

The Threat to Delivering Quality Justice in the Era of Modern Pragmatism

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Introduction

The Magistrates' Court of Victoria is the highest volume Court in Victoria, with over three quarters of a million listings each year in the criminal division alone. In 2014-15 (the most recent statistics available), nearly 250,000 criminal cases were initiated in the Court, an increase of 13% from the previous year and a 48% increase from 2010-11¹. Magistrates – and indeed all regular court users – are acutely aware of the effect, if not the statistics themselves, of this increase. The increase in workload is universal. At June 30, 2011 there were 111 magistrates, 11 acting magistrates and 6 judicial registrars appointed at the Court. At June 30, 2015 - keeping in mind the 48% increase in criminal initiations, as well as an overall increase in matters finalised of 48% - there were 15 fewer magistrates².

It goes without saying that managing anything of this sort of quantity requires a hefty dose of pragmatism, but as judicial officers our primary concern is and should be the quality of justice.

The source of the pressures

Crime rates – and the type of crime

The crime rate in Victoria has steadily risen in pure numerical terms as well as offences per 100,000 population. In the period June 2012 to June 2016, the number of offences per 100,000 population increased 22.5%³. Whilst this alone affects the caseload of the Court, the statistics do not show the shift in the nature of crime that Magistrates have observed in recent years.

In 2013 the definition of “serious injury” in the *Crimes Act 1958* was amended⁴. Where previously the definition was inclusively defined as including a combination of injuries, referable to the definition of “injury” which included unconsciousness, hysteria, pain and any substantial impairment of bodily function⁵. The new definition exclusively defines it as an injury that endangers life or is substantial and protracted, or involves the destruction of a foetus, and states that it may include the cumulative effect of more than one injury⁶. These amendments resulted in a host of serious matters being heard in the Magistrates' Court as injuries simpliciter.

The seriousness of drug and firearm cases heard in the Magistrates Court has also increased dramatically. In my view we have experienced a cultural shift, where we have become so inured with the proliferation of drugs that what were once considered significant quantities are now

¹ *Magistrates' Court of Victoria Annual Report 2011-12* page 111, *Magistrates' Court of Victoria Annual Report 2014-15* page 75

² *Magistrates' Court of Victoria Annual Report 2011-12* page 21, *Magistrates' Court of Victoria Annual Report 2014-15* page 11

³ Crime Statistics Agency, *Offences Data Table – year ending 30 June 2016*, table 2 available at <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/year-ending-30-june-2016>

⁴ *Crimes Amendment (Gross Violence Offences) Act 2013* section 3(b)

⁵ *Crimes Act 1958* section 15, reprint no. 22

⁶ *Crimes Act 1958* section 15

accepted as lower end. Meanwhile, sentences for firearms offences remain low; generally within the two-year jurisdictional limit of the Magistrates' Court.

Specialist Courts

The Government continues to invest in specialist Courts, programs and lists, which deliver (or are intended to deliver) improved outcomes for those who qualify for them. The Drug Court, ARC, sexual offences list and family violence division all serve a valuable purpose. Unfortunately, even when these initiatives are adequately funded, rarely are the impacts on the main lists of the Court considered or effectively counterbalanced. The recent Drug Court expansion has seen significant building works undertaken at Melbourne to create suitable spaces for the Drug Court – a properly funded program based on a proven model. The expansion will no doubt deliver benefits to the additional 160 people per year admitted to the Drug Court. However, the impact on already overstretched resources is significant; the Drug Court will occupy two custody courtrooms four days a week.

The Government has committed to implementing the 227 recommendations of the Royal Commission into Family Violence⁷. The implementation of the recommendations relating to the Magistrates' Court (primarily recommendations 60-77) will have a significant impact on Court resources, even allowing for the allotted additional funding. The Royal Commission recommended extending the functions of the Family Violence Court Division, and hearing all family violence matters in specialist Courts⁸. Already the Court operates a Family Violence fast-track list at several Courts, though it is self-evident that fast tracking some matters will serve to delay others.

Infrastructure

The problem of the specialist Courts highlights the unsatisfactory infrastructure of the Court. The Melbourne Court, constructed in the mid-1990s, has been at capacity for years, with many administration functions being moved out of the Court building shortly thereafter (first to the old Supreme Court Building at 436 Lonsdale St and more recently to the William Cooper Justice Centre), but despite having moved out all non-essential staff out of the Court building, the Court is well and truly at capacity. There are now more Magistrates' assigned to Melbourne than chambers available.

Other Courts across the state are older, in various states of disrepair and lacking essential functions such as security. The government has committed to improvements in Shepparton⁹ as well as provided funds to plan an upgrade of the Bendigo Court¹⁰, but other Courts languish until one "fortuitous" day a destructive flood (Heidelberg) or fire (Cobram) commands attention to the building and its facilities.

Police numbers

In mid-2016, there were around 15,000 sworn members of Victoria Police¹¹. Later that year, the Victorian Government committed to recruiting 2729 new police officers¹². Intuitively, we expect that an increase in police numbers would increase the number of arrests and have flow on effects

⁷ Daniel Andrews, media release, It's Time To Fix Our Broken Family Violence System, <http://www.premier.vic.gov.au/its-time-to-fix-our-broken-family-violence-system/>

⁸ *Report of the Royal Commission Into Family Violence*, recommendations 60-61

⁹ Denis Naphine, media release, *New Court Complex for Shepparton*, <http://pandora.nla.gov.au/pan/150272/20150224-1149/archive.premier.vic.gov.au/2014/media-centre/media-releases/9788-new-court-complex-for-shepparton.html>

¹⁰ Victorian Budget 2017-18, budget paper 3, page 109

¹¹ Victoria Police Annual Report 2015-16 page 69

¹² Daniel Andrews, Media Release, *Record Frontline Police Boost to Keep Victorians Safe* 4 December 2016

in the number of criminal matters brought before the Courts. In December 2016, the Police Association responded to allegations of misconduct of Protective Service Officers stating that

During the same period (2012-2015) due to government public safety commitments, the number of Transit PSO's saw a ten-fold increase from 88 officers in 2012 to 940 officers in June 2015.

It follows that the number of public contacts, arrests and interactions that these members have had with offenders and others in the community increased similarly¹³.

Police Commissioner Graham Ashton has stated that Victoria Police processed 30 per cent more offenders last year than they did five years ago, and 12 per cent more than they did in 2015 - an extra 18,453 offenders¹⁴.

In 2008, researchers at Griffith University conducted a literature review and concluded that

Little is known about the effects of police numbers on crime clearance rates or prosecutions. It is likely that policing rates of crime clearance have downstream implications for prosecution, although such a hypothesis requires investigation¹⁵.

The same review noted several studies that increased police numbers results in increased arrests, and more recently, in 2013, statistical modelling conducted by Ben Shoesmith showed a direct correlation between government expenditure on police and the number of arrests¹⁶. The NSW Bureau of Crime Statistics and Research estimate that a ten per cent increase in male arrests produces an immediate increase in community based supervision orders and number of full time prisoners of 2.3% and 3.3% respectively, with the long-term increase estimated to be approximately 4% for both¹⁷. So whilst there has been no specific research into the effect on Court workload, we can certainly infer an effect from the data that does exist.

The Victorian Government's Access to Justice Review lists increased police numbers, as well as other Government Decisions such as the establishment of Protective Services Officers, additional child protection workers, and changes to monitoring and supervision of offenders, as matters that increase demand for Legal Aid¹⁸.

Prison population and the remand spike, transport

The prison population continues to increase – for the first time ever exceeding 7,000 in Victoria¹⁹ – not only in response to increased police numbers and arrests, but also due to changes to the parole system in the wake of Jill Meagher's murder (amongst other high-profile murders committed by men on parole) which made it more difficult to get parole and introduced stricter reporting conditions. Parole and bail have once again found themselves under siege in Victoria following the Bourke Street attack and Brighton terror attack this year, with a massive spike in the number of

¹³ Ron Iddles, *InBrief*, "IBAC report about Transit PSOs is overstated and lacks context" December 2016

¹⁴ Graham Ashton, *Herald Sun*, "Victoria Police catching more criminals than ever: Graham Ashton" February 6, 2017

¹⁵ James M. Ogilvie, Troy J. Allard and Anna L. Stewart, *Impact of Police Numbers on Crime*, Produced by Justice Modelling @ Griffith, December 2008

¹⁶ Ben Shoesmith and Chris Klein *An Examination of the Impact of Police Expenditures on Arrest Rates*, Explorations, the Journal of Undergraduate Research and Creative Activities for the state of North Carolina, Volume 7

¹⁷ Wai-Yin Wan, *The relationship between police arrests and correctional workload*, NSW Bureau of Crime Statistics and Research Bulletin, 150, May 2011

¹⁸ Victorian Government, *Access to Justice Review Report and Recommendations* August 2016, page 380

¹⁹ Corrections Victoria, *Monthly Prisoner and Offender Statistics 2016-17 (to April 2017)*, Table 1

<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/monthly+prisoner+and+offender+statistics>

people on remand being held in Victorian prisons. In the 12 months to April 2017, in part fuelled by among other factors, law and order populism, the overall prison population increased by 9.4% whilst the number of prisoners on remand increased by 25%²⁰.

Riots at Metropolitan Remand Centre, Malmsbury and Ravenhall created additional pressures, including a reduction in capacity due to unexpected closures, reduced prisoner movement and increased security measures, whilst construction of a pressure-reducing medium security facility at Ravenhall was delayed when the builders went bankrupt.

Police cells across Victoria are full, resulting in people in custody transported across the state to be held in the most unlikely of places, limiting access to families and legal practitioners.

The Melbourne Custody Centre, attached to the Melbourne Magistrates' Court and intended to be a transit facility, accommodating accused appearing before the Court on any given day is instead being used as a prison, accommodating prisoners for up to two weeks. This situation disproportionately impacts female prisoners, who are allocated three times the cell space of men. As a result, Corrections are less likely to bring female prisoners to Court. At the height of prisoner transport crisis frequently more than 30 prisoners were not brought before the court, in direct contravention of remand warrants and gaol orders and probably their human rights as well.

The pragmatic responses

Audio-Visual Link Legislation

On September 12, 2016 amendments to the *Evidence (Miscellaneous Provisions) Act 1958* came into effect, stipulating that for all hearings in the Magistrates' Court other than contested committals and summary trials unless the Court otherwise orders an accused in custody is to appear via audio-visual link (AVL)²¹. The changes were simultaneously celebrated and derided by various members of the magistracy as a triumph of pragmatism. From the amendments' conception, some Magistrates expressed concerns about the impact on the quality of justice, as well as the repercussions in Courtroom practice and procedure. The amendments went ahead, lauded as change that would finally bring an end to the prisoner transport crisis, improve efficiency and reduce delays. As they say, "the results speak for themselves". Prisoner transport persists as an ongoing issue in the Court, with up to 20 accused not being brought before the Melbourne Court on any given day. The Supreme Court has criticised Corrections Victoria for its failing in this regard but *habeas corpus* applications have resulted only in the production of the named prisoner; no systemic changes have been effected²². In fact, in their own pursuit of pragmatism, Corrections now presume that any prisoner not physically brought before the Court will be permitted to appear by video link, often expecting Court administration to simply "convert" the appearance to AVL, despite the existence of an order of the Court that the person physically appear and the fact that the decision to amend the terms of a gaol order is rightly a judicial one. Meanwhile, Magistrates – particularly those who consider arbitrary use of video-links to be an affront to justice – are forced to compromise their own judicial principles and grant video links in the interests of the accused who are, to many minds, being unlawfully detained and will continue to be so. Disparate views within the magistracy compound the problem. A pro-AVL magistrate may list a bail application to be

²⁰ Corrections Victoria, *Monthly Prisoner and Offender Statistics 2016-17 (to April 2017)*, Table 1 and Corrections Victoria, *Monthly Prisoner and Offender Statistics 2015-16*, Table 1.10
<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/monthly+prisoner+and+offender+statistics>

²¹ *Evidence (Miscellaneous Provisions) Act 1958*, section 42JA

²² *Stewart v Magistrates Court of Victoria and Chief Commissioner of Police* [2017] VSC 110

heard by video link, but that matter comes before a magistrate who does not believe it is appropriate to hear a bail application by AVL. That magistrate is in an invidious position. To deny the AVL in those circumstances will delay proceedings and serve to keep in custody a person who may otherwise have been granted bail.

In the Courtroom, video-links have proven to be as disruptive and counter-productive as their early detractors feared. The experience of Magistrates is increasingly that video-links are an impediment to matters progressing, much less resolving. Practitioners are not attending on clients in custody to receive instructions, inadequate numbers of video link facilities result in strict time limits, which are often insufficient, and technical problems abound. On countless occasions the wrong accused has appeared by video link. Statistics on the increasing number of video links is presented as evidence that the amendments are “working” but the reality is that in addition to the predictable increase triggered by the amendments these issues, specific to AVL, are multiplying the number of Court events. Court coordinators are distracted from their primary task, obliged to spend a significant amount of their time dealing with the increase in volume and rescheduling that video-links have created with no additional resources. As a consequence they are now struggling to effectively coordinate the caseload of the Court. The promised reduction in delay has not eventuated, and instead Court timelines continue to blow out at a higher rate than ever. It’s not only AVL matters that are affected. Obviously system-wide delays affect all matters in the Court, however day-to-day poor scheduling of limited AVL facilities, and management’s deference to and prioritisation of video-links are disrupting hearings throughout the Court. Typically, a Magistrate will be faced with the decision to either interpose a scheduled video-link (the booking of which they had no control) during a bail or plea hearing, or direct that the video link be rescheduled. Both options are disruptive and inconvenient.

The results should not have come as a surprise. A 2010 study on a United Kingdom “Virtual Court” pilot found that video links for first appearances saved a mere 17 minutes in custody cases. Additionally, the average number of hearings for finalised cases increased from 2.19 to 2.33. Fixed hearing slots were found to be inflexible and inefficient. Whilst it significantly reduced prisoner transport costs, on the most conservative model the overall cost saving was 400,000 pounds; the model used in the pilot would not show an economic benefit for 9 years²³.

Another dimension of hearings via video link is the issue of the authority and ceremony of the Court. The theatre of the courtroom is an important aspect of Court proceedings and is severely lacking in such hearings. As a consequence the authority and ceremony of the Court is diminished, making it difficult to impress on accused the significance of the occasion. This too was noted in the UK review, with Judges reporting that it was more difficult to impose authority remotely, and that defendants took the process less seriously than they would have if they appeared in person²⁴. Carolyn McKay of the University of Sydney argues that

“courtroom spaces exude neutrality, transparency and permeability in their openness and accessibility to the public. There is a clear distinction between open, civic and dignified courtroom space, versus the closed conditions of incarcerating space.

In the ‘formal and ritualistic social setting’ of a courtroom (Carlen 1976: 50), we find architecture embedded with legal authority, and gravity made manifest through the formal and ordered design, solid materials and French mottos (Mohr 2005). There is an aesthetic and sensory dimension that ‘suffuses our engagement with everything about us’, affecting us profoundly, including our experience of legal space (Manderson 2000: 4, 23, 27). While the

²³ Matthew Terry, Steve Johnson and Peter Thompson, *Virtual Court pilot Outcome Evaluation* Ministry of Justice Research Series 21/10 December 2010, page 14

²⁴ Matthew Terry, Steve Johnson and Peter Thompson, *Virtual Court pilot Outcome Evaluation* Ministry of Justice Research Series 21/10 December 2010, page 22-23

prison video studio may be a legislated conceptual extension of the courtroom, it remains in an enclosed, non-public site that is not at all like a court. There are no aesthetic markers or signifiers denoting a serious legal encounter. Behind the seat where the prisoner sits in front of the camera, there is no coat of arms, merely a paper notice identifying the name of the correction centre. As Hillman finds, the 'coercive environment' (2007: 62) of incarceration is 'hardly a replication of a courtroom' (2007: 61), nor reflective of the gravitas (Ashdown and Menzel 2002: 106; Bermant and Woods 1994-1995: 67). The prison video studios are drab, functional and sparsely furnished, and lack dignified courtroom ambience. While these two disparate spaces are conceptually linked by audio visual technologies, the prison video studio is 'phenomenologically at odds with the social space' of the physical courtroom in which the prisoner's legal proceedings actually takes place (Rowden 2011: 253).²⁵

Night Court, Weekend Court

Another response to the pressures outlined above has been the introduction of night and weekend sittings of the Magistrates' Court. Generally, the night and weekend remand Courts achieve their objective of relieving pressure during regular sittings, with 25% of people brought before them being released on bail or even having their matter finalised. The limited success of these measures should not distract from the systemic problems. A properly resourced, efficient, modern Court should not need to sit at night and on weekends. Additionally, these Courts have not stemmed the rising number of people held in custody, and come with their own problems. Most accused are not represented by their legal practitioners (there is a Legal Aid duty lawyer rostered at the weekend, but not at night), and this problem is compounded when accused are remanded to appear by video-link the following week. Unfortunately, even if an accused's solicitor is made aware of the arrest and remand, they will not have time to attend the prison to take instructions before the return date. As a consequence, Magistrates are experiencing a significant increase in the number of accused who on their third or fourth mention via video-link have still not had a legal practitioner attend upon them. Whereas we could once proudly state that the administration of justice in Victoria prevented people from becoming lost in the system, this is simply no longer true.

Government investment

Whilst it may not hold electoral appeal, Government must invest in modernisation of the Court. The electoral appeal of "law and order" politics ensures that governments commit to funding the start and end of the course of justice (being police and corrections) whilst the Courts in the middle of that process do not fare so well.

Without thoughtful, holistic investment in infrastructure, information technology and resources, the Court will not only continue to struggle with increasing caseloads but will soon begin to sink under the weight of them.

That said, the Court can attempt to deal with the situation through structural improvements on a micro level, which has proven to be effective in managing some of the day to day pressures. Magistrates and court administration must be flexible and responsive, but most of all must work smarter.

²⁵ Carolyn McKay, *Video Links from Prison: Permeability and the Carceral World*, International Journal for Crime, Justice and Social Democracy 2016 5(1): 21-37

ccac Court structure and listing practices

Whilst it is true that all Magistrates are appointed as independent equals, it is also true that each brings to the role their own particular skills and knowledge. To be a truly modern institution, the Magistrates' Court must play to its strengths and use Magistrates' individual skills to its best advantage. Court management have begun to acknowledge this and as a result listing practices have been improved; now where possible Magistrates with a trial background sit in the committal mention court to more readily identify relevant issues, but this is just the tip of the iceberg in terms of what can be done in this regard.

Changes to practice and procedure

Filing hearings in the Court used to be treated as a merely procedural step. Now more than simply rubber-stamping timelines, the filing hearing is used to give directions and address obvious issues such as the format of CCTV and lodging exhibits for forensic examination. Cooperation with the Victoria Police Forensic Services Department has seen agreement that where the pure quantity of a substance is relevant they will proceed with analysis as if it is a contested matter, to encourage early pleas.

The committal coordination team now work closely with the supervising magistrates to identify major trial committals and address interlocutory and ancillary issues at an early stage and have the case assigned to a specific magistrate at that time.

Amendments to section 124 of the *Criminal Procedure Act 2009* in 2014²⁶ allow magistrates to adopt a stricter test for the granting of leave for cross-examination and confines cross examination to the issue for which leave to cross examine was granted (where previously leave on a single issue permitted cross examination at large). The amendments also removed the onus on magistrates to find special circumstances in order to refuse leave where the informant did not object. The 2014 amendments made the informant's consent merely a factor for consideration by the Magistrate.

Court coordinators and senior staff now have greater input at the counter, doing as much as possible to ensure that by the time a matter comes before a Magistrate it is ready to proceed.

Standard of VicPol prosecutors

Magistrates are generally of the view that summary prosecutions would be better handled by the OPP, however proposals to this effect have always been resisted by VicPol. There is no current initiative regarding this on foot. If VicPol are to maintain summary prosecutions then training and selection should be the subject of review, with a view to improving the standard of VicPol prosecutors.

NSW model for indictable offences triable summarily

A significant cause of congestion in the Court is the current procedure for consent to jurisdiction and failure to appear. In Victoria, the accused must consent to the jurisdiction of the Magistrates' Court for any indictable offence to proceed summarily. Where the accused fails to appear, the matter cannot proceed; the Court must issue a warrant to arrest, and the accused is brought before the Court and given bail. This process is a burden on Court and Police resources.

²⁶ *Criminal Organisations Control and Other Acts Amendment Act 2014* section 109

The NSW *Criminal Procedure Act 1986* deals with indictable offences very differently²⁷. Schedule 1 lists many indictable offences which are to be dealt with summarily, and splits them into two categories. The first category, listed in Table 1, are to be dealt with summarily unless the prosecutor or the person charged elects otherwise. The second category, listed in Table 2, lists indictable offences to be dealt with summarily unless the prosecutor elects otherwise. Broadly, the right of the accused to refuse summary jurisdiction appears to be related to the seriousness of the offence. For example, for larceny and certain other property offences, the right of the accused to elect to have the matter dealt with on indictment turns on whether the value of the property, matter or thing, or the damage, or the amount of money or reward, in respect of which the offence is charged is more or less than \$5,000.

Most significantly, where an accused fails to appear they are taken to consent to jurisdiction and the matter can proceed *ex parte*, with the safeguard that no sentence of imprisonment can be imposed *ex parte*. This approach in Victoria would result in significant time and resource savings, and is currently under consideration by the Court.

In the face of the threats to the delivery of quality justice magistrates must stand tall and firm. It is for Magistrates to ensure that their courtrooms are run in such a way that justice is delivered in a meaningful and qualitatively effective manner. It is for Magistrates, in their unique position of power and control in the Courtroom, to insist on quality justice for all who come before them and ensure that hearings are not adversely impacted by the pressures of caseloads and the allure pragmatism.

²⁷ *Criminal Procedure Act 1986* (NSW) chapter 5 (Summary Disposal of Indictable Offences by Local Court) and Schedule 1.