

LAW REFORM COMMITTEE
Inquiry into County Court appeals

Sydney — 10 April 2006

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Mr R. Bonnici, barrister.

The CHAIR — Roland, thank you for taking the time to come and speak with us. We are members of the parliamentary Law Reform Committee in Victoria and we are looking at County Court appeals. We are particularly interested in looking at the differences between Victoria and New South Wales. In Victoria appeals can be heard de novo. That is a full rehearing — it is not a rehearing on the transcripts — both in terms of all-grounds appeals and appeals against sentence, although appeals against sentence tend to be based on the decision of the judge. The all-grounds appeals are full rehearsals. We have been asked to look at whether or not these de novo appeals should continue. That is why we are here to get the benefit of your experience, and others in terms of what happens in New South Wales. Anything you can offer us would be terrific.

All evidence is being recorded by Hansard. You will have an opportunity to review the transcript, and following that we will make your evidence available on our web site, and hopefully we can quote from it in our report. If you would like to talk to us initially, we will then ask some questions.

Mr BONNICI — The first question is: is there any discretion at all on running it on the depositions or does it have to be on de novo? I will tell you about our old system and compare it. Our old system under the Justices Act was very similar to yours. The one question I am not clear on — and I have had a quick look at some of your legislation — is: although it is de novo, by consent can it be run on the deposition? Does anybody know the answer to that?

Mr LUPTON — I do not think it can be.

Mr BONNICI — You do not.

Mr LUPTON — It is essentially a de novo — —

The CHAIR — For an all-grounds appeal.

Mr BONNICI — That probably qualifies a little bit what I am about to say. If I can give you a quick history of both, I remember when I was on the legal aid task force back in 1984 or 1985 when it merged with the ALAO we came to Victoria to see the Legal Aid Commission. A lot of these things were looked at in terms of the view that federal and state were merging. I was particularly on the criminal law side, looking at some of the systems in place in Victoria, in Queensland and in New South Wales, and obviously merit tests are involved in New South Wales for appeals whereas for legal aid they are not involved in the initiating process. If someone is charged they get legal aid as of right.

That is quite important because the majority of appeals in New South Wales in those days were done on legal aid. A magistrate would convict and then there would be an appeal under section 122 of the Justices Act whereby you would run it de novo. However, I think it was the old section 126 of the Justices Act, by the consent of the Crown and the appellant or the defence, you could run it on the depositions. In other words, you would have a full transcript there and if both parties consented then the judge would read the depositions and run it on the depositions.

In the 1980s in particular when I was in charge of the Liverpool legal aid office we probably had more appeals than anyone else. These are just figures out of my head, but I would say the majority of appeals were done through legal aid, particularly in that area where there was quite an open amount of unemployment and other problems.

Most of our appeals took a lot of time because they were run de novo; there are no two ways about that. Often they were run like mini-trials because the judge up there wanted to run them that way. Then, of course, the depositions were used sometimes as prior inconsistent statements which probably increased the length of the de novo appeal. His Honour Judge Blanch is very economically minded, and I know His Honour quite well because he appointed me as a Crown

prosecutor in those days, although I am back in defence now. His Honour is very conscious of saving time and administration costs and things like that.

The CHAIR — That came through.

Mr BONNICI — Yes, there are no two ways about it, which is admirable provided you have a balance, and I suppose I am here to talk about that balance.

The CHAIR — Okay.

Mr BONNICI — Then the system changed, and now we have what is called the Crimes (Local Courts and Review) Act 2001. There was quite a dramatic change particularly from a practitioner's point of view and the Crown's point of view — and I will point out why — and also I suppose particularly from an appellant's point of view. Before — assuming he could afford it — he would have a complete run de novo; if he could not afford it he would have to apply for legal aid with reasonable prospects of success. But assuming once he got to the barrier, this is the stark difference. The old system was run de novo with a discretion; unlike yours obviously where there is no discretion; it is just run de novo which must take a lot of the court's time.

I suppose apart from the qualification of a legal aid grant you really cannot stop someone from appealing. What they did in New South Wales — and I think this was foremost in mind to save time and money if possible — was to put this restriction in. And it is a restriction in a sense because all of a sudden the Local Court hearing before the magistrate becomes extremely important. It was always important but now more so because you do not get a de novo hearing as of right. Are you aware of that? Has anyone given you the background to this?

The CHAIR — It appears to be de novo as of right on the transcripts.

Mr BONNICI — Only on the transcripts.

The CHAIR — But it is in fact a rehearing, not an appeal.

Mr BONNICI — It is really a review; that is the best way of naming it, because you cannot call new evidence or fresh evidence without leave. That is probably an added factor. Under the old system, which is your system, you could call further witnesses and you did not need leave; you just ran it totally de novo. You did not even have to look at the depositions. Of course now you cannot call evidence. You have to rely on the transcript, and if you do not then you have to put on a notice of motion and you have to show cause why you want to call this fresh evidence.

That is a step which I think is a bit unfortunate because, firstly, it creates more work; secondly, it is more costly; and thirdly, if an error has been made before the magistrate, particularly by the practitioner running it, or if he is unrepresented that impact is greater now — although I would say that if he is unrepresented the chances are it would be a lot easier to get leave.

What it has done is probably put it on a kilter with appeals to the Court of Criminal Appeal because there you cannot call fresh evidence because there has been a trial; you have to get leave. It is really the same test. That is something that is completely new between our old system, the equivalent of yours, and the new system.

The CHAIR — But an appeal to the Court of Criminal Appeal would have to be on errors of law.

Mr BONNICI — Yes.

The CHAIR — Whereas this is not quite that.

Mr BONNICI — Not quite, except that there is another fundamental difference.

The CHAIR — It is not the same test.

Mr BONNICI — Under the old system, which is yours — —

The CHAIR — I am just trying to understand it.

Mr BONNICI — 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.

Mr HILTON — That is totally different from what he told us today.

The CHAIR — Judge Blanch said that he has the discretion to look at the magistrate's decision.

Mr BONNICI — Most judges do not. The ones I have done practically, they say 'No'. They say, 'No, you tell us why there has been a mistake made'. There is a moot point on this. If there is a mistake in law, are you still allowed to run it before the District Court judge or do you have to take it to the court of appeal?

His Honour says it is at his discretion. Some judges take the view that because it is de novo on the transcript, then what the magistrate decided really has not got anything to do with it. Others take the view — and I am just telling you from a practitioner's point of view — that it is not discretionary. These things have not been really streamlined or argued fully that much. I can see why if you are running it straight off the transcript, then really what His Honour decided becomes a fundamental error. But that is not the test; the test is de novo running it off the transcript.

Under the old system you could actually — and I did it many times, for example in a goods in custody case — go directly to the point where you say the magistrate made a mistake as a matter of law. You could win it on all grounds on that basis, and it was really all grounds.

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 not appealing it as an error of law per se, it really does not matter what the magistrate decided because he has got to look at and it may well be that if I am acting I would say, 'I do not want you to look at it because it may influence you', and His Honour would then have to pull out. It is interesting. I will have a chat to him about that because I am having this problem before District Court judges.

The other one of course is when is it de novo? I think the legislation says it must be run on the transcript, and if you want fresh evidence you have got to seek leave. Some judges take the view, for example, that if the transcript is not ready — and I have this for a matter I have got tomorrow — they have a discretion to run it totally de novo. I do not think that is right because the section says 'must'. I do not know if I am on the right track.

The CHAIR — You are, very much.

Mr BONNICI — I am giving it to you from a practitioner's point of view, and they are problems we are facing every day because nobody is exactly sure. When you do your legislation, and I gather you might be slanting that way —

The CHAIR — We are considering all options at the moment, it is fair to say, including status quo options.

Mr BONNICI — There are points on which we have problems. But there is no doubt that in the long run it has probably cut down on appeals. I have got no doubt that it has cut down on the number of appeals because people have to think twice. The other thing it has done is — and I know it has affected me — when I was doing Liverpool as the officer in charge of legal aid there, three or four of my days were in the District Court doing appeal work because I suppose it was the area that we had, and I am sure their honours will not mind me saying that we had some fairly tough magistrates who believed they had to be forceful. So there was a lot of appeal work.

We had an extremely fair and brilliant judge sitting, who in effect quoted himself as the Don Quixote of the west; who wanted to set standards. He was very fair and very compassionate but would run them like mini-trials, so they would take a long time. The reality of that was that a lot more people had access to the system. More importantly, I would do my own appeals. I would do the Local Court matter and I would have no qualms as a practitioner unless I made a fundamental error.

Now I advise people, particularly other lawyers, that they should not do their own appeals, because one of the things that is looked at very carefully is the whole of the transcript and particularly how it was handled by the legal practitioner, for obvious reasons — things have been left out, cross-examination has not been fully done, evidence has not been called. They are things that you did not worry about under your system and our old system but have now become very important. Why I suggest to other lawyers not to do their own, if possible, particularly if it looks like there might be an appeal, is because they could be compromised and could find themselves defending their own decision.

As a result that has increased or introduced a new element. Although the cost factor may be taken away from the state because appeals are down, it certainly increases the cost to the personal litigant, if not only the delay, because now you have got to read the de novo transcript almost like a Court of Criminal Appeal matter and without the judgment or the reasons for deciding being as important. You really have to scrutinise how it was run in the Local Court, how the practitioner ran it, if things have been left out or not, with a view to deciding whether you can run it purely on that or you need other materials.

The CHAIR — Is that a good or a bad thing?

Mr BONNICI — Put it this way: it is a good thing if you are acting for the appellant. I am doing one tomorrow and I have got permission to show you this; it is just a traffic matter. 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. So if you put submissions in written form and you come in in the morning and hand one to the Crown, most of the time I suppose the Crown has a lot of appeals on, they cannot look it like the individual can who is doing one matter. The judge 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. But the amount of work is a lot extra and that is certainly one aspect which in a way is fairer for the appellant if you are prepared to do it that way. 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.

The CHAIR — It is not as much work though as rehearing the case, completely de novo, with witnesses.

Mr BONNICI — It depends. It is not as much work in court. It probably is as much work out of court, particularly if you are doing written submissions. That is where the Crown probably does not do that; they still have to read it and obviously address it. But, yes, in court it is longer, and often the Crown may not read the depositions, if they do not have to, before if it is not going to be by consent. Certainly it is advisable now. You know you have no option; you have to read them, you have to address them and you have got to look at a lot more things.

The out-of-court preparation is definitely longer, it is probably more expensive, but when you get into court it is far more streamlined. Yes, you can probably do 4, 5 or 6 all-grounds appeals at least in a day. Before they were like mini-trials. On the other side of course you can run them on aspects of law straight off what I believe are the reasons for deciding. I do not know what His Honour said to you. There is a discretion there I think but I think some of the judges take the view that, 'This is a matter of law, we cannot really look at it.'

The CHAIR — Even though it is de novo on the transcript?

Mr BONNICI — Yes, but the transcript not including the decision of the magistrate. That is not being clarified. Under the old system there was no doubt about that. Certainly it saves a lot of time in actual court days.

The CHAIR — Aside from the disadvantage that you have just pointed out because the magistrate's decision may or may not be considered by the District Court judge, what are the other disadvantages of the change, if any, from your point of view?

Mr BONNICI — I think it puts a lot more importance on how the case is run before the magistrate. In true terms, if the case is run in such a way that it is maybe not 'tactically not competently done' or there are things left out or the cross-examination is not thoroughly done, I think that is a disadvantage. Ultimately under the old system you would be running a de novo hearing, a new lawyer would look at it and you might cross-examine at length. You were really getting a full second bite at the cherry. 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.

The CHAIR — Is that a good thing or a bad thing?

Mr BONNICI — It is a contradiction in terms in one sense. On one hand it is a good thing because you have to do it right, but one of the reasons you are appealing is because it has been done wrongly. It is a bit each way.

The CHAIR — Are you saying that could not be picked up on the transcript by the judge?

Mr BONNICI — No; it can and it cannot. 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. 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.

When I was thinking about what to say, I think the individual appellant still gets justice but I think in the wash probably some people do not. 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 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. The running of it has certainly become far more important. Before you would walk into court and run it de novo.

The CHAIR — Obviously the idea would be to make sure that justice is done in every case and that you can have a form of de novo rehearing but at the same time ensuring you have

maximum efficiency in terms of the use of court time and you are not unnecessarily wasting court time or you are not unnecessarily re-cross-examining witnesses who might, for example, have been victims of violence or sexual assault or whatever. If you had to enhance the New South Wales model, what would you do to improve it, based on what it is now?

Mr BONNICI — The very first thing I would do is ensure that if the appellant and/or the Crown wanted, they could go to a point of law, look straight at the magistrate's decision and say there had been an error made. That needs to be clarified because I do not think they are clear on that at the moment. That used to be under the old system.

The CHAIR — And you would have a full rehearing then?

Mr BONNICI — No, on the contrary.

The CHAIR — Not necessarily.

Mr BONNICI — You would save time.

The CHAIR — More restricted.

Mr BONNICI — I can tell you I probably did more than most in New South Wales in the 1980s and I remember running quite a few like that. It did save time because the mistakes stood up off the paper.

Mr LUPTON — Just to be clear about that, in the past if you could tick the box to go to the District Court on a question of law, were there two methods of appealing on a question of law in those days?

Mr BONNICI — Yes. It is still open now.

Mr LUPTON — You have the Supreme Court of Appeal.

Mr BONNICI — The Court of Appeal from a matter purely of law — of course, if a District Court judge makes a mistake in an appeal, your only ground is under section 5B of the Criminal Appeal Act.

Mr LUPTON — But before the reforms we are talking about here, were there in effect two ways that you could appeal on a question of law?

Mr BONNICI — Yes.

Mr LUPTON — To the Court of Criminal Appeal or to the District Court, and you could take your choice.

Mr BONNICI — 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 — 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.

Mr LUPTON — It is not the question they are asking, is it?

Mr BONNICI — That is right, exactly.

Mr LUPTON — What you are recommending is that if the party or the representatives believe an error of law has been made, they could appeal strictly on that ground in the District Court and bring the reasons in directly in that process.

Mr BONNICI — That is right. That is a way of saving a lot of time. I do not know if His Honour gave you a direct answer on that because I do not think anybody is quite clear on it. We had no doubts before. Whether it should have been done is another point but if you remember the boxes — I do not know if you have seen our old forms under the Justices Act but they had five boxes — the second one was, I think, ‘law’, a point of law, so it could be done. Now there are no boxes and I think you have seen — —

Mr LUPTON — We have a form here.

Mr BONNICI — There it is. You just say, ‘I am not guilty’, and then really it comes down to writing the submissions.

Mr LUPTON — When that appeal on a question of law was taken and that no. 2 box was ticked, what kind of information in terms of grounds of appeal, as we understand them, would need to be set out? Was it fairly straightforward just against the evidence or was it a bit more specific?

Mr BONNICI — Probably a bit more specific. The trick is you would not just tick the law one, you would tick the law one and the other one, or you would tick them all. This is a moot point, but otherwise it may have come to the point where someone said it was such a defined point of law that you should be going to the Supreme Court.

The CHAIR — It was not a technical error of law requirement. The hurdle was not a technical error of law requirement because you had a right to a de novo hearing on it.

Mr LUPTON — Surely if the box said ‘Error of law’ you would have to identify the error of law.

The CHAIR — But what the barristers were saying in Victoria was they were concerned that if it is just an error of law appeal but not de novo, the technical requirements in order, say, to go to a higher court — and it would have to be probably the Supreme Court in our case — the grounds are much more narrow. I am just trying to establish when you had that box whether it was a technical requirement. You are saying you would tick multiple boxes.

Mr BONNICI — You would. 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.

You see, it is a subtle difference, but that is the way you could run them. I have tried a couple of times and been told, ‘I do not think you can do that now’, because it really has not set out the same things. I agree that if it is a pure technical point of law, and nothing else, then yes, you would have to go and get some relief in the Court of Appeal — agreed. But the way I have just said it to you is that you go to the magistrate’s decision and you say, ‘Look, he has really applied’, for example, ‘the wrong onus because it is deemed supply and there is enough evidence to show’, so accordingly if he had applied the right onus’ — and he made an error of law. But how do you apply the right onus, because it is de novo, and then of course he would have been acquitted? So you mix the two together and you have cleaned it up.

I do not think you can do that now. That is something that has just happened in the wash, I think. Actually it increases the problems with disposing of matters on those issues down in the District Court, whereas before they used to run it completely *de novo*. Now, because you are running it purely on the transcript, you are actually in a way doing it more *de novo* but not by allowing new evidence in, because 'de novo' really means a rehearing and allowing fresh evidence. 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. It has really stopped there being another shot at it, but if the miscarriage is so obvious, then you still get your other shot.

I am not giving you a judgment either way, but certainly that is what has happened, and probably intentionally to stop superfluous appeals and appeals that should not have been made. I think it has certainly done that. And I find it has certainly increased the time for preparing for these appeals.

The CHAIR — Are there any other ways you would modify the New South Wales system if you could? You just mentioned one. Are you one of those people who says, 'We should go back to the way it was'?

Mr BONNICI — I would like to see a hybrid, somewhere in between the two. That is easier said than done. If the appellant could show reasons why it should be run *de novo* — which I think is a lot less stringent test than calling for leave to adduce fresh evidence — at the very beginning, and then maybe even let the judge hear that, by consent of the Crown. Keep it as it is, but have that little extra added of saying, 'Look I think in this case it really has not been properly run', or, 'He has been unrepresented', or, 'There has been a miscarriage' — just enough to show that something is wrong, because 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. Unfortunately sometimes they are badly run, for whatever reasons. You could put in some sort of safety mechanism and the test could be not so stringent, because at the moment you have not even got the depositions in.

Of course one of the advantages of running a *de novo* with the depositions is that if a witness has to go back into the box and it is on a matter of credibility, if you have a set of depositions from the Local Court, you will — probably — get a few prior inconsistencies, whether it is with truthfulness or reliability. Your *de novo* hearing at the moment in some ways allows for cross-examining fully a second time, even for the Crown, which we really have not got any more under our system.

The depositions in those cases were used not just to review the whole hearing but in a tactical way, so that if the witness in the *de novo* hearing made a mistake or contradicted what he said prior, the depositions were prior inconsistent statements. That part of it, I think, has gone forever. That is one loss.

One train of thought would say, 'That is a good thing', and another train of thought would say, 'It is really a safeguard that has been taken away.' It was there for a long, long time. Mind you, as I said, it puts a lot more emphasis now on making sure it is done correctly before the magistrate — not that it ever would not have been, but now I think you really have to stress the point because you are not going to get the same bite at the cherry. That is one aspect that really has gone. Now in your system you call whoever it is again, ask him questions and cross-examine him, and then you have got whatever has been said in the local court. That has gone. That is certainly one disadvantage. I am not saying whether that is fair or unfair, but that is certainly one aspect of it that has gone.

The CHAIR — Among the legal profession have you had expressed to you similar concerns to the ones you are expressing? Has there been any move by the criminal bar association or the law institute or anyone else to say, ‘Look, there are some problems with this system. Now it has been operating for seven years we need to review it.’?

Mr BONNICI — When it first came in I remember that Peter Johnson, who is now a Supreme Court judge, gave a paper on exactly these issues. The same problems that I am talking about now were still there then; you could see them coming off the paper. I do not know the statistics, but I do not think too much revision of it has been done. I could stand corrected; I do not do as many of these as I used to. Obviously that is partly by choice, but also partly because it takes so much more time, and I do not think clients are willing to pay that kind of money.

The legal aid test is probably a little more stringent now because of budgeting and everything else. 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.

Having said that, I think the calibre of magistrates — I do not know, I mean legal aid is also having difficulty budgeting, whereas in the 1980s we had no problems. In fact when I used to appear there were Crown prosecutors on one side and senior defence counsellors on the other doing these kinds of matters. Now they are done by first-year students — and we all have to learn. I remember being a first-year person out — not a first-year student, sorry, a first-year person out working — and a lot of these may be done that way. It is a really difficult area.

Under the de novo system it was not as serious, but now it is because you will not get that clear-cut second bite of the cherry. You still will in the more dire cases, but not as of right, put it that way. That is the difference: as of right, not as of right. It saves time, it saves money, no doubt — the individual case not so much so. The chances of winning the appeal per se I think are greater now, the ones you run, because probably you are filtered out.

The CHAIR — They are meritorious.

Mr BONNICI — Yes. They are the ones. That is covering what you may have wanted me to get to. As to your direct question, I do not think as many people are doing these appeals now. Legal aid is doing a lot of them in-house under the test. Private barristers like myself are not doing that much, and I think certainly our numbers are down. These points have not been looked at that closely because I think the system is just now working and it becomes a paper trail. And it is working in a sense. I do not know if they have been looked at any closer to fix them up.

I do not think we will go back the other way at all, because it has been shown that it has saved time — it has saved court time — and it can be more efficient. Personally, as a matter of fairness to everybody, I would still like that little choice of that safeguard with a test, to say ‘Can you show why you would want it run de novo, and just state your reasons’, without actually making it a strict legal test, with leave applications. That is one of the differences that I would have liked to have seen. I do not know if that answers your question.

The CHAIR — It does.

Mr BONNICI — I do not think that has been canvassed as fully. Certainly when I was working in legal aid, my last job there was in charge of appeals and advice — that was in 1987 before I became a Crown prosecutor. In those days we had a really good system set up there and we wanted to run a system the Crown where all these things could be streamlined. Unfortunately with budgeting problems and so much change in legislation as we have had in New South Wales in the last 10 years, things like that fall by the wayside now. In a way, put it this way, from my

own point of view in the 1980s I was very happy to be able to have all-grounds appeals because obviously a lot more people got access to them, and for different reasons you got different results.

I think things are a bit different in this era. Obviously money is not as easy to come by. There is a certain perception now about law and order and I think there is a lot more impetus on magistrates being appointed, 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.

The CHAIR — That is still a problem in Victoria because you may not get a rehearing de novo if you cannot get legal aid, and you will only get legal aid for a rehearing if legal aid thinks you have a meritorious case, and it might even have to be a serious case as well.

Mr BONNICI — That is another budgeting restriction in a sense, because if someone got a jail sentence or did not have a criminal record, on the face of it — and you would really start with a magistrate's decision — I think it was a lot easier. I used to grant a lot of legal aid, and the proof was in the pudding because we used to get up on a lot of the appeals because obviously the judges — it is easier to point to the mistakes off paper. Add that to the fact that you are re-running it, add that to the fact that you could have a prior inconsistent statement, it is going to be easier for more people. But I qualify that by saying that every one that I have run, and I have probably run about 10 of these in the period since it has come in, once you do it the submission way it stands up off the paper.

There is a moot point there that you do not know where the gap is and I think that people have fallen through it. I cannot pick that up, of course, because I am no longer in legal aid. A lot of my colleagues are not doing that many of these appeals, and they are being thoroughly run a lot more quickly because I think now the judge actually reads them before he gets on. So it is really a hybrid of the Court of Criminal Appeal and that is the test that you are applying. That test is a lot sterner in some ways than just a de novo hearing, particularly for someone who can afford it. You really are getting two trials: a summary trial once and a summary trial under your system, whereas now you are not getting a second summary trial, really. That is something that I think you, ladies and gentlemen, have to work out because of the finances and everything else. It is a problem, but I do not think it is as big as it was. I think people have got accustomed to this now.

The CHAIR — Thank you very much for your considerable expertise and knowledge. We appreciate that from a practitioner's point of view. Thank you for coming.

Mr BONNICI — Good luck anyway. Thanks for that.

The CHAIR — Regarding Peter Johnson's paper, what was he at the time?

Mr BONNICI — He was senior counsel. I do apologise. I have looked everywhere for it; I spent half of Sunday. I wanted to bring it here. A lot of what I have told you comes from that paper, because I did some papers under the old system in the 1980s. I must have lent it to somebody and I just cannot find it. But if you ring His Honour, I am sure he will give it to you. It is a very good paper, and Peter is a great bloke.

The CHAIR — He is now a judge?

Mr BONNICI — He is now a judge, yes, of the Supreme Court. He is Judge Peter Johnson, and I am sure he has got it. I do apologise. I did want to bring it in and give you a copy — I just could not find it. I think I remember lending it to a colleague without copying it. I will never make that mistake again! But His Honour will have it and it is very worthwhile, because when he gave it some of these points just stood up off the paper.

On some problems of sentencing, for example, and staying; I know now they have clarified that one. They were not sure whether once you lodged an all-grounds appeal it would stay a conviction and, more importantly, a penalty. Of course that has been fixed up, but at the time when it came in there was a real problem there because it seemed that you were staying some sentence appeals but you were not staying conviction appeals. That has been clarified.

The other point was that with sentencing appeals there was a bail situation of course, but it seemed that you did not need leave to call further evidence, and I do not think you do, in a sentencing matter. This is something I forgot to mention. When you are doing a sentencing matter de novo you can actually call fresh evidence; there is no bar on that. But when you are doing it in the all-grounds situation you cannot, you have to get leave. That is another slight dichotomy. It has been streamlined a bit; I think they have looked at those points.

The CHAIR — That is interesting. Thank you very much for that. That was very helpful.

Mr BONNICI — Thanks.

Witness withdrew.