



# Submission

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## Criminal Law Section

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### Inquiry Into County Court Appeals

To: Victorian Parliament Law Reform Committee

A submission from the Criminal Law Section of the Law Institute of Victoria (Submission: CRIM15)

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***Queries regarding this submission should be directed to:***

Contact person Andrew Closey  
Ph (03) 9607 9374  
Email [aclosey@liv.asn.au](mailto:aclosey@liv.asn.au)

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## 1 Introduction

The Law Institute of Victoria (LIV) is pleased to make this submission to the Victorian Parliament Law Reform Committee (VPLRC).

The aim of this submission is to address the Terms of Reference as referred to the VPLRC by the Governor in council 22 September 2005.

The LIV would welcome the opportunity to make further oral or written submissions regarding Appeals from the Magistrates' Court to the County Court should that be considered appropriate.

## 2 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 LIV considers the historical justification for the system of dealing with appeals from Magistrates' Court to the County Court as de novo hearings is based on the need to balance competing interests in achieving justice. Most particularly the need to ensure that public confidence in a just and equitable dealing with criminal matters dealt with summarily must be balanced with the need to produce efficient and timely results for victims, the accused and the community. The 'de novo' system in appeals is found in many legal systems that arise from English Common Law. Such a system operates in other Australian jurisdictions, for example NSW (*Crimes (Local Courts Appeal and Review) Act 2001 (NSW)*).

The LIV submits that the reasons and justifications for the system continue to exist and will continue to exist while criminal matters are divided into summary and indictable matters and decisions are made to deal with matters in lower courts expeditiously; dispensing with many of the overheads necessarily associated with hearings that require strict points of law to justify appeals.

## 3 The effects of the 1999 changes to County Court Appeals and the extent to which the procedures are applied in practice;

The LIV considers that the 1999 changes have had a chilling effect on lodging of Appeals. We consider that the announcing of risk of increased sentence on re-hearing at the time of lodging an appeal causes some defendants to abandon the right to appeal at a time of considerable stress. In other cases defendants lodge appeals in that crisis period that follows a lower court decision and retract on reflection. Generally there is no consequence that flows from a considered and timely withdrawal of an Appeal; however the LIV notes the potential to enforce costs penalties for less timely withdrawal.

The LIV submits that there is no realistic method of capturing reliable statistics on defendants whose decision not to appeal a Magistrates' Court outcome is based on the risk of higher penalty. Further it is noted that in this jurisdiction even anecdotal information is skewed by the number of defendants who by choice or circumstance self-represent.

The LIV considers that the risk of higher penalty without warning in the circumstance of a truly de novo hearing offends both natural justice and double jeopardy principles. Further the need to make out *exceptional* circumstances to abandon an appeal is

considered unwarranted in circumstances where the decision is often based on calmer reflection, and/or further (perhaps first) legal advice.

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

The LIV considers it undesirable to change accused persons as of right appeal to the County Court for a de novo hearing. The range of seriousness of matters dealt with in the Magistrates' Court is broad, and is likely to increase. We submit that the following consequences are likely to flow from such a change:

- (a) Increased numbers of matters proceeding to contest;
- (b) Increased time for hearing summary and indictable offences triable summarily (IOTS);
- (c) Requests for detailed reasons from Magistrates, leading to general delay in the delivery of decisions;
- (d) Increased transcribing of Magistrates' Court recordings (in the case of legally aided matters this will have a direct impact on funding too);
- (e) Need for the County Court to be a 'Court of Record' in respect of its appeal jurisdiction – thus requiring reporting and publishing of decisions;
- (f) Increased focus on law rather than fact in the first instance;
- (g) Increased disqualification applications in the Magistrates Court;
- (h) Reluctance of Magistrates to proceed in many cases with unrepresented defendants.

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

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

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

The LIV suggests these three terms of reference are intrinsically linked. The LIV considers that the number of appeals would be likely to reduce if the current right to appeal were changed from 'as of right' or the appeal was not a de-novo hearing. However it is submitted that many appeals, especially against sentence, would continue to be lodged as appeals on a point of law (manifestly unjust sentence). The LIV considers that the net impact of this would be a slower more cumbersome road to the same outcome.

The LIV is not in a position to comment on the savings or costs implications at the different jurisdictions. However we submit that:

- (a) The impacts would potentially flow to the Supreme Court as well, as an increased number of applications using Order 56 of the Supreme Court Rules might be expected.
- (b) As indicated at point 4 above the LIV would expect that there will be considerable impacts to case management in the Magistrates' Court.
- (c) Further it is considered probable that many IOTS matters will not proceed in the Magistrates' Court as the defendant will be relinquishing access to a jury trial with diminished appeal safeguards.

- 8 If so, whether any anticipated gains in the County Court from the proposed change would be outweighed by additional costs in the Magistrates' Court;

The LIV is not convinced that the 'proposed change' would result in savings in either jurisdiction and considers that the impact would conceivably be higher costs to both jurisdictions. In the County Court this is considered to be due largely to the probable need for that court to become a court of record.

- 9 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.

The LIV considers that the County Court relies on the Magistrates' Court to dispense justice in a fair, even-handed, efficient and just manner so that the numbers of appeals are minimised. The Magistrates' Court relies on the County Court to apply a diligent hand to re-considering matters on appeal and provide constructive reasoning where outcome on Appeal differs from that at first instance.

Even so Magistrates, Judges, Prosecutors, Defence Counsel, Court Staff, Victims and Defendants are human and error and misjudgement occur. The LIV considers that the current system serves the interests of justice well and has broad community support. The LIV does not consider any changes to this area of the justice system are required or warranted.