New South Wales Government
Attorney General's Department

Crimes (Appeal and Review) Act 2001

Report on the Statutory Review of the Act
August 2008

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Contents

EXECUTIVE SUMMARY

The Crimes (Appeal and Review) Act 2001 provides a statutory regime for the review of decisions of Local Courts.

Section 120 of the Act requires the Minister to review the Act five years from the date of assent to determine whether the policy objectives of the legislation remain valid and whether the terms of the Act remain appropriate for securing those objectives.

In undertaking the review, submissions were invited from heads of jurisdictions, legal stakeholders and other interested parties.

Statutory rights for appeals against Local Courts have their origin in appeals against Courts of Petty Sessions created in 1835. Although the legislation has been substantially modified to meet the needs of a modern court system, many of the recommendations made in this review relate to matters that are historic vestiges of the former appeal rights under the Justices Act 1902.

The primary reform issue considered in this review is whether the nature of appeal against the decisions of Local Courts to the District Court remains appropriate. One argument raised is that unlike magistrates in Courts of Petty Sessions, Local Court magistrates are professional and independent judicial officers and their decisions should not be overturned in the absence of error being established. The countervailing view is that the requirement to establish error may slow proceedings in the Local Court as magistrates take the time to provide detailed reasons. In addition, unrepresented defendants will experience difficulties in being able to frame grounds of appeal to establish an error. This review contains a recommendation that the Attorney General's Department undertake consultation to determine whether rights in relation to appeal against sentence to the District Court should be limited to sentences that are manifestly excessive or inadequate.

A second issue involving substantive reform is to change the process of appeals against sentence from de novo hearings to a process of rehearing on the transcript, with leave of the court being required to bring additional evidence. This proposal is similar to the reforms introduced in relation to appeals against conviction in 1998. The review recommends that further consultation be undertaken on this proposal.

These two recommendations involve issues of substantive law and it is necessary to seek the views of a wider range of stakeholders on the impact of these changes.

The remaining matters addressed in the recommendations relate to clarifying the Act or streamlining the processes under it.

While the report contains a number of recommendations, the review concludes that the Crimes (Appeal and Review) Act 2001 remains largely effective in meeting its objectives.

RECOMMENDATIONS

Recommendation 1:
That the definition of sentence in section 3 of the Act be amended to include the recording of a conviction against the defendant as part of the final judgment of the court.

Recommendation 2:
(a) Section 11A be amended to limit the right of appeal against a decision to refuse to grant an annulment application to a refusal by the Local Court to annul a conviction.

(b) Section 20(1) be amended to provide that the District Court may determine an appeal by setting aside the conviction and making such other order as it thinks just, including where an appeal is made under section 12(1) remitting the matter to the Local Court.

Recommendation 3:
That section 84 of the Crimes (Domestic and Personal Violence) Act 2007 be amended to provide that an annulment application or an appeal against the making, dismissal, variation or revocation of an apprehended violence order may be made in the same way as an annulment or appeal against a conviction under the Crimes (Appeal and Review) Act 2001.

Recommendation 4:
That section 84 of the Crimes (Domestic and Personal Violence) Act 2007 be amended to allow an applicant for an apprehended violence order to apply for an annulment if an application is dismissed in the absence of the applicant.

Recommendation 5:
That section 64 of the Local Courts Act 1982 be amended to provide that an annulment application or appeal against an order under Part 6 is to be dealt with in the same way as an annulment application or appeal against a conviction under the Crimes (Appeal and Review) Act 2001.

Recommendation 6:
Amend the Crimes (Domestic and Personal Violence) Act 2007 to provide that if an apprehended violence order is annulled by the District Court and remitted to the Local Court, the District Court must make an interim order in favour of the protected person pending the rehearing of the matter.

Recommendation 7:
Amend the Act to provide that an appeal to the District Court or Land and Environment Court against conviction and sentence is to be a rehearing on the basis of the transcript of the proceedings and other material before the original Local Court.

Recommendation 8:
That the Attorney General's Department undertake further consultation on the proposal that section 17 of the Act be amended to provide that an appeal against sentence is to be heard by way of a rehearing on the transcripts of proceedings and

other material before the Local Court. The District Court may grant leave for fresh evidence to be given in the following circumstances:
a) in the case of a prosecutor, if exceptional circumstances exist.
b) In the case of a defendant, if it is satisfied that it is in the interests of justice.

Recommendation 9:
That the Attorney General's Department undertake further consultation on the proposal that the Act be amended to provide that an appeal under Part 3 or Part 4 of the Act against a sentence imposed by the Local Court be dismissed unless the sentence was manifestly excessive or, in the case of an appeal by the prosecution, manifestly inadequate.

Recommendation 10:
That section 72 of the Act requiring costs ordered on appeal to be paid to the original Local Court be repealed.

Recommendation 11:
That subject to any order of the appeal court, a suspension of licence in place immediately prior to the determination of the proceedings in the Local Court shall resume upon lodging a notice of appeal and continue until the appeal proceedings are determined.

Recommendation 12:
That the references to "certified" transcripts in section 18 and 37 be repealed.

Recommendation 13:
That section 182 of the Criminal Procedure Act 1986 be amended to provide that lodging a written notice of plea under this section satisfies any requirement that the defendant appear before a court.

Recommendation 14:
That section 11 be amended to provide (1) that an appeal may be made against the conviction or sentence or both and (2) that when dealing with an appeal against both the conviction and sentence the District Court will determine the appeal against the conviction first and, if the conviction is upheld, the District Court will then determine the appeal against the sentence.

Recommendation 15:
That consideration be given to introducing a standard form of Notice of Appeal to the District Court and Land and the Environment Court.

Recommendation 16:
That section 48 of the Act be amended to provide that the Land and Environment Court may determine an appeal against an order referred to in sections 32(1) and 42(2B) by setting aside the order and remitting the matter to the Local Court.

Recommendation 17:
That section 34 and 44 of the Land and Environment Court be amended to provide that an appeal against an environmental offence is to be lodged with the Land and Environment Court.

1. INTRODUCTION

1.1 Terms of reference for the review

Section 120 of the Crimes (Appeal and Review) Act 2001 (the Act) provides:

Review of the Act:

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as practicable after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

(4) A review of the provisions of Part 8 is to be undertaken as soon as practicable after the period of 5 years after their insertion into this Act by the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 (and the report of the outcome of that review is to be tabled in each House of Parliament within 12 months after the end of that period) despite anything to the contrary in this section.

The Act was assented to on 19 December 2001 and proclaimed to commence on 7 July 2003. The Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 was assented to on 19 October 2006.

The Act is within the ministerial responsibility of the Attorney General, the Hon. John Hatzistergos, MLC.

1.2 Conduct of the review

This review examines whether the objectives of the Act remain relevant and appropriate. It also considers whether the reforms introduced by the Act remain consistent with promoting these objectives, and considers suggestions for further refinement or improvement in the operation of the Act.

Part 8 of the Act relating to acquittals is not within the scope of this review by virtue of section 120(4) of the Act.

The review has been conducted by the Attorney General's Department at the direction of the Attorney General. The review process involved detailed consideration of the objectives of the Act and submissions to the review.

Submissions were sought from key stakeholders and through an advertisement appearing in the Sydney Morning Herald and the Daily Telegraph on Wednesday, 21 March 2007. A schedule of people and organisations that have made submissions to the review is at Appendix 1.

2. BACKGROUND TO THE ACT

2.1 Overview of the Act

The Crimes (Appeal and Review) Act 2001 provides a legislative framework for appeals and reviews in relation to criminal proceedings dealt with summarily. The Act does not apply to civil proceedings or rights of appeal in criminal proceedings dealt with on indictment.

The appeal and review procedures contained in Parts 2,3 and 5 of the Crimes (Appeal and Review) Act 2001 apply to certain non-criminal proceedings. The provisions apply to application proceedings under Part 6 of the Local Courts Act 1982 as well as apprehended violence proceedings.

Part 1 Preliminary
This Part outlines the application of the Act. By virtue of the definition of a Local Court in section 3 of the Act the rights of appeal and review extend to the decisions of the following:

(a) a Children's Court
(b) a Warden's Court
(c) a Licensing Court
(d) any court that is constituted by a Magistrate and that exercises criminal jurisdiction, and
(e) any Magistrate or court that exercises any function under Chapter 3 (Part 3 excepted), Chapter 4 (Part 5 excepted), and Chapter 5 of the Criminal Procedure Act 1986.

A right of appeal or review exists in relation to a conviction or sentence imposed by the Local Court. A sentence is defined in section 3 as any order made as a consequence of the court having convicted the person of an offence, including:

(a) imprisonment, periodic detention, home detention
(b) community service order, good behaviour bond or fine
(c) any order suspending execution of a sentence of imprisonment under section 12 of the Crimes (Sentencing Procedure) Act 1999
(d) any non association or place restriction order
(e) any direction of compensation under the Victims Support and Rehabilitation Act 1996
(f) any child protection registration under section 3D of the Child Protection (Offenders Registration) Act 2000
(g) Any order or direction with respect to restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege
(h) Any order under section 10 or 11 of the Crimes (Sentencing Procedure) Act 1999
(i) Any order made revoking a good behaviour bond or any order made as a consequence of the revocation of a good behaviour bond
(j) Any order for restitution of property or any order for costs
(k) Any banning order under the Sporting Venues (Offenders Banning Orders) Act 2005.

Part 2 Review of Local Court Decisions

This Part contains rights with respect to the annulment by a Local Court of a conviction or sentence. An application can be made by a defendant within two years of the conviction or sentence "if the defendant was not in appearance before the Local Court when the conviction or sentence was made or imposed". An application can be made to the Minister after that time. The Minister must not refer the application to the original Local Court unless the Minister is satisfied that a question of doubt exists as to the defendant's guilt or liability for the penalty.

A Local Court must grant an application for an annulment if:

(a) the defendant was not aware of the original Local Court proceedings until after the proceedings were completed; or
(b) the defendant was otherwise hindered by accident, illness, misadventure or other cause from taking action in the proceedings; or
(c) having regard to the circumstances of the case, it is in the interests of justice to annul the conviction or sentence.

Part 3 Appeals from the Local Court to the District Court

This Part contains rights of appeal from a Local Court to the District Court. Division 1 deals with appeals by defendants. An appeal may be made to the District Court either against the conviction or sentence. A defendant may lodge an appeal as of right within 28 days of the Local Court decision or with leave of the District Court within three months of the Local Court decision. Leave to appeal must be sought if a defendant seeks to appeal against the conviction after entering a plea of guilty in the Local Court or where rights of annulment have not been exhausted in the Local Court.

Fresh evidence may be given without leave in an appeal against sentence and with leave in an appeal against conviction. In an appeal against sentence the District Court may set aside the sentence, vary the sentence or dismiss the appeal. In an appeal against conviction the District Court may quash or uphold the conviction.

Division 2 deals with appeals by prosecutors to the District Court. An appeal may be lodged against the adequacy of the sentence imposed by the Local Court. An appeal may be lodged within 28 days after the sentence is imposed. The Director of Public Prosecutions may only give fresh evidence at the appeal hearing in exceptional circumstances. The District Court may set aside the sentence, vary the sentence or dismiss the appeal.

The provisions for appeals to the District Court contained in Part 3 of the Act are the primary appeal mechanism against decisions in the Local Court. The number of appeals against Local Court decisions lodged under Part 3 in recent years is as follows:

Year	Conviction appeals	Severity appeals	Inadequacy appeals
2004	1,145	4,445	71
2005	1,350	5,062	42
2006	1,352	5,033	38

Part 4 Appeals from the Local Court to the Land & Environment Court
This Part contains rights of appeal from a Local Court to the Land and Environment Court in relation to environmental offences. The process largely mirrors the procedures applicable to appeals against decisions of the Local Court to the District Court.

Part 5 Appeals from a Local Court to the Supreme Court
This Part contains rights of appeal from a Local Court to the Supreme Court. A defendant or prosecutor may lodge and appeal as of right on a ground that involves a question of law alone. Defendants may also appeal against a sentence imposed by a Local Court on a mixed question of fact or law with leave of the Supreme Court.

Appeals to the Supreme Court must be lodged with the Supreme Court within 28 days of the decision that is the subject of the appeal.

On an appeal against sentence the Supreme Court may set aside or vary the sentence or remit the matter to the Local Court for redetermination in accordance with the Supreme Court's directions or dismiss the appeal.

Part 6 Provisions common to all Appeals
This Part contains provisions common to all appeals. The provisions allow the courts to overlook or cure technical defects in notices of appeal and provide for an automatic stay of execution following the lodgement of an appeal. The Part also contains a number of other miscellaneous provisions including:

- Allowing an appeal to be withdrawn with the leave of the appeal court
- Allowing an appeal court to backdate a conviction or sentence
- Ensuring that a good behaviour bond continues in force following confirmation of a sentence
- Restricting the circumstances in which costs can be awarded against the prosecutor

Part 7 Review of Convictions and Sentences
This Part was inserted into the Act on 23 February 2007 by the Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006. The Part reproduces provisions formerly contained in Part 13A – sections 474B-4747N of the Crimes Act. These provisions allow the Attorney General or the Supreme Court to refer a conviction to the Court of Criminal Appeal for reconsideration at any time. The Part also establishes the DNA Review Panel that replaces the now defunct Innocence Panel. The provisions allow convicted persons to apply to the panel to have identified biological material that might affect their claim of innocence tested.

2.2 History of Legislative Rights of Appeal and Review

The Crimes (Appeal and Review) Act 2001 confers rights of appeal and review against the decisions of Local Courts and provides a statutory framework outlining the procedures for dealing with appeals and reviews. The current legislation re-enacts and modifies provisions contained in earlier legislation.

Appeal Provisions

Summary Jurisdiction Act

Legislative rights of appeal in New South Wales were first created in 1835 and related to appeals against justices of the peace sitting in Courts of Petty Session to Courts of Quarter Session. The Summary Jurisdiction Act, 5 Wm. IV No.22, created a general right of appeal from the decisions of magistrates sitting as Courts of Petty Session to the Court of Quarter Session.

Justices Act 1902

The right of appeal was subsequently incorporated in the Justices Acts Amendment Act 1900 and then in Part 5 of the Justices Act 1902. Part 5 contained a number of Divisions. Division 1 dealt with appeals by way of stated case to the Supreme Court, Division 2 dealt with applications to the Supreme Court to make orders restraining summary proceedings. Division 3 dealt with procedures in the Supreme Court. Division 4 contained general appeal rights to the District Court.

Justices (Appeals) Amendment Act 1988

In 1988, Part 5 of the Justices Act 1902 was amended by adding Division 4A to introduce a right for the Director of Public Prosecutions to appeal to the District Court against the adequacy of a sentence imposed by a Justice or Justices.

Justices Legislation Amendment (Appeals) Act 1998

On 1 March 1999, the Justices Legislation Amendment (Appeals) Act 1998 commenced. The amending legislation replaced procedures for a stated case to the Supreme Court with provisions allowing an appellant to commence an appeal by summons. The amendments also changed the nature of an appeal to the District Court against conviction from a de novo hearing to a rehearing on the transcripts, however, fresh evidence could be given with leave of the Court.

Crimes (Local Courts Appeal and Review) Act 2001

The Crimes (Local Courts Appeal and Review) Act 2001 commenced on 7 July 2003 as part of a Local Courts reform package which repealed the Justices Act 1902. The appeal and review provisions were consolidated into the separate Act without substantial change.

On 15 December 2006, the title of the legislation was amended by the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 to remove the reference to Local Courts from the title to reflect the broader scope of the legislation.

Review Provisions

Prior to 1967, the Justices Act 1902 did not contain any power enabling a magistrate who had either convicted or made an order against a defendant to set it aside and rehear the matter. In that year, the Act was amended and section 100A allowed convictions made in the absence of the defendant to be annulled within 12 months if the defendant could show that he or she was not aware of the hearing. Section 100B allowed the Minister to refer an application for annulment to the court for consideration if the Minister was satisfied that a question of doubt had arisen in relation to the persons liability to pay the penalty.

Justices (Procedure) Act 1997
The review provisions remained relatively unchanged until the commencement of the Justices (Procedure) Act 1997. The amending legislation expanded the grounds for annulling a conviction or order to include where the defendant was hindered by accident, illness, misadventure or other cause from taking part in the proceedings.

Crimes (Local Courts Appeal and Review) Act 2001
On 7 July 2003 the review provisions contained in the Justices Act 1902 were repealed and incorporated in Part 2 of the Act without substantial modification.

2.3 The Nature of the Right of Appeal

The nature of the right of appeal differs according to the type of appeal. In *Turnbull v New South Wales Medical Board (1976) 2 NSWLR 281* Glass JA identified the following appeals:

(a) Appeals to supervisory jurisdiction – only errors going to jurisdiction or denials of natural justice can be ventilated.
(b) Appeals on questions of law only, undetermined or wrongly determined issues of fact must be remitted.
(c) Appeals after a trial before judge and jury – the result below will be disturbed if the judge fell into error of law, or if the jury's errors of fact transcend the bounds of reason. But, except for the assessment of damages, issues of fact must be redetermined in a new trial.
(d) Appeals from a judge in the strict sense - if the judge fell into error of law, or has made a finding of fact which is clearly wrong, the appellate court will substitute its own judgment.
(e) Appeals from a judge by way of rehearing – if errors of law or wrong findings of fact have occurred below, the appellate court will try the case again on the evidence used in the court below, together with such additional evidence as it thinks fit to receive.
(f) Appeals involving a hearing de novo – all issues must be retried.

Rights of appeal from decisions of the Local Court have their origin in appeals against the decisions of justices to Courts of Quarter Sessions in England. Initially, the Conventicle Act of 1670 (Statute 22 Car. 2c.1) required appeals to be heard before a jury, although Statute 22&23 Car. 2c. 25 subsequently allowed certain appeals to be heard by justices of the peace at Quarter Sessions to conduct a rehearing without a jury. The Quarter Sessions Appeal Act 1731 expressly provided the right for the Court to conduct any appeal without a jury.

The nature of the appeal was described by Lush J in *The Queen v Pilgrim L.R., 6QB 89*:

"Generally speaking, on appeal to the Quarter Sessions the justices are not limited to the evidence before the petty sessions, but they have to hear the whole matter de novo, and the issue is the same, and the justices are put in the same position as the

justices in the Court below. It is only in cases in which the particular Statute giving the appeal limits the inquiry to the same evidence, that the Quarter Sessions are precluded from going into fresh evidence,… but where there is no such limitation, either expressly or by implication, the matter is at large, and the Quarter Sessions are to rehear the whole matter, and give their judgment upon all the evidence that is brought before them."

The nature of appeals from Courts of Petty Sessions to Courts of Quarter Sessions in New South Wales was similar to appeal rights in England. The High Court in *Sweeney v Fitzhardinge (1906) 4CLR 716* held that an appeal from a magistrate sitting as a Licensing Court to the Court of Quarter Sessions was a hearing de novo. As a consequence, all issues in the proceedings must be retried and the party succeeding in the court below enjoys no advantage, and must win the case a second time.

The nature of appeal proceedings before the District Court was reconsidered in *R v Longshaw (1990) 20 NSWLR 554* in the context of new appeal provisions against the inadequacy of sentences under Part 5 Div 4A of the Justices Act 1902. The Court of Criminal Appeal held that the District Court judge is required to exercise his or her own discretion and is not limited to a review of the magistrate's sentences and orders to determine whether the magistrate erred in law.

The requirement to present all evidence afresh at an appeal hearing was reduced by section 126 Justices Act 1902. That provision allowed the deposition of any witness examined at the hearing before the justice may be read as evidence for either party at the hearing of the appeal if the other party consents or if certain prescribed conditions applied. Notwithstanding this concession, the proceedings remained a de novo hearing.

The nature of the right of appeal was altered by the Justices Legislation Amendment (Appeals) Act 1998 by modifying the procedure for appeals against the conviction. The development of a professional, independent magistracy that maintains a complete record of its proceedings meant that it was no longer imperative for an appellate court to start proceedings afresh. The requirement to recall witnesses to give evidence again caused delays in the appeal process and caused unnecessary distress to witnesses.

Sections 132 and 133 of the Justices Act 1902 were amended to provide that appeals against conviction were to be dealt with by way of rehearing on depositions of the Local Court, however, parties were permitted to recall witnesses where there were substantial reasons why, in the interest of justice, the witness should be called again in the appeal.

The changes introduced by the Justices Legislation Amendment (Appeals) Act 1998 were re-enacted in the Crimes (Appeal and Review) Act 2001. The nature of a conviction appeal was considered by McClellan CJ in *Gianoutsos v Glykis (2006) NSWCCA 137*:

"However, an appeal under s 18 of the Crimes (Local Courts Appeal and Review) Act 2001 (NSW) is not a hearing de novo. Rather, it is a rehearing of a similar

nature to a rehearing under the former s 5AA of the Criminal Appeal Act 1912 (s 5AA was amended in 2000 so that it now provides for an appeal in the strict sense rather than by way of rehearing)".

Although section 18 of the Crimes (Appeal and Review) Act 2001 creates a right of appeal against conviction in the nature of a rehearing, it is unnecessary for the appellant to establish an error on the part of the lower court before the District Court exercises its appellate jurisdiction.

The Justices Legislation Amendment (Appeals) Act did not alter the manner in which appeals against sentence are conducted. In essence, they remain de novo hearings. Section 17 of the Crimes (Appeal and Review) Act 2001 provides that an appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in appeal proceedings.

Except in relation to appeals against a refusal to annul a conviction or sentence, the District Court does not have the power to remit proceedings on appeal to the Local Court for re-determination in accordance with its directions.

2.4 Comparative Appeal Rights in other States and Territories

Appeal rights against the decisions of criminal courts of summary jurisdictions exist in all other States and Territories.

Queensland
An appeal to the District Court under section 222 Justices Act 1886 (Qld) is by way of a rehearing on the evidence. Leave may be given to adduce fresh evidence. If the defendant pleads guilty or admits the truth of a complaint, a person may only appeal against sentence on grounds that the sentence was excessive or inadequate.

Victoria
An appeal is available under the Magistrate's Court Act 1989 (Vic) to the County Court against a sentencing order. An appeal on a question of law is made to the Supreme Court. The appeal to the County Court is by way of a hearing de novo. The Parliament of Victoria Law Reform Committee published a report on de novo appeals to the County Court in October 2006 and recommended against changing the nature of appeals. The Government of Victoria has accepted this recommendation.

Western Australia
An appeal is available only to the Supreme Court rather than the District Court under the Criminal Appeals Act 2004 (WA). The appeal is by way of rehearing and a party may seek special leave to adduce additional evidence. The right of appeal is limited to grounds that there was a miscarriage of justice or that a court of summary jurisdiction:

a) made an error of law or fact;
b) acted without or in excess of jurisdiction;

c) imposed a sentence that was inadequate or excessive.

South Australia
An appeal may be made to the Supreme Court under the Magistrates Court Act 1991 (SA). On appeal, the Supreme Court may, if the interests of justice so require, rehear any witnesses or receive fresh evidence. The appellant must provide grounds for the appeal in sufficient detail to identify the issues for determination. Appeals may involve questions of fact or law.

Tasmania
An appeal is available to the Supreme Court under the Justices Act 1959 (Tas). An appeal is by way of rehearing, although a party may apply for a hearing de novo. An appeal is available on the following grounds:

a) error or mistake of fact or law
b) excess of jurisdiction

ACT
An appeal is available to the Supreme Court under section 130 Magistrates Court Act 1930 (ACT). The appeal is by way of rehearing although further evidence may be given if the court considers it necessary or expedient to do so.

Northern Territory
An appeal is available to the Supreme Court under the Justices Act 1928 (NT). An appeal against conviction is limited to grounds of error of fact or law or excess of jurisdiction.

3. OBJECTIVES OF THE ACT

The long title of the Crimes (Appeal and Review) Act 2001 provides that it is an Act to restate the law with respect to appeals and other forms of review in relation to criminal proceedings; and for other purposes. The Act does not contain a formal statement of objectives.

The second reading speech on the introduction of the legislation does not elaborate on the objectives of the Act. The Act was introduced as part of the Local Court Reform Package with the Criminal Procedure Amendment (Justices and Local Courts) Bill 2001 and the Justices Legislation Repeal and Amendment Bill 2001. The second reading speech by the Hon. M Egan makes the following reference to the Act:

"The third bill in the new package is the Crimes (Local Courts Appeal and Review) Bill 2001. This bill consolidates and simplifies the criminal appeal and review provisions of the Justices Act 1902. The appeal provisions were substantially amended by the Justices Legislation Amendment (Appeals) Act 1998 and were not as antiquated as other sections. The new bill consolidates the existing law. The bill has provided an opportunity to clarify some matters that have arisen since the 1998 Act and to arrange the sections in a way that makes the relevant law easier to find and understand. The bill makes it clear, for example, that the Land and Environment Court is to be the appeal court for all summary environmental offences. Under the previous provisions, it was arguable that parties lodge appeals in either the Land and Environment Court or the Supreme Court. Clearly, it is desirable to have consistency in the appeal process. That is best achieved by having the same kind of offences dealt with by the same appellate court."

The then Attorney General J W Shaw introduced the Justices Legislation Amendment (Appeals) Bill as an exposure draft. In his second reading speech to Parliament on 19 November 1997 he concluded:

"As I reflect upon the description of the appellate processes with which this bill deals, I realise that they are labyrinthine in their nature, and complex in the practical implementation. If this bill has the effect of streamlining and simplifying these processes, making them more accessible and less costly, it will have achieved its purpose".

The Attorney Generals' second reading speech on the Bill after consultation on the exposure draft concluded:

"The measures being introduced by the bill represent a further step in the Government's broader strategy to reform the structure of the court system and to make it more efficient in the interests of the users of that system and the wider community. The bill also represents a considered and careful response to the competing policy interests associated with Local Court appeal rights following an extensive period of consultation."

The “competing policy interests” alluded to by the former Attorney General are the objectives of ensuring that appeal proceedings are streamlined and simple while still affording an appropriate opportunity for aggrieved parties to seek redress against Local Court decisions. The primary object of Act is to provide a means of reviewing certain decisions of the Local Court. The creation of an effective mechanism to review decisions and to correct errors promotes public confidence in the justice system.

4. SUBMISSIONS TO THE REVIEW

4.1 General Comments on Effectiveness of the Act

Thirteen submissions were received in relation to the review of the Act. A number of submissions raised procedural and substantive matters regarding the operation of the legislation.

A number of submissions commented in general terms that the objectives of the Act remain valid and the provisions remain substantially effective in achieving these objectives. The Chief Judge of the District Court, the Hon. Justice R O Blanch commented that from his experience in dealing with a large number of appeals "the system works fairly for both the defence and the prosecution". The NSW Police Ministry and NSW Bar Association indicated that they had no concerns with the operation of the Act.

The Chief Magistrate raised concerns as to whether the appeal provisions to the District Court against conviction and sentence remain appropriate. The appeal regime was established in 1835 when non-legally qualified people were appointed as magistrates and the record of proceedings was scant. Although the legislation has been modified over time, the appeal process to the District Court does not require error on the part of the magistrate to be established. Given that magistrates are now a professional and skilled branch of the judiciary, the Chief Magistrate questions whether the objectives of the legislation are achieved by allowing a rehearing that effectively requires the District Court to disregard the decision of the magistrate. The Chief Magistrate believes that the right of appeal to the District Court should be qualified by requiring an error on the part of the Local Court to be established.

None of the submissions suggested that the legislative framework was in need of radical reform. A number of issues that were raised relate to minor procedural reform or clarification of existing matters.

5. DISCUSSION OF APPEAL AND REVIEW ISSUES

5.1 Definition of Conviction and Sentence

In its submission, the Law Society of New South Wales has sought clarification on appeal procedures in the Land and Environment Court. In *Advanced Arbor Service Pty Ltd v Strathfield Municipal Council [2006] NSWLEC 485* and *Denning v Department of Environment and Conservation [2007] NSWLEC 258* Preston J held that on an appeal against sentence under the Crimes (Appeal and Review) Act 2001 the Land and Environment Court does not have power to quash the conviction and impose an order dismissing the charge under section 10(1) of the Crimes (Sentencing Procedure) Act 1999. Preston J held that this approach was unavailable as it required the setting aside of the conviction imposed by the Local Court which could not occur in an appeal against sentence. The decision in Advanced Arbor and Denning was followed by Pain J in *Franks v Woollahra Municipal Council [2007] NSWLEC 461*.

The decisions of the Land and Environment Court rely on the structure of the appeal Act which enables a defendant to appeal either against the conviction or the sentence. The definition of sentence in section 3 of the Act does not include the recording of a conviction against the defendant. As a consequence, the Land and Environment Court concluded that setting aside a conviction on an appeal against sentence is unavailable and that a separate appeal must be lodged against the conviction. One difficulty caused by this construction of the Act is that an appeal against a conviction is unavailable where a defendant pleads guilty in the Local Court except with leave.

Although the provisions relating to an appeal against decisions of Local Courts to the Land and Environment Court are similar to those relating to an appeal to the District Court there are no decisions of the District Court taking a similar construction of the appeal provisions.

The difficulty highlighted by the Land and Environment Court in these cases is attributable to different meanings accorded to the term “conviction” in various legal contexts.

In *Maxwell v The Queen (1996) 184 CLR 501*, Toohey J indicated that the meaning of the term “conviction” generally depends on determining the sense in which it is used in the statute under consideration. Dawson J and McHugh J stated “on the one hand, a verdict of guilty by a jury or a plea of guilty upon arraignment has been said to amount to a conviction. On the other hand, it has been said that there can be no conviction until there is a judgment of the court, ordinarily in the form of a sentence.”

Their Honours referred to what was stated by Tindal CJ in *Burgess v Boetefeur (1844) 7 Man & G 481* that the word conviction “is sometimes used as meaning the verdict of a jury and, at other times, in its more strictly legal sense, for the sentence of the court”.

In *Keys v West [2006] NSWSC 126,* Hall J stated that the term "conviction" had a different meaning depending on its context and held in that case that a conviction in ex parte proceedings was not a conviction in the sense of a final disposition of the proceedings.

The different meanings of the term "conviction" were noted by Carruthers J in *Kinney v Green (1992) 29 NSWLR 137*:

"The relevant authorities establish that "conviction" may mean a determination that the offence has been proved or it may mean a final adjudication of guilt."

The Crimes (Appeal and Review) Act 2001 uses the term conviction in the context of a finding of guilt or the acceptance of a plea of guilty as opposed to the final disposition of the proceedings. Section 12 of the Act creates the right of appeal against conviction as a separate right from an appeal against a sentence. Where a defendant lodges an appeal against the conviction under section 12, the defendant asserts that they are not guilty of the offence. Where a defendant lodges an appeal against the severity of the sentence, the defendant seeks a review of the orders made on sentencing including the order that the court record a conviction against the defendant. The ability of the court to review the recording of a conviction on sentencing is uncertain given that the order is not included in the definition of a sentence under the Act.

To remove this uncertainty, the Law Society has suggested it should be made clear that an appeal against sentence authorises the court to consider whether a conviction should be recorded against a defendant as part of the final sentencing order. This suggestion is accepted.

Recommendation 1:

That the definition of sentence in section 3 of the Act be amended to include the recording of a conviction against the defendant as part of the final judgment of the court.

5.2 Appeals against Refusal to Grant an Annulment

If proceedings are determined in the absence of the defendant, the defendant may apply under section 4 of the Act for the annulment of any conviction or sentence imposed. When considering the application, the Local Court will have regard to any reasons offered by the defendant regarding their failure to attend. If the application for annulment is refused, the defendant may lodge an appeal to the District Court under section 11A of the Act. If the District Court upholds the appeal and annuls the order the proceedings will be remitted to the Local Court to redetermine the proceedings.

The Chief Magistrate has indicated that the process of sending matters back and forth between jurisdictions has the potential to undermine the efficiency of the court. The Chief Magistrate has suggested that where an appeal against the refusal to

grant an annulment is upheld, and the annulment relates only to the sentence, the District Court should have authority to determine the proceedings.

The Director of Public Prosecutions has also raised concerns regarding appeals against the refusal to grant an annulment. The Director of Public Prosecution submits:

"When a magistrate refuses to allow persons convicted in their absence to have their convictions set aside, the accused may then lodge an appeal to the District Court under section 12(1). If the Judge allows the appeal against the Magistrate's refusal, then the case runs in the District Court. I would ask that consideration be given for a provision in the Act to require that in such matters the case be remitted to the Local Court for hearing as the more appropriate venue".

The comments made by the Chief Magistrate and the Director of Public Prosecution suggest that defendants are taking different avenues of redress when a conviction or sentence is imposed by the Local Court in their absence.

The relevant legislative provisions regarding rights of appeal are:

Section 11 Appeal as of right
(1) Any person who has been convicted or sentenced by a Local Court may appeal to the District Court against the conviction or sentence.
(1A) Subsection (1) does not apply in respect of a conviction if the person was convicted in the person's absence or following the person's plea of guilty.

Section 11A Appeals as of right against Local Court's refusal of application for annulment of conviction or sentence
(1) Any defendant whose application under section 4 for annulment of a conviction or sentence has been refused may appeal to the District Court against the refusal.

Section 12 Appeals requiring leave
(1) Any person who has been convicted by a Local Court in the person's absence or following the person's plea of guilty may appeal to the District Court against the conviction, but only by leave of the District Court.

The legislation creates the option for the defendant convicted in their absence to either appeal against the refusal by the Local Court to annul the conviction under section 11A(1) or to seek leave to appeal the conviction made in their absence under section 12(1). In relation to a sentence imposed in the absence of the defendant, a defendant may appeal against a refusal to annul the sentence under section 11A(1) or lodge an appeal against the sentence under section 11(1).

If a defendant elects to lodge an appeal as of right under section 11A of the Crimes (Appeal and Review) Act 2001, then under section 16A, if the District Court upholds the appeal, the District Court must remit the matter to the Local Court. If, alternatively, the defendant proceeds under section 12(1) or section 11(1) then there is no power to remit the matter to the Local Court.

In the majority of cases it would be expected that a defendant would first apply to the Local Court to annul the order under section 4 and then, if refused, to proceed with the unfettered right of appeal against the annulment refusal provided under section 11A. However, there are circumstances where the defendant would be unlikely to succeed on an annulment application, for example, if the defendant was aware of the Local Court proceedings and was not hindered from taking part in the proceedings. To require the defendant in these circumstances to exhaust rights under section 4 and then to take the issue on appeal under section 11A would be inappropriate.

Sections 11A and 16A were inserted in the Crimes (Appeal and Review) Act 2001 by the Courts Legislation Amendment Act 2004. The purpose of these provisions was referred to during the second reading speech to Parliament:

"Currently, when a person charged with a criminal offence in the Local Court does not appear, the matter can be dealt with in their absence. When this occurs, a right to seek a rehearing of the matter exists under section 4 of the Crimes (Local Courts Appeal and Review Act) 2001. However, if this application for rehearing is refused, the only recourse for the defendant is to appeal to the District Court. This current process uses the District Court's valuable time and resources, and deprives the defendant of any right to appeal from the finding. If this subsequent application to the District Court is granted, there must be a complete hearing of all evidence in the District Court. To overcome this, the proposed amendment clarifies in section 11A that a right of appeal from the decision of the magistrate to refuse a rehearing be allowed to the District Court, and that the District Court be granted the ability to order a full hearing in the Local Court".

The underlying policy behind section 11A and section 16A is that, as a general rule, matters should be fully heard in the Local Court prior to decisions on conviction and sentence being reviewed by the District Court. This policy prevents matters being unnecessarily summarily heard in the District Court and ensures that rights of appeal in relation to the original decision are maintained. However, this policy must be qualified in circumstances where the defendant by neglect or intention does not participate in the original Local Court proceedings.

The proposal by the Chief Magistrate seeks to qualify rights of appeal in relation to sentences imposed in the absence of the defendant. The power to impose a sentence against an absent defendant is provided by section 25 of the Crimes (Sentencing Procedure) Act 1999. It applies to less serious offences where only a monetary penalty is imposed. The need to remit minor matters to the Local Court where the finding of guilt is not contested needs to be balanced against the need to finalise these matters expediently.

The Chief Magistrate recommends that rather than these minor matters being remitted to the Local Court for re-sentencing the District Court should finally determine the proceedings in the same way as dealing with an appeal against sentence. The Chief Magistrate's concerns could be resolved by limiting the operation of section 11A to convictions only. By doing so, a defendant would be entitled to lodge an appeal against the sentence as of right to the District Court under section 11(1). The District Court would then determine the appeal rather than remitting the matter to the Local Court.

The Chief Magistrate makes a distinction in relation to appeals against a conviction imposed in the absence of the defendant and accepts that it is appropriate for those matters to be remitted to the Local Court. The Local Court has the power to conduct an ex parte hearing and convict a person in their absence in more serious offences.

Where a defendant wishes to contest a conviction recorded against them on an ex parte basis then it is appropriate that all evidence be heard in the Local Court before an appeal against the conviction is heard by the District Court.

The Director of Public Prosecutions believes that in these circumstances the District Court should have the opportunity to remit the matter to the Local Court. The comments by both the Chief Magistrate and the Director of Public Prosecution are consistent in that where the charge is contested the matter should be remitted to the Local Court for a defended hearing.

The Director of Public Prosecutions concerns could be addressed by allowing the District Court the right to remit matters to the Local Court if the appeal relates to the conviction and the matter has not been fully litigated in the Local Court. This could occur where the conviction is either determined in the absence of the defendant or the District Court grants leave for a defendant to appeal a conviction after the defendant had pleaded guilty in the Local Court.

This approach would ensure that the District Court, when dealing with appeals, is not unnecessarily placed in the position of conducting an original defended hearing.

The authority of the District Court when dealing with appeals against conviction is limited by section 20(1) to either setting aside the conviction or dismissing the appeal. If the conviction is set aside then it may be appropriate for the District Court to make further orders. If the District Court intends to remit the proceedings to the Local Court then the court may wish to make further orders such as a determination in relation to bail, until the proceedings are relisted before the Local Court. Alternatively, if a conviction is set aside the District Court may seek to make orders dismissing the charge and making orders for costs. These ancillary orders should be expressly available to the District Court when dealing with an appeal against conviction.

The issues identified in relation to appeals against a refusal to grant an annulment equally apply to the Land and Environment Court. Section 39(1) is the equivalent power of the Land and Environment Court for an appeal against conviction to the power in section 20(1) for the District Court. Section 39(1) should be amended to provide that the Land and Environment Court may determine the appeal by setting aside the conviction and making such orders as it thinks just, including where an appeal is made under section 32(1) (being the corresponding provision to section 12(1) of the District Court), remitting the matter to the Local Court.

Recommendation 2:
(a) Section 11A be amended to limit the right of appeal against a decision to refuse to grant an annulment to a refusal by the Local Court to annul a conviction.

(b) Section 20(1) be amended to provide that the District Court may determine an appeal by setting aside the conviction and making such orders as it thinks just including, where an appeal is made under section 12(1) remitting the matter to the Local Court.

5.3 Apprehended Violence Orders

Section 84 of the Crimes (Domestic and Personal Violence) Act 2007 outlines the rights of appeal for parties in relation to the making, variation or revocation of apprehended violence orders. The section allows annulment applications and appeals to be made in accordance with the provisions of the Crimes (Appeal and Review) Act 2001 as though the apprehended violence order was a "conviction or sentence". The intention of the section is to allow the procedures contained in the Crimes (Appeal and Review) Act 2001 to apply to certain apprehended violence orders with such modifications as may be considered necessary.

The Crimes (Appeal and Review) Act 2001 contains different appeal procedures in relation to a conviction as opposed to a sentence. Section 17 of the Act outlines the procedures to be following in relation to appeals against sentence. Section 18 outlines procedures in relation to appeals against conviction. Section 20 outlines different determinations available to the District Court in relation to appeals on conviction as opposed to sentence. The failure of the section to distinguish which procedures apply could lead to uncertainty as to the appeal procedures to be followed. In *Gianoutsos v Glykis [2006] NSWCCA 137,* the Court of Criminal Appeal considered the nature of an appeal in apprehended violence orders. The Court held that the appeal was required to be dealt with as if it was an appeal against conviction under Part 3 of the Crimes (Appeal and Review) Act 2001. To remove any uncertainty section 84 should specify that an appeal should be dealt with in accordance with the procedures for an appeal against a conviction.

Recommendation 3:
That section 84 of the Crimes (Domestic and Personal Violence) Act 2007 be amended to provide that an annulment application or an appeal against the making, dismissal, variation or revocation of an apprehended violence order may be made in the same way as an annulment or appeal against a conviction under the Crimes (Appeal and Review) Act 2001.

5.4 Annulment of Order Dismissing Apprehended Violence Order

Section 84 of the Crimes (Domestic and Personal Violence) Act 2007 allows a defendant to apply to the Local Court for an annulment if an apprehended violence order is made in his or her absence. If the Local Court declines to grant an annulment the defendant may appeal the refusal to the District Court. If the District Court annuls the order then the proceedings shall be remitted to the Local Court for a hearing.

The Chief Judge has indicated that an applicant for an apprehended violence order does not enjoy a similar right if the Local Court dismisses the application in the absence of the applicant. Consequently, the only option available to the applicant is to file a fresh application in the District Court. The District Court is placed in the position of the original court hearing the proceedings for the first time.

The Chief Judge is of the view that a defended hearing should not normally be conducted in the District Court without the issues first being fully litigated in the Local Court. The absence of a right to apply for an annulment of the order denies the applicant the opportunity to present his or her case in the Local Court before commencing proceedings in the District Court.

It is anomalous that a defendant in apprehended violence proceedings has a right to apply for an annulment of an order made in his or her absence, yet an applicant who is similarly prevented from attending court does not have this right. Increasing the rights of applicants seeking protection from the Local Court is consistent with objectives of the Crimes (Domestic and Personal Violence) Act 2007.

Recommendation 4:
That section 84 of the Crimes (Domestic and Personal Violence) Act 2007 be amended to allow an applicant for an apprehended violence order to apply for an annulment if an application is dismissed in the absence of the applicant.

5.5 Appeal against decisions under Part 6 Local Courts Act 1982

Section 64 of the Local Courts Act 1982 provides that in relation to any order arising from an application notice under Part 6 of the Act an appeal or review may be made in the same way as an appeal against a *sentence* under the Crimes (Appeal and Review) Act 2001.

As noted in paragraph 5.3 above, the process for an appeal differs depending upon whether the appeal is against a conviction or a sentence. Where an appeal is made against a conviction then an appeal is by way of rehearing and each party may be given leave to introduce fresh evidence. An appeal against sentence is a de novo hearing. When determining an appeal against an order made under Part 6 it may be appropriate to remit the matter to the Local Court, for example, where the order was made in the absence of the respondent.

Consistent with recommendation 3 above, the determination of reviews and appeals should follow the procedure for appeals and reviews against convictions rather than sentences. If the District Court determines an appeal against an order under Part 6 the District Court should be authorised to set aside the order and make such other order as it thinks appropriate.

Recommendation 5:
That section 64 of the Local Courts Act 1982 be amended to provide that an annulment application or appeal against an order under Part 6 is to be dealt with in the same way as an annulment application or appeal of a conviction under the Crimes (Appeal and Review) Act 2001.

5.6 Appeal against a Refusal to Annul an Apprehended Violence Order

Section 84 of the Crimes (Domestic and Personal Violence) Act 2007 provides that if an apprehended violence order is made in the absence of the defendant, the defendant may seek an annulment of the order under Part 2 of the Crimes (Appeal and Review) Act 2001 as though the order was a conviction or sentence. If the application for an annulment is refused by the Local Court, a defendant may lodge an appeal under Part 3 of the Crimes (Appeal and Review) Act 2001. Part 3 of the Act includes the right to appeal under section 11A against the refusal by the Local Court to annul the order under section 4.

The Chief Magistrate has indicated that if an appeal under section 11A is granted by the District Court then the apprehended violence order that is in place is annulled and the proceedings are remitted to the Local Court for a further hearing. During the period between the annulment and the further hearing in the Local Court the alleged victim is not protected by any interim apprehended violence order. The decision to annul an apprehended violence order is not done on the basis of any determination that the order is without merit. The decision is made on the basis of affording procedural fairness to a defendant who was absent at the original hearing.

The objectives underlying domestic violence proceedings are contained in section 9 of the Crimes Act and include:

- Ensuring the safety and protection of all persons, including children, who experience domestic violence, and
- Reducing and preventing violence between persons who are in a domestic relationship with each other.

Lodging a notice of appeal under section 84 of the Crimes (Domestic and Personal Violence) Act does not have the effect of staying the operation of the apprehended violence order. A court may stay an order under appeal only if it is satisfied that it is safe to do so, having regard to the need to ensure the safety and protection of the protected person or any other person. The section is intended to ensure that protection continues while appeal rights are being exercised.

It is inconsistent with the objectives of the Act that an apprehended violence order made after taking evidence on an ex parte basis be set aside on the grounds that the defendant was hindered from attending the original hearing. Although the District Court should be entitled to remit the matter to the Local Court for a further rehearing, protective orders should remain in place until the matter is listed before the Local Court. This would ensure that the appellant has the opportunity to have their day in court whilst at the same time protecting the person in need of protection.

Recommendation 6:
Amend section 84 of the Crimes (Domestic and Personal Violence) Act 2007 to provide that if an apprehended violence order is annulled by the District Court and remitted to the Local Court, the District Court must make an interim order in favour of the protected person pending the rehearing of the matter.

5.7 Reliance on Transcripts of Evidence

Sections 17 and 18 of the Act provide that an appeal is to be heard by way of a rehearing on the basis of transcripts of evidence given in the original proceedings. In *Charara v The Queen [2006] NSWCCA244,* the Court of Criminal Appeal considered whether it was appropriate for the District Court to also have regard to the magistrate's reasons for finding an offence proved. The issue was considered by Mason J at 23:

"Howie and Johnson, *Criminal Practice and Procedure NSW* state [4-s.19.10(g)] that the reasons of the magistrate for finding the offence proved are not "evidence" and that the District Court may not have regard to those reasons unless the parties consent to that course. The point has not been argued before us, but I wish to express my doubts as to the correctness of this opinion of the learned authors. District Court judges traditionally and understandably refrained from reading the reasons of the Local Court when the appeal was de novo. But the nature of an appeal by way of rehearing on the transcript indicates to me that this approach is no longer justified. The magistrate's reasons are not part of the "certified transcripts of evidence" referred to in s18(1) any more than the exhibits tendered in the Local Court. Nevertheless, as I see it, the District Court is impliedly directed to consider the reasons because the stated appellate function could not properly take place without reference to them.

The Local Court reasons will doubtless include an explanation why the conviction was entered at first instance, including an assessment of the credibility issues touching any factual dispute. Without reference to the reasons the District Court would be driven to speculation or deciding the issue entirely afresh. Neither such course would be consonant with the statutory scheme. In civil appeals, the court of appeal is not entitled to ignore the reasons in which findings based on credibility are to be found. There is no basis in principle for a different approach in the criminal law."

The Legal Aid Commission's submission to this review suggested that in light of the comments of Mason J this is an issue that the review could put beyond doubt.

The requirement that appeals be dealt with by way of a rehearing on transcripts of evidence limits the material from the original hearing that may be before the District Court. If narrowly construed, it suggests that the District Court is unable to rely on exhibits before the magistrate in the Local Court without giving leave. Similarly, other material such as the reasons given by the magistrate, that does not constitute evidence, are not included in the transcripts of evidence.

The District Court is at a disadvantage rehearing the proceedings without the benefit of seeing or hearing the witnesses. In *Fox v Percy (2003) 214CLR118,* Gleeson CJ, Gummow and Kirby JJ referred to the natural limitations upon the appellate court rehearing the proceedings on the record of the lower court:

"These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share."

Assessments by the magistrate on issues of credibility would provide the District Court with a greater understanding of the conduct of the case and the decision made in the original proceedings. The comments by Mason J in Charara recognise that it is consistent with the nature of an appeal by way of rehearing that the reasons given by the magistrate be available to reduce these "natural limitations".

The term "transcript of evidence" was an appropriate term when the nature of the appeal was a hearing de novo. The change of the nature of an appeal to a rehearing means that the material originally before the magistrate should be available to the District Court. This change should also be reflected in appeals against environmental offences to the Land and Environment Court.

Recommendation 7:
Amend the Act to provide that an appeal to the District Court or Land and Environment Court against conviction and sentence is to be a rehearing on the basis of the transcript of the proceedings and other material before the original Local Court.

5.8 Appeals Against Sentence

The nature of an appeal against sentence differs from an appeal against conviction. Historically, both forms of appeal were conducted by rehearing de novo subject to the concession that certain depositions may be read as evidence at the hearing of the appeal, subject to the consent of the parties or other conditions being met.

The Justices Legislation Amendment (Appeals) Act changed the nature of appeals. However, the then Attorney General, the Hon Jeff Shaw, expressly indicated that the reform was only intended to modify appeals against conviction. When referring to appeals against sentence, the former Attorney General stated:

"The second way in which an appeal may be determined is an appeal limited to a review of the sentence imposed by the Local Court. In sentence appeals the District Court judge hears further submissions from the accused and the prosecution without the need for further evidence to be taken and without the need for a transcript of the Local Court proceedings to be prepared."

The description by the former Attorney General was not intended to be understood in a legal technical sense. As indicated in *R v Longshaw (1990) 20NSWLR 554,* the District Court is called upon to exercise its own discretion and is not limited to a review of the magistrate's sentence to determine whether the magistrate erred in law.

Section 17 of the Act provides that an appeal against a sentence imposed by the Local Court is to be dealt with by way of rehearing of the evidence given in the original Local Court proceedings and fresh evidence may be given in the appeal.

In terms of development of the law on appeals against sentence, the only change is that since the 1998 amendments evidence before the Local Court must be relied on by the District Court rather than such reliance being conditional. Section 17 retains the unfettered right for a party to call witnesses and bring fresh evidence. In practice, transcripts of evidence from the Local Court are not obtained in appeals against sentence and appeals are conducted as de novo hearings with both parties making fresh submissions on sentence.

The Director of Public Prosecution has commented that an unusual consequence of section 17 is that the defence may be able to call a victim on a severity appeal and there is no mechanism to oppose such a course. There is no requirement for leave to adduce fresh evidence and the restrictions contained in section 18 and 19 do not apply. The Director of Public Prosecutions has referred to an instance where, after a plea of guilty in the Local Court, an accused appealed the severity of his sentence and the defendant subpoenaed the victim to give "fresh evidence" about the facts of the case even though the victim did not give evidence in the Local Court proceedings.

The requirement to give "fresh evidence" in appeals against sentences should be exceptional. The prosecutor is under an obligation to provide all relevant material to the original sentencing court. A legal practitioner acting for a defendant must seek to advance all relevant matters in mitigation of the offence in discharging the obligation to advance and protect the client's interests. In view of these obligations, the need to introduce fresh evidence at a sentencing appeal should rarely arise.

The right of the parties to give fresh evidence in appeals against sentences should be restricted by leave of the District Court. In the case of a prosecutor, leave should be granted in only exceptional cases in view of the obligation to provide all relevant material at the original sentencing hearing. In the case of a defendant, there may be a wider range of circumstances in which it may be appropriate to give leave. If a defendant omitted matters in mitigation of the offence at the original sentencing hearing or failed to address the court on a particular sentencing option, then it may be appropriate to allow the defendant the opportunity to bring fresh evidence. The test for the defendant to bring fresh evidence should be based on whether it is in the interests of justice for fresh evidence to be adduced. This test is consistent with the test that already applies to defendants in relation to appeals to the Land and Environment Court under Part 4 of the Act.

This proposal will align the process of appeals against sentence more closely with appeals against convictions. The proposal would have the effect of extending the changes brought about by the Justices Legislation Amendment (Appeals) Act 1998 to appeals against sentence so that the District Court relied only on the evidence before the Local Court unless leave was granted for fresh evidence.

The effect of this proposal should be considered in the context of recommendation 6 which seeks to clarify that the District Court can rely on the evidence of the lower

court including the transcript of the proceedings (as opposed to the transcript of witness evidence) and other material.

In practical terms, the proposal would mean that an appeal against sentence would be determined by the District Court on the basis of the Local Court papers, together with the transcript of proceedings that include submissions by both the prosecutor and defendant and the reasons for decision by the magistrate. Any supplementary evidence or oral submissions would require leave of the District Court.

The submission by the Director of Public Prosecutions was made in the context of requiring leave to call witnesses to give oral evidence. However, the views of Mason J in Charara which have been adopted in recommendation 6 has the effect of altering the way in which sentencing appeals are conducted. In view of the fact that this proposal is a change of substance it is appropriate that further consultation be undertaken with stakeholders specifically on this issue prior to any legislative amendment.

Recommendation 8:
That the Attorney General's Department undertake further consultation on the proposal that section 17 of the Act be amended to provide that an appeal against sentence is to be heard by way of a rehearing on the transcripts of proceedings and other material before the Local Court. The District Court may grant leave for fresh evidence to be given in the following circumstances:

a) in the case of a prosecutor, if exceptional circumstances exist.
b) in the case of a defendant, if it is satisfied that it is in the interests of justice.

5.9 Appeals to the District Court – Requirement to Establish Error

A defendant may appeal to the District Court without establishing error on the part of the magistrate. The Chief Magistrate has questioned whether the objectives of the Act are advanced by allowing a judge of the District Court to substitute his or her sentencing discretion for that of the magistrate regardless of the existence of error. The Chief Magistrate has noted that the unfettered right to appeal emanates from a time when magistrates were not judicial officers. While the provision of an unrestricted right of appeal was appropriate to review the decisions of non-judicial officers, its retention is questionable in relation to the decisions of a professional branch of the judiciary. The Chief Magistrate has suggested that consideration be given to amending the Act to provide that an appeal against a conviction should be based on establishing error and an appeal against severity of sentence should be based on establishing that the sentence is manifestly excessive.

Conviction Appeals – Error of law
The purpose of the criminal appellate jurisdiction is to safeguard against the possibility of error by a lower court.

Rights of appeal from courts of criminal summary jurisdiction exist in other States and Territories throughout Australia. In all other States and Territories other than Victoria, the right of appeal against the decision of a court of criminal summary

jurisdiction is by way of rehearing and is dependent upon establishing error on the part of the magistrate. In Victoria, the right of appeal against the decision of a magistrate to the County Court is a de novo hearing.

In 2006, there were 1,352 appeals against conviction. In 40.9% of these appeals the appellant successfully had one or more charges overturned by the District Court.

The proposal that the right of appeal against a conviction to the District Court should depend on establishing an error of fact or law raises some serious concerns. For example, many defendants appearing before the Local Court will be unlikely to properly frame questions of law on appeal to the District Court without the aid of a legal practitioner. As a result, the proposal may increase the cost of the appeal process and create a barrier for unrepresented defendants seeking to appeal.

A defendant lodging an appeal against a conviction is asserting that they are not guilty of the alleged offence. The unrestricted right of appeal protects against a potential wrongful conviction against a defendant in the Local Court. It is not appropriate to restrict this right.

Sentence Appeals – Manifestly Inadequate or Excessive

The right to appeal against a sentence imposed by the Local Court without establishing error on the part of the magistrate means that defendants have an unfettered right to seek a review of a sentence.

If a magistrate imposes a penalty within the higher range of the sentencing discretion, then a defendant may elect to appeal in the hope of obtaining a more lenient outcome on appeal.

There is an established convention in District Court appeals that a judge contemplating an increase in the sentence under appeal, will signal that possibility to the appellant. The warning will allow the appellant the opportunity to either seek leave to withdraw the appeal or to address the court on the more serious penalty being considered. The practice was recognised and supported by the Court of Appeal in *Parker v Director of Public Prosecutions (1992) 28NSWLR 282*. The convention protects against double jeopardy and contemplates that Parliament intended that the right of appeal provided to the defendant was not intended to result in the defendant being in a worse position than had he or she accepted the decision of the Local Court.

While the District Court is obliged to apply its own sentencing discretion, and therefore may impose a more severe penalty, the practice of the District Court to make a Parker direction reduces the likelihood of a more severe penalty being imposed on appeal to the District Court.

The absence of any requirement to establish that a sentence is manifestly excessive or that there was error on the part of the magistrate may encourage speculative and unmeritorious appeals. To some extent, the legal profession filters out speculative and unmeritorious appeals. The Legal Aid Commission refused requests for legal aid in 139 matters between July 2006 and April 2007 on the basis of lack of merit.

This filtering process, however, would not prevent an appeal against a sentence that was at the higher end of the normal sentencing range for a particular offence.

The figures below indicate that the rate of appeal against decisions of courts of summary jurisdiction is higher in both New South Wales and Victoria where there is no requirement on appeal to establish error on the part of the magistrate.

Table: Appeal Rates for Australian States and Territories 2005/2006

	NSW	Vic	Qld	SA	Tas	ACT	NT
Proven Guilty	135,495	78,152	128,299	36,101	34,438	3,627	7,584
No. of Appeals	6,382*	2,430	360	239	35	60	99
Appeal Rate	4.7%	3.1%	0.3%	0.65%	0.1%	1.65%	1.3%

*Denotes number of appeals for calendar year 2006 rather than financial year.

In 2006, there were 5,033 appeals by defendants against the severity of the sentence. In 67.7% of appeals against the severity of sentence appellants successfully reduced the penalty in the District Court on at least one charge.

There are a number of possible reasons why the success rates of severity appeals appears significantly high. The defendant has an opportunity to prepare better and more detailed submissions on sentence having regard to the sentencing issues that were raised in the Local Court. The nature of the de novo hearing means that the District Court, when reassessing the sentence, is entitled to have regard to any rehabilitative steps taken by the appellant during the time between their conviction in the Local Court and the appeal hearing in the District Court. In addition, as the District Court exercises a fresh sentencing discretion, it is inevitable that there will be variance in decisions between judicial officers. That is not to say that either outcome is necessarily correct or incorrect.

The proposal that the District Court be satisfied on appeal that a sentence was manifestly excessive would require the defendant to demonstrate that the magistrate failed to exercise the sentencing discretion appropriately. It is not sufficient for a judge to be satisfied that they would have imposed a significantly lesser penalty, although this would strongly suggest a sentencing error on the part of a magistrate.

In New South Wales, the issue of manifestly excessive sentence is relevant on appeals in more serious offences determined by the District Court and Supreme Court and is often applied in the context of lengthy sentences of imprisonment. The question arises as to whether this test could easily be applied in relation to less serious summary offences. In Western Australia, South Australia, Queensland, ACT, Tasmania and the Northern Territory, the test of manifest excess is applied in relation to appeals against a sentence in less serious summary matters.

The proposal to introduce a test on appeal that the sentence is manifestly excessive may potentially create adverse impacts upon the appeal system.

The requirement to establish a sentence to be manifestly excessive may increase the complexity of the appeal process. The District Court will be required to consider submissions regarding sentencing errors as a preliminary step to exercising its own

sentencing discretion. In addition, it will be difficult for defendants not legally represented to identify a misapplication of sentencing principles by a magistrate.

A further consideration is that the proposal may also lengthen the processes in the Local Court. At present, a magistrate will deal with many sentences in a busy court list on an ex tempore basis. One magistrate has expressed concerns in a submission to the review that the requirement to establish error may require magistrates to approach the sentencing process in a more formal manner providing detailed reasons for each decision. There is a potential that this could slow the processes of the Local Court.

Appeals against decisions of summary courts in Western Australia, ACT, Tasmania, South Australia, Queensland and the Northern Territory require error to be established. The Report on Government Services 2007 indicates that summary courts in New South Wales and Victoria determine cases in a more timely manner than other States and Territories. There is no information available on the factors that contribute to the difference in timeliness.

During 2006 there were 38 appeals by the prosecutor to the District Court against the inadequacy of the sentence imposed by the Local Court. The comparatively small number of appeals against inadequate sentences demonstrates that prosecutors lodge an appeal only in exceptional circumstances. The approach taken by prosecutors has regard to the principle of double jeopardy that a defendant should not be placed in danger of being convicted for the same offence arising from the same conduct twice. While the legislation does not import such a restriction, a number of cases support the proposition that the judge hearing an appeal should have regard to the element of double jeopardy in assessing a proper sentence (see *Comptroller-General of Customs v D'Aquino Bros Pty Ltd No.60223 of 1995*). In practice, the Director of Public Prosecutions will lodge an appeal against the inadequacy of the sentence only if it is manifestly inadequate.

The concern that the introduction of a legal test of manifestly excessive sentences may impact on financially or socially disadvantaged defendants needs to be balanced against the availability of legal assistance. Legal aid is available for District Court appeals where aid would have been available in the Local Court proceedings being appealed from, and for severity appeals against a custodial sentence including a suspended sentence. Between July 2006 and April 2007, Legal Aid NSW granted 1,500 legal aid applications and refused 335 applications in relation to appeals to the District Court. Most applications were rejected on grounds of merit or because the application fell outside the types of proceedings for which legal aid is granted.

It is recognised that the introduction of a manifestly excessive/inadequate test for sentence appeals would represent a substantial shift in the rights of the defendant to access an appellate system. While this review sought the views of stakeholders generally, there has not been an opportunity for stakeholders to consider the impact of this proposal in specific terms. It is appropriate that further consultation take place specifically on this proposal before any legislative amendment is considered.

Recommendation 9:
That the Attorney General's Department undertake further consultation on the proposal that the Act be amended to provide that an appeal under Part 3 or Part 4 of the Act against a sentence imposed by the Local Court be dismissed unless the sentence was manifestly excessive or, in the case of an appeal by the prosecution, manifestly inadequate.

5.10 Orders for Costs

Section 72 of the Act requires an appeal court when making an order for costs to direct that costs be paid to the registrar of the original Local Court and to direct the time within which the costs must be paid. The Registrar then pays the amount to the party in favour of whom the costs order was made. The section applies to all appeals, including appeals from the Local Court to the Land and Environment Court, the District Court and the Supreme Court.

The requirement to pay costs to the original Local Court was contained in the appeal provisions of the Justices Act 1902. The requirement dates back to a time when separate District Court criminal registries did not exist and the Clerk of the Peace was responsible for managing the criminal records of the District Court and Clerks of Petty Session managed the outcomes of an appeal. The Clerk of the Peace was abolished in 1987. The effect of this provision is outdated. There are no practical reasons why costs ordered on appeal before the District Court, Land and Environment Court or the Supreme Court should be paid to the original Local Court. The provision creates unnecessary double handling and the payment of costs should be as directed by the appeal court.

Recommendation 10:
That section 72 of the Act requiring costs ordered on appeal to be paid to the original Local Court be repealed.

5.11 Stay of Execution of Sentence

Section 63 of the Act provides that the execution of any sentence is stayed pending the determination of the appeal. The stay applies from the time the notice of appeal is lodged, or, if leave to appeal is required, upon leave being granted. Where the defendant is in custody a stay of sentence does not take effect unless the defendant is released on bail pending the appeal.

Section 205 of the Road Transport (General) Act 2005 enables a police officer to suspend, by written notice, a person's drivers licence within 48 hours after the person is charged with certain offences involving alcohol or drugs until the determination of the charges by the court. For example, a police officer may suspend a licence in relation to a person charged with driving with a high range prescribed concentration of alcohol until the Local Court determines the charge.

The Chief Magistrate has pointed out that where a defendant lodges an appeal against a sentence to which section 34 applies, the defendant is entitled to continue to drive pending the determination of the appeal by virtue of the automatic stay created by lodging the appeal. The Chief Magistrate has indicated that if the purpose of section 63 of the Crimes (Appeal and Review) Act 2001 is to restore parties to their position prior to sentence, then it is arguable that it is in the interests of public safety to reinstate the suspension that applied prior to sentence until the determination of the appeal by the District Court. The District Court would then be required to take into account the period of suspension in the same way as the Local Court in the first instance.

The purpose of the suspension provisions under the Road Transport Legislation is to protect the community by ensuring that a person charged with a serious traffic offence is not able to continue to drive while the charge is pending. The automatic stay of the sentence on appeal undermines this objective. A defendant having admitted the offence may lodge an appeal against the sentence imposed by the Local Court and resume driving during the appeal period.

The proposal to reactivate the period of suspension until any appeal is determined could result in a suspension being in place for a lengthy period. The minimum period of disqualification available for an offence to which the suspension provisions applies is six months. In 2004, the District Court determined 60% of severity appeals within 2 months and 95% within six months. To avoid the potential for a suspension period being in place for an unreasonable period of time the District Court should have the discretion to lift a suspension, either at the request of the appellant or on the court's own motion, if there is unreasonable delay in determining the proceedings.

Recommendation 11:
That subject to any order of the appeal court, a suspension of licence in place immediately prior to the determination of the proceedings in the Local Court shall resume upon lodging a notice of appeal and continue until the appeal proceedings are determined.

5.12 Certified Transcripts

Sections 18 and 37 require the appeal against a conviction to be conducted as a rehearing based on the "certified" transcript of evidence from the Local Court. The section gives no indication of the method in which the transcript is to be "certified".

Several inquiries have been made to the Department regarding the requirement for a transcript to be certified. There is no other legislative requirement for a transcript to be "certified" and it is not the practice of the Department's Reporting Services Branch, when preparing transcripts to give a certification.

The reference to a "certified" transcript in section 18 of the Act is a historic vestige of former provisions under the Justices Act 1902. Section 132(2) of the Justices Act 1902 provided:

"(2) For the purposes of subsection (1), a transcript is taken to be a correct transcript of the true record of evidence if the transcript is certified in the manner prescribed by the regulations."

Clause 19 of the Justices (General) Regulation 2000 provided:
"The person by whom transcript is prepared of depositions recorded by one of the means (other than writing) referred to in section 36(4) or 70(4) of the Act must certify that the transcript so prepared is a correct transcript of the depositions so recorded."

Section 132 of the Justices Act 1902 and the Justices (General) Regulation 2000 were repealed on 7 July 2003. Section 132 was remade in terms of section 18 of the Crimes (Appeal and Review) Act 2001 while clause 19 of the regulation was not remade.

There has never been a requirement to certify transcript of proceedings in either the District Court or Supreme Court. The requirement to certify a transcript as correct is unnecessary as it remains open to the Court to produce the original tape recording if any concerns are raised in relation to the accuracy of the written transcript.

Recommendation 12:
That the references to "certified" transcripts in section 18 and 37 be repealed.

5.13 Right to Annul Order where Defendant lodges a Written Plea

A number of Local Court Registrars have raised uncertainty as to whether a defendant who lodges notice in writing under section 182 of the Criminal Procedure Act 1986 indicating a plea of guilty to an offence has the right to subsequently apply to annul a sentencing order made in the defendant's absence.

The right to enter a guilty plea in writing allows a defendant to provide written material containing matters in mitigation of the offence so that the court may determine the proceedings in the absence of the person. The right to provide a written notice of a plea extends to minor offences where the defendant is not subject to bail. The option is most frequently used in minor traffic and regulatory offences that commenced after the court election of an infringement notice.

Section 4 of the Crimes (Appeal and Review) Act 2001 allows a defendant to apply to annul a sentence imposed when the defendant was "not in appearance". The section does not define what constitutes an appearance although the Evidence (Audio and Audio Visual Links) Act 1998 expressly provides that a requirement to appear in court is satisfied by an appearance by way of audio or audio visual link. There is no similar provision in section 182 of the Criminal Procedure Act to make it clear that a person satisfies the requirement of appearance by lodging a written plea.

The provisions relating to written pleas were introduced into the Justices Act 1902 by the Justices (Procedure) Amendment Act 1997 as a means to allow defendants an alternative to appearance in person. The legislation should expressly indicate that the lodgement of a written plea satisfies the requirement of an appearance. If a

defendant is dissatisfied with the sentence imposed then the defendant may lodge an appeal to the District Court under section 11(1) of the Act.

Recommendation 13:
That section 182 of the Criminal Procedure Act 1986 be amended to provide that lodging a written notice of plea under this section satisfies any requirement that the defendant appear before a court.

5.14 Appeal Against Conviction and Sentence

The recent decision of the District Court in *R v Holten (2007) NSWDC 58* considered whether it was permissible for an appellant who had lodged a severity appeal to convert the appeal to an all grounds appeal under section 62(2).

Section 14(2) requires a notice of appeal to state in writing the general grounds of appeal. Section 11(1) provides that a person who has been convicted or sentenced by a Local Court may appeal to the District Court against the conviction or sentence. As a matter of practice, when a notice of appeal is lodged the appellant will nominate whether they are appealing on grounds that they are not guilty of the offence for which a conviction was found (a conviction appeal) or against the severity of the sentence (a sentence appeal).

Berman SC DCJ held that section 62(2) of the Act permitted the court to amend the notice of appeal to amend the grounds. Judge Berman's decision, however, highlighted a number of procedural anomalies in the appeal process:

"First s11 doesn't make specific provision for a single appeal against both conviction and sentence. It is the experience of this Court that often a Notice of Appeal is filed which states that the ground of appeal is that the appellant is not guilty, but when that appeal is dismissed a challenge is then made to the sentence imposed by the magistrate. In such circumstances the practice has been to hear the sentence aspect of the appeal after (either explicitly or implicitly) allowing amendment of the Notice of Appeal to add an additional ground challenging the sentence. If the Crown in the present case is right then such amendment is not permissible where, as in most cases, the time limits have expired."

The comment by Judge Berman highlights the distinction contained in section 11 that suggests that an appeal may only be lodged against either a conviction or a sentence. In practice, an appellant unsuccessful in an appeal against the finding of guilt will then seek the reconsideration of the severity of the sentence.

The Director of Public Prosecution has requested that the procedures be clarified and suggested that the legislation be amended to remove the apparent requirement that the appeal must be either against the conviction or sentence and to include an acknowledgement that it is possible to appeal both conviction and sentence in any given case, with the exception being when an appellant who has pleaded guilty in the Local Court then seeks to appeal against the conviction. In such instances, an appeal against the conviction may only proceed with leave of the District Court. The

Legal Aid Commission considered the decision of R v Holten in its submission and suggested that the Act be amended to authoritatively resolve this issue.

Part 3 of the Crimes (Appeal and Review) Act 2001 treats appeals against conviction and appeals against sentence as being two separate and distinct appeal processes. The nature of the rehearing and right to call witnesses differs according to whether the appeal is against the conviction or sentence. Section 20 distinguishes the way in which the District Court may determine an appeal against a conviction from an appeal against a sentence.

The practice of the District Court referred to in R v Holten suggests that maintaining this distinction is not appropriate. The legislation should enable an appellant to indicate their intention to contest both the conviction and sentence. In these circumstances the appeal process should be managed in two stages, firstly, as an appeal against the conviction determined according to the provisions relevant to a conviction appeal and then, secondly, as an appeal against the sentence determined according to the provisions relevant to a sentencing appeal.

Recommendation 14:
That section 11 be amended to provide (1) that an appeal may be made against the conviction or sentence or both and (2) that when dealing with an appeal against both the conviction and sentence the District Court will determine the appeal against the conviction first and, if the conviction is upheld, the District Court will then determine the appeal against the sentence.

5.15 Form of Notice of Appeal to the District Court

In addition to procedural anomalies referred to above Judge Berman in R v Holten [2007] NSWDC 58 raises concerns regarding the form of Notice of Appeal. Judge Berman notes; "It seems that there are various versions of this form used by various people and which form is used depends on who the appellant approaches to provide him or her with the form."

In relation to the published form on the Attorney General's Lawlink website Judge Berman comments:

"To return to the Notice of Appeal, the various forms used have other curiosities. For example the form available on Lawlink contains advice to the appellant to cross out those grounds of appeal which are not applicable from a list of 3. The second of those options is "I am appealing the <u>above</u> sentence because the penalty is too severe" (emphasis added) yet nowhere in the form above that entry is there any space for the sentence to be recorded."

The form of Notice of Appeal is a form that is not prescribed by regulation. The practice of prescribing court forms in regulations is cumbersome and fails to meet the needs of a responsive court system. Rules of court now allow the head of jurisdiction or a rule committee to approve forms for use by litigants.

The Chief Judge has authority to approve forms for use in District Court proceedings under Part 47 rule 2(2). To date, no form has been approved for lodging an appeal to the District Court and, as a consequence, forms have been developed by registrars. The form of notice of appeal has historically been a document prepared by registrars of the Local Court. The absence of an approved form has led to variations in the form of Notice of Appeal and instances of outdated and incorrect information.

In his submission to this review, Judge Williams has indicated that the absence of an approved form has been the source of confusion for legal practitioners. Judge Williams has provided a draft notice of appeal form. A copy of the draft form is contained at appendix "2".

Recommendation 15:
That consideration be given to introducing a standard form of Notice of Appeal to the District Court.

5.16 Appeals on question of law to the Land and Environment Court

The decision of Jagot J in *Dennis Flaherty on behalf of Strathfield Council v Columbia Nursing Homes Pty Ltd [2007] NSWLEC 148* notes a legislative anomaly in relation to the rights of appeal to the Land and Environment Court limited to grounds involving questions of law alone.

Jagot J points out that before the Crimes (Appeal and Review) Act 2001 came into force, the Justices Act 1902 provided that the Land and Environment Court had the "same jurisdiction and powers as the Supreme Court" to hear and determine proceedings on appeal against any conviction, sentence or order made by a magistrate. When the Crimes (Appeal and Review) Act 2001 came into force it omitted reference to appeals by prosecutors on a question of law against orders by a magistrate dismissing a charge. The Statute Law (Miscellaneous Provisions) Act (No.2) 2004 inserted sections 42(2A) and (2B) to rectify the omission. However, the provision did not amend section 48(2) to state the powers of the Land and Environment Court when determining an appeal under section 48(2B).

The Crimes (Appeal and Review) Act 2001 contains no express power for the Land and Environment Court to set aside the order and remit the matter to the magistrate for a redetermination of the proceedings. When dealing with an appeal under section 48(2B) it is appropriate that the court has this express power.

To avoid argument on the powers of the Land and Environment Court, the power to remit proceedings to the Local Court in appeals against a dismissal of the charge on a question of law should be restored.

The power of a District Court to remit a matter to a Local Court was considered in paragraph 5.2. A similar concern arises in relation to appeals to the Land and Environment Court where leave to appeal against a conviction is given under section 32(1) in relation to a person convicted in their absence or following the person's plea of guilty. Consistent with recommendation 2 in this review, the Land and

Environment Court should have the power to remit proceedings to the Local Court in circumstances where it would otherwise be called upon to conduct the original summary contested hearing.

Recommendation 16:
That section 48 of the Act be amended to provide that the Land and Environment Court may determine an appeal against an order referred to in sections 32(1) and 42(2B) by setting aside the order and remitting the matter to the Local Court.

5.17 Lodging Notice of Appeal to the Land and Environment Court

Procedural difficulties with filing a Notice of Appeal in relation to appeals against environmental offences were highlighted in *Denning v Department of Environment and Conservation [2007] NSWLEC 258*. In that case the appellant lodged a notice of appeal with the Local Court against a sentence imposed for an environmental offence under the National Parks and Wildlife Act 1974. The appeal was subsequently listed before the District Court although that court did not have jurisdiction. The proceedings were ultimately transferred to the Land and Environment Court.

The Land and Environment Court has jurisdiction to deal with a range of miscellaneous appeals under Class 2. Appeals under Class 2 are lodged by the appellant directly with the Land and Environment Court. Section 21A of the Land and Environment Court Act provides that appeals from convictions relating to environmental offences under the Crimes (Appeal and Review) Act 2001 are to be dealt with as Class 6 appeals. The Land and Environment Court Rules prescribe Form 5 "Notice of Appeal" as the appropriate form to commence Class 6 proceedings.

Although the Land and Environment Court Act provides a process for lodging appeals directly with the court, sections 34 and 44 of the Crimes (Appeal and Review) Act 2001 provide that an appeal against an environmental offence must be lodged with the registrar of the Local Court who will then transmit the records to the Land and Environment Court. As there is no prescribed form, in practice the notice of appeal to the District Court is normally adapted for this purpose. As illustrated in Denning's case, the process has the potential to cause confusion.

The normal procedure to initiate appeal proceedings is for the appellant to file appeal notices within the appellate jurisdiction. Appeals to the Supreme Court under Part 5 of the Crimes (Appeal and Review) Act 2001 are lodged directly with the Supreme Court. The Registrar of the Land and Environment Court has indicated that to remove the potential confusion that arose in Denning's case it is preferable that appeals against environmental offences be lodged directly with the court.

Recommendation 17:
That section 34 and 44 of the Land and Environment Court be amended to provide that an appeal against an environmental offence is to be lodged with the Land and Environment Court.

6. CONCLUSION

The Crimes (Appeal and Review) Act 2001 provides an effective framework for parties aggrieved by decisions of magistrates and Local Courts to seek redress. The appeal process does not depend on demonstrating errors or identifying legal issues. As a result the appellate system is accessible by all defendants who feel aggrieved by the decision of the Local Court irrespective of their understanding of legal issues.

The Act creates an informal and streamlined process that allows the District Court to determine appeals within a short timeframe. In 2006, the District Court finalised over 90% of all ground appeals within 12 months of lodgement and 90% of sentencing appeals within 6 months of lodgement.

The Crimes (Appeal and Review) Act 2001 is effective in meeting its objectives. The majority of recommendations contained in this report are intended to clarify existing provisions and address minor drafting issues.

Two recommendations deal with substantive issues regarding the nature of appeals rights. The report recommends further consultation be undertaken in relation to these issues.

The recommendations contained in this report promote the objectives of providing an accessible and efficient appeal and review process that is an effective safeguard against wrongful convictions or inappropriate penalties.

APPENDIX 1

List of agencies and people who made submissions to the review:

The Hon Justice R O Blanch, Chief Judge of the District Court

His Honour Judge Williams, District Court

Chief Magistrate of the Local Court Graeme Henson

Magistrate Chris Bone, Local Court

Director, Court Services

Registrar, Land and Environment Court

Department of Juvenile Justice

Legal Aid NSW

Bar Association of NSW

Director of Public Prosecutions

Ministry for Police

NSW Police

Department of Juvenile Justice

APPENDIX 2

NOTICE OF APPEAL TO THE DISTRICT COURT

Appellant: DOB: CNI: Licence No:
Address:
Court: Date of Court: Magistrate:
Offence(s):

I am appealing on the following grounds:- **(NB:- cross out whichever is *not* applicable)**
A:- I am appealing the above conviction/order BECAUSE I AM NOT GUILTY
B:- I am appealing the above sentence BECAUSE THE PENALTY IS TOO SEVERE
C:- I am appealing because I CONTEST THE APPREHENDED VIOLENCE ORDER MADE IN THESE PROCEEDINGS

If you are an Aboriginal or Torres Strait Islander and you wish to be represented by an Aboriginal Legal Officer please tick this box [ ]
Note: The District Court will not generally grant leave to appeal unless all rights for review by the Local Court of this conviction or order have been exhausted.

_____Signature of appellant Date:

LISTING DETAILS

The Appeal has been listed at the District Court at on

- **You are required to attend Court on that date**
- **If you have a solicitor/counsel you should notify them of the date**
- **If you do not appear the appeal may be dealt with in your absence**
- **The police officers involved in the case and police witnesses will not be at court unless a Judge grants a request by you and directs their attendance.**

I have been given a copy of this notice and understand that it will be the only one given/sent to me.

_____**Appellant Date:**

_____**Witness Date:**

ENQUIRIES DISTRICT COURT CRIMINAL REGISTRY AT PHONE:

PARTICULARS OF BAIL

Note: The decision of the Local Court will be stayed upon lodgment of the notice of appeal except where bail is either refused or granted but not entered into by the appellant. A stay will not apply where leave to appeal is sought.

[ ] Bail Is Refused APPELLANT IN $

[ ] Bail Is Dispensed With or does not apply GUARANTOR IN $

[ ] Unconditional Bail Granted

_____Magistrate / Authorised Justice Date:

[ ] BAIL ENTERED ON (Copy of Bail Attached) [ ]BAIL NOT ENTERED AS AT

[ ] STAY APPLIES [ ] STAY DOES NOT APPLY

Office Use Only: Transcript for (dates) applied for on

Papers forwarded to:

1. District Court Criminal Registry at
2. Public Prosecution Office at
3. Applicant / Respondent
4. Governor of the Gaol at
5. Police Criminal Records Section,
6. Registrar of the Court at:
7. Enforcement Litigation Unit
8. Copy of Notice of Appeal, and original AVO & Bail faxed to Police Domestic Violence Databank
9. Applicant & Protected Person in AVO proceedings
10. File