



SUPREME COURT OF WESTERN AUSTRALIA

Factsheet: Criminal appeals from the Magistrates Court

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1. Introduction

This factsheet is intended to assist you if you are seeking to appeal a decision of a Magistrate concerning a criminal charge.

The factsheet is not legal advice about your particular situation. If you are considering an appeal from a Magistrate's decision you should obtain legal advice before doing so. Part 17 of this factsheet provides information about applying to Legal Aid for assistance. Other sources of legal advice include private lawyers and community legal centres. Court staff cannot provide you with legal advice.

You do not have the right to have a decision 'reviewed' or 'reheard' simply because you are not happy with the decision. An appeal in this context is a review of a decision on one of the following grounds:

- (a) that the court of summary jurisdiction (Magistrates Court or Children's Court) –
 - (i) made an error of law or fact, or of both law and fact;
 - (ii) acted without or in excess of jurisdiction;
 - (iii) imposed a sentence that was inadequate or excessive;
- (b) that there has been a miscarriage of justice.

To start an appeal, you will need to lodge an appeal notice (Form 20) at the Supreme Court. However, before you commence an appeal, you should consider the following.

2. Where should I commence my appeal?

Before you begin, it is important to make sure that you commence your appeal in the right court. Certain decisions may be appealed to a single Judge of the Supreme Court.

Does the decision you seek to appeal fall within one of the following categories?
1. A decision to convict you, whether after a plea of guilty or after a trial.
2. A sentence imposed, or order made as a result of a conviction.
3. A refusal to make an order that might be made as a result of a conviction. (For example, a refusal to make a spent conviction order.)
4. A decision as to costs.

There are other decisions of Magistrates that may be appealed. However, this factsheet only deals with appeals from the categories of decision referred to above.

There are also some exceptions. Certain decisions of the Magistrates Court cannot be appealed to a single Judge of the Supreme Court.

Does your appeal concern a restraining order?

A decision to make or refuse a restraining order, under the *Restraining Orders Act 1997* (WA), cannot be appealed to the Supreme Court. Those appeals are made to and heard by the District Court.

This is subject to one exception. If the appeal concerns a restraining order and the decision was made by a Magistrate of the Children's Court (and not a Judge), then the appeal should be commenced in the Supreme Court.

Does your appeal concern a decision about bail?

You cannot appeal a decision of a Magistrate concerning bail to the Supreme Court.

A fresh application for bail can be made to a Judge of the Supreme Court pursuant to section 14 of the *Bail Act 1982* (WA).

Where a person is in custody and they have lodged an appeal to the Supreme Court (not the Court of Appeal) against the decision by virtue of which they are in custody, an application may be made for bail.

Does your appeal concern a decision to refuse an extraordinary driver's licence?

A decision to refuse to issue an extraordinary driver's licence may be appealed to the District Court. It cannot be appealed to the Supreme Court.

3. What documents do I need?

You will need to prepare and lodge a number of documents if you wish to appeal a decision of a Magistrate. However, there are two documents that you will need quickly that can only be sourced from the Magistrates Court.

Prosecution notice or notices

First, you will need to obtain for the purpose of lodging your appeal notice a copy of the prosecution notice for each charge being appealed.

The prosecution notice(s) must be **certified** by the Magistrates Court, and not by a solicitor or Justice of the Peace.

Transcript

Secondly, you will need a copy of the transcript of the proceedings before the Magistrate. The transcript is the record of what was said in Court.

You need to ensure that you obtain **all the relevant transcript**.

For an appeal against sentence this includes the transcript of your plea, the prosecution's statement of facts as read to the court, any submissions made by you on your behalf to the Magistrate, and the Magistrate's sentencing remarks.

For an appeal against conviction this includes the opening statements, the evidence, submissions and the Magistrate's reasons for conviction. Depending on your grounds of appeal, it may include transcript of previous mentions and/or the sentencing transcript.

Transcript is not usually prepared until a request is received and may take some time to prepare. You should contact the Magistrates Court as soon as possible to request your transcript.

It is very likely that **fees** will be payable for the transcript.

You can access a Magistrates Court document request form [here](#).

Click on '*Magistrates Court (General) Rules 2005 Forms*' which is in the list of forms, fees and factsheets. You will then find the Form 1 request form which is available in both PDF and Word. Click on the link to open the Form 1.

4. What legislation sets out the appeals process, and how do I find it?

Together, the *Criminal Appeals Act 2004* (WA) and the *Criminal Procedure Rules 2005* (WA) set out the procedure for initiating a criminal appeal against a decision of a Magistrate.

If you intend to represent yourself in an appeal, it is important that you access a copy of any applicable legislation and rules.

You can find Western Australian legislation online [here](#).

You do not have to pay to access legislation on this website.

If you are looking for an Act, click on the 'Acts in force' link on the left hand side of the page.

Then select the first letter of the name of the Act, for example C for *Criminal Procedure Act* or the *Criminal Code*, and navigate to the heading of your Act.

If you click on this link you can select to view the Act in PDF, Word or HTML.

If you are looking for subsidiary legislation, for example the *Criminal Procedure Rules*, click on the link under the heading 'Subsidiary legislation in force'.

5. How long do I have to commence an appeal?

An appeal against a decision of a Magistrate must be commenced no later than 28 days after the date of the decision that is being appealed. However, if a person is sentenced on a later date than the date on which the person is convicted of the offence, the time for appeal (that is, 28 days) runs from the date of sentencing.

What can I do if I am late in commencing my appeal?

If you are late in commencing the appeal, at the time that you lodge the appeal notice you can ask the Court for an extension of time. As explained in more detail below, you will need to make clear in the appeal notice that you require an extension of time to bring the appeal.

It is up to the Court whether or not to extend the time for starting an appeal. The longer the delay, the harder it is to get an extension.

This Court will grant an extension of time to appeal if it is in the interests of justice to do so.

Where there has been a lengthy delay, you must establish exceptional circumstances, unless it can be shown that there will be a miscarriage of justice if an extension is not granted.

Merely showing that there are reasonable prospects of the appeal succeeding is not sufficient. Something more has to be shown, otherwise there would be no practical consequences ever flowing from the failure to appeal within time.

In an affidavit is lodged at the same time as your appeal notice, you should explain the reason for the delay. An affidavit is a formal statement of facts sworn or affirmed in front of an authorised witness (such as a Justice of the Peace or an experienced lawyer).

You can find the form of the affidavit, under the heading 'Miscellaneous forms', [here](#).

You can find information about locating a Justice of the Peace to witness your affidavit [here](#).

6. How do I commence an appeal?

Form 20 – Appeal Notice

To start your appeal you need to prepare and lodge an appeal notice (Form 20).

You can find a copy of the appeal notice (Form 20) [here](#).

If possible, you should download the form and electronically complete it.

If you do not have access to a computer, you can present your handwritten appeal notice to the Court to be lodged. You may complete the appeal notice form by writing in capital letters in a blue or black ballpoint pen. If you do not complete the notice of appeal so that its contents can be easily read and understood then the Supreme Court may refuse to accept your appeal notice.

Set out below are some tips to assist you in completing the appeal notice.

Parties to the appeal

The appellant: The appellant is the person who is appealing a decision.

Insert your full name before the word appellant and underline your last name. For example:

Jane Joan <u>Smith</u>	Appellant
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The respondent: The respondent is the other side in your appeal.

If a prosecution has been brought in the Magistrates Court by a police officer, and the Magistrate's decision is appealed, the proper respondent to the appeal is the police officer who commenced the prosecution by issuing the notice (*Tey v Plotz* [2010] WASC 163).

The prosecution notice provides the name and official title of the person who issued the notice. Therefore, you will need a copy of the prosecution notice to determine the proper name of the respondent.

The respondent is not 'the WA police' as this is not a legal person.

Insert the full name of the person who issued the prosecution notice before the word 'Respondent' and underline the last name. For example:

John James <u>Smith</u>	Respondent
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If there is more than one prosecution notice then put down the name of each police officer and identify them separately as the first respondent, the second respondent etc.

Primary Court's decision

Insert the Magistrates Court at the location where your case was determined (e.g. Magistrates Court at Perth, or Magistrates Court at Mandurah).

Insert the Prosecution Notice Number. The number can be found on the prosecution notice, described as the charge number.

Insert the names of the parties (that is, your name and the name of the other party, who is the respondent in the appeal).

Insert the date the decision was made.

Insert the Magistrate's name.

For example:

Primary Court's Decision	
Primary Court	Magistrates Court at Perth
Prosecution Notice No.	PE 1111 of 2019
Parties	Jane Joan Smith John James Smith
Date of decision	1 January 2019
Magistrate's name	Magistrate Brown

Decision details

When completing this part of the form, you should refer to Notes 1 to 5 to Form 20 (found at the end of the Form).

If there is more than one conviction, put the details of the other convictions, sentences and orders on an attachment.

Decision details	
Conviction recorded	Yes
Sentence imposed	\$2,000 fine
Other orders made	Prosecution costs ordered in the total amount of \$7,073.
Decision made	Appellant was convicted and the Magistrate refused to make a spent conviction order.

Appeal details

This part requires you to tick one or more boxes. Tick the relevant box as to whether your appeal relates to an appeal against conviction, sentence or other order.

This part of the Form 20 also requires you to write down your grounds of appeal. Grounds of appeal are the reasons for appealing. They are the reasons why you say the conviction or sentence was wrong.

When entering your grounds of appeal on the form, you should refer to Note 6 to Form 20 (found at the end of the Form).

It is not enough for you to say that the decision was unfair. To win your appeal you need to show a ground of appeal that is accepted by the law. This could be that the Magistrate in your case made an error about the law or an error about a fact or imposed a sentence that was excessive.

If a lawyer represented you in court you should ask the lawyer if there are grounds of appeal.

You cannot merely state in your grounds of appeal that the decision-maker 'erred in fact or law' or that 'the sentence was excessive'. You must set out why it is you think the Court was in error or imposed an excessive sentence. For example, if you allege there was an error of fact, you need to state succinctly the factual finding you say ought not to have been made, the factual finding which you say ought to have been made and why the Magistrate was not entitled to make the challenged finding. A Magistrate does not make an error simply because he or she decided the facts against you. In order to succeed on appeal you will need to show that there was no evidence or insufficient evidence for the Magistrate's finding of fact.

If there is not enough space in the box provided to write down all of your grounds of appeal, then type up the grounds of appeal on a separate piece of paper and attach it to the Form 20.

You should carefully consider your grounds of appeal. There may be an opportunity to amend the grounds of appeal, however the Court is not required to give you this opportunity.

If you seek to amend your grounds of appeal, you can find the form of a 'minute of proposed amended grounds of appeal' [here](#).

This part of the form also requires you to insert the last date for appealing. Insert the date which is 28 days from the date that you were sentenced.

If an extension of time is needed, mark the form 'Yes'.

If you are not legally represented, mark the form 'No'.

If you are applying for legal aid, mark the form 'Yes'.

Appellant's details for service

Put in your name and address (i.e. if you are in prison, the name of the prison).

Sign and date the appeal notice.

7. Lodging the appeal notice

When you have completed the appeal notice, you need to lodge it by delivering it in person or by post to the Supreme Court Registry (Level 11, David Malcolm Justice Centre, 28 Barrack Street, Perth WA), or by faxing it to 9421 5353. You may also post the appeal notice to the Court, but it is your responsibility to ensure that it is received no later than 28 days after the Magistrate's decision.

You also need to provide the Supreme Court with a certified copy of the prosecution notice(s), the transcript and any other document that the Court will need to determine the appeal. Other documents may include documents which were considered by the Magistrate but which were not kept by the Magistrate or additional material which you wish to rely on in the appeal.

Additional evidence: An appeal is generally heard on the basis of the material which was before the Magistrate. The Court may permit you to add to that material, but if you wish to rely on other documents you must file:

- (a) an Application in an Appeal (Form 23) which identifies the additional documents you want the Court to take into account; and
- (b) an affidavit which attaches those documents and which states what they are, explains why they were not before the Magistrate, and why they are relevant to the appeal.

You can find a copy of the form of the Application in an Appeal (Form 23) [here](#).

If you cannot obtain the prosecution notice(s), the transcript and any other required document before the 28-day time limit to appeal is reached, you should still send your appeal notice to the Supreme Court within the time limit and notify the Court that you are seeking the prosecution notice(s), the transcript and/or any other document.

If you require an extension of time within which to appeal you must also lodge an affidavit explaining why the appeal was not commenced within time. You can find more information and the form of the affidavit in Part 5 of this factsheet.

If you get a letter from the Supreme Court telling you to provide the prosecution notice(s) and transcript by a certain date you must comply with this. If you are having difficulty getting the prosecution notice(s) and transcript within the required time, you should inform the Court by letter addressed to the Judicial Officer in charge of Single Judge Appeals.

Keep a photocopy of all documents that you lodge for your reference. Always keep copies of everything you send.

8. Service on the respondent

Every document lodged in your appeal must be served on the respondent.

If you are in prison then send or fax a copy of your appeal notice and other documents to the solicitor for the respondent.

If you are not in prison then you should deliver a copy of your appeal notice and other appeal documents to the solicitor for the respondent.

If the charge related to a State offence then your appeal documents are served on the State Director of Public Prosecutions (DPP) or State Solicitor (SSO), depending on the original charge.

If the charge was an indictable charge (it could have been dealt with in the District Court such as a burglary charge) then you should serve your documents on the State Director of Public Prosecutions.

The service and contact details for the DPP are as follows:

Office of the Director of Public Prosecutions for Western Australia

Ground floor, 55 St George's Terrace
PERTH WA 6000
Phone: (08) 9425 3999, Fax: (08) 9425 3600

If the charge was a summary charge (one that could only be dealt with in a Magistrates Court such as driving under the influence of alcohol) then you should serve your documents on the State Solicitor's Office.

The service and contact details for the SSO are as follows:

State Solicitor's Office

Level 23, David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Phone: (08) 9264 1888, Fax: (08) 9264 1440

If the charge related to a Commonwealth offence such as social security fraud then your appeal documents need to be served on the Commonwealth Director of Public Prosecutions.

The service and contact details for the Commonwealth DPP are as follows:

Commonwealth Director of Public Prosecutions

Level 1
226 Adelaide Terrace
Perth WA 6000
Phone: (08) 9264 7264, Fax: (08) 9264 7266

9. Service certificate

After you have served the appeal notice and other documents on the respondent, you need to prepare and lodge a service certificate.

You can access a copy of the Form 21 [here](#).

If you are in prison, you may send the service certificate to the Supreme Court by post or by fax.

If you are not in prison, please lodge your Service Certificate at the Supreme Court Registry in person or by post.

10. What happens next?

Notice of respondent's intention

After being served with an appeal notice (Form 20), the respondent may lodge a notice of respondent's intention (Form 22).

If the respondent does not lodge a Form 22 within seven days after being served with the appeal notice, or any extension on that time that the Court orders, the respondent is not entitled to take part or be heard in the proceedings and will not be considered a party to the appeal.

In some appeals, the DPP will lodge a Form 22 and at the same time give notice to the Court that it will take over the appeal as the respondent. The DPP will do so if your conviction in the Magistrates Court was for an offence that could have been determined in either the Magistrates Court or the District Court (what is known as an 'either-way charge'). In such cases the DPP, rather than the police officer who commenced your prosecution, will be named as the respondent on the Form 22 and any documents which are subsequently lodged.

Primary Court to be notified and to supply records

After you lodge your appeal notice, the Supreme Court will give the Magistrates Court a copy of the appeal notice. It will also ask the Magistrates Court to deliver to it all exhibits that it holds. You do not have to take any action to secure the exhibits.

However, if you are not sure whether a document was made an exhibit you should make enquiries with the Magistrates Court or the Supreme Court to ensure that all relevant documents have been sent to the Supreme Court. If a document on which you wish to rely has not been sent to the Supreme Court, it is your responsibility to ensure that it is before the Court by the time the appeal is heard.

Directions hearings and provisional decisions

The general practice of the Court is that once all the required documents are lodged, the file is reviewed by the Judicial Officer in charge of Single Judge Appeals.

Your appeal may be listed for **directions**.

At a directions hearing, the Judicial Officer may make a range of case management directions to facilitate the efficient hearing of the appeal. This includes requiring the parties to attend to certain tasks within fixed timeframes.

The Judicial Officer may also make a provisional decision, based on documents lodged and without requiring the parties to attend a hearing. Provisional decisions will be provided to the parties in writing.

If either party wants a hearing in relation to the provisional decision, they must lodge a request for a hearing (Form 25). You can find a copy of the Form 25 [here](#).

A request for hearing (Form 25) must be lodged within five working days of the party being served with notice of the provisional decision. If a request for hearing is lodged, the matter will be listed for hearing and a final decision made. If no request for hearing is lodged, the provisional decision will become the final decision.

If you are having difficulty complying with any order of the Court within the required time, you should inform the Court by letter addressed to the Judicial Officer in charge of Single Judge Appeals. All of your correspondence with the Court must also be sent to the respondent's representative.

You may be required to lodge other documents. For example, the Court may order you, and/or the respondent to lodge and serve an outline of written submissions.

Outline of written submissions

The purpose of an outline of written submissions is to set out the points that you want to make in relation to your appeal, and to list any cases and legislation that you want to refer to at the hearing of the appeal.

The outline should contain your main points for each ground of appeal.

Your outline must comply with the Supreme Court Practice Direction 2.1, and should not exceed 10 pages in length. You can find a copy of Practice Direction 2.1, within the Court's Consolidated Practice Directions, [here](#).

In the outline you may set out the rules established in previous cases, which support your appeal and the names of such cases and the citation for each case.

Before the hearing of the appeal, you will also receive the respondent's outline of submissions in response.

Leave to appeal

The appellant requires leave to appeal in respect of each of the grounds of appeal.

The Court will not give leave to appeal on a ground of appeal unless it is satisfied the ground has a reasonable prospect of succeeding. That means that the ground must be judged to have a rational and logical prospect of succeeding so that, in effect, it has a real prospect of success.

If leave to appeal is refused on each ground, the appeal will be taken to be dismissed.

The Court may order that the application for leave to appeal and any application for an extension of time be heard together with the appeal. That is, at the one hearing.

Some sentences will be suspended when leave to appeal is granted

The lodgment of a notice of appeal does not suspend a sentence or any consequential order.

If and when leave to appeal is granted, certain sentences will automatically be suspended until the appeal is decided (e.g. a disqualification from holding or obtaining a driver's licence under section 4 of the *Road Traffic Administration Act 2008 (WA)*). Other sentences may only be suspended if the Court so orders.

Unless you are certain that a sentence or consequential order has been suspended you must continue to comply with any sentence or order even after you have lodged your notice of appeal.

Will my fine be suspended until after my appeal is determined?

If your appeal is commenced against a decision involving or giving rise to the imposition of a fine (as defined in the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* section 28(1)), commencing an appeal in the Supreme Court **will not suspend** that decision.

Such a decision cannot be suspended unless or until leave to appeal is granted.

11. Can I apply for bail?

As explained above, you cannot appeal a decision of a Magistrate concerning bail to the Supreme Court.

You can lodge an application asking for bail at the same time as filing your appeal notice.

To apply for bail you must lodge an application in an appeal (Form 23) and an affidavit.

You can find a copy of the form of the Application in an Appeal (Form 23) [here](#).

You can find the form of the affidavit, under the heading 'Miscellaneous forms', [here](#).

12. What if I need my appeal to be determined quickly?

There may be a good reason for you to seek that the Supreme Court determine your appeal on an urgent basis. For example, you may be in custody and it is likely that your sentence may be served before the appeal is heard, and you are not able to secure bail.

An application for an urgent appeal order may be made by filing an application in an appeal (Form 23). If such an application is made, it should state the appellant's earliest release date under the current sentence.

You can find a copy of the form of the Application in an Appeal (Form 23) [here](#).

You can find the form of the affidavit, under the heading 'Miscellaneous forms', [here](#).

13. How does the Court decide my appeal?

An appeal will usually be heard at a hearing where both parties are present. If you fail to attend the hearing, the Judge may proceed to determine the appeal in your absence. If you do not wish this to occur and you cannot attend a hearing you must advise the Court as soon as possible and request an adjournment of the hearing.

Oral submissions: The Judge will ask both the appellant and the respondent to make oral submissions. Generally, the Judge will ask you, the appellant, to go first.

You should explain to the Judge each of your grounds of appeal and you may support any arguments you make by referring to legislation or previous cases.

The respondent will follow you and make their oral submissions.

It is up to the Judge to decide how long each party will be allowed to speak. You must follow any direction given to you by the Judge about the length of your submissions.

On an appeal against sentence, the Court may have regard to any relevant matter that has occurred between the date of conviction and the date on which the appeal is heard.

If you wish to rely on such matters you need to file an Application in an Appeal (Form 23) and an affidavit which sets out the information. The Court is unlikely to permit you to provide the information orally at the hearing.

The decision: After hearing the parties' submissions, the Court may reserve its decision. That is, the Judge will give the appeal further consideration and you will be informed when the Judge is ready to give their judgment and deliver his or her reasons for decision. Alternatively, the Judge may give his or her decision orally, at the end of the hearing.

The Judge may allow the appeal, dismiss the appeal, vary the decision and/or sentence imposed by the Magistrates Court or order that the matter be dealt with again by the Magistrates Court.

14. Costs

If you fail to attend a hearing the Court may order you to pay the respondent's costs if they attended the hearing.

If you lose your appeal, the Court can order you to pay the respondent's legal costs. The costs order can be a significant amount.

If you win your appeal, as an unrepresented appellant you cannot claim legal costs but you can ask for an order that the respondent pay your disbursements, such as the cost of obtaining the transcript and the cost of transport to and from court. If you have paid for any legal advice relating to your appeal you can also claim for the cost of that advice. You should bring proof of payments to the Court so that you can present them to the Judge.

15. Discontinuing an appeal

If after commencing the appeal, you decide that you no longer wish to pursue it, you may discontinue by lodging and serving a discontinuance notice (Form 26).

You can find the form of a Discontinuance Notice (Form 26) [here](#).

16. Courtroom etiquette

You can find information concerning court etiquette [here](#).

You can find information concerning the people you can expect to be in Court, and the setup of the Court, [here](#).

17. Applying to Legal Aid

You can apply for legal aid by attending at your nearest office of Legal Aid or by contacting Legal Aid on 1300 650 579 to obtain an application form.

If you are in prison, make an appointment to see Legal Aid at the prison. Legal Aid goes to Hakea, Casuarina, Acacia and Bandyup each week. Other prisons are visited upon request.

You should see Legal Aid as soon as possible after you are sentenced because of the time limit for starting an appeal.

You may be further assisted by downloading a copy of the Magistrates Court Appeal Kit on the Legal Aid website, which you can find [here](#). You will need to click on the link to the kit, which is under the heading 'Criminal appeals against conviction or sentence'.

Last updated: 31 May 2021