

**LAW REFORM COMMITTEE**

**Inquiry into County Court appeals**

Melbourne — 13 February 2006

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Witnesses

Mr R. Melasecca, immediate past president;  
Mr M. McNamara, deputy chair; and  
Mr J. Dowsley, deputy chair, criminal law section; Law Institute of Victoria.

**The CHAIR** — The Law Reform Committee welcomes representatives from the Law Institute of Victoria to this hearing into County Court appeals: Mr Rob Melasecca, Mr James Dowsley and Mr James McNamara, another member of the executive committee.

We have half an hour, so could speak briefly to your submission and then we would like to ask questions for the last 15 minutes or so. I indicate that there is a presumption that because this is a public hearing your submission will be on the public record. If there are any aspects of your submission which you want to be heard in camera, then you can indicate that to us, but otherwise the transcript will be a public document placed on our web site and made available for other people to read and peruse. We are governed by the Parliamentary Committees Act, which extends parliamentary privilege to these proceedings.

**Mr MELASECCA** — I have a correction. We have had some changes at the law institute. I am now immediate past president. James is the deputy chair, and Michael is also a deputy. I suppose in starting this discussion I should say that there is a lot of experience in criminal law defence present. I have been probably 28 years in the business and in the criminal section at the law institute for 12 of those as deputy chair and as immediate past chair for 3 years. Mr McNamara comes from a background of many years of being involved with the Police Lawyers Liaison Committee. Mr Dowsley is now working for the defence, but previously was in prosecution.

We have a unanimous knee-jerk reaction to the proposal. We are petrified about it occurring. We think that it would be a terrible intrusion into justice for the system to be changed.

By way of comment, it is interesting to note that we mooted this around the law institute. There are very few people who work in the defence field who can speak about having lost an appeal to the County Court other than on a handful of occasions that they can recollect. That tells us that lawyers very carefully assess whether a case is meritorious before launching into an appeal, because there are grave consequences to their clients, irrespective of what the legislation says. The thing is to make sure that there is success, so accordingly this well-balanced exercise effectively means that the members of the legal profession are carrying it out in a very well-balanced way.

To now introduce the notion of circumstances, such as were introduced recently by the warnings that were given on the last amendment, to us is horrendous. We believe that as a result of that we as defence lawyers will elect to go for trial and have trial by judge and jury preferably than summary justice. We will no longer follow through in a fast mode; we will very carefully assess each and every case, much more so than we have previously done. We will make sure that every case goes from perhaps the normal 10 to 15 minutes into half a day to a day, and funding for all this will need to be put in place.

Effectively we believe that what magistrates do intuitively will be bogged down by the concern of not being able to rectify mistakes that occur. We are petrified of it, and we think that it would lead to an unjust situation. It is our experience already that the warnings that are needing to be signed by appellants who go up to the County Court are already having an impact on justice — that is, that the true decision whether to appeal or not is not so much the merits of the case but the fear of an inappropriate exercise of a judicial discretion in the County Court.

Injustice is already occurring as a result of the last amendment and we will not allow it to occur a second time. If there are to be any amendments, I think many defence practitioners will opt for trial, or they will start processes of further and better details, ask for more information from police and start to interrogate at summary level in correspondence. It will turn what has historically been a very fast system of justice — and a pretty accurate one, because magistrates are fairly intuitive — into a system where no mistakes can be made. If that is the case, it will bog the system down, there will be significant delays and we will not take any chances. We are too scared to take chances.

The reason the County Court has the difficulties it has is because there is no appeal as of right from the County Court. You can only go from the County Court to the Supreme Court because of a mistake in law; therefore, in the County Court everything gets done slowly and carefully. This will occur in the Magistrates Court. We are just stepping it back so that one has to assess the purpose of these changes. If the purpose is to improve justice, that will not be achieved. If the purpose is to stop or improve case flow, that will not be achieved. The only thing that will be achieved is the turning of a junior court into a very serious court where everything must be considered. I know that James wants to say a number of things.

**Mr DOWSLEY** — To add to that, one of the more important points we seek to make in these hearings is that the flow-on effect will be a slower process in the County Court if this proposal is put through — that is, more people will elect to go to trial as a matter of certainty, one would think, therefore increasing the waiting lists in the County Court. And there is a double process that things will slow down, as Mr Melasecca just said, in the Magistrates Court, because if there is one thing that magistrates will be concerned about that is being overturned on appeal is an error in law.

Like anybody else they have professional pride of course, and they will be seeking to ensure that they do things absolutely by the book. That will take away what we have now and which Mr Melasecca has talked about — that is, some instinctive process that happens in the Magistrates Court where sentencing happens expeditiously, but we say justly, to all parties concerned. We are not only talking about the defendants but also about the victims, the police and the prosecution.

We say that there will be a double effect in terms of delay at an upper level and at a lower level. In our respectful submission to you, that means the cost to run the County Court — when inevitably you are going to put more cases in there by taking this de novo right away from defendants — will balloon out in terms of the County Court, and we say it will not be cost effective.

At the moment there is not enough incentive at the Magistrates Court level as it is currently for defendants to consent to summary jurisdiction on indictable matters. If you take away their de novo rights, there will be less ability for them to consent — that is, there is less incentive, therefore they are more likely to go to the County Court. That is a natural or possible progression of the steps that the committee seeks to make. At the moment we say that the way the Magistrates Court is effectively run benefits all participants — that is, the defendants, the community at large and the victims — because there is speedy resolution of matters. It is done so with a view to all interested parties, and, as we say, it is done so expeditiously. Abolishing the de novo rights is going to slow the entire process. It will also likely reduce public confidence in the system as it is now.

**Mr McNAMARA** — We could normally do a straightforward Magistrates Court plea in the time we have taken to do this. We need to be that quick because the magistrates have anything up to 100 cases to do every day. If we start slowing down and touching every point that we have to touch in a plea to stop the appeals and to avoid the problems that go with them, it will take all day. The list in just the Magistrates Court will blow out.

To be fair to the magistrates, there used to be 97 of them. I do not know the exact numbers at the moment; I think it is a bit more. If we presume that they are all perfect at their jobs and that no magistrates have bad weeks and bad months but occasionally have a bad day, and if we do not have the proper right of appeal to the County Court — and it is not relatively easy to fix up mistakes — all sorts of injustice will be done when they make mistakes.

Magistrates would not sit here and say they do not make mistakes; clearly they make mistakes by virtue of the volume if nothing else. If we had all day to do each case, then terrific, things would probably be more perfect — if that is grammatically correct. The bottom line is that they do make mistakes; and if we cannot fix it, there is going to be a lot of injustice. We have all done appeals where we have all shaken our heads and said, ‘This is a ridiculous decision’. Whether you think it

is because a magistrate is having a bad day or is a bad magistrate does not really matter. Having proper appeal processes gives us a chance to fix things when they are wrong.

**The CHAIR** — Would not those mistakes, as you call them, be able to be fixed under the new system? You would be able to appeal on errors of law and on the basis of the excessive nature of the sentence, so those two mistakes, as you call them, would still be the basis of an appeal to the County Court. That is not being removed, or not proposed to be removed.

**Mr McNAMARA** — The problem is in the definition of those terms. Mistakes of law are not always the problem. Magistrates are pretty good. There are some difficult magistrates, who have long-winded explanations for what they are doing and which tend to close the doors. They are all there; they do not want to be a burden. As a matter of law they say, 'I have thought about all of these things', and as a lawyer you cannot touch it because it looks all right on paper, but the reality is that some poor person is going to jail for six months when they should not.

**Mr MELASECCA** — In answer to your question, Chair, the difficulty is that there are many, many cases. We are not concerned about the guilty or not guilty. So many cases in the Magistrates Court end up being pleas of guilty, so we are concerned about the sentence applied. That is why as an error of law the main appeal from an error of law is that the sentence is manifestly excessive. It is not a question of whether it is excessive. To be an error of law the sentence must be manifestly excessive.

It is very difficult in a Magistrates Court to call any sentence imposed manifestly excessive and therefore give it the label of error in law. What you are doing is removing the ability for a magistrate to say, 'I think this is the sentence', and then it is awfully wrong to have that right of appeal on someone applying the intuitive synthesis yet again.

**The CHAIR** — Would it not be the case though that if a magistrate made other errors in terms of procedural fairness, that that would also be the basis of an appeal?

**Mr MELASECCA** — It is not going to happen. Yes, you are right, that is what will happen, but that is not what is happening now. At the moment we are moving along at a very fast rate of speed, all trusting each other and all very confident in each other's abilities. We know the prosecutors, the magistrates and the police, and we are all going with it because we all have a level of trust.

I do not know about my brethren, but on the three or four occasions that I can think of in a 30-year career that I lost an appeal to the County Court, it devastated me. It totally destroyed my ability to function for the next few days because it was so disheartening to see injustice applied. I would never let that occur. If I knew that I had no appeal process, I would be so careful with every case.

I am not saying there is anything wrong with having a Magistrates Court process which is very detailed. That is fine, but I do not think that is what is being sought to achieve. If you are trying to achieve going faster and having more justice, this is not the way and that is the concern. As lawyers we will adapt. If you remove the de novo, we will adapt. We will become virtually like civil lawyers. We will start to interrogate, to demand things and to subpoena and the process will bog down. That is our concern.

**Mr DOWSLEY** — I think it is hard to be critical — and we do not seek to be critical of your point, Chair. There is nothing wrong with a carefully considered decision on each occasion — there is nothing wrong with that of course — but that point is that if you bring in these proposed changes, then that is exactly what is going to happen. Every case is going to slow down from every angle — that is, the defence preparation, the prosecution and the magistrate. Inevitably decisions would have to be made to put on more magistrates — a considerable number of them — in order to cope with the volume of cases that go through that court. At the moment we say that

there is nothing wrong with the system. Yes, mistakes can be made, but they can be rectified in the present system.

**The CHAIR** — You made the point in your submission that you believe that more cases will go to the County Court for trial. Could you explain why you think that would be the case? Why would it of necessity mean that more of those cases that would ordinarily be heard in a Magistrates Court would be transferred to the County Court?

**Mr DOWSLEY** — It is because the proposed changes would take away one of the incentives that defendants have at the moment in that they have the option, as you would be well aware, for any indictable matter to go to trial by judge and jury in a Magistrates Court. I would say that well over 90 per cent of cases get dealt with in a Magistrates Court because the consenting comes from the defendant in relation to having it heard in the summary level.

Why I say that those numbers would decrease — that is, that people would elect to go to trial — is that part of the incentive, being dealing with the matters at a summary level, is that they have a right de novo to appeal. I understand that you are not taking away their rights to appeal; however, you are making it more difficult — considerably more difficult — for them to appeal. We would have to explain that as defence practitioners and tell them that their chances in terms of getting a successful appeal to the County Court could not be guaranteed. That would have a marked effect on their decision-making process. As lawyers we would have to explain their rights, and they may well take it to judge and jury. We say that because they have not got much to lose then. The incentive is evaporating.

**Mr LUPTON** — Is it sentencing differential that they stand to lose?

**Mr DOWSLEY** — With a sentencing differential the County Court are still at large, in terms of obviously they have all the powers that the Magistrates Court would have. But effectively — and I speak as a practical person who is at the coalface every day — that would impact on their rights. They may well think that they would prefer to stay at the Magistrates Court's level, but they are losing that ability because if they take their rights and go to a judge and jury, they would get the same result. We would have to explain that as well — that is, that they could possibly get the same result.

**Mr MELASECCA** — I would like to add to the earlier question from the Chair in respect of why they would elect to go for trial. It is just a practical reason. What occurs is that if one elects for trial, you have the right of a committal before you go for trial. The right of a committal allows you to better assess the case in a very meticulous and detailed way without exposing yourself to any sentence. When you no longer have the right of appeal, to be safe it is preferable to go by way of committal where you can test the case and know fully that by the next time you appear you will be able to say, 'Yes, I am guilty' or, 'No, I am not guilty'. It is the question of no longer taking chances.

**Mr HILTON** — I must admit I am finding it hard to follow the logic in this. If only 2 per cent of cases go through this de novo process anyway, what is the issue, if all we are saying is that we do not replicate something which is already being done, presumably at a professional and competent level in the first place?

**Mr MELASECCA** — I can answer that. The reason is that, right now, we are trusting everyone and are not concerned, simply because we have that comfort level. What is only 2 per cent at this point in time will be no longer. Because we are trusted to look after our client, we get the case and we are asked to advise. The difficulty we have is that we must advise accurately and correctly. We always have the safeguard of a de novo hearing in the event that we are wrong.

The answer is that it is only 2 per cent now because the system is working well. It will not be 2 per cent when we are very concerned about what the possible outcome will be. What will occur is that we will then start being very careful about what we do.

**Mr HILTON** — Of course what the DPP said this morning — and I am sure you will look at his submission — is that if we take away this second look, it means that the lawyers have to get it right the first time around.

**Mr MELASECCA** — We agree.

**Mr HILTON** — Is there anything wrong with that?

**Mr MELASECCA** — Nothing at all, except: what are your objectives? Are they to speed up the system and to save costs? Because if they are your objectives, that is not what you are achieving. That is a different objective. Getting it right the first time — we agree that is exactly what we will do. It really depends what you — —

**The CHAIR** — It will take longer. It will slow it down.

**Ms BEATTIE** — Throughout the whole process.

**Mr LUPTON** — The further point that the DPP was making was that of course the system should try and get it right in the first instance, but why is allowing somebody to simply have a second go at it more likely to get it right? Can you address that point?

**Mr MELASECCA** — Yes. It is the fact that you have that safeguard. It is a practical answer rather than perhaps a legalistic answer. The practical answer is: it allows us all to move faster and trust each other without the need to be very careful.

**The CHAIR** — To dot the i's and cross the t's.

**Mr MELASECCA** — That is it. What I am saying is if I compare my civil law side of the practice to this other side, I cannot believe what they do. I look at them and say, 'Why are you doing all this? Why are all these letters going forward? Why are there all these interrogatories? You are all crazy!'

Whereas we do it with, 'Hello, Gerry, how's it going? Let's push this through'. All of that will have to stop. That is the answer. Of course we will be more efficient and we will be a little more careful; but the bottom line is: no more chances will be taken and trust will not occur.

**Mr McNAMARA** — And the tone reflected in, 'Just have a second go' is that you are just having a second go. But the reality is — and it is proven — that it is only 2 per cent. We do not just give all of these a second go — it is not just open slather. Very few go on a second time to have another go, if you want to use that language, because of the costs, the time and everything else involved. All those costs and so on have stopped ridiculous appeals.

I am sure there are a few and they often involve people appearing in person, but the percentages of people just having a go for the sake of it are small. It is usually for a very good reason, otherwise they cannot afford it. Legal aid does not lightly let people do it, and people's pockets will not let them privately pay for it, if there is no good reason.

**Mr DOWSLEY** — And legal aid is merits-based; so it is not as if we can just take legal aid and use those funds.

**Mr MELASECCA** — An interesting statistic that we have not got but you might like as part of your research is: how many pleas of guilty in the Magistrates Court become pleas of not guilty in the County Court or vice versa? The reason I ask that is that many a time, as an appeal

practitioner — because I do get a lot of appeals — we find that people pleaded guilty in a hurried way because of the trust element, but when properly assessed, a ‘not guilty’ plea was more appropriate.

So I find that on many occasions we are, on appeal, changing an appeal from guilty to not guilty, and that is why you have both, ‘Are you guilty?’ as one ground, and, ‘Is the sentence manifestly excessive?’ on the other. Many a time, the appeal process is different. People are either going up for the opposite to what they did in the Magistrates court.

**Ms BEATTIE** — You talk in your submission about the de novo appeal system being quite common in English law. Can you talk about other jurisdictions and the arrangements that work in them? And how well do they work?

**Mr MELASECCA** — No, I cannot.

**Mr DOWSLEY** — No, I am not aware of that.

**Mr McNAMARA** — I am not as smart as these two, so don’t ask me!

**The CHAIR** — I take you back to the other 1999 changes. You have indicated that they have had ‘a chilling effect’ on the lodging of appeals. You referred to the number of appeals lodged in the crisis period following an initial decision, but that they are withdrawn when the person has had the opportunity of reflection, and the potential costs if they do not withdraw on time.

I think the DPP was basically saying today that anyone who is out of time and goes before the County Court to withdraw their appeal will be allowed to do so. Do you have any contrary evidence to that?

**Mr MELASECCA** — What was meant by ‘chilling’ and what was meant by that particular paragraph in the submission is ‘chilling to justice’. We are finding that the real discussions taking place when you are advising appellants is not about the merits of the appeal but the fear of the possible increase. And that is chilling because what you should be discussing, in a just society, is whether the sentence was just, rather than whether there is a risk that it will be increased. Because we cannot predict with certainty or guarantee that there will not be an increase, we are therefore not advising our clients on the correctness of the decision in the first place, but rather we are living in this world of fear that it might be increased, which is not really what we should be all about. That is what is chilling.

**The CHAIR** — But on that one, should it not always be up to a judge on appeal to increase the sentence?

**Mr MELASECCA** — Yes.

**The CHAIR** — Should that not be something that lawyers, as a matter of course, should point out as one of the risks associated with making an appeal?

**Mr MELASECCA** — They do, but the beauty of justice is that judges in the common-law system give warnings, and do so in a very accurate and appropriate way when they see that an appeal is frivolous, vexatious or lodged for the wrong reason. They have assessed it, they have an intuitive process and they say, ‘Does your client know about’ — —

**The CHAIR** — But in a sense you are now giving a warning. You are now saying, ‘Look, we could take this on appeal, but I have to tell you that in certain circumstances’ — and they could include the ones you have just outlined — ‘you could face the risk of an increased sentence’. Is that not, in a sense, trying to provide a forward warning or deterrent to people from taking frivolous cases to appeal?

**Mr MELASECCA** — No, because we do that as a matter of course, as jurists and lawyers, because we know that in a hearing de novo anything can occur.

**The CHAIR** — But what is inappropriate about you being the one who provides that warning before someone goes before a court — —

**Mr MELASECCA** — The inappropriateness is that when it is there as a warning and a person has been warned, an appellant is being told of the warning in a way that is calculated to prevent him lodging the appeal. It is not calculated to prevent him lodging a vexatious or frivolous appeal; it is calculated on uncertainty, on ‘Mr Melasecca, Mr Dowsley, McNamara, can you guarantee us that it will not be increased?’ — and our hands are up in the air.

**The CHAIR** — But is there not always that uncertainty?

**Mr MELASECCA** — It is a lot different when it is highlighted in text and thrown at you and that becomes a document that must be signed by the appellant. What is the purpose, in a just society, of an appellant signing a document which gives him notification that a sentence — —

**The CHAIR** — It is making the appellant fully aware — I am just putting the contra view here — that they know the risks associated with taking that to the higher court.

**Mr McNAMARA** — Part of the problem is that if you are told that 90 per cent of this will be fixed and 10 per cent might increase, unfortunately our client base will focus on the 10 per cent, and it terrorises them into not making what might be a sensible appeal.

**The CHAIR** — I did put two questions to you and it was a bit double-barrelled. It was the question of people being able to withdraw outside the time period. Can you comment on that?

**Mr MELASECCA** — Most of the time it is not a problem with most sensible judges. There are occasions when it does become a problem, and it does involve aspects of potentially not being granted the permission; but in recent times that has improved, and we are not finding it to be as much of the problem as it was when it was initially legislated. But I agree that if one looks at percentages, it does not occur all that often.

**The CHAIR** — I think there was a suggestion by one of the other submitters that perhaps you should be able to withdraw at any point up to three weeks before the trial. I think we put that to the DPP, and he thought that was a reasonable viewpoint. Do you have any comment on that?

**Mr MELASECCA** — You should be able to withdraw at any point up until you stand on your feet, and that is what happens in the Court of Appeal. Effectively the most sensible court in our state has that system.

**Mr DOWSLEY** — That is a good point that Mr Melasecca makes. You can withdraw in the Court of Appeal at any point in time, but not the lower courts, so it does not seem to be logical. The rule should be the same.

**The CHAIR** — Thank you very much for your comprehensive submission and for taking the time to come and appear before us today.

**Witnesses withdrew**