



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 55 Part I**

**Review of  
The Justices Act 1902**

**WORKING PAPER**

**FEBRUARY 1978**

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

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# CONTENTS

## PREFACE

<b>CHAPTER 1 – TERMS OF REFERENCE</b>	<b>1.1</b>
Collection of Information	1.3
<i>Preliminary submissions</i>	1.3
<i>The Law in other jurisdictions</i>	1.4
<i>Statistical survey</i>	1.5
<b>CHAPTER 2 – APPEALS: PRESENT LAW IN WESTERN AUSTRALIA</b>	
<b>PART A: RIGHT OF APPEAL</b>	<b>2.1</b>
Introduction	2.1
Ordinary appeals	2.3
Appeals by way of an order to review	2.5
Miscellaneous	2.17
<b>PART B: THE HEARING OF THE APPEAL</b>	
<b>PART C: PROCEDURE</b>	
(a) Institution of appeals and notice to other parties	2.26
<i>Ordinary appeal</i>	2.26
<i>Order to review</i>	2.28
(b) Security for appeal	
<i>Ordinary appeal</i>	2.33
<i>Order to review</i>	2.36
(c) Bail	
<i>Ordinary appeal</i>	2.39
<i>Order to review</i>	2.41
(d) Stay of execution	2.44
<i>Ordinary appeal</i>	2.44
<i>Order to review</i>	2.45
(e) Transmission to appellate court	2.47
<i>Ordinary appeal</i>	2.47
<i>Order to review</i>	2.49

(f)	Entry for hearing and notice to parties	2.51
	<i>Ordinary appeal</i>	2.51
	<i>Order to review</i>	2.53
(g)	Failure to prosecute appeal	2.55
	<i>Ordinary appeal</i>	2.55
	<i>Order to review</i>	2.56
(h)	Implementing the results of the appeal	2.57
	<i>Ordinary appeal</i>	2.57
	<i>Order to review</i>	2.61
(i)	Miscellaneous	2.63
	(i) <i>Enlargement or abridgement of time</i>	2.64
	(ii) <i>Effect of informalities</i>	2.66
	(iii) <i>Service of notices and documents</i>	2.67
	(iv) <i>Arrest of absconding appellants</i>	2.68
	(v) <i>Provision for rules</i>	2.70

### CHAPTER 3 - APPEALS: POSSIBLE REFORMS

PART A: RIGHT OF APPEAL	3.1
A single mode of appeal	3.2
Ambit of appeal	3.3
(i) <i>Decisions on incidental matters</i>	3.4
(ii) <i>Committal for trial</i>	3.5
(iii) <i>Appeal by defendant who pleads guilty</i>	3.6
Who should be able to appeal and on what grounds?	3.7
<i>Defendant</i>	3.7
<i>Complainant</i>	3.9
<i>Attorney General</i>	3.12
<i>Other persons</i>	3.15
Leave to appeal	3.17
PART B: THE HEARING OF THE APPEAL	3.21
The appellate court	3.21
Further appeals	3.27
Powers of the appellate court	3.29

PART C: PROCEDURE	3.38
INTRODUCTION	3.38
THE PLACE OF RULES OF COURT	3.39
APPEALS AS OF RIGHT	3.40
(a) Institution of appeal and notice to other parties	3.40
<i>Frivolous or vexatious appeals</i>	3.44
<i>Other matters</i>	3.46
(i) Appeal on more than one matter	3.46
(ii) Amendment of notice of appeal before hearing	3.47
(iii) Consolidation of appeals	3.48
(iv) Discontinuing appeals	3.49
(b) Security for appeal and costs	3.52
(c) Bail	3.57
(d) Stay of other proceedings	3.67
(e) Transmission of documents to appellate court	3.70
(f) Entry for hearing and notice to parties	3.76
(g) Failure to prosecute appeal	3.77
(h) Hearing of the appeal and the decision	3.80
(i) Implementing the results of the appeal	3.85
(j) Further appeal	3.91
(k) Miscellaneous	3.92
(i) <i>Enlargement or abridgement of time</i>	3.92
(ii) <i>Effect of informalities</i>	3.93
(iii) <i>Service of notices and other documents</i>	3.94
(iv) <i>Arrest of absconding appellant</i>	3.97
(v) <i>Costs</i>	3.99
APPEALS WITH LEAVE	3.104
(a) Institution of appeal and notice to other parties	3.104
<i>Other matters</i>	3.112
(b) Security for appeal and costs	3.114
(c) Bail	3.115
(d) Stay of other proceedings	3.116
(e) Miscellaneous	3.117
<b>CHAPTER 4 - AMENDMENT OF DECISION OTHER THAN BY WAY OF APPEAL</b>	
Introduction	4.1
Rectification of orders	4.2
Rehearing	4.8

**CHAPTER 5 - OTHER MATTERS**

Case stated during hearing	5.1
Case stated after decision	5.4
Administrative matters	5.6

**CHAPTER 6 - SUMMARY OF QUESTIONS FOR DISCUSSION** 6.1

**APPENDIX - JUSTICES ACT 1902: PART VIII - APPEALS FROM  
THE DECISIONS OF JUSTICES**

## PREFACE

The Law Reform Commission has been asked to review the *Justices Act 1902*. As the first part of this project, the Commission has resolved to consider the law relating to appeals under Part VIII of the *Justices Act*.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticism (with reasons where appropriate) on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 12 May 1978.

Copies of the paper are being sent to the -

Aboriginal Legal Service of Western Australia  
Australian Legal Aid Office  
Chief Justice and Judges of the Supreme Court  
Citizens Advice Bureau  
Civil Liberties Association  
Commissioner of Police  
Commonwealth Deputy Crown Solicitor  
Crown Counsel  
Crown Prosecutor  
Crown Solicitor  
Institute of Legal Executives  
Judges of the District Court  
Judges of the Family Court  
Law School of the University of Western Australia  
Law Society of Western Australia  
Legal Aid Commission of Western Australia  
Magistrates' Institute  
Master of the Supreme Court  
Solicitor General  
Parliamentary Counsel  
Under Secretary for Law  
Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the working paper and to submit comments.

The research material on which the working paper is based is at the offices of the Commission and will be made available there on request.



# CHAPTER 1

## TERMS OF REFERENCE

1.1 "To consider and report upon the procedure for appeals from decisions of Courts of Petty Sessions,<sup>1</sup> with a view to such appeals being simplified and, amongst other things, rendered less costly".

1.2 After receiving the above terms of reference the Commission was asked to review the *Justices Act 1902*.<sup>2</sup> The Commission considered the possibility of incorporating the question of appeals from Courts of Petty Sessions in a comprehensive working paper reviewing the *Justices Act*. As the Attorney General has since asked the Commission to give priority to the reform of the law and procedure relating to appeals the Commission now issues this working paper confined to that topic.

### Collection of information

#### *Preliminary submissions*

1.3 In February 1977, in order to help identify problems in the operation of the *Justices Act*, the Commission by means of a press advertisement invited preliminary submissions from persons interested. A number of the submissions related to appeals under the *Justices Act*, and where relevant these are referred to in this working paper.

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<sup>1</sup> The term "Courts of Petty Sessions" is very wide and includes not only a justice or magistrate sitting as a Court of Petty Sessions to determine a matter for which jurisdiction is conferred by the *Justices Act*, but also matters where jurisdiction is conferred by some other Act: see *Interpretation Act 1918*, s.4 and s.15(1) of the *Justices Act 1902*. Justices and magistrates may also be required to make decisions out of a Court of Petty Sessions. The following are examples of decisions which may be made by a Court of Petty Sessions, or justices out of a Court of Petty Sessions -

- (a) The issue of a search warrant under s.711 of the *Criminal Code*.
- (b) Whether publications seized by a member of the Police Force should be returned to the person from whom the publication was seized: *Indecent Publications and Articles Act 1902*, s.12A(6) .
- (c) To determine whether an animal or food seized is diseased, unsound, unwholesome or unfit for human consumption: *Health Act 1911*, s.202.

However, it is not clear whether all such decisions are subject to review by the Supreme Court: see paragraph 5.7 below. The jurisdiction of magistrates and justices in the circumstances referred to above should be distinguished from the jurisdiction of Local Courts, which are constituted by a Stipendiary Magistrate and have a limited civil jurisdiction: see *Local Courts Act 1904*, ss.30-34.

<sup>2</sup> The law and procedures relating to appeals from Courts of Petty Sessions is contained in Part VIII of the *Justices Act 1902*. This Part of the *Justices Act 1902* is reproduced as an Appendix to this paper.

*The law in other jurisdictions*

1.4 The Commission has carried out a study of the law in the following jurisdictions:

South Australia:	<i>Justices Act 1921.</i>
Tasmania:	<i>Justices Act 1959.</i>
Victoria:	<i>Magistrates' Courts Act 1971, Magistrates (Summary Proceedings) Act 1975.</i>
New South Wales:	<i>Justices Act 1902.</i>
Queensland:	<i>Justices Act 1886.</i>
Australian Capital Territory:	<i>Court of Petty Sessions Ordinance 1930.</i>
New Zealand:	<i>Summary Proceedings Act 1957.</i>
England:	<i>The Magistrates' Courts Act 1952, The Courts Act 1971.</i>

Where considered significant the law in those jurisdictions will be referred to in this working paper.

*Statistical survey*

1.5 The Commission has also carried out a survey of appeals instituted during 1976 under Part VIII of the *Justices Act*. One significant finding was that the majority of appeals were by way of an order to review. In 1976 there were 117 applications for an order to review, but only two ordinary appeals were instituted.<sup>3</sup> Other relevant findings of the survey are referred to in this working paper.

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<sup>3</sup> The circumstances in which a person may appeal by way of an order to review and by an ordinary appeal are discussed in paragraphs 2.3 to 2.16 below.

## CHAPTER 2

### APPEALS: PRESENT LAW IN WESTERN AUSTRALIA

#### PART A: RIGHT OF APPEAL

##### Introduction

2.1 An appeal from a decision of justices<sup>1</sup> is not a common law procedure but is wholly a creature of statute.<sup>2</sup> In Western Australia, the authority and the procedure for an appeal to the Supreme Court from a decision of justices is contained exclusively in Part VIII of the *Justices Act*. Section 221 of the Act goes so far 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".

This does not, however, prevent a person from challenging the jurisdiction, proceedings and decisions of justices by issuing a prerogative writ out of the Supreme Court.<sup>3</sup> There are four relevant prerogative writs,<sup>4</sup> namely habeas corpus, certiorari, prohibition and mandamus.<sup>5</sup> These writs, and their scope and operation, are deeply rooted in the common law. Although only used occasionally,<sup>6</sup> these remedies should be retained, as they may continue to serve a useful purpose alongside the appeal procedure.

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<sup>1</sup> Throughout this working paper, 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*. Note that Part VIII does not apply to decisions made by justices in respect of prison offences under the Prisons Act 1903: *Stratton v Holden* [1977] WAR 97.

<sup>2</sup> See Abbott C.J. in *R. v Hanson* (1821) 4 B & Ald. 519 at 521; 106 ER 1027 at 1028, and Kennedy Allen, *The Justices Acts (Queensland)* (3rd ed. 1956) at 522.

<sup>3</sup> Proceedings by way of a prerogative writ are not an appeal. They rather exist in order to secure a residue of supervisory jurisdiction by the superior courts. Further consideration of these writs falls outside the purview of this paper.

<sup>4</sup> The two major characteristics of the prerogative writs are that they are not writs of course (that is, proper cause must be shown to a court before they can be issued) and the award of the writs usually lies within the discretion of the court.

<sup>5</sup> Section 39 of the *Justices Act 1902* provides for an order which operates in a manner similar to mandamus: see *Klopper v Hogg* [1961] WAR 92 for an application of this provision. For a general discussion of the prerogative remedies of habeas corpus, certiorari, prohibition and mandamus see Paley, *Summary Convictions* (10th ed. 1953) at 365-377.

<sup>6</sup> A writ of mandamus was recently issued when a magistrate ruled that he could not proceed with a case because both he and the prosecutor were public servants and could be accused of bias. The Full Court of the Supreme Court held that the magistrate had no ground for disqualifying himself from the case: see *Falconer v Howe and Baker* [1977] Supreme Court of Western Australia 1397/77.

2.2 There are at present two modes of appeal: the ordinary appeal and the appeal by way of an order to review. The development of these two modes of appeal, which find their historical roots in the nineteenth century, is discussed briefly below.

### Ordinary appeals

2.3 During the nineteenth century a right of ordinary appeal, which involved an appeal as of right, as distinct from an appeal by leave, was to be found in various statutes creating offences which could be determined by justices. For example, s.21 of the *Sale of Spirituous and Fermented Liquors by Retail Act 1832*<sup>7</sup> gave a right of appeal to any person aggrieved by any judgment or conviction made under the Act regardless of whether he had pleaded guilty or not guilty.

2.4 The *Justices Act 1902* consolidated these various appeal provisions and gave a right of ordinary appeal to a person if he -

- (i) was summarily convicted or had an order made against him; and
- (ii) did not plead guilty or admit the truth of the complaint; and
- (iii) was imprisoned without the option of a fine<sup>8</sup> or if he was fined more than \$20.

In 1919 an amendment to the *Justices Act 1902*<sup>9</sup> narrowed this right of appeal by deleting the provision allowing such an appeal where a fine exceeding \$20 was imposed. This right of appeal has otherwise remained unchanged for some seventy-five years.<sup>10</sup>

### Appeals by way of an order to review

2.5 The other mode of appeal originates from an Ordinance<sup>11</sup> to improve the law concerning summary proceedings before justices. This provided that a party to such

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<sup>7</sup> 2 Wm IV No.8.

<sup>8</sup> A person who feels himself aggrieved by a summary conviction for an offence in respect of which a probation order is made may appeal against the conviction by way of an ordinary appeal notwithstanding that no imprisonment is adjudged without the option of a fine: *Offenders Probation and Parole Act 1963*, s.20(4).

<sup>9</sup> *Justices Act Amendment Act 1919*, s.18.

<sup>10</sup> Section 183 was amended in 1948: *Justices Act Amendment Act 1948*, s.3. However, this amendment related only to the appellate court, and did not affect the ambit of the appeal.

<sup>11</sup> 23 Vict. No.3 (1859).

proceedings could require the justices to state a case for consideration by a higher court where he was dissatisfied with the determination as being erroneous in point of law.<sup>12</sup>

2.6 When the law relating to appeals was consolidated in 1902 the case stated method applied when either party desired to appeal from a decision of justices on the ground that it was erroneous in point of law or in excess of jurisdiction.<sup>13</sup> The procedure required the applicant in writing to require the justices to state a case for consideration by the Supreme Court. Security was required to prosecute the appeal without delay, submit to the judgment, pay costs and, if bail was granted, to appear before a justice or justices to abide by the decision of the Supreme Court.<sup>14</sup> If the justices refused to state a case, for example, if it was thought that the appeal was frivolous,<sup>15</sup> the applicant could apply direct to the Supreme Court for an order calling upon the justices and the party supporting the decision to show cause why a case should not be stated.<sup>16</sup>

2.7 In 1919 an amendment<sup>17</sup> to the *Justices Act* abolished appeals by way of case stated and replaced them with appeals by way of an order to review. The appeal by way of order to review appears to have been first provided in Queensland in 1886,<sup>18</sup> and then in Victoria the following year.<sup>19</sup> The order to review was seen as a procedural simplification. Its purpose seems to have been to amalgamate appeals by way of case stated and the use of prerogative writs to challenge decisions made by justices, though the prerogative writs were not abolished. By combining the various features of these different remedies into a mode of appeal, there would no longer be a danger of an application failing simply because the appellant was pursuing the wrong remedy. In 1886, in introducing the bill providing for the new procedure, H. Cuthbert said:<sup>20</sup>

"I propose....to render it [appealing] as simple as possible, by providing that all that shall be necessary shall be to ask for an 'order to review'. While none of the different common-law remedies which at present exist are swept away, the clause provides that all that any person who is dissatisfied with a decision of a court of petty sessions will

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<sup>12</sup> This Ordinance was based on an English provision, the *Summary Jurisdiction Act 1857* (20 & 21 Vict. c.43).

<sup>13</sup> *Justices Act 1902*, s.197.

<sup>14</sup> *Ibid.*, ss.198 and 199.

<sup>15</sup> *Ibid.*, s.200.

<sup>16</sup> *Ibid.*, s.201.

<sup>17</sup> *Justices Act Amendment Act 1919*, s.20.

<sup>18</sup> *Justices Act 1886* (Qld), ss.209-217.

<sup>19</sup> *The Justices of the Peace Act 1887* (Vic), ss.150-160.

<sup>20</sup> Vic. Parl. Deb. (1886) Vol. 52 at 1519. The Bill was reintroduced and passed in 1887.

have to do in order to appeal against that decision will be to show to a Judge of the Supreme Court, by affidavit, that he has reason to be dissatisfied with the decision, and, if he does so, the Judge will grant him an order calling upon the parties concerned to show cause why the decision should not be reviewed".

2.8 In Western Australia when the order to review replaced appeals by way of case stated in 1919, the Attorney General said that the appeal by way of case stated:<sup>21</sup>

"...is not satisfactory, for the reason that, first of all, it means that the parties have to agree upon the facts stated. In practice it generally works out that the magistrate is asked by the appellant to state a case. The magistrate then asks the appellant's solicitor, and also the solicitor for the respondent, to appear before him and agree upon the facts. It generally means rather lengthy and not very satisfactory argument... Generally speaking, in practice I do not think the profession have found that an appeal by way of case stated on a point of law really works very well".

2.9 An appeal by way of an order to review 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 an order is made the appeal is then heard on its merits. Provision is made for two categories of appeal by way of an order to review.<sup>22</sup> First, to "...a person who feels aggrieved as complainant, defendant, or otherwise by the decision of any Justices..." 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;<sup>23</sup>
  - (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.

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<sup>21</sup> W.A. Parl. Deb. (1919) Vol. 60 at 390.

<sup>22</sup> *Justices Act 1902*, s.197(1) (a) and (b).

<sup>23</sup> This would appear to allow appeals on the grounds that the decision was contrary to the evidence, or that it was against the weight of evidence. In the first case, where there is no evidence to support the decision it will be set aside. In the second case, if the relative credibility of witnesses who have been examined and cross-examined requires consideration the appellate court will not reverse a decision on a question of fact unless it is manifestly wrong: see *Coghlan v Cumberland* [1898] 1 Ch 704 quoted with approval in *Dearman v Dearman* (1908) 7 CLR 549 at 553. However, a distinction must be drawn between questions relating to primary facts and those relating to inferences of fact. Where the only question is as to the inferences to be drawn from proved facts, the appellate court is generally in as good a position to evaluate the evidence as the trial court: see *Benmax v Austin Motor Co. Ltd.* [1955] 1 All ER 326 at 329. The use of the words "against the weight of the evidence" in formulating the grounds of appeal was recently criticised by Jones J. in *Nowotny v Millar* [1977] Supreme Court of Western Australia, No. 107/1977.

2.10 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"<sup>24</sup> and so able to appeal by way of an order to review. For example, it would appear that a person on whom a fine is imposed under s.75(1) of the *Justices Act* for neglecting or refusing to appear as a witness at the time and place appointed by a summons may appeal against that decision by way of an order to review.

2.11 Second, to a person who is convicted, after pleading guilty or admitting the truth of the complaint, if he shows by affidavit to a Judge that there are sufficient reasons to show that the decision of the justices should be reviewed. Provision for an appeal in the latter circumstance was introduced by legislation in 1964<sup>25</sup> following comments by Hale J. in *Di Camillo v Wilcox*.<sup>26</sup> In that case the defendant had pleaded guilty so that he had no right of ordinary appeal, and on an appeal by way of an order to review, was unable to show a want or excess of jurisdiction, or an error or mistake in law or fact. Hale J. said:<sup>27</sup>

"...I cannot regard it as satisfactory that where a man is convicted in petty sessions on his plea of guilty and where this Court is persuaded that there is real doubt as to the propriety of that plea (but without error on the part of the magistrate or justices) and where the man merely asks that he be tried in the ordinary way on the charge made against him, that then the Supreme Court is without power to see that he has such a trial".

2.12 A further amendment to the right to appeal under the *Justices Act* was made in 1972.<sup>28</sup> In that year s.197 was amended to empower the Attorney General to seek an order to review. In introducing the amendment the Attorney General said:<sup>29</sup>

"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

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<sup>24</sup> This only gives a right of appeal to a person who has had something done or determined against him and who has suffered a legal grievance: *Ex parte Sidebotham* [1874-80] All ER Rep 588 at 590. See also Kennedy Allen, *The Justices Acts (Queensland)* (3rd ed. 1956) at 472-473.

<sup>25</sup> *Justices Act Amendment Act 1964*, s.2.

<sup>26</sup> [1964] WAR 44.

<sup>27</sup> *Ibid.*, at 49. See *Slater v Marshall* [1965] WAR 222 a case in which this section applied.

<sup>28</sup> *Justices Act Amendment Act 1972*, s.13.

<sup>29</sup> W.A. *Parl. Deb.* (1972) Vol. 193 at 440.

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".

2.13 The order to review procedure applies to a "decision" of justices. A "decision" includes:<sup>30</sup>

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

Thus, the appeal provisions apply<sup>31</sup> not only to a final determination such as a conviction or acquittal but also to a decision to commit for trial, to grant bailor to issue a warrant for arrest<sup>32</sup> or a search warrant.<sup>33</sup>

2.14 The definition of decision would appear to include decisions which do not finally determine a matter before justices and which are merely incidental, 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. However, it would appear that such decisions may not be the subject of a separate appeal but only grounds for an appeal against the final determination of the matter being heard by the justices. In *Brennan v Williams*, Dwyer C.J. said:<sup>34</sup>

"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*".

2.15 There appear to be two limitations on the scope of an order to review arising from the need to show an "error or mistake in law or fact". First, an allegation of an error or mistake in law or fact can only be made with respect to the material before the trial court and fresh evidence<sup>35</sup> may not be produced.<sup>36</sup>

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<sup>30</sup> *Justices Act 1902*, s.4. The reprint of the *Justices Act 1902* approved for reprint 17 November 1972 contains a misprint as it does not have a comma after the word "conviction".

<sup>31</sup> See note 1, at p.4 above, for an instance where the appeal provisions do not apply.

<sup>32</sup> See for example, *Criminal Code*, s.439.

<sup>33</sup> See *T.V.W. Limited v Robinson and Cant* [1964] WAR 33.

<sup>34</sup> (1951) 53 WALR 30 at 31.

<sup>35</sup> Such evidence must be fresh in the sense that it was not available to the appellant at the time of the trial: see *Gouldham v R.* [1970] WAR 119 at 121-122. See also *Craig v R.* (1933) 49 CLR 429 at 439 for the principles to be followed in considering whether a new trial should be granted because fresh evidence is available.

<sup>36</sup> See *Chen Yin Ten v Little* (1976) 11 ALR 353 at 361 where Burt J. (as he then was) said:



2.16 Second, not all discretionary decisions may involve a question of law or fact.<sup>37</sup> The result is that a discretionary decision, other than one relating to a penalty or sentence for which there is specific provision,<sup>38</sup> may not be subject to appeal by way of an order to review if it did not involve an error or mistake in law or fact.

### **Miscellaneous**

2.17 A Judge may not make an order to review if the applicant has a right of ordinary appeal.<sup>39</sup> However, if the applicant does manage to obtain an order to review and appeals by way of such an order, he is estopped from proceeding on the basis of his right of ordinary appeal.<sup>40</sup>

2.18 Section 218 provides that no writ of certiorari or other writ is required to remove any conviction, order or other decision into the Supreme Court.

### **PART B: THE HEARING OF THE APPEAL**

2.19 In the case of an ordinary appeal, the appeal is heard by a Judge in Perth, but a Judge may, on the application of a party, order that it be heard by a Judge in a Circuit District.<sup>41</sup> 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.<sup>42</sup> The powers of the Court on the hearing of the appeal are contained in s.190. The Court may adjourn the hearing, confirm or reverse or modify the decision, remit the case back to the Court of Petty Sessions or make such other order as it thinks fit and exercise any power which might have been exercised by the Court of Petty Sessions. Section 190(2) allows the Court to make such order as to costs as it thinks fit. However, s.219 provides that no costs shall be awarded against a justice or police

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"There is considerable authority for the view that the question for the court to decide upon the return of an order *nisi* to review is whether the decision of the Court of Petty Sessions was right or wrong upon the material placed before it".

<sup>37</sup> For example, Courts of Petty Sessions exercise jurisdiction of a purely administrative kind: see paragraph 3.16 below. An applicant may consider that the court's decision to refuse to grant him an inquiry agent's licence was wrong even though he is unable to point to any specific mistake of law or fact. See generally de Smith, *Judicial Review of Administrative Action* (2nd ed. 1968) at 89-90.

<sup>38</sup> See *Justices Act 1902*, s.197(1) (a).

<sup>39</sup> *Justices Act 1902*, s.197(1).

<sup>40</sup> *Ibid.*, s.2061.

<sup>41</sup> *Ibid.*, s.183.

<sup>42</sup> *Ibid.*, s.191.

officer in respect of any appeal, or of any proceeding in the Supreme Court in its control over summary convictions. There is an exception 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 this case, costs may be allowed to the respondent. However, the costs are not recoverable from the police officer but are payable by the Treasurer on production of a certificate from the Registrar of the Supreme Court showing the amount.

2.20 An order to review is heard either by the Supreme Court sitting as a Full Court or by a single Judge depending on the order made by the Judge who granted the application.<sup>43</sup> However, if a single Judge who is hearing the appeal thinks it desirable, he may, at the request of any party to the appeal, refer the appeal to the Full Court.<sup>44</sup> Where orders to review have been granted to the Attorney General and another person in respect of the same decision, both orders may be heard together.<sup>45</sup> The Act does not specify whether appeals by way of an order to review may be heard in a circuit town. In practice they are usually heard in Perth.<sup>46</sup>

2.21 Upon hearing the appeal, the Court or Judge may amend or add to the grounds stated in the order to review.<sup>47</sup> There is power to obtain details of the evidence and of the proceedings before the justices, including any notes taken, and power to rehear the evidence.<sup>48</sup> There is also power to hear further evidence, oral or by affidavit, and the Court or Judge may amend the sentence as well as the actual conviction.<sup>49</sup> However, there is a discretion given to the Court or Judge to dismiss the appeal if it or he considers that no substantial miscarriage of justice has occurred.<sup>50</sup> Section 206(1) enables such order as to costs as may be deemed just to be made, but again it appears that no order can be made against a justice, and only in limited circumstances can an order be made where a police officer is party to the appeal.<sup>51</sup>

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<sup>43</sup> Ibid., s.198(1) .A survey carried out by the Commission indicated that of eighty-nine orders to review granted in 1976, eighty-three were made returnable before a single Judge, and six before the Full Court. Two of the orders to review made returnable before a single Judge were later referred to the Full Court.

<sup>44</sup> Ibid., s.206A.

<sup>45</sup> Ibid., s.198(2).

<sup>46</sup> However, for a report of one case which was heard in a circuit town see *The West Australian* 21 May 1977.

<sup>47</sup> *Justices Act 1902*, s.199.

<sup>48</sup> Ibid., s.206C.

<sup>49</sup> Ibid., s.205(1) and (3), respectively.

<sup>50</sup> Ibid., s.205(2).

<sup>51</sup> See paragraph 2.19 above.

2.22 It should be noted that the provisions relating to the hearing of the two different modes of appeal differ in that there is no power given in the case of ordinary appeals for the court to dismiss the appeal if there is no substantial miscarriage of justice or to refer the appeal to the Full Court.

2.23 Section 190(3) provides that the decision of the appellate court on an ordinary appeal is final between the parties. Section 206A, relating to appeals by way of an order to review, provides that there shall be no appeal from any determination of a single Judge to the Full Court.

2.24 The limitations on further appeals to the Full Court from decisions of a single Judge appear to be anomalous as it is possible to appeal to the High Court of Australia if special leave is granted.<sup>52</sup>

## **PART C: PROCEDURE**

2.25 Because of the different nature of ordinary appeals and appeals by way of an order to review, there are different procedures for each. In some respects these overlap, but in many instances the procedures vary, sometimes for no apparent reason. In this part of this paper the procedures are considered separately for each mode of appeal, and some of the difficulties are outlined, under the following headings -

- (a) Institution of appeals and notice to the other parties
- (b) Security for appeal
- (c) Bail
- (d) Stay of execution
- (e) Transmission to appellate court
- (f) Entry for hearing and notice to parties
- (g) Failure to prosecute appeal
- (h) Implementing the results of the appeal
- (i) Miscellaneous.

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<sup>52</sup> *Judiciary Act 1903* (Cwth), s.35(2).

**(a) Institution of appeals and notice to the other parties**

*Ordinary appeal*

2.26 The appellant first gives notice in writing to the prosecution or other party and the clerk of petty sessions of the court in which he was convicted of his intention to appeal and of his grounds.<sup>53</sup> There is no prescribed form for the notice, but it must be served within seven days<sup>54</sup> after the day on which the decision appealed from was given. Service may be effected by personal delivery or by registered post addressed to the usual or last known place of abode of the person to be served.<sup>55</sup> There are no stipulations as to who may effect personal service or as to the manner in which service may be proved, except that in the case of service by registered post it is deemed to have been served in the time that it would have been delivered in the ordinary course of post. Section 215, a general provision in the Act relating to service of notices, provides that where a party is represented by a solicitor, it is deemed to be good service on the party if the notice is served personally or by pre-paid post on that solicitor, or delivered at his office.

2.27 There appear to be the following difficulties with this procedure –

- (a) The Commission understands that on occasions the notice has not been filed in the Supreme Court but in the Court of Petty Sessions. The Act is silent on whether the notice has to be lodged at the Central Office of the Supreme Court in Perth. Although the appeal is to the Supreme Court the section fails to ensure that there is a record of the institution of the appeal at that Court. Consequently, the first occasion when the Supreme Court may receive notice of the appeal is when the clerk of petty sessions sends up the court record of the trial, or when the appellant enters the appeal for hearing.
- (b) There is no form prescribed for the notice.

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<sup>53</sup> *Justices Act 1902*, s.184.

<sup>54</sup> Section 184 of the *Justices Act 1902* actually provides for service "...within the time prescribed, or, if no time is prescribed, within seven days". No time has been prescribed by regulation under the Act.

<sup>55</sup> *Justices Act 1902*, s.186.

- (c) The appellant is given only seven days from the date of the decision to serve his notice. Although there is power to enlarge time,<sup>56</sup> it is questionable whether seven days is sufficient time to allow initially, especially if the appeal is from a decision made in a country area, and if the notice has to be filed in the Central Office of the Supreme Court. Seeking an order enlarging the time adds to the amount of work and cost involved in instituting the appeal, and begins the appeal in an embarrassing or uneasy manner.
- (d) There is no provision requiring proof of service of the notice of intention to appeal.

### *Order to review*

2.28 The appellant files a motion for an order to review supported by an affidavit with the relevant documents exhibited<sup>57</sup> in the Central Office of the Supreme Court. Although there are no specific provisions as to time, this would be governed by the requirement that a Judge may only grant an order to review within two months from the giving of the decision in respect of which the order to review relates. Because the application is made *ex parte* there is no need at this stage to provide for service on any other person. There is no provision requiring notice to be given to the Court of Petty Sessions. The application<sup>58</sup> is heard in court or chambers<sup>59</sup> invariably, but perhaps not necessarily, in Perth.<sup>60</sup>

2.29 If an order is made it must state the grounds for reviewing the relevant decision<sup>61</sup> and a memorandum of the decision of the Judge is sent by the Master of the Supreme Court to the clerk of the relevant Court of Petty Sessions, the Attorney General and to any person called on by the order to show cause why the justices' decision should not be reviewed.<sup>62</sup> Section 206E

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<sup>56</sup> See paragraph 2.64 below.

<sup>57</sup> Among the documents often exhibited are the complaint, the appellant's criminal record or probation report (if any; these are particularly relevant if the appeal involves an appeal against the sentence), the justices' notes of evidence, the transcript of the proceedings, and the written decision of the justices.

<sup>58</sup> Where the Attorney General and another person are appellants in respect of the same decision the Judge may consider and determine their applications at the same time: *Justices Act 1902*, s.197(3).

<sup>59</sup> In practice they are usually heard in chambers.

<sup>60</sup> The Act is silent on this point.

<sup>61</sup> *Justices Act 1902*, s.199.

<sup>62</sup> *Ibid.*, s.201(1).

requires the prescribed officer<sup>63</sup> to serve a memorandum as to each decision made on an application for an order to review, on the same persons as well as on any person having custody of the appellant. There is also provision requiring the appellant to serve an official copy of the order to review on each party who is called upon by the order to show cause. The service must be effected a number of days before the hearing of the review. This varies depending on where service was effected. The Act<sup>64</sup> provides the following times:

"Where the distance from the place where the order is returnable to the place where the service is effected is –	The number of days which must elapse between the service and the hearing shall be –
Not more than 322 kilometres ...	Ten days.
More than 322 but not more than 644 kilometres ...	Sixteen days.
More than 644 but not more than 966 kilometres...	Twenty-one days.
More than 966 kilometres ...	Thirty days."

The provisions of s.215 of the Act relating to service where a party is represented by a solicitor<sup>65</sup> would seem to apply to service of the order to review.

2.30 If the application for an order to review is refused in respect of all or any of the grounds, there is a right of appeal to the Full Court of the Supreme Court.<sup>66</sup>

2.31 There appear to be the following difficulties with this procedure -

- (a) The Act is silent on whether an application for an order to review can be made outside Perth. Presumably such an application can be made.

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<sup>63</sup> Section 4 of the *Interpretation Act 1918* provides that "prescribed" means "...prescribed by the Act wherein the term is used, or by a regulation, rule, or by-law made thereunder". No officer has been prescribed.

<sup>64</sup> *Justices Act 1902*, s.202.

<sup>65</sup> See paragraph 2.67 below.

<sup>66</sup> *Justices Act 1902*, s.204.

- (b) The Act is silent on the manner in which the application for an order to review is made. In practice such applications are made by means of a motion for an order to review. This is in fact a manner in which certain civil proceedings are commenced under the *Supreme Court Rules 1971*.<sup>67</sup> However, these rules do not appear to apply to criminal proceedings.<sup>68</sup>
- (c) Although the Commission understands that it is not uncommon for one application for an order to review to be made with respect to a number of matters heard and determined at the same hearing, doubt has been cast on this practice by a recent Victorian case.<sup>69</sup>
- (d) Section 201(1) (b) requires the Master of the Supreme Court to forward a memorandum of a decision to grant an order to review to the Attorney General in all cases. This may seem to be unnecessary when the Attorney General is the appellant, or where the appeal is instituted by an appellant represented by the Crown Law Department.
- (e) There is duplication in the Act, relating to service of the order. Under s.201 the Master of the Supreme Court is required to send a memorandum of a decision to grant an order to review or for the release of an appellant from custody to the clerk of the relevant Court of Petty Sessions, the Attorney General, and any person called on by the order to show cause why the justices' decision should not be reviewed. However, under s.206E the prescribed officer is also required to serve a memorandum as to each decision made on the application for an order to review, on the same persons as well as on any person having custody of the appellant. The appellant is required to serve an official copy of the order to review on each party who is called upon by the order to show cause.
- (f) There is no provision requiring proof of service of the official copy.

2.32 A difficulty, which arises from the dual system of appeals, where two or more charges are dealt with together is that there may be an ordinary appeal against one decision and an

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<sup>67</sup> The *Supreme Court Rules 1971*, Order 4 rule 1.

<sup>68</sup> *Ibid.*, Order 1 rule 3.

<sup>69</sup> See *Riddle v Ingram* [1977] VR 20.

appeal by way of order to review against another. There is no provision in the Act for consolidating appeals in these circumstances. Consolidation would have the effect of reducing the documentation required, for example, only one appeal book would be required,<sup>70</sup> and the costs would be reduced if both appeals were heard at the same time.

**(b) Security for appeal**

*Ordinary appeal*

2.33 The appellant must, within any prescribed time,<sup>71</sup> or within three days from the day on which notice was served, enter into a recognizance before a Court of Petty Sessions in such sum as the Court thinks fit with or without sureties. The recognizance, supported if required by sureties, is conditioned for appearance by the appellant at the appeal, submission by him to the judgment and payment of costs.<sup>72</sup>

2.34 A Court constituted by a magistrate appears to have an unfettered power to dispense with sureties, but there are provisos limiting the powers of a Court constituted by justices. In the latter case, the power to dispense with sureties can only arise where the justices have thought it expedient for the appellant to deposit as security a sum of money of not less than fifty dollars. Any person proposing to stand as surety must be acceptable to the Court of Petty Sessions.<sup>73</sup> The money is deposited with the clerk of petty sessions.

2.35 There appear to be the following difficulties -

- (a) Although s.187 does not provide that the recognizance should be conditioned to prosecute the appeal without delay this is one of the conditions contained in Form 28, *Recognisance on appeal*.<sup>74</sup>
- (b) The appellant has only three days after the day on which he gives the notice of intention to appeal to enter into the recognizance. Although an order enlarging

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<sup>70</sup> An appeal book is required in the case of appeals by way of order to review: see paragraph 2.49 below. In practice appeal books are also filed in the case of ordinary appeals.

<sup>71</sup> No time has been prescribed.

<sup>72</sup> *Justices Act 1902*, s.187.

<sup>73</sup> *Ibid.*

<sup>74</sup> See *Justices Act 1902*, The Fourth Schedule.



the time may be sought under s.206B of the *Justices Act*, the additional cost and complication involved in seeking such an order may be avoided if a greater time were provided for obtaining the recognizance.

- (c) It may be questioned whether a recognizance conditioned to prosecute the appeal serves any practical purpose. A better approach may be to provide the Attorney General or any other party with power to apply to have the appeal dismissed if the appellant defaults in prosecuting the appeal without delay or in taking any necessary steps in the presentation of the appeal, together with a power to award costs.<sup>75</sup>
- (d) An appeal may be prevented merely because the appellant is unable to enter into the recognizance required and/or deposit the required sum of money.
- (e) The recognizance serves a dual purpose; it requires the appellant to submit to the judgment of the appellate court, and it **requires** his release from custody. It is understandable that, in every case, the appellant should be bound to submit to judgment, but it may be questionable whether he should be released from custody in every case, or whether the same recognizance is suitable for both purposes.

### *Order to review*

2.36 The terms and conditions of the appellant's<sup>76</sup> recognizance are set by the Judge who granted the order to review. The appellant must then, within ten days, or in any event before his release, if allowed, on bail,<sup>77</sup> enter into a recognizance before a justice on such terms and conditions as are set, to prosecute his appeal without delay, appear at the hearing, submit to judgment and pay costs.<sup>78</sup> If sureties are required, they must be acceptable to the justice.<sup>79</sup>

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<sup>75</sup> There is a power to dismiss an ordinary appeal: *Justices Act 1902* s.216, see paragraph 2.55 below. However, the power in the case of appeals by way of order to review appears to be preferable: see paragraph 2.56 below.

<sup>76</sup> The provision relating to security for appeal does not apply to the Attorney General when he is the appellant: *Justices Act 1902*, s.197(4).

<sup>77</sup> See paragraphs 2.41 and 2.42 below.

<sup>78</sup> *Justices Act 1902*, s.200(1).

<sup>79</sup> *Ibid.*, s.201(3).

2.37 Section 201 of the *Justices Act* refers to the obligation of the Master of the Supreme Court to send to the various persons interested a memorandum of the Judge's decision to grant an order to review.<sup>80</sup> The memorandum must set out the terms and conditions of the recognizance required.

2.38 There appear to be the following difficulties with this procedure -

- (a) As with ordinary appeals it may be questioned whether a recognizance to prosecute the appeal serves any practical purpose, particularly as there is power to dismiss an appeal for want of prosecution.<sup>81</sup>
- (b) Again, as with ordinary appeals, the requirement for a recognizance to prosecute the appeal may prevent the implementation of the appeal.

(c) **Bail**

*Ordinary appeal*

2.39 If an appellant complies with the requirements for a recognizance and, if necessary, procures the sureties or security required<sup>82</sup> the Court of Petty Sessions is required to order his release from imprisonment.<sup>83</sup>

2.40 There appear to be the following difficulties with this procedure -

- (a) There is no opportunity for the complainant to be heard on the question of bail for the appellant. By contrast the complainant can be represented when a person is arrested, though not convicted, and applies for bail.
- (b) There is no discretion as to bail.
- (c) The same recognizance serves both as security for appeal and release on bail.

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<sup>80</sup> See paragraph 2.29 above.

<sup>81</sup> See paragraph 2.56 below.

<sup>82</sup> See paragraphs 2.33 and 2.34 above.

<sup>83</sup> *Justices Act 1902*, s.188.

- (d) There is no requirement for the custodian of the appellant to report the fact that the appellant has been released on bail to the Attorney General, the Master of the Supreme Court, or the other parties to the appeal. This fact must be reported to the Master of the Supreme Court and the Attorney General in appeals by way of an order to review.<sup>84</sup> There is therefore a possibility that an appellant could be released from custody and stay out of custody for an inordinate length of time without prosecuting the appeal.

### *Order to review*

2.41 Until recently the bail provisions in the case of an appeal by way of an order to review were similar to those applying to ordinary appeals, but an amendment to the *Justices Act* in 1976<sup>85</sup> introduced a more involved procedure. Where the appellant is in custody and a Judge determines that he ought to be released pending the hearing of the appeal, he may direct the release of the appellant on his entering into a recognizance on such terms and conditions, including procuring sureties or giving security as the Judge thinks fit. The Judge's determination may be made at the granting of the order, or subsequently on the application of the appellant.<sup>86</sup> It would seem that this recognizance is quite distinct from the recognizance required as security for the appeal referred to above,<sup>87</sup> but presumably the Judge, as part of the terms and conditions, could combine the two.

2.42 A memorandum as to the Judge's order for release of the appellant from custody must be sent by the Master of the Supreme Court to the clerk of the Court of Petty Sessions, the Attorney General, and any person called on by the order to show cause.<sup>88</sup> This memorandum must also set out the terms and conditions of the recognizance required. The recognizance is presented to the person holding the appellant in custody,<sup>89</sup> and on that person being satisfied that the recognizance has been entered into in accordance with the order for his release the appellant must be released.<sup>90</sup> The custodian must report "that fact" (presumably the release of the appellant) by memorandum to the Master of the Supreme Court and the Attorney

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<sup>84</sup> See paragraph 2.42 below.

<sup>85</sup> *Justices Act Amendment Act (No.2) 1976*.

<sup>86</sup> *Justices Act 1902*, s.197(1).

<sup>87</sup> See paragraph 2.36 above.

<sup>88</sup> *Justices Act 1902*, s.201(1).

<sup>89</sup> *Ibid.*, s.201(2).

<sup>90</sup> *Ibid.*, s.201(3).

General.<sup>91</sup> This procedure was introduced by the *Justices Act Amendment Act (No.2) 1976*. Before the procedure was introduced an appellant could be released without the police or the Crown being aware that an appeal had been instituted or that the appellant had been released. Under the previous procedure the first notice the police had of an appeal was when a copy of the order nisi was served upon them by the appellant. As the Attorney General said of the appellant when introducing the legislation:<sup>92</sup>

"It does not take a great deal of imagination to realise that he may 'forget' to do this or that by the time his solicitor does so the appellant - having obtained his release at a bargain price - may have developed a sudden yearning for distant places."

The present procedure ensures that the Crown is informed as soon as an appellant is released from custody.

2.43 There appear to be the following difficulties with this procedure -

- (a) There is no provision entitling the prosecution to be heard on the question of bail.
- (b) As has been seen, where an appellant is in custody, two recognizances may be required. The Act is not clear as to whether these recognizances may be combined in a single recognizance.
- (c) Section 201(1) is drafted as if only one recognizance is required. That subsection provides that the memorandum to be given by the Master of the Supreme Court should set out "...the terms and conditions of the recognizance required". In addition, s.201(2) commences "On such recognisance being given Although it is by no means clear, this appears to refer to the recognizance to prosecute the appeal because the subsection later provides that if the appellant is in custody he shall be released on presentation of a recognizance entered into in accordance with the order for his release.

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<sup>91</sup> Ibid. The provision relating to the arrest of absconding appellants is discussed below: see paragraphs 2.68 and 2.69 below.

<sup>92</sup> W.A. Parl. Deb. 1976 Vol. 214 at 3444.

**(d) Stay of execution**

*Ordinary appeal*

2.44 Execution is stayed when the appellant is released from custody on entering into a recognizance with appropriate sureties or security. Otherwise, the appeal does not operate as a stay of execution.<sup>93</sup>

*Order to review*

2.45 Section 201(2) provides that on a recognizance being given, the recovery of fines, penalties and other sums ordered to be paid is stayed until the order is disposed of, or the Supreme Court or a Judge otherwise orders.

2.46 There appear to be the following difficulties with this procedure -

- (a) As the section deals with both recognizances of security for the appeal and for bail, and as execution is stayed on entry into "such recognizance" it is difficult to know which would suffice. However, it appears to refer to the recognizance to prosecute the appeal.<sup>94</sup>
- (b) Where the appellant is held in custody the person by whom the appellant is held in custody is required to release the appellant on "... receipt of a copy of a recognisance given by an appellant..." once he has verified that it was correctly entered into.<sup>95</sup> Although it is not expressed clearly this presumably refers to a recognizance entered into in accordance with the order for the appellant's release from custody.

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<sup>93</sup> *Justices Act 1902*, s.188.

<sup>94</sup> See paragraph 2.43(c) above.

<sup>95</sup> *Justices Act 1902*, s.201(3).

**(e) Transmission to appellate court**

*Ordinary appeal.*

2.47 A copy of the complaint, depositions, conviction or order, other proceedings and the recognizances are sent to the Supreme Court by the clerk of the Court of Petty Sessions.<sup>96</sup>

2.48 There appear to be the following difficulties with this procedure -

- (a) The term "other proceedings" is vague and it is not clear whether it includes exhibits, the notes of evidence or a transcript of the proceedings, or the written reasons for the decision.
- (b) There is no requirement that appeal books be lodged.<sup>97</sup>
- (c) The clerk of the Court of Petty Sessions is not required to retain in his custody any exhibits in a trial during the time in which an appeal may be instituted.

*Order to review*

2.49 There are no similar specific provisions relating to appeals by way of an order to review. However, at least some of the relevant documents might have been submitted by the appellant to the Supreme Court when the application for the order to review was made.<sup>98</sup> In practice, once an appeal has been entered for hearing, copies of the proceedings, including copies of the notes of the justices or magistrate, are forwarded to the Supreme Court by the clerk of the Court of Petty Sessions. Furthermore, under a practice direction of the Supreme Court<sup>99</sup> the appellant, not less than six days before the date fixed for the hearing of the appeal, must prepare and lodge in the Central Office of the Supreme Court, an appeal book containing all material relevant to the hearing of the appeal. The book must be prepared to the satisfaction of the Registrar, and a copy served by the appellant on the other parties to the appeal.

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<sup>96</sup> Ibid., s.189.

<sup>97</sup> There is such a requirement in the case of appeals by way of order to review: see paragraph 2.49 below.

<sup>98</sup> See paragraph 2.28 above.

<sup>99</sup> Supreme Court of Western Australia, Practice Direction, 25 May 1972: *Proceedings Under Particular Statutes*.

2.50 There appear to be the following difficulties with this procedure -

- (a) There is no provision requiring the transmission of the relevant documents to the appellate court by the clerk of petty sessions of the trial court.
- (b) As with ordinary appeals there appears to be a need to require the clerk of petty sessions to retain any exhibits in a trial during the time in which an appeal by way of order to review may be instituted.

**(f) Entry for hearing and notice to parties**

*Ordinary appeal*

2.51 An appeal must be entered for hearing by the appellant within the prescribed time,<sup>100</sup> or within fifteen days from the date of the decision which is the subject of the appeal.<sup>101</sup>

2.52 Difficulties with this procedure are that there is no provision requiring that a copy of the entry of the appeal for hearing be served on the other party to the appeal or dealing with the responsibility of giving notice of the date for hearing to the parties.

*Order to review*

2.53 The appellant must enter the appeal for hearing within the time fixed by the Judge who granted the order.<sup>102</sup> However, there are conditions to be met before the appeal will be entered for hearing. First, the appellant, unless he is the Attorney General,<sup>103</sup> must pay any fees which are prescribed.<sup>104</sup> Second, the appellant must show that he has entered into a recognizance pursuant to the order to review. Where the appellant is released on bail, he may satisfy this requirement if the memorandum as to his release<sup>105</sup> also acknowledges receipt of the

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<sup>100</sup> No time has been prescribed.

<sup>101</sup> *Justices Act 1902*, s.185.

<sup>102</sup> *Ibid.*, s.203 (1).

<sup>103</sup> See *Justices Act 1902*, s.197(4).

<sup>104</sup> *Justices Act 1902*, s.200(2).

<sup>105</sup> See paragraph 2.42 above.

recognizance entered into pursuant to the order to review.<sup>106</sup> Otherwise, he must present such recognizance when he makes his application for the entry for hearing.<sup>107</sup> Once the appeal has been entered for hearing it is inserted in the proper list, and comes on for hearing as the Chief Justice may direct.<sup>108</sup>

2.54 As with ordinary appeals, there are no provisions requiring that a copy of the entry of the appeal for hearing be served on the other party to the appeal or relating to the giving of notice as to the date set for the hearing to the interested parties.

### **(g) Failure to prosecute appeal**

#### *Ordinary appeal*

2.55 If an appeal is not duly set down for hearing, s.216(1)<sup>109</sup> provides that any justices may proceed to enforce the conviction or order as if no notice of appeal had been given, and if the appellant has been released from custody, they may estreat the recognizance (if any) and issue a warrant for his arrest and committal to jail. If such a power is exercised the clerk of the Court of Petty Sessions must send a memorandum to the Master of the Supreme Court.<sup>110</sup> It may be arguable that the power to dismiss an appeal should rest with the appellate court rather than a magistrate or justices.

#### *Order to review*

2.56 In the case of an appeal by way of an order to review, there is power to dismiss an appeal for default in prosecuting the appeal without delay or for not taking the necessary steps in the presentation of the appeal.<sup>111</sup> This power is exercisable by a Judge in Chambers or the Master<sup>112</sup> on the application of the Attorney General or any other party. The application is brought by way of summons which must be served on the appellant. The Commission is not aware of any problems with this procedure.

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<sup>106</sup> *Justices Act 1902*, s.203(2) (a).

<sup>107</sup> *Ibid.*, s.203 (2) (b) .

<sup>108</sup> *Ibid.*, s.203 (1) .

<sup>109</sup> It would appear, from the reference to a notice of appeal in the section, that this provision applies only to ordinary appeals.

<sup>110</sup> *Justices Act 1902*, s.216(2).

<sup>111</sup> *Ibid.*, s.206D.

<sup>112</sup> *Supreme Court Rules 1971*, Order 60 rule 1(1) (k).



**(h) Implementing the results of the appeal**

*Ordinary appeal*

2.57 If an ordinary appeal does not confirm the justices' decision a memorandum of the decision is sent by the Associate or Registrar of the Supreme Court to the clerk of petty sessions for entry in the court record, and a copy is to be attached to every copy or certificate of the conviction or order.<sup>113</sup> If the justices decision is confirmed on appeal, the appellant is required to pay the penalty, or amount ordered to be paid and costs if any together with any costs ordered to be paid by the appellate court. The appellate court or any justice may commit the appellant to jail to serve the sentence imposed according to the conviction or order.<sup>114</sup>

2.58 The recovery of any fine or other money ordered to be paid and costs ordered by the justices may be enforced by a justice as if no appeal had been made and/or by “putting the recognisance (if any) in suit.”<sup>115</sup>

2.59 If costs awarded on the appeal are not paid, the Associate or the Registrar of the Supreme Court is required to grant a certificate on the application of the party entitled to the costs.<sup>116</sup> On production of this certificate to any justice, the recovery may be enforced as if they were costs awarded by the justices.<sup>117</sup>

2.60 There appear to be the following difficulties with this procedure –

- (a) It is not clear what is meant by "putting the recognisance (if any) in suit". It may mean the enforcement of the recognizance under s.154A of the *Justices Act 1902*.
- (b) Without a certificate, it does not appear to be possible to enforce an order for the payment of costs awarded on an appeal. These certificates cannot

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<sup>113</sup> *Justices Act 1902*, s.192.

<sup>114</sup> *Ibid.*, s.193. Under s.190(4) of the *Justices Act 1902* the appellate court or any prescribed officer may issue such warrants as may be necessary to give effect to the court's decision.

<sup>115</sup> *Justices Act 1902*, s.194.

<sup>116</sup> *Ibid.*, s.195.

<sup>117</sup> *Ibid.*, s.196.

ordinarily be issued because orders for costs do not require that the costs be paid into Court. As a result costs are not paid into Court and the Associate or Registrar has no knowledge as to whether the costs have been paid.

### *Order to review*

2.61 After an appeal brought by way of an order to review has been heard, the prescribed officer is required to send to the clerk of petty sessions, the Attorney General, any person having custody of the appellant and any person called upon by the order to show cause, a memorandum of the decision. This memorandum is sufficient evidence of the facts specified.<sup>118</sup> There is power for any justice to enforce any conviction, sentence or order made or affirmed on the appeal and issue such summonses or warrants as may be necessary.<sup>119</sup> If costs on the appeal are not paid a certificate is required to be granted by a prescribed officer on the application of the party entitled,<sup>120</sup> and on production of this, the recovery of such costs may be enforced by justices.<sup>121</sup> These provisions do not apply to an order for the payment of the costs of an appeal from an order for the payment of money with respect to any of the matters specified in the Eighth Schedule to the *Justices Act*.<sup>122</sup> An order for the payment of money with respect to any of the matters referred to in the Eighth Schedule is recoverable in the same manner as a judgment of a Local Court.<sup>123</sup> It does not appear that this procedure applies to an order for costs made on an appeal.

2.62 The difficulties referred to in paragraph 2.60 above with respect to ordinary appeals also arise under the procedure provided for appeals by way of an order to review.

#### **(i) Miscellaneous**

2.63 The *Justices Act* contains a number of provisions which appear to apply to all appeals, whether ordinary or by way of an order to review. These provisions will be considered under the following heads –

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<sup>118</sup> Ibid., s.206E.

<sup>119</sup> Ibid., s.206F.

<sup>120</sup> Ibid., s.206G.

<sup>121</sup> Ibid., s.206H.

<sup>122</sup> Ibid., s.206H proviso.

<sup>123</sup> Ibid., s.155(6).

- (i) Enlargement or abridgement of time
- (ii) Effect of informalities
- (iii) Service of notices and documents
- (iv) Arrest of absconding appellants
- (v) Provision for rules.

(i) *Enlargement or abridgement of time*

2.64 Section 206B empowers the Supreme Court, a Judge or the Master<sup>124</sup> to enlarge or abridge any of the times prescribed in the Act relating to appeals or fixed by any order.

2.65 A difficulty with this provision is that it does not provide a procedure for making the application, for example, by summons or motion. Nor does it provide whether the other parties have to be given notice of the application.

(ii) *Effect of informalities*

2.66 There are several provisions in the Act enabling the justices' decision to stand in spite of defects or informalities. For example, s.211 provides that no complaint, conviction, order or other proceeding before justices shall be quashed or set aside for want of form. Even if there were no complaint or summons, a conviction may stand if the person concerned appeared before the justices at the hearing and did not object.<sup>125</sup> Section 214 provides that no conviction or order shall be defeated for want of distribution or wrong distribution of penalty or forfeiture. Section 212 gives an extensive power to the Court or Judge to sustain a conviction or warrant which is supported by the facts or evidence appearing by the depositions by making all necessary amendments. The Commission is not aware of any difficulties with respect to these provisions.

(iii) *Service of notices and documents*

2.67 Where documents, notices or proceedings are to be served by or upon any party who is represented by a solicitor, service by or upon the solicitor, or at his office or if sent to him by

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<sup>124</sup> *Supreme Court Rules 1971*, Order 60 rule 1(1) (k).

<sup>125</sup> *Justices Act 1902*, s.213.

prepaid post is deemed to be good service.<sup>126</sup> When the notice is served by post it is deemed to have been served when it would have been delivered in the ordinary course of post. The Commission is not aware of any difficulties with this provision.

(iv) *Arrest of absconding appellants*

2.68 If it is shown on oath that an appellant who has entered into a recognizance is about to leave Western Australia, a warrant for his arrest may be issued by a justice and the appellant may be imprisoned forthwith if the ends of justice would otherwise be defeated.<sup>127</sup> The appellant is to remain in custody for the time mentioned in the recognizance for his appearance to receive judgment or render himself in execution.

2.69 This provision appears to be narrow in that it applies only if the appellant is about to leave Western Australia. It would appear that it should be wider so as to include cases where the appellant is about to abscond within Western Australia.

(v) *Provision for rules*

2.70 Section 220 allows the Judges of the Supreme Court to make rules and orders to regulate the practice and procedure of appeals, and to prescribe fees and the costs to be allowed. Because of the comprehensive nature of the provisions in the *Justices Act* no rules have been made.<sup>128</sup>

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<sup>126</sup> Ibid., s.215.

<sup>127</sup> Ibid., s.217.

<sup>128</sup> In paragraph 3.39 below the Commission suggests that the procedure for appeals should be encompassed in rules rather than in the present statutory form.

## CHAPTER 3 - APPEALS: POSSIBLE REFORMS

### PART A: RIGHT OF APPEAL

3.1 Although appeals might add an air of uncertainty to the trial process and may prolong the outcome of a case, the Commission does not think it could be seriously argued that they are undesirable and ought to be restricted. On the contrary, in this part of this paper the Commission's concern is to simplify the right of appeal and remove some of the technical restrictions which exist under the present law.

#### A single mode of appeal

3.2 One method of simplifying the existing law would be to create a single mode of appeal replacing the existing dual modes of ordinary appeals and appeals by way of an order to review. This would be an appeal system similar to that applicable to appeals in respect of indictable offences.<sup>1</sup> The grounds for the appeal could be wide<sup>2</sup> but in some cases, in order to prevent the appellate court's time from being taken up considering frivolous appeals, it may be desirable to require leave to be given,<sup>3</sup> or to provide a procedure for summary dismissal.<sup>4</sup> Special provision might be required to deal with the situation where the defendant pleads guilty.<sup>5</sup> In so far as the appellant may be required to obtain leave this single mode of appeal might bear some similarity to an order to review, but the advantages of a single mode of appeal are that leave would not be required in all cases and a single and more efficient procedure would be provided.<sup>6</sup>

#### Ambit of appeal

3.3 It is the Commission's view that appeal provisions should apply to the same wide range of decisions which a defendant may appeal against at present either by way of an order

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<sup>1</sup> See *Criminal Code*, s.688.

<sup>2</sup> See paragraphs 3.7 and 3.8 below.

<sup>3</sup> See paragraphs 3.17 to 3.20 below.

<sup>4</sup> See paragraphs 3.44 and 3.45 below.

<sup>5</sup> See paragraph 3.6 below. This circumstance is not really an appeal but involves the defendant in seeking an order to reverse a plea, vacate a conviction, and to have a new trial.

<sup>6</sup> See Chapter 3, Part C: Procedure, paragraphs 3.38 to 3.117 below.

to review or by an ordinary appeal.<sup>7</sup> However, three issues arise in respect of the ambit of appeal under the existing law as to orders to review. They are –

- (i) whether a separate appeal ought to be available in respect of an incidental decision;<sup>8</sup>
- (ii) whether an appeal ought to be available in respect of a decision to commit for trial for an indictable offence:
- (iii) whether a person who pleads guilty ought to be able to apply for a new trial.

(i) *Decisions on incidental matters*

3.4 Decisions of an " incidental" nature, such as whether a plea is good or bad, are not at present subject to separate appeal.<sup>9</sup> However, a decision on the whole case may be the subject of an appeal because of an error on an incidental question. It may be that this is expedient because proceedings before justices would be disrupted if a decision of an incidental nature could be the subject of an appeal during the course of the proceedings. The Commission notes, however, that in Victoria decisions of an incidental nature may themselves be the subject of a separate appeal during a hearing of a matter.<sup>10</sup> This approach may be justified because it may not always be more convenient to delay an appeal until a decision on the whole case is made.

For example, a decision as to whether a confession is admissible might be decisive as to whether there is a case to answer. Certain determinations of an incidental nature, such as an adjournment of a matter sine die, while not finally determining the matter before the justices, may amount to a refusal to hear and determine the matter.<sup>11</sup> In such a case it appears to be only fair<sup>12</sup> that the decision should be the subject of an appeal.<sup>13</sup> One means of striking a

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<sup>7</sup> See paragraphs 2.4 and 2.13 to 2.16 above.

<sup>8</sup> An incidental decision is a decision which does not finally dispose of a matter before justices: see paragraph 2.14 above.

<sup>9</sup> See paragraph 2.14 above.

<sup>10</sup> See *Byrne v Baker* [1964] VR 443 at 463-466. In practice it may be difficult to appeal against such decisions because the court may refuse to adjourn the proceedings in order to allow the appeal to be instituted.

<sup>11</sup> See *Matheson v Matheson* [1952] VLR 27.

<sup>12</sup> It may also be unfair if justices refuse an application for an adjournment: see *Myers v Myers* [1969] WAR 19.

balance may be to allow appeals on matters of an incidental nature only with the leave of the appellate court. This question is discussed below.<sup>14</sup>

(ii) *Committal for trial*

3.5 Pursuant to the definition of “decision” in the *Justices Act*<sup>15</sup> an order committing a defendant for trial is subject to appeal by way of an order to review. Although a defendant may appeal against such an order it appears to be a procedure which is rarely used. The Commission's survey of appeals instituted in 1976<sup>16</sup> did not disclose any appeals against an order committing a defendant for trial. The Commission notes that there is no similar provision in any of the other Australian jurisdictions studied by the Commission. It may be argued that such an appeal should not be permitted because the decision to commit a defendant for trial does not finally dispose of the matter and the defendant has an opportunity of being acquitted at the trial. On the other hand, it may be argued that it is unfair that a defendant should be confronted with the risk of being convicted at the trial if an error was made during the committal hearing. 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.

(iii) *Appeal by defendant who pleads guilty*

3.6 In the absence of express provision, it may be doubtful whether an appeal would be available to a person who pleads guilty. For example, it may appear to be inconsistent for a person to plead guilty to an offence and then be able to appeal against his conviction. However, there might be cases where the person's plea ought not to stand. This might be the case where a plea has been "entered under some obvious mistake, misunderstanding or misapprehension, or where the defendant may not have appreciated the nature of the charge or may not have intended to admit his guilt."<sup>17</sup> The desirability of an appeal for a defendant who has pleaded guilty has been recognised in Western Australia, and express statutory provision

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<sup>13</sup> A more appropriate remedy may, however, be an order in lieu of mandamus under s.39 of the *Justices Act 1902*.

<sup>14</sup> See paragraphs 3.17 to 3.20 below.

<sup>15</sup> Section 4, see paragraph 2.13 above.

<sup>16</sup> See paragraph 1.5 above.

<sup>17</sup> Wily, *Summary Proceedings and Police Court Practice* (4th ed. 1969) at 105.

was made extending the order to review procedure to these circumstances.<sup>18</sup> The Commission considers that a person's right to appeal notwithstanding a plea of guilty has a desirable effect and ought to be retained in any revised mode of appeal. It may, however, be desirable for leave to be required.<sup>19</sup>

### **Who should be able to appeal and on what grounds?**

#### *Defendant*

3.7 One of the complexities arising out of the existing dual mode of appeal system in Western Australia is that the right of the defendant to appeal and his grounds vary depending on which mode is available. Although a defendant has an unfettered right of appeal in the case of an ordinary appeal, that mode of appeal is only available in respect of a summary conviction or order and not in respect of other decisions of justices. Consequently, appeals from decisions regarding bail, search warrants and other such "decisions" must be brought by way of order to review. However, in the case of an order to review, the defendant must show certain grounds. He must, for example, bring his appeal on the basis of an error of law or fact, or excess or want of jurisdiction, or excessive penalty or sentence.<sup>20</sup>

3.8 These technical distinctions could be removed if a defendant were given a single mode of appeal in respect of decisions of justices<sup>21</sup> with no restriction as to the grounds unless these are necessary for the purpose of detailing the circumstances in which leave ought to be required.<sup>22</sup> Removal of requirements to show an error or mistake of law or fact might allow a right of appeal in respect of some decisions of a discretionary nature such as a decision relating to a warrant for arrest or dismissing a charge against a first offender where it might otherwise be difficult to show a specific error of law or fact.<sup>23</sup> This would remove existing uncertainty<sup>24</sup> as to rights of appeal in respect of such decisions.

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<sup>18</sup> See paragraph 2.11 above.

<sup>19</sup> See paragraphs 3.17 to 3.20 below.

<sup>20</sup> See paragraph 2.9 above.

<sup>21</sup> See paragraph 3.2 above.

<sup>22</sup> See paragraphs 3.17 to 3.20 below.

<sup>23</sup> *Criminal Code*, s.669. But in this case only a complainant is likely to wish to appeal.

<sup>24</sup> See paragraph 2.16 above.



### *Complainant*

3.9 At present a complainant may appeal only by way of an order to review.<sup>25</sup> This entitles him to appeal on matters relating to law, fact and sentence. It might be argued that there should be some limits imposed on the complainant's right to appeal. For example, in some jurisdictions, namely New South Wales,<sup>26</sup> New Zealand<sup>27</sup> and England,<sup>28</sup> the complainant's right of appeal arises only on a case stated as to law. This excludes an appeal on a question of fact or on sentence unless the sentence involves some legal question.

3.10 However, the Commission is opposed to any such limitation in Western Australia. It would amount to a diminution of a complainant's existing rights of appeal and a departure from his rights of appeal in respect of indictable offences.<sup>29</sup> The Commission is not aware of any dissatisfaction<sup>30</sup> with the manner in which complainants have exercised their existing right of appeal. In the case of appeals against sentence, the right is used sparingly,<sup>31</sup> possibly because the Supreme Court will not interfere with the discretion of justices to fix a penalty or sentence merely because the Court might have fixed a different penalty or sentence. In *Gibbs and Jones v R*<sup>32</sup> McMillan C.J. stated the principles upon which an appellate court would intervene as follows:

"...this court is not likely to interfere with the sentence imposed by the judge at the trial, who has much better opportunity of arriving at a just conclusion as to the nature of the sentence which the case requires than we have sitting in this court. It is not enough for us to be able to say that the sentence does seem somewhat severe, but we must come to the conclusion that there has been some mistake or some wrong principle adopted, or something which we can say renders it inequitable that the sentence should be allowed to remain".

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<sup>25</sup> See paragraph 2.9 above.

<sup>26</sup> *Justices Act 1902* (NSW), s.101.

<sup>27</sup> *Summary Proceedings Act 1957* (NZ), s.107.

<sup>28</sup> *The Magistrates' Courts Act 1952* (Eng), s.87.

<sup>29</sup> See *Criminal Code*, s.688.

<sup>30</sup> A survey carried out by the Commission indicates that complainants have exercised the right of appeal sparingly, and when it has been used, its use has, apparently, been justified. The survey showed that during 1976 there were 117 applications for an order nisi to review, eighteen of which were made by a complainant; sixteen by the Crown and two by private complainants. In only one of these cases was an order nisi refused. At the time the survey was carried out nine of the appeals had been heard by the Supreme Court. Eight of the appeals were successful and only one was dismissed. Three of the appeals involved an appeal against sentence, all of which were successful.

<sup>31</sup> *Ibid.*

<sup>32</sup> (1916) 19 WALR 12 at 16; see also Dwyer C.J. in *Reynolds v Wilkinson* (1948) 51 WALR 17 at 18-19 which concerned an appeal against a sentence imposed by a Court of Petty Sessions. See also *Skinner v R.* (1913) 16 CLR 336 at 339-340 and *Whittaker v R.* (1928) 41 CLR 230 at 249-250.

3.11 No doubt the community is interested in a balanced and accurate dispensation of justice for both the prosecution and the defendant, and in the Commission's view, the circumstances in which a complainant should be able to appeal should be as wide as those relating to a defendant.<sup>33</sup> However, to avoid the possibility of unnecessary inconvenience and expense to a defendant it might be desirable for the complainant to be required to obtain leave before appealing in any case, or in a case where the appeal is against sentence or other disposition of the case.<sup>34</sup>

#### *Attorney General*

3.12 By an amendment to the *Justices Act* in 1972 the Attorney General was given the right to appeal by way of order to review in the same circumstances as a defendant, including the situation where the defendant has pleaded guilty.<sup>35</sup>

3.13 The only other Australian jurisdiction in which a similar power exists is Victoria. In that State, however, the Attorney General may appeal only where he considers that a different sentence or penalty should have been passed or imposed or against an order dismissing or adjourning a charge against a person on his entering into a good behaviour bond.<sup>36</sup>

3.14 The Commission is not aware of any reason why the Attorney General's rights to remedy an injustice ought to be removed or limited, and considers that he should be given the same wide rights of general appeal as a defendant.

#### *Other persons*

3.15 In the case of an appeal by way of order to review, the right to appeal is not confined to the complainant, defendant<sup>37</sup> and Attorney General. It extends to any person who "feels

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<sup>33</sup> See paragraph 3.8 above. If a defendant were permitted to appeal separately on an incidental matter (see paragraph 3.4 above) so too would a complainant. If, however, a defendant were permitted to appeal against a decision to commit him for trial (see paragraph 3.5 above) it would not be necessary to give a complainant power to appeal against a refusal to commit for trial because the Attorney General may present an ex officio indictment in any court of criminal jurisdiction: *Criminal Code*, s.579.

<sup>34</sup> See paragraphs 3.17 to 3.20 below.

<sup>35</sup> See paragraph 2.12 above.

<sup>36</sup> *Magistrates' Courts Act 1971* (Vic), s.74(1).

<sup>37</sup> Under s.4 of the *Justices Act 1902* a defendant is "...a person complained against before Justices for an indictable offence, simple offence or other matter".

aggrieved" by the decision.<sup>38</sup> A person aggrieved by the decision means someone who has his legal rights affected and would not include a person who was merely dissatisfied with the decision.<sup>39</sup> There might be some uncertainty as to who might fall within the description of person aggrieved. For example, it may apply to a witness who is fined for non-appearance<sup>40</sup> but it might also describe a victim of a criminal assault who is not the complainant but who has his legal rights to compensation affected. While the Commission sees merit in providing an appeal for the witness, it might be undesirable to extend the right of appeal to a dissatisfied victim. Certainty in this area would be desirable.

3.16 Some proceedings before justices are not of a criminal nature. For example, under s.4 of the *Inquiry Agents Licensing Act 1954* a Court of Petty Sessions constituted by a Stipendiary Magistrate may grant an Inquiry Agent's Licence. Where an application for a licence is refused it would appear that the applicant may appeal against the decision by way of an order to review as a person aggrieved. Appeals against decisions of this nature will be discussed in paragraphs 5.6 to 5.8 below as they involve questions relating to administrative law rather than the criminal matters which are ordinarily associated with justices.

### **Leave to appeal**

3.17 Existing law in effect requires leave for an appeal by way of an order to review.<sup>41</sup> Ordinary appeals, where available, may be brought as of right without leave. If a single mode of appeal were introduced, the question would arise as to the circumstances in which this ought to be available as of right or on leave.

3.18 One view might be that leave ought to be required in every case as it is at present required for orders to review. This would protect the finality of proceedings and prevent the implementation of appeals which are frivolous or vexatious. However, of the jurisdictions studied by the Commission none requires leave in all cases. The disadvantages of a requirement for leave are that it adds to delay, it requires a more complicated procedure and it increases costs. In the Commission's view the protection of the finality of proceedings and the prevention of vexatious or frivolous appeals do not warrant a requirement for leave in all

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<sup>38</sup> See paragraph 2.10 above.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> See paragraph 2.9 above.

cases. The latter problem could be mitigated by introducing a procedure to allow a party to apply to have an appeal struck out on the grounds that it is frivolous or vexatious.

3.19 On the other hand, it may be undesirable to go to the other extreme and allow an appeal as of right in all cases. It may be desirable to have a requirement for leave to appeal in some or all of the following cases –

- (a) In the case of an appeal by a defendant –
  - (1) If he pleads guilty,<sup>42</sup> unless his appeal is against –
    - (i) any sentence or penalty;<sup>43</sup> or
    - (ii) a sentence or penalty involving a term of imprisonment, or a fine exceeding a certain sum - say \$200.
  - (2) If he is appealing against a sentence which does not involve a term of imprisonment or a fine exceeding a certain sum.
  - (3) If his appeal relates to a minor offence, that is any non-indictable offence.
  - (4) If he is appealing against a committal for trial assuming that an appeal ought to be available at all in such a case.<sup>44</sup>
- (b) In the case of an appeal by a complainant –
  - (1) In all cases.<sup>45</sup> As a complainant may at present only appeal by way of an order to review he is, in effect, required to obtain the leave of a Judge of the Supreme Court in all cases, or

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<sup>42</sup> The circumstances in which a person would be permitted to seek a new trial after pleading guilty are discussed in paragraph 3.6 above.

<sup>43</sup> See, for example, s.83(1) of *The Magistrates' Courts Act 1952* (Eng).

<sup>44</sup> See paragraph 3.5 above.

<sup>45</sup> See paragraph 3.11 above.

- (2) In all cases where the appeal is against a sentence or other disposition of the case such as a dismissal of a case against a first offender.<sup>46</sup>
- (c) In the case of an appeal by any person who is not a party to the proceedings (assuming such a person is to be given a right of appeal at all<sup>47</sup>).
- (d) In the case of an appeal by any person –
  - (1) Where the appeal is based on a mistake as to fact;<sup>48</sup>
  - (2) Where the appeal relates to an incidental<sup>49</sup> or interlocutory matter;<sup>50</sup>
  - (3) Where the appeal relates to a ministerial act such as the issue of a warrant for arrest or for search.

3.20 In any other cases, including the case where the Attorney General is appealing, an appeal might be available as of right.

## **PART B: THE HEARING OF THE APPEAL**

### **The appellate court**

3.21 At present both ordinary appeals and appeals by way of an order to review are determined by the Supreme Court. In the case of an ordinary appeal the Court is constituted by a single Judge.<sup>51</sup> In the case of an appeal by way of an order to review the appeal may be determined either by a single Judge or the Full Court.<sup>52</sup> The question arises whether the

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<sup>46</sup> Ibid.

<sup>47</sup> See paragraph 3.15 above.

<sup>48</sup> For example, in the case of appeals to the Court of Criminal Appeal by persons who are convicted in a trial on indictment a defendant may appeal as of right on a question of law alone, but only with leave on a ground which involves a question of fact: *Criminal Code*, s.688(1)(a) and (b).

<sup>49</sup> See paragraph 3.4 above.

<sup>50</sup> There is a precedent in Western Australia for this approach in the case of appeals from a Local Court to the District Court. Under s.107(1) of the *Local Courts Act 1904* a party to an action or matter who is dissatisfied with a final judgment may appeal against that judgment to the District Court as of right. However, where the judgment is not a final judgment an appeal may only be made with the leave of the District Court.

<sup>51</sup> See paragraph 2.19 above.

<sup>52</sup> See paragraph 2.20 above.

Supreme Court ought to continue to be the appellate court of first instance in the case of appeals from decisions of justices. To assist the answer to this question, the following table contains an outline of the appellate structure in the other Australian States and the Australian Capital Territory.

3.22 In Western Australia it might be possible for appeals from justices' decisions to be heard by the District Court. This would have advantages in that it might relieve the Supreme Court of some less important matters.<sup>53</sup> Those matters which are considered to be sufficiently important to warrant consideration by the Supreme Court could come before that Court sitting as a Full Court either by way of further appeal,<sup>54</sup> referral by a District Court Judge,<sup>55</sup> or by removal of the matter from the District Court by an order of a Supreme Court Judge on the application of a party to the appeal. A precedent for such an appeal or removal is found in Western Australia in respect of appeals from a Local Court.<sup>56</sup>

3.23 There could also be practical advantages in having the appeal heard by the District Court.<sup>57</sup> At present both the District Court and the Supreme Court hold sittings in circuit towns.<sup>58</sup> Although each Court holds the same number of sittings in each circuit town during a year, it may be more convenient for country residents if provision were made for appeals to the District Court because Deputy Registrars of the District Court are situated in each circuit town. The only registry of the Supreme Court is the Central Office which is situated in Perth. If provision were made for an appeal to the District Court it would be possible to provide for the filing of the documents associated with an appeal at the registry nearest to the place at which the decision the subject of the appeal was made.<sup>59</sup> A solicitor in a country town representing an appellant could institute the appeal by filing the document at the nearest registry. Consequently, it would not be necessary for him to engage an agent in Perth, with the additional cost and delay necessarily involved.

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<sup>53</sup> See *W.A. Parl. Deb.* (1969-70) Vol. 184 at 1435.

<sup>54</sup> See paragraph 3.27 below

<sup>55</sup> See paragraph 3.32 below.

<sup>56</sup> *Local Courts Act 1904*, s.107(1) and (5).

<sup>57</sup> Practical difficulties of such an appeal are referred to in the following paragraph.

<sup>58</sup> The circuit towns of both Courts are the same: Albany, Broome, Bunbury, Carnarvon, Derby, Geraldton, Kalgoorlie, Kununurra, Port Hedland and Wyndham. The name of the District Court is perhaps something of a misnomer because the Court does not sit permanently in districts, but rather involves itinerant judges visiting the various circuit towns.

<sup>59</sup> This is the position with respect to appeals from a Local Court to the District Court: see *District Court (Appeal) Rules*, 1977 Rule 3.

3.24 There may, however, be practical difficulties. For example, if an application for bail had to be made to a judge,<sup>60</sup> unless the application were made to a judge during a circuit sitting, which could involve a delay of up to three months, it would be necessary to make an application to a judge in Perth. This would probably involve the engagement of a Perth agent. It may also be necessary to transmit the court record in the registry of the circuit town to Perth. Similar difficulties might arise if provision were made for the summary dismissal of an appeal.<sup>61</sup> These difficulties might be remedied if District Court Judges sat permanently in major country towns. However, unless or until such a situation exists, the appellant could be given the choice of instituting his appeal either in a circuit registry, or in Perth.

3.25 On the other hand if provision for appeals to the Supreme Court in the first instance were retained, the Commission envisages that the appeal would be heard by a single Judge, unless he referred it to the Full court.<sup>62</sup> Although the appeal would have to be instituted in Perth the appeal could, if practicable, be heard in a circuit town.

3.26 One further matter which warrants consideration in relation to the appellate structure is a suggestion made in a preliminary submission to the Commission that stipendiary magistrates should have powers of review over any decision of justices given in court. The only jurisdiction studied by the Commission which has such an appeal system is Tasmania. In Tasmania a person aggrieved by an order of justices may appeal to the Supreme Court<sup>63</sup> or, where the order was made by a Court of Petty Sessions (other than one constituted by a magistrate), he may appeal to a magistrate.<sup>64</sup> Such a right of appeal may be of value in remote areas of Western Australia where Courts of Petty Sessions constituted by justices are held regularly, as it may be more convenient to appeal to a local magistrate rather than to the Supreme Court or the District Court in Perth or in a circuit town. However, in the interests of achieving uniformity and consistency in the administration of justice it is arguable that the appeal should not be to the same Court, even if it were constituted by a magistrate rather than by justices.

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<sup>60</sup> See paragraph 3.59 below.

<sup>61</sup> See paragraph 3.44 below.

<sup>62</sup> See paragraph 3.32 below.

<sup>63</sup> *Justices Act 1959* (Tas), s.107.

<sup>64</sup> *Ibid.*, s.113A.

## **Further appeals**

3.27 At present, there is no right of appeal from a decision of a Judge of the Supreme Court to the Full Court in respect of either ordinary appeals or orders to review. There is, however, a right of appeal to the High Court of Australia if special leave is granted.<sup>65</sup> Although the Commission is conscious of the need to bring an end to criminal proceedings, it may appear to be anomalous for a matter to be referred to the High Court in the absence of consideration by the Full Court of the Supreme Court. The Commission suggests that an appeal to the Full Court is desirable, but that it might be restricted for example to appeals on questions of law and/or by requiring leave to appeal in every case.

3.28 If appeals to the Full Court of the Supreme Court of Western Australia were desirable, it might apply not only to decisions made on the hearing of the appeal at first instance but also to a refusal to grant leave or an extension of time.<sup>66</sup> As the Commission suggests that there ought to be a procedure for the summary dismissal of appeals,<sup>67</sup> it might also be desirable to allow a further appeal, perhaps with leave from any determination made on such an application.

## **Powers of the appellate court**

3.29 It is the Commission's view that the appellate court should have wide powers on the hearing of the appeal along the lines which the Supreme Court now has in the case of ordinary appeals. This means it would have power to:<sup>68</sup>

“...adjourn the hearing of the appeal, and, upon the hearing thereof ... confirm, reverse, or modify the decision appealed from, or remit the matter, with the opinion of the Court, to the Court of Petty Sessions, or...make such other order in the matter as the Court may think just, and...by such order, exercise any power which the Court of Petty Sessions might have exercised”.

3.30 It may also be necessary to provide the appellate court with other specific powers including power to receive such further evidence, either oral or by affidavit, as it thinks the justice of the case requires. This follows from the Commission's suggestion that appeals

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<sup>65</sup> See paragraph 2.24 above.

<sup>66</sup> There is a right of appeal from a single Judge to the Full Court against an order made on an application for an order to review: see paragraph 2.30 above.

<sup>67</sup> See paragraphs 3.44 and 3.77 to 3.79 below.

<sup>68</sup> *Justices Act 1902*, s.190(1).



should not be restricted to a review of whether the justices made an error or mistake upon the material placed before them.<sup>69</sup>

3.31 In the case of appeals by way of an order to review the Court or Judge may discharge the order if it or he considers that "no substantial miscarriage of justice has occurred", notwithstanding that any point raised by the order to review might have been decided in favour of the appellant.<sup>70</sup> It may be desirable to retain such a provision which appears to recognise that the grant or refusal of an order to quash a conviction on a purely technical point is in the discretion of an appellate court.<sup>71</sup>

3.32 Whether the appellate court were to be the Supreme Court or the District Court it might be desirable to empower the judge hearing the appeal to refer the matter to the Full Court of the Supreme Court if he thinks it desirable.<sup>72</sup> It might also be desirable to empower the appellate court to state in the form of a special case for the opinion of the Full Court of the Supreme Court any question of law arising upon the facts of the case.<sup>73</sup>

3.33 In the case of an ordinary appeal the appellate court may order, or the parties may agree, that an appeal shall be by way of a rehearing de novo,<sup>74</sup> each side calling all its witnesses to give evidence. In the case of an appeal by way of an order to review there is no provision for a rehearing de novo. It may be desirable to retain a power similar to that applicable to ordinary appeals as a rehearing de novo may be necessary where there is an appeal on fact alone or where there is no material to assist the court in the record of the proceedings before the justices.<sup>75</sup> On the other hand, there is a danger that the parties to proceedings before justices will withhold their true case in order to present it before the appellate court.

3.34 The appellate court ought to continue to have power to make such order as to costs to be paid by either party as it may think just.<sup>76</sup> The existing provisions in the *Justices Act* as to

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<sup>69</sup> See paragraphs 3.7 and 3.8 above.

<sup>70</sup> *Justices Act 1902*, s.205(2).

<sup>71</sup> See *Sweeney v Kelly* (1908) 7 CLR 30 at 33.

<sup>72</sup> There is such a power at present given to a single Judge of the Supreme Court but only in the case of appeals by way of an order to review: see paragraph 2.20 above.

<sup>73</sup> In Queensland there is provision for a judge hearing an appeal to state a case: see *Justices Act 1886* (Qld), s.227.

<sup>74</sup> See paragraph 2.19 above.

<sup>75</sup> As an example see *Keefer v Lister* (1962) 56 QJPR 119.

<sup>76</sup> See *Justices Act 1902*, ss.190(2) and 206.

appeal costs are subject to s.219 of the *Justices Act*, which provides that where a police officer is the complainant, costs may be awarded in favour of the defendant only if the police officer appeals and loses the appeal or, if the appeal is allowed, the case involved a point of law of exceptional public importance.<sup>77</sup> Costs cannot be awarded under the *Justices Act* in favour of a defendant who successfully appeals against a decision given in favour of a police officer complainant. There are prohibitions in other enactments also on awarding costs against certain Government officials: see, for example, s.101 of the *Road Traffic Act 1974* and s.365 of the *Health Act 1911*.

3.35 However, these restrictions in the *Justices Act* and elsewhere would appear to be of little consequence as far as the defendant is concerned, since the *Official Prosecutions (Defendants' Costs) Act 1973* provides for the costs of defendants who are successful appellants in such cases to be paid out of the Consolidated Revenue Fund. There may, however, be an argument for the enactment of a provision empowering the court to order costs against official complainants direct in special cases.

3.36 The Commission in its recent report, *The Suitors' Fund Act Part B: Criminal Proceedings* (1977) recommended a thoroughgoing 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*.<sup>78</sup> In particular, the Commission recommended that that Act be amended to provide that costs should generally be awarded in favour of a defendant who was an unsuccessful respondent (that is, where the appeal court overturned a decision in his favour in the trial court) or who was a successful respondent (that is, where the appeal court sustained a decision in his favour in the trial court). The Commission also recommended that the proviso to s.219 of the *Justices Act*, dealing with the defendant's costs where a police officer complainant appeals, should be consequently repealed.<sup>79</sup>

3.37 Taking into account the foregoing, the Commission would welcome comment on what provision should be made for appeal costs in the *Justices Act*.

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<sup>77</sup> Costs awarded to a defendant in such cases are payable out of the Consolidated Revenue Fund and not by the police officer personally: see paragraph 2.19 above.

<sup>78</sup> See generally paragraphs 5.66 to 5.75 of that report.

<sup>79</sup> Report, paragraph 5.74.

## **PART C: PROCEDURE**

### **INTRODUCTION**

3.38 One of the main advantages from the introduction of a single mode of appeal as suggested by the Commission<sup>80</sup> is that this would permit a single procedure. Special steps might, however, still be needed in those cases where leave was required: these are discussed separately below. The Commission's primary aim in this part of this paper is to outline the essential features of a modern appeal procedure which, in the Commission's view, is a preferable course to attempting to update the existing procedure or to rectify the existing procedural difficulties referred to in Part C of Chapter 2. Because of this approach it is not expedient to refer specifically to each of the existing difficulties. However, where an existing difficulty is relevant to the discussion reference is made to it in a footnote. The Commission wishes to emphasise that the procedure suggested below is intended as a guide to the issues which arise and does not purport to be a complete code on the subject. The issues are summarised under the following heads –

- (a) Institution of appeal and notice to other parties.
- (b) Security for appeal and costs.
- (c) Bail.
- (d) Stay of other proceedings.
- (e) Transmission of documents to appellate court.
- (f) Entry for hearing and notice to parties.
- (g) Failure to prosecute appeal.
- (h) Hearing of the appeal and the decision.
- (i) Implementing the results of the appeal.
- (j) Further appeal.
- (k) Miscellaneous
  - (i) Enlargement or abridgement of time.
  - (ii) Effect of informalities.
  - (iii) Service of notices and other documents.
  - (iv) Arrest of absconding appellant.
  - (v) Costs.

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<sup>80</sup> See paragraph 3.2 above.

## THE PLACE OF RULES OF COURT

3.39 The Commission suggests that in so far as it is practicable, the control of the conduct of an appeal should be vested in the appellate court. The Commission also takes the view that the procedure in respect of appeals ought to be encompassed in rules rather than in the present statutory form.<sup>81</sup> There is authority now for Judges of the Supreme Court to make rules to regulate the practice and procedure for appeals and to prescribe fees and costs.<sup>82</sup> However, if appeals were made to the District Court of Western Australia it might be more suitable for the rules to be made by Judges of that Court. In the Commission's view it would be desirable for the appellate court to be in a position where it could oversee not only whether the parties to the appeal comply with the rules but also whether the rules themselves are suitable from time to time. The other advantage from the use of rules of court to govern the procedure is that they are more easily brought up to date and amended where necessary than provisions of a statute.

## APPEAL AS OF RIGHT

### (a) Institution of appeal and notice to other parties

3.40 An appeal as of right could be instituted by filing the *Notice of Appeal* either in the appellate court<sup>83</sup> or in the Court of Petty Sessions nearest to the place where the decision appealed from was made.<sup>84</sup> It is noted that the latter procedure applies in New Zealand.<sup>85</sup> However, the Commission considers that the former procedure would be more appropriate in Western Australia because it ensures that the appellate court is informed of the existence of an appeal from the outset. The notice of appeal should be in writing in a prescribed form naming the appellant and the other parties or persons interested in the proceedings or decision the subject of the appeal, and containing the following details: the date of the decision appealed from, the name of the justices concerned and the Court of Petty Sessions involved if the

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<sup>81</sup> See paragraph 2.70 above. In the case of appeals from a Local Court to the District Court the procedure is laid down by rules of the appellate court: *District Court (Appeal) Rules, 1977*. The practice is for the Joint Costs and Rules Committee, which is a non-statutory body composed of representatives of the bench and the practising profession, to be consulted before rules of court are made.

<sup>82</sup> See paragraph 2.70 above.

<sup>83</sup> In the case of an appeal to the Supreme Court the notice would be filed in the Central Office in Perth. In the case of an appeal to the District Court the notice could be filed at a District Registry or in Perth.

<sup>84</sup> At present, in ordinary appeals, the Act is silent on the court in which the notice of intention to appeal must be lodged and no form is prescribed: see paragraph 2.27(a) and (b) above.

<sup>85</sup> See *Summary Proceedings Act 1957* (NZ), s.116(1).

decision was made in Court, the plea (if any) entered by the defendant, the nature of the proceedings in which the decision was made, particulars of the order made by the court, and the appellant's address for service or that of his solicitor. It would also be necessary for the notice of appeal to state, with sufficient particularity, the grounds of appeal.<sup>86</sup> If an appellant in custody intended to apply for release on bail pending the determination of the appeal, and if it were necessary for him to give notice of that intention to the other parties,<sup>87</sup> that notice could be included in the Notice of Appeal.

3.41 A copy of the Notice of Appeal would then be served on the other parties to the appeal and also on the clerk of petty sessions for the place where the decision appealed from was given. It would be the responsibility of that clerk to inform the justices concerned that an appeal had been instituted.<sup>88</sup> The means by which service of the Notice could be effected are discussed below.<sup>89</sup> The responsibility for the service of the Notice of Appeal could lie upon the appellant. Although it is arguable that the Master (or Registrar) of the appellate court could be responsible for service, the Commission sees disadvantages in this procedure. It would cast additional duties on the Master (or Registrar) and it removes from the appellant an element of control over his appeal. The Commission is, however, of the view that the Master (or Registrar) of the appellate court should be required to send a copy of the Notice of Appeal to the Attorney General. In this way the Crown would 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 parties or the clerk of petty sessions. If it came to the attention of the Attorney General that there had been neglect or delay in the service of the Notice of Appeal on the other parties it would be open to him to apply for the summary dismissal of the appeal.<sup>90</sup>

3.42 It is the Commission's view that the period of seven days presently provided for instituting ordinary appeals is inadequate to enable a person to obtain legal advice, settle the grounds of appeal and file and serve the Notice of Appeal. Although an application can be made for an enlargement of the time,<sup>91</sup> such an application would increase the work and cost

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<sup>86</sup> Although the Commission has suggested that the appellant need not be required to meet specific grounds before being able to appeal he should nevertheless be required to state in his notice sufficient information for the respondent and the court as to the nature of his appeal and his reasons for appealing.

<sup>87</sup> See paragraph 3.58 below.

<sup>88</sup> This would be particularly necessary if provision were made allowing the justices to file an explanatory affidavit: see paragraph 3.84 below.

<sup>89</sup> See paragraphs 3.94 to 3.96 below.

<sup>90</sup> See paragraph 3.77 below.

<sup>91</sup> See paragraph 2.64 above.

involved in instituting an appeal. It is the Commission's view that a period of twenty-one days would be a reasonable time to provide for the institution of appeals.<sup>92</sup>

3.43 Circumstances may arise where an appellant, through no fault of his own, is unable to serve the Notice of Appeal within the time prescribed. For example, he may not be able to locate one of the parties to the appeal. It may, therefore, be desirable to provide the appellant with power to apply to a judge of the appellate court for an order extending the time for service and, if necessary, for an order for substituted service.<sup>93</sup>

#### *Frivolous or vexatious appeals*

3.44 Where appeals may be instituted as of right, that is without the need to obtain the leave of a court, appeals of a frivolous or vexatious nature might be instituted. In such a case it might be desirable to allow a respondent and the Attorney General to apply by way of summons to a judge of the appellate court, either in court or in chambers, for the summary dismissal of the appeal.<sup>94</sup>

3.45 Where an appeal is dismissed it might be necessary to provide the judge with power to make any necessary consequential orders, including an order for costs and, where the appellant has been released on bail pending the determination of the appeal, for the committal of the appellant into custody. The question of an appeal from a determination made on an application for dismissal of a frivolous or vexatious appeal is considered above.<sup>95</sup>

#### *Other matters*

##### **(i) Appeal on more than one matter**

3.46 The Commission understands that under existing practice where decisions relating to a number of matters are made at the same hearing it is not uncommon for one application for an order to review to be made with respect to a number of matters. This practice obviates the

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<sup>92</sup> This is also the time provided for the institution of appeals to the Court of Criminal Appeal (*Criminal Code*, s.695) and to the Full Court of the Supreme Court in civil matters: *Supreme Court Rules 1971*, Order 63 rule 4(1).

<sup>93</sup> These questions are discussed in paragraphs 3.92 and 3.95 below.

<sup>94</sup> There may be other grounds for summary dismissal, for example, failure to prosecute the appeal or to provide sufficient particulars. These are considered in paragraphs 3.77 to 3.79 below.

<sup>95</sup> See paragraph 3.28 above.

need for additional documentation and a consequent increase in the cost of appeals which would occur if a separate application had to be made with respect to each matter. Doubt has been cast on the validity of this practice by a recent Victorian case<sup>96</sup> in which it was held that a separate order must be obtained from the Supreme Court with respect to each information, even if identical grounds were relied on in each case. It is the Commission's view that this result should be avoided in Western Australia, and that where an appellant appeals against a number of decisions made at the one hearing and in proceedings between the same parties he should be able to commence the appeal by one Notice of Appeal. The Notice of Appeal could contain particulars relating to each decision appealed against. There is provision in Victoria, in the case of appeals to the County Court under s.73 of the *Magistrates' Courts Act 1971*, for an appellant to appeal against a number of decisions by means of one Notice of Appeal. Order 34A rule 3 of the *County Court Rules 1964* provides:

"In the event of the appellant appealing against a number of convictions or orders imposed or made by the same Magistrates' Court on the same day and in proceedings between the same parties, he may give one Notice only, in which shall be included the particulars relating to each conviction or order appealed against".

**(ii) Amendment of notice of appeal before hearing**

3.47 It may be desirable to enable an appellant to apply to a judge of the appellate court for the amendment of the Notice of Appeal before the hearing of the appeal.<sup>97</sup> If this were considered to be desirable, provision for the amendment of the Notice of Appeal could be made in a form similar to s.209(3) of the *Court of Petty Sessions Ordinance 1930 (ACT)*<sup>98</sup> which provides:

"The Supreme Court may, on such terms and conditions as it thinks fit, grant leave to the appellant to amend a notice of appeal..".

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<sup>96</sup> See *Riddle v Ingram* [1977] VR 20.

<sup>97</sup> The question of the amendment of the grounds of appeal at the hearing of the appeal is discussed in paragraph 3.83 below.

<sup>98</sup> In the case of civil appeals to the Full Court of the Supreme Court appeals are instituted by means of a notice of motion. In these appeals there is a provision for the amendment of the notice of motion: Order 63 rule 2(5) of the *Supreme Court Rules 1971* provides:

"A notice of motion may be amended by order of a Judge before the appeal is listed for hearing on such terms (if any) as the Judge thinks fit".

**(iii) Consolidation of appeals**

3.48 If the appellant is able to combine several appeals in one notice of appeal as suggested above<sup>99</sup> no difficulty arises. But there may be other cases where separate appeals relating to the same proceedings must be instituted. One situation where this might occur is where appeals are made by the complainant, defendant, and in some cases by the Attorney General in respect of the same decision. Another situation where separate appeals may relate to the same decision could be where an appeal is made as of right on one ground but with leave on another. In these circumstances it would appear to be expedient to make provision for a judge, either on his own motion or upon an application by a party, to order the consolidation of one appeal with another.<sup>100</sup>

**(iv) Discontinuing appeals**

3.49 At present the *Justices Act* contains no provision which enables an appellant to abandon an appeal. However, the Commission understands that on occasions appeals have been abandoned by a “Notice of Discontinuance” being filed at the Supreme Court.

3.50 In a number of jurisdictions studied by the Commission there is provision for abandoning appeals,<sup>101</sup> and in Western Australia there is also provision for the abandonment of appeals from trials on indictment in the *Criminal Practice Rules*.<sup>102</sup> In New Zealand s.129 of the *Summary Proceedings Act 1957* provides:

"An appellant may at any time after he has given notice of appeal, or after he has applied for extension of time for such a notice, abandon his appeal by giving the Registrar of the Supreme Court and the respondent notice to that effect in the prescribed form, and upon the giving of the notice the appeal shall, subject to the right of the respondent to apply for an order as to costs, be deemed to have been dismissed by the Supreme Court for non-prosecution."

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<sup>99</sup> See paragraph 3.46 above.

<sup>100</sup> Such a power is contained in Rule 21(8) of the *District Court (Appeal) Rules 1977* which applies to appeals from a Local Court to the District Court.

<sup>101</sup> Victoria: *Magistrates' Courts Act 1971*, s.75(1)(p)-(r). See also *County Court Rules 1964*, Order 34A rule 11, Form 121F.

New Zealand: *Summary Proceedings Act 1957*, s.129.

England: *The Crown Court Rules 1971*, Order 9.

<sup>102</sup> Order IX rule 13.



The leave of the Supreme Court is not required. Once an appeal has been abandoned the decision of the trial court may be enforced in the normal manner.<sup>103</sup>

3.51 The Commission is in favour of provision for the discontinuance of appeals in Western Australia but considers that there might be a case for requiring leave of the appellate court at least in cases where discontinuance is sought after the appeal has been entered for hearing.<sup>104</sup> Where leave is required to discontinue an appeal, the respondent's costs could be settled at the hearing of the application for leave or an order might be made that they be taxed. If an appeal could be discontinued without leave of the court, it would be necessary to provide, as in New Zealand, for the respondent to apply for an order as to costs. The time for making such an application could be limited, say, to within one month of the respondent receiving notice of the discontinuance of the appeal.<sup>105</sup> It might also be desirable for the Attorney General or the Crown Solicitor to be notified when a notice of discontinuance is filed so that steps may be taken if necessary to have the appellant returned to custody if he is released on bail.<sup>106</sup>

#### **(b) Security for appeal and costs**

3.52 At present, both in the case of ordinary appeals and appeals by way of an order to review, the appellant must enter into a recognizance<sup>107</sup> whereby he binds himself to prosecute the appeal without delay, appear at the hearing, and submit to the judgment of the appellate court. The recognizance also binds the appellant to pay such costs of the appeal as the court may award.<sup>108</sup> The Commission notes that in both South Australia and New Zealand a recognizance as security for the prosecution of the appeal and for the costs of the appeal is not required. One undesirable consequence of requiring an appellant to enter into a recognizance is that he may be prevented from appealing merely because he is unable to enter into the security.<sup>109</sup> It is the Commission's tentative view that the object of ensuring that an appeal is prosecuted without delay could be met by providing the Attorney General or a party to the appeal with power to apply to a judge of the appellate court for an order dismissing the appeal

<sup>103</sup> *Summary Proceedings Act 1957* (NZ), s.135(1).

<sup>104</sup> See, for example, the position in the case of appeals to the Full Court of the Supreme Court in civil matters: *Supreme Court Rules 1971*, Order 63 rule 17.

<sup>105</sup> See *Magistrates' Courts Act 1971* (Vic), s.75(1)(r).

<sup>106</sup> See paragraph 3.63 below.

<sup>107</sup> In the case of ordinary appeals the security required by a recognizance or the deposit of money must not be less than fifty dollars: *Justices Act 1902*, s.187.

<sup>108</sup> See paragraphs 2.33 and 2.36 above.

<sup>109</sup> See paragraphs 2.35(d) and 2.38(b) above.

for want of prosecution.<sup>110</sup> If so, recognizances to prosecute the appeal would no longer be required in Western Australia.

3.53 However, it might still be desirable to require an appellant to enter into a recognizance to pay such costs of the appeal as the appellate court may award or to deposit a sum of money as security.<sup>111</sup> For example, in the case of appeals from a Local Court to the District Court Rule 7 of the *District Court (Appeal) Rules 1977* provides:

"Security in the sum of one hundred dollars to answer the costs of the appeal in the event of the appellant being unsuccessful shall be paid into the Registry by the appellant when the notice of appeal is filed".

3.54 Another approach to the question of security for the payment of the costs of the appeal would be to provide for a person on whom a Notice of Appeal has been served to apply by way of summons to a judge of the appellate court for an order requiring the appellant to give such security on such terms as to costs or otherwise as the judge thinks fit.<sup>112</sup> Such a procedure would enable the judge to fix a realistic sum as security for the costs of the appeal.

3.55 If, on the other hand, it were considered that the present approach should be retained, a number of points arise for consideration –

- (a) Should security be required for both the costs of the appeal and also to prosecute the appeal?<sup>113</sup>
- (b) Should the security be provided only by a recognizance, with or without a surety or sureties, or only by the deposit of a sum of money, or by either of these methods?
- (c) Should security be required in all cases or should it be discretionary?<sup>114</sup>

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<sup>110</sup> See paragraphs 3.77 to 3.79 below.

<sup>111</sup> The question of the recovery of the costs of an appeal is discussed in paragraphs 3.99 to 3.103 below.

<sup>112</sup> A procedure similar to this is provided in Tasmania: see *Justices Act 1959* (Tas), s.109(1)(b).

<sup>113</sup> In the Australian Capital Territory, for example, security is required only for the costs of the appeal: see the *Court of Petty Sessions Ordinance 1930*, ss.211(1) and 219D(1)(a).

<sup>114</sup> At present, both in the case of ordinary appeals and appeals by way of an order to review, it appears to be required in all cases: see paragraphs 2.33 and 2.36 above.

- (d) Should a time for entering into the recognizance or depositing the money as security be provided?<sup>115</sup>
- (e) Should the recognizance be conditioned for the appearance of the appellant, not only at the hearing of the appeal, but also on any day on which the hearing is, from time to time, adjourned or postponed?<sup>116</sup>
- (f) In many cases in which a complainant appeals the appeal is instituted on behalf of the Crown or an authority such as a local authority because the complainant is a police officer or some other public officer. The Commission welcomes comment on whether these persons should be required to enter into a recognizance or deposit money as security for the prosecution of the appeal and for the costs of the appeal.
- (g) Should the requirement for security be determined by justices<sup>117</sup> or by the appellate court in line with the Commission's view that that court ought to control the appellate process?<sup>118</sup> In either case the appellant could be required to make the application within a certain time from his filing the notice of appeal. Also, in either case, where a recognizance is required, it could be entered into before justices.
- (h) Should the determination of the security be heard *ex parte*, or only after notice has been given to the other parties, or *ex parte*, but subject to the judge ordering that notice be given to the other parties?
- (i) If money is required to be deposited, should this be paid into the clerk of petty sessions<sup>119</sup> or into the appellate court?<sup>120</sup>

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<sup>115</sup> The existing time for ordinary appeals appears to be insufficient: see paragraph 2.35(b) above. Perhaps the appellant should be required to enter into the recognizance or deposit the money as security before the appeal is entered for hearing.

<sup>116</sup> This would mean that there would be no need for provision for the respite of the recognizance.

<sup>117</sup> As it is at present in the case of ordinary appeals: see paragraph 2.33 above.

<sup>118</sup> See paragraph 3.39 above. This is the position at present in the case of appeals by way of an order to review: see paragraph 2.36 above.

<sup>119</sup> As it is for ordinary appeals (see paragraph 2.34 above) and in the following jurisdictions -  
Queensland: *Justices Act 1886*, s.222(2)(i)(b).  
Australian Capital Territory: *Court of Petty Sessions Ordinance 1930*, s.211(2).

3.56 Where a recognizance has been entered into or money has been deposited as security either for the prosecution of the appeal or for the costs of the appeal, and a condition of the recognizance has been breached<sup>121</sup> the recognizance could be enforced under the *Justices Act*.<sup>122</sup> However, money deposited as security for the costs of the appeal would be returned to the appellant subject to an order of the court for the payment of the costs of the other party or parties to the appeal. If the money deposited did not cover the costs awarded to the other party or parties, or if no money were deposited, the balance or the costs awarded could be recovered in the manner referred to in paragraphs 3.99 to 3.102 below.

**(c) Bail**

3.57 In the case of an ordinary appeal, if the appellant enters into a recognizance as security for the prosecution of the appeal, he is required to be released from custody.<sup>123</sup> In the case of an appeal by way of an order to review a Judge of the Supreme Court may grant an appellant bail when granting an order nisi to review, or subsequently on the application of the appellant.<sup>124</sup> It is the Commission's view that an appellant who is in custody as a result of the decision the subject of the appeal should not be released automatically on bail<sup>125</sup> but should be entitled to apply for release on bail<sup>126</sup> pending the outcome of the appeal, so long as he is not being held in custody as the result of some other decision. Where the Attorney General appeals<sup>127</sup> against a conviction or order as a result of which a person has been imprisoned it is the Commission's view that that person should also be entitled to apply to be released on bail.

3.58 One apparent problem with the present position in the case of both ordinary appeals and appeals by way of an order to review is that a person may be released on bail without the

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<sup>120</sup> This would be in line with the Commission's view that the appellate court ought to control the appellate process. This is the position in the case of appeals from a Local Court to the District Court: *District Court (Appeal) Rules 1977*, Rule 7.

<sup>121</sup> For example, where an appeal has been summarily dismissed for failure to prosecute: see paragraphs 3.77 to 3.79 below.

<sup>122</sup> *Justices Act 1902*, s.154A.

<sup>123</sup> See paragraph 2.39 above.

<sup>124</sup> See paragraph 2.41 above.

<sup>125</sup> See paragraph 2.40(b) above.

<sup>126</sup> The Commission has recently issued a working paper which reviews bail procedures: The Law Reform Commission of Western Australia; Project No. 64 – *Review of Bail Procedures*. The matters considered in that paper will generally be of relevance to the grant of bail pending an appeal. In this paper it is intended to consider a number of matters of particular relevance to the grant of bail pending an appeal and the treatment of a person who has not been released on bail pending the determination of an appeal.

<sup>127</sup> See paragraphs 3.12 to 3.14 above.

prosecution being aware that he has applied for bail and therefore without the prosecution being able to appear and be heard with respect to the bail application.<sup>128</sup> The Commission notes that in the case of an appeal to the Court of Criminal Appeal an application for bail must be made upon notice of motion or summons served on the Crown Prosecutor.<sup>129</sup> A similar procedure applies in South Australia in respect of appeals from decisions of a Court of Summary Jurisdiction.<sup>130</sup> It is the Commission's view that the procedure for appeals under the *Justices Act* and for appeals to the Court of Criminal Appeal should be assimilated on the question of bail so that an appellant who is in custody and intends to apply for bail should be required to give notice of that application to the other parties. Such notice could be given with the Notice of Appeal or by a summons or motion.

3.59 At present, in the case of an ordinary appeal, the conditions of bail are set by a Court of Petty Sessions.<sup>131</sup> However, in the case of an appeal by way of an order to review the conditions of bail are set by a Judge of the Supreme Court, either when the order nisi to review is granted or subsequently on the application of the appellant.<sup>132</sup> The Commission welcomes comment on whether the application for bail should be determined by a judge of the appellate court, either sitting in court or in chambers, or by a Court of Petty Sessions or justices out of sessions. It is the Commission's tentative view that an application for bail should be determined by a judge of the appellate court. This is in line with the Commission's view that, so far as it is practicable, the control of the conduct of an appeal should be vested in the appellate court.

3.60 The Commission's working paper on bail procedures<sup>133</sup> contains a comprehensive discussion of pre-release conditions which must be met before a defendant can obtain his release on bail, and post-release conditions which operate after a defendant has been released on bail. Any recommendations that the Commission makes in its report on bail with respect to these conditions will apply to bail granted to a defendant during an appeal from a decision of justices and therefore further elaboration of the issues is not required here. The recognizance to appear at the appeal might be combined with the recognizance to prosecute the appeal if

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<sup>128</sup> See paragraphs 2.40(a) and 2.43(a) above.

<sup>129</sup> *Criminal Practice Rules*, Order VI rule 1.

<sup>130</sup> See *Justices Act 1921* (SA), s.168(2) and (3) where an appellant is required to give the respondent "reasonable notice of his intention to apply for release" and the prosecution may object to the application for release.

<sup>131</sup> *Justices Act 1902*, s.187.

<sup>132</sup> *Ibid.*, s.197(1).

<sup>133</sup> Project No. 64 - *Review of Bail Procedures*, Chapters 6 and 7.

this latter recognizance were retained.<sup>134</sup> However, this might lead to confusion,<sup>135</sup> for example when a surety is required, and the Commission's tentative view is that separate recognizances might be desirable.

3.61 Where a recognizance for the release of an appellant from custody has been entered into, the appellant would present a copy of the recognizance to the person by whom he is held in custody who, on verifying that it was correctly entered into, would release the appellant from custody.<sup>136</sup> As at present in the case of appeals by way of an order to review, the person releasing the appellant from custody would report that fact to the Master (or Registrar) of the appellate court and also to the Attorney General.<sup>137</sup> This would continue to avoid the situation which had occurred in Western Australia where an appellant obtained his freedom on bail but failed to prosecute his appeal.<sup>138</sup>

3.62 At present, where a person has been released on bail pending an appeal, there is no provision for the revocation of bail for any surety to be discharged from his obligations under a recognizance. There is, however, power to revoke bail conditioned for the appearance of a person before justices or to take his trial before the Supreme Court or the District court.<sup>139</sup> The question whether this power should be retained or revised was considered by the Commission in its working paper on the *Review of Bail Procedures*. Similar conditions would appear to be applicable in the case of bail granted pending an appeal. In its working paper the Commission said:<sup>140</sup>

"It may come as a surprise to a defendant to discover that the person who has enabled his release on bail may terminate his freedom at any time even though he is complying with the terms of his bail and clearly intends to continue to do so. The procedure may be open to abuse by a surety.

A more satisfactory solution might be to enable a surety to be discharged if he gives reasonable notice to the defendant and to the police. Reasonable notice would give the defendant time to arrange for a substitute surety or to have the conditions for his bail reviewed. Alternatively, the surety could be given rights to apply to a court for a discharge and a warrant could be issued for the defendant's arrest".

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<sup>134</sup> See paragraph 3.52 above.

<sup>135</sup> See paragraph 2.43(c) above.

<sup>136</sup> This is similar to the present position in the case of appeals by way of an order to review: see paragraph 2.42 above.

<sup>137</sup> See paragraph 2.42 above.

<sup>138</sup> See paragraph 2.40(d) above.

<sup>139</sup> *Justices Act 1902*, s.94A.

<sup>140</sup> Project No.64 - *Review of Bail Procedures*, paragraphs 7.77 and 7.78.

3.63 Where a person is released from custody on bail pending an appeal and the appeal is dismissed either before<sup>141</sup> or after<sup>142</sup> the hearing of the appeal, or is discontinued with leave<sup>143</sup> it would be convenient for the judge of the appellate court hearing the matter to have power to issue a warrant committing the appellant to his former custody.<sup>144</sup> If the appeal is discontinued merely on notice<sup>145</sup> it might be necessary for the Master (or Registrar) to notify the Attorney General or an officer of the Crown Law Department, so that steps can be taken for the appellant to be returned to custody.<sup>146</sup> It might be convenient for any necessary warrant to be issued by a justice.

3.64 The provisions of the *Justices Act* do not regulate the manner in which a convicted appellant, who is not admitted to bail, is to be treated prior to the determination of his appeal. In the case of appeals to the Court of Criminal Appeal from trials on indictment, s.700(1) of the *Criminal Code* provides that a convicted appellant who is not admitted to bail is 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.<sup>147</sup> In South Australia,<sup>148</sup> an appellant who has instituted an appeal and who is not released on bail pending the determination of the appeal must, unless he is in custody for some other cause, be treated in the same manner as a person who is committed for trial and is in custody awaiting trial. If the result of the appeal is that the appellant is required to serve a term of imprisonment, then, subject to any direction to the contrary by the Supreme Court, the time during which he is in custody and is specially treated pending the appeal counts as part or the whole of that term.

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<sup>141</sup> See paragraphs 3.44 above and 3.77 to 3.79 below.

<sup>142</sup> See paragraph 3.29 above.

<sup>143</sup> See paragraph 3.51 above.

<sup>144</sup> At present, in the case of an appeal by way of an order to review there is express power for the court or a prescribed officer to issue such warrants as may be necessary to carry into effect the decision of the court: *Justices Act 1902*, s.205(4). There is no similar express power in the case of an ordinary appeal.

<sup>145</sup> See paragraph 3.51 above.

<sup>146</sup> Ibid.

<sup>147</sup> See *Prison Regulations 1974*, reg. 80 which provides:

"Prisoners detained for safe custody only pursuant to an order made either by the Court or Governor, under the provisions of section 653 of the *Criminal Code*, shall be treated as if they are sentenced prisoners, and the regulations governing sentenced prisoners shall apply and have effect save that –

- (a) if the Superintendent is of the opinion that it is in the best interests of the prisoner, and the prison generally, the prisoner may be segregated; and
- (b) the Medical Officer shall examine the prisoner periodically and record his physical and mental state, and may recommend any alteration to the location of the prisoner, or work placement".

<sup>148</sup> *Justices Act 1921* (SA), s.168(4).

3.65 In Tasmania an appellant who is not released on bail pending the determination of an appeal may elect either to continue his sentence or to be treated as a person awaiting trial.<sup>149</sup> If he elects to be treated as a person awaiting trial or is granted bail, the period during which he is so treated or liberated does not count as part of his term of imprisonment.<sup>150</sup>

3.66 One disadvantage of a procedure allowing special treatment is that it might lead to delays by the appellant in order that he might benefit from the special treatment while serving his term of imprisonment. However, if procedures were introduced for the dismissal of appeals for want of prosecution as the Commission has suggested<sup>151</sup> this problem could be alleviated.

**(d) Stay of other proceedings**

3.67 If a decision is made which does not involve imprisonment, for example, where a fine or compensation is ordered to be paid, or property is ordered to be forfeited consideration needs to be given to the means by which such orders can be stayed pending the determination of an appeal.<sup>152</sup>

3.68 In the case of appeals from a Local Court to the District Court a Judge may, either upon his own initiative or on a motion, stay the execution of a judgment against which a notice of appeal has been filed.<sup>153</sup> A similar procedure could be adopted in the case of appeals from decisions of justices. If a stay of execution were granted the order would be filed with the relevant clerk of petty sessions thus staying the execution process. 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

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<sup>149</sup> See also *Summary Proceedings Act 1957* (NZ), s.127.

<sup>150</sup> *Justices Act 1959* (Tas), s.121A(1) and (2).

<sup>151</sup> See paragraphs 3.77 to 3.79 below.

<sup>152</sup> At present, for both ordinary appeals and orders to review execution is stayed once a recognizance for the prosecution of the appeal has been entered into: see paragraphs 2.44 and 2.45 above.

<sup>153</sup> *District Court (Appeal) Rules 1977*, Rule 21(2).



warrant for execution is kept informed of any stay in execution and of the results of the appeal.<sup>154</sup>

3.69 Different considerations might apply in a case where the decision appealed against imposed a good behaviour bond. These may last for up to six months<sup>155</sup> and involve the forfeiture of a recognizance if the defendant commits any offence which is in law a breach of the condition of the recognizance. In this case it might be desirable for the period of good behaviour under the bond to run notwithstanding the appeal in every case. Alternatively it might be desirable to empower a judge, either on his own initiative or on an application by the appellant by summons to order the obligations under the bond to be suspended until the results of the appeal are known. Of these two approaches, the Commission tentatively favours the latter. Although an appellant ought to be of good behaviour pending his appeal, it might be unjust if he were subjected to forfeiture procedures if he breaches his bond pending the appeal, and the result of the appeal is that the bond should never have been imposed in the first place. Similar considerations would seem to apply to other orders affecting the defendant's freedom but not involving imprisonment, for example, probation orders and community service orders.

**(e) Transmission of documents to appellate court**

3.70 The Commission understands that at present it is the practice of the Supreme Court to request the relevant clerk of petty sessions to forward copies of the proceedings the subject of an appeal to the Supreme Court when an appeal has been entered for hearing.<sup>156</sup> In the case of an appeal from a Local Court to the District Court, the clerk of the Local Court must forthwith on request being made by the Registrar or Deputy Registrar of the District Court transmit the relevant documents to the Registry.<sup>157</sup> There is a similar procedure in the case of appeals from the District Court or the Family Court of Western Australia to the Supreme Court.<sup>158</sup> 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.<sup>159</sup> In Queensland, for example, s.222(2)(ii) of the *Justices Act 1886* provides:

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<sup>154</sup> See paragraph 3.85 below

<sup>155</sup> *Justices Act 1902*, s.178.

<sup>156</sup> There is no requirement that this be done at present for orders to review: see paragraph 2.50(a) above.

<sup>157</sup> *District Court (Appeal) Rules 1977*, Rule 15.

<sup>158</sup> *Supreme Court Rules 1971*, Order 64 rule 3(3).

<sup>159</sup> South Australia: *Justices Act 1921*, s.175.

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

3.71 The Commission tentatively favours the Queensland approach because it would appear to be more convenient for the appellate court to have all of the documents relating to an appeal as soon after the institution of the appeal as possible. For example, they may be required where an application for the summary dismissal of an appeal is made. Consequently, a clerk of petty sessions would be required to transmit the relevant documents in his possession to the appellate court as soon as he receives a copy of the notice of appeal.<sup>160</sup>

3.72 Relevant documents which should be transmitted by the clerk would include a certified copy of the complaint, any depositions, the conviction or order of the justices, any recognizance entered into by the appellant,<sup>161</sup> the justices' notes of evidence and addresses of counsel, a list of the exhibits in evidence, and so far as practicable, the original exhibits,<sup>162</sup> the defendant's criminal record, any probation report, and a transcript of the proceedings (if any).

3.73 At present under a practice direction<sup>163</sup> an appellant in the case of an order to review<sup>164</sup> is required, not less than six days before the date of the hearing of the appeal, to prepare, file and serve a copy of an appeal book. It is also necessary to prepare an appeal book in the case of an appeal to the Court of Criminal Appeal.<sup>165</sup> It is the Commission's tentative view that appeal books provide an orderly and convenient reference source to all documents relating to the appeal and should continue to be required.

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Tasmania: *Justices Act 1959*, s.109(2).

Queensland: *Justices Act 1886*, s.222(2)(ii).

New Zealand: *Summary Proceedings Act 1957*, s.117.

<sup>160</sup> The Commission suggests above that the original Notice of Appeal ought to be filed in the appellate court and a copy served on the clerk of petty sessions: see paragraphs 3.40 and 3.41 above.

<sup>161</sup> For example, a recognizance entered into under s.178 of the *Justices Act 1902* to keep the peace or be of good behaviour.

<sup>162</sup> See paragraph 3.75 below for a discussion of the custody of exhibits.

<sup>163</sup> Supreme Court of Western Australia, Practice Direction, 25 May 1972: *Proceedings Under Particular Statutes*.

<sup>164</sup> They are not required at present for ordinary appeals though in practice they are lodged: see paragraph 2.48(b) above.

<sup>165</sup> *Criminal Practice Rules*, Order IX rule 22. See also the *Supreme Court Rules 1971*, Order 63 rule 13 where an appeal book is required in the case of an appeal to the Full Court of the Supreme Court.

3.74 In order to facilitate the preparation of appeal books it is necessary to ensure that the parties to an appeal have access to the relevant court documents. Although s.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, this provision may not be wide enough to cover all of the documents referred to in paragraph 3.72 above. It would, therefore, appear to be necessary to extend the scope of s.148 to cover those documents. It may also be necessary to provide that a party to an appeal should be entitled to obtain copies of those documents from the Master (or Registrar) of the appellate court where they have been transmitted to that court.<sup>166</sup> This would be so particularly when the originals are located in a distant Court of Petty Sessions.

3.75 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.<sup>167</sup> In the case of trials on indictment the *Criminal Practice Rules*<sup>168</sup> require the Clerk of Arraignment to retain custody of the exhibits after the trial has concluded for a period of twenty-one days pending the lodging of a Notice of Appeal or an Application for leave to appeal.<sup>169</sup> A similar provision appears to be desirable in the case of proceedings in Courts of Petty Sessions.

**(f) Entry for hearing and notice to parties**

3.76 The appellant should be required to enter an appeal for hearing within a prescribed time say fourteen days from the date of service of the Notice of Appeal. Proof of service of the Notice of Appeal could be made a prerequisite to entry of the appeal for hearing.<sup>170</sup> The entry of the appeal for hearing would be effected by the appellant filing an Application for Entry of Appeal in the appellate court together with proof of service of the Notice of Appeal and serving a copy of the Application on the other parties to the appeal. The appeal would then come on for hearing as soon as practicable as directed by the appellate court. The onus would be on the parties to ascertain from the court list the date set down for the hearing of the appeal. It should, however, be possible for a party to the appeal to apply by way of summons

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<sup>166</sup> This is permitted for example in Tasmania, see *Justices Act 1959* (Tas), s.109(3).

<sup>167</sup> See paragraphs 2.48(c) and 2.50(b) above.

<sup>168</sup> Order XIV rule 3.

<sup>169</sup> See also the *Supreme Court Rules 1971*, Order 34 rule 14 for the position in the case of a trial by a Judge of the Supreme Court.

<sup>170</sup> See paragraphs 2.52 and 2.54 above and paragraph 3.96 below.

for an enlargement or abridgement of the time for entering an appeal for hearing, either before or after the expiration of the prescribed time.

**(g) Failure to prosecute appeal**

3.77 At present, there is provision in the *Justices Act* for the Attorney General or any party to an appeal to apply to a Judge or the Master in Chambers by summons served on the appellant for an order discharging an order to review if the appellant fails to prosecute his appeal within a reasonable time.<sup>171</sup> It is the Commission's tentative view that this procedure ought to be available for all appeals and ought to apply in the following circumstances, namely where the appellant fails –

- (a) to comply with the conditions for instituting an appeal, for example, serving the Notice of Appeal within the prescribed time, stating the grounds of appeal with sufficient particularity and entering into any security such as security to pay costs and/or to prosecute the appeal;
- (b) to prosecute the appeal without delay;
- (c) to take any necessary step in the presentation of the appeal such as having the appeal entered for hearing or filing an appeal book;
- (d) to appear on the day on which the appeal is to be heard.

3.78 It would also appear to be desirable for a judge hearing an application for summary dismissal to have the following powers –

- (a) to enable an error to be corrected so that an appeal would not be dismissed because of a technicality;
- (b) to dispense with compliance with any condition for the institution of an appeal;
- (c) to amend the Notice of Appeal or grounds of appeal;

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<sup>171</sup> See paragraph 2.56 above.

- (d) to order forfeiture of any security for the prosecution of the appeal;
- (e) to make an order as to the costs including an order for the payment to the respondent of any money deposited by the appellant as security for costs;
- (f) to issue a warrant for the arrest of the appellant if on bail and a warrant for committal to jail.

Where the appellate court dismisses an appeal for want of prosecution the Master (or Registrar) of the court would transmit a memorandum to that effect to the clerk of petty sessions and to the prison superintendent if the appellant has remained in custody.<sup>172</sup> Enforcement of the decision appealed against would then follow as if there had been no appeal.

3.79 In any case where an appeal is summarily dismissed in the absence of the appellant it may be desirable to allow the appellant an opportunity to have the order set aside if he can show good reason for his failure to appear. In Victoria there is a provision applying to the situation where the appeal is dismissed because the appellant failed to appear at the hearing of the appeal.<sup>173</sup>

#### **(h) Hearing of the appeal and the decision**

3.80 The Commission has already discussed the powers which the appellate court should have with respect to the hearing and determination of appeals.<sup>174</sup> There are, however, a number of specific questions relating to procedure on which the Commission would welcome comment.

3.81 First, should provision be made for a convicted person, whether or not represented by counsel, to present his case and his arguments in writing instead of by oral argument? There is

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<sup>172</sup> If he were being specially treated and the time he was so treated did not count as part of his term of imprisonment (see paragraphs 3.64 to 3.66 above) he would continue to serve his term of imprisonment from the date of the decision of the appellate court.

<sup>173</sup> *Magistrates' Courts Act 1971* (Vic), s.75(1)(s). A failure to appear at the hearing appears to be the only ground in Victoria for summary dismissal. See also *Justices Act 1902* (NSW), s.127A.

<sup>174</sup> See paragraphs 3.29 to 3.37 above.

provision for this in s.695(1) of the *Criminal Code* in the case of appeals to the Court of Criminal Appeal. In New Zealand, s.130(1) of the *Summary Proceedings Act 1957* provides that any party to an appeal who is in custody is entitled to present his case and his arguments in writing instead of by oral argument. Any case or argument so presented must be considered by the Supreme Court.

3.82 Second, should a convicted person, who is in custody, whether or not he is represented by counsel, be entitled to be present at the hearing of the appeal? In the case of appeals to the Court of Criminal Appeal, s.699 of the *Criminal Code* provides that even if he is in custody a convicted appellant, or a respondent in the case of an appeal under s.688(2)(d), is entitled to be present if he desires it, except where the appeal is on some ground involving a question of law only. In such a case, or in the case of an application for leave to appeal, or any proceedings preliminary or incidental to an appeal, the person is not entitled to be present except with the leave of the Court.<sup>175</sup>

3.83 Third, should there be a specific provision for the amendment of the grounds of appeal at the time of the hearing of the appeal? In South Australia, s.166 of the *Justices Act 1921* provides:

"No appeal shall be defeated merely by reason of any defect, whether of substance or of form, in any notice or statement of the grounds of appeal, but if upon the hearing thereof the Supreme Court is of opinion that any objection raised to such notice or statement is valid, it may cause the notice or statement to be forthwith amended: Provided that if the notice or statement appears to have been misleading, or to have occasioned expense, or to have prejudiced the respondent, such amendments shall be allowed only upon such terms as to costs or postponement, or both, as the Supreme Court thinks just".

3.84 Fourth, what provision should be made for the filing of explanatory affidavits by justices? In Victoria, in the case of an appeal by way of an order to review, the adjudicating magistrate may file an affidavit setting out the grounds of his decision. He may also include any facts which he considers to have a material bearing upon the question at issue, but only where the evidence has not been taken down in writing and signed and the exhibits marked.<sup>176</sup>

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<sup>175</sup> See also *Summary Proceedings Act 1957* (NZ), s.130.

<sup>176</sup> *Magistrates' Courts Act 1971* (Vic), s.100(1), see also s.696 of the *Criminal Code*.

**(i) Implementing the results of the appeal**

3.85 Whenever a decision is given on an appeal the Master (or Registrar) of the appellate court would send a memorandum of the decision of the court to the appropriate clerk of petty sessions. The clerk of petty sessions would enter the memorandum of the decision in the Court record and it would be attached to any copy or certificate of the conviction or order. The memorandum of the decision would be sufficient evidence of the decision in every case where such a copy or certificate would be sufficient evidence of the conviction or order.<sup>177</sup> It would be the clerk's responsibility to inform any person responsible for the enforcement of a warrant of execution as to the results of the appeal. It is arguable that a memorandum of the decision of the appellate court should also be sent to each party to the appeal. On the other hand, it might be considered sufficient to provide that a copy of the memorandum should be sent to any party to the appeal who is in custody and was not present when the decision was given.<sup>178</sup>

3.86 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 is quashed and the appellate court does not impose another sentence of imprisonment, the Master (or Registrar) of the appellate court would send a copy of the memorandum of the decision of the appellate 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 would then be released.<sup>179</sup>

3.87 Where the defendant is in custody pending the outcome of an appeal and on the determination of the appeal his imprisonment is to continue a memorandum of the decision of the appellate court would be forwarded to the superintendent of the penal institution in which the defendant is held in custody and would serve as notice of the term of imprisonment to be served by the defendant. It would not be necessary to issue a warrant to commitment.<sup>180</sup>

3.88 When any decision has been affirmed, amended, varied, or made upon any appeal the justices from whose decision the appeal was brought, or any other justices, would have

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<sup>177</sup> The position at present is discussed in paragraphs 2.57 and 2.60 above.

<sup>178</sup> See *Summary Proceedings Act 1957* (NZ), s.134.

<sup>179</sup> *Ibid.*, s.136(2).

<sup>180</sup> *Ibid.*, s.135(3) and s.136(3).

authority to enforce the decision in the same way as if it had been adjudged, imposed or made by them. However, 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 the appellate court or justices would have power to commit the appellant to jail.<sup>181</sup>

3.89 Where a good behaviour bond, probation or community service order has been imposed on a defendant, and the appeal is allowed in his favour, the relevant order would be quashed, and, in the case of the good behaviour bond the recognizance entered into by the defendant and the obligation of any surety thereunder would be discharged.<sup>182</sup>

3.90 Another matter which is not specifically dealt with at present is the resumption of good behaviour bonds, probation and community service orders, assuming these have been temporarily suspended pending the outcome of the appeal.<sup>183</sup> In New Zealand there is a specific provision relating to probation orders. Section 137 of the *Summary Proceedings Act 1957* (NZ) provides:

"Where under any determination in respect of which either party appeals the Magistrate's Court has released the defendant on probation, and –

- (a) Where the appeal is determined neither the decision to release the defendant on probation nor the conviction on which it was made is set aside, or
- (b) The appeal is not prosecuted or is dismissed for non-prosecution, -

the term of probation as specified by the Magistrate's Court or as varied by the Supreme Court, as the case may be, shall be resumed as from the day the appeal is determined or, as the case may be, the Magistrate or Justice or Justices certify that it has not been prosecuted or the Registrar of the Supreme Court certifies that it has been dismissed for non-prosecution."

The Commission welcomes comment on the question whether a specific provision similar to s.137 should be provided in Western Australia in respect not only of probation orders but also community service orders and good behaviour bonds.

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<sup>181</sup> See also paragraph 3.78 above where a similar procedure is suggested when an order is made summarily dismissing an appeal.

<sup>182</sup> See *Magistrates' Courts Act 1971* (Vic), s.76(1).

<sup>183</sup> See paragraph 3.69 above.



**(j) Further appeal**

3.91 In paragraphs 3.21 to 3.24 above the Commission considered whether the appellate court of first instance should be the Supreme Court or the District Court, and whether a further appeal to the Full Court of the Supreme Court from a single Judge of the Supreme Court or from the District Court should be permitted. If the appellate court of first instance were a single Judge of the Supreme Court, and a further appeal to the Full Court were permitted, a procedure similar to that in Order 63 of the *Supreme Court Rules 1971* could be adopted. If on the other hand the appellate court of first instance were the District Court and a further appeal to the Full Court of the Supreme Court were permitted a procedure similar to that in Order 64 of the *Supreme Court Rules 1971* could be adopted. On any further appeal, the Full Court of the Supreme Court would have the same power to adjudicate on the proceedings as had the appellate court of first instance.<sup>184</sup> The same consequences and proceedings would follow from the decision of the Full Court of the Supreme Court as if the decision had been given by the appellate court of first instance.<sup>185</sup>

**(k) Miscellaneous****(i) *Enlargement or abridgement of time***

3.92 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 under ss.183-206A upon such terms (if any) as the case may require. An application for an extension of time may be made before or after the expiration of the time appointed or allowed.<sup>186</sup> The Commission is of the view that a general provision similar to this should be retained.

**(ii) *Effect of informalities***

3.93 There are several provisions in the *Justices Act* which enable justices' decisions to stand despite defects or informalities in the proceedings or documents.<sup>187</sup> The Commission is

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<sup>184</sup> See paragraphs 3.29 to 3.37 above.

<sup>185</sup> See *Summary Proceedings Act 1957* (NZ), s.144(4).

<sup>186</sup> *Justices Act 1902*, s.206B.

<sup>187</sup> See paragraph 2.66 above.

not aware of any injustices or administrative inconveniences which flow from these provisions. However, the Commission welcomes comment on whether these provisions should be retained or whether they should be amended in any way.

(iii) *Service of notices and other documents*

3.94 The service of all notices and other documents relating to an appeal could be effected by personal service, or where the person refuses to accept a notice or document by the notice or document being brought to the attention of the party.<sup>188</sup> The Commission welcomes comment on the question whether service should also be permitted by registered letter addressed to the party at his last known or usual place of residence, or at his place of business. Service could also be effected by leaving the documents at his place of residence with a member of his family living with him and appearing to be of or over the age of fourteen years. At present, where documents, notices or proceedings are to be served on any party who is represented by a solicitor, service on the solicitor, or at his office or by prepaid post is deemed to be good service.<sup>189</sup> It might however be desirable to substitute a registered letter for prepaid post. It would be desirable to have the solicitors acting for the parties to the appeal entered on the court record. The solicitors for the appellant would be noted on the Notice of Appeal. The solicitors for the respondent could be required to file and serve on the other parties a notice of intention to be heard.<sup>190</sup> The same could be expected from any other party to the appeal. Such solicitors would be deemed to be authorised to accept service of documents on behalf of their clients. In any case where such notices have not been filed and served, as a precondition to service on solicitors it might be desirable to require a memorandum to the effect that they are instructed to accept service of any documents on behalf of their clients.<sup>191</sup>

3.95 It may be suggested that provision should be made for the substituted service of any notice or document relating to an appeal or to the summary dismissal of an appeal. The Commission notes that substituted service is permitted in civil proceedings under Order 72 rule 4 of the *Supreme Court Rules 1971* which provides:

“(1) Where by these Rules personal service of a document is required and it appears to the Court that personal service of such document on a person required to be

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<sup>188</sup> See *Summary Proceedings Act 1957* (NZ), s.24.

<sup>189</sup> See paragraph 2.67 above.

<sup>190</sup> This is now done in practice when the Crown Solicitor is representing a respondent.

<sup>191</sup> See *Summary Proceedings Act 1957* (NZ), s.28(2).

served is impracticable, the Court may order that the document be served on that person by substituted service.

- (2) An application for an order for substituted service shall be supported by an affidavit stating the facts on which the application is founded.
- (3) Substituted service pursuant to an order under this Rule is effected by taking such steps as the Court directs to bring the document to the notice of the person to be served, and has the same operation as personal service”.

3.96 At present, there is no provision for the manner in which the service of a notice or document is to be proved.<sup>192</sup> This is a matter for which it would appear to be necessary to make express provision. Service could be proved where necessary by an affidavit of service<sup>193</sup> or of post by registered mail if this were permitted.

(iv) *Arrest of absconding appellant*

3.97 At present, s.217 of the *Justices Act* provides that if it is shown on oath that an appellant who has entered into a recognizance to appear at the hearing of the appeal is about to leave Western Australia a warrant for his arrest may be issued, and he may be imprisoned until the appeal is determined. This provision appears to be unduly narrow in that it applies only if the appellant is about to leave Western Australia. The Commission therefore welcomes comment on whether a wider provision similar to s.126 of the *Summary Proceedings Act 1957* (NZ) should be enacted in Western Australia. That section provides:

"Where an appellant is released on bail, any Magistrate or Justice, if satisfied on the oath of the respondent or of any surety or on the oath of some person on behalf of the respondent or any surety, that the appellant has absconded or is about to abscond for the purpose of evading justice, may issue a warrant in the prescribed form to arrest him and bring him before a Magistrate or Justice. When the appellant is arrested pursuant to the warrant, any Magistrate or Justice, on being satisfied that the appellant had absconded or was about to abscond, may commit him to a penal institution until the hearing".

3.98 The question of the powers of the police to arrest a person on bail who they suspect is about to abscond was considered by the Commission in its working paper on the *Review of Bail Procedures*.<sup>194</sup> The Commission suggested that the police could be given power to

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<sup>192</sup> See paragraphs 2.27(d) and 2.31(f) above.

<sup>193</sup> See *Supreme Court Rules 1971* Order 13 rule 8, Order 72 rule 7 and s.29 of the *Summary Proceedings Act 1957* (NZ).

<sup>194</sup> Project No.64 - *Review of Bail Procedures*, paragraph 6.21.

apprehend without warrant and bring before a justice or magistrate any defendant whom they have reasonable cause to suspect is on bail and is about to abscond.<sup>195</sup>

(v) *Costs*

3.99 Where the appellate court makes an order as to costs, the judge could order the payment of a specific sum for costs or that the costs be taxed. It would be necessary to provide for the regulation of the taxation of costs by rules.<sup>196</sup> Where money has been deposited as security for the costs of an appeal<sup>197</sup> and costs are awarded against the person who deposited the money, the judge could order that the money so deposited be paid out to the party entitled thereto.

3.100 Where money has not been deposited as security for the costs of an appeal, or where money has been deposited but is not sufficient to cover the costs awarded when an appeal is abandoned, summarily dismissed, or determined it is necessary to provide a procedure for the recovery of the costs awarded or outstanding. At present, the procedure for the recovery of an order for costs in the case of an ordinary appeal is similar to that in the case of an appeal by way of an order to review.<sup>198</sup> The Commission understands that this procedure for the recovery of costs is not used in practice. This appears to be because an order for the payment of costs does not ordinarily contain an order that the costs be paid into court to be paid over to the party entitled thereto.<sup>199</sup> Consequently, as the costs of an appeal are not paid to the Associate or Registrar he has no knowledge of whether the costs have been paid, and cannot issue the certificate which is necessary before the payment of the costs can be enforced.<sup>200</sup>

3.101 In Queensland, if upon an appeal a judge orders either party to pay costs, such order must direct that the costs be paid to the Registrar of the Court, to be paid by him to the party entitled to the same. As a result, if the costs are not paid within the time prescribed, the Registrar is in a position to issue a certificate upon the application of the party entitled to the

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<sup>195</sup>

Ibid.

<sup>196</sup>

See for example, *Supreme Court Rules 1971*, Order 66.

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See paragraphs 3.53 and 3.55(b) above.

<sup>198</sup>

See paragraphs 2.59 and 2.61 above.

<sup>199</sup>

See paragraphs 2.60(b) and 2.62 above.

<sup>200</sup>

See paragraphs 2.59 and 2.60(b) above.

costs. Once a certificate has been issued the payment of such costs may be enforced in the same manner as is provided for enforcing the payment of costs awarded by justices.<sup>201</sup>

3.102 An alternative approach is taken in New Zealand. If either party is ordered to pay costs, the order as to costs is included in a certificate of the decision which is transmitted to the Registrar of the Magistrates' Court. The order as to costs is then enforceable as if it were a fine imposed by the Magistrates' Court.<sup>202</sup> The Commission welcomes comment on whether either of these procedures should be adopted in Western Australia.

3.103 An existing provision<sup>203</sup> in the *Justices Act* relating to matters falling within the Eighth Schedule to that Act<sup>204</sup> provides for the recovery of money ordered to be paid in such cases as if ordered in a judgment of a Local Court. The Commission is not aware of any reason for altering this situation, but there appears to be a need to make it clear that this procedure applies to the enforcement of the payment of costs of an appeal in such cases.<sup>205</sup>

## APPEALS WITH LEAVE

### (a) Institution of appeal and notice to other parties

3.104 In the case of those appeals (if any) in which leave is required<sup>206</sup> the first problem which the Commission sees is whether an application for leave to appeal should be made to a judge of the appellate court or to the justices who made the decision appealed against, or perhaps giving the appellant a choice. At present, in the case of an appeal by way of an order to review, an application for an order nisi to review is made to a Judge of the Supreme Court, and not to the justices who made the decision appealed against.

3.105 The Commission also notes that in the case of appeals to the Supreme Court from the District Court under s.79(1) (b) of the *District Court of Western Australia Act 1969* and also under s.107(3) of the *Local Courts Act 1904* it is necessary to obtain the leave of a Judge of the Supreme Court. By providing that only the appellate court may grant leave, the court is

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<sup>201</sup> *Justices Act 1886* (Qld), s.232.

<sup>202</sup> *Summary Proceedings Act 1957* (NZ), s.142.

<sup>203</sup> *Justices Act 1902*, s.155(6) and see paragraph 2.61 above.

<sup>204</sup> Such as the recovery of water rates and expenses of repairs.

<sup>205</sup> See paragraph 2.61 above.

<sup>206</sup> See paragraphs 3.17 to 3.20 above.

able to control the appeal process from the outset and to prevent the institution of appeals which are frivolous or vexatious. For this reason, it is the Commission's tentative view that an application for leave to appeal should be made to a judge of the appellate court. The application for leave to appeal could be heard either in court or in chambers, and either in Perth or in a circuit town.

3.106 An appeal in which leave is required would be initiated by the appellant filing a Notice of Application for leave to appeal in the appellate court.<sup>207</sup> The notice would contain details similar to those referred to in paragraph 3.40 above, and would be supported by an affidavit sworn by the appellant or his solicitor. Annexed to the affidavit as exhibits would be copies of such documents as would be necessary to support the application, such as the complaint, the defendant's criminal record, the justices' notes of evidence and the written decision of the justices. The judge hearing the application could require the production of further material if necessary.

3.107 A time for filing the application for leave would be prescribed, but if an appellant failed to file his Notice of Application for leave within the prescribed time, say twenty-one days, he would be able to apply for an extension of time. The application for an extension of time would have to be supported by an affidavit setting out the reasons for the delay in filing the Application. Both applications, namely the application for an extension of time and the application for leave to appeal, could be heard at the same time.

3.108 Another problem which the Commission sees is whether an application for leave to appeal or an application for an extension of time should be heard *ex parte*, whether all parties to the appeal should be given notice of these proceedings, or whether it should be heard *ex parte* with the judge hearing the appeal empowered to require that the notice be served on the other parties to the appeal. Although giving notice to the other parties would enable them to dispute whether leave to appeal, or an extension of time, should be granted it would result in an increase in the costs of an appeal and delay the proceedings. A delay in the proceedings may be unsatisfactory, particularly where the appellant is in custody and wishes to obtain bail pending the determination of the appeal.<sup>208</sup> At present the Commission tentatively favours the

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<sup>207</sup> In the case of an appeal to the Supreme Court the Notice would be filed in the Central Office at Perth. In the case of an appeal to the District Court the Notice could be filed either in Perth or at the Registry in the circuit town nearest to the place where the decision appealed against was given.

<sup>208</sup> See paragraph 3.115 below for a discussion of the question of the grant of bail pending the determination of an appeal.

approach whereby the application would be heard *ex parte*, but the judge would be empowered to require that the notice be served on the other parties to the appeal.

3.109 If it were thought to be more desirable that the other parties to an appeal were given notice of an application for leave to appeal or an extension of time, or if a judge were empowered to order that they be given notice, it would be necessary to make provision for the means and proof of service of the applications on the other parties. The question of the service of notices and documents has already been discussed in relation to appeals as of right<sup>209</sup> and the same provisions for service would apply to notices relevant to an appeal in which leave is required.

3.110 Another approach to the hearing of an application for leave to appeal would be for the appellate court to hear the application and the merits of the case at the same time.<sup>210</sup> However, it might be more desirable to keep the two hearings separate so that appeals without merit can be filtered-out at an early stage.

3.111 Where an application for leave to appeal is granted the Notice of Application for leave to appeal would act as a Notice of Appeal. There is a precedent for this procedure in the *Criminal Practice Rules*, Order IX rule 12 of which provides:

“Where the Court of Criminal Appeal has, on a Notice of Application for leave to appeal duly served, and in the form provided under these Rules, given an Appellant leave to appeal, it shall not be necessary for such Appellant to give any Notice of Appeal, but the Notice of Application for leave to appeal shall in such case be deemed to be a Notice of Appeal.”

Of course, if the application for leave to appeal were heard *ex parte* and leave were granted, it would be necessary to serve a copy of the Notice of Application for leave to appeal on the other parties to the appeal. Again the provisions for service and proof of service of notices and documents referred to above<sup>211</sup> would apply. The question of appeals from refusals to grant leave or to grant an extension of time is considered above.<sup>212</sup>

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<sup>209</sup> See paragraphs 3.41 and 3.94 to 3.96 above.

<sup>210</sup> In the same way as an application for leave is heard by the Court of Criminal Appeal.

<sup>211</sup> See paragraphs 3.41 and 3.94 to 3.96 above.

<sup>212</sup> See paragraph 3.28 above.

*Other matters*

3.112 The Commission has already considered in relation to appeals as of right whether appeals on more than one matter should be permitted,<sup>213</sup> whether there should be provision for the consolidation of appeals<sup>214</sup> and for discontinuing appeals.<sup>215</sup> It is the Commission's view that the same procedure in respect to these matters should apply to cases of appeals with leave.

3.113 Another matter discussed above in relation to appeals as of right is the question of the amendment of the Notice of Appeal before the hearing and whether the leave of the appellate court ought to be required.<sup>216</sup> In the case of appeals with leave, similar procedures ought to apply but where the amendment is sought before the application for leave is heard it might be unnecessary to require the court's permission to amend the application.

**(b) Security for appeal and costs**

3.114 Provision for security for the appeal and costs ought to apply equally to appeals with leave and appeals as of right,<sup>217</sup> but in the former case the security could be determined by the judge who determines whether or not leave to appeal should be granted.<sup>218</sup>

**(c) Bail**

3.115 Problems relating to bail and treatment while in custody would appear to apply equally to appeals as of right<sup>219</sup> and with leave. However, in the latter case two procedural variations require consideration. The first matter relates to who should determine a bail application. In the case of an appeal as of right, it was suggested that it could be determined by a judge of the appellate court, by a Court of Petty Sessions, or justices out of sessions.<sup>220</sup> In the case of appeals in which leave has been granted it would appear that the most convenient procedure would be one similar to the present procedure in the case of appeals by way of an order to

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<sup>213</sup> See paragraph 3.46 above.

<sup>214</sup> See paragraph 3.48 above.

<sup>215</sup> See paragraphs 3.49 to 3.51 above.

<sup>216</sup> See paragraph 3.47 above.

<sup>217</sup> See paragraphs 3.52 to 3.56 above.

<sup>218</sup> See paragraph 3.55(h) above.

<sup>219</sup> See paragraphs 3.57 to 3.66 above.

<sup>220</sup> See paragraph 3.59 above.



review,<sup>221</sup> namely, to provide for the application for bail to be determined by a judge of the appellate court, either when the application for leave is determined, or subsequently on the application of the appellant. The second matter concerns the requirement of notice of an application for bail to the other parties. Although separate notices might be required in the case of appeals as of right,<sup>222</sup> in the case of appeals requiring leave, the notice of intention to apply for bail could be combined with the notice of application for leave to appeal where this latter notice is required to be served on the other parties to an appeal.

**(d) Stay of other proceedings**

3.116 In the case of an appeal in which leave is granted, the Commission envisages that proceedings would be stayed once leave was granted. In other respects an approach similar to that taken in the case of appeals as of right would be taken.<sup>223</sup>

**(e) Miscellaneous**

3.117 It is the Commission's view that a similar procedure in respect of the following matters discussed above in relation to appeals as of right ought to apply to appeals with leave once leave to appeal has been given –

1. The transmission of documents to the appellate court, the preparation of appeal books and the custody of exhibits once a decision has been made by justices.<sup>224</sup>
2. The entry of an appeal for hearing and the giving of notice of that entry to the parties to an appeal.<sup>225</sup>
3. The dismissal of an appeal for failure to prosecute.<sup>226</sup>
4. The procedure for hearing an appeal.<sup>227</sup>

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<sup>221</sup> See paragraph 2.41 above.

<sup>222</sup> See paragraph 3.58 above.

<sup>223</sup> See paragraphs 3.67 to 3.69 above.

<sup>224</sup> See paragraphs 3.70 to 3.75 above.

<sup>225</sup> See paragraph 3.76 above.

<sup>226</sup> See paragraphs 3.77 to 3.79 above.

<sup>227</sup> See paragraphs 3.80 to 3.84 above.

5. The implementation of the results of the appeal.<sup>228</sup>
6. The procedure if a further appeal were permitted from the decision of the appellate court.<sup>229</sup>
7. The following matters -<sup>230</sup>
  - (a) the enlargement or abridgement of time;
  - (b) the effect of informalities;
  - (c) service of notices and other documents;
  - (d) the arrest of absconding appellants;
  - (e) the costs of an appeal.

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<sup>228</sup> See paragraphs 3.85 to 3.90 above.

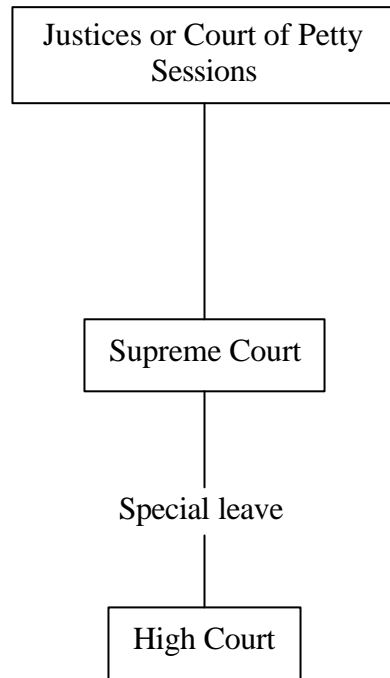
<sup>229</sup> See paragraph 3.91 above.

<sup>230</sup> See paragraphs 3.92 to 3.103 above.

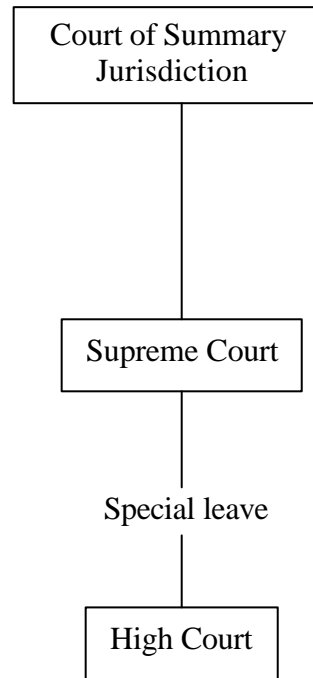
**TABLE**

**AN OUTLINE OF THE APPELLATE STRUCTURE IN WESTERN AUSTRALIA AND ELSEWHERE\***

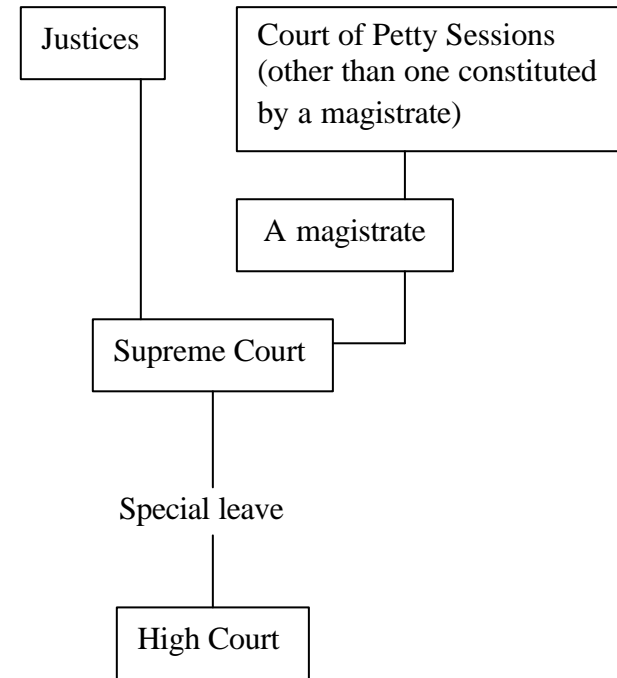
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**SOUTH AUSTRALIA**



**TASMANIA**

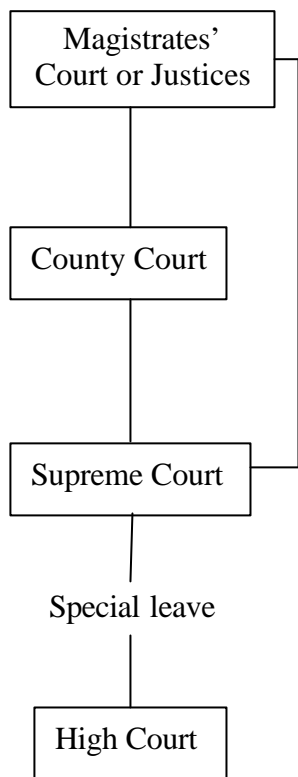


\* This table only shows the structure of the appellate systems in the jurisdictions. It does not show who may appeal, the ambit of the appeal and modes of appeal available.

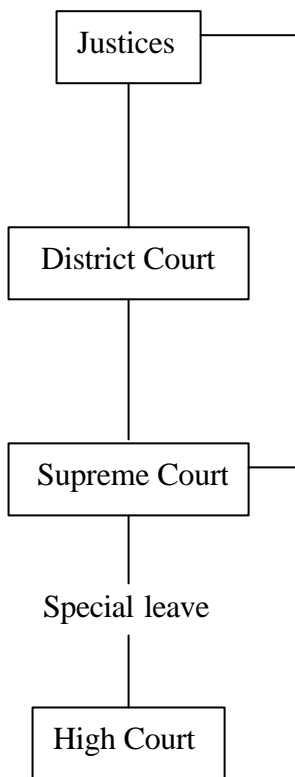
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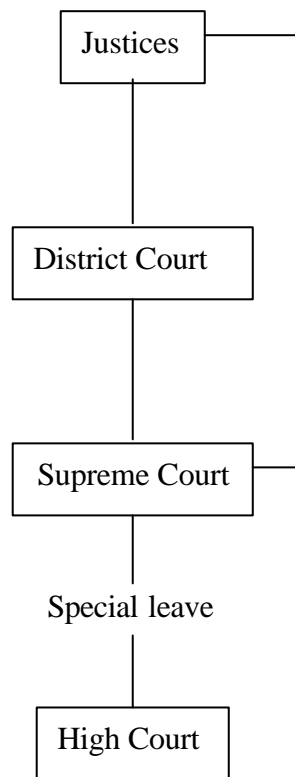
**VICTORIA**



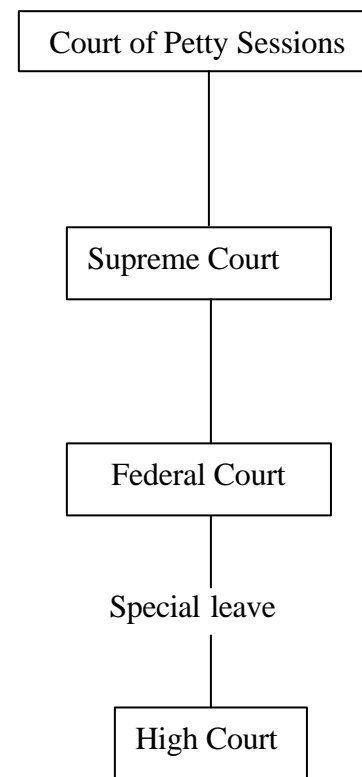
**NEW SOUTH WALES**



**QUEENSLAND**



**AUSTRALIAN CAPITAL TERRITORY**



## CHAPTER 4 - AMENDMENT OF DECISION OTHER THAN BY WAY OF APPEAL

### Introduction

4.1 There may be circumstances where justices have made a decision which is so obviously incorrect that it would appear to be unnecessary and undesirable to put the parties to the expense and inconvenience of having to remedy the matter by way of an appeal. The appropriate procedure in these cases may be to permit the justices, or perhaps other justices, on their own initiative or at the request of any of the parties to the case, to correct that decision. Although this is not an appeal procedure it relates directly to appeals in that the existence and the scope of such remedial power affects the need for an appeal. Consequently, the Commission in this chapter considers the two existing powers of justices in Western Australia to remedy their decisions, namely rectification and rehearing, and possible reforms as to their scope.

### Rectification of orders

4.2 Under s.166B of the *Justices Act*, if a defendant is convicted by justices and they impose, or fail to impose, a punishment<sup>1</sup> 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 justices own motion or on an application of a party to the complaint.<sup>2</sup> Doubts have been expressed in *Shortland v Heath*<sup>3</sup> as to whether an application can be made by another person acting on behalf of a party.

4.3 Before s.166B was added to the *Justices Act* in 1968,<sup>4</sup> an irregularity in the punishment imposed could only be corrected by an appeal. In introducing the amendment the Minister for Justice said:<sup>5</sup>

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

<sup>2</sup> The section does not affect the operation of Part VIII of the *Justices Act* relating to appeals: *Justices Act 1902*, s.166B(2).

<sup>3</sup> [1977] WAR 61 at 62.

<sup>4</sup> *Justices Act Amendment Act 1968*, s.31.

<sup>5</sup> W.A. *Parl. Deb.* (1968-69) Vol. 179 at 887.

"This procedure [order to review] is cumbersome, costly, and also inappropriate, where the only question is the correctness of the penalty or sentence".

4.4 A clear case where rectification is available would be where justices have imposed a sentence which exceeded the maximum prescribed for the particular offence. Rectification would also appear to be available in some cases where the sentence was imposed because the justices were mistaken as to fact. However, until recently, it was the view of some justices that the rectification procedure would not permit justices to receive fresh evidence. The distinction can be illustrated as follows: if different penalties were prescribed depending on factors such as whether it was the defendant's first or second offence for drunken driving, or whether the person assaulted was a male or female,<sup>6</sup> and the justices having the relevant facts before them failed to impose the correct penalty, rectification is possible. If, on the other hand, the justices were misinformed at the trial on such factors, then the view taken was that rectification would not be possible as it would involve correction of the facts by receipt of fresh evidence.

4.5 In *Shortland v Heath*, which involved a drunken driving case where justices were misinformed that it was the defendant's first such offence, Jackson C.J. ruled that in these circumstances fresh evidence could be admitted to show that it was the defendant's second offence and rectification of the penalty was permissible. In the course of his judgment the Chief Justice appeared to suggest that the rectification procedure was only available where justices did not have the true facts at the trial.<sup>7</sup> This would amount not just to an extension of the view formerly held by justices as to the scope of s.166B but to a complete reversal of that view so that rectification would not be permitted in the rare but possible case where justices know, for example, that it is the defendant's second offence for drunken driving, but, in error, sentence him as if it were his first. However, such a result would be inconsistent with a passage a little later in the judgment.<sup>8</sup> The result would appear to be that such a limitation on the scope of s.166B was not intended by the Chief Justice, nor in the Commission's view would such a limitation be desirable.

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<sup>6</sup> ss.321 and 322 of the *Criminal Code*.

<sup>7</sup> The difficulty arises on p.63. His Honour expresses his view that the section could provide -  
(a) for cases where justices have erred on the true facts (the view formerly taken by justices); or  
(b) for cases where the penalty is imposed on incorrect facts which are subsequently corrected.  
He subsequently holds that the "second of the alternatives I have stated is the correct meaning of the section" and by implication rejects its application to the first.

<sup>8</sup> At p.63 lines 22-25.

4.6 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 practical to recall the justices who made the initial decision. This may be particularly so in country areas where one of two justices presiding at the trial may live in a country town and the other on a farm or sheep station. It might be desirable to provide that a decision may be rectified under s.166B by any justices.<sup>9</sup>

4.7 The Commission seeks comment as to the desirability and the scope of existing powers of justices to rectify decisions and also as to whether these powers should be exercisable only by the justices who made the original decision.

### **Rehearing**

4.8 Another means by which decisions of justices can be amended without the need for an appeal is a rehearing by justices. 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 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.<sup>10</sup> Although no express provision is 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.

4.9 It might be desirable to extend the circumstances in which a case can be reheard. It could be extended to those circumstances in which there has been a miscarriage of justice, for example, if 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. It might, however, be desirable to provide for a rehearing in more specific circumstances, namely -

- (i) Where there has been fraud by the complainant. For example, where a complainant has been convicted of perjury.

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<sup>9</sup> See, for example, s.77 of the *Summary Proceedings Act 1957* (NZ).

<sup>10</sup> See also *Magistrates (Summary Proceedings) Act 1975* (Vic), s.152; *Justices Act 1902* (NSW), s.100A; *Justices Act 1886* (Qld), s.142(6).

- (ii) Where fresh evidence is available.
- (iii) Where one or more of the justices presiding at the initial hearing is alleged to be biased. In this circumstance it would not be appropriate for the application for a rehearing to be made to the justice alleged to have been biased, and it would be necessary for the application to be made to other justices.

4.10 In New Zealand s.75 of the *Summary Proceedings Act 1957* provides:

"(1) Where on the hearing of any information or complaint the defendant has been convicted or, as the case may be, an order has been made against him, the Magistrate or Justice or Justices who presided over the Court before which the information or complaint was heard may, in his or their discretion, grant a rehearing of the information or complaint either as to the whole matter or only as to the sentence or order, as the case may be, upon such terms as he or they think fit:

Provided that, if any such Magistrate or Justice has since the date of the hearing ceased to hold office as such or died or left New Zealand, or if for any other reason it is impracticable that he should be present to hear the application for rehearing, any Magistrate may grant a rehearing".

4.11 It has been held that the purpose of this provision is that a rehearing should be granted whenever that course would be necessary to avoid a miscarriage of justice.<sup>11</sup> There is no appeal from a Magistrate's refusal to order a rehearing.<sup>12</sup>

4.12 The Commission welcomes comment as to whether similar provisions ought to be introduced in Western Australia and, if so, whether there should be an appeal from an order granting or refusing a rehearing.

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<sup>11</sup> See *Anderson v Evans* [1969] NZLR 769 at 770.

<sup>12</sup> *Tuohy v Police* [1959] NZLR 865.



## CHAPTER 5 - OTHER MATTERS

### Case stated during hearing

5.1 A stipendiary magistrate who made a preliminary submission to the Commission suggested that provision should be made for the statement of a case to a higher tribunal on a question of law during a hearing in a Court of Petty Sessions.<sup>1</sup> It is arguable that a case stated on a question of law during a hearing is preferable to hearing a matter right through to a decision, then considering the point of law in an appeal. A case stated procedure could save expense, time and trouble.

5.2 On the other hand, it may be argued that provision for stating a case during a hearing should not be made because it is the responsibility of justices<sup>2</sup> to determine points of law in matters before them, and if they do make an error, that the proper remedy is an appeal. It may also be suggested that a power to state a case could be open to abuse because it may be used as a means to avoid making difficult decisions. For these reasons it might be considered that there should be no provision for a case stated during a hearing, or at least, that it should be limited to matters of law of exceptional public importance. For example, in Tasmania s.114 of the *Justices Act 1959* provides:

“(1) Where, in the opinion of the justices, the matter before them involves a question of law of such public and general importance as to make it desirable in the public interest that it should be determined by the Supreme Court, the justices instead of deciding the matter may state a case for the opinion of the Supreme Court, and may adjourn the hearing of the matter pending the receipt of the opinion of the Supreme Court thereon.

(2) In any such case the justices shall forthwith prepare and state a case setting forth the material facts and their findings thereon, and stating the question of law upon which they desire the opinion of the Supreme Court; and shall transmit the case without delay to the Registrar of the Supreme Court.

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<sup>1</sup> The Commission notes that there is provision for a case stated during a hearing in three of the jurisdictions studied by the Commission -

South Australia: *Justices Act 1921*, s.162.

Tasmania: *Justices Act 1959*, s.114.

New Zealand: *Summary Proceedings Act 1957*, s.78.

In Western Australia there is provision for stating a case for the Supreme Court in Acts such as the *Arbitration Act 1895*, s.21 and the *Workers' Compensation Act 1912*, s.29(9)-(10). See also the *Supreme Court Rules 1971*, Order 31.

<sup>2</sup> See above at 4, n.1.

- (3) On receipt of a case stated under this section the Registrar shall set it down for hearing and give the parties at least 3 days notice thereof.
- (4) On the hearing of a case stated, the Supreme Court –
  - (a) shall be constituted by a single judge;
  - (b) may remit the case to the justices for amendment if, in its opinion, the case is defective;
  - (c) may reserve the case or any point arising thereon for the Full Court or direct the case or any such point to be argued in the Full Court; and
  - (d) shall cause the case to be remitted to the justices with the opinion of the Court on the question therein submitted.
- (5) The Full Court has power to hear and determine any case or point that is reserved for the Full Court or directed to be argued in the Full Court pursuant to subsection (4)(c)".

5.3 The Commission welcomes comment on whether provision should be made for justices to state a case during a hearing, and if so, upon what basis.

### **Case stated after decision**

5.4 Another stipendiary magistrate who made a preliminary submission to the Commission suggested that provision should be made for appeals by way of case stated.<sup>3</sup> This differs from an appeal in that it is restricted to a question of law and the question is referred by justices to a superior tribunal either on their initiative, or on the application of the parties to the case. The court answering the questions may remit the matter to the justices with its opinion, reverse, confirm or amend the justices' decision, or make such other order as it thinks fit. The *Justices Act* provided for an appeal by way of case stated<sup>4</sup> but this was abolished in 1919 when the appeal by way of an order to review was introduced. The main difficulty apparently being the inability of the parties to agree upon the facts forming the basis of the case stated.<sup>5</sup>

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<sup>3</sup> There is provision for appeals by way of case stated in the following jurisdictions studied by the Commission –

South Australia: *Justices Act 1921*, s.162.

Victoria: *Magistrates' Courts Act 1971*, ss.83 and 84.

New South Wales: *Justices Act 1902*, ss.101-111.

New Zealand: *Summary Proceedings Act 1957*, ss.107-114.

England: *The Magistrates' Courts Act 1952*, s.87.

<sup>4</sup> See paragraphs 2.5 and 2.6 above.

<sup>5</sup> See paragraph 2.8 above.

5.5 The stipendiary magistrate who made the preliminary submission that an appeal by way of case stated should be provided envisaged that it would only be used where the matter in question went beyond the particular interests of the parties to the matter and involved a complex question of law of public importance. However, such a procedure would necessitate agreement by the parties as to the nature of the case stated and as to facts, and it might involve some procedural changes. Questions of law could be considered under the appeal procedures suggested by the Commission in this paper, and if it were a matter of exceptional public interest and the parties were not interested in appealing, an appeal could be instituted by the Attorney General.<sup>6</sup>

### **Administrative matters**

5.6 Apart from being required to hear and determine matters of a criminal nature, justices may also be required to hear and determine other matters. There are circumstances where a Court of Petty Sessions functions as an administrative tribunal or an administrative appeals tribunal.<sup>7</sup> An example of the latter is provided by s.8(1) of the *Aerial Spraying Control Act 1966* where 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.

5.7 In some of these matters the legislature has expressly excluded any appeal from the Court of Petty Sessions making the decision or any further appeal from the decision of the Court of Petty Sessions.<sup>8</sup> In other cases there is no express provision excluding such an appeal and it would appear that a person may appeal by way of an order to review against the decision of the Court of Petty Sessions, though this is not clear.

5.8 The Commission currently has a reference<sup>9</sup> dealing with appeals from administrative decisions. The question of appeals from decisions of a Court of Petty Sessions of an administrative nature or as an administrative appeal tribunal will be considered as part of that reference. In the meantime it is the Commission's view that the present position should be

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<sup>6</sup> See paragraphs 3.12 to 3.14 above.

<sup>7</sup> An example of the former is referred to in paragraph 3.16 above.

<sup>8</sup> See, for example, *Aerial Spraying Control Act 1966*, s.8(3).

<sup>9</sup> Project No.26 -Appeals from Administrative Bodies. The terms of reference are:

"to consider the need for the establishment of an Administrative Appeals Tribunal to deal with all the various types of appeal and recommend whether such Tribunal should be a division of a Superior Court and the extent of its jurisdiction".

maintained so far as is possible, and that decisions of an administrative nature or as an administrative appeal tribunal, which are presently subject to an appeal by way of an order to review, should not be excluded from the operation of any new appeal structure.

## CHAPTER 6 - SUMMARY OF QUESTIONS FOR DISCUSSION

6.1 The Commission welcomes comment (with reasons where appropriate) on any matter arising out of this paper, and in particular on the following –

- (1) What decisions should be the subject of an appeal, and in particular should the following decisions be subject to appeal –
  - (i) an incidental matter;
  - (ii) a committal for trial?

(paragraphs 3.3 to 3.5)
- (2) Should a defendant who pleads guilty be able to appeal?

(paragraph 3.6)
- (3) On what grounds should a defendant be able to appeal?

(paragraphs 3.7 and 3.8)
- (4) On what grounds should a complainant be able to appeal?

(paragraphs 3.9 to 3.11)
- (5) Should the Attorney General be able to appeal and, if so, on what grounds?

(paragraphs 3.12 to 3.14)
- (6) In what circumstances should other persons be able to appeal?

(paragraph 3.15)
- (7) In what circumstances, if any, should leave to appeal be required?

(paragraphs 3.17 to 3.20)
- (8) Should the appellate court be the Supreme Court or the District Court?

(paragraphs 3.21 to 3.24)

- (9) What powers should the appellate court have and, in particular, should it have power to –
- (i) hear further evidence;
  - (ii) dismiss an appeal if there has been "no substantial miscarriage of justice";
  - (iii) refer the matter to the Full Court of the Supreme Court;
  - (iv) state a special case for the opinion of the Full Court of the Supreme Court;
  - (v) order that an appeal be by way of a rehearing de novo?
- (paragraphs 3.29 to 3.33)
- (10) What provision should be made for appeal costs in the *Justices Act*?
- (paragraphs 3.34 to 3.37)
- (11) Should a further appeal to the Full Court of the Supreme Court be allowed and, if so, in what circumstances?
- (paragraphs 3.27 and 3.28)
- (12) Should stipendiary magistrates have power to review decisions of justices given in court?
- (paragraph 3.26)
- (13) To what extent should the law governing the practice and procedure of appeals from justices be contained in the *Justices Act* and to what extent should it be contained in rules of court?
- (paragraph 3.39)
- (14) In what manner should an appeal as of right be instituted?
- (paragraph 3.40)
- (15) Should an appeal as of right be instituted by filing a Notice of Appeal in the appellate court or with the clerk of petty sessions nearest to the place at which the decision appealed from was given?
- (paragraph 3.40)

- (16) Who should be responsible for serving the Notice of Appeal?  
(paragraph 3.41)
- (17) Should the Master (or Registrar) of the appellate court be required to send a copy of the Notice of Appeal to the Attorney General?  
(paragraph 3.41)
- (18) What time should be prescribed for instituting appeals as of right?  
(paragraph 3.42)
- (19) Should provision be made for an order for substituted service?  
(paragraph 3.43)
- (20) Should provision be made for the summary dismissal of frivolous or vexatious appeals?  
(paragraph 3.44)
- (21) Should appeals against a number of decisions made at the one hearing and in proceedings between the same parties be commenced by one Notice of Appeal?  
(paragraph 3.46)
- (22) Should provision be made for the amendment of a Notice of Appeal before the hearing of an appeal?  
(paragraph 3.47)
- (23) Should provision be made for the consolidation of appeals?  
(paragraph 3.48)
- (24) What provisions should be made for discontinuing appeals?  
(paragraphs 3.49 to 3.51)

(25) Should a recognizance to prosecute the appeal and to pay the costs of the appeal be retained?

(paragraphs 3.52 and 3.53)

(26) Should a person on whom a Notice of Appeal has been served be given power to apply to a judge of the appellate court for an order requiring the appellant to give security for the payment of the costs of the appeal?

(paragraph 3.54)

(27) If the present approach were retained should -

- (a) security be required for both the costs of the appeal and also to prosecute the appeal;
- (b) a deposit of money be permitted;
- (c) the security be discretionary;
- (d) a time for entering into the recognizance or depositing the money be prescribed;
- (e) the recognizance be conditioned for the appellant's appearance on any adjournment or postponement of an appeal;
- (f) a police officer or other public officer be required to give security?

(paragraph 3.55)

(28) Who should make a determination as to the security required?

(paragraph 3.55(g))

(29) Should the determination of what security should be required be heard ex parte, or otherwise?

(paragraph 3.55(h))

(30) Where money is required to be deposited, should the money be paid into the appellate court or the clerk of petty sessions on whom the notice of appeal was served?

(paragraph 3.55(i))



- (31) Should an appellant who is in custody be required to give notice of his intention to apply for bail to the other parties?  
(paragraph 3.58)
- (32) Who should hear and determine the bail application?  
(paragraph 3.59)
- (33) Should provision be made for the revocation of a bail order or the discharge of a surety?  
(paragraph 3.62)
- (34) What provision should be made to regulate the manner in which a convicted appellant is treated prior to the determination of his appeal?  
(paragraphs 3.64 to 3.66)
- (35) What provision should be made for the stay of proceedings, other than those involving the imprisonment of a person?  
(paragraphs 3.67 and 3.68)
- (36) What provision, if any, should be made for the stay of a good behaviour bond, probation order or community service order?  
(paragraph 3.69)
- (37) When should the documents relevant to an appeal be transmitted to the appellate court by the clerk of petty sessions?  
(paragraphs 3.70 and 3.71)
- (38) Should appeal books be required?  
(paragraph 3.73)
- (39) Should a party to an appeal be able to obtain copies of documents forwarded to the appellate court from the Master (or Registrar) of the appellate court?  
(paragraph 3.74)

- (40) Should the justices or clerk of petty sessions be required to retain custody of the exhibits pending an appeal once a decision has been made by justices?  
(paragraph 3.75)
- (41) What procedure should be provided for the entry of an appeal for hearing and the giving of notice of that entry?  
(paragraph 3.76)
- (42) What provision should be made for the summary dismissal of an appeal for failure to prosecute it?  
(paragraph 3.77)
- (43) What powers should a judge hearing an application for summary dismissal for failure to prosecute have?  
(paragraph 3.78)
- (44) Should provision be made for an order dismissing an appeal to be set aside?  
(paragraph 3.79)
- (45) Should a convicted person be able to present his case and his arguments in writing?  
(paragraph 3.81)
- (46) Should a convicted person who is in custody be present at the hearing of the appeal?  
(paragraph 3.82)
- (47) Should there be provision for the amendment of the grounds of appeal at the hearing of the appeal?  
(paragraph 3.83)
- (48) Should the justices be able to file an explanatory affidavit?  
(paragraph 3.84)

- (49) What provision should be made for implementing the results of an appeal?  
(paragraphs 3.85 to 3.89)
- (50) What provision should be made for the resumption of probation orders, community service orders and good behaviour bonds once an appeal is determined?  
(paragraph 3.90)
- (51) What procedure should be provided in the case of a further appeal?  
(paragraph 3.91)
- (52) Should provision be made for the enlargement or abridgement of time?  
(paragraph 3.92)
- (53) What provision should be made for the effect of informalities?  
(paragraph 3.93)
- (54) What provision should be made for the service of notices and other documents?  
(paragraph 3.94)
- (55) What provision, if any, should be made for the substituted service of notices and documents?  
(paragraph 3.95)
- (56) What provision should be made for the proof of service of notices and documents?  
(paragraph 3.96)
- (57) What provision should be made for the arrest of absconding appellants?  
(paragraphs 3.97 and 3.98)
- (58) What provision should be made for the recovery of costs?  
(paragraphs 3.99 to 3.102)

- (59) To whom should an application for leave to appeal be made?  
(paragraphs 3.104 and 3.105)
- (60) Should an application for leave to appeal or for an extension of time be heard ex parte or otherwise?  
(paragraphs 3.108 and 3.110)
- (61) What provision should be made for the amendment of a Notice of Application for leave to appeal?  
(paragraph 3.113)
- (62) Should a judge who determines an application for leave to appeal also determine what security, if any, should be required?  
(paragraph 3.114)
- (63) Should a judge who determines an application for leave to appeal also determine any application for bail?  
(paragraph 3.115)
- (64) What provision should be made for the rectification of decisions of justices?  
(paragraphs 4.2 to 4.5)
- (65) Should any powers of rectification be exercisable only by the justices who made the original decision or by other justices?  
(paragraph 4.6)
- (66) Should the scope of the circumstances in which a matter may be reheard be widened?  
(paragraphs 4.8 to 4.12)
- (67) Should provision be made for stating a case during a hearing and, if so, in what circumstances?  
(paragraphs 5.1 to 5.3 )

- (68) Should provision be made for stating a case after a decision and, if so, in what circumstances?

(paragraphs 5.4 and 5.5)

## APPENDIX

### JUSTICES ACT 1902

#### PART VIII. - APPEALS FROM THE DECISIONS OF JUSTICES.\*

##### *Ordinary Appeal*

- Appeal to a Judge at Perth or in a Circuit District. Amended by No.19 of 1919, s.18; No.29 of 1948, s.3.
183. When any person is summarily convicted, or an order is made against any person by Justices, and –
- (a) Imprisonment is adjudged without the option of a fine; and
  - (b) [*Deleted by No.19 of 1919, s.18.*]
  - (c) Such person did not plead guilty or admit the truth of the complaint,

he may appeal, subject to the following provisions –

- (a) The appeal shall be made to a Judge at Perth.
- (b) A Judge may, on the application of a party to the appeal, order that the appeal shall be made to a Judge in a Circuit District and at a time to be named in the order; and, on the order being made, the appeal shall, for the purpose of the remaining sections of this Act, be deemed to have been made to the Court named in the order, and the consequences shall be the same in all respects and with regard to all persons as if the appeal had been so made.

- Notice of appeal. Amended by No.22 of 1968, s.34.
184. The appellant shall, within the time prescribed, or, if no time is prescribed, within seven days after the day on which the decision appealed from was given, serve on the prosecutor or other party, and on the clerk of petty sessions of the court in which the decision appealed from was given, notice in writing of his intention to appeal, and on the grounds of such appeal.

- Entry of appeal for hearing. Amended by No.29 of 1948, s.4.
185. The appellant shall enter the appeal for hearing by a Judge in Perth, within the prescribed time, or, if no time is prescribed, within fifteen days after the day on which the decision appealed from was given.

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\* This is an unofficial consolidation of this Part of the Act.

Service of notices.  
Amended by  
No.41 of 1977, s.5.

186. Every notice required to be given by an appellant shall be in writing, signed by him or by his solicitor, and may be served by delivering the same to the person to whom it is addressed or by sending the same in a registered letter through the post addressed to such person at his usual or last known place of abode, in which case such notice shall be deemed to have been served at the time when the letter would be delivered in the ordinary course by post.

Security for  
appearance of  
appellant.  
Amended by  
No.19 of 1919,  
s.19; No.29 of  
1948, s.5; No.9 of  
1957, s.5; No.113  
of 1965, s.8. No.22  
of 1968, s.35.

187. The appellant shall, within the prescribed time, or, if no time is prescribed, within three days after the day on which he gives notice of appeal, enter into a recognisance before a Court of Petty Sessions in such sum as the Court of Petty Sessions thinks fit, and with or without sureties as such Court of Petty Sessions may direct conditioned to appear before the Court to which the appeal is made, and to submit to the judgment of the Court to which the appeal is made, and to pay such costs as the Court to which the appeal is made may award; or the appellant may, if the Court of Petty Sessions before whom the appellant appears to enter into a recognisance thinks it expedient, in addition to entering into a recognisance but instead of procuring sureties thereto give such other security by deposit of money with the Clerk of Petty Sessions or otherwise as such Court of Petty Sessions may deem sufficient.

Provided that in no case shall the security required by the recognisance or money deposited be less than fifty dollars.

Provided further that, notwithstanding anything hereinbefore contained, in no case shall any surety be accepted unless he justifies to the satisfaction of the Court of Petty Sessions, and that sureties shall not be dispensed with, except by a Magistrate, unless a deposit of money is made as aforesaid.

Appeal not a stay  
unless appellant  
gives security.  
Amended by  
No.29 of 1948, s.6.

188. Where the appellant is in custody a Court of Petty Sessions shall, on the appellant entering into such a recognisance and, where applicable, procuring sureties or giving security as provided by the last preceding section, by order release him from custody; but no appeal shall in any case operate as a stay of execution unless and until the appellant enters into such recognisance and where applicable, procures sureties or gives such security as aforesaid.

Copies of  
proceedings to be  
transmitted.  
Amended by  
No.119 of 1976,  
s.4.

189. A copy of the complaint, depositions, the conviction or order, and other proceedings before the Justices and the recognisances shall be transmitted by the clerk of petty sessions to the Court to which the appeal is made.

Hearing of appeal.  
Amended by

190. (1) The Court to which the appeal is made may adjourn the hearing of the appeal, and, upon the hearing thereof, may confirm,

No.119 of 1976,  
s.5.

reverse, or modify the decision appealed from, or remit the matter, with the opinion of the Court, to the Court of Petty Sessions, or may make such other order in the matter as the Court may think just, and may, by such order, exercise any power which the Court of Petty Sessions might have exercised, and such order shall have the same effect and may be enforced in the same manner as if it had been made by the Court of Petty sessions.

(2) Except as provided in section two hundred and nineteen the Court may make such order as to costs to be paid by either party as the Court may think just.

(3) The decision of the Court shall be final between the parties.

(4) The Court or a prescribed officer may issue such memorandum of the decision and such warrants as may be necessary to carry into effect the decision of the Court.

Appeal to be on original materials unless rehearing ordered or agreed to.

191. If the Court to which the appeal is made so orders, or the parties so agree, the appeal shall be by way of rehearing; but otherwise the appeal shall be heard and determined upon the evidence and proceedings before the Justices.

Procedure where decision reversed on appeal.

192. Whenever a decision is not confirmed by the Court to which the appeal is made, the Associate, or Registrar of the Supreme Court, as the case may be, shall send to the clerk of petty sessions of the court from which the appeal was made, for entry in his register, a memorandum of the decision of the Court to which the appeal was made; and where any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence of the decision in every case where such copy or certificate would be sufficient evidence of such conviction or order.

Amended by No.22 of 1968, s.36; No. 72 of 1975, s.9.

Effect of affirming decision.

193. If upon the hearing of the appeal the decision of the Justices by which the appellant was aggrieved is affirmed, the appellant shall forthwith pay the penalty or amount ordered to be paid and costs, if any, together with any costs adjudged to be paid by the Court to which the appeal is made, or, if such decision contains a sentence of imprisonment, the appellant may be committed by such Court or any Justice to gaol according to the conviction or order, and for the space of time therein mentioned.

Committal on default.

194. If the penalty imposed, or the amount ordered to be paid, or the costs awarded by the Justices is not or are not then paid, the same or any other Justice may enforce the payment thereof in the same manner in which payment might have been enforced if there had been no appeal, or by putting the recognisance (if any) in suit, or in both such modes, unless the same is or are sooner paid.

If costs not paid,

195. If the costs ordered to be paid by either party to an appeal are not



certificate to be granted. Amended by No.72 of 1975, s.10.

paid, the Associate, or the Registrar of the Supreme Court, as the case may be, upon application of the party entitled to such costs, or of any person on his behalf, shall grant to the party so applying a certificate that such costs have not been paid.

Enforcement of order for costs.

196. Upon production of such certificate to any Justice, the payment of such costs may be enforced in the same manner as is hereinbefore provided for enforcing the payment of costs awarded by Justices, or by putting the recognisance (if any) in suit, or in both of such modes.

*Appeal by way of Order to Review*

Order to review. Repealed and re-enacted by No.10 of 1964, s.2. Amended by No.17 of 1972, s.13; No.119 of 1976, s.6.

197. (1) When –
- (a) a person who feels aggrieved as complainant, defendant, or otherwise by the decision of any Justices shows, or the Attorney General shows by affidavit to a Judge sitting in Court or chambers, a *prima facie* case of error or mistake in law or fact on the part of the Justices, or that the Justices had no jurisdiction in giving the decision or exceeded their jurisdiction in giving the decision, or that the penalty or sentence imposed was, according as the person aggrieved or the Attorney General may allege, inadequate or excessive in the circumstances of the case; or
  - (b) a person who has been convicted by Justices after he has pleaded guilty or a person against whom an order has been made by Justices after he has admitted the truth of the complaint shows, or, in respect of such a case, the Attorney General shows, by affidavit to the satisfaction of such Judge so sitting, that in the circumstances of the case there are reasons which are sufficient to show that the decision of the Justices in convicting the person or making the order should be reviewed,

the Judge may, unless the applicant has the right of appeal under section one hundred and eighty-three of this Act, but otherwise, whether any other remedy is provided by law or not, within two months from the giving of the decision, grant the applicant (hereinafter called the "appellant") an order (hereinafter called an "order to review") calling upon the party interested in maintaining the decision (hereinafter called "the respondent"), and also, if the Judge for any special reason so directs, upon the Justices to show cause, at a time to be specified in the order to review or so soon thereafter as the matter can come on for hearing, why the decision should not be reviewed and where, at any time within such period of two months from the giving of the decision whether at the time of the giving of the order to review or subsequently on the application of the appellant, the Judge determines that an

appellant in custody should be liberated prior to the return of the order to review he may direct that the appellant be released from custody on the appellant entering into a recognisance on such terms and conditions including, where applicable, procuring sureties or giving security, as the Judge thinks fit.

(2) The right of the Attorney General to be an appellant is irrespective of, and does not effect –

(a) any right that another person has to be an appellant or to appeal under section one hundred and eighty-three of this Act; or

(b) any other remedy that is provided by law to any person,

in respect of the same decision.

(3) Where the Attorney General and another person are appellants in respect of the same decision, the Judge may consider and determine their applications for an order to review at the same time.

(4) Where the Attorney General is an appellant the provisions of sections two hundred, two hundred and six G, and two hundred and six H of this Act do not apply to or in respect of him but the other provisions of this Act relating to an appellant for an order to review do, with any necessary modifications, so apply.

(5) In considering and determining any application for an order to review or for the release of an appellant from custody the Judge may inform himself as to all the circumstances in such manner as he thinks fit.

Order to review.  
Before whom  
returnable.  
Substituted by  
No.19 of 1919,  
s.21. Amended by  
No.17 of 1972,  
s.14.  
Grounds to be  
stated in order.  
Substituted by  
No.19 of 1919,  
s.21.  
Appellant to give  
security.  
Substituted by  
No.19 1919, s.21.  
Amended by  
No.29 of 1948, s.8;

198. (1) An order to review may be made returnable before the Supreme Court sitting as the Full Court or before a single Judge sitting in Court.

(2) Where orders to review have been granted to the Attorney General and another person in respect of the same decision, the Court or a Judge may, at any time, direct that the orders shall be heard together.

199. The order to review shall state the grounds upon which it is sought to review the decision appealed against, but on the return of the order the Court or Judge shall have power to amend or add to the grounds stated.

200. (1) The appellant shall, within ten days after the granting of an order to review, or such shorter period as may have been ordered on the determination of the application for that order and in any event prior to his release from custody enter into a recognisance before a Justice with or without a surety or sureties in such sum and on such terms and conditions as the Judge may have determined in granting the order

No.113 of 1965, s.8; No.22 of 1968, s.37; No.119 of 1976, s.7. conditioned to prosecute his appeal without delay to appear before the Court to which the appeal is made and to submit to the judgment on the order to review and to pay such costs as the Court or Judge may thereon award.

(2) The appellant shall before proceeding to set the order down for hearing pay the clerk of the petty sessions at which the decision complained of was delivered the prescribed fees.

(3) In no case shall any surety be accepted unless he justifies to the satisfaction of the Justice.

Stay of execution. Release of appellant on further recognisance. Substituted by No.19 of 1919, s.21. Amended by No.29 of 1948, s.9; No.119 of 1976, s.8.

201. (1) Where an order for review or for the release of an appellant from custody is granted the Master of the Supreme Court shall cause to be sent to –

- (a) the clerk of petty sessions of the court from which the appeal was made;
- (b) the Attorney General; and
- (c) any person who is by the order for review called upon to show cause,

a memorandum of the decision of the Judge setting out the terms and conditions of the recognisance required.

(2) On such recognisance being given, execution shall be stayed until the order to review is disposed of or the Supreme Court or a Judge, otherwise orders, and the appellant, if then in custody, shall be liberated on presentation of a recognisance entered into in accordance with the order for his release to the person by whom he is held in custody.

(3) On receipt of a copy of a recognisance given by an appellant, the person by whom that appellant is held in custody shall verify that it is correctly entered into and shall thereupon release the appellant from custody and by memorandum report that fact to –

- (a) the Master of the Supreme Court; and
- (b) the Attorney General.

Service of order to review. Substituted by No.19 of 1919, s.21. Amended by No.19 of 1973.

202. The appellant shall, within the time fixed by the Judge who granted the order, cause an official copy of the order to review to be served on each party, who is thereupon called upon to show cause, and such service shall be effected such number of days before the hearing as is indicated below, that is to say:-

Where the distance from the place where the order is returnable to the place where the service is effected	The number of days which must elapse between the service and the hearing shall be –
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is –	
Not more than 322 kilometres	Ten days.
More than 322 but not more than 644 kilometres	Sixteen days.
More than 644 but not more than 966 kilometres	Twenty-one days.
More than 966 kilometres	Thirty days.

Entry of order to review for hearing. Substituted by No.19 of 1919, s.21. Amended by No.119 of 1976, s.9.

203. (1) Every order to review shall, within the time fixed by the Judge who granted the order, be entered by the appellant for hearing in the central office of the Supreme Court, and shall be inserted in the proper list, and come on for hearing as the Chief Justice may direct.

(2) No order for review shall be entered for hearing unless –

(a) a memorandum as to the release from custody of the appellant has been received pursuant to subsection (3) of section two hundred and one of this Act acknowledging receipt of a recognisance entered into pursuant to the order for review;

or

(b) such recognisance is presented at the time of making application for the entry for hearing.

Appeal from refusal to grant order to review. Substituted by No.19 of 1919, s.21.

204. An appeal from the refusal of a Judge, whether sitting in Court or Chambers, to grant an order to review or to grant it upon any ground or grounds, shall be to the Full Court as defined in the *Supreme Court Act, 1880*.<sup>1</sup>

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<sup>1</sup> See now *Supreme Court Act, 1935*.

Powers of Full Court or Judge on return of order to review. Substituted by No.19 of 1919, s.21. Amended by No.29 of 1948, s.10; No.119 of 1976, s.10.

205. (1) On the return of the order to review, the Court may, on a consideration of the evidence and materials adduced and brought before the Justices, and if the Court or Judge thinks fit, of any further evidence either oral or by affidavit, discharge such order to review, or may confirm, vary, amend, rescind, set aside, or quash the decision appealed against, and any order, conviction, warrant, or other proceeding founded thereon, and may remit the case for hearing or rehearing to the said Justices or to any other Justices, with or without any direction in law, and may prohibit the Justices and all other persons concerned from proceeding or further proceeding in respect of the decision, and may make such other order as to such Court or Judge seems just, and may also, for such purposes or any of them and without prejudice to the generality of the powers hereinbefore conferred, exercise all or any of the powers or jurisdiction which the Court possesses or might exercise upon *certiorari*, *mandamus*, prohibition or, *habeas corpus*.

(2) Notwithstanding that the Court or Judge may be of opinion that any point raised by the order to review might be decided in favour of the appellant, the order may be discharged if he or it considers that no substantial miscarriage of justice has occurred.

(3) The power to vary or amend the order or conviction founded upon the decision appealed against shall include a power to vary, reduce or increase the penalty or sentence imposed by the Justices upon such order or conviction.

(4) The Court or a prescribed officer may issue such memorandum of the decision and such warrants as may be necessary to carry into effect the decision of the Court.

Costs. Substituted by No.19 of 1919, s.21. Amended by No.17 of 1972, s.15.

206. (1) Subject to this Act the Court or Judge may make such order as to costs as it or he deems just.

(2) Where the Attorney General is an appellant and costs are allowed against him to another person, such costs are not recoverable from the Attorney General but the Registrar of the Supreme Court shall give to that other person a certificate sealed with the seal of the Supreme Court showing the amount of such costs and on production of the certificate to the Treasurer, that other person shall be paid such amount out of the Consolidated Revenue Fund.

No appeal from Judge. Added by No.19 of 1919, s.21.

206A. There shall be no appeal to the Full Court from any determination of a single Judge made on the return of any order to review, but the Judge on such return may, if he thinks it desirable, refer such order to review for hearing and determination by the Full Court at the request of any party thereto.

- Enlargement or abridgment of time. Added by No.19 of 1919, s.21. Amended by No.29 of 1948, s.11.
- 206B. The Supreme Court or a Judge shall have power to enlarge or abridge the time appointed by the preceding sections one hundred and eighty-three to two hundred and six A both inclusive of this Part or fixed by any order for doing any act or taking any proceeding upon such terms (if any) as the Justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.
- Evidence of proceedings in court below. Added by No.19 of 1919, s.21.
- 206C. The Court or Judge, on the hearing of an order to review, shall have power to determine and ascertain what evidence was given or what proceedings taken before the Justices on such evidence or statement of what occurred before the Justices, including the notes of the Justices (if any) as the Court or Judge may deem sufficient, and may rehear the testimony of any witness.
- Dismissal for want of prosecution. Added by No.19 of 1919, s.21 No.119 of 1976, s.11.
- 206D. If any appellant makes default in prosecuting his appeal without delay or in taking any necessary steps in the presentation thereof, the Attorney General or any other party may apply to the Judge in Chambers by summons served on such appellant for an order discharging the order to review, and the Judge shall make such order as shall be just with regard to the subject matter of the application and to costs.
- Evidentiary provisions. Substituted by No.119 of 1976, s.12.
- 206E. The prescribed officer shall send to the proper clerk of petty sessions, any person having the appellant in custody, the Attorney General, and any party called upon by the order for review to show cause, a memorandum as to each decision given on or in relation to an application for an order for review, the order or the determination made on the return of the order, and such memorandum shall be sufficient evidence of the relevant facts therein specified.
- Enforcement of decision of Supreme Court. Added by No.19 of 1919, s.21.
- 206F. Any conviction, sentence or order affirmed, amended, varied, adjudged, imposed or made by the decision of the Supreme Court or a Judge thereof in relation to any order to review, may be enforced (subject to any variation made therein) by any Justices (whether the Justices in respect of whose decision the order to review was granted or not) in the same way as if it had been adjudged, imposed, or made by them, and any Justices may issue, make, adjudge, or impose all such summonses, warrants, orders, convictions, and sentences as may be necessary to carry into effect any directions contained in any decision of the Supreme Court or Judge given in relation to any order to review, and no action or proceedings shall be taken against any Justices for enforcing any such conviction, sentence, or order notwithstanding any defect therein.

If costs not paid, certificate to be granted. Added by No.19 of 1919, s.21. Amended by No.26 of 1932, s.4.

Enforcement of order for costs. Added by No.19 of 1919, s.21. Amended by No.26 of 1932, s.5.

Appellant by way of order to review deemed to have abandoned other rights of appeal. Added by No.19 of 1919, s.21.

206G. Subject to the proviso to section two hundred and six, if any costs ordered to be paid by either party to an appeal hereunder are not paid, the prescribed officer shall, upon application of the party entitled to such costs, grant to him a certificate that such costs have not been paid, and shall therein specify the amount of such costs.

206H. Upon production of such certificate to any Justice, the payment of such costs may be enforced in the same manner as is hereinbefore provided for enforcing the payment of costs awarded by Justices, but the provisions of this section are without prejudice to any other method of enforcement.

Provided that, where such appeal relates wholly or partly to an order made by Justices for the payment of money in regard to any of the matters specified in the Eighth Schedule, no order for payment of costs in connection with any such appeal shall be enforceable under the provisions of this section.

206I. Any person who appeals by way of order to review against any decision of Justices, from which he is by law entitled to appeal in any other manner, shall be taken to have abandoned any such other right of appeal.

### *Habeas Corpus*

Control of Supreme Court over summary convictions.

207. No person brought before the Supreme Court, or a Judge thereof, on *habeas corpus* shall be discharged from custody by reason of any defect or error in a warrant of commitment of any Justices exercising a summary jurisdiction, unless such Justices, or one of them, and the prosecutor or other party interested in supporting the warrant have received reasonable and sufficient notice of the intention to apply for such discharge. Such notice shall require them to transmit or cause to be transmitted to the Court or Judge the conviction or order, if any, on which the commitment was founded, together with the depositions and complaint, if any, intended to be relied on in support of such conviction or order, or certified copies thereof.

Amendment. 208. If any such conviction or order, complaint, and depositions, or certified copies, are so transmitted, and the offence charged or intended to be charged thereby appears to have been established, and the judgment of the Justices thereupon to have been in substance warranted, and the defects or errors appear to be defects of form only, or mistakes not affecting the substantial merits of the proceedings before the Justices, the Court or Judge shall allow the warrant of commitment, and the conviction or order, to be forthwith amended in all necessary particulars in accordance with the facts, and the person committed shall thereupon be remanded to his former custody.

Notice dispensed with. 209. The notice hereby prescribed may be given either before or after the issue of the writ of *habeas corpus*: Provided that when the copies of the conviction or order and depositions are produced at the time of applying for the writ, the Court or Judge may dispense with such notice.

Power to Court or Judge to admit to bail. 210. When any person committed to gaol by virtue of a summary conviction or order is brought up by writ of *habeas corpus*, and the Court or Judge postpones the final decision of the case, such Court or Judge may discharge the person upon his recognisance, with or without sureties for his appearance at such time and place, and upon such conditions, as the Court or Judge may appoint.

If the judgment of the Court or Judge is against any person so brought up, the Court or Judge may remand him to his former custody, there to serve the rest of the term for which he was committed.

*Amendment – Informalities*

Proceedings not to be quashed for want of form. 211. No complaint, conviction, order, or other proceeding before any Justices shall be quashed or set aside, or adjudged void, or insufficient for want of form.

Respecting the amendment of convictions, etc. 212. Whenever the facts or evidence appearing by the depositions in substance support the adjudication of the Justices, and if such facts or evidence would have justified the Justices in making any necessary allegation or finding omitted in such adjudication, or in the formal conviction or order, or any warrant issued in pursuance of such adjudication, all necessary amendments shall be made by the Court or Judge, and when in a conviction there is some excess which may (consistently with the merits of the case) be corrected, the conviction shall be amended accordingly, and shall stand good for the remainder; and all amendments shall be subject to such order as to costs and otherwise as the Court or Judge thinks fit.



Want of summons or complaint. 213. When the person convicted, or against whom an order has been made, or any person whose goods have been condemned or directed to be sold as forfeited, was present at the hearing of the case, the conviction or order shall be sustained, although there may have been no complaint or summons or amendment thereof, unless he objected at the hearing that there was no complaint or summons or amendment thereof.

Distribution of penalty. 214. No conviction or order shall be defeated for the want of any distribution, or for a wrong distribution of the penalty or forfeiture.

#### *Service of Notices*

Service by or upon solicitor acting for party. Repealed and new section added by No.19 of 1919, ss.22-23. 215. Where a party acts or is represented by a solicitor, any document, notice, or proceeding required under this Part of this Act to be served by or upon such party may be served by or upon such solicitor, and service of any such document, notice, or proceeding upon such solicitor or delivery of the same at his office or sending the same to him properly addressed by post prepaid shall be deemed to be good service upon the party whom such solicitor represents, or for whom he acts, as upon the day when the same is so served or delivered, or upon which in the ordinary course of post it would be delivered.

#### *Abandoned Appeals*

Enforcement of conviction when appeal abandoned. Amended by No.119 of 1976, s.13. 216. (1) When an appeal is not duly set down for hearing, the Justices from whose decision the appeal was made, or any other Justices, may enforce the conviction or order as if no notice of appeal had been given, and, if the appellant has been released from custody, may estreat the recognisance (if any), and, if the decision contains a sentence of imprisonment, issue a warrant for the arrest of the appellant and commit him to gaol according to the conviction.

(2) Where any Justices exercise a power conferred by subsection (1) of this section, the proper clerk of petty sessions shall send a memorandum to the Master of the Supreme Court setting out the relevant circumstances and parties.

Absconding appellant may be arrested. 217. If it is made to appear on oath to any Justice that any person within the jurisdiction of such Justice is under such recognisance as aforesaid, and that such person is about to leave Western Australia, such Justice may issue his warrant for the apprehension of such person so under recognisance, and upon being satisfied that the ends of justice would be otherwise defeated, may commit such person, when arrested, to gaol, there to be kept until the time mentioned in the recognisances for the appearance of such person to receive judgment or render himself in execution.

#### *No Certiorari necessary*

Certiorari not to be required for proceedings under this Act. 218. No writ of *certiorari* or other writ shall be required for the removal of any conviction, order, or other decision, in relation to which a case is stated under this Part of this Act, or otherwise for obtaining the judgment or determination of the Supreme Court on such case.

*Costs*

No order for costs to be made against Justices or police officers. Amended by No.29 of 1948, s.12. 219. No costs shall be allowed against any Justice or police officer in respect or by reason of any appeal under this Act, or of any proceeding in the Supreme Court in its control over summary convictions.

Provided that where, on an appeal brought by a police officer, the decision appealed against is confirmed, or, if not confirmed, has involved, in the opinion of the Court or Judge hearing the appeal, a point of law of exceptional public importance, costs may be allowed to the respondent. Such costs shall not be recoverable from the police officer, but the Registrar of the Supreme Court shall, in any case where costs are so allowed, give to the respondent a certificate sealed with the seal of the Supreme Court showing the amount of such costs, and, on production of the certificate to the Treasurer, the respondent shall be paid such amount out of the Consolidated Revenue Fund.

*Rules*

Rules 220. The Judges of the Supreme Court, or any two of them, may make general rules and orders to regulate the practice and procedure under this Part of this Act, and may prescribe the fees to be taken and the costs to be allowed.

All appeals to be subject to this Act. 221. 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.