



## INQUIRY INTO COUNTY COURT APPEALS

*Prepared by the Committee of Magistrates*

The Law Reform Committee of the Parliament of Victoria is inquiring into County Court appeals. A copy of the terms of reference has been forwarded to all Magistrates. Another copy is attached herewith together with a letter dated the 25<sup>th</sup> October 2005 to the Chief Magistrate on behalf of the Committee inviting our participation.

A Committee of Magistrates comprising Lisa Hannan, Lesley Fleming, Julian Fitzgerald, Maurice Gurvich, Michael Stone, Ross Betts, Nunzio La Rosa and Michael Smith met and has considered various issues involved. Magistrates are invited to submit their views to Maurice Gurvich on or before 2<sup>nd</sup> December 2005. It is hoped that an opportunity will be given at the Conference to discuss these matters and an indication of the view of Magistrates obtained

In relation to the terms of reference the Committee of Magistrates makes the following observations:-

- We do not think there is any problem with Separation of Powers in making submissions because we have been specifically invited so to do by the Executive;
- Paragraph one – The Committee of Magistrates is in agreement that the historical justifications for appeals from the Magistrates' Court to the County Court no longer continue to exist;
- Paragraph two – we do not think this is applicable to us for comment;
- Paragraph three – in considering this aspect we are not taking into account any proposed changes to the increase in seriousness of offences which have been foreshadowed. We note that we are no longer a Court of Petty Sessions, Justices of the Peace have no role as presiding Judicial Officers, Magistrates are fully qualified lawyers, and Magistrates are appointed from different backgrounds predominantly from private practice as lawyers.

Arguments in favour of change include –

- Civil cases have never been heard *de novo* and appeal rights presently depend on error of law.
- The qualifications for appointment as a Magistrate are the same as qualifications for appointment as a County Court Judge.

- There is a perception in the community that Magistrates make errors of judgment when County Court judges determine matters differently on appeal which determinations are never explained. We think this has an impact on community confidence in our Court.
  - This impact we think must affect general deterrence and this can be seen clearly in regional areas where there is wide reporting of cases.
  - There is, we think, a serious effect on witnesses which includes victims when a case is re-run on appeal. The victims must endure delay and the reliving of the events.
  - As against the above matters, there are serious issues of a lack of resources in our Court and to Legal Aid authorities for the proper presentation of cases which may require more time for their presentation.
  - Some Magistrates believe that justice requires a second bite at the cherry;
- We do not think that paragraphs four and five have application for our consideration;
  - Paragraph six – because there is a belief that if there were no right of appeal *de novo* there may be required, inter alia-
    - Additional adjournments in order to prepare the case;
    - An increase in the time involved in hearing a case and preparing reasons for decision;
 we think however, that this would be set off by better preparation and presentation of cases and that in time practice standards would improve.

Administrative arrangements could assist in this regard including better listing arrangements, and the assignment of dedicated clerks to Magistrates.

- We do not know whether there would be any anticipated gains by any proposed change but we would emphasise that our Court should not be driven by financial constraints;
- As to paragraph eight, we make no comment;
- We consider that if there were to be a change to the appeal system that appeals should be based on errors of law and must be to the Supreme Court. We would be concerned if appeals were not to the Supreme Court because this would result in inconsistent decisions, a lack of finality, the possibility of nonbinding effect on Magistrates, and no precedents being set.

# Inquiry into County Court Appeals

Authored by Magistrate Caitlin English

## Introduction

A committee of Magistrates was established to consider and comment on the Parliamentary Law Reform Committee Inquiry into County Court Appeals.

Maurice Gurvich has prepared a paper on behalf of the Committee of Magistrates. His paper supports a change from de novo appeals and recommends limiting appeals from the Magistrates' Court to the Supreme Court on a point of law.

A number of Magistrates disagree with that position and support the retention of the current appeal de novo system.

I make the following comments are made regarding the Parliamentary Committee's terms of reference<sup>1</sup> and incorporate comment on the matters raised in the Magistrates' Committee paper:

### **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 main historical argument raised in favour of justifying appeals de novo from the Magistrates to the County Court has been the notion of the Magistrates' Court being a 'police court' presided over by Justices of the Peace who were not legally qualified.

The Magistracy has changed significantly since 1984. Victorian Magistrates are required to be legally qualified and admitted to practice for a minimum of five years and the Magistracy is now structurally independent from the Executive Government<sup>2</sup>.

The Magistrates' Court is still the State's busiest criminal court and the process is often less than perfect with many defendants appearing unrepresented.<sup>3</sup> The introduction of the 'mention' court system has meant that mention courts often have over 130 matters listed for summary plea on one day and of these, the presiding Magistrate may hear and determine 30 or more matters a day. The jurisdiction of the Magistrates' Court continues to increase with a Magistrate summarily dealing with charges such as robbery or aggravated burglary as part of a busy mention court list, cases alone which previously a County Court judge may have had listed for a day's hearing. As a result, matters are heard without evidence being called or medical reports tendered, often because of time and resource constraints.

There is a tension with the Magistrates' Court being an accessible, timely and economic forum for justice that is safe guarded by the appeal de novo process.

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<sup>1</sup> I have no comment to offer in respect of the Terms of Reference paragraphs 2, 4 and 5

<sup>2</sup> Magistrates' Court (Appointment of Magistrates) Act 1984

<sup>3</sup> There are currently no figures available on the number of unrepresented persons appearing before the Magistrates' Court.

Whilst the professional nature of the Magistrates comprising the Court may have changed, the process which demands swift decision making in the context of the pressure of list management has not.

**3. the desirability or otherwise of any change having regard to any changes to the seriousness of offences heard by the Magistrates' court;**

The jurisdiction of the Magistrates' Court continues to increase without there being any commensurate increase in resources or change to the way in which the Court hears these more serious matters. As pointed out above, serious criminal charges routinely crop up in the mention list, alongside more minor shop thefts, careless driving and speeding matters. Criminal damage by fire (arson)<sup>4</sup>, robbery and aggravated burglary are all charges heard in mention courts as one of many matters heard on a single day by Magistrates.<sup>5</sup>

An argument in favour of retaining the current system of appeals de novo is the current process by which these extremely serious matters are heard in the Magistrates' Court. Time limits and pressures of the court list are a disadvantage to defendants pleading guilty in a mention list. The defendant may be unrepresented or there may be Legal Aid or other constraints in materials that can be presented for the case.

A de novo hearing is a re-hearing and gives the defendant an opportunity to adduce fresh evidence on appeal. It is not the role of the County Court judge to examine the correctness of the decision of the Magistrate. In 1989, section 85 of the Magistrates Court Act (1989) was amended to allow an appeal against conviction where a plea of guilty had been entered in the Magistrates' Court. This corresponds with the situation in other Australian states.<sup>6</sup> This amendment extended defendants rights on an appeal de novo.

The statistics show that the Magistrates' Court has a 2% appeal rate, with approximately 2300 matters being appealed each year. This figure has been reducing by about one hundred over each of the last three years. The majority of appeals (about 70%) are against sentence however the statistics provided do not reveal the success or otherwise of the appeals<sup>7</sup>. This data would be most helpful to this debate. What can be said is that the safeguard of the appeal de novo is not often used, so on numbers alone it appears it is an efficient safeguard.

Section 92 Magistrates' Court Act 1989 provides a party to a criminal proceeding may appeal to the Supreme Court on a question of law. This is a civil proceeding so

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<sup>4</sup> Since 2004

<sup>5</sup> 'The Magistrates Court deals with the bulk of criminal cases in Victoria. Approximately 250 000 sentences for summary offences are imposed on some 92 000 defendants in the Magistrates Court each year, compared with 6 200 sentences imposed on 1 500 persons accused of indictable offences in the County and Supreme Courts.' See Fox, R *Victorian Criminal procedure*, (2000) p. 79.

<sup>6</sup> Nash, *Victorian Courts* v.3 [30.2705 ] & [30.2717]

<sup>7</sup> An email dated 7 November 2005 was sent to all Magistrates containing statistics from the County Court.

costs follow the event. It also means that a defendant will pay his or her own costs, together with those of the prosecution (if unsuccessful). When the prosecution appeals, as the provisions of the Appeals Cost Fund Act are not available, the defendant bears his/her own costs unless the prosecution fails. When a prosecution appeal is successful, costs are routinely ordered against Defendants, although generally not enforced. This is a financial deterrent for Defendants. In contrast on appeal against sentence to the County Court, (the majority of appeals) each party bears its own costs. An appeal on a point of law to the Supreme Court will increase costs (such as the costs of the transcript of proceedings in the Magistrates' Court) borne by the party appealing.

The Committee of Magistrates has made the point that there is no appeal de novo in civil cases. However an appeal de novo is available from orders made under the Crimes (Family Violence) Act and also from decisions of the Children's Court. Removing the appeal de novo in criminal matters would not result in a consistent approach within the Court.

It should also be noted an appeal de novo against a sentencing order can be made following a finding of guilt, including conviction, disqualification, restitution or compensation. There is also a right of appeal for any one re-sentenced in a proceeding for variation or breach of a sentencing order<sup>8</sup>. The Road Safety Act 1986 s 29 gives a defendant a right to appeal from an order of the Magistrates' Court involving a drivers licence cancellation, suspension or disqualification.<sup>9</sup> Removing the right of de novo appeals would be a significant incursion into defendants' current rights.

On the other hand, the Magistrates' Court Committee's response refers to the detrimental effect on witnesses including victims when a case is re run on appeal de novo as there is delay and the events are relived.

However, it is important to take into account the following when considering the weight to be attached to this consideration.

Firstly, as previously detailed the appeal rate is 2% and reducing. Secondly, the vast majority of those appeals are in respect of sentence only and not conviction and thus witnesses are not called. Thirdly, if, as has been referred to above, there is an increase in the number of defendants not consenting to summary jurisdiction, then witnesses will be exposed to being required to give evidence twice: once before a Magistrate at the committal hearing and secondly before a jury at the trial.

If an appeal on a point of law against conviction is successful, the general practice is for the Supreme Court to remit matters to the Magistrates' Court. If this general practice is followed, then this will mean not only witnesses giving evidence twice, but extra delay between hearings caused by listings. This has implications for resources in the Magistrates' Court where matters will be double dealt with.

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<sup>8</sup> S. 105 Sentencing Act (1991)

<sup>9</sup> Fox, R. Victorian Criminal Procedure (2000) pp 386 – 387.

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

Although the legal qualifications for Magistrates and County Court judges are the same, the resources available in the County Court and the method of hearing cases is very different. If the Magistrates Court was to become a Court of record and appeals only available on a point of law, this would have a significant impact on the way in which the Court operates. If the restrictive appeal on a point of law only was introduced, more defendants may plead not guilty at first instance and there could be an increase in the number of defendants refusing to consent to summary jurisdiction.

As raised in the submission prepared on behalf of the Magistrates' Committee, pleas of guilty on more serious charges would take up more court time, with defendants (with the resources) leaving little unsaid (by way of witnesses called, reports tendered, etc). There would be more applications for adjournments. Decision making would take longer as reasons for decision would need to be more detailed to cover all aspects of the case: the failure to state reasons will normally constitute an error of law. Two recent Court of Appeal decisions make it plain that '...in circumstances where one would generally expect to see stated reasons for taking a particular course, the failure to give an explanation betokened sentencing error.'<sup>10</sup>

The Magistrates' Court committee also referred to administrative arrangements, including better listing arrangements and the assignment of dedicated clerks to Magistrates, to address the resource implications of longer cases, more time to prepare reasons and more adjournments. The resource implications for the Court of a change to the appeals process are significant and not ameliorated by a re-arranging of current resources but would require an increase in the numbers Magistrates, staff and supporting infrastructure.

**7. Would anticipated gains in the County Court be outweighed by additional costs in the Magistrates' Court?**

For the reasons outlined above, a change from the current appeal de novo would significantly affect the way in which the Court currently manages the bulk of cases which proceed as a plea of guilty. It would increase time needed for those matters and may increase the number of not guilty pleas.

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

One of the points made by the Magistrates' Court Committee's response is that public confidence in the Magistrates' Court is impacted by the public perception that the County Court is correcting errors made by the Magistrates' Court and new determinations are never explained. This is a matter of ensuring the public is informed about the appeal process.

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<sup>10</sup> The Queen v Jenkins [2005] VSCA 253 at 3-4. See also The Queen v Wade [2005] VSCA 276

As pointed out above it is not the role of the County Court judge to examine the correctness of the Magistrates decision as it is a re-hearing. One suggestion is that judges, when dismissing or allowing appeals, send reasons for their decision to the original sentencing Magistrate.

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7 December 2005