## A. Introduction – About Victoria Legal Aid

Victoria Legal Aid (VLA) is the State's largest criminal law practice. We employ 130 lawyers who practise criminal law. During 2004–05 we provided the following services to our criminal law clients:

- Multilingual telephone information service
- Face-to-face legal advice at our offices and prisons
- 40,585 duty lawyer services at the Magistrates' Court
- 8,308 grants of assistance for legal representation
- 260 grants of aid in respect of County Court appeals conducted by VLA in house lawyers

## B. Inquiry into County Court Appeals – Terms of Reference

### *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.*

Although a creature of historical factors that have changed over time, the de novo appeal remains a relevant and viable institution in our current day criminal justice system. It is a cost effective and efficient means of affording natural justice to appellants from Magistrates' Court decisions. As a proportion of the overall matters heard by the Magistrates' Court, the number of matters appealed to the County Court in 2003-2004 was less than 2%. VLA submits that the costs associated with administering this level of de novo appeals are justifiable in light of the benefits such a system provides.

Underpinning the justification for retaining de novo appeals is the very important consideration of access to justice by indigent defendants. There is no clearer example of how people before the Court can access higher courts in a cost effective, simple and efficient manner.

Further, the administration of justice in the Magistrates' Court is fast paced, and can lead to disparate outcomes depending on differences of approach between magistrates sitting in various regions across Victoria and different community attitudes towards particular offences. This can lead to vastly different outcomes for the accused. It is important to balance the efficient administration of justice with the need to ensure those charged with criminal offences receive consistent outcomes at Court.

VLA submits that if the County Court appeal process were to be rationalised or diminished in any way, then the processes relating to the original hearing would need to be modified accordingly. This will no doubt lead to a less efficient and more time consuming process in the Magistrates' Court.

De novo appeals serve a very important purpose on a number of different bases and are well suited to the efficiency of the modern day administration of the criminal justice system. De novo appeals should not be compromised by unwarranted amendment.

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

Part three of the *Magistrates' Court (Amendment) Act 1999* came into operation on 1 July 1999 introducing the following changes:

- A prospective appellant at the time the notice of appeal is completed is informed that the severity of the sentencing disposition appealed from may be increased on appeal. Thus no warning is required to be given by the Judge hearing the appeal that such an event may occur.
- An appellant can only abandon an appeal without the leave of the Court within 30 days of giving notice of appeal. Thereafter the leave of the Court is required.
- An appeal may be heard in the absence of an appellant. The Court may order a re-hearing of such a matter only if it is satisfied that the failure to appear was not due to the fault or neglect of the appellant.
- The Court is empowered to order costs against an appellant if satisfied that the appeal was brought vexatiously or frivolously or in abuse of process

Rather than bringing about a more efficient, fairer appellate process from the Magistrates' Court to the County Court, the changes to the legislation have made appeals difficult, and at times cumbersome without any discernible benefits.

VLA supports the Law Institute of Victoria's submission regarding the impact on defendants of the changes to the appeal process.[1] VLA agrees that the risk of higher penalty without warning in the circumstances of a de novo hearing offends both natural justice and double jeopardy principles.

Support for this proposition can be found in the comments of Justice Coldrey in *Brand v Parsons* [1994] 1 VR 252 at 257:

> *the requirements of procedural fairness [a modern expression for the term natural justice (see p 254)] demand that a warning of the possibility of an increased sentence be given … …*
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> *… … a requirement of procedural fairness which alerts an appellant to his or her situation of jeopardy and enables the formulation of a response to it is easily to be implied into the relevant legislation.*

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[1] See Law Institute of Victoria Submission to VPLRC Terms of Reference, page 2.

Justice Coldrey cited with approval the comments of Kirby P (as he then was) in *Praker v Director of Public Prosecutions* (1992) 28 NSWLR 282 where he said that a warning from a Judge who contemplates an increased sentence is a well established practice and 'should rarely, if ever, be departed from. The basis of the practice is to be found in a species of double jeopardy principle.'

Unfortunately the 1999 changes mean that those cases where there are grounds for an appeal, but there is some risk that the appeal will fail, are much less likely to be appealed because of the potential adverse consequences for the appellant. This is in effect a restriction on appeal rights. The current system means that two different defendants may in practice receive very different rights of appeal as a result of the way that the system operates.

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 or legal advice. The insertion of this requirement in the legislation has made the appeal process cumbersome and more time consuming as the appellant must now argue his or her case for abandonment before a Judge – a hearing to avoid a hearing.

This process is contrary to good case management principles and causes prejudice to indigent appellants who have sought considered legal advice, conceded that an appeal would fail, yet must face the court unrepresented to argue their case for abandonment. A grant of legal aid is not available for this process.

The current time limitations present problems for appellants and their lawyers. VLA is aware of instances where by the time VLA receives an application to fund an appeal the time limit has already expired. VLA submits that a more effective system may be to allow an appeal to be abandoned three weeks before the appeal date without penalty. The current regime only allows an appellant to abandon an appeal without the leave of the Court within 30 days of giving notice of appeal.

VLA also submits that some of the current issues in relation to appeals may be overcome by a different regime of management, rather than legislative change

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

The Department of Justice is currently reviewing a number of areas of the criminal justice system, including the classification of a large number of offences. VLA provided a submission to the Department of Justice in July 2005 in relation to offence classification.

VLA submits that if, by virtue of reclassification of offences, the Magistrates' Court is empowered to hear a greater number of cases than it currently hears, it is imperative that an efficient, cost effective and accessible appeal process such as the de novo appeal be maintained.

The benefits to be gained by reclassifying offences will quickly diminish if defendants elect to have their matters heard in the County Court because their appeal rights from the Magistrates' Court are compromised.

It is desirable to encourage defendants to have their matters heard in the most appropriate and least expensive jurisdiction. Guaranteeing an appeal process that is fair and easily accessible will facilitate this objective.

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

VLA submits that as a matter of public policy the primary aim of any reforms should not be to reduce the number of appeals. It is important to ensure the system enables matters to be dispensed with appropriately, consistently, fairly and in accordance with the law.

In the event that the Committee recommends reforms to the appeal process VLA urges the Committee to satisfy itself that the impact of any change would not be to reduce the number of meritorious appeals. Rights to appeal should not be restricted so more people "lose" their appeals. Those who are currently able to successfully appeal their decisions should be able to continue to do so under any reforms. VLA is not aware of statistics that indicate that a large number of appeals are currently being lost.

VLA submits that there is no certainty that changing rights of appeal will reduce the number of appeals. The statistics relating to appeals from Magistrates to County Court (de novo appeals) and appeals from the County Court to the Supreme Court (appeals based on error) do not support a reduction of appeals if current rights are changed.

In 2002-03 116,812 arrest and summons cases (excluding PERIN cases) were initiated in the Magistrates Court.[2] The County Court recorded 2,299 appeals, approximately 1.97% of cases.[3] In 2003-04, 122,923 cases were initiated in the Magistrates' Court.[4] The County Court recorded the commencement of 2,319 appeals, approximately 1.9% of cases.[5] The number of appeals for those two years was constant.

By contrast, in 2003-04 the County Court heard 2,503 criminal cases.[6] The Supreme Court received 362 appeals. The proportion of cases being appealed from the County Court to the

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[2] Magistrates' Court of Victoria Annual Report 2002-03.

[3] County Court of Victoria Annual Report 2003-04, page 24.

[4] Magistrates' Court of Victoria Annual Report 2003-04, page 14. This excludes PERIN but includes committals.

[5] County Court of Victoria Annual Report 2003-04, page 24.

[6] County Court of Victoria Annual Report 2003-04 page 24.

Supreme Court (a more rigorous, expensive and time consuming appeal process) in 2003-04 was 14.5%.[7]

The comparative figures for 2003-04 show that the proportion of Magistrates' Court decisions appealed is very low (almost insignificant) compared with appeals from the County Court to the Supreme Court. The latter appeal process is based on error (and presumably the model that would be followed if appeal rights from the Magistrates' Court were to be changed).

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

Any savings to the County Court may simply shift costs to the Magistrates' Court. We refer to our answer at question six. This is not an issue that should be determined by cost alone. Whilst the efficient administration of justice is an important consideration, it is equally important to consider whether Courts are providing fair, consistent and appropriate criminal justice dispositions that are in step with community expectations.

On the issues of costs and savings generally, we refer to the experiences of one of our regional offices in October 2005. Four defendants received sentences of imprisonment. On appeal the prison sentences were removed. In 2003-04 the cost of maintaining a single prisoner averaged at $162 per day.[8] VLA submits that the overall costs to the justice system of reducing appeals to the County Court should be considered.

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

In New South Wales the entitlement for an appeal to be heard de novo was abolished in 2001. The NSW *Crimes (Local Courts Appeal and Review) Act 2001* now provides for a re-hearing of appeals against conviction on 'the transcripts of evidence before the magistrate' (s.18). Sentence appeals are still heard by way of hearing de novo, although fresh evidence may be given during the appeal proceedings (s.17). Section 18(3) of the *Crimes (Local Courts Appeal and Review) Act 2001* states that the parties to an appeal are each entitled to be provided with one free copy of the certified transcripts of evidence relevant to the appeal. If fresh evidence is given, the parties are also to be provided one free copy of the transcript of the fresh evidence.

If such a system were to be adopted in Victoria it would add to the costs of obtaining transcripts in Magistrates' Court hearings. Proceedings are currently taped, however VGRS do

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[7] Supreme Court of Victoria Annual Report 2003-04 page 10.

[8] See Australian Government Attorneys General Department, Interventions for Prisoners Returning to the Community, http://www.ag.gov.au/agd

not type the tapes automatically. Generally transcripts are typed by private contractors at great expense. There are also problems associated with certification. If a more efficient transcript process could be adopted it would greatly assist the current appeals process as any matters in dispute could be resolved much earlier than is currently the case.

VLA submits that it would arguably be more expensive to move to a system where transcripts are produced for appeals. Not only must the transcript be produced, but a County Court Judge must read and consider the transcript. Such a system would not save the amount of County Court Judge time spent on appeals and would probably increase it.

VLA also submits that the opportunity to examine witnesses and take into account their demeanour is an important aspect of determining a matter. This would not be possible if appeals were conducted on the basis of transcripts alone.

In the event that hearings de novo were replaced with another form of appeal (such as appeals based on an error of law or an error of fact), Magistrates would no doubt take more time to formulate detailed decisions. This would have a significant impact on the Magistrates' Court's ability to deal with cases in an efficient manner.

Abolition of appeals de novo in the County Court may also affect the services that are able to be provided by VLA duty lawyers in the Magistrates' Court. VLA provides around 40,000 duty lawyer services in the Magistrates' Court annually.[9] This level of service will be difficult to maintain if current appeal rights were compromised. The practical impact may be that only the most basic pleas will be able to be performed by duty lawyers on the first mention day. Anything that appears to be complicated will require an adjournment so the duty lawyer has more time to prepare the case followed by an exhaustive presentation in Court.

Magistrates may also be more reluctant to hear matters where self-represented litigants appear. This may lead to more adjournments in those matters to allow self represented litigants to seek legal aid or a duty lawyer.

In the event that appeals de novo are abolished, lawyers will be more likely to run their cases in a different and more exhaustive way to ensure that they protect every right of appeal that may be available to their client.

The hidden cost to the administration of justice, not to mention the very real cost of increased number of grants of legal aid should not be underestimated.

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[9] Victoria Legal Aid Annual Report 2004-05 page 21.

### 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*

We refer to our answer to question 6.

The following statistics have been published by the County Court[10]:

| Appeal Grounds | 2004-05 | 2003-04 | 2002-03 | 2002-02 |
|---|---|---|---|---|
| Sentence Only | 67.1% | 74.5% | 73.3% | 75.8% |
| Sentence and Conviction | 24.2% | 22.3% | 21.8% | 18.3% |
| Order Made | 8.7% | 3.2% | 4.9% | 5.9% |
| Total | 100% | 100% | 100% | 100% |

Should de novo appeals be abolished, sentence appeals on the basis of an error in law may take longer in the County Court. This is because instead of just listening to a summary of the case and fixing a sentence, County Court judges will be required to understand the decision in the Magistrates' Court, hear legal argument in relation to the decision, and make a determination on error.

As the above statistics show, most appeals are appeals against sentence. Appeals against sentence will still be time consuming even if they are not heard de novo for the reasons stated above. There is no guarantee that abolishing appeals de novo will reduce the workload of the County Court. It is however highly likely that such an abolition would increase the workload of the Magistrates' Court.

VLA notes that whilst ostensibly the abolition of de novo appeals may seem attractive from a cost saving perspective, the volume of cases does not bear this out. In 2003-04 122,923 criminal cases were initiated in the Magistrates' Court.[11] Slightly higher costs in each of these cases would surely outweigh any costs savings from reforming County Court Appeals.

### 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.*

The justice system can be measured by a number of economic and efficiency indicators such as the number of appeals and the speed with which they are dealt with. However, the justice system must also serve a much larger purpose and that is consistent and fair decision making. The Magistrates' Court and County Court can be considered as one system in terms of furthering this aim. A robust appeal process from the Magistrates' Court to the County Court provides an

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[10] See County Court of Victoria Court statistics at http://www.countycourt.vic.gov.au

[11] Magistrates Court of Victoria Annual Report 2003-04 page 14.

important and efficient safe guard. The appeal de novo process is one of the reasons why the Magistrates' Court can continue to deal with such a high volume of matters as quickly and efficiently as it does.