



4 December 2009

## **DISCUSSION DOCUMENT: APPEAL PATHS**

### **PURPOSE**

1. The Criminal Procedure (Simplification) Project is proposing a range of comprehensive reforms to criminal procedure with the aim of reducing unnecessary court delay and creating a simplified criminal process. This paper discusses options for potential reform of the pathways for appeals in criminal cases (“appeal paths”), in light of changes being made to other parts of criminal procedure. It also identifies some more minor issues with appeal processes that could be addressed as part of this Project.
2. This paper has been prepared to enable further discussion about future appeal paths with members of the judiciary, legal practitioners, and interested agencies and individuals. It does not present a preferred option. The appeal paths that are ultimately progressed will be reflected in the new Criminal Procedure Bill, planned for introduction into Parliament in 2010.
3. Views on any parts of the paper are welcome. Questions for discussion are attached as Appendix One. Written comments should be provided by 1 March 2010.

### **EXECUTIVE SUMMARY**

4. Initial consultation on appeal processes has already taken place as part of the Simplification Project.<sup>1</sup> Since that consultation occurred, new proposals have been developed for how cases should progress through the summary and indictable jurisdictions.<sup>2</sup> More broadly, changes are proposed that will have implications for the type of cases that are dealt with in each jurisdiction. All of these changes have implications for the way in which appeals should be dealt with.
5. This paper proposes two broad options. Under option 1, current appeal paths would be reflected to the extent possible. This would enable the Court of Appeal to maintain its current supervisory role in jury trials and in sentencing. However, in some cases, appeal paths differ according to whether the appeal

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<sup>1</sup> See *Discussion Document: Sentencing Jurisdiction and Appeals*.

<sup>2</sup> See *Discussion Document: Criminal Procedure Case Progression Model*. Currently, the indictable jurisdiction deals with cases that are tried by a jury. The summary jurisdiction deals with cases where the option of trial by jury is not available or the defendant has not elected to be tried by a jury. It provides a simpler process for dealing with criminal cases. All cases in the indictable jurisdiction are dealt with in the District Court’s summary jurisdiction until they are committed for trial in either the District Court or the High Court.

is brought before or after committal. It is now proposed that the committal process be abolished. This will have particular implications for first instance appeals in indictable cases from the District Court. Post-committal appeals from the District Court make up a substantial proportion of the Court of Appeal's criminal workload. Option 1 therefore aims to retain present appeal paths to the extent possible, with necessary changes to allow for the abolition of the committal process.

6. Option 2 proposes more fundamental reform, where appeal paths would reflect a more hierarchical approach. This option would have a significant effect on the Court of Appeal, because it may lose up to two-thirds of its indictable criminal appeal workload. These appeals (first-instance indictable appeals from the District Court) would instead be heard in the High Court. As a consequence, option 2 puts at risk the Court of Appeal's supervisory role. To address this concern, there would need to be a residual ability for appeals that would otherwise be heard in the High Court to "leapfrog"<sup>3</sup> the High Court to the Court of Appeal. This could include, for example, when an appeal raises an important or novel question of law, when there are inconsistent decisions in the High Court, or when it concerns a sentence for which no or insufficient sentencing guidance exists.

## **BACKGROUND**

### **Current appeal paths**

7. A summary of current appeal paths is attached as Appendix Two. For appeals from the original decision made or order imposed ("first-instance appeals"), the situation is broadly as follows:
  - (a) Appeals against bail and name suppression decisions are heard in the next immediate court in the court hierarchy – for example, appeals against bail decisions made in the District Court are heard in the High Court, and appeals against bail decisions made in the High Court are heard in the Court of Appeal.
  - (b) With the exception of bail and name suppression:
    - (i) Appeals against decisions in the District Court's summary jurisdiction (which includes all indictable cases<sup>4</sup> before a case is committed for trial) are heard in the High Court, except for appeals from decisions of Community Magistrates which are heard in the District Court.
    - (ii) Appeals against decisions in indictable cases after a case has been committed for trial are heard in the Court of Appeal, whether or not the decision being appealed against was made in the District Court or the High Court.

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<sup>3</sup> By "leapfrog" we mean that the appeal is not heard by the next court in the hierarchy, but instead in the court above upon a successful application by the parties.

<sup>4</sup> See footnote 2. Indictable cases and offences are those which will eventually be heard by a jury in the indictable jurisdiction. All indictable offences, including those that must eventually be tried in the High Court, begin in the District Court.

- (iii) “Related”<sup>5</sup> appeals against conviction and sentence are heard together in the Court of Appeal, even if the decisions appealed from were made by different courts.
8. Most first-instance appeals are as of right (do not require the leave of the court).<sup>6</sup> Appeals from decisions made in first-instance appeals (“subsequent appeals”) require leave. Sometimes this leave must be granted by the court appealed from (for example, subsequent appeals on name suppression from the District Court or the High Court, and most appeals from the summary jurisdiction), and sometimes by the court appealed to (any appeal to the Supreme Court). Appeals from the High Court can “leapfrog” the Court of Appeal and go directly to the Supreme Court in some circumstances.<sup>7</sup>
  9. A key feature of current appeal paths is the Criminal Appeal Division of the Court of Appeal (CAD), which was established in 1991 along with a civil appeal equivalent. CADs are divisions of three judges which may comprise three Court of Appeal judges (a “permanent division”), two Court of Appeal judges and one High Court judge, or one Court of Appeal judge and two High Court judges.<sup>8</sup> Their main purpose is to deal with the majority of criminal appeals made to the Court of Appeal each year. This enables the permanent Court of Appeal to focus on appeals requiring analysis of more difficult or complex legal issues and to clarify and provide guidance on matters of legal principle.<sup>9</sup>
  10. All criminal appeals are set down for a hearing before a CAD comprising two High Court judges and one Court of Appeal judge unless the President of the Court of Appeal directs otherwise.<sup>10</sup> In 2008, these CADs heard 340 of the 404 criminal appeals dealt with by the Court of Appeal.<sup>11</sup> CADs with High Court judge involvement also enable criminal appeal decisions to draw on the experience of current trial judges.

### **Rationale of current appeal paths**

11. Appeal paths for bail and name suppression reflect the hierarchical approach. Bail decisions, particularly, are more likely to be routine and involve factual matters that do not require the Court of Appeal’s oversight and expertise. In

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<sup>5</sup> An appeal will be a related appeal if it is in respect of an offence that arises from the same incident or series of incidents as the conviction or sentence appealed to the Court of Appeal, or is an offence for which the person was sentenced on the same occasion as the imposition of the sentence appealed to the Court of Appeal (s 384A(1)(a) & (b) inserted by Crimes Amendment Act 2008 (No 2)).

<sup>6</sup> Exceptions include a prosecution appeal against conviction and sentence in indictable proceedings (s383(2), Crimes Act 1961), appeals in pre-trial matters (s379A, Crimes Act 1961), and appeals to the Supreme Court (s12, Supreme Courts Act 2003).

<sup>7</sup> See, for example, section 383(1) and (2)), Crimes Act 1961 in relation to appeals against conviction and sentence in indictable proceedings.

<sup>8</sup> Judicature Act 1908, section 58A.

<sup>9</sup> New Zealand Law Commission *Delivering Justice For All* (NZLC R85, Wellington, 2004) p 278, and E Geddis “The Criminal Appeal Division” the first three years” (1995) *NZLJ* 118.

<sup>10</sup> Counsel for either the appellant or the respondent may request a direction that an appeal be heard by a permanent division or a Full Court. See *New Zealand Gazette* No 116, 12 October 2006, pg.3461.

<sup>11</sup> *Court of Appeal Annual Report for 2008*, pg. 11. 56 appeals were heard by the permanent division, and 8 were heard on the papers.

addition, neither bail nor name suppression have an impact on how a jury trial is conducted, which is a particular focus of the Court of Appeal's supervisory function in the indictable jurisdiction.

12. There are two underlying rationales for other appeal paths. The first is that issues which arise in the indictable jurisdiction are sufficiently complex, serious, or important that oversight by a specialist appellate body, the Court of Appeal, is required. The second is the desirability of the Court of Appeal exercising a supervisory function over jury trial cases, which enables the development of a consistent approach and jurisprudence in matters ranging from pre-trial applications about the admissibility of evidence to sentencing.
13. In relation to the first rationale, the assumption that issues which arise in the indictable jurisdiction will necessarily be more complex than issues which arise in the summary jurisdiction is at least questionable. It is true that there are a number of matters unique to jury trials that have no equivalent in summary trials. In addition, other changes being made as part of the Simplification Project are likely to increase the seriousness and complexity of cases dealt with in the summary jurisdiction. However, even in indictable cases some appeals are relatively straightforward (eg, many defence appeals against sentence<sup>12</sup>). Hearing routine or straightforward appeals is arguably not an optimal use of the Court of Appeal's expertise and skill.<sup>13</sup>
14. In relation to the second rationale, the large number of appeals CADs deal with, coupled with their varying membership,<sup>14</sup> creates a risk of inconsistency in their decisions. To mitigate the risk of inconsistency, we understand that draft CAD decisions are now circulated to the permanent members of the Court of Appeal a short time before release. It is unclear whether this practice has been effective in achieving its objective.
15. While the stated rationales for current appeal paths have been diluted, we are not aware of any suggestion that the current appeal paths are fundamentally flawed or are causing injustice. Hearing appeals from the District Court's indictable trial jurisdiction in the Court of Appeal (effectively bypassing the High Court) is an anomaly in one sense. In principle, however, it enables the Court of Appeal to maintain its supervisory jurisdiction over indictable matters, particularly the conduct of jury trials. The process has also been exacerbated in the past by complexities in how cases end up in the summary and indictable jurisdictions. Many of these complexities may be addressed as part of the Simplification Project.

### **Implications of the Criminal Procedure (Simplification) Project reforms**

16. As part of earlier work in this Project on sentencing jurisdiction and appeals, it was proposed that appeal paths continue to reflect current arrangements.<sup>15</sup> The exception was in respect of first-instance appeals from decisions of Community Magistrates and Justices of the Peace. Currently, appeals from

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<sup>12</sup> For example, an appeal contending that the sentencing judge did not correctly apply a relevant guideline judgment, or did not take into account a relevant aggravating or mitigating factor.

<sup>13</sup> See similar discussion in New Zealand Law Commission *Delivering Justice For All* (NZLC R85, Wellington, 2004) p 274.

<sup>14</sup> We understand that current practice is for the CAD workload are allocated on a rotational basis.

<sup>15</sup> See *Discussion Document: Sentencing Jurisdiction and Appeals*, paragraphs 19-23.

Justice of the Peace decisions are heard in the High Court, while appeals from Community Magistrate decisions are heard in the District Court. It was proposed that first-instance appeals from decisions of both of these types of judicial officer be heard by a District Court judge.

17. Since then, a range of other changes have been proposed to criminal procedure that have implications for appeal paths. This includes changes in the type of cases that are dealt with in the summary and indictable jurisdictions. In particular, it has been proposed that the prosecution's ability to lay charges summarily or indictably in respect of those offences identified in Schedule 1 of the Summary Proceedings Act 1957 should be removed,<sup>16</sup> and that the jury trial threshold should be raised to more than three years imprisonment.<sup>17</sup> As a result of these changes, there are likely to be fewer cases in the indictable jurisdiction, and cases dealt with in the summary jurisdiction may be more serious and complex.
18. We propose to abolish the concept of committal of a case for trial.<sup>18</sup> Committal currently represents the stage in the process at which an indictable case moves from the summary jurisdiction to the indictable jurisdiction. Appeal pathways under the Criminal Disclosure Act 2008 are linked to committal,<sup>19</sup> as may be appeal paths against a sentence imposed in the District Court for contempt of court.<sup>20</sup>
19. With the exception of those offences that must be tried in the High Court, committal also affects how appeals against sentence in other indictable cases are dealt with.<sup>21</sup> If the defendant pleads guilty *before* the case is committed for trial,<sup>22</sup> and the sentence imposed is within the summary sentencing limit,<sup>23</sup>

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<sup>16</sup> See *Discussion Document: Criminal Procedure (Simplification) Project – Proposals Relating to Restricting Availability of Jury Trials*. For those offences listed in Schedule 1, the prosecution can choose whether to lay a charge summarily (so that the case is dealt with in the summary jurisdiction unless the defendant elects trial by jury) or indictably (so that the case is heard by a jury unless the defendant pleads guilty at an earlier stage).

<sup>17</sup> See *Discussion Document: Criminal Procedure (Simplification) Project – Proposals Relating to Restricting Availability of Jury Trials*. Currently, defendants have a right to elect trial by jury if they are charged with an offence punishable by more than three months imprisonment.

<sup>18</sup> The primary function of committal is to act as a means of establishing whether there is sufficient evidence to put the defendant on trial. The substantive components of committal are the filing of written statements of evidence from prosecution witnesses that outline the case against the defendant, applications for oral evidence orders to require a witness to give evidence at a hearing, and applications to discharge the defendant on the basis that there is insufficient evidence to put the defendant on trial. Although it is proposed to abolish the concept of committal, these substantive components will remain. See *Discussion Document: Criminal Procedure Case Progression Model*.

<sup>19</sup> Criminal Disclosure Act 2008, s33.

<sup>20</sup> Right of appeal to High Court against District Court sentence for contempt of court imposed under s206 of Summary Proceedings Act (except an order to the effect only that a person be taken into custody and detained until the rising of the Court) (SPA, s115B). The appeal path provided by the statutory provision is not clear as to whether there is a pre-committal/post-committal division.

<sup>21</sup> This includes cases involving “electable” offences where the defendant has a right to elect trial by jury, and “middle band” offences which may be heard in either the District Court or the High Court. There is a statutory process for deciding which court middle band offences will be heard in – see Summary Proceedings Act 1957, s184Q.

<sup>22</sup> In this situation, High Court only offences must be transferred to the High Court for sentence.

<sup>23</sup> District Court judges without a jury trial warrant cannot sentence over that limit. The standard summary sentencing limit is five years imprisonment or a \$10,000 fine (s7, SPA). Some statutes provide specific summary penalties which override the standard limit (see, for example, sections 6, 9, and 12A of the Misuse of Drugs Act 1975).

any appeal against it is heard in the High Court.<sup>24</sup> When the sentence exceeds the summary sentencing limit, the appeal is heard in the Court of Appeal.<sup>25</sup> If the defendant pleads guilty *after* an indictable case is committed for trial, the appeal against sentence is heard in the Court of Appeal. This occurs whether or not the sentence was nominally within the summary sentencing limit.<sup>26</sup>

20. If committal is abolished, there is a question about whether all sentence appeals in indictable cases should be heard in the Court of Appeal, regardless of when a guilty plea was entered, or whether some sentence appeals should still be heard in the High Court.

## **PATHWAYS WHERE STATUS QUO RETAINED**

### **No proposed reform to Supreme Court appeal thresholds**

21. The proposals in this paper are not intended to affect the threshold for appeals from the High Court or Court of Appeal to the Supreme Court.

### **No proposed reform to appeals against bail and name suppression**

22. This paper is focused on appeal paths for matters that arise pre-trial or involve appeals against conviction and sentence. As noted previously, bail and name suppression appeals follow a hierarchical approach. There is a question about whether this remains appropriate, or whether appeals from District Court name suppression and bail decisions in indictable cases should follow the same appeal paths as all other indictable appeals.

23. However, if the Court of Appeal was to hear District Court name suppression and bail decisions in indictable cases, its workload would soon become unmanageable. On current workloads, we estimate that the Court's workload would increase by approximately 177 cases per year if it were to hear all indictable bail appeals from the District Court.<sup>27</sup> We do not have comparable figures for name suppression.

24. In addition, the issues that arise in bail and name suppression decisions tend to be different in nature from the issues that arise in appeals against pre-trial decisions or against conviction. Bail and name suppression decisions tend to be fact-based decisions that rely heavily on the judge's discretion and assessment of the particular circumstances of the case. They do not lend themselves so readily to a supervisory jurisdiction.

25. We therefore do not propose any change to appeal paths for bail and name suppression at this stage.

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<sup>24</sup> Summary Proceedings Act 1975, s115(2A); District Courts Act 1947, s28H(2)(b).

<sup>25</sup> Crimes Act 1961, s383(1A); District Courts Act 1947, s28H(2)(a).

<sup>26</sup> Note that the summary sentencing limit does not apply to sentences imposed following guilty pleas entered after committal.

<sup>27</sup> Average indictable bail appeals filed in the High Court each year, for the three years from 2006 to 2008. Ministry of Justice estimates.

## TWO BROAD OPTIONS FOR REMAINING APPEAL PATHS

26. There are two broad options in relation to future appeal paths from the District Court (excluding bail and name suppression) in light of other proposed changes to criminal procedure.<sup>28</sup>

- (a) Reflect current appeal paths to the extent possible;
- (b) Reflect a broadly hierarchical approach so that appeals generally move from one court in the hierarchy to the next.

27. When considering these options, it is intended that where one case comprises a mixture of offences, the case will be dealt with according to the process (and appeal path) required for the offence which falls into the highest offence category. The tables also use the term “Preliminary Stage” to represent the procedural court processes prior to transfer to a trial court under the proposed simplification reforms.

### Option 1: Reflect current appeal paths to the extent possible

Current appeal paths		Appeal Court
Preliminary Stage	DC	HC unless sentence only appeal > 5 years (CA)
Trial Stage	DC	CA
	HC	

28. For current appeal paths to be maintained to the extent possible, at least some adjustment to them is required in light of other proposed simplification changes.

29. Reflecting current appeal paths in summary cases is relatively unproblematic. First-instance appeals would continue to be heard in the High Court. Leave would be required to take a subsequent appeal to the Court of Appeal, which would be limited to a question of law. First-instance appeals from decisions of Community Magistrates and Justices of the Peace would be heard by a District Court judge, with subsequent appeals to the High Court limited to questions of law and requiring the leave of the District Court. The following discussion, therefore, refers only to appeals from indictable cases.

30. The proposed abolition of committal creates a difficulty in relation to first-instance appeals in indictable cases from the District Court. There are three possible approaches to addressing this difficulty:

- (a) Enable the Court of Appeal to hear all first-instance indictable appeals;
- (b) Enable the Court of Appeal to hear all first-instance indictable appeals from a particular point in the process;

<sup>28</sup> It is proposed that for each of the approaches outlined, first-instance appeals from the High Court would continue to be dealt with in the Court Appeal.

- (c) Enable the Court of Appeal to hear all first-instance indictable appeals, or all first-instance appeals from a particular point, except for sentence only appeals that are less than a particular sentencing limit.

**Approach (a): Enable the Court of Appeal to hear all first-instance indictable appeals**

Option 1(a) 1 <sup>st</sup> instance appeals to CA		Appeal Court
Preliminary Stage	DC	CA
Trial Stage	DC	CA
	HC	

31. Under this approach, the Court of Appeal would hear all first-instance indictable appeals from the District Court and High Court. This would include all appeals in relation to purely indictable offences<sup>29</sup> from the time a charge is laid, and all appeals in relation to electable offences<sup>30</sup> from the point at which a defendant elects to be tried by a jury.
32. The main difference between this approach and the current situation is that the Court of Appeal would hear sentence only appeals from District Court indictable cases when a guilty plea is entered before the case transfers to the trial court and the sentence imposed is less than the current summary sentencing limit.
33. This approach it strengthens the Court's supervisory function in indictable cases. The primary concerns are that the Court of Appeal may be required to deal with more appeals in minor matters, particularly appeals against sentences that are less than the current summary sentencing limit, and the potential impact on the High Court and Court of Appeal workloads.
34. In respect of the first concern, sentences below the summary sentencing limit are appealed to the Court of Appeal now if the sentence is imposed following a guilty plea entered after committal and the appeal is a sentence only appeal. The dividing line that committal provides for sentence appeals is therefore somewhat artificial.
35. The impact on the Court of Appeal's workload is more of a concern under this approach. We estimate that, on current workloads, an additional 87 sentence appeals would be filed in the Court of Appeal each year. This can be compared to the current average workload of 129 sentence only appeals filed each year, and represents an increase of 67%.<sup>31</sup> However, some of this impact may be balanced by the potential reduction in its workload arising from

<sup>29</sup> Purely indictable offences are offences that are almost always tried by a jury, other than in exceptional cases. They include middle band offences (offences that may be tried in either the District Court or the High Court) and High Court only offences (offences that must be tried in the High Court).

<sup>30</sup> Electable offences are offences for which the defendant has the right to elect trial by jury.

<sup>31</sup> Average indictable sentence only appeals filed in the High Court each year, for the three years from 2006 to 2008. On average, over the three years, 129 indictable appeals were filed each year. Ministry of Justice estimates.

the movement of some indictable cases into the summary jurisdiction, as a result of an increase in the jury trial threshold, and other changes.<sup>32</sup> First-instance appeals in those cases would be heard in the High Court.

**Approach (b): Enable the Court of Appeal to hear all first-instance indictable appeals from a particular point in the process**

Option 1(b) 1 <sup>st</sup> instance pre-transfer to HC; post-transfer to CA		Appeal Court
Preliminary Stage	DC	HC
Trial Stage	DC	CA
	HC	

36. A second approach is for the Court of Appeal to hear all first-instance District Court indictable appeals from a point in the process (a “switch-over point”) that is relatively similar in time to committal. Appeals from District Court decisions made prior to that point, including sentence only appeals following an early guilty plea, would be heard in the High Court. Appeals from decisions made after that point would be heard in the Court of Appeal.
37. We have considered a number of possibilities for what the switch-over point could be. The most obvious is from the time the case is transferred to the court in which the trial will take place (the “trial court”). This point is effectively an equivalent point in the process to committal. Other potential points are the point of the first callover, or from the time the prosecution is required to file formal written statements. Both are close in time to committal.<sup>33</sup>
38. The insertion of a switch-over point provides a pragmatic mechanism to manage the appeals workload, while enabling the Court of Appeal to maintain its supervisory jurisdiction over cases that are progressing to an indictable trial. There is no principled basis to choose one switch-over point over another. All have a degree of arbitrariness. On a pragmatic basis, transfer of a case to the trial court seems the preferable point to apply. It is a discrete point in the proposed case progression process for indictable cases and will be reflected in legislation. For example, there is not currently an intention to make legislative provision for the first callover.
39. Regardless of which switch-over point was chosen, this approach would increase the High Court’s appeal workload and decrease the Court of Appeal’s workload. The High Court would hear sentence only appeals against sentences that were imposed following a guilty plea entered before the switch-over point, including those over the current summary sentencing limit that are now heard in the Court of Appeal. However, this would only move approximately 15 appeals from the Court of Appeal to the High Court every year.<sup>34</sup>

<sup>32</sup> In particular, the removal of the prosecution’s ability to lay charges summarily or indictably in respect of those offences included in Schedule 1 of the Summary Proceedings Act 1957.

<sup>33</sup> The first callover is the next hearing or process step after a case is committed for trial. The filing of written statements is currently part of the committal process.

<sup>34</sup> In the three years from 2006-2008, the Court of Appeal heard 309 appeals against sentences of five years imprisonment or more, 264 of which arose post-committal and 45 pre-committal, giving an average over the three years of 15 pre-committal appeals (Ministry of Justice estimates).

**Approach (c): Enable the Court of Appeal to hear all first-instance indictable appeals, or all first-instance indictable appeals from a particular point, except for sentence only appeals against sentences that are less than a particular sentencing limit**

40. A third approach is to impose a sentencing limit so that the Court of Appeal would only hear more serious sentence appeals as indicated by the original sentence imposed. For the purposes of this discussion, we propose that a “serious” sentence is any sentence of more than five years’ imprisonment. This reflects the current summary sentencing limit.

41. This approach would be implemented in combination with either of the above two approaches. There are a number of ways it could work. For example:

- (i) The Court of Appeal could hear all first-instance appeals, but not hear sentence only appeals against sentences that were five years imprisonment or less imposed by the District Court. These would be heard in the High Court.

<b>Option 1(c)(i)</b> Option (a) + sentencing limit		Appeal Court
Preliminary Stage	DC	CA unless sentence only appeal ≤ 5 years (HC)
Trial Stage	DC	CA unless sentence only appeal ≤ 5 years (HC)
	HC	CA

- (ii) The High Court could hear all first-instance appeals prior to the switch-over point, except for sentence only appeals where the sentence is greater than 5 years. The Court of Appeal would hear those appeals and all first-instances appeals after the switch-over point. This option most closely resembles current appeal paths.<sup>35</sup>

<b>Option 1(c)(ii)</b> Option (b) + sentencing limit*		Appeal Court
Preliminary Stage	DC	HC unless sentence only appeal > 5 years (CA)
Trial Stage	DC	CA
	HC	

\* Sentencing limit only has effect prior to transfer to the trial court

<sup>35</sup> With the possibility of appeals against decisions made under the Criminal Disclosure Act 2008, which could also be heard in the Court of Appeal.

(iii) The High Court would hear all appeals prior to the switch-over point, except for sentence only appeals against sentences greater than 5 years' imprisonment. The Court of Appeal would hear all other first-instance appeals.

<b>Option 1(c)(iii)</b> Option (b) + sentencing limit <sup>‡</sup>		Appeal Court
Preliminary Stage	DC	HC unless sentence only appeal > 5 years (CA)
Trial Stage	DC	CA unless sentence only appeal ≤ 5 years (HC)
	HC	CA

<sup>‡</sup> Sentencing limit has effect prior to and following transfer to the trial court

42. There are two main justifications for including a sentencing limit in the appeal pathways. First, it helps to manage the increase in the Court of Appeal's workload that would occur if the Court heard all indictable appeals, particularly all sentence only appeals. Secondly, it ensures that the Court can continue to provide sentencing guidance, another critical aspect of its supervisory role, but without having to hear minor sentence only appeals.
43. However, some difficulties with this approach remain. As happens currently, the Court of Appeal would still hear appeals against sentences of five years or less when an appeal was filed against both conviction and sentence. This may lead to appeals against conviction being made in cases to ensure the sentence appeal can be filed in the Court of Appeal. The appeal against conviction could then be abandoned when the appeal was actually heard. We are uncertain whether this would eventuate in practice, as this is not a significant issue under the current system.
44. Fundamentally, any choice of sentencing limit is arbitrary. We have no reason to identify a sentence of more than five years imprisonment as a "severe" sentence other than that it reflects the current summary sentencing limit. The difference between an offender who receives a sentence of six years and an offender who receives a sentence of five years imprisonment may simply be that the latter offender pleaded guilty to the offence at an early stage (and therefore received a reduction in sentence to recognise that plea) while the former did not. The actual sentence imposed may not provide a reliable indication of the seriousness of the offender's conduct.
45. The summary sentencing limit, on which this approach is based, is also to be abolished. Currently, its main purpose is to restrict the sentencing jurisdiction of District Court judges who do not hold a jury warrant. Some may consider it inconsistent to abolish a sentencing limit in relation to this purpose, but to retain a sentencing limit for another.
46. In addition, it will not always be the case that sentences of five years imprisonment or less do not require any oversight from the Court of Appeal. For example, Court of Appeal guidance may be required in respect of sentencing for high-volume offences like drink driving or lesser assault

offences. However, these cases would not reach the Court of Appeal unless they involved a point of law.

### ***Can more matters be heard by a single Court of Appeal judge?***

47. With the exception of 1(c)(ii) approach (which most closely reflects current appeal paths), the Court of Appeal under Option 1 is likely to hear some appeals that previously would have been dealt with by a single High Court judge.
48. It may be possible for some appeals to be heard by a single Court of Appeal judge. For example, there seems no reason in principle why a single Court of Appeal judge could not deal with routine appeals made under the Criminal Disclosure Act 2008. It is difficult to see why routine appeals against sentence that were previously dealt with by a single High Court judge should now be dealt with by a three-judge Court of Appeal.
49. Currently, a Court of Appeal judge acting alone may decide whether an application or appeal will be heard orally or on the papers,<sup>36</sup> decide applications for leave to appeal against conviction or sentence,<sup>37</sup> extend timeframes for notices of appeal or applications for leave to appeal,<sup>38</sup> allow the appellant to be present at proceedings when he or she is not entitled to be present,<sup>39</sup> issue a warrant for the accused's detention pending a new trial,<sup>40</sup> or grant bail to an appellant.<sup>41</sup> There is also a range of administrative matters that he or she may deal with.<sup>42</sup>
50. One reason why having a greater range of appeals heard by a single Court of Appeal judge may not be appropriate is concern about the potential for inconsistency and variation in decisions. If this concern applies to decisions made by CADs, it must also apply to decisions made by a judge acting alone. It would also be necessary to develop a procedure and criteria for determining which appeals can be heard by one judge.

### ***Summary Comments on Option 1***

51. An approach to appeal paths that reflects current arrangements as much as possible would require the least change and be the least disruptive. For that reason alone, it should be seriously considered. Approach (a) has the advantage of simplicity, but may increase the Court of Appeal's workload as the Court of Appeal would be dealing with more minor sentence only appeals than currently. Approach (b) has less impact on the Court of Appeal's workload but does distinguish between appeals from the preliminary stage and appeals from the trial stage. Approach (c) relies on various options

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<sup>36</sup> Crimes Act 1961, s392A(3).

<sup>37</sup> Crimes Act 1961, s393(1).

<sup>38</sup> Crimes Act 1961, s393(2)(a).

<sup>39</sup> Crimes Act 1961, s393(2)(b).

<sup>40</sup> Crimes Act 1961, s393(2)(c).

<sup>41</sup> Crimes Act 1961, s393(2)(d). Note that for all matters under s393, if on an application by an appellant, a judge refuses to exercise a power in favour of the appellant, the appellant may have the application determined by a bench of three – see s393(3).

<sup>42</sup> *R v Chatha* [2008] NZCA 466, para 8.

provided by a sentencing limit for sentence only appeals based on the level of sentence imposed.

**Option 2: Reflect a hierarchical approach**

52. The aim of a hierarchical approach is to put in place simplified appeal arrangements, in which appeals step through the court hierarchy. Broadly, if a hierarchical approach was followed, the next court in the hierarchy would hear all appeals in the first instance. There are two possible approaches:

- (a) Establish appeal paths based on the level of the court in which the case is heard;
- (b) Establish appeal paths based on the categorisation of the offence.

**Approach (a): Appeal paths based on the level of the trial court in which the case is heard**

Option 2(a) Hierarchical 1 <sup>st</sup> instance appeals		Appeal Court
Preliminary Stage	DC	HC
Trial Stage	DC	HC
	HC	CA

53. Under this approach, the High Court would hear all first-instance appeals from decisions made in the District Court, and the Court of Appeal would hear all first-instance appeals from decisions made in the High Court.

54. This approach assumes that the level of the court in which the case is heard provides an indication of the seriousness and complexity of the case itself. If a matter is not so serious or complex that it must be dealt with in the High Court, it can be presumed that the matter is unlikely to require the expertise of the Court of Appeal to deal with any appeals that arise from it in the first instance.

55. The primary impact on appeal paths would be on first-instance appeals from decisions of the District Court in indictable cases. These would all be heard in the High Court, rather than be split between the High Court and Court of Appeal as currently. This has at least six implications.

56. First, there would not be one appellate court dealing with all or most appeals from indictable cases. Although the High Court would continue to be guided by principles developed by the Court of Appeal in appeals that Court deals with, there is still potential for inconsistency, both in the outcome of appeals (for example, from one sentence appeal to another) and in matters of legal principle. The result may be the development of a supervisory jurisdiction that differs between High Court regions.

57. Secondly, the Court of Appeal’s criminal appeal workload would reduce significantly. We estimate that the Court of Appeal would lose approximately

two-thirds of its first-instance indictable workload.<sup>43</sup> This would enable the Court to devote more time to the appeals it does receive, and relieve it of more minor appeals. However, it is unlikely that a sufficient number of cases would reach the Court to enable it to exercise its supervisory role. Most first-instance sentence only appeals, where the need for guideline judgments arise, would be heard in the High Court. The Court of Appeal's supervisory role would largely shift to the High Court.

58. Thirdly, the Court of Appeal would be relieved of many appeals that it currently deals with, and for which CADs were originally established to hear. Most appeals that would previously have been heard by CADs would instead be heard in the High Court. The increased workload of the High Court may mean that High Court Judges, in their current capacity, could no longer sit as part of CAD. An amendment to the Judicature Act 1908 may be required, and there would be a significant change to the operation of the Court of Appeal.
59. Fourthly, the High Court's criminal appeal workload would increase by the same amount that the Court of Appeal's workload decreased. Effectively, the High Court judicial resource currently allocated to hear appeals in the Court of Appeal would be re-allocated back to the High Court. However, there would also be substantial implications for other Court of Appeal and High Court resources including Registry staff, scheduling and rostering requirements, courtrooms and technological resources which would need to be modelled and considered.
60. Fifthly, High Court judges who sit on CADs are exposed to the practice of other geographical areas through sitting on appeals nationally. This may have a moderating effect on each judge's practice which, as a result, may lead to greater national consistency in High Court trial practice. To the extent that this is a side-effect of CAD, it will be lost through the removal of High Court judges from CADs. The result may be greater inconsistency in trial practice between different High Court regions.
61. Finally, this option would have implications for the allocation of appeals between Crown Counsel employed by Crown Law and Crown Solicitors. Currently, Crown Solicitors deal with appeals in the High Court, and Crown Counsel deal with appeals in the Court of Appeal. If that approach was retained, most of the work currently undertaken by Crown Counsel would instead be dealt with by Crown Solicitors, who could more easily appear in local High Courts.
62. To address the potential impact on the Court of Appeal's supervisory function, it may be useful to have a residual ability for appeals that would otherwise be heard in the High Court to "leapfrog" that Court in favour of the Court of Appeal. This could occur on the application of either party when the appeal to the High Court raises an important or novel question of law, when there are inconsistent decisions in the High Court, or when it concerns a sentence for which there is no or insufficient sentencing guidance. However, we note that a "leapfrogging" provision will add to the complexity of the appeals structure, and may also result in a greater administrative burden on the courts

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<sup>43</sup> For the three years from 2006 to 2008, DC indictable appeals comprised 67% of the Court of Appeal's workload. Ministry of Justice estimates.

(particularly if the Court of Appeal has to consider a significant number of these applications).<sup>44</sup>

**Approach (b): Appeal paths based on the categorisation of the offence**

<b>Option 2(b)</b> Offence category 1 <sup>st</sup> instance appeals		Appeal Court
Preliminary Stage	DC	HC if elected
		CA if middle band or HC purely indictable
Trial Stage	DC	HC if elected
		CA if middle band
	HC	CA

63. The court in which the case is tried will not always provide a reliable indicator of the case’s seriousness or complexity. For example, whether a middle band offence is tried in the District Court or the High Court will depend, in part, on the respective workload of each court. It seems problematic for appeal paths to partly depend on fluctuations in trial court workload.
64. To address this difficulty, a second approach is for appeal paths to follow offence categorisation. The only real change from the first approach is in relation to middle band offences. First-instance appeals from these cases would all be heard in the Court of Appeal, regardless of whether they are tried in the District Court or the High Court. First-instance appeals against decisions made in respect of summary or electable offences would be heard in the High Court.
65. This approach reflects an assumption that the categorisation of an offence as a middle band offence provides an indication that its seriousness, complexity, or public importance requires Court of Appeal oversight. As part of related work on offence categories,<sup>45</sup> we have proposed that offences should only be included in the middle band if, for symbolic reasons or due to their seriousness or complexity, a High Court trial is warranted in a sufficient proportion of cases that it is appropriate that the trial court be determined in each case. Appeal paths would follow from this principle.
66. The primary impact on current appeal paths would be on appeals from decisions of the District Court for electable offences where the defendant elects to be tried by jury. Appeals from these cases would be heard in the High Court, rather than in the Court of Appeal as currently. The Court of Appeal would also hear sentence only appeals following a guilty plea to a middle band offence entered prior to the case transferring to a trial court.
67. As with the first approach, there would be more than one appellate court dealing with both pre-committal and post-committal appeals. As appeals from decisions made in electable cases comprise the bulk of the indictable appeals workload, the Court of Appeal’s workload would still reduce to the point where its supervisory role would largely shift to the High Court. As a consequence, the proposed ability for an appeal to be heard, on application, in the Court of

<sup>44</sup> Note that under this proposal the Court of Appeal would determine any application (in a similar way that the Supreme Court determines which appeals it will hear).

<sup>45</sup> See discussion document: *Categories of Offences and the Middle Band*.

Appeal rather than the High Court is likely to be required under this approach as well.

68. This approach also retains some systematic “leapfrogging” of the High Court in appeals from middle band cases heard in the District Court. Currently, most middle band offences are heard in the District Court.<sup>46</sup> The approach also relies upon appropriate and consistent decisions being made about what offences should be in the middle band category of offences. Finally, the assumption that an offence’s categorisation as a middle band offence indicates that Court of Appeal oversight is required could equally work in the opposite direction. In particular, that Parliament decided that an offence was not so serious, complex, or of sufficient public importance that it must always be heard in the High Court may indicate that the offence is not so serious, complex or of sufficient importance that Court of Appeal oversight of it is required.

### ***Appeal paths for subsequent appeals***

69. Both hierarchical approaches raise the issue of subsequent appeal paths up to and including to the Supreme Court (eg, under approach (a), if the first instance appeal is to the High Court, this may lead to an extra appeal opportunity). However, this is a particular concern under the hierarchical approach, because more first instance appeals are to the High Court.

70. If a hierarchical option was applied to first-instance appeals, further consideration would also be required about where subsequent appeals were heard – for example, whether appeals from High Court appeal decisions arising from District Court indictable trials under the first approach should be heard in the Court of Appeal or the Supreme Court.

71. If subsequent appeals were heard in the Court of Appeal, it would assist the Court to maintain the mass of cases critical to fulfilling its supervisory role (although the Court may still not receive a sufficient number of cases given the limited nature of sentencing appeals on questions of law). It would also maintain the Supreme Court’s more specialised role as a court of final appeal. However, an appeal route that includes the Court of Appeal will mean that appeals from District Court indictable cases will have an additional appeal available as compared to High Court indictable cases. This seems anomalous, but essentially reflects the current position in relation to appeals that arise in summary proceedings.

72. If subsequent appeals were heard in the Supreme Court, the high threshold that appeals must meet before an appeal can be taken to that Court is likely to mean that few second-instance appeals are heard. It also means that the current leapfrogging of the High Court to the Court of Appeal in District Court indictable appeals would be replaced by the leapfrogging of the Court of the Appeal to the Supreme Court in those same cases. To the extent that this type of systematic leapfrogging is anomalous, we do not think one should be replaced with another.

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<sup>46</sup> 93% of middle band cases are transferred to the District Court for trial. MoJ estimates.

## **Summary Comments on Option 2**

73. The hierarchical approach is the standard approach taken to appeal paths in New Zealand. Appeals in the civil jurisdiction follow a hierarchical path. Appeal paths in the criminal jurisdiction are also largely based on court hierarchy. The key exception is appeals from decisions in District Court indictable cases after committal. The move away from the hierarchical approach in these cases is, in large part, simply the effect of a number of incremental changes made over many years to expand the District Court's indictable jurisdiction.
74. Reflecting a hierarchical approach to all criminal appeals would mean some fundamental changes to the appeals system. The Court of Appeal's criminal workload would significantly reduce. It is likely that a process would be required to ensure that the Court's supervisory role in the indictable jurisdiction, particularly with respect to providing sentencing guidance, was retained. We have suggested one way in which this could be achieved.

## **OTHER APPEAL ISSUES**

75. Regardless of appeal paths, there are some apparent anomalies in other aspects of appeal processes that should also be addressed. For example, in relation to the timeframes for filing appeals, appeals to the High Court in the summary jurisdiction,<sup>47</sup> in relation to suppression orders must be lodged within three days,<sup>48</sup> while applications to the Court of Appeal for leave to appeal against the grant or refusal of a suppression order before a trial must be made within 10 days.<sup>49</sup> Appeals to the Court of Appeal against a High Court decision to refuse or grant bail must be filed within 10 days, while all other bail appeals must be filed within 28 days. We propose that timeframes for filing appeals be reviewed to ensure they follow a consistent and logical approach.
76. There are also some matters for which no ability to appeal exists, when one may have been expected. In relation to name suppression, for example, an appeal cannot be taken against a suppression order made in the course of a trial. In addition, unlike an acquittal in the District Court, when a person is acquitted in the High Court but name suppression is refused, he or she cannot appeal that decision.
77. We also intend to rationalise the different appeal grounds that apply to appeals against conviction and sentence in the summary and indictable jurisdictions. The relevant statutory provisions in relation to appeals against sentence in the summary jurisdiction are quite specific, but little is said about the grounds for appeals against conviction.<sup>50</sup> The reverse is true in the indictable jurisdiction.<sup>51</sup> There seems no reason why the same approach should not be taken to appeals in both jurisdictions.

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<sup>47</sup> Under Summary Proceedings Act 1957, s115C.

<sup>48</sup> Summary Proceedings Act 1957, s116(1A).

<sup>49</sup> Crimes Act 1961, s379A(ba) and s379(4).

<sup>50</sup> See Summary Proceedings Act 1957, s 121, which is silent on the grounds for overturning a conviction but quite specific as to sentence.

<sup>51</sup> See Crimes Act 1961, s385(1) which states four specific grounds (and a proviso) for determining appeals against conviction but has only a general statement on sentence.

78. When leave to appeal is required, there are some differences in whether leave must be granted by the court appealed to or the court appealed from. In general, when leave to appeal is required in summary proceedings, that leave must be granted by the court appealed from.<sup>52</sup> In indictable proceedings, leave must be granted by the court appealed to.<sup>53</sup> We also intend to review these provisions (we do not intend to review the leave requirements for appeals to the Supreme Court).
79. Finally, the Crimes Act 1961 enables an appeal against conviction to be filed and (presumably) heard before a sentence is imposed.<sup>54</sup> We assume that, in reality, the appeal against conviction would not be heard until after sentencing.<sup>55</sup> However, it makes more sense for an appeal against conviction not to be filed until after sentencing, so that the appeals can be filed and dealt with together. This should be clarified in the legislation.

## CONCLUSION

80. The various reform proposals emerging from the Criminal Procedure (Simplification) Project have implications for current appeal pathways. This paper sets out a range of possible reforms to address those implications with no preference for any particular option. We are interested in your views on these matters and on any other issues with appeal processes that could be addressed as part of the Project.
81. We should also note that there is the potential for appeal paths to be reconsidered further if our proposal to simplify the framework for offence categories is progressed. That proposal, introduced in the postscript to the *Discussion Document: Categories of Offences and Middle Band Offences*, would separate the decision about the mode of trial (whether judge or jury) from the decision about the court in which the case was to be heard (whether the District Court or the High Court).

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<sup>52</sup> See Appendix Two – for example, subsequent appeals to the Court of Appeal against conviction and sentence on a point of law require the leave of the court appealed from.

<sup>53</sup> See Appendix Two – for example, the prosecutor must seek leave of the court appealed to (the Court of Appeal) in relation to a first-instance appeal against sentence. Appeals against decisions in pre-trial matters also require the leave of the court appealed to.

<sup>54</sup> See Crimes Act 1961, s388(1).

<sup>55</sup> Court of Appeal's notice of appeal indicates/assumes that conviction appeal is being made after sentence.

**QUESTIONS FOR DISCUSSION**

1. Which of options 1 or 2 do you prefer and why?
2. In respect of option 1:
  - (a) What should be the Court of Appeal's jurisdiction over first-instance indictable appeals from the District Court? Options include for the Court of Appeal to hear:
    - (i) All first-instance indictable appeals;
    - (ii) All first-instance appeals from a switch-over point – for example, from the point at which a case is transferred to the trial court;
    - (iii) All/most first-instance indictable appeals except for appeals against sentences that are less than five years imprisonment (in combination with (i) or (ii))?
  - (b) Are there any matters that could appropriately be dealt with by one Court of Appeal judge?
3. In respect of option 2:
  - (a) Which approach should be adopted? In particular, should appeal paths be based on:
    - (i) The court in which the case was heard;
    - (ii) The categorisation of the offence.
  - (b) Should subsequent appeals from High Court appeal decisions arising from District Court indictable trials be heard in the Court of Appeal or the Supreme Court?
4. Are there any other issues related to either option 1 or 2 that should be considered?
5. Do you agree that no changes should be made to appeal paths for bail and name suppression?
6. Are there any other issues with appeal processes that could be addressed as part of the Criminal Procedure (Simplification) Project?

**COMMENTS**

Please provide written comments on this paper by 1 March 2010 to either:

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## APPENDIX 2

### CURRENT APPEAL PATHS

	INITIAL APPEAL	FURTHER APPEALS
<b>Bail</b>		
<i>Summary proceedings</i>		
CM decisions	Right of appeal to DC to be heard by DCJ (Bail Act, s40(1) & (2), s41(1)-(3) (defendant and informant), s43(1) (defendant only) amended by Schedule 1, s45(5)).	No further right of appeal to HC (Bail Act 2000, s41(5), s43(3) amended by Schedule 1; <i>Newton v R</i> 7/10/05, Asher J, HC Hamilton CRI-2005-419-124).
JP and DCJ decisions	Right of appeal to HC (Bail Act, s41(1)-(3) (defendant and informant), <sup>56</sup> s43(1) (defendant only), <sup>57</sup> s45(5) (defendant and informant) <sup>58</sup> ).	No further appeal to CA by way of case stated or on question of law (Bail Act, s42(3)) or in relation to entry of non-performance of bail condition in Criminal Records (s43(3)).
<i>Indictable proceedings</i>		
All DC decisions	Right of appeal to HC (Bail Act, s41(1)-(3) by virtue of s28E(2A) of District Courts Act (defendant and informant), s68(1) (defendant only)). <sup>59</sup>	No further right of appeal to CA by way of case stated or on question of law (Bail Act, s42(3) by virtue of s28E(2A) of District Courts Act) or in relation to entry of non-performance of bail condition in Criminal Records (s68(3)).
When committal to HC	Right of appeal to CA (Bail Act 2000, s66(2) (defendant and prosecutor) <sup>60</sup> & s68(1) (defendant only) <sup>61</sup> ).	Further appeal to SC with SC leave against refusal to grant bail or conditions (s69A(1)). No further appeal to SC on entry of non-performance of bail condition in Crown Book or similar register (s68(3)). <sup>62</sup>
<b>Name suppression (orders made under s138(2)(a) &amp; (b) or s140 of CJA)</b>		
CM decisions	Right of appeal for applicant for order or for informant to DC to be heard by DCJ (SPA, s114A(1) & (2), s115C(1) as modified by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may give special leave to appeal if DC refuses leave (s114B(1) & (5))

<sup>56</sup> Appeal against grant or refusal of bail or conditions.

<sup>57</sup> Appeal against entry of non-performance of bail condition in Criminal Records.

<sup>58</sup> Appeal against refusal to grant bail pending appeal against conviction/sentence.

<sup>59</sup> See also s49(2) (bail during committal proceedings), s50(2) (bail following guilty plea before committal), and s55 (bail once defendant committed to DC). Section 43 of the Bail Act, relating to appeals against entry of non-performance of bail condition in Criminal Records does not appear to apply when District Court exercising indictable jurisdiction.

<sup>60</sup> Appeal against grant or refusal of bail or conditions.

<sup>61</sup> Appeal against entry of non-performance of bail condition in Crown Book or other register.

<sup>62</sup> SC may also hear appeal against CA decision to refuse bail pending appeal to CA against conviction or sentence – *Greer v R* [2006] 3 NZLR 740.

All other DC decisions	Right of appeal for applicant for order and informant to HC (s115C(1)). Includes when DC exercising indictable jurisdiction (District Courts Act, s28E(2B)).	Appeal to CA on question of law with HC leave (SPA, s115C(3) and s144(1)). CA may grant special leave to appeal if HC refuses leave. (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, 144A(1)(c)). May appeal direct from HC to SC with SC leave in exceptional circumstances (s144A(1) and (2)).
HC	Pre-trial right of appeal for prosecutor and accused to CA or SC with leave of court appealed to (Crimes Act, s379A(1)(ba)). No ability to appeal order made in course of trial ( <i>Re Victim X</i> <sup>63</sup> ). After trial, sentence appeal provisions apply. <sup>64</sup>	Appeal to SC against CA decision with SC leave (Crimes Act, s379AB).
<b>Pre-trial applications (indictable only)</b>		
DC and HC	Appeal to CA or SC with leave of court appealed to for the prosecutor and accused (for matters listed in s379A(1) or the accused only (for matters listed in 379A(2)) (Crimes Act, s379A).	Appeal to SC against CA decision with SC leave for the prosecutor and accused (for matters listed in s379A(1)) or the accused only (for matters listed in s379A(2)) (Crimes Act, s379AB).
<b>Conviction<sup>65</sup> and sentence<sup>66</sup></b>		
<i>Summary proceedings</i>		
CM decisions	Right of appeal to DC to be heard by DCJ (SPA, s114A(1) & (2), s115(1) (defendant) & s115A(1) <sup>67</sup> (informant) as modified by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may grant special leave. (SPA, s114B(1) & (5))
Other DC decisions	Right of appeal to HC (SPA, s115(1) (defendants), 115A(1) (informant) <sup>68</sup> ). Includes sentence imposed under s28F(4) of District Courts Act when sentence imposed within the summary sentencing limit (SPA, s115(2A), DCA, s28H(2)(b)).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, 144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(2)).

<sup>63</sup> *Re Victim X* [2003] 3 NZLR 220.

<sup>64</sup> *R v Liddell* [1995] 1 NZLR 538 at 544.

<sup>65</sup> Includes appeals against finding under CPMIP Act about defendant's fitness to stand trial (s16, CPMIP) and acquittal on account of insanity (s21, CPMIP).

<sup>66</sup> Includes appeals against CPMIP orders under s24 (detention of defendant found unfit to stand trial or insane as special patient or special care recipient); s25 (alternative decisions in respect of defendant found unfit to stand trial or insane); s27 (stay of proceedings when alternative decision made in respect of defendant unfit to stand trial) – s29, CPMIP Act. Also includes appeals against an extended supervision order – s107R, Parole Act 2002.

<sup>67</sup> Informant appeal against sentence only, unless sentence is fixed by law (s115A(1)). Informant's right to appeal against sentence under section s115A requires S-G consent to be given and lodged with notice of appeal (SPA, s115A(2)).

<sup>68</sup> Informant appeal against sentence only, unless sentence is fixed by law (s115A(1)). Informant's right to appeal against sentence under section s115A requires S-G consent to be given and lodged with notice of appeal (SPA, s115A(2)).

<i>Indictable proceedings</i>		
DC and HC	Right of appeal to CA (defendant) or to CA with leave (prosecutor) or to SC with SC leave (both parties) (Crimes Act, s383(1) & (2)). <sup>69</sup> Includes DC sentence imposed under s28F(4) of DCA that exceeds summary sentencing limit (DCA, s28H(2)(a), Crimes Act, s383(1A)).	Appeal against CA decision to SC with SC leave (Crimes Act, s383A(1) & (2)).
NB.	Related appeals against conviction and sentence that are before the HC and the CA are to be heard in the CA (Crimes Act 1961, s384A). <sup>70</sup> Appeal rights in sections 115 to 115DA are subject to section 384A (SPA, 115DB).	
<b>Costs orders</b>		
CMS	Defendant right of appeal to DC (to be heard by DCJ) against costs order made by CM at time information or complaint determined (SPA, s114A(1) & (2), s115(1)(b) as amended by Schedule 2A). Informant has no right of appeal (s114A(1) SPA).	Final appeal to HC on question of law with DC leave. HC may grant special leave if DC refuses leave. (s114B(1), (5) & (7)).
DC summary	Right of appeal to HC against DC costs order made at time DC determines information or complaint (SPA, s115DA (informant) <sup>71</sup> ; s115(1)(b) <sup>72</sup> (defendant)).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, 144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(2)).
DC indictable and all HC	Right of appeal to CA <sup>73</sup> or to SC with SC leave in relation to order made before, during, or after trial under Costs in Criminal Cases Act (Crimes Act 1961, s379CA(1)).	Not clear if s379CA also allows appeal to SC against CA decision with SC leave. <sup>74</sup>

<sup>69</sup> Informant appeal against sentence only, unless sentence is fixed by law (s383(2)).

<sup>70</sup> An appeal will be a related appeal if it is in respect of an offence that arises from the same incident or series of incidents as the conviction or sentence appealed to the Court of Appeal, or is an offence for which the person was sentenced on the same occasion as the imposition of the sentence appealed to the Court of Appeal (s 384A(1)(a) & (b)).

<sup>71</sup> Section 115DA assumed to link to order made under s115(1)(b) but not immediately clear on face of legislation.

<sup>72</sup> Includes order for payment of costs and order declining an application for payment of costs – s115(1)(b).

<sup>73</sup> Note s379CA(1) suggests leave not required to appeal to the Court of Appeal, but s379CA(3) suggests leave is required.

<sup>74</sup> SCA, s10(a) states that SC can hear appeals authorised by Part 13 of CA. No equivalent s379AB in relation to costs orders.

<b>Contempt of court</b>		
CMS	Right of appeal to DC (to be heard by DCJ) against order made under s206 of SPA <sup>75</sup> (SPA, s114A(1) & (2), s115B as amended by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may grant special leave if DC refuses leave. (s114B(1) & (5)) Appeal to be by way of rehearing (s 119(1)).
DC summary and pre-committal(?)	Right of appeal to HC against DC sentence for contempt of court imposed under s206 of SPA <sup>76</sup> (SPA, s115B).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)) Further appeal to SC against CA decision with SC leave (SPA, 144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(2)).
HC or when DC proceeding on indictment <sup>77</sup>	Right of appeal against sentence for contempt of court to CA or to SC with SC leave (Crimes Act s384(2)). Right of appeal against HC finding of contempt or sentence imposed to CA or to SC with SC leave (Crimes Act, 384(4)). May bypass CA in exceptional circumstances (s384(6)).	Appeal to SC against CA decision with SC leave (Crimes Act, s384(5))
<b>Questions of law<sup>78</sup></b>		
<i>Summary proceedings</i>		
CM decisions	Right of appeal against determination of information/ complaint on question of law by way of case stated to be heard in DC by DCJ (SPA, s114A(1) & (2), s107 as amended by Schedule 2A).	Final appeal to HC on question of law with DC leave. HC may grant special leave if DC refuses (SPA, s114B(1) & (5)).
Other DC decisions	Right of appeal against determination of information/ complaint on question of law by way of case stated to HC (SPA, s107(1)). DCJ or JPs can refuse to state a case if appeal frivolous (s109(1)). HC may require DCJ or JP to state case (s109(3)) <sup>79</sup> or order removal of appeal to CA (s113(1)).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave (SPA, s144(1)). Further appeal to SC against CA decision with SC leave (SPA, 144A(1)). May appeal direct from HC to SC in exceptional circumstances (s144A(1) & (2)). No further appeal if removed to the CA by the HC under s113(1) (s113(2)).

<sup>75</sup> Except an order to the effect only that a person be taken into custody and detained until the rising of the Court.

<sup>76</sup> Except an order to the effect only that a person be taken into custody and detained until the rising of the Court.

<sup>77</sup> Unclear whether this also applies pre-committal.

<sup>78</sup> Including appeals by prosecution on question of law about finding under CPMIP Act that evidence not sufficient to establish defendant's caused actus reus or that defendant mentally impaired (s19, CPMIP).

<sup>79</sup> Applicant for case may apply to HC for order that DCJ or JP must state case.

<i>Indictable proceedings</i>		
DC and HC	During or after trial, Court before which case is tried may reserve question of law for opinion of CA <sup>80</sup> (Crimes Act, s380(1)).	Appeal to SC against CA decision with SC leave (s380(5)?). If question not reserved, party applying may move CA for leave to appeal against that refusal (s381(1)). No further appeal to SC if CA then refuses leave (s381(3A)).
	Question of law arising out of discharge under section 347 or stay of prosecution may be referred to CA on prosecutor's application (s381A(1)). Prosecutor may apply to the CA for leave to appeal against refusal of referral (s381A(5)).	No further appeal to SC if CA then refuses leave (s381(3A)).
<b>Criminal disclosure</b>		
Pre-committal	Appeal to HC with HC leave (or to SC with SC leave) for prosecutor or defendant against court order for disclosure of information or court order setting conditions for inspection of exhibit, or for prosecutor, defendant, or non-party against Court determination following non-party disclosure hearing (s33, CDA).	Further appeal to CA on question of law with HC leave. CA may grant special leave if HC refuses leave. (SPA, s144(1)).
Post-committal	Appeal to CA with CA leave (or to SC with SC leave) for prosecutor or defendant against court order for disclosure of information or court order setting conditions for inspection of exhibit or for prosecutor, defendant, or non-party against Court determination following non-party disclosure hearing (s33, CDA).	

<sup>80</sup> Other than a question already determined by the CA under section 379A.