

LAW REFORM COMMITTEE

Inquiry into County Court appeals

Sydney — 10 April 2006

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Mr P. Johnson, senior legal officer, inner city Local Court section;

Ms S. Beckett, senior legal officer, inner city Local Court section; and

Mr J. Mulder, solicitor in charge, Penrith Legal Aid Office, New South Wales.

The CHAIR — Thank you very much for coming along to talk to us. As you know, we are doing an inquiry for the Victorian Parliament in relation to County Court appeals — which in Victoria is the equivalent of your District Court — and in Victoria they are still de novo. We were interested in the model that you have here. That is part of our investigations because there is a bit of a debate in Victoria as to whether or not there should be de novo appeals. Quite interestingly, I think we could pass the comment that no-one actually knew exactly what the New South Wales system was or how it worked, so it has been very helpful to us today to come and hear that.

I welcome you here. We are very keen to get the legal aid perspective. We are recording this as a Hansard transcript. You will get the opportunity to review the transcript. If you want to provide any evidence in camera you can tell us that as we go along. Otherwise there is a presumption that it is on the public record. You will get a chance to correct the transcript and then we will put it on our web site. Hopefully we can quote it with reference to your experience. So you may like to talk to us in the first instance, then we will ask questions.

Mr MULDER — Do you want our background.

The CHAIR — Yes, please introduce yourselves.

Mr LUPTON — Can you tell us what you do in the commission?

Mr MULDER — My name is John Mulder, I am the solicitor in charge of the Legal Aid Commission NSW, Penrith Legal Office. I was admitted in 1988, joined legal aid straight after that. I have been the senior solicitor out there since 1995, working in the criminal field most of that time. A lot of my work is involved in Local Court (criminal), and also the District Court of Appeal.

Mr JOHNSON — My name is Paul Johnson. I am in the criminal section of our head office. I was admitted in January 1991. I have worked always in criminal law in a number of different jurisdictions. I have had particular experience with appeals since the amendments. I have some knowledge of the appeals before the amendments but not really running the de novo appeals ourselves. The commission gives that sort of work to more experienced criminal lawyers, so it takes a number of years to move into the District Court appeal practices.

Certainly since the changes in 1999 I have had a lot to do with the appeal sector. Most of my work has been Local Court and District Court appeals and in some other jurisdictions.

Ms BECKETT — My name is Sophia Beckett. I am also employed at the Legal Aid Commission. I was admitted in December 1990 and I have had a varied history in private practice and in the Legal Aid Commission and in Aboriginal legal services. I am currently the more senior solicitor in conducting District Court appeals and have had a mostly appeals practice since around 2001, give or take a few maternity leave periods. Mostly that is what I have been doing. I have a very dim memory of conduct appeals under the old provisions. I think I might have done two or three, but other than that it has all been under the new legislation, which is by way of transcript.

Mr JOHNSON — Sophia was also at the Criminal Law Review Division for a while, so has some experience with legislative changes.

The CHAIR — Who would like to lead off? I do not know where you want to start, but perhaps we will leave that to you. Do you want to comment generally on your perspective of how the system now works under the new reforms?

Mr MULDER — Now that this new system has been in for some time, our memory of the old system is not that clear. My colleagues have not had that much experience in de novo hearings. I ran a few back in the old days.

Mr LUPTON — What do you see as the pros and cons of the way the system works now?

Mr MULDER — From your point of view — finance, time, savings and things like that obviously?

The CHAIR — We are thinking of the comments that Roland Bonnici raised.

Mr MULDER — I was thinking of some of those. I liked his idea of the hybrid system somewhere along the line, particularly in relation to clients who are unrepresented, say, in the Local Court hearing. It is not fair trying to run a hearing on their transcripts when some of them have not even asked any questions. There are also situations, as Roland said, for whatever reasons where the case was not run up to scratch, so to speak, or where certain areas were left out and you would like the opportunity to revisit the whole case, so to speak. It would be lovely to have that opportunity. I would say in the interest of justice would be the argument, as it is, if you want to seek leave to call further evidence et cetera.

Mr JOHNSON — Listening to Roland on that point and returning to it, I think my comment would be that you are always going to be able to much more readily convince a judge to give you that leave if the hearing in the Local Court was run on an unrepresented basis. Even within the current system, seeking that leave, showing why it was not done in the Local Court, why it is in the interest of justice even to call everyone again, even though you have a transcript, you are always going to be able to do that much more readily if the person is unrepresented in the lower court. There is no doubt about that.

Ms BECKETT — And the legislation requires you to consider that — section 19.

Mr JOHNSON — It is specifically stated there that the court in making that decision has to consider whether the person was represented.

The CHAIR — As leave to hear fresh evidence or new witnesses — —

Mr JOHNSON — Or recall witnesses for further cross-examination or further evidence.

The CHAIR — Putting aside the question of representation, is that test a bit too tough at the moment? Obviously you are saying where someone is unrepresented you could probably make out an argument you should be able to recall witnesses or hear fresh evidence, but putting that aside, if someone was represented, is the test too high in your experience?

Ms BECKETT — In my experience I have not had any problem in applying for leave to have fresh evidence called, especially when the person has not been legally represented. It is seen as a basic right. On that point, there is not much of a problem, especially as consideration is given to it in the wording of the legislation at present.

Mr LUPTON — Where people are represented is there much evidence of a problem and a need to have a real second look at a great number of cases because they were not conducted well enough?

Ms BECKETT — My view is that conducting an appeal on the transcript is in some respects second best, particularly when it comes to assessing the credit of a witness. There is nothing better — you cannot replace the evidence of the person sitting in the chair giving evidence. So that is lost, and it is lost not just to the accused but to justice as a whole when you do not get to see and assess the demeanour of somebody while they are giving evidence.

There are all sorts of limitations that are perhaps hard to put a finger on, but when you consider the make-up of a Local Court in New South Wales and you compare that with that of a District Court, judge and prosecution, then usually generally speaking, you are dealing with a judicial officer who is less senior than a District Court judge would be; you are dealing with a prosecutor who may not have legal expertise in terms of obtaining qualifications, and as a generalisation you are dealing with defence representatives who are also likely to be junior.

My experience is that quite often you read transcripts where there is a general sense of dissatisfaction as to the overall conduct of a Local Court hearing. That is lost when you have difficulties fashioning an argument to obtain leave to have people recalled on appeal when you cannot point to something specific to say, 'I need to ask formal questions of the second witness, an eye witness, in the motion for the identification of X'. It really is the overall flavour of the standard of the hearing in a Local Court that is lost.

The CHAIR — But it would be hard to construct a system, short of what we have in Victoria, which is an as-of-right de novo hearing, to actually get at that in your system. Without going into a lot you would have to make out quite detailed grounds. It is hard to say, 'Well, look, I just was not happy with the way it was conducted. I just do not think it was properly conducted'; you would have to actually go into the problem, would you not?

Ms BECKETT — Yes, and that makes it similar to the grounds of an appeal between the District Court and the Supreme Court in the first instance up to the Court of Criminal Appeal where you have to point to something specific, a miscarriage of justice, and you are as an advocate tied to the manner in which somebody has called evidence in that first instance. It is a de novo appeal, as it is at the moment under the new legislation, but it is not really because you are tied to the tactical way that first advocate has run the hearing.

The CHAIR — In the Court of Criminal Appeal, you are talking about now?

Ms BECKETT — It is the same really, even though it is a de novo hearing, even though you look at the transcript afresh as though you were seeing that evidence for the first time — —

The CHAIR — Sorry, you are talking about in the District Court?

Ms BECKETT — I am saying because of the introduction of the transcript it does have that same flavour.

Mr LUPTON — Are we still at the point where the basic rationale for all of this is really the magistrates or the Local Court still really cannot be trusted to get it right to an adequate degree and that is why we have to have this second bite at the cherry in this way?

Ms BECKETT — Paul would say that, no.

The CHAIR — He may say that — —

Mr LUPTON — You may say that. Because if it can be trusted to get it right in the way our other courts do, does that not undermine the case for having a complete rehearing where you just get a second go simply because you did not like the first outcome?

Mr JOHNSON — I heard Roland talking about the improvements in qualification of the appointments to the magistracy and I think the three of us would agree with that. I noticed that one of your references was to look at the historical reasons for there being de novo hearings in the District Court and maybe one of the reasons it was a whole re-hearing from the beginning was that the Local Court magistrates were not necessarily legally qualified. Perhaps it was seen as one of the historical reasons it was all done again in front of a District Court judge.

The CHAIR — Without putting words into Sophia's mouth, I thought she was saying that is, in a sense, still one of the prevailing reasons today, in the sense that you need to be able to have a fresh look at the case. Being tied to the transcript is a significant inhibition on making sure that justice is fully done in each and every case. Would that be a fair summary of what you are saying or are you reluctant to say so?

Ms BECKETT — I do not want to overstate it. I suppose I read a lot of transcripts where I can see a lot of things have gone wrong and I am concerned about the standard of the hearing overall. It is sometimes hard to point to a specific — —

The CHAIR — But Judge Blanch would say it jumps out at you on the paper — you read the transcript, a lot of things have gone wrong, you can tell straightaway it has gone wrong and you then make some decisions as a judge about whether you need to hear fresh evidence or it is so obvious something has gone wrong that you decide to acquit.

Ms BECKETT — I just think that fresh evidence is not called perhaps as much as — I will withdraw that.

Mr HILTON — I suppose — —

The CHAIR — Sorry, I thought she was just on the verge of finishing the answer.

Ms HADDEN — Can I just make a comment? It is like anything in law. At that coalface in our Magistrates Court and in your Local Court you are going to get legal aid lawyers who are junior. You are never going to get a senior lawyer doing legal aid, coalface, duty solicitor stuff.

Ms BECKETT — You do sometimes.

Ms HADDEN — Not very often, unless they are duty bound or have some great community conscience. You are always going to get the junior police prosecutor — I should not say ‘junior’, most of them in Victoria are pretty skilled and they do go through a special training process so they are not unskilled or less professional than some of the barristers who appear prosecuting. Given all of that and given that your appeal rate is down, your system must be working pretty well up here?

The CHAIR — Was that a statement?

Mr LUPTON — It is on the record now.

Mr MULDER — When you say ‘the appeal rate’, you are talking about all grounds of appeal, conviction appeals?

Ms HADDEN — I come from the old system. I was a practising lawyer for 15 years in Victoria and I come from that old system and I am very familiar with appeals. I have never experienced this system; although I am admitted up here, I have never practised in New South Wales. Just from listening today and from my reading, I think it is admirable. I think we ought to introduce it into Victoria tomorrow. That is my view.

Ms BEATTIE — Perhaps we will have a discussion before we do.

Ms HADDEN — That is merely my personal view. I am just wondering what is so wrong about it.

The CHAIR — Perhaps we can go back to the question which was in relation to — I think you were suggesting, Sophia, that it is not as easy to call fresh evidence, in cases where it might be warranted, as you would like it to be.

Ms BECKETT — I do not know that I have a personal point of view about it. However, it is meant to be a de novo hearing, you look at it afresh, and I think it is difficult to look at something afresh where you are running the matter on somebody else’s transcript and they have conducted the hearing in a manner that you perhaps would not have chosen to conduct it. It is meant to be, under the legislation, a de novo hearing and yet the fact that it is on transcript — —

The CHAIR — So it is hybrid de novo in a sense?

Ms HADDEN — De novo on the transcript.

Ms BECKETT — Under the old section you could still rely on the transcript if there was consent, I believe.

Mr MULDER — If both parties consented, you could run it on the transcript.

Ms BECKETT — The previous speaker was talking about introducing a hybrid system and it indeed was a hybrid system before, as I understand it. In a way that would be perhaps a preferable system.

Mr JOHNSON — Some of the solicitors I spoke to who have gone elsewhere and who did do a lot of the de novo hearings said that the Director of Public Prosecutions and the defence would get together and decide which parts of the evidence were not contested, so you would have a tendering of maybe half or three-quarters of the transcript and then you got down to the witnesses who actually had an issue. It was half and half.

The CHAIR — That was by consent but obviously the legislature said that was not enough because if there is no consent, if the defence says it does not agree to that and wants a full rehearing, there was sufficient concern about the fact that vulnerable witnesses were being re-cross-examined or it was wasting court time or it was wasting witness time or wasting police time to bring in this restriction.

It seems to me that what you are suggesting is we have a couple of possibilities. One is Roland's suggestion that you could ask for leave for it to be run de novo or you could ask for leave for it to be run de novo on certain parts of the evidence that are contested or it could be run de novo by consent. These seem to be some of the various possibilities. Do you have any thoughts on those?

Ms BECKETT — Just before I forget them I think the problem I have with the system as it is is that the court transcript goes to the hearing judge prior to the parties appearing before the judge. Often when you appear before the judge to commence the appeal the judges appear to have already read the transcript and at the end of the transcript — it is more of an administrative problem — there are the comments of the magistrate in the lower court.

The problem with it happening that way is it then ceases to be a de novo and becomes more of a question of what was wrong with the finding of the Local Court magistrate. It becomes more of a review of the first instance decision rather than a de novo hearing. That is an administrative problem.

The second issue is that when you turn up for an appeal there should be the ability of the parties to object to the evidence as it went up in the Local Court. Once it has already been read the effect of that power to object is nullified, it is not there. These are administrative difficulties which have crept into our system.

Mr LUPTON — On that latter point, should that be part of the pre-trial process where you would have to make your submission about evidence being excluded?

Ms BECKETT — The transcript should be tendered. I mean, that is the way it proceeds anyway; the transcript is tendered by the Crown. Then the defence has the opportunity to object to it. But in practice it has already been read.

Mr LUPTON — The judge who is hearing the appeal is going to have to look at the evidence to determine whether to include it or exclude it, though?

Ms BECKETT — Yes.

Mr LUPTON — So one way or another they are going to hear it.

Ms BECKETT — There are so many more matters being listed for hearing in one day now because it is done on the transcript than would have been the case where it was completely de novo. A judge may have several all-grounds appeals listed in one day. The practice then is, ‘How am I expected to go off the bench and read this matter, which may be two or three days of hearing, in one day?’. So often the practice has crept in for them to read it before, and you can understand why that has happened. It does make the de novo a little bit more difficult to practise.

Mr HILTON — Do you have any objective evidence that this just has not been done as a result of this new system, as opposed to the old system?

Mr JOHNSON — No, I do not.

Ms BECKETT — I am trying to think of something.

Mr MULDER — No, I have not; not that I can directly point out.

The CHAIR — You seem to be indicating that in some cases you have been involved with you feel that you would like to be able to more easily point to the injustice by way of de novo hearing than if you are constrained by the transcript — —

Ms BECKETT — Yes, I think that is fair summary — —

The CHAIR — Has it resulted ultimately, though, in an unjust outcome, which I think is Jeff’s question? Notwithstanding the restriction with the transcript, have you got cases where you feel that if you had been able to run them completely de novo, you would have got a completely different result than de novo on the transcript?

Mr JOHNSON — My view is that that would come up when it is one person’s evidence against another. There is no supporting evidence, there are no admissions, there is no real corroboration, and you have a case where it is one person’s word against the other. All of the people I have spoken to and the judges comment, ‘Well, it is a credibility thing; I have not seen them, I cannot assess the credibility’.

My personal view is that the inclination may be towards leaving the decision as was found by the magistrate. I do not know if that is true or not; that is my feeling. In those types of cases I certainly have in the past known that it would have been better to have seen the victim or seen the witness, or whatever it is, and for myself and for the judge to make a determination on that single person’s evidence and cross-examination against the appellant.

The CHAIR — Judge Blanch said to us today that where it is the evidence of one person against the other, given the criminal test of ‘beyond reasonable doubt’, probably there would be no alternative but to acquit, in the absence of any other evidence.

Mr MULDER — And you hear that from judges all the time — ‘How am I going to decide credit? It is one on one — you tell me’. That is the system.

Mr LUPTON — From the defendant’s point of view, what is wrong with that analysis?

Mr MULDER — In those circumstances it is beneficial to their case.

The CHAIR — That is right. But you are saying there are judges who actually take the converse view and would say, ‘The original conviction stands because I have not had an opportunity to look at the credit of the witnesses’?

Mr JOHNSON — That is the feeling I get, that is what I am saying.

Mr MULDER — That is the feeling; they do not say that.

Mr LUPTON — Would that judge be just as likely to make the same decision, having heard the witnesses?

Ms BECKETT — It is hard to say.

Mr LUPTON — It seems to me to have a little bit to do with the judge's attitude about those sorts of issues rather than whether they are dealing with the witness or the papers. That is all.

Mr JOHNSON — Sophia and I have had a lot of experience with running appeals in front of Judge Blanch.

Ms BECKETT — Just today!

Mr JOHNSON — I was saying that he has a particular way of running appeals and is very efficient. The experience of running appeals in front of him is not the same as running appeals in front of many other District Court judges.

Ms BECKETT — That is true.

Mr JOHNSON — I'd be happy to have a judge — —

The CHAIR — What would be the principal difference to the others?

Mr MULDER — He is quick, for a start. He has read it all before he has come on. He is more practical.

Mr JOHNSON — He is practical.

Ms BECKETT — He is wonderful. Many of them are very experienced judges of course, but because of his wealth of experience and because he deals with short matters in such a large quantity he has an ability to really home in on the issues — an amazing capacity.

Mr JOHNSON — He gets straight to the point.

Mr MULDER — He 'cuts to the chase' is the term we would use.

Ms HADDEN — Do your judges undergo professional development during the year?

Ms BECKETT — I think they do but I do not have any details.

Mr MULDER — They have their conferences and things like that. There is one coming up next week, I think. They have conferences, they have judicial handbooks.

Ms BECKETT — But with him it is a matter of having a wealth of experience and aptitude.

Ms HADDEN — But he is the chief judge, isn't he, so I would think it would filter through.

Mr JOHNSON — He also has an incredible work ethic. He reads the transcripts from 5.00 a.m. or 6.00 a.m. onwards and he is all ready to go at 10.00 a.m., whereas in many other places that is really when we start. Sometimes people will not start until they have the transcript formally tendered by the DPP.

Ms BECKETT — He is unique.

Mr JOHNSON — He is unique.

The CHAIR — You can only hope he has read the transcript of this before your next appeal before him.

Ms BECKETT — He is not always an easy judge to appear before — —

Mr MULDER — There are a number of other judges who take that approach as well. They have read the transcript and read all the short matters before you even come in. Some of them walk in and say, ‘I am thinking of a bond in respect of this matter’, and it is all over very quickly because they are prepared and because of their work ethic and things like that.

Mr JOHNSON — His Honour had a lot of interest in the District Court overruns in trials and short matters and various other things and he devoted himself to getting them reduced and more manageable. There are other things that I believe he was involved in which cut down the amount of matters being dealt with in the District Court. I do not know about Victoria but when you do not appear in the Local Court here and you are convicted in your absence, you have the ability to make an application to overturn that conviction.

The CHAIR — Yes, he made reference to that.

Mr JOHNSON — For quite some time, once the magistrate had refused to overturn that conviction your only avenue of appeal was to the District Court as an all-ground appeal. A new appeal was put in place in 2004 which allowed the District Court judge to look at that simple decision, and if they disagreed with the Local Court they were able to annul the conviction and return the matter to the Local Court so that the Local Court would hear the matter again rather than the District Court.

In those circumstances the District Court was forced, even under the change to transcript, to run hearings de novo in those circumstances because there simply was no transcript from the Local Court. I am sure that has saved a lot of money and a lot of time in the District Court, at least as well by virtue of the fact that they do not have to essentially run a Local Court hearing in the District Court.

It is may have been an oversight but it is another way that the transcripts have become much more important, such that there is now the ability to send something back to the Local Court if there was no transcript because there was no hearing. Then the rights of appeal thereafter exist based on that transcript.

Ms BECKETT — It is a benefit to all parties that that practice take place.

Mr JOHNSON — I think it probably was an oversight or there was a view that it could have been done before and was challenged, and it has all been clarified now by some later amendments to the legislation. Things like that are quite important if financial and time constraints are part of what you are looking into, because there are always those little oversights, and then it has to be returned to later after a few years and everyone is wondering how to get around it.

Ms HADDEN — Is there a time limit on that amendment? Is there a time limit within which you have to appeal?

Mr JOHNSON — Yes, there is.

Mr MULDER — But you are appealing against the refusal of the annulment application only, and you basically take that up to the District Court first.

Mr JOHNSON — In theory you can still have a complete de novo, all-grounds appeal in the District Court, and that would happen where the Local Court refuses your annulment application; you appeal to the District Court against that refusal; the judge comes to a similar view — that you do not have a good reason for not having turned up in the Local Court — so

confirms the refusal to annul, and then those people have never ever had a hearing on the merits of the case unless the District Court then grants them leave to have an all-grounds appeal.

That was sought to be avoided because it is the running of the Local Court hearing in the District Court, and it is perhaps why a lot of those refusals to annul are granted and sent back to the Local Court, because the consequence of not granting them is you are going to run that hearing in the District Court or, if you do not, that person who says that they are not guilty has never had any hearing whatsoever.

Ms BEATTIE — You raised the issue of time constraints and resources, and certainly the magistrates in Victoria are not unified in their positions — some of them think we should scrap de novo appeals, others think we should retain them, and those who think they should be retained are saying to us quite clearly that it would slow the process down completely, because they would have to take so much more care in writing up their documentation. What is your feeling on that? Do you think it would slow down the process of justice or do you think your system speeds it up?

Mr JOHNSON — I think the most important thing is to have the supporting administrative network run well and efficiently. The greatest delay at the moment is the ordering of the transcripts and the delays in getting the transcripts of the Local Court all ready to be given to both parties and to have the matter listed, because nothing is listed until that happens. It can take months and months, especially if the matter has been part heard on a number of different days. It is all right if the hearing was concluded in one day, but the greatest delay is waiting for all of the transcripts to be obtained.

The CHAIR — In the meantime someone is in jail, perhaps.

Mr JOHNSON — Potentially, yes.

The CHAIR — Someone who may eventually be acquitted or have the sentence reduced?

Mr JOHNSON — Potentially, yes.

Ms HADDEN — Can they apply for bail during that period?

Mr JOHNSON — Yes.

Mr MULDER — We have the merit tests, so we have got to get the transcript before we can determine the matter.

Mr JOHNSON — But even under the old system they still did not list them until they had the transcripts, as I understand it. So they had the transcript, and they did not list any of the appeals without the transcript anyway. I am just saying that that is probably one of the biggest problems there is here, the delay in that.

Ms BEATTIE — That has certainly been raised with us before, the delay with transcripts.

Mr JOHNSON — Your comment about Victorian magistrates — I do not really understand it. Their decisions should not be part of the material that gets used in the District Court anyway.

Mr LUPTON — That point really gets raised if we were looking at restricting rights to appeal on a question of law. The magistrates would have to spend significant time making sure that their reasons stood up.

Ms BECKETT — Yes. As it is under our system, it is a de novo, so you cannot describe our system as not being de novo. It is a de novo despite the fact it is on transcript, so the judgment of the Local Court magistrate is not relevant and should not in fact go up. It should be objected to and taken out, if it is sought to be tendered. So the argument of that magistrate, on our system, is that it would be irrelevant — the quality of their judgment.

Mr LUPTON — So in this sense the system of review or appeal to the District Court that you have does not seem to have had any bearing on the way Local Court cases are conducted, really. The changes in 1999 do not seem to have had any major effect.

Ms BECKETT — We were thinking of this beforehand. I think because you know that you are confined to the transcript unless you can satisfy the tests under section 11, then perhaps a little more time is put into ensuring — it depends on how each independent practitioner runs their cases; do they run their cases in the first instance with an eye to acquittal or do they have their eye to an appeal? But most competent solicitors would take the view that you run it in the full and proper way at the first instance. I suppose you — —

Mr MULDER — It depends on the magistrate.

Ms BECKETT — It can depend on the magistrate. You may not call your client, but now you think, will that be a problem on appeal in terms of not being able to satisfy the criteria, and do I not take that risk, therefore I put them in the witness box now?

Mr JOHNSON — That was a comment made to me by a few people. You do know the magistrates, you do know or have an idea of what their attitude is going to be, and apparently in the old days you would often not call your client. You would hope to cause some inroads in the prosecution case, but you would not call your client, and you would be very well aware that if the magistrate did not agree with you, you were able to call your client in the appeal. Now, given that you were legally represented, you would possibly have a bit more difficulty asking for that fresh evidence to be called, because they were legally represented and they made some sort of tactical decision.

Ms BECKETT — So from a public policy point of view it is probably a better system as it is, for those reasons.

Mr JOHNSON — We are defence lawyers as well, and I can see the reasons why there was some concern about victims and witnesses being cross-examined twice in the same case — but I am sure you are getting that sort of information from elsewhere — but I think we generally would not mind another go if it had not gone very well in the Local Court.

The CHAIR — Can I ask you about sentence appeals, because whilst you are required to rely on the evidence in the Local Court, as I understand it, there is no requirement to use the Local Court transcript. Can you tell us about that?

Mr MULDER — They do not use the Local Court transcript — very rarely.

Ms BECKETT — That is de novo as well. You are not tied by the evidence that was tendered in the Local Court, so you can still object to the facts. Normally if it happens and you do not want to rely on the second document that was tendered, it does not go up. If it was a defence document in the Local Court, it does not go up on appeal unless the defence tenders it again.

Mr LUPTON — So the restrictions on witnesses and evidence and so forth simply do not apply?

Mr MULDER — We very rarely call evidence in the Local Court on a sentence matter. It would be frowned upon in our local courts; we just do not have the time, whereas in the District

Court you may call character evidence, you may call the parents, you might call somebody from the rehab to bring out how they are going — —

Mr LUPTON — In the Local Court it might be done by a letter or submissions?

Mr MULDER — A letter or something like that, but it is just submissions, yes.

Ms BECKETT — You do usually rely on the documents that are attached from the Local Court, but not always.

Mr JOHNSON — You never have a problem introducing further and subjective material and fresh evidence, and I also cannot remember ever having a transcript of the plea of guilty for a severity appeal. It is not ordered. The only time I can imagine it might have been was where you for some reason were allowed in the Local Court to call a string of character referees. But I would imagine the judge would say, ‘Well, I don’t want to read it. If you want to call him again, call him again now’. So there is not that delay in ordering the transcripts. I have never seen a transcript in a severity appeal.

Ms BECKETT — I had a situation the other day where somebody tried to tender the transcript of the judgment of the Local Court magistrate. Of course it was objected to and it was not tendered. I think that stems from a misunderstanding that it is de novo and it must be treated that way. Any judicial officer who says, ‘What is wrong with that sentence?’ is approaching it, I would suggest, from the wrong way. There is a tendency to do that — that is, ‘Let us start from that sentence they received in the Local Court and work out what is wrong with it’. In fact, that is in practice what happens.

Mr LUPTON — That is part of the subliminal problem with all of these things, whether it is the conviction or sentence issue. The second judicial officer always has this underlying tendency to be looking for where it went wrong. Someone is in front of you because they are complaining about a decision someone else made. It is an inherent problem we are trying to grapple with.

Ms BECKETT — It is a bit of a fiction between the Local Court and the District Court. The same sort of principles creep into an appeal between the District Court and the Court of Criminal Appeal. Although they have higher standards in terms of the tests to be applied in terms of interfering with a lower sentence, there is a tendency to treat it in the same way.

Mr JOHNSON — There are a lot of other underlying issues as well. Most judges know that the Legal Aid Commission has a merit test in relation to all-grounds appeals and indeed in relation to severity appeals. In talking about all-grounds appeals, they can see us on the record for five or six appearances where the transcripts have been ordered and then suddenly legal aid is no longer in it. They know what has happened.

We are not always right — in fact, I have seen occasions where an assessment of merit has been made and the judge’s view has been different. It is very embarrassing but it does happen. However, there is that issue as well that legal aid has a merit test and indeed needs a merit test for appeals, and judges know that. There are all sorts of undercurrents.

Mr MULDER — And the clients have the right of appeal against our initial decision on merit and they can then go before the District Court and say they need a further adjournment because they are appealing to the Legal Aid Review Committee for a second decision. That is noted somewhere on the District Court — —

Mr LUPTON — That is de novo?

The CHAIR — In terms of where witnesses are allowed to be called, Judge Blanch said that probably in his estimate of the 1540 cases that go up on all-grounds appeals, in less than 5 per

cent of those cases would witnesses be allowed to be called. He said that in probably less than 10 per cent of cases was there a submission from the appellant that witnesses be called. Does that accord with your experience as the Legal Aid Commission?

Mr MULDER — I have not been knocked back yet in cases where I wanted to call fresh evidence. It has always been a witness who was not available or we were not aware of this witness — —

The CHAIR — On appeal?

Mr MULDER — On appeal. The grounds have been sufficient for us being allowed to call fresh evidence.

Ms BECKETT — I could not put a number on it, I could not begin to pretend to be accurate on that. But certainly in the majority of cases fresh evidence is not called, in my experience.

The CHAIR — Is that because you as a lawyer are making the assessment that given the grounds on which fresh evidence will be allowed, you would not be able to adduce it?

Ms BECKETT — My view is often that I would not have run the case that way but apart from a tactical reason I cannot think of a ground that fits within the wording of the legislation to get over the threshold. That is simply a tactical issue.

The CHAIR — Would you change the threshold if you had the capacity to reform the New South Wales legislation?

Ms BECKETT — By special and substantial and in the interests of justice I think they are pretty predictable, and there is a bit of room to move within the case law that defines those provisions. As I say, most of the times when I have chosen not to it has been simply tactical. I do not know on a public policy basis whether there is an interest in simply re-running matters because there is a tactical advantage. But from a defence perspective we would prefer to have a tactical advantage.

The CHAIR — Sure. Are there any other questions? Is there anything else you would like to say to us?

Mr JOHNSON — I did actually want to talk about the problems with transcripts. That is a real problem; it delays things. The other thing was the amendments, that things should have been thought of first and the ability to remit matters back to the Local Court so that they do have their first hearing there. From my point of view the protections for unrepresented people in the Local Court are essential if you are going to have this sort of system. There needs to be — and it is in our legislation — particular regard to whether the person was represented or not.

Whatever the system is, you are still going to have self-represented people appealing anyway, and they take up a lot of time, from what I observe. But as long as there are reasonably loosely worded safeguards in terms of reasons for further cross-examination or reasons for calling fresh evidence or other witnesses, I think as long as those safeguards are in there, we are reasonably happy with what we have got.

Mr MULDER — You would have to have those safeguards.

Mr JOHNSON — Yes.

Mr MULDER — The right to call fresh evidence — —

Mr LUPTON — So the refinements that you have had put into your system since 1999 have largely taken care of those problems?

Mr JOHNSON — I believe so.

The CHAIR — Although Roland Bonnici was basically saying that it should be another test to find out whether or not you should actually have a fresh brief.

Mr MULDER — He would like a lower threshold so we could open the door for those cases where we would like to go back and really — —

Ms BECKETT — Which is really the old system, where you were allowed to deal with and you could tender the transcripts, so that hybrid system as he was describing it was intact. It was really the old system.

The CHAIR — No. He was talking about that, but he was also saying that rather than an as-of-right, fresh re-running of the case you should be able to convince a District Court judge that it was in the interests of justice to re-run the case, not just strictly on the transcript, not strictly on calling selectively fresh evidence or new witnesses, but the whole case again.

Mr LUPTON — I suspect that in practice that would be roughly the old system, in effect?

Mr MULDER — Yes, basically.

Ms BECKETT — It is hard to think how you would fashion that.

The CHAIR — Thank you very much for your time. We appreciate it as you are obviously incredibly busy.

Ms BECKETT — Thanks.

Ms HADDEN — You have been generous with your time. Thank you.

Committee adjourned.