

LAW REFORM COMMITTEE

Inquiry into County Court appeals

Melbourne — 14 February 2006

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Ms A. Radonic, Principal Lawyer; and
Ms H. Atwa, Solicitor, Youthlaw.

The CHAIR — I welcome to today's hearing representatives from Youthlaw — Anna Radonic, who is the principal lawyer, and Hala Atwa, who is a solicitor with the service. Thank you for coming. As you are probably aware, our deliberations are governed by the Parliamentary Committees Act so that parliamentary privilege extends to the proceedings today which as you can see are being recorded by Hansard. There is a presumption that your submission is for the public record and therefore once you have given your evidence and had an opportunity to correct the transcript, it will be placed on our web site and be available for people to read and digest. If there are any aspects of your evidence you would like to give in camera, please let us know and we will be happy to try to accommodate that. We have just under half an hour, so if you would speak briefly to your submission, we would then like to ask questions.

Ms RADONIC — Our submission is very brief, and I want to apologise for that and put it into context. Our submission was done towards the end of last year although I cannot remember the date. I gather you all have a copy; it does not even cover two pages. Our centre was involved in a number of law reform issues last year, and when this came to us we thought we needed to make a submission, so I apologise for it being so brief.

As a member of the Law Institute of Victoria I have a copy of its submission which we endorse, and I am sure that you also have a copy. Victoria Legal Aid has provided a much more comprehensive submission, and I see that Michael Wighton is sitting behind me. I am sure he will talk in more depth about the issues that face clients from community legal centres which are similar issues to those that Victoria Legal Aid has.

Our centre is youth specific, so we see young people up to 25 years of age. Our experience in terms of crime is basically with summary crime. So we see lots of young people, mostly young adults. For whatever reason the majority of our clients are in the age category from 18 to 24 years. and so most of them who come in with summary crime are dealt with in the Magistrates Court, which is, of course, the first port of call for most people involved with crime.

Over 90 per cent of crime is dealt with in the Magistrates Court. Our experience is that the vast majority of cases that we have seen have not gone to appeal, and I note in the submission from Victoria Legal Aid that the statistics from the magistrates and County Court is that less than 2 per cent of Magistrates Court decisions go on appeal to the County Court. So we are talking about a very small number of cases, given 98 per cent of them are not appealed.

Very briefly, the concerns we outlined regard any proposed changes, to change the basis on which appeals are heard in the County Court from de novo. We understand the New South Wales system where there is not a hearing de novo; you rely on what evidence is given in the lower court. It is a similar system to what we have here — where there is an error of law, you appeal to the Supreme Court.

Our concern is that the vast majority of clients, not just in our legal centre but in the other 49 legal centres spread across Victoria, have no means to pay for legal representation. Members would be aware from the submission that Victoria Legal Aid has tight guidelines as to income and merit in terms of appeal. So the worry we have in community legal centres is how those clients who are perhaps not eligible to legal aid — because a percentage are not eligible to legal aid — represent themselves in a County Court appeal before a judge. How will it be explained to them that if the system were to change that they could make comments on legal decisions when they have no experience in law? So that is one of the major worries. I suppose I am really saying that it is an access to justice issue and that the principles of natural justice should apply, and in our submission that is the basis on which de novo hearings should continue.

The other significant concern we have, and which is expressed very briefly in our submission, is that the changes made in 1999 have had a significant effect on a lot of appellants. That is in relation to the 30-day time limit that people have to put in their notices of abandonment to court. Prior to commencing at Youthlaw I was an in-house counsel at Victoria Legal Aid in the

Children's Court section, and as in-house counsel we were briefed to do County Court appeal matters as well as summary matters, and there were a number of matters where we would have to seek leave to abandon appeal on behalf of clients who perhaps we did not see earlier on, in both the Children's Court and the Magistrates Court. You then had to come across the argument of exceptional circumstances. So that was the major concern. There is a lot more material in the VLA submission regarding that, and I do not really want to repeat points that I am sure my friend will repeat when we are finished.

The other issue is that the committee would be looking at a costs argument, that perhaps if de novo appeals were replaced, there would be a saving of costs. Our submission would be that that may not be the natural consequence of things. At the moment recordings are the transcripts and they are not supplied without a fee. So you have to apply for transcripts. If the nature of appeal hearings were to change, I am sure there would be a cost to supply those transcripts. Then there may be questions at law as to what is admissible if there is any introduction of evidence. The whole County Court appeals system, both conviction or sentence, could become much more legalistic and encumbered and could end up costing a lot more.

Obviously magistrates are aware that any decision can be appealed currently, but if they are then told, 'It will not be a hearing de novo; we will be relying on what you say in the Magistrates Court' and they are aware it is all transcribed, we think hearings in the Magistrates Court may take longer, and that too would be an added cost. So we cannot really see that there are going to be any great savings if that is one of the factors the committee is taking into account in changing the nature of the hearings. So that is another issue. Again the VLA submission addresses that in a lot more detail than we have in our written submission, and I do not propose to add all the statistics that you already have before you.

They are the main points that we wish to make — that is, about changes and costs — and there are strong arguments to maintain the current system. I suppose there is also the point that when we are talking about summary jurisdiction and the Magistrates Court, we are talking about courts all over Victoria. Magistrates' decisions can vary greatly especially with co-accused persons. In our experience it is not always the case that co-accuseds are dealt with together either where there is a contested hearing or certainly at a sentence hearing. So we find — and I am sure VLA will have more statistics on this — is that different magistrates make different decisions with two defendants who have very similar cases, maybe similar background material et cetera and roles in an offence; sometimes they are dealt with quite differently. If there is no fair process of appeal for these defendants, it questions the whole make-up of how accessible and fair our criminal justice system is in terms of procedural fairness. Technically, everyone should be able to appeal, have another go and start afresh before a County Court judge.

So to finish off, and I think this argument relates to the costs argument, given it is such a small percentage — we understand that under 2 per cent of matters are appealed — we are not talking about a huge cost to the criminal justice system for the continuation of hearings de novo, bearing in mind there will be some added costs if the situation is changed. I am not sure if the committee has any figures from New South Wales as to whether there have been savings in that state. I am not aware of that information. If you had that information, you could perhaps use it as a comparative; but if that information is not available, there is nothing on which — —

The CHAIR — Generally we are struggling for statistics. There are the broad statistics about the number of people who appeal, and there is information that about 70 per cent of those who carry through with their appeals are doing so on the basis of the sentence. We do not have any confirmed information about the amount of court time that is taken up, and whether or not it has increased over time. We do not have any comparative data in relation to New South Wales or indeed other jurisdictions. So we are dealing with a fair bit of impressionistic information and guesswork, and we are rather keen to get statistics if people can drill down into the data and give us more information. Perhaps just dealing with your organisation which specialises in young

people, are you able to tell us of the young people you have represented, how many of those in, say, the last five or six years have taken appeals to the County Court, and are you able to give us a breakdown of their cases — whether it has been on sentence or — —

Ms RADONIC — Unusually, we can interpret our statistics to say that we have been very lucky with most of our clients. At least in the last two years we have not had a client who has lodged an appeal where we have acted. We have certainly advised a number of our clients to appeal but they have not chosen to do so. So we cannot give you statistics from our centre showing how many clients have appealed because we do not have that information. It may well be that clients we have advised to appeal have gone elsewhere and have not chosen to stay with us, although I would find that unusual. That is not to say that all of our summary crime matters have fantastic outcomes; there have been concerns with a number of our clients. But we have clients who may come in and see us initially and instruct us summarily. We would lose them if they went to jail because we do not really have a visiting service where we can go out to prison to visit them. But of those who have a non-custodial sentence, none has chosen to appeal whether or not we have advised them to appeal. So we cannot really assist you with any statistics for the centre.

The CHAIR — In relation to the 1999 changes you mentioned, we have had some conflicting, impressionistic information about this. I suppose most people did not like the changes but when we asked whether, for example, in relation to the 30-day time limit has anyone beyond that had difficulty withdrawing their case on the basis of exceptional circumstances, while some people said it is a problem, generally most of the judges have been fairly amenable and allowed people to withdraw on exceptional circumstance grounds if they are beyond the time limit.

Ms RADONIC — I have a clear recollection of appearing in a number of matters in the County Court not long after the changes, as well as appearing and sitting down and watching judges. The quick view that I formed and from talking to colleagues is that judges were interpreting that exceptional circumstance provision quite liberally. I just want to make a point in comparison with suspended jail sentences.

A provision was inserted at about the same time, and maybe Michael can confirm it, where if you breached a suspended sentence the defendant had to prove exceptional circumstances to not get an immediate jail term on the breach. The experience of the vast majority of defence advocates was that most, although not all magistrates, were interpreting that quite liberally rather than literally, giving it a wide interpretation, and that seems to be the case from what we hear anecdotally in the County Court also. If judges went by the letter of the law and if there was a literal interpretation, a lot more people would not be allowed to abandon their appeals, but our understanding is that — and this is the point you made earlier — generally judges are allowing people outside that 30-day time limit to abandon their appeals whereas the letter of the law is quite strict. I would submit that that is not a justification to keep it. Why have that provision there if judges are interpreting it — —

The CHAIR — Again, it would be helpful if we had some statistics but currently we have not been able to get hold of such information.

Ms RADONIC — The County Court does not have those statistics. They probably would not have them themselves. It might be that individual judges may, through interest, have them. Unfortunately we cannot assist in giving you those statistics.

The CHAIR — Do you have any data on the extent to which young people and their legal representatives are deterred from lodging appeals because of the prospect of an increased sentence? Do you have any data on that?

Ms RADONIC — Not data in terms of — you are asking about numbers?

The CHAIR — Yes.

Ms RADONIC — I can just say to the committee that we advise all the clients that we see that there is a right to appeal to the County Court. There have been a number of cases, probably at least a dozen cases, where we have advised our clients, young people, to appeal because it has been a harsh sentence — not a jail sentence, but still in the circumstances a harsh sentence. For instance, the young person has thought, ‘No, I’ve got a suspended jail sentence’, and their view is, ‘I’m not immediately in jail. I’ve got a suspended jail sentence. I’m not going to jail today. I’m not going back to court’. They do not have the understanding or maturity as to the impact of what a sentence is.

It seems that their main point is that they are out. For those who have been charged on the more, if we say, serious crime, their main concern is that they have gone to court, they have had it once, and they have got off, if you like. They do not understand the consequences of, for instance, ‘You come back in six months’, or whatever the period is, and if it is a suspended sentence, ‘If you breach it you are looking at automatic jail’. The way I would have to answer the question is no, we cannot give you numbers, but we can say that many young people are very reluctant. One, they do not like the whole court process in any event, and the sooner they are out of court the better, from their point of view. It would have probably been different and I am sure we would have done a few appeals had a jail term or perhaps a youth training centre term been imposed, because that would have been very immediate and we would have got instructions right there and then. But for all the others they have either refused our advice, or they have been quite happy, or we have advised them not to appeal.

The CHAIR — Based on your last six or seven years of experience is it a reasonable summary to say that by and large most of the young people you have dealt with have been happy with the decisions that have been made in the Magistrates Court in relation to their cases?

Ms RADONIC — Yes.

Mr LUPTON — Sufficiently accepting of the decision.

The CHAIR — Sufficiently accepting of the decision not to go to appeal?

Ms RADONIC — I would say yes, they have been, but then not realising, I think, the consequences of what their actual sentence will entail.

The CHAIR — But what is your view of the decisions, of the young people you have represented?

Ms RADONIC — We happened to have two clients who both went to court on the one day. I think both had drug addictions, and their charges were burglaries and thefts. One of our clients had a mental health breakdown; the CAT team had seen her twice and she had not even attended her community-based order. She got a CBO initially for approximately 20 charges of burglary and theft. She followed the boyfriend, who had introduced her to heroin. She had had a perfectly clean record before then. She had not done anything on a community-based order. One of her drug and alcohol workers had contacted corrections to say that she was currently an inpatient at a hospital and she could not comply with her order. She had had two admissions over six months. Her concentration was not on when she would start to get better and go to do work on a community-based order. It was more, ‘I’m out, let’s cope with all the support services’ that she was getting. She was then breached for non-compliance. It was not for reoffending, it was for non-compliance; she had not done anything on her order.

We got legal aid and briefed a barrister. She received an eight-month term of imprisonment suspended for two years. This was a young woman who had just turned 20 a couple of days before her court case. My advice to her over the phone a number of times or in writing was, ‘You really should consider appealing.’ She was lucky enough not to get a conviction initially, but she is looking at an eight-month sentence if she goes into Coles and steals a can of coke. She had no

contemplation of that. I had spoken to a number of her co-workers, and they had also advised her that she should consider appealing. But her view was, 'I'm out. I was told I could go to jail. I'm too old for a youth training centre' — that is right; she had just turned 21 so she was too old for a youth training centre — 'I'm not going to jail; I'm happy'. It did not matter that her mother — there had been a little bit of a reconciliation with her mother — her workers and her lawyer were advising her. This is unfortunate, and it is not really the fault of the young person; they just cannot look ahead. They cannot even look a month ahead, really — not two years ahead where they will need to remain — —

This will be a real concern. If she reoffends I am sure she will be back in our system saying, 'Oh, you'll get me out, won't you? I won't go to jail — will I?'. This is not directly on point, but our strong advice was to appeal. We had a client in a similar situation with many lesser charges — they were mainly of shop theft. This was a male client. He actually received an ICO, an intensive corrections order, which we felt he probably would have been unlikely to be able to comply with because of other issues that were going on. We recommended that he appeal and that maybe the thrust of the appeal would be that there be a CBO, where he would have more chance, just because of — I do not need to explain the differences with an ICO; it is much more intensive and just does not work with young people. He was under 20, so he was not even one of our older clients. So yes, had we appealed I would have been able to quote a couple of statistics with those two young people. That was just before Christmas.

Mr HILTON — I think we all accept the principle that a decision can be appealed. My understanding of the de novo appeal is that it is really a rehash of the evidence that has already been presented and so is not really an appeal as such but more of a second opinion. I am wondering what your response is to that.

Ms RADONIC — Really an appeal is a second bite of the cherry, if you like, or a review of the decision. But what we are saying is that with an appeal de novo, probably in the vast majority of cases it would be the same evidence that was heard in the summary jurisdiction that would be heard in the County Court. But a judge reading a transcript of a record of interview is not the same — and presumably the transcript with the examination and cross-examination of witnesses, probably including the defendant — is not the same really as seeing someone in person doing it. I, in contested hearings, remember when I — —

Mr HILTON — Excuse me; I take your point. But either we trust the magistrate's system to be staffed by qualified magistrates, or we do not. I would suggest that if only 3 per cent of these decisions are appealed, that system has got credibility.

Ms RADONIC — Yes.

Mr HILTON — I am not really too concerned about the practicalities and the costs, but the principle that we have a legal process in which there are appeals not on a point of law or an excessive sentence but on the basis that the same evidence is just gone through again. I am not sure I understand why we are doing that.

Ms RADONIC — I suppose there are two points there. You say there can be an appeal to the Supreme Court, and magistrates decisions are, on a point of law, still appealed and continue to be appealed on a question of law. But that is a separate issue. Magistrates make mistakes and County Court judges make mistakes, because you have the Court of Appeal, in some cases, saying it. You even have the High Court saying that Supreme Court judges make mistakes. Everyone makes mistakes. I do take your point that it is an efficient system and that by and large magistrates — especially given the statistics, yes, of less than 3 per cent, or 2 per cent — decisions are not appealed. I just make the point that a judge dealing with a matter on an appeal point should be seeing the matter again, should be seeing if there is a contested hearing, certainly, should be seeing the witnesses. Because he or she will be making decisions on the credit of a witness. How can you do that when you have just read a transcript? Yes, you can do that — on a transcript it

could be obvious that a witness broke down and admitted they were lying, or their credibility could become apparent — but it is much more apparent if it is in person. I really cannot add to that.

The CHAIR — Thank you very much for taking the time to talk to us today. We appreciate your written submission and for coming and giving evidence to us.

Witnesses withdrew.