Pause for Thought? The Case for Reversing the Abolition of De Novo Criminal Appeals

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Overview

Following the enactment of legislation passed by the Victorian Government in 2019,[2] de novo appeals from the Magistrates' Court to the County Court were to be abolished from 3 July 2021 ('the reforms').[3] On 23 March 2021, the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic.) received Royal Assent, delaying the reforms until 1 January 2023.[4] That delay was said to be justified on the basis that "[c]hanging the forced commencement date supports the implementation of these reforms by providing additional time to prepare for commencement, in light of the impact of COVID-19 on the justice system".[5]

No doubt this comes as a relief to those operating in an overburdened system struggling with the reality of 'COVID-normal' and the backlog of summary cases and criminal trials. However, it also raises the question: if de novo appeals should not be abolished now, should they be abolished at all?

De Novo Appeals in Criminal Matters

De novo appeals allow for matters determined in the Magistrates' Court to be reconsidered afresh by way of rehearing in the County Court.[6] The accused person is not bound by his or her plea in the Magistrates' Court.[7] The origin of the de novo appeal lies in the accused forgoing his or her right to trial by jury, and the principle that by consenting to summary jurisdiction the de novo appeal is a 'counterweight' that provides protection to the accused.[8] Given the "paramount importance of the individual's right to have indictable charges tried by a jury",[9] consenting to summary jurisdiction is no small thing. Those with practical experience in the Magistrates' Court know that this 'safety net' can provide a powerful reason for accused persons to resolve matters summarily.

Magistrates sometimes have to deal with more than 80 matters in a day. In 2018–19 alone, 151,765 cases were initiated and 67,973 were finalised in the Magistrates' Court.[10] There were 660,262 criminal listings.[11] This vast caseload places great pressure on all involved. Magistrates must make swift decisions that can have lasting consequences for an accused (such as imposing a conviction or a gaol sentence), and the majority of decisions are given ex tempore. While a day may be available for a plea hearing in the County Court, a hearing in the Magistrates' Court may take as little as a few minutes. A large number of summary matters involve unrepresented accused, or legal representation by relatively junior lawyers. Due to changes to legal aid eligibility guidelines in 2015, more work has to be undertaken by duty lawyers, who regularly have to meet multiple accused persons, give advice to unrepresented accused, take instructions, and prepare and present multiple pleas on any given day. The de novo appeal provides a vital safety net.

As the then attorney-general remarked when introducing the reforms, the Magistrates' Court handles over 90 per cent of all cases that come before Victorian criminal courts each year, and only a small percentage are appealed.[12] In contrast to the figures from the Magistrates' Court, in 2018–19 there were only 2,498 criminal appeals commenced in the County Court, with 2,273 finalised (with 96 per cent disposed of within six months).[13] Such appeals have formed a relatively small proportion of the business of the County Court.

Written submissions are now required for all County Court pleas.[14] There is generally the time to make detailed submissions and for relevant points of law to be addressed and determined. Applications for leave to appeal against sentence from the County Court to the Court of Appeal require the identification of an error in the sentence first imposed.[15] Points not made before the County Court will rarely be entertained if ventilated for the first time on appeal before the Court of Appeal.[16]

Proceeding with the abolition of de novo appeals will narrow the distinction between how summary and indictable proceedings are heard and determined. That would be a misstep. It would increase costs. It would increase delays. It would result in relatively fewer matters being determined summarily, and those matters that are to be finalised in the Magistrates' Court being approached as though they were indictable proceedings.

The last significant investigation into the de novo appeals system in Victoria was undertaken by the Law Reform Committee of the Parliament of Victoria in October 2006.[17] The findings of that investigation were published in a 270-page report entitled 'De Novo Appeals to the County Court' (the Report) which recommended that de novo appeals be retained. The Report concluded:

> As the framers of the English criminal justice system apparently realised in the 17th century, de novo appeals are not a substitute for trial by jury, but they do provide an important counterweight to summary trial. For this reason, de novo appeals can also be seen as serving to enhance public confidence in the criminal justice system.[18]

The Report also found that the abolition of the de novo appeal system would 'almost certainly reduce the efficiency of, and increase costs for, the Magistrates' Court' and would make hearings in the Magistrates' Court longer and more complex.[19] Further, the Report considered the need for people to access a fair appeals system and warned against weakening the protections against errors made in the Magistrates' Court.[20]

The Reforms

Once operational, the reforms will, amongst other things, abolish 'as of right' appeals to the County Court for all matters where a person pleaded guilty or did not appear when convicted and sentenced at the Magistrates' Court.[21]

For both conviction and sentence matters, after filing an application for leave to appeal or a notice of appeal within 28 days of the relevant sentence,[22] the reforms require the filing of a 'summary of appeal notice' within the next 28 days stating the general grounds of appeal in the prescribed form.[23] For an application for leave to appeal, the County Court may only grant leave if it is in the interests of justice – and this test will apply to people seeking to change their plea.[24] An appeal may be struck out on the basis that it does not have reasonable prospects of success.[25] The County Court will be empowered to remit matters, dismiss charges, substitute charges, and to vary and impose sentences.[26]

In relation to appeals against conviction, the reforms limit the right of appeal, in general, to a reconsideration of the evidence given before the Magistrates' Court in the summary hearing.[27] The Court *must* consider the reasons of the Magistrates' Court.[28] The Court may receive further evidence if it is in the interests of justice having regard to factors including the right of an appellant to fully present their appeal and whether the evidence was available at the summary hearing.[29] For what is deemed as "protected" evidence,[30] the evidence must be "substantially relevant to a fact in issue".[31] If there is a recording available of the evidence, consideration must be given as to why the evidence should be given again.[32]

In relation to appeals against sentence, the reforms limit the right of appeal to a reconsideration of the evidence and other material that was before the Magistrates' Court,[33] although the Court may have regard to evidence, material or information that occurred *after* the Magistrates' Court sentenced the person.[34]

Concerningly, there is no express power to have regard to material in existence at the time, but not relied on, before the Magistrates' Court. The Court must only allow an appeal if it is satisfied that there are "substantial reasons" to impose a different sentence.[35] The Court *must* have regard to the reasons of the Magistrates' Court and "the need for a fair and just outcome".[36] The Court is not required to find specific error, but it must be more than merely arguable that a different sentence should be imposed (although the Court does not have to be satisfied that the sentence was unreasonable or plainly unjust).[37]

What this all means will have to be tested.

The Consequences

Abolishing de novo appeals removes a powerful reason for accused persons to resolve matters summarily. That would be unfortunate given the utilitarian benefits that summary resolutions bring, including to the community and to victims. It also imposes a very different model of advocacy upon those who practise in the Magistrates' Court, and a burden on Magistrates that is simply not practicable given the pressures on that court.

These reforms would require defence lawyers to obtain recordings and/or transcript of Magistrates' Court hearings[38] and all the material that was before the court, consider whether there are errors in the reasons in order to frame notices for leave to appeal, and prepare an entirely different form of submissions to the County Court. Whether Victoria Legal Aid will be able to able to properly fund this exercise for those unable to afford private legal representation is not known. The County Court will be confronted with more complex appeals, and more jury trials as more accused persons refuse to plead guilty and/or consent to summary jurisdiction without the safety net.

The Purported Basis for the Reforms

The arguments in favour of the abolition of de novo appeals are misguided. To the extent it is claimed that de novo appeals undermine public confidence in Magistrates[39] or their abolition would result in better decision-making, there is no evidence that is so. Imposing an obligation on Magistrates to give full reasons with one eye on a potential appeal, when the practical constraints of the court make it almost impossible to do so, is simply

unfair. Magistrates already face vast pressure operating at the coalface of the criminal justice system.

To the extent it is claimed that de novo appeals can traumatise complainants by them having to give evidence a second time,[40] in almost all circumstances that only applies to conviction appeals, which are a small part of the County Court's appeal workload. It is already the case that pre-recorded evidence is admissible in many cases.[41] Any inappropriate cross-examination should be stopped.[42] There are significant protections in relation to how witnesses may give their evidence.[43] It is certainly, at its highest, not an argument for the abolition of de novo sentence appeals.

It also wrong to suggest that de novo appeals, when conducted properly, are inefficient. Such appeals, in the vast majority of matters, are more efficient than having to obtain material, prepare and present legal submissions, and then have a judge review and resolve issues in dispute in an appellate jurisdiction bound in part by the way the matter proceeded before the Magistrates' Court.

Conclusion

In 2006, the Law Reform Committee concluded:

> Victoria's system of de novo appeal is both comparatively efficient—when seen in the wider context of its place within the criminal justice system—and comparatively fair. In the Committee's view, Victoria's system of de novo appeal achieves a remarkable synthesis of justice and value for money.[44]

Preserving this "remarkable synthesis" during the COVID-19 crisis was necessary. There is now time for reflection, and the reforms should be reversed.

1 Some of the following is based on a comment prepared by Liberty Victoria on the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 (Vic.). With thanks to colleagues Stewart Bayles and Julia Kretzenbacher.
2 *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic.) ("the 2019 Act") pt 3 div 1.
3 Ibid s 2(3). It also applies to appeals under the *Children, Youth and Families Act 2005* (Vic.). The proposed reforms had attracted significant criticism from parts of the legal community. See, e.g., Karin Derkley, "De novo appeals a vital 'safety net'", *Law Institute Journal* (Web Page, 14 August 2018). <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/August-2018/De-novo-appeals-a-vital--safety-net->.
4 *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic.), pt 19.
5 Explanatory Memorandum to the Justice Legislation Amendment (System Enhancements and Other Matters) Bill 2021 (Vic.) cl 124.
6 *Criminal Procedure Act 2009* (Vic.) pt 6.1.
7 Ibid, s 256(1).
8 Law Reform Committee, Parliament of Victoria, "De Novo Appeals to the County Court" (Final Report, 17 October 2006) 30.
9 *Clayton v Hall & Anor* (2008) 184 A Crim R 440, 450 [33] (Kaye J).
10 Magistrates' Court of Victoria, Annual Report 2018–19 (Report, 14 November 2019) 33 <https://www.mcv.vic.gov.au/sites/default/files/2019-11/Annual_Report_18-19.pdf>. Given the impact of COVID-19 in 2019–20, this article refers to the 2018-19 statistics.
11 Ibid.
12 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3687 (The Hon Jill Hennessy, Attorney-General, Minister for Workplace Safety).
13 County Court of Victoria, Annual Report 2018–19 (Report, 2019) 7 <https://www.countycourt.vic.gov.au/files/documents/2019-10/ccv-annual-report-2018-19.pdf>.
14 County Court of Victoria, Practice Note PNCR 1-2015 (12 July 2019) 10 [7.12].
15 *Criminal Procedure Act 2009* (Vic.) s 281(1). And that a different sentence should be imposed.
16 *Romero v The Queen* (2011) 32 VR 486.
17 See Liberty Victoria, Comment on the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill, (web page 18 August 2018) <https://libertyvictoria.org.au/content/justice-legislation-amendment-unlawful-association-and-criminal-appeals-bill>.
18 The Report, 202.
19 Ibid 5.
20 Ibid xi.
21 *Criminal Procedure Act 2009* (Vic.) s 254(2) (as will be substituted once pt 3 div 1 of the 2019 Act becomes operational on 1 January 2023). A person who did not appear must first apply to the Magistrates' Court for the matter to be reheard: s 254(3). Pursuant to s 254(4), an application or appeal against a decision of the Chief Magistrate as a dual commission holder must be made to the Trial Division of the Supreme Court.
22 Ibid s 255(1).
23 Ibid s 255A. Or the appeal with be taken to be abandoned and may be struck out pursuant to s 266A.
24 Ibid s 255B.
25 Ibid s 268A.
26 Ibid ss 256, 256B(8). The reforms also abolish the limited right of an accused person to seek leave to appeal to the Court of Appeal against a sentence of imprisonment imposed by the County Court on appeal from the Magistrates' Court or Children's Court, where the original court did not order the person to be imprisoned: *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic.) ss 16, 30. In contrast, the limited right of the DPP to appeal to the Court of Appeal for some categories of cases pursuant to s 290A of the *Criminal Procedure Act 2009* (Vic.) is preserved.
27 Ibid s 256(1).
28 Ibid s 256(1)(c).
29 Ibid s 265E(2).
30 Ibid s 265E(3)-(4), involving complainants in sexual offences, family violence and obscenity matters, and witnesses in such matters (or where the offence involves an assault or injury or threat of injury) who were children, or cognitively impaired, at the time that the criminal proceeding commenced.
31 *Criminal Procedure Act 2009* (Vic.) s 265(1), (3)-(4) (as will be amended when the 2019 Act comes into operation).
32 Ibid s 265E(d)(ii).
33 Ibid s 256B(1), having regard to s 256B(2).
34 Ibid s 256B(3).
35 Ibid s 256B(5).
36 Ibid s 256B(6).
37 Ibid s 256B(7).
38 Ibid s 265C. Transcripts may be ordered by the Court at a pre-appeal mention hearing or by a registrar or the Prothonotary.
39 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3687 (The Hon Jill Hennessy, Attorney-General, Minister for Workplace Safety).
40 Ibid.
41 *Criminal Procedure Act 2009* (Vic.) pt 8.2 div 5.
42 *Evidence Act 2008* (Vic) s 41.
43 *Criminal Procedure Act 2009* (Vic.) s 360.
44 Law Reform Committee, Parliament of Victoria, *De Novo Appeals to the County Court* (Final Report, 17 October 2006) xvii.