DIRECTOR of PUBLIC PROSECUTIONS VICTORIA

PAUL COGHLAN Q.C.
Director

SUBMISSION NO. 12

Victorian Law Reform
13 FEB 2006
Committee

Mr. Robert Hudson MP.,
Chair,
Victorian Parliament Law Reform Committee,
Level 8, 35 Spring Street,
Melbourne. Vic. 3000

By fax: 9651 3674

Attention: Merrin Mason

Dear Sir,

Re: Inquiry into County Court Appeals

I refer to your letter dated 15 November 2005, enclosing a copy of the Terms of Reference for the Inquiry into County Court Appeals, and inviting written and oral submissions from my Office.

I am due to appear before the Committee on Monday, 13 February, however the following written comments in response to the Inquiry's Terms of Reference may assist the Committee when considering my oral submissions.

Terms of Reference and DPP's Response

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

DPP response:

A right of appeal which leads to a de novo hearing may have been warranted from courts which often consisted of Honorary Justices of the Peace but it should be reviewed now that all Magistrates are legally qualified and nearly all of them have practised.

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In my submission de novo appeals should be abolished. Appeals to the County Court should be based upon error. Sentence appeals should be limited to sentences which are manifestly excessive. In most situations the Magistrates are in fact more experienced in relation to local matters than Judges.

A system which simply replaces one intuitive or instinctive synthesis sentence for another is not necessary in terms of preventing miscarriage of justice.

Appeals against conviction should be based on error. Since all Magistrates' Court hearings are now recorded such an appeal would be relatively straight forward. Section 92 Magistrates' Court appeals to the Supreme Court could be abolished.

If changes were being contemplated then I would make more detailed submissions on how it might be managed.

The fact that County Court Appeals allow an appeal against conviction irrespective of the plea in the Magistrates' Court is capable of rendering injustice from the point of view of the Crown. No matter what circumstances brought about a plea, including an agreement to withdraw other charges, an Appellant may appeal against conviction. It is completely anomalous that in a case where an Appellant pleads guilty to recklessly causing serious injury and a charge of intentionally causing serious injury is withdrawn that even after the plea, on appeal, there may be an appeal against conviction. The Crown has no right to do anything about it. It cannot ever been taken care of by amendment that would allow all charges which had been before the Magistrates' Court to be reinstated because the charge of intentionally causing serious injury cannot be heard summarily.

The same may be said about a range of sexual offences particularly when indecent assault replaces a penetrative offence.

Consideration should be given to requiring leave to change a plea where an Appellant was represented at the Magistrates' Court.

(2) The effects of the 1999 changes to County Court Appeals and the extent to which the procedures are applied in practise.

DPP response:

1. s.86(1AA) – County Court is not required to warn an appellant before passing a more severe penalty

   In most instances Judges warn appellants of an intention to pass a more severe sentence and give leave to abandon the prior to passing sentence.

2. s.86(3)(a) – repealed – strike out appeal if fail to appear – now s.86(3A)(b)

3. s.86(3A)(a)(b)(c) and (3B); (3C) – Court empowered to hear an appeal in the absence of the appellant.

   On the failure to appear Judges will either strike out the appeal or issue a warrant of arrest.

4. s.87 – repealed – County Court could not have imposed more severe order where adjourned undertaking imposed.

5. s.88A – court may order costs against the appellant if appeal brought vexatiously or frivolously or in abuse of process.

   We are not aware of any cases where Judges have ordered costs in these circumstances.

   The Crown does not apply for costs in nearly all cases. That practice should be reviewed.

6. S.89A – court may grant re-hearing where appeal heard in the absence of the appellant.

   This provision is in accordance with the usual rule relating to *ex parte* hearings.

7. Schedule 6 Cl.1 (4A) and (4B) – Warning on notice of appeal that the County Court may impose a more severe penalty.

   If the provision is a sensible one, and in most cases where the case arise Judges give a warning.

8. Schedule 6 Cl.6 Appellant may only abandon appeal after 30 days of the making of the sentencing order by leave of the court if satisfied of the existence of exceptional circumstances.

In practice Judges require appellants to demonstrate exceptional circumstances, however rarely refuse leave to abandon. It is most unlikely that a Judge would increase a sentence in these circumstances.

9. Schedule 6 Cl.9(1) – If the order appealed is an aggregate sentence the Registrar must ensure original charge sheet or sheets are transmitted to the registrar of the County Court.

10. Schedule 6 Cl.9(2) – On sentencing in relation to an aggregate order the County Court may rely on any agreed statement of facts.

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

DPP response:

Changes to the jurisdiction of the Magistrates' Court must be made having regard to the capacity of the Court to deal with the work. If the legislature is satisfied that the Court should hear such cases it must accept that the cases would be heard competently.

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

DPP response:

I assume that the number of cases would decrease.

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

DPP response:

These are not matters within my knowledge.

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

DPP response:

There would be an obligation for cases to be argued more completely in the Magistrates' Court. The mere fact of the availability of a de novo is not a proper reason for cases not to be so conducted. Magistrates are concerned that more elaborate reasons for sentence would be required but that is a matter which could be looked at in an proper amendment.

(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.**

DPP response:

This is not a matter within my knowledge.

(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.**

DPP response:

In my submission cases which are trusted to be within the ordinary competence of the Magistrates' Court should be done once. The only reason to do those cases twice is if error can be found. It is anomalous that the less serious a charge the wider are your rights of appeal.

I trust these notes are of some assistance to you and I look forward to making further submissions to the Committee this morning.

Yours faithfully,

P. A. Coghlan

PAUL COGHLAN QC,

Director of Public Prosecutions.