THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 55 – Part I

Review Of The Justices Act 1902
Part I - Appeals

REPORT

APRIL 1979

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972.*

The Commissioners are -

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To: The Hon. I.G. Medcalf, Q.C., M.L.C.
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on the law and procedure relating to appeals from decisions of magistrates and justices under the *Justices Act 1902*.

David K. Malcolm
Chairman

5 April 1979

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CHAPTER 1 - INTRODUCTION

Terms of reference

1.1 The Commission was asked "to consider and report upon the procedure for appeals from decisions of Courts of Petty Sessions, with a view to such appeals being simplified and, amongst other things, rendered less costly".

Comment on terms of reference

1.2 After receiving the above terms of reference the Commission was asked to review the *Justices Act 1902*,[1] which deals with appeals from decisions of justices, whether or not sitting as a Court of Petty Sessions.[2] The Commission considered the possibility of incorporating the question of appeals from justices in a general review of the *Justices Act*. However, as the Attorney General asked the Commission to give priority to the reform of the law and procedure relating to appeals, the Commission has dealt with this matter separately.[3]

Working paper

1.3 In February 1978 the Commission issued a working paper to inform the public of the issues involved in the project and to stimulate comment. The names of those who commented on it are set out in the Appendix.

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1 Project No. 55.

2 See Part VIII of the *Justices Act 1902*.

3 Courts of Petty Sessions are invested with federal jurisdiction pursuant to s.39(2) of the *Judiciary Act 1903* (Cwth) so as to enable them to try summary offences and to hold committal proceedings in respect of offences created by Commonwealth legislation. Such jurisdiction must be exercised by a Magistrate, not justices: ibid, s.39(2)(d) and s.68(3). Section 68 of the *Judiciary Act* provides that the relevant State law governing the procedure as to appeals applies to Commonwealth offences. The changes recommended in this report would also apply to appeals in respect of Commonwealth offences: see *Peel v R.* (1971) 125 CLR 447.

CHAPTER 2 - THE PRESENT LAW IN WESTERN AUSTRALIA

RIGHT OF APPEAL

Introduction

2.1 The principal function of justices acting under the *Justices Act* is to try summary offences (that is, criminal offences other than those which are required to be tried by a judge and jury). However, justices are given jurisdiction to make decisions in respect of many other matters, for example -

(a) the issue of search warrants under s.711 of the *Criminal Code*;

(b) whether or not a person should be required to enter into a bond to keep the peace and be of good behaviour under Part VII of the *Justices Act*;

(c) the trial of aggravated prison offences under s.36 of the *Prisons Act 1903;*[1]

(d) as to whether publications seized by the police under the *Indecent Publications and Articles Act 1902* should be returned to the owner (see s.12A(6) of that Act);

(e) as to whether an animal or food seized by the health authorities is diseased or unfit for human consumption under s.202 of the *Health Act 1911*.

2.2 In Western Australia, the authority and the procedure for an appeal from a decision of justices[2] is contained exclusively in Part VIII of the *Justices Act*.[3] That Part applies not only to decisions made by justices in criminal trials, but also to decisions of the kind referred to in (a) to (e) in the previous paragraph. Decisions of the kind in (d) and (e) of the previous paragraph

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1 The High Court in *Stratton v Pam* (1978) 18 ALR 422 overruled a decision of the Full Court of Western Australia by holding that an appeal lay under s.197 of the *Justices Act* in respect of a conviction of a prisoner for an aggravated prison offence.

2 Throughout this report, unless expressed to the contrary, the Commission uses the term "justices" to refer to any person, whether a Justice of the Peace or a Magistrate, who has jurisdiction to make a decision which is subject to appeal under Part VIII of the *Justices Act 1902*.

3 Section 221 of the *Justices Act* goes so far as as to provide that:
"Notwithstanding anything contained in any other Act to the contrary, there shall be no appeal from any summary conviction or order of Justices except as provided by this Act".

could be said to relate to administrative law rather than criminal law, and may require separate consideration.[4]

2.3 Apart from appeals, decisions of justices can also be reviewed by issuing a prerogative writ out of the Supreme Court. These writs are designed to control the jurisdiction of justices and do not provide a means of reviewing the merits of a decision.[5] Although they are used only occasionally, it is the Commission's view that they serve a useful purpose alongside the appeal procedure. The Commission's recommendations below as to appeals should not be taken as implying that their scope should be curtailed.

2.4 The *Justices Act* provides for two modes of appeal: the ordinary appeal and the appeal by way of an order to review. Their development on separate lines seems largely the result of historical accident.[6]

Ordinary appeals

2.5 A person may appeal to the Supreme Court by way of an ordinary appeal if he -

(a) was summarily convicted or had an order made against him;
(b) did not plead guilty or admit the truth of the complaint; and
(c) was imprisoned without the option of a fine.[7]

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4 See paragraphs 3.18 and 3.19 below. For further examples of decisions relating to administrative law see footnotes 21 and 22 in Chapter 3.

5 The prerogative writs referred to are *certiorari*, which enables the quashing of a decision of a judicial officer made without jurisdiction, *prohibition*, which can be used to direct a judicial officer to refrain from doing something he has no jurisdiction to do, *mandamus*, which can be used to direct a judicial officer to exercise a jurisdiction he has been given, and *habeas corpus* which can be used to free persons who have been unlawfully detained. The *Justices Act* has placed a limitation upon the use of the writ of *certiorari*. Under s.147 of the Act a conviction or order cannot be removed to the Supreme Court by such a writ for want of form. Nor can a warrant of commitment on a conviction be held to be void by reason of any formal defect, so long as the warrant states that the party has been duly convicted and that there is a valid conviction to sustain it: see generally Kennedy Allen, *The Justices Acts (Queensland)* (3rd ed. 1956) at 404-414.
Even though the Commission recommends that the Supreme Court, on the determination of an appeal from a decision of justices, should be able to exercise any jurisdiction it has under the prerogative writs (see paragraph 4.4 below), there may be cases in which a prerogative writ may be more appropriate than an appeal. One such case is that of *Falconer v Howe and Baker* [1978] WAR 81 where the Supreme Court issued a writ of *mandamus* directing a magistrate to hear a case where he had declined to do so on the ground of bias.

6 See paragraphs 2.3 to 2.16 of the Working Paper for an outline of their development.

7 *Justices Act 1902*, s.183.

An ordinary appeal is exercisable as of right: there is no need to obtain the leave either of the justices who made the decision appealed against or the Supreme Court. Ordinary appeals are rare. In 1976, 1977 and 1978 there were two, one and two, respectively. This is in contrast to the number of appeals by way of an order to review where there were eighty, eighty-four and fifty-nine, respectively, in those years.

Appeals by way of an order to review

2.6 The circumstances in which a person may appeal by way of an order to review are much wider than those applicable to an ordinary appeal. However, unlike an ordinary appeal, it is necessary to obtain leave in order to do so. This involves an application to a judge of the Supreme Court for an order calling upon the other party to show cause why the decision should not be reviewed. If such order is made the appeal is then heard on its merits.

2.7 Provision is made for two categories of appeal by way of an order to review. The first is very wide and under it the Attorney General or "...a person who feels aggrieved[8] as complainant, defendant, or otherwise by the decision of any Justices"[9] can appeal where he can show by affidavit to a judge of the Supreme Court a prima facie case that the justices had-

(a) made an error or mistake in law or fact;
(b) no jurisdiction in giving the decision;
(c) exceeded their jurisdiction in giving the decision; or
(d) imposed a sentence or penalty which was inadequate or excessive in the circumstances of the case.[10]

2.8 The effect of the words "complainant, defendant, or otherwise" appears to be that a person other than a complainant or defendant may be a person "aggrieved" and so able to appeal by way of an order to review. For example, a witness who fails to appear at the hearing in answer to a witness summons may be fined "then and there... in his absence"[11] by the justices. This procedure would not normally involve a complaint being laid against the

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8 That is, a person who has had something done or determined against him and who has suffered a legal grievance: see *Egerton v Middleton* [1953] VLR 191. See also Kennedy Allen, *The Justices Act (Queensland)* (3rd ed. 1956) at 472-473.
9 *Justices Act 1902*, s.197(1)(a).
10 Ibid.
11 Ibid., s.75(1).

witness. Consequently, he would not fall within the definition of "defendant" in s.4 of the *Justices Act*, since that definition only applies to a person against whom a complaint has been laid.

2.9 The order to review procedure applies to a "decision" of justices. A decision includes:[12]

> "...a committal for trial and an admission to bail as well as a conviction, order, order of dismissal, or other determination".

However, it appears that, although not expressly limited, only the final determination of a matter being heard by justices is subject to separate appeal.[13] Decisions of an incidental nature, such as a ruling on whether a plea is good or bad, and decisions relating to procedural matters, such as an order for or refusal of an adjournment, cannot be the subject of a separate appeal. However, any error made on such a matter may provide a ground for appealing against the final determination made by the justices.

2.10 The second category of appeals by way of an order to review applies only where a person has been convicted after he has pleaded guilty or where an order has been made against him after he has admitted the truth of the complaint. In such a case the person concerned, or the Attorney General, may appeal if he shows by affidavit to a judge that there are sufficient reasons to show that the decision of the justices should be reviewed.[14]

Selection of mode of appeal

2.11 A person who has a right of appeal by way of an ordinary appeal must use that mode since a judge has no power to make an order to review if the applicant has a right of ordinary appeal.[15] If the applicant does happen to obtain an order to review and appeals by way of it, he cannot then proceed by way of ordinary appeal.[16]

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12 Ibid., s.4.
13 See Dwyer C.J. in *Brennan v Williams* (1951) 53 WALR 30 at 31, and paragraph 2.14 of the Working Paper.
14 *Justices Act 1902*, s.197(1)(b).
15 Ibid., s.197(1).
16 Ibid., s.206I.

THE HEARING OF THE APPEAL

Ordinary appeals

2.12 An ordinary appeal is normally heard by a judge in Perth, but a judge may, on the application of a party, order that it be heard in a circuit district.[17] The appeal is heard and determined on the evidence presented before the justices unless the parties agree, or the Court orders, that the appeal should be a rehearing.[18] On the hearing of an appeal the Court may -

(i) adjourn the hearing;
(ii) confirm, reverse or modify the decision;
(iii) remit the case back to the Court of Petty Sessions; or
(iv) make such other order as it thinks just, including exercising any power which might have been exercised by the Court of Petty Sessions.[19]

2.13 The Court may make such order as to costs as it thinks fit.[20] However, s.219 of the Act provides that no costs shall be awarded against a justice or police officer in respect of any appeal, or of any proceedings in the Supreme Court in its control over summary convictions. There are exceptions where an appeal is brought by a police officer and the decision appealed against is confirmed, or if not confirmed, has involved an appeal on a point of law of exceptional public importance. In these cases, costs may be allowed to the respondent. However, the costs are not recoverable from the police officer but are payable by the Treasurer.

2.14 Subject to the provisions relating to appeals to the High Court, the decision of the Supreme Court is final between the parties.[21]

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17 Ibid., s.183.
18 Ibid., s.191.
19 Ibid., s.190(1).
20 Ibid., s.190(2).
21 Ibid., s.190(3). The High Court may grant special leave to appeal to the High Court notwithstanding that the law of a State prohibits an appeal: see s.73 of the Constitution and s.35(1) and (2) of the *Judiciary Act 1903* (Cwth).

Appeals by way of an order to review

2.15 An order to review is heard either by a single judge of the Supreme Court or the Full Court, depending on the order made by the judge who granted it.[22] A single judge who is hearing an appeal may, at the request of any party to the appeal, refer the appeal to the Full Court if he thinks it desirable to do so.[23] If separate orders to review in respect of the same decision have been granted to the Attorney General and another person, both orders may be heard together.[24]

Appeals by way of an order to review are usually heard in Perth, though they have been heard in a circuit district.

2.16 Upon hearing the appeal, the Court may -

(i) amend or add to the grounds stated in the order to review;[25]

(ii) obtain details of the evidence and of the proceedings before the justices, including any notes taken;[26]

(iii) rehear the witnesses;[27]

(iv) in addition to considering the evidence and materials which were before the justices, hear further evidence, either orally or by affidavit;

(v) discharge the order to review or vary, amend, rescind or quash the decision appealed against and any order, conviction or other proceeding founded upon it (including any penalty or sentence);

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22 *Justices Act 1902*, s.198(1).
23 Ibid., s.206A.
24 Ibid., s.198(2).
25 Ibid., s.199.
26 Ibid., s.206C.
27 Ibid.

(vi) remit the case for hearing or rehearing to the justices who made the decision, or to any other justices;

(vii) dismiss the appeal if the Court considers that no substantial miscarriage of justice has occurred;[28]

(viii) make such other order as it thinks just, including those which can be made on the prerogative writs.

There is no appeal from any determination of a single judge to the Full Court.[29]

2.17 Section 206(1) of the *Justices Act* enables the Court to make any order as to costs as may be deemed to be just, but again it appears that no order can be made against a justice, and only in limited circumstances where a police officer is a party to the appeal.[30]

PROCEDURE

2.18 Because of the different nature of ordinary appeals and appeals by way of an order to review, different procedures are provided in the *Justices Act* for each. In some respects the procedures coincide, but in many instances they differ, sometimes for no apparent reason. The procedures, and difficulties associated with them were outlined in the Working Paper.[31]

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28 Ibid., s.205(2) . There is no similar power in the case of ordinary appeals.
29 *Justices Act 1902*, s.206A. See, however, footnote 21 above.
30 See paragraph 2.13 above.
31 See paragraphs 2.26 to 2.70 of the Working Paper.

CHAPTER 3 - RECOMMENDATIONS: THE SCOPE OF THE APPEAL

A single mode of appeal

3.1 The Commission considers that the existing dual system of appeals, each applicable only in certain circumstances, is unnecessarily cumbersome. The difference in statutory wording setting out each mode has tended to raise doubts as to the permissible grounds of appeal and as to the powers and functions of the appellate court. It has also led to separate procedures, with different forms, time limits, bail provisions and documentary requirements generally. The Commission is of the view that the present dual mode system should be replaced by a single system of appeals and procedure, with emphasis on clarity and simplicity. The Commission's recommendations below are designed to achieve these ends.

3.2 The Commission's recommendations in respect of its proposed single system of appeals deal with the following matters -

(a) the ambit of the appeal;
(b) the persons who can appeal;
(c) the permissible grounds of appeal;
(d) the appellate court;
(e) the powers of the appellate court;
(f) the procedural steps to be taken in instituting an appeal and in enforcing the appellate court's decision.

The ambit of the appeal

3.3 The Commission recommends that all decisions of justices, except those of an incidental nature, should be subject to appeal. In effect this would maintain the present position, since such decisions are appealable either by way of an ordinary appeal or by way of an order to review.

3.4 The exclusion of decisions on incidental matters from those which should be subject to appeal reflects the existing position in regard to appeals by way of an order to review. Under the present law, an error made in determining an incidental question, such as whether a plea is

good or bad, is not itself subject to appeal.[1] In the Working Paper, the Commission raised the question whether decisions on incidental questions should be subject to separate appeal, on the ground that it might not always be convenient to delay an appeal until a decision on the whole case was made. For example, the question whether a confession was admissible might be decisive as to whether the defendant had a case to answer. However, both of those who commented on this aspect[2] were not in favour of such a course.

3.5 Having further matter, the Commission is of the view that although it might be convenient for incidental matters to be the subject of appeal as they arose, in general the exercise of such a power could tend to disrupt the hearing or trial, with consequent additional expense and delay. It may encourage a party to adopt the tactic of mounting appeals in respect of a number of incidental decisions in the one case. Accordingly, the Commission recommends that the present position be maintained under which incidental questions are not subject to separate appeal. An error on a decision of an incidental nature would, of course, continue to provide a ground for appealing against the final determination.

3.6 The Working Paper also raised the question whether an appeal should continue to be available in respect of a decision to commit for trial.[3] On further consideration, the Commission agrees with the Law Society's comments that such appeals should not be abolished. Although a decision to commit a defendant for trial is not a conviction and the defendant may successfully defend himself at the trial, and even though such appeals are rarely made, it would be unfair to subject a defendant who wished to appeal in these circumstances to the ordeal of a trial because of an error made by the committing justices. For example, it may be that if evidence, which was wrongly admitted at the preliminary hearing, had been excluded a prima facie case could not have been made out by the prosecution, and the defendant would not have been committed for trial. The Commission accordingly recommends that a defendant should continue to be able to appeal against a decision committing him for trial.

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1 See *Brennan v Williams* (1951) 53 WALR 30 at 31 where Dwyer C.J. states:
"It is my view that a decision appealed from must be a decision as defined by the *Justices Act*, and the wording of the definition does not extend to what is a ruling given by a magistrate on an incidental question whether certain pleas are good or bad. The magistrate should proceed to a decision on the whole case; that is the decision which is subject to review under the *Justices Act*".

2 The Law Society of Western Australia and Mr. Goudie.

3 Western Australia is unique among Australian jurisdictions in allowing the possibility of an appeal in this respect: see paragraph 3.5 of the Working Paper.

3.7 One further point should be mentioned. Section 197(1)(b) of the *Justices Act 1902* specifically provides for an appeal by way of an order to review against a conviction in the case where a defendant pleaded guilty. This provision was introduced into s.197 in 1964[4] following comments by Hale J. in *Di Camillo v Wilcox*[5] who held that s. 197(1)(a), which provides for a general appeal in respect of decisions of justices, did not normally apply to a case where a conviction followed a guilty plea, since the defendant could not usually point to an "error or mistake in law or fact" or any other relevant error on the part of the justices in convicting him.[6] The Commission considers that a defendant should continue to be able to appeal against his conviction even though he pleaded guilty.[7]

3 .8 Although the Commission's recommendation below[8] that the grounds of appeal should be left at large would probably make it unnecessary to make specific provision for an appeal against conviction following a plea of guilty, it considers that, to avoid any possible doubt, express provision should continue to be made for it.

The persons who should be able to appeal and the permissible grounds

Complainant and defendant

3.9 In some jurisdictions,[9] the defendant is able to appeal in respect of a wider range of circumstances than a complainant. However, in the view of the Commission, the community interest balanced and accurate dispensation of justice would best be served by providing both complainants and defendants with an equal opportunity of appealing in respect of decisions

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4 *Justices Act Amendment Act 1964*.

5 [1964] WAR 44.

6 See paragraph 2.7 above.

7 Another matter which requires comment is that at present the prosecution may appeal by way of an order to review against an admission to bail: see paragraph 2.9 above. In its Report on *Bail* the Commission has made a number of recommendations relating to appeals from bail decisions, both by the prosecution and a defendant. Briefly they are that -

(a) a defendant who wishes to challenge a decision of a justice to refuse to grant bail should be able to appeal to a judge of the District or Supreme Court (Report on *Bail* (1979), paragraph 8.6);

(b) where appropriate, the appeal should be heard by a judge of the District Court unless there were special circumstances advanced by the defendant (ibid.; see also paragraphs 2.7 to 2.9);

(c) the prosecution should have the same right of appeal as that proposed for defendants (ibid., paragraph 8.17).

Of importance here is the recommendation that there should be separate legislation to deal with all aspects of bail at all stages of criminal proceedings: ibid., at 7. As a consequence, it would be necessary to exclude an appeal against a bail decision from the appeal system proposed in this Report.

8 See paragraph 3.11 below.

9 New Zealand and England.

made against them,[10] and it recommends accordingly. The implementation of such a recommendation would in effect make no change in the existing law. It is true that in the case of certain decisions, a defendant can appeal as of right,[11] whereas a complainant must obtain the leave of a judge of the Supreme Court in every case. However, the question of leave raises separate issues, and the Commission's recommendations as to this are set out paragraphs 3.20 to 3.28 below.

3.10 As indicated above,[12] the grounds of appeal are left at large in the case of ordinary appeals but are specified with some particularity in the case of appeals by way of an order to review. It might at first sight be thought that the listed grounds in appeals by way of an order to review, taken together, are sufficient to ensure that the appellate court is not unduly restricted. However, it appears that this might not be so. There are dicta suggesting that ground (a) in paragraph 2.7 above (that the justices made an error or mistake in law or fact) cannot be used to appeal on the ground that additional facts have come to light which would justify upsetting the decision of the justices, since the appellant may not be able to point to an error or mistake by the justices in regard to the evidence then available.[13] A further possible limitation to ground (a) may be that it would not permit an appeal against the exercise of a discretionary power (even though the decision may be wrong) unless it could be shown that the exercise of the power was based on a mistake of law or fact.[14]

3.11 The Commission therefore considers that the appellate court should have the widest possible jurisdiction in entertaining appeals to ensure that justice is done in order to avoid any such technical limitations as presently may apply in the case of appeals by way of an order to review, the Commission recommends that no attempt should be made in the legislation to specify the permissible grounds of appeal and that they should be left at large, as is presently the case with ordinary appeals.

3.12 Just as the appellate court should not be limited as to the grounds on which it could entertain an appeal, so, equally, it should not be limited as to the powers it may exercise at the

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10 This is also the view of the Law Society of Western Australia. It was suggested by one commentator that an appeal by way of case stated would be appropriate. However, such an appeal procedure could only apply where appeals were confined to questions of law, and would be inappropriate because of the Commission's recommendation that the grounds of appeal be unrestricted: see paragraph 3.11 below.

11 That is, institute an ordinary appeal: see paragraph 2.5 above.

12 See paragraphs 2.5 to 2.7 above.

13 See *Chen Yin Ten v Little* (1976) 11 ALR 353 at 361.

14 This could apply particularly in cases involving discretionary decisions to grant or refuse licences: see generally de Smith, *Judicial Review Administrative Action* (3rd ed. 1973) at 84-85.

appeal hearing. The Commission's recommendations in this latter respect are contained in paragraphs 4.3 to 4.5 below.

The Attorney General

3.13 Under the existing law, the Attorney General may appeal by way of an order to review in the place of a complainant or defendant, including where a defendant has been convicted after having pleaded guilty.[15] In introducing this new right of appeal in 1972,[16] the Attorney General stated:[17]

> "Where, on a police prosecution, a person has been convicted after trial or on a plea of guilty, and it appears through some mischance or error that a conviction should not have been recorded, it is fair that the complainant should have the power to rectify the matter and have the conviction quashed or an order to review. In summary convictions it is frequently not worth the expense for the defendant to appeal, although he may feel aggrieved that the conviction stands against him. Under these circumstances, the amendment empowering the Attorney-General to seek an order to review is in the best interests of the administration of justice and enables the record to be corrected at no expense to the defendant".

3.14 The Minister's remarks are directed to the case where a defendant has been unjustly convicted but feels that it is not worth the expense of appealing, even though he feels aggrieved at the injustice. However, the actual amendment made in 1972 also enables the Attorney General to appeal in the place of a complainant against an acquittal or an inadequate sentence. The Law Society, in its comments on the Working Paper, suggested that the Attorney General's power to appeal should be limited to questions of public importance, to be certified by the court appealed from or a judge of the Supreme Court. The Commission does not favour such a limitation, since it may prevent the Attorney General from appealing in a case where the decision is an unjust one even though a question of public importance was not involved.

3.15 The Commission is of the view that the present powers of the Attorney General in regard to appeals should not be diminished, and consequently it recommends that he should be able to appeal in the place of either a complainant or a defendant. The Commission considers that the Attorney General would be unlikely to appeal in the place of a complainant

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15 See paragraph 2.10 above.
16 *Justices Act Amendment Act 1972*, s.13.
17 W.A. *Parl. Deb.* (1972) Vol. 193 at 440.

except where he considered the public interest required it and where the complainant would himself not pursue the appeal.

Other persons

3.16 The appeal by way of an order to review is not restricted to a complainant, the defendant or the Attorney General, but also covers any person who "feels aggrieved" by a decision of justices.[18] The word "aggrieved" refers, not to a person's state of mind, but to his legal position and concerns a person who has suffered a legal grievance by having something done or determined against him by the justices.[19]

3.17 The reference to a person other than a complainant or defendant would, for example, enable someone to appeal on whom a fine was imposed under s.75(1) of the *Justices Act* for neglecting or refusing to attend as a witness in accordance with a summons.[20] Another example would be where a person is summarily convicted by the justices for interrupting the proceedings under s.41 of the *Justices Act*. Clearly such persons should be able to appeal against the decision, and the Commission accordingly recommends that the appeal provisions should not be limited to complainants and defendants. The Commission considered whether the word "aggrieved" should be replaced by a term less misleading to a layman. However, it decided against such a course, since the word is well understood by the courts and no other term or phrase appeared to have precisely the same legal significance. Nevertheless, there is no need to continue to use the term "feels", and the reference should be to "a person who is aggrieved".

3.18 As was mentioned in paragraphs 2.1 and 2.2 above, justices or magistrates may be required to hear and determine non-criminal matters, such as licensing applications[21] and appeals from decisions of administrative bodies.[22] In some of these cases, the relevant Act has expressly excluded any appeal from the decision of the justices or magistrates. In other cases there is no express provision excluding an appeal. Where such proceedings have been

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18 *Justices Act 1902*, s.197(1)(a).

19 *Egerton v Middleton* [1953] VLR 191 at 193. See also Kennedy Allen, *The Justices Acts (Queensland)* (3rd ed. 1956) at 472-473.

20 See paragraph 2.8 above.

21 For example, under s.4 of the *Inquiry Agents Licensing Act 1954*.

22 For example, under s.8(1) of the *Aerial Spraying Control Act 1966*, a person whose application for a chemical rating certificate or renewal thereof has been refused by the Director of Agriculture may appeal to a Court of Petty Sessions constituted by a stipendiary magistrate sitting alone. See also (d) and (e) in paragraph 2.1 above.

commenced by complaint, either party could appeal by way of an order to review. Where some other mode of commencing proceedings is prescribed,[23] either party could appeal as a person "who feels aggrieved".

3.19 The Commission currently has a reference[24] dealing with the review of administrative decisions. The question of appeals from decisions of justices or magistrates sitting as an administrative tribunal is being considered as part of that project. In the meantime, it is the Commission's view that the present position should be maintained so far as is possible, and that those decisions which are presently subject to an appeal by way of an order to review should be included in the new appeal structure recommended by the Commission in this Report. The Commission considers that its recommendations above allowing appeals by complainants, defendants, and "other persons" would ensure this.

Leave to appeal

3.20 As almost all appeals instituted at present are by way of an order to review, most appellants are in effect required to obtain the leave of a judge of the Supreme Court.[25] The only occasion on which a person may appeal as of right (that is, by ordinary appeal) is where he -

(a) was summarily convicted or had an order made against him;
(b) did not plead guilty or admit the truth of the complaint; and
(c) was imprisoned without the option of a fine.

3.21 As the Commission has recommended that a single mode of appeal should be introduced to replace the existing dual modes of appeal,[26] the question arises whether an appeal should be permitted as of right in all cases, with leave in all cases, or as of right in some cases but with leave in others.

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23 See, for example, regulation 3 and Form 1 of the *Auction Sales Act Regulations 1974*, where proceedings are commenced by an "Application for a General Licence".

24 Project No. 26 - Review of Administrative Decisions. The terms of reference are:

"To consider and recommend what principles and procedures should apply in Western Australia in relation to the review, both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court, of administrative decisions."

The Commission issued a working paper and survey dealing with the existing appellate arrangements in November 1978.

25 See paragraph 2.6 above.

26 See paragraph 3.1 above.

3.22 Two commentators on the Working Paper expressed whether leave to appeal should be required. The Law Society said that leave should only be required where the appeal is instituted by the Attorney General[27] and for an appeal against sentence. The Society gave no reasons for this view.

3.23 On the other hand, the Chief Justice of Western Australia, the Hon. Sir Francis Burt, favoured a requirement for leave in all cases. He said:

> "I think that all appeals should be by way of order to review or otherwise with leave, with an appeal over as at present if leave is refused. I do not think... that the order to review does add to delay. It is not a complicated process and I doubt whether it significantly increases costs. And it has advantages in that the very occasional frivolous appeal brought perhaps for some ulterior reason can be stopped and more importantly, I think, it enables a Judge to have a look at the material which will be placed before the appeal court, so enabling him to make sure that when the appeal is called on for hearing, the materials will be there so that the appeal can be disposed of".

3.24 The Commission agrees with the Chief Justice that leave should be required and broadly for the reasons he gives. A requirement for leave to appeal would enable the appellate court to take control of the appellate process at an early stage and to ensure that all the appropriate grounds of appeal have been put forward, that they are properly formulated, and that all the relevant material would be made available to the appellate court.

3.25 In the long run therefore, requiring leave before an appeal can be instituted would help ensure that the hearing of the appeal was not delayed. An application for bail could be determined at the hearing of the application for leave[28] and the judge could also decide whether the appeal should be heard by a single judge or the Court of Criminal Appeal.[29]

3.26 The Commission considers that although it is important that appeals which have a reasonable chance of success should not be prevented from going forward, it is also important that the appeal system should not be overburdened by dealing with cases which have no intrinsic merit. By enabling a judge to review the grounds of appeal before the matter

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27 See paragraph 3.14 above.

28 See paragraphs 5.17 and 5.18 below.

29 See paragraph 5.10 below. The Chief Justice also referred to these two procedural advantages of a requirement for leave to appeal.

proceeds to a full hearing the opportunity would be given of preventing appeals which would waste the time of the appellate court and of the other party.

3.27 The Commission understands that the present practice in the case of appeals by way of an order to review is that orders nisi are granted except in cases where the grounds advanced are frivolous or vexatious or otherwise have no prospect of success. In recommending the requirement that leave be obtained as a condition of appealing, the Commission intends that the same practice should continue and that the discretion should be a discretion to refuse, not to grant. Accordingly, the Commission recommends that the judge should be empowered to refuse leave if he considers that the appeal is frivolous or vexatious or that the grounds do not disclose an arguable case.[30]

3.28 Although the proposal means that a defendant could no longer appeal without leave in the circumstances in which an ordinary appeal is presently available,[31] the Commission regards such a change as justified. It would be unlikely that an appeal would in fact succeed if a judge's initial review of the case had shown that the appellant had no good grounds. In addition, a requirement for leave would give the defendant the benefit of the procedural advantages referred to above.

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30 See paragraph 4.7 below for the Commission's recommendations on a right of appeal from such a decision.

31 See paragraph 2.5 above.

CHAPTER 4 - RECOMMENDATIONS: THE HEARING OF THE APPEAL

The appellate court

4.1 In the Working Paper the Commission raised the question whether the Supreme Court ought to continue to be the court which should hear appeals from decisions of justices or whether the District Court would be the more appropriate appellate body. All those who commented on this part of the Working Paper favoured the Supreme Court as the appellate court.[1]

4.2 The Commission agrees that the Supreme Court should continue to be the appellate court in the case of appeals from decisions of justices and recommends accordingly.[2] There are a number of reasons for this view. First, the Commission considers that it is important that the Supreme Court's traditional supervisory jurisdiction over inferior courts, including justices, should be maintained. Secondly, it is important to have only one authority supervising the implementation of the criminal law and sentencing policy in Western Australia, and in the Commission's view this is a role which should be reserved to the Supreme Court. Finally, the present distribution of jurisdiction among the Supreme Court, District Court and the Family Court means that the Supreme Court has little difficulty in dealing with appeals promptly.

Powers of the Supreme Court

4.3 The Commission recommends that the appeal to the Supreme Court should be by way of rehearing. The Commission does not mean by this that the case should be reheard *de novo*, with the onus being on the complainant as in the court below. What is meant is that the Supreme Court should not be limited to a consideration of whether the decision of the justices was wrong on the evidence and material before them,[3] but that it should consider whether, in

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1 The Chief Justice, Mr. Justice Wallace, the Law Society and Mr. B.W. Rowland Q.C.

2 That is, subject to the Commission's recommendations in its Report on *Bail* referred to briefly in footnote 7 in Chapter 3.

3 This is a possible restriction in the case of appeals by way of an order to review: see paragraph 3.10 above.

the light of that evidence and material together with any other or further evidence or material the court thinks fit to receive, the decision should be over-ruled.[4]

4.4 In order to facilitate the determination of an appeal the Commission is of the view that the Supreme Court should have wide powers both as to the orders it could make in determining the appeal and as to the procedure at the hearing itself. The Commission considers that the powers presently given to a judge of the Supreme Court upon the hearing of an appeal by way of an order to review[5] are sufficiently wide for the purpose. Accordingly, it recommends that the judge hearing the appeal should have power to -

(a) amend or add to the grounds stated in the Notice of Appeal;

(b) obtain details of the evidence and of the proceedings before the justices, including any notes taken;

(c) in addition to considering the evidence and materials which were before the justices, rehear any witness, or hear further evidence, either orally or by affidavit;

(d) vary, amend, rescind or quash the decision appealed against and any order, conviction or other proceeding founded upon it (including any penalty or sentence);

(e) remit the case for hearing or rehearing to the justices who made the decision, or to any other justices;

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4 The jurisdiction which the Commission recommends the Supreme Court should have is similar to that which is outlined by Lord Atkin in *Powell v Streatham Manor Nursing Home* [1935] All ER (Rep) 58 at 63 where he stated:

> "I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The court has to re-hear; in other words, has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the court is still a court of appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognise the onus upon the appellant to satisfy it that the decision below is wrong: it must recognise the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate court can never recapture the initial advantage of the judge who saw and believed".

5 See paragraphs 2.15 to 2.17 above.

(f) dismiss the appeal if he considers that no substantial miscarriage of justice has occurred;

(g) make such other order as he thinks just, including those which can be made on the prerogative writs;

(h) award costs.

In addition, the judge should have power, instead of hearing the appeal himself, to refer the appeal to the Court of Criminal Appeal if he considers that it is desirable to do so.

4.5 In its Report on the *Suitors' Fund Act Part B: Criminal Proceedings*, the Commission recommended a revision of the law governing the circumstances in which costs should be awarded to defendants in criminal appeals, and that this should be done by appropriate amendments to the *Official Prosecutions (Defendants' Costs) Act 1973*.[6] As far as appeals are concerned, that Act at present applies only where a defendant successfully appeals. The Commission recommended that that Act be amended to provide that costs should also generally be awarded in favour of a defendant who was an unsuccessful respondent (that is, where the appellate court overturned a decision in his favour by the justices) or who was a successful respondent (that is, where the appellate court sustained a decision in his favour by the justices). Subject to the recommendations in that Report, the Commission recommends that the judge should continue to have a general discretion as to an award of costs.

Further appeals

4.6 At present, there is no right of appeal to the Full Court in respect of a decision made by a judge of the Supreme Court on either an ordinary appeal or an appeal by way of an order to review.[7] Although the Commission is conscious of the need to bring criminal proceedings to an end it considers that it is desirable to allow a further appeal to the Court of Criminal Appeal from such decisions, but only with the leave of that Court,[8] to be given only if special

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6 Report on Project No. 49, *The Suitors' Fund Act Part B : Criminal Proceedings* (May 1977), paragraphs 5.44 to 5.75.

7 See paragraphs 2.14 and 2.16 above.

8 The Court of Criminal Appeal is the Full Court as constituted under s.57 of the *Supreme Court Act 1935* in the exercise of its jurisdiction to hear and determine appeals from trials on indictment: *Criminal Code*,

circumstances exist. The Commission envisages that appeals to the Court of Criminal Appeal would be rare and that most appeals from decisions of justices would be finally disposed of by a judge of the Supreme Court. The Commission considers that a further appeal to the Court of Criminal Appeal should also be allowed, with the leave of that Court, from a refusal of a judge to grant an application for an enlargement of time,[9] or from an order dismissing an appeal for failure to prosecute it.[10]

4.7 At present, an appeal is available, as of right, to the Full Court against the grant or refusal of an order to review.[11] The Commission considers that there should be a similar right of appeal to the Court of Criminal Appeal against a decision of a judge of the Supreme Court to grant, or to refuse to grant, leave to appeal from a decision of justices.[12]

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s.687. It is constituted by at least three judges of the Supreme Court and must be constituted by an uneven number: *Supreme Court Act 1935*, s.57(1).

9 See paragraph 5.55 below.

10 See paragraph 5.35 below.

11 *Justices Act 1902*, s.204.

12 See paragraphs 3.20 to 3.28 above.

CHAPTER 5 - RECOMMENDATIONS: PROCEDURE

Introduction

5.1 One significant advantage of the Commission's recommendation for a single mode of appeal, with leave to appeal required in all cases, instead of the present dual mode, is that only one set of procedural rules would be required. The following contains the Commission's recommendations as to the procedural steps in instituting, hearing, determining the appeal and in enforcing decisions made on appeal. In making these recommendations the Commission has attempted to look at the whole question of procedure afresh, with a view to devising a model appeal procedure. The Commission has borne in mind the difficulties involved in the existing procedures,[1] and its aim has been to provide a clearly formulated set of rules covering every step so that the parties will know with reasonable certainty how to proceed.

Rules of court

5.2 In the Working Paper the Commission suggested that the procedure in respect of appeals ought to be contained in rules of court rather than in the *Justices Act* itself. The Commission confirms its provisional view on this matter and recommends accordingly.[2] Authorising the Judges of the Supreme Court to make rules to regulate the practice and procedure for appeals enables the persons best fitted to do so to keep the rules under constant review. Embodying the procedure in rules of court has the additional advantage that the procedure can be amended more easily than if it was incorporated in a statute.

Institution of appeals and notice to the other party

5.3 In paragraph 3.24 above the Commission recommended that a person wishing to appeal should obtain the leave of a judge of the Supreme Court before he can do so. Such an application for leave to appeal could be heard either in Court or in chambers, and either in Perth or in a circuit district.[3]

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1 See Part C of Chapter 2 of the Working Paper.

2 The Law Society agreed that the practice and procedure for appeals should be contained in the *Rules of the Supreme Court*.

3 The towns in which the Supreme Court sits when it is on circuit are Albany, Broome, Bunbury, Carnarvon, Derby, Geraldton, Kalgoorlie, Kununurra and Port Hedland.

5.4 The Commission recommends that the appeal be commenced by means of an Application for Leave to Appeal which would normally be filed in the Central Office of the Supreme Court at Perth. However, a requirement for the application to be filed in the Central Office should not prevent an appellant, in urgent cases,[4] from applying for leave to appeal from a judge who is present in a circuit district, if he undertakes to file the Application in the Central Office as soon as possible.

5.5 The Application for Leave to Appeal should be in writing in a prescribed form naming the appellant and the other parties or persons interested in the decision the subject of the appeal, and stating with sufficient particularity the grounds upon which the appeal is based.[5]

5.6 The application should be required to be supported by an affidavit sworn by the appellant or his solicitor, with such supporting material as may be necessary to enable the judge to decide whether leave to appeal should be granted, such as a copy of the complaint, the defendant's criminal record (where applicable), the justices' notes of evidence or their written decision and reasons. The judge hearing the application should be empowered to require the production of further evidence if necessary.

5.7 The Commission recommends that an Application for Leave to Appeal should be filed in the Supreme Court within twenty-one days of the date of the decision appealed against. However, it should be possible for the appellant to apply for an extension of the time for appealing.[6] This application should be supported by an affidavit setting out the reasons for the delay in instituting the appeal. It should be possible for both applications, namely the application for an extension of time and the application for leave to appeal, to be heard at the same time.

5.8 The Commission considers that a determination of the question whether leave to appeal should be granted or not could usually be made without hearing argument from the other party to the appeal. The Commission accordingly recommends that the judge should be empowered to hear the application for leave to appeal ex parte. This should also be the

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4 For example, where the appellant is in custody and wishes to be released on bail once leave to appeal has been granted.

5 It would also be desirable for the application to contain details of the date of the decision appealed from, the name of the justices who made the decision, the plea (if any) entered by the defendant, the nature of the proceedings, particulars of the order made by the court, and the appellant's address for service or that of his solicitor.

6 See paragraph 5.55 below.

position in regard to an application for an extension of time to appeal. However, the judge should be empowered to require the appellant to serve a notice on the other party so that he can be heard if he considers that course of action to be desirable.

5.9 In the Working Paper the Commission put forward another approach whereby the appellate court could hear the application for leave and the merits of the case at the same time.[7] However, it is the Commission's view that it would generally be desirable to have separate hearings so that appeals without merit could be filtered out at an early stage, and so that, where leave was granted, a judge could ensure that all relevant material was made available to the appellate court. However, there could be cases where it would be advantageous to both parties for the application for leave to appeal, and the appeal itself, to be heard together. The Commission recommends that power should be given accordingly.

5.10 Where an application for leave to appeal is granted the judge should determine whether the appeal should be heard by the Court of Criminal Appeal or a single judge. A copy of the Application for Leave to Appeal (amended where necessary)[8] should then stand as a Notice of Appeal and should be served[9] on the other party to the appeal and the clerk of the Court of Petty Sessions for the place where the decision appealed from was given.[10]

5.11 The Commission recommends that the appellant should be responsible for serving the Notice of Appeal on the other party and the clerk within ten days of being granted leave to appeal. It also recommends that the Registrar of the Supreme Court should be required to send a copy of the Notice of Appeal to the Attorney General.[11] The Crown would then be alerted to the fact that an appeal had been instituted, even if the appellant neglected or delayed in serving the Notice of Appeal on the other party or the clerk of Petty Sessions. The Attorney General could then apply for the summary dismissal of the appeal[12] if it came to his attention that there had been neglect or delay in serving the Notice of Appeal or otherwise prosecuting the appeal.

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7 See paragraph 3.110 of the Working Paper.

8 In particular, if the grounds of appeal were amended on the hearing of the application. If the application were amended it would be necessary to file the Notice of Appeal as amended in the Central Office of the Supreme Court.

9 For a discussion of the means of service see paragraphs 5.57 to 5.59 below.

10 It would be the responsibility of the clerk to inform the justices concerned that an appeal had been instituted. This would enable the justices to ensure that the complete record of the proceedings was transmitted to the Supreme Court: see paragraphs 5.28 and 5.29 below.

11 This is required at present in the case of appeals order to review: *Justices Act 1902*, s.201(1).

12 See paragraph 5.35 below.

5.12 The Commission recognises that circumstances may arise where an appellant, through no fault of his own, is unable to serve the Notice of Appeal within the time prescribed. This problem and the question whether provision should be made for substituted service are discussed in paragraphs 5.55 and 5.59 below. In essence, the Commission recommends that a judge should be able to extend the time for service of the Notice of Appeal and, if necessary, make an order for substituted service.

5.13 At present, in the case of appeals by way of an order to review, it is not uncommon where decisions relating to a number of matters are made at the same hearing, for one application for an order to review to be made with respect of all those matters. However, there appears to be no express authority for this course. The practice is desirable because it avoids the need for additional documentation and a consequent increase in the costs. For these reasons the Commission recommends that where an appellant appeals against a number of decisions made at the one hearing (whether or not the complainant was the same in each case) express provision should be made to enable him to commence the appeal by one Application for Leave to Appeal. The Application should contain particulars relating to each decision appealed against. Where a judge grants leave to appeal he should have power to order that appeals instituted by one Application should be heard together or separately.

Security for appeal and costs

5.14 At present, in the case of appeals by way of an order to review, the appellant must enter into a recognisance whereby he binds himself to prosecute the appeal without delay, appear at the hearing, submit to the judgment of the appellate court, and to pay such costs of the appeal as the court may award.

5.15 In the Commission's view no useful purpose is served by requiring an appellant to enter into a recognisance conditioned in any of the ways referred to in the previous paragraph, particularly since the practice is to set the amount of the recognisance at a low figure. Moreover, a requirement that an appellant enter into a recognisance could have the undesirable consequence of preventing him from appealing if he could not provide any sureties which were required.

5.16 For these reasons, the Commission recommends that there should be no requirement for an appellant to enter into a recognisance relating to the appeal or the cost of the appeal. The recovery of the costs of an appeal could be dealt with by providing an efficient means of enforcing an order for costs.[13] The prompt prosecution of an appeal and the attendance of the appellant at the hearing of the appeal could be secured by enabling the Attorney General or a party to the appeal to apply to a judge of the Supreme Court for an order dismissing the appeal for want of prosecution.[14]

Bail

5.17 The Commission has made a report to the Attorney General on bail procedures which contains detailed recommendations on the law relating to bail in Western Australia.[15] The recommendations made in that Report are generally relevant to the grant of bail pending an appeal. One recommendation made in that Report was that, in the case of an appeal to the Supreme Court from a decision of justices, bail should be dealt with by a single judge of the Supreme Court.[16] Consequently an appellant, who is in custody as a result of the decision the subject of an appeal, should be able to apply to a judge of the Supreme Court for release on bail pending the outcome of the appeal once leave to appeal has been granted, so long as he is not being held in custody as the result of some other decision. The application for bail could be considered at the hearing of the application for leave to appeal.

5.18 Where the Attorney General appeals against a conviction or order as a result of which a person has been imprisoned,[17] it is the Commission's view that that person should also be able to apply to a judge of the Supreme Court to be released on bail. Another recommendation made in the Report on *Bail* (paragraph 5.13) was that an application for bail should be made on notice to the prosecution where an appeal is brought in respect of an offence which carries a maximum penalty of six months imprisonment or more.

5.19 At present, in the case of appeals by way of an order to review, the person releasing an appellant from custody is required to report that fact to the Master of the Supreme Court and

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13 See paragraphs 5.62 and 5.63 below.
14 See paragraph 5.35 below.
15 Report on *Bail* (1979).
16 Ibid., paragraph 2.8.
17 See paragraph 3.15 above.

also to the Attorney General.[18] The Commission recommends that this requirement be retained as it would assist in avoiding the situation which occurred in Western Australia where an appellant obtained his freedom on bail but failed to prosecute his appeal.[19]

5.20 Where a person is released from custody on bail pending an appeal and the appeal is dismissed either before[20] or after the hearing,[21] the Commission recommends that the judge of the Supreme Court hearing the matter should have power to issue a warrant committing the appellant to his former custody. Where an appeal is discontinued[22] the Commission recommends that a judge of the Supreme Court should be able to issue a warrant for the arrest of the appellant and for his detention in accordance with the decision of the justices.[23]

5.21 At present, the manner in which a convicted appellant who is sentenced to imprisonment is to be treated prior to the determination of his appeal is not regulated. In the case of appeals to the Court of Criminal Appeal from trials on indictment, the time during which any convicted appellant is admitted to bail pending the determination of an appeal, does not count as part of any term of imprisonment to which the appellant is subject. Any sentence passed by the trial court or the Court of Criminal Appeal does not resume or begin to run until the day he is received into prison under the sentence.[24] The Commission recommends that convicted appellants released on bail pending an appeal from a decision of justices should have any sentence of imprisonment dealt with in the same way.

5.22 In the case of appeals to the Court of Criminal Appeal from trials on indictment, the Criminal Code requires a convicted appellant who is not admitted to bail to be treated in accordance with any special regulations applicable to prisoners unconvicted of a crime during the period of their detention for safe custody.[25] Under s.20 of the *Criminal Code*, any time which the appellant is so treated, "subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal", does not count as part of any term of imprisonment under his sentence. Any sentence passed by the trial court or the Court of

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18 *Justices Act 1902*, s.201(3).

19 See *The West Australian*, 29 September 1976 at 3.

20 See paragraph 5.35 below.

21 See paragraph 4.4 above.

22 See paragraphs 5.52 to 5.54 below.

23 The justices should also be able to enforce the order as if there had been no appeal: see paragraph 5.54 below.

24 *Criminal Code*, s.20.

25 Ibid., s.700(1). The relevant regulations are regulations 82 to 94 of the *Prison Regulations 1974*. Although there does not appear to be any authority for it, the Commission understands that persons who are appealing against a decision of justices are treated in the same way.

Criminal Appeal does not resume or begin to run until the day on which the appeal is determined.

5.23 In its submission to the Commission on the Working Paper, the Law Society stated:

> "The convicted appellant should be entitled to elect whether or not he should receive special treatment. ...If he elects not to receive special treatment the time served while awaiting the determination of the appeal should be taken into account in calculating the sentence. If he elects to receive special treatment the Appellate Court should have the right to treat this as part of the sentence".

5.24 The Commission agrees that a convicted appellant should be able to elect one or other of the two methods of detention (unless he is being held in custody for some other reason, in which case he should continue to serve that sentence). If he elects to serve his sentence then the sentence of imprisonment should not be interrupted pending the outcome of the appeal.[26] If, however, he elects to be treated as a prisoner unconvicted of a crime, the period he was so treated should not count as part of his term of imprisonment. As at present in the case of appeals to the Court of Criminal Appeal, the judge hearing the appeal should have power to give a contrary direction.

Stay of other proceedings

5.25 A decision made by justices which is the subject of an appeal need not, of course, involve a sentence of imprisonment. It could, for example, involve a fine or compensation order, an order that the defendant enter into a good behaviour bond, a probation order or a community service order.[27]

5.26 In the case of decisions other than those involving a sentence of imprisonment (which have been discussed in paragraphs 5.17 to 5.24 above), the Commission recommends that the proceedings should be stayed once leave to appeal has been granted and the Notice of Appeal has been served on the clerk of Petty Sessions for the place where the decision appealed from was given.

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[26] The Commission is at present considering whether a person who is detained in custody and ultimately acquitted should receive compensation: Project No. 43, *Compensation for Persons Detained in Custody*. A Working Paper discussing the issues involved was issued in November 1976.

[27] In the case of appeals by way of an order to review, execution is stayed once a recognisance is entered into under s.201 of the *Justices Act 1902*.

5.27 This would prevent the issue of a warrant of execution, but if a warrant had been issued, execution on the warrant would be stayed and goods could not be seized, or, if goods had been seized pursuant to the warrant, the sale of the goods would be stayed. In the unlikely event of the execution process having proceeded to the point of sale, the person charged with the execution of the warrant would have to hold the proceeds of the sale pending the outcome of the appeal. It should be the responsibility of the clerk to ensure that any person charged with the enforcement of a warrant for execution is informed of any stay in execution and of the results of the appeal. The stay of execution would also mean that a good behaviour bond, probation or community service order would be stayed and the obligation of any surety under the bond would be suspended.

Transmission of documents to the Supreme Court

5.28 At present it is the practice of the Supreme Court to request the relevant clerk of Petty Sessions to forward the proceedings the subject of an appeal to the Court when an appeal has been entered for hearing. There is no requirement that this be done in the case of appeals by way of an order to review. In a number of jurisdictions studied by the Commission, the documents must be forwarded to the appellate court as soon as the appeal is instituted.[28]

5.29 The Commission recommends that this approach be adopted in Western Australia because it would be convenient for the Supreme Court to have all of the documents relating to an appeal as soon after leave to appeal is granted as possible.[29] For example, the documents may be required where an application for the dismissal of an appeal is made.[30]

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28 In Queensland, for example, s.222(2)(ii) of the *Justices Act 1886* provides:

"The said clerk of petty sessions shall on receipt of the notice of appeal forthwith transmit the complaint, depositions and other proceedings before the justices to the Registrar of the Supreme Court".

29 Relevant documents which should be transmitted by the clerk would include the complaint, any depositions, the conviction or order of the justices, their reasons, any recognizances entered into by the appellant, the justices' notes of evidence and addresses of counsel, a list of the exhibits in evidence, and so far as practicable, the original exhibits, the defendant's criminal record, any probation report, and a transcript of the proceedings (if any) .The importance of all of the documents relating to an appeal being forwarded to the Supreme Court was highlighted by a magistrate who referred to a case in which the reasons for a decision had been mislaid. The Supreme Court therefore had to decide the case without this very important part of the proceedings of the Court of Petty Sessions. In footnote 10 above the Commission stated that the clerk of Petty Sessions should be under a duty to bring to the attention of the justices the fact that an appeal had been instituted. If this were done, the justices could (if they wished) ensure that all the documents relating to the appeal were transmitted to the Supreme Court.

30 See paragraph 5.35 below.

5.30 At present under a Practice Direction[31] a person who is appealing by way of an order to review is required, not less than six days before the date of the hearing of the appeal, to prepare, file and serve on the other party to the appeal a copy of an appeal book. As appeal books provide an orderly and convenient reference source to all documents relating to an appeal, the Commission recommends that a requirement for them be retained. The Law Society supported this view. It did, however, propose that the Master of the Supreme Court should be able to determine (on reference to the Chief Justice if necessary) whether or not an appeal book is required in any particular matter. The Commission agrees with this proposal and recommends accordingly.

5.31 In order to facilitate the preparation of an appeal and the appeal book it is necessary to ensure that the parties to an appeal have access to the relevant court documents. Section 148 of the *Justices Act* enables all parties interested in a conviction, order, or order of dismissal to demand copies of the complaint and depositions, and of a conviction or order from the officer or person having custody thereof. As this provision does not appear to be wide enough to cover all of the documents[32] relating to a proceeding before justices, the Commission recommends that it be so extended.

5.32 For the sake of convenience, the Commission also recommends that provision be made for a party to an appeal to obtain from the Registrar of the Supreme Court copies of the documents transmitted to the Supreme Court, upon payment of a prescribed fee.

5.33 At present the *Justices Act* contains no provision requiring the justices or the clerk of Petty Sessions to retain custody of the exhibits once a decision has been made by the justices. The Commission recommends that the clerk of Petty Sessions should be required to retain the exhibits for a period of at least thirty-one days[33] after a trial has concluded pending the filing of an Application for Leave to Appeal, and where leave to appeal has been granted, until the appeal has been disposed of.[34]

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31 Supreme Court of Western Australia, Practice Direction, 25 May 1972: *Justices Act, 1902 – Orders to review – Appeal books.*

32 See footnote 29 above.

33 The time for instituting an appeal (twenty-one days) plus the time for serving the Notice of Appeal on the clerk (ten days).

34 See, for example, Order XIV rule 3 of the *Criminal Practice Rules* and Order 34 rule 14 of the *Supreme Court Rules 1971*.

Entry for hearing and notice to parties

5.34 The Commission considers that appeals should be entered for hearing within fourteen days from the date of service of the Notice of Appeal on the other party and the clerk of Petty Sessions. The Notice of Entry of Appeal should be accompanied by an affidavit of service of the Notice of Appeal. A copy of the Notice of Entry of Appeal should be served on the other party to the appeal, and within seven days of entering the appeal for hearing, the appellant should, on notice to the respondent, attend on the List Clerk to fix a date for hearing the appeal. This is similar to the procedure at present with respect to appeals by way of an order to review. The Commission understands that the procedure has presented no problems in practice. It has the advantages that it enables the List Clerk to fix an early date for hearing the appeal suitable to all parties and it obviates the need for the appellant to serve a copy of a Notice for Date for Hearing on the other party. If any or all of the parties are unable to attend on the List Clerk (for example, if one party is in custody or out of Perth), the List Clerk should fix the date for the hearing and inform all parties concerned accordingly.

Failure to prosecute appeal

5.35 An appellant should take whatever steps are necessary with reasonable promptitude and, in order to ensure that he does so, the Commission considers that the other party to the appeal or the Attorney General should be able to apply to a judge of the Supreme Court for an order dismissing the appeal if the appellant fails to -

1. prosecute the appeal without undue delay;
2. take any necessary step in the presentation of the appeal such as having the appeal entered for hearing, attending on the List Clerk to set the date for the hearing, or filing and serving an appeal book;
3. appear on the day on which the appeal is to be heard.

If the appellant fails to appear at the hearing of the appeal, the judge who was to hear the appeal should be able to dismiss it. In the other cases referred to above the other party to the appeal or the Attorney General should be able to apply by way of a summons to show cause to a judge of the Supreme Court for an order dismissing the appeal.

5.36 Apart from having power to dismiss the appeal, the judge should have power to -

1. make such order (including an order enlarging the time for doing any act) as the justice of the case requires;
2. make an order as to costs;
3. issue a warrant for the arrest of the appellant if on bail and a warrant for committal to jail;
4. order that the time the appellant was specially treated while in prison be included in the term of imprisonment.[35]

5.37 Where an appeal is dismissed the Registrar of the Supreme Court should be required to transmit a memorandum to that effect to the clerk of Petty Sessions and to the prison superintendent if the appellant has remained in custody. The decision appealed against could then be enforced as if there had been no appeal. If the defendant was in custody and being specially treated, and the time he was so treated did not count as part of his term of imprisonment, he would continue to serve his term of imprisonment from the date of the decision of the judge.

5.38 The hearing of an application to dismiss an appeal should proceed in the absence of the appellant if he has failed to appear at the hearing or at the time specified in the summons. However, if an appeal were summarily dismissed in his absence, he should be able to apply to a judge of the Supreme Court to have the order set aside if he can show good reason for his failure to appear.

Hearing of the appeal and the decision

5.39 The Commission has already made recommendations with respect to the powers which the Supreme Court should have on the hearing and determination of an appeal.[36] There are, however, a number of matters of a procedural nature relating to the hearing of the appeal which require consideration.

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35 The power recommended in (4) is analogous to the general power which the Commission recommends should be given to the appellate court at the hearing of the appeal: see paragraph 5.24 above.

36 See paragraphs 4.3 to 4.5 above.

5.40 In the Working Paper, the Commission[37] raised the question whether a convicted person, whether or not represented by counsel, should be able to present his case and his arguments in writing instead of by oral argument. Having further considered the matter, the Commission is of the view that provision should be made enabling any defendant to present his case in writing but that the power should be limited to cases where he is unrepresented and it recommends accordingly. In such a case he should also be allowed to be present in court if he so elects at the hearing of the appeal. His attendance in court may in any case be desirable in order to allow the judge to question him for the purpose of clarifying his written arguments.

5.41 Another matter raised in the Working Paper was whether a party to an appeal who is in custody, whether or not he is represented by counsel, should be entitled to be present at the hearing of the appeal.[38] This involves the question whether the prison administration should be required to provide an escort and transport facilities for the appellant. The Commission recommends that a party who is in custody should be entitled to attend any proceedings relating to an appeal if he is unrepresented. If, however, he is represented the Commission recommends that he should not be entitled to attend the hearing of the appeal, a hearing of an application for leave to appeal, a hearing of an application to dismiss an appeal, or any proceeding preliminary or incidental to an appeal, except with the leave of a judge of the Supreme Court.

Implementing the results of the appeal

5.42 The Commission recommends that whenever a decision is given on an appeal or an appeal is dismissed for failure to prosecute it, the Registrar of the Supreme Court should be required to send a memorandum of the decision to the appropriate clerk of Petty Sessions and to the Attorney General. The clerk of Petty Sessions should be required to enter the memorandum of the decision in the court record which would then be attached to any copy or certificate of the conviction or order. The memorandum of the decision should be deemed to be sufficient evidence of the decision in every case where such a copy or certificate would be sufficient evidence of the conviction or order.[39] Where a warrant of execution has been stayed[40] it should be the responsibility of the clerk to inform the person with responsibility for

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37 See paragraph 3.81 of the Working Paper.
38 See paragraph 3.82 of the Working Paper.
39 See s.142 of the *Justices Act 1902*.
40 See paragraphs 5.26 and 5.27 above.

executing it of the result of the appeal. The Registrar should also send a copy of the memorandum to any party to the appeal (whether in custody or not) who was not present or represented when the decision was given.[41]

5.43 Where a defendant is in custody or has been released on bail pending the determination of an appeal and either his conviction is quashed, or his sentence of imprisonment is set aside and the Supreme Court does not impose another sentence of imprisonment, the Registrar of the Supreme Court should send a copy of the memorandum of the decision of the Court to the superintendent of the penal institution in which the person sentenced is detained or was detained in custody. If he is still in custody, but is not being held for any other matter, he should be released immediately.[42]

5.44 Where the defendant is in custody pending the outcome of an appeal and on the determination of the appeal his sentence of imprisonment is to continue (whether or not amended), a memorandum of the decision of the Court should be forwarded by the Registrar to the superintendent of the penal institution in which the defendant is held in custody. The memorandum should serve as notice of the term of imprisonment to be served by the defendant. It should not be necessary to issue a warrant of commitment.[43]

5.45 When any decision has been affirmed, amended, varied, or a new decision made upon an appeal, the justices from whose decision the appeal was brought, or any other justices, should have authority to enforce the decision in the same way as if it had been made by them. Where a defendant sentenced to imprisonment is released on bail pending the determination of the appeal and the sentence of imprisonment is confirmed or modified, either a judge of the Supreme Court or any justices should have power to commit the appellant to jail.

5.46 In paragraphs 5.26 and 5.27 above the Commission recommended that a good behaviour bond, probation or community service order imposed on an appellant should be stayed pending the outcome of an appeal. Where an appeal is successful the Supreme Court would have power to quash the order.[44] Where an order for a good behaviour bond is quashed,

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41 See, for example, *Summary Proceedings Act 1957* (NZ), s.134.
42 Ibid., s.136(2).
43 Ibid., ss.135(3) and 136(3).
44 See paragraph 4.4 above.

the recognizance entered into by the defendant and the obligation of any surety thereunder should be discharged automatically.

5.47 If, however, the conviction, the good behaviour bond, or probation or community service order is not quashed, any obligation under those orders should resume from the date of the decision of the Supreme Court.[45]

Further appeal

5.48 In paragraphs 4.6 and 4.7 above, the Commission recommended that a party to an appeal should have an opportunity of further appeal to the Court of Criminal Appeal. Such an appeal should be instituted within twenty-one days of the date on which the decision appealed from was made (or within such further time as the Court of Criminal Appeal allows) by filing a Notice of Appeal or Notice of Application for Leave to Appeal, as the case may be,[46] in the Court. The Notice should state the grounds on which the further appeal is based and be served on the other party to the appeal (if any). The appeal should be conducted on the basis of the material before the judge who made the decision appealed from and his reasons for that decision. The appellant should file and serve a copy of the reasons on the other party to the appeal, and should be responsible for entering the appeal for hearing. Where leave to appeal is required,[47] both the application for leave and the appeal could be heard at the same time. On the determination of the appeal, the Court of Criminal Appeal should have the same power as the judge who made the decision the subject of the appeal. The same consequences and proceedings would follow from the decision of the Court of Criminal Appeal as if it had been given by that judge.

Miscellaneous

(i) Hearing in a circuit district

5.49 The Commission recommends that provision be made empowering a judge, on the application of a party to an appeal, to order that the appeal be heard in a circuit district. This

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45 See, for example, s.137 of the *Summary Proceedings Act 1957* (NZ).

46 See paragraph 4.6 for the circumstances in which the Commission recommended that leave to appeal should be required.

47 See paragraph 4.6 above.

is, at present, expressly provided for in the case of ordinary appeals[48] but not in the case of orders to review.

(ii) Amendment of Notice of Appeal before hearing

5.50 In the Working Paper, the Commission suggested that it may be desirable to enable an appellant to apply to a judge of the appellate court for an amendment of the Notice of Appeal before the hearing of the appeal.[49] The Commission adopts this suggestion and recommends accordingly. The respondent should be entitled to be heard on the application. Such an amendment should be permitted on such terms and conditions as the judge thinks fit.

(iii) Consolidation of appeals

5.51 Although the Commission has recommended that an appellant should be able to combine several appeals in one Application for Leave to Appeal,[50] there may be circumstances in which separate appeals relating to the same proceedings could be instituted. One circumstance where this might occur is where appeals are made by the complainant, defendant and the Attorney General in respect of the same proceeding. In order to avoid multiple proceedings, the Commission recommends that a judge, either on his own motion or upon an application by a party to an appeal, should be able to order the consolidation of one appeal with another and to make orders with respect to the entry of the appeal for hearing and the preparation of appeal books.

(iv) Discontinuing appeals

5.52 At present the *Justices Act* contains no provision which enables an appellant formally to abandon an appeal. However, the Commission understands that on occasions appeals have been treated as abandoned by a "Notice of Discontinuance" being filed in the Supreme Court.

5.53 The Commission considers that this practice should be given legislative authority and that provision be made for the appellant to discontinue an appeal prior to the hearing by filing

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48 See paragraph 2.12 above.

49 See paragraph 3.47 of the Working Paper. At present, the power to amend seems to be exercisable only at the appeal hearing itself.

50 See paragraph 5.13 above.

a Notice of Discontinuance in the Supreme Court and serving a copy of it on the other party to the appeal. The other party should be entitled to apply to the Supreme Court on notice to the appellant for an order as to costs within one month of receiving such a Notice. The Court should be able to order the appellant to pay to the other party such costs as appear to the Court to be just and reasonable in respect of expenses properly incurred by that party in connection with the appeal before he was served with the Notice of Discontinuance.

5.54 Where an appeal is discontinued, the order of the justices appealed against should be enforceable as if no appeal had been instituted. For this purpose the Registrar of the Supreme Court should be required to advise the clerk of Petty Sessions, and if the appellant is in custody, the superintendent of the penal institution in which he is held,[51] that an appeal had been discontinued.

(v) Enlargement or abridgement of time

5.55 At present, both in the case of ordinary appeals and appeals by way of an order to review, the Supreme Court or a judge thereof has power to enlarge or abridge any time appointed for doing any act or taking any proceedings relating to an appeal. An application for an extension of time may be made before or after the expiration of time appointed or allowed.[52] The Commission is of the view that a general provision similar to this should be retained, and recommends accordingly.

(vi) Effect of informalities

5.56 There are several provisions in the *Justices Act* which enable justices' decisions to stand despite defects or informalities in the proceedings or documents.[53] The Commission is not aware of any injustices or administrative inconveniences which have flowed from these provisions and accordingly recommends that they be retained.

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51 If he were being specially treated the term of imprisonment would continue to run from the date the appeal was discontinued.

52 *Justices Act 1902*, s.206B.

53 Ibid., ss.211 to 214. See paragraph 2.66 of the Working Paper.

(vii) Service of notices and other documents

5.57 It is the Commission's view that the means by which notices and documents relating to an appeal can be served by a party to the appeal should be permitted in any of the following ways -[54]

1. by personal service, or where the person refuses to accept it, by the notice or document being brought to his attention and leaving a copy of it with him;

2. by registered letter addressed to the party's last known or usual address or place of business;

3. by leaving it at his place of residence with a member of his family living with him and appearing to be of or over the age of sixteen years;

4. if represented by a solicitor, at the business address of the solicitor.

In order to facilitate the service of notices and documents, the names of solicitors acting for parties to an appeal should be entered on the court record as soon as they receive instructions from their client.[55] Entry of the name of a client's solicitor on the court record would also be of assistance to the court. Where a solicitor for the appellant is appointed before an Application for Leave to Appeal is made this could be noted on that document. The solicitors for the respondent should be required to file and serve on the other party a Notice of Intention to be Heard. The solicitors for the appellant and the respondent should be deemed to be authorised to accept service of notices and documents on behalf of their clients. The fact that a solicitor representing a party to an appeal is not on the court record should not prevent another party to the appeal from serving notices or documents on that solicitor if he is aware that the solicitor is representing the other party. Such service could be effected in the manner provided for in s.28(2) of the *Summary Proceedings Act 1957* (NZ). That section provides:

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54 At present, apart from a provision that documents, notices or proceedings may be served on the solicitor of a party to an appeal (*Justices Act 1902*, s.215), the *Justices Act* makes no express provision for the mode of service of notice and documents. Presumably, therefore, the modes of service set out in s.31 of the *Interpretation Act 1918* would apply.

55 There should also be a provision enabling a party to change his solicitor on notice to that effect and a provision enabling a solicitor who has ceased to act for a party who has not filed such notice to withdraw from the proceeding: see for example Order 8 rules 2 and 7 of the *Rules of the Supreme Court 1971*.

> "Where a solicitor represents that he is authorised to accept service of any document on behalf of any person, it shall be sufficient service to deliver the document to him if he signs a memorandum stating that he accepts service of the document on behalf of that person".

5.58 The Commission also considers that provision should be made for substituted service of notices or documents where service by any of the means referred to in the previous paragraph is impracticable.[56]

5.59 Where it is necessary to prove the service of any document or notice this should be done by means of an affidavit.

(viii) Absconding appellants

5.60 The question of how people who abscond, or who are suspected of being about to abscond, while on bail should be dealt with has been considered in the Commission's Report on *Bail.*[57] These recommendations would be applicable to an appellant who is released on bail pending an appeal.

5.61 In other cases (that is, where the appellant has not been imprisoned and released on bail pending the appeal), the Commission does not consider that it is necessary to provide for his arrest if he absconds or it is reasonably suspected that he is about to abscond.[58] If he fails to prosecute the appeal, the other party could apply to have the appeal dismissed prior to the hearing[59] and if he failed to appear at the hearing of the appeal the appeal could also be dismissed.[60] In either case, the decision of the justices appealed against could be enforced as if there had been no appeal.

(ix) Costs

5.62 Where a judge makes an order as to costs[61] he should be able to order the payment of a specific sum for costs or that the costs be taxed.[62] The certificate of taxation should be

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56 See Order 72 rule 4 of the *Supreme Court Rules 1971*

57 Report on *Bail* (Project No. 64), paragraphs 6.33 to 6.38.

58 At present, under s.217 of the *Justices Act 1902* it would appear that such a person could be arrested if he were about to leave Western Australia.

59 See paragraph 5.35 above.

60 Ibid.

61 See paragraphs 4.4 and 4.5 above.

deemed to be a judgment of the Court. Unless the judge who determined the appeal sets a time for payment of the costs, they should be paid within twenty-eight days of the date of the order of the judge or the date of the certificate of taxation of the costs. If the costs are not paid within that time it should be possible, within fourteen days of service of an extract of the judgment or the certificate of taxation on the party responsible for paying the costs, to enforce the order or certificate in accordance with Part VII of the *Supreme Court Act 1935* and the *Rules of the Supreme Court 1971*.

5.63 In the Working Paper, the Commission referred to an existing provision in the *Justices Act* relating to matters falling within the Eighth Schedule to the Act[63] which provides for the recovery of money ordered to be paid in such cases as if ordered in a judgment of a Local Court.[64] This provision was enacted because what are "truly civil debts" may be recovered in Courts of Petty Sessions, and it was considered that the enforcement provisions of the *Local Courts Act* were more appropriate than the enforcement provisions of the *Justices Act 1902*.[65] The provision does not appear to apply to the enforcement of an order for the payment of costs of an appeal. The Commission considers that this position should be retained and that the enforcement of the costs of an appeal relating to a matter referred to in the Eighth Schedule should be dealt with in the same way as costs of other appeals.

5.64 At present, when the Attorney General appeals by way of an order to review and costs are allowed against him, the costs are not recoverable from him,[66] and are paid out of the Consolidated Revenue Fund by the Treasurer. The Commission recommends that such a provision be retained.

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62 A procedure contained in Order 66 of the *Rules of Supreme Court 1971* for the taxation of costs could be adopted. The costs and fees could follow those provided in the Fourth and Fifth Schedules to the Rules.

63 Such as the recovery of water rates and expenses of repairs.

64 *Justices Act 1902*, s.155(6).

65 See W.A. *Parl. Deb.* (1932) Vol. 88 at 923.

66 *Justices Act 1902*, 5.206(2).

CHAPTER 6 - RECOMMENDATIONS: OTHER MATTERS

AMENDMENT OF DECISION OTHER THAN BY WAY OF APPEAL

Introduction

6.1 There may be circumstances where justices have made a decision which is so obviously incorrect that it would be undesirable to put the parties to the expense and inconvenience of having to rectify the matter by way of an appeal (for example, if they imposed a sentence greater than the maximum). It may also be desirable to provide a rehearing in cases where it is shown that there has been a miscarriage of justice.

6.2 In these cases it is the Commission's view that it is appropriate to provide a procedure whereby the justices who made the decision, or in some circumstances other justices, can correct that decision. There is already a procedure whereby an order can be rectified and the Commission recommends that the scope of this power be clarified. The Commission also recommends that provision be made for a rehearing by the justices. These procedures are discussed further below. Although they do not involve an appeal as such, they relate directly to appeals in that the scope of their remedial power will affect the need to appeal in a particular case.

Rectification of orders

6.3 At present, under s.166B of the *Justices Act*, if a defendant is convicted by justices and they impose, or fail to impose, a punishment[1] otherwise than in accordance with the provisions of the Act under which the complaint was made, the justices may recall the order and impose a punishment that is not contrary to, or that is in conformity, with those provisions. The recall may be made after giving the parties an opportunity to be heard, either on the justice's own motion or on an application of a party to the complaint. The operation of this provision has raised two problems which the Commission considers warrant clarification.

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1 "Punishment" includes a forfeiture, disqualification and loss or suspension of a licence or privilege: *Justices Act 1902*, s. 166B(2).

6.4 First, in *Shortland v Heath*[2] Jackson C.J. ruled that the rectification procedure was available where the justices did not have the true facts at the trial, and for the purpose of correcting the decision, fresh evidence could be admitted. However, he appeared also to suggest that the rectification procedure was not available where the justices had erred on the true facts, for example, if they imposed a sentence which exceeded the maximum prescribed for the particular offence or if they knew that it was a defendant's second offence for drunken driving but, in error, sentenced him as if it were his first offence. However, further on in the judgment, the Judge appears to suggest that the rectification procedure was available in these cases.[3] The Commission considers that the provision should be clarified and recommends that it be made clear that it is available in both these circumstances, namely -

(a) for cases where justices have erred on the true facts, and

(b) for cases where the penalty is imposed on incorrect facts which are subsequently corrected.

6.5 Secondly, the section appears to contemplate that the court constituted by the justices who made the initial decision should be re-convened to consider an application made under s.166B. However, the Commission understands that a magistrate has ruled that he had jurisdiction under s.166B to review a decision made by justices. It may not always be convenient or practicable to recall the justices who made the initial decision, particularly in country areas where the justices concerned live at a distance from the court. The Commission accordingly recommends that, if the justices who made the initial decision are not available, the order should be rectifiable by two other justices[4] or a magistrate.

Rehearing

6.6 Another means by which decisions of justices can be amended without the need for an appeal is a rehearing. At present in Western Australia a rehearing would seem to be possible in only one limited situation. Under s.136A of the *Justices Act* if a decision has been made in

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2 [1977] WAR 61 at 62 and 63.

3 Ibid., at 63 lines 19-37.

4 This would be subject to s.32 of the *Justices Act 1902* which provides in part:
"Any one Justice may exercise the jurisdiction of two Justices under this or any other Act whenever no other Justice usually residing in the district can be found at the time within a distance of sixteen kilometres... ".

default of appearance by a complainant or defendant, an application may subsequently be made by that defaulting party for the decision to be set aside. Although no express provision has been made for a rehearing, presumably an order setting aside the decision would leave the original complaint undisposed of and, in effect, a rehearing would follow.

6.7 In the Working Paper, the Commission raised the question whether a rehearing should be permitted where there had been a miscarriage of justice.[5] Such a concept could cover the following situations -

(a) where it is shown that a plea of guilty was not a reasoned choice of the defendant because of his mental condition at the time the plea was made;

(b) where there has been fraud by the complainant, for example, where he has been convicted of perjury;

(c) where fresh evidence is available; and

(d) where one or more of the justices presiding at the initial hearing is alleged to be biased. In this circumstance it would be desirable for the application for a rehearing to be made to a bench which did not include the justice concerned.

6.8 In its comments on the Working Paper, the Law Society suggested that such a provision for a rehearing be made. The Commission agrees and recommends accordingly. If, for any reason, it is impracticable or undesirable for the justices who heard the matter initially to hear the application for rehearing, any other justices or a magistrate should be able to hear it.

CASE STATED

6.9 In the Working Paper, the Commission raised the question whether provision should be made for the statement of a case to the Supreme Court during a trial by justices.[6] The Commission, having further considered the matter, recommends that no provision for the

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5 See, for example, s.75 of the *Summary Proceedings Act 1957* (NZ) referred to in paragraph 4.10 of the Working Paper.

6 See paragraphs 5.1 to 5.3 of the Working Paper.

statement of a case to the Supreme Court should be made.[7] Experience in other areas where cases may be stated (for example, workers compensation) has shown that the process can be cumbersome and can cause delay. Problems can arise if the questions of law have not been properly or clearly framed, or if questions which should have been asked have been omitted, or if the court hearing the case does not consider that sufficient findings of fact have been made. In these circumstances it is necessary to return the matter to the lower court to restate the questions, or to state a question which should have been asked, or to make the necessary findings of fact. If no power to state a case is given, the present position will continue to apply whereby the justices make a decision in the light of the law as they determine it to be. If their view is incorrect, this can be remedied on appeal if a party, or the Attorney General, wishes to take that course.

7 This is also the view of the Chief Justice.

CHAPTER 7 - SUMMARY OF RECOMMENDATIONS

7.1 The Commission summarizes its recommendations as follows –

The scope of the appeal

1. The present dual mode system of appeals should be replaced by a single system.

(paragraph 3.1)

2. All decisions of justices (except those of an incidental nature) should be subject to appeal as at present.

(paragraphs 3.3 to 3.6)

3. There should continue to be express provision for a defendant who pleads guilty to appeal against conviction.

(paragraphs 3.7 & 3.8)

4. Both the complainant and the defendant should be able to appeal against the same range of decisions of justices and the grounds of appeal should be left at large.

(paragraphs 3.9 to 3.11)

5. The existing rights of appeal of the Attorney General should be retained.

(paragraphs 3.13 to 3.15)

6. Any other person who is aggrieved by a decision of justices should continue to be able to appeal.

(paragraphs 3.16 to 3.19)

7. Any person wishing to appeal should be required to obtain leave.

(paragraphs 3.20 to 3.28)

8. The judge hearing the application for leave should only refuse; it where he considers that the appeal is frivolous or vexatious or that the grounds of appeal advanced do not disclose an arguable case.

(paragraph 3.27)

9. There should be an appeal to the Court of Criminal Appeal from the grant or refusal of leave to appeal.

(paragraph 4.7)

The hearing of the appeal

10. The Supreme Court should continue to be the appellate court in the case of appeals from decisions of justices.

(paragraphs 4.1 & 4.2)

11. The appeal should be by way of a rehearing.

(paragraph 4.3)

12. The judge hearing the appeal should have power to -

(a) amend or add to the grounds stated in the Notice of Appeal;
(b) obtain details of the evidence and of the proceedings before the justices, including any notes taken;
(c) in addition to considering the evidence and materials which were before the justices, rehear any witness, or hear further evidence, either orally or by affidavit;
(d) vary, amend, rescind or quash the decision appealed against and any order, conviction or other proceeding founded upon it (including any penalty or sentence);
(e) remit the case for hearing or rehearing to the justices who made the decision, or to any other justices;
(f) dismiss the appeal if he considers that no substantial miscarriage of justice has occurred;

(g) make such other order as he thinks just, including those which can be made on the prerogative writs;

(h) award costs;

(i) refer the appeal to the Court of Criminal Appeal if he considers that it is desirable.

(paragraphs 4.4 & 4.5)

13. There should be an opportunity of further appeal from a judge of the Supreme Court to the Court of Criminal Appeal with the leave of the latter Court in special circumstances.

(paragraph 4.6)

Procedure

Rules of Court

14. The procedure in respect of appeals should be contained in Rules of Court.

(paragraph 5.2)

Institution of appeals

15. The appeal should be commenced by an Application for Leave to Appeal which should be -

(a) filed in the Central Office of the Supreme Court at Perth;

(paragraph 5.4)

(b) in writing in a prescribed form, stating with sufficient particularity the grounds upon which the appeal is based;

(paragraph 5.5)

(c) supported by an affidavit sworn by the appellant or his solicitor;

(paragraph 5.6)

(d) filed within twenty-one days of the date of the decision appealed against.

(paragraph 5.7)

16. * An appellant should be able to apply for an extension of the time for appealing.

(paragraph 5.7)

17. * An application for leave to appeal should normally be heard ex parte.

(paragraph 5.8)

18. The judge should be empowered to require the appellant to serve a notice on the other party so that he can be heard on the application for leave.

(paragraph 5.8)

19. There should be power for an application for leave, and the appeal itself, to be heard together.

(paragraph 5.9)

20.* Where an application for leave is granted the judge should determine whether the appeal should be heard by the Court of Criminal Appeal or a single judge.

(paragraph 5.10)

21. The Application for Leave to Appeal (amended where necessary) should stand as a Notice of Appeal.

(paragraph 5.10)

22. The appellant should be responsible for serving the Notice of Appeal on the other party and the clerk of Petty Sessions within ten days of being granted leave to appeal.

(paragraph 5.11)

23. * The Registrar should be required to send a copy of the Notice of Appeal to the Attorney General.

(paragraph 5.11)

24. Where an appellant appeals against a number of decisions made at the one hearing he should be able to commence the appeal by one Application for Leave to Appeal.

(paragraph 5.13)

Security for appeal and costs

25. There should be no requirement for an appellant to enter into a recognisance relating to the appeal or the costs of the appeal.

(paragraphs 5.14 to 5.16)

Bail

26. * An appellant who is in custody should be able to apply to a judge of the Supreme Court for bail pending the outcome of the appeal.

(paragraph 5.17)

27. * Where the Attorney General appeals against a conviction or order as a result of which a person has been imprisoned that person should also be able to apply for bail.

(paragraph 5.18)

28. * Where a person is released from custody on bail the person releasing him should report that fact to the Master of the Supreme Court and also to the Attorney General.

(paragraph 5.19)

29. A judge of the Supreme Court should be able to issue a warrant committing a person released from custody pending an appeal to prison where the appeal is -

(a) dismissed; or
(b) discontinued.

(paragraph 5.20)

30. The sentence of a convicted appellant who is released on bail should not resume or begin to run until the day he is received into prison under the sentence.

(paragraph 5.21)

31. A convicted appellant who is held in custody pending an appeal (unless he is held for some other reason) should be able to elect whether to continue to serve his sentence or be treated as a prisoner unconvicted of a crime. If he elects the former his sentence of imprisonment would not be interrupted. If he elects the latter, his sentence would be interrupted unless the judge hearing the appeal orders that it form part of his sentence.

(paragraphs 5.22 to 5.24)

Stay or other proceedings

32. In the case or decisions other than those involving a sentence or imprisonment, the proceedings should be stayed once leave to appeal has been granted and the Notice or Appeal has been served on the clerk or Petty Sessions.

(paragraphs 5.25 to 5.27)

Transmission or documents to the Supreme Court

33. The relevant clerk or Petty Sessions should forward the file relating to the proceedings before the justices to the Supreme Court as soon as the appeal is instituted.

(paragraphs 5.28 & 5.29)

34. * Appeal books should continue to be lodged unless the Master or the Supreme Court determines that they are not required in any particular case.

(paragraph 5.30)

35. A party to an appeal should be able to obtain copies or those documents relating to the decision appealed against which are in the custody or the clerk or Petty Sessions or the Registrar or the Supreme Court.

(paragraphs 5.31 & 5.32)

36. The clerk or Petty Sessions should be required to retain custody or exhibits for a period or at least thirty-one days after a trial, and where leave to appeal is granted, until the appeal has been disposed or.

(paragraph 5.33)

Entry for hearing

37. An appeal should be entered for hearing within fourteen days from the date or service or the Notice or Appeal on the other party and the clerk or Petty Sessions.

(paragraph 5.34)

38.* The appeal should be entered for hearing by filing and serving a Notice or Entry or Appeal and attending on the List Clerk to fix a date for hearing the appeal.

(paragraph 5.34)

Failure to prosecute appeal

39. A judge should be able to dismiss an appeal on the application of the respondent or the Attorney General if the appellant fails to -

(a) prosecute the appeal without undue delay;
(b) take any necessary step in the presentation of the appeal;
(c) appear on the day on which the appeal is to be heard.

(paragraphs 5.35 & 5.36)

40. The hearing of an application to dismiss an appeal should proceed in the absence of the appellant if he fails to appear. Where an appeal is dismissed in

his absence, the appellant should be able to apply to a judge to have the order set aside if he can show good reason for his failure to appear.

(paragraph 5.38)

Hearing of the appeal and the decision

41. Where a defendant is unrepresented on an appeal he should be able to present his case in writing and should be allowed to be present in Court.

(paragraph 5.40)

42. A defendant who is in custody should be entitled to be present at any proceedings relating to an appeal if he is unrepresented. If he is represented, he should not be entitled to attend except with the leave of a judge of the Supreme Court.

(paragraph 5.41)

Implementing the results of the appeal

43. The Registrar of the Supreme Court should send a memorandum of the decision made on an appeal to the appropriate clerk of Petty Sessions, the Attorney General and any party to the appeal who was not present or represented when the decision was given. Such a course of action should also be taken where an appeal is dismissed for failure to prosecute it.

(paragraph 5.42)

44 * A person held in custody whose conviction is quashed or whose sentence is set aside should be released immediately unless the Court imposes another sentence of imprisonment.

(paragraph 5.43)

45 * Where, on appeal, a decision of justices has been affirmed, amended, varied, or a new decision made, any justice should have authority to enforce it as if it had been made by him.

(paragraph 5.45)

Further appeal

46. A procedure should be provided for a further appeal from a single judge to the Court of Criminal Appeal.

(paragraph 5.48)

Miscellaneous

47. The practice of hearing ordinary appeals in circuit districts should apply to appeals under the proposed system.

(paragraph 5.49)

48. It should be possible to amend a Notice of Appeal before the hearing of the appeal.

(paragraph 5.50)

49. A judge should be able to order the consolidation of one appeal with another and to make orders with respect to the entry of the appeal for hearing and the preparation of appeal books.

(paragraph 5.51)

50. Express provision should be made for an appellant to discontinue an appeal by filing a notice to that effect.

(paragraphs 5.52 to 5.54)

51. * Provision should be made enabling a judge to enlarge or abridge any time appointed for doing any act or taking any proceedings relating to an appeal.

(paragraph 5.55)

52. * The provisions in the *Justices Act 1902* relating to informalities (ss.211 to 214) should be retained.

(paragraph 5.56)

53. Service of notices and documents relating to an appeal should be permitted in any of the following ways -

(a) by personal service, or where the person refuses to accept it, by the notice or document being brought to his attention and leaving a copy of it with him;
(b) by registered letter addressed to the party's last known or usual address or place of business;
(c) by leaving it at his place of residence with a member of his family living with him and appearing to be of or over the age of sixteen years;
(d) if represented by a solicitor, at the business address of the solicitor.

(paragraph 5.57)

54. Provision should be made for substituted service of notices and documents.

(paragraph 5.58)

55. The names of solicitors acting for parties to an appeal should be required to be entered on the court record.

(paragraph 5.57)

56. In cases other than those where an appellant has been released on bail pending an appeal an appellant should not be liable to be arrested for absconding.

(paragraph 5.61)

57. There should be provision for the taxation of costs and for the enforcement of costs ordered to be paid in accordance with Part VII of *the Supreme Court Act 1935* and the *Rules of the Supreme Court 1971*.

(paragraphs 5.62 & 5.63)

58. * Provision should continue to be made for the costs of the Attorney General, when he appeals, to be paid out of the Consolidated Revenue Fund.

(paragraph 5.64)

Other matters

59. The procedure for rectification of orders under s.166B of the *Justices Act 1902* should be clarified so that it is clear that -

(a) it is available where -
  (i) justices have erred on the true facts, or
  (ii) where the penalty is imposed on incorrect facts which are subsequently corrected;
(b) if the justices who made the initial decision are not available, the order should be rectifiable by two other justices or a magistrate.

(paragraphs 6.4 & 6.5)

60. There should be provision for a rehearing before justices or a magistrate where there has been a miscarriage of justice.

(paragraphs 6.6 to 6.8)

61. There should be no provision for the statement of a case to the Supreme Court during a trial by justices.

(paragraph 6.9)

(Signed) David K. Malcolm
Chairman

Neville H. Crago
Member

Eric Freeman
Member

5 April 1979

* An asterisk denotes that this is similar to an existing requirement in regard to appeals by way of an order to review.

APPENDIX

List of those who commented on the working paper

The Hon. Sir Francis Burt, Chief Justice of Western Australia

Goudie, W.R.

Rarlock, R.F., S.M.

The Law Society of Western Australia

Rowland, B.W., Q.C.

The Hon. Mr. Justice Wallace