

# VICTORIAN PARLIAMENT LAW REFORM COMMITTEE

## INQUIRY INTO COUNTY COURT APPEALS

### **SUBMISSION OF THE VICTORIAN BAR AND THE CRIMINAL BAR ASSOCIATION OF VICTORIA**

**8 FEBRUARY 2006**

1. The Victorian Bar and the Criminal Bar Association of Victoria thank the Committee for the invitation to make written submissions and to give evidence at the public hearing. Representatives of the Bar and Criminal Bar Association are scheduled to give evidence to the Committee on Monday 13 February 2006 at 4 pm.
2. As stated in the Bar's 30 November 2005 letter to the Committee, we support the retention of the right of appeal from the Magistrates' Court to the County Court in criminal matters by way of re-hearing *de novo*.
3. We now address each of the eight numbered issues identified in the Committee's terms of reference, first setting out the issue in italics by way of heading, followed by our comments. We then set out the explanatory paragraph covering all eight numbered issues, and address that. For convenience of reference the paragraphs in this submission are numbered consecutively.

*1. The historical justifications for appeals from the Magistrate's Court to the County Court being heard de novo and whether such justifications continue to exist*

4. Appeals from the Magistrates' Courts, and their predecessors, the Courts of Petty Sessions and Justices of the Peace, have always been by way of re-hearing. However, it is misleading to suggest that the "historical justifications" for such appeals being heard *de novo* are based solely on the initial hearing being before Justices of the Peace, who are, and were, for the most part, without any legal qualification or training, and on the rehearing being by a County Court Judge. Historically in

England, the re-hearing was not by a County Court Judge, but by Justices of the Peace.<sup>1</sup> More recently in Victoria, there has been provision for an appeal by way of re-hearing from a judgment of the Children's Court constituted by the President of that Court, who is a County Court Judge.<sup>2</sup>

5. Historically, in England, the appeal from a conviction by Justices of the Peace sitting in Petty Sessions was to Justices of the Peace in General Quarter Sessions – see *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 728 (per Griffith CJ). This dates back to an Act of 1671.<sup>3</sup> Appeals from Victorian Courts of Petty Sessions in criminal matters were to Courts of General Sessions, until 1968, when those courts were abolished and that jurisdiction was vested in the County Court.
6. In Victoria, the *Crimes (Family Violence) Act* 1987, provided, and still provides, for an appeal against an intervention order from the Children's Court constituted by the President of that Court, who is a Judge of the County Court<sup>4</sup>, to be by way of rehearing.<sup>5</sup> The appeal is to the Trial Division of the Supreme Court<sup>6</sup>, and is still by way of rehearing.<sup>7</sup>
7. In other words, neither the historical origins of these County Court appeals by way of re-hearing *de novo*, nor modern Victorian additions to such appeals, depend on the initial judgment being that of a Justice (or Justices) of the Peace, or on the re-hearing being by a County Court Judge.
8. For more than 20 years now in Victoria, since 1984, only persons admitted to practice have been eligible for appointment as Magistrates (previously called Stipendiary Magistrates).<sup>8</sup> Also since 1984, Justices of the Peace have

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<sup>1</sup> See para 5, below.

<sup>2</sup> See para 6, below.

<sup>3</sup> *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 728 (per Griffith CJ) (referring to the English statute 22 & 23 Car 2 c 25).

<sup>4</sup> *Children and Young Persons Act* 1989 s. 12(2) ("The President must be a judge of the County Court . . .").

<sup>5</sup> *Crimes (Family Violence) Act* 1987 s.21(3) ("The County Court or the Supreme Court (as the case requires) must proceed to *re-hear* the case upon appeal . . .") (emphasis added).

<sup>6</sup> *Id.* ss. 20(1) & 21(1).

<sup>7</sup> *Id.* s.21(3) ("The County Court or the Supreme Court (as the case requires) must proceed to *re-hear* the case upon appeal . . .") (emphasis added).

<sup>8</sup> *Magistrates' Courts (Appointment of Magistrates) Act* 1984; *Magistrates' Court Act* 1989 s. 7(3).

not been able to sit on the Magistrates' Court to hear criminal matters.<sup>9</sup>

9. However, the enhanced quality and standing of the Magistrates' Court is not, in our submission, a good reason to abolish County Court appeals in criminal matters by way of re-hearing *de novo*.
10. The Magistrates' Court remains a court of summary jurisdiction that hears a very large volume of cases. Perhaps more so than in other courts, many criminal defendants are unrepresented, or have only the assistance of a Legal Aid duty solicitor, consulted in haste and under pressure on the day of the hearing. Defendants charged with indictable offences triable summarily, in consenting to the matter being heard in the Magistrates' Court, give up their right to a jury trial.
11. It is a vital part of this system of summary criminal hearings that there be a right of appeal to the County Court by way of re-hearing *de novo*.
12. The statistics furnished to the Bar by this Committee show that the number of County Court appeals is only a very small percentage of the cases decided in the Magistrates' Court in which there is a right of appeal – something in the region of 2.23 – 3 %.<sup>10</sup> Such statistics also show that most such appeals proceed to completion, 74.5%; and that a substantial majority of completed appeals are allowed, 81.8%.<sup>11</sup>
13. These statistics are all long after the 1984 changes referred to in paragraph 8 above, requiring those appointed to the Magistrates' Court to be admitted to practice, and disqualifying Justices of the Peace from hearing criminal matters.

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<sup>9</sup> *Magistrates' Courts (Jurisdiction) Act* 1984. Even earlier, by 1979, Justices of the Peace could no longer sit on the court to hear civil matters.

<sup>10</sup> Letter dated 13 Dec 2005 from the Committee to Kate McMillan S.C., Chairman of the Victorian Bar Council. Footnote 1 of the letter explains the reason for the two different percentages: 2.23% and 3%.

<sup>11</sup> *Ibid.* The two sets of figures, those for the percentage of appeals completed, and those for completed appeals allowed and dismissed, are for different years: 2004/05 and 1997-98, respectively. However, that does not, in our submission detract from their validity in giving a general picture of the situation. As remarked in footnote 2 of the letter, the figures do not vary greatly from year to year ("The figure is similar for proceeding [*sic*] years").

2. *The effects of the 1999 changes to County Court Appeals and the extent to which the procedures are applied in practice*

14. The 1999 amendments<sup>12</sup>, as significantly relevant to County Court appeals, were intended “to bring about a fairer and more efficient appeals system [in criminal cases] in which an appellant will be genuinely at risk when he or she appeals from the Magistrates’ Court to the County Court. The Bill also discourages frivolous appeals.”<sup>13</sup>
15. Such amendments include requiring that notices of appeal include a statement signed by the appellant acknowledging that he or she is aware that the County Court may impose a more severe sentence than that of the Magistrates’ Court; and that the Magistrates’ Court Registrar give persons wishing to file notices of appeal a notice to the same effect.<sup>14</sup> They also require leave of a Judge, based on exceptional circumstances, for abandonment of an appeal after the 30 day period for giving notice of appeal.<sup>15</sup> The amendments also empower the County Court to award costs against an unsuccessful appellant, if satisfied that the appeal was vexatious, frivolous or an abuse of process.<sup>16</sup>
16. The 1999 amendments requiring notices that the County Court may impose a more severe sentence effected little change for those with legal representation. Professional advice on a County Court appeal always would have been seriously derelict if it did not include a warning to that effect. The 1999 amendments requiring such notices reinforces such advice. The change is that the required notices also reach those without professional advice. On both counts, the required notices are obviously a good thing.
17. Members we have consulted who practise in this area do not see the 1999 amendments as having had a very significant effect. Most appellants are represented at the hearing of these appeals, and our members and their instructing

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<sup>12</sup> See *Magistrates’ Court (Amendment) Act 1999*.

<sup>13</sup> *Ibid.* Second Reading Speech in the Legislative Assembly, 29 October 1998.

<sup>14</sup> *Magistrates’ Court Act 1989*, Sch 6 cl 1(4A) & (4B).

<sup>15</sup> *Id.* Sch 6 cl 6(2C).

<sup>16</sup> *Id.* s. 88AA.

solicitors always did warn clients of the possibility of a more severe sentence.

18. In the experience of those members we consulted, the procedures established by the 1999 amendments are applied in practice. Notices of appeal do contain the required signed statement recording the appellant's knowledge that the sentence may be more severe. We assume Magistrates' Court Registrars discharge the statutory responsibility of giving a notice to persons intending to file notice of appeal.
19. As to the other 1999 amendments, the members we consulted were aware of cases in which leave to abandon an appeal after the 30 day period was denied. It is, however, fair to say that denial of leave to abandon an appeal is not common. No-one we consulted knew of a case in which costs were awarded against an unsuccessful appellant.
20. Leave to abandon an appeal is refused in some cases. It is no surprise that there are more cases in which a judge is satisfied of exceptional circumstances justifying the grant of leave to abandon an appeal, and few, if any, cases in which the evidence before the court supports the rather extreme finding that the exercise of a statutory right of appeal against a criminal conviction or sentence was vexatious, frivolous or an abuse of process.

*3. The desirability or otherwise of any change having regard to any changes to the seriousness of offences heard by the Magistrates Court*

21. There have, from time to time over the years, been additions to the criminal jurisdiction of the Magistrates' Court that have raised the level of seriousness of offences triable summarily in that Court. Indeed, in 2005, the Criminal Law Advisory Group was reviewing options for further amendments in relation to indictable offences triable summarily.
22. In our submission none of that in any way alters or affects the matters referred to in paragraphs 4 – 13 above supporting the need for, and soundness of, the present system of County Court appeals by way of rehearing *de novo*.

23. It is only the interest in cost efficiency that the Magistrates' Court has, over the years, been given jurisdiction to hear more serious offences. This has been done in the context of the safeguard of the present right of appeal by way of re-hearing *de novo* in all criminal cases.<sup>17</sup>
24. The greater seriousness of offences heard by the Magistrates' Court makes the right of appeal by way of rehearing even more imperative. The more serious the offence, the greater the need for the present right to a complete re-hearing and re-determination in the County Court.

4. *The effect on the number of appeals should the current rights of appeal be changed*

25. It is not possible to say what the full effect might be of changes to the current rights of appeal without any indication of what might be substituted for the current rights of appeal.
26. However, that said, anything short of the present rights of appeal to a re-hearing *de novo* would constitute a serious abridgement. As stated above, the present rights of appeal to the County Court by way of re-hearing *de novo* are a vital part of the whole framework of criminal offences, and increasingly of more serious criminal offences, being tried summarily in the Magistrates' Court, and of that system operating fairly and efficiently.
27. Section 92 of the *Magistrates' Court Act 1989* already provides for an appeal on a question of law.

5. *If that number would be reduced, the savings to the County Court which would follow*

28. It should not be assumed that the number of appeals to the County Court would be reduced, were appeals by way of re-hearing *de novo* removed – see response to term of reference 6 below.

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<sup>17</sup> For indictable offences triable summarily there are the additional safeguards that the Magistrates' Court has jurisdiction only if the accused consents and waives the right to a jury trial, and the court considers the case appropriate to be heard summarily. However the safeguard of appeal by way of re-hearing *de novo* applies to all criminal cases.

29. It is not clear what change is proposed – see paragraph 31 below. However, any change from a rehearing to a review of the Magistrates’ Court decision must, we believe, result in more complex and longer hearings in the County Court, with higher costs to both the County Court and the Office of Public Prosecutions.
30. The present County Court re-hearings operate very efficiently. Almost universally, both appellant and respondent are represented. The issues have been identified from the Magistrates’ Court hearing. The experienced County Court judges assigned to hear these appeals dispose of several such appeals in a day (routinely 6-9 appeals a day).
31. In contrast, a system of review rather than re-hearing would be more complex. It would likely involve the filing of outlines of submissions. The hearing of one such review could easily occupy a judge for a day. Such a system of review would also likely involve the preparation of reasons for decision, both in the Magistrates’ Court and in the County Court.
32. We do not believe any significant savings to the County Court would follow.

*6. Whether any proposed change would affect the way in which hearings in the Magistrates Court are conducted*

33. As noted in paragraphs 26 and 30 above, it is not clear from the terms of reference precisely what change is being proposed – only that the Committee is to consider “whether appeals . . . to the County Court should continue to be hearings *de novo*, or whether they should be heard in some other way, and if so, what”.<sup>18</sup> What is clear is that the Committee is to consider alternatives to the present system of rehearings *de novo*, and removal of that present right.
34. If the right of appeal by way of re-hearing *de novo* were removed, the most obvious likely consequence is that accused persons and their advisors would have to consider much more carefully whether to give up the right to trial in the County Court, whether by judge alone or by judge and jury.

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<sup>18</sup> Terms of Reference to the Parliament of Victoria Law Reform Committee: Inquiry into County Court Appeals, unnumbered explanatory paragraph covering all eight numbered issues.

35. We believe it entirely likely that a significant number of matters that, under the present regime, are tried summarily in the Magistrates' Court would be taken to the County Court. Moreover, in a significant number of such cases, the accused would seek trial by jury.
36. Such criminal matters as continued to be heard in the Magistrates' Court would be tried in light of the context of no appeal by way of re-hearing *de novo*. Solicitors and counsel must tailor the strategies in their conduct of cases to the judicial framework, and their advice to their client must take that framework into account. Magistrates' Court hearings in those matters would very likely become more complex and take longer.
37. In summary: (a) more cases would go for trial in the County Court, with resultant pressure on the resources of that court, and on the resources of the Office of Public Prosecutions; (b) criminal cases remaining in the Magistrates' Court would be more complex and take longer, with resultant pressure on the resources of that court; and (c) County Court appeals would be more complex, with resultant pressure on both courts and on the Office of Public Prosecutions.

*7. If so, whether any anticipated gains in the County Court from the proposed change would be outweighed by additional costs in the Magistrates Court*

38. This term of reference "anticipates" gains in the County Court and positively asserts "additional costs in the Magistrates Court". As explained in the summary in paragraph 38 above, there will, in our opinion, be no gains in the County Court by removing the present right of appeal. On the contrary, we believe there is a strong likelihood of significant additional costs in the County Court, and in the Magistrates' Court, and for the Victoria Police, and in the Office of Public Prosecutions, and for Victoria Legal Aid.

*8. In general, how the Magistrates Court and the County Court operate as one system, and what if any changes to that system will produce the best outcomes for the justice system*

39. It is misleading to see the Magistrates' Court and County Court as one system to the exclusion of the Supreme Court, both the Trial Division and the Court of Appeal. They are all the one system of courts for Victoria.
40. The present system produces the best outcomes for the justice system, encouraging and making possible less expensive, less complex and very much shorter hearings of criminal matters in the Magistrates' Court in a very large number of cases. It generates comparatively few appeals, and such appeals are by judge alone, there being no revival, in cases where it was waived, of the right to a jury.
41. There is an appropriate division of the appellate function between the County Court and the Supreme Court – the former conducting re-hearings, and the latter appeals on points of law.
42. Moreover, the present system delivers the best quality of justice, the County Court hearing the evidence for itself, and being in the best position to do justice where there is an appeal.

Explanatory paragraph covering all eight terms of reference above:  
*This will be with a view to making recommendations on whether appeals from the Magistrate's Court to the County Court should continue to be hearings de novo, or whether they should be heard in some other way, and if so, what.*

43. This explanatory paragraph qualifies all eight numbered terms of reference. It makes clear that the key question to this Committee is whether the present system of appeals from the Magistrates' Court to the County Court by way of re-hearing *de novo* should continue.
44. Unequivocally it should. This system of appeals is a vital part in the important balance between cost-efficiency and justice. The Magistrates' Court is able to hear a very high volume of criminal cases, including many cases in which there is a right to trial in the County Court, and to trial by jury, because of the safeguard of the right of appeal to the County Court by way of re-hearing *de novo*.

45. All cases (both summary and indictable triable summarily) can be heard quickly and efficiently because the present appeal by way of rehearing *de novo* as of right frees the parties and their lawyers from the need to explore every possible legal argument in order to preserve it for an appeal by way of review for error. The Magistrates' Court hears the main thrust of both the evidence and legal argument, and decides on the spot. This works very well, as shown by the statistics referred to in paragraph 12 above. There are comparatively very few appeals (some 2.23 – 3 %) and most such appeals are allowed (some 81.8%).
46. An additional specialist County Court Judge is desirable to hear appeals under the *Crimes (Family Violence) Act 1987* – see paragraph 53 below. Otherwise, we have no suggestions for any change in the present system.

*Appeals to the County Court by way of re-hearing de novo from intervention orders under the Crimes (Family Violence) Act 1987*

47. This submission has, to date, addressed the issue of the proposed removal of the right of appeal by way of re-hearing *de novo* in criminal cases generally.
48. The Committee's terms of reference are, however, not limited to criminal cases. The terms of reference cover *all* appeals from the Magistrates' Court to the County Court.
49. We thus turn now to the particular issue of appeals from the Magistrates' Court (and from the Children's Court) by way of re-hearing *de novo* in relation to applications under the *Crimes (Family Violence) Act 1987* for quasi-criminal intervention orders.
50. The experience of members with whom we have consulted is that there are no problems in general criminal appeals to the County Court, but there are serious problems in relation to appeals arising out of applications for intervention orders.
51. In marked contrast to criminal appeals from the Magistrates' Court, appeals in relation to intervention orders under the *Crimes (Family Violence) Act 1987* are a severe strain on the resources of the County Court. Whereas in almost all criminal

appeals, both appellant and respondent are represented, in most intervention order appeals, at least one party is unrepresented – sometimes both parties. It is not uncommon for an intervention order appeal to occupy a judge for a whole day, even for a number of days.

52. The framework established under the *Crimes (Family Violence) Act 1987* recognises the importance of providing for appeals by way of re-hearing. It also recognises that this is a specialist area of law and practice, and accordingly has established a specialist division of the Magistrates' Court to process and hear applications under that Act. The complexity and importance to the community of all this is also recognised in the 2002 reference on the *Crimes (Family Violence) Act 1987* to the Victorian Law Reform Commission, and the Commission's still ongoing work under that reference.
53. Serious consideration should be given to the appointment to the County Court of an additional specialist judge, who would be able to hear intervention order appeals, as well as other matters within the County Court jurisdiction. Just as a specialist division of the Magistrates' Court is needed for this specialist jurisdiction, so an additional specialist County Court judge is needed for appeals.<sup>19</sup>

## **Conclusion**

54. The Victorian Bar and Criminal Bar Association of Victoria urge the Committee to recommend to the Parliament in the strongest terms that the present appeals from the Magistrates' Court should continue to be hearings *de novo*, and that serious consideration be given to the appointment of an additional County Court Judge with specialist experience to hear appeals under the *Crimes (Family Violence) Act 1987*, as well as other matters within the jurisdiction of the County Court.

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<sup>19</sup> There is, by the way, no need for a similar appointment to the Supreme Court because appeal by way of rehearing in that court is limited to orders of the Children's Court constituted by the President of that Court, who is a County Court Judge. So far as we are aware, there has never been such an appeal.