

GOVERNMENT RESPONSE TO THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE REPORT ON DE NOVO APPEALS TO THE COUNTY COURT

The Government welcomes the Report of the Victorian Parliament Law Reform Committee (the Committee) on its inquiry into de novo appeals to the County Court.

On 22 September 2005 the Committee received terms of reference from the Governor-in-Council to inquire into and report on, appeals from the Magistrates' Court to the County Court with a view to making recommendations as to whether these appeals should continue to be hearings de novo.

The de novo appeal – the right to a new hearing heard afresh – is a long standing part of the criminal justice system in Victoria. A de novo appeal gives a person convicted in the Magistrates' Court the ability to have their conviction or sentence heard again in the County Court.

In considering whether the system of de novo appeals is still necessary the Committee considered a range of matters, including:

- the historical justification for this method of appeal;
- the benefits of the de novo appeal in ensuring fair and reasonable access to justice;
- alternative forms of appeal that could be introduced; and
- the benefits and costs of alternative appeal models.

The Committee consulted widely and received contributions from a range of bodies involved in the prosecution of criminal matters, non-government organisations, police and the courts.

The Committee considered evidence on the performance of the Victorian court systems and compared it with other relevant jurisdictions, interstate and overseas. It also collected evidence about recent changes to the appeals systems in New South Wales.

Having looked at models in Australia and overseas the Committee considered that alternatives to the de novo system would not introduce significant improvements to the efficiency of the justice system.

The Committee concluded that the de novo appeals systems provided superior access to justice than alternatives that restricted the scope or grounds of appeal, and that the de novo system delivered these benefits in a very cost effective manner.

Accordingly, the Committee recommended that the system of de novo appeals be retained in Victoria. It also recommended that a number of changes be made to improve the performance of the de novo appeals system.

The recommended changes are:

- a greater use of judicial warnings pertaining to the potential that sentences, on appeal, can be increased;
- greater flexibility to allow appeals to be withdrawn prior to the new hearing;
- records relevant to the appeal process should be retained for a longer period of time to reduce the possibility of abuse of the de novo appeals system.

The right to appeal against a conviction and sentence is protected under the Victorian *Charter of Human Rights and Responsibilities Act 2006*. This right is essential to ensure that the justice system operates fairly.

The Committee has provided a detailed evaluation of the performance and appropriateness of the existing system of de novo appeals. The Committee has expressly indicated that it is not convinced that alternative forms of appeal provide the same level of protection against errors made in rulings of the lower court.

The Government wants to ensure that the justice system is fair, accessible, efficient and transparent. It therefore supports the Committee's recommendation to retain the current system of de novo appeals. The Government also supports the Committee's recommendations to introduce a number of changes to improve the current system (each of which are discussed in the attachment).

The Government thanks the Committee for its extremely valuable work in undertaking these terms of reference and for producing a comprehensive report on this important area of the law.

RECOMMENDATIONS

Recommendation 1: That the *Magistrates' Court Act 1989* be amended to require the County Court judge hearing an appeal under section 83 of the Act to give an appellant a warning, as early as possible during the hearing, that she or he faces the possibility of receiving a more severe sentencing order than was originally imposed by the Magistrates' Court.

Historically, if the County Court was considering increasing an appellant's sentence, procedural fairness was regarded as requiring the provision of a warning and the opportunity to make submissions in response. In 1999 the *Magistrates' Court Act* was amended to provide that no such warning was required during the hearing.

The Committee expressed concern that the current position has the potential to undermine the principles of procedural fairness with respect to County Court appeals and recommended that the existing legislation with respect to judicial warnings be repealed.

The Government supports the Committee's recommendation.

Recommendation 2: That clause 6 of Schedule 6 of the *Magistrates Court Act 1989* be repealed so that an appellant is not required to seek the County Court's leave and to demonstrate 'exceptional circumstances' in order to abandon an appeal.

Currently the legislation provides that an appellant can only abandon an appeal without the leave of the Court within 30 days of giving notice of the appeal. Thereafter, the leave of the Court is required and the appellant must demonstrate exceptional circumstances.

The Committee maintains that a level of abandonment is inevitable and that requiring an appellant to demonstrate 'exceptional circumstances' is administratively inefficient.

The Government agrees with the Committee that the requirement that an appellant must seek leave to abandon an appeal and demonstrate 'exceptional circumstances' more than 30 days after lodging an appeal should be repealed.

Recommendation 3: The Committee recommends that audio tapes of the proceedings in the Magistrates' Court be retained for six months.

Victoria Police told the Committee that it was concerned about the use, and potential misuse, of evidence in de novo appeals on two grounds. Firstly, Victoria Police noted the potential for an appellant to present a different version of the facts in a de novo hearing to those given before the original court, effectively allowing perjury to go unchecked. Secondly, Victoria Police noted that the de novo hearing provides both

parties to an appeal with an opportunity to improve or refine their evidence and questioned whether this was a legitimate use of public funds, particularly in defendant appeals.

In the Committee's view, the potential for the abuse identified by Victoria Police is an avoidable feature of the appeal de novo. The Committee heard from Victoria Police that the transcript of evidence from the Magistrates' Court can be used to put prior inconsistencies to the appellant during the hearing. The Committee considered that it would be more appropriate to improve the procedures for retaining transcripts of the Magistrates' Court.

The Government notes that the present direction governing the tape recording of proceedings in the Magistrates' Court is a matter regulated by the Court itself. Proceedings in the Magistrates' Court are required to be recorded and retained for three months by virtue of a practice note issued by the Chief Magistrate under section 16A of the *Magistrates' Court Act 1989*.

Recommendation 4: That de novo appeals from the Magistrates' Court to the County Court be retained in their current form, subject to the minor procedural modifications recommended by the Committee.

The Government supports the retention of the current system of de novo appeals from the Magistrates' Court to the County Court, subject to the procedural modifications recommended by the Committee.