

20 DEC 2005

Committee

**SUBMISSION NO. 3**

19 December 2005

Victorian Parliament Law Reform Committee  
Level 8, 35 Spring Street  
Melbourne  
Vic 3000

**Response to Law Reform Committee of Parliament on County Court Appeals  
From Criminal Defence Lawyers Association**

- 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;**

The de novo hearing is based on the English County Court Act. The reason for the establishment of that Court / jurisdiction was the need for the public to have access to an appeal that was relatively cheap and informal. These reasons remain strong and very important and access to Justice is an issue that this Government, to their credit, have been very strong in promoting.

The current appeal system is an integral part of the Victorian Criminal Justice System. Victoria has an admirable record in terms of lower crime rates than other States. It is unfortunately starting to imprison more people. Increased imprisonment rates are a clear and obvious consequence of changes to hearings de novo.

Another historical justification was the quality of justice in the Magistrates' Court as an inferior Court.

It appears that there are a high percentage of successful appeals and therefore that appeals are an important component in the quality of justice in this State.

It is submitted that it is not increasing access to justice nor the quality of justice to remove long held appeal right because the Courts are under-resourced.

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

No marked effect has been noted in practice.

There are only a couple of Judges who increase sentences without giving a warning. The giving of a warning is the application of natural justice and fairness. It is merely telling

someone their appeal is ill-advised and they should consider abandoning it. The Association advocates that this section be repealed and that a Judge have to indicate if they are considering an increase in a sentence.

Exceptional circumstances to abandon an appeal are generally made out, and rightfully so, by a change in legal advice as to outcome. Punishing people for changing their minds on the basis of different, perhaps better legal advice, remains unfair.

The Association advocates that this requirement be withdrawn. This would save Court time as when a Court refuses an application to abandon then they have to hear the entire appeal de novo.

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

The Magistrates' Court hears a number of very serious matters. The de novo hearings are an important part of that Court's process and any change would cause a lot of change to the practice and procedure of that Court.

Many Magistrates are clearly comfortable with the concept of de novo hearings. You will often hear Magistrates tell people that "you may think I am wrong and if I am they will fix it up across the road".

The logic of reference 3 seems to be that because the Magistrates Court deals with increasingly serious matters that they have in some way transformed from their origins. While the Magistrates are all now legally qualified and many have been advocates before their going to the bench the work is still very high volume and wide-ranging.

Their hearing serious matters enhances the reasons for de novo hearings. This is because the more serious the matters the more there is a need for it to be dealt with again unless there is a change in the practice and procedure of the Magistrates Court.

The Magistrates' Court gets through a vast amount of work and in the process there is a truncating of many of the procedures that are necessary for a Court of Record. Every day you will hear people receiving long prison sentences with very little by way of considered reasons being articulated. If the Court is to maintain its quality of justice and no longer has a Hearing de novo process to rely on then there will need to be considered decisions that elaborate on reasons. This will have the effect of substantially slowing what is currently a very efficient Court.

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

If appeals became appeals on questions of law it would probably be too daunting for many unrepresented people or people with inexperienced counsel.

It would seem regrettable if appeals dropped at the expense of the most vulnerable of those who participate in the criminal justice system.

There is a strong filtering process that occurs with experienced practitioners as to whether an appeal has merit. That would seem to be confirmed by what we understand is the high success rate of appeals.

With all due respect it is also missing the point to measure these matters in such a manner.

Any change to appeals which results in the lessening of appeals will just reduce the quality of justice and move the costs somewhere else. Logically, as just one example, it will result in more people being placed in gaol. The consequential cost of this financially and socially has not been calculated as far as we are aware.

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

This is not measurable. The Higher Courts often talk about the need for appeals to correct idiosyncratic decision makers. This of course applies in principle to the Magistrates Court as well. There are a number of Magistrates who are idiosyncratic in their decision-making and well known for this approach.

It is obvious that if the appeal process was eliminated then defendants will refuse to have their matters heard in the Magistrates Court when before these Magistrates. If there is no de novo hearing possible and an advocate has to advise a client then they will have to tell them, amongst other things, the following;

- a) You will lose in front of this Magistrate and get a bad result.
- b) You will have a far better chance with a jury.

It will then simply come down to money. Legal Aid will not fund self-elected matters so the clients taking this course will be the ones with money. If this were the result of changes to appeals it certainly does not enhance access to justice.

Each County Court trial is considerably slower and more expensive than a summary hearing followed by an appeal de novo. There is also a lengthy committal process which adds costs in the Magistrates' Court.

The net effect of these changes may not be any saving for the County Court. Certainly their will be a cost to the Magistrates' Court. There will be cost to the community in more people in gaol. There will also be a public perception that the system is being changed because there are not enough County Court Judges available to carry out the work load.

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

There will be considerable effect to hearings in the Magistrates' Court some of which, but only our initial impressions are;

a) The need for considered reasons being given. Particularly with responsible and conscientious Magistrates who want to make their decision clear for an Appellate Court. They will be obliged to articulate their response to legal submissions

b) There will be a need to take Magistrates to the case law on sentencing and refer to it on a plea in mitigation. Within the last 5 years a Magistrate said "you can not quote law, this is a mention Court". While that is not often articulated it clearly an under-current in the Magistrates' Court. The system is significantly tariff based and so there is often an expectation that a short submission that addresses the points that relate to the tariff is sufficient.

If it was necessary to appeal on the basis of what was put at the Magistrates' Court then that process would be lengthened. If the appeal is to be on the basis of law then the foundation will have to be laid before the Magistrate.

It begs the question whether new lists at Court will be made for people who want to do a full plea? It is hard to imagine the mention list getting bogged down in case law being beneficial for anyone.

c) There will be more committals. Refusal of jurisdiction where there is no longer a hearing de novo will become more prevalent. This will effect an already overburdened committal system.

d) There will often be a necessity to argue each and every point to preserve rights on appeal and to avoid criticism on appeal.

f) There will be a lot more arguments on law during the running of matters and less pragmatism.

g) Procedurally there will be all manner of changes. As a minor example on a plea it will be necessary for references to be tendered more formally and it would be less likely that they would be handed up together. It is more likely that character witnesses will be called in the Magistrates' Court as people will not have the de novo process. It is widely

understood that character evidence is not generally called in the Magistrates Court. On appeal it is often called.

h) There will be more adjournment applications. In a situation where there is no de novo hearing then the necessity for adjournments becomes stronger in situations where the defendant's case is being prejudiced.

**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;**

This pre-supposes that any changes would not increase costs at both Courts. This has not been established. Given the increase in people refusing jurisdictional before Magistrates we do not believe there will necessarily be a gain in the County Court.

The Magistrates Court is highly efficient Court where a high percentage of matters in Victoria are heard. Tinkering with its procedures in regards to Appeals may have a substantially deleterious effect.

Obviously on appeals based on law to the higher Courts there is a power to remit for re-hearing. That would obviously have to be built into any changed system to avoid injustice.

If so then the additional costs in the Magistrates' Court and scheduling problems would be large.

**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.**

Clearly they are both operating as one system. Changes to that system that lower the quality of justice are a bad outcome. Taking away appeal rights from the public because the Courts are under-resourced is a bad outcome.

Many appeals are because there has been a realization that some error has occurred when the sentence was inputted and there is no longer an ability to utilize the slip rule. Examples of this are where time served is not properly noted (outside the slip rule) or where a sentence that was ordered to be concurrent is entered on the computer as cumulative. Another similar type of error is that a conviction has been recorded because a

person has not known to make submissions on that issue. All of these are matters that are easily remedied by a de novo hearing. Making it an appeal on question of law would overly complicate the more mundane uses of the appeal system.

The best change to the system would be to provide the County Court with more resources so they can deal with their work load.

The County Court has long delays in trials being heard. Reducing appeals de novo might can reduce the delays in trials. This is an administration problem that would be fixed by increasing the number of Judges.

It should not reduce access to justice or the quality of justice. It is also just speculation.

Bill Doogue from the Criminal Defence Lawyers Association would be available to discuss this submission before the Parliamentary committee as required and the CDLA welcome any opportunity to be further included in the consultation process.

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Yours faithfully



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