposal that appeals be heard by the Supreme Court:

> Superior courts deliver systematically better recorded and reported decisions that are binding over lower courts. This would provide better supervision and direction to judicial officers in those courts and would be part of ongoing legal training for Magistrates'.[709]

However, Victoria Police also acknowledged the higher costs to appellants of having to appeal to the Supreme Court and agreed that its proposed changes to appeals —

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[706] Blackstone, *Commentaries on the Laws of England*, vol I, Professional Books, Abingdon (1982 ed), 70, quoted in A MacAdam and J Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) 16.

[707] MacAdam, above n 706, 29.

[708] The Committee considers the separate issue of reasons for the decisions of the Magistrates' Court in the section on efficiency below. In this section the Committee is concerned solely with the question of reasons for the decisions of the County Court on appeal.

[709] Evidence to the Committee, Melbourne, 13 February 2006, 23 (Superintendent Stephen Leane, Victoria Police).

including the production of reasons — would work equally well if appeals were heard in the County Court.[710]

The absence of reasons for the County Court's decision on appeal was also identified as a problem by Magistrate Gurvich:

> The majority of magistrates in the committee which prepared the original paper think there is a perception in the community that magistrates make errors of judgment when County Court judges determine matters differently on appeal de novo. Sometimes penalties are increased but this is relatively rare. The reason for the differences — often a tinkering or modification in penalty — are not explained, and the judges have no obligation in this regard. This may well have an impact on community confidence in our court.[711]

Magistrate Gurvich also told the Committee that the absence of County Court reasons on appeal has an adverse impact on the confidence of some magistrates and on the goal of deterrence, as noted earlier in the chapter. He continued:

> We think this is aggravated in regional areas where there tends to be wider reporting of court cases. A degree of cynicism creeps in as well.[712]

On the other hand, Judge Elizabeth Curtain of the County Court emphasised that de novo appeals do not involve the 'correction' of errors made in the Magistrates' Court:

> Because it is a hearing de novo we are not, strictly speaking, looking at the correctness of the magistrate's decision. We do not sit there and say that it [the sentence imposed] is too much or too little; we impose our own.[713]

Discussion

The concern raised by Victoria Police and Magistrate Gurvich is as much a product of the court hierarchy as it is of the de novo appeal. In simple terms, it is the role of a superior court within a judicial hierarchy to make, and authoritatively interpret, legal precedent. In the Victorian criminal justice system, that role is fulfilled by the Supreme Court and the High Court of Australia. It is also a general legal principle that a court is bound by the decisions of courts that sit above it in the same hierarchy.[714] There is therefore no doubt that both the Magistrates' Court and the County Court are bound

[710] Ibid 29.

[711] Evidence to the Committee, Melbourne, 14 February 2006, 83 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[712] Ibid 83–4.

[713] Evidence to the Committee, Melbourne, 26 April 2006, 5 (Judge Elizabeth Curtain, County Court of Victoria).

[714] MacAdam, above n 706, 72

by precedent made in the Supreme Court and that all three are bound by the decisions of the High Court.[715]

However, the general principle that a court must follow the decision of a superior court within the same hierarchy raises two questions. First, when is a court to be regarded as superior? Second, when is a court correctly seen as being in the same hierarchy as a court beneath it?[716]

Turning to the first of the above questions, the Committee notes that the County Court and the Magistrates' Court are both inferior courts — the superior courts comprise the Supreme Court, the Federal Court, the Family Court and the High Court.[717]

It follows that, when deciding summary matters on appeal, the County Court is acting as an inferior court.[718] In other words, it is only when a summary matter is appealed from the Magistrates' Court to the Supreme Court on a point of law that the potential for the creation of precedent arises.

Turning to the second of the above questions, the Committee notes the principle that a court is not bound by the decision of a higher court when that decision is made outside the 'framework of the appellate structure' of which the lower court is a part.[719] The Committee notes that this principle applies to courts that are not part of the same 'appellate structure' but that, in the case of summary matters, an appeal does lie directly from the Magistrates' Court to the County Court.

In one sense, therefore, the Magistrates' Court and the County Court do sit within the same appellate structure. However, in another, arguably overriding sense, these courts are not part of the same appellate structure because there is no appeal on a point of law from the Magistrates' Court to the County Court. To appreciate this point, it must be remembered that a de novo hearing is not, strictly speaking, an appeal but

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[715] See for example the High Court decision of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 80 ALR 574, cited in MacAdam, above n 706, 73–4. As to the latter point, see however the discussion below regarding decisions of a superior court that is not within the same appellate structure.

[716] MacAdam, above n 706, 76.

[717] Ibid 79.

[718] The Committee notes here that a historical connection apparently exists between the inferior/superior court distinction on the one hand and whether a court was originally a court of record on the other hand. Although both the Magistrates' and County Courts are today considered courts of record — ie courts whose acts and proceedings are permanently recorded — neither Petty nor General/Quarter Sessions were originally courts of record: See Walker, *Oxford Companion to Law*, 307, 1198; Roger Bird, *Osborn's Concise Law Dictionary* (7th ed, 1983) 100.

[719] *Bone v Commissioner of Stamp Duties* [1972] 2 NSWLR 651, 655 (Jacobs P), quoted in MacAdam, above n 706, 77. As MacAdam and Pyke note, a similar approach has been followed in other cases: *Appleton Papers Inc v Tomasetti Paper Pty Ltd* [1983] 3 NSWLR 208, 219; *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499; *Perron Investments Pty Ltd v Deputy Commissioner of Taxation* (WA) (1989) 90 ALR 1.

a hearing anew. The Committee recalls here the observation of Judge Curtain quoted above.

The specific question as to whether the Magistrates' Court is bound by decisions of the County Court has also been answered in the negative. As Hansen J found in the Victorian Supreme Court decision of *Whittaker v Delmina Pty Ltd*:

> I should say something about the conclusion of the Magistrate that he should follow the opinion of Judge Ross for the sake of consistency and certainty. Although the County Court is above the Magistrates' Court in the hierarchy of courts in this State, a Magistrate is not bound by a decision of a judge of the County Court. Indeed the Magistrate in this case acknowledged that fact. Nevertheless it is proper for a Magistrate to have a decision of the County Court drawn to his attention and to consider it. In *Valentine v. Eid* (1992) 27 NSWLR 615 Grove J considered the position as between the Local Court and the District Court in New South Wales, and at 622 stated that for reasons of comity it is proper that a magistrate not depart from decisions of the District Court unless after earnest consideration and for good reason he or she became convinced that the decision was wrong.
>
> I agree with that expression of view in relation to the Magistrates' Court and the County Court. Stripped to its essentials it means, in my view, that if a Magistrate, after appropriate consideration, concludes that a decision of a County Court judge is wrong because it is based on erroneous reasoning he or she should not follow the decision. It is important to remember that judges of the County Court have a heavy workload which inevitably places an emphasis on expedition and turnover of the many cases before it with limited scope to reserve a matter for judgment and adequate time for reflection and consideration in formulating reasons for decision. Further, many decisions are given by the judges in the County Court and if a party is to rely on a decision of a judge of the County Court in a hearing in the Magistrates' Court, care will be required to ensure that other, and perhaps conflicting, decisions are provided.[720]

To summarise, the County Court is not required to provide detailed written reasons for decision on appeal for the same reason that the Magistrates' Court is not required to do so — because both are inferior courts and it is the function of a superior court deciding questions of law on appeal to give such reasons.

As suggested by Hansen J in the passage above, it is important to recall that there is also a practical basis for the absence of written reasons for County Court appeals. In an important sense, this basis is essentially the same as for the Magistrates' Court. Magistrates' Court cases and de novo appeals in the County Court are heard summarily — without the legal formalities that are observed for more serious cases — and are generally decided on an extempore basis.

Moreover, as the Committee noted in the previous chapter, summary decisions generally turn on the facts; where the law is a feature of the decision, its application to

[720] *Whittaker v Delmina Pty Ltd* [1998] VSC 175 (18 December 1998), [17–18].

the facts is generally straightforward and does not warrant detailed reasons.[721] In the Committee's view, a requirement that the County Court produce written reasons for its decisions would not only fail to result in the creation of precedent, it would also significantly reduce the efficiency of the court in the same way that an identical requirement would reduce the efficiency of the Magistrates' Court.

In conclusion, the Committee finds that elevating decisions of the County Court in summary appeals to the status of precedent by requiring the production of written reasons would significantly reduce the capacity of both the County Court and the Magistrates' Court to deal with their existing case loads. In relation to the latter point, the Committee notes that the relatively peripheral role of precedent in the criminal jurisdiction of the Magistrates' Court was cited as one reason for its efficiency.

Potential for abuse of process by appellants

Victoria Police told the Committee that it was concerned about the use, and potential misuse, of evidence in de novo appeals on two grounds. First, Victoria Police noted the potential for an appellant to present a different version of the facts in a de novo hearing to those given before the original court, effectively allowing perjury to go unchecked.[722] Second, Victoria Police noted that the de novo hearing provides both parties to the appeal with an opportunity to improve or refine their evidence and questioned whether this was a legitimate use of public funds, particularly in defendant appeals.[723]

Regarding the first of these concerns here, Victoria Police advised the Committee that:

> Practical problems exist in the current system — for example, the Magistrates' Court does not routinely produce transcripts. Consequently there is no automatic verification of the evidence relied on during appeal and that causes some delay if there is a need to wait until the transcript becomes available. It is usually not possible to identify whether the appellant is providing a different version of events on appeal.[724]

Victoria Police identified this absence of a mechanism for automatically verifying the evidence given by the appellant to the County Court with the evidence given to the Magistrates' Court as a potential source of unmeritorious and vexatious appeals.[725]

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[721] However, the Committee notes that, as in the Magistrates' Court, the County Court is not prohibited from producing detailed written reasons and may choose to do so in particular cases.

[722] Evidence to the Committee, Melbourne, 13 February 2006, 29 (Sergeant Kyle McDonald, Victoria Police).

[723] Ibid 30.

[724] Ibid 22.

[725] Ibid.

Victoria Police stated, however, that there was no data available to confirm the rate at which this is occurring at the current time, or indeed whether it is occurring.[726]

Victoria Police also noted that the provision of a different version of events on appeal was now less likely since the introduction of the full recording of magistrates' decisions.[727] Nevertheless, Victoria Police was concerned about this potential for abuse in the system of appeal. Victoria Police also noted that the potential is greatest where an appeal is lodged out of time[728] because audio tapes of proceedings in the Magistrates' Court are retained for only three months and there have been occasions when the tapes could no longer be found for such appeals.[729] In such cases, it is impossible to produce a transcript.

The Committee notes that when an appellant gives the appeal court a different version of events it will not necessarily represent an abuse of the justice system. An appellant may simply wish to clarify or expand on earlier evidence or to exercise the right to change his or her plea. However, the Committee understands the central argument to be that there is the potential for appellants to replace a truthful testimony at the Magistrates' Court with an untruthful testimony at the County Court. The Committee agrees with Victoria Police that the difficulty of verifying consistency between the evidence given to the Magistrates' and the County Courts represents a serious issue.

A related matter, which the Committee noted in chapter two, is the appeal abandonment rate: the County Court observed in previous years that a significant proportion of abandoned appeals were 'unmeritorious' and 'frivolous'.[730]

In the Committee's view, the potential for the abuse identified by Victoria Police is an avoidable feature of the appeal de novo. The Committee heard from Victoria Police that the transcript of evidence from the Magistrates' Court can be used to put prior inconsistencies to the appellant during the hearing. The Committee considers that ending de novo appeals would not provide a solution to the problems cited by Victoria Police. Instead, the Committee considers that it would be more appropriate to improve the procedures for retaining the transcripts of the Magistrates' Court.

The Committee is concerned by the evidence of Victoria Police that, on occasion, audio tapes of proceedings in the Magistrates' Court cannot be located, despite the

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[726] Evidence to the Committee, Melbourne, 13 February 2006, 29 (Superintendent Stephen Leane, Victoria Police).

[727] Ibid.

[728] An appeal as of right must be lodged within 30 days; appeals lodged after this period are heard subject to the court's leave: *Magistrates' Court Act 1989* sch 6, cl 1.

[729] Evidence to the Committee, Melbourne, 13 February 2006, 29 (Sergeant Kyle McDonald, Victoria Police).

[730] See for example County Court of Victoria, *Annual Report* (1999–2000) 19–20. However, as the Committee found in chapter two, appellants may decide to abandon an appeal for a range of legitimate and understandable reasons.

requirement that they be retained for three months. The Committee recommends that such tapes be kept for a longer period of time, given that appeals out of time are not uncommon.

Recommendation 3. The Committee recommends that audio tapes of the proceedings in the Magistrates' Court be retained for six months.

The Committee turns now to the second concern noted by Victoria Police regarding the consistency of evidence between the Magistrates' Court and the County Court.

As noted above, Victoria Police agreed that the de novo hearing provides both parties to the appeal with an opportunity to improve or refine their evidence and questioned whether this is an appropriate use of public funds:

> I think there is the potential for that to occur on both sides. From our perspective in practice, because we have different prosecuting agencies in the Magistrates' and County courts, it happens rarely, if ever, and I suspect it probably happens rarely with the defendant who becomes the appellant. It is not so much the case of a suggestion that people have the opportunity to improve their evidence or to refine it, although no doubt any practitioner worth his or her salt would make their best effort to present the case in a good light on the second occasion.
>
> It is the theoretical concept that the system allows you to have two bites of the cherry — in a system where, aside from your own case, the remainder of the system is funded by the public purse — for no apparent reason other than you would like to have that second bite of the cherry.[731]

On the other hand, the Committee heard from Chief Magistrate Gray that:

> The norm is most lawyers in our court put all they can to us in each case because they know that the prospect of an appeal, given the tiny numbers of appeals, is not likely. Cases are run as the first and only crack at it in most cases. For sure there is the safety net of the appeal but the tiny numbers — now less than 2 per cent — make it very clear that lawyers are not really running this as a dry run in the Magistrates' Court with recourse to the County Court as a fall back in a routine sense.[732]

The Committee notes that this concern is about the appropriate use, rather than the misuse, of evidence. Moreover, a central feature of the adversarial system of criminal justice is that it allows both parties discretion in the emphasis placed on particular evidence. The Committee notes that it would only be possible to entirely prevent cases from being differently constructed, and evidence from being differently presented, in an appeal based on error.

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[731] Evidence to the Committee, Melbourne, 13 February 2006, 30 (Sergeant Kyle McDonald, Victoria Police).

[732] Evidence to the Committee, Melbourne, 14 February 2006, 88–9 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

However, the Committee has concluded in the previous chapter that appeals on that basis would remove an important safety net for appellants. In addition, an appeal based on error contains only very limited opportunity for the reconsideration of evidence. Given the evidence provided to the Committee about the speed and volume of cases in the Magistrates' Court, the Committee considers that the complete removal of the appellant's capacity to address the evidence a second time in an appeal would not strike the proper balance between access to justice and the appropriate expenditure of public funds.

The Committee notes that where an appellant's legal representatives put different arguments and material to the court on appeal it will not necessarily mean that they held that material in reserve at the time of the hearing in the Magistrates' Court — it may just as readily be due to the additional time that the lawyer has had to consider the case.

A similar effect may explain the adoption of a fresh approach in an appeal where the appellant is represented by new counsel — as Justice Kirby has noted in the context of the High Court:

> Commonly, new counsel are retained on the appeal. They sometimes see and argue points that were not taken at the trial. Rarely have I thought that this was because trial counsel saw a winning point of law or evidence and left it in reserve for the appeal. Generally, such divergencies arise out of nothing more than the attention of different minds, sometimes with different skills.[733]

Miscarriages and sentencing consistency

The Committee will not repeat the arguments that it outlined regarding the impact of ending de novo appeals on miscarriages of justice and sentence appeals in chapter four. The Committee recalls those issues here purely to emphasise that both have significance beyond their impact in an individual case. Both are clearly important issues of principle for the integrity of the criminal justice system and for the maintenance of public confidence in that system. In the Committee's view, both are issues of significant importance to the maintenance of the rule of law.

In reaching this conclusion, the Committee draws again on the broad meaning of the rule of law as representing the principles of certainty,[734] generality[735] and equality.[736]

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[733] Michael Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?' (2002) 23 *Australian Bar Review* 16.

[734] Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 *Macquarie Law Journal* 137, citing Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.

[735] Stewart, above n 734, citing Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law', in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 5.

[736] Ibid, citing Murray Gleeson, *The Rule of Law and the Constitution* (2000) 62.

The Committee believes that an appeal system that is consistent with the principle of equality is one that attempts to ensure that every person has an equal opportunity to appeal, regardless of their financial means or other personal circumstances.

Sentencing consistency

> sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[737]
>
> Unless a statute or some other law requires the contrary, sentencing of offenders always involves consideration both of matters relevant to the offence and matters relevant to the offender. In Canada, these are commonly called "offence factors" and " 'offender' considerations". In Australia, they are sometimes described (inaptly in my view) as the "objective" and "subjective" considerations.[738]
>
> A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law".[739]

The Committee notes that, while public concern regarding the sentence imposed in a particular case is likely to focus solely on the offence committed and on the resulting penalty, there are a number of other factors that may be relevant to the sentence that a person receives in a particular case.

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[737] *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476–7 (Mason CJ, Brennan, Dawson and Toohey JJ).

[738] *Ryan v R* [2001] HCA 21 (3 May 2001), 110 (Kirby J), citing *R v Stuckless* (1998) 17 CR (5th) 330, 339 (Abella JA).

[739] *Ryan v R* [2001] HCA 21 (3 May 2001), 118 (Kirby J), quoting *R v M* (CA) [1996] 1 SCR 500, 558 (Lamer CJ). Justice Kirby went on to note that in cases of offences against children, as in *Ryan*, which involve infringements of '… the fundamental human rights of immature, dependent and vulnerable persons, punishment also has an obvious purpose of reinforcing the standards which society expects of its members'.

As Brennan J highlighted in the 1985 High Court decision of *He Kaw Teh*:

> Criminal responsibility depends not only upon a person's act or omission but also upon the circumstances in which the acts done or the omission made, usually upon his state of mind at that time and sometimes upon the result of his act or omission.[740]

In this section the Committee considers the broader implications for the administration of justice of sentencing consistency and the interplay between sentencing and community views.

On the question of sentencing consistency, the Committee heard from Chief Magistrate Gray that there is some variation in the sentences imposed by Victorian magistrates. Chief Magistrate Gray told the Committee that a minority of magistrates impose more severe or more lenient sentences at either end of a spectrum but that the majority adopt a similar approach:

> There is obviously a variety within the court. Some people will describe others as idiosyncratic; some people will use other adjectives … [such as b]iased. Some people will say there are 2, 3, 5 or 10 magistrates who are outside the general range of sentencing within the court. That is true. There are magistrates who represent extremes of a spectrum; that is true. Some are more severe; some are more lenient. It happens in all courts. It certainly happens in the County Court. So the observation that they are idiosyncratic is an understandable word to use colloquially, but the best way to describe this is that across the spectrum there are an enormous number who probably gather around the middle of the range, if you like, in sentencing disposition, and some at each end of the spectrum.[741]

Chief Magistrate Gray emphasised the effectiveness of the judicial training undertaken by Victorian magistrates and of the Judicial Officers Information Network — an electronic database of legal information provided to all Victorian judicial officers by the Judicial College of Victoria — in promoting consistency in sentencing.

Chief Magistrate Gray acknowledged that, while such developments had improved the capacity for sentencing consistency, room for improvement remained:

> If you talk about quality control, which we do not in the sense that you mean it, of course, but in terms of professional development a number of things are happening. We do an enormous amount of professional development on sentencing, and part of that discussion which we do several times a year in groups, small and large, is to compare what sentences we give, and we do that across a range of areas; there is no doubt about that. Sometimes it is very surprising just where somebody might be on a particular charge and there is no doubt about that either. But with the professional development resources we now have the advent of JOIN, which is this Judicial Officers Information Network, where one can now go and see all the most recent

[740] *He Kaw Teh v The Queen*, A Crim R 203, 233 (Brennan J).

[741] Evidence to the Committee, Melbourne, 14 February 2006, 92 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

> sentences applied by judges in all the superior courts, on burglary, theft and all manner of things, and you can punch in age, gender, number of prior convictions, homeless, mentally ill and all those other things. There is now an environment within which we sentence which is better and better able to create, support and promote consistency. Does it do that yet? No. Is it likely to do that over time? Yes.[742]

Chief Magistrate Gray agreed with Magistrate Caitlin English that:

> perhaps those magistrates who are outside the range … are the ones who are regularly appealed to the County Court, and that offers a speedy and efficient avenue for those defendants.[743]

The Director of Public Prosecutions argued that the sentencing discretion should largely be left to the Magistrates' Court due to magistrates' familiarity with local conditions and the prevalence of certain crimes in an area.[744]

However, Mr Michael Wighton of Victoria Legal Aid noted that de novo appeals are an important means of ensuring that justice is impartial, and seen to be impartial, in such a context:

> Some magistrates are stationed in small communities in Victoria and have been for many years, and their ability to work at arms length is sometimes lost or sometimes weakened. It is just the reality of practice, I think, in some locations. Magistrates in such circumstances may have longstanding relationships with local police, but again they still get it right 99 per cent of the time. Even if they do not get it wrong for that reason, the perception may exist that a decision is influenced by familiarity.
>
> De novo appeals are at arms length. They provide the safety net of a dispassionate arms length hearing by a stranger if the appellant feels the original decision was not made on relevant considerations. Appeals on points of law, which is the obvious replacement for a de novo system, are far more complicated, time consuming and expensive than the system where the appeal is as of right.[745]

Mr Rob Stary of the CDLA made a similar point:

> We all know that there are sorts of flavours of the month from region to region. Some magistrates do not like drug trafficking cases in particular regions; some magistrates do not like residential burglaries; some magistrates do not like the sorts of gratuitous violence cases. The

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[742] Ibid.

[743] Evidence to the Committee, Melbourne, 14 February 2006, 93 (Magistrate Caitlin English, Magistrates' Court of Victoria); Ibid.

[744] Evidence to the Committee, Melbourne, 13 February 2006, 4 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[745] Evidence to the Committee, Melbourne, 14 February 2006, 61 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

> County Court brings about a much more consistent application of the law and sentencing principles.[746]

The Committee heard a notable example of a New South Wales case in which a prison sentence was imposed by the Local Court that apparently reflected the attitude of the magistrate more than consistency and proportionality in sentencing. As Chief Judge Reginald Blanch of the District Court of New South Wales told the Committee:

> But, you certainly do get in the number of Magistrates that we have got, a significant variation. There are some Magistrates who have a very tough attitude towards drink driving for example. I had a case a couple of weeks ago of a Magistrate with some fellow who had been charged with drink driving. The reading was only about 0.9 or thereabouts, he had a previous drink driving, a special reading of drink driving where he was on his P's and had 0.01…it was a very, very low reading and that was all. The magistrate sentenced him to nine months jail and then refused him bail when he launched the appeal. By the time it came to me he had been in custody for 10 days and I of course let him out straight away with all the appropriate disqualifications and so forth. You do get that, no doubt you get them in Victoria as well.[747]

Mr Wighton also told the Committee that de novo sentence appeals play a significant role both in maintaining sentencing consistency and in ensuring the efficiency of sentencing in the summary jurisdiction:

> It also has a very important corrective function in the system. These general sentences are published — I am not sure in exactly what format in terms of the overturn rate but certainly the ultimate sentences imposed in the County Court on appeal are published — and it all synthesises to form the tariff that you have probably heard of in terms of what the sentence is for any particular offence; the tariff being the most likely penalty that you would expect in certain circumstances. All of this data goes into creating this tariff and that helps run a fast and efficient summary system of justice. People know when they get to court, or their lawyers know anyway and they can advise them, what they are likely to expect. Therefore, the corrective function of the County Court appeal process is very important. If excessive sentences are imposed in only 2 per cent of cases, or a proportion of the 2 per cent, that is still an important amount. We are dealing with big numbers — 120,000 prosecutions would represent at least 100,000 individual people.[748]

The Committee is mindful of the tensions that underlie the process of sentencing. On the one hand, there is the importance of maintaining a criminal justice system that is responsive to the views of the community in which it operates. On the other hand, confidence in the justice system depends on some degree of consistency in approach to sentencing across the entire jurisdiction.

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[746] Evidence to the Committee, Melbourne, 14 February 2006, 74 (Mr Rob Stary, President, Criminal Defence Lawyers Association).

[747] Evidence to the Committee, Sydney, 10 April 2006, 174 (Chief Judge Reginald Blanch, District Court of New South Wales).

[748] Evidence to the Committee, Melbourne, 14 February 2006, 74 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

Moreover, the centrality of judicial independence to the maintenance of the rule of law cannot be underestimated. Justice Kirby has highlighted the interaction between these forces in the context of increasing media interest in, and commentary on, the subject of law and order. Justice Kirby notes:

> the changing context of much criminal law, practice and sentencing in Australia today. Whereas in earlier times, at least to some extent, such activities were left to judges to perform, without undue political and media commentary, today this has changed. Criminal justice and sentencing have become a major focus of media attention and consequently of political debate. Whether this is healthy or unhealthy is for others to say. However, the performance of their functions by trial judges and courts of criminal appeal, under a barrage of media commentary (sometimes based on inadequate knowledge of the facts) and occasionally also political pressure, is an undoubted feature of contemporary Australia. On some occasions, there may even be efforts by powerful forces, outside of the judicial branch of government, to exert external and not too subtle pressure on judicial officers (and indeed prosecutors) to perform their functions other than strictly in accordance with law and the evidence and merits of the particular case.
>
> It is in such a situation that the Australian Constitution upholds the independence of the judiciary. It is in such cases that the rule of law is tested. The existence at the apex of the hierarchy of a court, with constitutional status and a clear vision of its own independence, is an important institutional guarantee. That guarantee protects not only all judicial officers and other independent decision-makers who play a role in the system of criminal justice. It is also an important guarantee for all people in the Commonwealth, that their liberty, rights and reputation are ultimately determined not by populist outcry or pressure but by the administration of justice by judicial officers who are competent, independent and impartial.[749]

The Committee concludes that the likely impact of ending de novo appeals on the consistency of summary sentencing would be negative, for two reasons.

First, such a change would almost certainly lead to a significant decline in the number of sentence appeals and would therefore reduce the role of the appeal system as a check that promotes consistency across the state.

Second, while consistency of approach to similar offences is a general principle of sentencing, the Committee notes that the principle of deterrence may also justify sentencing that recognises the prevalence of particular crimes in a given locality.

However, the Committee believes that this is a sentencing consideration that should be no less subject to review than any other. While magistrates working in regional areas may have a greater knowledge of local conditions, the Committee believes that the County Court plays an important role in ensuring that such conditions are not

[749] Michael Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?' (2002) 23 *Australian Bar Review* 18–19 (reference omitted). Justice Kirby notes that the final three criteria are those stated as necessary for judicial office in the *International Covenant on Civil and Political Rights*, art 14.1. Justice Kirby cites *Ryan v The Queen* 2001 [HCA] 21 in relation to the increasing media scrutiny of judicial decisions.

treated as an overriding factor. It may also be the case that a circuit appeal that results in a sentence reduction will simply reflect new or additional evidence.

In conclusion, the Committee believes that ready access to an appeal against sentence severity ensures a balance between sentencing in accordance with local conditions on the one hand and proportionality on the other.

Efficiency

Witnesses opposed to the abolition of de novo appeals told the Committee that the system provides a safety net for magistrates and legal practitioners to work with the speed necessary in the summary jurisdiction. In other words, they argued that the safety net for appellants outlined in chapter five also has an important systemic function. The Committee notes that the efficiency of the appeal system, and of the criminal justice system as a whole, is a function of two related factors: time and resources. It follows that the less time and resources required to achieve the same outcome, the more efficient the appeal and criminal justice systems.

In the following sections the Committee assesses the likely effects on the practice and procedure of the Magistrates' Court and County Court of replacing de novo appeals with a system based on the demonstration of error. The Committee reiterates here its finding in chapter three that appeals by way of rehearing on the transcript of evidence, as heard in the NSW Local Court, also have a tendency to operate more like an appeal requiring the demonstration of error.

A number of witnesses argued that ending de novo appeals would reduce the cost of the appeal system in the County Court, primarily because of the decline in appeals that would be likely to follow such a change. However, witnesses opposed to the abolition of de novo appeals argued that any savings of time and resources at this level of the criminal justice system would be more than negated by increased costs in the Magistrates' Court.

Impact on the County Court

As noted in chapter three, Victoria Police and Magistrate Gurvich told the Committee that their preferred form of appeal would be from the Magistrates' Court to the Supreme Court. However, Victoria Police also told the Committee that appeal to the County Court on a basis other than de novo would also meet their central concerns. The Committee notes that Chief Magistrate Gray differed from Magistrate Gurvich on this point, preferring that appeals continue to be heard by the County Court.

The Committee reached the conclusion that appeals from the Magistrates' Court should continue to be heard by the County Court, persuaded primarily by the greater cost to appellants of pursuing an appeal in the Supreme Court and of the potential loss of expertise in the County Court's appellate jurisdiction.

As noted above, those witnesses who opposed the abolition of de novo appeals all agreed that such a change would lead to a decline in the number of appeals. While it

might be assumed that this would reduce the burden on County Court resources, a number of witnesses who opposed the abolition of de novo appeals rejected this conclusion, noting that such a change could have indirect costs for the County Court because more defendants would elect to have indictable offences heard in the County Court at first instance.[750]

Magistrate Gurvich rejected this argument, citing the limit on sentences in the Magistrates' Court, the fact that legal aid may not be available for an accused who chooses such a course and the advantages of a less expensive and quicker hearing in the Magistrates' Court.[751]

Associate Professor Willis also cited access to legal aid as a factor in a person's decision to consent to summary jurisdiction. He also noted that, under the current system, most people consent to a summary hearing despite acquittal rates being much higher in the County Court than in the Magistrates' Court.[752]

The Committee acknowledges that a range of factors may influence a person's decision whether to consent to a summary hearing and that it is therefore difficult to predict how this might be affected by the abolition of the de novo system. On balance, however, the Committee considers that ending de novo appeals would probably lead to some increase in the number of people choosing to have their matter heard by the County Court at first instance. Given the difficulty in predicting the size of any such increase, it is equally difficult to determine whether the abolition of de novo appeals would lead to savings for the County Court.

The Committee notes that, even in the absence of a significant increase in appellants choosing to have indictable matters heard in the County Court, the potential savings to the Court could be relatively modest. First, appeals consume only a small proportion of the County Court's judicial resources: in recent years, an average of two Judges sat in Melbourne on a daily basis hearing appeals[753] and the Committee estimates that the equivalent of one judge sits per day hearing appeals on circuit.[754]

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[750] See for example: Evidence to the Committee, Melbourne, 14 February 2006, 75 (Mr Bill Doogue, Public Officer, Criminal Defence Lawyers Association); Evidence to the Committee, Melbourne, 14 February 2006, 73 (Mr Rob Stary, President, Criminal Defence Lawyers Association); Evidence to the Committee, Melbourne, 14 February 2006, 14 (Mr James Dowsley, Deputy Chair, Criminal Law Section, Law Institute of Victoria).

[751] Evidence to the Committee, Melbourne, 14 February 2006, 84 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[752] Evidence to the Committee, Melbourne, 13 February 2006, 48 (Associate Professor John Willis, School of Law, La Trobe University).

[753] See: County Court of Victoria, *Annual Report 2004-05*, 28; County Court of Victoria, *Annual Report 2005-06*, 15.

[754] The Committee was not able to obtain figures on the judicial resources used for circuit appeals but notes that appeals heard on circuit make up approximately one quarter of all appeals.

The County Court was unable to provide the Committee with an estimate of the potential savings that would result if de novo appeals were ended, advising that if the number and nature of appeals were varied a workload assessment would be required to identify the impact on judicial and support resources. Moreover, the cost of judicial and support resources would depend on the precise details of the model proposed.[755] In the absence of precise modelling, the Committee is unable to speculate as to how many of the three to four full-time judges currently hearing appeals might no longer be required for such work if the de novo system were abolished.

Second, while the Director of Public Prosecutions described the resources used for de novo appeals as significant (five to six barristers per day), he also acknowledged that it was a relatively inexpensive form of appeal. It is also far from clear whether the DPP would require fewer barristers if appeals were heard on a basis other than de novo — while it is likely there would be fewer appeals it is also likely that they would be more complex and time consuming.[756]

Impact on the Magistrates' Court

A central argument of those witnesses who opposed the abolition of de novo appeals was that such a change would lead to a significant slowing of summary proceedings in the Magistrates' Court. These witnesses argued that the consequent increase in costs per finalisation would override any savings in the County Court. The reasons given for such a slowdown fell into three broad categories: the effect on legal practitioners, the effect on the decision making of the accused, and the effect on magistrates.

The effect on legal representation

A number of witnesses who opposed the abolition of de novo appeals told the Committee that the Magistrates' Court relies on defence lawyers being able to proceed speedily and that ending de novo appeals would significantly reduce this capacity.

Mr Wighton of Victoria Legal Aid articulated this argument in the following terms:

> When I worked in the Magistrates' Court on a daily basis as a defence lawyer for legal aid I appeared in a large number of hearings, and I can attest to the efficiency of the Magistrates' Court. However, it is an efficiency that would be dramatically curtailed, I believe, if the right to appeal as of right was removed. Defence lawyers would be forced to run cases like trials, ensuring that every point was taken up and pursued, every avenue in a case explored, every bit of evidence carefully pored over for relevance, admissibility and probative value. Hearings would necessarily be longer.

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[755] County Court of Victoria, *'Appeal Matters' Cost Attribution Exercise*, 6 July 2006.

[756] Evidence to the Committee, Melbourne, 13 February 2006, 7 (Mr Paul Coghlan, QC, Director of Public Prosecutions).

> I sometimes think about the work of a duty lawyer in the Magistrates' Court as a bit like a tightrope walker with the appeal as of right process as the safety net. If the defence lawyer is walking across the tightrope, he will scamper across a lot faster with a safety net in place than if there is not one. That is meant to illustrate that if you take away the appeal as of right and restrict appeals to narrow points of law, the safety net is effectively removed and that means defence lawyers in that Magistrates' Court — where the vast volume of work gets done — would have to slow everything down and take more time and more care to ensure that not a single mistake is made by either them, their client or the magistrate. In a court that has the volume which the Magistrates' Court has the potential to blow out significantly the total cost of the criminal justice system is a very live issue.
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> …
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> In general we believe hearings and subsequent appeals would be more procedural in nature, would take longer and cost more, and in the law time is truly money. The Magistrates' Court system and the system of summary appeals to the County Court is cheap because it is fast. De novo appeals are efficient, timely and cheap, and we believe, in our submission, that there would have to be a strong case for removing them.[757]

A similar view was expressed by most witnesses who opposed the abolition of de novo appeals, including:

- Justice Smith of the Supreme Court;[758]
- The Law Institute of Victoria — as Mr Rob Melasecca told the Committee:

> I am not saying there is anything wrong with having a Magistrates' Court process which is very detailed. That is fine, but I do not think that is what is being sought to achieve. If you are trying to achieve going faster and having more justice, this [ending de novo appeals] is not the way and that is the concern. As lawyers we will adapt. If you remove the de novo, we will adapt. We will become virtually like civil lawyers. We will start to interrogate, to demand things and to subpoena and the process will bog down. That is our concern;[759]

- The Victorian Bar and the Criminal Bar Association of Victoria;[760]
- CDLA — Mr Stary noted that, in addition to defence lawyers proceeding more carefully and slowly, there would be an increase in requests for adjournments;[761]

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[757] Evidence to the Committee, Melbourne, 14 February 2006, 62 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

[758] Evidence to the Committee, Melbourne, 6 March 2006, 105 (Justice Tim Smith, Supreme Court of Victoria).

[759] Evidence to the Committee, Melbourne, 13 February 2006, 15 (Mr Rob Melasecca, Law Institute of Victoria).

[760] See in particular evidence to the Committee, Melbourne, 13 February 2006, 36–7 (Dr Greg Lyon, Secretary, Criminal Bar Association of Victoria).

- Associate Professor Willis, who noted in particular the need for legal aid lawyers to proceed in the absence of a thorough analysis of the case;[762] and
- Magistrate English — who also predicted an increase in applications for adjournments by legal practitioners and told the Committee:

> It will also mean that practitioners will take more time in putting their case to the court. They will not leave any stone uncovered. They will be calling witnesses. Part of the joy and strength of the Magistrates' Court is its ability to deal with matters very quickly, and there is a real danger that if that appeal de novo option or right is abolished, then much more time will be put into cases.[763]

Mr McNamara of the Law Institute of Victoria emphasised that the issue is as relevant to cases in which an accused pleads guilty as it is to contested cases:

> If we start slowing down and touching every point that we have to touch in a plea to stop the appeals and to avoid the problems that go with them, it will take all day. The list in just the Magistrates' Court will blow out.[764]

As noted above, Mr Melasecca of the Law Institute of Victoria told the Committee that there is a level of trust between the parties in summary criminal matters that allows them to dispense with many of the legal formalities observed in civil proceedings and that, in the absence of the de novo safety net, criminal proceedings would become more like civil proceedings.[765]

The Committee notes that some support for this argument may be found in the contrasting finalisation times for criminal and civil matters in the Magistrates' Court. In 2003–04 the Magistrates' Court finalised 89.1 per cent of criminal cases within six months of the defendant's first appearance in court. However, of defended civil claims finalised by way of hearing, only 50.3 per cent were finalised within six months of the notice of defence being filed.[766]

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[761] See evidence to the Committee, Melbourne, 14 February 2006, 72, 73 (Mr Rob Stary, President, Criminal Defence Lawyers Association).

[762] John Willis, *Submission No. 6*, 2.

[763] Evidence to the Committee, Melbourne, 14 February 2006, 87 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[764] Evidence to the Committee, Melbourne, 13 February 2006, 14 (Mr Michael McNamara, Deputy Chair, Law Institute of Victoria).

[765] Evidence to the Committee, Melbourne, 13 February 2006, 15, 17 (Mr Rob Melasecca, Law Institute of Victoria).

[766] Magistrates' Court of Victoria, *2003–04 Annual Report*, 14, 20.

Finally, the Committee heard that abolishing de novo appeals would also be costlier to the criminal justice system because of the likely increase in Legal Aid costs:

> Of course those appeals that are heard in the Court of Appeal are very expensive, very complex and take a fair amount of time to deal with — the average Court of Appeal matter takes a full day to determine. You only need to look at the legal aid rates of pay for legally assisted matters in both courts: in the County Court we pay a lump sum fee of around about $780 all in; for the Court of Appeal we pay around $2,500 as a lump sum with additional costs for appearances on subsequent days, which is often required. It is a significant increase in costs. That represents, I think, what the potential is if there was a move to make appeals from the Magistrates' Court to the County Court restricted to points of law only.[767]

The effect of the decision on the accused

Witnesses who opposed the abolition of de novo appeals predicted a number of effects that such a change would have on the options exercised by an accused that would both slow proceedings in the Magistrates' Court and increase the demand on its resources, including:

- an increase in committal proceedings due to an increase in persons facing indictable charges choosing to have their cases heard in the County Court;[768]
- more defendants choosing to contest their charges in the Magistrates' Court[769] — as the Committee has noted above, a contest takes significantly more time to hear than a plea;
- an increase in applications for disqualification of the magistrate for bias, including for strategic reasons, which would in turn lead to more adjournments;[770] and
- an increase in defendants requesting adjournments to see the Legal Aid duty solicitor on the day of their hearing.[771]

On the other hand, witnesses who supported the abolition of de novo appeals told the Committee that they considered some of these outcomes unlikely.[772]

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[767] Evidence to the Committee, Melbourne, 14 February 2006, 61–2 (Mr Michael Wighton, Manager, Regional Divisions, Victoria Legal Aid).

[768] Evidence to the Committee, Melbourne, 14 February 2006, 73 (Mr Bill Doogue, Public Officer, Criminal Defence Lawyers Association).

[769] Evidence to the Committee, Melbourne, 14 February 2006, 87 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[770] This argument was cited in a confidential submission by a criminal law barrister.

[771] Ibid.

Impact on magistrates

A number of witnesses told the Committee that the abolition of de novo appeals would increase the need for magistrates to provide detailed written reasons for their decisions. These witnesses told the Committee that the introduction of appeals based on error would lead to magistrates producing more detailed and legalistic reasons, the more frequent reduction of reasons to writing and an increase in adjournments to prepare reasons. Their concern was that this would significantly slow proceedings in the Magistrates' Court.

Witnesses who made this argument included:

- Magistrate English, who told the Committee that, even if magistrates did not resort to more written decisions, crafting decisions could well take longer and require more adjournments;[773]
- CDLA;[774]
- Ms Anna Radonic of Youthlaw;[775] and
- Associate Professor Willis.[776]

On the other hand, Chief Magistrate Gray and Magistrate Gurvich disagreed that decisions would necessarily take longer.[777] Both argued that the nature of the charges and the complexity of the case determine the time taken to prepare a decision.[778] The Director of Public Prosecutions also shared this view.[779]

A further impact predicted by opponents of ending de novo appeals was that the remittal of matters from the County or Supreme Courts following a successful appeal

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[772] On the question of adjournments, see for example: Evidence to the Committee, Melbourne, 14 February 2006, 85 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[773] Evidence to the Committee, Melbourne, 14 February 2006, 98–9 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[774] Criminal Defence Lawyers Association, *Submission No. 3*, 2.

[775] Evidence to the Committee, Melbourne, 14 February 2006, 54 (Ms Anna Radonic, Principal Lawyer, Youthlaw).

[776] Evidence to the Committee, Melbourne, 13 February 2006, 46 (Associate Professor John Willis, School of Law, La Trobe University).

[777] Evidence to the Committee, Melbourne, 14 February 2006, 88, 97 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria); evidence to the Committee, Melbourne, 14 February 2006, 96 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[778] Evidence to the Committee, Melbourne, 14 February 2006, 88, 99 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria); evidence to the Committee, Melbourne, 14 February 2006, 85 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[779] Evidence to the Committee, Melbourne, 13 February 2006, 4 (Mr Paul Coghlan QC, Director of Public Prosecutions).

on the basis of error would create an additional drain on the resources of the Magistrates' Court.[780] Magistrate Gurvich acknowledged that such an outcome would increase delays but disagreed that it would require witnesses to give their evidence twice, noting that in his experience such a requirement was extremely rare in the case of matters currently remitted from the Supreme Court.[781]

Discussion

The Committee found that the evidence from witnesses on the latter two questions above — that is, the effect of ending de novo appeals on the efficiency of magistrates' decision making and on the decisions of the accused — was equivocal, and the Committee was unable to obtain empirical data that would settle the issues one way or the other.[782]

The Committee notes, however, that witnesses on both sides of the debate agreed that ending de novo appeals would involve a risk that defence lawyers would slow down.[783] Moreover, witnesses who argued for the abolition of de novo appeals also acknowledged that there was a risk of a slowdown in the criminal jurisdiction of the Magistrates' Court overall.[784] From the Committee's perspective, this is the crucial point.

The Committee notes the views of those witnesses who argued that the economic cost of the de novo system is high[785] and that it would be more cost effective to spend additional time and money on hearings in the Magistrates' Court than on appeal. As Sergeant McDonald told the Committee:

> I think the point should be made that if additional time is going to be spent — whether it be in the summary stream or whether it is on appeal in the County Court — it is a cheaper prospect for the

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[780] See for example evidence to the Committee, Melbourne, 14 February 2006, 74 (Mr Rob Stary, President, Criminal Defence Lawyers Association); evidence to the Committee, Melbourne, 14 February 2006, 73 (Mr Bill Doogue, Public Officer, Criminal Defence Lawyers Association).

[781] Evidence to the Committee, Melbourne, 14 February 2006, 84–5 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[782] However, the Committee notes the academic research of John Lowndes that magistrates are often required to provide detailed written decisions in those jurisdictions where appeals are not heard de novo. See: John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond — Part II' (2000) 74 *Australian Law Journal* 592, 595.

[783] Evidence to the Committee, Melbourne, 14 February 2006, 88 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria).

[784] Jennifer Taylor, *Submission No. 1*, 68; Evidence to the Committee, Melbourne, 14 February 2006, 88, 97 (Chief Magistrate Ian Gray, Magistrates' Court of Victoria). However, the Committee notes that Chief Magistrate Gray referred to this as a 'low risk'.

[785] Evidence to the Committee, Melbourne, 14 February 2006, 82 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

> community to expend that money and time on justice in the Magistrates' Court than it is to do it once and then to revisit it again in the County Court. Put simply, if it takes a bit longer in the Magistrate's Court, so be it; that is a cheaper place to argue the issues more fully than it is to argue them more fully in the County Court. There are attendant costs — not just for us directly but for the community by funding the dispute resolution system in the form of the courts, and also for the appellant or the respondent to the appeal, who has to engage counsel, and there are a whole range of knock on costs. If they are sustained in the Magistrates' Court, which is a cheaper forum than in the County Court, that is not necessarily a bad thing.[786]

Some indication of the possible effect of an error-based appeal system on the efficiency of the Magistrates' Court is provided by comparing the current performance of the court with that of courts in other states and territories. Two important measures are provided by the Productivity Commission of Australia in the form of a backlog indicator for criminal cases pending in the Magistrates' Courts and the cost per finalised criminal matter. The Magistrates' Court of Victoria compares favourably on both indicators. The comparison with South Australia — which, as the Committee noted in chapter three, has a system of appeal that is most dissimilar to Victoria and effectively requires the demonstration of error — is particularly striking.

The backlog indicator allows a comparison between the states and territories of the time taken to hear a criminal matter in the Magistrates' Courts. Significantly, Victoria's Magistrates' Court is 17 per cent *below* the national average for cases pending for more than six months and 43 per cent *below* the national average for cases pending for more than 12 months.[787]

Victoria's performance on this measure contrasts markedly with that of South Australia. As the Committee noted in chapter two, during 2004–05, South Australia's Magistrates' Court had more than 1.5 times the Victorian percentage of matters pending for more than six months and nearly three times the Victorian percentage of matters pending for more than 12 months.

The Magistrates' Court of Victoria also compares favourably on real net recurrent expenditure per criminal finalisation, which is 15 per cent lower than the national average and 21 per cent lower than in South Australia.[788]

While the difference between Victoria and South Australia on these measures may be due to a range of factors, the Committee is not able to rule out the influence of the differing appeal systems.

As the Committee noted above, a further line of empirical evidence for the argument that criminal proceedings would be slower in an appeal system based on error is the

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[786] Evidence to the Committee, Melbourne, 13 February 2006, 25 (Sergeant Kyle McDonald, Victoria Police).

[787] Productivity Commission, *Report on Government Services 2006* [6.25].

[788] Ibid Table 6A.23.

significantly slower finalisation times for contested civil matters determined by hearing in the Magistrates' Court.

On balance, the Committee is not persuaded that it would be cheaper to spend additional time hearing matters in the Magistrates' Court than to retain a system in which a little over two per cent of cases are appealed.[789] In the Committee's view, it is essentially a question of numbers. Although the Magistrates' Court may be a less expensive criminal justice forum than the County Court, any slowdown in hearing the 83,000 criminal matters adjudicated in the Court each year[790] would very likely negate any savings from a reduction in appeal numbers.

Moreover, the Committee also heard that, unlike appeals based on error, de novo appeals are heard in a summary manner that is similar to the hearing at first instance so that the system is able to accommodate a greater number of appeals at less expense. The paradox of the de novo appeal — which, as the Committee found in chapter four, provides maximum access to justice but which, as the Committee has found in this chapter, does so at minimum expense — was captured by Justice Smith:

> I would be surprised if you did not have a situation where more time had to be spent in the Magistrates' Court on more cases because they have to be canvassed in more detail and the reasons have to be given in sufficient detail to satisfy the requirements of the law about the duty to give reasons. It is interesting when you look at a system. You look at it and say, "That seems a bit odd; why is there this special arrangement for these appeals?" Then once you start to dig deeper and look at the ramifications of change, it suddenly starts to become difficult.[791]

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[789] This is the rate of appeal once the abandonment rate of nearly 25 per cent is accounted for.

[790] A total of 83,114 matters were adjudicated in the Magistrates' Court in 2004–05: Australian Bureau of Statistics, *Criminal Courts, Australia, 2004-05*, 20.

[791] Evidence to the Committee, Melbourne, 6 March 2006, 105 (Justice Tim Smith, Supreme Court of Victoria).

CHAPTER SIX – THE MAGISTRATES' COURT AND THE COUNTY COURT AS ONE SYSTEM OF JUSTICE

The Committee has set out its findings in relation to a number of the terms of reference in the preceding chapters of this report. In this chapter the Committee addresses the two remaining terms of reference:

- the desirability or otherwise of any change to de novo appeals from the Magistrates' Court to the County Court having regard to any changes to the seriousness of offences heard by the Magistrates' Court;[792] and
- in general, how the Magistrates' Court and the County Court operate as one system, and what if any changes to that system will produce the best outcomes for the justice system.[793]

The Committee addresses the first of these matters — the issue of offence reclassification — in the first section of this chapter.

The final term of reference is the subject of the remainder of the chapter. As noted in chapter one, the Committee decided to interpret this question in the context of the de novo appeal system.[794] The issue has been partly addressed in chapter five, in the discussion of the possible increase in defendants choosing to have indictable offences triable summarily heard in the County Court if de novo appeals were abolished.

However, the Committee also received evidence from Victorian witnesses on a number of additional matters that are relevant to this question. These include:

- the impact of de novo appeals on witnesses and victims of crime;
- the right of a person sentenced in the Magistrates' Court following a plea of guilty to appeal against his or her conviction; and

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[792] Terms of reference, Law Reform Committee, Parliament of Victoria, inquiry into County Court appeals, 3.

[793] Ibid 8.

[794] One example of an initiative that may assist the Magistrates' Court and the County Court to operate as one system and that has relevance beyond the de novo appeal system is the training and services provided by the Judicial College of Victoria. A notable service provided by the college is the Judicial Officers Information Network (JOIN), an electronic database of legal information available to all Victorian judicial officers; see Judicial College of Victoria website, 13 June 2006, at http://www.judicialcollege.vic.edu.au.

- whether appeals involving Intervention Orders made in the Magistrates' Court should continue to be heard de novo and in the County Court.

In the final section of this chapter the Committee briefly considers the significance of the jury to de novo appeals.

Offence classification

In considering the desirability or otherwise of any change to the de novo appeal system, the terms of reference ask the Committee to have regard to changes in the seriousness of offences heard by the Magistrates' Court. The Committee notes that this issue is connected to another term of reference — namely, how the Magistrates' Court and County Court operate as a single system.

The question of whether a particular offence should be heard in the Magistrates' Court or in the County Court is one of four jurisdictional issues that were identified in the *Attorney-General's Justice Statement* as central to the modernisation of criminal procedure.[795]

The rationale for this examination of existing jurisdictional boundaries between the courts was described in the *Justice Statement* in the following terms:

> Modernising criminal procedure also requires examination of the jurisdictions currently exercised by the criminal courts. Higher courts should not be congested by more minor offences, and the lower courts should not be required to adjudicate serious matters that require the skills and authority of a higher jurisdiction. Related to this concept is the need for flexible mechanisms to transfer cases between jurisdictions.
>
> The basic principle for allocation of jurisdiction should be that matters are heard in the lowest appropriate jurisdiction. The two key elements for defining the lowest appropriate jurisdiction are the seriousness of a case and its complexity. Seriousness is usually measured by the maximum penalty available for the offence. Complexity is more difficult to measure. Offences such as fraud may often involve examination of lengthy document trails, but also may involve relatively simple matters of deception.
>
> The prosecution and defence in practice have some choice, subject to the court's discretion, on whether to have some indictable offences tried in the County Court or Magistrates' Court. This facilitates the hearing of more minor cases of potentially serious offences, such as robbery, in

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[795] See Department of Justice, Victoria, *Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004–2014* (May 2004), 27. The other three issues identified were a review of the respective criminal jurisdictions of the Supreme Court and the County Court, a review of the respective jurisdictions of the Magistrates' Court and the Infringement Court (formerly PERIN Court), and whether County Court appeals should continue to be heard de novo: at 27–8.

> the lower court and is an efficient allocation mechanism that is also consistent with the community's expectations of justice.[796]

As the Committee noted in chapter two, a number of previously indictable offences have been reclassified, over a number of years, as indictable offences triable summarily. Accordingly, these relatively more serious criminal matters (which were previously heard in the County Court before a jury) may now be heard in the Magistrates' Court, if the accused consents and the court is of the opinion that it is appropriate to deal with the matter summarily.[797] In Victoria, as in the other Australian states and territories, this reclassification trend has resulted in an actual increase in the seriousness of the matters heard in the Magistrates' Court.

Associate Professor John Willis of La Trobe University's School of Law has noted that, although it is dependent on the consent of the accused, the expanded summary jurisdiction of the Victorian Magistrates' Court is regularly used.[798] For example, Associate Professor Willis notes that most indictable dishonesty offences in Victoria (such as theft, fraud and burglary), which are capable of being heard summarily, are now heard in the Magistrates' Court.[799] In other words, the reclassification trend has been particularly notable in the case of property offences.[800]

Before 1980 the Magistrates' Court could hear indictable property offences such as theft, obtaining property by deception and burglary only where the value of the goods was below $2,000.[801] However, as a result of successive increases in the monetary threshold for such 'dishonesty offences', the vast majority are now dealt with in the Magistrates' Court.[802]

At the time of writing, the monetary threshold was set to increase further from $25,000 to $100,000 when the relevant provisions of the *Courts Legislation (Jurisdiction) Act 2006* come into operation.[803] The *Courts Legislation (Jurisdiction) Act 2006* also

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[796] Ibid 27.

[797] *Magistrates Court Act 1989*, s 53(1). A parallel development, which has also contributed to the seriousness of the matters heard in the Magistrates' Court overall, has been the removal of a large volume of minor summary matters (for example traffic and parking offences) from the court system. These matters are increasingly dealt with by way of infringement notice; see John Willis, 'The Processing of Cases in the Criminal Justice System', *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 142–3.

[798] Ibid 143.

[799] Ibid 143–4.

[800] Ibid 143.

[801] Ibid.

[802] Ibid 143–4.

[803] A number of the Act's provisions came into operation following Royal Assent on 15 August 2006. However, the reclassification provisions, which are contained in s 22, are to come into operation on a day or day to be proclaimed or by default on 1 July 2007.

reclassifies common-law assault and affray as indictable offences that may be heard summarily.[804]

The Attorney-General explained the intention of this recent reclassification — and, in the view of the Committee, of the reclassification trend in general — in his second reading speech for the *Courts Legislation (Jurisdiction) Bill 2006*:

> By broadening the range of indictable offences that can be heard summarily if the court and the defendant agree, the bill will help to ensure that jury trials are confined to appropriate cases.
>
> Many indictable offences can be, and are, already dealt with fairly and efficiently in the Magistrates' Court.
>
> …
>
> These changes will enable more cases to be heard in the lowest appropriate jurisdiction, which is an important principle of the government's justice statement.[805]

It is important to note that the jurisdiction of the Magistrates' Court in relation to indictable offences triable summarily is subject to the consent of the accused and to a determination by the Magistrates' Court that it is appropriate to deal with the matter in that jurisdiction. Notably, the second of these criteria was also the subject of changes introduced by the *Courts Legislation (Jurisdiction) Act 2006*.[806]

That Act will amend the *Magistrates' Court Act 1989* so that, in determining whether it is appropriate to determine a particular charge summarily, magistrates must have regard to:

- the seriousness of the offence;
- the adequacy of the available sentencing orders if the charge is heard and determined summarily, considering (among other things) any previous findings of guilt or conviction of the defendant;
- any decision of the Court as to how a charge of the same offence against a co-defendant is to be heard and determined; and
- any other relevant matter.

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[804] *Courts Legislation (Jurisdiction) Act 2006* s 22.

[805] Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006, 1774 (Rob Hulls, Attorney-General) — second reading speech on the *Courts Legislation (Jurisdiction) Bill 2006*.

[806] As noted above, a number of the Act's provisions came into operation following Royal Assent on 15 August 2006. However, the reclassification provisions, which are contained in s 22, are to come into operation on a day or day to be proclaimed or by default on 1 July 2007

In having regard to the seriousness of an offence, the Court must consider (among other things):

- the nature of the offence;
- the manner in which the offence is alleged to have been committed; and
- the complexity of the proceeding for determining the charge.[807]

Evidence received

Magistrate Maurice Gurvich told the Committee that the increasingly serious matters that may be heard in the Magistrates' Court demonstrates the confidence that Parliament has in the Court to hear and determine such matters.[808]

On the other hand, the Committee heard from a number of witnesses that the expansion in the jurisdiction of the Magistrates' Court is an argument against any changes that would restrict the existing right of appeal.

On this matter the Victorian Bar and the Criminal Bar Association of Victoria told the Committee:

> It is only [because of] the interest in cost efficiency that the Magistrates' Court has, over the years, been given jurisdiction to hear more serious offences. This had been done in the context of the safeguard of the present right of appeal by way of re-hearing de novo in all criminal cases.
>
> The greater seriousness of offences heard by the Magistrate's Court makes the right of appeal by way of rehearing even more imperative. The more serious the offence, the greater the need for the present right to a complete re-hearing and re-determination in the County Court.[809]

Magistrate Caitlin English made the same observation, focusing on the 1997 increases to the jurisdiction of the Magistrates' Court and the pressures under which the Court works:

> The other point that I did want to make about these offences was in respect of the seriousness of offences heard by the Magistrates' Court. … If you look at sections 53(1A) and (1B) of the *Magistrates' Court Act 1989*, which were introduced in 1997, they significantly expanded the indictable matters which the court can hear summarily. So I agree there is certainly no dispute in the fact that magistrates are well qualified … but if you look at the way in which the court operates, at the speed we are required to work at and the degree of efficiency with which we are

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[807] This is an abbreviated description of the matters to be taken into account; for a full list, please see the extract from the Act in Appendix 3

[808] See evidence to Law Reform Committee, Parliament of Victoria ('the Committee'), Melbourne, 14 February 2006, 84 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

[809] Victorian Bar and Criminal Bar Association of Victoria, *Submission No. 11*, 6.

> required to do our duties and give our decisions, inevitably there can be mistakes. The appeal de novo safeguards that process.[810]

Victoria Legal Aid also cited the increasing seriousness of the matters that may be heard in the Magistrates' Court as an argument for the retention of de novo appeals:

> if, by virtue of the reclassification of offences, the Magistrates' Court is empowered to hear a greater number of cases than it currently hears, it is imperative that an efficient, cost effective and accessible appeal process such as the de novo appeal be maintained.[811]

As Associate Professor Willis told the Committee, the majority of defendants consent to the hearing of indictable offences triable summarily in the Magistrates' Court when pleading not guilty, despite acquittal rates for such matters being much higher in the County Court.[812] Associate Professor Willis noted that there are a range of reasons that defendants consent to summary jurisdiction but highlighted the fact that legal aid is rarely granted for defendants who do not consent.[813]

Associate Professor Willis noted that, while summary jurisdiction has disadvantages for the defendant, it is safeguarded by the existing right of appeal:

> If it is heard in the Magistrates' Court you do not have a committal, and in many cases you cannot see what witnesses are made of until you find them on the day. If you lose, you can appeal. You can have another go. It is the backstop. In nasty cases if you cannot appeal I would be advising clients, "Go upstairs", for these reasons: firstly, you get a committal and you can have a look at the witnesses — see what they are made of.[814]

Discussion and conclusion

The Committee agrees with Magistrate Gurvich that the increasing seriousness of the matters that may be heard in the Magistrates' Court reflects the confidence that Parliament has in the Court's capacity to deal with such matters.[815] However, the Committee is mindful that this increase has occurred in the context of the existing right to a de novo appeal to the County Court.

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[810] Evidence to the Committee, Melbourne, 14 February 2006, 87 (Magistrate Caitlin English, Magistrates' Court of Victoria).

[811] Victoria Legal Aid, *Submission No. 9*, 4.

[812] Evidence to the Committee, Melbourne, 13 February 2006, 48 (Associate Professor John Willis, School of Law, La Trobe University). For example in 2004–05 the proportion of finalised defendants who were acquitted in Victoria's higher courts was 9.1 per cent, compared with 3.2 per cent in the Victorian Magistrates' Court: Australian Bureau of Statistics, *Criminal Courts, Australia, 2004-05*, 19–20.

[813] Evidence to the Committee, Melbourne, 13 February 2006, 48 (Associate Professor John Willis, School of Law, La Trobe University).

[814] Ibid.

[815] See for example evidence to the Committee, Melbourne, 14 February 2006, 84 (Magistrate Maurice Gurvich, Magistrates' Court of Victoria).

Moreover, as the Committee found in chapter four, the Magistrates' Court operates under significant pressures of speed and volume and the de novo appeal provides an important safety net. The Committee therefore also agrees with those witnesses who argued that the ongoing increase in serious criminal matters heard summarily is a strong argument against any restriction in the existing right of appeal against conviction.

Considerations of efficiency are also relevant to this issue. As the Committee found in chapter five, one possible effect of ending de novo appeals would be an increase in County Court trials of indictable offences that are triable summarily. In other words, people charged with such intermediate-level offences may be less likely to consent to the summary hearing of their matter in the Magistrates' Court in the absence of the de novo appeal safety net.

The Committee is unable to quantify the possible increase in persons who might opt to have such matters heard in the County Court if the de novo system were to be abolished. However, it is clear that any such increase would be contrary to the aim of the *Courts Legislation (Jurisdiction) Act 2006* and of offence reclassification in general. The Committee is concerned by the possibility that the restriction of existing appeal rights could affect the criminal justice system in a way that is contrary to the rationale behind offence reclassification.

As the Committee found in chapter five, the desirability of any change to the current appeal system must consider not only the effect on the efficiency of the appeal system itself but on the criminal justice system as a whole.

Witnesses and victims of crime

A particular criticism of the de novo appeal system made by those Victorian witnesses who argued for its abolition was that it requires witnesses and victims of traumatic crimes to give their evidence twice: first in the Magistrates' Court and again in the County Court.

Magistrate Gurvich explained the potential impact on witnesses and victims of crime in the following terms:

> There is an effect on witnesses which cannot be overemphasised. This is the most serious consequence of appeals de novo in my view.
>
> Imagine you are a witness in a case. You might be the victim of an offence. You might be an eyewitness to a crime who has come forward as a matter of duty; or you might be the parent or spouse of a witness. It is no easy task being a witness. Under oath, sworn to tell the truth, not understanding the system, you want to get on with your life. You think the case is on next week, but it is adjourned. You do not understand why. Finally, you are called after many sleepless nights of worry and anxiety. You are sworn, you give your evidence in chief, you are cross examined and re-examined, straining to remember, endeavouring to be honest and fair. The magistrate makes a decision. Your evidence is accepted. It is over, so you thought. And then you are told there will be an appeal to the County Court. "What does that mean?", you ask. Then

> come the indelible words, “You have to go through it all over again”. And it does not matter how unmeritorious the appeal is. You will continue to relive events which you did not think were controversial. The pain continues for you and your loved ones. Victims of crime must endure delay and inability to put the circumstances of the offences behind them. This is commonplace.[816]

Victoria Police made the same point:

> The appeal process incurs additional cost to the community, the parties, the witnesses and complainants. These costs include … [the] stress and anxieties that witnesses and complainants go through in an appeal after the matter has been dealt with in the Magistrates’ Court.[817]

On the other hand, Magistrate English suggested that this issue needs to be considered in the context of the following factors:

- the low rate of appeal from the Magistrates’ Court to the County Court;[818]
- the fact that the large majority of appeals are against sentence and therefore do not require witnesses to be called; and
- that any decline in the number of defendants consenting to summary jurisdiction as a result of a restriction of appeal rights would increase the number of witnesses required to give their evidence twice (ie once before a magistrate at a committal hearing and again before a jury in the County Court trial).[819]

Justice Tim Smith of the Supreme Court of Victoria also told the Committee that, although introducing a right of appeal based on a claim of error[820] might reduce the number of witnesses who are recalled to give evidence on appeal, it would not remove the possibility of such recall occurring.[821]

The Committee also heard from Associate Professor Willis that different procedures apply for giving evidence in the Magistrates’ and County Courts and that, in his view, giving evidence in the Magistrates’ Court is not as traumatic as giving evidence before a jury in the higher courts:

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[816] Ibid.

[817] Evidence to the Committee, Melbourne, 13 February 2006, 22 (Superintendent Stephen Leane, Victoria Police). See also Victoria Police, *Submission No. 10*, 3.

[818] As the Committee noted in chapter two, the appeal rate is between two per cent and three per cent.

[819] Caitlin English, *Submission No 8(A)*, 3.

[820] As the Committee noted in chapter three, an appeal by way of rehearing may also operate in practical terms as a strict appeal on the basis of error (see the discussion of the different types of appeal in chapter two).

[821] Evidence to the Committee, Melbourne, 6 March, 104 (Justice Tim Smith, Supreme Court of Victoria).

> People are concerned about victims. My instinctive guess about this, and I might be wrong — I am thinking of sex cases but not only — is that most of them are on closed circuit television these days, they are not in the same room, and I do not really believe it is as stressful giving evidence in a Magistrates' Court as it is before a jury.[822]

The Committee gave particular consideration to the category of sexual offences.

This was confirmed in statistics provided to the Committee by the Department of Justice. During 2004–05 the County Court heard 11 appeals against conviction in the Magistrates' Court for two categories of sexual offences. These appeals involved relatively less serious matters — that is, non-aggravated sexual assault (1.72 per cent of conviction appeals)[823] and non-assaultive sexual offences (0.17 per cent of conviction appeals).[824]

The Committee also notes the recent measures taken by the government to reduce the trauma of giving evidence for particular victims of crime. For example, the new *Crimes (Sexual Offences) Act 2006*, proclaimed in March 2006, allows children and people with cognitive impairments to give their evidence via video link.

Under the new legislation such witnesses will no longer be required to be in the same court room as their alleged attacker, to repeat their evidence a number of times, or to face repeated cross-examination. Witnesses in such cases will now be able to give their evidence once, in a separate part of the court or off-site, and their evidence will be replayed during the trial.[825]

The Committee notes that, under the Smart Courts Program of the Department of Justice, video-conferencing technology will be used to achieve the aims of the new legislation:

> The Smart Courts technology aims to make going to court less traumatic for the most vulnerable victims of crime and to give victims of sexual assault, family violence and other violent crime more confidence to come forward and seek justice.
>
> It will reduce the very real apprehensions that victims have about giving evidence, and particularly their fears of facing their attacker in court.[826]

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[822] Evidence to the Committee, Melbourne, 13 February 2006, 48 (Associate Professor John Willis, School of Law, La Trobe University).

[823] Based on a sample of 2434 cases selected at random from the registry of the County Court in Melbourne.

[824] Department of Justice, Victoria, *Appeals from the Magistrates' Court 2004/05 by offence category*, see Appendix 5.

[825] Department of Justice, Victoria, *Integrated Courts Management System — ICMS* and *Smart Court Rollout for County Court at Ballarat* (16 June 2006) at www.justice.vic.gov.au.

[826] Department of Justice, Victoria, 'Upgrading Videoconferencing in Courts' (6 October 2006) at www.justice.vic.gov.au.

The Committee also notes the further measures introduced by the *Crimes (Sexual Offences) (Further Amendment) Bill 2006*[827] regarding the giving of evidence in such cases.[828]

According to the second reading speech:

> The bill will amend the *Evidence Act 1958* to create a right for complainants in sexual assault cases to give their evidence to the court through alternative arrangements that do not require them to be in the same room as the accused person, instead allowing them to be seen and heard via closed-circuit television. Although these alternative arrangements for giving evidence have previously been available to victims, they are rarely used. These changes will ensure that these arrangements are available to a complainant as of right and will make the use of such arrangements more routine.[829]

Conclusion

The Committee is particularly mindful of the difficulties faced by victims of crime within the criminal justice system, particularly victims of sexual offences. The Committee is very conscious of the fact that the harm experienced by victims of crime can be long lasting and can be physical, emotional or financial.[830]

The Committee finds, however, that despite the increasingly serious matters heard in the Magistrates' Court, more serious matters involving victims of crime are largely not determined in the Magistrates' Court. It is primarily for this reason that the Committee concludes that de novo appeals do not disadvantage victims of crime to the extent that would justify a restriction of existing appeal rights.

Appeals against conviction following a guilty plea

A notable consequence of the de novo hearing of criminal and related appeals from summary conviction is that a person may appeal his or her conviction despite having entered a plea of guilty in the Magistrates' Court.

The Director of Public Prosecutions, Mr Paul Coghlan QC, described the situation as follows:

> Because of the way that section 85 of the [*Magistrates' Court Act 1989*] is expressed, there is no reason to bind you to the plea that you made in the Magistrates' Court; you can simply effectively

[827] The Bill was passed by the Legislative Council on 3 October 2006 but at the time of writing had not yet been assented to.

[828] See also Victorian Law Reform Commission, *Sexual Offences Final Report*, (2004).

[829] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 August 2006, 2794 (Rob Hulls, Attorney-General) — second reading speech on the Crimes (Sexual Offences) (Further Amendment) Bill 2006.

[830] See Department of Justice, Victoria, 'Are You a Victim?' (28 September 2006) at http://www.justice.vic.gov.au.

> appeal against conviction and sentence, irrespective of what happened in the Magistrates' Court.[831]

The unrestricted nature of the right of appeal in such circumstances was also noted as a matter of concern by Victoria Police.[832]

The Director of Public Prosecutions told the Committee that an appeal against conviction following a plea of guilty can present particular challenges for prosecutors where a person has agreed to plead guilty as a result of a plea bargain:

> One of the difficulties that presently arises about that is that it does not bind you. So you can negotiate a plea. Say you plead guilty to "recklessly causing serious injury" as against "intentionally causing serious injury" … "recklessly causing serious injury" can be dealt with summarily; "intentionally causing serious injury" cannot. So you can have a case that comes out of the binding indictable stream — that is, it cannot ever be dealt with summarily — into the summary stream — that is, dealt with on a plea [ie a plea of guilty] — and in which appeal is then taken and you get a plea of not guilty to the charge, but you cannot bring your "intentionally causing serious injury" charge back onto the table.[833]

The Director of Public Prosecutions cited a particular case of an appeal against conviction following a plea of guilty in the Magistrates' Court as an illustration of the difficulties that the Office of Public Prosecutions can face in prosecuting particularly sensitive criminal charges:

> In one particular case, for a whole series of reasons, we settled a number of charges of sexual penetration with charges of indecent assault with a very, very sensitive complainant who we were desperately worried about putting through the system. We were offered the plea to "indecent assault" and we accepted that plea, and the magistrate decided to dispose of the case in the Magistrates' Court; the penetrative offences could not have been.
>
> Our reason for taking the plea mostly was governed by the proposition that we did not want to put a complainant through the burden of giving evidence if it could be avoided, and we were concerned about whether she could give evidence at all. That went through in the Magistrates' Court and a term of imprisonment was imposed, and rightly imposed, by the magistrate. There was then an appeal, which turned into an appeal against conviction and sentence.

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[831] Evidence to the Committee, Melbourne, 13 February 2006, 3, (Mr Paul Coghlan, QC, Director of Public Prosecutions).

[832] Victoria Police, *Submission No. 10*, 2. See also evidence to the Committee, Melbourne, 13 February 2006, 22 (Superintendent Stephen Leane, Victoria Police).

[833] Evidence to the Committee, Melbourne, 13 February 2006, 3, (Mr Paul Coghlan, QC, Director of Public Prosecutions).

> We were then faced with: one, we could not resurrect the penetrative offences; and two, the difficulty of running the appeal and calling the complainant, when that is really what we never wanted to do in the first place.[834]

The appellant in the case referred to by the Director of Public Prosecutions was convicted on appeal.[835] The Director of Public Prosecutions noted, however, that the case is illustrative of a real problem inherent in de novo appeals and the Committee also heard that following a plea bargain the defendant often succeeds in an application to have the matter heard in the Magistrates' Court rather than in the County Court despite the opposition of the Office of Public Prosecutions.[836]

Discussion and conclusion

The Committee notes that the right to appeal against conviction despite an original plea of guilty is an inherent feature of the de novo appeal because it effectively requires the case to be heard again as though for the first time.

The situation described by the Director of Public Prosecutions is therefore an obvious potential problem of the de novo system. However, it is important to determine the extent to which this issue is a problem for the criminal justice system. First, how often does a change of plea actually occur on appeal? Second, what legitimate reasons might appellants have for appealing their conviction despite having originally pleaded guilty?

The Committee deals with each of these in turn.

The Committee was unable to obtain authoritative statistics regarding the rate at which appeals against conviction follow a plea of guilty in the Magistrates' Court. However, the Committee's sample of cases from 2005 suggests that these are relatively rare — they made up just four per cent of conviction and sentence appeals.[837]

The second question of relevance to this issue is closely connected with the practice of plea bargaining. The Committee will not reiterate its discussion of this issue in chapter four[838] but notes here that plea bargaining can work to the disadvantage (as well as to the advantage) of a defendant.

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[834] Ibid.

[835] The Committee notes that the Director of Public Prosecutions described this particular case as having resulted in an acquittal on appeal to the County Court; ibid. However, the Office of Public Prosecutions subsequently advised the Committee that the appeal against conviction in the County Court was unsuccessful: email from Bruce Gardener, Manager, Policy, Office of Public Prosecutions, to Committee Research Officer, 21 April 2006.

[836] Email from Bruce Gardener, Manager, Policy, Office of Public Prosecutions, to Committee Research Officer, 21 April 2006.

[837] There were six such cases out of a sample of 152 appeals.

[838] See the discussion in chapter four under the heading, 'The invisibility of the pre-trial process'.

One problem apparently associated with plea bargaining is worthy of note in the current context. In a 1996 survey of 50 Victorian barristers practising predominantly in criminal law, legal scholars Robert D Seifman and Arie Feiberg found that:

> a significant number … admitted to having experienced a plea bargain that had "backfired", usually in the context of a prosecutor reneging on a pre-arranged version of an agreed summary.[839]

The Committee believes that the scenarios identified by the Director of Public Prosecutions and Magistrate Gurvich are as symptomatic of the practice of plea bargaining as they are of the existing appeal system.

The Committee notes that in some Australian states and territories an appeal against summary conviction following an original plea of guilty is subject to the court's leave (see for example New South Wales). However, on balance and particularly in view of the potential relative disadvantages to a defendant of having her or his matter heard in the Magistrates' Court, the Committee decided that it is not necessary to introduce such a restriction on the right of appeal in Victoria.

This may require further investigation, but is beyond the scope of this report.

Intervention Orders

An Intervention Order is the most commonly used protection order in Victoria.[840] It may be imposed against a family member under s 4 of the *Crimes (Family Violence) Act 1987*, or against a non-family member under the stalking provisions of the *Crimes Act 1958*.[841] There are similar statutory provisions in each of the Australian states and territories.[842]

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[839] Robert D Seifman and Arie Freiberg, 'Plea Bargaining in Victoria: The Role of Counsel', (April 2001) 25 *Criminal Law Journal* 73. The authors identify the use of an 'agreed summary' as one of three main categories of plea bargaining — they describe the practice as an arrangement between the defendant and the prosecution whereby the defendant agrees to plead guilty in exchange for a favourable summary of the allegations against him or her. The authors note that an 'agreed summary' may serve to conceal aspects of the defendant's conduct from the magistrate or judge for the purposes of sentencing and that, despite judicial criticism of the practice, the survey revealed that it remains 'relatively widespread': at 71, 73.

[840] A court may also make an order under s 126A of the *Magistrates' Court Act 1989* known as a 'bind over to the keep the peace', but such orders may only be appealed to the Supreme Court.

[841] Section 21A(5) of the *Crimes Act 1958* effectively provides that the Court may make an intervention order against a person who is not a member of the affected person's family under the *Crimes (Family Violence) Act 1987* 'if satisfied on the balance of probabilities that the defendant has stalked another person and is likely to continue to do so or to do so again'.

[842] LexisNexis, *Halsbury's Laws of Australia* (17 October 2006) [130–13495].

An Intervention Order may impose 'any restrictions or prohibitions on the person that appear necessary or desirable in the circumstances to the court'.[843] Typical restrictions include restricting a person's access to premises, banning a person from an identified area or from contacting the affected family member, requiring the subject of the order to attend counselling, and revoking a person's licence or permit to carry or use a firearm.[844]

The defendant or the complainant may appeal to the County Court against a magistrate's decision in relation to an Intervention Order (that is, the complainant may appeal against a decision to refuse to make an order and the defendant may appeal against the imposition of an order or its terms). Appeals are heard de novo. Appeals against Intervention Orders were less than 7 per cent of all appeals commenced by the County Court in 2005–06.[845]

The Committee heard from the County Court that appeals involving Intervention Orders can be time consuming and complex. As Judge Jenkins told the Committee:

> I think what we can say about them is they are invariably unrepresented. They are certainly conducted as de novo hearings. There seem to be a disproportionate number that are really in the nature of family disputes. There are often Family Court proceedings still outstanding, in particular custody orders pending, and the intervention order is often, we perceive, caught up in that whole scene. They are very difficult.[846]

The Committee notes that the 1999 changes introduced in NSW have apparently altered the way in which matters involving the equivalent of Intervention Orders are heard in that state. In NSW a person may apply to the court for an Apprehended Violence Order (AVO) in similar circumstances to those covered by an Intervention Order in Victoria. There is also a right of appeal, available to both complainant and defendant, from a magistrate's decision to the District Court against a decision to:

- make or refuse to make an AVO;
- grant an application to vary an AVO or refuse the variation of an AVO; or

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843 *Crimes (Family Violence) Act 1987* s 4(2).

844 Fitzroy Legal Service, *The Law Handbook* (2003) 715.

845 This is the percentage of appeals 'against the order made' as a proportion of all appeals 'commenced' during the period — 189 appeals were commenced 'against the order made' in 2004–05 out of 2666 commencements: County Court of Victoria, *Annual Report* (2005–06) 17.

846 Evidence to the Committee, Melbourne, 26 April 2006, (Judge PD Jenkins, County Court of Victoria). The general consensus of the Court would be that the County Court is not the appropriate jurisdiction for dealing with matters related to these types of intervention orders, and that the matter would be best dealt with by the Magistrates' Court in the first instance (Judge PD Jenkins, telephone conversation 16 October 2006).

- revoke or refuse to revoke an AVO.[847]

Since the 1999 changes to appeals (discussed in chapter three) AVO appeals are by way of a rehearing on the transcript of the Local Court evidence and the District Court grants leave to hear new evidence only when satisfied that it is in the interests of justice.[848]

The Committee was unable to obtain detailed evidence regarding the effect of the 1999 changes on the hearing of AVO appeals in NSW. The Committee notes, however, Chief Judge Reginald Blanch's observation that the difficulty associated with hearing AVO appeals was one of the reasons for the 1999 changes to the appeal system in NSW.[849] However, evidence provided by Mr Roland Bonnici, a NSW barrister, confirmed that such appeals remain factually complex and often emotional and that they regularly turn on questions of credibility.[850]

Discussion

The Committee acknowledges that the hearing of Intervention Order appeals is a time consuming and difficult component of the County Court's appellate jurisdiction. However, the Committee was not persuaded on the evidence that the NSW system of hearing such appeals primarily on the transcript of evidence from the original court should be adopted in Victoria.

In reaching this conclusion, the Committee is particularly mindful of the difficulty of making credibility assessments in an appeal based largely on a transcript of evidence. The Committee also notes that the Magistrates' Court has recently introduced a Family Violence Court Division as a pilot program at selected locations. Among other matters, the new division will focus on Intervention Orders.[851]

The Committee believes that this problem-solving approach in the Magistrates' Court may help to reduce the incidence of such appeals. Finally, the Committee feels that the question of appeals involving Intervention Orders would benefit from further research.

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[847] Redfern Legal Centre Publishing, *The Law Handbook — Your Practical Guide to the Law in New South Wales* (9th ed, 2004) 509.

[848] Ibid 510.

[849] Evidence to the Committee, Sydney, 10 April 2006, 166 (Chief Judge Reginald Blanch, District Court of New South Wales).

[850] Telephone conversation between Committee Research Officer and Mr Roland Bonnici, 24 April 2006.

[851] The Magistrates' Court has recently begun a pilot program that established a Family Violence Court Division at the Magistrates' Court of Victoria at Ballarat and Heidelberg. The Family Violence Court Division has been sitting at those locations since mid-2005 and will continue to do so until 30 June 2007: Magistrates' Court of Victoria, *Family Violence Court Division*, at: www.magistratescourt.vic.gov.au.

The jury

As the Committee noted in chapter four, the vast majority of criminal matters are no longer heard by a jury, largely because most matters are heard in the Magistrates' Court and are resolved by a plea of guilty. Jury trial is today reserved for more serious criminal matters, which make up only a small fraction of all criminal matters. As the Committee noted in the first section of this chapter, the relative decline in the role of the jury is in large part due to the trend of offence reclassification, primarily in relation to dishonesty offences.[852]

On first consideration the terms of reference might suggest the need for no more than a passing reference to the place of the jury within Victoria's criminal justice system. Clearly, the current inquiry does not require a detailed consideration of this ancient institution.[853] However, the Committee believes that some consideration of the scope of jury trial in Victoria is relevant to the current inquiry.

There are essentially three reasons for this conclusion. First, as the Committee found in chapter two, the once near-universal right to trial by jury in England apparently explains the origin of, and provides the original historical justification for, de novo appeals. Second, as is clear from the discussion of the origins of English summary jurisdiction in chapter two, a summary trial is the converse of trial by jury.[854] That is, the limit of each is defined by the extent of the other. Third, the jury has historically been the primary means of direct community participation in the criminal justice system.

The appropriate scope of the jury within modern criminal justice systems is a matter of debate. On the one hand, there are those who regard the jury as an important guarantor of liberty:

> Each jury is a little parliament. The jury sense is the parliamentary sense … The first object of any tyrant … would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the

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[852] Unlike NSW, South Australia, Western Australia and the ACT, a person prosecuted on indictment in Victoria does not have the option of electing for trial by judge alone.

[853] Notably, the jury predates both the proliferation of summary jurisdiction in 17th-century England and the office of justice of the peace, having originated in England during the 11th and 12th centuries; see Brown et al, above n 151, 304. For a very detailed account of the history of the jury, see: Victorian Law Reform Commission, *Appendices, The Role of the Jury in Criminal Trials*, Background Paper No. 1 (November 1985).

[854] As noted earlier in this report, a defining feature of summary justice, as exemplified by the criminal and related jurisdiction of the Victorian Magistrates' Court, is that the trial of an accused, where there is a trial, takes place without a jury. As also noted in earlier chapters, the vast majority of matters heard and determined in the Magistrates' Court do not involve a trial because they are resolved by a guilty plea. In such cases the magistrate's role is restricted to imposing sentence.

> hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.[855]

On the other side of the debate is the view that the jury's importance to the administration of justice is overrated:

> If the jury is such a "palladium" of English justice (Blackstone), why is it reserved for such a small number of cases, most defendants being treated to the quicker, cheaper, less flamboyant "trivial" justice of the magistrates' court? If the jury is such a guardian of our liberties and of justice, are we implying that magistrates dispense some lesser form of justice? Are we implying, since we invest so much cash and rhetoric in the jury system, that it is more likely to do justice and get the verdict right, whatever that means, than the magistrates? … There is one obvious answer to my questions here. The symbolic function of the jury far outweighs its practical significance.[856]

The Committee notes that debate about the role and appropriate scope of the jury within the criminal justice system is not new and that moves to restrict trial by jury have not always been motivated purely by claims of greater efficiency.[857]

Trial by jury has long been regarded as an institution of political significance within societies based on elective and participative government, such as Australia.[858] The importance of trial by jury is also recognised in the Victorian Attorney-General's *Justice Statement*, which describes the right to jury trial in 'more serious cases' as one of the fundamental principles determining the fairness of the criminal justice system.[859]

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[855] P Devlin, *Trial by Jury* (revised ed, 1966) 164, quoted in John Willis, 'The Declining Role of the Jury', in John Basten, Mark Richardson, Chris Ronalds, George Zdenkowski (eds) *The Criminal Injustice System* (1982) 227.

[856] Penny Darbyshire, 'The Lamp That Shows That Freedom Lives — Is It Worth the Candle?', (October 1991) *The Criminal Law Review* 741 (references omitted). Although these comments were directed to the contemporary English situation, the Committee has noted above that the jury plays an equally limited role in Australia, in the sense that only a small minority of criminal matters are heard in this way.

[857] See for example, David Neal, 'The Political Significance of the Jury' in D Challinger (ed) *The Jury* (1986) 61, 62–5, cited in Brown et al, above n 151, 305-306. As Neal notes:

> Opposition to jury trial has a long pedigree in Australia too. For over forty years from colonisation, England refused to allow trial by jury in New South Wales … Even in the early decades governors and governed complained about the absence of trial by jury, the abuses practised by the officers of the New South Wales Corps who sat as a panel in criminal cases, and the military flavour of the court. However, the real agitation for trial by jury began as the growing number of emancipated convicts began to organise themselves politically … They identified trial by jury with the English constitution and the protection of English liberty from arbitrary government. They also saw trial by jury as inextricably linked with elective institutions and the opportunity for them to participate in the government of the colony.

Ibid 306.

[858] Ibid.

[859] *Justice Statement*, above n 4, 25.

Moreover, despite the potential disadvantages associated with jury trials,[860] there is widespread agreement regarding the practical role that juries play in the maintenance of public confidence in the criminal justice system.[861] This function of the right to trial by jury was articulated by the High Court in *Kingswell v The Queen*:

> Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a "fair go" tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases.[862]

Conclusion

The Committee believes that de novo appeals from summary conviction may be seen as providing an important counterweight to the fact that summary jurisdiction involves the discretion of a single individual.

In summary matters the magistrate has three powers: fact finding, passing sentence and, in particular cases, exercising discretion in relation to both of the former. Notably, where a person is tried before a jury, it is a panel of representatives from the community who are entrusted with the fact-finding process and, in particular cases, with exercising the discretion that in summary matters is the province of the magistrate. In this sense, the jury has historically enabled the law to respond to the community that it serves.

For these reasons, the Committee considers that the diminishing role of the jury within the criminal justice system may be seen as both a historical and contemporary justification for retaining de novo appeals from summary conviction.

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[860] For a discussion of those disadvantages the reader is referred to Holdsworth, above n 95, 347–8.

[861] See for example New Zealand Law Commission, *Report No. 69: Juries in Criminal Trials* (February 2001) 2, 24–5, which describes the 'democratic nature' of the jury as the 'core value' underlying its function: at 2. See also L Waller and C R Williams, *Criminal Law: Text and Cases* (10th ed, 2005) 23–4; the authors question the characterisation of the jury as purely that of a fact-finding body, noting that in the criminal jurisdiction a major function of the jury has always been the exercise of discretion in reaching its verdict.

[862] *Kingswell v The Queen* (1985) 159 CLR 264 [51] (Deane J).

As the framers of the English criminal justice system apparently realised in the 17th century, de novo appeals are not a substitute for trial by jury, but they do provide an important counterweight to summary trial. For this reason, de novo appeals can also be seen as serving to enhance public confidence in the criminal justice system.

Finally, for the reasons noted in chapter four — notably, the pressures faced by defendants to plead guilty in the Magistrates' Court — the Committee concludes that de novo appeals against sentence also provide an important safeguard for individuals and, ultimately, for the Victorian community.

Recommendation 4. That de novo appeals from the Magistrates' Court to the County Court be retained in their current form, subject to the minor procedural modifications recommended by the Committee.

Adopted by the Committee

16 October 2006

APPENDIX 1 – LIST OF SUBMISSIONS

No.	Date of Submission	Name	Affiliation
1	17 November 2005	Jennifer Taylor	
2	29 November 2005		Confidential
2S	13 February 2006		Confidential
3	20 December 2005	Bill Doogue	Criminal Defence Lawyers Association
4	22 December 2005	Anna Radonic	Youthlaw
5	3 January 2006	Andrew Closey	Law Institute Victoria
6	3 January 2006	John Willis	La Trobe University
7	3 January 2006		Confidential
8	3 January 2006	Ian L Gray Includes a minority submission authored by Caitlin English	Magistrates' Court of Victoria
9	11 January 2006	Llewellyn Prain	Victoria Legal Aid
10	12 January 2006	Victoria Police	Victoria Police
11	8 February 2005	David Neil / Dr Gregory Lyon S.C.	Victorian Bar / Criminal Bar Association
12	13 February 2005	Paul Coghlan Q.C.	Director of Public Prosecutions

APPENDIX 2 – LIST OF WITNESSES

No.	Date of Meeting	Witness	Affiliation
1	13 February 2005 Melbourne	Mr P. Coghlan, QC	Director of Public Prosecutions
2		Mr B. Gardner	Manager, Policy **Office of Public Prosecutions**
3		Mr R. Melasecca	Immediate Past President
4		Mr M. McNamara	Deputy Chair
5		Mr J. Dowsley	Deputy Chair, Criminal Law Section **Law Institute of Victoria**
6		Superintendent S. Leane	Manager, Legal and Corporate Policy Unit
7		Sergeant K. McDonald	Member, Research and Training Unit
8		Ms P. Maroulis	Policy Officer **Victoria Police**
9		Mr R. Nankivell,	Legal Policy Officer
10		Dr D. Neal, SC	Member, Victorian Bar Council
11		Dr G. Lyon, SC	Secretary **Criminal Bar Association of Victoria**
12		Associate Professor J. Willis	School of Law **La Trobe University**
13	14 February 2005 Melbourne	Ms A. Radonic	Principal Lawyer
14		Ms H. Atwa	Solicitor **Youthlaw**

15		Mr M. Wighton	Manager, Regional Divisions
16		Ms T. Segbedzi	Policy Officer **Victoria Legal Aid**
17		Mr R. Stary	President
18		Mr B. Doogue	Public Officer **Criminal Defence Lawyers Association**
19		Mr I. Gray	Chief Magistrate
20		Mr M. Gurvich	Magistrate
21		Ms C. English	Magistrate **Magistrates' Court of Victoria**
22	6 March 2006 Melbourne	Justice T. Smith	**Supreme Court of Victoria**
23	10 April 2006 Sydney	Judge Derek Price	Chief Magistrate **Local Court of New South Wales**
24		Ms C. Girotto	Deputy Solicitor **Office of the Director of Public Prosecutions** (Operations), NSW
25		Mr M. Day	Managing Lawyer **Office of the Director of Public Prosecutions**, NSW
26		Mr R. Bonnici	Barrister
27		Mr P. Johnson	Senior Legal Officer, Inner City Local Court Section
28		Ms S. Beckett	Senior Legal Officer, Inner City Local Court Section
29		Mr J. Mulder	Solicitor in Charge **Penrith Legal Aid Office**, NSW

APPENDIX 3 – RELEVANT VICTORIAN LEGISLATION

Extract from *Magistrates' Court Act 1989*, Act No. 51/1989

82I. Power to assist police at road checks

S. 82I inserted by No. 99/2000 s. 4.

(1) This section applies if a member of the police force exercising a power conferred (whether directly or by implication) by the **Road Safety Act 1986** requests or signals the driver of a motor vehicle to stop the vehicle.

(2) Once the vehicle has stopped, the member of the police force, the sheriff or any person who is a bailiff for the purposes of the **Supreme Court Act 1986** may direct the driver of the vehicle—

(a) to keep the vehicle stationary;

(b) to drive the vehicle to a designated spot;

(c) to produce his or her driver licence document or permit document;

(d) to comply with any other reasonable direction—

to enable a determination of whether the driver, or any person accompanying the driver, is named in any warrant.

(3) A person who is given a direction under sub-section (2) must comply with the direction unless he or she has a reasonable excuse for not doing so.

Penalty: 5 penalty units.

Division 4—Appeals

Subdivision 1—Appeals to County Court

83. Appeal to County Court[19]

(1) A person may appeal to the County Court against any sentencing order made against that person by the Court in a criminal proceeding conducted in accordance with Schedule 2.

(2) If a person appeals under Subdivision 3 to the Supreme Court on a question of law, that person is deemed to have abandoned finally and conclusively any right under this or any other Act to appeal to the County Court.

84. Appeal by DPP against sentence for offence punishable summarily

(1) The Director of Public Prosecutions may appeal to the County Court against any sentencing order made by the Court in a criminal proceeding conducted in accordance with Schedule 2 if satisfied that an appeal should be brought in the public interest.

(2) The Director of Public Prosecutions must not bring a further appeal against a sentencing order made by the County Court.

85. Appeal operates as re-hearing

An appeal under section 83 or 84 must be conducted as a re-hearing and the appellant is not bound by the plea entered in the Magistrates' Court.

86. Powers of County Court on appeal

(1) On the hearing of an appeal under section 83 or 84, the County Court—

(a) must set aside the order of the Magistrates' Court; and

(b) may make any order which the County Court thinks just and which the Magistrates' Court made or could have made; and

(c) may exercise any power which the Magistrates' Court exercised or could have exercised.

(1AA) Despite any rule of law or practice to the contrary, the County Court is not required, on the hearing of an appeal under section 83, to warn the appellant before making a sentencing order of the possibility of a sentencing order being made, or of its intention to make a sentencing order, that is more severe than that made by the Magistrates' Court.

S. 86(1AA) inserted by No. 10/1999 s. 9(1).

(1A) The County Court may backdate an order made under sub-section (1) to a date not earlier than the date of the order of the Magistrates' Court that was set aside on the appeal[20].

S. 86(1A) inserted by No. 33/1994 s. 12(1).

(2) An order made under sub-section (1) is for all purposes to be regarded as an order of the County Court, except for the purposes of section 74 of the **County Court Act 1958**.

S. 86(2) amended by Nos 49/1991 s. 119(7) (Sch. 4 item 13.3), 48/1997 s. 66(1).

(3) If an appellant—

* * * * *

S. 86(3)(a) repealed by No. 10/1999 s. 9(2).

(b) abandons the appeal in accordance with clause 6 of Schedule 6—

the County Court must strike out the appeal.

(3A) If an appellant fails to appear at the time listed for the hearing of the appeal, the County Court may—

S. 86(3A) inserted by No. 10/1999 s. 9(3).

(a) proceed to hear and determine the appeal in the appellant's absence without prejudice, if the appellant has been released on bail under clause 4 of Schedule 6, to any right of action arising out of the breach of the bail undertaking; or

(b) strike out the appeal; or

(c) adjourn the proceeding on any terms that it thinks fit.

S. 86(3B) inserted by No. 10/1999 s. 9(3).

(3B) If the County Court proceeds under sub-section (3A)(a) to hear and determine an appeal in the appellant's absence, it may do so on the basis of—

(a) any statement, or exhibit or document referred to in a statement, a copy of which was served on the appellant in a brief of evidence in accordance with section 37; or

(b) evidence on oath given by or on behalf of the respondent.

S. 86(3C) inserted by No. 10/1999 s. 9(3).

(3C) The County Court may rule as inadmissible the whole or any part of a statement or of any exhibit or document referred to in a statement.

S. 86(4) amended by No. 10/1999 s. 9(4).

(4) If an appeal is struck out under sub-section (3) or (3A)(b), the order of the Magistrates' Court may be enforced as if an appeal had not been made but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay.

S. 87 amended by Nos 49/1991 s. 119(7) (Sch. 4 item 13.4), 33/1994 s. 12(2), repealed by No. 10/1999 s. 10.

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88. Procedure on appeal

Appeals under sections 83 and 84 must be conducted in accordance with Schedule 6.

88AA. Costs powers of County Court on appeal

S. 88AA inserted by No. 10/1999 s. 11.

(1) If an appeal under section 83 is struck out or dismissed, the County Court may order the appellant to pay all or a specified portion of the respondent's costs of the appeal if satisfied that the appeal was brought vexatiously or frivolously or in abuse of process.

(2) Nothing in sub-section (1) limits any discretion as to costs of an appeal conferred on the County Court by any other provision of this Act or the **County Court Act 1958**.

88A. Regulations may prescribe costs of appeal

S. 88A inserted by No. 64/1996 s. 34.

The Governor in Council may make regulations for or with respect to prescribing by scale or otherwise the costs of and incidental to proceedings in the County Court on an appeal under section 83 or 84.

89. Appellant's failure to appear

(1) The County Court may, at any time, set aside an order striking out an appeal because of the failure of the appellant to appear, if the appellant satisfies the Court that the failure to appear was not due to fault or neglect on the part of the appellant.

(2) An application under sub-section (1) to set aside an order may be made at any time on notice in writing to the respondent served a reasonable time before the making of the application.

(3) Notice under sub-section (2) must be served in the same way as a notice of appeal.

(4) If the County Court grants an application under sub-section (1), the Court—

(a) must order the reinstatement of the appeal subject to the payment of any costs that the Court thinks fit; and

(b) may require the appellant to give a further undertaking to prosecute the appeal.

S. 89A inserted by No. 10/1999 s. 12.

89A. Re-hearing where County Court hears appeal in appellant's absence

(1) If the County Court hears and determines an appeal under section 86(3A)(a) in the appellant's absence, the appellant may, within 30 days after being notified in writing of the determination of the appeal, apply to the County Court for an order that any order made under section 86(1) be set aside and that the appeal be re-heard.

(2) An appellant may apply under sub-section (1) after the end of the period of 30 days referred to in that sub-section with the leave of the County Court granted on an application by the appellant under this sub-section.

(3) The County Court may only grant leave on an application under sub-section (2) if—

(a) it is of the opinion that the failure to apply under sub-section (1) within the period referred to in that sub-section was due to exceptional circumstances; and

(b) it is satisfied that the respondent's case would not be materially prejudiced because of the delay.

(4) An application under sub-section (1) must—

(a) state why the appellant did not appear at the hearing of the appeal; and

(b) be filed with the registrar of the County Court and a copy of it served on the respondent in the same way as a notice of appeal.

(5) If the County Court grants an application under sub-section (1)—

(a) it must set aside any order made under section 86(1) and order the reinstatement of—

(i) the order of the Magistrates' Court; and

(ii) the appeal—

subject to the payment of any costs that it thinks fit; and

(b) it may require the appellant to give a further undertaking to prosecute the appeal; and

(c) clause 3 of Schedule 6 applies to the sentencing order appealed against as if the granting of the application were the filing of the notice of appeal.

(6) The County Court may only grant an application under sub-section (1) if satisfied that the failure to appear was not due to fault or neglect on the part of the appellant.

90. Appeal to County Court authorised by other Acts

If a person is authorised by or under another Act to appeal from an order of the Magistrates' Court to the County Court, the provisions of this Act with respect to appeals to the County Court apply.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

SCHEDULE 4

Section 53(1)

INDICTABLE OFFENCES WHICH MAY BE HEARD AND DETERMINED SUMMARILY

1. Causing serious injury recklessly

Offences under section 17 of the **Crimes Act 1958**.

Sch. 4 cl. 1 substituted by No. 48/1997 s. 65(3)(a).

2. Extortion with threat to kill

Offences under section 27 of the **Crimes Act 1958**.

Sch. 4 cl. 2 substituted by No. 48/1997 s. 65(3)(a).

* * * * *

Sch. 4 cls 3–7 repealed by No. 48/1997 s. 65(3)(a).

* * * * *

Sch. 4 cl. 8 substituted by No. 8/1991 s. 14, amended by No. 81/1991 s. 10(Sch. item 2.1), repealed by No. 48/1997 s. 65(3)(a).

* * * * *

Sch. 4 cls 9–13 substituted by No. 8/1991 s. 14, repealed by No. 48/1997 s. 65(3)(a).

14. Occupier, etc. permitting unlawful sexual penetration

Offences under section 54 of the **Crimes Act 1958**.

Sch. 4 cl. 14 substituted by No. 8/1991 s. 14.

Sch. 4 cls 14A, 14B inserted by No. 8/1991 s. 14, repealed by No. 48/1997 s. 65(3)(b).

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Sch. 4 cl. 15 repealed by No. 48/1997 s. 65(3)(b).

* * * * *

16. Theft

Offences under section 74 of the **Crimes Act 1958**, if the amount or value of the property alleged to have been stolen does not in the judgment of the Court exceed $25 000 or if the property alleged to have been stolen is a motor vehicle.

17. Robbery

Offences under section 75 of the **Crimes Act 1958**, if the amount or value of the property alleged to have been stolen does not in the judgment of the Court exceed $25 000.

18. Burglary

Offences under section 76 of the **Crimes Act 1958**, if the offence involves an intent to steal property the amount or value of which does not in the judgment of the Court exceed $25 000.

19. Aggravated burglary

Offences under section 77 of the **Crimes Act 1958**, if the offence involves an intent to steal property the amount or value of which does not in the judgment of the Court exceed $25 000.

20. Removal of articles from places open to the public

Offences under section 78 of the **Crimes Act 1958**, if the amount or value of the article alleged to have been removed does not in the judgment of the Court exceed $25 000.

21. Obtaining property by deception

Offences under section 81 of the **Crimes Act 1958**, if the amount or value of the property alleged to have been obtained does not in the judgment of the Court exceed $25 000.

22. Obtaining financial advantage by deception

Offences under section 82 of the **Crimes Act 1958**, if the amount or value of the financial advantage alleged to have been obtained does not in the judgment of the Court exceed $25 000.

23. False accounting

Offences under section 83 of the **Crimes Act 1958**, if the amount or value of the alleged gain or loss does not in the judgment of the Court exceed $25 000.

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Sch. 4 cls 24, 25 repealed by No. 48/1997 s. 65(3)(b).

26. Suppression, etc. of documents

Offences under section 86 of the **Crimes Act 1958**, if the amount or value of the alleged gain or loss does not in the judgment of the Court exceed $25 000.

27. Handling stolen goods

Offences under section 88 of the **Crimes Act 1958**, if the amount or value of the stolen goods alleged to have been handled does not in the judgment of the Court exceed $25 000.

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Sch. 4 cl. 28 repealed by No. 48/1997 s. 65(3)(b).

29. Receipt or solicitation of secret commission by agent

Offences under section 176 of the **Crimes Act 1958**, if the amount or value of the valuable consideration received, solicited, given or offered does not in the judgment of the Court exceed $25 000.

30. Giving or receiving false or misleading receipt or account

Offences under section 178 of the **Crimes Act 1958**, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25 000.

31. Gift or receipt of secret commission in return for advice given

Offences under section 179 of the **Crimes Act 1958**, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25 000.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

32. Secret commission to trustee in return for substituted appointment

Offences under section 180 of the **Crimes Act 1958**, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25 000.

33. Aiding and abetting offences within or outside Victoria

Offences under section 181 of the **Crimes Act 1958**, if the amount or value of the valuable consideration received or given does not in the judgment of the Court exceed $25 000.

34. Fraudulently inducing persons to invest money

Offences under section 191 of the **Crimes Act 1958**.

Sch. 4 cl. 35 amended by No. 59/2004 s. 10.

35. Destroying or damaging property

Offences under section 197(1) and (3) of the **Crimes Act 1958** (including offences charged as arson), if the amount or value of the property alleged to be destroyed or damaged does not in the judgment of the Court exceed $25 000.

36. Threats to destroy or damage property

Offences under section 198 of the **Crimes Act 1958**, if the amount or value of the property alleged to be threatened to be destroyed or damaged does not in the judgment of the Court exceed $25 000.

37. Possessing anything with intent to destroy or damage property

Offences under section 199 of the **Crimes Act 1958**, if the amount or value of the property alleged to be intended to be destroyed or damaged does not in the judgment of the Court exceed $25 000.

Sch. 4 cl. 37A inserted by No. 10/2003 s. 12.

37A. Computer Offences

(1) Offences under section 247B of the **Crimes Act 1958**, if the maximum penalty does not exceed level 5 imprisonment.

(2) Offences under sections 247E and 247F of the **Crimes Act 1958**.

Sch. 4 cl. 38 repealed by No. 48/1997 s. 65(3)(b), new Sch. 4 cl. 38 inserted by No. 60/1998 s. 17.

38. Commercial quantity of RC publications, films or computer games

Offences under sections 15(3), 23A(1), 23A(2), 25(4), 31(3), 36(3), 45A(1) and 45A(2) of the **Classification (Publications, Films and Computer Games) (Enforcement) Act 1995**.

39. Non-compliance with compliance notice

Offences under section 48(1) of the **Information Privacy Act 2000**.

Sch. 4 cl. 39 repealed by No. 48/1997 s. 65(3)(b), new Sch. 4 cl. 39 inserted by No. 98/2000 s. 75.

40. Publication or transmission of child pornography

Offences under section 57A of the **Classification (Publications, Films and Computer Games) (Enforcement) Act 1995**.

Sch. 4 cl. 40 repealed by No. 48/1997 s. 65(3)(b), new Sch. 4 cl. 40 inserted by No. 69/2001 s. 19.

41. Unlawful interment

An offence under section 114 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 41 repealed by No. 34/1990 s. 4(Sch. 3 item 20), new Sch. 4 cl. 41 inserted by No. 129/1993 s. 9(3), repealed by No. 48/1997 s. 65(3)(b), new Sch. 4 cl. 41 inserted by No. 80/2003 s. 184.

42. Offence to inter bodily remains in public cemetery without interment authorisation

An offence under section 115 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 42 repealed by No. 34/1990 s. 4(Sch. 3 item 20), new Sch. 4 cl. 42 inserted by No. 129/1993 s. 9(3), repealed by No. 48/1997 s. 65(3)(b), new Sch. 4 cl. 42 inserted by No. 80/2003 s. 184.

Sch. 4 cl. 42A inserted by No. 80/2003 s. 184.

42A. Unlawful cremation

An offence under section 129 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 42B inserted by No. 80/2003 s. 184.

42B. Offence to cremate without cremation authorisation

An offence under section 130 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 42C inserted by No. 80/2003 s. 184.

42C. Offence to make false statement in application for cremation authorisation

An offence under section 132 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 42D inserted by No. 80/2003 s. 184.

42D. Offence to make false statement in application for approval for cremation by Secretary

An offence under section 137 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 42E inserted by No. 80/2003 s. 184.

42E. Offence to make false statement in certificate of registered medical practitioner authorising cremation

An offence under section 140 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 42F inserted by No. 80/2003 s. 184.

42F. Offence to exhume other than in accordance with Cemeteries and Crematoria Act 2003

An offence under section 155 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 42G inserted by No. 80/2003 s. 184.

42G. Offence to dispose of falsely identified bodily remains

An offence under section 176 of the **Cemeteries and Crematoria Act 2003**.

Sch. 4 cl. 43 repealed by No. 34/1990 s. 4(Sch. 3 item 20), new Sch. 4 cl. 43 inserted by No. 102/1994 s. 96, repealed by No. 48/1997 s. 65(3)(c), new Sch. 4 cl. 43 inserted by No. 2/2001 s. 110.

43. Non-compliance with enforcement notice—health information

Offences under section 71(1) of the **Health Records Act 2001**.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

44. Obtaining payment for sexual services provided by a child

Offences under section 6(1) of the **Prostitution Control Act 1994**.

Sch. 4 cl. 44 substituted by No. 102/1994 s. 96.

45. Agreement for provision of sexual services by a child

Offences under section 7(1) of the **Prostitution Control Act 1994**.

Sch. 4 cl. 45 repealed by No. 25/1989 s. 8(3), new Sch. 4 cl. 45 inserted by No. 34/1990 s. 4(Sch. 3 item 21), substituted by No. 102/1994 s. 96.

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Sch. 4 cls 46, 47 repealed by No. 25/1989 s. 8(3), new Sch. 4 cls 46, 47 inserted by No. 34/1990 s. 4(Sch. 3 item 21), substituted by No. 102/1994 s. 96, repealed by No. 48/1997 s. 65(3)(c).

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Sch. 4 cl. 48 substituted by No. 102/1994 s. 96, repealed by No. 48/1997 s. 65(3)(c).

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Sch. 4 cl. 48A inserted by No. 102/1994 s. 96, repealed by No. 48/1997 s. 65(3)(c).

Sch. 4 cl. 48AB inserted by No. 73/1996 s. 61, repealed by No. 48/1997 s. 65(3)(c).

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Sch. 4 cl. 48B inserted by No. 102/1994 s. 96, repealed by No. 48/1997 s. 65(3)(c).

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Sch. 4 cl. 48C inserted by No. 99/1995 s. 24 (as amended by No. 73/1996 s. 63), substituted as Sch. 4 cl. 46 by No. 44/1999 s. 34.

46. Offence to have interest in more than one brothel licence or permit

Offences under section 75(1) of the **Prostitution Control Act 1994**.

Sch. 4 cl. 49 amended by Nos 61/2001 s. 12(1), 35/2002 s. 28(Sch. item 4.1).

49. Drug offences

Indictable offences under the **Drugs, Poisons and Controlled Substances Act 1981** (except for offences against sections 71, 71AA, 72 and 72A and offences against the following provisions as in force before the commencement of the **Drugs, Poisons and Controlled Substances (Amendment) Act 2001**—

(a) section 71(1) where the alleged offence is committed in relation to a quantity of a drug of dependence that is not less than the commercial quantity applicable to that drug of dependence;

(b) section 72(1) where the alleged offence is committed in relation to a quantity of a drug of dependence, being a narcotic plant, that is not less than the commercial quantity applicable to that narcotic plant)

but the maximum penalties that the Court may impose are imprisonment for a period not exceeding 3 years or a fine of not more than 50 penalty units or both.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

49A. Offence for prohibited person to possess, carry or use a firearm

Offences under section 5(1) and (2) of the **Firearms Act 1996**.

Sch. 4 cl. 49A inserted by No. 26/1997 s. 55.

49B. Offence for a non-prohibited person to possess, carry or use a longarm without a licence

Offences under section 6(3), (4), (5) and (6) of the **Firearms Act 1996**.

Sch. 4 cl. 49B inserted by No. 26/1997 s. 55, amended by No. 28/2003 s. 76(a).

49BA. Offence to possess, carry or use an unregistered longarm

Offences under section 6A(1), (2), (3) and (4) of the **Firearms Act 1996**.

Sch. 4 cl. 49BA inserted by No. 28/2003 s. 76(b), amended by No. 78/2005 s. 68.

49BB. Offence for non-prohibited person to possess, carry or use a handgun without a licence

Offences under section 7(1), (2), (3), (4), (5) and (6) of the **Firearms Act 1996**.

Sch. 4 cl. 49BB inserted by No. 28/2003 s. 76(b).

49BC. Offence for holder of general category handgun licence to possess, carry or use certain types of handguns under the licence

Offences under section 7A(1) and (6) of the **Firearms Act 1996**.

Sch. 4 cl. 49BC inserted by No. 28/2003 s. 76(b).

49BD. Offence to possess, carry or use an unregistered general category handgun

Offences under section 7B(1) of the **Firearms Act 1996**.

Sch. 4 cl. 49BD inserted by No. 28/2003 s. 76(b).

49C. Offence not to comply with licence conditions of longarm licence

Offences under section 36(3) of the **Firearms Act 1996**.

Sch. 4 cl. 49C inserted by No. 26/1997 s. 55.

49D. Failure to dispose of firearms where licence not renewed

Offences under section 45(5) of the **Firearms Act 1996**.

Sch. 4 cl. 49D inserted by No. 26/1997 s. 55.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

Sch. 4 cl. 49E inserted by No. 26/1997 s. 55.

49E. Failure to surrender firearms or licence document

Offences under section 53(1) of the **Firearms Act 1996**.

Sch. 4 cl. 49F inserted by No. 26/1997 s. 55.

49F. Offence to carry on business of dealing in firearms

Offences under section 59(2) of the **Firearms Act 1996**.

Sch. 4 cl. 49G inserted by No. 26/1997 s. 55.

49G. Failure to surrender firearms or licence document

Offences under section 83 of the **Firearms Act 1996**.

Sch. 4 cl. 49H inserted by No. 26/1997 s. 55.

49H. Acquisition of firearms from particular persons

Offences under section 93(3) of the **Firearms Act 1996**.

Sch. 4 cl. 49I inserted by No. 26/1997 s. 55.

49I. Disposal of firearms to particular persons

Offences under section 94(3) of the **Firearms Act 1996**.

Sch. 4 cl. 49J inserted by No. 26/1997 s. 55, amended by No. 28/2003 s. 76(c).

49J. Acquisition of firearm from person who is not a licensed dealer

Offences under section 95(2), (2A), (3) and (4) of the **Firearms Act 1996**.

Sch. 4 cl. 49K inserted by No. 26/1997 s. 55, amended by No. 28/2003 s. 76(d).

49K. Disposal of firearm to a person who is not a licensed dealer

Offences under section 96(2), (2A), (3) and (4) of the **Firearms Act 1996**.

Sch. 4 cl. 49L inserted by No. 26/1997 s. 55.

49L. Acquisition of firearm from place outside the State

Offences under section 99(3) of the **Firearms Act 1996**.

Sch. 4 cl. 49M inserted by No. 26/1997 s. 55.

49M. Disposal of firearm to place outside the State

Offences under section 100(3) of the **Firearms Act 1996**.

49MA. Offence to finance the illegal acquisition or disposal of firearms

Sch. 4 cl. 49MA inserted by No. 28/2003 s. 76(e).

Offences under section 101B(2) and (3) of the **Firearms Act 1996**.

49N. Acquisition of firearm without a permit

Sch. 4 cl. 49N inserted by No. 26/1997 s. 55, amended by No. 28/2003 s. 76(f).

Offences under section 102(2A), (3) and (3A) of the **Firearms Act 1996**.

49O. Notice of bringing of firearm into the State

Sch. 4 cl. 49O inserted by No. 26/1997 s. 55.

Offences under section 115(1) of the **Firearms Act 1996**.

49P. Notice of removal of firearm from the State

Sch. 4 cl. 49P inserted by No. 26/1997 s. 55.

Offences under section 116(1) of the **Firearms Act 1996**.

49Q. Storage of longarms and handguns

Sch. 4 cl. 49Q inserted by No. 26/1997 s. 55.

Offences under section 121(3) of the **Firearms Act 1996**.

49R. Storage of firearms held under collectors licences

Sch. 4 cl. 49R inserted by No. 26/1997 s. 55.

Offences under section 122(2) of the **Firearms Act 1996**.

49S. Storage of firearms under dealers licences

Sch. 4 cl. 49S inserted by No. 26/1997 s. 55.

Offences under section 123(3) of the **Firearms Act 1996**.

49T. Safekeeping of firearms during carriage

Sch. 4 cl. 49T inserted by No. 26/1997 s. 55.

Offences under section 126(3) of the **Firearms Act 1996**.

49U. Use of firearm by person other than possessor

Sch. 4 cl. 49U inserted by No. 26/1997 s. 55, amended by No. 28/2003 s. 76(g).

Offences under section 127(2A) and (3) of the **Firearms Act 1996**.

Sch. 4 cl. 49UA inserted by No. 28/2003 s. 76(h).

49UA. Offence to use firearm held under a firearms collectors licence

Offences under section 127A(1) of the **Firearms Act 1996**.

Sch. 4 cl. 49V inserted by No. 26/1997 s. 55.

49V. Carriage and use of firearms

Offences under section 132(2) of the **Firearms Act 1996**.

Sch. 4 cl. 49W inserted by No. 26/1997 s. 55.

49W. Offence to alter a firearm

Offences under sub-section (1), (2) and (3) of section 134 of the **Firearms Act 1996**.

Sch. 4 cl. 49WA inserted by No. 28/2003 s. 76(i).

49WA. Offence to possess a firearm that has been altered in a particular way

Offences under section 134C of the **Firearms Act 1996**.

Sch. 4 cl. 49X inserted by No. 26/1997 s. 55.

49X. Offence to own a firearm without a licence to possess

Offences under section 135(3) of the **Firearms Act 1996**.

Sch. 4 cl. 49Y inserted by No. 26/1997 s. 55.

49Y. Offence to dispose of a firearm to a minor

Offences under section 136 of the **Firearms Act 1996**.

Sch. 4 cl. 49Z inserted by No. 26/1997 s. 55.

49Z. Offence to alter documents

Offences under section 137 of the **Firearms Act 1996**.

Sch. 4 cl. 49ZA inserted by No. 26/1997 s. 55.

49ZA. False entries in registers

Offences under section 138 of the **Firearms Act 1996**.

Sch. 4 cl. 49ZB inserted by No. 28/2003 s. 76(j).

49ZB. Offence to make false or misleading statement or to use false or misleading information

Offences under section 140A(2) of the **Firearms Act 1996**.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

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Sch. 4 cl. 50 repealed by No. 54/1989 s. 35(5) (as amended by No. 34/1990 s. 7(7)), new Sch. 4 cl. 50 inserted by No. 90/1991 s. 35, repealed by No. 108/1997 s. 154.

51. Killing, taking, etc. whales

Offences under section 76(1), (2), (2A) and (5) of the **Wildlife Act 1975**, but subject to section 85 of that Act.

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Sch. 4 cl. 52 amended by No. 23/2002 s. 199, repealed by No. 44/2006 s. 16.

52A. Equipment (Public Safety) Act 1994

Sch. 4 cl. 52A inserted by No. 21/1994 s. 39, amended by No. 107/1997 s. 75(a)(b), substituted by No. 31/2005 s. 36(a).

Indictable offences under the **Equipment (Public Safety) Act 1994**, but the maximum penalty that the Court may impose is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

53. Occupational Health and Safety Act 2004

Sch. 4 cl. 53 amended by Nos 11/1990 s. 12(2) (as amended by No. 34/1990 s. 7(8)), 107/1997 s. 75(a)(b), substituted by No. 107/2004 s. 181(1).

Indictable offences under the **Occupational Health and Safety Act 2004** but the maximum penalty that the Court may impose is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

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Magistrates' Court Act 1989
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Sch. 4 cl. 53A inserted by No. 48/1989 s. 18 (as amended by No. 34/1990 s. 7(6)(a)(b)), amended by No. 107/1997 s. 75(a), substituted by No. 31/2005 s. 36(b).

53A. Dangerous Goods Act 1985

Indictable offences under the **Dangerous Goods Act 1985**, but the maximum penalty that the Court may impose is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

Sch. 4 cl. 54 repealed by No. 24/2005 s. 29.

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Sch. 4 cl. 54A inserted by No. 13/1998 s. 16.

54A. Health Services Act 1988

Indictable offences under the **Health Services Act 1988**.

Sch. 4 cl. 55 amended by No. 49/2000 s. 4(1).

55. Aggravated pollution

Offences under section 59E of the **Environment Protection Act 1970** but the maximum penalties that the Court may impose are imprisonment for a period not exceeding 2 years or a fine of not more than 1000 penalty units or both.

Sch. 4 cl. 55A inserted by No. 9/2006 s. 159(1)(a).

55A. Rail Safety Act 2006

Indictable offences under the **Rail Safety Act 2006** but the maximum penalty that the Court may impose is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

Sch. 4 cl. 55B inserted by No. 9/2006 s. 159(1)(a).

55B. Road Management Act 2004

Indictable offences under section 48B, 48C or 48D of the **Road Management Act 2004** but the maximum penalty that the Court may impose is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

56. Marine Act

Indictable offences under the **Marine Act 1988**, but subject to section 110 of that Act.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

56A. Pollution of Waters by Oil and Noxious Substances Act

Indictable offences under the **Pollution of Waters by Oil and Noxious Substances Act 1986**, but subject to section 24C of that Act.

Sch. 4 cl. 56A inserted by No. 46/1991 s. 48.

56B. Crimes Act

Offences under section 31A of the **Crimes Act 1958**.

Sch. 4 cl. 56B inserted by No. 66/1996 s. 201(3) (as amended by No. 26/1997 s. 35(1)).

56C. Electricity Industry Act 2000

Offences by a body corporate under section 97(7) of the **Electricity Industry Act 2000**, offences under section 93A(1) or (2) or 97(11) of that Act but the maximum penalty that the Court may impose in respect of offences under section 93A(1) or (2) is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

Sch. 4 cl. 56C inserted by No. 36/1999 s. 26, substituted by No. 69/2000 s. 57, amended by No. 11/2002 s. 3(Sch.1 item 43.1), substituted by No. 9/2006 s. 159(1)(b).

56D. Electricity Safety Act 1998

Offences under section 141A of the **Electricity Safety Act 1998**.

Sch. 4 cl. 56D inserted by No. 36/1999 s. 26.

56E. Gas Industry Act 2001

Offences by a body corporate under section 208(5) of the **Gas Industry Act 2001** and offences under section 149A(1) or (2), 186(9) or 210(1) of that Act but the maximum penalty that the Court may impose in respect of offences under section 149A(1) or (2) is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

Sch. 4 cl. 56E inserted by No. 39/1999 s. 39, substituted by Nos 32/2001 s. 35, 9/2006 s. 159(1)(c).

56F. Gas Safety Act 1997

Offences under section 107 of the **Gas Safety Act 1997**.

Sch. 4 cl. 56F inserted by No. 39/1999 s. 39.

Sch. 4 cl. 56G inserted by No. 9/2006 s. 159(1)(d).

56G. Water Act 1989

Indictable offences under section 137A(1) or (2) of the **Water Act 1989** but the maximum penalty that the Court may impose is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

Sch. 4 cl. 56H inserted by No. 9/2006 s. 159(1)(d).

56H. Water Industry Act 1994

Indictable offences under section 62A(1) or (2) of the **Water Industry Act 1994** but the maximum penalty that the Court may impose is—

(a) in the case of a natural person, 240 penalty units; and

(b) in the case of a body corporate, 1200 penalty units.

Sch. 4 cl. 57 amended by No. 48/1997 s. 65(3)(e).

57. Incitement

Offences under section 321G of the **Crimes Act 1958** which are alleged to have been committed in relation to an indictable offence to which section 53(1) of this Act applies.

Sch. 4 cl. 58 amended by No. 48/1997 s. 65(3)(e).

58. Attempts

Offences under section 321M of the **Crimes Act 1958** which are alleged to have been committed in relation to an indictable offence to which section 53(1) of this Act applies.

Sch. 4 cl. 59 amended by No. 48/1997 s. 65(3)(e).

59. Accessories

Offences under section 325 of the **Crimes Act 1958** which are alleged to have been committed in relation to a serious indictable offence (within the meaning of that section) to which section 53(1) of this Act applies.

Sch. 4 cl. 60 amended by No. 48/1997 s. 65(3)(e).

60. Concealing offences for benefit

Offences under section 326(1) of the **Crimes Act 1958** which are alleged to have been committed in relation to a serious indictable offence (within the meaning of that section) to which section 53(1) of this Act applies.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

61. Heritage Act 1995

Indictable offences under Part 4, Part 5 and Part 8 of the **Heritage Act 1995**.

Sch. 4 cl. 61 inserted by No. 67/1993 s. 26, substituted by No. 93/1995 s. 218(1) (Sch. 2 item 4), amended by No. 74/2003 s. 14.

62. Infertility Treatment Act

Indictable offences under the **Infertility Treatment Act 1995**.

Sch. 4 cl. 62 inserted by No. 63/1995 s. 169.

63. Juries Act 2000

Offences under sections 66(1), 77(1), 78(1), 78(2) and 78(6) of the **Juries Act 2000**.

Sch. 4 cl. 63 inserted by No. 53/2000 s. 97.

63A. Environment Protection Act 1970

Indictable offences (other than an offence under section 59E) under the **Environment Protection Act 1970**, but the maximum fine that the Court may impose in respect of a single offence is 1000 penalty units.

Sch. 4 cl. 63 inserted by No. 35/1996 s. 453(Sch. 1 item 53.7), repealed by No. 48/1997 s. 65(3)(f), new Sch. 4 cl. 63 inserted by No. 49/2000 s. 4(2), re-numbered as Sch. 4 cl. 63A by No. 11/2002 s. 3(Sch. 1 item 43.2).

64. Food Act 1984

Indictable offences under the **Food Act 1984**, but the maximum fine that the court may impose in respect of a single offence is—

(a) in the case of a corporation, 2000 penalty units;

(b) in any other case, 600 penalty units.

Sch. 4 cl. 64 inserted by No. 14/2001 s. 34.

Magistrates' Court Act 1989
Act No. 51/1989

Sch. 4

Sch. 4 cl. 65 inserted by No. 47/2002 s. 45.

65. Sports Event Ticketing (Fair Access) Act 2002

Indictable offences under the **Sports Event Ticketing (Fair Access) Act 2002**, but the maximum fine that the Court may impose in respect of a single offence is—

(a) 300 penalty units in the case of a natural person; or

(b) 1500 penalty units in the case of a body corporate.

Sch. 4 cl. 66 inserted by No. 52/2003 s. 52(Sch. 1 item 8).

66. Australian Crime Commission (State Provisions) Act 2003

Indictable offences under the **Australian Crime Commission (State Provisions) Act 2003**, but the maximum penalty that the Court may impose in respect of a single offence is a fine not exceeding $2200 or imprisonment for a period not exceeding one year.

Sch. 4 cl. 67 inserted by No. 45/2005 s. 29.

67. Tobacco Act 1987

Offences against sections 6(2D), 7(5), 8(3) and 9(5) of the **Tobacco Act 1987**.

SCHEDULE 6

Section 88

PROCEDURE ON APPEALS TO THE COUNTY COURT

1. Service of notice of appeal

(1) Notice of an appeal under section 83 or 84 must be given within 30 days after the day on which the sentencing order of the Magistrates' Court was made.

(2) A notice of appeal given after the end of the period referred to in sub-clause (1) is deemed to be an application for leave to appeal on the grounds stated in the notice.

(3) The County Court may grant leave to appeal under sub-clause (2) and the appellant may proceed with the appeal if—

(a) it is of the opinion that the failure to give notice of appeal within the period referred to in sub-clause (1) was due to exceptional circumstances; and

(b) it is satisfied that the respondent's case would not be materially prejudiced because of the delay.

Sch. 6 cl. 1(4) amended by No. 34/1990 s. 4(Sch. 3 item 23).

(4) Notice of appeal is given by filing with the registrar of the Magistrates' Court at any venue of the Court a notice in the form prescribed by the rules of the County Court and stating the general grounds of appeal and serving a copy of the notice on the respondent in accordance with clause 5.

Sch. 6 cl. 1(4A) inserted by No. 10/1999 s. 13.

(4A) A notice of appeal under section 83 must include a statement in the form approved by the Chief Judge of the County Court signed by the appellant to the effect that the appellant is aware that on the appeal the County Court may make a sentencing order more severe than that sought to be appealed against.

Sch. 6 cl. 1(4B) inserted by No. 10/1999 s. 13.

(4B) Before accepting receipt of a notice of appeal under section 83 a registrar of the Magistrates' Court must—

(a) give to the person seeking to file the notice of appeal a notice in the form approved by the Chief Judge of the County Court to the effect that on the appeal the County Court may make a sentencing order more severe than that sought to be appealed against; and

(b) if the person seeking to file the notice of appeal is not the proposed appellant, be satisfied that the proposed appellant has signed the statement required to be included in the notice of appeal by sub-clause (4A).

(5) A registrar who receives a notice of appeal under sub-clause (4) must forward a copy of it to the registrar of the County Court.

(6) If the County Court is satisfied that—

(a) a copy of a notice of appeal was served on the respondent; and

(b) the appeal was not afterwards prosecuted or the County Court has no jurisdiction to hear and determine the appeal—

the County Court may order the appellant to pay to the respondent any costs that it thinks reasonable.

2. Undertaking to prosecute appeal

(1) A notice of an appeal under section 83 must include an undertaking signed by the appellant—

(a) to appear at the County Court to prosecute the appeal at a place and on a day fixed or to be fixed by the registrar of the County Court and to be present in the County Court for the duration of the appeal; and

(b) to notify forthwith the registrar of the County Court in writing of any change of address of the appellant from that appearing in the notice of appeal.

(2) An undertaking under sub-clause (1) must be signed by the appellant in the presence of—

(a) the registrar of the Magistrates' Court with whom the notice of appeal is filed; or

(b) if the appellant is in a prison or youth training centre or youth residential centre, the officer in charge of the prison or youth training centre or youth residential centre or any prison officer of or above the rank of senior prison officer; or

Sch. 6 cl. 2(2)(b) amended by No. 48/1997 s. 66(3).

(c) if the appellant is in a police gaol, a member of the police force of or above the rank of sergeant or for the time being in charge of a police station.

(3) If an appellant breaches an undertaking under sub-clause (1) or abandons an appeal under clause 6, the County Court may order the appellant to pay any costs incurred as a result of the breach or abandonment.

(4) A corporation may sign a notice of appeal and enter into an undertaking under sub-clause (1) by a person duly appointed by the corporation to represent it for those purposes.

3. Stay of order

(1) If an appellant is not in custody because of the sentencing order appealed against, the appeal operates as a stay of the sentencing order when the appellant files the notice of appeal and signs the undertaking referred to in clause 2(1).

(2) If an appellant is in custody because of the sentencing order appealed against, the appeal operates as a stay of the sentencing order when—

(a) the appellant files the notice of appeal and signs the undertaking referred to in clause 2(1); and

(b) the appellant enters bail, if bail is granted under clause 4.

(3) This clause is subject to section 29 of the **Road Safety Act 1986**.

4. Bail pending appeal

(1) If an appellant is in custody because of the sentencing order appealed against and wishes to be released pending the determination of the appeal, the appellant—

(a) may apply to the Magistrates' Court to be released on bail; and

(b) if he or she makes such an application, must give reasonable notice of the application to the respondent to the appeal.

(2) If an application is made under sub-clause (1), the Court must either grant or refuse bail as if the appellant were accused of an offence and were being held in custody in relation to that offence and, for this purpose, the **Bail Act 1977** (with any necessary modifications) applies.

5. Service of notices

A copy of a notice of appeal must be served on the respondent—

(a) by delivering it to the respondent personally or by leaving it for the respondent at the respondent's last or most usual place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age; or

(b) in any other manner directed by the Court if satisfied that service as provided in paragraph (a) cannot reasonably be effected.

6. Abandonment of appeal

Sch. 6 cl. 6(1) amended by No. 10/1999 s. 14(1).

(1) An appellant may, subject to sub-clause (2A), abandon an appeal against a sentencing order under which a term of imprisonment or detention was imposed—

(a) if the appellant is not in custody, by surrendering to the registrar of the County Court and immediately filing with the registrar a notice in the form prescribed by the rules of the County Court; or

(b) if the appellant is in custody, by filing with the registrar of the County Court a notice referred to in paragraph (a).

Sch. 6 cl. 6(2) amended by No. 10/1999 s. 14(1).

(2) An appellant may, subject to sub-clause (2A), abandon an appeal against any other sentencing order by filing with the registrar of the County Court a notice in the form prescribed by the rules of the County Court.

Sch. 6 cl. 6(2A) inserted by No. 10/1999 s. 14(2).

(2A) After the end of the period referred to in clause 1(1), an appellant may only abandon an appeal against a sentencing order with the leave of the County Court granted on an application by the appellant under this sub-clause.

Sch. 6 cl. 6(2B) inserted by No. 10/1999 s. 14(2).

(2B) An application may be made under sub-clause (2A) at any time before or after the County Court commences to hear the appeal and, if the County Court grants such an application after commencing to hear the appeal, it must order the reinstatement of the order of the Magistrates' Court.

Sch. 6 cl. 6(2C) inserted by No. 10/1999 s. 14(2).

(2C) The County Court may only grant leave on an application under sub-clause (2A) if it is satisfied that it is in the interests of justice to do so because of the existence of exceptional circumstances.

Sch. 6 cl. 6(3) amended by No. 35/1996 s. 453(Sch. 1 item 53.9).

(3) If an appeal is struck out under section 86(3), the registrar of the County Court must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal.

(4) The making of an order striking out an appeal discharges the undertaking of the appellant to prosecute the appeal.

7. Costs on abandonment

(1) Within 30 days after receiving a copy of the order striking out the appeal, the respondent may apply to the County Court for an order dealing with the respondent's costs of the appeal.

(2) If a respondent proposes to apply to the Court under sub-clause (1), the respondent must first give notice in writing of the proposed application to the appellant.

(3) A notice under sub-clause (2) may be given by posting it to the address of the appellant on the notice of appeal.

(4) On an application under sub-clause (1), the County Court may make any order that it considers just.

8. One notice of appeal for two or more sentencing orders

If sentencing orders are made in respect of two or more charges contained in the one charge-sheet and heard together, the appellant may give one notice of appeal for all or any of those sentencing orders.

Sch. 6 cl. 9 inserted by No. 48/1997 s. 66(4), amended by No. 10/1999 s. 15 (ILA s. 39B(3)).

9. Appeal against aggregate sentence

(1) If the sentencing order appealed against is an aggregate sentence of imprisonment imposed in accordance with section 9(1) of the **Sentencing Act 1991**, or an aggregate fine imposed in accordance with section 51 of that Act, the registrar of the Magistrates' Court with whom the notice of appeal is filed must ensure that the original charge sheet or charge sheets are transmitted to the registrar of the County Court.

Sch. 6 cl. 9(2) inserted by No. 10/1999 s. 15.

(2) On sentencing an appellant where the sentencing order appealed against is of a kind referred to in sub-clause (1), the County Court may rely on any agreed statement of facts (however derived) relevant to any charge contained in the original charge sheet or charge sheets.

Extract from *Sentencing Act 1991*, Act No. 49/1991

PART 10—MISCELLANEOUS PROVISIONS

109. Penalty scale[19]

(1) An offence that is described in an Act, subordinate instrument or local law as being an offence of a level specified in column 1 of Table 1 or as being punishable by imprisonment of a level specified in that column is, unless the contrary intention appears, punishable by a term of imprisonment not exceeding that specified opposite it in column 2 of the Table.

S. 109(1) Table 1 substituted by No. 48/1997 s. 27.

TABLE 1

Column 1	*Column 2*
Level	*Maximum Term of Imprisonment*
1	Life
2	25 years
3	20 years
4	15 years
5	10 years
6	5 years
7	2 years
8	1 year
9	6 months

(2) An offence that is described in an Act, subordinate instrument or local law as being an offence of a level specified in column 1 of Table 2 or as being punishable by a fine of a level specified in that column is, unless the contrary intention appears, punishable by a fine not exceeding that specified opposite it in column 2 of the Table.

S. 109(2) Table 2 substituted by No. 69/1997 s. 12.

TABLE 2

Column 1	*Column 2*
Level	*Maximum Fine*
1	—
2	3000 penalty units
3	2400 penalty units
4	1800 penalty units
5	1200 penalty units
6	600 penalty units
7	240 penalty units
8	120 penalty units
9	60 penalty units
10	10 penalty units
11	5 penalty units
12	1 penalty unit.

S. 109(3) amended by No. 69/1997 ss 14(1), 15.

(3) Subject to sub-section (3A), an offence that is punishable by a term of imprisonment (other than life) is, unless the contrary intention appears, punishable (in addition to or instead of imprisonment) by—

(a) a maximum fine of the number of penalty units that is 10 times more than the maximum number of months imprisonment that may be imposed; or

(b) a community-based order with a community service condition attached requiring, in the case of an offence punishable by a term of imprisonment specified in column 1 of Table 3, a number of hours of unpaid community work not exceeding that specified opposite it in column 2 of the Table to be performed over the period specified in column 2.

S. 109(3) Table 3 substituted by No. 48/1997 s. 28(4), amended by No. 69/1997 s. 13(1)(a)(b).

TABLE 3

Column 1	*Column 2*
Term of Imprisonment	*Unpaid Community Work*
More than 2 years	500 hours over a 2 year period
2 years	375 hours over a 1½ year period
1 years or more but less than 2	250 hours over a 1 year period
6 months or more but less than 1 year	125 hours over a 6 month period
Less than 6 months	50 hours over a 3 month period.

(c) both such a fine and community-based order as are referred to in paragraphs (a) and (b).

S. 109(3A) inserted by No. 69/1997 s. 14(2).

(3A) An offence that is punishable by level 2 imprisonment is, unless the contrary intention appears, punishable (in addition to but not instead of imprisonment) by a level 2 fine if the offender is not a body corporate.

S. 109(4) amended by No. 69/1997 ss 14(3), 15.

(4) An offence that is punishable by a fine (including an offence referred to in sub-section (3A)) is, unless the contrary intention appears, punishable (in addition to or instead of a fine) by a community-based order with a community service condition attached requiring, in the case of an offence punishable by a fine specified in column 1 of Table 4, a number of hours of unpaid community work not exceeding that specified opposite it in column 2 of the Table to be performed over the period specified in column 2.

TABLE 4

S. 109(4) Table 4 amended by No. 41/1993 s. 16, substituted by No. 48/1997 s. 28(5), amended by No. 69/1997 s. 13(2)(a)(b).

Column 1	*Column 2*
Fine	*Unpaid Community Work*
More than 240 penalty units	500 hours over a 2 year period
240 penalty units	375 hours over a 1½ year period
120 penalty units or more but less than 240	250 hours over a 1 year period
60 penalty units or more but less than 120	125 hours over a 6 month period
10 penalty units or more but less than 60	50 hours over a 3 month period.

109A. Operation of penalty provisions

S. 109A inserted by No. 48/1997 s. 29.

If an offence is described in a provision of an Act, subordinate instrument or local law as being an offence of a specified level or as being punishable by imprisonment or a fine of a specified level and there is included in that provision a description in years or months or both of the term of imprisonment, or in penalty units or dollars of the amount of the fine, by which that offence is punishable, that description—

(a) is inserted for convenience of reference only and does not affect the operation of the penalty provision as expressed in terms of levels; and

(b) must be disregarded if it is inconsistent with that penalty provision—

unless the contrary intention appears.

S. 110 substituted by No. 10/2004 s. 13.

110. Meaning of penalty units

(1) If in an Act or subordinate instrument (except a local law made under Part 5 of the **Local Government Act 1989**) there is a statement of a number (whether whole, decimal or fractional) of what are called "penalty units", that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying the number of penalty units by the amount fixed from time to time by the Treasurer under section 5(3) of the **Monetary Units Act 2004**.

(2) If in a local law made under Part 5 of the **Local Government Act 1989** there is a statement of a number (whether whole, decimal or fractional) of what are called "penalty units", that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying $100 by that number of penalty units.

S. 111 amended by No. 48/1997 s. 30.

111. Location and effect of penalty provisions

A penalty set out at the foot of a provision of an Act, subordinate instrument or local law must, unless the context otherwise requires, be construed as indicating that a contravention (whether by act or omission) of the provision is an offence against the Act, subordinate instrument or local law punishable on a finding of guilt (with or without recording a conviction as required by section 7) by a penalty not exceeding that set out.

Extract from *Courts Legislation (Jurisdiction) Act 2006*, Act No. 50/2006

22. Indictable offences triable summarily

(1) For section 53(1A) of the **Magistrates' Court Act 1989 substitute—**

"(1A) In addition to the offences referred to in Schedule 4, sub-section (1) applies to an indictable offence under an Act or subordinate instrument or an offence at common law if it is described by an Act or subordinate instrument as—

(a) being level 5 or 6; or

(b) being punishable by—

(i) level 5 or 6 imprisonment or fine or both; or

(ii) a term of imprisonment not exceeding 10 years or a fine not exceeding 1200 penalty units or both—

unless the contrary intention appears in this or any other Act or in any subordinate instrument.".

(2) After section 53(2) of the **Magistrates' Court Act 1989 insert—**

"(3) In determining under sub-section (1) whether a charge is appropriate to be determined summarily, the Court must have regard to—

(a) the seriousness of the offence;

(b) the adequacy of the available sentencing orders if the charge is heard and determined summarily considering (among other things) any previous findings of guilt or convictions of the defendant;

(c) any decision of the Court as to how a charge of the same offence against a co-defendant is to be heard and determined;

(d) any other relevant matter.

(4) In having regard to the seriousness of an offence under sub-section (3)(a), the Court must consider (among other things)—

(a) the nature of the offence;

(b) the manner in which the offence is alleged to have been committed including—

(i) the apparent degree of organisation behind the commission of the offence;

(ii) the presence of any aggravating circumstances;

(iii) whether the offence forms part of a series of offences being alleged against the defendant;

(c) the complexity of the proceeding for determining the charge.

(5) To avoid doubt nothing in sub-section (3) or (4) applies to a proceeding in the Children's Court.".

(3) In Schedule 4 to the **Magistrates' Court Act 1989**—

(a) in clauses 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 29, 30, 31, 32, 33, 35, 36 and 37, for "$25 000" **substitute** "$100 000";

(b) in clause 27 after "if" **insert** "the stolen goods alleged to have been handled are a motor vehicle or, in any other case,";

Courts Legislation (Jurisdiction) Act 2006
Act No. 50/2006

Part 5—Amendment of Magistrates' Court Act 1989

s. 22

(c) after clause 34 **insert**—

"**34A. Dealing with proceeds of crime**

Offences under section 194(1) and (2) of the **Crimes Act 1958**, if the property alleged to have been dealt with is a motor vehicle or, in any other case, the amount or value of the proceeds of crime alleged to have been dealt with does not in the judgment of the Court exceed $100 000.

34B. Dealing with property which subsequently becomes an instrument of crime

Offences under section 195A(1) of the **Crimes Act 1958**, if the amount or value of the property alleged to have been dealt with does not in the judgment of the Court exceed $100 000.";

(d) after clause 37A **insert**—

"**37B. Perjury**

Offences under section 314 of the **Crimes Act 1958**.

37C. Conspiracy to cheat and defraud

Offences at common law of conspiracy to cheat and defraud, if the amount or value of the property or the financial advantage alleged to be involved does not in the judgment of the Court exceed $100 000;

37D. Conspiracy to defraud

Offences at common law of conspiracy to defraud, if the amount or value of the property or the financial advantage alleged to be involved does not in the judgment of the Court exceed $100 000.";

(e) in clause 49A after "5(1)" **insert** ", (1A)";

(f) for clause 49BD **substitute**—

"**49BD. Offence to possess, carry or use an unregistered handgun**

Offences under section 7B(1) and (2) of the **Firearms Act 1996**.".

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APPENDIX 4 – APPEAL FORMS

Victoria

FORM 2–2L

NOTICE TO CERTAIN OFFICIALS OF A COUNTY COURT'S APPEAL DECISION

To the Registrar of the County Court at:

To the Registrar of the Magistrates' Court at:

To the Officer in charge of the prison at:

To the Superintendent of the Youth Training Centre at:

Regarding an Appeal from a conviction(s)—recorded at the Magistrates' Court at on [*date*]

a sentence(s)

an order

Appellant	*Respondent*

The details are as follows:

Registrar's Number	*Order/Conviction appealed against*	*Sentence appealed against*	*Result of Appeal*

[When a custodial sentence was imposed (confirmed)—the Appellant *has/*has not been returned to custody]

Before His/Her Honour Judge at on [*date*] . Associate Registrar

* Delete if inapplicable.

———————————

New South Wales

NOTICE OF APPEAL TO THE DISTRICT COURT

Appellant: DOB: CNI: Licence No:
Address:
Court: Date of Court: Magistrate:
Offence(s):

I am appealing on the following grounds:- **(NB:- cross out whichever is *not* applicable)**
A:- I am appealing the above conviction/order BECAUSE I AM NOT GUILTY
B:- I am appealing the above sentence BECAUSE THE PENALTY IS TOO SEVERE
C:- I am appealing because I CONTEST THE APPREHENDED VIOLENCE ORDER MADE IN THESE PROCEEDINGS

If you are an Aboriginal or Torres Strait Islander and you wish to be represented by an Aboriginal Legal Officer please tick this box [ ]
Note: The District Court will not generally grant leave to appeal unless all rights for review by the Local Court of this conviction or order have been exhausted.

____________________Signature of appellant Date:

LISTING DETAILS

The Appeal has been listed at the District Court at on

- **You are required to attend Court on that date**
- **If you have a solicitor/counsel you should notify them of the date**
- **If you do not appear the appeal may be dealt with in your absence**
- **The police officers involved in the case and police witnesses will not be at court unless a Judge grants a request by you and directs their attendance.**

I have been given a copy of this notice and understand that it will be the only one given/sent to me.

________________Appellant Date: ________________________Witness Date:

ENQUIRIES DISTRICT COURT CRIMINAL REGISTRY AT PHONE:

PARTICULARS OF BAIL

Note: The decision of the Local Court will be stayed upon lodgment of the notice of appeal except where bail is either refused or granted but not entered into by the appellant. A stay will not apply where leave to appeal is sought.

[ ] Bail Is Refused — APPELLANT IN $
[ ] Bail Is Dispensed With or does not apply — GUARANTOR IN $
[ ] Unconditional Bail Granted — GUARANTORS IN $
[ ] BOND IS FIXED:

____________________Magistrate / Justice of the Peace Date:

[ ] BAIL ENTERED ON (Copy of Bail Attached) [ ] BAIL NOT ENTERED AS AT
[ ] STAY APPLIES [ ] STAY DOES NOT APPLY

South Australia

FORM 37 **Rule 96C.03(3)**

NOTICE OF APPEAL PURSUANT TO SECTION 42 OF MAGISTRATES COURT ACT 1991

The [*Party*] [*Name*] appeals to the Supreme Court of South Australia, at its sittings in [*specify month and year*] for hearing appeals under section 42 of the Magistrates Court Act, 1991, against the order of that Court made on [*date*][*month*][*year*].

The appeal is against [*conviction*] [*penalty*] [*conviction and penalty*] [*dismissal*] [*costs*]

Court location appealed from:

Date of [*conviction/dismissal*]:

Date(s) of [*penalty/costs*]:

Judicial Officer appealed from:

Magistrates Court File No:

Respondent's address:

Order appealed against:

[*Set out text of relevant order*]

The appeal is against [*the whole of /the following portion of*] the order

[*If applicable specify that portion appealed against*]

[*If applicable*] The appellant seeks an extension of time within which to appeal, upon the following grounds:

[*Specify grounds in successively numbered paragraphs*]

The grounds of appeal are:

[*Specify grounds in successively numbered paragraphs*]

The appellant seeks the following orders:

[*Set out relief sought in successively numbered paragraphs*]

Supreme Court Rules 1987 – Schedule 1: Forms – Current to Amendment 100

The Registrar of the Magistrates Court is requested:

(1) to advise the Registrar of the Supreme Court of the existence of the appeal and afford that Court access to any electronic file relating to this matter; and

(2) to forward to the Registrar all hard copy material relevant to the appeal, which is not contained in such electronic file.

[*Signed*] ....
[*Solicitor for the Appellant (s)*]

[*OR*]

[*Appellant(s)*]

[NOTE: *1. This notice is to be accompanied by Form 1, duly completed.*

2. The appellant must also serve a copy of the notice of appeal on the Registrar of the Supreme Court and the respondent within seven days of lodgement of it with the Magistrates Court, pursuant to Rule 96C.04 of the those Rules.

3. If this document is filed electronically, the initials and name(s) of the issuing Solicitor or Party/Parties should be typed in, in lieu of a signature.]

Appendix 5 – Relevant Victorian Statistics

Most common charges heard 2004–05, Magistrates' Court of Victoria

Description	Number	Per cent
Theft	40,020	11.4
Obtain property by deception	18,556	5.3
Drunk in a public place	12,751	3.6
Drive whilst disqualified	11,034	3.1
Unlawful assault	9,802	2.8
Drive at speed over speed limit	9,300	2.6
Drive whilst exceeding PCA	9,084	2.6
Possess drug of dependence	8,465	2.4
Exceed PCA within three hours of breath test	8,452	2.4
Fail to answer bail	8,032	2.3
Burglary	7,678	2.2
Intentionally/recklessly cause injury	7,569	2.1
Handle/receive/dispose of stolen goods	7,033	2.0
Use unregistered motor vehicle on highway	6,808	1.9
Careless driving	6,680	1.9
Assault/resist police/person assisting police	6,116	1.7
Criminal Damage	6,067	1.7
Drive vehicle unregistered in toll zone	5,536	1.6

Unlicensed driving	5,316	1.5
Breach intervention order	5,239	1.5
Use drug of dependence	4,340	1.2
Attempt to commit indictable offence	4,279	1.2
Deal property suspected being proceeds of crime	3,662	1.0
Assault in company/by kicking/with weapon etc	3,529	1.0
Obtain financial advantage by deception	3,494	1.0
Go equipped to steal/cheat	3,028	0.9
Refuse/fail to furnish return	2,907	0.8
Traffic drug of dependence	2,834	0.8
Learner driver without experienced driver	2,733	0.8
Drive in a manner dangerous	2,503	0.7
Bring money/proceeds to Vic – proceeds of crime	2,214	0.6
Drive without L plates displayed	2,197	0.6
Make false document to prejudice another	2,142	0.6
Fraudulently alter registration label/plates etc	1,914	0.5
Behave indecent/offensive manner in public place	1,907	0.5
False accounting	1,845	0.5
Use indecent/obscene language in public place	1,760	0.5
Failure to comply with no stopping sign	1,714	0.5
Possess/carry/use regulated/controlled weapon	1,709	0.5
Make threat to kill	1,705	0.5
Park for longer than indicated	1,504	0.4
Cultivate narcotic plant	1,484	0.4
Local law offence	1,428	0.4

Indecent act with child under 16	1,412	0.4
Failure to pay parking fee	1,370	0.4
State false name	1,354	0.4
Unlawfully on premises/precinct	1,341	0.4
Wilfully injure/damage property	1,336	0.4
Fail to five name/address to owner/injured	1,249	0.4
Use false document to prejudice another	1,247	0.4
Total Listed	265,679	75
Total Charges Heard	352,437	100.0

Source: Magistrates' Court of Victoria, *2004-05 Annual Report*, p. 25. (annotated)

Appeals from the Magistrates' Court 2004–05 by offence category

Rank	ASOC	Offence	Appeal Grounds - Sentence	%	Appeal Grounds - Conviction	%	All Appeals	%
24	211	Aggravated Assault	174	9.40%	52	8.92%	226	9.29%
30	212	Non-Aggravated Assault	63	3.40%	22	3.77%	85	3.49%
12	312	Non-Aggravated Sexual Assault	26	1.40%	10	1.72%	36	1.48%
13	329	Non-Assaultive Sexual Offences	0	0.00%	1	0.17%	1	0.04%
89	411	Driving under the influence of Alcohol or Drugs	12	0.65%	4	0.69%	16	0.66%
90	412	Dangerous or Negligent driving	79	4.27%	26	4.46%	105	4.31%
33	491	Neglect of Person Under Care	1	0.05%	0	0.00%	1	0.04%
35	499	Other Dangerous or Negligent Acts Endangering Persons	29	1.57%	9	1.54%	38	1.56%
23	611	Aggravated Robbery	30	1.62%	2	0.34%	32	1.31%
59	711	Unlawful Entry with Intent/Burglary, Break and Enter	167	9.02%	38	6.52%	205	8.42%
79	822	Theft of Intellectual Property	1	0.05%	0	0.00%	1	0.04%
80	829	Theft (Except Motor Vehicles)	216	11.67%	42	7.20%	258	10.60%

81	831	Receiving or Handling Proceeds of Crime	27	1.46%	12	2.06%	39	1.60%
63	912	Make, Use or Possess Equipment to Make False/Illegal Financial Instrument	11	0.59%	3	0.51%	14	0.58%
64	913	Fraudulent Trade Practices	2	0.11%	2	0.34%	4	0.16%
65	914	Prescription Drug Fraud	3	0.16%	1	0.17%	4	0.16%
66	915	Fare Evasion	4	0.22%	1	0.17%	5	0.21%
68	919	Fraud	93	5.02%	22	3.77%	115	4.72%
69	931	Dishonest Conversion	4	0.22%	1	0.17%	5	0.21%
56	941	Bribery Involving Government Officials	1	0.05%	0	0.00%	1	0.04%
71	991	Misrepresentation of Professional Status	1	0.05%	0	0.00%	1	0.04%
72	999	Deception Offences	1	0.05%	0	0.00%	1	0.04%
19	1022	Deal or Traffic in Illicit Drugs - Non-Commercial Quantity	80	4.32%	18	3.09%	98	4.03%
21	1031	Manufacture or Cultivate Illicit Drugs	21	1.13%	9	1.54%	30	1.23%
123	1041	Possess Illicit Drug	12	0.65%	5	0.86%	17	0.70%
124	1042	Use Illicit Drug	1	0.05%	0	0.00%	1	0.04%
45	1112	Sell, Possess and/or Prohibited Weapons/Explosives	5	0.27%	1	0.17%	6	0.25%

47	1119	Prohibited Weapons/Explosives Offences	1	0.05%	0	0.00%	1	0.04%
48	1121	Unlawfully Obtain or Possess Regulated Weapons/Explosives	38	2.05%	11	1.89%	49	2.01%
49	1122	Misuse of Regulated Weapons/Explosives	5	0.27%	1	0.17%	6	0.25%
94	1219	Property Damage	25	1.35%	6	1.03%	31	1.27%
99	1229	Environmental Pollution Offences	1	0.05%	0	0.00%	1	0.04%
128	1311	Trespass	4	0.22%	0	0.00%	4	0.16%
129	1312	Offensive language	3	0.16%	2	0.34%	5	0.21%
130	1313	Offensive Behaviour	2	0.11%	1	0.17%	3	0.12%
131	1314	Criminal Intent	5	0.27%	2	0.34%	7	0.29%
132	1319	Disorderly Conduct	8	0.43%	3	0.51%	11	0.45%
122	1323	Censorship Offences	5	0.27%	4	0.69%	9	0.37%
135	1324	Prostitution Offences	2	0.11%	0	0.00%	2	0.08%
137	1329	Regulated Public Order Offences	1	0.05%	0	0.00%	1	0.04%
142	1411	Driving while Licence Cancelled or Suspended	140	7.56%	37	6.35%	177	7.27%
143	1412	Driving without a Licence	2	0.11%	2	0.34%	4	0.16%

145	1419	Driving Licence Offences	4	0.22%	1	0.17%	5	0.21%
146	1421	Registration Offences	30	1.62%	10	1.72%	40	1.64%
92	1431	Exceeding the Prescribed Content of Alcohol Limit	105	5.67%	45	7.72%	150	6.16%
149	1432	Exceeding Legal Speed Limit	44	2.38%	16	2.74%	60	2.47%
150	1433	Parking Offences	4	0.22%	7	1.20%	11	0.45%
151	1439	Regulatory Driving Offences	53	2.86%	31	5.32%	84	3.45%
112	1511	Escape Custody Offences	1	0.05%	0	0.00%	1	0.04%
113	1512	Breach of Bail	15	0.81%	4	0.69%	19	0.78%
115	1514	Breach of Domestic Violence Order	30	1.62%	13	2.23%	43	1.77%
118	1519	Breach of Justice Order	71	3.84%	26	4.46%	97	3.99%
139	1522	Resist or Hinder Police Officer or Justice Official	8	0.43%	1	0.17%	9	0.37%
119	1523	Prison Regulation Offences	1	0.05%	0	0.00%	1	0.04%
110	1529	Offences against Justice Procedures	5	0.27%	2	0.34%	7	0.29%
141	1541	Resist or Hinder Government Official (excluding Police Officer, Justice Official or Government Security Officer)	2	0.11%	0	0.00%	2	0.08%
111	1549	Offences against Government Operations	0	0.00%	1	0.17%	1	0.04%

39	1611	Harassment and Private Nuisance	23	1.24%	6	1.03%	29	1.19%
88	1612	Offences against Privacy	1	0.05%	0	0.00%	1	0.04%
40	1613	Threatening Behaviour	19	1.03%	7	1.20%	26	1.07%
100	1621	Sanitation Offences	4	0.22%	1	0.17%	5	0.21%
107	1629	Public Health and Safety Offences	2	0.11%	0	0.00%	2	0.08%
85	1631	Commercial/Industry/Financial Regulation	6	0.32%	8	1.37%	14	0.58%
108	1691	Environmental Regulation Offences	3	0.16%	0	0.00%	3	0.12%
87	1694	Import/Export Regulations	1	0.05%	1	0.17%	2	0.08%
155	1699	Miscellaneous Offences	4	0.22%	2	0.34%	6	0.25%
157	9999	Inadequately described	109	5.89%	51	8.75%	160	6.57%
		Total	1851	100%	583	100%	2434	100%
		all traffic						26.78%
		all assault						12.78%

Source: Courtlink. (annotated)

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