

Authorised Version No. 050
Criminal Procedure Act 2009
No. 7 of 2009

Authorised Version incorporating amendments as at
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Authorised Version incorporating amendments as at
12 September 2016

The Parliament of Victoria enacts:

Chapter 1—Preliminary

1 Purposes

The purposes of this Act are—

- (a) to clarify, simplify and consolidate the laws relating to criminal procedure in the Magistrates' Court, the County Court and the Supreme Court;
- (b) to introduce a new procedure permitting the service of a notice to appear in the Magistrates' Court;
- (c) to provide new pre-trial disclosure requirements for the prosecution;
- (d) to provide for a 6-month time limit for the filing of charges for summary offences in the Children's Court;
- (e) to provide for the transfer to the County Court or Supreme Court of summary offences related to an offence to be tried on indictment by the relevant court;
- (f) to abolish the procedure of indictment by grand jury;
- (g) to provide for interlocutory appeals in criminal proceedings in the County Court and the Supreme Court;

- (h) to clarify the tests relating to determination of appeals by the Court of Appeal;
- (i) to provide for the stay of sentences on appeal;
- (j) to amend the **Sentencing Act 1991** to provide for a maximum fine that may be imposed for an indictable offence that is heard and determined summarily;
- (k) to amend the **Crimes Act 1958**, the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**, the **Magistrates' Court Act 1989**, the **Children, Youth and Families Act 2005** and the **Appeal Costs Act 1998**;
- (l) to repeal the **Crimes (Criminal Trials) Act 1999**;
- (m) to make consequential and other amendments.

2 Commencement

- (1) This Chapter comes into operation on the day after the day on which this Act receives the Royal Assent.

S. 2(2)
amended by
No. 68/2009
s. 51(a),
repealed by
No. 30/2010
s. 56.

* * * * *

- (3) Subject to subsection (4), the remaining provisions of this Act come into operation on a day or days to be proclaimed.
- (4) If a provision referred to in subsection (3) does not come into operation before 1 January 2011, it comes into operation on that day.

3 Definitions

In this Act—

accused means a person who—

- (a) is charged with an offence; or
- (b) is directed under section 415 to be tried for perjury;

S. 3 def. of
accused
amended by
No. 68/2009
s. 51(b)(i).

appeal includes application for leave to appeal;

appeal period means the period permitted by or under this Act or any other Act for commencing an appeal under Part 6.3 or, if a notice of appeal or notice of application for leave to appeal under Part 6.3 is filed within that period, the determination of the appeal;

appear, in relation to a party, has the meaning given in section 328;

appellant includes an applicant for leave to appeal;

appropriate registrar means—

- (a) the registrar at the venue of the Magistrates' Court referred to in section 11; or
- (b) if an order is made under section 31, the registrar at the venue of the Magistrates' Court at which the hearing is to be held;

arraignment has the meaning given in section 215(1);

attend, in relation to a person, means—

- (a) be physically present in court; or
- (b) if authorised or required to do so under Division 2 or 3 of Part IIA of the **Evidence (Miscellaneous Provisions)**

S. 3 def. of
attend
amended by
No. 69/2009
s. 54(Sch. Pt 2
item 18.1),
substituted by
No. 38/2016
s. 9(1).

Act 1958, appear or be brought before the court by audio visual link;

S. 3 def. of
child pornography
inserted by
No. 42/2015
s. 12.

child pornography has the meaning given by section 67A of the **Crimes Act 1958**;

cognitive impairment includes impairment because of mental illness, intellectual disability, dementia or brain injury;

commencement of trial, in relation to the Supreme Court or the County Court, has the meaning given in section 210;

compulsory examination hearing means a hearing under section 106;

contest mention hearing means a hearing under section 55;

S. 3 def. of
conviction
amended by
No. 68/2009
s. 3(a).

conviction, in Chapter 6, includes a finding of guilt by a court, whether or not a conviction is recorded;

corporate accused means an accused that is a body corporate;

S. 3 def. of
criminal record
amended by
No. 81/2011
s. 3(1).

criminal record, in relation to a person, means a document that—

- (a) sets out all previous convictions and infringement convictions of the person alleged by the prosecution; and
- (b) complies with section 77 or 244, as the case requires;

Crown Prosecutor means the Chief Crown Prosecutor, a Senior Crown Prosecutor or a Crown Prosecutor appointed under the **Public Prosecutions Act 1994**;

depositions means the transcript of evidence given in a committal proceeding and any statements admitted in evidence in a committal proceeding in accordance with Chapter 4;

direct indictment means an indictment filed against an accused—

- (a) who has not been committed for trial in respect of the offence charged in the indictment or a related offence; or
- (b) whose prosecution for the offence charged in the indictment or a related offence—
 - (i) was discontinued under section 177; or
 - (ii) was the subject of a nolle prosequi; or
 - (iii) resulted in an acquittal within the meaning of Chapter 7A and the prosecution of the offence charged in the indictment may only proceed if the Court of Appeal gives authorisation under section 327O;

S. 3 def. of *direct indictment* substituted by No. 30/2010 s. 57, amended by No. 81/2011 s. 3(2).

DPP means the Director of Public Prosecutions for Victoria;

evidence in support of alibi means evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time the accused was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission;

S. 3 def. of *evidence in support of alibi* inserted by No. 68/2009 s. 3(d).

filing hearing means a hearing referred to in section 101;

full brief means a full brief described in section 41;

hand-up brief means a hand-up brief described in section 110;

in detention means—

- (a) in a prison in the legal custody of the Secretary to the Department of Justice; or
- (b) in custody in a police gaol in the legal custody of the Chief Commissioner of Police; or
- (c) detained in a designated mental health service within the meaning of the **Mental Health Act 2014** in the legal custody of the authorised psychiatrist for the designated mental health service; or
- (d) in custody in a remand centre, youth residential centre or youth justice centre within the meaning of the **Children, Youth and Families Act 2005** in the legal custody of the Secretary to the Department of Human Services; or
- (e) in custody in a residential institution or a residential treatment facility within the meaning of the **Disability Act 2006** in the legal custody of the Secretary to the Department of Human Services;

indictable offence that may be heard and determined summarily means an offence to which section 28(1) applies;

S. 3 def. of
in detention
amended by
No. 26/2014
s. 455(Sch.
item 8.1).

informant means a person who commences a criminal proceeding in the Magistrates' Court;

infringement conviction means an infringement notice that has taken effect as a conviction of the offence specified in the notice;

S. 3 def. of *infringement conviction* inserted by No. 81/2011 s. 3(3).

infringements registrar has the same meaning as in the **Infringements Act 2006**;

interlocutory appeal means an appeal under Division 4 of Part 6.3;

interlocutory decision means a decision made by a judge in a proceeding referred to in section 295(1), whether before or during the trial, including a decision to grant or refuse to grant a permanent stay of the proceeding;

S. 3 def. of *interlocutory decision* amended by No. 87/2009 s. 6.

Juries Commissioner has the same meaning as in the **Juries Act 2000**;

legal practitioner means—

- (a) an Australian legal practitioner; or
- (b) a government lawyer within the meaning of the Legal Profession Uniform Law (Victoria);

S. 3 def. of *legal practitioner* amended by No. 17/2014 s. 160(Sch. 2 item 30.1).

mention hearing means a hearing referred to in section 53;

notice to appear means a notice served under section 21;

S. 3 def. of *notice to appear* inserted by No. 68/2009 s. 3(d).

ordinary service means service in accordance with section 394;

S. 3 def. of *ordinary service* amended by No. 68/2009 s. 51(b)(ii).

S. 3 def. of
*original
jurisdiction*
amended by
No. 65/2011
s. 107(Sch.
item 4.1).

original jurisdiction includes—

- (a) a proceeding for an indictable offence;
and
- (b) a proceeding for a related summary
offence heard under section 242; and
- (c) a proceeding for an unrelated summary
offence heard under section 243; and
- (d) a proceeding for contempt of court; and
- (e) a proceeding for variation or
contravention of a sentencing order
under the **Sentencing Act 1991**;

originating court means the County Court in its
original jurisdiction or the Trial Division of
the Supreme Court in its original
jurisdiction;

S. 3 def. of
*personal
service*
amended by
No. 68/2009
s. 51(b)(iii).

personal service means service in accordance
with section 391;

plea brief means a plea brief described in
section 117;

police gaol has the same meaning as in the
Corrections Act 1986;

S. 3 def. of
police officer
inserted by
No. 37/2014
s. 10(Sch.
item 41.1).

police officer has the same meaning as in the
Victoria Police Act 2013;

preliminary brief means a preliminary brief
described in section 37;

previous conviction means a prior conviction or finding of guilt by a court (whether in or out of Victoria) but does not include—

S. 3 def. of *previous conviction* amended by No. 3/2016 s. 60.

- (a) a conviction or finding of guilt set aside by the Magistrates' Court under section 92; or
- (b) a conviction or finding of guilt set aside by the County Court or the Supreme Court, as the case requires, under section 256; or
- (c) a conviction or finding of guilt set aside by the Court of Appeal under section 277; or
- (d) a conviction or finding of guilt by a children's court (whether in or out of Victoria) made more than 10 years before the hearing at which it is sought to be proved;

prison has the same meaning as in the **Corrections Act 1986**;

* * * * *

S. 3 def. of *prison officer* repealed by No. 68/2009 s. 3(b).

proceeding, in relation to the Magistrates' Court, includes a committal proceeding but does not include the exercise by a registrar of the Magistrates' Court of any jurisdiction, power or authority vested in the registrar as infringements registrar;

S. 3 def. of
protective services officer
inserted by
No. 37/2014
s. 10(Sch.
item 41.1).

protective services officer has the same meaning
as in the **Victoria Police Act 2013**;

S. 3 def. of
public official
amended by
No. 30/2010
s. 77(1).

public official means—

- (a) a public official within the meaning of
the **Public Administration Act 2004**;
or
- (b) a person employed by, or the holder of
an office in, or on the governing body
of a Council within the meaning of the
Local Government Act 1989; or
- (c) in the case of a charge for an offence
referred to in section 24ZW(1) of the
**Prevention of Cruelty to Animals
Act 1986**, a full-time officer of the
Royal Society for the Prevention of
Cruelty to Animals authorised under
section 24ZW(1)(b) of that Act;

related offences means offences that are founded
on the same facts or form, or are part of, a
series of offences of the same or a similar
character;

related summary offence means a summary
offence the proceedings for which are
transferred from the Magistrates' Court under
section 145;

S. 3 def. of
responsible person
amended by
No. 26/2014
s. 455(Sch.
item 8.2).

responsible person, in relation to a person in
detention, means—

- (a) in the case of a prison, the officer in
charge of the prison;
- (b) in the case of a police gaol, the Chief
Commissioner of Police;

- (c) in the case of a designated mental health service within the meaning of the **Mental Health Act 2014**, the authorised psychiatrist for the designated mental health service;
- (d) in the case of a remand centre, youth residential centre or youth justice centre within the meaning of the **Children, Youth and Families Act 2005**, the Secretary to the Department of Human Services;
- (e) in the case of a residential institution or a residential treatment facility within the meaning of the **Disability Act 2006**, the Secretary to the Department of Human Services;

return date, in relation to a criminal proceeding in the Magistrates' Court, means the first date on which the proceeding is listed before the court;

sentence includes—

- (a) the recording of a conviction; and
- (b) an order made under Part 3, 3A, 3B, 3BA, 3C, 3D, 4 or 5 of the **Sentencing Act 1991**, other than an order incidental to or preparatory to the making of the order; and
- (c) an order made under section 11 of the **Sex Offenders Registration Act 2004**; and
- (d) an order made under section 84S or 84T of the **Road Safety Act 1986**; and

S. 3 def. of ***sentence*** amended by Nos 68/2009 s. 3(c), 65/2011 s. 107(Sch. item 4.2), 26/2012 s. 73.

- (e) an order made under section 365, 367, 373, 380 or 387 of the **Children, Youth and Families Act 2005** made by the Supreme Court in its original jurisdiction or the County Court in its original jurisdiction;

Note

Section 586 of the **Children, Youth and Families Act 2005** gives the Supreme Court and the County Court, when sentencing a child for an indictable offence, power to impose any sentence which the Children's Court may impose.

sexual offence means—

- (a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I of the **Crimes Act 1958** or under any corresponding previous enactment; or
- (b) an attempt to commit an offence referred to in paragraph (a); or
- (c) an assault with intent to commit an offence referred to in paragraph (a);

special hearing means a hearing conducted under section 370;

S. 3 def. of *special hearing* inserted by No. 68/2009 s. 3(d).

summary case conference means a conference referred to in section 54;

summary hearing means a hearing conducted in accordance with Part 3.3;

S. 3 def. of *total effective sentence* inserted by No. 48/2012 s. 4.

total effective sentence means the product of individual sentences and orders for cumulation or concurrency of those sentences imposed on a person on the same occasion;

traffic camera offence means—

- (a) an offence under the **Road Safety Act 1986** or regulations or rules under that Act that is detected by a road safety camera, a speed detector or a process prescribed for the purposes of that Act; or
- (b) an offence under the **Melbourne City Link Act 1995** that is detected by a tolling device or a process prescribed for the purposes of Part 4 of that Act; or
- (c) an offence under the **EastLink Project Act 2004** that is detected by a tolling device or a process prescribed for the purposes of Part 9 of that Act;

S. 3 def. of
*traffic camera
offence*
inserted by
No. 55/2014
s. 112.

trial judge means the judge of the Trial Division of the Supreme Court or the judge of the County Court before whom an accused is tried;

Victoria Legal Aid means Victoria Legal Aid established under section 3 of the **Legal Aid Act 1978**;

youth justice centre means a youth justice centre established under section 478 of the **Children, Youth and Families Act 2005**.

4 References to Parts

Unless the context otherwise requires, a reference in this Act to a Part by a number must be construed as a reference to the Part of this Act designated by that number.

Chapter 2—Commencing a criminal proceeding

Part 2.1—Ways in which a criminal proceeding is commenced

5 How a criminal proceeding is commenced

A criminal proceeding is commenced by—

- (a) filing or signing a charge-sheet in accordance with section 6; or
- (b) filing a direct indictment in accordance with section 159; or
- (c) a direction under section 415 that a person be tried for perjury.

S. 5(c)
amended by
No. 68/2009
s. 51(c).

Note to s. 5
inserted by
No. 48/2012
s. 10.

Note

A proceeding may also be commenced under section 83AL of the **Sentencing Act 1991**.

Part 2.2—Charge-sheet and listing of matter

6 Commencement of a criminal proceeding in the Magistrates' Court

- (1) A criminal proceeding is commenced—
 - (a) by filing a charge-sheet containing a charge with a registrar of the Magistrates' Court; or
 - (b) if the accused is arrested without a warrant and is released on bail, by filing a charge-sheet containing a charge with a bail justice; or
 - (c) if a summons is issued under section 14, at the time the charge-sheet is signed.

Note

A criminal proceeding against a child is commenced in the same manner in the Children's Court: section 528 of the **Children, Youth and Families Act 2005**.

- (2) If a charge-sheet is filed in accordance with the method prescribed by the rules of court for electronic filing, the requirements of sections 8(1) and 9(1) of the **Electronic Transactions (Victoria) Act 2000** are taken to have been met.
- (3) A charge-sheet must—
 - (a) be in writing; and
 - (b) be signed by the informant personally; and
 - (c) comply with Schedule 1.

Note

Section 18 requires an informant to nominate an address for service of documents and other details. That information may be included on a charge-sheet.

- (4) The informant may include a request for a committal proceeding in a charge-sheet containing a charge for an indictable offence that may be heard and determined summarily.

7 Time limits for filing a charge-sheet

- (1) A proceeding for a summary offence must be commenced within 12 months after the date on which the offence is alleged to have been committed except where—
- (a) otherwise provided by or under any other Act; or
 - (b) the accused gives written consent, and the DPP or a Crown Prosecutor consent, to the proceeding being commenced after the expiry of that period.

Note

See Part 5.1A of Chapter 5 of the **Children, Youth and Families Act 2005** for a shorter time limit in relation to children.

- (2) A proceeding for an indictable offence—
- (a) may be commenced at any time, except where otherwise provided by or under this or any other Act; and
 - (b) may be heard and determined summarily even though the proceeding may have been commenced more than 12 months after the date on which the offence is alleged to have been committed.

7A Time limits on prosecuting certain former sexual offences removed

S. 7A
inserted by
No. 74/2014
s. 10.

- (1) Any immunity from prosecution arising because of the time limit imposed by the following repealed provisions on commencing a proceeding for an offence is abolished—
 - (a) section 47 of the **Crimes Act 1928**;
 - (b) section 51 of the **Crimes Act 1957**;
 - (c) section 51 of the **Crimes Act 1958** (repealed by section 5 of the **Crimes (Sexual Offences) Act 1980**);
 - (d) section 48(6) of the **Crimes Act 1958** (inserted by section 5 of the **Crimes (Sexual Offences) Act 1980** and repealed by section 3 of the **Crimes (Sexual Offences) Act 1991**);
 - (e) section 49(6) of the **Crimes Act 1958** (inserted by section 5 of the **Crimes (Sexual Offences) Act 1980** and repealed by section 3 of the **Crimes (Sexual Offences) Act 1991**).
- (2) Subsection (1) does not apply to an offence if the conduct constituting it would not constitute an offence under the law of Victoria immediately before the day after the day on which the **Jury Directions Act 2015** receives the Royal Assent.
- (3) Without limiting any other defence available to a person charged, because of subsection (1), with an offence of a kind described in column 1 of the Table in this subsection, the person may rely on a defence described in column 2 of that Table in relation to that offence.

S. 7A(2)
amended by
No. 14/2015
s. 80.

Table

<i>Column 1</i>	<i>Column 2</i>
An offence against a child under the age of 16	A defence that would be available under section 45(4) of the Crimes Act 1958 if the person were charged with an offence under section 45(1) of that Act
An offence against a 16 or 17 year old child	A defence that would be available under section 48(2) of the Crimes Act 1958 if the person were charged with an offence under section 48(1) of that Act

8 Order for amendment of charge-sheet

- (1) The Magistrates' Court at any time may order that a charge-sheet be amended in any manner that the court thinks necessary, unless the required amendment cannot be made without injustice to the accused.
- (2) If a charge-sheet is amended by order under this section, the charge-sheet is to be treated as having been filed in the amended form for the purposes of the hearing and all proceedings connected with the hearing.
- (3) An amendment of a charge-sheet that has the effect of charging a new offence cannot be made after the expiry of the period, if any, within which a proceeding for the offence may be commenced.

- (4) If a limitation period applies to the offence charged in the charge-sheet, the charge-sheet may be amended after the expiry of the limitation period if—
- (a) the charge-sheet before the amendment sufficiently disclosed the nature of the offence; and
 - (b) the amendment does not amount to the commencement of a proceeding for a new offence; and
 - (c) the amendment will not cause injustice to the accused.

9 Errors etc. in charge-sheet

- (1) A charge-sheet is not invalid by reason only of a failure to comply with Schedule 1.
- (2) A charge on a charge-sheet is not invalid by reason only of—
- (a) omitting to state the time at which the offence was committed unless time is an essential element of the offence; or
 - (b) incorrectly stating the time at which the offence was committed; or
 - (c) stating the offence to have been committed on an impossible day or on a day that never happened.

10 Listing of matter for mention hearing or filing hearing in the Magistrates' Court

- (1) If a charge-sheet contains a charge for a summary offence, the proceeding must be listed for a mention hearing.
- (2) Subject to subsection (3), if a charge-sheet contains a charge for an indictable offence that may be heard and determined summarily, the proceeding may be listed for a mention hearing or

a filing hearing, having regard to any request for a committal proceeding included on the charge-sheet.

- (3) If a notice to appear is served under section 21 and a charge-sheet is filed in accordance with section 22, the proceeding must be listed for a mention hearing on the date specified in the notice to appear.
- (4) Despite subsections (1) and (2), if a charge-sheet contains a charge for an indictable offence that is not an indictable offence that may be heard and determined summarily, the proceeding must be listed for a filing hearing.

Notes

- 1 A mention hearing is the first hearing for a charge that will be heard and determined summarily.
- 2 A filing hearing is the first stage in a committal proceeding under Chapter 4.
- 3 Section 28(1) sets out the indictable offences that may be heard and determined summarily.

11 Place of hearing

- (1) A criminal proceeding in the Magistrates' Court is to be heard at the venue of the court that is nearest to—
 - (a) the place where the offence is alleged to have been committed; or
 - (b) the place of residence of the accused—

except where otherwise provided by this or any other Act or by a nomination under subsection (2).

Note

Part 2 of the **Magistrates' Court Act 1989** sets out the special requirements for matters that may be heard in the various Divisions of the Magistrates' Court: the Drug Court Division, the Koori Court Division, the Family Violence Court Division and the Neighbourhood Justice Division.

- (2) The Chief Magistrate may from time to time, by notice published in the Government Gazette, nominate a venue of the Magistrates' Court as a venue for the hearing of a specified criminal proceeding or a specified class of criminal proceeding.
- (3) A criminal proceeding in the Magistrates' Court is not invalid only because it was conducted at a venue of the court other than the venue referred to in subsection (1) or nominated under subsection (2).

Part 2.3—Notifying accused of court appearance

Division 1—Summons or warrant to arrest

12 Court may issue summons or warrant to arrest

- (1) On the filing of a charge-sheet under section 6, an application may be made to a registrar of the Magistrates' Court for the issue of—
 - (a) a summons to answer to the charge directed to the accused; or
 - (b) a warrant to arrest in order to compel the attendance of the accused—

unless a notice to appear has been served on the accused under Division 2.

Note to s. 12(1) inserted by No. 1/2016 s. 22(2).

Note

There is a presumption in favour of proceeding by summons if an accused is a child—see section 345 of the **Children, Youth and Families Act 2005**.

- (2) An application under subsection (1)(b) must be made by the informant personally but an application under subsection (1)(a) may be made by the informant or a person on behalf of the informant.
- (3) An application under subsection (1) may be made by the applicant in person or by post.
- (4) On an application under subsection (1), the registrar must, if satisfied that the charge discloses an offence known to law, issue—
 - (a) a summons to answer to the charge; or
 - (b) subject to subsection (5), a warrant to arrest.

- (5) A registrar of the Magistrates' Court must not issue in the first instance a warrant to arrest unless satisfied by sworn evidence, whether oral or by affidavit, that—
- (a) it is probable that the accused will not answer a summons; or
 - (b) the accused has absconded, is likely to abscond or is avoiding service of a summons that has been issued; or
 - (c) a warrant is required or authorised by any other Act or for other good cause.

Notes

- 1 If an accused fails to appear in answer to a summons, sections 80 and 81 provide for the issue of a warrant to arrest the accused. Section 330 provides for the issue of a warrant to arrest a person who has been remanded in custody or granted bail to attend a hearing but fails to attend.
- 2 Section 29 of the **Magistrates' Court Act 1989** enables a magistrate to exercise the powers of a registrar to issue a summons or warrant.

13 Summons or warrant to be accompanied by charge-sheet and notice when served

S. 13
amended by
No. 68/2009
s. 4(a).

A summons to answer to a charge issued under section 12 or 14 or a warrant to arrest issued under section 12, on service or execution on the accused, must be accompanied by—

- (a) a copy of the charge-sheet; and
- (b) a notice, in the form prescribed by the rules of court, containing—
 - (i) if the charge is for an indictable offence that may not be heard and determined summarily or the charge-sheet contains a request for a committal proceeding, a summary of Part 4.4; and

S. 13(b)(i)
substituted by
No. 68/2009
s. 4(b).

S. 13(b)(ii)
inserted by
No. 68/2009
s. 4(b).

- (ii) if the charge is for any other indictable offence or a summary offence, a summary of Division 2 of Part 3.2; and

S. 13(b)(ii)
renumbered
as s. 13(b)(iii)
by
No. 68/2009
s. 4(c).

- (iii) advice that the accused should seek legal advice and that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and

S. 13(b)(iii)
renumbered
as s. 13(b)(iv)
by
No. 68/2009
s. 4(d).

- (iv) details of how to contact Victoria Legal Aid.

14 Police or public official may issue summons

- (1) Without limiting the power of a registrar of the Magistrates' Court in any way—

S. 14(1)(a)
substituted by
No. 37/2014
s. 10(Sch.
item 41.2(a)).

- (a) a police officer; or

- (b) a public official acting in the performance of his or her duty (whether the power to commence the proceeding is conferred on him or her by or under an Act or at common law)—

may, after signing a charge-sheet containing a charge, issue a summons to answer to the charge.

Note to
s. 14(1)
inserted by
No. 1/2016
s. 22(2).

Note

There is a presumption in favour of proceeding by summons if an accused is a child—see section 345 of the **Children, Youth and Families Act 2005**.

S. 14(2)
amended by
No. 37/2014
s. 10(Sch.
item 41.2(b)).

- (2) If a police officer or a public official issues a summons under subsection (1), he or she must file the charge-sheet and summons with the

appropriate registrar within 7 days after signing the charge-sheet.

- (3) If it appears to the Magistrates' Court that subsection (2) has not been complied with in relation to a proceeding, the court may strike out the charge.

Note

Section 401(3) allows the court to award costs if a charge is struck out.

**Note to
s. 14(3)
amended by
No. 68/2009
s. 51(d).**

15 Contents of summons

- (1) A summons to answer to a charge must direct the accused to appear at the venue of the Magistrates' Court referred to in section 11 on a specified date and at a specified time to answer the charge.
- (2) A summons to answer to a charge for an indictable offence that is to be served on a corporate accused must state that, if the accused does not appear in answer to the summons, the Magistrates' Court may proceed—
- (a) in the case of an indictable offence that may be heard and determined summarily, to hear and determine the charge in the absence of the accused in accordance with Division 10 of Part 3.3; or
- (b) in any case, to conduct a committal proceeding in the absence of the accused in accordance with Chapter 4.

Notes

- 1 See sections 80, 81 and 82 for consequences of failing to appear in answer to a summons.
- 2 Section 28(1) sets out the indictable offences that may be heard and determined summarily.

S. 16
amended by
No. 68/2009
s. 51(e).

16 Personal service of summons

Except where otherwise expressly enacted, every summons to answer to a charge must be served personally on the accused in accordance with section 391—

S. 16(b)
amended by
No. 68/2009
s. 5.

- (a) subject to paragraph (b), at least 14 days before the return date;
- (b) in the case of a charge for an indictable offence in respect of which a registrar of the Magistrates' Court has fixed a date for a filing hearing, at least 7 days before that date or any other time before that date that is prescribed by the rules of court.

Note to s. 16
amended by
No. 68/2009
s. 51(f).

Note

See section 399(4) for filing in court of affidavit or declaration of service.

17 Summons for summary offence may be served by ordinary service

S. 17(1)
amended by
Nos 68/2009
s. 51(g),
55/2014
s. 113(1).

- (1) A summons to answer to a charge for a summary offence (other than a traffic camera offence) must be served personally on the accused in accordance with section 391 unless the informant is satisfied that ordinary service is appropriate in all the circumstances.

Note to
s. 17(1)
amended by
No. 68/2009
s. 51(h).

Note

Section 394 provides for ordinary service.

- (2) In considering whether to effect service of a summons by ordinary service, an informant must consider whether it is an appropriate method of service in all the circumstances as known by the informant including—

- (a) the nature and gravity of the alleged offence;
 - (b) whether the accused has previously been found guilty or convicted of any similar offence;
 - (c) the period of time that has elapsed since the accused's address for service was ascertained.
- (3) If a summons is served in accordance with section 394(1)(a), evidence of service must state—
- (a) how the informant ascertained the address to which the summons was posted; and
 - (b) the time and place of posting; and
 - (c) whether the informant considered the matters referred to in subsection (2) before determining to effect service by post.

S. 17(3)
amended by
Nos 68/2009
s. 51(i),
55/2014
s. 113(2).

17A Service of summons for traffic camera offence

- (1) A summons to answer to a charge for a traffic camera offence may be served personally on the accused in accordance with section 391 or by ordinary service in accordance with section 394.
- (2) If a summons is served in accordance with section 394(1)(a) or (ab), evidence of service must state—
 - (a) how the informant ascertained the address to which the summons was posted; and
 - (b) the time and place of posting.

S. 17A
inserted by
No. 55/2014
s. 114.

18 Informant must nominate address etc. for service of documents

- (1) An informant must nominate in writing a business address, email address, if any, and fax number for service on the informant of documents in relation to a charge.

- (2) A nomination under subsection (1) may be included on a charge-sheet or any other document served with a charge-sheet.

19 Extension of return date if summons not served

- (1) If the informant has not served a summons to answer to a charge, the appropriate registrar may extend a return date specified in the summons without cause on one occasion on the application of the informant—
- (a) before the return date; or
 - (b) within 28 days after the return date.
- (2) The appropriate registrar may extend a return date on a subsequent occasion on the application of the informant—
- (a) before the current return date; or
 - (b) within 28 days after the current return date—
- if the registrar is satisfied by sworn evidence, whether oral or by affidavit, that reasonable efforts have been made to serve the summons.

Note

See also section 331 as to the court's general power of adjournment.

20 Adjournment of proceeding on application of accused

On the application of the accused, the appropriate registrar may—

- (a) if the accused is not on bail or in custody, before or on the return date or on the date to which the proceeding is adjourned, adjourn the proceeding to a later date;

- (b) if the accused is on bail, on the return date or on the date to which the proceeding is adjourned, adjourn the proceeding to a later date and extend bail but not vary the conditions of bail or revoke bail.

Note

See also section 331 as to the court's general power of adjournment.

Division 2—Notice to appear

21 Police or public official may serve notice to appear

- (1) A police officer or a public official acting in the performance of his or her duties may serve on a person a notice to appear if the police officer or public official reasonably suspects that the person has committed—
 - (a) a summary offence; or
 - (b) an indictable offence that may be heard and determined summarily.
- (2) A notice to appear must—
 - (a) state the name of the person serving the notice; and
 - (b) if the notice is served by a public official, state the name of the employer of the public official; and
 - (c) state a telephone number and email address at which the person serving the notice may be contacted and the business address of the person and may state similar details for a person authorised to act in relation to the notice on behalf of the person serving the notice; and
 - (d) state the full name and address of the person served with the notice; and

S. 21(1)
amended by
No. 37/2014
s. 10(Sch.
item 41.3).

- (e) state the offence that the person served with the notice is suspected of having committed; and
 - (f) state in general terms the circumstances of the suspected offence; and
 - (g) direct the person served with the notice to appear at a venue of the Magistrates' Court on a date (at least 28 days after the date of service of the notice) and at a time specified in the notice to answer any charge in respect of the suspected offence; and
 - (h) include a summary of this Division; and
 - (i) be signed by the person serving the notice.
- (3) A notice to appear must be served by—
- (a) giving it to the person to be served; or
 - (b) if the person does not accept it, by putting it down in the person's presence and telling the person the nature of the document.

22 Notice to appear lapses unless charge-sheet filed within 14 days

S. 22(1)
amended by
No. 37/2014
s. 10(Sch.
item 41.4).

- (1) If a police officer or a public official serves a notice to appear on a person, the notice lapses on the expiry of 14 days after service unless, within that period, the police officer or public official files with a registrar of the Magistrates' Court—
 - (a) a charge-sheet containing a charge against the person for the suspected offence stated in the notice to appear or a related offence; and
 - (b) a copy of the notice to appear; and
 - (c) evidence of service.
- (2) Failure to file a charge-sheet in accordance with subsection (1) does not affect the filing of a charge-sheet at any later time.

23 Notice to be given on lapsing

- (1) Within 7 days after the lapsing of a notice to appear, the police officer or public official who served the notice must ensure that—
- (a) written notice is given to the person on whom the notice to appear was served that—
 - (i) a charge-sheet has not been filed; and
 - (ii) the person is not required to appear at the Magistrates' Court on the date and at the time specified in the notice to appear; and
 - (b) the Magistrates' Court is notified that the notice to appear has lapsed.
- (2) A notice under subsection (1) is given by sending it by prepaid ordinary post addressed to the person at the last known address of the person.

S. 23(1)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

24 Preliminary brief to be served if charge-sheet filed

If a charge-sheet is filed in accordance with section 22(1), the informant must—

- (a) serve a preliminary brief on the accused within 21 days after the day on which the charge-sheet is filed; and
- (b) on the return date have available a copy of the preliminary brief for provision to the accused or the legal practitioner representing the accused, on request.

S. 24(a)
amended by
No. 48/2012
s. 11.

Notes

- 1 Section 36 sets out how a preliminary brief must be served.
- 2 Section 37 sets out the contents of a preliminary brief, including a copy of the charge-sheet.

25 Non-appearance of accused served with notice to appear

- (1) If a charge-sheet containing a charge for a summary offence is filed against an accused in accordance with section 22(1) and the accused does not appear in answer to the notice to appear, the Magistrates' Court may—
 - (a) issue a warrant to arrest the accused; or
 - (b) proceed to hear and determine the charge in the absence of the accused in accordance with Division 10 of Part 3.3; or
 - (c) adjourn the proceeding on any terms that it considers appropriate.
- (2) If a charge-sheet containing a charge for an indictable offence that may be heard and determined summarily is filed against an accused in accordance with section 22(1) and the accused does not appear in answer to the notice to appear, the Magistrates' Court may issue a warrant to arrest the accused.

26 Notice to appear does not commence proceeding

Service of a notice to appear does not commence a criminal proceeding.

Note

Chapter 8 contains general provisions that apply to all criminal proceedings.

Chapter 3—Summary procedure

Part 3.1—When a summary hearing may be held

27 Summary offences

A charge for a summary offence is to be heard and determined summarily in accordance with this Chapter or, if the case requires, Division 1 of Part 5.8.

Note

The procedure set out in the **Infringements Act 2006** may be used instead of commencing a proceeding for certain offences. See section 99 of the **Magistrates' Court Act 1989**.

28 Indictable offences that may be heard and determined summarily

- (1) A charge for any of the following indictable offences may be heard and determined summarily by the Magistrates' Court, if section 29 is satisfied—
 - (a) an offence referred to in Schedule 2;
 - (b) an indictable offence under an Act or subordinate instrument or an offence at common law if the offence is described by an Act or subordinate instrument as being—
 - (i) a level 5 offence or level 6 offence; or
 - (ii) punishable by level 5 or level 6 imprisonment or fine or both; or
 - (iii) punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 1200 penalty units or both—unless the contrary intention appears in this or any other Act or in any subordinate instrument.

Note

A level 5 offence is punishable by 10 years imprisonment maximum and a level 6 offence is punishable by 5 years imprisonment maximum: section 109 of the **Sentencing Act 1991**.

- (2) If an indictable offence is described as being punishable in more than one way or in one of 2 or more ways, all of those ways must be referred to in subsection (1) for subsection (1) to apply.
- (3) If an indictable offence referred to in Schedule 2 is qualified by reference to a specified amount or value or a specified kind of property, that qualification is not affected by subsection (1)(b) or (2).

29 When an indictable offence may be heard and determined summarily

- (1) The Magistrates' Court may hear and determine summarily a charge for an offence to which section 28(1) applies if—
 - (a) the court considers that the charge is appropriate to be determined summarily, having regard to the matters in subsection (2); and
 - (b) the accused consents to a summary hearing.

Notes

- 1 Section 82 provides for a summary hearing without consent in the case of a corporate accused which fails to appear in answer to a summons.
- 2 Section 168(3) provides that a charge transferred by order under that section must be heard and determined summarily.

- (2) For the purposes of subsection (1)(a), the Magistrates' Court must have regard to—
- (a) the seriousness of the offence including—
 - (i) the nature of the offence; and
 - (ii) the manner in which the offence is alleged to have been committed, the apparent degree of organisation and the presence of aggravating circumstances; and
 - (iii) whether the offence forms part of a series of offences being alleged against the accused; and
 - (iv) the complexity of the proceeding for determining the charge; and
 - (b) the adequacy of sentences available to the court, having regard to the criminal record of the accused; and
 - (c) whether a co-accused is charged with the same offence; and
 - (d) any other matter that the court considers relevant.
- (3) A legal practitioner appearing for an accused may, on behalf of the accused, consent to a summary hearing of a charge for an indictable offence.
- (4) Nothing in subsection (2) applies to a proceeding in the Children's Court.
- (5) If a body corporate and a natural person are jointly charged with an indictable offence which may be heard and determined summarily, the Magistrates' Court must not hear and determine the charge summarily against either of the accused unless—
- (a) each of them consents to a summary hearing;
- or

S. 29(2)(b)
amended by
No. 68/2009
s. 6.

- (b) if the body corporate fails to appear in the proceeding, the natural person consents to a summary hearing and the court proceeds under section 82 to hear and determine the charge in the absence of the body corporate.

30 Procedure for indictable offences that may be heard and determined summarily

- (1) The informant or the accused may apply for a summary hearing under section 29(1).
- (2) Without any application under subsection (1), the Magistrates' Court may offer a summary hearing under section 29(1).
- (3) An application for, or an offer of, a summary hearing may be made at any time before the Magistrates' Court determines whether to commit the accused for trial.

Note

Section 6(4) provides that an informant may include a request for a committal proceeding in a charge-sheet containing a charge for an indictable offence that may be heard and determined summarily.

- (4) If an application for a summary hearing is made before the hearing of any evidence, the Magistrates' Court may seek from the prosecutor or, if the informant is appearing in person, the informant and he or she must give—
 - (a) an outline of the evidence which will be presented for the prosecution; and
 - (b) any other information which the court considers relevant—

for the purpose of enabling the court to determine whether to grant a summary hearing.

- (5) Any statement made by the prosecutor or informant under subsection (4) is not admissible in evidence in any subsequent proceeding in respect of the charge.
- (6) If the Magistrates' Court grants a summary hearing, the hearing and determination of the charge must be conducted in accordance with Part 3.3.

Note

Sections 112A to 113D of the **Sentencing Act 1991** provide for maximum penalties in the Magistrates' Court.

- (7) Subject to subsection (8), if—
 - (a) a committal hearing commences; and
 - (b) the Magistrates' Court subsequently grants a summary hearing—

the court may, with the consent of the accused, admit as evidence in the summary hearing—

 - (c) the oral evidence of any witness; and
 - (d) the statement of any witness; and
 - (e) any document or exhibit—

given or tendered during the committal hearing.
- (8) If evidence is admitted under subsection (7)—
 - (a) the Magistrates' Court must, at the request of the informant or the accused, call or recall (as the case requires) any witness for examination or cross-examination; and
 - (b) the hearing must otherwise be conducted in the same manner as a proceeding for a summary offence.

Part 3.2—Procedure before summary hearing

Division 1—General

31 Court may change place of hearing

If the Magistrates' Court considers that—

- (a) a fair hearing in a criminal proceeding cannot otherwise be had; or
- (b) for any other reason it is appropriate to do so—

the court may order that the hearing be held at another place or venue of the court that the court considers appropriate.

32 Accused entitled to copy of charge-sheet and particulars

- (1) An accused is entitled to receive free of charge a copy of the charge-sheet from the informant or the appropriate registrar.
- (2) An accused is entitled to receive from the informant reasonable particulars of the charge.

33 Unrepresented accused who requires legal advice

If—

- (a) an accused is charged with an offence punishable by imprisonment; and
- (b) the accused is unrepresented on the return date—

the court must—

- (c) ask the accused whether the accused has sought legal advice; and

- (d) if satisfied that the accused has not had a reasonable opportunity to obtain legal advice, grant an adjournment if so requested by the accused; and
- (e) inform the accused that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**.

34 Return of property

- (1) If—
 - (a) property has been taken from an accused; and
 - (b) the Magistrates' Court considers that the property or part of it can be returned consistently with the interests of justice and with the safe custody of the accused—

the court must direct that the property or part of it be returned to the accused or to any other person that the accused directs.

- (2) If property has been taken from a person other than the accused, the Magistrates' Court, on application by the person, may direct that the property be returned to the person at any time, and subject to any condition, that the court considers appropriate.

Division 2—Pre-hearing disclosure of prosecution case

35 When preliminary brief is to be served

- (1) If required to do so by section 24, the informant must serve a preliminary brief on the accused.
- (2) At any time after the commencement of a proceeding, the accused, by written notice to the informant, may request that a preliminary brief be served.

- (3) If the accused gives notice under subsection (2), the informant must serve on the accused a preliminary brief within 14 days after receipt of the notice.
- (4) Nothing in this section prevents the informant from serving a preliminary brief on the accused at any other time.

36 How preliminary brief must be served

S. 36(1)
amended by
No. 68/2009
s. 51(j).

- (1) A preliminary brief must be served personally on the accused in accordance with section 391 unless the informant is satisfied that ordinary service is appropriate in all the circumstances.

Note to
s. 36(1)
amended by
No. 68/2009
s. 51(k).

Note

Section 394 provides for ordinary service.

- (2) In considering whether to effect service of a preliminary brief by ordinary service, the informant must consider whether it is an appropriate method of service in all the circumstances as known by the informant including—
 - (a) the nature and gravity of the alleged offence;
 - (b) whether the accused has previously been found guilty or convicted of any similar offence;
 - (c) the period of time that has elapsed since the accused's address for service was ascertained;
 - (d) the manner of service of the summons to answer to the charge.

37 Contents of preliminary brief

- (1) A preliminary brief must include—
- (a) a copy of the charge-sheet in respect of the alleged offence; and
 - (b) a notice in the form prescribed by the rules of court—
 - (i) explaining this section and section 84; and
 - (ii) explaining the importance of the accused obtaining legal representation; and
 - (iii) advising that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (iv) providing details of how to contact Victoria Legal Aid; and
 - (c) a statement made by the informant personally that complies with subsection (2) and section 38; and
 - (d) any evidentiary certificate issued under any Act that is likely to be relevant to the alleged offence and is available at the time the preliminary brief is served; and
 - (e) a copy of the criminal record of the accused that is available at the time the preliminary brief is served or a statement that the accused has no previous convictions or infringement convictions known at that time; and

S. 37(1)(e)
amended by
No. 81/2011
s. 4.

- (f) if the informant refuses to disclose any information, document or thing that is required to be included in the preliminary brief, a written notice that the informant refuses disclosure under section 45, identifying the ground for refusing disclosure; and
 - (g) a list of any other orders that are or will be sought, as known at the time of preparation of the preliminary brief.
- (2) A statement by the informant in a preliminary brief must be a complete and accurate statement of the material available to the prosecution at the time the statement is sworn, signed or attested and must include—
- (a) a statement of the alleged facts on which the charge is based, including reference to the material available to the prosecution to support the alleged facts; and
 - (b) a description of the background to and consequences of the alleged offence, if known; and
 - (c) a summary of any statements made by the accused concerning the alleged offence, including any confession or admission; and
 - (d) a list of the names of all persons who, at the time the statement is signed, may be called by the prosecution as witnesses at the hearing of the charge, indicating whether those persons have made statements; and
 - (e) a list of any things the prosecution may tender as exhibits, indicating whether they are in the possession of the prosecution at the time the statement is signed.

- (3) A preliminary brief may include any other information, document or thing that is relevant to the alleged offence and may assist the accused in understanding the evidence against the accused that is available to the prosecution.

Example

Statements of key witnesses may be included in the preliminary brief.

Notes

- 1 If the Magistrates' Court hears and determines a charge in the absence of the accused, section 84 provides that certain documents in a preliminary brief served on the accused at least 14 days before the hearing date are admissible in evidence.
- 2 See section 86 as to proof of criminal record in the absence of the accused.

38 Requirements for informant's statement in preliminary brief

S. 38
amended by
No. 68/2009
s. 9(a).

A statement by the informant in a preliminary brief must be—

- (a) in the form of an affidavit; or
- (b) signed by the informant and contain an acknowledgment signed in the presence of a person referred to in Schedule 3 that the statement is true and correct and is made in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury; or
- (c) in a form, and attested to in a manner, prescribed by the rules of court.

* * * * *

S. 38(2)
repealed by
No. 68/2009
s. 9(b).

Note to
s. 38(2)
repealed by
No. 68/2009
s. 9(c).

* * * * *

Note to s. 38
inserted by
No. 68/2009
s. 9(d).

Note

Section 414 provides for acknowledgment of false statements.

39 When full brief must be served

S. 39(1)
substituted by
No. 30/2010
s. 58.

- (1) The accused, by written notice to the informant, may request that a full brief be served.

S. 39(1A)
inserted by
No. 30/2010
s. 58.

- (1A) A request under subsection (1) may be made—

S. 39(1A)(a)
amended by
No. 55/2014
s. 115.

- (a) if a preliminary brief is served within 21 days after the day on which the charge-sheet is filed, at any time after a summary case conference is held; or
- (b) in any other case, at any time after the criminal proceeding has commenced.
- (2) If the accused gives a notice under subsection (1), the informant must serve a full brief on the accused at least 14 days before—
- (a) the contest mention hearing; or
- (b) if a contest mention hearing is not held, the summary hearing.
- (3) The Magistrates' Court, by order, may vary the date for service of a full brief to a specified date that is earlier or later than the date for service required by subsection (2).

- (4) Nothing in this section prevents agreement between the informant and the accused to more limited disclosure than is required in a full brief.

40 How full brief must be served

- (1) A full brief must be served personally on the accused in accordance with section 391 unless the informant is satisfied that ordinary service is appropriate in all the circumstances.

**S. 40(1)
amended by
No. 68/2009
s. 51(l).**

Note

Section 394 provides for ordinary service.

**Note to
s. 40(1)
amended by
No. 68/2009
s. 51(m).**

- (2) In considering whether to effect service of a full brief by ordinary service, the informant must consider whether it is an appropriate method of service in all the circumstances as known by the informant including—
- (a) the nature and gravity of the alleged offence;
 - (b) whether the accused has previously been found guilty or convicted of any similar offence;
 - (c) the period of time that has elapsed since the accused's address for service was ascertained;
 - (d) the manner of service of the summons to answer to the charge.

41 Contents of full brief

- (1) Unless earlier disclosed to the accused, whether in a preliminary brief, at a summary case conference or otherwise, a full brief must contain—
- (a) a notice in the form prescribed by the rules of court—
 - (i) explaining this section and section 83;
and

S. 41(1)(c)
amended by
No. 81/2011
s. 5.

- (ii) explaining the importance of the accused obtaining legal representation; and
 - (iii) advising that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (iv) providing details of how to contact Victoria Legal Aid; and
- (b) a copy of the charge-sheet relating to the alleged offence; and
- (c) a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions; and
- (d) any information, document or thing on which the prosecution intends to rely at the hearing of the charge including—
- (i) a copy of any statement relevant to the charge signed by the accused, or a record of interview of the accused, that is in the possession of the informant; and
 - (ii) a copy, or a transcript, of any audio-recording or audiovisual recording required to be made under Subdivision (30A) of Division 1 of Part III of the **Crimes Act 1958**; and
 - (iii) a copy or statement of any other evidentiary material that is in the possession of the informant relating to a confession or admission made by the accused relevant to the charge; and

S. 41(1)(d)(iii)
amended by
No. 68/2009
s. 49(a).

- (iv) a list of the persons the prosecution intends to call as witnesses at the hearing, together with a copy of each of the statements made by those persons; and

Note

See section 47 for requirements for statements.

- (v) a legible copy of any document which the prosecution intends to produce as evidence; and
 - (vi) a list of any things the prosecution intends to tender as exhibits; and
 - (vii) a clear photograph, or a clear copy of such a photograph, of any proposed exhibit that cannot be described in detail in the list; and
 - (viii) a description of any forensic procedure, examination or test that has not yet been completed and on which the prosecution intends to rely as tending to establish the guilt of the accused; and
 - (ix) any evidentiary certificate issued under any Act that is likely to be relevant to the alleged offence; and
- (e) any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence including—
 - (i) a list of the persons (including experts) who have made statements or given information relevant to the alleged offence but who the prosecution does not intend to call as witnesses at the hearing; and

- (ii) a copy of every statement referred to in subparagraph (i) made by each of those persons or, if the person has not made a statement, a written summary of the substance of any evidence likely to be given by that person or a list of those statements or written summaries; and
- (iii) a copy of every document relevant to the alleged offence that the prosecution does not intend to tender as an exhibit at the hearing or a list of those documents; and
- (iv) a list containing descriptions of any things relevant to the alleged offence that the prosecution does not intend to tender as exhibits at the hearing; and
- (v) a clear photograph, or a clear copy of such a photograph, of any thing relevant to the alleged offence that cannot be described in detail in the list; and
- (vi) a copy of—
 - (A) records of any medical examination of the accused; and
 - (B) reports of any forensic procedure or forensic examination conducted on the accused; and
 - (C) the results of any tests—
carried out on behalf of the prosecution and relevant to the alleged offence but on which the prosecution does not intend to rely; and

- (vii) a copy of any other information, document or thing required by the rules of court to be included in a full brief; and
 - (f) if the informant refuses to disclose any information, document or thing that is required to be included in the full brief, a written notice that the informant refuses disclosure under section 45, identifying the ground for refusing disclosure.
- (2) Section 48 applies to information and other material supplied in a full brief.

Notes

- 1 See section 416 as to the prosecution's general obligation of disclosure.
- 2 Section 39(4) enables an informant and an accused to agree to the provision of less material in the full brief than is required by section 41.
- 3 If the Magistrates' Court hears and determines a charge in the absence of the accused, section 83 provides that certain documents in a full brief served on the accused are admissible in evidence.
- 4 See section 86 as to proof of criminal record in the absence of the accused.

**Notes to s. 41
amended by
No. 68/2009
s. 51(n).**

42 Continuing obligation of disclosure

- (1) This section applies to any information, document or thing that—
- (a) comes into the informant's possession or comes to the informant's notice after the service of a preliminary brief or a full brief, as the case may be; and
 - (b) would have been required to be listed, or a copy of which would have been required to be served, in the preliminary brief or the full brief.

- (2) The informant must serve on the accused a copy of the document or list as soon as practicable after the information, document or thing comes into the informant's possession or comes to the informant's notice.
- (3) If the informant refuses to disclose any information, document or thing that is required to be disclosed under this section, the informant must serve on the accused as soon as practicable a written notice that the informant refuses disclosure under section 45, identifying the ground for refusing disclosure.

Note to s. 42
amended by
No. 68/2009
s. 51(o).

Note

See section 416 as to the prosecution's general obligation of disclosure.

43 Accused may make request for material etc. not provided

- (1) The accused may give to the informant a written request for—
 - (a) a copy of any statements made or information given by persons listed in a full brief;
 - (b) a copy of any things listed in a full brief;
 - (c) subject to section 43A, inspection of the exhibits at a time and place agreed between the accused and the informant;
 - (d) a copy of any information, document or thing specified by the accused that is required by or under this Act to be included in a preliminary brief or a full brief, as the case may be, and was not so included;

S. 43(1)(c)
amended by
No. 42/2015
s. 13.

- (e) particulars of previous convictions of any witness who the prosecution intends to call at the hearing.
- (2) Subject to subsection (3), a request under subsection (1) may be made at any time after service of the preliminary brief or the full brief, whichever first occurs.
- (3) Unless the Magistrates' Court otherwise orders, a request under subsection (1) must be made at least 7 days before—
 - (a) the contest mention hearing; or
 - (b) if a contest mention hearing is not held, the summary hearing.

43A Inspection of exhibits that include child pornography where accused is legally represented

S. 43A
inserted by
No. 42/2015
s. 14.

- (1) This section applies if—
 - (a) a request under section 43(1)(c) relates to an exhibit, or a part of an exhibit, that is child pornography; and
 - (b) the accused is legally represented.
- (2) The accused may request inspection of the exhibit, or the part of the exhibit, by the accused's legal practitioner (but not the accused personally).

Example

The informant may agree with the accused's legal practitioner on a time and place for the accused's legal practitioner to inspect exhibits that include child pornography. The legal practitioner may not show such an exhibit to the accused but may discuss its content with the accused in order to obtain instructions.

44 Informant must comply with request or state grounds of refusal

- (1) Within 7 days after the informant receives a request under section 43, the informant must comply with the request or serve on the accused a written notice that the informant refuses to comply with the request, identifying the grounds for refusing disclosure.
- (2) The Magistrates' Court may vary a time limit referred to in this section.

45 Grounds on which informant may refuse disclosure

- (1) The informant may refuse to disclose any information, document or thing that is required by this Division to be disclosed to the accused if the informant considers that disclosure would, or would be reasonably likely to—
 - (a) prejudice the investigation of a contravention or possible contravention of the law or prejudice the enforcement or proper administration of the law in a particular instance; or
 - (b) prejudice the fair hearing of the charge against a person or the impartial adjudication of a particular case; or
 - (c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or
 - (d) disclose methods or procedures for preventing, detecting, investigating or dealing with matters arising out of contraventions or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

- (e) endanger the lives or physical safety of persons engaged in, or in connection with, law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law; or
- (f) endanger the life or physical safety of a person referred to in section 43(1)(a) or of a family member, as defined in the **Family Violence Protection Act 2008**, of such a person; or
- (g) result in the disclosure of child pornography to the accused personally.
- (1A) The informant may not refuse, on the ground referred to in subsection (1)(g), a request under section 43(1)(c) for inspection of exhibits by the accused's legal practitioner (but not the accused personally).
- (2) The informant may refuse to disclose any information, document or thing that is requested under section 43(1)(d) on any ground on which the informant would be entitled to refuse to produce the information, document or thing under a witness summons.
- (3) The informant may refuse to disclose the particulars of any previous conviction of any witness who the informant intends to call at the hearing if the previous conviction is, because of its character, irrelevant to the proceeding but the informant must advise the accused of the existence of any undisclosed previous convictions.

S. 45(1)(f)
amended by
No. 42/2015
s. 15(1)(a).

S. 45(1)(g)
inserted by
No. 42/2015
s. 15(1)(b).

S. 45(1A)
inserted by
No. 42/2015
s. 15(2).

Notes to s. 45
amended by
No. 68/2009
s. 51(p).

Notes

- 1 See section 14 of the **Victims' Charter Act 2006** as to victims' privacy.
- 2 See section 416 as to the prosecution's general obligation of disclosure.

46 Accused may apply for order requiring disclosure

- (1) The accused may apply to the Magistrates' Court for an order under subsection (2) requiring disclosure if—
 - (a) the informant has served on the accused under section 45 a statement of grounds for refusing disclosure; or
 - (b) the informant has failed to give disclosure in accordance with this Division.
- (2) On application under subsection (1), the Magistrates' Court may order that the informant disclose to the accused any information, document or thing in accordance with a request under section 43 or a requirement of this Division.
- (3) Without limiting subsection (2), if an application under subsection (1) relates to an informant's refusal to disclose any information, document or thing on the ground referred to in section 45(1)(g), the Magistrates' Court, having regard to whether the accused is legally represented, may order, on any conditions specified by it, that the disclosure be made to—
 - (a) the accused's legal practitioner (but not the accused personally); or
 - (b) the accused personally.

S. 46(3)
inserted by
No. 42/2015
s. 16.

47 Rules with respect to statements

- (1) Subject to subsection (3), a statement referred to in section 41 which the informant intends to tender at the hearing of the charge if the accused does not appear must be—

S. 47(1)
amended by
No. 49/2012
s. 3.

- (a) in the form of an affidavit; or
 - (b) signed by the person making the statement and contain an acknowledgment signed in the presence of a person referred to in Schedule 3 that the statement is true and correct and is made in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury; or
 - (c) in a form, and attested to in a manner, prescribed by the rules of court.
- (2) If a person under the age of 18 years makes a statement which the informant intends to tender as mentioned in subsection (1), the statement must include the person's age.
- (3) If a person who cannot read makes a statement which the informant intends to tender as mentioned in subsection (1)—
- (a) the statement must be read to the person before he or she signs it; and
 - (b) the acknowledgment must state that the statement was read to the person before he or she signed it.

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**S. 47(4)
repealed by
No. 68/2009
s. 9(e).**

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**Note to
s. 47(4)
repealed by
No. 68/2009
s. 9(f).**

Note

Section 414 provides for acknowledgment of false statements.

**Note to s. 47
inserted by
No. 68/2009
s. 9(g).**

48 Disclosure of address or telephone number of witness

- (1) The informant must not disclose the address or telephone number (including a private, business or official address or telephone number) of any person in any information, document or thing provided to the accused under this Division unless—
 - (a) the informant believes that—
 - (i) the information, document or thing does not identify the address or telephone number as that of any particular person; or
 - (ii) the address or telephone number is relevant to the offence charged and disclosure is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - (b) the Magistrates' Court permits the disclosure in accordance with subsection (3) on application made by the informant or the accused.
- (2) For the purposes of subsection (1), the informant may delete, or render illegible, an address or telephone number included in the information, document or thing before service on the accused.
- (3) The Magistrates' Court may grant an application made under subsection (1)(b) if the court is satisfied that—
 - (a) the address or telephone number is relevant to the offence charged; and

- (b) one of the following applies—
 - (i) disclosure is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - (ii) having regard to the matters referred to in subsection (4), the interests of justice outweigh any risk referred to in subparagraph (i).
- (4) For the purposes of subsection (3)(b)(ii), the Magistrates' Court must have regard to—
 - (a) the right to privacy of the witness; and
 - (b) the right of the accused to prepare properly for the hearing.

Note

See section 14 of the **Victims' Charter Act 2006** as to victims' privacy.

49 Informant may place material on database

- (1) This section applies if—
 - (a) the informant is a police officer or an officer of a prescribed agency; and
 - (b) the accused's legal practitioner is authorised by the Secretary to the Department of Justice to access electronically the information, documents and things referred to in section 43; and
 - (c) it is practicable to transmit electronically the information, documents and things that are required to be disclosed.
- (2) Subject to this Division, the informant must place on the prescribed database a copy of—
 - (a) the preliminary brief, if any; and

S. 49(1)(a)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

- (b) the full brief; and
 - (c) all additional information, documents and things, if any, requested by the accused under section 43; and
 - (d) all additional information, documents and things required to be disclosed under section 42.
- (3) Placement of copies of material on the prescribed database under subsection (2) is deemed to be service for the purposes of this Division.

Note

Time limits provided in this Division for service of a preliminary brief, a full brief or particular information, documents or things still apply.

- (4) A statement by the informant in a copy of a preliminary brief placed on the prescribed database need not be sworn or attested as required by section 38 if—
- (a) the database technology does not permit placement of the copy in that form; and
 - (b) a physical copy of the preliminary brief complies with section 38.
- (5) An informant who places an unsworn or unattested preliminary brief on the prescribed database must retain the physical copy of the preliminary brief that is sworn or attested for a period of 12 months after the determination of the charge.

Note to s. 49(5)
repealed by
No. 68/2009
s. 9(h).

* * * * *

Note to s. 49
inserted by
No. 68/2009
s. 9(i).

Note

Section 414 provides for acknowledgment of false statements.

Division 3—Preliminary disclosure of case of accused

50 Expert evidence

- (1) If the accused intends to call a person as an expert witness at the hearing of the charge, the accused must serve on the informant in accordance with section 392 and file in court a copy of the statement of the expert witness in accordance with subsection (2)—
- (a) at least 7 days before the day on which the contest mention hearing is to be held; or
 - (b) if there is no contest mention hearing, at least 7 days before the summary hearing; or
 - (c) if the statement is not then in existence, as soon as possible after it comes into existence.
- (2) The statement must—
- (a) contain the name and business address of the witness; and
 - (b) describe the qualifications of the witness to give evidence as an expert; and
 - (c) set out the substance of the evidence it is proposed to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matters and circumstances on which the opinion is formed.

S. 50(1)
amended by
No. 68/2009
s. 51(q).

Note

Section 177 of the **Evidence Act 2008** provides for certificates of expert evidence.

51 Alibi evidence

- (1) This section applies to an accused on a summary hearing, if the accused is represented by a legal practitioner.
- (2) An accused must not, without leave of the court—
 - (a) give evidence personally; or
 - (b) adduce evidence from another witness—
in support of an alibi unless the accused has given notice of alibi within the period referred to in subsection (3).
- (3) A notice of alibi is given by serving the notice on the prosecutor or the informant—
 - (a) at least 7 days before the day on which the contest mention hearing is to be held; or
 - (b) if there is no contest mention hearing, at least 7 days before the summary hearing; or
 - (c) if the notice is not then in existence, as soon as possible after it comes into existence.
- (4) A notice of alibi must be served in accordance with section 392.
- (5) A notice of alibi must contain—
 - (a) particulars as to time and place of the alibi; and
 - (b) the name and last known address of any witness to the alibi; and
 - (c) if the name and address of a witness are not known, any information which might be of material assistance in finding the witness.

S. 51(4)
amended by
No. 68/2009
s. 51(r).

- (6) If the name and address of a witness are not included in a notice of alibi, the accused must not call that person to give evidence in support of the alibi unless the court is satisfied that the accused took reasonable steps to ensure that the name and address would be ascertained.
- (7) If the accused is notified by the informant that a witness named or referred to in a notice of alibi has not been traced, the accused must give written notice to the informant, without delay, of any further information which might be of material assistance in finding the witness.
- (8) The court must not refuse leave under subsection (2) if it appears to the court that the accused was not informed of the requirements of this section.
- (9) If—
 - (a) an accused gives notice of alibi under this section; and
 - (b) the prosecutor requests an adjournment—
the court must grant an adjournment for a period that appears to the court to be necessary to enable investigation of the alibi unless it appears that to do so would prejudice the proper presentation of the case of the accused.

52 Offence to communicate with alibi witness

- (1) If a person (other than a person referred to in subsection (2)) has been named or referred to as a proposed witness in a notice of alibi given under section 51—
 - (a) a person acting for the prosecution; or

S. 52(1)(b)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

(b) a police officer—

must not communicate with that person directly or indirectly with respect to the charge or any related matter before the conclusion of the proceeding, including any rehearing, without the consent and presence during the communication of—

(c) the legal practitioner representing the accused; or

(d) if not legally represented, the accused.

Penalty: Level 8 imprisonment (1 year maximum)

(2) Subsection (1) does not apply to a person who the accused has been notified may be called as a witness for the prosecution at the summary hearing.

Ch. 3 Pt 3.2
Div. 4
(Heading)
substituted by
No. 68/2009
s. 7.

Division 4—Mention hearing, summary case conference and contest mention hearing

53 Mention hearing

At a mention hearing, the Magistrates' Court may—

(a) if the offence is an indictable offence that may be heard and determined summarily, grant a summary hearing;

(b) proceed immediately to hear and determine the charge;

(c) fix a date for a contest mention hearing;

- (d) fix a date for a summary hearing of the charge;
- (e) make any other order or give any direction that the court considers appropriate.

53A Documents to be provided by police at first mention hearing

S. 53A
inserted by
No. 81/2011
s. 6.

- (1) This section applies if the informant is a police officer.
- (2) At the first mention hearing, the informant must have the following documents available for provision to the accused or the legal practitioner representing the accused—
 - (a) a copy of the preliminary brief (if prepared);
 - (b) a copy of the full brief (if prepared);
 - (c) if neither a preliminary brief nor a full brief has been prepared—
 - (i) a copy of the charge-sheet in respect of the alleged offence; and
 - (ii) a statement of the alleged facts on which the charge is based; and
 - (iii) either—
 - (A) a copy of the criminal record of the accused that is available at the time of the first mention hearing;
or
 - (B) a statement that the accused has no previous convictions or infringement convictions known at that time.

S. 53A(1)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

S. 53A(3)
substituted by
No. 55/2014
s. 116.

- (3) This section does not apply to a proceeding for a traffic camera offence.

54 Summary case conference

S. 54(2)
amended by
Nos 30/2010
s. 59(1),
48/2012 s. 12.

- (1) A summary case conference is a conference between the prosecution and the accused for the purpose of managing the progression of the case including—
- (a) identifying and providing to the accused any information, document or thing in the possession of the prosecution that may assist the accused to understand the evidence available to the prosecution; and
 - (b) identifying any issues in dispute; and
 - (c) identifying the steps required to advance the case; and
 - (d) any other purpose prescribed by the rules of court.
- (2) If a preliminary brief is served within 21 days after the day on which the charge-sheet is filed, a summary case conference must be conducted before—
- (a) the charge is set down for a contest mention hearing or a summary hearing; or
 - (b) a request for a full brief is made under section 39(1).
- (3) The Magistrates' Court may direct the parties to attend a summary case conference.
- (4) Nothing in this section prevents a summary case conference from being conducted at any other time, if the parties agree.

(5) If an accused is not legally represented, the Magistrates' Court may dispense with the requirement under subsection (2) to conduct a summary case conference.

S. 54(5)
substituted by
No. 30/2010
s. 59(2).

(6) A summary case conference must be conducted in accordance with the rules of court.

S. 54(6)
substituted by
No. 30/2010
s. 59(2).

(7) Evidence of—

(a) anything said or done in the course of a summary case conference; or

(b) any document prepared solely for the purposes of a summary case conference—

is not admissible in any proceeding before any court or tribunal or in any inquiry in which evidence is or may be given before any court or person acting judicially, unless all parties to the summary case conference agree to the giving of the evidence.

55 Contest mention hearing

(1) This section applies to a proceeding for—

(a) a summary offence; or

(b) an indictable offence that may be heard and determined summarily.

(2) The Magistrates' Court may, between the return date and the day on which the charge is heard, from time to time conduct a contest mention hearing.

(3) At a contest mention hearing, the Magistrates' Court may—

(a) require the parties to provide an estimate of the time expected to be needed for the hearing of the charge;

- (b) require the parties to advise as to the estimated number and the availability of witnesses (other than the accused) for the hearing of the charge and whether any witnesses are from interstate or overseas;
- (c) request each party to indicate the evidence that party proposes to adduce and to identify the issues in dispute;
- (d) require the accused to advise whether the accused is legally represented and has funding for continued legal representation up to and including the hearing of the charge;
- (e) require the parties to advise whether there are any particular requirements of, or facilities needed for, witnesses and interpreters;
- (f) order a party to make, file in court or serve (as the case requires) any written or oral material required by the court for the purposes of the proceeding;
- (g) allow a party to amend a document that has been prepared by or on behalf of that party for the purposes of the proceeding;
- (h) if the court considers that it is in the interests of justice to do so, dispense with or vary any requirement imposed on a party by or under this Part;
- (i) require or request a party to do anything else for the case management of the proceeding.

Criminal Procedure Act 2009
No. 7 of 2009
Part 3.2—Procedure before summary hearing

(4) The accused must attend all contest mention hearings.

Notes

- 1 Section 3 defines *attend*.
- 2 See section 334 in relation to a corporate accused.
- 3 Section 330 gives the court power to excuse an accused from attending a hearing.

**Note 1 to
s. 55(4)
amended by
No. 38/2016
s. 9(2).**

Part 3.3—Summary hearing

Division 1—Joint or separate hearing of charges

56 Multiple charges on single charge-sheet or multiple accused named on single charge-sheet

- (1) If a charge-sheet contains more than one charge, the charges must be heard together unless an order is made under section 58.
- (2) If a charge-sheet names more than one accused, whether in the same charge or separate charges, the charge or charges against all accused must be heard together unless an order is made under section 58.
- (3) A separate charge-sheet must be filed against each accused.

57 Joint hearing of charges on separate charge-sheets

On the application of the prosecutor or the accused, the Magistrates' Court may order that any number of charges in separate charge-sheets be heard together.

58 Order for separate hearing

- (1) If a charge-sheet contains more than one charge, the Magistrates' Court may order that any one or more of the charges be heard separately.
- (2) If a charge-sheet names more than one accused, the Magistrates' Court may order that charges against a specified accused be heard separately.
- (3) The Magistrates' Court may make an order under subsection (1) or (2) if the court considers that—
 - (a) the case of an accused may be prejudiced because the accused is charged with more than one offence in the same charge-sheet; or

- (b) a hearing with co-accused would prejudice the fair hearing of the charge against the accused; or
 - (c) for any other reason it is appropriate to do so.
- (4) The Magistrates' Court may make an order under subsection (1) or (2) before or during the hearing.
 - (5) If the Magistrates' Court makes an order under subsection (1) or (2), the prosecutor may elect which charge is to be heard first.
 - (6) The procedure on the separate hearing of a charge is the same in all respects as if the charge had been set out in a separate charge-sheet.
 - (7) If the Magistrates' Court makes an order for a separate hearing under subsection (1) or (2), the court may make any order for or in relation to the bail of the accused that the court considers appropriate.

Division 2—Diversion program

59 Adjournment to undertake diversion program

- (1) This section does not apply to—
 - (a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the **Road Safety Act 1986** or the **Sentencing Act 1991** from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the **Road Safety Act 1986** or regulations made under that Act; or

S. 59(1)(a)
amended by
No. 56/2013
s. 34(1).

- (b) an offence against section 49(1) of the **Road Safety Act 1986** not referred to in paragraph (a).
- (2) If, at any time before taking a formal plea from an accused in a criminal proceeding for a summary offence or an indictable offence that may be heard and determined summarily—
- (a) the accused acknowledges to the Magistrates' Court responsibility for the offence; and
 - (b) it appears appropriate to the Magistrates' Court, which may inform itself in any way it considers appropriate, that the accused should participate in a diversion program; and
 - (c) both the prosecution and the accused consent to the Magistrates' Court adjourning the proceeding for this purpose—
- the Magistrates' Court may adjourn the proceeding for a period not exceeding 12 months to enable the accused to participate in and complete the diversion program.
- (3) An accused's acknowledgment to the Magistrates' Court of responsibility for an offence is inadmissible as evidence in a proceeding for that offence and does not constitute a plea.
- (4) If an accused completes a diversion program to the satisfaction of the Magistrates' Court—
- (a) no plea to the charge is to be taken; and
 - (b) the Magistrates' Court must discharge the accused without any finding of guilt; and

- (c) the fact of participation in the diversion program is not to be treated as a finding of guilt except for the purposes of—
 - (i) Division 1 of Part 3 and Part 10 of the **Confiscation Act 1997**; and
 - (ii) section 9 of the **Control of Weapons Act 1990**; and
 - (iii) section 151 of the **Firearms Act 1996**; and
 - (iv) Part 4 of the **Sentencing Act 1991**; and
 - (d) the fact of participation in the diversion program and the discharge of the accused is a defence to a later charge for the same offence or a similar offence arising out of the same circumstances.
- (5) If an accused does not complete a diversion program to the satisfaction of the Magistrates' Court and the accused is subsequently found guilty of the charge, the Magistrates' Court must take into account the extent to which the accused complied with the diversion program when sentencing the accused.
- (6) Nothing in this section affects the requirement to observe the rules of natural justice.
- (7) This section does not affect the incurring of demerit points under the **Road Safety Act 1986** or regulations made under that Act.

Division 3—Sentence indication

60 Court may give sentence indication

- (1) At any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Magistrates' Court may indicate that, if the accused pleads guilty to

S. 60
amended by
No. 49/2012
s. 4 (ILA
s. 39B(1)).

the charge for the offence at that time, the court would be likely to impose on the accused—

- (a) a sentence of imprisonment that commences immediately; or
- (b) a sentence of a specified type.

Note

Section 126 of the **Magistrates' Court Act 1989** enables the court to close a proceeding to the public.

S. 60(2)
inserted by
No. 49/2012
s. 4.

- (2) Without limiting its discretion under subsection (1), the Magistrates' Court may decide not to give a sentence indication under subsection (1) if the Magistrates' Court considers there is insufficient information before it of the impact of the offence on any victim of the offence.

Note

Under section 5(2)(daa) of the **Sentencing Act 1991**, in sentencing an offender a court must have regard to the impact of the offence on any victim of the offence.

61 Effect of sentence indication

- (1) If—
 - (a) the Magistrates' Court gives a sentence indication under section 60; and
 - (b) the accused pleads guilty to the charge for the offence at the first available opportunity—

the court, when sentencing the accused for the offence, must not impose a more severe type of sentence than the type of sentence indicated.

- (2) If—
 - (a) the Magistrates' Court gives a sentence indication under section 60; and

(b) the accused does not plead guilty to the charge for the offence at the first available opportunity—

the court that hears and determines the charge must be constituted by a different magistrate, unless all the parties otherwise agree.

- (3) A sentence indication does not bind the Magistrates' Court on any hearing before the court constituted by a different magistrate.
- (4) A decision to give or not to give a sentence indication is final and conclusive.
- (5) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.
- (6) This section does not affect any right to appeal against sentence.

Division 4—Entering a plea

62 Charge to be read or explained to accused before plea

- (1) Subject to subsection (2), the Magistrates' Court must ensure that any charge, as set out in the charge-sheet, is read to the accused or its substance is explained to the accused before the accused is asked to plead to the charge.
- (2) It is not necessary that a charge be read, or its substance explained, to an accused who is represented by a legal practitioner if the Magistrates' Court considers it appropriate not to do so.

63 Legal practitioner may enter plea on behalf of accused

A legal practitioner appearing for an accused may, on behalf of the accused, enter a plea.

64 Refusal to plead

- (1) If, when an accused is asked to plead to a charge, the accused will not answer directly to the charge, the Magistrates' Court may order that a plea of not guilty be entered on behalf of the accused.
- (2) A plea of not guilty entered under subsection (1) has the same effect as if the accused in fact had pleaded not guilty.

Note

See the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** when an accused is or may be unfit to stand trial.

64A Pleading to course of conduct charge

- (1) In this section *course of conduct charge* has the same meaning as in clause 4A of Schedule 1.
- (2) This section applies if an accused, on being asked to plead to a course of conduct charge, informs the court that they—
 - (a) would plead guilty to the charge if it related only to a specified period falling within the period to which the charge set out in the charge-sheet relates; and
 - (b) would plead not guilty to the charge insofar as it relates to any other period within the period to which the charge set out in the charge-sheet relates.
- (3) If an accused informs the court in accordance with subsection (2) and the court is satisfied that, having regard to that information, it is not appropriate for the accused to be asked to plead to the charge, the court may adjourn the proceeding

S. 64A
inserted by
No. 74/2014
s. 11.

to allow a fresh charge-sheet to be filed relating only to the specified period referred to in subsection (2)(a).

- (4) If a fresh charge-sheet as described in subsection (3) is filed and the accused does not plead guilty to the charge as set out in that charge-sheet, a further fresh charge-sheet may be filed that sets out the original charge or an amended version of that charge.
- (5) If the accused does not plead to that charge, the Magistrates' Court may order that a plea of not guilty be entered on behalf of the accused unless it considers that it is not in the interests of justice to do so.

Division 5—Opening addresses

65 Parties may give opening addresses

- (1) With the leave of the Magistrates' Court and before any evidence is given—
 - (a) the prosecutor may give an opening address to the court on the prosecution case against the accused; and
 - (b) the accused may give an opening address to the court in response to the prosecutor's opening address.
- (2) The Magistrates' Court may limit the length of the opening addresses.

Division 6—Case for the accused

66 Accused entitled to respond after close of prosecution case

After the close of the case for the prosecution, an accused is entitled—

- (a) to make a submission that there is no case for the accused to answer;

- (b) to answer the charge by choosing to give evidence or call other witnesses to give evidence or both;
- (c) not to give evidence or call any witnesses.

67 Election when accused is legally represented

If the accused is represented by a legal practitioner, at the close of the case for the prosecution, the Magistrates' Court may question the legal practitioner to determine which of the options referred to in section 66 the accused elects to take.

68 Election when accused is not legally represented

- (1) If the accused is not represented by a legal practitioner, immediately after the close of the case for the prosecution the Magistrates' Court must inform the accused, in a manner that is likely to be understood by the accused that—
 - (a) the accused has the right to answer the charge and must choose either—
 - (i) to give sworn evidence, that is, to enter the witness box, take the oath or make an affirmation and say what the accused wants to say in answer to the charge and then to respond to any questions from the prosecution or the court about the evidence of the accused; or
 - (ii) to say nothing in answer to the charge; and
 - (b) in either case, the accused may call any witnesses to give sworn evidence for the accused.
- (2) After giving the information referred to in subsection (1), the Magistrates' Court must ask the accused what the accused wants to do.

69 Procedure for joint hearings if no-case submission made

- (1) After the close of the case for the prosecution, an accused who wishes to make a submission that there is no case for the accused to answer must do so at that time.
- (2) If, after the Magistrates' Court has ruled on all no-case submissions, charges against 2 or more accused remain to be determined, each accused must advise the court, in response to questioning under section 67 or 68, which of the options referred to in section 66(b) or (c) the accused elects to take.

S. 69
(Heading)
amended by
No. 68/2009
s. 49(b).

S. 69(2)
amended by
No. 68/2009
s. 49(c).

70 Questioning to determine proper course of proceeding

- (1) If the accused intends to call witnesses to give evidence at the hearing, the accused must indicate, when called on by the Magistrates' Court to do so—
 - (a) the names of those witnesses (other than the accused); and
 - (b) the order in which those witnesses are to be called.
- (2) The accused must not present the case of the accused differently to the way indicated to the Magistrates' Court under subsection (1) without the leave of the court.

71 Opening address of accused at beginning of case for the accused

- (1) If the accused intends to give evidence, or to call other witnesses on behalf of the accused, or both, the Magistrates' Court may grant leave to the accused to open the case for the accused if the court considers it appropriate to do so.

- (2) If the accused gives an opening address, it must be given before the accused gives evidence or calls any other witnesses.
- (3) The Magistrates' Court may limit the length of the opening address of the accused.
- (4) The accused is not required to give evidence before any other witness is called on behalf of the accused.

72 Evidential burden on accused for exceptions etc.

- (1) If—
 - (a) an Act or subordinate instrument creates an offence and provides any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence; and
 - (b) the accused wishes to rely on the exception, exemption, proviso, excuse or qualification—

the accused must present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish the exception, exemption, proviso, excuse or qualification.

- (2) No proof in relation to an exception, exemption, proviso, excuse or qualification is required on the part of the informant unless the accused has presented or pointed to evidence in accordance with subsection (1).
- (3) If satisfied that it is in the interests of justice to do so, the Magistrates' Court may allow the prosecutor to re-open the case for the prosecution in order to adduce evidence in rebuttal of evidence presented or pointed to by the accused in accordance with subsection (1).

S. 72(3)
amended by
No. 68/2009
s. 49(d).

Division 7—Closing addresses

73 Prosecutor's closing address

- (1) In a hearing under this Part—
 - (a) after the close of all evidence; and
 - (b) before the closing address of the accused, if any, under section 74—

the Magistrates' Court may grant leave, if it is appropriate to do so, to the prosecutor to address the court for the purpose of summing up the evidence.

- (2) The Magistrates' Court may limit the length of the closing address of the prosecutor.

74 Closing address of the accused

- (1) In a hearing under this Part—
 - (a) after the close of all evidence; and
 - (b) after the closing address of the prosecutor, if any, under section 73—

the Magistrates' Court may grant leave, if it is appropriate to do so, to the accused to address the court for the purpose of summing up the evidence.

- (2) The Magistrates' Court may limit the length of the closing address of the accused.

75 Supplementary address by prosecutor

- (1) If, in the closing address of the accused under section 74, the accused asserts facts which are not supported by any evidence that is before the Magistrates' Court, the court may grant leave to the prosecutor to make a supplementary address to the court.
- (2) A supplementary address must be confined to replying to the assertion referred to in subsection (1).

- (3) The Magistrates' Court may limit the length of a supplementary address.

Division 8—Determination of charge

76 Option of finding of attempt

In a summary hearing under section 29(1) of a charge for an indictable offence, if the Magistrates' Court finds the accused not guilty of the offence charged, the court may find the accused guilty of having attempted to commit the offence charged.

Division 9—Criminal record

77 Criminal record

- (1) A criminal record must contain, in relation to each previous conviction—
- (a) the date of the previous conviction; and
 - (b) the court in which the previous conviction took place; and
 - (c) the place of sitting of that court; and
 - (d) the offence committed; and
 - (e) the sentence imposed.

Note

Previous conviction is defined by section 3 to refer only to a conviction or finding of guilt made by a court and does not include an infringement conviction.

- (2) If other offences were taken into account when a sentence was imposed in respect of a previous conviction, a criminal record may contain a statement to that effect and the offences taken into account, including the number of offences.

Note to
s. 77(1)
inserted by
No. 81/2011
s. 7(1).

(2A) A criminal record must contain, in relation to each infringement conviction—

S. 77(2A)
inserted by
No. 81/2011
s. 7(2).

- (a) the date on which the infringement notice took effect as a conviction; and
- (b) the offence specified in the notice; and
- (c) the amount specified in the notice as the penalty for the infringement; and
- (d) any other penalty that results from the operation of the notice.

Example

A period of cancellation, disqualification or suspension of a licence or permit.

(3) A criminal record is inadmissible as evidence against the person to whom it relates in a proceeding for an offence unless the criminal record is signed by—

- (a) a police officer; or
- (b) a Crown Prosecutor; or
- (c) a member of staff of the Office of Public Prosecutions who is a legal practitioner; or
- (d) in the case of a proceeding commenced by an informant—
 - (i) a person who is entitled to represent the informant and is a legal practitioner; or
 - (ii) a public official.

S. 77(3)(a)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

78 Proof of previous convictions and infringement convictions by criminal record

S. 78
(Heading)
amended by
No. 81/2011
s. 8(1).

- (1) If a person is found guilty of an offence in a summary hearing, the prosecution may provide to the court the criminal record, if any, of the person.

S. 78(2)
amended by
No. 81/2011
s. 8(2).

- (2) The court must ask the person whether the person admits the previous convictions and infringement convictions set out in the criminal record.

S. 78(3)
amended by
No. 81/2011
s. 8(3).

- (3) If the person admits to a previous conviction or infringement conviction, the court may sentence the person accordingly.

S. 78(4)
amended by
No. 81/2011
s. 8(4).

- (4) If the person does not admit to a previous conviction or infringement conviction, the prosecution may lead evidence to prove the previous conviction or infringement conviction.

S. 78(5)
amended by
No. 81/2011
s. 8(5).

- (5) A legal practitioner appearing for the person may, on behalf of the person, admit a previous conviction or infringement conviction set out in the criminal record.

Notes

- 1 Section 178 of the **Evidence Act 2008** provides for proof of previous convictions by the filing of a certificate.
- 2 Section 86 of this Act provides for proof of a criminal record in the absence of the accused.

Division 10—Non-appearance of party

79 Non-appearance of informant

If the informant in a criminal proceeding does not appear on the date on which the proceeding is listed for hearing, the Magistrates' Court may—

- (a) dismiss the charge; or
- (b) adjourn the proceeding on any terms that it considers appropriate.

Note

Section 328 sets out who may appear on behalf of an informant.

80 Non-appearance of accused charged with summary offence

- (1) If an accused does not appear in answer to a summons to answer to a charge for a summary offence, the Magistrates' Court may—
- (a) if the summons was served in accordance with section 394 (ordinary service), direct that the accused be served personally with the summons; or
 - (b) issue a warrant to arrest the accused; or
 - (c) proceed to hear and determine the charge in the absence of the accused in accordance with this Part; or
 - (d) adjourn the proceeding on any terms that it considers appropriate.

S. 80(1)(a)
amended by
No. 68/2009
s. 51(s).

Note

Section 328 sets out who may appear on behalf of an accused.

- (2) If an accused has been charged with a summary offence and fails to attend in answer to bail, the Magistrates' Court may—
- (a) proceed to hear and determine the charge in the absence of the accused in accordance with this Part; or
 - (b) adjourn the proceeding on any terms that it considers appropriate—

without prejudice to any right of action arising out of the breach of the bail undertaking.

- (3) If the Magistrates' Court proceeds to hear and determine a charge under subsection (1)(c) or (2)(a), the court may dispense with or vary any requirement imposed by or under this Part.

Note

See section 25 for consequences of failing to appear in answer to a notice to appear.

81 Non-appearance of accused charged with indictable offence

If an accused does not appear in answer to a summons to answer to a charge for an indictable offence which has been served in accordance with this Act, the Magistrates' Court may issue a warrant to arrest the accused.

Notes

- 1 Section 25 sets out the consequences of failing to appear in answer to a notice to appear.
- 2 Section 328 sets out who may appear on behalf of an accused.

82 Non-appearance of corporate accused charged with indictable offence

- (1) If a corporate accused does not appear in answer to a summons to answer to a charge for an indictable offence that may be heard and determined summarily, the Magistrates' Court may hear and determine the charge summarily in the absence of the accused if—
- (a) the court is satisfied that the charge and the return date in relation to it have been brought to the notice of the accused; and
 - (b) the court considers that the charge is appropriate to be determined summarily—
- even though the accused has not consented to a summary hearing.

- (2) If the Magistrates' Court proceeds to hear and determine a charge summarily in accordance with subsection (1), the court may dispense with or vary any requirement imposed by or under this Part.
- (3) If the Magistrates' Court finds a corporate accused guilty in its absence, the court must cause written notice of any sentence imposed by it to be served on the accused.

83 Admissibility of evidence in absence of accused where full brief served

- (1) If—
 - (a) under section 25(1) or 80 the Magistrates' Court proceeds to hear and determine a charge in the absence of the accused; and
 - (b) the informant has served a full brief on the accused in accordance with Division 2 of Part 3.2—

S. 83(1)(a)
amended by
No. 68/2009
s. 8.

the following are, subject to subsections (2) and (3), admissible as if their contents were a record of evidence given orally—

- (c) any statement a copy of which has been served in the full brief;
 - (d) any exhibit or document referred to in a statement which is admissible.
- (2) The Magistrates' Court may rule as inadmissible the whole or any part of a statement or of any exhibit or document referred to in a statement.
- (3) The criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions, when served in a full brief, is only admissible for the purpose of sentencing in accordance with section 86.

S. 83(3)
amended by
No. 81/2011
s. 9.

S. 83(4)
amended by
No. 68/2009
s. 8.

- (4) Subsection (1) does not limit the power of the Magistrates' Court to proceed to hear and determine the charge in the absence of the accused under section 25(1) or 80 on the basis of sworn evidence given by or on behalf of the informant if the informant has not served a full brief on the accused.

84 Admissibility of evidence in absence of accused where preliminary brief served

S. 84(1)(a)
amended by
No. 68/2009
s. 8.

- (1) If—
- (a) under section 25(1) or 80 the Magistrates' Court proceeds to hear and determine a charge in the absence of the accused; and
 - (b) the informant has served a preliminary brief on the accused in accordance with Division 2 of Part 3.2 at least 14 days before the date of the hearing under paragraph (a); and
 - (c) the Magistrates' Court considers that the matters set out in the preliminary brief disclose the offence charged—
- the following are, subject to subsections (4) and (5), admissible in evidence, despite the rule against hearsay—
- (d) the informant's statement in the preliminary brief;
 - (e) any exhibit referred to in the informant's statement.
- (2) Without limiting any other power conferred on the Magistrates' Court, if the court considers that the matters set out in a preliminary brief do not disclose the offence charged, the court may require the informant to provide additional evidence.

- (3) The additional evidence referred to in subsection (2) is inadmissible unless—
- (a) it is in the form of written statements that comply with section 38; and
 - (b) a copy of each statement has been served on the accused at least 14 days before the Magistrates' Court considers the additional evidence.
- (4) The Magistrates' Court may rule as inadmissible the whole or any part of a preliminary brief, a statement or an exhibit.
- (5) The criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions, when served in a preliminary brief, is only admissible for the purpose of sentencing in accordance with section 86.
- (6) This section does not limit the power of the Magistrates' Court to proceed to hear and determine the charge in the absence of the accused under section 25(1) or 80 on the basis of sworn evidence given by or on behalf of the informant if the informant has not served a preliminary brief on the accused.

S. 84(5)
amended by
No. 81/2011
s. 10.

S. 84(6)
amended by
No. 68/2009
s. 8.

85 Non-appearance of accused—Infringements Act 2006

- (1) This section applies to a lodgeable infringement offence within the meaning of the **Infringements Act 2006** in respect of which—
- (a) an election to have the matter of the offence heard and determined in the Magistrates' Court under Part 2 or Part 4 of that Act has been made; or

- (b) an order under section 72(1) of that Act has been made.
- (2) Without limiting any other power of the Magistrates' Court, if the accused fails to appear and the Magistrates' Court proceeds to hear and determine the charge in the absence of the accused under section 80, the court may hear and determine the charge based on the prescribed information lodged under section 40(1)(a) or 71(1)(a) of that Act (as the case requires).

86 Proof of criminal record in absence of accused

- (1) If—
 - (a) an accused is charged with a summary offence; and
 - (b) it is alleged that the accused has previous convictions or infringement convictions—

S. 86(1)(b)
amended by
No. 81/2011
s. 11(1).

there may be served on the accused a copy of the criminal record of the accused.

Notes

- 1 See section 77 as to contents of a criminal record.
 - 2 A copy of the criminal record of the accused is included in the preliminary brief (section 37) or, if a preliminary brief is not served, in the full brief (section 41).
- (2) If the Magistrates' Court—
 - (a) finds the accused guilty in the absence of the accused; and

(b) is satisfied that a copy of the criminal record of the accused was served on the accused at least 14 days before the hearing of the charge—

the criminal record is admissible only for the purpose of sentencing and—

- (c) is evidence that the accused has the previous convictions and infringement convictions set out in the criminal record; and
- (d) is evidence of the particulars set out in the criminal record.

S. 86(2)(c)
amended by
No. 81/2011
s. 11(2).

87 Limitations on sentencing in absence of accused

- (1) If the Magistrates' Court proceeds to hear and determine a charge in the absence of the accused and finds the accused guilty, the court must not make a custodial order under Division 2 of Part 3 of the **Sentencing Act 1991**.
- (2) If the Magistrates' Court finds an accused guilty in the absence of the accused on the basis of a preliminary brief—
- (a) the court must not make an order under Part 3B of the **Sentencing Act 1991** for a fine exceeding 20 penalty units and the total sum of orders for fines must not exceed in the aggregate 50 penalty units; and
- (b) the total sum of orders made under Divisions 1 and 2 of Part 4 of the **Sentencing Act 1991** for the payment of restitution or compensation must not exceed \$2000.

S. 87(2)(a)
amended by
Nos 65/2011
s. 107(Sch.
item 4.3),
26/2012 s. 74.

Note

In addition to this section, the court cannot make an order that requires the consent of the accused to its making, for example, a community correction order.

Note to
s. 87(2)
amended by
No. 65/2011
s. 107(Sch.
item 4.4).

- (3) If, at any time during the hearing, the Magistrates' Court considers that the charge, if proven, is likely to result in an order prohibited by subsection (1) or (2) or an order that requires the consent of the accused, the court—
- (a) must adjourn the proceeding to enable the accused to attend or to be brought before the court to answer to the charge; and
 - (b) may issue a warrant to arrest the accused.
- (4) If the Magistrates' Court finds a charge against a person proved and imposes a sentence in the absence of the person, the court must serve written notice on the person, at the address of the person on the register kept under section 18 of the **Magistrates' Court Act 1989**, of—
- (a) the order of the court; and
 - (b) their right to apply for a rehearing of the charge.

Note

Part 3.4 provides for a rehearing in certain circumstances. In particular, section 94 provides for automatic rehearing in certain cases.

Part 3.4—Rehearing

88 Right to apply for rehearing

If a sentence is imposed by the Magistrates' Court in a criminal proceeding on a person who did not appear in the proceeding, that person, or the informant on that person's behalf, may apply to the Magistrates' Court for an order that the charge be reheard.

89 Notice of intention to apply for rehearing

A notice of intention to apply for a rehearing must—

- (a) state the reason why the person on whom the sentence was imposed did not appear in the proceeding; and
- (b) be filed with the registrar at the venue of the Magistrates' Court at which the sentence was imposed.

90 Service of notice

- (1) If the applicant is the person on whom the sentence was imposed, the applicant must serve on the respondent in accordance with section 392 a copy of the notice under section 89 within 7 days after filing the notice.
- (2) If the informant makes an application for a rehearing on behalf of the person on whom the sentence was imposed, the informant must serve personally on that person in accordance with section 391 a copy of the notice under section 89 within 7 days after filing the notice.

S. 90(1)
amended by
No. 68/2009
s. 51(f).

S. 90(2)
amended by
No. 68/2009
s. 51(u).

91 Stay of sentence etc.

S. 91(1)
amended by
No. 56/2013
s. 34(2).

- (1) On the filing of a notice under section 89, the sentence (other than an order for the cancellation, suspension or variation of the driver licence or learner permit of the person on whom the sentence was imposed or the disqualification of that person under the **Road Safety Act 1986** or the **Sentencing Act 1991** from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria) is stayed until—
 - (a) the application for rehearing has been heard; and
 - (b) if a rehearing is granted, the charge has been reheard.

S. 91(2)
amended by
No. 56/2013
s. 34(3).

- (2) If the driver licence or learner permit of the person on whom the sentence was imposed has been cancelled, suspended or varied by order of the Magistrates' Court or that person has been disqualified under the **Road Safety Act 1986** or the **Sentencing Act 1991** by order of the Magistrates' Court from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria, the applicant may, on or after the filing of a notice under section 89, apply for a stay of the order pending the determination of the rehearing.

S. 91(3)
amended by
Nos 68/2009
s. 51(v),
56/2013
s. 34(4).

- (3) An applicant under subsection (2) (other than an informant who is making the application on behalf of the person whose driver licence or learner permit has been cancelled, suspended or varied or who has been disqualified as mentioned in subsection (2)) must serve on the informant in accordance with section 392 written notice of the application at least 7 days before making the application.

(4) On an application under subsection (2), the Magistrates' Court may order that the order for the cancellation, suspension or variation of the person's driver licence or learner permit or the order for the disqualification of the person from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria be stayed until—

S. 91(4)
amended by
No. 56/2013
s. 34(5).

(a) the application for rehearing has been heard;
and

(b) if a rehearing is granted, the charge has been reheard.

(5) The Magistrates' Court must cause particulars of a stay under subsection (4) to be sent immediately to the Corporation.

S. 91(5)
inserted by
No. 56/2013
s. 34(6).

(6) In this section *driver licence* and *learner permit* have the same meanings as in the **Road Safety Act 1986**.

S. 91(6)
inserted by
No. 56/2013
s. 34(6).

92 Court may order rehearing

On an application under section 88, the Magistrates' Court may set aside any findings and orders made in the earlier proceeding subject to any terms and conditions that it thinks just and rehear the charge.

93 Failure to appear on application

If an applicant fails to appear at the time fixed for the hearing of an application under section 88 and the application is struck out, the applicant may reapply under that section only if the applicant first obtains the leave of the Magistrates' Court.

94 Automatic rehearing in certain cases

S. 94(1)(a)
amended by
No. 68/2009
s. 51(w).

(1) On an application under section 88, if—

(a) the charge-sheet was served in accordance with section 394 (ordinary service); and

(b) the Magistrates' Court is satisfied that the charge-sheet was not brought to the notice of the applicant prior to the hearing of the charge—

the court must set aside any findings and orders made in the earlier proceeding and rehear the charge.

(2) If a person is served with a notice under section 87(4) and applies under section 88 for a rehearing of the charge within 28 days after the date of service of the notice, the Magistrates' Court must set aside the findings and orders made in the earlier proceeding and rehear the charge.

Note

Chapter 8 contains general provisions that apply to all criminal proceedings.

Chapter 4—Committal proceeding

Part 4.1—Preliminary

95 Definition

In this Chapter—

the registrar means the registrar at the venue of the Magistrates' Court at which a committal proceeding is, or is to be, held.

96 When a committal proceeding must be held

A committal proceeding must be held in all cases in which the accused is charged with an indictable offence, except cases where—

- (a) a direct indictment is filed; or
- (b) the charge is heard and determined summarily.

97 Purposes of a committal proceeding

The purposes of a committal proceeding are—

- (a) to determine whether a charge for an offence is appropriate to be heard and determined summarily;
- (b) to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;
- (c) to determine how the accused proposes to plead to the charge;
- (d) to ensure a fair trial, if the matter proceeds to trial, by—
 - (i) ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;

- (ii) enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses;
- (iii) enabling the accused to put forward a case at an early stage if the accused wishes to do so;
- (iv) enabling the accused to adequately prepare and present a case;
- (v) enabling the issues in contention to be adequately defined.

98 When a committal proceeding commences

A committal proceeding commences on the commencement of a filing hearing.

Notes

- 1 See section 6(1) as to when a criminal proceeding is commenced.
- 2 Section 102 provides for the fixing of a date for a filing hearing.

99 Time limit for determining certain committal proceedings for a sexual offence

- (1) This section applies to a committal proceeding for a sexual offence if—
 - (a) the complainant was a child or a person with a cognitive impairment when the criminal proceeding was commenced; and
 - (b) a witness other than the complainant is to be cross-examined in the committal hearing.
- (2) The Magistrates' Court must determine a committal proceeding to which subsection (1) applies within 2 months after the committal mention hearing or, if more than one committal mention hearing is held, the final committal mention hearing.

- (3) The Magistrates' Court may fix a longer period for the determination of a committal proceeding to which subsection (1) applies if the court is satisfied that it is in the interests of justice that another period should be fixed having regard to—
 - (a) the seriousness of the offence; and
 - (b) the reason a longer period is required.
- (4) Subsection (2) does not apply if—
 - (a) the accused has failed to attend in accordance with the conditions of his or her bail; or
 - (b) a warrant to arrest the accused has been issued and at the end of the relevant period referred to in section 126(1) the accused has not been arrested; or
 - (c) the accused requests that the committal proceeding be determined after the period referred to in subsection (2) and the Magistrates' Court is satisfied that in the interests of justice the request should be granted.
- (5) If a committal proceeding to which subsection (1) applies has not been determined before the expiry of the period referred to in subsection (2), or any longer period fixed under subsection (3), the Magistrates' Court may, on the application of the accused, order that the accused be discharged.

100 Hearings in a committal proceeding and attendance of accused

- (1) The hearings that may be held in a committal proceeding are—
 - (a) a filing hearing;
 - (b) a special mention hearing;
 - (c) a compulsory examination hearing;

- (d) a committal mention hearing;
 - (e) a committal case conference;
 - (f) a committal hearing.
- (2) An accused must attend all hearings in the committal proceeding against the accused unless excused under—
- (a) section 135, in the case of a committal hearing; or
 - (b) section 330, in any other case.

Part 4.2—Filing hearing

101 Filing hearing

At a filing hearing, the Magistrates' Court may—

- (a) fix a date for a committal mention hearing;
- (b) fix a period of time for service of a hand-up brief;
- (c) make any order or give any direction that the court considers appropriate.

102 Time limit for filing hearing

The date fixed for a filing hearing must be—

- (a) within 7 days after the charge-sheet is filed, if the accused has been arrested and either remanded in custody or granted bail; or
- (b) within 28 days after the charge-sheet is filed, if a summons to answer to a charge is issued in respect of the accused.

Part 4.3—Compulsory examination

103 Application for order

- (1) Subject to this section, an informant may apply for an order under section 104(1).
- (2) An application under subsection (1) may only be made—
 - (a) after a charge-sheet has been filed against the accused in relation to the matter to which the proposed examination relates; and
 - (b) subject to subsection (3), before the committal hearing, if any, commences.
- (3) An application under subsection (1) may be made after the committal mention hearing only if the Magistrates' Court is satisfied that it is in the interests of justice to allow the making of the application at that time.
- (4) On an application under subsection (1), the informant must advise the Magistrates' Court of the following information—
 - (a) whether the person sought to be examined has been asked by the prosecution to make a statement and has refused to do so; and
 - (b) whether the informant is aware of whether the person sought to be examined has obtained legal advice concerning the proposed examination; and
 - (c) whether the person sought to be examined is or has been a suspect with respect to the matter to which the proposed examination relates; and
 - (d) whether the person sought to be examined has been made aware of the application; and

- (e) any other information prescribed by the rules of court.
- (5) An application under subsection (1) may be made with or without notice to the accused.
- (6) If the person sought to be examined in an application under subsection (1) is or has been a suspect with respect to the matter to which the proposed examination relates, the informant must give reasonable notice of the application to the person, or a legal practitioner representing the person, whether or not—
 - (a) a charge-sheet against the person has been filed; or
 - (b) a charge against the person has been determined.
- (7) The accused—
 - (a) is not a party to an application under subsection (1); and
 - (b) may not address the court on the application.

104 Order for compulsory examination hearing

- (1) On the application of the informant, the Magistrates' Court may make an order requiring a person to attend before the court on a date fixed by the court for the purpose of being examined by or on behalf of the informant or producing a document or thing or both.
- (2) The Magistrates' Court may make an order under subsection (1) if it is satisfied that it is in the interests of justice to do so.
- (3) The Magistrates' Court may set aside an order under subsection (1) at any time, whether on its own motion or on the application of the informant or the person sought to be examined.

105 Notice of compulsory examination order to be served

- (1) The informant must serve notice of an order made under section 104(1) on—
 - (a) the person to whom the order relates; and
 - (b) the accused.
- (2) The notice must—
 - (a) be in the form prescribed by the rules of court; and
 - (b) be served personally on the person to whom the order relates in accordance with section 391.
- (3) Section 134(1) of the **Magistrates' Court Act 1989** (contempt of court) applies to a person ordered to attend the Magistrates' Court under section 104(1) as if—
 - (a) the person had been summoned as a witness and had been given or tendered any conduct money required to be given or tendered; and
 - (b) the order were a summons.

S. 105(2)(b)
amended by
No. 68/2009
s. 51(x).

106 Compulsory examination hearing

- (1) A person ordered under section 104(1) to attend the Magistrates' Court for a compulsory examination hearing—
 - (a) may be represented at the hearing by a legal practitioner; and
 - (b) may address the court personally or through the legal practitioner.
- (2) The evidence of a witness at a compulsory examination hearing must be—
 - (a) sworn and given by way of examination-in-chief; and

- (b) recorded in the same manner as evidence at a committal hearing.
- (3) The accused may attend a compulsory examination hearing.
- (4) At a compulsory examination hearing, if the Magistrates' Court determines that there are exceptional circumstances, the accused may address the court personally or through a legal practitioner representing the accused but may not cross-examine a witness.
- (5) Nothing in this section excludes or limits the operation of any other law as to the competence or compellability of a witness to give evidence.

Part 4.4—Pre-hearing disclosure of prosecution case

107 Informant must serve hand-up brief

- (1) Subject to subsection (2), the informant must serve on the accused a hand-up brief that complies with section 110.
- (2) The informant is not required to serve a hand-up brief if he or she has served a plea brief under section 116 and the accused pleads guilty to the charge.
- (3) At the same time as the hand-up brief is served, the informant must serve on the accused a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions.

S. 107(3)
amended by
No. 81/2011
s. 12.

108 How hand-up brief must be served

- (1) A hand-up brief must be served at least 42 days before the committal mention hearing unless—
 - (a) the Magistrates' Court fixes another period for service; or
 - (b) the accused gives written consent to a lesser period for service.
- (2) A hand-up brief must be served personally on the accused in accordance with section 391 unless the informant is satisfied that ordinary service is appropriate in all the circumstances.

S. 108(2)
amended by
No. 68/2009
s. 51(y).

Note to
s. 108(2)
amended by
No. 68/2009
s. 51(z).

Note

Section 394 provides for ordinary service.

- (3) In considering whether to effect service of the hand-up brief by ordinary service, the informant must consider whether it is an appropriate method of service in all the circumstances as known by the informant including—
- (a) the nature and gravity of the alleged offence;
 - (b) whether the accused has previously been found guilty or convicted of any similar offence;
 - (c) the period of time that has elapsed since the accused's address for service was ascertained.

109 Copy hand-up brief to be filed and forwarded to DPP

The informant must file a copy of the hand-up brief with the registrar, and, if the DPP is conducting the committal proceeding, forward another copy to the DPP, within 7 days after service of the brief on the accused.

110 Contents of hand-up brief

A hand-up brief must contain—

- (a) a notice in the form prescribed by the rules of court—
 - (i) specifying the date of the committal mention hearing; and
 - (ii) explaining the nature of a committal proceeding and the purpose of the various stages; and
 - (iii) explaining the importance of the accused obtaining legal representation; and
 - (iv) advising that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and

S. 110
amended by
No. 68/2009
s. 10(a).

- (v) providing details of how to contact Victoria Legal Aid; and
- (vi) describing the effect of section 125(2); and
- (b) a copy of the charge-sheet relating to the alleged offence; and
- (c) a statement of the material facts relevant to the charge; and
- (d) any information, document or thing on which the prosecution intends to rely in the committal proceeding including—
 - (i) a copy of any statement relevant to the charge signed by the accused, or a record of interview of the accused, that is in the possession of the informant; and
 - (ii) a copy, or a transcript, of any audio-recording or audiovisual recording required to be made under Subdivision (30A) of Division 1 of Part III of the **Crimes Act 1958**; and
 - (iii) a copy or statement of any other evidentiary material that is in the possession of the informant relating to a confession or admission made by the accused relevant to the charge; and
 - (iv) a list of the persons who have made statements that the informant intends to tender at the committal hearing, together with copies of those statements; and

- (v) if a person has been examined under section 106 and the informant intends to tender a record of that examination at the committal hearing, a transcript of the recording of the examination; and
- (va) if a person has been examined under Part 4 of the **Major Crime (Investigative Powers) Act 2004** and the informant intends to tender a record of that examination at the committal hearing, a transcript of the recording of the examination; and
- (vi) if the committal proceeding relates (wholly or partly) to a charge for—
 - (A) a sexual offence; or
 - (B) an offence which involves an assault on, or injury or a threat of injury to, a person—a transcript of any audio or audiovisual recording of a kind referred to in section 367, if the informant intends to tender the transcript at the committal hearing; and
- (vii) a legible copy of any document which the prosecution intends to produce as evidence; and
- (viii) a list of any things the prosecution intends to tender as exhibits; and
- (ix) a clear photograph, or a clear copy of such a photograph, of any proposed exhibit that cannot be described in detail in the list; and

S. 110(d)(va)
inserted by
No. 55/2014
s. 168(a).

S. 110(d)(vi)
amended by
No. 68/2009
s. 10(b).

- (x) a description of any forensic procedure, examination or test that has not yet been completed and on which the prosecution intends to rely as tending to establish the guilt of the accused; and
- (e) any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence including—
 - (i) a list of the persons (including experts) who have made statements relevant to the alleged offence which the prosecution does not intend to tender at the committal hearing; and
 - (ii) a copy of every statement referred to in subparagraph (i) made by each of those persons or, if the person has not made a statement, a written summary of the substance of any evidence likely to be given by that person or a list of those statements or written summaries; and
 - (iii) a copy of every document relevant to the alleged offence that the prosecution does not intend to tender as an exhibit or a list of those documents; and
 - (iv) a list containing descriptions of any things relevant to the alleged offence that the prosecution does not intend to tender as exhibits; and
 - (v) a clear photograph, or a clear copy of such a photograph, of any thing relevant to the alleged offence that cannot be described in detail in the list; and

- (vi) a copy of—
 - (A) records of any medical examination of the accused; and
 - (B) reports of any forensic procedure or forensic examination conducted on the accused; and
 - (C) the results of any tests—
carried out on behalf of the prosecution and relevant to the alleged offence but on which the prosecution does not intend to rely; and
- (f) if the committal proceeding relates (wholly or partly) to a charge for a sexual offence, a copy of every statement made by the complainant to any police officer that relates to the alleged offence and contains an acknowledgment of its truthfulness; and
- (g) a copy of, or a list of, any other information, documents or things required by the rules of court to be included in a hand-up brief.

S. 110(f)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

Note

See section 416 as to the prosecution's general obligation of disclosure.

Note to s. 110
amended by
No. 68/2009
s. 51(za).

111 Continuing obligation of disclosure

- (1) This section applies to any information, document or thing that—
 - (a) comes into the informant's possession or comes to the informant's notice after the service of the hand-up brief; and
 - (b) would have been required to be listed, or a copy of which would have been required to be served, in the hand-up brief.

- (2) The informant must—
- (a) serve on the accused a copy of the document or list; and
 - (b) file a copy with the registrar; and
 - (c) if the DPP is conducting the committal proceeding, forward another copy to the DPP—

as soon as practicable after the information, document or thing comes into the informant's possession or comes to the informant's notice.

- (3) This section does not apply to a plea brief.

Note to s. 111
amended by
No. 68/2009
s. 51(zb).

Note

See section 416 as to the prosecution's general obligation of disclosure.

112 Rules with respect to statements

- (1) A statement that the informant intends to tender in a committal proceeding must be—
- (a) in the form of an affidavit; or
 - (b) signed by the person making the statement and must contain an acknowledgment signed by that person in the presence of a person referred to in Schedule 3 that the statement is true and correct and is made in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury; or
 - (c) in a form, and attested to in a manner, prescribed by the rules of court.
- (2) If a person under the age of 18 years makes a statement that the informant intends to tender in a committal proceeding, the statement must include the person's age.

- (3) If a person who cannot read makes a statement that the informant intends to tender in a committal proceeding—
- (a) the statement must be read to the person before he or she signs it; and
 - (b) the acknowledgment must state that the statement was read to the person before he or she signed it.

* * * * *

S. 112(4)
repealed by
No. 68/2009
s. 9(j).

Note

Section 414 provides for acknowledgment of false statements.

Note to s. 112
inserted by
No. 68/2009
s. 9(k).

113 Rules with respect to recordings

- (1) A transcript of an audio or audiovisual recording of an examination under section 106 or of the evidence-in-chief of a witness under Division 5 of Part 8.2 or of an examination under Part 4 of the **Major Crime (Investigative Powers) Act 2004** must be accompanied by an affidavit sworn by the person who asked the questions, or made the recording, attesting to the accuracy of the recording.
- (2) A person who acknowledges the contents of a recording referred to in subsection (1) that the person knows at the time to be false may be dealt with as if the contents of the recording had been evidence given in court.

S. 113(1)
amended by
Nos 68/2009
s. 11, 55/2014
s. 168(b).

114 Disclosure of address or telephone number of witness

- (1) The informant must not disclose the address or telephone number (including a private, business or official address or telephone number) of any person in any information, document or thing provided to the accused under this Part unless—
 - (a) the informant believes that—
 - (i) the information, document or thing does not identify the address or telephone number as that of any particular person; or
 - (ii) the address or telephone number is relevant to the offence charged and disclosure is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - (b) the Magistrates' Court permits the disclosure in accordance with subsection (3) on application made by the informant or the accused.
- (2) For the purposes of subsection (1), the informant may delete, or render illegible, an address or telephone number included in the information, document or thing before service on the accused.
- (3) The Magistrates' Court may grant an application made under subsection (1)(b) if the court is satisfied that—
 - (a) the address or telephone number is relevant to the offence charged; and

- (b) one of the following applies—
- (i) disclosure is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - (ii) having regard to the matters referred to in subsection (4), the interests of justice outweigh any risk referred to in subparagraph (i).
- (4) For the purposes of subsection (3)(b)(ii), the Magistrates' Court must have regard to—
- (a) the right to privacy of the witness; and
 - (b) the right of the accused to prepare properly for the hearing.
- (5) Compliance, or a failure to comply, with subsection (1) does not affect the admissibility of a statement.

Note

See section 14 of the **Victims' Charter Act 2006** as to victims' privacy.

115 Inspection of exhibits

The accused may inspect the exhibits at a time and place agreed between the accused and the informant.

Note

Sections 45(1)(g) and 122(2) provide for restricting inspection by an accused personally of evidence that is child pornography.

Note to s. 115
inserted by
No. 42/2015
s. 17.

116 Informant may serve and file plea brief

- (1) At any time before service of a hand-up brief, the informant may serve on the accused a plea brief that complies with section 117 if consent is given under subsection (2).

S. 116(3)
amended by
No. 68/2009
s. 51(zc).

- (2) A plea brief may only be served if the accused, or a legal practitioner representing the accused, gives written consent to the service of a plea brief to—
 - (a) the informant; and
 - (b) if the DPP is conducting the committal proceeding, the DPP.
- (3) A plea brief must be served on the accused in accordance with section 394 (ordinary service).
- (4) Within 7 days after service of the plea brief on the accused, the informant must—
 - (a) file a copy of a plea brief with the registrar; and
 - (b) if the DPP is conducting the committal proceeding, forward another copy to the DPP.

Note

Section 142 provides for determination of a committal proceeding where a plea brief is used.

117 Contents of plea brief

- (1) A plea brief must contain—
 - (a) a copy of the charge-sheet relating to the offence; and
 - (b) a statement of the material facts relevant to the charge; and
 - (c) a copy of any statement relevant to the charge signed by the accused, or a record of interview of the accused, that is in the possession of the informant; and

- (d) a copy, or a transcript, of any audio-recording or audiovisual recording required to be made under Subdivision (30A) of Division 1 of Part III of the **Crimes Act 1958**; and
 - (e) a copy or statement of any other evidentiary material that is in the possession of the informant relating to a confession or admission made by the accused relevant to the charge.
- (2) The informant must include in a plea brief a copy of any statement made by an alleged victim of an offence to which the committal proceeding relates if the statement—
- (a) concerns the circumstances of the offence; and
 - (b) would be admissible in evidence; and
 - (c) is in the possession of the informant.
- (3) The informant may include in a plea brief any other statement relevant to the charge.
- (4) Sections 112 and 114 apply to a statement included in a plea brief.

Note

Section 414 provides for acknowledgment of false statements.

**Note to s. 117
inserted by
No. 68/2009
s. 12.**

Part 4.5—Case direction

118 Case direction notice

S. 118(1)
amended by
No. 68/2009
s. 49(e).

- (1) If a hand-up brief is served under section 107, the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant must jointly file with the registrar a case direction notice at least 7 days before the committal mention hearing.
- (2) If the accused is not represented by a legal practitioner and does not sign a case direction notice, the DPP or, if the DPP is not conducting the committal proceeding, the informant must file the case direction notice, despite—
 - (a) it not being signed by or on behalf of the accused; and
 - (b) the accused not having participated in any discussion or other activity connected with its preparation.
- (3) If the Magistrates' Court at any time fixes another date for a committal mention hearing, the court may—

S. 118(3)(a)
amended by
No. 68/2009
s. 49(f).

- (a) direct that another case direction notice is to be jointly filed with the registrar by the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant at least 7 days before that date or within any other period that is fixed by the court; and
- (b) give any direction that it considers appropriate as to the matters to be dealt with by that case direction notice.

119 Contents of case direction notice

A case direction notice—

- (a) must be in the form prescribed by the rules of court;
- (b) must specify the procedure by which it is proposed that the matter be dealt with or indicate whether an adjournment of the committal mention hearing would assist the parties in determining how the matter should be dealt with;
- (c) must state the names of any witnesses that the accused intends to seek leave to cross-examine, and for each witness the accused must specify—
 - (i) each issue for which leave to cross-examine is sought; and
 - (ii) the reason why the evidence of the witness is relevant to the issue; and
 - (iii) the reason why cross-examination of the witness on the issue is justified;

S. 119(c)
substituted by
No. 55/2014
s. 108(1).

Notes

- 1 At a committal mention hearing, the Magistrates' Court may grant leave to cross-examine a witness on one or more issues. If the Magistrates' Court grants leave to cross-examine a witness, the court must identify each issue on which the witness may be cross-examined. See section 124(6).
- 2 If leave to cross-examine a witness is granted under section 124, the Magistrates' Court may grant leave, during the committal hearing, for the accused to cross-examine the witness on other issues. See section 132A.

S. 119(d)
substituted by
No. 55/2014
s. 108(2).

- (d) must state, in respect of each issue specified in accordance with paragraph (c)—
 - (i) whether the informant consents to or opposes leave being granted in respect of that issue; and
 - (ii) if the informant opposes leave being granted, the reason why leave is opposed;
- (e) may include a statement that the accused requires—
 - (i) specified items listed in the hand-up brief to be produced for inspection or a copy given to the accused on or before the committal mention hearing;
 - (ii) a copy of any information, document or thing specified by the accused that the accused considers ought to have been included in the hand-up brief;
 - (iii) particulars of previous convictions of any witness on whose evidence the prosecution intends to rely in the committal proceeding;
- (f) may include a statement that the accused is prepared, or is not prepared, to proceed or proceed further with the committal hearing while a forensic procedure, examination or test described in the hand-up brief remains uncompleted;
- (g) must be signed by or on behalf of the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant.

120 Late application for leave to cross-examine witness

- (1) The Magistrates' Court may permit an accused to apply for leave to cross-examine a witness after the expiry of the period for filing a case direction notice if the court is satisfied that it is in the interests of justice to do so, having regard to the reason why the application was not made before the expiry of the period.
- (2) If the Magistrates' Court allows an accused to apply for leave to cross-examine a witness in the circumstances referred to in subsection (1), the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant must jointly file with the registrar another case direction notice—
 - (a) at least 7 days before the next committal mention hearing; or
 - (b) within any other period that is fixed by the court.
- (3) Section 119(b) does not apply to a case direction notice required to be filed under subsection (2).

S. 120(2)
amended by
No. 68/2009
s. 49(g).

121 Adjournment without appearance of parties

- (1) If the parties have indicated in a case direction notice under section 118 that an adjournment of the committal mention hearing would assist them in determining how the matter should be dealt with, the Magistrates' Court may, without requiring the appearance of the informant or the accused, if satisfied that it is in the interests of justice to do so—
 - (a) adjourn the hearing for up to 14 days and fix another date for a committal mention hearing; and

- (b) if the accused has been granted bail in respect of the committal proceeding—
 - (i) excuse the accused from attending on the date on which the accused was bailed to attend; and
 - (ii) extend the bail of the accused to the date fixed under paragraph (a).
- (2) If the Magistrates' Court adjourns a committal mention hearing under subsection (1), it must give to the prosecution and the accused written notice of the date to which the hearing is adjourned.
- (3) If the Magistrates' Court extends bail under subsection (1)(b)(ii) it must give to the accused and the surety or sureties, if any, written notice of—
 - (a) the extension of bail by the court in the absence of the accused and the surety; and
 - (b) the date, time and place at which the accused is bound to attend; and
 - (c) the consequences of failure to attend on that date at that time and place.

122 Compliance with request to copy or inspect items or disclose previous convictions of witness

- (1) Subject to subsection (2), the informant must comply with any reasonable request referred to in section 119(e)(i) or (ii) for a copy of an item but, if the informant considers that it is not reasonable to copy the item owing to its size or nature, the informant must allow the accused to inspect it on or before the committal mention hearing.

- (2) The informant may object to the production of an item requested under section 119(e)(i) or (ii) on any ground referred to in section 45 or 114.

Note

Sections 45(1)(g) provides for restricting inspection by an accused personally of evidence that is child pornography.

**Note to
s. 122(2)
inserted by
No. 42/2015
s. 18.**

- (3) The informant may object to the disclosure of the particulars of any previous conviction of any witness requested under section 119(e)(iii) if the previous conviction is, because of its character, irrelevant to the proceeding but the informant must advise the accused of the existence of any undisclosed previous convictions.

Note

See section 14 of the **Victims' Charter Act 2006** as to victims' privacy.

- (4) Nothing in this section—
- (a) prevents the accused applying for the issue of a witness summons in respect of an item listed in the hand-up brief; or
 - (b) requires the informant to produce an item listed in the hand-up brief if its production is not requested under section 119(e)(i) or a witness summons is not issued in respect of it, unless the Magistrates' Court otherwise orders; or

- (c) prevents the Magistrates' Court or the informant proceeding, or proceeding further, with the committal hearing, irrespective of any statement included by the accused in the notice under section 119(f).

Note

At a committal mention hearing the Magistrates' Court may hear and determine any objection to disclosure of material: section 125(1)(e).

123 No cross-examination of certain witnesses in sexual offence cases

Despite anything to the contrary in this Part, the Magistrates' Court must not grant leave to cross-examine a witness who—

- (a) is a complainant in a proceeding that relates (wholly or partly) to a charge for a sexual offence; and
- (b) was a child or a person with a cognitive impairment when the criminal proceeding was commenced; and
- (c) made a statement a copy of which was served in the hand-up brief or whose evidence-in-chief or examination at a compulsory examination hearing was recorded and a transcript of the recording was served in the hand-up brief.

124 Leave required to cross-examine other witnesses

- (1) A witness (other than a witness referred to in section 123) cannot be cross-examined without leave being granted under this section.

- (2) In determining whether to grant leave to cross-examine a witness, the Magistrates' Court may have regard to whether the informant consents to or opposes leave being granted.
- (3) The Magistrates' Court must not grant leave to cross-examine a witness unless the court is satisfied that—
- (a) the accused has identified an issue to which the proposed questioning relates and has provided a reason why the evidence of the witness is relevant to that issue; and
 - (b) cross-examination of the witness on that issue is justified.
- (4) In determining whether cross-examination is justified, the Magistrates' Court must have regard to the need to ensure that—
- (a) the prosecution case is adequately disclosed; and
 - (b) the issues are adequately defined; and
 - (c) the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged; and
 - (d) a fair trial will take place if the matter proceeds to trial, including that the accused is able adequately to prepare and present a defence; and
 - (e) matters relevant to a potential plea of guilty are clarified; and
 - (f) matters relevant to a potential discontinuance of prosecution under section 177 are clarified; and

S. 124(2)
substituted by
No. 55/2014
s. 109(1).

S. 124(3)
amended by
No. 55/2014
s. 109(2).

- (g) trivial, vexatious or oppressive cross-examination is not permitted; and
- (h) the interests of justice are otherwise served.

Notes to
s. 124(4)
inserted by
No. 55/2014
s. 109(3).

Notes

- 1 Section 102 of the **Evidence Act 2008** provides that credibility evidence about a witness is not admissible (the *credibility rule*).
 - 2 Section 103(1) of the **Evidence Act 2008** provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
- (5) In addition to the requirements of subsection (4), if the witness is under 18 years of age, the Magistrates' Court must have regard to—
- (a) the need to minimise the trauma that might be experienced by the witness in giving evidence; and
 - (b) any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding; and
 - (c) any mental, intellectual or physical disability to which the witness is or appears to be subject and of which the court is aware; and
 - (d) the importance of the witness to the case for the prosecution; and
 - (e) the existence or lack of evidence that corroborates the proposed evidence of the witness; and
 - (f) the extent of any proposed admissions; and
 - (g) the probative value of the proposed evidence of the witness; and
 - (h) the issues in dispute; and

- (i) the weight of the proposed evidence of the witness; and
 - (j) any statements of other witnesses that contradict the proposed evidence of the witness.
- (6) If the Magistrates' Court grants leave to cross-examine a witness, the court must identify each issue on which the witness may be cross-examined.

**S. 124(6)
inserted by
No. 55/2014
s. 109(4).**

Part 4.6—Committal mention and case conference

125 Committal mention hearing

(1) At a committal mention hearing, the Magistrates' Court may—

S. 125(1)(a)
amended by
No. 68/2009
s. 13.

- (a) immediately determine the committal proceeding in accordance with section 141, 142 or 143;
- (b) offer a summary hearing or determine an application for a summary hearing in accordance with section 30;
- (c) hear and determine an application for leave to cross-examine a witness;
- (d) fix a date for a committal hearing;
- (e) hear and determine any objection to disclosure of material;
- (f) fix another date for a committal mention hearing;
- (g) make any other order or give any direction that the court considers appropriate.

(2) In considering whether to fix another date for a committal mention hearing to enable the accused to obtain legal representation, the Magistrates' Court must have regard to whether the accused has made reasonable attempts to obtain legal representation.

S. 125(3)
inserted by
No. 42/2015
s. 19.

(3) In determining any objection to the disclosure of material on the ground referred to in section 45(1)(g), the Magistrates' Court, having regard to whether the accused is legally represented, may order, on any conditions specified by it, that the disclosure be made to—

- (a) the accused's legal practitioner (but not the accused personally); or
- (b) the accused personally.

126 Time for holding committal mention hearing

(1) A committal mention hearing must be held—

- (a) in the case of a sexual offence, within 3 months after the commencement of the criminal proceeding for the offence; or
- (b) in the case of any other offence, within 6 months after the commencement of the criminal proceeding for the offence—

or any other period fixed by the Magistrates' Court under subsection (2).

Note

Section 6(1) sets out how a criminal proceeding is commenced.

(2) The Magistrates' Court may fix a longer period for the holding of a committal mention hearing if the court is satisfied that it is in the interests of justice that another period should be fixed having regard to—

- (a) the seriousness of the offence; and
- (b) the reason a longer period is required.

(3) Subsection (1) does not apply—

- (a) if the accused has failed to attend in accordance with the conditions of his or her bail; or
- (b) if a warrant to arrest the accused has been issued and at the end of the period referred to in subsection (1)(a) or (b) (as the case requires) the accused has not been arrested; or

- (c) if the accused requests that a committal mention hearing be held after the period referred to in subsection (1)(a) or (b) (as the case requires) and the Magistrates' Court is satisfied that in the interests of justice the request should be granted.
- (4) If a committal mention hearing has not been held before the expiry of the period referred to in subsection (1)(a) or (b) (as the case requires), or any longer period fixed under subsection (2), the Magistrates' Court, on the application of the accused, may order the accused to be discharged.

127 Committal case conference

- (1) The Magistrates' Court may direct the parties to a committal proceeding to appear at a committal case conference to be conducted by a magistrate.
- (2) Wherever practicable, a committal case conference should be conducted on the date of the committal mention hearing.
- (3) Evidence of—
 - (a) anything said or done in the course of a committal case conference; or
 - (b) any document prepared solely for the purposes of a committal case conference—is not admissible in any proceeding before any court or tribunal or in any inquiry in which evidence is or may be given before any court or person acting judicially, unless all parties to the committal case conference agree to the giving of the evidence.

Part 4.7—Committal hearing

128 Committal hearing

At a committal hearing, the Magistrates' Court—

- (a) may offer a summary hearing or determine an application for a summary hearing in accordance with section 30;
- (b) may hear evidence in accordance with section 130;
- (c) if the committal hearing proceeds, must determine, in accordance with section 141, whether there is evidence of sufficient weight to support a conviction;
- (d) may make any order or give any direction that the court considers appropriate.

129 Attendance of witnesses

- (1) If leave is granted to cross-examine a witness referred to in section 124 or to call such a witness to give oral evidence-in-chief, the witness must attend on the date to which the committal hearing is adjourned for the witness to give evidence.
- (2) The informant must ensure that the witness attends at the time and place fixed for the giving of evidence by the witness.
- (3) A witness who is required to attend a committal hearing must attend on any date to which the hearing is adjourned unless excused from attendance by the Magistrates' Court.

Note

See section 134 for powers of the Magistrates' Court and inadmissibility of statement etc. when a witness who is required to attend a committal hearing fails to do so.

130 Giving of evidence by witnesses

(1) In this section—

S. 130(1)
def. of
recording
amended by
No. 68/2009
s. 14(a).

recording means an audio or audiovisual recording of—

- (a) the evidence-in-chief of a witness; or
- (b) the compulsory examination of a person under section 106—

a transcript of which was served in the hand-up brief;

statement means a statement of a witness, a copy of which was served in the hand-up brief.

(2) A witness may be called to give evidence at a committal hearing if—

- (a) the Magistrates' Court grants leave under section 124 for the cross-examination of the witness; or
- (b) having regard to the interests of justice, the Magistrates' Court grants leave to the prosecution to call the witness to give oral evidence-in-chief.

(3) If the Magistrates' Court grants leave under section 124 to cross-examine a witness, the evidence-in-chief of the witness must be confined to the witness identifying himself or herself (in a manner consistent with section 131) and attesting to the truthfulness of the statement or the contents of the recording, unless the Magistrates' Court gives leave under subsection (4) or (5).

(4) If it is in the interests of justice, the Magistrates' Court may give leave for a witness referred to in subsection (3) to give oral evidence-in-chief supplementary to the statement or recording.

- (5) If exceptional circumstances exist, the Magistrates' Court may give leave for a witness referred to in subsection (3) to give the whole of his or her evidence-in-chief orally.
- (6) On application by a party, the Magistrates' Court may permit a statement or the transcript of a recording to be read aloud before the witness is asked to attest to its truthfulness or is cross-examined.
- (7) Subject to section 124, a witness who gives evidence-in-chief may be cross-examined and re-examined.
- (8) Evidence given at a committal hearing must be recorded in accordance with Part VI of the **Evidence (Miscellaneous Provisions) Act 1958**.

S. 130(8)
amended by
No. 69/2009
s. 54(Sch. Pt 2
item 18.1).

131 Disclosure of address or telephone number of witness

- (1) A witness whose address or telephone number was not disclosed in material provided to the accused under Part 4.4 must not disclose that information to the Magistrates' Court unless the court permits the disclosure in accordance with subsection (2) on application by the informant or the accused.
- (2) The Magistrates' Court may only grant an application under subsection (1) if the court is satisfied that—
 - (a) the address or telephone number is relevant to the offence charged; and
 - (b) one of the following applies—
 - (i) disclosure is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person; or

- (ii) having regard to the matters referred to in subsection (3), the interests of justice outweigh any risk referred to in subparagraph (i).
- (3) For the purposes of subsection (2)(b)(ii), the Magistrates' Court must have regard to—
 - (a) the right to privacy of the witness; and
 - (b) the right of the accused to prepare properly for the hearing.

132 Cross-examination of witnesses

S. 132(1)
substituted by
No. 55/2014
s. 110(1).

- (1) An accused who obtains leave to cross-examine a witness is limited to cross-examining the witness on—
 - (a) the issues identified under section 124(6); and
 - (b) the issues, if any, in relation to which leave has been obtained under section 132A.
- (2) Without limiting any other power that it has to forbid or disallow questions, the Magistrates' Court may disallow any question asked of a witness in the course of cross-examination in a committal hearing if it appears to the court that—

S. 132(2)(a)
substituted by
No. 55/2014
s. 110(2).

- (a) the question does not relate to an issue in relation to which leave has been obtained under section 124 or 132A; or
 - (b) the question is not justified.
- (3) In determining whether a question is justified, the Magistrates' Court must have regard to the matters referred to in section 124(4) and (5).

132A Leave to cross-examine witness on different issue

- (1) This section applies if the Magistrates' Court grants leave for the accused to cross-examine a witness under section 124.
- (2) The Magistrates' Court may grant leave for the accused to cross-examine the witness on an issue that was not identified under section 124(6).
- (3) In determining whether to grant leave, the Magistrates' Court may have regard to whether the informant consents to or opposes leave being granted.
- (4) The Magistrates' Court must not grant leave unless the court is satisfied that—
 - (a) the accused has identified an issue to which the proposed questioning relates and has provided a reason why the evidence of the witness is relevant to that issue; and
 - (b) cross-examination of the witness on that issue is justified.
- (5) In determining whether cross-examination on an issue is justified, the Magistrates' Court must have regard to the matters referred to in section 124(4) and (5).

S. 132A
inserted by
No. 55/2014
s. 111.

133 Special rules applicable to sexual offences

- (1) This section applies to a committal hearing relating to a charge for a sexual offence, whether or not the committal hearing relates to any other charge against the same or any other person and whether or not it is alleged that there are aggravating circumstances.
- (2) The informant must be represented by a legal practitioner.

- (3) While the complainant is giving evidence or a recording of the evidence of the complainant or of his or her examination under section 106 is being played, only the following persons may be present—
- (a) the informant;
 - (b) the accused;
 - (c) a person whom the complainant wishes to have present for the purpose of providing emotional support to him or her and who is available and approved by the court to be present;
 - (d) the legal practitioners representing the prosecution and the accused and not more than one assistant for each legal practitioner;
 - (e) the court officials whose presence is required;
 - (f) authorized officers within the meaning of the **Court Security Act 1980** whose presence is required for court security purposes;
 - (g) any person recording the evidence in accordance with Part VI of the **Evidence (Miscellaneous Provisions) Act 1958**;
 - (h) any other person who has been authorised by the Magistrates' Court to be present.
- (4) The Magistrates' Court must give reasons for authorising a person to be present under subsection (3)(h).

S. 133(3)(g)
amended by
No. 69/2009
s. 54(Sch. Pt 2
item 18.1).

134 Failure of witness to attend committal hearing

- (1) If a witness who is required to attend a committal hearing does not attend, the Magistrates' Court may—
 - (a) adjourn the hearing; or
 - (b) cause a summons to be issued to compel the attendance of the witness; or
 - (c) continue the committal hearing in the absence of the witness if satisfied that it would not be unfair to the accused to do so.
- (2) If the Magistrates' Court continues the committal hearing in the absence of the witness referred to in subsection (1), the statement or recorded evidence or examination of the witness is inadmissible in evidence in the committal hearing.

S. 134(1)(b)
amended by
No. 69/2009
s. 54(Sch. Pt 1
item 14.1).

Note

Section 194 of the **Evidence Act 2008** provides for the court to issue a warrant to apprehend a witness who does not attend court.

Note to s. 134
inserted by
No. 69/2009
s. 54(Sch. Pt 1
item 14.2).

135 Court may permit accused to be absent from committal hearing

- (1) Before or during a committal hearing, an accused may apply to the Magistrates' Court for permission to be absent from the committal hearing for a specified period.
- (2) On application made under subsection (1), the Magistrates' Court may permit an accused to be absent from the committal hearing for a period, and subject to any conditions, specified by the court if the court—
 - (a) is satisfied that there are special circumstances in respect of the accused; and

- (b) considers that the committal hearing cannot be postponed without undue prejudice or inconvenience to the prosecution or any other accused or any witness.
- (3) If the Magistrates' Court permits an accused to be absent from a committal hearing, the court may continue the committal hearing in the absence of the accused.
- (4) The power under section 330(3) to excuse the attendance of an accused does not apply to this section.

136 Accused who absconds etc. during a committal hearing

If, during a committal hearing, an accused—

- (a) absconds; or
- (b) behaves in a manner necessitating the removal of the accused from the courtroom and the Magistrates' Court orders the accused to be removed; or
- (c) is absent for any other reason without the permission of the court—

the Magistrates' Court may continue the committal hearing in the absence of the accused if the court considers that the committal hearing cannot be postponed without undue prejudice or inconvenience to the prosecution or any other accused or any witness.

137 Accused (natural person) absent at close of prosecution case

If—

- (a) a committal hearing is continued in the absence of an accused who is a natural person; and

(b) the accused is not present when the evidence for the prosecution is concluded—

the Magistrates' Court must, unless it makes an order under section 141(4)(a) for the accused to be discharged—

(c) postpone the committal hearing until the accused is present; or

(d) if any other accused is present, postpone the committal hearing in respect of the charge against the absent accused.

138 Procedure on accused's attendance after absence

If an accused—

(a) has been absent from a committal hearing; and

(b) was not represented by a legal practitioner during the absence—

then, on the accused's attendance, the Magistrates' Court—

(c) must direct that—

(i) the record of evidence be played or read in the presence of the accused; or

(ii) the accused be supplied with a transcript of the evidence; and

(d) may, on the application of the accused and subject to section 124, recall for further examination any witness who gave oral evidence during the accused's absence.

Part 4.8—Evidence in committal proceeding

139 Admissibility of non-oral evidence

- (1) Subject to subsections (2) and (3), on proof of their service on the accused in accordance with Part 4.4, the following are admissible as if their contents were a record of evidence given orally—
 - (a) any statement the truthfulness of which has been attested to, other than a statement that is inadmissible under section 134(2);
 - (b) any exhibit or document referred to in a statement which is admissible;
 - (c) any recording the truthfulness of the contents of which has been attested to, other than a recording that is inadmissible under section 134(2);
 - (d) any other recording a transcript of which has been served in the hand-up brief, other than a recording that is inadmissible under section 134(2).
- (2) The Magistrates' Court may rule as inadmissible the whole or any part of—
 - (a) a statement; or
 - (b) any exhibit or document referred to in a statement; or
 - (c) the contents of a recording.
- (3) A recording, a transcript of which has been served in the hand-up brief, is only admissible if it is proved that the accused and his or her legal practitioner were given a reasonable opportunity to listen to and, in the case of an audiovisual recording, view the recording.

S. 139(3)
amended by
No. 68/2009
s. 14(b).

140 Procedure if accused makes admission of relevant fact or matter

- (1) If under section 184 of the **Evidence Act 2008** an accused makes, during a committal proceeding, an admission of any fact or matter that is relevant in the proceeding, the Magistrates' Court must cause the admission to be included in the record of the proceeding.
- (2) An admission made by an accused during a committal proceeding may be used in evidence at the subsequent trial.

Part 4.9—Determination of committal proceeding

141 Determination of committal proceeding where hand-up brief used

- (1) After the evidence for the prosecution is concluded, the Magistrates' Court must enquire whether the accused intends to call any witness or make any submission.
- (2) If the accused is not represented by a legal practitioner, the Magistrates' Court must inform the accused, in a manner likely to be understood by the accused, that—
 - (a) the accused has the right to answer the charge and must choose either—
 - (i) to give sworn evidence, that is, to enter the witness box, take the oath or make an affirmation and say what the accused wants to say in answer to the charge and then to respond to any questions from the prosecution or the court about the evidence of the accused; or
 - (ii) to say nothing in answer to the charge; and
 - (b) in either case, the accused may call any witnesses to give sworn evidence for the accused.
- (3) After giving the information referred to in subsection (2), the Magistrates' Court must ask the accused what the accused wants to do.

- (4) At the conclusion of all of the evidence and submissions, if any, the Magistrates' Court must—
- (a) if in its opinion the evidence is not of sufficient weight to support a conviction for any indictable offence, discharge the accused; or
 - (b) if in its opinion the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged, commit the accused for trial in accordance with section 144; or
 - (c) if in its opinion the evidence is of sufficient weight to support a conviction for an indictable offence other than the offence with which the accused is charged, adjourn the committal proceeding to enable the informant to file a charge-sheet in respect of that other offence and, if a charge-sheet is filed, must commit the accused for trial in accordance with section 144.
- (5) If the informant does not file a charge-sheet for the other offence within the period of an adjournment under subsection (4)(c), the Magistrates' Court must discharge the accused.

142 Determination of committal proceeding where plea brief used

- (1) If a plea brief is served, the Magistrates' Court, at the committal mention hearing, must—
- (a) ask how the accused pleads to the charge to which the committal proceeding relates; and
 - (b) if the accused pleads guilty and, in the opinion of the court, the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged, commit the accused for trial in accordance with section 144.

- (2) If the accused does not plead guilty to the charge to which the committal proceeding relates, the Magistrates' Court must direct the informant to prepare and serve a hand-up brief.

143 Determination of committal proceeding where accused elects to stand trial

- (1) Any time after the service on an accused of a hand-up brief, the accused may elect to stand trial.
- (2) An election is made by—
- (a) filing with the registrar a notice in the form prescribed by the rules of court and signed by the accused; and
 - (b) serving a copy of the notice on the informant in accordance with section 392.
- (3) As soon as practicable after a notice is filed with the registrar under this section, the Magistrates' Court must—
- (a) if the accused is in custody, direct that the accused be brought before the court; or
 - (b) if the accused is not in custody, direct that a summons to attend or warrant to arrest be issued.
- (4) On the attendance of the accused before the Magistrates' Court, if the court considers that the accused understands the nature and consequence of the election, the court must commit the accused for trial in accordance with section 144.

S. 143(2)(b)
amended by
No. 68/2009
s. 51(zd).

144 Procedure before and on committing accused for trial

- (1) Before committing an accused for trial, the Magistrates' Court must, in the manner prescribed by the rules of court, if any—
 - (a) ask the accused whether the accused pleads guilty or not guilty to the charge; and
 - (b) inform the accused that the sentencing court may take into account a plea of guilty and the stage in the proceeding at which the plea or an intention to plead guilty is indicated.
- (2) On committing an accused for trial, the Magistrates' Court must—
 - (a) if the accused was not represented by a legal practitioner in the committal proceeding—
 - (i) explain to the accused the importance of obtaining legal representation for the trial; and
 - (ii) advise that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (iii) warn the accused that, if the accused wishes to be legally aided, it is the accused's responsibility to make application to Victoria Legal Aid as soon as possible; and
 - (b) explain to the accused, in a manner likely to be understood by the accused—
 - (i) the provisions of section 190 (alibi evidence), if relevant; and
 - (ii) the provisions of sections 342, 344 and 346, if relevant; and

S. 144(2)(b)(ii)
substituted by
No. 68/2009
s. 15.

- (iii) any other information required to be given by the rules of court; and
- (c) if the accused is a natural person, remand the accused in custody, or grant bail, until trial or a date before trial fixed by the court; and

Note

See section 333 where accused is undergoing a sentence of detention in a youth justice centre.

- (d) in the case of a corporate accused, order the accused to appear, by a representative or a legal practitioner, on the day on which the trial of the accused is listed to commence or on any other day specified by the court.

Note

See section 252 (offence for corporate accused to fail to appear on day trial listed to commence etc.).

Part 4.10—Procedure after committal

145 Transfer of summary offences that are related offences on or after committal

(1) Subject to subsection (3), on committal for trial of an accused charged with an indictable offence, the Magistrates' Court must order that all proceedings in respect of charges against the accused for summary offences that are related offences are transferred to the court to which the accused has been committed for trial.

(2) If—

(a) an accused charged with an indictable offence is committed for trial; and

(b) before trial of the indictable offence, the accused is charged with a summary offence that is a related offence—

the Magistrates' Court must, subject to subsection (3), order that the proceeding for the summary offence is transferred to the court to which the accused has been committed for trial.

(3) If the informant to a charge for a summary offence that is a related offence or, if the DPP is prosecuting the charge, the DPP and the accused agree, the Magistrates' Court may order that the proceeding for that charge is not transferred under this section.

**S. 145(3)
amended by
No. 30/2010
s. 60.**

Notes

- 1 See the definition of *related offences* in section 3.
- 2 Section 242 enables the Supreme Court or the County Court to hear and determine a charge for a related summary offence.

146 Documents to be forwarded to DPP

After committal the registrar must forward to the DPP—

- (a) the depositions; and
- (b) all exhibits which have remained in the custody of the Magistrates' Court; and
- (c) all recordings referred to in section 139 admitted in evidence in the committal proceeding; and
- (d) copies of all process filed in the Magistrates' Court in the proceeding; and
- (e) copies of all bail undertakings in the proceeding.

147 Accused entitled to copies of depositions and exhibits

An accused committed for trial is entitled as soon as possible after being committed—

- (a) to receive free of charge from the DPP—
 - (i) a copy of the depositions; and
 - (ii) a transcript of any recording admitted in evidence, if a transcript has not previously been supplied to the accused; and
- (b) to examine any exhibits.

148 Absent corporate accused to be notified of committal

If a corporate accused does not appear at its committal proceeding and is committed for trial in its absence, the DPP or, if the DPP did not conduct the committal proceeding, the informant must serve on the accused in accordance with section 393 within 14 days after the committal a notice stating—

S. 148
amended by
No. 68/2009
s. 51(ze).

- (a) that the accused has been committed for trial on a specified charge or specified charges; and
- (b) that the Magistrates' Court has ordered the accused to appear, by a representative or a legal practitioner, on the day on which the trial of the accused is listed to commence or on any other day specified by the court and that it is an offence not to comply with that order; and
- (c) the date and time specified in the order at which the accused must appear, by a representative or a legal practitioner; and
- (d) that if the accused does not appear on the date and time specified in the order the court may, in its absence, proceed to hear and determine the charge.

Part 4.11—Taking evidence after accused committed for trial

149 Application for order that evidence be taken after committal

- (1) If an accused has been committed for trial, the accused may apply to the Magistrates' Court for an order that the evidence of a person be taken at a time and place fixed by the court.
- (2) An applicant for an order under subsection (1) must give notice of the application, in the form prescribed by the rules of court, to the DPP and the co-accused, if any, at least 14 days before the hearing of the application or any shorter period that is agreed to by the DPP.

150 Determination of application

- (1) Subject to this section, after an accused has been committed for trial the Magistrates' Court may order that the evidence of a person be taken at a time and place fixed by the court.
- (2) The Magistrates' Court must not make an order under subsection (1) in respect of a person who—
 - (a) was examined as a witness at the committal hearing; or
 - (b) made a statement the contents of which were admitted as a record of evidence in the committal proceeding under section 139(1)(a); or

- (c) gave evidence-in-chief in accordance with Division 5 of Part 8.2 and the contents of the recording were admitted as a record of evidence in the committal proceeding under section 139(1)(c)—

S. 150(2)(c)
amended by
No. 68/2009
s. 16(1).

unless the person subsequently makes a statement or a supplementary statement the truthfulness of which has been attested to.

- (3) The Magistrates' Court must not make an order under subsection (1) unless it is satisfied that in relation to the statement or supplementary statement of the person—

- (a) there is an issue to which the evidence proposed to be taken relates; and
(b) there is a reason as to why the evidence of the person is relevant to that issue; and
(c) taking of evidence from the person is justified.

- (4) In determining whether the taking of evidence from the person is justified, the Magistrates' Court must have regard to the matters referred to in sections 124(4) (other than paragraph (c)) and 124(5).

S. 150(4)
amended by
No. 68/2009
s. 49(h).

- (5) The Magistrates' Court must not make an order under subsection (1) in respect of a witness referred to in section 123.

S. 150(5)
inserted by
No. 68/2009
s. 16(2).

151 Attendance of witness

- (1) If the accused obtains an order under section 150(1) with respect to the examination of a prosecution witness, the informant must ensure that the witness attends at a time and place fixed by the Magistrates' Court for examination.
- (2) A witness who is required to attend for examination in accordance with an order under section 150(1) must attend on any day to which

the hearing is adjourned unless excused from attendance by the Magistrates' Court.

- (3) If a witness who is required to attend for examination in accordance with an order under section 150(1) does not attend, the Magistrates' Court may cause a warrant to arrest or summons to be issued to compel the attendance of the witness.

152 Taking of evidence after committal

- (1) If the accused obtains an order under section 150(1), the DPP may appear at the hearing at which evidence is taken and address the Magistrates' Court.
- (2) On making an order under section 150(1) or at the hearing at which evidence is taken, the Magistrates' Court may make any order with respect to the examination or cross-examination of the person giving evidence under this section if the court considers that it is in the interests of justice to do so.
- (3) Without limiting subsection (2), the Magistrates' Court may order that the accused may cross-examine the person giving evidence under this section, irrespective of who calls the person as a witness.
- (4) A person cross-examining a witness giving evidence under this section is not limited to cross-examining on the issue with respect to which the order was made under section 150(1).
- (5) Section 132 applies in relation to the cross-examination of a person giving evidence under this section as if the person were a witness in the course of cross-examination in a committal hearing.

S. 152(3)
substituted by
No. 68/2009
s. 16(3).

- (6) Section 133 applies as if a reference to a committal hearing were a reference to a hearing at which evidence is given under this section.
- (7) The evidence of a person given under this section must be given and recorded in the same manner as evidence at a committal hearing.
- (8) The record of the evidence of any person given under this section—
 - (a) must be forwarded as soon as possible to the DPP by the registrar; and
 - (b) has effect and must be treated as if it were a record of evidence given at the committal hearing.

Part 4.12—General

153 Special mention hearing

At a special mention hearing, the Magistrates' Court may—

- (a) change the date fixed by the court for any hearing in a committal proceeding;
- (b) make any order or give any direction that the court considers appropriate for the management of the committal proceeding;
- (c) if the court considers it appropriate to do so, immediately conduct a committal mention hearing and determine a committal proceeding in accordance with section 141, 142 or 143.

S. 153(c)
amended by
No. 68/2009
s. 17.

154 Non-appearance of corporate accused

- (1) If a corporate accused does not appear in answer to a summons to answer to a charge for an indictable offence, the Magistrates' Court may conduct a committal proceeding in the absence of the accused if—
 - (a) the court is satisfied that the charge and the date of the committal mention hearing in relation to it have been brought to the notice of the accused; and
 - (b) the court considers that it is appropriate to do so.
- (2) If the Magistrates' Court conducts a committal proceeding in the absence of a corporate accused, the court may dispense with or vary any requirement imposed by or under this Chapter.

155 Nature of committal proceeding

Nothing in this Act alters the nature of a committal proceeding from that existing immediately before the commencement of this section.

156 Nothing in Chapter affects certain powers of DPP

Nothing in this Chapter affects the power of the DPP—

- (a) to file an indictment against a person for an offence if, on a committal proceeding conducted in relation to a charge for that offence, the Magistrates' Court ordered the person to be discharged on the charge; or
- (b) to discontinue a prosecution under section 177, or not to take within the period prescribed by section 163 any step mentioned in that section, in relation to a charge on which a person was committed for trial.

157 DPP may give directions for release of property tendered in evidence

- (1) If property is tendered in evidence during a committal proceeding and an accused is committed for trial for an offence with respect to the property, a person may apply in writing to the DPP for the release of the property.
- (2) On receipt of an application under subsection (1), the DPP may give directions in writing that the property be released to the applicant.
- (3) The release of property under subsection (2) may be subject to a condition that the property released must be produced at the trial and to any other conditions that the DPP considers appropriate.

- (4) The DPP may require a person to whom property is released under this section to give an undertaking to comply with the conditions to which the release is subject.
- (5) A person must not fail, without reasonable cause, to comply with an undertaking given by the person under subsection (4).
Penalty: Level 10 fine (10 penalty units maximum).
- (6) Directions given under subsection (2) do not affect the legal title to the property or any legal right to possession of the property.
- (7) The DPP is not liable for or with respect to any direction given by the DPP under subsection (2).

Note

Chapter 8 contains general provisions that apply to all criminal proceedings.

Chapter 5—Trial on indictment

Part 5.1—Introduction

158 Application of Chapter

This Chapter applies if—

- (a) an accused is committed for trial under Chapter 4; or
- (b) a direct indictment is filed against an accused.

Part 5.2—Indictment and place of trial

159 DPP or Crown Prosecutor may file an indictment

- (1) Subject to the **Public Prosecutions Act 1994**, the DPP or a Crown Prosecutor in the name of the DPP may file an indictment.
- (2) An indictment may be filed at any time, except where otherwise provided by or under this or any other Act.

Note

Section 163 provides time limits for the filing of certain indictments.

- (3) An indictment must—
 - (a) be in writing; and
 - (b) be signed by the DPP or a Crown Prosecutor in the name of the DPP; and
 - (c) comply with Schedule 1.

Notes

- 1 Section 253 abolishes the common law procedure of calling a grand jury.
- 2 Section 172 permits the DPP to nominate an address for service of documents. That information may be included on an indictment.

160 Choice of Supreme Court or County Court for filing an indictment

- (1) An indictment may be filed in—
 - (a) the Supreme Court; or
 - (b) the County Court, if all of the indictable offences alleged in the indictment are within the jurisdiction of that court.

Note

See section 36A of the **County Court Act 1958** for the criminal jurisdiction of the County Court.

- (2) In determining whether to file an indictment in the Supreme Court or in the County Court, the DPP or a Crown Prosecutor must have regard to—
- (a) the complexity of the case; and
 - (b) the seriousness of the alleged offence; and
 - (c) any particular importance attaching to the case; and
 - (d) any other consideration that the DPP or Crown Prosecutor considers relevant.

161 Direct indictment commences criminal proceeding

The filing of a direct indictment commences a criminal proceeding.

Notes

- 1 See the definition of *direct indictment* in section 3. This includes an indictment filed after the Magistrates' Court declines to commit an accused for trial in respect of the offence charged in the indictment or a related offence.
- 2 A criminal proceeding may also be commenced—
 - (a) in accordance with section 6; or
 - (b) by a direction under section 415 that a person be tried for perjury.

Notes to
s. 161
amended by
No. 68/2009
s. 51(zf).

162 Filing of any other indictment does not commence criminal proceeding

The filing of an indictment other than a direct indictment does not commence a new criminal proceeding against the accused.

163 Time limits for filing certain indictments

- (1) If a person is committed for trial in respect of an offence other than a sexual offence, the DPP or a Crown Prosecutor may file an indictment against the person—
- (a) within 6 months after the date of committal;
or

- (b) if the period referred to in paragraph (a) or any extension of that period is extended under section 247, within the extended period.
- (2) If a person is committed for trial in respect of a sexual offence in which the complainant was a child or a person with a cognitive impairment when the criminal proceeding was commenced, the DPP or a Crown Prosecutor may file an indictment against the person—
 - (a) within 14 days after the date of committal; or
 - (b) if the period referred to in paragraph (a) or any extension of that period is extended under section 247, within the extended period.
- (3) If a person is committed for trial in respect of a sexual offence other than one referred to in subsection (2), the DPP or a Crown Prosecutor may file an indictment against the person—
 - (a) at least 28 days before the day on which the trial is listed to commence; or
 - (b) if the period referred to in paragraph (a), or any extension or abridgment of that period, is extended or abridged under section 247, within the extended or abridged period.

164 Filing of fresh indictment

- (1) In this section—

fresh indictment means an indictment which includes a charge for the same offence as an offence charged in an indictment previously filed in court against that accused or a related offence.
- (2) Nothing in section 163 prevents the filing of a fresh indictment.

- (3) The filing of a fresh indictment does not commence a new criminal proceeding.
- (4) On the filing of a fresh indictment against an accused, proceedings in relation to a charge for the same offence or a related offence in an indictment previously filed in court against that accused are discontinued.

Note

See the definition of *related offences* in section 3.

165 Order for amendment of indictment

- (1) The court at any time may order that an indictment be amended in any manner that the court thinks necessary, unless the required amendment cannot be made without injustice to the accused.
- (2) If an indictment is amended by order under this section, the indictment is to be treated as having been filed in the amended form for the purposes of the trial and all proceedings connected with the trial.

Note

Section 327Q provides a limitation on amendments in the case of direct indictments under Chapter 7A.

**Note to s. 165
inserted by
No. 81/2011
s. 13.**

166 Errors etc. in indictment

- (1) An indictment is not invalid by reason only of a failure to comply with Schedule 1.
- (2) A charge on an indictment is not invalid by reason only of—
 - (a) omitting to state the time at which the offence was committed unless time is an essential element of the offence; or
 - (b) incorrectly stating the time at which the offence was committed; or

- (c) stating the offence to have been committed on an impossible day or on a day that never happened.

167 Supreme Court may order that accused be tried in County Court or Supreme Court

- (1) If—
 - (a) an indictment against an accused is filed in the Supreme Court; and
 - (b) the offence charged in the indictment may be tried by the County Court—

the Supreme Court may order that the accused be tried at a sitting of the County Court specified in the order.

- (2) If an indictment against an accused is filed in the County Court, the Supreme Court may order that the accused be tried at a sitting of the Supreme Court specified in the order.

168 Court may transfer certain charges to Magistrates' Court or Children's Court

- (1) At any time except during trial, the Supreme Court or the County Court may order that a proceeding for a charge for an indictable offence that may be heard and determined summarily be transferred to the Magistrates' Court or the Children's Court (as the case requires) if—
 - (a) the accused consents to the transfer; and
 - (b) the court considers that the charge is appropriate to be determined summarily, having regard to—
 - (i) in the case of the Magistrates' Court, the matters in section 29(2); or

S. 168
(Heading)
amended by
No. 30/2010
s. 61(1).

S. 168(1)
amended by
No. 30/2010
s. 61(2).

S. 168(1)(b)
substituted by
No. 30/2010
s. 61(3).

- (ii) in the case of the Children's Court, whether the Children's Court is required to hear and determine the charge summarily by section 356(3) of the **Children, Youth and Families Act 2005**.

Note

See section 28 for indictable offences that may be heard and determined summarily.

- (2) The court must not transfer a charge that the Magistrates' Court or the Children's Court has refused to hear and determine summarily unless there has been a significant change in the charges against the accused or in the prosecution case against the accused. **S. 168(2) amended by No. 30/2010 s. 61(4).**
- (3) If an order is made under this section, the transferred charge must be heard and determined summarily.
- (4) If an order is made under this section, the transferring court may— **S. 168(4) inserted by No. 68/2009 s. 18.**
- (a) order that the accused appear before the Magistrates' Court or the Children's Court (as the case requires) on a specified date; or **S. 168(4)(a) amended by No. 30/2010 s. 61(5).**
- (b) if the accused is a natural person, remand the accused in custody, or grant bail, to appear before the Magistrates' Court or the Children's Court (as the case requires) on a specified date; or **S. 168(4)(b) amended by No. 30/2010 s. 61(6).**
- (c) in the case of a corporate accused, order the accused to appear, by a representative or a legal practitioner, before the Magistrates' Court on a specified date.

169 Place of hearing of criminal trial

- (1) A criminal trial in the Supreme Court or the County Court is to be held in the court sitting at the place that is nearest to the place where the offence is alleged to have been committed, unless an order is made under section 192.
- (2) A criminal trial is not invalid only because it was conducted at a place other than the place referred to in subsection (1).

170 Multiple charges or multiple accused on single indictment

- (1) If an indictment contains more than one charge, the charges must be heard together unless an order is made under section 193 or 195.
- (2) If an indictment names more than one accused, whether in the same charge or separate charges, the charge or charges against all accused must be tried together unless an order is made under section 193.

Part 5.3—Notifying accused of indictment

171 Copy indictment to be served

- (1) The DPP must, as soon as practicable after an indictment is filed, serve on the accused—
 - (a) a copy of the indictment; and
 - (b) if the DPP does not have notice that the accused is represented by a legal practitioner, a notice in the form prescribed by the rules of court—
 - (i) advising that legal representation should be sought and that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (ii) providing details of how to contact Victoria Legal Aid.
- (2) If a direct indictment is filed, the copy indictment referred to in subsection (1)(a) must be served personally on the accused in accordance with section 391.

S. 171(2)
amended by
No. 68/2009
s. 51(zg).

172 DPP may nominate address etc. for service of documents

- (1) The DPP may nominate in writing a business address, email address or fax number for service on the DPP of documents in relation to a charge.
- (2) A nomination under subsection (1) may be included on an indictment or any other document served on the accused.

173 Extra notice for corporate accused

If a corporate accused—

- (a) is to be served with a copy of an indictment under section 171(1); and
- (b) has not been served with a notice in relation to that offence under section 148—

the DPP must serve with the copy indictment a notice stating—

- (c) the date and time specified in the order under section 144(2)(d) at which the accused must appear, by a representative or a legal practitioner; and
- (d) that if the accused does not appear on the date and time specified in the order, the court may, in its absence—
 - (i) proceed with the trial; and
 - (ii) if applicable, proceed to hear and determine a summary offence under Division 1 of Part 5.8.

174 Compelling attendance when direct indictment filed

- (1) On the filing in court of a direct indictment against an accused, the DPP may apply to the court for the issue of a summons or a warrant to arrest in order to compel the attendance of the accused.
- (2) On an application under subsection (1), the court, if satisfied that the charge discloses an offence known to law, must issue—
 - (a) a summons requiring the accused to attend at the court on a specified date and at a specified time to answer to the indictment; or
 - (b) subject to subsection (3), a warrant to arrest.

- (3) The court must not issue in the first instance a warrant to arrest unless satisfied by sworn evidence, whether oral or by affidavit, that—
 - (a) it is probable that the accused will not answer a summons; or
 - (b) the accused has absconded, is likely to abscond or is avoiding service of a summons that has been issued; or
 - (c) a warrant is required or authorised by any other Act or for other good cause.
- (4) If the accused fails to attend before the court on the date and at the time specified in the summons, the court, on the application of the DPP, may issue a warrant to arrest the accused.

Note

Section 411 provides that an arrested person must, if practicable, be brought before the court which issued the warrant.

**Note to s. 174
amended by
No. 68/2009
s. 51(zh).**

175 Service of summons

- (1) The DPP must serve a summons issued under section 174 by personal service on the accused in accordance with section 391 at least 14 days before the date specified in the summons.
- (2) A summons served on the accused must be accompanied by—
 - (a) a copy of the indictment; and
 - (b) if applicable, a notice required by section 171(1); and
 - (c) in the case of a corporate accused, a notice stating that, if the accused does not appear in answer to the summons, the court may, in its absence—
 - (i) proceed with the trial; and

**S. 175(1)
amended by
No. 68/2009
s. 51(zi).**

- (ii) if applicable, proceed to hear and determine a summary offence under Division 1 of Part 5.8.

176 Warrant to be accompanied by indictment and notice

On execution of a warrant issued under section 174, the warrant must be accompanied by a copy of the indictment and, if applicable, a notice required by section 171(1).

Part 5.4—Discontinuing a prosecution

177 DPP may discontinue a prosecution without adjudication

- (1) The DPP may discontinue a prosecution for an offence against an accused by—
 - (a) announcing the discontinuance in court; or
 - (b) filing in court written notice of the discontinuance, signed by the DPP.

- (2) A prosecution may be discontinued—
 - (a) at any time except during trial;
 - (b) whether or not an indictment against the accused has been filed.

- (3) If an indictment has not been filed against the accused, the written notice referred to in subsection (1)(b) must be filed in the court to which the accused has been committed for trial.

- (4) If a discontinuance of prosecution is announced in court, written notice of the discontinuance, signed by the DPP, must be filed in court as soon as practicable after the announcement.

- (5) The DPP must serve a copy of a written notice of discontinuance that has been filed in court under subsection (1)(b) or (4) on—
 - (a) the accused; or
 - (b) if the accused is dead, on—
 - (i) the legal practitioner who last represented the accused, if that legal practitioner can reasonably be identified; or
 - (ii) the next of kin of the accused, if that person can reasonably be identified.

S. 177(1)(b)
amended by
No. 77/2013
s. 17.

S. 177(4)
amended by
No. 77/2013
s. 17.

- (6) A discontinuance of prosecution does not amount to an acquittal.
- (7) An accused may be indicted on a charge in respect of which an earlier prosecution has been discontinued.

178 Release from custody on discontinuance of prosecution

- (1) If—
 - (a) a prosecution for a charge against a person is discontinued under section 177; and
 - (b) the person is in custody in relation to that charge, irrespective of whether the person is in custody for any other reason—the DPP must immediately notify the person who has legal custody of the person that the prosecution has been discontinued.
- (2) On notification being given under subsection (1), the person in custody is to be released, if the person is not in custody for any other reason.

Note

See Part 1A of the **Corrections Act 1986** and section 483 of the **Children, Youth and Families Act 2005** as to who has legal custody.

Part 5.5—Pre-trial procedure

Division 1—Directions hearings

179 Directions hearing

At any time except during trial, the court may conduct one or more directions hearings.

Note

Section 210 sets out when a trial commences.

180 Accused may be arraigned at a directions hearing

- (1) The accused may be arraigned at a directions hearing, if an indictment has been filed against the accused.

Notes

- 1 Section 215 sets out how and when arraignment occurs.
 - 2 Arraignment at a directions hearing does not commence a trial: see section 210.
- (2) Despite subsection (1), if the accused pleads not guilty to one or more charges in the indictment and indicates an intention to plead not guilty to one or more remaining charges, it is not necessary for those remaining charges to be read to the accused and the accused must be taken to have pleaded not guilty to those charges.

181 Powers of court at directions hearing

- (1) At a directions hearing, the court may make or vary any direction or order, or require a party to do anything that the court considers necessary, for the fair and efficient conduct of the proceeding.

- (2) Without limiting subsection (1), the court may—
- (a) require the accused to advise whether the accused is legally represented and has funding for continued legal representation up to and including the trial;
 - (b) without being limited by section 200, require the parties to notify the court of any pre-trial issues that the parties intend to raise or any orders under section 199(1) that the parties intend to seek;
 - (c) without being limited by section 200, set a timetable for the hearing of pre-trial issues or applications for orders under Division 3 or 4;
 - (d) in the case of a trial for a sexual offence in which the complainant was a child or a person with a cognitive impairment when the criminal proceeding was commenced—
 - (i) require the prosecutor to advise as to the availability of the complainant, and the accused to advise as to his or her own availability for the special hearing to be held under Division 6 of Part 8.2; and
 - (ii) give a direction under section 370(1A) that the special hearing is to be held before the trial or during the trial; and
 - (iii) if the special hearing is to be held during the trial, specify the date on which the special hearing is to commence;

S. 181(2)(d)
amended by
No. 68/2009
s. 19,
substituted by
No. 48/2012
s. 13.

Note

See section 5 as to the commencement of a criminal proceeding.

- (e) require the parties to provide an estimate of the length of the trial;
 - (f) require the parties to advise as to the estimated number and the availability of witnesses (other than the accused) and any relevant requirements of witnesses and interpreters;
 - (g) order a party to make, file in court or serve (as the case requires) any written or oral material required by the court for the purposes of the proceeding;
 - (h) order the prosecution to file in court and serve on the accused a copy of any material on which the prosecution intends to rely at the trial;
 - (i) determine any objection relating to the disclosure of information or material by the prosecution;
 - (j) allow a party to amend a document that has been prepared by or on behalf of that party for the purposes of the proceeding;
 - (k) determine an application for a sentence indication.
- (3) At a directions hearing, the court may make any order or other decision that can be made or decided before trial by or under this or any other Act.

Note

Section 199(1) indicates the issues that may be decided before trial under this Act.

S. 181A
inserted by
No. 74/2014
s. 12.

181A Course of conduct charge

- (1) In this section *course of conduct charge* has the same meaning as in clause 4A of Schedule 1.
- (2) This section applies if the charge on an indictment is a course of conduct charge and the accused—
 - (a) would plead guilty to the charge if it related only to a specified period falling within the period to which the charge relates; and
 - (b) would plead not guilty to the charge insofar as it relates to any other period within the period to which the charge relates.
- (3) The accused must, at a directions hearing or otherwise, advise the court of the matters referred to in subsection (2) as soon as possible after deciding how to plead to the charge on the indictment.
- (4) If an accused advises the court in accordance with subsection (3) and the court is satisfied that, having regard to that advice, it is not appropriate for the accused to be arraigned, the accused must not be arraigned at a directions hearing pending the filing of a fresh indictment or the making of a decision to proceed with the indictment as already filed.
- (5) If a fresh indictment is filed against the accused containing a charge relating only to the specified period referred to in subsection (2)(a) and the accused does not plead guilty to the charge on that indictment, a further fresh indictment may be filed containing the original charge or an amended version of that charge.
- (6) The accused may be arraigned on that further fresh indictment unless the court considers that it is not in the interests of justice to do so.

Division 2—Pre-trial disclosure

182 Summary of prosecution opening and notice of pre-trial admissions

- (1) Unless the court otherwise directs, at least 28 days before the day on which the trial of the accused is listed to commence, the DPP must serve on the accused and file in court—
 - (a) a summary of the prosecution opening; and
 - (b) a notice of pre-trial admissions.
- (2) The summary of the prosecution opening must outline—
 - (a) the manner in which the prosecution will put the case against the accused; and
 - (b) the acts, facts, matters and circumstances being relied on to support a finding of guilt.
- (3) The notice of pre-trial admissions must identify the statements of the witnesses whose evidence, in the opinion of the DPP, ought to be admitted as evidence without further proof, including evidence that is directed solely to formal matters including—
 - (a) continuity; or
 - (b) a person's age; or
 - (c) proving the accuracy of a plan, or that photographs were taken in a certain manner or at a certain time.
- (4) If an accused has not received, under section 147, a copy of a statement identified in a notice of pre-trial admissions, the notice must contain a copy of the statement.

183 Response of accused to summary of prosecution opening and notice of pre-trial admissions

S. 183(1)
amended by
No. 68/2009
s. 51(zj).

- (1) After being served with a copy of the documents referred to in section 182, the accused must serve on the prosecution in accordance with section 392 and file in court, at least 14 days before the day on which the trial of the accused is listed to commence—
 - (a) a copy of the response of the accused to the summary of the prosecution opening; and
 - (b) a copy of the response of the accused to the notice of pre-trial admissions.
- (2) The response of the accused to the summary of the prosecution opening must identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken.
- (3) The response of the accused to the notice of pre-trial admissions must indicate what evidence, as set out in the notice of pre-trial admissions, is agreed to be admitted as evidence without further proof and what evidence is in issue and, if issue is taken, the basis on which issue is taken.
- (4) Despite subsections (2) and (3), the accused is not required to state—
 - (a) the identity of any witness (other than an expert witness) to be called by the accused;
or
 - (b) whether the accused will give evidence.

184 Intention to depart at trial from document filed and served

If a party intends to depart substantially at trial from a matter set out in a document served and filed by that party under this Division, the party—

- (a) must so inform the court and the other party in advance of the trial; and
- (b) if the court so orders, must inform the court and the other party of the details of the proposed departure.

185 Continuing obligation of disclosure

(1) This section applies to any information, document or thing that—

- (a) comes into the possession of the prosecution after an accused is committed for trial; or
- (b) is in the possession of the prosecution when, or comes into the possession of the prosecution after, a direct indictment is filed against an accused—

and would have been required to be listed, or a copy of which would have been required to be served, in the hand-up brief.

Note

See section 110 for the contents of a hand-up brief.

(2) Subject to subsection (4) and section 185A, the prosecution must serve on the accused a copy of the document or list as soon as practicable after—

- (a) the information, document or thing comes into the possession of the prosecution; or
- (b) the direct indictment is filed against the accused—

as the case requires.

**S. 185(2)
amended by
No. 42/2015
s. 20.**

- (3) If the information, document or thing cannot reasonably be copied, the prosecution must advise the accused of the existence of the information, document or thing and make it available for inspection at a time and place agreed between the accused and the prosecution.
- (4) The prosecution need not provide any information, document or thing under this section if it has already been provided to the accused by the prosecution.

Notes to
s. 185
amended by
No. 68/2009
ss 49(i),
51(zk).

Notes

- 1 Section 188 requires the prosecution to serve a notice if additional evidence is to be given at trial.
- 2 See section 416 as to the prosecution's general obligation of disclosure.

S. 185A
inserted by
No. 42/2015
s. 21.

185A Disclosure of evidence that is child pornography

- (1) The prosecution need not provide, or make available for inspection, any information, document or thing that is required by section 185 to be provided or made available for inspection if the prosecutor believes that doing so will result in the disclosure of child pornography to the accused personally.
- (2) The accused may apply to the court for an order requiring the prosecution to provide, or make available for inspection, any information, document or thing not provided or made available for inspection under subsection (1).
- (3) The court, having regard to whether the accused is legally represented, may order, on any conditions specified by it, that the information, document or thing be provided to or made available for inspection by—

- (a) the accused's legal practitioner (but not the accused personally); or
- (b) the accused personally.

186 Disclosure of address or telephone number of witness

- (1) The prosecution must not disclose the address or telephone number (including a private, business or official address or telephone number) of any person in any information, document or thing provided to the accused under this Division unless—
 - (a) the prosecutor believes that—
 - (i) the information, document or thing does not identify the address or telephone number as that of any particular person; or
 - (ii) the address or telephone number is relevant to the offence charged and disclosure is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - (b) the court permits the disclosure in accordance with subsection (3) on application made by the prosecutor or the accused.
- (2) For the purposes of subsection (1), the prosecution may delete, or render illegible, an address or telephone number included in the information, document or thing before service on the accused.
- (3) The court may grant an application made under subsection (1)(b) if the court is satisfied that—
 - (a) the address or telephone number is relevant to the offence charged; and

- (b) one of the following applies—
- (i) disclosure is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - (ii) having regard to the matters referred to in subsection (4), the interests of justice outweigh any risk referred to in subparagraph (i).
- (4) For the purposes of subsection (3)(b)(ii), the court must have regard to—
- (a) the right to privacy of the witness; and
 - (b) the right of the accused to prepare properly for the trial.

Note

See section 14 of the **Victims' Charter Act 2006** as to victims' privacy.

187 Previous convictions of witness

- (1) The accused may request the prosecutor to provide particulars of previous convictions of any witness who the prosecution intends to call at the trial.
- (2) A request under subsection (1) does not require the prosecutor to give to the accused particulars of any previous conviction of any witness if the previous conviction is, because of its character, irrelevant to the proceeding but the prosecutor must advise the accused of the existence of any undisclosed previous convictions.

Notes

- 1 See section 14 of the **Victims' Charter Act 2006** as to victims' privacy.
- 2 At a directions hearing the court may hear and determine any objection to disclosure of any information, document or thing: section 181(2)(i).

188 Prosecution notice of additional evidence

(1) In this section—

additional evidence means any evidence that is not included in the depositions in the proceeding.

(2) If the DPP intends to call a witness at trial to give additional evidence, the DPP must serve on the accused and file in court—

- (a) a notice of intention to call additional evidence; and
- (b) a copy of the statement of the proposed witness containing the additional evidence or an outline of the additional evidence that the witness is expected to give.

Notes

- 1 See the definition of *depositions* in section 3.
- 2 Section 185 (Continuing obligation of disclosure) requires the prosecution to serve a copy of a document as soon as practicable after the document comes into the possession of the prosecution.

189 Expert evidence

(1) If the accused intends to call a person as an expert witness at the trial, the accused must serve on the prosecution in accordance with section 392 and file in court a copy of the statement of the expert witness in accordance with subsection (2)—

- (a) at least 14 days before the day on which the trial of the accused is listed to commence; or
- (b) if the statement is not then in existence, as soon as possible after it comes into existence.

(2) The statement must—

- (a) contain the name and business address of the witness;

S. 189(1)
amended by
No. 68/2009
s. 51(zl).

- (b) describe the qualifications of the witness to give evidence as an expert;
- (c) set out the substance of the evidence it is proposed to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matters and circumstances on which the opinion is formed.

Note

Section 177 of the **Evidence Act 2008** provides for certificates of expert evidence.

190 Alibi evidence

- (1) An accused must not, without leave of the court—
 - (a) give evidence personally; or
 - (b) adduce evidence from another witness—
in support of an alibi unless the accused has given notice of alibi within the period referred to in subsection (2).
- (2) A notice of alibi must be given by serving the notice on the DPP within 14 days after—
 - (a) the day on which the accused was committed for trial on the charge to which the alibi relates; or
 - (b) if paragraph (a) does not apply, the day on which the accused received a copy of the indictment.
- (3) A notice of alibi must be served in accordance with section 392.
- (4) A notice of alibi must contain—
 - (a) particulars as to time and place of the alibi; and
 - (b) the name and last known address of any witness to the alibi; and

S. 190(3)
amended by
No. 68/2009
s. 51(zm).

- (c) if the name and address of a witness are not known, any information which might be of material assistance in finding the witness.
- (5) If the name and address of a witness are not included in a notice of alibi, the accused must not call that person to give evidence in support of the alibi unless the court is satisfied that the accused took reasonable steps to ensure that the name and address would be ascertained.
- (6) If the accused is notified by the DPP that a witness named or referred to in a notice of alibi has not been traced, the accused must give written notice to the DPP, without delay, of any further information which might be of material assistance in finding the witness.
- (7) The court must not refuse leave under subsection (1) if it appears to the court that the accused was not informed of the requirements of this section.
- (8) If—
- (a) an accused gives notice of alibi under this section; and
 - (b) the DPP requests an adjournment—
- the court must grant an adjournment for a period that appears to the court to be necessary to enable investigation of the alibi unless it appears that to do so would prejudice the proper presentation of the case of the accused.

191 Offence to communicate with alibi witness

- (1) If a person (other than a person referred to in subsection (2)) has been named or referred to as a proposed witness in a notice of alibi given under section 190—
- (a) a person acting for the prosecution; or

S. 191(1)(b)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

(b) a police officer—

must not communicate with that person directly or indirectly with respect to the charge or any related matter before the conclusion of the proceeding, including any new trial or rehearing, without the consent and presence during the communication of—

(c) the legal practitioner representing the accused; or

(d) if not legally represented, the accused.

Penalty: Level 8 imprisonment (1 year maximum)

(2) Subsection (1) does not apply to a person who the accused has been notified may be called as a witness for the prosecution at the trial.

Division 3—Orders

192 Power to change place of trial

If a court considers that—

(a) a fair trial in a criminal proceeding cannot otherwise be had; or

(b) for any other reason it is appropriate to do so—

the court may order that the trial be held at any other place that the court considers appropriate.

193 Order for separate trial

(1) If an indictment contains more than one charge, the court may order that any one or more of the charges be tried separately.

- (2) If an indictment names more than one accused, the court may order that charges against a specified accused be tried separately.
- (3) The court may make an order under subsection (1) or (2) if the court considers that—
 - (a) the case of an accused may be prejudiced because the accused is charged with more than one offence in the same indictment; or
 - (b) a trial with the co-accused would prejudice the fair trial of the accused; or
 - (c) for any other reason it is appropriate to do so.
- (4) The court may make an order under subsection (1) or (2) or under section 195 before trial or during a trial.
- (5) If the court makes an order under subsection (1) or (2) or under section 195, the prosecutor may elect which charge is to be tried first.
- (6) If an order under subsection (1) or (2) or under section 195 is made after a jury is empanelled, the court may order that the jury be discharged from giving a verdict on the indictment.
- (7) The procedure on the separate trial of a charge is the same in all respects as if the charge had been set out in a separate indictment.
- (8) If the court makes an order for a separate trial under subsection (1) or (2) or under section 195, the court may make any order for or in relation to the bail of the accused that the court considers appropriate.

194 Order for separate trial—sexual offences

(1) In this section—

sexual offence includes an offence to which clause 1 of Schedule 1 to the **Sentencing Act 1991** applies.

(2) Despite section 193 and any rule of law to the contrary (other than the Charter of Human Rights and Responsibilities), if in accordance with this Act 2 or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together.

(3) The presumption created by subsection (2) is not rebutted merely because evidence on one charge is inadmissible on another charge.

195 Order for separate trial—conspiracy

Despite section 193, if an indictment contains a charge of conspiracy to commit an offence and another charge alleging the commission of that offence, the court must order that the charge of conspiracy be tried separately from the other charge, unless the court considers that it would be in the interests of justice to try those charges together.

196 Other powers of court not affected

Any power of the court under section 165, 193 or 195 is in addition to any other power of the court for the same or similar purposes.

197 Order for legal representation for accused

(1) In this section—

private law practice has the same meaning as in the **Legal Aid Act 1978**;

private legal practitioner has the same meaning as in the **Legal Aid Act 1978**.

- (2) Subject to subsection (3) and despite any rule of law to the contrary (other than the Charter of Human Rights and Responsibilities), the fact that an accused has been refused legal assistance in respect of a trial is not a ground for an adjournment or stay of the trial.
- (3) If a court is satisfied at any time that—
- (a) it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial; and
 - (b) the accused is in need of legal representation because the accused is unable to afford the full cost of obtaining from a private law practice or private legal practitioner legal representation in the trial—

the court may order Victoria Legal Aid to provide legal representation to the accused, on any conditions specified by the court, and may adjourn the trial until that legal representation has been provided.

- (4) Despite anything in the **Legal Aid Act 1978**, Victoria Legal Aid must provide legal representation in accordance with an order under subsection (3).
- (5) Despite anything to the contrary in subsection (3)—
- (a) if the court is satisfied that, in relation to the trial, the accused has engaged in vexatious or unreasonable conduct that has contributed to the accused's inability to afford the full cost of obtaining from a private law practice or private legal practitioner legal representation in the trial, the court may refuse to make an order under subsection (3);

- (b) the legal burden of proof for the purposes of subsection (3)(b) that the accused is unable to afford the full cost of obtaining legal representation rests on the accused;
 - (c) for the purposes of proving under subsection (3)(b) that the accused is unable to afford the full cost of obtaining legal representation, regard must be had to property—
 - (i) that is subject to the effective control of the accused (whether or not the accused has an interest in it); or
 - (ii) in which the accused has an interest—
as determined in accordance with section 9 or 10 of the **Confiscation Act 1997**;
 - (d) the conditions that may be specified by the court under subsection (3) do not include conditions relating to the identity, number or remuneration of persons representing the accused.
- (6) A court must give Victoria Legal Aid an opportunity to appear and be heard before an order is made under subsection (3).
- (7) Despite anything to the contrary in this or any other Act, Victoria Legal Aid may appeal to the Court of Appeal, if the Court of Appeal gives leave to do so, from an order under subsection (3) made by the Trial Division of the Supreme Court constituted by a Judge.

S. 197(7)
amended by
No. 68/2009
s. 20.

198 Order for taking evidence from a witness before trial

- (1) At any time except during trial, a party to a criminal proceeding may apply to the court for an order that the evidence (including cross-examination and re-examination) of a person be taken at a time and place fixed by the court.
- (2) An application may be made under subsection (1) only if—
 - (a) the person was not available to be examined as a witness at the committal hearing; or
 - (b) a statement or transcript from the person was not included in a hand-up brief served on the accused under Part 4.4; or
 - (c) it is reasonably anticipated that the person will be unavailable to give evidence at the trial of the accused; or
 - (d) the parties agree that the evidence of the person should be taken before the trial of the accused; or
 - (e) for any other reason the court considers that it is appropriate that the evidence of the person should be taken before the trial of the accused.
- (3) An application under subsection (1) must state the grounds on which an order is sought.
- (4) The court must not make an order referred to in subsection (1) unless it is satisfied that it is in the interests of justice that the evidence of the witness be taken.

S. 198(5)
amended by
No. 69/2009
s. 54(Sch. Pt 2
item 18.1).

Note to
s. 198(5)
amended by
No. 69/2009
s. 54(Sch. Pt 2
item 18.2).

- (5) An order referred to in subsection (1) may include a direction that the evidence of the person is to be given or recorded in a specified manner in accordance with the **Evidence (Miscellaneous Provisions) Act 1958**.

Note

Part VI of the **Evidence (Miscellaneous Provisions) Act 1958** provides for the recording of evidence.

Division 4—Procedure for pre-trial orders and other decisions

199 Court may make orders and other decisions before trial

- (1) At any time before trial, the court may hear and decide any issue with respect to the trial that the court considers appropriate, including—
- (a) an issue of law or procedure that arises or is anticipated to arise in the trial, including an issue as to admissibility of evidence;
 - (b) an issue of fact, or mixed law and fact, that may be determined lawfully by a judge alone without a jury, including an issue as to admissibility of evidence;
 - (c) an application for an order that may be made in relation to the trial under this or any other Act or at common law, including an application to quash a charge in the indictment;
 - (d) any other issue with respect to the trial.
- (2) Subsection (1) applies despite sections 181, 183, 184 and 200.

- (3) An order or other decision made at a directions hearing or other pre-trial hearing has the same effect as if it had been made after the commencement of the trial.
- (4) Nothing in this section limits the power of the court to make any order or other decision that it has power to make otherwise than under subsection (1).

Note

Section 192A of the **Evidence Act 2008** provides for advance rulings in relation to evidence proposed to be adduced in a proceeding.

200 Disclosure of pre-trial issues

- (1) If a party intends to raise an issue referred to in section 199(1)(a), (b), (c) or (d), whether before or during trial, the party must—
 - (a) first, notify the other party of the issue or the order sought, in order to ascertain whether the issue will be in dispute or the order will be opposed; and
 - (b) secondly, notify the court of the issue or the order sought.
- (2) Notification under subsection (1)(b) must include—
 - (a) confirmation that the other party has been notified of the issue or the order sought; and
 - (b) information, if available, as to whether the issue is in dispute or the order is opposed.
- (3) Notification under subsection (1) must occur—
 - (a) as soon as possible after the party becomes aware of the issue and at least 14 days before the day on which the trial of the accused is listed to commence; or

- (b) if the party is not aware of the issue within the period referred to in paragraph (a), as soon as possible after the party becomes aware of it.

201 Court may decide pre-trial issue without a hearing

- (1) If—
 - (a) the court is notified of an issue under section 200(1) at least 14 days before the day on which the trial of the accused is listed to commence; and
 - (b) all the parties to the proceeding agree—
the court may decide the issue entirely on the basis of written submissions, without the appearance of the parties.
- (2) If the parties agree to have the issue decided on the basis of written submissions, at least 10 days before the day on which the trial of the accused is listed to commence, the party who raised the issue must file in court and serve on all other parties a copy of that party's submission.
- (3) Within 5 days after a party is served with a copy of a submission under subsection (2), that party must file in court and serve on all other parties a copy of a written submission in reply.
- (4) Within 3 days after a party is served with a written submission in reply under subsection (3), that party must file in court and serve on all other parties a copy of a written submission in response to the reply.
- (5) If an issue could be decided in accordance with subsection (1) but the parties do not agree to do so, at least 10 days before the day on which the trial of the accused is listed to commence, the party who raised the issue must—

- (a) notify the court that agreement has not been reached; and
- (b) request the court to conduct a directions hearing.

202 Hearing of application for exclusion of evidence

On the hearing of an application by the accused for the exclusion of evidence, the court may hear evidence called on behalf of the accused before it hears evidence called on behalf of the prosecution.

203 Judge at pre-trial hearing need not be trial judge

The judge who constitutes the court at a directions hearing or other pre-trial hearing held in connection with the trial of an accused need not be the trial judge on the trial of the accused.

204 Pre-trial orders and other decisions generally binding on trial judge

An order or other decision made at a directions hearing or other pre-trial hearing by a judge who is not the trial judge is binding on the trial judge unless the trial judge considers that it would not be in the interests of justice for the order or other decision to be binding.

205 Pre-trial orders and other decisions may be applied in new trial

- (1) If a new trial is held, the court may treat any order or other decision made at a directions hearing or other pre-trial hearing held in connection with the earlier trial as if it had been made at a directions hearing or other pre-trial hearing held in connection with the new trial.
- (2) Despite subsection (1), the court need not treat an order or other decision in the manner set out in subsection (1) if the court considers that to do so—

- (a) would be inconsistent with any order or decision made or direction given on an appeal; or
- (b) would otherwise not be in the interests of justice.

206 Procedure if prosecution proposes not to lead evidence

- (1) This section applies if, before the trial of an accused commences, the accused is arraigned and pleads not guilty to a charge in respect of which the prosecution proposes not to lead evidence.
- (2) The prosecution must inform the court that the prosecution proposes not to lead evidence on the charge.
- (3) The court must direct that an entry of not guilty be made on the record in respect of the charge.
- (4) An entry of not guilty under subsection (3) has the same effect as if it were the verdict of a jury on the trial of the accused on that charge.
- (5) This section does not limit the power to discontinue a prosecution under section 177.

Part 5.6—Sentence indication

207 Court may give sentence indication

At any time after the indictment is filed, the court may indicate that, if the accused pleads guilty to the charge on the indictment at that time or another charge, the court would or would not (as the case may be) be likely to impose on the accused a sentence of imprisonment that commences immediately.

Note

Section 18 of the **Supreme Court Act 1986** and section 80 of the **County Court Act 1958** enable the court to close a proceeding to the public.

208 Application for sentence indication

- (1) A sentence indication under section 207—
 - (a) may be given only on the application of the accused; and
 - (b) may be given only once during the proceeding, unless the prosecutor otherwise consents.
- (2) An application under subsection (1)(a) may be made only with the consent of the prosecutor.
- (3) If an application under subsection (1)(a) is made in respect of a charge that is not on the indictment, the accused must specify the charge in the application.
- (4) The court may refuse to give a sentence indication under section 207.

S. 208(5)
inserted by
No. 49/2012
s. 5.

- (5) Without limiting subsection (4), the court may refuse to give a sentence indication under section 207 if the court considers there is insufficient information before it of the impact of the offence on any victim of the offence.

Note

Under section 5(2)(daa) of the **Sentencing Act 1991**, in sentencing an offender a court must have regard to the impact of the offence on any victim of the offence.

209 Effect of sentence indication

- (1) If—
- (a) the court indicates that it would not be likely to impose on the accused a sentence of imprisonment that commences immediately; and
 - (b) the accused pleads guilty to the charge for the offence at the first available opportunity—

the court, when sentencing the accused for the offence, must not impose a sentence of imprisonment that commences immediately.

- (2) If—
- (a) the court gives a sentence indication under section 207; and
 - (b) the accused does not plead guilty to the charge for the offence at the first available opportunity—

at trial the court must be constituted by a different judge, unless all the parties otherwise agree.

- (3) A sentence indication does not bind the court on any hearing before the court constituted by a different judge.
- (4) A decision to give or not to give a sentence indication is final and conclusive.

- (5) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.
- (6) This section does not affect any right to appeal against sentence.

Part 5.7—Trial

Division 1—Preliminary

210 When trial commences

- (1) A trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with section 217.
- (2) If a jury panel is split into 2 or more parts under section 30(5) of the **Juries Act 2000**, the trial commences when the accused pleads not guilty on arraignment in the presence of the first part of the jury panel that is present in court.

Note

Section 215 sets out how and when arraignment occurs.

211 Time limit for commencing trial for offences other than sexual offences

The trial of a person for an offence (other than a sexual offence) must commence—

- (a) within 12 months after the day on which the person is committed for trial in respect of the offence; or
- (b) if no committal proceeding in respect of the offence is held, within 12 months after the day on which the indictment against the person is filed; or
- (c) if a new trial is ordered by the Court of Appeal, within 6 months after the day on which the order is made; or
- (d) if the period referred to in paragraph (a), (b) or (c) or any extension of that period is extended under section 247, within the extended period.

212 Time limits for commencing trials for sexual offences

The trial of a person for a sexual offence must commence—

- (a) within 3 months after the day on which the person is committed for trial in respect of the offence; or
- (b) if no committal proceeding in respect of the offence is held, within 3 months after the day on which the indictment against the person is filed; or
- (c) if a new trial is ordered by the Court of Appeal, within 3 months after the day on which the order is made; or
- (d) if the period referred to in paragraph (a), (b) or (c) or any extension of that period is extended under section 247, within the extended period.

S. 212(d)
amended by
No. 68/2009
s. 49(j).

213 Powers of trial judge not affected

- (1) Subject to section 204, a trial judge may make any order or other decision during trial that could have been made under Division 3 or 4 of Part 5.5.
- (2) Nothing in this Act removes or limits any powers of a trial judge that existed immediately before the commencement of this Act.

214 Non-appearance of corporate accused at trial

- (1) If a corporate accused does not appear on the date and at the time specified in an order under section 144(2)(d), the court, may, in its absence, proceed with the trial and, if applicable, proceed to hear and determine a summary offence under Division 1 of Part 5.8 if—

- (a) the court is satisfied that a notice under section 148 or 173 has been served on the accused; and
 - (b) the court considers that it is appropriate to do so.
- (2) If the court conducts a trial in the absence of a corporate accused, the court may dispense with or vary any requirement imposed by or under this Part.

Division 2—Arraignment

215 Arraignment

- (1) An accused is arraigned when the court—
- (a) asks the accused whether the accused is the person named on the indictment; and
 - (b) reads out each charge on the indictment and asks the accused whether the accused pleads guilty or not guilty to the charge.
- (2) An accused may be arraigned or re-arraigned at any time.

216 Written pleas of guilty may be accepted

- (1) If an accused pleads guilty to one or more charges in the indictment and indicates an intention to plead guilty to one or more remaining charges—
- (a) it is not necessary for those remaining charges to be read to the accused; and
 - (b) the court may accept pleas of guilty to the remaining charges in the indictment by written notice signed by the accused.
- (2) A court must not accept pleas of guilty under subsection (1)(b) unless—
- (a) the prosecution consents; and

- (b) the court considers that it is appropriate to do so, having regard to the number of charges in the indictment.
- (3) A plea of guilty accepted under this section has the same effect as if it were entered on arraignment.

217 Arraignment in presence of jury panel

If an accused has not pleaded guilty to all of the charges on an indictment—

- (a) the accused must be arraigned in the presence of the jury panel or, if a jury panel is split into 2 or more parts under section 30(5) of the **Juries Act 2000**, the first part of the jury panel that is present in court; and
- (b) a jury for the trial must be empanelled from that jury panel.

Notes

- 1 A trial commences when arraignment under this section occurs: see section 210.
- 2 The **Juries Act 2000** sets out the process for empanelling a jury.

218 Special pleas in addition to plea of not guilty

On arraignment, an accused may enter a special plea in addition to pleading not guilty.

219 Plea of guilty to alternative offence

- (1) On arraignment, an accused may plead not guilty to the offence charged but guilty to another offence of which the accused might be found guilty.
- (2) The consequences of pleading guilty to another offence under subsection (1) are the same as if the other offence had been charged in the indictment.

220 Form of plea of previous conviction or previous acquittal

- (1) In a plea of previous conviction, it is sufficient for an accused to state that the accused has been lawfully convicted of the offence charged in the indictment.
- (2) In a plea of previous acquittal, it is sufficient for an accused to state that the accused has been lawfully acquitted of the offence charged in the indictment.
- (3) Subject to Chapter 7A, the rules of common law with respect to *autrefois convict* and *autrefois acquit* continue in force in respect of pleas of previous conviction and previous acquittal, respectively.

S. 220(3)
amended by
No. 81/2011
s. 14.

221 Refusal to plead

- (1) If, on arraignment, an accused will not answer directly to a charge on the indictment, the court may order that a plea of not guilty be entered on behalf of the accused.
- (2) A plea of not guilty entered under subsection (1) has the same effect as if the accused in fact had pleaded not guilty.

Note

See the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** when an accused is or may be unfit to stand trial.

Division 3—Assisting the jury

222 Judge may address jury

At any time during a trial, the trial judge may address the jury on—

- (a) the issues that are expected to arise or have arisen in the trial;

- (b) the relevance to the conduct of the trial of any admissions made, directions given or matters determined prior to the commencement of the trial;
- (c) any other matter relevant to the jury in the performance of its functions and its understanding of the trial process, including giving a direction to the jury as to any issue of law, evidence or procedure.

223 Jury documents

- (1) For the purpose of helping the jury to understand the issues or the evidence, the trial judge may order, at any time during the trial, that copies of any of the following are to be given to the jury in any form that the trial judge considers appropriate—
 - (a) the indictment;
 - (b) the summary of the prosecution opening;
 - (c) the response of the accused to the summary of the prosecution opening and the response of the accused to the notice of pre-trial admissions of the prosecution;
 - (d) any document admitted as evidence;
 - (e) any statement of facts;
 - (f) the opening and closing addresses of the prosecution and the accused;
 - (g) any address of the trial judge to the jury under section 222;
 - (h) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;

Note

See sections 29(4) and 50 of the **Evidence Act 2008**.

S. 223(1)(ha)
inserted by
No. 12/2013
s. 29(1).

(ha) the transcript of the evidence in the trial;

(i) transcripts of evidence or audio or
audiovisual recordings of evidence;

(j) transcripts of any audio or audiovisual
recordings;

(k) the trial judge's directions to the jury under
section 238;

S. 223(1)(ka)
inserted by
No. 12/2013
s. 29(2).

(ka) a jury guide;

(l) any other document that the trial judge
considers appropriate.

S. 223(1A)
inserted by
No. 12/2013
s. 29(3).

(1A) A jury guide referred to in subsection (1)(ka) may
contain any of the following—

S. 223(1A)(a)
amended by
No. 14/2015
s. 69(4)(a).

(a) a list of questions to assist the jury in
reaching a verdict (including questions that
are included in integrated directions within
the meaning of section 67 of the **Jury
Directions Act 2015**);

(b) directions on the evidence and how the
evidence is to be assessed;

(c) references to the way in which the
prosecution and the accused have put their
cases in relation to the issues in the trial;

S. 223(1A)(d)
amended by
No. 14/2015
s. 69(4)(b).

(d) any evidence identified under section 66 of
the **Jury Directions Act 2015**;

(e) any other information.

- (2) The trial judge may specify in an order under subsection (1) when any material is to be given to the jury.

Division 4—Opening addresses

224 Opening address by prosecutor

- (1) The prosecutor must give an opening address to the jury on the prosecution case against the accused before any evidence is given in the trial.
- (2) If documents have been served and filed by the prosecution under Part 5.5, the prosecutor must restrict himself or herself to the matters set out in those documents when opening the prosecution case, unless the trial judge considers that there are exceptional circumstances.
- (3) For the purposes of subsection (2), a change of legal practitioner does not constitute exceptional circumstances.
- (4) Despite subsection (2), the prosecutor is not restricted to a verbatim presentation of the summary of the prosecution opening as served and filed under Part 5.5.
- (5) The trial judge may limit the length of the prosecution opening.

225 Response of accused to prosecution opening

- (1) In all trials before a jury, immediately after the prosecutor's opening, the accused—
- (a) if represented by a legal practitioner, must present;
 - (b) if not represented by a legal practitioner, may present—

to the jury the response of the accused to the prosecution opening prepared in accordance with Part 5.5.

- (2) If documents have been served and filed by the defence under Part 5.5, the accused is restricted to the matters set out in those documents when presenting the response of the accused to the prosecution opening, unless the trial judge considers that there are exceptional circumstances.
- (3) For the purposes of subsection (2), a change of legal practitioner does not constitute exceptional circumstances.
- (4) Despite subsection (2), the accused is not restricted to a verbatim presentation of the response of the accused to the summary of the prosecution opening as served and filed under Part 5.5.
- (5) The trial judge may limit the length of the response of the accused.

Division 5—Case for the accused

226 Accused entitled to respond after close of prosecution case

After the close of the case for the prosecution, an accused is entitled—

- (a) to make a submission that there is no case for the accused to answer;
- (b) to answer the charge by choosing to give evidence or call other witnesses to give evidence or both;
- (c) not to give evidence or call any witnesses.

227 Election when accused is legally represented

If the accused is represented by a legal practitioner, at the close of the case for the prosecution, the trial judge may question the legal practitioner to determine which of the options referred to in section 226 the accused elects to take.

228 Election when accused is not legally represented

- (1) If an accused is not represented by a legal practitioner, immediately after the close of the case for the prosecution and in the absence of the jury, the trial judge must inform the accused, in a manner that is likely to be understood by the accused, that—
 - (a) the accused has the right to answer the charge and must choose either—
 - (i) to give sworn evidence, that is, to enter the witness box, take the oath or make an affirmation and say what the accused wants to say in answer to the charge and then to respond to any questions from the prosecution or the court about the evidence of the accused; or
 - (ii) to say nothing in answer to the charge; and
 - (b) in either case, the accused may call any witnesses to give evidence at the trial.
- (2) After giving the information referred to in subsection (1), the trial judge must ask the accused what the accused wants to do.

229 Procedure for joint trials if no-case submission made

- (1) This section applies to a trial in which 2 or more accused are named on the indictment.
- (2) After the close of the case for the prosecution, an accused who wishes to make a submission that there is no case for the accused to answer must do so at that time.
- (3) If, after the trial judge has ruled on all no-case submissions, 2 or more accused remain on trial, the accused named first on the indictment must advise the trial judge, in response to questioning

**S. 229(3)
amended by
No. 68/2009
s. 49(k).**

under section 227 or 228, which of the options referred to in section 226(b) or (c) the accused elects to take.

- (4) Each accused named subsequently on the indictment is not required to advise the trial judge of the election of that accused until the close of the case for the previously named accused.
- (5) The cases of all accused must proceed according to the order in which the accused are named on the indictment, unless the trial judge otherwise orders.

230 Questioning to determine proper course of proceeding

- (1) If the accused intends to call witnesses to give evidence at the trial, the accused must indicate, when called on by the trial judge to do so—
 - (a) the names of those witnesses (other than the accused); and
 - (b) the order in which those witnesses are to be called.
- (2) The accused must not present the case of the accused differently to the way indicated to the trial judge under subsection (1) without the leave of the trial judge.

231 Opening address of accused

- (1) If the accused intends to give evidence, or to call other witnesses on behalf of the accused, or both, the accused is entitled to give an opening address to the jury outlining the evidence that the accused proposes to give or call.
- (2) If the accused gives an opening address, it must be given before the accused gives evidence or calls any other witnesses.

- (3) The trial judge may limit the length of the opening address of the accused.
- (4) The accused is not required to give evidence before any other witness is called on behalf of the accused.

Division 6—Giving of evidence

232 Manner of giving evidence

- (1) The trial judge may permit a person to give evidence—
 - (a) with the consent of the parties, by the witness reading from the statement of the witness prepared in advance of giving evidence;
 - (b) if the person is called in his or her capacity as an expert witness, by the presentation of audio or audiovisual material;
 - (c) by means of playing an audio or audiovisual recording;
 - (d) in any other manner that the trial judge considers may be of assistance.
- (2) Nothing in subsection (1) precludes—
 - (a) in the case of subsection (1)(b), the questioning of an expert witness by cross-examination or otherwise before, during or after a presentation; or
 - (b) in the case of subsection (1)(c), if unanticipated issues arise during the trial, the trial judge making an order that the witness attend before the court.
- (3) Nothing in this section affects the operation of Division 6 of Part 8.2 of this Act, Part IIA of the **Evidence (Miscellaneous Provisions) Act 1958** and sections 29 and 50 of the **Evidence Act 2008**.

S. 232(3)
amended by
Nos 68/2009
s. 21, 69/2009
s. 54(Sch. Pt 2
item 18.1).

233 Introduction of evidence not previously disclosed

- (1) If the trial judge gives leave to do so, the prosecutor or the accused may introduce at the trial evidence which was not disclosed in accordance with Part 5.5 and which represents—
 - (a) in the case of the prosecutor, a substantial departure from the summary of the prosecution opening, if any, as served on the accused and filed in court; or
 - (b) in the case of the accused, a substantial departure from—
 - (i) the response of the accused to the summary of the prosecution opening; or
 - (ii) the response of the accused to the notice of pre-trial admissions—if any, as served on the prosecution and filed in court.
- (2) If, after the close of the prosecution case, the accused gives evidence which could not reasonably have been foreseen by the prosecution having regard to—
 - (a) the response of the accused to the summary of the prosecution opening; and
 - (b) the response of the accused to the notice of pre-trial admissions—as served on the prosecution and filed in court, the trial judge may allow the prosecutor to call evidence in reply.
- (3) Nothing in this section limits any other power of the trial judge to allow the prosecutor to call evidence after the prosecutor has closed the prosecution case.

Division 7—Closing addresses and judge's directions to the jury

234 Prosecution closing address

- (1) The prosecution is entitled to address the jury for the purpose of summing up the evidence—
 - (a) after the close of all evidence; and
 - (b) before the closing address of the accused, if any, under section 235.
- (2) Subject to section 236, the prosecution is not entitled to any further or other right to address the jury following the close of evidence.
- (3) The trial judge may limit the length of the closing address of the prosecution.

235 Closing address of the accused

- (1) The accused is entitled to address the jury for the purpose of summing up the evidence—
 - (a) after the close of all evidence; and
 - (b) after the closing address of the prosecution, if any, under section 234.
- (2) The trial judge may limit the length of the closing address of the accused.

236 Supplementary prosecution address

- (1) If, in the closing address of the accused under section 235, the accused asserts facts which are not supported by any evidence that is before the jury, the trial judge may grant leave to the prosecution to make a supplementary address to the jury.

- (2) A supplementary address must be confined to replying to the assertion referred to in subsection (1).
- (3) The trial judge may limit the length of a supplementary address.

237 Comment on departure or failure

S. 237(1)
amended by
No. 48/2012
s. 14(1)(a).

- (1) Subject to subsection (2), the trial judge or, with the leave of the trial judge, a party may make any comment that the trial judge thinks appropriate on—
 - (a) a departure referred to in section 233(1); or
 - (b) a failure by a party to comply with a requirement of this Chapter or an order made under this Chapter.
- (2) The trial judge may grant leave to a party to comment on a departure or failure only if satisfied that—
 - (a) the proposed comment is relevant; and
 - (b) the proposed comment is permitted by another Act or a rule of law; and

S. 237(2)(b)
substituted by
No. 48/2012
s. 14(1)(b).

Note

See section 20 of the **Evidence Act 2008**.

S. 237(2)(c)
inserted by
No. 48/2012
s. 14(1)(b).

- (c) the proposed comment is not unfairly prejudicial to the party about whom the comment is made.

S. 237(3)
repealed by
No. 48/2012
s. 14(2).

* * * * *

238 Judge's directions to the jury

At the conclusion of the closing address of the prosecution, the closing address of the accused and any supplementary prosecution address, the trial judge must give directions to the jury so as to enable the jury to properly consider its verdict.

Note

See the **Jury Directions Act 2015**.

Note to s. 238
inserted by
No. 12/2013
s. 30,
substituted by
No. 14/2015
s. 69(5).

Division 8—Alternative verdicts and discharge of jury from delivering verdict

239 Alternative verdicts on charges other than treason or murder

- (1) On a trial on indictment for an offence other than treason or murder, if the jury finds the accused not guilty of the offence charged but the allegations in the indictment amount to or include, whether expressly or impliedly, an allegation of another offence that is within the jurisdiction of the court, the jury may find the accused guilty of that other offence.
- (2) For the purposes of subsection (1), an allegation of an offence includes an allegation of an attempt to commit the offence.

240 Judge may order that guilt in respect of alternative offences is not to be determined

Despite section 421(1) of the **Crimes Act 1958** and section 239, if the trial judge considers that it is in the interests of justice to do so, the judge may order that the guilt of the accused in respect of all or any of the other offences of which the accused

may be found guilty is not to be determined at the trial.

Note

The **Crimes Act 1958** contains other provisions concerning alternative verdicts.

241 When judge may enter finding of guilty or not guilty

- (1) If, during trial, an accused is re-arraigned and pleads guilty to a charge on the indictment, the trial judge may discharge the jury from delivering a verdict on the charge and instead direct that an entry of guilty be made on the record in respect of that charge.
- (2) If—
 - (a) during trial the prosecution informs the trial judge that the prosecution proposes not to lead evidence on a charge on the indictment;
or
 - (b) at the close of the case for the prosecution, the trial judge decides that there is no case for the accused to answer in respect of a charge on the indictment—the trial judge may discharge the jury from delivering a verdict on the charge and instead direct that an entry of not guilty be made on the record in respect of that charge.
- (3) An entry of guilty under subsection (1) or an entry of not guilty under subsection (2) has the same effect as if it were the verdict of a jury on the trial of the accused on that charge.

Part 5.8—General

Division 1—Hearing of charges for related and unrelated summary offences

242 Summary offence related to indictable offence

- (1) If an accused before the Supreme Court or the County Court—
 - (a) pleads guilty to an indictable offence; or
 - (b) is found guilty or not guilty of an indictable offence—

the court may hear and determine a charge for a related summary offence before sentencing or otherwise dealing with the accused.

- (2) The court must hear and determine a charge for a related summary offence without a jury and in accordance with Part 3.3, as far as practicable.
- (3) Without affecting the admissibility of any evidence which might be given apart from this subsection, on the hearing of a charge against an accused for a related summary offence, the court may admit as evidence in relation to the charge—
 - (a) evidence given during the trial of the accused in respect of the indictable offence;
 - (b) in the case of a plea of guilty to the indictable offence, the depositions and all exhibits and all recordings referred to in section 139 that were admitted in evidence in the committal proceeding in relation to the indictable offence.
- (4) A party may adduce further evidence only with the leave of the court.

S. 242(6)
amended by
No. 68/2009
s. 49(l).

- (5) If the court considers it appropriate to do so, the court may transfer a proceeding for a related summary offence back to the Magistrates' Court for hearing and determination.
- (6) The court may impose any sentence in respect of a related summary offence that could be imposed by the Magistrates' Court.

Notes

- 1 See the definition of *related summary offence* in section 3.
- 2 See the definitions of *originating court* and *original jurisdiction* in section 3 in relation to rights of appeal under Part 6.3.

243 Unrelated summary offence

- (1) The Supreme Court or the County Court may hear and determine a charge against an accused for a summary offence that is not a related summary offence if the accused—
 - (a) is before the court in respect of an indictable offence; and
 - (b) consents to the court hearing and determining the charge for the summary offence; and
 - (c) states an intention to plead guilty to the charge for the summary offence.
- (2) If the accused consents to the court hearing and determining a charge for a summary offence that is not a related summary offence, the proceeding in respect of the charge is transferred from the Magistrates' Court to the Supreme Court or the County Court, as the case may be.

Note

A charge-sheet for a summary offence may only be filed in the Magistrates' Court. See section 6.

- (3) The court must hear and determine the charge for the summary offence without a jury and in accordance with Part 3.3, as far as practicable.
- (4) If the accused—
 - (a) does not plead guilty to the charge for the summary offence; or
 - (b) states an intention to plead not guilty to the charge for the summary offence—the court is to direct that the charge be transferred to the Magistrates' Court for hearing and determination.
- (5) The court may impose any sentence in respect of the summary offence that could be imposed by the Magistrates' Court.

Note

See the definitions of *originating court* and *original jurisdiction* in section 3 in relation to rights of appeal under Part 6.3.

Division 2—Criminal record

244 Criminal record

- (1) A criminal record must contain, in relation to each previous conviction—
 - (a) the date of the previous conviction; and
 - (b) the court in which the previous conviction took place; and
 - (c) the place of sitting of that court; and
 - (d) the offence committed; and
 - (e) the sentence imposed.

Note

Previous conviction is defined by section 3 to refer only to a conviction or finding of guilt made by a court and does not include an infringement conviction.

**Note to
s. 244(1)
inserted by
No. 81/2011
s. 15(1).**

S. 244(2A)
inserted by
No. 81/2011
s. 15(2).

(2) If other offences were taken into account when a sentence was imposed in respect of a previous conviction, a criminal record may contain a statement to that effect and the offences taken into account, including the number of offences.

(2A) A criminal record must contain, in relation to an infringement conviction—

- (a) the date on which the infringement notice took effect as a conviction; and
- (b) the offence specified in the notice; and
- (c) the amount specified in the notice as the penalty for the infringement; and
- (d) any other penalty that results from the operation of the notice.

Example

A period of cancellation, disqualification or suspension of a licence or permit.

(3) A criminal record is inadmissible as evidence against the person to whom it relates in a proceeding for an offence unless the criminal record is signed by—

S. 244(3)(a)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

- (a) a police officer; or
- (b) a Crown Prosecutor; or
- (c) a member of staff of the Office of Public Prosecutions who is a legal practitioner; or
- (d) in the case of a proceeding commenced by an informant—
 - (i) a person who is entitled to represent the informant and is a legal practitioner; or
 - (ii) a public official.

245 Proof of previous convictions and infringement convictions by criminal record

S. 245
(Heading)
amended by
No. 81/2011
s. 16(1).

(1) If the prosecution intends to allege, in the event of a finding of guilt against a person, that the person has previous convictions or infringement convictions, the prosecution may file the criminal record of the person in court at any time after the indictment is filed and before the sentencing hearing commences.

S. 245(1)
amended by
No. 81/2011
s. 16(2).

(2) If the criminal record of the person is not available before the sentencing hearing commences, the prosecution may file it in court at any time before sentencing, if the court considers that it is in the interests of justice to do so.

(3) If a person is found guilty of an offence and the criminal record of the person has been filed in court, the court must ask the person whether the person admits the previous convictions and infringement convictions set out in the criminal record.

S. 245(3)
amended by
No. 81/2011
s. 16(3).

(4) A person may admit, orally or in writing on the criminal record, all or any of the previous convictions or infringement convictions set out in the criminal record.

S. 245(4)
amended by
No. 81/2011
s. 16(4).

(5) If the person admits to a previous conviction or infringement conviction, the court may sentence the person accordingly.

S. 245(5)
amended by
No. 81/2011
s. 16(5).

S. 245(6)
amended by
No. 81/2011
s. 16(6).

- (6) If the person does not admit to a previous conviction or infringement conviction, the prosecution may lead evidence to prove the previous conviction or infringement conviction.

Note

Section 178 of the **Evidence Act 2008** provides for proof of previous convictions by the filing of a certificate.

Division 3—Powers and obligations

246 Attendance of accused at hearings

An accused must attend all hearings conducted under this Chapter in the criminal proceeding against the accused unless excused under section 330.

247 Power to extend or abridge time

- (1) The court, by order, may extend or abridge any time fixed—
- (a) by or under this Chapter; or
 - (b) by any order extending or abridging time made under this section—
- if the court considers that it is in the interests of justice to do so.
- (2) An extension of the time for commencement of a trial for a sexual offence must not exceed 3 months.
- (3) It is not necessary that an order be made under subsection (1) if a ruling made, or direction given, by the court provides for the extension or abridgment of time.
- (4) The court may extend time under subsection (1) before or after the time expires.
- (5) More than one extension of time may be granted under subsection (1).

- (6) Unless the court otherwise orders, no material in support of an order under subsection (1) need be filed.

248 Parties must inform Juries Commissioner of certain events

If a party to a criminal proceeding listed for trial before a jury becomes aware of any event that affects—

- (a) whether or not a jury will be required for the trial; or
- (b) when a jury will be required for the trial; or
- (c) the dates on which persons will be required to attend for jury service—

the party must inform the Juries Commissioner as soon as practicable after the party becomes aware of the event.

249 Counsel required to retain brief for trial

- (1) A legal practitioner who has been briefed or otherwise agreed to appear for an accused at a trial must, at least 7 days before the day on which the trial is due to commence, advise the court of his or her intention to appear for the accused.
- (2) A legal practitioner may only relinquish a brief to appear or withdraw from an agreement to appear for an accused within 7 days before the day on which the trial is due to commence with the leave of the court.
- (3) On an application for leave under subsection (2), the court may make an order as to costs to be paid personally by the legal practitioner if the court considers that in the circumstances of the case—

- (a) the agreement to appear at trial for the accused or the acceptance of a brief to appear for the accused at trial is unreasonable; or
- (b) the withdrawal from an agreement to appear for the accused at trial or the relinquishment of a brief to appear for the accused at trial is unreasonable.

S. 250
amended by
No. 17/2014
s. 160(Sch. 2
item 30.2).

250 Complaints about legal practitioners

If a court considers that a legal practitioner for a party has failed to comply with—

- (a) a requirement of Part 5.5 or an order made under Part 5.5, including an order or requirement under section 181; or
- (b) an order under section 404 or 410—

S. 250(b)
amended by
No. 68/2009
s. 51(zn).

the court may make a complaint about the legal practitioner's conduct to the Victorian Legal Services Commissioner.

251 Judge at earlier trial not prevented from presiding at later trial

- (1) This section applies if an offence charged in an indictment and an offence that was tried at an earlier trial are the same or related offences.
- (2) The trial judge at an earlier trial, or a judge who conducted a directions hearing or other pre-trial hearing in relation to the earlier trial, is not prevented from being the trial judge at the later trial merely because the judge made a decision in relation to the earlier trial on any issue of law or procedure that, in his or her opinion, is likely to be contentious in the later trial.

Note

See the definition of *related offences* in section 3.

252 Offence for corporate accused to fail to appear

- (1) A corporate accused must comply with an order made under section 144(2)(d).

Penalty: 240 penalty units.

- (2) If the court orders a corporate accused to appear at any other hearing, the corporate accused must not, without reasonable excuse, fail to appear, by a representative or a legal practitioner, at the hearing.

Penalty: 240 penalty units.

253 Abolition of grand jury procedure

The common law procedure of calling a grand jury to determine, on evidence called by the applicant for a grand jury, whether a person charged with an indictable offence ought to be put on trial before an ordinary jury is abolished.

Note

Chapter 8 contains general provisions that apply to all criminal proceedings.

Division 4—Procedure on guilty plea or guilty verdict

Ch. 5 Pt 5.8
Div. 4
(Heading and
ss 253A,
253B)
inserted by
No. 30/2010
s. 62.

253A Abolition of allocutus

The common law procedure of administering the allocutus is abolished.

S. 253A
inserted by
No. 30/2010
s. 62.

Note

Administering the allocutus is the step in a criminal proceeding which occurs when, after a plea of guilty or a finding of guilt by the jury, the court asks the accused whether there is any reason why the court should not proceed to pass judgment according to law.

S. 253B
inserted by
No. 30/2010
s. 62,
amended by
No. 48/2012
s. 15.

253B When finding of guilt occurs

If—

- (a) on arraignment, an accused enters a plea of guilty to a charge for an offence; or
- (b) a jury delivers a verdict finding an accused guilty of an offence—

then at that moment the accused is found guilty of the offence unless the judge sets aside the plea or verdict.

Chapter 6—Appeals and cases stated

Part 6.1—Appeal from Magistrates' Court to County Court

Division 1—Appeal by offender

254 Right of appeal

- (1) Subject to subsection (2), a person convicted of an offence by the Magistrates' Court in a criminal proceeding conducted in accordance with Part 3.3 may appeal to the County Court against—
- (a) the conviction and sentence imposed by the court; or
 - (b) sentence alone.

Note

See the definitions of *conviction* and *sentence* in section 3.

- (2) If the Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, the appeal is to be made to the Trial Division of the Supreme Court.

255 How appeal is commenced

- (1) An appeal under section 254 is commenced by filing a notice of appeal with a registrar of the Magistrates' Court at any venue of the Magistrates' Court within 28 days after the day on which the sentence of the Magistrates' Court is imposed.
- (2) A copy of the notice of appeal must be served on the respondent in accordance with section 392 within 7 days after the day on which the notice is filed.

S. 254
amended by
No. 3/2016
s. 61(2) (ILA
s. 39B(1)).

S. 254(1)
amended by
No. 3/2016
s. 61(1).

S. 254(2)
inserted by
No. 3/2016
s. 61(2).

S. 255(2)
amended by
No. 68/2009
s. 51(zc).

S. 255(3)(b)
amended by
No. 3/2016
s. 62(1).

S. 255(4)
amended by
No. 3/2016
s. 62(2).

S. 255(5)
amended by
No. 3/2016
s. 62(3)(a).

S. 255(5)(a)
amended by
No. 3/2016
s. 62(3)(b).

S. 255(5)(ab)
inserted by
No. 3/2016
s. 62(3)(c).

- (3) A notice of appeal must—
- (a) state whether the appeal is against conviction and sentence, or sentence alone; and
 - (b) be in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires.
- (4) A notice of appeal must include a statement in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires and signed by the appellant to the effect that the appellant is aware that on the appeal the court may impose a sentence more severe than that sought to be appealed.
- (5) A notice of appeal must also include an undertaking signed by the appellant in the manner prescribed by the rules of the County Court or the Supreme Court, as the case requires—
- (a) subject to paragraph (ab), to appear at the County Court to proceed with the appeal at a place and on a day fixed or to be fixed by the registrar of the County Court and to appear at the County Court for the duration of the appeal; and
 - (ab) in the case of an appeal referred to in section 254(2), to appear at the Supreme Court to proceed with the appeal at a place and on a day fixed or to be fixed by the Prothonotary of the Supreme Court and to appear at the Supreme Court for the duration of the appeal; and

- (b) to give written notice without delay to the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires of any change of address of the appellant from that appearing in the notice of appeal. **S. 255(5)(b) amended by No. 3/2016 s. 62(3)(d).**
- (6) Before accepting a notice of appeal, a registrar of the Magistrates' Court must—
- (a) give to the person seeking to file the notice of appeal a notice in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires to the effect that on the appeal the court may impose a sentence more severe than that sought to be appealed against; and **S. 255(6)(a) amended by No. 3/2016 s. 62(4).**
- (b) if the person seeking to file the notice of appeal is not the proposed appellant, be satisfied that the proposed appellant has signed the statement required to be included in the notice of appeal by subsection (4).
- (7) A notice of appeal filed under this section must be transmitted to the County Court or the Supreme Court, as the case requires. **S. 255(7) amended by No. 3/2016 s. 62(5).**

256 Determination of appeal

- (1) An appeal under section 254 must be conducted as a rehearing and the appellant is not bound by the plea entered in the Magistrates' Court.
- (2) On the hearing of an appeal under section 254, the County Court or the Supreme Court, as the case requires— **S. 256(2) amended by No. 3/2016 s. 63(1)(a).**
- (a) must set aside the sentence of the Magistrates' Court; and

S. 256(2)(b)
amended by
No. 3/2016
s. 63(1)(b).

(b) may impose any sentence which the court considers appropriate and which the Magistrates' Court imposed or could have imposed; and

(c) may exercise any power which the Magistrates' Court exercised or could have exercised.

S. 256(3)
amended by
No. 3/2016
s. 63(2).

(3) On the hearing of an appeal under section 254, the court must warn the appellant, as early as possible during the hearing, that the appellant faces the possibility that a more severe sentence may be imposed than that imposed by the Magistrates' Court.

S. 256(4)
amended by
No. 3/2016
s. 63(2).

(4) The court may backdate a sentence imposed under subsection (2) to a date not earlier than the date of the sentence of the Magistrates' Court that was set aside on the appeal.

S. 256(5)
amended by
No. 3/2016
s. 63(3).

(5) A sentence imposed under subsection (2) is for all purposes to be regarded as a sentence of the County Court or the Supreme Court, as the case requires.

Note to s. 256
inserted by
No. 68/2009
s. 22,
amended by
No. 32/2013
s. 53.

Note

See the definition of *sentence* in section 3. This includes the recording of a conviction and an order as to costs.

Division 2—Appeal by DPP against sentence

257 DPP's right of appeal against sentence

S. 257(1)
amended by
No. 3/2016
s. 64(1).

(1) Subject to subsection (1A), the DPP may appeal to the County Court against a sentence imposed by the Magistrates' Court in a criminal proceeding conducted in accordance with Part 3.3 if satisfied that an appeal should be brought in the public interest.

- (1A) If the Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, the appeal is to be made to the Trial Division of the Supreme Court. S. 257(1A)
inserted by
No. 3/2016
s. 64(2).
- (2) The DPP must not bring a further appeal against a sentence imposed by the County Court or the Trial Division of the Supreme Court, as the case requires. S. 257(2)
amended by
No. 3/2016
s. 64(3).

258 How appeal is commenced

- (1) An appeal under section 257 is commenced by filing a notice of appeal with a registrar of the Magistrates' Court at any venue of the Magistrates' Court within 28 days after the day on which the sentence of the Magistrates' Court is imposed.
- (2) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 within 7 days after the day on which the notice is filed. S. 258(2)
amended by
No. 68/2009
s. 51(zp).
- (3) A notice of appeal must—
- (a) state the general grounds of appeal; and
 - (b) be in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires. S. 258(3)(b)
amended by
No. 3/2016
s. 65(1).
- (4) The DPP must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the criminal proceeding to which the appeal relates, if that legal practitioner can reasonably be identified.
- (5) A notice of appeal filed under this section must be transmitted to the County Court or the Supreme Court, as the case requires. S. 258(5)
amended by
No. 3/2016
s. 65(2).

259 Determination of DPP's appeal

S. 259(2)
amended by
No. 3/2016
s. 66(1)(a).

(1) An appeal under section 257 must be conducted as a rehearing and the respondent is not bound by the plea entered in the Magistrates' Court.

(2) On the hearing of an appeal under section 257, the County Court or the Supreme Court, as the case requires—

(a) must set aside the sentence of the Magistrates' Court; and

S. 259(2)(b)
amended by
No. 3/2016
s. 66(1)(b).

(b) may impose any sentence which the court considers appropriate and which the Magistrates' Court imposed or could have imposed; and

(c) may exercise any power which the Magistrates' Court exercised or could have exercised.

S. 259(3)
amended by
No. 3/2016
s. 66(2).

(3) In imposing a sentence under subsection (2), the court must not take into account the element of double jeopardy involved in the respondent being sentenced again, in order to impose a less severe sentence than the court would otherwise consider appropriate.

S. 259(4)
amended by
No. 3/2016
s. 66(2).

(4) The court may backdate a sentence imposed under subsection (2) to a date not earlier than the date of the sentence of the Magistrates' Court that was set aside on the appeal.

S. 259(5)
amended by
No. 3/2016
s. 66(3).

(5) A sentence imposed under subsection (2) is for all purposes to be regarded as a sentence of the County Court or the Supreme Court, as the case requires.

Division 3—Appeal by DPP—failure to fulfil undertaking

260 DPP's right of appeal—failure to fulfil undertaking

(1) Subject to subsection (1A), without limiting any right of appeal under section 257, the DPP may appeal to the County Court against a sentence imposed on a person convicted of an indictable offence that was heard and determined summarily by the Magistrates' Court if—

S. 260(1)
amended by
No. 3/2016
s. 67(1).

(a) the sentence was less severe because of an undertaking given by the person to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence, whether or not proceedings for that offence had commenced at the time of sentencing; and

(b) the DPP considers that the person has failed, wholly or partly, to fulfil the undertaking.

(1A) If the Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, the appeal is to be made to the Trial Division of the Supreme Court.

S. 260(1A)
inserted by
No. 3/2016
s. 67(2).

(2) The DPP may bring an appeal under this section at any time, whether or not the sentence has been served.

261 How appeal is commenced

(1) An appeal under section 260 is commenced by filing a notice of appeal, signed by the DPP personally, with a registrar of the Magistrates' Court at any venue of the Magistrates' Court.

(2) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 within 14 days after the day on which the notice is filed.

S. 261(2)
amended by
No. 68/2009
s. 51(2a).

S. 261(3)
amended by
No. 3/2016
s. 68(1).

(3) A notice of appeal must be in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires.

(4) The DPP must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the criminal proceeding to which the appeal relates, if that legal practitioner can reasonably be identified.

S. 261(5)
amended by
No. 3/2016
s. 68(2).

(5) A notice of appeal filed under this section must be transmitted to the County Court or the Supreme Court, as the case requires.

262 Determination of DPP's appeal—failure to fulfil undertaking

(1) An appeal under section 260 must not be conducted as a rehearing.

S. 262(2)
amended by
No. 3/2016
s. 69(1).

(2) On an appeal under section 260, if the County Court or the Supreme Court, as the case requires, considers that the respondent has failed, wholly or partly, to fulfil the undertaking referred to in section 260(1)(a), the court may—

(a) set aside the sentence imposed by the Magistrates' Court; and

(b) impose the sentence that it considers appropriate, having regard to the failure of the respondent to fulfil the undertaking.

S. 262(3)
amended by
No. 3/2016
s. 69(2).

(3) In imposing a sentence under subsection (2), the court must not take into account the element of double jeopardy involved in the respondent being sentenced again, in order to impose a less severe sentence than the court would otherwise consider appropriate.

Division 4—Procedure

263 Late notice of appeal deemed to be application for leave to appeal

- (1) A notice of appeal filed after the end of the period referred to in section 255(1) or 258 is deemed to be an application for leave to appeal on the grounds stated in the notice.
- (2) The County Court or the Supreme Court, as the case requires, may grant leave to appeal under subsection (1) and the appellant may proceed with the appeal if—
 - (a) the court considers that the failure to file a notice of appeal within the period referred to in section 255(1) or 258 was due to exceptional circumstances; and
 - (b) the court is satisfied that the respondent's case would not be materially prejudiced because of the delay.
- (3) If the court does not grant leave to appeal under subsection (2), the court must strike out the appeal.
- (4) If—
 - (a) the County Court or the Supreme Court, as the case requires, strikes out an appeal under subsection (3); and

S. 263(2)
amended by
No. 3/2016
s. 70(1).

S. 263(3)
inserted by
No. 48/2012
s. 16,
amended by
No. 3/2016
s. 70(2).

S. 263(4)
inserted by
No. 48/2012
s. 16,
amended by
No. 3/2016
s. 70(3)(b).

S. 263(4)(a)
amended by
No. 3/2016
s. 70(3)(a).

(b) the appellant had been sentenced to a term of imprisonment or detention by the Magistrates' Court—

the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires, may issue, in accordance with the **Magistrates' Court Act 1989**, a warrant to imprison the appellant and may recall and cancel that warrant.

S. 263(5)
inserted by
No. 48/2012
s. 16.

(5) If an appeal is struck out under subsection (3)—

(a) the sentence of the Magistrates' Court is reinstated and may be enforced as if an appeal had not been commenced but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay; and

S. 263(5)(b)
amended by
No. 3/2016
s. 70(4).

(b) the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires, must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal; and

(c) the making of an order striking out an appeal discharges the undertaking of the appellant to proceed with the appeal.

S. 264
(Heading)
amended by
No. 68/2009
s. 49(m).

264 Stay of sentence

(1) If an appellant appeals against sentence and is not in custody because of that sentence, the appeal operates as a stay of the sentence (but not a conviction in respect of the sentence) when the appellant files the notice of appeal and signs the undertaking referred to in section 255(5).

- (2) If an appellant appeals against sentence and is in custody because of that sentence, the appeal operates as a stay of the sentence (but not a conviction in respect of the sentence) when—
 - (a) the appellant files the notice of appeal and signs the undertaking referred to in section 255(5); and
 - (b) the appellant enters bail, if bail is granted under section 265.
- (3) This section is subject to section 29 of the **Road Safety Act 1986**.

265 Bail pending appeal

- (1) If an appellant is in custody because of the sentence appealed against and wishes to be released pending the appeal, the appellant—
 - (a) may apply to the Magistrates' Court to be released on bail; and
 - (b) if he or she makes an application under paragraph (a), must give reasonable notice of the application to the respondent to the appeal.
- (2) If an application is made under subsection (1), the Magistrates' Court must either grant or refuse bail as if the appellant were accused of an offence and were being held in custody in relation to that offence and, for this purpose, the **Bail Act 1977** (with any necessary modifications) applies.

266 Abandonment of appeal

- (1) Subject to subsections (2) and (3), an appeal to the County Court or the Supreme Court, as the case requires, may be abandoned by filing a notice of abandonment of appeal, in the form prescribed by the rules of the applicable court, with the applicable court.

S. 266(1)
substituted by
No. 68/2009
s. 23(1),
amended by
No. 3/2016
s. 71(1).

S. 266(3)
substituted by
No. 68/2009
s. 23(2).

S. 266(3)(a)
amended by
No. 3/2016
s. 71(2).

S. 266(3A)
inserted by
No. 68/2009
s. 23(2),
amended by
No. 3/2016
s. 71(3).

S. 266(4)
amended by
Nos 68/2009
s. 23(3),
3/2016
s. 71(4).

S. 266(5)(a)
amended by
No. 68/2009
s. 23(4).

S. 266(5)(b)
amended by
No. 3/2016
s. 71(5).

(2) If an appellant appeals against both conviction and sentence but does not pursue the appeal against conviction, the appellant must give written notice to the court and the respondent that the appeal against conviction is abandoned.

(3) An appellant who has been sentenced to a term of imprisonment or detention but who is not in custody may abandon the appeal by—

(a) surrendering to the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires; and

(b) immediately filing a notice of abandonment of appeal in accordance with subsection (1).

(3A) If a person surrenders to the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires, in accordance with subsection (3), the registrar or Prothonotary may issue, in accordance with the **Magistrates' Court Act 1989**, a warrant to imprison the person.

(4) If an appellant abandons an appeal, the court must strike out the appeal.

(5) If an appeal is struck out under subsection (4)—

(a) the sentence of the Magistrates' Court is reinstated and may be enforced as if an appeal had not been made but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay; and

(b) the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal; and

(c) the making of an order striking out an appeal discharges the undertaking of the appellant to proceed with the appeal.

(6) The court may not set aside an order under subsection (4) striking out an appeal.

S. 266(6)
inserted by
No. 30/2010
s. 63,
amended by
No. 3/2016
s. 71(6).

267 Appellant's failure to appear

(1) If an appellant (other than the DPP) fails to appear at the time listed for the hearing of the appeal, the County Court or the Supreme Court, as the case requires, may—

S. 267(1)
amended by
No. 3/2016
s. 72(1).

(a) strike out the appeal; or

(b) adjourn the proceeding on any terms that it considers appropriate.

(1A) If—

S. 267(1A)
inserted by
No. 30/2010
s. 64(1),
amended by
No. 3/2016
s. 72(2)(b).

(a) the County Court or the Supreme Court, as the case requires, strikes out an appeal under subsection (1)(a); and

S. 267(1A)(a)
amended by
No. 3/2016
s. 72(2)(a).

(b) the appellant had been sentenced to a term of imprisonment or detention by the Magistrates' Court—

the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires may issue, in accordance with the **Magistrates' Court Act 1989**, a warrant to imprison the appellant and may recall and cancel that warrant.

Criminal Procedure Act 2009
No. 7 of 2009
Part 6.1—Appeal from Magistrates' Court to County Court

- (2) If an appeal is struck out under subsection (1)(a)—
- S. 267(2)(a) amended by No. 68/2009 s. 24(1).**
- (a) the sentence of the Magistrates' Court is reinstated and may be enforced as if an appeal had not been commenced but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay; and
- S. 267(2)(b) amended by No. 3/2016 s. 72(3).**
- (b) the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal; and
- (c) the making of an order striking out an appeal discharges the undertaking of the appellant to proceed with the appeal.
- S. 267(3) amended by No. 3/2016 s. 72(4).**
- (3) The court, at any time, may set aside an order striking out an appeal because of the failure of the appellant to appear, if the appellant satisfies the court that the failure to appear was not due to fault or neglect on the part of the appellant.
- (4) An application under subsection (3) to set aside an order may be made at any time on notice in writing to the respondent served a reasonable time before the making of the application.
- (5) Notice under subsection (4) must be served in the same way as a notice of appeal.
- S. 267(6) amended by No. 3/2016 s. 72(4).**
- (6) If the court grants an application under subsection (3), the court—
- (a) must order the reinstatement of the appeal subject to the payment of any costs that the court considers appropriate; and

(b) may require the appellant to give a further undertaking to proceed with the appeal.

(6A) An application under section 265 for bail pending the reinstated appeal may be made to the County Court or the Supreme Court, as the case requires,.

S. 267(6A)
inserted by
No. 30/2010
s. 64(2),
amended by
No. 3/2016
s. 72(5).

(7) On the reinstatement of an appeal under subsection (6), the appeal operates as a stay of the sentence (but not a conviction in respect of the sentence) when—

S. 267(7)
inserted by
No. 68/2009
s. 24(2).

(a) if required, the appellant signs the undertaking referred to in subsection (6)(b); and

(b) if the appellant is in custody because of the sentence appealed against and bail is granted under section 265, the appellant enters bail.

(8) Subsection (7) is subject to section 29 of the **Road Safety Act 1986**.

S. 267(8)
inserted by
No. 68/2009
s. 24(2).

268 Respondent's failure to appear on appeal by DPP

(1) If a respondent to an appeal under section 257 or 260 by the DPP fails to appear at the time listed for the hearing of the appeal, the County Court or the Supreme Court, as the case requires—

S. 268(1)
amended by
Nos 68/2009
s. 24(3)(a),
3/2016 s. 73.

(a) may adjourn the proceeding on any terms that it considers appropriate; or

S. 268(1)(b)
amended by
No. 68/2009
s. 24(3)(b).

(b) if satisfied that notice of the appeal has been given in accordance with section 258 or 261, as the case may be, may hear and determine the appeal in the absence of the respondent.

Note to
s. 268(1)(b)
amended by
Nos 65/2011
s. 107(Sch.
item 4.5) (as
amended by
No. 43/2012
s. 3(Sch.
item 47.3)),
3/2016 s. 73.

Note

The County Court or the Supreme Court, as the case requires cannot impose a sentence that requires the consent of the respondent, for example a community correction order, in the absence of the respondent.

S. 268(2)
amended by
Nos 68/2009
s. 24(4),
3/2016 s. 73.

(2) If the County Court or the Supreme Court, as the case requires adjourns the proceeding and is satisfied that notice of the appeal has been given in accordance with section 258 or 261, as the case may be, the court may issue a warrant to arrest the respondent and to bring the respondent before the judge who issued the warrant or any other judge of the court.

269 One notice of appeal for 2 or more sentences

If 2 or more sentences are imposed in respect of charges that have been heard together, the appellant may give one notice of appeal for all or any of those sentences.

S. 270
amended by
No. 3/2016
s. 74.

270 Appeal against aggregate sentence

On sentencing a person where the sentence appealed against is an aggregate sentence of imprisonment imposed in accordance with section 9(1) of the **Sentencing Act 1991** or an aggregate fine imposed in accordance with section 51 of that Act, the County Court or the Supreme Court, as the case requires may rely on any agreed statement of facts (however derived) relevant to any charge contained in the original charge-sheet.

271 Appeal to County Court authorised by other Acts

- (1) If a person is authorised by or under any other Act to appeal from an order of the Magistrates' Court to the County Court, subject to that Act, the provisions of this Act with respect to appeals to the County Court apply.
- (2) In this section, if the appeal was from the Magistrates' Court constituted by the Chief Magistrate who is a dual commission holder, a reference to the County Court is to be construed as a reference to the Trial Division of the Supreme Court.

S. 271
amended by
No. 3/2016
s. 75 (ILA
s. 39B(1)).

S. 271(2)
inserted by
No. 3/2016
s. 75.

Notes

- 1 Section 283 gives a further right of appeal from the County Court to the Court of Appeal in certain circumstances.
- 2 Section 302A provides for the reservation of a question of law for determination by the Court of Appeal during the hearing of an appeal by the County Court.

Note to s. 271
substituted as
Notes to
s. 271 by
No. 48/2012
s. 17.

Part 6.2—Appeal from Magistrates' Court to Supreme Court on a question of law

272 Appeal to Supreme Court on a question of law

(1) A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to the Supreme Court on a question of law, from a final order of the Magistrates' Court in that proceeding.

S. 272(2)
amended by
No. 37/2014
s. 10(Sch.
item 41.5).

(2) If an informant who is a police officer wishes to appeal under subsection (1), the appeal may be brought only by the DPP on behalf of the informant.

(3) An appeal under subsection (1) is commenced by filing a notice of appeal in accordance with the rules of the Supreme Court within 28 days after the day on which the order complained of was made.

(4) A copy of the notice of appeal must be served on the respondent in accordance with subsection (5) within 7 days after the day on which the notice of appeal was filed.

S. 272(5)
amended by
No. 68/2009
s. 49(n).

(5) A copy of the notice of appeal must be served—

S. 272(5)(a)
amended by
No. 68/2009
s. 51(zr)(i).

(a) personally on a respondent who was the accused in accordance with section 391; or

S. 272(5)(b)
amended by
No. 68/2009
s. 51(zr)(ii).

(b) on a respondent who was the informant in accordance with section 392.

- (6) An appeal under subsection (1) does not operate as a stay of any order made by the Magistrates' Court unless the Supreme Court otherwise orders.
- (7) An appeal commenced after the end of the period referred to in subsection (3) is deemed to be an application for leave to appeal under subsection (1).
- (8) The Supreme Court may grant leave under subsection (7) and the appellant may proceed with the appeal if the Supreme Court—
 - (a) is of the opinion that the failure to commence the appeal within the period referred to in subsection (3) was due to exceptional circumstances; and
 - (b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.
- (9) After hearing and determining the appeal, the Supreme Court may make any order that it thinks appropriate, including an order remitting the case for rehearing to the Magistrates' Court with or without any direction in law.
- (10) An order made by the Supreme Court on an appeal under subsection (1), other than an order remitting the case for rehearing to the Magistrates' Court, may be enforced as an order of the Supreme Court.
- (11) The Supreme Court may provide for a stay of the order or for admitting any person to bail as it considers appropriate.

273 Appeal on question of law precludes appeal to County Court

If a person appeals under this Part to the Supreme Court on a question of law, that person abandons finally and conclusively any right under this or any other Act to appeal to the County Court in relation to that proceeding.

Part 6.3—Appeal and case stated from County Court or Trial Division of Supreme Court to Court of Appeal

Division 1—Appeal against conviction

274 Right of appeal against conviction

A person convicted of an offence by an originating court may appeal to the Court of Appeal against the conviction on any ground of appeal if the Court of Appeal gives the person leave to appeal.

Note

See the definitions of *conviction*, *originating court* and *original jurisdiction* in section 3.

275 How appeal is commenced

- (1) An application for leave to appeal under section 274 is commenced by filing a notice of application for leave to appeal in accordance with the rules of court within 28 days after the day on which the person is sentenced or any extension of that period granted under section 313.
- (2) The Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of application for leave to appeal within 7 days after the day on which the notice of application is filed.

276 Determination of appeal against conviction

- (1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—
 - (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

- (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
 - (c) for any other reason there has been a substantial miscarriage of justice.
- (2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

277 Orders etc. on successful appeal

- (1) If the Court of Appeal allows an appeal under section 274, it must set aside the conviction of the offence (*offence A*) and must—
- (a) order a new trial of offence A; or
 - (b) enter a judgment of acquittal of offence A; or
 - (c) if—
 - (i) the appellant could have been found guilty of some other offence (*offence B*) instead of offence A; and
 - (ii) the court is satisfied that the jury must have been satisfied of facts that prove the appellant was guilty of offence B—enter a judgment of conviction of offence B and impose a sentence for offence B that is no more severe than the sentence that was imposed for offence A; or
 - (d) if the appellant could have been found guilty of some other offence (*offence B*) instead of offence A and the court is not satisfied as required by paragraph (c)(ii), order a new trial for offence B;
 - (e) if the court is satisfied that the appellant should have been found not guilty of offence A because of mental impairment, enter a finding of not guilty because of mental impairment and make an order or

declaration under section 23 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**; or

- (f) if the appellant could have been found guilty of some other offence (*offence B*) instead of offence A and the court is satisfied—
- (i) that the jury must have been satisfied of facts that prove the appellant did the acts or made the omissions that constitute offence B; and
 - (ii) that the appellant should have been found not guilty of offence B because of mental impairment—

enter a finding of not guilty of offence B because of mental impairment and make an order or declaration under section 23 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**.

- (2) If the Court of Appeal orders a new trial, the court must order that the appellant attend on a specified date before the court in which the new trial will be conducted.

S. 277(2)
amended by
No. 68/2009
s. 25(1).

Note

Section 323 enables the Court of Appeal to remand the appellant in custody or grant bail pending a new trial.

Note to
s. 277(2)
inserted by
No. 68/2009
s. 25(2).

- (3) If the Court of Appeal sets aside the conviction of offence A, it may vary a sentence that—
- (a) was imposed for an offence other than offence A at or after the time when the appellant was sentenced for offence A; and
 - (b) took into account the sentence for offence A.

- (4) A power of the Court of Appeal under this section to impose a sentence in substitution for the sentence imposed by the originating court may still be exercised even if the sentence imposed by the originating court is an aggregate sentence of imprisonment.
- (5) If at the conclusion of an appeal the appellant remains convicted of more than one offence, the Court of Appeal may either—
 - (a) impose a separate sentence in respect of each offence; or
 - (b) impose an aggregate sentence of imprisonment in respect of all offences or any 2 or more offences.

Division 2—Appeal by offender against sentence

278 Right of appeal against sentence imposed by originating court

A person sentenced for an offence by an originating court may appeal to the Court of Appeal against the sentence imposed if the Court of Appeal gives the person leave to appeal.

Note

See the definitions of *originating court* and *original jurisdiction* in section 3.

279 How appeal is commenced

- (1) An application for leave to appeal under section 278 is commenced by filing a notice of application for leave to appeal in accordance with the rules of court within 28 days after the day on which the person is sentenced or any extension of that period granted under section 313.

- (2) The Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of application for leave to appeal within 7 days after the day on which the notice of application is filed.

280 Determination of application for leave to appeal under section 278

S. 280
amended by
No. 68/2009
s. 26,
substituted by
No. 48/2012
s. 5.

- (1) The Court of Appeal may refuse an application for leave to appeal under section 278 in relation to any ground of appeal if—
- (a) there is no reasonable prospect that the Court of Appeal would impose a less severe sentence than the sentence first imposed; or
- (b) there is no reasonable prospect that the Court of Appeal would reduce the total effective sentence despite there being an error in the sentence first imposed.

Note

Subsection (3) empowers the Court of Appeal to correct a sentence if an application is refused in the circumstances referred to in subsection (1)(b).

- (2) An application may be refused under subsection (1) even if the Court of Appeal considers that there may be a reasonably arguable ground of appeal.
- (3) On refusing an application by reason of subsection (1)(b), the Court of Appeal may, if it considers it appropriate to do so—
- (a) amend the sentence first imposed by substituting a less severe sentence; and

- (b) make any other order that the Court of Appeal considers ought to be made.

Note

If an application for leave to appeal is heard and refused by a single Judge of Appeal under section 315(1), section 315(2) entitles the applicant to have the application determined by the Court of Appeal.

281 Determination of appeal

- (1) On an appeal under section 278, the Court of Appeal must allow the appeal if the appellant satisfies the court that—
- (a) there is an error in the sentence first imposed; and
 - (b) a different sentence should be imposed.
- (2) In any other case, the Court of Appeal must dismiss an appeal under section 278.
- (3) If the Court of Appeal is considering imposing a more severe sentence than the sentence first imposed, the Court of Appeal must warn the appellant, as early as possible during the hearing of the appeal, that the appellant faces the possibility that a more severe sentence may be imposed than that first imposed.

282 Orders etc. on successful appeal

- (1) If the Court of Appeal allows an appeal under section 278, it must set aside the sentence imposed by the originating court and either—
- (a) impose the sentence, whether more or less severe, that it considers appropriate; or
 - (b) remit the matter to the originating court.
- (2) If the Court of Appeal imposes a sentence under subsection (1)(a), it may make any other order that it considers ought to be made.

- (3) If the Court of Appeal remits a matter to the originating court under subsection (1)(b)—
- (a) it may give directions concerning the manner and scope of the further hearing by the originating court, including a direction as to whether the hearing is to be conducted by the same judge or a different judge; and
 - (b) the originating court, whether constituted by the same judge or a different judge, must hear and determine the matter in accordance with the directions, if any.

283 Right of appeal against sentence of imprisonment imposed by County Court on appeal from Magistrates' Court

- (1) In this section—

imprisonment includes detention in a youth justice centre or youth residential centre but does not include imprisonment in default of payment of a fine.

- (2) A person sentenced to a term of imprisonment by the County Court or the Supreme Court, as the case requires under section 256, 259 or 262 may appeal to the Court of Appeal against the sentence if—
- (a) in the proceeding that is the subject of the appeal, the Magistrates' Court had not ordered that the person be imprisoned; and
 - (b) the Court of Appeal gives the person leave to appeal.

S. 283(2)
amended by
No. 3/2016
s. 76.

284 How appeal is commenced

- (1) An application for leave to appeal under section 283 is commenced by filing a notice of application for leave to appeal in accordance with the rules of court within 28 days after the day on which the person is sentenced by the court or any

S. 284(1)
amended by
No. 3/2016
s. 77.

extension of that period granted under
section 313.

- (2) The Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of application for leave to appeal within 7 days after the day on which the notice of application is filed.

S. 284A
inserted by
No. 68/2009
s. 27,
substituted by
No. 48/2012
s. 6.

**284A Determination of application for leave to appeal
under section 283**

- (1) The Court of Appeal may refuse an application for leave to appeal under section 283 in relation to any ground of appeal if—
- (a) there is no reasonable prospect that the Court of Appeal would impose a less severe sentence than the sentence imposed by the court; or
- (b) there is no reasonable prospect that the Court of Appeal would reduce the total effective sentence despite there being an error in the sentence imposed by the court.

S. 284A(1)(a)
amended by
No. 3/2016
s. 78.

S. 284A(1)(b)
amended by
No. 3/2016
s. 78.

Note

Subsection (3) empowers the Court of Appeal to correct a sentence if an application is refused in the circumstances referred to in subsection (1)(b).

- (2) An application may be refused under subsection (1) even if the Court of Appeal considers that there may be a reasonably arguable ground of appeal.
- (3) On refusing an application by reason of subsection (1)(b), the Court of Appeal may, if it considers it appropriate to do so—

S. 284A(3)(a)
amended by
No. 3/2016
s. 78.

- (a) amend the sentence imposed by the court by substituting a less severe sentence; and

- (b) make any other order that the Court of Appeal considers ought to be made.

Note

If an application for leave to appeal is heard and refused by a single Judge of Appeal under section 315(1), section 315(2) entitles the applicant to have the application determined by the Court of Appeal.

285 Determination of appeal

- (1) On an appeal under section 283, the Court of Appeal must allow the appeal if the appellant satisfies the court that—
- (a) there is an error in the sentence imposed; and
 - (b) a different sentence should be imposed.
- (2) In any other case, the Court of Appeal must dismiss an appeal under section 283.
- (3) If the Court of Appeal is considering imposing a more severe sentence than the sentence imposed by the County Court or the Trial Division of the Supreme Court, as the case requires, the Court of Appeal must warn the appellant, as early as possible during the hearing of the appeal, that the appellant faces the possibility that a more severe sentence may be imposed than that imposed by the County Court or the Trial Division of the Supreme Court.

S. 285(3)
amended by
No. 3/2016
s. 79.

286 Orders etc. on successful appeal

- (1) If the Court of Appeal allows an appeal under section 283, it must set aside the sentence imposed by the Court and either—
- (a) impose the sentence, whether more or less severe, that it considers appropriate; or
 - (b) remit the matter to the County Court or the Trial Division of the Supreme Court, as the case requires.

S. 286(1)
amended by
No. 3/2016
s. 80(a).

S. 286(1)(b)
amended by
No. 3/2016
s. 80(b).

S. 286(2)
amended by
No. 3/2016
s. 80(c).

(2) If the Court of Appeal remits a matter under subsection (1)(b)—

S. 286(2)(a)
amended by
No. 3/2016
s. 80(d).

(a) it may give directions concerning the manner and scope of the further hearing by the court, including a direction as to whether the hearing is to be conducted by the same judge or a different judge; and

S. 286(2)(b)
amended by
No. 3/2016
s. 80(e).

(b) the court, whether constituted by the same judge or a different judge, must hear and determine the matter in accordance with the directions, if any.

Division 3—Crown appeal against sentence

287 Right of appeal—inadequate sentence

The DPP may appeal to the Court of Appeal against a sentence imposed by an originating court if the DPP—

- (a) considers that there is an error in the sentence imposed and that a different sentence should be imposed; and
- (b) is satisfied that an appeal should be brought in the public interest.

288 How appeal is commenced

- (1) An appeal under section 287 is commenced by filing a notice of appeal in accordance with the rules of court within 28 days after the day on which the sentence is imposed or any extension of that period granted under section 313.
- (2) A notice of appeal under subsection (1) must be signed by the DPP personally.

(3) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 within 7 days after the day on which the notice of appeal is filed.

S. 288(3)
amended by
No. 68/2009
s. 51(zs).

(4) The DPP must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the criminal proceeding to which the appeal relates, if that legal practitioner can reasonably be identified.

289 Determination of Crown appeal

(1) On an appeal under section 287, the Court of Appeal must allow the appeal if the DPP satisfies the court that—

(a) there is an error in the sentence first imposed; and

(b) a different sentence should be imposed.

(2) In considering whether an appeal should be allowed, the Court of Appeal must not take into account any element of double jeopardy involved in the respondent being sentenced again, if the appeal is allowed.

S. 289(2)
amended by
No. 68/2009
s. 28.

(3) In any other case, the Court of Appeal must dismiss an appeal under section 287.

290 Orders etc. on successful appeal

(1) If the Court of Appeal allows an appeal under section 287, it must set aside the sentence imposed by the originating court and impose the sentence, whether more or less severe, that it considers appropriate.

(2) If the Court of Appeal imposes a sentence under subsection (1), it may make any other order that it considers ought to be made.

- (3) In imposing a sentence under subsection (1), the Court of Appeal must not take into account the element of double jeopardy involved in the respondent being sentenced again, in order to impose a less severe sentence than the court would otherwise consider appropriate.

291 Right of appeal—failure to fulfil undertaking

Without limiting any right of appeal under section 287, the DPP may appeal to the Court of Appeal against a sentence imposed on a person by an originating court if—

- (a) the sentence was less severe because of an undertaking given by the person to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence, whether or not proceedings for that offence had commenced at the time of sentencing; and
- (b) the DPP considers that the person has failed, wholly or partly, to fulfil the undertaking.

292 How appeal is commenced

- (1) An appeal under section 291 is commenced by filing a notice of appeal in accordance with the rules of court.
- (2) A notice of appeal under subsection (1) must be signed by the DPP personally.
- (3) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 within 14 days after the day on which the notice of appeal is filed.
- (4) The DPP must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the criminal proceeding to which the appeal relates, if that legal practitioner can reasonably be identified.

S. 292(3)
amended by
No. 68/2009
s. 51(zt).

293 Determination of Crown appeal—failure to fulfil undertaking

On an appeal under section 291, if the Court of Appeal considers that the respondent has failed, wholly or partly, to fulfil the undertaking referred to in section 291(a), the Court of Appeal may allow the appeal.

294 Powers of Court of Appeal on successful appeal

- (1) If the Court of Appeal allows an appeal under section 291, it may—
 - (a) set aside the sentence imposed by the originating court; and
 - (b) impose the sentence that it considers appropriate, having regard to the failure of the respondent to fulfil the undertaking.
- (2) In imposing a sentence under subsection (1), the Court of Appeal must not take into account the element of double jeopardy involved in the respondent being sentenced again, in order to impose a less severe sentence than the court would otherwise consider appropriate.

* * * * *

S. 294(3)
repealed by
No. 68/2009
s. 29(1).

Note

Section 321 provides for the effect on sentence of new evidence.

Note to s. 294
inserted by
No. 68/2009
s. 29(2).

Division 4—Interlocutory appeal

295 Right of appeal against interlocutory decision

- (1) This section applies to a proceeding in the County Court or the Trial Division of the Supreme Court for the prosecution of an indictable offence.
- (2) Subject to this section, a party to a proceeding referred to in subsection (1) may appeal to the Court of Appeal against an interlocutory decision made in the proceeding if the Court of Appeal gives the party leave to appeal.

Note

See the definition of *interlocutory decision* in section 3.

- (3) A party may not seek leave to appeal unless the judge who made the interlocutory decision certifies—
 - (a) if the interlocutory decision concerns the admissibility of evidence, that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case; and
 - (b) if the interlocutory decision does not concern the admissibility of evidence, that the interlocutory decision is otherwise of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and
 - (c) if the interlocutory decision is made after the trial commences, either—
 - (i) that the issue that is the subject of the proposed appeal was not reasonably able to be identified before the trial; or
 - (ii) that the party was not at fault in failing to identify the issue that is the subject of the proposed appeal.

- (4) A request for certification under subsection (3) must be determined as soon as practicable after the request is made.

296 Review of refusal to certify

- (1) If a judge refuses to certify under section 295(3), the party which requested certification may apply to the Court of Appeal, in accordance with the rules of court, for review of the decision.
- (2) An application for review under subsection (1) is commenced by filing a notice of application for review in accordance with the rules of court—
- (a) subject to paragraph (b), if the trial has not commenced when the judge refuses to certify, within 10 days after the day on which the judge refuses to certify or any extension of that period granted under section 313; or
 - (b) if the trial commences within 10 days after the day on which the judge refuses to certify, within 2 days after the day on which the trial commences or any extension of that period granted under section 313; or
 - (c) if the trial has commenced when the judge refuses to certify, within 2 days after the day on which the judge refuses to certify or any extension of that period granted under section 313.
- (3) A copy of the notice of application for review must be served on the respondent in accordance with section 392 or 394, as the case requires, within the relevant period specified in subsection (2) for filing the notice.
- (4) On a review under subsection (1), the Court of Appeal—
- (a) must consider the matters referred to in section 295(3); and

S. 296(3)
substituted by
No. 68/2009
s. 30(1).

- (b) if satisfied as required by section 297, may give the applicant leave to appeal against the interlocutory decision.

297 When leave to appeal may be given

- (1) Subject to subsection (2), the Court of Appeal may give leave to appeal against an interlocutory decision only if the court is satisfied that it is in the interests of justice to do so, having regard to—
- (a) the extent of any disruption or delay to the trial process that may arise if leave is given; and
 - (b) whether the determination of the appeal against the interlocutory decision may—
 - (i) render the trial unnecessary; or
 - (ii) substantially reduce the time required for the trial; or
 - (iii) resolve an issue of law, evidence or procedure that is necessary for the proper conduct of the trial; or
 - (iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial; and
 - (c) any other matter that the court considers relevant.
- (2) The Court of Appeal must not give leave to appeal after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial.
- (3) If the Court of Appeal refuses leave to appeal under this section, the refusal does not preclude any other appeal on the issue that was the subject of the proposed appeal.

298 How interlocutory appeal is commenced

- (1) An interlocutory appeal under section 295 is commenced by filing a notice of application for leave to appeal in accordance with the rules of court—
 - (a) subject to paragraph (b), if the trial has not commenced when the interlocutory decision is made, within 10 days after the day on which the interlocutory decision is made or any extension of that period granted under section 313; or
 - (b) if the trial commences within 10 days after the day on which the interlocutory decision is made, within 2 days after the day on which the trial commences or any extension of that period granted under section 313; or
 - (c) if the trial has commenced when the interlocutory decision is made, within 2 days after the day on which the interlocutory decision is made or any extension of that period granted under section 313.
- (2) A copy of the notice of application for leave to appeal must be served on the respondent in accordance with section 392 or 394, as the case requires, within the relevant period specified in subsection (1) for filing the notice.

S. 298(2)
substituted by
No. 68/2009
s. 30(2).

299 Adjournment of trial if leave to appeal given

If the Court of Appeal gives leave to appeal against an interlocutory decision after the trial has commenced, the trial judge must adjourn the trial without discharging the jury, if reasonably practicable, until the appeal has been determined.

300 Determination of appeal

- (1) An appeal against an interlocutory decision is to be determined on the evidence, if any, given in the proceeding to which the appeal relates, unless the Court of Appeal gives leave to adduce additional evidence.
- (2) On an appeal under section 295, the Court of Appeal—
 - (a) may affirm or set aside the interlocutory decision; and
 - (b) if it sets aside the interlocutory decision—
 - (i) may make any other decision that the Court of Appeal considers ought to have been made; or
 - (ii) remit the matter to the court which made the interlocutory decision for determination.
- (3) If the Court of Appeal remits a matter under subsection (2)(b)(ii)—
 - (a) it may give directions concerning the basis on which the matter is to be determined; and
 - (b) the court to which the matter is remitted must hear and determine the matter in accordance with the directions, if any.

301 Determination of interlocutory appeal to be entered on record

The Registrar of Criminal Appeals of the Supreme Court must transmit the decision of the Court of Appeal to the court which made the interlocutory decision and that court must enter the decision on the court record.

Division 5—Case stated for Court of Appeal

302 Reservation of question of law

- (1) This section applies to a proceeding in the County Court or the Trial Division of the Supreme Court for the prosecution of an indictable offence.
- (2) In a proceeding referred to in subsection (1), if a question of law arises before or during the trial, the court may reserve the question for determination by the Court of Appeal if the court is satisfied that it is in the interests of justice to do so, having regard to—
 - (a) the extent of any disruption or delay to the trial process that may arise if the question of law is reserved; and
 - (b) whether the determination of the question of law may—
 - (i) render the trial unnecessary; or
 - (ii) substantially reduce the time required for the trial; or
 - (iii) resolve a novel question of law that is necessary for the proper conduct of the trial; or
 - (iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.
- (3) The court must not reserve a question of law after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial.

Note

Section 33 of the **Charter of Human Rights and Responsibilities Act 2006** also provides for the referral to the Supreme Court of questions of law that relate to the application of the Charter or the interpretation of a statutory provision in accordance with the Charter.

S. 302A
inserted by
No. 48/2012
s. 18,
amended by
No. 3/2016
s. 81.

302A Reservation of question of law on appeal to County Court

If on the hearing of an appeal under Part 6.1 to the County Court from the Magistrates' Court or, if Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, to the Trial Division of the Supreme Court a question of law arises, the County Court or the Trial Division of the Supreme Court, as the case requires, may reserve the question for determination by the Court of Appeal if the court is satisfied that it is in the interests of justice to do so, having regard to—

- (a) the extent of any disruption or delay to the hearing that may arise if the question of law is reserved; and
- (b) whether the determination of the question of law may—
 - (i) render the hearing unnecessary; or
 - (ii) substantially reduce the time required for the hearing; or
 - (iii) resolve a novel question of law that is necessary for the proper conduct of the hearing.

S. 303
amended by
No. 48/2012
s. 19 (LA
s. 39B(1)).

303 Adjournment if question of law reserved

- (1) If a court reserves a question of law under section 302 after the trial has commenced, the court must adjourn the trial without discharging the jury, if reasonably practicable, until the question of law has been determined.
- (2) If a court reserves a question of law under section 302A, the court must adjourn the hearing, if reasonably practicable, until the question of law has been determined.

S. 303(2)
inserted by
No. 48/2012
s. 19.

304 Refusal to reserve question of law

- (1) If the Supreme Court or the County Court refuses an application under section 302 or 302A to reserve a question of law, the applicant may apply to the Court of Appeal for an order calling on—

(a) the court which dismissed the application;
and

(b) the respondent—

to show cause why the question of law should not be reserved for determination by the Court of Appeal.

- (2) On an application under subsection (1), the Court of Appeal may order that the question of law be reserved for its determination or refuse the application with or without costs.

- (3) If the Court of Appeal orders that the question of law be reserved, the court to which the order is directed must reserve the question for determination by the Court of Appeal.

S. 304(1)
amended by
No. 48/2012
s. 20(1).

305 Case to be stated if question of law reserved

- (1) If a court reserves a question of law under section 302, 302A or 304, it must state a case, setting out the question and the circumstances in which the question has arisen.

- (2) The court must sign the case stated and transmit it within a reasonable time to the Court of Appeal.

- (3) The Court of Appeal may return a case stated transmitted to it under subsection (2) for amendment and the court that stated the case must amend it as required.

S. 305(1)
amended by
No. 48/2012
s. 20(2).

306 General powers of Court of Appeal on case stated

- (1) The Court of Appeal may hear and finally determine a question of law set out in a case stated.

S. 306(2)
amended by
No. 48/2012
s. 20(2).

- (2) In the case of a question of law reserved under section 302, 302A or 304, the Court of Appeal may remit the question and the determination of the Court of Appeal back to the court which reserved the question.
- (3) The applicant is not required to attend the hearing under subsection (1).

307 Judgment to be entered on record

The Registrar of Criminal Appeals of the Supreme Court must transmit the judgment and order (if any) of the Court of Appeal to the court that reserved the question of law and that court must enter the judgment and order (if any) on the court record.

308 DPP may refer point of law to Court of Appeal

- (1) If a person is acquitted in respect of all or any charges—
 - (a) in a trial on indictment before the Supreme Court or the County Court; or
 - (b) on an appeal to the County Court from the Magistrates' Court or, if Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, to the Trial Division of the Supreme Court—

the DPP may refer to the Court of Appeal any point of law that has arisen in the proceeding.

- (2) The Court of Appeal is to consider a point of law referred to it under subsection (1) and give its opinion on it.
- (3) An acquitted person who appears in court in person or by a legal practitioner is entitled to reasonable costs as settled by the Costs Court.

S. 308(1)(b)
amended by
No. 3/2016
s. 82.

S. 308(3)
amended by
No. 68/2009
s. 31.

- (4) A reference under this section does not affect the trial or hearing in relation to which the reference is made or an acquittal in that trial or hearing.

S. 308(4)
amended by
No. 48/2012
s. 20(3).

Division 6—Status of sentences and orders during appeal period

309 Sentence not stayed during appeal period

- (1) A sentence is not stayed during the appeal period unless—
- (a) this Act or any other Act otherwise provides; or
 - (b) an order is made under subsection (2).
- (2) The trial judge or, if a notice of appeal or notice of application for leave to appeal is filed, the Court of Appeal may stay a sentence if satisfied that it is in the interests of justice to do so.

Note

See the definition of *sentence* in section 3.

310 Bail pending appeal

- (1) A prisoner within the meaning of the **Corrections Act 1986** who appeals, or applies for leave to appeal, to the Court of Appeal may apply to the Court of Appeal to be granted bail.
- (2) On an application under subsection (1), the Court of Appeal may grant the prisoner bail pending the appeal.

Note

See section 323 for bail following appeal.

311 Stay of certain orders during appeal period

- (1) This section applies to an order under section 84, 85B or 86 of the **Sentencing Act 1991** made by the Supreme Court or the County Court.

Note

See section 83G(1) of the **Sentencing Act 1991** in relation to superannuation orders.

- (2) Unless the Supreme Court or the County Court otherwise directs, an order referred to in subsection (1) is stayed during the appeal period.
- (3) If an order is stayed under subsection (2) and the conviction is set aside on appeal, the order does not take effect unless the Court of Appeal otherwise orders.
- (4) The Court of Appeal may set aside or vary an order made by the Supreme Court or the County Court under subsection (2).
- (5) Rules of court may provide for securing the safe custody during the appeal period of any property the subject of an order referred to in subsection (1).

S. 311(3)
amended by
No. 68/2009
s. 32.

312 Execution of order for forfeiture or destruction of property

- (1) If a court orders the forfeiture or destruction of any property in relation to an offence, the property must not be forfeited or destroyed during the appeal period unless earlier forfeiture or destruction is permitted by any other law.
- (2) This section does not apply to orders made under the **Confiscation Act 1997**.
- (3) Rules of court may provide for securing the safe custody during the appeal period of any property the subject of an order referred to in subsection (1).

Division 7—Powers and procedure

313 Extension of time for filing or serving notice of appeal or notice of application for leave to appeal

(1) The Court of Appeal or, in accordance with the rules of court, the Registrar of Criminal Appeals of the Supreme Court at any time may extend the time within which—

S. 313(1)
amended by
Nos. 34/2010
s. 47, 81/2011
s. 22(1).

(a) a notice of appeal or notice of application for leave to appeal may be filed under this Part;
or

S. 313(1)(a)
amended by
No. 68/2009
s. 33.

(b) a notice referred to in paragraph (a) may be served.

(2) If the Registrar of Criminal Appeals of the Supreme Court refuses an application to extend time under subsection (1), the applicant is entitled to have the Court of Appeal determine the application.

314 Abandonment of appeal

An appeal to the Court of Appeal may be abandoned in accordance with the rules of court.

315 Powers which may be exercised by Court of Appeal constituted by a single Judge of Appeal

S. 315
(Heading)
amended by
No. 48/2012
s. 7(1).

(1) The Court of Appeal constituted by a single Judge of Appeal may exercise the following powers—

S. 315(1)
amended by
No. 48/2012
s. 7(2).

(a) to give leave to appeal;

(b) to review a refusal to certify;

(c) to extend the time within which notice of appeal may be filed and served;

S. 315(1)(c)
amended by
No. 68/2009
s. 34(1)(a).

Criminal Procedure Act 2009

No. 7 of 2009

Part 6.3—Appeal and case stated from County Court or Trial Division of
Supreme Court to Court of Appeal

- S. 315(1)(d)**
amended by
No. 68/2009
s. 34(1)(a).
- (d) to extend the time within which notice of application for leave to appeal may be filed and served;
- (e) to grant the appellant bail;
- S. 315(1)(f)**
amended by
No. 68/2009
s. 34(1)(b).
- (f) to order stays of sentence;
- S. 315(1)(g)**
inserted by
No. 68/2009
s. 34(1)(c).
- (g) to call on a court and a respondent to show cause why a question of law should not be reserved for determination by the Court of Appeal.
- S. 315(2)**
amended by
Nos 68/2009
s. 34(2),
48/2012
s. 7(3).
- (2) If the Court of Appeal constituted by a single Judge of Appeal refuses an application to exercise a power referred to in subsection (1) in relation to any ground of appeal, the applicant is entitled to have the application determined by the Court of Appeal constituted by 2 or more Judges of Appeal.
- S. 315(3)**
inserted by
No. 48/2012
s. 7(4).
- (3) An order under section 280(3) or 284A(3) made by the Court of Appeal constituted by a single Judge of Appeal is stayed on the filing of an application to have the application for leave to appeal determined by the Court of Appeal constituted by 2 or more Judges of Appeal.
- S. 315(4)**
inserted by
No. 48/2012
s. 7(4).
- (4) An order stayed under subsection (3)—
- (a) takes effect on the refusal of the application for leave to appeal by the Court of Appeal constituted by 2 or more Judges of Appeal;
- (b) is of no effect if the application for leave to appeal is granted by the Court of Appeal constituted by 2 or more Judges of Appeal.

316 Trial judge may be required to provide report on appeal

- (1) For the purposes of this Part, the Registrar of Criminal Appeals of the Supreme Court may require a trial judge to provide to the Registrar a report on a case tried by the judge, giving the opinion of the trial judge on the case or on any point arising in the case.
- (2) A trial judge must comply with a requirement under subsection (1) in accordance with the rules of court.

317 Production of documents, exhibits or other things

For the purposes of this Part, the Court of Appeal may order the production of any document, exhibit or other thing connected with the proceeding if the Court of Appeal considers that it is in the interests of justice to do so.

318 Order for examination of compellable witness

- (1) For the purposes of this Part, if the Court of Appeal considers that it is in the interests of justice to do so, the Court of Appeal may order any witness who would have been a compellable witness at the trial to attend and be examined before the court, whether or not the witness was called at the trial.
- (2) If the Court of Appeal makes an order under subsection (1), it may order that the examination of the witness be conducted, in accordance with the rules of court, before any person appointed by the Court of Appeal for that purpose.
- (3) The Court of Appeal may admit as evidence any deposition of a witness taken in an examination under subsection (2).

319 Evidence of competent but not compellable witness

For the purposes of this Part, if the Court of Appeal considers that it is in the interests of justice to do so, the Court of Appeal may receive the evidence of any witness (including the appellant) who is a competent but not compellable witness.

Note

As to competence and compellability of witnesses, see Division 1 of Part 2.1 of Chapter 2 of the **Evidence Act 2008**.

320 Reference of question to special commissioner

- (1) The Court of Appeal may appoint a special commissioner to inquire into and report on any question referred to the special commissioner by the court if—
 - (a) the question arises on an appeal under this Part or an application for leave to appeal under this Part; and
 - (b) the question involves—
 - (i) prolonged examination of documents or accounts; or
 - (ii) any scientific or local investigation; and
 - (c) the court considers that the examination or investigation cannot conveniently be conducted before the court; and
 - (d) the court considers that it is in the interests of justice to do so.
- (2) The Court of Appeal may act on the report of a special commissioner to the extent that the court considers appropriate to adopt the report.
- (3) The Court of Appeal may determine the remuneration of a special commissioner.

321 New evidence—effect on sentence

- (1) Subject to subsections (2) and (3), on an appeal under this Part, including an appeal by the DPP, the Court of Appeal must not increase a sentence by reason of any evidence that was not given at the trial or sentencing hearing.
- (2) On an appeal under section 291, the Court of Appeal may increase a sentence by reason of evidence of the failure to fulfil an undertaking referred to in section 291(a).
- (3) On an appeal under this Part, including an appeal by the DPP, the Court of Appeal may increase a sentence, by reason of any evidence that was not given at the trial or sentencing hearing, if the court considers that—
 - (a) the originating court was misled at the sentencing hearing as to a material fact; and
 - (b) an increase in sentence is necessary in the interests of justice.

322 Sentence in absence of offender

- (1) The Court of Appeal may impose a sentence on a person under this Part even though the person does not attend the hearing of an appeal or an application to the Court of Appeal.

Note

The Court of Appeal cannot impose a sentence that requires the consent of the person, for example a community correction order, in the absence of the person.

- (2) For the purposes of this section, the making of an order under section 280(3) or 284A(3) is an imposition of a sentence.

S. 322
amended by
No. 48/2012
s. 8 (ILA
s. 39B(1)).

Note to s. 322
amended by
No. 65/2011
s. 107(Sch.
item 4.6).

S. 322(2)
inserted by
No. 48/2012
s. 8.

323 Bail following appeal

If on an appeal the Court of Appeal orders a new trial or remits a matter to the Trial Division of the Supreme Court or to the County Court, the Court of Appeal may remand the appellant in custody or grant the appellant bail pending the commencement of the new trial or the remitted matter.

Note to s. 323
inserted by
No. 68/2009
s. 35.

Note

Section 277(2) requires the Court of Appeal to order that the appellant appear on a specified date for the new trial.

324 Warrants

For the purposes of this Part, the Court of Appeal may issue any warrant necessary for enforcing the orders of the court.

325 Ancillary orders of originating court

(1) In this section—

ancillary order means an order (other than the order that is the subject of the appeal) made by the originating court in the proceeding.

(2) On an appeal under this Part, the Court of Appeal may set aside or vary an ancillary order, if the court is satisfied that it is in the interests of justice to do so.

Example

On an appeal against conviction from the County Court, the Court of Appeal may set aside or vary an order made by the County Court for the suppression of a name.

326 Expenses of assessors and special commissioners

Subject to any prescribed rates and scales of payment, the Attorney-General must pay out of money provided by Parliament all expenses of and incidental to—

Criminal Procedure Act 2009

No. 7 of 2009

Part 6.3—Appeal and case stated from County Court or Trial Division of
Supreme Court to Court of Appeal

- (a) the appointment of an assessor by the Court of Appeal under section 77 of the **Supreme Court Act 1986** in an appeal under this Part;
- (b) a reference of a question to a special commissioner under section 320.

Note

Chapter 8 contains general provisions that apply to all criminal proceedings.

Chapter 7—Reference to Court of Appeal on petition for mercy

327 Reference by Attorney-General

- (1) If a person convicted on indictment or found unfit to stand trial or found not guilty because of mental impairment petitions for the exercise of Her Majesty's mercy in relation to the conviction or finding, or the sentence imposed on the person, the Attorney-General—
 - (a) may refer the whole case to the Court of Appeal; or
 - (b) may refer any point arising in the case to the judges of the Trial Division of the Supreme Court for their opinion.
- (2) If the Attorney-General refers the whole case to the Court of Appeal, the Court of Appeal must hear and determine the case as if it were an appeal by the person.
- (3) If the Attorney-General refers a question to the judges of the Trial Division of the Supreme Court, those judges or any 3 of them must consider the point and provide the Attorney-General with their opinion.
- (4) Nothing in this Chapter affects the prerogative of mercy.

**Note to s. 327
substituted by
No. 68/2009
s. 36.**

Notes

- 1 Chapter 8 contains general provisions that apply to all criminal proceedings.
- 2 Clause 11 of Schedule 4 contains transitional provisions.

Chapter 7A—Limitations on rules relating to double jeopardy

Ch. 7A
(Heading and
ss 327A–
327S)
inserted by
No. 81/2011
s. 17.

327A Application of Chapter

- (1) This Chapter extends to an acquittal in a place outside Victoria if the law of that place permits the acquitted person to be retried.
- (2) Subject to subsection (3), this Chapter does not apply if a person is acquitted of the offence charged but is convicted of a lesser offence arising out of the same set of circumstances that gave rise to the charge.
- (3) This Chapter applies in the circumstances set out in subsection (2) if the acquittal was tainted.

S. 327A
inserted by
No. 81/2011
s. 17.

327B Definitions

In this Chapter—

acquittal includes—

- (a) a verdict of not guilty (other than a verdict of not guilty because of mental impairment); and
- (b) an entry of not guilty made on the record on the direction of the trial judge; and
- (c) a judgment of acquittal entered by the Court of Appeal on an appeal;

administration of justice offence means—

- (a) perjury or subornation of perjury; or
- (b) perverting, or attempting to pervert, the course of justice or conspiracy to pervert the course of justice; or

S. 327B
inserted by
No. 81/2011
s. 17.

- (c) bribery of a public official, being a judge of the County Court or the Supreme Court; or
- (d) a substantially similar offence against the law of a place outside Victoria corresponding to an offence referred to in paragraph (a), (b) or (c).

S. 327C
inserted by
No. 81/2011
s. 17.

327C Meaning of fresh and compelling evidence

- (1) For the purposes of this Chapter, evidence relating to an offence of which a person is acquitted is—
 - (a) *fresh* if—
 - (i) it was not adduced at the trial of the offence; and
 - (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and
 - (b) *compelling* if—
 - (i) it is reliable; and
 - (ii) it is substantial; and
 - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.
- (2) Evidence that would be admissible on a new trial under this Chapter is not precluded from being fresh or compelling only because it would not have been admissible in the earlier trial of the offence that resulted in the acquittal.

S. 327D
inserted by
No. 81/2011
s. 17.

327D Meaning of tainted acquittal

For the purposes of this Chapter, if at the trial of an offence a person is acquitted of the offence, the acquittal will be *tainted* if—

- (a) the person or another person has been convicted (whether or not in Victoria) of an administration of justice offence in connection with the trial resulting in the acquittal; and
- (b) it is more likely than not that, had it not been for the commission of the administration of justice offence, the person would have been convicted of the first mentioned offence at the trial.

327E Circumstances in which police may reinvestigate offence after acquittal

S. 327E
inserted by
No. 81/2011
s. 17.

- (1) In this section—

an offence of which a person has previously been acquitted includes—

- (a) any other offence charged against the person in the same indictment as the charge for the offence of which the person was acquitted; and
- (b) any other offence of which the person could have been convicted at the trial of the offence of which the person was acquitted;

reinvestigation, in relation to an offence of which a person has previously been acquitted, means—

- (a) the questioning and search of the person; or
- (b) the conduct of a forensic procedure on the person and the taking of the person's fingerprints in accordance with the **Crimes Act 1958**; or

- (c) the search of property or premises owned or occupied by the person and the seizure of any thing found in or on the property or premises, including any vehicle; or
- (d) the use of surveillance devices in accordance with the **Surveillance Devices Act 1999**; or
- (e) the doing of anything authorised by a warrant issued under Part 2-5 of the Telecommunications (Interception and Access) Act 1979 of the Commonwealth;

S. 327E(1) def.
of *senior member*
substituted as
senior police officer
No. 37/2014
s. 10(Sch.
item 41.6(a)).

senior police officer means a police officer of or above the rank of superintendent.

S. 327E(2)
amended by
No. 37/2014
s. 10(Sch.
item 41.6(b)).

- (2) Subject to subsections (5), (6) and (7), a police officer must not conduct, or authorise the conduct of, a reinvestigation of an offence of which a person has previously been acquitted unless the DPP has given written authorisation.
- (3) Only the Chief Commissioner of Police, a Deputy Commissioner or an Assistant Commissioner may apply to the DPP for an authorisation under subsection (2).
- (4) The DPP must not authorise a reinvestigation referred to in subsection (2) unless—
 - (a) the DPP is satisfied that—
 - (i) there is, or as a result of the reinvestigation there is likely to be, sufficient new evidence of the commission of the offence by a person

to warrant the conduct of the
reinvestigation; and

- (ii) it is in the public interest for the
reinvestigation to proceed; and
 - (b) in the DPP's opinion, the previous acquittal
would not be a bar to the trial of the person
for an offence that may be charged as a result
of the reinvestigation.
- (5) A police officer may apply to a senior police
officer for written authorisation to conduct, or
authorise the conduct of, a reinvestigation referred
to in subsection (2) if the applicant reasonably
believes that—
- (a) urgent action is required to prevent the
reinvestigation being substantially and
irrevocably prejudiced; and
 - (b) it is not reasonably practicable in the
circumstances to obtain the DPP's
authorisation before taking the action.
- (6) On an application under subsection (5), a senior
police officer may give written authorisation for a
reinvestigation referred to in subsection (2) if the
senior police officer reasonably believes that—
- (a) urgent action is required to prevent the
reinvestigation being substantially and
irrevocably prejudiced; and
 - (b) it is not reasonably practicable in the
circumstances to obtain the DPP's
authorisation before taking the action.
- (7) A police officer may conduct, or authorise the
conduct of, a reinvestigation referred to in
subsection (2) without the written authorisation of
the DPP or a senior police officer if the police
officer reasonably believes that—

**S. 327E(5)
amended by
No. 37/2014
s. 10(Sch.
item 41.6(c)).**

**S. 327E(6)
amended by
No. 37/2014
s. 10(Sch.
item 41.6(d)).**

**S. 327E(7)
amended by
No. 37/2014
s. 10(Sch.
item 41.6(e)).**

S. 327E(7)(b)
amended by
No. 37/2014
s. 10(Sch.
item
41.6(e)(ii)).

- (a) urgent action is required to prevent the reinvestigation being substantially and irrevocably prejudiced; and
 - (b) it is not reasonably practicable in the circumstances to obtain the authorisation of the DPP or a senior police officer before taking the action.
- (8) The DPP must be informed as soon as practicable of—
- (a) an authorisation given under subsection (6) and the action, if any, taken under the authorisation; or
 - (b) any action taken under subsection (7)—
- and the reinvestigation must not proceed further without the DPP's written authorisation.
- (9) The DPP may, by instrument, delegate any function or power of the DPP under this section (other than this power of delegation) to the Chief Crown Prosecutor or a Senior Crown Prosecutor appointed under the **Public Prosecutions Act 1994**.

S. 327F
inserted by
No. 81/2011
s. 17.

327F DPP may file indictment

- (1) The DPP may file a direct indictment (in accordance with Chapter 5) charging an offence the prosecution of which may only proceed if the Court of Appeal gives authorisation under section 327O.
- (2) Any circumstances referred to in section 327M(2)—
 - (a) need not be specified in a charge for an offence referred to in that subsection; and
 - (b) are not elements of the offence.

327G Bail following filing of direct indictment

If an accused is in custody following the filing of a direct indictment under this Chapter, it is to be presumed that the accused is to be released on bail, regardless of the offence charged, pending determination of the DPP's application under section 327H or discontinuance of the prosecution under section 327K.

S. 327G
inserted by
No. 81/2011
s. 17.

Note

Sections 331(2) and 411(4) provide further for bail.

327H DPP may apply to Court of Appeal

- (1) The DPP may apply to the Court of Appeal for an order—
 - (a) setting aside the previous acquittal of the accused or removing the previous acquittal as a bar to the accused being tried on the direct indictment (as the case requires); and
 - (b) authorising the continuation of the prosecution of the charge in the indictment.
- (2) An application must specify whether it is based on—
 - (a) a tainted acquittal; or
 - (b) fresh and compelling evidence; or
 - (c) an administration of justice offence.
- (3) An application based on fresh and compelling evidence cannot be made in relation to an acquittal resulting from a new trial authorised under this Chapter.
- (4) An application under subsection (1) is commenced by filing a notice of application in accordance with the rules of court within 28 days after the day on which a direct indictment is filed under section 327F.

S. 327H
inserted by
No. 81/2011
s. 17.

- (5) A notice of application under subsection (4) must be signed by the DPP personally.
- (6) A copy of the notice of application must be served personally on the accused in accordance with section 391 within 7 days after the day on which the notice of application is filed.
- (7) The DPP must provide a copy of the notice of application to the legal practitioner who last represented the accused in the criminal proceeding which resulted in the previous acquittal, if that legal practitioner can reasonably be identified.
- (8) An accused is entitled to appear at the hearing of an application under this section and may be represented by a legal practitioner.

S. 327I
inserted by
No. 81/2011
s. 17.

327I Extension of time for filing or serving notice of application

- (1) The Court of Appeal or, in accordance with the rules of court, the Registrar of Criminal Appeals of the Supreme Court at any time may extend the time within which—
 - (a) a notice of application under section 327H may be filed; or
 - (b) a notice referred to in paragraph (a) may be served—

if the court or Registrar considers that it is in the interests of justice to do so.

S. 327I(2)
amended by
No. 48/2012
s. 9(1).

- (2) The power of the Court of Appeal to extend time under this section may be exercised by the Court of Appeal constituted by a single Judge of Appeal.

S. 327I(3)
amended by
No. 48/2012
s. 9(2).

- (3) If the Court of Appeal constituted by a single Judge of Appeal or the Registrar of Criminal Appeals of the Supreme Court refuses an application to extend time under subsection (1), the DPP is entitled to have the Court of Appeal

constituted by 2 or more Judges of Appeal determine the application.

327J DPP may apply only once in relation to particular acquittal

S. 327J
inserted by
No. 81/2011
s. 17.

The DPP may make an application to the Court of Appeal under section 327H only once in relation to a particular acquittal.

327K DPP must discontinue prosecution if fails to make application

S. 327K
inserted by
No. 81/2011
s. 17.

If the DPP fails to make an application under section 327H within 28 days after filing a direct indictment under section 327F, or any extension of that period granted under section 327I, the DPP must discontinue the prosecution (in accordance with Part 5.4) within 14 days after the expiry of the 28 days or the extension (as the case requires).

327L Determination of application where acquittal tainted

S. 327L
inserted by
No. 81/2011
s. 17.

On an application under section 327H, the Court of Appeal may make any order referred to in section 327O in relation to a person who has been acquitted of an offence if the court is satisfied that—

- (a) at the time the offence is alleged to have been committed, the offence was punishable by level 4 imprisonment (15 years maximum) or more (however the penalty is described); and
- (b) the acquittal was tainted; and
- (c) it is likely that a new trial for that offence would be fair, having regard to—
 - (i) the length of time since the offence is alleged to have been committed; and

- (ii) whether there has been a failure on the part of the police or the prosecution to act with reasonable diligence or expedition with respect to the making of the application; and
- (iii) any other matter that the court considers relevant.

S. 327M
inserted by
No. 81/2011
s. 17.

327M Determination of application where fresh and compelling evidence

- (1) On an application under section 327H, the Court of Appeal may make any order referred to in section 327O in relation to a person who has been acquitted of an offence if the court is satisfied that—
 - (a) the offence is referred to in subsection (2); and
 - (b) any circumstances referred to in subsection (2) in respect of the offence were present in the commission of the offence; and
 - (c) there is fresh and compelling evidence against the person in relation to the offence; and
 - (d) it is likely that a new trial for that offence would be fair, having regard to—
 - (i) the length of time since the offence is alleged to have been committed; and
 - (ii) whether there has been a failure on the part of the police or the prosecution to act with reasonable diligence or expedition with respect to the making of the application; and
 - (iii) any other matter that the court considers relevant.

- (2) Subsection (1) applies to the following offences—
- (a) murder;
 - (b) murder contrary to section 3A of the **Crimes Act 1958** (unintentional killing in the course or furtherance of a crime of violence);
 - (c) conspiracy to commit murder (section 321 of the **Crimes Act 1958**);
 - (d) incitement to commit murder (section 321G of the **Crimes Act 1958**);
 - (e) attempting to commit murder (section 321M of the **Crimes Act 1958**);
 - (f) manslaughter;
 - (g) child homicide (section 5A of the **Crimes Act 1958**);
 - (h) arson causing death (section 197A of the **Crimes Act 1958**);
 - (i) trafficking in a drug or drugs of dependence—large commercial quantity (section 71 of the **Drugs, Poisons and Controlled Substances Act 1981**);
 - (j) cultivation of narcotic plants—large commercial quantity (section 72 of the **Drugs, Poisons and Controlled Substances Act 1981**);
 - (k) rape (section 38 of the **Crimes Act 1958**), rape by compelling sexual penetration (section 39 of the **Crimes Act 1958**) or armed robbery (section 75A of the **Crimes Act 1958**) if the offence is committed in circumstances where—
 - (i) torture (being the deliberate and systematic infliction over a period of time of severe pain on the victim) was

S. 327M(2)(k)
amended by
No. 74/2014
s. 15(1).

involved in the commission of the offence; or

- (ii) the offender caused really serious injury to the victim; or
 - (iii) the offender threatened to cause death or really serious injury to the victim;
- (l) a substantially similar offence against a previous enactment or the law of a place outside Victoria corresponding to an offence referred to in this subsection.

S. 327N
inserted by
No. 81/2011
s. 17.

327N Determination of application where administration of justice offence

On an application under section 327H, the Court of Appeal may make any order referred to in section 327O in relation to a person who has been acquitted of an offence if the court is satisfied that—

- (a) at the time the offence is alleged to have been committed, the offence was an indictable offence; and
- (b) there is fresh evidence against the acquitted person of the commission of an administration of justice offence in relation to the previous acquittal; and
- (c) it is likely that a trial for the administration of justice offence would be fair, having regard to—
 - (i) the length of time since the administration of justice offence is alleged to have been committed; and

- (ii) whether there has been a failure on the part of the police or the prosecution to act with reasonable diligence or expedition with respect to the making of the application; and
- (iii) any other matter that the court considers relevant.

327O Orders on determination of application

S. 327O
inserted by
No. 81/2011
s. 17.

- (1) On an application under section 327H, if the Court of Appeal is satisfied of the matters in section 327L or 327M, the court may order that—
 - (a) the previous acquittal of the accused of an offence charged in the direct indictment be set aside or removed as a bar to the accused being tried on the direct indictment (as the case requires); and
 - (b) the prosecution of the charge in the direct indictment may continue.
- (2) On an application under section 327H, if the Court of Appeal is satisfied of the matters in section 327N, the court may order that—
 - (a) the previous acquittal of the accused be removed as a bar to the accused being tried for the administration of justice offence alleged to have been committed in relation to the previous acquittal; and
 - (b) the prosecution of the charge in the direct indictment may continue.
- (3) In addition to subsections (1) and (2), the Court of Appeal may make any other order that it considers appropriate.
- (4) If the Court of Appeal is not satisfied that section 327L, 327M or 327N applies or that a fair trial is likely, the court must order that the charge in the direct indictment is permanently stayed.

- (5) If more than one offence is charged in the direct indictment, the Court of Appeal must make an order under subsection (1), (2) or (4) in relation to each charge.
- (6) If the Court of Appeal makes an order under subsection (1) or (2), the court may make any order for or in relation to the bail of the accused that the court considers appropriate.

S. 327P
inserted by
No. 81/2011
s. 17.

327P DPP must elect which offence to prosecute

If the DPP satisfies the Court of Appeal under sections 327L, 327M and 327N, or any 2 of those sections, the DPP must elect to prosecute either—

- (a) the administration of justice offence; or
(b) the offence of which the accused has been acquitted or a related offence—

and may proceed only on that basis.

S. 327Q
inserted by
No. 81/2011
s. 17.

327Q Amendment of indictment

If the Court of Appeal makes an order under section 327O(1) or (2) in relation to an offence charged in a direct indictment, the trial court must not amend the indictment to significantly change the offence charged.

S. 327R
inserted by
No. 81/2011
s. 17.

327R Prohibition on making certain references in new trial

At a new trial that has been authorised under this Chapter, the prosecution must not refer to the fact that the Court of Appeal has been satisfied that—

- (a) there is fresh evidence, or fresh and compelling evidence, against the accused in relation to the offence charged; or

- (b) it is more likely than not that, had it not been for the commission of an administration of justice offence, the accused would have been convicted of the offence charged at the earlier trial.

Note

Section 18 of the **Supreme Court Act 1986** permits the court to make an order prohibiting the publication of the whole or part of a proceeding.

327S Appeal and review rights unaffected

This Chapter does not affect any right to appeal or review the acquittal of a person.

S. 327S
inserted by
No. 81/2011
s. 17.

Chapter 8—General

Part 8.1—Conduct of proceeding

328 Appearance

A party to a criminal proceeding may appear—

- (a) personally; or
- (b) by a legal practitioner or other person empowered by law to appear for the party; or
- (c) in the Magistrates' Court, in the case of an informant who is a police officer or a protective services officer, by a police prosecutor; or

S. 328(c)
amended by
No. 67/2011
s. 3,
substituted by
No. 37/2014
s. 10(Sch.
item 41.7).

- (d) if the proceeding was commenced by the filing, by a prescribed person or a member of a prescribed class of persons, of a charge-sheet containing a charge for an offence under—

S. 328(d)
amended by
No. 32/2013
s. 43(a).

- (i) Division 1 of Part 3C or Schedule 3 of the **Sentencing Act 1991**; or

S. 328(d)(i)
amended by
No. 32/2013
s. 43(b).

- (ii) section 156 of the **Infringements Act 2006**—

S. 328(d)(ii)
amended by
No. 30/2010
s. 77(2).

by any other prescribed person or any other member of the prescribed class of persons within the meaning of the **Sentencing Act 1991** or the **Infringements Act 2006**, as the case requires.

329 When accused etc. is required to appear at hearing

- (1) An accused must appear at every hearing in the criminal proceeding against the accused, unless otherwise provided by this Act or the rules of court.
- (2) A party to an appeal who was the accused in the criminal proceeding to which the appeal relates must appear at every hearing in the appeal, unless otherwise provided by this Act or the rules of court.
- (3) The court may excuse a person from appearing at a hearing.

Notes

- 1 See section 328 for the ways in which an accused may appear.
- 2 Division 3 of Part IIA of the **Evidence (Miscellaneous Provisions) Act 1958** authorises or requires the appearance of an accused before the court by audio visual link in certain circumstances.

Note 2 to s. 329 amended by Nos 69/2009 s. 54(Sch. Pt 2 item 18.2), 38/2016 s. 9(3).

330 When accused etc. is required to attend hearing

- (1) An accused must attend a hearing in the criminal proceeding against the accused if—
 - (a) this Act or the rules of court require the attendance of the accused at the hearing; or
 - (b) the accused has been remanded in custody or granted bail to attend the hearing; or
 - (c) the court requires the attendance of the accused at the hearing.

- (2) A party to an appeal who was the accused in the criminal proceeding to which the appeal relates must attend a hearing in the appeal if—
 - (a) this Act or the rules of court require the attendance of the party at the hearing; or
 - (b) the party has been remanded in custody or granted bail to attend the hearing; or
 - (c) the court requires the attendance of the party at the hearing.
- (3) The court may excuse a person from attending a hearing.
- (4) If a person fails to attend when required under subsection (1)(a), (1)(b), (2)(a) or (2)(b), the court may issue a warrant to arrest the person.
- (5) If a person fails to attend when required under subsection (1)(c) or (2)(c), the court may issue a warrant to arrest the person if the court is satisfied that the person has had reasonable notice of the requirement to attend.

Notes

Note 1 to
s. 330(5)
amended by
No. 38/2016
s. 9(4).

- 1 Section 3 defines *attend*.
- 2 Section 100(2) provides for the attendance of an accused at hearings in a committal proceeding.
- 3 Section 246 provides for the attendance of an accused at hearings conducted under Chapter 5 (Trial on Indictment).

331 Power to adjourn proceeding

- (1) A court may adjourn the hearing of a criminal proceeding before the court—
 - (a) to any time and place; and

- (b) for any purpose; and
 - (c) on any terms as to costs or otherwise—
that it considers appropriate.
- (2) If at any time a court adjourns the hearing of a criminal proceeding, the court may—
- (a) allow the accused to go at large; or
 - (b) remand the accused in custody; or
 - (c) grant the accused bail or extend his or her bail.

Note

See section 333 of this Act and section 5A of the **Bail Act 1977** where accused is undergoing a sentence of detention in a youth justice centre.

- (3) If a court has adjourned the hearing of a criminal proceeding to a particular time, it may order that the hearing be held or resumed before that time.
- (4) A court may only make an order under subsection (3)—
- (a) with the consent of all the parties; or
 - (b) on the application of a party who has given reasonable notice of the application to the other parties.
- (5) If a court adjourns a criminal proceeding in which a jury has been sworn, whether or not the accused is present, the court may discharge the jury from giving a verdict and order a new trial.
- (6) If a court has adjourned the hearing of a criminal proceeding to a particular time and has remanded the accused in custody, the court may order that the accused be brought at any time before then—
- (a) before the court; or

S. 331(6)(b)
amended by
No. 69/2009
s. 54(Sch. Pt 2
item 18.1).

(b) to another place specified in the order where facilities exist to enable the accused to appear before the court by audio visual link (within the meaning of Part IIA of the **Evidence (Miscellaneous Provisions) Act 1958**)—

in order that the hearing may be held or continued.

- (7) The officer in charge of the prison or youth justice centre or other officer who has custody of the accused must obey an order under subsection (6).

332 Transfer of accused between place of detention and court

- (1) A person who has the legal custody of an accused in detention must cause the accused to be brought to and from court whenever necessary so that the accused may be tried, sentenced or otherwise dealt with according to law.
- (2) If a court considers it in the interests of justice that an accused in detention should be present in court otherwise than for trial, hearing or sentence, the court may order that the accused be brought before the court.
- (3) If a court makes an order under subsection (2), the responsible person, on receiving a copy of the order, must cause the accused to be brought before the court in accordance with the order.

Note

See the definitions of *in detention* and *responsible person* in section 3.

333 Power to return accused to youth justice centre

- (1) Despite anything in the **Bail Act 1977**, if—
- (a) the accused in a criminal proceeding in the Magistrates' Court is undergoing a sentence of detention in a youth justice centre; and

(b) the Magistrates' Court adjourns the proceeding or commits the accused to stand trial—

the court may, instead of remanding the accused in custody—

(c) direct that the accused be returned to the custody of the Secretary to the Department of Human Services until the end of the sentence of detention or the resumption of the hearing or the commencement of the trial (whichever is the sooner); and

(d) either—

(i) grant the accused bail on a condition that bail is not to be entered until the end of the sentence of detention; or

(ii) refuse bail and direct that the accused be brought before the Magistrates' Court at a later date for it to consider the granting of bail.

S. 333(1)(d)(i)
amended by
No. 70/2010
s. 36.

(2) For the purposes of this section, *the end of the sentence of detention* means the time when the accused is released from custody, whether on parole or otherwise.

Note

Section 5A of the **Bail Act 1977** provides equivalent powers to the Supreme Court and the County Court.

334 Proceedings against bodies corporate

(1) In this section—

representative, in relation to a body corporate, means a person duly appointed by the body corporate to represent it for the purpose of doing any act or thing which this section authorises a representative to do.

- (2) For the purposes of this section, a representative need not be appointed under the seal of the body corporate.
- (3) For the purposes of this section, a statement in writing that—
- (a) purports to be signed by a managing director of a body corporate or by any person (by whatever name called) having, or being one of the persons having, the management of the affairs of the body corporate; and
 - (b) is to the effect that the person named in the statement has been appointed as the representative of the body corporate for the purposes of this section—

is admissible in evidence and, in the absence of evidence to the contrary, is proof that the person has been so appointed.

- (4) A representative may do any act or thing that a natural person may do in a criminal proceeding subject to the following—
- (a) if a body corporate is charged with an indictable offence, a representative may consent to the charge being heard and determined summarily;
 - (b) if expressly authorised to do so, a representative may plead guilty on behalf of the body corporate;
 - (c) if expressly authorised to do so, a representative may sign a notice of appeal referred to in section 255 and enter into an undertaking under section 255(5);
 - (d) if—
 - (i) a representative appears in a proceeding against a body corporate for an offence; and

- (ii) a provision of this Act requires something to be done in the presence of the accused, or to be said to the accused—

it is sufficient if that thing is done in the presence of the representative or said to the representative.

335 Interpreter

If—

- (a) a person is charged with an offence punishable by imprisonment; and
(b) the court is satisfied that the person does not have a knowledge of the English language that is sufficient to enable the person to understand, or participate in, the proceeding—

the court must not hear and determine the proceeding without a competent interpreter interpreting it.

336 Subpoenas and witness summonses

A party to a criminal proceeding may apply for the issue of a subpoena in accordance with the rules of court or a witness summons in accordance with the **Magistrates' Court Act 1989**, as the case requires.

336A Victim who is a witness entitled to be present in court

- (1) In a criminal proceeding where a victim of the offence is a witness in the proceeding, the court may order the victim to leave the courtroom until required to give evidence only if the court considers it appropriate to do so.

S. 336A
inserted by
No. 68/2009
s. 37.

- (2) Nothing in this section prevents the court from ordering a victim who is a witness to leave the courtroom at any time after giving evidence.

S. 337
amended by
No. 68/2009
s. 38 (LA
s. 39B(1)).

337 Court may act on application or on own motion

- (1) Unless the context otherwise requires, a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion.
- (2) Unless the context otherwise requires, a power or discretion referred to in subsection (1) includes a power or discretion to revoke or vary a decision or order made in the exercise of that power or discretion.

S. 337(2)
inserted by
No. 68/2009
s. 38.

Part 8.2—Witnesses

New Ch. 8
Pt 8.2
(Heading and
ss 338–389)
inserted by
No. 68/2009
s. 50.

Division 1—Guiding principles

338 Guiding principles

It is the intention of Parliament that in interpreting and applying this Part in any criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, courts are to have regard to the fact that—

New s. 338
inserted by
No. 68/2009
s. 50.

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical sign of an offence having occurred.

Division 2—Evidence concerning complainant

339 Application of Division

- (1) This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence.

New s. 339
inserted by
No. 68/2009
s. 50.

- (2) This Division applies to all complainants in a criminal proceeding referred to in subsection (1).
- (3) This Division applies despite anything in this or any other Act or any rule of law to the contrary.

New s. 340
inserted by
No. 68/2009
s. 50.

340 Definition

In this Division—

sexual history evidence means evidence that relates to or tends to establish the fact that the complainant—

- (a) was accustomed to engaging in sexual activities; or
- (b) had freely agreed to engage in sexual activity (other than that to which the charge relates) with the accused person or another person.

New s. 341
inserted by
No. 68/2009
s. 50.

341 Prohibition on questions and evidence concerning complainant's chastity

The court must not allow any questions as to, or admit any evidence of, the general reputation of the complainant with respect to chastity.

New s. 342
inserted by
No. 68/2009
s. 50.

342 Restriction on questions and evidence concerning complainant's sexual activities

The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or non-consensual) of the complainant (other than those to which the charge relates), without the leave of the court.

New s. 343
inserted by
No. 68/2009
s. 50.

343 Admissibility of sexual history evidence

Sexual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates.

344 Application for leave

An application for leave under section 342—

- (a) in the case of a summary proceeding, must be filed with the Magistrates' Court and served on the informant in accordance with section 392 at least 7 days before the summary hearing;
- (b) in the case of a committal proceeding, must be filed with the Magistrates' Court and served on the informant and the DPP in accordance with section 392 at least 7 days before the committal hearing;
- (c) in the case of a trial, must be filed with the County Court or the Supreme Court (as the case requires) and served on the DPP in accordance with section 392—
 - (i) at least 14 days before the day on which the trial is listed to commence; or
 - (ii) if a special hearing is to be held, at least 14 days before that hearing;
- (d) in the case of a sentencing hearing, must be filed with the relevant court and served on the informant or the DPP (as the case requires) in accordance with section 392 at least 7 days before the sentencing hearing is listed to commence.

New s. 344
inserted by
No. 68/2009
s. 50.

345 Application for leave out of time

If it is in the interests of justice to do so, the court may hear and determine an application for leave under section 342 after the expiry of the relevant time limit specified in section 344.

New s. 345
inserted by
No. 68/2009
s. 50.

New s. 346
inserted by
No. 68/2009
s. 50.

346 Contents of application for leave

- (1) An application for leave under section 342 must be in writing and set out the matters required by subsection (2) or (3), as the case requires.
- (2) An application for leave to cross-examine the complainant as to the sexual activities of the complainant must set out—
 - (a) the initial questions sought to be asked of the complainant; and
 - (b) the scope of the questioning sought to flow from the initial questioning; and
 - (c) how the evidence sought to be elicited from the questioning has substantial relevance to facts in issue or why it is proper matter for cross-examination as to credit.
- (3) An application for leave to admit evidence as to the sexual activities of the complainant must—
 - (a) identify the evidence that is sought to be admitted; and
 - (b) set out how the evidence has substantial relevance to facts in issue.

New s. 347
inserted by
No. 68/2009
s. 50.

347 Waiver of requirement to apply for leave in writing

If it is in the interests of justice to do so, the court may waive the requirement that an application for leave under section 342 be made in writing.

New s. 348
inserted by
No. 68/2009
s. 50.

348 Hearing of application for leave

An application for leave under section 342 must be heard in the absence of the jury (if any) and, if the accused so requests, in the absence of the complainant.

349 Determination of application for leave during summary hearing, committal proceeding or trial

New s. 349
inserted by
No. 68/2009
s. 50.

In the course of a summary hearing, committal proceeding or trial, the court must not grant leave under section 342 unless it is satisfied that the evidence has substantial relevance to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence, having regard to—

- (a) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked; and
- (b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility; and
- (c) the need to respect the complainant's personal dignity and privacy; and
- (d) the right of the accused to fully answer and defend the charge.

Note

Section 352 limits the relevance of sexual history evidence.

350 Determination of application for leave during sentencing hearing

New s. 350
inserted by
No. 68/2009
s. 50,
amended by
No. 30/2010
s. 65 (ILA
s. 39B(1)).

- (1) In the course of a sentencing hearing, the court must not grant leave under section 342 unless it is satisfied that the evidence has substantial relevance to the issue of appropriate sentence and the offender—

S. 350(2)
inserted by
No. 30/2010
s. 65.

- (a) has pleaded guilty to all sexual offences charged against the offender; or
 - (b) has been found guilty of all sexual offences charged against the offender.
- (2) In determining, under subsection (1), whether the evidence has substantial relevance to the issue of appropriate sentence, the court must have regard to—
- (a) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked; and
 - (b) the need to respect the complainant's personal dignity and privacy.

Note

Section 352 limits the relevance of sexual history evidence.

New s. 351
inserted by
No. 68/2009
s. 50.

351 Court must state reasons if leave granted

- (1) If the court grants leave under section 342 it—
 - (a) must state in writing the reasons for granting leave; and
 - (b) cause those reasons to be entered in the records of the court.
- (2) The failure of a court to comply with subsection (1) does not invalidate any order made by it.

352 Limitation on sexual history evidence

Sexual history evidence is not to be regarded—

- (a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or
- (b) as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

New s. 352
inserted by
No. 68/2009
s. 50.

Division 3—Cross-examination of protected witnesses

353 Application of Division

- (1) This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for—
 - (a) a sexual offence; or
 - (b) an offence where the conduct constituting the offence consists of family violence within the meaning of the **Family Violence Protection Act 2008**.
- (2) This Division applies to a protected witness in a criminal proceeding referred to in subsection (1).

New s. 353
inserted by
No. 68/2009
s. 50.

354 Definitions

In this Division—

family member, in relation to the complainant or the accused, includes—

- (a) a person who is or has been married to the complainant or the accused; and
- (b) a person who has or has had an intimate personal relationship with the complainant or the accused; and

New s. 354
inserted by
No. 68/2009
s. 50.

- (c) a person who is or has been the parent or step-parent of the complainant or the accused; and
- (d) a child who normally or regularly resides with the complainant or the accused; and
- (e) a guardian of the complainant or the accused; and
- (f) another person who is or has been ordinarily a member of the household of the complainant or the accused;

protected witness means—

- (a) the complainant; or
- (b) a family member of the complainant; or
- (c) a family member of the accused; or
- (d) any other witness whom the court declares under section 355 to be a protected witness.

New s. 355
inserted by
No. 68/2009
s. 50.

355 Court may declare witness to be protected witness

The court may at any time declare a witness to be a protected witness.

New s. 356
inserted by
No. 68/2009
s. 50.

356 Protected witness not to be cross-examined by accused in person

A protected witness must not be cross-examined by the accused in person.

New s. 357
inserted by
No. 68/2009
s. 50.

357 When accused is not legally represented

- (1) If the accused is not legally represented, the court must—
 - (a) inform the accused and the jury (if any) that the accused is not permitted personally to cross-examine a protected witness; and

- (b) ask the accused whether the accused has sought legal representation for the cross-examination of a protected witness; and
 - (c) if satisfied that the accused has not had a reasonable opportunity to obtain legal representation, grant an adjournment if so requested by the accused.
- (2) If the accused does not obtain legal representation for the cross-examination of a protected witness (after being given a reasonable opportunity to do so), the court must order Victoria Legal Aid to provide legal representation for the accused for that purpose.
 - (3) Despite anything in the **Legal Aid Act 1978**, Victoria Legal Aid must provide legal representation in accordance with an order under subsection (2).
 - (4) A legal practitioner provided by Victoria Legal Aid must act in the best interests of the accused if the accused does not give any instructions to that legal practitioner.
 - (5) If the accused refuses the legal representation provided under subsection (3), or otherwise refuses to co-operate, the court must warn the accused that the accused will not be permitted to adduce evidence in relation to a fact in issue in order to contradict the evidence of a protected witness unless the evidence on which the accused intends to rely has been put to the protected witness during cross-examination.

358 Jury warning concerning legal representation for cross-examination

If the accused is only legally represented for the cross-examination of a protected witness, the trial judge must warn the jury—

New s. 358
inserted by
No. 68/2009
s. 50.

- (a) that it is routine practice for an unrepresented accused to obtain or be provided with legal representation for the cross-examination of a protected witness; and
- (b) that no adverse inference may be drawn against the accused as a result of the cross-examination not being conducted by the accused in person; and
- (c) that the evidence given under cross-examination is not to be given any greater or lesser weight as a result of the cross-examination not being conducted by the accused in person.

Division 4—Alternative arrangements for giving evidence

359 Application of Division

New s. 359
inserted by
No. 68/2009
s. 50.

- (1) This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for—
 - (a) a sexual offence; or
 - (b) an offence where the conduct constituting the offence consists of family violence within the meaning of the **Family Violence Protection Act 2008**; or
 - (c) an offence against section 17(1) or 19 of the **Summary Offences Act 1966**.

S. 359(1)(b)
amended by
No. 30/2010
s. 66(1).

S. 359(1)(c)
inserted by
No. 30/2010
s. 66(2).

- (2) This Division applies to all witnesses (including complainants) in a criminal proceeding referred to in subsection (1).
- (3) This Division applies at any stage of the criminal proceeding, including an appeal or rehearing.

360 Alternative arrangements for giving evidence

New s. 360
inserted by
No. 68/2009
s. 50.

The court may direct that alternative arrangements be made for the giving of evidence by a witness, including arrangements—

- (a) permitting the evidence to be given from a place other than the courtroom by means of closed-circuit television or other facilities that enable communication between that place and the courtroom;
- (b) using screens to remove the accused from the direct line of vision of the witness;
- (c) permitting a person, chosen by the witness and approved by the court for this purpose, to be beside the witness while the witness is giving evidence, for the purpose of providing emotional support to the witness;
- (d) permitting only persons specified by the court to be present while the witness is giving evidence;
- (e) requiring legal practitioners not to robe;
- (f) requiring legal practitioners to be seated while examining or cross-examining the witness.

Notes

- 1 Section 337(1) enables this direction to be made by the court on the application of a party or on its own motion.
- 2 Section 337(2) provides that this direction may be varied or revoked.

361 Jury warning concerning alternative arrangements

New s. 361
inserted by
No. 68/2009
s. 50,
amended by
No. 30/2010
s. 67.

If the court directs that alternative arrangements be made in a trial for the giving of evidence by a witness, the trial judge must warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the making of those arrangements.

New s. 362
inserted by
No. 68/2009
s. 50.

362 Evidence given by closed-circuit television or other facilities

- (1) This section applies to arrangements referred to in section 360(a) that are directed to be made under that section.
- (2) Any place outside the courtroom where the witness is permitted to give evidence is taken to be part of the courtroom while the witness is there for the purpose of giving evidence.
- (3) The court must direct that any evidence given by the witness is recorded.
- (4) The court may make any order it considers appropriate to enable the witness to view any place or thing, or identify any person or thing, for the purposes of the proceeding or the evidence of the witness.

New s. 363
inserted by
No. 68/2009
s. 50,
amended by
No. 30/2010
s. 68.

363 When court must direct use of closed-circuit television or other facilities for complainant

If the witness is a complainant in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court must direct that an arrangement referred to in section 360(a) be made unless—

- (a) the prosecution applies for the complainant to give evidence in the courtroom; and
- (b) the court is satisfied that the complainant—
 - (i) is aware of the right of the complainant to give evidence in another place by closed-circuit television or other facilities; and
 - (ii) is able and wishes to give evidence in the courtroom.

364 When court must direct use of screens for complainant

If the witness is a complainant in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence and is to give evidence in the courtroom, the court must direct that an arrangement referred to in section 360(b) be made unless the court is satisfied that the complainant—

- (a) is aware of the right of the complainant to give evidence while screens are used to remove the accused from the direct line of vision of the complainant; and
- (b) does not wish a screen to be so used.

New s. 364
inserted by
No. 68/2009
s. 50,
amended by
No. 30/2010
s. 69.

365 When court must direct presence of support person for complainant

(1) If the witness is a complainant in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court must direct that an arrangement referred to in section 360(c) be made unless the court is satisfied that the complainant—

- (a) is aware of the right of the complainant to have a support person when giving evidence; and
 - (b) does not wish to have a support person.
- (2) Subsection (1) applies whether the witness is to give evidence in the courtroom or in another place.

New s. 365
inserted by
No. 68/2009
s. 50.

S. 365(1)
amended by
No. 30/2010
s. 70.

Division 5—Use of recorded evidence-in-chief of children and cognitively impaired witnesses in sexual offence and assault matters

366 Application of this Division

New s. 366
inserted by
No. 68/2009
s. 50.

(1) This Division applies to a criminal proceeding (other than a committal proceeding) that relates (wholly or partly) to a charge for—

S. 366(1)(b)
amended by
No. 48/2012
s. 21(a).

- (a) a sexual offence; or
- (b) an indictable offence which involves an assault on, or injury or a threat of injury to, a person; or

S. 366(1)(c)
inserted by
No. 48/2012
s. 21(b),
amended by
No. 42/2015
s. 22.

- (c) an offence against section 68, 69, 70AAAB, 70AAAC, 70AAAD or 70AC of the **Crimes Act 1958**; or

S. 366(1)(d)
inserted by
No. 48/2012
s. 21(b).

- (d) any offences against section 23 or 24 of the **Summary Offences Act 1966** if those offences are related offences to an offence specified in paragraph (a), (b) or (c), despite whether any such related offences are withdrawn or dismissed before an offence against section 23 or 24 of the **Summary Offences Act 1966** is heard and determined.

Note

For committal proceedings see Chapter 4.

- (2) This Division applies to a witness in a criminal proceeding referred to in subsection (1) if the witness is—
 - (a) a person under the age of 18 years; or
 - (b) a person with a cognitive impairment.
- (3) In this Division, *witness* means a witness referred to in subsection (2).

367 Use of recorded evidence-in-chief

A witness may give evidence-in-chief (wholly or partly) in the form of an audio or audiovisual recording of the witness answering questions put to him or her by a person prescribed by the regulations for the purposes of this section.

New s. 367
inserted by
No. 68/2009
s. 50.

368 Admissibility of recorded evidence-in-chief

(1) Subject to subsection (3), a recording referred to in section 367 is admissible as evidence in a summary hearing, special hearing or trial in the proceeding as if its contents were the direct testimony of the witness if—

New s. 368
inserted by
No. 68/2009
s. 50.

- (a) a transcript of it was served personally on the accused in accordance with section 391, or on the legal practitioner representing the accused in accordance with section 394—
 - (i) in the case of a summary proceeding, at least 14 days before the contest mention hearing or, if a contest mention hearing is not held, the summary hearing;
 - (ii) in the case of a trial, at least 14 days before the day on which the trial is listed to commence or, if a special hearing is to be held, at least 14 days before that hearing; and
- (b) the court is satisfied that the accused and the legal practitioner of the accused were given, in accordance with the regulations, a reasonable opportunity to listen to and, in the case of an audiovisual recording, view the recording; and

- (c) at the summary hearing, special hearing or trial, the witness—
- (i) identifies himself or herself and attests to the truthfulness of the contents of the recording; and
 - (ii) is available for cross-examination and re-examination.

(2) The admissibility of a recording of the evidence of a person under the age of 18 years is not affected only because the person attains the age of 18 years before the evidence is presented in a proceeding.

(3) The court may rule as inadmissible the whole or any part of the contents of a recording and, if so, the court may direct that the recording be edited or altered to delete any part of it that is inadmissible.

(4) Subject to this section, a recording referred to in section 367 is admissible in evidence as if its contents were the direct testimony of the witness—

- (a) in the proceeding; and
- (b) unless the relevant court otherwise orders, in—
 - (i) any new trial of, or appeal from, the proceeding; or
 - (ii) another proceeding in the same court for the charge for an offence specified in section 366(1) or a charge for a related offence; or
 - (iii) a civil proceeding arising from the same facts as those on which the charge for an offence specified in section 366(1) is founded.

S. 368(3)
amended by
No. 48/2012
s. 22(1).

S. 368(4)
inserted by
No. 48/2012
s. 22(2).

- (5) The court, by order, may abridge any time fixed—
- (a) by or under subsection (1)(a); or
 - (b) by any order abridging time made under this subsection—

if the court considers that it is in the interests of justice to do so.

S. 368(5)
inserted by
No. 48/2012
s. 22(2).

368A Court may order production of recording made under this Division in certain circumstances

S. 368A
inserted by
No. 48/2012
s. 23.

- (1) A court may order that a recording referred to in section 367 be produced for use in a proceeding (other than a proceeding referred to in section 368) before that court if the court is satisfied that it is in the best interests of the witness to do so.
- (2) If a court makes an order under subsection (1), it must also specify—
 - (a) the persons who may view or listen to the recording; and
 - (b) when and where the recording is required to be produced; and
 - (c) if necessary, any requirements as to the destruction of the recording.
- (3) In making an order under subsection (1), the court must have regard to the need to protect the privacy of the witness.
- (4) In this section, *court* includes a tribunal if the complainant is the applicant in a proceeding before the tribunal.

Division 6—Procedure and rules for children and cognitively impaired complainants

369 Application of Division

- (1) This Division applies to a trial in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence.
- (2) This Division applies to a complainant in a criminal proceeding referred to in subsection (1) if, at the time at which the proceeding commenced, the complainant—
 - (a) was under the age of 18 years; or
 - (b) had a cognitive impairment.
- (3) In this Division, *complainant* means a complainant referred to in subsection (2).

New s. 369
inserted by
No. 68/2009
s. 50.

S. 369(3)
amended by
No. 29/2011
s. 3(Sch. 1
item 24).

S. 370
(Heading)
amended by
No. 48/2012
s. 24(1).
New s. 370
inserted by
No. 68/2009
s. 50.

S. 370(1)(b)
amended by
No. 48/2012
s. 24(2).

S. 370(1A)
inserted by
No. 48/2012
s. 24(3).

370 Special hearing for recording evidence

- (1) Subject to subsection (2), the whole of the evidence (including cross-examination and re-examination) of a complainant must be—
 - (a) given at a special hearing under this Division and recorded as an audiovisual recording; and
 - (b) in the case of a special hearing before the trial, presented to the court in the form of that recording.
- (1A) The court must direct that a special hearing under this Division is to be held—
 - (a) before the trial; or
 - (b) during the trial.

Note

Section 337 enables the court to vary its direction on the application of a party or on its own motion.

- (1B) In making a direction under subsection (1A), the court must have regard to—
- (a) if the complainant is a child, the age and maturity of the child; and
 - (b) if the complainant is cognitively impaired, the severity of that impairment; and
 - (c) any preference expressed by the complainant to give their evidence before the trial or during the trial; and
 - (d) whether conducting the special hearing during the trial is likely—
 - (i) to intimidate the complainant when giving his or her evidence; or
 - (ii) to have an adverse effect on the complainant; and
 - (e) the need to complete the evidence of the complainant expeditiously; and
 - (f) the likelihood that the evidence given by the witness will include inadmissible evidence that may result in the discharge of the jury; and
 - (g) any other matter that the court considers relevant.
- (2) On the application of the prosecution, the court may direct that subsection (1) is not to apply and that the complainant is to give direct testimony in the proceeding if the court is satisfied that the complainant—
- (a) is aware of the right of the complainant to have his or her evidence taken at a special hearing under this Division and audiovisually recorded; and

S. 370(1B)
inserted by
No. 48/2012
s. 24(3).

- (b) is able and wishes to give direct testimony in the proceeding.

Note

Division 4 provides that the court may make alternative arrangements for the giving of direct testimony.

New s. 371
inserted by
No. 68/2009
s. 50.

371 Time limits for special hearing

- (1) If a special hearing is to be held, it must be held—
- (a) within 3 months after the day on which the accused is committed for trial; and
 - (b) before the court at which the indictment is filed.

Note

Section 212 imposes time limits for commencing trials for sexual offences.

S. 371(2)
substituted by
No. 48/2012
s. 25.

- (2) The court may extend the time for holding a special hearing if the court considers that it is in the interests of justice to do so, having regard to—
- (a) if the complainant is a child, the age and maturity of the child; and
 - (b) if the complainant is cognitively impaired, the severity of that impairment; and
 - (c) the period of time since the complaint was first made; and
 - (d) the period of time since the offence was allegedly committed; and
 - (e) any other matter that the court considers relevant.
- (3) The court may extend time under subsection (2) before or after the time expires.
- (4) More than one extension of time may be granted under subsection (2).

371A Timing arrangements for special hearing during trial

S. 371A
inserted by
No. 48/2012
s. 26.

If the court directs that a special hearing be held during the trial, the court must—

- (a) as far as possible, commence the special hearing on the date specified under section 181(2)(d)(iii); and
- (b) ensure that the complainant's evidence is disrupted to the least extent possible.

Example

An application to discharge the jury may be heard and determined after the special hearing is completed.

Note

Section 212 sets out time limits for commencing trials for sexual offences.

372 Conduct of special hearing

New s. 372
inserted by
No. 68/2009
s. 50.

- (1) At a special hearing—
 - (a) the accused and his or her legal practitioner are to be present in the courtroom;
 - (b) the accused—
 - (i) is not to be in the same room as the complainant when the complainant's evidence is being taken;
 - (ii) is entitled to see and hear the complainant while the complainant is giving evidence and to have at all times the means of communicating with his or her legal practitioner;
 - (ba) in the case of a special hearing held during the trial, the jury is to be present in the courtroom;

S. 372(1)(ba)
inserted by
No. 48/2012
s. 27.

- (c) no person, other than a person authorised by the court, is to be present in the courtroom or the same room as the complainant when the complainant's evidence is being taken;
 - (d) the evidence of the complainant is to be given by means of closed-circuit television or other facilities that enable communication between the room in which the complainant is present and the courtroom;
 - (e) except as provided by this Division, the usual rules of evidence apply.
- (2) The room in which the complainant gives evidence is taken to be part of the courtroom while the complainant is there for the purpose of giving evidence.

New s. 373
inserted by
No. 68/2009
s. 50.

373 Form in which recording of special hearing is to be tendered

S. 373(1)
amended by
No. 48/2012
s. 28.

- (1) A recording of a special hearing that is tendered as evidence by the prosecution must be the best available record, or be comprised of the best available records, of the evidence of the complainant.
- (2) In subsection (1)—
the best available record of the evidence, or any part of the evidence, means an audiovisual recording of the evidence.
- (3) In exceptional circumstances and having regard to whether the accused would be unfairly prejudiced, the court may admit as evidence an audio recording of the evidence, or any part of the evidence, if an audiovisual recording of the evidence is not available.

374 Admissibility of evidence from special hearing

New s. 374
inserted by
No. 68/2009
s. 50.

(1) In this section—

recording means a recording of a special hearing.

S. 374(1)
amended by
No. 48/2012
s. 28.

(2) Subject to subsection (3), a recording is admissible in evidence as if its contents were the direct testimony of the complainant—

(a) in the proceeding; and

(b) unless the relevant court otherwise orders, in—

(i) any new trial of, or appeal from, the proceeding; or

(ii) another proceeding in the same court for the charge for a sexual offence or a charge for a related offence; or

(iii) a civil proceeding arising from the same facts as those on which the charge for a sexual offence is founded.

(3) The court may rule as inadmissible the whole or any part of the contents of a recording and, if so, the court may direct that the recording be edited or altered to delete any part of it that is inadmissible.

Note

A party may apply for a ruling under subsection (3):
section 337.

(4) Subject to subsection (3), the whole of a recording must be heard by the court.

(5) The admissibility of a recording of the evidence of a person under the age of 18 years is not affected only because the person attains the age of 18 years before the evidence is presented in a proceeding.

- (6) Subject to section 376(3), if under this section a recording is admitted into evidence in a proceeding, the complainant is not required to attend the proceeding unless required to do so for cross-examination or re-examination.

New s. 375
inserted by
No. 68/2009
s. 50.

375 Jury warning as to recording of special hearing

If a recording of a special hearing is admitted into evidence under section 374, the trial judge must warn the jury—

- (a) that it is routine practice for the evidence of a complainant who is under the age of 18 years or has a cognitive impairment to be recorded at a special hearing before the trial; and
- (b) that no adverse inference may be drawn against the accused as a result of the evidence being recorded; and
- (c) that the evidence of the complainant is not to be given any greater or lesser weight as a result of the evidence being recorded.

S. 375A
inserted by
No. 48/2012
s. 29.

375A Jury warning as to special hearing held during trial

If a special hearing is held during a trial, the trial judge must warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the arrangements put in place under section 372 for the special hearing.

New s. 376
inserted by
No. 68/2009
s. 50.

376 Cross-examination of complainant

- (1) A complainant whose evidence is recorded under section 370 cannot be cross-examined or re-examined without leave.

- (2) A court must not grant leave to cross-examine a complainant referred to in subsection (1) unless the court is satisfied that—
- (a) the accused is seeking leave because of becoming aware of a matter of which the accused could not reasonably have been aware at the time of the recording; or
 - (b) if the complainant were giving direct testimony in the proceeding, the complainant could be recalled, in the interests of justice, to give further evidence; or
 - (c) it is otherwise in the interests of justice to permit the complainant to be cross-examined or re-examined.
- (3) If leave is granted under subsection (2), the complainant must attend the proceeding to be cross-examined or re-examined.

377 Exception to hearsay rule—previous representations made by complainant under 18 years

New s. 377
inserted by
No. 68/2009
s. 50.

- (1) In this section—
- asserted fact* has the same meaning as in the **Evidence Act 2008**;
- hearsay rule* has the same meaning as in the **Evidence Act 2008**;
- previous representation* has the same meaning as in the **Evidence Act 2008**.
- (2) This section applies in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence if a complainant under the age of 18 years who made a previous representation is available to give evidence about an asserted fact or the complainant's credibility is relevant.

- (3) Subject to subsection (4), if a complainant has been or is to be called to give evidence, the hearsay rule does not apply to evidence to support an asserted fact or the complainant's credibility that is given by—
 - (a) the complainant; or
 - (b) a person who saw, heard or otherwise perceived the representation being made.
- (4) Subsection (3) does not apply unless the court is satisfied that the evidence is relevant to a fact in issue and is sufficiently probative, having regard to the nature and content of the representation and the circumstances in which it was made.
- (5) A witness has personal knowledge of the asserted fact if his or her knowledge of that fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.
- (6) Evidence of the kind referred to in subsection (3) is admissible to support the credibility of the complainant as a witness.
- (7) Nothing in this section takes away from or limits any discretion a court has to exclude evidence.

Pt 8.2 Div. 7
(Heading)
amended by
No. 28/2016
s. 10.

New s. 378
inserted by
No. 68/2009
s. 50.

Division 7—Admission of recorded evidence of complainant given in trial for sexual offences

378 Application of Division

- (1) This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence.

- (2) This Division applies to a complainant in a criminal proceeding referred to in subsection (1), other than a complainant whose evidence has been taken at a special hearing under Division 6.
- (3) This Division applies to a recording of the evidence (including cross-examination and re-examination) of a complainant given during a trial in a criminal proceeding referred to in subsection (1).
- (4) If the jury is discharged without verdict before a complainant completes his or her evidence, this Division applies to a recording of the partial evidence of the complainant.
- (5) In this Division—

complainant means a complainant referred to in subsection (2);

recording means a recording referred to in subsection (3) or (4).

379 Admissibility of recording of complainant's evidence

Subject to section 381, a recording is admissible in evidence as if its contents were the direct testimony of the complainant—

- (a) in the proceeding; and
- (b) unless the relevant court otherwise orders, in—
 - (i) any new trial of, or appeal from, the proceeding; or
 - (ii) another proceeding in the same court for the charge for a sexual offence or a charge for a related offence; or
 - (iii) a civil proceeding arising from the same facts as those on which the charge for a sexual offence is founded.

New s. 379
inserted by
No. 68/2009
s. 50.

New s. 380
inserted by
No. 68/2009
s. 50.

380 Prosecution to give notice of intention to tender recording

- (1) If the prosecution intends to apply to tender a recording as evidence in a proceeding referred to in section 379, the prosecution must serve on the accused and file in court written notice of that intention at least 21 days before the day on which the trial or hearing is listed to commence.
- (2) The court may dispense with or vary a requirement imposed by subsection (1).

New s. 381
inserted by
No. 68/2009
s. 50.

381 Admission of recording of evidence of complainant

- (1) The court may admit a recording of the evidence of the complainant if it is in the interests of justice to do so, having regard to—
 - (a) whether the complainant's recorded evidence is complete, including cross-examination and re-examination;
 - (b) the effect of editing any inadmissible evidence from the recording;
 - (c) the availability or willingness of the complainant to give further evidence;
 - (d) whether the accused would be unfairly disadvantaged by the admission of the recording;
 - (e) any other matter that the court considers relevant.
- (2) The court may admit the whole or any part of the contents of a recording and may direct that the recording be edited or altered to delete any part of it that is inadmissible.

382 Jury warning as to recorded evidence of complainant

New s. 382
inserted by
No. 68/2009
s. 50.

If a recording is admitted into evidence under section 381, the trial judge must warn the jury—

- (a) that no adverse inference may be drawn against the accused as a result of the evidence being recorded; and
- (b) that the evidence of the complainant is not to be given any greater or lesser weight as a result of the evidence being recorded.

383 Attendance of complainant

New s. 383
inserted by
No. 68/2009
s. 50.

Subject to sections 384 and 385, if a recording is admitted into evidence in a proceeding, the complainant is not required to attend the proceeding unless required to do so to give further evidence.

384 Direct testimony in addition to recording

New s. 384
inserted by
No. 68/2009
s. 50.

- (1) On the application of the prosecution, the court may direct that the complainant is to give direct testimony additional to a recording admitted into evidence if the court is satisfied that—
 - (a) the complainant is able and wishes to give direct testimony; and
 - (b) it is in the interests of justice to do so.
- (2) A complainant may be cross-examined and re-examined in relation to any direct testimony given by the complainant in response to a direction under subsection (1).

Note

Any other cross-examination requires leave under section 385.

New s. 385
inserted by
No. 68/2009
s. 50.

385 Cross-examination of complainant

- (1) Subject to section 384(2), if a recording of the evidence of the complainant is admitted into evidence in a proceeding, the complainant cannot be cross-examined or re-examined without leave.
- (2) A court must not grant leave to cross-examine a complainant unless the court is satisfied that—
 - (a) the accused is seeking leave because of becoming aware of a matter of which the accused could not reasonably have been aware at the time of the recording; or
 - (b) if the complainant were giving direct testimony in the proceeding, the complainant could be recalled, in the interests of justice, to give further evidence; or
 - (c) it is otherwise in the interests of justice to permit the complainant to be cross-examined or re-examined.
- (3) If leave is granted under subsection (2), the complainant must attend the proceeding to be cross-examined or re-examined.

S. 386
inserted by
No. 68/2009
s. 50.

386 Form in which recording of complainant's evidence is to be tendered

- (1) A recording that is tendered as evidence by the prosecution under this Division must be the best available record, or be comprised of the best available records, of the evidence of the complainant.
- (2) In subsection (1)—
the best available record of the evidence, or any part of the evidence, means an audiovisual recording of the evidence.

- (3) In exceptional circumstances and having regard to whether the accused would be unfairly prejudiced, the court may admit as evidence an audio recording of the evidence, or any part of the evidence, if an audiovisual recording of the evidence is not available.

387 Exception to hearsay rule

- (1) In this section—

hearsay rule has the same meaning as in the **Evidence Act 2008**.

- (2) The hearsay rule does not prevent—

- (a) the admission of a recording in accordance with this Division; or
(b) the use of the recording to prove the existence of a fact that the complainant intended to assert by a representation made in the recorded evidence.

S. 387
inserted by
No. 68/2009
s. 50.

Division 7A—Admission of recorded evidence of complainant given in summary hearing by Children's Court of certain sexual offences

387A Application of Division

- (1) This Division applies to a criminal proceeding that relates (wholly or partly) to a charge for an offence against any of the following provisions of the **Crimes Act 1958**—
- (a) section 38 (rape);
(b) section 39 (rape by compelling sexual penetration);
(c) section 44(1), (2), (3) or (4) (incest);
(d) section 45 (sexual penetration of child under the age of 16);

Pt 8.2 Div. 7A
(Heading and
ss 387A, 387B
inserted by
No. 28/2016
s. 9.

S. 387A
inserted by
No. 28/2016
s. 9.

- (e) section 47A (persistent sexual abuse of child under the age of 16);
- (f) section 48(1) (sexual penetration of 16 or 17 year old child).
- (2) This Division applies to a complainant in a criminal proceeding referred to in subsection (1).
- (3) This Division applies to a recording of the evidence (including cross-examination and re-examination) of a complainant given during a summary hearing by the Children's Court in a criminal proceeding referred to in subsection (1).

S. 387B
inserted by
No. 28/2016
s. 9.

387B Admissibility of recording of complainant's evidence

Division 7 (other than sections 378 and 382) applies to this Division as if—

- (a) a reference to a sexual offence were a reference to an offence referred to in section 387A(1); and
- (b) a reference to a complainant were a reference to a complainant referred to in section 387A(2); and
- (c) a reference to a recording were a reference to a recording referred to in section 387A(3); and
- (d) a reference to a trial were a reference to a summary hearing of the charge by the Children's Court.

Division 8—Miscellaneous

388 Evidence of specialised knowledge in certain cases

Despite any rule of law to the contrary, in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court may receive evidence of a person's opinion that is

S. 388
inserted by
No. 68/2009
s. 50.

based on that person's specialised knowledge (acquired through training, study or experience) of—

- (a) the nature of sexual offences; and
- (b) the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that he or she has been the victim, of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence.

389 Audiovisual link evidence from overseas in certain proceedings

S. 389
inserted by
No. 68/2009
s. 50.

- (1) This section applies to a criminal proceeding that relates (wholly or partly) to a charge for an offence against section 49A(1) of the **Crimes Act 1958**.
- (2) The court may, on the application of a party to the criminal proceeding, direct that a witness give evidence by audiovisual link if—
 - (a) the witness will give the evidence from outside Australia; and
 - (b) the witness is not an accused in the proceeding; and
 - (c) the facilities required by subsection (3) are available or can reasonably be made available; and
 - (d) the court is satisfied that attendance of the witness at the court to give the evidence would—
 - (i) cause unreasonable expense or inconvenience; or
 - (ii) cause the witness psychological harm or unreasonable distress; or

- (iii) cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced; and
 - (e) the court is satisfied that it is consistent with the interests of justice that the evidence be taken by audiovisual link.
- (3) A witness can give evidence under a direction under this section only if the courtroom or other place in Victoria where the court is sitting (*the Victorian point*) and the place where the evidence is given (*the overseas point*) are equipped with audiovisual facilities that—
 - (a) enable all persons at the Victorian point that the court considers appropriate, to see and hear the witness give the evidence; and
 - (b) enable all persons at the overseas point that the court considers appropriate, to see and hear appropriate persons at the Victorian point.
- (4) The place where a witness gives evidence under a direction under this section is taken to be part of the courtroom or other place in Victoria where the court is sitting while the witness is there for the purpose of giving evidence.
- (5) An oath or affirmation to be sworn or made by a witness who is to give evidence under a direction under this section may be administered either—
 - (a) by means of the audiovisual link, in as nearly as practicable the same way as if the witness were to give the evidence at the courtroom or other place in Victoria where the court is sitting; or
 - (b) at the direction of, and on behalf of, the court at the place where the witness is to give the evidence by a person authorised by the court.

- (6) A court may make any orders that are just for the payment of expenses incurred in connection with the giving of evidence under a direction by the court under this section.
- (7) This section does not prevent any other law, or any rule or regulation made under any other law, about taking evidence of a witness outside Australia from applying for the purposes of a proceeding to which this section applies.
- (8) Nothing in this section limits the application of this Part to a charge for an offence against section 49A(1) of the **Crimes Act 1958**.

Part 8.3—Service of documents

Ch. 8 Pt 8.2
renumbered
as Ch. 8 Pt 8.3
by
No. 68/2009
s. 52(a).

390 General rules as to service

Unless this Act or any other Act or the rules of court otherwise provide—

S. 338
renumbered
as s. 390 by
No. 68/2009
s. 52(b).

S. 338(a)
amended by
No. 68/2009
s. 51(zw)(i),
renumbered
as s. 390(a) by
No. 68/2009
s. 52(b).

S. 338(b)
amended by
No. 68/2009
s. 51(zw)(ii),
renumbered
as s. 390(b) by
No. 68/2009
s. 52(b).

S. 338(c)
amended by
No. 68/2009
s. 51(zw)(iii),
renumbered
as s. 390(c) by
No. 68/2009
s. 52(b).

S. 338(d)
amended by
No. 68/2009
s. 51(zw)(iv),
renumbered
as s. 390(d) by
No. 68/2009
s. 52(b).

- (a) if a document is to be served personally, it must be served in accordance with section 391;
- (b) if a document is to be served on the informant or the prosecution, it must be served in accordance with section 392;
- (c) if a document is to be served on a company, registered body, incorporated association or other body corporate, it must be served in accordance with section 393;
- (d) in any other case, a document may be served in accordance with section 394.

391 Personal service

- (1) Unless this Act or any other Act or the rules of court otherwise provide, personal service of a document must be effected in accordance with subsection (2), (3) or (4).
- (2) Personal service of a document is effected by—
 - (a) giving a copy of the document to the person to be served; or
 - (b) if the person does not accept the copy, putting the copy down in the person's presence and telling the person the nature of the document; or
 - (c) leaving a copy of the document for the person at the person's last known or usual place of residence with a person who appears to be of or over the age of 16 years.
- (3) If the person to be served is in detention or in immigration detention within the meaning of section 5 of the Migration Act 1958 of the Commonwealth, personal service of a document on the person may be effected by sending a copy of the document by registered post addressed to the person at the place of detention.

Note

See the definition of *in detention* in section 3.

- (4) If a legal practitioner has given written notice to the informant or the prosecution that the legal practitioner represents an accused and is instructed to accept personal service of documents on behalf of the accused, personal service of a document on the accused may be effected by—

S. 339
renumbered
as s. 391 by
No. 68/2009
s. 52(c).

S. 339(2)(b)
amended by
No. 68/2009
s. 49(o),
renumbered
as s. 391(2)(b)
by
No. 68/2009
s. 52(c).

S. 391(4)(c)
amended by
No. 30/2010
s. 71(1).

S. 391(4)(d)
inserted by
No. 30/2010
s. 71(2).

S. 391(5)
inserted by
No. 30/2010
s. 71(3).

- (a) giving a copy of the document to the legal practitioner; or
 - (b) leaving a copy of the document at the ordinary place of business of the legal practitioner with a person who appears to work there; or
 - (c) sending a copy of the document by registered post addressed to the legal practitioner at the ordinary business address of the legal practitioner; or
 - (d) if the legal practitioner—
 - (i) has facilities for the reception of documents in a document exchange; and
 - (ii) consents to accepting personal service of documents by delivery to those facilities in the document exchange—by delivering a copy of the document addressed to the legal practitioner into those facilities.
- (5) If a document is delivered into the facilities of a document exchange in accordance with subsection (4)(d), the day of service of the document is taken to be—
- (a) the day following the day on which it is so delivered; or
 - (b) if the document is delivered on a Friday, the following Monday—
- or on any other day that may be proved.

392 Service on informant or DPP

S. 340
renumbered
as s. 392 by
No. 68/2009
s. 52(d).

(1) In this section—

informant includes an appellant, applicant or respondent who was the informant at first instance.

(2) If the person to be served is the informant, a document may be served—

(a) by giving a copy of the document to—

(i) the informant; or

(ii) a person representing the informant at a hearing in relation to the charge; or

(b) by sending a copy of the document by prepaid ordinary post addressed to the informant at the business address nominated by the informant under section 18; or

(c) by sending a copy of the document by fax or email addressed to the informant at the fax number or email address nominated by the informant under section 18; or

(d) by leaving a copy of the document for the informant at the informant's business address nominated under section 18 with a person who appears to work there; or

(e) in any other manner agreed between the informant and the party serving the document.

(3) If the person to be served is the DPP, a document may be served—

(a) by giving a copy of the document to a person representing the DPP at a hearing in relation to the charge; or

S. 340(3)(da)
inserted by
No. 68/2009
s. 39(1),
renumbered
as
s. 392(3)(da)
by
No. 68/2009
s. 52(d).

- (b) by leaving a copy of the document at the Office of Public Prosecutions with a person who appears to work there; or
- (c) by sending a copy of the document by prepaid ordinary post addressed to the Office of Public Prosecutions at the ordinary business address of the Office of Public Prosecutions; or
- (d) by sending a copy of the document by prepaid ordinary post addressed to the DPP at the business address, if any, nominated by the DPP under section 172; or
- (da) if the DPP has facilities for the reception of documents in a document exchange, by delivering a copy of the document addressed to the DPP into those facilities; or
- (e) by sending a copy of the document by fax or email addressed to the DPP at the fax number or email address, if any, nominated by the DPP under section 172; or
- (f) in any other manner agreed between the DPP and the party serving the document.

S. 340(4)
inserted by
No. 68/2009
s. 39(2),
renumbered
as s. 392(4) by
No. 68/2009
s. 52(d).

- (4) If a document is delivered into the facilities of a document exchange in accordance with subsection (3)(da), the day of service of the document is taken to be—
 - (a) the day following the day on which it is so delivered; or

(b) if the document is delivered on a Friday, the following Monday—

or on any other day that may be proved.

Notes

- 1 The **Electronic Transactions (Victoria) Act 2000** applies to enable a document to be served electronically, including facsimile transmission and email, in accordance with that Act.
- 2 Section 172 provides that the DPP may nominate an address for service of documents.

393 Service on company, registered body, incorporated association or other body corporate

- (1) If the person to be served is a company within the meaning of the Corporations Act, service of a document on the person may be effected in accordance with section 109X of that Act or in accordance with subsection (4).
- (2) If the person to be served is a registered body within the meaning of the Corporations Act, service of a document on the person may be effected in accordance with section 601CX of that Act or in accordance with subsection (4).
- (3) If the person to be served is an incorporated association within the meaning of the **Associations Incorporation Reform Act 2012**, service of a document on the person may be effected in accordance with section 217 of that Act or in accordance with subsection (4).
- (4) If the person to be served is a body corporate and service is not effected in accordance with subsection (1), (2) or (3), service of a document on the person must be effected—

(a) by leaving a copy of the document at the registered office or principal place of business of the body corporate; or

S. 341
renumbered
as s. 393 by
No. 68/2009
s. 52(e).

S. 393(3)
amended by
Nos 48/2012
s. 31, 20/2012
s. 226(Sch. 5
item 10).

- (b) by sending a copy of the document by prepaid ordinary post to the registered office or principal place of business of the body corporate; or
- (c) if the body corporate is represented by a legal practitioner, by sending a copy of the document by prepaid ordinary post addressed to the legal practitioner at the ordinary business address of the legal practitioner; or
- (d) by serving a copy of the document on a representative of the body corporate within the meaning of section 334 in a manner nominated in writing by the representative.

Note

The Electronic Transactions Act 1999 of the Commonwealth or the **Electronic Transactions (Victoria) Act 2000** applies to enable a document to be served electronically, including fax transmission and email, in accordance with the relevant Act.

S. 342
amended by
No. 68/2009
s. 39(4) (ILA
s. 39B(1)),
renumbered
as s. 394 by
No. 68/2009
s. 52(f).

394 Ordinary service

- (1) Unless this Act or any other Act or the rules of court otherwise provide, ordinary service of a document is effected—
 - (a) by sending a copy of the document by prepaid ordinary post addressed to the person to be served at the last known place of residence or business of the person; or
 - (ab) if the document relates only to a traffic camera offence, by sending a copy of the document by prepaid ordinary post addressed to the person to be served at a post office box address nominated by the person; or
 - (b) if the person to be served is represented by a legal practitioner, by sending a copy of the document by prepaid ordinary post addressed to the legal practitioner at the ordinary business address of the legal practitioner; or

S. 394(1)(ab)
inserted by
No. 55/2014
s. 117.

(ba) if the person to be served is represented by a legal practitioner who has facilities for the reception of documents in a document exchange, by delivering a copy of the document addressed to the legal practitioner into those facilities; or

S. 342(ba) inserted by No. 68/2009 s. 39(3), renumbered as s. 394(1)(ba) by No. 68/2009 s. 52(f).

(c) in any other manner agreed by the parties.

Notes

- 1 See section 49 of the **Interpretation of Legislation Act 1984** as to service by post.
- 2 The **Electronic Transactions (Victoria) Act 2000** applies to enable a document to be served electronically, including fax transmission and email, in accordance with that Act.

(2) If a document is delivered into the facilities of a document exchange in accordance with subsection (1)(ba), the day of service of the document is taken to be—

S. 342(2) inserted by No. 68/2009 s. 39(4), renumbered as s. 394(2) by No. 68/2009 s. 52(f).

(a) the day following the day on which it is so delivered; or

(b) if the document is delivered on a Friday, the following Monday—

or on any other day that may be proved.

395 Personal service satisfies ordinary service

If this Act requires or permits service of a document to be effected in accordance with section 394 or by ordinary service, the document may be served in accordance with section 391.

S. 343 amended by No. 68/2009 s. 51(zx), renumbered as s. 395 by No. 68/2009 s. 52(g).

396 Last known place of residence or business

Rules of court may prescribe how the last known place of residence or business of an accused is to be ascertained in specified circumstances.

S. 344 renumbered as s. 396 by No. 68/2009 s. 52(h).

S. 345
renumbered
as s. 397 by
No. 68/2009
s. 52(i).

397 Order for substituted service

If it appears to a court by sworn evidence, whether oral or by affidavit, that service cannot be promptly effected, the court may make an order for substituted service.

S. 346
renumbered
as s. 398 by
No. 68/2009
s. 52(j).

398 Who may effect service

If by or under this Act a person is required or permitted to serve a document, the person may serve the document by causing it to be served by another person.

S. 347
renumbered
as s. 399 by
No. 68/2009
s. 52(k).

399 Proof of service

- (1) Service of a document may be proved by—
 - (a) oral sworn evidence; or
 - (b) affidavit; or
 - (c) declaration.
- (2) Evidence of service must identify the document served and state the time and manner in which service was effected.
- (3) A document purporting to be an affidavit or declaration under subsection (1)(b) or (1)(c) is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements in it.
- (4) An affidavit or declaration under subsection (1)(b) or (1)(c) must be filed in court—
 - (a) in the case of service of a summons to answer to a charge for an indictable offence where a date for a filing hearing has been fixed, at least 2 days before the filing hearing;

- (b) in the case of service of any other summons to answer to a charge, at least 7 days before the return date;
- (c) in the case of service of any other document, a reasonable time before the hearing to which it applies.

Ch. 8 Pt 8.3
renumbered
as Ch. 8 Pt 8.4
by
No. 68/2009
s. 52(l).

Part 8.4—Costs

Division 1—Preliminary

S. 348
renumbered
as s. 400 by
No. 68/2009
s. 52(m).

400 Right to be heard

- (1) Subject to subsection (2), the court must not make an order awarding costs against a person without giving that person a reasonable opportunity to be heard.
- (2) Subsection (1) does not apply to an order for costs made on the hearing and determination of a charge in the absence of the accused in accordance with Division 10 of Part 3.3.

Division 2—Costs in summary proceedings and committal proceedings

S. 349
renumbered
as s. 401 by
No. 68/2009
s. 52(n).

401 Costs in Magistrates' Court

- (1) Unless otherwise expressly provided by this or any other Act or by the rules of court, the costs of, and incidental to, all criminal proceedings in the Magistrates' Court are in the discretion of the court and the court has full power to determine by whom, to whom and to what extent the costs are to be paid.
- (2) In exercising its discretion under subsection (1) in a criminal proceeding, the Magistrates' Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the court is satisfied resulted in prolonging the proceeding.
- (3) If the Magistrates' Court strikes out a charge under section 14(3), the court may award costs against the informant.

- (4) This section and section 410 apply to a purported proceeding in the Magistrates' Court which is beyond the jurisdiction of the court as if the purported proceeding were within jurisdiction.
- (5) If the Magistrates' Court determines to award costs against an informant who is a police officer, the order must be made against the Chief Commissioner of Police.

S. 401(4)
amended by
No. 68/2009
s. 51(zy).

S. 401(5)
amended by
No. 37/2014
s. 10(Sch.
item 41.8).

402 Notice to appear

S. 350
amended by
No. 68/2009
s. 40 (ILA
s. 39B(1)),
renumbered
as s. 402 by
No. 68/2009
s. 52(o).

- (1) If a notice to appear lapses under section 22(1) and notice is given in accordance with section 23, the police officer or public official who served the notice is not liable for any costs of the person served with the notice in respect of the serving or lapsing of the notice.
- (2) If a notice to appear lapses under section 22(1) and notice is not given in accordance with section 23, the Magistrates' Court may award costs against the police officer or public official who served the notice as if the notice to appear were a criminal proceeding in the Magistrates' Court.

S. 402(1)
amended by
No. 37/2014
s. 10(Sch.
item 41.8).

S. 350(2)
inserted by
No. 68/2009
s. 40,
renumbered
as s. 402(2) by
No. 68/2009
s. 52(o),
amended by
No. 37/2014
s. 10(Sch.
item 41.8).

403 Convicted accused to pay filing fee

If—

- (a) a charge-sheet containing one or more charges is filed with a registrar of the Magistrates' Court; and

S. 351
renumbered
as s. 403 by
No. 68/2009
s. 52(p).

- (b) no filing fee is payable because of an exemption provided for in the regulations; and
- (c) the accused is convicted of one or more of the alleged offences and is ordered to pay a fine—

the Magistrates' Court must order the accused to pay by way of costs, in addition to the amount of the fine and any other costs, the amount of the filing fee that, but for the exemption, would have been payable.

Division 3—Costs in trials on indictment

404 Costs in the Supreme Court and County Court

S. 352
renumbered
as s. 404 by
No. 68/2009
s. 52(q).

- (1) If—
 - (a) the Supreme Court or the County Court is satisfied that an act or omission by, or on behalf of, a party before the commencement of trial was unreasonable and resulted in prolonging the trial; or
 - (b) there has been a departure referred to in section 233; or
 - (c) a party has failed to comply with a requirement of Part 5.5 or an order made under that Part—

the court may make any order that it considers appropriate with respect to the costs of and incidental to the trial and, for this purpose, it has full power to determine by whom, to whom and to what extent those costs are to be paid.

- (2) An order under subsection (1) may be made against—
 - (a) a party, whether the Crown or the accused; or

(b) a party's legal practitioner or, in the case of a legal practitioner who is employed by a law practice (within the meaning of the Legal Profession Uniform Law (Victoria)), the law practice.

S. 404(2)(b)
amended by
No. 17/2014
s. 160(Sch. 2
item 30.3).

(3) If the accused and the accused's legal practitioner have complied with the requirements of Part 5.5 and any orders made under that Part and the hearing of a criminal proceeding is—

(a) discontinued or adjourned; and

(b) the reason for the discontinuance or the adjournment was not attributable in any way to the act, neglect or fault of an accused or that accused's legal practitioner—

any indemnity certificate granted by the court under section 16 or 17 of the **Appeal Costs Act 1998** may include an indemnity certificate for the accused's own costs incurred in consequence of a requirement imposed on the accused under that Part.

405 Costs order

If the court determines that costs should be paid under section 404 or 410, the order must provide—

- (a) if the court is satisfied that a party or a party's legal practitioner has reasonably incurred additional costs as a consequence of any act or omission of another party, for payment of costs to the first-mentioned party or that party's legal practitioner;
- (b) in any other case, for payment of costs into court for payment into the Consolidated Fund.

S. 353
amended by
No. 68/2009
s. 51(zz),
renumbered
as s. 405 by
No. 68/2009
s. 52(r).

Division 4—Costs on appeal

406 Costs on appeal to County Court or the Trial Division of the Supreme Court under section 254

S. 406
(Heading)
amended by
No. 3/2016
s. 83(1).

S. 354
renumbered
as s. 406 by
No. 68/2009
s. 52(s).

S. 406(1)
amended by
No. 3/2016
s. 83(2)(b).

S. 406(1)(b)
amended by
No. 3/2016
s. 83(2)(a).

S. 406(2)
amended by
No. 3/2016
s. 83(3).

S. 406(3)
amended by
No. 3/2016
s. 83(4)(a)(c).

- (1) If—
- (a) an appeal under section 254 is struck out or dismissed; and
 - (b) the County Court or the Trial Division of the Supreme Court, as the case requires, is satisfied that the appeal was brought vexatiously or frivolously or in abuse of process—

the court may order that the appellant pay all or a specified portion of the respondent's costs of the appeal.

- (2) Nothing in subsection (1) limits any discretion as to costs of an appeal conferred on the County Court or the Supreme Court, as the case requires, by any other provision of this Act or the **County Court Act 1958** or the **Supreme Court Act 1986**, as the case requires.
- (3) If the County Court or the Supreme Court, as the case requires, is satisfied that—
- (a) a copy of a notice of appeal under section 254 or 257 was served on the respondent; and

(b) the appeal was not afterwards prosecuted or the court has no jurisdiction to hear and determine the appeal—

S. 406(3)(b)
amended by
No. 3/2016
s. 83(4)(b).

the court may order that the appellant pay to the respondent any costs that it thinks reasonable.

(4) If an appellant under section 254—

S. 406(4)
amended by
No. 3/2016
s. 83(5).

(a) breaches an undertaking referred to in section 255(5); or

(b) abandons an appeal—

the court may order that the appellant pay any costs incurred as a result of the breach or abandonment.

407 Costs on abandonment of appeal to County Court or the Trial Division of the Supreme Court

S. 407
(Heading)
amended by
No. 3/2016
s. 84(1).

S. 355
renumbered
as s. 407 by
No. 68/2009
s. 52(t).

(1) Within 28 days after receiving a copy of the order striking out an appeal, the respondent may apply to the County Court or the Trial Division of the Supreme Court, as the case requires, for an order dealing with the respondent's costs of the appeal.

S. 407(1)
amended by
No. 3/2016
s. 84(2)(a).

(2) If a respondent proposes to apply to the court under subsection (1), the respondent must first serve notice in writing of the proposed application on the appellant.

S. 407(2)
amended by
No. 3/2016
s. 84(2)(b).

Note

See section 394 for ordinary service.

Note to
s. 355(2)
amended by
No. 68/2009
s. 51(zza),
renumbered
as note to
s. 407(2) by
No. 68/2009
s. 52(t).

S. 407(3)
amended by
No. 3/2016
s. 84(2)(b).

- (3) On an application under subsection (1), the court may make any order that it considers just.

S. 356
renumbered
as s. 408 by
No. 68/2009
s. 52(u).

408 Costs on appeal from Magistrates' Court to Supreme Court on a question of law

The costs of, and incidental to, an appeal under section 272 are in the discretion of the Supreme Court and the court has full power to determine by whom and to what extent the costs are to be paid.

S. 357
renumbered
as s. 409 by
No. 68/2009
s. 52(v).

409 No costs on appeal to Court of Appeal or on new trial

No costs are to be allowed to a party to—

- (a) an appeal under Part 6.3; or
- (b) a new trial; or
- (c) a proceeding preliminary or incidental to an appeal or new trial.

Division 5—Legal practitioners

S. 358
renumbered
as s. 410 by
No. 68/2009
s. 52(w).

410 Costs liability of legal practitioner

- (1) If a legal practitioner for a party to—
- (a) a criminal proceeding in the Magistrates' Court; or
 - (b) a criminal proceeding in the Supreme Court or the County Court before the commencement of trial—

whether personally or through a servant or agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by any other misconduct or default, the court may make an order that—

- (c) all or any of the costs between the legal practitioner and the client be disallowed or that the legal practitioner repay to the client the whole or part of any money paid on account of costs; or
 - (d) the legal practitioner pay to the client all or any of the costs which the client has been ordered to pay to any party; or
 - (e) the legal practitioner pay all or any of the costs payable by any party other than the client.
- (2) Without limiting subsection (1), a legal practitioner is in default for the purposes of that subsection if a proceeding cannot conveniently be heard or proceed, or fails or is adjourned without any useful progress being made, because the legal practitioner failed to—
- (a) attend in person or by a proper representative; or
 - (b) file any document which ought to have been filed; or
 - (c) file any document in court which ought to have been filed; or
 - (d) lodge or deliver any document for the use of the court which ought to have been lodged or delivered; or
 - (e) be prepared with any proper evidence or account; or
 - (f) otherwise proceed.
- (3) The court may order that notice of a proceeding or order against a legal practitioner under this section may be given to the client in any manner that the court directs.

Part 8.5—Miscellaneous

Ch. 8 Pt 8.4
renumbered
as Ch. 8 Pt 8.5
by
No. 68/2009
s. 52(x).

S. 359
renumbered
as s. 411 by
No. 68/2009
s. 52(y).

411 Issue of warrant to arrest

- (1) A warrant to arrest authorised to be issued under this Act is to be issued in accordance with Division 3 of Part 4 of the **Magistrates' Court Act 1989** and that Division applies to such a warrant with any necessary modifications.
- (2) Despite anything to the contrary in the **Magistrates' Court Act 1989**, if a warrant to arrest is issued under this Act by a court other than the Magistrates' Court, a person arrested on the warrant must, if practicable, be brought before the court which issued the warrant.

Note to
s. 411(2)
amended by
Nos 81/2011
s. 22(2),
38/2016
s. 9(5).

Note

Division 3 of Part IIA of the **Evidence (Miscellaneous Provisions) Act 1958** authorises or requires the appearance of an accused before the court by audio visual link in certain circumstances.

- (3) If it is not practicable to bring an arrested person before the court which issued the warrant within a reasonable period of time after arrest, the person must be brought before a bail justice or the Magistrates' Court.
- (4) If an arrested person is brought before a bail justice or the Magistrates' Court in accordance with subsection (3), the bail justice or the Magistrates' Court must remand the arrested person in custody or grant the arrested person bail to attend before the court which issued the warrant.

S. 359(4)
amended by
No. 68/2009
s. 41,
renumbered
as s. 411(4) by
No. 68/2009
s. 52(y).

412 Power to amend when there is a defect or error

For the purpose of correcting any defect or error in substance or in form, a court may amend any summons, warrant, plea, judgment or order.

S. 360
renumbered
as s. 412 by
No. 68/2009
s. 52(z).

413 Transfer of charge to court with jurisdiction

- (1) If, as a result of error, a charge is before a court which does not have jurisdiction to hear it, the court may order that the charge be transferred to the appropriate court, if the court is satisfied that it is in the interests of justice to do so.
- (2) If an order is made under this section, the transferring court may—
 - (a) order that the accused appear before the court to which the charge is transferred on a specified date; or
 - (b) if the accused is a natural person, remand the accused in custody, or grant bail, to appear before the court to which the charge is transferred on a specified date; or
 - (c) in the case of a corporate accused, order the accused to appear, by a representative or a legal practitioner, before the court to which the charge is transferred on a specified date.

S. 361
amended by
No. 68/2009
s. 42 (ILA
s. 39B(1)),
renumbered
as s. 413 by
No. 68/2009
s. 52(za).

S. 361(2)
inserted by
No. 68/2009
s. 42,
renumbered
as s. 413(2) by
No. 68/2009
s. 52(za).

414 Acknowledgment of false statement

A person is liable to the penalties of perjury if—

- (a) the person makes a written statement for the purposes of a criminal proceeding or potential criminal proceeding or the investigation of an offence; and
- (b) the statement contains an acknowledgment signed in the presence of a person referred to in Schedule 3 that the statement is true and correct and is made in the belief that a person making a false statement in the

S. 414
inserted by
No. 68/2009
s. 53.

circumstances is liable to the penalties of perjury; and

- (c) the person knows at the time of signing the acknowledgment that the statement is false.

Notes

- 1 Section 314 of the Crimes Act 1958 provides for the offence of perjury.
- 2 Sections 38, 47 and 112 of this Act set out rules with respect to statements in summary hearings and committal proceedings.

S. 362
renumbered
as s. 415 by
No. 68/2009
s. 54(a).

415 Court may direct that a person be prosecuted for perjury

- (1) A court may direct that a person be tried for perjury if it appears to the court that the person has committed perjury in—
 - (a) any evidence given orally before the court;
or
 - (b) an affidavit, deposition, examination or other proceeding made or taken before the court.
- (2) If a court directs that a person be tried for perjury, the court may remand the person in custody or grant the person bail pending the trial.

S. 363
renumbered
as s. 416 by
No. 68/2009
s. 54(b).

416 Disclosure of material by prosecution

- (1) Nothing in this Act derogates from a duty otherwise imposed on the prosecution to disclose to the accused material relevant to a charge.
- (2) Nothing in this Act requires the prosecution to disclose to the accused material which the prosecution is required or permitted to withhold under this or any other Act or any rule of law.

417 Court fees not payable by accused

It is not lawful to receive—

- (a) any court fees for the issuing of any process on behalf of an accused; or
- (b) a fee from an accused for taking or discharging a recognisance of bail or issuing a writ or recording an appearance or plea.

S. 364
renumbered
as s. 417 by
No. 68/2009
s. 54(c).

418 Supreme Court—limitation of jurisdiction

It is the intention of sections 61(4) and 209(4) to alter or vary section 85 of the **Constitution Act 1975**.

S. 365
renumbered
as s. 418 by
No. 68/2009
s. 54(d).

419 Rules of court

- (1) Rules of court made by the authority having for the time being power to make rules regulating the practice and procedure of a court may include rules for or with respect to any matter for which provision is to be made under this Act or under the **Jury Directions Act 2015** or the **Crimes (Mental Impairment or Unfitness to be Tried) Act 1997** by rules of court.
- (2) Rules of court made under this Act may regulate generally the practice and procedure under this Act.

S. 366
renumbered
as s. 419 by
No. 68/2009
s. 54(e).

S. 419(1)
amended by
Nos 12/2013
s. 31, 14/2015
s. 69(6).

420 Regulations

- (1) The Governor in Council may make regulations for or with respect to—
 - (a) prescribing by scale or otherwise the costs of and incidental to proceedings in the County Court on an appeal under section 254, 257 or 260; and

S. 367
renumbered
as s. 420 by
No. 68/2009
s. 54(f).

Criminal Procedure Act 2009
No. 7 of 2009
Part 8.5—Miscellaneous

S. 420(1)(b)
repealed by
No. 81/2011
s. 22(3).

* * * * *

- (c) prescribing allowances and expenses to be paid to prosecution witnesses and interpreters—
 - (i) in criminal trials and criminal appeal proceedings in the Supreme Court and in criminal trials in the County Court;
 - (ii) in criminal proceedings in the Magistrates' Court and in appeal proceedings in the County Court;
- (d) prescribing allowances and expenses to be paid to witnesses and interpreters—
 - (i) attending on the order of the Court of Appeal or examined in a proceeding incidental to a criminal appeal or new trial;
 - (ii) attending for examination by a person appointed by the Court of Appeal for the purposes of criminal appeal proceedings;
- (e) prescribing allowances and expenses to be paid to a special commissioner appointed by the Court of Appeal to examine a question arising on criminal appeal proceedings;
- (ea) the making, use (including for training purposes), possession, copying, storage, access to and destruction of an audio or audiovisual recording referred to in Chapter 4 or 5 or Part 8.2;

S. 367(1)(ea)
inserted by
No. 68/2009
s. 43,
renumbered
as
s. 420(1)(ea)
by
No. 68/2009
s. 54(f),
amended by
No. 30/2010
s. 72.

- (f) any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.
- (2) The regulations—
- (a) may be of general or limited application; and
 - (b) may differ according to differences in time, place or circumstances; and
 - (c) may confer a discretionary authority or impose a duty on a specified person or body or class of persons or bodies; and
 - (d) may leave any matter or thing to be from time to time determined, applied, dispensed with or regulated by a specified person; and
 - (e) may provide in a specified case or class of cases for the exemption of persons or things or a class of persons or things from any of the provisions of the regulations whether unconditionally or on specified conditions and either wholly or to any extent that is specified.

* * * * *

Ch. 9
(Heading and
ss 421–438)
amended by
No. 68/2009
ss 44–48,
49(p)(q),
51(zzb), 54(g)–
(x), 30/2010
s. 73,
repealed by
No. 7/2009
s. 438.

Ch. 10
(Heading and
s. 439)
inserted by
No. 68/2009
s. 55.

Chapter 10—Savings and transitional provisions

439 Savings and transitional provisions

Schedule 4 has effect.

S. 440
inserted by
No. 30/2010
s. 76.

440 Transitional provisions—Justice Legislation Amendment Act 2010

- (1) An application for leave to appeal against sentence under section 567(d) of the **Crimes Act 1958** as in force immediately before its repeal that has been commenced but not determined on the commencement of section 76 of the **Justice Legislation Amendment Act 2010** is to be determined in accordance with section 280 of this Act as if—
 - (a) a reference to section 278 were a reference to section 567(d) of the **Crimes Act 1958**; and
 - (b) a reference to section 315(1) were a reference to section 582 of the **Crimes Act 1958** as in force immediately before its repeal.
- (2) Section 350 as amended by section 65 of the **Justice Legislation Amendment Act 2010** applies to a sentencing hearing that commences on or after the commencement of section 65 of that Act.
- (3) Section 359 as amended by section 66 of the **Justice Legislation Amendment Act 2010** applies to a hearing in a criminal proceeding if the hearing commences on or after the commencement of section 66 of that Act.

441 Transitional provisions—Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011

S. 441
inserted by
No. 81/2011
s. 18.

- (1) Section 53A as inserted by section 6 of the **Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011** applies to a proceeding in which the first mention hearing is held on or after the commencement of section 6 of that Act.
- (2) Section 77 as amended by section 7 of the **Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011** applies to a criminal record that is provided to a court on or after the commencement of section 7 of that Act.
- (3) Section 244 as amended by section 15 of the **Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011** applies to a criminal record that is filed in a court on or after the commencement of section 15 of that Act.
- (4) Chapter 7A as inserted by section 17 of the **Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011** applies on and from the commencement of that section to an acquittal, irrespective of whether the acquittal occurred before, on or after the commencement of section 17 of that Act.

442 Transitional provisions—Criminal Procedure Amendment Act 2012

S. 442
inserted by
No. 48/2012
s. 32.

- (1) This Act as amended by Division 1 of Part 2 of the **Criminal Procedure Amendment Act 2012** applies to an application for leave to appeal against sentence that is determined on or after the day on which Division 1 of Part 2 of that Act comes into operation, irrespective of when the application was commenced.

- (2) Division 5 of Part 8.2 as amended by sections 22 and 23 of the **Criminal Procedure Amendment Act 2012** applies irrespective of whether the recording is made before, on or after the commencement of those sections.
- (3) Division 6 of Part 8.2 as amended by sections 24, 25, 26, 27, 28 and 29 of the **Criminal Procedure Amendment Act 2012** applies to a proceeding in which a special hearing is held on or after the commencement of those sections.

S. 443
inserted by
No. 12/2013
s. 32.

443 Transitional provision—Jury Directions Act 2013

Section 223 as amended by the **Jury Directions Act 2013** applies to a trial that commences on or after the day on which that Act comes into operation.

S. 444
inserted by
No. 55/2014
s. 118.

444 Transitional provision—Criminal Organisations Control and Other Acts Amendment Act 2014

- (1) Sections 17 and 394 as amended by sections 113 and 117 of the **Criminal Organisations Control and Other Acts Amendment Act 2014** apply to a criminal proceeding commenced on or after the day on which sections 113 and 117 of that Act come into operation, irrespective of when the offence is alleged to have been committed.
- (2) Section 17A as inserted by section 114 of the **Criminal Organisations Control and Other Acts Amendment Act 2014** applies to a criminal proceeding commenced on or after the day on which section 114 of that Act comes into operation, irrespective of when the offence is alleged to have been committed.
- (3) Section 39 as amended by section 115 of the **Criminal Organisations Control and Other Acts Amendment Act 2014** applies to a criminal proceeding commenced on or after the day on which section 115 of that Act comes into

operation, irrespective of when the offence is alleged to have been committed.

- (4) Section 119 as amended by section 108 of the **Criminal Organisations Control and Other Acts Amendment Act 2014** applies to a committal proceeding in which a committal mention hearing is held on or after the day on which section 108 of that Act comes into operation, irrespective of when the committal proceeding commenced.
- (5) Sections 124 and 132 as amended by sections 109 and 110 of the **Criminal Organisations Control and Other Acts Amendment Act 2014** apply to a committal proceeding in which no committal mention hearing or committal hearing has been held before the day on which sections 109 and 110 of that Act come into operation, irrespective of when the committal proceeding commenced.
- (6) Section 132A as inserted by section 111 of the **Criminal Organisations Control and Other Acts Amendment Act 2014** applies to a committal proceeding in which no committal mention hearing or committal hearing has been held before the day on which section 111 of that Act comes into operation, irrespective of when the committal proceeding commenced.

445 Transitional provisions—Crimes Amendment (Sexual Offences and Other Matters) Act 2014

A person may be charged with a course of conduct charge (within the meaning of clause 4A of Schedule 1) irrespective of when the incidents of the commission of the offence are alleged to have taken place.

S. 445
inserted by
No. 74/2014
s. 16.

S. 446
inserted by
No. 42/2015
s. 23.

**446 Transitional provision—Crimes Amendment
(Child Pornography and Other Matters) Act 2015**

This Act, as amended by the **Crimes Amendment (Child Pornography and Other Matters) Act 2015**, applies to a request for inspection of an exhibit (or a part of an exhibit), or for a copy of any information, document or thing, made on or after the day on which section 14 of that Act comes into operation irrespective of when—

- (a) the proceeding in relation to which the request is made commenced; or
- (b) the offence to which the proceeding relates is alleged to have been committed.

Schedules

Schedule 1—Charges on a charge-sheet or indictment

Sections 6(3), 159(3)

1 Statement of offence

A charge must—

- (a) state the offence that the accused is alleged to have committed; and
- (b) contain the particulars, in accordance with clause 2, that are necessary to give reasonable information as to the nature of the charge.

2 Statement of particulars

- (1) Subject to subclause (2), particulars of the offence charged must be set out in ordinary language and the use of technical terms is not necessary.
- (2) If a rule of law or a statute limits the particulars that are required to be given in a charge, nothing in this clause requires any more particulars than those required.

3 Statutory offence

- (1) In this clause—

statutory offence means an offence created by an Act or subordinate instrument, or by a provision of an Act or subordinate instrument.

- (2) For the purposes of clause 1(a), a statement of a statutory offence is sufficient if it—
- (a) identifies the provision creating the offence; and
 - (b) describes the offence in the words of the provision creating it, or in similar words.
- (3) If a statutory offence states—
- (a) the offence to be committed in alternative ways; or
 - (b) any element or part of the offence in the alternative—

a charge may state the commission of the offence or the element or part of the offence in the alternative.

4 Exceptions, exemptions etc.

Any exception, exemption, proviso, excuse or qualification need not be specified or negated in a charge.

4A Course of conduct charge

- (1) In this clause—

course of conduct charge is a charge for a relevant offence that involves more than one incident of the offence;

relevant offence means—

- (a) a sexual offence; or
- (b) an offence under any of the following provisions of the **Crimes Act 1958**—
 - (i) Division 2 of Part I (other than sections 75, 75A, 76, 77, 78, 80 and 91);
 - (ii) Division 2AA of Part I;
 - (iii) Division 2A of Part I;

Sch. 1 cl. 4A
inserted by
No. 74/2014
s. 13.

(iv) Division 2B of Part I;

(v) Subdivision (6) of Division 3 of Part I.

Note

Sexual offence is defined in section 3 by reference to an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I of the **Crimes Act 1958** or under any corresponding previous enactment.

- (2) More than one incident of the commission of the same relevant offence may be included in a single charge only if—
- (a) each incident constitutes an offence under the same provision; and
 - (b) for a charge for a sexual offence, each incident relates to the same complainant; and
 - (c) the incidents take place on more than one occasion over a specified period; and
 - (d) the incidents taken together amount to a course of conduct having regard to their time, place or purpose of commission and any other relevant matter.
- (3) More than one type of act may be alleged in the one charge to prove an element of the offence.

Example

A course of conduct charge for a sexual offence may allege acts of digital penetration as well as acts of penetration with an object.

- (4) In subclause (3), **act**, in relation to a sexual act, includes—
- (a) sexual penetration as defined by section 37D of the **Crimes Act 1958**; and

- (b) touching that is sexual within the meaning of Subdivision (8A) of Division 1 of Part I of the **Crimes Act 1958**.

Note

An act for the purposes of subclause (3) is not limited to an act that constitutes an offence inserted by the **Crimes Amendment (Sexual Offences and Other Matters) Act 2014** but includes an act that falls within the definition of *sexual penetration* or *touching* inserted by section 4 of that Act in the **Crimes Act 1958** but is an offence that pre-dates the 2014 Act.

- (5) The charge must contain a statement that the charge is a course of conduct charge.
- (6) To avoid doubt, a course of conduct charge is a charge of a single offence.

Note

Because it is a single charge there is no scope for an order to be made under section 193 or 194 for a separate trial of any of the incidents.

- (7) To avoid doubt, on a course of conduct charge the accused may rely on any exception, exemption, proviso, excuse or qualification that applies to the offence covered by the charge.
- (8) The prosecution must prove beyond reasonable doubt that the incidents of an offence committed by the accused, taken together, amount to a course of conduct having regard to their time, place or purpose of commission and any other relevant matter.
- (9) However, to prove a course of conduct offence it is not necessary to prove an incident of the offence with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted only by that incident.

- (10) Without limiting subclause (9), it is not necessary to prove—
- (a) any particular number of incidents of the offence or the dates, times, places, circumstances or occasions of the incidents; or
 - (b) that there were distinctive features differentiating any of the incidents; or
 - (c) the general circumstances of any particular incident.
- (11) Without limiting clause 1(b), the particulars necessary to give reasonable information as to the nature of a course of conduct charge—
- (a) must be determined having regard to—
 - (i) the fact that the charge is a course of conduct charge; and
 - (ii) the limitations contained in subclause (2); and
 - (iii) the fact that the various incidents of the offence are alleged to have occurred over a period of time; and
 - (b) need not include particulars of any specific incident of the offence, including its date, time, place, circumstances or occasion; and
 - (c) do not need to distinguish any specific incident of the offence from any other.
- (12) A charge-sheet that contains a course of conduct charge for a sexual offence must not be filed or signed in accordance with section 6 without the consent of the Director of Public Prosecutions.
- (13) This clause has effect despite any rule of law to the contrary.

5 Joinder of charges

- (1) A charge-sheet or indictment may contain charges for related offences, whether against the same accused or different accused.
- (2) If more than one offence is charged in a charge-sheet or indictment, the particulars of each offence charged must be set out in a separate, consecutively numbered paragraph.
- (3) A charge-sheet or indictment may contain, as an alternative charge to a course of conduct charge, a charge of a relevant offence of the kind covered by the course of conduct charge and alleged to have been committed within the period to which the course of conduct charge relates.
- (4) In the circumstances set out in subclause (3), for the purposes of section 220 an acquittal on the course of conduct charge does not constitute a previous acquittal in relation to the alternative charge.
- (5) A charge-sheet or indictment must not contain both a course of conduct charge and a charge for an offence against section 47A of the **Crimes Act 1958**.
- (6) In this clause, *course of conduct charge* has the same meaning as in clause 4A.

Sch. 1 cl. 5(3)
inserted by
No. 74/2014
s. 14.

Sch. 1 cl. 5(4)
inserted by
No. 74/2014
s. 14.

Sch. 1 cl. 5(5)
inserted by
No. 74/2014
s. 14.

Sch. 1 cl. 5(6)
inserted by
No. 74/2014
s. 14.

6 Charge against multiple accused

If an offence is alleged against more than one accused, regardless of their degree of participation in the offence, an indictment or charge-sheet may name each of those accused in the charge for the offence.

7 Descriptions generally

Subject to any other provision of this Schedule, if it is necessary to describe anything in a charge, it is sufficient to describe the thing in ordinary language in a manner that indicates with reasonable clarity the thing referred to.

8 Description of persons

- (1) The description or designation in a charge of a person must be reasonably sufficient to identify the person.
- (2) If it is impracticable to comply with subclause (1)—
 - (a) a description or designation must be given that is reasonably practicable in the circumstances; or
 - (b) the person may be described as "a person unknown".

9 Description of document

If it is necessary to refer to a document or instrument in a charge, it is sufficient to describe it by any name by which it is usually known or by its substance, without setting out a copy of it.

10 Description of property

- (1) The description of property in a charge must—
 - (a) be in ordinary language; and
 - (b) indicate the property with reasonable clarity.
- (2) If a description of property complies with subclause (1), it is not necessary to name the owner of the property or the value of the property, unless that information is required to describe an offence which depends on a special ownership of property or a special value of property.

- (3) If property is vested in more than one person and the owners of the property are referred to in a charge, it is sufficient to describe the owners of the property—
- (a) by naming one of those persons followed by the words "with others"; or
 - (b) if the owners are a body of persons with a collective name, by using the collective name alone.

11 Statement of intent to deceive, injure or defraud

In stating an intent to deceive, injure or defraud, it is not necessary to state an intent to deceive, injure or defraud any particular person if the statute creating the offence does not make an intent to deceive, injure or defraud a particular person an element of the offence.

12 Perjury, subornation of perjury, etc.

- (1) In a charge for perjury or for an offence deemed to be perjury, it is sufficient to set out—
- (a) the substance of the offence charged; and
 - (b) the court, tribunal or person before whom the accused falsely swore or falsely declared or affirmed the matter charged as false—
- without setting out the commission or authority of the court, tribunal or person.
- (2) In a charge for subornation of perjury and other similar offences where the offence of perjury has been actually committed, it is sufficient to allege the offence of the person who committed the offence of perjury in the manner referred to in subclause (1) and then to allege that the accused unlawfully caused and procured that person to commit the offence of perjury as alleged.

- (3) In a charge for subornation of perjury and other similar offences where the offence of perjury or other offence has not been actually committed, it is sufficient to set out the substance of the offence charged against the accused, without setting out any of the matters referred to in subclause (1).

13 Names of witnesses to be included on indictment

The following information must be included on an indictment—

- (a) the name of every witness who gave evidence at the committal proceeding, indicating whether the prosecution proposes to call the witness at the trial; and
- (b) the names of any other witnesses the prosecution proposes to call at the trial.

14 Additional information to be included on indictment charging offence to which Chapter 7A applies

The following information must be included on a direct indictment charging an offence the prosecution of which may only proceed if the Court of Appeal gives authorisation under section 327O—

- (a) a statement that the DPP will apply to the Court of Appeal to set aside the previous acquittal of the accused or to remove the previous acquittal as a bar to the accused being tried on the direct indictment (as the case requires); and
- (b) identification of each charge on the indictment to which the statement is relevant.

Sch. 1 cl. 14
inserted by
No. 81/2011
s. 19.

Sch. 2
substituted by
No. 68/2009
s. 56.

Schedule 2—Indictable offences that may be heard and determined summarily

Section 28(1)

1 Common law

- 1.1 Offences at common law of conspiracy to cheat and defraud, if the amount or value of the property or the financial advantage alleged to be involved does not in the judgment of the court exceed \$100 000.
- 1.2 Offences at common law of conspiracy to defraud, if the amount or value of the property or the financial advantage alleged to be involved does not in the judgment of the court exceed \$100 000.

2 Aboriginal Heritage Act 2006

- 2.1 Indictable offences under the **Aboriginal Heritage Act 2006**.

3 Assisted Reproductive Treatment Act 2008

- 3.1 Indictable offences under the **Assisted Reproductive Treatment Act 2008**.

Sch. 2 item 3A
inserted by
No. 13/2009
s. 79 (as
amended by
No. 68/2009
s. 97(Sch.
item 14.10)).

3A Bus Safety Act 2009

Indictable offences under the **Bus Safety Act 2009**.

Sch. 2 item 3B
inserted by
No. 54/2014
s. 16.

3B Crime Statistics Act 2014

Offences under section 9 of the **Crime Statistics Act 2014**.

4 Crimes Act 1958

- 4.1 Offences under section 17 of the **Crimes Act 1958** (causing serious injury recklessly).

- 4.2 Offences under section 27 of the **Crimes Act 1958** (extortion with threat to kill).
- 4.2A Offences under section 42 of the **Crimes Act 1958** (assault with intent to commit a sexual offence).
- 4.3 Offences under section 54 of the **Crimes Act 1958** (occupier, etc. permitting unlawful sexual penetration).
- 4.4 Offences under section 74 of the **Crimes Act 1958** (theft), if—
- (a) the amount or value of the property alleged to have been stolen does not in the judgment of the court exceed \$100 000; or
 - (b) the property alleged to have been stolen is a motor vehicle.
- 4.5 Offences under section 75 of the **Crimes Act 1958** (robbery), if the amount or value of the property alleged to have been stolen does not in the judgment of the court exceed \$100 000.
- 4.6 Offences under section 76 of the **Crimes Act 1958** (burglary), if the offence involves an intent to steal property the amount or value of which does not in the judgment of the court exceed \$100 000.
- 4.7 Offences under section 77 of the **Crimes Act 1958** (aggravated burglary), if the offence involves an intent to steal property the amount or value of which does not in the judgment of the court exceed \$100 000.
- 4.8 Offences under section 78 of the **Crimes Act 1958** (removal of articles from places open to the public), if the amount or value of the article alleged to have been removed does not in the judgment of the court exceed \$100 000.

Sch. 2
item 4.2A
inserted by
No. 74/2014
s. 15(2).

- 4.9 Offences under section 81 of the **Crimes Act 1958** (obtaining property by deception), if the amount or value of the property alleged to have been obtained does not in the judgment of the court exceed \$100 000.
- 4.10 Offences under section 82 of the **Crimes Act 1958** (obtaining financial advantage by deception), if the amount or value of the financial advantage alleged to have been obtained does not in the judgment of the court exceed \$100 000.
- 4.11 Offences under section 83 of the **Crimes Act 1958** (false accounting), if the amount or value of the alleged gain or loss does not in the judgment of the court exceed \$100 000.
- 4.12 Offences under section 86 of the **Crimes Act 1958** (suppression, etc. of documents), if the amount or value of the alleged gain or loss does not in the judgment of the court exceed \$100 000.
- 4.13 Offences under section 88 of the **Crimes Act 1958** (handling stolen goods), if—
- (a) the stolen goods alleged to have been handled are a motor vehicle; or
 - (b) in any other case, the amount or value of the stolen goods alleged to have been handled does not in the judgment of the court exceed \$100 000.
- 4.14 Offences under section 176 of the **Crimes Act 1958** (receipt or solicitation of secret commission by agent), if the amount or value of the valuable consideration received, solicited, given or offered does not in the judgment of the court exceed \$100 000.

- 4.15 Offences under section 178 of the **Crimes Act 1958** (giving or receiving false or misleading receipt or account), if the amount or value of the valuable consideration received or given does not in the judgment of the court exceed \$100 000.
- 4.16 Offences under section 179 of the **Crimes Act 1958** (gift or receipt of secret commission in return for advice given), if the amount or value of the valuable consideration received or given does not in the judgment of the court exceed \$100 000.
- 4.17 Offences under section 180 of the **Crimes Act 1958** (secret commission to trustee in return for substituted appointment), if the amount or value of the valuable consideration received or given does not in the judgment of the court exceed \$100 000.
- 4.18 Offences under section 181 of the **Crimes Act 1958** (aiding and abetting offences within or outside Victoria), if the amount or value of the valuable consideration received or given does not in the judgment of the court exceed \$100 000.
- 4.19 Offences under section 191 of the **Crimes Act 1958** (fraudulently inducing persons to invest money).
- 4.20 Offences under section 194(1) or (2) of the **Crimes Act 1958** (dealing with proceeds of crime), if—
- (a) the property alleged to have been dealt with is a motor vehicle; or
 - (b) in any other case, the amount or value of the proceeds of crime alleged to have been dealt with does not in the judgment of the court exceed \$100 000.

- 4.21 Offences under section 195A(1) of the **Crimes Act 1958** (dealing with property which subsequently becomes an instrument of crime), if the amount or value of the property alleged to have been dealt with does not in the judgment of the court exceed \$100 000.
- 4.22 Offences under section 197(1) or (3) of the **Crimes Act 1958** (destroying or damaging property) (including offences charged as arson), if the amount or value of the property alleged to be destroyed or damaged does not in the judgment of the court exceed \$100 000.
- 4.23 Offences under section 198 of the **Crimes Act 1958** (threats to destroy or damage property), if the amount or value of the property alleged to be threatened to be destroyed or damaged does not in the judgment of the court exceed \$100 000.
- 4.24 Offences under section 199 of the **Crimes Act 1958** (possessing anything with intent to destroy or damage property), if the amount or value of the property alleged to be intended to be destroyed or damaged does not in the judgment of the court exceed \$100 000.
- 4.25 Offences under section 247B of the **Crimes Act 1958** (computer offences), if the maximum penalty does not exceed level 5 imprisonment.
- 4.26 Offences under section 314 of the **Crimes Act 1958** (perjury).
- 4.27 Offences under section 321G of the **Crimes Act 1958** (incitement) which are alleged to have been committed in relation to an indictable offence to which section 28(1) of this Act applies.
- 4.28 Offences under section 321M of the **Crimes Act 1958** (attempt) which are alleged to have been committed in relation to an indictable offence to which section 28(1) of this Act applies.

4.29 Offences under section 325 of the **Crimes Act 1958** (accessories) which are alleged to have been committed in relation to a serious indictable offence (within the meaning of that section) to which section 28(1) of this Act applies.

4.30 Offences under section 326(1) of the **Crimes Act 1958** (concealing offences for benefit) which are alleged to have been committed in relation to a serious indictable offence (within the meaning of that section) to which section 28(1) of this Act applies.

5 Dangerous Goods Act 1985

5.1 Indictable offences under the **Dangerous Goods Act 1985**.

6 Drugs, Poisons and Controlled Substances Act 1981

6.1 Indictable offences under the **Drugs, Poisons and Controlled Substances Act 1981**, except for offences against sections 71, 71AA, 72 and 72A and offences against the following provisions as in force before the commencement of the **Drugs, Poisons and Controlled Substances (Amendment) Act 2001**—

- (a) section 71(1) where the alleged offence is committed in relation to a quantity of a drug of dependence that is not less than the commercial quantity applicable to that drug of dependence;
- (b) section 72(1) where the alleged offence is committed in relation to a quantity of a drug of dependence, being a narcotic plant, that is not less than the commercial quantity applicable to that narcotic plant.

7 Electricity Industry Act 2000

7.1 Offences under section 93A(1) or (2) of the **Electricity Industry Act 2000**.

7.2 Offences by a body corporate under section 97(7) of the **Electricity Industry Act 2000**.

7.3 Offences under section 97(11) of the **Electricity Industry Act 2000**.

8 Electricity Safety Act 1998

8.1 Offences under section 141A of the **Electricity Safety Act 1998**, but the maximum penalty that the court may impose on a body corporate is 10 000 penalty units.

9 Environment Protection Act 1970

9.1 Indictable offences under the **Environment Protection Act 1970**, but if there are 2 or more accused, one of whom is a natural person charged under section 66B of that Act and one of whom is a body corporate, and the charges must be heard together, the maximum fine that the court may impose on the natural person in respect of a single offence is 2500 penalty units.

Note

See section 56 as to when charges must be heard together.

10 Equipment (Public Safety) Act 1994

10.1 Indictable offences under the **Equipment (Public Safety) Act 1994**.

11 Firearms Act 1996

11.1 Offences under section 5(1A) of the **Firearms Act 1996** (offence for prohibited person to possess, carry or use unregistered firearm).

11.2 Offences under section 7B(2) of the **Firearms Act 1996** (offence to possess, carry or use an unregistered category E handgun).

12 Food Act 1984

12.1 Indictable offences under the **Food Act 1984**.

13 Gas Industry Act 2001

13.1 Offences under section 149A(1) or (2) of the **Gas Industry Act 2001**.

13.2 Offences by a body corporate under section 208(5) of the **Gas Industry Act 2001**.

13.3 Offences under section 210(1) of the **Gas Industry Act 2001**.

14 Gas Safety Act 1997

14.1 Offences under section 107 of the **Gas Safety Act 1997**, but the maximum penalty that the court may impose on a body corporate is 10 000 penalty units.

15 Health Records Act 2001

15.1 Indictable offences under the **Health Records Act 2001**.

16 Heritage Act 1995

16.1 Indictable offences under the **Heritage Act 1995**.

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Sch. 2 item 17
repealed by
No. 60/2014
s. 140(Sch. 3
item 10.1).

18 Juries Act 2000

18.1 Indictable offences under the **Juries Act 2000**.

19 Major Sporting Events Act 2009

19.1 Indictable offences under the **Major Sporting Events Act 2009**.

19A Marine Safety Act 2010

19A.1 Indictable offences under the **Marine Safety Act 2010**.

Sch. 2
item 19A
inserted by
No. 65/2010
s. 420(Sch. 3
item 4).

20 Occupational Health and Safety Act 2004

20.1 Indictable offences under the Occupational Health and Safety Act 2004.

Sch. 2 item 21
repealed by
No. 37/2014
s. 10(Sch.
item 41.9(a)).

* * * * *

Sch. 2
item 21A
inserted by
No. 57/2014
s. 150.

21A Powers of Attorney Act 2014

21A.1 Offences under section 135(1), (2) or (3) of the Powers of Attorney Act 2014.

22 Pollution of Waters by Oil and Noxious Substances Act 1986

22.1 Indictable offences under the Pollution of Waters by Oil and Noxious Substances Act 1986, but subject to section 24C of that Act.

Sch. 2
item 22A
inserted by
No. 60/2014
s. 140(Sch. 3
item 10.2).

22A Privacy and Data Protection Act 2014

22A.1 Indictable offences under the Privacy and Data Protection Act 2014.

23 Prohibition of Human Cloning for Reproduction Act 2008

23.1 Indictable offences under the Prohibition of Human Cloning for Reproduction Act 2008.

Sch. 2 item 24
(Heading)
substituted by
No. 63/2010
s. 81(Sch.
item 5.1).

24 Sex Work Act 1994

Sch. 2
item 24.1
amended by
No. 63/2010
s. 81(Sch.
item 5.2).

24.1 Offences under section 6(1) of the Sex Work Act 1994 (obtaining payment for sexual services provided by a child).

- 24.2 Offences under section 7(1) of the **Sex Work Act 1994** (agreement for provision of sexual services by a child).
- 25 Rail Safety (Local Operations) Act 2006**
- 25.1 Indictable offences under the **Rail Safety (Local Operations) Act 2006**.
- 25A Rail Safety National Law (Victoria)**
- 25A.1 Indictable offences under the Rail Safety National Law (Victoria).
- 26 Research Involving Human Embryos Act 2008**
- 26.1 Indictable offences under the **Research Involving Human Embryos Act 2008**.
- 27 Road Management Act 2004**
- 27.1 Indictable offences under the **Road Management Act 2004**.
- 28 Tobacco Act 1987**
- 28.1 Indictable offences under the **Tobacco Act 1987**.
- 29 Transport Act 1983**
- 29.1 Indictable offences under the **Transport Act 1983**.
- 29A Victoria Police Act 2013**
- 29A.1 Offences under section 228 of the **Victoria Police Act 2013**.
- 30 Water Act 1989**
- 30.1 Indictable offences under the **Water Act 1989**.
- 31 Water Industry Act 1994**
- 31.1 Indictable offences under the **Water Industry Act 1994**.

Sch. 2
item 24.2
amended by
No. 63/2010
s. 81(Sch.
item 5.2).

Sch. 2 item 25
substituted by
No. 22/2013
s. 80.

Sch. 2
item 25A
inserted by
No. 22/2013
s. 80.

Sch. 2
item 29A
inserted by
No. 37/2014
s. 10(Sch.
item 41.9(b)).

Schedule 3—Persons who may witness statements in preliminary brief, full brief or hand-up brief

Sections 38, 47, 112

Sch. 3 item 1
substituted by
No. 37/2014
s. 10(Sch.
item 41.10).

1 A police officer or a member of a police force or police service of any other State or of the Northern Territory.

2 A member of the Australian Federal Police.

Sch. 3 item 3
substituted by
No. 27/2016
s. 45(a).

3 An Immigration and Border Protection worker, within the meaning of the Australian Border Force Act 2015 of the Commonwealth, at Australian Public Service level 5 or higher who is performing work for that part of the Department of Immigration and Border Protection of the Commonwealth known as the Australian Border Force.

4 An officer at Australian Public Service level 5 or higher in the Australian Securities and Investments Commission.

Sch. 3 item 5
amended by
No. 82/2012
s. 160.

5 A person employed at Victorian Public Service Grade 4 or higher classification under Part 3 of the **Public Administration Act 2004** in the IBAC within the meaning of the **Independent Broad-based Anti-corruption Commission Act 2011**.

Sch. 3 item 6
amended by
No. 68/2009
s. 57(a).

6 An officer at Australian Public Service level 5 or higher who is an Investigator in, or a member of, the Investigations Branch of the Department of Education, Employment and Workplace Relations of the Commonwealth.

Sch. 3 item 7
amended by
No. 68/2009
s. 57(b).

7 An officer at Australian Public Service level 5 or higher who is a member of the Investigations Branch of the Inspector General Division in the Department of Defence of the Commonwealth.

8 A person who is an authorised officer for the purposes of Part 9 of the Law Enforcement Integrity Commissioner Act 2006 of the Commonwealth.

Criminal Procedure Act 2009

No. 7 of 2009

Schedule 3—Persons who may witness statements in preliminary brief, full
brief or hand-up brief

- 9 A person who is an inspector appointed under section 267(1)(a) or (b) of the Radiocommunications Act 1992 of the Commonwealth.
- 10 A person appointed under regulation 42 of the Radiocommunications Regulations 1993 of the Commonwealth as an authorised person for those Regulations.
- 11 A person who is an inspector for the purposes of a provision of the Telecommunications Act 1997 of the Commonwealth by force of section 533(1)(a) or (b) of that Act.
- 12 An Investigations Officer at Australian Public Service level 5 or higher in the Department of Agriculture, Fisheries and Forestry of the Commonwealth. **Sch. 3 item 12 amended by No. 68/2009 s. 57(c).**
- 13 An officer at Australian Public Service level 5 or higher who is an authorised person in relation to a provision of Part 6-2 of the Therapeutic Goods Act 1989 of the Commonwealth and employed in the Surveillance Unit, Therapeutic Goods Administration of the Department of Health and Ageing of the Commonwealth. **Sch. 3 item 13 amended by No. 68/2009 s. 57(d).**
- 14 A member of the staff of the National Offshore Petroleum Safety and Environmental Management Authority who is appointed as an OHS inspector under section 680 of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 of the Commonwealth. **Sch. 3 item 14 amended by No. 68/2009 s. 57(e), substituted by No. 74/2012 s. 55.**
- 15 A member of the staff of the Australian Crime Commission who is an Investigator.
- 16 An Investigation Officer or a Senior Investigation Officer or the Manager, Investigations in Medicare Australia. **Sch. 3 item 16 amended by No. 68/2009 s. 57(f).**
- 17 An officer at Australian Public Service level 5 or higher or an equivalent level who is a Fraud Investigator or Fraud Investigator Manager in the Commonwealth Services Delivery Agency (Centrelink).

Criminal Procedure Act 2009

No. 7 of 2009

Schedule 3—Persons who may witness statements in preliminary brief, full brief or hand-up brief

- Sch. 3 item 18 amended by No. 68/2009 s. 57(g).
- 18 An officer at Australian Public Service level 5 or higher who is an Investigator or Senior Investigator in the Passport Fraud Section of the Department of Foreign Affairs and Trade of the Commonwealth.
- 19 An officer at Australian Public Service level 5 or higher who is an investigator in the Australian Taxation Office.
- Sch. 3 item 20 repealed by No. 48/2012 s. 30(1).
- * * * * *
- Sch. 3 item 21 substituted by No. 68/2009 s. 57(h).
- 21 A person authorised by or under section 241 of the **Building Act 1993**.
- Sch. 3 item 22 substituted by No. 30/2010 s. 74.
- 22 An authorised officer within the meaning of the **Conservation, Forests and Lands Act 1987**.
- Sch. 3 item 22A inserted by No. 30/2010 s. 74.
- 22A An enforcement officer within the meaning of the **Electricity Safety Act 1998**.
- Sch. 3 item 22B inserted by No. 30/2010 s. 74.
- 22B An inspector within the meaning of the **Gas Safety Act 1997**.
- 23 An inspector within the meaning of the **Dangerous Goods Act 1985, Equipment (Public Safety) Act 1994 or Occupational Health and Safety Act 2004**.
- Sch. 3 item 24 repealed by No. 48/2012 s. 30(1), new Sch. 3 item 24 inserted by No. 55/2014 s. 171.
- 24 A general inspector within the meaning of the **Prevention of Cruelty to Animals Act 1986**.

Criminal Procedure Act 2009

No. 7 of 2009

Schedule 3—Persons who may witness statements in preliminary brief, full
brief or hand-up brief

- | | |
|--|--|
| 24A A specialist inspector within the meaning of the
Prevention of Cruelty to Animals Act 1986. | Sch. 3
item 24A
inserted by
No. 55/2014
s. 171. |
| 25 An employee of the Australian Postal Corporation who is
appointed by the Corporation to act as a Corporate
Investigator.

* * * * * | Sch. 3 item 26
substituted by
No. 68/2009
s. 57(i),
repealed by
No. 27/2016
s. 45(b). |
| 27 An officer at Australian Public Service level 5 or higher
who is an Investigator or Investigation Manager in the
Insolvency and Trustee Service Australia.

* * * * * | Sch. 3 item 28
repealed by
No. 48/2012
s. 30(1). |
| 29 A transport safety officer within the meaning of the
Transport (Compliance and Miscellaneous) Act 1983. | Sch. 3 item 29
amended by
No. 6/2010
s. 203(1)
(Sch. 6
item 11) (as
amended by
No. 45/2010
s. 22). |
| 30 Any person, or a member of a class of persons, prescribed
by the rules of court. | Sch. 3 item 30
amended by
No. 48/2012
s. 30(2). |
| 31 A person before whom an affidavit may be sworn and
taken under section 123C(1)(gb) of the Evidence
(Miscellaneous Provisions) Act 1958. | Sch. 3 item 31
inserted by
No. 48/2012
s. 30(3). |
| 32 An inspector of municipal administration appointed under
section 223A of the Local Government Act 1989. | Sch. 3 item 32
inserted by
No. 48/2012
s. 30(3). |

Criminal Procedure Act 2009

No. 7 of 2009

Schedule 3—Persons who may witness statements in preliminary brief, full brief or hand-up brief

- Sch. 3 item 33 inserted by No. 48/2012 s. 30(3).
- 33 An authorised officer appointed by a municipal council under section 224 of the **Local Government Act 1989**.
- Sch. 3 item 34 inserted by No. 48/2012 s. 30(3).
- 34 An officer at Australian Public Service level 5 or higher who is a member of the Investigations and Intelligence Branch of the Department of Climate Change and Energy Efficiency of the Commonwealth.
- Sch. 3 item 35 inserted by No. 48/2012 s. 30(3), amended by No. 67/2013 s. 649(Sch. 9 item 10).
- 35 A person authorised under section 608 of the **Workplace Injury Rehabilitation and Compensation Act 2013** to file charge-sheets on behalf of the Victorian WorkCover Authority.
- Sch. 3 item 36 inserted by No. 48/2012 s. 30(3).
- 36 An officer of the Roads Corporation authorised under section 77(2)(d) of the **Road Safety Act 1986** to prosecute any offence against that Act or the regulations made under that Act.
- Sch. 3 item 37 inserted by No. 48/2012 s. 30(3).
- 37 An officer of the Roads Corporation authorised under section 112 of the **Road Safety Act 1986**.
- Sch. 3 item 38 inserted by No. 48/2012 s. 30(3).
- 38 A person authorised by or under section 229 of the **Transport (Compliance and Miscellaneous) Act 1983** to bring a proceeding for an offence against that Act or the regulations made under that Act.
- Sch. 3 item 39 inserted by No. 20/2015 s. 42.
- 39 A person authorised under section 31(1) of the **Heavy Vehicle National Law Application Act 2013** to commence a proceeding for an offence against the Heavy Vehicle National Law (Victoria).

Schedule 4—Savings and transitional provisions

Sch. 4
inserted by
No. 68/2009
s. 58.

Section 439

1 Definitions

In this Schedule—

commencement day means the day on which this Act (other than Chapter 1 and section 437) comes into operation;

superseded provision means a provision of an Act that has been amended or repealed by this Act or the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009**.

2 General transitional provision

- (1) Except where the contrary intention appears, this Schedule does not affect or take away from the **Interpretation of Legislation Act 1984**.
- (2) If a superseded provision of an Act continues to apply by force of this Schedule, the following provisions also continue to apply in relation to that provision—
 - (a) any other provisions of that Act necessary to give effect to that continued provision; and
 - (b) any regulations or rules of court made under that Act for the purposes of that continued provision.
- (3) This Schedule applies despite anything to the contrary in any other provision of this Act.

3 Renumbering

On and from the commencement day, unless the context otherwise requires, in an Act or in an instrument made under an Act or in any other document of any kind, a reference to a provision of this Act that has been renumbered or relocated must be construed as a reference to the provision as renumbered or relocated and in force for the time being.

4 References to superseded provisions

A reference to a superseded provision in any Act (other than this Act or the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009**) or in any rule, regulation, order, agreement, instrument, deed or other document of any kind must, so far as it relates to any period on or after the commencement day and if not inconsistent with the context or subject matter, be construed as a reference to the relevant provision of this Act.

5 Commencing a criminal proceeding

- (1) Chapter 2 applies to a criminal proceeding commenced on or after the commencement day, irrespective of when the offence is alleged to have been committed.

Note

Section 5 sets out how a criminal proceeding is commenced.

- (2) Subject to this Schedule, Part 4 of the **Magistrates' Court Act 1989** as in force immediately before the commencement day continues to apply to a criminal proceeding commenced in the Magistrates' Court before the commencement day as if that Part had not been amended.

6 Summary procedure

- (1) Chapter 3 applies to a criminal proceeding commenced on or after the commencement day, irrespective of when the offence is alleged to have been committed.

Note

Section 5 sets out how a criminal proceeding is commenced.

- (2) Subject to this Schedule, Part 4 of the **Magistrates' Court Act 1989** as in force immediately before the commencement day continues to apply to a criminal proceeding commenced in the Magistrates' Court before the commencement day as if that Part had not been amended.

7 Committal proceeding

- (1) Chapter 4 applies to a criminal proceeding commenced on or after the commencement day, irrespective of when the offence is alleged to have been committed.

Note

Section 5 sets out how a criminal proceeding is commenced.

- (2) Subject to this Schedule, Part 4 of the **Magistrates' Court Act 1989** as in force immediately before the commencement day continues to apply to a criminal proceeding commenced in the Magistrates' Court before the commencement day as if that Part had not been amended.
- (3) Section 145 applies to an accused committed for trial on or after the commencement day.

8 Trial

- (1) On and from the commencement day, Chapter 5 applies to a criminal proceeding in which—
- (a) the accused is committed for trial; or
 - (b) a direct indictment is filed against the accused—

on or after the commencement day.

- (2) If an accused is committed for trial on or after the commencement day in a criminal proceeding that was commenced before the commencement day, the criminal proceeding is taken to be a criminal proceeding commenced under Chapter 2.

- (3) On and from the commencement day—

- (a) section 168 applies to a criminal proceeding in which the accused was committed for trial before the commencement day;
- (b) sections 216 and 241 apply to an accused committed for trial or against whom a presentment was filed before the commencement day, as if the presentment were an indictment filed under this Act;

- (3A) An indictment may be filed in accordance with Part 5.2 charging an accused with an offence in respect of which that accused, before the commencement day—

- (a) was committed for trial; or
- (b) was given a notice of trial or a notice of intention to prefer a presentment—

if the indictment charges the same or a related offence against at least one other accused who was not committed for trial for that offence before the commencement day.

Sch. 4
cl. 8(3A)
inserted by
No. 30/2010
s. 75.

(3B) An indictment may be filed in accordance with Part 5.2 charging an accused with an offence in respect of which that accused, before the commencement day—

Sch. 4
cl. 8(3B)
inserted by
No. 30/2010
s. 75.

- (a) was committed for trial; or
- (b) was given a notice of trial or a notice of intention to prefer a presentment—

if the indictment charges a related offence in respect of which the accused was not committed for trial before the commencement day.

(3C) If an indictment is filed under subclause (3A) or (3B)—

Sch. 4
cl. 8(3C)
inserted by
No. 30/2010
s. 75.

- (a) Chapter 5 applies to each charge in the indictment; and
- (b) the criminal proceeding against each accused is taken to be a criminal proceeding commenced under Chapter 2; and
- (c) where presentment of an accused has already been made, a charge in the indictment for the same offence as an offence charged in the presentment or a related offence is taken to be a fresh indictment filed under section 164.

(4) Subject to this clause—

- (a) the **Crimes Act 1958**; and
- (b) the **Crimes (Criminal Trials) Act 1999**; and
- (c) the **Public Prosecutions Act 1994**—

as in force immediately before the commencement day continue to apply to an accused who, before the commencement day—

- (d) was committed for trial; or
- (e) was given a notice of trial or a notice of intention to prefer a presentment.

9 New trial or further hearing

- (1) Subject to subclause (2), on and from the commencement day, if on appeal or a case stated a new trial or further hearing is ordered, this Act applies to the new trial or further hearing, irrespective of when the first trial or hearing was conducted.
- (2) Subclause (1) does not apply to a new trial or further hearing that is ordered under Division 4 or 5 of Part 6.3 in a proceeding that commenced before the commencement day.

10 Appeals

- (1) Part 6.1 applies to an appeal in relation to a sentence imposed by the Magistrates' Court on or after the commencement day.
- (2) Section 567A(1A) of the **Crimes Act 1958** as in force immediately before the commencement day continues to apply to a sentence passed before the commencement day.
- (3) Part 6.2 applies to an appeal from a final order of the Magistrates' Court made on or after the commencement day.
- (4) Divisions 1, 2 and 3 of Part 6.3 apply to an appeal where the sentence is imposed on or after the commencement day.
- (5) Division 4 of Part 6.3 applies to an interlocutory decision made in a proceeding on or after the commencement day, irrespective of when the proceeding commenced.
- (6) Division 5 of Part 6.3 (other than section 308) applies to a question of law that arises in a proceeding on or after the commencement day, irrespective of when the proceeding commenced.

- (7) Section 308 applies to an acquittal recorded on or after the commencement day, irrespective of when the proceeding commenced.
- (8) On and from the commencement day, a finding of guilt or a conviction, decision or determination in a criminal proceeding that has been quashed before the commencement day is taken to have been set aside.

11 Petitions for mercy

- (1) Chapter 7 applies to a petition for mercy made on or after the commencement day, irrespective of when the proceeding commenced in relation to which the petition is made.
- (2) If a petition for mercy relates to a criminal proceeding in which presentment was made under section 353 of the **Crimes Act 1958** as in force before its repeal, Chapter 7 applies as if a reference to indictment were a reference to presentment.

12 Witnesses

- (1) Part 8.2 applies to a hearing in a criminal proceeding if the hearing commences on or after the commencement day.
- (2) Sections 37A, 37B, 37C, 37CAA, 37CA, 37D and 37E and Division 3AA of Part II of the **Evidence Act 1958** as in force immediately before the commencement day continue to apply to a hearing in a criminal proceeding if the hearing commenced before the commencement day and—
 - (a) continued on or after that day; or
 - (b) was adjourned until that day or a day after that day.

- (3) If an application for leave under Rule (2) in section 37A(1) of the **Evidence Act 1958** has been given to the DPP but not determined before the commencement day, on and from the commencement day the application is taken to have been filed and served under section 344 of this Act.
- (4) If a transcript of a recording of the evidence-in-chief of a witness for the prosecution has been served under section 37B(3)(a) of the **Evidence Act 1958** before the commencement day, on and from the commencement day the transcript is taken to have been served under section 368 of this Act.
- (5) If a special hearing is held under section 41G of the **Evidence Act 1958** before the commencement day and the evidence is presented at trial on or after that day, on and from the commencement day the special hearing is taken to have been conducted under Division 6 of Part 8.2 of this Act.
- (6) If, before the commencement day—
 - (a) an accused has been committed for trial in respect of a charge for an offence under Subdivision (8EAA) of Division 1 of Part I of the **Crimes Act 1958**; or
 - (b) an accused has been presented for trial on such a charge without the holding of a committal proceeding—

section 371 of this Act does not apply to the holding of a special hearing in relation to the charge on or after the commencement day.

13 Costs

- (1) On and from the commencement day, Part 8.4 applies to a proceeding to which this Act applies.
- (2) For the purposes of subclause (1), if a proceeding was commenced but not determined before the commencement day, the whole of the proceeding is taken to be a proceeding to which this Act applies.

14 Power to amend when there is a defect or error

On and from the commencement day, section 412 applies to any summons, warrant, plea, judgment or order, irrespective of when the summons, warrant, plea, judgment or order was issued or made.

15 Transfer of charge to court with jurisdiction

On and from the commencement day, section 413 applies to a charge before a court, irrespective of when the charge was filed.

16 Perjury

- (1) Section 414 applies to an offence alleged to have been committed on or after the commencement day.
- (2) On and from the commencement day, section 415 applies to a direction that a person be tried for perjury, irrespective of when the alleged perjury was committed.

17 Transitional regulations

The Governor in Council may make regulations containing provisions of a savings or transitional nature consequent on the enactment of this Act.

Endnotes

1 General information

See www.legislation.vic.gov.au for Victorian Bills, Acts and current authorised versions of legislation and up-to-date legislative information.

Minister's second reading speech—

Legislative Assembly: 4 December 2008

Legislative Council: 5 February 2009

The long title for the Bill for this Act was "A Bill for an Act to provide for procedures for the initiation and conduct of criminal proceedings and appeals in criminal proceedings, to amend the **Crimes Act 1958**, the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**, the **Magistrates' Court Act 1989**, the **Children, Youth and Families Act 2005**, the **Sentencing Act 1991** and the **Appeal Costs Act 1998** and to repeal the **Crimes (Criminal Trials) Act 1999** and for other purposes."

Constitution Act 1975:

Section 85(5) statement:

Legislative Assembly: 4 December 2008

Legislative Council: 5 February 2009

Absolute majorities:

Legislative Assembly: 5 February 2009

Legislative Council: 26 February 2009

The **Criminal Procedure Act 2009** was assented to on 10 March 2009 and came into operation as follows:

Chapter 1 (sections 1–4) on 11 March 2009: section 2(1); sections 5–436, 438, 439 on 1 January 2010: Government Gazette 10 December 2009 page 3215; section 437 never proclaimed, repealed by No. 30/2010 section 73.

INTERPRETATION OF LEGISLATION ACT 1984 (ILA)

Style changes

Section 54A of the ILA authorises the making of the style changes set out in Schedule 1 to that Act.

References to ILA s. 39B

Sidenotes which cite ILA s. 39B refer to section 39B of the ILA which provides that where an undivided section or clause of a Schedule is amended by the insertion of one or more subsections or subclauses, the original section

or clause becomes subsection or subclause (1) and is amended by the insertion of the expression "(1)" at the beginning of the original section or clause.

Interpretation

As from 1 January 2001, amendments to section 36 of the ILA have the following effects:

- **Headings**

All headings included in an Act which is passed on or after 1 January 2001 form part of that Act. Any heading inserted in an Act which was passed before 1 January 2001, by an Act passed on or after 1 January 2001, forms part of that Act. This includes headings to Parts, Divisions or Subdivisions in a Schedule; sections; clauses; items; tables; columns; examples; diagrams; notes or forms. See section 36(1A)(2A).

- **Examples, diagrams or notes**

All examples, diagrams or notes included in an Act which is passed on or after 1 January 2001 form part of that Act. Any examples, diagrams or notes inserted in an Act which was passed before 1 January 2001, by an Act passed on or after 1 January 2001, form part of that Act. See section 36(3A).

- **Punctuation**

All punctuation included in an Act which is passed on or after 1 January 2001 forms part of that Act. Any punctuation inserted in an Act which was passed before 1 January 2001, by an Act passed on or after 1 January 2001, forms part of that Act. See section 36(3B).

- **Provision numbers**

All provision numbers included in an Act form part of that Act, whether inserted in the Act before, on or after 1 January 2001. Provision numbers include section numbers, subsection numbers, paragraphs and subparagraphs. See section 36(3C).

- **Location of "legislative items"**

A "legislative item" is a penalty, an example or a note. As from 13 October 2004, a legislative item relating to a provision of an Act is taken to be at the foot of that provision even if it is preceded or followed by another legislative item that relates to that provision. For example, if a penalty at the foot of a provision is followed by a note, both of these legislative items will be regarded as being at the foot of that provision. See section 36B.

- **Other material**

Any explanatory memorandum, table of provisions, endnotes, index and other material printed after the Endnotes does not form part of an Act. See section 36(3)(3D)(3E).

Criminal Procedure Act 2009
No. 7 of 2009
Endnotes

2 Table of Amendments

This publication incorporates amendments made to the **Criminal Procedure Act 2009** by Acts and subordinate instruments.

Criminal Procedure Act 2009, No. 7/2009

Assent Date: 10.3.09
Commencement Date: S. 438 on 1.1.12: s. 438
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Bus Safety Act 2009, No. 13/2009 (as amended by No. 68/2009)

Assent Date: 7.4.09
Commencement Date: S. 79 on 31.12.10: s. 2(3)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009, No. 68/2009

Assent Date: 24.11.09
Commencement Date: Ss 3–58 on 25.11.09: s. 2(1)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Statute Law Amendment (Evidence Consequential Provisions) Act 2009, No. 69/2009

Assent Date: 24.11.09
Commencement Date: S. 54(Sch. Pt 1 item 14), (Sch. Pt 2 item 18) on 1.1.10: s. 2(2)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Justice Legislation Miscellaneous Amendments Act 2009, No. 87/2009

Assent Date: 15.12.09
Commencement Date: S. 6 on 16.12.09: s. 2(1)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Transport Integration Act 2010, No. 6/2010 (as amended by No. 45/2010)

Assent Date: 2.3.10
Commencement Date: S. 203(1)(Sch. 6 item 11) on 1.7.10: Special Gazette (No. 256) 30.6.10 p. 1
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Justice Legislation Amendment Act 2010, No. 30/2010

Assent Date: 8.6.10
Commencement Date: S. 77 on 1.1.10: s. 2(2); ss 56–76 on 26.6.10: Government Gazette 24.6.10 p. 1274
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

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Courts Legislation Miscellaneous Amendments Act 2010, No. 34/2010

Assent Date: 15.6.10
Commencement Date: S. 47 on 1.1.11: s. 2(5)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Consumer Affairs Legislation Amendment (Reform) Act 2010, No. 63/2010

Assent Date: 28.9.10
Commencement Date: S. 81(Sch. item 5) on 1.11.10: s. 2(2)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Marine Safety Act 2010, No. 65/2010

Assent Date: 28.9.10
Commencement Date: S. 420(Sch. 3 item 4) on 1.7.12: s. 2(2)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Bail Amendment Act 2010, No. 70/2010

Assent Date: 19.10.10
Commencement Date: S. 36 on 1.1.11: s. 2(2)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Statute Law Revision Act 2011, No. 29/2011

Assent Date: 21.6.11
Commencement Date: S. 3(Sch. 1 item 24) on 22.6.11: s. 2(1)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Sentencing Amendment (Community Correction Reform) Act 2011, No. 65/2011
(as amended by No. 43/2012)

Assent Date: 22.11.11
Commencement Date: S. 107(Sch. item 4) on 16.1.12: Special Gazette (No. 423) 21.12.11 p. 3
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Justice Legislation Further Amendment Act 2011, No. 67/2011

Assent Date: 29.11.11
Commencement Date: S. 3 on 30.11.11: s. 2
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011, No. 81/2011

Assent Date: 21.12.11
Commencement Date: S. 22(1)–(3) on 21.12.11: s. 2(1); ss 3–19 on 18.3.12: Special Gazette (No. 66) 6.3.12 p. 1
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

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Associations Incorporation Reform Act 2012, No. 20/2012

Assent Date: 1.5.12
Commencement Date: S. 226(Sch. 5 item 10) on 26.11.12: Special Gazette (No. 384) 20.11.12 p. 1
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Courts and Sentencing Legislation Amendment Act 2012, No. 26/2012

Assent Date: 29.5.12
Commencement Date: Ss 73, 74 on 16.7.12: Special Gazette (No. 237) 3.7.12 p. 1
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Criminal Procedure Amendment Act 2012, No. 48/2012

Assent Date: 4.9.12
Commencement Date: Ss 4–9, 11–32 on 5.9.12: s. 2(1); s. 10 on 1.11.12: s. 2(3)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Act 2012, No. 49/2012

Assent Date: 4.9.12
Commencement Date: Ss 3–5 on 31.1.13: s. 2(2)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Act 2012, No. 74/2012

Assent Date: 4.12.12
Commencement Date: S. 55 on 1.1.13: s. 2
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Integrity and Accountability Legislation Amendment Act 2012, No. 82/2012

Assent Date: 18.12.12
Commencement Date: S. 160 on 10.2.13: Special Gazette (No. 32) 6.2.13 p. 2
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Jury Directions Act 2013, No. 12/2013

Assent Date: 13.3.13
Commencement Date: Ss 29–32 on 1.7.13: s. 2(2)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Rail Safety National Law Application Act 2013, No. 22/2013

Assent Date: 23.4.13
Commencement Date: S. 80 on 19.5.14: Special Gazette (No. 148) 13.5.14 p. 2
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

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Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013, No. 32/2013

Assent Date: 4.6.13
Commencement Date: S. 43 on 5.6.13: s. 2(1); s. 53 on 19.4.14: Special Gazette (No. 122) 15.4.14 p. 2
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Road Safety and Sentencing Acts Amendment Act 2013, No. 56/2013

Assent Date: 24.9.13
Commencement Date: S. 34 on 25.9.13: s. 2(1)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Workplace Injury Rehabilitation and Compensation Act 2013, No. 67/2013

Assent Date: 12.11.13
Commencement Date: S. 649(Sch. 9 item 10) on 1.7.14: s. 2(1)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Justice Legislation Amendment (Miscellaneous) Act 2013, No. 77/2013

Assent Date: 17.12.13
Commencement Date: S. 17 on 18.12.13: s. 2(1)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Legal Profession Uniform Law Application Act 2014, No. 17/2014

Assent Date: 25.3.14
Commencement Date: S. 160(Sch. 2 item 30) on 1.7.15: Special Gazette (No. 151) 16.6.15 p. 1
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Mental Health Act 2014, No. 26/2014

Assent Date: 8.4.14
Commencement Date: S. 455(Sch. item 8) on 1.7.14: s. 2(1)
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Victoria Police Amendment (Consequential and Other Matters) Act 2014, No. 37/2014

Assent Date: 3.6.14
Commencement Date: S. 10(Sch. item 41) on 1.7.14: Special Gazette (No. 200) 24.6.14 p. 2
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Crime Statistics Act 2014, No. 54/2014

Assent Date: 26.8.14
Commencement Date: S. 16 on 1.1.15: Special Gazette (No. 364) 14.10.14 p. 1
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

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**Criminal Organisations Control and Other Acts Amendment Act 2014,
No. 55/2014**

Assent Date: 26.8.14
Commencement Date: Ss 168, 171 on 27.8.14: s. 2(1); ss 108–118 on
1.10.14: Special Gazette (No. 330) 23.9.14 p. 1
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Powers of Attorney Act 2014, No. 57/2014

Assent Date: 26.8.14
Commencement Date: S. 150 on 1.9.15: s. 2(2)
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Privacy and Data Protection Act 2014, No. 60/2014

Assent Date: 2.9.14
Commencement Date: S. 140(Sch. 3 item 10) on 17.9.14: Special Gazette
(No. 317) 16.9.14 p. 1
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Crimes Amendment (Sexual Offences and Other Matters) Act 2014, No. 74/2014

Assent Date: 21.10.14
Commencement Date: S. 10 on 22.10.14: s. 2(1); ss 11–16 on 1.7.15: s. 2(3)
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Jury Directions Act 2015, No. 14/2015

Assent Date: 12.5.15
Commencement Date: S. 80 on 13.5.15: s. 2(1); s. 69(4)–(6) on 29.6.15:
s. 2(4)
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Justice Legislation Amendment Act 2015, No. 20/2015

Assent Date: 16.6.15
Commencement Date: S. 42 on 17.6.15: s. 2(3)
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

**Crimes Amendment (Child Pornography and Other Matters) Act 2015,
No. 42/2015**

Assent Date: 22.9.15
Commencement Date: Ss 12–23 on 1.12.15: s. 2(2)
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Bail Amendment Act 2016, No. 1/2016

Assent Date: 16.2.16
Commencement Date: S. 22(2) on 2.5.16: Special Gazette (No. 103) 19.4.16
p. 1
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

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Justice Legislation Further Amendment Act 2016, No. 3/2016

Assent Date: 16.2.16
Commencement Date: Ss 60–84 on 1.5.16: Special Gazette (No. 114) 26.4.16
p. 1
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Confiscation and Other Matters Amendment Act 2016, No. 27/2016

Assent Date: 31.5.16
Commencement Date: S. 45 on 1.6.16: s. 2(1)
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Crimes Legislation Amendment Act 2016, No. 28/2016

Assent Date: 31.5.16
Commencement Date: Ss 9, 10 on 1.6.16: s. 2(1)
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

Justice Legislation (Evidence and Other Acts) Amendment Act 2016, No. 38/2016

Assent Date: 28.6.16
Commencement Date: S. 9 on 12.9.16: Special Gazette (No. 278) 6.9.16 p. 1
Current State: This information relates only to the provision/s
amending the **Criminal Procedure Act 2009**

3 Amendments Not in Operation

This publication does not include amendments made to the **Criminal Procedure Act 2009** by the following Act/s.

Fines Reform Act 2014, No. 47/2014

Assent Date: 1.7.14
Commencement Date: Ss 256–259 not yet proclaimed
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Crimes Legislation Amendment Act 2016, No. 28/2016

Assent Date: 31.5.16
Commencement Date: S. 12 not yet proclaimed
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

Crimes Amendment (Sexual Offences) Act 2016, No. 47/2016

Assent Date: 6.9.16
Commencement Date: S. 37 not yet proclaimed
Current State: This information relates only to the provision/s amending the **Criminal Procedure Act 2009**

At the date of this publication, the following provisions amending the **Criminal Procedure Act 2009** were Not in Operation:

Amending Act/s:

Fines Reform Act 2014, No. 47/2014

256 Definitions

In section 3 of the **Criminal Procedure Act 2009**—

- (a) at the foot of the definition of *infringement conviction* insert—

"Note

An offence where an infringement notice may take effect as a conviction includes an infringement offence to which any of the following provisions apply—

- sections 89A to 89D of the **Road Safety Act 1986**; or
- sections 61A and 61BA of the **Marine (Drug, Alcohol and Pollution Control) Act 1988**; or

- section 95 of the **Transport (Safety Schemes Compliance and Enforcement) Act 2014**.";
- (b) the definition of *infringements registrar* is **repealed**;
- (c) in the definition of *proceeding*, for "as infringements registrar" **substitute** "under the **Fines Reform Act 2014**".

257 Summary offences

In the note at the foot of section 27 of the **Criminal Procedure Act 2009**, for "**Infringements Act 2006**" **substitute** "**Fines Reform Act 2014**".

258 Non-appearance of accused—Infringements Act 2006

- (1) For section 85(1) of the **Criminal Procedure Act 2009** **substitute**—

"(1) This section applies to an infringement offence within the meaning of the **Infringements Act 2006** in respect of which an election to have the matter of the offence heard and determined in the Magistrates' Court under Part 2 of that Act has been made."

- (2) In section 85(2) of the **Criminal Procedure Act 2009** **omit** "or 71(1)(a)".

259 Appearance

In section 328(d) of the **Criminal Procedure Act 2009**—

- (a) for subparagraph (ii) **substitute**—

"(ii) section 160 of the **Fines Reform Act 2014**—";

- (b) for "or the **Infringements Act 2006**" **substitute** "or the **Fines Reform Act 2014**".

Crimes Legislation Amendment Act 2016, No. 28/2016

12 Division 7A of Part 8.2 of the Criminal Procedure Act 2009 amended

- (1) After section 387A(1)(d) of the **Criminal Procedure Act 2009** insert—

"(da) section 47(1) (indecent act with child under the age of 16);".

- (2) In section 387A(1)(f) of the **Criminal Procedure Act 2009**, for "child." substitute "child);".

- (3) After section 387A(1)(f) of the **Criminal Procedure Act 2009** insert—

"(g) section 49(1) (indecent act with 16 or 17 year old child).".

Crimes Amendment (Sexual Offences) Act 2016, No. 47/2016

37 Criminal Procedure Act 2009

- (1) In section 3 of the **Criminal Procedure Act 2009**—

- (a) for the definition of *child pornography* substitute—

"*child abuse material* has the same meaning as in section 51A of the **Crimes Act 1958**";

- (b) for paragraph (a) of the definition of *sexual offence* substitute—

"(a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the **Crimes Act 1958** or under any corresponding previous enactment; or".

- (2) In the heading to section 43A of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (3) In section 43A(1)(a) of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (4) In the example at the foot of section 43A(2) of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (5) In section 45(1)(g) of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (6) In the note at the foot of section 115 of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (7) In the note at the foot of section 122(2) of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (8) In the heading to section 185A of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (9) In section 185A(1) of the **Criminal Procedure Act 2009**, for "child pornography" substitute "child abuse material".
- (10) In section 366(1) of the **Criminal Procedure Act 2009**—
 - (a) in paragraph (b), for "person; or" substitute "person.";
 - (b) paragraph (c) is **repealed**.
- (11) In the note at the foot of clause 4A(1) of Schedule 1 to the **Criminal Procedure Act 2009**,

for "(8E) or (8EAA)" **substitute** "(8E), (8F) and (8FA)".

(12) Clause 4A(4) of Schedule 1 to the **Criminal Procedure Act 2009** is **repealed**.

(13) For item 4.3 of Schedule 2 to the **Criminal Procedure Act 2009** **substitute**—

"4.3 Offences under section 54 of the **Crimes Act 1958** (occupier etc. permitting unlawful sexual penetration) inserted in the **Crimes Act 1958** on 5 August 1991 by section 3 of the **Crimes (Sexual Offences) Act 1991** and repealed by section 16 of the **Crimes Amendment (Sexual Offences) Act 2016**."

4 Explanatory details

No entries at date of publication.