



# (DIS)ADVANTAGE IN LOWER AND HIGHER COURTS

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There is great discrepancy between higher and lower courts in New South Wales that extends past the most apparent differences such as sentencing powers or the seriousness of matters heard. The division marks a fundamental difference in court operation, public perception and adherence to traditional notions of how justice is to be done. 95.9% of criminal hearings take place in lower court,<sup>1</sup> however, local courts are where defendants are given the least equitable chance to defend their innocence.

## I. POLICE PROSECUTION

As a somewhat lay observer in the Local Courts, it is particularly evident to me that the relationship between police prosecutors and the police officers testifying is significantly different to that between the officers and defence lawyers. In my observations, officers tended to be openly hostile to defence lawyers' questioning, at some points bordering on ridiculing the questions asked. This is in stark contrast to the elaborate, seemingly pre-prepared responses to the prosecution's questions.

In 1997, the Wood Royal Commission found that the independence and impartiality of police prosecutors is compromised for three main reasons:<sup>2</sup>

1. They are answerable to their superiors in the police chain of command.<sup>3</sup> This creates a conflict of interest between the court and their peers, whom they may be questioning. Regardless of a police prosecutor's intention to remain impartial, the fact that their superiors, who may not be as familiar with the courts system,<sup>4</sup> would be biased towards protecting another police officer.<sup>5</sup> This clouds the impartiality of the prosecutor, resulting in unjust interactions between police officers and the court.
2. Police prosecutors do not have a legal duty like solicitors and barristers do.<sup>6</sup> According to the police prosecutor's code of conduct, prosecutors are required to 'discharge their duties to the Court and Police Service honestly and impartially.'<sup>7</sup> Simultaneously, the prosecutor's course guides prosecutors to embrace

the principle of *Giannarelli v Wraith*.<sup>8</sup> This contradiction of duty is evidently problematic, representing a conflict of interest that gives the prosecution an inequitable advantage.

3. Police prosecutors are not subject to the same code of practice of behaviour and professional discipline as members of the legal profession.<sup>9</sup> Solicitors and barristers are bound by and face significant penalties for not adhering to their professional code of conduct. The police prosecutor code of conduct is ambiguous (see (2) above), and the mechanisms of its enforcement are significantly different, resulting in different actors in the local court system being held to varying standards for performing similar roles.

In short, the Wood Royal Commission said that police prosecutors face a conflict of interest between being impartial to ensure a fair trial, and protecting and aligning with their peers. The problem is distinct from any conflict of interest defence representation may face, as police prosecutors adhere to a different set of rules that may not be enforced as effectively as those for solicitors and barristers. It is my opinion that this problem still exists in local courts, or that little has been done to remedy it.

## II. DEFENCE IN LOCAL COURTS

The position of advantage enjoyed by police prosecutors stands in contrast to the position of most defendants, particularly those who are self-represented. These defendants are generally given a minimal level of guidance, resulting in a limited grasp of court room terminology, for example, being able to refer to the Magistrate properly. These defendants are however, unable, on the whole, to present legally compelling arguments, often times resorting to an emotional appeal destined to fail in a courtroom. There tends to be a preparedness by Local Courts magistrates

to relax the formality of court ceremonies such as the role of the magistrate as a 'referee' rather than an active participant, is representative of the contrast in purpose of lower and higher courts.<sup>10</sup> Higher courts represent an ideological practice of law and justice, while lower courts practice summary justice that is 'not real law',<sup>11</sup> and devoid of 'traditional due process'.<sup>12</sup>

Other defendants in the Local Court are represented by a variety of under-paid legal-aid lawyers<sup>13</sup> and often-inexperienced solicitors. This is in itself a problem against police prosecutors who have an advantage, as discussed above. The court environment, designed to reflect traditional courtroom power structures,<sup>14</sup> does not remedy the problem. Most defendants sit furthest of all participants in the court room. Those in the dock sit well off to the side of proceedings, which is a particular problem

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in the event of self-represented defendants from the dock. The other consequence of this spatial organisation is that audibility is compromised.<sup>15</sup> Inaudibility further compromises the position of both self-represented defendants and inexperienced solicitors who may not be familiar with court jargon, thus putting defendants at further disadvantage in lower courts.

### III. DEFENCE IN HIGHER COURTS

In higher courts, there exists a more level playing field between the defence and prosecuting counsel. Director of Public Prosecutions (DPP) and defence lawyers tend to be equally familiar with and confident in addressing the court and interacting with the judge. All legal professionals involved in these courts interact with the court on a regular basis, hence are equally capable of interacting with it.

In contrast, from the perspective of the defendant or any lay person, stepping into a court room is a daunting experience, due to the immediately perceptible nature of power dynamics,<sup>16</sup> signs of which saturate the court room, from the elevated and ornate judge's bench to the language used and the ritual of bowing. In the idealistic perception of the operation of the court room, the judge and court officers 'hold a fair monopoly over ceremonies'<sup>17</sup> It is through ceremonies, often archaic,<sup>18</sup> that power is exuded. The major difference, to me, between lower and higher courts is the relaxing of these ceremonies and rules. Thus, given the disadvantage that self-represented defendants are at in lower courts, self-represented defendants in higher courts are at an entirely unacceptable disadvantage. While the incidence of such defendants is rare, it is not unheard of, especially in matters such as bail hearings. Self-represented defendants in these courts may have been given greater legal advice than in lower courts, higher courts simply lack the experience of dealing with such defendants to accommodate them equitably. Fundamentally, a self-represented defendant will require some degree of leniency or assistance from the judge or magistrate regarding process and court rules.<sup>19</sup> This cannot often occur in higher courts as empirically, such rules and processes are more strictly enforced in higher courts, particularly the Supreme Court. The relaxation of rules and assistance from the

judge in higher courts risks the perception of bias, invalidating a trial or hearing.<sup>20</sup> Self-represented defendants thereby result in improper court processes, which is particularly problematic in higher courts.

### IV. DPP PROSECUTION

Prosecutions by the DPP tend to bring the operation of the court closer to the ideal. First, both prosecutors and defence lawyers in higher courts are bound by the same codes of practice, therefore have the same limits placed on their conduct. Second, any special relationship or familiarity a public prosecutor has, is dealt with professionally by the court. Prosecutors already have a close working relationship with judges, but are able to maintain a degree of formality and professionalism that ensures that justice is not only done in higher courts, but is also seen to be done.<sup>21</sup> Even so, some of the greatest miscarriages of justice have occurred in some of the highest courts in Australia. Mohamed Haneef was wrongly charged and detained on advice given by the Commonwealth DPP on the basis of inaccurate information given by the Federal Police.<sup>22</sup> This is indicative of the fact that higher courts are not perfect and still face problems such as prosecutorial discretion. Higher courts might be better for a fairer trial, however they are hugely expensive, and not by any means perfect.

### V. CONCLUSION

The greatest difference between lower and higher courts with regard to representation is the discrepancy of advantage that the prosecution has over defendants. In lower courts, this arises from the advantage police prosecutors have in addition to the disadvantage self-represented defendants are at. Higher courts tend to be a more level playing field, with most matters having similar calibre prosecutors and defence

representatives. This is a product of the way in which each court is conducted, a result of the function of each tier of the courts system in society. As academic Doreen McBarnett argues, higher courts reflect the ideal of the criminal justice system, and exist partly for public consumption, resulting in rigid rules of process.<sup>23</sup> Lower courts exist to 'get through the list' and process as many matters as possible in the shortest time possible,<sup>24</sup> resulting in more lax court processes. The

result of these differing functions has led to the current, inequitable situation. Steps can be taken to move towards a more equitable adversarial process in lower courts, in my opinion, by transferring responsibility for prosecutions to the DPP and ensuring self-represented defendants have sufficient resources to defend themselves.

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