

**LAW REFORM COMMITTEE**

**Inquiry into County Court appeals**

Melbourne — 6 March 2006

Members

Ms D. A. Beard  
Ms E. J. Beattie  
Mr R. Dalla-Riva  
Ms D. G. Hadden  
Mr J. G. Hilton

Mr R. J. Hudson  
Mr D. Koch  
Mr A. G. Lupton  
Mr N. J. Maughan

Chair: Mr R. J. Hudson  
Deputy Chair: Mr N. J. Maughan

Staff

Executive Officer: Ms M. Mason  
Research Officers: Ms M. McDonnell and Mr N. Bunt

Witness

Justice T. Smith, Supreme Court of Victoria.

**The CHAIR** — We welcome to this hearing of the parliamentary Law Reform Committee Justice Tim Smith from the Supreme Court of Victoria. We are very pleased to have you here today. As you know, we are looking at de novo appeals to the County Court. We are particularly interested to draw on your experience as a Supreme Court justice and as a law reform commissioner to assist us with this inquiry. I wonder if you might like to start out with some observations about the nature of the appeals you hear in the Supreme Court, particularly appeals from the Magistrates Court, and your views as to the merits or otherwise of continuing the system of de novo appeals to the County Court. We might then follow up with some questions. This is being recorded, but we will ask you what we can quote or not quote — and we will send you a copy of the transcript.

**Justice SMITH** — Provided I say nothing, that will be fine.

**The CHAIR** — That is right. You can say nothing and then you can tell us later.

**Justice SMITH** — Thank you for the opportunity. The Chief Justice asked me to respond to your committee's request. Looking at it I had the benefit of being provided with a number of the submissions, other than the confidential ones of course. However, it struck me that I probably should confine my remarks to thoughts that have occurred to me in light of those submissions, but also to look at the situation from a Supreme Court perspective — look at how the present system operates from a Supreme Court perspective and what might be the impact of some of the changes.

One of the things I noticed from the submissions was that the options are not quite as clear as they might be. Certainly there are suggestions of an appeal based on error to the County Court and appeals based on error to the Supreme Court — error in the broad sense as opposed to error of law — but whether, for example, in the County Court it is proposed for that proposal that there be three County Court judges or one County Court judge I do not know, that is not clear. If you were to go down the appeal-on-the-grounds-of-error approach and model, then I think generally that model has three judges presiding.

You will see that I have briefly touched in the document I have given you on the case for change. I can understand people saying, 'This is very odd. We've got this system of de novo hearings for these cases, but we don't have that anywhere else in the system'.

On the other hand I think there are a number of submissions that provide a strong argument for the present system and I thought that probably the Victorian Bar one puts those arguments most succinctly, referring to the large volume of cases in the Magistrates Court, the large number of unrepresented criminal defendants, and the fact that they have to rely on very oppressed legal aid duty solicitors — the whole thing is done under considerable pressure, as I understand it, in the Magistrates Court still. Notwithstanding obviously that we have much better qualified and equipped magistrates than we did, nonetheless there are significant pressures in the system.

I thought another point they made which was of some significance, if I might say so, was the point that accused persons charged in indictable offences triable summarily give up their right to jury trial by choosing to be heard in the Magistrates Court. I think implicit in that was a suggestion by the Victorian Bar that there is, as it were, a sort of trade-off — that if you trade off your right to a jury trial you can have at least the protection of a rehearing de novo. I do not think anyone else made those points, but they did strike me as being quite significant.

What I wanted to focus on really is the likely impact on the court system of abandonment or termination of the de novo hearing approach. I imagine you are familiar with the two modes of appeal to the Supreme Court. There is the appeal on a question of law under section 92 of the Magistrates' Court Act and there is the order 56 judicial review approach, which enables decisions to be reviewed on the basis of error of law and denial of natural justice, which includes bias. I did extract for you some figures which indicate that at present the number of those proceedings really is quite small. You will see on page 3 in footnote 5 that there were 24 in all in 2004 and 29 in

2005. You will notice a dramatic reduction in percentage terms in the numbers of judicial review proceedings under order 56 — I do not know why that has occurred — and you will see a significant rise in the appeal figure — that is, the 92 figure. My hunch is that that has something to do with the fact that the court has discouraged the use of order 56 judicial review proceedings where the section 92 appeal is available.

Fashions can change, too, in legal practice and it may be that those who were minded to use order 56 have changed their minds and they are now using section 92. Both those procedures require an application to be made to a Master. Of course you have initiating documents prepared, you have to have affidavits and you also have to spend a little time identifying what is the question of law. That may sound easy, but it is not; precise formulation of the question of law can be quite a challenge.

I mention on page 3 two particular grounds of appeal or review which I think have ramifications for the Supreme Court and the Magistrates Court if there is a significant change. One is that error of law can be demonstrated and relied on under both procedures if there is a duty to give reasons and they are not given or, if they are given, there is an argument that they were insufficient. The other error of law that I wanted to mention is the error of law of a decision being made which is said to be not open on the facts. It is a fairly tough hurdle for the appellant to get over because it is not enough to show that another decision could have been made on the facts; it has to be shown that it was not open to make the decision that was made. That does not mean that counsel, with their usual ingenuity, cannot present a plausible argument which has to be considered and thought through.

In this document I have looked at basically the two situations. One is that you do not replace the present appeals system with anything else; the other is that you replace it with some sort of appeal based on error to the Supreme Court. I have suggested that if you do not replace it with the appeal based on error generally, it is reasonable to assume there would be a significant increase in section 92 and order 56 cases and I think a significant increase in applications in which the parties seeking to appeal or review argue that the factual findings of the magistrate were not open.

One cannot talk with any precision about the likely effect of that, but the reality is that these cases generally, I think, last about a day, maybe a bit less — they can be a little bit longer. But what we all find usually is that we then have to spend the equivalent of two to three days doing the judgment. So if you apply those figures to, say, 29 or 30, you are talking about half a judge; if you double that you are talking about a judge. I would be surprised if the figures did not more than double; that would only get you up to 60. If that were the only system of appeal I would expect a more significant increase in numbers than that.

One of the big concerns — and I sympathise with it — is that when you have rehearings the witnesses in particular have to do it all again. Giving evidence in court is not fun and that is, I agree, a serious question — a serious problem. The reality is that whatever you do with appeals you are likely to have rehearings where that will happen. It may be fewer — it probably would be fewer — than you have at the moment under the present *de novo* hearing if you look at it solely from the point of view of appeals, but I will come back to that in a moment.

If you had an appeal based on error to, say, the Supreme Court, rather like the appeals you would have at the moment from the County Court or single judges of the Supreme Court, you would have leave applications to the Court of Appeal. At the hearing in the Court of Appeal, if leave was given, the appellant would seek to demonstrate error of some sort. Again, I would expect a significant increase in the number of those. I think one needs to remember that the Magistrates Courts today deal with significant matters and the consequences for those who are found guilty can be quite serious, so there is every reason why, if you could find a way to appeal, you would seek to do so. For many people the loss of the driving licence, for example, can have catastrophic financial consequences. There is every incentive to appeal.

On page 4 of my documents I have just made the point, which I think I have already mentioned, that if you look at what is involved in preparing a section 92 appeal, an order 56 review or an appeal to the Court of Appeal you are talking about preparation of a significant body of documents, all of which require legal input. In the section 92 appeal or the order 56 review you have to have the initiating documents prepared and you have to have the affidavits, exhibits and the like. Normally — I have not mentioned it here — the practice these days is for counsel to prepare a written argument, which is also paid for. Similarly in the court of appeal procedures you have got a lot of material.

I have suggested that there are resource implications for the Supreme Court when there has been any change, and it seems to me that — whatever system you adopt — if you change the de novo system, it will inevitably put demands upon the Supreme Court in terms of judges, masters and so on. I was interested to see that the police in their submission frankly acknowledged that, but they see it as being worthwhile. I guess that is the judgment you will need to make. But I think it cannot go unsaid that if we go down either path — that is, a no-replacement system or a Supreme Court appeal — the resource implications for the Supreme Court will be significant. If you have a County Court appeal, the implications of that would depend upon, I suppose, whether you had one judge or three. Of course the order 56 procedure can also be used to review a decision of the County Court on a question of law.

It seems to me that in the Magistrates Court — I have suggested on pages 5 and 6 that if you simply remove the de novo right of appeal and do not replace it with anything, one of the things that will happen in the Magistrates Courts will be the development of a practice of seeking reasons for tactical reasons, forensic reasons. Because if they are refused, that is a ground of review. If they are given, and you can find some error in them, that is a ground of review. If they are given, and you think you can argue that they are inadequate, that is another ground of review. I think what you would find — I suppose my observations of counsel are now confined to those appearing in the Supreme Court, but I do not know that counsel have changed much over the years, and they have got a job to do for their clients. There is a lot at stake, and if a client can hold onto a licence for another 12 months, for example, that is a very significant benefit to the client. Lawyers have a job to do, and I think as the Victorian bar said, ‘the lawyers’ strategies will be tailored to the judicial framework provided’ — that was the way it was put — that is right. That is what happens, and they cannot be criticised for that, because they are the rules they are provided with, and they have to do what is in the best interests of their clients.

I am inclined to agree, too, that proceedings will probably take longer in the Magistrates Court, and you also have the issues of the transcript and legal aid. But I would also suggest that if there were a new right of appeal on grounds of general error to the Supreme Court or County Court, again reasons would be sought, because they provide the material upon which the appeal will be argued, and the transcript of evidence and so forth will provide the material on which the case will be argued. I think those who have argued that there would be a significant lengthening of proceedings in the Magistrates Court are right. Another interesting point raised was that there is likely to be — whatever appeal system you employ in the future — an increase in jury trials rather than with magistrates alone. That again will have an impact on legal costs and so forth. I seem to be raising problems with this approach.

I think that always where change is sought the onus is on the party seeking change to the system to demonstrate the case. That is always the way I have approached the law reform exercise — that is, that one does not change things for change’s sake but the need for change needs to be demonstrated, particularly in something as important as this where the issue is raised: do we change the way we deal with appeals from decisions of magistrates?

I have suggested in this situation particularly it would need to be demonstrated that there is a clear case for change, that it will lead to improvement and will not increase the risk of a miscarriage of justice. I think that is difficult to satisfy if you formulate it in that way. There may be an issue as to

whether that is a reasonable formulation, but we are talking about limiting rights of appeal, so that makes it difficult to satisfy the test that I have formulated. From a practical point of view and a cost point of view I do not think it can be demonstrated that it would be saving costs. In fact it rather looks as though it would add to the cost of the system.

I was last involved in the de novo appeal system a long time ago now — about 15 years ago — but it has the beauty of simplicity about it. You do not have to prepare an originating motion, an affidavit or an exhibit, and you do not have to prepare an appeal book et cetera. You simply go up and run the case again. I gather from the submissions that they speak of doing anything up to six sentence appeals in a day. You would not be able to do that under section 92 or order 56. You would not be able to do that in an appeal to the Court of Appeal. You might get through three. The simplicity of the approach of the present system does appeal to me, and you avoid the complications that I think will occur in the Magistrates Court.

Can I just come back to the rehearing issue. I touch on that again on page 6 of the document. I think we are all troubled about the problems faced by witnesses, particularly victims of sexual offences who, where there is a successful appeal, will find themselves having to give evidence again, which is a dreadful business. But trying to assess the likely impact of the different proposals on that issue is not easy.

I have noted that the statistics referred to in the submission suggest that assuming rehearing issues will affect witnesses only where there has been a successful appeal against conviction, we are looking, under the present system, at 25 to 30 per cent of the appeals to the County Court, so it is not all the appeals. It is 25 to 30 per cent. It is still a significant number. But the other problem is then to determine if you have another appeal system, what is likely to be the success rate of those appeals where you will have further hearings? You still have that problem. Probably it will be reduced by a statistically significant figure, if I can put it that way. But you may still have two hearings as well, because if there is an increase in jury trials there will be an increase in committals. And if there is a committal, there is every chance the lawyers for the defendant will want to question key witnesses. I have suggested, 'What would be the difference?'. One cannot come up with a clear answer, I do not think, except to say that there is likely still to be a significant number of occasions where there are two hearings, either because of a rehearing order after a successful appeal or because there is an increase in committals and jury trials.

On the last page I make a plea that if the committee is minded to introduce a different appeal system, I do not think there is any doubt that it will have resource implications. I have asked that if you go down that path could you identify them with as much precision as possible, because too often changes are made without consideration being given to that. I think I probably speak for all judges and all magistrates in asking that if you decide there will be resource implications, could you please emphasise that and consider whether you make it a condition of implementation. I have probably said enough at this point. Are there any questions?

**The CHAIR** — Thank you very much, Justice Smith. Playing devil's advocate for a moment, one of the arguments would be that if you could only make appeals on errors of law you might have less appeals because of the cost and the complexity of mounting those cases. One of the arguments that has been put is that people are looking for finality. They get a decision in the Magistrates Court and they decide that the costs of appealing to the County Court on errors of law will be too costly and they decide that is it, it is more final. I guess that is in a sense the magistrates position too; they are arguing that it would give greater finality to their decisions whereas in some ways it is currently seen as a rehearsal. What would you say to that proposition?

**Justice SMITH** — Perspectives are tricky things, and I suppose you heard from me on a Supreme Court perspective. I cannot comment on the extent to which it could be demonstrated that the hearing in a Magistrates Court is simply used as a rehearsal. I would be surprised if that were the case. It might be the case subsequently.

**The CHAIR** — I suppose from the point of view of the magistrates, the magistrates feel that people know if they do not succeed there they can go to the County Court. In other words, it undermines the prestige and stature of the Magistrates Court.

**Justice SMITH** — That may be their feeling about it. Whether people looking on would see it that way I do not know. I must say when I read that, it had not occurred to me that it would be seen that way. I do not know whether I can say more on that. It is probably not very helpful.

**The CHAIR** — On the question of whether the costs associated with an appeal on errors of law, whether that will lead to more.

**Justice SMITH** — Costs will discourage. On the other hand it is not as if the present system does not have a cost. It does. I think the other appeal systems — the alternatives — would have higher costs, but then should we be discouraging people from appealing, which is really what is being suggested, is it not? It is terribly important for the system that a reasonable system of appeals is available because frankly every judge and magistrate benefits from the reality that their decision could be reviewed. We need to know that what we are doing is subject to review. If we were in a situation where what we decided was not subject to any review, I think that would be a bad thing. My concern I think ultimately is to ensure we have a reasonable system of appeals and that we do not change it in such a way as to reduce the scope, add to the cost and reduce the number. I would feel very anxious about that result. I do not think the criminal justice system would be working as well as it should be if you end up in that situation.

**Mr LUPTON** — If I can just add to that, it seems to me that one of the fairly obvious outcomes of any change would be a restriction in the number of appeals and the right of appeal to some degree. While at the moment presumably there are some unmeritorious appeals, and they get dealt with in the process, any sort of change would mean that the meritorious appeals would be more difficult and more costly.

**Justice SMITH** — I think that is right.

**Mr LUPTON** — It also seems that it would likely lead to a lengthening of proceedings because of the nature of the type of appeal processes, a lot more paperwork and possibly an extended wait in the County or Supreme courts for lengthier hearings.

**Justice SMITH** — I think there would be that but you also have the impact on the Magistrates Court.

**Mr LUPTON** — Longer hearings at first instance.

**Justice SMITH** — Probably. There would still be a lot of cases where it would not happen, I imagine. Perhaps I should not be commenting on that in too much detail because I do not have direct experience of that. But I would be surprised if you did not have a situation where more time had to be spent in the Magistrates Court on more cases because they have to be canvassed in more detail and the reasons have to be given in sufficient detail to satisfy the requirements of the law about the duty to give reasons. It is interesting when you look at a system. You look at it and say, 'That seems a bit odd; why is there this special arrangement for these appeals?'. Then once you start to dig deeper and look at the ramifications of change, it suddenly starts to become difficult.

**Mr LUPTON** — It seems the main issue about whether to change or not arises from the fact that the de novo rehearing just seems to be something of an assault on logic.

**Justice SMITH** — I do not know — perhaps all appeals should be de novo hearings. No-one has asked that question: should we look at the other systems of appeal and whether they

are wrong? Perhaps we should have a de novo hearing for everybody. I wonder how that would go.

**Mr HILTON** — Following up on the Chair's point, the idea that you can have an appeal presumably means there are some grounds for an appeal, yet in these appeals to the County Court the grounds could be, 'I do not like the decision.' To me, not being a lawyer, the implication is that we either do not have any faith in the magistrates system as such, because if people do not like the decision they can go for another opinion, or the magistrates system is so overwhelmed that errors are bound to occur and we need this as some sort of fallback mechanism. I am not sure why we have a magistrates system at all if there is going to be some automatic right to have your case reheard by another body.

**Justice SMITH** — I agree that one would normally think you appeal because something went wrong. I think the explanations that are offered in the submissions on the present system focus on the practicalities. They say it should not be seen as reflecting badly on the magistracy or that system; it is simply reflecting on the desire to have speedy disposal of matters in the Magistrates Court. I suppose it is seen as more cost effective. That would seem to be one of the arguments when you have regard to the fact that something under 2 per cent that go to the County Court — a mere 2 per cent. That figure alone indicates presumably that there is not a lot of error going on in the Magistrates Court. On the face of it it seems out of kilter with what you would expect, but I think the arguments that have been advanced in support in my mind justify this. It should not be seen as a reflection on the magistracy, although I get the impression that some of them feel that it does. I do not know what one can do about that because by and large they are doing a very good job.

**The CHAIR** — In New South Wales they have a system of appeals, which I hope I can accurately describe it as de novo on the transcript, which presumably does not involve therefore the calling of the witnesses again.

**Justice SMITH** — Does that allow fresh evidence as well?

**Mr LUPTON** — The evidence we have had says that it does.

**The CHAIR** — We are going to New South Wales to have a look at the system more closely, but I am just wondering from your point of view, particularly given your background in the law of evidence, what your views would be about that, if any?

**Justice SMITH** — Looking at it more as a judge I would rather see and hear the witness, I think, although I recall from my work on the laws of evidence that there was research in the past — and I do not know what it is today — suggesting that mock juries made more accurate assessments of credibility from transcript than they did from watching witnesses, which was an interesting counterintuitive finding.

It would be interesting to know in New South Wales to what extent applications are made to lead fresh evidence, because the impression I got from some of the submissions was that a not infrequent happening is that the case below was not presented as well as it should have been and at the hearing de novo there is the opportunity to call evidence, particularly on sentencing, about the accused's antecedents, what treatment might be being received and all that sort of thing, which it was not possible to organise below. I could well imagine that that is a fairly significant percentage but I do not know the figures. Do you have figures on that sort of thing?

**The CHAIR** — No.

**Justice SMITH** — One of the problems in this is to get empirical material. Have I answered your question or managed to avoid it?

**The CHAIR** — I am happy with the answer. I think you have probably dealt with this substantially but I am just wondering, given your extensive knowledge of the law of evidence, what you think the ending of de novo appeals might have for the conduct of appeals in the Supreme Court and the County Court?

**Justice SMITH** — You would not normally have evidence called. I think there is the option to seek leave to do so but it is very, very rare. What you have to do if you are for the appellant is demonstrate error of some sort, but it does allow you to attack the fact findings. I am not quite clear about the evidentiary aspect you were concerned about in your question.

**The CHAIR** — For example, in the conduct of trials in the Magistrates Court obviously they would not necessarily have kept open every aspect of possible appeal later on, but they may be more inclined to do so and lay the grounds for appeal.

**Justice SMITH** — I am sure that is right, because if you could put yourself in the position of the duty lawyer, or whoever it might be, acting for the accused, the preparation will occur at the court on the day. It will be 15 or 20 minutes or something, I do not know. The lawyer will have to do the best he or she can in the circumstances. The likelihood is that if there had been a conference the week before, lines of inquiry would have been revealed which could have been followed up, or a report might have been obtained from somebody. But the duty lawyer might think, 'I am in a position to make a plea on sentence now and I will do the best I can, and hopefully we will get the sort of result that I would hope for, but if we do not I can appeal and we will have more evidence which we can put to verify these various things they are going to be putting to the magistrate'.

**Mr LUPTON** — That is the real crux of it, I think.

**Justice SMITH** — So to come back to the question, I am sorry to hear that magistrates see it as perhaps a perception that they are not doing their job. I think it is more a consequence of the whole system that we need something like this. I do not think it has anything to do with the magistrates at all; it is more to do with the pressures of the system. When you think about it and you look at the figure of 2 per cent, obviously magistrates are dealing with a lot of work, dealing with it well and in such a way that no-one wishes to appeal. You are only talking about 2 per cent. From a practical point of view, from the point of view of cost to the community and from the point of view of ensuring that justice is done, I am inclined to the view that what we have is probably the best system or, to put it another way, the least unsatisfactory.

**The CHAIR** — Sounds like democracy.

**Justice SMITH** — That is right. You will never have a perfect system, will you?

**Mr LUPTON** — I am very happy with that, thank you.

**The CHAIR** — Thank you very much for your time. We certainly appreciate the unique perspective you have brought to us. We will certainly weigh very carefully the views and thoughts you have given us today. We appreciate your time.

**Justice SMITH** — Thank you very much. Thank you for the opportunity, and I hope it will be of some help. I did bring a few bits and pieces, which I will give to your secretariat.

**The CHAIR** — Excellent; thank you.

**Committee adjourned.**