The Executive officer
Victorian Parliament Law Reform Committee
Level 8, 35 Spring Street
Melbourne 3000

15 November 2005

Dear Sir

Re: Inquiry into County Court Appeals

I respond to your advertisement for submissions in relation to the above inquiry.

I have had an interest in this reference for many years. It was the subject of my minor thesis, which I completed in 1999 for my Master’s degree in Criminology, undertaken at the University of Melbourne. Professor Arie Freiberg was my supervisor.

I enclose a copy of this thesis which is also available in bound form, for your information.

I would be very happy to discuss the matter further should you wish.

Yours faithfully,

Jennifer Taylor
THE DE NOVO APPEAL:

Whether the current practice of appeal from the Magistrates' Court to the County Court is outdated and justifies systemic change

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A thesis submitted in partial fulfilment of the requirements for the degree of Master of Criminology in the Department of Criminology, Faculty of Arts, University of Melbourne

December 1999
DECLARATION OF AUTHORSHIP

I, Jennifer Robin Taylor, declare that this thesis comprises only my original work, except where due acknowledgment has been made in the text to all other materials used. This thesis does not exceed 19,000 words in length, exclusive of bibliographies, footnotes and appendices.

........................................................................................................... Date:
(Signature)
ABSTRACT

The vast majority of criminal cases are heard in the Magistrates’ Court, sometimes referred to as the “peoples’ court” whose aims are to deal speedily and responsively with the resolution of the matters coming before it. The criminal justice system is sometimes criticised for the discrepancies between sentences delivered by magistrates at first instance and by judges of the County Court on appeal. In Victoria and appeal to the County Court is “de novo”. The case is presented as if for the first time and little if any regard is had to the decision of the magistrate. In the superior jurisdictions, appeal is based on error. In some other states of Australia, appeal from a magistrate’s decision is also based on error. The statistics reveal that although only a small percentage of magistrates decisions are appealed, the numbers remain significant. Most of those cases which reach the County Court result in the earlier sentence being reduced in some way. The question of whether the de novo appeal is an appropriate method of appeal has been raised, given the enormous changes which have taken place in the Magistrates’ Court in the last few decades, particularly in its “professionalisation”. This study sought the views of various participants in the criminal appeal process in order to establish what attitudes and perceptions are held in relation to this issue. The study found that most participants accepted that the historical reasons for the de novo appeal lay in the unprofessional nature of this tribunal whose arbiters were legally unqualified persons. These reasons are no longer valid. Defence lawyers argue that, although the bench is today a legally qualified one, other reasons exist for the retention of appeal in this manner, namely speed. However, this thesis concludes that the de novo appeal is today out of place in the criminal justice system and is nothing more than a “second bite at the cherry”. The practices of the modern Magistrates’ Court warrants a change in the manner of its appeals. Given the importance of this court today and the undesirability of wasting resources which are better utilised in making it an even more efficient and socially useful institution, the de novo appeal ought to be abolished in favour of appeal by way of review based on error to the County Court.
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CHAPTER ONE

INTRODUCTION

"The statistics suggest that magistrates are not dealing with sentences in a well-considered and appropriate manner or there is a huge difference between judges and magistrates on their interpretation of more serious crimes".¹

Criticism of the judicial role in sentencing is a common and recurring theme in the media, focusing generally on the court's perceived leniency and disassociation from public opinion. The assumption that there is widespread disparity in sentencing is frequently given voice in the media and elsewhere (Green 1995: 112). Yet, it is a fundamental principal of criminal law and sentencing process that like cases must be treated in a like manner and that where they are not there is disparity. Consistency in sentencing is seen to be desirable for many reasons, including the need for public confidence in the judicial system as well as the issues of general deterrence. This must be balanced with the fundamental concern of justice and the need for flexibility in order that sentencers have some discretion so as to take account of the particular facts of individual cases, often involving conflicting points (Ashworth 1995).

As the great bulk of work in the administration of justice in our system occurs at the lowest level, namely the Magistrates' Courts, and as most prison sentences are handed down by magistrates, it is not surprising that much of the criticism of sentencing directed from time to time at the courts will find its place in this jurisdiction. Cases are processed rapidly and the time available to consider the sentence is strictly limited. Although most offences in this jurisdiction are

¹ The Border Mail 7 August 1997, editorial :Courts and Justice" referring to a study of appeals in Wangaratta in which 93% of appeals in an 18 month period commencing in 1996 resulted in reductions to sentences.
generally of a minor nature, it is here that the majority of first time offenders come into contact with the judicial arm of the state (Polk and Tait 1987).

A Magistrates’ Court or Court of Petty Sessions, has formed the foundation of the legal system since the early days of Australian colonisation. Reforms to the courts and their officers have taken place since the first Courts of Petty Sessions commenced functioning last century. Of particular relevance are the changes which occurred in the 1980s, when the magistracy was “professionalised”, in that magistrates were required to have professional university qualifications rather than being recruited from the ranks of Clerks of Courts. Additionally, the jurisdiction of the court has been increased, the system has been centralised and procedures updated and made more efficient. It is clear that great changes have occurred in this court of inferior jurisdiction and yet its function remains essentially the same.

It is a principle of criminal justice that aggrieved convicted offenders have a right of appeal to a higher authority. In Victoria, the decisions of the Magistrates' Court are subject to appeal, by way of a re-hearing at the County Court, and to a review on questions of law at the Supreme Court. In contrast, appeals from courts of superior jurisdiction proceed by way of review based on error. In a “de novo” hearing, regard is not had to the decision of the magistrate at the first instance and judicial discretion is exercised anew.

The de novo appeal process is problematic for a number of reasons. The facts of the case are often quite differently presented at the time of the appeal and significant changes may have occurred in the circumstances of the offender. Indeed a plea of guilty in the first instance is no bar to appeal against conviction in the second. There are no reasons required to be given or recorded upon conviction or otherwise, or when sentence is passed which is different from that which the magistrate imposed. Whereas the Court of Appeal has restricted powers to interfere with sentences passed by single judges, which are seen as an exercise of discretion, a judge sitting on appeal in a matter from the Magistrates’ Court may substitute a sentence which it considers appropriate as if he or she is hearing the case for the first time.
In 1988, the Victorian Sentencing Committee noted the peculiar nature of the de novo appeal, but recommended that the procedures governing appeal in this jurisdiction "remain unchanged".\(^2\)

Over recent years concern has been expressed by a number of magistrates in relation to the number of their decisions being changed on appeal in ways with which they do not agree. Because feedback from the higher courts has been found to be somewhat haphazard, magistrates have difficulty in learning of the fate of the decisions (Weatherburn 1989). There are some who would be in favour of abolishing the de novo appeal in favour of appeal by way of review which would then provide better guidance by way of a reported and binding set of principles, (Brown 1972). It is argued that appeal "de novo" is no longer the appropriate procedure to be employed if the principles of consistency, parity, predictability and precedent are to be observed. Indeed, in an effort to reduce inefficiency and waste within the criminal justice system, there have been recent amendments to the legislation in an effort to restrict the mounting of frivolous appeals generally.

In view of the fairly recent reforms to the magistracy including its professionalisation, it is believed by some that the historical reasons for the nature of this appeal process, for example, that the magistracy was a lay quorum as opposed to the higher professional courts, are no longer valid and that the entire process of appeal by way of re-hearing is in need of review. As McHugh J. in Goldfinch (1987)\(^3\) said, 'if s 122\(^4\) is to be reformed, the starting point might be the abolition of a hearing de novo on new evidence. Now that the Local Court comprises highly qualified, professional magistrates, the necessity to retry the case afresh on new evidence seems dubious. Indeed the advantages of an appeal from a qualified magistrate to a single judge of the District Court on questions of fact are not entirely self-evident. A right of appeal

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\(^2\) ibid

\(^3\) Goldfinch (1987) 30 A Crim R 212 at 219

\(^4\) Justices Act 1902 (NSW)
in the strict sense to a bench of two District judges might be more appropriate."
Given that it is desirable that there be consistency and predictability in
sentencing both within and between jurisdictions, the provision of reasons for a
successful appeal in the County Court from a decision in the Magistrates' Court
would enable the original sentencer, as well as the wider community, to gain an
understanding of any mistakes being made, who is making them and where. It
is arguable that the present system may encourage the commencement of
frivolous appeals as well as offering an offender a "second go" or "another bite
of the cherry" to which he ought not be entitled.

It is said that court functioning depends among other things on morale and the
extent to which individual decision makers see themselves as part of a larger
whole (Douglas & Laster 1992). One index of the acceptance of their work may
be the number of appeals lodged against their decisions and also the fate of
these appeals in the higher courts (O'Connor 1972). Additionally, there is a
need to ensure that maximum guidance is given to those passing sentence at
first instance. However, it has been argued in response to these propositions,
that, as the number of appeals is always relatively small, the appellate system
ought not be a control or guidance of the sentencing discretion exercised by
individual judges and magistrates.\(^5\)

These considerations raise questions as to how this de novo appeal process
could be changed in a practical and realistic manner. Ought it be by way of
review as it is from the County Court to the Supreme Court or by way of appeal
to a full court of appeal within the magistracy similar to the one in the Supreme
Court? Has the de-novo system outlived its usefulness? Would a thorough
study of the case statistics reveal that law reform strategies be developed in
this area? And would a study of the economics of the current situation
compared with any innovations made to it reveal such changes to be justified or
not?

In order to answer such questions and address any grievances against the

current system of appeals from these courts of "inferior" jurisdiction, a scrutiny of the way they function, their historical roots and development, as well as an understanding of the nature and number of appeals generally is both necessary and useful. There has been little research done on the extent to which unjustified disparity of sentences exists between jurisdictions in dealing with like situations, for example, in sentencing outcomes dealing with the same case at the Magistrates' Court and, then on appeal at the County Court.

This thesis is directed towards examining these matters. A study of the issues involved in this process may reveal that these concerns are not justified nor is any improvement to the system desirable. Alternatively, some changes may be of advantage and may be able to be implemented with little added cost. It is expected that vigorous resistance to any change in the present appeal processes would be made by most defence lawyers who would argue the need to maintain the rights of the accused and for broad powers as to the determination of the facts to remain in the appeal courts. However, systemic change may be revealed to be imperative if the goals of sentencing are to be maintained and adapted to current practices.

The aim of the research is to determine, compare and evaluate the views of groups of people working in the criminal justice system on the value or otherwise of maintaining the present system of appeal at the Magistrates' Court level. The research will attempt to determine possible means of change and the practicalities and ramifications of any such change. This will add to the understanding of certain areas in the criminal justice system which are already the subject of amendment and modernisation, such as consistency in sentencing, trial efficiency, streamlining cases and the proposals to discourage frivolous appeals.

It is important to remember that:-

"we need from time to consider what our machine of justice or a given component of what it is actually doing and what we want it to do"

(Jałowicz 1986).
OVERVIEW

In order to examine and analyse the issues raised above, the thesis first provides a background to the history and operation of the system of appeals in the Victorian criminal justice system. A summary of the research theories involved and the methods used in this study is discussed in Chapter 2. This is followed by a brief history of the courts of petty sessions and its emergence in the early days of colonial Australia (Chapter 3), and an outline of the law pertaining to appeals generally (Chapter 4), within Victoria (Chapter 5) and then within other Australian states (Chapter 6). Statistics from the past two years on the status of appeals in Victoria are provided in Chapter 7. The results of the field work are then discussed and analysed (Chapter 8). In the final chapter, the writer's conclusions and recommendations are set out.
CHAPTER TWO

METHODOLOGY

Research is a means by which hypotheses can be tested and the method used assists their verification (Jupp 1989). The research strategy to be employed in this study was determined by the essential nature of the enquiry, namely, the need to obtain an understanding of the perceptions and experiences of the main players in the criminal justice system in relation to the issue of de novo appeals from the decisions of the Magistrates' Court. Thus, the preferred method used was the qualitative analysis of data collected by a series of interviews from a chosen sample of participants. It is a discovery-based approach (Jupp 1989) which allows for interchange between problem, theory and method rather than the unilinear transition inherent in quantitative research. It requires astute questioning, a relentless search for answers, accurate recall, the recognition of the significant from the insignificant, and the attribution of consequences to antecedents (Morse 1994). The researcher must become immersed in the social situation of those whose ideas and action he or she wants to understand and explain.

In order for the researcher to gain a better perspective of the setting, more than one method is often used within a project. In this study, use was made of the grounded theory to complement the phenomenological approach. This was done by structuring the interview question to elicit answers based on the process of the particular experience of the participant as well as their reflections upon the essence or their understanding of it. In this way the methods used complemented each other to produce a broader data base. Post-positivist research, in stressing the value of qualitative research accepts that all research is value laden and allows that it develops as it takes place. Its adequacy refers to the amount of data collected rather than the number of subjects, as in quantitative research (Denzin & Lincoln 1994).

Additionally, some quantitative methods have been incorporated, albeit separately, into the overall design in order to synthesise the results and
produce a better basis for conclusion. These are seen in the section on
statistical results and analysis. The mixing of research techniques, or “tri-
angulation validity”, in acknowledging that no single source of data can provide
a perfect image of reality, helps to strengthen the findings (Heilpern 1998).
However, no claims are made for the statistical validity of the qualitative
findings.

THE INTERVIEW

The main methodological tool used in this qualitative work to collect the primary
data was the interview. It occurred on an individual basis, as a face to face
verbal interchange. It was structured in the sense that each participant was
asked a series of pre-established questions, asked in the same sequence, and
was recorded⁶. However, it allowed for a fair amount of variation in the
responses and flexibility in the nature of additional material. The personal views
of the participant were included where appropriate and a certain amount of
discussion took place occasionally at the conclusion of the more structured
part, thus allowing for greater breadth of the enquiry and its facilitation. In this
sense it had some aspects of the semi-structured interview.

Discussions took place at the interviewees’ places of work or a designated
other neutral place and were conducted by the writer. They ranged between
forty-five minutes to an hour and a half, depending on the particular personality
of the interviewee. As expected, some were more inclined to be expansive,
volunteering more information than others who favoured a more direct format.
In order for the interview to be as neutral as possible, I attempted to maintain at
all times a casual but impersonal rapport. I was rewarded with consistently
helpful and insightful comments and responses and I was appreciative of the
time and care extended given to the interview.

The interview was tape-recorded for the purposes of later aiding in verifying any
notes taken during its course or in any necessary transcription.

⁶ See Appendix “A”, “List of Questions”.
SELECTION OF INTERVIEWEES

The participants for this study were chosen purposively rather than randomly, and were representative of a set of subsidiary or focus-groups which were seen as being theoretically relevant to the investigation. The logic behind this is that the selection be information rich, but in order for the results to be adequate, strategies such as seeking negative cases are also important. Such a method is useful when sampling abstract concepts (Denzin 1994).

The key players in the area of de novo appeals were identified as follows:

1. The magistrates who hear the cases at the first instance;
2. The judges who decide appeals in the County Court;
3. The prosecutors who appear at all levels within the criminal justice system and who are familiar with the procedures involved in appealing the decisions of magistrates; and
4. The defence lawyers.

The appropriate candidate was identified as having the knowledge and experience required for the study, having the ability to reflect, was articulate and willing to participate (Morse 1994). In this case, suitable candidates were seen to be persons with professional knowledge in the criminal justice system and whose field of expertise lies in the conduct of court cases and in the decision making processes involved. A quota of five subjects within each category was chosen as being adequate for the purposes of this study. It is recognised that agency contacts and co-operation are essential in such selections in order for the study to proceed in a way which is most productive to the enquiry (Hagan 1997). Thus, internal sources who identified and were able to make contact with such knowledgeable and appropriate persons enabled the research to be undertaken. Direct contact was made with the candidate and arrangements were made for the interview to take place. All participants elicited interest in the issues concerned although there was some difficulty in recruiting County Court judges some of whom felt themselves to be fettered in making any comments in relation to an issue which may result in public policy
recommendations. I was therefore somewhat more limited in my choice of participants from this category. Numbers however were made up by the recruitment of some retired judges and a last minute but most valuable addition of a Supreme Court judge who was able to offer an opinion from the perspective of a different type of appeal process, namely appeal based on error.

THE QUESTIONNAIRE

As the wording of the question determines the focus and scope of the response, whether each one is to be phrased broadly or narrowly is to be considered at the outset. It is to be noted that no matter how carefully a question is worded and the answers are reported, the written word always has a residue of ambiguity (Denzin 1994). The language ought be geared to the ‘target population” (Hagan 1997), in this case persons with a high degree of educational and literary skills, and I was thus able to use terms applicable to the legal system and understood by the interviewees.

A series of twenty seven questions were put to each person, and a further five questions to the first category, namely the magistrates. These were designed to assess their perceptions as to the status of the current appeal system, its workability and value, as well as its future. The major topics addressed by the interview questions were:

- the impact, in a personal sense, on the magistracy of the outcome of appeals from their decisions,

- the understanding of the reasons behind the de novo appeal,

- the identification of any problems with the current practice.

- whether the imposition of a different system of appeal would be preferable.

It was expected that the responses would primarily reflect the particular interests of each group although some diversity within them would not be inconsistent with a profession renowned for articulate and assured independent thinkers.
THE OBSERVATION OF ETHICAL STANDARDS

It has long been recognised that as the objects of inquiry are individual human beings with their own social history and perspective, extreme care must be taken to avoid any harm to them and to protect their autonomy. Concerns revolve around issues of informed consent and the right to privacy as well as protection from physical, emotional, financial or other types of harm. Thus the subjects should always be volunteers who give full and free consent without duress and who have the right to terminate the interview at any time should they feel the need to do so. The subjects involved in this study were perceived to be at minimal risk of any adverse consequences owing to the non-invasive nature of the research, their stature in the field and their general level of education and understanding of the topic.

(a) Consent:

In this study, prior to the interview commencing the participant was shown two forms both of which clearly identified the topic of enquiry. One form explained in plain language the relevant background relating to the project, such as the nature of the information being sought form them and the reason behind the research, the assurance of confidentiality, voluntariness, and the identity of the researcher and the university at which the studies were being undertaken. The second was a consent form to be signed acknowledging that the subject had been so informed and agreed to and understood the procedures about to take place, including the audio recording. A quota of five subjects within each group was chosen as being adequate for the purposes of this study.

(b) Confidentiality:

Certain procedures were implemented for the purposes of ensuring confidentiality of the data obtained. The notes taken at the interview and the

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7 See appendix B, “Plain Language Statement”

8 See appendix C, “Consent Form”
tape recordings made were identified immediately subsequent to the interview by a code which is untraceable to that individual. This is accessible only by the researcher and kept in a locked facility. Discretion was assured as I was the only person who had contact with the interviewees.

DATA COLLATION AND ANALYSIS

It is through diligent observation and conceptual work on the part of the researcher that the patterns of relationships between facts begins to emerge (Denzin, 1994). In this project I endeavoured to sort the interview notes, cross-checked by transcript, into computer tables according to the type of question being asked and the responses thereto. In this way the information was organised and reduced to enable theoretical insights and linkages to become more obvious.

Categories and highlights emerged as to how the participants perceived the current appeal system and as to how these were validated or otherwise. Key categories which emerged from the responses were:

- the nature and scope of the Magistrates' Court today,
- recent changes to Magistrates' Court, including technological advances,
- dissatisfaction with the current system,
- evaluation of the efficiencies and inefficiencies of the current system
- reasons for preservation of the status quo,
- the form of any change to the appeal system
- balancing change against retention of the status quo.

Ideas, concepts and meanings within these categories were able to be noted, interpreted and then presented systematically as theoretical constructions. The fact remains that there is no single interpretative truth but the process of moving from the field to text to theory is itself reflexive and embodies the researcher's own understandings and truthful evaluations.
CHAPTER THREE

HISTORICAL PERSPECTIVES OF INFERIOR JURISDICTIONS

(A) BRITISH LAW

The fourteenth century “Custodians of the Peace”
Legislation was introduced in the fourteenth century in England which gradually increased the judicial powers of the “most sufficient knights, esquires and gentlemen of the land” to keep the peace, to arrest and imprison offenders, to imprison or take surety of suspected persons, to hear and determine felonies and trespasses done in the county and to hold their sessions four times a year” (Holdsworth 1903). They were appointed by the Crown and were rarely dismissed from office. They exercised wide powers which would now be classified as legislative, administrative and judicial. These duties were done by the country gentry, without formal legal qualifications, for whom it was an honorary post of considerable prestige. These matters combined to produce a great deal of class exclusivity.

Justices sat at courts of Quarter Sessions four times a year or at General Sessions at other times and their jurisdiction was wide. At these sittings the justices acted with juries to try serious offences, including capital offences. By means of a process of presentment and indictment they not only tried criminal cases, but also supervised the whole administration of local government (Holdsworth 1903).

Changes to jurisdiction in the nineteenth century
The power of the courts of Quarter Sessions was narrowed in 1842 by enactments that removed jurisdiction in relation to certain serious offences such as treason and murder. Soon after, in 1848\(^9\), the law was codified as to the

\(^9\) 1848; 11, 12 Victoria c. 43.
procedure to be observed by justices in the exercise of their summary jurisdiction in what was named Courts of Petty Sessions. A right of appeal from this court lay to the court of Quarter Sessions. Similarly, the procedure to be followed in relation to the power to arrest persons suspected of felony, and the conduct of preliminary enquiry in criminal cases was regulated (Holdsworth 1903). The practice of paying justices to perform magisterial functions was introduced, ostensibly to stop corruption among them in urban areas (Castles 1982).

The remnant of powers
The last quarter of the nineteenth century saw major changes in the powers and personnel of the justices of the peace. Elected councils controlled the majority of local administrative functions and the persons appointed were more representative of all classes of the community. The courts of Quarter Sessions today are now controlled by the courts of common law or their modern representatives. However, although in the UK justices still retain some of their judicial powers, in Australia their role is limited to dealing with certain administrative matters.

(B) THE EMERGENCE OF AUSTRALIAN COURTS

Between 1788 and 1823
The First Charter of Justice (1787) enabled justices in the colony of New South Wales, as the whole of the eastern part of Australia was known, to exercise basically the same functions and authority as their counterparts in England (Castles 1982). With this and other powers granted by the Governors of the colony, the magistrates of New South Wales were the main instruments of government control. Although the court of Quarter Sessions had not yet been created, magistrates sat together on benches or individually to exercise their wide powers in the supervision and punishment of convicts, as well as dealing with coronial matters and some civil actions.

Appointments to the magistracy were made by the Governor from the ranks of
officials in the colony who then often achieved a special pre-eminence as did
the English justices. Later, former convicts were appointed, not without initial
resistance from the exclusive elements of the colony.

In 1810, D'Arcy Wentworth was appointed by Governor Macquarie as the first
paid or stipendiary magistrate, a relatively new practice even in England. He
was described as a Police Magistrate and he established a separate court to
deal with minor criminal offences, although magistrates, in the English tradition,
could exercise their functions without formal court proceedings, subject to
supervision by the Governors. It appears that the lines of demarcation between
the Criminal Court and the Bench of Magistrates were not always clearly
defined and that some discretion was exercised in committing persons
convicted for trial for serious offences. The greatest difference, however,
between the colonial magistrates and the English counterparts lay in the
disciplining of convicts, sometimes resulting in measures which were rough and
brutal forms of justice.

**The reforms of 1823**

The *New South Wales Act* of 1823\(^{10}\) and the Third Charter of Justice provided
for the creation of a Supreme Court modelled on the main English courts as
well as Courts of General or Quarter Sessions. The latter was to have
jurisdiction in the traditional way but with additional powers with respect to
convicts. They were regulated locally by the *Justices Act, 1829*.

The Courts of Petty Session were created by virtue of an Act passed in
1825\(^{11}\) which authorised single justices to try and punish convicts in the same
way as Courts of Quarter Sessions in England.

Most of the reforms of 1823 remained in force until the second half of the
twentieth century. Justices of the peace and stipendiary magistrates continued
to be accepted as the judicial officers responsible for the administration of the

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\(^{10}\) 4 Geo. 4 c 96

\(^{11}\) *Felons(Punishment) Act*, 1825, 6 Geo.1V, Ch. 5
law at its lowest level. Many of the changes made in the powers and functions of the magistrates in England during this period were adopted in Australia (Castles 1982).

**The Jervis Acts of 1848 and beyond.**

These British Acts, adopted in New South Wales in 1850, regulated the manner in which justices were to act in relation to committing persons to trial, to trying persons summarily and in the issuing of warrants. They became a basic foundation for the exercise of many magisterial powers for the remainder of the century and beyond, demanding a higher degree of professional skill. The paid magistracy began to be regarded as judicial officials who acted independently and were expected to be more like judges.

Provision was also made by legislation\(^{12}\) for the courts of Quarter Sessions and General Sessions to be presided over by paid, professional judges in the exercise of their functions in the criminal jurisdiction. In 1848 the District courts and their equivalents in other states, were formed wherein both the civil and criminal jurisdiction were vested together.\(^{13}\)

In 1852, Victorian parliament passed legislation which established the first County Court in Victoria.\(^{14}\) Jurisdiction was vested into it as a criminal court of record with a wide jurisdiction over indictable offences and as a judicial tribunal with a supervisory power over the exercise of summary jurisdiction by the magistracy.

Since 1980, much legislation has been passed to upgrade the jurisdiction of the lower courts and to professionalise its operation. Many country and local Magistrates' Courts have been absorbed into regionalised court complexes with new administrative systems designed to ensure greater efficiency and maximum use of resources (Douglas and Laster 1992). The magistrates sitting

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\(^{12}\) Justices of the Peace(Jurisdiction) Act, 1852

\(^{13}\) District Court Act 2(NSW) 1848

\(^{14}\) 16 Vic No. 11 (1853)
in the courts of Petty Sessions have been required since relatively recent times to be legally qualified\textsuperscript{15} and are now categorised as "judicial officers having achieved structural independence of the Executive Government in 1982."\textsuperscript{16} Thus enormous structural change has been accommodated by an institution whose roots go back hundreds of years.

\textsuperscript{15} For example, (1955) in New South Wales and 1984 in Victoria

\textsuperscript{16} Local Courts Act (New South Wales) 1982 and, in Victoria, Magistrates' Court (Appointment of Magistrates) Act 1984
CHAPTER FOUR

APPEALS

THE ORIGIN AND HISTORY OF APPEALS

As has been noted in Chapter 3, the bulk of criminal justice had been administered, for more than four hundred years, not by professional judges, but by unpaid lay justices of the peace, called magistrates. Three such magistrates would sit with a qualified clerk who would advise them on points of law and procedure in a wide summary jurisdiction. Similarly, in the early days of colonisation in Australia, the magistracy played an important part in the administration of justice. Although there were differences in Australian and English magistracies, many features of administration of justice by the inferior courts can only be understood by reference to English history.¹⁷

The earliest instance of an appeal from a conviction of justices of peace is found in the Convict Act¹⁸, 1646, which gave to the party convicted before a justice the privilege of an appeal to Quarter Sessions with a jury. This was a hearing de novo. From 1646, as evidenced in an Act passed for the “protection of game”, appeals from justices in relation to particular offences have been heard in this way but without a jury. It was declared by parliament in England in 1732¹⁹ that the object of this method of appeal was not to introduce any new form of procedure but to rectify any defects in form and to determine the truth and merits of the appeal. The Act provided that on appeal the court was to “make such determinations thereupon as by law they should or ought to have done in case there had not been any such a defect or want of form in the original proceedings, any law usage or custom to the contrary notwithstanding". This indicates that it was already the practice to deal with appeals in this way.

¹⁷ R v Longshaw, (1990), 20 NSWLR 554 per Gleeson, J.

¹⁸ Statute 22 & 23 Car.2 c.25 (1646)

¹⁹ 5 Geo 11 c 19 (1732)
Further, it was judicially declared in 1870 that "it is only in cases in which the particular Statute giving the appeal limits the inquiry to the same evidence that the Quarter Sessions are precluded from going into fresh evidence"\(^{20}\), confirming the appeal as do novo. In 1879\(^{21}\) a uniform procedure was established for all appeals from a court of summary jurisdiction by way of rehearing.

The courts of Quarter Sessions of New South Wales, having the same powers and duties as their counterparts in England, followed the same procedures; that is, the appeal went from one set, a smaller set, of justices to another larger set. Later, this larger set was replaced by the Chairman of the Quarter Sessions who had to determine the facts as well as the law by the taking of evidence.

Judges of the District Court, appointed under legislation in 1858\(^{22}\) were empowered to act as Chairmen of Quarter Sessions, the capacity in which they exercised their criminal jurisdiction. In fact, the judge now sat alone and the appeal was from a magistrate, rather than justices of the peace. Thus, the character of the court changed but the character of the appeal did not.

Likewise, when the criminal jurisdiction of the Quarter Sessions was vested in the District Court of New South Wales\(^{23}\) and the County Court of Victoria,\(^{24}\) (similar legislation was introduced in other Australian states, although important differences exist in South Australia in relation to review of magistrates' decisions to the Supreme Court) appeal from summary proceedings was provided for to a judge of that court. Again, the nature of the appeal did not otherwise change.

\(^{20}\) *The Queen v Pilgrim* (1870) LR, 6 QB., 89 at 95

\(^{21}\) *Summary Jurisdiction Act* 1879 (UK)

\(^{22}\) *District Court Act* 1858 (NSW)

\(^{23}\) *District Court Act* 1973 (NSW)

\(^{24}\) *County Court Statute* (1852), 16 Vic No.11
THE MEANING OF "APPEAL"

Generally

An appeal is not a common law proceeding; rather it is a remedy given by statute. In Sweeney v Fitzhardinge (1906), Griffith CJ noted that "when a new court is created and no appeal is given, prima facie, no appeal will lie." It is a formal proceeding by which an unsuccessful party seeks to have the formal order of the court set aside or varied in his favour by an appellate court. However courts had long established their own practices of dealing with appeals and these practices were generally not interfered with unless seen to be manifestly unjust.

Review of the decisions of courts exercising summary jurisdiction by superior courts has long been settled practice. Writs of certiorari, mandamus and prohibition were used from the sixteenth century to correct errors of law and jurisdiction but the procedures were costly and could not be used to appeal a question of fact (Patenden 1996). Today, it is generally agreed that a litigant who has lost at first instance should be entitled to have his case considered a second time at a higher level and "the legal system of every civilised country provides machinery for appeal in some form or another"

(i) Stricto Sensu

In an appeal "stricto sensu", the question to be considered is whether the order appealed from was right on the material which the lower court had before it. The court of "review" has no power to substitute its own decision if it finds error which falls within its purview; it can only remit the case elsewhere for a fresh decision (Jalowicz 1986) It cannot reconsider findings of fact.

35 Sweeney v Fitzhardinge and Others (1906) 4 CLR at 725
36 Evershed Committee, 1953, (UK)
37 Builders Licensing Board v Sperway Constructions (Syd) Pty. Ltd., (1976), 135 CLR 616
(ii) Rehearing

On a rehearing the court has the power to take fresh evidence and draw inferences of fact but its ultimate duty is to determine the merits of the matter as at the date of the appeal on the evidence given in the court below. It may take different forms but generally original witnesses are not heard again. The rights of the parties must be determined by reference to the law as it then exists and the circumstances as they then exist.\textsuperscript{28}

(iii) Hearing de novo

This is the kind of appeal provided for by the provisions of the \textit{County Court Act} 1958, the result of the historical development already discussed. The appeal court determines both fact and law. Evidence is taken afresh, subject to certain provisions which may allow for depositions of witnesses to be read and called as evidence. The court has the power to make any order in the matter as the court seems just.\textsuperscript{29}

The differing purposes of each

Appeal by way of review in which clarification of the law is the major purpose serves primarily the ‘public’ interest in upholding and protecting the legal order itself, whereas the appeal de novo serves the private interests of the parties to the litigation in the actual outcome of the case (Jalowicz 1986). There is therefore a balance to be found in limiting the number of appeals to one that the state can afford, and reaching finality on the one hand, and being careful not to create a sense of injustice in a case in which the decision may be wrong on the other. Certain restrictions on the right of appeal are both necessary and commonplace in all systems of law.

\textsuperscript{28} \textit{Builders Licensing Board v Sperway Constructions (Syd) Pty. Ltd.} (1976), 135 CLR 616

\textsuperscript{29} \textit{Superintendent of Licences v Ainsworth Nominees Pty Ltd} (1987) 9 NSWLR 691; and \textit{R v Longshaw}, (1990), 20 NSWLR.554.
Although the number of appeals increased once legal aid was introduced\textsuperscript{30} and the procedures were simplified, it is still argued that there are factors which militate against instituting an appeal, such as the risk of receiving a higher sentence, inability to obtain legal aid and the ordeal of the rehearing (Patendon 1996). Patendon believes that since many defendants are unrepresented at trial in the Magistrates’ Courts, the opportunities for miscarriages of justice are greater than in jury trials, and the fact that there is a high rate of success justifies this conclusion. Studies done in Australia in relation to the “success” rate of appeal outcomes indicate similar results. (Weatherburn 1988). That is, most cases on appeal result in a more favourable sentence being imposed on an accused person.

Thus there is a balance to be found in allowing a genuinely aggrieved person to bring a matter to the attention of the appropriate arbiter, and in an offender reaching an acceptance at some point of the punishment meted out by the state for wrongdoing.

\textsuperscript{30} \textit{Summary Jurisdiction (Appeals) Act} 1933 (UK)
CHAPTER FIVE

APPEALS IN VICTORIA

DIFFERENCES BETWEEN RIGHTS OF APPEAL ARISING OUT OF MATTERS BEFORE THE MAGISTRATES COURT AND THOSE BEFORE THE COUNTY COURT.

The essential difference between appeals in these jurisdictions is that the majority of appeals in the former are by way of rehearing where the court has power to deal with the whole matter as if the case came before it for the first time, whereas in the latter, appeal is mostly by way of review, where the court's powers are more limited, restricted to a finding of some error.

It is to be noted that the higher up in the court hierarchy a case proceeds the more formalistic the appeals become (Brown et al 1990)

(A). The right of appeal from the Magistrates’ Court

A person convicted and sentenced in the Magistrates’ Court may, within 30 days, file a Notice of Appeal either to the County Court or, if the appeal involves a question of law, to the Supreme Court (Magistrates’ Court Act 1989, s.83-90). Once the appellant has signed an Undertaking to Appear, the order of the Magistrate is automatically stayed. The Clerk at the Magistrates’ Court is responsible for the preparation of any necessary paperwork and there are no costs to the appellant.

(i) The Appeal to the County Court.

If an appeal is to the County Court it proceeds by way of re-hearing (de novo) before a single judge and the evidence is called afresh. New evidence may be called, the defendant is not bound by any earlier plea and no reference is made to the Magistrate’s reasons. The Magistrates’ order must be set aside and a new order made. In relation to appeals against sentence, the judge must decide
for himself or herself what penalty is to be imposed, not whether that imposed
by the magistrate was appropriate31. Until recently, the proceedings have not
been recorded and reasons for the new order are not published (Order 2,
Chapter 2 of the Rules to the County Court Act 1958). Generally, this decision
is final. However, where the County Court has substituted a custodial sentence
for a non-custodial sentence the principles applicable are the same as those
applied in appeal from the County Court to the Supreme Court.

(ii) Appeal to the Supreme Court on a Question of Law
An appeal on a question of law from a final order of the magistrates’ court must
be brought in accordance with the rules of the supreme court ( S.92
Magistrates’ Court Act 1989). This is by way of review and requires the
demonstration of error, mistake or excess of jurisdiction. Evidence is produced
by way of affidavit. The appeal must be decided on the basis of the law as it
existed when the order was made. In the case of an order made by the
Magistrate in exercise of discretion the court cannot simply substitute its own
exercise of discretion. It may make any order it thinks fit including remitting the
case for re-hearing by the Magistrates’ court.

(iii) Appeal from the Magistrates’ Court by the Director of Prosecutions
The Director of public Prosecutions may also appeal against any order (s. 84
Magistrates’ Court Act 1989) and is subject to essentially the same conditions
as those prescribed for Crown appeals against sentence under s. 567A of the
Crimes Act 1958, namely that the director be satisfied that an appeal should be
brought in the public interest. Normally, such an appeal will be against the
inadequacy of the sentence and the Full Court will exercise its jurisdiction to
interfere with the sentence only if the sentence is manifestly inadequate or the
sentencer acted on a wrong principle or misunderstood some feature of the
evidence (Nash, 1999).

31 per Hunt CJ in Budget Nursery Pty Ltd v Commissioner of Taxation (Cw) (1989) 42 A Crim. R 81
(B). Appeal from the County Court or the Supreme Court to the Court of Appeal

Appeals against conviction and sentence in relation to indictable matters which have been prosecuted in the County Court or Supreme Court depend wholly on statute and are regulated in this state by the Crimes Act 1958 (Fox 1997). The Registrar of Appeals deals with the administrative processing of criminal appeals and the appeal is heard in the Court of Appeal, one of the divisions of the Supreme Court. Appeal is by way of review based on the ground of error or mistake of law. Apart from appeal against conviction on a question of law leave must be obtained from the Court of Appeal (section 567, Crimes Act, 1958). A Notice of Appeal or an Application for Leave to Appeal must be filed within fourteen days of conviction and sentence (Order 2, Criminal Appeals and Procedure Rules). Transcript of the proceedings, a report from the trial judge and original exhibits are provided to the court (section 573, Crimes Act 1958). Full reasons for the decision are published.

Grounds of appeal

Leave to appeal may be granted on any ground of appeal which involves a question of law, question of fact, or a question of fact and law or "any other ground which appears to be a sufficient ground of appeal") as well as against the sentence passed unless it is fixed by law (s 567 Crimes Act 1958).

Where:-

1. the verdict of the jury is found to be unreasonable or not supported by the evidence, or
2. there was a wrong decision of any question of law, or
3. on any ground there was a miscarriage of justice,

then the court may,

1. quash the conviction and enter a verdict of acquittal or order a new trial,
2. pass another sentence in substitute, or
3. remit the case back to the trial court with or without directions.( see ss.568 and s 569 Crimes Act 1958)
Thus, where there was a wrongful exercise of the trial judge’s discretion in relation to the admission or rejection of evidence, the ordering of separate trials or the reopening of the Crown case the appeal may be allowed. The power of the appellate court to grant a new trial is discretionary and ought only to be exercised where the interest of justice requires (Fox 1997).

In the case of appeals against sentence, the appellant must satisfy the court that there has been error vitiating the exercise of the original sentencing discretion. However, an appeal in this case may be allowed in the absence of sentencing error where subsequent additional evidence is available of significant factors which would make the sentence erroneous.

**Appeal by the DPP**

The Director of Public Prosecutions has the right to appeal against sentence where it is in the public interest to do so (s. 567A Crimes Act 1958). It has recently been held that such an appeal is appropriate where it is shown:

1. that there has been manifest inadequacy or consistency in sentencing standards as to constitute and error in principle,

2. it is necessary to lay down principles of governance,

3. to enable courts to establish and maintain adequate standards of punishment,

4. to enable the idiosyncratic views of individual judges to be corrected,

5. to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscious,

6. to ensure uniformity in sentencing.\(^{32}\)

Strict compliance with the procedural requirements is essential (Nash, 1999) and leave to appeal should only be granted where it is necessary for the court

\(^{32}\) *R v Clarke* 1996 2 VR 185
to fulfil its function of putting right errors of sentencing principle.\textsuperscript{33}

\textbf{THE MAGISTRATES' COURT (AMENDMENT) ACT}

The County Court has always been under an obligation to warn an appellant of its intention to increase the penalty.\textsuperscript{34}.

By the introduction of the \textit{Magistrates' Court (Amendment) Act} in 1999 significant changes have been made to the way in which appeals from the Magistrates' Court are dealt with. In tabling the Bill, the then Attorney-General\textsuperscript{35} stated that the objectives of the amendments were to "bring about a fairer and more efficient appeals system in which an appellant will be genuinely 'at risk' when he or she appeals." It was also aimed at discouraging 'frivolous appeals' -

"Public concerns about utilising court resources effectively are addressed by promoting the most efficient use of prosecutorial and judicial resources".

In practice, the requirement for a warning led to few cases where the appellant in fact did in fact receive a higher sentence. Under the new provisions however, the court is no longer required to do give this warning\textsuperscript{36}. The result is that the appellant risks a higher sentence than the one imposed by the magistrate and will be unable to withdraw the proceedings with the knowledge that the judge is of a mind to increase. The reasoning behind such a move is the recognition of the real meaning of the de novo appeal. That is, if the judge is required to warn then he or she must be informed of the magistrate's sentencing order, but if it is a true de novo then this information ought not be accessible.

Until the new provisions came into effect on 1 July 1999, the appellant has had the right to abandon an appeal at any time up until the commencement of the

\textsuperscript{33} \textit{R v Laffey} 1998 1 VR

\textsuperscript{34} \textit{Brand v Parson} 1994 1 VR 252 at 256

\textsuperscript{35} The Honourable Jan Wade

\textsuperscript{36} s. 9(1) of the \textit{Magistrates' Court (Amendment) Act} 1999
appeal at the County Court and thereafter with leave of the court. Now, withdrawal of appeal after thirty days from lodgement of it requires that the judge is satisfied that exceptional circumstances exist. \(^{37}\) The reasoning behind such an amendment is to rectify the situation which has existed where several appeals listed for hearing before a judge on any one day are abandoned at the door of the court -

"this demonstrates an unacceptable lack of thought, preparation and assessment of the merits of a case...and which indicates 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."\(^{38}\)

Additionally, if an appeal is struck out or dismissed, the judge may order that the appellant pay costs if satisfied that it was brought "vexatiously or frivolously" or in abuse of process. \(^{39}\) Power has also been given to the judge to hear and determine an appeal ex parte and any leave granted later by the appellant later to have the appeal reheard will depend on the appellant showing such failure to appear was not due to his or her fault or neglect. \(^{40}\)

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\(^{37}\) S. 14(2) of the Magistrates' Court (Amendment) Act 1999

\(^{38}\) The Attorney-General, the Honourable Ian Wade, 29 October 1998

\(^{39}\) S. 11 of the Magistrates' Court (Amendment) Act 1999

\(^{40}\) S. 9(3) of the Magistrates' Court (Amendment) Act 1999
CHAPTER SIX

APPEALS IN OTHER AUSTRALIAN STATES

The appeal procedures in each state are governed by either rules of court or statute. In all jurisdictions there is a right of appeal from the decision of the magistrate to a superior court.\textsuperscript{41} It is relevant to this thesis to compare these procedures in order to evaluate the system which exists in Victoria and as to whether a different appeal process would be preferable.

APPEALS BY WAY OF REVIEW ONLY TO THE SUPREME COURT

(1) Western Australia:

Part V111 of the\textit{ Justices Act} 1902 (WA) confers the power to appeal to the Supreme Court by way of leave granted by a judge in chambers or in court. Such leave is granted unless it is considered to be frivolous or vexatious, or if no arguable case is advanced. It is made ex parte unless it is ordered that the application be served on the other party. The grounds for such leave are in relation to error of law or fact, or both, on the part of the magistrate, lack of jurisdiction, inadequate or excessive penalty, or "some other reason that is sufficient to justify a review of the decision".\textsuperscript{42} The application may be made notwithstanding that the decision was made following a plea of guilty or an admission of truth of any matter. The appeal is argued in most cases before a judge alone on the material that was before the magistrate, as well as on further oral or affidavit evidence. The Court may dismiss the appeal, quash or vary the magistrate's decision, substitute its own decision, remit it for hearing by the magistrate, refer the case to the Full Court or make any other order it thinks fit.

\textsuperscript{41} The Laws of Australia (1999), 11.8 at 17

\textsuperscript{42} s.186(1) of the\textit{ Justices Act} (WA) 1902,
(2) Northern Territory:

Under the *Justices Act 1928* (NT) appeal lies to the Supreme Court. A point of law may be reserved for consideration, or a case stated by the Crown, but this does not invalidate any order made by the magistrate\(^{43}\). Appeal may also be instituted by notice on a ground which involved sentence or error or mistake by the magistrate. It may be as to law, fact or both provided there is no specific legislation prohibiting such appeal in that case\(^{44}\). The appeal is heard and determined in a summary way and evidence is limited to the material presented at the Magistrates' Court, although the Supreme Court may admit fresh evidence if it is credible and a reasonable explanation exists for failure to adduce it originally\(^{45}\). The Supreme Court can vary, affirm, quash, substitute remit and make any orders as required\(^{46}\).

**APPEALS BY WAY OF REHEARING AND REVIEW TO THE SUPREME COURT**

(1) Australian Capital Territory:

Part X1 of the *Magistrates Court Act (ACT)* 1930 allows for two methods of appeal to the Supreme Court -

(i) appeal by way of re-hearing, although the depositions of witnesses called at the Magistrates' Court may be relied upon. The Supreme Court may make such orders "as it considers fit"\(^{47}\).

(ii) appeal by way of review. Where an order nisi is granted for a person to proceed in this way, the right to rehearing is forfeited. Such an order is granted on the grounds that there was a prima facie case or error or

\(^{43}\) s.162 *Justices Act 1928* (NT)

\(^{44}\) s.163(1) *Justices Act 1928* (NT)

\(^{45}\) s.176A(1) *Justices Act 1928* (NT)

\(^{46}\) s.177 *Justices Act 1928* (NT)

\(^{47}\) s.218 of the *Magistrates' Court Act (ACT)* 1930
mistake on the part of the Magistrates' Court\textsuperscript{48} or that the decision should not in law have been made. After reviewing the evidence, the Supreme Court may discharge the order, thereby restoring the magistrate's decision, or otherwise vary the magistrate's decision. It may also remit the matter to the Magistrates' Court for re-hearing with or without any direction in law, or make other such orders as it considers necessary to determine the matter fully.\textsuperscript{49}

(2) South Australia:

Under the provisions of the \textit{Magistrates' Court Act} 1991 (SA) appeals are to the Supreme Court. If the matter relates to a summary offence then it is to a single judge\textsuperscript{50} and if a minor indictable then to the Full Court unless the appellant elects otherwise or the judge refers it on. Although the Director of Public Prosecutions can appeal, the Supreme Court is reluctant to interfere with acquittals. The appeal is by way of rehearing but is not de novo. However the court may reheat any witnesses or receive fresh evidence if the interests of justice so require.\textsuperscript{51} The notice of appeal must set out the grounds of appeal and whether any fresh evidence is to be called. An outline submissions must be provided to the judge prior to the hearing and a list of authorities lodged with the judge's associate. The court may then affirm, vary, quash remit or make any other order. A further appeal lies to the Full Court with leave from any decision of the Supreme Court on a magistrate's appeal.\textsuperscript{52}

\textbf{APPEALS BY WAY OF REVIEW AND LIMITED DE-NOVO HEARING TO THE}

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\textsuperscript{48} s.219c(1) of the \textit{Magistrates' Court Act} (ACT) 1930

\textsuperscript{49} s. 219F (3) of the \textit{Magistrates' Court Act} (ACT) 1930

\textsuperscript{50} s.42 of the \textit{Magistrates' Court Act} 1991 (SA)

\textsuperscript{51} s. 42(4) of the \textit{Magistrates' Court Act} 1991 (SA)

\textsuperscript{52} Supreme Court Rules 1987 (SA), r94
SUPREME COURT

(1) Tasmania:
The legislation conferring the right of appeal from the Magistrates' Court in this state is the Justices Act 1959 (Tasmania) -

(i) Notice of appeal alleging error or mistake by the magistrate on a question of law or fact or both is made to the Supreme Court for review of the decision.  

The Court in considering the evidence as well as such further evidence as it thinks fit, may dismiss, confirm, remit or order the matter to be retried or make any other order to secure final determination.

(ii) The person who files or is served with a notice of review may apply for an order that the appeal be heard de novo in the Supreme Court. The order is not made unless the appeal court is satisfied that, having regard to all the circumstances, the interests of justice require that it be re-heard, nor if the appellant has already pleaded guilty. For example, it will be ordered where the appellant was not represented at the Magistrates' Court and there was evidence of defence available which was not adduced, where it is not practical to bring all the evidence before the court, or where the parties agree. The court in this case can make any order as it thinks fit.

53 s 107(4) of the Justices Act 1959 (Tas)
54 s 110(2) of the Justices Act 1959 (Tas)
55 s 110(2) of the Justices Act 1959 (Tas)
56 s 111(5) of the Justices Act 1959 (Tas)
57 s.111(7) of the Justices Act 1959 (Tas)
APPEALS BY WAY OF REHEARING TO THE DISTRICT COURT AND REVIEW TO THE SUPREME COURT

(1) Queensland:

The Justices Act 1886 (Qld) provides a means of appeal whereby-

(i) a person convicted of a "simple offence" may appeal to a judge of the District Court where the fine imposed is more than $10, any period of imprisonment is more than one month or by leave of the judge. It proceeds by way of rehearing but is heard on the evidence put before the magistrate. The judge may confirm, quash, or make any order considered to be "just".

(ii) appeal may be made to the Supreme Court by way of order to review. The appellant must show a prima facie case of error or mistake in law or fact by the magistrate or that he or she acted in excess of jurisdiction. Any other right of appeal is thereby abandoned. No order to review may be granted unless some important principle of justice is involved, the magistrate acted outside jurisdiction or substantial injustice was done. Again, the Supreme Court may discharge, confirm, vary, quash, remit to the Magistrates' Court with or without directions or make any other order considered necessary to secure final determination.

APPEALS BY WAY OF DE-NOVO HEARING TO THE DISTRICT COURT AND REVIEW TO THE SUPREME COURT

(1) New South Wales:

Appeals proceed under the Justices Act 1902 (NSW) in a similar manner to the system in Victoria -

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58 s. 222(1) of the Justices Act 1886 (Qld)

59 s. 225 of the Justices Act 1886 (Qld)

60 s. 209 of the Justices Act 1886 (Qld)

61 s. 209(5) of the Justices Act 1886 (Qld)
(i) appeals to the District Court are by way of de novo hearing, in a summary manner without a jury. The appellant may rely on new grounds even if a plea of guilty was entered before the magistrate. It may make any order it thinks fit but matters are not remitted back to the Magistrates' Court. A District Court judge may submit any question of law arising on any appeal to the Supreme Court for determination.

(ii) an appeal to the Supreme Court may be made by way of case stated on the basis of error in law. A magistrate may refuse to state a case where of the opinion the application is merely frivolous. the appellant may then apply to the Supreme Court for an order for the Magistrates' Court to state the case. When hearing the matter the magistrate confirm, remit reverse or make any other order it thinks fit.

(2) VICTORIA

The procedure is outlined at greater length in the previous chapter. It is notably similar to that which is followed in New South Wales.

CONCLUSION

Thus it has been shown that an appeal from the Magistrates' Court in most states is to the Supreme Court by way of review as to error, and the de novo appeal only exists in Victoria, New South Wales, Tasmania and the Australian Capital Territory. However, it is of note that Tasmania, the Northern Territory and the Australian Capital Territory do not have the next intermediate level of justice, the County or District Court. Furthermore, the right to a de novo appeal in Tasmania is limited. Queensland has a mixture of both procedures in that some offences are appealed at the District Court and others by way of review to the Supreme Court. Victoria and New South Wales stand alone with their system of appeal being a de novo hearing to the County or District Court. One

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62 s.122 of the Justices Act 1902 (NSW)

63 s.106(1) of the Justices Act 1902 (NSW)
proposition for this similarity would appear to lie in the historically joint
development of these two states until their separation in the mid-1850's.

Prima facie then, any resistance to an argument for change from the de-novo
appeal appears to be inconsistent with the accepted practices of appeal
procedures in most in other states. To consider that any other system would be
a radical departure from the tenets of natural justice does not seem to be the
case given that most appeals in Australia do not take the form of a de-novo
rehearing.
CHAPTER SEVEN

APPEAL STATISTICS

Each year, a large number of criminal cases are processed at the Magistrates' Court of Victoria. A number of these courts are situated in regional Victoria and in the suburbs of Melbourne, but the majority of cases heard at this level take place at the Magistrates' Court in Melbourne. In the financial year 1997/98, 115,699 cases were initiated and 119,566 were completed. Of those cases in which proceedings are initiated, some are adjourned to a date fixed or to be fixed later and of those cases in which the magistrate has made a decision and sentenced and offender, a small number are appealed. This is done by the appellant lodging a Notice of Appeal within 14 days of the decision made by the magistrate. In 1997/98, the number of appeals represents approximately 1.7% of the total number of completed cases.

TABLE 1.

CRIMINAL MATTERS AT THE MAGISTRATES' COURT, VICTORIA 1997/98

<table>
<thead>
<tr>
<th>Summary Criminal Cases Initiated</th>
<th>115,699</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary Criminal Cases Completed</td>
<td>119,566</td>
</tr>
<tr>
<td>Notices of Appeal Lodged</td>
<td>2021</td>
</tr>
</tbody>
</table>

[Source: Magistrates' Court Annual Report 1997-98 and statistics provided by the Attorney-General's Committee for Criminal Justice & Research]

In 1997/98, however, a total of 3026 appeals were actually dealt with in the County Court, Victoria. The discrepancy between this number and the number of appeals lodged is due to the difference in lodgment time and the hearing of the case. It can be seen that although the percentage of cases appealed is small, the actual number of cases heard at the County Court is significant.
RESULTS OF COUNTY COURT APPEALS 1997/98

Not all of the appeals which are initiated at the County Court come before a judge. Some appellants may decide to abandon their appeal before the fixed date and others do this on the listed hearing day. Some appeals, for various reasons, may be adjourned to a date fixed and others to an unspecified date. Some of the appeals heard at the County Court are dismissed, others are allowed and the appellant is re-sentenced. The following table indicates the cases which fall into theses categories for the year 1997/98.

TABLE 2

<table>
<thead>
<tr>
<th>APPEAL ALLOWED</th>
<th>1584</th>
</tr>
</thead>
<tbody>
<tr>
<td>APPEAL ABANDONED ON FIXED DATE</td>
<td>687</td>
</tr>
<tr>
<td>APPEAL ABANDONED BEFORE FIXED DATE</td>
<td>56</td>
</tr>
<tr>
<td>APPEAL ABANDONED BEFORE LISTED</td>
<td>16</td>
</tr>
<tr>
<td>APPEAL ADJOURNED DATE FIXED</td>
<td>835</td>
</tr>
<tr>
<td>APPEAL ADJOURNED TO DATE TO BE FIXED</td>
<td>141</td>
</tr>
<tr>
<td>APPEAL DISMISSED</td>
<td>352</td>
</tr>
<tr>
<td>APPEAL REINSTATED</td>
<td>16</td>
</tr>
<tr>
<td>APPEAL STRUCK OUT</td>
<td>261</td>
</tr>
</tbody>
</table>

[Source: Office of Public Prosecutions]
Figure 1 presents this data in the form of a pie chart. If the numbers of appeals abandoned and adjourned are excluded for the sake of this analysis, it can be seen that the majority of appeals heard by the County Court are successful.

RESULTS OF SENTENCE APPEALS 1998/99

A random sample of approximately 10% of the "sentence only" County Court appeal results in the financial year 1998/99 were analysed as to any changes made. This involved selecting every tenth case from a chronologically ordered list of cases.

### TABLE 3

<table>
<thead>
<tr>
<th>TOTAL NUMBER OF CASES</th>
<th>1848</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL NUMBER OF CASES ANALYSED</td>
<td>170</td>
</tr>
</tbody>
</table>

[Source: Office of Public Prosecutions]

The type of change, if any, was then noted. Where a sentence was seen to be reduced in any way, a decision was then made by the researcher as to whether this reduction was significant or insignificant. For example, where a sentence involving actual imprisonment was altered in a way whereby the offender was given his or her liberty, albeit with the imposition of alternative dispositions such
as a Community Based Order, an Intensive Corrections Order or a suspended sentence, this was considered to be a significant reduction. Where, however, a sentence of imprisonment was reduced by a quarter or less, this was considered to be an insignificant reduction. Similarly, a sentence in which a period of actual imprisonment was imposed in lieu of, for example, an Intensive Corrections Order, this was considered to a significant increase in sentence, whereas a sentence in which a fine was increased by less than a quarter was considered to be an insignificant increase.

**TABLE 4**

**ANALYSIS OF SENTENCE RESULTS**

<table>
<thead>
<tr>
<th>Sentence</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>SAME SENTENCE</td>
<td>14</td>
</tr>
<tr>
<td>SENTENCE SIGNIFICANTLY REDUCED</td>
<td>95</td>
</tr>
<tr>
<td>SENTENCE INSIGNIFICANTLY REDUCED</td>
<td>45</td>
</tr>
<tr>
<td>SENTENCE SIGNIFICANTLY INCREASED</td>
<td>5</td>
</tr>
<tr>
<td>SENTENCE INSIGNIFICANTLY INCREASED</td>
<td>11</td>
</tr>
</tbody>
</table>

[Source: The Office of Public Prosecutions]

**FIGURE 2**

**SENTENCE APPEAL BREAKDOWN**

- Sentence Significantly Increased: 3%
- Sentence Insignificantly Increased: 6%
- Sentence Significantly Reduced: 56%
- Same Sentence: 8%
Figure 2 shows that, of the appeals which are successful in the County Court, 82% result in a reduced sentence and the majority of these are reduced significantly. Only 9% are increased, and the majority of these are insignificantly reduced. Thus, it could be said that, from an appellant's point of view, it is worthwhile bringing his or her grievance with the magistrate’s decision to the attention of a judge of the County Court.

COMAPARISON WITH THE COURT OF APPEAL

In order to place these data in context, a comparison was made with appeals to the Court of Appeal from the County Court and Supreme Court.

In the financial year 1997/98, the Office of Public Prosecutions conducted 1335 cases involving trials and pleas of guilty in the County Court and Supreme Court of Victoria.

**TABLE 5**

**TRIALS AND PLEAS CONDUCTED BY THE OFFICE OF PUBLIC PROSECUTIONS 1997/98**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>MELBOURNE COUNTY COURT TRIALS</td>
<td>231</td>
</tr>
<tr>
<td>MELBOURNE COUNTY COURT PLEAS</td>
<td>711</td>
</tr>
<tr>
<td>MELBOURNE SUPREME COURT TRIALS</td>
<td>37</td>
</tr>
<tr>
<td>MELBOURNE SUPREME COURT PLEAS</td>
<td>39</td>
</tr>
<tr>
<td>CIRCUIT SUPREME AND COUNTY COURT TRIALS</td>
<td>122</td>
</tr>
<tr>
<td>CIRCUIT SUPREME AND COUNTY COURT PLEAS</td>
<td>195</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1335</td>
</tr>
</tbody>
</table>

[Source: Office of Public Prosecutions Annual Report 1997/98]

In the same period, the Office of Public Prosecutions conducted 267 appeals to the Court of Appeal and 12 matters in the High Court.
TABLE 6

APPEALS FROM THE COUNTY COURT AND SUPREME 1997/98

<table>
<thead>
<tr>
<th>COURT OF APPEAL</th>
<th>267</th>
</tr>
</thead>
<tbody>
<tr>
<td>HIGH COURT</td>
<td>12</td>
</tr>
<tr>
<td>TOTAL</td>
<td>279</td>
</tr>
</tbody>
</table>

[Source: Office Public Prosecutions Annual Report 1997/98
Note: High Court includes applications for leave to appeal]

It can be seen that the number of appeals heard in the Court of Appeal and High Court in this period is approximately 20% of the total number of cases conducted in the County Court and Supreme Court for the same period. Although this does not represent the percentage of all cases which are appealed in that period it is expected that the ratio would not vary from year to year.

TABLE 7

COMPARISON OF APPEALS BETWEEN JURISDICTIONS: 1997/98

<table>
<thead>
<tr>
<th>MAGISTRATE COURT APPEALS</th>
<th>1.7%</th>
</tr>
</thead>
<tbody>
<tr>
<td>COUNT AND SUPREME COURT APPEALS</td>
<td>21%</td>
</tr>
</tbody>
</table>

The comparatively small number of cases which are appealed from the Magistrates' Court relates in part to the large number of offences of a less serious nature being heard in this jurisdiction, and the expense involved in bringing a matter of little import, for example a small fine, to the attention of the County Court.

In conclusion, this data reveals that, overall, the ratio of de novo appeals to the County Court in Victoria is low. The actual number, however, being in the order of 3,000 cases is significant, and of these the majority are successful. It is of importance to an understanding of the processes involved in the de novo appeal to have regard to the opinions and perceptions of those who participate in them. In the next chapter, information of a qualitative nature, being the
responses of some of these participants, will be examined to so further this understanding.
CHAPTER EIGHT

RESPONSES TO THE SURVEY

THE MAGISTRATES' COURT TODAY

As described in Chapter One, this tribunal has evolved quite dramatically over the last several decades. Some of these notable changes include the following:-

1. The jurisdiction it exercises has grown enormously and it now hears matters which were previously heard by a judge and jury in the County Court; for example the offence of burglary can now be heard summarily by a magistrate.

2. The bench, once comprised of lay Justices of the Peace, became professional in the sense that experienced clerks of court who had studied and passed subjects in law for entrance to the magistracy were appointed to it. Since the mid-1980's, only qualified legal practitioners of a certain standing are able to join its ranks.

3. Once not considered a court of record, now all proceedings are recorded by audio technology and transcripts of proceedings can be made available.

4. Many suburban and regional courts have closed and a large new modern central building now occupies a prominent position in the precinct shared by all the major courts in Melbourne.

In short, it is a court which can be seen to be taking an ever more important place in modern times and as it enters the new millennium.

As outlined in Chapter Four, an appeal from a decision of a court of law generally proceeds by way of review based on error. The rationale is that the decision should stand unless some error pertaining to law is revealed and it is incumbent upon the appellant to satisfy the appeal court of this on the basis of material presented to the court below. Tribunals comprised of lay persons have traditionally been treated differently in respect of appeals from its decisions.
These proceed de novo, presumably for reasons relating to a certain distrust of the validity of its decisions at first instance. The decisions of the Magistrates’ Court are still appealed in this way today. Perceptions vary as to why this is and as to whether it ought remain so in the light of all the other changes it has undergone.

THE MAGISTRATES

All the magistrates in the study described how they are made aware of the outcome of appeals from their decisions by way of material contained in what are called “green sheets”. These are forms with which they are provided on an “ad hoc basis” containing a brief pro forma list of results from appeals and a reference to the magistrate to whose decisions they pertain. They contain no reasoning behind any change made to the decision and are received, according to one magistrate, at a time “so distant that the he or she hardly recalls the facts of the particular case”. They are not provided with information prior to the appeal that it is to take place. There appeared to be some general dissatisfaction as to the lack of communication between the relevant courts in this regard and the unhelpfulness to them of such an arrangement.

Most magistrates revealed that their decisions weren’t appealed from frequently although one had a large number which were. However, it was generally felt that most appeals appeared to result in a different outcome. Some of these were significant and others not. When asked whether this affected them personally, only one replied that it never did. The other responses ranged from not generally to affirmative. Some recalled instances where they had not been impressed with the outcome and where they would have liked to have had the benefit of the judge’s reasoning behind the decision as they disagreed with it. One stated, “I would have liked to have known where I went wrong”. Those magistrates who admitted that it did affect them personally, stated that it was “disquieting” and “frustrating” particularly where there was a big disparity between sentences or if a matter had been completely overturned. In the view of another magistrate -
"it can be galling for an experienced sentencer to have a carefully thought out sentence undone by the County Court whose status may be recognised but whose members don’t see a similar range of defendants as those that the Magistrates’ Court sees.”

However it was acknowledged that in some cases it was not altogether surprising given that new evidence as to remorse or psychological reports may have been tendered at the second hearing which might lead to a different decision.

As to whether or not this affected their work in any way, all responded that it did not and that they continued to do what was correct in each case. There appeared to be a certain confidence generally in their own experience and ability to assess a case. A couple of the magistrates even went so far as to say it is a “safety valve” and of some “comfort” to know that if there is a mistake there is an appeal process to pick it up. One, however said that it was “always in the back of your mind that you might be appealed from”.

It is evident from the above that magistrates exhibited a high degree of care and concern in the way they approach their task of judging matters in this court. There also appears to be some general disquiet relating to the way some of these matters are appealed, whether that was as to the outcome of the appeal or just the poor communication of it. There thus appears to be some illogicality to a system where decision makers feel such disquiet but where in fact the non-communication and disregard for the previous decision is in keeping with the principal behind the de novo appeal; that is, that what has occurred in the court below is not relevant to what occurs on appeal.

THE LEGAL PROFESSION GENERALLY

Given the current climate of concern as to public spending and the economic rationalisation which has occurred across the public service generally, it was considered of special interest to find out whether in fact and perception there is a relationship between the number of de novo appeals and the nature of the de novo appeal itself and whether there are any resulting inefficiencies inherent in
the current system which could be avoided.

All participants in the four groups interviewed, namely magistrates, judges, prosecutors and defence lawyers, were asked whether to their knowledge many convictions and sentences were subject to appeal. There was some variation of opinion, but in general, the magistrates felt that quite a large proportion of cases were appealed and that the number was quite high especially in the case of sentences involving loss of liberty or the right to drive. Most of the judges questioned felt that the grievance rate would not be high and that there were relatively few appeals. Prosecutors and defence counsel on the whole however were of the understanding that a significant number of Magistrates' Court cases were appealed from. In fact, as seen from the appeal statistics in Chapter Seven, the percentage is only 5% but given the huge volume of cases heard in the Magistrates' Court each year the actual number of cases is high and takes up a considerable amount of County Court time.

Of these decisions appealed from, there appear to be obvious differences relating to their origin. In other words, some magistrates are appealed from more than others. All of the participants had heard this anecdotally at least, both in relation to appeals from the Magistrates' Court as well as appeals from the County Court decisions to the Supreme Court. Defence lawyers were most definite in this regard. It was suggested by one magistrate that the vast number however would maintain parity of outcome where appropriate. Another also suggested that this is merely representative of the community generally, in that some have more “heavy handed” approaches to sentencing and these are always the sentences appealed from. One of the judges also referred to this disparity in individuals' ideas for meting out punishment and the standards of tolerance that vary in any sector. Another discrepancy was pointed out by one of the magistrates where there are some noted regional differences in sentencing outcomes which suggest that there may be a consensus of policy in some regions in relation to certain offences. It appears also that there is a certain amount of “luck of the draw” perceived to be involved on the day of the case in relation to the magistrate who is sitting at the time and who is perceived to hold certain “views”. This may result in some “forum shopping”. It is
questionable whether a system of de novo appeal or appeal based on error is best suited to deal with this problem equitably.

When asked whether it was of concern to them if the appeal results in a different outcome from the original, most magistrates more or less reiterated their responses to the previous question relating to their work practices in that they experienced some frustration if there was a complete turnaround and they did not know why. Without even brief reasons, the “green sheets” appear to have no great purpose because they give no clear message as to why the appeal might have been changed and what may be learned from this. This frustration exists even with the understanding that the de novo appeal is a complete rehearing and proceeds on the basis that what occurs at the Magistrates' Court level is not relevant and the appellant may have had better quality representation. Furthermore, as a couple of them pointed out, if the sentence was merely "tinkered with" the appellant may be led to the conclusion that he or she has had some "success" on the merits of the case whereas all that has occurred is minor change near enough to “rubber-stamping” which is an unnecessary cost to the system. This in turn has an impact on the "successful operation and integrity of the system if it leads ultimately to loss of manpower and funds". The judges were unanimous in their response that the outcome of appeals was of no concern to them although the Supreme Court judge noted that it might be of concern if that outcome was infected by error. It is worthy of note here that although experienced judges do sit in appeals at the County Court, it is renowned for being a training ground for newly appointed judges some of whom may never have sat in the criminal jurisdiction before.

The statistics in Chapter Seven also indicate that only a small percentage of appeals heard in the County Court are appealed to a higher court and even more rarely are they appealed by the Director of Public Prosecutions. This partly due to the fact that there is a limited right of appeal to the Supreme Court/ It is restricted to those cases in which a custodial sentence has been imposed and to questions of law.

The response of the prosecutors was that from a legal point of view they didn’t generally have a concern. This was in recognition of the fact that new evidence
may be before the judge, the appellant’s counsel may be more experienced and the County Court has more time to deal with the matter carefully. However some of them felt concerned at what they perceived as a tendency, especially with the newer judges to “soften” the sentence in what sometimes seems to be mere acknowledgment of the time and trouble it took the appellant to bring the appeal on. By contrast, the defence lawyers were concerned only if the sentence was increased, although some acknowledged that if they lost on “proper grounds in law” they wouldn’t complain. However, this comment would appear to be more in line with the appeal “stricto sensu”.

When asked whether the de novo appeal, in their opinion, ever resulted in an unjust outcome almost all participants save the defence lawyers responded in the negative. However, some interesting aspects to this topic were raised. One of the magistrates noted that from his own experience, the process rarely achieved a result very different from that achieved at first instance. Another pointed out that the different sentence may well be justified on the basis of the new plea material presented and better representation, but -

“the magistrates get a much broader range of people and facts in their court and are able to compare cases more readily than judges. The sentence may therefore be more accurate as the judge may not have the range of comparisons to make”.

The defence lawyers had all had experiences where a sentence was increased on appeal and in their belief was a harsh and unjust outcome. Some examples were where a judge might convert a small custodial sentence to a long suspended sentence resulting in an appellant who was always at risk of re-offending serving a much longer sentence than was warranted by the original offence; where a woman convicted to imprisonment was dying of breast cancer and the case “blatantly called out for reduction” but the judge actually increased the sentence; and, in a more controversial setting, where a young boy of ethnic origins and with no prior convictions was sentenced to mandatory imprisonment for a drink driving whilst disqualified offence. The problem lay more with the identity of the particular magistrate and judge encountered at each stage. That
is, injustice might result if they came before a “harsh” magistrate and an even “harshor” judge. on appeal. In the same vein, the Supreme Court judge described some instances in legal history which -

“have outcomes characterised by an injustice which has been carried right through the appellate system. The cases of Chamberlain\(^\text{64}\) and Splatt\(^\text{65}\) are examples of where the appellate system can straitjacket itself. Things sometimes go wrong if a jury has happened to be of a developed frame of mind opposed to the accused”.

Another defence lawyer raised the issue of the requirement that the judge warn the appellant should he be of the opinion that the sentence ought to be raised. The notion that a judge is hearing an appeal as if for the first time is inconsistent with such a requirement. This fact has been recognised by some judges who have taken the stance that they ought not even have any regard to the sentence of the magistrate before they deal with the appeal. This however places the court in an artificial situation where everyone really knows the matters which occurred below but can only refer to some of them. This situation has now changed since the new Magistrates’ Court Act amendments. The judge now has no obligation to “warn” the jury and the appellant will have to bear costs if he or she abandons the case within a certain time before the hearing. To the defence lawyers these amendments are disturbing and critical and will influence them in their decision as to whether or not they ought to try and run a case at all.

THE REASONS BEHIND THE DE NOVO APPEAL

The participants were asked several questions relating to the reasons for the appeal from the Magistrates’ Court being de novo as opposed to review as in

\(^{64}\) *R v Chamberlain* (1984) 153 CLR 521

other jurisdictions. Nearly all of them expressed the opinion that the way the court was constituted historically called for the appeal system to be de novo. It was generally recognised that its precursor, the Court of Petty Sessions——

"had as its bench persons of integrity but little experience in the profession or practice of law and who didn't have the qualifications which lawyers have as a minimum to being admitted to practice. Also, some of its decisions were decisions of lay persons who had even less qualifications in terms of legal training".

These untrained civilian persons who sat on the bench were Justices of the Peace. They dealt with cases in a brief summary manner. The risk of a potentially inadequate hearing or "idiosyncratic decision making of lay persons" required that on appeal the matter could only be dealt with afresh, as a re-hearing. It is for similar reasons that the decisions of other tribunals consisting of lay persons, for example the Medical Practitioners Board, are appealed by way of re-hearing. Thus, it can be seen that the nature of the bench has changed dramatically in relatively recent times as a result of "government recognition that the Court of Petty Sessions was not suitable to modern life".

Additionally, the Magistrates' Court has never been considered to be a court of record and transcript has not been available until very recently for the purposes of establishing what transpired during the proceedings, which is of paramount significance for determining error by an appeal court. Being able to compare, for example, prior inconsistent statements of witnesses is impossible without adequate recording.

When asked whether these historical reasons remained valid today, the responses this time more obviously reflected the particular interests of each sub-group, although there was always some variation from within as well. Generally, the prosecution lawyers and magistrates believed that these reasons no longer reflected the needs of the current situation in relation to appeals from this court. It was described, in short, as "an historical anachronism". The

66 Since July 1 1999
majority of the judges and certainly defence lawyers were of the opinion that other needs had surpassed any historical ones and the appeal de novo was still the best method of appeal from this court, although it became apparent upon further questioning that it was conceded that were these other needs addressed, then the appeal might be able to take another form. These modern day reasons were, in summary -

(1) **Volume and speed:**

The Magistrates' Court deals on a daily basis with a large number of cases\(^{67}\) and magistrates are under some pressure to deal with as many of these as possible, and as quickly, decisively and efficiently as they are able. Thus there is limited time available to them to hear fully the circumstances of each case and to give a case the depth of consideration warranted. Injustice may result without fault on the part of the magistrate. Additionally, the duty lawyer is under the same constraints with the added pressure of budgetary restrictions and the magistrate may not receive all the information required in order to determine the matter properly. The desire on all parties to expedite matters it was said, may lead them to settle them in ways which may not be in the best interests of justice. By the time the matter comes to the attention of the appeal court, it should have been looked at properly and prepared adequately. It was said by one defence lawyer that -

"the system is based on the fact that you can get the matter fixed up if something went wrong. This gives them confidence to keep things short and sweet in the Magistrates' Court".

(2) **Increases in jurisdiction:**

The jurisdiction of the Magistrates' Court has increased continuously over time\(^{68}\) and has resulted in it hearing matters once the domain of the County

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\(^{67}\) See Chapter 7

\(^{68}\) see Chapter One
Court. Thus, as put by one judge-

"serious matters, once heard by judge and jury, are now heard by a magistrate alone. This would give rise to disquiet were it not for the provision of right by retrial in the case of dissatisfaction by the defendant. Findings of fact are matters for a judge and jury."

To make this situation of a vastly extended jurisdiction acceptable it was argued, then the appeal ought to be heard de novo a by a judge.

(3) Quality of magistrate:

Some defence lawyers were of the opinion that many of the magistrates appointed today are not necessarily any better than ones appointed in the past. It was thought that the appointment of qualified lawyers to the magistracy would change the inadequacies and "inherent unfairness of the process". One stated that "some of the best were still the ones who came up through the ranks of the clerks of court". Another went so far as to say that a number of appointments have been "disgraceful" and many of the appointees are totally unsuited to sitting in any judicial capacity. At the very least it was noted by one magistrate that decision making at the Magistrates' Court is more subjective than at other levels and the appeal de novo allows for this subjectivity.

The regional nature of the magistracy was thought by some of the participants to present a problem in relation to the objectivity of the magistrate in that he or she may be open to some of the kinds of prejudices found in that region and be at risk of becoming too close to the police. One defence lawyer was of the opinion that country magistrates are prone to local prejudices and closeness to the police, and the problem would be addressed by having circuit magistrates instead.

(4) Unpreparedness:

It was acknowledged by several defence lawyers that at first instance matters have not always reached "fruition". That is, matters may not have been
explored well enough, as well as some defendants may not be fully
cognisant of the seriousness of the matter facing them. The de novo appeal
allows for these matters to be addressed. Also, the cuts in legal aid have
resulted in fewer defendants being represented or in less experienced
representation being offered at this level.

(5) As a useful tool:
It appears that sometimes the magistrate will feel free to give the offender a
harsh sentence knowing that it is almost certain they will lodge an appeal
and be dealt with more leniently at the County Court. It is “a useful power to
intimidate the offender at first instance”. This gives the offender an
opportunity to “think about” the consequences of what they have done and to
work harder to rehabilitate. The de novo appeal thus operates as a measure
of deterrence not otherwise available to the sentencer at first instance.

(6) Simplicity:
Most defence lawyers maintained that the present system was in their minds
a simple and inexpensive means of addressing any unjust outcome. No
record of the case or published reasons are required in either court.

CHANGING THE SYSTEM
When questioned as to the faults of the system, a number of the same
criticisms emerged as in relation to the changed nature of the Magistrates'
Court. Those in favour of the system being changed to reflect the times cited
the following reasons -

(1) The second bite at the cherry:
Almost every participant recognised that the de novo appeal was just that,
namely a second “go” at the facts. The same case may be presented
entirely differently the second time, with any weaknesses having been
addressed and even to the point where the appellant can reverse a plea of
guilty. This is anomalous in the judicial structure and could be said to be
"productive of litigation". Certainly, the prosecution lawyers perceived this to be "inequitable" from their point of view. For example, where a case is heard fully in the Magistrates' Court and half of the charges are dismissed or if the defendant pleads guilty to some and not others, if the defendant then lodges an appeal the only issues being appealed are the ones found proven. For the prosecutor,

"the case is severely compromised because the new quorum doesn't have the benefit of the flow of facts, which leads to an artificial situation. This is inherently unfair on the prosecution and it runs to the benefit of the appellant and they know it. Thus it is not even a true de novo where all the charges would recommence".

However, it is also noteworthy that it is not a true de novo appeal in that the County Court judge is nearly always made aware of the penalty imposed below. Until the new amendments, the judge was required to give a warning \(^{69}\) if of the opinion that the case appeared to warrant an increased penalty. The appellant is now at risk of such an increase and defence lawyers believe this will have serious repercussions for the running of appeals.

(2) Duplication of costs:

From a prosecution point of view generally, the de novo appeal was seen to be a waste of time and resources given that the same case, albeit altered or expanded in some way, is being dealt with a second time in a superior court. In one magistrate's view, the judge, in a much more costly way, is doing what the magistrate ought to be doing at first instance; that is, hearing "issues which are fully canvassed by people who are better qualified than a jury from whom there is no appeal on the facts". In an age of scant resources, a process which involves the Office of Public Prosecutions, two court registries, judges, their staff and counsel and which appears weighted in

\(^{69}\) as decided in Brand v Parson, 1994, 1VR 252 at 256
favour of a defendant who has already been dealt with staff must be adequately justified.

(3) Choice of forum:

One prosecutor was of the opinion also that many questions of law which ought to be heard in the Supreme Court are done in the County Court to save money. Argument is made in an ad hoc manner as to both questions of law and fact, in situations where the subsequent decision is substituted rather than being made appropriately as to error on the part of the magistrate.

(4) Loss of confidence in decisions of magistrate:

Some magistrates felt that the de novo procedure for appeal had a tendency to “diminish the currency of decisions of the Magistrates’ Court” Whereas a system of criminal justice ought to inspire confidence in its decision makers, this process of appeal “indicates to the public that the person who made the decisions at first instance is likely to have erred”. Similarly, as noted by a prosecutor, where there are inconsistent findings between the jurisdictions there is likely to be a resultant loss of confidence in the system. Some barristers were notorious for not running a case in full expecting to go to the County Court on appeal in the belief that judges give lighter sentences than the magistrates in certain cases. The prosecution in this case will not know the extent of the defence and may not be prepared with sufficient evidence. Indeed such a practice was readily admitted to by one of the defence lawyers -

“In the past, if I had a magistrate I knew would convict, I would hardly run the case. I would go through the motions, being careful not to raise issues of fact so as not to alert police to difficulties and then prepare it further for the County Court on matters for which they were unprepared.”

This dissatisfaction by the prosecution is particularly so in relation to a change of a guilty plea to a not guilty plea. The appeal judge hears the case on the premise that the magistrate’s decision is wrong rather than that there was a miscarriage of justice as in other jurisdictions.
(5) Quality of substituted sentence:

Most magistrates and prosecutors had had experiences where on appeal, judges have fallen into sentencing error because they don't have the same kind of experience as the magistrate in relation to the type of offence and sentence being heard and made at the Magistrates' Court. Driving matters were frequently cited as an example where it was considered the judge at the County Court was sentencing "in a vacuum". The magistrates therefore may be being "second guessed" and this may not always be a better thing. It was acknowledged through all the subgroups that there is a great deal of disparity between judges and the way they hear appeals in the County Court. The "quality" of County Court appointments has, particularly in recent times, been the subject of concern and has led to some obvious disquiet within the profession. Whether it is still a generally "superior" bench is debatable by some. Additionally, one magistrate pointed out that even at the County Court level, the quality of representation on both sides may not be of a sufficiently high standard to guide the judge in relation to areas of the law in which they are not experts or where there have been changes to the law unlike in the Supreme Court where matters appealed from are usually better prepared.

(6) Disparity of sentencing:

As a result of the above findings, a further question was asked of the participants as to whether the de novo appeal resulted in disparity of sentencing contrary to established principles of law. While all agreed that each case is different with its own set of variables, and that every judicial officer takes onto the bench their own viewpoints and prejudices, they were divided as to whether on a de novo appeal, this amounted to a contravention of established principles. Any disparity was more in the sense that a judge may have a lack of familiarity with some offences as opposed to a magistrate who is more experienced in that area of the law. A change of jurisdiction can lead to an appellant playing the "luck of the draw". Until the recent
amendments\textsuperscript{70} an appellant could abandon an appeal or seek an adjournment if they didn't like the "look" of the judge. This seems to indicate a certain amount of faith in disparate sentencers between jurisdictions. At least, where the intention of the legislation is that the sentencer has no discretion, for example in relation to certain driving offences, then it could be argued that any resulting change in outcome on appeal is unjustified disparity.

(7) Accountability of magistrates:

Given the differences between sentencers generally, as well as the regional differences especially on country circuits, it was pointed out by one prosecutor that the appeal de novo doesn't engender accountability on the part of the magistrates. Not all magistrates explain the sentence, even briefly, and the giving of brief reasons for the purpose of scrutiny at appeal might force them to make better and less "cavalier" decisions. This would be to the benefit of all parties including the defendant.

(8) Lack of useful guideline:

Without reasons for County Court judges' decisions which result in a change from the outcome at the Magistrates' Court the magistrates do not have the benefit of any precedent to refer to in their future handling of similar cases.

AN APPEAL BASED ON REVIEW

When asked if the appeal process would be improved by taking the form of review based on error rather than being a de novo hearing, all but one prosecutor, most but not all the magistrates, some of the judges and only one of the defence lawyers replied in the affirmative. Some of these saw a need for a cautious approach to be taken, with some attention being given to existing problems before any radical changes made, for example,

\textsuperscript{70} see Chapter Five
• the provision of better funding at the Magistrates' Court level for defendants,
• an acceptance of less need for speed,
• the appointment of more magistrates to counteract any slowing down of the system at that level
• the provision of transcript for those cases being appealed.
• some allowance by the appeal court in relation to matters such as time limits and lack of knowledge of the processes involved by inexperienced persons.

As one judge eloquently said -

"the current criteria of appointment to the magistracy that a candidate should dispose quickly and efficiently the business of the court would have to change. Speed is often the enemy of justice."

Most of the affirmative participants agreed that the appropriate venue for such an appeal was the County Court in the same way that a County Court decision is appealed to the Supreme Court. Appeal papers would need to be drafted and the proceedings and the magistrate’s reasons transcribed. It is suggested that all this should be kept simple and a certain amount of latitude would be required in the case of any lay drafting, although a mechanism such as a Master (as at the Supreme Court) or a mention or callover system might enable these matters to proceed smoothly. It is acknowledged that a change on these lines would increase the effort and time required for such presentation but it was believed, especially by the prosecutors, that such an increase would be offset by a reduction in time taken to hear the appeal given that there would be no requirement for witnesses as there are in appeals on conviction today, as well as a reduction in the number of frivolous appeals generally.

However, a number of other appeal jurisdictions were suggested also. These, and the reasons for them, were:-

(1) The Supreme Court:

Some of the judges and a defence lawyer were of the view that the review process, being a “delicate” one, ought not be placed in any hands below those of the Supreme Court. One noted -
"It alone has the jurisdiction to provide authority binding on other courts in the Victorian hierarchy ... it would otherwise lead to competition between the Supreme Court and County Court in relation to binding law on many subjects shared by both."

The problem with having the County Court's decision being final on appeal, subject to a case stated to the Supreme Court, is that if there were appeals from these leading to retrial, a three tiered system would have been created instead of a two tiered one. One defence lawyer felt that County Court judges are essentially trial judges and they are not appointed on the basis of appellate work.

(2) The Magistrates' Court:

One of the judges suggested that a court of appeal within the Magistrates' Court might be an appropriate venue for such appeals to take place. This idea was generally not favoured, especially by the magistrates who disliked the notion of sitting in judgment on their "brother or sister" magistrates.

However, one of the defence lawyers was of the view that should new matters arise the correct court to hear the matter is the Magistrates' Court, as in, for example, applications for variation of bail. If error is found by the County Court then the Magistrates' Court would be the appropriate court to rehear the matter.

(3) The County Court with a quorum of magistrates:

One judge posited the situation in the United Kingdom where a judge in the Crown court on an appeal sits with two magistrates who do not come from the court appealed from. This is designed apparently to give reassurance that the Crown court is acting fairly.

THE EFFECT OF CHANGING THE DE NOVO APPEAL

Most participants foreshadowed that a better case would be prepared at first
instance were an appeal to take the form of review as to error, although the majority of defence lawyers were less confident of such an outcome. The general belief with this sub-group was that other factors operate at the Magistrates’ Court beside a concern for getting the case “right”, such as lack of understanding, language barriers, poor advocacy of junior barristers and inexperienced solicitors from small suburban firms as well as police prosecutors with a lack of knowledge of the law. Pleas would take longer and become more sophisticated. Without much better funding to ensure adequate preparation and presentation as well as the appointment of many more magistrates of a high calibre to cope with the inevitable slowing down of the system, the same mistakes could be repeated, not to mention a “blow-out” of cases not getting heard in a reasonable time-frame. However, whilst added costs may be encountered at the Magistrates’ Court level were these changes made, the duplicitous proceedings at the County Court which is “vastly more expensive” would be lessened.

With the assistance of transcript and clearly defined appeal issues, the scope for misunderstanding and misdescribing what transpired at the Magistrates’ Court would be limited. As stated by one prosecutor -

“these checks and balances would ensure that the appeal court would become a true court of appeal where it would become apparent if an irregularity had occurred. The matter would then be re-submitted for hearing”.

Thus it was perceived by a number of participants that the making of some of those appeals brought on for “frivolous” reasons would be discouraged, although it was also acknowledged that these exist in any jurisdiction. There will always be those who appeal for the sake of the principle involved. One judge noted-

“unless you have sound advice at the Magistrates’ Court level you will always have someone coming away feeling unjustly dealt with....We live in a litigious society. People do not always want to accept their medicine!”.
The use of the unfettered right to appeal from the Magistrates' Court will be curbed according to most defence lawyers by the introduction of the new amendments already spoken of. Tactics such as waiting to see how their case "shaped up on the day" and gauging the personality of the judge allotted, will not now be used without considerable risk, in the nature of increased legal costs or increase in sentence.

More importantly, however, given the changes to the magistracy profession, the majority of magistrates and prosecutors and over half the judges believed that a change to appeal based on error, as opposed to appeal de novo, with careful provision for proper implementation to avoid the problems aforesaid, brings the Magistrates' Court into line with other professional tribunals at the end of the twentieth century. As one magistrate succinctly said -

"Justice requires that a defendant has his or her case decided to law. that is the best justice can do and this involves no more than the right to appeal against demonstrated error".
CHAPTER NINE

CONCLUSION

The reform of the criminal justice system is a theme which has been at the forefront of government policy and public concern for some considerable time. Evidence of this is to be found in the setting up of law reform committees, the tabling of reports, government sponsored enquiries in relation to sentencing in local newspapers, legislative changes such as the recent Magistrates' Court (Amendment) Act 1999 and the Criminal Trials (Amendment Act) 1999, as well as a plethora of articles, interviews and letters in the media generally. Justification for any reform must be scrutinised carefully in order to avoid change which reflects the misguided intentions of those articulating them and which may ultimately do more harm than good. Evaluating the success of change in the criminal justice system is equally not always easy to achieve. Some change may benefit overall but disadvantage some who are vulnerable. Some may involve the passing of some amount of time for the effects to be properly realised. However, the delivery of high quality and efficient justice, the containment of costs to the state and the maintenance of a respected hierarchy of criminal courts and the integrity therein, are crucial concerns in today's rapidly changing legal environment.

As outlined in the earlier chapters of this thesis, 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.

In Victoria, an appeal from a decision of a magistrate in a court of first instance occurs primarily by way of de novo hearing. This allows an appellant to have his or her case heard before a judge in the County Court on the same set of facts and circumstances with, ostensibly, no regard for what occurred in the court below. On the face of it, this would appear to support a system which is
duplicating itself unnecessarily.

Additionally, it has been observed that the reasoning for a de novo appeal lies in the lay nature of the tribunal. For example, regard may be had to the Medical Practitioners Board, comprised primarily of non-legal persons, where appeal lies to the Victorian Civil and Administration Tribunal, (VCAT), on the basis of a re-hearing. However, this is no longer the type of tribunal which comprises the Magistrates' Court. It might be said then, that this basis for the de-novo appeal no longer exists at this level.

The de novo appeal is not the only type of appeal from the Magistrates' Court which exists in Australia. It can be seen from the discussion in Chapter Six, that several other states, namely Western Australia, Northern Territory, Queensland and, to a lesser extent, South Australia, the Australian Territory and Tasmania, have a system of appeal to the Supreme Court which is based on review of the facts and findings. Should error be found to have occurred in these systems, the matter may, depending on the particular mechanisms in place, be remitted back to the original court or a decision substituted. Thus, it is seen that the de-novo appeal is by no means the only system of appeal in this country from these particular courts.

The research conducted for this thesis was of a qualitative nature, as described in Chapter Two, in which a selected group of individuals from different areas of the professional criminal justice system was interviewed by way of a set questionnaire, aimed at discovering their perceptions and understanding of the practice of the law pertaining to the de-novo appeal. It revealed that there is a certain amount of discomfort within the magistracy in relation to the manner in which their decisions are appealed to the higher courts. Although some magistrates elicited a degree of conservatism for change, most were critical in some measure of the lack of proper communication in relation to the outcome of the appeals. There appeared to be a general feeling that where the outcome was different it would be helpful to them in their capacity as decision-makers to know why. However, such a procedure would be contrary to the general rationale of the de-novo appeal, that error on the part of the court below is
irrelevant to the new hearing. It thus appears that there would have to be some other good reason apart from setting useful and consistent precedent in the modern Magistrates' Court to retain the de novo appeal today.

The research also indicated that the de novo appeal was generally regarded as a “second go” at the same case, albeit an improved one. Whilst the prosecution lawyers felt that this was unfair from their point of view, unproductive in the litigious sense as well as a waste of resources, there was some reluctance on the part of most the defence lawyers and some of the judges to change the current practice to appeal based on error. There was a perception that some injustice may result to a defendant given the problems already confronting them at the Magistrates' Court.

Arguments were outlined\textsuperscript{71}, particularly by defence barristers and some of the judges, that the very nature of the Magistrates' Court requires that a vast number of cases be heard swiftly and efficiently and that this carries a risk of error only repaired by a rehearing of the facts and, also, that defendants and their legal representatives are often in a state of unpreparedness at first instance due to lack of recognition of the seriousness of the offence. These are valid concerns and it is recognised that the community is best served by a system which processes its offenders speedily and which allows a wrongdoer to deal with his or her problems responsibly in order to rehabilitate themselves and avoid future aberrant behaviour. However, 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 made could be properly picked up on appeal by way of review rather than de novo. That is, they are equally if not better placed to be making reliable decisions in relation to offences of a summary nature. Furthermore, it is submitted that, with appropriate explanation and understanding on the part of the magistrates, for example in the form of the granting of adjournments, the knowledge that it is just as important to “get it right” at the court of first instance as it is at any other

\textsuperscript{71} See Chapter Eight
level would soon lead to a change of practice and culture.

The comments made by defence lawyers in relation to the quality of appointment of magistrates applies equally to those of County Court judges and this is a matter which requires address and redress, rather than the retention of an outdated system to accommodate any such weaknesses.

Finally, the concerns espoused by the judiciary in relation to the increases in the jurisdiction of the Magistrates' Court are acknowledged to be important in relation to a change of the system of appeal. While it is true that quite serious offences which have traditionally been heard by judge and jury, for example, burglary, are now able to be heard summarily, it can equally be said that a magistrate is in the same position as judge on appeal and as able to make a decision on the facts. Additionally, factual error may be the subject of appeal by way of review, insofar as it is open to the appeal judge to find that there is no evidence upon which a finding as to a particular fact could have been made and that it was not open to the magistrate to make that finding. Although it may be harder to succeed on appeal in this way than it would be on a rehearing of the facts, with a proper look at the transcript of the previous proceedings such a finding can be made. Just as the Court of Appeal may find that a verdict from a trial in the County Court was unsafe and against the weight of the evidence, so too could an appeal judge find a decision of the magistrate.

Thus it may be argued that whilst the issues outlined above are important in themselves, they are matters which can be addressed by other means, such as adequate funding for defendants at the lower levels of justice (which are ultimately cheaper than the huge costs of running the superior courts), including the appointment of more magistrates to counteract any slowing down of procedures, proper direction and handling by the magistrates and by a resulting change of culture where cases in the Magistrates' Courts are viewed as deserving the same care as those in the superior courts. None of the above arguments would appear sufficient for the retention of a tradition which is anomalous and open to question in the modern legal system.

The trend towards discouraging “frivolous” appeals, as evidenced by the recent
amendments in relation to the abolition of the “warning” previously required, as well as the new rules as to the abandonment of appeals, indicates an awareness that the appeals system has not been operating as efficiently as it ought. However, during the interviews of the defence lawyers it became clear that there was real disquiet as to the far-reaching effects of such amendments. Some of them indicated it would discourage all appeals, not only those which were frivolous or marking time. Indeed, the recent statistics\textsuperscript{72} suggest that there has been a marked decrease across the board in matters being appealed. Should this include appeals where there is genuine grievance as to the result in the Magistrates’ Court then these concerns are certainly warranted. It may well be that these recent amendments may not be addressing the real issues and that a close look at the continuing viability of the appeal de-novo would be of greater value.

As previously acknowledged, any change to a system which has long been in place, albeit for outdated reasons, carries with it the need for careful consideration as to the mechanisms being proposed as a replacement. Change for the sake of change ought to be avoided, particularly where the rights of an individual who is standing accused by the State, are at stake. However, in an age of great fluidity and advancement in all areas, be it scientific, sociological, technical, constitutional and ethical, it is inevitable that a process in the legal system which appears to be out of step with others will be questioned. All rational informed views should be heard, however heretical. An example of reformist opinion was recently given voice by the Chief Judge of the County Court, in a public forum, where he stated: -

\textit{“in circumstances where the County Court is well established as the principal trial Court in this in this State and where the Supreme Court is now divided into the Trial Division and the Court of Appeal, there is no logical justification to maintain the County Court and the trial Division of the Supreme Court as separate and distinct entities in the Court’s}

\textsuperscript{72} See Chapter Seven
hierarchy."

Thus, it may be said, that with the espousal of views such as this and with consequences as far reaching as the merging of the County Court with the Supreme Court, it would appear timely to commence an enquiry into the validity of the retention of an appeal system originally put in place to deal with the vagaries of a bench comprised of persons with little or no legal training dealing with those who have committed criminal offences.

It has been to this end that this research has been directed.

RECOMMENDATION

It is submitted that the results of this study indicate that the appeal de novo from a decision of a magistrate ought now to be abolished in favour of a system which treats any such decision on its merits, as befits a court comprised of professionals, accountable for their actions, and in a court where the proceedings are now recorded and able to be transcribed.

The recommendation therefore, is for such an appeal to take the form of appeal based on error, similar to the form of appeal from a decision of a County Court judge, either to the County Court or to the Supreme Court. For this to take place, certain checks and balances will need to be put in place, such as additional funding at the lower courts to cover increased need for better representation, transcription, additional magistrates and initial education campaigns. It is an option which ought to be given immediate attention, at a time of renewed accountability of leaders in all professions, of constraining financial awareness and of the need for procedures within our institution of the Magistrates' Court to keep up with the rapid changes made in the last decades.

73 "The County Court: Will it reform itself out of existence?", a paper delivered on 12 August 1999 at the Victorian Government Solicitor's Office, Seminar 4, 1999 series, by His Honour Chief Judge Waldron
APPENDIX A: THE INTERVIEW QUESTIONS

1. To your knowledge, or in your opinion, are many convictions or sentences from the Magistrates’ Court appealed from?

2. Are you aware of the fate of appeals from your decisions?

3. If so, are many of your decisions altered on appeal? How many?

4. To your knowledge, are there obvious differences between magistrates in relation to the quantum of appeals?

5. Does it concern you if the appeal results in a different outcome from the original?

6. To your knowledge, or in your opinion, do these appeals result in unjust outcomes? If so, is this often or sometimes?

7. Does it affect you personally if or when one of your decisions or sentences is changed on appeal?

8. Does this affect the way you continue to work?

9. Why, in your opinion, does an appeal from a decision of the Magistrates’ Court proceed by way of de novo hearing as opposed to appeal based on error in other jurisdictions?

10. Do you believe that the different system has its historical roots in the fact that the inferior courts were originally resided over by totally unqualified laymen of widely varying experience?

11. Ought the professionalisation of the magistracy result in its system
of appeals being the same as in other jurisdictions?

12. In other words, do those historical reasons remain valid?

13. Do you believe that the system of appeal de novo is the correct method of appeal?

14. What, if any, are the reasons for retaining such a system?

15. What do you see as the faults of this system?

16. Does it result in any disparity of outcome contrary to established principles of sentencing?

17. Whilst respecting the principle that every person is entitled to at least one appeal, does the appeal de novo (a hearing as if for the first time) allow an appellant to have a "second go" at the same case?

18. Does this method of appeal give a properly convicted and sentenced but dissatisfied offender a means to have the same case tried again but in a different way?

19. Is this an appropriate outcome?

20. Does it result in resources being wasted?

21. Is it an expensive outcome?

22. Are there any particular offences which stand out as necessitating some kind of change to the appeal system?

23. Given that there are concerns about the system as it stands, should it be changed to work more effectively, and if so, how?
24. Would the abovenamed system of appeal be improved by taking the form of appeal by way of review based on error as in appeals to the Supreme Court from matters decided in the County Court?

25. Are there any practical difficulties which would impede the implementation of such a system at this level of justice? For example, is the recording of proceedings and any subsequent transcribing for the purposed of appeal cost prohibitive?

26. Would a more expensive and sophisticated system of appeal result in any injustice to the ordinary man?

27. Would such a system encourage better cases being made out in the first instance and also discourage frivolous appeals being made, thereby resulting in cost savings in the efficient running of the criminal justice system?
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