

**LAW REFORM COMMITTEE**

**Inquiry into County Court appeals**

Melbourne — 14 February 2006

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Witnesses

Mr M. Wighton, manager, regional divisions; and  
Ms T. Segbedzi, policy officer, Victoria Legal Aid.

**The CHAIR** — I welcome Mr Michael Wighton, the manager of regional divisions, and Ms Tonya Lee Segbedzi, the policy and research officer, from Victoria Legal Aid. I believe Mr Bill Grimshaw, an articulated clerk, is also here with you in attendance. We have about 40 minutes; if you would like to talk to your submission, after that we would be very happy to ask some questions.

**Mr WIGHTON** — Thank you very much. On behalf of Victoria Legal Aid I would like to thank the committee for its invitation to attend today to address the matters before you and to expand a little on our written submission of 9 January. VLA's interest in the issues before the committee is based on the fact that we are the state's largest criminal law services provider, having more than 130 lawyers in the field doing criminal law work. We are also the primary funder of criminal law legal services to the private profession which conducts grants of legal aid on behalf of VLA in favour of defendants before the courts.

In 2004–05 we funded a total of 22 000 Magistrates Court matters, of which about 8000 or so were conducted in-house by VLA's own staff. In the same year, the last financial year, we conducted 40 500 duty lawyer appearances in the Magistrates Court around the state and had a further 7500 performed for us for a fee by the private profession as duty lawyers. My own personal interest is that I have been a legal aid lawyer for the last 16 years. I have appeared for a bit over a decade exclusively in the Magistrates and County courts doing criminal defence work and have probably appeared in 5000 or 6000 individual cases over that time.

VLA is both a funder and a provider of legal services. As this committee has heard several times before in different inquiries, our resources are very stretched. VLA has a very strong interest in a criminal justice system that is effective, efficient and low cost. We have no interest in creating work for lawyers, pushing up the cost of lawyers, or making the legal system more complicated than it already is. Our concern is simply that the appeals from the summary jurisdiction of the criminal justice system to the County court be preserved as they are now, as we believe this represents the most efficient and effective aspect of the wider legal system.

The major themes in our written submission are that appeals de novo are a vital feature of the Victorian justice system, and to simply abolish them without making serious changes to the way that Magistrates Courts practise, and their procedures, would be quite regressive. This is because de novo appeals are a relatively cost-effective function and because they constitute a major protection of the liberties of the citizen. De novo appeals allow the Magistrates Court to function as a court of summary jurisdiction of no record. An appeal as of right, as opposed to an appeal on the law, is an essential safeguard in a legal system that sees around 120 000 criminal cases initiated in Victoria alone. They are relatively serious charges on summons as opposed to simply fine enforcements under the PERIN system.

The committee's terms of reference include an examination of whether the so-called historical justification for the de novo process should continue to exist. It has been said — and I am not sure if the committee has already heard this evidence from anybody else — that one of the reasons, or it is believed that one of the reasons in an earlier era, was that stipendiary magistrates were not required to be legally trained. It is our submission that this was not the rationale for de novo appeals — it never was and is not today. In fact the magistracy has been comprised mainly of lawyers professionally trained for several decades, yet the issue has arisen very recently.

The true historical — probably still current — justification for de novo appeals really harks back to the common-law system in England when the visiting magistrate would sit and hear minor cases and deliver a summary judgment as they do now. De novo appeals existed so that the citizen aggrieved with the ruling of a summary court of no record could still access the king's justice and go before a Queen's Bench — the equivalent of the County Court today.

In the County Court a jury of 12 is the arbiter of fact at the first instance and therefore appeals on factual issues are not permitted to go to the Supreme Court. The defendant in a Magistrates Court

does not have the benefit of 12 minds of his or her peers deliberating on the facts — it is only by a single magistrate; a very overworked magistrate sitting in a very busy court. The magistrate is the only arbiter of fact. The *de novo* appeal is a safety valve for where the judgment of an individual arbiter errs. Appeals to the Magistrates Courts only against errors of law do not adequately protect, in our opinion, the rights of defendants. This is particularly so as the types of offences and the range of offences, particularly serious criminal offences, that a Magistrates Court may hear on a summary basis continue to increase and change.

Parliament obviously likes the efficiencies that are inherent in the summary system of law because over the past two decades it has empowered the Magistrates Court to deal with an ever-widening range of serious criminal offences — from robbery to serious assaults. Even when I started practising a short 16 years ago minor thefts, minor assaults and minor drug charges were the main staple of the court, whereas very serious charges of threats to kill, aggravated burglary and robbery can now be heard, and with more to come. The Department of Justice is currently looking at recommending an expansion of the range of offences that the court can hear, which in VLA's view makes the issue of *de novo* appeal rights being preserved, even more important.

A civil society cannot expect a citizen to face a single magistrate sitting in a busy, overworked court, electing to give up their right to a trial by a judge and jury — a right that they still have — to be dealt with in a speedy fashion, and then have no right to take a grievance about the way a magistrate has dealt with the case before a judge — no right in the sense that a *de novo* appeal is an 'as of right' appeal as opposed to an appeal where a point of law has to be established before the appeal can be heard.

Magistrates are entitled to be proud of the institution of the court and their work within it. As you have already heard, only 2 per cent of cases are ever appealed each year; 2 per cent of nearly 120 000 cases is a significant vote of confidence in the work of the Magistrates Court. The magistrates get it right most of the time, but not always. Mistakes are made; memories can be faulty, especially in long hearings. Some magistrates are stationed in small communities in Victoria and have been for many years, and their ability to work at arms-length is sometimes lost or sometimes weakened. It is just the reality of practice, I think, in some locations. Magistrates in such circumstances may have longstanding relationships with local police, but again they still get it right 99 per cent of the time. Even if they do not get it wrong for that reason, the perception may exist that a decision is influenced by familiarity.

*De novo* appeals are at arms-length. They provide the safety net of a dispassionate arms-length hearing by a stranger if the appellant feels the original decision was not made on relevant considerations. Appeals on points of law, which is the obvious replacement for a *de novo* system, are far more complicated, time consuming and expensive than the system where the appeal is as of right.

The Victorian justice system has three tiers, but it is in the Magistrates Court that the real business gets done. It handles a truly massive number of cases every year. The appeal numbers are not large, compared with the rate of appeals from the County Court to the Supreme Court and the Court of Appeal. Our analysis of statistics is that, as the written submission suggests, appeals from the County Court on points of law to the Court of Appeal run at about 14.5 per cent per year — nearly an eightfold increase on the rate of those from the Magistrates Court to the County Court.

Of course those appeals that are heard in the Court of Appeal are very expensive, very complex and take a fair amount of time to deal with — the average Court of Appeal matter takes a full day to determine. You only need to look at the legal aid rates of pay for legally assisted matters in both courts: in the County Court we pay a lump sum fee of around about \$780 all in; for the Court of Appeal we pay around \$2500 as a lump sum with additional costs for appearances on subsequent days, which is often required. It is a significant increase in costs. That represents, I think, what the

potential is if there was a move to make appeals from the Magistrates Court to the County Court restricted to points of law only.

When I worked in the Magistrates Court on a daily basis as a defence lawyer for legal aid I appeared in a large number of hearings, and I can attest to the efficiency of the Magistrates Court. However, it is an efficiency that would be dramatically curtailed, I believe, if the right to appeal as of right was removed. Defence lawyers would be forced to run cases like trials, ensuring that every point was taken up and pursued, every avenue in a case explored, every bit of evidence carefully pored over for relevance, admissibility and probative value. Hearings would necessarily be longer.

I sometimes think about the work of a duty lawyer in the Magistrates Court as a bit like a tightrope walker with the appeal as of right process as the safety net. If the defence lawyer is walking across the tightrope, he will scamper across a lot faster with a safety net in place than if there is not one. That is meant to illustrate that if you take away the appeal as of right and restrict appeals to narrow points of law, the safety net is effectively removed and that means defence lawyers in that Magistrates Court — where the vast volume of work gets done — would have to slow everything down and take more time and more care to ensure that not a single mistake is made by either them, their client or the magistrate. In a court that has the volume which the Magistrates Court has the potential to blow out significantly the total cost of the criminal justice system is a very live issue.

More defendants than is currently the case would elect, as is their right, to go to trial rather than risk the hearing of a serious charge before a single magistrate if that safety net was removed. If de novo hearings are replaced with another form of appeal, such as appeals based on errors in law and fact, we think magistrates would no doubt take more time to formulate their detailed decisions, which would, again, have an impact on the court's ability to deal with cases in an efficient manner with very fast turnover. Magistrates may also be reluctant to hear matters where self-represented litigants appear. This may lead to more adjournments in those matters to allow litigants to seek legal aid, a duty lawyer or their own representation.

Abolition of appeals de novo to the County Court may also affect the services that we can provide in VLA through our duty lawyer service in the Magistrates Court. The level of service would be difficult to maintain at 40 000 appearances per year if current appeal rights were compromised. The practical impact may be that only the most basic pleas could be conducted on the first day of hearing. Other matters with more complexity might have to be adjourned off to get more time to prepare — to prepare the client, to prepare the case, to prepare evidence and to examine the evidence — again because that safety net as represented by the de novo appeal would be removed.

In general we believe hearings and subsequent appeals would be more procedural in nature, would take longer and cost more, and in the law time is truly money. The Magistrates Court system and the system of summary appeals to the County Court is cheap because it is fast. De novo appeals are efficient, timely and cheap, and we believe, in our submission, that there would have to be a strong case for removing them.

The committee is also considering the possible impact on the number of appeals if de novo appeals are removed. Our view is that abolishing de novo appeals may not reduce the overall number of appeals. The main reason for that is that the largest number of appeals are appeals against sentence, which I think run at about 75 per cent to 80 per cent of the total. In appeals against sentence in the Court of Appeal from the County Court, which are only on points of law, the main ground that is usually cited is that the sentence imposed by the judge is manifestly excessive — they are basically saying, 'I got too much, the penalty was too harsh.'. That is an appeal on law.

A lot of time is spent in the Court of Appeal deliberating on what manifest excessiveness means, but if you strip away all of the pomp and ceremony of the Court of Appeal, the arguments of the lawyers and the complexity of the arguments, you are left simply with a lawyer saying, 'My client got too long', or, 'too much' or, 'the penalty was too harsh'. That is exactly the nature of a de novo appeal in the County Court. My point is if you abolish de novo appeals and replace them with

appeals on points of law, with the largest category of appeals being sentence appeals, all you have to say is, 'I got too much', you have a point of law and you go to appeal in the County Court.

**The CHAIR** — So they would still get up.

**Mr WIGHTON** — They would still get to the County Court for their appeal. There would be no substantive difference in the nature of the argument. The remaining 20 per cent to 25 per cent of the appeals — which are the appeals against conviction, the contests of the facts — represents a very small amount of the court's work. Even if in those cases leave was required to appeal, that would simply add a hearing to the work of the County Court, add a level of administration and another day of hearing. It would be very likely that the County Court would choose to hear appeals where leave is granted on the same day but that is unknown. It is interesting to note that in the Court of Appeal leave is required for appeals against sentence or conviction but if the court does not grant leave to appeal, the appellant is still free to move on to appeal, to the next stage, to the hearing — it is not actually a bar on proceeding. Most sensible defendants would take that signal from the Court of Appeal to heart and not proceed but the fact is the right to continue is still there. My point here is if there was a similar system established in the County Court where leave is required for appeals, in our experience, looking at the abandonment procedures as a relevant issue, judges would nearly always grant leave that would allow the defendant to continue with their appeal. The leave mechanism itself might not do much to reduce or fetter the number of appeals.

**The CHAIR** — Do we have any statistics on how many people appeal on conviction and are subsequently acquitted?

**Mr WIGHTON** — Our written submission does include those statistics.

**Ms SEGBEDZI** — But not about how many are acquitted.

**Mr WIGHTON** — I beg your pardon. I asked that question today of our research staff — we cannot find that. I do not believe the County Court actually keeps those records or we have a breakdown between sentence appeals and conviction appeals.

**The CHAIR** — The fact that the majority of the appeals are on the question of sentence — 70 per cent — I assume that 70 per cent is 70 per cent of the 75 per cent that actually go ahead. Is that right?

**Mr WIGHTON** — I am not sure if it is 70 per cent of the number of filings or the number of actual hearings.

**The CHAIR** — We need to clarify that; that is a technical point. The argument cuts both ways, does it not? The argument could be equally mounted that basically the Magistrates Court pretty much gets it right. There may be issues on the question of the sentence and that is a legitimate ground for appeal, but we are not actually talking about significant miscarriages of justice as a result of the operations of the Magistrates Court. That is the contrary argument.

**Mr WIGHTON** — I understand that.....

**The CHAIR** — We have heard mixes of philosophical and practical argument. One of the arguments that has been made is the Magistrates Court is high-speed justice where not all the arguments are run in their absolute level of technicality in order to lay the grounds for possible appeal. It is summary justice, it is dealt with fairly quickly, and where it is occasionally got wrong it should go to the County Court. It is hard to us to get at how many cases we are talking about and whether there is evidence that they have got it wrong.

**Mr LUPTON** — If you could add to that, I suppose, if we are talking about 2 per cent or 3 per cent of Magistrates Court cases get appealed, three-quarters of them are on sentence. That

means that the general proposition is there is virtual unanimity that the magistrates generally get it right as far as guilt or innocence is concerned?

**Mr WIGHTON** — Indeed, and when you reflect on the fact that most pleas entered in the court are pleas of guilty they only have a very small number of contested hearings, so that might actually change the impact of the proportion of not guilty appeals. It may be a larger subset of the number of contested hearings than appeals against sentence are of guilty pleas, if that makes sense.

**The CHAIR** — The system should as far as possible ensure that no-one who is innocent gets convicted. There is certainly that question, but there is also the question of what the data is and what that tells us.

**Mr LUPTON** — Is the number of guilty pleas a factor in that often the not guilty cases go off to the County Court?

**Mr WIGHTON** — No. The cases that are intended for the County Court usually commence in the filing stream and the committal stream of the Magistrates Court of Melbourne. There is a particular stream for them. Cases that are filed in the Magistrates Court regular, if you like, proceed and stay there. A defendant has a right, as you will know, with indictable charges heard summarily to elect to go before a jury. Most do not — hardly anyone does — for a number of very good reasons. The no. 1 reason is legal aid does not allow it in most cases, unless there is a very strong argument that the interests of justice require that the case go before a jury. However, in terms of the issue of how many cases are overturned on appeal in the County Court, we do not have strong figures. All we have is our anecdotal experience; we are a very large provider of services. In my personal experience, and I believe in the organisation's experience, most cases get up on appeal.

**The CHAIR** — You must have that data on your file?

**Mr WIGHTON** — They are in individual files. I am repeating myself from a previous occasion before the committee: we have this data on our files but they are not in the system — we cannot extract it from our data collection system.

**Mr LUPTON** — You would have to look at each file individually?

**Mr WIGHTON** — Yes. We could look at all our appeal files and work out the rate. However, we know, because we only fund cases that have merit, objectively, on our assessment, and of those cases the vast majority are successful to some degree, whether it be a total reduction in sentence or a shaving of the sentence or a not guilty finding.

**Mr LUPTON** — I want to take up that point. In fact, there are two elements I would like you to address some comments to. The first is when we are talking about de novo appeals a change in the sentence — just limit it to appeals on sentence for simplicity's sake — is regarded as a victory, a successful appeal.

**Mr WIGHTON** — Downwards.

**Mr LUPTON** — Depending on what side of the bar table you are sitting on. If we are for a defendant and the sentence is reduced by any measure at all, then it is a successful appeal. However, in a de novo hearing it is really, is it not, a matter of degree and the way in which a second person looking at the same evidence can come to a perfectly valid but different conclusion. It is not necessarily the case that one is more or less right than the other — it is simply a different outcome because they have looked at it differently and perhaps in the months since the Magistrates Court case different material and so forth has been able to be put together. That is the first point, if you could just address that.

**Mr WIGHTON** — Sure. I think from the funder's perspective, and also from a defence lawyer's perspective and I imagine from a client's perspective, any reduction in sentence is a good outcome — it makes the funding worthwhile. It also has a very important corrective function in the system. These general sentences are published — I am not sure in exactly what format in terms of the overturn rate but certainly the ultimate sentences imposed in the County Court on appeal are published — and it all synthesises to form the tariff that you have probably heard of in terms of what the sentence is for any particular offence; the tariff being the most likely penalty that you would expect in certain circumstances. All of this data goes into creating this tariff and that helps run a fast and efficient summary system of justice. People know when they get to court, or their lawyers know anyway and they can advise them, what they are likely to expect. Therefore, the corrective function of the County Court appeal process is very important. If excessive sentences are imposed in only 2 per cent of cases, or a proportion of the 2 per cent, that is still an important amount. We are dealing with big numbers — 120 000 prosecutions would represent at least 100 000 individual people.

**The CHAIR** — We are not really arguing about the sentence issues because those appeals will still be allowed. We are really arguing about whether or not the case should be reheard in full — —

**Mr WIGHTON** — A full contested hearing.

**The CHAIR** — Afresh — whether the magistrate got it so manifestly wrong or whether the defendant was so badly represented and the arguments were not run sufficiently well that really that was a miscarriage of justice that would not be apparent on the face of the record and therefore the case should be heard again.

**Mr WIGHTON** — Several practical — —

**Mr HILTON** — Can I just add something there — sorry for interrupting — and maybe this is wrong but my understanding is that in the criminal justice system a person can be found guilty by a jury and can be sentenced by the judge?

**Mr WIGHTON** — Yes.

**Mr HILTON** — And there can be an appeal to the Court of Appeal that the sentence was excessive?

**Mr WIGHTON** — Yes.

**Mr HILTON** — Now the Court of Appeal does not hear all the evidence. It does not interview all of the witnesses, it does not have access to the jury room — it makes a decision based on its own considerations. Why is it different in this case?

**Mr WIGHTON** — There is a very critical difference between a Magistrates Court hearing and a jury trial — that is, as I alluded to earlier, a magistrate sitting alone in a busy court is hearing dozens of cases a day, whereas a jury is empanelled to hear one case only and all their focus, all their attention, all the resources of the court are focused on that one case. It is a critical, practical and substantial difference between the two types of hearing.

**Mr HILTON** — I would take issue with that because I think we are talking about the sentence. You do not have to hear all the evidence in a case to determine if a sentence is excessive?

**Mr WIGHTON** — No, but a Court of Appeal would at least read the transcript of the sentence. The transcript of the reasons for the sentence by the judge would also have a summary of the evidence and a summary of the allegations.

**Mr HILTON** — I agree with that but the Court of Appeal would not read the transcripts of all of the evidence which was provided in the court?

**The CHAIR** — Neither does the County Court. The average appeal on sentence, we are told, takes 30 minutes.

**Mr WIGHTON** — I was going to make the point that it is almost as efficient as the original Magistrates Court hearing — it takes just slightly longer. There are some trappings of the court that are observed so it is a little bit slower, and a little bit more time and care is taken to ensure that justice is properly done as best it can be.

**Mr LUPTON** — In that sense perhaps you could just address this point. If the law was changed so that instead of appealing against sentence as of right one had to cast it in the language of an error and say it was manifestly excessive, if that was done, what would be the practical outcome of that change insofar as how would appeals against sentence in the County Court actually run? My suspicion is it would not really change.

**Mr WIGHTON** — I think it would quite significantly change. I think it would have to.

**Mr LUPTON** — Why is that?

**Mr WIGHTON** — In terms of the total system, the hearing includes preparation by the lawyers, proofing a client and also the appearance in court. All of those things would have to slow down and would become more complex. Right now an appeal against sentence in the County Court, to pick up the earlier question, is run very basically — almost like a Magistrates Court hearing. The prosecutor has a summary, it is a copy of the police summary — the same thing the magistrate heard. It is read out, the priors are read out and it is over to the defence lawyer for the plea. It is very fast, just a little bit slower to accommodate the different procedures of the court.

If you transfer that to an appeal on a point of law, then the point of law has to be properly illustrated by the lawyer. There would have to be a written submission to support the oral submission. The judge would be dealing with important issues of case law, precedent, the law set down by the High Court and the various courts of appeal around the country to determine the common law. It is a vastly different process. It takes a lot longer. Lawyers would take a lot more time to prepare. The court would have to provide transcripts of the magistrate's decision, because you have to consider exactly what the magistrate said, exactly what informed his decision, what materials were before the Magistrates Court to inform the original sentence. This is the whole point of difference between a point of law appeal and a de novo appeal. A de novo appeal is a walk-up start and can be done very quickly, but a legal appeal on a point of law has a lot more complexity and preparation required. The impact on the legal aid fund would be significant because we would have to review the fees paid for this work. Right now a County Court appeal is effectively a summary proceeding in the County Court.

**The CHAIR** — But 70 per cent are on sentence. Surely you are doing the same thing?

**Mr WIGHTON** — This is the point. You have to find a point of law and then — —

**Mr LUPTON** — But it is really about the procedure, it is about how you conduct these processes, is it not? What counsel for a defendant appellant would have to do is convince a County Court judge that in all the circumstances of the case, and by effectively putting the plea and couching it in terms of law, the magistrate's decision was excessive in the circumstances.

**Mr WIGHTON** — I would characterise that more as a de novo appeal than appeal on a point of law. In an appeal on law you are not saying that the judge may have made a different decision, you are saying that he got it wrong in law, that the sentence was not just wrong or too

much but was actually lawfully wrong, that it failed to recognise the established common law principles behind the sentencing.

**Mr LUPTON** — Does this not get us into this really thorny issue and the whole question of what is an error of law? I think it is regarded by the higher courts that it is a serious error of fact that the court wants to interfere with and it becomes an error of law.

**Mr WIGHTON** — Absolutely.

**Mr LUPTON** — That is what I am getting at — the way you put the thing on the appeal or in the de novo hearing is really the essence of how it is dealt with.

**Mr WIGHTON** — That is certainly true but you still need to be able to support your case to the Court of Appeal, or in this case to the County Court exercising a similar sort of jurisdiction, framed by reference to the common law of sentencing. It is not as simple as saying, 'My client is a good fellow, he should have got less for that offence'.

**Mr LUPTON** — But where we are dealing with matters of sentence you can characterise, I suppose, simply an error of law perhaps being that the magistrate imposed a sentence that the Magistrates' Court Act did not allow them to impose.

**Mr WIGHTON** — Easiest kind of appeal.

**Mr LUPTON** — A classic simple case from one end of the spectrum. But then most appeals against sentence are really going to be a far different case to that, where people say, 'In all the circumstances of this he should not have been sent to jail', or a similar type of argument. Basically the original court has handed down a sentence that is just really outside the range, it is too heavy and we just disagree with it.

**Mr WIGHTON** — It is really simply a matter that a de novo appeal is a summary form of hearing. It is very, very quick. It is a synthesis of issues. You can simply say to the judge, 'We all know what the tariff is for these offences; you have the summary of the charge; you have heard the pleas, here is my plea; impose a lower sentence'. But a legal appeal on a point of law does not run that way. You have to establish not just that the magistrate imposed too heavy a sentence but that a sentence was wrong in law. So that requires a great deal more preparation, research — case law research particularly — and making a submission than a de novo hearing would really allow.

I made the point earlier that in my mind it would not reduce the volume of appeals because it is not that hard to show a sentence is manifestly excessive. What is hard is to convince the judge to act on that in a legal appeal or point of law. In a de novo appeal if the judge happens to agree with you, then he or she can simply overturn the magistrate and impose their own decision. The Court of Appeal cannot do that nor can the High Court — they have to find an error of law first. You see plenty of sentence judgments in the Court of Appeal where they say, 'We might not have imposed sentence but we cannot find an error of law; it is within range, the range being from three to seven years'.

**Mr LUPTON** — I suppose my point is what is wrong with that? What is wrong with leaving it to the magistrate?

**Mr WIGHTON** — Our position is that the whole summary system of justice is supported by the fact that there is a right of appeal. It is not the same as the County Court and the Supreme Court's original jurisdiction where you have a lot of time to prepare and have great resources; you have a grant of legal aid and you have one or two lawyers working for you. A duty lawyer working for legal aid has maybe 20 or 30 people to see that day; the magistrate has got 50 cases to hear. Everything is fast and quick. No-one has time to think about things too carefully. That is supported by the safety net of the de novo process. I can think of so many dozens of clients

of mine whom I would not have advised to even use their right to a summary hearing. You would go to the County Court for a jury trial. You might not even risk going for a magistrate on a sentence plea if you know there is no right of appeal, if you have got to find a very narrow area of law before you can challenge the decision. It would really give pause to a lot of people working in that system, magistrates and lawyers included. That is our main thrust.

**The CHAIR** — I want to come back to another aspect. Tony, do you want to ask about another point?

**Mr LUPTON** — The other thing I wanted you to comment on was the way in which Victoria Legal Aid comes to its decisions about funding. In a sense that is performing a kind of gatekeeper function. I am interested to know on what basis you make those sorts of judgments.

**Mr WIGHTON** — Guidelines for the County Court and Court of Appeal matters use relatively similar language. You effectively have to have a reasonable case to argue, an arguable case. There have to be reasonable grounds of appeal — a case that on an objective reading has an argument and a prospect of success. It is a gatekeeper role. We funded 700 or 800 appeals in the last financial year of the over 2000 cases that were heard. It is a large component. There are a number of fetters on unmeritorious appeals. One is our guidelines because most people need legal aid to go to the criminal courts. The others are the abandonment rules in the court; the possibility of costs being imposed in seriously mischievous cases although I have not heard of one where a cost order has been imposed; and of course the ultimate risk is one of increased sentence. That is the one that probably stays most defendants' hands in appealing on advice from their lawyers.

On the issue of abandonment and how the 1999 reforms have or have not worked, most defendants who abandon we see as an efficiency not as a nuisance because when you decide to appeal at the door of the court as you are leaving in the hurly-burly of the Magistrates Court, it is often done without thinking and without the lawyer having the chance to advise their client properly because the next client is waiting to be seen. On quiet reflection the defendant might decide not to pursue it, where the lawyer might advise the client that it does not have sufficient merit to run the risk of getting an increased sentence or the defendant, to use the example earlier, is able to digest and accept the penalty. When they abandoned under the old rules it was by letter or fax. If you were looking at a jail sentence, you presented yourself to an officer of the court to go into custody. Now it requires a hearing if it is more than 30 days after the appeal is lodged. To us that is a fairly serious inefficiency given that in most cases leave is actually granted. You have replaced a letter or a fax with a full hearing before a judge with a prosecutor present in the County Court. If there is no real evidence that people are suffering a detriment, or being forced to have the appeals heard because it is really in no-one's interest which is why judges tend not to do it, not to refuse leave, then those reforms probably have not achieved very much in terms of creating efficiencies.

**Mr LUPTON** — Can you give us an idea of the number of cases that are put to you for appeal funding that you do not give funding to?

**Mr WIGHTON** — The refusal rate — we could provide that to your officers. We need time to research it; I think our system can pull that data out.

**Mr LUPTON** — If you are able to do that, I would appreciate it.

**Mr WIGHTON** — We have refusal rates by category of case so it should not be too hard to find.

**Mr HILTON** — You mention that one of the issues with the Magistrates Court is that there are so many cases coming through all the time and the magistrate may get it wrong. And yet I understood you to say that in the County Court appeal it is still done very quickly and in fact there is probably no difference in time at the Magistrates Court and the County Court currently. If it is

the same time pressures, why do we believe that the County Court may get it right and the magistrate not?

**Mr WIGHTON** — I would not say the same time pressures. Roughly the same amount of time is allowed for hearing an appeal as for say a booked-in plea of guilty for a serious case; a little more time to allow the procedures of the court and the different approach in the County Court. But they do not have the same number of cases listed each day. A County Court will have maybe half a dozen appeals whereas the Magistrates Court will have several hundred. That is the key difference — it is the throughput on the day, not the length of time for any individual hearing that I was really referring to.

**The CHAIR** — First of all I have a comment on the historical justification. You said the historical justification is not about the qualifications of magistrates; it is about the fact that the Magistrates Court has not been a court of record. It is now a court of record in the sense there is a transcript.

**Mr WIGHTON** — If you ask for it. It depends which court you ask.

**The CHAIR** — It is available for the purposes of an appeal which seems to me to be the critical point that you are trying to make there. I just point to that — in fact that has changed in recent times. But can I take you to a more substantive point which is you refer to the abolition of appeals de novo in New South Wales. We can pursue this ourselves, but I am getting conflicting views about whether appeals de novo have been abolished in New South Wales or not. Your own submission is actually a little bit contradictory on this from reading it because it refers to the fact that appeals de novo were abolished in 2001 but then it says:

Sentence appeals are still heard by way of hearing de novo, although fresh evidence may be given during the appeal proceedings ...

I am a bit confused about what the actual impact of the New South Wales reforms were and is there any evidence we can access that tells us what the impact on the administration of justice has been?

**Mr WIGHTON** — We can obtain some anecdotal views from our colleagues in New South Wales if that was of any assistance to the committee, from the New South Wales Legal Aid Commission in Sydney.

**The CHAIR** — That would certainly be helpful.

**Mr WIGHTON** — My reading of the legislation which I have had a very brief look at is that they have changed the nature of appeals in contested matters against conviction — they are no longer de novo. But in sentence matters they remain as de novo hearings where fresh evidence can be introduced as is the case in Victoria currently. In a sense it is a new hearing on the same facts and circumstances. As far as I understand it, and I have not read the legislation very carefully, it is only in relation to appeals against conviction, against the finding of fact that they have removed the as-of-right ability to appeal. You have to get leave or show something other than just a desire to have it heard again. I have the legislation here but I have not had the chance to read it very carefully.

**The CHAIR** — We are dealing with two arguments. There is a philosophical one about whether you should be allowed to have it heard all over again because of the nature of the Magistrates Court, because the system should be as fair as possible to the defendant. The other one is the time-saving one. We are struggling with data so if you are able to help us with any of that and the impact of the New South Wales changes, their practical impact and what it has meant in terms of the resources of the court, that would be very helpful.

**Mr WIGHTON** — Our submission has been we do not believe it is very difficult to forecast what the changes might be right up and down the food chain, the justice system from the Magistrates Court to the County Court to the Supreme Court were de novo appeals to be removed in the sense of the impact on magistrates' decision-making, duty lawyer work, the work of lawyers and magistrates generally about the care required to make sure you can work without that safety net and work effectively. We think it is a combination of philosophical and very practical issues in the administration of justice. I have seen one other submission that use the simple line 'if it ain't broke, don't fix it' and no one can really tell us how it is broken. That of course is a matter for the committee.

**The CHAIR** — You mentioned in your submission that Victoria Legal Aid provided a submission to the Department of Justice last year on the widening of offences to be heard before the Magistrates Court. Can you tell us briefly what the main points of that submission were?

**Mr WIGHTON** — I have it with me. It is a fairly lengthy submission. It is a blow-by-blow discussion of each individual offence. We supported the reclassification of a number of offences to summary and we opposed the reclassification of some serious indictable offences to summary. It really depends on a range of offences. I can certainly provide a copy to you. It was a mixed bag of support and opposition depending on the nature of the circumstances. Many of the categories of offences the department we believe would recommend be converted to summary we would agree with by virtue of the fact the court is already well used to dealing with very serious offences. We have also made the point that that being the case — that is the trend to continue expanding the jurisdiction of the court — that is another reason to maintain the corollary which is the appeal process to the Court of Appeal.

**The CHAIR** — Thank you very much for taking the time to give us your written submission and also your expanding on that here today. We appreciate that.

**Witnesses withdrew.**