Victorian Parliament Law Reform Committee Inquiry into County Court Appeals

Victoria Police Submission

Victoria Police is pleased to make this submission to the Victorian Parliament Law Reform Committee's inquiry into appeals from the Magistrates' Court to the County Court. As a key stakeholder in the summary jurisdiction of the Magistrates' Court, Victoria Police has a particular interest in the appeal process.

The Magistrates' Court hears the majority of criminal cases in Victoria. Appeals from the Magistrates' Court to the County Court lie under sections 83 and 84 of the *Magistrates' Court Act 1989* ('the Act').

The Act provides automatic rights of appeal from the Magistrates' Court to the County Court. A person may appeal against any sentencing order made against them in a criminal proceeding. The Act does not require an appellant to establish that an error or fault occurred in the first instance, but provides an automatic right to seek a second hearing of the same facts. This varies from other appeal mechanisms, which require an appellant to demonstrate a mistake at law or are limited to an appeal against sentence.

The rationale for this appeal procedure appears to be that in the past, summary hearings were conducted by Justices of the Peace, who were not necessarily legally trained or qualified. However this is no longer the case. Justices of the Peace have been formally removed from any adjudicative role, and all Magistrates must now be legally qualified and have been admitted to practice for a minimum of 5 years.

1. *Comparison against other avenues of appeal*

Other avenues of appeal in Victoria all require some form of error or wrong to found the appeal. In some cases, that error is described as an error of law; in others, manifest excessiveness or inadequacy.

These other appeals include:

- From the Magistrates' Court to the Supreme Court, to correct an error of law — *Magistrates' Court Act 1989* s 92;
- From the County Court to the Court of Appeal to correct an error of law, miscarriage of justice or manifest inadequacy/excessiveness— *Crimes Act 1958* ss 450A, 567, 567A and *Magistrates' Court Act 1989* s 91.
- From the Supreme Court to the Court of Appeal — as above;
- From the Court of Appeal to the High Court — *Judiciary Act* s 35A; *Morris v The Queen* (1987) 163 CLR 454. This form of appeal is noteworthy as it

requires not only prima facie case of error, but also some special feature that warrants the consideration of the High Court.

In South Australia the grounds for appeal from the Magistrates' Court must be identified before the appeal can be made and the appeal is made directly to the Supreme Court.[1] We discuss further the South Australian model below, and recommend it as the preferred option for Victorian appeals from the Magistrates' Court.

2. *Shortcomings of the present appeal system*

Victoria Police has several concerns regarding the present automatic right of appeal provided by s 83 of the *Magistrates' Court Act.*

- It offends against the principle of res judicata, with little justification for doing so. Res judicata is the doctrine that judgment of a court is final. The doctrine operates to prevent the constant re-litigation of disputed matters, thereby finalising legal proceedings. Appeals are an exception to this doctrine. In appropriate cases — typically involving error or other issue that might undermine public confidence in the curial system — res judicata may give way to the process of appeal.
- The automatic right of appeal from the Magistrates' Court to the County Court can be distinguished from all the other bases for appeal in Victoria, which are based on some error or wrong.
- The underlying rationale for automatic appeals of decisions of Magistrates no longer applies. Magistrates are qualified professionals admitted to legal practice. They receive induction and continuation training at the Judicial College of Victoria[2], and may access training from the Australian Institute of Judicial Administration[3], the National Judicial College of Australia[4], professional bodies such as the Victorian Bar and the Law Institute of Victoria, and organizations such as the Commonwealth Magistrates' and Judges' Association[5]. The integrity of the judicial arm of government is undermined by this automatic appeal without requiring the identification of an error or some other ground of appeal.
- The automatic right of appeal is available regardless of what may have occurred in the Magistrates' Court. This means that a person may appeal against sentence and conviction to the County Court even if they have pleaded guilty in the Magistrates' Court.

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[1] *Supreme Court Rules* 1987 (SA) Order 96C.
[2] *Magistrates' Court Act* 1989 s 13B; www.judicialcollege.vic.edu.au.
[3] www.aija.org.au.
[4] http://www.njca.com.au.
[5] http://www.cmja.org/.

- The appeal process incurs additional costs. The community has to pay for the courts to adjudicate: not once, but twice. There are additional costs to the parties to the case, and most importantly, to witnesses and complainants. These costs are both tangible, such as time and money; and intangible, such as the stress associated with court hearings and the diversion of resources from other areas of the criminal justice system. For this reason, appeals should be restricted to cases where there are grounds of appeal such as error.

- In all other appeals based on some form of error, there is a gatekeeper process that screens out unmeritorious and vexatious appeals.[6] This does not occur for appeals to the County Court.[7] Such a process does not ensure an efficient use of scarce community resources.

- There are practical problems with the current process. Transcripts are not routinely produced in Magistrates' Courts in Victoria.[8] Consequently, there is no automatic verification of the evidence relied on below. It is usually not possible to identify if the defendant is providing a contrary version of events on appeal; even lying in the superior court. Victoria Police considers that a system which has the potential for perjury to occur undetected is not sound.

- The appeal can have the effect of rendering the Magistrates' hearing a mere rehearsal. It is not uncommon for barristers to admit that if their client is unhappy with the outcome at first instance, they simply rely on that as a dry-run, and have another "bite of the cherry" on appeal at the County Court.

Of course, appeals against manifestly excessive sentences and other miscarriages of justice must remain.[9]

3. *Discussion of Crown appeals*

The present system is also unsatisfactory regarding Crown appeals. An unsuccessful prosecution in the Magistrates' Court can be reviewed in one of three ways:

- Appeal against a final order on a question of law, pursuant to s 92 of the *Magistrates' Court Act*;

- Appeal against a sentencing order when in the public interest, pursuant to s 84 of the *Magistrates' Court Act*;

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[6] For example, the appellant must satisfy a Master there is a prima facie case for relief before an appeal is allowed to the Supreme Court under s 92 of the *Magistrates' Court Act* 1989: *Supreme Court (General Civil Procedure) Rules* 1996 Order 58.
[7] *County Court Miscellaneous Rules* 1999 Order 2.
[8] In contrast, under the *Supreme Court Rules* 1987 (SA) Order 96C.05, the registrar of the Magistrates' Court must forward a transcript of the proceedings to the Supreme Court upon receipt of a notice of appeal.
[9] For example, one avenue of appeal recognised by the common law is where the defendant should be permitted to change his or her plea because of incorrect legal advice at an earlier stage: *De Kruijff v Smith* [1971] VR 761; *R v Broadbent* [1964] VR 733 and *Bourke's Criminal Law*, above at n 29, [s 391.25].

- Order to review pursuant to Order 56 of the Supreme Court (General Civil Procedure) Rules 1996.

There are also various common law restrictions that courts apply when considering appeals by the prosecution. These include the principle that a Crown appeal offends against double jeopardy, exposing the respondent to the appeal to the risk of jail on more than one occasion; and that Crown appeals should only be brought in rare and exceptional cases for the purpose of establishing some point of principle.[10]

The effect of this is that some decisions of magistrates are not appealable — either legally, practically or both. The main instance is when a magistrate dismisses a charge. Then, the only avenue of appeal is to the Supreme Court on a question of law. Yet there may be no real question of law involved: the law may be settled; there may be no need to seek a precedent; a simple misapprehension of facts may be the cause. Orders to review may be sought, but these prerogative writs — typically of certiorari, mandamus or prohibition — are frequently inapplicable to these decisions.

There are practical concerns with the operation of the present system. The Magistrates' Court is the primary experience of the criminal justice system for most defendants and witnesses.[11] There is little justification for having a different and less rigorous basis for appeal by the defendant from the lower courts compared to appeals from the higher courts.[12]

Arguments in favour of retaining the right to a full re-hearing include the need for a widely based procedure to counterbalance the speed and volume of the Magistrates' Court's caseload and to smooth out inconsistencies between the many different cases and venues of the Magistrates' Court.[13] However Victoria Police considers that the provision of continuous legal education in the form specifically tailored training targeted for Magistrates would be a more effective and efficient way for Government to deliver consistency across magisterial decision-making.

Re-hearings are appropriate and desirable in some cases. The re-hearing process available under Part 4, Division 5 of the *Magistrates' Court Act* 1989 illustrates the proper function of a rehearing. This process allows a defendant to apply for a rehearing, subject to certain criteria, when a sentencing order is made against a person who did not appear in the proceeding. Because the evidence led in the original proceeding was not tested under cross-examination it is appropriate that the remedy, or appeal, available to

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[10] Lexis Nexis Butterworths, *Bourke's Criminal Law*, [s 567A.10].
[11] Australian Bureau of Statistics 2005 *Criminal Courts Australia 2003 – 04*, Catalogue no. 4513.0, Canberra, pp 21 & 26. For 2003 – 04, 15 005 defendants were tried in Higher Courts across Australia, 2 426 in Victoria; 466 657 defendants were tried in Magistrates' Court across Australia, 78 109 in Victoria. This equates to 3219% or 32 times more defendants tried in Magistrates' Courts in Victoria, and. 3110%, or 31 times, more defendants across Australia.
[12] Penny Darbyshire, 'An essay on the importance and neglect of the magistracy' [1997] *Criminal Law Review* 627.
13 *Attorney-General's Justice Statement: new directions for the Victorian justice system 2004-2014* (May 2004) 29.

the defendant is a re-hearing. This allows the defendant to fully understand the nature of the prosecution case, and to challenge and test it.

We also draw the Committee's attention to this provision as an appropriate remedy for a defendant who is sentenced in her/his absence, rather than by way of appeal to the County Court. Where the defendant is present at court, is apprised of the prosecution case and chooses to accept the jurisdiction of the Magistrates' Court, a rehearing is not an appropriate and just process.

The disparity between the restriction on Crown appeals and defence appeals does not achieve just outcomes. In November 2005, a successful prosecution appeal against a magistrate's failure to activate a suspended sentence of imprisonment did not result in the defendant returning to prison, because of the special considerations attaching to Crown appeals.[14] Victoria Police considers that it is an unsatisfactory outcome for an appellate court to hold that the court below has erred, and for this error to remain uncorrected because of unfairness to the defendant.

4. *Comments on the desirability of change, if the jurisdiction of the Magistrates' Court is broadened*

The Attorney-General's Justice Statement is considering broadening the jurisdiction of the Magistrates' Court.

Victoria Police considers that attempts to broaden the jurisdiction of the Magistrates' Court, should also consider the sentencing jurisdiction of the Court. If the Magistrates' Court is to deal with more serious offences, and more of them, it has to be able to impose adequate sentences where appropriate. The present maximum of 2 years imprisonment for any single offence, and 5 years aggregate imprisonment[15], is too low if the Court is to deal with more serious offences.

Ideally, the sentencing jurisdiction of the Court should be mapped to the charge jurisdiction. That is, if the Court's upper-limit for hearing indictable offences tried summarily is 10 years, then its sentencing jurisdiction should be capped at 10 years too. For example, the Magistrates' Court can presently hear a charge of possessing child pornography. Such a charge may be determined summarily. The offence carries a maximum penalty of 5 years imprisonment. If determined in the Magistrates' Court, the maximum penalty that can be imposed is 2 years imprisonment. In some cases, it is clear that whilst summary determination is appropriate — particularly for a plea of guilty — a sentencing jurisdiction maximum that does not adequately reflect the gravity of the offending is not appropriate.

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[14] *DPP v Marell* [2005] VSC 430 at [99] – [109].
[15] *Sentencing Act* 1991 ss 113, 113B.

It is clear that the Magistrates' Court will continue to hear the serious offences it presently does, and probably consider offences that are more serious in the future. Victoria Police considers that there is no justification for granting a court of justice — staffed by a professional, legally qualified magistracy — the power to adjudicate the bulk of criminal offences, and to allow an automatic right of appeal where no error is claimed or identified. Choice of venue should not permit a defendant to automatically appeal a judicially considered decision in the venue that hears the greatest volume of cases, and not in the higher courts.

There is a perception that the high volume of cases dealt with in the Magistrates' Courts increases the risk of error or injustice. This is one argument for retention of the current appeal process. As discussed above however, Victoria Police considers that these concerns could be better addressed by way of amendment to Magistrates' Court processes, and the provision of specialised, targeted continuous legal education.

5. *Effect on number of appeals if appeal rights are changed*

Statistics from the County Court do not provide a great deal of information on criminal appeals. Court Services, Department of Justice does not presently discriminate between appeals allowed or disallowed, or break down appeals into appellant/respondent categories.[16]

Some statistics are available on the County Court website.[17] In general, around 2 500 appeals commence each year, and around 75% are allowed or disallowed. The remainder are abandoned or struck out. Around 70% of appeals are against sentence; around 23% are against sentence and conviction.

Appeals represent between 18 – 24% of the County Court's total case load.

If the avenue of appeal is changed, that figure will vary. If appeals from Magistrates' Courts are still determined at the County Court but require a error-basis, they may decrease. However, someone would have to perform the gatekeeper function for this process. Whether it is magistrates, judges, or registrars from either court, there will be some increase in workload attached to the process. The total number of cases considered may not vary, but an extra-curial process would reduce the amount of court time dedicated to the overall appeal process.

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[16] Perry Wood, Legal Risk Unit, Victoria Police, interview with Joanna Conroy, Court Services, Department of Justice, email inquiry (Melbourne, 5 December 2005).

[17] County Court of Victoria, *Statistics of the County Court of Victoria* (2005), County Court <http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Publications_Reports/$file/County%20Court%20Statistics_2005.pdf> at 6 December 2005.

6. *Savings to the County Court*

It follows that, depending on the system adopted, significant savings can apply to the County Court. The County Court, as an inferior court or court of first instance, is one whose primary focus is on hearing disputed cases. The Supreme Court, as a superior and appellate court, is one whose primary focus is on appeals.

Accepting this, taking appeals out of the County Court and into the Supreme Court makes sense. It allows each court to attend to its area of focus. It provides a more logical and rational appellate hierarchy. There are, we suggest, real prospects of time and costs savings because of the expertise of the Supreme Court in dealing with appeals.

Allowing the County Court to concentrate on hearing serious criminal trials, rather than presiding over the re-hearing of cases already determined before the Magistrates' Court, makes sense.

If the South Australian model is adopted, a significant increase in Supreme Court workload will result. Despite this, there are several reasons why this would be a beneficial outcome. Supreme Courts are superior courts that deliver systematically recorded and reported decisions binding on inferior courts. This provides better supervision and direction to judicial officers in those inferior courts.

In addition, the Supreme Court already has a functioning gatekeeper system in the Masters, and would not require much additional infrastructure to accommodate these new appeals. However, it would require more Masters and Judges. Moreover, the cost of justice at Supreme Court level — both for courts funded by the community, and for the advocates funded by the parties to a case — is more expensive.

7. *Effect on hearings in the Magistrates' Court*

Based on our experience, we expect there will be no effect on the Magistrates' Court. As we note above, magistrates are professional and competent judicial officers who already deal with the bulk of criminal cases in this state. Most of these cases are not disputed. For 2003/04 2.9 % of cases were appealed from the Magistrates' Court.[18]

8. *How the Magistrates' and County Courts operate as one system*

The fact that Victoria Police prosecutes the bulk of criminal cases in the courts of summary jurisdiction, whilst the Office of Public Prosecutions prosecutes indictable offences, results in fragmentation of the appeal process.

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[18] Combining statistics from the County Court at n 37 above, and the ABS at n 34 above. Because some appeals will be from the Children's Court — see n 4 above — the number of County Appeals from the Magistrates' Court will be lower. Our experience suggests the difference will be low.

Because the Magistrates' Court does not automatically produce transcripts, and destroys recordings of its proceedings after three months[19], it is common for there to be no authoritative record of the proceedings below at an appeal in the County Court. Police are often unaware if or when an appeal is made; and similarly, prosecutors in the superior courts are unaware of proceedings in the Magistrates' Court.

9. *Concluding remarks*

The South Australian model is preferable to the present Victorian system. If adopted, we ask that consideration be given to overturning the common law restrictions applying to Crown appeals.

The advantage of the South Australian system is it allows for both parties to appeal to the Supreme Court on a number of grounds, such not presently provided for, such as a decision being against the weight of the evidence, or a magistrate misapprehending the facts. That is, both parties to a criminal proceeding can launch a justifiable appeal on equal footing.

Additionally, it provides a broader scope of appeal for those cases where some injustice might occur, but an appeal is not available under the present system. Examples are orders other than "final orders" or "sentencing orders", which are the respective subject matter of ss 92, and 83 and 84 of the *Magistrates' Court Act 1989*.

If this option were rejected, Victoria Police considers that the automatic appeal process presently available should be modified. In our view, a gatekeeper restriction allowing only meritorious and genuine appeals to remedy some error or injustice is more appropriate, and consistent with the approach taken for all other appeals in the criminal justice system.

[19] Magistrates' Court of Victoria Practice Note 1 of 1999, *Recording of Proceedings*.