

Bench Book/ **Criminal Proceedings Manual.**



Judicial
College of
Victoria

A Bench Book on the law of criminal procedure, including commentary
on relevant authorities and legislation.

Criminal Proceedings Manual

1 Jurisdiction

1. The jurisdiction of Victorian courts is governed by the:
 - *Constitution Act 1975*;
 - *Supreme Court Act 1986*;
 - *County Court Act 1958*;
 - *Magistrates' Court Act 1989*;
 - *Children, Youth and Families Act 2005*
2. Federal jurisdiction is conferred by the *Judiciary Act 1903* (Cth).
3. Criminal jurisdiction over cartel conduct offences is shared between the Federal Court and the supreme courts of the states and territories.¹

Last updated: 11 May 2009

1.1 Original Jurisdiction

1. The following sections address the original jurisdiction of the Victorian courts. For information on the appellate jurisdiction of courts, see 20 Appeals.

Supreme Court of Victoria

2. The Supreme Court is a superior court of record. It is divided into the Court of Appeal and the Trial Division.²
3. The Court has general substantive jurisdiction and territorial jurisdiction in relation to Victoria, its dependencies and adjacent areas.³
4. Additional jurisdiction may be conferred on the Supreme Court.⁴
5. An Act of Parliament is not taken to repeal, alter or vary the jurisdiction of the Supreme Court unless:
 - The Act expressly refers to s 85 of the *Constitution Act 1975* and expressly states an intention for a provision of the legislation to repeal, alter or vary the effect of that section;
 - The person introducing the Bill into the Legislative Council or Legislative Assembly that will repeal, alter or vary s 85 of the *Constitution Act* makes a statement in Parliament of the reason for repealing, altering or varying s 85; and
 - The statement in Parliament is made during the second reading speech, on at least 24 hours notice prior to the third reading or at any time prior to the third reading, with leave of the Legislative Council or Legislative Assembly (as the case requires).⁵

¹ *Trade Practices Act 1974* (Vic) s 163(2).

² *Constitution Act 1975* (Vic) ss 75, 75A, 76.

³ *Ibid* s 85(1).

⁴ *Ibid* s 85(4).

6. A judge of the Supreme Court may grant a writ of habeus corpus for bringing any prisoner detained in any gaol or prison before any court to be examined as a witness.⁶
7. The Court is not required to exercise jurisdiction if jurisdiction is also given to another court.⁷
8. The Supreme Court has jurisdiction to hear and determine any summary proceedings founded on the same set of facts that are transferred from the Magistrates' Court at the conclusion of the committal proceedings.⁸
9. The court may also sentence an offender for unrelated summary offences where the accused consents and states his or her intention to plead guilty to those unrelated offences.⁹
10. The power to sentence an offender for an unrelated summary offence applies to federal summary offences, except for summary offences under the *Corporations Act 2001* (Cth) or the *Australian Securities and Investment Commission Act 2001* (Cth). Only a magistrate may exercise jurisdiction over summary offences under the Corporations legislation.¹⁰

County Court of Victoria

11. The County Court of Victoria consists of judges, masters and a registrar. It is a court of record and may sit and act at any place and time.¹¹
12. Criminal jurisdiction is conferred over all offences except:
 - Treason and misprision of treason;
 - Murder and Child destruction;
 - Attempted murder;
 - Unlawful combinations or conspiracies to commit any offence that, when committed by an individual acting alone, could only be tried in the Supreme Court;
 - Offences which, by any Act, cannot be prosecuted or tried in the County Court (*County Court Act 1958* s 36A).
13. Except in relation to these offences, the County Court has the same jurisdiction and powers over indictable offences and trials as the Supreme Court, including the power to grant injunctions or make any other orders appropriate to ensure the fair and proper conduct of proceedings (*County Court Act 1958* s 36A).
14. The Country Court adopts the general principles of practice and procedure of the Supreme Court (*County Court Act 1958* s 36A).
15. The court has jurisdiction to hear and determine any summary proceedings founded on the same set of facts that are transferred from the Magistrates' Court at the conclusion of the committal proceedings (*CPA 2009* s 242).

⁵ Ibid s 85.

⁶ Ibid s 86.

⁷ Ibid s 87(1).

⁸ *Criminal Procedure Act 2009* (Vic) s 242 ('CPA 2009').

⁹ Ibid s 243.

¹⁰ *Corporations Act 2001* (Cth) s 1338; *Judiciary Act 1903* (Cth) s 68 ('JA 1903').

¹¹ *County Court Act 1958* (Vic) ss 4, 35; *Taleveski v County Court of Victoria* [2001] VSC 171; *Hansford v Judge Neesham* [1995] 2 VR 233; *Wilson v County Court of Victoria* (2006) 14 VR 461.

16. The court may also sentence an offender for unrelated summary offences where the accused is before the court, he or she consents and states his or her intention to plead guilty to those unrelated offences.¹²
17. The power to sentence an offender for an unrelated summary offence applies to federal summary offences, except for summary offences under the *Corporations Act 2001* (Cth) or the *Australian Securities and Investment Commission Act 2001* (Cth). Only a magistrate may exercise jurisdiction over summary offences under the Corporations legislation.¹³

Magistrates' Court of Victoria

18. The Magistrates' Court of Victoria consists of magistrates, registrars and judicial registrars. The Court includes the following divisions:
 - Industrial Division;
 - Drug Court Division;
 - Koori Court Division;
 - Family Violence Court Division;
 - Neighbourhood Justice Division
 - Municipal Electoral Tribunal; and
 - Victims of Crime Assistance Tribunal.¹⁴
19. The Magistrates' Court has jurisdiction over:
 - (a) summary offences;
 - (b) indictable offences that may be heard and determined summarily;
 - (c) committal proceedings into indictable offences; and
 - (d) recovery of fines.¹⁵

The Children's Court of Victoria

20. The Children's Court of Victoria consists of a President, magistrates and registrars. It is divided into the following Divisions:
 - The Family Division;
 - The Criminal Division;
 - The Koori Court (Criminal Division);
 - The Neighbourhood Justice Division (*Children, Youth and Families Act 2005* s 504(2), (3)).
21. The Criminal Division has jurisdiction over:
 - (a) summary offences by children;

¹² CPA 2009 s 243.

¹³ *Corporations Act 2001* (Cth) s 1338; JA 1903 s 68.

¹⁴ *Magistrates' Court Act 1989* (Vic) ss 4–4Q ('MCA 1989'); *Local Government Act 1989* (Vic); *Victims of Crime Assistance Act 1996* (Vic) s 19.

¹⁵ MCA 1989 s 25(1).

- (b) indictable offences by children other than murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death;
 - (c) committal proceedings for offences by children;
 - (d) bail for children; and
 - (e) breach of a sentencing order or variation of a sentencing order concerning a child.¹⁶
22. A child is defined as a person who is between the age of 10 and 18 at the time of the alleged commission of an offence and under the age of 19 at the time proceedings are commenced.¹⁷
23. Persons under the age of 10 are conclusively presumed incapable of committing offences.¹⁸
24. All indictable offences by children except murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death may be heard and determined summarily in the Children's Court.¹⁹
25. Before hearing an indictable offence summarily, the court must inform the accused and his or her parent that the accused may object to the summary hearing.²⁰
26. The court may adjourn proceedings where a child under the age of 15 is charged with an indictable offence within the summary jurisdiction of the court if his or her parent is not present.²¹
27. The Children's Court must hear an indictable offence within its jurisdiction summarily unless:
- the child objects prior to evidence being led; or
 - the court at any time considers the charge is unsuitable to be heard summarily due to exceptional circumstances.²²
28. The parent of a child under the age of 15 who is not legally represented and is charged with an indictable offence within the summary jurisdiction of the Court may object to the matter being heard summarily on behalf of the child.²³
29. The court must give reasons for its decision that the charge is not suitable to be heard summarily.²⁴
30. The court must hold a committal proceeding if it does not hear an indictable offence summarily.²⁵
31. The Children's Court may be granted additional jurisdiction under any Act.²⁶

¹⁶ *Children, Youth and Families Act 2005* (Vic) s 516(1)) ('CYFA 2005').

¹⁷ *Ibid* s 3. See 2 Commencement of Proceedings for further information.

¹⁸ CYFA 2005 s 344.

¹⁹ *Ibid* s 516.

²⁰ *Ibid* s 356(1).

²¹ *Ibid* s 356(2).

²² *Ibid* s 356(3).

²³ *Ibid* s 356(4).

²⁴ *Ibid* s 356(3).

²⁵ *Ibid* s 356(3).

32. The jurisdiction of the Children's Court of Victoria was previously exclusive.²⁷ This provision was not included when the *Children and Young Persons Act 1989* was replaced by the *Children, Youth and Families Act 2005*. Criminal proceedings against children may now be brought in other courts.

Last updated: 19 July 2010

1.2 Exercise of Federal Jurisdiction

1. Victorian courts have jurisdiction to hear and determine proceedings for offences against Commonwealth laws.²⁸
2. Victorian law relating to criminal procedure,²⁹ evidence, competency of witnesses, appeals and bail governs trials in Victorian courts for Commonwealth offences.³⁰
3. Victorian courts may exercise federal jurisdiction regardless of the location of the offence and regardless of any territorial limitations normally imposed on the court.³¹ However, see Constitutional Considerations below.
4. The Magistrates' Court and Children's Court may decline to exercise jurisdiction in relation to a Commonwealth offence committed outside the State if it is satisfied that it is appropriate in all the circumstances.³²
5. Victorian courts are also invested with federal jurisdiction in all matters in which the High Court has original jurisdiction, except:
 - matters arising under a treaty;
 - suits between States
 - suits by the Commonwealth against a State;
 - suits by a State against the Commonwealth;
 - matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.³³

Constitutional Considerations

6. Victorian courts exercising Commonwealth jurisdiction are subject to the limitations in s 80 of the Commonwealth Constitution.³⁴

²⁶ Ibid s 516(3).

²⁷ Ibid s 17.

²⁸ JA 1903 s 68.

²⁹ Criminal procedure includes summary hearings, committal hearings and criminal trials.

³⁰ JA 1903 ss 68, 79.

³¹ Ibid ss 68(5), (5C).

³² Ibid s 68(5A).

³³ JA 1903 ss 38, 39. References to a State or the Commonwealth include references to people suing or being sued on behalf of or by the State or Commonwealth.

³⁴ JA 1903 ss 68, 79.

7. Trials on indictment for Commonwealth offences must be by jury and held in the State where the offence was committed.³⁵
8. The provisions of the *Juries Act 2000* (Vic) apply to trials on indictment of Commonwealth offences unless they are inconsistent with s 80 of the *Australian Constitution*.³⁶
9. Section 80 of the *Australian Constitution* was intended to allow the constant evolution of the jury trial. While a modern jury trial must conform to the essential features of the jury trial, as it existed at the time of federation, it need not be identical in every respect.³⁷
10. The following features of a jury trial are essential to comply with s 80 of the Commonwealth Constitution:
 - The verdict of the jury must be unanimous;³⁸
 - The number of jurors may be reduced over the course of the trial, provided the remaining number is sufficient to be a representative cross section of the community and able to perform group deliberations;³⁹
 - The jury must be randomly and impartially selected from a list that is representative of the community and not chosen by the prosecution or the state;⁴⁰
 - The jury must consist of impartial lay decision makers.⁴¹
11. In contrast, the following features of the jury system are not essential:
 - Only consist of men who own a certain amount of property – Restrictions on gender or property holdings are inconsistent with modern democratic society;⁴²
 - Strictly twelve jurors – Modern juries may contain reserve jurors and may return a verdict even if the group is reduced below twelve.⁴³
 - Confinement – Modern juries are not required to remain confined during deliberations and may receive food, drink and heating.⁴⁴
12. Reserve jurors may be removed through a random process before the jury commences deliberations. The process may exempt the foreperson, but may not exempt a juror because of his or her views on the case.⁴⁵

³⁵ *Australian Constitution* s 80.

³⁶ JA s 68; *Brownlee v R* (2001) 207 CLR 278 ('Brownlee').

³⁷ *Brownlee*; *Ng v R* (2003) 217 CLR 521 ('Ng').

³⁸ *Cheatle v R* (1993) 177 CLR 541 ('Cheatle'); *Brownlee*. That is, all those who are members of the jury panel at the time the verdict is delivered must agree: *NG*.

³⁹ *Brownlee*. A reduced jury of 10 people is consistent with s 80 of the *Constitution*, though further reductions may not be permissible: *Brownlee*.

⁴⁰ *Cheatle*; *Katsuno v R* (1999) 199 CLR 40.

⁴¹ *Cheatle*; *Brownlee*; *Ng*.

⁴² *Brownlee*.

⁴³ *Brownlee*; *Ng*.

⁴⁴ *Brownlee*.

⁴⁵ *Brownlee*; *Ng*. See 11 Empanelment and Management of Juries for details on reserve jurors.

13. A trial is conducted at the location where the evidence is received. The use of video link evidence from outside the State does not breach the requirements of s 80.⁴⁶
14. An offence committed in a Commonwealth place within a State is taken to have been committed within that State for the purposes of s 80.⁴⁷
15. Where parts of a federal offence is committed in multiple States, the trial may take place in any of those States⁴⁸ and the trial of a federal offence not committed in any state and not being an offence to which s 70 applies may be held in any state or territory.⁴⁹

Constitutional Consideration and Committals

16. State procedures relating to committals apply to Commonwealth offences. The Commonwealth Constitution permits a State to determine how committal proceedings will be conducted, including permitting restrictions on cross-examination of witnesses.⁵⁰

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1.3 Territorial Limits

1. The criminal courts of a State only apply the criminal law of that State and any invested federal jurisdiction. A court may need to determine whether the offence occurred within the territorial jurisdiction of the court.⁵¹
2. This is not strictly a question of jurisdiction. A person who has been duly charged or indicted before a Victorian court is within the jurisdiction of that court and may be dealt with according to law. The Court must, however, determine whether the alleged conduct constitutes an offence that is known to the law of Victoria.⁵²
3. The law presumes that criminal legislation only has domestic effect. Clear language is required in order to create extra-territorial offences.⁵³
4. The Parliament of Victoria is legislatively competent to pass extra-territorial legislation where there is a link between the offence and the State of Victoria.⁵⁴
5. Result-based offences⁵⁵ will generally be punishable in the jurisdiction where those results occur. In contrast, conduct-based offences⁵⁶ are punishable at the location of the conduct.⁵⁷

⁴⁶ *R v Wilkie* (2005) 64 NSWLR 125.

⁴⁷ *Pinkstone v R* (2004) 219 CLR 444 ('Pinkstone'); *R v Phillips* (1970) 125 CLR 93.

⁴⁸ JA 1903 s 70; *Pinkstone*.

⁴⁹ JA 1903 s 70A.

⁵⁰ *DPP (Cth) v Bayly* (1994) 63 SASR 97. See 4 Committal Hearings for details on Victorian committal hearings.

⁵¹ *Thompson v R* (1989) 169 CLR 1 ('Thompson').

⁵² *Re Hamilton-Byrne* [1995] 1 VR 129; *Treacy v DPP* [1971] AC 537; *DPP v Stonehouse* [1978] AC 55; *McDonald v Bojkovic* [1987] VR 387; *DPP v Sutcliffe* [2001] VSC 43 ('Sutcliffe').

⁵³ *XYZ v Commonwealth* (2006) 227 CLR 532; *Lipohar v R* (1999) 200 CLR 485; *Treacy v DPP* [1971] AC 537; *R v Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256; *Thompson; McDonald v Bojkovic* [1987] VR 387.

⁵⁴ *Australia Act 1986* (Cth) s 2; *Sutcliffe*.

⁵⁵ See, eg, murder, intentionally causing serious injury, obtaining property by deception.

6. The common law generally presumes that an offence is only committed in a single place. This is subject to exceptions for continuing and inchoate offences.⁵⁸
7. Some result-based offences may form an exception to the rule of a single location for an offence. Parliament may create offences that are punishable at the location of the conduct and the location of the result.⁵⁹

Location of Offences

8. While it is common practice for the prosecution to identify the alleged location of the offence in the indictment, it is not necessary to prove the place of offending unless the location is an essential element of the offence.⁶⁰
9. However, where the jurisdiction of the court is challenged on the basis of the location of the offence, the prosecution must establish that the offence took place in Victoria on the balance of probabilities.⁶¹
10. In the exceptional case where the location of the offence is in issue, the judge should seek a special verdict from the jury. If the special verdict reveals that no offence took place in Victoria, the jury should be discharged without returning a general verdict on the guilt or innocence of the accused.⁶²
11. The general rule is that the location of an offence is the place where the offence is committed. This has been shown in relation to a number of specific examples:
 - Obtaining property by false pretences occurs where the property is obtained, regardless of where the deception occurs.⁶³
 - Murder is committed where the deceased is affected by the acts.⁶⁴
12. English law, however, has recognised that some offences may be punished in the jurisdiction where the conduct is initiated.⁶⁵

Specific Territorial Examples

13. Previous cases may provide some guidance on where an offence takes place for particular offences. This section provides a short, non-exhaustive, set of examples, and does not suggest that the offences are necessarily exclusively justiciable as found in the examples below.
14. A conspiracy to commit crime may be prosecuted in:

⁵⁶ See, eg, possession of a drug of dependence.

⁵⁷ *Thompson*.

⁵⁸ *Lipohar v R* (1999) 200 CLR 485 ('*Lipohar*'). Cf *Libram v R* [1985] 2 SCR 178.

⁵⁹ *Thompson*; *Treacy v DPP* [1971] AC 537; *DPP v Stonehouse* [1978] AC 55.

⁶⁰ *HA v R* (2013) 38 VR 154 ('*HA*').

⁶¹ *Thompson*. Cf *R v Graham* [1984] VR 649.

⁶² *Thompson*; *HA*.

⁶³ *R v Manning* [1999] QB 980; *R v Kron* (1995) 78 A Crim R 474; *Lipohar v R* (1999) 200 CLR 485.

⁶⁴ *Ward v R* (1980) 142 CLR 308; *R v Graham* [1984] VR 649; *Thompson v R* (1989) 169 CLR 1.

⁶⁵ *Treacy v DPP* [1971] AC 537.

- The jurisdiction where the agreement is reached;⁶⁶
 - The jurisdiction where the object of the conspiracy is to be achieved;⁶⁷ and
 - Any jurisdiction in which a participant performs an overt act.⁶⁸
15. The offence of stalking is justiciable in the jurisdiction where the offender performs his or her acts, even if those acts are directed at a person in another jurisdiction.⁶⁹
 16. It seems likely that offences involving the use of carriage services (e.g. telephone and internet) contrary to Division 474 of the Commonwealth *Criminal Code* may be committed where the offender acts and also where those acts take effect.⁷⁰
 17. In other cases, culpability for offences involving the internet may depend on identifying the place where the offence is committed, which depends on the elements of the offence.⁷¹
 18. An attempt to commit an offence will occur where the conduct is intended to take effect.⁷²
 19. Conspiracy to defraud is punishable in the State where the conduct is likely to produce harm.⁷³
 20. A continuing offence may be prosecuted in any jurisdiction where it is committed.⁷⁴
 21. A person charged with being knowingly concerned in the importation of a drug of dependence may be tried in the place where the importation takes place.⁷⁵
 22. Pollution offences are punishable where the pollution is experienced.⁷⁶
 23. Fraud offences may take place:
 - Where money is credited to an account;⁷⁷
 - Where the property is obtained;⁷⁸
 - Where a cheque is honoured;⁷⁹

⁶⁶ *Mayer v Henderson* (1993) 68 A Crim R 155.

⁶⁷ *R v Sansom* (1991) 92 Cr App R 115; *Lipohar*; *R v Doot* [1973] AC 807; *Liangsiriprasert v United States* [1991] 1 AC 225.

⁶⁸ *R v Kellow* [1912] VLR 162; *R v Doot* [1973] AC 807; *R v Skewes* (1981) 7 A Crim R 276; *R v Sansom* (1991) 92 Cr App R 115; *Lipohar*.

⁶⁹ *Sutcliffe*.

⁷⁰ *Judiciary Act* s 70. See also *R v Molloy* (2008) 102 SASR 452; *R v Shepherd* [2008] ACTSC 116.

⁷¹ See *Dow Jones v Gutnick* (2002) 210 CLR 575.

⁷² *R v McNeily* (1981) 4 A Crim R 46; *R v Baxter* [1972] 1 QB 1. See, however, *Crimes Act 1958* (Vic) s 321O on extra-territorial jurisdiction for attempts.

⁷³ *Re Hamilton-Byrne* [1995] 1 VR 129; *Lipohar*.

⁷⁴ *R v Millar* [1970] 2 QB 54; *R v Manning* [1999] QB 980; *R v Baxter* [1972] 1 QB 1.

⁷⁵ *R v Wall* (1974) 59 Cr App R 58; *R v Toubya* [1993] 1 VR 226.

⁷⁶ *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78.

⁷⁷ *R v Hansford* (1974) 8 SASR 164; *R v Collins* (1986) 44 SASR 214.

⁷⁸ *R v Kron* (1995) 78 A Crim R 474.

- Where a credit transaction is honoured;⁸⁰
- Where the fraudulent transaction is processed.⁸¹

Victoria - New South Wales Border

24. Victoria's northern boundary is formed by a straight line from Cape Howe to the nearest source of the Murray River and then following the river to the eastern border of South Australia.⁸²
25. The precise location of the northern boundary is the top of the southern bank of the main channel of the Murray River. The boundary does not move with constant changes in the water level of the Murray.⁸³
26. The identity of the Murray River in 1850 determines the current border. Variations in water level or flow into other rivers do not alter the identity of the 'Murray River'. Similarly, a process of avulsion is not likely to change the border between Victoria and New South Wales.⁸⁴
27. Topography and popular reputation in 1850 determines which branch of the Murray River constitutes the main watercourse. This is relevant when the river splits and rejoins.⁸⁵
28. The positioning of the southern bank is a question of fact in each case. It must be decided by considering the size and nature of the river, the level of the land compared to the river and the composition of the land at the relevant location.⁸⁶
29. The location of the southern bank must be determined by present conditions. This will change as a result of gradual erosion or accretion. It is not fixed by reference to conditions as they existed in 1850.⁸⁷

Islands

30. The location and identity of the Murray River determines whether certain islands are within Victoria and New South Wales. It is settled that Pental Island and Beveridge Island are both within Victoria.⁸⁸
31. Artificial changes to the course of the river, such as the creation of Lock Island near Mildura, most likely do not affect the border. Lock Island is, therefore, likely in Victoria.⁸⁹

⁷⁹ *R v Lawson* (1996) 86 A Crim R 111. A cheque is honoured where one bank presents the cheque to the bank responsible for the payment of the funds. It is not honoured at the bank where the cheque holder presents the cheque for payment: see *ibid*.

⁸⁰ *R v Bevan* (1986) 84 Cr App R 143.

⁸¹ *Secretary of State for Trade v Markus* [1976] AC 35.

⁸² *Separation Act 1850* (Imp).

⁸³ *Ward v R* (1980) 142 CLR 308 ('Ward').

⁸⁴ *Hazlett v Presnell* (1982) 149 CLR 107 ('Hazlett').

⁸⁵ *Ibid*.

⁸⁶ *Ward; Jones v Mersey River Board* [1958] 1 QB 143.

⁸⁷ *Ward; Hazlett*.

⁸⁸ *Ibid*.

⁸⁹ *Hazlett*.

Victoria - South Australia Border

32. The western border of Victoria is marked by the 141st east meridian, which is the eastern border of South Australia.⁹⁰
33. While official survey maps incorrectly record the location of the 141st east meridian, these maps are the authoritative border due to agreements between South Australia and New South Wales in 1847. The official border may only be changed by agreement between Victoria and South Australia.⁹¹

Commonwealth Places

34. The Commonwealth has exclusive power to make laws over 'all places acquired by the Commonwealth for public purposes' ('Commonwealth places'). This excludes the operation of State laws in Commonwealth places.⁹²
35. This exclusion has been overcome by the *Commonwealth Places (Application of Laws) Act 1970* (Cth) ('CPALA 1970') and corresponding State Acts. The laws of a State apply within Commonwealth places as Commonwealth laws ('applied provisions').⁹³
36. State courts are invested with federal jurisdiction in relation to matters arising under applied provisions.⁹⁴
37. The laws of a State in a Commonwealth place apply in accordance with their tenor. The applied provisions are, however, Commonwealth laws and are subject to any constitutional considerations that apply to Commonwealth laws. For example, trials on indictment under the applied provisions must be before a jury.⁹⁵ See 1.2 Exercise of Federal Jurisdiction.
38. The procedural and sentencing laws of Victoria govern proceedings under the applied provisions.⁹⁶
39. The characterisation of an applied offence as indictable or summary is determined by the laws of Victoria. Commonwealth classification of offence laws do not apply.⁹⁷
40. A proceeding commenced under the incorrect legislative basis operates as if correctly brought under the applied provisions or State laws, as the case may be.⁹⁸

Offences at Sea

41. The territory of a State ends at the low water mark of the coast (the 'normal baseline').⁹⁹

⁹⁰ *South Australia Act 1834* (UK).

⁹¹ *South Australia v Victoria* (1914) 18 CLR 115.

⁹² *Australian Constitution* s 52; *Worthing v Rowell* (1970) 123 CLR 89; *R v Phillips* (1970) 125 CLR 93; *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262.

⁹³ *Commonwealth Places (Application of Laws) Act 1970* (Cth) s 4 ('CPALA 1970').

⁹⁴ *Ibid* s 7.

⁹⁵ *Pinkstone* (McHugh and Gummow JJ); *R v Porter* (2004) 61 NSWLR 384; CPALA 1970 s 12.

⁹⁶ CPALA 1970 ss 12, 5(3) and The Schedule.

⁹⁷ CPALA 1970 s 5(2); *Pinkstone*; c.f. *Crimes Act 1914* (Cth) s 4G ('Crimes Act 1914').

⁹⁸ CPALA 1970 ss 14–15; *Commonwealth Places (Application of Laws) Act 1970* (Vic) ss 11–12)

⁹⁹ *New South Wales v Commonwealth* (1975) 135 CLR 337; *Seas and Submerged Lands Act 1973* (Cth).

42. The baseline at any point may be adjusted by drawing straight lines between appropriate points if:
- The coastline is deeply indented and cut into;
 - There is a fringe of islands along the coast;
 - The coastline is highly unstable due to the presence of a delta.¹⁰⁰
43. Victorian law applies to the area on the landward side of the baseline and up to 12 nautical miles seaward (the ‘inner adjacent area’).¹⁰¹
44. Victorian law applies as surrogate federal law in the region from 12 nautical miles from the baseline to the limits of Victoria specified in the *Petroleum (Submerged Lands) Act 1967* (Cth) (the ‘outer adjacent area’).¹⁰²
45. Occupational health and safety laws may be excluded from applying to offshore facilities. Currently, no regulations have been made to exclude the operation of Victorian OH&S laws.¹⁰³
46. Victorian laws of investigation, procedure and evidence apply to investigations, procedures and acts by state authorities and Commonwealth laws of investigation, procedure and evidence apply in respect of commonwealth authorities.¹⁰⁴
47. All Victorian laws other than substantive criminal law and laws of criminal procedure, investigation and evidence apply in the adjacent area as defined in the *Petroleum (Submerged Lands) Act 1967* (Cth).¹⁰⁵
48. Where the location of an offence is an element of the offence, and it is alleged that the act, omission or state of affairs took place in the adjacent area, inner adjacent area or outer adjacent area, that is presumed to have been proved, in the absence of proof to the contrary.¹⁰⁶
49. Consent of the Commonwealth Attorney-General is required before a hearing can commence where:
- The offence is alleged to have been committed on or from a foreign ship;
 - The ship is registered under the law of a country other than Australia; and
 - The country of registration has, under international law, jurisdiction over the alleged offence.¹⁰⁷
50. The absence of consent does not prevent the arrest, charging, proceedings for extradition, remand or bail of the alleged offender.¹⁰⁸

¹⁰⁰ *Seas and Submerged Lands Act 1973* (Cth).

¹⁰¹ *Crimes at Sea Act 1999* (Vic) sch 1, s 2 (‘*Crimes at Sea Act 1999*’).

¹⁰² *Ibid.*

¹⁰³ As of 1 February 2009. *Offshore Petroleum Act 2006* s 68.

¹⁰⁴ *Crimes at Sea Act 1999* sch 1, s 3.

¹⁰⁵ *Interpretation of Legislation Act 1958* (Vic) s 57.

¹⁰⁶ *Crimes at Sea Act 1999* sch 1, s 4; *HA v R* (2013) 38 VR 154.

¹⁰⁷ *Crimes at Sea Act 1999* sch 1, s 7.

¹⁰⁸ *Ibid.*

51. For offences outside the outer adjacent area, the substantive criminal law of the Jervis Bay Territory applies in limited circumstances.¹⁰⁹

Classification of Offences

52. Offences prosecuted in Victorian courts under the *Crimes at Sea Act 1999* that are not Victorian offences are:
- Summary offences, if the maximum penalty is 2 years' imprisonment or less; and
 - Indictable offences, otherwise.¹¹⁰

Specific Offences

53. The *Crimes at Sea Act 1999* does not create any specific offences at sea. These are created by the common law or other legislation, such as:
- Piracy;¹¹¹
 - Smuggling;¹¹²
 - Being on a ship unlawfully.¹¹³

Extra-Territorial Jurisdiction

54. For some offences, the legislation creating the offence may specify the circumstances in which extra-territorial acts or results may be tried in Victoria or Australia. These include:
- Murder;¹¹⁴
 - Stalking;¹¹⁵
 - Piracy;¹¹⁶
 - Fraud and blackmail;¹¹⁷
 - Computer offences;¹¹⁸
 - Conspiracy to commit an offence outside Victoria;¹¹⁹

¹⁰⁹ See *Crimes at Sea Act 2000* (Cth) s 6.

¹¹⁰ *Crimes at Sea Act 1999* s 5.

¹¹¹ *Crimes Act 1958* (Vic) ss 70A–70D ('*Crimes Act 1958*'); *Crimes Act 1914* s 52.

¹¹² *Customs Act 1901* (Cth) s 233.

¹¹³ *Navigation Act 1912* (Cth) s 380.

¹¹⁴ *Crimes Act 1958* s 9.

¹¹⁵ *DPP v Sutcliffe* [2001] VSC 43.

¹¹⁶ *Crimes Act 1958* ss 70–70C.

¹¹⁷ *Ibid* s 80A.

¹¹⁸ *Ibid* s 247I.

¹¹⁹ *Ibid* s 321A.

- Incitement to commit an offence outside Victoria;¹²⁰
- Attempts to commit an offence outside Victoria;¹²¹
- Child Sex Tourism;¹²²
- Piracy;¹²³
- Offences on board aircraft;¹²⁴
- Trafficking;¹²⁵
- Hostage taking;¹²⁶
- Hostile activity against a foreign state;¹²⁷
- Financial transaction reporting offences;¹²⁸
- Certain fisheries offences.¹²⁹

55. The *Crimes Act 1914* expressly applies throughout and beyond the Commonwealth and the Territories.¹³⁰

56. The Commonwealth *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code 1995*') creates four types of extended geographic jurisdiction. Category A extended geographic jurisdiction applies where:

- Conduct occurs wholly or partly in Australia;¹³¹
- Conduct occurs wholly outside Australia, and the result of the conduct occurs wholly or partly in Australia;¹³²
- Conduct occurs wholly outside Australia and the accused is an Australian citizen or a corporation incorporated under the law of Australia or an Australian State or Territory; or
- The offence is an ancillary offence¹³³ where the conduct occurs wholly outside Australia and the conduct constituting the primary offence or the result of the conduct occurs or is intended to occur wholly or partly in Australia.¹³⁴

¹²⁰ Ibid s 321H.

¹²¹ Ibid s 321O.

¹²² *Crimes Act 1914* pt IIIA.

¹²³ Ibid pt IV.

¹²⁴ *Crimes (Aviation) Act 1991* (Cth).

¹²⁵ *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth).

¹²⁶ *Crimes (Hostages) Act 1989* (Cth) s 8.

¹²⁷ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 6.

¹²⁸ *Financial Transaction Reports Act 1988* (Cth).

¹²⁹ *Fisheries Management Regulations 1992* (Cth) r 4; *Fisheries Management Regulations (Amendment) 1994* (Cth), r 2.

¹³⁰ *Crimes Act 1914* s 4A.

¹³¹ For this purpose, wholly or partly in Australia includes wholly or partly on an Australian aircraft or ship.

¹³² For this purpose, wholly or partly in Australia includes wholly or partly on an Australian aircraft or ship.

57. The Code creates defences for primary and ancillary offences where the conduct occurs wholly outside Australia, the offender is not an Australian citizen or Australian corporation and there is not an equivalent local law in the territory where the offence is committed.¹³⁵
58. Category B extended geographic jurisdiction expands Category A to also cover conduct occurring wholly outside Australia by Australian residents, along with Australian citizens and Australian corporations. The same defences apply as for Category A.¹³⁶
59. Category C extended geographic jurisdiction provides that an offence can be committed whether or not the conduct occurs in Australia and whether or not the results of the conduct occur in Australia. The same defences apply as for Category A.¹³⁷
60. Category D extended geographic jurisdiction is the same as Category C, except that the defences do not apply.¹³⁸
61. Offence provisions state when extended geographic jurisdiction applies.¹³⁹ See, for example:
- Document offences related to people smuggling.¹⁴⁰
 - Treason and Sedition;¹⁴¹
 - Terrorism.¹⁴²

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1.4 Immunity from Jurisdiction

1. This section examines several bases on which a person may be immune from criminal jurisdiction.

Crown Immunity

2. At common law, the Crown is immune from prosecution for criminal offences.¹⁴³
3. Courts must interpret statutes in accordance with a rebuttable presumption that criminal laws do not bind the Crown. This presumption may be overcome by clear words or be a necessary implication.¹⁴⁴

¹³³ This term is defined in the Dictionary and relates to attempts, incitement, conspiracy, or offences committed pursuant to complicity or common purpose or using an innocent agent (See *Criminal Code (Cth)* Division 11).

¹³⁴ For this purpose, wholly or partly in Australia includes wholly or partly on an Australian aircraft or ship.

¹³⁵ *Criminal Code Act 1995 (Cth)* sch 1 ('*Criminal Code 1995*'), s 15.1.

¹³⁶ *Ibid* s 15.2.

¹³⁷ *Ibid* s 15.3.

¹³⁸ *Ibid* s 15.4.

¹³⁹ See *ibid* ch 2, pt 2.7, div 15.

¹⁴⁰ *Ibid* ch 4, div 73, sub-div B.

¹⁴¹ *Ibid* ch 5, pt 5.1, div 80.

¹⁴² *Ibid* ch 5, pt 5.3.

¹⁴³ *Cain v Doyle* (1946) 72 CLR 409 ('*Cain*'); *Bropho v Western Australia* (1990) 171 CLR 1 ('*Bropho*'); *Jacobsen v Rogers* (1995) 182 CLR 572 ('*Jacobsen*').

4. The High Court reduced the strength of the presumption of Crown immunity in 1990. A court interpreting a statute should consider the perceived strength of the presumption at the time the legislation was enacted.¹⁴⁵
5. The presumption in favour of Crown immunity is weaker in relation to government corporations and related commercial entities. The court must consider the nature of the alleged conduct and whether the corporation, while engaged in that conduct, should be regarded as a manifestation of the Crown, with all the traditional Crown immunities.¹⁴⁶
6. Crown immunity does not extend to employees and agents of the Crown. Employees and agents are subject to the criminal law when acting within the scope of their authority.¹⁴⁷
7. Crown immunity will usually include immunity from contempt of court. This includes contempt arising from breach of court orders.¹⁴⁸

Law Enforcement Officers

8. Specific legislation may grant exemption or protection to police officers who conduct controlled operations.¹⁴⁹
9. Commonwealth laws may exempt Commonwealth officers from certain state laws.¹⁵⁰
10. In the absence of a specific exemption, a police officer is personally liable for any offences he or she commits in the course of duty.¹⁵¹

Defence Force Personnel

11. Australian defence force personnel are ordinarily subject to state and territorial laws.¹⁵²
12. Australian domestic law does not apply to visiting defence force personnel who act in the course of duty or only harm persons or property of the visiting force.¹⁵³
13. The visiting force may ask the Commonwealth Attorney-General not to exercise jurisdiction over a member of a visiting force in all other cases.¹⁵⁴

¹⁴⁴ *Bropho*.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Roads Corporation v Gerkens* (1993) 6 VAR 363; *Townsville Hospital Board v Townsville City Council* (1982) 149 CLR 282; *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330.

¹⁴⁷ *Jacobsen; Bropho*. An employee or agent could not, however, aid or abet the Crown to commit an offence, due to the nature of accessorial liability: *Cain*.

¹⁴⁸ *Crowther v Queensland* [2007] 1 Qd R 232.

¹⁴⁹ *Crimes Act 1914* pt 1AB; *Australian Federal Police Act 1979* (Cth) s 12; *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 51.

¹⁵⁰ See, eg, *Australian Protective Services Act 1987* (Cth) s 22; *Australian Federal Police Act 1979* (Cth) s 12.

¹⁵¹ *Yip Chiu-Cheung v R* [1995] 1 AC 111; *Ridgeway v R* (1995) 184 CLR 19 ('Ridgeway'); *A v Hayden (No 2)* (1984) 156 CLR 532; *R v Phung* [2001] VSCA 195.

¹⁵² *Pirrie v McFarlane* (1925) 36 CLR 170; *X v McDermot* (1994) 51 FCR 1; *Re Tracey; ex parte Ryan* (1989) 166 CLR 518; *McWaters v Day* (1989) 168 CLR 289; *Re Nolan; ex parte Young* (1991) 172 CLR 460; *Re Tyler; ex parte Foley* (1994) 181 CLR 18.

¹⁵³ *Defence (Visiting Forces) Act 1963* (Cth) s 9.

¹⁵⁴ *Ibid* s 10.

14. A visiting defence force member who commits an offence may be dealt with by his or her own country's tribunals. Once the person has been dealt with, he or she may not be tried in Australia for substantially the same offence.¹⁵⁵
15. The *Defence (Visiting Forces) Act 1963* does not apply to a deserter who is a member of the armed forces of a country but who is not a member of the visiting forces of that country.¹⁵⁶

Foreign Sovereign Immunity

16. Under international law, heads of state, heads of government, former heads of state and former heads of government have personal immunity for actions taken as part of their role as head of state or head of government.¹⁵⁷
17. Foreign ministers also have personal immunity from the criminal law while they are serving as foreign minister. This immunity is provided by customary international law to allow the effective performance of their duties. The immunity covers conduct by a serving foreign minister before s/he assumed that office and includes conduct in both a public and private capacity.¹⁵⁸
18. The immunity of former heads of state does not extend to certain international crimes subject to universal jurisdiction.¹⁵⁹

Diplomatic Immunity

19. A diplomatic agent is:
 - Defined as the head of a diplomatic mission and other members of the diplomatic mission holding diplomatic rank;¹⁶⁰
 - Immune to criminal jurisdiction;¹⁶¹
 - Not compellable to give evidence as a witness;¹⁶² and
 - Not to be arrested or detained (*Vienna Convention on Diplomatic Relations* Art 29; *Diplomatic Privileges and Immunities Act 1967* (Cth) s 7).¹⁶³
20. The accused should enter a plea of diplomatic immunity as a special plea at the commencement of trial.¹⁶⁴

¹⁵⁵ Ibid s 8.

¹⁵⁶ *R v Peterson; ex parte Hartmann* [1969] VR 417; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514.

¹⁵⁷ *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte* [2000] 1 AC 61 ('Bow Street Metropolitan Stipendiary Magistrate').

¹⁵⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (International Court of Justice, General List No 121, 14 February 2002).

¹⁵⁹ *Bow Street Metropolitan Stipendiary Magistrate*.

¹⁶⁰ *Vienna Convention on Diplomatic Relations*, signed April 1961, 500 UNTS 95 (entered into force 24 April 1964) art 1 ('*Vienna Convention on Diplomatic Relations*'); *Diplomatic Privileges and Immunities Act 1967* (Cth) s 7 ('*DPIA 1967*').

¹⁶¹ *Vienna Convention on Diplomatic Relations* art 31; *DPIA 1967* s 7.

¹⁶² Ibid.

¹⁶³ *Vienna Convention on Diplomatic Relations* art 29; *DPIA 1967* s 7.

¹⁶⁴ *CPA 2009* s 218; *Von Arnim v Popovic*, unreported, VSC 1 July 1998.

21. Diplomatic immunity can only be waived by the sending State. The immunity is held by the State and may not be waived by individual beneficiaries.¹⁶⁵ See 12 Arraignment for further details on entering a plea.
22. The immunity of a diplomatic agent from giving evidence is a matter for the parties. The court does not need to be satisfied that a witness has waived his/her immunity.¹⁶⁶
23. Diplomatic immunity extends to members of the family of a diplomatic agent and administrative and technical staff at a diplomatic mission, and their families.¹⁶⁷
24. Diplomatic status is granted by the receiving State. Evidence of diplomatic status must therefore come from recognition by Australia and not be from the foreign State.¹⁶⁸
25. Conversely, evidence that a person has not been recognised by Australia as holding diplomatic status is evidence that the person does not enjoy diplomatic privileges and immunities.¹⁶⁹
26. The Minister for Foreign Affairs may issue a certificate stating whether a person was entitled to diplomatic, consular or international organisation privileges or immunities at a relevant time. This certificate is evidence of the status of that person at that time.¹⁷⁰
27. Consular officers and consular employees are immune from judicial authorities in respect of acts performed in the exercise of their consular functions.¹⁷¹
28. Officers and former officers of international organisations are also given certain immunities.¹⁷²
29. The holder of the immunity must establish the immunity. The prosecution may call evidence to rebut the immunity as part of its case and should avoid splitting its case.¹⁷³
30. Where the court is satisfied that the accused has sovereign or diplomatic immunity, it should decline to proceed with the matter and may stay proceedings on application of a party or on its own motion.¹⁷⁴

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2 Commencement of Proceedings

1. Criminal proceedings in Victoria are commenced by:
 - Filing or signing a charge-sheet;

¹⁶⁵ *Vienna Convention on Diplomatic Relations* art 32; *DPIA* 1967 s 7.

¹⁶⁶ *R v Browning* (1991) 103 FLR 425 ('*Browning*').

¹⁶⁷ *Vienna Convention on Diplomatic Relations* art 37; *DPIA* 1967 s 7.

¹⁶⁸ *Browning*; *Vienna Convention on Diplomatic Relations* art 4; *R v Duff* (1979) 39 FLR 315.

¹⁶⁹ *Von Arnim v Federal Republic of Germany* [1999] FCA 1159.

¹⁷⁰ *DPIA* 1967 s 14; *Consular Privileges and Immunities Act* 1972 (Cth) s 12 ('*CPIA* 1972'); *International Organisations Act* 1963 (Cth) s 11.

¹⁷¹ *CPIA* 1972 s 5; *Vienna Convention on Consular Relations* art 43.

¹⁷² *International Organisations (Privileges and Immunities) Act* 1963 (Cth) s 6.

¹⁷³ *Green v Philippines Consulate General* [1971] VR 12; *R v Stolpe*, unreported, NSWCCA, 30 October 1996.

¹⁷⁴ See, eg, *Australian Federation of Islamic Councils Inc v Westpac Banking Corporation* (1988) 17 NSWLR 623.

- Filing a direct indictment; or
- The direction of a court that a person be prosecuted for perjury.¹⁷⁵

Commencement by Charge-Sheet

2. A charge-sheet is a document signed by the informant that states the offence or offences alleged against the accused.¹⁷⁶ See 2.1 - Charge-Sheet and Indictment below for further details on the contents of a charge-sheet.
3. Proceedings are commenced by charge-sheet when:
 - the charge-sheet is filed with a registrar of the Magistrates' Court;
 - the charge-sheet is filed with a bail justice, if the accused was arrested without warrant and released on bail; or
 - the charge-sheet is signed, if a summons to answer a charge is issued by a police officer or a public official, rather than the court, at that time.¹⁷⁷
4. When a charge-sheet is filed with a registrar, an application can be made to a registrar for the court to issue a summons to answer the charge or a warrant to arrest the accused, unless a notice to appear has been served on the accused.¹⁷⁸
5. The application for the summons or warrant may be made at the same time the charge-sheet is filed.¹⁷⁹
6. If the registrar is satisfied that the charge discloses an offence known to law, the registrar may issue a summons or a warrant.¹⁸⁰ The registrar may not issue a warrant to arrest in the first instance unless satisfied, by sworn or affirmed evidence (orally 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 authorized by any other Act or for other good cause.¹⁸¹
7. While the question of whether the accused would attend is an important consideration in deciding whether there is 'other good cause' for the purpose of CPA 2009 s 12(5)(c), good causes are not limited to the question of attendance. Other factors that may be relevant to deciding whether there is good cause include the risk of interference with the administration of justice that might occur if the accused were allowed to remain at liberty, the strength or cogency of the evidence, the seriousness of the offending, the accused's connection to the Victorian community and whether the accused resided interstate.¹⁸²

¹⁷⁵ CPA 2009 s 5.

¹⁷⁶ Ibid s 6, sch 1.

¹⁷⁷ Ibid s 6.

¹⁷⁸ Ibid s 12(1).

¹⁷⁹ *Fiore v Magistrates' Court of Victoria* [2020] VSC 92, [113] ('*Fiore*').

¹⁸⁰ CPA 2009 s 12(4).

¹⁸¹ Ibid s 12(5).

¹⁸² *Fiore* [75]–[90].

8. A police officer or public official who issues a summons to answer a charge must file the charge-sheet and summons with a registrar of the Magistrates' Court within 7 days of signing the charge sheet. If he or she fails to file the charge-sheet and summons, the court may strike out the charge.¹⁸³
9. It is not necessary for the person who signs the charge-sheet to personally attend the court registry to file the document. Filing may be performed on behalf of the signatory by an agent.¹⁸⁴
10. A summons to answer a charge must direct an accused to attend a specified Magistrates' Court at a given time to answer the charge.¹⁸⁵
11. It is not necessary to show that proceedings were called on for hearing on the date listed in the summons. The appropriate registrar on the application of the informant, may extend the return date before the return date or within 28 days of that date, if the summons has not been served. The registrar may grant the first extensions without and may only grant subsequent extensions if satisfied by sworn evidence that reasonable efforts have been made to serve the summons.¹⁸⁶
12. The court may only act on a summons that has been extended by the appropriate registrar if it is satisfied that the extension was made within the time permitted by the Act. The registrar should usually record the date on the order extending time.¹⁸⁷

Commencement by Direct Indictment

13. The Director of Public Prosecutions may file a direct indictment against an accused. This is a document signed by the Director that states the offences alleged against the accused.¹⁸⁸
14. A direct indictment commences criminal proceedings against the accused where a magistrate has not committed the accused to stand trial on that offence or a related offence, or if the proceedings have previously been discontinued under s 177, or through a *nolle prosequi*.¹⁸⁹
15. The power to file a direct indictment is generally a 'special decision' under the *Public Prosecutions Act 1994*. A power that is a special decision can only be exercised by the Director on the advice of a Director's Committee. Crown Prosecutors may not exercise the power to file a direct indictment.¹⁹⁰
16. A direct indictment may be distinguished from other indictments. Indictments that are filed after a magistrate commits the accused to stand trial for the offences that are charged in the indictment or for related offences do not commence new criminal proceedings and are not direct indictments. Instead, these indictments are part of the continuation of a criminal proceeding that started in the Magistrates' Court with the filing or signing of the charge-sheet.¹⁹¹

¹⁸³ CPA 2009 s 14; *DPP v Sher* [2000] VSC 268; *DPP v Hogg & Cyberman* [2006] VSC 257; *Uren v Neale* [2009] VSC 267.

¹⁸⁴ *DPP v Judge Fricke* [1993] 1 VR 369 ('Judge Fricke').

¹⁸⁵ CPA 2009 s 15.

¹⁸⁶ *Ibid* s 19. See also *Murdoch v Smith* (2006) 15 VR 186.

¹⁸⁷ *Brereton v Sinclair* (2000) 2 VR 424.

¹⁸⁸ CPA 2009 ss 159, 161; *Public Prosecutions Act 1994* (Vic) ss 3, 36 ('*Public Prosecutions Act 1994*').

¹⁸⁹ CPA 2009 ss 3, 161. A committal proceeding that ends with the discharge of the accused is the end of that criminal proceeding. Any indictment based on the charges alleged in the committal proceeding will be a new criminal proceeding commenced by a direct indictment: *R v Rushton* [1967] VR 842 ('*Rushton*').

¹⁹⁰ *Public Prosecutions Act 1994* ss 3, 22, 36. The *Public Prosecutions Act 1994* contains some exceptions to this general principle, including where the accused consents, or intends to plead guilty to the new charges.

¹⁹¹ CPA 2009 s 162; *Rushton*.

17. A direct indictment without a previous committal proceeding should only be used in exceptional circumstances. While the power to issue a direct indictment is not reviewable, the court may order a stay of proceedings in order to prevent any miscarriage of justice from the use of a direct indictment.¹⁹²
18. The absence of committal proceedings will always call for a careful examination of whether any resulting trial will be fair. The court will need to balance the interests of the community and the interests of the accused to determine whether any resulting trial would not be fair according to accepted standards of justice.¹⁹³
19. A committal proceeding is an important process that allows the accused to hear and test the evidence before trial. It gathers the prosecution evidence into the form of depositions and may enable the accused to cross-examine witnesses prior to trial. While a magistrate's decision not to commit the accused to trial does not fetter the power of the Director of Public Prosecutions to file a direct indictment, the decision can serve as a strong statement to the prosecution that a matter should not be brought to trial.¹⁹⁴
20. The DPP may file a direct indictment where the magistrate has discharged the accused at the conclusion of the committal proceedings, or committed the accused to stand trial on a lesser offence. A court should not frustrate this power by ordering a stay of proceedings unless there is a good reason to do so.¹⁹⁵
21. The law is currently unclear on whom the burden of proof lies in an application for a stay. On one view, the burden is on the accused, as he or she is the one bringing the application. The alternative view is that the burden is similar to an evidentiary burden and, once the accused properly raises the matter, the court must determine for itself whether a stay is required in the interests of justice.¹⁹⁶
22. Where the accused applies for a stay of proceedings based on a direct indictment, the Crown should provide the court with an explanation for why this exceptional process was used. This assists the court to balance the interests of the Crown and the accused.¹⁹⁷
23. In some cases, coronial inquiries and other pre-trial procedures may remove the need for a committal. The accused may already have a brief of evidence and have had the opportunity to cross-examine witnesses. In addition, cross-examination of prosecution witness in a preliminary CPA 2009 s 198B hearing inquiry may supplement any previous hearings in relation to particular witnesses.¹⁹⁸
24. The suitability of a s 198B hearing as a means of overcoming prejudice associated with the lack of committal proceedings must be judged based on the interests of justice in the case. These interests may include the interest of the community in avoiding unacceptable delays.¹⁹⁹

¹⁹² *Barton v R* (1980) 147 CLR 75 ('Barton'); *R v Dupas* (2006) 14 VR 228 ('Dupas'); *Barron v A-G (NSW)* (1987) 10 NSWLR 215 ('Barron').

¹⁹³ *Barton; Williams v DPP* [2004] VSC 516 ('Williams').

¹⁹⁴ *Grassby v R* (1989) 168 CLR 1 ('Grassby'); *Williams; Fox v DPP* [1992] 1 VR 673.

¹⁹⁵ *Kolalich v DPP* (1991) 173 CLR 222.

¹⁹⁶ Compare *Williams* and *Dupas*.

¹⁹⁷ *Williams*.

¹⁹⁸ *Dupas; Williams*.

¹⁹⁹ See *Dupas*.

25. A s 198B hearing may not be suitable where there are many witnesses who would need to be examined, or where the process is expected to take an extended period of time.²⁰⁰ See Chapter 17 – Voir Dire for further information.

Commencement by Direction of a Court

26. A court may direct that a person be tried for perjury if he or she is of the opinion that the person has committed perjury in an affidavit, oral evidence or other proceeding before the judge.²⁰¹

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2.1 Charge-Sheet and Indictment

1. The filing of a charge-sheet or an indictment is the formal process which enlivens the jurisdiction of the court over the accused and commences the proceedings in that court.²⁰²
2. Since 29 January 2019 (in the Supreme Court) and 29 April 2019 (in the County Court), the prosecution has been required to file indictments electronically, through the court's electronic filing system, unless otherwise specified.²⁰³
3. The Practice Note identifies four exceptions to the general rule that indictments must be filed electronically:
 - Where a proceeding is commenced by direct indictment;
 - Where an indictment is filed over on the day of a plea hearing in circumstances where electronic filing would cause unnecessary delay;
 - If there is a disruption to the Court's online filing system; or
 - As directed by the judge for any other purpose.²⁰⁴
4. Where a proceeding is to be commenced by direct indictment, the prosecution may lodge a draft direct indictment electronically. The parties must contact the Court to list the matter for Mention so that a signed paper indictment can be filed in court.²⁰⁵
5. Electronically filed indictments may be amended with leave in court by requesting a printout of the existing indictment, amending the indictment with red pen, and annotating the indictment to note the grant of leave, including who granted leave, the location of the court hearing and the date of amendment. The amended indictment is then returned to the court, scanned and uploaded to the court's e-filing system.²⁰⁶

²⁰⁰ See *Williams & Ors v DPP* [2004] VSC 516.

²⁰¹ CPA 2009 s 415.

²⁰² *R v McNamara (No 2)* [1997] 1 VR 257; *R v Parker* [1977] VR 22; *Ayles v R* (2008) 232 CLR 410 ('Ayles'); *Ciorra v Cole* [2004] VSC 416; *R v Swansson & Henry* (2007) 69 NSWLR 406 ('Swansson & Henry'); *R v Hull* (1989) 16 NSWLR 385.

²⁰³ Supreme Court of Victoria and County Court of Victoria, *Practice Note SC CR 9: Joint Jurisdictional Practice Note for the Electronic Filing of Indictments*, 2019, [1], [6] ('Joint Jurisdictional Practice Note for the Electronic Filing of Indictments').

²⁰⁴ *Ibid* [14].

²⁰⁵ *Ibid* [15]–[17].

²⁰⁶ *Ibid* [20]–[24].

6. Indictments must generally be identified with a single case number. If an indictment is to be severed, then the prosecution must obtain a new case number before filing the severed indictment. However, if an accused pleads guilty to multiple matters which originated from multiple Magistrates' Court case references, the matters may be consolidated to a single indictment which contains all relevant case numbers.²⁰⁷
7. Electronic filing of an indictment removes the need for a paper indictment to also be filed in open court unless otherwise specified in the Practice Note or another Act or Rule.²⁰⁸
8. The Joint Practice Note records the following benefits to electronic filing of indictments:
 - As the indictment may be filed immediately, it removes the risk of an indictment being invalid when filed, due to changes that occur between the time of signing and the time of filing;²⁰⁹
 - An indictment required on circuit can be signed in Melbourne and filed electronically so it is immediately accessible to the circuit judge. This removes the need for a hard copy to arrive;
 - Electronic filing reduces the risk of indictments going missing.²¹⁰
9. An indictment must contain the signature of an authorised person. An electronic signature may be used, provided the requirements of *Electronic Transactions (Victoria) Act 2000* s 9 are met. The electronic signature must be a handwritten depiction of the authorised person's name, and not merely their typed name.²¹¹
10. In appropriate cases, the Commonwealth and State prosecuting bodies may produce a joint indictment. This indictment is a single document that alleges breaches of both Commonwealth and State offences. A joint indictment must comply with the law of indictments for both jurisdictions.²¹²
11. Notations on the charge-sheet or indictment are not part of the formal record of the court. These notations are treated as minutes or memoranda and may be ignored if they are wrong. The formal record of the court is constituted by a separate document called the 'quadruplicate'. The quadruplicate must be signed and dispatched before any order of the court passes into the record.²¹³
12. A criminal proceeding may only be governed by a single indictment at a time. This has been described as the rule of 'one indictment, one jury'. It is not permissible to try a person on more than one indictment simultaneously, even with the consent of the accused. Multiple offences must be dealt with in separate proceedings or, if they are related offences, in the one indictment.²¹⁴

²⁰⁷ Ibid [25]–[37].

²⁰⁸ Ibid [10]; cf *R v Holden* [2001] VSCA 63 ('Holden').

²⁰⁹ Cf *DPP v Phillips & Cakebread* [2018] VSC 447.

²¹⁰ *Joint Jurisdictional Practice Note for the Electronic Filing of Indictments* [5].

²¹¹ Ibid [9].

²¹² See, eg, *Holden*; *R v Nicola* [1987] VR 1040. This dual qualification requirement may be satisfied by a single person where he or she is authorised to sign indictments by the Commonwealth Director of Public Prosecutions and also holds an appointment with the consent of the Commonwealth Attorney-General to prosecute state offences: *Director of Public Prosecutions Act 1983* (Cth) ss 9, 17.

²¹³ *R v Saxon* [1998] 1 VR 503; *R v TSR* (2002) 5 VR 627.

²¹⁴ *R v Landy* [1943] VLR 73 ('Landy'); *DPP v Ferguson* [2004] VSC 261 ('Ferguson'); *R v Callaghan & Grant*, unreported, VSCA, 12 December 1996; *Swansson & Henry*; *Crane v DPP* [1921] 2 AC 299; *R v Dennis* [1924] 1 KB 867.

13. The rule of ‘one indictment, one jury’ only applies to indictments. A magistrate may hear proceedings summarily under multiple charge-sheets following an application by either party. In practice, this is usually only granted to allow consolidated pleas of guilty.²¹⁵
14. In a proceeding against multiple accused, the prosecution must file a separate charge-sheet for each accused.²¹⁶
15. While the prosecution has an unreviewable prerogative to choose which matters to prosecute, the power must be exercised in a manner consistent with fairness towards the accused. The prosecution should not include every conceivable charge on a charge-sheet or indictment as this is unfair and tends to impede the proper disposition of the more serious offences. The court may order a stay of some proceedings until further order to ensure a fair trial.²¹⁷

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2.1.1 Contents of Charge-Sheet or Indictment

1. A charge-sheet or indictment must comply with Schedule 1 of the CPA 2009 (CPA 2009 s 6, s 159).
2. The *Magistrates’ Court Criminal Procedure Rules 2019* prescribes the following forms for charge-sheets and related documents:
 - Charge-sheet – Form 1;
 - Continuation of charges – Form 2;
 - Charge-sheet and summons – Form 3;
 - Charge-sheet and summons for a corporate accused – Form 4;
 - Charge-sheet and warrant to arrest – Form 5 (*Magistrates’ Court Criminal Procedure Rules 2019* s 13).
3. The Director of Public Prosecutions or a Crown prosecutor in the name of the Director must sign an indictment (CPA 2009 s 159 and Schedule 1).
4. The person who signed the indictment must remain a person authorised to sign indictments at the time the indictment is filed. An indictment is invalid if it was signed by a person who had ceased being the Director or a Crown prosecutor by the time it was filed. As the filing of a valid indictment is the act that confers jurisdiction on the court, an invalid indictment renders the wholly proceeding invalid (*DPP v Phillips & Cakebread* [2018] VSC 447; *R v Parker* [1977] VR 22).
5. The charge-sheet or indictment must state the offence that the accused is alleged to have committed and contain sufficient particulars to give the accused reasonable information as to the nature of the charge (CPA 2009 Schedule 1, clause 1; *R v DWB* (2008) 20 VR 112; [2008] VSCA 223).
6. A charge on a charge-sheet or indictment must contain sufficient information as a whole to inform a reasonable accused of the essential elements of the offences charged. However, failure to do so does not mean the charge-sheet is a nullity and treated as if it was of no effect. The charge-sheet remains effective at invoking the court’s jurisdiction, and defects in the statement of a charge may mean the charge is ineffective and cannot support a conviction unless it is amended (*DPP v Kypri* (2011) 33 VR 157; [2011] VSCA 257; *Fox v DPP* [2022] VSCA 38, [15], [54]. See also *Director of Public Prosecutions Reference No 2 of 2001* (2001) 4 VR 55; [2001] VSCA 114; *Woolworths (Victoria) Ltd v Marsh*, Unreported, VSC, 12/6/1986). See 2.1.3 - Amendment of Charge-Sheet or Indictment for information on when a charge may be amended.

²¹⁵ CPA 2009 s 57; *Munday v Gill* (1930) 44 CLR 38.

²¹⁶ CPA 2009 s 56.

²¹⁷ *R v Siugzdinis & Mauri* (1984) 32 NTR 1; *R v Ambrose* (1973) 57 Cr App R 538; *R v Slade* (1982) 7 A Crim R 43 (‘Slade’); *Maxwell v R* (1996) 184 CLR 501 (‘Maxwell’); *R v PHW* [2004] VSC 411.

7. In assessing whether a charge contains sufficient information, a court will interpret the charge in the manner of a ‘reasonable accused “striv[ing] conscientiously” to understand the charges’.²¹⁸ This has also been expressed as requiring a court to interpret the charge ‘in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context.’²¹⁹ This allows the court to find that the necessary information is included by implication.²²⁰
8. In applying the ‘reasonable accused’ test, specification in a charge-sheet of the relevant statutory provision creating the offence cannot fill gaps in the statement of the charge,²²¹ and the likely knowledge of the expected class of defendants under the offence in question is not relevant.²²²
9. Statutory offences are described by identifying the provision creating the offence and describing the offence in the words of the provision, or in similar words.²²³
10. The prosecution should not include any unnecessary words in the description of the offence. In particular, the prosecution should avoid giving the impression that there are additional elements that must be proven which are not part of the statutory offence.²²⁴
11. Descriptions in the charge-sheet or indictment should be in ordinary language that indicates or identifies the person or thing described with reasonably clarity.²²⁵
12. It is not necessary to specify the value of any property obtained in the commission of the offence unless that value is part of the definition of the offence.²²⁶
13. A charge-sheet or indictment may allege that the accused has committed multiple offences or that multiple accused have committed offences if all the offences are related offences. Particulars of each offence must be set out in separate, consecutively-numbered, paragraphs.²²⁷ See 2.3 - Joinder of Charges.
14. A single charge may allege that it was committed by multiple accused.²²⁸
15. Charges may state the commission of a statutory offence in the alternative if the statute states that it may be committed in one of several ways or has elements that are in the alternative.²²⁹

²¹⁸ *DPP v Lamb* [2021] VSC 615, [33] (*‘Lamb’*).

²¹⁹ *Bell v Dawson* (2001) 4 VR 55, [40]; *DPP v Kypri* (2011) 33 VR 157, [16] (*‘Kypri’*). See also *DPP v Fogarty* [2021] VSC 392, [29]–[33]; *Daly v Karamoshos* [2020] VSC 506, [218].

²²⁰ See *Sheerin v DPP* [2021] VSCA 48, [36], [50], [58]; *Lamb* [33].

²²¹ *Alwer v McLean* [2000] VSC 396, [17]–[19]; *Lamb* [35].

²²² See *Lamb* [13], [34].

²²³ CPA 2009 sch 1, cl 3. See also *Kitanovski v Melton City Council (Ryan)* [2016] VSC 474, [21].

²²⁴ *R v Nilson* [1968] VR 238.

²²⁵ CPA 2009 sch 1, cls 7–10.

²²⁶ *Ibid* sch 1, cl 10; *R v Benli* (1998) 2 VR 157.

²²⁷ CPA 2009 sch 1, cl 5.

²²⁸ *Ibid* sch 1, cl 6.

²²⁹ *Ibid* sch 1, cl 3.

16. Statutory aggravating factors that must be found by the jury result in the creation of a new offence. These factors must be pleaded in the charge and are elements of the offence. In contrast, statutory mitigating factors that only need to be established on the balance of probabilities do not create a new, lesser, offence.²³⁰
17. Statutory aggravating factors that do not need to be found by the jury should be pleaded in the indictment in order to put the accused on notice that the prosecution will argue that those factors are present if the accused is convicted. The judge when sentencing the accused may only act on these matters if he or she is satisfied of them beyond reasonable doubt.²³¹
18. The court must determine as a matter of statutory interpretation whether aggravating factors must be determined by the judge or the jury. The general principle is that aggravating factors that create a new maximum penalty create a new offence. This presumption may be rebutted by evidence of a contrary statutory intention.²³²
19. It is not necessary to specifically negative any exception, exemption, proviso, excuse or qualification in the wording of a charge.²³³ See Evidentiary burden on accused for exceptions and qualifications in 3.9 – Hearing procedure for information on when a matter will be an exception, exemption, proviso, excuse or qualification.
20. An indictment must contain a list of all witnesses who gave evidence at the committal proceeding and indicate whether the prosecution proposes to call that person at trial. The indictment must also list any other witnesses the prosecution proposes to call at the trial.²³⁴

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2.1.2 Particulars

1. Under clause 1 of Schedule 1 of the CPA, the charge must:
 - (b) contain the particulars, in accordance with clause 2, that are necessary to give reasonable information as to the nature of the charge.
2. This requirement is informed by the common law principles concerning the adequacy of particulars. Those common law principles state that the particulars must set out the ‘essential factual elements’ of the charge, along with its legal nature.²³⁵

²³⁰ *R v Satalich* (2001) 3 VR 231 (‘Satalich’); *R v Pantorno* [1988] VR 195 (‘Pantorno’); *R v Clarke & Johnstone* [1986] VR 643 (‘Clarke & Johnstone’); *Kingswell v R* (1985) 159 CLR 264 (‘Kingswell’).

²³¹ *Kingswell*; *R v Meaton* (1986) 160 CLR 359 (‘Meaton’).

²³² *Satalich*; *Kingswell*; *Pantorno*; *Pantorno v R* (1989) 166 CLR 466.

²³³ CPA 2009 sch 1, cl 4.

²³⁴ CPA 2009 sch 1, cl 13. A list of proposed witnesses is not required for a charge-sheet. This is provided to the accused in the preliminary brief: CPA 2009 s 37.

²³⁵ *DPP v Fox* [2021] VSC 226, [28]–[29]; *Baiada Poultry Pty Ltd v Glenister* [2015] VSCA 344, [5] (‘Baiada Poultry’); *Bant v Grant* [2021] VSC 276; *DPP v Fogarty* [2021] VSC 392, [27].

3. While the common law can help identify what is required, courts must not lose sight of the fact that the common law test of particulars has been replaced by a statutory test. Whether the particulars for a given charge will be sufficient is a question of fact and degree, depending on the offences in question and the factual allegations.²³⁶ As the Court explained in *Fox v DPP* '[t]here is no verbal formula that can be substituted for the statutory test'.²³⁷
4. At common law, the 'essential factual elements' did not include every element of an offence that must be proved to sustain the charge. There was no 'technical verbal formula' for determining which elements were essential in this sense, but the manner in which the section was drafted may be relevant.²³⁸
5. Particulars are necessary in order to inform the accused of the case that he or she will face and allow the court to link the evidence that is given with the allegations in the charge-sheet or indictment.²³⁹
6. A charge-sheet or indictment that only identifies the alleged statutory offence the accused has committed will generally be inadequate. The accused must be informed of *how* he or she is alleged to have committed the offence. A charge-sheet or indictment may, however, be valid even if the prosecutor has not framed the charge in the most precise manner possible.²⁴⁰
7. For offences under the *Occupational Health and Safety Act 2005* (Vic), the charge must do more than recite the words of the statute. It must identify how the working environment was unsafe, and the type of measures that should have been adopted to make the environment safe. This may include reference to failure to take 'adequate' steps in relation to a particular process or part of machinery. However, it is not necessary to specify the 'detailed actions which it was reasonably practicable for the defendant to take'. The appropriate measures and how those measures are reasonably practicable may be identified closer to trial through requests for further and better particulars, rather than being essential elements of a valid charge-sheet or indictment.²⁴¹ Inadequate particulars on an indictment create a risk of compromise verdicts or a lack of unanimity. The jury's verdict must clearly disclose what they have agreed upon and lack of particulars gives rise to a risk that the individual jurors may disagree on the occasions when the offences were committed.²⁴²
8. Adequate particulars are essential to a fair trial. The degree of particularisation required depends on the nature and circumstances of the offences charged. No single approach to particularisation will be sufficient for every case.²⁴³

²³⁶ *Fox v DPP* [2022] VSCA 38, [51] ('Fox').

²³⁷ *Ibid* [51].

²³⁸ *Nunn v Pezzimenti* [2021] VSC 313, [24], citing *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508, 520; *Baiada Poultry Pty Ltd v Glenister* [2015] VSCA 344; *DPP Reference No 2 of 2001* (2001) 4 VR 55.

²³⁹ *Johnson v Miller* (1937) 59 CLR 467 ('Johnson'); *R v Magistrates' Court at Heidelberg; ex parte Karasiewicz* [1976] VR 680; *Veysey v R* (2011) 33 VR 277 ('Veysey').

²⁴⁰ *O'Sullivan v De Young* [1949] SASR 159; *R v Magistrates' Court at Heidelberg; ex parte Karasiewicz* [1976] VR 680; *S v R* (1989) 168 CLR 266 ('S v R'); *R v PHW* [2004] VSC 411.

²⁴¹ *Baida Poultry v VWA* [2015] VSCA 344 at [46]–[54].

²⁴² *S v R; R v GAE* (2000) 1 VR 198. Cf *WGC v R* (2007) 233 CLR 66 ('WGC').

²⁴³ *Veysey*. See also *Dacre v The Queen* (2018) 57 VR 285.

9. The degree of particularization also depends on the definition of the offence. Where a person is charged with a preparatory conduct offence, the specificity of particulars may be less than would be expected for a completed offence. This reflects the fact that preparatory conduct offences are designed to criminalise conduct at an earlier point in time, including when planning for the offence is less advanced than for a substantive offence.²⁴⁴
10. Inadequate particulars on an indictment create a risk of compromise verdicts or a lack of unanimity. The jury's verdict must clearly disclose what they have agreed upon and lack of particulars gives rise to a risk that the individual jurors may disagree on the occasions when the offences were committed.²⁴⁵
11. If particulars are not provided, the court has a common law power to order the prosecution to provide any particulars that are necessary in the interests of justice.²⁴⁶
12. Where the prosecution fails to particularise its case, it is not the judge's role to provide the jury with the underlying structure and narrative to explain the relevance of each witness' evidence. Such an approach gives the evidence a judicially approved structure and coherence which it lacks, and the judge impermissibly becomes an advocate for a party.²⁴⁷
13. Particulars must be in ordinary language and the use of technical terms is not necessary. Specific legislation may reduce the general obligation to provide particulars.²⁴⁸
14. The prosecution should provide particulars where it is alleged that the accused committed the offence as an accessory. This avoids the potential for confusing the jury where there will be no evidence led that the accused personally committed the alleged conduct.²⁴⁹

Particulars and Section Numbers

15. A mistake on the section number stated in the charge-sheet or indictment will generally be a formal defect that will not cause a miscarriage of justice.²⁵⁰
16. An error in the section number will only be significant if it causes ambiguity in identifying the particular offence that is being alleged against the accused. This may arise where there is a conflict between the section number and the description of the offence. The court should order an amendment of the charge-sheet or indictment in order to resolve this issue.²⁵¹ See 2.1.3 - Amendment of Charge-Sheet or Indictment.

²⁴⁴ See *Dacre v The Queen* (2018) 57 VR 285, [7].

²⁴⁵ *S v R*; *R v GAE* (2000) 1 VR 198. Cf *WGC*.

²⁴⁶ *Marchesi v Barnes* [1970] VR 434; *Johnson*.

²⁴⁷ *Veysey*.

²⁴⁸ CPA 2009 sch 1, cl 2. See, for example, *Crimes Act 1958* s 47A. For a discussion of the dangers associated with providing inadequate particulars for a charge under s 47A, see *KRM v R* (2001) 206 CLR 221; *KBT v R* (1997) 191 CLR 417; *R v KRM* [1999] VSCA 91.

²⁴⁹ *King v R* (1986) 161 CLR 423; *Giorgianni v R* (1985) 156 CLR 473; *R v Maxwell* (1978) 1 WLR 1350.

²⁵⁰ *R v McEwen* [2005] VSCA 202.

²⁵¹ *R v DD* (2002) 5 VR 243.

Particulars and Date

17. The prosecution should provide as much specificity on the time of the alleged offence as is available in the circumstances of the case. This will depend on the evidence of the prosecution witnesses and assists the accused to understand the case that he or she will face at trial.²⁵²
18. The date of an alleged offence will often be a necessary particular and in some cases may be an element of the offence. If the date is not an element of the offence, then the prosecution may allege that an offence occurred between certain dates and, if the evidence discloses that the accused committed the offence outside those dates, the accused may still be convicted.²⁵³
19. At common law, whether the date was an essential element of the offence would depend on the circumstances of the case and the provisions of the statute creating the offence. The date of an offence may be an essential element at common law when:
 - The offence is subject to a limitations period for the commencement of proceedings;
 - The statute was repealed or amended in a relevant manner at the relevant time;
 - The age of the complainant is an essential element and may be in issue depending on the date of the offence; or
 - The conduct of the parties is such as to make the date of the offence an essential element, such as due to reliance on an alibi for certain dates.²⁵⁴
20. For sexual offences, repeal or amendment, and the age of the complainant, may be less likely to make the date an essential element, if the prosecution alleges the offence was committed at some time during a period. CPA 2009 s 7B provides a mechanism which allows an offence to be charged outside its period of operation if the following conditions are met:
 - (a) Conduct is alleged to have occurred at some time during a period; and
 - (b) The conduct, if proven, would constitute a sexual offence at all times during that period; and
 - (c) There is uncertainty as to when, during that period, the conduct allegedly occurred, and;
 - (d) Because of a change in the law during that period, the conduct, if proven, would constitute one sexual offence before the change and a different sexual offence after the change.
21. Where these conditions are met, the person may be charged with whichever of the sexual offences has the lowest maximum penalty. If both offences have the same maximum penalty, the person may be charged with the offence as it stood before the relevant change in the law.²⁵⁵
22. When a person is charged with an offence with an offence under CPA 2009 s 7B, the offence charged is taken to have been in force when the conduct allegedly occurred, and any requirement to prove the complainant was of a particular age is satisfied if the prosecution proves the complainant was of that age at some time during the period.²⁵⁶

²⁵² WGC.

²⁵³ *R v Dossi* (1918) 13 Cr App R 158; WGC.

²⁵⁴ WGC; *Hackwill v Kay* [1960] VR 632; *Kerr v Hannon* (1992) 1 VR 43.

²⁵⁵ CPA 2009 s 7B(2).

²⁵⁶ *Ibid* ss 7B(4)–(5).

23. The Explanatory Memorandum for the legislation which introduced s 7B says that the provision is not intended to be a transitional provision, and is intended ‘to ensure that prosecutions do not fail due to a technical gap in the law’, and is intended to apply to both past and future changes to the law.²⁵⁷
24. The effect of this provision will be to displace previous authority which required the prosecution to prove beyond reasonable doubt that the alleged conduct was committed at a time when the relevant offence provision was in force.²⁵⁸
25. Section 7B(5), on its face, appears to remove the need to prove that the complainant was a particular age at the time of the offending, provided the complainant was of the required age at some time during the period. Despite this, it is suggested that s 7B(1)(d) means that s 7B will only be relevant where the charged period is such that, on each occasion within that period, the alleged offence was a crime under the statute as it stood at the time.
26. For example, the *Crimes Legislation Amendment Act 2010* (Vic) raised the minimum age for the aggravated form of the offence of sexual penetration of a child under 16 from 10 to 12 for offences committed on or after 17 March 2010. If the complainant turned 10 on 15 March, it is suggested that s 7B(1)(d) would not allow a single charge to encompass the period 1 January 2010 to 15 March 2012, as the possibility that the offence was committed on 15 or 16 March 2010 would mean that the former offence was inapplicable on those dates. However, if the complainant turned 10 on 18 March 2010, then the prosecution could alleged that the offending occurred in a single period from 1 January 2010 to 17 March 2012, despite the changes to the offence, and s 7B(5) would allow a conviction on the basis that the complainant was aged under 10 for part of that period.

‘Between Dates’ Particulars

27. Where the accused has been charged with committing an offence between certain dates, it will be a question of degree whether the Crown has provided sufficient particulars.
28. Where the offences involve repeated conduct and then a long delay in complaint, there may not be any unique features of any single occasion that the prosecution can identify as particulars. As a last resort, the prosecution may specify that the offence charged is the ‘first occasion’ of the alleged conduct within a designated period.²⁵⁹
29. A bare ‘first occasion’ particular is neither necessary nor appropriate where the prosecution alleges a discrete number of occasions. In such a case, the problem of offending on numerous indistinguishable occasions does not exist and there is no need to use the ‘first occasion’ particular.²⁶⁰
30. Whether or not the ‘first occasion’ specification is sufficient depends on the evidence led and the circumstances of the case.²⁶¹
31. In *JRW v R*,²⁶² Redlich JA explained what is required for a ‘first occasion’ particular:
First the evidence of what occurred on the first occasion must establish the elements of

²⁵⁷ Explanatory Memorandum, Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic), 58.

²⁵⁸ See *Stephens v The Queen* [2022] HCA 31, [20], on effect of the similarly worded New South Wales provision, *Crimes Act 1900* (NSW) s 80AF.

²⁵⁹ *DPP v Judge Lewis* [1997] 1 VR 391; *Veysey*; *PPP v R* (2010) 27 VR 68 (‘PPP’); *BN v R* [2011] VSCA 406 (‘BN’).

²⁶⁰ *Veysey v R* (2011) 33 VR 277.

²⁶¹ *PPP*; *R v DWB* (2008) 20 VR 112 (‘DWB’); *R v Baker*; *ex parte A-G* [2002] 1 Qd R 274 (‘Baker’); *Veysey*; *BN*.

²⁶² [2013] VSCA 255.

the offence. Second, the complainant must have a degree of recollection that enables the complainant to say that such particular conduct had not previously occurred. As was stated in *PPP*, it is not necessary that the recollection of the detail of the ‘first occasion’ contain some feature which distinguishes it from later occasions. Third, the evidence must establish that the ‘first occasion’ occurred within the period stated in the count ...

32. An allegation that a charge refers to the ‘first occasion’ of certain conduct may be inadequate if there is insufficient evidence to distinguish the first occasion from all other occasions. The prosecution may not rely on a ‘notional’ first occasion, where the complainant can only recall a regular course of conduct that constitutes the offence charged and ask the jury to infer that there logically must have been a first occasion.²⁶³
33. A ‘first occasion’ particular will also be insufficient if there is a conflict in the evidence concerning the circumstances of that first occasion. Where there is such a conflict, a bare ‘first occasion’ particular deprives the accused of the ability to challenge the credibility of witnesses by pointing to inconsistencies of detail, or to raise any defence other than a bare denial of the charges. The prosecution must instead specify an underlying narrative that reconciles the conflicting accounts and encapsulates the offences charged.²⁶⁴
34. A claim by the prosecution that a charge refers to the first occasion implicitly involves undertaking the burden of proving that a particular occasion was the first and that there were no earlier occasions of that conduct.²⁶⁵
35. If the ‘between dates’ are sufficiently recent and precise, it may be appropriate to charge one offence as the first and one as the last.²⁶⁶
36. Designation of an offence as the ‘first offence’ within a certain period may also be permissible if there is some external factor which distinguishes the charged offence from any other similar conduct.²⁶⁷
37. It is not, however, necessary for the prosecution to specify details that ‘objectively distinguish’ a first occasion from subsequent occasions. A ‘first occasion’ particular is sufficient if the complainant can give evidence of an actual first occasion, rather than a notional first occasion. When the defence raises a complaint of latent ambiguity in response to an indictment that specifies charges on a ‘first occasion’ basis, the court must consider whether the accused is prejudiced by the ambiguity. A ‘first occasion’ charge is permissible if there is no more than a theoretical possibility that, if the prosecution provided greater particularity, then the accused could raise a more detailed defence.²⁶⁸

Particulars and Place and Time

38. It is not generally necessary to identify the time of day when an offence is alleged to have occurred, unless other matters in the charge make time of day a necessary particular, such as to remove ambiguity between several different possible offences that occurred on the same day.²⁶⁹

²⁶³ *DWB*; *PPP*; *Veysey*; *Baker*; *BN*.

²⁶⁴ *Veysey*.

²⁶⁵ *DWB*; *Baker*; *DPP v Judge Lewis* [1997] 1 VR 391.

²⁶⁶ *DWB*; *Baker*.

²⁶⁷ *DWB*.

²⁶⁸ *PPP*.

²⁶⁹ *DPP v Fox* [2021] VSC 226, [32]–[34]; *Bant v Gant* [2021] VSC 276, [53].

39. Where the accused is charged with a speeding offence, the requirement to specify the place of the alleged offence is usually satisfied by specifying the road that the accused was travelling along and the suburb. While it is commonly done, it is not necessary to identify the nearest cross-roads, and such details are surplusage.²⁷⁰

Particulars and Course of Conduct Charges

40. Where the accused has been charged with committing an offence as a course of conduct, within the meaning of cl 4A of Schedule 1 of the CPA 2009:

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.²⁷¹

41. The particulars necessary to give reasonable information as to the nature of the charge therefore need not include any specific incidence of the offence including its date, time, place, circumstances or occasion. Nor do the particulars need to distinguish any specific offence or incident of the offence from any other.²⁷²

42. Instead, the necessary particulars in a course of conduct charge must be determined having regard to the following:

- the fact of the charge being a course of conduct charge, which requires that:
 - each incident constitutes an offence under the same provision
 - for a sexual offence charge, each incident relates to the same complainant,
 - the incidents took place on more than one occasion over a specified period,
 - the incidents taken together amount to a course of conduct having regard to their time, place or purpose of their commission and any other relevant matter; and
- the fact that the various incidents of the offence are alleged to have occurred over a period of time.²⁷³

43. For more on course of conduct charges see 2.2 - Duplicity.

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2.1.3 Amendment of Charge-Sheet or Indictment

1. The court may order a charge-sheet or indictment to be amended in any manner the court thinks necessary. An order may be made before or during a trial or hearing, unless the required amendment would cause injustice to the accused.²⁷⁴

²⁷⁰ *DPP v Fox* [2021] VSC 226, [35]–[36].

²⁷¹ CPA 2009 sch 1, cl 4A(9).

²⁷² *Ibid* sch 1, cls 4A(11)(b)–(c).

²⁷³ *Ibid* sch 1, cls 4A(11)(a), (2).

²⁷⁴ *Ibid* ss 8, 165.

2. Section 8 contains a broad power of amendment, which may be available even if the charge, at common law, would have been considered invalid. For this reason, it is not useful to ask whether a charge is valid or a nullity. Instead, it is better to describe a defective charge as ‘ineffective’. Where there is a question about whether a charge is ineffective, the starting point will often be whether the matter is one that can be solved by amendment. It is only if the issue cannot be addressed by amendment that the court may need to dismiss or strike out the charges.²⁷⁵
3. Unlike the equivalent provision that existed before the CPA 2009, s 8 is not limited to charge-sheets that contain a defect. For this reason, it can, subject to ss 8(3) and 8(4), be used to amend a charge to add a new charge without making any changes to existing charges on the charge-sheet.²⁷⁶
4. However, other than removal of the requirement that there be defects or errors before exercising the amendment power, the Court of Appeal has held that s 8 does not appear to have any other significant changes compared to the pre-CPA 2009 position.²⁷⁷
5. In exceptional cases, an indictment may even be amended during an appeal, to correct a formal defect. This may include amending the wording of a count to remove an ambiguity or to identify the relevant statutory provision.²⁷⁸
6. In determining whether an amendment to a charge-sheet or indictment will cause prejudice to the accused, the court should consider the stage of proceedings at which the amendment is sought.²⁷⁹
7. The effect of the order should be noted on the charge-sheet or indictment. Failure to do so will not, however, deprive the order of any effect.²⁸⁰
8. A charge-sheet or indictment that is amended is treated as if it were filed in the amended form.²⁸¹ However, if a charge-sheet is amended in the Magistrates’ Court and then subject to an appeal to the County Court, an appeal against conviction and sentence is treated as an appeal against the charge-sheet as originally filed (without any amendments), while an appeal against sentence alone is treated as an appeal against the charge-sheet in its final form.²⁸²
9. The statutory amendment power is wide ranging and allows amendments that add charges, substitute applicable charges for inapplicable charges and add or vary the particulars of an offence. The court may also amend a charge to correct the omission of an essential element, or to state the correct statutory provision. It is not necessary that the original charge-sheet or indictment correctly set out the essential elements of the charge or the relevant statutory provisions before the amendment power can be exercised.²⁸³

²⁷⁵ Ibid ss 8, 9; *Fox* [15], [30], [52], [54], [74].

²⁷⁶ *Fox* [23]; *Fazal v Beauchamp* [2021] VSCA 103, [18].

²⁷⁷ *Fox* [20].

²⁷⁸ *OAA v R* [2010] VSCA 155; *Nelson v R* (1977) 65 Cr App R 119.

²⁷⁹ *R v Street* [1960] VR 669; *R v Westerman* (1991) 55 A Crim R 353.

²⁸⁰ *Ayles*.

²⁸¹ CPA 2009 ss 8, 165.

²⁸² See *Walters v Magistrates’ Court of Victoria* [2015] VSC 88, [116], [119].

²⁸³ *Ayles*; *DPP Reference No 2 of 2001* (2001) 4 VR 55; *Ciorra v Cole* [2004] VSC 416; *Kypri*; *Fazal v Beauchamp* [2021] VSCA 103, [18].

10. The power to amend an indictment extends to all offences, including common law offences such as perjury.²⁸⁴
11. The power to amend a charge-sheet or indictment includes the power to reduce the period of the accused's alleged offending in a course of conduct charge (within the meaning of cl 4A of Schedule 1 of the CPA 2009). This power applies when the accused informs the court that s/he would plead guilty to the charge if it related only to a specified period falling within the period to which the original charge relates, but would not plead guilty in respect of the remaining period/s in the original charge.²⁸⁵
12. While the court may exercise the power of amendment of its own motion, it should normally raise the matter with the parties and invite submissions. This may not be necessary where the matter has been raised by a party and the party then fails to formally apply for the amendment.²⁸⁶
13. Where a charge is bad for duplicity or uncertainty the prosecutor should elect which offence is being charged and the charge-sheet or indictment should be amended accordingly.²⁸⁷ See 2.2 Duplicity.
14. If a charge-sheet or indictment is amended in the absence of the accused, the amended document should be served on him or her. Service should be through the same means as for the initiating document.²⁸⁸ See Chapter 9 - Service of Documents.
15. In some cases, it may be appropriate to re-arraign the accused following an amendment to the charge-sheet or indictment. While this will not be necessary in all cases, it is desirable where the amendment presents a significantly different issue for the court on which the accused has not previously joined issue.²⁸⁹
16. The prosecution may even amend an indictment to add further charges after a jury has been empanelled, provided the amendment does not cause injustice to the accused. Where a judge allows an amendment of significance, the accused should be re-arraigned.²⁹⁰
17. A key consideration in determining whether an amendment to add further charges can be made without injustice is whether such an amendment would take the accused by surprise. In deciding whether an amendment can be made without causing injustice, the court may look beyond the charge-sheet or indictment to other material provided to the accused, such as a preliminary or full brief, the prosecution's continuing obligation of disclosure and the power to request material under CPA 2009 s 43.²⁹¹
18. Where the amendment is made before evidence is called and there is no change to the factual case against the accused, it is more likely that the amendment can be made without injustice.²⁹²

²⁸⁴ *R v Hoser* [1998] 2 VR 535.

²⁸⁵ CPA 2009 ss 64A, 181A.

²⁸⁶ *Ibid* s 337; *Ayles*. See also *Kypri* (2011).

²⁸⁷ *Johnson; Linehan v Australian Public Service Association (Fourth Division Officers)* (1982) 2 IR 470; *R v Hoser* [1998] 2 VR 535; *Kypri*.

²⁸⁸ See *Ciorra v Cole* [2004] VSC 416.

²⁸⁹ *R v Hoser* [1998] 2 VR 535.

²⁹⁰ *Reid v R* (2010) 29 VR 446.

²⁹¹ See *Fox* [9], [107], [135].

²⁹² *Sutton v R* (2015) 47 VR 496; [2015] VSCA 251, [95].

19. In determining whether an amendment will cause ‘injustice’, it is not relevant that the amendment will make it more likely that the accused will be convicted (or to minimise a risk of acquittal) on a charge. This will often be the purpose and effect of an amendment.²⁹³
20. A charge-sheet may not be amended with the effect of charging a new offence if the limitation period has expired for that offence. To do so would involve avoiding the limitations period.²⁹⁴
21. A court may only amend a charge outside 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 proceeding for a new offence; and
 - (c) The amendment will not cause injustice to the accused.²⁹⁵
22. The test of whether the unamended charge-sheet sufficiently disclosed the nature of the offence is different from and broader than the requirement in Schedule 1, cl 1 that the charge contain the particulars necessary to give reasonable information as to the nature of the charge. Whether the nature of the offence is sufficiently disclosed is a question of fact and degree that depends on the offence in question and how the charge is framed.²⁹⁶
23. Section 8 directs attention to whether the charge-sheet sufficiently disclosed the nature of the offence, rather than whether the charge sufficiently disclosed the nature of the offence. A court considering whether to allow an amendment can therefore consider other matters on the charge-sheet that are not part of the statement of the charge. This may include the identification of the legislation and section number, or the registration number of a vehicle, if those are not part of the charge itself.²⁹⁷
24. Curing a defect which would have caused a charge to be invalid at common law does not necessarily involve commencing proceedings for a new offence. Instead, the court must decide the issue as a matter of substance, by comparing the initially alleged offence and the offence alleged after the amendment.²⁹⁸
25. In deciding whether amendment will cause injustice, the court may consider material extrinsic to the charge-sheet, such as the preliminary brief and statements by police at the time of the alleged offending.²⁹⁹

²⁹³ Ibid [89]–[104].

²⁹⁴ *Kypri*.

²⁹⁵ CPA 2009 s 8.

²⁹⁶ Fox [66], [73(h)(i)].

²⁹⁷ Ibid [67], footnote 46.

²⁹⁸ Ibid [63], [73(h)(ii)]; *Whedlock v Flaws* [2022] VSC 359, [34]–[36].

²⁹⁹ *Whedlock v Flaws* [2022] VSC 359, [37]–[39].

26. The principle from *Glenister v Magistrates' Court of Victoria*,³⁰⁰ which held that a charge-sheet will only sufficiently disclose the nature of an offence if the charge complies with cl 1 of Schedule 1, has been overruled. A charge may meet the test in CPA 2009 s 8(4)(a) for post-limitations period amendment even if it does not meet the requirements of cl 1 of Schedule 1.³⁰¹

Last updated: 1 January 2023

2.1.4 'Filing Over' Subsequent Charge-Sheets or Indictments

1. Section 164 of the CPA 2009, in combination with s 159(2), permits the prosecution to file a 'fresh indictment', which is defined as:

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.³⁰²
2. The prosecution has an inherent right to file a fresh indictment at any time prior to arraignment. This process is often referred to as 'filing over'. Leave of the court is not required, but is usually sought as a matter of practice.³⁰³
3. Filing a fresh indictment discontinues proceedings for any offences or related offences on the previous indictment. It does not, however, commence new criminal proceedings and, in some cases, may be no more than a more convenient restatement of the earlier charges.³⁰⁴
4. A fresh indictment may be used to allow the accused to plead guilty to an agreed set of charges. The judge should arraign the accused on the fresh indictment and may enter verdicts of guilty. Even if a jury has been empanelled, it is not necessary to discharge the jury before the prosecution can file the fresh indictment in these circumstances.³⁰⁵
5. A fresh indictment may also be used to adjust the charges brought against the accused. This can be done even after a jury has been empaneled. In this situation, it is not necessary to discharge the jury. The jury has been empaneled to try the issues between the Crown and the accused in relation to charges brought in the trial. This includes charges brought on a fresh indictment for the same offences or related offences as those specified in the earlier indictment.³⁰⁶

Last updated: 14 August 2017

2.1.5 Formal Requirements for a Charge-Sheet or Indictment

1. A charge-sheet must be in writing and signed by the informant.³⁰⁷

³⁰⁰ [2014] VSC 265.

³⁰¹ *Fox* [64]–[72].

³⁰² CPA 2009 s 164(1).

³⁰³ See *R v Harris (No 2)* [1990] VR 305.

³⁰⁴ *R v TSR* (2002) 5 VR 627; CPA 2009 s 164. Sections 162 and 164 of the CPA 2009 changed the law that existed prior to that Act. Previously, filing of a new indictment containing different charges to those on which the accused was committed for trial may have commenced a new criminal proceeding. See *R v Taylor (No 2)* (2008) 18 VR 613; *R v BDX* (2009) 24 VR 288.

³⁰⁵ *R v Callaghan & Grant*, unreported, VSCA, 12 December 1996; *Ferguson*; CPA 2009 ss 164, 241. CPA 2009 s 241 is a new procedure that overrides the effect of the decision in *R v Paprounas* [1970] VR 865. See, eg, Explanatory Memorandum, CPA 2009, cl 241.

³⁰⁶ *Falzon v R* [2017] VSCA 74, [114]–[122].

³⁰⁷ CPA 2009 s 6.

2. An indictment must be in writing and signed by the Director of Public Prosecutions or a Crown Prosecutor in the name of the Director.³⁰⁸
3. In the case of an indictment for a Commonwealth offence, it must be signed by the Commonwealth Director of Public Prosecutions (CDPP) or by a person authorised by the CDPP to sign indictments. A delegation to the Victorian Director of Public Prosecutions does not authorise Crown Prosecutors to sign Commonwealth indictments.³⁰⁹
4. The person who signed the indictment must remain qualified to do so at the date of filing.³¹⁰
5. The task of filing an indictment may be delegated to another and the person who signs the indictment need not personally attend court for filing.³¹¹
6. Where a statute requires the consent of a particular office holder (such as the Attorney-General) before a prosecution may be commenced, the trial judge must determine whether that consent existed at the date the indictment was filed. It is not necessary for the consent to exist at the date the indictment is signed.³¹²
7. In determining whether an indictment has been filed on behalf of the correct person, the court should look at the substance of the situation and not rely on matters of form. The Court may disregard statements on the indictment which conflict with the clear intentions of the prosecutor.³¹³

Last updated: 30 August 2021

2.1.6 Defects in Charge-Sheet and Indictment

1. The following defects in a charge-sheet or indictment will not render the document invalid:
 - Failure to comply with Schedule 1 of the CPA 2009;
 - Failing to state the time at which the offence was committed, unless the time of the offence is an essential element;
 - Incorrectly stating the time of the offence;
 - Incorrectly stating the day on which the offence occurred by specifying an impossible day or a day that never happened.³¹⁴
2. Whether a failure to comply with a particular statutory requirement leads to invalidity of the charge-sheet depends on a process of statutory construction. Courts have identified two defects which do not affect the validity of the charge-sheet (even if they may mean a charge should be amended):

³⁰⁸ CPA 2009 s 159.

³⁰⁹ See *Director of Public Prosecutions Act 1983* (Cth) s 9; *Ravarotto v R* [2012] VSCA 263.

³¹⁰ *R v Parker* [1977] VR 22; *DPP v Phillips* [2018] VSC 447, [12]; *DPP v Roote* [2018] VSC 496, [5]. The court must take judicial notice of the signatures of those entitled to sign indictments which purport to be on official documents and of the identity of those who hold the offices of the Director of Public Prosecutions, Acting Director of Public Prosecutions, Chief Crown Prosecutor, Acting Chief Crown Prosecutor, Crown Prosecutor or Associate Crown Prosecutor: *Public Prosecutions Act 1994* (Vic) s 48.

³¹¹ *Holden*.

³¹² *R v Cullen* [1951] VLR 335.

³¹³ *Holden*.

³¹⁴ CPA 2009 ss 9, 166.

- An error in the description of the statutory provision under which the charge is brought will not render the proceedings void *ab initio*. The court should exercise the power to amend where that is in the interests of justice and where the amendment does not have the effect of charging a different offence;³¹⁵
- The fact that a charge does not comply with the requirements of cl 1 of Schedule 1 of the CPA 2009 does not mean the charge-sheet containing that charge is invalid, even if such a charge-sheet does not comply with CPA 2009 s 6(3). Instead, the question will be whether the charge needs to be amended, and whether it can be amended.³¹⁶

Last updated: 5 April 2022

2.2 Duplicity

1. The rule against duplicity prohibits the prosecution alleging two or more offences in a single charge in a charge-sheet or indictment.³¹⁷
2. The rule against duplicity is based on the following considerations:
 - The accused must know the case alleged so that he or she can prepare and present a defence;
 - The court must know the charges alleged so that it can determine the admissibility of evidence, direct the jury and determine the appropriate punishment in the event of a conviction;
 - The jury or the magistrate must know the precise charges in order to focus on the relevant fact-finding task and consider the possibility of defences operating at different times;
 - The accused must be able to use a court record to support a defence of previous conviction or previous acquittal.³¹⁸
3. Duplicity may take two forms:
 - *Patent* duplicity exists when a single charge in the charge-sheet or indictment alleges the commission of two or more offences;
 - *Latent* duplicity arises when the evidence in respect of a single charge reveals the commission of two or more possible offences.³¹⁹
4. Patent duplicity relates to the form of the charge-sheet or indictment. It does not depend on the evidence the prosecution will adduce, or the service of a brief of evidence or depositions.³²⁰
5. The rule against duplicity is a rule of law. The presiding judicial officer confronted with a charge-sheet or indictment that breaches the rule does not exercise a discretion when determining how to remedy the breach.³²¹

³¹⁵ *McMahon v DPP*, Unreported, VSCA, 20 June 1995; *DPP v Ross* Unreported, VSC, 7 January 1993; *Ciorra v Cole* [2004] VSC 416; *Kypri*.

³¹⁶ *Fox* [14]–[15].

³¹⁷ *Rixon v Thompson* (2009) 22 VR 323 ('*Rixon*'); *Walsh v Tattersall* (1996) 188 CLR 77 ('*Walsh*'); *R v Khouzame* [1999] NSWCCA 173 ('*Khouzame*').

³¹⁸ *S v R*; *Walsh*.

³¹⁹ *Walsh* (Kirby J); *Walsh v R* [2002] VSCA 98.

³²⁰ *Walsh*; *Kypri*.

³²¹ *Rixon*.

6. While the rule against duplicity is clearly established, courts have not determined a fixed rule for determining when a charge breaches the rule. Instead, the matter is a question of fact and degree.³²²
7. The prohibition on duplicity operates equally at the summary, committal and trial stages of the criminal process.³²³
8. Compliance with the rule against duplicity may lead to the prosecution filing additional charges. This is not a valid basis for rejecting a complaint of duplicity.³²⁴
9. When a party raises the issue of duplicity, the presiding judicial officer must determine whether the charge is duplex and whether an exception applies. He or she must not concentrate solely on whether the accused is exposed to unfairness and may not reject the complaint on the basis that there is no unfairness.³²⁵

Overcoming Duplicity

10. The prosecution may cure a duplex charge by:
 - Making an election to cure latent duplicity;
 - Providing particulars to remove the ambiguity; or
 - Amending the charge-sheet or indictment.³²⁶
11. Directions that the jury must make unanimous findings of fact can address the risk that the jury may reach a compromise verdict on a charge affected by latent duplicity. The judge may tell the jury that all jurors must agree that the accused committed one of the alleged acts before considering the other elements of the offence in respect of that act.³²⁷
12. A charge-sheet or indictment that alleges alternative offences in separate charges is not duplex. The alternatives may be common law or statutory alternatives and the court must not take verdicts on the alternative offences if the accused is found guilty of the primary offence.³²⁸
13. Similarly, a charge is not duplex when the evidence reveals a single offence, but that the jury may be able to convict on several alternate legal bases. This most often arises in homicide cases, and jurors are routinely directed that they do not need to unanimously agree on the path to guilt, unless the different bases involve materially different issues or consequences.³²⁹

³²² *Stanton v Abernathy* (1990) 19 NSWLR 656; *Walsh; Brinkworth v Dendy* (2007) 97 SASR 416; *R v Heaney* (2009) 22 VR 164.

³²³ *Rixon; Stanton v Abernathy* (1990) 19 NSWLR 656.

³²⁴ *Rixon*.

³²⁵ *Ibid*.

³²⁶ *Walsh; Johnson; Stanton v Abernathy* (1990) 19 NSWLR 656; *R v VN* (2006) 15 VR 113; *R v WWS* (2009) 22 VR 559; *PDI v R* [2011] VSCA 446. Despite an obiter statement that suggest the contrary in *R v Trotter* (1982) 7 A Crim R 8, it is likely that a court cannot allow the prosecution to amend an indictment during a trial to cure latent duplicity by charging separate offences unless the court discharges the jury. See 2.1.3 - Amendment of Charge-Sheet or Indictment.

³²⁷ *R v Heaney* (2009) 22 VR 164. See also *R v Holmes* [2006] VSCA 73; *Khouzame; R v Trotter* (1982) 7 A Crim R 8; *S v R*.

³²⁸ *R v Warburton & Anor* (2006) 14 VR 235.

³²⁹ See *Walsh v R* [2002] VSCA 98.

Exceptions to the Rule Against Duplicity

14. Despite the strictness of the rule against duplicity, prosecutors should not scrutinise the alleged conduct in fine detail and charge as many offences as possible. For example, it is not necessary to charge every blow against a victim as a separate assault or to bring separate charges of theft for every item taken during a burglary.³³⁰
15. A charge is not duplex when the alleged conduct:
 - occurred so close in space and time that it may be viewed as a single composite activity; or
 - is of a continuing nature.³³¹
16. This will often be a question of fact and degree. Previous cases may provide some guidance on how the rule against duplicity has applied on other occasions.³³²
17. The operation of these exceptions depend on how the prosecution puts its case. In some cases, there may be multiple possible formulations of the offences charged, some of which will be impermissibly duplex, while others will allege activity of an ongoing nature. The court must apply the rule against duplicity and the exceptions based on how the prosecution has chosen to put its case and not on the fact that an alternative formulation may exist which is not duplex.³³³
18. The court should consider the following factors when determining whether a charge that involves several separate criminal acts may be valid:
 - (a) the connection of the events in point of time;
 - (b) the similarity of the acts;
 - (c) the physical proximity of the place where the events happened; and
 - (d) the intention of the accused throughout the conduct.³³⁴
19. The court may also need to consider the nature of the offence to determine whether each act is a separate offence or whether it can be committed as a continuing or composite offence. This will often depend on the language of the statute in question and the 'gist' of the offence.³³⁵
20. Breaks in time or location between particular acts and intervening events may give rise to separate offences. However, it will be a question of fact and degree whether a particular gap gives rise to a new offence or whether the old offence continues despite the break.³³⁶
21. The following offences may be committed by a course of continuous conduct and a single charge covering the whole conduct will not be duplex:
 - Drug trafficking;³³⁷

³³⁰ *R v Slade* (1982) 7 A Crim R 43; *DPP v Esso (No 5)* [2001] VSC 103; *R v Whelan* [1973] VR 268; *Khouzame*; *Gardner v Caporn* [2005] WASCA 153; *DPP v Merriman* [1973] AC 584.

³³¹ *Gardner v Caporn* [2005] WASCA 153; *Walsh* (Kirby J); *R v Heaney* (2009) 22 VR 164; *Kartawidjaja v Rowe* [2021] VSC 143.

³³² See *Walsh R v Heaney* (2009) 22 VR 164; *R v Eades* (1991) 57 A Crim R 151; *Brinkworth v Dendy* (2007) 97 SASR 416; *Walsh v R* [2002] VSCA 98).

³³³ See *Kartawidjaja v Rowe* [2021] VSC 143, [126]–[131].

³³⁴ *Walsh* 108 (Kirby J).

³³⁵ See *Brinkworth v Dendy* (2007) 97 SASR 416; *R v Lo Presti* [2005] VSCA 259. Cf *Walsh* (Kirby J).

³³⁶ See *R v DD* (2007) 19 VR 143; *Gardner v Caporn* [2005] WASCA 153; *Brinkworth v Dendy* (2007) 97 SASR 416; *R v Goldman* [2007] VSCA 25; *R v Chen*, Unreported, QSC, 21 October 1997; *R v Suckling* [1998] VSCA 60.

- Conspiracy;³³⁸
 - Treason;
 - Harassment;
 - Stalking;³³⁹
 - Breach of a community based order;³⁴⁰
 - Money laundering; and
 - Some fraud offences where the gist of the offence is the obtaining, rather than the deception.³⁴¹
22. It is not appropriate to characterise conduct as a continuing act when there is a realistic possibility that the jury may not agree on its verdict concerning all the alleged acts. This may occur because of variations in the strength of the evidence, or because the accused may have a defence to part of the alleged conduct.³⁴²
23. An appellant raising a complaint of latent duplicity regarding a continuing act for the first time on an appeal may need to demonstrate that the duplicity affected the conduct or the outcome of the proceeding.³⁴³
24. Additionally, a course of conduct charge, within the meaning of cl 4A, Schedule 1 of the CPA 2009, is a statutory exception to the rule against duplicity. This type of charge is available only for certain specified offences.

Duplicity and Rolled-Up Charges

25. An accused may waive the prohibition on patent duplicity by pleading guilty to a ‘rolled-up’ charge. A ‘rolled-up’ charge alleges a series of separate offences in a single charge and is permissible only with the consent of the accused and on a plea of guilty. In these circumstances, the accused is not exposed to the risks of uncertainty, complexity or unfairness that would normally arise due to duplicity.³⁴⁴
26. Use of a rolled-up charge is *only* permissible when the accused pleads guilty. The prosecution and defence may not require a jury to determine the accused’s guilt on a rolled-up charge in a negotiated indictment.³⁴⁵

³³⁷ *R v Giretti & Giretti* (1986) 24 A Crim R 112; *R v Locchi* (1991) 22 NSWLR 309. If the prosecution alleges a ‘business of trafficking’ over a period of time, it will need to establish that the accused engaged in that conduct. This will often require the jury to draw an inference from a number of individual acts of trafficking. The prosecution may also allege separate charges of trafficking in respect of each transaction in the relevant period, either instead of, or as an alternative to, a ‘business of trafficking’ charge. See *R v Giretti & Giretti* (1986) 24 A Crim R 112; *R v Te* [1998] 3 VR 566.

³³⁸ *R v Perrier* [2008] VSCA 97.

³³⁹ See *Walsh; Tasmania v M* (2008) 17 Tas R 220; *Rau v Magistrates’ Court of Victoria*, Unreported, VSC, 2 July 1993.

³⁴⁰ *Nguyen v DPP* (1996) 85 A Crim R 510.

³⁴¹ See *R v Ferguson (Ruling No 11)* [2005] VSC 527; *R v Moussad* [1999] NSWCCA 337; *Weinel v Fedcheshen* (1995) 65 SASR 156; *R v Beary* (2004) 11 VR 151, [29] (Buchanan JA); *DPP (Cth) v Hussein* (2003) 8 VR 92.

³⁴² *Khouzame; Rixon; R v Rigoli* [2006] VSCA 1.

³⁴³ *R v Goldman* [2007] VSCA 25. But see *Rixon; Walsh*.

³⁴⁴ *R v El-Kotob* (2002) 4 VR 546; *R v Jones* [2004] VSCA 68; *R v Beary* (2004) 11 VR 151.

³⁴⁵ *Tyson v R* (2005) 16 NTLR 161.

Duplicity and Sexual Offences

27. In sexual offences, the mode of penetration will generally not be an element of the offence. An offender is not prejudiced or embarrassed in his or her defence where the prosecution alleges penetration with one of several possible items. The jury only need to unanimously agree on the fact of sexual penetration, rather than the means.³⁴⁶
28. It is not appropriate to divide a charge of rape into separate offences of an initial penetration and a failure to withdraw.³⁴⁷ Rape is a continuing act and the jury do not need to unanimously agree on the point when the accused became aware that the complainant was not consenting.³⁴⁸
29. The prosecution should generally lay separate charges if the evidence reveals several discrete acts of sexual penetration. However, in some cases, the court may treat a series of sexual acts of the same character as a single activity, in the same way that courts will often treat a series of punches as a single assault. This approach will only be suitable if the issues in relation to each alleged act of penetration within an episode are the same.³⁴⁹
30. Courts have disapproved prosecution attempts to adopt the nomenclature of a ‘composite charge’ to describe multiple acts of sexual penetration alleged in a single charge. Such a term is not defined in the authorities and, where it is used as a synonym for a ‘rolled-up charge’ on a plea of guilty, prosecutors should use the more established terminology.³⁵⁰
31. In circumstances where the accused has allegedly committed the same type of sexual offence on several occasions over a period of time, a course of conduct charge may be used. A course of conduct charge is available to the prosecution when the incidents of the offence amount to a course of conduct having regard to their time, place, purpose of commission and other relevant matters.³⁵¹
32. Alternatively, an offence of ‘persistent sexual abuse’ requires proof that the accused, on three or more occasions, committed an act that would constitute one of several listed sexual offences within a designated period.³⁵²
33. The Crown may specify the alleged sexual offences as particulars of an offence under s 47A and may also charge the acts as separate alternative offences. This does not give rise to latent or patent duplicity.³⁵³
34. The Crown may not frame the particulars of a charge of ‘persistent sexual abuse’ to exclude certain offences within the designated period. The offence concerns *all* sexual offences by the accused against the complainant in the designated period. Charges for individual sexual offences are alternative charges and the court may only take a verdict on those charges if the jury finds the accused not guilty of the charge of persistent sexual abuse.³⁵⁴ See 7.3.22 Persistent Sexual Abuse of a Child Under 16 in the Victorian Criminal Charge Book.

³⁴⁶ *R v Castles* (2007) 17 VR 329.

³⁴⁷ Cf *Crimes Act 1958* ss 38(2)(a) and (b).

³⁴⁸ See *R v Yankovski* (2007) 17 VR 315.

³⁴⁹ See *WGC; Khouzame; PDI v R* [2011] VSCA 446; *Walsh*.

³⁵⁰ *Holland v The Queen* [2018] VSCA 241, [6]; *Schembri v The Queen* [2020] VSCA 217, [57]–[59].

³⁵¹ CPA 2009 sch 1, cls 4A(1), (8).

³⁵² *Crimes Act 1958* s 47A.

³⁵³ *R v GJB* (2002) 4 VR 355.

³⁵⁴ *R v GJB* (2002) 4 VR 355; *R v Menta* [2004] VSCA 57.

Duplicity and Course of Conduct Charges

35. A course of conduct charge is a single charge for a single offence, which incorporates multiple incidents of the same offence committed on more than one occasion over a specified period.³⁵⁵
36. Course of conduct charges enable the prosecution of a series of offending, where the individual instances of the offending are not disclosed in enough detail to be prosecuted as individual offences. The course of conduct charge is an exception to rule against duplicity.³⁵⁶
37. This form of charge was introduced to deal with repeat and systematic sexual offending. As a rule of criminal procedure, it is a method of pleading a charge, rather than a discrete offence.³⁵⁷
38. Course of conduct charges are available only for the following offences:³⁵⁸
- A sexual offence, as defined in s 3 of the *Crimes Act 1958* with reference to the offences under the following subdivisions of div 1 of pt 1:
 - (8A) – Rape and sexual assault,
 - (8B) – Incest,
 - (8C) – Sexual offences against children,
 - (8D) – Sexual offences against persons with a cognitive impairment,
 - (8E) – Other sexual offence,
 - (8EAA) – Sexual servitude, or
 - Under any corresponding previous enactment.³⁵⁹
 - Any offence under the following provisions of the *Crimes Act 1958*:
 - Division 2 of Part I – Theft and similar or associated offences; excluding sections 75 (Robbery), 75A (Armed robbery), 76 (Burglary), 77 (Aggravated burglary), 78 (Unlawfully taking control of an aircraft), 80 (Removal of articles from places open to the public) and 91 (Going equipped for stealing etc);
 - Division 2AA of Part I – Identity crime;
 - Division 2A of Part I – Money laundering;
 - Division 2B of Part I – Cheating at gambling; and
 - Subdivision (6) of Division 3 of Part I – Computer offences
39. Course of conduct charges are available only if each incident is an offence under the same provision. Where there are multiple instances of more than one offence, separate course of conduct charges must be filed in respect of each relevant offence.³⁶⁰

³⁵⁵ CPA 2009 sch 1, cls 4A(1), (2), (6).

³⁵⁶ Ibid sch 1, cl 4A(13).

³⁵⁷ Cf *Crimes Act 1958* s 47A – Persistent sexual abuse of a child under 16.

³⁵⁸ CPA 2009 sch 1, cl 4A(1).

³⁵⁹ Ibid sch 1, note to cl 4A(1).

³⁶⁰ CPA 2009 sch 1, cl 4A(2).

40. In a course of conduct charge, more than one type of act may be alleged to prove an element of the relevant offence. In relation to sexual offences, an ‘act’ in this context includes sexual penetration as defined by s 37D and sexual touching within the meaning of sub-div (8A) (rape and sexual assault) of the *Crimes Act 1958*.³⁶¹ For example, a single course of conduct charge for a sexual offence can allege acts of digital penetration as well as acts of penetration with an object. However, the Director’s Policy on course of conduct charges is that, unless the accused is pleading guilty, the charge should only allege a single type of conduct, and multiple charges should be used for different types of conduct.³⁶²
41. For a sexual offence, each incident must relate to the same complainant.³⁶³
42. The consent of the Director of Public Prosecutions must be obtained before a charge sheet containing a course of conduct charge for a sexual offence is filed.³⁶⁴ While the Director’s consent is not necessary for other charges, it is expected that police will obtain advice from the OPP before using a course of conduct charge in relation to fraud offending.³⁶⁵
43. A course of conduct charge must include a statement to the effect that it is a course of conduct charge.³⁶⁶
44. 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 of that incident.³⁶⁷ See 2.1.2 Particulars.
45. However, course of conduct charges may be used only when 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. The prosecution must prove the course of conduct beyond reasonable doubt.³⁶⁸
46. Both rolled-up charges and course of conduct charges include multiple instances of the same offending in a single charge. However, unlike rolled-up charges, course of conduct charges require neither a guilty plea nor the consent of the accused.
47. The Director’s Policy on course of conduct charges sets out the following criteria which must be considered in deciding whether to use a course of conduct charge:
- substantive charges are to be preferred wherever possible;
 - regard should be given to whether a course of conduct charge adequately reflects the criminality of the offending involved;
 - there should be a reasonable explanation as to why the state of the evidence and/or the allegations of the victim are sparse or lacking in detail as to dates or exact circumstances;
 - where multiple complainants are involved, separate course of conduct charges must be utilised in sex matters for each complainant;

³⁶¹ CPA 2009 sch 1, cls 4A(3), (4).

³⁶² Director’s Policy 54, [59]–[60].

³⁶³ CPA 2009 sch 1, cl 4A(2).

³⁶⁴ Ibid sch 1, cl 4A(12).

³⁶⁵ Director’s Policy 54, [64].

³⁶⁶ CPA 2009 sch 1, cls 4A(5), (12).

³⁶⁷ Ibid sch 1, cl 4A(9).

³⁶⁸ Ibid sch 1, cl 4A(2)(8).

- where multiple victims are involved, separate course of conduct charges must be utilised in non-sex trial matters for each victim, but on a plea for non-sex matters, a single course of conduct charge may incorporate multiple victims;
 - the nature of any alleged admissions is to be taken into account; and
 - each case is to be considered on its individual and evidentiary merits.
48. In addition, course of conduct charges should not be used to overcome evidentiary difficulties arising from a defective investigation.³⁶⁹
49. However, a course of conduct charge might be used to avoid what would otherwise be an overloaded indictment.³⁷⁰
50. The Policy indicates that the choice of whether to use a course of conduct charge or a charge of the type permitted under the principles from *R v Giretti*³⁷¹ or *DPP v Merriman*³⁷² is to be made based on the evidence available in the case.³⁷³
51. The Policy also indicates that the prosecution opening should be as specific as the evidence allows and include an indication of the number or frequency of occasions. Imprecise terms such as ‘regularly’ or ‘on a number of occasions’ should be avoided.³⁷⁴
52. Finally, the Policy outlines the Director’s view on the interaction between course of conduct charges and other provisions such as serious offender provisions, continuing criminal enterprise offending and sex offender registration.³⁷⁵

Duplicity and Conspiracy

53. It is undesirable for an accused to be charged with both conspiracy to commit crime and the completed offence. The prosecution should charge the substantive offence only.³⁷⁶
54. While an indictment containing charges for both conspiracy and the completed offence will not be bad for duplicity, the sentencing judge or magistrate must be careful to avoid double punishment.³⁷⁷
55. If the Crown intends to charge a person with both conspiracy and the associated substantive offence, it should include those offences in a single indictment. It is not appropriate to charge the accused with conspiracy and the substantive offences in separate proceedings.³⁷⁸

³⁶⁹ Director’s Policy 54, [31].

³⁷⁰ Ibid 54, [32]–[34].

³⁷¹ (1986) 24 A Crim R 112.

³⁷² [1973] AC 584.

³⁷³ Director’s Policy 54, [16]–[18].

³⁷⁴ Ibid 54, [23].

³⁷⁵ Ibid 54, [39]–[47].

³⁷⁶ *R v Hoar* (1981) 148 CLR 32; *R v El-Kotob* (2002) 4 VR 546.

³⁷⁷ *R v El-Kotob* (2002) 4 VR 546.

³⁷⁸ *R v Hoar* (1981) 148 CLR 32.

56. Conspiracy to defraud is defined by the proposed object of the conspiracy, rather than the means of carrying out the conspiracy. Particulars of overt acts or planned overt acts do not render a charge of conspiracy to defraud duplex.³⁷⁹

Duplicity and Perjury

57. When the accused is charged with perjury, it is unclear whether each lie is a separate offence or whether multiple lies may be pleaded as particulars of a single charge of perjury. There have been decisions each way and the Court of Appeal expressly reserved the point for future consideration when it last arose.³⁸⁰

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2.3 Joinder of Charges

1. A charge-sheet or indictment may only contain charges for more than one offence where all offences are 'related offences'. Thus, it is a mandatory statutory requirement that the offences are related before they can be joined in an indictment.³⁸¹
2. In addition, a single charge may allege that the offence was committed by multiple accused. This gives rise to separate charges against each named accused that shall be determined in the one proceeding unless the charges are severed.³⁸²
3. In a criminal trial, the prosecution must specify all charges and all accused in the one indictment (the 'one indictment, one jury' rule). In contrast, while a single charge-sheet may allege charges against multiple accused, the prosecution must file an individual charge-sheet for each accused.³⁸³
4. All offences that are related offences should be included in the one charge-sheet or indictment. Courts may exercise their power to prevent an abuse of process where the prosecution seeks to bring proceedings for offences that should have been included in an earlier charge-sheet or indictment.³⁸⁴
5. There is no power for the accused to consent to joinder of unrelated charges, even if the accused wishes to allege that the complainants or witnesses of different charges have colluded or concocted their accounts.³⁸⁵ Further, there is no principle that charges must be joined if the accused wishes to allege collusion between the different witnesses or complainants. Indeed, in the context of sexual offences which are not cross-admissible, running separate trials reduces the risk of the jury hearing irrelevant and prejudicial material that is relevant to one, but not the other, group of offences.³⁸⁶

³⁷⁹ *R v Mitchell* [1971] VR 46.

³⁸⁰ See *R v Hoser* (1998) 2 VR 535, 544–5 (Brooking JA).

³⁸¹ CPA 2009 sch 1, cl 5(1); *White v The King* [2022] VSCA 278, [64] ('White'). Cf *White* [98]–[99] (Macaulay JA).

³⁸² CPA 2009 sch 1, cl 6.

³⁸³ *R v Landy* [1943] VLR 73; CPA 2009 s 56.

³⁸⁴ *R v Harris (No 2)* [1990] VR 305; *Connelly v DPP* [1964] AC 1254.

³⁸⁵ *White* [65].

³⁸⁶ *Ibid* [84].

6. It is not appropriate to include additional (rather than alternative) charges in an indictment where, as a matter of substance, the charges are alternatives or are based on the same facts. The judge should require the prosecution to amend the indictment to state that the offences are pleaded in the alternative or order a stay of proceedings for the additional charges.³⁸⁷
7. In Victoria, there is a long-standing practice not to join other charges to a charge of murder. Part of the basis for this practice is that 'murder is too serious a matter to be complicated by having alternative counts inserted in the indictment'. This practice may be departed from where there are cogent reasons to do so, such as where the non-murder offences are closely connected to the murder charges.³⁸⁸

Meaning of 'Related Offences'

8. 'Related offences' are defined as:

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.³⁸⁹

9. The first 'or' in the definition operates disjunctively. The definition therefore proposes two alternate limbs:
 - Offences that are founded on the same facts;
 - Offences that form, or are part of, a series of offences of the same or a similar character.³⁹⁰
10. The first limb directs attention to the facts which found the offences, whereas the second directs attention to the character of the offences.³⁹¹
11. Offences are 'founded on the same facts' focusses attention on the material facts required to prove the offences and not the evidence sought to be adduced to prove those material facts.³⁹²
12. Clause 5(1) and the definition of 'related offences' should be given a broad interpretation and should not be constrained by inflexible principles. The purpose of the rule is to promote flexibility and to overcome rigidity that once existed in criminal pleadings.³⁹³
13. The words of the definition are not technical and should be given their ordinary meaning.³⁹⁴
14. The purpose of cl 5(1) is to allow all charges that can properly and conveniently be dealt with together to be joined on a single charge-sheet or indictment. The clause also allows a single magistrate or jury to make findings on the whole of the facts alleged against the accused.³⁹⁵

³⁸⁷ *R v Mai & Tran* (1992) 26 NSWLR 371; *Pereira v DPP* [1988] HCA 57; *R v Simonidis* [1983] 2 Qd R 54.

³⁸⁸ *Fleming v The Queen* [2021] VSCA 206, [91]–[101] ('*Fleming*').

³⁸⁹ CPA 2009 s 3.

³⁹⁰ *Fleming* [58].

³⁹¹ *Ibid*.

³⁹² *Ibid* [90].

³⁹³ *R v Renzella*, Unreported, VSCA, 7 August 1997; *R v Gregory (No 1)* [2009] VSC 358.

³⁹⁴ *Nicholls v R* [2016] VSCA 250, [55].

³⁹⁵ *R v McLean* (2000) 2 VR 118 ('*McLean*'); *R v Kray* [1970] 1 QB 125; *R v Collins; ex parte A-G* [1996] 1 Qd R 631.

15. It is not possible to state a precise formula for when two or more offences will be ‘related offences’. The broad definition has a flexible operation that allows it to be applied to the facts of each case.³⁹⁶
16. The test is designed to be easily satisfied, with the risk of injustice addressed by the discretion to order separate trials.³⁹⁷
17. Courts have used certain phrases to test whether two or more offences are ‘related offences’:
 - There must be a common factual origin, connection or nexus between the offences;
 - The offences must be linked, or in a series, rather than separate and discrete;
 - It must be convenient in all the circumstances to try the offences together, rather than separately.³⁹⁸
18. Offences may also be related if the evidence on one charge would be admissible in the trial of another.³⁹⁹
19. It is not appropriate to concentrate solely on the form of the charge-sheet or indictment, as that may not sufficiently reveal the similarities between the charges. The court must consider legal similarities between the offences as well as common facts the prosecution alleged, even if the defence disputes that evidence.⁴⁰⁰
20. However, the mere existence of legal similarities between the different offences is not sufficient, if the commission of the offences in their factual settings are different.⁴⁰¹
21. Because questions of joinder and severance must be determined at the start of proceedings, it is necessary to analyse the issues on the basis of the Crown case as alleged and ask whether, if the Crown case is proved, then there would be the necessary nexus.⁴⁰² Offences may be part of a series if the earlier offences provide the context necessary to understand the accused’s conduct in relation to the later offences. Offences are more likely to be related when evidence is cross-admissible between certain charges.⁴⁰³
22. Offences may be part of a series if the earlier offences provide the context necessary to understand the accused’s conduct in relation to the later offences. Offences are more likely to be related when evidence is cross-admissible between certain charges.⁴⁰⁴
23. Charges may have a common factual origin where there are ‘primary charges’ and ‘subsidiary charges’, such that the subsidiary charges could not have been alleged but for the facts giving rise to the primary charges.⁴⁰⁵

³⁹⁶ *McLean*; *R v Renzella*, Unreported, VSCA, 7 August 1997.

³⁹⁷ *Nicholls v R* [2016] VSCA 250, [59]; *De Jesus v R* [1986] HCA 65.

³⁹⁸ *R v Reid* [1999] 2 VR 605 (‘Reid’); *McLean*; *R v Cogley* [1999] 3 VR 366; *Ludlow v Metropolitan Police Commissioner* [1971] AC 29; *R v Kray* [1970] 1 QB 125.

³⁹⁹ *Dragojlovic v The Queen* (2013) 40 VR 71, [196]. Cf *Fleming* [89]–[90].

⁴⁰⁰ *R v Smart* [1983] 1 VR 265; *R v McDonald* (1979) 21 SASR 198; *Sutton v R* (1984) 152 CLR 528; *R v Renzella*, Unreported, VSCA, 7 August 1997; *R v Gregory (No 1)* [2009] VSC 358; *Ludlow v Metropolitan Police Commissioner* [1971] AC 29.

⁴⁰¹ *De Jesus v The Queen* [1986] HCA 65; *Fleming* [67].

⁴⁰² *DPP v Preston (Ruling No 2)* [2015] VSC 396, [26].

⁴⁰³ *R v Spina* [2005] VSCA 319.

⁴⁰⁴ *R v Spina* [2005] VSCA 319. Cf *Fleming* [71].

24. It is not necessary for the offences to be committed in an identical fashion or at the same time before they may be described as a series. Existence of a common factual basis does not require obvious factual similarities or even close similarity.⁴⁰⁶
25. In cases of financial fraud, it will be sufficient if the alleged offences have a 'common genesis or are otherwise linked and associated by commonality of parties or transactions'.⁴⁰⁷
26. Other sources of commonality include a common *modus operandi*, a common target of the offending or a combination of things which, individually, may not create a 'nexus' but do so together.⁴⁰⁸
27. All offences joined on a charge-sheet or indictment must be related to one another. It is not permissible to join offences which are only related by a common, third offence.⁴⁰⁹
28. A difference in time may mean that offences cease to be part of a series.⁴¹⁰
29. A charge-sheet or indictment may contain both a course of conduct charge (within the meaning of CPA 2009 sch 1, cl 4A) and an ordinary charge of the offence covered by the course of conduct charge as an alternative.⁴¹¹ The alleged date of commission of the relevant offence in the alternative charge must be within the period to which the course of conduct relates.
30. However, a charge-sheet or indictment must not contain both a course of conduct charge and a charge for an offence against s 47A of the *Crimes Act 1958* (persistent sexual abuse of a child under the age of 16).⁴¹²

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2.4 Severance of Charges

1. The initial decision of whether to join multiple charges in a charge-sheet or indictment is a decision for the prosecuting authorities.⁴¹³
2. Multiple charges against an accused and multiple accused named on the one charge-sheet or indictment must be tried or heard together unless the court orders a separate trial or hearing.⁴¹⁴
3. If the judge orders separate trials or hearings, the prosecution may usually elect which proceeding will be determined first. The judge has a residual power to order that certain proceedings must be heard first in order to avoid a miscarriage of justice or an abuse of process.⁴¹⁵

⁴⁰⁵ *R v Barrell & Wilson* (1979) 69 Cr App R 250, 252.

⁴⁰⁶ *Reid; McLean; R v Cogley* [1999] 3 VR 366; *Ludlow v Metropolitan Police Commissioner* [1971] AC 29; *R v Kray* [1970] 1 QB 125; *R v Barrell & Wilson* (1979) 69 Cr App R 250; *R v Gregory (No 1)* [2009] VSC 358, [13].

⁴⁰⁷ *R v Heinze* [2005] VSCA 124, [48].

⁴⁰⁸ *DPP v Preston (Ruling No 2)* [2015] VSC 396, [24].

⁴⁰⁹ *R v Collins; ex parte A-G* [1996] 1 Qd R 631; *McLean*. Tadgell JA in *McLean* [26] explained that, 'where three charges (call them x, y and z) are joined, and joinder of x and y and of y and z is clearly valid, the joinder of x and z can be justified only if those two could stand had y not been included.'

⁴¹⁰ *R v Gregory (No 1)* [2009] VSC 358; *White* [68].

⁴¹¹ CPA 2009 sch 1, cl 5(3).

⁴¹² *Ibid* sch 1, cl 5(5).

⁴¹³ *R v Demirok* [1976] VR 244; *R v TJB* [1998] 4 VR 621.

⁴¹⁴ CPA 2009 ss 56, 170.

Power to Order Separate Trials or Hearings

4. Where the prosecution has joined several offences on a charge-sheet or indictment, the judge has a discretion to order a separate trial or hearing in respect of one or more charges where:
 - (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 indictment;
 - (b) a trial or hearing with a co-accused would prejudice the fair trial of the accused; or
 - (c) for any other reason it is desirable to do so.⁴¹⁶
5. An order for separate trials or hearings may be made before or during a trial and may be made on the judge's own motion.⁴¹⁷
6. Meeting one or more of the three grounds listed above is a precondition to ordering order separate trials or hearings. Even where one or more conditions are met, the court retains a true discretion and should consider any countervailing factors. This is different to some other legislation where the term 'may' can mean that, where the preconditions for the exercise of the power are met, the court must exercise the relevant power.⁴¹⁸
7. The discretion to order separate trials or hearings must be exercised judicially. It is not necessary to show that there is some 'special feature' beyond one of the preconditions before the discretion may be exercised in favour of ordering separate trials.⁴¹⁹

Exercise of the Discretion

8. The judge or magistrate must consider:
 - whether the joinder of the offences complies with rule 5 of Schedule 1; and
 - whether the judge or magistrate should exercise his or her discretion under s 58 or s 193 to order severance of the indictment.

These two questions must be considered separately and may not be merged into a single issue.⁴²⁰
9. Whilst the following principles are of general application to judges and magistrates, some principles may be of particular relevance to judges conducting jury trials.
10. Exercising the discretion to sever charges on a charge-sheet or indictment requires a judge or magistrate to strike a balance between the interests of the accused in avoiding unnecessary prejudice due to one jury hearing evidence relating to other charges and the public interest in the efficient allocation of judicial resources, consistency of verdicts, convenience of witnesses and finality of litigation.⁴²¹

⁴¹⁵ Ibid ss 58, 193, 195; *R v Brown* [1990] VR 820; *R v Cox (Ruling No 5)* [2005] VSC 262.

⁴¹⁶ CPA 2009 ss 58, 193.

⁴¹⁷ Ibid ss 58, 193, 337.

⁴¹⁸ *R v TJB* [1998] 4 VR 621; *R v GAS* [1998] 3 VR 862; *GBF v R* [2010] VSCA 135. Cf *Mitchell v R* (1996) 184 CLR 333.

⁴¹⁹ *De Jesus v R* [1986] HCA 65; *R v Demirok* [1976] VR 244. Cf *Ludlow v Metropolitan Police Commissioner* [1971] AC 29.

⁴²⁰ *R v Renzella*, Unreported, VSCA, 7 August 1997.

⁴²¹ *Reid*; *R v Demirok* [1976] VR 244; *Ludlow v Metropolitan Police Commissioner* [1971] AC 29; *R v PHW* [2004] VSC 411; *R v Oliver* (1984) 57 ALR 543.

11. Despite references in some cases to the need to balance considerations of prejudice and convenience, it is wrong for a judge to apply a test of whether ‘prejudice far outweighs convenience’. Such an approach erroneously inverts the recognised power of a judge to allow joint trials where convenience far outweighs the risk of prejudice.⁴²²
12. The judge may consider the complexity of the issues the jury would need to analyse. In some cases, the evidence may be so complex that the jury cannot be expected to understand and evaluate the issues in the case. In other cases, there may be a high degree of overlap in the relevant information, or the conduct on each occasion may be similar. The judge or magistrate should also consider whether the accused may be unfairly prejudiced in his or her defence to certain charges due to the joinder of other charges.⁴²³
13. The accused is likely to suffer greater prejudice as the number of charges on the indictment increases. The burden of charging the jury on the facts relevant to the elements of each offence and the complexity of any ‘separate consideration’ directions will increase substantially. While there is no fixed maximum number of charges permitted on a charge-sheet or indictment, the court should carefully consider whether there are so many charges that prejudice to the accused is inevitable.⁴²⁴
14. The court must order separate trials even in the absence of an application if that is necessary in order to avoid a miscarriage of justice.⁴²⁵
15. In deciding how to exercise the discretion to order separate trials the judge should consider whether any prejudice to the accused due to the joinder of charges can be cured by appropriate directions. The judge should take into account that juries can usually be trusted to follow a judge’s directions on separate consideration and the use of evidence.⁴²⁶
16. Provided the offences are related offences, the Crown may join offences where the accused bears an onus of proof with offences where the accused does not bear an onus of proof. Such combination of offences is permissible and will not be enough by itself to justify ordering separate trials, even though it may place pressure on the accused to give evidence.⁴²⁷
17. Similarly, the mere fact that the cases on some charges are weaker or stronger than other charges will not be enough to justify an order for separate trials.⁴²⁸
18. While the Crown case as alleged must be assumed to be true for the purpose of assessing whether joinder is permissible, the court when deciding severance is entitled to take into account the strength of the evidence which establishes the connection between the offences. Weak or tenuous evidence in support of the existence of a connection may provide a foundation for ordering severance even if joinder is otherwise justified.⁴²⁹

⁴²² *Baini v R* (2011) 33 VR 252; *KRM v R* (2001) 206 CLR 221, [38] (McHugh J).

⁴²³ *R v AB & Baker (Ruling No 1)* [2008] VSC 106; *R v Smart* [1983] 1 VR 265; *Reid*; *R v D* [1999] VSCA 148; *R v Brown* [1990] VR 820.

⁴²⁴ *R v Smart* [1983] 1 VR 265; *R v King* [1897] 1 QB 214; *Durovic v R* (1994) 4 Tas R 113; *R v PHW* [2004] VSC 411.

⁴²⁵ *Reid*; *R v Demirok* [1976] VR 244.

⁴²⁶ *R v KRA* [1999] 2 VR 708; *R v GAE* (2000) 1 VR 198; *R v Cogley* [1999] 3 VR 366; *R v TJB* [1998] 4 VR 621; *Sutton v R* (1984) 152 CLR 528; *R v Bright* (2014) 45 VR 744; [2014] VSCA 341, [51]; *Huynh & Huynh v The Queen* [2020] VSCA 220, [44].

⁴²⁷ *McLean*.

⁴²⁸ *R v GAS* [1998] 3 VR 862.

⁴²⁹ *DPP v Preston (Ruling No 2)* [2015] VSC 396, [27].

19. One common consideration when deciding the question of severance is whether there is cross-admissibility of the evidence between the different charges. While the question of cross-admissibility is important, it is not decisive. Where the evidence is not cross-admissible, the judge will need to consider whether the risk of prejudice can be addressed by directions.⁴³⁰
20. In addition, there may be cases where the evidence is not cross-admissible, but there are common witnesses. In such cases, one consideration will be whether cross-examination of common witnesses on credit issues can be conducted without creating a misleading picture.⁴³¹
21. Where the issue of severance is affected by questions about the cross-admissibility of evidence, the judge must determine those admissibility questions before making a ruling on severance. Otherwise there is a risk of inconsistency if the ultimate ruling about cross-admissibility is different to assumptions the judge made for the purpose of the severance application.⁴³²
22. Where charges are joined on one indictment and the evidence for some or all charges is not cross-admissible, the judge will usually need to warn the jury that each charge may only be proven by the evidence admissible on that charge and not to use evidence that is only admissible on a different charge.⁴³³ See 1.8 Separate Consideration in the Victorian Criminal Charge Book.
23. In cases which are likely to provoke an emotional reaction in the jury, there may be a greater need to sever charges where evidence is not cross-admissible. For example, in *R v Penrose (Ruling No 1)*,⁴³⁴ Lasry J ordered severance where the accused was charged with recklessly causing serious injury and then manslaughter of an 11 month old child. The two incidents occurred several days apart and, in the context of a child homicide case, there was a risk that the jury would impermissibly allow its findings on the recklessly causing injury charge to affect their verdict on the manslaughter charge.⁴³⁵
24. The judge should give reasons for the decision to sever or refuse to sever a charge from an indictment. While the reasons can often be ascertained from the course of discussions between counsel and the court, a formal ruling will clarify the weight the judge ultimately gives to the various considerations discussed and facilitates appellate review of the decision.⁴³⁶

Multiple Accused

25. The interests of justice normally require that all co-accused are dealt with in the one trial. A joint trial will reduce the risk of inconsistent verdicts. Prejudice associated with inadmissible material can usually be cured by appropriate directions.⁴³⁷
26. The general rule in favour of joint trials may be displaced where this course will deny an accused a fair trial.⁴³⁸

⁴³⁰ *R v Papamitrou* (2004) 7 VR 375; *GBF v R* [2010] VSCA 135, [54].

⁴³¹ *Nicholls v R* [2016] VSCA 250, [102].

⁴³² *R v Bright* (2014) 45 VR 744; [2014] VSCA 341, [45].

⁴³³ *R v Cogley* [1999] 3 VR 366.

⁴³⁴ [2015] VSC 786.

⁴³⁵ *Ibid* [18]–[19].

⁴³⁶ *Bui & Hargrave v R* [2011] VSCA 404; *Baini v R* (2011) 33 VR 252; *R v Bright* (2014) 45 VR 744; [2014] VSCA 341, [48]–[49].

⁴³⁷ *Webb v R* (1994) 181 CLR 41; *R v Gibb* [1983] 2 VR 155; *R v Demirok* [1976] VR 244; *R v Oliver* (1984) 57 ALR 543.

⁴³⁸ *R v Oliver* (1984) 57 ALR 543; *R v Patsalis* [1999] NSWSC 649; *R v Cox & Ors* [2005] VSC 255.

27. One example of cases where this general rule will be displaced is where there will be significant evidence which implicates an accused, but is irrelevant and highly prejudicial in the trial of the other accused. The argument for a separate trial will be much stronger where the trial judge finds that the prejudice cannot be cured by judicial direction (*R v Gibb & McKenzie* [1983] 2 VR 155; *R v Jones & Waghorn* (1991) 55 A Crim R 159).
28. There are two main forms of improper prejudice in this context. First, the evidence may be prejudicial in the traditional sense, such as evidence of bad character or other forms of collateral prejudice. Second, the evidence may improperly bolster a weak case in such a way that the jury would be unable to give effect to separate consideration directions (*Young & Ors v R* [2015] VSCA 265).
29. The presumption in favour of joint trials is not rebutted simply because one or more accused intends to implicate a co-accused (a "cut-throat defence"). The judge must determine whether a joint trial could cause unfair prejudice to each accused. Such prejudice is likely to be uncommon (*R v Ignjatic*, Unreported, NSW CCA 6 July 1993; *R v Patsalis* [1999] NSWSC 649).
30. Where an accused will rely on a "cut-throat defence", a joint trial will allow the jury to consider all the relevant facts. The evidence at separate trials is likely to be incomplete in relation to each accused and the jury would receive an artificial version of events (*R v Fernando & Ors* [1999] NSWCCA 66; *R v Beaven* (1952) 69 WN 140; *R v Gibb & McKenzie* [1983] 2 VR 155; *R v Grondkowski* [1946] KB 369).
31. A joint trial where one accused intends to implicate a co-accused may be inappropriate where the evidence which will be led is so prejudicial that a fair trial for all accused would be impossible (*R v Gibb & McKenzie* [1983] 2 VR 155; *R v Grondkowski* [1946] KB 369; *R v Patsalis* [1999] NSWSC 649).
32. Where several accused are charged as co-conspirators, they should not be tried together if the evidence against one or more is substantially different to the evidence against the others. Such a situation creates a real risk that the jury may convict one of the accused on inadmissible evidence by failing to give effect to a separate consideration direction (*R v Darby* (1982) 148 CLR 668; [1982] HCA 32; *R v Brown* [1990] VR 820).

Homicide

33. Although courts have previously been reluctant to allow joinder of other offences with murder charges, this view is no longer prevalent. In some cases it is possible for the same jury to determine homicide and non-homicide offences (*R v AB & Baker (Ruling No 1)* [2008] VSC 106; c.f. *R v Pollitt* [1991] 1 VR 299).
34. The court must consider whether separate trials are necessary in order to ensure that the issues for the jury are manageable. A judge will often need to give numerous and complex directions in a murder trial and inclusion of other charges risks placing an intolerable burden on the jury which creates a risk of an unfair trial for the accused (*R v Debs & Roberts* [2005] VSCA 66; *R v Pollitt* [1991] 1 VR 299).
35. A critical but not decisive factor is the cross-admissibility of evidence between the homicide and non-homicide offences (*DPP v Iliopoulos & Ors (Ruling No 1)* [2016] VSC 32, [91], [94]; *R v Basham (Ruling No 1)* [2021] VSC 349, [80]).
36. Where there is a high degree of cross-admissibility, the potential for complex directions about differential admissibility or complex trial management is reduced (*R v Basham (Ruling No 1)* [2021] VSCA 349, [513]–[526]).

Sexual Offences

37. Section 194 of the CPA 2009 creates a presumption of joinder for charges of "sexual offences":⁴³⁹

⁴³⁹ Sexual offence is defined in s 3 of the Act to mean:

(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.

38. Section 194 of the Act reflects the former s 372(3AA) of the *Crimes Act 1958*. Section 372(3AA) was introduced to change the previous practice in Victoria that trials for sexual offences against different complainants must be heard separately unless the complainant's evidence was cross-admissible (*R v KRA* [1999] 2 VR 708; [1999] VSCA 157; *R v Hakeem* [2006] VSC 265; *R v Papamitrou* (2004) 7 VR 375; [2004] VSCA 12; *De Jesus v R* [1986] HCA 65; *Sutton v R* (1984) 152 CLR 528; [1984] HCA 5; *R v TJB* [1998] 4 VR 621).⁴⁴⁰
39. Section 194 creates a prima facie presumption that sexual offences may be tried together when they have been properly joined in the one indictment (*R v D* [1999] VSCA 148; *R v TJB* [1998] 4 VR 621).
40. Where evidence is cross-admissible, there will usually be no point in ordering separate trials (*De Jesus v R* [1986] HCA 65; *R v Bright* (2014) 45 VR 744; [2014] VSCA 341).
41. For this reason, a judge must generally determine issues of admissibility before making any decision on the question of severance. Questions of severance should not be determined on the basis of global assumptions about admissibility, as this can produce difficulties if the ultimate rulings vary from the assumptions made for the purpose of determining severance (*R v Bright* (2014) 45 VR 744; [2014] VSCA 341, [45]; *De Jesus v R* [1986] HCA 65).
42. However, s 194 does not dictate that sexual offences must be heard together in all cases, even where the evidence is not cross-admissible. Cross-admissibility continues to be a powerful factor that influences whether court should order separate trials. Directions on separate consideration are likely to be less effective when the jury must consider the evidence of a large number of separate complainants and where the evidence appears to be probative (*R v Papamitrou* (2004) 7 VR 375; [2004] VSCA 12; *R v Buckley* (2004) 10 VR 215; [2004] VSCA 185; *R v TJB* [1998] 4 VR 621; *R v GAE* (2000) 1 VR 198; [2000] VSCA 18).
43. Evidence of one charge may be admissible on a second charge even if evidence of the second charge is not admissible on the first charge. In this situation, evidence on the charges may still be treated as cross-admissible and justify a court refusing to order separate trials (*R v Renzella*, Unreported, VSCA, 7 August 1997).
44. Previous decisions in this area can only provide limited guidance. The judge in each case must consider where the interests of justice lie (*R v Papamitrou* (2004) 7 VR 375; [2004] VSCA 12).

(a) an offence under Subdivision (8A), (8B), (8C), (8D) or (8EAA) of Division 1 of Part 1 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).

In s 197, sexual offence is defined to also include offences listed in clause 1 of schedule 1 of the *Sentencing Act 1991* ("serious sexual offender offences").

⁴⁴⁰ Section 194 only applies to criminal trials. There is no equivalent provision for summary hearings (CPA 2009 s 58).

45. Evidence in sexual offence cases is particularly likely to arouse prejudice and directions to the jury designed to overcome those prejudices are likely to be less effective than usual. Section 194 does not ignore that reality and the court must continue to consider those factors when determining severance (*R v TJB* [1998] 4 VR 621; *De Jesus v R* [1986] HCA 65).
46. In *R v TJB* [1998] 4 VR 621, Callaway JA set out five principles to provide guidance on the exercise of the discretion to sever an indictment:
1. A presentment⁴⁴¹ should always be severed where that is both desirable and practicable in order to ensure a fair trial. It is for defence counsel to persuade the judge that that is so. In that respect sexual offences are no different from other offences.
 2. One aspect of a fair trial is the taking of reasonable steps to prevent a jury from misusing evidence. That is not limited to propensity evidence and again is not peculiar to trials of sexual offences. See, for example, *R. v Smart* especially at 283 and 289.
 3. It is usually to be assumed that the jury will comply with any directions they are given by the judge. A fair-minded lay observer takes that very factor into account in considering whether a trial is fair: cf. *Webb v R* (1994) 181 CLR 41 at 55; [1994] HCA 30.
 4. There are nevertheless cases where the risk of prejudice is unacceptable. It will often be found that that is so in the case of offences of an unnatural character or offences that arouse strong emotions or excite revulsion.
 5. There is also a greater risk that a direction will be ineffectual if evidence in relation to one complainant is probative in relation to another *but* either the Crown does not rely on it for that purpose or the judge rules that it is inadmissible because of prejudice.⁴⁴²
47. A corollary to the fifth principle from *R v TJB* (above) is that where propensity evidence is not probative, there will usually be less risk of the jury relying upon it improperly when suitable directions are given. The risk arises where the evidence is ruled inadmissible on one charge due to the prejudicial effect of the evidence and the jury may be unable to understand why they are required to disregard the evidence (*R v TJB* [1998] 4 VR 621).
48. The fourth principle requires care in its application. This concern about particular types of cases does not mean there is a presumption of unacceptable prejudice in relation to joint trials with multiple complainants involving allegations of sexual offences against young children (*Baker v The Queen* [2015] VSCA 323, [69]; *Dun v The Queen* [2021] VSCA 286, [23]–[24], [58]).
49. If there is limited cross-admissibility of evidence between charges, the judge should consider whether the directions on the permissible and impermissible uses of the evidence would be comprehensible and whether the jury would be able to apply the directions. Generally, directions on separate consideration of charges against different complainants are sufficient, as there is no reason to think that such directions are not followed. However, in some cases there will be an unacceptable risk that the jury will use the evidence in an impermissible manner and the judge must address this risk by making appropriate orders for severance (*GBF v R* [2010] VSCA 135; *DR v R* [2011] VSCA 440).

⁴⁴¹ Prior to the CPA 2009, proceedings in the County and Supreme courts were almost always commenced by "presentment". Proceedings are now commenced by indictment.

⁴⁴² For information on when evidence of other discreditable acts may be led even though it is not relied on as being tendency or coincidence evidence, see 4.19 Other Forms of Other Misconduct Evidence in the Victorian Criminal Charge Book. This issue may also arise where evidence is led from several complainants which has significant probative value as tendency or coincidence evidence, but is not admissible for that purpose because the prosecution, for whatever reason, does not file a tendency evidence or coincidence evidence notice (see, e.g., *Dun v The Queen* [2021] VSCA 286, [42]–[47]).

Conspiracy and Substantive Offences

50. A charge of conspiracy to commit an offence should not be tried together with a charge alleging the commission of the principal offence unless the court considers that it is in the interests of justice to try the charges together (*CPA 2009 s 195*).
51. The burden is on the prosecution to show that it is in the interests of justice for a substantive offence and a related conspiracy to be heard together (*R v Pollitt* [1991] 1 VR 299).
52. It is generally undesirable for an accused to be charged with both conspiracy to commit an offence and the substantive offence where the criminality of the accused can be adequately represented in a single charge. The prosecution must ensure that the accused does not face the prospect of an unnecessarily complex trial due to inappropriate charges on the indictment (*R v Hoar* (1981) 148 CLR 32; [1981] HCA 67; *R v El-Kotob* (2002) 4 VR 546; [2002] VSCA 109; *R v Pollitt* [1991] 1 VR 299; *R v Moore* [1988] 1 Qd R 252).
53. The judge should take into account that it is difficult for a jury to properly apply directions in relation to statements by co-conspirators and avoid the hearsay use of statements when considering substantive offences (*R v Moore* [1988] 1 Qd R 252. See also *Ahern v R* (1988) 165 CLR 87; [1988] HCA 39; *R v Pektas* [1989] VR 239).
54. The court should also be very cautious before allowing a charge of conspiracy to commit an offence and attempting to commit that offence to be tried together. While this is not proscribed by s 195, the same principles apply (*Krakouer v R* (1998) 194 CLR 202; [1998] HCA 43).

Last updated: 1 January 2023

2.5 Summary and Indictable Offences

1. Offences in Victoria are classified as either summary offences or indictable offences.
2. Offences in the *Crimes Act 1958* and the *Wrongs Act 1958* are deemed to be indictable, unless the contrary intention appears (*Crimes Act 1958 s 2B*; *Wrongs Act 1958 s 2A*).
3. Offences in legislation other than the *Crimes Act 1958* or the *Wrongs Act 1958* that are described as being level 1–6 or punishable by level 1–6 imprisonment, fine or both are presumed to be indictable offences unless the contrary intention appears. All other offences are presumed to be summary offences, unless the contrary intention appears (*Sentencing Act 1991 s 112*).

Summary Offences

4. Charges for summary offences may be heard and determined summarily in accordance with Chapter 3 of the *CPA 2009* (*CPA 2009 s 27*). See Chapter 3 - Summary Hearings for further information.
5. After an accused is committed for trial, the magistrate must transfer any charges for related offences that are summary offences to the trial court unless the accused and the informant agree otherwise. Magistrates must also order the transfer of any charges for summary offences that are commenced later and are related to the indictable offences for which the accused was committed to stand trial (*CPA 2009 s 145*).
6. A trial court hearing a summary offence must determine the matter in accordance with summary procedure, as far as practicable. The court operates without a jury, using the evidence given during the trial or on the depositions. Further evidence may only be led with the leave of the court. The court may impose any sentence that the Magistrates' Court could have imposed (*CPA 2009 ss 242, 243*).
7. A trial court may transfer proceedings for related summary offences back to the Magistrates Court if it considers it appropriate to do so (*CPA 2009 s 242*).

8. A trial court may also hear and determine charges for any other summary offences that are not related summary offences if the accused is before the court for an indictable offence, consents to the court hearing and determining the summary offence and states his or her intention to plead guilty to the summary offence. Such unrelated summary offences are transferred from the Magistrates' Court to the trial court (*CPA 2009 s 243*).
9. An application to transfer unrelated summary offences from the Magistrates' Court to the County Court must be made at least 21 days before the listed date for the plea hearing (*County Court Criminal Procedure Rules 2019 r 2.11*).
10. The registrar of the Magistrates' Court must forward the following documents to the higher court when the court orders the transfer of proceedings for an unrelated summary offence:
 - (a) the Magistrates' Court case file number;
 - (b) the original charge-sheet;
 - (c) the address and telephone number of the Court where the proceeding for the summary offence was commenced;
 - (d) where the accused has been admitted to bail, the undertaking, and a surety's affidavit of justification or declaration of justification (*Magistrates' Court Criminal Procedure Rules 2019 r 91(1)*).
11. The registrar must also record the transfer of an unrelated summary offence in the court register (*Magistrates' Court Criminal Procedure Rules 2019 r 91(2)*).
12. The court has no power to order the prosecution to commence proceedings for a summary offence. The powers under s 242 and s 243 may only be used where the summary proceedings have been commenced (see, e.g., *Brygel v County Court of Victoria* [1998] VSC 99).
13. If, following the transfer of proceedings from the Magistrates' Court, the accused does not plead guilty to the unrelated summary offences, then the charges are remitted back to the Magistrates' Court (*CPA 2009 s 243*).

Indictable Offences Heard and Determined Summarily

14. The Magistrates' Court may hear and determine the following Victorian indictable offences summarily:
 - An offence referred to in *CPA 2009* Schedule 2; or
 - An indictable offence that is described as:
 - A level 5 or level 6 offence;
 - Punishable by level 5 or level 6 imprisonment, fine or both;
 - Punishable by a term of imprisonment of not more than 10 years, a fine of not more than 1200 penalty units or both (*CPA 2009 s 28*).⁴⁴³
15. *CPA 2009 s 28(3)* states:

⁴⁴³ There are a wider range of offences that the Children's Court may hear and determine summarily.

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).

16. Many property offences listed in Schedule 2 are limited to offences where the value of the property is less than \$100,000. The effect of CPA 2009 s 28(3) is that such offences cannot be heard summarily even if they are also punishable by level 5 or level 6 imprisonment. However, this monetary limit does not apply to attempt offences. An attempt offence may be heard and determined summarily either through the combined effect of item 4.28 and s 28(1)(b) (where there is an attempt to commit a substantive offence with a maximum penalty of level 5 or level 6 imprisonment), or directly through s 28(1)(b) itself (where the attempt offence is punishable by level 5 or level 6 imprisonment, per *Crimes Act 1958* s 321P) (*DPP v Platt & Anor* [2020] VSCA 83, [23]–[48]).
17. Summary hearing of indictable offences can only take place if:
 - The court considers that it is appropriate to hear and determine the charge summarily; and
 - The accused consents to a summary hearing (CPA 2009 s 29).
18. The court must have regard to the following factors when determining whether it is appropriate to hear and determine a charge summarily:
 - The seriousness of the offence;
 - The adequacy of sentences available to the court on summary hearing;
 - Whether a co-accused is charged with the same offence; and
 - Any other matter the court considers relevant (CPA 2009 s 29)
19. In assessing the seriousness of the offence, the court will take into account both the general nature of the offence charged, and the specific facts alleged against the accused (*DPP v Kuol* [2023] VSC 385, [29]).
20. The adequacy of sentences considers whether the summary court could impose acceptable or sufficient sentences, given the gravity of the offending and the circumstances of the offender. In assessing adequacy, the court does not need to cover every possible contingency. The court may conclude that the sentencing options are adequate even if a sentence beyond the jurisdictional limit would be open in the exercise of discretion. Similarly, the court may consider the options are inadequate even if the very bottom of the range of possible sentences fell within the jurisdictional limit (*DPP v Batich* [2013] VSCA 53, [34]–[38]).
21. Adequacy of available sentences is only one factor. It does not automatically follow that the Magistrates' Court must hear the matter merely because it could impose an adequate sentence, or because the County or Supreme Court would impose a sentence within the Magistrates' Court jurisdictional limit (see *DPP v Kuol* [2023] VSC 385, [35]).
22. The opinion that a summary hearing is appropriate is not to be formed lightly (*DPP v Cowling* (1994) 71 A Crim R 198).
23. While a magistrate may consider any circumstances that may be relevant to deciding whether to hear and determine the charge summarily, there is no general power to obtain additional information about the previous convictions of the accused before deciding whether to grant the application for a summary hearing (*Hansford v Judge Neesham*, Unreported, VSC, 31 August 1994; *Hall v Braybrook* (1956) 59 CLR 620).
24. A decision that summary jurisdiction is appropriate does not need to be reflected in a formal order (*Treloar v Richardson* [2020] VSCA 216, [41]).
25. Both the informant and the accused may apply for an indictable offence to be heard and determined summarily. In the absence of an application, the Court may offer a summary hearing to the accused (CPA 2009 s 30).

26. An application for summary hearing must be in writing, using Form 31 of the *Magistrates' Court Criminal Procedure Rules 2019*. The application must be filed in court and served on the other party. The Magistrate that grants a summary hearing will also conduct the hearing, if it is practicable to do so (*Magistrates' Court Criminal Procedure Rules 2019* r 70; *Magistrates' Court Practice Direction No 3 of 2008*).
27. The registrar must inform the higher courts when the Magistrates' Court determines that it is not appropriate to hear and determine a charge summarily. This ensures that the higher courts will not transfer a proceeding back to the Magistrates' Court unless there has been a significant change in the charges or the prosecution's case (*CPA 2009* s 168; *Magistrates' Court Criminal Procedure Rules 2019* r 90).

Accused's Consent to Summary Jurisdiction

28. The legal practitioner appearing for the accused may, on behalf of the accused, give consent to summary jurisdiction (*CPA 2009* s 29). Where this occurs, there is no requirement to treat the consent given as provisional until confirmed by the accused, or require that it be given in the presence of the accused (*Treloar v Richardson* [2020] VSCA 216, [35]–[36]).
29. If the accused does not consent to a summary hearing, then the matter must proceed in the committal stream and the case must be adjourned for a filing hearing (*Guneser v Magistrates' Court of Victoria* [2008] VSC 57; *Magistrates' Court Practice Direction No 3 of 2008*).
30. The consent of the accused to a summary hearing is treated as continuing from when it is first given until the hearing. The accused may change his or her position and seek to withdraw that consent at any time prior to the final hearing (*Clayton v Hall* [2008] VSC 172).
31. An accused may only withdraw consent to summary hearing with the leave of the court (*Clayton v Hall* [2008] VSC 172; *Marci v Ryan* (1993) 74 A Crim R 504).
32. The court may grant leave to withdraw consent if that is in the interests of justice. The decision to grant leave is not constrained by any requirement to show exceptional circumstances (*Clayton v Hall* [2008] VSC 172).
33. The magistrate who determines whether to grant leave to withdraw consent to summary jurisdiction may be a different magistrate to the one who hears the case. The magistrate hearing the case is bound by the decision of the earlier magistrate (*Clayton v Hall* [2008] VSC 172).
34. The magistrate who grants an application for a summary hearing should, as far as practical, continue to hear the case (*Magistrates' Court Practice Direction No 3 of 2008*).
35. The application to withdraw consent should be made on the basis of admissible evidence. A party should not rely on putting matters from the bar table (*Clayton v Hall* [2008] VSC 172).
36. The following matters may be relevant in determining whether the interests of justice require a grant of leave to withdraw consent to summary jurisdiction:
- The seriousness of the offences;
 - The importance of the right of a person charged with an indictable offence to a trial by jury; and
 - The history of the case, including the basis for the accused's change of position (*Clayton v Hall* [2008] VSC 172).

Magistrate Revoking Summary Jurisdiction

37. Once a magistrate has made an order granting summary jurisdiction, the court cannot later revoke that order and transfer the matter to the committal stream (*Williams v Hand & Anor* [2014] VSC 527).

38. Once a Magistrate has made a finding that summary jurisdiction is appropriate, an accused has an accrued right to have the matter determined in the Magistrates' Court, and the court is obliged to hear the matter as a summary proceeding, subject to the decision being challenged on appeal. It is an abuse of process for the prosecution to file a direct indictment in relation to the same offending in an attempt to force the proceedings into a higher court (*Maya v DPP* (2019) 60 VR 276).

Commonwealth Indictable Offences Tried Summarily

39. Commonwealth indictable offences that are punishable by not more than 10 years' imprisonment may be tried summarily if the prosecution and the accused both consent (*Crimes Act 1914* (Cth) s 4J).⁴⁴⁴
40. The Magistrates' Court may also exercise summary jurisdiction over Commonwealth indictable offences that are punishable by a fine of not more than 600 penalty units for an individual or 3,000 penalty units for a corporation if the prosecution and the accused both consent. This provision only applies if the offence is not punishable by imprisonment (*Crimes Act 1914* (Cth) s 4JA).
41. Finally, a Commonwealth indictable offence is also triable summarily on the request of the prosecutor if the offence relates to property the value of which does not exceed \$4,000. The court does not require the consent of the accused in this situation (*Crimes Act 1914* (Cth) s 4J).

Last updated: 8 December 2023

2.6 Time Limits

1. The CPA 2009 sets time limits for parties and judicial officers to complete various stages of the criminal process. The following sections contain tables that summarise these time limits.

Commencement of proceedings

2. There are currently no general limitation periods for commencing proceedings for indictable offences in Victoria. This freedom from limitation extends to indictable offences heard and determined summarily (CPA 2009 s 7(2)).
3. Previously, there have been limitation periods in relation to some sexual offences. These have been retrospectively abolished, and the limitation period no longer applies to offences committed at the time the limitation period applied: CPA 2009 s 7A.
4. There is also a two year limitations period under the *Occupational Health and Safety Act 2004*, for proceedings instituted by Victorian Workcover Authority. However, the Director of Public Prosecutions can institute proceedings at any time, or may authorise the Authority to do so at any time. When deciding whether to institute proceedings after the two year limitations period, or to authorise the Authority to do so, the Director does not need to provide procedural fairness to the accused and the decision is not subject to judicial review (*DPP v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81; [2012] VSCA 300; *Occupational Health and Safety Act 2004* ss 130, 132).
5. Proceedings for summary offences against the law of Victoria must generally be commenced within one year of the date of the offence for adult offenders. This rule may be adjusted by specific legislation for particular offences and compliance may be waived where both the accused and either the DPP or a Crown Prosecutor consent (CPA 2009 s 7(1)). See, e.g., *Fair Trading Act 1999* s 142 (3 years); *Taxation Administration Act 1997* s 134 (3 years); *First Home Owners Grant Act 2000* s 52 (3 years); *Motor Car Traders Act 1986* s 82C (3 years); *Sex Offenders Registration Act 2004* s 48 (No limitation period); *Infringements Act 2006* ss 55, 56 (6 months); *Road Safety Act 1986* s 77A (2 years)).

⁴⁴⁴ If a Commonwealth indictable offence specifies that it is triable summarily, then s 4J of the *Crimes Act 1914* (Cth) does not apply. The circumstances in which such an offence is triable summarily will be specified by the legislation creating the offence.

6. Sections 38 and 39 of the *Fines Reform Act 2014* can also operate to extend the time for bringing a summary proceeding. Where Fines Victoria decides to cancel an infringement notice, the enforcement agency must, within 90 days, decide whether to take no further action, issue a warning, or commence proceedings by charge-sheet and notify the accused of that decision. Where the infringement agency decides to commence proceedings by charge-sheet, it must do so within six months of notifying the accused of the decision to charge. This extended time limit allows a proceeding to be initiated even over one year since the alleged offence (*Fines Reform Act 2014* ss 38, 39; *Gebrehiwot v Mccutcheon* [2020] VSC 109).
7. Chapter 2 – Commencement of Proceedings explains three ways in which a proceeding may be commenced by charge-sheet. For the purpose of the one year time limit, it is the date of commencement which is relevant and not the date of hearing for the charge (*Djime v Le* [2016] VSCA 202 at [42]–[53]).
8. The time limit for commencing proceedings for a summary offence against an offender who is a child is 6 months. This limit may be extended to up to 12 months from the date of the offence by the court if it considers it appropriate (*Children, Youth and Families Act 2005* s 344A, s 344C).
9. When considering whether to extend time for commencing proceedings, the court must consider:
 - (a) the age of the child; and
 - (b) the seriousness of the alleged offence and the circumstances in which it is alleged to have occurred; and
 - (c) whether the delay in commencing the proceeding was caused by factors beyond the control of the applicant; and
 - (d) the length of the delay; and
 - (e) any other matter that the Court considers relevant (*Children, Youth and Families Act 2005* s 344C).
10. The court may also allow police to commence a proceeding for a charge of a summary offence against a child outside the 6 month limit if the child and a police officer of at least the rank of sergeant both consent. The child may only give consent after receiving legal advice and must give his or her consent in writing. The court must be satisfied that the child has received legal advice and must adjourn proceedings to enable the child to obtain legal advice (*Children, Youth and Families Act 2005* s 344A).
11. For Commonwealth offences, the limitation period is determined by the maximum penalty. The following tables indicate the limitation periods for proceedings against an individual and a corporation (*Crimes Act 1914* (Cth) s 15B):

Table 1: Limitation periods for proceedings against an individual

Maximum term of imprisonment	Greater than 6 months	All other cases
Proceedings may be commenced	At any time	Within one year of the alleged offence

Table 2: Limitation periods for proceedings against a corporation

Maximum fine for a first offence	Greater than 150 penalty units	All other cases
Proceedings may be commenced	At any time	Within one year of the alleged offence

12. The limitation period for an individual who aids or abets an offence by a corporation is the limitation period that is applicable to proceedings against the corporation (*Crimes Act 1914* (Cth) s 15B).
13. Specific Commonwealth legislation may extend the above limitation periods for particular offences unless the limitation was created before the commencement of the *Crimes Act 1914* (Cth) (*Crimes Act 1914* (Cth) s 15B. E.g. *Customs Act 1901* (Cth) s 249 (5 years); *Taxation Administration Act 1953* (Cth) s 8ZB (No limitation period)).
14. Provisions that allow offences to be heard and determined summarily will often impose a lower maximum penalty on summary conviction. This reduced maximum penalty does not affect the limitation period for the offence. The maximum penalty for the purpose of the limitation period is the maximum penalty attaching to the offence itself and does not depend on the mode of prosecution (*Re Burley* (1932) 47 CLR 53).

Fast track listing of summary family violence hearings

15. Since 1 December 2014, the Magistrates' Court has progressively rolled out a fast-track listing process for summary hearings involving offences arising out of family violence. The fast-track listing process involves the following timelines:

Filing to first listing for bail matters (the time to first listing from the release of an accused on bail)	1 week
Interview to first listing for summons' matters	4 weeks
First listing to second listing (a summary case conference to be conducted on or before the second listing)	4 weeks
Second listing to contest mention	4 weeks
Contest mention to contested hearing	4 weeks

16. This fast-track process applies at the following venues in accordance with the listed practice note:

Court	Practice Note	Date of commencement
Dandenong	No 10 of 2014	1 December 2014
Broadmeadows and Shepparton	No 7 of 2015	3 August 2015
Ballarat and Ringwood	No 8 of 2015	12 October 2015
Frankston and Moorabin	No 3 of 2016	1 May 2016
Bendigo and Geelong	No 8 of 2016	1 September 2016
Neighbourhood Justice Centre	No 12 of 2016	2 January 2017
Heidelberg and Melbourne	No 13 of 2016	2 January 2017
Sunshine and Werribee	No 7 of 2017	1 June 2017
Latrobe Valley	No 11 of 2017	1 September 2017
Mildura, Horsham and Warrnambool	No 1 of 2018	1 March 2018

Time Limits in Committal Proceedings

17. The following table shows the time limits under which a committal proceeding operates.

Table 1: Committal proceedings time line

Event	Time line	Relevant section of <i>CPA 2009</i>
Date fixed for filing hearing	Within 7 days of the charge-sheet being filed, if the accused has been arrested and is in custody or on bail; or Within 28 days of the charge-sheet being filed, if a summons to answer the charge was issued	s 102
Service of Hand-up brief	At least 42 days before the committal mention hearing	s 108
Service of Plea Brief	Within the time allowed for service of the Hand-up brief	s 116
Filing of Hand-up or Plea brief and service on the DPP (if relevant)	Within 7 days of service on the accused	s 109, s 116
Filing of case direction notice	At least 7 days before the committal mention hearing	s 118
Holding of committal mention hearing	Within 3 months of the commencement of proceedings, if the matter relates to a sexual offence; or Within 6 months of the commencement of proceedings, in all other cases	s 126

18. The case direction notice must be filed jointly by the accused and either the DPP or the informant, if a hand-up brief has been served (*CPA 2009* s 118).
19. If the court fixes another date for the committal mention, it may order the accused and the DPP or the informant to jointly file another case direction notice at least 7 days before the new date or within any other period fixed by the court (*CPA 2009* s 118).
20. The Magistrates' Court may fix a longer period for holding a committal mention if it is in the interests of justice. The Court must consider the seriousness of the offence and the reason why a longer period is necessary when determining whether to extend the period. An application for a longer period for holding a committal mention hearing must be in Form 34 of the *Magistrates' Court Criminal Procedure Rules 2019* (*CPA 2009* s 126; *Magistrates' Court Criminal Procedure Rules 2019* r 61).
21. The time limits for holding a committal mention hearing do not apply if:
- The accused has failed to attend the court in accordance with his or her bail conditions;
 - A warrant to arrest the accused has been issued and at the end of the period for holding a committal mention hearing, the accused has not been arrested;

- The accused requests that the period specified in the legislation should not apply and the Magistrates' Court is satisfied that it is in the interests of justice to grant this request (*CPA 2009 s 126*)

22. If the committal mention hearing has not been held within the period specified in the legislation or as extended by the court, the court may, on application of the accused, order that the accused be discharged (*CPA 2009 s 126*).

Time Limits for Pre-Trial and Trial procedures

23. The following table shows the time limits that apply to pre-trial and trial procedures.

Table 1: Pre-trial and trial proceedings time line

Event	Time line	Relevant section of <i>CPA 2009</i>
Filing of indictment	Within 14 days of committal for trial, if the accused is committed for trial in respect of a sexual offence against a child or cognitively impaired person; or Within 28 days of committal for trial, if the accused is committed for trial in respect of a sexual offence against a complainant who is not a child or cognitively impaired person; or Within 6 months of committal for trial, in all other cases	s 163
Service on accused and filing of: summary of prosecution opening; and notice of pre-trial admission	At least 28 days before the day on which the trial is listed to commence	s 182
Service on prosecution and filing of: defence response to prosecution opening; and defence response to notice of pre-trial admissions	At least 14 days before the day on which the trial is listed to commence	s 183
Service of expert witness' statement by accused (if relevant)	At least 14 days before the day on which the trial is listed to commence	s 189

Commencement of trial for non-sexual offences	Within 12 months of the day on which the accused was committed to stand trial; or Within 12 months of the day on which the direct indictment was filed; or Within 6 months of the day on which the Court of Appeal orders a retrial	s 211
Commencement of trial for sexual offences	Within 3 months of the day on which the accused was committed to stand trial; or Within 3 months of the day on which the direct indictment was filed; or Within 3 months of the day on which the Court of Appeal orders a retrial	s 212

24. The 14 day and 6 month time limits for filing an indictment may be extended if the court considers that it is in the interests of justice. The 28 day period may be extended or abridged (CPA 2009 s 163, s 247).
25. The time line for filing the summary of prosecution opening, the notice of pre-trial admissions and the defence responses is subject to any contrary order of the court (CPA 2009 s 182).
26. The County Court Criminal Division Practice Note requires parties to indicate on the Case Initiation Notice whether they consent to all extensions of time for the commencement of the trial being made on the Court's own motion. The Court will make such extensions if it considers that it is in the interests of justice to do so. If a party does not consent, the party must contact the Court and advise the other party (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.98]–[5.105]).
27. The requirement to commence the trial for a sexual offence within 3 months as prescribed by s 212 does not apply to a second trial following the discharge of a jury. Under the section, only retrials ordered by the Court of Appeal are subject to the time limit, and not retrials ordered for other reasons (*Davis v R* [2016] VSCA 272 at [46]).
28. A trial commences when the accused is arraigned before a jury panel and pleads not guilty. The jury for the trial must be chosen from this jury panel (CPA 2009 ss 210, 217).⁴⁴⁵
29. The time limits for the commencement of the trial may be extended if the court considers that it is in the interests of justice (CPA 2009 s 247).

⁴⁴⁵ The CPA 2009 changed the existing law on when a trial commences. Previously, the time of commencement of a trial was interpreted in accordance with the purpose of the statute in question. Generally, a trial commenced no later than when the accused was first arraigned on the presentment, regardless of whether the plea was guilty or not guilty. This did not need to be in the presence of the jury panel (see *R v Symons* [1981] VR 297; *R v Talia & Ors* [1996] 1 VR 462; *R v McNamara (No 2)* [1997] 1 VR 257; *R v His Honour Judge Hewitt*; *ex parte Attorney-General for the State of Victoria* [1973] VR 484).

30. An order extending time for the commencement of a trial for a sexual offence must not be greater than 3 months. The Act does not prohibit, however, multiple orders that provide a total extension greater than 3 months (CPA 2009 s 247). See County Court Criminal Division Practice Note, PNCR 2-2022, [5.98]–[5.105] for information on the process of the court extending time on its own motion.
31. The time limits for filing the indictment and commencing the trial are procedural provisions designed to lay down a basic timetable for the commencement of proceedings. The time limits can be amended and extended before or after the expiry of the prescribed periods. The court may even extend time in circumstances that amount to an implied extension of more than 3 months (e.g., extending the period for commencing a trial more than 6 months after the day on which the Court of Appeal orders a retrial). The provisions do not create an accrued right for an accused if the time limit expires, or deprive a court of jurisdiction if an indictment is not filed in time (*Keenan v The Queen* [2020] VSCA 105, [55]–[67]; *R v Harris (No 1)* [1990] VR 293; *DPP v BDX & Anor (No 2)* (2010) 27 VR 536; [2010] VSCA 134; CPA 2009 s 247. See also *Davis v R* [2016] VSCA 272 at [65]).

Last updated: 17 March 2023

2.7 Penalty and offence information

- The following topics provide information on maximum penalties, section numbers and whether the offence falls within any of the following statutory categories
 - Indictable
 - Determinable summarily
 - Serious offence offence under Part 2A, Schedule 1 *Sentencing Act 1991*
 - Continuing criminal enterprise offence under Part 2B, *Sentencing Act 1991*
 - Indefinite sentence offence under ss 3, 18A-18P *Sentencing Act 1991*
 - Forensic sample offence under s 464ZF, Schedule 8, *Crimes Act 1958*
 - Forfeiture offence under s 3, Schedule 1, *Confiscations Act 1997*
 - Automatic forfeiture offence under s 3, Schedule 2, *Confiscations Act 1997*
 - Civil forfeiture offence under s 3, Schedule 3, *Confiscations Act 1997*
 - Sexual offender registrable offence under *Sex Offenders Registration Act 2004*

Last updated: 18 September 2020

2.7.1 Murder

Current penalties for murder

Offence	Offence Section	Penalty Section	Penalty	Applies to offences committed on or after

Murder	Common law	<i>Crimes Act 1958</i> ss 3, 3(2)	Level 1 imprisonment (life) or imprisonment for such other term as is fixed by the court ⁴⁴⁶ Standard sentence of 25 years applies, or 30 years if the victim was a custodial officer or emergency worker on duty and the accused knew or was reckless as to that fact ⁴⁴⁷	All dates
Attempted murder	<i>Crimes Act 1958</i> s 321M	<i>Crimes Act 1958</i> s 321P(1A)	Level 2 imprisonment (25 years maximum)	1/9/1997
Incitement to murder	<i>Crimes Act 1958</i> s 321G	<i>Crimes Act 1958</i> s 321I(1)(ba)	Level 1 imprisonment (life) or imprisonment for such other term as is fixed by the court.	1/8/1993

Last updated: 18 September 2020

2.7.2 Manslaughter

Penalties for manslaughter

Offence	Offence Section	Penalty Section	Maximum penalty (current penalty shaded)	Applies to offences committed on or after
Manslaughter	Common Law	<i>Crimes Act 1958</i> s 5	Level 2 imprisonment (25 years) ⁴⁴⁸	1 July 2020

⁴⁴⁶ Murder is a **category 1 offence** if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁴⁷ The standard sentence is relevant for offences committed after 1 February 2018.

⁴⁴⁸ Manslaughter is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

			Level 3 imprisonment (20 years) ⁴⁴⁹	1 September 1997
			Level 3 imprisonment (15 years)	22 April 1992
Child homicide	Common law; <i>Crimes Act 1958 s 5A</i>	<i>Crimes Act 1958 s 5A</i>	Level 2 imprisonment (25 years) ⁴⁵⁰	1 July 2020
			Level 3 imprisonment (20 years) ⁴⁵¹	19 March 2008
Homicide by firearm	Common law; <i>Crimes Act 1958 s 5B</i>	<i>Crimes Act 1958 s 5B</i>	Level 2 imprisonment (25 years) ⁴⁵²	1 July 2020
			Standard sentence of 13 years applies	
Suicide pact manslaughter	<i>Crimes Act 1958 s 6B(1)</i>	<i>Crimes Act 1958 s 6B(1A)</i>	Level 5 imprisonment (10 years)	1 September 1997

⁴⁴⁹ Manslaughter is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991 s 3*).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991 s 44*) unless specified circumstances exist (see *Sentencing Act 1991 ss 3, 5(2H)*).

⁴⁵⁰ Child homicide is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991 s 3*).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991 s 44*) unless specified circumstances exist (see *Sentencing Act 1991 ss 3, 5(2H)*).

⁴⁵¹ Child homicide is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991 s 3*).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991 s 44*) unless specified circumstances exist (see *Sentencing Act 1991 ss 3, 5(2H)*).

⁴⁵² Homicide by firearm is a category 2 offence if committed by an offender on or after 1 July 2020 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991 s 3*).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991 s 44*) unless specified circumstances exist (see *Sentencing Act 1991 ss 3, 5(2H)*).

Unlawful and dangerous act manslaughter - single punch or strike	Common law; <i>Crimes Act 1958</i> s 4A	<i>Crimes Act 1958</i> s 5; <i>Sentencing Act 1991</i> s 9C	Level 2 imprisonment (25 years) ⁴⁵³ Minimum non-parole period 10 years, unless special circumstances exist ⁴⁵⁴	1 July 2020
			Level 3 imprisonment (20 years) ⁴⁵⁵ Minimum non-parole period 10 years, unless special circumstances exist ⁴⁵⁶	1 November 2014

⁴⁵³ Unlawful and dangerous act manslaughter - single punch or strike is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁴⁵⁴ Only applies if the prosecution has filed notice that it seeks the court to sentence in accordance with *Sentencing Act 1991* s 9C.

⁴⁵⁵ Unlawful and dangerous act manslaughter - single punch or strike is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁴⁵⁶ Only applies if the prosecution has filed notice that it seeks the court to sentence in accordance with *Sentencing Act 1991* s 9C.

Manslaughter - gross violence	Common law	Sentencing Act 1991 s 9B	Level 2 imprisonment (20 years) ⁴⁵⁷ Minimum non-parole period 10 years, unless special circumstances exist ⁴⁵⁸	1 July 2020
			Level 3 imprisonment (20 years) ⁴⁵⁹ Minimum non-parole period 10 years, unless special circumstances exist ⁴⁶⁰	1 November 2014

⁴⁵⁷ Manslaughter - gross violence is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁴⁵⁸ Only applies if the prosecution has filed notice that it seeks the court to sentence in accordance with *Sentencing Act 1991* s 9B.

⁴⁵⁹ Manslaughter - gross violence is a category 2 offence if committed by an offender on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁴⁶⁰ Only applies if the prosecution has filed notice that it seeks the court to sentence in accordance with *Sentencing Act 1991* s 9B.

2.7.3 Driving offences

Current and historic penalties for fatal and injurious driving offences

Offence	Section	Maximum Penalty ⁴⁶¹	Applies to offences committed on or after (current penalty shaded)
Culpable driving causing death	<i>Crimes Act 1958</i> s 318	Level 3 imprisonment (20 years) ⁴⁶² Standard sentence of 8 years applies	1/9/1997
		Level 3 imprisonment (15 years)	13/6/1992 to 31/8/1997
		Level 5 imprisonment (10 years)	22/4/1992 to 12/6/1992
Intentionally exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving	<i>Crimes Act 1958</i> s 317AC	Level 3 imprisonment (20 years) ⁴⁶³ Minimum non-parole period - 2 years unless offender under the age of 18 at the time of the offence or special reason exists ⁴⁶⁴	5/4/2018

⁴⁶¹ The standard sentence is relevant for offences committed after 1 February 2018.

⁴⁶² Culpable driving causing death is a category 2 offence if committed on or after 20 October 2018 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 24 months (*Sentencing Act 1991* s 89).

⁴⁶³ Intentionally exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving is a category 1 offence if committed on or after 5 April 2018 by an offender who is aged 18 years or more at the time of offending, and, in the commission of the offence, a protected worker within the section is injured (*Sentencing Act 1991* s 3). If the protected worker is not injured, the offence is neither a category 1 or category 2 offence.

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 24 months (*Sentencing Act 1991* s 89).

Aggravated intentionally exposing an emergency worker, custodial officer or a youth justice custodial officer to risk by driving	<i>Crimes Act 1958</i> s 317AD	Level 3 imprisonment (20 years) ⁴⁶⁵ Minimum non-parole period - 2 years unless offender under the age of 18 at the time of the offence or special reason exists ⁴⁶⁶	5/4/2018
Recklessly exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving	<i>Crimes Act 1958</i> s 317AE	Level 5 imprisonment (10 years) ⁴⁶⁷	5/4/2018
Aggravated recklessly exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving	<i>Crimes Act 1958</i> s 317AF	Level 5 imprisonment (10 years) ⁴⁶⁸	5/4/2018

⁴⁶⁴ *Sentencing Act 1991* is 10AE.

⁴⁶⁵ Aggravated intentionally exposing an emergency worker, custodial officer or a youth justice custodial officer to risk by driving is a category 1 offence if committed on or after 20 October 2018 by an offender who is aged 18 years or more at the time of offending, and, in the commission of the offence, a protected worker within the section is injured. If the protected worker is not injured and the offence is committed on or after 5 April 2018, the offence is a category 2 offence.

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)). If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 24 months (*Sentencing Act 1991* s 89).

⁴⁶⁶ *Sentencing Act 1991* is 10AE.

⁴⁶⁷ The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 24 months (*Sentencing Act 1991* s 89).

⁴⁶⁸ Aggravated recklessly exposing an emergency worker, custodial officer or a youth justice custodial worker to risk by driving is a category 2 offence if committed on or after 5 April 2018 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

Dangerous driving causing death	<i>Crimes Act 1958</i> s 319	Level 5 imprisonment (10 years) ⁴⁶⁹	19/3/2008
Dangerous driving causing serious injury	<i>Crimes Act 1958</i> s 319	Level 6 imprisonment (5 years) ⁴⁷⁰	19/3/2008
Dangerous driving causing death or serious injury	<i>Crimes Act 1958</i> s 319	Level 6 imprisonment (5 years)	12/10/2004 to 18/3/2008
Damaging emergency service vehicle	<i>Crimes Act 1958</i> s 317AG	Level 6 imprisonment (5 years)	5/4/2018
Dangerous or negligent driving while pursued by police	<i>Crimes Act 1958</i> s 319AA	3 years imprisonment ⁴⁷¹	20/12/2012

Checklist of statutory categories

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
317AC Intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving	Yes	No	No	No	No
317AD Aggravated offence of intentionally exposing an emergency worker, a	Yes	No	No	No	No

The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 24 months (*Sentencing Act 1991* s 89).

⁴⁶⁹ Dangerous driving causing death is a category 2 offence if committed by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 18 months (*Sentencing Act 1991* s 89).

⁴⁷⁰ The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 18 months (*Sentencing Act 1991* s 89).

⁴⁷¹ The court must also cancel the offender's driver licence or learner permit and disqualify them from obtaining a further one for at least 12 months (*Sentencing Act 1991* s 89).

custodial officer or a youth justice custodial worker to risk by driving					
317AE Recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving	Yes	Yes	No	No	No
317AF Aggravated offence of recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving	Yes	Yes	No	No	No
317AG Damaging an emergency service vehicle	Yes	Yes	No	No	No
318 Culpable driving causing death	Yes	No	No	No	No
319(1) Dangerous driving causing death	Yes	Yes	No	No	No
319(1A) Dangerous driving causing serious injury	Yes	Yes	No	No	No
319AA Dangerous or negligent driving while pursued by police	Yes	Yes	No	No	No

2.7.4 Causing injury

Current and historic penalties for causing injury offences

Offence	Offence Section (<i>Crimes Act 1958</i>)	Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty (Current penalty shaded)	Applies to offence committed on or after (Current period shaded)
Intentionally causing serious injury in circumstances of gross violence	s 15A	s 15A	Level 3 imprisonment (20 years) ⁴⁷² Minimum non-parole period - 5 years (protected worker), ⁴⁷³ 4 years (otherwise) ⁴⁷⁴	1 July 2013
Recklessly causing serious injury in circumstance of gross violence	s 15B	s 15B	Level 4 imprisonment (15 years) ⁴⁷⁵ Minimum non-parole period - 5 years (protected worker), ⁴⁷⁶ 4 years (otherwise) ⁴⁷⁷	1 July 2013

⁴⁷² Intentionally causing serious injury in circumstances of gross violence is a category 1 offence if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁷³ For offences committed on or after 2 November 2014, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b) and the offender proves on the balance of probabilities that their involvement was minor, or if the offender was under the age of 18 years at the time of the commission of the offence.

⁴⁷⁴ For offences committed on or after 1 July 2013, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b), or if the offender was under the age of 18 years at the time of the commission of the offence.

⁴⁷⁵ Recklessly causing serious injury in circumstance of gross violence is a category 1 offence if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁷⁶ For offences committed on or after 2 November 2014, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b) and the offender proves on the balance of probabilities that their involvement was minor, or if the offender was under the age of 18 years at the time of the commission of the offence.

Intentionally causing serious injury	s 16	s 16	Level 3 imprisonment (20 years) ⁴⁷⁸ Minimum non-parole period - 3 years (protected worker) ⁴⁷⁹	1 September 1997
			Level 4 imprisonment (12.5 years)	22 April 1992
			15 years imprisonment	24 March 1986

⁴⁷⁷ For offences committed on or after 1 July 2013, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b), or if the offender was under the age of 18 years at the time of the commission of the offence.

⁴⁷⁸ Intentionally causing serious injury is a category 1 offence if committed on or after 20 October 2018 by an offender aged 18 years or more at the time of offending, against a protected worker and accused was reckless as to the person being a protected worker. Otherwise a category 2 offence if committed on or after 20 March 2017 (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁴⁷⁹ For offences committed on or after 2 November 2014, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b) and the offender proves on the balance of probabilities that their involvement was minor, or if the offender was under the age of 18 years at the time of the commission of the offence.

Recklessly causing serious injury	s 17	s 17	Level 4 imprisonment (15 years) ⁴⁸⁰ Minimum non-parole period - 2 years (protected worker) ⁴⁸¹	1 September 1997
			Level 5 imprisonment (10 years)	22 April 1992
			10 years	24 March 1986
Intentionally causing injury	s 18	s 18	Level 5 imprisonment (10 years) ⁴⁸² Minimum non-parole period - 6 months (protected worker) ⁴⁸³	1 September 1997

⁴⁸⁰ Recklessly causing serious injury is a category 1 offence if committed on or after 20 October 2018 by an offender aged 18 years or more at the time of offending, and offence committed against a protected worker and accused was reckless as to the person being a protected worker (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁸¹ For offences committed on or after 2 November 2014, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b) and the offender proves on the balance of probabilities that their involvement was minor, or if the offender was under the age of 18 years at the time of the commission of the offence.

⁴⁸² Intentionally causing injury is a category 1 offence if committed on or after 20 October 2018 by an offender aged 18 years or more at the time of offending, and offence committed against a protected worker and accused was reckless as to the person being a protected worker (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁸³ For offences committed on or after 2 November 2014, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b) and the offender proves on the balance of probabilities that their involvement was minor, or if the offender was under the age of 18 years at the time of the commission of the offence.

			Level 6 imprisonment (7½ years)	22 April 1992
			7 years	24 March 1986
Recklessly causing injury	s 18	s 18	Level 6 imprisonment (5 years) ⁴⁸⁴ Minimum non-parole period - 6 months (protected worker) ⁴⁸⁵	1 September 1997
			7 years	24 March 1986
Negligently causing serious injury	s 24	s 24	Level 5 imprisonment (10 years)	19 March 2008

⁴⁸⁴ Intentionally causing injury is a category 1 offence if committed on or after 20 October 2018 by an offender aged 18 years or more at the time of offending, and offence committed against a protected worker and accused was reckless as to the person being a protected worker (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁸⁵ For offences committed on or after 2 November 2014, unless the accused was “involved in the commission of the offence” within the meaning of *Crimes Act 1958* s 323(1)(a) or (b) and the offender proves on the balance of probabilities that their involvement was minor, or if the offender was under the age of 18 years at the time of the commission of the offence.

			Level 6 imprisonment (5 years)	22 April 1992
			3 years	24 March 1986

Note:

1. A protected worker is an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty within the meaning of *Sentencing Act 1991* s 10AA(8)–(11).
2. The minimum non-parole period provisions only apply if, at the time of carrying out the conduct, the offender knew or was reckless as to whether the victim was a protected worker.
3. Minimum non-parole periods do not apply if the court finds under *Sentencing Act 1991* s 10A that a special reason exists.

Current and historic penalties for assault and associated offences

Offence	Offence Section (<i>Crimes Act 1958</i>)	Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty (Current penalty shaded)	Applies to offence committed on or after (Current period shaded)
Administering substances	s 19	s 19	Level 6 imprisonment (5 years)	22 April 1992
			7 years	24 March 1986
Intentionally causing a very serious disease	s 19A	s 19A	Level 2 imprisonment (25 years)	25 May 1993
Stalking	s 21A	s 21A	Level 5 imprisonment (10 years)	23 January 1995
Assaults	s 31	s 31	Level 6 imprisonment (5 years)	1 September 1997
			Level 8 imprisonment (3 years)	22 April 1992
			5 years	24 March 1986
Common assault	Common law offence	s 320	Level 4 imprisonment (15 years), Level 5 imprisonment (10 years) or Level 6 imprisonment (5 years) ⁴⁸⁶	1 September 1997

⁴⁸⁶ The base maximum penalty for common assault is Level 6 imprisonment (5 years). The maximum rises to level 5 imprisonment (10 years) if the offence was committed on or after 5 June 2019 and:

- (a) at the time of the assault, the offender has an offensive weapon readily available
- (b) the victim is a police or protective services officer on duty
- (c) the offender knows or is reckless as to whether the victim is a police or protective services officer
- (d) the offender enables the victim to see the offensive weapon or its general shape, or tells or suggests to the victim the offender has an offensive weapon readily available, and
- (e) the offender knows or ought to have known that engaging in the conduct described in (d) would be likely to arouse apprehension or fear.

The maximum rises to level 4 imprisonment (15 years) if the offence was committed on or after 5 June 2019 and:

- (a) at the time of the assault, the offender has a firearm or imitation firearm readily available;
- (b) the victim is a police or protective services officer on duty,
- (c) the offender knows or is reckless as to whether the victim is a police or protective services officer,
- (d) the offender enables the victim to see the firearm or imitation firearm or its general shape, or tells or suggests to the victim the offender has a firearm or imitation firearm readily available, and
- (e) the offender knows or ought to have known that engaging in the conduct described in (d) would be likely to arouse apprehension or fear.

Where the maximum penalty is raised to level 4 or level 5 imprisonment, the offence is a category 2 offence if the assault consisted of or included the direct application of force within the meaning of the definition of assault in s 31(2) of the *Crimes Act 1958*.

		-	At large	24 March 1986
Using a firearm in the commission of an offence	s 31A	s 31A	Level 6 imprisonment (5 years)	30 June 2008
Being armed with criminal intent	s 31B	s 31B	Level 6 imprisonment (5 years)	14 September 2005
Discharging a firearm reckless to safety of a police or protective services officer	s 31C	s 31C	Level 4 imprisonment (15 years) ⁴⁸⁷	5 June 2019

Checklist of statutory categories

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
15A Causing serious injury intentionally in circumstances of gross violence	Yes	No	Violent; Serious violent	Yes	No
15B Causing serious injury recklessly in circumstances of gross violence	Yes	No	Violent; Serious violent	Yes	No
16 Causing serious injury intentionally	Yes	No	Violent; Serious violent	Yes	No
17 Causing serious injury recklessly	Yes	Yes ⁴⁸⁸	Violent	No	No
18 Causing injury intentionally or recklessly	Yes	Yes	No	No	No
19 Offence to administer certain substances	Yes	Yes	No	No	No
21A	Yes	Yes	No	No	No

⁴⁸⁷ Discharging a firearm reckless to safety of a police or protective services officer is a category 2 offence if committed on or after 5 June 2019 by an offender aged 18 years or more at the time of offending, and the offence was committed in circumstances where the offender's conduct created a risk to the physical safety of the victim or to any member of the public (*Sentencing Act 1991* s 3).

If the offence is a category 2, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁴⁸⁸ Except if the offence is alleged to have been committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty, within the meaning of *Sentencing Act 1991* s 10AA.

Stalking					
24 Negligently causing serious injury	Yes	Yes	No	No	No
31 Assaults	Yes	Yes	No	No	No
Common assault	Yes	Yes	No	No	No

2.7.5 Other offences against the person

Current and historic penalties for kidnapping and related offences

Offence	Offence and Penalty Section (<i>Crimes Act</i> 1958)	Maximum penalty (current penalty shaded)	Applies to offences committed in period
Abduction and detention for purpose of marriage or sexual penetration	s 55	Level 5 imprisonment (10 years)	22/4/1992+
Taking away a child under 16 for purpose of sexual penetration	s 56	Level 6 imprisonment (5 years)	1/9/1997+
		Level 7 imprisonment (7½ years)	22/4/1992 – 30/8/1997
Child stealing	s 63(1)	Level 6 imprisonment (5 years)	1/9/1997+
		Level 7 imprisonment (7½ years)	22/4/1992 – 30/8/1997
Taking away a child	s 63(2)	Level 6 imprisonment (5 years)	22/4/1992+
Kidnapping (for ransom or gain)	s 63A	Level 2 imprisonment (25 years) ⁴⁸⁹	1/9/1997+
		Level 2 imprisonment (20 years)	22/4/1992 – 30/8/1997
Kidnapping	[Common law offence] Penalty: s 320	Level 2 imprisonment (25 years) ^{490*}	1/9/1997+

⁴⁸⁹ Kidnapping (for ransom or gain) is a category 2 offence if committed on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act* 1991 s 3).

If the offence is a category 2, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act* 1991 s 44) unless specified circumstances exist (see *Sentencing Act* 1991 ss 3, 5(2H)).

⁴⁹⁰ Kidnapping is a category 2 offence if committed on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act* 1991 s 3).

If the offence is a category 2, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act* 1991 s 44) unless specified circumstances exist (see *Sentencing Act* 1991 ss 3, 5(2H)).

	Common law	At large	22/4/1992 – 30/8/1997
False imprisonment	[Common law offence]	Level 5 imprisonment (10 years)	1/9/1997+
	Penalty: s 320		
	Common law	At large	22/4/1992 – 30/8/1997

Current and historic penalties for blackmail, extortion and threats

Offence	Offence and Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty (current penalty shaded)	Applies to offences committed in period
Blackmail	s 87	Level 4 imprisonment (15 years)	1/9/1997+
		Level 4 imprisonment (12½ years)	22/4/1992 – 30/8/1997
Threats to kill	s 20	Level 5 imprisonment (10 years)	1/9/1997+
		Level 7 imprisonment (5 years)	22/4/1992 – 30/8/1997
Threats to inflict serious injury	s 21	Level 6 imprisonment (5 years)	1/9/1997+
		Level 8 imprisonment (3 years)	22/4/1992 – 30/8/1997
Extortion with threat to kill or injure	s 27	Level 4 imprisonment (15 years)	1/9/1997+
		Level 6 imprisonment (7½ years)	22/4/1992 – 30/8/1997
Extortion with threat to destroy property	s 28	Level 5 imprisonment (10 years)	1/9/1997+
		Level 7 imprisonment (5 years)	22/4/1992 – 30/8/1997
Threatening injury to prevent arrest / investigation	s 30	Level 6 imprisonment (5 years)	1/9/1997+
		Level 7 imprisonment (5 years)	22/4/1992 – 30/8/1997

Current and historic penalties for endangerment offences

Offence	Offence and Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty (current penalty shaded)	Applies to offences committed in period
Reckless conduct endangering life (RCEL)	s 22	Level 5 imprisonment (10 years)	22/4/1992+
Reckless conduct	s 23	Level 6 imprisonment (5 years)	1/9/1997+

		Level 7 imprisonment (7½ years)	22/4/1992 – 30/8/1997
Setting traps etc. to kill	s 25	Level 4 imprisonment (15 years)	1/9/1997+
		Level 4 imprisonment (12½ years)	22/4/1992 – 30/8/1997
Setting traps etc. to cause serious injury	s 26	Level 5 imprisonment (10 years)	22/4/1992+

Current penalties for Commonwealth detention and threat offences

Offence	Offence and Penalty Section (<i>Criminal Code</i>)	Maximum penalty	Applies to offences committed on or after
Kidnapping United Nations (UN) or associated person	s 71.9	15 years	1/1/2001
Aggravated kidnapping UN or associated person	s 71.9	19 years	1/1/2001
Unlawful detention of UN or associated person	s 71.10	5 years	1/1/2001
Aggravated unlawful detention of UN or associated person	s 71.10	6 years	1/1/2001
Threatening to commit offence under s 71.1 to s 71.11	s 71.12	variable depending on offence threatened	1/1/2001
Unwarranted demands with menaces	s 139.1	12 years	24/5/2001
Unwarranted demands by a Commonwealth public official	s 139.2	12 years	24/5/2001
Threatening to cause serious harm to a Commonwealth public official	s 147.2	7 years	24/5/2001
Threatening to cause harm to a Commonwealth public official	s 147.2	2 years	24/5/2001

Statutory categories for kidnapping and related offences

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
63(1) Child stealing with intent to deprive	Yes	Yes	No	No	No
63(2)	Yes	Yes	No	No	No

Child stealing					
63A Kidnapping	Yes	No	Violent	No	No
Kidnapping (common law)	Yes	No	Violent	No	No
False imprisonment (common law)	Yes	Yes	No	No	No

Statutory categories for demands, threats and engagements

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
20 Threats to kill	Yes	Yes	Violent; Serious violent	No	No
21 Threats to inflict serious injury	Yes	Yes	Violent	No	No
22 Conduct endangering life	Yes	Yes	No	No	No
23 Conduct endangering persons	Yes	Yes	No	No	No
25 Setting traps etc. to kill	Yes	No	No	No	No
26 Setting traps etc. to cause serious injury	Yes	Yes	No	No	No
27 Extortion with threat to kill	Yes	Yes	No	No	Yes ⁴⁹¹
28 Extortion with threat to destroy property etc	Yes	Yes	No	No	Yes ⁴⁹²
30 Threatening injury to prevent arrest	Yes	Yes	No	No	No
87 Blackmail	Yes	No	No	No	Yes ⁴⁹³

⁴⁹¹ Only if there is only one offence and the value of amount demanded was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the value of the combined demands are \$75,000 or more.

⁴⁹² Only if there is only one offence and the value of amount demanded was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the value of the combined demands are \$75,000 or more.

⁴⁹³ Only if there is only one offence and the value of the amount demanded was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the value of the combined demands are \$75,000 or more.

2.7.6 Sexual offences

2.7.6.1 Penalties for rape, sexual assault and indecent assault

Offence	Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Rape	s 38	Level 2 imprisonment (25 years) ⁴⁹⁴	1/9/1997 +
		Standard sentence of 10 years applies ⁴⁹⁵	
		25 years	1/1/1992 to 30/8/1997
	s 40	10 years	5/8/1991 to 12/12/1991
Rape by compelling sexual penetration	s 39	Level 2 imprisonment (25 years) ⁴⁹⁶	1/7/2015+
Compelling sexual penetration	s 38A	Level 2 imprisonment (25 years)	1/12/2006 to 30/6/2015
Rape with aggravating circumstances	s 41	20 years	5/8/1991 to 12/12/1991
Sexual assault	s 40	Level 5 imprisonment (10 years)	1/7/2015+
Indecent assault	s 39	Level 5 imprisonment (10 years)	1/9/1997 to 30/6/2015
		10 years	1/1/1992 to 31/8/1997

⁴⁹⁴ Rape is a 'category 1 offence' if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁹⁵ The standard sentence is relevant for offences committed on or after 1 February 2018.

⁴⁹⁶ Rape by compelling sexual penetration is a 'category 1 offence' if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

	s 42	5 years	5/8/1991 to 12/12/1991
Indecent assault with aggravating circumstances	s 43	10 years	5/8/1991 to 12/12/1991
Sexual assault by compelling sexual touching	s 41	Level 5 imprisonment (10 years)	1/7/2015+
Assault with intent to commit a sexual offence	s 42	Level 4 imprisonment (15 years)	1/7/2015+
Assault with intent to rape	s 40	Level 5 imprisonment (10 years)	1/9/1997 +
		Level 5 imprisonment (10 years)	Act No. 41/1993 15/8/1993 – 31/8/1997
Threat to commit a sexual offence	s 43	Level 6 imprisonment (5 years)	1/7/2015+

2.7.6.2 Penalties for incest offences

Offence	<i>Crimes Act 1958</i> section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Sexual penetration of a child or lineal descendant	s 50C	Level 2 imprisonment (25 years) ⁴⁹⁷ Standard sentence of 10 years applies ⁴⁹⁸	1/7/2017+
Sexual penetration of a step-child	s 50D	Level 2 imprisonment (25 years) ⁴⁹⁹ Standard sentence of 10 years applies ⁵⁰⁰	1/7/2017+

⁴⁹⁷ Sexual penetration of a child or lineal descendant is a 'category 1 offence' if committed on or after 1 July 2017 by an offender aged 18 years or more at the time of offending and the victim was under 18 years at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁴⁹⁸ The standard sentence is relevant for offences committed on or after 1 February 2018 if the victim was under 18 years at the time of offending.

⁴⁹⁹ Sexual penetration of step-child is a 'category 1 offence' if committed on or after 1 July 2017 by an offender aged 18 years or more at the time of offending and the victim was under 18 years at the time of offending (*Sentencing Act 1991* s 3).

Incest – sexual penetration with child or other lineal descendant or step-child	s 44(1)	Level 2 imprisonment (25 years) ⁵⁰¹	1/9/1997 – 30/6/2017
		Level 2 imprisonment [20 years]	22/4/1992 – 31/8/1997
		20 years	5/8/1991 – 21/4/1992
Incest – sexual penetration with person under 18 who is the child, other lineal descendant or step-child of de facto	s 44(2)	Level 2 imprisonment (25 years) ⁵⁰²	1/9/1997 – 30/6/2017
		Level 2 imprisonment [20 years]	22/4/1992 – 31/8/1997
		20 years	5/8/1991 – 21/4/1992
Sexual penetration of a parent, lineal ancestor or step-parent	s 50E	Level 6 imprisonment (5 years)	1/7/2017+
Incest – person aged 18 or above who permits sexual penetration with father or mother or other lineal ancestor or step-father or step-mother	s 44(3)	Level 6 imprisonment (5 years)	1/9/1997 – 30/6/2017
		Level 6 imprisonment [7½ years]	22/4/1992 – 31/8/1997
		5 years	5/8/1991 – 21/4/1992
Sexual penetration of a sibling or half-sibling	s 50F	Level 6 imprisonment (5 years)	1/7/2017+
Incest – sexual penetration with sister, half-sister, brother	s 44(4)	Level 6 imprisonment (5 years)	1/9/1997 – 30/6/2017

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁰⁰ The standard sentence is relevant for offences committed on or after 1 February 2018 if the victim was under 18 years at the time of offending.

⁵⁰¹ Incest – sexual penetration with child or other lineal descendant or step-child is a ‘category 1 offence’ if committed on or after 1 July 2017 by an offender aged 18 years or more at the time of offending and the victim was under 18 years at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁰² Incest – sexual penetration with person under 18 who is the child, other lineal descendant or step-child of de facto is a ‘category 1 offence’ if committed on or after 1 July 2017 by an offender aged 18 years or more at the time of offending and the victim was under 18 years at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

		Level 6 imprisonment [7½ years]	22/4/1992 – 31/8/1997
		7 years	5/8/1991 – 21/4/1992

2.7.6.3 Penalties for primary offences against children

Offence	<i>Crimes Act 1958</i> section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Sexual penetration of a child under the age of 16	s 49B	Level 4 imprisonment (15 years) Standard sentence of 6 years applies ⁵⁰³	1/7/2017+
Sexual penetration of a child under the age of 10	s 45(2)(a)	Level 2 imprisonment (25 years)	22/11/2000 – 16/3/2010 (also retrospective from 5/8/1991)
Sexual penetration of a child under the age of 12	s 49A	Level 2 imprisonment (25 years) ⁵⁰⁴ Standard sentence of 10 years applies ⁵⁰⁵	1/7/2017+
	ss 45(2)(a), 45(2A)	Level 2 imprisonment (25 years) ⁵⁰⁶	17/3/2010 – 30/6/2017
Sexual penetration of child aged between 10 and 16 and under the care, supervision or authority of the offender	s 45(2)(b)	Level 4 imprisonment (15 years)	22/11/2000 – 16/3/2010 (also retrospective from 5/8/1991)

⁵⁰³ The standard sentence is relevant for offences committed after 1 February 2018.

⁵⁰⁴ Sexual penetration of a child under the age of 12 is a 'category 1 offence' if committed on or after 1 July 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁰⁵ The standard sentence is relevant for offences committed after 1 February 2018.

⁵⁰⁶ Sexual penetration of a child under the age of 12 is a 'category 1 offence' if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

Sexual penetration of child where child aged between 12 and 16 and under the care, supervision or authority of the offender	s 45(2)(b)	Level 4 imprisonment (15 years)	17/3/2010 – 30/6/2017
Sexual penetration of child in any other case (i.e. aged between 10 and 16 but not under the care, supervision or authority of the offender)	s 45(2)(c)	Level 5 imprisonment (10 years)	22/11/2000 – 16/3/2010 (also retrospective from 5/8/1991)
Sexual penetration of child in any other case (i.e. aged between 12 and 16 but not under the care, supervision or authority of the offender)	s 45(2)(c)	Level 5 imprisonment (10 years)	17/3/2010 – 30/6/2017
Sexual penetration of a child under the age of 10 (If charged before 22/11/2000)	s 45	Level 2 imprisonment (25 years)	1/9/1997 – 22/11/2000 (If charged before 22/11/2000)
		Level 2 imprisonment (20 years)	22/4/1992 – 31/8/1997 (If charged before 22/11/2000)
Sexual penetration of a child aged between 10 and 16 – (a) under the care, supervision or authority of the offender (b) any other case (If charged before 22/11/2000)	s 46(1)	(a) Level 4 imprisonment (15 years) (b) Level 5 imprisonment (10 years)	1/9/1997 – 22/11/2000 (If charged before 22/11/2000)
		(a) Level 3 imprisonment (15 years) (b) Level 5 imprisonment (10 years)	22/4/1992 – 31/8/1997 (If charged before 22/11/2000)
Sexual assault of child under the age of 16	s 49D	Level 5 imprisonment (10 years) Standard sentence of 4 years applies ⁵⁰⁷	1/7/2017+

⁵⁰⁷ The standard sentence is relevant for offences committed after 1 February 2018.

Sexual activity in the presence of a child under the age of 16	s 49F	Level 5 imprisonment (10 years) Standard sentence of 4 years applies ⁵⁰⁸	1/7/2017+
Indecent act with or in the presence of a child under the age of 16	s 47	Level 5 imprisonment (10 years)	1/9/1997 – 30/6/2017
		Level 5 imprisonment [10 years]	22/4/1992 – 31/8/1997
		10 years	5/8/1991 – 21/4/1992
Persistent sexual abuse of a child under the age of 16	s 49J	Level 2 imprisonment (25 years) ⁵⁰⁹ Standard sentence of 10 years applies ⁵¹⁰	1/7/2017+
	s 47A	Level 2 imprisonment (25 years) ⁵¹¹	1/12/2006 – 30/6/2017
Maintaining a sexual relationship with a child under the age of 16	s 47A	Level 2 imprisonment (25 years)	1/9/1997 – 30/11/2006
		‘a penalty not exceeding the maximum penalty fixed ... for the offence which the relevant act would constitute’	5/8/1991 – 31/8/1997
Sexual penetration of a child aged 16 or 17 who is under	s 49C	Level 5 imprisonment (10 years)	1/7/2017+

⁵⁰⁸ The standard sentence is relevant for offences committed after 1 February 2018.

⁵⁰⁹ Persistent sexual abuse of a child under the age of 16 is a ‘category 1 offence’ if committed on or after 1 July 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵¹⁰ The standard sentence is relevant for offences committed after 1 February 2018.

⁵¹¹ Persistent sexual abuse of a child under the age of 16 is a ‘category 1 offence’ if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

	s 48	Level 5 imprisonment (10 years)	1/9/1997 – 30/6/2017
		Level 8 imprisonment [3 years]	22/4/1992 – 31/8/1997
		3 years	5/8/1991 – 21/4/1992
Sexual assault of a child aged 16 or 17 under offender's care, supervision or authority	s 49E	Level 6 imprisonment (5 years)	1/7/2017+
Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority	s 49G	Level 6 imprisonment (5 years)	1/7/2017+
Indecent act with or in the presence of a child aged 16 or 17 who is under offender's care, supervision or authority	s 49	Level 6 imprisonment (5 years)	1/12/2006 – 30/6/2017
Indecent act with or in the presence of a 16 year old child who is under offender's care, supervision or authority	s 49	Level 6 imprisonment (5 years)	1/9/1997 – 30/11/2006
		Level 8 imprisonment [3 years]	22/4/1992 – 31/8/1997
		2 years	5/8/1991 – 21/4/1992
Facilitating a sexual offences against a child	s 49S	Level 3 imprisonment (20 years)	1/7/2017+

	s 49A	Level 3 imprisonment (20 years)	1/9/1997 +
		Level 2 imprisonment [20 years]	Act 102/1994 s 93 13/6/1995 – 31/8/1997
Causing a child under the age of 16 to be present during sexual activity	s 49H	Level 5 imprisonment (10 years) Standard sentence of 4 years applies ⁵¹²	1/7/2017+
Causing a child aged 16 or 17 under care, supervision or authority to be present during sexual activity	s 49I	Level 6 imprisonment (5 years)	1/7/2017+
Encouraging a child under the age of 16 to engage in, or be involved in, sexual activity	s 49K	Level 5 imprisonment (10 years)	1/7/2017+
Encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity	s 49L	Level 6 imprisonment (5 years)	1/7/2017+
Grooming for sexual conduct with a child under the age of 16	s 49M	Level 5 imprisonment (10 years)	1/7/2017+

2.7.6.4 Penalties for offences against the cognitively impaired

Offence	Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Sexual penetration of a person with a cognitive impairment or mental illness	s 52B	Level 5 imprisonment (10 years)	1/7/2017+
Sexual penetration of a person with a cognitive impairment by provider of medical or therapeutic services	s 51(1)	Level 5 imprisonment (10 years)	1/12/2006 – 30/6/2017
Sexual penetration of a person with impaired mental	s 51(1)	Level 5 imprisonment (10 years)	1/9/1997 – 30/11/2006

⁵¹² The standard sentence is relevant for offences committed after 1 February 2018.

		Level 7 imprisonment [5 years]	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992
Sexual assault of a person with a cognitive impairment or mental illness	s 52C	Level 6 imprisonment (5 years)	1/7/2017+
Sexual activity in the presence of a person with a cognitive impairment or mental illness	s 52D	Level 6 imprisonment (5 years)	1/7/2017+
Causing a person with a cognitive impairment or mental illness to be present during sexual activity	s 52E	Level 6 imprisonment (5 years)	1/7/2017+
Indecent act by provider of medical or therapeutic services with a person with a cognitive impairment	s 52(2)	Level 6 imprisonment (5 years)	1/12/2006 – 30/6/2017
Indecent act by provider of medical or therapeutic services with a person with impaired mental functioning	s 52(2)	Level 6 imprisonment (5 years)	1/9/1997 – 30/11/2006
		Level 8 imprisonment [3 years]	22/4/92 – 31/8/1997
		3 years imprisonment	5/8/1991 – 21/4/1992
Sexual penetration of a resident with a cognitive impairment at a residential facility by a worker at that facility	s 51(1)	Level 5 imprisonment (10 years)	1/12/2006 – 30/6/2017
Sexual penetration of a resident by a worker at a residential facility	s 51(1)	Level 5 imprisonment (10 years)	1/9/1997 – 30/11/2006
		Level 7 imprisonment [5 years]	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992
Indecent act by or with a resident with a cognitive impairment at a residential facility by a worker at that facility	s 52(2)	Level 6 imprisonment (5 years)	1/12/2006 – 30/6/2017
Indecent act by a worker at a residential facility with a	s 52(2)	Level 6 imprisonment (5 years)	1/9/1997 – 30/11/2006

		Level 8 imprisonment [3 years]	22/4/1992 – 31/8/1997
		3 years imprisonment	5/8/1991 – 21/4/1992

2.7.6.5 Penalties for other indictable sexual offences

Offence	Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Administration of an intoxicating substance for a sexual purpose	s 46	Level 5 imprisonment (10 years)	1/7/2017+
Administering a drug, matter or thing or causing a drug, matter or thing to be taken by a person for the purposes of sexual penetration	s 53	Level 5 imprisonment (10 years)	1/9/1997 – 30/6/2017
		Level 5 imprisonment [10 years]	22/4/1992 – 31/8/1997
		10 years imprisonment	5/8/1991 – 21/4/1992
Occupier etc. inducing or knowingly allowing a child to enter or remain on premises for the purpose of taking part in an unlawful act of sexual penetration: ...where child under the age of 13;	s 54	Level 4 imprisonment (15 years)	1/9/1997 – 30/6/17
		Level 5 imprisonment [10 years]	22/4/1992 – 31/8/1997
		10 years imprisonment	5/8/1991 – 21/4/1992
...where child aged between 13 and 17	s 54	Level 5 imprisonment (10 years)	1/9/1997 +

		Level 7 imprisonment [5 years]	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992
Abduction or detention for a sexual purpose	s 47	Level 5 imprisonment (10 years)	1/7/2017+
Abduction or detention of a person for marriage or sexual penetration	s 55	Level 5 imprisonment (10 years)	1/9/1997 – 30/6/2017
		Level 5 imprisonment [10 years]	22/4/1992 – 31/8/1997
		10 years imprisonment	5/8/1991 – 21/4/1992
Abduction or detention of a child under the age of 16 for a sexual purpose	s 49P	Level 5 imprisonment (10 years)	1/7/2017+
Abduction of a child under the age of 16 for sexual penetration	s 56	Level 6 imprisonment (5 years)	1/9/1997 – 30/6/2017
		Level 6 imprisonment [7½ years]	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992
Procuring sexual act by threat	s 44	Level 5 imprisonment (10 years)	1/7/2017+
Procuring sexual penetration by threats or intimidation	s 57(1)	Level 5 imprisonment (10 years)	1/9/1997 – 30/6/2017

		Level 6 imprisonment [7½ years]	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992
Procuring sexual act by fraud	s 45	Level 6 imprisonment (5 years)	1/7/2017+
Procuring sexual penetration by fraud	s 57(2)	Level 6 imprisonment (5 years)	1/9/1997 – 30/6/2017
		Level 7 imprisonment [5 years]	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992
Sexual activity directed at another person	s 48	Level 6 imprisonment (5 years)	1/7/2017+
Causing or allowing a sexual performance involving a child	s 49Q	Level 5 imprisonment (10 years)	1/7/2017+
Inviting or offering a sexual performance involving a child	s 49R	Level 5 imprisonment (10 years)	1/7/2017+
Soliciting or procuring a child under the age of 16 to take part in an act of sexual penetration or an indecent act	s 58(1)	Level 5 imprisonment (10 years)	1/12/2006 – 30/6/2017
Soliciting or procuring a person to take part in an act of sexual penetration or an indecent act with a child under the age of 16	s 58(2)	Level 5 imprisonment (10 years)	1/12/2006 – 30/6/2017

Soliciting or procuring a person aged 16 or 17 who is in offender's care, supervision or authority to take part in an act of sexual penetration or an indecent act	s 58(3)	Level 5 imprisonment (10 years)	1/12/2006 – 30/6/2017
Procuring sexual penetration of child under the age of 16	s 58	Level 6 imprisonment (5 years)	1/9/1997 – 30/11/2006
		Level 7 imprisonment (5 years)	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992
Bestiality	s 54A	Level 6 imprisonment (5 years)	1/7/2017+
	s 59	Level 6 imprisonment (5 years)	1/9/1997 – 30/6/2017
		Level 7 imprisonment (5 years)	22/4/1992 – 31/8/1997
		5 years imprisonment	5/8/1991 – 21/4/1992

2.7.6.6 Penalties for miscellaneous sexual offences

Offence	Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Soliciting or encouraging a child under the age of 18 and who is under his or her care,	s 60	Level 8 imprisonment (1 year) or Level 8 fine (120 penalty units)	1/9/1997 – 30/11/2006

		Level 10 imprisonment (12 months)	22/4/92 – 31/8/1997
		12 months imprisonment	5/8/1991 – 21/4/1992
Sexual offence whilst armed with an offensive weapon (Summary offence)	s 60A	Level 7 imprisonment (2 years)	1/9/1997 – 30/6/17
		Level 8 imprisonment (3 years)	Act 41/1993 s 21 15/8/1993 – 31/8/1997
Loitering near schools etc by sexual offender	s 49N	Level 6 imprisonment (5 years)	1/7/2017+
Sexual offender found loitering in or near schools etc. (Indictable offence if offender previously sentenced as a serious sexual offender – otherwise a summary offence)	s 60B	Serious sexual or violent offender – Level 6 imprisonment (5 years) or Level 6 fine (600 penalty units); or In any other case, Level 7 imprisonment (2 years) or Level 7 fine (240 penalty units)	Act 65/1998 s 3(3) 4/11/1998 – 30/6/2017
		Level 8 imprisonment (1 year) or a level 11 fine (5 p.u.)	1/9/1997 – 3/11/1998
		Level 10 imprisonment [12 months] or a level 11 fine [60 p.u.]	Act 129/1993 s 10 21/12/1993 – 31/8/1997
Failure by person in authority to protect a child from a sexual offence	s 49O	Level 6 imprisonment (5 years)	1/7/2017+

Penalties for sexual servitude offences

Offence	Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Using force, threat etc. to cause another person to provide commercial sexual services	s 53B	Level 4 imprisonment (15 years)	1/7/2017+
Causing another person to provide commercial sexual services in circumstances involving sexual servitude	s 53C	Level 4 imprisonment (15 years)	1/7/2017+
	s 60AB	Level 4 imprisonment (15 years)	19/5/2004 – 30/6/2017

Conducting a business in circumstances involving sexual servitude	s 53D	Level 4 imprisonment (15 years)	1/7/2017+
Aggravated sexual servitude	s 53E	Level 3 imprisonment (20 years)	1/7/2017+
Causing a person aged under 18 to provide a commercial sexual service	s 60AC	Level 3 imprisonment (20 years)	19/5/2004 – 30/6/2017
Deceptive recruiting for commercial sexual services	s 53F	Level 6 imprisonment (5 years)	1/7/2017+
	s 60AD	Level 6 imprisonment (5 years)	19/5/2004 – 30/6/2017
Aggravated deceptive recruiting for commercial sexual services	s 53G	Level 5 imprisonment (10 years)	1/7/2017+
Deceptive recruiting of a person aged under 18 for commercial sexual services	s 60AE	Level 5 imprisonment (10 years)	19/5/2004 – 30/6/2017

2.7.6.7 Penalties for sexual offences between 1/3/1981 and 4/8/1991

Prior to the amendments commencing on 5 August 1991, Victoria's sexual offences were largely as enacted by the *Crimes (Sexual Offences) Act 1980* No. 9509/1980. This Act came into operation on 1 March 1981.

Offence	Section (<i>Crimes Act 1958</i>)	Penalty
Indecent assault ⁵¹³	s 44(1)	5 years
Indecent assault with aggravating circumstances ⁵¹⁴	s 44(2)	10 years
Rape	s 45(1)	10 years
Attempted rape or assault with intent to commit rape	s 45(2)	5 years
Rape with aggravating circumstances	s 45(3)	20 years
Attempted rape or assault with intent to commit rape with aggravating circumstances	s 45(4)	10 years
Sexual penetration of a child under the age of 10	s 47(1)	20 years

⁵¹³ Including indecent assault upon a child under 16 pursuant to s 44(3).

⁵¹⁴ Including indecent assault upon a child under 16 with aggravating circumstances pursuant to s 44(3).

Offence	Section (<i>Crimes Act 1958</i>)	Penalty
Attempted sexual penetration of a child under the age of 10 or assault with intent to take part in an act of sexual penetration with a child under the age of 10	s 47(2)	10 years
Sexual penetration of a child between the age of 10 and 16	s 48(1)	10 years
Sexual penetration of a child between the age of 10 and 16 where child is under the care, supervision or authority of offender	s 48(3)	15 years
Attempted sexual penetration of a child between the age of 10 and 16 or assault with intent to take part in an act of sexual penetration with a child between the age of 10 and 16	s 48(2)	5 years
Attempted sexual penetration of a child between the age of 10 and 16 or assault with intent to take part in an act of sexual penetration with a child between the age of 10 and 16 where child is under the care, supervision or authority of offender	s 48(3)	7 years
Sexual penetration of a person aged between 16 and 18	s 49(1)	2 years
Attempted sexual penetration or assault with intent to take part in an act of sexual penetration of a person aged between 16 and 18	s 49(2)	1 year
Where a person is under the care, supervision or authority of the offender with respect to s 49(1)	s 49(3)	3 years
Gross indecency by, with or in the presence of a person under the age of 16	s 50(1)	2 years
Gross indecency by, with or in the presence of a person under the age of 16... (a) Where person was under the care, supervision or authority of the offender; or (b) The offender has previously been convicted of gross indecency	s 50(2)	3 years
Sexual penetration or attempted sexual penetration or assault with intent to commit sexual penetration by a person employed by any institution of a mentally ill or intellectually defective person	s 51(1)	5 years
Sexual penetration or attempted sexual penetration or assault with intent to commit sexual penetration by a person who has the care or charge of a mentally ill or intellectually defective person	s 51(2)	5 years
Incest – sexual penetration with own child aged above 10 or other lineal descendant or step-child	s 52(1)	20 years
Attempted incest – attempted sexual penetration with own child aged above 10 or other lineal descendant or step-child	s 52(2)	10 years

Offence	Section (<i>Crimes Act 1958</i>)	Penalty
Incest – Person aged above 18 who permits sexual penetration with father, mother or other lineal ancestor or step-father or step-mother	s 52(3)	5 years
Incest – sexual penetration with a person above the age of 10 known to be his sister, half-sister, brother or half brother	s 52(4)	7 years
Attempted incest – attempted sexual penetration or assault with intent to take part in sexual penetration of a person aged above 10 known to be his sister, half-sister, brother or half-brother	s 52(5)	5 years
Procuring an act of sexual penetration by: threats or intimidation; or fraud	s 54	5 years
Administering a drug, matter or thing or causing a drug, matter or thing to be taken by a person for the purposes of sexual penetration	s 55	10 years
Abduction or detention with intent to marry or take part in an act of sexual penetration	s 56	10 years
Abduction of person aged under 18 from possession of parents with intent to take part in an act of sexual penetration	s 57	5 years
Bestiality	s 58	5 years
Procuring or attempted procuring of sexual penetration with a third person or prostitute	s 59	5 years
Owner or occupier allowing person under the age of 18 to take part in an act of sexual penetration: (a) if person aged under 13 years; or (b) if person under the age of 18 years	s 60	(a) 10 years; or (b) 5 years
Unlawful detention for the purpose of sexual penetration	s 61	5 years

2.7.6.8 Penalties for sexual offences between 1/4/1959 and 28/2/1981

Prior to the amendments commencing on 1 March 1981, Victoria's sexual offences were largely as enacted by the original *Crimes Act 1958*, which came into operation on 1 April 1959. Minor amendments in 1961 and 1967 are also indicated in this table.

Offence	Section	Penalty

Rape	s 44(1)	20 years
Rape with mitigating circumstances	s 44(2)	10 years
Attempted rape or assault with intent to rape	s 45	10 years
Carnal knowledge and abuse of a girl under the age of 10	s 46	20 years
Attempted carnal knowledge and abuse or assault with intent of a girl under the age of 10	s 47	10 years
Carnal knowledge and abuse of a girl aged between 10 and 16	s 48(1)	10 years
Carnal knowledge and abuse of a girl aged between 10 and 16 where the offender is a schoolteacher and the girl his pupil	s 48(1)	15 years
(a) Attempted carnal knowledge and abuse of a girl aged between 10 and 16 (b) Attempted carnal knowledge and abuse of a girl aged between 10 and 16 where the offender is a schoolteacher and the girl is a pupil	s 48(2)	(a) 3 years (b) 5 years Misdemeanour ⁵¹⁵
Carnal knowledge of an unmarried female between the age of 16 and 18 where the offender is aged above 21	s 50(1)	12 months

⁵¹⁵ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

Incest – carnal knowledge of a daughter, lineal descendant or step-daughter above 10 years of age	s 52(1)	20 years
Incest – attempted carnal knowledge or assault with intent of a daughter, lineal descendant or step-daughter above 10 years of age	s 52(2)	10 years
Incest – carnal knowledge of a sister or mother above 10 years of age	s 52(3)	7 years
Incest – attempted carnal knowledge of a sister or mother above 10 years of age	s 52(4)	5 years
Incest – woman or girl who consents to her father or other lineal ancestor or step-father or brother or son having carnal knowledge of her	s 53	5 years
Person employed in any mental hospital or person having the care of any female patient who carnally knows or attempts or assaults with intent any female under care and treatment	s 54(1)	5 years Misdemeanour ⁵¹⁶
Indecent assault of woman or girl	s 55	3 years, or in the case of a second offence, 10 years Misdemeanour ⁵¹⁷
	From 8/11/1967 (Act No. 7577)	5 years, or in the case of a second offence, 10 years

⁵¹⁶ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵¹⁷ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

Procuring or attempting to procure a woman to have a carnal connection	s 56	2 years Misdemeanour ⁵¹⁸
	From 26/4/1961 (Act No. 6761)	5 years Misdemeanour ⁵¹⁹
Carnal connection by threats, intimidation or fraud	s 57	2 years Misdemeanour ⁵²⁰
Owner or occupier permitting carnal knowledge of a girl under the age of 13	s 58	10 years Felony ⁵²¹
Owner or occupier permitting carnal knowledge of a girl between 13 and 16	s 58 (To 25/4/1961 (Act No. 6761))	2 years Misdemeanour ⁵²²
Owner or occupier permitting carnal knowledge of a girl between 13 and 18	s 58 (To 26/4/1961 (Act No. 6761))	5 years Misdemeanour ⁵²³

⁵¹⁸ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵¹⁹ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²⁰ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²¹ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²² Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²³ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

Abduction of a girl under the age of 18 with intent to have carnal knowledge	s 59 (Before 26/4/1961)	2 years Misdemeanour ⁵²⁴
	s 59 (From 26/4/1961 (Act No. 6761))	5 years
Unlawful detention of any woman or girl to have carnal knowledge	s 60	2 years Misdemeanour ⁵²⁵
	s 60 (From 26/4/1961 (Act No. 6761))	5 years
Abduction of woman from motives of lucre with intent to marry or carnally know	s 61	15 years
Forcible abduction of any woman with intent to marry or carnally know	s 62	10 years
Buggery with any person or animal	s 68(2)	15 years
Attempted buggery or assault with intent to commit buggery with any person or animal	s 68(3)	10 years Misdemeanour ⁵²⁶

⁵²⁴ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²⁵ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²⁶ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

Indecent assault upon a male person	s 68(3) (Before 8/11/1967)	10 years Misdemeanour ⁵²⁷
Indecent assault upon a male person	s 68(3) (From 8/11/1967)	5 years
Indecent assault upon a male person (with prior convictions)	s 68(3B) (From 8/11/1967)	10 years
Gross indecency with or in the presence of any girl under 16 years of age	s 69	2 years, or in the case of a second offence, 3 years Misdemeanour ⁵²⁸
Gross indecency with any male person	s 69(4)	3 years Misdemeanour ⁵²⁹

Last updated: 18 September 2020

2.7.6.9 Statutory categories for sexual offences Sections 38 to 48

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
38 Rape	Yes	No	Sexual	Yes	No
39 Rape by compelling sexual penetration	Yes	No	Sexual	Yes	No
40 Sexual assault	Yes	Yes	Sexual	No	No
41 Sexual assault by compelling sexual touching	Yes	Yes	Sexual	No	No

⁵²⁷ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²⁸ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

⁵²⁹ Offences originally characterised as felonies and misdemeanours were recharacterised as indictable offences with the commencement of the *Crimes (Classification of Offences) Act 1981*.

42 Assault with intent to commit a sexual offence	Yes	Yes	Sexual	Yes	No
43 Threat to commit a sexual offence	Yes	Yes	Sexual	No	No
44 Procuring sex. act by threat	Yes	Yes	Sexual	No	No
45 Procuring sex. act by fraud	Yes	Yes	Sexual	No	No
46 Administration of an intoxicating substance for a sexual purpose	Yes	Yes	Sexual	No	No
47 Abduction or detention for a sexual purpose	Yes	Yes	Sexual	Yes	No
48 Sexual activity directed at another person	Yes	Yes	No	No	No

2.7.6.10 Statutory categories for sexual offences Sections 38 to 40 prior to 1 July 2015

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
38 Rape	Yes	No	Sexual	Yes	No
38A Compelling sex. pen.	Yes	No	Sexual	Yes	No
39 Indecent assault	Yes	Yes	Sexual	Yes	No
40 Assault with intent to rape	Yes	Yes	Sexual	Yes	No

2.7.6.11 Statutory categories for sexual offences Sections 49A to 49I

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
49A Sex. pen. child under 12	Yes	No	Sexual	Yes	No
49B Sex. pen. child under 16	Yes	No	Sexual	Yes	No
49C Sex. pen. child aged 16 or 17	Yes	Yes	Sexual	No	No
49D Sexual assault of child under 16	Yes	Yes	Sexual	No	No
49E Sexual assault of child 16 or 17 under offender's	Yes	Yes	Sexual	No	No

care, supervision or authority					
49F Sexual activity in the presence of a child under the age of 16	Yes	Yes	Sexual	No	No
49G Sexual activity in the presence of a child aged 16 or 17, under care, supervision or authority	Yes	Yes	Sexual	No	No
49H Causing a child under the age of 16 to be present during sexual activity	Yes	Yes	Sexual	No	No
49I Causing a child aged 16 or 17 under care, supervision or authority to be present during sexual activity	Yes	Yes	Sexual	No	No

2.7.6.12 Statutory categories for sexual offences Sections 49J to 49S

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL ORFEITURE OFFENCE?
49J Persistent sexual abuse child under 16	Yes	No	Sexual	Yes	No
49K Encouraging a child under the age of 16 to engage in, or be involved in, sexual activity	Yes	Yes	Sexual	No	No
49L Encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity	Yes	Yes	Sexual	No	No
49M Grooming for sexual conduct with a child under the age of 16	Yes	Yes	Sexual	No	No
49N Loitering by sex offender	Yes	Yes	Sexual	No	No

49O Failure by person in authority to protect a child from a sexual offence	Yes	Yes	Sexual	No	No
49P Abduction of child under 16	Yes	Yes	Sexual	Yes	No
49Q Causing or allowing a sexual performance involving a child	Yes	Yes	Sexual	No	No
49R Inviting or offering a sexual performance involving a child	Yes	Yes	Sexual	No	No
49S Facilitating sexual offences against children	Yes	No	Sexual	No	No

2.7.6.13 Statutory categories for sexual offences Sections 50 to 52

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
50C, 50D Sex. pen. of child / lineal descendant / step-child	Yes	No	Sexual	Yes ⁵³⁰	No
50E Sex. pen. of parent / lineal ancestor / step-parent	Yes	Yes	No	No	No
50F Sex. pen. of sibling / half-sibling	Yes	Yes	Sexual/No	Yes ⁵³¹	No
52B Sex. pen. of a person with a cognitive impairment or mental illness	Yes	Yes	Sexual	No	No
52C Sexual assault of a person with a	Yes	Yes	Sexual	No	No

⁵³⁰ Unless both people are aged 18 or older and each consented.

⁵³¹ Unless both people are aged 18 or older and each consented.

cognitive impairment or mental illness					
52D Sexual activity in the presence of a person with a cognitive impairment or mental illness	Yes	Yes	Sexual	No	No
52E Causing a person with a cognitive impairment or mental illness to be present during sexual activity	Yes	Yes	Sexual	Yes	No

2.7.6.14 Statutory categories for sexual offences Sections 53 to 54

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
53B Using force, threat etc. to cause another person to provide commercial sexual services	Yes	No	Sexual	No	Yes
53C Sexual servitude	Yes	No	Sexual	No	Yes
53D Conducting a business in circumstances involving sexual servitude	Yes	No	Sexual	No	Yes
53E Aggravated sexual servitude	Yes	No	Sexual	No	Yes
53F Deceptive recruiting for sexual services	Yes	Yes	Sexual	No	Yes
53G Aggravated deceptive recruiting for sexual services	Yes	Yes	Sexual	No	Yes
54A Bestiality	Yes	Yes	Sexual	No	No

2.7.6.15 Statutory categories for sexual offences Repealed sections

Offences under *Crimes (Sexual Offences) Act 1991*

The offences of rape (s 40), rape with aggravating circumstances (s 41), indecent assault (s 42), and indecent assault with aggravating circumstance (s 43) were enacted on 5 August 1991 by *Crimes (Sexual Offences) Act 1991* and repealed on 12 December 1991 by *Crimes (Rape) Act 1991*.

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
40 Rape	Yes	No	Sexual	Yes	
41 Rape with aggravating circumstances	Yes	No	Sexual	Yes	

42 Indecent assault	Yes	No	Sexual	No	
43 Indecent assault with aggravating circumstances	Yes	No	Sexual	No	

Offences under *Crimes (Sexual Offences) Act 1980*

Offences contrary to repealed ss 44–52

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERM- INATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
44(1) Indecent assault	Yes	Yes	Sexual	No	No
44(2) Aggravated indecent assault	Yes	Yes	Sexual	No	No
45(1) Rape	Yes	Yes	Sexual	Yes	No
45(2) Attempted rape	Yes	Yes	Sexual	Unclear	No
45(3) Aggravated rape	Yes	No	Sexual	Yes	No
45(4) Aggravated attempted rape	Yes	Yes	Sexual	Unclear	No
47(1) Sex. pen. of a child under 10	Yes	No	Sexual	Yes	No
47(2) Attempted sex. pen. of a child under 10	Yes	Yes	Sexual	No	No
48(1) Sex. pen. of a child aged 10-16	Yes	Yes	Sexual	Yes	No
48(2) Attempted sex. pen. of a child aged 10-16	Yes	Yes	Sexual	Unclear	No
48(3) Aggravated s 48 offence (care/ supervision /authority)	Yes	Yes ⁵³²	Sexual	Yes	No
49(1) Sex. pen. of a child aged 16-18	Yes	No	No	No	No
49(2) Attempted sex. pen. of a child aged 16-18	Yes	No	No	No	No
49(3) Aggravated s 49 offence (care/	Yes	No	No	No	No

⁵³² Only if the aggravated offence is contrary to s 48(2), rather than s 48(1).

supervision /authority)					
50(1) Gross indecency child under 16	Yes	No	Sexual	No	No
50(2) Aggravated gross indecency	Yes	No	Sexual	No	No
51(1) Sex. pen. / assault with intent of mentally ill (employee)	Yes	No	Sexual	No	No
51(2) Sex. pen. / assault with intent of mentally ill (care or charge)	Yes	No	Sexual	No	No
52(1) Incest – child	Yes	No	Sexual	Yes ⁵³³	No
52(2) Attempted incest - child	Yes	No	Sexual	Unclear	No
52(3) Consenting to incest	Yes	No	Sexual	No	No
52(4) Incest - sibling	Yes	No	Sexual	Yes ⁵³⁴	No
54 Procuring sex. pen by threats/fraud	Yes	No	Sexual	No	No
55 Administering drug to procure sex. pen.	Yes	No	Sexual	No	No
56 Abduction or detention to marry or sex pen.	Yes	No	Sexual	Yes ⁵³⁵	No
57 Abduction from possession of parent	Yes	No	No	Yes ⁵³⁶	No
58(1) Bestiality	Yes	No	No	No	No
58(2) Attempted bestiality	Yes	No	No	No	No
59 Procuring for prostitution	Yes	No	No	No	No

⁵³³ Unless both people are aged 18 or older and each consented.

⁵³⁴ Unless both people are aged 18 or older and each consented.

⁵³⁵ Unless the abduction or detention is with intent to marry.

⁵³⁶ Only if the conduct would otherwise constitute an offence under *Crimes Act 1958* ss 47, 49P or 63A, if those provisions had been in force at the time of the offence.

60 Householder permitting prostitution	Yes	No	No	No	No
61 Unlawful detention for purpose of sex. pen.	Yes	No	Sexual	No	No

Offences under *Crimes Act 1958* (Original provisions)

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERM- INATION?	SERIOUS OFFENDER OFFENCE?	INDEFINITE SENTENCE OFFENCE?	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
44(1) Rape	Yes	No	Sexual	Yes	No
44(2) Aggravated rape	Yes	No	Sexual	Yes	No
45 Attempted rape	Yes	No	Sexual	Yes	No
46 Carnal knowledge of girl under 10	Yes	No	Sexual	Yes	No
47 Attempted carnal knowledge of girl under 10	Yes	No	Sexual	Yes	No
48(1) Carnal knowledge of girl 10-16	Yes	No	Sexual	Yes	No
48(2) Attempted carnal knowledge of girl 10-16	Yes	No	Sexual	Yes	No
50 Carnal knowledge of girl 16-18	Yes	No	No	No	No
52(1) Incest – daughter over 10	Yes	No	Sexual ⁵³⁷	Yes	No
52(2) Attempted incest – daughter over 10	Yes	No	Sexual ⁵³⁸	Yes	No
52(3) Incest – sister or mother over 10	Yes	No	Sexual ⁵³⁹	Yes	No
52(4)	Yes	No	Sexual ⁵⁴⁰	Yes	No

⁵³⁷ Unless the victim is the sister of the offender, both are aged 18 or over and the alleged offence was committed with the consent of the sister.

⁵³⁸ Unless the victim is the sister of the offender, both are aged 18 or over and the alleged offence was committed with the consent of the sister.

⁵³⁹ Unless the victim is the sister of the offender, both are aged 18 or over and the alleged offence was committed with the consent of the sister.

⁵⁴⁰ Unless the victim is the sister of the offender, both are aged 18 or over and the alleged offence was committed with the consent of the sister.

Attempted incest – sister or mother over 10					
53 Consenting to incest	Yes	No	No	Yes	No
51(1) Carnal knowledge / assault with intent of mentally ill	Yes	No	Sexual	No	No
55 Indecent assault	Yes	No	Sexual	No	No
68(1) Buggery of child under 14 without consent	Yes	No	Sexual	Yes	No
68(2) Buggery (not covered by 68(1))	Yes	No	Sexual	No	No
68(3) Attempted buggery	Yes	No	Sexual	No ⁵⁴¹	No
69(1) Gross indecency	Yes	No	Sexual	No	No
69(4) Party to gross indecency	Yes	No	No	No	No

⁵⁴¹ Unless the offence consisted of an indecent assault on a male person.

Commentary on checklists for repealed offences

Inapplicable statutory categories

None of the offences considered in this part are continuing criminal enterprise offences under Part 2B of the *Sentencing Act 1991*.

Indictable/summary

- all offences under *Crimes (Sexual Offences) Act 1980* were indictable offences.
- all listed *Crimes Act 1958* offences were indictable. These offences included both felonies and misdemeanours (both indictable) but that distinction has no significance for contemporary sentencing.

Summary determination

- Subject to contrary provision, indictable offences that are punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 1200 penalty units or both may be determined summarily (*Criminal Procedure Act 2009* s 28(b)(iii)).

Serious offender offences

- Sentencing Act 1991* Schedule 1 lists the offences under *Crimes (Sexual Offences) Act 1980* which are serious offender 'sexual offences'. All offences are included, except the offences contrary to ss 49, 57, 58, 59 and 60. Incest offences between siblings (ss 52(4) and (5)) are excluded if the offences involved consenting parties aged 18 or older.
- Schedule 1 lists the offences repealed by the *Crimes (Sexual Offences) Act 1980* which are serious offender 'sexual offences'. Incest offences between siblings (ss 52(3) and (4)) are excluded if the offences involved consenting parties aged 18 or older.

Indefinite sentence offences

Sentencing Act 1991 s 3 'serious offence' (d) permits a judge to determine that a repealed offence is a 'serious offence' where an offence against that repealed provision, if committed since the enactment of the indefinite sentence provisions, could have been charged as a contemporary 'serious offence'. All offences identified above as s 3 'serious offences' are thus identified only conditionally, though most such identifications are in fact unproblematic.

Last updated: 3 August 2017

2.7.7 Property and dishonesty offences

2.7.7.1 Penalties for theft, robbery, carjacking, burglary, home invasion and handling offences

Offence	Offence and Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty (current penalty shaded)	Applies to offences committed on or after
Theft	s 74	Level 5 imprisonment (10 years)	22/4/1992+
Robbery	s 75	Level 4 imprisonment (15 years maximum)	1/9/1997+
		Level 4 imprisonment (12 ½ years)	Pre 1/9/1997

Armed robbery	s 75A	Level 2 imprisonment (25 years maximum) ⁵⁴²	1/9/1997+
		Level 2 imprisonment (20 years)	Pre 1/9/1997
Burglary	s 76	Level 5 imprisonment (10 years)	1/9/1997+
		Level 4 imprisonment (12 ½ years)	Pre 1/9/1997
Aggravated burglary	s 77	Level 2 imprisonment (25 years)	1/9/1997+
		Level 3 imprisonment (15 years)	Pre 1/9/1997
Home invasion	s 77A	Level 2 imprisonment (25 years) ⁵⁴³	7/12/2016+
Aggravated home invasion	s 77B	Level 2 imprisonment (25 years) ⁵⁴⁴ Minimum non-parole period - 3 years, unless offender under the age of 18 at the time of the offence or a special reason exists ⁵⁴⁵	7/12/2016+
Carjacking	s 79	Level 4 imprisonment (15 years) ⁵⁴⁶	7/12/2016+

⁵⁴² Armed robbery is a 'category 2 offence' if committed on or after 20 October 2018 by an offender aged 18 years or more at the time of offending if:

- i) the offender had with him or her a firearm at the time of the offence, or
- ii) a victim of the offence suffered injury as a direct result of the offence, or
- iii) the offence was committed by the offender in company with one or more other persons (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁵⁴³ Home invasion is a category 2 offence if committed on or after 20 October 2018 by an offender who is aged 18 years or more at the time of the offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁵⁴⁴ Aggravated home invasion is a category 1 offence if committed on or after 20 October 2018 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁴⁵ *Sentencing Act 1991* s 10AC.

⁵⁴⁶ Carjacking is a category 2 offence if committed on or after 20 October 2018 by an offender who is aged 18 years or more at the time of the offending (*Sentencing Act 1991* s 3).

Aggravated carjacking	s 79A	Level 2 imprisonment (25 years) ⁵⁴⁷ Minimum non-parole period - 3 years unless offender under the age of 18 at the time of the offence or a special reason exists ⁵⁴⁸	7/12/2016+
Handling stolen goods	s 88	Level 4 imprisonment (15 years)	1/9/1997+
		Level 5 imprisonment (10 years)	Pre 1/9/1997
Going equipped to steal	s 91	Level 7 imprisonment (2 years)	1/9/1997+
		Level 8 imprisonment (3 years)	Pre 1/9/1997

2.7.7.2 Penalties for deception, false accounting & false document offences

Offence	Offence and Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty (current penalty shaded)	Applies to offences committed on or after
Obtaining property by deception	s 81	Level 5 imprisonment (10 years)	22/4/1992+
Obtaining financial advantage by deception	s 82	Level 5 imprisonment (10 years)	22/4/1992+
False accounting	s 83	Level 5 imprisonment (10 years)	22/4/1992+
		Level 6 imprisonment (7 ½ years)	Pre 1/9/1997
Falsification of documents	s 83A(1)–(5B)	Level 5 imprisonment (10 years)	1/9/1997+
		Level 6 imprisonment (7 ½ years)	Pre 1/9/1997
Make or possess material for	s 83A(5C)	Level 6 imprisonment (5 years)	1/9/1997+

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

⁵⁴⁷ Aggravated carjacking is a category 1 offence if committed on or after 20 October 2018 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁴⁸ *Sentencing Act 1991* s 10AD.

making false document		Level 6 imprisonment (7 ½ years)	Pre 1/9/1997
Liability of company officers for company offences	s 84	See penalties for ss 81–83	1/9/1997+
False statements by company directors	s 85	Level 5 imprisonment (10 years)	1/9/1997+
		Level 6 imprisonment (7 ½ years)	Pre 1/9/1997
Suppression of documents	s 86	Level 5 imprisonment (10 years)	1/9/1997+
		Level 6 imprisonment (7 ½ years)	Pre 1/9/1997
Conspiracy to defraud	Common law offence Penalty: s 320	Level 4 imprisonment (15 years)	1/9/1997+
	Penalty at common law	At large	Pre 1/9/1997
Conspiracy to cheat and defraud	Common law offence Penalty: s 320	Level 4 imprisonment (15 years)	1/9/1997+
	Penalty at common law	At large	Pre 1/9/1997

2.7.7.3 Penalties for bribery and secret commission offences

Offence	Offence and Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty (current penalty shaded)	Applies to offences committed on or after
Secret commissions	Ss 176, 178, 179, 180	Level 5 imprisonment (10 years) or Level 5 fine (120pu) or both	1/9/1997+
		Level 5 imprisonment (10 years) or Level 5 fine (120pu) or both	Pre 1/9/1997
Secret commissions... if a corporation		Level 5 fine (120pu)	1/9/1997+

		Level 5 fine (120pu)	Pre 1/9/1997
Bribery of a public official	Common law offence Penalty: s 320	Level 5 imprisonment (10 years)	1/9/1997+
	Penalty at common law	At large	Pre 1/9/1997
Misconduct in public office	Common law offence Penalty: s 320	Level 5 imprisonment (10 years)	1/9/1997+
	Penalty at common law	At large	Pre 1/9/1997

2.7.7.4 Penalties for money laundering offences

Offence	Offence and Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty	Applies to offences committed on or after
Money laundering (dealing with proceeds of crime) ...knowing proceeds of crime and intending to conceal that it is proceeds of crime	s 194(1)	Level 3 imprisonment (20 years)	1/1/2004+
...intentional dealing	s 194(2)	Level 4 imprisonment (15 years)	1/1/2004+
...reckless dealing	s 194(3)	Level 5 imprisonment (10 years)	1/1/2004+
...negligent dealing	s 194(4)	Level 6 imprisonment (5 years)	1/1/2004+
Dealing with property suspected of being proceeds of crime	s 195	Level 7 imprisonment (2 years)	1/1/2004+

Dealing with property which subsequently becomes an instrument of crime ...intentional dealing	s 195A(1)	Level 4 imprisonment (15 years)	1/1/2004+
...reckless dealing	s 195A(2)	Level 5 imprisonment (10 years)	1/1/2004+
...negligent dealing	s 195A(3)	Level 6 imprisonment (5 years)	1/1/2004+

Repealed offences

Offence	Offence and Penalty Section	Maximum penalty	Applies to offences committed on or after
Money laundering	<i>Confiscations Act 1997</i> s 122	Level 3 imprisonment (20 years) or 2,400 penalty units or both	1/9/1997 – 31/12/2003
Possession etc. of property suspected of being proceeds of crime	<i>Confiscations Act 1997</i> s 123	Level 7 imprisonment (2 years) or fine of 240 penalty units or both	1/9/1997 – 31/12/2003
Money laundering	<i>Crimes (Confiscation of Profits) Act 1986</i> s 41Q(1)	10 years imprisonment	To 31/8/1997

2.7.7.5 Penalties for damaging property offences

Offence	Offence and Penalty Section	Maximum penalty (current penalty shaded)	Applies to offences committed on or after
Intentionally destroying or damaging property	s 197(1)	Level 5 imprisonment (10 years)	1/9/1997+
		Level 6 imprisonment (7 ½ years)	Pre 1/9/1997

Intentionally destroying or damaging property intending to endanger life	s 197(2)	Level 4 imprisonment (15 years)	1/9/1997+
		Level 4 imprisonment (12 ½ years)	Pre 1/9/1997
Criminal damage with view to gain	s 197(3)	Level 5 imprisonment (10 years)	1/9/1997+
		Level 5 imprisonment (10 years)	Pre 1/9/1997
Criminal damage by arson	s 197(7)	Level 4 imprisonment (15 years)	1/9/1997+
		Level 4 imprisonment (12 ½ years)	Pre 1/9/1997
Arson causing death	s 197A	Level 2 imprisonment (25 years) ⁵⁴⁹	1/9/1997+
Threats to destroy or damage property	s 198	Level 6 imprisonment (5 years)	1/9/1997+
		Level 7 imprisonment (5 years)	Pre 1/9/1997
Possessing anything with intent to destroy or damage property	s 199	Level 6 imprisonment (5 years)	1/9/1997+

⁵⁴⁹ Arson causing death is a category 2 offence if committed on or after 20 March 2017 by an offender who is aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

		Level 8 imprisonment (3 years)	Pre 1/9/1997
Intentionally or recklessly causing a bushfire	s 201A	Level 4 imprisonment (15 years)	7/5/2003+
Rioters demolishing buildings	s 206(1)	Level 4 imprisonment (15 years)	1/9/1997+
		Level 6 imprisonment (7 ½ years)	Pre 1/9/1997
Rioters damaging or injuring buildings	s 206(2)	Level 6 imprisonment (5 years)	1/9/1997+
		Level 7 imprisonment (5 years)	Pre 1/9/1997

2.7.7.6 Penalties for computer crimes, sabotage and contamination of goods offences

Offence	Offence and Penalty Section (<i>Crimes Act 1958</i>)	Maximum penalty	Applies to offences committed on or after
Causing unauthorised computer function with intent to commit a serious offence	s 247B	Same as ulterior offence	7/5/2003+
Unauthorised modification of data to cause impairment	s 247C	Level 5 imprisonment (10 years)	7/5/2003+
Causing unauthorised impairment of electronic communication	s 247D	Level 5 imprisonment (10 years)	7/5/2003+
Possessing etc data with intent to commit a serious computer offence	s 247E	3 years	7/5/2003+
Producing etc data with intent to commit a serious computer offence	s 247F	3 years	7/5/2003+

Causing unauthorised access to or modification of restricted data	s 247G	Level 7 imprisonment (2 years)	7/5/2003+
Causing unauthorised impairment to data	s 274H	Level 7 imprisonment (2 years)	7/5/2003+
Sabotage	s 247K	Level 2 imprisonment (25 years)	7/5/2003+
Threats to sabotage	s 247L	Level 4 imprisonment (15 years)	7/5/2003+
Contamination of goods with intent to cause public alarm or economic loss	s 249	Level 5 imprisonment (10 years) or level 5 fine (1200 p.u.) or both	1/1/1999+
Threat of contamination of goods with intent to cause public alarm or economic loss	s 250	Level 5 imprisonment (10 years) or level 5 fine (1200 p.u.) or both	1/1/1999+
Making false statement concerning contamination of goods with intent...	s 251	Level 5 imprisonment (10 years) or level 5 fine (1200 p.u.) or both	1/1/1999+

2.7.7.7 Penalties for dishonesty offences under Crimes Act 1914

Destroying or damaging property contrary to *Crimes Act 1914* s 29 attracts a maximum penalty of 10 years imprisonment.

Knowingly making a false certificate contrary to *Crimes Act 1914* s 87 attracts a maximum penalty of 2 years imprisonment.

2.7.7.8 Penalties for Commonwealth theft, robbery, burglary, deception and related offences

Offence	Offence and penalty Section (<i>Criminal Code</i>)	Maximum penalty	Applies to offences committed on or after
Theft	s 131.1	10 years	24/5/2001+
Receiving	s 132.1	10 years	24/5/2001+
Robbery	s 132.2	15 years	24/5/2001+
Aggravated robbery	s 132.3	20 years	24/5/2001+
Burglary	s 132.4	13 years	24/5/2001+

Aggravated burglary	s 132.5	17 years	24/5/2001+
Making off without payment	s 132.6	2 years	24/5/2001+
Going equipped for theft or a property offence	s 132.7	3 years	24/5/2001+
Dishonest taking or retention of property	s 132.8	2 years	24/5/2001+
Obtaining property by deception	s 134.1	10 years	24/5/2001+
Obtaining a financial advantage by deception	s 134.2	10 years	24/5/2001+
False or misleading statements in applications...with knowledge	s 136.1	12 months	24/5/2001+
False or misleading statements in applications...recklessly	s 136.1	6 months	24/5/2001+
False or misleading information	s 137.1	12 months	24/5/2001+
False or misleading documents	s 137.2	12 months	24/5/2001+
Forgery	s 144.1	10 years	24/5/2001+
Using a forged document	s 145.1	10 years	24/5/2001+
Possession of a forged document	s 145.2	10 years	24/5/2001+
Possession etc. device etc for making forgery	s 145.3	10y /2y	24/5/2001+
Falsification of documents	s 145.4	7 years	24/5/2001+
Giving information derived from false documents	s 145.5	7 years	24/5/2001+

2.7.7.9 Penalties for Commonwealth bribery and related offences

Offence	Offence and penalty section (<i>Criminal Code</i>)	Maximum penalty	Applies to offences committed on or after
Unwarranted demands of/ by a Commonwealth public official	ss 139.1, 139.2	12 years	24/5/2001+
Bribing a foreign public official	s 70.2	10 years	17/12/1999+
Bribery of a Commonwealth public official	s 141.1	10 years	24/5/2001+
Corrupting benefits for Commonwealth public official	s 142.1	5 years	24/5/2001+
Abuse of public office	s 142.2	5 years	24/5/2001+

2.7.7.10 Penalties for Commonwealth money laundering offences

Offence	Offence and penalty section (<i>Criminal Code</i>)	Maximum penalty	Applies to offences committed on or after
Dealing in proceeds of crime-worth \$1million+ ...with knowledge	s 400.3(1)	25 years, or 1500 penalty units, or both	1/1/2003+
... recklessly	s 400.3(2)	12 years, or 720 penalty units, or both	1/1/2003+
... negligently	s 400.3(3)	5 years, or 300 penalty units, or both	1/1/2003+
Dealing in proceeds of crime-worth \$100,000+ ... with knowledge	s 400.4(1)	20 years, or 1200 penalty units, or both	1/1/2003+
... recklessly	s 400.4(2)	10 years, or 600 penalty units, or both	1/1/2003+
... negligently	s 400.4(3)	4 years, or 240 penalty units, or both	1/1/2003+
Dealing in proceeds of crime-worth \$50,000+ ... with knowledge	s 400.5(1)	15 years, or 900 penalty units, or both	1/1/2003+
... recklessly	s 400.5(2)	7 years, or 420 penalty units, or both	1/1/2003+
... negligently	s 400.5(3)	3 years, or 180 penalty units, or both	1/1/2003+
Dealing in proceeds of crime-worth \$10,000+ ... with knowledge	s 400.6(1)	10 years, or 600 penalty units, or both	1/1/2003+
... recklessly	s 400.6(2)	5 years, or 300 penalty units, or both	1/1/2003+
... negligently	s 400.6(3)	2 years, or 120 penalty units, or both	1/1/2003+
Dealing in proceeds of crime-worth \$1,000+ ... with knowledge	s 400.7(1)	5 years, or 300 penalty units, or both	1/1/2003+
... recklessly	s 400.7(2)	2 years, or 120 penalty units, or both	1/1/2003+
... negligently	s 400.7(3)	12 months, or 60 penalty units, or both	1/1/2003+

Dealing in proceeds of crime - no minimum value ... with knowledge	s 400.8(1)	12 months, or 60 penalty units, or both	1/1/2003+
... recklessly	s 400.8(2)	6 months, or 30 penalty units, or both	1/1/2003+
... negligently	s 400.8(3)	10 penalty units	1/1/2003+
Possession etc. of property reasonably suspected of being proceeds of crime etc	s 400.9	2 years, or 50 penalty units, or both	1/1/2003+

2.7.7.11 Penalties for repealed Crimes Act 1914 dishonesty offences

Offence	Offence and penalty Section (<i>Crimes Act 1914</i>)	Maximum penalty	Applies to offences committed
False Pretences	s 29A	5 years imprisonment	Pre 1/1/2003
False Representations (Imposition)	s 29B	2 years imprisonment	Pre 1/1/2003
Untrue Statements in Applications for Grants (etc) -	s 29C	2 years imprisonment	Pre 1/1/2003
Fraud	s 29D	10 years imprisonment, or \$100,000 fine, or both	Pre 1/1/2003
Forgery and uttering of seals	s 65	10 years imprisonment	Pre 1/1/2003
Forgery and uttering of official signatures	s 66	10 years imprisonment	Pre 1/1/2003
Forgery and uttering of Commonwealth documents	s 67	10 years imprisonment	Pre 1/1/2003
Forgery and uttering of official marks	s 68	2 years imprisonment	Pre 1/1/2003
Making special paper	s 69	4 years imprisonment	Pre 1/1/2003
Stealing property of the Commonwealth	s 71	7 years imprisonment	Pre 1/1/2003
Corruption and bribery of Commonwealth officers	s 73	2 years imprisonment	Pre 1/1/2003

Corruption and bribery of members of Parliament	s 73A	2 years imprisonment	Pre 1/1/2003
Conspiracy to defraud	s 86A	20 years imprisonment, or \$200,000 fine, or both	October 1984 to 15/9/1995

Last updated: 18 September 2020

2.7.7.12 Statutory categories for property and dishonesty offences

Crimes Act 1958 ss 74–77, s 79, ss 81–86, 88 & 91

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE?	AUTOMATIC/ CIVIL FORFEITURE OFFENCE?
74 Theft	Yes	Yes ⁵⁵⁰	No	Yes	Yes ⁵⁵¹
75 Robbery	Yes	Yes ⁵⁵²	No	Yes	Yes ⁵⁵³
75A Armed robbery	Yes	No	No	Yes	Yes ⁵⁵⁴
76 Burglary	Yes	Yes ⁵⁵⁵	Sexual ⁵⁵⁶	No	No
77	Yes	Yes ⁵⁵⁷	Sexual ⁵⁵⁸	No	No

⁵⁵⁰ Only if the value of the property alleged to have been stolen does not in the judgment of the court exceed \$100,000 or is a motor vehicle.

⁵⁵¹ Only if there is only one offence and the value of the property stolen was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the combined value of the property stolen is \$75,000 or more.

⁵⁵² Only if the value of the property alleged to have been stolen does not in the judgment of the court exceed \$100,000.

⁵⁵³ Only if there is only one offence and the value of the property stolen was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the combined value of the property stolen is \$75,000 or more.

⁵⁵⁴ Only if there is only one offence and the value of the property stolen was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the combined value of the property stolen is \$75,000 or more.

⁵⁵⁵ Unless the offence involved an intent to steal property, the amount or value of which, in the judgment of the court, exceeds \$100,000.

⁵⁵⁶ Only if committed in circumstances where the offender entered the building or part of the building with intent to commit an offence referred to in subparagraph (i) to (ix) or (x) to (xvie) of *Sentencing Act 1991* Schedule 1 clause 1(a).

⁵⁵⁷ Only if the offence involves an intent to steal property, the value of which does not in the judgment of the court exceed \$100,000.

⁵⁵⁸ Only if committed in circumstances where the offender entered the building or part of the building with intent to commit an offence referred to in subparagraph (i) to (ix) or (x) to (xvie) of *Sentencing Act 1991* Schedule 1 clause 1(a).

Aggravated burglary					
77A Home invasion	Yes	No	No	No	No
77B Aggravated home invasion	Yes	No	No	No	No
79 Carjacking	Yes	Yes	No	No	No
79A Aggravated carjacking	Yes	No	No	No	No
81, Obtaining property by deception,	Yes	Yes ⁵⁵⁹	No	Yes	Yes ⁵⁶⁰
82 Obtaining financial advantage by deception	Yes	Yes ⁵⁶¹	No	Yes	Yes ⁵⁶²
83 False accounting	Yes	Yes ⁵⁶³	No	Yes	No
83A Falsification of documents	Yes	Yes	No	No	No
84, 85, 86 Liability of company officers for certain offences by company, False statements by company directors Suppression of documents	Yes	Yes	No	No	No
88 Handling stolen goods	Yes	Yes ⁵⁶⁴	No	Yes	Yes ⁵⁶⁵
91	No	Yes	No	No	No

⁵⁵⁹ Only if the value of the property alleged to have been obtained does not in the judgment of the court exceed \$100,000.

⁵⁶⁰ Only if there is only one offence and the value of the property obtained was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the combined value of the property obtained is \$75,000 or more.

⁵⁶¹ Only if the value of the property alleged to have been obtained does not in the judgment of the court exceed \$100,000.

⁵⁶² Only if there is only one offence and the value of the financial advantage obtained was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the combined value of the financial advantage obtained is \$75,000 or more.

⁵⁶³ Only if the amount or value of the alleged gain or loss does not in the judgment of the court exceed \$100,000.

⁵⁶⁴ Only if the value of the property alleged to have been handled does not in the judgment of the court exceed \$100,000 or is a motor vehicle.

⁵⁶⁵ Only if there is only one offence and the value of the handled was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the combined value of the property handled is \$75,000 or more.

Going equipped for stealing					

2.7.7.13 Statutory categories for criminal damage offences

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE?	AUTOMATIC/ CIVIL FORFEITURE OFFENCE?
197(1) Intentionally destroying or damaging property	Yes	Yes ⁵⁶⁶	No	Yes	No
197(3) Criminal damage with a view to gain	Yes	Yes ⁵⁶⁷	No	Yes	No
197(2) Intentionally destroying or damaging property intending to endanger life	Yes	No	No	Yes	No
197(6), (7) Arson	Yes	No	Yes	Yes	No
197(7) Criminal damage by arson	Yes	No	Yes	Yes	No
197A Arson causing death	Yes	No	Yes	No	No
198 Threats to destroy or damage property	Yes	Yes ⁵⁶⁸	No	No	No
199 Possessing anything with intent to destroy or damage property	Yes	Yes ⁵⁶⁹	No	No	No
206(1) Rioters demolishing buildings	Yes	No	No	No	No
206(2) Rioters damaging or injuring buildings	Yes	Yes	No	No	No

2.7.7.14 Statutory categories for secret commission, money laundering & common law offences

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER	CONTINUING CRIMINAL	AUTOMATIC/ CIVIL FORFEITURE

⁵⁶⁶ Only 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.

⁵⁶⁷ Only 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.

⁵⁶⁸ Only if the amount or value of the property threatened to be destroyed or damaged does not in the judgment of the court exceed \$100,000.

⁵⁶⁹ Only if the amount or value of the property intended to be destroyed or damaged does not in the judgment of the court exceed \$100,000.

			OFFENCE?	ENTERPRISE OFFENCE?	OFFENCE?
176, 178-180 Secret commissions	Yes	Yes ⁵⁷⁰	No	Yes	Yes ⁵⁷¹
194(1) Knowingly dealing with proceeds of crime knowing proceeds of crime and intending to conceal that it is proceeds of crime	Yes	Yes ⁵⁷²	No	Yes	Yes ⁵⁷³
194(2) Knowingly dealing with proceeds of crime	Yes	Yes ⁵⁷⁴	No	Yes	Yes ⁵⁷⁵
194(3) Recklessly dealing with proceeds of crime	Yes	Yes	No	Yes	Yes ⁵⁷⁶
194(4) Negligently dealing with proceeds of crime	Yes	Yes	No	No	No
195 Dealing with property suspected of being proceeds of crime	No	N/A	No	No	No
195A(1)	Yes	Yes ⁵⁷⁷	No	No	No

⁵⁷⁰ Only 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.

⁵⁷¹ Only if there is only one offence and the value of the relevant property was \$50,000 or more, or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the combined value of the relevant property is \$75,000 or more.

⁵⁷² Only if the amount or value of the proceeds of crime does not in the judgment of the court exceed \$100,000, or is a motor vehicle.

⁵⁷³ Only if there is only one offence and the value of the property, financial advantage or economic loss in respect of that offence is \$50,000 or more or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the value of the property, financial advantage or economic loss in respect of which the offences are committed is \$75,000 or more.

⁵⁷⁴ Only if the amount or value of the proceeds of crime does not in the judgment of the court exceed \$100,000, or is a motor vehicle.

⁵⁷⁵ Only if there is only one offence and the value of the property, financial advantage or economic loss in respect of that offence is \$50,000 or more or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the value of the property, financial advantage or economic loss in respect of which the offences are committed is \$75,000 or more.

⁵⁷⁶ Only if there is only one offence and the value of the property, financial advantage or economic loss in respect of that offence is \$50,000 or more or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the value of the property, financial advantage or economic loss in respect of which the offences are committed is \$75,000 or more.

⁵⁷⁷ Only 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.

Intentionally dealing with property which subsequently becomes an instrument of crime					
195A(2) Recklessly dealing with property which subsequently becomes an instrument of crime	Yes	Yes	No	No	No
195A(3) Negligently dealing with property which subsequently becomes an instrument of crime	Yes	Yes	No	No	No
Bribery of a public official (common law)	Yes	Yes	No	No	Yes
Misconduct in public office (common law)	Yes	Yes	No	No	Yes
Conspiracy to cheat or defraud (common law)	Yes	Yes ⁵⁷⁸	No	Yes	Yes ⁵⁷⁹

2.7.7.15 Statutory categories for computer crime, sabotage and contamination of goods

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE?	AUTOMATIC/ CIVIL FORFEITURE OFFENCE?
247B Causing unauthorised computer function with intent to commit a serious offence	Yes	Yes ⁵⁸⁰	No	No	No
247C Unauthorised modification of data to cause impairment	Yes	Yes	No	No	No
247D Causing unauthorised impairment of electronic communication	Yes	Yes	No	No	No
247E Possessing etc data with intent to	Yes	Yes	No	No	No

⁵⁷⁸ Only 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.

⁵⁷⁹ Only if there is only one offence and the value of the property, financial advantage or economic loss in respect of that offence is \$50,000 or more or more than one offence is charged and the offences are founded on the same facts or form or are part of a series of offences of the same or similar character and the value of the property, financial advantage or economic loss in respect of which the offences are committed is \$75,000 or more.

⁵⁸⁰ Only if the applicable maximum penalty for the intended offence does not exceed level 5 imprisonment (10 years).

commit a serious computer offence					
247F Producing etc data with intent to commit a serious computer offence	Yes	Yes	No	No	No
247G Causing unauthorised access to or modification of restricted data	No	N/A	No	No	No
247H Causing unauthorised impairment to data	No	N/A	No	No	No
247K Sabotage	Yes	No	No	No	No
247L Threats to sabotage	Yes	No	No	No	No
249 Contamination of goods with intent to cause public alarm or economic loss	Yes	Yes	No	No	No
250 Threats of contamination of goods with intent to cause public alarm or economic loss	Yes	Yes	No	No	No
251 Making false statements concerning contamination of goods with intent to cause, or being reckless as to whether it would cause, public alarm or economic loss	Yes	Yes	No	No	No

2.7.8 Drug offences

2.7.8.1 Penalties for Victorian drug offences

Penalties for trafficking, possession for trafficking, and supply to a child

Offence	<i>DPCS Act</i> Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Trafficking in not less than large commercial quantity of a drug of dependence or 2 or more drugs of dependence	s 71	Level 1 imprisonment – Life imprisonment and fine not exceeding 5000 penalty units ⁵⁸¹ Standard sentence of 16 years applies ⁵⁸²	1/1/2002 +
Trafficking in not less than commercial quantity of a drug of dependence or 2 or more drugs of dependence for the benefit of or at the direction of a criminal organisation	s 71AA(2)	Level 1 imprisonment – Life imprisonment and fine not exceeding 5000 penalty units ⁵⁸³	05/06/2019 +
Trafficking in not less than commercial	s 71AA(1)	Level 2 imprisonment – 25 years maximum ⁵⁸⁴	1/1/2002 +

⁵⁸¹ Trafficking in not less than large commercial quantity of a drug of dependence or 2 or more drugs of dependence is a category 1 offence if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁸² The standard sentence is relevant for offences committed after 1 February 2018.

⁵⁸³ Trafficking in not less than commercial quantity of a drug of dependence or 2 or more drugs of dependence for the benefit of or at the direction of a criminal organisation is a category 1 offence if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁸⁴ Trafficking in not less than commercial quantity of a drug of dependence or 2 or more drugs of dependence is a category 2 offence if committed on or after 5 June 2019 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2H)).

quantity of a drug of dependence or 2 or more drugs of dependence	s 71(1)(a)	Level 2 imprisonment (25 years) and fine not exceeding 2500 penalty units	1/9/1997 – 31/12/2001
	s 71(1)(a)	25 years and fine not exceeding 2500 penalty units	18/12/1983 – 31/8/1997
Trafficking in a drug of dependence to a child	s 71AB	Level 3 imprisonment – 20 years maximum	1/1/2002 +
	s 71(1)(ab)	Level 3 imprisonment and/or 2400 penalty units	1/9/1997 – 31/12/2001
Trafficking in a drug of dependence (i.e less than commercial quantity, not to child)	s 71AC	Level 4 imprisonment – 15 years maximum	1/1/2002 +
	s 71(1)(b)	Level 4 imprisonment (15 years) and/or 1000 penalty units	1/9/1997 – 31/12/2001
	s 71(1)(b)	15 years and/or 1000 penalty units	18/12/1983 – 31/8/1997
Possession of substance, material, documents or equipment for purpose of trafficking	s 71A	Level 5 imprisonment – 10 years	1/9/1997 +
Supplying a drug of dependence to a child for use or sale by that child	s 71B	Level 4 imprisonment – 15 years maximum and/or fine of 1000 penalty units	1/9/1997 +
Possession of a tablet press	s 71C	Level 6 imprisonment – 5 years maximum and/or fine of 600 penalty units	10/5/2006+
Possession of precursor chemicals	s 71D	Level 6 imprisonment – 5 years maximum and/or fine of 600 penalty units	10/5/2006+

Penalties for cultivation of narcotic plant

Offence	<i>DPCS Act</i> Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Cultivation of a narcotic plant in not less than a large commercial quantity	72	Life imprisonment and fine not exceeding 5000 penalty units ⁵⁸⁵	1/1/2002 +

⁵⁸⁵ Cultivation of a narcotic plant in not less than a large commercial quantity is a category 1 offence if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

Cultivation of a narcotic plant not less than a commercial quantity	72A	Level 2 imprisonment – 25 years maximum ⁵⁸⁶	1/1/2002 +
	72(1)(ab)	Imprisonment 25 years and fine not exceeding 2500 penalty units	1/9/1997 – 31/12/2002
Cultivation of a narcotic plant in any other case where the judge or magistrate is satisfied on the balance of probabilities that the offence was not committed with purpose related to trafficking in that plant	72B(a)	(a) Level 8 imprisonment 1 year maximum and/or fine not exceeding 20 penalty units Note the provisions of s.76 in relation Magistrates Courts hearings	1/1/2002 +
	72(1)(a)	Level 8 imprisonment (1 year) and/or 20 penalty units	1/9/1997 – 31/12/2002
	72(1)(a)	Imprisonment 1 year and /or 20 penalty units	18/12/83 – 31/8/1997

If the offence is a category 1 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) (see *Sentencing Act 1991* ss 3, 5(2G)).

⁵⁸⁶ Cultivation of a narcotic plant in not less than a commercial quantity is a category 2 offence if committed on or after 20 March 2017 by an offender aged 18 years or more at the time of offending (*Sentencing Act 1991* s 3).

If the offence is a category 2 offence, the court must impose a custodial sentence under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with *Sentencing Act 1991* s 44) unless specified circumstances exist (see *Sentencing Act 1991* ss 3, 5(2G)).

Cultivation of a narcotic plant in any other case	72B(b)	Level 4 imprisonment-15 years maximum	1/1/2002 +
	72(1)(b)	Level 4 imprisonment (15 years) and/or 1000 penalty units	1/9/1997 – 31/12/2002
	72(1)(b)	Imprisonment 15 years and fine not exceeding 1000 penalty units	18/12/83 – 31/8/1997

Penalties for possession of a drug of dependence

Offence	<i>DPCS Act</i> Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Possession of a small quantity of cannabis or tetrahydrocannabinol and offence not committed for any purpose related to trafficking	73(1)(a)	Fine not exceeding 5 penalty units	1/9/1997 +
		Fine not exceeding 5 penalty units	18/12/1983 – 31/8/1997
Drug of dependence possessed for a purpose unconnected with trafficking	73(1)(b)	Level 8 imprisonment – 1 year maximum and/or fine not exceeding 30 penalty units	1/9/1997+
		1 year imprisonment and/or 30 penalty units	18/12/1983 – 31/8/1997
Any other case	73(1)(c)	Level 6 imprisonment 5 years maximum and/or fine not exceeding 400 penalty units	1/9/1997+
		5 years imprisonment and/or 400 penalty units	18/12/1983 – 31/8/1997

Penalties for using, introducing etc a drug of dependence

Offence	<i>DPCS Act</i> Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Using or attempting to use a drug of dependence a) Court is satisfied that the offence in relation to cannabis or tetrahydrocannabinol b) In other case	75(1)	Introducing a drug of dependence into another, without licence or authorisation under Act	1/9/97+
		a) Fine not exceeding 5 penalty units b) 1 year imprisonment and/or fine not exceeding 30 penalty units	18/12/1983 – 31/8/1997
Introducing a drug of dependence into another, without licence or authorisation under Act	74	Level 8 imprisonment – 1 year maximum and/or fine not exceeding 30 penalty units	1/9/97+
		1 year imprisonment and/or fine not exceeding 30 penalty units	18/12/1983 – 31/8/1997

Penalties for producing, selling, supplying and advertising psychoactive substances

Offence	<i>DPCS Act</i> Section	Maximum penalty (Current penalty shaded)	Applies to offence committed in period (Current period shaded)
Producing psychoactive substance (natural person)	56D	2 years maximum and/or fine not exceeding 240 penalty units	1/11/2017 +
Producing psychoactive substance (body corporate)	56D	Fine not exceeding 1200 penalty units	1/11/2017 +
Selling psychoactive substance (natural person)	56E(1)	2 years maximum and/or fine not exceeding 240 penalty units	1/11/2017 +
Selling psychoactive substance (body corporate)	56E(1)	Fine not exceeding 1200 penalty units	1/11/2017 +
Supplying psychoactive substance (natural person)	56E(2)	2 years maximum and/or fine not exceeding 240 penalty units	1/11/2017 +
Supplying psychoactive substance (body corporate)	56E(2)	Fine not exceeding 1200 penalty units	1/11/2017 +
Advertising psychoactive substance (natural person)	56F	2 years maximum and/or fine not exceeding 240 penalty units	1/11/2017 +
Advertising psychoactive substance (body corporate)	56F	Fine not exceeding 1200 penalty units	1/11/2017 +

Penalties for conspiring and aiding and abetting

Pursuant to *Drugs, Poisons and Controlled Substances Act 1981* ss 79 and 80, all the primary versions of extended liability for State drug offences attract the same maximum penalties as their reference offences.

There is no absolute bar to charging a conspiracy involving drug offending pursuant to *Crimes Act 1958* s 321C: *Pepe* (2000) 2 VR 412; [2000] VSCA 208. The charging decision has no impact on maximum penalties, as *Crimes Act 1958* s 321C(1)(a) has the same effect as s 79.

Last updated: 18 September 2020

2.7.8.2 Penalties for Commonwealth drug offences

Penalties for Commonwealth trafficking, cultivation and selling

Offence	<i>Criminal Code 1995</i> section	Maximum penalty	Applies to offence committed in period
Trafficking a commercial quantity of a controlled drug	s 302.2	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Trafficking a marketable quantity of a controlled drug	s 302.3	25 yrs imprisonment and/or 5,000 penalty units	6/12/2005+
Trafficking a controlled drug	s 302.4	10 yrs imprisonment and/or 2,000 penalty units	6/12/2005+
Cultivating a controlled plant for a commercial purpose in a commercial quantity	s 303.4	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Cultivating a controlled plant for a commercial purpose in a marketable quantity	s 303.5	25 yrs imprisonment and/or 5,000 penalty units	6/12/2005+
Cultivating a controlled plant for a commercial purpose	s 303.6	10 yrs imprisonment and/or 2,000 penalty units	6/12/2005+
Selling a commercial quantity of a controlled plant	s 304.1	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Selling a marketable quantity of a controlled plant	s 304.2	25 yrs imprisonment and/or 5,000 penalty units	6/12/2005+
Selling a controlled plant	s 304.3	10 yrs imprisonment and/or 2,000 penalty units	6/12/2005+

Penalties for Commonwealth manufacturing and pre-trafficking

Offence	<i>Criminal Code 1995</i> section	Maximum penalty	Applies to offence committed in period
Manufacturing a commercial quantity of a controlled drug	s 305.3	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Manufacturing a marketable quantity of a controlled drug	s 305.4	25 years imprisonment and/or 5,000 penalty units	6/12/2005+

Manufacturing a marketable quantity of a controlled drug in aggravating circumstances ⁵⁸⁷	s 305.4	28 years imprisonment and/or 5,600 penalty units	6/12/2005+
Manufacturing a controlled drug	s 305.5	10 years imprisonment and/or 2,000 penalty units	6/12/2005+
Manufacturing a controlled drug in aggravating circumstances ⁵⁸⁸	s 305.5	12 years imprisonment and/or 2,400 penalty units	6/12/2005+
Pre-trafficking a commercial quantity of a controlled precursor	s 306.2	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Pre-trafficking a marketable quantity of a controlled precursor	s 306.3	15 years imprisonment and/or 3,000 penalty units	6/12/2005+
Pre-trafficking a marketable quantity of a controlled precursor in aggravating circumstances ⁵⁸⁹	s 306.3	17 years imprisonment and/or 3,400 penalty units	6/12/2005+
Pre-trafficking a controlled precursor	s 306.4	7 years imprisonment and/or 1,400 penalty units	6/12/2005+
Pre-trafficking a controlled precursor in aggravating circumstances ⁵⁹⁰	s 306.4	9 years imprisonment and/or 1,800 penalty units	6/12/2005+

Penalties for importing / exporting

Offence	Criminal Code 1995 section	Maximum penalty	Applies to offence committed in period
Importing/exporting a commercial quantity of a border controlled drug/plant	s 307.1	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Importing/exporting a marketable quantity of a border controlled drug/plant	s 307.2	25 years imprisonment and/or 5,000 penalty units	6/12/2005+

⁵⁸⁷ Note: the additional elements for an aggravated offence are set out in Criminal Code s 310.4(3).

⁵⁸⁸ Note: the additional elements for an aggravated offence are set out in Criminal Code s 310.4(3).

⁵⁸⁹ Note: the additional elements for an aggravated offence are set out in Criminal Code s 310.4(3).

⁵⁹⁰ Note: the additional elements for an aggravated offence are set out in Criminal Code s 310.4(3).

Importing/exporting a border controlled drug/plant	s 307.3	10 years imprisonment and/or 2,000 penalty units	6/12/2005+
Importing/exporting a border controlled drug/plant – no defence relating to lack of commercial intent	s 307.4	2 years imprisonment and/or 400 penalty units	6/12/2005+
Importing/exporting a commercial quantity of a border controlled precursor with required intention or belief	s 307.11	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Importing/exporting a marketable quantity of a border controlled precursor with required intention or belief	s 307.12	15 years imprisonment and/or 3,000 penalty units	6/12/2005+
Importing/exporting a border controlled precursor with required intention or belief	s 307.13	7 years imprisonment and/or 1,400 penalty units	6/12/2005+

Penalties for Commonwealth possession

Offence	Criminal Code 1995 section	Maximum penalty	Applies to offence committed in period
Possession of a commercial quantity of a border controlled drug/plant unlawfully imported	s 307.5	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Possession of a marketable quantity of a border controlled drug/plant unlawfully imported	s 307.6	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Possession of a border controlled drug/plant unlawfully imported	s 307.7	2 years imprisonment and/or 400 penalty units	6/12/2005+
Possession of a commercial quantity of a border controlled drug/plant reasonably suspected of having been unlawfully imported	s 307.8	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Possession of a marketable quantity of a border controlled drug/plant reasonably suspected of having been unlawfully imported	s 307.9	25 years imprisonment and/or 5,000 penalty units	6/12/2005+

Possession of a border controlled drug/plant reasonably suspected of having been unlawfully imported	s 307.10	2 years imprisonment and/or 400 penalty units	6/12/2005+
Possession of a controlled drug	s 308.1	2 years imprisonment and/or 400 penalty units	6/12/2005+
Possession of a controlled precursor with required intention	s 308.2	2 years imprisonment and/or 400 penalty units	6/12/2005+
Possession of plant material, equipment or instructions for commercial cultivation of controlled plants with required intention	s 308.3	7 years imprisonment and/or 1,400 penalty units	6/12/2005+
Possession of substances, equipment or instructions for commercial manufacture of controlled drugs with required intention	s 308.4	7 years imprisonment and/or 1,400 penalty units	6/12/2005+

Penalties for Commonwealth drug offences involving children

Offence	Criminal Code 1995 section	Maximum penalty	Applies to offence committed in period
Supplying controlled drugs to children	s 309.2	15 years imprisonment and/or 3,000 penalty units	6/12/2005+
Supplying marketable quantities of controlled drugs to children for trafficking	s 309.3	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Supplying controlled drugs to children for trafficking	s 309.4	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Procuring children for trafficking marketable quantities of controlled drugs	s 309.7	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Procuring children for trafficking controlled drugs	s 309.8	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Procuring children for pre-trafficking marketable quantities of controlled precursors	s 309.10	Life imprisonment and/or 7,500 penalty units	6/12/2005+

Procuring children for pre-trafficking controlled precursors	s 309.11	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Procuring children for importing or exporting marketable quantities of border controlled drugs/plants	s 309.12	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Procuring children for importing or exporting border controlled drugs/plants	s 309.13	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Procuring children for importing or exporting marketable quantities of border controlled precursors with required intention	s 309.14	Life imprisonment and/or 7,500 penalty units	6/12/2005+
Procuring children for importing or exporting border controlled precursors with required intention	s 309.15	25 years imprisonment and/or 5,000 penalty units	6/12/2005+
Danger of serious harm to person under 14 from exposure to unlawful manufacturing of controlled drug or controlled precursor	s 310.2	9 years imprisonment and/or 1,800 penalty units	6/12/2005+
Causing harm to person under 14 from exposure to unlawful manufacturing of controlled drug or controlled precursor	s 310.3	9 years imprisonment and/or 1,800 penalty units	6/12/2005+

Penalties for conspiracy and other forms of extended liability

Criminal Code 1995 ss 11.1–11.6 address liability under Commonwealth law generally for forms of criminal complicity characterised as ‘extended liability’. These include attempt (s 11.1), complicity & common purpose (s 11.2), innocent agency (s 11.3), incitement (s 11.4) and conspiracy (s 11.5). Except for offences contrary to s 11.4 (incitement), these extended forms of liability all attract the same maximum penalties as their reference offences. Incitement attracts a scale of different maximum penalties depending on the maximum penalty of the reference offence.

Last updated: 26 February 2013

2.7.8.3 Statutory categories for Victorian drug offences

Sections 71–72B

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
71 Trafficking in a drug or drugs of dependence—large commercial quantity	Yes	No	Drug	Yes	Yes
71AA(1) Trafficking in a drug or drugs of dependence—commercial quantity	Yes	No	Drug	Yes	Yes
71AA(2) Trafficking in a drug or	Yes	No	Drug	Yes	Yes

drugs of dependence for criminal organisation—commercial quantity					
71AB Trafficking in a drug or drugs of dependence to a child	Yes	Yes	No	Yes	Yes
71AC Trafficking in a drug or drugs of dependence	Yes	Yes	No	Yes	Yes
71B Supply of drug of dependence to a child	Yes	Yes	No	No	No
71C Possession of tablet press	Yes	Yes	No	No	No
72 Cultivation of narcotic plants—large commercial quantity	Yes	No	Drug	Yes	Yes
72A Cultivation of narcotic plants—commercial quantity	Yes	No	Drug	Yes	Yes
72B Cultivation of narcotic plants	Yes	Yes	No	No	No

Sections 73(1)(a)–79(2)

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
73(1)(a) Possession of small quantity of cannabis etc.	Yes	Yes	No	No	No
73(1)(b) Possession of drug of dependence not for purpose of trafficking	Yes	Yes	No	No	No
73(1)(c) Possession of drug of dependence	Yes	Yes	No	No	No
74 Introduction of a drug of dependence into the body of another person	No	Yes	No	No	No
75(1) Use of drug of dependence – Cannabis etc.	No	Yes	No	No	No
75(2) Use of drug of dependence	No	Yes	No	No	No

79(1) Conspiracy	Yes	Yes	Drug ⁵⁹¹	Yes ⁵⁹²	Yes ⁵⁹³
79(2) Conspiracy	No	Yes	No	No	No

Sections 56D–56E

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERM- INATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
56D Produce psychoactive substance	Yes	Yes	No	No	No
56E(1) Sell psychoactive substance	Yes	Yes	No	No	No
56E(2) Supply psychoactive substance	Yes	Yes	No	No	No
56F Advertise psychoactive substance	Yes	Yes	No	No	No

Inapplicable statutory categories

No drug offences are indefinite sentence offences under *Sentencing Act 1991* ss 3, 18A – 18P.

Last updated: 1 November 2017

2.7.9 Offences against justice

Perverting the course of justice - Victorian statutory categories

Attempting to pervert the course of justice and perverting the course of justice are indictable and forfeiture offences. They are also offences for which a forensic sample order may be made, pursuant to *Crimes Act 1958* s 464ZF. They may not be determined summarily. No other statutory categories as defined in this Manual apply.

Perverting the course of justice - Commonwealth statutory scheme

The Commonwealth *Crimes Act 1914* (Cth) proscribes various types of conduct that undermine the course of justice, including acting with actual bias, destruction of evidence, certain conspiracies against justice and attempting to pervert the course of justice.

Offence name	<i>Crimes Act 1914</i> (Cth) section	Maximum penalty
Judge or magistrate acting oppressively or when interested	s 34	2 years
Giving false testimony	s 35	5 years

⁵⁹¹ If the principal offence of the conspiracy is a serious drug offence.

⁵⁹² If the principal offence of the conspiracy is a continuing criminal enterprise offence.

⁵⁹³ If the principal offence of the conspiracy is an automatic / civil forfeiture offence.

Fabricating evidence	s 36	5 years
Intimidation of witnesses	s 36A	5 years
Corruption of witnesses	s 37	5 years
Deceiving witnesses	s 38	2 years
Destroying evidence	s 39	5 years
Preventing witnesses from attending court	s 40	1 year
Conspiracy to bring false accusation	s 41	10 years
Conspiracy to defeat justice	s 42	5 years
Attempting to pervert justice	s 43	5 years
Compounding offences	s 44	3 years

Section 43 is designed as a ‘catch-all’ provision to cover any conduct not caught by the specific offences against justice contained in the Act.

Contempt of court - Victorian statutory categories

Contempt of court is a summary offence.

Offences against court security - Applicable statutory categories

The offence under s 4 of the *Court Security Act 1980* is indictable and a forfeiture offence. It is also an offence for which a forensic sample order may be made, pursuant to *Crimes Act 1958* s 464ZF.

It may be determined summarily (*Criminal Procedure Act 2009* s 28(1)(b)(iii)).

Perjury - Victorian statutory categories

Perjury is an indictable offence and a forfeiture offence. As it is an indictable offence, it is one for which a forensic sample order may be made pursuant to *Crimes Act* s 464ZF.

It may be determined summarily (*Criminal Procedure Act 2009* s 28 & Sched. 2, Item 4.26).

Last updated: 3 July 2014

2.7.10 Offences against public order

Riot offences - Applicable statutory categories

CURRENT OFFENCE SECTION ⁵⁹⁴	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
195I	Yes	Unclear ⁵⁹⁵	No	No	No

⁵⁹⁴ The common law offences of affray, rout and riot were repealed as of 13 September 2017, and the statutory offences of affray and violent disorder commenced on this date.

Violent disorder					
195H Affray	Yes	Yes	No	No	No

Penalties for resisting arrest offences

Offence	Offence section (<i>Crimes Act 1958</i>)	Penalty section (<i>Crimes Act 1958</i>)	Maximum penalty (Current penalty shaded)	Applies to offences committed on or after (Current penalty shaded)
Using a firearm to resist arrest	s 29(1)	s 29(1)	Level 5 imprisonment (10 years)	22/4/1992
			14 years' imprisonment	24/3/1986
Threatening injury to prevent arrest	s 30	s 30	Level 6 imprisonment (5 years)	1/9/1997
			Level 7 imprisonment (5 years)	22/4/1992
			10 years' imprisonment	23/3/1986
Assaulting police in the execution of duty	s 31(1)(b)	s 31(1)	Level 6 imprisonment (5 years)	1/9/1997
			Level 8 imprisonment (3 years)	22/4/1992
			5 years' imprisonment	23/3/1986
Assaulting police with intent to resist or prevent arrest	s 31(1)(c)	s 31(1)	Level 6 imprisonment (5 years)	1/9/1997
			Level 8 imprisonment (3 years)	22/4/1992
			5 years' imprisonment	23/3/1986

Resisting arrest - Applicable statutory categories

CURRENT OFFENCE SECTION	INDICTABLE?	SUMMARY DETERMINATION?	SERIOUS OFFENDER OFFENCE?	CONTINUING CRIMINAL ENTERPRISE OFFENCE	AUTOMATIC / CIVIL FORFEITURE OFFENCE?
29 Using firearm to resist arrest	Yes	Yes	No	No	No

⁵⁹⁵ - Section 195I(3) specifies two maximum penalties for the offence of violent disorder, depending on whether the offender was wearing a face-covering for a proscribed purpose. The lower maximum penalty is within the limit for summary hearings, while the higher maximum penalty is outside the range for summary hearing. It is therefore uncertain whether the offence can be heard and determined summarily. In a case where the issue arises, a court will need to consider *Criminal Procedure Act 2009* s 28(2) and the principles outlined in cases such as *Satalich* (2001) 3 VR 231, *Kingswell* (1985) 159 CLR 264 and *Courtie* [1984] AC 463 to determine whether s 195I creates one offence with two maximum penalties (in which case the offence cannot be heard summarily) or two offences with different maximum penalties (in which case the non-aggravated offence can be heard summarily).

30 Threatening injury to prevent arrest	Yes	Yes	No	No	No
31 Assault	Yes	Yes	No	No	No

Last updated: 30 January 2018

2.7.11 Occupational health and safety

Penalties for indictable OHS offences punishable by imprisonment

<i>OHS Act 2004</i> Section	Offence	Maximum penalty (Individual)	Maximum penalty (Company)
32	Recklessly endangering persons	5 years imprisonment and/or fine of 1800 penalty units	20,000 penalty units
125(2)	Assault or intimidation of inspector or person assisting	2 years imprisonment and/or fine of 240 penalty units	1,200 penalty units

Penalties for higher maximum fine OHS offences

Individual maximum penalty: Fine of 1800 penalty units

Corporate maximum penalty: Fine of 9000 penalty units.

<i>OHS Act 2004</i> Section	Offence
21(1)	Failure by employers to provide and maintain a safe working environment
23(1)	Exposure of non-employees to risks
24(1)	Exposure of non-employees to risks by self-employed
25(1)	Failure by employee to take reasonable care and comply with health and safety requirements
25(2)	Misuse of health and safety equipment
26(1)	Failure by managers to provide and maintain a safe working environment
27(1)	Failure by plant designers to comply with health and safety design requirements
29(1)	Failure by plant manufacturers to comply with health and safety design and information requirements
30(1)	Failure by plant suppliers to comply with health and safety design and information requirements
31(1)	Commissioning, installing or erecting a plant in an unsafe manner

Penalties for lower maximum penalty OHS offences

Individual maximum penalty: Fine of 500 penalty units

Corporate maximum penalty: Fine of 2500 penalty units.

<i>OHS Act 2004</i> Section	Offence
16(3)	Contravening an undertaking given in connection with a matter relating to a contravention or alleged contravention
28(1)	Building or structure designer failing to comply with health and safety design requirements
40(1)	Conducting an undertaking at a workplace without a required licence
62	Failure to comply with a provisional improvement notice which does not need to be affirmed by an inspector
63	Failure to comply with a provision improvement notice affirmed by an inspector
76(4)	Discrimination
110(4)	Failure to comply with a non-disturbance notice
111(4)	Failure to comply with an improvement notice
112(5)	Failure to comply with a prohibition notice
120(2)	Failure to comply with a direction from an inspector

Penalties for summary OHS offences

<i>OHS Act 2004</i> Section	Offence	Maximum penalty (Individual) Fine (P.U.)	Maximum penalty (Company) Fine (P.U.)
9(2)	Failure to provide information to Victorian Workcover Authority	60	300
10(2)	Misuse of information obtained in an official capacity	100	N/A
22(1)	Failure to monitor the health of employees and workplace conditions	240	1200
22(2)	Failure to record information on the health and safety of employees and employ people to advise on OH&S	60	300
35	Failure to consult with employees	180	900
38	Failure to report safety breaches to Victoria Workcover Authority	60	300

39	Failure to preserve incident site	60	300
40(2)	Failure to hold a required licence for the use of a plant	100	500
40(3)	Failure to hold a required licence for the use of a substance	100	500
40(4)	Failure to hold a required licence for an activity	100	500
41	Failure to hold the required qualifications or experience for an activity	100	500
42	Failure to hold the required permit or certificate of competency for an activity	100	500
43	Failure to commence negotiations for the formation of work groups within 14 days	10	50
44(2)	Failure to give written notice giving effect to negotiated agreement concerning formation of work group	10	50
44(4)	Failure to give written notice of variation of work group	10	50
48(2)	Failure by multiple employers to give written notice giving effect to negotiated agreement concerning formation of work group	10	50
48(4)	Failure by multiple employers to give written notice of variation of work group	10	50
53	Coercion in negotiations for the formation of work group	60	300
60(4)	Failure to circulate a provisional improvement notice	5	25
67	Failure to allow health and safety representative to attend course	60	300
69(1)	Failure to allow health and safety representative to perform duties	60	300
69(2)	Breach of privacy in provision of information to health and safety representative	60	300
71	Failure to keep and display list of health and safety representatives	5	25
72(1)	Failure to establish health and safety committee	10	50
73(2)	Appointment of inappropriate representative for resolution of health and safety issue	60	300
91	Misconduct by authorised representative of employee organisation	60	N/A
93	Obstruction of authorised representative of employee organisation	60	300

94	Impersonating an authorised representative of an employee organisation	60	N/A
100	Failure to provide information to an inspector	60	300
108(3)	Failure to comply with terms imposed for return of item taken by inspector	60	300
115(2)	Failure to circulate non-disturbance notice	5	25
119(3)	Failure to supply personal details to inspector	5	N/A
121	Failure to provide assistance to inspector	60	300
122(2)	Failure to allow person assisting inspector access to workplace	60	300
125(1)	Hindering an inspector	60	300
126	Impersonating an inspector	60	N/A
138(c)	Breach of adjournment order	10	50
151A	Failure to provide information used to calculate contribution payments to Victoria Workcover Authority	1	5
151B	Failure to provide information relating to employment, health and safety to Victoria Workcover Authority	1	5
151C	Failure to provide further information requested by Victoria Workcover Authority	1	5
151D	Failure to provide information concerning collection, collation, storage and retrieval of information to Victoria Workcover Authority	1	5
151E	Failure to comply with request by Victoria Workcover Authority to change manner of information collection, collation, storage, retrieval or transferral	1	5
153(1)	Provision of false or misleading information	240	1200
153(2)	Provision of false or misleading document	240	1200

Penalties for repealed OHS offences

Most sections of the *Occupational Health and Safety Act 2004* commenced operation on 1 July 2005. Prior to that time, the relevant legislation was the *Occupational Health and Safety Act 1985*. Section 47 contained a general penalty provision. The maximum penalties are set out in the following table:

	Individual	Company
Indictable offences	500 penalty units	2500 penalty units
Summary offences	100 penalty units	400 penalty units

All breaches of the Act were indictable offences: *Occupational Health and Safety Act 1985* ss 47(1), 47(3). Breaches of the regulations were capable of being summary offences.

Further penalty for subsequent offences

If the offender has previously been convicted of an offence under the *Occupational Health and Safety Act 1985*, then the Court may impose an additional penalty under s 53. The following table describes the range of penalties:

	Individual	Company
Indictable offences	Fines between 10 and 500 penalty units and up to 5 years' imprisonment	Between 50 and 2500 penalty units
Summary offences	Fines between 10 and 200 penalty units and up to 2 years' imprisonment	Between 50 and 400 penalty units

Statutory categories

All indictable offences under the *Occupational Health and Safety Act 2004* are triable summarily (*Criminal Procedure Act 2009* s 28 & Schedule 2 item 20.1).

These offences are forfeiture offences under Schedule 1 *Confiscation Act 1997*, but not civil or automatic forfeiture under that Act.

All indictable offences under the *Occupational Health and Safety Act 2004* are forensic sample offences pursuant to *Crimes Act 1958* s 464ZF.

None of these offences belong to the special 'serious offence' categories created by statute.

Last updated: 19 February 2020

2.7.12 Inchoate offences

Conspiracy

Victorian scheme: Crimes Act 1958 s 321C

The maximum penalties for conspiracy are set out in s 321C which provides:

(1) Where a person is convicted under section 321 of conspiracy to commit an offence or offences against a law or laws in force in Victoria—

(a) if the penalty for the relevant offence is fixed by law, the person shall be liable to a penalty not exceeding the penalty for the relevant offence;

(b) if the relevant offence, or any of the relevant offences, is an offence for which the penalty is imprisonment for a term the maximum length of which is not prescribed by law, the person shall be liable to level 4 imprisonment (15 years maximum);

(ba) despite paragraph (b), if the relevant offence, or any of the relevant offences, is murder or treason, the person is liable to—

(i) level 1 imprisonment (life); or

(ii) imprisonment for such other term as is fixed by the court—

as the court determines;

(c) subject to paragraphs (a), (b), (ba) and (d), if the relevant offence, or any of the relevant offences, is an offence for which a maximum penalty is prescribed by law, the person shall be liable to a penalty not exceeding that maximum penalty or the accumulated maximum penalties, as the case may be; or

(d) if the relevant offence, or each of the relevant offences, is triable only in the Magistrates' Court, the person shall be liable to—

(i) level 6 imprisonment (5 years maximum); or

(ii) imprisonment for a term not exceeding the maximum term of imprisonment (if any) prescribed in respect of the relevant offence or the greatest of the maximum terms prescribed in respect of any of the relevant offences, as the case requires—

whichever is the greater.

(2) Where a person is convicted under section 321 of conspiracy to commit an offence or offences against a law or laws in force only in a place outside Victoria—

(a) the person shall, if the relevant offence, or any of the relevant offences, is punishable by a term of imprisonment, be liable to a term of imprisonment not exceeding the maximum term of imprisonment prescribed in respect of the relevant offence; and

(b) the person shall, in any other case, be liable to a level 6 fine (600 penalty units maximum).

Interpretation of Crimes Act 1958 s 321C

Generally the maximum penalty is the same as for the substantive offence: s 321C(1)(c)

For most conspiracy offences the maximum penalty is determined pursuant to s 321C(1)(c), which provides that the maximum penalty is the same as that provided for the substantive offence. Other rules apply, however, in a number of special circumstances.

Maximum where a mandatory penalty is fixed by law: s 321C(1)(a)

If a mandatory penalty for the relevant offence is fixed by law, then s 321C(1)(a) applies to set that penalty as the maximum (not mandatory) penalty for the conspiracy offence. There are currently no identified indictable offences in Victoria with mandatory penalties, and as such this provision appears to have no current application: *Dimozantos* (1992) 174 CLR 504 (though compare *Pepe* (2000) 2 VR 412; [2000] VSCA 208, where the Court interpreted s 321C(1)(a) as providing that the maximum penalty of the substantive offence also applied to the conspiracy, without reference to the High Court's decision in *Dimozantos* (1992) 174 CLR 504).

Maximum where substantive offence maximum at large: s 321C(1)(b)

Where there is no maximum penalty, the operative maximum is Level 4 imprisonment (15 years): s 321C(1)(b).

Applying *Dimozantos* (1992) 174 CLR 504, life imprisonment is not 'a prescribed maximum penalty' and so, except in the case of conspiracy to commit murder or treason (s 321C(1)(ba)), if the maximum for the substantive offence is Level 1 imprisonment (life), the operative maximum for conspiracy to commit that offence will be Level 4 imprisonment (15 years).

This situation could arise if a person is charged with conspiracy under s 321 to traffick in a large commercial quantity of a drug of dependence, contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act 1981*.

Maximum penalty for conspiracy to murder or commit treason: s 321C(1)(ba)

The maximum penalty for conspiracy to commit murder or treason is either life imprisonment or 'such other term as is fixed by the court': s 321C(1)(ba).

Maximum penalty for conspiracy to commit multiple offences: s 321C(1)(c)

The offence of conspiracy may relate to a conspiracy to commit a single offence or multiple offences. Both forms of criminal conduct may be validly charged and no issue of duplicity arises. In both instances, there is a single conspiracy and the difference is only in the content of the agreement. Where it matters, one must look at the presentment to determine which has been charged: *DPP v Stark* [2006] VSCA 61.

Where a single conspiracy to commit multiple offences is charged, the maximum penalty is to be determined by reference to the ‘accumulated maximum penalties’ for those relevant offences. This novel provision has not been judicially considered, and nor is there any assistance as to its application in the Parliamentary debates.

Maximum where offence only triable in Magistrates’ Court: s 321C(1)(d)

Where the substantive offence is triable only in the Magistrates’ Court, the maximum penalty is the greater of either level 6 imprisonment (5 years) or the maximum prescribed for any of the substantive offences: s 321C(d).

Maximum for a conspiracy to commit an offence outside Victoria: s 321C(2)

Liability for conviction for a conspiracy to commit an offence outside Victoria is governed by s 321A. Under s 321C(2), if the substantive offence is punishable by imprisonment, the maximum penalty shall be the same as for the substantive offence. If the substantive offence is not punishable by imprisonment, the maximum penalty is a level 6 fine (600 penalty units).

Commonwealth scheme: Criminal Code 1995 s 11.5

Section 11.5 provides:

A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

The effect of this provision is that the same maximum penalty applies to conspiracy to commit an offence as applies to the offence itself. This does not mean that a sentencing judge should disregard the special considerations relevant to a conspiracy offence, including its inchoate quality: *Roche* [2005] WASCA 4, [3]–[4]; *R v Templer* [1999] VSCA 216, [3].

Common law offences

The maximum penalties for the common law offences of conspiracy to cheat and defraud and conspiracy to defraud are now both set to Level 4 imprisonment (15 years) by the *Crimes Act 1958* (Vic), s 320.

For conspiracy to commit common law offences not mentioned in s 320, the maximum penalty will be Level 4 imprisonment (15 years) as directed by the operation of s 321C(1)(b).

Statutory categories

The following categories apply to the offences of conspiracy created by s 321 of the *Crimes Act*.

Category	Inchoate conspiracy	Conspiracy to cheat and Conspiracy to cheat and defraud
Indictable	Y	Y
Summary determination, under s 28 or Schedule 2, <i>Criminal Procedure Act 2009</i> ?	N	\$
Serious offender offence, under Part 2A, Schedule 1, <i>Sentencing Act 1991</i>	Y	N
Forensic sample offence, under s 464ZF, <i>Crimes Act 1958</i>	Y	Y

Forfeiture offence, under s 3, Schedule 1, <i>Confiscation Act 1997</i>	Y	Y
Automatic forfeiture offence, under s 3, Schedule 2, <i>Confiscation Act 1997</i>	Y%	Y^
Civil forfeiture offence, under s 3, Schedule 2, <i>Confiscation Act 1997</i>	Y%	Y^
Continuing criminal enterprise offence, under Part 2B, Schedule 1A, <i>Sentencing Act 1991</i>	Y%%	Y^^
Indefinite sentence offence, under ss 3, 18A–18P <i>Sentencing Act 1991</i>	Y	N
Sexual offender registrable offence, under s 7, Schedules 1, 2, <i>Sex Offenders Registration Act 2004</i>	Y	N

\$ - These offences are triable summarily 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.

% - Applies only to select conspiracy offences, including conspiracy under the *Drugs, Poisons and Controlled Substances Act 1981*, money laundering and conspiracy to commit offences under ss 111A, 111B and 111C of the *Fisheries Act 1995*

%% - Applies only if the conspiracy offence is also an automatic forfeiture offence and the value of the property is \$50,000 or more

^ - Applies only if the value of the property is at least \$50,000 (single offence) or \$75,000 (combined value for multiple offences)

^^ - Applies only if the value of the property concerned is at least \$50,000

Incitement

Incitement - Victorian scheme

Crimes Act 1958 s 321G creates a statutory offence of incitement. Maximum penalties are set by s 321I. The penalty is determined in the same manner as for conspiracy.

The *Drugs, Poisons and Controlled Substances Act 1981* also proscribes incitement. The offence of aiding and abetting under s 80 of the Act covers offences against the Act. While section 321I does not apply to offences charged under the *Drugs, Poisons and Controlled Substances Act 1981*, this chapter deals with sentencing principles relevant to incitement and so remains relevant for those offences.

Crimes Act 1958 s 321I Incitement

The penalties for s 321G incitements are determined by application of s 321I.

Section 321I provides:

(1) Where a person is convicted under section 321G of incitement to commit an offence or offences against a law or laws in force in Victoria -

(a) if the penalty for the relevant offence is fixed by law, the person shall be liable to a penalty not exceeding the penalty for the relevant offence;

(b) if the relevant offence, or any of the relevant offences, is an offence for which the penalty is imprisonment for a term the maximum length of which is not prescribed by law, the person shall be liable to level 4 imprisonment (15 years maximum);

(ba) despite paragraph (b), if the relevant offence, or any of the relevant offences, is murder or treason, the person is liable to -

(i) level 1 imprisonment (life); or

(ii) imprisonment for such other term as is fixed by the court -

(iii) as the court determines;

(c) subject to paragraphs (a), (b), (ba) and (d), if the relevant offence, or any of the relevant offences is an offence for which a maximum penalty is prescribed by law, the person shall be liable to a penalty not exceeding that maximum penalty or the accumulated maximum penalties, as the case may be; or

(d) if the relevant offence, or each of the relevant offences, is triable only in the Magistrates' Court, the person shall be liable to -

(i) level 6 imprisonment (5 years maximum); or

(ii) imprisonment for a term not exceeding the maximum term of imprisonment (if any) prescribed in respect of the relevant offence or the greatest of the maximum terms prescribed in respect of any of the relevant offences as the case requires -

whichever is the greater.

(2) Where a person is convicted under section 321G of incitement to commit an offence or offences against a law in force only in a place outside Victoria -

(a) the person shall, if the relevant offence, or any of the relevant offences, is punishable by a term of imprisonment, be liable to a term of imprisonment not exceeding the maximum term of imprisonment prescribed in respect of the relevant offence; and

(b) the person shall, in any other case, be liable to a level 6 fine (600 penalty units maximum).

Interpretation of Crimes Act 1958 s 321I

Generally the maximum penalty is the same as for the substantive offence: s 321I(1)(c)

For most incitement offences the maximum penalty is determined pursuant to s 321I(1)(c), which provides that the maximum penalty is the same as that provided for the relevant offence. However other rules apply (sometimes to the same effect) in a number of special circumstances.

Maximum where a mandatory penalty is fixed by law: s 321I(1)(a)

If a mandatory penalty for the relevant offence is fixed by law, then s 321I(1)(a) applies to set that penalty as the maximum (not mandatory) penalty for the incitement offence. There are currently no identified indictable offences in Victoria with mandatory penalties, and as such this provision appears to have no current application: *Dimozantos* (1992) 174 CLR 504 (though compare *Pepe* (2000) 2 VR 412; [2000] VSCA 208, where the Court interpreted s 321I(1)(a) as providing that the maximum penalty of the substantive offence also applied to the conspiracy, without reference to the High Court's decision in *Dimozantos* (1992) 174 CLR 504).

Maximum where the substantive offence maximum is at large: s 321I(1)(b)

Where there is no maximum penalty, the operative maximum is Level 4 imprisonment (15 years): s 321I(1)(b).

Applying *Dimozantos* (1992) 174 CLR 504, life imprisonment is not, 'a prescribed maximum penalty' and so, except in the case of incitement to commit murder or treason (s 321I(1)(ba)), if the maximum for the substantive offence is Level 1 imprisonment (life), the operative maximum for incitement to commit that offence will be Level 4 imprisonment (15 years).

Maximum penalty for incitement to murder or treason: s 321I(1)(ba)

The maximum penalty for incitement to murder or treason is either life imprisonment or 'such other term as is fixed by the court': s 321I(1)(ba).

Maximum penalty for incitement to commit multiple offences: s 321I(1)(c)

The offence of incitement may relate to an incitement to commit a single offence or multiple offences. By parity of reasoning with conspiracy, both forms of criminal conduct may be validly charged and it is not expected that any issue of duplicity arises. In both instances, there is a single incitement and the difference is only in the content of the conduct incited: See, in the analogous context of conspiracy, *DPP v Stark* [2006] VSCA 61.

Where a single incitement to commit multiple offences is charged, the maximum penalty is to be determined by reference to the 'accumulated maximum penalties' for those relevant offences. This novel provision has not been judicially considered, and nor is there any assistance as to its application in the Parliamentary debates.

Maximum where the offence is only triable in the Magistrates' Court: s 321I(d)

Where the substantive offence is triable only in the Magistrates' Court, the maximum penalty is the greater of either level 6 imprisonment (5 years) or the maximum prescribed for any of the substantive offences: s 321I(d).

Maximum for a incitement to commit an offence outside Victoria: s 321I(2)

Liability for conviction for an incitement to commit an offence outside Victoria is governed by s 321H. Under s 312I(2), if the substantive offence is punishable by imprisonment, the maximum penalty shall be the same as for the substantive offence. If the substantive offence is not punishable by imprisonment, the maximum penalty is a level 6 fine (600 penalty units).

Commonwealth scheme: Criminal Code 1995 s 11

Liability for incitement to commit Commonwealth offences is created by s 11.4 of the *Criminal Code*.

11.4 Incitement

(1) A person who urges the commission of an offence is guilty of the offence of incitement.

...

(5)...

Penalty:

(a) if the offence incited is punishable by life imprisonment--imprisonment for 10 years; or

(b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment--imprisonment for 7 years; or

(c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more--imprisonment for 5 years; or

(d) if the offence is otherwise punishable by imprisonment--imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or

(e) if the offence incited is not punishable by imprisonment--the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Statutory categories

Indictable	Y
Summary determination, under s 28 or Schedule 2, <i>Criminal Procedure Act 2009</i> ?	Y*
Serious offender offence, under Part 2A, Schedule 1, <i>Sentencing Act 1991</i>	Y*
Forensic sample offence, under s 474ZF, Schedule 8, <i>Crimes Act 1958</i>	Y*
Forfeiture offence, under s 3, Schedule 1, <i>Confiscation Act 1997</i>	Y*
Automatic forfeiture offence, under s 3, Schedule 2, <i>Confiscation Act 1997</i>	Y^
Civil forfeiture offence, under s 3, Schedule 2, <i>Confiscation Act 1997</i>	Y^
Continuing criminal enterprise offence, under Part 2B, Schedule 1A, <i>Sentencing Act 1991</i>	Y^^
Indefinite sentence offence, under ss 3, 18A – 18P <i>Sentencing Act 1991</i>	Y*
Sexual offender registrable offence, under s 7, Schedules 1, 2, <i>Sex Offenders Registration Act 2004</i>	Y*

[^] - Applies only to incitement to commit drug offences listed in Schedule 2 of the *Confiscation Act 1997* (Vic)

^{^^} - Applies only to incitement to commit drug offences listed in Schedule 2 of the *Confiscation Act 1997*(Vic) where the value of the property concerned is \$50,000 or more

Attempt

Victorian scheme

Crimes Act 1958 s 321M creates the statutory offence of attempt. Maximum penalties are set by s 321P of the Act. Generally, attempt offences are punishable by a maximum penalty one level lower than that applied to the substantive offence attempted.

Some substantive offences are drafted to cover 'attempted' conduct, most notably the primary indictable offences in the *Drugs, Poisons and Controlled Substances Act 1981*. While section 321P does not apply to these offences the general principles examined here may be equally relevant to those offences.

Crimes Act 1958 s 321P Attempts

The penalties for s 321M attempts are determined by application of s 321P.

Section 321P provides:

(1) A person convicted of attempting to commit an offence is liable-

(a) if the penalty for the relevant offence is set out by reference to an expression specified in column 1 of the Table, to the penalty set out opposite it in column 2 of the Table:

TABLE

Column 1	Column 2
Level 1 imprisonment (life)	Level 2 imprisonment (25 years maximum)
Level 2 imprisonment (25 years maximum)	Level 3 imprisonment (20 years maximum)
Level 2 fine (3000 penalty units maximum)	Level 3 fine (2400 penalty units maximum)
Level 3 imprisonment (20 years maximum)	Level 4 imprisonment (15 years maximum)
Level 3 fine (2400 penalty units maximum)	Level 4 fine (1800 penalty units maximum)
Level 4 imprisonment (15 years maximum)	Level 5 imprisonment (10 years maximum)

Level 4 fine (1800 penalty units maximum)	Level 5 fine (1200 penalty units maximum)
Level 5 imprisonment (10 years maximum)	Level 6 imprisonment (5 years maximum)
Level 5 fine (1200 penalty units maximum)	Level 6 fine (600 penalty units maximum)
Level 6 imprisonment (5 years maximum)	Level 7 imprisonment (2 years maximum)
Level 6 fine (600 penalty units maximum)	Level 7 fine (240 penalty units maximum)
Level 7 imprisonment (2 years maximum)	Level 8 imprisonment (1 year maximum)
Level 7 fine (240 penalty units maximum)	Level 8 fine (120 penalty units maximum)
Level 8 imprisonment (1 year maximum)	Level 9 imprisonment (6 months maximum)
Level 8 fine (120 penalty units maximum)	Level 9 fine (60 penalty units maximum)
Level 9 imprisonment (6 months maximum)	Level 10 fine (10 penalty units maximum)
Level 9 fine (60 penalty units maximum)	Level 10 fine (10 penalty units maximum)
Level 10 fine (10 penalty units maximum)	Level 11 fine (5 penalty units maximum)
Level 11 fine (5 penalty units maximum)	Level 12 fine (1 penalty unit maximum)
Level 12 fine (1 penalty unit maximum)	Level 12 fine (1 penalty unit maximum)

(b) if the penalty for the relevant offence is not set out by reference to an expression specified in column 1 of the Table in paragraph (a), to a penalty not exceeding 60% of the maximum penalty fixed or prescribed by law for the relevant offence; or

(c) if the maximum penalty for the relevant offence is not fixed or prescribed by law, to Level 6 imprisonment (5 years maximum).

(1A) For the avoidance of doubt, it is declared that if a person is convicted of attempting to commit murder or treason, the person is liable to level 2 imprisonment (25 years maximum).

(2) A person convicted under this Division of attempting to commit an offence for which, under another enactment, a penalty is provided that is lower than that provided under sub-section (1), the person is liable only to that lower penalty.

(3) In this section, a reference to a maximum penalty includes, in relation to an offence against the law of a place outside Victoria, a reference to a maximum penalty (not exceeding life imprisonment) fixed or prescribed by a law of that place and, if a maximum penalty so fixed or prescribed exceeds life imprisonment, is a reference to life imprisonment.

Interpretation of Crimes Act 1958 s 321P

Maximum penalty where the substantive offence is governed by a level of fine or imprisonment: s 321P(1)(a)

Under s 321P(1)(a), if the substantive offence is punishable using the levels of imprisonment introduced by the *Sentencing Act 1991*, then the maximum penalty for an attempt is one level lower than the substantive attempt. If the maximum penalty is Level 9 imprisonment, the lowest level of imprisonment, the maximum penalty becomes a level 10 fine. An attempt to commit an offence punishable by a level 12 fine remains punishable by a level 12 fine.

Maximum penalty for attempted murder or attempted treason: s 321P(1A)

Section s 321P(1A) provides that the maximum penalty for attempted murder and attempted treason is level 2 imprisonment (25 years).

Maximum penalty where substantive offence is not governed by a level of imprisonment or fine: s 321P(1)(b)

If the penalty is not set as a level of imprisonment, then by s 321P(1)(b), the maximum penalty for the attempt is 60% of the maximum penalty for the substantive offence.

Offences for which the maximum penalty is not fixed in terms of levels of imprisonment include offences:

- contrary to the *Firearms Act 1996*
- against laws outside Victoria.

Maximum penalty where no maximum penalty applies to the substantive offence: s 321P(1)(c)

Under s 321P(1)(c), if the maximum penalty for the substantive offence is at large, then the maximum penalty for the attempt is level 6 imprisonment (5 years).

Maximum penalty for indictable attempts tried summarily: s 321P(2)

Section 321P(2) provides that the table in s 321P(1)(a) is subject to reduced maximum penalties contained in any other Act. By s 113 of the *Sentencing Act 1991*, where an offence is tried summarily the maximum penalty will be 2 years' imprisonment.

Commonwealth scheme: Criminal Code 1995 s 11

Liability for attempts is created by s 11.1 of the *Criminal Code*. Certain specific offences in the Code are made exempt from the attempt provisions, such as s 474.8 (Possession or control of data or a device with intent to modify a telecommunications device identifier).

11.1 Attempt

(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

Statutory categories

Indictable	Y*
Summary determination, under s 28 or Schedule 2, <i>Criminal Procedure Act 2009</i> ?	Y*
Serious offender offence, under Part 2A, Schedule 1, <i>Sentencing Act 1991</i>	Y*
Forensic sample offence, under s 474ZF, Schedule 8, <i>Crimes Act 1958</i>	Y*
Forfeiture offence, under s 3, Schedule 1, <i>Confiscation Act 1997</i>	Y*
Automatic forfeiture offence, under s 3, Schedule 2, <i>Confiscation Act 1997</i>	Y*
Civil forfeiture offence, under s 3, Schedule 2, <i>Confiscation Act 1997</i>	Y*
Continuing criminal enterprise offence, under Part 2B, Schedule 1A, <i>Sentencing Act 1991</i>	Y^
Indefinite sentence offence, under ss 3, 18A–18P <i>Sentencing Act 1991</i>	Y*
Sexual offender registrable offence, under s 7, Schedules 1, 2, <i>Sex Offenders Registration Act 2004</i>	Y*

^ - Applies only to attempts to commit automatic forfeiture offences where the value of the property concerned is \$50,000 or more

Last updated: 3 July 2014

3 Summary Hearings

1. This chapter examines the procedure for determining offences summarily. This procedure applies to the hearing of summary offences and indictable offences heard summarily (*CPA 2009 ss 27, 30*).

Last updated: 15 December 2021

3.1A Overriding Objectives of the Magistrates' Court Rules

1. The *Magistrates' Court Criminal Procedure Rules 2019* states that the overriding objective of the rules is "to secure the just and timely determination of every criminal proceeding". In applying and interpreting the rules, the court must give effect to this overriding objective. This includes:

- (a) ensuring simplicity in procedure, fairness in administration and the elimination of unnecessary delay;
 - (b) efficiently determining all the issues in the case;
 - (c) ensuring an appropriate allocation of the Court's resources, while taking into account the needs of other cases (*Magistrates' Court Criminal Procedure Rules 2019 r 5*).
2. The rules state that the Court must further this objective by active case management to:
- (a) promote the early resolution of summary proceedings;
 - (b) facilitate accurate and early disclosure of the prosecution case once a proceeding is commenced;
 - (c) encourage parties to discuss issues in dispute relating to disclosure and negotiate outcomes;
 - (d) decide the order in which the issues are to be resolved;
 - (e) fix timetables or otherwise manage the progress of the case;
 - (f) make use of technology to further the overriding objective; and
 - (g) give directions to ensure that the hearing of a case proceeds in a timely manner and efficiently (*Magistrates' Court Criminal Procedure Rules 2019 r 5*).
3. Parties to proceedings must assist the Court to further this overriding objective and ensure cases are dealt with fairly and expeditiously. Parties must also help the court minimise the delay between commencement and conclusion of proceedings, except where it is necessary to identify issues genuinely in dispute (*Magistrates' Court Criminal Procedure Rules 2019 r 5*).
4. The court may exercise any power under the Rules on the application of a party, a person with a sufficient interest or on the court's own motion (*Magistrates' Court Criminal Procedure Rules 2019 r 8*).

Last updated: 31 August 2020

3.1 Location of Hearing

1. A summary proceeding is usually heard in the Magistrates' Court that is closest to:
- (a) the place where the offence is alleged to have been committed; or
 - (b) the place of residence of the accused (*CPA 2009 s 11*).
2. The appropriate venue for the hearing may be changed in the following circumstances:
- The Chief Magistrate may specify a venue of the Magistrates' Court as a venue for the hearing of a specified criminal proceeding or a specified class of criminal proceeding (*CPA 2009 s 11*); or
 - The court may order that a hearing will be held at another place or venue that it considers appropriate if:

- a fair hearing cannot be achieved at the current venue; or
- for any other reason it is appropriate to do so (CPA 2009 s 31).

Last updated: 3 December 2009

3.2 Notice to Appear Procedure

1. A police officer or an authorised public official acting in the performance of his or her duties may serve a "notice to appear" on a person if the member or official reasonably suspects that that person has committed a summary offence or an indictable offence triable summarily (CPA 2009 s 21).
2. A notice to appear must be in Form 7 of the *Magistrates' Court Criminal Procedure Rules 2019* (Magistrates' Court Criminal Procedure Rules 2019 r 16).
3. A notice to appear must contain the following information and be signed by the person serving the notice:
 - the name of the person serving the notice;
 - the name of the employer of the person serving the notice, if he or she is an authorised public official;
 - a telephone number, email address and business address for contacting the person serving the notice;
 - the full name and address of the person served with the notice;
 - the offence the person served with the notice is suspected of having committed;
 - the circumstances of the suspected offence, in general terms;
 - a direction that the person served with the notice must appear at the appropriate venue of the Magistrates' Court at a specified date and time (at least 28 days after the date of service of the notice to appear) to answer the charge; and
 - a summary of Division 2 of Part 2.3 of the CPA 2009 (CPA 2009 s 21).
4. The police officer or authorised public official who serves a notice to appear must file a charge sheet to commence criminal proceedings within 14 days, or the notice to appear lapses. The charge-sheet must be filed along with a copy of the notice to appear and an affidavit of service of the notice (CPA 2009 s 22; *Magistrates' Court Criminal Procedure Rules 2019* r 16).⁵⁹⁶
5. An informant may commence proceedings by filing a charge-sheet in the normal manner after a notice to appear lapses. If this occurs, the hearing follows the usual summary procedure, as if the notice to appear had not been issued (CPA 2009 s 22).
6. The notice to appear procedure modifies the summary hearing procedure in the following ways:
 - the court must hold a mention hearing on the date specified in the notice to appear. This date must be at least 28 days from the date of serving the notice to appear (CPA 2009 ss 10, 21);
 - the informant must serve a preliminary brief on the accused within 21 days of filing the charge-sheet and have a copy of the brief available for the accused or his or her legal practitioner on the return date (CPA 2009 s 24);
 - a notice in Form 8 or 9 of the *Magistrates' Court Criminal Procedure Rules 2009*, as the case requires, must accompany a preliminary brief or a full brief (*Magistrates' Court Criminal Procedure Rules 2019* r 18);

⁵⁹⁶ Criminal proceedings commence when the informant files the charge-sheet, rather than when he or she serves the notice to appear (CPA 2009 ss 5, 26).

- the parties must hold a summary case conference before the charge is set down for a contest mention hearing or a summary hearing (CPA 2009 s 54); and
 - the accused may not request a copy of the full brief until after the summary case conference (CPA 2009 s 54).
7. Apart from the above modifications, a court conducts a criminal proceeding commenced following a notice to appear in the usual manner.
 8. The notice to appear procedure is designed to provide a simple and efficient way for the police to inform an accused that he or she may be charged with an offence. It is hoped to avoid the delays commonly associated with the charge and summons procedure (Victoria, *Parliamentary Debates*, Legislative Assembly, Thursday 4 December 2008, 4973 (Mr Hulls (Attorney-General)). Compare *Police Powers and Responsibilities Act 2000* (Qld) s 382).

Last updated: 31 August 2020

3.3 Summary case conference

1. The summary case conference is a meaningful discussion between the prosecution and the accused regarding pre-trial disclosure, the issues in dispute and the prospects of resolving the charges. It can be conducted in any manner, including in person, over the phone or by other means of communication (*Magistrates' Court Criminal Procedure Rules 2019* r 22).
2. One of the expected benefits of the summary case conference is that following a request by the defence, the prosecution will provide a copy of specific relevant witness statements or test results. These will reveal the strength or weakness of the prosecution's case. In suitable cases, this targeted disclosure may be a more efficient use of police resources than preparing a full brief.
3. The CPA 2009 states that:
 - (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 (CPA 2009 s 54(1)).
4. Evidence of anything said or done in the course of a case conference is not admissible in any later proceeding or judicial inquiry. Documents prepared solely for the purpose of the conference are similarly inadmissible. These restrictions on admissibility are designed to promote open discussion of the case between the parties (CPA 2009 s 54; CPA 2009, Explanatory Memorandum, clause 54).
5. A magistrate or a registrar may direct the parties to attend a summary case conference, regardless of whether a Notice to Appear is issued, where:
 - Victoria Police provides a Summary Case Conference Service; and
 - a preliminary brief or a full brief has been served on the accused (or their legal representative) before the case is listed for contest mention or summary hearing (CPA 2009 s 54; *Magistrates' Court Practice Direction No 3 of 2010*).
6. If a preliminary brief was served on the accused within 21 days of filing the charge-sheet, a summary case conference must be held 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 s 39(1) (CPA 2009 s 54(2)).

7. If the accused is not legally represented, the court as constituted by a magistrate, registrar or judicial registrar may dispense with the need for a summary case conference (CPA 2009 s 54; *Magistrates' Court Criminal Procedure Rules 2019* r 25; *Magistrates' Court Practice Direction No 3 of 2010*).
8. The parties may agree to hold a summary case conference even if the police did not issue a notice to appear (CPA 2009 s 54).

Last updated: 31 August 2020

3.4 Preliminary Hearings

1. The following hearings may be held prior to the summary contested hearing:
 - a mention hearing; and
 - a contest mention hearing (CPA 2009 ss 53, 55).

Mention Hearing

2. A mention hearing is usually the first hearing for a criminal proceeding that will be determined summarily. The Magistrates' Court must list the matter for mention hearing after the charge-sheet is filed if the accused is charged with a summary offence, or if the informant requests a summary hearing of an indictable offence triable summarily (CPA 2009 s 10).
3. Where the informant is a police officer, he or she must have the following documents available for providing to the accused at the first mention hearing:
 - (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 (CPA 2009 s 53A).
4. This obligation to provide documents at a mention hearing does not apply in proceedings for a traffic camera offence (CPA 2009 s 53A).
5. 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) proceeding 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 (CPA 2009 s 53).
6. The court may only hold a summary hearing for an indictable offence that may be heard and determined summarily if the court considers that it is appropriate to do so and the accused consents. The court must consider the seriousness of the offence, the adequacy of sentences available, the status of co-accused and any other matters it considers relevant. The accused may communicate his or her consent through counsel and, with the leave of the court, may withdraw that consent at any time (CPA 2009 s 29. See 2.5 Summary and Indictable Offences for further details.
7. If the accused is charged with an offence punishable by imprisonment and does not have legal representation on the return date (which will usually be the first mention hearing), then the court must:
- ask the accused whether he or she has sought legal advice;
 - grant an adjournment if the accused requests, provided the court is satisfied that he or she has not had a reasonable opportunity to obtain legal advice; and
 - inform the accused that he or she has the right to legal aid if he or she is eligible under the *Legal Aid Act 1978* (CPA 2009 s 33).⁵⁹⁷

Contest Mention Hearing

8. The court may conduct a contest mention hearing at any time between the first date on which the proceeding is listed before the court (the return date) and the date on which the charge is heard (CPA 2009 ss 3, 55).
9. At a contest mention hearing, the court may:

⁵⁹⁷ The obligation to inform the accused of the right to legal aid is a new obligation on magistrates, and appears to be designed to comply with the *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(e).

- (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 [Part 3.2 of the Act];
- (i) require or request a party to do anything else for the case management of the proceeding (CPA 2009 s 55).

10. The accused must attend all contest mention hearings unless the court excuses him or her from attending (CPA 2009 ss 55, 330). See 9.1 Presence of the Accused for information on when an accused may be required to attend a hearing by audio-visual link.
11. *Magistrates' Court Practice Direction No 3 of 2015* sets out the usual way in which contest mention hearings are conducted:

(1) Unless impracticable, all contest mention hearings are to be heard in a separate list and should not be part of any other list (e.g. a criminal mention list).

(2) Ordinarily, the Court will proceed as follows:

(a) Request the prosecution to provide the summary of the offence (supplemented, where appropriate, by further particulars of the offence or evidence proposed to be presented at the contested hearing or plea hearing);

(b) Request the accused's legal representative or the accused to [identify] the issue or issues in dispute;

(c) May, if appropriate, comment upon the issue or issues in dispute;

(d) May indicate that, if the accused pleads guilty to the charge for the offence, the Court would be likely to impose on the accused an immediate sentence of imprisonment or a sentence of a specified type.

(e) Require from the parties information, including:

(i) The estimated number and availability of witnesses (other than the accused) for the hearing and whether any witnesses are from interstate or overseas;

(ii) Whether the accused is legally represented and has funding for continued legal representation up to and including the hearing;

(iii) Whether there are any particular requirements or, or facilities needed for, witnesses and interpreters;

(iv) A party to make, file or serve any written or oral material required by the court for the purposes of the proceeding.

12. Where the proceeding includes a charge for a sexual offence, the parties must file a contest mention information form at the contest mention before a date for a summary contested hearing is fixed. The contest mention information form is Form A of *Magistrates' Court Practice Direction 7 of 2018*.
13. The parties must also file a Notice of Readiness for Hearing form in Form B of *Magistrates' Court Practice Direction 7 of 2018*. This form must be filed either at the contest mention or a special mention at least 14 days before the summary contested hearing.
14. The parties should clearly identify the issues in the case at the contest mention, so as to avoid "trial by ambush" (*DPP v Cummings* [2006] VSC 327).

Last updated: 15 December 2021

3.5 Preliminary Disclosure

1. The prosecution has disclosure obligations so that the accused knows the allegations against him or her and can prepare his or her plea or defence. These obligations include:
 - service of a preliminary brief (*CPA 2009 s 35*);
 - service of a full brief (*CPA 2009 s 39*);
 - continuous disclosure obligations (*CPA 2009 s 42*); and
 - contest mention hearing disclosure obligations (*CPA 2009 s 55*).

2. The accused is also under limited disclosure obligations to ensure effective case management and to avoid "trial by ambush". The defence must indicate whether it will call any expert evidence or any alibi evidence (CPA 2009 ss 50, 51). The court can also ask the defence at the contest mention hearing to indicate the evidence it proposes to adduce and the issues in dispute (CPA 2009 s 55).
3. An accused charged with a summary offence or with an indictable offence where the charge-sheet requests a summary hearing must receive the following information when served with a summons or when a warrant to arrest is executed:
 - a copy of the charge-sheet;
 - details of when and where the matter is listed to be heard; and
 - a notice in Form 8 of the *Magistrates' Court Criminal Procedure Rules 2019*, which provides:
 - a summary of the accused's pre-hearing disclosure rights in Division 2 of Part 3.2 of the Act;
 - advice that the accused should seek legal advice and is entitled, if eligible, to legal aid under the *Legal Aid Act 1978*; and
 - details on how to contact Victoria Legal Aid, the Federation of Community Legal Centres and Victoria Aboriginal Legal Service (CPA 2009 ss 13, 15; *Magistrates' Court Criminal Procedure Rules 2019* r 18).
4. However, failure to provide this information does not vitiate the proceedings, though it may be cause for an adjournment if the plaintiff is prejudiced (*Guss v Magistrates' Court of Victoria* [2015] VSC 259).

Preliminary Brief

5. The "preliminary brief" must be served on the accused:
 - within 21 days after the charge-sheet is filed, if the accused was served with a notice to appear; or
 - within 14 days of the accused making a written request for the brief from the informant (CPA 2009 s 35).
6. The informant may serve a preliminary brief on the accused at any time, in the absence of a request (CPA 2009 s 35).
7. If the informant serves a preliminary brief within 21 days of filing the charge-sheet (whether or not the accused was served with a notice to appear), the parties must conduct a summary case conference before the charge is set down for a contest mention hearing or a summary hearing, or the defence requests a full brief (CPA 2009 s 54(2)). See 3.3 Summary case conference.
8. The preliminary brief must contain:
 - a copy of the charge-sheet;
 - a notice in Form 10 of the *Magistrates' Court Criminal Procedure Rules 2019*, which contains:

- a checklist of the required contents of the preliminary brief and that the informant's statement and other witness statements may be used as evidence in the proceeding if the accused does not attend (see 3.10 Non-Attendance of a Party);
- an explanation of the importance of obtaining legal representation;
- information on the consequences of non-attendance, depending on whether the accused is on bail or summons;
- advice that the accused has the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
- details of how to contact Victoria Legal Aid;
- a complete and accurate statement by the informant of the material available to the prosecution, including:
 - a statement of the alleged facts on which the charge is based and the evidence to support those facts;
 - a description of the background to and consequences of the alleged offence, if possible;
 - a summary of any statements by the accused concerning the alleged offence, including any confessions or admissions;
 - a list of people the prosecution may call as witnesses, including whether they have made statements; and
 - a list of things the prosecution may tender as exhibits, and whether these things are currently in the prosecution's possession;
- any evidentiary certificate that has been issued under an Act that it is relevant and available;
- a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions known at that time;
- if relevant, written notice that the informant refuses to disclose certain information, documents or things that are otherwise required as part of the preliminary brief and the grounds for refusing to disclose; and
- a list of orders that are or will be sought (*CPA 2009 ss 37, 38; Magistrates' Court Criminal Procedure Rules 2019 r 19*).

9. The statement by the informant in the preliminary brief must either 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 (*CPA 2009 s 38*).

Full Brief

10. The accused may require the prosecution to serve a "full brief". The accused may make the request after the summary case conference is held, if the accused was served with a preliminary brief within 21 days after the charge-sheet was filed. Otherwise, the accused may make the request at any time after the proceeding has commenced (*CPA 2009 s 39(1A)*).

11. The police may also serve a full brief at any time without a request. This may occur if the police wish to use witness statements from the full brief at the hearing if the accused fails to attend (see CPA 2009 s 83).
12. If the police served the accused with a preliminary brief within 21 days of filing the charge-sheet, he or she may not request a full brief until after the summary case conference (see 3.3 Summary case conference) (CPA 2009 s 39(1A)).
13. A party may apply to the Court for an order that the full brief be served by a date that is earlier or later than the date specified in the Act (CPA 2009 s 39).
14. Unless earlier provided to the accused,⁵⁹⁸ a full brief must contain:
 - a notice in Form 11 of the *Magistrates' Court Criminal Procedure Rules 2019*, which contains:
 - a checklist of the required contents of the full brief and that statements in the brief may be used as evidence in the proceeding if the accused does not attend;
 - an explanation of the importance of obtaining legal representation;
 - information on the consequences of non-attendance, depending on whether the accused is on bail or summons;
 - advice that the accused has the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
 - details of how to contact Victoria Legal Aid;
 - a copy of the charge sheet;
 - a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions;
 - any information, document or thing the prosecution intends to rely upon at the hearing, including:
 - a copy of the accused's signed statement, or the record of interview;
 - a copy or a transcript of any audio or audio-visual recording of the accused required under Subdivision (30A) of Division 1 of Part II of the *Crimes Act 1958*;
 - a copy or statement of any other evidentiary material relating to a relevant confession or admission made by the accused;
 - a list of all persons the prosecution intends to call as witnesses, together with a copy of each witnesses' statement;
 - a copy of any document the prosecution intends to produce as evidence;
 - a list of things the prosecution intends to tender as exhibits;
 - a photograph of any proposed exhibit that cannot be described in detail;
 - a description of any forensic procedure, examination or test that has not yet been completed and upon which the prosecution intends to rely;
 - any evidentiary certificate that has been issued under an Act that it is relevant and available;
 - any other relevant information, document or thing in the possession of the prosecution, including:

⁵⁹⁸ The accused may have previously received some of this information in a preliminary brief or at a summary case conference.

- a list of all people who have made statements or given relevant information that the prosecution does not intend to call, along with a copy of those statements, a summary of the evidence that person would give or a list of these statements or summaries;
 - a copy of all relevant documents that the prosecution does not intend to tender as exhibits, or a list of those documents;
 - a list describing all relevant things that the prosecution does not intend to tender as exhibits;
 - a photograph of any relevant things that cannot be described in detail in the list;
 - a copy of the records of any medical examination of the accused, reports of any forensic procedure or examination that has been conducted on the accused and the results of any tests carried out for the prosecution that the prosecution does not intend to rely upon; and
 - a copy of any other information required by the court rules to be included in a full brief;
 - subject to the exclusion of confidential communications, a copy of any information, document or thing relevant to the credibility of a prosecution witness (such as the witness' criminal history, a prosecution letter of assistance, reduction of criminal charges, favourable treatment, payment or reward, as a result of the witness' cooperation with police); and
- if relevant, written notice that the informant refuses to disclose certain information, documents or things that are otherwise required as part of the full brief and the grounds for refusing to disclose (CPA 2009 s 41; *Magistrates' Court Criminal Procedure Rules 2019* r 20).
15. Witness statements that are part of the full brief that the informant intends to tender at the hearing must be:
- (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 (CPA 2009 s 47(1)).⁵⁹⁹
16. A witness statement must also include the age of the maker of the statement if he or she is under 18 (CPA 2009 s 47).
17. The informant (or, if the informant did not investigate the offence, the officer who prepared the full brief) must, subject to any contrary order of a court, serve a disclosure certificate on the accused when the full brief is served. Within 7 days of service, they must also file a copy of the disclosure certificate and, if the DPP is conducting the prosecution, forward a copy of the disclosure certificate to the DPP (CPA 2009 ss 41A(2), (4)).
18. A disclosure certificate must be in the form set out in Schedule 2 of the *Criminal Procedure Regulations 2020* and must describe any information, document or thing which is not contained in the full brief because of a claim of privilege, public interest immunity, statutory immunity or other statutory prohibition or restriction and must identify the nature of the relevant privilege, immunity, prohibition or restriction (CPA 2009 s 41A(1); *Criminal Procedure Regulations 2020* r 27).

⁵⁹⁹ The Act specifies alternative procedures for witness statements where the maker of the statement cannot read (see CPA 2009 s 47).

19. Section 41A was introduced by the *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022*, which was passed in response to recommendation 63 of the Royal Commission into the Management of Police Informants. The Royal Commission had heard evidence about non-compliance by Victoria Police of their disclosure obligations and encourage clear and transparent provision of information (*Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021*, Explanatory Memorandum, 8).

Ongoing Disclosure

20. Disclosure obligations are ongoing. When the informant serves a preliminary or full brief and subsequently obtains information or material that would have been disclosed as part of that brief, he or she must supplement the previous brief (*CPA 2009 s 42*).
21. If the informant obtains additional information or material that he or she refuses to disclose, then he or she must supplement the previous brief with a statement that he or she refuses to disclose certain additional material and the grounds for refusing to disclose (*CPA 2009 s 42(3)*).
22. The accused may also serve a request on the informant for the following items at any time after receiving the preliminary brief or the full brief:
- (a) a copy of any statement 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;
 - (e) particulars of previous convictions of any witness who the prosecution intends to call at the hearing (*CPA 2009 s 43*).
23. Unless the court otherwise orders, a request for additional information must be made at least 7 days before the contest mention hearing or, if there is no contest mention hearing, the summary hearing (*CPA 2009 s 43*).
24. The informant must either comply with the request or inform the accused of the grounds on which he or she refuses to disclose the information requested within 7 days, unless the court varies this time limit (*CPA 2009 s 44*).
25. Section 43A provides that where an exhibit is or contains child pornography, a legally represented accused cannot ask to personally inspect the exhibit, but may ask for his or her legal practitioner to inspect that exhibit (*CPA 2009 s 43A*).

Refusal to Disclose

26. The informant may refuse to disclose information otherwise required in a preliminary brief, full brief or in response to a request by the accused if the disclosure would or be reasonably likely to:
- prejudice an investigation or the proper administration of the law;
 - prejudice the fair hearing of a charge against a person;
 - enable a person to ascertain the identity of a confidential source of information;
 - disclose details of policing methods which is likely to prejudice the effectiveness of those methods;
 - endanger the safety of law enforcement personnel or sources of confidential information;
 - endanger the safety of a person listed in the full brief or a family member of that person

- result in the disclosure of child pornography to the accused personally (CPA 2009 s 45).
27. The informant may also refuse to disclose information that is required to form part of a preliminary brief or a full brief on any ground that he or she could have refused to provide that information in response to a witness summons (CPA 2009 s 45).
28. The informant may not refuse to disclose an exhibit on the basis that it may result in the disclosure of child pornography to the accused personally if the request is for inspection by the accused's legal practitioner (CPA 2009 s 45(1A)).
29. The informant may refuse to disclose particulars of any prior convictions of a prosecution witness if the prior convictions are irrelevant to the proceeding. The informant must disclose that the witness has undisclosed prior convictions (CPA 2009 s 45).
30. Where the informant refuses to disclose certain information or fails to disclose information in accordance with Division 2 of Part 3.2 of the CPA 2009, the accused may apply to the Magistrates' Court for an order that the informant disclose the material in question (CPA 2009 s 46). The magistrate must balance the accused's desire for access to the information against the informant's concern regarding possible adverse consequences of disclosing the information and determine whether it is in the interests of justice to order disclosure.
31. In addition, where the informant refused to disclose material on the ground that it may result in disclosure of child pornography to an accused personally, the Court must have regard to whether the accused is legally represented and may order disclosure on conditions, either to the accused personally or to the accused's legal practitioner (CPA 2009 s 46(3)).

Addresses and Telephone numbers

32. The informant must not include the address or telephone number of a person as part of pre-hearing disclosure unless:
- the informant believes that the address or telephone number provided does not identify a particular person;
 - the informant believes that the address or telephone number is relevant and disclosure is not likely to pose a reasonably ascertainable risk to the welfare or safety of any person; or
 - the Magistrates' Court permits the disclosure on the application of the informant or the accused (CPA 2009 s 48).
33. The court may permit the disclosure of an address or telephone number if it is satisfied that the information is relevant and either:
- the disclosure is not likely to pose a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - having regard to the right to privacy of the witness and the right of the accused to prepare properly for the hearing, the interests of justice outweigh the risk to the welfare or physical safety of the witness (CPA 2009 s 48; *Charter of Human Rights and Responsibilities Act 2005* ss 13, 24, 25).

Defence Disclosure

34. The accused must give preliminary disclosure of the following types of evidence in summary proceedings:
- expert evidence; and
 - alibi evidence (CPA 2009 ss 50, 51).

Expert Evidence

35. The accused must serve and file the statement of any expert witness he or she intends to call at least 7 days before the scheduled contest mention hearing or, if there is no contest mention hearing, the summary hearing. If the statement is not ready at that time, then the statement must be served and filed as soon as possible after it comes into existence (CPA 2009 s 50).
36. The expert witness statement must contain the following details:
- the name and business address of the expert witness;
 - a statement of the qualifications of the witness to give expert evidence; and
 - the substance of the evidence the accused intends to adduce, including the witness' opinion and the basis for the opinion (CPA 2009 s 50).
37. Courts should interpret this section consistent with its purpose, which is to avoid surprise and facilitate the effective management of cases. The statement must contain sufficient details to give the prosecution notice of the expert evidence the accused will call at the hearing (*Foskett v Burgess* (1998) 102 A Crim R 448).

Alibi Evidence

38. If the accused is represented by a legal practitioner,⁶⁰⁰ then the accused may not give evidence in support of an alibi personally or adduce alibi evidence from another witness without the leave of the court unless he or she gave the prosecution or the informant a "notice of alibi" within the prescribed period (CPA 2009 s 51).
39. "Evidence in support of an alibi" is defined as:
- 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 (CPA 2009 s 3).
40. The notice of alibi must be served on the prosecutor at least 7 days before the scheduled contest mention hearing or, if there is no contest mention hearing, the summary hearing. If the notice is not ready at that time, it must be served as soon as possible after it comes into existence (CPA 2009 s 51).
41. The notice of alibi must contain the following details:
- the time and place of the alibi;
 - the name and last known address of any alibi witnesses; and
 - if the name and address of a witness is not known, material information that may assist in locating that witness (CPA 2009 s 51).
42. A notice of alibi must be in Form 14 of the *Magistrates' Court Criminal Procedure Rules 2019* (Magistrates' Court Criminal Procedure Rules 2001 r 28).
43. If the accused is unable to include the name and address of an alibi witness in the notice, the court will not allow him or her to call that person unless it is satisfied that the accused took reasonable steps to ensure the witness' name and address would be ascertained (CPA 2009 s 51).
44. The notice of alibi must contain sufficient particulars to inform the prosecution of the nature of the alibi. It is not sufficient for a notice to specify only that named witnesses will give alibi evidence (*R v Sorby* [1986] VR 753).

⁶⁰⁰ Unlike in criminal trials, the obligation to inform the prosecution of alibi evidence in summary hearings only applies if the accused is legally represented (CPA 2009 s 51).

45. The court should consider whether the accused has provided an adequate explanation for failing to provide an alibi notice when determining whether to grant leave to adduce alibi evidence. In addition, the importance of the evidence in the context of the accused's case is relevant. The court should be slow to withhold leave where there is a valid explanation and the evidence is important, unless a grant of leave and subsequent adjournment would cause irreparable prejudice to the prosecution (*Skondin v R* [2005] NSWCCA 417; *R v Gardiner* Unreported, NSWCCA, 3 June 1997; *R v Williamson & Morell*, Unreported, WACCA, 11 October 1990).
46. The prosecution may lead evidence of a notice of alibi as part of its case. Failure by the defence to lead evidence consistent with the notice allows the prosecution to attack the credibility of the defence case and may raise the issue of why the defence has not called alibi witnesses. Similarly, the prosecution may lead evidence of conflicting alibi notices to undermine the defence case (*R v Heuston* (1996) 90 A Crim R 213; *R v McKinney & Judge* Unreported, NSWCCA, 6 September 1993; *R v Smith & Ors*, Unreported, SACCA, 1 June 1995; *Nicolaides v WA* [2007] WASCA 203; c.f. *R v Keane*, Unreported, Vic CCA, 29 June 1978).
47. It is an offence for a person acting for the prosecution or a police officer to communicate with a witness named in an alibi notice with respect to the charge before the conclusion of the proceeding, unless it is with the consent and in the presence of the accused's legal practitioner or, if he or she is self-represented, the accused (CPA 2009 s 52). The prohibition on contacting witnesses named in an alibi notice does not apply to a witness the prosecution has indicated to the accused that it intends to call as a witness for the prosecution (CPA 2009 s 52; *R v Beljajev* (2006) 14 VR 241; [2006] VSC 413).

Last updated: 8 May 2023

3.6 Return of Property

1. If property has been taken from the accused and the Magistrates' Court considers that it is consistent with the interests of justice and safe custody of the accused for some or all of the property to be returned, the court must direct that the property be returned to the accused or to another person chosen by the accused (CPA 2009 s 34).
2. On the application of a person other than the accused, the court may direct that property taken from that person be returned subject to any conditions the court considers appropriate (CPA 2009 s 34).

Last updated: 3 December 2009

3.7 Diversion Program

1. Except in prescribed cases, a magistrate may adjourn proceedings for up to 12 months to allow the accused to complete a diversion program. Diversion may only be ordered if:
 - the accused acknowledges responsibility for the offence;
 - the court considers that diversion is appropriate for the accused; and
 - the prosecution and the accused consent to the program (CPA 2009 s 59).
2. These three matters are jurisdictional requirements for a diversion order. A court cannot order diversion if any of these three matters are not satisfied (*DPP v Venier-Moro* [2015] VSC 704 at [24]–[25]).
3. The court may not order diversion if the accused is charged with:
 - an offence punishable by a fixed or minimum sentence, including mandatory licence disqualification;⁶⁰¹ or

⁶⁰¹ The incurring of demerit points is not a fixed or minimum sentence for this purpose (CPA 2009 s 59).

- an offence under s 49(1) of the *Road Safety Act 1986* (CPA 2009 s 59).
4. Acknowledgment of responsibility is a formal step that must take place in open court. It is not to be implied in the accused's request for the matter to be adjourned for diversion (*Rumbiak v Hough* [2004] VSC 95).
 5. The acknowledgement of responsibility is not admissible as evidence in a proceeding for the offence charged and is not a plea (CPA 2009 s 59).
 6. A magistrate should consider the circumstances of the case, the gravity of the offence and the offender's prior convictions before deciding whether the charge is suitable for diversion. He or she is not constrained by the opinion of the diversion co-ordinator or any established policy of the court (*Rumbiak v Hough* [2004] VSC 95; *TH v Police* (2005) 91 SASR 329; [2005] SASC 143).
 7. Police officers interviewing a suspect or an accused must be careful when discussing diversion programs. Evidence of admissions to police are not admissible unless the circumstances in which an admission was made was unlikely to affect its truth. In some cases, an offer to support an application for the diversion program may be capable of affecting the truth of a subsequent admission (see *Evidence Act 2008* s 85).
 8. The court must discharge the accused without any plea or finding of guilt if the accused successfully completes the diversion program. This discharge acts as a defence to any later charge for the same or a similar offence arising out of the same circumstances and the fact of participation in the diversion program is not treated as a finding of guilt, except for the purpose of consequential orders under:
 - division 1 of Part 3 and Part 10 of the *Confiscation Act 1997* (Forfeiture and Disposal orders);
 - section 9 of the *Control of Weapons Act 1990* (Forfeiture of weapons and dangerous articles);
 - section 151 of the *Firearms Act 1996* (Forfeiture of firearms, ammunition and other items); and
 - part 4 of the *Sentencing Act 1991* (Compensation and other orders in addition to sentence).
 9. Evidence of progress in the diversion program is relevant to sentencing if the accused does not complete the diversion program and is subsequently found guilty of the offence charged (CPA 2009 s 59).
 10. Magistrates should ensure that any orders in relation to diversion are clear and unambiguous. The parties should not be uncertain whether a matter has been adjourned for diversion or whether it has been adjourned to be considered for diversion (see *Rumbiak v Hough* [2004] VSC 95).
 11. There is currently some uncertainty about whether diversion is available on an appeal from the Magistrates' Court to the County Court. Judges should seek submissions on whether a diversion order is available while recognising that diversion is only available if the accused acknowledges responsibility for the offence, the court considers that diversion is appropriate and both the prosecution and the accused consent to the proposed diversion program (see *DPP v Venier-Moro* [2015] VSC 704 at [19]).

Last updated: 15 December 2021

3.8 Sentence Indication

1. At any time during summary proceedings, the Magistrates' Court may indicate that, if the accused pleads guilty at that time, the Court would be likely to impose a sentence of imprisonment that commences immediately or a sentence of a specified type (CPA 2009 s 60).
2. One basis for refusing to give a sentence indication is that the court considers that there is insufficient information before it regarding the impact of the offence on any victim of the offence (CPA 2009 s 60).
3. A magistrate who gives a sentence indication may not sit and determine the charge if the accused then pleads not guilty, unless all the parties agree (CPA 2009 s 61(2)).

3.9 Hearing Procedure

1. This section describes the steps that take place at a summary hearing.
2. A request to list a matter for a contested summary hearing must be in Form 12 of the *Magistrates' Court Criminal Procedure Rules 2019* and must be filed with the registrar of the court (*Magistrates' Court Criminal Procedure Rules 2019* r 23).

Entering a Plea

3. The court must ensure that all charges are read to the accused or that the substance of the charges are explained before the accused is asked to plead. The accused's legal practitioner may enter a plea on behalf of his or her client (*CPA 2009* ss 62, 63).
4. If the accused is represented by a legal practitioner, the court may omit the procedure of reading or explaining the charges, if it considers that this is appropriate (*CPA 2009* s 62).
5. The court may treat an accused who refuses to enter a plea as if he or she pleads not guilty (*CPA 2009* s 64).

Authority to Prosecute

6. Prosecutions for certain statutory offences can only be brought by those authorised by legislation. Whether legislation abrogates the common law right for any private citizen to bring a prosecution for a matter of a public nature is a question of statutory interpretation (*Duncan v Demir* [2009] VSC 37).
7. If an accused intends to challenge the authority of the informant, he or she must appear under protest and put the informant on notice. An authority to prosecute is not an element of an offence and the presumption of regularity will usually apply so that no evidence is necessary (*Duncan v Demir* [2009] VSC 37; *Sher v DPP* [2001] VSCA 110).

Opening Addresses

8. The prosecution and the accused may only make an opening address with the leave of the court. The address must be made before any evidence is given and the court may limit the length of the address (*CPA 2009* s 65).
9. The purpose of the prosecution opening is to outline the prosecution case for the magistrate and the defence. This assists the other participants in the hearing to understand the issues and the evidence as it unfolds (*R v Haydon (No 7)* [2005] SASC 21).
10. It is not appropriate for the prosecutor to:
 - adopt an argumentative approach, rather than to summarise the facts that will be led;
 - refer to the possible course of the defence, including the right of the accused to give evidence (*Peterson & Ors v R* (1979) 27 ALR 641);
 - refer to evidence that is or might be inadmissible or unavailable (*Wood & Ors v R* (1995) 87 A Crim R 346; *R v Armstrong* (1989) 53 SASR 25);
 - comment on the weight of the evidence;
 - refer to the status of co-offenders, unless defence counsel consent;
 - using mocking or sarcastic language when describing the accused's conduct and previous statements to police (*R v Weiss* [2002] VSC 24); or
 - use emotive or prejudicial language (see 7 Role of Counsel).

11. It is not appropriate for defence counsel to use the defence response as an opportunity to outline the defence case in the nature of an opening address. Counsel should focus on identifying the issues in contention. He or she should not comment on questions of law (*R v MM* [2004] NSWCCA 81; *R v Karapandzk* (2008) 101 SASR 7; [2008] SASC 126).

Conduct of Prosecution Case

12. After any opening statements, the informant is entitled to call witnesses to prove his or her case. Witnesses are examined in chief, cross-examined and, if necessary, re-examined. The conduct of these stages must take place in accordance with the laws of evidence (see *Evidence Act 2008* Part 2.1).
13. A police officer may give evidence in chief by reading or being led through the signed statement he or she made soon after the relevant events. The prosecution must provide this statement to the defence a reasonable time before the hearing (*Evidence Act 2008* s 33).
14. The prosecution may seek to reopen its case either during the defence case or after the close of the defence case. This is only permissible in exceptional circumstances (*Shaw v R* (1952) 85 CLR 365; *Killick v R* (1981) 147 CLR 565; [1981] HCA 63; *Kurzbock v Hallett* [2001] VSC 459; *Yamasa Seafood v Watkins* [2000] VSC 156). See 5.8 Re-Opening the Crown Case.

Conduct of Defence Case

15. After the close of the prosecution case, the accused may:
- submit that there is no case to answer;
 - answer the charge by calling evidence from the accused him or herself or other witnesses;
 - or
 - choose not to give evidence or call any witnesses (*CPA 2009* s 66).
16. A submission that there is no case to answer does not affect the accused's ability to call evidence. If the magistrate rejects the submission, the accused must then determine whether he or she shall give or call evidence.
17. If the accused has legal representation, the magistrate may ask the accused's legal practitioner what the defence shall do at the close of the prosecution case (*CPA 2009* s 67).
18. If the accused is not represented by a legal practitioner, the court must inform the accused of the following matters in a manner that the accused is likely to understand immediately after the close of the case of the prosecution:
- that the accused has the right to give sworn evidence him or herself and must then answer questions from the prosecutor or the court;
 - that the accused may choose to remain silent; and
 - that the accused may choose to call other witnesses to give evidence, irrespective of whether the accused gives evidence.

The court must then ask the accused what he or she wishes to do (*CPA 2009* s 68).⁶⁰²

⁶⁰² The *CPA 2009* s 68 removed the mandatory requirement in s 46 of the *Magistrates' Court Act 1989* and s 398 of the *Crimes Act 1958* that this information must be given in writing. Information under s 68 must be given in a manner that the accused is likely to understand. Section 398 of the *Crimes Act 1958* also contained the following script for conveying this information to the accused:

"You now have the right to answer the charge against you and may take either of the following courses:

19. The Court must follow the procedure outlined in section 68 strictly where the accused is unrepresented. Failure to follow this procedure is a jurisdictional error, and the Magistrates' orders may be set aside (*Strangio v The Magistrates' Court of Victoria* [2013] VSC 496; *Brygel v Stewart-Thornton* [1992] 2 VR 387).

No-Case Submissions

20. The test for a "no-case" submission is the same in a contested summary hearing as in a criminal trial. The court must determine whether, on the evidence available, the accused can lawfully be convicted. It is not necessary to consider the weight of evidence or whether he or she *ought* to be convicted (*May v O'Sullivan* (1955) 92 CLR 654; *Doney v R* (1990) 171 CLR 207; [1990] HCA 51).
21. For details on the test for a "no-case" submission, see 5.7 Conduct of the Defence Case.
22. If there are two or more accused charged together, all "no-case" submissions must be made at the end of the prosecution case. If there are still charges against two or more accused once all "no-case" submissions have been determined, each accused must then inform the court whether he or she shall be calling evidence (CPA 2009 s 69).⁶⁰³

Defence Opening

23. If the defence indicates to the magistrate that it intends to call evidence, the court may grant leave to allow the accused to make an opening address outlining the evidence that he or she proposes to call (CPA 2009 s 231).
24. This opening is given after all "no-case" submissions have been determined and before any witnesses for that accused have been called (CPA 2009 s 231).⁶⁰⁴
25. The defence opening will outline the contents of the defence case and may explain any relevant matters of law. The purpose is to identify the evidence that shall be called and the inferences that are available. It is distinct from the defence response to the prosecution opening.
26. Defence counsel should not:
- comment on the evidence already given or about to be given;
 - use emotive language; or
 - describe any material which is or may be inadmissible or unavailable.

You may enter the witness box, take the oath, and say what you want to say in answer to the charge. This is known as giving sworn evidence and when you have given your evidence you may be asked questions about it by the prosecution or the Court;

You may say nothing in answer to the charge.

In either of these cases you may call any witness or witnesses to give sworn evidence for you. What do you desire to do?"

This script, or words to similar effect, should satisfy the requirements of s 68.

⁶⁰³ This sequence differs between summary proceedings and criminal trials. In a criminal trial, an accused is not required to inform the court whether he or she shall call evidence until the close of the case of all previous accused (CPA 2009 s 229). See 5.7 Conduct of the Defence Case for further information.

⁶⁰⁴ Where there are multiple accused, the accused must wait until all previous accused have closed their cases until he or she may make an opening address.

Defence Evidence

27. The accused must indicate the proposed identity of all defence witnesses other than the accused and the order in which these witnesses will give evidence when asked by the court (CPA 2009 s 70).
28. The defence may not change the order or identity of defence witnesses without the leave of the court. The accused may give evidence at any time during the defence case and does not need to be included in the order of witnesses provided (CPA 2009 s 70).
29. The accused should usually give his or her evidence before calling any other witnesses. This is especially appropriate when witnesses are ordered out of court. An accused who gives evidence after other defence witnesses may be suspected of having tailored his or her evidence to fit with other evidence (*R v RPS*, Unreported, NSW CCA, 13 August 1997; *RPS v R* (2000) 199 CLR 620; [2000] HCA 3; *R v Richards & Ors* [1918] SALR 315; *R v Lister* [1981] 1 NSWLR 110).
30. The principle that the accused should give his or her evidence first is a rule of practice only and cannot be enforced as a rule of law. The accused is entitled to give evidence at any stage of the defence case (see CPA 2009 s 71; *R v RPS*, Unreported, NSW CCA, 13 August 1997; *RPS v R* (2000) 199 CLR 620; [2000] HCA 3; *R v Connell* (1994) 12 WAR 133; *R v Smith* (1968) 52 Cr App R 224).

Evidentiary Burden on Accused for Exceptions and Qualifications

31. In a summary hearing, the accused has an evidentiary burden to establish the possible existence of a statutory exception. It is only if that evidentiary burden is met that the onus shifts back to the prosecution to disprove the exception. Section 72 of the Act states:
 - (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).
32. The court will need to determine whether a particular matter is an exception, or whether it is an element of the offence. In the latter case, the prosecution will bear the onus of proving that element, even if the matter is expressed as a negative. The distinction is commonly made between a statute which lays down a general prohibition and a prohibition that is subject to an exception (*Barritt v Baker* [1948] VLR 491; *Dowling v Bowie* (1952) 86 CLR 136; *Vines v Djordjevitch* (1955) 91 CLR 512; *Chugg v Pacific Dunlop* (1990) 170 CLR 249; [1990] HCA 41).

33. When determining whether a matter is an element or an exception, the court must consider the substance of the offence and the words used in the statute. The form of the legislation is relevant, but not decisive. An exception will usually take the form of "confession and avoidance", where the accused argues that even if the prosecution case is accepted, he or she is not guilty due to some additional facts (*Dowling v Bowie* (1952) 86 CLR 136; *Pye v Metropolitan Coal* (1934) 50 CLR 614; *Darling Island Stevedoring v Jacobsen* (1945) 70 CLR 635; *Killeen v Sharp* [1988] VR 954).
34. A matter will usually be an exception or qualification if the legislation specifies that an act is prohibited, except in specified circumstances, or by specified persons. The court should also consider whether the subject-matter of the purported exception is peculiarly within the accused's knowledge (*Chugg v Pacific Dunlop* (1990) 170 CLR 249, 258–259; [1990] HCA 41; *R v Hunt* [1987] AC 352; *Nominal Defendant v Dunstan* (1963) 109 CLR 143).
35. However, the mere fact that the offence creating provision uses the phrase 'other than' does not always mean that the provision is creating an exception. The matter must be determined as one of substance, based on the particular legislation (*Kokas v Stanojlovic* [2021] VSCA 119, [47]. See also [50], where it was held that 'other than a motor cycle' was definition of when the obligation arose, rather than an exception).
36. A distinction may exist between a statement defining the circumstances in which the obligation exists and a statement excluding a particular class of people from that obligation. The former may be part of the definition of the offence, while the latter may be a statement of an exception (see *Kokas v Stanojlovic* [2021] VSCA 119, [51]–[52]).

Closing Addresses

37. With the leave of the court, the prosecutor and the accused may sum up the evidence to the court. The prosecutor gives his or her address first. The court may limit the length of these addresses (*CPA 2009 ss 73, 74*).
38. The prosecutor may seek leave to make a supplementary closing address if the accused asserts facts in his or her closing address that are not supported by evidence in the proceeding. This supplementary address is given after the accused's closing address and must be limited to replying to the unsupported facts (*CPA 2009 s 75*).
39. While the magistrate must reason in accordance with matters specified in Parts 4–7 of the *Jury Directions Act 2015*, it is not necessary for parties or the magistrate to go through the process identified in *Jury Directions Act 2015 ss 11 and 12* of identifying the directions required and facts in issue. The procedure and content of closing addresses is governed by the *Criminal Procedure Act 2009* and not the *Jury Directions Act 2015* (*Makeham v Sheppard* [2020] VSCA 242, [51]).

Verdicts and Reasons

40. At the end of the hearing, the magistrate may enter a verdict of guilty or may dismiss the charges. If the accused is found guilty, then the magistrate may proceed to sentence him or her.
41. If the accused is charged with an indictable offence, the court may find the accused not guilty of the offence charged and guilty of attempting to commit that offence. This power is not available in relation to summary offences (*CPA 2009 s 76*).
42. Like all judicial officers, a magistrate must provide adequate reasons for his or her decision. See 6.2 Reasons for Decision.
43. In giving its verdict, the magistrate must address any defence raised on the evidence, regardless of the position of the accused. This is a function of the judicial obligation to ensure a fair trial (*Kok v Lomax* [2017] VSCA 366 at [39]).

Last updated: 15 December 2021

3.10 Non-Appearance of a Party

1. A person may appear in court–

(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, by a police prosecutor; or

(d) if the proceeding was commenced by the filing, by a prescribed person or a member of a prescribed class of persons, of a chargesheet containing a charge for an offence under—

(i) Division 1 of Part 3C or Schedule 3 of the *Sentencing Act 1991*; or

(ii) section 156 of the *Infringements Act 2006*—

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 (CPA 2009 s 328).

2. A party is only required to personally attend a hearing when required to do so by:

- the *Criminal Procedure Act 2009*;
- the conditions of bail;
- the rules of court; or
- an order of the presiding judicial officer (CPA 2009 s 330).

3. The informant and the accused must appear for each hearing, but need not attend unless the accused's conditions of bail, the rules of court or the order of a magistrate requires the party to attend. The following table outlines the consequences of failing to appear.

Table 1: Consequence of failure to appear in summary matters

Failure to appear by:	Available court orders:
Informant (CPA 2009 s 79)	(a) Dismiss the charge; or (b) Adjourn the proceedings on any terms the court considers appropriate.
Accused – Served with notice to appear for summary offence (CPA 2009 s 25(1))	(a) Issue a warrant to arrest the accused; (b) Hear and determine the charge in the absence of the accused; (c) Adjourn the proceeding on any terms the court considers appropriate;
Accused – Served with notice to appear for indictable offence that may be heard and determined summarily (CPA 2009 s 25(2))	Issue a warrant to arrest the accused
Accused – Served with summons for summary offence (CPA 2009 s 80(1))	(a) If the summons was served by ordinary service, direct that the accused be served by personal service; (b) Issue a warrant to arrest the accused; (c) Hear and determine the charge in the absence of the accused; or (d) Adjourn the proceedings on any terms the court considers appropriate.
Accused – Failure to answer bail for a summary offence (CPA 2009 s 80(2))	(a) Hear and determine the charge in the absence of the accused; or (b) Adjourn the proceedings on any terms the court considers appropriate.
Accused – Failure to appear for an indictable offence tried summarily (CPA 2009 s 81)	Issue a warrant to arrest the accused
Accused – Failure by corporate accused to appear for an indictable offence triable summarily (CPA 2009 s 82)	Hear and determine the charge summarily if the court considers it appropriate, provided the court is satisfied that the charge and return date have been brought to the attention of the accused. ⁶⁰⁵

4. The power in CPA 2009 s 79 can be used even when the matter has been adjourned for sentencing. However, in deciding how to exercise the power at that time, the Court must take into account the gravity of the offences, the stage of proceedings, the public interest in the timely resolution of proceedings and the public interest in imposing sentences when a person is guilty of an offence (*DPP v Horan* [2022] VSC 692).

Admissibility of Evidence

5. Statements in a preliminary brief or a full brief that were served on the accused may be admissible as evidence in the hearing if the accused fails to appear (CPA 2009 ss 83, 84).
6. The informant's statement and any exhibits referred to in that statement in a preliminary brief are admissible despite the rule against hearsay if:

⁶⁰⁵ The court may hear and determine a matter in relation to a corporate accused summarily even if the corporation has not consented to summary hearing (see also CPA 2009 s 15).

- the informant served the preliminary brief on the accused at least 14 days before the hearing; and
 - the court considers that the matters set out in the preliminary brief disclose the offence charged (CPA 2009 s 84).
7. In deciding whether the matters set out in the preliminary brief disclose the offence charged, the court must decide whether, if the allegations in the preliminary brief were accepted, the facts alleged would prove the commission of the offence charged (*Kinnersly v Johnson* (2018) 58 VR 214, [63]).
 8. The court may require the informant to provide further written evidence if it appears that the preliminary brief does not disclose the offence charged. The additional evidence is admissible if:
 - (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 (CPA 2009 s 84(3)).
 9. The court retains a discretion to rule inadmissible the whole or any part of a preliminary brief, a statement or exhibit (CPA 2009 s 84(4)).
 10. Section 84 has the effect that, where the accused fails to appear and the conditions in s 84(1) are met, the court may determine the case on the basis of the informant's statement of alleged facts in the preliminary brief, without the need for those statements to be supported by evidence in admissible form (*Kinnersly v Johnson* (2018) 58 VR 214, [2]; c.f. *McWhirter v Dunlop*; *Tran v Harris* [2013] VSC 697).
 11. If the informant served a full brief on the accused, then any statements in the brief may be treated as if the witness had given that evidence orally. The court may also use any admissible exhibits or documents referred to in a witness' statement (CPA 2009 s 83).
 12. One difference between ss 83 and 84 is that where a preliminary brief is filed, s 84 allows the court to require the informant to provide additional evidence if the court considers that the matters in the preliminary brief do not disclose the offence charged. In contrast, s 83 does not provide a power to require further evidence if the full brief does not disclose the offence charged (see *Kinnersly v Johnson* (2018) 58 VR 214, [62] for this and other differences between ss 83 and 84).
 13. In matters under the *Infringements Act 2006*, the court may use the prescribed information specified in r 13 and r 16 of the *Infringements (General) Regulations 2006* and lodged with the court under s 40(1)(a) or s 71(1)(a) of that Act. This includes information about the accused, the alleged date and time of the offence, the relevant enforcement agency and a description of the alleged offence (CPA 2009 s 85).
 14. The court may receive sworn evidence in a hearing in the absence of the accused even if the informant has not served a preliminary brief or a full brief (CPA 2009 ss 83, 84).
 15. The criminal record of the accused is only admissible if the court is satisfied that the accused was served with a copy of the record at least 14 days before the hearing and the accused is found guilty of the offence charged (CPA 2009 s 86). See 19.6 Criminal Record of Accused for information on the required contents of a criminal record.

Sentencing in the Absence of the Accused

16. The court must serve a written notice on the accused detailing any sentencing order made when he or she fails to appear. The notice must inform the accused of his or her right to apply for a rehearing (CPA 2009 s 87).
17. The court may not impose a custodial sentence under Division 2 of Part 3 of the *Sentencing Act 1991* where the court finds the accused guilty in his or her absence (CPA 2009 s 87).
18. In addition, where the Court finds the accused guilty in his or her absence on the basis of a preliminary brief, the following sentences are not available:

- a fine exceeding 20 penalty units;
 - cumulative fines exceeding an aggregate of 50 penalty units;
 - a restitution or compensation order for more than \$2000 (CPA 2009 s 87).
19. Finally, when sentencing an accused in his or her absence, the court cannot make any order that requires the consent of the accused (CPA 2009 s 87). This precludes certain sanctions such as a community correction order (see *Sentencing Act 1991* s 37).
20. The court should consider the sanction that is likely to be imposed if the accused is found guilty when determining whether to hear a matter in the accused's absence. If, during the hearing, it appears that it will be unable to impose an appropriate sentence due to the above restrictions, the court must adjourn the hearing to allow the accused to appear and may issue a warrant for his or her arrest (CPA 2009 s 87).

Rehearing

21. The accused may apply for a rehearing if the court hears and determines a matter when he or she did not appear. The informant may also apply on behalf of the accused (CPA 2009 s 88).
22. It is likely that the right to apply for a rehearing in s 88 is not available when the accused attends the hearing but then leaves the courtroom in the course of the hearing (*Kyriazis v Victoria Police* [2022] VSC 596, [43]).
23. A party applies for a rehearing by filing an application for a rehearing in Form 18 of the *Magistrates' Court Criminal Procedure Rules 2019* with the registrar of the court where the sentence was imposed. The application must state the reason why the accused did not appear in the proceeding (CPA 2009 s 89; *Magistrates' Court Criminal Procedure Rules 2019* r 35).
24. The court must grant the application for a rehearing, set aside the earlier findings and orders and rehear the charge in the following situations:
- where the charge-sheet was served on the accused using ordinary service and the court is satisfied that it was not brought to the accused's attention prior to the hearing; or
 - where the accused applies within 28 days of service of the court's ex parte sentencing order (CPA 2009 s 94).
25. In other cases, the court may grant the application for a rehearing and set aside the previous findings and orders on any terms and conditions it considers just (CPA 2009 s 92).
26. A rehearing is a de novo hearing. The prosecution has carriage of the matter and must lead evidence to establish the guilt of the accused as if the previous hearing did not take place.
27. If the accused applies for a rehearing and fails to appear for the hearing of that application, the court must strike out the application. The accused must then obtain the leave of the court before he or she may make a further application for a rehearing (CPA 2009 s 93).
28. Filing of a notice of intention to apply for a rehearing acts as an automatic stay on all orders made at the earlier hearing except any cancellation, suspension or variation of the accused's driver's licence or learner's permit, or disqualification under the *Road Safety Act 1986* or the *Sentencing Act 1991*, until the latter of:
- the court's ruling on whether to grant a rehearing; and
 - if a rehearing is granted, the conclusion of the rehearing (CPA 2009 s 91).
29. The accused may apply to the court for a stay of any orders relating to cancellation, suspension or variation of a driver's licence or learner's permit, or disqualification under the *Road Safety Act 1986* or the *Sentencing Act 1991*. The court may stay that order until the application or the rehearing is determined. When the court orders a stay, the court must immediately send particulars of the stay to the Roads Corporation (CPA 2009 s 91).

4 Committal Hearings

1. The purposes of committal proceedings 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 (*CPA 2009 s 97*).
2. A committal proceeding provides an opportunity for the accused to receive disclosure of the prosecution case and to test whether there is sufficient evidence to support a conviction. The discharge of the accused at the end of a committal is a powerful statement to the prosecuting authorities that the proceeding should not be brought to trial (*Barton v R* (1980) 147 CLR 75; *Grassby v R* (1989) 168 CLR 1; [1989] HCA 45; *Williams & Ors v DPP* [2004] VSC 516; *Fox v DPP* [1992] 1 VR 673).
3. Victorian committal procedures apply to both Victorian offences and the prosecution of Commonwealth offences in Victorian courts (*Judiciary Act 1903 s 68*; *Thorp v Abbotto* (1992) 34 FCR 366).

Last updated: 15 December 2021

4.1A Legal Practitioner Must File Notice of Appearance

1. In a committal proceeding, the legal practitioner for the accused must file a Notice of Appearance in Form 25 of the *Magistrates' Court Criminal Procedure Rules 2019* with the Court as soon as practicable after the practitioner receives instructions to represent the accused (*Magistrates' Court Criminal Procedure Rules 2019 r 49*).
2. The legal practitioner must also serve the Notice of Appearance on the DPP or other prosecuting agency (*Magistrates' Court Criminal Procedure Rules 2019 r 49*).
3. When the DPP or other prosecuting agency receives a Notice of Appearance, it must advise the legal practitioner of the following contact details within 7 days:
 - The name and address of the relevant prosecutor;
 - A fax number, email address, DX number or a business address for service on the prosecutor; and

- A fax number, email address, DX number or business address for service on the informant (*Magistrates' Court Criminal Procedure Rules 2019* r 50).
- 4. The prosecuting agency must inform the court of the above contact details if it has not received a Notice of Appearance 21 days before the committal mention date (*Magistrates' Court Criminal Procedure Rules 2019* r 50).
- 5. If the legal practitioner ceases to act for a party to a committal, the practitioner must file a notice in court that he or she has ceased to act in Form 25A and must serve a copy of the notice on the informant and the prosecuting agency (*Magistrates' Court Criminal Procedure Rules 2019* r 51).

Last updated: 31 August 2020

4.1 Preliminary Hearings

1. The following hearings may be held in a committal proceeding:
 - a filing hearing;
 - a special mention hearing;
 - a compulsory examination hearing;
 - a committal mention hearing;
 - a committal case conference; and
 - a committal hearing (*CPA 2009* s 100).
2. A committal hearing may not be held if the proceedings relate to a charge for a sexual offence, where the complainant was a child or a person with a cognitive impairment when the proceedings commenced (*CPA 2009* ss 100, 123).

Filing Hearing

3. A committal proceeding is commenced on the commencement of a filing hearing (*CPA 2009* s 98).
4. When a charge-sheet containing a charge for an indictable offence is filed, the matter must be listed for filing hearing if it contains a charge that is not triable summarily. The court will also list the matter for a filing hearing if the informant requests a committal proceeding for an indictable offence that is triable summarily (*CPA 2009* ss 6, 10).
5. 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; or
 - (c) make any order or give any direction that the court considers appropriate (*CPA 2009* s 101).
6. The date fixed for the 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 (*CPA 2009* s 102).
7. At the end of a filing hearing, the registrar must provide the accused with a notice in Form 33 of the *Magistrates' Court Criminal Procedure Rules 2019* identifying the committal mention date, and the next steps in the proceeding (*Magistrates' Court Criminal Procedure Rules 2019* r 60).

Special Mention Hearing

8. A special mention hearing may be held on the application of a party or on the court's own motion. An application by a party must be in Form 31 of the *Magistrates' Court Criminal Procedure Rules 2019* and must identify the purpose of the hearing (*Magistrates' Court Criminal Procedure Rules 2019* r 74).
9. A registrar may, on the application of the parties, cancel a special mention hearing if it is no longer required (*Magistrates' Court Criminal Procedure Rules 2019* r 75).
10. The court may also conduct a special mention hearing on its own motion to adequately control or oversee the progress of a committal proceeding (*Magistrates' Court Criminal Procedure Rules 2019* r 74(3)).
11. At a special mention hearing, the Magistrates' Court may:
 - change the date fixed for any hearing in the committal proceeding;
 - make any order or give any direction the court considers appropriate for the management of the committal proceeding;
 - immediately hold a committal mention hearing and either determine the matter or direct the informant to serve a hand-up brief (*CPA 2009* s 153).

Compulsory Examination Hearing

12. The informant may apply to the Magistrates' Court for a compulsory examination hearing in order to examine a relevant person (the examinee) or to require that person to produce a document or other item (*CPA 2009* ss 103, 104).
13. An application for a compulsory examination must be in Form 26 of the *Magistrates' Court Criminal Procedure Rules 2019* (*Magistrates' Court Criminal Procedure Rules 2019* r 55).
14. The application can only be made after the charge-sheet has been filed and before the committal hearing commences. The court may only order a compulsory examination hearing after the committal mention hearing if it is satisfied that it is in the interests of justice to make the order at that time (*CPA 2009* ss 103, 104).
15. The hearing provides a coercive environment in which the police may acquire relevant information to assist their investigation of the offence. This coercive, investigatory purpose distinguishes the compulsory examination hearing from other examination hearings, such as taking evidence after the committal, taking pre-trial evidence or in a *CPA 2009* s 198B hearing (*Harvey & McManus v County Court of Victoria* [2006] VSC 293).
16. The informant must provide the following information to the court when applying for a compulsory examination order:

(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 matters 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 (CPA 2009 s 103).

17. The informant must give reasonable notice of the application for a compulsory examination to the proposed examinee of the order, or his or her legal practitioner, if he or she is or has been a suspect in relation to the present criminal proceeding (CPA 2009 s 103).
18. An application for a compulsory examination hearing can be made with or without notice to the accused. The accused is not a party to the application and may not address the court (CPA 2009 s 103).
19. The power to order a compulsory examination hearing is not one to be exercised merely on the request of the informant. He or she must satisfy the court that it is in the interests of justice to make the order. This process is designed to safeguard the use of coercive examination powers, which are not to be exercised lightly. The accused is not a party to the application and therefore the court does not have a contradictor to the application (CPA 2009 s 104; *Murdaca v Magistrates' Court of Victoria* [2009] VSC 270).
20. The information should demonstrate the relevance of the evidence he or she seeks, the scope and purpose of the proposed questions and how those questions relate to the facts in issue (*Murdaca v Magistrates' Court of Victoria* [2009] VSC 270).
21. If a hearing is granted, the informant must give notice of the hearing to the accused in Form 27 of the *Magistrates' Court Criminal Procedure Rules 2019*. Form 28 must also be served on the subject of the hearing (*Magistrates' Court Criminal Procedure Rules 2019* r 56).
22. The accused is entitled to be present when the compulsory examination hearing takes place but is not entitled to cross-examine the examinee and is not entitled to address the court unless the court finds that there are exceptional circumstances (CPA 2009 ss 103, 105, 106).
23. The examinee must attend a compulsory examination hearing as if he or she was validly served with a witness summons.⁶⁰⁶ He or she is entitled to be represented at the hearing, and his or her counsel may address the court (CPA 2009 ss 105, 106).
24. Provided the examinee is a competent and compellable witness, he or she must give sworn evidence in the form of examination-in-chief at the hearing. This evidence is recorded as if it were given in the committal hearing (CPA 2009 s 106. See also *Evidence Act 2008* ss 12–19).

Committal Mention Hearing

25. At a committal mention hearing, the Magistrates' Court may:
 - determine the committal proceeding in accordance with ss 141, 142 or 143 of the CPA 2009;
 - offer a summary hearing or determine, on the application of a party, whether the matter should be heard summarily;

⁶⁰⁶ Failure to comply with a witness summons is punishable as contempt of court (see *Magistrates' Court Act 1989* s 134).

- determine an application for leave to cross-examine a witness;
 - fix a date for a committal hearing, or change the date of a hearing;
 - hear and determine any objection to the disclosure of material;
 - make any other order or give any other direction that the court considers appropriate (CPA 2009 s 125).
26. The power to determine applications for leave to cross-examine witnesses and fix a date for the committal hearing do not apply if the proceedings relate to a charge for a sexual offence where the complainant was a child or a person with a cognitive impairment when the proceedings commenced (CPA 2009 ss 123, 125(1A)).
27. If a plea brief has been served, the Magistrates' Court must ask the accused how he or she pleads. If the accused pleads guilty and the court is satisfied that the evidence is of sufficient weight to support a conviction, the court must commit him or her for trial (CPA 2009 s 142). See 4.5 Committal for Trial and Subsequent Events for information on the process of committing the accused for trial.
28. If a plea brief has been served and the accused does not plead guilty, the court must order the informant to prepare and serve a hand-up brief (CPA 2009 s 142).
29. See 2.5 Summary and Indictable Offences for when a court may allow a summary hearing and see 3 Summary Hearings for the conduct of that proceeding.
30. If the accused applies for an adjournment of the committal mention hearing in order to obtain legal representation, the court must consider whether he or she has made reasonable attempts to obtain representation (CPA 2009 s 125).
31. The court must hold the committal mention hearing within 3 months of the commencement of proceedings if the charge is for a sexual offence or within 6 months of the commencement of proceedings for any other offence. The court may fix a longer period for holding the committal mention hearing if satisfied that it is in the interests of justice to do so, having regard to the seriousness of the alleged offence and the reasons why a longer period is necessary (CPA 2009 s 126).⁶⁰⁷

Committal Case Conference

32. The committal case conference is a case management tool. Its purpose is to assist in the effective management of the proceeding and the timely resolution of issues. It provides a more informal opportunity for the prosecution, the defence and the court to discuss the case and attempt to identify the key issues to be resolved.
33. Where practicable, the committal case conference should be held on the same day as the committal mention hearing (CPA 2009 s 127).
34. Evidence of statements and actions made in the course of a case conference are not admissible in any later proceeding or judicial inquiry unless all parties agree. Documents prepared solely for the purpose of the conference are similarly inadmissible unless all parties agree. These restrictions on admissibility are designed to promote open discussion of the case between the parties (CPA 2009 s 127).

⁶⁰⁷ The time limit on holding the committal mention hearing does not apply if the accused:

- fails to attend in accordance with bail;
- is currently the subject of an outstanding warrant to arrest; or
- seeks a committal mention outside the time limit specified and the court is satisfied that it is in the interests of justice to grant that request (CPA 2009 s 126).

35. The court may direct the legal practitioners for the informant and the accused to attend a committal case conference and may hold the conference in closed court if satisfied that this is necessary to achieve the purpose of the conference (*Magistrates' Court Criminal Procedure Rules 2019* r 63).

Last updated: 31 August 2020

4.2 Presence and Absence of the Accused

1. The accused must personally attend all hearings that form part of the committal proceeding unless excused by the court (*CPA 2009* s 100).
2. The court may excuse an accused from attending a committal hearing for a specified period if he or she applies and 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 (*CPA 2009* s 135)(2)).
3. An application under s 135 to be excused from attending a committal hearing must be in Form 31 of the *Magistrates' Court Criminal Procedure Rules 2019* and must be filed at least 7 days before the first day of absence from the committal hearing, unless the court directs otherwise (*Magistrates' Court Criminal Procedure Rules 2019* r 58).
4. For all other hearings, the court may excuse the accused from attending if it considers it appropriate to do so (*CPA 2009* s 330).

Last updated: 31 August 2020

4.3 Pre-Hearing Disclosure

1. An accused charged with an offence that cannot be heard and determined summarily, or where the charge-sheet requests a committal proceeding, must receive the following information when served with a summons or when a warrant to arrest is executed:
 - a copy of the charge-sheet;
 - details of when and where the matter is listed to be heard; and
 - a notice in Form 9 of the *Magistrates' Court Criminal Procedure Rules 2019*, which contains:
 - a summary of Part 4.4;
 - advice that the accused should seek legal advice and is entitled, if eligible, to legal aid under the *Legal Aid Act 1978*; and
 - details on how to contact Victoria Legal Aid, the Federation of Community Legal Centres and Victoria Aboriginal Legal Service (*CPA 2009* ss 13, 15; *Magistrates' Court Criminal Procedure Rules 2019* r 18).⁶⁰⁸
2. A summons for a corporate accused must also state that the court may hold a committal hearing in the absence of the accused (*CPA 2009* s 15).⁶⁰⁹

⁶⁰⁸ A summons issued by a member of the police or a public official does not need to be accompanied by a copy of the charge-sheet or the notice in prescribed form. It is only necessary to direct the accused to appear at the appropriate venue of the Magistrates' Court at the specified date and time (see *CPA 2009* s 14).

⁶⁰⁹ The notice must also state that the court can hear the matter summarily in the absence of the accused, if the offence may be heard and determined summarily. This requirement applies to summons issued by the court and by the police or public officials (*CPA 2009* s 15).

3. The accused in a committal proceeding is also entitled to receive a:
 - hand-up brief; or
 - plea brief (*CPA 2009* s 107).
4. The informant must serve a hand-up brief on the accused unless he or she pleads guilty after receiving a plea brief (*CPA 2009* s 107).
5. Prosecution disclosure obligations stem from the need to ensure a fair trial, in circumstances where the prosecution and the defence have disproportionate resources for the investigation of an offence. The prosecution is required to disclose material which weakens its case or which strengthens the defence case. Experience has demonstrated that miscarriages of justice can occur where there is inadequate disclosure (*Roberts v The Queen* [2020] VSCA 277, [127], [132]; *R v H* [2004] 2 AC 134, [14]).
6. The prosecution's duty of disclosure extends to three classes of evidence. The prosecution must disclose material that, on a sensible appraisal:
 - is relevant or possibly relevant to an issue in the case;
 - raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
 - holds out a real (as opposed to fanciful) prospect of providing a line of enquiry as to evidence that falls into either of the other two classes (*Gild v The Queen* [2018] VSCA 317, [49]; *R v Farquharson* (2009) 26 VR 410, [213]; *Visser v DPP (Cth)* [2020] VSCA 327, [36]; *Spiteri v The Queen* (2004) 61 NSWLR 369).
7. One critical class of disclosable material is any information which reflects materially on the credibility of prosecution witnesses (*AJ v The Queen* (2011) 32 VR 614, [21]). This is because "the question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important 'issues' in the case" (*R v Brown* [1998] AC 367, 377; *Roberts v The Queen* [2020] VSCA 277, [129]).
8. This does not require disclosing every "speculative and scurrilous rumour which may have come to the ears of investigating officers concerning a witness" (*R v K* (1991) 161 LSJS 135, 140).
9. Changes in a witness' statement, including the existence of earlier drafts or a substantial delay between the relevant events and the making of the statement, can be a matter relevant to the witness' credibility or reliability and which should be disclosed so the defence has an opportunity to challenge the statements, and so the jury can assess the reliability of the evidence (*Roberts v The Queen* [2020] VSCA 277, [156]).
10. As a matter of good prosecution practice, the prosecution should provide the accused with a copy of electronic material which falls within the duty of disclosure. The prosecution should not confine itself to notifying the accused of the existence of such electronic material, and leaving it for the accused to decide whether to request the material (see *Edwards v The Queen* [2021] HCA 28, [23] (Kiefel CJ, Keane and Gleeson JJ), [33]–[35] (Edelman and Steward JJ)).⁶¹⁰
11. However, the duty of disclosure does not extend to material:
 - (a) relevant only to the credibility of defence (as distinct from prosecution) witnesses;
 - (b) relevant only to the credibility of the accused person;
 - (c) relevant only because it might deter an accused person from giving false evidence or

⁶¹⁰ Note that while *CPA 2009* s 110(e)(iii) gives the prosecution a choice of whether to provide a copy of a document which it does not intend to tender, or a list of such documents, the judgement of Kiefel CJ, Keane and Gleeson JJ in *Edwards v The Queen* [2021] HCA 28 suggests that the prosecution should provide a copy as a matter of good practice, rather than providing a list. The judgment of Edelman and Steward JJ, which also favours an obligation to provide a copy rather than a list, is founded in the text of New South Wales disclosure obligations, which differ from Victorian statutory disclosure obligations.

raising an issue of fact which might be shown to be false;
(d) for the purpose of preventing an accused from creating a trap for himself, if at the time the prosecution became aware of the material it was not a relevant issue at trial (*R v Farquharson* (2009) 26 VR 410, [214]).

Hand-Up Brief

12. The informant must serve the hand-up brief on the accused at least 42 days before the committal mention hearing unless the court orders otherwise or the accused gives written consent to receive service at a time closer to the hearing (CPA 2009 s 108).
13. The informant must also file a copy of the hand-up brief with the appropriate registrar and, if the DPP is conducting the committal proceeding, serve a copy of the brief on the DPP, within 7 days of serving the brief on the accused (CPA 2009 s 109).
14. The hand-up brief must contain:
 - a notice in Form 29 of the *Magistrates' Court Criminal Procedure Rules 2019* containing the following information:
 - the date of the committal mention hearing;
 - the nature of a committal proceeding and the purpose of the various stages of the proceeding;
 - the importance of obtaining legal representation;
 - the right to apply for and, if eligible, receive, legal aid;
 - details on how to contact Victoria Legal Aid; and
 - that, if the accused applies to change the date of the committal mention hearing to allow him or her to obtain legal representation, the court must consider whether he or she has made reasonable attempts to obtain representation;
 - a copy of the charge-sheet;
 - a statement of the relevant material facts;
 - any information the prosecution intends to rely upon in the proceeding, including:

- a copy of the accused's signed statement, or the record of interview;
- a copy or a transcript of any audio or audio-visual recording of the accused required under Subdivision (30A) of Division 1 of Part II of the *Crimes Act 1958*;
- a copy or statement of any other evidentiary material relating to a relevant confession or admission made by the accused;
- a list of all persons who have made statements that the prosecution intends to tender at the hearing, together with a copy of each witness' statement;
- a transcript of any compulsory examination hearing the informant wishes to tender;
- any transcript of the recording of an examination under Part 4 of the *Major Crime (Investigative Powers) Act 2004* the informant wishes to tender;
- in appropriate cases, a transcript of the pre-recorded evidence-in-chief of the complainant in accordance with s 367 of the *CPA 2009* that the informant wishes to tender;
- a copy of any document the prosecution intends to produce as evidence;
- a list of things the prosecution intends to tender as exhibits;
- a photograph of any proposed exhibit that cannot be described in detail;
- a description of any forensic procedure, examination or test that has not yet been completed and upon which the prosecution intends to rely;
- any other relevant information in the possession of the prosecution, including:
 - a list of all people who have made statements or given relevant information that the prosecution does not intend to call, along with a copy of those statements, a summary of the evidence that person would give or a list of these statements or summaries;
 - a copy of all relevant documents that the prosecution does not intend to tender as exhibits, or a list of those documents;
 - a list describing all relevant things that the prosecution does not intend to tender as exhibits;
 - a photograph of any relevant things that cannot be described in detail in the list;
 - a copy of the records of any medical examination of the accused, reports of any forensic procedure or examination that has been conducted on the accused and the results of any tests carried out for the prosecution that the prosecution does not intend to rely upon;
 - a copy of any other information, document or thing required by the rules of court in a hand-up brief;
 - subject to the exclusion of confidential communications, a copy of any information, document or thing relevant to the credibility of a prosecution witness (such as the witness' criminal history, a prosecution letter of assistance, reduction of criminal charges, favourable treatment, payment or reward, as a result of the witness' cooperation with police); and
- if the proceeding relate wholly or partly to a charge for a sexual offence, a copy of every relevant statement made by the complainant to a member of police and containing an acknowledgement of its truthfulness; and
- Form 30 of the *Magistrates' Court Criminal Procedure Rules 2019*, listing other information required to be included in a hand-up brief (*CPA 2009* s 110; *Magistrates' Court Criminal Procedure Rules 2019* r 57).

15. The informant must also serve a copy of the accused's criminal record, or a statement that the accused has no criminal record, on the accused at the same time as serving the hand-up brief. The accused's criminal record is not included in the hand-up brief (CPA 2009 s 107).
16. The informant (or, if the informant did not investigate the offence, the officer who prepared the full brief) must, subject to any contrary order of a court, serve a disclosure certificate on the accused when the hand-up brief is served. Within 7 days of service, they must also file a copy of the disclosure certificate and, if the DPP is conducting the prosecution, forward a copy of the disclosure certificate to the DPP (CPA 2009 ss 110A(2), 110A(6)).
17. A disclosure certificate must be in the form set out in Schedule 3 of the *Criminal Procedure Regulations 2020* and must describe any information, document or thing which is not contained in the hand-up brief because of a claim of privilege, public interest immunity, statutory immunity or other statutory prohibition or restriction and must identify the nature of the relevant privilege, immunity prohibition or restriction (CPA 2009 s 110A(1); *Criminal Procedure Regulations 2020* r 7).
18. The CPA 2009 provides in relation to a hand-up brief disclosure certificate (but not for a full brief disclosure certificate) that the certificate does not need to describe any information, document or thing covered by the certificate in a way that would prejudice a claim for public interest immunity in the Supreme Court in its inherent jurisdiction that has commenced or that the informant knows will be commenced, or an application for a non-disclosure order that has commenced or that the informant knows will be commenced (CPA 2009 s 110A(3)). For information on non-disclosure orders, see 7.2 Counsel for the Prosecution.
19. Section 110A was introduced by the *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022*, which was passed in response to recommendation 63 of the Royal Commission into the Management of Police Informants. The Royal Commission had heard evidence about non-compliance by Victoria Police of their disclosure obligations, and so called for legislation which would remind police of their obligations and encourage clear and transparent provision of information (*Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021*, Explanatory Memorandum, 10–11).
20. Witness statements that are part of the hand-up brief that the informant intends to tender during the committal proceeding must either be:
 - (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 (CPA 2009 s 112(1)).⁶¹¹
21. The statement must also specify the age of the maker of the statement if he or she is under 18 (CPA 2009 s 112).
22. The transcript of the audiovisual recording of the compulsory examination hearing or the complainant's evidence-in-chief under Division 5 of Part 8.2 of the CPA 2009 or 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 (CPA 2009 s 113).

⁶¹¹ The Act specifies alternative procedures for witness statements where the maker of the statement cannot read (CPA 2009 s 112).

23. The prosecution chooses the evidence it wishes to tender at the committal hearing. Subject to common law disclosure obligations, the prosecution is not required to tender all relevant information. The prosecution may use evidence at the trial that it did not lead in the committal (*Barton v R* (1980) 147 CLR 75).
24. The prosecution must, however, act fairly towards the accused. It should not present the minimum evidence required to secure a committal for trial or hold evidence back for tactical reasons. The prosecution should tender all relevant material (*R v Basha* (1989) 39 A Crim R 337; *R v Harry; ex parte Eastway* (1985) 39 SASR 203).

Plea Brief

25. The informant may serve a plea brief on the accused if he or she gives written consent to receive a plea brief. A plea brief cannot be served once a hand-up brief has been served (CPA 2009 s 116).
26. The informant must also file a copy of the plea brief with the appropriate registrar and, if the DPP is conducting the committal proceeding, serve a copy of the brief on the DPP, within 7 days of serving the brief on the accused (CPA 2009 s 116).
27. A plea brief must contain:
- a copy of the charge-sheet;
 - a statement of the relevant facts;
 - a copy of the accused's signed statement, or the record of interview;
 - a copy or a transcript of any audio or audio-visual recording of the accused required under Subdivision (30A) of Division 1 of Part II of the *Crimes Act 1958*;
 - a copy or statement of any other evidentiary material relating to a relevant confession or admission made by the accused;
 - a copy of any alleged victim's statement in the possession of the informant if it concerns the circumstances of the offence and would be admissible (CPA 2009 s 117).
28. The informant may also include any other relevant statements in the plea brief (CPA 2009 s 117).
29. Statements that are part of the plea brief that the informant intends to tender during the committal proceeding must either be:
- (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 (CPA 2009 s 112(1)).⁶¹²
30. The statement must also specify the age of the maker of the statement if he or she is under 18 (CPA 2009 ss 112, 117).

⁶¹² The Act specifies alternative procedures for witness statements where the maker of the statement cannot read (CPA 2009 s 112).

Ongoing Disclosure

31. Disclosure obligations are ongoing. If the informant subsequently acquires material that would have been included or listed in the hand-up brief, then he or she must supplement the previous brief by serving a copy of the material on the accused, filing a copy with the court and, if relevant, forwarding a copy to the DPP as soon as practicable (CPA 2009 s 111).
32. Ongoing disclosure obligations only apply to hand-up briefs and do not apply to plea briefs (CPA 2009 s 111).

Addresses and Telephone numbers

33. The informant must not include the address or telephone number of a person in a hand-up or plea brief unless:
 - the informant believes that the address or telephone number provided does not identify a particular person;
 - the informant believes that the address or telephone number is relevant and disclosure is not likely to pose a reasonably ascertainable risk to the welfare or safety of any person; or
 - the Magistrates' Court permits the disclosure on the application of the informant or the accused (CPA 2009 s 114).
34. The court may permit the disclosure of an address or telephone number if it is satisfied that the information is relevant and either:
 - the disclosure is not likely to pose a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - having regard to the right to privacy of the witness and the right of the accused to prepare properly for the hearing, the interests of justice outweigh the risk to the welfare or physical safety of the witness (CPA 2009 s 114).

Case Direction Notice

35. At least 7 days before the committal mention date, the accused and the informant or the DPP must jointly file a case direction notice if a hand-up brief was served (CPA 2009 s 118).
36. A case direction notice must be in Form 32 of the *Magistrates' Court Criminal Procedure Rules 2019* and signed by the accused and either the DPP or the informant. The notice:

(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

(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 prepare, 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 (CPA 2009 s 119);

(fa) subject to any order of a court, the prosecution must describe in the notice any of the following not described in a disclosure certificate in accordance with section 110A(3)-

(i) any information, document or thing, including any detail relating to the information, document or thing, that was not described in the certificate; and

(ii) the nature of the privilege, immunity, prohibition or restriction to which that information, document or thing is subject

(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 (CPA 2009 s 119).

37. *Magistrates' Court Practice Direction No 6 of 2013* specifies that as part of the case direction notice, the parties must provide details of the issues which prevented the case from resolving, based on discussions held at least 14 days before the committal mention hearing.

38. If the court fixes another time for a committal mention hearing, the court may order that another case direction notice be filed at least 7 days before that new committal mention date, or within some other fixed period. The court may also give any appropriate directions concerning the matters to be dealt with in the case direction notice (CPA 2009 s 118).

39. If the accused is unrepresented and does not cooperate with the case direction notice procedure, the informant or the DPP must file a notice signed only by that party (CPA 2009 s 118).

Adjournment on Request

40. The court may adjourn the date of a committal mention hearing on the papers for up to 14 days following a request in a case direction notice. The court may exercise this power if it considers that it is in the interests of justice to do so. If the court exercises this power, it must:
- give the prosecution and accused written notice of the new hearing date; and
 - if the court extends bail to the new hearing date, give written notice of the details of when the accused is next required to attend pursuant to his or her bail to the accused and any sureties and the consequences of the accused failing to attend at that time (CPA 2009 s 121).

Last updated: 8 May 2023

4.4 Committal Hearing Procedure

1. During the committal hearing, the court may hear evidence and determine whether there is evidence of sufficient weight to support a conviction. The court may make any order or give any direction that is appropriate as part of this process (CPA 2009 s 128).
2. In appropriate cases, the court may also allow the matter to proceed as a summary hearing (CPA 2009 s 128).
3. If the court allows the matter to proceed as a summary hearing, it may use the oral evidence of witnesses, witness statements and documents or exhibits tendered in the committal as evidence in the summary hearing with the consent of the accused. The court must call or recall any witness who are required for cross-examination as part of the summary hearing and the proceeding otherwise continues as a summary hearing (CPA 2009 s 30). See 3 Summary Hearings for further information.

Child and cognitively impaired complainants of sexual offences

4. The court cannot conduct a committal hearing, and the accused cannot apply to cross-examine any witness, if the proceeding relates (wholly or partly) to a charge for a sexual offence and a complainant in relation to a charge for a sexual offence was a child or a person with a cognitive impairment when the criminal proceeding commenced (CPA 2009 ss 100, 123). In such proceedings, any application to cross-examine a witness before trial is dealt with by the trial court (CPA 2009 ss 198A, 198B).
5. Magistrates' Court Practice Direction 3 of 2019 specifies the committal procedure for these charges and provides guidance to ensure the parties are ready to proceed by way of hand up brief at the first committal mention. Key elements of this practice direction are:
 - as part of the hand up brief, the informant must provide the "Standard Disclosure Materials";
 - within 14 days of receiving the hand up brief, the accused must notify the informant if further disclosure material is required;
 - at the committal mention:
 - the parties must be ready to make submissions about disputed disclosure material;
 - the accused must be ready to make submissions about whether the evidence is of sufficient weight to support convictions;
 - charges involving child abuse material which are not directly relevant to charges involving a child or cognitively impaired complainant may be severed and adjourned for further committal mention after analysis by VicPol's E-Crime unit or the AFP's Digital Forensics unit

- the informant must lodge relevant material for analysis with E-Crime or Digital Forensics, or with Forensic Services Department or AFP forensics, within 7 days of the filing hearing. The relevant department must be notified that the complainant is a child (and if so, whether the child is under 12) or is cognitively impaired;
 - the practice direction contains a “Certificate of Committal Readiness” which replaces the Form 32 case direction notice, until the *Magistrates’ Court Criminal Procedure Rules 2019* are amended to incorporate the new notice. This must be filed at least 7 days before the committal mention hearing.
6. The “standard disclosure items” are specified in an appendix to the Practice Direction, and include:
- specified investigative material created by Victoria Police;
 - notes made by civilian witnesses in the Informant’s possession;
 - INTERPOSE database entries regarding the allegations;
 - LEAP database entries regarding the investigation;
 - VARE or VARE transcript and other notes or documents concerning conversations between Victoria Police and any witnesses, potential witnesses or suspects in the investigation;
 - copies of covert recordings made in the course of the investigation
 - copies of statements, including draft statements, obtained in the course of the investigation which are not in the hand-up brief;
 - copies of notes or documents used by any prosecution witnesses to help with drafting or preparing their witness statement;
 - copies of warrants obtained during the investigation;
 - copies of photos and video footage taken by police during the investigation;
 - copies of audio, visual or audio-visual material created by civilian witnesses in relation to the allegations;
 - copies of exhibit logs and similar documents regarding exhibits and property seized or obtained during the investigation;
 - list of prior convictions or findings of guilt in relation to any witnesses who may give evidence, except for police or expert witnesses.
7. The police may object to providing items listed as standard disclosure materials. The parties are encouraged to discuss the nature of those objections.

Last updated: 1 January 2023

4.4.1 Evidence in Committal Hearings

1. The committal hearing is conducted primarily on the material contained in the hand-up brief. The court may use the following evidence, if it was served on the accused prior to the hearing:
 - a statement which the witness has attested to as truthful;
 - an exhibit or document referred to in an admissible statement;
 - a recording which has been attested to as truthful; and
 - any other recording, provided the transcript of that recording was served as part of the hand-up brief and the accused and his or her legal practitioner were given a reasonable opportunity to listen to and view the recording (CPA 2009 s 139).

2. The court may rule the whole or any part of a statement, an exhibit referred to in a statement or a recording inadmissible. Such evidence does not form part of the material before the court for the purpose of the committal (CPA 2009 s 139. See also *Grassby v R* (1989) 168 CLR 1; [1989] HCA 45 per Deane J (dissenting); *Rielly v Gregg*, Unreported, Supreme Court of Western Australia, 7 June 1990).
3. The court should only reject clearly inadmissible evidence. The task of determining the admissibility of evidence will primarily fall on the trial judge and may depend on the conduct of the trial. A court conducting a committal proceeding should be especially cautious before rejecting evidence on discretionary grounds, such as unfairness (*R v Grassby* (1988) 15 NSWLR 109; *Shaw v Coco* [1994] 1 Qd R 469; c.f. *Rielly v Gregg*, Unreported, Supreme Court of Western Australia, 7 June 1990).
4. The prosecution or the defence may apply to the court for a witness to give oral evidence. The court may allow a witness to give oral evidence if it is satisfied that it is in the interests of justice for the prosecution to call the witness to give evidence-in-chief or if the court has granted leave to cross-examine that witness (CPA 2009 s 130).
5. If the court allows the prosecution to call a witness to give oral evidence-in-chief, that witness may be cross-examined and re-examined, provided the court grants leave to do so (CPA 2009 ss 124, 130).
6. A witness who is required for cross-examination must usually confine his or her evidence-in-chief to identifying him or herself and attesting to the truthfulness of his or her statement, or the contents of a recording. The court may grant leave if it is in the interests of justice for the witness to supplement his or her earlier statement or recording by further oral evidence and, in exceptional circumstances, may allow the witness to give the whole of his or her evidence-in-chief orally (CPA 2009 s 130).
7. The court may also, on the application of a party, allow the statement or transcript of the recording to be read aloud before the witness is asked to attest to its truthfulness or is cross-examined (CPA 2009 s 130).
8. If the court allows a witness to give oral evidence-in-chief or to be cross-examined, the witness must attend court on the date of the hearing, and any subsequent hearing dates unless the court excuses his or her attendance (CPA 2009 s 129).
9. The court may take the following steps if a witness fails to attend court as required:
 - adjourn the hearing;
 - issue a warrant to arrest or summons to compel the attendance of the witness; or
 - continue the hearing in the absence of the witness, if this will not cause unfairness to the accused (CPA 2009 s 134).
10. If the court continues the hearing in the absence of the witness, then any statement or recorded evidence of that witness is inadmissible (CPA 2009 s 134).
11. All evidence given at a committal hearing must be recorded by a short-hand writer or by mechanical means, such as a tape recorder or other electronic device. The person recording the evidence acts as an officer of the court and is under the direction of the court (CPA 2009 s 130, *Evidence (Miscellaneous Provisions) Act 1958* ss 131, 134).
12. Once the short-hand writer or the person who operated the tape recorder certifies that the notes, recording or transcript are correct, that material is evidence of the matters recorded therein (*Evidence (Miscellaneous Provisions) Act 1958* s 135).

Cross-Examination

13. The defence may not cross-examine witnesses at a committal hearing unless the court grants leave to do so (CPA 2009 s 124).
14. No cross-examination is permissible if the proceeding relates to a sexual offence where the complainant was a child or a person with a cognitive impairment when the criminal proceeding commenced (CPA 2009 ss 123, 124(1AA)).

15. An accused who wishes to cross-examine a witness will usually apply for leave in the case direction notice and the matter will be determined at the committal mention hearing. The court may also allow the accused to apply for leave after the time for filing the case direction notice has passed if the court is satisfied that it is in the interests of justice. The court must consider the reasons for the late application when determining whether it is in the interests of justice (CPA 2009 ss 119, 120).
16. If the court allows an accused to make a late application for leave to cross-examine a witness, the accused and the informant or the DPP must jointly file another case direction notice with the registrar at least 7 days before the next committal mention hearing, or within another period specified by the court. This case direction notice does not need to contain details of the procedure proposed for resolving the matter or whether an adjournment is requested (CPA 2009 s 120).
17. When determining whether cross-examination is justified, the court may have regard to whether the informant consents to or opposes leave being granted (CPA 2009 s 123(2)).
18. The court must also:
 - ... 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
 - (g) trivial, vexatious or oppressive cross-examination is not permitted; and
 - (h) the interests of justice are otherwise served (CPA 2009 s 124(4)).
19. The court must also consider the following matters, if the witness is a 'specified witness':

- (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 (CPA 2009 s 124(5)). See also *Farmer v Lockley* (2003) 12 Tas R 244; [2004] TASSC 103).

20. A 'specified witness' is:

- a child;
- a person with a cognitive impairment;
- a complainant in relation to a charge for a sexual offence or an offence where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008* (CPA 2009 s 124(5A)).

21. If the court grants leave, it must give reasons for granting leave, with reference to the matters set out in s 124(4) and (5) and identify each issue on which the witness may be cross-examined (CPA 2009 s 124A).

22. An accused who obtains leave to cross-examine a witness may cross-examine only on the issues identified by the court in the grant of leave. The Court may disallow questions that do not relate to an issue where leave has been obtained, or if the question is not justified (CPA 2009 s 132; *Henderson v Magistrates' Court of Victoria* [2004] VSC 544). Further leave may be obtained where the accused identifies an issue to which the proposed questioning relates, gives a reason why the evidence is relevant to that issue and cross-examination of the witness on that issue is justified (CPA 2009 s 132A).

23. One of the purposes of cross-examination at committal is to give the defence the opportunity to test the prosecution case and to investigate facts where the answers are unknown. It is not, however, meant to allow a "dry-run" at cross-examination and allow the accused to test out questions that would not be asked in front of a jury due to the risks associated with possible answers (*R v Sandford* (1994) 33 NSWLR 172; *Tural v Potter* [2000] VSC 80; *R v Basha* (1989) 39 A Crim R 337; *Moss v Brown* [1979] 1 NSWLR 114).

Evidence of Addresses and Telephone Numbers

24. A witness who is called to give evidence in a hearing must not disclose his or her address or telephone number, if this information was not included in the hand-up brief (CPA 2009 s 131). See 4.3 Pre-Hearing Disclosure

25. The court can permit the disclosure of an address or telephone number if it is satisfied that the information is relevant and either:
- The disclosure is not likely to pose a reasonably ascertainable risk to the welfare or physical safety of any person; or
 - Having regard to the right to privacy of the witness and the right of the accused to prepare properly for the hearing, the interests of justice outweigh the risk to the welfare or physical safety of the witness (*CPA 2009 s 114*).

Last updated: 1 January 2023

4.4.2 Committal Hearings and Open Court Principles

1. Magistrates' Court proceedings must be conducted in open court, unless the court orders otherwise (*Magistrates' Court Act 1989 s 125*). The circumstances in which it is appropriate to close or restrict access to the court are identified in s 126 of the *Magistrates Court Act 1989*:

(1) The Court may make an order under this section if in its opinion it is necessary to do so in order not to—

- (a) endanger the national or international security of Australia; or
- (b) prejudice the administration of justice; or
- (c) endanger the physical safety of any person; or
- (d) cause undue distress or embarrassment to the complainant in a proceeding that relates to a charge for a sexual offence; or
- (e) cause undue distress or embarrassment to a witness under examination in a proceeding that relates to a charge for an offence where the conduct constituting the offence consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the *Crimes Act 1958*.

(2) The Court may in the circumstances mentioned in subsection (1)—

- (a) order that the whole or any part of a proceeding be heard in closed court; or
- (b) order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding; or
- (c) make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding; or
- (d) make an order prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the Court.

(3) If an order has been made under this section, the Court must cause a copy of it to be posted on a door of, or in another conspicuous place at, the place at which the Court is being held.

(4) A person must not contravene an order made and posted under this section.

Penalty applying to this subsection: 1000 penalty units or imprisonment for 3 months.

(5) The Court must specify a period (not exceeding 7 days) for which an order made under subsection (2)(d) is to remain in force and the order shall remain in force for that period unless it is sooner set aside by the Court.

(6) The Court may set aside or vary an order made under subsection (2)(d) on an application made by any person, whether or not a party to the proceeding pending in the Court, but cannot extend the period of the order to more than 7 days or make another order under subsection (2)(d) that would have the effect of an order in the same terms being in force for more than 7 days.

(7) Nothing in subsection (6) prevents the Supreme Court or the County Court, in the exercise of any jurisdiction, power or authority to do so conferred on it, making an order to the same or a similar effect as an order under subsection (2)(d), including an order that has effect from immediately an order under subsection (2)(d) ceases to be in force.

2. For further details on the circumstances in which it is appropriate to close the court or make a suppression order, see the Open Courts Bench Book.

3. In a committal hearing that includes a charge for a sexual offence, the court must only allow the following people to be present when the complainant gives evidence or a recording of the complainant's evidence is played:
- the informant;
 - the accused;
 - an approved emotional support person;⁶¹³
 - the legal practitioners representing the prosecution and the accused, and no more than one assistant for each practitioner;
 - any required court officials;
 - any authorised and required court security officers;
 - any person recording the evidence in accordance with Part VI of the *Evidence Act 1958*; and
 - any other person authorised by the court to be present (*CPA 2009 s 133*).⁶¹⁴

Last updated: 1 January 2010

4.4.3 Absence of Accused during Committal Hearing

1. The accused must attend the committal hearing unless excused from doing so by the court (see 4.2 Presence and Absence of the Accused).
2. The court may continue a committal hearing despite an unauthorised absence of the accused if the hearing cannot be postponed without undue prejudice or inconvenience to the prosecution, other accused or a witness. An accused may be absent in this way due to:
 - absconding;
 - being removed from the court by order of the presiding magistrate due to the accused's behaviour; or
 - any other reason (*CPA 2009 s 136*).
3. When the accused returns to court, the court must direct that the record of evidence be played or read in the presence of the accused or that he or she be supplied with a transcript of evidence unless he or she was represented by a legal practitioner during the absence. The court may also recall any witnesses who gave evidence during the accused's absence on his or her application (*CPA 2009 s 138*).
4. The court must postpone the hearing until the accused is present if the accused is a natural person who is absent at the close of the prosecution's case and the court intends to commit the accused for trial. It is not necessary to postpone the hearing if the court intends to discharge the accused (*CPA 2009 s 137*).
5. If there are multiple accused, the court must postpone the hearing in respect of the charges involving the absent accused and may continue the hearing in respect of other charges where all relevant accused are present (*CPA 2009 s 137*).

⁶¹³ See *CPA 2009 s 365* on the availability of a person to sit beside the complainant to provide emotional support. See also 13.6 Alternative Arrangements.

⁶¹⁴ The court must give reasons for authorising any additional person to be present (*CPA 2009 s 133*).

4.4.4 Joint Committal Hearings

1. The Magistrates' Court and the Children's Court may exercise jurisdiction over committal proceedings concurrently and hold a joint committal proceeding for an adult and a child in specified circumstances (*Magistrates' Court Act 1989* s 25; *Children, Youth and Families Act 2005* s 516A).
2. In the Magistrates' Court, an application for a joint committal must be in Form 36 of the *Magistrates' Court Criminal Procedure Rules 2019*. The registrar of the Magistrates' Court must inform the Children's Court of the application for a joint committal (see *Magistrates' Court Criminal Procedure Rules 2019* r 64).
3. In the Children's Court, an application for a joint committal must be in Form 5 of the *Children's Court Criminal Procedure Rules 2019*. Similarly, the registrar of the Children's Court must notify the Magistrates' Court of any application for a joint committal (*Children's Court Criminal Procedure Rules 2019* r 2.06M).
4. The following conditions must be met before a joint committal may be conducted:
 - The charges against must be able to be joined in the same indictment (see 2.3 Joinder of Charges);
 - The child accused must be at least 15 years old when the criminal proceedings were commenced;
 - The child must be charged with murder, attempted murder, manslaughter, arson causing death or culpable driving causing death;⁶¹⁵
 - The Magistrates' Court and the Children's Court must both make orders for their respective accused to allow a joint committal (*Magistrates' Court Act 1989* s 25; *Children, Youth and Families Act 2005* s 516A).
5. While s 516A of the *Children, Youth and Families Act 2005* allows joint committals in relation to child homicide and defensive homicide, s 25 of the *Magistrates' Court Act 1989* does not contain an equivalent provision. This anomaly means that joint committals are not available when the child accused is charged with child homicide or defensive homicide.
6. When determining whether a joint committal is appropriate, the courts must have regard to the following factors:
 - (a) the age of the child;
 - (b) the effect of victims of the offence charged if the committal proceedings were not conducted jointly; and
 - (c) the estimated duration of the committal proceeding if conducted jointly; and
 - (d) the number of witnesses that would be cross-examined by both accused; and
 - (e) any other matter considered relevant (*Magistrates' Court Act 1989* s 25(4)).
7. The Children's Court must also consider the ability of the child to participate in a joint committal and provide instructions to his or her legal practitioner (*Children, Youth and Families Act 2005* s 516A).
8. Each party is entitled to be present and address the court when the court is considering making a joint committal order (*Magistrates' Court Act 1989* s 25; *Children, Youth and Families Act 2005* s 516A).

⁶¹⁵ The Children's Court does not have jurisdiction to hold a summary hearing in relation to these offences (*Children, Youth and Families Act 2005* s 516).

9. Once the Magistrates' Court or the Children's Court makes an order for a joint committal, that court may adjourn proceedings for up to 28 days to enable the other court to make the complementary order. When the Magistrates' Court makes a joint committal order, the registrar must provide a copy of the order to the registrar of the Children's Court (*Magistrates' Court Act 1989* s 25; *Children, Youth and Families Act 2005* s 516A; *Magistrates' Court Criminal Procedure Rules 2019* r 64(3)).
10. Joint committals are conducted so that:
 - (a) the *Children, Youth and Families Act 2005* applies as far as practicable to the child; and
 - (b) the *Criminal Procedure Act 2009* applies as far as practicable to the other accused-with any necessary modifications to ensure that the joint committal proceedings are conducted fairly and efficiently (*Magistrates' Court Act 1989* s 25(8). See also *Children, Youth and Families Act 2005* s 516A(6)).

Last updated: 31 August 2020

4.4.5 Determination of Committal Proceeding

1. After the close of the prosecution case, the court must generally enquire whether the accused intends to call evidence or make submissions. However, if the proceedings relate to a charge for a sexual offence where the complainant was a child or a person with a cognitive impairment when the proceedings commenced, the court must not enquire whether the accused intends to call witnesses (*CPA 2009* s 141).
2. If the accused is not represented by a legal practitioner, the court must inform the accused, in a manner likely to be understood by the accused, that he or she may:
 - give sworn evidence him or herself and must then answer questions from the prosecutor or the court;
 - choose to remain silent; or
 - choose to call other witnesses to give evidence, regardless of whether he or she gives evidence, unless the proceedings relate to a charge for a sexual offence where the complainant was a child or a person with a cognitive impairment when the proceedings commenced (*CPA 2009* ss 141(2), (2A)).⁶¹⁶
3. The court must make one of the following orders at the conclusion of all the evidence and submissions:

⁶¹⁶ The *CPA 2009* s 141 removed the mandatory requirement in s 46 of the *Magistrates' Court Act 1989* that this information must be given in writing. Information under s 141 must be given in a manner that the accused is likely to understand. Form 37 of the *Magistrates' Court Criminal Procedure Rules 2019* contains the following script for conveying this information to the accused:

"You now have the right to answer the charge against you and must choose either:

- (a) to give sworn evidence, that is, to enter the witness box, take the oath or make an affirmation and say what you want to say in answer to the charge. This is known as giving sworn evidence. When you have given your evidence you may be asked to respond to questions about it by the prosecution or the Court;

- (b) You may say nothing in answer to the charge.

In either case you may call any witness or witnesses to give sworn evidence for you. What would you like to do?" (see *Magistrates' Court Criminal Procedure Rules 2019* r 65).

(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 ...; 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... (CPA 2009 s 141(4)).⁶¹⁷

4. These above three orders are the only orders available to the magistrate at the end of a committal. There is no power to dismiss charges on the basis that it would be contrary to the interests of justice to allow the charges to proceed (*McKenzie & Anor v Magistrates' Court of Victoria* (2013) 39 VR 311; [2013] VSCA 81) or commit the accused for a summary hearing (*Gild v Magistrates' Court of Victoria* (2015) 44 VR 446; [2015] VSC 84).
5. Strict compliance with the procedure in sections 141(1) to (3) must be complete before the magistrate can validly exercise the jurisdiction to commit the accused to stand trial. Failure to comply with that procedure so renders the committal decision void (*Strangio v The Magistrates' Court of Victoria* [2013] VSC 496; *Brygel v Stewart-Thornton* [1992] 2 VR 387).
6. The court must strictly apply the statutory test of whether to commit the accused to stand trial. The fairness of any subsequent trial is not a relevant consideration. A magistrate may not discharge an accused on the basis that any subsequent trial would be an abuse of process (*Grassby v R* (1989) 168 CLR 1; [1989] HCA 45).
7. The role of a magistrate is to determine whether a reasonable jury could, or could not, convict the accused on the evidence available. This may involve some assessment of the credibility of witnesses and strength of the prosecution case. The assessment is undertaken on the assumption that the prosecution case is taken at its highest (*Forsyth v Rodda* (1988) 37 A Crim R 50; *Forsyth v Rodda* (1989) 42 A Crim R 197).
8. The test of "sufficient evidence" is designed to ensure that a person is not committed for trial upon evidence which is so weak that the prospects of conviction are minimal. The magistrate must not, however, assume the role of the jury. He or she is not required to choose between competing hypotheses and only commit the accused for trial if there is no hypothesis consistent with innocence. The role of the magistrate is similar to the role of a judge hearing a "no-case" submission (*Forsyth v Rodda* (1988) 37 A Crim R 50; *Thorp v Abbotto* (1992) 34 FCR 366; *Morriss v R* (1993) 68 A Crim R 556). See 5.7 Conduct of the Defence Case for further details on the test for a "no-case" submission.
9. A hypothesis consistent with innocence may weaken the hypothesis consistent with guilt and demonstrate that there is not sufficient evidence to support a conviction. Some evidence is usually necessary to support a hypothesis consistent with innocence, but this is not essential in all cases (*Thorp v Abbotto* (1992) 34 FCR 366).
10. The magistrate should not speculate on the likely outcome of the trial, or whether a verdict of guilt may be overturned on appeal on the basis of being unsafe or unsatisfactory (*Thorp v Abbotto* (1992) 34 FCR 366; *Wentworth v Rogers* [1984] 2 NSWLR 422; *Parker v Taylor*, Unreported, Supreme Court of Western Australia, 29 October 1993; *Morriss v R* (1993) 68 A Crim R 556).

⁶¹⁷ The court does not have the power to direct the prosecution to file a charge of another offence. The court should discharge the accused if the prosecution does not file a charge-sheet for the other offence.

11. A magistrate exercises ministerial or administrative power when he or she conducts a committal hearing, rather than judicial power. He or she does not make a binding determination of the rights of the parties and does not make a finding of fact concerning whether the accused is guilty or not guilty. The magistrate must, however, act judicially in the exercise of the committal power (*Grassby v R* (1989) 168 CLR 1; [1989] HCA 45; *Potter v Tural* (2000) 2 VR 612; [2000] VSCA 227).
12. A magistrate has no power to stay a committal proceeding as an abuse of process. The role of the magistrate is to consider the sufficiency of the evidence and not to decide whether the accused should be tried. The latter question is a matter for the DPP, and the trial court has adequate power to ensure that any subsequent prosecution is fair (*Grassby v R* (1989) 168 CLR 1; [1989] HCA 45; c.f. *Miller v Ryan* [1980] 1 NSWLR 93).

Last updated: 31 August 2020

4.4.6 Election to Stand Trial

1. At any time after the accused is served with the hand-up brief, he or she may elect to stand trial by filing a signed notice in Form 38 of the *Magistrates' Court Criminal Procedure Rules 2019* with the appropriate registrar and serving a copy of that notice on the informant (CPA 2009 s 143; *Magistrates' Court Criminal Procedure Rules 2019* r 66).
2. The accused must then be brought before the Magistrates' Court and, provided the court is satisfied that the accused understands the nature and consequences of electing to stand trial, it must commit the accused for trial (CPA 2009 s 143).

Last updated: 31 August 2020

4.4.7 Committal Hearings, Fitness to be Tried and Mental Impairment

1. While committals for Commonwealth offences usually adopt Victorian procedure, the treatment of fitness to be tried issues varies for Commonwealth and Victorian offences.
2. A magistrate may make a preliminary assessment of whether the accused is not guilty because of mental impairment. Evidence of mental impairment may also affect the magistrate's assessment of whether the prosecution has provided sufficient evidence of any mental element for the offence charged (*Keighran v Lowndes* (1997) 138 FLR 448; *R v Hawkins* (1994) 179 CLR 500; [1994] HCA 28).

Victorian Offences

3. For Victorian Offences, a committal hearing must be determined without regard to the question of the accused's fitness to stand trial. If the accused is committed for trial and a question arose concerning the accused's fitness to be tried, then that question must be reserved for the trial judge (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 8).
4. Once the accused is committed for trial, the DPP must file an indictment and the trial judge must decide whether there is an issue to be determined concerning the accused's fitness. If there is an issue, an investigation must be held in accordance with the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and determined within 3 months of committal. The court may extend the 3 month time limit for multiple periods of up to 3 months on each occasion (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 8). See 10.1 Investigations into Unfitness to Stand Trial in the Victorian Criminal Charge Book for further information.

Commonwealth Offences

5. When a question of the accused's fitness to stand trial is raised in a committal for a Commonwealth offence, the court must transfer the proceeding to the court which would hear the matter if the accused is committed for trial (*Crimes Act 1914* (Cth) s 20B).
6. The magistrate must order the accused to be detained in prison or hospital only for as long as is necessary in order to allow a trial court to determine whether the accused is fit to be tried, or whether the accused should be discharged, detained or bailed (*Crimes Act 1914* (Cth) s 20B).

7. The trial court must determine whether the accused is fit to be tried. If it finds that the accused is fit to be tried, it must remit the matter to the magistrate to determine whether to commit the accused for trial. Otherwise, it must determine whether there is sufficient evidence to put the person on trial for the offence. For this purpose:
- (a) the person may give evidence or make an unsworn statement; and
 - (b) the person may raise any defence that could properly be raised if the proceedings were a trial for that offence; and
 - (c) the court may seek such other evidence, whether oral or in writing, as it considers likely to assist in determining the matter (*Crimes Act 1914* (Cth) s 20B(7)).
8. If the court finds that there is sufficient evidence to put the person on trial, it must dismiss the charge if the circumstances of the offender or the offence mean that no more than nominal punishment would be appropriate. Otherwise, the court must determine whether, on the balance of probabilities, the accused will become fit to stand trial within 12 months. In making this determination, the court must obtain and consider evidence from a qualified psychiatrist and at least one other medical practitioner, along with any other evidence the court thinks it appropriate to consider (*Crimes Act 1914* (Cth) s 20BA).
9. The court must determine whether the accused suffers from a mental illness that can be treated in a hospital and if so, whether the accused objects to being detained for treatment. If the accused does not object to treatment, then the court must order that the accused be detained in a hospital and otherwise, order that the accused be detained in a place other than a hospital or placed on bail. The order for detention or bail must end:
- If the court finds that the accused will become fit to be tried within 12 months:
 - When the accused becomes fit to be tried; or
 - When the court makes a further order, which must take place as soon as possible after 12 months has elapsed if the accused has not become fit to be tried; or
 - If the court does not find that the accused will become fit to be tried within 12 months:
 - At the end of the period specified in the order, which must not exceed the maximum term of imprisonment available for the offence charged (*Crimes Act 1914* (Cth) ss 20BB, 20BC).
10. If the accused become fit to be tried within 12 months of the trial court's determination, the committal proceeding must recommence and the magistrate must determine whether there is sufficient evidence to justify a conviction (*Crimes Act 1914* (Cth) s 20BB; CPA 2009 s 141).
11. If the accused does not become fit to be tried within 12 months, or if the trial court determines that it is not likely that the accused will become fit to stand trial within 12 months, the court may order the accused detained in either a hospital or another place (including a prison) for a period not exceeding the maximum term of imprisonment available for the offence charged or may order the accused's released from custody (*Crimes Act 1914* (Cth) ss 20BB, 20BC).

Last updated: 1 January 2010

4.5 Committal for Trial and Subsequent Events

1. The magistrate must specify whether he or she commits the accused for trial in the County Court or the Supreme Court. The magistrate will consider whether the offence charged is within the jurisdictional competence of the County Court and whether the prosecution expresses a desire for the matter to be tried in a particular court.

Taking a Plea

2. If the magistrate intends to make a committal order, then before doing so, he or she must:

- ask the accused whether he or she pleads guilty; and
 - inform the accused that a sentencing court may take into account a plea of guilty and the time at which the plea is made (CPA 2009 s 144).
3. The magistrate must conduct the plea inquiry in accordance with Form 39 of the *Magistrates' Court Criminal Procedure Rules 2019* (CPA 2009 s 144. See *Magistrates' Court Criminal Procedure Rules 2019* r 67). The magistrate must say to the accused:
- You may plead guilty or not guilty. If you plead guilty to all the charges or some of the charges today or at any time before or during your trial, the sentencing judge may take into account whether you pleaded guilty and the stage in the proceedings at which you pleaded guilty or indicated an intention to plead guilty. It is also your right to plead not guilty to all of the charges or some of them. Whatever you say will be recorded and may be given in evidence if you appear before a judge. Do you plead guilty or not guilty?
4. The accused cannot be compelled to enter a plea. The court should treat a failure to answer as a plea of not guilty (Victoria, *Parliamentary Debates*, Legislative Assembly, Thursday 4 December 2008, 4973 (Mr Hulls (Attorney-General))).

Post-Committal Cautions

5. When committing the accused for trial, the 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, if relevant;⁶¹⁸ and
 - (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
 - (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 (CPA 2009 s 144).
6. The court must read the following caution, or a caution to similar effect, to the accused regarding the importance of legal representation:

⁶¹⁸ These provisions relate to applications for leave to lead evidence of the complainant's prior sexual history.

I am required to inform you of the importance of obtaining legal representation for the trial and that if you wish to be legally aided, it is your responsibility to make an application to Victoria Legal Aid as soon as possible (*Magistrates' Court Criminal Procedure Rules 2019* r 69).

7. Form 40 of the *Magistrates' Court Criminal Procedure Rules 2019* prescribes an alibi caution magistrates may use to comply with s 144(2)(b)(i):

I caution you that your right to call evidence at trial in support of an alibi is restricted.

To be allowed to call alibi evidence you must give written notice to the Court now or to the DPP not later than 14 days after the end of this committal proceeding.

The notice must contain—

- (a) particulars as to time and place of the alibi; and
- (b) the name of any witness to the alibi; and
- (c) last known address of the witness; and
- (d) if the name and address of a witness are not known, any information which might be of material assistance in finding the witness—

in support of your alibi (*Magistrates' Court Criminal Procedure Rules 2019* r 68, Form 40).

8. At trial, the accused must not lead evidence in support of an alibi without leave of the court unless he or she gave a notice of alibi within 14 days of committal. The trial court must not refuse leave if it appears that the accused was not informed of the requirement of an alibi notice (*CPA 2009* s 190).

Transfer of Related Summary Proceedings

9. When the court commits the accused for trial for an indictable offence, it must also order the transfer of all proceedings for charges for summary offences that are related to the indictable offence to either the County Court or the Supreme Court (*CPA 2009* s 145).

10. Related offences are:

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 (*CPA 2009* s 3).

11. When the court transfers a related summary proceeding, the registrar must forward the following documents to the relevant court:

- (a) the Magistrates' Court case file number;
- (b) the original charge-sheet;
- (c) the address and telephone number of the Court where the proceeding for the summary offence was commenced;
- (d) where the accused has been admitted to bail, the undertaking, and a surety's affidavit of justification or declaration of justification (*Magistrates' Court Criminal Procedure Rules 2019* r 89).

12. If new summary proceedings are commenced after the accused is committed for trial, the court must also transfer any new proceedings for related offences to the trial court (*CPA 2009* s 145).

13. The court may choose not to transfer proceedings to the trial court if the informant (or, if the DPP is prosecuting the charge, the DPP) and the accused both agree (CPA 2009 s 145).

Taking Evidence Post-Committal

14. Until the commencement of *Justice Legislation Miscellaneous Amendment Act 2018* s 28 on 3 March 2019, CPA 2009 contained Part 4.11, which allowed evidence to be taken after the accused had been committed for trial. This process has been abolished due to the introduction of post-committal directions hearings in the County and Supreme Courts (*Justice Legislation Miscellaneous Amendment Bill 2018*, Explanatory Memorandum, clause 28).

Last updated: 31 August 2020

5 Trial Procedure

1. This chapter covers trial and pre-trial procedures in the County Court and the Supreme Court. These procedures apply from the moment the accused is committed for trial or when a direct indictment is filed (CPA 2009 s 158).
2. A trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel (or the first part of the jury panel) in accordance with s 217 of the CPA 2009 (CPA 2009 s 210).

Last updated: 15 December 2021

5.1A eLodgement in the County Court

1. The County Court Criminal Division Practice Note specifies that all forms and documents must be filed electronically except
 - (a) Draft Warrants – Must be emailed to the relevant Associate
 - (b) Executed Warrants – Must be handed up in open court
 - (c) Any charge that is required to be issued by the court – must be filed with the Criminal Registry Services in person
 - (d) Depositions filed by the Office of Public Prosecutions - must be filed by e-Depositions
 - (e) Commonwealth Depositions – may be delivered or handed to the Criminal Registry Services until further notice. If Commonwealth depositions are available electronically, the Office of the Commonwealth DPP must contact the Court to arrange electronic delivery of the depositions.
 - (f) Forms and documents for a matter represented by a pre-CR-15 or pre AP-16 case number (*County Court Criminal Division Practice Note*, PNCR 2-2022, [2.4]).
2. The requirement that documents are filed by eLodgement does not apply to self-represented accused, who can file documents by email or by post to the Melbourne Registry of the County Court (*County Court Criminal Division Practice Note*, PNCR 2-2022, [2.8]).

Last updated: 17 March 2023

5.1 Pre-Trial Procedures

1. The following sections describe a number of steps that may take place before the trial commences.

Last updated: 25 May 2009

5.1.1 Directions Hearings

1. The court may conduct directions hearings at any time, except during the trial.

2. At a directions hearing, the court may make or vary any direction or order, or do anything the court considers necessary for the fair and efficient conduct of the proceeding. For example, the court may:
 - require the accused to indicate whether he or she is legally represented and has funding for continued representation for the trial;
 - require each party to notify the court of any pre-trial issues it seeks to raise and any pre-trial orders it seeks;
 - set a timetable for the hearing of pre-trial issues or applications for orders;
 - if relevant, require the parties to advise the court on the availability of the complainant and the accused for a special hearing under Division 6 of Part 8.2 of the CPA 2009, and direction that a special hearing be held;
 - require the parties to estimate the expected length of the trial;
 - require the parties to advise on the estimated number of witnesses, the availability of witnesses other than the accused and any requirements of those witnesses or interpreters;
 - order a party to make, file or serve any written or oral material required for the purpose of the proceeding;
 - order the prosecution to file and serve a copy of any material the prosecution intends to rely upon at the trial;
 - determine objections relating to the disclosure of information or material by the prosecution;
 - allow a party to amend a document it has prepared for the purposes of the proceeding;
 - determine an application for a sentence indication (CPA 2009 ss 179, 181).
3. A judge may also make any order or direction that can be made or decided before trial (CPA 2009 s 181(3)). This allows a judge to make pre-trial orders and rulings on admissibility and issues of law under s 199 of the CPA 2009 at a directions hearing.
4. If the prosecution has filed an indictment, the court may arraign the accused at a directions hearing. If the accused pleads not guilty to one or more charges and indicates his or her intention to plead not guilty to all charges, it is not necessary to read the remaining charges to the accused and he or she must be taken to have pleaded not guilty to those charges (CPA 2009 s 180).⁶¹⁹

Supreme Court Directions Hearings

5. At the end of the committal hearing, the Magistrates' Court will contact the Supreme Court Principal Registry to schedule a Post-Committal Directions Hearing (PCDH) (*Supreme Court of Victoria*, Practice Note SC CR 8, [4.3]).
6. The PCDH will normally be held before the judicial registrar. Counsel who appeared at the committal are expected to appear at the PCDH (*Supreme Court of Victoria*, Practice Note SC CR 8, [4.2], [4.8]).
7. The PCDH will normally be listed within a day or two of the completion of the committal hearing. However, if the committal hearing was conducted outside the Melbourne metropolitan area, then the PCDH will normally occur within five days of the completion of the committal (*Supreme Court of Victoria*, Practice Note SC CR 8).

⁶¹⁹ An arraignment at a directions hearing does not mark the commencement of the trial (CPA 2009 ss 210, 217). In addition, the process of entering a plea of not guilty to all charges through a representative plea is not available at an arraignment before the jury (Compare CPA 2009 s 215).

8. The prosecution is not required to file an indictment at the Post-Committal Directions Hearing, although they must provide a police summary prior to the hearing (*Supreme Court of Victoria*, Practice Note SC CR 8, [4.7]).
9. The Magistrates' Court will forward relevant documents to the Supreme Court registry on the day of committal (*Supreme Court of Victoria*, Practice Note SC CR 8, [4.3]).
10. Unless the accused was bailed to appear at the Supreme Court, the accused does not need to be present for the PCDH, but will appear by video-link (*Supreme Court of Victoria*, Practice Note SC CR 8, [4.6]).
11. If the accused intends to plead guilty, the Judicial Registrar will set a timetable and a date for the plea hearing, and may arraign the accused (*Supreme Court of Victoria*, Practice Note SC CR 8, [4.9]).
12. In a contested case, the Judicial Registrar will set a timetable for the filing of pre-trial documents and notices, and schedule a directions hearing before the Principal Judge. The Practice Note provides a standard timetable, which may be modified in a more complex case, if there are fitness to be tried issues, or if resolution may be possible (*Supreme Court of Victoria*, Practice Note SC CR 8, [4.10]–[4.12]).
13. At the Directions Hearing before the Principal Judge, trial counsel are expected to appear. In addition to the matters identified in CPA 2009 s 181(2), counsel are expected to identify:
 - Any potential problems with legal representation or funding;
 - Any potential issues in relation to witness availability;
 - Whether the prosecution have any investigations that have not been completed;
 - What, if any, further notices of additional evidence are anticipated;
 - What, if any, *Basha* hearings are anticipated;
 - Any outstanding requests for the provision of documents or information from the prosecution;
 - When any additional expert reports will be provided by either side;
 - Any anticipated subpoena issues, including whether the defence intend to subpoena documents from third parties, the production of which is likely to be substantial or contested;
 - Whether a further directions hearing needs to be held to deal with any of the above matters;
 - Any specific technology requirements for the trial;
 - Whether the original trial estimate needs to be revised; and
 - Whether the case would benefit from being referred to a Judicial Registrar or Judge for a case conference (*Supreme Court of Victoria*, Practice Note SC CR 8, [5.5])
14. A final directions hearing is held at least six weeks before the trial date. Trial counsel are expected to attend the final directions hearing. The purpose of the final directions hearing is to ensure all orders for filing documentation are complied with and the trial is ready to proceed on the listed trial date (*Supreme Court of Victoria*, Practice Note SC CR 8, [6.1]–[6.3])

Supreme Court Case Conference

15. The Judicial Registrar of the Criminal Division may conduct a case conference at any time before the trial (*Supreme Court (Criminal Procedure) Rules 2017* r 4.07(1)).
16. The purpose of a case conference is to assist in the fair and efficient conduct of the trial. This includes clearly identifying what is in dispute and ensuring the trial is ready to begin on the listed trial date (*Supreme Court (Criminal Procedure) Rules 2017* r 4.07(2)).

17. At a case conference, the DPP must, subject to any substantial concerns about a witness' personal safety:
- (i) give notice of the name of any witness who may be called as a Crown witness upon the trial and whose name does not appear on the indictment as a witness or as an additional witness;
 - (ii) give notice of the substance of the evidence proposed to be adduced from each such witness (whether by way of provision of a copy of a statement made by the witness or otherwise);
 - (iii) provide to the Judicial Registrar-Criminal Division any information that the Judicial Registrar-Criminal Division may reasonably require as to the availability of each Crown witness;
 - (iv) notify the Judicial Registrar-Criminal Division and the accused of the name of any potential Crown witness whose deposition the Crown proposes to apply to tender in evidence and the grounds of any such proposed application (*Supreme Court (Criminal Procedure) Rules 2017* r 4.07(4)(a))
18. The accused or the accused's legal practitioner must be prepared to certify that the accused is ready to proceed on the proposed trial date (*Supreme Court (Criminal Procedure) Rules 2017* r 4.07(4)(b)).
19. Nothing said by or on behalf of an accused at a case conference, or a failure to answer a question at a case conference, can be used in any subsequent trial or made the subject of committal at that trial (*Supreme Court (Criminal Procedure) Rules 2017* r 4.07(5)).

County Court Directions Hearings

20. Chapter 5 of the *County Court Criminal Division Practice Note* PNCR 2-2022 sets out the case management principles which are used in cases that do not involve charges for sexual offences where the complainant is a child or has a cognitive impairment (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.2]).
21. The Practice Note identifies the principles of case management, including:
- Case management is customized to the needs of each matter;
 - Court processes that do not require a hearing are conducted administratively;
 - In-Court hearings should be meaningful, with parties advising the court if more time is required to continue discussions or meet Court directions (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.9]–[5.14]).
22. In determining how to approach case management, the court will take into account 'priority factors', which are identified as:
- Witnesses under 18 years of age;
 - Witnesses with cognitive impairment;
 - Witnesses or accused over the age of 70;
 - Accused under the age of 21;
 - Accused is an Aboriginal or Torres Strait Islander;
 - A vulnerable witness or accused (such as for medical reasons)
 - Accused in custody;
 - The matter involves a fatality (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.17])
23. When the accused pleads not guilty, an initial directions hearing will be held:

- Approximately 28 days post-committal if the accused is an adult;
 - 14 days post-committal if the accused is a child;
 - On a nominated date if the matter involves a change of plea, direct indictment or re-trial (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.18]).
24. The prosecution must file and serve the police summary and the Prosecution case initiation notice within 7 days of the committal. The defence must also file the Notice of practitioner acting and the defence case initiation notice within 7 days of the committal (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.19]–[5.20]).
25. Before the initial directions hearing, the court will triage the case to determine the appropriate case management approach. This will be based on the priority factors, the case initiation notices and case management requirements. If no case management is required, then the matter may be considered for a direct to trial process (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.22]–[5.25]).
26. The Practice Note explains that case management may be conducted administratively by Criminal Division lawyers contacting the parties and by judicial officers conducting directions hearings (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.27]–[5.28]).
27. Judicial officers can conduct a longer ‘case assessment hearing’. This kind of hearing is expected to take 15-30 minutes, is used to facilitate resolution discussions where there is a discrete issue preventing resolution and to determine whether that issue might benefit from further case management before a judge. A case assessment hearing may involve a discussion of the evidence, clarification of the prosecution case and the potential for resolution. The prosecution must file and serve the depositions before a case assessment hearing, and the court may require additional materials including written submissions, trial documents and audio-visual material (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.29]–[5.37]).
28. Another type of case management hearing is a ‘case conference hearing’. This is a substantive in-court hearing, and may take a significant amount of time. The accused must attend the case conference in person unless otherwise directed by the Court. The purpose of a case conference hearing is to facilitate resolution discussions, narrow the issues in dispute, clarify the prosecution case and discuss or determine any substantial pre-trial legal issues. The judge will conduct an in-depth discussion with the parties about matters including the state of the evidence, factual issues in dispute and legal issues. The judge may also test the strength and weaknesses of the parties’ positions. Case conferences are conducted on a without prejudice basis, and do not bind the parties, or the Court, and statements made in a case conference (or documents prepared for a case conference) are not admissible at trial. Before a case conference, the prosecution must file the depositions, trial indictment, summary of prosecution opening, written submissions and *Evidence Act* and *Jury Directions Act* notices. The defence must file written submissions relevant to the case conference, and the court may require either party to file an outline of submissions or other documents prepared for the purpose of the case conference (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.38]–[5.56]).

Initial Directions Hearings for sexual offences against a child or a cognitively impaired person

29. Chapter 6 of the *County Court Criminal Division Practice Note* PNCR 2-2022 sets out the case management processes which apply in cases that involve charges for sexual offences where the complainant is a child or has a cognitive impairment (*County Court Criminal Division Practice Note*, PNCR 2-2022, [6.1]).
30. Once the accused is committed for trial, the prosecution must file and serve on the defence the police summary and the prosecution case initiation notice within 7 days. Then, within 14 days of committal, the prosecution must file and serve on the defence the indictment, summary of the prosecution opening, depositions and any notices under the *Evidence Act 2008* or *Jury Directions Act 2015* (*County Court Criminal Division Practice Note*, PNCR 2-2022, [6.3]–[6.4]).

31. The defence must file and serve on the prosecution a notice of practitioner acting and the defence case initiation notice within 7 days of committal. Further, if the defence wish to conduct pre-trial cross examination under CPA 2009 s 198A, it must file a completed application, signed by both parties, at least 7 days before the initial directions hearing.

Evidentiary status of statements by accused

32. In the Supreme Court, statements by or on behalf of the accused at a case conference, or an accused's failure to answer a question, may not be used in a subsequent trial or made the subject of comment at a trial. This does not apply to prevent the accused from relying on an indication to plead guilty (*Supreme Court (Criminal Procedure) Rules 2019* r 4.07(5)).
33. Similarly, in the County Court, statements by or on behalf of the accused at a pre-trial conference or directions hearing or an accused's failure to answer questions not be used in a subsequent trial or made the subject of comment (*County Court Criminal Procedure Rules 2019* r 2.06).

Last updated: 17 March 2023

5.1.2A Legal practitioner to notify that he or she acts

1. The Supreme Court and County Court rules set out procedures for an accused's legal practitioner notifying the court and other parties to the proceeding that he or she acts for the accused.
2. In the Supreme Court, the practitioner must serve Form 6-4B of the *Supreme Court (Criminal Procedure) Rules 2017* on the DPP, the Judicial Registrar-Criminal Division and the Prothonotary (*Supreme Court (Criminal Procedure) Rules 2017* rr 4.04, 4.05).
3. If the legal practitioner ceases to act, he or she must serve notice in writing in Form 6-4C of the *Supreme Court (Criminal Procedure) Rules 2017* on the DPP, the Judicial Registrar-Criminal Division, the Prothonotary and the accused. The legal practitioner must also return all material provided by the Judicial Registrar-Criminal Division or the DPP to the appropriate body (*Supreme Court (Criminal Procedure) Rules 2017* rr 4.04, 4.05).
4. In the County Court, the legal practitioner must file Form 1A of the *County Court Criminal Procedure Rules 2019* with the Registrar and must serve a copy of the form on all other parties to the proceeding. If a legal practitioner ceases to act, he or she must file Form 1B of the *County Court Criminal Procedure Rules 2019* with the Registrar and serve a copy on all other parties as soon as practicable (*County Court Criminal Procedure Rules 2019* r 1.07).

Last updated: 31 August 2020

5.1.2 Pre-Trial Disclosure

1. Once an accused has been committed for trial, the DPP must provide a copy of the transcript of evidence and statements admitted in evidence at the committal, along with a transcript of any recording admitted in evidence (the depositions). The accused must also be given an opportunity to examine any exhibits (CPA 2009 s 147).
2. The DPP must also serve a copy of the indictment and a notice in prescribed form on the accused as soon as practicable after the indictment is filed (CPA 2009 s 171).
3. The notice in prescribed form must advise the accused to seek legal representation and that the accused has the right, if eligible, to legal aid, and provide details for how to contact Victoria Legal Aid (CPA 2009 s 171). The relevant forms are:
 - Form 6-4E of the *Supreme Court (Criminal Procedure) Rules 2017*; and
 - Form 2A of the *County Court Criminal Procedure Rules 2019*.

Prosecution Disclosure and Additional Evidence

4. The prosecution is under a continuous disclosure obligation. The prosecution must disclose any information, document or thing that would have been disclosed as part of the hand-up brief that it receives after the accused is committed for trial. If it is not reasonably possible to provide the item in question, then the prosecution must disclose the existence of the new material and make it available for inspection at an agreed place and time (CPA 2009 s 185. See also *Gild v The Queen* [2018] VSCA 317 [46]).
5. While the disclosure obligation is owed by the prosecution to the court, material information in the possession of investigating police should be regarded as being in the possession of the prosecution. Otherwise there is a risk that the disclosure obligation will be fragmented by the division between prosecuting and investigative agencies in a way that leads to an unfair trial (*Roberts v The Queen* [2020] VSCA 277, [127]; *R v Lucas* [1973] VR 693; *Visser v DPP (Cth)* [2020] VSCA 327, [39]–[40], [73]–[86]).
6. The disclosure obligation includes, in an appropriate case, an obligation to make enquiries about disclosable material (*AJ v The Queen* (2011) 32 VR 614, [22]; *Anile v The Queen* [2018] VSCA 235, [130]).
7. However, there must be something which puts the prosecution or investigating police officer on notice of why there may be potentially disclosable material (*Ewins v Ablett* [2023] VSC 261, [103]–[104]).
8. It also includes an obligation on prosecutors to personally satisfy themselves that adequate disclosure has taken place. This is especially relevant where there is a change of prosecuting counsel in the course of preparing a matter for trial, as a subsequent prosecutor cannot assume that the earlier prosecutor has provided complete and adequate disclosure (*AJ v The Queen* (2011) 32 VR 614, [39]).
9. The obligation to disclose information held by investigating police, even if not actually known by the prosecution, extends to information held by separate investigating agencies where there is a joint operation. It does not, however, extend to agencies conducting a parallel investigation, such as where a person is investigated by both the AFP and ASIO (*Visser v DPP (Cth)* [2020] VSCA 327, [73]–[86]; *R v Thomas* (2008) 19 VR 214, [29]).
10. If the accused is indicted upon a direct indictment, then the prosecution must serve a copy of any document or list that would have been included in a hand-up brief, and continuous disclosure obligations apply to any additional material that later comes into the prosecution's possession (CPA 2009 s 185).
11. Subject to sections 185(4) and 185A, the prosecution must comply with this obligation 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 (CPA 2009 s 185(2)).
12. The prosecution's duty of disclosure extends to three classes of evidence. The prosecution must disclose material that, on a sensible appraisal:
 - is relevant or possibly relevant to an issue in the case;
 - raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or
 - holds out a real (as opposed to fanciful) prospect of providing a line of enquiry as to evidence that falls into either of the other two classes (*Gild v The Queen* [2018] VSCA 317, [49]; *R v Farquharson* (2009) 26 VR 410, [213]; *Visser v DPP (Cth)* [2020] VSCA 327, [36]; *Spiteri v The Queen* (2004) 61 NSWLR 369; *Anile v The Queen* [2018] VSCA 235, [130]).
13. In *Anile v The Queen* [2018] VSCA 235, the Court of Appeal observed that:

The duty to disclose is not confined to material that bears upon the credit of prosecution witnesses, though that is sometimes mistakenly believed. Any material that might enable the defence to prepare its case properly, whether seemingly admissible in evidence or not, and whether considered by the prosecution to be more generally harmful to the accused than of assistance, must be disclosed. What use, if any, is to be made of that material is a matter for the defence, not for the prosecution (at [136]).

14. This duty is not limited to the terms of CPA 2009 ss 110 and 111, which specifies the contents of the hand-up brief, and the statutory continuous disclosure obligation in relation to new material that would have been included in the hand-up brief (*Visser v DPP (Cth)* [2020] VSCA 327, [37]).
15. One critical class of disclosable material is any information which reflects materially on the credibility of prosecution witnesses (*AJ v The Queen* (2011) 32 VR 614, [21]). This is because "the question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important 'issues' in the case" (*R v Brown* [1998] AC 367, 377; *Roberts v The Queen* [2020] VSCA 277, [129]).
16. This does not require disclosing every "speculative and scurrilous rumour which may have come to the ears of investigating officers concerning a witness" (*R v K* (1991) 161 LSJS 135, 140).
17. Changes in a witness' statement, including the existence of earlier drafts or a substantial delay between the relevant events and the making of the statement, can be a matter relevant to the witness' credibility or reliability and which should be disclosed so the defence has an opportunity to challenge the statements, and so the jury can assess the reliability of the evidence (*Roberts v The Queen* [2020] VSCA 277, [156]).
18. However, the duty of disclosure does not extend to material:
 - (a) relevant only to the credibility of defence (as distinct from prosecution) witnesses;
 - (b) relevant only to the credibility of the accused person;
 - (c) relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false;
 - (d) for the purpose of preventing an accused from creating a trap for himself if, at the time the prosecution became aware of the material it was not a relevant issue at trial (*R v Farquharson* (2009) 26 VR 410, [214]).

The scope of disclosure obligations

19. The continuous disclosure obligation extends to new material which the prosecutor discovers in the course of proofing a witness, where the witness changes or adds to his or her previous account. Such material should be provided to the accused in the form of a statement signed by the witness (*Majinski v Johnson* (2003) 37 VR 301; [2013] VSCA 10).
20. It is not necessary for the prosecution to provide material to the accused that it has already provided (CPA 2009 s 185(4)).

The prosecutor does not need to provide or make available for inspection any material that the prosecutor believes will result in disclosure of child pornography to an accused personally. However, an accused may apply for a court order where the prosecutor refuses to provide material on this basis. The court may then order disclosure on conditions after having regard to whether the accused is legally represented (CPA 2009 s 185A).

21. If the prosecution intends to call a witness to give evidence that was not contained in the depositions,⁶²⁰ the prosecution must serve on the accused and file in court:

⁶²⁰ Depositions are defined as "the transcript of evidence given in a committal proceeding and any statements admitted in evidence in a committal proceeding in accordance with Chapter 4" (CPA 2009 s 3). It therefore appears that the definition of "additional evidence" covers the whole of the prosecution case if the accused is charged using a direct indictment.

(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 (CPA 2009 s 188(2)).

22. The accused may ask the prosecution to provide details of any previous convictions of witnesses the prosecution intends to call at the trial. The prosecution does not need to provide details of convictions that are irrelevant to the proceeding, but must inform the accused that the witness has undisclosed convictions (CPA 2009 s 187).

Prosecution disclosure and expert evidence

23. If the prosecution has served a forensic report on the accused, the accused may ask the prosecution to obtain an expert report in relation to a matter (or matters) that will be contested at trial ('responding expert report') (*Supreme Court of Victoria, Practice Note SC CR 3, 5.2; County Court of Victoria Practice Note: Expert Evidence in Criminal Trials, 3.2*).
24. If the prosecution rejects that request, or fails to respond within a reasonable time, the accused may apply to the court for a direction that an expert report be obtained. The accused must give the prosecution at least 14 days notice of such an application (*Supreme Court of Victoria, Practice Note SC CR 3, 5.2–5.3; County Court of Victoria Practice Note: Expert Evidence in Criminal Trials, 3.2–3.3*).
25. The accused may not apply for a responding expert report after the date fixed by the court for the filing of the defence response to the summary of the prosecution opening, unless the court gives leave (*Supreme Court of Victoria, Practice Note SC CR 3, 5.5; County Court of Victoria Practice Note: Expert Evidence in Criminal Trials, 3.5*).
26. A party wishing to introduce an expert report must serve it on the other party as early as reasonably practical, and no later than 60 days before the trial is listed to start. If the report is in response to an expert report produced by another party, it must be served as early as reasonably practical and no later than 14 days before the trial. A party that fails to comply with these timeframes may not introduce the expert evidence without the consent of the other party or leave of the court (*Supreme Court of Victoria, Practice Note SC CR 3, 8.1–8.2; County Court of Victoria Practice Note: Expert Evidence in Criminal Trials, 6.1–6.2*).
27. These timelines for service do not apply where the prosecution has not agreed to produce an expert report under 3.2 of the practice note, or been ordered to by the court under 3.6 of the practice note. They also do not apply to proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (*Supreme Court of Victoria, Practice Note SC CR 3, 8.3; County Court of Victoria Practice Note: Expert Evidence in Criminal Trials, 6.3*).
28. A party who serves an expert report on another must make the expert available for interview by the other party, if the expert agrees to be interviewed (*Supreme Court of Victoria, Practice Note SC CR 3, 10.1–10.5; County Court of Victoria Practice Note: Expert Evidence in Criminal Trials, 8.1–8.5*).

Defence Disclosure

29. The accused must give preliminary disclosure of the following types of evidence before the trial:
- Expert evidence; and
 - Alibi evidence (CPA 2009 ss 189, 190).

Expert Evidence

30. The accused must serve on the prosecution and file in court the statement of any expert witness he or she intends to call at least 14 days before the trial is listed to commence. If the statement is not ready at that time, then the statement must be served and filed as soon as possible after it comes into existence (CPA 2009 s 189).
31. The expert witness statement must contain the following details:

- the name and business address of the expert witness;
 - a statement of the qualifications of the witness to give expert evidence; and
 - the substance of the evidence the accused intends to adduce, including the witness' opinion and the basis for the opinion (CPA 2009 s 189).
32. Courts should interpret this section consistent with its purpose, which is to avoid surprise and facilitate the effective management of cases. The statement must contain sufficient details to give the prosecution notice of the expert evidence the accused will call at the hearing (*Foskett v Burgess* (1998) 102 A Crim R 448).
33. For proceedings in the County Court, the party calling the witness must provide the witness with a copy of the 'Expert Witness Code of Conduct' at the time of engaging the witness. The expert's report must contain an acknowledgment that the expert has read and complied with the code in preparing the report. Parties must comply with PNCR 1-2014 which sets out the requirements for expert evidence sought to be adduced in the County Court, including the obligation to serve an expert evidence report as early as possible and at least 60 days before the trial (in the case of a primary report) or at least 14 days before the trial (in the case of a responding report). Parties may not introduce expert evidence if the parties has not complied with the above filing requirements unless the other parties agree or the court gives leave (*County Court Criminal Division Practice Note*, PNCR 2-2022, [18.5]–[18.8]).
34. The Code includes matters such as:
- The expert witness' overriding duty to assist the court;
 - An expert witness is not an advocate for a party;
 - The witness' obligation to inform the court if he or she changes his or her opinion on a material matter;
 - That the witness may be required to confer with other expert witnesses and provide a joint report (*County Court Criminal Division Practice Note*, PNCR 2-2022, Expert Witness Code of Conduct).

Alibi Evidence

35. The accused may not give evidence in support of an alibi personally or adduce such evidence from another witness without the leave of the court unless he or she gave the DPP a "notice of alibi" within the prescribed period (CPA 2009 s 190).⁶²¹
36. "Evidence in support of an alibi" is defined as:
- 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 (CPA 2009 s 3).
37. The accused must serve the notice of alibi on the DPP within 14 days of being committed to stand trial. If the accused is indicted on a direct indictment, the notice must be served within 14 days of receiving a copy of the indictment (CPA 2009 s 190).
38. The notice of alibi must contain the following details:
- the time and place of the alibi;
 - the name and last known address of any alibi witnesses; and

⁶²¹ Unlike in summary hearings, the obligation to serve an alibi notice applies to all accused and not only legally represented accused (compare CPA 2009 ss 51 and 190).

- if the name and address of a witness is not known, material information that may assist in locating that witness (CPA 2009 s 190).
39. The relevant forms are:
- Form 6-4E of the *Supreme Court (Criminal Procedure) Rules 2017*; and
 - Form 2D of the *County Court Criminal Procedure Rules 2019*.
40. If the accused is unable to include the name and address of an alibi witness in the notice, the court will not allow him or her to call that person unless it is satisfied that the accused took reasonable steps to ensure the witness' name and address would be ascertained (CPA 2009 s 190).
41. The notice of alibi must contain sufficient particulars to inform the prosecution of the nature of the alibi. It is not sufficient to state only that named witnesses will give alibi evidence (*R v Sorby* [1986] VR 753).
42. The court should consider whether the accused has provided an adequate explanation for failing to provide an alibi notice when determining whether to grant leave to adduce alibi evidence. In addition, the importance of the evidence in the context of the accused's case is relevant. The court should generally grant leave where there is a valid explanation and the evidence is important, unless a grant of leave and subsequent adjournment would cause irreparable prejudice to the prosecution (*Skondin v R* [2005] NSWCCA 417; *R v Gardiner* Unreported, NSWCCA, 3 June 1997; *R v Williamson & Morell*, Unreported, WACCA, 11 October 1990).
43. The court must not refuse leave if it appears that the accused was not informed of the requirement to give notice of alibi to the prosecution. The accused will usually be informed of this requirement at the conclusion of the committal hearing (CPA 2009 ss 144, 190).
44. The prosecution may lead evidence of a notice of alibi as part of its case. Failure by the defence to lead evidence consistent with the notice allows the prosecution to attack the credibility of the defence case and may raise the issue of why the defence has not called alibi witnesses. Similarly, the prosecution may lead evidence of conflicting alibi notices to undermine the defence case (*R v Heuston* (1996) 90 A Crim R 213; *R v McKinney & Judge*, Unreported, NSWCCA, 6 September 1993; *R v Smith & Ors*, Unreported, SACCA, 1 June 1995; *Nicolaides v WA* [2007] WASCA 203; c.f. *R v Keane*, Unreported, Vic CCA, 29 June 1978).
45. If the accused gives a notice of alibi, the court must grant a prosecution request for adjournment if that is necessary to enable the investigation of the alibi, unless that adjournment would prejudice the proper presentation of the accused's defence (CPA 2009 s 190).
46. It is an offence for a person acting for the prosecution or a member of the police force to communicate with a witness named in an alibi notice with respect to the charge before the conclusion of the proceeding, unless it is with the consent and in the presence of the accused's legal practitioner or, if he or she is self-represented, the accused (CPA 2009 s 191). The prohibition on contacting witnesses named in an alibi notice does not apply to a witness the prosecution has informed the accused that it intends to call as a witness for the prosecution (CPA 2009 s 191; *R v Beljajev* (2006) 14 VR 241; [2006] VSC 413).

Addresses and Telephone Numbers

47. The prosecution must not include the address or telephone number of a person in any material provided to the accused unless:
- the prosecutor believes that the address or telephone number provided does not identify a particular person;
 - the prosecutor believes that the address or telephone number is relevant and disclosure is not likely to pose a reasonably ascertainable risk to the welfare or safety of any person; or
 - the trial court permits the disclosure on the application of the prosecutor or the accused (CPA 2009 s 186).

48. The court may permit the disclosure of an address or telephone number if it is satisfied that the information is relevant and either:
- the disclosure is not likely to pose a reasonably ascertainable risk to the welfare or safety of any person; or
 - having regard to the right to privacy of the witness and the right of the accused to prepare properly for the hearing, the interests of justice outweigh the risk to the welfare or safety of the witness (CPA 2009 s 186. See also *Charter of Human Rights and Responsibilities Act 2005* ss 13, 24, 25).

Pre-Trial Statements

49. Unless the court orders otherwise, the prosecution must serve and file a summary of the prosecution opening and a notice of pre-trial admissions at least 28 days before the trial is due to commence.⁶²² The summary 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 (CPA 2009 s 182(2)).
50. The summary of the prosecution opening should not be treated as a pleading. It should outline the acts, facts, matters and circumstances of the alleged offending in general terms. It should not set out each and every fact alleged, or each and every inference which should be drawn from a particular primary fact (*North v The Queen* [2020] VSCA 1; *Said v The Queen* [2020] VSCA 178, [42]–[43]).
51. The summary should also identify any alternative ways in which the prosecution seeks to put its case (*DPP v Elliot* [2022] VSC 171, [53]).
52. The notice of pre-trial admissions must identify the statements of witness whose evidence the DPP believes the defence should admit without formal proof. This may include formal matters such as continuity, age, accuracy of a plan or that photographs were taken in a certain manner or at a certain time (CPA 2009 s 182).
53. After being served with the summary of prosecution opening and notice of pre-trial admissions, the defence must prepare a defence response to the summary of the prosecution opening and a response to the prosecution notice of pre-trial admissions. These documents must be served on the prosecution and filed in court at least 14 days before the day on which the trial is due to commence (CPA 2009 s 183).
54. The defence response to the prosecution opening must:
- ... identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken (CPA 2009 s 183(2)).
55. As the Court of Appeal explained in *Alfarsi v The Queen*:
- [Section] 183(2) requires no more of an accused person than to point out those acts, facts, matters and circumstances in the prosecution opening with which he or she disagrees, and to provide a reason for such disagreement. But the provision does not — expressly or impliedly — require an accused person taking issue with an act, fact, matter or circumstance to make any positive statements of fact in relation to it (*Alfarsi v The Queen* [2021] VSCA 283, [31]).
56. The process of requiring a defence response does not make any fundamental alterations to the accusatorial system of criminal justice, or impinge on the privilege against self-incrimination (*Alfarsi v The Queen* [2021] VSCA 283, [33]).

⁶²² The trial is due to commence on the date when the accused is due to be arraigned in the presence of the jury panel from which the jury for the trial will be empanelled (CPA 2009 ss 210, 217).

57. The Court of Appeal also made the following comment in *Alfarsi v The Queen*:

Before parting with this matter, we would make the following observations. The workload of the criminal justice system is constantly increasing, its effective discharge now being further complicated by the effects of the COVID-19 pandemic. The provisions under consideration in these applications are, despite their limitations, intended to enable the conduct of criminal trials to proceed more efficiently and occupy less time in Court. That efficiency will be promoted where frank disclosure can occur without prejudice to the accused in any given case. The conclusion we have expressed in this case should not in any way be regarded as a licence to avoid being candid and co-operative where candour and co-operation can be achieved without compromising the case of the accused. In cases such as this, goodwill and the sensible conduct of counsel is indispensable to the proper conduct of criminal trials (*Alfarsi v The Queen* [2021] VSCA 283, [36]).

58. Thus, parties are encouraged to provide more than the minimum necessary to comply with the defence response provisions, where that can occur without prejudice to the accused.

59. The defence response to the notice of pre-trial admissions must identify the evidence that it agrees to admit as evidence and what evidence is in issue and the basis on which that evidence is in issue (*CPA 2009 s 183*).

60. The defence does not need to indicate the identity of any defence witnesses other than expert witnesses and does not need to indicate whether the accused will give evidence (*CPA 2009 s 183*).

61. The prosecution and the defence must inform the court and the other party of any intention to depart at trial substantially from the matters in the above pre-trial statements and the court may order the party to give details of the proposed departure (*CPA 2009 s 184*).

62. Possible remedies if the prosecution departs at trial from its summary of the prosecution opening include discharging the jury and adjourning the trial, or requiring the prosecution to file a new summary. It is not appropriate to allow the defence to draw the jury's attention to the departure as though it were a prior inconsistent statement (*Tran v R* [2012] VSCA 283).

63. Unlike formal admissions under the *Evidence Act 2008*, the *CPA 2009* does not limit an accused's ability to withdraw an admission made in the notice of pre-trial admissions. The fundamental right of the defence to require the prosecution to prove its case will generally be a powerful reason why the defence must be entitled to change its position. However, this may be subject of strong comment and the judge does not need to suggest possible innocent explanations for the decision to withdraw an admission (*R v Shalala* (2007) 17 VR 133; [2007] VSCA 199; *R v Sumner* [2010] VSCA 298). See also *Evidence Act 2008 s 191*.

Last updated: 8 December 2023

5.1.3 Sentence Indication

1. At any time after the indictment has been filed, the court may indicate whether or not it would be likely to impose a sentence of imprisonment that commences immediately if the accused pleads guilty to the charge on the indictment or another charge at that time (*CPA 2009 s 207*).

2. In giving a sentence indication, the court may indicate that it would likely impose:

- a sentence of a specified type;
- a specified maximum total effective sentence (*CPA 2009 s 207*).

3. A court may only give a sentence indication on the application of the accused and with the consent of the prosecution. An indication can only be given once during a proceeding, unless there has been a change in circumstances since the previous sentence indication that is likely to materially affect the sentence indication previously given (*CPA 2009 s 208(1), (3A)*).

4. The accused may apply for a sentence indication in relation to a charge which is not presently on the indictment. Where this occurs, the accused must specify the charge in the application (*CPA 2009 s 208(3)*).

5. The court may refuse to give a sentence indication. One basis for refusing to give a sentence indication is that the court considers that there is insufficient information before it regarding the impact of the offence on any victim of the offence (CPA 2009 ss 208(4), (5)).
6. If the court gives a sentence indication under s 207 and the accused pleads guilty to the charge to which the indication relates at the first available opportunity, the court when sentencing the accused for that offence must not impose a more severe sentence than the type or maximum total effective sentence that the court indicated (CPA 2009 s 209(1)).
7. A trial judge should not give a sentence indication other than in accordance with Part 5.6 of the CPA 2009. An 'informal indication' stating what the judge thinks the likely penalty would be in the absence of a plea does not provide an accused with the protections in CPA 2009 s 209, may risk placing undue pressure on an accused to plead guilty and may create a risk of the judge feeling compelled to act in accordance with the informal indication rather than acting on the basis of material led at any subsequent sentencing hearing (see *Gild v R* [2017] VSCA 367 at [19]–[33]).

Sentence Indication procedure – County Court

8. Before applying for a sentence indication, the defence must obtain the prosecution's position and any unsuitable dates for the hearing of the application for a sentence indication, and the sentence indication itself if the application is granted (*County Court Criminal Division Practice Note*, PNCR 2-2022, [7.1]).
9. The defence may then contact the Court to obtain a date for the application, and advise whether the prosecution consent, any unsuitable dates and the estimated duration of the hearing, including the number of witnesses to be called (*County Court Criminal Division Practice Note*, PNCR 2-2022, [7.1]).
10. The defence must then file and serve an application for a sentence indication hearing at least 7 days before the hearing which identifies whether the court has provided any previous sentence indications, the relevant charges for the purpose of the indication and whether the prosecution opposes the application. The defence must also file a brief outline of submissions setting out the facts and evidence the defence seeks to rely upon, and submissions the defence might seek to make, and any material the defence seek to rely on, including expert reports and character references (*County Court Criminal Division Practice Note*, PNCR 2-2022, [7.3]).
11. The prosecution must file and serve at least 3 days before the hearing a summary of the agreed factual basis of the relevant charges, whether the prosecution opposes the application (and if so, why the prosecution opposes the application), the views of the complainant (if any and known), whether there will be sufficient information about the impact of the offence on the victim and the accused's criminal record (if any) (*County Court Criminal Division Practice Note*, PNCR 2-2022, [7.4]).
12. If the court grants an application for a sentence indication hearing, it may immediately then hold the hearing. After giving an indication, the court will stand down or adjourn the matter for a reasonable time to allow the accused to consider the indication (*County Court Criminal Division Practice Note*, PNCR 2-2022, [7.5]–[7.6]).
13. If the accused agrees to plead guilty to the proposed charges, the prosecution accepts the plea and the accused accepts the sentence indication, the court will then list the matter for a plea hearing before the judge who gave the sentence indication, and the usual processes for a plea hearing will apply (*County Court Criminal Division Practice Note*, PNCR 2-2022, [7.7]–[7.8]).

Last updated: 17 March 2023

5.1.4 Place of Trial

1. The DPP must file an indictment in the Supreme Court or the County Court. The indictment may only be filed in the County Court if all the offences alleged on the indictment are within the jurisdiction of the County Court (CPA 2009 s 160).
2. The Supreme or County Court must conduct the trial at the court sitting nearest to the place where the offence was alleged to have been committed unless the court orders otherwise (CPA 2009 s 169).

Change of Venue

3. A court may order that the proceedings be heard at any other place it considers appropriate if:
 - a fair trial cannot otherwise be had; or
 - it is appropriate to do so for any other reason (*CPA 2009 s 192*).
4. A court must determine an application for a change of venue on its own merits, without preconceptions. The guiding principle is that, unless the accused shows sufficient cause, a trial should ordinarily take place in the district where the offence was committed (*R v Yanner* [1998] 2 Qd R 208; *R v Iaria & Panozzo* (2004) 9 VR 425; [2004] VSC 96; *R v Ratten*, Unreported, VSC, 4 August 1970; *DPP v Bennett* (2004) 10 VR 355; [2004] VSC 148; *Gram v R* [2010] VSC 277).
5. Relevant considerations on a change of venue application include:
 - the need to ensure a fair trial;
 - the need to ensure the appearance of a fair trial;
 - ability to select an impartial jury that is fairly representative of the local community;
 - any cost, expense, inconvenience or emotional burden to parties or witnesses;
 - disruption to court schedules;
 - waste of court resources;
 - delay that would be caused by a change of venue;
 - the extent of any local pre-trial publicity that may undermine a fair trial;
 - the general desirability of holding a trial in the district where the offence was committed (*R v Iaria & Panozzo* (2004) 9 VR 425; [2004] VSC 96; *R v Yanner* [1998] 2 Qd R 208; *DPP v Bennett* (2004) 10 VR 355; [2004] VSC 148; *DPP v Towle* [2007] VSC 551; *Gram v R* [2010] VSC 277).
6. The appearance of justice is particularly important in deciding change of venue applications. The trial should be held in a location where all reasonable people would admit that it would be fair (*R v Iaria & Panozzo* (2004) 9 VR 425; [2004] VSC 96; *Cording v Trembath* [1921] VLR 163).
7. The attitude of the parties is relevant, though not conclusive. The public interest in holding a trial in the community affected by the offences may outweigh the preferences of the prosecution and defence (*DPP v Towle* [2007] VSC 551).
8. While the accused carries the onus of persuading the court to change the venue, it is unclear whether the court should be reluctant to exercise its discretion and move the proceedings away from the location where the offence took place. Nettle J in *R v Iaria & Panozzo* (2004) 9 VR 425; [2004] VSC 96 stated that:

... it overstates the burden that lies upon an applicant for a change of venue to say that the venue will not be altered unless the court is satisfied that there is a reasonable possibility that the applicant will not have a fair and impartial trial and that the discretion although wide is not lightly to be exercised.
9. In contrast, in *DPP v Bennett* (2004) 10 VR 355; [2004] VSC 148, Cummins J stated that:

On an application for a change of venue based as here on matters of asserted local prejudice or prejudgment, the test is that a trial will be heard locally unless there is a real risk that the accused might not receive, or be seen to receive, a fair trial locally.
10. In the County Court, change of venue applications are described in chapter 34 of the *County Court Criminal Division Practice Note* PNCR 2-2022. Chapter 34 includes an obligation to consult with the other party, to file a Form 1C General application form with details of the proposal, and any affidavit in support.

5.1.5A Uplift and remittal of charges

1. Division 1 of Part 5.8 of the CPA 2009 gives the Supreme Court and the County Court jurisdiction to hear and determine charges against the accused for summary offences if he or she is before the court for charges on an indictment.
2. These provisions are subject to any contrary intention in legislation that vests sole jurisdiction in the Magistrates' Court (see, e.g., *Corporations Act 2001* (Cth) s 1338).
3. These provisions only apply to summary offences and do not apply to indictable offences that could be heard and determined summarily. See 4.5 Committal for Trial and Subsequent Events for information on the obligation to uplift related summary offences, and 19.7 Related and Unrelated Offences in the Higher Courts for information on how related and unrelated summary offences may be heard and determined post-sentence.
4. Further, Part 5.2 contains provisions which allow the Supreme or County Court to remit indictable charges back to the Magistrates' or Children's Court to be determined summarily.

Change of Court - Court or County Court

5. The trial will take place in the court where the indictment is filed, unless the Supreme Court orders otherwise. The Supreme Court may exercise the power to transfer proceedings from the County Court to the Supreme Court or from the Supreme Court to the County Court (CPA 2009 s 167).
6. When the Supreme Court makes an order under s 167, the Court may also order that charges for summary offences also be transferred to the County Court or the Supreme Court, as the case may be (CPA 2009 s 241A).
7. A party may apply to the Supreme Court for an order under s 167, or the court may make an order transferring proceedings on its own motion (CPA 2009 s 337).
8. When making the order, the court should consider the nature, seriousness and extent of the offences alleged, along with the history of the matter before the court in question (*DPP v Xydias* (Ruling No 1) [2008] VSC 142; *DPP v Drinovan* (No 2) [2004] VSC 249).

Remittal to Magistrates' Court or Children's Court

9. The Supreme or County Court may also order the transfer of proceedings back to the Magistrates' Court or the Children's Court for summary hearing if:
 - the accused consents to the transfer; and
 - the court considers that it is appropriate for the matter to be determined summarily, having regard to:
 - for transfers to the Magistrates' Court, the matters in CPA 2009 s 29(2); and
 - for transfers to the Children's Court, whether the court must hear and determine the charge summarily in accordance with *Children, Youth and Families Act 2005* s 356(3) (CPA 2009 s 168).
10. If the Magistrates' Court or Children's Court has previously declined to hear the matter summarily, then subject to CPA 2009 s 168A, the trial court may only exercise this power if there has been a significant change in the charges or in the nature of the prosecution case (CPA 2009 s 168(2)).
11. The transferring court has a broad discretion to weigh the range of considerations of whether to make the transfer order (*DPP v Batich* (2013) 38 VR 554, 563 [33]). For information on the considerations in CPA 2009 s 29, see 2.5 – Summary and Indictable Offences.

12. While the discretion is broad, it would not be appropriate to transfer a proceeding merely to avoid a limitation on the sentencing power of the higher court. For example, in *DPP v Batich*, a County Court could not impose a suspended sentence for the offence charged against the accused, but the Magistrates' Court could do so. The Court of Appeal held that a judge would act with an improper purpose if the sole or actuating motive for transferring the case was to avoid that restriction on suspended sentences. However, the presence or absence of a sentencing option may be a relevant factor in deciding whether transfer is appropriate (*DPP v Batich* (2013) 38 VR 554, 563 [32]).
13. Under CPA 2009 s 168A, the trial court may transfer certain serious offences back to the Children's Court if:
- (a) The charge is for a Category A serious youth offence that was committed when the child was aged 16 years or over, other than a death-related offence which the Children's Court cannot hear;
 - (b) The Children's Court has refused to hear and determine the charge summarily;
 - (c) The child or the prosecution requests that the charge be heard and determined summarily;
 - (d) The trial court is satisfied that the Children's Court has adequate sentencing options available for the offending;
 - (e) One of more of the following applies:
 - (i) It is in the interests of the victim or victims that the charge be heard and determined summarily;
 - (ii) The accused is particularly vulnerable because of cognitive impairment or mental illness;
 - (iii) There is a substantial or compelling reason why the charge should be heard and determined summarily (CPA 2009 s 168A(1)).
14. A "category A serious youth offence" is defined as:
- murder
 - attempted murder
 - manslaughter
 - child homicide
 - intentionally causing serious injury in circumstances of gross violence
 - aggravated home invasion
 - aggravated carjacking
 - arson causing death
 - culpable driving causing death
 - offences under *Terrorism (Community Protection) Act 2003* s 4B, Subdivision A of Division 72 of Chapter 4 of the *Commonwealth Criminal Code*, Part 5.3 or 5.5 of the *Commonwealth Criminal Code* or the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (CPA 2009 s 3).
15. For the purpose of CPA 2009 s 168A(1)(e)(iii), in determining whether there is a substantial and compelling reason, the trial court must have regard to Parliament's intention that Category A serious youth offences should not normally be heard and determined summarily (CPA 2009 s 168A(2)).

16. In deciding whether to transfer a “category B serious youth offence” alleged to have been committed by a child aged 16 years or over, the trial court must consider whether *Children, Youth and Families Act 2005* s 356(3) has the effect that the offence should not be heard and determined summarily (*CPA 2009* s 168A(3)).
17. A “category B serious youth offence” is defined as:
 - Recklessly causing serious injury in circumstances of gross violence
 - Rape
 - Rape by compelling sexual penetration
 - Home invasion
 - Carjacking (*CPA 2009* s 3).
18. *Children, Youth and Families Act 2005* s 356(3) provides that the Children’s Court must hear and determine proceedings for indictable offences other than the six listed death-related offences, unless the child objects or the court considers that it is unsuitable to hear and determine the charge summarily because of exceptional circumstances. For information on when it will be unsuitable for the Children’s Court to hear a charge because of exceptional circumstances, see 23.4 – When indictable charge unsuitable to be determined summarily in the Children’s Court Bench Book.
19. For proceedings in the County Court, where a party seeks a transfer of indictable matters determinable summarily back to a summary court, the party must:
 - Obtain the position of the other party;
 - Obtain a date for the application from Criminal Registry and advise whether the application is opposed or not;
 - File a notice of application to transfer charges to the Magistrates’ / Children’s Court at least 3 days before the hearing date;
 - The Application must:
 - Indicate whether the application is made under s 168(1) or s 242(5);
 - Include the Indictment number and a copy of the Indictment (if the Indictment has been filed);
 - Include a copy of the charge sheets for the summary charges sought to be transferred;
 - Outline which charges are sought to be transferred and pursuant to which section;
 - State whether the charges are sought to be transferred to the Magistrates’ Court or the Children’s Court and at which location;
 - Provide the date to which the charges are to be adjourned to, if the Application is successful, if known (*County Court Criminal Division Practice Note*, PNCR 1-2015, [19.2])
20. If the application is under *CPA 2009* s 168, then the prosecution must file a copy of the accused’s criminal record (if any) 24 hours before the hearing (*County Court Criminal Division Practice Note*, PNCR 2-2022, [16.4]).
21. A party must ensure that all charges are dealt with. Charges which are not to be transferred back to the Magistrates’ Court or the Children’s Court must be dealt with by the County Court through an indictment or a notice of discontinuance (*County Court Criminal Division Practice Note*, PNCR 2-2022, [16.5]).

5.1.5 Discontinuing a Prosecution

1. The DPP may discontinue a prosecution at any time, except during the trial,⁶²³ by announcing a discontinuance in court or filing a notice of discontinuance in court, signed by the DPP. The DPP may discontinue a proceeding before or after filing the indictment in the trial court (CPA 2009 s 177).
2. Following the commencement of section 17 of the *Justice Legislation Amendment (Miscellaneous) Act 2013* on 18 December 2013, it is no longer necessary that the DPP sign a notice of discontinuance personally.
3. The County Court rules specify that a notice of discontinuance is filed when:
 - Written notice is handed to a judge in open court; or
 - Written notice is provided to the Registry (*County Court Criminal Procedure Rules 2019* r 2.05).
4. The County Court practice note also states that if the prosecution intends to discontinue a prosecution, they must contact the court to advise and obtain a date for a directions hearing if no immediate upcoming hearing is listed for the matter. The prosecution must also file and serve on the accused at least 24 hours before the hearing a Notice of Discontinuance signed by the DPP. If the indictment has not been filed, the Notice must include the details of the charges on which the accused was committed for trial, including Magistrates' Court reference numbers and attach the charge sheets containing the charges which are the subject of the discontinuance (*County Court Criminal Division Practice Note*, PNCR 2-2022, [15.1]–[15.3]).
5. If the prosecution seeks to discontinue a proceeding where there are related summary offences in the County Court, the prosecution must file and serve on the defence a notice of application to transfer charges to the Magistrates'/Children's Court. The notice must include details of the summary charges and whether they are to be withdrawn or transferred to the Magistrates' Court or the Children's Court (*County Court Criminal Division Practice Note*, PNCR 2-2022, [15.6]–[15.7]).
6. Entering a discontinuance deprives the court of jurisdiction to continue proceedings for that offence (*R v GKA* (1998) 99 A Crim R 491).
7. The power to discontinue a prosecution is not susceptible to judicial review. The prosecution cannot be compelled to enter a discontinuance and a person cannot challenge the exercise of the power (*Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *Barton v R* (1980) 147 CLR 75; *Grimwade v State of Victoria* (1997) 90 A Crim R 526. But see *Harkness v Banks* [2023] VSC 588).
8. The power to discontinue a prosecution replaces the common law power of the DPP to enter a *nolle prosequi*. As with *nolle prosequis*, a discontinuance does not act as an acquittal and does not prevent the prosecution bringing fresh charges against the accused (CPA 2009 Explanatory Memorandum, Clause 177; *Davis v Gell* (1924) 35 CLR 275; *R v Swiggler* [1996] 1 VR 257; *Broome v Chenoweth* (1946) 73 CLR 583; *R v Jell*; *ex parte Attorney-General* [1991] 1 Qd R 48).
9. The prosecution may revive a prosecution it has previously discontinued. This will not necessarily be an abuse of process justifying a stay (*R v Swiggler* [1996] 1 VR 257; *Wilson v Police* (2003) 85 SASR 422; [2003] SASC 168). See 15 Abuse of Process and Stays for further details.

⁶²³ A trial begins when the accused is arraigned in the presence of the jury panel and ends when the jury delivers a verdict or is discharged without delivering a verdict (See CPA 2009 ss 210, 217; CPA 2009 Explanatory Memorandum, Clause 177).

10. At common law, it was unclear whether the trial judge could refuse to accept a *nolle prosequi* during a trial and before verdict. The new statutory process removes this ambiguity, as the DPP cannot discontinue a proceeding during the trial (CPA 2009 s 177(2)(a)). See, *R v Kellett* (1856) 1 VLT 5; *Davis v Gell* (1924) 35 CLR 275; *Re Question of Law Reserved on Acquittal (No 3 of 1995)* (1996) 66 SASR 450; *R v Jell; ex parte Attorney-General* [1991] 1 Qd R 48 and *R v Lorkin* (1995) 15 WAR 499 on a judge's right to refuse a *nolle prosequi*.⁶²⁴
11. The filing of a fresh indictment automatically discontinues any proceedings for the same offence or for a related offence. It is not necessary to enter a discontinuance before filing a fresh indictment (CPA 2009 ss 164, 177).

Last updated: 8 December 2023

5.1.6 Taking Evidence Before Trial

1. A party to the proceeding may apply to the court at any time except during the trial for an order under CPA 2009 s 198 that the evidence of a person be taken at a time and place fixed by the court. The court must be satisfied that it is in the interests of justice to make the order. The order allows a potential witness to undergo examination-in-chief, cross-examination and re-examination before the trial commences (CPA 2009 s 198).
2. An application to the County Court for an order to take evidence before trial must be in Form 2E of the *County Court Criminal Procedure Rules 2019* (see r 2.08).
3. The party must indicate the grounds for the order in the application. An application can only be made if:
 - (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 (CPA 2009 s 198(2)).
4. The court may direct that the evidence of the witness be recorded and may permit the recording to be tendered as the witness' evidence if he or she not available during the trial (CPA 2009 s 198; *Evidence Act 2008* s 65).
5. This procedure is intended to contribute to a fair trial. It is not to be used as an investigatory tool for the prosecution and is not the equivalent to a compulsory examination order that can be made during a committal proceeding. The judge should dismiss applications for orders designed to allow the prosecution to conduct coercive investigations (*Harvey & McManus v County Court of Victoria* [2006] VSC 293; *R v Jacobson (Ruling No 1)* [2014] VSC 188. Compare CPA 2009 ss 103–106).
6. A judge may make an order under s 198 on the application of the prosecution over the objection of the defence, if the order is in the interests of justice. While the DPP can call a witness who has not given a statement, it is desirable for the prosecution not to call a witness "cold" (*Harvey & McManus v County Court of Victoria* [2006] VSC 293; *R v Jacobson (Ruling No 1)* [2014] VSC 188).
7. This process may also be used to pre-record a witness' evidence where the witness has travel plans which mean that he or she will be out of the country at the time of the trial (*DPP v Byrne* [2016] VSC 216).

⁶²⁴ The Attorney-General retains the common law power to enter a *nolle prosequi*. However, that power is rarely exercised in Victoria, as the DPP is responsible for prosecutorial decisions.

8. Following the commencement of *Justice Legislation Miscellaneous Amendment Act 2018* s 31 on 3 March 2019, CPA 2009 ss 198A and 198B provide specific processes for an accused to apply to cross-examine a witness before or during a trial.
9. Section 198A only applies in a case where the proceeding relates to a sexual offence where the complainant was a child or a person with a cognitive impairment at the time the proceeding commenced. In such cases, a committal hearing cannot be conducted and s 198A provides a replacement process which is controlled by the trial court (compare CPA 2009 ss 100(1)(f), 123, 198A).
10. Under s 198A, the accused may apply to cross-examine a witness other than the child or cognitively impaired complainant. The requirements and test for whether to grant the application are the same as those that apply to applications to cross-examine witnesses at a committal hearing.
11. The practice of courts is that where the charge-sheet alleges sexual offences against multiple complainants, the prohibition on a committal hearing will apply if at least one of the complainants is a child or is cognitively impaired. However, the prohibition on pre-trial cross-examination only applies to the child or cognitively impaired complainant, and the defence may apply to cross-examine adult complainants.
12. The application must state the issue for which leave is sought, the reason why the evidence is relevant and why cross-examination is justified. The court must only grant cross-examination if the accused has identified an issue and provided a reason why the witness' evidence is relevant to that issue and the cross-examination is justified. In assessing whether cross-examination is justified, the court must consider the same matters that apply in an application for leave in a committal hearing in the Magistrates' Court. Finally, if the court grants the application, the court must identify each issue on which the witness may be cross-examined (CPA 2009 s 198A). For information on these considerations, see 4.4.1 Evidence in Committal Hearings.
13. Section 198B provides a limited power to order cross-examination of any witness by the accused. This process provides a statutory replacement for the common law *Basha* hearing, which has been abolished (CPA 2009 s 198C). The language of the power under s 198B suggests that it is designed to provide a more limited form of cross-examination than would be permitted under s 198A.
14. An application for cross-examination under s 198B must state the issue on which the proposed questioning relates and the purpose of the proposed questioning. The court may only order questioning under s 198B if it is satisfied that the questioning is necessary to avoid a serious risk that the trial would be unfair (CPA 2009 ss 198B(2), 198B(3)). As with common law *Basha* hearings, it is not appropriate to allow an exploratory investigation of the witness' evidence (*R v Sandford* (1994) 33 NSWLR 172; *DPP v Farquharson* (Ruling No 1) [2007] VSC 294).
15. In the County Court, the applicant must contact Court to obtain a date for the application and must file and serve a completed s 198A Application for pre-trial cross-examination signed by both parties. The application may be determined administratively or at an in-court hearing (*County Court Criminal Division Practice Note*, PNCR 2-2022, [6.7]–[6.9]).
16. At common law, this process was used to ensure a fair trial where the accused had not been adequately informed of what evidence the witness would give (*R v Basha* (1989) 39 A Crim R 337; *DPP v Denysenko* [1998] 1 VR 312). This situation most often arose where the accused, for whatever reason, had not been able to cross-examine the witness at the committal hearing (*R v Pham* [2008] VSCA 41; *Harvey & McManus v County Court of Victoria* [2006] VSC 293). However, it could also arise where it appeared likely that the witness might change his or her evidence between the committal hearing and the trial, as this risk could negate any benefits obtained by cross-examining the witness at the committal hearing (*R v Ibrahim* [2007] NSWSC 1140).
17. As at common law, this process is not designed to let the defence test out a line of cross-examination, see if risky questions produce favourable answers in the absence of the jury, or so the defence is more confident in cross-examining those witnesses. Such matters are not part of the purpose of committal hearings, and their absence do not produce a risk of an unfair trial (see *R v Montaine*, Unreported, VSCA, 11 December 1997; *R v Sandford* (1994) 33 NSWLR 172; *Barron v Attorney-General for NSW* (1987) 10 NSWLR 215; *Moss v Brown* [1979] 1 NSWLR 114).

18. In deciding whether there is a serious risk the trial would be unfair, the court must consider the purpose of a committal proceeding and the limitations on cross-examination of a witness at a committal hearing (CPA 2009 s 198B(4)). This requirement matches the principles that applied to *Basha* hearings at common law (DPP v Bayly (1994) 63 SASR 97).
19. According to the explanatory memorandum:

It is not intended that new section 198B permit cross-examination of a complainant in a sexual offence case who is a child or a person with a cognitive impairment when the criminal proceeding commenced (i.e., a complainant referred to in section 123 of the *Criminal Procedure Act 2009*).

The operation of a *Basha* in this way is well-accepted (as the court should have regard to the purposes of a committal hearing and restrictions on cross-examination at a committal hearing).

Furthermore, the special hearing held under Division 6 of Part 8.2 of the *Criminal Procedure Act 2009* provides for special procedure and rules in these cases (and allows the complainants evidence to be taken pre-trial or during the trial pursuant to section 370(1A)) (Explanatory Memorandum, Justice Legislation Miscellaneous Amendment Bill 2018, clause 31).
20. The test of a “serious risk that the trial would be unfair” suggests that, as at common law, preliminary cross-examination is not necessary in all cases where the prosecution gives the defence a notice of additional evidence (see *R v Sandford* (1994) 33 NSWLR 172; *DPP v Denysenko* [1998] 1 VR 312; *Williams & Ors v DPP* [2004] VSC 516).
21. The prosecution may re-examine the witness if the court allows cross-examination under s 198B (CPA 2009 s 198B(5)).
22. A party may apply under s 198B before or during the trial. If an application is made during the trial, the application and any subsequent cross-examination or re-examination must be conducted in the absence of the jury (CPA 2009 ss 198B(6), 198B(7)).
23. At common law, the *Basha* hearing was considered unsuitable where there were many witnesses who would need to be examined, or where the process was expected to take an extended period of time (*Williams & Ors v DPP* [2004] VSC 516). While the s 198B process can be invoked before or during trial, it is unclear whether the impact of delay, or disruption to court schedules, is relevant when assessing whether there is a serious risk that the trial would be unfair.

Last updated: 31 August 2020

5.1.7 Direct Indictments and Attendance

1. When the DPP files a direct indictment, he or she may apply to the court for a summons or warrant to arrest the accused, in order to compel the accused to attend court. The court must issue either a summons to attend or a warrant to arrest if the indictment discloses an offence known to law (CPA 2009 s 174).
2. The court must not issue a warrant before issuing a summons unless it is satisfied by sworn evidence 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 (CPA 2009 s 174(3)).
3. In the County Court, the application for a summons or warrant must be made at the time of filing the direct indictment, unless the circumstances of the case require a later application. The summons or warrant must be issued by a judge. The summons must be in Form 2B and the warrant must be in Form 2C of the Rules (*County Court Criminal Procedure Rules 2019* r 2.04).

5.1.8 Pre-Trial Resolution of Issues

1. Division 4 of Part 5.5 of the CPA 2009 allows judges to make binding determinations of issues of law and fact before the trial commences. The court may hear and decide any issue with respect to the trial it 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 (CPA 2009 s 199(1)).
2. Pre-trial resolution of issues can contribute to the efficient conduct of trials and minimise inconvenience for jurors and witnesses. It also allows the judge to prepare for the application and reserve judgment if needed (*R v NM* [2013] 1 Qd R 374; [2012] QCA 173).
3. Any judge can make these determinations and the trial judge is bound by the earlier order or ruling, unless he or she considers that that is not in the interests of justice (CPA 2009 ss 203, 204).
4. If a party intends to raise any of the above issues, it must first notify the other party and then the court as soon as possible. The notification to the court must include confirmation that the other party has been notified and indicate whether the issue is in dispute or the order is opposed (CPA 2009 s 200).
5. The court may determine a pre-trial matter without a hearing on the basis of written submissions if the court is notified at least 14 days before the trial is due to commence and all the parties consent. If this procedure is adopted, the party that raised the issue must file and serve copies of its submissions at least 10 days before the trial is due to commence. All other parties must file and serve their replies to those submissions within 5 days of being served by the applicant. The applicant must then file and serve its response to the reply within 3 days (CPA 2009 s 201).
6. If a party raises an issue with the court at least 14 days before the trial is due to commence and there is not consent for the court to determine the matter on the papers, then at least 10 days before the trial is due to commence the applicant must notify the court that the matter cannot be determined on the papers and request the court to conduct a directions hearing (CPA 2009 s 201).
7. If the accused applies for the exclusion of evidence, the court may hear evidence from the accused before it hears evidence called by the prosecution (CPA 2009 s 202).
8. A court may also treat a pre-trial order that was made in an earlier trial as applying to a subsequent trial. The court need not do so if it would be inconsistent with any order, decision or direction given on appeal or it is not in the interests of justice to do so (CPA 2009 s 205).
9. Decisions made on these issues are interlocutory decisions that a party may be able to seek leave to appeal under the interlocutory appeal process (see CPA 2009 ss 3, 295). See 20.4.3 Interlocutory Appeals.
10. Parties may also obtain advance rulings in relation to the admissibility or use of evidence, the operation of the law in relation to evidence or the giving of leave, permission or direction under s 192 of the *Evidence Act 2008* if the court considers it appropriate to do so (*Evidence Act 2008* s 192A).

11. When a party seeks an advance ruling on any matter, the court should be careful to ensure the ruling does not create a risk of an apprehension of bias. The parties are responsible for forensic decisions and a judge should not appear to influence the tactical decision making of counsel by giving provisional or advisory opinions based on limited material (*TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46).

Last updated: 17 September 2012

5.1.9 Leading No Evidence

1. If the accused is arraigned before the trial commences and the prosecution proposes not to lead evidence on a charge, it must inform the court of this intention and the court must direct that an entry of not guilty be made on the record in respect of that charge. This entry has the same effect as if a jury had returned a verdict of not guilty at the trial (*CPA 2009 s 206*).
2. The obligation to inform the court of a decision to lead no evidence does not limit the power to discontinue a prosecution under s 177 (*CPA 2009 s 206(5)*). The prosecution may decide either to discontinue the proceeding or to lead no evidence. See 5.1.5 Discontinuing a Prosecution.

Last updated: 25 May 2009

5.2 Presence and Absence of the Accused

1. The accused must personally attend all hearings that form part of the trial unless excused by the court (*CPA 2009 s 246*).
2. The court may excuse the accused from attending if it considers it appropriate to do so (*CPA 2009 s 330*).
3. The court may order a corporate accused to appear by a legal practitioner or representative. Failure to comply with this order is a summary offence punishable by a fine of up to 240 penalty units (*CPA 2009 ss 144, 252*).
4. When the prosecution seeks a warrant to arrest (such as where the accused fails to attend a hearing), the prosecution must email a draft copy of the warrant to the chambers of the relevant judicial officer. The relevant judicial officer will sign the warrant and have it returned to the prosecution (*County Court Criminal Division Practice Note*, PNCR 2-2022, [9.1]–[9.2]).
5. If there is a condition of surety on the accused's bail, the prosecution must bring this to the relevant judicial officer's attention. If the prosecution seeks forfeiture of the surety, the prosecution must contact the Court to list the matter for an application to forfeit the surety (*County Court Criminal Division Practice Note*, PNCR 2-2015, [9.3]–[9.4]).
6. For information about when to conduct a proceeding in the absence of the accused, see 9.1 Presence of the Accused.

Last updated: 17 March 2023

5.3 Providing Legal Representation

1. In most situations, legal representation is necessary to produce a fair trial (*Attorney-General for New South Wales v Milat* (1995) 37 NSWLR 370; *Dietrich v R* (1992) 177 CLR 292; [1992] HCA 57).
2. A trial court can order Victoria Legal Aid ("VLA") to provide legal representation to an accused on any conditions specified by the court if it is satisfied that:
 - it is unable to ensure a fair trial for the accused unless he or she is legally represented; and
 - the accused requires legal representation because he or she is unable to afford the full cost of obtaining private legal representation (*CPA 2009 s 197*).

3. Section 197 only enables the court to order that Victoria Legal Aid provide the accused with legal representation. It does not draw a distinction between barristers and solicitors and the section does not enable the court to order Victoria Legal Aid to provide counsel with an instructing solicitor. However, in some cases, the absence of an instructing solicitor or other assistant for counsel may raise issues concerning the fairness of the trial and may lead the court to ordering a temporary stay (*MK v Victoria Legal Aid* (2013) 40 VR 378; [2013] VSC 49; *R v Chaouk* (2013) 40 VR 356; [2013] VSC 48; *R v Chaouk* (2013) 40 VR 356; [2013] VSCA 99).
4. Section 197 is limited to an order to provide legal representation and ‘is not broad enough to embrace the provision of clothes, stationery, a ‘McKenzie friend’ or an expert witness (except as an incident of providing legal representation)’ (*Cook v The Queen* [2019] VSCA 87 [39]).
5. The court should provide the accused with a copy of s 197 of the CPA 2009 at an early directions hearing if he or she is unrepresented and inform him or her of the right to apply for an order under that section. The judge should also indicate what evidence the accused must provide before the court may make the order (*R v Hoang* (2007) 16 VR 369; [2007] VSCA 117).
6. In the County Court, an accused intending to apply for an order under s 197 must advise the prosecution and contact the Court to obtain a date for the hearing of the application. The Court may then list the matter for determination. At the hearing, the accused must be ready to provide the Court with the date VLA declined to provide assistance and the outcome of any internal VLA review. The accused must file and serve on the prosecution and VLA a letter from VLA declining to provide financial assistance, the accused’s financial records, payslips, bank statements and other material relied on in the application, including any material which disputes a finding by VLA that the accused did not meet the means-test requirements (*County Court Criminal Division Practice Note*, PNCR 2-2022, [5.106]–[5.110]).
7. The judge must consider whether to order VLA to provide representation even if the accused does not formally apply for an order. The court must take steps to ensure the fair trial of an accused and it would defeat the purpose of the Act to require a formal application by an unrepresented accused (*R v Hoang* (2007) 16 VR 369; [2007] VSCA 117).
8. The court must give VLA the opportunity to appear and be heard before ordering it to provide legal representation to the accused (CPA 2009 s 197).
9. The standard practice of the prosecution during applications under s 197 is to make any submissions it wishes to make on whether the trial of the accused without legal representation would be unfair and then seek to be excused from the hearing. This provides some protection for an accused who may otherwise fear disclosing matters that may be used against him or her during the trial (see, e.g., *R v Reid* [1998] 1 VR 224).
10. The power to order VLA to provide legal representation is an exercise of judicial power, or a power related to the exercise of judicial power. It is not administrative power and does not raise issues of separation of powers in Commonwealth matters (*DPP (Cth) v Judge Wodak* [1998] VSC 15).
11. Section 197 is limited to trials on indictment before a jury. It does not apply to other proceedings, such as summary hearings, committal hearings or rehearings on an appeal from the Magistrates’ Court to the County Court. Where a court in such other proceedings cannot provide a fair hearing, it may be necessary to use common law remedies such as an adjournment or a stay (see *Slaveski v Smith & Anor* (2012) 34 VR 206; [2012] VSCA 25).
12. An order under s 197 cannot be the subject of an interlocutory appeal, as it is not an order made in the proceeding. Further, if the order is made or refused by the Supreme Court, only VLA can bring an appeal, while orders made in the County Court can be challenged by way of judicial review either by an accused or by VLA (*Cook v The Queen* [2019] VSCA 87; CPA 2009 s 197(7); *Victoria Legal Aid v Beljajev* [1999] 3 VR 764).

Need for Representation to Ensure a Fair Trial

13. The law presumes that a trial without legal representation is unfair. The accused does not need to demonstrate that there is a "triable issue". Unless the accused waives the right to representation, the presumption will only be rebutted in a very exceptional case, where the court is satisfied that legal representation could not have any impact on the outcome of the case. A court must be careful in accepting that this presumption has been rebutted, as it is often those who appear on a preliminary view to be guilty that are most in need of legal representation (*R v Phung* [1999] 3 VR 313; [1999] VSCA 195; *R v Rich* [1998] 4 VR 44).
14. The following risks to a fair trial arise when an accused is unrepresented:
 - possible reception of inadmissible evidence;
 - failure of accused to give evidence;
 - failure of accused to properly test the prosecution evidence;
 - deficiencies in accused's address to the jury;
 - the potential for the trial to be terminated or miscarry; and
 - the added burden placed on the trial judge when the accused is unrepresented (*Frugtniet v Victoria* [1997] HCA 44; *R v Phung* [1999] 3 VR 313; [1999] VSCA 195).
15. The court may need to re-evaluate the need for an order under s 197 during the trial, as events unfold that reveal that representation is necessary to ensure a fair trial (*R v Hoang* (2007) 16 VR 369; [2007] VSCA 117; *Frugtniet v Victoria* [1997] HCA 44).
16. The judge must, however, be satisfied that the court cannot provide a fair trial in the absence of legal representation. It is not sufficient for the judge to be satisfied that representation would make the trial quicker, more orderly or easier to conduct (*Victoria Legal Aid v Beljajev* [1999] 3 VR 764; [1998] VSCA 56; *Frugtniet v Victoria Legal Aid*, Unreported, VSC, 11 September 1997).
17. Legal representation is not an essential precondition of a fair trial if the accused refuses representation. The wishes of the accused are a relevant factor in determining the content of the obligation to ensure a fair trial (*Victoria Legal Aid v Beljajev* [1999] 3 VR 764; [1998] VSCA 56 per Callaway JA).

Inability to Afford Representation

18. The accused must demonstrate that he or she is unable to afford the full cost of obtaining private legal representation (*CPA 2009* s 197).
19. The accused bears the onus of proof on this issue and will usually need to provide evidence of his or her financial situation to the court (*R v Hoang* (2007) 16 VR 369; [2007] VSCA 117).
20. When assessing whether the accused is unable to afford the cost of private legal representation, the court must have regard to property under the effective control of the accused or in which he or she has an interest. The terms "effective control" and "interest" carry the same meaning as under ss 9 and 10 of the *Confiscation Act 1997* (*CPA 2009* s 197).
21. A person can have effective control over property even if he or she does not have an interest in the property. The court must consider the accused's interest in:

(a) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property; and

(b) a trust that has a relationship to the property; and

(c) family, domestic, business or other relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b), and other persons (*Confiscation Act 1997* s 9).

22. Property in which the accused has an interest includes:

(a) any property that is, on the day when the first application is made under this Act in respect of that offence, subject to the effective control of the accused; and

(b) any property that was the subject of a gift from the accused to another person—

(i) within the period of 6 years before the first application made under this Act in respect of that offence; and

(ii) at any time if the application is made for the purposes of automatic forfeiture or civil forfeiture (*Confiscation Act 1997* s 10).

23. The judge may consider whether the accused was evasive or dishonest in his or her dealings with VLA. Such conduct may affect the judge's assessment of the accused's evidence, but it is not appropriate to punish such conduct by refusing to order VLA to provide representation to an indigent accused (*Re an application for Legal Aid under s 360A(2) of the Crimes Act 1958* (2004) 9 VR 275; [2004] VSCA 3; *R v Reid* [1998] 1 VR 224).

Discretion to Order Representation

24. Even if the accused satisfies the court of the two conditions in s 197(3) of the CPA 2009, the court has a discretion to refrain from ordering VLA to provide representation.

25. In exercising this discretion, the court should consider the need to provide a trial that is manifestly fair. The complexity of the issues, the length of the trial and the appearance of a well-resourced prosecution against an unrepresented accused may all contribute to an appearance of unfairness (*Frugtniet v Victoria* [1997] HCA 44).

26. The court may also have regard to any guidelines on providing representation published by VLA. These guidelines cannot bind the court, but may affect the exercise of discretion (*R v Reid* [1998] 1 VR 224).

27. The court may refuse to order VLA to provide representation to the accused if he or she has behaved vexatiously or unreasonably in relation to the trial (CPA 2009 s 197).

28. While the court does not need to consider whether the accused is unrepresented through no fault of his or her own, the conduct of the accused outside the trial may be relevant to the exercise of the court's discretion. Evidence that the accused has divested him or herself of assets is a good basis for refusing to make an order (*Victoria Legal Aid v Beljajev* [1999] 3 VR 764; [1998] VSCA 56; *Frugtniet v County Court of Victoria* (1997) 97 A Crim R 127; *R v Williams*, Unreported, VSC, 14 November 1997).

Legal Aid and Conditions

29. When ordering VLA to provide legal representation, the court may attach any conditions that are necessary or appropriate for ensuring a fair trial. This power must be exercised judicially and the conditions may not cover matters such as the identity, number or remuneration of persons representing the accused. Conditions may relate to the conduct of both VLA and the accused. The court may make non-binding recommendations to VLA on how best to achieve a fair trial (CPA 2009 s 197; *Victoria Legal Aid v Beljajev* [1999] 3 VR 764; [1998] VSCA 56; *R v Williams* (1997) 98 A Crim R 387).

30. VLA cannot exercise its statutory power to attach conditions to a grant of leave following an order under s 197. Only the court has the power to impose conditions (*DPP v Kavanagh* (1997) 98 A Crim R 496).
31. Commonly, the court will attach a condition that if the accused terminates the services of VLA, his or her solicitors or counsel, then he or she shall continue in the trial unrepresented (see *R v Reid* [1998] 1 VR 224; *Frugtniet v County Court of Victoria* (1997) 97 A Crim R 127).

Legal Aid, Adjournments and Stays

32. If the court orders VLA to provide representation, then VLA must do so and the court may adjourn the trial until representation has been provided (CPA 2009 s 197).
33. Subject to the operation of the *Charter of Human Rights and Responsibilities Act 2006*, the fact that the accused has been refused legal assistance is not a ground for an adjournment or a stay of proceedings (CPA 2009 s 197. C.f. *Dietrich v R* (1992) 177 CLR 292; [1992] HCA 57).⁶²⁵
34. Under the *Charter of Human Rights and Responsibilities Act 2006*, an accused charged with a criminal offence has the following rights:
- (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and
 - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978*; and
 - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978* (*Charter of Human Rights and Responsibilities Act 2006* s 25(2)).

Legal Aid and Protected Witnesses

35. An accused may not personally cross-examine a protected witness in proceedings for:
- a sexual offence; and
 - an offence where the conduct constituting the offence consists of family violence (CPA 2009 s 353).
36. The court must order VLA to provide representation if the accused does not obtain representation for the cross-examination of a protected witness (CPA 2009 s 357).
37. The court cannot compel the accused to accept the representation, but must warn the accused that he or she shall not be permitted to adduce evidence to contradict a protected witness unless he or she puts contested facts to the witness in cross-examination (CPA 2009 s 357).
38. A court exercising the power to order VLA to provide representation under s 357 does not need to consider whether the accused is unable to afford the full cost of private representation or whether the accused is unable to receive a fair trial without representation (compare CPA 2009 s 197). The provisions relating to legal aid for cross-examination of protected witnesses are in mandatory terms.

⁶²⁵ At common law, a court may be required to stay a proceeding where the accused is unrepresented and is unable to afford representation. The predecessor to s 197 was introduced in 1993 to avoid the prospect of a permanent stay (see *Dietrich v R* (1992) 177 CLR 292; [1992] HCA 57 and Victorian Parliamentary Debates, Legislative Assembly, 29 April 1993, Mrs Wade (Attorney-General), 1359).

39. Unlike s 197 of the CPA 2009, there is no express power to attach conditions to a grant of aid under s 357 of the CPA 2009. It is unclear whether this means that VLA can attach conditions under the *Legal Aid Act 1978* s 27 or whether it means that neither the court nor VLA can attach conditions to the grant (see *DPP v Kavanagh* (1997) 98 A Crim R 496).

Related topic: 13.8 Protected witnesses

Last updated: 17 March 2023

5.4 Arraignment

1. Arraignment is the formal process where the accused admits his or her identity and pleads to all charges on the indictment. It is only after arraignment that it is known whether there will be a trial, as there is no need for a trial if the accused pleads guilty (*R v Vickers* (1975) 61 Cr App R 48).
2. The trial commences when the accused is arraigned in the presence of the jury panel (or the first part of the panel) that the trial jury is selected from (CPA 2009 ss 210, 217). For this purpose, the jury panel (or the accused) may be present by video-link (*Pell v The Queen* [2019] VSCA 186 [1163]–[1178]).
3. The date and time of arraignment must be recorded in the records of the court for trials in the Supreme Court. For trials in the County Court, only the date of arraignment must be recorded (*Supreme Court (Criminal Procedure) Rules 2017* r 4.12; *County Court Criminal Procedure Rules 2019* r 2.09).
4. Where the accused wishes to plead guilty to some charges and not guilty to others, it is often appropriate to file separate indictments, so that the trial jury does not learn of the other charges to which the accused pleaded guilty (*Wilson v R* [2015] VSCA 211, [70]).

Last updated: 31 August 2020

5.5 Opening Addresses

1. At the beginning of the trial, the judge should address the jury to explain how the trial process operates and to assist the jury to understand its function. This may include selecting a foreperson, the role of the judge and jury and processes for assessing evidence.⁶²⁶ See 1.11 Consolidated preliminary directions in the Criminal Charge Book for a sample charge on these matters.
2. After the judge's opening remarks, the prosecution and the defence must present their opening addresses to the jury (CPA 2009 ss 224, 225).⁶²⁷
3. If the prosecution has served a summary of the prosecution opening, it must not depart from that outline unless there are exceptional circumstances. Despite this, the prosecution is not restricted to a verbatim presentation of the filed summary (CPA 2009 s 224).
4. The purpose of the prosecution opening is to outline the prosecution case for the judge, jury and the defence. The other participants in a trial should be able to understand the issues and the evidence as it unfolds (*R v Haydon (No 7)* [2005] SASC 21).
5. It is not appropriate for the prosecutor to:
 - use emotive or prejudicial language;
 - using mocking or sarcastic language when describing the accused's conduct and previous answers;
 - refer to evidence that is or might be inadmissible or unavailable;
 - refer to the status of co-offenders, unless defence counsel consent;

⁶²⁶ The power to address the jury at any time is contained in s 222 of the CPA 2009.

⁶²⁷ The accused does not need to make a defence response to the prosecution opening if he or she is not represented by a legal practitioner (CPA 2009 s 225).

- comment on the weight of the evidence;
 - adopt an argumentative approach, rather than to summarise the facts that will be led; or
 - refer to the possible course of the defence, including the right of the accused to give evidence (*R v Weiss* [2002] VSC 24; *Wood & Ors v R* (1995) 87 A Crim R 346; *R v Armstrong* (1989) 53 SASR 25; *Peterson & Ors v R* (1979) 27 ALR 641).
6. If the defence has filed and served a response to the prosecution opening, it must not depart from the matters set out in that document, unless there are exceptional circumstances. The defence is not restricted to a verbatim presentation of the filed defence response (CPA 2009 s 225).
 7. A change of legal practitioners does not constitute exceptional circumstances justifying a departure from the written prosecution opening or defence response (CPA 2009 ss 224, 225).
 8. It is not appropriate for defence counsel to use the defence response as an opportunity to outline the defence case in the nature of an opening or closing address. Counsel should focus on identifying for the jury the issues in contention and should not address general matters such as the need to decide a case without emotion or prejudice (see *Duong v R* [2017] VSCA 78 at [39]–[41]).
 9. At any time during the trial, the judge may address the jury on the following matters:
 - (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 (CPA 2009 s 222).

Effect of pre-trial processes

10. The prosecution opening serves an important purpose of indicating the conceptual nature of the prosecution case. While criminal trials are not decided on the basis of pleadings, the prosecution must generally stick to the basis on which it has conducted its case (*Tran v The Queen* (2000) 105 FCR 182, [133]; *R v Tangye* (1992) 92 A Crim R 545, 556).
11. For these reasons, the prosecution opening is an important part of providing an accused with procedural fairness. A significant departure from the prosecution opening can breach that right and result in a substantial miscarriage of justice. Late changes in the nature of the prosecution's case (such as during closing addresses) are also likely to involve a breach of the rule in *Browne v Dunn* (*Astbury v The Queen* [2020] VSCA 132, [67]).
12. The prosecution and defence may introduce evidence in the course of the trial that is a substantial departure from the pre-trial documents with the leave of the court (CPA 2009 s 233).
13. It is not clear whether s 233(1) *prohibits* a party from adducing evidence that substantially departs from the pre-trial documents *without* the leave of the court. Unlike the alibi notice provisions (see CPA 2009 s 190), the section does not expressly prohibit a party adducing such evidence. It is, however, difficult to see what function s 233(1) serves if leave from the trial judge is not necessary.
14. The judge must not impose a requirement of "exceptional circumstances" before granting leave to lead additional evidence or to depart from previous admissions. The CPA 2009 does not contain any such requirement and it is not in the interests of justice to impose one. An admission may be withdrawn at any time unless this would cause irreparable prejudice to the other party (*R v Shalala* (2007) 17 VR 133; [2007] VSCA 199).
15. The court should generally grant leave to the defence to make a substantial departure from its pre-trial position. The fundamental right of the accused to put the prosecution to its proof is a powerful reason that supports the grant of leave. The judge's view regarding the merits of the new position is irrelevant and should not influence the decision to grant leave (*R v Shalala* (2007) 17 VR 133; [2007] VSCA 199).

5.6 Conduct of the Prosecution Case

1. The Crown must present its whole case before the defence presents its case and may not split its case on any issue. See 5.8 Re-Opening the Crown Case.
2. The prosecutor is responsible for deciding the order of prosecution witnesses. The trial judge should not usurp this function, but may intervene if necessary to ensure the accused receives a fair trial (*R v Saffron (No 2)* (1988) 36 A Crim R 315).
3. The prosecution may also indicate during the trial that it will not lead any evidence on one or more charges in the indictment. The judge may then discharge the jury from returning a verdict on those charges and direct that an entry of not guilty be made on the record in respect of that charge (CPA 2009 s 241).

Admissions and Agreed Facts

4. An accused may admit any fact or give any consent which a party in a civil proceeding may make or give. An admission or consent is not effective, however, unless the accused has been advised to do so by his or her legal practitioner or the court is satisfied that the accused understands the consequences of making the admission or giving the consent (*Evidence Act 2008* s 184).
5. Unless the court directs otherwise, the pre-trial procedure includes a process for identifying witness statements that may be admitted by the accused without further proof (CPA 2009 ss 182, 183).
6. Formal admissions are a valuable tool for limiting the issues in dispute, especially in long trials. Courts encourage parties to make use of formal admissions (*R v Mitchell* [1971] VR 46; *R v Maes* [1975] VR 541).
7. An admission only binds the accused that makes it. If there are multiple accused and a co-accused does not agree to the same fact, the prosecution will need to lead evidence to prove that fact against the co-accused (*R v Maes* [1975] VR 541).
8. The power to make admissions includes a power to admit inferences or conclusions. An accused may admit a matter that is not within his or her personal knowledge (*R v Longford* (1980) 17 FLR 37).
9. Even if the accused admits a fact, the Crown may lead evidence in support of that fact if it is appropriate to do so in the circumstances of the case. The general discretion to reject admissible evidence provides the court with sufficient power to ensure that the Crown does not embellish an admitted fact with prejudicial evidence (*R v Smith* [1981] 1 NSWLR 193; *Evidence Act 2008* s 137; *R v Christie* [1914] AC 545; *Stanoevski v R* (2001) 202 CLR 115; [2001] HCA 4).
10. Finally, the parties may agree upon particular facts. This agreement must either be:
 - made in writing, signed by both parties and tendered as evidence of the agreed fact; or
 - with leave of the court, stated before the court with the agreement of all other parties (*Evidence Act 2008* s 191).
11. Unless the court grants leave, evidence is not required to prove an agreed fact and a party may not lead evidence to contradict or qualify an agreed fact (*Evidence Act 2008* s 191).
12. No clear practice has emerged on how the statement of agreed facts should be treated. One view is that an accused who is prepared to admit facts should not suffer from the permanence of that admission being available to the jury during deliberations. The other approach is that a statement of agreed facts should be treated as any other exhibit (Compare *DPP v Thomas (Ruling No 12)* [2006] VSC 253 and *Quach v R* [2008] NSWCCA 284).

Concurrent and consecutive expert evidence

13. CPA 2009 s 232A allows the trial judge, with the consent of the prosecution and the accused, to direct that two or more expert witnesses give evidence concurrently or consecutively.
14. Section 232A includes a non-exhaustive series of directions the judge may give to facilitate the concurrent or consecutive evidence of expert witnesses, including that any expert witness:
 - (a) Give evidence at any stage of the trial, including after all factual evidence has been adduced on behalf of the prosecution and the accused; or
 - (b) Give an oral exposition of the opinion of the expert witness on any issue; or
 - (c) Give the opinion of the expert witness of any opinion given by another expert witness; or
 - (d) Be examined, cross-examined or re-examined in a particular manner or sequence, including by putting to each expert witness in turn each question relevant to one more or issue at a time; or
 - (e) Be permitted to ask questions of any other expert witness who is concurrently giving evidence (CPA 2009 s 232A(3)).
15. The Act also gives the judge power to question expert witnesses to identify the real issues in dispute between two or more expert witnesses, including questioning more than one expert witness at the same time (CPA 2009 s 232A(4)).
16. This provision supports the processes set out in *Supreme Court of Victoria*, Practice Note SC CR 3 – Expert Evidence in Criminal Trials, and the corresponding practice note in the County Court, PNCR 1-2014.
17. Section 232A also addresses the problem identified in *Ta-Vuong v R* [2015] VSCA 238 by Priest JA and Croucher AJA that the CPA 2009, as it then existed, did not allow the defence to call witnesses before the close of the prosecution case. Under this provision, both the prosecution and accused are permitted to ‘split’ their case, to the extent that the judge so orders in relation to expert witnesses

Impermissible expansion of the prosecution case

18. As a general principle, the prosecution must not be allowed to expand their case in circumstances where the expansion would cause unfairness to the accused (*King v The Queen* (1986) 161 CLR 423, 429; *Parker v The Queen* [2021] VSCA 348, [56]–[57]).
19. Relevant forms of unfairness include tactical considerations which governed the conduct of counsel for the accused, including objections to evidence, lines of cross-examination, calling evidence and the content of final addresses (*Robinson v The Queen* (2006) 162 A Crim R 88, [145]–[146]).
20. In deciding whether there is unfairness, the judge should also consider how the accused has conducted his or her case. For example, introducing an alternative mental element, where the principal dispute concerns whether the accused engaged in the relevant physical acts, might not cause relevant unfairness (see, e.g., *Campbell v The Queen* [2014] NSWCCA 175, [189]–[190]).
21. This principle also applies to limit the way in which a judge may respond to a question from the jury. Where the jury’s question opens an alternative pathway to conviction which the defence has not had an opportunity to address, the judge must not permit the jury to convict on that basis (see *R v GAS* [1998] 3 VR 862; *RR v The Queen* [2013] VSCA 147, [117]; *R v Falcone* (2008) 190 A Crim R 440, [64]–[68]).
22. While, at common law, a judge was required to leave to the jury alternative views of the evidence which could lead to an acquittal, even if not embraced by the accused, there was no corresponding obligation or power to leave paths to conviction which the prosecution had not adopted (*Robinson v The Queen* (2006) 162 A Crim R 88, [143], [147]).

23. In deciding whether the prosecution case is being impermissibly expanded, the court should consider the content of the prosecution opening (both written and oral), the evidence led from witnesses and the directions sought under the *Jury Directions Act 2015* s 12 conversation (*Parker v The Queen* [2021] VSCA 348, [62]–[80]).
24. The prosecution may be allowed to change a matter which is a mere particular, such as the identification of weapons used in an offence of violence, where the change would not cause unfairness to the accused. In considering whether a change would cause unfairness, the judge may consider whether the change affects how the prosecution has presented its case, and whether the defence case might have been conducted differently if the prosecution had conducted its case in accordance with the change from the outset (*Singh v The Queen* [2021] VSCA 345, [58]–[67]).

Last updated: 1 January 2023

5.7 Conduct of the Defence Case

1. At the conclusion of the prosecution case, the accused may:
 - submit that there is no case to answer;
 - answer the charge by calling evidence from the accused or other witnesses; or
 - choose not to give evidence or call any witnesses (*CPA 2009* s 226).
2. The trial judge may ask the accused's legal practitioner what the defence shall do at the close of the prosecution case (*CPA 2009* s 227). This should initially be done in the absence of the jury.
3. If the accused is not represented by a legal practitioner, the trial judge must inform the accused in the absence of the jury in a manner he or she is likely to understand that he or she:
 - has the right to give sworn evidence and must then answer questions from the prosecutor or the court;
 - may choose to remain silent; and
 - may choose to call other witnesses to give evidence, irrespective of whether the accused gives evidence (*CPA 2009* s 228).⁶²⁸
4. After explaining these matters to the accused, the judge must ask the accused what he or she wishes to do (*CPA 2009* s 228).

⁶²⁸ The *CPA 2009* s 228 removed the mandatory requirement in s 398 of the *Crimes Act 1958* that this information must be given in writing. Information under s 228 must be given in a manner that the accused is likely to understand. Section 398 of the *Crimes Act 1958* also contained the following script for conveying this information to the accused:

"You now have the right to answer the charge against you and may take either of the following courses:

You may enter the witness box, take the oath, and say what you want to say in answer to the charge. This is known as giving sworn evidence and when you have given your evidence you may be asked questions about it by the prosecution or the Court;

You may say nothing in answer to the charge.

In either of these cases you may call any witness or witnesses to give sworn evidence for you. What do you desire to do?"

This script, or words to similar effect, should satisfy the requirements of s 228.

5. A submission that there is no case to answer does not affect the accused's ability to call evidence. If the judge rejects the submission, the accused must then determine whether he or she shall give or call evidence.
6. Prior to the commencement of *CPA 2009 s 232A* (introduced by *Crimes Legislation Further Amendment Act 2017* on 1 April 2017), *CPA 2009 s 226* did not allow defence evidence to be called before the close of the prosecution case (*Ta-Vuong v R* [2015] VSCA 238 per Priest JA and Croucher AJA. Cf *Supreme Court Practice Note SC CR 3*, Expert Evidence in Criminal Trials and *County Court Practice Note: Expert Evidence in Criminal Trials*, PNCR 1-2014).
7. Following the introduction of *CPA 2009 s 232A*, the trial judge may direct the two or more expert witnesses to give evidence concurrently or consecutively. See Concurrent and consecutive expert evidence in 5.6 Conduct of the Prosecution Case for more information.

No Case to Answer

8. At the end of the prosecution case, the defence may submit to the judge that there is no case for the accused to answer (*CPA 2009 s 226*).
9. The test for a "no-case" submission is well established:

[I]f there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty (*Doney v R* (1990) 171 CLR 207; [1990] HCA 51).
10. A judge assesses a "no-case" submission by taking the prosecution evidence (including the answers of prosecution witnesses to cross-examination) at its highest and by drawing all inferences that are the most favourable to the prosecution case that are reasonably open (*Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410; *Case Stated by DPP (No 2 of 1993)* (1993) 70 A Crim R 323; *R v Galbraith* [1981] 2 All ER 1060).
11. Where the case depends on circumstantial evidence, the question is not whether the trial judge considers that there remains open a reasonable hypothesis consistent with innocence. Rather, the test is whether the jury could rationally conclude that any inference consistent with innocence is not reasonably open on the evidence (*DPP v Iliopoulos* [2016] VSC 132, [8]–[9]).
12. The weight of evidence is purely a question for the jury. The judge is not called upon to determine whether he or she thinks that the accused should be convicted. The test is whether, as a question of law, a jury could lawfully find the accused guilty (*May v O'Sullivan* (1955) 92 CLR 654; *Zanetti v Hill* (1962) 108 CLR 433).
13. The judge must assume that the jury will accept the prosecution witnesses as credible and reliable. The assessment of witnesses is a matter for the jury and where, on one view of the evidence, the evidence demonstrates the accused's guilt, a "no-case" submission must be rejected (*Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410; *R v Galbraith* [1981] 2 All ER 1060).
14. At common law, the judge did not need to consider evidence that contradicts, qualifies or explains the prosecution's case or that supports the accused's case (*R v R* (1989) 18 NSWLR 74). However, following the commencement of *CPA 2009 s 226(2)*, the judge may take into account any evidence from an expert witness which has already been called by the accused. This may occur where the judge orders under *CPA 2009 s 232A* that expert evidence be given concurrently or consecutively (see Concurrent and consecutive expert evidence in 5.6 Conduct of the Prosecution Case).
15. The test for a "no-case" submission is different to the test on appeal for whether a verdict is "unsafe or unsatisfactory". A judge on a "no case" submission must apply the test stated above and may not uphold the submission on the basis that any conviction is likely to be overturned on appeal as unsafe and unsatisfactory (*Doney v R* (1990) 171 CLR 207; [1990] HCA 51; *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410; c.f. *M v R* (1994) 181 CLR 487; [1994] HCA 63).

16. Courts on appeal will not inquire into the correctness of a decision on a "no-case" submission. The court will instead consider the whole of the evidence to determine whether the conviction was unsafe or unsatisfactory. This will include any evidence led by the accused in his or her defence. The court is not limited to deciding whether the evidence that was available at the close of the prosecution case was sufficient to support the verdict (*R v Wood* [1974] VR 117; *R v Vasic* (2005) 11 VR 380; [2005] VSCA 38; *R v Barclay*, Unreported, VSC CCA, 13 February 1985).
17. A no-case submission is not the time to raise defects in the drafting of the indictment. Such matters must be raised at the earliest opportunity as part of counsel's obligation to assist the court and to identify issues of law and procedure as soon as possible after becoming aware of the issue (see *CPA 2009* ss 199, 200; *Downer EDI Works Pty Ltd v R* [2017] VSCA 27 at [34]–[41]; *DPP v Vibro-Pile* (2016) 49 VR 676; [2016] VSCA 55 at [131]). See Duty to Assist the Court in 7.1 All Counsel.

Circumstantial Evidence

18. The jury can only use circumstantial evidence to prove the accused's guilt if an inference of guilt is the only reasonable inference available on the evidence. The jury must be able to exclude all reasonable hypotheses consistent with innocence (*Knight v R* (1992) 175 CLR 495; *Shepherd v R* (1990) 170 CLR 573; [1990] HCA 56; *Chamberlain v R (No 2)* (1984) 153 CLR 521; [1984] HCA 7; *Barca v R* (1975) 133 CLR 82; *Plomp v R* (1963) 110 CLR 234; *Thomas v R* (1960) 102 CLR 584).
19. A "no-case" submission will succeed in a case that relies on circumstantial evidence only if:
 - A reasonable inference consistent with innocence is open; and
 - That inference cannot be rationally excluded (*R v Cengiz* [1998] 3 VR 720; *R v Barnes* [2008] VSC 66; *Case Stated by DPP (No 2 of 1993)* (1993) 70 A Crim R 323; *R v Debs* [2007] VSC 168).
20. The judge is not required to decide for him or herself whether the Crown has ultimately excluded every hypothesis consistent with innocence. This is a question of fact for the jury. Instead, the judge must determine whether a reasonable jury *could* exclude any inferences consistent with innocence (*Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410; *R v Martin (Ruling)* [2005] VSC 121).
21. The judge does not need to consider and reject fanciful hypotheses. He or she should only consider whether any *reasonable* or *rational* hypotheses consistent with innocence remain open on the evidence (*R v Cengiz* [1998] 3 VR 720).
22. The judge must remember that evaluating evidence and drawing inferences is essentially a matter for the jury as the constitutional fact finding tribunal. The judge should not remove cases from the jury where a hypothesis consistent with innocence is reasonable only if certain evidence is accepted or other inferences are drawn. Such hypotheses may be open, but can be reasonably excluded by the jury's decisions on other evidence (*R v Cengiz* [1998] 3 VR 720; *Doney v R* (1990) 171 CLR 207; [1990] HCA 51).
23. Matters such as self-defence must usually be left to the jury. It is only in exceptional cases that a "no-case" submission will be upheld on the basis that the Crown has failed to rebut an arguable case of self-defence. Such an exceptional case may arise where the case for self-defence is so strong that there is no rational basis for rejecting it (*DPP v Federico* [2005] VSC 470).

Joint Trials

24. In a trial where there are 2 or more accused, all "no-case" submissions must be made at the close of the prosecution case. If there are still 2 or more accused after the judge has dealt with the "no case" submissions, then the judge may ask the first accused whether he or she wishes to call evidence (*CPA 2009* s 229).
25. The second and any subsequent accused are not required to indicate whether they shall call evidence until the close of the case of all previous accused (*CPA 2009* s 229).
26. The order of accused follows the sequence in which their names appear on the indictment unless the judge orders otherwise (*CPA 2009* s 229).

27. The CPA 2009 modified the existing common law approach to "no-case" submissions in joint trials. At common law, there was uncertainty on the order of submissions. Some earlier decisions suggested that the "no-case" submission for the second and subsequent accused should take place after the close of the case for any previous accused. Other cases suggested that all "no case" submissions were deferred until the close of the case for any accused who did not wish to make a "no-case" submission (see *R v Faure & Corrigan* [1978] VR 246; *R v Webster* [1974] VR 457; *R v Benbrika & Ors* (Ruling No 27) [2008] VSC 456). These earlier authorities no longer apply.

Procedure Following a "No-Case" Submission

28. A judge who finds that there is no case for the accused to answer in respect of a charge on the indictment may discharge the jury from delivering a verdict on that charge and direct that a verdict of not guilty be entered on the record (CPA 2009 s 241).⁶²⁹
29. If there are still charges left for the jury to consider after the judge has entered verdicts of not guilty in relation to the relevant charges, he or she must then ask the accused or his or her legal practitioner whether the defence will be calling any witnesses.
30. An acquittal following a no-case submission can only be ordered in relation to a 'charge on the indictment'. It is not available in relation to an uncharged statutory alternative to a charge on the indictment. There is, however, a residual power to use the pre-CPA process of directing the jury to return a verdict of acquittal (as distinct from the judge entering one directly) in relation to both the charged offence and the uncharged statutory alternative (*R v Frank (No 2)* [2021] VSC 7, [221], [226]).
31. Where there are uncharged alternative offences open on the indictment (such as due to CPA 2009 s 239 or *Crimes Act 1958* ss 421–435), a successful no-case submission in relation to the charge on the indictment does not require the court to discharge the jury from delivering a verdict on the uncharged alternatives. A jury retains the ability to consider such uncharged offences, unless the judge exercises the power in CPA 2009 s 240 to order that guilt of the alternative offences is not to be determined at the trial (see, e.g., *R v Cengiz* [1998] 3 VR 720; *R v Richards* (2016) 125 SASR 341, [43]–[49]).
32. The prosecution cannot challenge a judge's determination that there is no case to answer through an interlocutory appeal (*DPP v Singh* (2012) 34 VR 364; [2012] VSCA 167).

Prasad Invitation

33. It was previously thought that jurors had a right to return a verdict of not guilty at any time after the close of the prosecution case (the "Prasad invitation"). The High Court has now held that the jury does not have such a right and so a direction informing the jury of such a right is contrary to law and should not be given (*DPP Reference No 1 of 2017* [2019] HCA 9).

Defence Opening

34. If the defence indicates to the judge that it intends to call evidence, it is entitled to make an opening address to the jury outlining the evidence that it proposes to call (CPA 2009 s 231).
35. This opening is given after all "no-case" submissions have been determined and before any witnesses for that accused give evidence (CPA 2009 s 231).⁶³⁰

⁶²⁹ Section 241 is a major change from the common law position, which required the judge to direct the jury to return a verdict of not guilty. Common law authorities prohibiting the judge from directly entering verdicts must therefore be read subject to the CPA 2009 (see, e.g., *R v Paprounas* [1970] VR 865).

⁶³⁰ Where there are multiple accused, the accused must wait until all previous accused have closed their cases until he or she may make an opening address.

36. The purpose of the defence opening is to identify the evidence that the accused will call and the inferences that the jury may or may not draw. It is distinct from the defence response to the prosecution opening.
37. Defence counsel should not:
- Comment on the evidence already given or about to be given;
 - Use emotive language; or
 - Describe any material which is or may be inadmissible or unavailable.

Defence Witnesses

38. The defence may call any competent witnesses and may compel the attendance of any compellable witnesses as part of his or her case. These witnesses are examined by the defence, cross-examined by the prosecution and may be re-examined by the defence. See 13 Witnesses for further information on examination of witnesses.
39. The accused is a competent and compellable witness in his or her own case, but not the case of any co-accused who are tried at the same time (*Evidence Act 2008* ss 12, 17).

Order of Defence Witnesses

40. The defence must indicate the proposed identity of all defence witnesses other than the accused and the order in which they will give evidence when asked by the trial judge (*CPA 2009* s 230).
41. The defence may not change the order or identity of defence witnesses without the leave of the court (*CPA 2009* s 230).
42. The accused may give evidence at any stage of the defence case (*CPA 2009* s 231). While it is considered good practice for the accused to give his or her evidence before other witnesses, this practice cannot be enforced as a rule of law (*R v RPS*, Unreported, NSW CCA, 13 August 1997; *RPS v R* (2000) 199 CLR 620; [2000] HCA 3; *R v Connell* (1994) 12 WAR 133; *R v Smith* (1968) 52 Cr App R 224).
43. An accused who gives evidence after other witnesses may be suspected of having tailored his or her evidence to fit with the other witnesses and the judge may tell the jury about this possibility. This is especially significant when all witnesses are ordered out of court (*R v RPS*, Unreported, NSW CCA, 13 August 1997; *RPS v R* (2000) 199 CLR 620; [2000] HCA 3; *R v Richards & Ors* [1918] SALR 315; *R v Lister* [1981] 1 NSWLR 110; *R v Sumner* [2010] VSCA 298).

Silence of the Accused

44. The judge, the prosecution and any defence counsel cannot say or suggest that, because the accused did not give evidence, the jury can:
- (a) conclude that the accused is guilty from that fact; or
 - (b) use the failure of the accused to provide an explanation of facts, which must be within the knowledge of the accused, to more safely draw an adverse inference based on those facts which, if drawn, would prove the guilt of the accused; or
 - (c) draw an inference that the accused did not give evidence or call a witness (as the case requires) because that would not have assisted his or her case (*Jury Directions Act 2015* s 42).
45. However, the defence may request a direction from the judge that explains:

- (a) the prosecution's obligation to prove that the accused is guilty; and
- (b) that the accused is not required to give evidence or call a witness (as the case requires); and
- (c) that the jury should not guess or speculate about what might have been contained in—
 - (i) the evidence that was not given by the accused; or
 - (ii) the evidence that might have been given by a witness who was not called— as the case requires; and
- (d) that the fact that the accused did not give evidence or call a witness (as the case requires)—
 - (i) is not evidence against the accused; and
 - (ii) is not an admission by the accused; and
 - (iii) must not be used to fill gaps in the evidence adduced by the prosecution; and
 - (iv) does not strengthen the prosecution case (*Jury Directions Act 2015* s 41).

Last updated: 14 October 2021

5.8 Re-Opening the Crown Case

1. The prosecution must present its entire case before the defence begins and must not split its case on any issue (*Shaw v R* (1952) 85 CLR 365; *Killick v R* (1981) 147 CLR 565; [1981] HCA 63).
2. The prosecution may reopen its case if the accused gives evidence that could not reasonably have been foreseen by the prosecution having regard to the defence response to the summary of the prosecution opening and the defence response to the notice of pre-trial admissions (CPA 2009 s 233(2)).
3. At common law, the prosecution could only reopen its case in special or exceptional circumstances and not if the need for the evidence ought reasonably to have been foreseen (*R v Chin* (1985) 157 CLR 671; [1985] HCA 35; *Lawrence v R* (1981) 38 ALR 1; *Killick v R* (1981) 147 CLR 565; [1981] HCA 63). It appears that s 233(2) of the CPA 2009 lowered the threshold for a judge to allow the prosecution to reopen its case.
4. The rule against reopening the Crown case is an important rule of fairness. There is a risk that a jury may give increased importance to prosecution evidence that is led after the defence closes its case (*Killick v R* (1981) 147 CLR 565; [1981] HCA 63).
5. Courts may be more willing to allow the prosecution to re-open its case where the application is made after the Crown formally closes its case and before the defence calls evidence. In such circumstances, there is no splitting of the prosecution case and instead the court allows the prosecution to withdraw its formal closure (see *Hiscox v Guildersleeve* [2011] WASC 229).
6. The power to allow the prosecution to re-open its case in CPA 2009 s 233(2) operates alongside the continued operation of the common law power to permit re-opening. Importantly, s 233(2) is limited to cases where the *accused* gives unexpected evidence (see *Obian v The King* [2023] VSCA 18, [328] per Macaulay JA).

Splitting the Prosecution Case

7. The judge should consider whether the additional evidence primarily supports the Crown case or to primarily rebuts some aspect of the defence case. Only evidence in the latter category is admissible, due to the prohibition on splitting the Crown case.⁶³¹ A judge, however, should be careful not to reject rebuttal evidence that is marginally relevant to supporting the prosecution case. Appropriate rebuttal evidence may address a defence case based on insanity or good character (*Lawrence v R* (1981) 38 ALR 1; *Killick v R* (1981) 147 CLR 565; [1981] HCA 63; *R v Chin* (1985) 157 CLR 671; [1985] HCA 35; *R v Soma* (2003) 213 CLR 299; [2002] HCA 28).
8. Generally, if the court grants the accused leave to raise an alibi defence he or she has not previously disclosed, the court should also allow the Crown to reopen its case to rebut that defence (*Killick v R* (1981) 147 CLR 565; [1981] HCA 63. See also CPA 2009 s 190).
9. The prosecution must not split its rebuttal of the defence case. Generally, the prosecution should be permitted to reopen its case if the accused raises a defence where he or she carries the onus of proof. However, if the prosecution anticipates a certain defence and leads evidence as part of its case to rebut that defence, the court should generally not allow the prosecution to lead further rebuttal evidence in response to that defence (*R v Chin* (1985) 157 CLR 671; [1985] HCA 35; *Killick v R* (1981) 147 CLR 565; [1981] HCA 63). However, the prosecution may be entitled to lead additional evidence if it could not reasonably have foreseen the details of the defence (see CPA 2009 s 233).
10. The prohibition on case splitting does not directly limit the scope of a prosecutor's cross-examination. As a matter of fairness, however, the court may prevent the prosecutor from raising in cross-examination a wholly new matter that is probative of the accused's guilt where the accused has not been notified of this matter earlier in the proceeding (*R v Chin* (1985) 157 CLR 671; [1985] HCA 35; *R v Kane* (1977) 65 Cr App R 270).

Foreseeability

11. Under the CPA 2009, the trial judge may allow the prosecution to reopen its case if, after the close of the prosecution case, the accused gives evidence that could not reasonably have been foreseen by the prosecution having regard to:
 - the defence response to the summary of the prosecution opening; and
 - the defence response to the notice of pre-trial admissions (CPA 2009 s 233).
12. In *Obian v The King* [2023] VSCA 18, Niall JA and Macaulay JA (Priest JA not deciding) differed on the extent to which s 233(2) limits the matters a judge may consider when deciding the question of foreseeability.
13. Niall JA held that the court must consider the two defence response documents and may consider any other matter that is relevant to the foreseeability question, such as disclosures during a previous trial and informal communications between the parties (*Obian v The King* [2023] VSCA 18, [95]–[106], [111] per Niall JA).
14. In contrast, Macaulay JA held that s 233 imposes a threshold requirement for when the court may allow the prosecution to reopen its case, and that this threshold test is assessed only by reference to the two defence response documents. But, if the matter was not reasonably foreseeable by reference to those two documents, the court retains a discretion on whether to permit re-opening. This discretion must be exercised taking into account the principle of fairness that the prosecution should ordinarily present its whole case before the accused responds, and will include consideration of other sources of information, such as informal disclosures. However, in exercising the discretion a court should not reintroduce the common law requirement that circumstances be exceptional or very special before granting leave (*Obian v The King* [2023] VSCA 18, [320]–[323] per Macaulay JA).

⁶³¹ Formal, technical or non-contentious evidence appears to be an exception to this rule.

15. This difference of view is unlikely to have a practical impact on whether a judge grants leave, as a judge will always be able to consider both the defence responses and other matters in deciding whether to permit re-opening, whether as a single step or as a two-step decision.
16. The requirement that the evidence could not have reasonably be foreseen must be assessed "from the viewpoint of a person applying reason without requiring extraordinary foresight" (*Obian v The King* [2023] VSCA 18, [327]–[329] per Macaulay JA).
17. The Crown is entitled to assume that the defence will comply with the rule in *Browne v Dunn* and the prosecution does not need to call evidence to corroborate unchallenged witnesses. Failure to comply with the rule in *Browne v Dunn* may, in some cases justify allowing the prosecution to call additional evidence to support a witness who it could not have reasonably foreseen would be criticised (see *R v Popescu* (1989) 39 A Crim R 137; c.f. *R v Brown* [1980] Tas R 61).
18. At common law, the court may also consider the conduct of the committal and any previous hearings. The prosecution may ask the accused whether he or she proposes to rely on certain defences. While the accused is not required to answer, the failure to disclose certain aspects of the defence case may justify the prosecution reopening its case (*Killick v R* (1981) 147 CLR 565; [1981] HCA 63; *R v Herring*, Unreported, NSW CCA, 24 November 1998). In addition, a court should allow the prosecution to call further evidence if the disclosure was misleading or inaccurate, so that the prosecution could not reasonably have anticipated the real issues in the case (see *Burridge v Tonkin* [2007] VSC 230; *Kurzbock v Hallett* [2001] VSC 459).
19. The prosecution should not pre-emptively counter weak or improbable defences with damning prejudicial evidence. The prosecution does not need to lead evidence that is marginally, minimally or doubtfully relevant before knowing the scope of the defence case. Parties may, however, dispute whether evidence should be classed as "marginally, minimally or doubtfully relevant" (*Killick v R* (1981) 147 CLR 565; [1981] HCA 63).

Exercise of Discretion

20. Allowing the prosecution to call further evidence is an exercise of discretion. The judge should consider:
 - the probative value of the proposed evidence;
 - the possibility of the jury hearing inadmissible evidence; and
 - the possibility of unfairness or prejudice to the accused (*R v Langer* [1972] VR 973; *R v Kern* [1986] 2 Qd R 209).
21. Whether the accused is legally represented or not is irrelevant to the exercise of discretion to allow the prosecution to reopen its case (*Hansford v McMillan* [1976] VR 743).
22. When assessing whether reopening the prosecution case would cause prejudice to the accused, the judge should consider whether the defence case may have been presented differently if the proposed evidence had been led at the proper time. Explanations by defence counsel that other evidence could have been called may be examined critically and rejected if there is no basis for believing that the additional evidence could have affected the presentation of the defence case (*Kurzbock v Hallett* [2001] VSC 459).
23. Considerations of forensic disadvantage and prejudice in the conduct of jury trials do not apply with the same force in summary hearings. The requirement of fairness operates differently between matters heard by a magistrate and matters heard by a jury (*Yamasa Seafood v Watkins* [2000] VSC 156).

Formal, Technical and Non-Contentious Matters

24. The prosecution is usually allowed to reopen its case to prove formal, technical or non-contentious matters. Examples of such matters include the publication of regulations, the holding of a licence or the validity of a restraining order. Courts usually allow the prosecution to reopen its case on such matters because it would bring the administration of justice into disrepute if an accused was acquitted because the prosecution overlooked an indisputable formal or technical matter (*Hansford v McMillan* [1976] VR 743; *In Re Kendrick (No 2)* (1903) 28 VLR 472; *R v Brown* [1985] 2 Qd R 126; *Hiscox v Guildersleeve* [2011] WASC 229).
25. The three descriptors of "formal", "technical" and "non-contentious" describe separate, though possibly overlapping, categories of evidence. The prosecution may be permitted to reopen its case to prove substantive, rather than technical, elements, if the evidence in question is of a formal nature (*Yamasa Seafood v Watkins* [2000] VSC 156).
26. When determining whether there are circumstances that justify allowing the prosecution to reopen its case, the judge should consider any earlier indications from the defence about the issues in dispute. If the defence raises additional formal issues after the close of the prosecution case, the prosecution should usually be permitted to repair such defects (*Blair v County Court of Victoria* [2005] VSC 213).

Reopening of Case During Jury Deliberations

27. The power to allow the prosecution to reopen its case applies up until the jury delivers its verdict. In exceptional cases where there is no real risk of prejudice, a judge may allow further evidence to be called even while the jury is deliberating. This will often be in response to a request for further evidence from the jury (*R v Bodi* [1969] VR 36; *R v Harrison* [1966] VR 72; *Dryburgh v R* (1961) 105 CLR 532).
28. The considerations, however, against allowing the prosecution to reopen its case apply with even greater force after the judge delivers his or her charge to the jury. In practice, it will usually only be appropriate to allow the additional evidence if the defence consents (*R v Harrison* [1966] VR 72; *R v Cotter* [2004] VSC 295; *Dryburgh v R* (1961) 105 CLR 532; *R v Bodi* [1969] VR 36).
29. If the judge allows further evidence after the jury begins deliberating, he or she must usually give the jury further directions on how it may or may not use the additional evidence (*R v Bodi* [1969] VR 36).

Last updated: 17 March 2023

5.9 Final Addresses

1. The prosecution and the defence may each make a closing address after the close of all the evidence. The prosecution addresses first and the judge may limit the length of addresses (CPA 2009 ss 234, 235).
2. In general, the final addresses of counsel should be taped if the evidence was recorded (*R v Lucas* [1973] VR 693).
3. With the leave of the trial judge, a party may comment in its final address on the following matters:
 - a substantial departure by the prosecution from the summary of the prosecution opening;
 - a substantial departure by the defence from the defence response to the prosecution opening or defence response to the notice of pre-trial admissions;
 - a failure by a party to comply with a requirement of Chapter 5 of the CPA or an order made under that Chapter (CPA 2009 s 237).
4. A judge may only grant leave if the proposed comment is permitted by another Act or a rule of law and the proposed comment is not unfairly prejudicial (CPA 2009 s 237).

5. The prosecutor may not comment on the failure of the accused, his or her spouse or de facto or his or her parent or child to give evidence. The judge or another accused may comment on this fact, but the judge must not suggest that the accused failed to give evidence because he or she was, or believe that he or she was, guilty of the offence (*Evidence Act 2008* s 20; *RPS v R* (2000) 199 CLR 620; [2000] HCA 3; *Azzopardi v R* (2001) 205 CLR 50; [2001] HCA 25).

Prosecution Final Address

6. The following conduct by a prosecutor in a final address may risk undermining a fair trial and deserves censure:
- a submission to the jury based upon material which is not in evidence;
 - intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury;
 - comments which belittle or ridicule any part of an accused's case;
 - conveying to the jury the prosecutor's personal opinions (*Livermore v R* (2006) 67 NSWLR 659; [2006] NSWCCA 334; *R v Teasdale* [2004] NSWCCA 91; *R v Smith* [2007] QCA 447).
7. In addition, the prosecutor should not seek to undermine any rulings or proposed directions on the law, or express a view that the rulings or directions were wrong or unnecessary. He or she must give full respect to any rules that apply to the jury's fact-finding exercise, such as the desirability of corroboration (*R v Hay* [1968] Qd R 459; *R v Lewis* [1994] 1 Qd R 613; *R v KNP* (2006) 67 NSWLR 227; [2006] NSWCCA 213; *R v MM* [2004] NSWCCA 81).
8. The prosecution's address must not undermine the burden of proof. The prosecutor must not invite the jury to speculate, but may invite the jury to draw inferences that are open on the evidence (*R v Russo* (2004) 11 VR 1; [2004] VSCA 206; *R v Ivanovic* [2005] VSCA 238; *R v Rugari* [2001] NSWCCA 64).
9. The prosecutor should not convey to the jury that the defence should be rejected merely because it is a common defence in the type of case in question, or is commonly pursued by guilty people. This type of address seeks to introduce evidence from the bar table, convey the prosecutor's personal opinion and distract the jury from considering the evidence (*R v Rigney* [2005] SASC 264).
10. If the prosecutor engages in any inappropriate conduct, the court must consider whether it is necessary to discharge the jury. This will depend on the severity of the conduct, the potential for prejudice, the strength of the prosecution case and whether the accused can still receive a fair trial (*Smale v R* [2007] NSWCCA 328).
11. While the judge will usually be reluctant to intervene during a final address, he or she may do so to ensure a fair trial. If the prosecutor includes impermissible or prejudicial material in his or her final address, the judge should quickly intervene to correct the situation. It is not appropriate to wait until opposing counsel objects before intervening, or wait until the charge to correct the error (*R v DDR* [1998] 3 VR 580; *R v Lewis* [1994] 1 Qd R 613; *Steele v Mirror Newspapers Ltd* [1975] 2 NSWLR 48).

Defence Final Address

12. If there is more than one accused, then in the absence of agreement, the accused present their defence and closing addresses in the order in which their names are listed in the indictment (*R v Garrett* [1917] VLR 238; *R v Webb* (1992) 64 A Crim R 38).
13. Counsel in a final address should not mention the penalty that will be imposed on the accused if he or she is found guilty. This is irrelevant to the jury's deliberations (*Lucas v R* (1970) 120 CLR 171).
14. If, during the defence closing address, the defence asserts facts that are not supported by the evidence, the trial judge may allow the prosecutor to make a supplementary closing address that is confined to replying to these assertions (*CPA 2009* s 236).

15. Assertions put to witnesses are not evidence unless the witness adopts the assertion by his or her answer. There is no evidence to support a proposition that is founded only on assertions put to a witness that are denied (*R v Anastasiou* (1991) 21 NSWLR 394; *R v Mathe* [2003] VSCA 165; *Dahlstrom v R* [2003] TASSC 53).
16. The judge cannot grant the prosecutor the right to make a supplementary address to deal with illogical, extravagant or dishonest arguments. The responsibility for addressing such arguments falls on the trial judge in his or her charge (*R v O'Donoghue* (1988) 34 A Crim R 397; *R v Glusheki* (1987) 33 A Crim R 193).

Unrepresented Accused

17. The judge must inform an unrepresented accused that he or she has the right to make a closing address and must provide enough information to allow the accused to exercise this right in an informed manner. The judge is not required to advise the accused on how to conduct a final address (*R v Nilson* [1971] VR 853; *R v Anastasiou* (1991) 21 NSWLR 394; *MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46).
18. A prosecutor traditionally will not address the jury in a simple case if the accused is unrepresented. Prosecutors may justifiably depart from this tradition if the accused dismisses his or her counsel late in the trial and is able to present a well-reasoned address. It is also appropriate to depart from the tradition if the evidence is complex and the jury would benefit from a prosecutor's address (*Varley v R* (1976) 12 ALR 347; *R v Maranjancevic* [1982] VR 936).
19. More recently, in *TS v The Queen*, the New South Wales Court of Criminal Appeal highlighted that any practices regarding prosecution final addresses and unrepresented accused are mere practices, and not rules of practice or rules of law. In each case, the judge may exercise a discretion on whether to allow the prosecutor to make a final address. The rationale for the practice historically has been to provide fairness. In *TS*, the Court noted the greater availability of legal aid, the risk of unfairness that arises by requiring the judge to be the one who presents the prosecution's case to the jury and uncertainty on the basis for any power of the judge to prevent the prosecution from addressing except if that would be necessary to prevent an unfair trial (*TS v The Queen* [2022] NSWCCA 222, [91]–[102]).

Last updated: 8 December 2023

6 Role of the Judge

1. The judge is responsible for controlling and supervising the conduct of the trial. This includes an obligation to ensure that the jury considers the issues and is not distracted when hearing the evidence (*R v Cesan & Rivadavia* (2008) 236 CLR 358; [2008] HCA 52).
2. The judge has a critical role in maintaining public confidence in the administration of justice. He or she must pay attention to the evidence and the submissions of the parties (*R v Cesan & Rivadavia* (2008) 236 CLR 358; [2008] HCA 52).
3. Due to the need to maintain public confidence, a trial will miscarry if a judge's conduct creates the reality or appearance that he or she has substantially failed to discharge the duty of supervision over the trial process (*R v Cesan & Rivadavia* (2008) 236 CLR 358; [2008] HCA 52).
4. Minor lapses in attention do not cause miscarriage of justice. The law is a human institution and is administered by judges who operate with human limitations (*R v Cesan & Rivadavia* (2008) 236 CLR 358; [2008] HCA 52).

6.1 Judicial Bias

1. It is critically important that justice is done and is seen to be done (*R v Sussex Justices ex parte McCarthy* (1924) 1 KB 256; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39).
2. A judge must not sit on a case where he or she is biased ("actual bias") or might reasonably be thought to be biased ("apprehended bias") (*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; [1983] HCA 17; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39; *Johnson v Johnson* (2000) 201 CLR 488; [2000] HCA 48).
3. While a judge in a criminal trial has no responsibility for fact-finding, the principles of actual bias and apprehended bias still apply. A judge in a criminal trial may be required to make discretionary decisions, may subtly influence the jury and must determine the sentence if the accused is found guilty (*R v Goussis* [2007] VSC 171; *R v Branko Balic (No 2)* (1994) 75 A Crim R 52; *Rozenes v Kelly* [1996] 1 VR 320).
4. The tests for actual and apprehended bias discussed in the following sections are well settled, though judges often vary in their application of the tests to particular factual situations. As a counsel of prudence, judges should readily disclose any matters that may give rise to an appearance of bias. This allows the parties to make an informed decision whether to apply for the judge to remove him or herself.
5. Cautionary disclosure is not necessary if the judge believes that he or she should not sit on a particular case. A judge may indicate that, for personal reasons, it is not appropriate for him or her to hear the case.
6. A party that intends to raise issues of actual or apprehended bias should do so as soon as possible in proceedings. It is not appropriate to raise submissions on other matters of law with an application for recusal held 'in reserve' pending the decision on those other matters (*Gild v R* [2017] VSCA 367 at [33]).
7. Where a judge is invited to recuse themselves for bias or apprehended bias, it is well established that for a single judge bench, the judge hearing the case decides whether to recuse. It is not, however, well-established how the matter is resolved in the case of a multi-member bench. In *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, three different views were put forward. Kiefel CJ and Gageler J held that apprehended bias goes to the jurisdiction of the court, and as all members of the multi-member bench must decide whether they have jurisdiction to hear the matter, the whole bench must decide the issue of bias ([26]–[33]). Gordon, Edelman and Steward JJ held that the judge who is subject to the allegation of bias must determine the issue in the first instance, but the whole bench may need to reconsider the issue if the other members are concerned about whether the bias application should have been accepted, or if a party renews the bias objection for the whole bench to consider ([66], [94], [100]–[102] (Gordon J), [108]–[109], [131] (Edelman J), [193] (Steward J)). Jagot J directly rejected the possibility that other members of the multi-member bench could revisit the question of bias ([309]–[316]). The final member of the Court, Gleeson J, did not express a view on the issue, as it was not necessary to address and may be the subject of possible law reform ([271]). This means there was no majority support for any of the three approaches.
8. When the potential for apprehended bias of a member of a multi-member bench arises, the member in question should identify the relevant facts and circumstances in open court (*QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, [104]).

9. In *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, Edelman J observed that while issues of bias are often separated into actual bias and apprehended bias, the two issues may be linked. A judge who considers the abstracted question of apprehended bias helps overcome the psychological phenomenon of a bias blind spot, by consider whether someone else might perceive them as biased, rather than directly confronting the issue of their own bias (*QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, [125]–[126]).

Actual Bias

10. A judge must not sit on a case where he or she is biased against one of the parties (*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17).
11. An allegation of actual bias should not be made lightly. A party asserting actual bias carries a heavy onus. The allegation must be distinctly made and clearly proven (*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17; *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16).
12. A judge will only be disqualified for actual bias when a party establishes that the judge is so committed to a particular outcome that he or she will not alter that outcome, regardless of what evidence or arguments are presented (*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17).

Apprehended Bias

13. The test for apprehended bias is whether:
a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63).
14. This test depends on whether there is a real rather than a remote possibility of bias. A party does not need to establish that it is likely or probable that the judge *would not* bring an impartial mind to resolution of the case (*Young v Judge Nixon* [2008] VSCA 5; *Gascor v Ellicott* [1997] 1 VR 332; *Hodgson v County Court of Victoria* [2004] VSC 501; *Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Johnson v Johnson* (2000) 201 CLR 488; [2000] HCA 48; *AJH Layers v Careri* (2011) 34 VR 236, [20]).
15. The accused and the Crown both have the right to apply for a judge to disqualify him/herself on the grounds of apprehended bias (*Rozenes v Kelly* [1996] 1 VR 320).
16. A party applying for a judge to discharge himself or herself must identify the cause of an appearance of bias and then show the logical connection between that cause and the appearance of partiality. The bare assertion that a judge has an interest in the outcome of the case is not sufficient (*Young v Judge Nixon* [2008] VSCA 5; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *AJH Layers v Careri* (2011) 34 VR 236, [22]).
17. Where there is a dispute regarding whether a judicial officer made a comment which may give rise to an apprehension of bias, it will not always be necessary to resolve the question of fact of whether the disputed statement was made. An apprehension can arise from the fact that plausible allegations have been made about the judicial officer (*CUR24 v DPP* (2012) 83 NSWLR 385; [2012] NSWCCA 65).
18. However, where there is no plausible evidence that the disputed statement was made, the court may dismiss the complaint of apprehended bias as insubstantial (*Fattal & Ors v R* [2013] VSCA 276).
19. An applicant may not question the judge in order to determine if there is a cause for an appearance of bias. Judges should disclose relevant matters and it is not appropriate for applicants to pry into the judge's background by further questions (*Eastman v Somes (No 2)* (1992) 107 FLR 86; *Limbo v Little* (1989) 65 NTR 19).

20. The apprehension of bias must be reasonable. The test considers the perspective of a hypothetical fair-minded lay observer and is not concerned with fanciful or unreasonable apprehensions of bias (*Gascor v Ellicott* [1997] 1 VR 332).
21. The assessment of apprehended bias must be undertaken in the context of a judicial system where judges are bound by rules of precedent and where decisions may have wide-ranging effects in the community. The hypothetical fair-minded lay observer understands that judges must make decisions in accordance with law and are usually capable of ignoring the consequential effects of decisions (*Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* [1999] HCA 56; *Ronan v ANZ Banking Group* (2000) 2 VR 531; [2000] VSCA 77).
22. While the hypothetical lay observer does not have a detailed knowledge of the law, he or she understands the judicial process and the issues to be determined. He or she knows that judges are under strong professional pressures to act with integrity and impartiality (*Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; [1990] HCA 31; *Johnson v Johnson* (2000) 201 CLR 448).⁶³²
23. However, the hypothetical observer does not bring an awareness that, as judges are usually appointed from the Bar, it is to be expected that they will have personal or professional associations with the barristers who appear before them. The hypothetical observer does not assume that judges and barristers will conduct themselves with professional restraint when meeting outside the case (*Charisteas v Charisteas* [2021] HCA 29, [20]–[21]).
24. Where such personal or professional relationships exist between a judge and a barrister, contact between them must cease while the barrister is appearing before the judge. Contact may resume when the judge makes orders and publishes reasons, bringing the litigation to an end (*Charisteas v Charisteas* [2021] HCA 29, [22]).
25. The hypothetical lay observer does not know the personality or character of the judge. He or she only knows that the person is a judge and, by his or her training, is expected to discard irrelevant, prejudicial or immaterial matters (*Honda Australia Motorcycle v Johnstone* [2005] VSC 387; *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530).
26. The hypothetical lay observer has a broad knowledge of the material facts of the case and the circumstances that led to the commencement of proceedings. He or she does not rely on inaccurate or incomplete information, or rely solely on the facts known to one of the parties (*Honda Australia Motorcycle v Johnstone* [2005] VSC 387; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; [1990] HCA 31; *Victoria v Psaila* [1999] VSCA 193).
27. The material facts are only the objective facts. The subjective views of a party are not relevant (*R v Nicholas* (2000) 1 VR 356; [2000] VSCA 49; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Frugtniet v DPP*, Unreported, VSC, 15 April 1996).
28. Mere lack of nicety or bad temper does not establish apprehended bias (*R v Commonwealth Conciliation & Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546).
29. A short and emotional exchange will not necessarily demonstrate that a judge is incapable of behaving impartially. Prolonged or intense animosity towards a party may create an appearance of bias, even if the animosity is not always apparent (*Galea v Galea* (1990) 19 NSWLR 263; *Victoria v Psaila* [1999] VSCA 193).

⁶³² For example, the fair-minded lay observer is aware that discussions between the judge and prosecutor on the contents of the judge's charge to the jury are a routine part of the trial process where counsel assists the judge to avoid appealable error (*R v Tapatu* [2005] VSCA 256).

Obligation to Hear Cases

30. The obligation on a judge to disqualify him or herself for apprehended bias is matched by an obligation to hear all cases where he or she is not disqualified. A judge must not disqualify him or herself too readily or allow a party to dictate whether the judge may sit on the case (*Re Polites; Ex parte Hoyts Corporation* (1991) 173 CLR 78; [1991] HCA 31; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; [1983] HCA 17; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39; *AJH Layers v Careri* (2011) 34 VR 236, [19]).
31. A party must positively satisfy the judge that the test for apprehended bias is established. A judge should not disqualify him or herself without good cause and must not reach that conclusion lightly (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Honda Australia Motorcycle v Johnstone* [2005] VSC 387; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39).
32. In cases of doubt, however, the judge should err in favour of disqualification. This is necessary to give effect to the principle that justice must be seen to be done (*Clenae v ANZ Banking Group* [1999] 2 VR 573; [1999] VSCA 35).

Preliminary Views

33. A judge may express a tentative view about an issue without creating an apprehension of bias. The High Court explained that:

Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias (*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17; *R v Commonwealth Conciliation & Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; [1990] HCA 31).
34. While it was once thought that a judge should remain silent throughout proceedings, it is now recognised that this is not ideal judicial conduct:

Nor will that requirement of the reality and appearance of impartial justice be infringed if a judge with preconceived views about the general reliability of the evidence of a particular medical witness discloses the existence of such views in the course of the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case. In the course of an eloquent passage in his judgment in *R v Watson; Ex parte Armstrong* Jacobs J expressed the view that judicial "silence" is a "counsel of perfection". We respectfully disagree with the application of that observation to a trial judge sitting without a jury. It seems to us that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated (*Vakauta v Kelly* (1989) 167 CLR 568; [1989] HCA 44).
35. Counsel often benefit from the judge expressing his or her tentative views. This allows the parties to respond to those issues and seek to persuade the judge in light of those responses (*Anderson v National Australia Bank* [2007] VSCA 172; *Vakauta v Kelly* (1989) 167 CLR 568; [1989] HCA 44; *Johnson v Johnson* (2000) 201 CLR 488; [2000] HCA 48; *AJH Layers v Careri* (2011) 34 VR 236, [23]). See also Judicial Intervention (below)
36. The judge should express him or herself in tentative terms. Interlocutory findings on the same issues as the substantive hearing must not be in absolute terms and must be qualified as being based on the lower standard of proof and the limited evidence available (*Kwan v Kang* [2003] NSWCA 336; *Montedeen v Bamco Villa* [1999] VSCA 59; *Rozenes v Kelly* [1996] 1 VR 320).
37. Statements by the judge on his or her preliminary views should be courteous and not sarcastic (*Anderson v National Australia Bank* [2007] VSCA 172).

38. A judge should not express firm views on a matter calling for a ruling prior to hearing argument from counsel. Statements of opinion in strong terms prior to hearing counsel may indicate that the judge is unwilling to consider any arguments for a contrary opinion. The statements may also effectively deny a party the right to be heard (*Antoun v R* [2006] HCA 2).
39. Previous judicial decisions are not evidence of pre-judgment, even where those decisions are directly relevant to the legal issues in the case. The principle of apprehended bias is constrained by the doctrine of precedent and a judge is not relevantly biased where he or she acts in accordance with previous judicial authority (*Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* [1999] HCA 56; *Rogers v Wentworth* Unreported, NSW CA, 9 October 1998).
40. Views about the punishment warranted for particular classes of crime do not necessarily give rise to an apprehension of bias, even if those views depart from current practices. It is the expectation of the law that judicial officers put such personal views aside when exercising their function of imposing sentence (*CUR24 v DPP* (2012) 83 NSWLR 385; [2012] NSWCA 65).

Previous Hearings

41. Ordinarily, reasonable apprehension of bias is not established merely by showing that the judge has previously made a ruling in relation to one of the parties on different facts and on a different issue (*Young v Judge Nixon* [2008] VSCA 5; *Rozenes v Kelly* [1996] 1 VR 320).
42. If an accused is re-tried for an offence in an indictment or a related offence, the judge who sat on the earlier trial, or earlier pre-trial hearing, may sit on the subsequent trial, even if he or she previously decided an issue of law or procedure that is likely to be contentious in the later trial (*CPA* 2009 s 251).
43. Mason J of the High Court explained that:
It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way (*ReJRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39).
44. A judge is generally competent to sit on cases involving the same accused in multiple trials. In these circumstances the judge must not make assumptions about the course of the evidence or the credibility of lay witnesses based on previous trials (*Rozenes v Kelly* [1996] 1 VR 320; *Vakauta v Kelly* (1989) 167 CLR 568; [1989] HCA 44).
45. All proceedings concerned with alleged co-offenders should, as far as practical, be heard by the same judge. This promotes uniformity in evidentiary and other rulings, and consistency in sentencing. The fact that the judge may make findings on sentencing for earlier alleged co-offenders does not, without more, create an apprehension of bias where those earlier alleged co-offenders will give evidence in the trials of later alleged co-offenders. Judges are expected to decide cases on the evidence, and are known to revise views expressed in one hearing in light of the evidence given in another hearing (*North v The Queen* [2020] VSCA 1, [55]; *Alfarsi v The Queen* [2020] VSCA 119, [13]).
46. However, a judge should not hear a case concerned with the same questions of fact as one of his or her previous decisions. His or her previous findings of fact may create a perception that the judge would strive to be consistent with his or her earlier decision (*Livesey v New South Wales Bar Association* (1983) 151 CLR 288; [1983] HCA 17).

47. Similarly, the judge should not decide a case where the credibility of a witness is a critical issue where the judge has previously made adverse findings against the witness on the same issue. A judge must not decide a case on the basis of credibility findings made on a previous occasion (*Livesey v New South Wales Bar Association* (1983) 151 CLR 288; [1983] HCA 17; *Jambajimba v Dredge* (1985) 33 NTR 19).
48. Decisions by a trial judge as part of pre-trial proceedings or on a *voir dire* that indicates he or she is likely to form an adverse view of part of a party's case will not usually establish bias. An accused cannot insist that a judge be removed from a case due solely to an adverse decision on the credit of the accused in the course of the trial (*R v Masters* (1992) 26 NSWLR 450; *Fitzgerald v DPP* (1991) 24 NSWLR 45; *ReJRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39; *R v Nicholas* (2000) 1 VR 356; [2000] VSCA 49; c.f. *Australian National Industries v Spedley Securities* (1992) 26 NSWLR 411).
49. Previous administrative rulings against an applicant cannot establish judicial bias without some additional feature. These preliminary hearings do not involve determinations of issues in the case or the credit of a party (*Young v Judge Nixon* [2008] VSCA 5).
50. However, a judge's conduct in pre-trial hearings, including bail hearings, might give rise to an apprehension of bias where the judge's comments or actions indicate that he or she has lost impartiality or objectivity (*GP v R* (2010) 27 VR 632; [2010] VSCA 142).
51. A judge may carry perceptions of expert witnesses with him or herself between trials. The principle of apprehended bias is applied in the real world of criminal trials where experts commonly appear in multiple cases and it is inevitable that judges will form opinions on the expertise or reliability of those experts (*Vakauta v Kelly* (1989) 167 CLR 568; [1989] HCA 44).
52. There is no clear test for when adverse views of a party's expert witnesses will give rise to an apprehension of bias. A judge should be careful not to dismiss the evidence of an expert based solely on these preconceived perceptions or seek to vindicate these perceptions in his or her judgment. A judge must not infer that a party's case is tainted or weaker due to the use of particular experts. Such conduct is likely to give rise to an apprehension of bias (*Vakauta v Kelly* (1989) 167 CLR 568; [1989] HCA 44).
53. It is common practice in Victoria that one judge will hear all matters arising out of a single criminal enterprise, in order to achieve consistency of rulings and sentencing. This practice means that the judge in one trial may need to determine the position of co-offenders who are still awaiting trial. These findings of fact generally do not give rise to an apprehension of bias that prevents the judge hearing proceedings against the co-offenders, as the findings do not imply any pre-determination of the issues in the later trials. Judges are able to put aside events in previous trials for the purpose of subsequent trials (*R v Goussis* [2007] VSC 171; *R v Sonnet* (2010) 30 VR 519; [2010] VSCA 315).
54. A judge who has previously issued a warrant enabling the police to gather information against the accused in the case must carefully consider whether he or she should disqualify him or herself. An apprehension of bias may arise where the judge receives information related to the case that is not disclosed to other parties (*R v Eastman* (1994) 76 A Crim R 9; *R v George* (1987) 9 NSWLR 527; *R v Frugtniet*, Unreported, NSW CCA 25 June 1998; *Kirkland v Tippet* [2000] TASSC 94).

Judicial Intervention

55. Judges may intervene in proceedings by questioning a witness in order to clarify a matter in doubt or clear up matters that are equivocal or uncertain (*Buchwald v R* (2011) 38 VR 199; [2011] VSCA 445; *R v Esposito* (1998) 45 NSWLR 442; *PRW v R* [2011] VSCA 381).
56. The judge must not use this power to deprive a party of the opportunity to cross examine a witness effectively. The judge should not suggest answers to the witness or provide the witness with the chance to correct omissions in the witness' evidence-in-chief (*Hoare Bros v Magistrates' Court of Victoria* [2003] VSC 257; *Buchwald v R* (2011) 38 VR 199; [2011] VSCA 445). Nor should the judge assume responsibility for cross-examining the witness (see *Nwagbo v The Queen* [2021] VSCA 93, [95]–[96]).

57. It is not appropriate for a judge to ask questions to fill gaps in the prosecution case or raise issues which the prosecution or accused have left alone (*R v Brdarovski* [2006] VSCA 231; *Nwagbo v The Queen* [2021] VSCA 93, [33]). This does not stop a judge from questioning a witness so that the witness clarifies ambiguous answers (*PRW v R* [2011] VSCA 381; *R v Esposito* (1998) 45 NSWLR 442).
58. The power to ask questions to clarify ambiguous answers should not be used, in relation to an expert witness, to provide the expert with an opportunity to elaborate on the reasons for an opinion which the prosecution failed to adduce. Such a process may supplement the prosecution's case and carry extra weight as coming from the judge. Instead, any such elaboration is a matter for the prosecution, such as in re-examination (*Nwagbo v The Queen* [2021] VSCA 93, [70]–[73]).
59. The judge must ensure that he or she does not intervene excessively, as this may give rise to a miscarriage of justice by:
- Preventing the defence from fully presenting its case to the jury;
 - Preventing witnesses giving a full account of their evidence;
 - Giving rise to an apprehension of bias;
 - Creating a belief in the mind of the jury that the judge holds a certain view of the correct outcome
 - Creating a belief in the mind of the jury that the judge holds certain views about the competence of counsel (*R v Mawson* [1967] VR 205; *Jones v National Coal Board* [1957] 2 QB 55; *R v Tang* (2007) 16 VR 454; [2007] VSCA 134; *Buchwald v R* (2011) 38 VR 199; [2011] VSCA 445; *Percival v R* (2015) 49 VR 238; [2015] VSCA 200).
60. While the assessment of whether intervention is 'excessive' cannot be conducted numerically, a comparison between the number of questions asked by the judge and the number of questions asked by the parties can indicate the extent of participation by the judge (see *R v Mawson* [1967] VR 205, 207–208; *Nwagbo v The Queen* [2021] VSCA 93, [98]–[99]).
61. The judge should be careful not to break the flow of cross-examination of a witness. This may destroy the sequence of counsel's arguments or reduce the chance of the witness making relevant admissions (*R v Clewer* (1953) 37 Cr App R 37; *Jones v National Coal Board* [1957] 2 QB 55; *Nwagbo v The Queen* [2021] VSCA 93, [32]).
62. To avoid the risk of interrupting the flow of cross-examination, judges should save any questions they have until after both parties have examined a witness, assuming the judge's question remains unanswered. The judge should also give both parties an opportunity to further examine the witness after the judge's questions (*Nwagbo v The Queen* [2021] VSCA 93, [102]. See also *Buchwald v R* (2011) 38 VR 199; [2011] VSCA 445).
63. Despite these principles of restraint, it is necessary to consider the practical reality of trials. As the Court explained in *McPadden v The Queen*:
- In many circumstances, it is simply neither practical nor proper to deal with unduly repetitive cross-examination, or cross-examination which is improper for other reasons (for example, because it invites hearsay), by sending the jury to their room, and engaging with counsel in the jury's absence. Most judicial intervention to prevent ill-advised cross-examination needs to be swift and decisive (subject, of course, to the need to avoid unnecessary denigration of counsel or his or her client's case). Indeed, experience suggests that juries react adversely to being repeatedly and often sent to their jury room, because of challenges made to cross-examination. In some circumstances, a jury's perception that they are being made to troop into and out of the jury room by reason of counsel's unnecessary and undisciplined questioning is calculated to cause more prejudice to counsel (and his or her client's cause) than swift and decisive judicial intervention accomplished in their presence (*McPadden v The Queen* [2018] VSCA 57, [38]. See also *Nwagbo v The Queen* [2021] VSCA 93, [31]).
64. Excessive intervention may also weaken the effectiveness of cross-examination by giving the witness added time to determine his or her answers and may distract counsel from pursuing his or her line of questions (*Jones v National Coal Board* [1957] 2 QB 55).

65. Impermissible judicial intervention can also occur when:
- The judge requires a party to call particular evidence;
 - The judge seeks to influence a party's decision to call a witness;
 - The judge expands the prosecution's case by directing on a line of argument in his or her charge that the prosecution did not raise;
 - The judge persuades the prosecution to expand the parameters of its case against the accused;
 - The judge harasses and belittles counsel during his or her conduct of the case; or
 - The judge reprimands counsel in the presence of the jury for misconduct in a way that reflects on the defence case (see *Waters v R* [2011] VSCA 415 and cases cited therein; *Percival v R* (2015) 49 VR 238; [2015] VSCA 200; *Piccolotto v R* [2015] VSCA 182. On impermissible expansion of the prosecution case, see 5.6 Conduct of the Prosecution Case).
66. While the judge must not seek to impermissibly influence the content of the prosecution's case, the judge may point out that a prosecutor has left a formal gap in their evidence (*Waters v R* [2011] VSCA 415).
67. In assessing the effect of judicial intervention, the appellate court will recognise that judges have 'the full range of human strengths and weaknesses', and 'it is unrealistic to expect unfailing wisdom seasoned with serene composure'. The question of whether the cumulative impact of a judge's intervention constitutes a substantial miscarriage of justice is one of fact and degree (*Nwagbo v The Queen* [2021] VSCA 93, [36]).
68. A judge may take steps to ensure that a witness is not frightened or overawed by the experience of giving evidence without creating an appearance of bias. Witnesses do not have a legal practitioner to protect their interests. A judge may take steps to make a witness feel at ease, such as inviting young witnesses to nominate the times suitable for giving evidence and engaging in preliminary questioning so that a witness can "find his or her voice" and become used to the process of answering questions (*LAL v R* [2011] VSCA 111).
69. The judge has an overriding responsibility to maintain the smooth function of the trial. A judge may order that certain questions are impermissible, even in the absence of objection from the other party. However, intervention in the absence of objection requires caution, because it risks creating the perception that the judge has an interest in the outcome of proceedings and may interrupt the flow of evidence to the detriment of a party (*Nwagbo v The Queen* [2021] VSCA 93, [102]).
70. Exceptional cases where intervention in the absence of an objection may be appropriate include where:
- Counsel seeks to elicit evidence in breach of a previous evidentiary ruling of the judge;
 - The question is phrased in a manner that is ambiguous or may elicit an answer that may confuse the jury;
 - The question is plainly offensive (*R v Lars & Ors*, Unreported, NSWCCA, 30 June 1994; *R v Tang* (2007) 16 VR 454; [2007] VSCA 134).
71. In addition, the judge *must* intervene to disallow an improper question (*Evidence Act* 2008 s 41). Further information on the operation of s 41 is available in the Uniform Evidence Manual.
72. However, judges must exercise restraint when interjecting in response to improper, impermissible or ambiguous questions, maintain the dignity of the court and treat counsel with respect, using neutral language (see *Percival v R* (2015) 49 VR 238; [2015] VSCA 200, [76]–[77]; *Piccolotto v R* [2015] VSCA 182).

73. Disputes between the judge and counsel on the appropriateness of any judicial intervention should generally take place in the absence of the jury. Otherwise, there is a risk that the jury may form the view that defence counsel is being criticised and form a prejudice against the defence case as a result. The judge should avoid this by instructing the jury that such disputes are a normal part of the trial and do not reflect adversely on counsel or his or her submissions (*R v Tang* (2007) 16 VR 454; [2007] VSCA 134; *R v Weiss* (2004) 8 VR 388; [2004] VSCA 73; *Percival v R* (2015) 49 VR 238; [2015] VSCA 200).

Case management

74. Judicial officers are not expected to devote unlimited time to each case. Provided a party is given a fair opportunity to be heard, which includes an opportunity to articulate their arguments, judicial officers are entitled to manage the hearing and require a party to move on to their other points (*AJH Layers v Careri* (2011) 34 VR 236, [25]).
75. Where a party is making a seemingly unmeritorious argument, it is important that the party have the opportunity to make their submissions, and that the judicial officer does not give the impression that they are not listening, or are only listening under sufferance (*AJH Layers v Careri* (2011) 34 VR 236, [25]).

Pecuniary and Other Interests

76. A judge is not automatically disqualified in Australia where he or she has a pecuniary interest in a company appearing in litigation. A judge is disqualified only if he or she meets the test of apprehended bias (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; c.f. *Dimes v Proprietors of the Grand Junction Canal* (1852) 10 ER 301).
77. In most cases, a judge who owns shares in a company will only be disqualified if there is a realistic possibility that the outcome of the litigation may affect the value of those shares (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Ronan v ANZ Banking Group* (2000) 2 VR 531; [2000] VSCA 77; *Clenae v ANZ Banking Group* [1999] 2 VR 573; [1999] VSCA 35).
78. The usual practice of judges is to disclose the size and nature of any shareholding at the start of the hearing and invite submissions from the parties (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63).
79. The principle that a judge is disqualified from sitting on cases in which he or she has an interest is not limited to financial interests. A judge may be disqualified due to a political interest where that association gives rise to a reasonable apprehension of bias in the context of the case (*R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] AC 119; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63).

Association with a Party

80. An existing or previous association between the judge and a party to the proceedings may give rise to an apprehension of bias (*Re Polites; Ex parte Hoyts Corporation* (1991) 173 CLR 78; [1991] HCA 31).
81. If the judge believes that a relationship might give rise to an apprehension of bias, he or she should disclose that relationship in open court and invite the parties to make submissions on whether the judge is disqualified due to that relationship (*S & M Motor Repairs v Caltex Oil* (1988) 12 NSWLR 358).
82. It is not necessary for the judge to disclose a personal relationship if he or she is satisfied, without any need for submissions from the parties, that it is inappropriate for him or her to sit on the case. It is only necessary to disclose the relationship if the judge is not prepared to excuse him or herself from the case on his or her own motion.
83. A judge should normally disqualify him or herself from sitting on cases where a near relative or a close friend is a party. In cases involving more remote relationships, the judge should consider the nature of the relationship, its intensity and duration (*Chessells v Burg* Unreported, VSC, 19 June 1997; *S & M Motor Repairs v Caltex Oil* (1988) 12 NSWLR 358).

84. The relationship of judge and former client does not automatically give rise to an apprehension of bias. The judge must consider the nature of the retainer, the information acquired from the client and the time between the relationship and the current case to determine whether he or she should continue to sit on the case (*R v Nicholas* (2000) 1 VR 356; [2000] VSCA 49; *Re Polites; Ex parte Hoyts Corporation* (1991) 173 CLR 78; [1991] HCA 31).
85. Previous work as a prosecutor of the individual who is appearing in either related or unrelated proceedings before the judge may be especially significant. As Kiefel CJ and Gageler J noted, the fair-minded lay observer would take into account the justifiable sense of disquiet the appellant might have “in seeing his former prosecutor turn up as one of his judges” (*QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, [49]. See also [50]–[55], [64], [83], [186], [300]).
86. The principle that a judge should not sit in judgment over his or her own case means that a judge should not hear any matter that is concerned with the quality, accuracy or effect of advice he or she gave while practicing as a lawyer (*Re Polites; Ex parte Hoyts Corporation* (1991) 173 CLR 78; [1991] HCA 31).

Association with Counsel

87. It is commonly understood and accepted that judges are often appointed from practicing lawyers and will therefore be familiar with the barristers and solicitors appearing before them. This is not sufficient to create apprehension of bias by itself. A judge must consider whether he or she has a relationship with the lawyers appearing in the case that gives rise to an appearance of bias (*Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272; *Re Polites; Ex parte Hoyts Corporation* (1991) 173 CLR 78; [1991] HCA 31; *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530).

Ex-parte Communications

88. A judge must not receive private communications from a party or the representatives of a party without the knowledge and consent of the other party (*R v Magistrates’ Court at Lilydale; Ex parte Ciccone* [1973] VR 122; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39).
89. A judge must also maintain the appearance of impartiality and must not be in a situation where he or she could be suspected of having sought or received private communications from a party or a witness (*R v Magistrates’ Court at Lilydale; Ex parte Ciccone* [1973] VR 122; *Haldane and Transexecutive Airlines Pty Ltd v Chegwiddden* (1986) 41 SASR 546).
90. For this reason, a judge hearing a matter must not have any personal contact with a barrister appearing in the case. This obligation is not limited to the days when the trial is held. It extends until the judge delivers orders and reasons, bringing the litigation to an end (*Charisteas v Charisteas* [2021] HCA 29, [22]).
91. A judge also must not meet privately with a witness, even for the purpose of allaying the witness’ anxiety. Any such ‘witness settling’ exercise must occur in the presence of counsel. While it may involve the judge leaving the bench and talking to the witness informally in the courtroom, it cannot occur in private (*Alec v The King* [2023] VSCA 208, [27]–[38]).
92. Similarly, a judge cannot meet with the witness informally before the hearing in the presence of counsel for the prosecution and defence. Such a meeting is inconsistent with open justice principles, which requires hearings to be accessible to the public and the accused, subject to limited exceptions (*DPP v Smith* [2023] VSCA 293).
93. As part of this obligation, a judge should not accept transport to or from a view in the presence of only one party. Counsel for both parties should accompany the judge, or he or she should travel solely with court staff (*R v Magistrates’ Court at Lilydale; Ex parte Ciccone* [1973] VR 122).

Necessity

94. The doctrine of necessity is a qualification on the rule of exclusion based on apprehended bias. A judge may continue to sit on a matter in circumstances of necessity, despite an appearance of bias, such as:

- Where all other available members of the court are affected by an appearance of bias (*Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; [1990] HCA 31; c.f. *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; [1983] HCA 17); or
- Where the basis for an apprehension of bias arises after a key witness dies (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63; *Clenae v ANZ Banking Group* [1999] 2 VR 573; [1999] VSCA 35).

Waiver

95. A party may waive the chance to object to conduct that gives rise to an apprehension of bias if he or she fails to make a timely objection (*Vakauta v Kelly* (1989) 167 CLR 568; [1989] HCA 44; *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122).

Personal experience of crime

96. The mere fact that a judge is, or is related to, a victim of crime does not disqualify the judge from presiding at trials for similar crimes (*LAL v R* [2011] VSCA 111. See also *R v Goodall* (2007) 15 VR 673; [2007] VSCA 63).

97. Where the judge is related to a victim of crime, the following factors may be relevant in whether a judge should recuse himself or herself from hearing such a case:

- Whether the judge discloses his or her relationship with a victim of crime;
- The nature of the relationship between the judge and the victim of crime;
- Any similarities between the complainant and the judge's relative, including similarities in the alleged offences (e.g. age or exploitation of vulnerability);
- Any personal trauma the judge suffered from the crime against a relative (*LAL v R* [2011] VSCA 111).

98. The ultimate question when determining whether a judge must refuse to hear a case due to his or her personal experience of crime is the general test for apprehended bias. That is, whether a fair minded person might reasonably apprehend that the judge might not bring an impartial mind to the case (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63).

Last updated: 8 December 2023

6.2 Reasons for Decision

1. A judicial officer is under a general duty to provide reasons for his or her decisions. This obligation is an incident of the judicial process and essential for facilitating an effective right of appeal (*Soulemezis v Dudley* (1987) 10 NSWLR 247; *R v Arnold* [1999] 1 VR 179; [1998] VSCA 34).
2. Reasons for a decision may also be required under specific statutory provisions. These provisions may indicate the content or the nature of the reasons that must be given (see, e.g., *CPA* 2009 s 351; *Bail Act* 1977 s 4(4); *Evidence Act* 1958 s 32D(4); *Children, Youth and Families Act* 2005 s 356(3)).
3. Reasons for a decision serve at least five distinct purposes. The reasons:
 - Allow the parties to see the extent to which their arguments have been understood and accepted;
 - Allow the parties to see the basis for the judge's decision;
 - Foster judicial accountability;

- Facilitate certainty in the law by assisting practitioners, the legislature and the public to see how similar cases may be decided; and
 - Assist appellate courts to determine whether the trial judge's decision was affected by appealable error (*Fletcher Construction Australia v Lines Macfarlane & Marshall* (2001) 4 VR 28; [2001] VSCA 167; *Soulemezis v Dudley* (1987) 10 NSWLR 247; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430; *De Iacovo v Lacanale* [1957] VR 553).
4. Adequate reasons for a decision should contain:
 - A statement of the relevant principles of law;
 - The court's findings of fact; and
 - In a finding of guilt, a statement of any warnings or directions the judge or magistrate was required to consider and how they gave effect to that warning (*Brittingham v Williams* [1932] VLR 237; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Hodgson v Police* [2002] SASC 35; *Fleming v R* (1998) 197 CLR 250; [1998] HCA 68; *DW v R* [2004] ACTCA 22; *Sun Alliance Insurance v Massoud* [1989] VR 8).
 5. Reasons should refer to the relevant evidence. While it is not necessary to refer to the evidence in detail, the reasons should refer to evidence that is important or critical to the proper determination of the matter. Further, where there is conflicting evidence of a significant nature, both sets of evidence should be referred to. Further, the reasons must set out how the judge or magistrate came to accept one set of conflicting evidence over the other (*Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 442–444; *Makeham v Sheppard* [2020] VSCA 242, [36]–[38]).
 6. The content of the obligation to give reasons varies with the circumstances of the case and the complexity of the issues. It is therefore not possible to precisely define the content of the obligation in all cases (*Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171; *Soulemezis v Dudley* (1987) 10 NSWLR 247; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *R v Arnold* [1999] 1 VR 179; [1998] VSCA 34; *Farrugia v The County Court of Victoria* [2000] VSC 11; *DW v R* [2004] ACTCA 22; *Makeham v Sheppard* [2020] VSCA 242, [36], [37]).
 7. Reasons for decision must demonstrate that the judicial officer has directed his or her mind to the relevant issues and has determined the matter in accordance with law. The reasons must demonstrate a process of reasoning and explain the basis for the decision (*DPP v Harika* [2001] VSC 237).
 8. A judicial officer is not required to address every piece of evidence, every submission or every fleeting thought they consider. Whether a judge is required to address a piece of evidence or a submission depends on the importance of the point and its likely effect on the outcome of the case. This has been expressed by reference to "key evidence" and "substantial points" (*Makeham v Sheppard* [2020] VSCA 242, [90]).
 9. A court is not required to give reasons in every case. A failure to give reasons must be assessed in the context of the case and the issues. Absence of reasons will not automatically be an error of law that vitiates a decision (*Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171; *Mansbridge v Nichols* [2004] VSC 530; *R v Arnold* [1999] 1 VR 179; [1998] VSCA 34).
 10. A magistrate presiding over a criminal hearing has a duty to give reasons. This duty requires more than setting out the evidence adduced by one party and asserting that, having considered the evidence, the magistrate finds the charges proved. The magistrate should set out material findings of fact and any ultimate conclusions or findings, along with reasons for arriving at those findings and conclusions, and show how the law is applied to each fact found. This does not require explicit findings on each disputed piece of evidence, or address every argument or submission, where the arguments are numerous and of varying significance (*Bookless v Smith* [2020] VSC 56, [24]]; *Makeham v Sheppard* [2020] VSCA 242, [35]–[38]).

11. The content of the duty on magistrates does, however, take account of the busy nature of summary courts. Magistrates hearing dozens of cases a day are under less onerous obligations than judges of higher courts, and relatively brief reasons may be sufficient. However, where a magistrate reserves a case for preparation of reasons, more detailed reasons may be expected (see *Makeham v Sheppard* [2020] VSCA 242, [41]–[42]).
12. The obligation in *Jury Directions Act 2015* s 4A for a magistrate to reason in a manner consistent with how a jury would be directed under that Act does not mean that a magistrate's reasons must recite the directions required under that Act (*Makeham v Sheppard* [2020] VSCA 242, [49]–[50]).
13. Where credibility is in issue, reasons will need to do more than simply state that the complainant is believed over the accused. In particular, the court will need to deal with matters that detract from the complainant's credibility, rather than just referring to matters that support the complainant (*Douglass v The Queen* (2012) 290 ALR 699; [54]–[57]; *Bookless v Smith* [2020] VSC 56, [24]; *Makeham v Sheppard* [2020] VSCA 242, [87]). However, where the complainant is not believed, the reasons may not need to say much more than stating that the complainant was not believed (see *Ta v Thompson* (2013) 46 VR 10, [52]).
14. Reasons are especially important where the majority of evidence is received from recordings or transcripts from a previous hearing. The court will need to deal in some detail with the points that the evidence raises and the parties rely on (*Grabski v Beier* [2020] VSC 156, [54]).
15. There is generally no need to give detailed reasons in relation to exercising a procedural discretion, or making orders for costs. The need for detailed reasons in either of these circumstances must be determined by the issues in the case (*R v Power* [2003] SASC 77; *DW v R* [2004] ACTCA 22; *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171).
16. The existence of a de novo appeal pathway does not remove the duty to give reasons, though it may reduce the level of detail required in reasons. While deficiencies in the reasons given at first instance will have no relevance if a party brings a de novo appeal, any deficiencies will be relevant where there is an appeal on the basis of an error of law, as a failure to give reasons is an error of law (*Makeham v Sheppard* [2020] VSCA 242, [43]–[48], [94]. But see also [62] regarding the effect of abolishing de novo appeals).
17. Reasons for a decision will be inadequate if:
 - An appellate court would be unable to ascertain the process of reasoning employed by the judge; or
 - Where an appeal is limited to a question of law, the appellate court is unable to see whether the decision involved an error of law;
 - If the community is unable to see that the judge has engaged in transparent decision making (*Sun Alliance Insurance v Massoud* [1989] VR 8; *Hajdu v Breguet* [2008] VSC 183; *DW v R* [2004] ACTCA 22; *Soulemezis v Dudley* (1987) 10 NSWLR 247; *Bookless v Smith* [2020] VSC 56, [24]).
18. A statement that the court has "considered all relevant matters and discarded all irrelevant matters" does not satisfy the obligation to give reasons (*Pettitt v Dunkley* [1971] 1 NSWLR 376; *De Iacovo v Lacanale* [1957] VR 553). The reasons must demonstrate the path by which the conclusion has been reached (*Makeham v Sheppard* [2020] VSCA 242, [77]).
19. Where reasons for decision are delivered ex tempore, and are unclear, it may be open to counsel to seek further reasons or clarification. Where this occurs, the judicial officer should hear the submissions on the need for clarification and decide whether there is merit in the submission. There is, however, no general duty to enlarge on reasons whenever a request for clarification is made (*Makeham v Sheppard* [2020] VSCA 242, [54]–[55]; *Ta v Thompson* (2013) 46 VR 10, [83]).

Rulings in the Course of a Trial

20. The obligation to give reasons applies to both final decisions and rulings in the course of trial on matters such as admissibility of evidence.

21. As with final orders, reasons for a ruling must disclose the process of reasoning and allow a party to assess whether the judge has made an error of law (*R v McCullagh* [2007] VSCA 293; *Webb v R* (1994) 13 WAR 257).
22. The judge should deliver the reasons to the parties in the course of the trial. It is not appropriate for a judge to wait until an appeal from his or her decision is heard until he or she publishes formal reasons (*R v Juric* (2002) 4 VR 411; [2002] VSCA 77; *R v McCullagh* [2007] VSCA 293). See Timing of Decisions (below).
23. If the judge indicates that he or she will give reasons, the prosecutor should remind the judge of this fact at the end of the trial if the judge did not provide reasons in the course of the trial (*R v Schaeffer* (2005) 13 VR 337; [2005] VSCA 306).

Timing of Rulings

24. It is often not practical for a judge to give reasons contemporaneous with his or her decision in the course of a criminal trial. There is no absolute rule prohibiting a delay in the delivery of reasons (*Fletcher Construction Australia v Lines Macfarlane & Marshall* (2001) 4 VR 28; [2001] VSCA 167).
25. It is, however, generally desirable for a judge to deliver reasons at the same time as the ruling is made (*Fletcher Construction Australia v Lines Macfarlane & Marshall* (2001) 4 VR 28; [2001] VSCA 167).
26. There is a risk (or a perceived risk) that a judge who does not give reasons at the time of the ruling may mould the reasons to conform ruling. The reasoning process of the judge should be complete at the time he or she gives his or her decision and the published reasons should reflect that process (*Fletcher Construction Australia v Lines Macfarlane & Marshall* (2001) 4 VR 28; [2001] VSCA 167; *Palmer v Clarke* (1989) 19 NSWLR 158).
27. Publication of reasons at the time of decision also facilitates an effective appeal right. An unsuccessful party must commence an appeal within a specified period measured from the date of the ruling. Late publication of reasons for a decision frustrates this process and obliges a party to seek an extension of time in which to lodge an appeal. The appellate court also benefits from contemporaneous reasons in case it needs to determine whether to grant urgent relief (*Palmer v Clarke* (1989) 19 NSWLR 158; *Fletcher Construction Australia v Lines Macfarlane & Marshall* [2000] VSCA 158). See also 20.4.3 Interlocutory Appeals.
28. Once a judgment is released it becomes the property of the profession and the public. A judge may not change his or her published reasons in response to shifts in his or her opinion (*De Iacovo v Lacanale* [1957] VR 553).
29. *Ex tempore* reasons may be altered after judgment is finalised provided the alterations do not affect the substance of the reasons or the decision those reasons support (*Fletcher Construction Australia v Lines Macfarlane & Marshall* (2001) 4 VR 28; [2001] VSCA 167).

Last updated: 30 August 2021

6.3 Judge Sitting in Place of Another Judge

1. The powers of the Supreme Court may be exercised by another judge if the Court cannot be constituted by the original judge for any reason (*Constitution Act 1975* s 87(2)).
2. The statutory power of a County Court judge to sit in place of another judge is more limited and may be exercised if the original judge:
 - Has ceased to be a judge;
 - Is absent on leave;
 - Is absent due to sickness; or
 - Is otherwise absent (*County Court Act 1958* s 15).
3. There is no statutory power for one Magistrate to sit in place of another Magistrate.

4. At common law, a judge may sit in place of another judge where circumstances of necessity arise and the interests of justice require that course of action. Statutory authorisation is not necessary (*Carra v Hamilton* (2001) 3 VR 114; [2001] VSC 215; *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642).
5. A judge who replaces another judge in the course of the trial must determine whether he or she shall use evidence already led or whether the trial must be commenced de novo. There are grave objections to using evidence that has been previously led, especially when there is a serious conflict in the evidence (*Brennan v Brennan* (1953) 89 CLR 129).
6. In most cases, the judge should consider the wishes of the parties. While appellate courts often criticise the practice of continuing the trial on the existing evidence, cases are rarely overturned on this basis where the judge acts with the concurrence of the parties (see *Coleshill v Manchester Corporation* [1928] 1 KB 776; *Brennan v Brennan* (1953) 89 CLR 129; *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642).
7. It does not appear that there are any special or different rules in relation to jury trials. A judge should consider the wishes of the parties and may need to commence the trial de novo, rather than continuing with the original jury (see, e.g., *Coleshill v Manchester Corporation* [1928] 1 KB 776).

Last updated: 14 April 2009

6.4 Considerations in Long and Complex Trials

1. Long trials present particular problems for judges and require care to ensure the trial does not become fragmented or dislocated by:
 - breaks in the evidence arising from matters such as illness or unavailability of judge, counsel or jurors during the trial and
 - any breaks due to public holidays and court holidays
 - breaks due to the need to resolve legal argument in the absence of the jury.
2. In long or fragmented trials, counsel may seek a discharge of the jury on the basis that there is no reasonable prospect of the jury being able to return a true verdict according to the evidence or that the length of the trial has rendered a fair trial impossible (*R v Wilson & Grimwade* [1995] 1 VR 163; *R v Kellard* [1995] 2 Cr App R 134).
3. Courts are reluctant to grant a discharge or stay on the basis that a trial has become too long or too complex for a jury to understand. Otherwise, trials would need to be conducted within a time limit (*R v Kellard* [1995] 2 Cr App R 134).
4. Instead, jurors are recognised as capable of understanding a large volume of evidence and recalling impressions of witnesses over an extended period. However, in long and complex trials, measures should be taken to assist jurors to recall the evidence and perform their task (see *R v Wilson & Grimwade* [1995] 1 VR 163 and *R v Cohen*, unreported, English Court of Appeal (Criminal Division), 28 July 1992; *R v Higgins* (1994) 71 A Crim R 429; *R v Lam (Ruling No 29)* [2005] VSC 414; *Dragojlovic v R* (2013) 40 VR 71; [2013] VSCA 151).
5. Measures to assist the jury in potentially long trials can include:
 - Careful and detailed references to the evidence in the summing up;
 - Appropriate severance of charges to avoid undue complexity;
 - Providing jurors with transcript of evidence or key witnesses as the trial progresses (*A v R* [2007] EWCA Crim 2485; *Dragojlovic v R* (2013) 40 VR 71; [2013] VSCA 151).
6. On any appeal from a conviction in a long and complex trial, the court will give significant weight to any decision by the accused during the trial to seek or not seek the discharge of the jury. It will be a rare case where an appellate court will find that the trial judge erred by failing to discharge the jury following a considered refusal by trial counsel to apply for the discharge of the jury (*Dragojlovic v R* (2013) 40 VR 71; [2013] VSCA 151).

7 Role of Counsel

1. The primary role of counsel is to assist in the administration of justice. Counsel must exercise independent forensic skill and judgment to advance his or her client's case (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52).
2. Counsel appearing in a criminal trial exercises a privilege and a duty. They must cooperate with the court and each other to ensure the continued function of the adversarial system (*R v Wilson & Grimwade* [1995] 1 VR 163).
3. The duty on counsel includes an obligation to assist the court. Counsel who perceive an error of law in the trial process must raise the issue in a timely manner to allow the court to correct the error. Failure to do so may undermine their client's right to raise the issue on appeal (*R v Clarke & Johnstone* [1986] VR 643; *R v Wright* [1999] 3 VR 355; [1999] VSCA 145; *R v Tait & Bartley* (1979) 24 ALR 473).

Related resource: [Legal Profession Uniform Conduct \(Barristers\) Rules 2015](#)

Last updated: 14 April 2009

7.1 All Counsel

1. Counsel appearing in a criminal trial owes a duty to the court to promote the proper and efficient conduct of proceedings. Counsel must not act as the mere mouthpiece of his or her client and must exercise independent forensic judgment (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52; *Victoria Bar Practice Rules*, Rule 16).
2. The independence of counsel is considered an essential component of the adversarial system and exists for the benefit of the client. The adversarial system assumes that the client is best served by an advocate who is manifestly independent and who need not hold a personal belief in his or her client's case (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52).
3. As independent officers of the court, counsel are under several distinct duties in respect of their behaviour in court:
 - Duty of courtesy;
 - Duty not to mislead the court;
 - Duty not to misuse the privileges of counsel; and
 - Duty to assist the court.
4. These duties override the duty to the client. The barrister must comply with his or her duty to the court, even if the client gives instructions to the contrary (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52; *R v Serrano (Ruling No 4)* [2007] VSC 208).

Duty of Courtesy

5. Counsel must act with dignity and courtesy towards the court, witnesses and other parties. This behaviour is designed to promote the dignity of the trial process (*R v Lars & Ors*, Unreported, NSWCCA, 30 June 1994; *R v Weiss* (2004) 8 VR 388; [2004] VSCA 73).
6. A barrister who disagrees with a ruling by the judge should not ventilate his or her frustration in front of the jury. The appeal process provides a remedy for incorrect rulings. A barrister does a disservice to his or her client if he or she maintains ongoing animosity towards the trial judge. Such conduct may poison the atmosphere of the court (*R v Lars & Ors*, Unreported, NSWCCA, 30 June 1994).

7. If a dispute develops between the judge and counsel for a party in the presence of the jury, the judge may need to explain to the jury that such disputes are a common part of the trial system. The judge should explain that the jury should not infer anything against the client, or the client's case, because of these disputes (*R v Tang* (2007) 16 VR 454; [2007] VSCA 134; *R v Weiss* (2004) 8 VR 388; [2004] VSCA 73)..

Duty Not to Mislead the Court

8. As officers of the court, counsel must not engage in conduct that will or may mislead the court. The court must be able to have implicit trust in all who appear before it (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52; *Meek v Fleming* [1961] 2 QB 366; *Rondel v Worsley* [1969] 1 AC 191).
9. The duty not to mislead the court includes a duty not to make submissions that may have the effect of misleading the court. Counsel must not make a submission that is literally true if it is capable of creating a misleading impression (*R v Rumpf* [1988] VR 466).
10. Where counsel learns that he or she has inadvertently misled the court, he or she is under a duty to correct that situation as soon as possible (*Victoria Bar Practice Rules*, Rule 20).
11. The ongoing obligation not to mislead the court extends across the whole of a proceeding, including during any appeal. Counsel on an appeal, who learns that a misleading submission was made below, must either disclaim reliance on that submission or correct the error (*R v Rumpf* [1988] VR 466).
12. While the primary duty to correct misleading statements is on counsel making the statement, the other party may also be under a duty to correct the statement as part of the duty to the client to test the opposing party's case (*R v Rumpf* [1988] VR 466).

Duty to Assist the Court

13. Counsel are under a duty to assist the court. This includes timely and accurate submissions of law and provision of relevant authorities (*R v Meldrum*, Unreported, VSC CCA, 4 May 1995; *R v Clarke & Johnstone* [1986] VR 643).
14. Counsel are under a duty to raise questions of law or procedure as soon as possible after becoming aware of the issue, and at least 14 days before the trial is listed to commence (CPA 2009 ss 199, 200. See also *Downer EDI Works Pty Ltd v R* [2017] VSCA 27 at [34]–[41]; *DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [7]).
15. Where defence counsel identifies a legal defect in a charge (including an absence of necessary particulars), counsel must raise that matter at the earliest practicable opportunity. Counsel must not wait until the close of the prosecution case to raise such matters on a no-case submission. Delaying such submissions is likely to undermine the system of justice (*Downer EDI Works Pty Ltd v R* [2017] VSCA 27 at [34]–[41]; *DPP v Vibro-Pile* (2016) 49 VR 676; [2016] VSCA 55 at [131]).
16. A party must inform the court of any relevant authorities contrary to that party's case that are:
- Binding on the court;
 - From another Australian appellate Court;
 - From the Federal Court or another State Supreme Court on materially similar legislation (*Victoria Bar Practice Rules*, Rule 24; *R v Meldrum*, Unreported, VSC CCA, 4 May 1995);
17. The party must also inform the court of any applicable legislation that is contrary to the party's case (*Victoria Bar Practice Rules*, Rule 24).
18. Counsel must assist the judge to avoid appealable error by bringing the matter to the judge's attention so that the judge can correct the error. Counsel must not save the error as an appeal point (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52; *R v Schaeffer* (2005) 13 VR 337; [2005] VSCA 306; *R v Meldrum*, Unreported, VSC CCA, 4 May 1995; *R v Clarke & Johnstone* [1986] VR 643).
19. The obligation to assist the court includes an obligation to alert the judge to any necessary directions of law that he or she must give to the jury (*R v Cardamone* [2007] VSCA 77).

20. With the commencement of the *Jury Directions Act 2013*, counsel are under a continuing obligation from the close of the evidence to the end of the trial to identify the issues in the case and the directions the judge must give. Where counsel fails to request a direction or a re-direction, the question on the appeal is whether the omitted direction was of such central importance that its absence caused a miscarriage of justice (*Xypolitos v R* (2014) 44 VR 423; [2014] VSCA 339, [44]; *Joseph v R* [2014] VSCA 343, [55]).
21. Failure to raise an issue at trial may be used as evidence that the error was not material in the context of the trial (*R v Clarke & Johnstone* [1986] VR 643; *R v Tait & Bartley* (1979) 24 ALR 473; *R v Casey & Wells* (1986) 20 A Crim R 191).
22. Counsel for both parties should take appropriate notes of the reasons for an *ex tempore* judgment. These notes may be the only evidence of the reasons for judgment if the judge does not produce formal written reasons. Counsel have a duty to assist the court by providing sufficient information to enable the appellate court to properly review the decision (*Hills v Sklivas* [1995] 1 VR 599).

Duty Not to Misuse the Privileges of Counsel

23. All counsel enjoy immunity from the tort of negligence for in-court decisions and immunity from the tort of defamation for in-court statements (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52; *Strange v Hybinett* [1988] VR 418).
24. Counsel must not allege fraud, dishonesty or other misconduct unless he or she is satisfied the allegation is supported by admissible evidence and the client instructs counsel to make the allegation, having been advised of the seriousness of such allegations. Immunity from defamation carries a responsibility to ensure that reputations are not wantonly attacked (*Strange v Hybinett* [1988] VR 418; *Law & Other Things* (Lord Macmillan, 1937); *Oldfield v Keogh* (1941) 41 SR (NSW) 206; *Victoria Bar Practice Rules* Rules 38, 42).

Conflicts of Interest

25. A court has an inherent or implied jurisdiction to restrain a legal practitioner from acting for a party. This is a power to be exercised with circumspection, according to the needs of justice and the appearance of justice. The court will not interfere with the right of a party to choose his or her counsel without good reasons (*Grimwade v Meagher* [1995] 1 VR 446; *Black v Taylor* [1993] 3 NZLR 403).
26. In *Grimwade v Meagher*, Mandie J stated:

The objective test to be applied in the context of this case is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that counsel be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause (*Grimwade v Meagher* [1995] 1 VR 446 at 452).
27. A court may restrain counsel from acting for either party where he or she has previously acted for a related party in other proceedings. The court must consider whether the interests of justice require removing counsel from the case. This is likely to arise where:
 - Accepting the prosecution brief is a breach of an ongoing duty of loyalty;
 - Accepting the brief may be a breach of a duty to preserve confidential information;
 - Counsel's conduct in previous proceedings may be called into question in the current proceedings; or
 - Continuing to act risks undermining confidence in the administration of justice (*Ismail-Zai v WA* (2007) 34 WAR 379; [2007] WASCA 150).
28. The court must, however, be highly reluctant to restrain the Office of Public Prosecutions from acting in a matter. The OPP has a statutory duty to conduct prosecutions and must take the necessary precautions to ensure that solicitors working for the OPP do not disclose confidential information regarding an accused (*Mullins v Rothschild* [2001] TASSC 76).

29. The need to remove a prosecutor may depend on the nature of the previous relationship, the nature of counsel's previous instructions and the passage of time between the previous retainer and the current brief. The court should consider whether the prosecutor may have acquired information relevant in the proceedings or have an inappropriate advantage in cross-examining the accused due to a previous relationship (*Ismail-Zai v WA* (2007) 34 WAR 379; [2007] WASCA 150).
30. Counsel who seek to act for more than one accused must ensure that there is no actual or potential conflict of interest between the accused. If a conflict arises, he or she may need to cease acting for both accused. Any doubt about a conflict should be resolved in favour of separate representation (*R v Clark & Ors* (1996) 91 A Crim R 46; *R v Mills* [1995] 1 WLR 511).⁶³³
31. The duty to avoid a conflict of interest also applies to the solicitors representing an accused. The solicitors must ensure that there is no actual or potential conflict between co-accused, between an accused and a former client and between an accused and a current client. For example, a solicitor may need to cease to act where an important witness in the proceeding is a former client (*Pedley v Police* [2008] SASC 214; *R v Gilfillan* [2003] NSWCCA 102).
32. Finally, a court may need to restrain counsel from acting for an accused where that practitioner has previously acted for the prosecution in earlier proceedings against a co-offender.

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7.2 Counsel for the Prosecution

1. The prosecutor in a criminal trial occupies a special position. His or her role is unlike counsel for a party in a civil trial or counsel for an accused.
2. Unlike other clients who have an interest in securing a favourable outcome in proceedings, the Crown does not have an interest in securing a conviction at all costs. Prosecutors are often called 'ministers of justice' and their role is to present the whole case to the jury and assist the jury to find where the truth lies (*R v Puddick* (1865) 176 ER 662; *McCullough v R* [1982] Tas R 43; *R v Beydag*, Unreported, Vic CA, 25 November 1996; *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38).
3. Due to their special role in criminal trials, prosecutors are under several well defined duties, including:
 - Duty of disclosure;
 - Duty to call all credible and relevant witnesses;
 - Duty to conduct the case fairly.
4. Many of these duties are reflected in *Victoria Bar Practice Rules* Rules 134 to 148.
5. Prosecutors owe their duties to the court and not to individual accused. Unless the prosecution assumes a duty of care, an accused may not sue the prosecution authorities in negligence for carelessly commencing or continuing a prosecution. The prosecutor's duty is to prosecute fairly and he or she does not need to balance this duty against concern for the wellbeing of the accused (*Grimwade v State of Victoria*, Unreported, VSC, 21 January 1997; *Elgouzouli-Dag v Commissioner of Police of the Metropolis* [1995] QB 335; c.f. *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692).

Duty of disclosure

6. Prosecutors in criminal trials owe disclosure obligations under common law and statute. The duty of disclosure is a component of the duty to conduct the case fairly and to ensure the accused is aware of the case against him or her.

⁶³³ For a discussion of the possibility of conflict between co-defendants and the limitation on a person's right to have a lawyer of his or her choice, see, in a related context, the power of ASIC or the NCA to exclude a lawyer from compulsory examinations (*Collard v ASIC (No 3)* (2008) 173 FCR 117; [2008] FCA 1681; *ASIC v Bell* (1991) 32 FCR 517; *National Crime Authority v A, B and D* (1988) 18 FCR 439).

7. The scope of the duty varies with the nature of proceedings. Lower disclosure obligations exist in summary proceedings than indictable proceedings and different disclosure obligations exist in committal proceedings (*R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145; CPA 2009 ss 36, 40, 106).

Statutory disclosure obligations

8. The CPA 2009 creates statutory disclosure obligations on the police and the DPP. These include serving the appropriate type of brief and a summary of the prosecution opening in indictable matters. These statutory disclosure obligations are generally performed prior to trial and are discussed in 3 - Summary Hearings, 4 - Committal Hearings and 5 - Trial Procedure.
9. The CPA 2009 also creates a statutory obligation on the informant for disclosure to the DPP, where the DPP is conducting the prosecution.
10. The police disclosure obligation to the DPP applies to:
 - any information document or thing, that is in the possession of, or is known by, the informant or the law enforcement agency represented by the informant, that is relevant to the alleged offence (CPA 2009 s 415A(2)).
11. The obligation does not extend to any information, document or thing that is the subject of a claim of privilege, public interest immunity, statutory immunity or other statutory prohibition or restriction. Instead, the informant must notify the DPP of the existence and nature of such information, document or thing, and the relevant privilege, immunity, prohibition or restriction (CPA 2009 s 415A(2), (3)).
12. However, the DPP may request such withheld material, in which case the informant must provide it to the DPP, to the extent permitted by any relevant statutory prohibition or restriction (CPA 2009 s 415(5), (8), (9)). This process of allowing the DPP to request and insist on receiving material, despite the existence of a public interest immunity, privilege or statutory immunity, reflects the Royal Commission into the Management of Police Informants conclusion that material should still be disclosed to the DPP so the DPP can assess whether failure to disclose the material will affect the potential for a fair trial (Royal Commission into the Management of Police Informants, *Final Report Volume IV*, (November 2020), 44).
13. The informant must comply with the obligation in s 415A as soon as practicable after the DPP assumes conduct of the proceeding, and as additional relevant information, document or thing comes to the possession or notice of the informant or relevant law enforcement agency (CPA 2009 s 415A(4)).
14. These provisions largely reflect existing disclosure principles under common law and the *Policy of the Director of Public Prosecutions for Victoria* (see Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021 Explanatory Memorandum, 3–7).

Common Law Disclosure Obligations

15. The common law also imposes disclosure obligations on the prosecutor. The prosecutor must inform the accused of all relevant evidence, including significant evidence concerning the credibility or reliability of prosecution witnesses (*Grey v R* [2001] HCA 65; *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68).
16. The prosecutor's duty of disclosure includes:
 - The names of any witness beyond those named on the indictment that the prosecution intends to call to give evidence;
 - The names and statements of material witnesses the prosecution does not intend to call to give evidence;
 - Any medical reports from prison doctors on the state of mind of the accused while in custody;
 - Particulars of relevant convictions of any prosecution witnesses;

- Any previous convictions of the accused;
 - Material that may undermine the prosecution case or assist the defence case (*Cannon v Tache* (2002) 5 VR 317; [2002] VSCA 84; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1; *R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145; *Clarkson v DPP* [1990] VR 745; *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68; *Grey v R* [2001] HCA 65).
17. The prosecution must fulfil their disclosure obligations pro-actively. The prosecution must make enquiries into matters that it may need to disclose. It is not appropriate to wait for the defence to ask for information (*R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145).
 18. Inadequate disclosure may affect the admissibility of evidence. Section 65(3) of the *Evidence Act* 2008 allows a party to adduce evidence of statements made in the course of other proceedings by a witness who is not available to give evidence if the accused cross-examined the witness about the statement or had a reasonable opportunity to cross-examine the witness about the statement. Failure to disclose relevant material may deprive the accused of a *reasonable* opportunity to cross-examine (*R v Sonnet* (2010) 30 VR 519; [2010] VSCA 315. See also *R v Cross*, Unreported, NSWCCA, 8/9/1998).
 19. Principles of discovery in civil litigation have no place in criminal proceedings. The defence may not bring proceedings to enforce the prosecution's duty of disclosure. Failure to disclose necessary matters may, however, be a ground of appeal following conviction due to the risk that the trial was unfair. An accused who does not receive all relevant information may be unable to properly test the strength of the prosecution case (*Clarkson v DPP* [1990] VR 745; *R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1).
 20. Disclosure obligations must be guided by common sense. It is not necessary to disclose every suspicion or rumour concerning a prosecution witness, or every previous conviction. The prosecution only needs to disclose credibility matters that are sufficiently reliable that a reasonable person may think that cross-examination on those matters may affect the credibility of the witness. This may include a witness' prior inconsistent statements in other proceedings (*R v K* (1991) 161 LSJS 135; *R v Lewis-Hamilton* [1998] 1 VR 630; *R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145; *AJ v R* [2010] VSCA 331).
 21. Disclosure obligations also require the prosecution to make a reasonable appraisal of the matters that are likely to be in issue. It will only be necessary to disclose material that affects the credibility of a witness if the prosecution reasonably anticipates that the witness' credibility may be in issue (*Vo v WA* [2012] WASCA 6).
 22. The obligation to disclose prior convictions may be reduced in summary hearings and for non-contentious witnesses. It may not be necessary to disclose prior convictions in relation to expert witnesses or those who give evidence only on formal matters (*R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145; c.f. *Wilson v Police* [1992] 2 NZLR 533).
 23. In addition, the prosecution may properly inform the defence that certain witnesses have stale or irrelevant prior convictions that will only be supplied on request. This ensures that the defence is informed of a relevant chain of enquiry while reducing the prosecution's disclosure obligation (*R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145).
 24. Despite the breadth of the duty of disclosure, the prosecution is not expected or required to disclose the entirety of the prosecution brief. The obligation is to disclose evidence that is or may be relevant in the context of the case so that the accused is aware of the case that is being made against him or her (*R v TSR* (2002) 5 VR 627; [2002] VSCA 87).
 25. The prosecution is not, for example, required to disclose evidence that undermines the expected defence case or the credit of defence witnesses. The defence is responsible for the presentation of its case and must make its own enquiries on the credit of its witnesses (*Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1; *R v Browne* [1998] AC 367).

26. Disclosure obligations only apply to material in the possession of the prosecution. However, in *BA v Attorney-General* [2017] VSC 259, Bell J considered that prosecution disclosure obligations were relevant when deciding whether to grant a defence application for a certificate under the *Mutual Assistance in Criminal Matters Act 1987* (Cth), as the material sought would have been disclosed if it had been in the prosecution's possession.

Non-disclosure orders

27. CPA 2009 ss 416A - 416C govern non-disclosure orders. These are orders a court may make which excuse a person from disclosing information relevant to the alleged offence.
28. While s 416A permits a court to make a non-disclosure order, it is clear from the section that it does not confer any new or additional power to make such orders. Instead, the Act provides a name and process for the court to exercise pre-existing powers that have the effect of excusing or preventing disclosure. The provision also allows a person to make a preemptive application for an order permitting non-disclosure, rather than waiting for a call of disclosure and then objecting (Criminal Procedure Disclosure and Other Matters) Bill 2021, Explanatory Memorandum, 15).
29. Section 416A(2) provides that, in exceptional cases, a person may apply for a non-disclosure order without giving notice to the accused. An example to the subsection suggests that exceptional cases may be where giving notice will defeat the public interest (CPA 2009 s 416A(2)).
30. Further, the Act specifies that a non-disclosure order does not affect the prosecutor's duty of disclosure to disclose any information, document or thing that comes into its possession after the non-disclosure order is made, or becomes relevant to an issue after the order is made, and that is relevant to an application for, or review of, a non-disclosure order (CPA 2009 s 416A(5)).
31. Non-disclosure orders are not binding on a higher court. This includes the trial court, in the case of a non-disclosure order made during committal, and on a court hearing an appeal (CPA 2009 s 416B).
32. Non-disclosure orders may be reviewed on the courts own motion, or on the application of a person who could apply for a non-disclosure order (CPA 2009 s 416C).

Duty to Call Relevant and Credible Witnesses

33. The prosecution is solely responsible for deciding how to present its case and choosing which witnesses to call. In *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38, the Court outlined six key principles in relation to the prosecution duty to call witness:
- (1) The Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.
 - (2) The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.
 - (3) Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.
 - (4) When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.
 - (5) Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.
 - (6) A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

34. The prosecutor must exercise his or her power to choose which witnesses to call consistent with the requirements of fairness. He or she is under a duty to call all credible witnesses whose evidence is essential to fully presenting the narrative of the case. This includes calling evidence that is both favourable and unfavourable to its case (*Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279; *Dabbah v Attorney-General for Palestine* (1944) AC 156; *Whitehorn v R* (1983) 152 CLR 657; [1983] HCA 42; *Dyers v R* (2002) 210 CLR 285; [2002] HCA 45; *Mahmood v Western Australia* (2008) 232 CLR 397; [2008] HCA 1; *R v Soma* (2003) 212 CLR 299; [2003] HCA 13; *R v Shaw* (1991) 57 A Crim R 425).
35. The obligation to call witnesses is sometimes expressed in terms of the prosecution's duty to call 'material' witnesses. In this context, 'material' has a wide meaning and evidence which is admissible and capable of influencing the jury's assessment of guilt or otherwise is capable of being material (*Dyers v R* (2002) 210 CLR 285; [2002] HCA 45 at [11]; *R v Manning* [2017] QCA 23 at [19]).
36. While this will generally mean that the prosecutor should call all witnesses named on the indictment,⁶³⁴ the process of naming witnesses on the indictment is not determinative. The need for a witness is based on dictates of fairness and not on the list of names included in the indictment (*R v Lucas* [1973] VR 693; *Richardson v R* (1974) 131 CLR 116; *Whitehorn v R* (1983) 152 CLR 657; [1983] HCA 42; *R v Su & Ors* [1997] 1 VR 1).
37. Unless there is a good reason for not calling the witness, prosecutors should call all eye-witnesses to the events constituting the alleged offence. The prosecutor must not refuse to call a witness merely because the witness' evidence is not favourable to the prosecution's case, or is inconsistent with the prosecution's case (*R v Shaw* (1991) 57 A Crim R 425).
38. While there is a difference between the obligation to call witnesses as to the facts and expert witnesses, this difference should not be overstated. Where the Crown obtains the advice of an expert witness whose expertise and impartiality are not in question, on a matter where the Crown bears the onus of proof, the Crown should call the witness (*Coulson v R* [2010] VSCA 146. See also *Velevski v R* [2002] HCA 4; *Gilham v The Queen* [2012] NSWCCA 131, [383]–[412]).
39. However, where the defence retains an expert who provides an opinion which disagrees with the expert retained by the prosecution, the prosecution does not become required to call that defence expert, unless there are primary facts which the expert can attest to, rather than merely providing a different conclusion on the same facts (*WG & KG v The Queen* [2020] NSWCCA 155, [977]–[978]).
40. Further, where the expert witness would provide evidence on a matter such as mental impairment, where the accused bears the onus of proof, the prosecution does not generally have an obligation to call that witness (*R v Fitchett* (2009) 23 VR 91; [2009] VSCA 150).
41. As part of the obligation to call all available, cogent and admissible evidence, the prosecutor should generally lead evidence of any out-of-court statements by the accused, such as a record of interview. There are exceptions to this general rule, such as where the accused has refused to comment. But where the statement includes both inculpatory and exculpatory statements, it is expected that the prosecution will tender that statement as part of the prosecutorial duty, unless there is good reason not to (*Nguyen v The Queen* [2020] HCA 23, [41]. See also *Mahmood v WA* (2008) 232 CLR 397; [2008] HCA 1).
42. Tendering the record of interview also removes the risk of the jury speculating about whether the accused had given an account of their actions when first challenged by police (*Nguyen v The Queen* [2020] HCA 23, [39]–[40]).

⁶³⁴ The name of every witness who gave evidence at the committal proceeding and all witnesses the prosecution propose to call at the trial must be included on the indictment (CPA 2009 Schedule 1, s 13).

43. While the prosecution obligation is framed in terms of tendering “available, cogent and admissible evidence”, the admissibility of a record of interview is not judged solely by whether it contains admissions. *Evidence Act 2008* s 190 allows the parties to waive the application of any provisions in Parts 3.2–3.8, if the accused has been advised to do so by his or her lawyer and the court is satisfied the accused understands the consequences of agreeing to waive the provision. Where a record of interview does not meet the requirements of s 81(2) (the admissions exception to the hearsay rule), a prosecutor should use s 190 with the consent of the accused to tender the interview (*Nguyen v The Queen* [2020] HCA 23, [39]–[40]).
44. The prosecutor must not allow tactical considerations to guide his or her choice of which witnesses to call. He or she must not omit an otherwise relevant and credible witness so that he or she has the opportunity to cross-examine that witness (*R v Lucas* [1973] VR 693; *Richardson v R* (1974) 131 CLR 116; *Whitehorn v R* (1983) 152 CLR 657; [1983] HCA 42; *Coulson v R* [2010] VSCA 146; *Nguyen v The Queen* [2020] HCA 23, [45]).
45. Previously, however, it was recognised that the prosecution might refuse to call a witness where the interests of justice required that the prosecution have the opportunity to cross-examine that witness (*Richardson v R* (1974) 131 CLR 116; *R v Chimiri* [2010] VSCA 57). This ground for refusing to call a witness may no longer be available, as *Evidence Act 2008* s 38 gives the prosecutor greater opportunity to cross-examine witnesses who give unfavourable or inconsistent evidence (see *Santo v R* [2009] NSWCCA 269; *Kanaan v R* [2006] NSWCCA 109; *Kneebone v R* (1999) 47 NSWLR 450; [1999] NSWCCA 279 per Smart AJ).
46. In some cases, it is appropriate for the prosecution to call a witness and conduct minimal examination-in-chief. The prosecution does not put such a witness forward as a witness of truth. This process allows the defence to cross-examine the witness and elicit favourable evidence without exposing the witness to cross-examination by the prosecution (*Dabbah v Attorney-General for Palestine* (1944) AC 156; *Richardson v R* (1974) 131 CLR 116; *R v Macfie (No 2)* (2004) 11 VR 215; [2004] VSCA 209).
47. The prosecution must be careful when criticising the evidence of a witness it has called but not examined in chief. The prosecutor should not suggest that the witness has collaborated with the accused to commit the offence. Such criticism is inappropriate where the prosecutor has not cross-examined the witness *De Vries v R* [2013] VSCA 210; (*R v Macfie (No 2)* (2004) 11 VR 215; [2004] VSCA 209; *R v MRW* [1999] NSWCCA 452; *R v Kennedy* [2000] NSWCCA 487; *R v Teasdale* [2004] NSWCCA 91).
48. The prosecution also should not attack the credit of a prosecution witness without having given that witness the opportunity to address the substance of the criticism (*De Vries v The Queen* [2013] VSCA 210; *Smith v The Queen* [2018] VSCA 139; *Ritchie v The Queen* [2019] VSCA 202; *Ferguson v The Queen* [2020] VSCA 166, [65]).
49. In giving the witness an opportunity to respond, it is not always necessary to put the imputation explicitly to the witness, provided the witness is able to understand that his or her evidence is being challenged and the manner in which it is being challenged. For example, merely making it clear that a witness’ evidence is challenged may not be enough to justify a specific accusation that the witness is biased in favour of the defendant and has tailored his or her evidence accordingly. Similarly, a general challenge to a witness’ credibility does not provide a basis for arguing that the witness has colluded with the accused to jointly invent a false account (*Ritchie v The Queen* [2019] VSCA 202, [69]–[78], [103]).
50. However, the prosecution can invite the jury to disregard the evidence of a witness it has called. In such cases, it is prudent for the prosecutor to explain that this does not allow the jury to impute a motive for the witness to lie (such as to protect the accused) and hence bolster the prosecution’s case. Instead, the prosecutor should warn the jury against reasoning impermissibly and the trial judge may need to supplement that warning in his or her directions to the jury (*De Vries v R* [2013] VSCA 210; *Ritchie v The Queen* [2019] VSCA 202).
51. It is not necessary to call witnesses whose evidence is:
- Irrelevant;
 - Repetitious;

- Not credible or reliable (*Richardson v R* (1974) 131 CLR 116; *Tran v Magistrates' Court of Victoria* [1998] 2 VR 294; *R v Chimiri* [2010] VSCA 57; *R v Manning* [2017] QCA 23 at [19]).
52. The prosecution should subpoena all witnesses named on the indictment and make them available for the defence to call (*Richardson v R* (1974) 131 CLR 116; *Tran v Magistrates' Court of Victoria* [1998] 2 VR 294; *Stefanovski v County Court of Victoria* [2000] VSC 417).
 53. The prosecutor should only refuse to call a relevant witness on clear and identifiable grounds. It is not sufficient that the prosecutor merely suspects that the witness is biased or unreliable. The prosecution should not refuse to interview, consider or call a witness suggested by the defence solely because of a suspicion of bias (*R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38; *R v Armstrong* [1998] 4 VR 533; *R v Jensen* (2009) 23 VR 591; [2009] VSCA 266; *R v Manning* [2017] QCA 23 at [19]).
 54. Similarly, the prosecutor may not refuse to call a witness simply on the basis that it conflicts with the evidence of another witness, or is uncorroborated. These matters will not necessarily provide a sufficient basis for the prosecutor to consider the witness unreliable, or not credible (*Svajcer v R* [2010] VSCA 116).
 55. There is no expectation that the prosecution will call witnesses it alleges are co-offenders. Such offenders are clearly unreliable and the prosecution has a legitimate interest in cross-examining them (*R v Su & Ors* [1997] 1 VR 1).
 56. The prosecution should inform the defence of any witnesses named on the indictment that the prosecution will not call to give evidence, along with the reasons for that decision (*Whitehorn v R* (1983) 152 CLR 657; [1983] HCA 42).
 57. The judge should only call a witness in exceptional circumstances. The parties are responsible for the running of the case and the judge will often not have sufficient information to determine whether a witness ought to be called. The judge will not know what evidence the witness may give or whether the witness is reliable. The judge risks derailing the trial with collateral issues if he or she calls a witness (*Whitehorn v R* (1983) 152 CLR 657; [1983] HCA 42; *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38).
 58. Even if the judge is inclined to call a witness, he or she will usually not be able to make this assessment until the close of the prosecution case. The defence should not invite the judge to exercise this power until that time (*DPP v Jensen* [2007] VSC 77).
 59. A judge may question the prosecutor on the reasons for not calling a witness, and may encourage the prosecutor to reconsider this decision (*R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38; *R v Jensen* (2009) 23 VR 591; [2009] VSCA 266; *Svajcer v R* [2010] VSCA 116). However, it will only be in the most exceptional circumstances that the judge should comment to the jury on the prosecutor's decision to refuse to call a witness (*Dyers v R* (2002) 210 CLR 285; [2002] HCA 45). See 4.9 Prosecution Failure to Call or Question Witnesses in the Criminal Charge Book for guidance on this issue.

Duty to Conduct the Case Fairly

60. The Crown's interest in criminal trials is to ensure that the jury are presented with the evidence in a clear and understandable manner. The Crown does not seek a conviction at all costs (*R v Puddick* (1865) 176 ER 662; *McCullough v R* [1982] Tas R 43; *R v Beydag*, Unreported, Vic CA, 25 November 1996; *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38; *R v Livermore* (2006) 67 NSWLR 659; [2006] NSWCCA 334; *Bugeja & Johnson v R* (2010) 30 VR 493; [2010] VSCA 321).
61. The prosecutor must perform his or her role with fairness, impartiality and detachment. He or she must endeavour to assist the jury to discover the whole truth and ensure that the trial is fair (*R v MG* (2007) 69 NSWLR 20; [2007] NSWCCA 57; *Whitehorn v R* (1983) 152 CLR 657; [1983] HCA 42; *Cannon v Tache* (2002) 5 VR 317; [2002] VSCA 84).
62. The prosecution opening serves an important purpose of indicating the conceptual nature of the prosecution case. While criminal trials are not decided on the basis of pleadings, the prosecution must generally stick to the basis on which it has conducted its case (*Tran v The Queen* (2000) 105 FCR 182, [133]; *R v Tangye* (1992) 92 A Crim R 545, 556).

63. For these reasons, the prosecution opening is an important part of providing an accused with procedural fairness. A significant departure from the prosecution opening can breach that right and result in a substantial miscarriage of justice. Late changes in the nature of the prosecution's case (such as during closing addresses) are also likely to involve a breach of the rule in *Browne v Dunn* (*Astbury v The Queen* [2020] VSCA 132, [67]).
64. A prosecutor is not permitted to invite the accused in cross-examination to say whether another witness, or the complainant, has lied. Such questioning is unfair and has a tendency to undermine the onus of proof. Where such questioning takes place, the judge should intervene quickly and give the jury a clear and firm instruction that such questions are irrelevant and are not permitted (*Reeves v R* (2013) 41 VR 275; [2013] VSCA 311; *R v SWC* [2007] VSCA 201; *R v Bajic* (2005) 12 VR 155; [2005] VSCA 158).
65. The prosecutor must not put forward misleading or unfair submissions to the jury. For example, it may be inappropriate to focus on a defence failure to cross-examine a witness where the prosecution knows that the failure was due to a reasonable forensic decision and the failure does not imply that the witness' evidence is uncontested (see *Bugeja & Johnson v R* (2010) 30 VR 493; [2010] VSCA 321). Similarly, where the case involves recorded evidence, prosecutors must not make arguments that are only tenable because of edits to the recording (*FG v R* [2012] VSCA 84).
66. The prosecutor should confine his or her arguments to the evidence led in the case. It is not appropriate for a prosecutor to make submissions that do not have a valid evidentiary basis (*R v Livermore* (2006) 67 NSWLR 659; [2006] NSWCCA 334; *Paulino v The Queen* [2018] VSCA 306; *Astbury v The Queen* [2020] VSCA 132, [72]–[78]).
67. The prosecutor may also be limited by evidence which has been excluded. Where evidence has been excluded under *Evidence Act 2008* s 137 as being unfairly prejudicial, it is not appropriate for the prosecutor to make submissions that are contrary to or inconsistent with that excluded evidence (*Paulino v The Queen* [2018] VSCA 306 [165]).
68. While arguments may be supported by analogy or by appeals to the life experiences of the jury, the prosecutor's address should not contain personal anecdotes or factual assertions from the bar table (*Smith v The Queen* [2018] VSCA 139, [83]; *Henson v The Queen* [2018] VSCA 283).
69. Intemperate language may jeopardise a fair trial. A prosecutor must not appeal to emotion or seek to excite or inflame undue prejudice in the jury. He or she must not belittle or ridicule the defence case, or invite the jury to engage in impermissible speculation. The prosecution must not improperly belittle or mock the accused, or defence witnesses (*R v Vella* (1990) 2 WAR 537; *R v Beydag*, Unreported, Vic CA, 25 November 1996; *R v DDR* [1998] 3 VR 580; *R v Deriz* [1999] WASCA 267; *R v McCullough* [1982] Tas R 43; *De Vries v R* [2013] VSCA 210; *Basic v The Queen* [2015] VSCA 109; *Smith v The Queen* [2018] VSCA 139, [80]; *Ritchie v The Queen* [2019] VSCA 202; *Ferguson v The Queen* [2020] VSCA 166, [86]–[88]; *Pringle v The Queen* [2021] VSCA 89, [134]).
70. The prosecutor must also not make improper and intemperate attacks on the behavior of defence counsel. Such attacks may unfairly diminish the jury's confidence in the conduct of the defence case, and unfairly undermine defence counsel's ability to persuade the jury. Also, in a case where credibility is important, attacks on the behavior of defence counsel may amount to attacks on the accused for authorising such allegedly improper behavior (*Ford v The Queen* [2020] VSCA 162, [15]–[31]).
71. In assessing whether the language is intemperate, the court will consider the extent to which the prosecutor repeats certain problematic terms or phrases (*Ritchie v The Queen* [2019] VSCA 202, [82]).
72. While the use of rhetorical questions is an accepted part of advocacy, a prosecutor must take care to ensure that rhetorical questions do not invert the onus of proof or invite the jury to engage in improper reasoning (*Smith v The Queen* [2018] VSCA 139, [85]).
73. It is improper for the prosecutor to suggest that a defence argument is a 'smokescreen' or distraction. Such an argument may deflect the jury from a rational assessment of the evidence, by imputing that defence counsel have sought to distract the jury from the strength of the prosecution case (*Paulino v The Queen* [2018] VSCA 306 [147]).

74. The prosecutor should not seek to explain or undermine the judge's directions of law. The prosecutor's role is to explain the facts and to assist the jury. He or she should not seek to elaborate or confine the warnings that will be delivered in the judge's charge (*R v KNP* (2006) 67 NSWLR 227; [2006] NSWCCA 213; *R v MM* [2004] NSWCCA 81).
75. Where the prosecutor engages in inappropriate rhetoric, the judge should immediately intervene to correct the position and may need to discharge the jury. The judge should not wait until his or her charge to the jury to correct the balance (*R v DDR* [1998] 3 VR 580; *R v Bazley* (1986) 21 A Crim R 19). See 11.10 Discharge of the Whole Jury for information on when to discharge a jury.
76. The obligation to present the case for the prosecution with temperance and detachment does not require meek or lifeless submissions of fact. The prosecutor is entitled to present its case firmly and vigorously and to test or attack the case for the defence (*R v McCullough* [1982] Tas R 43; *R v Lyons* (1992) 64 A Crim R 101; *R v Livermore* (2006) 67 NSWLR 659; [2006] NSWCCA 334; *R v DDR* [1998] 3 VR 580; *R v Beydag*, Unreported, Vic CA, 25 November 1996). However, the prosecution must exercise a measure of restraint and avoid dwelling overly long on matters that may excite sympathy or prejudice, even if those matters are an inevitable part of the trial (see *Terdputham v R* [2017] VSCA 123).
77. The prosecutor's special role as a "minister of justice" means that he or she must not make any submission or argue any proposition of fact unless he or she believes on reasonable grounds that it is capable of contributing to a conviction and that it carries weight (*McCullough v R* [1982] Tas R 43; *Victoria Bar Practice Rules* Rule 137).
78. A prosecutor who conducts proceedings without a reasonable belief in the guilt of the accused may commit the tort of malicious prosecution. The prosecution brief must contain sufficient information that:
- The prosecutor reasonably believes that the accused is probably guilty; and
 - An ordinarily prudent and cautious person may reasonably believe that the accused is probably guilty (*Grimwade v State of Victoria*, Unreported, VSC, 21 January 1997; *Mitchell v John Heine and Son Ltd* (1938) 38 SR (NSW) 466).
79. The prosecutor should not make public statements about a case or convey to the jury his or her personal belief in the guilt of the accused. These statements may give rise to ostensible bias or may divert the jury from its proper role.
80. Prosecutors must perform their role with impartiality and detachment. Public statements on proceedings risk creating the appearance that the prosecutor has lost the ability to rationally and impartially assess the evidence. In exceptional cases, the court may order a stay of proceedings until the Crown briefs a new prosecutor to conduct the case in order to ensure that the trial will be fair (*R v MG* (2007) 69 NSWLR 20; [2007] NSWCCA 57; *R v TS* [2004] NSWCCA 38).
81. It is not necessary to demonstrate actual bias in a prosecutor. It is sufficient that the prosecutor's conduct creates the appearance of bias (*R v MG* (2007) 69 NSWLR 20; [2007] NSWCCA 57).
82. The test for ostensible bias in relation to a prosecutor must be applied with due regard to the special nature of the prosecutor's role. He or she is an advocate for the Crown and conducts trials in an adversarial system (*R v Karounos* (1995) 63 SASR 451; *R v Lyons* (1992) 64 A Crim R 101).
83. Statements by the prosecutor to the jury of his or her personal opinion may distract the jury from its proper function. A jury is not called upon to determine whether the prosecutor's personal view is correct. Instead, the jury must make its own independent assessment of the evidence and should not be swayed by the personal beliefs of counsel (*R v Livermore* (2006) 67 NSWLR 659; [2006] NSWCCA 334; *R v KNP* (2006) 67 NSWLR 227; [2006] NSWCCA 213; *R v Rugari* [2001] NSWCCA 64).

7.3 Counsel for the Accused

1. Counsel for the accused must cooperate in ensuring the continued functioning of the trial system. Irresponsible conduct by defence counsel places more pressure on the criminal justice system and risks the collapse of the entire system. It is unfair to exploit the current system at the expense of those who expect the system to survive (*R v Sorby* [1986] VR 753; *R v Grimwade & Wilson* [1995] 1 VR 163; *R v Lewis* (2000) 1 VR 290; [2000] VSCA 140).
2. It is neither necessary nor appropriate for defence counsel to cross-examine on every difference and discrepancy that might be identified between a witness' trial evidence and previous statements. While cross-examination on prior inconsistent statements can be important, tedious cross-examination about peripheral discrepancies is discouraged. Such conduct unnecessarily lengthens trials and is often counter-productive as it risks irritating the jury (*Slater v The Queen* [2020] VSCA 270, [142]).

Conduct of Counsel Binds the Accused

3. The conduct of counsel for the accused generally binds the accused. Defence counsel is responsible for the running of the trial and appellate courts are slow to find that a trial has miscarried due to deliberate choices by counsel. A miscarriage of justice will not occur where the conduct of defence counsel may be explained as seeking a forensic advantage or avoiding a forensic risk (*R v Ali* (2004) 9 VR 489; [2004] VSCA 108; *R v Birks* (1990) 19 NSWLR 677; *R v Wright* [1999] 3 VR 355; [1999] VSCA 145).
4. Forensic decisions are often made on the basis of instinct and experience. A trial will not be unfair simply because counsel for the accused makes imprudent or unwise forensic decisions (*TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46).
5. While the judge retains the obligation to ensure a fair trial, and tactical decisions of counsel do not bind the judge, the right to a fair trial includes the right to choose the issues in dispute. There are significant limitations on the ability of a judge to introduce alternative verdicts or issues which are not addressed by the parties (see *Jury Directions Act 2015* Part 3 and 3.1 Directions under the *Jury Directions Act 2015* in the Criminal Charge Book).

Duty to Appear when Accused Absconds

6. Some judges have expressed the view that the duty to appear persists until the retainer is withdrawn by the accused, even if he or she absconds. Counsel may be able to continue to present the defence without needing further instructions, such as during final submissions and in taking exceptions to the charge (see *R v Serrano (Ruling No 4)* [2007] VSC 208; *R v Mokbel (Ruling No 5)* [2006] VSC 520).

8 Contempt of Court

8.1 General contempt principles

1. The following principles apply to all species of contempt unless otherwise specified.

Purpose

2. The law of contempt aims to uphold the effective administration of justice (Ian Cram (ed), *Borrie and Lowe: The Law of Contempt* (LexisNexis Butterworths, 4th ed, 2010), 3).
3. The purpose of the jurisdiction to punish for contempt of court is to vindicate the authority of the court (*Lewis v Ogden* (1984) 153 CLR 682, 693; [1984] HCA 28).

Jurisdiction

Inherent

4. As a superior court of record, the Supreme Court may punish summarily for contempt of its judicial authority. This includes both offences committed in the face of the court, and outside of the court (*R v Metal Trade Employer's Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 254).
5. The Supreme Court may also exercise a 'protective' jurisdiction in respect of inferior courts, allowing it to deal summarily with any contempt of those courts (*John Fairfax & Sons Pty Ltd v McRae* (1954) 93 CLR 351, also *Supreme Court (General Civil Procedure) Rules 2015* r. 75.05(1)(c)).
6. The jurisdiction of the County and Magistrates' Court in respect of contempt offences committed outside of the court is limited to that conferred by statute.

Statutory

7. The County Court has the same jurisdiction and powers in respect of any contempt of the County Court as the Supreme Court has in respect of contempt of the Supreme Court (s 54, *County Court Act 1958*).
8. The Magistrates' Court has a statutory jurisdiction over the specific instances of contempt listed in ss 133 and 134(1) of the *Magistrates' Court Act 1989*.

Intention

9. It is not necessary to establish that the alleged contemnor intended to interfere with or obstruct the administration of justice. It is sufficient if it is proven that the alleged contemnor intended to commit the acts which objectively had the requisite tendency to interfere (*Attorney-General for New South Wales v Dean* (1990) NSWLR 650, 655).
10. There may be exceptions for acts that interfere with witnesses outside of the courtroom, or acts that constitute an abuse of the court's process. See 8.6 Acts interfering with the course of justice.

Standard of proof

11. In all contempt proceedings, all elements of the offence must be proven to the criminal standard of beyond reasonable doubt (*Witham v Holloway* (1995) 183 CLR 525, 534. See also *Fortune Holding Group Pty Ltd v Zhang (No 2)* [2017] VSC 738 at [28]–[29]).

Proceedings

12. In Victoria, a jury will not be empanelled for contempt proceedings. Contempt offences are heard summarily by a judge or magistrate (*The Broken Hill Proprietary Company Limited v Dagi* [1996] 2 VR 117, 136–137).
13. Despite this, at least in the case of criminal contempt, it appears that contempt is an indictable offence (see *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 364).
14. In *R v Slaveski (Appln to set aside contempt orders)* [2017] VSC 526, Riordan J held that, at least in relation to criminal contempt, it is "strongly arguable" that the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* applies for the purpose of determining whether the accused is fit to be tried (at [98]). However, it was not necessary to determine the issue, because it was not suggested that a different result would follow if the common law test for fitness to be tried applied.

Contempt and appeals

15. *Magistrates' Court Act 1989* s 134(2) provides that in resolving a contempt under that section, the Court must cause the accused to be informed of the contempt charged, and may adopt any procedure the Court thinks fit.

16. As the procedure is governed by that chosen by the court under s 134(2), there is no right of appeal under *Criminal Procedure Act 2009* s 254. This is because s 254 is limited to a conviction ‘in a criminal proceeding conducted in accordance with Part 3.3’. Even if the Magistrates’ Court adopts a procedure that mirrors Part 3.3, the contempt proceeding will be heard under *Magistrates’ Court Act 1989* s 134(2) and not *Criminal Procedure Act 2009* Part 3.3 (*Mokbel v County Court of Victoria* [2021] VSC 191).

Contempt and future proceedings

17. In rare circumstances, a party in contempt of court by breach of a court order will not be permitted to invoke the jurisdiction of the court. While there used to be a general rule with narrow exceptions that a party in contempt could not bring further proceedings, the modern approach is that the court will consider whether the requirements of justice demand that the contemnor purge the contempt before he or she may invoke the jurisdiction of a court (see *Slea Pty Ltd v Connective Services Pty Ltd* [2017] VSC 706 at [37]–[50]).

Last updated: 30 August 2021

8.2 Contempt proceedings

1. Contempt proceedings are unique in that contempt is the only criminal offence at common law punishable summarily (*Re Perkins; Mesto v Galpin* [1998] 4 VR 505).

Initiating proceedings

2. Contempt proceedings may be brought by:
- The court;
 - A party;
 - The Attorney-General; or
 - The Director of Public Prosecutions.
3. The following sections describe the differences in how proceedings are initiated depending on the party bringing the proceedings.

Summary procedure for contempt in the face of the court

4. Where it is alleged or it appears to the court that a person is guilty of contempt in the face of court, the Court may orally order that the respondent be arrested and brought to court, or issue a warrant for the arrest of the respondent (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.02, *County Court Civil Procedure Rules 2008* r. 75.02, *Magistrates’ Court Act 1989* s 133(1)).
5. The Court must inform the respondent of the contempt with which they are charged, and then adopt such procedure as they see fit (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.03, *County Court Civil Procedure Rules 2008* r. 75.03, *Magistrates’ Court Act 1989* s 133(2)).
6. The Supreme Court or County Court may order that the respondent be kept in custody or be released on terms (including the giving of security), until the charge is finalised (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.04, *County Court Civil Procedure Rules 2008* r. 75.04).

Contempt proceedings by summons or originating motion

7. In the Supreme Court and County Court, an alternate procedure to the summary procedure above can be used to hear any contempt proceeding, including contempt committed in the face of the court (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.05, *County Court Civil Procedure Rules 2008* r. 75.05).

8. Under this alternate procedure, a person with standing may apply by summons or originating motion (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.06, *County Court Civil Procedure Rules 2008* r. 75.06).
9. The summons or originating motion must specify the contempt alleged against the respondent. It must be personally served on the respondent along with a copy of every affidavit unless the Court otherwise orders (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.06, *County Court Civil Procedure Rules 2008* r. 75.06).
10. In addition to the right of an aggrieved party, the DPP or the Attorney-General to initiate proceedings, the judge may direct the Prothonotary (in the Supreme Court) or the Registrar (in the County Court) to apply by summons or originating motion for punishment of contempt (*Supreme Court (General Civil Procedure) Rules 2015*, r. 75.07; *County Court Civil Procedure Rules 2008*, r. 75.07).
11. The Supreme Court may also use this procedure to hear a claim for contempt of an inferior court (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.05).
12. Where a summons or originating motion has been filed, and it appears to the Court that the respondent has absconded or is likely to abscond from Victoria, the Court may issue a warrant for the respondent's arrest and detention in custody, until the respondent is brought before the Court to answer the charge or give security (*Supreme Court (General Civil Procedure) Rules 2015* r. 75.08, *County Court Civil Procedure Rules 2008* r. 75.08).

Proceedings brought by the Attorney-General

Power of the Attorney-General to Bring Proceedings

13. As the Crown has a direct interest in the administration of criminal justice and control over its processes, the Attorney-General may bring a motion by summons to punish acts of contempt against the criminal justice system (*The Broken Hill Proprietary Company Ltd v Dagi* [1996] 2 VR 117).
14. The Attorney-General also has the power to make an application by summons that a person be punished for contempt in civil proceedings (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572, [58]).
15. While the power of the Attorney-General to bring proceedings for "criminal contempt" is well established, it is not fully resolved whether the power also extends to "civil contempt" (*CFMEU v Boral Resources* [2013] VSCA 378, [14]). The difference between civil and criminal contempt relates to the seriousness of the conduct and not the proceedings out of which the contempt of court arose.

Power of the Attorney-General to Join Proceedings

16. The Attorney-General may join an extant proceeding brought by a private litigant where the facts of the case contain "special features" indicative of "public defiance", and:
 - there exists a relevant question arising out of, relating to or connected with a claim in the contempt proceeding, as between the plaintiff, the defendant, and the Attorney-General;
 - the Attorney-General is a person with a "sufficient interest"; and
 - it is just and convenient to determine that question as between the Attorney-General and the defendant as well as between the defendant and the plaintiff (*Supreme Court (General Civil Procedure) Rules 2015* r. 9.06(b)(ii), *County Court Civil Procedure Rules 2008* r. 9.06(b)(ii)).
17. This power to join an existing action may be exercised even if the application relates to civil contempt, provided the factors necessary to warrant joinder are established (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572, [58]).

Special features

18. Elements of public defiance in a contempt action may include:
 - The defendant represents a large number of people, such as a union;

- The defiance impacts upon a large number of people, such as those involved in a construction site; or
- The alleged contempt has a negative effect on many members of the community (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572, [71]–[75]).

Sufficient interest

19. The Attorney-General's interest in protecting the administration of justice, including by instituting contempt proceedings, is well recognised (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572; *Attorney-General (UK) v Times Newspaper* [1974] AC 273; *Grocon v CFMEU* [2013] VSC 275).
20. At least in relation to criminal contempt, the Attorney-General has a sufficient interest to initiate proceedings (*Attorney-General (UK) v Times Newspaper* [1974] AC 273; *Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572).
21. The Attorney-General may also have a sufficient interest to join or initiate a civil contempt where there is a risk that the contempt proceedings may be compromised as part of a settlement of a wider civil proceeding. This could foster a perception that court orders can be disobeyed with impunity. The Attorney-General's interest arises from the need to make sure these contempts are appropriately dealt with, and in doing so vindicate the authority of the court (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572, [97]).

Just and convenient

22. When considering whether it is just to join the Attorney-General as a party, the Court should have regard to the general rule that the defendant should not have to face two sets of prosecuting plaintiffs (*SCI Operations Pty Ltd v Australian Paper Manufacturers Ltd* (1983) 51 ALR 365, 373).
23. If the Attorney-General is joined, it must be practically possible for the Court to conduct proceedings such that they are not oppressive, prejudicial or unjust to the defendant, including making such orders as are necessary to achieve this (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572, [113]).
24. When considering whether it is convenient to join the Attorney-General as a party, the Court should have regard to the potential inconvenience of the Attorney-General issuing a separate proceeding for contempt, so that the Court must deal with two sets of litigation on the same alleged contempt (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572, [115]).

Proceedings brought by the Director of Public Prosecutions

25. The Director of Public Prosecutions may institute, prepare and conduct proceedings to punish a person for contempt of court, or to restrain an apprehended contempt of court, in relation to a criminal proceeding (*Public Prosecutions Act 1994* s 22(ba)(iii)).
26. Alternatively, the Director may refer a matter to the Attorney-General if the Director believes that it may be desirable for the Attorney-General to institute proceedings for contempt (*Public Prosecutions Act 1994* s 22(c)).
27. Where the Director institutes, prepares and conducts contempt proceedings, he or she does so on behalf of the Crown. The Director may otherwise be a party to contempt proceedings (*Public Prosecutions Act 1994* s 22(ba)(iii)).

No trials by jury

28. In Victoria, contempt proceedings are always heard summarily by a judge or magistrate alone. Juries are not used in relation to contempt (*The Broken Hill Proprietary Company Limited v Dagi* [1996] 2 VR 117, 136–137; *R v Vasiliou* [2012] VSC 216, [12]).

Procedural fairness

29. A person may not be punished for contempt of court unless the specific charge is distinctly stated, and the accused is given a reasonable opportunity of placing before the court any evidence or submissions of fact and law (*Coward v Stapleton* (1953) 90 CLR 573, 579)

30. Similarly, where there is uncertainty about the severity of the alleged contempt, the initiating party or the court must put the accused on notice before the court can characterise the contempt as “criminal” and shift the purpose of proceedings from enforcement of court orders to punishment (*CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
31. Putting a party on notice may occur through the initiating process, or through statements in court. It is not necessary that an allegation of contempt specifically plead that the contempt was contumacious (*CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
32. Despite this, the rule against duplicity which applies in relation to criminal charges does not strictly apply to contempt. Proceedings for contempt in the Supreme Court and the County Court are governed by the rules of civil procedure. The summons or originating motion which commences proceedings for contempt does not need to be drafted as if it were an indictment in a criminal proceeding (*National Australia Bank v Juric* [2001] VSC 375; *Harmsworth v Harmsworth* (1987) 1 WLR 1676; *Rich v The Attorney-General for the State of Victoria* [1999] VSCA 14).
33. It is therefore permissible for a single charge of contempt to specify multiple acts such as a repeated refusal to answer questions, or to several instances of rudeness or abuse of the judge. This process may only be adopted if it does not cause unfairness to the accused (*Rich v Attorney-General* [1999] VSCA 14).

Procedural issues for contempt in the face of the court

34. The summary procedure for dealing with contempt of court should be adopted rarely and only in “serious cases” (*Lewis v Ogden* (1984) 153 CLR 682, 693; [1984] HCA 28; *Zukanovic v Magistrates’ Court of Victoria at Moorabin* (2011) 32 VR 216; [2011] VSC 141). These may include cases where it is “urgent and imperative to act immediately” to preserve the integrity of “a trial in progress or about to start” (*Keeley v Brooking* (1979) 143 CLR 162, 174; *Kift v R* [1993] 1 VR 703).
35. Such a case may arise where the judge is the only witness to the alleged contempt (*Zukanovic v Magistrates’ Court of Victoria at Moorabin* (2011) 32 VR 216; [2011] VSC 141, [36]).
36. In other cases, the matter should be instituted by summons or originating motion (by a party, the Attorney-General, the DPP or at the direction of the judicial officer) and heard in the normal course of business of the court (*Kift v R* [1993] 1 VR 703).
37. It may happen that the judge plays at once the role of victim and witness, initiates proceedings against the contemnor, determines the charge, and determines whether the charge is made out beyond reasonable doubt. This multiplicity of roles imposes upon the judge a “special obligation to ensure that he has not made up his mind until everything that can reasonably be put on the scale is allowed to be put there” (*Fraser v R* [1984] 3 NSWLR 212, 225).
38. The following steps must be committed in sequence before a charge of contempt in the face of court can be determined:
 - Setting out the charge orally or in writing, so that the accused understands the charge being laid against them;
 - Affording the accused the opportunity to consider the charge, and if necessary, to seek further legal advice, an adjournment, or further particulars of the charge;
 - Giving the accused the opportunity to plead guilty or not guilty to the charge;
 - If the accused pleads not guilty, giving the accused the opportunity to present evidence and make submissions relevant to the determination of the charge;
 - Carefully considering all the evidence and deciding whether the court is satisfied beyond reasonable doubt that the accused is guilty of the charge (*Zukanovic v Magistrates’ Court of Victoria at Moorabin* (2011) 32 VR 216; [2011] VSC 141, [41]; affirmed in *Mansell v Mignacca-Randazzo* [2013] WASC 66, [106]; *Director of Public Prosecutions v Green* [2013] VSCA 78).

39. These procedures apply generally to contempt in the face of the court. In the case of contempt in the Magistrates' Court, it is immaterial whether the contempt is charged under *Magistrates Court Act 1989* s 133 or s 134 (*Director of Public Prosecutions v Green* [2013] VSCA 78).
40. Despite the language of *Magistrates' Court Act 1989* ss 133 and 134, it is not necessary for the court to direct that the accused be arrested, or to issue a warrant for the arrest of the accused, before exercising the power to commit for contempt (*Zukanovic v Magistrates' Court of Victoria at Moorabin* (2011) 32 VR 216; [2011] VSC 141; *R v Perkins* (2002) VSCA 132).
41. These steps may be as compressed or as extensive as circumstances permit, depending on the particular proceeding (*Director of Public Prosecutions v Green* (2013) VSCA 78).
42. However, warning a witness of the possibility of a finding of contempt is not sufficient to set out the charge (*Director of Public Prosecutions v Green* [2013] VSCA 78).
43. Special procedures are permitted in summary proceedings for contempt in the face of court, but they should only be used where circumstances demand their use. These procedures include:
- The receiving of hearsay evidence; and
 - A restriction on the right of the alleged contemnor to cross-examine witnesses against him or her (*R v Kift* [1993] 1 VR 703, 707).
44. There are differing views within courts on when it will be appropriate to use the summary contempt power. In *Allen v R*, Priest JA (Maxwell P and Weinberg JA concurring) held that where there is no immediate need to uphold the authority of the court, a judge "would be well advised" to use the procedures provided for in Pt 3 of Rule 75 of the *Supreme Court (General Civil Procedure) Rules 2005* or equivalent rules in other courts, rather than proceeding summarily. In contrast, the Court in *CFMEU v Grocon & Ors* (Ashley, Redlich and Weinberg JJA) noted that *Allen* "does not stand for any general proposition to the effect that the use of summary procedures should, if possible, be avoided" (*Allen v R* (2013) 36 VR 565; [2013] VSCA 44, [71]; *CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261, footnote 37).

Application of civil procedure rules

45. Contempt proceedings initiated under Order 75 of the Rules are heard in the civil jurisdiction of the court, and the civil procedure rules apply to that proceeding (*Boral Resources (Vic) v CFMEU* [2014] VSC 120; *CFMEU v Boral Resources (Vic) & Ors* [2013] VSCA 378).
46. This means that the rules of joinder of parties in Order 9 dictate when additional parties may be joined to the proceeding (*CFMEU v Boral Resources (Vic) & Ors* [2013] VSCA 378).
47. The court must, however, distinguish between the nature of the offence and the jurisdiction of the Court in which the offence is prosecuted. While contempt is a criminal offence, this does not dictate that the hearing of a contempt is a "criminal proceeding" (*Boral Resources (Vic) v CFMEU* [2014] VSC 120).
48. The character of contempt proceedings cannot be neatly described as 'civil' or 'criminal'. There are several substantive and procedural rights, including appellate rights, the need for personal service, the applicable standard of proof and the operation of the right to silence that reflect the criminal character of contempt, while other factors, such as the availability of discovery, reflect the civil character of contempt proceedings. Courts must assess this issue on a case by case basis, in light of the history of the common law on procedures applicable to contempt (*CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
49. The inferences available in civil proceedings based on the failure of a party to call a particular witness (the rule in *Jones v Dunkel*) are not available in contempt proceedings, whether characterised as civil contempt or criminal contempt (*CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261; *Jones v ACCC* (2010) 189 FCR 390; [2010] FCAFC 136; c.f. *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379, [40]–[44]).
50. Contempt proceedings follow the usual rule in civil proceedings that costs follow the event (*CFMEU v Boral Resources* [2013] VSCA 378).

51. In proceedings for contempt, the usual basis for assessing costs is the indemnity basis. This reflects the need to ensure that a litigant who needs to enforce contempt proceedings should not be out of pocket (*Deputy Commissioner of Taxation v Gashi* (No 2) [2011] VSC 448; *National Australia Bank v Juric* (No 2) [2001] VSC 398; *Grocon v Construction, Forestry, Mining and Energy Union* (No 2) [2014] VSC 134).
52. Some rules of civil procedure may, however, be dispensed with where the proceedings are for criminal contempt, in order to avoid interfering with the rights and privileges of a defendant in criminal proceedings (*Boral Resources (Vic) v CFMEU* [2014] VSC 120).
53. The same approach to costs orders does not follow on an appeal. First, in the case of appeals in relation to criminal contempt, the appeal is brought under Part 6.3 of the CPA 2009 and the Act precludes any order for costs on such appeals (CPA 2009 s 409). Second, for appeals in relation to a civil contempt, there is no basis for departing on appeal from the usual basis for assessing costs (*CFMEU v Grocon & Ors* [2014] VSCA 298).
54. In cases where the accused is a corporate party, orders for discovery can be appropriate, and so may be made if necessary in the case. This is based in part on the unavailability of the privilege against self-incrimination and so a different result is likely in the case of an individual defendant where discovery would interfere with the privilege against self-incrimination (*Boral Resources (Vic) v CFMEU* [2014] VSC 120; *CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261; *CFMEU v Boral Resources (Vic)* (2015) 256 CLR 375 at [33]).
55. In deciding whether to order discovery, the following matters may be relevant to the court's exercise of discretion:
- The importance of the evidence sought;
 - Whether the use of discovery will assist the court to uncover the true factual situation;
 - Whether there are other means of obtaining the evidence sought, or whether the material is peculiarly within the knowledge of the accused;
 - The extent to which discovery would impose an inappropriate burden on the accused, or be oppressive or disproportionate to the proceedings (*Boral Resources (Vic) v CFMEU* [2014] VSC 120).
56. Despite the fact that contempt of court is regulated by civil procedure, the availability of any appeal rights must be determined as if the accused was prosecuted in a criminal proceeding (*DPP v Garde-Wilson* (2006) 15 VR 640; [2006] VSCA 295; c.f. *Rich v Attorney-General* [1999] VSCA 14).
57. Prior to the commencement of the *Criminal Procedure Act 2009*, it was held that the Crown had no right to appeal against sentence imposed in contempt proceedings, unless the proceedings were commenced by indictment (*DPP v Garde-Wilson* (2006) 15 VR 640; [2006] VSCA 295). Given the width of *Criminal Procedure Act 2009* s 287 compared to *Crimes Act 1958* s 567A (repealed), it is unclear whether this limitation still applies.

Application of *Evidence Act 2008*

58. It is unresolved whether a proceeding for contempt is a 'criminal proceeding' for the purpose of the *Evidence Act 2008*. While contempt proceedings are heard in a court's civil jurisdiction, it is well established that proceedings must be seen as criminal in nature (*Witham v Holloway* (1995) 183 CLR 525).
59. When an issue concerning the operation of the *Evidence Act 2008* arises, it will usually be prudent to apply the provisions of the Act which regulate criminal proceedings, rather than civil proceedings (see, e.g., *Athens v Randwick City Council* (2005) 64 NSWLR 58; [2005] NSWCA 317). This is only a counsel of prudence, and there is no clear authority on which set of rules applies. Indeed, it may even be the case that contempt proceedings use a hybrid of the civil and criminal evidence rules (see *CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261, [455]–[461]; c.f. *ASIC v Sigalla* (No 4) (2011) 80 NSWLR 113; [2011] NSWSC 62).

Styling of proceedings

60. In proceedings for contempt, the judge or the Court is not a party. Where proceedings are initiated summarily by the judge, the Crown is the relevant party. Where proceedings are initiated by originating motion and the proceeding is styled as ‘The Queen v [the defendant]; on the application of [the applicant]’ (*Allen v R* (2013) 36 VR 565; [2013] VSCA 44; *Supreme Court (General Civil Procedure) Rules 2015* r75.06; *County Court Civil Procedure Rules 2008* r75.06).
61. Where the contempt is committed by a party to proceedings, the application for contempt is by summons in the proceeding, and the styling of the application will follow the styling of the underlying proceeding (see *Supreme Court (General Civil Procedure) Rules 2015* r75.06; *County Court Civil Procedure Rules 2008* r75.06).
62. Where the judge has initiated contempt proceedings summarily, an appeal against that finding must also name the Crown as the proper respondent (*Fraser v R* [1984] 3 NSWLR 212, 218–219; *Allen v R* (2013) 36 VR 565; [2013] VSCA 44).

Civil and criminal contempt

63. Traditionally, the law drew a distinction between civil and criminal contempt. However, that distinction has eroded, to the point where the classification of a contempt as civil or criminal has “almost no practical impact” (*Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572, [52]).
64. The traditional basis of the distinction was that civil contempt had a remedial function in coercing compliance with court orders. In contrast, criminal contempt had a punitive and deterrent function and was concerned with protecting the public interest in the integrity of the judicial process (*Witham v Holloway* (1995) 183 CLR 525, 532).
65. The High Court has drawn attention to the difficulties of applying this distinction in practice:
- There is no true dichotomy between proceedings in the public interest and those in the interest of the individual. All orders are made in the interests of justice and non-compliance necessarily interferes with the administration of justice, even when the position can be remedied between parties; and
 - Imprisonment and fines constitute punishment, and these remain the usual sanctions for both civil and criminal contempt: (*Witham v Holloway* (1995) 183 CLR 525, 534).
66. It is not necessary to classify contempt as civil or criminal at an early stage of proceedings. Instead, the court may hear the evidence to establish whether the contempt is proved and then, at a later hearing on penalty, determine the question of whether the contempt is civil or criminal (*CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
67. When adopting the course of determining whether the contempt is civil or criminal at the penalty stage, the court must ensure procedural fairness. This requires that the accused was put on notice, at an early stage of proceedings, of the risk of a finding of criminal contempt (*CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
68. Contempts may be classified as technical, wilful or contumacious. The difference between those three categories lies in the nature of the offender’s state of mind. While wilful conduct is intentional, contumacious conduct involves an “attitude of defiance”, or a direct intention to disobey the order (*Mosman Municipal Council v Kelly* (No 3) [2009] NSWLEC 92; *Grocon v Construction, Forestry, Mining and Energy Union* (No 2) [2014] VSC 134; *Police v Cadd* (1997) 69 SASR 150).
69. While public defiance of the order may be relevant in determining whether the contempt was contumacious, it is not a necessary requirement (*Grocon v Construction, Forestry, Mining and Energy Union* (No 2) [2014] VSC 134).

70. Where the classification of a charge of contempt is unclear, the Court may choose to characterise the charge as either civil or criminal. This turns on the distinction between the applicant seeking to ensure compliance with an order (civil), or seeking to punish for past breaches of it (criminal). In applying this distinction, the substantial character of the plaintiff's application needs to be considered, and not just formal or incidental facts (*Hearne v Street* (2008) 235 CLR 125, 133; [2008] HCA 36).
71. Because of the power of the court to determine whether a contempt is civil or criminal, it is not necessary for an applicant to plead that the contempt was contumacious before the court can characterise the contempt as criminal (*CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
72. One area in which the distinction may be relevant is in the availability and determination of sanctions. Recording a formal criminal conviction is only available if the contempt is considered to be a criminal contempt. In addition, a finding of criminal contempt is likely to lead to a more severe penalty, including imprisonment (see *CFMEU v Grocon* (2014) 47 VR 527; [2014] VSCA 261 at [173]).
73. In New South Wales, the distinction remains procedurally significant in at least one important respect – where a person is acquitted from a charge of criminal contempt in the Supreme Court, no appeal will lie to the Court of Appeal (s 101(6), *Supreme Court Rules 1970* (NSW)). For this reason, decisions from New South Wales on the distinction between civil and criminal contempt, and the consequences of that distinction, must be treated with caution in a Victorian context.

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8.3 Contempt by breach of a court order

1. A failure by a party to comply with a court order may constitute a contempt of court (*Legal Services Board v Forster* (No 2) [2012] VSC 633, [43]).
2. The plaintiff bears the burden of establishing five elements:
 - that an order was made by the Court;
 - that the terms of the order are clear, unambiguous, and capable of compliance (see below);
 - that either:
 - the order was served on the defendant; or
 - failure to serve the order was excused in the circumstances; or
 - service was dispensed with pursuant to the rules of the Court;
 - that the defendant had knowledge of the terms of the order; and
 - that the defendant breached the terms of the order (*Advan Investments v Dean Gleeson Motor Sales* [2003] VSC 201; *National Australia Bank v Juric* [2001] VSC 375; *Fortune Holding Group Pty Ltd v Zhang* (No 2) [2017] VSC 738 at [33]).
3. There are, however, a number of statutory offences for contravention of certain court orders, such as *Family Violence Protection Act 2008* s 123 (contravention of a family violence intervention order) and *Sentencing Act 1993* s 83AD (contravention of a community correction order). Where applicable, these specific offences be used in preference to general contempt powers.

Clear, unambiguous, and capable of compliance

4. In considering whether the order was expressed so that the recipient knew or should have known what was required, it may be appropriate to have regard to the circumstances in which the order was made (*Athens v Randwick City Council* (2005) 64 NSWLR 58; [2005] NSWCA 317, [36].)

5. Where orders are ambiguous, the ambiguity must be resolved firstly by reference to the originating judgment. The court may also refer to the proceedings in which the judgment was given, particularly the pleadings, which identify the relief sought. Orders may also incorporate external documents by reference, provided this does not interfere with the clarity of the order (*Athens v Randwick City Council* (2005) 64 NSWLR 58; [2005] NSWCA 317, [140]).
6. However, it should be kept in mind that where possible orders should be self-contained and self-explanatory (*Athens v Randwick City Council* (2005) 64 NSWLR 58; [2005] NSWCA 317, [137]).
7. Where the order is ambiguous on its face but only admits of two possible constructions, neither of which were complied with, this may be sufficient to establish contempt, unless the breach arose because the accused did not understand the order (*Athens v Randwick City Council* (2005) 64 NSWLR 58; [2005] NSWCA 317, [37]).

Intention and wilfulness

8. The plaintiff does not have to prove that the defendant had an intention to deliberately breach the order, unless the terms of the order require it. The deliberate commission of an act or an omission to act which is in breach of an order will be sufficient (*Advan Investments v Dean Gleeson Motor Sales* [2003] VSC 201, [51]). This requirement has also been described as a requirement that the accused was aware of the facts which made the relevant act a breach of the order (*Commissioner for Consumer Protection v Armstrong (No 4)* [2015] WASC 8).
9. However, where the breach of the order is casual, accidental or unintentional, the court may exercise a discretion to impose no penalty (*Australasian Meat Industry Employee's Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; [1986] HCA 46; *Markisic v Commonwealth of Australia* (2007) 69 NSWLR 737; [2007] NSWCA 92; *Advan Investments v Dean Gleeson Motor Sales* [2003] VSC 201).
10. Conversely, where the breach is contumacious, then the breach of the order will be treated as a criminal contempt, rather than a civil contempt (see *CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
11. A breach will be contumacious where:
 - The accused knows the act is prohibited and has no reasonable belief that it can be excused (*In the Marriage of Kitchener* (1978) 20 ALR 535)
 - The breach involves perverse obstinate resistance to authority (*Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1985) 9 FCR 194)
 - There is a direct intention to disobey the order' (*Seymour v Migration Agents Registration Authority* (2006) 215 FCR 168; [2006] FCA 965).
12. The weight of authority indicates that the plaintiff must prove beyond reasonable doubt that the breach was not casual, accidental or unintentional (*Markisic v Commonwealth of Australia* (2007) 69 NSWLR 737; [2007] NSWCA 92; *Australasian Meat Industry Employee's Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; [1986] HCA 46; *Barkley v Barkley-Brown* [2010] NSWSC 746). However, there are some cases which point the other way (*Advan Investments v Dean Gleeson Motor Sales* [2003] VSC 201 at [45]; *Anderson v Hassett* [2007] NSWSC 1310, [6]).
13. Where the person bound by an order has misconstrued its terms, this will not amount to a casual, accidental or unintentional default (*Athens v Randwick City Council* (2005) 64 NSWLR 58; [2005] NSWCA 317).

Trivial breaches

14. Contempt proceedings for breach of a court order should not be brought except in the clearest cases of breach, and where circumstances necessitate contempt proceedings to achieve obedience with the order, or the imposition of a punishment. Proceedings should not be brought for a trivial breach of an order (*Advan Investments v Dean Gleeson Motor Sales* [2003] VSC 201, [102]–[103]).

15. Where contempt proceedings are brought for trivial breaches or with ulterior motives, costs may be awarded against the plaintiff on an indemnity basis. Certain facts may lead the court to this conclusion:
- Proceedings issued without notice asking defendant for explanation;
 - Proceedings based upon tenuous evidence;
 - Many initial charges reduced to far fewer charges after proper investigation;
 - No substance in the charges;
 - Proceedings issued where the breach would be easily remedied;
 - Where the plaintiff should have realised that the breach was minor and not the stuff of a contempt charge (*Advan Investments v Dean Gleeson Motor Sales* [2003] VSC 201, [118]).

Proof of breach

16. As noted in 8.1 General contempt principles, the standard of proof that applies in contempt hearings is beyond reasonable doubt.
17. Some court orders will prohibit certain conduct unless committed in prescribed circumstances. The court will need to determine who bears the onus in relation to those matters of exception.
18. There are two approaches to this issue. In *ASIC v Sigalla (No 3)* [2010] NSWSC 1076, White J held that where an exception provides an “exculpation justification, excuse, grounds of defeasance, or exclusion which assumes the existence of the general or primary grounds from which the liability arises, but denies the liability in a particular case by reason of additional or special facts”, the defendant bears the onus in relation to that matter. This conclusion was based on the jurisprudence on provisos and exceptions from *Vines v Djordjevitch* (1955) 91 CLR 512 (*ASIC v Sigalla (No 3)* [2010] NSWSC 1076 at [46]–[47]. See also *CC Containers v Lee (No 8)* [2015] VSC 478 at [72]).
19. In contrast, in *Fortune Holding Group Pty Ltd v Zhang (No 2)* [2017] VSC 738 at [35]–[49], Zammit J disapproved of the *ASIC v Sigalla (No 3)* approach and held that as contempt proceedings are quasi-criminal, the defendant should only bear an evidentiary onus to raise an exception and that the plaintiff at all times carries the legal onus of establishing the breach, including disproof of any relevant exceptions. Her Honour noted that *Vines v Djordjevitch* concerned statutory offences, and that courts should be cautious before importing those distinctions into proceedings for contempt (*Fortune Holding Group Pty Ltd v Zhang (No 2)* [2017] VSC 738 at [35]–[49]).

Classification as civil or criminal contempt

20. A failure to comply with an injunction in a civil proceeding is usually classed as a civil contempt. However, it can be converted into a criminal contempt where the conduct breaching the court order involves deliberate defiance (*Witham v Holloway* (1995) 183 CLR 525 at 530).
21. While disobedience of a court order is generally a civil contempt, it may be a criminal contempt where:
- The contempt is contumacious; or
 - The proceedings serve a punitive purpose of punishing a past breach, rather than a remedial purpose of coercing obedience with the order (see *Mosman Municipal Council v Kelly (No 3)* [2009] NSWLEC 92; *CFMEU v Grocon & Ors* (2014) 47 VR 527; [2014] VSCA 261).
22. In practice, there may be little procedural consequence for a contempt of court being classed as civil or criminal. For further elaboration, see ‘Civil and Criminal contempt’.

Third Parties

23. Third parties may be liable for contempt of court despite not being the subject of an order. Where the subject of a court order breaches the terms of the order after receiving notice of it, a third party who knows the terms of the injunction and wilfully assisted in the breach will also be liable (*Deputy Commissioner of Taxation v Gashi & Anor (No 2)* [2011] VSC 351, [19]).
24. Where the alleged contemnor is not directly bound by an order, he or she can still be guilty of contempt of court if, with knowledge of the order, he or she does an act which frustrates the efficacy of the order (*R v Hinch* [2013] VSC 520, [55]).
25. For example, a third party who publishes the name of a person who is protected by a pseudonym order may be guilty of contempt by acting to frustrate the pseudonym order if the third party knows or is aware of the order. This form of contempt is available even though the third party is not bound by the pseudonym order, the order does not contain a non-publication component and the third party has discovered the person's identity independent of the court process (*PQR v Secretary, Department of Justice and Regulation* [2017] VSC 517 at [96]–[102]; *Hunter v Australian Football League* [2015] VSC 112, [6]; *RN v Commonwealth* (2014) 41 VR 699, [13]).
26. The third party who assisted in breaching the order will be punished for obstructing the process of the court, rather than for breaching the original order (*Sigalla v TZ Ltd* [2011] NSWCA 334, [14]).

Suppression orders

Open Courts Act 2013 (Vic)

27. The *Open Courts Act 2013* does not limit or affect any jurisdiction or power a court may have in respect of dealing with contempt of court (s 6).
28. However where the Act has expressed a clear intention to deal with certain subject matters and penalties for default, it is unlikely that the Court will decide to exercise its common law contempt jurisdiction (*R v Nationwide News Pty Ltd* (2008) 22 VR 116; [2008] VSC 526; *R v Metal Trades Employer's Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208, 241–243).
29. A breach of a proceeding suppression order (s 18) or closed court order (s 30) is an offence under the Act. Courts will therefore be unlikely to deal with such a breach as a contempt of court.
30. Information on these kinds of orders is available in the Open Courts Bench Book.
31. A breach of a broad suppression order issued by the Supreme Court in its inherent jurisdiction, or by the County Court in criminal proceedings, will still be a contempt of court. Whether these offences are dealt with as breaches of court orders, or under the principles governing sub judice contempt, will depend on whether the conduct had a tendency to interfere with the due administration of justice in cases being heard or pending trial (For further information, see 'Contempt by publication').
32. In contrast, broad suppression orders made in the Magistrates' Court will be dealt with under the statutory breach offence in section 27, rather than under common law contempt powers.

Failure to comply with subpoena

33. A person is guilty of contempt of court if they fail to comply with a subpoena, without lawful excuse (*County Court Civil Procedure Rules 2008* Rule 42.12(1), *Supreme Court (General Civil Procedure) Rules 2015* Rule 42.12(1)).
34. Mere non-production of documents that are called for by a subpoena is insufficient to establish that there has been a contempt. It must also be established that the documents required by the subpoena actually exist, and that they were in the possession of the alleged contemnor (*Markisic v Commonwealth of Australia* (2007) 69 NSWLR 737; [2007] NSWCA 92, [61]).
35. Documents are taken to be in the possession of the alleged contemnor if he or she has possession of them, or is able to obtain possession of them (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66). See exceptions below where a more appropriate party exists.

36. The question of whether a failure to comply with a subpoena should be classed as a civil or a criminal contempt was considered but not decided in *Markisic v Commonwealth of Australia* (2007) 69 NSWLR 737; [2007] NSWCA 92.

Exceptions

37. In *Barkley v Barkley-Brown* [2010] NSWSC 746, Ball J identified a number of exceptions which would not constitute contempt in the context of subpoenas:
- Wilful conduct will not amount to contempt where the conduct occurred with the **consent** of the party that issued the subpoena.
 - A party that has conducted a **reasonable search** but nonetheless failed to produce documents required by a subpoena will not be in contempt of court.
 - Where there is a **more appropriate party** to produce the documents, and that party is identified and willing to do so, the subpoenaed party shall not be in contempt of court (see also *Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66).

Breach of an undertaking

38. A contempt of court can be committed by breaching an undertaking given to the court (*Australian Consolidated Press Ltd. v Morgan* (1965) 112 CLR 483).
39. The undertaking must be given a sensible construction consistent with its actual terms, which is capable of being complied with (*Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69, [56]–[57]).
40. The undertaking must not be ambiguous, such that it cannot be said what compliance required (*Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69, [56]–[57]).
41. An undertaking is not ambiguous merely because there is more than one way to comply with the undertaking. It simply gives the person giving the undertaking a choice of how to comply (*Commonwealth Bank of Australia v Salvato (No. 4)* [2013] NSWSC 321, 136).
42. It is not necessary to establish that the contemnor was aware that his or her conduct was in breach of the undertaking (*Microsoft Corporation v Marks (No.1)* (1996) 69 FCR 117, 143).

Punishment and failure to comply with Court Rules

43. While sentencing for contempt is discussed generally in 8.7 Sentencing in contempt cases, there is one matter which is specific to court orders which must be noted here.
44. *Supreme Court (General Civil Procedure) Rules 2015* rule 66.10 states:

(1) A judgment shall not be enforced by committal or sequestration unless—

(a) a copy of the judgment is served personally on the person bound; and

(b) if the judgment requires the person bound to do an act within a fixed time, the copy of the judgment is so served a reasonable time before that time expires.

(2) Where the person bound is a corporation, the judgment shall not be enforced by committal of an officer of the corporation or by sequestration of the property of an officer of the corporation unless, in addition to service under paragraph (1) on the corporation—

(a) a copy of the judgment is served personally on the officer; and

(b) if the judgment requires the corporation to do an act within a fixed time, the copy of the judgment is so served a reasonable time before that time expires.

(3) A copy of a judgment served under this Rule shall be indorsed with a notice, naming the person served, that the person served is liable to imprisonment or to sequestration of property if—

(a) where the judgment requires the person bound to do an act within a fixed time, the person bound refuses or neglects to do the act within that time; or

(b) where the judgment requires the person bound to abstain from doing an act, the person disobeys the judgment.

(4) Where a judgment requires the person bound to do an act and an order is made under Rule 59.03 fixing a time within which the act is to be done, a copy of the judgment, indorsed as required by paragraph (3)(a), and a copy of the order shall be served on that person a reasonable time before the expiry of that time.

(5) A judgment requiring a person to do an act within a fixed time or a judgment requiring a person to abstain from doing an act may be enforced under Rule 66.05 notwithstanding that service has not been effected under this Rule if the person against whom the judgment is to be enforced has notice of the judgment—

(a) by being present when the judgment was given; or

(b) by being notified of the terms of the judgment whether by telephone, telegram or otherwise.

(6) The Court may dispense with service under this Rule.

45. Non-compliance with rule 66.10(3) is not lightly excused, as contempt proceedings are criminal in nature and require strictness in proof and procedure. A court will only dispense with the requirement of r66.10(3) if there is admissible evidence that proves beyond reasonable doubt that the defendant was well aware of his or her obligations under the order and the consequences of breaching it (*Alpass v Hession* [2017] VSC 748 at [48]).

46. If the order did not contain the endorsement required by r66.10(3), the court may only punish contempt by way of a fine and not imprisonment (*Miller v Eurovox* [2004] VSCA 211 at [38]; *Alpass v Hession* [2017] VSC 748 at [46]).

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8.4 Contempt by publication

1. There are two types of contempt which may be committed by publication:

- Publications which interfere with a proceeding (sub judice contempt); and
- Publications which interfere with justice as a continuing process (scandalising the court).

Meaning and timing of publications

2. The meaning of ‘publication’ does not appear to be restricted to any particular medium. Publication can occur in (but is not limited to) such diverse settings as:
 - a radio broadcast (*Director of Public Prosecutions v Francis (No 2)* [2006] SASC 261);
 - a speech (*Gallagher v Durack* (1983) 152 CLR 238; [1983] HCA 2);
 - published books (*Hoser v R* [2003] VSCA 194);
 - a newspaper (*Bell v Umina Beach Bowling Club Ltd (No 2)* [2003] NSWSC 846); and
 - words spoken in a courtroom but not in the hearing of the court (*Attorney-General for the State of Queensland v Colin Lovitt QC* [2003] QSC 279).
3. For the purposes of contempt offences, publication occurs when the offending material is made available. The contempt occurs when the administration of justice is exposed to risk, whether or not the risk actually materialises (*News Digital Pty Ltd v Mokbel* (2010) 30 VR 248; [2010] VSCA 51, [65]).
4. The publication of material on the internet is considered to be a continuing act so long as the contemnor leaves the material accessible on the internet (*Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125, [43]).

Publications interfering with a proceeding (sub judice)

5. A publication will be in contempt if it has a real and definite tendency in practical reality to preclude or prejudice the fair and effective administration of justice in cases currently being heard or pending trial (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15; [1987] HCA 56).
6. This test should be applied to the circumstances that existed at the time of publication (*Attorney-General (NSW) v Time Inc Magazine Co Ltd* (unrep, 15/5/94, NSWCA).

Real and definite tendency

7. When considering whether the publication had the requisite tendency, the court should have regard to the material published and the probabilities as at the date of publication (*Attorney-General for New South Wales v John Fairfax and Sons* (1985) 6 NSWLR 695, 711).
8. A reasonable doubt about a publication’s tendency to interfere with the course of justice may arise where other publications have disclosed the same or similar material. Whether contempt can be proved in relation to such a publication may depend on:
 - Whether the prejudicial material contained in the publication was new material or historical;
 - Whether the material was “conversational”, in the sense that it was constituted of contributions from various members of the public (e.g. social media publications), as opposed to an “editorial” publication by a professional media organisation;
 - Whether the publication aggregated the disparate material contained in other publications;
 - Whether the publication aggravated the antecedent prejudice caused by the other publications by reinforcing or reviving it (*R v Hinch* [2013] VSC 520, [105]–[113]).
9. Other factors that may be relevant include:
 - The probable delay between publication and trial. In *Attorney-General for New South Wales v John Fairfax and Sons* (1985) 6 NSWLR 695 a delay that was likely to be no less than six months was a significant factor in finding that a publication lacked the tendency to interfere with an upcoming trial;

- Where the publication in question might interfere with a jury, whether that jury has been sequestered or will be released every day of the trial (*Attorney-General for the State of New South Wales v Radio 2UE Sydney Pty Ltd* [1997] NSWCA 30);
- Where the publication is a broadcast, the location of the broadcast, the influence of the publisher and the size of the audience (*Attorney-General for the State of New South Wales v Radio 2UE Sydney Pty Ltd* [1997] NSWCA 30).

Pending trial

10. Sub judice contempt is limited to cases pending trial. Cases are pending trial where legal proceedings have been issued but have not yet concluded (*James v Robinson* (1963) 109 CLR 593, 615).
11. In criminal proceedings, a case is 'pending trial' when the accused is arrested or a warrant is issued for the accused's arrest. Mere police activity is insufficient (*James v Robinson* (1963) 109 CLR 593).
12. A criminal proceeding is considered complete when:
 - Charges are withdrawn or the accused is acquitted or sentenced; and
 - The time for lodging an appeal has passed, or all possible appeals have been heard (*New South Wales Law Reform Commission, Contempt by Publication, Report 100* (2003), [7.46]–[7.71]).
13. In civil proceedings, a case is considered pending after a statement of claim or originating motion has been filed. The case remains pending while pre-trial procedures take place (D Butler and S Rodrick, *Australian Media Law*, 3rd edition, Sydney, 2007, p 235).
14. There is some uncertainty as to when the sub judice period in civil proceedings is complete. It may be that a case loses its sub judice status as soon as judgment is entered, but that status revives should there be notice of an appeal, or an order of a retrial (D Butler and S Rodrick, *Australian Media Law*, 3rd edition, Sydney, 2007, p 236–237).

Intention

15. Proof of an actual intention to interfere with the administration of justice is unnecessary (*John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371). It is sufficient that the defendant had the intention to publish material which objectively had that tendency (*Attorney-General for New South Wales v Dean* (1990) 20 NSWLR 650, 656).

Audience

16. The test for determining the meaning of words alleged to constitute a contempt is the effect on an ordinary reasonable member of the community (*Attorney-General for New South Wales v John Fairfax and Sons* (1985) 6 NSWLR 695, 702).

Judicial officers

17. Judicial officers are trained to put aside prejudicial material, and as such are seen as being unlikely to be influenced by a publication (*Attorney-General for New South Wales v John Fairfax and Sons* (1985) 6 NSWLR 695, 709; *State of Victoria v Australian Building Construction Employees and Builders Laborers' Foundation* (1982) 152 CLR 25; [1982] HCA 31).

Jurors

18. In determining whether the risk of prejudice to a jury is significant enough to exercise contempt jurisdiction, the court must have regard to the assumption that jurors will comply with their obligations under the *Juries Act 2000* as well as with judicial directions given during the trial (*News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 266; [2010] VSCA 51).
19. It should not be assumed that jurors do not have or will not exercise a critical judgment of what they hear and see in the media (*Duff v R* (1979) 39 FLR 315, 333).
20. In *Attorney-General v MGN Ltd* [1997] 1 All ER 456 (applied in *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 66), Schiemann LJ listed a number of principles relevant to the assessment of whether a publication creates a serious risk of prejudice:

- The likelihood of a publication coming to the attention of a juror, including:
- Whether the publication circulates in the area from which the jurors are drawn, and
- The extent of the circulation.
- The likely impact of the publication on an ordinary reader, including:
- The prominence of the article in the publication, and
- The novelty of the content of the article in the context of likely readers of that publication.
- The residual impact of the publication on a notional juror at the time of trial, including:
- The length of time between publication and trial;
- The “focusing effect” of exposure to evidence over a prolonged trial; and
- The likely effect of a judge’s directions to a jury (see also *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125).

Editors of publications

21. Where a contempt of court is committed by the publication of a newspaper article, the editor of the newspaper can be held liable regardless of whether he or she had knowledge of the article (*John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 370, 372).

Reporting on court proceedings

22. Where an account of court proceedings is fair, accurate and published in good faith, it cannot be a contempt of court notwithstanding that it may prejudice a party in litigation (*Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255).
23. Other conditions apply for a report to fall under the “fair and accurate exoneration” (*New South Wales Law Reform Commission, Contempt by Publication, Report No 100* (2003) 212):
 - The report must be of proceedings that are held in open court (*Scott v Scott* [1913] AC 417, 452);
 - The report must not be subject to a suppression order or some other kind of prohibition (see below);
 - The report must not disclose information that was said in the absence of the jury, for example during a voir dire (*R v Day & Thompson* [1985] VR 261), until such time as the jury comes to a verdict (*Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 19);
 - The report must not contain any information that the trial judge has prohibited from being put before the jury (*Ruse v Sullivan* [1969] WAR 142);
 - The report must be fair and accurate, in the sense that a person of ordinary intelligence using reasonable care might regard it as a fair summary of proceedings (*Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 259); and
 - The report must be made in good faith, in that it must not be published solely for publicity and without regard to the consequences on the trial (*R v Scott* [1972] VR 663, 675).

Photographs and identity of the accused

24. Where the identity of an accused is a live issue, the publication of a photograph of the accused is likely to constitute contempt (*Attorney-General (NSW) v Time Inc Magazine Co Ltd* (unrep, 15/5/94, NSWCA)).
25. In *Attorney-General (NSW) v Time Inc Magazine Co Ltd* (unrep, 15/5/94, NSWCA) Gleeson CJ identified the risks involved in identification evidence:

- The ‘displacement effect’ – in identifying an accused, a witness may mistakenly recognise the person that they had seen in the photograph, and not the person they had witnessed on the occasion in question.
 - Suggestibility – people can honestly believe they recognise somebody because of ideas that have been suggested to them. Distinguishing between the various sources from which beliefs have formed can prove to be impossible.
26. These risks contribute to a “real and definite possibility” that the evidence of potential witnesses might be contaminated by their having seen the photograph of an accused before performing an act of identification (*Attorney-General (NSW) v Time Inc Magazine Co Ltd* (unrep, 15/5/94, NSWCA)).

Defences

Public interest

27. The law recognises a defence to sub judice contempt where the publication is of public importance (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15; [1987] HCA 56; *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242).
28. In such cases, the court must balance the public interest in the freedom of discussion of the matter against the public interest in the administration of justice (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15; [1987] HCA 56; *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242).
29. The balancing process involves applying the following principles:
- The particular public interests to be balanced must first be identified and attributed a certain weight;
 - The court should balance competing interests by evaluating matters of fact through the application of judicial principles, not through the exercise of discretionary judgment;
 - The court does not start with the scales evenly balanced, as the public interest in the administration of justice is so significant as to curb freedom of speech. But it will only do so to the extent necessary to prevent ‘a real and substantial prejudice’ (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 41; [1987] HCA 56).
30. As the criminal onus of proof applies in all contempt cases, if a reasonable doubt persists as to the final state of the balance, the prosecution will fail (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 44; [1987] HCA 56).
31. This defence applies to publications prejudicial to criminal proceedings as well as civil proceedings (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15; [1987] HCA 56).
32. Where the publication lacks the requisite tendency to prejudice the administration of justice, it is unnecessary to weigh up the respective public interests (*Attorney-General for New South Wales v John Fairfax and Sons* (1985) 6 NSWLR 695, 715).

Public interest considerations specific to criminal proceedings

33. Different considerations apply when the defence is raised in a criminal trial as opposed to a civil trial. Moffit P said in *Attorney-General (NSW) v Willesee* [1980] 2 NSWLR 143 at [18]: The right to a fair trial upon a criminal charge is so fundamental to our system of law that in any priorities it must be regarded as entitled to a primary place.
34. However the public interest in free speech may outweigh the public interest in a criminal trial entirely free of prejudice under certain conditions, such as where:
- the publication is only incidentally related to a criminal trial (in the sense that it does not refer to the alleged crime, the charge nor the trial);
 - the publication is for the purposes of ventilating a question of public concern; or
 - the effect that the publication has upon the trial is inadvertent (*Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650).

35. The public interest in free discussion of criminal cases does not require disclosure of prior convictions and the prejudice that disclosure is likely to cause to a fair trial (*Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 27; [1987] HCA 56).

Publications interfering with justice as a continuing process (scandalising the court)

Elements

36. The Court has jurisdiction to punish for contempt of court where a publication aims at lowering the authority of the Court or its officers, by casting doubts upon the integrity, propriety and impartiality of the judicial office (*R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 442–443). This species of contempt is traditionally referred to as ‘scandalising the court’.

Tendency

37. The publication must have a tendency to undermine public confidence in the administration of justice. Words that are gratuitous and offensive may fall short of being in contempt of court (*Saltalamacchia v Parsons* [2000] VSCA 83, [9]).
38. Where the publication reaches only a small audience, it may lack such a tendency notwithstanding that the allegations within are scandalous and untrue. This is particularly so where the remarks are made to a person or body responsible for dealing with complaints against the court. In *McGuirk v University of New South Wales* [2009] NSWSC 1058 James J said at [342]: In my opinion, the court should be slow to find that a complaint that a judge has been corrupt sent to either the Independent Commission against Corruption or the Ombudsman is a contempt of court, however groundless the complaint is.
39. However, the small size of an audience is likely to be irrelevant where the audience is composed of persons likely to give the publication wider exposure, such as journalists (*Attorney-General for the State of Queensland v Colin Lovitt QC* [2003] QSC 279).

Necessity

40. The Court should only exercise its jurisdiction where “the Court is satisfied that it is necessary in the interests of justice” (*R v Fletcher; Ex Parte Kitsch* (1935) 52 CLR 248, 257; [1935] HCA 1).
41. In many cases the “good sense of the community” will be a sufficient safeguard against the scandalising of the court (*Gallagher v Durack* (1983) 152 CLR 238, 243; [1983] HCA 2).

Contextual factors

42. In determining whether the publication had a tendency to undermine confidence in the administration of justice, and whether the exercise of the Court’s contempt jurisdiction is necessary in the interests of justice, the context in which the publication was made may be relevant.
43. The following cases provide examples of the considerations which led to a finding of contempt, or of no contempt:
- In *Gallagher v Durack* (1983) 152 CLR 238; [1983] HCA 2 a contemnor had remarked to the media that a Court had bowed to union pressure in coming to a decision. As a high ranking official in a large national trade union, his statement though warrantless was more likely to be believed by the public. The High Court considered this in finding him in contempt of court.
 - While being served with a court order, a solicitor made vulgar comments about the judge who had issued the order. The Court of Appeal found the following contextual factors to be relevant in finding no contempt of court:
 - The audience was small, and the words were not spoken to attract further publication;
 - The words were an emotional, unpremeditated response to the court order;
 - There were no elements of intimidation or defiance in the words (*Saltalamacchia v Parsons* [2000] VSCA 83, [10]).

- A barrister commented to journalists in a courtroom that the presiding magistrate was a “cretin”. In finding the barrister in contempt, the Court considered that he had many years experience and was appointed to a position of leading counsel. The journalists were likely to make public the insult, and the public were likely to expect the barrister’s criticism to be considered and knowledgeable (*Attorney-General for the State of Queensland v Colin Lovitt QC* [2003] QSC 279, [66]).
- In a statement to media, a defendant referred to a jury as “sheep” shortly after they returned a guilty verdict against him. In finding the defendant in contempt, the Court considered that the statement was intended to reach as large an audience as possible; had a tendency to undermine public confidence in the administration of justice by suggesting that the jury had not discharged their function properly; and deterred potential jurors by depicting the process as a thankless task likely to result in abuse and public humiliation (*Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389).

Tension with freedom of speech

44. The purpose of this species of contempt is to maintain public confidence in the administration of justice. In doing so, this must be reconciled with the principle that “speech should be free, so that everyone has the right to comment on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed” (*Gallagher v Durack* (1983) 152 CLR 238, 257; [1983] HCA 2).
45. The jurisdiction is not exercisable “for the purpose of restricting honest criticism based on rational grounds” (*R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 442–443). It is exercisable only where the attacks are “unwarrantable” (*R v Fletcher; Ex Parte Kitsch* (1935) 52 CLR 248, 257; [1935] HCA 1).

Scurrilous abuse

46. Most cases of contempt by scandalising the court involve casting doubts on the integrity, propriety and impartiality of the court. However a publication may be in contempt of court by being scurrilously abusive of a judge or a court (Ian Cram (ed), *Butterworths Common Law Series The Law of Contempt* (Reed Elsevier, 4th ed, 2010, 415).
47. Where abuse of a judge casts doubt on the judge’s capacity to perform judicial functions, this may amount to contempt. In *Attorney-General for the State of Queensland v Colin Lovitt QC* [2003] QSC 279, counsel was found to be in contempt of court after remarking to journalists in the gallery that the magistrate was a “cretin”. Chesterman J said at [61]:

The authorities speak of attacks upon the integrity, propriety and impartiality of the court but I have no doubt that a scurrilous attack upon a judicial officer’s mental capacity or intellect amounts to contempt.

Last updated: 20 June 2014

8.5 Contempt in the face of court (in facie curiae)

1. All courts of record, including the Supreme, County and Magistrates’ Courts, have inherent jurisdiction to punish summarily for contempt in the face of court (*R v Metal Trades Employer’s Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208, 241–243).
2. Contempt in the face of court may be generally described as the unlawful disruption or obstruction of court proceedings (Ian Cram (ed), Borrie and Lowe: *The Law of Contempt* (LexisNexis Butterworths, 4th ed, 2010) 456).

Meaning of “in the face of court”

3. The geographical limits of what constitutes a contempt in the face of court, as opposed to other species of contempt, appear to be unsettled. The broader view is that contempt in the face of court extends to proximate areas outside of the courtroom, such as:

- Distributing pamphlets to jurors outside the entrance of court buildings (*Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682);
 - An abusive tirade directed at opposing counsel in the elevator of the court building (*Re Goldman and Rule Nisi for Contempt of Court* [1968] 3 NSWLR 325).
4. The narrower view is that contempt in the face of court can occur only in respect of what the judge saw or heard, or could have seen or heard (*Fraser v R* [1984] 3 NSWLR 212). In *European Bank A-G v Wentworth* (1986) 5 NSWLR 445, Kirby P held that a party who struck a potential witness in the courtroom but after the judge had left could not be guilty of contempt in the face of court. Priestley JA said at 463:
- Until the question is settled I find it difficult to see that any judge confronted with the question at first instance could be criticised for adopting either view.
5. Contempt in the face of the court can take a variety of forms, including:
- Assaulting or threatening persons in court;
 - Disrupting the course of proceedings;
 - Disrespectful or other misbehaviour.

Assaulting or threatening persons in court

6. Assaulting or threatening any person in the court room during proceedings is a grave threat to the administration of justice, and will be punished as a very serious contempt (Ian Cram (ed), Borrie and Lowe: *The Law of Contempt*, LexisNexis Butterworths, 4th ed, 2010), 460).
7. Examples of contempt by assaulting or threatening persons in the face of court include offences against:
- Judicial officers (*Prothonotary v Wilson* [1999] NSWSC 1148, [26]);
 - Jurors (*DPP v Johnson* [2002] VSC 583);
 - Witnesses (*European Bank A-G v Wentworth* (1986) 5 NSWLR 445); and
 - Advocates (*Brown v Putnam* (1975) 6 ALR 307).

Disrespectful or other misbehaviour

8. Interference with the course of justice is not confined to physical disturbance. A calculated gesture of defiance (e.g. a raised fist) may be contempt where such a gesture, if permitted and repeated, might have a tendency to lower the authority of the courts and to weaken the spirit of obedience to the law (*Ex Parte Tuckerman*; *Re Nash* [1970] 3 NSWLR 23).

Insulting the court

Judges

9. A person who wilfully insults a judge in the course of proceedings in court does something which necessarily interferes, or tends to interfere, with the course of justice (*Lewis v Ogden* (1984) 153 CLR 682, 689; [1984] HCA 28).
10. The power to punish for contempt of court exists to vindicate the authority of the court, and not to vindicate the personal dignity of the judge. It should be used ‘sparingly and only in serious cases’ (*Lewis v Ogden* (1984) 153 CLR 682, 693; [1984] HCA 28).
11. A contempt against the judge must be a “wilful insult”. Conduct that is “discourteous, perhaps offensive and deserving of rebuke” may still fall short of this standard (*Lewis v Ogden* (1984) 153 CLR 682, 693; [1984] HCA 28).

Disrupting court proceedings generally

12. The following conduct may constitute a contempt of court by disrupting court proceedings:
- Attempting to disrobe, loud screaming, physically resisting correctional officers (*R v Ogawa* [2011] 2 Qd R 350; [2009] QCA 307);
 - The accused yelling at a witness, making imputations on the witness' character (*DPP v Johnson* [2002] VSC 583).
 - Protests or demonstrations in court (*Morris v Crown Office* [1970] 2 QB 114);
 - A disruptive prank (*Balogh v St Albans Crown Court* [1975] QB 73);
 - Repeated interruptions, disobeying directions to sit down and be silent, protracted outbursts of anger and abuse (*R v Slaveski* [2011] VSC 643; *DPP v Johnson* [2002] VSC 583).

Contempt committed by particular persons

13. Where contempt in the face of court is committed by particular classes of persons, additional principles may apply. These classes include:
- Witnesses;
 - Advocates;
 - Jurors;
 - Parties.

Witnesses

14. A witness is guilty of contempt if they:
- refuse to be sworn or answer any lawful question;
 - refuse or neglect (without sufficient cause) to attend; or
 - refuse to produce any documents or things that they are required to produce.
15. These forms of contempt are recognised at common law, as well as regulated by *Magistrates' Court Act* 1989 s 134 (See *R v Garde-Wilson* [2005] VSC 452).
16. A statutory offence of contempt of the Chief Examiner also exists in relation to witnesses examined under the *Major Crime (Investigative Powers) Act* 2004.

Refusing to be sworn or to answer questions

17. A person summoned as a witness will be guilty of contempt if they refuse to be sworn or answer any lawful question.
18. Where a witness does not answer a question, in deciding whether to punish for contempt a judge should consider the credibility of the witness, the relevance of the question, and the reason for declining to answer (*Hancock v Lynch* [1988] VR 173, 178).
19. The fact that a witness fears reprisals for giving evidence will rarely provide a defence in relation to contempt. The witness must establish that the defence of duress arises as a result of the threat (*Z v New South Wales Crime Commission* [No 2] [2005] NSWSC 1388, [74]).
20. It is the practice of courts in Victoria and other states for a judge to warn a witness that a failure to answer a lawful question may amount to a contempt of court. However, there is no requirement in statute or at common law to do so (*Hancock v Lynch* [1988] VR 173, 177).
21. Where a witness may be unwilling to answer a question for reasons which are not justifiable in law, such as where answering might incriminate another or lead to personal embarrassment, it is a matter of judgment whether the witness should be pressed by the Court to answer the question (*Hancock v Lynch* [1988] VR 173, 178).

Prevarication

22. A witness who deliberately evades questions by falsely swearing that he cannot recall will also be guilty of contempt (*Keeley v Brooking* (1979) 143 CLR 162).
23. The difference between contempt by false swearing and “mere perjury” is that it will be a contempt of court when it can be concluded beyond reasonable doubt that the false swearing was done with the actual or inevitable intent or consequence of frustrating or obstructing the proceedings (*Keeley v Brooking* (1979) 143 CLR 162, 169).

Refusing to attend a court hearing or produce documents

24. A person summoned as a witness will be guilty of contempt if they refuse or neglect (without sufficient cause) to attend, or to produce any documents or things required by the summons.
25. In the Magistrates’ Court this is dealt with under the *Magistrates’ Court Act 1989* s 134(1)(a).
26. Historically, a failure by a witness to attend a court hearing has been classified as a contempt in the face of court (Ian Cram (ed), Borrie and Lowe: *The Law of Contempt* (LexisNexis Butterworths, 4th ed, 2010) 498).
27. However where the witness has been subpoenaed to appear a failure to attend is more likely to be punished as a contempt by breach of a court order (*Registrar of the Court of Appeal v Maniam [No 1]* (1991) 25 NSWLR 459, 462–3). See 8.3 Contempt by breach of a court order for more information.

Contempt of the Chief Examiner

28. A person commits a contempt of the Chief Examiner when he or she attends before the Chief Examiner in response to a witness summons and: (a) fails without reasonable excuse to produce any document or other thing the person is required by the witness summons to produce; or (b) being called or examined as a witness at an examination, refuses to be sworn or to make an affirmation or, without reasonable excuse, refuses or fails to answer any question relevant to the subject-matter of the examination; or (c) engages in any other conduct that would, if the Chief Examiner were the Supreme Court, constitute a contempt of that Court (*Major Crime (Investigative Powers) Act 2004* s 49).
29. The offence in section 49 applies to both witnesses who appear on a witness summons and witnesses required to attend under a custody order issued under section 18 requiring the delivery of a person held in a prison or a police gaol (*Major Crime (Investigative Powers) Act 2004* ss 18(8), 49).
30. As with contempt of court, the penalty for contempt of the Chief Examiner is at large, though the maximum penalty of 5 years’ imprisonment for an offence under section 36 of the Act is considered a useful comparator (*R v QF* [2014] VSC 81).
31. There is also a separate statutory offence which applies where a person appears as a witness at an examination before the Chief Examiner and fails to take an oath or make an affirmation without reasonable excuse (*Major Crime (Investigative Powers) Act 2004* s 36). This offence is capable of applying to witnesses brought to court on a custody order under s 18 of the Act (*DPP v Debono* [2013] VSC 408).
32. In relation to the section 36 offence, a witness will have a reasonable excuse for refusing to take an oath or make an affirmation on the basis of a fear of reprisal only if:
 - There is an objective basis for the fear of physical harm;
 - The objective basis for the fear is reasonable in the circumstances; and
 - The fear exists at the time of the refusal and is relevant to that failure or refusal to take an oath or make an affirmation (*DPP v Debono* [2013] VSC 408).

Advocates

33. In considering whether counsel has committed contempt it is essential to bear in mind that proceedings for contempt are designed to protect the integrity of the court, not to assuage the feelings of the judge. There is a clear distinction between discourtesy and contempt of court and due weight must be given to the obligations of counsel (*Lewis v Ogden* (1984) 153 CLR 682; [1984] HCA 28).

34. Despite the latitude given to counsel in the conduct of their cases, some behaviour by counsel may constitute contempt, for instance:
- defiantly attempting to circumvent or go behind, or make further submissions concerning, or dispute, a judge's ruling (*Ex parte Bellanto; Re Prior; Stuart v Brown* (1996) 17 WAR 525);
 - defiantly renewing an application which has been refused (*Mollison; Ex parte Faussett* (1872) 3 VR (L) 3);
 - repeatedly defying a judge's requests and directions to be seated (*Re Perkins; Mesto v Galpin* [1998] 4 VR 505).
 - threatening or attempting violence on an opponent, or using language "so outrageous and provocative as to be likely to lead to a brawl" (*Parashuram Deteram Shamdasani v King-Emperor* [1945] AC 264);
 - deceiving the court by positive conduct. For instance, by being a party to the reading to the court of a false affidavit, or by fictitiously endorsing a writ of summons in order to disguise the true nature of the cause of action (*Ditfort v Brown* (1990) 19 NSWLR 49; *Linwood v Andrews* (1888) 58 LT 612; *Weisz; Ex parte Hector MacDonald Ltd* [1951] 2 KB 611);
 - insulting a juror, such as by imputing bias (*Ex parte Pater* (1864) 122 ER 842);
 - writing an insulting and offensive letter to the court concerning something allegedly done to the writer in his private capacity as a suitor (*Re Wallace* (1866) LR 1 PC 283; *IV Moore* NS 140; 16 ER 269).
35. Deliberate misconduct by counsel aimed at obtaining another trial is a most serious contempt which a court should unhesitatingly punish (*Magistrates' Court v Murphy* [1997] 2 VR 186).
36. It would be "rare indeed" for words used in the course of an argument, however irrelevant, to amount to contempt where they relate to an opponent, whether counsel or litigant (*Parashuram Deteram Shamdasani v King-Emperor* [1945] AC 264).
37. The fact that counsel is warned and then charged with contempt does not mean, and does not necessarily mean, that a fair-minded observer would entertain a reasonable apprehension that the judicial officer might not bring an impartial mind to the issues (*Parkin v Crisp* 27/10/1995 Sup Ct Vic).
38. A submission that a judge should disqualify him or herself, if properly and courteously made, and even if misguided, cannot constitute contempt. However a submission made in an insulting and disrespectful a manner can constitute a contempt. It may also be a contempt where the submission is made not for any genuine concern of bias but to prevent the case being dealt with by a particular judge, or to gain an adjournment, or to gain some other procedural advantage (*Magistrates' Court v Murphy* [1997] 2 VR 186).
39. A judge has the power to control the proceedings in his or her court, including the conduct of those participating (see *Magistrates' Court v Murphy*). That power extends to excluding counsel from the court for good cause (*Ex parte Cory* (1864) 3 NSW SCR 304).
40. Whether non-attendance by counsel constitutes contempt depends upon the circumstances (see *Izuora; Weston v Central Criminal Courts Administrator* [1977] QB 32).
41. An unqualified person appearing before a court purporting to be a barrister will be guilty of contempt (*In the Marriage of Slender* (1977) 29 FLR 267).

Jurors

42. The *Juries Act 2000* (Vic) prescribes a range of offences relating to jurors under Part 10, such as supplying false or misleading information (s 70); failing to attend (s 71); refusing to be sworn (s 73); impersonating a juror (s 74) and accepting extra remuneration for jury service (s 75).
43. While these offences do not affect a court's ability to deal summarily with a contempt of court (s 84), it will often be more appropriate to use these statutory offences than contempt proceedings.

44. The following behaviours by jurors may constitute a contempt of court:
- Attending for jury service under the influence of liquor such that the juror is incapable of undertaking jury service (*Tomlinson* 16/1/1996 Sup Ct Vic).
 - Reaching a verdict capriciously (*Langdell v Sutton* (1737) Barnes 32; 94 ER 791).
45. However, it is not a contempt to return a perverse verdict - even one that is against the direction of the judge (*R v Schot* [1997] 2 Cr App R 383; *Bushell's Case* (1670) Vaugh 135).

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8.6 Acts interfering with the course of justice

1. The category “acts interfering with the course of justice” encompasses any conduct which interferes with specific court proceedings, but does not occur in the face of the court, or take the form of a publication (*Australian Law Reform Commission, Contempt, Report No 97* (1987), 86).
2. The offence does not require an alleged contemnor to have successfully interfered with the course of justice (*Harkianakis v Skalkos* (1997) 42 NSWLR 22, 29).
3. Recent cases have decided that general contempt principles apply with respect to intention – that it is sufficient that the alleged contemnor intended to perform an act which objectively had the requisite tendency to interfere (*R v Vasiliou* [2012] VSC 216, [19]; *R v Slaveski* [2011] VSC 643; *Legal Services Board v Forster (No 2)* [2012] VSC 633. [80]). However there remains some uncertainty in the case of interfering with witnesses, and acts constituting an abuse of process (see below).
4. The major types of acts which interfere with the course of justice are:
 - Interference with persons having duties to discharge in a court of justice;
 - Interference with parties to an action;
 - Abuse of the court’s process;
 - Reprisals.
5. Many examples of this conduct can also be prosecuted as a charge of attempting to pervert the course of justice, which may be more appropriate than relying on the court’s contempt powers.

Interference with persons having duties to discharge in a court of justice

Interference with witnesses

6. It is a contempt of court to intimidate witnesses in a manner likely to deter them from giving evidence or to influence them in their giving of evidence (*Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1322, [25]).
7. It need not be established that the witness was actually deterred or influenced (*Re B(JA) (an infant)* [1965] 2 All ER 168).
8. Interfering with witnesses is a criminal contempt. The Court will not allow witnesses to be intimidated in any way, either before the trial, pending trial or after trial (*Moore v Clerk of Assize, Bristol* [1971] 1 WLR 1669; *Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1322, [14]).
9. It is also a contempt to punish a witness for having testified notwithstanding that the trial has concluded (*Attorney-General v Butterworth; In the matter of Goldman* [1968] 3 NSW 325).
10. For the conduct to constitute contempt, it must be established that the alleged contemnor had some appreciation that the person to whom the conduct in question is directed was a witness or potential witness (*Gregory v Philip Morris Ltd* (1987) 74 ALR 300).
11. The following conduct may constitute contempt by interfering with a witness:

- to assault, threaten or abuse a witness or potential witness (*European Asian Bank AG v Wentworth* [1986] 5 NSWLR 445);
- to prevent a witness from receiving a subpoena (*Lane v Registrar of Supreme Court of New South Wales* (1981) 148 CLR 245; [1981] HCA 35);
- to attempt to induce a witness to confess that she had committed perjury at a trial while an appeal is pending (*Jones v Jones* (1898) 19 LR (NSW) 43);
- to threaten a witness with a perjury charge if the witness gives evidence as intended (*R v McLachlan* [1998] 2 VR 55);
- to seek to influence a witness against a party by disparagement of that party, or to otherwise prejudice the case (*Welby v Still* (1892) 8 TLR 202);
- to arrest a witness on the way to or while attending the court to give evidence, or otherwise prevent a witness duly summoned from attending court (*Hall* (1776) 96 ER 655);
- to bribe or attempt to bribe a witness (*Lewis v James* (1887) 3 TLR 527);
- to remove a person from office because of evidence given (*Attorney-General v Butterworth* [1963] 1 QB 696); and
- for a landlord to give a tenant notice to quit because the tenant had given evidence against him or her (*Chapman v Honig* [1963] 2 QB 502).

Intention

12. There are two views as to what constitutes the requisite intent for interfering with a witness (*Attorney-General v Butterworth* [1963] 1 QB 696):
13. The first view is that the alleged contemnor must have intended to deter a witness from giving evidence, or have intended to influence a witness to give evidence in a manner that they would not otherwise have given.
14. In *R v Taylor* [1989] 3 VR 657, Gobbo J held that he was not satisfied that the alleged contemnor had “the necessary intention to interfere with the course of justice ([40]). His Honour considered but did not decide whether a more lenient standard of being reckless as to the likely consequences of one’s actions would suffice.
15. The second view is that the alleged contemnor need not have had an intention to interfere with the course of justice, so long as their conduct was inherently likely to interfere.
16. Recent cases in Victoria (*R v McLachlan* [1998] 2 VR 55) and New South Wales (*Farahbakht v Midas Pty Ltd* [2006] NSWSC 1322, [38]) have adopted this second view.

Interference with jurors

17. An attempt to interfere with a juror is a serious contempt (*In re Dunn* [1906] VLR 493; *R v Owen* [1976] 3 All ER 239; *R v Goult* (1982) 76 Cr App R 140; *R v Giscombe* (1983) 79 Cr App R 79).
18. The *Juries Act 2000* (Vic) s 89 also preserves the crime of embracery.
19. Interference with a juror may occur while a juror is discharging his or her duty, whilst he or she is travelling to and from the court, and even after the case has been completed and the juror has returned home (*Ex parte Pater* (1864) 122 ER 842; *In re Johnson* (1887) 20 QBD 68; *Martin* (1848) 5 Cox CC 356; *Lovelady* [1982] WAR 65).
20. The following are examples of where an interference with jurors has been found to be a contempt of court:
 - The distribution of pamphlets outside the court to jurors or potential jurors seeking to influence their opinion on matters arising in the case before them (*Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682; *Fraser v R* [1984] 3 NSWLR 212; *Prothonotary v Collins* [1985] 2 NSWLR 549).

- An employer dismissing or threatening to dismiss an employee because he or she has received or responds to a jury summons, or to instruct him or her not to respond to a jury summons: *Lovelady; Drinkwater* 4/6/1991 Sup Ct Vic; *R v Rogerson* (1992) 174 CLR 268; [1992] HCA 25.
- Writing a letter (the contents of which were untrue) seeking to have an employee excused from jury duty (In the matter of *Newton* 24/7/1989 Sup Ct Vic).

Interference with judges

21. Where a person's conduct has the tendency to intimidate or improperly influence the decision of a judge, that person will be in contempt of court (*R v Vasiliou* [2012] VSC 216, [36]–[37]).
22. For this purpose, the prosecution must prove that the accused intended to direct his or her threats or remarks to a judge in his or her official capacity (*R v Slaveski (Appln to set aside contempt orders)* [2017] VSC 526 at [108]).

Interference with parties to an action

Civil proceedings

23. It is a contempt of court to engage in conduct which has a tendency to improperly pressure a litigant who would seek curial vindication of his or her rights (*Harkianakis v Skalkos* (1997) 42 NSWLR 22, 28).
24. Delay between the conduct and the anticipated trial date is irrelevant, because improper pressure on litigants may divert them at any stage of the proceedings (*Harkianakis v Skalkos* (1997) 42 NSWLR 22, 29).
25. Improper pressure may be a contempt of court even when it is shown to have no impact on the litigant concerned. As with sub judice contempt, the essence of the offence is engaging in conduct which has a tendency to interfere (*Harkianakis v Skalkos* (1997) 42 NSWLR 22, 29).
26. A distinction must be drawn between proper and improper pressure (*Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41):
 - A litigant does not have absolute freedom to conduct litigation free of pressure – for example, a judicial officer fixing an early hearing date may pressure a litigant, but cannot be said to be improper (*Harkianakis v Skalkos* (1997) 42 NSWLR 22, 30).
 - Lawful pressure is not necessarily saved from being improper – a threat to prosecute, or a threat to report a legal practitioner to a disciplinary body, may still constitute contempt (*Harkianakis v Skalkos* (1997) 42 NSWLR 22, 30).

Criminal proceedings

27. Any conduct aimed at intimidating an accused to plead a certain way is a perversion of justice, regardless of whether the alleged contemnor honestly believes the accused is guilty, or not guilty. The essence of the offence is conduct which has a tendency to cause an accused to plead otherwise than in the exercise of a free choice (*Meissner v The Queen* (1995) 184 CLR 132; [1995] HCA 41).

Abuse of the court's process

28. A definite attempt to deceive the court in a pending proceeding will be a contempt of court (*Maslen v The Official Receiver* (1947) 74 CLR 602).
29. There must be a deliberate intention to deceive the court, or knowledge of the falsity of information being presented before the court. It is insufficient for the information simply to be false, without accompanying knowledge (*Ditfort v Katz* [1991] NSWCA 80).

Reprisals

30. It is a contempt of court to threaten or take reprisals against judges, witnesses, jurors, legal practitioners and persons involved in the judicial process (*Re: Johnson* (1887) 20 QBD 68; approved in *Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389, [25]).
31. Actions taken in reprisal may constitute a contempt even if proceedings have concluded, as they may interfere with the administration of justice by deterring or influencing persons involved in the judicial process from further participating, or by deterring persons generally from participating (*Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389, [33]).

Last updated: 26 February 2018

8.7 Sentencing in contempt cases

1. The purpose of punishing for contempt is to uphold and preserve the orderly administration of justice. In furtherance of that goal, the principal aims of sentencing in contempt cases include:
 - specific deterrence;
 - general deterrence; and
 - denunciation (*R v Derryn Hinch* [2013] VSC 554, [12]).
2. Contempt of court is predominantly a common law offence and as such there is no maximum penalty (*Smith v The Queen* (1991) 25 NSWLR 1, 13). However, the *Magistrates' Court Act 1998* contains specific offences of contempt which are punishable according to the limitations in the statute (see below).
3. The penalties for contempt usually consist of fines, imprisonment or both. While a sentence of imprisonment is available in cases of civil contempt, it will rarely be appropriate (*Vaysman v Deckers Outdoor Corporation* [2011] FCAFC 17 per Bromberg J [178]; *Jones v ACCC* (2010) 189 FCR 390; [2010] FCAFC 136 [36]; *Langer v AEC* (No 2) (1996) 59 FCR 463).
4. The distinction between civil and criminal contempt is principally relevant to sentencing. A court may only record a formal criminal conviction if the contempt is considered to be a criminal contempt. In addition, a finding of criminal contempt is likely to lead to a more severe penalty, which may include imprisonment (see *CFMEU v Grocon* (2014) 47 VR 527 at [173]).

Matters relevant in sentencing for contempt generally

5. In *R v Witt* (No 2) [2016] VSC 142 at [93], J Forrest J identified the following as relevant considerations in sentencing for contempt:
 - the nature and circumstances of the contempt (including the objective seriousness of the contempt);
 - the effect of the contempt on the administration of justice;
 - the contemnor's culpability as judged by his or her state of mind and intention at the time of the contempt;
 - general and specific deterrence;
 - the previous good character of the contemnor (including the absence or presence of a prior conviction for contempt);
 - the contemnor's personal circumstances and financial means;
 - whether the contemnor has exhibited contrition and made an apology;
 - denunciation of the contempt; and
 - the passage of time since the occurrence of the contempt (see also *DPP v Johnson* [2002] VSC 583 at [59]).

Context of proceedings

6. Where a contempt of court occurs in the context of an ongoing murder trial, and the contempt has a tendency to prejudice proceedings, this is a serious contempt (*R v Herald Weekly Times* (2008) VSC 251, [19]).

Objective seriousness and actual consequences

7. A contempt of court will be considered very serious where a trial must be adjourned as a direct consequence (*R v Nationwide News Pty Ltd* [2006] VSC 420, [6]).
8. Conversely, where the contempt does not involve any significant element of public risk, the offending will be less serious and the need for vindication of the court's authority and general and specific deterrence may be satisfied by less severe penalties than would otherwise be imposed (*Vaysman v Deckers Outdoor Corporation* [2011] FCAFC 17).
9. A contempt of court will be considered serious where it creates a potential risk to the lives of witnesses, and has the potential to prejudice the success of the witness protection program (*R v General Television Corporation Pty Ltd* [2009] VSC 84, [18]).
10. Even though a contempt of court may have created risks of harm, the absence of actual harm must be taken into account when assessing the seriousness of the actual contempt (*R v General Television Corporation Pty Ltd* [2009] VSC 84, [19]).
11. When assessing the seriousness of the contempt, the court may not seek to compensate for any loss suffered due to the contempt. This may exclude considerations such as the cost of police activity, or the costs caused where a trial must be aborted (*Grocon v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 134).
12. However, the scale and impact of the contempt may be assessed in part by the consequences of the contempt, such as the need to deploy police or to delay a trial (*Grocon v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 134).

State of mind and intention

13. The presence or absence of an intention to interfere with the due administration of justice, and any awareness of a suppression order in sub judice cases, is to be considered in deciding penalty (*R v Pacini* [1956] VLR 544 at 546–547).

Character and antecedents of contemnor

14. The presence or absence of any prior convictions for contempt can be relevant when determining whether the contemnor displays genuine remorse or contrition (*R v Derryn Hinch* [2013] VSC 554, [36]; *R v Holman* [2012] TASSC 75, [24]).
15. Unlike sentencing for other criminal offences, the presence of previous convictions for non-contempt offences is generally considered irrelevant (*R v Vasiliou (No 2)* [2012] VSC 242; *Scott v Evia* [2007] VSC 15; *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 134).
16. However, where the conduct involves a refusal to give evidence, prior criminal conduct may be relevant to issues of rehabilitation or willingness to comply with the law (see *Corruption and Crime Commission v Allbeury (No 2)* [2011] WASC 26).

Specific deterrence

17. Where it is important to make clear to a contemnor who has repeatedly been in contempt of court that further such actions will not be tolerated, it is suitable to impose a fine which will cause “real financial pain” for the contemnor, based on his or her specific financial circumstances (*R v Derryn Hinch* [2013] VSC 554, [45]). This may serve as personal as well as general deterrence to the community at large.

18. It may be unnecessary to address specific deterrence in sentencing where actions are taken by the contemnor to:
- reduce the impact of the contempt;
 - deal with those immediately responsible for it; and
 - decrease the possibility of further breaches (*R v Holman* [2012] TASSC 75, [23]).
19. Where the contemnor is an organisation, there will be a “strong need” to address specific deterrence where organisational structures that led to the contempt have not been addressed, or have been only partially addressed (*R v General Television Corporation Pty Ltd* [2009] VSC 84, [71]).

Apology, guilty plea or willingness to pay costs

20. The contemnor’s conduct out of court may assist in deciding the sincerity of any apology offered. The presence or absence of genuine remorse or contrition is to be decided on the balance of probabilities (*R v Derryn Hinch* [2013] VSC 554, [34]).
21. Contrition may be demonstrated by any actions taken by the contemnor to reduce the impact of the contempt, deal with those immediately responsible for it, and decrease the possibility of further breaches (*R v Holman* [2012] TASSC 75, [21]). Current sentencing practices 256. As with sentencing for other criminal offences, courts sentencing for contempt must take into account current sentencing practices. This will inform the appropriate penalty, relative to other comparable cases (*Vaysman v Deckers Outdoor Corporation* [2011] FCAFC 17).

Sentencing issues in contempt by publication (sub judice)

22. Additional factors relevant in sub judice cases include:
- the circumstances of the offence (*R v Nationwide News Pty Ltd* (Unreported, Supreme Court of Victoria, Gillard J, 18 February 1998) 10);
 - whether the relevant organisation had systems in place to prevent contempt (*R v David Syme & Co Ltd* [1982] VR 173, 178);
 - whether legal advice was sought before publication (*DPP (Cth) v United Telecasters Sydney Ltd* (in liq) (1992) 7 BR 364, 374); and
 - the general nature and purpose of the publication (*R v David Syme & Co Ltd* [1982] VR 173, 180).

Systems to prevent contempt

23. The existence of systems in place by a publisher to prevent contempt of court is a mitigating factor.
24. However, the weight to be given to this factor is diminished:
- where the systems themselves are deficient; and
 - where the systems fail because they are not properly adhered to (*R v The Age Company Ltd* [2008] VSC 305, [30], *R v Herald Weekly Times Pty Ltd & Anor* [2008] VSC 251, [25]).
25. Systems can be considered deficient where a publisher fails to give due priority to the need to guard against contempt, resulting in a higher likelihood of human error (*R v General Television Corporation* [2009] VSC 84, [42]).
26. The need for adequate systems to prevent contempt may play a role in promoting specific or general deterrence of future acts of contempt. Kyrou J stated in *R v Herald & Weekly Times Pty Ltd & Anor* [2006] VSC 251, at [41]:
- The media need to be reminded that they must not only have appropriate systems in place to avoid contempt, but they must ensure compliance with those systems in all cases.

Circumstances of the offence

27. If circumstances arise where there is insufficient time to properly check an article to ensure it is not in contempt of court, it is the responsibility of the publisher to defer publication until such time as the checks can be done (*R v The Age Company Ltd* [2008] VSC 305, [21]).
28. Pushing ahead with a publication to meet a deadline, in full knowledge that the material has not been properly scrutinised, is a more serious contempt than an inadvertent failure to check (*R v The Age Company Ltd* [2008] VSC 305, [23]).

Legal advice

29. If the contemnor obtained legal advice before publishing the offending material, this can be a mitigating factor in deciding the punishment for contempt (*R v Herald Weekly Times Pty Ltd* [2008] VSC 251, [26]; *R v Haley* [2012] TASSC 86).
30. The weight to be given to this factor depends upon the nature of the advice given, the circumstances in which it was given, and whether or not the advice is disclosed to the Court in detail (*R v Herald Weekly Times Pty Ltd* [2008] VSC 251, [28]).
31. If the contemnor seeks to rely on legal advice as a mitigating factor, they must put details of the advice into evidence. Relevant details may include whether the advice was concerned with contempt issues; the length of any consultation with a lawyer; whether the lawyer was actually able to peruse the offending material; and what if anything was done in response to the legal advice (*R v Herald Weekly Times Pty Ltd* [2008] VSC 251, [28]).
32. If any weight is to be given to the contemnor's having received legal advice, privilege cannot be maintained in relation to the particulars of the advice (*R v Herald Weekly Times Pty Ltd* [2008] VSC 251, [28]).

Fines and the financial capacity of the offender

33. The fact that the offender is impecunious or bankrupt is not a basis for imposing a sentence of imprisonment when one is otherwise not appropriate (*Jones v Toben (No 2)* [2009] FCA 477; *Vaysman v Deckers Outdoor Corporation* [2011] FCAFC 17).

Relevance of the *Sentencing Act 1991* and common law sentencing principles

34. General statutory provisions relating to sentencing should not be construed as fettering the common law unless the legislation expresses a clear intent to do so (*Hinch v Attorney-General* [1987] VR 721, 749).
35. However, some provisions of the *Sentencing Act 1991* (Vic) have been held to apply in contempt proceedings by analogy. The need to apply these provisions may depend in part on whether the contempt is classified as criminal or civil (*Grocon v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 134, [77]; *Varnavides v VCAT* (2005) 12 VR 1; [2005] VSCA 231).
36. Common law sentencing principles such as proportionality, totality, parity, parsimony and the operation of the standard of proof in sentencing proceedings are all relevant and applicable when sentencing for contempt (*Pico Holdings v Voss* [2002] VSC 319; *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 134).
37. In *R v Herald Weekly Times Pty Ltd* [2008] VSC 251 at [45] Kyrou J ruled that certain provisions of the *Sentencing Act 1991* (Vic) could be relevant in a contempt proceeding under Order 75 of the *Supreme Court (General Civil Procedure) Rules 2005*. Relevantly, this included:
 - If a person is guilty of an offence, the Court may order the person to pay a fine, with or without recording a conviction (s 7(1)(f)).
 - In exercising its discretion over whether or not to record a conviction, the Court must have regard to all the circumstances of the case including (s 8(1)):

- (a) the nature of the offence;
 - (b) the character and past history of the offender;
 - (c) the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects.
38. In *R v Derryn Hinch* [2013] VSC 554, Kaye J took into account the principle of parsimony expressed in *Sentencing Act 1991* s 5(4): that the Court must not impose a custodial sentence where a non-custodial sentence would achieve the purposes for which the sentence is imposed.
39. Other provisions that have been held to apply in the context of a contempt of court proceeding include those pertaining to:
- Fixing of non-parole periods (ss 11 to 14, applied in *DPP (Vic) v Johnson* (2002) 6 VR 235, 237; [2002] VSC 565);
 - Order of service of sentences (s 15, applied in *Varnavides v Victorian Civil and Administrative Tribunal* (2005) 12 VR 1, 6; [2005] VSCA 231); and
 - Whether sentences are concurrent or cumulative (s 16, applied in *Law Institute of Victoria Ltd v Nagle* [2005] VSC 47, [37]).
40. Division 4 of Part 3 of the *Sentencing Act 1991*, which deals with fines, has been held not to apply to fines for contempt (*McKinnon v Adams (No 2)* [2003] VSC 502, [39]).
41. Similarly, sentencing options available only under the *Sentencing Act 1991* may not be available. For example, the Court of Appeal held in *Varnavides v VCAT* (2005) 12 VR 1; [2005] VSCA 231 that VCAT's power to imprison for contempt, set out under the *VCAT Act*, did not extend to a power to suspend a sentence of imprisonment (see also *Rich v Attorney-General (Vic)* [1999] VSCA 14).
42. However, the decision in *Varnavides v VCAT* may be limited to the legislation which governs VCAT. The decision did not refer to the terms of r75.11 of the *Supreme Court (General Civil Procedure) Rules 2005* which recognise the power of the court to impose a sentence of imprisonment on terms, which may include suspension of punishment (see *National Australia Bank v Juric (No 2)* [2001] VSC 398).

Punishment

43. It is not necessary in all cases to impose a punishment. The court may decide that the public interest has been vindicated by factors such as the prosecution itself, the burdens of the trial, the published findings of the court and any orders for costs (*DPP (NSW) v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732, 742; *Davey v Dessco Pty Ltd & Anor (Contempt)* [2017] VSC 743).
44. As noted in 8.2.8 – Civil and criminal contempt, a court may only record a formal criminal conviction if the contempt is considered to be a criminal contempt. (see *CFMEU v Grocon* (2014) 47 VR 527 at [173]).
45. The penalties for contempt usually consist of fines, imprisonment or both. While a sentence of imprisonment is available in cases of civil contempt, it will rarely be appropriate (*Vaysman v Deckers Outdoor Corporation* [2011] FCAFC 17 per Bromberg J [178]; *Jones v ACCC* (2010) 189 FCR 390; [2010] FCAFC 136 [36]; *Langer v AEC (No 2)* (1996) 59 FCR 463).
46. There may, however, be cases where imprisonment is appropriate in relation to civil contempt as a coercive sanction, to compel compliance with the order, disregard of which constituted the contempt (See, e.g., *Mahaffy v Mahaffy* [2013] NSWSC 245, [67], *ASIC v Reid* [2002] FCA 84).
47. However, the principle of parsimony applies to sentencing for contempt (see Relevance of the *Sentencing Act 1991* and common law sentencing principles, above) and so a court must not impose a sentence of imprisonment unless all less severe sentences are inappropriate (*Vaysman v Deckers Outdoor Corporation* [2011] FCAFC 17).

48. The Court may issue the following punishments for contempt of court (r. 75.11):

(1) Natural persons: imprisonment, fine or both

(2) Corporations: sequestration, fine or both

49. The Court may order the contemnor to imprisonment or further imprisonment until he or she pays the fine (r. 75.11).

50. The Court may make an order for punishment on terms, including suspension of that punishment (r. 75.11).

Magistrates' Court

Magistrates' Court Act 1989

51. The *Magistrates' Court Act 1989* contains two statutory offences which are specific to the Magistrates' Court.

Contempt in the face of court:

52. A person found guilty of contempt in the face of the court may be sentenced to a term of imprisonment of no more than six months, and fined not more than 25 penalty units (s 133(4)).

53. The Court may order the discharge of a person sentenced to imprisonment, before the end of their term (s 133(5)).

54. The Court may accept an apology given for a contempt and decide to reduce or forego any punishment accordingly (s 133(6)).

Other forms of contempt

55. *Magistrates' Court Act 1989* s 134 prescribes a maximum penalty of one month imprisonment or a fine of not more than five penalty units in the case of contempt by witnesses who fail to give evidence as required. The penalty in default of the fine is imprisonment for not more than one month (*Magistrates' Court Act 1989* s 134).

Last updated: 26 February 2018

9 The Accused

1. This chapter addresses general issues relating to the accused, including presence at hearings, self-represented accused and the use of interpreters.

Last updated: 3 August 2009

9.1 Presence of the Accused

1. The general rule is that criminal proceedings should be held in the presence of the accused, regardless of whether he or she wishes to attend (*R v Benbrika & Ors (Ruling No 20)* (2008) 18 VR 410; [2008] VSC 80; *R v Serrano (No 5)* (2007) 16 VR 360; [2007] VSC 209; *R v Abrahams* (1895) 21 VLR 343).

2. The accused must attend the following hearings unless he or she is excused by the court:

- A contest mention hearing in a summary proceeding;
- All hearings in a committal proceeding;
- All hearings in a trial (CPA 2009 ss 55, 100, 246).

3. For the purposes of the CPA 2009:

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) Act 1958*, appear or be brought before the court by audio visual link (CPA 2009 s 3).

4. Parties to an appeal must appear in court, but need not personally attend the hearing unless otherwise required to do so (CPA 2009 s 329; *Hamilton v Pickering* (2014) 42 VR 681; [2014] VSC 399). On an appeal under Part 6.3 of the Act, the Court of Appeal may impose a sentence on a person even though that person did not attend the hearing (CPA 2009 s 322).
5. The accused does not need to attend other hearings unless required to do so by an order of the court, his or her conditions of bail or a rule of court (CPA 2009 s 330; *Hamilton v Pickering* (2014) 42 VR 681; [2014] VSC 399).

Audio-Visual Links

6. Division 3 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958* provides a process for an adult accused to attend certain hearings through an audio-visual link. These provisions are set out below and discussed in the following topics.
7. In the Magistrates' Court, Order 9 of the *Magistrates' Court Criminal Procedure Rules 2019* regulates the forms to be used when applying for audio-visual links, and the obligation to serve the application on the other parties by pre-paid post as soon as practicable after filing.
8. **Related topic:** 8.4.2 - Child Accused and Audio-Visual Links

Appearance of adult accused in custody in Magistrates' Court - 42JA

9. Following the commencement of the *Justice Legislation (Evidence and Other Acts) Amendment Act 2016* on 12 September 2016, the *Evidence (Miscellaneous Provisions) Act 1958* created a new default position that accused in the Magistrates' Court, who are being held in custody, will appear at proceedings by audio visual link (*Evidence (Miscellaneous Provisions) Act 1958* s 42JA(1)). An accused may, however, apply under s 42L to attend in person.
10. The Act provides for four exceptions to this general rule.
11. In the following proceedings, an adult accused must appear in person in the Magistrates' Court unless the court makes a direction under section 42M(1) to the contrary:
 - An inquiry into the accused's fitness to plead;
 - The hearing of the charge if the accused is pleading not guilty;
 - A committal hearing (*Evidence (Miscellaneous Provisions) Act 1958* s 42JA(2)).
12. The remaining exception is for an adult who has been taken into custody and must be brought before a bail justice or the Magistrates' Court within a reasonable time of being taken into custody. For that hearing, the person must be brought physically to court unless the person consents to appear before the court by audio visual link (*Evidence (Miscellaneous Provisions) Act 1958* ss 42JA(3) and 42MAA(1)).

Application to attend in person

13. For proceedings in which the default position is that the accused appear by audio visual link, a party may apply for the accused to appear in person (*Evidence (Miscellaneous Provisions) Act 1958* s 42L(2)).
14. A court may direct an accused to attend the court physically in one of the above proceedings if it is satisfied that:

(a) physical appearance is required in the interests of justice; or

(b) it is not reasonably practicable for the accused person to appear before the court by audio visual link (*Evidence (Miscellaneous Provisions) Act 1958 s 42L(1)*).

15. In deciding whether physical appearance is required in the interests of justice, the Magistrates' Court must take into consideration whether physical attendance is required for the accused to comprehend the proceedings or communicate with legal representatives and give instructions or express wishes to that representative (*Evidence (Miscellaneous Provisions) Act 1958 s 42L(1A)*).
16. The accused or the prosecution may apply for a direction that the accused appear physically by filing a notice in court and stating the grounds for that direction at least 3 days before the proposed hearing, or within a shorter period that the court fixes for a good and sufficient reason. The applicant must serve a copy of the notice and grounds on the other party. The court must determine the application without a hearing based on the notice and any written submissions filed by either party (*Evidence (Miscellaneous Provisions) Act 1958 s 42L*).
17. The application must be made in Form 45 of the *Magistrates' Court Criminal Procedure Rules 2019*, filed at the venue where the proceeding is listed (*Magistrates' Court Practice Direction No 11 of 2016*).
18. Where the accused is charged on summons but is in custody for other matters, the accused's lawyer and the police informant must notify the Court of this fact so that an audio-visual link can be arranged. If the accused wishes to attend in person, then the accused must apply under s 42L (*Magistrates' Court Practice Direction No 11 of 2016*).
19. A party may also apply at any time during the proceeding with leave of the court for a direction that the accused attend in person, even if the court has previously refused such an application. This application may be made orally and the parties are entitled to be heard (*Evidence (Miscellaneous Provisions) Act 1958 s 42L*).
20. The court may also direct that the accused attend personally of its own motion, even if the court has previously refused an application to make such a direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42L*).

Application to attend by audio-visual link

21. In the proceedings listed in *Evidence (Miscellaneous Provisions) Act 1958 s 42JA(2)*, a court may direct an accused to attend by audio-visual link in these proceedings if it is satisfied on the application of a party that attendance by audio-visual link is consistent with the interests of justice and is reasonably practicable in the circumstances (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).
22. The accused or the prosecution may apply for an audio-visual link direction by filing a notice in court and stating the grounds for that direction at least 14 days before the proposed hearing, or within a shorter period that the court fixes for a good and sufficient reason. The applicant must serve a copy of the notice and grounds on the other party (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).
23. The alleged victim of the offence may address the court or make a written submission opposing an audio-visual link direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).
24. The court may only grant an application for an audio-visual link direction with the consent of all parties to the proceeding, or in exceptional circumstances (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).
25. A party may also apply at any time during the proceeding with leave of the court for a direction that the accused attend by audio-visual link, even if the court has previously refused such an application. The court may also direct that the accused attend by audio-visual link of its own motion, even if the court has previously refused an application to make such a direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).

Appearance of adult accused in courts other than the Magistrates' Court by video link – s 42K

26. An adult accused in a Court other than the Magistrates' Court who is held in custody may attend the following hearings by audio-visual link, unless the court otherwise directs:
- proceedings with respect to bail;
 - subsequent proceedings concerning the accused's remand in custody, if he or she has previously been remanded in custody;
 - applications for adjournments; or
 - arraignment on a day other than a day on which the trial is due to take place (*Evidence (Miscellaneous Provisions) Act 1958 s 42K(1)*).
27. A court may direct an accused to attend the court physically in one of the above proceedings if it is satisfied on the application of a party that:
- (a) physical appearance is required in the interests of justice; or
 - (b) it is not reasonably practicable for the accused person to appear before the court by audio visual link (*Evidence (Miscellaneous Provisions) Act 1958 s 42L(1)*).
28. The accused or the prosecution may apply for an audio-visual link direction by filing a notice in court and stating the grounds for that direction at least 3 days before the proposed hearing, or within a shorter period that the court fixes for a good and sufficient reason. The applicant must serve a copy of the notice and grounds on the other party. The court must determine the application without a hearing based on the notice and any written submissions filed by either party (*Evidence (Miscellaneous Provisions) Act 1958 s 42L*).
29. A party may also apply at any time during the proceeding with leave of the court for a direction that the accused attend in person, even if the court has previously refused such an application. This application may be made orally and the parties are entitled to be heard (*Evidence (Miscellaneous Provisions) Act 1958 s 42L*).
30. The court may also direct that the accused attend personally of its own motion, even if the court has previously refused an application to make such a direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42L*).

Appearance of Adult Accused in Person in Courts other than Magistrates' Court – s 42K(2)

31. An adult accused held in custody must attend the following proceedings personally and may not attend by audio-visual link unless the court directs otherwise:
- an inquiry into the accused's fitness to stand trial;
 - the trial (apart from arraignment) or hearing of the charge;
 - a sentencing hearing; or
 - an appeal arising out of the trial or hearing (*Evidence (Miscellaneous Provisions) Act 1958 s 42K(2)*).
32. A court may direct an accused to attend by audio-visual link in these proceedings if it is satisfied on the application of a party that attendance by audio-visual link is consistent with the interests of justice and is reasonably practicable in the circumstances (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).
33. The accused or the prosecution may apply for an audio-visual link direction by filing a notice in court and stating the grounds for that direction at least 14 days before the proposed hearing, or within a shorter period that the court fixes for a good and sufficient reason. The applicant must serve a copy of the notice and grounds on the other party (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).

34. The alleged victim of the offence may address the court or make a written submission opposing an audio-visual link direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).
35. The court may only grant an application for an audio-visual link direction with the consent of all parties to the proceeding, or in exceptional circumstances (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).
36. A party may also apply at any time during the proceeding with leave of the court for a direction that the accused attend by audio-visual link, even if the court has previously refused such an application. The court may also direct that the accused attend by audio-visual link of its own motion, even if the court has previously refused an application to make such a direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42M*).

Residual power to direct appearance by audio-visual link

37. In any proceeding not otherwise referred to in sections 42JA or 42K, the court may direct that an accused appear before it by audio visual link if satisfied that appearance by audio-visual link is consistent with the interests of justice (*Evidence (Miscellaneous Provisions) Act 1958 s 42MA*).
38. An application for a direction under section 42MA may be made by the accused or the prosecution up to 14 days before the hearing, or any shorter period that the court fixes because of a good and sufficient reason (*Evidence (Miscellaneous Provisions) Act 1958 s 42N(1)*).
39. A party must file notice in the prescribed form (if any), stating the grounds of the application and serving a copy of on the other party (*Evidence (Miscellaneous Provisions) Act 1958 s 42N(2)*).
40. A party may also apply at any time during the proceeding with leave of the court for a direction that the accused appear by audio visual link, even if the court has previously refused such an application. This application may be made orally and the parties are entitled to be heard (*Evidence (Miscellaneous Provisions) Act 1958 s 42N(3)*).
41. The court may also direct that the accused attend personally of its own motion, even if the court has previously refused an application to make such a direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42N(5)*).

Audio-Visual Links and Jury Directions

42. If the accused attends proceedings by audio-visual link, the court must warn the jury not to draw any inference adverse to the accused or give evidence received through audio-visual link greater or lesser weight due to the manner of presenting the evidence (*Evidence (Miscellaneous Provisions) Act 1958 s 42V*). See 2.3.1.1 Charge: Alternative Arrangements in the Victorian Criminal Charge Book for a model charge.

Continuing proceedings in absence of accused

43. As noted above, the general rule is that criminal proceedings should be held in the presence of the accused, regardless of whether he or she wishes to attend (*R v Benbrika & Ors (Ruling No 20)* (2008) 18 VR 410; [2008] VSC 80; *R v Serrano (No 5)* (2007) 16 VR 360; [2007] VSC 209; *R v Abrahams* (1895) 21 VLR 343; *Taupati v R* [2017] VSCA 106; *Boros v O'Keefe* [2017] VSC 560 at [17]–[22]).
44. Where the accused is unable to attend proceedings due to illness, the court must decide whether to allow proceedings to continue in the accused's absence. The court should consider the nature of the accused's illness, when he or she is likely to recover and the evidence that will be led while the accused is absent (see *R v Sykes & Campi (No 2)* [1969] VR 639; *R v McHardie & Danielson* [1983] 2 NSWLR 733).

45. Where the accused absconds during the trial, the court has a discretion to continue the proceeding. Before exercising this discretion, the court should first undertake reasonable enquiries and give a reasonable opportunity for the accused to be located. A court must not allow an accused to frustrate the administration of justice by absconding when it appears that he or she will be convicted. Where the accused absconds, the prima facie conclusion is that the accused has waived his or her right to be present (*R v Serrano* (No 5) (2007) 16 VR 360; [2007] VSC 209; *R v McHardie & Danielson* [1983] 2 NSWLR 733; *R v Jones* (1998) 72 SASR 281; [1998] SASC 7021; *R v Mokbel* (Ruling No 5) [2006] VSC 520; *Taupati v R* [2017] VSCA 106 at [29]–[30]). See also 7.3 Counsel for the Accused.
46. The court must also consider whether the proceeding against any co-accused should continue when one accused absconds (*R v Nolan* [1961] VR 12).
47. While it has been said that the discretion to continue a trial in the absence of the accused should be exercised sparingly, this reluctance usually applies where the accused fails to attend the start of a trial. Different considerations apply where the accused absconds during a trial, or at the end of a trial (*Taupati v R* [2017] VSCA 106 at [28]).
48. If the accused has absconded and is convicted, the court will need to consider whether to sentence in the absence of the accused. Whether this is appropriate will depend on the circumstances of the case, including:
- The public interest in the completion of the sentencing process;
 - The status of any co-offenders and thus the need to consider questions of parity;
 - The fact that the absence of the accused will mean that matters personal to the accused will not be identified in the plea hearing (*Taupati v R* [2017] VSCA 106 at [33]. See also *R v Mokbel* (2010) 30 VR 115; [2010] VSCA 11).

Last updated: 17 March 2023

9.2A Removal of the Accused

1. While the accused is generally entitled to be present to hear and test the prosecution evidence and to present his or her own case, the judge or magistrate may remove the accused from the courtroom if he or she renders an orderly hearing impossible. An accused may waive the right to be physically present for the hearing through disruptive conduct (*R v Vernell* [1953] VLR 590; *R v McHardie & Danielson* [1983] 2 NSWLR 733; *Lawrence v R* [1933] AC 699; *Boros v O’Keefe* [2017] VSC 560 at [17]–[22]).
2. A judge or magistrate should try all other less disruptive means of controlling the accused’s behaviour before ordering the accused out of court, especially where the accused may receive a heavy sentence. In addition, the judge or magistrate should permit the accused to re-enter the courtroom if he or she ceases to disrupt the proceeding (*R v Vernell* [1953] VLR 590; *Eastman v R* (1997) 76 FCR 9; *Boros v O’Keefe* [2017] VSC 560 at [17]–[22]).
3. If possible, when the accused is removed from the courtroom, the court should provide an audio-visual link with the accused’s location. This may be one way or two way, depending on whether the accused’s conduct in the separate location may continue to disrupt the proceeding (*R v Johnson* [2002] VSC 583; *Eastman v R* (1997) 76 FCR 9).
4. If necessary, the judge should warn the jury not to draw an adverse inferences from the accused’s behaviour and, in appropriate cases, may explain why the accused is absent. The jury must not punish the accused for his or her outbursts or absence (*Eastman v R* (1997) 76 FCR 9; *R v Stuart & Finch* [1974] Qd R 297).

9.2 Self-Represented Accused

1. An accused is entitled to conduct proceedings him or herself. While legal representation is desirable and a court may order Victoria Legal Aid to provide representation, the court cannot compel an accused to accept representation (*Collins v R* (1975) 133 CLR 120; *R v Zorad* (1990) 19 NSWLR 91; *Sacco v The Queen* [2018] VSCA 353 [25]).
2. If the accused is self-represented at a hearing, the court should ascertain whether he or she intends to conduct the proceedings him or herself. The court may inform the accused of the difficulty of conducting proceedings and that it is desirable to obtain representation (*R v Osborne* [2002] VSCA 156; *R v MK* [2005] VSCA 194).
3. A self-represented accused lacks the qualities of professional skill and objective judgment that legal representatives bring to a case (*Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337; *Re F: Litigants in Person Guidelines* [2001] FamCA 348).
4. While a self-represented accused is not entitled to any special advantages, the court must provide the accused with any information that is necessary to ensure a fair trial. In some cases, this obligation can be onerous, as the purpose of the court's explanation is to counteract the accused's disadvantage in conducting proceedings without legal representation (*MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46; *R v Zorad* (1990) 19 NSWLR 91; *Dietrich v R* (1992) 177 CLR 292; [1992] HCA 57).

Degree of Assistance Required

5. Courts have rejected attempts to lay down a strict list of matters that judges or magistrates must tell a self-represented accused. The degree of assistance an accused requires depends on his or her needs, the complexity of the case and his or her intelligence or ability to understand and apply legal principles. The court must explain the legal position on the substantive and the procedural issues in the case and the options available to the accused (*Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337; *Abram v Bank of New Zealand* (1996) 18 ATPR 41–507; *MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46; *R v White & Piggin* (2003) 7 VR 442; [2003] VSCA 174; *Re F: Litigants in Person Guidelines* [2001] FamCA 348; *O'Connell v WA* [2012] WASCA 96).
6. The variable nature of the degree of assistance required reflects the fact that the right to a fair hearing requires a court to ask itself what the duty to act fairly requires in the circumstances of the particular case. This is because fairness is not abstract, but is essentially practical (*Roberts v Harkness* (2018) 57 VR 334, [47], citing *Kioa v West* (1985) 159 CLR 550, 585 and *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [38]).
7. The practical content of the duty of fairness requires the court to assess the capability of the self-represented litigant and consider:
 - the nature of the decision to be made;
 - the nature and complexity of the issues in dispute;
 - the nature and complexity of the submissions which the party wishes to advance;
 - the significance to that party of an adverse decision ('what is at stake'); and
 - the competing demands on the time and resources of the court or tribunal (*Roberts v Harkness* (2018) 57 VR 334, [49], [54]).
8. A court is entitled to enforce minimum standards of conduct on self-represented litigants. They are not permitted "to misbehave, flout the legal or procedural rules, ignore the law of evidence or to treat the trial judge and witnesses with disrespect or contempt". Where a self-represented litigant fails to comply with these minimum standards, the court may take actions to deal with such behaviour (*O'Connell v WA* [2012] WASCA 96, [109]).

9. The presiding judicial officer may decide the order in which issues are to be addressed. Enforcing such decisions regarding practice and procedure does not deprive a self-represented litigant of their entitlement to procedural fairness (*Kyriazis v Victoria Police* [2022] VSC 596, [38]).
10. Considering the competing demands on the time and resources of the court or tribunal directs attention to the statutory framework governing the decision-making process. In relation to courts, this includes any statement of purposes in the legislation and rules governing that court (*Roberts v Harkness* (2018) 57 VR 334, [50]–[51]).
11. The Family Court has produced guidelines for conducting family law hearings involving self-represented litigants. These guidelines have been widely endorsed and some of the principles may be relevant in criminal proceedings.

A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.

A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses.

A judge should explain to the litigant in person any procedures relevant to the litigation.

A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.

If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.

A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.

If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.

A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* (1994) 68 ALJR 509 at 510; [1994] HCA 23).

Where the interests of justice and the circumstances of the case require it, a judge may:

- draw attention to the law applied by the Court in determining issues before it;
- question witnesses;
- identify applications or submissions which ought to be put to the Court;
- suggest procedural steps that may be taken by a party;
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias (*Re F: Litigants in Person Guidelines* (2001) 161 FLR 189 at 226–227; [2001] FamCA 348).

12. In criminal proceedings, a judge or magistrate may need to explain some of the following matters to a self-represented accused:
 - the elements of the offence;
 - any procedural issues in the case, including the conduct of any preliminary hearings and the purpose of those hearings;

- the process of arraignment;
 - how to challenge jurors;
 - the permissible content and purpose of an opening address;
 - the operation of examination-in-chief, cross-examination and re-examination of witnesses;
 - the proper way to formulate questions (but not to reformulate improper questions for the accused);
 - the rule in *Browne v Dunn* (if the judge proposes to comment on the accused's failure to comply with the rule);
 - the right to give and to call evidence;
 - the rules relating to the admission of evidence, and the right to test the admissibility of evidence on a voir dire;
 - that the accused may be entitled to lead evidence before the jury that the court considered on a voir dire, even if the judge ruled against the accused on the voir dire (e.g., evidence relevant to the credibility of a witness);
 - the right to make a final address;
 - the obligation of the judge or magistrate to help the accused understand the case, and the limits of that obligation (see, e.g. *R v Osborne* [2002] VSCA 156; *R v Manolakis* [2007] SASC 438; *Clark v R* [2008] NSWCCA 122; *R v White & Piggin* (2003) 7 VR 442; [2003] VSCA 174; *R v Zorad* (1990) 19 NSWLR 91; *MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46).
13. The obligation of the judge will, in some cases, include informing the accused of the operation of *Evidence Act 2008* s 165 and the right of the accused to request a direction on evidence that may be unreliable (*Andelman v R* (2013) 38 VR 659; [2013] VSCA 25).
14. This information may be providing orally or in writing (see *R v Manolakis* [2007] SASC 438; *Clark v R* [2008] NSWCCA 122).

Extent of Appropriate Intervention and Assistance

15. When advising the accused of how criminal proceedings operate, the judge or magistrate must observe the distinction between "telling the players how to play and telling them the rules of the game". The presiding judicial officer must not become the accused's advocate, but may explain the likely forensic consequences of certain decisions so that the accused can make an informed choice (*R v Gidley* [1984] 3 NSWLR 168; *MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46; *Minogue v HREOC* (1999) 84 FCR 438; [1999] FCA 85; *Mentyn v Law Society of Tasmania* [2004] TASSC 24).
16. Current judicial practice is to intervene more extensively when the accused is self-represented even if, viewed in isolation, such conduct would give rise to an apprehension of bias. The boundary between appropriate and inappropriate intervention is flexible and the judge or magistrate should aim to meet the twin objectives of efficiency and fairness in the conduct of proceedings (*R v White & Piggin* (2003) 7 VR 442; [2003] VSCA 174; *Panagopoulos v Southern Healthcare Network*, Unreported, VSC, 15 September 1997, *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337; *Minogue v HREOC* (1999) 84 FCR 438; [1999] FCA 85; *Re F: Litigants in Person Guidelines* [2001] FamCA 348). See also 6.1 Judicial Bias.
17. The judge or magistrate may choose not to strictly apply procedural or evidentiary rules to a self-represented accused if this is appropriate in the circumstances of the case. Procedural and evidentiary rules will continue to be strictly applied against the Crown (*R v White & Piggin* (2003) 7 VR 442; [2003] VSCA 174; *R v MK* [2005] VSCA 194).

18. In some cases, the judge should seek to dissuade the accused from engaging in clearly unwise forensic decisions. While the judge or magistrate is not to assume the mantle of a legal adviser, he or she may need to prevent the accused's own forensic choices from jeopardising a fair trial. This line will often be difficult to draw and the court must allow the accused to conduct his or her own defence (Compare *R v White & Piggin* (2003) 7 VR 442; [2003] VSCA 174 per Chernov JA and Eames JA).
19. The judge must decide whether to allow the accused to conduct his or her case from the bar table or the dock. Practices vary among judges on what is suitable. In most cases, the judge should consider:
 - whether the accused poses a security risk by conducting the case from the bar table; and
 - whether the accused has sufficient facilities in the dock to properly organise his or her evidence and materials (compare *R v Hoang* (2007) 16 VR 369; [2007] VSCA 117 and *R v Burke* [1993] 1 Qd R 166).

McKenzie Friend

20. Traditionally, a "McKenzie friend" is an adviser who assists a self-represented accused by prompting him or her, taking notes and quietly making suggestions. This person does not need to be legally trained and may not take part in the proceedings as an advocate (*McKenzie v McKenzie* [1970] 3 All ER 1034; *Collier v Hicks* (1831) 109 ER 1290).
21. The concept has, however, been extended in appropriate cases to allow the "McKenzie friend" to make oral submissions on behalf of the person (*Li v So* [2021] VSCA 32, [20]; *Nepal v Minister for Immigration and Border Protection* [2015] FCA 366, [13]–[16]).
22. An accused may only use the assistance of a "McKenzie friend" with the leave of the court. The choice of whether to allow a "McKenzie friend" is a matter of practice and procedure for the court and there is no absolute rule that a court must permit or refuse such assistance (*Smith v R* (1985) 159 CLR 532; [1985] HCA 62; c.f. *Macartney v R* (2006) 31 WAR 416; [2006] WASCA 29).
23. When determining whether to permit the accused to have the assistance of a "McKenzie friend", the court should consider the following factors:
 - the complexity of the evidence and the issues;
 - the accused's ability to understand the evidence and the course of proceedings;
 - the accused's ability to express him or herself in the court setting;
 - whether the accused can receive the same benefits by conferring with his friend or lay adviser during adjournments (*R v Burke* [1993] 1 Qd R 166).
24. In criminal trials, judges are very reluctant to grant leave for a "McKenzie friend", as experience has shown that the practice is fraught with danger. Proceedings are more likely to become protracted, or miscarry. The adviser is not an officer of the court and is not subject to the professional disciplinary rules that govern lawyers. The accused may attempt to use the adviser as a convenient excuse for any improper or disruptive behaviour by the accused and deflect the risk of censure in the eyes of a jury. Finally, the presence of a third party may impede the judge's efforts to control proceedings and ensure a fair trial (*R v EJ Smith* [1982] 2 NSWLR 608; *R v Dodd (No 2)* [1985] 2 Qd R 282; *R v Burke* [1993] 1 Qd R 166; *Re B* [1981] 2 NSWLR 372).
25. The accused's decision to refuse legal aid is a relevant factor when a court is deciding whether to allow a "McKenzie friend". While the accused is entitled to conduct the case him or herself, this right must not be exercised at the expense of unnecessary disruption to the court or delay of future hearings. A court is entitled to be very sceptical when the accused refuses legal aid and seeks to have a barrister provide support as a "McKenzie friend" (*R v Burke* [1993] 1 Qd R 166; *Smith v R* (1985) 159 CLR 532; [1985] HCA 62).

26. Limiting representation to qualified and accredited lawyers is designed to promote the interests of justice, rather than to protect a lawyer's monopoly. The presence of an unqualified adviser may harm the interests of the accused, cause delays to proceedings and impair the administration of justice (*Mihaka v Police* [1981] 1 NZLR 54; *Damjanovic v Maley* (2002) 55 NSWLR 149; [2002] NSWCA 230; *Skrijel v Mengler* [2004] VSC 128).

Last updated: 8 December 2023

9.3 Dispensing with Counsel During Trial

1. The accused may terminate the retainer of his or her counsel at any time. The accused may even exercise this power in the hope of gaining a forensic advantage. When the accused withdraws his or her instructions, the court may grant a short adjournment and suggest that the accused make a further attempt to resolve the dispute with his or her legal practitioners. If the accused and his or her legal practitioners do not resolve the dispute, counsel must withdraw from the case and the court cannot intervene to prevent the accused from terminating the retainer, unless the accused appears to be operating under a mental disability at that time (*R v Varley* [1973] 2 NSWLR 427; *R v Woodward* [1944] KB 118; *R v Greer* (1992) 62 A Crim R 442; *R v Bollen* (1998) 99 A Crim R 510; *R v IAS* (2004) 89 SASR 159; [2004] SASC 240).
2. If the accused terminates his or her counsel's retainer during a trial, counsel should inform the judge in the absence of the jury and seek leave to withdraw from the case. The judge may ask counsel to state in the presence of the jury that his or her retainer has been terminated. This ensures that the jury does not speculate on why a barrister ceases to act for the accused during the trial. In particular, it prevents the jury from forming the mistaken view that Victoria Legal Aid has withdrawn assistance because the accused's case is unmeritorious (*R v Greer* (1992) 62 A Crim R 442).
3. The accused will not usually be permitted to recall witnesses to conduct further cross-examination or make a further address to the jury after he or she dismisses his or her legal practitioner (*R v Woodward* [1944] KB 118).
4. A judge may need to consider whether it is necessary to discharge the jury after the accused terminates his or her counsel's retainer. An accused may argue that the jury have formed an unfavourable view of him or her personally, or of the merits of the case. In addition, the court may need to consider whether counsel failed to meet the standards of a reasonably competent counsel (*R v Osborne* [2002] VSCA 156; *R v IAS* (2004) 89 SASR 159; [2004] SASC 240).

Adjournment Following Dismissal of Counsel

5. The judge may need to consider whether an adjournment is necessary in the interests of justice when the accused terminates the services of his or her counsel. Barwick CJ analysed the relevant factors in *McInnis v R* (1979) 143 CLR 575 at 579 and explained:

Nothing I say, nor what follows, can be taken to cast any doubt on my own belief that a defence conducted by a competent counsel has an advantage to an accused and that it is in the best interests of the administration of justice that an accused be so represented. Consequently, in my opinion, the trial judge ought very seriously to consider whether an accused should be forced on without counsel in any case in which there is a reasonable possibility that he may obtain the services of counsel in his defence without unbearable delay: but, of course, a trial judge must also have in mind the interests of the Crown and of the witnesses, including a prosecutrix in such a case as the present, and of the jurors. In the present case, the case had been specially fixed for trial on the day in question, the jurors had been summoned and the witnesses were present. It is indeed a close balance and a matter of judgment whether in those circumstances the chance that the refusal of legal aid might on appeal or review be reversed outweighed other considerations. I would not be prepared myself to say that the trial judge erred in his exercise of judgment and in his refusal of an adjournment. But in so saying, I would emphasize the need for the most careful weighing of the interests of the accused, of Crown, witnesses, jurors and, generally, of the administration of justice, when an adjournment is sought in order to obtain or to

endeavour to obtain the services of counsel for the conduct of the defence.

6. Legal representation for an accused charged with a serious criminal offence is so important that courts will usually allow an adjournment unless competing interests, such as the interests of the Crown, witnesses, jurors and the administration of justice, are overwhelming (*McInnis v R* (1979) 143 CLR 575 per Mason J. See also *R v Maher* [1987] 1 Qd R 171; *R v Osborne* [2002] VSCA 156).
7. While a court should grant an adjournment to an accused who is without representation "through no fault of his own", this does not limit the court's discretion to cases where the accused is wholly without blame. The court should consider whether the accused's conduct in dismissing his or her counsel was gratuitous or unreasonable (*Dietrich v R* (1992) 177 CLR 292; [1992] HCA 57; *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58; *R v IAS* (2004) 89 SASR 159; [2004] SASC 240).
8. The judge or magistrate may consider the stage of proceedings where the accused withdraws his or her counsel's retainer and the circumstances of that decision. The court may also consider the effect of any further adjournments on the conduct of the trial (*R v Osborne* [2002] VSCA 156; *R v Bollen* (1998) 99 A Crim R 510).
9. A judge or magistrate need not grant an adjournment to enable the accused to seek replacement representation where it appears that no counsel would be acceptable to the accused. This may occur in some cases when the accused dismisses his or her counsel because counsel refused to present the defence in accordance with the accused's wishes (see *Frawley v R* (1993) 69 A Crim R 208; *Philopos v R* [2008] NSWCCA 66; *R v Osborne* [2002] VSCA 156; *R v MK* [2005] VSCA 194).

Last updated: 3 August 2009

9.4 Child Accused

1. This section examines the capacity of a child to commit a criminal offence and the process for allowing a child accused to attend proceedings using an audio-visual link.

Capacity to Commit Criminal Offences

2. A child under the age of 10 cannot be liable for a criminal offence (*Children, Youth and Families Act* 2005 s 344; *Crimes Act 1914* (Cth) s 4M).
3. If the accused was aged between 10 and 14 at the time of the alleged offending, the prosecution must prove beyond reasonable doubt that the accused knew at the time of the offence that his or her conduct was seriously wrongful.⁶³⁵ The accused's capacity arises as a question of law if the accused was aged between 10 and 14 and it is not necessary for the accused to raise the question of capacity as a defence (*R v ALH* (2003) 6 VR 276; [2003] VSCA 129; *Crimes Act 1914* (Cth) s 4N).
4. As the High Court explained in *RP v R* (2016) 259 CLR 641; [2016] HCA 53, [8] and [9]:

The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*.

...

No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH* suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised

⁶³⁵ The common law "presumption" that a child aged between 10 and 14 is *doli incapax* only indicates that the prosecution bears the onus of disproving the presumption (*R v ALH* (2003) 6 VR 276; [2003] VSCA 129).

5. Despite the High Court's disapproval of part of *R v ALH* in the extract, a jury can draw an inference concerning knowledge from the circumstances of the offending. In *BC v The Queen*, the NSW Court of Criminal Appeal endorsed a hypothetical example that while *doli incapax* might not be rebutted by evidence of a child stealing a phone from a teacher, evidence that the child planned to break into a shop to steal 50 phones might well rebut the presumption (*BC v The Queen* [2019] NSWCCA 111, [53]).
6. The jury must consider whether the child is aware that the conduct is wrong as a matter of morality, rather than examining the child's knowledge that the law prohibits the conduct (*RP v R* (2016) 259 CLR 641; [2016] HCA 53 at [11]).
7. Proof beyond reasonable doubt that the accused understood the conduct was morally wrong is difficult to achieve. As the High Court has stated, it "is not a low standard" (*BDO v The Queen* [2023] HCA 16, [48]).
8. When considering this issue, the jury must be careful not to attribute adult value judgments to children (*R v ALH* (2003) 6 VR 276; [2003] VSCA 129; *R (A Child) v Whitty* (1993) 66 A Crim R 462).
9. The prosecution must show that accused's knew that his or her conduct was more than merely childish naughtiness or mischief. He or she must have realised that the conduct was seriously wrong (*JM (A Minor) v Runeckles* (1984) 79 Cr App R 255; *R (A Child) v Whitty* (1993) 66 A Crim R 462).
10. In some cases, the fact that the accused took acts to avoid detection (such as keeping away potential witnesses, telling the complainant to keep the conduct secret, or threatening to harm the complainant or a family pet) may be of little help in identifying whether the accused thought the act was seriously wrong, as distinct from "merely naughty", as such evidence may be equally consistent with either state of mind (*BC v The Queen* [2019] NSWCCA 111, [52], [54]; *BDO v The Queen* [2023] HCA 16, [46]–[50]).
11. In *RP v R* (2016) 259 CLR 641; [2016] HCA 53 the majority (Kiefel, Bell, Keane and Gordon JJ) gave the following guidance on the factors to consider when deciding whether the presumption is rebutted:

What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. For example, a child is likely better able to understand control of his or her own possessions and the theft of others' property compared to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery. Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required. It has been said that the closer the child defendant is to the age of 10 the stronger must be the evidence to rebut the presumption. Conversely, the nearer the child is to the age of 14, the less strong need the evidence be to rebut the presumption. The difficulty with these statements is that they are apt to suggest that children mature at a uniform rate. The only presumption which the law makes in the case of child defendants is that those aged under 14 are *doli incapax*. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.
12. In assessing whether the presumption is rebutted, the jury does not need to examine whether the child knew the moral significance of the particular features of the crime charged. Rather, the focus is on the moral wrongness of the conduct alleged, without the need to appreciate the matters that distinguish one crime from another (*RP v R* (2016) 259 CLR 641; [2016] HCA 53 at [29]).

13. The jury must keep at the forefront of its mind the fact that the onus is on the prosecution to rebut the presumption of *doli incapax* beyond reasonable doubt. This reinforces the need for the prosecution to call evidence, and the need for caution in the drawing of inferences. Even extreme sexual violence will not be enough, by itself, to show that the presumption is rebutted, as there may be other reasonable inferences besides a conclusion that the child knows the conduct is morally wrong. Such inferences might include the possibility that the child has been subjected to such conduct, or that the child does not realise it is seriously wrong to cause hurt or distress to another (see *RP v R* (2016) 259 CLR 641; [2016] HCA 53 at [32]–[36]).
14. One limb of the mental impairment test is that the accused did not know that his or her conduct was wrong according to ordinary principles of reasonable people. A magistrate or a jury can use this test when determining whether a child aged between 10 and 14 is liable for a criminal offence. However, it is important to note that the test for rebutting the presumption of *doli incapax* requires the distinction between serious wrongness and mere naughtiness (*R (A Child) v Whitty* (1993) 66 A Crim R 462; *R v M* (1977) 16 SASR 589; *RP v R* (2016) 259 CLR 641; [2016] HCA 53. See *R v White & Piggitt* (2003) 7 VR 442; [2003] VSCA 174 on the mental impairment test). See also 8.4 Mental Impairment in the Victorian Criminal Charge Book.
15. In some cases, the prosecution may lead evidence of admissions or convictions of previous offending by the accused to demonstrate that he or she knew that his or her conduct was seriously wrong. The prosecution may also lead evidence of similar unproven allegations to show that the accused previously learnt that certain acts were seriously wrong (*R v F*; *ex parte Attorney-General* [1999] 2 Qd R 157; *R v M* (1977) 16 SASR 589; *R v Harris, Kirby & Johnson*, Unreported, NSW CCA, 18 July 1986).
16. The prosecution does not need to prove that the accused knew that his or her conduct was wrongful if the accused was aged over 14 (*R v ALH* (2003) 6 VR 276; [2003] VSCA 129; *R (A Child) v Whitty* (1993) 66 A Crim R 462; *Children, Youth and Families Act 2005* s 3). An accused over the age of 14 who did not know that his or her conduct was wrong may seek to use the defence of mental impairment.
17. If there is insufficient evidence to prove the age of a person, the court may use the accused's apparent age to determine that he or she is at least 10 years old (*R v Hanley* [1942] VLR 239).
18. Victorian legislation has abrogated the common law presumption that a male child under the age of 14 is impotent (*Crimes Act 1958* s 62).

Child Accused and Audio-Visual Links

19. A child accused who is in custody and required to attend court in a criminal proceeding must physically attend the hearing unless the court makes an order to the contrary (*Evidence (Miscellaneous Provisions) Act 1958* ss 42O, 42J).
20. A court may direct a child accused to attend by audio-visual link if it is satisfied on the application of a party that attendance by audio-visual link is consistent with the interests of justice and reasonably practicable in the circumstances (*Evidence (Miscellaneous Provisions) Act 1958* s 42P).
21. The court must consider the child's ability to comprehend the proceedings and communicate with his or her legal representatives when determining whether it is in the interests of justice to allow a child to attend by audio-visual link (*Evidence (Miscellaneous Provisions) Act 1958* s 42P).
22. The accused or the prosecution may apply for an audio-visual link direction by filing a notice in court and stating the grounds for that direction at least 14 days before the proposed hearing, or within a shorter period that the court fixes for a good and sufficient reason.⁶³⁶ A copy of the notice and grounds must also be served on the other party (*Evidence (Miscellaneous Provisions) Act 1958* s 42P).
23. The alleged victim of the offence may address the court or make a written submission against allowing the accused to attend by audio-visual link:

⁶³⁶ A person may also apply on behalf of a child accused (*Evidence (Miscellaneous Provisions) Act 1958* s 42P).

(a) on the trial (apart from the arraignment of the child) or hearing of the charge; or

(b) on a sentencing hearing (*Evidence (Miscellaneous Provisions) Act 1958 s 42P*).

24. The court may only grant the application if all parties to the proceeding consent, or if there are exceptional circumstances (*Evidence (Miscellaneous Provisions) Act 1958 s 42P*).
25. A party may also apply at any time during the proceeding with leave of the court for a direction that the accused attend by audio-visual link, even if the court has previously refused such an application. The court may also direct that the accused attend by audio-visual link of its own motion, even if the court has previously refused an application to make such a direction (*Evidence (Miscellaneous Provisions) Act 1958 s 42P*).

Last updated: 8 December 2023

9.5 Right to an Interpreter

1. Section 335 of the CPA 2009 states:

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 (CPA 2009 s 335).

2. The *Charter of Human Rights and Responsibilities Act 2006* also provides that an accused in criminal proceedings has the right to an interpreter or communication assistance:

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees -

...

(i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and

(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance (*Charter of Human Rights and Responsibilities Act 2006 s 25(2)*).

3. Finally, at common law, the accused must be able to understand and participate in the proceeding in order to receive a fair trial (*Kunnath v The State* [1993] 1 WLR 1315; *Ebatarinja v Deland* (1998) 194 CLR 444; [1998] HCA 62; *R v Johnson* (1987) 25 A Crim R 433; *R v Saraya* (1993) 70 A Crim R 515; *R v Yasso* [2007] VSCA 306).
4. It therefore seems likely that the right to an interpreter extends to all hearings for all offences.
5. There is a difference between an "interpreter" and a "translator". An "interpreter" is concerned with the spoken word, while a "translator" examines written words. Interpreters must sometimes incorporate meanings from gestures and other non-verbal cues (*Espriella-Velasco v R* (2006) 31 WAR 291; [2006] WASCA 31).

Use of an Interpreter

6. The *Evidence Act 2008* specifies when a witness (including the accused) may give evidence through an interpreter and how deaf or mute witnesses may be questioned or give evidence:

30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

31 Deaf and mute witnesses

- (1) A witness who cannot hear adequately may be questioned in any appropriate way.
 - (2) A witness who cannot speak adequately may give evidence by any appropriate means.
 - (3) The court may give directions concerning either or both of the following—
 - (a) the way in which a witness may be questioned under subsection (1);
 - (b) the means by which a witness may give evidence under subsection (2).
 - (4) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter under section 30 (*Evidence Act 2008* ss 30, 31).
7. It is unclear whether this provision modified the discretion of a judge at common law on when a witness may use an interpreter (*Aslan v Shehade*, Unreported, NSWCA, 17 December 1998; *Mifsud v BHP* [2002] NSWCC 46).
 8. An accused may require an interpreter even if he or she has some knowledge of English. The ability to speak and understand sufficient English for daily life may not be enough to give evidence and understand questions in highly stressful court proceedings (*Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75; *Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507; *Singh v MIMA* (2001) 115 FCR 1; [2001] FCA 1376).
 9. A party is entitled to comment critically on the decision of a witness, including an accused, who uses an interpreter selectively to obtain a tactical advantage in proceedings. The court's decision that a person is entitled to use an interpreter does not preclude the jury from finding that the witness misused that right (*Tsang v DPP (Cth)* (2011) 35 VR 240; [2011] VSCA 336).
 10. Misuse of an interpreter may occur when a person who is fluent in English uses an interpreter in response to some questions to gain additional time to formulate his or her answer (*Tsang v DPP (Cth)* (2011) 35 VR 240; [2011] VSCA 336).
 11. Where the prosecution invites the jury to infer that the accused has 'hidden behind an interpreter', the judge should remind the jury of the need for caution before making credibility findings based on the accused's use of an interpreter. The judge should inform the jury of the difficulties an accused faces when giving evidence and that while he or she may have sufficient fluency for day-to-day life, it may be necessary and legitimate to rely on an interpreter in the stressful context of a criminal trial (*Tsang v DPP (Cth)* (2011) 35 VR 240; [2011] VSCA 336).
 12. Section 30 of the *Evidence Act 2008* appears to contemplate that a witness may not require an interpreter for all aspects of his or her evidence. A witness with some knowledge of English should give as much of his or her evidence in English as possible and may use an interpreter when he or she is no longer able to do so (see, e.g., *Vukelic v Glad Cleaning Service* [2003] NSWCA 253; *Mifsud v BHP* [2002] NSWCC 46).

13. The purpose of an interpreter is to put the accused in the same position he or she would be in if he or she understood the language of the court. The interpreter should interpret the whole proceedings, including the legal arguments of counsel. The court generally may not direct the interpreter to cease interpreting for the accused (*Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; *Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507).
14. If the court allows a person to serve as an interpreter, the interpreter must take an interpreter's oath or affirmation (*Evidence Act 2008* s 22).
15. Schedule 2 of the *Evidence Act 2008* contains a permissible form for the interpreter's oath or affirmation:

Oaths by interpreters

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability. (*Evidence Act 2008* Schedule 2).

16. An interpreter who makes an oath or affirmation on a day does not need to make a further oath or affirmation before acting as an interpreter in any subsequent proceedings in that court on that day (*Evidence Act 2008* s 22).

Adequacy of Interpretation

17. The court may require evidence of qualifications, accreditation and experience if there is any reason to doubt an interpreter's competence (*R v Tran* [1994] 2 SCR 951; *Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507).
18. A court assessing whether the standard of interpretation is adequate should consider the following five factors:
 - Continuity;⁶³⁷
 - Precision or accuracy;
 - Impartiality;
 - Competency;
 - Contemporaneousness (*Espriella-Velasco v R* (2006) 31 WAR 291; [2006] WASCA 31; *R v Tran* [1994] 2 SCR 951).
19. Complete and accurate interpreting of proceedings is vital for a non-English speaking accused. The court may need to intervene if the interpreter does not appear to be interpreting all statements for the accused (see *R v Yasso* [2007] VSCA 306).
20. A high standard of interpretation is also required when the accused is being questioned by police. Errors in interpretation of questions or answers may make the record of interview unreliable by materially affecting the:
 - degree to which the accused can be said to have answered the questions asked;

⁶³⁷ The interpreter must provide a continuous interpretation of the proceedings. It is not acceptable to summarise any discussions (*R v Tran* [1994] 2 SCR 951; *Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507).

- meaning of any admissions made during the interview;
 - impression given to the jury of how the accused responded to police questioning, with consequential effects on the accused's perceived credibility and responsiveness (*NT v R* [2012] VSCA 213).
21. An interpreter does not perform a mechanical task of converting the words of one language into the same words in another language. Some languages do not possess equivalent linguistic expressions. Interpretation will be sufficiently accurate when the interpreter expresses in the other language, as accurately as the language and circumstances permit, the idea or concept that has been expressed (*Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507).
 22. The interpreter should aim to state the evidence as close to word-for-word or idea-for-idea as the situation allows. He or she should speak in the first person, using the words of the accused, and should not add any grammar, syntax, or form that the original statements did not possess (*R v Tran* [1994] 2 SCR 951).
 23. If a second interpreter is not available to check the quality of an interpreter, the court may use the following evidence to help assess an interpreter's competence:
 - responsiveness of interpreted answers to questions asked;
 - coherence of answers;
 - consistency between answers and the accused's case;
 - any evidence of confusion in discussions between the interpreter and the court (*Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507; *Espriella-Velasco v R* (2006) 31 WAR 291; [2006] WASCA 31).
 24. Incompetent interpretation may result in an unfair trial. The court must consider whether the impugned interpretation concerned a matter of substance in the proceeding and whether the accused may have been prejudiced by the lapse in competence. A breach of continuity when the court is discussing administrative arrangements is regrettable, but is unlikely to affect the fairness of the trial. In contrast, inadequate interpretation when the accused is giving evidence undermines the accused's right to put his or her version of the facts before the court (*Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507; *R v Saraya* (1993) 70 A Crim R 515).
 25. A magistrate or jury may need to consider whether unresponsive or incoherent answers are due to difficulties with the interpreter, rather than demonstrating a lack of candour (*Perera v MIMA* (1999) 92 FCR 6; [1999] FCA 507; *MZXPV v Minister for Immigration* [2008] FMCA 1225).

Last updated: 14 May 2013

9.6 Corporate Accused

1. A corporation is a legal person and is subject to the criminal law (see *Salomon v Salomon* [1897] AC 22; *Interpretation of Legislation Act* 1984 s 38; *Crimes Act* 1914 (Cth) s 4B; *Acts Interpretation Act* 1901 (Cth) s 22).
2. A corporation cannot claim the privilege against self-incrimination (*Evidence Act* 2008 s 187; *Corporations Act* 2001 s 1316A; *Environmental Protection Authority v Caltex Refining* (1993) 178 CLR 477; [1993] HCA 74).
3. A statutory corporation is subject to the criminal law, unless it is protected by Crown immunity (*Victorian Railways Board v Snowball* [1983] 1 VR 689).

Attributing Corporate Responsibility

4. A court may need to determine whether the acts of a corporation's officers or employees are attributable to the corporation. Such individuals may also be liable as accessories to the offence (*Tesco Supermarkets v Nattrass* [1972] AC 153; *R v Goodall* (1975) 11 SASR 94; *Hamilton v Whitehead* (1988) 166 CLR 121; [1988] HCA 65).

5. When hearing a prosecution for a novel criminal offence, the court must apply the normal principles of interpretation and consider the language of the Act and its content and policy to determine whether the offence applies to a corporation and, if so, how it operates. The company's internal rules of attribution as well as principles of agency generally provide a sufficient guide to determining when a company performs an act. However, these rules may be inadequate when dealing with some criminal offences (*Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500; *DPP Reference No 1 of 1996* [1998] 3 VR 352; *Tesco Supermarkets v Natrass* [1972] AC 153 per Lord Diplock).
6. One principle that courts have developed to attribute criminal liability to corporations is the doctrine of identification. A corporation must act through living people and the law may treat a person as the embodiment of a corporation, so that his or her acts and state of mind are the acts and state of mind of the company itself. Once a magistrate or jury has determined the facts, it is a question of law whether a person is regarded as the corporation, or merely as the corporation's servant or agent acting for the benefit of the company (*Tesco Supermarkets v Natrass* [1972] AC 153; *Lennard's Carrying Co v Asiatic Petroleum* [1915] AC 705; *H.L. Bolton (Engineering) Co v T.J. Graham & Sons Ltd* [1957] 1 QB 159; *Hamilton v Whitehead* (1988) 166 CLR 121; [1988] HCA 65).
7. Usually, the court will attempt to identify a person who is the corporation's "directing mind and will" for the purposes of the offence. This depends on the facts of the case and the search is often for the individual who would be responsible for the relevant conduct, if there was not a separate corporate personality. While this is a useful test, attribution is not limited to those who are the corporation's directing mind and will (See *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500; *DPP Reference No 1 of 1996* [1998] 3 VR 352).
8. The prosecution must also show that the identified individual acted within the scope of the authority delegated to him or her by the corporation. A corporation must be linked to the actions of the relevant employee, agent or officer (see *Environmental Protection Authority v Caltex Refining* (1993) 178 CLR 477; [1993] HCA 74; *DPP Reference No 1 of 2000* (2001) 11 NTLR 111; [2001] NTSC 91).
9. While senior managers and directors of a corporation are usually identified as its "directing mind and will", the law will not attribute acts by these individuals that intentionally harm the corporation (*Canadian Dredge & Dock Co v R* (1985) 19 DLR (4th) 314).
10. The doctrine of identification only applies in cases involving fraud when an individual:
 - Acts within his or her field of operation within the company;
 - Does not act totally in fraud of the company; and
 - Brings, either by design or result, a benefit to the company (*Canadian Dredge & Dock Co v R* (1985) 19 DLR (4th) 314).
11. When the law attributes the conduct of an individual to a corporation, the corporate liability is direct, rather than vicarious. There is no general principle of vicarious liability in the criminal law.⁶³⁸ Instead, the law treats the corporation as having acted through the individual (*Tesco Supermarkets v Natrass* [1972] AC 153; *Hamilton v Whitehead* (1988) 166 CLR 121; [1988] HCA 65).
12. Conduct of an employee can be attributed to a company even if it was unlawful (*Presidential Security Services v Brilley* (2008) 73 NSWLR 241; [2008] NSWCA 204; *Linehan v Australian Public Service Association* (1987) 67 FLR 412).
13. A court generally cannot aggregate the knowledge of separate officers to impute criminal mens rea to a corporation (*Macquarie Bank v Sixty-Fourth Throne* [1998] 3 VR 133. See also *DPP Reference No 1 of 1996* [1998] 3 VR 352. But compare *Criminal Code (Cth)* s 12.4 concerning negligence).

⁶³⁸ Particular statutory provisions may impose vicarious criminal liability (see, e.g., *Mallan v Lee* (1949) 80 CLR 198 and the explanation of that decision in *Hamilton v Whitehead* (1988) 166 CLR 121; [1988] HCA 65).

14. In some cases, a court will attribute the conduct of a very low-level employee to the company. This will be appropriate where it is required by the terms of the offence and the policy objectives of the statute (*ABC v Wallace* [2006] VSC 171).
15. For some offences, no rules of attribution are necessary. A corporation may commit an offence by failing to "ensure" a certain condition is met or is not met. For such offences, it does not matter where in the corporate structure its internal systems broke down. The company itself commits the offence by failing to make certain that the specified conditions are met or are not met (*ABC v Wallace* (2007) 16 VR 409; [2007] VSCA 138; *R v CIGG* (2006) 14 VR 321; [2006] VSCA 181).

Personal Liability for Acts of Corporation

16. The individual whose acts are attributable to the corporation may also be personally liable as an accessory to the company's wrongdoing. In a passage later approved by the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121; [1988] HCA 65, Bray CJ stated that:

... my view is that the logical consequence of *Salomon's* case ... is that the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done (*R v Goodall* (1975) 11 SASR 94).
17. This general principle is subject to any contrary statutory intention. When a statutory scheme requires a corporation to perform particular acts through an individual, it may not be appropriate to punish both the individual and the corporation for a failure to perform those acts (see, e.g., *O'Connors Management v Currie*, Unreported, WASC, 17 February 1997).

Limits on Corporate Criminal Liability

18. There are now very few offences that, as a matter of statutory interpretation or legal theory, cannot be committed by a corporation. Courts have recognised that corporations can commit offences such as manslaughter and perjury. In practice, however, it is highly unlikely that a corporation would commit sexual offences, or an offence such as bigamy (see *Presidential Security Services v Brilley* (2008) 73 NSWLR 241; [2008] NSWCA 204 per Allsop P; *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run Off Ltd (formerly Orion Insurance Co plc)* [2000] EWCA Civ 71; *Attorney-General's Reference (No 2 of 1999)* [2000] QB 796).
19. While a successor to a statutory corporation does not generally inherit the criminal liability of the predecessor corporation, this is subject to any contrary statutory intention (*Workcover Authority of NSW v Energy Australia* (1998) 85 IR 99).

Corporate Criminal Liability for Federal Offences

20. The Commonwealth Criminal Code contains detailed provisions that set out when the acts of an employee or agent are attributable to a corporation. These provisions apply subject to any contrary intention in specific legislation, such as s 769B of the *Corporations Act 2001* (Cth).
21. Part 2.5 of the Commonwealth Criminal Code is extracted below:

12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

(a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

(b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

22. The effect of these provisions is that the physical elements of an offence are attributable to a corporation when the acts are performed by an employee, agent or officer within the actual or apparent scope of his or her employment or authority (*Criminal Code* (Cth) s 12.2).
23. For fault elements other than negligence, a corporation is liable if the board of directors or a high managerial agent intentionally, knowingly or recklessly engaged in the relevant conduct or authorised or permitted the commission of the offence (*Criminal Code* (Cth) s 12.3).
24. A corporation is also responsible if there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or if the corporation failed to create and maintain a culture that required compliance with the relevant provision (*Criminal Code* (Cth) s 12.3).
25. When determining whether a corporation is negligent, a magistrate or jury may examine whether an individual within the corporation was negligent or it may aggregate the conduct of all the employees and view the conduct of the corporation as a whole. The magistrate or the jury may consider whether there was inadequate supervision of employees, agent or officers, or there were inadequate systems in place for conveying relevant information to the relevant people (*Criminal Code* (Cth) s 12.4).

Procedural Provisions Relating to Corporate Accused

26. The CPA 2009 creates several special procedures that only apply to corporate accused.
27. First, any summons to a corporate accused must contain a notice that if the accused does not appear to answer the summons, the court may proceed to hear and determine the matter in the accused's absence (CPA 2009 ss 15, 175).
28. Secondly, a court may conduct a summary hearing, committal proceeding or a trial in the accused's absence if the court is satisfied that:
 - the accused had notice of the charges and the relevant date of the proceeding; and
 - it is appropriate to do so (CPA 2009 ss 82, 154, 214).
29. The court may conduct a summary hearing for an indictable offence triable summarily in a corporate accused's absence even if the accused has not given its consent. For natural persons, the court cannot hear an indictable matter summarily unless the accused consents (CPA 2009 s 82; c.f. CPA 2009 s 29).
30. Thirdly, if a court conducts a proceeding in a corporate accused's absence, it may dispense with or vary any requirement under Part 3, Part 4 or Part 5 of the Act, depending on the nature of the hearing (CPA 2009 ss 82, 154, 214).
31. Fourthly, if the Magistrates' Court hears an indictable matter summarily in the absence of a corporate accused and finds the accused guilty, then it must cause written notice of any sentence it imposes to be served on the accused (CPA 2009 s 82).

32. Fifthly, when committing a corporate accused to stand trial, the Magistrates' Court must order the accused to appear in the trial court by a legal practitioner or a representative on day the trial is listed to commence, or on any other day specified by the court. It is an offence for the accused to fail to comply with this order (*CPA 2009 ss 144, 252*).
33. Sixthly, if a corporate accused is committed for trial in its absence, the prosecution must, within 14 days, serve on the accused a notice stating:
- (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 (*CPA 2009 s 148*).
34. Seventhly, unless a corporate accused has received a notice under s 148, the DPP must serve a notice containing the following information along with the copy indictment:
- (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 (*CPA 2009 s 173*).
35. Eighthly, a corporate accused may appoint a representative to appear in proceedings on its behalf:

(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 (*CPA 2009* s 334).

Finally, the process for service of documents on a corporation is set out in s 393. See 10.2 Forms of Service.

Last updated: 1 January 2010

10 Service of Documents

1. This chapter discusses service obligation and methods under the *CPA 2009*.

10.1 Electronic Service in Summary Proceedings

1. Section 49 of the *CPA 2009* envisages an electronic database to facilitate service of certain material. The section applies if:
 - the informant is a police officer or an officer of a prescribed agency;
 - the accused's legal practitioner is authorised to electronically access certain material; and
 - it is practicable to electronically transmit the relevant material (*CPA 2009 s 49*).
2. If these three conditions are satisfied, then the informant must upload the preliminary brief, the full brief, material disclosed as part of a continuous disclosure obligation and material requested by the accused to the electronic database. Uploading the material in this way is deemed to be service for the purpose of Division 2 of Part 3.2 of the Act (*CPA 2009 s 49*).
3. If the database technology does not allow the informant to upload a sworn or attested statement for the preliminary brief, the informant may place an unsworn and unattested statement on the database. The informant must then keep a physical copy of the sworn or attested statement in the preliminary brief for 12 months after the charge is determined (*CPA 2009 s 49*).
4. While this database does not currently exist, s 49 provides a legislative basis for a database that may be developed in the future.

Last updated: 5 March 2015

10.2 Forms of Service

1. Section 390 the *CPA 2009* specifies four types of service and creates a presumption for when those service types apply:
 - Personal service must be performed in accordance with s 391;
 - Service on the informant or the prosecution must be performed in accordance with s 392;
 - Service on a company, registered body, incorporated association or other body corporate must be performed in accordance with s 393; and
 - In any other case, a document may be served in accordance with s 394 (*CPA 2009 s 390*).
2. These presumptions may be rebutted by contrary language in the *CPA 2009*, any other Act or the rules of court (*CPA 2009 s 390*).
3. A court may order substituted service if it appears, based on sworn evidence, that service cannot be promptly effected (*CPA 2009 s 397*).
4. Section 399 governs how a party may prove the service of a document:

(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.

5. Attaching a copy of the document served to an affidavit is the best way to identify the document served (*Re Appeal under s 92 of the Magistrates' Court Act 1989*; *Smith v Chalmers* [2003] VSC 236).

Personal Service

6. Section 391 of the CPA 2009 specifies how personal service is effected:

(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, by 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—

(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.

7. Sections 18 and 172 of the Act govern the process for the informant and the DPP to inform the accused where to serve documents:

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.

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.

8. The manner of service on the informant or the DPP is described below:

(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

(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.

(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 (CPA 2009 s 392).

9. The *Electronic Transactions (Victoria) Act 2000* permits service of material electronically if:
- At the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
 - The recipient of the material consents to electronic service (*Electronic Transactions (Victoria) Act 2000* s 8).

Service on a Body Corporate

10. Section 393 of the Act specifies how a person may serve documents on a 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 Incorporations Act 1981*, service of a document on the person may be effected in accordance with section 48 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
 - (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.

Ordinary Service

11. Unless an Act or the rules of court otherwise provide, ordinary service 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

(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

(c) in any other manner agreed by the parties.

(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-

(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 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 (CPA 2009 s 394).

12. Personal service also satisfies the requirements of ordinary service (CPA 2009 s 395).

13. In committal proceedings, the accused may be served by sending the document by electronic communication to the accused's legal practitioner, as stated in the practitioners Notice of Appearance. If a document is served electronically, the original copy of the document must be retained and must be provided on request by the court (*Magistrates' Court Criminal Procedure Rules 2019* r 52, 53).

Last updated: 31 August 2020

10.3 Service Obligations

1. The following sections contain tables that summarise the service obligations that exist under the CPA 2009. These tables list:

- what type of document must be served;
- when the document must be served;
- how service is performed; and
- the relevant CPA 2009 sections for that document.

2. The following tables are written on the assumption that the accused is a natural person, unless the document is specific to a body corporate. If the accused is a body corporate, then substitute service on a corporation for both personal service or ordinary service, wherever appearing.

3. While sections 391 to 394 of the CPA 2009 specify the general types of service, some sections of the Act specify how certain documents are to be served. These specific requirements take precedence over the general service provisions (CPA 2009 s 390).
4. In the Magistrates' Court, affidavits of service must:
 - be signed by the deponent on each page;
 - contain a completed jurat signed by the person before whom it was sworn;
 - contain the name, address and capacity of the person before whom it is sworn;
 - if the document was served personally, state:
 - who served the document and the person's occupation;
 - the time, day and date when it was served;
 - the place of service;
 - how the person to be served was identified; and
 - if the document was not served personally, state with relevant dates the facts of service (*Magistrates' Court Criminal Procedure Rules 2019* r13; *Oaths and Affirmations Act 2018* ss 25–27).

Last updated: 31 August 2020

10.3.1 Commencement of Proceedings

Table 1 – Service obligations for commencement of proceedings

Type of document	Time for service	Type of service	CPA 2009 section
Summons to answer charge	At least 7 days before the fixed date for a filing hearing of an indictable offence; Otherwise at least 14 days before the return date	Personal service	s 16
Summons for a summary offence	At least 14 days before the return date	Personal service, unless informant satisfied that ordinary service is appropriate	ss 16, 17
Summons for a traffic camera offence	At least 14 days before the return date	Personal service or ordinary service	ss 16, 17A
Notice to appear	None applicable	Giving it to the person to be served or, if he or she does not accept service, putting it down in his or her presence and telling him or the nature of the document	s 21
Lapse of notice to appear	Within 7 days of notice to appear lapsing	By prepaid ordinary post addressed to the person at his or her last known address	s 23

1. When determining whether to serve a summons by ordinary service, the informant must consider whether that is appropriate all the circumstances, 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 (CPA 2009 s 17(2)).

2. If summons is served by post to the accused's last known address, the evidence of service must also 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 (CPA 2009 s 17(3)).

3. If the informant relies on any legislation or rules to ascertain the accused's address, he or she should use the language of the legislation or the rules in the evidence of service (*Re Appeal under s 92 of the Magistrates' Court Act 1989; Smith v Chalmers* [2003] VSC 236).

4. It is not necessary to uniquely identify the post box or post office when stating the place of posting. It is sufficient, for example, to state that the document was posted at a named shopping complex (*Re Appeal under s 92 of the Magistrates' Court Act 1989; Smith v Chalmers* [2003] VSC 236).

10.3.2 Summary Proceedings

Table 1 – Service Obligations in Summary Proceedings

Type of document	Time for service	Type of service	CPA 2009 section
Preliminary brief on request	Within 14 days of the accused's request	Personal service, unless informant satisfied that ordinary service is appropriate	Ss 35, 36
Preliminary brief following notice to appear	Within 7 days of filing the charge-sheet	Personal service, unless informant satisfied that ordinary service is appropriate	s 24
Full brief on request	At least 14 days before contest mention hearing or, if there is no contest mention hearing, at least 14 days before the summary hearing	Personal service, unless informant satisfied that ordinary service is appropriate	ss 39, 40
Continuous disclosure by informant	As soon as practicable after the material comes into the informant's possession	Ordinary service	s 42
Expert evidence notice	At least 7 days before contest mention hearing or, if there is no contest mention hearing, at least 7 days before the summary hearing. If it is not available at that time, as soon as possible after it becomes available	Service on informant or DPP	s 50
Alibi notice	At least 7 days before contest mention hearing or, if there is no contest mention hearing, at least 7 days before the summary hearing. If it is not available at that time, as soon as possible after it becomes available	Service on informant or DPP	s 51
Transcript of pre-recorded evidence to the accused	At least 14 days before the contest mention hearing or, if there is no contest mention hearing, the summary hearing	Personal service on the accused or ordinary service on practitioner representing the accused	ss 367, 368
Application for leave to cross-examine on the sexual activities of the complainant	At least 7 days before the summary hearing	Service on informant or DPP	ss 342, 344
Sentence for summary offence on absent natural person	None specified	Written notice to the person at the address of the person listed on the register kept under s 18 of the <i>Magistrates' Court Act 1989</i>	s 87
Sentence on absent corporate accused	None specified	Service on a body corporate	s 82

Notice of application for rehearing on informant	Within 7 days of filing the notice	Service on informant or DPP	s 90
Notice of application for rehearing on accused	Within 7 days of filing the notice	Personal service	s 90
Application for stay of licence suspension or cancellation	At least 7 days before applying for the stay	Service on informant or DPP	s 91

1. When determining whether to serve a preliminary brief or full brief by ordinary service, the informant must consider whether that is appropriate all the circumstances, 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 the charge (CPA 2009 ss 36(2), 40(2)).

Last updated: 19 July 2010

10.3.3 Committal Proceedings

Table 1 – Service obligations in Committal Proceedings

Type of document	Time for service	Type of service	CPA 2009 section
Notice of compulsory examination order	None specified	Personal service on the person to whom the order relates and ordinary service on the accused	s 105
Hand up brief to accused	At least 42 days before committal mention hearing, unless court fixes other period or accused consents to shorter service	Personal service, unless informant satisfied that ordinary service is appropriate	ss 107, 108
Hand up brief to DPP	Within 7 days of service on accused	Service on informant or DPP	s 109
Continuous disclosure	As soon as practicable after material comes into informant's possession	Ordinary service	s 111
Plea brief to accused	Any time before service of full brief	Ordinary service	s 116
Plea brief to DPP	Within 7 days of service on accused	Service on informant or DPP	s 116
Election to stand trial following hand-up brief	At any time after service of hand-up brief	Service on informant or DPP	s 143
Application for leave to cross-examine on the sexual activities of the complainant	At least 7 days before the committal	Service on informant or DPP	ss 342, 344
Notice of committal on absent corporate accused	Within 14 days of committal	Service on a body corporate	s 148

1. When determining whether to serve a hand-up brief by ordinary service, the informant must consider whether that is appropriate all the circumstances, 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 (CPA 2009 s 108(3)).

Last updated: 19 July 2010

10.3.4 Trial on Indictment

Table 1 – Service obligations in Trials on Indictment

Type of document	Time for service	Type of service	CPA 2009 section
Copy of indictment and, if the DPP does not have notice that the accused has legal representation, notice in prescribed form concerning legal representation	As soon as practicable after filing of indictment	Ordinary service if indictment follows committal and personal service for direct indictments	s 171
Extra notice for corporate accused	With copy of indictment	With copy of indictment	s 173
Summons following direct indictment	At least 14 days before date specified in summons	Personal service	s 175
Discontinuance by DPP	None specified	Ordinary service	s 177
Summary of prosecution opening and notice of pre-trial admissions	At least 28 days before trial is due to commence	Ordinary service	s 182
Defence response to prosecution opening and notice of pre-trial admissions	At least 14 days before trial is due to commence	Service on informant or DPP	s 183
Continuous disclosure	As soon as practicable after material comes into the prosecution's possession or after filing the direct indictment	Ordinary service	s 185
Notice of additional evidence	None specified, though continuous disclosure obligation may also apply	Ordinary service	s 188
Expert evidence notice	At least 14 days before trial is due to commence, or if it is not available at that time, as soon as possible after it comes into existence	Service on informant or DPP	s 189
Alibi notice	Within 14 days of committal for trial or service of direct indictment	Service on informant or DPP	s 190

Submissions of a party raising a pre-trial issue to be resolved without a hearing	At least 10 days before the trial is due to commence	Service on informant or DPP, or ordinary service, as appropriate	s 201
Submissions in reply for pre-trial issue to be resolved without a hearing	Within 5 days of service of submissions of party raising issue	Service on informant or DPP, or ordinary service, as appropriate	s 201
Response to reply for pre-trial issue to be resolved without a hearing	Within 3 days of service of submissions in reply	Service on informant or DPP, or ordinary service, as appropriate	s 201
Prosecution notice of intention to tender recording of complainant giving evidence	At least 21 days before the trial or hearing is due to commence	Ordinary service	ss 379–381
Application for leave to cross-examine on the sexual activities of the complainant	At least 14 days before the trial is listed to commence or before the special hearing	Service on informant or DPP	ss 342, 344
Transcript of pre-recorded evidence-in-chief to the accused	At least 14 days before the trial is listed to commence or before the special hearing	Personal service on the accused or ordinary service on practitioner representing the accused	ss 367, 368

1. Service under s 391(2)(c) (leaving the document at the recipient's last known place of residence with a person who appears to be over the age of 16) is not valid service for a summons in proceedings in the County Court (*County Court Criminal Procedure Rules 2019* r 1.10).

10.3.5 Appeals

Table 1 – Service obligations on Appeals

Type of document	Time for service	Type of service	CPA
Notice of appeal by offender from Magistrates' Court to County Court	Within 7 days of filing	Service on informant or DPP	s 255
Notice of appeal by DPP from Magistrates' Court to County Court	Within 7 days of filing	Personal service	s 258
Notice of appeal by DPP from Magistrates' Court to County Court for failure to fulfil undertaking	Within 14 days of filing	Personal service	s 261
Appeal from Magistrates' Court to Supreme Court or question of law	Within 7 days of filing	Personal service or service on informant or DPP, as appropriate	s 272
Crown appeal from County or Supreme Court to Court of Appeal against sentence	Within 7 days of filing	Personal service	s 288
Crown appeal from County or Supreme Court to Court of Appeal against sentence for failure to fulfil undertaking	Within 14 days of filing	Personal service	s 292
Review of refusal to certify issue for interlocutory appeal	• If the trial has not commenced, within 2 days of filing; or • If the trial commences within 10 days, within 2 days of refusal to certify; or • If the trial has commenced, within 2 days of refusal to certify.	Service on informant or DPP, or ordinary service, as appropriate	s 296
Commencement of interlocutory appeal	• If the trial has not commenced, within 2 days of filing; or • If the trial commences within 10 days, within 2 days of refusal to certify; or • If the trial has commenced, within 2 days of refusal to certify	Service on informant or DPP, or ordinary service, as appropriate	s 298

1. The Court of Appeal or the Registrar of Criminal Appeals may extend the time for service of a notice of appeal or a notice of application for leave to appeal (CPA 2009 s 313).

2. When the offender initiates an appeal or application for leave to appeal against conviction or sentence from the County or Supreme Court to the Court of Appeal, the Registrar of Criminal Appeals must provide a copy of the notice of application for leave to appeal to the DPP within 7 days. This replaces any service obligations on the offender (See CPA 2009 ss 275, 279, 284). This does not apply to interlocutory appeals by an accused. Instead, the accused must serve the application for leave on the DPP (CPA 2009 ss 296, 298).

Last updated: 19 July 2010

11 Empanelment and Management of Juries

1. Charges for indictable offences must be heard and determined through a trial by jury unless the court allows the matter to be determined summarily (*Criminal Procedure Act 2009* ss 27, 210). See 2.5 Summary and Indictable Offences for information on when an indictable offence may be heard summarily.
2. The common law regards the jury system as "the community's guarantee of sound administration of criminal justice" (*Brown v R* (1986) 160 CLR 171; [1986] HCA 11).
3. In *Kingswell v R* (1985) 159 CLR 264; [1985] HCA 72, Deane J explained that:

The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolate (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.
4. Juries also determine whether a person is fit to stand trial and whether a person who is not fit to stand trial committed an offence (*Juries Act 2000* s 3).

Last updated: 1 March 2017

11.1 Selecting a Jury

1. The process of selecting a jury begins when the Victorian Electoral Commission prepares jury rolls on the request of the Juries Commissioner. The rolls are prepared by random selection of as many names as requested by the Juries Commissioner from the electoral roles in a jury district (*Juries Act 2000* ss 18, 19).
2. From time to time, the Juries Commissioner sends a questionnaire to people on the jury roll. The Juries Commissioner uses the answers to the questionnaire to determine whether a person is qualified and liability for jury service (*Juries Act 2000* ss 20, 21).
3. A person is qualified and liable for jury service if:
 - he or she is aged 18 or older;
 - he or she is enrolled on the Victorian electoral roll for the Legislative Assembly and the Legislative Council; and
 - he or she is not otherwise excluded from service by the Act.

4. Schedule 1 of the Act sets out the basis on which a person may be disqualified from jury service. A person may be disqualified due to criminal convictions, pending criminal charges or bankruptcy (*Juries Act 2000* s 5, Schedule 1).
5. Schedule 2 specifies that certain people are ineligible for jury service, including:
 - legal practitioners;
 - a police officer;
 - judicial officers;
 - the Electoral Commissioner;
 - people with an intellectual disability within the meaning of the *Disability Act 2006*;
 - anyone who is unable to communicate in or adequately understand English (*Juries Act 2000* Schedule 2).
6. The Juries Commissioner may, on the application of a person, defer that person's jury service, or may temporarily or permanent excuse the person from service. The Commissioner must communicate his or her decision to the person and the person may appeal against the decision to the Supreme Court or County Court (*Juries Act 2000* ss 7, 8, 9, 10).
7. In the absence of express statutory provisions, there is no power for a judge to empanel an interpreter for a juror, or allow a non-juror to be present during jury deliberations. At least in Queensland (and likely also in Victoria), this means that a person who is deaf is not eligible for jury service (*Lyons v Queensland* (2016) 259 CLR 518; [2016] HCA 38 at [1], [33]–[36]).
8. A judge of the County or Supreme Court should not be involved in deciding whether to excuse a potential juror until the Juries Commissioner has made his or her decision (*R v Crown Court and Guildford; Ex parte Siderfin* [1990] 2 QB 683).
9. The Juries Commissioner compiles jury lists from the jury roll as often as necessary to provide sufficient numbers to constitute a jury panel for a court or a jury pool from which a panel may be drawn. The jury list is sent to the Chief Commissioner of Police to determine whether any person on the list has a disqualifying conviction (*Juries Act 2000* s 5, s 26, Schedule 1).
10. Summons are sent by the Juries Commissioner to some or all of the people on the jury list at least 10 days before the person is required to attend for jury service. The summons must specify the date, time and place where the person is required to attend for jury service (*Juries Act 2000* s 27).

Jury Pool and Jury Panel

11. People who attend the court in response to the summons form the jury pool. The Juries Commissioner or a pool supervisor may discharge a member of the pool if he or she is satisfied that the pool member is not available for a particular trial due to the expected length of that trial. The discharged pool member may be allocated to another jury pool (*Juries Act 2000* s 29; c.f. *R v Cavkic & Ors* (2007) 14 VR 389; [2007] VSC 47).
12. The trial judge must notify a pool supervisor of the need for a jury panel. The pool supervisor assigns part or all of a pool to form a jury panel for the trial (*Juries Act 2000* s 30).
13. The trial judge must authorise a person to assist in calling the panel and selecting jurors. This authorisation is usually given to the judge's associate, who becomes known for the purposes of the Act as the "proper officer". The proper officer may split the panel into two or more parts if this is necessary or expedient (*Juries Act 2000* s 30).
14. It is not necessary for the judge to announce his or her authorisation of the proper officer in open court (*R v Smith* [2004] VSC 99).

15. Following amendments introduced by the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* on 2 January 2018, the *Juries Act 2000* contains a presumption that panel members will be identified in court by number, rather than name (see *Juries Act 2000* s 30A(1)). Previously, the default position was that panel members were identified by name, unless the judge ordered that names not be read out (*Juries Act 2000* s 31, as in force before 2 January 2018).
16. Identifying numbers are assigned by the Juries Commissioner and recorded on the document prepared under *Juries Act 2000* s 29(3) that lists the person's identifying number, occupation and name.
17. A court may, if it considers that it is in the interests of justice to do so, direct that members of the panel be identified by name (*Juries Act 2000* s 30A(2)).
18. Historically, there were differing approaches among judges on whether to address jurors by name or by number.
19. Some judges believed that calling jurors by name was the traditional approach and that the court should only depart from that approach if there is a reason to do so in the circumstances of the case. Knowledge of a prospective jurors' name is one of the few pieces of information an accused receives before exercising the right of challenge. In addition, jurors may believe that the use of numbers indicates that the accused is dangerous and that anonymity is necessary for their safety.
20. Other judges believed that the use of numbers was the modern approach and may help reassure jurors. Appropriate directions could remove any possibility of prejudice to the accused.
21. Following the introduction of *Juries Act 2000* s 30A, judges will need to consider whether the matters which led to identifying prospective jurors by name meet the test in s 30A(2) of it being in the interests of justice to identify prospective jurors by name rather than the default position under the Act of identifying jurors by number.
22. Identification of prospective jurors by numbers is compatible with the constitutional guarantee to a trial by jury in Commonwealth matters. Failure to disclose the names of jurors does not place an improper fetter on the exercise of the right to make peremptory challenges (*R v Ronen* [2004] NSWCCA 176).
23. The panel (or part thereof) must assemble in court and the proper officer must call out the numbers (or if the judge makes a direction under s 30A(2), the names) of all members of the panel and record who is present. To avoid confusion, if the panel is being called by name, and two or more people in the panel have the same name, the proper officer must call out their occupation and, if they also have the same occupation, must also call out their identifying number (*Juries Act 2000* s 31).
24. The composition of a jury will not necessarily be fatally flawed if the wrong person responds to a name that is called. The effect of this irregularity may depend on whether the person who responded was part of the jury pool (See *R v Mellor* (1858) 1 Dearsley & Bell 468; *R v Ronen* [2004] NSWCCA 176; *Juries Act 2000* s 6).
25. Once the proper officer has recorded the identity of all panel members who are present, the court must inform the panel of the following information:
 - the type of offences;
 - the name of the accused;
 - the names of the principal witnesses expected in the trial;
 - the estimated length of the trial; and
 - any other relevant information (*Juries Act 2000* s 32).
26. For a model charge on these matters, see 1.2 Jury Empanelment in the Victorian Criminal Charge Book.
27. The information specified in section 32 must be presented to any supplementary jurors added to the panel under section 41.

28. There is no general requirement that the judge must inform the jury panel of information such as the name of the victim or the date and place of the alleged offence. Instead, the judge may consider whether that information is relevant in the particular circumstances of the case (*Caruso v R* [2012] VSCA 138).
29. If the judge knows a member of the jury, he or she should consider whether to remove that person from the panel. Attitudes vary concerning whether judges are comfortable with friends or acquaintances being on the jury.
30. In addition to the principal witnesses, the judge should also inform the panel of other people who are likely to be prominent in the case, such as a co-accused who will be identified but is not being prosecuted at that time. Previously, judges achieved this by reading the names to the panel. It is now increasingly common for the judge to distribute a written list of names. This allows potential jurors to carefully consider whether they know anyone involved in the case and whether they should apply to be removed. The judge must ensure that any written list is collected from the panel before it leaves the courtroom.
31. The judge should not seek or take excuses from the panel before he or she has informed the panel of the five matters listed above. Any interruption to the empanelment process may be a fundamental irregularity in the course of the trial (*DPP v Dupas (Ruling No 8)* [2007] VSC 260).
32. Once the judge has informed the panel members of the general details of the case, he or she must ask if any panel members wish to be excused. The court may exempt a person from service if the person:
- (a) will be unable to consider the case impartially; or
 - (b) is unable to serve for any other reason (*Juries Act 2000* s 32).
33. The standard practice is for panel members to apply to the judge to be excused orally. Judges may, however, allow panel members to apply in writing. The accused does not have the right to know the identity of a panel member who sought to be excused, the basis for the application or the judge's reasons for rejecting the application (*R v Lewis* (2000) 1 VR 290; [2000] VSCA 140).
34. Jurors must be impartial as between the Crown and the accused on whether the accused committed the offence charged. In cases involving offences that are committed as part of a political agenda, the judge should invite panel members to apply to be excused if they have strong views on that agenda, regardless of whether those views are favourable or unfavourable to the accused (*R v Knight* [2004] VSCA 48).
35. A judge does not need to excuse a potential juror solely because he or she recognises one of the witnesses. The judge should ask the prospective juror about his or her relationship with the witness and must determine whether the prospective juror is capable of considering the case impartially (*McCormick v R* [2007] NSWCCA 78; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63).
36. Panel members who are excused from serving on the jury are returned to the jury pool and may be assigned to another panel unless the court orders otherwise (*Juries Act 2000* s 32).
37. The judge may not take excuses from jurors at any later stage in the trial. Removal of jurors later in the proceeding is by using the power to discharge individual jurors under s 43 of the Act. If no evidence has been led when the juror is discharged, the judge should consider discharging the whole jury and commence a new empanelment. This is because there is no power to replace a juror with another member from the panel once the accused is placed in the charge of the jury (*R v Panozzo & Iaria* (2003) 8 VR 548; [2003] VSCA 184; *Pollock & Cameron v The Queen* [2020] VSCA 218).

Supplementary Jurors

38. The court may direct the Juries Commissioner to supplement a jury panel when it appears that there are insufficient people on the panel in order to form a jury. The court may direct the Juries Commissioner on the manner in which the jury panel is to be supplemented and the number of supplementary jurors required (*Juries Act 2000* s 41).

39. A jury panel may not be constituted solely by supplementary jurors (*R v Solomon* [1958] 1 QB 203).

Juror selection

40. Once the proper officer has recorded whether all members of the panel are present and the court has taken excuses, the court can begin to empanel the jury. The proper officer randomly selects people from the panel. He or she calls out that person's number (or name, if the judge has made a direction under *Juries Act 2000* s 30A(2) that panel members be identified by name rather than number) and his or her occupation. At this stage, the panel member moves to take his or her seat in the jury box and may be challenged or stood aside (see below). This process continues until the required number of jurors is selected (*Juries Act 2000* s 36).
41. Where the judge directs under *Juries Act 2000* s 30A(2) that panel members be identified by name and there are two or more people in the panel with the same name and occupation, the proper officer must also call out the relevant person's identifying number (*Juries Act 2000* s 36).
42. The court may seek further information from a panel member who has listed his or her occupation as "unemployed" or "retired" by asking the juror to identify his or her previous occupation (*DPP v Dupas (Ruling No 6)* [2007] VSC 257).
43. Panel members do not need to provide further details for other generic occupations, such as "consultant", "student" or "supervisor" (*DPP v Dupas (Ruling No 6)* [2007] VSC 257).
44. An accused is entitled to know a juror's occupation before deciding whether to exercise his or her right to challenge a juror (*R v Dooley* [1972] VR 55).
45. Historically, the standard practice in Victoria has been that when prospective jurors are called, they "parade" past the dock before moving to the jury box. This provides the accused with an opportunity to observe the appearance and demeanour of the potential juror, which is essential information for exercising the power to make a peremptory challenge (*Theodoropoulos v R* (2015) 51 VR 1; [2015] VSCA 364).
46. Following amendments introduced by *Jury Directions and Other Acts Amendment Act 2017* that commenced on 30 August 2017, *Juries Act 2000* s 39, the Act confirms that the accused must have a reasonable opportunity to exercise peremptory challenges, and that this includes a reasonable opportunity to view the face of each potential juror before that person is seated. However, this does not require a parade past the dock (*Juries Act 2000* s 39(2A)–(2C)).
47. A party may not consent to trial by an invalidly constituted jury. The right to trial by jury exists for the benefit of both the accused and the community and an irregularity in the formation of the jury will be a substantial miscarriage of justice (*R v Panozzo & Iaria* (2003) 8 VR 548; [2003] VSCA 184; *Pollock & Cameron v The Queen* [2020] VSCA 218).

Challenge to the Array

48. The accused may challenge the entire jury panel on the basis that it has not been compiled in accordance with the procedures in the *Juries Act* or if there is any irregularity in the formation of the panel. The basis for the challenge should be expressed in writing (*R v Badenoch* [2004] VSCA 95; *R v Thomas* [1958] VR 97; *R v Diack* (1983) 19 NTR 13; *R v Grant & Lovett* [1972] VR 423).
49. It is not necessary for the panel to contain a perfect cross-section of society, or to contain particular members of the accused's social, economic or ethnic group (*R v Grant & Lovett* [1972] VR 423; *R v Thomas* [1958] VR 97; *R v Badenoch* [2004] VSCA 95).
50. Misconduct by any person that does not affect the composition of the jury pool or jury panel does not provide a basis for a challenge to the array. For example, the previous practice of the Chief Commissioner of Police of sharing jury lists with the prosecution was illegal, but did not provide a basis for challenging the array (see *R v Thomas* [1958] VR 97; *Katsuno & Ors v R* (1999) 199 CLR 40; [1999] HCA 50).
51. A challenge to the array must be made before the jury is empanelled and sworn (*R v Grant & Lovett* [1972] VR 423).

Challenge to Individual Jurors

52. The prosecution and the accused can each challenge a number of individual jurors either for cause or without cause. These rights are discussed in the following sections.

Challenge for Cause

53. The Crown and the accused may challenge any number of potential jurors with a valid reason (a "challenge for cause") (*Juries Act 2000* s 37).
54. A challenge for cause may be upheld if:
- there is a risk that a potential juror is not impartial as between the accused and the Crown; or
 - a potential juror is not qualified to sit as a juror (*R v Bush* (1993) 43 FCR 549; *R v Judge of District Courts at Brisbane & Shelly; Ex-parte Attorney-General (Qld)* [1990] 1 Qd R 170).
55. The party challenging a potential juror for cause must disclose a prima facie basis for the challenge. A party may not invoke a challenge for cause to provide the opportunity to cross-examine the potential juror as part of a fishing expedition (*R v Manson* [1974] Qd R 191; *R v Chandler (No 2)* [1964] 2 QB 322; *R v Stuart & Finch* [1974] Qd R 297; *The People v Lehman (No 2)* [1947] Ir R 137).
56. Courts often set a high standard before allowing potential jurors to be cross-examined as part of a challenge for cause. Potential jurors who have not sought to be excused are unlikely to confess bias in the course of cross-examination. Questioning potential jurors is therefore an unreliable means of detecting bias (*Bush v R* (1993) 43 FCR 549; *Murphy v R* (1989) 167 CLR 94; [1989] HCA 28).
57. Adverse media coverage may provide a prima facie basis for challenging a juror for cause in rare and exceptional circumstances. There must be some evidence that the juror is likely to be aware of the coverage and likely to have been influenced by it (*Bush v R* (1993) 43 FCR 549; *Murphy v R* (1989) 167 CLR 94; [1989] HCA 28).
58. A potential juror who is aware of the issues in the case only needs to be discharged if he or she is unable to deliver a true verdict according to law based on the evidence in the case. He or she may hold tentative views, provided he or she is able to put those views aside when assessing the evidence (*Murphy v R* (1989) 167 CLR 94; [1989] HCA 28; *R v Giles* [1959] VR 583; *R v Hubbert* (1975) 29 CCC (2d) 279).
59. A challenge for cause may not be upheld on the basis that the accused does not wish to be tried by that potential juror. The accused may use peremptory challenges to influence the composition of the jury, but may not use a challenge for cause to give effect to his or her biases (*R v Judge of District Courts at Brisbane & Shelly; Ex-parte Attorney-General (Qld)* [1990] 1 Qd R 170).
60. A challenge for cause must be determined by the trial judge and not by any members of the jury (*R v Hall* [1971] VR 293).
61. If the challenge is upheld, the challenge juror must be returned to the jury pool and may be selected in another trial (*Juries Act 2000* s 40).

Peremptory Challenges

62. Each accused in a trial is also able to challenge a number of potential jurors without providing any reason (a "peremptory challenge"). Where there are multiple accused, the peremptory challenges of each accused are exercised separately and an accused has:
- 3 peremptory challenges, if he is the only accused arraigned in the trial;
 - 2 peremptory challenges if there are 2 or more accused arraigned in the trial (*Juries Act 2000* s 39).
63. The number of peremptory challenges was reduced on 2 January by the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017*.
64. A peremptory challenge can be exercised by:

- (a) The accused;
- (b) The legal practitioner for the accused;
- (c) A clerk of the legal practitioner of the accused (*Juries Act 2000* s 39(3)).

65. The challenge must be exercised after the potential juror is called and before he or she takes his or her seat.⁶³⁹ The judge should ensure that the accused understands that he or she has a right to challenge potential jurors and knows how to exercise that right (*Juries Act 2000* s 39; *Johns v R* (1979) 141 CLR 409; *R v Harrington & Hanlon* (1976) 64 Cr App R 1).
66. Historically, Victorian practice was that the accused personally exercised the right of challenge and very good reasons were required before the accused could delegate this right to challenge (see, e.g., *R v Sonnet* (2010) 30 VR 519; [2010] VSCA 315). Following the amendment of the *Juries Act 2000* by the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* on 2 January 2018, the accused's legal practitioner or a clerk of the accused's legal practitioner can exercise the right to challenge jurors (*Juries Act 2000* s 39(3)).
67. The right to make peremptory challenges is a fundamental right that allows the accused to influence the composition of the jury. The accused does not need to justify the challenge in any manner and may exercise the right solely on the basis that he or she does not wish to be tried by that potential juror (*Johns v R* (1979) 141 CLR 409).
68. The right to exercise peremptory challenges must not be infringed or be subject to interference (*R v Cherry* (2005) 12 VR 122; [2005] VSCA 89; *Johns v R* (1979) 141 CLR 409).
69. Section 39 of the *Juries Act 2000* was amended by the *Jury Directions and Other Acts Amendment Act 2017* on 30 August 2017 to add the following three subsections:

(2A) Each person arraigned must be given a reasonable opportunity to make each peremptory challenge that is allowed under subsection (1).

(2B) Without limiting subsection (2A), each person arraigned must be given an adequate opportunity to view the face of the potential juror before the potential juror is seated.

(2C) Nothing in this section requires a potential juror to walk past each person arraigned.

Note

The procedure of requiring potential jurors to walk past each person arraigned is known as a jury parade.

70. These amendments are designed to codify the common law (Victoria, Parliamentary Debates, Legislative Assembly, Wednesday 22 February 2017, 299 (Mr Pakula (Attorney-General))).
71. Historically, the standard practice in Victoria has been that when prospective jurors are called, they “parade” past the dock before moving to the jury box. This provides the accused with an opportunity to observe the appearance and demeanour of the potential juror, which is essential information for exercising the power to make a peremptory challenge (*Theodoropoulos v R* (2015) 51 VR 1; [2015] VSCA 364).
72. Prior to the amendments to section 39, courts held that while the “parade” was not a mandatory practice, any alterations to the practice must provide an alternate, adequate, opportunity to see the faces of potential jurors. One alternative would be for potential jurors to stand up from their seat in the public gallery and turn to face the dock before walking to the jury box (*Theodoropoulos v R* (2015) 51 VR 1; [2015] VSCA 364 at [93]).

⁶³⁹ The right of challenge is usually exercised by stating “challenge”.

73. Victorian practitioners have a practice that they do not exercise the right to challenge once the prospective juror enters the jury box, as there is no way of knowing when the prospective juror will sit down. Therefore, the accused's opportunity to challenge will, as a practical matter, run from when the prospective juror looks at the accused until the prospective juror enters the jury box (*Daniels v R* [2017] VSCA 159 at [94]).
74. When a judge adopts the 'turn and face the dock' procedure, the judge must ensure that the accused has an adequate time to exercise the right to challenge. Where a prospective juror only looks at the accused for one or two seconds, and is close to the jury box, there is a risk that the accused will not have sufficient time to receive assistance from his or her solicitor and then decide whether to exercise the right to challenge (*Daniels v R* [2017] VSCA 159 at [69]–[98]).
75. Another alternative is for jurors to walk to a position in the courtroom which provides an adequate opportunity for the accused in the dock and then turn to face the dock for a period of time, such as five seconds. While this may highlight the fact that the accused is in the dock and involve an element of confrontation between the prospective juror and the accused, these matters do not make the process unfair (*Beqiri v R* [2017] VSCA 112 at [26]–[53]).
76. Failure to provide an adequate opportunity to see the faces of potential jurors is a fundamental interference with the right to exercise peremptory challenges and is a fundamental defect in the running of a trial (*Theodoropoulos v R* (2015) 51 VR 1; [2015] VSCA 364; *Cook v R* [2016] VSCA 233).
77. It is customary in Victoria for the judge's associate to inform the accused when he or she has one peremptory challenge left (see *R v Cherry* (2005) 12 VR 122; [2005] VSCA 89).
78. An erroneous statement on the number of peremptory challenges remaining may fetter the free exercise of the right. This may be a fundamental defect in the empanelment process and require the discharge of all jurors empanelled at that point back into the jury panel (*R v Cherry* (2005) 12 VR 122; [2005] VSCA 89).
79. Once the accused exercises a peremptory challenge, he or she may not be able to withdraw that challenge without leave of the court (*Johns v R* (1979) 141 CLR 409 per Gibbs J).
80. The judge has no power to grant a party additional peremptory challenges (*R v Panozzo & Iaria* (2003) 8 VR 548; [2003] VSCA 184).

Stand Aside

81. The Crown may stand aside a number of potential jurors equal to the number of peremptory challenges available to the accused. That is:
- 3 potential jurors, if there is only one accused arraigned in the trial;
 - 2 potential jurors for each accused arraigned in the trial, if there are three or more accused (*Juries Act 2000* s 38).
82. A potential juror stood aside by the Crown returns to the jury pool and must not be empanelled on the jury in that trial (*Juries Act 2000* s 38).
83. The number of jurors who can be stood aside was reduced on 2 January by the *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017*.

Right of Challenge and Fitness to Stand Trial

84. There is no right to peremptorily challenge or stand aside jurors in an investigation into fitness to stand trial under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. Challenges are, however, permitted in special hearings under that Act (*Juries Act 2000* s 39).

Removal by the Judge

85. The judge may order, on his or her own motion, that a person shall not perform jury service. The order should specify the period in which the person is relieved from jury service and this may be for:
- The whole or part of the jury service period;

- A longer period specified by the court; or
 - Permanently (*Juries Act 2000* s 12).
86. The Juries Commissioner may apply to the judge for an order under s 12 of the Act if the Commissioner believes that a person may not be able to perform the functions of a juror (*Juries Act 2000* s 12).
87. The power of a judge to stand a potential juror aside may be exercised after that person has been selected as a juror and before he or she has been sworn (*R v Searle* [1993] 2 VR 367).
88. The following are some circumstances in which it may be appropriate to stand a person aside:
- where the person is incapable of participating in the trial, due to disability, drunkenness or inattentiveness (*R v Mansell* (1857) 120 ER 20; *R v Searle* [1993] 2 VR 367);
 - where the person indicates that he or she would be incapable of delivering a true verdict (*R v Mansell* (1857) 120 ER 20);
 - where a party belatedly realises that a challenge for cause should have been made (*R v Searle* [1993] 2 VR 367);
 - where the person was a member of an earlier jury which was discharged without verdict on an earlier trial of the accused (*R v Cullen* [1951] VLR 335).
89. The court should not make an order under s 12 in order to influence the composition of the jury (*R v Ford* [1989] QB 848; *R v Thomas* (1989) 88 Cr App R 370).

Last updated: 15 December 2021

11.2 Extra Jurors

1. The court must empanel at least 12 jurors in all criminal trials and may empanel up to 15 jurors (*Juries Act 2000* ss 22, 23).
2. In deciding whether to order additional jurors, the court must consider:
 - (a) the length of the trial;
 - (b) the nature of the trial;
 - (c) any other factor that may result in a juror being discharged during the trial (*Juries Act 2000* s 23, as introduced by *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* on 2 January 2018).
3. A judge should only exercise the power to empanel additional jurors when the nature of the trial creates a risk that the number of available jurors will be reduced during the course of the trial. The power should not be used simply as a matter of prudence in short trials, where there is evidence that may be unavailable in a later trial if the jury is discharged. The process of balloting is potentially unfair to the excluded jurors and should not be used unless necessary (*DPP (Cth) v Thomas* [2006] VSC 61).
4. A judge does not need to make a formal order for additional jurors. The preferable approach is, however, for a formal pronouncement that additional jurors are empanelled under s 23 of the Act (*R v Ng* (2002) 5 VR 257; [2002] VSCA 108; *Wu v R* (1999) 199 CLR 99; [1999] HCA 52).

5. If additional jurors are empanelled, the jury must be reduced to 12 jurors before the jury retires to consider its verdict. This is achieved by conducting a random ballot of juror names or numbers. The jury foreperson is exempt from being removed from the jury by this ballot process (*Juries Act 2000* s 48).⁶⁴⁰
6. A fresh ballot must be conducted each time the jury is required to retire to consider its verdict (*Juries Act 2000* s 48).
7. In practice, it is generally unnecessary to conduct more than one ballot. Multiple ballots may have previously been necessary when the jury retired to give effect to a directed acquittal or mid-trial plea of guilty to some charges.⁶⁴¹ It is now only likely if the judge splits his or her charge to the jury and directs the jury to return a verdict on some, but not all, charges on the indictment. This procedure is exceptionally unusual and, if there are extra jurors, s 48 of the *Juries Act 2000* means it is likely that a differently composed jury would consider different charges.

Last updated: 2 January 2018

11.3 Jury Oath or Affirmation

1. On empanelment, the court must swear jurors in accordance with the following oath or affirmation from schedule 3 of the *Juries Act 2000* (see *Juries Act 2000* s 42):

Oaths by jurors—Criminal Trial

You (or, if more than one person takes the oath, you and each of you) swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that you will faithfully and impartially try the issues between the Crown and [name of accused] in relation to all charges brought against [name of accused] in this trial and give a true verdict according to the evidence.

Affirmations by jurors—Criminal Trial

You (or, if more than one person affirms, you and each of you) solemnly and sincerely declare and affirm that you will faithfully and impartially try the issues between the Crown and [name of accused] in relation to all charges brought against [name of accused] in this trial and give a true verdict according to the evidence.

2. The relevant court official must inform the jurors that they may choose to take an oath or make an affirmation, unless the official is satisfied that the jurors are already aware of this choice (*Evidence (Miscellaneous Provisions) Act 1958* s 102). An affirmation has the same effect for all purposes as an oath (*Evidence (Miscellaneous Provisions) Act 1958* s 101).
3. It is not necessary to use a religious text when taking an oath, and the oath is valid even if the person taking the oath does not have a religious belief (*Evidence (Miscellaneous Provisions) Act 1958* s 103).
4. The *Evidence (Miscellaneous Provisions) Act 1958* no longer contains any set response to the oath or affirmation. Instead, a juror may respond in any manner that indicates that he or she intends for his or her conscience to be bound by the oath or affirmation (see *R v Benfield* [1997] 2 VR 491).

⁶⁴⁰ This process of exempting the foreperson from the ballot is compatible with the random selection process required in federal matters by s 80 of the Constitution (*Brownlee v R* (2001) 207 CLR 278; [2001] HCA 36; *Ng v R* (2003) 217 CLR 521; [2003] HCA 20).

⁶⁴¹ This procedure is no longer necessary (see *CPA 2009* s 241).

11.4 Jury Participation in the Trial

1. The jury should be present in court for the whole of the proceedings, unless the judge orders the jury out of court (*R v Hendry* (1988) 88 Cr App R 187).
2. The judge may direct the jury to leave the court at any stage of proceedings (*Watson v Hammence* [1957] VR 319).
3. The jury should not be present in the court room when:
 - a statute specifies that a matter must be determined in the absence of the jury - e.g., applications to lead evidence regarding the sexual history of a witness (see, e.g., CPA 2009 s 348).
 - a voir dire is conducted;
 - legal arguments are being made;
 - a no case submission is made; or
 - the judge is not present in the court room.

Note-Taking

4. Jurors are entitled to take notes during the trial and jurors who wish to take notes should be provided with appropriate materials (*R v Sandford* (1994) 33 NSWLR 172).
5. In Victoria, practices vary among judges as to whether note-taking should be encouraged or discouraged. Judges may warn jurors of the importance of paying attention to the demeanour of witnesses and not to be distracted by the process of note-taking. See 1.10.1 Charge: Trial Procedure in the Victorian Criminal Charge Book for a jury charge on note-taking.
6. Empirical research on the benefits and dangers of note-taking is currently mixed, with some evidence suggesting that jurors often do not receive sufficient guidance on how to take effective notes. For a brief discussion of the issue, see Consultation Paper 4 (2008) - Jury Directions, Law Reform Commission of New South Wales, and the papers cited therein.
7. Any notes made by a juror who is discharged in the course of the trial should be promptly destroyed and should not be left with the remaining jurors (*Derbas v R* (1993) 66 A Crim R 327).

Questioning of Witness

8. While jurors have the right to question witnesses, the role of a juror is not that of counsel or an investigator. The purpose of the jury is to determine if the prosecution has proven its case beyond reasonable doubt and it is not desirable for jurors to seek out additional evidence (*R v Lo Presti* [1992] 1 VR 696; *R v Cvijic*, Unreported, VSC FC, 21 February 1986; *R v Boland* [1974] VR 849; *Tootle v R* (2017) 94 NSWLR 430; [2017] NSWCCA 103).
9. As a general rule, a judge should consider the following guidelines on the matter of allowing a juror to question witnesses:
 - (1) Juries should not be told of any right possessed by them to question a witness.
 - (2) A juror who wishes to put, or have put, a question to a witness has a right for that to be done provided that the question or questions is or are limited to the clarification of evidence given or the explanation of some matter about which confusion exists.
 - (3) It is not essential that the question asked be formulated by the foreman.
 - (4) It is highly desirable that the question sought to be asked first be submitted to the judge so that he may consider its relevance and admissibility.
 - (5) If the judge allows the question it is immaterial whether it is actually asked by the juror or the judge. However, if the judge puts the question there will be removed the risk that exists when a layman is the questioner of the generation of a spontaneous

exchange of questions and answers in the course of which improper material may emerge (*R v Lo Presti* [1992] 1 VR 696).

Views

10. For information on the conduct of views, see 2.1 Views in the Victorian Criminal Charge Book.

Jury Investigations

11. The judge should tell the jury at the start of the trial that it is an offence punishable by a fine of up to 120 penalty units⁶⁴² for a juror to make inquiries into the issues in the case, except in the proper exercise of his or her functions as a juror (*Juries Act 2000* s 78A).
12. Prohibited enquiries include:
- Consulting another person;
 - Conducting research by any means, including using the internet to search a database;
 - Viewing or inspecting a place or object relevant to the trial;
 - Conducting an experiment;
 - Requesting another person to make an enquiry (*Juries Act 2000* s 78A).
13. The court may examine a juror on oath to determine whether he or she committed the offence of making impermissible enquiries. The privilege against self-incrimination does not apply to such an examination (*Juries Act 2000* ss 78B, 78C).
14. A juror may make enquiries of the court or other jurors in the proper exercise of the functions of a juror, or make enquiries authorised by the trial judge (*Juries Act 2000* s 78A).
15. The precise scope of this prohibition is unclear. In *Martin v R* (2010) 28 VR 579; [2010] VSCA 153, the court considered whether a juror breached s 78A by viewing pages of a legal dictionary and other websites concerning the meaning of the phrase 'beyond reasonable doubt'. The court noted, without deciding that, as jurors are responsible for giving meaning to that phrase, it is arguable that research into that phrase is a "proper exercise of his or her functions as a juror".

Exhibits, Examination and Experimentation

16. All exhibits should generally be made available for the jury to examine during its deliberations.
17. The court may exclude an exhibit from the jury room where it is large, inconvenient or poses a risk to security. Weapons and drugs are often excluded (*R v NZ* (2005) 63 NSWLR 628; [2005] NSWCCA 278; *R v Evans* [1998] SASC 6798).
18. The judge may also exclude exhibits where the jury is likely to give the exhibit undue weight, compared to the viva voce evidence (*R v NZ* (2005) 63 NSWLR 628; [2005] NSWCCA 278; *R v Evans* [1998] SASC 6798).
19. The judge should usually reconsider any decision to exclude an exhibit if the jury specifically asks to examine that exhibit (*R v Evans* [1998] SASC 6798).
20. The jury is entitled to use the full range of its senses to examine and test an exhibit in order to understand the evidence in the case. This process of examination must not involve experiments that result in the creation of new evidence. The dividing line between permissible examination and impermissible experimentation is often simple to identify in practice, but hard to define in the abstract (*Kozul v R* (1981) 147 CLR 221; [1981] HCA 19; *R v Hamitov* (1979) 21 SASR 596; *Hodge v Williams* (1947) 47 SR (NSW) 489).

⁶⁴² As of 3 July 2023, 120 penalty units is \$23,077.20.

21. There are at least three vices to experiments that result in new evidence. First, the experiment results in the case being determined on evidence that was not the subject of the scrutiny or testing of the parties. This is contrary to the adversarial and accusatory criminal trial system. Secondly, the discovery is equivalent to the introduction of new evidence after the close of a party's case, without giving the other party a chance to respond. This would be impermissible if a party sought to perform such conduct, and there is no relevant difference where the jury is responsible for the new evidence. Finally, any evidence generated by the jury through experimentation may be unreliable, as the jury may lack the expertise necessary to conduct an accurate experiment (*Kozul v R* (1981) 147 CLR 221; [1981] HCA 19; *R v Cotter* [2004] VSC 295).
22. The principles relevant to a view provide some guidance on whether the jury will be observing and understanding exhibits, or creating new evidence (*Kozul v R* (1981) 147 CLR 221; [1981] HCA 19).
23. If expert evidence has not been led on a matter, the judge may need to warn the jury not to examine the exhibits in a way that requires expert skills (*Kozul v R* (1981) 147 CLR 221; [1981] HCA 19; *R v O'Sullivan* [1969] 2 All ER 237).
24. It may be necessary to discharge the jury if, during its examination of an exhibit, it discovers a significant feature that the parties did not notice. This discovery may amount to new evidence that was not admitted or tested by the parties (*R v Cotter* [2004] VSC 295; *R v Rudkowsky*, Unreported, NSWCCA, 15 December 1992).
25. Permissible examination of exhibits includes:
 - comparing the handwriting of the accused with another exhibit; or
 - comparing the voice of the accused in court to a tape recording (*Adami v R* (1959) 108 CLR 605; [1959] HCA 70; *R v Smith & Ors* (1990) 50 A Crim R 434; *Bulejck v R* (1996) 185 CLR 375; [1996] HCA 50 per Brennan CJ, Toohey and Gaudron JJ (McHugh and Gummow JJ dissenting)).

Last updated: 14 April 2009

11.5 Selecting a Foreperson

1. The jury must select a foreperson to communicate with the judge and to announce the verdict. See 1.3.1 Charge: Selecting a Foreperson in the Victorian Criminal Charge Book for a model charge.

Last updated: 14 April 2009

11.6 Communication with the Jury

1. Once the jury has been empanelled, the judge should give preliminary directions on the conduct of proceedings and the need to avoid discussing the case with anyone outside the jury (*R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37). See 1.5.1 Charge: Decide Solely on the Evidence for directions on these preliminary matters.
2. The judge should invite the jury to inform him or her of any irregularities that arise in the course of the trial. This may include attempts by third parties to contact a juror, or where inadmissible material is taken into the jury room (*R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37).
3. Judges must generally reveal in open court the nature and content of a communication from the jury, unless it raises a matter unconnected with the trial such as a request to send a message to a relative of one of the jurors, or it contains information that the jury should not have revealed (*R v Black* (2007) 15 VR 551; [2007] VSCA 61; *R v Gorman* [1987] 1 WLR 545; *Farha v The Queen* [2018] VSCA 310).
4. The purpose of this rule is explained in *R v Gorman* [1987] 1 WLR 545:

We may add, before parting with the case, that the object of these procedures, which should never be lost sight of, is this: first of all, to ensure that there is no suspicion of any private or secret communication between the court and jury, and secondly, to enable the judge to give proper and accurate assistance to the jury on any matter of law

or fact which is troubling them. If those principles are borne in mind, the judge will, one imagines, be able to avoid the danger of committing any material irregularity (*R v Gorman* [1987] 1 WLR 545. Quoted with approval in *R v Black* (2007) 15 VR 551; [2007] VSCA 61. See also *Ngati v R* [2008] NSWCCA 3).

5. Subject to any exceptions, the judge must inform the parties of the precise terms of any communication. This is because the parties must receive an opportunity to see and comment on any material relevant to an issue a judge must decide which is available to the judge and known not to be available to counsel (*R v Wise* (2000) 2 VR 287; [2000] VSCA 169; *Smith v R* (2015) 255 CLR 161; [2015] HCA 27).
6. It is not appropriate to outline the proposed response without revealing as much of the terms of the question as permissible, as this deprives the parties the ability to make meaningful submissions (*R v Black* (2007) 15 VR 551; [2007] VSCA 61; *R v Sonnet* (2010) 30 VR 519; [2010] VSCA 315; *Smith v R* (2015) 255 CLR 161; [2015] HCA 27).
7. The jury should not provide information such as voting figures to the judge (*HM v R* [2013] VSCA 100; *MJR v R* (2011) 33 VR 306; [2011] VSCA 374; *Nguyen v R* [2013] VSCA 65). Where this occurs, the judge is not required to provide that information to the parties. Figures on how the jury is currently divided on verdicts are not relevant to any decision the judge must make, or any matter a party may make submissions on (*Smith v R* (2015) 255 CLR 161; [2015] HCA 27).
8. Jury deliberations should remain confidential. Both individual jurors and the jury as a whole should therefore not provide information about their reservations about the evidence. For instance, a juror should not spell out the reasons why that juror considers that a certain element has not been proved (*Farha v The Queen* [2018] VSCA 310 [26]).
9. Judges prefer juries to ask questions by writing the question down and handing it to the judge. The judge can then read the question in open court in the presence of the accused and their counsel. An acceptable alternative is that the foreperson asks the question in open court. The jury should not ask a question by conveying an oral request to the judge through the tipstaff or other court official (*R v Cavkic & Ors (No 2)* (2009) 28 VR 341; [2009] VSCA 43).
10. The judge should make a permanent record of the contents of the communication by attaching a written note to the court file or by reading the question into the transcript. This assists an appellate court to review the judge's response (*R v Masters* (1992) 26 NSWLR 450).
11. The judge should also inform the parties of the terms of any proposed response to a juror's question. This allows the parties to make submissions on whether the response adequately and appropriately answers the question (*R v Black* (2007) 15 VR 551; [2007] VSCA 61; *R v Kerr (No 2)* [1951] VLR 239).
12. In some cases, it may be appropriate for a judge to respond to a written question from the jury through a written letter that has been shown to parties, without making any statement in open court. The principle of open justice does not require a public response in all cases (*R v Shepherd (No 4)* (1989) 41 A Crim R 420).
13. Tipstaves, jury keepers and other court officials must not discuss the merits of the case with the jury or attempt to influence their verdict. Jurors or court officials should report any inappropriate communication to the judge, who may need to instruct the jury accordingly (*R v GAE* (2000) 1 VR 198; [2000] VSCA 18; *Costa v R* [2013] VSCA 5).

Last updated: 1 November 2019

11.7 Jury Sequestration and Separation

1. Jurors may freely separate at any time before commencing their deliberations, unless the judge orders the jury segregated for the trial. The judge should only order the segregation of the jury in exceptional cases, where it is necessary in the interests of justice to protect the jury from outside influences (*R v Chaouk* [1986] VR 707; *R v Prime* (1973) 57 Cr App R 632; *R v Gay* [1976] VR 577; *R v Voss* [1963] VR 22).

2. The judge should mitigate the possible prejudicial effect of any special measures that are taken to protect the jury. The measures should be no more obvious than necessary and the judge may need to direct the jury not to allow the measures to affect its consideration of the issues (*Smith v R* (1985) 159 CLR 532; [1985] HCA 62; *R v Richards* [1999] NSWCCA 114).
3. In exceptional cases, the court may keep the jury sequestered in a hotel once they commence their deliberations. The court will swear jury keepers to accompany the jurors and to ensure that there is no attempt to influence the jury (*R v Chaouk* [1986] VR 707).
4. The court should ensure that jurors do not have access to mobile phones during their deliberations (*R v Evans* (1995) 79 A Crim R 66).
5. Where it is necessary to prevent people having access to the jurors or the jurors having access to others, the court may appoint one or more jury keepers. This will usually only occur when the court orders that the jury be kept together while away from the court (*CMG v R* (2013) 46 VR 728; [2013] VSCA 243).
6. Jury keepers must be sworn with the following oath:

You [and each of you] swear by Almighty God that you will well and truly keep this jury and each of its members committed to your charge and that, except on the order of the court, while they are in your charge, you will not allow any of them to communicate with any other person, or any other person with any of them, whether directly or indirectly, and that you will not, either during the trial or after it has finished, communicate with any juror about any evidence given or issues raised, directly or indirectly, at the trial (*Juries Act 2000* s 49, Schedule 4).⁶⁴³
7. Jurors may not discuss the case with jury keepers. If necessary, the keeper should politely inform a juror that all matters about the case must be raised either with fellow jurors (if the matter relates to the jury's decision-making) or the trial judge (if the matter relates to further directions, or an irregularity). Jury keepers must not discuss the case with jurors or attempt to influence the jury in its verdict (*R v Stretton* [1982] VR 251; *R v Briffa & Portillo*, Unreported, VSCA, 21 April 1997).
8. Jury keepers are not necessary when the jury remains in the court building and moves between the court and the jury room. This function can be performed by a court tipstaff or a judge's associate even if that person is not sworn as a jury keeper (*CMG v R* (2013) 46 VR 728; [2013] VSCA 243).
9. The court must protect against the risk of outside influences during deliberations unless the jury is permitted to separate. In some cases, juries have been discharged due to having lunch outside the court during deliberations without the presence of a jury keeper (see, e.g., *R v Neal* [1949] 2 KB 590).

Separation During Deliberations

10. Section 50 of the *Juries Act 2000* states that:

⁶⁴³ While the *Juries Act 2000* does not specify the form of an affirmation, schedule 3 of the *Evidence (Miscellaneous Provisions) Act 1958* indicates that the form of any affirmation is "I solemnly and sincerely declare and affirm that (followed by the words of the oath prescribed or allowed by law)."

(1) Subject to subsection (2) but despite any rule of law or practice to the contrary, the court may –

(a) allow the jury to separate; or

(b) allow an individual juror to separate from the jury if, in the opinion of the court, there is good reason to do so –

after the jury has retired to consider its verdict and before the verdict is given or the jurors are discharged.

(2) A court may allow a jury or jurors to separate in accordance with subsection 91) only if each separating juror has been sworn in the form of Schedule 5.

11. The effect of s 50 is that a judge may only allow the jury to separate after retirement if the judge considers there is good reason to permit separation and ensures the appropriate oath or affirmation is taken by the jurors involved (*Youssef v The Queen* [2019] VSCA 240, [56]).
12. The jury separation oath is:

You [and each of you] swear by Almighty God that you will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations (*Juries Act 2000* Schedule 5).
13. The relevant court official must inform the jurors that they may choose to take an oath or make an affirmation, unless the official is satisfied that the jurors are already aware of this choice (*Evidence (Miscellaneous Provisions) Act 1958* s 102). An affirmation has the same effect for all purposes as an oath (*Evidence (Miscellaneous Provisions) Act 1958* s 101).
14. It is not necessary to use a religious text when taking an oath, and the oath is valid even if the person taking the oath does not have a religious belief (*Evidence (Miscellaneous Provisions) Act 1958* s 103).
15. The *Evidence (Miscellaneous Provisions) Act 1958* no longer contains any set response to the oath or affirmation. Instead, a juror may respond in any manner that indicates that he or she intends for his or her conscience to be bound by the oath or affirmation (see *R v Benfield* [1997] 2 VR 491).
16. Section 50 of the *Juries Act 2000* reflects s 51A of the *Juries Act 1967* (Vic) that was introduced on 1 February 1994. This section modified the common law practice that prohibited jurors from separating once they commenced their deliberations and before either verdict or discharge (*R v Clarke* (2002) 5 VR 480; [2002] VSCA 184).
17. Swearing or affirming the jury in accordance with Schedule 5 is mandatory before the jury may separate. Failure to do so is a fundamental irregularity in the course of a trial and will be fatal to the verdict (*R v Clarke* (2002) 5 VR 480; [2002] VSCA 184; *R v Taylor* (1996) 86 A Crim R 293).
18. The court only needs to administer the jury separation oath or affirmation once in the course of the trial. Jurors do not need to renew the oath or affirmation on each subsequent occasion during their deliberations before they may separate (*R v Patton* [1998] 1 VR 7; *R v Appleby* (1996) 88 A Crim R 456; *R v Sen* [1999] VSCA 181). However, there are some judges who consider that it is desirable to do so as part of constantly reminding the jury of the importance of not discussing the evidence or the jury's deliberations with any other person (*Youssef v The Queen* [2019] VSCA 240, [64]).
19. Administration of the separation oath or affirmation on a single occasion does not, however, permit the jury to separate on any occasion. Once deliberations start on a given day, the jurors must remain together, or otherwise under the supervision of a jury keeper, until permitted to separate at the end of the day (*Youssef v The Queen* [2019] VSCA 240, [63]).
20. The jury will usually need to be sworn or affirmed at the end of the first day of deliberations before they separate for the evening (see *R v Sen* [1999] VSCA 181).

21. It is desirable that the jurors are reminded that they remain bound by the separation oath or affirmation each time they are permitted to separate until finally being discharged (*Youssef v The Queen* [2019] VSCA 240, [64]).
22. If the judge completes his or her charge late in the day, current Victorian practice is to ask the jury whether it would like to commence deliberations immediately or when the trial resumes in the morning. If the jury chooses to commence deliberations in the morning, the judge should not instruct the jury to commence deliberations at that time. The jury separation oath or affirmation is only required after the jury is invited to commence its deliberations.
23. It may also be appropriate to send the jury home at the end of a long or complex charge, if the judge wishes to take exceptions from counsel before allowing the jury to commence deliberations.
24. The *Juries Act 2000* does not define what it means for a jury to deliberate, or how to determine when deliberations resume after the jury is permitted to separate. In *Alec v The King* [2023] VSCA 208, the Court of Appeal considered a case where the judge allowed jurors to arrive before the planned time for resumption of deliberations. Jurors who arrived early were allowed to read transcript and review exhibits, and could come and go from the jury room without a jury keeper. The court held that this was permissible, and there was no evidence the jury was allowed to deliberate while some members were absent. For this purpose, deliberations were treated as the process of discussing, debating and considering issues with a view to reaching a decision (at [66]).
25. The Court in *Alec* also advised that when jurors are permitted to separate overnight, the judge should fix a time at which deliberations resume and direct the jury that they must not discuss the case before the appointed time and that from the appointed time the jury must remain together subject to the supervision of jury keepers (*Alec v The King* [2023] VSCA 208, [68]).

Last updated: 8 December 2023

11.8 Absence of Individual Jurors

1. During deliberations, the jury will often discuss the case without all jurors being present and attentive. Such conduct is not fatal to the outcome of the case and the judge does not need to instruct the jury to cease deliberating when one of the jurors is inattentive or temporarily absent due to sickness. The judge may suspend deliberations if he or she knows that a juror will be unavailable for an extended time (*R v Brazel* (1993) 67 A Crim R 314).
2. Jurors who become ill may be examined by a doctor, in the presence of a court official. The doctor should be warned not to discuss the case with the juror and should be advised of the need for the juror to be able to contribute to a deliberative process and not to abandon an honestly held belief. The other jurors should not be present during the doctor's visit (*R v Brazel* (1993) 67 A Crim R 314).

Last updated: 14 April 2009

11.9 Discharge of a Juror

1. A judge may discharge a juror if:
 - (a) it appears to the judge that the juror is not impartial; or
 - (b) the juror becomes incapable of continuing to act as a juror; or
 - (c) the juror becomes ill; or
 - (d) it appears to the judge that, for any other reason, the juror should not continue to act as a juror (*Juries Act 2000* s 43).
2. While courts have often associated the power to discharge a juror with the common law test of there being a 'high degree of need', this language should not be used as a substitute for the language of s 43 (see *Najibi v R* [2016] VSCA 177 at [246]. Compare *R v Boland* [1974] VR 849; *R v Goodall* (2007) 15 VR 673; [2007] VSCA 63; *R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).

3. Unless the court brings the case within one of the four limbs of s 43, there is no basis for discharging a juror. Similarly, once a case comes within one of the four limbs, there is no need to separately consider whether there is a 'high degree of need', as that will already be established by proof of one of the limbs of s 43 (*Najibi v R* [2016] VSCA 177 at [240], [243]–[246]).
4. The limbs of s 43 (particularly (d)) must be narrowly construed. A judge must rigorously examine the circumstances before being satisfied that a relevant limb is established (*Najibi v R* [2016] VSCA 177 at [241]).
5. While s 43 is drafted in terms of a discretionary decision, a judge who is satisfied of any of the four limbs in subsections (a)–(d) must discharge the relevant juror and there is no residual discretion that must be exercised after finding that one of the four limbs of the test are satisfied. The judge does not, at the point of decision, choose between discharging the individual juror and discharging the whole jury (*Najibi v R* [2016] VSCA 177 at [248], [251]).
6. The judge may exercise this power at any time during the trial, including during the jury's deliberations (*R v Cavkic & Ors (No 2)* (2009) 28 VR 341; [2009] VSCA 43).
7. If a juror is discharged, the judge may direct that the trial shall continue if there are still at least 10 jurors (*Juries Act 2000* s 44).
8. There is no power to empanel a replacement juror if a juror is discharged (*Pollock & Cameron v The Queen* [2020] VSCA 218; *R v Panozzo & Iaria* (2003) 8 VR 548; [2003] VSCA 184).
9. Sections 43 and 44 modified the common law position that the discharge of a juror required the discharge of the whole jury (*Wu v R* (1999) 199 CLR 99; [1999] HCA 52). See 11.10 Discharge of the Whole Jury.⁶⁴⁴
10. A judge who exercises the power under s 44 to continue with a reduced jury should do so in unmistakable terms. The judge should make separate orders to discharge the juror under s 43 of the Act and to continue the trial under s 44 (*Wu v R* (1999) 199 CLR 99; [1999] HCA 52).
11. The court should allow counsel to make submissions before making an order discharging a juror. Counsel are entitled to be heard on any matter affecting the conduct of the trial (*R v Tortomano* [1981] VR 31).
12. A judge must carefully consider whether or not to discharge a juror under *Juries Act 2000* s 43. The wrongful discharge of a juror constitutes a fundamental irregularity in a trial, as the remaining jurors are not authorised in law to try the issues and deliver a verdict (*R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).
13. In some cases, the discharge of a juror, and any necessary directions, will create a greater risk of prejudice than that which the discharge was designed to prevent. In such cases, the judge must direct the jury so as to minimise the risk of prejudice (*R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39 per Harper JA).
14. Decisions concerning the discharge of a juror are discretionary decisions that often involve value judgements. There is limited utility in seeking to compare the facts of different cases, as discharge decisions often depend on the trial judge's observation of the jurors, the seriousness of any incidents, the stage of the trial and the potential for any irregularities to be cured by a direction (see *R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).

⁶⁴⁴ In the trial of a Commonwealth offence, discharge of a juror under s 43 and continuation of the trial under s 44 with between 10 and 12 jurors does not breach the constitutional guarantee to trial by jury (*Ng v R* (2003) 217 CLR 521; [2003] HCA 20; *R v Ng* (2002) 5 VR 257; [2002] VSCA 108; *Brownlee v R* (2001) 207 CLR 278; [2001] HCA 36; *Cheatle v R* (1993) 177 CLR 541; [1993] HCA 44).

15. When the judge discharges a juror, any accompanying directions to the remaining jury must be devised with care. The safest course will often be to simply instruct the jury that it has been necessary to discharge a juror and that the remaining jurors should not speculate as to why this occurred. The judge should generally not identify the circumstances that led to the discharge (*R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).
16. Detailed directions about the reason for discharging a juror may increase the risk of prejudice. The legal test of a reasonable apprehension of bias is easily misunderstood and may make an event seem far more sinister than the judge intends (*R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).

Lack of Impartiality

17. While it has not been finally determined, it is likely that s 43(a) ('it appears to the judge that the juror is not impartial') is limited to a conclusion of actual bias. Apprehended bias likely falls within s 43(d) ('it appears to the judge that, for any other reason, the juror should not continue to act as a juror') (*Platt v The Queen* (2018) 58 VR 593, [19]).
18. The test for whether a juror does not appear to be impartial is the same as the test of apprehended bias for a judge or a member of a quasi-judicial tribunal (*R v Gough* [1993] AC 646; *R v Evans* (1995) 79 A Crim R 66; *R v Vjestica* [2008] VSCA 47; *Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30). See also 6.1 Judicial Bias.
19. The appearance of a risk of bias will usually arise due to some incident in course of the trial. The judge must consider:
 - ... whether the incident is such that, notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially (*Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30).
20. This test was recently restated as being whether:
 - a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not discharge its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge (*HCF v The Queen* [2023] HCA 35, [11])
21. This formulation is sufficiently flexible that it is capable of applying regardless of the cause of the apprehension (see *HCF v The Queen* [2023] HCA 35, [11]).
22. In applying the test, the court will take into account the juror's oath or affirmation, and that an apprehension that a juror will violate that oath is not to be inferred lightly. The court will also take into account, when deciding whether to discharge a juror on the basis of a relevant apprehension, the difficulty of eliciting evidence from the jury or juror about their ability to give a verdict according to law, on the evidence, in accordance with directions (*HCF v The Queen* [2023] HCA 35, [16], [45]).
23. As with apprehended bias, it is important to note that the court does not need to be satisfied that the jury lacks impartiality. The decision is made on the basis of an unacceptable risk or possible perceptions (*R v Juric* [2003] VSC 383; *R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).
24. The court must consider whether:
 - ... the parties or the public *might* entertain a reasonable apprehension that the jury *might* not bring an impartial and unprejudiced mind to the resolution of the issues involved in the proceeding (*R v Maxwell* Unreported, NSWCCA, 23 December 1998 (Emphasis in original)).
25. The judge should separately consider:
 - whether the matter might give rise to a reasonable apprehension by a fair minded and informed observer that the juror might not evaluate the evidence in an impartial and unemotional manner; and

- whether this apprehension would be reduced by any direction the judge would give, on the assumption that jurors usually do their best to follow a judge's directions (*Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30; *R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).
26. The court must give appropriate weight to the need to ensure the appearance of justice and the perception of the fair-minded lay observer. A judge must not focus on the likelihood or danger of bias, as this marginalises the importance of public perceptions (*Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30).
 27. The judge must consider the nature of the incident giving rise to a possible apprehension of bias and the likely effect of that incident on the juror or the jury (*R v Juric* [2003] VSC 383).
 28. In some cases, the nature of the incident will mean that a direction is incapable of curing any apprehension of bias. In addition, the court should consider whether it is too late in the trial to cure any prejudice that has been discovered (*R v Czajkowski* [2002] NSWCCA 530; *R v Pearson* [2000] NSWCCA 149; *Williams v R* [2000] FCA 1868).
 29. A juror's rejection of the accused's evidence is not a relevant form of bias. Jurors are entitled to and expected to evaluate evidence as it is given and rejection of evidence does not demonstrate bias (*Koch v R* [2011] VSCA 435).
 30. Evidence that a juror has previously known the accused does not necessarily give rise to an apprehension of bias. The court must look at the nature of the relationship and when it existed when deciding whether a fair minded observer might entertain a reasonable apprehension that the juror might not discharge his or her task impartially (*LA v R* [2011] VSCA 293).
 31. Any contact between a juror and the accused, or a person connected with an accused or who has an interest in the outcome of the trial, may create a perception of impropriety, or may be designed to secure a favourable outcome for a party. Even innocent contact may create a perception of impropriety or may lead to a juror feeling uncomfortable during deliberations (*R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).
 32. Once the judge is satisfied that an event has led to a reasonable apprehension of bias, he or she may discharge the juror unless affirmatively satisfied that an appropriate direction would eliminate the need to do so (*R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).
 33. Where there is an allegation of juror misconduct, the court should be reluctant to allow jurors to be questioned by counsel as witnesses. Counsel will often not be in a position to effectively cross-examine jurors and the reliability of a juror's answers may be doubted (*R v Chaouk* [1986] VR 707; *Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30).
 34. The judge may, however, question a juror regarding a possible irregularity. The extent of this investigation is a matter of discretion for the trial judge (*R v Evans* (1995) 79 A Crim R 66).
 35. It is generally undesirable on an appeal for the court to call jurors as witnesses to inquire into whether they may have seen inappropriate material in the course of a trial. Jurors should be permitted to return to the community in anonymity once they complete their service (*R v Zampaglione* (1981) 6 A Crim R 287).
 36. When considering whether to discharge a juror, the judge should also consider whether it is necessary to discharge the whole jury. While these two questions are discrete and must be considered separately, the likely decision at each stage is a relevant matter for the other stage (*R v Juric* [2003] VSC 383; *Wu v R* (1999) 199 CLR 99; [1999] HCA 52; *R v Sharp* [2005] VSCA 44).
 37. The principle of bias applies regardless of whether the bias is in favour of the Crown or the accused. A juror who demonstrates the capacity to become biased is not suitable for sitting in a criminal trial, and may form different biases later in the trial (*R v Stretton* [1982] VR 251; *R v Czajkowski* [2002] NSWCCA 530).
 38. The court must discharge any juror who becomes fearful for his or her safety. Such a juror will be incapable of calm and dispassionate judgment. The judge should assess the effect of any attempted intimidation on the juror and whether the juror's consideration of the issues in the case will be affected (*R v Stretton* [1982] VR 251).

39. Mere evidence of attempts to contact a juror and influence the trial will not automatically lead to a discharge of the juror or the jury. Courts must not allow the administration of justice to be brought to a standstill (*R v Zampaglione* (1981) 6 A Crim R 287).
40. Similarly, mere evidence of contact or association with an alleged victim, the accused or a family member does not necessarily reveal bias. The court should consider the nature of the contact or association and whether it is likely to indicate that the juror cannot impartially consider the evidence in the case (*R v Vjestica* [2008] VSCA 47; *Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30; *R v Goodall* (2007) 15 VR 673; [2007] VSCA 63; *R v Ferguson & Anor (Ruling No 10)* [2005] VSC 514).⁶⁴⁵
41. The court should not assume that a juror who has been the victim of an offence cannot sit on a case involving similar offences. Juries should contain a cross-section of the community and a juror's status as a victim of crime is not sufficient to prove that he or she is likely to be biased against the accused. A juror may even use his or her experiences as a victim of crime to provide a basis for evaluating the credibility of the complainant (*R v Goodall* (2007) 15 VR 673; [2007] VSCA 63).

Jurors Becoming Ill or Unable to Continue

42. It is not necessary to conduct an elaborate factual inquiry before discharging a juror due to illness or incapacity. It will not always be necessary to take evidence on oath (*R v Tortomano* [1981] VR 31; *Wu v R* (1999) 199 CLR 99; [1999] HCA 52).
43. A report from the Juries Commissioner that a juror is ill provides a prima facie basis for discharging that juror (*Wu v R* (1999) 199 CLR 99; [1999] HCA 52).
44. The nature of a juror's illness is relevant only where it demonstrates whether the juror will recover within a manageable timeframe (*Wu v R* (1999) 199 CLR 99; [1999] HCA 52).

Otherwise not Suitable to Continue

45. The judge may discharge a juror if, for any reason, it appears that the juror should not continue to act as a juror (*Juries Act 2000* s 43).
46. This may be suitable where it appears that a juror persistently fails to pay proper attention during the trial. A high standard is expected of jurors in order to avoid a miscarriage of justice. The judge may be unable to give appropriate directions without embarrassing the juror in question, which may be counterproductive (*R v Ferguson & Anor (Ruling No 10)* [2005] VSC 514).
47. It may also be necessary to discharge a juror who has demonstrated an unwillingness or inability to follow the judge's directions. The juror's conduct must be assessed in context and the judge must consider whether the juror would comply with clearer and more emphatic directions (*R v Holt & Merriman* (1996) 87 A Crim R 82).
48. The judge should not question individual jurors when he or she receives a complaint that one or more juror is unable or unwilling to work cooperatively with the other jurors. Instead, the whole jury should be questioned through the foreperson to ascertain whether the jury as a body is able to fulfil its oath to deliver a true verdict according to the evidence (*R v Orgles & Orgles* (1993) 98 Cr App R 185).
49. When tensions arise within the jury body, the judge should not necessarily discharge the disruptive juror or jurors. This approach may improperly lead to a majority verdict, or suggest that the court will remove a dissenting voice to produce a unanimous verdict (*R v Roberts* [2005] 1 Qd R 408; [2004] QCA 366).

⁶⁴⁵ Note, however, that both *Vjestica* and *Webb* were murder cases and therefore the "victim" in question was the deceased. Courts may be more cautious when a juror shows sympathy towards an alleged victim in other cases, as such sympathy may demonstrate prejudgment of the issue in the proceeding.

11.10 Discharge of the Whole Jury

1. The judge may only discharge the whole jury if there is "a high degree of need" (*R v Boland* [1974] VR 849).
2. The trial judge will ordinarily be the person best placed to determine whether a discharge is necessary in the interests of justice. An appellate court does not have the benefit of observing the atmosphere of the trial or the reactions of the jurors and will often defer to the decision of the trial judge where he or she exercised his or her discretion judicially (*R v Boland* [1974] VR 849; *R v McKittrick* [1982] VR 637; *Crofts v R* (1996) 186 CLR 427).
3. The following factors may be relevant in determining whether it is necessary to discharge a jury:
 - the seriousness of the incident;
 - whether the incident is capable of affecting the outcome of the trial;
 - the stage of the trial;
 - whether the Crown could effectively present its case a second time;
 - whether the misconduct was deliberate; and
 - the likely effectiveness of any direction by the trial judge (*Crofts v R* (1996) 186 CLR 427; *R v Brown* [2004] VSCA 59; *R v Boland* [1974] VR 849; *R v Zampaglione* (1981) 6 A Crim R 287; *Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30).
4. A reasonable apprehension of bias is one circumstance that will meet the "high degree of need" test. There may be other situations. A reasonable apprehension of bias is not the sole ground on which it may be appropriate to discharge the jury (*R v Matthews* [1999] 1 VR 534; [1998] VSCA 2; *R v Holt & Merriman* (1996) 87 A Crim R 82).
5. A judge must consider whether wrongful admission of evidence gives rise to a risk of a substantial miscarriage of justice (*Maric v R* (1978) 20 ALR 513; *R v Weaver* [1968] 1 QB 353).
6. When evidence of bad character of the accused is admitted, the judge will need to discharge the jury unless he or she is satisfied that the evidence could not in any way affect the decision of the jury (*R v Knape* [1965] VR 469; *R v Halliday* (2009) 23 VR 419; [2009] VSCA 195; *Maric v R* (1978) 20 ALR 513).
7. The judge must consider the circumstances in which the evidence was admitted and the reason for the wrongful admission. For example, it is not necessary to discharge the jury whenever evidence was admitted to prove an offence which is later withdrawn from the jury due to a no-case submission. The judge should only discharge the jury if the wrongful admission of evidence causes irreversible prejudice to the accused. Otherwise, the judge should direct the jury in strong terms to disregard the evidence (*R v Iuliano* [1971] VR 412; *R v Glen* [1973] VR 809).
8. In some cases, judicial intervention may create a high degree of need to discharge the jury. Examples and principles relating to excessive judicial intervention are discussed in the context of creating an apprehension of bias (see 6.1 Judicial Bias) and must also be considered in the context of the impact of the intervention on the jury's perception of the case (*Percival v R* (2015) 49 VR 238; [2015] VSCA 200).
9. When assessing whether judicial intervention has caused a miscarriage of justice due to its impact on the jury, the question is not whether the intervention was unwarranted. Even if the interventions are justified, it is necessary to separately consider whether it is necessary to discharge the jury to ensure a fair trial (*Percival v R* (2015) 49 VR 238; [2015] VSCA 200, [58]–[60]).
10. This reflects the fact that in some cases it is necessary to discharge a jury because of the incompetence of counsel, where such incompetence is obvious to the jury and risks affecting the manner in which the jury evaluates the evidence and issues in the case (*Percival v R* (2015) 49 VR 238; [2015] VSCA 200, *R v Punnett* [2006] 1 NZLR 133).

11. It is only in exceptional cases that it will be necessary to discharge a jury on the basis that a prosecution witness has been wholly discredited. In most cases, directions are an adequate remedy for any prejudice caused by an unreliable witness' evidence (*R v Iuliano* [1971] VR 412; *R v Glen* [1973] VR 809).
12. Evidence that the jury is aware that the accused is in custody during the trial will not necessarily require the discharge of the jury. It is likely that most jurors will assume that an accused person is in custody during trial and would not assume that it is indicative of guilt, or that the offender is a person of bad character. However, if the jury learns that the accused is in custody due to previous offending, or because of concerns that the accused will not report while on bail, then it may be necessary to discharge the jury (*Ahmed v R* [2012] VSCA 76).
13. When assessing the likely effectiveness of a direction, the judge may consider the diligence, attentiveness and character of the juror or jurors in question (*Webb & Hay v R* (1994) 181 CLR 41; [1994] HCA 30; *R v Zampaglione* (1981) 6 A Crim R 287).
14. The judge will also take into account that the Australian system of justice assumes that juries obey instructions from judges to the best of their ability (*R v Halliday* (2009) 23 VR 419; [2009] VSCA 195; *Hills v R* [2011] VSCA 364).
15. In some cases, a judge will need to discharge the jury following receipt of a question which reveals that the jury is engaging or about to engage in an impermissible path of reasoning which the judge cannot effectively prevent through appropriate directions (see *Quach v R* (2011) 35 VR 71; [2011] VSCA 390).
16. The trial judge may question a juror in the absence of other members of the jury to ascertain the details of a situation that has given rise to the question of discharging the jury. The judge may also need to question other members of the jury or the jury as a whole to determine whether the bias of one juror has infected the whole jury. These questions must not inquire into the jury's deliberations (*R v Goodall* (2007) 15 VR 673; [2007] VSCA 63; *I v WA* [2006] WASCA 204; *R v Blackwell* [1995] 2 Cr App R 625).
17. The judge may consider whether the jurors feel that they are capable of continuing in a fair and impartial manner. Accepting the jury's views on this matter does not involve an abdication of the judge's decision-making responsibility (*R v Matthews* [1999] 1 VR 534; [1998] VSCA 2; *R v Goodall* (2007) 15 VR 673; [2007] VSCA 63).
18. When determining whether inappropriate media reporting may have influenced the jury, the judge should usually assume that at least one juror may have seen the offending material unless there is evidence to the contrary (*R v Zampaglione* (1981) 6 A Crim R 287).

Discharge of Whole Jury Following Discharge of Juror

19. The accused has a prima facie right to be tried by a jury of 12. This should be the starting point for any judge and a judge should not lightly disregard this right (*R v Juric* [2003] VSC 383; *Wu v R* (1999) 199 CLR 99; [1999] HCA 52; *Brownlee v R* (2001) 207 CLR 278; [2001] HCA 36).
20. A judge should identify some reason for continuing a trial with less than 12 jurors. Otherwise, the whole jury should be discharged (*Wu v R* (1999) 199 CLR 99; [1999] HCA 52).
21. The court may take into account the following matters when deciding whether to continue with less than 12 jurors:
 - the wishes of the accused and the accused's interest in knowing the outcome of the trial;
 - the delay between the date of the alleged offence and the trial;
 - the risk of witnesses' memories deteriorating before a further trial;
 - the added trauma to witnesses in a retrial;
 - the anxiety of witnesses and complainants in the resolution of proceedings;
 - the stage of proceedings;

- the waste of costs associated with discharge of the jury;
 - whether the incident that gave rise to the discharge of a single juror may have contaminated the whole jury (*R v Juric* [2003] VSC 383; *R v Sharp* [2005] VSCA 44; *DPP v Weiss (Ruling No 3)* [2002] VSC 155; *R v Matthews* [2021] VSCA 20, [34]–[39]).
22. The court should favour discharge of the whole jury where the case involves an issue that attracts strong divisions of opinion in the community or where the offence attracts strong prejudices from some members of the community (*Wu v R* (1999) 199 CLR 99; [1999] HCA 52 per McHugh J).
 23. Particular care is required in keeping a jury where there is some indication of how the discharged juror would have voted. Discharging a dissenting juror, and keeping the remaining jury may give rise to a perception that an obstacle to a verdict has been removed (*BG v The Queen* [2012] NSWCCA 139; *R v Roberts* [2005] 1 Qd R 408, [46] (cited in *Addo v The Queen* (2022) 108 NSWLR 522, [148])).
 24. While it might be possible to continue with a reduced jury, where it is known that a dissenting juror has been removed (such as where the jury has received a majority verdict instruction, and the juror was discharged due to their unwillingness to continue with deliberations), it will be essential when recording the verdict that the court clearly establishes whether the verdict was unanimous (see *Addo v The Queen* (2022) 108 NSWLR 522, [151]–[155]).
 25. The judge may need to question other jurors or the jury as a whole when a juror is discharged due to an incident occurring in the trial. This inquiry may be conducted through the foreperson, rather than asking each juror whether he or she can continue to conduct an impartial examination of the issues in the case (*R v Stretton* [1982] VR 251; *R v Goodall* (2007) 15 VR 673; [2007] VSCA 63).

Discharge Due to Disagreement on Verdict

26. The judge may discharge the jury if it is unable to reach a verdict after a period of time the court thinks is reasonable, having regard to the nature and complexity of the trial (*Juries Act 2000* s 46).

Last updated: 8 December 2023

11.11 Post-Trial

1. All materials which record the jury’s deliberations or that contain annotations by jurors should be destroyed after the discharge of the jury (*R v Smart* [1983] 1 VR 265).
2. The Juries Commissioner may grant exemptions from jury service to any person who attends for jury service or serves on a jury. The exemption is for the period specified by the Commissioner and must not exceed 3 years (*Juries Act 2000* s 13).
3. The court may also grant an exemption from service to a juror or the jury once the juror or the jury is discharged if the trial required the attendance of the juror or jurors for a lengthy period or for any other good reason. The court must specify the length of the exemption, and must notify the Juries Commissioner of the exemption (*Juries Act 2000* ss 13, 14).
4. Once a trial concludes, members should be allowed to return to the community. Appellate courts generally avoid calling jurors to give evidence on whether the jury should have been discharged (*R v Booth* [1983] 1 VR 39).
5. There are a range of views on how a judge should deal with the jury at the conclusion of the trial. Most judges thank jurors for their service and refer them to the Juries Commissioner for any further questions. In traumatic cases, it may be appropriate to remind jurors about counselling services that are offered by the Juries Commissioner.

Last updated: 14 April 2009

12 Arraignment

1. Section 215 of the CPA 2009 states:

(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.

2. The date and time of arraignment must be recorded in the records of the court for trials in the Supreme Court. For trials in the County Court, only the date of arraignment must be recorded (*Supreme Court (Criminal Procedure) Rules 2017* r4.12; *County Court Criminal Procedure Rules 2019* r 2.09).
3. The arraignment is the formal process in which the accused admits his or her identity and pleads to all the charges on the indictment. It is only after the arraignment that it is known whether there will be a trial, as there is no need for a trial if the accused pleads guilty (*R v Vickers* (1975) 61 Cr App R 48).
4. Unless the accused has pleaded guilty to all charges on an indictment at an earlier arraignment, the accused must be arraigned in the presence of the jury panel and the jury for the trial must be empanelled from that panel.⁶⁴⁶ This arraignment marks the formal commencement of the accused's trial (*CPA 2009* ss 210, 217).
5. Once the accused is arraigned in the presence of the jury panel, it is not necessary to re-arraign the accused before the particular jury chosen for that trial. There is no natural justice requirement that all members of the panel hear the accused plead (*DS v R* [2012] NSWCCA 159; *Caruso v R* [2012] VSCA 138).
6. During an arraignment, the accused must generally enter a personal plea to each charge. A plea may only be entered on behalf of the accused if he or she is deaf, mute, insane or a corporation (*R v Ellis* (1973) 57 Cr App R 571). A lay representative of a corporation may only enter a plea of guilty if he or she has express authorisation (*CPA 2009* s 334).⁶⁴⁷
7. A defective arraignment may vitiate the trial. However, an appellate court may hold that the accused waived his or her right to plead if he or she wished to plead not guilty and was treated as if he or she pleaded not guilty, even if the court failed to conduct a formal arraignment (*R v Williams* [1978] QB 373).
8. A plea must be clear and unambiguous. The court should treat an ambiguous plea as a plea of not guilty (*R v Golathan* (1915) 11 Cr App R 79).

Last updated: 31 August 2020

12.1 Plea of Not Guilty

1. By entering a plea of not guilty, the accused joins issue with the Crown on all elements of the charge and is entitled to have the matter determined by a jury (*R v Talia* [1996] 1 VR 462; *R v McNamara (No 2)* [1997] 1 VR 257).
2. The accused may enter a special plea in addition to a plea of not guilty. This may include a plea of previous conviction or previous acquittal (*CPA 2009* ss 218, 220). See 12.4 Special Pleas.

⁶⁴⁶ If the court splits a jury panel into two or more parts, the accused must be arraigned in the presence of the first part of the panel that is present in court (*CPA 2009* s 217).

⁶⁴⁷ In contrast, in summary hearings, a legal practitioner appearing for the accused may enter a plea on the accused's behalf (*CPA 2009* s 63).

12.2 Plea of Guilty

1. A plea of guilty is a formal and conclusive admission of all elements of that charge. When the accused pleads guilty, the Crown does not need to lead any evidence to prove that charge (*R v Broadbent* [1964] VR 733; *De Kruff v Smith* [1971] VR 761; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46).
2. The accused may enter a written plea of guilty by a notice signed by the accused to one or more charges on an indictment if:
 - the accused makes an oral plea of guilty to one or more charges in the indictment; and
 - the accused indicates his or her intention to plead guilty to one or more remaining charges; and
 - the prosecution consents to the accused making a written plea of guilty; and
 - the court considers it is appropriate to accept the written plea, having regard to the number of charges in the indictment (*CPA 2009* s 216).⁶⁴⁸
3. For written pleas of guilty in the Supreme Court, the notice of intention to plead guilty must be in Form 6-4F of the *Supreme Court (Criminal Procedure) Rules 2017*.
4. In the County Court, the accused must also sign each charge on the copy of the indictment attached to the written notice of intention to plead guilty in Form 2F of the *County Court Criminal Procedure Rules 2019* (*County Court Criminal Procedure Rules 2019* r 2.10(2)).
5. If the court accepts a written plea of guilty to one or more charges, it is not necessary to arraign the accused on those charges and the written plea has the same effect as if it was entered on arraignment (*CPA 2009* s 216).
6. If the accused pleads guilty to a charge, it is not necessary to arraign the accused on any alternatives to that charge (*R v Boyle* [1954] 2 QB 292).
7. The court may only act on a plea when it is a true and unequivocal admission of guilt. If the accused may be of unsound mind or may not be exercising a free choice to plead guilty, the court must either obtain an unequivocal plea or refuse to act on it (*Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *Meissner v R* (1995) 184 CLR 132; [1995] HCA 41).
8. The court does not need to be independently satisfied that the accused is guilty. It is only in exceptional circumstances that a court may reject a voluntary plea of guilty.⁶⁴⁹ There is no miscarriage of justice in acting on a voluntary plea, even if the accused is not guilty of the offence charged. A person may plead guilty for various reasons unrelated to his or her guilt, including the hope of a obtaining a more lenient sentence, or to avoid worry, expense or embarrassment (*Meissner v R* (1995) 184 CLR 132; [1995] HCA 41; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Carkeet* [2009] 1 Qd R 190; [2008] QCA 143). See also 12.5 Change of Plea.
9. A plea is an admission of the facts contained in the indictment and does not necessarily extend to all facts contained in the depositions. The accused may dispute the details of the offence during the sentencing hearing (*R v Broadbent* [1964] VR 733; *R v Riley* [1896] 1 QB 309).
10. While the accused is free to change his or her plea between the committal and arraignment, the prosecution may use evidence of an earlier guilty plea at the trial as a formal confession by the accused (*R v D'Orta-Ekenaike* [1998] 2 VR 140; *R v Broadbent* [1964] VR 733).

⁶⁴⁸ The written plea of guilty is a new procedure introduced under the *CPA 2009* to address the inefficiency of taking oral guilty pleas to all charges on large indictments, as may occur in fraud matters (*CPA 2009*, Explanatory Memorandum, Clause 216).

⁶⁴⁹ See plea decisions in 15.4 Proceedings That Would Bring the Administration of Justice into Disrepute.

11. The court may advise an unrepresented accused to withdraw his or her plea of guilty if it appears that there is insufficient evidence to support the charge. The court cannot compel the accused to plead not guilty and the court must accept the guilty plea if the accused persists with an unequivocal and freely made plea (*R v Inglis* [1917] VLR 672; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46).
12. A plea of guilty results in a formal finding of guilt, unless the judge sets aside the plea. It is not necessary for the court to take other steps to accept the plea such as recording or announcing a conviction (*Griffiths v R* (1977) 137 CLR 293; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Tonks & Goss* [1963] VR 121; *DPP v Nguyen & Duncan* (2009) 23 VR 66; [2009] VSCA 147).⁶⁵⁰
13. A confession or plea of guilty by a co-accused is not admissible against the accused. The judge must direct the jury on how it may and may not use this evidence (*R v Moore* (1956) 40 Cr App R 50; *R v Cowell* (1985) 24 A Crim R 47; *R v Fountain & Tootell* [2001] VSCA 200).⁶⁵¹
14. If the accused pleads guilty to some charge and not guilty to other charges, the court should not hold the plea and sentence until after the trial of the remaining charges. It is undesirable for two different judges to impose sentences at different times on different charges on the one indictment (*R v Judge Hewitt; Ex parte Attorney-General* [1973] VR 484).

Last updated: 31 August 2020

12.3 Plea of Guilty to Alternatives

1. An accused may plead not guilty to the offence charged but guilty to another offence of which he or she might be found guilty. This plea has the same effect as if the other offence had been charged in the indictment (*CPA 2009 s 219*).
2. The prosecutor may elect whether to accept the plea to an alternative offence or whether to seek a jury verdict on the offences charged on the indictment (*R v Broadbent* [1964] VR 733; *R v Tonks & Goss* [1963] VR 121).
3. The prosecution may withdraw its acceptance of a plea to a lesser offence with the leave of the court at any time before the accused is sentenced. The court should refuse leave if the accused made self-incriminating statements in reliance on the accepted plea of guilty (*Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46).⁶⁵²
4. If the prosecutor does not accept the plea to the alternative offence, the trial on the indictment should proceed, and the jury will determine the accused's guilt on the offences charged and any available alternative offences. The court should not act on the plea to the alternative offence, as that may constitute a "conviction" of that offence. If the jury find the accused not guilty of the more serious charge, it must then consider whether he or she is guilty of the alternative offence and the accused's plea is evidence that he or she committed that offence (*R v Broadbent* [1964] VR 733; *DPP v Collins* (2004) 10 VR 1; [2004] VSCA 179).

⁶⁵⁰ The meaning of "conviction" may be stricter in relation to a plea of "previous conviction". In that context, it may be necessary to show that the accused was convicted and sentenced. In other contexts, "conviction" may take place without the court ever imposing a final sentence, such as where the court releases the accused on an undertaking to be of good behaviour (*R v Celep* [1998] 4 VR 811; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *Griffiths v R* (1977) 137 CLR 293).

⁶⁵¹ If the evidence of the co-accused's plea is admitted for some other reason, it may prima facie be used as evidence to support the guilt of the co-accused, if that is relevant in the accused's trial (see *Choi v R* [2007] NSWCCA 150).

⁶⁵² It may be open to a court to grant leave on the condition that the accused's prejudicial statements may not be used in the proceeding (see *Barac v DPP* [2006] QSC 421, which was decided in the context of the prosecution resiling from an agreement not to prosecute).

Identification of Alternative Offences

5. If a charge in an indictment amounts to or includes an allegation of another offence that is within the jurisdiction of the court, the jury may find the accused guilty of that other offence. This includes attempts, common law alternatives and statutory alternatives (*CPA 2009* s 239; *R v Salisbury* [1976] VR 452; *Crimes Act 1958* ss 421–435).
6. At common law, an accused may be found guilty of any other offence that is "necessarily included" within the charged offence. This requires the court to examine the elements of each offence and determine whether each element of the lesser offence is included in the more serious offence.. This is sometimes called the 'red pencil' test, as it involves examining whether words could be deleted from the particulars of an offence in the indictment in a way that leaves the particulars of the alternative offence (*R v Salisbury* [1976] VR 452; *Mareangareu v The Queen* [2019] VSCA 101, [44]; *Reid v R* (2010) 29 VR 446; *R v Winner* (1989) 39 A Crim R 180; *Crimes Act 1958* s 421).
7. The availability of an alternative depends on the terms in which the charged offence is laid and not on the evidence adduced. The evidence led at the trial is only relevant to the extent that an accused cannot be found guilty of a lesser charge unless the evidence led supports a conviction on that charge (*R v Salisbury* [1976] VR 452; *Reid v R* (2010) 29 VR 446; *Pollard v R* (2011) 31 VR 416; *R v Perdikoyiannis* (2003) 86 SASR 262).
8. In the case of a charge for an offence like manslaughter by an unlawful and dangerous act, the availability of an alternative charge, such as the unlawful act relied on for manslaughter, depends on the wording of the indictment. Where the unlawful act is not explicitly particularised in the indictment a way that could be established through the 'red pencil' test, it will not be an available alternative (*DPP v Maskell (Ruling No 2)* [2023] VSC 507).
9. Section 239 does not allow a court to leave a State offence as a necessarily included alternative to a Commonwealth offence. This is because while s 239 may be 'picked up' by *Judiciary Act 1903* s 79(1) to permit an alternative verdict of one Commonwealth offence for another, a substantive offence cannot be picked up by s 79 to become 'another offence within the jurisdiction of the court' (*Chaarani & Ors v The Queen* [2020] VSCA 88, [66]. See also *DPP (Cth) v Fattal* [2013] VSCA 276, [122]).
10. An indictment may also charge several offences as factual alternatives. The accused may plead to one of those offences and, if the plea is accepted, he or she must not be punished for the alternative offences (*Interpretation of Legislation Act 1984* s 51; *R v Tonks & Goss* [1963] VR 121; *R v PHW* [2004] VSC 411; *R v Weeding* [1959] VR 298; *R v Sessions* [1998] 2 VR 304).
11. Even if an alternative offence is open under s 421 of the *Crimes Act 1958* or s 239 of the *CPA 2009*, the judge may order that the accused's guilt of that offence is not to be determined in the trial, if that is in the interests of justice (*CPA 2009* s 240).
12. The *Crimes Act 1958* contains prescribed statutory alternative offences. These are described in the following table:

Table 1: Prescribed alternative offences under the *Crimes Act 1958*

<i>Crimes Act 1958</i> section	Primary offence	Alternative offences
325	Any indictable offence punishable on first conviction by imprisonment for life or for a term of five years or more	Accessory after the fact to the charged offence (s 325)
421(1)	Murder	Manslaughter; Child homicide Any offence of which the accused may be found guilty under an enactment specifically providing; Accessory after the fact (s 325); Attempt to commit murder; or Attempt to commit any other alternative offence listed in s 421(1) ⁶⁵³
422(1)	Intentionally causing serious injury in circumstances of gross violence (s 15A)	Intentionally causing serious injury (s 16)
422(2)	Recklessly causing serious injury in circumstances of gross violence (s 15B)	Recklessly causing serious injury (s 17)
422A(1)	Culpable driving causing death (s 318); or	Dangerous driving causing death (s 319)
422A(1A)	Negligently causing serious injury (s 24)	Dangerous driving causing serious injury (s 319(1A))
426	Making, using or supplying identification information to commit an indictable offence (s 192B)	Possessing identification information to commit an indictable offence (s 192C)

⁶⁵³ This list of alternative offences for murder is exhaustive. An accused may not be found guilty of any other offence (*Crimes Act 1958* s 421).

427(1)	Intentional destruction or damage of property with intention to endanger the life of another (s 197(2)); Destruction of damage of property with a dishonest view to gain (s 197(3))	Intentional destruction or damage of property (s 197(1))
427(2)	Arson causing death (s 197A)	Intentional destruction or damage of property (s 197(1)); Intentional destruction or damage of property with intention to endanger the life of another (s 197(2)); Destruction of damage of property with a dishonest view to gain (s 197(3)); Arson (s 197(6))
428	Unauthorised modification of data to cause impairment (s 247C)	Intentional destruction or damage of property (s 197(1)); Unauthorised impairment of electronic communication (s 247D)
429	Unauthorised impairment of electronic communication (s 247D)	Intentional destruction or damage of property (s 197(1)); Unauthorised modification of data to cause impairment (s 247C)
435	Riot contrary to s 206(1)	Riot contrary to s 206(2)

Last updated: 8 December 2023

12.4 Special Pleas

1. The accused may enter a special plea in addition to a plea of not guilty (CPA 2009 ss 218, 220).

Previous Conviction and Previous Acquittal

2. The accused may enter a plea in bar of previous conviction or previous acquittal by stating that he or she has been lawfully convicted or acquitted of the offence charged in the indictment, as the case may be (CPA 2009 s 220).
3. The pleas of previous conviction and previous acquittal are a statutory substitute for the common law pleas of *autrefois convict* and *autrefois acquit*, respectively. The CPA 2009 introduced these pleas in an effort to modernise language. These common law rules continue to apply to the new statutory pleas (CPA 2009 s 220; CPA 2009, Explanatory Memorandum, clause 220).
4. The pleas of previous conviction and previous acquittal give effect to the common law principle that a person must not be placed in jeopardy more than once for the same, or substantially the same, offence (*Pearce v R* (1998) 194 CLR 610; [1998] HCA 57).

5. A plea of previous conviction or previous acquittal is available when the accused has previously been charged, tried and convicted or acquitted of the same offence, or substantially the same offence. Two offences are the same, or substantially the same if all the elements of one offence are wholly included within the other offence (*Pearce v R* (1998) 194 CLR 610; [1998] HCA 57).
6. A court must examine whether the elements are the same, rather than whether the evidence or the facts are the same. The plea is available on the sole basis that the court is required to investigate the same transaction or course of events. A court may examine the facts and the evidence only if that is necessary to identify the elements of the offence (*Pearce v R* (1998) 194 CLR 610; [1998] HCA 57; *Blockburger v United States* 284 U.S. 299 (1932); *United States v. Dixon* 509 U.S. 688 (1993); *R v Langdon & Langdon* (2004) 11 VR 18; [2004] VSCA 205; *R v P, NJ (No 2)* (2007) 99 SASR 1; [2007] SASC 135).⁶⁵⁴
7. The order in which the offences are charged is irrelevant. An accused charged with offence B who has previously been convicted or acquitted of offence A has a plea in bar if either:
 - Offence A is wholly included within offence B; or
 - Offence B is wholly included within offence A (*Island Maritime v Filipowski* (2006) 226 CLR 328; [2006] HCA 30 per Gummow, Hayne, Kirby and Callinan JJ; *R v P, NJ (No 2)* (2007) 99 SASR 1; [2007] SASC 135).
8. The court must look carefully at regulatory offences where the alleged conduct breaches a licence or an order. Such conduct may also constitute a more general offence and an acquittal on the general offence may support a plea of previous acquittal for the regulatory offence (see *Australian Iron & Steel v Environmental Protection Authority* (1992) 28 NSWLR 502; *Ashley v Marinov* (2007) 20 NTLR 33; [2007] NTCA 1).
9. The plea will only be available if the elements of one offence are, in all cases, wholly included in the other offence. It is not sufficient that the elements may be wholly included in a particular case. For example, where a single offence can be committed intentionally or recklessly and another offence can only be committed intentionally, neither of those offences will be wholly included in the other (*R v P, NJ (No 2)* (2007) 99 SASR 1; [2007] SASC 135).⁶⁵⁵
10. An acquittal on a course of conduct charge does not constitute a previous acquittal in relation to an alternative charge of the offence covered by the course of conduct charge which was alleged in the same charge-sheet or indictment (CPA 2009, Schedule 1, clause 5(4)). This ensures that the court can return a verdict on the alternative charge.
11. The pleas of previous conviction and previous acquittal are not the only means by which courts protect against double jeopardy. A court may also stay a proceeding as an abuse of process if it involves relitigation of a previously decided factual issue. A court will not allow the prosecution to question or call into question a previous acquittal. In addition, the prosecution are generally required to include all related offences on the one indictment and use of subsequent indictments for related offences may be vexatious (*Carroll v R* (2002) 213 CLR 635; [2002] HCA 55; *Pearce v R* (1998) 194 CLR 610; [1998] HCA 57; *Connelly v DPP* [1964] AC 1254; *Garrett v R* (1977) 139 CLR 437; *R v VN* (2006) 15 VR 113; [2006] VSCA 111; *Lecornu v R* (2012) 36 VR 382; [2012] VSCA 137). See also 15.3 Unjustifiably Oppressive Proceedings.

⁶⁵⁴ Repeated prosecutions based on the same factual circumstances may be an abuse of process. See 15.3 Unjustifiably Oppressive Proceedings.

⁶⁵⁵ Application of this principle gives rise to the so-called "murder exception", which states that an offender may be charged, tried and convicted of an offence against the person and, if the victim later dies, can later be charged with murder (see *R v P, NJ (No 2)* (2007) 99 SASR 1; [2007] SASC 135; *Connelly v DPP* [1964] AC 1254). In Victoria, the available alternative offences to murder are exhaustively defined in s 421(1) of the *Crimes Act* 1958. The effect of this provision is that assault, or intentionally causing serious injury is not an alternative offence to murder.

12. Some court orders carry a condition that the person must not commit other offences. Examples include Community Correction Orders (*Sentencing Act* s 45) and Supervision Orders (*Serious Sex Offenders (Detention and Supervision) Act* 2009 s 16). Where a person contravenes such an order by committing an offence, principles of double jeopardy and abuse of process do not prevent the person from being convicted of both the breach offence and the other offence. The contravention offence is distinct from the substantive offence which gave rise to the contravention (*Lecornu v R* (2012) 36 VR 382; [2012] VSCA 137; *Loader v R* (2011) 33 VR 86; [2011] VSCA 292; *Maple v Kerrison* [1978] 18 SASR 513).

Limitations on the Pleas

13. Principles of double jeopardy only apply if the accused was "in jeopardy" in earlier proceedings. The accused is not in jeopardy if a fatal flaw affected the earlier proceedings so that a court could not enter a valid conviction. This may arise if the earlier court did not have jurisdiction to hear the offence, or the indictment charged an offence that was unknown to the law (*Island Maritime v Filipowski* (2006) 226 CLR 328; [2006] HCA 30; *Broome v Chenoweth* (1946) 73 CLR 583; *Howard v Pacholli* [1973] VR 833).
14. A plea in bar is only available if the accused has been "convicted" or "acquitted". The point at which an accused is "convicted" can be unclear, as "the question of what amounts to a conviction admits no single, comprehensive answer".⁶⁵⁶ The meaning of "conviction" in this context may be stricter than in other contexts, and it may be necessary to show that the accused was both convicted and sentenced before the plea of "previous conviction" is available (*Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Richards* [1993] AC 217; *R v Tonks & Goss* [1963] VR 121).⁶⁵⁷ See also 12.2 Plea of Guilty.
15. Strictly, the plea of previous conviction or previous acquittal is not available if a matter was previously determined summarily. Instead, an analogous plea is available, which applies the same principles as the plea of previous conviction or previous acquittal. An accused may enter this plea at further summary proceedings and a later trial. A "discharge" by a magistrate after the parties join issue can give rise to a plea equivalent to a plea of previous acquittal (*Island Maritime v Filipowski* (2006) 226 CLR 328; [2006] HCA 30; *Broome v Chenoweth* (1946) 73 CLR 583; *Pearce v R* (1998) 194 CLR 610; [1998] HCA 57; *State Pollution Control Commission v Tallow Productions* (1992) 29 NSWLR 517; *R v Gamble; ex parte Cleary* [1947] VLR 491).⁶⁵⁸
16. An accused may also enter a plea in bar analogous to a plea of previous conviction if a court has previously taken an offence into account under s 100 of the *Sentencing Act* 1991. The Act prohibits the prosecution from taking or continuing any proceedings in relation to offences taken into account (*Sentencing Act* 1991 s 100).
17. When an appellate court allows an appeal and enters a verdict of acquittal on a charge, it may order a re-trial on an available alternative offence. The directed acquittal on the more serious offence does not support a plea of previous acquittal at the re-trial (*AJS v R* (2007) 235 CLR 505; [2007] HCA 27; *R v Taber* [2005] NSWSC 936).

Statutory Limits on Plea of Previous Conviction

18. On the application of the DPP, the Court of Appeal may set aside a previous conviction as a bar to a subsequent prosecution under Chapter 7A of the CPA 2009. The court may exercise this power where:

⁶⁵⁶ *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46 per Dawson and McHugh JJ.

⁶⁵⁷ *R v Celep* [1998] 4 VR 811, *DPP v Nguyen & Duncan* (2009) 23 VR 66; [2009] VSCA 147 and *DPP v Helou* (2003) 58 NSWLR 574; [2003] NSWCA 301 all demonstrate that a conviction may take place before sentence for other purposes, without affecting the principles of autrefois convict.

⁶⁵⁸ A discharge does not always give rise to a plea in bar, as a magistrate may enter a discharge for want of prosecution before issue is joined (see *Ward v Hodgkins* [1957] VR 715; *Re Galvin (No 2)* [1961] VR 740).

- The acquittal was tainted;
- Fresh and compelling evidence becomes available; or
- the accused is charged with an administration of justice offence connected with the original trial (CPA 2009 ss 327H, 327L, 327M, 327N).

19. For information on this process, see 21 Applications to set aside previous acquittals.

Double Punishment

20. The statutory prohibition on punishing an offender more than once for the same act or omission only creates a prohibition on double punishment. It does not affect the pleas in bar, prohibit multiple prosecutions or prevent the court from taking verdicts on overlapping offences (*Interpretation of Legislation Act 1984* s 51; *R v Sessions* [1998] 2 VR 304; *Director of Public Prosecutions Reference No 1 of 1992* [1992] 2 VR 405; *R v Langdon & Langdon* (2004) 11 VR 18; [2004] VSCA 205).
21. A court must examine all the relevant facts when determining whether the offender may be punished for several criminal acts, including the consequences of the conduct contemplated by the offence. The separate harms that flow to multiple victims of a single action are separate "acts" for the purpose of the statutory prohibition (*R v Bekhazi* (2001) 3 VR 321; [2001] VSCA 178; *Phillips v Carbone (No 2)* (1992) 10 WAR 169; *R v Dodd & Dodd* (1991) 56 A Crim R 451).
22. Where the offender is under an order that requires that he or she not commit other offences, principles of double punishment are relevant to sentencing when the offender has contravened the order by committing another offence. The judge must moderate the sentences imposed to avoid double punishment for any overlap between the offences. When sentencing for the substantive offence, the judge may take the fact that the substantive offence was committed while under the conditional order in account but cannot take into account the added criminality involved in contravening the earlier court order (*Lecornu v R* (2012) 36 VR 382; [2012] VSCA 137; *Loader v R* (2011) 33 VR 86; [2011] VSCA 292).

Double Punishment and Drugs of Dependence

23. When the prosecution alleges trafficking a drug of dependence based on the weight of a mixture, it may not bring separate charges for each component of that mixture. This would give rise to double punishment (*R v Ahmed* (2007) 17 VR 454; [2007] VSCA 270).
24. Where a person is charged with trafficking based on a mixture of drugs, the prosecution may particularise the charge in one of three ways:
- The offender may be charged with separate offences based on the weights of the pure drugs within the mixture, using the figures in Columns 1A, 2 or 3A of Part 3 of Schedule 11 of the *Drugs, Poisons and Controlled Substances Act 1981*;
 - The offender may be charged with a single offence of trafficking based on the weight of the mixture if the prosecution selects a single drug that is within the mixture, using the figures in Columns 1B, 2A or 3 of Part 3 of Schedule 11 of the *Drugs, Poisons and Controlled Substances Act 1981*; or
 - The offender may be charged with a single offence of trafficking based on the aggregated quantities of the pure drugs within the mixture (*R v Ahmed* (2007) 17 VR 454; [2007] VSCA 270).
25. The prosecution must also avoid the prohibition on double punishment when it charges a person with both possession and trafficking of a drug of dependence. The prohibition will not always arise and is not likely to arise when there is independent evidence of trafficking or where the charges concern possession and trafficking of different drugs. However, the prohibition on double punishment is likely to arise when the prosecution rely on the extended definition of trafficking that includes possession of a traffickable quantity (*R v Langdon & Langdon* (2004) 11 VR 18; [2004] VSCA 205; *R v Nor* (2005) 11 VR 390; [2005] VSCA 46).

Identity

26. There do not appear to be any published decisions on how a court should act if the accused denies that he or she is the person named on the indictment. As a matter of prudence, the court should ascertain who the accused claims to be and whether prison officials have brought the wrong person to the court. If the prosecution joins issue with the accused's denial of identity, then the plea should be resolved in the same way as other special pleas (see also *Evidence Act 2008* ss 179, 180 on proof of identity of convicted persons by use of fingerprint records).

Pardon

27. An accused may enter a special plea that he or she has the benefit of a pardon in respect of the offence charged. A pardon is an instrument issued by the governor on the advice and consent of the executive council and is made under the public seal of the state (*R v Milnes & Green* (1983) 33 SASR 211; *R v Milnes* (1983) 8 A Crim R 61; *R v Georgiadis* [1984] VR 1030).
28. The accused bears the onus of proof on this issue, and has carriage of the hearing (*R v Milnes & Green* (1983) 33 SASR 211).
29. The royal pardon has become increasingly rare in Australia. Instead, the DPP may exercise his or her statutory power to grant an indemnity to secure the co-operation of a witness. This statutory power is not equivalent to a pardon and does not give rise to a plea in bar (*R v Georgiadis* [1984] VR 1030; *R v McDonald* [1983] NZLR 252).

Procedure for Determining a Plea in Bar

30. Practices around Australia vary on how pleas in bar should be determined. Current practice in New South Wales and South Australia is that the judge hears and determines the plea in bar, in the same manner as an application for a stay on the basis of abuse of process (*R v Green* (2005) 64 NSWLR 413; [2005] NSWCCA 344; *R v P, NJ* [2006] SASC 309).
31. Older Victorian authorities indicate that the judge should empanel a jury to determine the plea on the balance of probabilities, with the accused carrying the onus of proof (see *R v Worland* [1964] VR 607; *R v Gamble; ex parte Cleary* [1947] VLR 491; *R v Coughlan* (1976) 63 Cr App R 33; *R v Clarkson* [1987] VR 962).
32. It is arguable that the common law has developed and those older Victorian authorities no longer apply. Instead, a judge should adopt the principle that a plea in bar raises a question of law, and questions of law are for the judge (see, e.g., *Winsor v R* (1866) LR 1 QB 289; *R v Snow* (1915) 21 ALR 382). The Victorian decisions cited above demonstrate that the judge would often direct the jury whether the plea was established. This supports the theory that the existence of a plea in bar is generally a question of law.

Last updated: 31 August 2020

12.5 Change of Plea

1. The accused may seek to change his or her plea at any time before the court imposes sentence, even if the court has recorded a verdict of guilty on the indictment (*R v Clouter & Heath* (1859) 8 Cox CC 237; *S (An Infant) v Recorder at Manchester* [1971] AC 481; *R v Douglass* (2004) 9 VR 355; [2004] VSC 376).

Change of Plea During Trial and on Appeal

2. The accused requires leave from the judge to change his or her plea during the trial. If the judge grants leave, the accused must be re-arraigned to allow him or her to formally enter the new plea (*R v Middap* (1989) 43 A Crim R 362; *R v Ellis* (1973) 57 Cr App R 571).
3. If the accused wishes to change his or her plea from not guilty to guilty, the judge should usually grant leave. In appropriate cases, the judge may need to be satisfied that the plea is made voluntarily (see *R v Hall* [1968] 2 QB 788).

4. If the accused pleads guilty to a charge on re-arraignment during a trial, the judge may discharge the jury from delivering a verdict on that charge and direct an entry of guilty be made on the record in respect of that charge (CPA 2009 s 241). This power only applies where the accused is “re-arraigned”. The power to enter a finding of guilt where the accused pleads guilty on initial arraignment is governed by CPA 2009 s 253B. See *Wilson v R* [2015] VSCA 211.
5. The test for whether a judge should grant leave for an accused to change his or her plea from guilty to not guilty is:

whether a miscarriage of justice, in the view of the Judge, would occur if the leave sought were denied the applicant. Each case must be examined on its own particular facts and merits, and there is no question but that the Judge has a discretion, indeed perhaps a wide discretion, to exercise in relation to the matter, which must be exercised judicially and having regard to the test to which I have referred (*R v Middap* (1989) 43 A Crim R 362. See also *R v Ferrer-Esis* (1991) 55 A Crim R 231).
6. In *Weston v R* (2015) 48 VR 413; [2015] VSCA 354 at [109], Redlich JA expressed the test as follows:

To impugn the integrity of the plea, whether before or after conviction, the applicant must show an ‘issuable question of guilt’ and the existence of some circumstance which affects the integrity of the plea so that it would be a miscarriage of justice to hold the applicant to his plea. Some of the more common examples cited that may justify the conclusion that the applicant should not be held to his plea are that the applicant may not have appreciated the nature of the plea which he had entered, there may be no evidence upon which he could have been convicted, he may not have intended to admit that he was guilty, or his plea may have been induced by fraud or threats or other impropriety or that it was not offered with a consciousness of guilt.
7. Redlich JA also noted that there was no definitive test on when a miscarriage of justice will occur due to holding an accused to his or her plea (*Weston v R* (2015) 48 VR 413; [2015] VSCA 354 at [109]).
8. The accused is under a heavy onus when seeking leave to withdraw a plea of guilty. The judge will only grant leave in rare and exceptional cases (*R v Pinhasovitch*, Unreported, VicCCA, 7 February 1994; *R v Sivov* [2008] VSCA 100).
9. While each case must be evaluated on its own facts, the following are a few situations in which leave should be given:
 - the accused did not appreciate the nature of the plea;
 - the accused did not appreciate the nature of the charge;
 - the accused did not intend to plead guilty;
 - the plea was not a free and voluntary confession;
 - upon the admitted facts the accused could not in law be convicted;
 - the offence charged is time-barred and so the accused cannot lawfully be convicted;
 - the charge gave rise to issues of duplicity or double punishment;
 - the plea was induced by fraud, threats or other impropriety
 - the accused was persuaded to plead guilty due to imprudent and inappropriate advice from his or her legal representatives (*R v Forde* [1923] 2 KB 400; *R v Stewart* [1960] VR 106; *R v Murphy* [1965] VR 187; *R v Kardogeros* [1991] 1 VR 269; *R v Boag* (1994) 73 A Crim R 35; *R v Tait* [1996] 1 VR 662; *R v Parsons* [1998] 2 VR 478; *R v Sessions* [1998] 2 VR 304; *R v Ahmed* (2007) 17 VR 454; [2007] VSCA 270; *R v Hura* [2001] NSWCCA 61; *Lawson v R* (2011) 206 A Crim R 557 at 563–564).
10. In *Keenan v The Queen* [2020] VSCA 105 at [52], the Court of Appeal spelt out some factors that may influence a person to plead guilty which will not undermine the validity of the plea:

A person may enter a plea of guilty even though they do not believe that they are guilty of the offence for pragmatic reasons, such as, to avoid worry, inconvenience or expense, avoid publicity, to protect family or friends or in the hope of obtaining a more lenient

sentence. But a plea entered on such a basis will not be set aside unless a miscarriage of justice is shown. Advice, even strong advice to plead guilty, does not undermine the plea. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs.

11. However, judges should be cautious not to undermine the accused's free choice of plea. While the judge may encourage the parties to have "meaningful discussions", the judge may undermine the validity of a plea by offering an inducement or exerting improper pressure on the accused to plead guilty (*Guariglia v R* [2010] VSCA 343. See also *R v Holden* [2009] VSCA 254; *R v Pinhasovitch*, Unreported, VicCCA, 7 February 1994 and *R v KCH* [2001] NSWCCA 273).
12. There is not necessarily a miscarriage of justice when the accused pleads guilty after the trial judge states that the Crown case is particularly strong. An appellate court will consider whether the judge's comments deprived the appellant of the freedom to choose his or her plea (*R v Holden* [2009] VSCA 254; *R v Pinhasovitch*, Unreported, VicCCA, 7 February 1994; c.f. *R v KCH* [2001] NSWCCA 273).
13. In *Kumar v R* [2014] VSCA 102, Nettle and Redlich JJA and Almond AJA stated in obiter that:
before a judge will entertain an application to withdraw a freely made admission of guilt on the basis that it was motivated by hope or expectation of technical advantage, the judge will need to be persuaded by evidence that the accused did not intend by the plea to accept guilt for an offence of which he believed himself to be guilty.
14. In *Weston v R* (2015) 48 VR 413; [2015] VSCA 354, Whelan and Kaye JJA expressed doubt about the correctness of this statement and expressed concern as to whether this involved an unwarranted addition to or qualification of the correct test for a change of plea application – "whether a miscarriage of justice would occur if the guilty plea were not permitted to be withdrawn" (at [128]). Redlich JA in separate reasons in *Weston* concluded that *Kumar* correctly describes the test for change of plea applications before conviction, while a different and more stringent test applies when considering the question on appeal. Whelan and Kaye JJA expressed doubt about that distinction, while reserving that issue for a future case.
15. Following *Weston*, trial judges hearing applications to change a plea of guilty should consider the matters put forward by the accused and assess whether those matters, individually or cumulatively, give rise to a miscarriage of justice. The judge should consider, based on the facts and the arguments in the case, if it is necessary to address the question whether the plea was based on the accused's subjective belief in his or her guilt. In some cases, this will not be necessary, especially where the judge rejects the factors which the accused puts forward as having undermined the integrity of the plea (see *Weston v R* (2015) 48 VR 413; [2015] VSCA 354 at [119]–[125]).
16. Advice from the accused's legal practitioner that the accused will receive a substantial sentencing discount for pleading guilty does not, by itself, affect the integrity of the plea (*Kumar v R* [2013] VSCA 297).
17. Similarly, a plea can be voluntary even if the accused forms a mistaken belief about the sentence he or she will likely receive, provided that belief is not due to erroneous legal advice (*Kumar v R* [2013] VSCA 297).
18. The accused's belief about the strength of the prosecution case is not a relevant consideration on an application for leave to withdraw a plea. The focus should be on the genuineness of the accused's plea and whether the accused could be lawfully convicted of the offences charged (*Woods v R* [2008] NSWCCA 83; *R v Toro-Martinez* [2000] NSWCCA 216; *Brooks v R* [2010] VSCA 322).
19. It will rarely be appropriate to allow a change of plea solely on the basis that the accused contends that key evidence is inadmissible and that, despite the accused's objective guilt, he or she would not be found guilty. The circumstances in which an accused may be allowed to change a plea on this basis must be extreme, and not just extraordinary (*R v Toro-Martinez* [2000] NSWCCA 216; *Elmir v R* [2009] NSWCCA 22).

20. Erroneous legal advice will be relevant only if it affects the integrity of the plea. It may reveal, for example, that the accused pleaded guilty due to a misapprehension of the elements of the offence. Whether erroneous legal advice affects the integrity of the plea will depend on the nature of the mistake. Errors about the elements of the offence will likely affect the integrity of the plea, while even negligently given advice about the likely sentence will not be relevant (*Kohari v R* [2017] VSCA 33 at [133]–[137]).
21. However, a court will not hold that there is a miscarriage of justice when an accused freely acts pursuant to competent advice in the hope of securing an advantage or avoiding a forensic risk (*R v Rae (No 2)* [2005] NSWCCA 380 at [24], [112]).
22. An appellate court may allow an appeal against a trial judge’s refusal to grant leave to withdraw a plea if the circumstances give rise to a miscarriage of justice (*R v Holden* [2009] VSCA 254; *Brooks v R* [2010] VSCA 322).
23. The court is not restricted to only allowing the appeal if the appellant did not understand the nature of the charge, did not intend to admit guilt or, if he or she could not be convicted on the admitted facts. There is, however, a strong public interest against allowing appeals against conviction after the accused freely pleaded guilty (*R v Holden* [2009] VSCA 254; *R v Coffey* (2003) 6 VR 543; [2003] VSCA 155. Compare *R v Forde* [1923] 2 KB 400; *R v Kardogeros* [1991] 1 VR 269; *R v Tait* [1996] 1 VR 662).
24. The public interest argument is particularly strong when a plea is accepted during a trial to a negotiated alternative and the appellant receives the benefit of a directed acquittal on the more serious charge. The defence of previous acquittal would apply to that charge if the court orders a retrial (*R v Holden* [2009] VSCA 254).
25. However, as noted above, it is currently unclear whether the factors relevant to a change of plea application at trial are the same as the factors relevant on appeal (see *Weston v R* (2015) 48 VR 413; [2015] VSCA 354 at [128]–[129] per Whelan and Kaye JJA and compare *Weston* at [109] per Redlich JA).

Change of Plea from Committal Hearing

26. At the end of a committal hearing, the magistrate must ask the accused whether he or she pleads guilty or not guilty to the charges (CPA 2009 s 144).
27. If the accused enters a plea at the end of a committal hearing, he or she may change the plea when he or she is arraigned. The accused may change the plea as of right and does not require leave to do so (*R v Broadbent* [1964] VR 733; *R v D’Orta-Ekenaike* [1998] 2 VR 140; c.f. *R v Vodopic* [2001] VSC 31).
28. However, evidence may be admitted at trial that the accused pleaded guilty at committal (*R v Broadbent* [1964] VR 733; *R v D’Orta-Ekenaike* [1998] 2 VR 140).
29. The judge will often need to give the jury careful directions on how they may use the earlier guilty plea. The judge must tell the jury that they can only use the earlier plea if they are satisfied that the plea was a true admission of the accused’s guilt of the offence charged and that the accused intended the plea to be such a true admission. The jury should disregard a plea if they find it is possible that the accused entered the plea in the hope of receiving a more lenient sentence, rather than because he or she believed that he or she was guilty of the offence charged (*R v D’Orta-Ekenaike* [1998] 2 VR 140).
30. Evidence that that plea was made on erroneous advice from a legal practitioner does not render the plea involuntary or mean that the judge should not allow the jury to hear about the earlier plea (*R v D’Orta-Ekenaike* [1998] 2 VR 140).

Last updated: 31 August 2020

12.6 Refusal to Plead

1. If the accused will not directly answer to a charge on the indictment, the court may order that a plea of not guilty be entered on the accused’s behalf. This has the same effect as if the accused pleaded not guilty (CPA 2009 s 221).

2. If the accused fails to enter a plea, the court may need to consider whether he or she is fit to be tried. One of the grounds of unfitness is that the accused is "unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury" (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 6).

Related topic: 12.7 Fitness to be Tried

Last updated: 3 August 2009

12.7 Fitness to be Tried

1. An accused cannot be tried for a criminal offence unless he or she is fit to stand trial (*R v Dashwood* [1943] KB 1; *R v Benyon* [1957] 2 QB 111; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29).
2. The issue of fitness to stand trial relates to the accused's condition at the time of the *trial*. This is in contrast to the defence of mental impairment, which relates to the accused's condition at the time of the *offence* (*R v Dennison*, Unreported, NSWCCA, 3 March 1988; *Ngatayiv The Queen* (1980) 147 CLR 1; *R v Presser* [1958] VR 45).
3. The following sections examine the Victorian and Commonwealth procedure when a question is raised concerning the accused's fitness to stand trial.

Last updated: 21 October 2016

12.7.1 Victorian Offences

1. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (the "*Crimes (MIUT) Act 1997*" or "the Act") sets out the procedure for determining an accused's fitness to stand trial for Victorian offences. This procedure applies regardless of when the alleged offences were committed (*Crimes (MIUT) Act 1997* Schedule 3).
2. The provisions of the *Crimes (MIUT) Act 1997* concerning fitness to be tried apply to the Supreme Court, County Court and Children's Court (when hearing an indictable offence). The Magistrates' Court has no jurisdiction to determine an accused's fitness to stand trial (*CL (a minor) v Lee* (2010) 29 VR 570; [2010] VSC 517; *CL v DPP* [2011] VSCA 227; *Crimes (MIUT) Act 1997* s 5A and Part 5A).
3. The Magistrates' Court and the Children's Court cannot continue a hearing for a summary offence if the accused is not fit to be tried (*Pioch v Lauder* (1976) 27 FLR 79).
4. Where a real question concerning the accused's fitness arises in proceedings for an indictable offence to be determined summarily in the Magistrates' Court or Children's Court, the Court must transfer the proceedings to the committal stream or, if that is not possible, stay the proceedings.
5. Where the question of the accused's fitness arises in committal proceedings, the court must complete the committal and reserve the question of fitness for the trial judge. The trial judge must then determine whether there is a real and substantial question as to the accused's fitness to stand trial and, if so, conduct an investigation to determine fitness within 3 months of the committal (*Crimes (MIUT) Act 1997* ss 8, 38M, 38N).
6. In the County Court, the defence must indicate if fitness is in issue in the case initiative notice and, if a psychiatric report has already been obtained, must file and serve that report on the prosecution before the initial directions hearing. At the initial directions hearing, the Court will set a date for filing the indictment, any prosecution and defence psychiatric reports and set a date for a directions hearing once the reports have been filed. At that later directions hearing, the Court may list the matter for a fitness investigation if satisfied there is a real and substantial question about the accused's fitness to be tried. Similar processes are prescribed if the issue of fitness arises after the filing of an indictment (see *County Court Criminal Division Practice Note*, PNCR 2-2022, [24.1]–[24.10]).
7. In the Supreme Court and the County Court, when a real and substantial question is raised concerning an accused's fitness to stand trial, the court must hold an investigation to determine whether he or she is unfit (*Crimes (MIUT) Act 1997* ss 8, 9, 11).

8. The process in the County Court where a real and substantial question concerning fitness is raised after an indictment is filed is set out in *County Court Criminal Division Practice Note*, PNCR 2-2022 at [24.6]–[24.10].
9. A similar process applies in the Children’s Court where the question arises in relation to indictable offences heard and determined summarily by the Children’s Court (*Crimes (MIUT) Act 1997* ss 38G, 38Q).
10. Fitness to be tried may emerge as an issue either before the trial or at any stage during the course of the trial. Whenever it emerges as a real issue (even if it is while the accused is giving evidence), the judge must adjourn the proceedings and conduct an inquiry into the accused’s fitness (*Eastman v R* (2000) 203 CLR 1; [2000] HCA 29; *SM v R* (2011) 33 VR 393; [2011] VSCA 332; *Camurtay v The Queen* [2020] VSCA 221, [86]–[92]).
11. Commencement of an investigation halts the time limits imposed by ss 211 and 212 of the CPA 2009. Those time limits resume once the investigation is complete (*Crimes (MIUT) Act 1997* s 9).
12. In the Supreme Court or County Court, if the court finds that the accused is fit to stand trial, the trial may be commenced or resumed in accordance with the usual procedure (*Crimes (MIUT) Act 1997* s 12).
13. In the Children’s Court, if the court finds the accused fit to be tried, the hearing must be commenced or resumed in accordance with the usual procedure as soon as possible, and must be resumed within 3 months (*Crimes (MIUT) Act 1997* s 38R(1)).
14. In the Supreme Court or County Court, if the court finds the accused unfit to stand trial, the judge must determine whether it is likely that he or she will become fit to stand trial within 12 months. If it is likely that he or she will recover within that time, the judge must adjourn the matter until the time when the accused is likely to be fit to be tried (*Crimes (MIUT) Act 1997* ss 11, 12).
15. In the Children’s Court, if the court finds the accused is not fit to be tried, the court must determine whether it is likely the accused will become fit to stand trial within 6 months. If it is likely that the accused will recover in that trial, the court must adjourn the matter until the time when the accused is likely to be fit to be tried (*Crimes (MIUT) Act 1997* s 38R(2)).
16. When the judge adjourns the matter, he or she may:
 - grant the accused bail; or
 - if the court has received a certificate of available services from the Secretary to the Department of Human Services, remand the accused in an approved mental health service or a residential service (an "appropriate place" under the Act) for a specified period that does not exceed the period of adjournment; or
 - if there are no practicable alternatives, remand the accused in a prison for a specified period that does not exceed the period of adjournment; or
 - make any other order the judge thinks appropriate (*Crimes (MIUT) Act 1997* s 14F).
17. In the Children’s Court, similar options are available, though there are no conditions on when the court may remand the child in custody (*Crimes (MIUT) Act 1997* s 38R(2)).
18. The accused or the DPP may apply to the court during an adjournment for an order:
 - that the trial or hearing commence or resume, if the moving party is of the opinion that the accused has become fit to stand trial; or
 - that the court hold a special hearing, if the moving party is of the opinion that the accused will not become fit to stand trial within 12 months of the first finding of unfitness for the Supreme Court or County Court or within 6 months of the first finding of unfitness for the Children’s Court. The court must either dismiss the application or make the order sought, if it is satisfied of the appropriate matter (*Crimes (MIUT) Act 1997* ss 14G, 38S).

19. An application for an order that the trial commence or resume, or that the court hold a special hearing, must be accompanied by a report on the accused's mental condition by a registered medical practitioner or registered psychologist (*Crimes (MIUT) Act 1997* ss 14G, 38S(2)).
20. At the end of an adjournment, the accused is presumed to be fit to stand trial and the court must, in the Supreme Court or County Court, either:
 - if the trial has already commenced, resume the trial as soon as possible;
 - if the trial has not commenced, commence the trial within 3 months; or
 - if a real and substantial question regarding the accused's fitness to stand trial is again raised:
 - extend the period of adjournment for a further period that will not exceed 12 months from the first finding of unfitness; or
 - proceed to hold a special hearing within 3 months (*Crimes (MIUT) Act 1997* s 14H).
21. In the Children's Court, at the end of an adjournment the accused is presumed to be fit to stand trial. If a real and substantial question regarding the accused's fitness to stand trial is again raised, the court must hold a special hearing as soon as possible and within 3 months. The Court may remand the child in custody or make other orders the court thinks appropriate for the safe custody of the child until the special hearing (*Crimes (MIUT) Act 1997* s 38T).
22. In the Supreme Court or County Court, a judge may extend the period in which the trial must commence for a further period not exceeding three months and may grant multiple extensions. These extensions also serve to extend any time limitation imposed by s 211 and s 212 of the CPA 2009 (*Crimes (MIUT) Act 1997* s 14H).
23. If it is not likely that the accused will become fit to stand trial within 12 months of the investigation in the Supreme or County Court, or within 6 months of the investigation for the Children's Court, the court must hold a special hearing within 3 months to determine whether the accused committed the offence charged (*Crimes (MIUT) Act 1997* ss 14F, 15, 38R, 38V).

Last updated: 17 March 2023

12.7.1.1 Investigation into Unfitness

When must an Investigation into the Accused's Fitness be Held?

1. A court must order an investigation into the accused's fitness to stand trial if it appears that there is a "real and substantial question" about that issue (*Crimes (MIUT) Act 1997* ss 9, 38N).
2. A "real and substantial question" will exist whenever it would be open to a properly instructed jury to conclude that the accused was not fit to stand trial (*Eastman v R* (2000) 203 CLR 1; [2000] HCA 29; *R v Alford* [2005] VSC 404; *Kesavarajah v R* (1994) 181 CLR 230; [1994] HCA 41; *R v Benbrika* (Ruling No 22) [2008] VSC 446).
3. To order an investigation, a judge does not need to have formed a *prima facie* view that the accused is unfit to be tried. When the question of fitness was to be determined by a jury, courts held that where there is a reason to doubt the accused's fitness, it must be left to the jury unless no reasonable jury could conclude that the accused was unfit (*Crimes (MIUT) Act 1997* s 7(3); *Kesavarajah v R* (1994) 181 CLR 230; [1994] HCA 41; *R v Khallouf* [1981] VR 360).
4. It is not necessary to call admissible evidence to raise a real and substantial question of the accused's fitness to be tried. Assertions from the bar table setting out a reasonable basis for concerns about fitness can be sufficient to raise the question, or at least warrant an adjournment to gather further evidence. Similarly, abnormal or eccentric behaviour by the accused during a trial may raise the question of the accused's fitness to be tried (*SM v R* (2011) 33 VR 393; [2011] VSCA 332; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29 per Callinan J; c.f. *R v Coffee*, Unreported, NSW SC, 20 November 1992).

5. The obligation to order an investigation is part of the judge's duty to ensure a fair trial. Where the accused is unrepresented, or has previously been found unfit to be tried, the judge must be particularly careful to ensure that the trial is not unfair (*Heffernan v R* [2005] NTCCA 14; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29).
6. Case management considerations and the fact that concerns about fitness are raised late in proceedings do not justify refusing to adjourn proceedings to investigate the accused's fitness. A court in criminal proceedings must prioritise considerations of justice over efficiency and case management (*SM v R* (2011) 33 VR 393; [2011] VSCA 332; *Brimbank Automotive Pty Ltd v Murphy* [2009] VSC 26).
7. An accused's mental illness may be exacerbated by stress in the time leading up to a trial. Therefore, an application to investigate fitness just before trial may not reveal any relevant delay or tardiness in making the application (*SM v R* (2011) 33 VR 393; [2011] VSCA 332).
8. Failing to order an investigation where there is a real and substantial question about the accused's fitness to stand trial will constitute a fundamental defect in the trial procedure, rendering the trial a nullity (*Eastman v R* (2000) 203 CLR 1; [2000] HCA 29).

Procedure for Ordering an Investigation

9. The issue of the accused's fitness to stand trial may be raised at any stage of proceedings by the prosecution, the defence or the judge (*Crimes (MIUT) Act 1997* ss 9, 38N; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29; *R v Presser* [1958] VR 45).
10. If the question of fitness arises before the trial or hearing, the court must reserve the question of the accused's fitness for an investigation. If the question arises during a trial or hearing, the trial or hearing must be adjourned or discontinued to allow an investigation to be conducted (*Crimes (MIUT) Act 1997* s 9, 38N).
11. The process in the County Court where a real and substantial question concerning fitness is raised after an indictment is filed is set out in *County Court Criminal Division Practice Note*, PNCR 2-2022 at [24.1]–[24.10].
12. The potential obligation to order an investigation into the accused's fitness continues until the jury's verdict has been delivered. A judge may therefore be required to adjourn a trial and order an investigation after the close of the prosecution case, or even after final addresses to the jury – especially if the accused is self-represented (*Kesavarajah v R* (1994) 181 CLR 230; [1994] HCA 41).
13. As the issue of the accused's fitness to stand trial may be raised more than once in the same proceedings, the fact that an investigation has previously been held does not prevent a judge from ordering another investigation (*Crimes (MIUT) Act 1997* ss 9, 38N(3)).
14. A judge may vacate an order for an investigation prior to conducting the investigation. This may be suitable where the order was made in error, or if the question about the accused's fitness has been resolved (*R v Demicoli* [2006] VSCA 69).

Conduct of Investigation

15. In the County Court and Supreme Court the question of the accused's fitness to stand trial is a question of fact, which must be determined in accordance with Division 2 of Part 2 (*Crimes (MIUT) Act 1997* s 7).
16. Prior to amendments introduced by the *COVID-19 Omnibus (Emergency Measures) Act 2020* and the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*, fitness to stand trial was determined by a specially empaneled jury. The sections which provide for jury determination of fitness remain in the Act, but are temporarily suspended while the judge-alone determination provisions are in force (*Crimes (MIUT) Act 1997* s 5C).
17. In the Children's Court, it is a question of fact that must be determined in accordance with Division 2 of Part 5A (*Crimes (MIUT) Act 1997* s 38L).

18. It is presumed that every person is fit to stand trial. The question on an investigation is whether, on the balance of probabilities, that "presumption of fitness" has been rebutted (*Crimes (MIUT) Act 1997* ss 7, 38L).
19. The role of the judge is intended to be more interventionist in an investigation than in a criminal trial. The judge may call evidence, require the accused to undergo examination by a registered medical practitioner or registered psychologist and require the tender of the results of that examination (*Crimes (MIUT) Act 1997* ss 14D, 38Q; *R v Langley* (2008) 19 VR 90; [2008] VSCA 81).

Evidence

20. The court must hear any relevant evidence and submissions put by the prosecution or the defence (*Crimes (MIUT) Act 1997* ss 14D, 38Q(1)).
21. The court may also call evidence on its own initiative, if of the opinion that it is in the interests of justice to do so (*Crimes (MIUT) Act 1997* ss 14D, 38Q(1)).
22. During an investigation, the judge may allow expert witnesses to give evidence concurrently or consecutively, as in a criminal trial (*Crimes (MIUT) Act 1997* s 14D(3); *CPA 2009* s 232A). See Concurrent and consecutive expert evidence in 5.6 Conduct of the Prosecution Case for more information.
23. The court may require the accused to undergo a medical examination, and require the results of that examination to be put before the court (*Crimes (MIUT) Act 1997* ss 14D, 38Q(1)(b)).

Onus of Proof

24. The standard of proof in an unfitness investigation is the civil standard of the balance of probabilities (*Crimes (MIUT) Act 1997* ss 7, 38L(3)).
25. Which party will bear the onus of proof depends on who raises the issue:
 - if it is raised by the prosecution, it will be for the prosecution to prove;
 - if it is raised by the defence, it will be for the defence to prove;
 - if it is raised by the judge, neither party bears the onus of proof (although the prosecution has carriage of the matter) (*Crimes (MIUT) Act 1997* ss 7, 38L).

Last updated: 17 March 2023

12.7.1.2 Test for Unfitness

1. According to section 6(1) of the Act, to find a person unfit to stand trial the court must be satisfied, on the balance of probabilities, that because his or her mental processes are disordered or impaired, he or she is (or will be at some time during the trial):
 - (a) unable to understand the nature of the charge; or
 - (b) unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or
 - (c) unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or
 - (d) unable to follow the course of the trial; or
 - (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
 - (f) unable to give instructions to his or her legal practitioner (*Crimes (MIUT) Act 1997* s 6(1)).
2. There are two parts to this test. The court must find that:

- the accused currently suffers from at least one of the above mentioned incapacities, or will at some time during the trial; and
 - that incapacity is caused by the accused's impaired or disordered mental processes (*Crimes (MIUT) Act 1997 s 6*).
3. This test represents the minimum standards of competence necessary before a person can be tried without unfairness or injustice (*Kesavarajah v R* (1994) 181 CLR 230; [1994] HCA 41; *SM v R* (2011) 33 VR 393; [2011] VSCA 332).
 4. A similar test applies for determining unfitness in the Children's Court, though the right to challenge jurors does not apply, and references to trials are replaced by references to hearings (see *Crimes (MIUT) Act 1997 s 38K*).
 5. In the context of equivalent, but not identical, Queensland legislation, the court held that the requirement that the accused be able to give instructions to his or her legal practitioner remained relevant even where the accused was intending to act without a legal practitioner (see *Berg v DPP* [2016] 2 Qd R 248, [20]).

Relevance of Common Law Authorities

6. The statutory test is largely derived from the common law test for fitness to stand trial. Common law authorities will therefore be relevant when interpreting the statutory test.
7. Under the common law, a person is unfit to stand trial if he or she is:
 - unable to understand the nature of the charge; or
 - unable to plead to the charge or exercise the right of challenge; or
 - unable to understand the nature of the proceedings as an inquiry into whether he or she committed the offence charged; or
 - unable to follow the course of the proceedings so as to understand what is going on in court in a general sense, even though he or she need not understand the purpose of all the various court formalities; or
 - unable to understand the substantial effect of any evidence that may be given against him or her; or
 - unable to decide what defence he or she will rely upon or make his or her defence or version of facts known to the court or to counsel (*R v Presser* [1958] VR 45; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29).

Determining the Accused's Capacities

8. The court should determine whether the accused is unfit to stand trial in a common sense fashion – because if the test is applied too literally, it may incorrectly set a threshold for fitness that can only be met by a person of very high intelligence (*Sinclair v R* (1946) 73 CLR 316; *R v Presser* [1958] VR 45).
9. The fact that the accused could perform better against some of the specified requirements if he or she had greater intelligence, or received additional treatment, is not determinative. The critical question is whether the accused meets the minimum requirements for fitness specified in the Act (*R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7; *Clarkson v R* [2007] NSWCCA 70).
10. The ability of an accused to follow the course of the trial, and to understand the substantial effect of the evidence, may depend on the complexity of the trial. For example, a greater degree of understanding and capacity may be required for a complex fraud trial than for a trial in which the issues are narrow and well defined (*R v Wahlstedt* [2003] SADC 172; *R v Gillard* [2006] SASC 46).
11. Where counsel will aid the accused during the trial, the jury should take this assistance into account in determining whether he or she is, or will be, able to understand and follow its processes (*Ngatay iv The Queen* (1980) 147 CLR 1; *R v Miller (No 2)* [2000] SASC 152).

12. Poor forensic choices or counter-productive behaviour does not demonstrate that a person is unfit to be tried by itself. While the accused must be able to make forensic choices, and instruct counsel on the nature of his or her defence, he or she is not required to make an *able* defence (*Heffernan v R* [2005] NTCCA 14(2005) 194 FLR 370; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29; *Kesavarajah v R* (1994) 181 CLR 230; [1994] HCA 41; *R v Taylor* (1992) 77 CCC (3d) 551; *R v Presser* [1958] VR 45).
13. A person will not be unfit to stand trial simply because he or she is suffering from memory loss (e.g. he or she cannot remember the facts surrounding the alleged offending) (*Crimes (MIUT) Act 1997* s 6; *R v Dennison*, Unreported, NSWCCA, 3 March 1988).
14. Bizarre or disruptive behaviour does not, of itself, render a person unfit to be tried (*Eastman v R* (2000) 203 CLR 1; [2000] HCA 29; *R v Taylor* (1992) 77 CCC (3d) 551).
15. The mere fact that a person refuses to rely on the defence of mental impairment, which may be open on the evidence, does not mean that he or she is unfit to stand trial. A person may rationally reject such an option out of concern for the consequences of a finding of not guilty because of mental impairment (*R v Bridge* [2005] NSWCCA 122).
16. A mental disorder may produce delusions related to the subject matter of the case, or affect the accused's ability to have a trusting relationship with his or her counsel, without affecting his or her fitness to be tried (*Heffernan v R* [2005] NTCCA 14; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29; *R v Taylor* (1992) 77 CCC (3d) 551; c.f. *R v Gu* [2009] NSWSC 25).
17. Conversely, a delusional disorder may affect a person's fitness to be tried where it leaves the accused incapable of giving proper instructions (*Camurtay v The Queen* [2020] VSCA 221, [85]).

Future Unfitness

18. In assessing whether an accused is fit to be tried, the court must consider both his or her present condition and his or her likely condition during the trial or hearing (*Crimes (MIUT) Act 1997* ss 6, 38K).
19. The expected length of the trial may affect the assessment of the accused's likely future condition. The court may take into account the possibility of deterioration over the course of the trial, as well as the risks associated with the disruption of a longer trial (*Kesavarajah v R* (1994) 181 CLR 230; [1994] HCA 41; *R v Miller (No 2)* [2000] SASC 152).
20. In cases where the accused's condition is sensitive to stress, the court may also take into account the fact that as a trial continues, his or her stress is likely to progressively accumulate. This may be of particular relevance in lengthy trials (*R v Wilson* [2000] NSWSC 1104).

Last updated: 17 March 2023

12.7.1.3 Unfitness and Mental Impairment

1. Fitness to be tried addresses different issues to the defence of mental impairment. An accused may be unfit to be tried even if he or she is not insane (in either the colloquial sense or the M'Naughten sense) (*Ngatayi v R* (1980) 147 CLR 1; *R v Presser* [1958] VR 45).
2. Similarly, the mere existence of a mental disorder will not mean that the accused is unfit to be tried. There must be some link between the mental disorder and the ability of the accused to understand and participate in the trial process (*Heffernan v R* [2005] NTCCA 14; *Eastman v R* (2000) 203 CLR 1; [2000] HCA 29; *R v Taylor* (1992) 77 CCC (3d) 551).
3. A judge must be careful when assessing a claim of unfitness not to conflate the issue of fitness to be tried and mental impairment. Evidence that casts doubt on a possible defence of mental impairment may be irrelevant to the question of fitness to stand trial (*SM v R* (2011) 33 VR 393; [2011] VSCA 332).

12.7.1.4 Impaired or Disordered Mental Processes

1. While the accused does not need to be insane to be considered unfit to stand trial, his or her incapacity must be caused by impaired or disordered mental processes (*Crimes (MIUT) Act 1997* ss 6, 38K).
2. This does not mean that the accused must suffer from a mental illness. A person's mental processes may be impaired or disordered due to other factors, such as an intellectual impairment, a learning disability or acquired brain injury (*R v Miller (No 2)* [2000] SASC 152; *R v Gillespie* (1987) 30 A Crim R 14; *R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7).
3. A person's "mental processes" may also be "impaired or disordered" where an impairment impedes the *reception* rather than the *processing* of information. This means that in some circumstances, a physical impairment such as deafness may fall within s 6 of the Act (*R v Abdulla* (2005) 93 SASR 208; [2005] SASC 399).

Last updated: 21 October 2016

12.7.1.5 Special Hearing

1. In the Supreme Court or County Court, if the judge is satisfied (either after the initial investigation, on the application of the DPP or the accused, or at the end of an adjournment period) that the accused will not become fit to stand trial within 12 months of the first finding of unfitness, the court must hold a special hearing under Part 3 of the Act within 3 months (*Crimes (MIUT) Act 1997* ss 12, 13, 14).
2. In the Children's Court, the court must consider whether the accused will become fit to be tried within 6 months of the first finding of unfitness. If the accused will not become fit to be tried within that time, then the court must hold a special hearing (*Crimes (MIUT) Act 1997* s 38R).
3. The purpose of a special hearing is for a jury to determine whether, on the evidence available, the accused:
 - is not guilty of the offence charged;
 - is not guilty of the offence charged because of mental impairment; or
 - committed the offence charged or an available alternative offence (*Crimes (MIUT) Act 1997* ss 15, 38V).
4. In the Supreme Court or County Court, the judge must leave all three of these verdicts to the jury, even if there is no evidence that the accused suffered from a mental impairment at the time of committing the offence or if the accused does not wish to raise the issue of mental impairment (*R v Langley* (2008) 19 VR 90; [2008] VSCA 81).
5. Special hearings should be conducted as nearly as possible as if they were regular criminal trials or hearings. To that end:
 - the *Juries Act 2000* applies for trials in the Supreme Court or County Court;
 - the accused is taken to have pleaded not guilty to the offences charged;
 - the accused's legal representative may exercise the accused's rights to challenge jurors or the jury for trials in the Supreme Court or County Court;
 - all defences that would be available in a criminal trial are available (including the defence of mental impairment);
 - the rules of evidence apply;
 - *Criminal Procedure Act 2009* s 197 applies in the Supreme Court or County Court;

- in the Children's Court, subject to section 524 of the *Children, Youth and Families Act 2005*, the child must be legally represented; and
 - any alternative verdicts that would be available in a criminal trial are available;
 - the court may order that expert witnesses give evidence concurrently or consecutively in accordance with CPA 2009 s 232A (*Crimes (MIUT) Act 1997* ss 16, 38W; *DPP v CJC* (2008) 21 VR 581; [2008] VSC 585).
6. Where a jury has found that the accused is not fit to be tried, the procedure under section 21(4), which allows a judge to determine a defence of mental impairment without empanelling a jury, is not available (*SM v R* (2013) 46 VR 464; [2013] VSCA 342).
 7. The standard of proof for a finding that the accused committed the offence charged or an available alternative offence is beyond reasonable doubt (*Crimes (MIUT) Act 1997* ss 17, 38X).
 8. A finding that the accused "committed the offence charged" (or an available alternative) is not the same as a verdict of guilty. It is a qualified finding of guilt, and does not constitute a basis in law for any conviction for the offence to which the finding relates (*Crimes (MIUT) Act 1997* ss 18, 38Y).
 9. Where the court makes such a finding, the court must declare that the accused is liable to supervision, or order that s/he be released unconditionally (*Crimes (MIUT) Act 1997* ss 18, 38Y).
 10. A finding that the accused committed the offence charged constitutes a bar to further prosecution in respect of the same circumstances, and is subject to appeal in the same manner as if the accused had been convicted of the offence in a criminal trial (*Crimes (MIUT) Act 1997* s 18).
 11. Findings of "not guilty" and "not guilty because of mental impairment" are to be taken for all purposes as if they were findings made at a criminal trial or hearing (*Crimes (MIUT) Act 1997* ss 18, 38Y).

Onus of Proof

12. To find that the accused committed the offence charged, or an available alternative offence, the jury must be satisfied of that fact beyond reasonable doubt (*Crimes (MIUT) Act 1997* ss 17, 38X).
13. To find the accused not guilty because of mental impairment, the jury must be satisfied by defence argument on the balance of probabilities (*Crimes (MIUT) Act 1997* s 21).

Mandatory Directions

14. At the start of a special hearing in the Supreme Court or County Court, the judge must explain to the jury:
 - that the accused is unfit to be tried in accordance with the usual procedures of a criminal trial;
 - the meaning of being unfit to stand trial;
 - the purpose of the special hearing;
 - the findings that are available; and
 - the standard of proof required for those findings (*Crimes (MIUT) Act 1997* s 16).
15. These directions must be given at the commencement of the special hearing. It is not sufficient to give them in running, or at the end of proceedings (*Subramaniam v R* [2004] HCA 51).
16. A judge cannot avoid giving these directions on the basis that counsel have already covered the relevant matters in their addresses to the jury (*Subramaniam v R* [2004] HCA 51).

Other Directions

17. As special hearings must be conducted (as far as possible) as if they were criminal trials, judges must give any other directions which must ordinarily be given in a criminal trial.
18. Judges must be alert to ensure that there is not a miscarriage of justice. For example, if the accused's mental impairment leads him or her to behave in a way that is prejudicial to his or her own interests, judge should give the jury a suitable warning to counter the prejudice (*R v Smith* [1999] NSWCCA 126).
19. The jury do not need to be told why the accused is unfit to be tried. A special hearing may proceed without any information being led concerning the accused's mental impairment (*Subramaniam v R* [2004] HCA 51).

Last updated: 3 April 2017

12.7.1.6 Supervision Orders

1. If the jury finds that the accused committed the offence charged or an available alternative offence, or that the accused is not guilty because of mental impairment, the judge must either:
 - declare that the accused is liable to supervision; or
 - order that the accused be released unconditionally (*Crimes (MIUT) Act 1997* ss 18, 23, 26).
2. If the court declares that a person is liable to supervision it must make either a custodial supervision order or a non-custodial supervision order. A custodial supervision order may commit the accused to custody in:
 - An approved mental health service or residential service (an "appropriate place" under the Act), if the court has received a s 47 certificate from the Secretary of the Department of Human Services stating that the necessary facilities or services are available; or
 - A prison, if there is no practicable alternative in the circumstances (*Crimes (MIUT) Act 1997* s 26).
3. If the court makes a non-custodial supervision order, the accused is released on the conditions the court specifies in the order (*Crimes (MIUT) Act 1997* s 26).
4. Supervision orders are for an indefinite term. The court must set a nominal term for the order in accordance with the Act and may direct that the matter be brought back before the court for review at the end of a specified period (*Crimes (MIUT) Act 1997* ss 27, 28).
5. The court must impose the nominal term of the supervision order in accordance with the following table (*Crimes (MIUT) Act 1997* s 28):

Offence	Nominal term
Murder or treason	25 years
A serious offence within the meaning of the <i>Sentencing Act 1991</i> other than: Murder; or Threats to kill (<i>Crimes Act 1958</i> s 20)	A period equivalent to the maximum term of imprisonment available for the offence
Any other offence for which there is a statutory maximum term of imprisonment	A period equivalent to half the maximum term of imprisonment available for the offence

Any other offence punishable by imprisonment for which there is not a statutory maximum term	A period specified by the court

6. While paragraph (f) of the definition of "serious offence" in the *Sentencing Act 1991* extends the definition of serious offence to conspiracy to commit, incitement to commit or attempt to commit a serious offence, the nominal term for inchoate forms of murder is a period equivalent to half the maximum term of imprisonment available for that offence (*R v Bartel* [2008] VSC 423).⁶⁵⁹ This exception presumably extends to inchoate forms of threats to kill, but not to other inchoate forms of serious offences.
7. The court must declare the day from which the nominal term runs (*Crimes (MIUT) Act 1997 s 28*).
8. If the accused is found to have committed multiple offences, or is found not guilty due to mental impairment for multiple offences, the nominal term is determined by reference to the offence that carries the longest maximum term of imprisonment (*Crimes (MIUT) Act 1997 s 28*).

Supervision Orders - Children's Court

9. If the Children's Court finds that the accused committed the offence charged or an available alternative on a special hearing, or that the accused is not guilty because of mental impairment, the court must either:
 - Declare that the accused is liable to supervision; or
 - Order that the accused be released unconditionally (*Crimes (MIUT) Act 1997 ss 38Y, 38ZD*).
10. The court must not declare the child accused liable to supervision unless it considers the declaration necessary in all the circumstances, taking into account:
 - (a) whether adequate supervision is available in the community; and
 - (b) whether the child has complied with community supervision and the extent of that compliance; and
 - (c) whether a declaration is required for the protection of the child or the community (*Crimes (MIUT) Act 1997 s 38Y(5)*).
11. Before making a supervision order, the court must first receive a report under Division 6 of the Act and a certificate stating that the facilities or services necessary for the order are available (*Crimes (MIUT) Act 1997 s 38ZH(6)*).
12. Supervision orders in the Children's Court are governed by *Crimes (MIUT) Act 1997 s 38ZH*.
13. Section 38ZH states:

⁶⁵⁹ So far, no case has considered what the appropriate nominal term is for a non-serious offence punishable by life imprisonment, such as trafficking a large commercial quantity of a drug of dependence (see *Drugs, Poisons and Controlled Substances Act 1981 s 71*. Compare *Dimoizantos v R* (1992) 174 CLR 504).

(2) The purpose of a supervision order is to ensure that a child receives treatment, support, guidance and assistance for the child's mental impairment or other condition or disability.

(3) A custodial supervision order has an additional purpose of protecting the child or the community while the child receives the treatment, support, guidance and assistance referred to in subsection (2).

(4) A child may be subject to a custodial supervision order only for as long as is required for the protection of the child or the community (*Crimes (MIUT) Act 1997 s 38ZH(2)–(4)*).

14. A supervision order may either commit a child to custody (a custodial supervision order) or release the child on conditions (a non-custodial supervision order) (*Crimes (MIUT) Act 1997 s 38ZH(5)*).
15. The court must not make a custodial supervision order unless the court finds that there is no practicable alternative and that the order is necessary for the protection of the child or the community (*Crimes (MIUT) Act 1997 s 38ZH(7)*).
16. Supervision orders made in the Children's Court are for a specified term not exceeding 6 months. The Court must direct that the matter be brought back to the court for review at the end of the specified period (*Crimes (MIUT) Act 1997 s 38ZI*).
17. A supervision order may be extended more than once, for a maximum period of 6 months at a time. The maximum duration of a supervision order, as extended is:
 - 12 months, for a child aged 10 or more and less than 15 when the order was first made;
 - 24 months, for a child aged 15 or more and less than 21 when the order was first made (*Crimes (MIUT) Act 1997 s 38ZI*).

Last updated: 21 October 2016

12.7.1.7 Relevant Principles and Reports

1. Sections 39 and 40 of the *Crimes (MIUT) Act 1997* contain relevant principles that a court must consider when conducting special hearings, the defence of mental impairment and when making supervision orders.

39 Principles to be applied

In deciding whether to make, vary or revoke a supervision order, to remand a person in custody, to grant a person extended leave or to revoke a grant of extended leave under this Act, the court must apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.

40 Matters to which the court is to have regard

(1) In deciding whether or not to make, vary or revoke an order under Part 3, 4 or 5 in relation to a person, to grant extended leave to a person or to revoke a grant of extended leave, the court must have regard to—

- (a) the nature of the person's mental impairment or other condition or disability; and
- (b) the relationship between the impairment, condition or disability and the offending conduct; and
- (c) whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of his or her mental impairment; and
- (d) the need to protect people from such danger; and
- (e) whether there are adequate resources available for the treatment and support of the person in the community; and
- (f) any other matters the court thinks relevant.

(2) The court cannot order a person to be released unconditionally or otherwise release a person from custody under Part 3, 4 or 5, or significantly reduce the degree of supervision to which a person is subject, unless it—

- (a) has obtained and considered the report of at least one registered medical practitioner or registered psychologist, who has personally examined the person, on—
 - (i) the person's mental condition; and
 - (ii) the possible effect of the proposed order on the person's behaviour; and
- (ab) in the case of a person who is subject to a supervision order, has obtained and considered the report of a person having the supervision of the person subject to the order; and
- (b) has considered the report submitted to the court under section 41(1) or (3) (as the case may be); and
- (c) is satisfied that the person's family members and the victims of the offence with which the person was charged (if any), have been given reasonable notice of the hearing at which the release or reduction is proposed to be ordered; and
- (d) has considered any report of the family members or victims made under section 42; and

(da) in the case of an application for extended leave—has considered the leave plan filed under section 57A; and

(e) has obtained and considered any other reports the court considers necessary.

2. If the court declares that a person is liable to supervision, the Secretary to the Department of Justice or the Secretary to the Department of Human Services must arrange to file in court within 30 days a report on the mental condition of the accused, including:
 - (a) a diagnosis and prognosis of the condition or an outline of the person's behavioural problems; and
 - (b) the person's response to treatment, therapy or counselling (if any); and
 - (c) a suggested treatment or other plan for managing the condition (*Crimes (MIUT) Act 1997* s 41(1)).
3. Family members of the accused and victims of the offence are also entitled to provide a report on the conduct of the accused and the impact of that conduct on the family member or victim. The report may be made in writing by statutory declaration and may be supplemented by oral evidence (*Crimes (MIUT) Act 1997* ss 42, 43).

Last updated: 3 August 2009

12.7.1.8 Suppression Orders

1. The court may make a suppression order in respect of a proceeding under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* if it is satisfied that it is in the public interest to do so. The court may restrict the publication of:
 - Any evidence given in the proceeding;
 - The contents of any report or other document put before the court; and
 - Any information that may allow the accused or another person who appeared or gave evidence in the proceeding to be identified (*Crimes (MIUT) Act 1997* s 75).
2. It appears that the standard of "in the public interest to do so" is a lower standard than the standard of "necessity" that applies in other proceedings.

Last updated: 3 August 2009

12.7.2 Commonwealth Offences

1. Division 6 of Part IB of the *Crimes Act 1914* (Cth) prescribe the consequences of a finding that an accused charged with a Commonwealth offence is unfit to be tried. The division also contains a process for referring unfitness questions that arise during a committal proceeding to a trial court.
2. The *Crimes Act 1914* (Cth) is silent on the process a trial court uses to determine determining fitness to be tried. Instead, s 79 of the *Judiciary Act 1903* (Cth) picks up the test of fitness and the process of holding an investigation under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (*Kesavarajah v R* (1994) 181 CLR 230; [1994] HCA 41).
3. This section must therefore be read in conjunction with the above section 12.7.1 Victorian Offences.

Fitness Questions During Committal

4. If the prosecution, the accused or the accused's legal representatives raise the question of the accused's fitness during a committal proceeding for a Commonwealth offence, the magistrate must refer the proceedings to the court where the proceedings would have been referred if the accused was committed for trial (*Crimes Act 1914* (Cth) s 20B(1)).

Consequences of a Finding of Unfitness

5. If the court finds that a person is unfit to be tried, the court may make an order detaining the accused in prison or a hospital only for as long as is reasonably necessary to allow it to determine whether to discharge the accused or make an order detaining the accused or granting bail (*Crimes Act 1914* (Cth) s 20B(5)).⁶⁶⁰ See also 4.4.7 Committal Hearings and 12.7.1.3 Unfitness and Mental Impairment.
6. If a courts finds that the accused is not fit to be tried, the court must then determine whether there is a prima facie case that the accused committed the offence (*Crimes Act 1914* (Cth) s 20B(3); *Crimes (MIUT) Act 1997* s 7).
7. A prima facie case exists if there is evidence that provides sufficient grounds to put the person on trial for the offence (*Crimes Act 1914* (Cth) s 20B(6)). See 4.4.5 Determination of Committal Proceeding for a further discussion of the test of "sufficient grounds".
8. In determining whether there is a prima facie case, the accused may give evidence or make an unsworn statement and may raise any defence that could be raised if the proceedings were a trial for the offence. The court may also seek additional evidence that is likely to assist it to determine the matter (*Crimes Act 1914* (Cth) s 20B(7)).

Discharge of Accused

9. If the court finds that there is no prima facie case, it must dismiss the charge against the accused and, if necessary, order his or her release from custody (*Crimes Act 1914* s 20BA(1)).
10. Even if there is a prima facie case, the court must order the accused's release from custody if it is inappropriate to inflict any punishment or anything more than nominal punishment. The need for only nominal punishment must be determined after having regard to the following factors:
 - (a) the character, antecedents, age, health or mental condition of the person; or
 - (b) the extent (if any) to which the offence is of a trivial nature; or
 - (c) the extent (if any) to which the offence was committed under extenuating circumstances (*Crimes Act 1914* (Cth) s 20BA(2)).

Future Fitness or Unfitness

11. If the court finds that there is a prima facie case and does not order the accused's release, then it must determine on the balance of probabilities whether the accused will become fit to be tried within 12 months of the finding of unfitness. The court must make this determination as soon as practicable (*Crimes Act 1914* (Cth) s 20BA(4)).
12. Before making this determination, the court must consider evidence from a qualified psychiatrist and one other qualified medical practitioner (*Crimes Act 1914* (Cth) s 20BA(5)).
13. If the court does not order the accused's release, it must determine whether the accused is suffering from a mental illness or mental condition for which treatment is available in a hospital and whether the accused objects to being detained in a hospital (*Crimes Act 1914* (Cth) ss 20BB(1), 20BC(1)).
14. If the accused is likely to become fit to be tried within 12 months, the court must:
 - if the accused does not object to being detained in a hospital, order the accused detained in a hospital; otherwise

⁶⁶⁰ This power does not exist if a magistrate referred the matter to the trial court for investigation. In that situation, only the magistrate has the power to order the detention of the accused pending an order by the trial court under ss 20BA or 20BB of the *Crimes Act 1914* (Cth).

- order the accused detained in another place (including a prison) or released on bail to live at an address specified by the court (*Crimes Act 1914* (Cth) s 20BB(2)).
15. This order lasts until the accused becomes fit to be tried or until 12 months elapse (*Crimes Act 1914* (Cth) s 20BB(2)).
 16. If the accused becomes fit to be tried during this time, the proceedings on the indictment must continue as soon as practicable or, if the accused has not been committed for trial, the committal proceedings must be resumed as soon as practicable (*Crimes Act 1914* (Cth) s 20BB(3)).
 17. If the accused is not likely to become fit to be tried within 12 months or if the accused is not fit to be tried at the end of 12 months after the court considered it likely that he or she would become fit to be tried, the court must:
 - if the accused does not object to being detained in a hospital, order the accused detained in a hospital; or
 - order the accused detained in another place (including a prison); or
 - if it is more appropriate to do so, order the accused's release from custody either absolutely or subject to conditions for a specified period of up to 3 years (*Crimes Act 1914* (Cth) s 20BC(2), (5)).
 18. The court must specify the period for which the accused is to be detained in a hospital or another place. This period cannot exceed the maximum period of imprisonment available for the offence charged (*Crimes Act 1914* (Cth) s 20BC(2)).

Finding of Prima Facie Case May Act as Stay of Proceedings

19. The finding that there is a prima facie case against an accused who is unfit to be tried may act as a stay on any proceedings or further proceedings against the accused. This will occur:
 - if the court determines that the accused will not become fit to be tried within 12 months; or
 - if the court determines that the accused will become fit to be tried within 12 months, but he or she does not become fit to be tried in that time (*Crimes Act 1914* (Cth) ss 20BB(6), 20BC(8)).

Last updated: 3 August 2009

13 Witnesses

1. This chapter examines many of the procedures for taking evidence from witnesses. Where possible, it does not examine questions of admissibility that form part of the law of evidence, as that is beyond the scope of this manual.

Related resource: Uniform Evidence Manual

Last updated: 19 November 2009

13.1 Competence of Witnesses

1. All witnesses are presumed competent to give evidence, unless the court finds otherwise. The court may decide that a witness is not competent to give evidence on the balance of probabilities and the parties do not carry any onus of proof on this issue (*Evidence Act 2008* ss 12, 13, 142; *RA v R* [2007] NSWCCA 251).
2. A party does not have the *right* to examine a witness to demonstrate lack of competence. Instead, the court may *permit* a party to examine a witness to demonstrate competence or lack of competence, or a judicial officer may allow counsel to suggest questions that the court should ask the witness (see *R v Lyons* (1889) 15 VLR 15; *R v RAG* [2006] NSWCCA 343).

3. A court must not assume that a witness is not competent to give evidence merely because of his or her age (*R v JTB* [2003] NSWCCA 295).

Last updated: 19 November 2009

13.2 Swearing of witnesses

1. Division 2 of Chapter 2 of the *Evidence Act 2008* governs the administration of oaths and affirmations in Victoria. Under these provisions, a witness must either take an oath or make an affirmation before giving evidence in a proceeding, unless he or she is entitled to give unsworn evidence (*Evidence Act 2008* s 21).
2. Swearing of witnesses must take place in open court (*R v Brooks* (1998) 44 NSWLR 121).
3. The evidence of a witness who is competent to give sworn evidence is not admissible unless the witness takes an oath or makes an affirmation. Relying on impermissible unsworn evidence is a fundamental irregularity (*R v Brooks* (1998) 44 NSWLR 121).
4. A witness may give unsworn evidence about a fact if he or she is able to understand a question about that fact and give an answer that can be understood, but is not able to understand that he or she is under an obligation to tell the truth (*Evidence Act 2008* s 13). The unsworn evidence of such a witness is admissible (*R v RAG* [2006] NSWCCA 343; *Pease v R* [2009] NSWCCA 136).⁶⁶¹

Choice of Oath or Affirmation

5. The court must inform a witness that he or she may choose whether to take an oath or affirmation, unless the court is satisfied that the witness has already been informed of this choice (*Evidence Act 2008* s 23).
6. Counsel may cross-examine a witness on:
 - whether the witness considers the oath or affirmation binding on his or her conscience; and
 - if the witness chose to affirm, the reason he or she objected to taking the oath (*R v VN* (2006) 15 VR 113; [2006] VSCA 111; *Queen's Case* (1820) 129 ER 976; *R v T* (1998) 71 SASR 265).
7. The traditional oath is valid even if the witness does not have a religious belief, does not believe in the existence of a god or does not understand the nature and consequences of the oath. In addition, a person may take an oath that does not include a reference to a god and may instead refer to the basis of a person's beliefs in accordance with a form prescribed by regulations (*Evidence Act 2008* ss 24, 24A).
8. The court has no reason to enquire into the witness' beliefs if he or she chooses to make an affirmation (*R v T* (1998) 71 SASR 265).

Administration of Oath or Affirmation

9. Schedule 1 of the *Evidence Act 2008* prescribes the following standard form oaths and affirmations:

⁶⁶¹ Such evidence may be excluded in the exercise of the general discretion (*Evidence Act 2008* ss 135, 137. See also *R v Cooper* [2007] ACTSC 74).

Oaths by witnesses

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Oaths by interpreters

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

10. It is not necessary to use a religious text when taking an oath (*Evidence Act 2008 s 24*). Alternatively, a person may request to be sworn on only part of a Bible. The court officer may instruct the witness to hold the Bible so as to indicate their preference or, if practicable, the court officer may provide a separate copy of the Old or New Testament. The court may also provide the appropriate religious text for non-Christian religions where practical. Court officials must treat all books or objects of religious significance with respect.
11. The form of oath or affirmation administered to a person with physical disabilities will depend on the nature of the disability. A person may make an oath using Auslan and may be asked to put a hand on the Bible before repeating the oath in Auslan.
12. The court must first swear an interpreter before administering an oath through the interpreter (*R v Kelly* (1848) 3 Cox CC 75).
13. It is not essential to follow the prescribed response to the oath or affirmation in precise terms. The critical issue is that the relevant person demonstrates that he or she considers him or herself bound in conscience by the oath or affirmation (see *R v Benfield* [1997] 2 VR 491).
14. In all cases it is the court that must administer the oath or affirmation and may do so by directing the witness or a court officer to read the oath. The witness then takes the oath (*R v Shuttleworth* [1909] VLR 431; *Re a Judge of the District Court* (1989) 43 A Crim R 160).

Related topic: 9.5 Right to an Interpreter

Last updated: 19 November 2009

13.3 Ordering witnesses out of court

1. The ordinary practice is that the presiding judicial officer will order all witnesses out of court on the application of a party. The court usually makes this order in the presence of the jury (*R v Franz* [1952] VLR 522; *R v Bassett* [1952] VLR 535; *Tran v Magistrates' Court of Victoria* [1998] 4 VR 294).
2. Witness exclusion orders are an exercise of the inherent or implied jurisdiction in the higher courts. In contrast, s 127 of the *Magistrates' Court Act 1989* expressly states:

(1) The Court may, and must if required by any party to a proceeding, at any time during the proceeding, order all witnesses other than—

(a) the informant or the plaintiff; and

(b) the accused or the defendant; and

(ba) in the case of a criminal proceeding, any victim of the offence unless the court otherwise specifies in the order; and

(c) the witness under examination—

to leave the Court and to remain outside and beyond the hearing of the Court until required to give evidence.

(2) Nothing in this section prevents the Court from ordering a witness to leave the Court and to remain outside and beyond the hearing of the Court at any time after giving evidence if the Court considers it appropriate to do so.⁶⁶²

3. In the County Court and the Supreme Court, the court may only order a victim of an offence who is a witness in the proceeding to leave the court until required to give evidence if the court considers it appropriate to do so (CPA 2009 s 336A).
4. The court will generally only order witnesses out of court on the application of a party. The court does not need to raise the matter with the parties or make the order on its own motion (see *Goldberg v Howells* [2003] VSC 414).
5. An order to leave the court may cover an instructing solicitor who is a witness to the proceeding. Counsel must then continue without an instructor until the witness is allowed to return to court (*Tran v Magistrates' Court of Victoria* [1998] 4 VR 294).
6. Similarly, the court may order a McKenzie friend who is also a witness out of the court, even though this will leave the accused unassisted (*Walker v Clarke*, Unreported, VSC, 13 December 1984; *R v Leicester City Justices; ex parte Barrow* [1991] 2 QB 260; *Horbelt v Elliot*, Unreported, SCSA, 15 November 1995).
7. Parties commonly agree to allow the following witnesses to remain in court:
 - corroborating witnesses;
 - expert witnesses;
 - instructing solicitors or others assisting counsel;
 - formal witnesses.
8. The court may allow particular witnesses to remain in court when the benefit of doing so outweighs the risk of prejudice to the other party (*R v Tait* [1963] VR 520). For example, when the accused relies on the defence of mental impairment, it may be necessary to allow prosecution witnesses to hear the defence expert evidence. This may be the only way the prosecution can rebut a defence of mental impairment, if the prosecution witnesses have not examined the accused.

⁶⁶² See *Holland v Evans* [1959] VR 54 on the possible application of this section to police prosecutors who are witnesses. Unlike the legislation considered in that case, s 127 of the *Magistrates' Court Act 1989* does not provide for excluding a witness from the order on the basis of "special circumstances". However, in *Tran v Magistrates' Court of Victoria*, Unreported, VSC, 5 May 1997, Coldrey J thought that a magistrate retained a discretion under s 127 to refuse to make a witness exclusion order, despite the mandatory terms in the Act.

9. Failure to comply with an order that witnesses leave the court affects the weight the court should give to the witness' evidence and may expose the witness to punishment for contempt. It does not make the witness incompetent to give evidence or his or her evidence inadmissible (*Halliday v Arnol*, Unreported, VSC, 27 August 1996).

Last updated: 1 November 2019

13.3A Preparing witnesses

1. The law recognises an important difference between witness coaching and witness familiarisation. While coaching is prohibited, familiarisation is permissible (*R v Momodou* [2005] 2 All ER 571).
2. The difference between coaching and familiarisation is one of degree. Counsel are entitled to take a witness through his or her statement before giving evidence and may:
 - (a) Advise the witness to refresh his or her memory from contemporaneous documents;
 - (b) Identify points about which questions may be asked;
 - (c) Give a sketch of court procedure;
 - (d) Direct the witness to points in his or her evidence which may be contradictory or fanciful;
 - (e) Remind the witness to bring all relevant documents;
 - (f) Give advice about the manner of answering questions;
 - (g) Give advice about matters of dress and grooming (*Re Equiticorp Finance Ltd; Ex parte Brock* (No 2) (1992) 27 NSWLR 391).
3. Advice moves beyond familiarisation and into impermissible coaching when it seeks to supplement or supplant the witness' true recollection with another version of events. This can include giving a witness advice on how to answer certain questions in a way favourable to the party's case, or allowing witnesses to collaborate on their answers (*Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731; [2005] NSWCA 110; *Majinski v WA* [2013] WASCA 10).
4. Coaching also occurs when counsel suggests (explicitly or implicitly) the answers the witness should give to particular questions. Implicit suggestion can take many forms, including the use of leading questions or inappropriate emphasis upon certain aspects of the evidence (*Majinski v WA* [2013] WASCA 10).
5. It is not appropriate to show a witness a photograph of an alleged offender if the witness has previously given a description of the offender which is inconsistent with the photograph. In that situation, showing a photograph may encourage the witness to modify his or her description of the offender (*Majinski v R* [2013] WASCA 10).
6. Counsel must be especially careful when proofing child witnesses due to the well-recognised dangers of suggestibility (*Majinski v WA* [2013] WASCA 10).

Last updated: 14 May 2013

13.4 Evidence Concerning the Complainant's Sexual History

1. The *CPA 2009* and the *Crimes Act 1914* (Cth) contain separate provisions on evidence about a person's sexual history. The Victorian provisions only apply in relation to Victorian offences and the Commonwealth provisions apply in relation to Commonwealth offences.

Differences between Victorian and Commonwealth provisions

2. In comparing the Commonwealth and Victorian provisions on sexual reputation and experience with respect to sexual activities, there are several significant differences to note:
 - The provisions apply to proceedings for different offences;

- The Commonwealth provisions apply to children, whereas the Victorian provisions apply to both adults and children;
- The Commonwealth provisions apply to both complainants and witnesses, whereas the Victorian provisions only apply to complainants;
- Victoria provides an absolute ban on questions about a complainant's sexual reputation, whereas the Commonwealth provision allows questions on reputation with respect to sexual activities with leave if the court is satisfied the evidence is substantially relevant;
- The Victorian provisions concerning sexual experience permit evidence to be given without leave where the conduct is the subject of the charge, whereas the Commonwealth provisions allow evidence without leave where the conduct is with the same defendant;
- The Victorian provisions require applications for leave to be filed a certain time before the hearing, with the court empowered to hear an application made out of time, whereas the Commonwealth provisions do not impose any time requirements.

Victorian Offences

3. Division 2 of Part 8.2 of the *CPA 2009* imposes three restrictions on the use and admission of evidence in proceedings that relate wholly or partly to a charge for a sexual offence.
4. First, courts must not admit evidence or allow any questions regarding the sexual reputation of the complainant (*CPA 2009* s 341).
5. Secondly, unless the court grants leave, the complainant must not be cross-examined and the court must not admit any evidence regarding the sexual activities of the complainant other than those relating to the offences charged (*CPA 2009* s 342).
6. Finally, evidence that the complainant was accustomed to engaging in sexual activities or had freely engaged in other sexual activity with the accused or another person is not admissible to support an inference that the complainant was the kind of person who is more likely to have consented to the sexual activity in the offences charged (*CPA 2009* s 343).
7. A party that wishes to lead evidence or to cross-examine the complainant on other sexual activity must apply for leave under s 344 of the *CPA 2009*. The applicant must file this with the relevant court and serve the application on the informant or the DPP as the case requires at least 7 days before the hearing, if the hearing relates to a summary proceeding, committal proceeding or a sentencing hearing. In the case of a trial, the application must be filed with the trial court and served on the DPP at least 14 days before the trial is due to commence or, if there is to be a special hearing, at least 14 days before that hearing (*CPA 2009* s 344).
8. The court may hear an application for leave out of time if it is in the interests of justice to do so (*CPA 2009* s 345).
9. The application for leave must be in writing, unless the court waives this requirement on the basis that it is in the interest of justice to do so.⁶⁶³ The application must set out the following matters:

⁶⁶³ Previously, these provisions were part of s 37A of the *Evidence Act 1958* and a court could only allow oral applications or applications outside the statutory time limit in exceptional circumstances. Under the *CPA 2009*, the test is whether it is in the interests of justice to allow the application. This lowers the threshold for an applicant (compare *R v O'Neill* (2003) 7 VR 408; [2003] VSCA 204).

(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 (CPA 2009 s 346).

10. A court must hear the application for leave in the absence of the jury and, if the accused requests, in the absence of the complainant (CPA 2009 s 348).
11. The CPA 2009 specifies different tests for leave in summary, committal or trial proceedings on the one hand and sentencing hearings on the other. In both cases, the Act prescribes a negative test that the court *must not* grant leave unless satisfied that the specified conditions are met. In summary, committal and trial proceedings, the conditions are:
 - that the evidence has substantial relevance to a fact in issue; and
 - it is in the interests of justice to admit the evidence or allow the cross-examination, having regard to the following matters:
 - (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 (CPA 2009 s 349).
12. This is a two-step test for granting leave. The court must be satisfied both that (1) the evidence has substantial relevance and (2) it is in the interests of justice to admit the evidence (*Cooper v The King* [2023] VSCA 67, [30]).
13. In determining these matters, a court must consider the effect of s 352 of the CPA 2009:

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 (CPA 2009 s 352).

14. In sentencing hearings, the court must not grant leave unless:
 - it is satisfied that the evidence has substantial relevance to the issue of the appropriate sentence; and
 - the offender:
 - has pleaded guilty to all sexual offences charged; or
 - has been found guilty of all sexual offences charged (CPA 2009 s 351).
15. A court that grants leave must state its reasons for doing so in writing and must cause those reasons to be entered in the records of the court. Failure to do so, however, does not affect the validity of the order granting leave (CPA 2009 s 351).

Commonwealth Offences

16. Division 2 of Part IAD of the *Crimes Act 1914* (Cth) governs the admission of evidence about sexual reputation and sexual experience in Commonwealth proceedings involving child witnesses and child complainants.
17. Division 2 applies in relation to proceedings for the following offences:

- (b) an offence against section 71.8 of the *Criminal Code* (sexual assault of United Nations and associated personnel);
- (c) an offence against Division 270 of the *Criminal Code* (slavery and slavery like conditions);
- (caa) an offence against Division 271 of the *Criminal Code* (trafficking in persons and debt bondage);
- (cab) an offence against Division 272 of the *Criminal Code* (child sex offences outside Australia);
- (cac) an offence against Division 273 of the *Criminal Code* (offences involving child pornography material or child abuse material outside Australia);
- (ca) an offence against Subdivision B or C of Division 471 of the *Criminal Code* (offences relating to use of postal or similar service involving sexual activity with person under 16);
- (cba) an offence against Subdivision D or F of Division 474 of the *Criminal Code* (offences relating to use of carriage service involving sexual activity with, or harm to, person under 16);
- (cb) an aggravated offence against Subdivision C of Division 12 of Part 2 of the *Migration Act 1958*;
- (d) a sexual offence specified in the regulations;
- (e) an offence that includes the commission of, or the intention to commit, an offence of a kind referred to in one of the preceding paragraphs of this subsection;
- (f) an offence of:
 - (i) attempting to commit; or
 - (ii) conspiring to commit; or
 - (iii) inciting the commission of;
 an offence of a kind referred to in one of the preceding paragraphs of this subsection (*Crimes Act 1914* s 15Y).

18. Evidence of a child witness' or child complainant's reputation with respect to sexual activities is not admissible in these proceedings unless the court gives leave (*Crimes Act 1914* s 15YB(1)).
19. The court may only give leave if satisfied that the evidence is "substantially relevant" to the facts in issue. It is not enough that the evidence may raise inferences as to the child's general disposition (*Crimes Act 1914* ss 15B(2), (3)).
20. If the evidence is admitted, it must not be treated as relevant to the child's credibility (*Crimes Act 1914* s 15YB(4)).
21. In addition, evidence of a child witness' or child complainant's experience with respect to sexual activities is inadmissible in proceedings for an offence listed above unless the court gives leave, or is of evidence of sexual activities with a defendant in the proceeding (*Crimes Act 1914* s 15YC(1))
22. The court must not give leave unless satisfied that:

(a) the evidence is substantially relevant to facts in issue in the proceeding

(b) if the evidence relates to the credibility of a child witness and is to be adduced in cross-examination of the child – the evidence has substantial probative value (*Crimes Act 1914* s 15YC(2)).

23. As with evidence of sexual reputation, evidence of sexual experience is not substantially relevant merely because of inferences it may raise about the child's general disposition (*Crimes Act 1914* s 15YC(3)).
24. In deciding whether evidence of a child's experience of sexual activities has substantial probative value for the purpose of credibility, the court must consider:
- (a) Whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
 - (b) The period that has elapsed since the acts or events to which the evidence relates were done or occurred (*Crimes Act 1914* s 15YC(4)).
25. Applications for leave under Division 2 of Part IAD must be made in writing and determined in the absence of the jury. If the court grants leave, it must state its reasons in writing and enter those reasons in the court's records (*Crimes Act 1914* s 15YD).
26. These provisions regarding sexual reputation and experience with respect to sexual activities do not apply to a child who is a defendant in the proceeding (*Crimes Act 1914* ss 15YB(5), 15YC(5)).

Commentary

27. These provisions have been introduced to encourage reporting of sexual offences and to counter a perception that courts did not treat complainants in sexual offence cases fairly. The provisions should be interpreted broadly, to give effect to that purpose (*Gutierrez v The Queen* [2018] VSCA 270, [52]–[53]; *Roberts v The Queen* [2012] VSCA 313, [57]–[63]).
28. Judges must be careful to identify how the sexual history evidence is said to be relevant in the case, as that will affect the assessment of the admissibility of the evidence. For example, evidence that the complainant has previously been the victim of a sexual offence, and has mistakenly attributed that event to the accused, challenges the victim's reliability rather than credibility and is not likely to arouse discriminatory beliefs or biases (see *Lancaster v R* (2014) 44 VR 820; [2014] VSCA 333 at [78]).
29. Both the Victorian and Commonwealth provisions require the court to consider whether the evidence is 'substantially relevant'. This is a more onerous test than mere relevance, without which the evidence would not be admissible (see *Evidence Act 2008* ss 55, 56). This test requires the court to consider whether the evidence has the capacity to substantially affect the assessment of the probability of the existence of a fact in issue (*Price v The Queen* [2022] VSCA 169, [27]).
30. Where the defence wishes to lead the evidence to establish that the complainant had previously had certain sexual experiences and was therefore in a better position to fabricate allegations of offending of a similar kind, it will often be appropriate to consider the age of the complainant and whether the complainant could have invented such an allegation regardless of the previous sexual activity (see *Furness v R* [2017] VSCA 40 at [73]–[76]).
31. Similarly, when the defence wish to lead evidence of previous sexual misconduct against the complainant and the complainant's response to that misconduct for the purpose of highlighting a delay in complaint, it is appropriate to consider the differences between the different occasions, including the seriousness of the sexual misconduct and relationships involved (*Cooper v The King* [2023] VSCA 67, [36]).

32. When deciding whether to grant leave, the court must not assume that the witness will give a particular answer. The court may grant leave to allow a party to challenge a witness' account, by providing an alternate explanation for the prosecution's case, or may seek to legitimately undermine the witness' credit. The court should not refuse leave and so exclude evidence where doing so leaves the jury with a potentially misleading view of the evidence (see *R v ERJ* [2010] VSCA 61).
33. One of the matters the court must consider when deciding whether it is in the interests of justice to admit evidence of other sexual activity is the need to respect the complainant's privacy and dignity (CPA 2009 s 349(c)). This consideration remains important even in a case where the complainant has died before trial (*Gutierrez v The Queen* [2018] VSCA 270, [88]). However, where the complainant is an adult, and has already been asked about such matters, that may be relevant to the degree of potential embarrassment (see *Price v The Queen* [2022] VSCA 169, [42]).
34. Evidence may be relevant to a fact in issue even if it relates only to the credibility of a witness, the admissibility of other evidence or a failure to adduce evidence (*Evidence Act 2008* s 55; c.f. *R v O'Neill* (2003) 7 VR 408; [2003] VSCA 204).
35. The exclusionary rules in CPA 2009 s 341 and *Crimes Act 1914* s 15YB only applies to evidence of the complainant's general reputation. It does not apply to evidence of the accused's beliefs. In appropriate cases, the prosecution (or the defence) could lead evidence that the accused believes that the complainant is promiscuous (*R v TSR* (2002) 5 VR 627; [2002] VSCA 87).
36. The precise scope of the prohibition on adducing evidence as to other sexual activities of the complainant is unclear. In *R v Warrell* [1993] 1 VR 671, the Court of Criminal Appeal queried whether evidence that the complainant was regularly taking an oral contraceptive involved evidence of the complainant's sexual activities. In contrast, the court in *R v Somers*, Unreported, VSCA, 15 June 1998, held that the prohibition extends to evidence that the complainant had made allegations of sexual offences on other occasions. The court warned that any distinction between cross-examining the complainant on the previous allegations and cross-examining on the substance of the complaints was likely to be more apparent than real. Finally, in *Bull v R* (2000) 201 CLR 443, McHugh, Gummow and Hayne JJ held that the term "sexual experiences" in the Western Australian legislation did not apply to evidence that the complainant had witnessed sexual activity between two or more other persons where he or she was not involved. Generally, a judge must determine whether Division 2 of Part 8.2 of the CPA 2009 and *Crimes Act 1914* s 15YC apply based on the nature of the evidence and the facts of the case.
37. In *Gutierrez v The Queen*, the Court held that a charge of loitering in a public place for the purpose of sex work is evidence of the complainant's sexual activities and falls within the scope of Division 2 of Part 8.2. In addition, seeking to use evidence of a previous conviction relating to sex work to show that the complainant was willing to engage in sexual activity for material gain is a form of propensity reasoning which is inconsistent with the guiding principles of part 8.2, even if the particular evidence is not sexual history evidence and so specifically excluded by CPA 2009 s 343 (*Gutierrez v The Queen* [2018] VSCA 270. See also *R v Lear* [1998] 1 VR 285).
38. In *Hurst v The Queen*, the parties accepted that Facebook posts by a complainant, some years after the alleged offending, which asserted that she enjoyed, or had been taught about, certain sexual practices, fell within the prohibition on cross-examination about sexual activities. The parties also accepted that cross-examination about the complainant Liking a particular page, which later featured a cartoon with a character fantasising about particular sexual acts, engaged the prohibition (*Hurst v The Queen* [2021] VSCA 3, [5]–[9]).
39. It appears that the prohibition on admitting evidence of other sexual activities also applies to the prosecution. If the prosecution applies for leave, the court should require it to serve a copy of the application on the accused (compare CPA 2009 s 344 and see *R v TSR* (2002) 5 VR 627; [2002] VSCA 87).

13.5 Pre-recorded evidence

1. Under Part 8.2 of the CPA 2009, a party may use pre-recorded evidence in the following situations:
 - The evidence-in-chief of a child or cognitively impaired complainant in a proceeding for a sexual offence or an indictable offence involving assault, injury or threat of injury (VARE Procedure);
 - The whole of the evidence of a child or cognitively impaired complainant in a proceeding for a sexual offence (Special Hearing Procedure); and
 - Evidence of a complainant in a proceeding for a sexual offence that was recorded at a previous trial (Previous Trial Evidence).
2. Section 4(1) of the Act defines 'sexual offence' as:

(a) an offence against—

(i) a provision of Subdivision (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the *Crimes Act 1958*; or

(ii) section 327(2) (failure to disclose a sexual offence committed against a child under the age of 16 years) of the *Crimes Act 1958*; or

(iii) section 5(1), 6(1), 7(1), 8(1), 9(1) or 11(1) of the *Sex Work Act 1994*;

(b) an offence an element of which involves—

(i) any person engaging in sexual activity; or

(ii) any person taking part in a sexual act; or

(iii) commercial sexual services; or

(iv) a sexual performance involving a child;

(c) an offence an element of which involves—

(i) an intention that any of the conduct referred to in paragraph (b) is to occur; or

(ii) soliciting, procuring, enabling or threatening any of the conduct referred to in paragraph (b); or

(iii) inducing or knowingly allowing a child to enter or remain on premises so that any of the conduct referred to in paragraph (b) may occur;

(d) an offence an element of which involves child abuse material;

(e) an offence an element of which involves indecency;

(f) an offence of attempting to commit, or of incitement or conspiracy to commit, an offence referred to in paragraph (a), (b), (c), (d) or (e);

(g) an offence against section 49C(2) (failure by person in authority to protect child from sexual offence) of the *Crimes Act 1958* as in force before the commencement of section 16 of the *Crimes Amendment (Sexual Offences) Act 2016*.

3. This definition is significantly broader than the previous definition, which only captured offences in subdivision (8A), (8B), (8C), (8E), (8F) or (8FA) of Division 1 of Part 1 of the *Crimes Act 1958*, an attempt to commit such an offence or an assault with intent to commit such an offence.
4. Section 4(2) of the Act provides that any offences under the *Sex Work Act 1994* which are not referred to in section 4(1)(a)(iii) are not sexual offences for the purpose of the *Criminal Procedure Act 2009*.
5. These three types of evidence are examined in the sections below.

13.5.1 VARE Procedure

1. The CPA 2009 and the *Crimes Act 1914* contain provisions regarding when a police interview can be used as the witness' evidence in chief. The Victorian provisions only apply in relation to Victorian offences and the Commonwealth provisions apply in relation to Commonwealth offences.

Differences between Victorian and Commonwealth provisions

2. In comparing the Commonwealth and Victorian provisions on VAREs, there are several significant differences to note:
 - The provisions apply to proceedings for different offences;
 - The Commonwealth provisions apply to children and adults, whereas one of the Victorian provisions apply only to children or people with a cognitive impairment, while the other applies only to complainants in family violence proceedings;
 - The Commonwealth provisions require the court to give leave to adduce evidence by a VARE, whereas the Victorian provisions make the VARE the default process and do not explicitly require either leave or provide for the court to refuse to allow a suitable person to give evidence by VARE;
 - Under the Victorian provisions, the witness must attest to the truthfulness of the recording. Under the Commonwealth provisions, this is not explicitly required.

Victorian offences

3. The CPA 2009 contains two sets of provisions to allow a person to give evidence-in-chief by way of a pre-recorded statement. Such a recording is known as a Video Audio Recording of Evidence, or "VARE".

VARE with children or a cognitively impaired witness

4. Division 5 of Part 8.2 covers witnesses under the age of 18, or who have a cognitive impairment, in summary and trial proceedings that relate wholly or partly to a charge for:
 - a sexual offence;⁶⁶⁴
 - an offence where the conduct consists of family violence within the meaning of *the Family Violence Protection Act 2008*;
 - an indictable offence which involves assault, injury or threat of injury;
 - common or aggravated assault under *Summary Offences Act 1966* ss 23 or 24, if they are related offences to the other offences specified above (CPA 2009 s 366. See also *R v Davis* [2007] VSCA 276; *R v Anders* (2009) 20 VR 596; [2009] VSCA 7).
5. Where these conditions are met, a witness may give evidence in the form of an audio or audio-visual recording of him or her answering questions put by a "prescribed person" (CPA 2009 ss 366, 367).⁶⁶⁵

⁶⁶⁴ "Sexual offence" is defined in s 4 of the CPA 2009 and is extracted at 13.5 Pre-recorded evidence above.

⁶⁶⁵ The prosecution may pre-record the evidence of a witness who, at the time of the recording, is under 18 and the admissibility of that recording is not affected by the fact that the witness is aged 18 or over at the time of the hearing (CPA 2009 s 368(2)).

6. "Injury", for the purposes of s 366 of the CPA 2009 includes mental harm (*R v Anders* (2009) 20 VR 596; [2009] VSCA 7).
7. A VARE provides the jury with the opportunity to observe the behaviour of the complainant and the investigating officer. This can help the jury form an accurate view about the complaint and whether the investigating officer obtained the details of the alleged offending properly (*Martin v R* (2013) 46 VR 537; [2013] VSCA 377 per Neave JA).
8. The following persons are "prescribed persons" who may question a witness for the purpose of compiling a VARE under Division 5:
 - (a) a member of Victoria Police who has successfully completed a training course conducted by Victoria Police on the procedures for making a Division 5 recording and examining a witness;
 - (b) a person authorised in writing by the Chief Commissioner of Police who has successfully completed a training course conducted by Victoria Police on the procedures for making a Division 5 recording and examining a witness;
 - (c) if the questions are put to the witness in another State or the Northern Territory, a member of the police force of that State or Territory;
 - (d) if the questions are put to the witness in a Territory other than the Northern Territory, a member of the Australian Federal Police (*Criminal Procedure Regulations 2009* reg 5).
9. A VARE under Division 5 must include the following information:
 - The date and place of the recording;
 - The times when the recording commenced and concluded;
 - The identity of all persons present during the recording;
 - The time when any break in questioning commences and concludes, and the reason for the break (*Criminal Procedure Regulations 2009* reg 6).
10. Section 368 sets out a number of procedural requirements for when the contents of a VARE is admissible as the evidence-in-chief of a witness.
11. First, a transcript of the VARE must be served on the accused at least 14 days before the relevant step in the proceeding. In the case of a summary hearing that step is the contest mention hearing or the summary hearing if there is no contest mention hearing. In the case of a trial, the relevant step is the day on which the trial is listed to commence or, if a special hearing is being held, the special hearing. The 14 day time requirement may be abridged if the court considers it is in the interests of justice to do so.
12. Second, the court must be satisfied that the accused and his or her legal practitioner were given a reasonable opportunity to listen to and view the VARE.
13. Thirdly, at the proceeding, the witness must identify himself or herself, attest to the truthfulness of the recording and be available for cross-examination and re-examination.
14. A VARE is admissible in:
 - the relevant proceeding;
 - any new trial of or appeal from that proceeding;
 - another proceeding for charges for offences specified in section 366(1);
 - charges for a related offence; or
 - a civil proceeding arising from the same facts as those which founded a charge for an offence specified under section 366(1) (CPA 2009 s 368(4)).

15. A VARE is not admissible in committal proceedings (CPA 2009 s 366).
16. A VARE may also be admitted and used in proceedings not specified in section 368 if a court or tribunal is satisfied that it is in the best interests of the witness to do so. In deciding whether to do so, the court or tribunal must have regard to the need to protect the privacy of the witness (CPA 2009 s 368A).
17. Where the court or tribunal makes an order allowing a VARE to be used in a non-specified proceeding, it must specify who may view the recording, when and where the recording must be produced and, if necessary, any requirements regarding destruction of the recording (CPA 2009 s 368A).

VARE in proceedings for a family violence offence

18. Division 7B of Part 8.2 contains a separate regime for a VARE with the complainant in a proceeding for a 'family violence offence'.
19. A family violence offence is defined as:
 - (a) an offence against section 37(2), 37A(2), 123(2), 123A(2) or 125A(1) of the *Family Violence Protection Act 2008*; or
 - (b) an offence where the conduct of the accused is family violence within the meaning of that Act.
20. Under this division, the complainant may give evidence in chief by way of a prerecorded statement. The recorded statement must:
 - be made as soon as practicable after the alleged offence;
 - be made with the complainant's informed consent;
 - include at the end of the recording an attestation by the complainant as to the truth of the contents of the statement; and
 - be in the form of an audiovisual recording, unless an audiovisual recording is not available, there are exceptional circumstances and having regard to whether the accused would be unfairly prejudiced, in which case an audio recording may be used (CPA 2009 s 387G).
21. The Act defines that informed consent requires that:
 - a trained police informed the complainant what proceedings the statement may be used in, that the complainant may be required to give further evidence, including cross-examination and re-examination, and the complainant may refuse to consent to making the recorded statement; and
 - the complainant indicates in the recorded statement that he or she understands the information provided and consents to making the recorded statement (CPA 2009 s 387G(3)).
22. Recorded statements under the Division which are not in English must either contain an oral translation into English or be accompanied by a separate written English translation (CPA 2009 s 387G(4)).
23. To be admissible:
 - the recorded statement must comply with CPA 2009 s 387G;
 - a copy or transcript of the recorded statement must have been served on the accused;
 - the court must be satisfied that, if the accused is not represented by a legal practitioner, the accused was given a reasonable opportunity to view the recorded audiovisual statement or listen to the recorded statement if it only exists in the form of an audio recording;

- the complainant must, at the hearing of the proceeding, identify themselves and attest to the truthfulness of the contents of the recorded statement and be available for cross-examination and re-examination (CPA 2009 s 387F(2)).
24. A reasonable opportunity to view a recorded statement exists if the accused was given the opportunity to view or listen to the statement while being questioned in relation to the offence, or if the informant notified the accused in writing that the accused could view or listen to the recorded statement on a day arranged with the informant (CPA 2009 s 387F(5)).
25. Parties may consent to the use of a recorded evidence even if it is not served or if the an unrepresented accused has not been given a reasonable opportunity to view or listen to the statement (CPA 2009 s 387F(3)).
26. The prosecution has a discretion whether to have the complainant's evidence-in-chief led through oral evidence or by tendering the recording. In deciding how to exercise that discretion, the prosecution must take into account:
- (a) the wishes of the complainant; and
 - (b) any evidence of intimidation of the complainant by the accused; and
 - (c) the purpose of the Family Violence Protection Act 2008 (CPA 2009 s 387E(2)).
27. A court may order that a recorded statement be edited to remove inadmissible material (CPA 2009 s 387F(4)).
28. CPA 2009 provides the following rules for the service of a recorded statement:
- A legal practitioner representing an accused must be served with an audiovisual copy of the recorded statement, but must not give or allow the accused to take, a copy of the recorded statement;
 - If the accused is not represented by a legal practitioner, the accused must only be given an audio recording or a transcript of the recorded statement, and not the audiovisual recording;
 - An accused must be served with a transcript rather than an audio recording if the informant or prosecutor believes that providing an audio recording would likely present a reasonably ascertainable risk that the accused would commit an offence of publishing, making an unauthorised copy or unauthorised supplying of a statement to another person. A transcript must also be served if, because of the accused's circumstances, a transcript is required, such as where the accused has a hearing impairment;
 - A transcript must be served in addition to a copy of the recording if the recording is to be used in a committal proceeding or a trial (CPA 2009 s 387H).
29. The major differences between Division 5 and Division 7B are that:
- Division 5 applies to any witness who is a child or a person with a cognitive impairment, whereas Division 7B only applies to the complainant;
 - Division 5 applies to a wider range of offences, compared to Division 7B;
 - Division 7B specifies matters the prosecution must consider in deciding whether to use this process, whereas Division 5 is silent on the circumstances in which the prosecution may elect to not use the VARE process;
 - Division 7B applies in summary hearings, committal hearings and trials, whereas Division 5 does not apply in committal hearings;
 - Division 7B does not apply if the accused was under 18 at the time of the alleged offence, whereas Division 5 is not affected by the age of the accused;
 - Division 7B recordings must be made as soon as practicable after the alleged events, whereas a Division 5 recording can be made at any time.

Commonwealth offences

30. A VARE is admissible in specified Commonwealth proceedings as the person's evidence in chief if the person was interviewed by an authorised person and the court gives leave (*Crimes Act 1914* s 15YM)
31. The following persons can give evidence through a VARE:
- A child witness, in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(1) (see extract at 13.4 Evidence Concerning the Complainant's Sexual History);
 - An adult complainant, in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(2) (slavery, debt-bondage, people trafficking and related offences), unless the adult complainant does not wish to be treated as a vulnerable adult complainant;
 - A person who the court has declared to be a special witness for the purpose of s 15YM (*Crimes Act 1914* s 15YM(1A)).
32. A VARE can be taken for Commonwealth proceedings by a constable or a person of a kind specified in the regulations (*Crimes Act 1914* s 15YM(1)(a)). The *Crimes Regulations 1990* r 4F states that the members of a police force, or other law enforcement agency, are specified for this purpose.
33. An application for leave to adduce evidence through a VARE must be made in writing. The court must refuse leave if satisfied that it is not in the interests of justice for the witness to give evidence by a VARE (*Crimes Act 1914* ss 15YM(2), (3)).
34. A VARE is not admissible if the court is satisfied that the defendant or the defendant's lawyer were not given a reasonable opportunity to listen to and view the recording (*Crimes Act 1914* s 15YN).

Commentary

35. The VARE procedure may be used more than once for a single witness. Subsequent VARE statements may be admissible provided the production of multiple VARE statements does not cause unfairness to the accused (*LAL v R* [2011] VSCA 111).
36. A VARE is conducted both as an aid to the police investigation and to form the basis of the complainant's evidence. The fact that it is carried out by members of the police, and for these two purposes, means that the complainant is questioned in a different manner to traditional examination-in-chief.
37. The investigating officer conducting a VARE must be mindful of the fact that the VARE may become the complainant's evidence-in-chief. The officer must therefore avoid misleading or suggestive questioning, or the use of leading cues. The officer must also ensure that the complainant's initial allegations are made voluntarily. However, courts reviewing the admissibility of a VARE must also make allowance for the fact that the VARE is an investigation tool and that investigators will need to ask questions to obtain more details about an alleged offence and may also ask questions to identify whether offences have been committed on any other occasions (*Martin v R* (2013) 46 VR 537; [2013] VSCA 377).
38. On a VARE, a question is not relevantly leading when it reminds the witness of an event he or she has previously reported, and seeks further details about that event. This is a necessary part of the VARE process, in order to elaborate on previous statements (*Martin v R* (2013) 46 VR 537; [2013] VSCA 377; *Tukuafu v R* [2014] VSCA 345).
39. Where the police conduct a 'disclosure interview' before a VARE, they must be careful not to influence the child's subsequent evidence. While there is not an absolute prohibition on the use of leading questions in a disclosure interview, the court will consider whether any leading questions tainted the subsequent VARE. This requires the court to ask whether there is a causal connection between the leading questions and the subsequent VARE answers. If such a causal connection exists, the court will consider whether the leading questions unfairly and unduly influenced the later evidence, such that the later evidence should be excluded under *Evidence Act 2008* s 138 (see *Elliot v The King* [2023] VSCA 48, [28]–[31]).

40. Where the accused seeks to object to leading or suggestive questions, the trial judge must consider whether the accused will have the opportunity to test the complainant's account through cross-examination, the directions to the jury and the circumstances in which the evidence was obtained (*Martin v R* (2013) 46 VR 537; [2013] VSCA 377).
41. When determining whether an offence involves assault, injury or threat of injury, the court must look at the elements of the offence, rather than the circumstances surrounding the individual case. For example, as the elements of stalking under s 21A of the *Crimes Act 1958* involve injury or threat of injury, the VARE procedure is available in relation to that offence (*R v Anders* (2009) 20 VR 596; [2009] VSCA 7).

Playing the VARE

42. In Victorian proceedings, the VARE can only be played after the witness identifies him or herself, attests to the truthfulness of the VARE and is available for cross-examination and re-examination (CPA 2009 s 368).
43. If the witness does not attest to the truthfulness of the recording, the evidence is only admissible if the accused does not object (*R v LRG* (2006) 16 VR 89; [2006] VSCA 288).
44. A recording may be admissible in part where a witness attests to the truthfulness of only part of a recording. This may be necessary where the witness later admits that he or she made certain false statements in a VARE statement (*LAL v R* [2011] VSCA 111).
45. In Commonwealth proceedings, the court must give leave and the witness must be available for cross-examination and re-examination (*Crimes Act 1914* s 15YM).
46. A VARE conducted with a child witness may contain questions and answers about the child's understanding of the importance of telling the truth. Such questions do not need to be removed from the version shown to the jury (*Davis v R* [2016] VSCA 272 at [153]; *LQ v R* [2011] VSCA 135 at [43]–[49]).
47. The witness does not need to retain the memory of the events he or she recounted on the VARE. The tape may be admissible if the witness states that he or she would have given truthful answers at the time the recording was made (*R v Anders* (2009) 20 VR 596; [2009] VSCA 7).
48. A witness who is unable to be effectively cross-examined at the hearing may not be "available for cross-examination" for the purpose of CPA 2009 s 368 and *Crimes Act 1914* s 15YM. Such a witness' VARE may not be admissible (*R v NRC* [1999] 3 VR 537; [1999] VSCA 184).
49. A VARE is a recording the evidence-in-chief of a witness. The tape is not an exhibit, but should be marked for identification (*R v Lewis* [2002] VSCA 200; *R v BAH* (2002) 5 VR 517; [2002] VSCA 164).
50. The judge may provide a transcript of the VARE to the jury to help it follow the recording and should retrieve this at the end of playing the recording (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164; *R v Welstead* [1996] 1 Cr App R 59).

Replaying a VARE

51. Jurors often ask to be allowed to view a VARE again during their deliberations. In responding to such a request, the judge has an overriding duty to ensure a fair trial. The judge may choose to replay the tape or to read relevant passages to the jury from the transcript or from his or her notes (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164).
52. In determining how to exercise this discretion, the judge should discuss the matter with counsel. If necessary, the judge may ask the jurors to identify why they wish to review the tape. Such questions should not intrude on the content of the jury's deliberations (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164; *R v H* [1999] 2 Qd R 283).
53. If the jury only require a reminder of *what* the witness said, it will usually be preferable to remind them of the relevant evidence by reading from the transcript. In contrast, if the jury seeks a reminder of *how* the witness said something, that may indicate a need to view the VARE again (*R v Rawlings*; *R v Broadbent* [1995] 1 WLR 178).

54. In some cases, it may also be necessary to remind the jury of the cross-examination of the witness, or any evidence that was led that contradicts the witness (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164).
55. Like any other request to be reminded about the evidence, requests for VARE tapes should be dealt with in open court. The relevant evidence should either be read out in court, or the tape should be played in the courtroom. Ordinarily, the jury should not be permitted to replay a VARE in the jury room, as there is a risk that the evidence will be given disproportionate weight in contrast to other evidence. This may prejudice the accused (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164; *R v Lyne* [2003] VSCA 118; *R v Lewis* [2002] VSCA 200).

Last updated: 8 December 2023

13.5.2 Special Hearing Procedure

1. The special hearing procedure applies to trials where the accused is charged with a sexual offence against a person who was under the age of 18 or who was cognitively impaired at the time the proceeding commenced (*CPA 2009 s 369*).
2. At a directions hearing, the court may give a direction that a special hearing be held (*CPA 2009 s 181*).
3. A special hearing may either be held before a trial or during a trial (*CPA 2009 s 370*).
4. In deciding which form of special hearing to hold, the court must have regard to:
 - If the complainant is a child, his or her age and maturity;
 - If the complainant is cognitively impaired, the severity of that impairment;
 - Whether the complainant has a preference to give evidence before or during the trial;
 - Whether conducting the special hearing during the trial is likely to intimidate the complainant when giving evidence or have an adverse effect on the complainant;
 - The need to complete the complainant's evidence quickly;
 - The likelihood that the witness will give inadmissible evidence that may result in the discharge of the jury; and
 - Any other relevant matters (*CPA 2009 s 370(1B)*).
5. When a special hearing is held before a trial, the whole of the evidence of the complainant must be given at a special hearing and recorded. The complainant's evidence is then presented to the court in the form of the recording (*CPA 2009 ss 370, 374*).
6. Where a special hearing is to be held during the trial, the court must specify at a directions hearing the date on which the special hearing is to commence (*CPA 2009 s 181*). As far as possible, the court must begin the special hearing on that date and ensure that the complainant's evidence is disrupted to the least extent possible (*CPA 2009 s 371A*).
7. The trial court must hold the special hearing within 3 months of the day on which the accused is committed for trial. The court may extend this time if it is in the interests of justice to do so (*CPA 2009 s 371*).
8. Where a special hearing is held outside the 3 month period without there being an extension of time, the court may backdate an extension of time order so that the special hearing evidence can be used in a trial. The earlier hearing is not treated as a nullity (*MAC v R* (2012) 34 VR 193; [2012] VSCA 19).
9. Prior to the commencement of the *Criminal Procedure Amendment Act 2012*, the power to extend time was contingent on there being exceptional circumstances. Now, the court must consider a range of matters when determining whether an extension of time is in the interests of justice, including:

- The age of a child complainant or the severity of the complainant's cognitive impairment;
 - The time since the complaint was first made;
 - The time since the offence was allegedly committed;
 - Any other matters the court considers relevant (CPA 2009 s 371).
10. The court may exercise the extension of time power before or after the time limit elapses (CPA 2009 s 371).
 11. The CPA 2009 specifies the following matters regarding the conduct of a special hearing:
 - The complainant must give evidence by closed-circuit television or other similar facilities;
 - The room where the complainant gives evidence is taken to be part of the courtroom while the complainant is giving evidence;
 - The accused must not be in the same room as the complainant when the complainant is giving evidence;
 - The accused and his or her legal practitioner must be present in the courtroom;
 - The accused must be able to see and hear the complainant while the complainant is giving evidence;
 - The accused must be able to communicate with his or her legal practitioner;
 - If the special hearing is held during the trial, the jury must be in the courtroom;
 - Only people authorised by the court may be present in the courtroom or the room where the complainant is giving evidence during the special hearing;
 - Apart from any modifications contained in Division 5 of Part 8.2 of the CPA 2009, all the usual rules of evidence apply (CPA 2009 s 372).
 12. The court may waive the use of the special hearing procedure and direct that the complainant give evidence in person on the application of the prosecution if the court is satisfied that the complainant is aware of the right to use the special hearing procedure and is able and wishes to give evidence in person (CPA 2009 s 370).
 13. If the complainant on a special hearing is to give evidence through a VARE, that recording must be played during the special hearing and the complainant must state that the evidence he or she gave during that interview is true and correct. The complainant is then cross-examined and re-examined, as if he or she was giving evidence at the trial (CPA 2009 s 368; *R v LRG* (2006) 16 VR 89; [2006] VSCA 288).
 14. At present, it does not appear technologically possible to present the VARE and the complainant's reactions to VARE simultaneously. If this becomes possible, the court should consider providing this so that the jury has the same chance to assess the complainant as if he or she gave evidence in the courtroom by VARE in the trial, rather than at a special hearing (Compare *R v Voss* (Ruling), Unreported, VCC, 25 February 2008 and *R v Samy* (Ruling), Unreported, VCC, 27 January 2009).
 15. A complainant whose evidence is recorded at a special hearing cannot be further cross-examined or re-examined unless the court gives leave. The court must not grant leave unless it 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 (CPA 2009 s 376).

16. This provision grants a court a broad power to recall the complainant if one or more of the conditions in paragraphs (a) to (c) are met (*Alexander v The Queen* [2022] VSCA 47, [44]–[45]).
17. In deciding whether it is in the interests of justice to permit the complainant to be recalled, the court may consider the attitude of the complainant. As accepted in *Alexander v The Queen*, a judge may consider that ‘the legislation ought not be used to prevent a willing and competent complainant from returning to give evidence if the interests of justice require’ (*Alexander v The Queen* [2022] VSCA 47, [48]).

Use of Special Hearing Tape

18. Subject to any editing to remove inadmissible material, the whole of the recording of the special hearing is admissible as if its contents were the direct evidence of the complainant:
 - in the proceeding; and
 - unless the court orders otherwise:
 - in any new trial of, or appeal from, the proceeding;
 - in another proceeding in the same court for the charge for a sexual offence or a charge for a related offence; or
 - in a civil proceeding arising from the same facts as those that founded the charge for a sexual offence (CPA 2009 s 374).
19. The recording of the special hearing must be an audio-visual recording. In exceptional circumstances, the court may admit an audio recording of the special hearing if an audio-visual recording is not available (CPA 2009 s 373).
20. The fact that the complainant attains the age of 18 between the special hearing and the tender of the recording in the trial does not affect its admissibility (CPA 2009 s 374(5)).⁶⁶⁶

Replaying a Special Hearing Tape

21. The jury may ask the judge to replay the tape of a witness’ evidence at a special hearing. The judge should deal with such a request in the same manner as a request to be reminded about other evidence in the trial (*Gately v R* (2007) 232 CLR 208; [2007] HCA 55).
22. Any viewing of a special hearing tape should take place in open court in the presence of the judge, counsel and the accused. It may be necessary to warn the jury that they are watching the evidence a second time and they must also consider other evidence or other matters raised by the accused (*Gately v R* (2007) 232 CLR 208; [2007] HCA 55).
23. In exceptional cases, the judge must also repeat the directions he or she gave when the special hearing evidence was first shown to the jury (*Gately v R* (2007) 232 CLR 208; [2007] HCA 55).

⁶⁶⁶ Section 374(5) of the CPA 2009 does not directly address the situation where the complainant attains the age of 18 before the special hearing. It appears that such a complainant may still use the special hearing procedure, provided that he or she was under 18 at the time the charge-sheet was filed (see CPA 2009 ss 5, 369).

13.5.3 Previous Trial Evidence

1. The CPA 2009 and the *Crimes Act 1914* (Cth) contain separate provisions on when evidence from a previous trial can stand as the evidence in a later trial without the witnesses needing to give evidence again.

Differences between Victorian and Commonwealth provisions

2. In comparing the Commonwealth and Victorian provisions on previous trial evidence, there are several significant differences to note:
 - The provisions apply to proceedings for different offences;
 - The Victorian provisions specify that the previous trial record must be complied in the form of an audio-visual recording, while the Commonwealth legislation is silent on the form of the record;
 - The Victorian provisions require the judge to exercise a discretion to decide whether it is in the interests of justice to do so, specify five matters the court must consider in exercising this discretion and create a presumption in favour of admitting the evidence. The Commonwealth provisions do not give the court a discretion to reject the evidence, but makes the evidence admissible provided it is in proper form and the prosecutor has given the required notice to the court and the defendants;
 - The Victorian provisions require the judge to give certain warnings about how it treats previous trial evidence, whereas the Commonwealth provisions prohibit any such warnings;
 - The Victorian and Commonwealth provisions contain different grounds on which to call a witness to give further evidence after that witness's evidence was admitted in the form of a previous trial recording.

Victorian offences

3. Division 7 of Part 8.2 of the CPA 2009 allows a court to admit a recording of a complainant who gave evidence in other criminal proceedings regarding a sexual offence. This provision operates as an exception to the hearsay rule. It was introduced to complement the special hearing process and reduce the trauma on adult complainants if there are a number of separate trials or if a new trial is ordered due to an appeal or a mistrial (see Victoria, *Parliamentary Debates*, Legislative Assembly, Thursday 17 September 2009 (Mr Hulls (Attorney-General), CPA 2009 s 387).
4. The division applies if:
 - the proceedings are criminal proceedings that relate wholly or partly to a charge for a sexual offence;
 - the complainant did not give evidence at a special hearing; and
 - there is a recording of the evidence of the complainant at a trial of the proceedings, including cross-examination and re-examination (CPA 2009 s 378).⁶⁶⁷
5. The recording of the earlier evidence of the complainant must be an audio-visual recording. In exceptional circumstances, the court may admit an audio recording of the earlier evidence if an audio-visual recording is not available (CPA 2009 s 386).
6. A recording of the complainant's evidence in trials where Division 7 of Part 8.2 applies may be admissible as if its contents were the direct evidence of the complainant:

⁶⁶⁷ If the jury is discharged without verdict before the complainant finishes giving evidence, the division also applies to the portion of the complainant's evidence available at that point.

- in the proceeding; and
 - unless the court orders otherwise:
 - in any new trial of, or appeal from, the proceeding;
 - in another proceeding in the same court for the charge for a sexual offence or a charge for a related offence; or
 - in a civil proceeding arising from the same facts as those that founded the charge for a sexual offence (CPA 2009 s 379).
7. If the prosecution intends to apply to tender a recording under Division 7, it must give written notice to the accused and the court at least 21 days before the day on which the trial or hearing is listed to commence, though the court may waive or vary this requirement (CPA 2009 s 380).
 8. There is a presumption in favour of admitting a previous trial recording (CPA 2009 s 381(1AAB)). The presumption is rebutted if the court considers it is in the interests of justice that the recording not be admitted, 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;
 - (d) whether the accused would be unfairly disadvantaged by the admission of the recording;
 - (e) subject to subsection (1A), any other matters that the court considers relevant (CPA 2009 s 381(1). See also *Davis v R* (2016) 55 VR 1, [121]–[128]; *Bauer v R* (No 2) [2017] VSCA 176, [33]).
 9. The availability or willingness of the complainant to give further evidence is irrelevant to whether it is in the interests of justice not to admit the recording (CPA 2009 s 381(1A)). Prior to amendments that commenced on 28 October 2018 by the *Justice Legislation Miscellaneous Amendment Act 2018*, there was no presumption in favour of admitting the recording and the complainant's willingness to give evidence was a factor in deciding whether to admit the recording. This factor was discussed in *Bauer v R* (No 2) [2017] VSCA 176 and *R v Bauer* [2018] HCA 40. The effect of the amendment is to remove availability and willingness as considerations on whether the recording is admitted.
 10. If the judge admits the recording of the complainant's evidence, he or she 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 (CPA 2009 s 382).
 11. The prosecution and the defence may apply to the court for an order directing the witness to attend for further examination or cross-examination. The court may only grant an application by the prosecution for further examination-in-chief if the court is satisfied that the complainant is able and wishes to give evidence in person and it is in the interests of justice to do so. If the complainant does give further evidence in this way, he or she may be cross-examined and re-examined on that additional evidence (CPA 2009 s 384).
 12. The court may only grant leave for further cross-examination if it satisfied that:
 - the accused could not reasonably have been aware of the matter in question at the time of the recording;
 - if the complainant were giving direct evidence in the proceeding, then he or she could be recalled in the interests of justice to give further evidence; or

- it is otherwise in the interests of justice to permit the complainant to be cross-examined or re-examined (CPA 2009 s 385).
13. The conduct of the second trial as a judge-alone trial is a matter that can be relevant to whether further cross-examination is in the interests of justice. Circumstances may arise where cross-examination on a topic before a jury is not feasible, but cross-examination on that same topic in a judge-alone trial is appropriate (*DPP v Jacobs* [2020] VSCA 266, [68]–[92]).
 14. The complainant only needs to attend the trial if required for further examination-in-chief, cross-examination or re-examination (CPA 2009 ss 383, 384, 385).
 15. The provisions of Division 7 also apply to summary hearings in the Children’s Court for the following offences:
 - (a) Rape
 - (b) Rape by compelling sexual penetration
 - (c) Sexual offences against children under *Crimes Act 1958* ss 49A – 49J
 - (d) Incest offences under *Crimes Act 1958* ss 50C – 50F
 - (e) An offence of attempting to commit or of incitement or conspiracy to commit an offence listed in s 387A (CPA 2009 ss 387A, 387B).
 16. The list of offences in CPA 2009 s 387A was amended by *Justice Legislation Amendment (Victims) Act 2018* s 14 on 28 February 2018. By the transitional provision introduced at the same time, these amendments do not apply to proceedings commenced after 28 February 2018 which concern charges for offences that were previously listed in CPA 2009 s 387A.
 17. The result is that subsequent hearings in the Children’s Court can use a complainant’s evidence from a previous summary hearing in the same way as if it had been given at a trial (see CPA 2009 s 379).

Commonwealth offences

18. Division 5A of Part IAD of the *Crimes Act 1914* contains “special rules for later trials”.
19. These provisions apply to the following vulnerable persons:
 - A child complainant in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(1) (see extract at 13.4 Evidence Concerning the Complainant’s Sexual History);
 - An adult complainant, in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(2) (slavery, debt-bondage, people trafficking and related offences), unless the adult complainant does not wish to be treated as a vulnerable adult complainant (*Crimes Act 1914* s 15YNB(4))
20. The Division applies to a retrial following both an appeal and where proceedings are discontinued (*Crimes Act 1914* s 15YNA).
21. The Act allows a prosecutor to prepare a record of all evidence given by a vulnerable person in the original proceeding if:

(a) The record is in a form, and is authenticated in a way, prescribed under subsection (5); and

(b) The prosecutor gives written notice to the court, and to the defendants in the new proceeding, of the prosecutor's intention to tender that record as evidence in the new proceeding; and

(c) That notice is so given:

(i) at least 21 days before the court commences hearing the new proceeding; or

(ii) within such other period as the court allows (*Crimes Act 1914* s 15YNB(1)).

22. Under s 15YNB(5), the Attorney-General has the power to prescribe the form and the ways for authenticating records.

23. At present, the Attorney-General has not prescribed any form for recordings. It is unclear whether this means that:

(a) Division 5A of Part IAD is incapable of operation, as it is impossible to satisfy the requirement in s 15YNB(1)(a) that the record "is in a form, and is authenticated in a way, prescribed"; or

(b) The prosecution is at large on how it chooses to compile and authenticate the record, subject to the control of the trial judge.

24. In a case where the prosecution seeks to rely on previous trial evidence under Division 5A, it would be prudent for the prosecution to seek a ruling from the trial judge on the operation of the Division at an early stage of proceedings.

25. The Act specifies that the defendant and their legal representatives are not entitled to receive a record of previous trial evidence which is prepared in the form of a video recording, but must be given reasonable access to the video recording to watch it (*Crimes Act 1914* s 15YND).

26. The Act makes the record of evidence prepared under s 15YNB and the exhibits tendered in connection with that evidence admissible in a new proceeding (*Crimes Act 1914* s 15YNB(3)).

27. A judge must not warn or suggest to the jury that the law requires them to give greater or lesser weight to evidence included in a record of previous trial evidence (*Crimes Act 1914* s 15YNE).

28. If the previous trial evidence is admitted, then the vulnerable witness need not give further evidence unless the court orders that it is necessary:

(a) To clarify the vulnerable person's evidence given in the original proceeding; or

(b) To give proper consideration of information or material that has become available since the original proceeding; or

(c) In the interests of justice (*Crimes Act 1914* s 15YNC(1)).

29. If the court orders that further evidence is necessary, it must limit the further evidence only about the matters specified in the order (*Crimes Act 1914* s 15YNC(2)).

30. The limits on a vulnerable person giving further evidence do not apply if the vulnerable person applies for leave to give further evidence and the court grants leave (*Crimes Act 1914* s 15YNC(4)).

Replaying Previous Trial Recordings

31. If the jury asks to re-watch the previous trial recording during deliberations, the same principles that apply to VAREs and Special Hearing recordings apply (*CF v R* [2017] NSWCCA 318 at [83], [87]). See 13.5.1 VARE Procedure.

13.6 Alternative Arrangements

1. The CPA 2009 and the *Crimes Act 1914* (Cth) contain separate provisions on defendants personally cross-examining certain protected witnesses. The Victorian provisions only apply in relation to Victorian offences and the Commonwealth provisions apply in relation to Commonwealth offences.

Differences between Victorian and Commonwealth provisions

2. In comparing the Commonwealth and Victorian provisions on alternative arrangements, there are several significant differences to note:
 - The provisions apply to proceedings for different offences;
 - The Commonwealth provisions require that the support person and any other people who are present with a witness giving evidence by closed-circuit television must be able to be viewed in the courtroom, whereas the Victorian provisions are silent on this;
 - The Commonwealth provisions recognise that the support person can speak to the witness while the witness is giving evidence, subject to certain restrictions, whereas the Victorian provisions are silent on this;
 - The Victorian alternative arrangement provisions require the court to make certain orders in cases involving certain witnesses, whereas the Commonwealth provisions set out a procedure that applies without the court needing to make orders to implement it;
 - Following the commencement of the *Jury Directions and Other Matters Amendment Act 2017*, mandatory jury directions in relation to alternative arrangements were abolished, but not prohibited. In contrast, the Commonwealth provisions prohibit warnings or suggestions that the law requires the jury to treat evidence given by closed-circuit television or alternative arrangements as having greater or lesser weight.

Victorian offences

3. Division 4 of Part 8.2 of the CPA 2009 is entitled "Alternative arrangements for giving evidence". The Division applies to criminal proceedings that relate wholly or partly to a charge for:
 - a sexual offence; or
 - an offence where the conduct consists of family violence; or
 - an offence against s 17(1) or s 19 of the *Summary Offences Act 1966* (CPA 2009 s 359).⁶⁶⁸
4. This division uses the following definition of "family violence" from s 5 of the *Family Violence Protection Act 2008*:

⁶⁶⁸ "Sexual offence" is defined in s 3 of the CPA 2009 as an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part 1 of the *Crimes Act 1958*, an offence under any corresponding previous enactments, an attempt to commit any of these offences or an assault with intent to commit any of these offences.

(1) ... family violence is—

(a) behaviour by a person towards a family member of that person if that behaviour—

(i) is physically or sexually abusive; or

(ii) is emotionally or psychologically abusive; or

(iii) is economically abusive; or

(iv) is threatening; or

(v) is coercive; or

(vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Examples

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a)—

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member's property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

(2) Without limiting subsection (1), *family violence* includes the following behaviour—

(a) assaulting or causing personal injury to a family member or threatening to do so;

(b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;

(c) intentionally damaging a family member's property, or threatening to do so;

(d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;

(e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.⁶⁶⁹

5. The Act specifies that the court may direct that a witness give evidence in accordance with alternative arrangements, such as:
 - giving evidence from outside the courtroom by closed-circuit television;
 - using a screen to remove the accused from the witness' line of vision;
 - allowing a person to be beside the witness while he or she is giving evidence to provide emotional support;
 - closing the court to everyone except specified people while the witness is giving evidence;
 - requiring legal practitioners not to robe; or
 - requiring legal practitioners to remain seated during examination and cross-examination (CPA 2009 s 360).
6. The CPA 2009 also makes certain alternative arrangements mandatory if the witness is the complainant in a criminal proceeding that relates wholly or partly to a charge for a sexual offence. The court must direct that the complainant give evidence using closed-circuit television unless:
 - the prosecution applies for the complainant to give evidence in court; and
 - the court is satisfied that the complainant is aware of the right to give evidence using closed-circuit television and is able and willing to give evidence in the court (CPA 2009 s 363).
7. If, in a criminal proceeding relating to a charge for a sexual offence, the complainant does give evidence in the court, the court must direct that a screen be used to remove the accused from the complainant's line of vision, unless the court is satisfied that the complainant is aware of the right to use a screen and does not wish a screen to be used (CPA 2009 s 364).
8. Finally, whether the complainant in a criminal proceeding that relates to a charge for a sexual offence gives evidence by closed-circuit television or in the courtroom, the court must permit a person to be beside the complainant to provide emotional support unless it is satisfied that the complainant is aware of the right to have a person for emotional support and does not wish to do so (CPA 2009 s 365).
9. The CPA 2009 specifies that if a witness gives evidence using closed-circuit television, then:
 - the remote facility where the witness is located is taken to be part of the courtroom while the witness is there for the purpose of giving evidence;
 - the court must direct that the witness' evidence is recorded; and
 - the court may make any order it considers appropriate to enable the witness to view exhibits or other material, or to identify anything or anyone for the purpose of the proceeding or the witness' evidence (CPA 2009 s 362).

Commonwealth offences

10. Division 4 of Part IAD of the *Crimes Act 1914* provides for vulnerable witnesses to give evidence by closed-circuit television and certain other alternative arrangements.
11. These provisions apply to the following vulnerable persons

⁶⁶⁹ Section 8 of the *Family Violence Protection Act 2008* contains an expansive definition of "family member" which includes spouses, people in an "intimate personal relationship", children who are normally resident with the person and people who have a relationship that may reasonably be regarded as like family members.

- A child witness, in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(1) (see extract at 13.4 Evidence Concerning the Complainant's Sexual History);
 - An adult complainant, in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(2) (slavery, debt-bondage, people trafficking and related offences), unless the adult complainant does not wish to be treated as a vulnerable adult complainant;
 - A person who the court has declared to be a special witness for the purpose of s 15YI (*Crimes Act 1914* s 15YG).
12. A court may declare a person to be a special witness in a proceeding if:
- ... satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner because of:
- (a) a disability; or
 - (b) intimidation, distress or emotional trauma arising from:
 - (i) the person's age, cultural background or relationship to a party to the proceeding; or
 - (ii) the nature of the evidence; or
 - (iii) some other relevant factor (*Crimes Act 1914* s 15YAB(1)).
13. A vulnerable person must give evidence by closed-circuit television unless:
- The person is at least 16 and chooses not to give evidence in this way;
 - The court orders that the person is not to give evidence in this way;
 - The court is not equipped with facilities for evidence to be given by closed-circuit television (*Crimes Act 1914* s 15YI(1)).
14. In relation to the power of a court to order that a person not give evidence by closed-circuit television, *Crimes Act 1914* s 15YI(2) provides that the court must not do so:
- ... unless satisfied that it is not in the interests of justice for the vulnerable person's evidence to be given by means of closed-circuit television.
15. When a person is giving evidence by closed-circuit television, the court may order that a court officer be present at the remote location as well as that another person be present:
- (i) To act as an interpreter;
 - (ii) To assist the vulnerable person with any difficulty in giving evidence associated with a disability; or
 - (iii) To provide the vulnerable person with other support (*Crimes Act 1914* s 15YJ(1)(c)).
16. When a person is giving evidence by closed-circuit television, the people who have an interest in the proceeding must be able to see the witness and anyone present with the witness on one or more television monitors (*Crimes Act 1914* s 15YK).
17. It is not clear whether, for the purpose of *Crimes Act 1914* s 15YK, members of the public gallery are "people who have an interest in the proceeding".
18. If a relevant witness does not give evidence by closed-circuit television, the court:
- must make arrangements to restrict contact the witness may have with any defendant while giving evidence;

- may make arrangements to restrict contact the witness may have with members of the public while giving evidence (*Crimes Act 1914* s 15YL(1)).
19. Arrangements to restrict contact include using screens or planning seating arrangements to adjust the level at which people sit and who is in the witness' line of vision (*Crimes Act 1914* s 15YL(2)).
 20. These provisions regarding vulnerable persons seeing the defendant or members of the public do not apply if the person is at least 16 and chooses not to give evidence under these arrangements (*Crimes Act 1914* s 15YL(3)).
 21. Part IAB also provides for a vulnerable person to choose an adult to accompany them when giving evidence (either in court or by closed-circuit television) (*Crimes Act 1914* s 15YO).
 22. Section 15YO gives a vulnerable person the right to be accompanied by a support adult, while the court has a discretion to disallow the person if the court determines that it is not appropriate for the adult to accompany the person (*Crimes Act 1914* s 15YO(2)).
 23. If it is in the interests of justice to do so, the court may allow more than one adult support person to accompany the vulnerable person (*Crimes Act 1914* s 15YO(3)).
 24. An adult support person must not:
 - (i) prompt the person or otherwise influence the person's answers; or
 - (ii) disrupt the questioning of the person (*Crimes Act 1914* s 15YO(4)).
 25. Subsection (5) states:

Any words spoken by an adult accompanying the person under this section must be able to be heard by:

 - (a) the judge; and
 - (b) if there is a jury in the proceeding – the members of the jury (*Crimes Act 1914* s 15YO(5)).
 26. The court may also order that some or all members of the public be excluded from the courtroom when a vulnerable witness is giving evidence (*Crimes Act 1914* s 15YP).
 27. In proceedings with a jury, the judge must not warn or suggest to the jury that:
 - The law regards a vulnerable person as an unreliable class of witness;
 - That the law requires greater or lesser weight to be given to evidence given by closed-circuit television or alternative arrangements under Division 4 of Part IAD;
 - That the law requires greater or lesser weight to be given to evidence because an adult accompanies the person under section 15YO (*Crimes Act 1914* s 15YQ).
 28. In the case of a person who is declared a special witness, the court needs to make a separate orders in relation each alternative arrangement (giving evidence by closed-circuit television; being accompanied by an adult support person; excluding people from the courtroom).

Related topic: 13.7 Remote witnesses

Related resource: 2.3.1 Alternative Arrangements in the Victorian Criminal Charge Book

Last updated: 9 March 2018

13.7 Remote witnesses

1. The following sections discuss provisions for taking evidence from a witness outside the courtroom using an audio or audio-visual link.

2. Use of remote witnesses in Commonwealth proceedings does not breach the requirement in s 80 of the Constitution that the trial on indictment of a Commonwealth offence must be held in the State where the offence was committed. The trial takes place where the evidence is received (*R v Wilkie & Ors* (2005) 64 NSWLR 125; [2005] NSWCCA 311).
3. Similarly, taking evidence under a letter of request (discussed in the sections below) is not part of the trial and the person who takes the evidence does not exercise Commonwealth judicial power. This process does not breach the requirements of s 80 of the Constitution (*DPP v Alexander* (1993) 33 NSWLR 482).

Last updated: 19 November 2009

13.7.1 Appearance of witnesses by audio-visual link

1. Under Division 2 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*, the court may direct that any person other than the accused may appear before the court by audio-visual link to give evidence or make submissions. The power to make this direction is subject to the rules of court and the court may act on its own motion, or on the application of a party. The court may vary or revoke an audio-visual link direction at any time (*Evidence (Miscellaneous Provisions) Act 1958 s 42E*).
2. An application for an audio-visual link direction must be filed at least 14 days before the person is due to give evidence or make submissions and must be in Form 41AA. The applicant must serve a copy of the application on every other party to the proceeding and, if he or she no longer requires the witness to give evidence or make a submission by audio-visual link, he or she must notify the Prothonotary or Registrar (*Supreme Court (General Civil Procedure) Rules 2005 Order 41A; County Court Civil Procedure Rules 2008 Order 41A*).
3. A court may only make an audio-visual link direction if it is satisfied that the technical requirements specified in s 42G of the Act are met (*Evidence (Miscellaneous Provisions) Act 1958 s 42E*). These relate to the ability of all parties at the court and the remote location to see and hear the appropriate people at the other location. The court rules may also prescribe requirements of a permissible audio-visual link and the presiding judge or magistrate may impose additional requirements that are not inconsistent with the Act or the rules of court (*Evidence (Miscellaneous Provisions) Act 1958 s 42G*).
4. The *Evidence (Miscellaneous Provisions) Act 1958* does not specify when the court should allow a witness to give evidence by audio-visual link. In *R v Cox & Ors (Ruling No 6)*, Kaye J distilled the following principles from previous decisions:
 - (1) The question for the court is whether it is in the interests of justice that an order be made under s 42E.
 - (2) In considering that question, the right of the accused to a fair trial is paramount.
 - (3) It does not follow that, because the accused may sustain some forensic disadvantage by reason of an order under s 42E, such an order should not be made. As Brooking J observed in a different context in *Jarvie v Magistrates' Court of Victoria*, a "... fair trial does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused."
 - (4) The right of an accused to confront, in person, those who testify against him or her is a fundamental right in our criminal justice system.
 - (5) However, as Redlich J observed in *Goldman*, that right, while fundamental, is not an absolute right at common law. Section 42E is a further qualification of that right in appropriate circumstances.
 - (6) The question whether it is in the interests of justice to make an order under s 42E must be determined by balancing, on the one hand, the interests of the accused, and, on the other hand, the public interest in the ability of witnesses to give evidence in significant criminal trials without thereby occasioning danger to themselves or to other members of the community.
 - (7) Nonetheless a court should not make an order under s 42E where to do so would unduly prejudice the right of an accused person to a fair trial. For, as I have observed, that right must be paramount (*R v Cox & Ors (Ruling No 6)* [2005] VSC 364, [7] (citations

omitted)).

5. The party applying for an audio-visual link direction carries the onus of persuading the court that the order is justified (*DPP v Finn (Ruling No 1)* [2008] VSC 303).
6. The court must balance the accused's right to confront witnesses in person against the public interest factors the Crown identifies to support the use of an audio-visual link. While the right of confrontation is an established and important common law right or interest, it is subject to a number of exceptions and the court should not give this factor undue weight (*R v Goldman* [2004] VSC 165; *DPP v Finn (Ruling No 1)* [2008] VSC 303).
7. While giving evidence is often a traumatic process for witnesses, the court will rarely allow a witness to give evidence remotely solely because the witness would be more comfortable doing so (*DPP v Finn (Ruling No 1)* [2008] VSC 303).
8. The court should consider the safety of the witness. In some cases, a person may attempt to harm the witness while he or she is travelling to or from the court (*R v Cox & Ors (Ruling No 6)* [2005] VSC 364; *R v Goldman* [2004] VSC 165).
9. Judicial attitudes towards taking evidence through an audio-visual link have changed over time. The current approach is to hold that witnesses can be adequately cross-examined using an audio-video link. Counsel and the jury can adequately observe the witness' demeanour over the link. In addition, the judicial officer can maintain control over proceedings and can terminate the link if the witness becomes disruptive (*Kim v R* [1998] VSC 215; *B v Dentists Disciplinary Tribunal* [1994] 1 NZLR 95; *DPP v Weiss (No 3)* [2002] VSC 15).
10. The remote facility where the witness gives evidence is taken to be part of the court and to be court premises for the purpose of the *Court Security Act 1980* while the witness is giving evidence. Laws relating to evidence, procedure, contempt of court and perjury apply to the witness as if he or she gave evidence in the court (*Evidence (Miscellaneous Provisions) Act 1958 s 42W*).
11. The witness may take the oath or affirmation over the audio-visual link as if he or she was present in court, or the oath or affirmation may be administered by an authorised person at the remote location (*Evidence (Miscellaneous Provisions) Act 1958 s 42Y*).
12. The Division also contains a cost making power for the Governor in Council concerning the costs of an audio-visual link (*Evidence (Miscellaneous Provisions) Act 1958 s 42H*) and provides that the division does not affect and is not affected by Part 8.2 of Chapter 8 of the CPA 2009 (*Evidence (Miscellaneous Provisions) Act 1958 s 42I*).
13. Under the *County Court Criminal Division Practice Note*, PNCR 2-2022, when the court gives leave for a witness to appear by Zoom or Webex, the party who applied for the witness to give evidence remotely must arrange a suitable location from which the witness will appear and provide all details to the presiding judge's chambers for the Court to forward a Zoom or Webex link to the witness. Similar processes exist for witnesses giving evidence by other kinds of video links (*County Court Criminal Division Practice Note*, PNCR 2-2022, [31.12]–[31.13]).

Documents and Audio-Visual Links

14. If it is necessary to show a document to a witness who is examined through an audio-visual link, the court may:
 - if the document is at the court, transmit a copy to the remote location by any means and put the copy to the witness; or
 - if the document is at the remote location, put the document to the witness and transmit a copy to the court (*Evidence (Miscellaneous Provisions) Act 1958 s 42U*).
15. A person may display the document itself over a video link and it is not necessary to prove that the document transmitted is a true copy of the original document (*Evidence (Miscellaneous Provisions) Act 1958 s 42U*).

16. Alternatively, the parties may send a copy of any document or exhibit the witness will need to examine to the remote facility in a sealed envelope before the hearing. A court official may then show a copy of the document or exhibit to the witness on the request of counsel examining the witness.

Related topic: Audio-visual links in 9.1 Presence of the Accused

Last updated: 17 March 2023

13.7.2 Section 389 of the *CPA 2009* Audio-visual links for charges under s 49S(1) of the *Crimes Act 1958*

1. Section 389 of the *CPA 2009* creates a specialised procedure for taking evidence from a witness in criminal proceedings that relate to a charge for an offence of facilitating sexual offences against children contrary of s 49S of the *Crimes Act 1958* or, for offences committed before 1 July 2017, *Crimes Act 1958* s 49A (*CPA 2009* s 389).
2. The court, on the application of a party, may direct that a witness give evidence by an audio-visual link if:
 - the witness will give the evidence from outside Australia;
 - the witness is not an accused in the proceeding;
 - the facilities enable all persons at the two locations to see and hear the appropriate people at the other location;
 - the court is satisfied that attendance by the witness at the court would:
 - cause unreasonable expense or inconvenience;
 - cause the witness psychological harm or unreasonable distress; or
 - cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced; and
 - the court is satisfied that it is consistent with the interests of justice to take the evidence by audio-visual link (*CPA 2009* s 389(2)).
3. Section 389 of the *CPA 2009* also provides that:
 - the remote location where the witness gives evidence is taken to be part of the courtroom while the witness is there giving evidence;
 - oaths or affirmations may be administered either through an audio-visual link or at the direction of and on behalf of the court at the remote location;
 - the court may make orders for payment of expenses associated with giving evidence under this procedure;
 - the section does not prevent the application of other laws, rules or regulations concerning taking evidence from witnesses outside Australia; and
 - the section does not displace the operation of any other provision in Part 8.2 of the *CPA 2009*.

Last updated: 7 March 2018

13.7.3 Examination of Witnesses Abroad in Victorian and Commonwealth Proceedings

1. Division 1A and 1B of Part 1 of the *Evidence (Miscellaneous Provisions) Act 1958* provide for taking evidence from a person outside Australia, or outside Victoria and within Australia, respectively. The two divisions create largely identical procedures with minor variations due to differences in subject matter. This part of the manual will therefore discuss the procedure established by Division 1A and readers should note that this process also applies with necessary modifications to witnesses who are outside Victoria and within Australia.

2. Part 2 of the *Foreign Evidence Act 1994* (Cth) creates a similar procedure for use in Commonwealth matters where the witness is outside Australia. There are five principal differences between the *Foreign Evidence Act 1994* (Cth) scheme and the *Evidence (Miscellaneous Provisions) Act 1958* scheme:

- The Commonwealth legislation only applies to proceedings in a court exercising federal jurisdiction;
- The Commonwealth legislation only applies to witnesses outside Australia and does not apply to witnesses who are merely outside Victoria;
- Under the Commonwealth legislation, the County Court is an inferior court and only the Supreme Court may make orders for the examination of a witness abroad;
- Under the Commonwealth legislation, evidence obtained by an order of the Supreme Court for use in a committal proceeding may be used in a later trial that results from that committal without requiring a fresh order (*Foreign Evidence Act 1994* (Cth) s 13); and
- Applications under the *Foreign Evidence Act 1994* (Cth) are made on summons (in the case of a proceeding in the Supreme Court) or originating motion (in all other cases) and shall be referred to an Associate Justice (*Supreme Court (General Civil Procedure) Rules 2005* r 41.19).

The provisions are otherwise the same and the relevant sections of the *Foreign Evidence Act 1994* (Cth) are referred to below.

3. In a proceeding for an offence against the law of Victoria in the Supreme Court or the County Court, a party may apply for an order to take evidence from a witness outside Australia. The court may make one of the following orders if it appears to be in the interests of justice to do so:

- Order the examination of the witness on oath or affirmation outside Australia before a judge or officer of the court or any other person the court may appoint;
- Issue a commission for examination of the witness on oath or affirmation at any place outside Australia; or
- Issue a letter of request to the relevant judicial authorities to take the evidence of the person or cause it to be taken (*Evidence Act (Miscellaneous Provisions) 1958* ss 9B(1), 9H(1); *Foreign Evidence Act 1994* (Cth) ss 7, 10).⁶⁷⁰

4. The court may also make orders concerning travel, accommodation and legal expenses incurred by the accused (*DPP v Alexander* (1993) 33 NSWLR 482).

5. If the court makes an order for the examination of the witness or the issue of a commission, the court may give any directions it considers just concerning the procedure for the examination of the witness, including the time, place and manner of the examination and any other relevant matters. Similarly, if the court orders the issue of a letter of request, it may include in the order a request regarding the examination, cross-examination and re-examination of the witness, the attendance of the parties' legal representatives and other prescribed matters (*Evidence (Miscellaneous Provisions) Act 1958* ss 9B(3), 9B(4), 9H(3), 9H(4); *Foreign Evidence Act 1994* (Cth) s 8).

6. A court may order or request the taping of the witness' evidence, so that the tape may be played in domestic proceedings (*DPP v Alexander* (1993) 33 NSWLR 482).

7. Evidence taken following the order is admissible in the proceeding on any terms the trial judge thinks fit. This may include rejection of parts of the evidence if it is in the interests of justice to do so (*Evidence (Miscellaneous Provisions) Act 1958* ss 9B(5), 9B(7), 9D, 9H(5), 9H(7), 9J; *Foreign Evidence Act 1994* (Cth) s 15. See also *Evidence Act 2008* ss 135–138).

⁶⁷⁰ For the purposes of Division 1B of Part 1 of the *Evidence Act 1958*, the relevant judicial authorities of the States and Territories are the Supreme Court of each State, the Supreme Court of the Australian Capital Territory and a judge of the Supreme Court of the Northern Territory (*Evidence (Examination of Witnesses Outside the State) Regulations 2011* 15).

8. In proceedings before the Magistrates' Court, a party may apply to the Supreme Court for one of the orders discussed above to permit the examination of a witness abroad. The same considerations apply and, if the Supreme Court makes an order, the Magistrates' Court may admit, exclude or limit the evidence in the same way as the Supreme Court or the County Court (*Evidence (Miscellaneous Provisions) Act 1958 ss 9C, 9I*).
9. Divisions 1A and 1B of Part 1 of the *Evidence (Miscellaneous Provisions) Act 1958* and Part 2 of the *Foreign Evidence Act 1994* (Cth) are not intended to exclude or limit the operation of any other law of Victoria that provides for the examination of witnesses outside Australia for proceedings in Victoria (*Evidence (Miscellaneous Provisions) Act 1958 ss 9E, 9K; Foreign Evidence Act 1994* (Cth) s 19).

Relevant Considerations

10. The court must consider the following matters when determining whether it is in the interests of justice to make an order for taking evidence from a witness abroad:
 - whether the witness is willing or able to come to Victoria to give evidence in the proceeding;
 - whether the witness will be able to give material evidence to an issue in the proceeding;
 - whether, having regard to the interests of the parties, justice will be better served by granting or refusing the order (*Evidence (Miscellaneous Provisions) Act 1958 ss 9B(2), 9H(2); Foreign Evidence Act 1994* (Cth) ss 7, 10).
11. The party applying for the order carries the onus of proof on these matters on the civil standard of "balance of probabilities" and does not need to prove that a witness' proposed evidence is truthful (*DPP v Alexander* (1993) 33 NSWLR 482).
12. While the risk that the judicial authorities of another jurisdiction will refuse to comply with a letter of request is not a basis for declining to make the order sought, such a letter may affect diplomatic relations between Australia and another country. This process should only be used when necessary (compare *DPP v Alexander* (1993) 33 NSWLR 482 and *Bond v ASC* (1994) 12 WAR 43).
13. The applicant should provide some evidence of the attitude of the foreign government if it seeks an order for taking evidence on commission or by an officer of the court. A court sitting in a foreign country may be an affront to that country's sovereignty and it is not appropriate to appoint a commissioner to take evidence in another country without that country's consent. The applicant is responsible for such matters and the accused may not assume that the prosecution will take the necessary steps if the court makes the desired order (*R v Winfield*, Unreported, SC SA, 26 July 1996).
14. When considering whether the interests of justice support making the order, the court must consider the possibility of prejudice to the accused by taking evidence from a witness outside Victoria. The court focuses on whether the *process* gives rise to prejudice and not the prejudice associated with the substance of the witness' evidence (*DPP v Alexander* (1993) 33 NSWLR 482).

Admissibility of Evidence

15. The fact that a judge has previously found that it was in the interests of justice to take the evidence does not determine whether the evidence should be admitted. These two matters involve different considerations and the earlier decision does not dictate or constrain the discretion of the judicial officer at the hearing (*DPP v Alexander* (1993) 33 NSWLR 482).
16. Evidence taken abroad is not admissible if:
 - it appears that the witness is in Victoria and is able to attend the hearing; or
 - the evidence would not have been admissible if a party adduced that evidence at the hearing (*Evidence (Miscellaneous Provisions) Act 1958 ss 9B(6), 9H(6); Foreign Evidence Act 1994* (Cth) ss 9, 12, 14).

Limitations on Taking Evidence Aboard

17. Requests to the appropriate authorities of another jurisdiction were developed in response to two principal difficulties with the process of taking evidence on commission. First, commissioners could not compel the attendance of witnesses and secondly, in some countries, commissioners could not administer oaths or affirmations (*DPP v Alexander* (1993) 33 NSWLR 482).
18. While the court cannot subpoena documents from a foreign witness, it may request a foreign court to do so (*Elna Australia v International Computers* (1987) 14 FCR 461; *DPP v Alexander* (1993) 33 NSWLR 482. See also *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 14).
19. Evidence taken on commission or following a letter of request must comply with the relevant local laws (*Idoport v National Australia Bank* [2001] NSWSC 838).
20. Courts have previously disapproved of taking a witness' evidence on commission when the witness' credit will be in question. Use of video recording equipment alleviates such concerns as it allows the jury to assess the witness' demeanour when he or she gave the evidence abroad (*DPP v Alexander* (1993) 33 NSWLR 482).

Last updated: 19 May 2011

13.7.4 Part 3 of the *Foreign Evidence Act 1994* Evidence Following an Attorney-General's Request

1. The Attorney-General may request the appropriate authorities of a foreign country:
 - (a) to arrange for:
 - (i) evidence to be taken in the foreign country in accordance with the law of that country; or
 - (ii) a document or other article in the foreign country to be produced in accordance with the law of that country;
 - for the purposes of a proceeding or investigation relating to a criminal matter in Australia; and
 - (b) to arrange for the evidence, document or other article to be sent to Australia (*Mutual Assistance in Criminal Matters Act 1987* (Cth) s 12(1). See also s 10).
2. As part of this process, the Attorney-General may request that the person be examined or cross-examined through video link by a party to the proceeding, a party's legal representative, a person being investigated or that person's legal representative (*Mutual Assistance in Criminal Matters Act 1987* (Cth) s 12).
3. Evidence may be taken or obtained in a foreign country following an Attorney-General's request even if the foreign country uses processes that cannot be used in Australia. However, a court may reject unlawfully or improperly obtained evidence (*Mutual Assistance in Criminal Matters Act 1987* (Cth) s 12; *Bollag v Attorney-General* (Cth) (1997) 79 FCR 198; *Evidence Act 2008* s 138).
4. Provided there is no law to the contrary, a request to a foreign country for assistance is lawful even if the request is not in accordance with the *Mutual Assistance in Criminal Matters Act 1987* (Cth) or the terms of the relevant treaty. The *Mutual Assistance Act* is not a code for requests for international assistance and does not limit other processes for providing or obtaining international assistance in criminal matters (*Mutual Assistance in Criminal Matters Act 1987* s 6; *Bollag v Attorney-General* (Cth) (1997) 79 FCR 198).
5. Under Part 3 of the *Foreign Evidence Act 1994* (Cth), evidence taken following such a request may be admissible in criminal proceedings for offences against Victorian and Commonwealth law (*Foreign Evidence Act 1994* (Cth) s 20, *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 1994* reg 4).

Admissibility of Evidence

6. Evidence obtained under this process must be on oath, affirmation or under such other caution as is required by the courts of the foreign country where the evidence was taken. The evidence may be recorded or reduced to writing and need not be in the form of an affidavit or a transcript of a proceeding in a foreign court (*Foreign Evidence Act 1994* (Cth) ss 22, 23).
7. Evidence obtained under this process is admissible, unless:
 - it appears that the witness is in Australia and is able to attend the hearing; or
 - the evidence would not have been admissible if a party adduced that evidence at the hearing (*Foreign Evidence Act 1994* (Cth) s 24).
8. A court may refuse to admit foreign material if that would better serve the interests of justice. When determining the interests of justice, the court must consider:
 - (a) the extent to which the foreign material provides evidence that would not otherwise be available; and
 - (b) the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding; and
 - (c) the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them; and
 - (d) whether exclusion of the foreign material would cause undue expense or delay; and
 - (e) whether exclusion of the foreign material would unfairly prejudice any party to the proceeding (*Foreign Evidence Act 1994* (Cth) s 25(2)).
9. Under s 25(2)(c), a court must consider whether the witness' evidence was susceptible to cross-examination and whether the accused had an adequate opportunity to cross-examine the witness. The court may consider whether the accused chose to deliberately forego cross-examination (*R v Reid* [1999] 2 VR 605; [1999] VSCA 98).
10. The above considerations do not apply in proceedings for "designated offences"⁶⁷¹ In such proceedings, the court may only refuse to admit foreign material if it is satisfied that adducing the material would have a "substantial adverse effect" on the right of the accused to a fair hearing. "Substantial adverse effect" means "an effect that is adverse and not insubstantial, insignificant or trivial" (*Foreign Evidence Act 1994* (Cth) s 25A).

Other Matters

11. The Attorney-General or an authorised officer may certify that specified foreign material was obtained as a result of an Attorney-General's request. This certificate establishes a presumption, in the absence of sufficient evidence to raise a doubt to the contrary, that the specified material was obtained through an Attorney-General's request (*Foreign Evidence Act 1994* (Cth) s 26).
12. To some extent, use of modern telecommunications equipment has reduced the need for Attorney-General's requests. It is now possible to allow a witness to give evidence in a proceeding by video or telephone conferencing (see *Garcin v Amerindo Investment Advisors Ltd* [1991] 4 All ER 655).

⁶⁷¹ These offences are defined in s 3 of the *Foreign Evidence Act 1994* (Cth) and mainly relate to offences concerning national security, including offences under Parts 5.3 and 5.4 of the *Criminal Code* (Cth), s 34L(4) of the *Australian Security Intelligence Organisation Act 1979* (Cth) and offences under the *Crimes (Internationally Protected Persons) Act 1976* (Cth).

13. Section 20(2) of the *Foreign Evidence Act 1994* (Cth) is a valid exercise of the external affairs power, even though it affects the law of evidence that affects State courts exercising State judicial power (*R v Reid* [1999] 2 VR 605; [1999] VSCA 98).
14. The *Mutual Assistance in Criminal Matters Act 1987* (Cth) also provides a process for Australia or the Attorney-General to request a foreign country to conduct a search and seizure of relevant material in relation to a "serious offence" as defined in that Act (*Mutual Assistance in Criminal Matters Act 1987* (Cth) ss 14, 15).

Last updated: 19 November 2009

13.7.5 Division 5 of Part IIIA of the *Crimes Act 1914* Overseas Evidence for Child Sex Tourism Offences

1. Division 5 of Part IIIA of the *Crimes Act 1914* (Cth) allows a court to receive evidence from an overseas witness when the accused is charged with an offence against Part IIIA (Child Sex Tourism) of that Act. The court may only make an order under this division on the application of a party and if:
 - (a) the witness will give the evidence from outside Australia; and
 - (b) the witness is not a defendant in the proceeding; and
 - (c) the facilities required by section 50EC 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 video link (*Crimes Act 1914* (Cth) s 50EA).
2. Section 50EC of the *Crimes Act 1914* (Cth) specifies the technical requirements for video links:

(1) A witness can give evidence under a direction only if:

- (a) the courtroom or other place in Australia where the court is sitting (*the Australian point*); and
- (b) the place where the evidence is given (*the overseas point*);

are equipped with video facilities that:

- (c) enable appropriate persons at the Australian point to see and hear the witness give the evidence; and
- (d) enable appropriate persons at the overseas point to see and hear appropriate persons at the Australian point.

(2) In subsection (1):

appropriate persons means such persons as the court considers appropriate.

3. Division 5 of Part IIIA also provides for:

- Application of laws about witness – s 50ED;
- Administration of oaths and affirmations – s 50EE; and
- Payment of expenses – s 50EF

4. This procedure does not affect any other law about taking evidence from a witness outside Australia (*Crimes Act 1914* (Cth) s 50EG).

Last updated: 19 November 2009

13.8A – Expert witnesses

1. The Supreme Court and the County Court have both issued practice notes on expert evidence in criminal trials (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*; *County Court of Victoria, PNCR 1-2014, Practice Note: Expert Evidence in Criminal Trials*).
2. The content of the two practice notes are the same, though the clause numbering is different between the two notes. For convenience, this chapter will use the Supreme Court practice note numbering.
3. The practice notes provide that an expert has an overriding duty to assist the Court impartially by giving objective, unbiased opinions on matters within their specialised knowledge. This includes an obligation to inform the parties and the court promptly if the expert's opinion changes from that contained in a report or statement (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [4.1]–[4.4]).
4. If the prosecution prepares and serves a forensic report on the accused, the accused may ask the prosecution to prepare an expert report in relation to any matters that will be contested at trial. This request must be made before the date for filing the defence response to the summary of the prosecution opening, unless the court gives leave. If the prosecution refuses the request, or fails to respond within a reasonable time, the defence may apply to the court for a direction that an expert report be obtained (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [5.1]–[5.6]).
5. Expert reports must contain the following material:
 - (a) the expert's name and place of employment;
 - (b) an acknowledgement that the expert has read this Practice Note and agrees to be bound by it;

- (c) whether and to what extent the opinion(s) in the report are based on the expert's specialised knowledge, and the training, study experience on which that specialised knowledge is based;
- (d) the material, observed facts, reported facts, assumed facts and other assumptions on which each opinion expressed in the report is based (a letter of instructions may be annexed);
 - (i) the reasons for,
 - (ii) any literature, research or other materials or processes relied on in support of,
 - (iii) a summary of— each such opinion;
- (e) (if applicable) that a particular question, issue or matter falls outside the expert's specialised knowledge;
- (f) any examinations, tests or other investigations on which the expert has relied, identifying the responsible laboratory by which, and the relevant accreditation standard under which, the examination, test or other investigation was performed;
- (g) a declaration that the expert has made all the inquiries and considered all the issues which the expert believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld;
- (h) any qualification of an opinion expressed in the report, without which the report would or might be incomplete or misleading;
- (i) any limitation or uncertainty affecting the reliability of
 - (i) the methods or techniques used; or
 - (ii) the data relied on— to arrive at the opinion(s) in the report; and
- (j) any limitation or uncertainty affecting the reliability of the opinion(s) in the report as a result of—
 - (i) insufficient research; or
 - (ii) insufficient data (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [6.1]).

6. To comply with these requirements, a report writer must do more than make assertions or general statements (see *Nwagbo v The Queen* [2021] VSCA 93, [51]–[53]).
7. Experts must also disclose any significant or recognised disagreements or controversies within their field which they know of and which are directly relevant to the expert's ability, technique or opinion (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [6.2]).
8. The practice notes also prescribe questions that must be answered in relation to reports on:
 - Cause of death in an alleged homicide;
 - Significance of genital and other injuries, or their absence, in adult sexual assault (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [7.1]–[7.3])
9. Expert reports that are governed by the practice note must be served:
 - At least 60 days before the trial is listed to commence, in the case of a primary report;

- At least 14 days before the trial is listed to commence, in the case of a responding report (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [8.1])
10. The practice notes give the other party the right to request to inspect of expert's instructions and material, notes made by the expert in connection with making the report, a record of any examination, measurement, test or experiment which provided the basis for the expert's opinion, or which were carried out in reaching the opinion, and the thing on which any examination, measurement, test or experiment was carried out. A party may withhold such material if the party would have grounds for objection to production of that material on a subpoena, but must disclose the objection and the reason (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [9.1]–[9.4]).
 11. A party may ask to interview the author of the other party's expert report. The expert does not need to agree. If the interview does take place, the commissioning party is entitled to be present. The parties may settle the conditions of the interview, including whether statements made during the interview may be referred to in court, and the court may resolve disputes about those conditions (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [10.1]–[10.5]).
 12. Where more than one party wants to introduce expert evidence on the same issue, the court may direct the experts to discuss the issues and prepare a statement which identifies the matters on which they agree and disagree, with the reasons for that agreement or disagreement (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [12.1]–[12.5]).
 13. The court may also direct that experts for two or more parties who have prepared reports on the same or closely related issues give evidence concurrently or consecutively, if the commissioning parties agree (*Supreme Court of Victoria, Practice Note SC CR 3, Expert Evidence in Criminal Trials*, [13.1]–[13.2]).
 14. It is the responsibility of the party calling the evidence to ensure that it complies with the practice note. No criticism can be made of the opposing counsel for waiting until trial to expose the inadequacies of the report, as early identification of such matters can provide the basis for the other party obtaining a fresh report which addresses those deficiencies (*Nwagbo v The Queen* [2021] VSCA 93, [54]).

Last updated: 30 August 2021

13.8 Protected witnesses

1. The CPA 2009 and the *Crimes Act 1914* (Cth) contain separate provisions on defendants personally cross-examining certain protected witnesses. The Victorian provisions only apply in relation to Victorian offences and the Commonwealth provisions apply in relation to Commonwealth offences.

Victorian offences

2. The accused may not personally cross-examine a protected witness in a criminal proceeding that relates to a charge for a sexual offence or an offence where the conduct constituting the offence consists of family violence (CPA 2009 ss 353, 356).⁶⁷²
3. Section s 354 of the CPA 2009 defines the following terms for the purpose of Division 3 of Part 8.2:

⁶⁷² Sexual offence is defined in s 3 of the CPA 2009 as an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part 1 of the *Crimes Act 1958*, an offence under any corresponding previous enactments, an attempt to commit any of these offences or an assault with intent to commit any of these offences.

family member, in relation to the complainant or accused person, 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
- (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.

4. Section 353 of the CPA 2009 uses the following definition of "family violence" from s 5 of the *Family Violence Protection Act 2008*:

(1) ... family violence is—

(a) behaviour by a person towards a family member of that person if that behaviour—

(i) is physically or sexually abusive; or

(ii) is emotionally or psychologically abusive; or

(iii) is economically abusive; or

(iv) is threatening; or

(v) is coercive; or

(vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Examples

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a)—

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member's property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

(2) Without limiting subsection (1), *family violence* includes the following behaviour—

(a) assaulting or causing personal injury to a family member or threatening to do so;

(b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;

(c) intentionally damaging a family member's property, or threatening to do so;

(d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;

(e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.⁶⁷³

5. The court may declare that person is a protected witness at any time (CPA 2009 s 355).
6. If the accused is not legally represented, the court must inform the accused and the jury (if any) that the accused may not personally cross-examine a protected witness (CPA 2009 s 357).
7. The court must also ask the accused whether he or she has sought legal representation for the cross-examination. If the court is satisfied that the accused has not had a reasonable opportunity to obtain legal representation it must adjourn the proceeding at the accused's request to allow him or her to obtain legal representation (CPA 2009 s 357). The court should conduct this inquiry in the absence of the jury.
8. If the accused does not obtain legal representation for the cross-examination of a protected person after having a reasonable opportunity to do so, the court must order Victoria Legal Aid (VLA) to provide representation for this purpose. VLA must comply with an order to provide representation and a practitioner provided by VLA must act in the best interests of the accused if he or she does not provide instructions (CPA 2009 s 357).
9. If the accused refuses legal representation or otherwise refuses to co-operate, the court must warn the accused that he or she may not adduce evidence regarding a fact in issue to contradict a protected witness without putting that contrary evidence to the witness during cross-examination (CPA 2009 s 357). This is more limiting than the rule in *Browne v Dunn*. While failure to comply with that rule of practice may result in an adverse comment by the judge, s 357 prohibits the accused from leading evidence to contradict the protected witness.
10. If the accused only has legal representation for the cross-examination of a protected witness, the judge must warn the jury that this is routine practice, that no adverse inference may be drawn against the accused and the jury must not give the evidence in cross-examination any greater or lesser weight than cross-examination conducted by the accused (CPA 2009 s 358).

Commonwealth offences

11. In proceedings for certain Commonwealth offences involving a child complainant, a defendant who is not represented by counsel is not allowed to cross-examine a child complainant. Instead, a person appointed by the court is to ask the child any questions that the defendant wishes to ask the child (*Crimes Act 1914* s 15YF).
12. The relevant offences are listed in *Crimes Act 1914* s 15Y(1) and are extracted in 13.4 Evidence Concerning the Complainant's Sexual History above.
13. A defendant who is not represented by counsel is also not permitted to personally cross-examine a vulnerable person unless the court gives leave. For this purpose, a vulnerable person is:
 - A child witness (other than the complainant), in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(1) (see extract at 13.4 Evidence Concerning the Complainant's Sexual History);
 - An adult complainant, in a proceeding for an offence listed in *Crimes Act 1914* s 15Y(2) (slavery, debt-bondage, people trafficking and related offences), unless the adult complainant does not wish to be treated as a vulnerable adult complainant;
 - A person who the court has declared to be a special witness for the purpose of s 15YG (*Crimes Act 1914* s 15YG).

⁶⁷³ Section 8 of the *Family Violence Protection Act 2008* contains an expansive definition of "family member" which includes spouses, people in an "intimate personal relationship", children who are normally resident with the person and people who have a relationship that may reasonably be regarded as like family members.

14. A court may declare a person to be a special witness in a proceeding if:
- ... satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner because of:
- (a) a disability; or
 - (b) intimidation, distress or emotional trauma arising from:
 - (i) the person's age, cultural background or relationship to a party to the proceeding; or
 - (ii) the nature of the evidence; or
 - (iii) some other relevant factor (*Crimes Act 1914* s 15YAB(1)).
15. The test for granting leave to personally cross-examine a vulnerable witness is whether the court is:
- Satisfied that the vulnerable person's ability to testify under cross-examination will not be adversely affected if the defendant conducts the cross-examination (*Crimes Act 1914* s 15YG(2)).
16. As part of this, the court must consider any trauma that could be caused if the defendant cross-examines the vulnerable person (*Crimes Act 1914* s 15YG(3)).
17. If the court refuses leave, a person appointed by the court is to ask the vulnerable person any questions the defendant wishes to ask (*Crimes Act 1914* s 15YG(5)).
18. Finally, if the defendant is represented by counsel, the defendant cannot personally cross-examine a person who the defendant could not cross-examine if the defendant were not represented (*Crimes Act 1914* s 15YH).

Related resources: 4.11 Failure to Challenge Evidence (Browne v Dunn) in the Victorian Criminal Charge Book.

2.3.2 Protected witnesses in the Victorian Criminal Charge Book

Last updated: 15 December 2021

13.9 Family members

1. The spouse, de facto partner, parent or child of the accused may object to:
 - giving evidence; or
 - giving evidence of a communication with the accused;as a witness for the prosecution (*Evidence Act 2008* s 18).
2. The court must satisfy itself that relevant witnesses are aware of the right to object to giving evidence for the prosecution (*Evidence Act 2008* s 18). However, failure to do so will not automatically vitiate the trial. The consequences will depend on the importance of the witness' evidence and whether the witness gave evidence willingly (*R v DJT* [1998] 4 VR 784).
3. A witness must object before giving evidence, or as soon as practicable after he or she becomes aware of the right to object (*Evidence Act 2008* s 18).
4. The witness holds the right to object, rather than the accused. The court only needs to rule on the issue when the witness raises the objection (*R v Sorby* [1986] VR 753).
5. Subsections (6) and (7) of s 18 govern the exercise of the discretion on when to uphold the objection:

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that—

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the accused, if the person gives the evidence; and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following—

(a) the nature and gravity of the offence for which the accused is being prosecuted;

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;

(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;

(d) the nature of the relationship between the accused and the person;

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the accused.

6. The court must determine the objection in the absence of the jury. The prosecutor may not comment on the objection, the court's ruling on the objection or the witness' failure to give evidence (*Evidence Act 2008* s 18. See also *Demirok v R* (1977) 137 CLR 20).

Last updated: 19 November 2009

13.10 Children

1. The *Evidence Act 2008* does not place the evidence of children in a special category. The competence of children is assessed in the same manner as other witnesses (*R v JTB* [2003] NSWCCA 295). See 13.1 Competence of Witnesses.
2. The *Jury Directions Act 2015* prohibits certain statements or directions regarding the reliability of a child's evidence:

The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that—

(a) children as a class are unreliable witnesses; or

(b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or

(c) a particular child's evidence is unreliable solely on account of the age of the child; or

(d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child (*Jury Directions Act 2015* s 33).

3. These provisions apply to both the judge and to counsel (and the accused, if the accused is self-represented). If counsel or the accused breach these prohibitions, the trial judge must correct the misstatement unless there are good reasons for not doing so (*Jury Directions Act 2015* s 7).

4. When taking evidence from children, courts and lawyers must take account of the shorter attention span of young children and how they can become quickly fatigued. Courts and parties should not keep young children waiting unnecessarily before giving evidence (*Go v The State of Western Australia* [2016] WASCA 132 at [81]).
5. In *Go v The State of Western Australia* [2016] WASCA 132 McLure P, Mazza JA and Mitchell J set out the following matters to consider when children are giving evidence:
 - (a) Parties should do all that they can to ensure that child witnesses are not unduly kept waiting to give evidence.
 - (b) The usual procedure, as we have said, is that a child witness attends to give evidence, where court is due to start at 10.00 am, at approximately 9.00 am.
 - (c) Facilities for witnesses vary in courthouses in Western Australia, but it should not be assumed, even in courts with suitable waiting facilities, that no harm will be done should a child witness be kept waiting unnecessarily before they are called to testify.
 - (d) It follows that, when child witnesses are involved in trials, it is particularly important that pre-trial issues are dealt with as far in advance as possible before the trial starts, or at least at a time which minimises the period before the child is called to testify.
 - (e) Defence counsel questioning child witnesses is expected to conduct his or her cross-examination in a manner appropriate to the age and capacity of the child. Where a child exhibits difficulties during the course of the cross-examination, counsel must do what they can, consistently with their duties to the court and their client to minimise any trauma to the child.
6. These propositions, which were developed in a Western Australian context, may be relevant for the conduct of proceedings in Victoria.
7. In addition, in *Ward v R* [2017] VSCA 37, the Maxwell P and Redlich JA extensively discussed the principles relevant to cross-examination of children, and how the requirement from *Browne v Dunn* (1893) 6 R 67 for a party to put its case to a witness operates in relation to children. This issue is discussed in Appendix A of the Uniform Evidence Manual.
8. Under Part 8.2A of the CPA 2009, a court hearing evidence from a child may be permitted to conduct a ground rules hearing or utilise an intermediary. These provisions are discussed in 13.11A Ground rules hearings and intermediaries.

Last updated: 7 March 2018

13.11 Cognitively Impaired Witnesses

1. The *Evidence Act 2008* does not place the evidence of cognitively impaired witnesses in a special category. The competence of cognitively impaired witnesses to give evidence is assessed in the same manner as other witnesses (see also *R v Hill* (1851) 165 ER 495; *R v Dunning* [1965] Crim LR 372; *R v Lee* [1988] Crim LR 525).⁶⁷⁴ See 13.1 Competence of Witnesses.
2. The judge should warn a jury of the danger of acting on the uncorroborated evidence of a person who has a cognitive impairment that affects his or her ability to give reliable evidence (*Bromley v R* (1986) 161 CLR 315; [1986] HCA 49). However, corroboration is not necessary as a matter of law to support a conviction.⁶⁷⁵
3. Under Part 8.2A of the CPA 2009, a court hearing evidence from a cognitively impaired person may be permitted to conduct a ground rules hearing or utilise an intermediary. These provisions are discussed in 13.11A Ground rules hearings and intermediaries.

⁶⁷⁴ At common law a cognitively impaired person was competent to give evidence provided he or she could give a rational account and could understand the nature and sanction of an oath.

⁶⁷⁵ Perjury and related offences are now the only offences where corroboration is required as a matter of law (see *Evidence Act 2008* s 164).

13.11A Ground rules hearings and intermediaries

1. Part 8.2A of the *CPA 2009* was introduced on 28 February 2018 by Part 4 of the *Justice Legislation Amendment (Victims) Act 2018*. Division 1 of Part 8.2A concerns ground rules hearings and Division 2 concerns intermediaries.
2. As the Attorney-General explained in the second reading speech:

The bill will introduce ground rules hearings and intermediaries. Intermediaries — or skilled communication specialists — are not advocates or support workers; their role is to facilitate communication with the witness (both at the police interview and trial stage). Intermediary schemes aim to protect and empower vulnerable witnesses to give their best evidence, ensuring that communication with the witness is as complete, coherent, and accurate as possible, helping to bring offenders to justice.

There is wide support for such a scheme, including recommendations of the Victorian Law Reform Commission's *The Role of Victims of Crime in the Criminal Trial Process* report (August 2016) and the Royal Commission into Institutional Responses to Child Sexual Abuse's *Criminal Justice Report* (14 August 2017). The Victorian Court of Appeal also endorsed such schemes in *Ward (A Pseudonym) v. The Queen* [2017] VSCA 37.

In response to these recommendations, the government included an investment of \$2.6 million as part of the Victorian budget 2017–18 to introduce intermediaries to assist in obtaining evidence from child victims and victims who have a cognitive impairment in a two-year pilot program, and to introduce ground rules hearings.

The function of an intermediary is to communicate to the witness questions put to the witness, and to any person asking such questions the answers given by the witness. The legislation will clarify that an intermediary is an officer of the court rather than an advocate for the witness, and will have a duty to act impartially. Intermediaries will be professionals with a range of skills, experience and qualifications. During the pilot phase, the intermediaries scheme will be limited to certain courts.

Ground rules hearings are a pre-trial process that involve all parties and the judge to address a number of issues, including the manner and content of cross-examination. Ground rules hearings are important in bringing to the attention of lawyers and judicial officers the comprehension capacity and communication needs of particular vulnerable witnesses, and assisting parties to plan their questions. Ground rules hearings will be required in criminal proceedings in any matter in which an intermediary has been appointed, and will be available where divisions 5 and 6 of part 8.2 of the *Criminal Procedure Act 2009* apply. These divisions relate to the use of recorded evidence-in-chief, and other procedures and rules for children and cognitively impaired people. If a ground rules hearing is held effectively, there should be less need for an intermediary to intervene during cross-examination.

These reforms will facilitate a less stressful experience for the witness and a more efficient trial (Parliamentary Debates, Legislative Assembly, 13 December 2017, Mr Pakula (Attorney-General), 4359).
3. Part 8.2A applies to a proceeding commenced, or in which the accused is committed for trial, on or after 28 February 2018, regardless of when the offence was alleged to have been committed (*CPA 2009* s 451).

Ground rules hearings

4. *CPA 2009* s 389AB provides that:

A ground rules hearing is a hearing at which the court—

(a) considers the communication, support or other needs of witnesses; and

(b) decides how the proceeding is to be conducted to fairly and effectively meet those needs.

5. Ground rules hearings are available in criminal proceeding that relates to a charge for:
 - A sexual offence as defined in CPA 2009 s 4 (see 13.5 Pre-recorded evidence for information on the meaning of sexual offence); or
 - An offence where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008*; or
 - An indictable offence which involves assault, injury or threat of injury to a person; or
 - Offences against sections 23 or 24 of the *Summary Offences Act 1966* (common assault or aggravated assault) if the offences are related offences to one of the above listed offences (CPA 2009 s 389A(1)).
6. Ground rules hearings are available in relation to a witness, other than an accused, who is under the age of 18, who has a cognitive impairment, or is the complainant in relation to a charge for a sexual offence (CPA 2009 s 389A(3)).
7. The availability of ground rules hearings was extended on 30 July 2023 through the commencement of Division 4 of Part 5 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*. Previously, ground rules were only available for witnesses under the age of 18 or who had a cognitive impairment. The 2023 amendments extended ground rules to also be available for adult complainants in sexual offence cases, in response to recommendation 84 of the VLRC Report, 'Improving the Response of the Justice System to Sexual Offences'.
8. A court must hold a ground rules hearing if an intermediary is appointed under Division 2 of Part 5 of the CPA 2009, or if a witness is a complainant in relation to a charge for a sexual offence (CPA 2009 s 389B(3)).
9. CPA 2009 s 389F allows a court to appoint an intermediary if the witness is under 18 at the time at which the proceeding commenced. In contrast, CPA 2009 s 389A provides that a witness, for the purpose of the ground rules hearings provisions, must be under 18. Implicitly, s 389A refers to the age of the witness at the date of the ground rules hearing. In this respect, the ground rules hearings provisions are narrower than the intermediaries provisions, in the case of the witness who turns 18 after the proceeding commenced. Despite this, a court may appoint an intermediary if the witness turns 18 after the proceeding commenced, and, if it does, the court must hold a ground rules hearing in accordance with s 389B(3) (*DPP v Jacobs* [2023] VSC 610, [46]–[62]).
10. Unlike the provisions relating to intermediaries, a court may hold a ground rules hearing at any venue, provided the case involves a qualifying offence (compare CPA 2009 s 389F(1)(b)).
11. A court may only hold a ground rules hearing:
 - before the commencement of any hearing at which a witness is to give evidence (CPA 2009 s 389C(1)).
12. The court has wide powers to extend the time for holding a ground rules hearing if it is in the interests of justice to do so, including after the hearing has commenced (CPA 2009 s 389C).
13. In the County Court, the court will hold the ground rules hearing for a sexual offence matter with an adult complainant who does not have a cognitive impairment on the first day of the trial before conducting the jury empanelment (*County Court Criminal Division Practice Note PNCR 2-2022*, [5.85], [5.91]).

14. In the Magistrates Court, the court will list the ground rules hearing on the morning of the proceeding if the complainant is an adult who does not have a cognitive impairment (*Magistrates' Court of Victoria Practice Direction 4 of 2023*, [3]–[4]). For other complainants, the ground rules hearing will be listed no later than 7 days before the contested hearing and, where possible, will be heard by the magistrate who will hear the summary contest or committal (*Magistrates' Court of Victoria Practice Direction 5 of 2023*, 3–4).
15. The County Court and the Magistrates' Court have both developed a Ground Rules Hearing Questionnaire for use where the complainant is an adult without a cognitive impairment. In the County Court, the Questionnaire must be filed, while in the Magistrates' Court a magistrate may direct the informant to complete and file the Questionnaire (*County Court Criminal Division Practice Note PNCR 2-2022*, [5.67], [5.81]; *Magistrates' Court of Victoria Practice Direction 4 of 2023*, [2]).
16. The Act states that the following people must attend a ground rules hearing:
 - (a) A person acting for the prosecution;
 - (b) The legal practitioner representing the accused or, if the accused is unrepresented, the accused;
 - (c) The intermediary appointed for a witness, if any (*CPA 2009 s 389D(1)*).
17. The witness need not attend the ground rules hearing and, if an intermediary has been appointed, the court may order that the witness must not attend the ground rules hearing (*CPA 2009 s 389D(2), (3)*).
18. The purpose of the ground rules hearing is to manage the conduct of the hearing and ensure that counsel act in accordance with pre-set rules in relation to questioning a child or cognitively impaired witness. This is designed to reduce the need for the judge to intervene during the questioning by addressing matters that could arise before questioning begins. It is also designed to ensure that the witness is treated fairly.
19. At a ground rules hearing, the court gives directions for the fair and efficient conduct of the proceeding. Such directions may include:
 - (a) A direction about the manner of questioning a witness;
 - (b) A direction about the duration of questioning a witness;
 - (c) A direction about the questions that may or may not be put to a witness;
 - (d) If there is more than one accused, a direction about the allocation among the accused of the topics about which a witness may be asked;
 - (e) A direction about the use of models, plans, body maps or similar aids to help communicate a question or an answer;
 - (f) A direction that if a party intends to lead evidence that contradicts or challenges the evidence of a witness or that otherwise discredits a witness, the party is not obliged to put that evidence in its entirety to the witness in cross-examination (*CPA 2009 s 389E*).
20. The notes to s 389E make two points. First, a direction under paragraph (f) may exclude all or part of the rule in *Browne v Dunn* as it applies to that witness. Second, the notes remind readers that under *Evidence Act 2008 s 41*, a court must disallow improper questions and improper questioning, or inform the witness that they don't need to answer such questions.
21. By exercising the power under *CPA 2009 s 389E(2)(c)* to give directions about the questions that may or may not be put to a witness, the court can ensure that questions are developmentally appropriate for the witness.

22. The available directions that can be given at a ground rules hearing are constrained by the principle of legality and other fundamental principles. While CPA 2009 s 389E states the judge may make or vary ‘any direction for the fair and efficient conduct of the proceeding’, this does not allow a judge to order a private meeting with a witness for the purpose of settling the witness. Such a meeting would be inconsistent with open justice principles and is not authorised by the general words in s 389E (*DPP v Smith* [2023] VSCA 293).
23. While the *Multi-jurisdictional court guide for the Intermediary Pilot Program* identifies possible directions that might be given at a ground rules hearing, the guide does not have the force of law and cannot expand the permissible scope of directions beyond that provided in CPA 2009 s 389E.

Intermediaries

24. Division 2 of Part 8.2A allows a court to appoint an ‘intermediary’ in relation to a witness.
25. As the Attorney-General explained in the second reading speech, an intermediary is a communications specialist whose role is to facilitate the witness giving their best evidence (Parliamentary Debates, Legislative Assembly, 13 December 2017, Mr Pakula (Attorney-General), 4359).
26. The Act specifies that the function of an intermediary is to help the witness understand the questions asked and to help the person questioning the witness to understand the witness’ answers (CPA 2009 s 389I(1)).
27. It is not part of the intermediary’s statutory function to make recommendations or suggestions on how to assist a witness’ confidence. The function of an intermediary is limited to the two matters identified in CPA 2009 s 389I and it is the judge who is responsible for giving directions at ground rules hearings (*DPP v Smith* [2023] VSCA 293, [43]).
28. As stated in CPA 2009 s 389I(2):
- An intermediary is an officer of the court and has a duty to act impartially when assisting communication with the witness (CPA 2009 s 389I).
29. A court may appoint an intermediary for a witness if:
- At the time when the proceeding commences, the witness is under the age of 18 or has a cognitive impairment; and
 - The proceeding is held at a participating venue of a court (CPA 2009 s 389F).
30. Appointment of an intermediary is a discretionary decision. A court is not required to appoint an intermediary whenever a witness meets the qualifying conditions. Instead, the court should decide whether to appoint an intermediary having regard to the purposes of the legislative scheme, the functions of an intermediary and the communication needs and capacity of the witness (*DPP v Jacobs* [2023] VSC 610, [69]–[73]).
31. Unlike the provisions for ground rules hearing, intermediaries are available in any kind of hearing and are not limited to proceedings for certain kinds of offences (compare CPA 2009 s 389A).
32. Currently, the intermediary program operates more narrowly than as set out in the Act. It is only available to Courts in the Melbourne legal precinct and in Bendigo, Geelong and Warrnambool (*Magistrates’ Court of Victoria Practice Direction 5 of 2023*, 2; *Multi-jurisdictional court guide for the Intermediary Pilot Program*, [3.3]).
33. Summary sexual offence matters at suburban courts which do not resolve to a plea of guilty may be transferred to Melbourne if the charges involve a child or cognitively impaired complainant (*Magistrates’ Court of Victoria Practice Direction 5 of 2023*, 4–5).
34. In the Magistrates’ Court, applications to appoint an intermediary are listed at the contest mention or committal mention (*Magistrates’ Court of Victoria Practice Direction 5 of 2023*, 3).
35. A court must not appoint an intermediary if satisfied that:
- The witness is aware of the right to apply for an intermediary; and

- The witness is able and wishes to give evidence without the assistance of an intermediary (CPA 2009 s 389J(3)).

36. A court must not appoint the following people as an intermediary:
 - (a) A relative, friend or acquaintance of the witness or the accused;
 - (b) A person who has assisted the witness (other than as an intermediary) or the accused in a professional capacity;
 - (c) A person who is a party or potential witness (other than due to the person's role as an intermediary) in the relevant proceeding (CPA 2009 s 389J(4)).
37. These disqualifying criteria are only assessed at the time of appointment. Where an intermediary later becomes a person who meets any of the criteria in s 389J(4) after appointment, the court has a discretion to remove that person's appointment as an intermediary (*SC v The Queen* [2020] NSWCCA 314, [31]–[34]).
38. Section 389(4)(b) is designed to exclude any person who has a previous professional association with the witness. The section operates on its terms, and is not subject to an exception that a previous professional association is permitted if it does not detract from the intermediary's impartiality (*SC v The Queen* [2020] NSWCCA 314, [35], [65]).
39. Exclusion on the basis of previous assistance in a professional capacity is not limited to therapeutic assistance or direct assistance in a clinical setting. While the scope of the term professional capacity is not defined, it must be assessed as an ordinary word, to be applied on a case by case basis. Professional assistance may also exist where the proposed intermediary has supervised students who provided clinical assistance to the relevant witness, if the proposed intermediary provides feedback to those students and assistance in the student's work with clients (*SC v The Queen* [2020] NSWCCA 314, [36], [66]–[67]).
40. Section 389J(4)(c) excludes a person from appointment as an intermediary where that person is a potential witness in the proceedings, other than due to the person's role as an intermediary. The equivalent legislation in New South Wales does not include the clause allowing the person to be a potential witness due to their role as an intermediary. In *SC v The Queen*, the New South Wales Court of Criminal Appeal considered the situation where the defence argued that the intermediary may be called to give evidence about a witness' language skills, where those skills were relevant to assessing the credibility or reliability of other evidence. The Court held that, in those circumstances, the trial judge has a discretion whether to revoke the person's appointment. Whether revocation is necessary depends on degree of probability of the person becoming a witness, the availability of other professionals to give that same evidence and whether the appointment as an intermediary should be revoked even if the person does need to give evidence as a witness (*SC v The Queen* [2020] NSWCCA 314, [46]–[53]).
41. A court may only appoint a person as an intermediary if the person is on the panel of intermediaries established by the Secretary to the Department of Justice and Regulation (CPA 2009 s 389H).
42. A witness must give evidence in the presence of his or her intermediary, in circumstances where:
 - (a) The court and any legal practitioner appearing in the proceeding are able to see and hear the witness giving evidence and to communicate with the intermediary; and
 - (b) The jury (if any) is able to see and hear the witness giving evidence (including any assistance given by the intermediary), other than evidence given in accordance with an arrangement made under section 360(a) as directed by the court (CPA 2009 s 389K(2)).
43. An intermediary must take an oath or affirmation in prescribed form, and the provisions in Division 2 of Part 2.1 of the *Evidence Act 2008* that apply to interpreters (other than section 22(2), which prescribes the form of interpreters oath) also apply to intermediaries (CPA 2009 s 389K(3), (4)).

44. However, the failure of an intermediary to take the relevant oath or affirmation is not a fundamental defect which automatically results in a miscarriage of justice. Instead, the consequences of any failure by an intermediary to take an oath or affirmation depends on extent of the intermediary's interventions. A substantial miscarriage of justice is more likely to arise where the intermediary who has not been sworn or affirmed makes interventions which materially affect the witness' evidence, or materially constrain the examination of the witness (*James v The King* [2023] VSCA 34, [83]).

Last updated: 14 December 2023

13.11B Excusing witnesses from cross-examination

1. In some cases, a witness may become ill or distressed while giving evidence and is unable or unwilling to continue giving evidence. In such cases, the court has a discretion to consider whether the witness' evidence can stand.
2. This issue may be particularly significant for children giving evidence as complainants in sexual offence trials (see *Go v The State of Western Australia* [2016] WASCA 132).
3. In exercising that discretion, the judge should consider the cause of the witness' unwillingness or inability to continue giving evidence and the obligation of the judge to ensure a fair trial. The focus should be on the effect of the witness' inability or unwillingness to give evidence, rather than on whether a particular party is at fault for how they questioned the witness. The judge must also take into account standards that are age appropriate and take into account the sophistication of the witness (*R v Hart* (1999) 135 CCC (3d) 377, cited with approval in *Go v The State of Western Australia* [2016] WASCA 132 at [71]–[72]).
4. This assessment will likely involve considering what evidence has already been obtained from the witness and what sort of evidence may have been lost by the witness' inability or unwillingness to continue giving evidence (see *Go v The State of Western Australia* [2016] WASCA 132 at [75]–[78]).

Last updated: 21 October 2016

13.12 Indemnified witnesses

1. The functions of the Victorian Director of Public Prosecutions include:
 - (ca) to grant indemnity from prosecution for any summary or indictable offence to a person on account of an undertaking given by that person to give evidence, or an understanding or expectation that that person will give evidence, in a specified proceeding;
 - (cb) to give an undertaking to a person that an answer given, or statement or disclosure made, by that person in a specified proceeding will not be used in evidence against that person in any criminal proceeding, other than a proceeding in respect of the falsity of evidence given by that person (*Public Prosecutions Act 1994* s 22(1)).
2. In contrast, the Commonwealth Director of Public Prosecutions may give an undertaking that:

(a) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in specified proceedings;

(b) the fact that the person discloses or produces a document or other thing in specified proceedings; or

(ba) any information, document or other thing that is obtained as a direct or indirect consequence of an answer that is given, a statement or disclosure that is made, or a document or other thing that is disclosed or produced, in specified proceedings;

will not be used in evidence against the person... (*Director of Public Prosecutions Act 1983* (Cth) s 9(6)).⁶⁷⁶

3. When the Commonwealth DPP gives this undertaking, the evidence of the indemnified person is not admissible against that person in any criminal or civil proceeding in any court, other than in proceedings concerning the falsity of the evidence (*Director of Public Prosecutions Act 1983* (Cth) s 9(6)).⁶⁷⁷
4. Immunities may be grouped into three categories:
 - *Use immunity* prevents the prosecution from using the witness' evidence against the witness in later proceedings;
 - *Derivative use immunity* prevents the prosecution from using any evidence gathered as a direct or indirect consequence of the witness' evidence against the witness in later proceedings; and
 - *Transactional immunity* prevents the prosecution from bringing proceedings against the person for any transactions dealt with in the witness' evidence (see *Ganin v NSW Crime Commission* (1993) 33 NSWLR 423; (1994) 10 NSWCCR 200; *Rogan v Hyde* (1995) 84 A Crim R 519).
5. In many cases, the prosecution will provide "use derivative use" immunity, which combines the first two categories above. This ensures that the prosecution has the benefit of the evidence and protects the witness from the risk of self-incrimination, without exculpating the witness for his or her criminal conduct (*Ganin v NSW Crime Commission* (1993) 33 NSWLR 423; (1994) 10 NSWCCR 200; *Rogan v Hyde* (1995) 84 A Crim R 519; *Registrar v Craven* (1994) 126 ALR 668).
6. The decision by the DPP to give an undertaking or indemnity is a unilateral act. It is not a contract and the witness does not need to accept the offer to perfect the undertaking (*Registrar v Craven* (1994) 126 ALR 668).
7. Indemnities usually specify that the witness must give truthful evidence and may be prosecuted for perjury if he or she gives false evidence (see *R v Brown* (1983) 21 NTR 6).
8. The prosecution should clearly communicate the terms of an indemnity to a witness before he or she gives evidence in the proceeding and obtain the witness' written acknowledgment of those terms (*R v Georgiadis* [1984] VR 1030; *R v McDonald* [1983] NZLR 252).
9. Despite some academic criticism, Australian courts do not consider the use of indemnities unethical or undesirable (*Rozenes v Beljajev* [1995] 1 VR 533; *R v Georgiadis* [1984] VR 1030; c.f. *R v Turner* (1975) 61 Cr App R 67).

⁶⁷⁶ See also *Director of Public Prosecutions Act 1983* (Cth) s 9(6B) concerning undertakings concerning evidence in State or Territory proceedings.

⁶⁷⁷ The constitutional validity of this provision, which limits the admissibility of evidence in State criminal proceedings, is uncertain (see *Court of Appeal Registrar v Craven* (No 2) (1995) 120 FLR 464).

Limits on Indemnities

10. An indemnity or undertaking is not a pardon and so the accused cannot plead the indemnity as a plea in bar (*R v Georgiadis* [1984] VR 1030).
11. Indemnities and undertakings can only relate to past offences. In the absence of relevant legislation, the State has no power to pre-emptively pardon an offence and an attempt to do so is invalid. Evidence that a witness gathers while relying on a purported indemnity may be excluded on a discretionary basis (*R v D'Arrigo* [1994] 1 Qd R 603; *R v Stead* [1994] 1 Qd R 665. See also *Evidence Act 2008* s 138).⁶⁷⁸
12. While an indemnity may not be strictly binding on the Crown, it is considered "unthinkable" that the Crown would not honour an indemnity. Indemnities serve the public interest by providing assurances to witness who would otherwise be unwilling to give evidence. If the Crown regularly resiled from indemnities or undertakings, witnesses would become unwilling to rely on the indemnity when giving evidence (*R v Georgiadis* [1984] VR 1030; *R v Milnes & Green* (1983) 33 SASR 211; *R v McDonald* [1980] 2 NZLR 102).
13. Indemnities should be interpreted in favour of the witness (*R v Georgiadis* [1984] VR 1030).

Evidence of Indemnified Witnesses

14. While the judge may exclude any evidence on the basis that it would lead to an unfair trial, there is no special rule of exclusion of indemnified witnesses. Evidence from indemnified witnesses is not inherently worthless and does not invariably lead to an unfair trial. The court will receive evidence of the details of the indemnity and the jury are usually able to assess whether the witness' evidence is credible and reliable (*Rozenes v Beljajev* [1995] 1 VR 533; *R v Peirce* [1992] 1 VR 273; *R v Brown* (1983) 21 NTR 6; *R v Turner* (1975) 61 Cr App R 67; *R v Chai* (1992) 27 NSWLR 153; *R v Booth* [1982] 2 NSWLR 857).
15. In some cases, the court will exclude evidence of an indemnified witness on public policy grounds. For example, courts may discourage ill-treatment of a witness before he or she agrees to give evidence by the discretionary rejection of such unreliable evidence. In other cases, the general discretions to reject unfairly prejudicial or illegally or improperly obtained evidence may apply (*R v Falzon* [1990] 2 Qd R 436. See also *Evidence Act 2008* ss 135, 137, 138).
16. The fact that a witness has a powerful motive to ingratiate him or herself with the prosecution, or to give evidence in accordance with his or her statement regardless of its truth, is not an adequate basis for rejecting the evidence of an indemnified witness. There must be some other feature of a case that overrides the public interest in allowing competent witnesses to give relevant and probative evidence (*R v McLean & Funk; ex parte Attorney-General* [1991] 1 Qd R 231).
17. The prosecution should hand the witness a copy of the undertaking or indemnity at the start of his or her evidence (*R v Georgiadis* [1984] VR 1030).
18. In appropriate cases, the judge should explain the significance of the indemnity and the effect it may have on the jury's evaluation of the witness' evidence. In addition, the judge may need to give an accomplice warning (*R v Chai* (1992) 27 NSWLR 153). See 4.22 Criminally Concerned Witnesses in the Victorian Criminal Charge Book.
19. The fact that a witness has received an indemnity from prosecution will not affect the credibility or reliability of his or her evidence in all cases. The jury should examine whether the witness may have a motive to ingratiate him or herself with the police, the prosecution or the courts, or may have a motive to shift blame to another (*R v Clark* [2001] NSWCCA 494).

⁶⁷⁸ Compare statutory indemnities in respect of controlled operations under Part IAB of the *Crimes Act 1914* (Cth) and s 28 of the *Crimes (Controlled Operations) Act 2004*.

13.13 Accomplices

1. An accomplice is a person who:
 - is a criminal participant in the offence alleged against the accused;
 - is a participant in an uncharged offence that has been led in evidence; or
 - a receiver of stolen goods who gives evidence that the accused stole those goods (*Davies v DPP* [1954] AC 378).
2. Accomplices are competent witnesses and there is no special exclusionary rule concerning the evidence of accomplices (*Rozenes v Beljajev* [1995] 1 VR 533).
3. Accomplices may, however, be unreliable witnesses and the judge may need to warn the jury about the dangers of relying on the evidence of an accomplice (*Jenkins v R* [2004] HCA 57).

13.14 Reviving Memory

1. Sections 32–35 of the *Evidence Act 2008* specify when and how a witness may revive or refresh his or her memory in court or out of court. This Act changed a number of common law rules and so pre-2010 Victorian cases must be read with care.
2. While the *Evidence Act 2008* refers to a process of *reviving* memory from a document, this was not intended to change the common law test on when a document can be used to *refresh* memory. The change of language was intended only to accurately describe the effect of a document on a witness' memory (*MGICA v Kenny & Good* (1996) 61 FCR 236; *Spalding v Radio Canberra* (2009) 166 ACTR 14; [2009] ACTSC 26).
3. One of the factors a court must consider when determining whether to allow a witness to revive his or her memory by reading a document is whether the witness wrote or adopted the document at a time when the facts were fresh in his or her memory. The court must determine this as a question of fact and while the length of time between the events in question and making the document is relevant, it is not determinative (*Evidence Act 2008* s 32; *R v Van Beelen* (1972) 6 SASR 534).
4. If a witness is blind or illiterate, special procedures may be necessary when attempting to revive the witness' memory in court. This may include reading a document to the witness (*Rose v R* (1993) 69 A Crim R 1).
5. If necessary, the court may provide copies of a witness' memory-reviving document to the jury to assist it to follow the witness' evidence. The document will not necessarily be admitted as an exhibit. In appropriate cases, the judge should instruct the jurors that the document is only an aide to assist them to follow the witness' evidence, but it is not evidence in the proceeding. The document should be retrieved from the jury at the end of cross-examination (*R v Sekhon* (1986) 85 Cr App R 19).
6. A witness is entitled to use any available means to help refresh or revive his or her memory prior to giving evidence in court. This includes reading over a proof of evidence prepared by counsel for a party (*Mather v Morgan* [1971] Tas SR 192; *O'Sullivan v Waterman* [1965] SASR 150; *Mancorp v Baulderstone* (1991) 57 SASR 87). However, it is not appropriate to allow a witness to read or hear another witness' proof of evidence (*R v Skinner* (1993) 99 Cr App R 212; *Ex parte Kear*; *Re Consolidated Press* (1954) 54 SR (NSW) 95; *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540).

Last updated: 19 November 2009

13.15 Unfavourable Witnesses

1. Section 38 of the *Evidence Act 2008* allows a party to cross-examine a witness it called if the court grants leave. This process replaces the common law process for declaring a witness hostile or adverse (*R v Lozano*, Unreported, NSW CCA, 10 June 1997).

Last updated: 19 November 2009

13.16 Use of Prior Statements

1. Part 3.2 of the *Evidence Act 2008* contains the prohibition on hearsay evidence and the various exceptions to that rule. In some circumstances, a court may allow a party to lead evidence of a person's previous statements as evidence in the proceeding, whether or not that person is available to give evidence (see, especially, ss 60, 65, 66).
2. For the purpose of the *Evidence Act 2008*, a person is unavailable to give evidence if:
 - (a) the person is dead; or
 - (b) the person is, for any reason other than the application of section 16 (Competence and compellability—judges and jurors), not competent to give the evidence about the fact; or
 - (c) it would be unlawful for the person to give evidence about the fact; or
 - (d) a provision of this Act prohibits the evidence being given; or
 - (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
 - (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success; or
 - (g) the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability (*Evidence Act 2008*, Dictionary, s 4).
3. Even if a person's prior statement is admissible, the court retains a discretion to exclude the evidence as irrelevant or prejudicial (*Evidence Act 2008* ss 56, 137; *Puchalski v R* [2007] NSWCCA 220; *R v Radford* (1993) 66 A Crim R 210).

Related resources: 4.14 Previous representations (Hearsay, recent complaint and prior statements) in the Victorian Criminal Charge Book

Last updated: 19 July 2010

13.17 Counsel for a witness

1. A trial judge may allow counsel to appear for a witness when the witness requires particular protection or wishes to rely on a privilege or immunity. The witness must personally assert the privilege or immunity and the judge may then allow counsel to appear for that witness (*R v Mooseek* (1991) 56 A Crim R 36; *Hunt v De Pinto* (1995) 63 SASR 402).

Last updated: 19 November 2009

13.18 Interpreters

1. The principles applicable to interpreters are considered in 9.5 Right to an Interpreter. These principles will often apply to interpreters for witnesses. See also *Evidence Act 2008* s 30.

13.19 Anonymous Witnesses

1. The relevant principles for anonymous witnesses are considered in the Open Courts Bench Book.

Last updated: 19 November 2009

13.20 Subpoenas and Witness Summons

1. A party to a criminal proceeding may apply to the Supreme Court or the Country Court for a subpoena in accordance with the rules of court, or the Magistrates' Court or a registrar for a witness summons in accordance with the *Magistrates' Court Act 1989* (CPA 2009 s 336).
2. For convenience, the following sections will refer only to "subpoenas", though the same principles apply with necessary modifications to witness summons under ss 43 and 44 of the *Magistrates' Court Act 1989*. In addition, this Manual refers to the party that applies for the subpoena as the "issuing party" and the recipient of the subpoena as the "respondent".

Last updated: 15 December 2021

13.20.1 General Principles of Subpoenas

1. A subpoena is an order of the court commanding a person to attend court to give evidence or to produce documents or other things in his or her possession to the court. Courts recognise that such orders can be burdensome and oppressive, but also that the orders can be necessary to ensure the administration of justice.
2. To balance competing public interests, courts have ruled that subpoenas must not be oppressive and must not be tantamount to ordering discovery against a person (*Clarkson v DPP* [1990] VR 745; *Sobh v Police Force of Victoria* [1994] 1 VR 41; *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *R v Robertson* (1983) 21 NTR 11).
3. The principles relating to a challenge to a subpoena have been summarised as follows:
 - (a) It is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought.
 - (b) The identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced.
 - (c) The applicant for the witness summons must also satisfy the court that it is 'on the cards', or that there is a 'reasonable possibility', that the documents sought under the subpoena 'will materially assist the defence'.
 - (d) A 'fishing expedition' is not a legitimate forensic purpose and will not be permitted.
 - (e) The relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.
 - (f) A mere assertion of bad faith by an application or that something might be found demonstrating bad faith is not enough - the criteria set out in (c) above must be satisfied.
 - (g) In criminal proceedings a 'more liberal' approach is taken by a court in respect of the application of the test. Special weight is to be given to the fact that the documents may assist the defence of an accused.
 - (h) Where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons (*Commissioner of the Australian Federal Police v Magistrates' Court of Victoria* [2011] VSC 3, [28]).

4. A subpoena to produce must be reasonably precise. The respondent should be able to easily locate the documents sought and should not need to evaluate the possible relevance of particular documents. To determine the degree of precision necessary, the court will consider the issues in the proceeding, the relevance of the documents sought and the difficulty of complying with the subpoena or forming an opinion on which documents the respondent must produce. The court will also take into account the respondent's knowledge of the relevant facts and circumstances and will assume that he or she will interpret a subpoena reasonably (*McColl v Lehmann* [1987] VR 503; *Lucas Industries v Hewitt* (1978) 18 ALR 555; *R v Robertson* (1983) 21 NTR 11).
5. Generally, a subpoena should specify particular documents or a class of documents, rather than all documents that relate to a particular subject. However, in some cases a party may subpoena documents on a subject, where that subject is clearly relevant to the proceeding (*Banks v Reading*, Unreported, VSC, 23 March 1995; *Lucas Industries v Hewitt* (1978) 18 ALR 555; *National Employers' Mutual General Association v Waind* [1978] 1 NSWLR 372).
6. Finally, while the prosecution must comply with its disclosure obligations, there is no obligation on third parties to provide relevant material to the prosecution or the accused. A subpoena is therefore the only way an accused may compulsorily gather relevant information from third parties (*R v Mokbel (Ruling No 1)* [2005] VSC 410).

Last updated: 30 August 2021

13.20.2 Issue of Subpoena

1. A court may issue a subpoena requiring a person to:
 - attend to give evidence;⁶⁷⁹
 - produce the subpoena (or a copy of it) and any document or thing as directed by the subpoena;⁶⁸⁰ or
 - do both of the above (*Supreme Court (Criminal Procedure) Rules 2017* r1.12; *Supreme Court (General Civil Procedure) Rules 2015* r42.02; *County Court Criminal Procedure Rules 2019* r1.09; *County Court Civil Procedure Rules 2018* r42.02. See also *Magistrates' Court Act 1989* s 43).⁶⁸¹
2. The form of a subpoena is:
 - in the Supreme Court:
 - for a subpoena to attend to give evidence, Form 6-1A of the *Supreme Court (Criminal Procedure) Rules 2017*;
 - for a subpoena to produce, Form 6-1B of the *Supreme Court (Criminal Procedure) Rules 2017*;
 - for a subpoena to both attend to give evidence and produce, Form 6-1C of the *Supreme Court (Criminal Procedure) Rules 2017*;
 - in the County Court:

⁶⁷⁹ Courts and textbook writers sometimes refer to this as a "subpoena ad testificandum".

⁶⁸⁰ Courts and textbook writers sometimes refer to this as a "subpoena duces tecum".

⁶⁸¹ While the rules relating to summons in the Supreme Court exist in the general civil procedure rules, those rules apply equally to criminal proceedings, except for appeals and applications for leave to appeal (*Supreme Court (Criminal Procedure) Rules 2017* r1.12(1)).

- for a subpoena to attend to give evidence, Form 1D of the *County Court Criminal Procedure Rules 2019*;
 - for a subpoena to produce, Form 1E of the *County Court Criminal Procedure Rules 2019*;
 - for a subpoena to both attend to give evidence and produce, Form 1EA of the *County Court Criminal Procedure Rules 2019*;
 - in the Magistrates' Court, Form 13 of the *Magistrates' Court Criminal Procedure Rules 2019*.
3. A subpoena can only be used for these purposes and cannot be used for an improper purpose, such as to compel a person to attend court to allow another witness to identify him or her (*Farulli v Farulli* [1917] P 28).
 4. In the Magistrates' Court, all witness summons for the production of documents or things must be made returnable:
 - (a) Where the case is listed for a Contest Mention or Committal Mention, on a date no later than the date of the Contest Mention or Committal Mention;
 - (b) Where the case is listed for Summary Hearing or Committal, on a Mention or Special Mention date prior to the hearing or committal, and wherever practicable, before the Magistrate assigned to hear the proceeding.
 - (c) If the matter is listed in a specialised list, where practicable, the witness summons should be made returnable in that list (*Magistrates' Court Practice Direction No 7 of 2014*).
 5. For more information on the process of issuing witness summons for documents which may contain confidential communications, see 13.20.4 Confidential Communications.
 6. If an inferior court or tribunal does not have jurisdiction to issue a subpoena, the issuing party may call on a superior court to issue a subpoena for the attendance of a witness in the inferior court (see *Re House* [1915] VLR 178; *Attorney-General for New South Wales v Hayden* (1994) 34 NSWLR 638 per McHugh JA at 655–656).
 7. Order 42 and 42A of the *Supreme Court (General Civil Procedure) Rules 2008* and the *County Court Civil Procedure Rules 2008* regulate the process for issuing subpoenas and the return of subpoenas, including:
 - form of subpoenas – r 42.03
 - alteration to the date in a subpoena – r 42.03.1
 - the power of a court to set aside a subpoena – r 42.04
 - service of subpoenas – r 42.05
 - compliance and failure to comply – rr 42.06–42.09, 42.12
 - custody of documents – rr 42.10, 42.13
 - costs of compliance – r 42.06, 42.11
 - subpoena for production to the Prothonotary or Registrar – Order 42A

Last updated: 17 March 2023

13.20.3 Who May Be Subpoenaed?

1. The issuing party may address a subpoena to any person who is amenable to the jurisdiction of the court.
2. However, a member of a House of Parliament is not compellable to give evidence if giving evidence would prevent him or her from attending a sitting of that House, a joint sitting of both Houses or a sitting of a relevant Parliamentary committee (*Evidence Act 2008* s 15). Similarly, a person with diplomatic immunity cannot be compelled to give evidence (*Diplomatic Privileges and Immunities Act 1967* (Cth) s 7).

3. In the Supreme Court and County Court, a subpoena must not be addressed to more than one person. In the Magistrates' Court, this restriction does not apply to a summons to produce documents or things only (*Supreme Court (General Civil Procedure) Rules 2015* r 42.03; *County Court Civil Procedure Rules 2018* r 42.03; *Magistrates' Court Criminal Procedure Rules 2019* r 26).
4. The issuing party must ensure that the subpoena is directed to the correct person. A person can only comply with a subpoena to produce documents if he or she has physical custody, possession or control of the relevant documents. The subpoena does not compel the respondent to give discovery, acquire the material from another or indicate the current owner of the documents (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *Amey v Long* (1808) 103 ER 653).
5. Difficulties can arise when a subpoena is directed to a person who holds documents on behalf of another. A subpoena does not compel a person who holds documents as a servant to produce them in breach of a duty owed to his or her master. Instead, the master is the proper subject of the subpoena (see *Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *Penn-Texas Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647).
6. A party that wishes to subpoena documents from an incorporated body should direct the subpoena to the body itself and not the "proper officer". A corporation is a separate legal person and while the proper officer must give effect to the subpoena, he or she acts on behalf of the corporation (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *Penn-Texas Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647; *R v Ronen* (2004) 63 NSWLR 707; [2004] NSWCCA 67).
7. Directing a subpoena to produce to a particular employee of a business is fraught with danger. That employee may not have custody of the documents or may not have authority to release the documents (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *R v Ronen* (2004) 63 NSWLR 707; [2004] NSWCCA 67).⁶⁸²
8. A party may serve a subpoena to produce on a company even if the accused is an officer of the company. The privilege against self-incrimination belongs to the accused personally and does not extend to the company. Generally, a company can comply with a subpoena through another officer or through an employee and the accused will not need to incriminate him or herself. Furthermore, it may not be oppressive to require an accused to step aside from management of a company or to appoint another person who can comply with the subpoena (compare *R v Ronen* (2004) 63 NSWLR 707; [2004] NSWCCA 67 per Spigelman CJ and Mason P).⁶⁸³
9. The principles discussed above regarding addressing subpoenas to incorporated bodies do not apply to unincorporated associations. The executive officer of an unincorporated association is the proper subject of a subpoena to produce and he or she must produce documents concerning the association (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66).
10. While it is unclear, a subpoena to produce directed to only one partner of a partnership may not compel the respondent to produce documents in the joint possession of all partners. Such a subpoena will only compel the respondent to produce documents in his or her possession (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *Attorney-General v Wilson* (1839) 59 ER 461; *Lee v Agnas* (1866) LR 2 Eq 59; *Forbes v Samuel* [1913] 3 KB 706).
11. A party should contact a witness before seeking a subpoena to attend to give evidence to ensure that the witness is available on the proposed hearing dates. A party that accepts a fixed hearing date without confirming that his or her witnesses will be available may be subject to an adverse costs order when he or she seeks an adjournment (*Castrucci v ACT Electricity Authority* (1990) 94 ACTR 1).

⁶⁸² The company must nominate the correct person if the issuing party directs the subpoena to a named employee who is no longer with the company (*Old Welshman's Reef Gold Mining v Welshman's Gold Mining* (1888) 14 VLR 253).

⁶⁸³ This approach may not apply to "one-person" companies (see *R v Ronen* (2004) 63 NSWLR 707; [2004] NSWCCA 67).

12. If the witness is not available at the time of the hearing, the party may need to provide an undertaking to meet the costs the witness incurs in becoming available (*Castrucci v ACT Electricity Authority* (1990) 94 ACTR 1).

Last updated: 31 August 2020

13.20.4 Confidential Communications and Protected Health Information

1. Under Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958*, the court must grant leave before:
 - a party may issue a subpoena to compel production of a confidential communication or protected health information;
 - a person may produce a document on the return of a subpoena that would disclose a confidential communication or protected health information; or
 - a party may adduce evidence in a proceeding that discloses a confidential communication or protected health information or disclose the contents of a document recording a confidential communication or protected health information (*Evidence (Miscellaneous Provisions) Act 1958* s 32C(1)).
2. The confidential communication and protected health information provisions in the were introduced to reduce the risk of sexual assault victims being deterred from reporting or fully disclosing information to doctors or counsellors because of uncertainty and fear about courts giving unwarranted access to those records (*KR v Shiva School Inc* [2018] VSCA 159, [32]; *Bowers v The Queen* [2020] VSCA 246, [9]).
3. On 30 July 2023, the provisions were expanded from their previous focus on confidential communications alone, to also cover protected health information. For the purpose of this chapter, confidential communications and protected health information will be referred to as 'protected information', and the individual terms will only be used when the Act or caselaw draws a distinction between the two classes of information.
4. A "confidential communication" is defined as:

a communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred (*Evidence (Miscellaneous Provisions) Act 1958* s 32B).
5. A literal interpretation of this definition would apply the confidential communication provisions to all communications in the context of a medical or counselling relationship provided the relevant person who has been, or is alleged to have been, the victim of a sexual offence. That interpretation poses practical difficulties as the party seeking production of the material may not know whether the other person has been the alleged victim of a sexual offence, or whether the communication relates to treatment for that alleged offence (*Staker v Kemp* [2018] VSC 367, [24]–[26]).
6. Due to the practical consequences, courts have rejected this literal interpretation. Instead, the confidential communication provisions will only apply where the confidential communication relates to the subject matter of the alleged sexual offence and there is a relationship between the relevant litigation and the alleged sexual offence (*Staker v Kemp* [2018] VSC 367, [30]. See also *R v Lyons* [2018] VSC 256, [42]).
7. The process of counselling involves treating emotional or psychological conditions by examination, diagnosis and application of care, remedies and other steps to relieve or cure the condition. It also includes any step along that process so that an initial examination may, in suitable circumstances, constitute counselling (See *R v Lee* (2000) 50 NSWLR 289; [2000] NSWCCA 444; *R v Joyce* [2002] NTSC 70).

8. However, notes which only record a psychologist's type of therapy, or diagnoses of the complainant, may not be a 'confidential communication' (*Bowers v The Queen* [2020] VSCA 246, [73], [90]).
9. Protected health information is defined in *Evidence (Miscellaneous Provisions) Act 1958* s 32BA. The definition applies where:
 - The material is health information within the meaning of the *Health Records Act 2001*;
 - The proceeding is a criminal proceeding that relates wholly or partly to a charge for a sexual offence;
 - The health information is about a person against whom that sexual offence is alleged to have been committed, or any other sexual offence has been committed or is alleged to have been committed;
 - The person who recorded or collected the information, or formed the opinion in the material, did so in a professional capacity.
10. Section 32E provides that the Division does not prevent the production or adducing of evidence in the following circumstances:
 - (a) with the consent of the protected person or, if he or she is under 14 years of age, with the consent of any person whom the court regards as being an appropriate person to give that consent; or
 - (b) of information acquired by a registered medical practitioner by physical examination (including communications made during the examination) of the protected person in relation to the commission or alleged commission of an offence against the protected person; or
 - (c) of a communication made, or the contents of a document prepared, for the purpose of a legal proceeding arising from the commission or alleged commission of the sexual offence; or
 - (d) of a communication made, or the contents of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
 - (e) of a communication made if it is evidence of the commission of an offence of wilful and corrupt perjury.
11. The Act draws a distinction between civil and criminal proceedings. Given the focus of this Bench Book, the following material will only consider the application of the protected information provisions in criminal proceedings.
12. Each application for leave must be made with at least 14 days notice to the other parties to the proceeding, the informant and the responsible person based on whether the material is a confidential communication or protected health information. The court may fix a shorter notice period or may dispense with the requirement of notice (*Evidence (Miscellaneous Provisions) Act 1958* s 32CC)
13. In the case of confidential communications, the responsible person is the medical practitioner or counsellor to whom the communication was made. For protected health information, it is either the person who recorded or collected the information or the organisation which holds the information, whichever the applicant considers appropriate (*Evidence (Miscellaneous Provisions) Act 1958* s 32CC(1)).

14. The prosecution is responsible for giving written notice of the application to the protected person within a reasonable time. The matters the prosecution must provide in their notice to the protected person are specified in s 32CD(4) and must be in the form prescribed by the rules of court. These matters include notifying the protected person of their right to appear, make submissions and give a confidential statement, the provisions regarding confidential statements, the option of seeking legal advice and information about the availability of legal advice (*Evidence (Miscellaneous Provisions) Act 1958 s 32CD*).
15. A court may waive the requirement to give notice if satisfied that:
 - (a) the prosecuting party has ensured that all reasonable steps to locate the protected person were taken, but the protected person has not been located; or
 - (b) the protected person has consented in writing to not being notified about an application for leave under section 32C(1); or
 - (c) the protected person has already been given notice under subsection (1)—
 - (i) in respect of the same confidential communication or protected health information as that to which the application relates; and
 - (ii) in the same proceeding as that in which the application is made (*Evidence (Miscellaneous Provisions) Act 1958 s 32CD(5)*).
16. In the County Court, the application to waive the notice requirements must be filed at least 2 days before the relevant hearing. The application must be accompanied by an affidavit stating the ground in s 32CD(5) which the prosecution relies upon (*County Court Criminal Division Practice Note PNCR 2-2022*, [12.34], [13.5]).
17. The protected person has a right to appear, make submissions and give a confidential statement to the court in response to an application for leave. The responsible person who receives the notice may seek leave to appear and make submissions (*Evidence (Miscellaneous Provisions) Act 1958 s 32CE(1), (5), (6)*).
18. A confidential statement from a protected person is an affidavit that describes the harm likely to be caused if the application is granted. The court must not disclose the contents of the confidential statement to anyone other than the protected person or their legal representatives unless it considers it is in the interests of justice to do so (*Evidence (Miscellaneous Provisions) Act 1958 s 32CE(2)–(4)*).
19. For the purpose of deciding whether to grant leave in relation to the protected information, or in relation to an application by the responsible person to make submissions, the court may order the document be produced to the court and the court may inspect it (*Evidence (Miscellaneous Provisions) Act 1958 s 32CF*).
20. Before the court may grant leave to issue a subpoena, produce a document or adduce evidence that would disclose a protected information, the court must be satisfied on the balance of probabilities that:
 - the evidence will, either by itself or with other evidence to be produced or adduced by the applicant, have substantial probative value to a fact in issue;
 - other evidence of similar or greater probative value concerning the matters disclosed in the protected evidence is not available; and
 - the public interest in preserving the confidentiality of confidential communications and protecting a protected person is substantially outweighed by the public interest in admitting evidence of substantial probative value (*Evidence (Miscellaneous Provisions) Act 1958 s 32D*. See also *LAL v R* [2011] VSCA 111; *KR v Shiva School Inc* [2018] VSCA 159, [14]).
21. These three requirements have been described as ‘sequential preconditions’ (*KR v Shiva School Inc* [2018] VSCA 159, [36]–[39]; *Bowers v The Queen* [2020] VSCA 246, [14]).

22. As the Court of Appeal spelt out in *Bowers v The Queen*:

The first requirement means that the Court must be satisfied that the evidence ‘will’ — not ‘may’ — have ‘substantial’ probative value to a fact in issue. The second requirement means that the Court must be positively satisfied of a negative, namely that other evidence of similar or greater probative value is not available. The third requirement makes clear that the statute is intended not only to recognise the individual rights of parties but to protect confidentiality of the proscribed class of evidence in the public interest (*Bowers v The Queen* [2020] VSCA 246, [14]).

23. In balancing the competing public interests in the third limb of the test in s 32D(1), a court must take into account:

(a) the likelihood, and the nature or extent, of harm that would be caused to the protected confider if the protected evidence is produced or adduced;

(b) the extent to which the protected evidence is necessary to allow the accused to make a full defence;

(c) the need to encourage victims of sexual offences to seek counselling and the extent to which victims may be discouraged to do so, or the extent to which the effectiveness of counselling may be diminished, if the protected evidence were produced or adduced;

(d) whether the party seeking to compel the production of or to produce or adduce the protected evidence is doing so on the basis of a discriminatory belief or bias;

(e) whether the protected confider objects to the disclosure of the protected evidence;

(f) the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person (*Evidence (Miscellaneous Provisions) Act 1958* s 32D(2)).

24. Subsections (a), (c), (d) and (e) relate to the public interest in the confidentiality of the material, while subsections (b) and (f) relate to the public interest in a fair trial (*Bowers v The Queen* [2020] VSCA 246, [16]).

25. This balancing exercise has been described as ‘broadly analogous to that required by s 130 of the *Evidence Act 2008* in respect of documents which attract claims of public interest immunity’ (*Bowers v The Queen* [2020] VSCA 246, [16]).

26. Evidence may have substantial probative value of a fact in issue if it demonstrates that the witness may not be able to give reliable evidence or if it reveals a disposition to make false complaints of sexual abuse. However, the mere fact that the witness had been the subject of other sexual offences and made confidential statements regarding those offences does not itself reveal a disposition to make false complaints (*LAL v R* [2011] VSCA 111 See also *Re Application by Donald Francis McInnes* [2009] ACTSC 29).

27. Despite some uncertainty at common law and divergent practices in other jurisdictions, in Victoria both a witness’ reliability and credibility are capable of having “substantial probative value to a fact in issue” (*SLS v R* (2014) 42 VR 64; [2014] VSCA 31, [240]–[242]).

28. As part of the 2023 amendments, an additional precondition was added before the court may grant leave. The court must be satisfied that:

- The protected person is aware of the application and has had a reasonable opportunity to consider obtaining legal advice about the application;
- The prosecuting party ensured all reasonable steps were taken to locate the protected person, but without success;
- The protected person has consented in writing to not being notified about an application for leave;

- The protected person has already been given notice under s 32D in respect of the same protected information in the same proceeding (*Evidence (Miscellaneous Provisions) Act 1958 s 32D(1A)*).

29. Paragraphs [12.29] to [12.46] of the *County Court Criminal Division Practice Note PNCR 2-2022* outline the process in the County Court for the issue of subpoenas relating to protected information. A party seeking a subpoena which is likely to contain a protected information must apply for leave to issue the subpoena. The party must contact the Court to obtain a date for hearing the application and must file at least 14 days before the hearing date an application for leave to issue a subpoena and a brief outline of submissions in support of the application. The party must also serve at least 14 days before the hearing date a copy of the application on each party to the proceeding, the responsible person and the informant.
30. If the responsible person seeks leave to be heard, they must contact the Court to advise of that intention. If the protected person wishes to appear (personally or by legal representative), the Court must be contacted to ensure any necessary arrangements are made for the protected person's attendance. Further, if the protected person intends to make a confidential statement, the statement must be filed with the Court by emailing a copy of the statement to the chambers of the allocated judicial officer at least 2 days before the leave hearing, though a judicial officer can grant leave for a confidential statement to be filed late (*County Court Criminal Division Practice Note PNCR 2-2022*, [12.35]–[12.37], [13.6]–[13.10]).
31. If leave to issue the subpoena is granted, the party must file the subpoena along with a copy of the order granting leave. The issuing party must also contact the Court after the date of production to confirm the document has been produced before requesting a date to apply for leave to inspect it (*County Court Criminal Division Practice Note*, PNCR 2-2022, [12.41]–[12.43]). However, this process is not necessary if the Court acted under *Evidence (Miscellaneous Provisions) Act 1958 s 32CF* and ordered that the protected information be produced to the court for the purpose of deciding whether to grant leave. Instead, if the judicial officer grants leave to issue a subpoena, they may immediately hear an application for leave to inspect the document if appropriate, or set a date for the hearing of such an application (*County Court Criminal Division Practice Note PNCR 2-2022*, [12.44]–[12.45]).
32. Parties seeking to produce evidence of protected information must also obtain leave. To seek leave, a party must contact the Court to advise of their intention to seek leave. At least 14 days before the Trial date, the party must file an Application for leave to adduce a confidential communication and serve a copy of the Application on each party to the proceeding, the responsible person and the informant. The Application must include the date, time and place of the hearing, notice that the person may attend and be represented at the hearing, notice that the person may provide to the court a written outline of any objection (whether or not the person wishes to appear at the hearing) (*County Court Criminal Division Practice Note*, PNCR 2-2022, [13.1]–[13.3]).
33. *Magistrates' Court Practice Direction No 9* of 2016 outlines the procedure for subpoenas in the Magistrates' Court regarding confidential communications in criminal proceedings. The critical features of the practice direction are:
 - the application for leave must be heard in the sexual offences list unless the court orders otherwise or the proceedings are listed at a suburban Magistrates' Court other than the Melbourne Magistrates' Court;
 - if the application relates to a summary hearing, the party seeking leave to issue the subpoena must foreshadow this at the contest mention and note it on the Sex Offence List Contest Mention Information Form A. The matter shall be listed at a special mention at least 4 weeks before the contested hearing and notice served at least 14 days before the hearing date unless the Court fixes a shorter period or waives notice;
 - Notice under section 32C(2) must include a brief outline of submissions in support of the application, a draft of the proposed subpoena and must inform the protected confider, medical practitioner and counsellor that on the return date they may seek leave to appear and to make submissions to the court;

- if the court grants leave to issue the summons, then the subpoena must be made returnable at least 3 days before the date provided for production. The issuing party must attach a notice to the subpoena advising the recipient that they may attend on the return date and make submissions about the release of the documents;
 - if a general subpoena is to be issued which might produce a confidential communication, the subpoena must specify that documents containing confidential communications are excluded from the material sought under the subpoena.
34. Further, where leave is sought to produce a document likely to contain a confidential communication in respect of a summary contested hearing:
- (a) the application must be heard at least 4 weeks before the contested hearing unless the Court fixes a shorter period between the application and the contested hearing; and
 - (b) the party applying for leave must serve the application not less than 14 days before the hearing date of the application unless directed otherwise by the Court (*Magistrates' Court Criminal Procedure Rules 2019* r 27(2)).
35. If leave to issue the witness summons is granted, the witness summons is, where possible, to be made returnable before the magistrate who granted leave (*Magistrates' Court Criminal Procedure Rules 2019* r 27(3)).

Last updated: 30 July 2023

13.20.5 Compliance with a Subpoena

1. The court maintains control over the subpoena to produce at three distinct stages. The court may:
 - set aside a subpoena and excuse the respondent from complying with it;
 - refuse to allow the parties to examine the documents produced on the subpoena; and
 - control the admissibility of evidence obtained on the subpoena.

Different considerations operate at each of these stages (*National Employers' Mutual General Association v Waind* [1978] 1 NSWLR 372).
2. A party may apply to the court either before the return date or on the return date to set aside the subpoena. The party may argue that the subpoena is invalid, oppressive, vexatious, an abuse of the process of the court or should otherwise be set aside (*National Employers' Mutual General Association v Waind* [1978] 1 NSWLR 372; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577). See 12.20.6 Setting Aside a Subpoena and Objections to Production or Inspection.
3. A party is not required to volunteer additional documents that fall outside the terms of a subpoena (*Lane v Registrar of Supreme Court of New South Wales* (1981) 148 CLR 245; [1981] HCA 35).
4. If the appropriate person is served with the subpoena to produce, the respondent may not refuse to comply with the subpoena due to orders from an employer, or other superior (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *James v Cowan*; *Re Botten* (1929) 42 CLR 305).
5. On the return date, a court may ask the respondent whether he or she has brought the documents and may take an unsworn answer. Victorian practice is to ask this question while the respondent is in the body of the court. If the respondent objects to producing the documents, he or she should state his or her objection on oath or affirmation and the court must determine whether the objection is sufficient. The usual practice is that the party who objects will state his or her reasons for objecting to producing the documents on an affidavit after examining the material sought (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *Sankey v Whitlam* (1978) 142 CLR 1).

6. The court may allow the issuing party to examine the respondent to ascertain whether the respondent has complied with the subpoena. A judge usually requires more than an assertion or suspicion from the issuing party before he or she will allow the issuing party to examine the respondent. This examination must only explore the issue of compliance and must not explore extraneous matters. The witness' statements are not evidence in the proceeding and, in appropriate circumstances, the respondent may exercise the privilege against self-incrimination (*Trade Practices Commission v Arnotts* (1989) 21 FCR 306; *Lewis v Nortex* [2002] NSWSC 1064).
7. If the court upholds the validity of the subpoena, the respondent must deliver the documents to the court. The court determines whether it shall allow the parties to inspect the documents and will consider whether the documents are protected by privilege and whether they have apparent relevance to the proceeding. The court should take a wide view of whether the documents have any potential or apparent relevance, as it does not know the details of the parties' cases (*Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *National Employers' Mutual General Association v Waind* [1978] 1 NSWLR 372; *R v Barton* [1981] 2 NSWLR 414; *Commonwealth Bank of Australia v White* [1999] VSC 27).
8. Generally, only the respondent and other interested parties may raise objections to inspection. The opposing party will generally not have an interest in maintaining the confidentiality of a third party's documents.
9. In some cases, the court must consider whether to allow both parties to inspect the documents, or whether this would undermine the issuing party's intended cross-examination (*National Employers' Mutual General Association v Waind* [1978] 1 NSWLR 372).
10. It is inappropriate for the issuing party to contact the respondent and arrange to take possession of the subpoenaed documents. A subpoena is an order of the court. The respondent must produce the documents to the court and the court decides whether the parties may inspect the documents (*R v Mokbel (Ruling No 1)* [2005] VSC 410; Victorian Bar, *Professional Conduct Bulletin No 1 of 1991*).
11. In the County Court, leave of the court is required to view all documents returned on a subpoena in criminal proceedings. The issuing party must obtain a date from the Court for when the party may apply for leave to inspect the documents (*County Court Criminal Procedure Rules 2019* r1.09; *County Court Criminal Division Practice Note PNCR 2-2022* at [12.11]). This procedure does not apply where a subpoena is issued in relation to documents that may contain confidential communications in a sexual offence case. See 12.20.4 Confidential Communications.
12. The recipient of the subpoena must complete the Declaration and lodge the subpoena with the completed Declaration and the material via eCase unless objecting to the production of the material. If the recipient seeks to object to the subpoena, the person should lodge by eCase a letter outlining the objection. The person may also object to release of part of the subpoenaed material, in which case they should lodge via eCase a redacted and unredacted version of the subpoenaed material and a letter setting out the reasons for the objection (*County Court Criminal Division Practice Note, PNCR 2-2022* at [12.7]–[12.14]).
13. The court may order that parts of a document are exempt from inspection. This may be appropriate when documents contain private and irrelevant information of no forensic value (*R v Efandis (Ruling No 1)* [2008] VSC 380; *R v J (No 1)* (1994) 13 WAR 342).
14. If a witness who has been served with a summons or subpoena, along with reasonable sum of money to meet the costs of attending fails to appear in court when called, the court may:
 - issue a warrant to apprehend the witness and bring him or her to court;
 - order the witness to pay a fine of not more than 5 penalty units; or
 - take any other action against the witness that is permitted by law (*Evidence Act 2008* s 194(1)).
15. The court may also issue a warrant to apprehend a witness and bring him or her before the court if a subpoena or summons has been issued and it is proven that the witness is avoiding service or has been served but is unlikely to comply with the summons or subpoena. A person who has been arrested under such a warrant may be released on bail (*Evidence Act 2008* s 194).

16. The third step where the court controls material produced under a subpoena is when the party seeks to tender the subpoenaed material in his or her case. At this stage, the court must consider whether the material is in admissible form and is relevant to the issues in the case (*National Employers' Mutual General Association v Waind* [1978] 1 NSWLR 372).
17. Admissibility of documents is not relevant when the court is determining whether to set the subpoena aside or whether to allow a party to inspect the documents (*National Employers' Mutual General Association v Waind* [1978] 1 NSWLR 372; *Mandic v Phillis* [2005] FCA 1279).
18. The opposing party cannot compel the issuing party to tender the respondent as a witness in the proceeding for cross-examination or compel the issuing party to tender the documents produced on the subpoena. However, the opposing party may be able to call the respondent as part of its case (*Penn-Texas Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647; *Trade Practices Commission v Arnotts* (1989) 21 FCR 306).

Last updated: 17 March 2023

13.20.6 Setting Aside a Subpoena and Objections to Production or Inspection

1. The court, on its own motion, on the application of a party or on the application of any person with a sufficient interest, may set aside a subpoena in whole or in part (*Supreme Court (General Civil Procedure) Rules 2005* r 42.04; *County Court Civil Procedure Rules 2008* r 42.04).
2. A third party has standing to apply to set aside a subpoena if disclosure of the respondent's documents would interfere with his or her rights or interests (*Street v Luna Park Sydney* [2006] NSWSC 95; *Compsyd v Streamline Travel Service* (1987) 10 NSWLR 648; *Mandic v Phillis* [2005] FCA 1279).
3. A person applying for an order to set aside a subpoena must notify the issuing party and the court may order the applicant to give notice to any other party to the proceeding or any person with a sufficient interest (*Supreme Court (General Civil Procedure) Rules 2005* r 42.04; *County Court Civil Procedure Rules 2008* r 42.04).
4. Similarly, a party or a person with a sufficient interest may object to the court allowing a party to inspect the documents (*Supreme Court (General Civil Procedure) Rules 2005* r 42.09; *County Court Civil Procedure Rules 2008* r 42.09).
5. The respondent may challenge a subpoena in two ways. First, the respondent may challenge the validity of the subpoena and argue that it is oppressive, vexatious, a fishing expedition, or does not demonstrate a legitimate forensic purpose. Secondly, the respondent may object to producing material under an otherwise valid subpoena on a basis such as legal professional privilege or public interest immunity (*R v Mokbel (Ruling No 1)* [2005] VSC 410).
6. The court should generally consider objections to each class of documents identified in a subpoena separately. However, when a subpoena is drafted so broadly as to be oppressive or uncertain, the court may reject it without considering each class individually. The onus is on the party seeking production of documents to redraft the subpoena in permissible form (*Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460).

Last updated: 19 November 2009

13.20.7 Specific Bases for Challenging Subpoenas

1. The following sections discuss some of the commonly argued grounds for setting aside subpoenas and indicate when a court will accept those grounds.
2. The bases listed here are not comprehensive and much will depend on the facts of the individual case.

3. One basis of objection which is not discussed below was considered in *CD (By her Litigation Guardian) & GH (By her Litigation Guardian) v Hamence* [2017] VSC 753 which involved a claim that production of certain material would constitute an offence under the child abuse material provisions of the *Crimes Act 1958*. In that case, the plaintiffs sought to subpoena from the Chief Commissioner of Police certain material which had been taken from the defendant and which contained indecent images of the plaintiffs. The plaintiffs sought this material in the context of their civil proceedings against the defendant. Judicial Registrar Clayton held that production of the material to the Court Prothonotary would not constitute an offence and that a wide reading of the exception in *Crimes Act 1958* s 51J was appropriate so that the civil proceedings were 'connected with the administration of the criminal justice system'.

Vexatious Subpoenas

4. A subpoena may be vexatious when it does not relate to any issue in the proceeding or if the documents sought could be conveniently obtained from another source (see *Sportingbet Australia v K & S Corporation* [2004] SASC 31; *Commonwealth Bank of Australia v Sky Empire* [2009] VSC 22).
5. A court may prevent a party from issuing vexatious subpoenas by ordering that a party must seek leave to issue any further subpoenas (*Commonwealth Bank of Australia v Sky Empire* [2009] VSC 22).

Oppressive Subpoenas

6. In some cases, the volume of material sought makes compliance with the subpoena oppressive. Furthermore, a subpoena may be oppressive when it requires the respondent to extensively examine his or her documents and determine whether there is anything that is relevant (*R v Robertson* (1983) 21 NTR 11).
7. The court will consider the resources and capacity of the respondent when determining whether a subpoena is oppressive (*Lucas Industries v Hewitt* (1978) 18 ALR 555).

Fishing

8. Courts will set aside a subpoena on the basis that it is a "fishing expedition". Such a subpoena either:
 - seeks documents to discover whether a possible case exists, rather than to strengthen an existing case; or
 - seeks to discover the strength of the other party's case (see *Raggv Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1 and *Begley v Police* (1995) 66 SASR 514).
9. While courts will usually set aside summons that are "fishing", courts give the parties greater latitude in criminal proceedings than in civil proceedings because of the need to avoid a miscarriage of justice (*Alister v R* (1984) 154 CLR 404; *R v Saleam* (1989) 16 NSWLR 14; *Raggv Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1; *Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460; *R v Mokbel (Ruling No 1)* [2005] VSC 410; *NSW Crime Commission v Hawes* (1992) 74 A Crim R 199; *R v White* (1976) 13 SASR 276; *R v Robertson* (1983) 21 NTR 11).

No Legitimate Forensic Purpose

10. The court set aside a subpoena that has no legitimate forensic purpose. To determine this question, the court applies a two stage test:
 - (a) Has the applicant identified a legitimate forensic purpose for which access is sought?
 - (b) Has the applicant established that it is 'on the cards' that the documents sought will materially assist his or her case? (*Alister v R* (1984) 154 CLR 404; *R v Saleam* (1989) 16 NSWLR 14; *R v Saleam* [1999] NSWCCA 86 at [11])

11. In the first stage of the test the court may call on the issuing party to specify precisely the purpose of the subpoena. This assists the court to determine whether there is a reasonable possibility that the evidence will meet that purpose (*WA v Christie* (2005) 30 WAR 514; [2005] WASC 214; *R v Saleam* (1989) 16 NSWLR 14; *Alister v R* (1984) 154 CLR 404; *Burmah Oil Company v Bank of England* [1980] AC 1090; *Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460).
12. A subpoena has a legitimate forensic purpose if there is a reasonable possibility that the document sought will materially assist the defence (*WA v Christie* (2005) 30 WAR 514; [2005] WASC 214; *Alister v R* (1984) 154 CLR 404; *Burmah Oil Company v Bank of England* [1980] AC 1090; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1).
13. The issuing party will often be unable to conclusively establish that the documents sought will assist its case. A person will only reach that state of certainty after inspecting the documents. However, an accused would have a legitimate sense of grievance if the court denied him or her access to a document merely because he or she could not establish that it certainly would assist his or her case (*Alister v R* (1984) 154 CLR 404; *Burmah Oil Company v Bank of England* [1980] AC 1090; *Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460; *R v Benbrika* (Ruling No 3) [2007] VSC 283; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1; *Johnson v Poppeliers* (2008) 20 VR 92; [2008] VSC 461).
14. A document may materially assist the defence even if it is not admissible in the proceeding. The document may assist in cross-examination or reveal information that may be admissible if it exists in another form (*Carter v Hayes* (1994) 61 SASR 451).
15. The accused is prima facie entitled to examine any document that may provide a fruitful basis for cross-examination. Criminal courts do not draw a distinction between material relevant to a witness' credit and material relevant to the issues in the proceeding. The court must assess whether the jury could properly accept the material in question and whether the material may have an impact on the outcome of the proceedings (*Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460).
16. The court will take a wide view of whether a particular document will materially assist the accused. The defence is often better able to assess this than the judge and the judge should be careful not to close off a legitimate forensic investigation (*Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1; *Felice v County Court of Victoria* [2006] VSC 12; *ACC v Brereton* [2007] VSC 297).
17. The classic formulation of the test is whether it is 'on the cards that the documents will materially assist the defence case' (see *Alister v R* (1984) 154 CLR 404; *R v Saleam* (1989) 16 NSWLR 14; *R v Saleam* [1999] NSWCCA 86 at [11]).
18. For this purpose, 'on the cards' means 'reasonably possible', and must be applied flexibly and with common sense in a way that gives an accused in criminal proceedings a fair opportunity to test the prosecution case and take advantage of applicable defences. However, mere speculation that the documents would assist is not sufficient, as this would amount to 'fishing'. Similarly, mere relevance is not sufficient (*Victoria (Department of Justice) v Lane* [2012] VSC 328, [18]–[20], approved in *Zirilli v The Queen* [2021] VSCA 2, [95]–[97]. See also *Holloway v Victoria (Department of Justice)* [2015] VSC 526).
19. Alternative tests such as 'mere possibility' and 'probability' are not suitable, as these set the threshold too low or too high, respectively (*DPP v Selway* (2007) 16 VR 508; [2007] VSC 244; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1).
20. Where the subpoena seeks technical information to support a statutory defence and that technical information is in the exclusive possession of the Crown, courts do not require positive evidence that establishes the documents will support the defence before allowing the subpoena. Such an approach would 'eviscerate' the defence (*Victoria (Department of Justice) v Lane* [2012] VSC 328 at [21]).

21. The court may examine a document and it may draw inferences from the surrounding circumstances to determine whether the accused has a legitimate forensic interest in that document (*Alister v R* (1984) 154 CLR 404; *Burmah Oil Company v Bank of England* [1980] AC 1090; *Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460; *R v Benbrika (Ruling No 3)* [2007] VSC 283; *Johnson v Poppeliers* (2008) 20 VR 92; [2008] VSC 461). In doing this, the court should be careful to first ensure that the subpoena is not a mere "fishing" process, as inspection by the judge may "be simply to pass the fishing rod to the judge" (*Hunt v De Pinto* (1995) 63 SASR 402; *Burmah Oil Company v Bank of England* [1980] AC 1090). See Fishing above.

Client Legal Privilege

22. A respondent may resist producing materials in response to a subpoena to produce on the ground of client legal privilege (*Evidence Act 2008* ss 118, 119, 131A).
23. The respondent may raise this objection when he or she attends court in answer to the subpoena or when a party to the proceeding seeks access to the materials (*Roux v Australian Broadcasting Commission* [1992] 2 VR 577).

Public Interest Immunity

24. Section 130 of the *Evidence Act 2008* states:

- (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
- (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
- (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
- (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would –
 - (a) prejudice the security, defence or international relations of Australia; or
 - (b) damage relations between the Commonwealth and a State or between 2 or more States; or
 - (c) prejudice the prevention, investigation or prosecution of an offence; or
 - (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or
 - (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
 - (f) prejudice the proper functioning of the government of the Commonwealth or a State.
- (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters-
 - (a) the importance of the information or the document in the proceeding;
 - (b) if the proceeding is a criminal proceeding - whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;
 - (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
 - (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
 - (e) whether the substance of the information or document has already been published;
 - (f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused – whether the direction is to be made subject to the condition that the prosecution be stayed.
- (6) A reference in this section to a State includes a reference to a Territory.

25. This provision was not designed to introduce any significant changes to the common law public interest immunity (ALRC Report 26, *Evidence(Interim)*, 1985, [864]).
26. Gibbs ACJ explained the common law doctrine of public interest immunity in *Sankey v Whitlam*:
The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However, the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v Rimmer* ([1968] AC 910) at 940, as follows:
"There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."
It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v Rimmer*, at 940, "the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it". In such cases once the court has decided that "to order production of the document in evidence would put the interest of the state in jeopardy", it must decline to order production (*Sankey v Whitlam* (1978) 142 CLR 1 at 38–39. See also *Alister v R* (1984) 154 CLR 404).
27. This principle was once known as "Crown privilege", but that term was criticised as incorrect and possibly misleading. First, the "privilege" is not absolute. Instead, the court must undertake a balancing exercise to determine whether the public interest in disclosure outweighs the public interest in withholding the document. Secondly, it cannot be waived by the government of the day. The court must consider whether the immunity applies and it is not necessary for the Crown to assert its right (see *Sankey v Whitlam* (1978) 142 CLR 1; *Rogers v Home Secretary* [1973] AC 388).
28. The court will often need to examine the documents in order to undertake the necessary balancing exercise. In this process, the court must attach special weight to the fact that an accused person in a criminal proceeding is seeking the documents. The court may, however, scrutinise the accused's claims with care and should not disclose material where there is a mere possibility that the material will assist the accused (*Alister v R* (1984) 154 CLR 404; *Banks v Reading*, Unreported, VSC, 23 March 1995).
29. If the respondent asserts public interest immunity, he or she should explain the scope and the basis of the claim in an affidavit. This affidavit should not contain confidential material that cannot be disclosed to the parties. Otherwise, the parties will not be able to present relevant arguments on whether the court should uphold the immunity. It is only in rare cases that it will be appropriate that a court rely on a confidential affidavit (*Banks v Reading*, Unreported, VSC, 23 March 1995; *R v Keane* [1994] 1 WLR 746; *R v Mokbel (Ruling No 1)* [2005] VSC 410).
30. The court will rarely allow cross-examination of the deponent of the affidavit. The court must determine the validity of the claim for public interest immunity and it does not rely simply upon the assertions of the deponent (*Woodroffe v NCA* [1999] FCA 1128).
31. Public interest immunity is a ground for objecting to produce documents under an otherwise valid subpoena. The court only undertakes the balancing exercise once it is satisfied that the documents are sought for a legitimate forensic purpose and fall within the scope of the immunity (*Attorney-General v Stuart* (1994) 75 A Crim R 8; *Royal Women's Hospital v Medical Board of Victoria* (2006) 15 VR 22; [2006] VSCA 85).

32. A respondent asserting a claim on the basis of the class of documents sought carries a heavy burden. Generally, immunity based solely on the class of documents is only available to documents concerning high government policy and decision-making (*Zarro v Australian Securities Commission* (1992) 36 FCR 40; *Royal Women's Hospital v Medical Board of Victoria* (2006) 15 VR 22; [2006] VSCA 85 per Charles JA; *R v Mokbel (Ruling No 1)* [2005] VSC 410).
33. Police documents do not enjoy immunity as a class. Instead, the court must undertake a balancing exercise to determine whether it is contrary to the public interest to reveal the specific information sought. The respondent should identify the nature of the documents sought and the reasons why they should not be disclosed (*Evidence Act 2008* s 130. See also *R v Robertson* (1983) 21 NTR 11; *R v Mokbel (Ruling No 1)* [2005] VSC 410; *R v Lewes Justices; Ex parte Home Secretary* [1973] AC 388).
34. Public interest immunity may apply to the following types of information:
- cabinet deliberations;
 - high level advice within government
 - the identity of informers;
 - policing methods;
 - activities of ASIO; and
 - information gathered under statutory regulatory powers (see *Evidence Act 2008* s 130(5); *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84; *LIV v Deputy Commissioner of Taxation* [2009] VSC 55; *Commonwealth v Northern Land Council* (1993) 176 CLR 604; [1993] HCA 24; *Alister v R* (1984) 154 CLR 404; *Sankey v Whitlam* (1978) 142 CLR 1; *R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171).
35. A prosecutor does not have a duty to ensure that a claim of public interest immunity is ventilated before the court. While a prosecutor may seek assistance from the police in gathering information and contacting witnesses, the police may refuse such requests. The police do not need to provide the basis of the immunity to the prosecutor and the prosecutor is not required to assess the merits of the claim in order to decide what witnesses to call at the trial (*DPP v County Court of Victoria* (1997) 98 A Crim R 270; c.f. *R v Soloman* (2005) 92 SASR 331; [2005] SASC 265).

Self-Incrimination

36. The respondent may object to producing a document to the court where it contains material that would expose the respondent to the risk of a criminal charge, penalty or forfeiture (*Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *Warman International & Ors v Envirotech Australia & Ors* (1986) 11 FCR 478).⁶⁸⁴
37. The respondent should not apply to set aside the subpoena on the mere possibility that the documents contain incriminating material. The risk of self-incrimination only arises when material may come to the attention of a person who may bring about criminal proceedings. Production of documents to the court does not create this risk. In some cases, the court will examine the documents itself to determine whether the risk exists (*Warman International & Ors v Envirotech Australia & Ors* (1986) 11 FCR 478).
38. A person may only claim the privilege against self-incrimination to resist inspection of documents on a subpoena when he or she is personally incriminated by the relevant documents. The privilege is a personal right and cannot be claimed for the benefit of another (*Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *R v Ronen* (2004) 63 NSWLR 707; [2004] NSWCCA 67).

⁶⁸⁴ At a pre-trial stage, the court applies the common law privilege against self-incrimination rather than s 128 of the *Evidence Act 2008* (*Evidence Act 2008* s 131A).

Lien

39. Solicitors are, prima facie, required to comply with a subpoena and produce documents to the court if the client would be required to produce the documents, even if the solicitor asserts a lien. The court can then decide whether to allow the parties access to the documents. This applies even if the former client seeks the documents (*Bolster v McCallum* [1966] 2 NSW 660; *R v Storer* (1993) 111 FLR 243; *In re Rapid Transit Company* [1909] 1 Ch 96; *Elders Rural Finance v Tapp* (1993) 113 FLR 351).
40. The court may make consequential orders to protect a lien, such as requiring the party's new solicitor to hold any documents subject to the lien and to deliver up all originals and copies of documents covered by the lien at the end of the proceeding (see *R v Storer* (1993) 111 FLR 243; *Queanbeyan Leagues Club v Poldune* [2001] NSWSC 831).

Last updated: 30 August 2021

13.20.8 Expenses and Conduct Money

1. The respondent does not need to comply with a subpoena to attend to give evidence unless conduct money was provided or tendered at the time of service of the subpoena or a reasonable time before the hearing (*Supreme Court (General Civil Procedure) Rules 2005* r 42.06; *County Court Civil Procedure Rules 2008* r 42.06; *Magistrates' Court Act 1989* s 43).
2. "Conduct money" is:

sum of money or its equivalent, such as pre-paid travel, sufficient to meet the reasonable expenses of the addressee of attending court as required by the subpoena and returning after so attending (*Supreme Court (General Civil Procedure) Rules 2005* r 42.01; *County Court Civil Procedure Rules 2008* r 42.01).
3. The conduct money must meet the cost of travelling to, staying at, subsisting at and returning from the place of trial (*Bank of New South Wales v Withers* (1981) 35 ALR 21).
4. A party does not comply with the rule relating to conduct money by offering to reimburse a witness for his or her expenses. The party must offer the witness money or its equivalent, such as pre-paid travel and hotel bookings (*Harris/D-E v McClelland's Coffee and Tea* [1999] NSWSC 36).
5. The court may also order the party that sought the subpoena to pay the amount of any reasonable loss or other expense the respondent incurs in complying with the subpoena (*Supreme Court (General Civil Procedure Rules) 2005* r 42.11; *County Court Civil Procedure Rules 2008* r 42.11).⁶⁸⁵ This may include costs in collating documents, copying documents and seeking legal advice on privilege or a claim for restricted use (*Sheraton v Albeth*, Unreported, VSC, 9 September 1993; *Fuelxpress v L M Ericsson* (1987) 75 ALR 284; *Pyramid Building Society v Farrow Finance Corporation* [1995] 1 VR 464; *ANZ Banking Group v Actus Australia* [2000] WASC 244).
6. The principles concerning expenses incurred in complying with a subpoena to produce documents also apply to a subpoena to give evidence (*Pyramid Building Society v Farrow Finance Corporation* [1995] 1 VR 464).
7. The court may only make orders regarding *reasonable* costs. In the ordinary case, a witness does not require legal advice on the obligation to answer a subpoena or legal assistance in communicating with the issuing party concerning the time, place and manner of attending (*Pyramid Building Society v Farrow Finance Corporation* [1995] 1 VR 464).

⁶⁸⁵ This rule was first introduced as r 42.08 in 1986. Between 1988 and 2006, the rule only applied when the witness "incurred expense or loss substantially exceeding the conduct money payable". Older authorities and authorities from outside Victoria must be read with caution.

8. While the common court rules suggest that a party must first incur the expenses before applying for an order for compensation, the court may have inherent or implied jurisdiction to make an order over expenses where the issuing party may not be able to meet the expected costs (*Re Bauhaus Pyrmont* [2006] NSWSC 253; *Danieletto v Khera* (1995) 35 NSWLR 684).
9. The court may also exercise the inherent or implied jurisdiction when a person incurs expenses (such as legal costs) in successfully setting aside a subpoena. Such costs do not fall within the terms of rule 42.11 of the common court rules, as the costs are not "incurred in complying with the subpoena" (*Danieletto v Khera* (1995) 35 NSWLR 684; *R v Barbaro* (1992) 108 ACTR 1; c.f. *Re Ansett Australia Holdings* [1998] 1 Qd R 116).
10. Expenses incurred in complying with a subpoena may include compensation for the witness' time, provided that is authorised by statute or by court rules. This is usually measured for a professional witness at his or her hourly charging rate (*Danieletto v Khera* (1995) 35 NSWLR 684; *Sheraton v Albeth*, Unreported, VSC, 9 September 1993; *Bank of New South Wales v Withers* (1981) 35 ALR 21; *Pyramid Building Society v Farrow Finance Corporation* [1995] 1 VR 464).
11. Where the issuing party unreasonably refuses to pay a witness' additional expenses, the cost of seeking an order under rule 42.11 may also be a cost reasonably incurred in complying with the subpoena (*Foyster v Foyster Holdings* [2003] NSWSC 881).

Last updated: 19 November 2009

13.20.9 Service of Subpoenas

1. A subpoena must be personally served on the respondent. The issuing party must also serve a copy of a subpoena to produce on each other party to the proceeding as soon as practicable after serving the respondent. This copy does not need to be sealed or personally served (*Supreme Court (Criminal Procedure) Rules 2017* r1.12(5); *Supreme Court (General Civil Procedure) Rules 2015* r42.05; *County Court Criminal Procedure Rules 2019* r1.09; *County Court Civil Procedure Rules 2018* r42.05).
2. A party may apply to the issuing court for an order permitting substituted service if it is impracticable to personally serve a subpoena (*Supreme Court (General Civil Procedure) Rules 2015* r6.10; *County Court Civil Procedure Rules 2018* r6.10). This may be appropriate if the respondent is deliberately avoiding service.
3. Courts are reluctant to allow substituted service of a subpoena outside Australia unless there is some way of enforcing compliance with the subpoena in the immediate future (*Sweeney v Howard* [2007] NSWSC 262).
4. Rule 42.03 of the common court rules specifies:
 - (8) The last date for service of a subpoena—
 - (a) is the date falling 5 days before the earliest date on which an addressee is required to comply with the subpoena or an earlier or later date fixed by the Court; and
 - (b) shall be specified in the subpoena.
5. The party must serve the subpoena before the specified last date for service (*Supreme Court (General Civil Procedure) Rules 2005* r42.06; *County Court Civil Procedure Rules 2008* r42.06).
6. A person who attends court in response to an irregular subpoena cannot refuse to give evidence. The court may order any competent and compellable witness who is present at the hearing to give evidence or produce documents, even in the absence of a validly served subpoena (*Evidence Act 2008* s 36).

Service of Subpoenas outside Victoria

7. Part 3 of the *Service and Execution of Process Act 1992* (Cth) ("SEPA") regulates the service of subpoenas outside a State, including service of subpoenas to those in prison.

8. SEPA also contains a number of general provisions concerning:
- the definition of a copy of a document (*SEPA* s 4);
 - the effect of the Act on other laws relating to transfer of prisoners and service of subpoenas and other process (*SEPA* s 8);
 - service upon companies, registered bodies and other bodies corporate (*SEPA* ss 9, 10); and
 - proof of service (*SEPA* s 11).

Service of Subpoenas Generally

9. Division 1 of Part 3 of *SEPA* allows a person to serve a subpoena issued by a Victorian court that is addressed to a person who is outside Victoria and is not in prison. This Division also applies if the respondent is in prison but is not required to attend court (*SEPA* ss 28, 29).
10. Service under this Division is carried out in the other State in the same way as it is carried out in Victoria (*SEPA* s 29). Victorian law requires personal service on the respondent unless a court makes an order for substituted service. Service in another State is only effective if:
- the subpoena contains an address for service on the issuing party (*SEPA* s 29(3));
 - the subpoena is served at least 14 days before the return date, or in such shorter period as the issuing court allows (*SEPA* s 30(1));
 - copies of prescribed notices and a copy of any order allowing a shorter service period are attached to the subpoena or the copy of the subpoena (*SEPA* s 31);⁶⁸⁶ and
 - conduct money is paid or tendered to the person at the time of service or at some other reasonable time (*SEPA* s 32).⁶⁸⁷
11. The respondent may comply with a subpoena to produce documents by delivering the material sought to the Registrar or Clerk of the court that issued the subpoena at least 24 hours before the return date. This removes the obligation to attend court on the return date (*SEPA* s 34).
12. A person served with a subpoena is entitled to payment of any reasonable expenses he or she incurs in complying with it. This amount must be paid by the issuing party and if there is no issuing party, by the State in which the subpoena was issued. The court that issued the subpoena may make orders to ensure that the respondent receives the exact amount of his or her reasonable expenses (*SEPA* s 35).
13. Division 1 of Part 3 of *SEPA* also provides for:
- the respondent to apply to set aside the subpoena or obtain other relief, and the procedure for making and determining that application (*SEPA* s 33);
 - service of a subpoena to a person under restraint, and the process for complying with it (*SEPA* s 36); and
 - a court to issue a warrant if a person fails to comply with a subpoena (*SEPA* s 37).

Service of Subpoenas Addressed to Persons in Prison

14. Division 2 of Part 3 of *SEPA* applies to subpoenas addressed to a person who is in prison in another State and who must attend before the court to comply with the subpoena (*SEPA* s 38).

⁶⁸⁶ The prescribed notice is Form 2 of Schedule 1 of the *Service and Execution of Process Regulations 1993* (Cth) (Regulation 4).

⁶⁸⁷ Conduct money only relates to the witness' allowances and travelling expenses. It does not relate to professional expenses or losses incurred in complying with the subpoena. Such expenses may be recoverable under the court rules (*Harris/D-E v McClelland's Coffee and Tea* [1999] NSWSC 36). See 12.20.8 Expenses and Conduct Money.

15. The issuing court may order that the prisoner be produced at the time and place specified in the subpoena if it is satisfied that:
- (a) the giving of the evidence that the prisoner is likely to give, or the production of a document or thing specified in the subpoena, is necessary in the interests of justice; and
 - (b) there will be enough time:
 - (i) for compliance with the order; and
 - (ii) to permit the making of applications under sections 43 and 44 (SEPA s 39(2)).
16. An order for the production of the prisoner must be addressed to the custodian of the prisoner, and may be subject to specified conditions. In addition, the court may stay the proceeding until the issuing party provides security for expenses (SEPA s 39).
17. The order for production and the subpoena, or a copy of the order and subpoena, must be served on the custodian of the prisoner along with a copy of both documents for service on the prisoner. Service of the subpoena must be carried out in the same way as in the issuing State and the order and subpoena must contain an address for service on the issuing party. The custodian must serve the additional copy on the prisoner as soon as practicable after receiving the order and subpoena (SEPA s 40).
18. Service of the subpoena is only effective if copies of the prescribed notices are attached the subpoena or the copy of the subpoena.⁶⁸⁸
19. Division 2 of Part 3 also contains provisions for:
- compliance by custodians of the prisoner with relevant court orders (SEPA s 40(4));
 - compliance by the prisoner with the subpoena if he or she is released in sufficient time that compliance with the subpoena is reasonably practicable (SEPA s 40(6));
 - payment to the custodian of allowances and travel expenses that would have been paid to the prisoner if he or she were not in prison, and the custodian's obligations in respect of these payments (SEPA s 42);
 - the prisoner to apply to a court to set aside the subpoena or obtain other relief and the procedure for making and determining that application (SEPA s 43);
 - the custodian or prisoner to apply to set aside or vary the order for production of the prisoner, the circumstances when the prisoner may apply and the procedure for making and determining that application (SEPA s 44);
 - the entitlement of a person to payment of reasonable expenses he or she incurs as a result of complying with the order for production of the prisoner, who must pay these expenses and the ability of a court to make an order to ensure the exact amount is paid (SEPA s 45); and
 - the custody of the prisoner during compliance with the order for production (SEPA s 46).

Last updated: 31 August 2020

13.21 Index

1. The following table provides a guide to relevant provisions in Victorian or Commonwealth legislation that relate to taking evidence from witnesses.

⁶⁸⁸ The prescribed notice is Form 3 of Schedule 1 of the *Service and Execution of Process Regulations 1993* (Cth) (Regulation 4).

Table 1: Index of legislative provisions concerning selected evidentiary topics

Topic	Relevant legislation
Accused as a witness	<i>Evidence Act 2008</i> ss 17, 104
Alibi witness	CPA 2009 ss 51, 52, 190, 191
Alternative arrangements for giving evidence	CPA 2009 ss 359–365
Attendance of witness, securing	<i>Evidence Act 2008</i> s 194
Audio visual link procedures	
Persons other than the accused	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 42D–42I
Accused persons	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 42J–42T
General	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 42U–42Y
Children as witnesses	<i>Evidence Act 2008</i> ss 12, 13, 14
Comparison of handwriting	<i>Evidence Act 2008</i> ss 78, 79
Confidential communications	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 32B– 32G
Corruption of witnesses	<i>Crimes Act 1914</i> (Cth) s 37
Cross-examination as to credit and compellability of answer	<i>Evidence Act 2008</i> s 103
Cross-examination of complainant in sexual offence proceedings	CPA 2009 ss 339–352
Examination of witnesses abroad	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 9A–9E
Examination of witnesses outside the State but within Australia	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 9F–9K
Impaired mental capacity	<i>Evidence Act 2008</i> ss 12, 13, 14
Impounding documents	<i>Evidence Act 2008</i> s 188
Improper Questions	<i>Evidence Act 2008</i> s 41
Intimidation of witnesses	<i>Crimes Act 1914</i> (Cth) s 36A
Manner of giving evidence	<i>Evidence Act 2008</i> s 29(4)
Modes of giving evidence	CPA 2009 ss 359–387
Non-disclosure by witnesses concerning:	
Applications for legal aid	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 21D–21H
Admissions made at mediation conferences	<i>Evidence (Miscellaneous Provisions) Act 1958</i> ss 21I–21N
Confessions to clergy	<i>Evidence Act 2008</i> s 127
Statements made to boards, commissions, etc	<i>Evidence (Miscellaneous Provisions) Act 1958</i> s 30
Oaths	
General	<i>Evidence Act 2008</i> ss 21, 23, 24, 24A, Schedule
Audio visual link	<i>Evidence (Miscellaneous Provisions) Act 1958</i> s 42Y CPA 2009 s 389

Order by Supreme Court to examine witness in Victoria	<i>Evidence (Miscellaneous Provisions) Act 1958 ss 4, 6</i> <i>Evidence Act 2008 s 138</i>
Order by Supreme Court or County Court in criminal proceeding (other than when exercising federal jurisdiction) to examine witness in Victoria	<i>Evidence (Miscellaneous Provisions) Act 1958 ss 9A–9E</i>
Order by Supreme Court or County Court in criminal proceeding (other than when exercising federal jurisdiction) to examine witness outside Victoria but within Australia	<i>Evidence (Miscellaneous Provisions) Act 1958 ss 9F–9K</i>
Persons present in court may be examined without subpoena	<i>Evidence Act 2008 s 36</i>
Perjury	<i>Crimes Act 1914 (Cth) s 35, Crimes Act 1958 s 314, s 315</i> <i>CPA 2009 s 414</i>
Perjury – Judge’s power to direct prosecution	<i>CPA 2009 s 415</i>
Previous convictions of witness	<i>Evidence Act 2008 ss 102, 103, 106</i>
Previous statements of witness	<i>Evidence Act 2008 ss 43, 106</i>
Prisoners may be brought before a court as witnesses by order in the form of the Second Schedule. No writ of habeas corpus is necessary	<i>Evidence (Miscellaneous Provisions) Act 1958 s 12</i>
Privileges of witnesses	
Of accused not to give evidence	<i>Evidence Act 2008 ss 17, 110</i>
Against disgrace or self-incrimination	<i>Evidence Act 2008 s 128</i>
Privileges of witnesses not allowable in criminal trials with respect to evidence concerning:	
Communication between spouses	<i>Evidence Act 2008 s 18</i>
Self-incrimination by witness in secret commission cases	<i>Crimes Act 1958 ss 184, 185</i>
Publication of prohibited questions	<i>Evidence Act 2008 s 195</i>
Recorded evidence in chief	<i>CPA 2009 ss 366–368</i>
Spouse, de facto, or family of accused as witness	<i>Evidence Act 2008 s 18</i>
Subpoena in criminal cases	<i>Crimes Act 1958 s 414</i>
Video link evidence from overseas	<i>Evidence (Miscellaneous Provisions) Act 1958 s 37D</i>
Unfavourable witness	<i>Evidence Act 2008 s 38</i>
Witness not appearing – warrant	<i>Evidence Act 2008 s 194</i>
Witness not incapacitated by reason of crime or interest	<i>Evidence Act 2008 s 12</i>

Last updated: 19 November 2009

14 Open Court Principles and Suppression Orders

1. It is a basic principle of the common law that all proceedings must be held in public unless there is legislation or a court order to the contrary (*Russell v Russell* (1976) 134 CLR 495; *R v Tait & Bartley* (1979) 24 ALR 473).

2. Victorian Courts operate on a presumption in favour of disclosure of information (*Open Courts Act* 2013 s 4).⁶⁸⁹
3. Information about open court principles and suppression orders is available in the Open Courts Bench Book.
4. Open court principles mean that it is not appropriate for a judge to meet with a witness in private before the witness gives evidence, even for the purpose of reassuring the witness or allaying the witness' anxiety about giving evidence. Such a meeting will create a suspicion of partiality (*Alec v The King* [2023] VSCA 208, [32]–[38]).
5. Similarly, a judge cannot meet with the witness informally before the hearing in the presence of counsel for the prosecution and defence. Such a meeting is inconsistent with open justice principles, which requires hearings to be accessible to the public and the accused, subject to limited exceptions (*DPP v Smith* [2023] VSCA 293).

Last updated: 8 December 2023

15 Abuse of Process and Stays

1. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process (*Clyne v New South Wales Bar Association* (1960) 104 CLR 186; *Barton v R* (1980) 147 CLR 75; *Connelly v DPP* [1964] AC 1254; *Neill v County Court of Victoria* [2003] VSC 328).
2. In *Clark v R* [2016] VSCA 96 at [14], the Court of Appeal explained:

The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in criminal proceedings. These are, first, that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.
3. The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. The content of these obligations cannot, however, be stated exhaustively or analytically. These obligations rely on intuitive judgments formed by experience (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66).
4. The obligation on a court is to provide a fair trial *in accordance with law*. Legislation may vary existing trial procedures, the elements of offences and the laws of evidence. Subject to issues of constitutional validity and interpretive principles concerning modification of existing common law principles, courts must apply the law set by Parliament. Therefore, the right to a fair trial may be modified by Parliament and courts are extremely reluctant to consider arguments that a court must grant a stay where legislative amendment interferes with the fairness of a trial (see *Grills v R* [1998] HCATrans 351; *R v PJE*, Unreported, NSWCCA, 9 October 1995).
5. Courts have noted that the obligation is not to provide a perfect trial, but to provide a trial as fair as possible. A perfect trial is an unrealistic aspiration (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *R v Glennon* (1992) 173 CLR 592; [1992] HCA 16).

⁶⁸⁹ Publication of documents on the court file may not attract any privilege against an action in defamation, unless those documents are used as part of the court process (*Smith v Harris* [1996] 2 VR 335. See also *Defamation Act* 2005 ss 27, 29).

6. Where a proceeding has been regularly commenced, courts have an obligation to exercise their jurisdiction and determine the matter. A court should not lightly refuse to exercise its jurisdiction. However, the right to a fair trial is paramount and if a proceeding cannot be conducted fairly, a court may grant a permanent stay (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *Barton v R* (1980) 147 CLR 75; *Attorney-General (NSW) v Watson* (1987) 20 Leg Rep SL 1).

Last updated: 14 August 2017

15.1 Permanent Stays

1. A party should usually apply for a stay at an early stage of proceedings and before the prosecution leads evidence. While this is not mandatory, the merits of the application will usually be based on facts that are independent of the evidence supporting the Crown case (*Edebone v Allen* [1991] 2 VR 659).
2. A court may only grant a permanent stays in an "extreme case" where there is "a fundamental defect that goes to the root of the trial 'of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences'" (*Dupas v R* (2010) 241 CLR 237; [2010] HCA 20; *R v Glennon* (1992) 173 CLR 592; [1992] HCA 16 per Mason CJ and Toohey J; *Clark v R* [2016] VSCA 96 at [17]).
3. The test for a permanent stay has also been expressed as:
whether, in all the circumstances, the continuation of the proceedings *would* involve unacceptable injustice or unfairness (*Walton v Gardiner* (1993) 177 CLR 378 at 392; [1993] HCA 77).
4. This test directs attention to whether there are other, less drastic, remedies available to the court than a permanent stay. A court cannot order a permanent stay if there are other ways to cure the relevant prejudice to ensure a fair trial (*Victoria International Container Terminal Limited v Lunt* [2021] HCA 11, [20]).
5. A permanent stay is not a remedy to punish non-compliance with case management procedures. The trial process itself is equipped to deal with most issues that threaten the fairness of the trial, such as through adjournments or temporary stays, rulings on evidence and directions to the jury (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *Barton v R* (1980) 147 CLR 75; *Mokbel v DPP* (2008) 26 VR 1; [2008] VSC 433; *Connelly v DPP* [1964] AC 1254; *Rona v District Court (SA)* (1995) 63 SASR 223. See also *Victoria International Container Terminal Limited v Lunt* [2021] HCA 11, [20]).
6. The fact that the evidence may be weak or tenuous does not, of itself, give rise to an abuse of process or make a trial unfair. Just as the judge has no power to direct an acquittal on the basis that the evidence is weak or tenuous, the judge has no power to stay a prosecution from commencing due to concerns about the reliability of the evidence, as reliability is a matter for the jury (*Hague v The Queen* [2019] VSCA 218, [114]–[125]).
7. It will be a rare case where the loss or inadvertent destruction of evidence will justify a permanent stay. A fair trial does not require that the prosecution and the accused are able to adduce all evidence that is relevant. The jury or a magistrate must reconstruct the relevant events on the evidence available, despite any loss of documents or death of witnesses (*R v Edwards* [2009] HCA 20; *Hodder v Public Transport Authority* [2009] WASC 293; *Police v Sherlock* (2009) 103 SASR 147; [2009] SASC 64; *Wells v R* [2010] VSCA 100; *Wells v R (No 2)* [2010] VSCA 294; *Aydin v R* (2010) 28 VR 588; [2010] VSCA 190).
8. In determining whether loss or destruction of evidence will render a trial unfair, the judge may consider how that loss of evidence would affect the conduct of the trial (*Aydin v R* (2010) 28 VR 588; [2010] VSCA 190).

9. This may require the judge to consider the credibility or reliability of any lost evidence. This assessment of credibility or reliability is necessary as part of assessing the probable impact of the lost evidence on the fairness of the trial. The assessment is not prohibited by any cases under the *Evidence Act 2008* which require the probative value of evidence to be assessed objectively, or taken at its highest. Instead, the evidence is assessed from the perspective of the defence to determine the effect of the loss of evidence on the defence case (*Haris v The King* [2023] VSCA 205, [59]–[65]).
10. Similarly, the fact that evidence was acquired illegally or improperly is not an independent basis for a stay. The correct approach to such an issue is to consider whether the evidence would be excluded and, if so, whether the proceeding is foredoomed to failure (*Giurina v DPP* [2017] VSC 289 at [41]).
11. While the power to grant a stay is a discretionary decision, the discretion only relates to determining whether there is an abuse of process. A court cannot grant a stay without finding an abuse of process and it cannot refuse to grant a stay after finding an abuse of process that cannot be cured by other means (*R v Carroll* (2002) 213 CLR 635; [2002] HCA 55 per Gaudron and Gummow JJ).
12. A court invited to permanently stay a proceeding must balance the following public interests factors:
 - the need to ensure that an accused receives a fair trial; and
 - the need to hear and determine charges for serious offences; and
 - the need to maintain confidence in the administration of justice (*Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77; *Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *R v Dupas (No 3)* (2009) 28 VR 380; [2009] VSCA 202; *Mokbel v DPP* (2008) 26 VR 1; [2008] VSC 433; *R v P, NJ (No 2)* (2006) 174 A Crim R 1).
13. There is a substantial public interest in the court exercising its jurisdiction to determine whether a person charged with a criminal offence is guilty. A permanent stay interferes with that public interest and is equivalent to conferring immunity from prosecution. Fairness to the accused is, therefore, not the only factor bearing on whether to grant a permanent stay. Where the application for the stay is based on pre-trial publicity, the court is conscious that granting a stay would "recognise that the media has the capacity to render an accused unable to be tried" (*R v Dupas (No 3)* (2009) 28 VR 380; [2009] VSCA 202 at [62]–[63] per Nettle JA. See also *Dupas v R* (2010) 241 CLR 237; [2010] HCA 20 at [37]).
14. The seriousness and nature of the offences is a relevant matter to consider when balancing the competing public interests. There is a greater public interest in the fair prosecution of serious offences than for less serious offences (*R v Clarkson* [1987] VR 962).
15. The court should also consider the likely sentence or outcome if the accused is found to have committed the offences. For example, in the case of an elderly and frail offender charged with offences from over 40 years earlier, it might be that any sentence would be nominal. This will weigh against the public interest in the resolution of the charges (*McDonald v R* [2016] VSCA 304 at [44]).
16. While it is recognised that special hearings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* exist to address some of the unfairness that otherwise exists where an accused is not fit to be tried, there can be cases where the combination of the factors which led to the accused being unfit and other factors such as delay, loss of evidence and degree of cognitive impairment may combine to justify a permanent stay of proceedings. It is not appropriate to exclude the unfitness factors on the basis that the special hearing process is designed to address those (see *McDonald v R* [2016] VSCA 304 at [45]–[47] (per Redlich JA and Beale AJA (Ferguson JA contra)); *R v Littler* [2001] NSWCCA 173; *Subramaniam v R* [2004] HCA 51).
17. Instead, it is important to recognize that it will be a rare case where mental infirmity alone can support the grant of a stay (*McDonald v R* [2016] VSCA 304 at [45]; *Subramaniam v R* [2004] HCA 51).

18. Despite rapid advances in communications technology, and the associated ability for numerous members of the community to publicly comment on a case (even in extreme terms), the experience of the courts is that jurors still approach their task conscientiously. With appropriate directions, judges generally have confidence that jurors will decide cases on the basis of evidence in court, rather than on commentary made in mainstream media or on social media (*Hughes v R* (2015) 93 NSWLR 474; [2015] NSWCCA 330 at [89]–[71], [84]).
19. The categories of abuse of process are not closed. Earlier decisions can only provide a guide to the kinds of situations in which a court will act to prevent its process from becoming an instrument of injustice. So far, three broad categories have emerged:
 - proceedings that are commenced for an improper or ulterior purpose;
 - proceedings that are conducted in a vexatious or oppressive manner; or
 - continuation of proceedings would bring the administration of justice into disrepute (*Moevao v Department of Labour* [1980] 1 NZLR 464; *Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *PNJ v R* [2009] HCA 6; *Rogers v R* (1994) 181 CLR 251; [1994] HCA 42).

Last updated: 8 December 2023

15.2 Conduct of Proceedings for an Improper Purpose

1. The purpose of criminal proceedings is to determine whether an accused has committed a criminal offence and, if so, to impose an appropriate sanction. The purpose of a prosecutor should be to bring the correct offender to justice. Proceedings that are predominantly instituted for another purpose, or are incapable of fulfilling these purposes, are an abuse of process (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *Spautz v Williams* [1983] 2 NSWLR 506; *Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77).
2. Where proceedings have been commenced for an improper purpose, a stay is likely to be the only adequate remedy. Other orders or directions will not remove this prejudice (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46).
3. The accused must show that the prosecutor's predominant purpose is improper. While it is not necessary to show an improper use of the proceedings, as well as the improper purpose, objective evidence of the prosecutor's use of proceedings provides a sounder foundation for a stay than evidence of his or her subjective intention. Similarly, it is not necessary to show that the improper purpose is the prosecutor's sole purpose (*Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34).
4. When proceedings are commenced for an improper purpose, a court does not need to be satisfied that a trial would be unfair. The abuse of process by conducting proceedings for an improper purpose is an adequate basis for ordering a stay (*Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34).
5. The accused does not need to demonstrate that the proceedings were commenced without reasonable grounds. A stay is available to prevent an abuse of process even if the prosecutor has, or must be assumed to have, a prima facie case (*Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34).
6. It will not be an abuse of process if the prosecutor has a legitimate grievance which he or she would wish to pursue even if he or she was also not motivated by the improper purpose. The accused arguing for a stay must demonstrate that the proceeding would not have been commenced, but for the ulterior purpose (*Goldsmith v Sperrings Ltd* [1977] 1 WLR 478; *Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34).

7. Similarly, it is not an abuse of process to commence proceedings with the intent of pursuing the proceedings to their conclusion, in the hope of obtaining some collateral advantage as a consequence of the conviction. The abuse must lie in the reason for initiating the proceedings and the hope of obtaining a benefit that the criminal law does not exist to provide (*Spautz v Williams* [1983] 2 NSWLR 506; *Dowling v Colonial Mutual Life Assurance Society* (1915) 20 CLR 509; [1915] HCA 56; *Victoria International Container Terminal Limited v Lunt* [2021] HCA 11, [23]–[24]).⁶⁹⁰
8. The court only considers whether the prosecutor has an improper purpose. It does not consider whether the complainant was motivated by an improper purpose (*R v Giles* [2000] VSCA 121).

Last updated: 30 August 2021

15.3 Unjustifiably Oppressive Proceedings

1. A court may stay a proceeding that is so unfairly and unjustifiably oppressive as to be an abuse of process. In such cases it is not necessary to show that the trial process itself will be unfair (*Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77; *Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66; *Clark v R* [2016] VSCA 96 at [15]–[16]).
2. Proceedings will also be unjustifiably oppressive if they are incapable of serving any legitimate purpose. This will arise if the proceedings are inevitably bound to fail or unnecessarily duplicate existing or previous proceedings (*Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77).
3. While a court may stay a proceeding that is foredoomed to fail, it must not usurp the role of the jury. A proceeding will not be foredoomed to fail if there is some evidence on which a jury could find the accused guilty (*R v Azad* [2007] VSC 115; *R v Smith* [1995] 1 VR 10; *Jones v R* [2017] VSCA 111 at [25]).
4. Criminal proceedings sometimes require defence counsel to make difficult forensic decisions which involve a risk of exposing the accused to some prejudice in the hope of securing a forensic advantage. The prospect that the accused will need to accept such a risk of prejudice in order to effectively counter a prosecution witness' evidence does not make the proceeding unjustifiably oppressive or unfair. Instead, judicial directions and evidentiary rulings from the trial judge are the appropriate mechanism to ensure the trial is not unjustifiably oppressive (see *Jones v R* [2017] VSCA 111 at [38]–[44]).
5. When assessing whether proceedings are unjustifiably oppressive, it will often be necessary to consider the charges individually, as the requirements of fairness, or the existence of prejudice, may vary between the charges, especially in cases involving delay (see *R v FLJ* (2014) 41 VR 572; [2014] VSCA 57 at [12]).
6. A fair trial does not require a complete and unexceptionable investigation. Inadequate pre-trial procedures are likely to be an abuse of process only if the accused can identify some prejudice he or she has suffered as a result. This may, for example, include concealment of evidence, inadequate pre-trial disclosure or unjustifiable failure to investigate exculpatory material (see *Penney v R* [1998] HCA 51).
7. The following sections examine a few of the situations in which proceedings may be oppressive. These are not intended to be exhaustive, as the categories of abuse of process are not closed (*Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; [2006] HCA 27).
8. In deciding whether proceedings would be unjustifiably oppressive, the court is not reviewing the Director's exercise of discretion to bring proceedings. As a consequence, it is not appropriate to give deference to the Director's assessment of whether proceedings would be unjustifiably oppressive (*Clark v R* [2016] VSCA 96 at [64]).

⁶⁹⁰ For example, to pressure a party in a civil action to compromise a claim.

Delays and incurable forensic disadvantage

9. In Victoria, an individual charged with a criminal offence has the right to a trial without undue delay (*Charter of Human Rights and Responsibilities Act 2006* ss 21, 25).
10. In *Hermanus v R* (2015) 44 VR 335; [2015] VSCA 2, Priest JA set out a summary of the principles which govern whether to grant a stay in the case of long delays:

First, the exercise of the power to stay must be exceptional since it results in effect in a refusal to exercise jurisdiction. The primary responsibility for deciding whether criminal proceedings should be maintained lies with the Executive and not with the court.

Secondly, in cases involving delay, to justify a permanent stay of criminal proceedings there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences. The accused must demonstrate that the delay is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute.

Thirdly, circumstances that the court should consider in determining an application for a stay include: the length of the delay; reasons given by the prosecution to explain or justify the delay; the accused's responsibility for and past attitude to the delay; proven or likely prejudice to the accused; and the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime. The critical factors are on the one hand the proven or likely prejudice to the accused, and on the other, the public interest in the prosecution and conviction of the guilty.

Fourthly, in order to justify a stay, it is the probability of unacceptable unfairness — rather than the possibility — that is critical.

Fifthly, a trial will not necessarily be unacceptably unfair even where relevant documents, recordings or other kinds of evidence have been lost or destroyed, or witnesses have died, so that the jury will be called upon to determine issues of fact on less than all of the relevant material which might bear upon the issues thrown up for determination.

Sixthly, the trial judge may avoid obstacles to a fair trial by evidentiary rulings — including by the exclusion of evidence which is technically admissible, but which might operate unfairly against the accused — and by directions to the jury designed to counteract any prejudice that the accused might otherwise suffer (*Hermanus v R* (2015) 44 VR 335; [2015] VSCA 2 at [40])

11. Delay alone is not a sufficient basis for granting a permanent stay (*Aydin v R* (2010) 28 VR 588; [2010] VSCA 190), but extreme delay, such as over 50 years between the alleged offending and the trial, may place a case at the outer end of what is acceptable in a criminal trial (*McGee v The Queen* [2020] VSCA 146, [149])
12. However, delay may combine with other factors to deprive the accused of a fair trial. Relevant factors include the death of important witnesses, the accused's inability to call exculpatory evidence, loss of documentary evidence and changes to procedural, evidentiary and sentencing law which operate adversely to the accused (*ADG v R* [2011] VSCA 430; *Brewer v R* [2017] VSCA 117 at [53]).

13. In historical sexual offence cases, delay and associated forensic disadvantage are common. The court will need to consider whether any forensic disadvantages arising from delay can be adequately addressed by a direction or by evidentiary rulings. In part, this will require the court to consider the available evidence and the evidence which has potentially been lost to see whether the loss of evidence has made a fair trial impossible. The court will consider what the lost evidence could have provided, but will be careful of the need to avoid speculation about the content of such evidence. In addition, the value of the evidence will depend on a close consideration of what is alleged, and whether the evidence could directly contradict those allegations or whether the evidence goes only to surrounding circumstances or details. Where the alleged offending occurred behind closed doors, delay is less likely to produce incurable disadvantage, compared to a case where the offending may have occurred in the presence of other people (*Brewer v R* [2017] VSCA 117 at [86]–[106], but compare [147]; *Green v R* [2017] VSCA 277 at [67]. See also *Jones v R* [2017] VSCA 111 at [62]–[76]; *R v FLJ* (2014) 41 VR 572; [2014] VSCA 57 at [38]; *Kenny v The Queen* [2018] VSCA 220; *Carson v The Queen* [2019] VSCA 4 [16]).
14. The court must perform the exercise of considering the significance of lost evidence from the perspective of the defence. In *McGee v The Queen*, which involved sexual offences from over 50 years earlier, there was a dispute about whether the complainants slept in a room inside the house or outside. The defence argued that the outside room did not exist, and the complainants must have slept inside. This then meant that D's parents could readily have heard any shouts from the complainants. Under those circumstances, the judge needed to assess the impact of the death of D's parents as being of great significance (*McGee v The Queen* [2020] VSCA 146, [132]).
15. Where the main argument in favour of a permanent stay is the unavailability of important witnesses, it must be shown that the witnesses would probably have materially assisted the defence case (*McGee v The Queen* [2020] VSCA 146, [140]).
16. The court must consider both the impact of individual matters which give rise to a forensic disadvantage and the cumulative impact of multiple such matters (*Green v R* [2017] VSCA 277 at [102]).
17. In *Green v R* [2017] VSCA 277, there were several disparate matters that led the court to order a permanent stay. The offences were allegedly committed by the complainant's foster brother. First, the death of the complainant's foster-parents deprived the defence of the ability to call evidence about the conditions in the home, which the complainant had alleged were oppressive and dehumanising, and which caused her not to inform others of the offences by her foster-brother. Second, the inability to call evidence from social workers for the Social Welfare Department who made notes about the complainant's foster placement meant that there was no evidence to contest the complainant's claim that she did not disclose the abuse because of fear of her foster mother. Third, the passage of time also meant that evidence could not be called to directly contradict the complainant's husband, who the complainant allegedly told of the offending over 40 years earlier. This absence of material could, potentially, have affected the credibility of both the complainant and her husband.
18. Where the stay application is based on a loss of evidence, the defence and the prosecution should take steps to make sure that the evidence has actually been lost and that no other evidence on that issue is available. Without such investigations, an application for a stay based on the loss of evidence is premature (*Brewer v R* [2017] VSCA 117 at [91]–[95]; *Jones v R* [2017] VSCA 111 at [82]–[88]).
19. Similarly, disputes about the admissibility of evidence should be resolved before a judge is asked to grant a permanent stay. As a refusal to admit evidence can be a mechanism to address unfairness and avoid the need for a stay, such evidentiary matters should be resolved before the stay issue is addressed (*Brewer v R* [2017] VSCA 117 at [107]–[111]. See also *R v FLJ* (2014) 41 VR 572; [2014] VSCA 57 at [35]).
20. In *McDonald v R* [2016] VSCA 304, the Court of Appeal identified that:

Implicit in the reasoning of the cases in which a stay application in the context of historic sexual offences has been refused is the assumption that notwithstanding the difficulties arising from the effluxion of time, the accused will ordinarily remain able to make a contribution to the challenging of the accusations made against him, whether

by instructions to counsel or by giving evidence (at [17]).

21. Delay in reporting frequently occurs in cases involving allegations of sexual offences against children. The Crown is not responsible for such delays and such a delay does not necessarily provide the basis for a permanent stay (*PG v R* [2010] VSCA 289. See also *Baker v DPP* [2017] VSCA 58).
22. For example, in, *R v ALP* [2002] VSCA 210, *Hermanus v R* (2015) 44 VR 335; [2015] VSCA 2, and *Jones v R* [2017] VSCA 111, the Court of Appeal refused to grant stays in relation to offences that were nearly 40 years old. However, in *Bauer v R* (2015) 46 VR 382, the Court of Appeal granted stays in relation to charges that took place between 46 and 47 years before trial on the basis that the delay was exceptional. Similarly, in *Green v R* [2017] VSCA 277, charges from between 44 and 52 years earlier were stayed where the complainant had significant health problems that affected her memory and recall and there was a loss of evidence of surrounding context which would have allowed the allegations to be properly tested.
23. It is unlikely that delay which leads to a young offender turning 19 and cease being subject to the jurisdiction of the Children's Court will lead to a permanent stay due to delay. Sentencing principles in adult courts for young offenders provide adequate scope for taking an offender's young into account and so the change of process will not demonstrate that the adult court process will be relevantly unfair (See *Baker v DPP* [2017] VSCA 58 at [122]–[123]).
24. A court must consider the statutory timeline for filing indictments and commencing proceedings, along with the unfettered power of a court to extend those timelines (*R v Clarkson* [1987] VR 962; CPA 2009 ss 163, 211, 212, 247).
25. Delay is measured both in the time taken to institute proceedings and in continuing proceedings that have been commenced (*R v Clarkson* [1987] VR 962).
26. While most accused are not eager to face an early trial, a court may consider whether the accused has taken any action to alert the prosecution to his or her objections to an unreasonable delay. Such conduct is evidence that the accused may be prejudiced if the delay continues (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46).
27. It is only in extreme cases that it will be appropriate to order a permanent stay on the basis of unreasonable delay. A permanent stay is equivalent to a certificate of indemnity and granting this too readily may undermine public confidence in the courts. A stay may be appropriate where the trial judge is unable to protect the accused against the unfair consequences of the delay and that any conviction would bring the administration of justice into disrepute (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *R v Clarkson* [1987] VR 962; *R v Edwards* [2009] HCA 20).
28. The court does not need to consider the strength of the prosecution case when deciding whether the delay has prejudiced the accused. It is not appropriate to pre-empt the jury's verdict, or to subject the accused to an unfair trial because he or she appears to be guilty (*R v Ferguson* [2008] QCA 227; *Holmden v Bitar* (1987) 47 SASR 509; *Commonwealth Service Delivery Agency v Bourke* (1999) 75 SASR 299; [1999] SASC 154).

Multiplicity of Proceedings

29. There are two general categories of cases where a multiplicity of proceedings will be an abuse of process:
 - subsequent proceedings may require the accused to re-litigate the same issues as in earlier proceeding; and
 - proceedings may be a collateral attack on an earlier decision (*R v Garth* (2008) 21 VR 203; [2008] VSCA 252; *R v Kite* (1992) 60 A Crim R 226; *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55).
30. There can also be an abuse of process where the charges in an indictment impermissibly overlap. This may occur where the charges, in substance, if not in form, allege the same offending. This principle does not prevent laying of charges which, together, reflect the whole criminality of the accused (*Pearce v The Queen* (1998) 194 CLR 610, [31], [67]).

31. In examining whether charges impermissibly overlap, it is not necessary that the elements are identical. Instead, the court should consider the extent of overlap, and "whether the offences are directed at distinct and separate forms of criminality" (*Allison v The Queen* [2021] VSCA 308, [38]).
32. An issue can also arise where criminal proceedings overlap with a civil proceeding between the complainant and the accused. Such a situation can lead to unfairness in the criminal trial, such as by compromising the right to silence, or the accusatory nature of criminal trials, or creating a risk of the jury in one matter being influenced by the decision of the jury in the other matter. This risk is usually managed by staying the civil trial until the criminal trial is complete (see *Lucciano v The Queen* [2021] VSCA 12, [23]–[25], and cases cited at footnote 10).
33. The doctrine of issue estoppel that exists in civil litigation is not directly relevant in criminal proceedings. The defences of previous acquittal or previous conviction, the rule against double jeopardy and the doctrine of abuse of process fill the role of that doctrine (*Rogers v R* (1994) 181 CLR 251; [1994] HCA 42).
34. One form of multiplicity of proceedings which can arise in criminal trials is where a jury is discharged without verdict due to the jurors being unable to agree on a verdict. The Victorian Court of Appeal has held that there is a strong prejudice associated with exposing a person to repeated trials as a result of previous juries being unable to reach a verdict. There is strong authority from around the common law world that a second retrial should be a rarity (*Clark v R* [2016] VSCA 96 at [66]).
35. Further, while the view of the complainant regarding the desirability of conducting a re-trial has some relevance in assessing whether a retrial is unjustifiably oppressive, the complainant's views are of reduced significance where procedures such as use of previous trial recorded evidence (see CPA 2009 s 378) will be used so that the complainant does not have to personally give evidence at the retrial. Such procedures can have a discriminatory effect by exposing the accused to the anxiety and burden of a retrial while the complainant does not need to participate and face the challenge of giving evidence (*Clark v R* [2016] VSCA 96 at [69]–[74]).
36. Re-litigation of decided issues in subsequent criminal proceedings:
 - increases the risk of conflicting decisions;
 - may erode public confidence in the administration of justice; and
 - breaches the principle that judicial determinations are final, binding and conclusive.One example of the application of this principle is that the prosecution may not tender evidence that was ruled inadmissible in earlier proceedings, if the reasons for that ruling continue to apply (*Rogers v R* (1994) 181 CLR 251; [1994] HCA 42).
37. A prosecutor should generally include all available offences in the one indictment. This ensures that one jury will consider all the relevant conduct and the court can sentence the accused on the correct basis. In addition, it is generally oppressive for the prosecution not to utilise the joinder provisions in clause 5 of schedule 1 of the CPA 2009 when they are available (*Pearce v R* (1998) 194 CLR 610; [1998] HCA 57; *Connelly v DPP* [1964] AC 1254; *R v Viers* [1983] 2 Qd R 1).
38. Factors that may be relevant in determining whether subsequent proceedings are oppressive or vexatious include:
 - the seriousness of the crime alleged;
 - whether the re-trial will involve the repetition of a long trial;
 - any delay in instituting the second proceeding;
 - any delay between the alleged commission of the offence and the commencement of the second proceeding;
 - the likely length of the second trial; and
 - whether the second trial involves any challenge to the first verdict (*R v Kite* (1992) 60 A Crim R 226).

39. It will not be oppressive to bring subsequent proceedings that could not fairly have been included in an earlier indictment. The nature of the offences and the presence of co-accused may mean that some charges cannot be dealt with in the one proceeding. In appropriate cases, the prosecutor may reasonably confine the indictment to particular issues and, if the prosecution fails, file a second incitement founded on the same facts, alleging different offences (*R v Clarkson* [1987] VR 962; *R v Kite* (1992) 60 A Crim R 226; *PG v R* [2010] VSCA 289).
40. In general, the prosecution should not be allowed to resile from an agreement or undertaking not to prosecute a person for a particular offence. Bringing subsequent proceedings in breach of an earlier agreement may be an abuse of process. It is in the public interest that people are able to give relevant evidence without the risk of self-incrimination. The court should consider the nature of the prosecution's conduct, the public interest in punishing those guilty of serious crimes and the public interest in encouraging people to give relevant evidence (*Barac v DPP* [2006] QSC 421; *Williamson v Trainor* [1992] 2 Qd R 572).
41. In some cases, the court may allow the prosecution to breach an earlier agreement and protect the interests of the accused by ruling that any statements he or she made while relying on the agreement are inadmissible (*Nolan v Curby*, Unreported, NSWCA, 20 December 1995; *Barac v DPP* [2006] QSC 421).
42. A party may also bring fresh applications to revisit an earlier interlocutory decision. Such an application will be appropriate unless the latter application is an abuse of process. The court will consider whether the earlier decision was affected by fraud or whether the party shows that there is fresh evidence that may affect the latter decision (*Guss v Magistrates' Court of Victoria* [1998] 2 VR 113; *Murdaca v Magistrates' Court of Victoria* [2009] VSC 270). See 20.4.6 Fresh Evidence for when new evidence is "fresh evidence".
43. When an accused is acquitted of certain charges, he or she is entitled to the full benefit of the acquittal in any subsequent proceedings. The "full benefit of the acquittal" will depend on the factual issues decided at the earlier trial and the likely reasons for the acquittal. The jury at a later trial may need to be directed on how any evidence related to an earlier charge may or may not be used (*R v Carroll* (2002) 213 CLR 635; [2002] HCA 55; *R v Calcedo* [1986] VR 499; *R v VN* (2006) 15 VR 113; [2006] VSCA 111).⁶⁹¹
44. Whether evidence from earlier proceedings which resulted in an acquittal can be used in a subsequent proceeding may depend on the reason for the acquittal. Where there is a directed acquittal due to lack of particulars, there will be greater scope to use evidence of the earlier alleged offence than if the acquittal was entered following the jury considering the issues (*R v VN* (2006) 15 VR 113; [2006] VSCA 111; *JRW v R* [2013] VSCA 255).
45. Whether subsequent proceedings will be a collateral attack on an earlier verdict depends on the questions of fact decided at the earlier proceeding and the issues to be decided in the new proceeding. It does not depend solely on the elements of the offences charged in each proceeding (*R v Carroll* (2002) 213 CLR 635; [2002] HCA 55; *R v Garth* (2008) 21 VR 203; [2008] VSCA 252; *R v Clarkson* [1987] VR 962; *Falkner v Barba* [1971] VR 332; *Hunter v Chief Constable* [1982] AC 529).

Pre-Trial Publicity

46. In modern society, some pre-trial publicity is inevitable, especially for serious crimes. Courts routinely direct the jury to consider only the evidence led in the court and to act fairly and without prejudice. A court may respond to pre-trial publicity by suppression orders, sequestration of the jury or further directions to ignore pre-trial publicity (*R v Glennon* (1992) 173 CLR 592; [1992] HCA 16; *Hughes v R* (2015) 93 NSWLR 474; [2015] NSWCCA 330).

⁶⁹¹ Such as any "tendency" or "relationship" evidence (*R v VN* (2006) 15 VR 113; [2006] VSCA 111; *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55; *R v Z* [2000] 2 AC 483; *R v Degnan* [2001] 1 NZLR 280; c.f. *R v Arp* [1998] 3 SCR 339).

47. The passage of time can also reduce the impact of any adverse pre-trial publicity. Courts recognise that the memories fade over time and in some cases a fair trial may be possible despite adverse publicity by delaying the commencement of trial for a suitable period. This delay means that an accused can receive a fair trial even if someone has been convicted of contempt of court due to publishing prejudicial material. A contempt decision determines whether the publication would prejudice a trial held at that time, and does not consider whether the publication permanently prevents a fair trial (*R v Glennon* (1992) 173 CLR 592; [1992] HCA 16; *R v Dupas (No 3)* (2009) 28 VR 380; [2009] VSCA 202).
48. Modern juries are generally believed capable of understanding that pre-trial publicity may or may not be accurate. Jurors are usually able to critically analyse the evidence, apply the directions on the standard of proof and do not automatically defer to the claims of politicians or media commentators. When properly directed, juries are generally able to decide the case solely on the evidence led in court, without being influenced by "extraneous considerations" (*Dupas v R* (2010) 241 CLR 237; [2010] HCA 20. See also *R v Hamza* [2007] QB 659, quoted in *Dupas v R* at [26]; *Hughes v R* (2015) 93 NSWLR 474; [2015] NSWCCA 330).
49. When determining whether pre-trial publicity creates the need for a permanent stay, courts must recall that the criminal justice system operates on the assumption that jurors will understand and obey a judge's directions (*Dupas v R* (2010) 241 CLR 237; [2010] HCA 20; *Gilbert v R* (2000) 201 CLR 414; [2000] HCA 15; *Yuill v R* (1993) 69 A Crim R 450; *R v Dupas (No 3)* (2009) 28 VR 380; [2009] VSCA 202).

Direct Indictments

50. A direct indictment, without previous committal or other investigatory proceedings, may be oppressive and justify a stay of proceedings (*Barton v R* (1980) 147 CLR 75). See 2.2.1 - Direct Indictments and the Interests of Justice for further details.
51. The Director of Public Prosecutions may, however, file an indictment for a more serious offence than the accused was committed for. This is a proper exercise of prosecutorial discretion and does not justify a stay of proceedings (*Kolalich v DPP* (1991) 173 CLR 222; [1991] HCA 47).
52. Once a Magistrate has made a finding that summary jurisdiction is appropriate, an accused has an accrued right to have the matter determined in the Magistrates' Court. It is an abuse of process for the prosecution to file a direct indictment in relation to the same offending in an attempt to force the proceedings into a higher court (*Maya v DPP* (2019) 60 VR 276).

Health of Accused

53. A court should not continue criminal proceedings against an accused if his or her deteriorating mental or physical health means that it would be "out of accord with common humanity" to do so (*R v Hakim* (1989) 41 A Crim R 372; *R v WRC* (2003) 59 NSWLR 273; [2003] NSWCCA 394; *R v Subramaniam* [2004] HCA 51).
54. In deciding this question, a court should consider the nature of the proceedings and the purpose it would serve. Special hearings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* must be conducted in a situation where a regular criminal trial would be unfair. The accused's mental impairment that gave rise to the special hearing is only likely to justify a stay in exceptional circumstances where there is a grave risk of further deterioration (*R v Subramaniam* [2004] HCA 51).

Entrapment

55. As Australian law does not recognise a substantive defence of entrapment, prosecution of an offender who committed an offence due to inducement by police officers is not prima facie an abuse of process. Such a proceeding is a regular use of the court's jurisdiction to determine the guilt of an accused (*Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66).
56. However, in some cases, the conduct of police officers while investigating the accused may lead to the rejection of evidence on discretionary grounds (*Evidence Act 2008* Part 3.11).

15.4 Proceedings That Would Bring the Administration of Justice into Disrepute

1. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration of justice is maintained (*Moevao v Department of Labour* [1980] 1 NZLR 464; *Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46).

Wrongful Extradition and Speciality Agreements

2. A court will stay proceedings against a person if he or she was brought into Australia in flagrant disregard of extradition law. This involves considering the circumstances in which the person was brought into Australia and whether the misconduct of the relevant authorities was "extraordinarily reprehensible" such that it would be "an affront to the public conscience to allow the prosecution to proceed" (*Jarrett v Seymour* (1993) 46 FCR 521; *R v Raby* [2003] VSC 213; *Mokbel v DPP* (2008) 26 VR 1; [2008] VSC 433; *R v Horseferry Rd Magistrates' Court; ex parte Bennett* [1994] 1 AC 42).
3. Australian courts are able to consider whether a person was extradited or deported in breach of the law of a foreign State. Determining whether foreign State officials acted illegally is necessary before the court focuses on the role of Australian officials in the extradition or deportation (*Moti v R* (2011) 245 CLR 456; [2011] HCA 50).
4. However, an Australian court should not find that another country has acted illegally unless there is clear evidence of contravention of an established legal rule. This requires proof of the content of the relevant law at the time of the relevant conduct, and it is not appropriate to speculate on how an area of foreign law may develop in the future. In addition, the breach must be sufficiently obvious to allow the court to draw a conclusion about knowledge of the breach by Australian officials (*Mokbel v R* (2013) 40 VR 625; [2013] VSCA 118).
5. Unless there is glaring or flagrant illegality by the foreign country, Australian officials can generally rely on the assurances of the foreign country that there is no impediment to extradition (*Mokbel v R* (2013) 40 VR 625; [2013] VSCA 118).
6. The court must consider whether Australian authorities were party to the misconduct. It may not be appropriate to stay proceedings if Australian authorities were not involved in and did not connive at the illegal conduct (*Levinge v Director of Custodial Services* (1987) 9 NSWLR 546).
7. The language used in previous decisions to describe the nexus necessary between the conduct of Australian officials and an illegal extradition or deportation must not be treated as defining the basis for a finding of an abuse of process. The language used in each case must be understood in the context of on the particular facts of each case (*Moti v R* (2011) 245 CLR 456; [2011] HCA 50).
8. The principle of speciality in extradition law also means that the prosecution must charge the accused with the same offence he was extradited for. This is determined by reference to the facts constituting the offence, rather than an analysis of the elements of each offence (*Extradition Act* 1988 (Cth) ss 10, 42; *Truong v R* (2004) 223 CLR 122; [2004] HCA 10; *R v Phong* (2005) 12 VR 17; [2005] VSCA 149).

Plea Decisions

9. Courts have accepted that it is theoretically possible that prosecution acceptance of a guilty plea may give rise to an abuse of process. While the judge does not usually have the power to reject a plea, he or she may need to act to avoid bringing the administration of justice into disrepute. This is, however, theoretical and courts are highly reluctant to interfere in the exercise of the prosecutorial discretion (see *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Brown* (1989) 17 NSWLR 472).

10. One basis for rejecting a voluntary plea is where the judge considers that, as a matter of law, the accused cannot be guilty of the offence charged, such as where the offence charged does not apply to the conduct alleged, or where the indictment does not charge an offence known to the law (see, e.g., *R v Hughes* [2015] VSC 312).
11. A further possible basis is where the agreed facts disclose an offence more serious than that admitted on the plea, such that the judge would need to sentence in a fundamentally illogical manner. At minimum, the prosecution should not put a judge in a position where the judge must impose sentence for a combination of charges which are internally inconsistent. In addition, if the prosecution does accept a plea to charges which require the judge to take an artificially limited view of the facts, the prosecution must not then lead evidence, such as on an agreed statement of facts, of the more serious form of offending (see *Pun v R* [2017] VSCA 219 at [15], [17]–[19]).
12. Related topic: 15.5 Stays and Initiating Criminal Proceedings

Risk of Inconsistent Verdicts

13. There is a risk that separate trials of co-offenders with different juries will produce inconsistent verdicts. This risk is amplified when there is evidence admissible against one co-offender but not against another. However, this is an accepted part of the trial system and does not bring the administration of justice into disrepute (see *R v Goral* [2001] VSC 246; *R v Darby* (1982) 148 CLR 668; [1982] HCA 32; *R v Howard* (1992) 29 NSWLR 242).
14. The prosecution may accept a plea to a lesser offence from one co-offender and continue with the prosecution of another co-offender on more serious charges. This conduct will not usually give the remaining co-offenders a right to a stay on the more serious charges (*R v Goral* [2001] VSC 246).

Prosecutorial misconduct

15. In exceptional cases, pre-trial misconduct by prosecuting and investigative agencies may so undermine the fairness of any trial that allowing the trial to proceed would involve ‘a defect in process ... so profound as to offend the integrity and functions of the court’. In that situation, the trial may be stayed to avoid bringing the administration of justice into disrepute (*Strickland v DPP (Cth)* (2018) 266 CLR 325, [106]).
16. This principle is, however, limited to an extreme case. In many situations, misconduct by investigators can be adequately addressed by the exclusion of evidence under *Evidence Act 2008* s 138 (*Visser v DPP (Cth)* [2020] VSCA 327, [155]).

Last updated: 30 August 2021

15.5 Stays and Initiating Criminal Proceedings

1. The jurisdiction of a trial court is only enlivened when the indictment is filed in that court. The Director of Public Prosecutions is responsible for preparing and filing indictments. This process is not susceptible to judicial review and a court has no role to play until the Director files an indictment (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46. But see *Harkness v Banks* [2023] VSC 588).
2. Courts do not determine whether particular proceedings are commenced, as this risks blurring the line between judge and prosecutor.⁶⁹² Judicial intervention in the choice of offences or the filing of indictments risks creating the perception that cases may only proceed with the approval of the judge (*Jago v District Court of NSW* (1989) 168 CLR 23; [1989] HCA 46; *DPP v Humphries* [1977] AC 1; *Ridgeway v R* (1995) 184 CLR 19; [1995] HCA 66; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46. But see *Harkness v Banks* [2023] VSC 588).

⁶⁹² This is subject to the exception that a judge may commence proceedings against a person for perjury (*CPA 2009* s 362) and may summarily punish for contempt (*Supreme Court (General Civil Procedure) Rules 2005* r 75.02, r 75.07).

3. A court considering an application for a permanent stay is not reviewing the prosecutorial decision to commence proceedings. The court must focus on whether the continuation of the proceeding would be an abuse of process (*Baker v DPP* [2017] VSCA 58 at [43]).
4. Courts have very few powers to control the exercise of prosecutorial discretion in matters such as the selection of offences on the indictment and the acceptance of pleas. It is only in exceptional cases that a court will intervene to prevent a miscarriage of justice by refusing to accept an indictment or a plea. A mere difference of opinion between the judge and the prosecutor on the proper conduct of proceedings will not be sufficient. A court that expresses a view on the appropriateness of a charge or a plea is doing no more than attempting to influence the prosecutor's discretion and may not be aware of all relevant matters (*Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Brown* (1989) 17 NSWLR 472).
5. For this reason, where the evidence is clearly capable of supporting the charged offences, and there is no suggestion that charges were brought for an improper purpose, there is no basis for a judge to order a stay to force the prosecution to file an indictment which also charges lesser alternative offences (*Chaarani & Ors v The Queen* [2020] VSCA 88, [86]. See also *Hines v The King* [2023] VSCA 168).
6. A prosecutor can accept a plea from a one accused to a lesser offence without being limited in the conduct of proceedings against another accused. While the prosecution cannot controvert the basis for the plea against an accused in subsequent proceedings *against that accused*, a second accused is a stranger to those proceedings. The prosecution can therefore accept a plea of manslaughter from a principal offender and charge an accessory with murder, without giving rise to issues of inconsistent verdicts or an abuse of process. This is permissible even if the prosecution must prove, in the trial against the accessory, that the principal offenders committed murder (*Likiardopoulos v R* (2012) 247 CLR 265; [2012] HCA 37).

Last updated: 8 December 2023

16 Documentary and Other Evidence

1. Section 223 of the CPA 2009 authorises a judge to provide jurors with the following material at any time during a trial in order to help them understand the issues or the evidence:

- (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;
- (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;
- (ka) a jury guide specific to the trial;
- (l) any other document that the trial judge considers appropriate (CPA 2009 s 223).

2. A jury guide specific to the trial may contain any of the following:

- (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;
- (d) any evidence identified under section 66 of the *Jury Directions Act 2015*;
- (e) any other information (CPA 2009 s 223(1A)).

3. The trial judge may also order that the jury receive copies of a general jury guide. A general jury guide may contain:

- (a) general information about the process of criminal trials, including information about—
 - (i) the roles of the jury, the judge and the parties; and
 - (ii) the usual order of events in a trial;
- (b) general information about legal concepts that are relevant to criminal trials, including information about—
 - (i) the presumption of innocence; and
 - (ii) the requirement of proof beyond reasonable doubt;
 - (iii) the meaning of the phrase "proof beyond reasonable doubt";
- (c) general information about jury deliberations and processes, including information about—
 - (i) what to do if a juror has a question; and
 - (ii) appointing a foreperson; and
 - (iii) ways in which the jury may wish to organise itself, discuss the evidence and the law, and vote;
- (d) any other general information (CPA 2009 s 223A(3)).

4. While CPA 2009 s 223A(1) gives the judge a discretion to order that the jury receive a general jury guide, s 223A(2) provides that if regulations are made prescribing the content of a general jury guide or the time when the general jury guide must be given to the jury, then the trial judge must provide the jury with a general jury guide which complies with the regulations (CPA 2009 s 223A(2)). At present, there is no general jury guide prescribed by regulations.
5. In *PA v R*, Maxwell P (Buchanan and Harper JJA agreeing) explained that the legislative precursor to s 233, *Crimes (Criminal Trials) Act 1999* s 19, is:

...a very significant provision for the management of jury trials. I note the introductory words, 'For the purpose of helping the jury to understand the issues...'. It is a power conferred for that specific purpose. It is unambiguously clear that the Victorian Parliament intended to authorise judges to do whatever they considered necessary to assist jurors in their comprehension of the issues (*PA v R* [2010] VSCA 85 at [39]).
6. Similarly, in *R v Benbrika (Ruling No 11)*, Bongiorno J remarked:

... [I]n general, the philosophy behind s 19 of the *Crimes (Criminal Trials) Act 1999* (Vic) is one to be embraced by criminal courts in the interests of efficiency generally and in the assistance of juries in the performance of their task in particular. But the embracing of such philosophy must always be subject to the overriding responsibility of the court to ensure, as far as possible, that the accused's right to a fair trial according to law is not infringed (*R v Benbrika & Ors (Ruling No 11)* [2007] VSC 580 at [32]).
7. This chapter examines some of the factors a judge should consider before providing such materials to the jury and any steps he or she must take after providing the documents. Many of these issues raise jury direction issues that are considered in detail in the Victorian Criminal Charge Book.

Exhibits

8. While exhibits should generally be available for the jury to examine during its deliberations, the court may withhold exhibits that are large, inconvenient or a risk to security (*R v NZ* (2005) 63 NSWLR 628; [2005] NSWCCA 278; *R v Evans* [1998] SASC 6798). See 11.4 Jury Participation in the Trial.
9. The trial judge should take steps to prevent tampering with an exhibit after it is tendered by a party (see, e.g., *R v Callan* (1994) 98 Cr App R 467).
10. A party may tender an item "for identification" on the basis that its admissibility will be proved by other evidence. The party must indicate how the item is relevant and admissible. The court will only provide the item to the jury if it is later admitted as an exhibit (*R v Trotter* (1982) 7 A Crim R 8).
11. Witnesses and jurors may examine an exhibit under a magnifying glass and the judge should not discourage this practice (*R v Alexander* [1979] VR 615).
12. The judge may provide jurors with copies of any schedules, chronologies, charts, diagrams, summaries or other explanatory material in order to help them better understand the issues or the evidence (*CPA 2009 s 223*).
13. Courts generally encourage parties to use such explanatory material provided it is complete and accurate and it will assist the jury. Explanatory material may either be part of a witness' evidence or may be an aid to assist the jury to understand other evidence (see *R v Mitchell* [1971] VR 46; *Smith v R* (1970) 121 CLR 572; *R v Benbrika & Ors (Ruling No 11)* [2007] VSC 580; *R v Van Beelen* (1973) 4 SASR 353; *Alucraft v Grocon(No 1)* [1996] 2 VR 377; *R v Collins* (1986) 44 SASR 214). See 2.2 Providing Documents to the Jury in the Criminal Charge Book for further information.

Custody of Exhibits Pending Appeal

14. In the Supreme Court, the trial judge may make orders and give directions concerning the production, custody or disposal of exhibits tendered during the trial. In the absence of an order:
 - The court will return prosecution exhibits and the prosecution must keep those exhibits pending any appeal; and
 - The judge's associate must keep any exhibit tendered by any other party for 21 days from the date of sentencing and then return the exhibit to the tendering party if no appeal is instituted (*Supreme Court (Criminal Procedure) Rules 2008 r 2.32*).
15. If the registrar of criminal appeals directs the prosecution to produce an exhibit, it must produce the exhibit as directed. Similarly, the associate must produce an exhibit if directed to do so by the registrar within 21 days of receiving the direction (*Supreme Court (Criminal Procedure) Rules 2008 r 2.32*).
16. Following an appeal, the Court of Appeal may make orders as to the return of exhibits as it thinks appropriate. The Rules also specify default procedures if the Court of Appeal does not make any orders regarding the return of the exhibits.

(1) When an appeal is finally determined, the Court of Appeal may make orders as to the return of exhibits as it thinks appropriate.

(2) If no order is made, each exhibit shall be returned to the person who tendered it unless—

(a) it is a document of a kind kept by the recording officer of the court of trial; or

(b) it is an exhibit to which section 311 of the Act applies.

(3) The Registrar shall return to the recording officer of the originating court when an appeal is finally determined any original depositions, exhibits, presentment, indictment, inquisition, plea or other document forming part of the record of the originating court which was given to the Registrar for the purposes of the appeal (*Supreme Court (Criminal Procedure) Rules 2008* r 2.34).

Tapes, Transcripts and Translations of Tapes

17. A party may tender a tape that records relevant evidence as an exhibit. It is the recording on the tape and not the tape itself that constitutes the evidence, as the tape is incapable of proving anything unless it is played (*Butera v DPP (Vic)* (1987)164 CLR 180; [1987] HCA 58).
18. The court should ensure that there is equipment in the jury room to allow the jury to replay a tape during its deliberations (*R v Narula* [1987] VR 661; *R v Watts* [1992] 1 Qd R 214).
19. The judge may also provide a transcript of a tape recording to the jury (*CPA 2009* s 223).
20. The transcript of an audio recording in English or a foreign language is admissible to prove the contents of the recording (*Evidence Act 2008* s 48). However, in accordance with the common law, judges often direct the jury that the transcript is only an aide and that the evidence consists of what they hear on the tape. This is especially important if the parties dispute the accuracy of the transcript (*R v Cassar & Sleiman* [1999] NSWSC 436; *Eastman v R* (1997) 76 FCR 9; *Foreign Media v Konstantinidis* [2003] NSWCA 161; *R v Cornwell* (2003) 57 NSWLR 82; [2003] NSWSC 97; *Butera v DPP (Vic)* (1987) 164 CLR 180; [1987] HCA 58).

Related resource: 2.2 Providing Documents to the Jury in the Victorian Criminal Charge Book.

Transcripts of VARE and Other Pre-Recorded Evidence

21. The judge may provide the jury with a transcript of a VARE under Division 5 of Part 8.2 of the *CPA 2009* while it is hearing the evidence. This may assist the jury to follow the witness' evidence (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164; *R v Welstead* [1996] 1 Cr App R 59).
22. In general, the judge should not allow the jury to take the transcript of the VARE into the jury room during its deliberations (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164; *R v Welstead* [1996] 1 Cr App R 59).
23. It is likely that these principles also apply when a complainant's evidence from a previous trial is admitted in subsequent proceedings under Division 7 of Part 8.2 of the *CPA 2009*.
24. However, practices vary on whether the judge should provide the jury with a full transcript of evidence. The judge should treat the transcript of the VARE in the same manner as a transcript of other evidence (*R v Tichowitsch* [2007] 2 Qd R 462; [2006] QCA 569. See also *R v NZ* (2005) 63 NSWLR 628; [2005] NSWCCA 278).
25. In contrast to other tapes, a party should not tender a VARE or other pre-recorded evidence as an exhibit. Instead, the tape should be marked for identification and forms part of the court's record (*R v BAH* (2002) 5 VR 517; [2002] VSCA 164; *R v Lewis* [2002] VSCA 200; *R v Gately* (2007) 232 CLR 208; [2007] HCA 55).

Demonstrations, Experiments and Inspections

26. Under the *Evidence Act 2008*, the court may order that a demonstration, experiment or inspection be held. A magistrate or juror may draw any reasonable inference from what he or she sees, hears or otherwise notices during the demonstration, experiment or inspection (*Evidence Act 2008* ss 53, 54).
27. Sections 53 and 54 of the *Evidence Act 2008* do not apply to demonstrations or experiments in the courtroom. The court may require a witness to undertake a range of acts including wearing exhibits, providing footprints and demonstrating injuries or identifying marks. A magistrate or a juror may use such evidence without the court making an order for an examination or experiment (*Evans v R* (2007) 235 CLR 521; [2007] HCA 59, especially at [203] per Heydon J).

Related resources: 2.1 Views in the Victorian Criminal Charge Book

Trial Transcripts

28. The judge may provide the jury with transcripts of evidence in a proceeding. The judge may also provide a copy of his or her directions to the jury (*CPA 2009* s 223; *MG v R* (2010) 29 VR 305; [2010] VSCA 97; *R v Morgan* [2009] VSCA 225).
29. Currently, practices vary among judges on whether it is in the interests of justice to exercise this power. A judge should decide whether to provide transcripts to the jury after hearing counsel's submissions. In some cases, the judge should inform counsel at the start of the trial that he or she intends to provide transcript to the jury, as this may affect how counsel conducts his or her case.
30. A judge should not give a transcript of the evidence to the jury as a matter of course. The decision to provide a transcript involves an exercise of judicial discretion and must be made in accordance with the relevant principles (*R v Tichowitsch* [2007] 2 Qd R 462; [2006] QCA 569; *R v BM* [2005] VSCA 260).
31. The accused is entitled to an oral trial, rather than a trial on the transcript. The judge must be aware of the risk that the jury will give the transcript undue emphasis or may treat it as additional supporting evidence. The jury should rely primarily on their impressions of a witness' evidence, rather than the record of the transcript. To address these risks, the judge must tell the jury that the transcript is only provided as an aide and is not evidence in the proceeding (*R v Morgan* [2009] VSCA 225 per Ashley JA and Lasry AJA (Neave JA contra); *R v Trieu* [2008] QCA 28; *R v Miller* [2007] QCA 373).
32. However, a request by the jury for a copy of certain parts of the trial transcript may reveal a conscientious jury, which does not wish to rely on its own imperfect recollection of the witness' evidence, or the judge's summary (*PA v R* [2010] VSCA 85).
33. The judge must ensure that he or she provides a balanced transcript. While the judge may provide transcript selectively, the transcript should include conflicting versions of an issue and the witness' cross-examination (*MBC v WA* [2009] WASCA 37).
34. The judge should explain his or her reasons if he or she refuses a jury's request for a transcript of the evidence (*R v BM* [2005] VSCA 260).
35. Provision of transcript does not satisfy the judge's obligation to summarise the evidence and apply to the law to the facts. Written materials cannot supplement or remedy an otherwise defective oral charge (*R v Gose* (2009) 22 VR 150; [2009] VSCA 66; *R v Thompson* (2008) 21 VR 135; [2008] VSCA 144).

17 Voir Dire

1. A voir dire is commonly referred to as a "trial within a trial". It is a hearing in which a court determines questions of fact and law after hearing evidence from witnesses. The judge or magistrate must assess the credit of witnesses, make findings of fact and apply the relevant law on the basis of evidence and submissions (*MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46; *Cornelius v R* (1936) 55 CLR 235).
2. A witness' evidence on a voir dire does not form part of the evidence in the trial or hearing. It will often be necessary for a witness to repeat some of the evidence that he or she gave on the voir dire in the main proceeding. This includes evidence that is relevant to a fact in issue or that affects the credibility of the witness, such as the qualifications of an expert witness (*Sinclair v R* (1946) 73 CLR 316; *Basto v R* (1954) 91 CLR 628; *R v Johnson* (1994) 75 A Crim R 522).
3. In cases involving a self-represented accused, the judge may need to inform the accused of the right to seek a voir dire to test certain evidence. This is part of the judge's obligation to explain the conduct of proceedings to a self-represented accused and does not constitute providing tactical or legal advice (*MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46).

Purpose of a Voir Dire

4. The purpose of a voir dire is to allow the judge to determine a question of law on the basis of the evidence of witnesses. This will often involve a decision on whether the evidence of a witness is admissible, or whether it should be rejected on discretionary grounds (*MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46).
5. The following examples are some issues that may be determined on a voir dire:
 - Whether an admission was influenced by violent, oppressive, inhuman or degrading conduct, or was made in circumstances that may adversely affect the truth of the admission (see *R v McNeill* [2007] NFSC 2; *R v Em* [2003] NSWCCA 374);
 - Whether a witness is entitled to exercise the privilege against self-incrimination (*R v Roberts & Urbanec* (2004) 9 VR 295; [2004] VSCA 1);
 - Whether a writing sample was written by the accused (*R v Browne-Kerr* [1990] VR 78);
 - Whether a witness is unfavourable (*R v Andrews* [1987] 1 Qd R 21; *R v Lam & Ors* (Ruling No 6) [2005] VSC 280. See also *Evidence Act 2008* s 38);
 - Whether a search warrant was validly executed (*R v Young* [2002] VSCA 2);
 - Whether it is necessary to discharge the jury due to an apprehension of bias (*R v Lawrence*, Unreported, VSCA, 7 October 1997).
6. When determining whether evidence is admissible, the judge must apply the relevant evidentiary test to that evidence. This may involve making findings of fact, based on the evidence led on the voir dire (*R v Evans & Doyle* [1998] VSC 486; *R v Wendo* (1963) 109 CLR 559; *R v Browne-Kerr* [1990] VR 78; *R v Thomas* [1970] VR 674).
7. A voir dire may be appropriate even in summary hearings. The voir dire allows the accused to challenge the admissibility of prosecution evidence by, if necessary, calling evidence in reply. It may enable the accused to give relevant evidence on the voir dire without being exposed to cross-examination in the trial itself. A magistrate, due to his or her training and experience, is able to determine the case based solely on the evidence led in the main hearing, disregarding evidence that is led solely on the voir dire (*Egan v Bott* [1985] VR 787; *Smithers v Andrews* [1978] Qd R 64).

Discretion to Grant a Voir Dire

8. The judge must determine whether a voir dire is essential in order to secure a fair trial. This is an exercise of discretion and a party does not have a right to a voir dire whenever he or she requests one (*R v Callaghan* (2001) 4 VR 79; [2001] VSCA 209; *R v Rowley* (1986) 23 A Crim R 371; *R v Liddicoat*, Unreported, Vic CCA, 2 April 1987).
9. The judge should only hold a voir dire after a party has identified the purpose of the voir dire and the evidence he or she seeks to adduce. A voir dire will rarely be necessary if the witnesses were cross-examined at the committal hearing, as all the relevant evidence is available in the depositions. A judge should examine the depositions to determine whether any additional evidence is necessary (*R v Callaghan* (2001) 4 VR 79; [2001] VSCA 209; *R v Coward* (1985) 16 A Crim R 257; *R v Williams* (1976) 14 SASR 1; *R v Rowley* (1986) 23 A Crim R 371; *R v Lam & Ors* (Ruling No 6) [2005] VSC 280; *R v Harris* (No 3) [1990] VR 310).
10. The voir dire process is expensive and time consuming. In some cases, parties attempt to use a voir dire as a fishing expedition. The court should not allow the process to be used for an improper purpose (*R v Callaghan* (2001) 4 VR 79; [2001] VSCA 209; *R v Rowley* (1986) 23 A Crim R 371).

Conduct of a Voir Dire

11. A party to the proceeding may call any competent witness on the voir dire. These witnesses are sworn and then examined-in-chief, cross-examined and, if necessary, re-examined.
12. Due to the risk of revealing prejudicial or inadmissible material, a voir dire is almost always held in the absence of the jury. In addition, various statutory provisions require the court to determine particular issues in the absence of the jury (see, e.g., *Evidence Act 2008* ss 17, 18 (Compellability of associated defendants and spouses in criminal trials), s 189 (Admissibility of admissions and improperly or illegally obtained evidence)).
13. The relevant form of oath for a witness on a voir dire is:

I swear by Almighty God that I shall give true answers to all questions put to me by this honourable court.⁶⁹³
14. The judge controls the conduct of the voir dire and the order in which parties present evidence (*R v Bradshaw* (1978) 18 SASR 83).
15. The judge can also limit the questioning of a witness on a voir dire. He or she may impose reasonable bounds on examination-in-chief and cross-examination so that the voir dire fulfils its purpose (*MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46; *R v Benbrika & Ors* (Ruling No 21) [2008] VSC 114).
16. A party does not have an inherent right to cross-examine a witness on a voir dire. The judge must decide whether it is in the interests of justice, based on the purpose of the voir dire, to allow cross-examination. While it will usually be appropriate to allow cross-examination if the voir dire concerns the admissibility of evidence, this general rule must be applied flexibly based on the issues in the case (*R v Ashton* (1999) 108 A Crim R 200; *R v Henderson* (1984) 37 SASR 82; c.f. *Price v Bevan* (1974) 8 SASR 81).
17. A voir dire is not, however, an inquisitorial process. The parties select the evidence they bring before the court and a judge should not exercise a power to call witnesses (*MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46).

⁶⁹³ The voir dire affirmation is "I do solemnly, sincerely and truly declare and affirm that I shall give true answers to all questions put to me by this honourable court".

18. The judge retains a power to question witnesses on voir dire in order to clarify issues. Such intervention is less likely to jeopardise a fair trial, as the jury will likely be absent. The judge must be careful, however, not to influence the answers the witness may give on the voir dire, or in his or her evidence in the trial (see *R v McCormack*, Unreported, VSCA, 16 May 1996). See also Judicial Intervention in 6.1 Judicial Bias.
19. The judge may terminate a voir dire at any time if he or she is satisfied that continuing it is unlikely to serve any useful purpose (*R v Lee*, Unreported, NSW CCA, 5 May 1997).
20. After the voir dire, the judge should generally not explain the outcome to the jury. Such explanations may influence the jury in its fact finding role. The judge may instead tell the jury that certain questions of law were being decided in their absence (*R v Banner* [1970] VR 240).

Questioning the Accused

21. In some cases an accused may wish to give evidence on voir dire to establish that evidence is inadmissible. This may arise in relation to evidentiary matters the judge must determine, such as disputed confession evidence (*MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46) or disputed writing samples (*R v Browne-Kerr* [1990] VR 78).
22. The issue of whether the confession was true or false must be disregarded unless the issue is introduced by the accused (*Evidence Act 2008* s 189).
23. If the accused raises the issue of the truthfulness of a confession, it is unclear whether it is appropriate to cross-examine the accused in a manner leading to self-incrimination. Such questions are prohibited in England, but permitted in Western Australia, Queensland and Canada (Compare *R v Tofilau (No 2)* (2006) 13 VR 28; [2006] VSCA 40 per Callaway JA at [15] and *R v Schaeffer* (2005) 13 VR 337; [2005] VSCA 306 at footnote 21. See also *Evidence Act 2008* ss 128, 189(10); *Wong Kam-Ming v R* [1980] AC 247; *Frijaf v R* [1982] WAR 128; *R v Semyraha* [2001] 2 Qd R 208; [2000] QCA 303; *DeClerq v R* (1968) 70 DLR (2d) 530; *MacPherson v R* (1981) 147 CLR 512; [1981] HCA 46; *Burns v R* (1975) 132 CLR 258).
24. Some judges have questioned whether the truthfulness of a confession is a relevant issue on a voir dire. It will only be relevant if there is a rational link between the truthfulness of a disputed confession and its voluntariness. A court must not admit an involuntary confession on the basis that it is truthful (*Evidence Act 2008* s 189; *R v Semyraha* [2001] 2 Qd R 208; [2000] QCA 303; *R v Tofilau (No 2)* (2006) 13 VR 28; [2006] VSCA 40; *Wong Kam-Ming v R* [1980] AC 247).
25. Even if the judge does allow cross-examination on the voir dire concerning the truthfulness of the confession, he or she may prohibit the use of those answers if the accused gives evidence in the trial (see *R v Tofilau (No 2)* (2006) 13 VR 28; [2006] VSCA 40 per Callaway JA; *R v Semyraha* [2001] 2 Qd R 208; [2000] QCA 303).

Accused's Answers on a Voir Dire

26. Evidence on a voir dire does not form part of the evidence in the trial (*Sinclair v R* (1946) 73 CLR 316).
27. Sections 189(1) and (8) of the *Evidence Act 2008* state:

(1) If the determination of a question whether –

- (a) evidence should be admitted (whether in the exercise of a discretion or not); or
- (b) evidence can be used against a person; or
- (c) a witness is competent or compellable-

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purpose of this section, a preliminary question.

...

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless-

- (a) it is inconsistent with other evidence given by the witness; or
- (b) the witness has died.

28. This provision gives effect to a policy that the accused should be completely free to give evidence on a voir dire, without jeopardising his or her right to silence in the trial. The accused's answers on a hearing to determine a preliminary question cannot be led as evidence in the proceeding unless it is inconsistent with other evidence he or she gives (*Evidence Act 2008* s 189; ALRC Report 26 (Interim), *Evidence*, 1985. See also *R v Rich (Ruling No 26)* [2009] VSC 159).
29. It is unclear whether this prohibition extends to voir dires that are not concerned with admission of evidence, use of evidence or the competence or compellability of witnesses (such as a voir dire regarding some procedural prejudice). The prosecution may be allowed to lead evidence of the accused's statements on such a voir dire if he or she gives evidence at the trial (*R v Rich (Ruling No 26)* [2009] VSC 159).

***Basha* and CPA 2009 s 198B**

30. At common law, a *Basha* was a separate hearing in the absence of the jury in which a prosecution witness was called for the purpose of cross-examination by the accused. The hearing was suitable when the defence did not have sufficient information to know what the witness would say at the trial.
31. From 3 March 2019, the *Basha* hearing procedure has been abolished and replaced with a similar statutory process (*CPA 2009* ss 198B, 198C).
32. The *Basha* and its statutory successor in *CPA 2009* s 198B are similar to a voir dire, in that evidence is taken outside the sequence of the trial and in the absence of the jury. Strictly, however, they are not voir dire hearings, as the evidence is led for the benefit of defence counsel, rather than to allow the judge to determine a question of law (*R v Cheung Wai Man*, Unreported, NSWSC, 11 September 1990; *R v Sandford* (1994) 33 NSWLR 172).
33. Because the s 198B process can be conducted before or during a trial, it is discussed in 5.1.6 Taking Evidence Before Trial.

18 Taking Verdicts

Procedure

1. The usual practice in Victoria is that the judge will direct the jury on all charges and all accused on the indictment at the one time. Once the jury finishes its deliberations, the judge will take all the verdicts at the one time (*R v Houssein* (1980) 70 Cr App R 267; *R v Wooding* (1980) 70 Cr App R 256; c.f. *R v Mitchell* [1971] VR 46).
2. The judge should not ask the jury to commence deliberating until he or she completes all required directions of law, including those requested by the parties. It is good practice to wait until after the parties have the opportunity to make applications for further directions before asking the jury to consider its verdict. However, the judge does not need to wait until he or she has provided the jury with any aides, such as decision trees (*R v McCormack* (1996) 85 A Crim R 445; *Spruill v R* [2008] NSWCCA 39; *R v Sandford* (1994) 33 NSWLR 172; *R v Lean* (1993) 66 A Crim R 296).
3. The judge should not take a verdict while there is an unanswered question from the jury that requires a further direction of law (*R v TAB* [2002] NSWCCA 274; *R v Salama* [1999] NSWCCA 105; *R v Lapins* [2007] SASC 281).
4. However, the judge may take a verdict if he or she rejects a request and asks the jury to reformulate its question. Alternatively, the jury may revoke a request to be reminded about certain evidence and return a verdict (*R v TAB* [2002] NSWCCA 274; *R v Lapins* [2007] SASC 281).
5. The process of taking the verdict should take place in open court in the presence of the judge. This is part of the trial and the accused should be present (see CPA 2009 s 246).
6. The judge may take a verdict on any day and at any time, including on a Sunday (*DPP v Micevic* (2005) 12 VR 14; *Supreme Court Act 1986* s 7; *County Court Act 1958* s 7).⁶⁹⁴
7. When the jury returns to the court after indicating that it has reached a verdict, the associate asks:

Mr/Madam Foreman and Members of the Jury, have you agreed upon your verdict?
8. The jury will answer yes, and then the associate will ask:

How say you on Charge 1 of ... do you find <Name of Accused> guilty or not guilty?
9. The associate takes the jury's verdict on charge 1 and repeats this process for all other charges. If the judge allows the jury to return a majority verdict, the associate will ask after each charge:

Have the jury agreed this verdict unanimously or by a majority of eleven of the twelve of you?⁶⁹⁵
10. After taking verdicts on all charges, the associate will read the verdicts back to jury as follows:

Listen to your verdict as the court records it.
You find <Name of Accused> GUILTY / NOT GUILTY on Charge 1 of ... and GUILTY / NOT GUILTY on Charge 2 of ... (repeating this process for all charges).
Is that the verdict of you all?
11. If the judge allowed the jury to return majority verdicts, the associate instead says:

Listen to your verdict as the court records it.
You find UNANIMOUSLY / BY A MAJORITY OF NOT LESS THAN 11 OF THE 12 OF YOU <Name of accused> GUILTY / NOT GUILTY on Charge 1 of... and (continuing the

⁶⁹⁴ The Chief Judge has not imposed any restrictions under s 7 of the *County Court Act 1958* on when the County Court may sit.

⁶⁹⁵ This should be modified to state the appropriate majority, if there are less than twelve jurors.

process until all charges are recorded)

In relation to Charges X, these are the verdicts of you all.

In relation to Charges Y, these are the verdicts of not less than 11 of the 12 of you.⁶⁹⁶

12. It is inappropriate to ask the jury only whether it finds the accused *guilty* of the offence charged. While this is a leading question, the error will generally not undermine the verdict (*R v Conway* [2005] QCA 194).
13. In general, no question arises of a court refusing to accept a jury's verdict. In extremely rare cases, a judge may direct the jury to reconsider its verdict. This may be appropriate if the judge believes that the jury has overlooked important evidence. However, the judge must accept the jury's verdict if it persists, even if there is no evidentiary basis for that verdict (*R v Hodgkinson* [1954] VLR 140; *Griffiths v R* (1977) 137 CLR 293; *Tajber v R* (1986) 13 FCR 524; *Gammage v R* (1969) 122 CLR 444; *R v Meany* (1862) 169 ER 1368; *R v Tappy & Davis* [1960] VR 137).
14. The law presumes that all jurors assent when the foreperson announces the verdict within their sight and hearing. A juror who dissents from the verdict should speak up and should not allow the foreperson to incorrectly state that the verdict is unanimous. This is an exception to the general principle that all communications from the jury should take place through the foreperson (*R v Challinger* [1989] 2 Qd R 352; *Nanan v The State* [1986] AC 860; *R v Muto & Eastey* [1996] 1 VR 336).
15. The judge has a discretion to take a unanimous verdict on some charges from the jury and direct the jury to continue deliberating on other charges. This may be appropriate if the judge may allow the jury to return a majority verdict. However, if anyone in the courtroom reacts to the delivery of verdict, the judge may need to instruct the jury to disregard those reactions when it resumes deliberations on the remaining charges (*Stevenson v R* [2000] WASCA 222; *HRJ v R* [2011] VSCA 217).
16. If the judge learns of a fatal irregularity in the trial process after taking the verdict, he or she must complete the trial and impose sentence. The judge does not have jurisdiction to discharge the jury or terminate the proceeding once the jury returns its verdict. A party must appeal in order to seek a remedy for the irregularity (*R v Clarke* (2002) 5 VR 480; [2002] VSCA 184).

Unanimous and Majority Verdicts

17. A jury verdict must be unanimous unless the judge exercises the discretion to allow the jury to return a majority verdict (*Juries Act 2000* s 46; *R v Muto & Eastey* [1996] 1 VR 336).
18. A majority verdict is a verdict of:
 - 11 jurors, if there are 12 jurors;
 - 10 jurors, if there are 11 jurors; or
 - 9 jurors, if there are 10 jurors (*Juries Act 2000* s 46).
19. Majority verdicts are not available in prosecutions for the following offences:
 - murder;
 - treason;
 - trafficking a large commercial quantity of a drug of dependence;
 - cultivation of a large commercial quantity of a narcotic plant; and
 - any offence against a law of the Commonwealth (*Juries Act 2000* s 46. See also *Cheatle v R* (1993) 177 CLR 541; [1993] HCA 44).

⁶⁹⁶ This should be modified to state the appropriate majority, if there are less than twelve jurors.

20. While criminal proceedings against a resident of another state involve an exercise of federal judicial power, the proceeding continues to involve an offence against the law of the State, rather than a law of the Commonwealth. For this reason, majority verdicts are available in proceedings against a resident of another State in the same circumstances as if the proceeding were against a resident of the prosecuting State (*Rizeq v WA* [2017] HCA 23).
21. A judge may only allow the jury to return a majority verdict if, after deliberating for a period of time the court thinks is reasonable, having regard to the nature and complexity of the trial, the jury is unable to agree on its verdict or has not reached a unanimous verdict (*Juries Act 2000* s 46(4)).
22. The trial judge is best placed to determine whether the jury has had a reasonable period for deliberation. Appellate courts are reluctant to review this issue (*RJS v R* [2007] NSWCCA 241; *R v McClintock* [2010] 1 Qd R 354; [2009] QCA 175).
23. The judge must ensure that he or she does not put a juror under pressure to join a verdict. A juror must feel free to maintain an honestly held minority opinion and must not compromise his or her position to produce a verdict (*R v Gallagher* [1986] VR 219; *Black v R* (1993) 179 CLR 44; [1993] HCA 71; *R v Challenger* [1989] 2 Qd R 352).
24. While the trial judge should usually invite submissions from counsel on whether to take a majority verdict, failure to do so does not necessarily cause a miscarriage of justice (*R v Muto & Eastey* [1996] 1 VR 336; *R v Ahmet* (2009) 22 VR 203; [2009] VSCA 86).
25. It was not the purpose of s 46 of the *Juries Act 2000* to transform the deliberative process of the jury. It is still expected that the jury will engage in a process of reasoning designed to reach consensus and unanimous agreement, rather than an individual decision making process where the voice of a lone dissenter will be overridden (*Cheatle v R* (1993) 177 CLR 541; [1993] HCA 44; *R v Muto & Eastey* [1996] 1 VR 336; *R v De Mauro* (2001) 3 VR 62; [2001] VSCA 52).
26. The judge may need to explain to the jury that his or her decision to accept a majority verdict on some charges does not imply that he or she will accept a majority verdict on other charges (*R v Appleby* (1996) 88 A Crim R 456).
27. If the jury are unable to reach a unanimous or majority verdict on all charges on the indictment, the judge may take the verdicts the jury did agree upon and discharge the jury from delivering verdicts on the remaining charges. The prosecution may retry the accused on those charges, as the discharge does not give rise to a plea in bar.

Communication with the Jury

28. See 10.6 Communication with the Jury for a detailed discussion of this topic.

Alternative Offences

29. The jury may return a verdict on an available alternative offence that is not on the indictment.
30. See also 3.10 Alternative Verdicts in the Victorian Criminal Charge Book on the judge's power or duty to leave alternative offences to the jury.

Aggravating Factors

31. Some offences prescribe a scale of maximum penalties depending on the existence of certain aggravating or mitigating factors. It is a question of construction whether or not the aggravating or mitigating factors are elements of a separate offences (*Kingswell v R* (1985) 159 CLR 264; [1985] HCA 72; *R v Meaton* (1986) 160 CLR 359; [1986] HCA 27; *R v Satalich* (2001) 3 VR 231; [2001] VSCA 106; *R v Hassett* (1994) 76 A Crim R 19).
32. As a rule of practice, the prosecution must specify any aggravating factors it alleges in the indictment where those factors may lead to a higher maximum penalty for the offence charged (*Kingswell v R* (1985) 159 CLR 264; [1985] HCA 72; *R v Meaton* (1986) 160 CLR 359; [1986] HCA 27).

33. If the parties join issue regarding the existence of an aggravating or mitigating factor, then that is a question of fact for the jury or other tribunal of fact (*Kingswell v R* (1985) 159 CLR 264; [1985] HCA 72; *R v Meaton* (1986) 160 CLR 359; [1986] HCA 27; *Hietanen v R* (1989) 51 SASR 510; *R v Coviello* (1995) 81 A Crim R 293).
34. The judge must direct the jury that it is open for them to find the accused guilty of the charge without the circumstances of aggravation (*R v Meaton* (1986) 160 CLR 359; [1986] HCA 27; *Hietanen v R* (1989) 51 SASR 510).
35. If the jury cannot agree on the aggravated form of the offence, the judge cannot take a verdict on the offence simpliciter and then determine as a sentencing fact whether the aggravating factor exists. Instead, the judge must take the verdict on the offence simpliciter and sentence in accordance with that verdict (see *R v Satalich* (2001) 3 VR 231; [2001] VSCA 106).
36. If the relevant circumstance of aggravation is the commission of a prior offence, then the court should not ask the jury to determine this question until after it has determined the accused's guilt of the offence charged. Once it delivers a verdict on that question, the court may ask the accused whether he or she admits the previous convictions alleged by the prosecution and, if he or she does not, then those convictions must be proven in the usual way (*Kingswell v R* (1985) 159 CLR 264; [1985] HCA 72; *Hietanen v R* (1989) 51 SASR 510). See 18.6 Criminal Record of Accused.

Verdict of Not Guilty Because of Mental Impairment

37. This section briefly discusses procedural aspects of the defence of mental impairment. See Mental Impairment in the Victorian Criminal Charge Book for a discussion of the elements of this defence and relevant jury directions.
38. This discussion focuses on mental impairment in trials in the Supreme Court and County Court. If the matter is heard and determined summarily and the magistrate finds the accused not guilty because of mental impairment, the magistrate must discharge the accused (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s 5*).
39. A trial judge may enter a verdict of not guilty because of mental impairment without empanelling a jury if:
 - the accused is charged with an indictable offence;
 - before the jury is empanelled, the prosecution and the defence agree that the evidence establishes the defence of mental impairment; and
 - the judge is satisfied that the evidence establishes the defence of mental impairment (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s 22*).
40. If the judge is not satisfied that the evidence establishes the defence of mental impairment, he or she must direct that the charge be tried by a jury (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s 22*).
41. The process of the trial judge assessing a defence of mental impairment is available on both trials and special hearings under Part 3 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* following a finding that the accused is not fit to be tried (*DPP v CJC* (2008) 21 VR 581; [2008] VSC 585).
42. The prosecution may withdraw its consent to the trial judge determining the defence of mental impairment before the hearing. The matter will then continue as a trial (*R v Dutton* [2008] VSC 182).
43. The accused may raise the defence of mental impairment at any time during the trial. The prosecution may only raise the defence with the leave of the judge (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s 22*).
44. The consequences of a finding of mental impairment depend on whether the accused was charged with a Commonwealth or a Victorian offence.
45. If the accused was found not guilty because of mental impairment of a Victorian offence, the court must either:

- declare that the accused is liable to supervision under Part 5 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*; or
 - order that the accused be released unconditionally (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 s 23*).
46. See 12.7.1.6 Supervision Orders for details on how these orders operate.
47. If the accused is found not guilty because of mental impairment of a Commonwealth offence, the court must order that he or she be detained in a prison or a hospital for a specified period that does not exceed the maximum period of imprisonment available for the offence charged (*Crimes Act 1914* (Cth) s 20BJ).
48. The court must make a detention order unless it is satisfied that it is more appropriate to order the accused's release from custody conditionally or unconditionally for a specified period that does not exceed 3 years. The available conditions include:
- that the accused remain in the care of a responsible person nominated in the order; and
 - that the accused attend upon a person nominated in the order or at a place specified in the order for assessment and, where appropriate, treatment (*Crimes Act 1914* (Cth) s 20BJ).
49. The accused or the DPP may apply at any time for variation of the conditions specified in the order (*Crimes Act 1914* (Cth) s 20BJ).
50. As soon as practicable after the person is detained in a prison or a hospital, the Commonwealth Attorney-General must consider whether the accused should be released. The Attorney-General must reconsider this matter at least once every 6 months while the accused is detained. In determining whether to order the accused's release, the Attorney-General:
- must obtain and consider the report of a duly qualified psychiatrist or psychologist and another medical practitioner;
 - may obtain and consider any other reports the Attorney-General considers necessary; and
 - must take into account any representations to the Attorney-General by the accused or on the accused's behalf (*Crimes Act 1914* (Cth) s 20BK).
51. The Attorney-General may order the release of the accused following a review if he or she is satisfied that the accused is not a danger to him or herself or to the community. The release order lasts for a fixed period of time, may be subject to conditions and may be later revoked by the Attorney-General (*Crimes Act 1914* (Cth) ss 20BL, 20BM).

Clearing the Indictment

52. As a rule of practice, the jury must return a verdict on all charges on indictment. This is called "clearing the indictment" (*R v Higgins*, Unreported, CCA Vic, 2 March 1994; *DPP v Collins* (2004) 10 VR 1; [2004] VSCA 179).⁶⁹⁷
53. This is a rule of practice that must not prevent a court doing justice in a particular case. The court may discharge the jury without taking a verdict on one or more charges when it is in the interests of justice to do so. This may occur when a verdict of conviction on one charge would give rise to a plea of "previous conviction" to another charge, if the accused were tried on a separate indictment (*R v Weeding* [1959] VR 298; *R v Sessions* [1998] 2 VR 304; *Reardon v Baker* [1987] VR 887).

⁶⁹⁷ If the accused offered to plead guilty to a lesser alternative offence, and the prosecution did not accept this plea, the jury must consider the offence charged on the indictment. If the jury acquit the accused of that offence, they will then need to consider the lesser alternative offence. It is not for the trial judge to enter a verdict of guilty to the lesser alternative offence if the jury acquits the accused of the offence charged on the indictment. See 12.3 Plea of Guilty to Alternatives and *DPP v Collins* (2004) 10 VR 1; [2004] VSCA 179.

54. The judge should take verdicts on legal or factual alternative charges in descending order of gravity and should discharge the jury from returning a verdict on the remaining alternative charges once it returns a verdict of guilty (*R v Sessions* [1998] 2 VR 304; *R v Weeding* [1959] VR 298; *R v RHMdL* [1999] 1 VR 746; [1998] VSCA 61; *R v Burr*, Unreported, CCA Vic, 6 April 1989; *Stanton v R* [2003] HCA 29).
55. Each verdict of the jury must be unanimous, unless the judge permits the jury to return a majority verdict. This includes a verdict of not guilty. Therefore, the jury can only return a verdict on a lesser alternative offence if it unanimously agrees that the accused is not guilty of the more serious offence and the judge must discharge the jury if it cannot reach a verdict on the more serious offence (*R v McCready* [1967] VR 325; *Stanton v R* [2003] HCA 29).
56. Where the alternative charges are of equal gravity or are inconsistent (e.g. theft and receiving stolen goods), the judge should take the verdict on the charge first appearing on the indictment and discharge the jury from delivering a verdict on the alternative charges if it returns a verdict of guilty (see *Ryman v R*, Unreported, SA CCA, 3 October 1991).
57. Failure to take a verdict on some charges on an indictment does not affect any otherwise valid verdicts (*R v Weeding* [1959] VR 298; *R v Higgins*, Unreported, CCA Vic, 2 March 1994).

Changing Verdicts

58. Where the foreperson delivers the jury's verdict in the sight and hearing of all other members of the jury, without any protest from other jurors, it is presumed that the jurors agree with the verdict (*NH, Jakaj, Zefi and Stakaj v DPP* [2016] HCA 33 at [20]).
59. However, a judge has a discretion to allow the jury to alter a verdict it has delivered if that is appropriate in the circumstances of the case. A jury is not functus officio the moment it delivers a verdict and it may correct an error or misunderstanding that arises in the process of returning a verdict (*R v Ciantar* (2006) 16 VR 26; [2006] VSCA 263; *Biggs v DPP* (1997) 92 A Crim R 127).
60. It may be appropriate to allow the jury to change its verdict when it indicates it has returned a verdict in error. The judge should consider:
- the time between the original verdict and the request to change the verdict;
 - the likely reason for the initial mistake;
 - whether the jury has dispersed or whether it is possible to reconvene the jury;
 - whether there is a risk that any outside influence has affected the jury between the return of the original verdict and the application to change the verdict;
 - the need to ensure that justice is done for both the prosecution and the defence (*R v Andrews* (1985) 82 Cr App R 148).
61. The purpose of the power to change a verdict is to correct an error in the process of conveying the verdict to the court. It is not to allow the jury to change its decision (*R v Loumoli* [1995] 2 NZLR 656; *Coy v Tasmania* [2004] TASSC 151).
62. Discharge of the jury or the accused does not preclude reconsideration of the verdict and there is no strict point at which a judge cannot recall the jury. The judge must draw a distinction between the time when the jury is functus officio due to being discharged by the judge and the moment when the court is functus officio, by entering the verdict into the records of the court. While the jury cannot change its verdict after it is functus officio, the court can receive evidence that the verdict was communicated in error and may act to correct its records (*R v Cefia* (1979) 21 SASR 171; *Tasmania v Coy* [2004] TASSC 151; c.f. *Re Donovan's Application* [1957] VR 333).
63. Without directly questioning the correctness of these earlier decisions, the High Court recently held that:
- There is a distinction to be drawn between a correction of the verdict by jurors acting collectively as the jury before they are discharged and a correction made by the trial judge on the basis of a request or evidence from members of the jury after they have

been discharged and have dispersed beyond the control of the court. The distinction is of importance. Before discharge the jurors are still a part of the court exercising jurisdiction in the case. After discharge they are no longer part of the court and unless recalled by the trial judge, following rescission of the discharge order, no longer act as a collective decision-making body. Any correction to the verdict taken by the trial judge without recalling the jury but acting on information supplied by the jurors can only be supported, absent any statutory authority, as the exercise of an inherent power. Whether or not the jury are recalled, the post-discharge power of the court to correct the verdict is narrowly confined (*NH, Jakaj, Zefi and Stakaj v DPP* [2016] HCA 33 at [22]).

64. Ideally, a judge should take the revised verdict as soon as possible and should not allow time for further deliberation. A judge may even take a verdict on a contingent basis and reserve his or her ruling on whether to accept the revised verdict (*R v Ciantar* (2006) 16 VR 26; [2006] VSCA 263). Alternatively, the court may vacate the earlier verdict and may then consider whether to accept the revised verdict or to order a new trial (*R v Cefia* (1979) 21 SASR 171).
65. Once the court has 'perfected' the verdict, such as by sentencing the accused, then the power to change the verdict as an exercise of the court's inherent power to change an order will be very limited (*NH, Jakaj, Zefi and Stakaj v DPP* [2016] HCA 33 at [71]).

Last updated: 27 May 2022

19 Post Verdict

19.1 Judgment

1. When the jury returns a verdict of guilty or not guilty, the court gives effect to that verdict by entering a judgment of conviction or acquittal respectively (see *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Snow* (1915) 20 CLR 315; *R v Celep* [1998] 4 VR 811).
2. In practice, the judge rarely announces a formal judgment of acquittal.
3. No question generally arises of a court refusing to accept a jury's verdict. In extremely rare cases, a judge may direct the jury to reconsider its verdict. This may be appropriate if the judge believes that the jury has overlooked important evidence in the case. However, the judge must accept the jury's verdict if it persists with its original verdict, even if there is no evidentiary basis for that verdict (*R v Hodgkinson* [1954] VLR 140; *Griffiths v R* (1977) 137 CLR 293; *Tajber v R* (1986) 13 FCR 524; *Gammage v R* (1969) 122 CLR 444; *R v Meany* (1862) 169 ER 1368; *R v Tappy & Davis* [1960] VR 137).
4. A court may expressly or impliedly accept a plea or verdict of guilty by taking further steps in the proceedings. There will generally be no difference between *adjourning* the matter for plea and sentence or *remanding* the accused on bail for plea and sentence (*DPP v Nguyen & Duncan* (2009) 23 VR 66; [2009] VSCA 147; *DPP v McCoid* [1988] VR 982).
5. Remanding the accused for sentencing may be an implicit acceptance of the plea, though this is not true in all cases (*R v Tonks & Goss* [1963] VR 121; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Celep* [1998] 4 VR 811; *DPP v McCoid* [1988] VR 982; c.f. *Rizzo v DPP* [2009] VSC 101).
6. In some cases, a court will need to distinguish between a "conviction" for the purpose of statutory provisions that depend on a conviction and formally recording a judgment of conviction. This distinction will depend on the context and the relevant legislation. A conviction will take place when the court unequivocally accepts the plea or verdict (*R v Celep* [1998] 4 VR 811; *R v De Marchi* [1983] 1 VR 619. See also *Rizzo v DPP* [2009] VSC 101 and *R v Tonks & Goss* [1963] VR 121).

19.2 Discharge of Accused

1. Once a judgment of acquittal is entered, the accused is entitled to be discharged from custody provided he or she is not lawfully detained on any other outstanding sentences or charges (*Mee v Cruikshank* (1902) 20 Cox CC 210).

Last updated: 22 June 2010

19.3 Allocutus and recording a finding of guilt

1. Section 253A of the CPA 2009 states:

The common law procedure of administering the allocutus is abolished.

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.⁶⁹⁸

2. Historically, the allocutus consisted of three parts. First, the judge's associate listed the offences the accused would be sentenced for and recited the admissions of any previous convictions.⁶⁹⁹ Secondly, the associate asked for the accused's name, age, date of birth, occupation and address. Thirdly, the associates asked the accused:
Have you anything to say, or do you know of any reason why this honourable court should not pass sentence upon you according to law?
3. Unless a relevant matter was raised in response to the allocutus, the judge began the sentencing process (*R v Shillingsworth* [1985] 1 Qd R 537; *DPP v Ferguson* [2004] VSC 261).
4. The original purpose of the allocutus was to allow an accused charged with treason or a felony to move in arrest of judgment on a point of law or to plead the benefit of clergy. It was an invitation to make a submission that there should be no sentence, rather than an invitation to make a plea in mitigation of sentence (*R v Gilbert* [2008] QCA 178; *Rizzo v DPP* [2009] VSC 101).
5. More recently, the allocutus was considered a means for the court to formally and unequivocally accept the plea or verdict of guilty. This did not depend on the subjective knowledge or intention of the judge (*DPP v Nguyen & Duncan* (2009) 23 VR 66; [2009] VSCA 147; *DPP v Ferguson* [2004] VSC 261. See also *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46; *R v Tonks & Goss* [1963] VR 121; *Rizzo v DPP* [2009] VSC 101; *R v SBJ* [2009] QCA 100; *Tihanyi v R* (1999) 21 WAR 377; [1999] WASCA 226).⁷⁰⁰
6. That function has now largely been replaced by s 253B of the CPA 2009, which states:

⁶⁹⁸ Section 253A was introduced by s 62 of the *Justice Legislation Amendment Act 2010*, which commenced on 26 June 2010.

⁶⁹⁹ See 19.6 Criminal Record of Accused.

⁷⁰⁰ The allocutus did not always indicate that the court accepted the plea or verdict and had entered a judgment of conviction. In some cases, conviction did not occur until sentencing (see *Rizzo v DPP* [2009] VSC 101).

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 (see also *Wilson v R* [2015] VSCA 211).

7. Two situations in which a judge might set aside the plea include where the judge allows the accused to withdraw a plea, or where the judge considers that, as a matter of law, the accused cannot plead guilty to the offence charge (see 12.2 Plea of Guilty and Plead Decisions in 15.4 Proceedings That Would Bring the Administration of Justice into Disrepute).

Last updated: 3 March 2016

19.4 Costs

1. Part 8.4 of the *CPA 2009* contains provisions governing the power of a court to order costs in the following proceedings:
 - Summary and committal proceedings;
 - Trials on indictment;
 - Appeals.
2. A court must not make a costs order against any person without giving that person a reasonable opportunity to be heard, unless the court is making orders in summary proceedings that are heard and determined in the accused's absence (*CPA 2009* s 400).
3. The court may also make a costs order against a legal practitioner (*CPA 2009* s 410).

Last updated: 22 June 2010

19.4.1 Costs in Summary and Committal Proceedings

1. The Magistrates' Court has an unfettered discretion to make costs orders in criminal proceedings. Section 401 of the *CPA 2009* states:

(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 358 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.

2. These provisions give the Magistrates' Court a broad power to award costs. The High Court has emphasised that appellate courts may provide guidance and assistance on how magistrates may exercise this discretion, but must not lay down inflexible rules. Previous cases may assist magistrates to identify relevant factors, but must not be treated as creating rigid categories of exceptions (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59; *Nguyen v Hoekstra* (1998) 99 A Crim R 497; *Redl v Toppin*, Unreported, VSC FC, 1 April 1993).
3. Section 14(3) of the CPA 2009 allows the Magistrates' Court to strike out a charge if a police officer or public official issued a summons and failed to file the charge-sheet and summons within 7 days of signing the charge-sheet. If this occurs, the court may award costs against the informant.
4. Section 402 of the Act limits the costs available when a notice to appear lapses:
 - (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.
5. The Act also states that the court must order an offender to pay by way of costs the amount of the filing fee if he or she is convicted and fined, and the informant was not required to pay the filing fee due to an exemption (CPA 2009 s 403).

Discretion to Order Costs

6. While it was once thought that magistrates should not exercise the power to order costs in favour of a successful accused, a majority of the High Court in *Latoudis v Casey* rejected that approach and held:

In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just

and reasonable to refuse an order for costs or to make a qualified order for costs (*Latoudis v Casey* (1990) 170 CLR 534 per Mason CJ at 542. See also Toohey J at 565 and McHugh J at 569)

7. In deciding that a successful accused is generally entitled to his or costs, the High Court also stated that there is no general rule that costs follow the event and that a party does not have a right to costs in the absence of an order of the court. A party must apply for a costs order (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59).
8. Mason CJ rejected comparisons with civil proceedings and noted that the absence of pleadings, the different onus of proof, the limited ability of an accused to compromise a proceeding and the serious consequences of a criminal conviction may provide a basis for refusing to order costs in favour of a successful informant (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59).
9. The majority judges also stated that the following factors are irrelevant when deciding whether to refuse costs to a successful accused:
 - whether the proceedings were brought in a public or private capacity;
 - whether the accused received support from legal aid; and
 - whether the informant had reasonable grounds for commencing the proceeding, such as whether the accused acted in a suspicious manner (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59)
10. The discretion to order costs is a broad one, and must be exercised judicially. A magistrate must give adequate reasons, so the parties are not left in the dark about why the court exercised the costs discretion in the way it did. The reasons must also reveal how the parties submissions have been taken into account and what factors the magistrate considered relevant in exercising their discretion (*Sobh v Children's Court of Victoria* (1994) 74 A Crim R 453; *CDC Clinics Pty Ltd v Coleman* [2022] VSC 464; *Mansbridge v Nichols* [2004] VSC 530).
11. The Magistrates' Court should usually order costs in favour of a successful accused if it is just and reasonable to do so. The court must be satisfied that the circumstance are out of the ordinary before refusing to grant costs to a successful accused (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59; *Junek v Busuttil* [2004] VSC 115; *Alexander v Renedy*, Unreported, VSC, 21 August 1995; *NG v IP* [2009] VSC 199).
12. Mason CJ in *Latoudis v Casey* also identified certain situations where an order for costs should not be made in favour of a successful accused:

... [T]here will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor.

... [I]f a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs (*Latoudis v Casey* (1990) 170 CLR 534 at 544 per Mason CJ).
13. An award of costs is an indemnity for a successful party. It is not intended to punish the unsuccessful party, or to censure its conduct in the proceeding (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59; *Anstee v Jennings* [1935] VLR 144).
14. An offer by the prosecution to discontinue a proceeding if the accused agrees to bear his or her own costs is not improper and does not necessarily demonstrate that the prosecution should not have been brought or was bound to fail (*Norton v Morphet* (1995) 83 A Crim R 90).

15. Merely exercising the right to silence is not enough to justify a court refusing a costs order. Courts have drawn a distinction between cases where the prosecution failed to adduce sufficient evidence and where the accused was acquitted due to exculpatory evidence he or she called after exercising the right to silence. In the former category, there may not be any proven causal link between the exercise of the right to silence and the continuation of the proceedings. In the latter category, the accused's evidence is critical in securing the acquittal and the court may hold that the accused brought the proceedings on him or herself by failing to disclose the evidence at an earlier time (*Larrain v Clark*, Unreported, VSC, 13 July 1995; *Junek v Busuttil* [2004] VSC 115; *Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59; *NG v IP* [2009] VSC 199).
16. Despite these general principles, the court must consider the circumstances of the case. A successful accused should not be deprived of his or her costs if he or she reasonably believed that the proceeding would have continued even if he or she revealed the exculpatory evidence. In some cases, it may appear that prosecuting agencies would never accept the accused's version of events and that waiving the right to silence would only give the prosecution a greater opportunity to rebut the defence at the hearing (see *Redl v Toppin*, Unreported, VSC FC, 1 April 1993 per Eames J; *NG v IP* [2009] VSC 199).
17. In each case, the critical question will be whether the failure of the accused to provide the information to prosecuting authorities *caused* the prosecution to bring or continue the proceedings (*Kymar Nominees v Sinclair* [2006] VSC 488; *Jandreoski v Colley* [2004] VSC 131).
18. An accused may be denied costs when his or her conduct unreasonably frustrated the ability of the relevant agency to investigate the offence (compare *Larrain v Clark*, Unreported, VSC, 13 July 1995 and *Nguyen v Hoekstra* (1998) 99 A Crim R 497).
19. The court may also withhold an award of costs when the accused unsuccessfully raises additional issues in the proceeding, such as contesting the jurisdiction of the court or attacking the credibility of witnesses (*Costa v Parks* [2008] VSC 47. See also *CPA 2009 s 401(2)*).
20. While the reasonableness of the prosecution is an irrelevant consideration, a court may, in exceptional circumstances, have some regard to the conduct of the accused that led to the charges. This may be appropriate when it is clear that the accused engaged in reprehensible conduct, but it was uncertain whether the conduct was criminal. This will depend on a close analysis of the facts of each case and merely anti-social conduct will not justify a court refusing to order costs (see *Jandreoski v Colley* [2004] VSC 131; *Redl v Toppin*, Unreported, VSC FC, 1 April 1993).
21. Similarly, it is not appropriate to refuse costs on the basis that the magistrate believes the accused is probably guilty. Failure of the accused to prove his or her innocence is not a valid basis for refusing to make an award of costs (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59; *Kymar Nominees v Sinclair* [2006] VSC 488; *Junek v Busuttil* [2004] VSC 115; *Costa v Parks* [2008] VSC 47). Similarly, it is not appropriate to refuse a defendant's application for costs on the basis that the prosecution proved some, but not all, of the elements of the offences charged (*CDC Clinics Pty Ltd v Coleman* [2022] VSC 464, [45]–[47]).
22. Most published decisions on costs in summary and committal proceedings consider the case of a "wholly successful" accused. Where the accused is convicted on some charges, the general rule that a successful accused should receive his or her costs does not apply. Practices between magistrates in these cases vary (*Hung Phi Do v Bowers*, Unreported, VSC, 10 October 1996. See also *Costa v Parks* [2008] VSC 47; *Saleeba v Beck* (1991) 54 A Crim R 114).
23. In exercising the costs discretion in a proceeding where the prosecution only proved some of the charges, the court may make an order that reflects the parties relative success and failure. This might involve ordering that costs be taxed to determine the amounts spent on different issues, or it might involve offsetting costs on a global basis. In other cases, the interests of justice might support making no costs order, due to the mixed result, so that each party bears its own costs (see *Do v Bowers*, Unreported, VSC, 10 October 1996; *Agar v McCabe (No 2)* [2014] VSC 333).

24. In Victoria, costs are frequently awarded against unsuccessful accuseds. These costs often include court fees and witness fees.⁷⁰¹ Professional costs are not included, as police prosecutors usually conduct summary prosecutions (*Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59).
25. A magistrate who intends to award costs against an informant who is a member of the police force must make the order against the Chief Commissioner of Police (CPA 2009 s 401).⁷⁰²

Quantum of Costs

26. Section 401 of the CPA 2009 gives magistrates a wide discretion over both:
- the decision whether or not to award costs; and
 - the quantum of any costs awarded.
27. While the magistrates' discretion on quantum of costs is at large, the magistrate will usually tax costs on a basis that corresponds to "party and party costs" in civil proceedings and will only allow costs that were reasonably incurred and of reasonable amount. In deciding this issue, the magistrate may consider the seriousness of the alleged offences and the complexity of the issues (*Norton v Morphett* (1995) 83 A Crim R 90; *Lovejoy v Johnson*, Unreported, VSC, 20 October 1997; *Sobh v Children's Court of Victoria* (1994) 74 A Crim R 453. See also *Peel v London and North Western Railway Co* [1907] 1 Ch 607).
28. Despite statements in *Latoudis v Casey* that costs are an "indemnity", the High Court did not set down a principle that costs in summary and committal proceedings should be taxed on the "indemnity basis" sometimes used in civil proceedings (*Norton v Morphett* (1995) 83 A Crim R 90; *Lovejoy v Johnson*, Unreported, VSC, 20 October 1997).
29. When fixing the costs of an adjournment, it is not appropriate to use the rates fixed for police officers attending as witnesses in civil proceedings. Police officers attend criminal proceedings as part of their employment and do not incur any additional expenses due to an adjournment (*Fitzgerald v Golden*, Unreported, VSC, 5 December 1995).
30. The magistrate must provide sufficient reasons to allow a party to understand his or her decision on taxation of costs. The reasons must allow a party to detect any error in the exercise of the discretion. If the magistrate conducts an itemised taxation of the costs, he or she must indicate which items he or she disallows and the basis for that decision. A magistrate may also assess the costs globally, provided he or she gives sufficient reasons that address the matters raised by the parties (*Mansbridge v Nichols* [2004] VSC 530; *Sobh v Children's Court of Victoria* (1994) 74 A Crim R 453).

Last updated: 1 January 2023

19.4.2 Costs in Trials on Indictment

1. The established practice is that the Crown neither gives nor receives costs. This practice continues to apply in trials on indictment, subject to limited statutory modifications (see *Attorney-General (Qld) v Holland* (1912) 15 CLR 46; [1912] HCA 26).

⁷⁰¹ In relation to court fees, see also CPA 2009 s 403.

⁷⁰² Historically, the executive indemnified police officers who were subject to adverse costs orders. The precursor to section 401 was introduced in 1994 in response to police concerns about individual liability for costs orders (Victoria Parliamentary Debates, Legislative Assembly, 28 April 1994, 1306). Such legislation was also suggested by Brennan J in *Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59.

2. At common law, a court does not have any inherent or implied jurisdiction to make an order for costs in the proceedings. Costs orders may only be made under a statutory power. While s 24 of the *Supreme Court Act 1986* provides a general power to order costs in proceedings, the exercise of this power is subject to s 24(2), which provides that the section does not alter the practice in any criminal proceeding. The result for the purpose of the Supreme Court is that jurisdiction to order costs is granted by s 24(1), but its exercise is limited by s 24(2) such that costs should generally not be ordered in trials on indictment (*Wright v Keon-Cohen* (1992) 77 A Crim R 67; *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171; *DPP v Leach* (2012) 34 VR 224; [2012] VSC 96 at [37]–[41]).
3. However, the operation of the general rule that the Crown neither gives nor receives costs is not absolute in relation to interlocutory proceedings.
4. For example, the Supreme Court may make a costs order in favour of a defendant where there is a successful application for a stay of proceedings on the basis of abuse of process (*CDPP v Brady & Ors (costs)* (2019) 58 VR 628, [60]–[63]; *DPP v Pyliotis (costs ruling)* [2021] VSC 306, [16]), or where there is judicial review of a decision of the County Court (*Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171).
5. The position in relation to the County Court is less clear. Section 78A(1) of the *County Court Act 1958* is in similar, though not identical language to *Supreme Court Act 1986* s 24(1). However, there is a no equivalent to *Supreme Court Act 1986* s 24(2), which preserves the practice in criminal proceedings. In *Wright v Keon-Cohen*, Brooking JA considered it unlikely that the County Court was intended to have a broader power to award costs than the Supreme Court, while in *Perkins v County Court of Victoria*, Phillips JA observed that *County Court Act 1958* s 78A needed to be construed with particular care, because of the lack of a savings provision like *Supreme Court Act 1986* s 24(2) (*Wright v Keon-Cohen* (1992) 77 A Crim R 67, 73; *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171, footnote 26).
6. Section 404 of the *CPA 2009* gives the Supreme Court and County Court jurisdiction to order costs in trials on indictment in the following circumstances:

(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 Act 2004*), the law practice.

(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.

7. Costs should only be ordered when there is clear non-compliance with Part 5.5 of the CPA 2009 (*R v Azad* [2007] VSC 149).
8. Section 404 can only be exercised if the trial commenced within the meaning of s 210 of the CPA 2009 (*DPP v Leach* (2012) 34 VR 224; [2012] VSC 96).
9. Section 405 states that, when making a costs order, the court must specify that the costs be paid to either the other party or into the court:

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.

Last updated: 30 August 2021

19.4.3 Costs on Appeal

1. Division 4 of Part 8.4 specifies how a court may make costs orders in relation to different appeals under the Act. These are dealt with in the sections below.

Appeal to the County Court

2. Sections 406 and 407 of the *CPA 2009* expressly provide for costs orders on appeals from the Magistrates' Court to the County Court when the appeal is struck out, dismissed or abandoned:

406 Costs on appeal to County Court

(1) If—

(a) an appeal under section 254 is struck out or dismissed; and

(b) the County Court is satisfied that the appeal was brought vexatiously or frivolously or in abuse of process—

the County 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 by any other provision of this Act or the *County Court Act 1958*.

(3) If the County Court 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 County Court has no jurisdiction to hear and determine the appeal—

the County Court may order that the appellant pay to the respondent any costs that it thinks reasonable.

(4) If an appellant under section 254—

(a) breaches an undertaking referred to in section 255(5); or

(b) abandons an appeal—

the County 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

(1) Within 28 days after receiving a copy of the order striking out an appeal, the respondent may apply to the County Court for an order dealing with the respondent's costs of the appeal.

(2) If a respondent proposes to apply to the County Court under subsection (1), the respondent must first serve notice in writing of the proposed application on the appellant.

Note

See section 394 for ordinary service.

(3) On an application under subsection (1), the County Court may make any order that it considers just.

3. The position in relation to successful appeals is less clear. On an appeal by an offender under s 254 of the CPA 2009 or by the DPP under s 257, the County Court must set aside the sentence of the Magistrates' Court and may impose any sentence which the County Court considers appropriate and which the Magistrates' Court imposed could have imposed. The County Court may also exercise any power that the Magistrates' Court exercised or could have exercised. This extends to making orders in relation to costs against the informant (see *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171).
4. In contrast, when the DPP appeals under s 260 due to the offender's failure to fulfil an undertaking, the County Court must set aside the sentence imposed and may impose the sentence that it considers appropriate, having regard to the offender's failure to fulfil an undertaking. There is no express power to award costs or make any other order the Magistrates' Court could have made (see *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171 and compare CPA 2009 ss 256, 259 and 262).

Appeal to the Supreme Court

5. The Supreme Court has full power to make orders for the costs of or incidental to an appeal from the Magistrates' Court on a question of law. The court may determine who and to what extent the costs are to be paid (CPA 2009 s 408).
6. In exercising this power, the court is guided by the same principles that apply when determining costs in the civil jurisdictions. This includes the usual rule that costs follow the event, and that the Supreme Court may apportion costs based on the issues in the case, the time occupied and any other relevant matters (*Kartawidjaja v Rowe* [2016] VSC 234, [6]–[7]).

Appeal to the Court of Appeal

7. Section 409 of the CPA 2009 is entitled "No costs on appeal to Court of Appeal or on new trial" and succinctly states:

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.
8. Part 6.3 of the CPA 2009 contains provisions for the following types of appeals:
 - Appeal against conviction by the offender;
 - Appeal against sentence by the offender or the DPP;
 - Interlocutory appeals; and
 - Case stated.
9. Parties to appeals under Part 6.3 may be entitled to seek an indemnity certificate under the *Appeal Costs Act 1998*. See 19.4.6 Appeal Costs Act.
10. A court cannot order costs in favour of a party in relation to a dispute about production of documents in connection with an appeal (such as a claim of public interest immunity), as the determination of that dispute is a proceeding incidental to the appeal and so covered by the prohibition in s 409(c) (*Madafferi v The Queen* [No 2] [2021] VSCA 4, [11]–[12]; *Zirilli v The Queen* [2021] VSCA 5, [20]–[23]).

11. Section 409 only prohibits costs orders in favour of a party. A court may make costs orders in favour of amicus curiae in an exceptional case. This depends on the nature of the case and the involvement and contribute of the amici. In *Madafferi v The Queen [No 2]* [2021] VSCA 4, [20], the Court of Appeal summarised the following matters as relevant to whether a case is relevantly exceptional:
 - (a) whether the amici curiae were appointed by, or appeared at the request of, the Court, as opposed to having successfully sought leave to appear;
 - (b) whether the proceeding depended on the participation of amici curiae, for instance because the amici curiae played the role of, or obviated the need for, a contradictor, including where a party is unwilling or unable to participate in the proceeding;
 - (c) whether the submissions of the amici curiae were of particular or significant assistance to the Court;
 - (d) whether the submissions of the amici curiae assisted in resolving issues of wider legal importance, transcending the interests of the parties to the proceeding;
 - (e) whether the amici curiae were independent counsel appointed to assist the Court and the administration of justice, or an interested non-party, such as a statutory body or officer of the Crown; and
 - (f) the outcome of the proceeding, although it is not a bar to a costs order in favour of amici curiae that their arguments were unsuccessful (see also *Zirilli v The Queen [No 2]* [2021] VSCA 5).
12. While a case stated is not an “appeal” and so the prohibition on ordering costs under section 409 does not apply, it is unlikely that a court would make an order for costs in a case stated proceeding. A case stated is an interlocutory criminal proceeding and there is a strong argument that the practice of not ordering costs in relation to interlocutory criminal proceedings also applies to a case stated (*R v Payara* (2012) 36 VR 326; [2012] VSCA 266).
13. After an appeal from the Magistrates’ Court to the Supreme Court on a question of law, a party may appeal with leave to the Court of Appeal (*Supreme Court Act 1986* s 17A(3A)(b)). Section 409 of the CPA 2009 does not regulate costs on such an appeal. Instead, costs will generally follow the event and the fact that the case may have raised a matter of public importance will not necessarily justify a different decision on costs (see *Yanner v Eaton (No 2)* [1999] HCA 69; *Walford v McKinney* [1997] 2 VR 353; *DPP v Greelish (No 2)* (2002) 5 VR 349; [2002] VSCA 68).
14. Section 409 applies to an appeal against a criminal contempt, even if the proceedings are brought by a private party, but does not apply to appeals in relation to a civil contempt. The Court of Appeal has noted that this is capable of producing absurd results, as costs become unavailable in relation to the more serious forms of contempt (*CFMEU v Grocon Constructions (Victoria) Pty Ltd* [2014] VSCA 298).

Costs Orders Against An Inferior Court

15. It is only in exceptional cases that a court will make a costs order directly against an inferior court. This may be appropriate if:
 - the inferior court attended proceedings and unsuccessfully attempted to defend its earlier decision, rather than indicating it would abide by the decision of the superior court; or
 - the conduct of the inferior court constituted serious misconduct that justifies an award of costs against it, such as corruption, gross ignorance or perverse conduct (*Magistrates’ Court at Heidelberg v Robinson* (2000) 2 VR 233; [2000] VSCA 198).
16. Serious misconduct justifying an award of costs is very rarely established. It requires something more than an error of law or even “an astounding blunder” concerning the relevant substantive law. The approach of the superior court should be benign. A court will only order costs against an inferior court for serious misconduct, where the impugned conduct was perverse or disregarded elementary principles that every court must obey (*Magistrates’ Court at Heidelberg v Robinson* (2000) 2 VR 233; [2000] VSCA 198; *R v Liverpool Justices; Ex parte Roberts* [1960] 1 WLR 585; *Ex parte Cox* (1896) 12 WN (NSW) 172; *Travis v Rando* [2022] VSC 782).

19.4.4 Costs in Applications for Prerogative Relief

1. Applications for judicial review or orders in the nature of certiorari arising out of criminal proceedings are properly characterised as criminal proceedings due to the nature of the underlying proceeding (*Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171).
2. While s 24(2) of the *Supreme Court Act* 1986 preserves the existing practice in criminal proceedings that the Crown neither gives nor receives costs, this practice does not extend to applications for judicial review. The Supreme Court routinely orders costs in proceedings for prerogative relief. The practice that the Crown neither gives nor receives costs also does not apply to judicial review proceedings arising out of a charge in the Magistrates' Court, as the defendant is the informant, rather than the Crown (see *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171 and cases discussed therein. See also *DPP v Hore* (No 2) [2005] VSCA 55).

Last updated: 22 June 2010

19.4.5 Costs Order Against a Practitioner

1. Section 410 of the *CPA* 2009 allows a court to make costs orders against a legal practitioner for a party if the practitioner causes costs to be improperly incurred or wasted. The section states:

(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.

2. The power to award costs in a proceeding in the County Court or Supreme Court only relates to costs improperly incurred *before* the commencement of the trial.⁷⁰³ It does not cover conduct that results in costs *during* the trial. The power to award costs on a proceeding in the Magistrates' Court is not so limited and includes conduct during the hearing (compare ss 410(1)(a) and (b)).

3. This section reproduces the right to order costs against a legal practitioner in civil proceedings under r 63.23 of the *Supreme Court (General Civil Proceedings) Rules 2005*. It allows the court to order a legal practitioner to pay the costs payable by any other party. This is not limited to other parties named on the charge-sheet or indictment and includes third parties who have incurred costs in relation to the proceeding (such as costs associated with setting aside a subpoena) (*Victoria Legal Aid v County Court of Victoria & Anor* (2004) 9 VR 686; [2004] VSCA 113).

⁷⁰³ A trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel (or first part of the jury panel) that the trial jury is selected from (CPA 2009 ss 210, 217).

4. For the purposes of s 410 of the CPA 2009, a practitioner is in default if he or she failed to do that which he or she ought to have done. It is not necessary to show that the practitioner's conduct was grossly negligent (*Victoria Legal Aid v County Court of Victoria & Anor* (2004) 9 VR 686; [2004] VSCA 113; c.f. *Etna v Arif* [1999] 2 VR 353; [1999] VSCA 99).

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19.4.6 *Appeal Costs Act*

1. The *Appeal Costs Act 1998* gives a court the power to issue a certificate on the application of the accused for costs incurred in the following circumstances:
 - Successful appeal against conviction;
 - Crown or DPP appeal against sentence;
 - Successful interlocutory appeal by accused;
 - Interlocutory appeal by prosecution;
 - Case stated proceeding;
 - Discontinuance of criminal proceedings;
 - Adjournment of criminal proceedings.
2. The grant or refusal of an indemnity certificate is an exercise of discretion by the court and no party has a right of appeal against that decision (*Appeal Costs Act 1998* s 37).
3. The grant of a certificate under the Act only gives a party the right to apply to the Appeal Costs Board for payment of costs. The final decision whether to make the payment lies with the Appeal Costs Board, which must determine whether the payment is authorised by the provisions of the Act (*Appeal Costs Act 1998* s 35; *Van Phuc Diep v Appeal Costs Board* [2003] VSC 386).
4. As state legislation, the *Appeal Costs Act 1998* does not apply to courts exercising federal jurisdiction. In particular, the respondent to an appeal by the Commonwealth DPP cannot apply for an indemnity certificate under s 15 of the Act (*DPP (Cth) v Hunter & Milner* (2003) 7 VR 119; [2003] VSCA 219; *Solomons v District Court of New South Wales* (2002) 211 CLR 119; [2002] HCA 47).
5. The *Federal Proceedings (Costs) Act 1981* applies to proceedings in federal courts, the Administrative Appeals Tribunal and courts in a territory other than the Northern Territory or Norfolk Island. It does not apply to proceedings in State courts exercising federal jurisdiction (see *Federal Proceedings (Costs) Act 1981* s 3).
6. A third party in a criminal proceeding cannot receive a certificate under the *Appeal Costs Act 1998*. Orders regarding third party costs may only be made under the general costs power of the court, or under Part 8.4 of the CPA 2009 (*Victoria Legal Aid v County Court of Victoria & Anor* (2004) 9 VR 686; [2004] VSCA 113).
7. Section 18 of the *Appeal Costs Act 1998* declares that the following types of proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* are treated as criminal proceedings, for the purpose of Part 3 of the *Appeal Costs Act 1998*:
 - Appeals to the Court of Appeal against a finding under s 17(1)(c);
 - Appeals to the Court of Appeal under ss 14A or 24AA;
 - Investigations under Part 2 into the accused's fitness to stand trial; and
 - Special hearings under Part 3.

Successful appeal against conviction

8. Section 14 of the *Appeal Costs Act 1998* states:

(1) If an appeal to a superior court against a conviction for an indictable offence succeeds and the court quashes the conviction, the appellant may, whether or not the court orders a new trial, apply to the court for, and the court may grant, an indemnity certificate in respect of costs.

(2) If, on an appeal referred to in subsection (1), the superior court orders a new trial, the appellant, in their application under that subsection for an indemnity certificate, may apply for the inclusion in that certificate of any additional costs that they will pay, or will be ordered to pay, as a consequence of the order for a new trial.

(3) An appellant granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the appellant in the approved form—

(a) an amount equal to the appellant's own costs of the appeal; and

(b) any additional costs that the appellant pays, or is ordered to pay, as a consequence of the order for a new trial—

that the Board considers to have been reasonably incurred.

(4) In this section, conviction includes—

(a) a finding under section 17(1)(c) of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997;

(b) a verdict of not guilty because of mental impairment;

(c) a finding of unfitness to stand trial.

9. Judges usually grant an indemnity in respect of both the costs of the appeal and the costs of the re-trial, as the Appeal Costs Board does not approve payment of costs for a re-trial unless those are separately certified by the judge under subsection (2).

Crown or DPP appeals

10. Section 15 of the *Appeal Costs Act 1998* states:

(1) If an appeal is instituted under—

(a) section 257, 260, 287 or 291 of the *Criminal Procedure Act 2009*; or

(b) section 427 of the *Children, Youth and Families Act 2005*—

the respondent to that appeal may apply to the Court of Appeal or the County Court (as the case requires) for, and the court may grant, an indemnity certificate in respect of the respondent's own costs of the appeal.

(2) A respondent granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the respondent in the approved form, an amount equal to the respondent's own costs of the appeal that the Board considers to have been reasonably incurred.

11. For the purpose of this section, "an appeal is instituted" when a party takes the first step in an appeal proceeding. A court may grant an indemnity certificate to a respondent who successfully defends an application for leave to serve a notice of appeal after the statutory period for commencing an appeal expires (*DPP v Hayden (No 2)* [2006] VSCA 155).

12. While the law is not settled, an offender may not be entitled to an indemnity certificate if the court increases the sentence following both a DPP appeal and an appeal by an offender (*R v Aydin & Kirsch* [2005] VSCA 86).
13. The court is not authorised to make an order under the *Appeal Costs Act 1998* when the informant appeals from the Magistrates' Court to the Supreme Court on a question of law. Appeals under s 272 of the *CPA 2009* are not listed in the *Appeal Costs Act 1998*. Similarly, the Act does not provide for an indemnity certificate when there is a further appeal by leave to the Court of Appeal under s 17A(3A)(b) of the *Supreme Court Act 1986* (*DPP v Norman* [2004] VSC 43; *DPP v Greelish (No 2)* (2002) 5 VR 349; [2002] VSCA 68; *DPP v Sher (No 2)* [2000] VSC 350; *DPP v Hore (No 2)* [2005] VSCA 55).

Successful Interlocutory Appeal by Accused

14. Section 15A of the *Appeal Costs Act 1998* states:

(1) In this section—

interlocutory appeal means an appeal under Division 4 of Part 6.3 of Chapter 6 of the *Criminal Procedure Act 2009*.

(2) If an interlocutory appeal by an accused succeeds, the accused may apply to the Court of Appeal for, and the Court of Appeal may grant, an indemnity certificate in respect of—

(a) the accused's own costs of the appeal; and

(b) if a new trial is ordered, any additional costs that the accused will pay, or will be ordered to pay, as a consequence of the order for a new trial.

(3) An accused granted an indemnity certificate under subsection (2) is entitled to be paid by the Board, on an application made to it by the accused in the approved form—

(a) an amount equal to the accused's own costs of the appeal; and

(b) any additional costs that the accused pays, or is ordered to pay, as a consequence of the order for a new trial—

that the Board considers to have been reasonably incurred

Interlocutory Appeal by the Crown

15. Section 15B of the *Appeal Costs Act 1998* states:

(1) If the prosecution appeals under section 295 of the *Criminal Procedure Act 2009*, the respondent to that appeal may apply to the Court of Appeal for, and the Court of Appeal may grant, an indemnity certificate in respect of—

(a) the respondent's own costs of the appeal; and

(b) if a new trial is ordered, any additional costs that the respondent will pay, or will be ordered to pay, as a consequence of the order for a new trial.

(2) A respondent granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the respondent in the approved form—

(a) an amount equal to the respondent's own costs of the appeal; and

(b) any additional costs that the respondent pays, or is ordered to pay, as a consequence of the order for a new trial—

that the Board considers to have been reasonably incurred.

Case Stated for Court of Appeal

16. Section 15C of the *Appeal Costs Act 1998* states:

(1) If a court states a case under section 305 of the *Criminal Procedure Act 2009*, the accused may apply to the Court of Appeal for, and the Court of Appeal may grant, an indemnity certificate in respect of—

(a) the accused's own costs of the hearing and determination of the question of law set out in the case stated; and

(b) if a new trial is ordered, any additional costs that the accused will pay, or will be ordered to pay, as a consequence of the order for a new trial.

(2) An accused granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the accused in the approved form—

(a) an amount equal to the accused's own costs of the hearing and determination of the question of law set out in the case stated; and

(b) if a new trial is ordered, any additional costs that the accused pays, or is ordered to pay, as a consequence of the order for a new trial—

that the Board considers to have been reasonably incurred.

Discontinuance of Criminal Proceedings

17. Section 16 of the *Appeal Costs Act 1998* states:

(1) If—

(a) the hearing of any criminal proceeding is discontinued; and

(b) the reason for the discontinuance was not attributable in any way to the act, neglect or fault of an accused or that accused's legal practitioner; and

(c) a new hearing or trial is ordered—

that accused may apply to the court before which the proceeding is discontinued for, and the court may grant, an indemnity certificate in respect of that accused's own costs of the discontinued proceeding.

(2) The court may only grant an indemnity certificate under subsection (1) if it is satisfied that the reason for the discontinuance was as set out in subsection (1)(b).

(3) An accused granted an indemnity certificate under subsection (1) who pays, or is ordered to pay, any additional costs as a consequence of the order for a new hearing or trial is entitled to be paid by the Board, on an application made to it by the accused in the approved form, an amount equal to the accused's own costs of the discontinued proceeding that the Board considers to have been reasonably incurred and that have not been ordered to be paid by any other party.

(4) For the purposes of this section, if in a criminal proceeding the presiding judge or magistrate directs that the proceeding be discontinued without ordering a new hearing or trial but with a view to another hearing or trial based on the same facts, or facts of a similar character, being conducted against the accused, a new hearing or trial is deemed to have been ordered.

18. A decision by a magistrate under s 29 of the CPA 2009 that an offence is not suitable for a summary hearing is not the discontinuance of a hearing. Costs incurred in relation to a hearing where a matter is transferred to the committal stream may be dealt with as an adjournment under s 17 of the *Appeal Costs Act 1998* in appropriate cases (*Van Phuc Diep v Appeal Costs Board* [2003] VSC 386).
19. The court may include the cost of complying with the requirements of Part 5.5 of the CPA 2009 on an indemnity certificate under s 16 of the *Appeal Costs Act 1998* if:
- the accused and his or her practitioner have complied with the requirements of Part 5.5 of the Act and any orders made under that Part;
 - the hearing of the proceeding is discontinued; and
 - the reason for the discontinuance was not attributable to the act, neglect or fault of the accused or his or her legal practitioner (CPA 2009 s 352).

Adjournment of Criminal Proceedings

20. Section 17 of the *Appeal Costs Act 1998* states:

(1) If—

(a) the hearing of any criminal proceeding is adjourned; and

(b) the reason for the adjournment was not attributable in any way to the act, neglect or fault of a party accused or convicted of an offence to which the proceeding relates (whether that party is an accused, appellant or respondent in the proceeding), or that party's legal practitioner—

that party may apply to the court for, and the court may grant, an indemnity certificate in respect of that party's own costs of the adjournment for the day on which the adjournment is granted and, if appropriate, the next day on which the court sits.

(2) The court may only grant an indemnity certificate under subsection (1) if it is satisfied that—

(a) it is inappropriate to make an order for costs against any party or any other person; and

(b) the reason for the adjournment was as set out in subsection (1)(b).

(3) A party granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by that party in the approved form and on proof being provided by that party of the costs that have been incurred, an amount equal to that party's own costs of the adjournment, to the maximum, if any, specified under subsection (5), in respect of the day or days referred to in the indemnity certificate, that the Board considers to have been reasonably incurred and that have not been ordered to be paid by any other party.

(4) For the purposes of this section, a criminal proceeding is deemed to have been adjourned if the court hearing the proceeding, the informant or the Director of Public Prosecutions (as the case may be) notifies the party accused or convicted of an offence (whether that party is an accused, appellant or respondent in the proceeding) to which the proceeding relates or their legal practitioner that a date has been fixed for the hearing of the proceeding, and the proceeding is not listed for hearing on that day.

(5) The Attorney-General may, by order published in the Government Gazette, specify the maximum amount payable by the Board for each day in respect of which an indemnity certificate has been granted under this section.

(6) An order made under subsection (5)—

(a) may be of general or limited application;

(b) may differ according to differences in time, place or circumstance.

21. It is unclear s 17 operates in relation to extended adjournments. The section states that a certificate may be given in respect of a party's costs of the adjournment on that day and, if the court considers it appropriate, the next sitting day. However, where there are multiple adjournments from day to day, it may be appropriate in exceptional cases to grant an indemnity certificate over the whole adjournment period (Compare *Appeal Costs Act 1998* s 17(1) and *DPP v Ivanovic* (No 13) [2003] VSC 400).

22. The deemed adjournment provision in subsection (4) does not apply when a proceeding is listed for a day but is not reached on that day. That situation is treated as an adjournment within the meaning of subsection (1) (*R v Hall* (2001) 4 VR 23; [2001] VSCA 181).

23. The court may include the cost of complying with the requirements of Part 5.5 of the CPA 2009 on an indemnity certificate under s 17 of the *Appeal Costs Act 1998* if:
- the accused and his or her practitioner have complied with the requirements of Part 5.5 of the Act and any orders made under that Part;
 - the hearing of the proceeding is adjourned; and
 - the reason for the adjourned was not attributable to the act, neglect or fault of the accused or his or her legal practitioner (CPA 2009 s 352).

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19.5 Record of Proceedings

1. The process of recording a sentence in the Supreme Court and County Court was succinctly explained by the Court of Appeal in *R v Saxon*:

In this State, whenever a sentence of imprisonment is imposed, the judge's associate first records the sentence on a blue form (headed "Record of Proceedings" and known as the "gaol calendar") and it is signed by him; this form provides the prison officer with the authority to convey the prisoner to a gaol and there to imprison him. Not necessarily on the same day, the sentence is recorded (endorsed) on the back of the presentment, and, commonly from that endorsement, the return of prisoners (the quadruplicate) is prepared, for signing by the judge and then by the prothonotary or registrar. In recent years the quadruplicate has enjoyed in the County Court a range of colours, now predominantly white. In the Supreme Court it is blue (*R v Saxon* [1998] 1 VR 503 at 506).
2. The associate will usually record the following details on the back of the indictment:
 - where the proceedings were held;
 - the date the proceedings were commenced and the date of any other occurrences which are recorded;
 - the date and time the jury are empanelled;
 - the name of the trial judge;
 - the plea made to the counts on arraignment;
 - if the accused fails to attend proceedings;
 - the date and time of any discharge of the jury;
 - the time the jury is sent out for deliberations;
 - the time of verdict;
 - the verdict of the jury;
 - the sentences for each count, along with any cumulation orders.⁷⁰⁴
 - any compensation, forfeiture and forensic sample orders.
3. These endorsements must be signed by the associate or the trial judge. The associate will often use these notes to complete the return of prisoners.
4. If the prosecution files a fresh indictment, the associate should clearly indicate that the old indictment has been filed over and should note the number of the fresh indictment on the old indictment.

⁷⁰⁴ Even though the sentence will ultimately be recorded on the return of prisoners, the associate should also record it on the indictment when it is pronounced (*Jovanovic v R* (1999) 92 FCR 580; [1999] FCA 1008).

5. When endorsing an amendment on the indictment, the judge or associate should make a record of the order authorising that amendment.
6. In the Magistrates' Court, the magistrate will usually enter the sentence and any other orders into Courtlink immediately after announcing the sentence.
7. In the County Court, the Chief Judge may direct the manner in which orders must be recorded (*County Court Criminal Procedure Rules 2019* r 1.12).

Official Record of the Court

8. The record of the Supreme or County Court consists of one copy of the quadruplicate that is filed along with the indictment. The sentence passes into record and cannot be recalled or vacated at common law when the quadruplicate has been signed and despatched. At this point the judge is *functus officio* (*R v TSR* (2002) 5 VR 627; [2002] VSCA 87; *R v Saxon* [1998] 1 VR 503; *R v Billington* [1980] VR 625; *R v De Zylva* (1988) 38 A Crim R 207; *R v Rapke; ex parte Curtis* [1975] VR 641; *R v Judge Bland; ex parte DPP* [1987] VR 225).
9. Where a judge imposes a sentence which is outside the court's jurisdiction (such as imposing a sentence that is greater than the maximum penalty for an offence), the sentence may pass into the official record and remain valid until set aside (*DPP v Edwards* (2012) 44 VR 114; [2012] VSCA 293).
10. As the quadruplicate constitutes the record of the court and will be used by the Department of Corrections when administering the sentence, the sentencing judge should ensure that his or her sentence is properly recorded. When sentences are incorrectly recorded a party must make a subsequent application to the sentencing court for a correction of the record (see *R v Ahomana & Ors* [2001] VSCA 155; *R v D'Brass & Ortillo* [2002] VSCA 39).
11. For other orders, the court is *functus officio* when the order is authenticated (*Victoria Legal Aid v County Court of Victoria & Anor* (2004) 9 VR 686; [2004] VSCA 113). The process of authentication of judgments varies between the courts.
12. In the Supreme Court, r 1.13 of the *Supreme Court (Criminal Procedure) Rules 2017* specifies how orders in the criminal jurisdiction are authenticated:
 - (1) A judgment or order of the Court in a proceeding to which these Rules relate may be authenticated in accordance with this Rule.
 - (2) Subject to paragraph (3), a judgment or order of the Court is authenticated when the judgment or order, having been drawn up, is signed by a Judge of the Court or sealed by the Prothonotary.
 - (3) In a proceeding in the Court of Appeal, a judgment or order of the Court is authenticated when the judgment or order, having been drawn up, is signed by a member of the Court of Appeal or the Registrar or sealed by the Prothonotary.
13. In the County Court, r 60A.02 of the *County Court Civil Procedure Rules 2018* states:

(1) A judgment or order other than a judgment or order under Rule 59.06 is authenticated when a form of the judgment or order, drawn up and lodged with the Registrar in accordance with Rule 60A.07—

(a) is—

(i) signed by a Judge or an associate judge; or

(ii) sealed by the Registrar with the seal of the Court; and

(b) is filed.

(2) A judgment or an order under Rule 59.06 is authenticated as provided in that Rule.

14. Rule 59.06 of the *County Court Civil Procedure Rules 2018* is unlikely to apply in criminal proceedings, as it relates to a limited class of consent orders (see *County Court Civil Procedure Rules 2008* rr 59.06(7) and (8)).
15. The *Magistrates' Court Criminal Procedure Rules 2019* do not specify how an order is authenticated (compare *Magistrates' Court (Criminal Procedure) Rules 2006* r 2.01).
16. Endorsements on the indictment are minutes or memoranda of an order and are not part of the formal record of the court. The trial court or an appellate court may amend or ignore an endorsement that is incorrect (*R v TSR* (2002) 5 VR 627; [2002] VSCA 87; *R v Hodgkinson* [1954] VLR 140; *R v Rapke; ex parte Curtis* [1975] VR 641; *R v Galvin*(No 2) [1961] VR 740).
17. A trial court may not issue a certificate of conviction until at least 35 days after the conviction. If the Registrar of Criminal Appeals of the Supreme Court notifies a trial court that a notice of appeal or an application for leave to appeal has been filed, the trial court may not issue a certificate of conviction until the appeal is determined or the application is dismissed (*Supreme Court (Criminal Procedure) Rules 2017* r 2.35).

Correction of Errors in the Record

18. At common law, a judge or magistrate may change a sentence at any time before it passes into record (*R v Brattoli* [1971] VR 446; *R v Judge Bland; ex parte DPP* [1987] VR 225; *R v Rapke; ex parte Curtis* [1975] VR 641; c.f. *Jovanovic v R* (1999) 92 FCR 580; [1999] FCA 1008).
19. Previously, it was thought that a judge could, at common law, also vary a sentence that was invalid (such as imposing a penalty greater than the maximum penalty for that offence) even after despatching the signed return of prisoners (see *R v Brattoli* [1971] VR 446; *R v Judge Bland; ex parte DPP* [1987] VR 225). This line of common law authority was overruled in 2012 (see *DPP v Edwards* (2012) 44 VR 114; [2012] VSCA 293; *CMG v R* (2013) 46 VR 728; [2013] VSCA 243).
20. Following the commencement of the *Sentencing Amendment (Correction of Sentencing Errors) Act 2015* on 3 June 2015, *Sentencing Act 1991* s 104B was introduced to provide a statutory power to reopen proceedings where a court has imposed a penalty contrary to law, or has failed to impose a penalty that is required to be imposed by law.
21. In exercising the power to reopen proceedings and impose a new penalty, the court must take into account the extent to which the person has already suffered the consequences of the original penalty (*Sentencing Act 1991* s 104B(4)).
22. For the purpose of section 104B, a penalty is not contrary to law only because the decision to impose that penalty was attended by erroneous reasoning or a factual error (*Sentencing Act 1991* s 104B(6)). Complaints about the judge's process of reasoning remain matters to be addressed on an appeal.
23. In the Magistrates' Court, applications for an order under section 104B are to be made to the Magistrate who made the original sentencing order, whenever reasonably practicable (*Magistrates' Court Practice Direction No 1* of 2016).

24. Where the court reopens proceedings and imposes a new penalty, that penalty is taken to have been imposed at the time the court imposed the original penalty or failed to impose that penalty, unless the court orders otherwise (*Sentencing Act 1991* s 104C)(1). However, the time for any appeal runs from when the new penalty is imposed (*Sentencing Act 1991* s 104C(2)).
25. In addition to the power to recall a judgment before it enters into the record, a court has several powers to correct errors that pass into the record, including under:
- *CPA 2009* s 412;
 - *Sentencing Act 1991* s 18;
 - *Sentencing Act 1991* s 104A; and
 - the inherent jurisdiction of the court.
26. These powers do not abrogate the doctrine of *functus officio*. The amendment powers therefore cannot be used to rectify any error, of any kind (*DPP v Edwards* (2012) 44 VR 114; [2012] VSCA 293); *CMG v R* (2013) 46 VR 728; [2013] VSCA 243; *Dimovski v The Queen* [2022] VSCA 6, [40]–[44]).
27. Section 412 of the *CPA 2009* confers a broad power to correct any defect or error in a summons, warrant, plea, judgment or order. However, this does not allow a judge to re-open a sentence which was valid and correct when passed due to new developments occurring after sentence. The section does not allow a sentence to be recalled and the reasons for sentence varied (*CMG v R* (2013) 46 VR 728; [2013] VSCA 243).
28. It also does not allow a judge to change reasons which reflected the judge’s decision and intent. Instead, s 412 is a statutory embodiment of the slip rule. It can be used to correct clerical errors, even if those errors could have substantive effect. An example of such a clerical error is a mistake in recording pre-sentence detention (*Dimovski v The Queen* [2022] VSCA 6, [43]).
29. Where a sentence becomes erroneous due to events which occur after the sentence, the remedy is to seek an order under *CPA 2009* s 277(3), an order of certiorari or an appeal against the impugned sentence (*CMG v R* (2013) 46 VR 728; [2013] VSCA 243).
30. On the application of a party, a court may amend a declaration of pre-sentence detention to declare the correct period and amend the sentence accordingly (*Sentencing Act 1991* s 18(7)).
31. A judge or magistrate may also amend a judgment or sentence if he or she is satisfied:
- (a) that it contains—
 - (i) a clerical mistake; or
 - (ii) an error arising from an accidental slip or omission; or
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
 - (iv) a defect of form; or
 - (b) that it fails to deal with a matter that it would have undoubtedly dealt with in accordance with the amendment if the attention of the judge or magistrate had been drawn to it (*Sentencing Act 1991* s 104A).
32. Following the commencement of the *Sentencing Amendment (Correction of Sentencing Errors) Act 2015* on 3 June 2015, this power is not subject to any statutory time limit (see *Sentencing Act 1991* s 104A). A judge may exercise this power in chambers and does not need to invite or hear submissions from the parties unless that is desirable in the interests of justice (*Jovanovic v R* (1999) 92 FCR 580; [1999] FCA 1008. See also *Donovan v R* [2010] VSCA 169).

33. Every court also has inherent jurisdiction to correct a judgment or order that, due to an error, does not give effect to the court's intention. This power may be exercised even after the order passes into the record, but cannot be exercised to vary an order that the court intended to make. This power cannot be used where there was no error in recording the court's intention (*R v De Zylva* (1988) 38 A Crim R 207; *R v Saxon* [1998] 1 VR 503. See also *R v Ahomana & Ors* [2001] VSCA 155 and *Supreme Court (Criminal Procedure) Rules 2017* r 1.14; *CMG v R* (2013) 46 VR 728; [2013] VSCA 243).
34. The power to correct clerical mistakes in a judgment or order, or errors from an accidental slip or omission is confirmed by r 1.14 of the *Supreme Court (Criminal Procedure) Rules 2017*. This power may be exercised at any time.
35. The precise ambit of *Sentencing Act 1991* s 104A and the potential for a residual common law power to amend slips or omissions has not been considered by the courts. Section 104A should not be unduly circumscribed by a restrictive interpretation. While it does not allow a judge to re-open the sentencing discretion, it does allow the judge to examine an issue that would have been considered if he or she was notified of it at the time of sentence, such as an undeclared period of pre-sentence detention. The purpose of the rule is to allow the judge to amend the record so as to give effect to his or her original sentencing intention (*DPP v Green* (2007) 17 VR 293; [2007] VSCA 231).
36. The Court of Appeal can exercise the power to amend a judgment or order on an application for leave to appeal, regardless of whether leave is granted or refused, or the appeal allowed or dismissed (*Sentencing Act 1991* s 104A(5A)).

Official Record and Appeals

37. When an appeal to the Court of Appeal is determined, the Registrar of Criminal Appeals must give notice in Form 6-2M of the *Supreme Court (Criminal Procedure) Rules 2017* to:
- the appellant;
 - the State or Commonwealth DPP, as the case requires;
 - the governor of the prison where the appellant is held;
 - the Secretary to the Department of Justice and Community Safety; and
 - the officer of the relevant trial court (*Supreme Court (Criminal Procedure) Rules 2017* r 2.39).
38. The Registrar must also notify the officer of the trial court of any additional orders or directions that were made in respect of the appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 2.39)
39. The decision of the Court of Appeal is perfected and passes into record when this notice and the returned indictment are filed in the court of trial (*R v McNamara (No 2)* [1997] 1 VR 257).
40. Once the Court of Appeal hears a matter on the merits and issues a judgment that is perfected, it is *functus officio* and does not have jurisdiction to re-open the appeal to consider further arguments or address grounds of appeal that were omitted from its judgment. A party must apply to reopen the case before the decision passes into record if the judgment does not address all the appeal grounds (*Grierson v R* (1938) 60 CLR 431; *R v GAM (No 2)* (2004) 9 VR 640; [2004] VSCA 117; *R v Saxon* (1998) 101 A Crim R 71; *Pantorno v R* (1989) 166 CLR 466; [1989] HCA 18; *R v McNamara (No 2)* [1997] 1 VR 257; *R v Lapa (No 2)* (1995) 80 A Crim R 398).
41. The Court of Appeal should only allow an application to reopen the appeal when the court has acted under a misapprehension of the facts or the law, and the misapprehension is not attributable solely to the neglect or default of the applicant. The power to reopen an appeal does not allow a party to reargue its case, or revive grounds that it had previously abandoned (*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300; [1993] HCA 6; *Elliot & Blessington v R* (2007) 234 CLR 38; [2007] HCA 51; *Rickard v R* [2007] NSWCCA 332; *O'Meara v R* [2009] NSWCCA 90).
42. The Court of Appeal may also allow an appeal to be re-opened when it is abandoned due to fraud or mistake. However, the court cannot re-open an appeal when the appellant asserts that the conviction was tainted by fraud or perjury (*R v GAM (No 2)* (2004) 9 VR 640; [2004] VSCA 117).

19.6 Criminal Record of Accused

1. The accused's criminal record contains the previous convictions and infringement convictions of the accused (*CPA 2009 s 3*).
2. An infringement conviction is an infringement notice that has taken effect as a conviction of the offence specified in the notice (*CPA 2009 s 3*).
3. The criminal record must contain the following information for each alleged previous conviction:
 - the date of the previous conviction;
 - the court where the conviction took place;
 - the place of sitting of that court;
 - the offence committed; and
 - the sentence imposed (*CPA 2009 ss 77, 244*).
4. For each infringement conviction, the accused's criminal record must contain:
 - The date on which the infringement notice took effect as a conviction;
 - The offence specified in the notice;
 - The infringement penalty;
 - Any other penalty that resulted from the operation of the notice, such as a licence disqualification (*CPA 2009 ss 77, 244*).
5. A previous conviction is a prior conviction or finding of guilt by any court, including a court outside Victoria, but does not include:
 - a conviction or finding of guilt set aside by the Magistrates' Court on a rehearing under s 92 of the *CPA 2009*;
 - a conviction or finding of guilt set aside on an appeal under ss 256 or 277 of the *CPA 2009*;
 - or
 - a conviction or finding of guilt by a children's court made more than 10 years before the hearing at which it is sought to be proved (*CPA 2009 s 3*).
6. The criminal record may contain a statement that other offences were taken into account when a sentence was imposed in respect of a previous conviction, along with the offences taken into account and the number of offences (*CPA 2009 ss 77, 244*).
7. A criminal record is only admissible if it is signed by:
 - a police officer;
 - a Crown Prosecutor;
 - a member of staff of the OPP who is a legal practitioner; or
 - if the proceedings were commenced by an informant:
 - a legal practitioner who is entitled to represent the informant; or
 - a public official as defined in s 3 of the *CPA 2009* (*CPA 2009 ss 77, 244*).
8. In summary proceedings, the prosecution may provide the criminal record to the court after the accused is found guilty of an offence (*CPA 2009 s 78*).

9. In proceedings in the County or Supreme Court, the prosecution may file the criminal record any time after the indictment is filed and before the sentencing hearing commences. If the criminal record is not available before the sentencing hearing commences, the prosecution may file it at any time before judge sentences the accused, if the court considers that it is in the interests of justice to do so (CPA 2009 s 245).
10. If the accused is found guilty of an offence and the prosecution has tendered the criminal record (in summary proceedings) or filed the criminal record (in proceedings on indictment), the court must ask the offender whether he or she admits the previous convictions and infringement convictions set out in the record (CPA 2009 ss 78, 245).
11. If the offender admits the previous conviction(s) and infringement conviction(s), the court may sentence him or her accordingly. Otherwise, the prosecution may lead evidence to prove those convictions (CPA 2009 ss 78, 245).
12. In summary proceedings, a legal practitioner appearing for the offender may admit a previous conviction or infringement conviction in the criminal record on his or her client's behalf (CPA 2009 s 78). This procedure is not available in proceedings on indictment, where the offender may admit previous convictions and infringement convictions orally or by writing on the criminal record (CPA 2009 s 245).
13. The prosecution may prove a previous conviction or infringement conviction by tendering a certificate signed by a judge, magistrate, registrar, or other proper officer of the applicable court:
 - (a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question; and
 - (b) stating the time and place of the conviction, acquittal, sentence, order or proceeding; and
 - (c) stating the title of the applicable court (*Evidence Act 2008* s 178(2)).

Last updated: 31 August 2020

19.7 Related and Unrelated Offences in the Higher Courts

1. Division 1 of Part 5.8 of the CPA 2009 gives the Supreme Court and the County Court jurisdiction to hear and determine charges against the accused for summary offences if he or she is before the court for charges on an indictment.
2. These provisions are subject to any contrary intention in legislation that vests sole jurisdiction in the Magistrates' Court (see, e.g., *Corporations Act 2001* (Cth) s 1338).
3. These provisions only apply to summary offences and do not apply to indictable offences that will be heard and determined summarily.

Related Summary Offences

4. On committal for trial for an indictable offence, the Magistrates' Court must transfer all proceedings concerning charges for summary offences founded on the same facts or that are part of a series of offences of the same or similar character as the indictable offences to the trial court. The Magistrates' Court must also transfer proceedings for any summary offences that are related to the indictable offences on which the accused was committed for trial that are commenced after committal for trial. Offences that are transferred in this way are known as "related summary offences" (CPA 2009 s 145).⁷⁰⁵ See 4.5 Committal for Trial and Subsequent Events.

⁷⁰⁵ The Magistrates' Court does not need to transfer a summary offence that is a related offence if the informant and the accused agree otherwise (CPA 2009 s 145).

5. If the Supreme Court makes an order under CPA 2009 s 167 to transfer proceedings either from the Supreme Court to the County Court, or from the County Court to the Supreme Court, it may also order that any related summary offences be transferred with the proceedings for the indictable offences (CPA 2009 s 241A).
6. After a plea of guilty or a verdict of guilty or not guilty on the indictable offences, the Supreme Court or County Court may hear and determine proceedings for any related summary offences before sentencing or otherwise dealing with the accused (CPA 2009 s 242).
7. The Supreme Court or County Court may continue to hear and determine transferred related summary offences even if the prosecution discontinues all charges against the accused for indictable offences (CPA 2009 s 242(1A)).
8. Related summary offences are heard and determined without a jury and in accordance with Part 3.3 of the CPA 2009 as far as practicable. The court may admit any evidence given during the trial and, if the accused pleaded guilty or the indictable charges were discontinued, may admit any evidence that was admitted at the committal hearing. A party may only adduce further evidence with the leave of the court (CPA 2009 s 242).
9. The trial court may impose any sentence for a related summary offence that the Magistrates' Court could impose (CPA 2009 s 242).
10. If the court considers it appropriate, it may transfer proceedings for a related summary offence back to the Magistrates' Court for hearing and determination (CPA 2009 s 242).
11. A party may apply for the Court to transfer proceedings back to the Magistrates Court. Where a party wishes to do so in the County Court, the person must:
 - Obtain the position of the other party;
 - Obtain a date for the application from the Court and advise whether the application is opposed or not;
 - File and serve on the other party a Notice of application to transfer charges to the Magistrates' / Children's Court at least 3 days before the application hearing date; and
 - The Application must:
 - Indicate whether the application is made under s 168(1) or s 242(5) of the CPA;
 - Include the Indictment number and a copy of the Indictment (if the Indictment has been filed);
 - Include a copy of the charge sheets for the summary charges sought to be transferred;
 - Outline which charges are sought to be transferred and pursuant to which section;
 - State whether the charges are sought to be transferred to the Magistrates' Court or the Children's Court and at which location;
 - Provide the date to which the charges are to be adjourned to, if the Application is successful, if known (*County Court Criminal Division Practice Note*, PNCR 2-2022, [16.1]–[16.3]).
12. A party must ensure that all charges are dealt with. Charges which are not to be transferred back to the Magistrates' Court or the Children's Court must be dealt with by the County Court, whether by indictment or by notice of discontinuance (*County Court Criminal Division Practice Note*, PNCR 2-2022, [16.5]).

Unrelated Summary Offence

13. Section 243 of the CPA 2009 gives the Supreme Court or County Court jurisdiction to hear and determine a charge for a summary offence that is not related to the charges on the indictment 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 (CPA 2009 s 243(1)).

14. The Supreme or County Court may also hear and determine a charge for an unrelated summary offence after all charges against the accused for indictable offences have been discontinued. The Court may exercise this power if the accused:
 - (a) consents to the court hearing and determining the charge for the summary offence; and
 - (b) states an intention to plead guilty to the charge for the summary offence (CPA 2009 s 243(1A)).
15. In the County Court, a party must apply to the court at least 21 days before the date listed for the plea hearing for the transfer of unrelated summary offences. The application must be in Form 2G (*County Court Criminal Procedure Rules 2019 r 2.11*).
16. The application must include a list of the unrelated summary charges, including the Magistrates' Court file number, venue and next hearing date of each charge, a statement about whether the accused is or is not on bail in relation to those charges and, if the accused is on bail, a copy of the accused's bail undertakings in relation to each of those charges (*County Court Criminal Division Practice Note PNCR 2-2022, [17.2]*).
17. At least three days before the transfer hearing, the prosecution must file an agreed written summary of the factual basis for the charge(s) and serve a copy on the Defence (*County Court Criminal Division Practice Note PNCR 2-2022, [17.3]*).
18. Proceedings for the unrelated summary offences are then transferred from the Magistrates' Court to the trial court, which must hear and determine the charges without a jury and in accordance with Part 3.3 of the CPA 2009 as far as practicable. The court may impose any sentence for an unrelated summary offence that the Magistrates' Court could impose (CPA 2009 s 243).
19. If the accused does not plead guilty to the summary offence or states an intention to plead not guilty, the trial court must direct that the charge for the unrelated summary offence be transferred back to the Magistrates' Court for hearing and determination (CPA 2009 s 243).
20. The section 243 process is only available in relation to summary offences and is not available for indictable offences which may be heard and determined summarily, even if the indictable offence is currently before the Magistrates' Court for summary hearing (*R v Nguyen [2012] VSCA 297; Short v R [2016] VSCA 210 at [36]–[38]*).
21. Once proceedings have been transferred, a party may apply for unrelated summary charges to be transferred back to the Magistrates' Court or the Children's Court.

Remittal procedure – County Court

22. For proceedings in the County Court, where a party seeks a transfer of indictable matters determinable summarily back to a summary court, the party must:
 - Obtain the position of the other party;
 - Obtain a date for the application from the Court and advise whether the application is opposed or not;
 - File a notice of application to transfer charges to the Magistrates' / Children's Court at least 3 days before the hearing date;
23. The Application must:

- Indicate the application is made under s 168(1);
 - Include the Indictment number and a copy of the Indictment (if the Indictment has been filed), or a copy of the charge sheet (if the Indictment has not been filed);
 - Outline which charges are sought to be transferred and pursuant to which section;
 - State whether the charges are sought to be transferred to the Magistrates' Court or the Children's Court and at which location;
 - Provide the date to which the charges are to be adjourned to, if the Application is successful (*County Court Criminal Division Practice Note*, PNCR 2-2022, [16.3])
24. The prosecution must also file a copy of the accused's criminal record (if any) 24 hours before the hearing (*County Court Criminal Division Practice Note*, PNCR 2-2022, [16.4]).
25. A party must ensure that all charges are dealt with. Charges which are not to be transferred back to the Magistrates' Court or the Children's Court must be dealt with by the County Court, whether by indictment or by notice of discontinuance (*County Court Criminal Division Practice Note*, PNCR 2-2022, [16.5]).

Last updated: 17 March 2023

19.8 Sentencing Hearings

1. The following sub-chapters describe rules relating to sentencing hearings in the Supreme Court and the County Court.

Last updated: 1 March 2017

19.8.1 Plea hearings in the Supreme Court

1. When the accused pleads guilty or is found guilty, the Court will set a date for a sentencing hearing. No later than ten days before the sentencing hearing the prosecution must file and serve its opening. The opening must contain:
 - The factual circumstances of the offending;
 - Submissions and outline of evidence on whether the offender is to be sentenced as a serious offender under Part 2A of the *Sentencing Act 1991* or a continuing criminal enterprise offender under Part 2B of the *Sentencing Act 1991*.
 - Submissions and outline of evidence on whether any minimum non-parole provisions apply and whether special reasons for the purpose of those minimum non-parole periods should be found to exist;
 - Any orders sought by the prosecution in addition to sentence, such as alcohol exclusion or disposal orders (*Supreme Court of Victoria*, Practice Note SC CR 4).
2. The prosecution must ensure that victim impact statements with any attached medical reports are filed and served no later than five days before the sentencing hearing. The prosecution must also provide a letter indicating whether the statement will be tendered, read by the prosecutor, read by the victim or sought to be read by another person. The letter should also indicate if alternative arrangements are required for giving evidence (*Supreme Court of Victoria*, Practice Note SC CR 4).
3. As soon as possible after receiving a victim impact statement, the defence must inform the prosecution of any objections to admissibility (*Supreme Court of Victoria*, Practice Note SC CR 4).
4. The prosecution must notify the victims about the process of resolving any dispute about the admissibility of a victim impact statement (*Victims Charter Act 2006* s 11; *Supreme Court of Victoria*, Practice Note SC CR 4).
5. No later than five days before the hearing the defence must file and serve:
 - Any expert reports sought to be tendered;

- Other documentary exhibits sought to be tendered
 - A list of witnesses to be called (*Supreme Court of Victoria*, Practice Note SC CR 4).
6. Where the prosecution contends that a minimum non-parole period applies, the defence submissions on the plea must address whether the relevant provisions apply and the defence position on the existence of special reasons (*Supreme Court of Victoria*, Practice Note SC CR 4).
7. The parties are expected to confer prior to the hearing and identify whether there will be a need to call witnesses and whether a preliminary hearing for ruling on contested issues may be necessary (*Supreme Court of Victoria*, Practice Note SC CR 4).

Last updated: 1 March 2017

19.8.2 Plea hearings in the County Court

1. When the accused pleads guilty or is found guilty, the prosecution must file with the Court and serve on the accused the following material:
 - At least 28 days before the plea date:
 - The Indictment;
 - The accused's criminal record (if any);
 - A chronology;
 - The prosecution opening on the plea (not required for post-verdict pleas) which includes the factual circumstances of the offending as well as:
 - The amount of pre-sentence detention as at the date of the plea hearing;
 - The status of any co-accused;
 - Whether the serious offender or continuing criminal enterprise offender provisions will be relevant;
 - Whether a minimum non-parole period applies and whether or not a special reason should be found under *Sentencing Act 1991* s 10A;
 - Whether the offence is a category 2 offence, which requires the court to impose a custodial sentence other than a combination of imprisonment and community correction order;
 - Any ancillary orders the prosecution seeks;
 - Whether the accused is eligible for a registration exemption order under *Sex Offender's Registration Act 2004* s 11A;
 - Whether any offence on the indictment is a standard sentence offence;
 - If any of the charges relate to child abuse material, a summary of the material, the classification level of the material and the volume of material associated with each classification level;
 - At least 10 days before the plea date (where applicable)
 - Any Victim Impact Statements, including:
 - Whether the statement is to be tendered in written form, read by the prosecutor or victim or read by another person;
 - Any alternative arrangements required for reading the victim impact statement;
 - Copies of any ancillary orders sought;
 - At least 2 days before the plea date:

- Prosecution Response to Defence Submissions;
 - Advice on whether a Sex Offender Registration Exemption Order is opposed (*County Court Criminal Division Practice Note*, PNCR 2-2022, [22.4]).
2. The prosecution must be aware, when proposing that a Statement or parts of a Statement are to be read aloud, of the obligation under *Sentencing Act 1991* s 8Q(2) to ensure that only admissible parts are read aloud. The prosecution is also responsible for informing victims about the process of determining issues of admissibility of their victim impact statements (*County Court Criminal Division Practice Note*, PNCR 2-2022, [22.4]; *York v R* [2014] VSCA 224).
 3. The defence must file and serve on the prosecution the following material:
 - At least 14 days before the plea hearing:
 - Any applicable expert reports;
 - Any applicable application for a sex offender registration exemption order, along with an affidavit in support;
 - At least 5 days before the plea hearing:
 - A chronology;
 - Defence outline of submissions, which must be clear and concise on:
 - What matters are relied on in mitigation, and the supporting evidence;
 - A brief personal history of the accused;
 - The disposition sought, and the basis for that;
 - Whether the amount of pre-sentence detention calculated by the prosecution is correct;
 - An estimate of the expected duration of the plea hearing;
 - A response to any prosecution identification that a minimum non-parole period applies;
 - A response to any prosecution identification that the category 1 or category 2 sentencing provisions apply (*County Court Criminal Division Practice Note*, PNCR 2-2022, [22.5])
 4. As soon as reasonably practicable after receiving a Victim Impact Statement, the defence must inform the prosecution of any objections to the admissibility of all or part of the Statement (*County Court Criminal Division Practice Note*, PNCR 2-2022, [22.6]).
 5. The defence must contact Criminal Registry to have the matter listed for mention before the List Judge as soon as any issues come to the practitioner's attention which may prevent the Plea proceeding on the listed date (whether funding issues or otherwise) (*County Court Criminal Division Practice Note*, PNCR 2-2022, [22.3]).
 6. At plea hearings in the County Court, practitioners are required to robe, with the judge deciding whether practitioners should be wigged (*County Court Criminal Division Practice Note*, PNCR 2-2022, [4.1]–[4.3]).

20 Appeals

20.1 Overview and Availability

1. Chapter 6 of the *CPA 2009* governs the rights of offenders and the Crown to either appeal or seek leave to appeal from interlocutory and final decisions in criminal proceedings. The chapter is broken down into the following parts:
 - Part 6.1 – Appeals from the Magistrates' Court to the County Court;
 - Part 6.2 – Appeals from the Magistrates' Court to the Supreme Court on a question of law; and
 - Part 6.3 – Appeal and case stated from the County Court or Trial Division of the Supreme Court to the Court of Appeal.
2. In addition, Chapter 7 allows the Attorney-General to refer a petition of mercy to the Court of Appeal or to the judges of the Trial Division of the Supreme Court.

Appeals in Commonwealth Matters

3. The provisions of Chapter 6 of the *CPA 2009* apply to both State and Commonwealth offences. Section 68(2) of the *Judiciary Act 1903* picks up the appeal provisions in the *CPA 2009*, including the case stated and DPP referral processes (see *Peel v R* (1971) 125 CLR 447; *Williams v R (No 2)* (1934) 50 CLR 551; *R v Gee* (2003) 212 CLR 230; [2003] HCA 12; *R v O'Keefe* [1979] VR 1).
4. Reservation of questions of law is permitted in Commonwealth matters, despite the constitutional requirement that federal judicial power may only be exercised in a "matter". Reserved questions of law arise in a proceeding and are related to that proceeding (*R v Gee* (2003) 212 CLR 230; [2003] HCA 12).
5. In Commonwealth proceedings, the provisions in the *CPA 2009* operate by analogy and the proper officer to institute Crown appeals is the Commonwealth Attorney-General, or the Commonwealth Director of Public Prosecutions (*Williams v R (No 1)* (1933) 50 CLR 536; *Peel v R* (1971) 125 CLR 447; *R v Williams & Somme* (1934) 34 SR (NSW) 143; *DPP v Hunter & Milner* (2003) 7 VR 119; [2003] VSCA 219; *Rohde v DPP* (1986) 161 CLR 119; [1986] HCA 50. See also *Director of Public Prosecutions Act 1983* (Cth) s 9).
6. Section 68(2) of the *Judiciary Act 1903* reflects a legislative policy choice to provide uniform procedures for the prosecution of State and Commonwealth offences within a State, rather than seek to provide uniformity across the States. The language of the section is general and ambulatory, able to accommodate differences in State procedures and changes to procedure within a State (*R v Gee* (2003) 212 CLR 230; [2003] HCA 12; *Williams v R (No 2)* (1934) 50 CLR 551 per Dixon J).

Last updated: 20 April 2010

20.2 Appeals From Magistrates' Court

1. Part 6.1 of the *CPA 2009* creates the following rights of appeal from the Magistrates' Court:
 - (a) Appeal by offender against conviction and sentence;
 - (b) Appeal by offender against sentence;
 - (c) Appeal by DPP against sentence; and
 - (d) Appeal by DPP against offender's failure to fulfil an undertaking.

2. CPA 2009 s 254 recognises a distinction between an appeal against sentence and an appeal against conviction and sentence. While CPA 2009 s 266 contains an express power to allow a party to convert an appeal against conviction and sentence into an appeal against sentence alone, there is no corresponding power to expand the ambit of an appeal against sentence. A party that wishes to expand the ambit of a filed appeal against sentence must instead rely on the process in CPA 2009 s 263 for filing a late notice of appeal (*DPP v Grivas & Filonis* [2023] VSC 260, [78]).
3. Appeals are commenced by filing the relevant notice of appeal with the Magistrates' Court at any venue (CPA 2009 ss 255, 258, 261).
4. Appeals from the Magistrates' Court are generally to the County Court. The exception is that if the Magistrates' Court was constituted by the Chief Magistrate who holds commission as a Supreme Court judge, then the appeal is to the Court of Appeal (CPA 2009 s 254).
5. When a person files a notice of appeal, the registrar must make an entry into the court register that a notice of appeal has been filed (*Magistrates' Court Criminal Procedure Rules 2019* r 78).
6. Appeals against conviction from the Magistrates' Court under the CPA 2009 are *de novo* appeals. The offender is not bound by his or her plea in the Magistrates' Court and the County Court judge must hear and determine the matter afresh. The informant presents his or her case first and carries the burden of proof for a second time. He or she does not derive any benefit from his or her earlier success. Further, the appellant does not need to show that the decision below was affected by error (*Sweeney v Fitzhardinge* (1906) 4 CLR 716; [1906] HCA 73; *Mr and Mrs X v Secretary to the Department of Human Services* [2003] VSC 140; *Neill v County Court of Victoria* [2003] VSC 328; *R v Longshaw* (1990) 20 NSWLR 554; *Lukatela v Birch* (2008) 164 ACTR 24; [2008] ACTSC 99).
7. On a hearing *de novo*, the appellant and respondent are not limited to presenting the evidence that they presented in the court below. A party could change its formulation of the case or its defence. In addition, the matter is determined on the law as it stands at the date of the appeal (*Mr and Mrs X v Secretary to the Department of Human Services* [2003] VSC 140; *Neill v County Court of Victoria* [2003] VSC 328; *R v Longshaw* (1990) 20 NSWLR 554).⁷⁰⁶
8. In almost all cases where witness credibility is in issue and the accused has chosen to give evidence, the rehearing *de novo* must be conducted by witnesses giving oral evidence or by video recordings of their evidence being played when that is permitted by legislation. A rehearing on the basis of the tender of audio recordings and transcripts is not sufficient in that kind of case. Whether in any case it is appropriate to rely on transcript and audio recordings will depend on the issues in dispute, the relevant legislative provisions and the duty to conduct a fair hearing which will support public confidence (*Grabski v Beier* [2020] VSC 156, [103]–[120]).
9. The judge on the appeal is sitting and exercising jurisdiction as a magistrate (see *Camilleri's Stock Feeds v Environmental Protection Authority* (1993) 32 NSWLR 683; *Builders Licensing Board v Sperway Constructions* (1976) 135 CLR 616; [1976] HCA 62; *Victorian Stevedoring and General Contracting v Dignan* (1931) 46 CLR 73; [1931] HCA 34).

⁷⁰⁶ While *de novo* appeals are determined on the law as it stands at the date of the appeal, changes in maximum penalty between the date of offending and the date of sentence will only apply if the maximum penalty is reduced (see *Sentencing Act 1991* s 114). The effect of changes in current sentencing practices is less clear and the court will, if possible, sentence based on the sentencing practices that existed at the date of offending (see *R v AMP* [2010] VSCA 48 for a discussion of this issue).

20.2.1 Appeal Against Conviction and Sentence

1. A person convicted of an offence in the Magistrates' Court may appeal as of right against the conviction and sentence (CPA 2009 s 254).⁷⁰⁷
2. An offender may commence an appeal against conviction and sentence by filing a notice of appeal with a registrar of the Magistrates' Court at any venue of the court within 28 days of the day on which he or she was sentenced. The notice of appeal must contain:
 - (a) a statement of whether the appeal is against conviction and sentence, or sentence alone; and
 - (b) a statement in prescribed form acknowledging that the County Court or Supreme Court (as the case may be) may impose a more severe sentence than that imposed by the Magistrates' Court; and
 - (c) an undertaking to appear to proceed with the appeal on the day fixed by the registrar of the County Court or the Prothonotary of the Supreme Court (as the case may be) for the hearing of the appeal and to continue to appear for the duration of the appeal (CPA 2009 s 255).
3. The prescribed form for the notice of appeal is Form 6-3DA of the *Supreme Court (Criminal Procedure) Rules 2017* and Form 3A of the *County Court Criminal Procedure Rules 2019* (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.03; *County Court Criminal Procedure Rules 2019* r 3.02).
4. The notice of appeal and undertaking to appear must be signed by the appellant in the presence of:
 - (a) the Registrar of the Magistrates' Court with whom the notice of appeal is filed; or
 - (b) if the appellant is in a prison, youth justice centre or youth residential centre—
 - (i) the officer in charge of the prison, youth justice centre or youth residential centre; or
 - (ii) any prison officer of or above the rank of senior prison officer; or
 - (c) if the appellant is in a police gaol, a police officer—
 - (i) of or above the rank of sergeant; or
 - (ii) for the time being in charge of a police station (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.03(2); *County Court Criminal Procedure Rules 2019* r 3.02).
5. Before accepting a notice of appeal and undertaking to proceed, a registrar of the Magistrates' Court must provide a notice in prescribed form stating that the County Court or Supreme Court (as the case may be) may impose a more severe sentence than that imposed by the Magistrates' Court. If the person seeking to file the notice is not the appellant, the registrar must also be satisfied that the proposed appellant has signed the statement acknowledging that the County Court or Supreme Court may impose an increased sentence (CPA 2009 s 255).

⁷⁰⁷ The CPA 2009 does not provide a mechanism for the accused to appeal against the conviction alone. An appeal against conviction also operates as an appeal against sentence and, if the court finds the charges proven, it must impose its own sentence (see CPA 2009 s 256).

6. The prescribed form the registrar must provide is Form 6-3DB of the *Supreme Court (Criminal Procedure) Rules 2017* or Form 3B of the *County Court Criminal Procedure Rules 2019 (Supreme Court (Criminal Procedure) Rules 2017 r 3D.03(3); County Court Criminal Procedure Rules 2019 r 3.02)*.
7. The appellant must serve a copy of the notice on the respondent within 7 days of the day of filing the notice (CPA 2009 s 255).
8. The County Court or the Supreme Court (as the case may be) must warn an appellant, as early as possible in the hearing, that the court may impose a more severe sentence than that imposed in the Magistrates' Court (CPA 2009 s 256).
9. This obligation only arises where the court considers that an increased sentence is a "practical possibility" in the particular case, rather than the theoretical possibility that exists in all cases. It operates in the same way as the equivalent warning in relation to appeals from the County Court to the Court of Appeal (*Firth v County Court of Victoria* (2014) 43 VR 663; [2014] VSC 448).
10. The obligation is triggered when the judge becomes aware of the real possibility of imposing a particular sentence which is, objectively, more severe than the one imposed by the Magistrates' Court. This will often occur early in the hearing, such as when the judge hears the prosecution summary, even if the judge ultimately decides not to impose a more severe sentence. This realisation always arrives before the judge reaches a concluded view on the appropriate sentence (*Firth v County Court of Victoria* (2014) 43 VR 663; [2014] VSC 448, [34]).
11. In some cases, there may be room for debate on whether one sentence is more severe than another, such as where a judge increases the custodial portion but reduces the operational period of a mixed imprisonment and CCO sentence, or alters the mix of conditions on a CCO. As a matter of prudence, if a judge is aware of the possibility of altering the parameters of a sentence in a way that reduces the severity of some portion of the sentence and increases in the sentence in other ways, the judge should give the statutory warning.
12. A more severe sentence imposed on appeal will be invalid if the judge failed to give the mandatory warning (*Firth v County Court of Victoria* (2014) 43 VR 663; [2014] VSC 448, [45]–[51]).
13. On the hearing of the appeal, the County Court or Supreme Court (as the case may be):
 - (a) must set aside the sentence of the Magistrates' Court; and
 - (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 (CPA 2009 s 256(2)).
14. These powers can only be exercised at the hearing of the appeal itself and cannot be exercised in pre-hearing proceedings such as mention hearings. For example, an application to amend the charge-sheet must be heard and determined as part of the hearing of the substantive appeal. A purported amendment before the appeal itself is void and a court will fall into jurisdictional error if it determines the appeal on the basis of the purported amendment (*Saric v Elliot & County Court of Victoria* [2013] VSC 509).
15. At the commencement of the appeal, the order of the Magistrates' Court is either formally set aside or deemed to be set aside. At the end of the hearing the judge must impose his or her own sentence, and does not have jurisdiction to amend or correct the magistrate's order. The judge cannot make an order quashing a conviction, or varying a sentence, because it is a hearing *de novo* (*Neill v County Court of Victoria* [2003] VSC 328; *Helpfenbaum v Sattler* [1999] 3 VR 583; [1999] VSC 548; *DPP v His Honour Judge Fricke* [1993] 1 VR 369. See CPA 2009 s 256).

16. Because the appeal is a hearing de novo, orders made during the Magistrates' Court hearing are also set aside. An appeal against conviction and sentence is determined against the charge-sheet as originally filed and any amendments permitted during the hearing of the charge at first instance must be disregarded for the purpose of the appeal. Instead, the parties must apply for, and the judge must determine whether to allow, amendment of the charge-sheet (*Neill v County Court of Victoria* [2003] VSC 32; *Walters v Magistrates' Court of Victoria* [2015] VSC 88, [116], [119]).
17. Similarly, where the Magistrates' Court sets aside one or more charges, the judge on the appeal may reinstate those charges in exercise of the power under CPA 2009 s 256(2)(c). Unlike the position in respect of amendments to the charge-sheet, orders setting aside charges are not automatically overturned at the commencement of the appeal. Rather, the judge exercises a discretion to reinstate charges which he or she must exercise based on the justice of the case (*Quick v Creanor; Taylor v Wilkins* [2015] VSCA 273, [18], [26]–[27]; *Keech v County Court of Victoria* [2017] VSC 525 at [66]–[101]).
18. The power to reinstate charges extends to charges that the Magistrates' Court dismissed on the basis that those charges were alternatives to charges where the Court recorded a conviction. On the appeal, the Court is not limited to the specific charges which were the subject of the appeal (*Keech v County Court of Victoria* [2017] VSC 525 at [66]–[101]).
19. However, this power to reinstate charges will normally be limited to those set aside or dismissed in the interests of clearing the summons and does not extend to charges where there was an acquittal on the merits (see *Keech v County Court of Victoria* [2017] VSC 525 at [100]).
20. As *de novo* appeals are not concerned with error, the judge does not need to stay proceedings for one or more charges when a magistrate erred by imposing "double punishment". The judge can correct the error by imposing the appropriate sentences, rather than by staying one of the charges and endeavouring to determine the appeal on a limited basis (*Neill v County Court of Victoria* [2003] VSC 328).

Last updated: 8 December 2023

20.2.2 Appeals Against Sentence by Offender

1. A person convicted of an offence in the Magistrates' Court may appeal as of right against the conviction and sentence, or against the sentence alone (CPA 2009 s 254).
2. An offender may commence an appeal against sentence by filing a notice of appeal with a registrar of the Magistrates' Court at any venue of the court within 28 days of the day on which he or she was sentenced. The notice of appeal must contain:
 - (a) a statement of whether the appeal is against conviction and sentence, or sentence alone; and
 - (b) a statement in prescribed form acknowledging that the County Court or Supreme Court (as the case may be) may impose a more severe sentence than that imposed by the Magistrates' Court; and
 - (c) an undertaking to appear to proceed with the appeal on the day fixed by the registrar of the County Court or the Prothonotary of the Supreme Court (as the case may be) for the hearing of the appeal and to continue to appear for the duration of the appeal (CPA 2009 s 255).
3. The prescribed form for the notice of appeal is Form 6-3DA of the *Supreme Court (Criminal Procedure) Rules 2017* and Form 3A of the *County Court Criminal Procedure Rules 2019* (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.03; *County Court Criminal Procedure Rules 2019* r 3.02).
4. The notice of appeal and undertaking to appear must be signed by the appellant in the presence of:

- (a) the Registrar of the Magistrates' Court with whom the notice of appeal is filed; or
- (b) if the appellant is in a prison, youth justice centre or youth residential centre—
 - (i) the officer in charge of the prison, youth justice centre or youth residential centre; or
 - (ii) any prison officer of or above the rank of senior prison officer; or
- (c) if the appellant is in a police gaol, a police officer—
 - (i) of or above the rank of sergeant; or
 - (ii) for the time being in charge of a police station (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.03; *County Court Criminal Procedure Rules 2019* r 3.02(2)).

5. Before accepting a notice of appeal and undertaking to proceed, a registrar of the Magistrates' Court must provide a notice in prescribed form stating that the County Court or Supreme Court (as the case may be) may impose a more severe sentence than that imposed by the Magistrates' Court. If the person seeking to file the notice is not the appellant, the registrar must also be satisfied that the proposed appellant has signed the statement acknowledging that the County Court or Supreme Court may impose an increased sentence (*CPA 2009* s 255).
6. The prescribed form the registrar must provide is Form 6-3DB of the *Supreme Court (Criminal Procedure) Rules 2017* or Form 3B of the *County Court Criminal Procedure Rules 2019* (*Supreme Court (Criminal Procedure) Rules 2008* r 3D.03(3); *County Court Criminal Procedure Rules 2009* r 3.02).
7. The appellant must serve a copy of the notice on the respondent within 7 days of the day of filing the notice (*CPA 2009* s 255).
8. The County Court or the Supreme Court (as the case may be) must warn an appellant, as early as possible in the hearing, that the court may impose a more severe sentence than that imposed in the Magistrates' Court (*CPA 2009* s 256).
9. This obligation only arises where the court considers that an increased sentence is a "practical possibility" in the particular case, rather than the theoretical possibility that exists in all cases. It operates in the same way as the equivalent warning in relation to appeals from the County Court to the Court of Appeal (*Firth v County Court of Victoria* (2014) 43 VR 663; [2014] VSC 448).
10. The obligation is triggered when the judge becomes aware of the real possibility of imposing a particular sentence which is, objectively, more severe than the one imposed by the Magistrates' Court. This will often occur early in the hearing, such as when the judge hears the prosecution summary, even if the judge ultimately decides not to impose a more severe sentence. This realisation always arrives before the judge reaches a concluded view on the appropriate sentence (*Firth v County Court of Victoria* (2014) 43 VR 663; [2014] VSC 448, [34]).
11. In some cases, there may be room for debate on whether one sentence is more severe than another, such as where a judge increases the custodial portion but reduces the operational period of a mixed imprisonment and CCO sentence, or alters the mix of conditions on a CCO. In those cases, the judge must give the statutory warning, as the offender may consider that the adjustment produces a more severe sentence (*Greatorex v R* [2016] VSCA 136, [4]–[8]).
12. A more severe sentence imposed on appeal will be invalid if the judge failed to give the mandatory warning (*Firth v County Court of Victoria* (2014) 43 VR 663; [2014] VSC 448, [45]–[51]).
13. On the hearing of the appeal, the County Court or Supreme Court (as the case may be):

(a) must set aside the sentence of the Magistrates' Court; and

(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 (CPA 2009 s 256(2)).

14. At the commencement of the appeal, the order of the Magistrates' Court is either formally set aside or deemed to be set aside. The judge must impose his or her own sentence, and does not have jurisdiction to amend or correct the magistrates' sentence (*Neill v County Court of Victoria* [2003] VSC 328; *Helpfenbaum v Sattler* [1999] 3 VR 583; [1999] VSC 548).
15. In contrast to the position for appeals against conviction and sentence, any amendment to the charge-sheet which took place during the Magistrates' Court proceeding remains in effect for the purpose of an appeal against sentence alone. This is because the appeal is against the sentence for the charge as specified on the final charge-sheet (*Walters v Magistrates' Court of Victoria* [2015] VSC 88, [119]).
16. As part of the plea in mitigation of sentence, the appellant may present further evidence of rehabilitation between the date of the Magistrates' Court hearing and the date of the appeal. This evidence is admissible and the appellant does not require leave to adduce "fresh evidence" (see Parliament of Victoria Law Reform Committee, *De Novo Appeals to the County Court*, 2006, at 134; c.f. *R v Eliassen* (1991) 53 A Crim R 391).
17. When the appeal is against sentence only, the rehearing takes place from conviction onwards. The court rehears the appellant's plea in mitigation of penalty and must impose the sentence that it considers ought to be imposed (see *Freeman v Harris* [1980] VR 267; *Dyson v Ellison* [1975] 1 WLR 150).
18. The court may only impose a sentence or exercise a power that the Magistrates' Court could have imposed or exercised. Key differences between sentencing powers in the Magistrates' Court and the County Court or Supreme Court (as the case may be) include:
 - The maximum term of imprisonment for a Victorian summary offence is 2 years, despite any contrary indication in any other Act (*Sentencing Act 1991* s 113A);⁷⁰⁸
 - The maximum term of imprisonment for a Victorian indictable offence heard summarily is 2 years, subject to any contrary intention in any other Act (*Sentencing Act 1991* s 113);
 - The maximum fine for a Victorian indictable offence heard summarily is 500 penalty units for a natural person and 2500 penalty units for a body corporate, subject to any contrary intention in any other Act (*Sentencing Act 1991* ss 112A, 113D);
 - The maximum term of imprisonment for a Commonwealth indictable offence heard summarily is 12 months if the maximum penalty does not exceed 5 years and 2 years if the maximum penalty is greater than 5 years' (e) imprisonment and does not exceed 10 years' imprisonment (*Crimes Act 1914* (Cth) s 4J);
 - The maximum cumulative term of imprisonment for several offences is 5 years, subject to any contrary intention in any other Act (*Sentencing Act 1991* s 113B);
 - The court may only impose a suspended sentence if the period of imprisonment, or aggregate period of imprisonment, does not exceed 2 years (*Sentencing Act 1991* s 27);
 - The period of suspension of a suspended sentence may not exceed 2 years (*Sentencing Act 1991* s 27); and
19. The maximum term of detention in a youth justice centre or youth residential centre is 2 years (*Sentencing Act 1991* s 32);

⁷⁰⁸ Other than a later Act that impliedly repeals s 113A of the *Sentencing Act 1991*.

20. It is currently unclear whether the cumulative maximum term of imprisonment of 5 years also operates as the maximum term of an aggregate sentence, or whether an aggregate sentence is subject to the lower maximum of 2 years imprisonment (see *Finn v Wallace* [2016] VSC 10 at [13]).
21. The *Sentencing Act 1991* also limits the power of the County Court or Supreme Court (as the case may be) to impose certain orders that are available to the Drug Court. The court cannot make a drug treatment order, even on an appeal from the Drug Court division of the Magistrates' Court. However, it may re-instate a drug treatment order it has set aside and, if the appeal is against the custodial part of a drug treatment order, may re-instate that part of the order and may increase or decrease the length of the sentence of imprisonment (*Sentencing Act 1991* s 18ZR).
22. The court may backdate the sentence to a date not earlier than the date of sentence in the Magistrates' Court and the sentence imposed is treated for all purposes as a sentence of the County Court or Supreme Court (as the case may be) (*CPA 2009* s 256). This means that proceedings for the breach of a sentence imposed on appeal must be commenced in the County Court or Supreme Court (as the case may be).

Last updated: 31 August 2020

20.2.3 Appeal Against Sentence by DPP

1. The DPP may appeal against a sentence imposed in the Magistrates' Court as of right if satisfied that an appeal should be brought in the public interest (*CPA 2009* s 257).
2. The DPP commences an appeal under s 257 by filing a notice of appeal in prescribed form with a registrar of the Magistrates' Court at any venue of the court within 28 days of when the respondent is sentenced. The notice must state the general grounds of the appeal and must be transmitted to the County Court or Supreme Court (as the case may be). The DPP must serve a copy of the notice on the respondent within 7 days and must provide a copy to the legal practitioner who last represented the respondent in the proceeding, if that practitioner can reasonably be identified (*CPA 2009* s 258).
3. The prescribed form for the notice of appeal is Form 6-3DC of the *Supreme Court (Criminal Procedure) Rules 2017* and Form 3A of the *County Court Criminal Procedure Rules 2019* (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.04; *County Court Criminal Procedure Rules 2019* r 3.02).
4. Within 7 days of serving the notice of appeal, the DPP must file a copy of the notice of appeal and an affidavit of service with the County Court or the Supreme Court (as the case may be) (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.04; *County Court Criminal Procedure Rules 2019* r 3.03).
5. As with appeals by the offender, a DPP appeal is conducted as a rehearing de novo and the respondent is not bound by his or her plea in the Magistrates' Court. On hearing the appeal, the court:
 - (a) must set aside the sentence of the Magistrates' Court; and
 - (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 (*CPA 2009* s 259(2)).
6. See 20.2.2 Appeals Against Sentence by Offender for details on the exercise of this power.
7. When imposing sentence, the court must not take into account any element of double jeopardy involved in sentencing the accused for a second time (*CPA 2009* s 259). See Crown Appeal Against Inadequate Sentence for further details on this requirement.
8. The court may backdate the sentence to a date not earlier than the date of sentence in the Magistrates' Court and the sentence imposed is treated for all purposes as a sentence of the County Court or Supreme Court (as the case may be) (*CPA 2009* s 259).

Appeal for Failure to Fulfil Undertaking

9. The DPP may also appeal to the against a sentence for an indictable offence determined summarily in the Magistrates' 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 (CPA 2009 s 260(1)).⁷⁰⁹
10. If the DPP brings an appeal under s 260, the DPP cannot bring a further appeal against the sentence imposed by the County Court or Supreme Court (CPA 2009 s 260(3)).
11. The DPP may bring an appeal under s 260 at any time, whether or not the offender has served the sentence (CPA 2009 s 260).
12. The DPP commences an appeal under s 260 by filing a notice of appeal in prescribed form with a registrar of the Magistrates' Court at any venue of the court. The DPP must sign the notice of appeal personally. A copy of the notice of appeal must be served on the respondent personally within 14 days and the DPP must provide a copy of the notice to the legal practitioner who represented the respondent, if that practitioner can reasonably be identified. The Magistrates' Court must transmit the notice of appeal to the County Court or Supreme Court (as the case may be) (CPA 2009 s 261).
13. The prescribed form for the notice of appeal is Form 6-3DC of the *Supreme Court (Criminal Procedure) Rules 2017* and Form 3A of the *County Court Criminal Procedure Rules 2019* (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.04(2); *County Court Criminal Procedure Rules 2019* r 3.02).
14. Within 7 days of serving the notice of appeal, the DPP must file a copy of the notice of appeal and an affidavit of service with the County Court or the Supreme Court (as the case may be) (*County Court Criminal Procedure Rules 2009* r 3.03; *Supreme Court (Criminal Procedure) Rules 2008* r 3D.04).
15. Unlike other appeals in Part 6.1 of the Act, an appeal under s 260 is not conducted as a rehearing *de novo*. Section 262(2) states:
 - (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 County 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 to the respondent to fulfil the undertaking (CPA 2009 s 262(2)).
16. See 20.4.2.4 Crown Appeal Due to Failure to Fulfil Undertaking for more details on the re-sentencing process on this type of appeal.
17. When imposing sentence, the court must not take into account any element of double jeopardy involved in sentencing the accused for a second time (CPA 2009 s 259). See Crown Appeal Against Inadequate Sentence for further details on this requirement.

⁷⁰⁹ The DPP has no power to appeal against the sentence for a summary offence on the ground that the accused failed to fulfil an undertaking to assist law enforcement authorities.

20.2.4 Procedural Matters

1. The following sections examine some procedural matters concerning appeals from the Magistrates' Court to the County Court or the Supreme Court (as the case may be).
2. When the notice of appeal is filed, a registrar of the Magistrates' Court must contact the court to obtain a date for the hearing of the appeal. The registrar of the Magistrates' Court must also forward the following documents to the higher court:
 - (a) a copy of the notice of appeal filed;
 - (b) the original charge-sheet;
 - (c) the undertaking of bail by the appellant and surety, if any;
 - (d) the affidavit of justification or declaration of justification made by the surety for bail, if any;
 - (e) the certified extract of the Court order;
 - (f) the exhibit sheet and witness cost sheet; and
 - (g) the address and telephone number of the Court where the sentence or conviction was made. (*Magistrates' Court Criminal Procedure Rules 2019* r 78(5)).
3. When the offender appeals against the conviction and sentence or against sentence alone, the registrar must forward the following to the DPP:
 - A copy of the notice of appeal;
 - Certified extracts of the court order;
 - The notification of the appeal (*Magistrates' Court Criminal Procedure Rules 2009* r 78(7)).
4. The registrar of the County Court or the Prothonotary of the Supreme Court (as the case may be) must fix the date and place for hearing the appeal and must notify each party and any of the legal practitioners on the record of the date and place of the hearing a reasonable time before the hearing (*Supreme Court (Criminal Procedure) Rules 2008* r 3D.05; *County Court Criminal Procedure Rules 2009* r 3.04).
5. A person may commence an appeal against two or more sentences that relate to charges that were heard together using a single notice of appeal. It is not necessary to file separate notices of appeal for each sentence (*CPA 2009* s 269).
6. When a person appeals against an aggregate sentence or an aggregate fine, the court may rely on an agreed statement of facts for any charge on the original charge-sheet (*CPA 2009* s 270).
7. Section 271 of the *CPA 2009* provides that Part 6.1 of the *CPA 2009* applies generally to appeals from the Magistrates' Court, subject to any contrary intention:
 - (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.
8. On an appeal against sentence alone, the respondent must file the following documents at least 4 days before the hearing:
 - (a) Police Summary or summaries;

- (b) Criminal Record;
 - (c) Victim Impact Statement/s; and
 - (d) Chart of Offences (*County Court Criminal Division Practice Note*, PNCR 2-2022, [29.6]).
9. A Chart of Offences is prepared where there are multiple offences being considered on the appeal. It should provide the following details:
- (a) Charge number as per the Notice of appeal (not the Charge Sheets);
 - (b) Informant;
 - (c) Offence and source of offence;
 - (d) Sentence imposed;
 - (e) Any concurrency or cumulation ordered;
 - (f) Maximum penalty;
 - (g) Any other orders made against each offence (Disposal, Forfeiture, Licence Cancellation etc); and
 - (h) Any pre-sentence detention (*County Court Criminal Division Practice Note*, PNCR 2-2022, [29.9])
10. The appellant must file and serve on the respondent at least 2 days before the appeal hearing any reports or other material the appellant seeks to rely on (*County Court Criminal Division Practice Note*, PNCR 2-2022, [29.10]).

Appeal First Listing

- 11. Appeals from the Magistrates' Court against conviction and sentence which are expected to take one day or more will be listed for a first listing approximately 21 days after the appeal is lodged (*County Court Criminal Division Practice Note* PNCR 2-2022, [29.1]).
- 12. The appellant must attend the first listing and appellants in custody will do so by video link, Zoom or Webex unless the court orders otherwise or a party requests that the appellant attend in person (*County Court Criminal Division Practice Note* PNCR 2-2022, [29.3]).
- 13. Witnesses are not required to attend the first listing (*County Court Criminal Division Practice Note* PNCR 2-2022, [29.2]).
- 14. Practitioners are not required to robe for the first listing (*County Court Criminal Division Practice Note* PNCR 2-2022, [4.2]).
- 15. For appeals against criminal charges, the parties must be prepared to answer the following questions:
 - (a) How long did the hearing in the Magistrates' Court run?
 - (b) Did all required witnesses attend?
 - (c) What are the factual issues in dispute?
 - (d) What is not in dispute?
 - (e) How can the appellant and respondent narrow the issues in dispute?
 - (f) Have any plea offers been made or will be made?
 - (g) Are there any co-accused, and if so what is their status?
 - (h) If the matter will proceed as an appeal hearing:

(i)

How many witnesses will be called, including identifying the number of expert witness, interstate witnesses, child witnesses or cognitively impaired witnesses;

Ho

(ii)	mate of the hearing length and how this was arrived at?	Esti
(iii)	any <i>Evidence Act</i> notices be served?	Will
(iv)	any subpoenas be sought?	Will
(v)	funding in place? (<i>County Court Criminal Division Practice Note</i> PNCR 2-2022, [29.4]).	Is

Late Notice to Appeal Deemed to be Application for Leave to Appeal

16. Section 263 of the CPA 2009 states:

- (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
 - (b) the appellant has 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.

- (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
 - (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.

17. When a notice of appeal is filed more than 28 days after the sentence was imposed, the registrar must record in the court register than an application for leave to appeal has been made under s 263 of the CPA 2009 (*Magistrates' Court Criminal Procedure Rules* 2019 r 80).

18. A party must show that the *failure to file* the notice of appeal was due to exceptional circumstances. The court is not concerned with whether the facts of the case or the merits of the appeal involve exceptional circumstances (*Shire of Carnarvon v Klein Corporation Pty Ltd* [2008] VSC 24, [34]–[42]; *Burlock v Wellington Street Investments Pty Ltd* [2009] VSC 565, [27]; *Kalb v Magistrates' Court of Victoria* [2014] VSC 137, [12]–[18]; *Cao v Collister* [2022] VSC 36, [16]).
19. The judge must also be satisfied that the delay does not materially prejudice the respondent's case (*CPA 2009 s 263(2)(b)*; *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337; *Cao v Collister* [2022] VSC 36, [45]–[47]).
20. This provision does not apply to appeals by the DPP against sentence due to the offender failing to fulfil an undertaking. The DPP may commence such an appeal at any time, even if the offender has served his or her sentence (*CPA 2009 s 260*).
21. If leave to appeal is refused, then the court must strike out the appeal and any sentence is reinstated (*CPA 2009 s 263*).

Stay of Order

22. An appeal or application for leave to appeal by an offender from the Magistrates' Court acts as a stay of the sentence but not the conviction when:
 - if the appellant is not in custody because of the sentence, when he or she files the notice of appeal and signs the undertaking in s 255(5) of the *CPA 2009*; or
 - if the appellant is in custody because of the sentence, when the appellant files the notice to appeal, signs the undertaking in s 255(5) of the *CPA 2009* and enters bail (*CPA 2009 s 264*).⁷¹⁰
23. The registrar must recall and cancel any consequential processes in relation to the sentence which are stayed, subject to *Road Safety Act 1986 s 29* (see *Magistrates' Court Criminal Procedure Rules 2019* rr 78, 80).
24. An offender may apply to the Magistrates' Court for bail pending appeal. He or she must give reasonable notice of the bail application to the respondent. The Magistrates' Court must grant or refuse bail as if the appellant were accused of the charge he or she is appealing and was being held in custody for the offence charged. The *Bail Act 1977* applies to this determination with any necessary modifications (*CPA 2009 s 265*).
25. If bail is granted, a registrar of the Magistrates' Court must recall and cancel any process in relation the custodial sentence under appeal (*Magistrates' Court Criminal Procedure Rules 2019 r 78(4)*).
26. If the court strikes out an offender's appeal for failure to appear under s 267 and later reinstates the appeal, any application for bail may be made to the County Court (*CPA 2009 s 267*).
27. An appeal, or an application for leave to appeal, by an offender does not act as an automatic stay of any licence or permit disqualification order, or a licence cancellation, suspension or variation order under the *Road Safety Act 1986* (*CPA 2009 s 264*; *Road Safety Act 1986 s 29*).
28. If the court stays a licence or permit disqualification, or a licence cancellation, suspension or variation order, the registrar must notify the Roads Corporation and the County Court and must recall and cancel the relevant process in relation to the sentence (*Magistrates' Court Criminal Procedure Rules 2019 r 79*).

⁷¹⁰ Note that under *CPA 2009 s 3*, "appeal includes application for leave to appeal".

Abandonment of Appeal

29. An appellant may abandon an appeal by filing a notice of abandonment in prescribed form with the County Court or the Supreme Court (as the case may be). An offender who appeals against conviction and sentence, but does not pursue the appeal against conviction, must give written notice to the court and the respondent in prescribed form that the appeal against conviction only is abandoned (CPA 2009 s 266).
30. In the County Court, the prescribed form for a notice of abandonment is Form 3D of the *County Court Criminal Procedure Rules 2019*, while Form 3E is the prescribed form for notifying the court that the appellant abandons an appeal against conviction only (*County Court Criminal Procedure Rules 2019* rr 3.05, 3.06). In the Supreme Court, the prescribed forms are Form 6-3DE for general abandonment of an appeal and Form 6-3DF for abandoning an appeal against conviction only (*Supreme Court (Criminal Procedure) Rules 2017* rr 3D.06, 3D.07).
31. If the sentence under appeal included a term of imprisonment or detention and the offender is not in custody, then he or she may abandon the appeal by surrendering to the registrar of the County Court or the Prothonotary of the Supreme Court (as the case may be) and immediately filing a notice of abandonment of appeal in the prescribed form. The registrar may then issue a warrant to imprison the offender in accordance with the *Magistrates' Court Act 1989* (CPA 2009 s 266).
32. When an appellant abandons an appeal, the Registrar of the County Court must make an order striking out the appeal, unless:
- the notice of abandonment is filed on the day the appeal is listed for hearing, in which case a judge may make the order striking out the appeal; or
 - the appellant seeks to maintain an appeal against sentence while abandoning an appeal against conviction, in which case the court must not make an order striking out the appeal (*County Court Criminal Procedure Rules 2019* r 3.05).
33. There is no equivalent requirement in the *Supreme Court (Criminal Procedure) Rules 2017*. However, CPA 2009 s 266(4) specifies that if an appellant abandons an appeal, the court must strike out the appeal and *Supreme Court (Criminal Procedure) Rules 2017* r 3D.06(2) provides that the court may be constituted by the Prothonotary or a Judge of the Court.
34. The court must not set aside an order under s 266(4) striking out an appeal (CPA 2009 s 266(6)).
35. The consequences of the court striking out an appeal are set out in s 266(5):
- (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.⁷¹¹
36. For further information on abandoning an appeal, see *County Court Criminal Division Practice Note PNCR 2-2022*, [29.11]–[29.15].

⁷¹¹ Note that according to the explanatory memorandum of the Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009, the words "the sentence of the Magistrates' Court is reinstated" in s 266(5) overturn the decision in *Helpfenbaum v Sattler* [1999] 3 VR 583; [1999] VSC 548.

Failure to Appear

37. Sections 267 and 268 of the CPA 2009 set out the powers of the court when an offender fails to appear for the hearing of the appeal by the offender or the DPP.
38. When the offender fails to appear at the time listed for the hearing of an appeal where he or she is the appellant, the court may strike out the appeal or adjourn the proceedings on any terms it considers appropriate (CPA 2009 s 267(1)).
39. When the court strikes out an appeal due to the offender's failure to appear and the offender 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 a warrant to imprison the offender in accordance with the *Magistrates' Court Act 1989*. The registrar or Prothonotary may also recall and cancel that warrant (CPA 2009 s 267).
40. The court may set aside the order striking out an appeal due to the appellant's failure to appear if the appellant satisfies the court that the failure was not due to his or her fault or neglect (CPA 2009 s 267).
41. In the County Court, when applying to set aside the order striking out the appeal, the party must:
- (a) Contact the other party to ascertain their position to the application;
 - (b) Contact the Court to obtain a date for the application.;
 - (c) Complete an Application to set aside order striking out an appeal due to non-appearance;
 - (d) File the application with the Court and serve on the respondent (*County Court Criminal Division Practice Note*, PNCR 2-2022, [29.17]).
42. An application to set aside the order striking out the appeal must be in Form 3F of the *County Court Criminal Procedure Rules 2019*. When the applicant files this, the Registrar must immediately forward a copy to the court that imposed the original sentence or order (*County Court Criminal Procedure Rules 2019* r 3.07). Form 6-3DG is the equivalent form in the Supreme Court (*Supreme Court (Criminal Procedure) Rules 2017* r 3D.08).
43. The appellant must serve a notice of the application on the respondent a reasonable time before making the application. This notice must be served in the same manner as a notice of appeal (CPA 2009 s 267(4), (5)).
44. If the court grants the application to set aside the order striking out the appeal, it must order the reinstatement of the appeal subject to any appropriate costs order and may require the appellant to give a further undertaking to proceed with the appeal (CPA 2009 s 267(6)).
45. On reinstatement of the appeal, the appeal once again operates as a stay of the sentence but not the conviction, subject to s 29 of the *Road Safety Act 1986*, when:
- The appellant signs the further undertaking, if he or she is required to do so; and
 - The appellant enters bail, if he or she is in custody because of the sentence and the Magistrates' Court grants bail pending the appeal (CPA 2009 s 267(7)).
46. If the respondent to a DPP appeal fails to appear at the time listed for the appeal, the court may adjourn the proceeding on any terms it considers appropriate or, if satisfied that the respondent received the notice of appeal in accordance with s 258 or s 261 of the Act, it may hear and determine the appeal in the absence of the respondent.⁷¹² If the court adjourns the proceeding and is satisfied that notice was given in accordance with s 258 or s 261, it may issue a warrant to arrest the respondent and bring him or her before a judge of the court (CPA 2009 s 268(2)).

⁷¹² Note: The County Court cannot impose a sentence that requires the consent of the respondent, for example a community-based order, in the absence of the respondent (CPA 2009 s 268).

47. The CPA 2009 does not contain any specific provisions concerning the failure of the DPP to appear on an appeal. Historically, this is an exceptionally unusual situation and is unlikely to arise.
48. The CPA 2009 only contains a requirement that the accused appear at the appeal. Unless otherwise required to do so due to a court order, condition of bail or remand, or the requirement of an Act or the rules of court, the accused does not need to personally attend the appeal (CPA 2009 s 330; *Hamilton v Pickering* (2014) 42 VR 681; [2014] VSC 399). See also 9.1 Presence of the Accused.

Recording and notification of result of appeals

49. *County Court Criminal Procedure Rules 2019* r 3.08 specifies the process of recording the outcome of an appeal and notifying the parties, the lower court and those administering the sentence under appeal:
- (1) The Court must record the result of an appeal in Form 3G.
 - (2) The Registrar must forward the result of appeal to—
 - (a) the court where the original sentence or order was imposed;
 - (b) the parties; and
 - (c) any person or authority concerned with the administration of any sentence or order originally imposed in the Magistrates' Court, or any sentence or order imposed by the Court on appeal.
 - (3) If a number of appeals are heard together, it is not necessary to record the sentence on a separate result of appeal, but the sentence or particulars of each charge must be recorded in full.
 - (4) Where the Court has imposed a sentence of imprisonment or detention, the result of appeal shall be sufficient to authorise the keeping of the appellant for the period and in the manner set out in the record.
50. *Supreme Court (Criminal Procedure) Rules 2017* r 3D.09 specifies the equivalent process for appeals against conviction or sentence from the Magistrates' Court to the Supreme Court:

(1) The Court shall record the result of each appeal to which this Order applies in a result of appeal form in Form 6-3DH.

(2) The Prothonotary shall forward a copy of the result of appeal form to—

(a) the court where the original sentence or order was imposed;

(b) the parties; and

(c) any person or authority concerned with the administration of any sentence or order originally imposed in the Magistrates' Court, or any sentence or order imposed by the Court on appeal.

(3) If more than one appeal is heard together, it is not necessary to record the sentence on a separate result of appeal form, but the outcome of each appeal, the particulars of each charge and the sentences imposed shall be recorded in full.

(4) Where the Court has imposed a sentence of imprisonment or detention, the result of appeal form shall be sufficient to authorise the keeping of the appellant for the period and in the manner set out in the form.

Last updated: 17 March 2023

20.3 Appeals from Magistrates' Court to Supreme Court on Question of Law

1. A party to a criminal proceeding in the Magistrates' Court may appeal as of right to the Supreme Court on a question of law from a final order of the Magistrates' Court. This appeal is not available in respect of committal proceedings (*CPA 2009 s 272(1)*).⁷¹³
2. Appeals under *CPA 2009 s 272* are available in relation to decisions of both magistrates and judicial registrars of the court. *Magistrates Court Act 1989 s 16K*, which provides for the review of decisions by judicial registrars does not displace the jurisdiction of the Supreme Court (*Rodger v Wojcik* [2014] VSC 308 at [13]).
3. If the informant is a police officer and wishes to appeal under *s 272* of the *CPA 2009*, the appeal may only be brought by the DPP on behalf of the informant (*CPA 2009 s 272(2)*). However, it is not necessary to lead sworn evidence to prove that the informant wishes to appeal. The court may examine the whole of the material to determine whether, on the balance of probabilities, the informant has demonstrated a desire to appeal. It may also accept, as a general proposition, that the DPP will only bring an appeal in accordance with the wishes of the informant (*Luff v DPP* [2003] VSCA 81).
4. The court must look at the underlying nature of a proceeding to determine whether it is a "criminal proceeding" for the purpose of *s 272*. This term can include ancillary orders that are related to a criminal proceeding, including some orders under the *Road Safety Act 1986* (*Clarkson v DPP* [1990] VR 745; *Perkins v County Court of Victoria* (2000) 2 VR 246; [2000] VSCA 171; *Chief Commissioner of Police v Rigg* (2004) 10 VR 134; [2004] VSC 448).
5. A person commences an appeal under *s 272* by filing a notice of appeal with the Trial Division of the Supreme Court within 28 days of the date the impugned order was made. The notice of appeal must be in writing signed by the appellant or the appellant's legal practitioner and set out:

⁷¹³ An appeal under Part 6.2 is brought by 'a party', in contrast to the appeal rights in Part 6.1 which are granted to 'a person convicted of an offence' and 'the DPP'. However, when the DPP exercises the power to take over a prosecution (see *Public Prosecutions Act 1994 s 22(1)(b)(ii)*), the original prosecutor ceases to be 'a party', and that person cannot invoke the appeal process in Part 6.2 (*Chalker v Baldwin* [2021] VSC 644, [18]–[19]).

- The order under appeal;
 - Whether the appeal is from the whole order or specify the part of the order under appeal;
 - The question of law in the appeal;
 - The grounds of appeal;
 - The order that is sought (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.03).
6. The appellant must serve a copy of the notice of appeal on the respondent within 7 days of filing (CPA 2009 s 272(5)).
 7. The notice of appeal must also state the people who will be served with the notice (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.03(1)(c)).
 8. As soon as practicable after filing the notice, the appellant must deliver a copy of the notice to the relevant Registrar of the Magistrates' Court and, unless the court orders otherwise, the appellant must serve a copy of the notice on all persons directly affected by the appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.03(2)).
 9. The registrar of the Magistrates' Court must record in the court register when a notice of appeal filed in the Supreme Court is delivered (*Magistrates' Court Criminal Procedure Rules 2019* r 82).
 10. An appeal under s 272 of the CPA 2009 does not operate as a stay of any order of the Magistrates' Court, unless the Supreme Court orders otherwise (CPA 2009 s 272(6)). The court may order a stay if necessary for the proper hearing and determination of the application or appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.07).
 11. Within 7 days of filing the notice of appeal, the appellant must file an affidavit setting out the acts, facts, matters and circumstances relating to:
 - (a) the order under appeal;
 - (b) the grounds set out in the notice of appeal; and
 - (c) if leave to appeal is needed, why leave to appeal should be given (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.04).
 12. The affidavit must include as an exhibit a copy of the order under appeal and a copy of the reasons for the order. If these documents are not included, the affidavit must account for their absence (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.04).
 13. The applicant must also apply on summons for directions and, if necessary, leave to appeal, within seven days of filing the notice of appeal. The rules set down a timetable for the applicant to serve the summons and affidavit, and for the respondent to serve and file an affidavit in answer. The court may make directions for the appeal and may decide whether leave to appeal should be determined separately or in the hearing of the appeal, and whether to dismiss the appeal on the basis that:
 - (a) the notice of appeal does not identify sufficiently or at all a question of law on which the appeal may be brought;
 - (b) the appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice; or
 - (c) the appeal is frivolous, vexatious or otherwise an abuse of the process of the Court (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.05).
 14. The Supreme Court may call for a report from the relevant Magistrates' Court that made the order under appeal and, if the report is made available to the parties, the Supreme Court may act on the report (*Supreme Court (Criminal Procedure) Rules 2017* r 3A.09).

15. Appeals under s 272 are only available concerning questions of law that are involved in the final order of the court (*Transport Accident Commission v Hoffman* [1989] VR 197; *Wong v Carter* [2000] VSCA 53). This may include some interlocutory decisions that relate to the admission of evidence (*Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460; *Johnson v Poppeliers* (2008) 20 VR 92; [2008] VSC 461).
16. Common examples of questions of law include:
 - (a) Whether the court identified the relevant legal test?
 - (b) Whether the court applied the correct legal test?
 - (c) Whether there was any evidence to support a finding of fact?
 - (d) Whether the facts found fall within the statute properly construed (*DPP v Burns* [2017] VSC 570 at [14]).
17. The question of whether there was any evidence to support a finding of fact can be expressed as:
 - (a) whether there was ‘any evidence upon which the magistrate might, as a reasonable person, come to the conclusion’ reached; or
 - (b) whether the finding was open (*DPP v Burns* [2017] VSC 570 at [15]).
18. These two formulations are substantially equivalent (*DPP v Burns* [2017] VSC 570 at [16]; *Victoria v Subramanian* (2008) 19 VR 335 at [32]).
19. A party must show that the magistrate improperly excluded evidence, erred in the exercise of discretion or improperly applied the law to the facts (*Engebretson v Bartlett* (2007) 16 VR 417; [2007] VSC 163; *Gamser v Rhind*, Unreported, VSC, 8 September 1993). It is not enough to argue that the decision was against the weight of the evidence (*Keep v Pozzebon*, Unreported, VSC, 1 September 1994; *Transport Accident Commission v Hoffman* [1989] VR 197).
20. A party cannot appeal against interlocutory decisions that are not involved in the final order. An order is final only if the legal effect of the order is to finally determine the rights of the parties. The court must look at the legal, rather than the practical, effect of the order. An order is interlocutory if it may be set aside on an application to the court that made the order, even if such an application is unlikely to succeed. For example, orders striking out or staying a proceeding are interlocutory (*Bereton v Sinclair* (2000) 2 VR 424; [2000] VSCA 211; *Kinex Exploration v Tasco Pty Ltd* [1995] 2 VR 318; *DPP v Moore* (2003) 6 VR 430; [2003] VSCA 90; *DPP v Sabransky* [2002] VSC 143; *Chalker v Baldwin* [2021] VSC 644, [15]–[17]).
21. If the notice of appeal is filed more than 28 days from the date of the impugned order, it is deemed to be an application for leave to appeal (*CPA 2009 s 272(7)*). The court may grant leave to appeal if satisfied that the failure to commence the appeal within 28 days was due to exceptional circumstances and that the case of any other party to the appeal would not be materially prejudiced by the delay (*CPA 2009 s 272(8)*).
22. A Judge of the Court may refer an appeal to an Associate Judge or judicial registrar for determination. In addition, Associate Judges and judicial registrars have authority to determine certain applications under the Rules that relate to service of notice of appeal, leave to amend grounds, issuing of directions, ordering stays or expedition and calling for reports from the Magistrates’ Court (*Supreme Court (Criminal Procedure) Rules 2017 rr 31A.10–3A.18*).
23. A party must show that the *failure to file* the notice of appeal was due to exceptional circumstances. The court is not concerned with whether the facts of the case or the merits of the appeal involve exceptional circumstances (*Schwerin v Equal Opportunity Board* (1994) 2 VR 279; *Hughes v Morgan* [1998] VSC 147).
24. In addition, the court is not concerned merely with the length of the delay, but must consider whether the delay materially prejudices the respondent’s case (*Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337).
25. After hearing and determining the appeal, the court may make any order it thinks appropriate. An order other than an order remitting the proceeding may be enforced as an order of the Supreme Court. The court may also grant a stay of the order or may admit an accused to bail (*CPA 2009 ss 272(9)–(11)*).

26. When informed that the Supreme Court has issued a stay under CPA 2009 s 272(11), the Registrar of the Magistrates' Court must recall any process giving effect to the order, and must notify the Roads Corporation if the Supreme Court stays an order under *Road Safety Act 1986 s 29* (*Magistrates' Court Criminal Procedure Rules 2019 r 83*).
27. The court may remit the matter to the Magistrates' Court with or without any direction in law, or may deal with the matter itself, depending on the state of the evidence and the needs of justice (CPA 2009 s 272. See also *DPP v Parsons* [1993] 1 VR 1).
28. If the Supreme Court remits the matter to the Magistrates' Court, the registrar of the Magistrates' Court must re-list the matter for hearing before the Magistrates' Court (*Magistrates' Court Criminal Procedure Rules 2019 r 84*).
29. If the Supreme Court finds an error of law, but is satisfied that the accused did not lose a chance of acquittal that was open, it may dismiss the appeal. The court may undertake its own evaluation of the evidence on the record and must take into account the natural limitations involved in such a review (*Walford v McKinney* [1997] 2 VR 353; *Engbretson v Bartlett* (2007) 16 VR 417; [2007] VSC 163; *Knox v Bible* [1907] VLR 485; *Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460).
30. A party that brings an appeal under s 272 of the CPA 2009 abandons finally and conclusively the chance to appeal to the County Court in relation to that proceeding (CPA 2009 s 273).
31. A party should not bring judicial review proceedings under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* if an appeal under s 272 of the Act is available. Bringing judicial review proceedings where an appeal is available may provide a discretionary reason for refusing judicial review relief (*Kuek v Victoria Legal Aid & Anor* (2001) 3 VR 289; [2001] VSCA 80; *Kyriazis v Victoria Police* [2022] VSC 596, [44]).

Related topic: 19.4.3 Costs on Appeal

Last updated: 8 December 2023

20.4 Appeal And Case Stated to the Court of Appeal

1. Part 6.3 of the CPA 2009 governs appeals to the Court of Appeal from the Trial Division of the Supreme Court and the County Court.
2. Throughout this Part, the Act uses the terms *conviction*, *original jurisdiction*, *originating court* and *sentence*. These terms are defined in s 3:

Conviction, in Chapters 6 and 8, includes a finding of guilt by a court, whether or not a conviction is recorded;

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 breach 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.

Sentence includes –

- (a) the recording of a conviction; and
- (b) an order made under Part 3, 3A, 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
- (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.

Related topic: 19.4.3 Costs on Appeal

Last updated: 15 December 2021

20.4.1A Powers and Procedures

1. Division 7 of Part 6.3 contains miscellaneous powers and procedures concerning appeals, including:
 - extension of time for filing and serving notices (CPA 2009 s 313. See also *Supreme Court (Criminal Procedure) Rules 2017* r 2.22 – r 2.25);
 - abandonment of appeal (CPA 2009 s 314. See also *Supreme Court (Criminal Procedure) Rules 2017* rr 2.40, 2.41);
 - exercise of powers of the Court of Appeal as constituted by a single judge (CPA 2009 s 315);
 - obligation on a trial judge to provide a report (CPA 2009 s 316);
 - provisions concerning evidence and witnesses (CPA 2009 ss 317, 318, 319, 321. See also *Supreme Court (Criminal Procedure) Rules 2017* rr 2.44, 2.45);
 - referrals to a Supreme or County Court trial judge for a 'reference determination' (CPA 2009 s 319A);
 - referrals to and payment of a special commissioner (CPA 2009 ss 320, 326. See also *Supreme Court (Criminal Procedure) Rules 2017* r 2.46);

- powers relating to bail, warrants and ancillary orders (CPA 2009 ss 323, 324, 325).
2. The Court or the Registrar of Criminal Appeals, may extend the period for filing or serving a notice of appeal or a notice of application for leave to appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 2.23). If the Registrar refuses an application to extend time, an applicant is entitled to have the Court of Appeal determine the application (CPA 2009 s 313).
 3. A party may apply for an order extending the time for filing or serving notices at any time. The court will not grant an application for extension of time as a matter of course. The following principles guide the exercise of discretion:
 - (1) the prescription by the statute of the time limit for giving notice is intended to secure finality and compliance is intended to be required in the ordinary case;
 - (2) extension of the time is a matter for the discretion of the Court, and the applicant must put material and considerations before the Court which will persuade it to exercise its discretion in favour of an extension;
 - (3) rigid restrictions cannot be imposed on the exercise of discretion but in general the Court will require special and substantial reasons for extending the time;
 - (4) the longer the time which elapses since the expiration of the statutory period and the more the changes that have taken place in the meantime, the more exceptional will the circumstances put before the Court have to be;
 - (5) it is the practice of the Court not to grant any considerable extension of time unless it is satisfied that there are such merits in the proposed appeal that it would probably succeed;
 - (6) a reasonably satisfactory account of the failure to comply with the statutory requirement needs to be forthcoming (*R v Darby*, Unreported, VSC FC, 2 May 1975. Quoted with approval in *R v O'Keefe* [1979] VR 1. See also *R v Davis* (2003) 6 VR 538; [2003] VSCA 173).
 4. A single judge of the Court of Appeal may exercise the following powers under the Act:
 - (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;
 - (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;
 - (f) to order stays of sentence;
 - (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 (CPA 2009 s 315).
 5. If a single judge of the Court of Appeal refuses an application to exercise one of the above powers in relation to any ground of appeal, the applicant may have the application determined by the Court of Appeal (CPA 2009 s 315).
 6. The Court of Appeal may set aside ancillary orders on an appeal under Part 6.3, if it is satisfied that it is in the interests of justice to do so (CPA 2009 s 325).⁷¹⁴

⁷¹⁴ The CPA 2009 defines "ancillary order" as "an order (other than the order that is the subject of the appeal) made by the originating court in the proceeding" (CPA 2009 s 325).

Applications for Leave

7. Applications for leave to appeal are determined prior to the hearing of the substantive appeal. In most cases, applications for leave are determined by a single judge without oral argument (*Supreme Court of Victoria*, Practice Note SC CA 1; *Supreme Court (General Criminal Procedure) Rules 2017* rr 2.06–2.07).
8. Applications for leave to appeal against conviction or sentence must be filed within 28 days of the date of sentence (CPA 2009 ss 275, 279, 284).
9. The Registrar of Criminal Appeals will provide a copy of the application for leave to the respondent within 7 days after it is filed. The applicant therefore is not required to serve a copy of the application on the respondent (*Supreme Court of Victoria*, Practice Note SC CA 1).
10. The Crown does not require leave to appeal (CPA 2009 ss 287, 291).

Grounds of Appeal and Written Case

11. When filing an application for leave to appeal, the applicant must also provide a written case. The purpose of the written case is to enable the Court to grasp the facts and issues in the case and to decide the application without oral argument (*Supreme Court of Victoria*, Practice Note SC CA 1).
12. Unless the Registrar otherwise directs, the written case must be concise, must not exceed 10 pages of 12 point font with 1.5 spacing between lines. Footnotes must be of no less than 10 point font (*Supreme Court of Victoria*, Practice Note SC CA 1).
13. The written case must contain the following information
 - The conviction or sentence from which leave to appeal is sought;
 - In applications for leave to appeal against sentence, the applicable maximum penalty and any other relevant statutory provisions must be shown in tabular format. Where there is a parity ground of appeal, an equivalent table must be provided for each co-offender;
 - A summary of the relevant facts (unless at first instance an agreed summary was used, in which case that agreed summary must be attached);
 - The grounds of appeal, numbered consecutively;
 - A list of authorities, separated into “Part A” (authorities which will be read from at any hearing) and “Part B” (additional authorities to which will be made);
 - A list of all materials which the applicant intends to rely upon, including a detailed description of the material and any exhibit numbers (*Supreme Court of Victoria*, Practice Note SC CA 1).
14. The grounds of appeal must be stated specifically and concisely, and not merely in general terms. The grounds must be sufficiently particularised to identify the matters relied upon. In addition, complaints about the weight attributed to sentencing factors must be treated as particulars of a ground of manifest excess unless there is an argument that the treatment of that factor reveals specific error (*Supreme Court (Criminal Procedure) Rules 2017* rr 2.05, 2.15; *Supreme Court of Victoria*, Practice Note SC CA 1. See also *Smith v The Queen* [2020] VSCA 159).
15. As part of each ground of appeal, the written case must contain a concise statement of argument which will be advanced in support of the ground, along with reference to any authorities relied upon or sought to be distinguished. The written case must also identify by date and time each passage of transcript that must be obtained in order to decide the application and identify any document mentioned in the ground by exhibit number or otherwise (*Supreme Court of Victoria*, Practice Note SC CA 1).
16. Where a ground of appeal is expressed in general terms, such as ‘the conviction is unsafe and unsatisfactory or unreasonable’, the ground must be sufficiently particularised to identify the matters relied on. In addition, the written case must include a schedule of the evidence and transcript references relevant to that ground (*Supreme Court of Victoria*, Practice Note SC CA 1).

17. The written case must be signed by counsel, or if counsel is not retained, the applicant's solicitor. If the applicant is self-represented, the applicant must sign the written case personally (*Supreme Court of Victoria*, Practice Note SC CA 1).
18. Where the written case does not comply with the Practice Direction, the application for leave to appeal will be rejected by the Registrar (*Supreme Court of Victoria*, Practice Note SC CA 1, [9.6]).

Crown Response

19. The Registrar of Criminal Appeals must provide the Crown with a copy of the notice of application for leave to appeal and written case within 7 days after it is accepted for filing (CPA 2009 ss 275(2), 279(2), 284(2); *Supreme Court of Victoria*, Practice Note SC CA 1).
20. In an application for leave to appeal against conviction, the Crown will ordinarily file a written case in response. In other cases, it is not expected that the Crown will always file a response (*Supreme Court of Victoria*, Practice Note SC CA 1).
21. Where the Crown provides a written case, it must be served and filed within 28 days of being provided with a copy of the notice of application for leave to appeal (*Supreme Court of Victoria*, Practice Note SC CA 1).
22. The Crown's written case must respond to each ground of appeal and each argument in the applicant's written case. If there is a ground of appeal that the conviction is unsafe and unsatisfactory, the Crown must also provide a schedule of evidence and transcript references which the Crown says is relevant to rebut that ground (*Supreme Court of Victoria*, Practice Note SC CA 1).
23. The Crown response does not need to re-summarise the facts but may explicitly adopt the applicant's summary. If the matter proceeded on the basis of an agreed summary of facts and the applicant did not provide the agreed summary, the Crown must attach a copy of that summary or advise that the summary is not available (*Supreme Court of Victoria*, Practice Note SC CA 1).
24. The Court of Appeal has indicated that where the Crown response contains a clear and cogent rebuttal of the grounds of appeal, the applicant's legal practitioners should engage second counsel to review the grounds of appeal. This can avoid the need to prepare for an appeal which is untenable and avoids the late abandonment of grounds (*Pillai v R* [2013] VSCA 359).

Revision of written case

25. Once an application for leave to appeal has been filed, the Registrar will obtain relevant sections of transcript and will provide it to the parties (*Supreme Court of Victoria*, Practice Note SC CA 1).
26. Where the applicant seeks to appeal against a conviction, the Registrar of Criminal Appeals will ordinarily invite counsel to revise the written case within 21 days of providing the transcript or within a period specified by the Registrar. If the applicant files a revised written case, the Registrar will provide a copy to the respondent, who will have 21 days to file an amended written case. The purpose of revising the written case is to add, subtract or amend grounds of appeal and to identify parts of the transcript relevant to each ground (*Supreme Court of Victoria*, Practice Note SC CA 1).
27. Where counsel wish to abandon grounds of appeal, the proper time to do this is during the time for revision of the written case (*Supreme Court of Victoria*, Practice Note SC CA 1).
28. If, during the revision period, counsel concludes that there are no valid grounds of appeal, counsel should advise the instructing solicitors in writing and the solicitors should send a copy of counsel's advice to the applicant and obtain instructions (*Supreme Court of Victoria*, Practice Note SC CA 1).
29. New grounds may not be added after the revision period without leave of the Court (*Supreme Court of Victoria*, Practice Note SC CA 1).
30. It is unlikely that revision will be required or permitted in applications for leave to appeal against sentence alone. However, the Registrar may invite revision if it is necessary for the assistance of the court (*Supreme Court of Victoria*, Practice Note SC CA 1).

31. If the applicant wishes to revise its written case and has not been invited to do so, they may apply to the Registrar for permission to revise, setting out the reasons (*Supreme Court of Victoria*, Practice Note SC CA 1).
32. The Revised Written Case must be filed electronically in marked up form, along with a 'clean' version (*Supreme Court of Victoria*, Practice Note SC CA 1).
33. If a party decides not to make revisions, the party should notify the Registrar so that the Registrar can process the application without waiting for the revision period to expire (*Supreme Court of Victoria*, Practice Note SC CA 1).

Determination of Application for Leave

34. Applications for leave to appeal are, in most cases, determined by a single judge, or, if the Registrar considers it appropriate to do so, the Court as constituted by two or more judges (*Supreme Court of Victoria*, Practice Note SC CA 1).
35. Cases which would be suitable for referral directly to two or more judges include those which involve a novel point of law and those in which the sentence passed is unlawful, such that the applicant must be re-sentenced (*Supreme Court of Victoria*, Practice Note SC CA 1).
36. Ordinarily, applications for leave to appeal will be determined without oral argument. However, the applicant may request an oral hearing as part of their application for leave to appeal. The Registrar may require the applicant to confirm such a request in writing and failure to do so is taken to be a decision that an oral hearing is not required (*Supreme Court (Criminal Procedure) Rules 2017* r 2.07; *Supreme Court of Victoria*, Practice Note SC CA 1, [17.1]–[17.4]).
37. The Crown is not required to attend an oral hearing for an application for leave to appeal unless required to do so by the Registrar or Court (*Supreme Court of Victoria*, Practice Note SC CA 1, [17.6]).
38. Where the Court conducts an oral hearing of an application for leave, the applicant is limited to 15 minutes for oral argument and, if the Crown appears, the Crown is limited to 10 minutes (*Supreme Court of Victoria*, Practice Note SC CA 1, [17.7]).
39. The aim of the Court is to deliver judgment shortly after oral argument whenever possible (*Supreme Court of Victoria*, Practice Note SC CA 1, [25.3]).
40. When determining an application for leave to appeal, the Court may:
 - Grant leave to appeal on all grounds sought;
 - Grant leave to appeal on one or more grounds and refuse leave to appeal on other grounds;
 - Refuse leave to appeal;
 - Refer the application to an enlarged bench (*Supreme Court of Victoria*, Practice Note SC CA 1, [18.1], [18.3]; *Supreme Court (Criminal Procedure) Rules 2017* rr 2.07–2.08).
41. When granting leave or referring an application to an enlarged bench, the Court may give directions for the filing of outlines of argument and other matters the Court thinks fit, or may return the matter to the Registrar for directions and case management (*Supreme Court of Victoria*, Practice Note SC CA 1, [18.4]).
42. In addition, where the application is determined by the Court constituted by two or more judges, the Court may treat the hearing of the application as the hearing of the appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 2.10).
43. The court expects that where it grants leave, or refers the matter to an enlarged bench, the applicant will be represented by counsel at the subsequent hearing (*Supreme Court of Victoria*, Practice Note SC CA 1, [22.1]).

Renewed Applications

44. Where a single judge refuses leave to appeal on one or more grounds, the applicant may elect to renew the application before a court constituted by two or more judges (CPA 2009 s 315; *Supreme Court (Criminal Procedure) Rules 2017* r 2.08; *Supreme Court of Victoria*, Practice Note SC CA 1, [19.1]–[19.6]).
45. To renew an application, the applicant must file a notice of election in the form of Form 6-2DB within 10 days of being notified of the outcome by the Registrar (*Supreme Court (Criminal Procedure) Rules 2017* r 2.08(2)).
46. In most cases, the Court will determine the renewed application on the written materials without oral argument. However, the applicant may request an oral hearing of the renewed application by notice in writing to the Registrar. The Registrar will then fix a hearing date (*Supreme Court of Victoria*, Practice Note SC CA 1, [19.2]–[19.4]).
47. As with the initial application, unless the Registrar gives notice to the contrary, the Crown will not be expected to appear at the hearing of a renewed application (*Supreme Court of Victoria*, Practice Note SC CA 1, [19.5]).
48. Similarly, time limits on oral arguments apply on a renewed application. The applicant is limited to 15 minutes and the Crown (if appearing) is limited to 10 minutes (*Supreme Court of Victoria*, Practice Note SC CA 1, [19.6]).
49. Where a single judge has refused leave and produced written reasons, practitioners must give careful consideration to whether there is a proper basis for renewing the application. While a renewed application entitles the application to a hearing de novo, the single judge’s reasons on the refusal “will ordinarily be given considerable weight” (*Lord v The Queen* [2018] VSCA 52, [4]). Unless the applicant can point to an error or misunderstanding by the leave judge, the renewal bench will likely come to the same decision (*Cao v The Queen* [2018] VSCA 98 [76]).

Registrar's Summary

50. When leave to appeal is granted, the Registrar will prepare a summary of the proceeding. This is sent to the parties for their information and will provide the basis for statements of facts and arguments in the Court’s judgment. The summary is the Registrar’s document and is designed to help the Court dispose of the appeal promptly (*Supreme Court of Victoria*, Practice Note SC CA 1, [24.1]–[24.3]).
51. It is the responsibility of counsel, in conjunction with the Registrar, to ensure that the summary is accurate. The summary will be sent to the legal representatives of the parties for their information. While the summary is the Registrar’s document, a party should promptly advise the Registrar if the summary contains a factual error (*Supreme Court of Victoria*, Practice Note SC CA 1, [24.4]).

Time Limits and Extension of Time

52. An application for leave to appeal and the accompanying written case must be filed within 28 days after the day on which the applicant is sentenced (CPA 2009 ss 275(1), 279(1), 284(1)) unless the time for filing is extended.
53. The 28 days time limit is set by the CPA 2009 and not by the *Supreme Court (Criminal Procedure) Rules 2017*. This means that provisions in the Rules regarding how time is measured which take into account court holidays do not apply to this time limit (*Supreme Court of Victoria*, Practice Note SC CA 1, [10.2]).
54. An application for extension of time to file an application for leave to appeal must be supported by an affidavit stating the reasons for the failure to file within time. Ordinarily, time will not be extended without an adequate explanation (*Supreme Court of Victoria*, Practice Note SC CA 1, [10.3]).
55. The application for extension of time and supporting affidavit must be filed with the application for leave to appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 2.22).

56. The Registrar will provide the respondent with a copy of the application for leave within seven days, along with a copy of the applicant's written case (*Supreme Court of Victoria*, Practice Note SC CA 1, [11.1]).
57. In the first instance, the Registrar will decide whether to grant the extension of time (CPA 2009 s 313; *Supreme Court (Criminal Procedure) Rules 2017* r 2.23).
58. If the Registrar refuses to grant an extension of time, the applicant may elect to renew the application before the Court (CPA 2009 s 313).
59. In most cases, the renewed application for extension of time will be determined on the basis of the written materials. However, the applicant may request an oral hearing as part of the form notifying the Court of the election to renew (*Supreme Court of Victoria*, Practice Note SC CA 1, [20.2]).
60. The Court will ordinarily consider the application for leave at the same time as the application for extension of time. The Crown may file a written submission addressing the leave to appeal application in the event that an extension is granted. These must be filed within 28 days of being provided a copy of the application for leave to appeal, and include the written case in response, a list of authorities and materials and, if the application for leave to appeal against conviction includes a ground that the conviction is unreasonable or cannot be supported having regard to the evidence, a schedule of the evidence and transcript references the Crown relies on in response (*Supreme Court of Victoria*, Practice Note SC CA 1, [20.5]).
61. If an oral hearing is held for a renewed application following a refusal of an extension of time, then the time for oral argument is limited. The applicant is limited to 15 minutes and the Crown (if appearing) is limited to 10 minutes (*Supreme Court of Victoria*, Practice Note SC CA 1, [20.7]).
62. The law on extension of time has been summarised as follows:
- The applicant carries the burden of persuading this Court that an extension of time should be granted. When considering the application, it must be acknowledged that time limits exist for sound reasons. Among those reasons is the desirability of achieving finality in criminal proceedings with reasonable expedition (consistently, of course, with the imperative of correcting substantial miscarriages of justice). The Court has a broad discretion whether to grant an extension of time, scrutiny being invited of the reasons for the delay and the merits of the proposed appeal. Although the exercise of the discretion whether to extend time must always be informed by what the interests of justice require in the particular circumstances of the case, the length of the delay — and the reasons for it — and the prospects of success should the extension be granted, are relevant (but not necessarily decisive). The reasons for the delay and the merits of the proposed appeal will not necessarily be in equipoise. Thus, where the merits of the putative appeal are very good, but the explanation for the delay is poor, the court may incline towards granting an extension. Where the merits of the proposed appeal are very poor, however, even a satisfactory explanation for the delay might not justify an extension. The discretion must, as we have said, be exercised according to the individual facts of each case (*Madafferi v The Queen* [2017] VSCA 302, [11]).
63. Time limits exist in order to provide finality to litigation. However, the principle of finality is not a discrete consideration in deciding whether to grant an extension of time (*Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37 at [32]).
64. Applicants for an extension of time must put material before the court which shows that there are special and substantial reasons for the extension. A longer delay will lead to the court requiring more exceptional circumstances before it will extend time (*Bowling v R* [2013] VSCA 87; *Smith v R* [2013] VSCA 310; *Kumar v R* [2014] VSCA 102, [8]).
65. The applicant must also put forward material which provides a reasonably satisfactory explanation for the failure to comply with the statutory time limit (*Kumar v R* [2014] VSCA 102, [8]; *Mueller v R* [2017] VSCA 132 at [5]–[11]; *Madafferi v The Queen* [2017] VSCA 302, [11]).
66. The explanation must be 'frank and thorough'. It must explain the reasons for all periods of delay between the original conviction or sentence and lodging the appeal (*Longley v The Queen* [2021] VSCA 288, [13]).

67. Where there is a long delay, the court will only extend time if satisfied that the appeal will probably succeed (*Bowling v R* [2013] VSCA 87; *Smith v R* [2013] VSCA 310; *Scott v R* [2013] VSCA 347; *Hopkins v R* [2015] VSCA 174; *Kumar v R* [2014] VSCA 102, [8]).
68. Legal practitioners owe a duty to their client to advise of the time limit, warn of the consequences of not complying with the time limit and take reasonable steps to meet the time limit. Counsel should not accept a brief if they know they cannot complete the work in a timely manner, and should return a brief if they become aware they are unable to complete the work in a timely manner (*Longley v The Queen* [2021] VSCA 288, [11]–[12]).
69. The principles relevant to extension of time applications operate differently in relation to appeals against conviction and appeals against sentence. In the case of appeals against conviction, one relevant consideration is whether a fair trial can be held after the period of additional delay. This invites attention to the availability of witnesses and exhibits and the impact of re-opening proceedings on the victim. In contrast, these matters will not be relevant in a sentence appeal (*Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37 at [29]).
70. Parties (especially the Crown) have been warned to avoid waiting until the last day for lodging an application for leave to appeal, due to the risk that the party may have calculated time incorrectly, or events occur which delay filing the appeal (see *CDPP v KMD* [2015] VSCA 255, [22]–[28]).
71. Unavailability of counsel of choice does not provide a sufficient basis for failure to comply with time limits (*Kramar v R* [2013] VSCA 236).
72. While the Court will act to address errors by lower courts, the Court has emphasised that ‘time limits are not advisory. They are imposed for good reason and they are intended to be observed’ (*Nguyen v R* [2013] VSCA 317).
73. Legal practitioners must not assume that they may take as long as they like to prepare an appeal, provided the applicant is not personally responsible (*Mitchell v The Queen* [2022] VSCA 32, [69]).
74. In 2013, the Court of Appeal called on the Director of Public Prosecutions to revisit his policy that applications for extensions of time will not be opposed where the delay is not the fault of the applicant and the Director is not adversely affected. The Court noted that finality is important both for the community and for victims of crime (*Scott v R* [2013] VSCA 347).

Reference determinations

75. CPA 2009 s 319A allows the Court of Appeal to refer, for the making of a reference determination, any specified issue or matter arising on an appeal or application for leave to appeal. The referral is to a judge of the Supreme Court Trial Division or the County Court who was not the trial judge in the matter under appeal (CPA 2009 s 319A(2), (7)).
76. Following a referral, the judge must hear and determine the matter or issue in accordance with any directions in the referral, and provide the reference determination to the Court of Appeal. The judge may otherwise conduct the hearing and determine the procedure as they think fit (CPA 2009 s 319A(4)).
77. The Court of Appeal may grant leave to hear and determine an appeal against a reference determination as part of the appeal which gave rise to the referral. If there is no challenge to the reference determination, then the reference determination is taken to be a determination of the Court of Appeal in the proceeding (CPA 2009 s 319A(5), (6)).
78. Section 319A provides a way to resolve factual disputes between parties for the purpose of an appeal (*Karam v The Queen* [2022] VSCA 23, [6]). This may be appropriate where, for example, there is a dispute about whether certain events occurred, in order to assess whether those events affected the fairness of the original trial.
79. Where witness credibility may be in issue, it is not appropriate to require the judge hearing the reference to merely take the evidence. Instead, that judge should make the appropriate findings of fact, having seen and heard the witnesses (*Karam v The Queen* [2022] VSCA 23, [13]).

20.4.1 Appeal Against Conviction

1. A person convicted of an offence in the Trial Division of the Supreme Court or the County Court in its original jurisdiction may appeal against conviction to the Court of Appeal if the Court of Appeal gives leave to appeal (CPA 2009 s 274).
2. A notice of application for leave to appeal against conviction must be in Form 6-2A of the *Supreme Court (Criminal Procedure) Rules 2017* and must be filed with the Registrar of Criminal Appeals (*Supreme Court (Criminal Procedure) Rules 2017* r 2.05). A written case, which complies with *Supreme Court of Victoria*, Practice Note SC CA 1 must be filed with the notice of application for leave to appeal.
3. Applications for leave are usually determined by a single Judge of Appeal, without oral argument (*Supreme Court of Victoria*, Practice Note SC CA 1, [5.1]).
4. The right to seek leave to appeal against conviction accrues when the plea or jury verdict is accepted. A person may seek leave to appeal against conviction even if the court imposes a sentence that does not involve recording a conviction (*R v Celep* [1998] 4 VR 811; CPA 2009 s 3).
5. In general, a person should wait until after sentencing before he or she applies for leave to appeal. It is only appropriate to seek leave to appeal after plea or verdict and before sentence in exceptional circumstances (*R v De Marchi* [1983] 1 VR 619).
6. A party applies for leave to appeal under s 274 by filing a notice of application for leave to appeal and written case within 28 days of the day on which the person is sentenced. The Registrar of Criminal Appeals must then provide a copy of the notice and written case to the respondent within 7 days of filing (CPA 2009 s 275).
7. The notice of application for leave to appeal must be in prescribed form (*Supreme Court (Criminal Procedure) Rules 2017* r 2.05) and must state the grounds of appeal as they appear in the written case. The notice must also be signed by counsel, the applicant's solicitor or the applicant personally, depending on whether the accused is represented. The written case must comply with the requirements set out in *Supreme Court of Victoria*, Practice Note SC CA 1, [9.4].
8. The Court of Appeal must allow the appeal 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 (CPA 2009 s 276(1)).
9. The three grounds above are the only bases for allowing an appeal and in all other cases the Court of Appeal must dismiss the appeal (CPA 2009 s 276).⁷¹⁵

⁷¹⁵ In exceptional cases, it appears that the Court of Appeal may refuse leave to appeal even though the applicant can meet one of the appeal grounds under s 276. The requirement in s 276 to allow the appeal if the party establishes one of the appeal grounds only arises after the court has given leave to appeal. This may be necessary if allowing the appeal would be manifestly unjust (see *R v GAM (No 2)* (2004) 9 VR 640; [2004] VSCA 117 at [46] per Callaway JA).

10. Once an application for leave to appeal is heard and determined on the merits and passes into record, a party can only bring a second appeal if they receive leave under Part 6.4 of the CPA 2009. This Part was introduced in November 2019 by the *Justice Legislation Amendment (Criminal Appeals) Act 2019* and reversed the previous rule that an offender who wanted to show a miscarriage of justice (such as by bringing fresh evidence) must rely on the petition for mercy process (*R v GAM (No 2)* (2004) 9 VR 640; [2004] VSCA 117). See 20.4.1.11 – Second or subsequent appeals against conviction for information on the process under Part 6.4.
11. The written case must identify specific errors in the trial process, rather than the general appeal grounds in s 276(1). While the following is not an exhaustive list, it provides an indication of some issues that can arise in the trial process:
 - lack of jurisdiction to hear and determine the charge;
 - errors in the indictment, such as duplicity;
 - errors affecting the jury process, such as apprehension of bias or errors in empanelment;
 - errors by the trial judge on procedural matters, such as orders in relation to separate trials or by improperly refusing an adjournment;
 - denial of procedural fairness;
 - improper conduct by the prosecution;
 - the judge made a wrong decision on the admission or exclusion of evidence;
 - incompetence of counsel;
 - the judge erred in his or her charge to the jury;
 - the verdict is unsafe or unsatisfactory;
 - the verdicts on separate counts are inconsistent.
12. Many of these errors relate to other parts of the criminal procedure process, and are dealt with in others parts of this manual. Other errors (such as errors relating to the admission or rejection of evidence or jury directions) are beyond the scope of this manual. Some grounds that are specifically relevant to appellate review are considered in the following sections.
13. In the context of juror misconduct, the question for the appellate court is different to the question of whether the trial judge would have discharged the juror or jury. At the stage of an appeal, the discharge question is hypothetical, and would have involved whether there was any real risk of a miscarriage of justice that could not be addressed through judicial directions. In contrast, the appeal question is whether, with the verdicts having been entered and all directions given, a miscarriage of justice has occurred (*HCF v The Queen* [2023] HCA 35, [45]–[46]).
14. Some of these matters involve discretionary decisions where there are a range of permissible decisions and no single factor is necessarily determinative. In addition, minds can reasonably differ over how discretionary power should be exercised. Appellate courts reviewing discretionary decisions therefore act with restraint (*Coal and Allied Operations v Australian Industrial Relations Commission* (2000) 203 CLR 194; [2000] HCA 47; *Jago v District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46; *R v Gallagher* [1998] 2 VR 671; *R v Chung & Rechichi* (2010) 25 VR 221; [2010] VSCA 39).
15. As there are a range of permissible decisions, a judge will not make a "wrong decision on a question of law" by declining to exercise a discretion unless he or she erroneously holds that the discretion does not exist or is not available (*R v Gallagher* [1998] 2 VR 671; *R v Edwards* [1998] 2 VR 354).
16. When a judicial officer misdirects him or herself in respect of a discretionary decision, an appellate court will only uphold the decision if it can conclude that the primary decision maker would necessarily have made the same decision by applying the correct principles. In contrast, if the judge was not asked to exercise the discretion, the appellate court will only intervene if it would not have been open to refuse to exercise the discretion (compare *R v Parsons* [1998] 1 VR 471 and *R v Gallagher* [1998] 2 VR 671).

20.4.1.1 *Verdicts that are unreasonable or cannot be supported by the evidence*

1. While this ground is often referred to as the ‘unsafe and unsatisfactory’ ground, this term does not appear in the CPA 2009 and should not be used as a substitute for the language of the appeal provisions (*Fleming v R* (1998) 197 CLR 250, [11]–[12]).
2. In assessing this ground, an appeal court must ask itself:
whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (*M v The Queen* (1994) 181 CLR 487, 493).
3. The application of the test requires the appellate court to review the evidence led in the trial. That body of evidence is not to be supplemented by fresh or new evidence (*Farrod v The Queen* [2021] VSCA 199, [43]).
4. The test has also been expressed as requiring the appellate court to decide whether the jury must, as distinct from might, have had a doubt about the appellant’s guilt (*Libke v R* (2007) 230 CLR 559, [113]. See also *Mejia v The Queen* [2016] VSCA 296, [140]; *Inia v The Queen* [2017] VSCA 49, [53]; *Conolly v The Queen* [2019] VSCA 125, [7]).
5. This test of ‘must have had a doubt’ is another way of saying that the finding of guilt was not reasonably open. It does not depart from, substitute or gloss the earlier test from *M* (*Pell v The Queen* (2020) 268 CLR 123, [45]; *Platt v The Queen* [2020] VSCA 130, [60]. See also *Conolly v The Queen* [2019] VSCA 125, [8]; *Tyrrell v The Queen* [2019] VSCA 52, [70]).
6. In applying this test, courts must be careful not to depart from the guidance laid down in *M v The Queen* (1994) 181 CLR 487. Authorities which predate that decision must be approached with caution. In particular, *Plomp v The Queen* (1963) 110 CLR 234, which distinguished between whether the Court thinks the evidence excluded a rational hypothesis consistent with innocence, and whether it was open to the jury to be satisfied of guilt, gave too much deference to the verdict of the jury and does not accord with *M* (*Dansie v The Queen* [2022] HCA 25, [11]). Judges should therefore be cautious when adopting the *Libke* formulation of asking whether the just must, as distinct from might, have had a doubt, as this may also not give sufficient weight to the requirement from *M* that the appellate court must decide for itself whether it was open for the jury to convict.
7. In deciding whether it was open to the jury to convict, the court must take into account the fact that the jury is principally responsible for determining guilt and innocence. Setting aside a jury’s verdict is a serious step. The appellate court must take account of the jury’s advantage in having seen and heard the witnesses. The court must not “substitute trial by an appeal court for trial by jury” (*M v The Queen* (1994) 181 CLR 487, 493; *R v Haseloff* [1998] 4 VR 359; *R v Baden-Clay* (2016) 258 CLR 308, [65]–[66]).
8. However, as the High Court explained in *M v The Queen*:
In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (*M v The Queen* (1994) 181 CLR 487, 494. See also *Inia v The Queen* [2017] VSCA 49, [53]).
9. Further, the High Court in *Pell v The Queen* explained that:
The function of the court of criminal appeal in determining a ground that contends

that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt (*Pell v The Queen* (2020) 268 CLR 123, [39]).

10. This process of assuming that the jury accepted a witness as credible and reliable and then examining the record to decide whether the jury ought to have had a reasonable doubt allows an appellate court to decide that, despite the assumption, the jury acting rationally ought not to have been satisfied of the witness' truthfulness and reliability (*Freeburn v The Queen* [2020] VSCA 155, [95]; *Henderson v The Queen* [2021] VSCA 312, [90]. See also *Pell v The Queen* (2020) 268 CLR 123, [119]).
11. In deciding that the jury should not have been satisfied of the witness' truthfulness and reliability in relation to one charge, the appellate court may take into account doubts it has about the witness' account in relation to another charge. The prohibition in *Jury Directions Act 2015* s 44F on directions about the effect of doubts regarding one charge on the assessment of another does not prohibit this reasoning (*Henderson v The Queen* [2021] VSCA 312, [90]).
12. Where there is conflicting evidence regarding whether the offending was possible, part of the question for the appellate court is whether, in light of the exculpatory evidence, it is reasonably possible that the inculpatory evidence was not correct, such that there was a reasonable doubt as to the appellant's guilt (*Pell v The Queen* (2020) 268 CLR 123, [46]). It is not enough that it was merely possible that the inculpatory evidence was correct.
13. In assessing the strength of the evidence, there are significant limitations on the ability of the court to draw inferences from the accused's failure to give evidence. An appellate court is bound by the same restrictions on drawing inferences from silence as a jury (*Jury Directions Act 2015* ss 4A, 42. For information on those restrictions, see 4.10 Defence Failure to Call Witnesses of the Victorian Criminal Charge Book).
14. However, any evidence from the accused, and the way the defence conducts its case may narrow the issues in dispute in a way that affects where certain hypotheses consistent with innocence are open, and hence whether the prosecution was required to disprove those hypothesis in order to prove guilt beyond reasonable doubt (*R v Baden-Clay* (2016) 258 CLR 308).
15. This ground of appeal is distinct from an argument that the verdicts are inconsistent. An acquittal on one charge will usually not be relevant to an argument that the verdicts are unsafe, unless the acquittal demonstrates that the verdicts are inconsistent. Complaints about inconsistent verdicts should be made through a discrete and explicit appeal ground (*MG v R* (2010) 29 VR 305; [2010] VSCA 97).
16. When the jury rejects a defence of mental impairment, an appellant relying on this ground must show that, on the evidence at the trial, a reasonable jury must have found the defence established. This will often be a very different question to the usual case, where the question is whether a reasonable jury could be satisfied of the accused's guilt beyond reasonable doubt (*R v Fitchett* (2009) 23 VR 91; [2009] VSCA 150; *M v R* (1994) 181 CLR 487; [1994] HCA 63).
17. In *Pell v The Queen*, the test was divided at the Court of Appeal level into two steps. First, each judge of the appellate court asks themselves whether they had a reasonable doubt about whether the offences had been committed. Second, if the judge does have a doubt, the judge must ask whether the jury's advantages in seeing and hearing the evidence was capable of resolving that doubt (*Pell v The Queen* [2019] VSCA 186, [25]). This two-stage approach to the test was not discussed in the High Court, and has not appeared in subsequent Court of Appeal decisions (but see *R v Bickell* [2020] QCA 37, [206], which was decided before *Pell v The Queen* (2020) 268 CLR 123).

20.4.1.2 Inconsistent or Compromise Verdicts

1. An appellant may argue that the jury's verdicts are inconsistent, or reflect a compromise within the jury. This argument is quite separate from an argument that the verdicts are unreasonable (see above), as the two areas involve different legal principles and will usually lead to different orders by the appellate court. Instead of assessing whether the verdict is supportable on the whole of the evidence, the court must look at "the facts and circumstances of the particular case". This includes the jury's verdicts and the significance of any acquittals (*TK v R* (2009) 74 NSWLR 299; [2009] NSWCCA 151; *MacKenzie v R* (1996) 190 CLR 348; [1996] HCA 35; *Jones v R* (1997) 191 CLR 439; *MFA v R* (2002) 213 CLR 606; *Mourkakos v The Queen* [2018] VSCA 26).
2. This ground may arise when there is some insight into the jury's thinking, either due to the verdicts on particular counts or because the jury has answered particular questions from the trial judge (*MacKenzie v R* (1996) 190 CLR 348; [1996] HCA 35).
3. There is a distinction between legal inconsistency and factual inconsistency. Two verdicts will be legally inconsistent when it is legally impossible for a single person to commit the two, such as both an attempt and the completed offence. Such verdicts will be readily set aside on the basis that the jury must have misunderstood the judge's directions, compromised disputes or otherwise fallen into error (*MacKenzie v R* (1996) 190 CLR 348; [1996] HCA 35).
4. The test for factual inconsistency is one of logic and reasonableness. That is, whether:
the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion (*R v Stone*, Unreported, 13 December 1954 per Devlin J. Cited in *MacKenzie v R* (1996) 190 CLR 348 at 366; [1996] HCA 35. See also *Mourkakos v The Queen* [2018] VSCA 26; *Tyrrell v The Queen* [2019] VSCA 52).
5. As juries generally produce logical and satisfactory verdicts, appellate courts are reluctant to find that jurors foreswore their oaths and returned verdicts on the basis of compromise (*Goldsmith v R* [2010] VSCA 99; *Amato v R* [2013] VSCA 346).
6. To reconcile jury verdicts which initially seem inconsistent, the court may infer that the jury rigorously applied the direction to separately consider each charge on the indictment. In other cases, the court may find that the jury acted on its innate sense of fairness or mercy and held that, although the prosecution established multiple offences, the accused could be adequately punished by returning a guilty verdict on only some offences. The prospect of a "merciful" verdict must be examined with care, as courts cannot accept any combination of verdicts on the basis that the jury may have been merciful. Another possibility is that, due to inaccurate or confusing directions about alternative charges on an indictment, the jury considered itself bound to acquit on one charge once it decided to convict on another (*R v Kirkman* (1987) 44 SASR 591; *MacKenzie v R* (1996) 190 CLR 348; [1996] HCA 35; *Goldsmith v R* [2010] VSCA 99; *Mourkakos v The Queen* [2018] VSCA 26).
7. An appellate court should be careful when evaluating a complaint of inconsistent verdicts due to conviction of only some charges against a single complainant. The jury may accept some parts of the complainant's evidence and fail to be satisfied beyond reasonable doubt of other parts of the evidence. This may rationally occur when there is supporting evidence for some part of the complainant's evidence and not other parts, if the complainant is more specific in relation to some charges than others or if there are discrete episodes of offending and the quality of the evidence varies between the episodes (*MFA v R* (2002) 213 CLR 606; [2002] HCA 53; *R v JA* [2008] VSCA 169; *R v Cordell* [2009] VSCA 128; *Amato v R* [2013] VSCA 346; *Gill v The Queen* [2019] VSCA 92).
8. Verdicts of acquittal do not necessarily show that the complainant's evidence has been disbelieved. The heavy onus on the prosecution may lead to acquittals even where the jury thinks it likely that the complainant was telling the truth, due to the jury taking a cautious approach to its responsibilities (*MFA v The Queen* (2002) 213 CLR 606; *Tyrrell v The Queen* [2019] VSCA 52, [76]–[79]).

9. The court must determine whether there is a rational explanation for the acquittals other than doubts about the complainant's credibility. It is only when the acquittals demonstrate doubt about the complainant's credibility or truthfulness that an appellate court will overturn verdicts on the basis of factual inconsistency (*TK v R* (2009) 74 NSWLR 299; [2009] NSWCCA 151; *Avery v The Queen* [2014] VSCA 86).
10. Despite the general deference to jury verdicts, there are some cases where the verdicts demonstrate an affront to logic and common sense. A court may infer that the jury has compromised internal differences or has failed to understand and apply the judge's directions on the elements of the offences (*MacKenzie v R* (1996) 190 CLR 348; [1996] HCA 35; *R v JA* [2008] VSCA 169).
11. In *Mackenzie v R*, Gaudron, Gummow and Kirby JJ noted that "[i]t is impossible to state hard and fast rules" and "[i]t all depends on the facts of the case" (*MacKenzie v R* (1996) 190 CLR 348 at 368; [1996] HCA 35).
12. No special rule attaches to different verdicts between alleged co-conspirators. Juries must consider the evidence in each case separately and, whether the alleged co-conspirators are tried jointly or separately, the acquittal of one will only affect the conviction of the other if the verdicts are inconsistent (*R v Darby* (1982) 148 CLR 668).
13. Principles relating to inconsistent verdicts do not apply to examining the jury's assessment of which occasions have been proved in relation to a charge of persistent sexual abuse of a child. An inability to find that a particular occasion was proved is not treated as a finding that the occasion was not proved, with consequences for whether the findings are inconsistent. This is because an inability to find that a particular occasion was proved may indicate that a single juror was not satisfied in relation to that particular occasion. This is a significantly different situation to one in which a jury finds the accused guilty of one charge and acquits of another charge in circumstances that cannot be rationally explained (*Martin v The Queen* [No 2] [2019] VSCA 60, [78]).
14. The fact that the jury returned unanimous verdicts on some charges and majority verdicts on other charges does not provide a basis for arguing that the verdicts are inconsistent. Even where charges relate to a single incident, the possibility that one juror was satisfied beyond reasonable doubt of some charges arising in the incident but not others does not invalidate the collective verdict of the jury (*Harmer v The Queen* [2020] VSCA 310, [87]–[88]).

Last updated: 30 August 2021

20.4.1.3 Substantial Miscarriage of Justice

1. Section 276(1) introduced a major change to the structure of the appeal grounds. Previously, s 568(1) of the *Crimes Act 1958* contained three grounds of appeal, which were that:
 - the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence;
 - the judgment should be set aside on the ground of a wrong decision on any question of law; or
 - on any ground there was a miscarriage of justice.
2. These appeal grounds were previously qualified by a proviso that:

... the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred (*Crimes Act 1958* s 568(1)).
3. Section 276(1) has amended this process by expanding the second ground of appeal and incorporating the test from the proviso of "substantial miscarriage of justice" into the second and third appeal grounds. That is, under the *CPA 2009*, the Court of Appeal must allow the appeal if:

(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 (CPA 2009 s 276(1)).

4. Section 276 must be construed according to its own language, rather than by reference to the construction of its statutory predecessor, *Crimes Act 1958* s 568(1) (*Baini v R* (2012) 246 CLR 469; [2012] HCA 59).
5. Section 276(1)(a) provides that the court must allow the appeal if the verdict is unreasonable or cannot be supported by the evidence. While this does not expressly refer to a substantial miscarriage, it is clear that such a result constitutes a substantial miscarriage of justice (*Baini v R* (2012) 246 CLR 469; [2012] HCA 59).
6. While not purporting to make an exhaustive statement of when there will be a substantial miscarriage of justice, the High Court has identified three situations:
 - Where the jury's verdict cannot be supported by the evidence;
 - Where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome;
 - Where there has been a serious departure from the proper processes of the trial (*Baini v R* (2012) 246 CLR 469; [2012] HCA 59. See also *Awad & Tambakakis v The Queen* [2022] HCA 36, [76]).
7. In the latter two categories, the court may find a substantial miscarriage of justice even if was *open* to the jury to *convict*. However, in the second category, finding that it was *not open* to the jury to *acquit* (that is, the accused's conviction was inevitable), may lead the court to conclude that there was not a substantial miscarriage of justice (*Baini v R* (2012) 246 CLR 469; [2012] HCA 59).
8. Deciding whether conviction was inevitable requires the appellate court to review the record of the trial (*Awad & Tambakakis v The Queen* [2022] HCA 36, [26]; *Baini v R* (2012) 246 CLR 469; [2012] HCA 59, [30]–[32]).
9. The obligation on the appellate court to consider whether conviction was inevitable does not reintroduce the common form proviso, or require the appellant to prove his or her innocence. Where the prosecution argues that conviction was inevitable, it is sufficient for the appellant to show that, if there had been no error, the jury may have entertained a doubt. The respondent will then need to convince the court that the conviction was inevitable (*Awad & Tambakakis v The Queen* [2022] HCA 36, [27], [78]; *Baini v R* (2012) 246 CLR 469; [2012] HCA 59, [30]–[31]).
10. In some cases an appellate court will not be in a position to decide whether conviction was inevitable. This is because of the "natural limitations" on an appellate court's task, including its disadvantage in evaluating the credibility of witnesses (*Awad & Tambakakis v The Queen* [2022] HCA 36, [28], [78]; *Baini v R* (2012) 246 CLR 469; [2012] HCA 59, [29]; *Kalbasi v Western Australia* (2018) 264 CLR 62, [15]).
11. However, where the accused gives evidence, and the appellate court considers the accused's evidence was "so glaringly improbable as to be incapable of belief", then the appellate court may disregard that evidence in deciding whether conviction was inevitable. This may be particularly significant where an element does not involve a conflict between oath and oath, such as about the accused's state of mind. For example, in relation to some sexual offences, the possibility of a reasonable belief in consent may principally arise from the accused's statements, and not require resolving a conflict between the evidence of the accused and the complainant (see *Hofer v The Queen* [2021] HCA 36, [61]–[63]).

12. It is generally not appropriate to approach the question of substantial miscarriage only by reference to whether the error was of a kind that it could not have made a difference to the trial. Where there is an error or irregularity, the obligation remains on the appellate court to decide whether conviction was inevitable, based on its assessment of the written record of the trial (see *Awad & Tambakakis v The Queen* [2022] HCA 36, [28]–[40]). An exception may exist where the nature of the error is so plainly innocuous that it could not possibly affect the outcome. However, if this high threshold cannot be reached, then the appellate court must assess inevitably of conviction on the whole of the record (*Awad & Tambakakis v The Queen* [2022] HCA 36, [94]).
13. A misdirection of law may or may not amount to a miscarriage of justice. Whether it does so depends on the context of the trial and the matters in issue. One example is where a misdirection relates to a matter which is not in dispute and which could not mislead the jury regarding any matter in issue (*Tunja v R* (2013) 41 VR 208; [2013] VSCA 174 per Maxwell P and Weinberg JA (Priest JA contra)).
14. A miscarriage of justice may also occur when the prosecutor mischaracterizes the accused's defence. If the judge then endorses that erroneous approach in his or her summing up, there may be an error or irregularity in or in relation to the trial (*Russell v R* [2013] VSCA 155).
15. The third category of error identified in *Baini*, a serious departure from the proper processes of the trial, recognises that some departures from the proper processes of the trial may be so great that the court may find that there has been a substantial miscarriage of justice even if the accused's conviction was inevitable (*Baini v R* (2012) 246 CLR 469; [2012] HCA 59; *Andelman v R* (2013) 38 VR 659; [2013] VSCA 25; *Saricayir v The Queen* [2018] VSCA 319; *Wilde v The Queen* (1988) 164 CLR 365).
16. This has been described as a radical or fundamental error, or one where there is 'such a departure from the essential requirements of the law that it goes to the root of the proceedings' (*Wilde v The Queen* (1988) 164 CLR 365, 373). Such a departure is likely to be rare. It must be fundamental to that trial and cannot be a departure of a lesser nature (*Saricayir v The Queen* [2018] VSCA 319, [74]; *Roberts v The Queen* [2020] VSCA 277, [257]).
17. In deciding whether a breach of a statutory requirement is a radical or fundamental error, the court must ask whether it was a purpose of the legislation that an act done in breach be invalid. Where a statute can be contravened in a variety of ways, with effects of varying seriousness, Parliament should rarely be taken to have intended that any breach be treated as a substantial miscarriage of justice (see *Awad & Tambakakis v The Queen* [2022] HCA 36, [18]–[23], [88]–[90]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355).
18. Appellate courts often treat counsel's failure to take or press an objection at trial as evidence that, in the atmosphere of the trial, counsel did not see any error or injustice in the proposed course of action. Counsel for both the prosecution and defence should object to matters that prejudice the fair trial of the accused. Failure to do so creates a serious obstacle to raising the matter on an appeal (*R v Luhan* [2009] VSCA 30; *NJ v R* (2012) 36 VR 522; [2012] VSCA 256; *R v Momcilovic* (2010) 25 VR 436; [2010] VSCA 50; *MB v R* [2012] VSCA 248).
19. While the judge is responsible for directing the jury about the matters in issue and must give any direction necessary to avoid a substantial miscarriage of justice (*Jury Directions Act 2013* ss 13, 14, 15), an issue must be sufficiently raised by the evidence to warrant a direction to the jury. It is only necessary for judges to direct on the real issues, rather than remote or artificial possibilities (*Gavanas v R* [2013] VSCA 178; *Tran v R* [2007] VSCA 19).
20. An appellate court will consider whether evidence which the accused does not rely upon sufficiently raises an alternate defence "so that a jury acting rationally might entertain a reasonable doubt as to whether the prosecution has established a necessary element of the charge" (*Gavanas v R* [2013] VSCA 178).

20.4.1.4 Incompetence of Counsel

1. Incompetence of counsel alone is not a sufficient basis to allow an appeal. The appellate court must focus on the consequences of the claimed incompetence and whether it led to a substantial miscarriage of justice (*R v Birks* (1990) 19 NSWLR 677; *Nudd v R* [2006] HCA 9; *TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46; *R v R* [2008] SASC 35; *R v Heeremans* [2007] SASC 187; *Bass v R* [2014] VSCA 350; *Anile v The Queen* [2018] VSCA 235, [213]).
2. A relevant consideration is whether, viewed objectively, counsel's conduct is capable of explanation or whether the conduct may have been for a legitimate forensic purpose. The court will rarely receive evidence of the reasons for an apparent forensic decision. Such reasons may reveal confidential information, or may be misleading. However, the court may receive evidence that counsel acted on a mistaken view of the law. Such evidence will show that the decision was not a deliberate forensic choice (*TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46; *Nudd v R* [2006] HCA 9; *Re Knowles* [1984] VR 751).
3. While the court will usually reject an argument alleging incompetence of counsel if the conduct may have served a legitimate forensic purpose, the court may be more willing to intervene if the forensic risks of the conduct clearly outweigh any possible advantages (*TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46; *Nicholls v R* [2016] VSCA 250).
4. Counsel is not required to present every possible line of argument or take every possible objection. It is a mark of incompetent, rather than competent, advocacy to pursue every possible hypothesis consistent with innocence, or cross-examine on every conceivable inconsistency, regardless of the significance of the issue in the context of the overall defence (*Ali v R* [2005] HCA 8; *Slater v The Queen* [2020] VSCA 270, [142]).
5. The court is not directly concerned with measuring the degree of incompetence. It is not necessary to assign epithets such as "flagrant" or "egregious" to the alleged incompetence (*TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46).
6. Criminal proceedings are adversarial and generally, the conduct of counsel binds the accused, even if it was imprudent or contrary to instructions. In *TKWJ v R*, Gleeson CJ explained that:

For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny (*TKWJ v R* (2002) 212 CLR 124 at 130–131; [2002] HCA 46. See also *Anile v The Queen* [2018] VSCA 235, [217]).
7. The strength of the prosecution case can affect the strategic options available to defence counsel. This may be relevant in assessing the competing forensic advantages and risks of a particular course of conduct (See *Nicholls v R* [2016] VSCA 250 at [99], [112], [116]).
8. Often, defence counsel will regret a decision or consider it unwise with the benefit of hindsight. It is not ordinarily the role of appellate courts to review the wisdom or prudence of trial counsel's decisions (*Nudd v R* [2006] HCA 9; *KLM v WA* [2009] WASCA 73).
9. Care must be taken when judging that impugned conduct could have been taken competently. Such an assessment will often involve an element of speculation (*Nudd v R* [2006] HCA 9 per Kirby J).

10. While the question of whether there was a rational forensic reason for the conduct must be determined objectively, trial counsel should receive an opportunity to respond to a ground of appeal which involves an allegation of incompetence of counsel. In limited circumstances, trial counsel's answer may be relevant to the appeal court's decision and in all circumstances, the interests of fairness require that counsel be given a chance to respond to the serious allegation that he or she engaged in conduct which disadvantaged the client for no forensic benefit (*Knowles v R* [2015] VSCA 141, [145]).
11. In general, it is the court which should invite a response from trial counsel rather than the parties (*Knowles v R* [2015] VSCA 141, [146], disapproving the contrary view from *R v Brown* (2002) 5 VR 463; [2002] VSCA 207. See also *Parsons v R* [2016] VSCA 17 at [68] & [85]).
12. In assessing any complaint regarding the competence of counsel, judges should also pay heed to the warning by Gleeson CJ in *R v Nudd*:

There is a further reason for caution in setting out to measure the performance of counsel. Criminal trials are conducted as a contest, but the adversarial system does not require that the adversaries be of equal ability. The system does its best to provide a level playing field, but it cannot alter the fact that some players are faster, or stronger, or more experienced than others. Opposing counsel may be mismatched, but this does not make the process relevantly unfair. Judges can do their best to minimise the effects of differences between the abilities of opposing counsel, but their capacity to intervene is limited by their own obligations of neutrality. Accreditation requirements impose basic standards of professional competence, but beyond those there are large differences in individual levels of competence. The practical effect of a certain level of performance by a defence counsel might depend upon the level of performance of the prosecutor. Any experienced advocate knows that what might amount to a minor slip against one opponent could be a fatal mistake against another (*Nudd v R* (2006) 225 ALR 161 at 166).
13. Once the court is satisfied that the impugned decision was not an informed and deliberate one, the court will consider whether the misconduct of counsel could have affected the outcome of the proceeding by depriving the accused of a fairly open chance of acquittal (*Nudd v R* [2006] HCA 9; *TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46; *Bass v R* [2014] VSCA 350).
14. Some failures of counsel may also produce a trial that does not meet the minimum standards of fairness required of a trial. It is not necessary in all cases to show that the incompetence of counsel affected the outcome of the trial (*TKWJ v R* (2002) 212 CLR 124; [2002] HCA 46 per McHugh J; *Nudd v R* [2006] HCA 9 per Kirby J; *Stevens v McCallum* [2006] ACTCA 13). This form of defect is similar to other miscarriage of justice that go "to the root of the proceeding" (see *Wilde v R* (1988) 164 CLR 365; [1988] HCA 6; *Quartermaine v R* (1980) 143 CLR 595).

Last updated: 30 August 2021

20.4.1.5 Failure to Discharge a Jury

1. Previously, appeals against a failure to discharge a jury were decided in accordance with the following statement of principle from *R v Gallagher*:

Accordingly, the applicant must show that there has been a miscarriage of justice. In the present circumstances, the question to be asked can be expressed as follows: did the learned Judge's refusal of the repeated applications for the discharge of the jury place the jury under undue pressure and thus create an unacceptable risk of the jury reaching a non-consensual verdict? By an "unacceptable risk" we mean a risk of a degree which this Court regards as unacceptable. By a "non-consensual verdict" we mean a verdict which is not the result of a true agreement among the jurors. If the above criteria are satisfied, it follows that a miscarriage of justice has occurred in the relevant sense, or, to express it differently, that the judicial discretion has miscarried (*R v Gallagher* [1986] VR 219 at 245).
2. This reflects the principle that the appeal is against the conviction and not simply against the judge's discretionary decision of whether or not to discharge the jury (*Maric v R* (1978) 52 ALJR 631).

3. Under the new appeal grounds, it is likely the test of "unacceptable risk of the jury reaching a non-consensual verdict" remains good law, as this will likely indicate not only a "miscarriage of justice", but a "substantial miscarriage of justice".

Last updated: 20 April 2010

20.4.1.6 Aggregation of errors

1. A court may find that there was a substantial miscarriage of justice even if it is satisfied that each individual ground of appeal did not involve any substantial miscarriage of justice. This does not mean "several nothings make a something". Instead, this ground of appeal recognises that the combined effect of several errors or irregularities may meet the threshold of a "substantial miscarriage of justice" (*R v Kotzmann* [1999] 2 VR 123; [1999] VSCA 27; *R v Schaeffer* (2005) 13 VR 337; [2005] VSCA 306; *R v Gell* [2006] VSCA 255; *R v Ireland* (1970) 126 CLR 321; *R v Glennon (No 3)* (2005) 12 VR 421; [2005] VSCA 262).
2. An aggregation of errors ground of appeal should not be the subject of discrete complaints. Instead, any discrete complaints should be the subject of separate grounds of appeal. The aggregation of errors ground is suitable where individual grounds might, even if established, not demonstrate that a substantial miscarriage of justice has occurred (*Davis v R* [2016] VSCA 272 at [136]).

Last updated: 1 March 2017

20.4.1.7 Appeal Against Conviction Following Guilty Plea

1. An appellant must demonstrate "very exceptional circumstances" before the Court of Appeal will grant leave to appeal against conviction following a plea of guilty. The appellant will generally need to show that, upon the admitted facts, he or she could not in law be convicted, or there is otherwise a substantial miscarriage of justice (*R v Ahmed* (2007) 17 VR 454; [2007] VSCA 270. See also *R v Forde* [1923] 2 KB 400; *R v El-Kotob* (2002) 4 VR 546; [2002] VSCA 109; *R v GJB* (2002) 4 VR 355; [2002] VSCA 54).
2. Bases for finding a substantial miscarriage of justice include:
 - the accused did not appreciate the nature of the charge or intend to plead guilty to that offence (*R v Stewart* [1960] VR 106; *R v Kardogeros* [1991] 1 VR 269);
 - on the admitted facts, the accused could not in law have been convicted of the offence charged (*Guarappaji v The Queen* [2018] VSCA 187, [6]);
 - the accused was induced by threats to plead guilty (*R v Murphy* [1965] VR 187);
 - the plea was induced by improper judicial pressure (*Guariglia v R* [2010] VSCA 343; *R v KCH* [2001] NSWCCA 273);
 - the pleas gave rise to duplicity or double punishment (*R v Bidmade* [2009] VSCA 90; *R v Doherty* [2009] VSCA 93).
 - the plea was made to an offence that did not exist at law (*DHC v R* [2012] VSCA 52)
3. In assessing whether there are very exceptional circumstances that support a grant of leave to appeal, the court also considers the strong public interest in restricting appeals against conviction following a voluntary plea of guilty (*R v Coffey* (2003) 6 VR 543; [2003] VSCA 155). The court will approach the process with 'caution bordering on circumspection' because of the high public interest in the finality of proceedings, and because a guilty plea by a person in possession of all the facts is normally taken to be an admission of all elements of the offence (*Gurappaji v The Queen* [2018] VSCA 187, [9]; *R v BDC* [2018] QCA 132, [6]).
4. The court may critically examine an offender's assertion that he or she did not intend to plead guilty to the charge as particularised. While the court does consider the offender's subjective state of mind, it may look at all the circumstances of the case and might not accept the assertions of the offender on oath or affirmation (see *R v Ellis* [2009] VSCA 186).

5. See also 12.5 Change of Plea for information on when an appellate court will allow an accused to appeal against conviction following a guilty plea.

Last updated: 31 August 2020

20.4.1.8 Legal Aid and Appeals

1. An appellate court has no power to order VLA to provide legal representation for an appeal (*R v Rich* [1998] 4 VR 44; c.f. CPA 2009 s 197). Compare 5.3 Providing Legal Representation.
2. The right to a fair trial does not extend outside the trial stage. A convicted person does not have a right to a fair appeal and the absence of a counsel on an appeal does not pose the same risks as lack of counsel at trial (*R v Rich* [1998] 4 VR 44).
3. The court may not grant an appeal merely on the ground that the appellant has been denied legal aid for the appeal. An appellant must satisfy the court that the trial miscarried on one or more of the bases identified in s 276 (*R v Rich* [1998] 4 VR 44).

Last updated: 20 April 2010

20.4.1.9 Orders on a Successful Appeal

1. If the Court of Appeal allows the appeal, it must set aside the conviction and may either:
 - order a new trial for the offence charged or some other offence;
 - enter a judgment of acquittal for the offence charged;
 - enter a judgment of conviction of some other offence the jury (or in the case of a plea, the judge) must have been satisfied that the accused committed; or
 - enter a finding of not guilty because of mental impairment of the offence charged or some other offence and make consequential orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CPA 2009 s 277).
2. The court engages in a two stage test to determine whether to order a new trial or to enter a judgment of acquittal:

In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case.... Then the court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused (*DPP (Nauru) v Fowler* (1984) 154 CLR 627; [1984] HCA 48).
3. When assessing whether there was sufficient admissible evidence to support the conviction, the appellate court will generally focus on the evidence that was led at the trial, as it would be unjust to allow the prosecution to supplement a defective case. However, if the prosecution uncovers fresh evidence after that the trial that it could not have been discovered with reasonable diligence, the appellate court may order a retrial even if the admissible evidence at the first trial was insufficient to support a conviction (*R v Thomas (No 3)* (2006) 14 VR 512; [2006] VSCA 300; *R v Thomas (No 4)* (2008) 19 VR 214; [2008] VSCA 107).
4. In deciding whether there are circumstances that might render it unjust to allow a retrial, the court must be careful not to usurp the functions of prosecuting authorities, or set aside the system of trial by jury where there is evidence capable of supporting a conviction (*R v Thomas (No 3)* (2006) 14 VR 512, 517 [27]). This need to respect the functions of prosecuting authorities may justify ordering a retrial even where the prosecution has indicated that it will discontinue proceedings if a retrial is ordered. Such an approach respects the delineation of functions between the appellate court and prosecuting authorities, and the quantitative difference between an acquittal and a discontinuance (*Mokbel v DPP (Cth)* [2021] VSCA 94, [65]–[69]).

5. The fact that the accused had served the whole of the sentence is relevant but not determinative of whether there should be a judgment of acquittal. This factor must be weighed against the public interest in questions of guilt being determined by a jury. That public interest remains, even if there is no sensible prospect that the accused will be further punished (*Mokbel v DPP (Cth)* [2021] VSCA 94, [61]).
6. Prior to the amendment of section 277 by the *Crimes Legislation Further Amendment Act 2017* on 1 April, the power to enter a judgment of conviction for a different offence was contingent on the court being satisfied that “the jury must have been satisfied of facts that prove the appellant was guilty of” the other offence. This power therefore could not be exercised where the court set aside a conviction following a guilty plea, as there was no jury and hence no basis for being satisfied that the jury must have been satisfied of certain facts. This result was described as a 'hiatus' and 'inconvenient', and has now been rectified (see *Riley v R* [2015] VSCA 259, [19]–[20]).
7. While the power to enter a judgment and verdict of acquittal should be exercised with caution, the court should not order a retrial as a matter of course whenever there is evidence that might sustain a conviction at a later trial. While it is generally desirable that an accused's guilt or innocence should be determined by a jury rather than an appellate court, there are many factors that may make it unjust to order a retrial, including:
 - the expense and burden of a retrial;
 - the number of previous trials;
 - the length of time the appellant has already served in prison compared to the likely sentence at a re-trial;
 - any future risks to a fair trial; and
 - which party is responsible for the substantial miscarriage of justice (*R v Nicoletti & Tolone* [2006] VSCA 175; *R v Garlick (No 2)* (2007) 15 VR 388; [2007] VSCA 23; *R v Barlett* [1996] 2 VR 687; *R v ALH* (2003) 6 VR 276; [2003] VSCA 129; *Dyers v R* (2002) 210 CLR 285; [2002] HCA 45 per Kirby J at [82]–[83]; *R v Thomas (No 3)* (2006) 14 VR 512; [2006] VSCA 300; *R v Trifilo* [2009] VSCA 194).
8. The court does not need to be satisfied that a conviction is likely before it will order a re-trial. The jury is the appropriate body for determining this matter and so the court may order a re-trial even if it believes that an acquittal is more likely than a conviction (*R v Reid* [1980] AC 343. Cited with approval in *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11).
9. In determining whether it would be unjust to allow the prosecution to make a new case against the accused, the court should consider both the formulation of the prosecution's case and the evidence that would be led on a re-trial. The court should also consider whether the proposed new case arises because of inconsistent verdicts and the impact of any earlier acquittals (*R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11; *Wilkes v R* (1948) 77 CLR 511; *King v R* (1986) 161 CLR 423; [1986] HCA 59).
10. The court should quash the conviction and enter a judgment of acquittal when it finds that the jury's verdict was unreasonable or cannot be supported by the evidence. It is ordinarily not appropriate to allow the prosecution to present a different case on a re-trial (*AK v Western Australia* (2008) 232 CLR 438; [2008] HCA 8; *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11; *DPP (Nauru) v Fowler* (1984) 154 CLR 627; [1984] HCA 48).
11. If the court orders a new trial, it must also order the appellant to attend on a specified date before the court where the new trial will be conducted (*CPA 2009* s 277).
12. An order for a new trial merely enables the DPP to bring a subsequent prosecution. Whether such a trial will occur is matter for the DPP in the exercise of prosecutorial discretion (see, e.g., *Dyers v R* (2002) 210 CLR 285; [2002] HCA 45 per Callinan J; *Stanoevski v R* (2001) 202 CLR 115; [2001] HCA 4).

13. The power to set aside a verdict of guilty and substitute a verdict of not guilty because of mental impairment is contingent on a successful ground of appeal. It is not an independent power that allows the court to substitute its opinion for the verdict of the jury (*CPA 2009 s 277*; c.f. *R v Fitchett* (2009) 23 VR 91; [2009] VSCA 150; *R v Weise* [1969] VR 953).
14. In *R v Fitchett*, the Court of Appeal noted the need for considerable hesitation when exercising the power to substitute a verdict of not guilty because of mental impairment:

This Court is simply not in a position where ... the substitution of our own view would be justified. The issues raised in a case of this kind are by statute and practicality quintessentially within the fact finding province and capacities of the jury. Appeal courts, which by reason of their role and limitations of the materials upon which their decisions must be based must be slow to overturn the jury's findings of fact and very reluctant simply to substitute their own views (*R v Fitchett* (2009) 23 VR 91; [2009] VSCA 150 at [49]).
15. When the court sets aside a conviction, it may vary the sentence for any other offence that was imposed at or after the appellant was sentenced for the appealed offence. The court may vary an aggregate sentence and may impose individual sentences or an aggregate sentence (*CPA 2009 ss 277(3), (4)*). It may be necessary to exercise this power when the court sets aside certain convictions and is left with a total effective sentence or a non-parole period that is inappropriate, excessive or inadequate.⁷¹⁶
16. This power can also be exercised when a conviction is set aside and that conviction may have affected a later sentencing exercise in relation to other offences. Use of *CPA 2009 s 277(3)* avoids the need for the offender to bring an appeal against that later sentence on the basis of fresh evidence arising from the successful appeal against conviction (*CMG v R* (2013) 46 VR 728; [2013] VSCA 243).
17. A later sentence may take into account an earlier sentence in a variety of ways. However, the section only applies where the earlier *sentence* was taken into account (such as for the purposes of assessing totality) and does not apply where the relevant fact is an earlier conviction (such as for assessing the prospects of rehabilitation) (*CMG v R* (2013) 46 VR 728; [2013] VSCA 243, [56]).
18. The Court of Appeal has not established a rule on when it is appropriate to exercise this power. In *Dhal v The Queen*, Croucher AJA noted competing submissions on when a successful conviction in relation to one charge on an indictment should re-open the sentencing discretion on the remaining charges, finding that it was not necessary to decide the issue (*Dhal v The Queen* [2020] VSCA 90, [120]–[127]).
19. It will usually only be appropriate to exercise the power to vary other sentences when there is some connection between the convictions the court quashes and those that remain. This connection may arise due to the prohibition on double punishment or the principle of totality (see *RHMCL v R* (2000) 203 CLR 452; [2000] HCA 46).
20. A judge should act with caution in exercising this power after ordering a new trial on some offences. If the accused is convicted of those offences at a re-trial, the sentencing judge will need to impose new sentences. The delay between the appeal and the re-trial will reduce the opportunity to make the later sentences concurrent with the earlier sentences. This creates a risk that the court will not be able to impose a sentence that is proportionate for the present offences while still giving effect to the principles of totality in light of the time the accused has already served (*RHMCL v R* (2000) 203 CLR 452; [2000] HCA 46).
21. The court should warn the offender that it may increase other sentences if it allows the appeal against conviction and give him or her the opportunity to make submissions on the appropriate sentence or withdraw the appeal (*RHMCL v R* (2000) 203 CLR 452; [2000] HCA 46).

⁷¹⁶ For example, in *R v RHMCL* [1999] 1 VR 746; [1998] VSCA 61, the Court of Appeal's orders overturning certain convictions would have produced a total effective sentence of 8 years and 6 months with a non-parole period of 10 years unless it varied the remaining sentences).

22. When exercising the power in s 277(3), the court should give effect to the principle that a person should generally not be left worse off by bringing an appeal against conviction (*Gilmore v R* (1979) 1 A Crim R 416; *RHMCL v R* (2000) 203 CLR 452; [2000] HCA 46).
23. Previously, the power now contained in s 277(3) was contingent on the Court of Appeal being satisfied the appellant had been "properly convicted" of the other offences before it could affirm or vary the sentence. As a result, the Court of Appeal would not affirm or vary a sentence if it did not have the opportunity to consider that conviction in the appeal (see *RHMCL v R* (2000) 203 CLR 452; [2000] HCA 46; *Ryan* (1982) 149 CLR 1; *R v Gibb* [1997] 2 VR 576). Section 277(3) does not contain a requirement that the court must be satisfied that the appellant was "properly convicted" and so the power may be exercised in a wider range of cases.
24. The power in s 277(3) is not limited to other sentences imposed at the same time, on the same indictment or in relation to the same circumstances, as the offences under the appeal against conviction. The section is considerably broader than the previous s 569(1) of the *Crimes Act 1958* (*CMG v R* (2013) 46 VR 728; [2013] VSCA 243).

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20.4.1.10 Late Addition of Grounds of Appeal

1. If the written case is not revised before it is placed before the Court, any attempted modification of the grounds after the revision stage will require leave of the Court and may result in the matter being taken out of the list. The Court is reluctant to grant leave to add substantive grounds if the appellant has had legal representation and sufficient opportunity to consider the grounds of appeal. Late applications cause difficulties for respondents, the Court and the Registrar. In addition, the Court may require a supplementary report from the trial judge (*R v Haseloff* [1998] 4 VR 359). See 20.6 Judge's Report.
2. Following the commencement of *Supreme Court Practice Direction No 2 of 2011*, the Court of Appeal is less willing to accept late applications to revise grounds of appeal than it was previously. This change in approach was necessary in order to keep up with the current volume of criminal appeals (*Rasimi v R* [2011] VSCA 365. See also *Supreme Court of Victoria*, Practice Note SC CA 1).
3. It is only in very exceptional circumstances that the Court will allow an application to vary the grounds of appeal after the appeal has been listed for hearing, where the effect of granting the application will be to vacate the hearing date and relist the appeal for a significantly later date. Despite this reluctance, the Court will grant an application where it involves an important point of principle that should be decided (*Rasimi v R* [2011] VSCA 365).
4. The court will consider whether the proposed additional grounds have sufficient prospects of success when determining whether to grant leave to amend. In addition, the court may permit the appellant to present its argument on the proposed grounds while the court reserves its decision on the question of leave (*R v Wright* [1999] 3 VR 355; [1999] VSCA 145).
5. The Court will consider whether the other party objects to an application to add a ground of appeal, but may refuse leave even if the application is unopposed (*R v Wright* [1999] 3 VR 355; [1999] VSCA 145).
6. Despite the reluctance to grant late applications for leave to add grounds of appeal, the Court will do so when a proposed ground has real merit or an injustice may have occurred at trial. It is not necessary to show special circumstances and the court may grant an adjournment if necessary (*R v Haseloff* [1998] 4 VR 359; *R v NRC* [1993] 3 VR 537; *R v Wright* [1999] 3 VR 355; [1999] VSCA 145). However, the Court will not grant a late application to raise additional grounds that were not argued at the trial unless there are exceptional circumstances (*R v Le Broc* (2000) 2 VR 43; [2000] VSCA 125).

20.4.1.11 *Second or subsequent appeals against conviction*

1. Part 6.4 of the CPA 2009 creates a right of a second or subsequent appeal to the Court of Appeal with leave. This process is available where a person has exhausted their appeal rights under Division 1 of Part 6.3, or has previously appealed under Part 6.4 but leave was not granted or the appeal was dismissed (CPA 2009 s 326A).
2. The Court may grant leave to appeal under s 326A:

if it is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal (CPA 2009 s 326C(1)).
3. The onus is on the applicant to establish that the test for granting leave is met. It is not sufficient for the applicant to show that it is merely reasonably arguable that the evidence is fresh and compelling (*Meade v The Queen* [2021] VSCA 74, [7]).
4. A grant of leave may also extend to any related summary offences, if leave is granted on the indictable offence (CPA 2009 s 326C(2)).
5. The terms used in the test for leave, ‘fresh’ and ‘compelling’, are defined as follows:
 - (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) either—
 - (A) it is highly probative in the context of the issues in dispute at the trial of the offence; or
 - (B) it would have eliminated or substantially weakened the prosecution case if it had been presented at trial (CPA 2009 s 326C(3)).
6. The words ‘reliable’, ‘substantial’ and ‘highly probative’ in s 326C(3) all carry their ordinary meaning. The requirement that the evidence is reliable means that it must be ‘credible and provide a trustworthy basis for fact finding’ (*Meade v The Queen* [2021] VSCA 74, [7], [82]; *Van Beelen v The Queen* (2017) 262 CLR 565, [28]).
7. The test for allowing an appeal under Part 6.4 is whether the Court of Appeal is satisfied there has been a substantial miscarriage of justice (CPA 2009 s 326D).
8. Where the Court allows an appeal, it has the same range of orders available as on an appeal against conviction under Part 6.3 (compare CPA 2009 ss 277(1) and 326E(1)). The Court also has an additional power to adjust sentences for offences imposed at or after the time when the accused was sentenced for the offence which was the subject of the successful appeal, or which took into account the sentence for the offence which was the subject of the successful appeal (CPA 2009 s 326E(3)).

Meaning of ‘substantial miscarriage of justice’

9. Provisions allowing second or subsequent appeals are a recent development, and there is little guidance on how the test of substantial miscarriage of justice operates in this context, as distinct from the operation of that test to a first appeal.
10. So far, two approaches have been adopted.
11. First, if the substantial miscarriage of justice stems from fresh evidence, and there is no indication the trial was unfair, then the same approach applies as in first appeals on the basis of fresh evidence. That is, there will be a substantial miscarriage of justice if the appellate court considers there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the fresh evidence had been before it at the trial (*Van Beelen v The Queen* (2017) 262 CLR 565, [22]; *Mickelberg v The Queen* (1989) 167 CLR 259).
12. Second, if the issue relates to the fairness of the trial, then a substantial miscarriage of justice may arise from a sufficiently serious departure from the prescribed processes for trial, or if an error or irregularity occurs and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome (*Roberts v The Queen* (2020) 60 VR 431, [43]). This different test helps recognise that procedural errors may make it difficult to evaluate the potential impact of fresh evidence on the outcome of the earlier trial, or which demonstrates that there was no fair trial according to law (see *Roberts v The Queen* (2020) 60 VR 431, [36]–[37]).
13. A conclusion that a guilty verdict was inevitable is relevant but not conclusive to whether there was a substantial miscarriage of justice (*Roberts v The Queen* (2020) 60 VR 431, [44]).
14. In assessing whether the original conviction involved a substantial miscarriage of justice, the Court may take into account both the fresh evidence relied on by the appellant and any fresh evidence offered by the prosecution. This is consistent with the approach to fresh evidence in relation to a first appeal, where prosecution fresh evidence may be led to contradict or weaken the fresh evidence offered by the appellant (*Roberts v The Queen* (2020) 60 VR 431, [73]–[76]).

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20.4.2 Appeal Against Sentence

1. The Crown and the offender may appeal or seek leave to appeal, respectively, against sentences imposed in the County Court or the Trial Division of the Supreme Court in its original jurisdiction (CPA 2009 Part 6.3, Division 2 and Division 3).
2. Appeals against sentence serve an important function in maintaining consistency of penalties and confidence in the administration of justice, as well as correcting idiosyncratic views (*Dinsdale v R* (2000) 202 CLR 321; [2000] HCA 54; *Everett v R* (1994) 181 CLR 295; [1994] HCA 49).
3. Appeals against sentence are constrained by the principles of appellate review of discretionary decisions stated in *House v R*:

It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred (*House v R* (1936) 55 CLR 499 at 505; [1936] HCA 40).

4. This passage contains four key propositions:

- An appellant must demonstrate error before the court will intervene;
 - It is not enough that the appellate judges would have imposed a different sentence;
 - An appellant may demonstrate error by showing that the sentencing judge acted upon a wrong principle, mistook the facts, took into account irrelevant matters or failed to take into account relevant matters;
 - In other cases, it may not be clear how an error occurred, but if the result is unreasonable or plainly unjust, the appellate court may conclude that there was error (see also *Lowndes v R* (1999) 195 CLR 665; [1999] HCA 29; *Dinsdale v R* (2000) 202 CLR 321; [2000] HCA 54).
5. These principles apply to both appeals by the Crown and by an offender (*Dinsdale v R* (2000) 202 CLR 321; [2000] HCA 54).
 6. Once a party demonstrates error in the sentencing process which could have materially affected the sentence, the appellate court must re-sentence unless, in the separate and independent exercise of its discretion, it concludes that no different sentence should be passed (*CPA 2009* ss 281, 285, 289. See also *Dimovski v The Queen* [2022] VSCA 6, [27]; *Johns v The Queen* [2020] VSCA 135, [83]–[88]).
 7. The third proposition from *House v R* addresses the kinds of errors that are commonly called “specific error”. Complaints of specific error should be confined to the sorts of errors which, if established, would vitiate the exercise of the sentencing discretion. Examples of specific error include those identified in the above passage from *House v R*:
 - Taking into account an irrelevant consideration;
 - Failing to take into account a relevant consideration;
 - Misdirecting as to the applicable principles; or
 - Making a finding of fact that was not reasonable open on the evidence (*Smith v The Queen* [2020] VSCA 159, [11]).
 8. A further example of specific error is where the judge fails to give effect to his or her stated intentions. This is most often argued by reference to the non-parole period and an asserted intention to impose a ‘shorter than usual’ non-parole period. Finding that a judge has both intended to impose a shorter than usual non-parole period and that the judge has failed to do so is exceptional, and is not likely to occur often (*Tutchell v The Queen* [2018] VSCA 269, [45]; *Dosen v The Queen* [2012] VSCA 307, [39]; *Wallace v The Queen* (2012) 35 VR 520, [2]; *Rahmani v The Queen* [2021] VSCA 51, [45]).
 9. The fourth proposition from *House v R* is commonly expressed as a complaint that the sentence is “manifestly excessive” or “manifestly inadequate”. This is, however, a statement of conclusion rather than a line of reasoning. Complaints of “manifest excess” or “manifest inadequacy” often do not allow much argument or elaboration, as a sentence either is or is not unreasonable or plainly unjust. The appellate court must review the circumstances of the case and determine whether the sentence imposed was outside the permissible range of sentences available (*Dinsdale v R* (2000) 202 CLR 321; [2000] HCA 54 per Gleeson CJ and Hayne J; *R v King* [2007] VSCA 38; *R v ALP* [2002] VSCA 210; *R v Hilton* [2001] VSCA 134).
 10. The complaint that a sentence is manifestly excessive or manifestly inadequate is very difficult to establish, as the appellant must show the sentence was wholly outside the range of sentences available to the judge. In other words, the appellant must show that it was not reasonably open to the sentencing court to impose the sentence that it did (*Kumar v R* [2013] VSCA 191; *Clarkson v R* (2011) 32 VR 361; [2011] VSCA 157; *Hards v R* [2013] VSCA 119).

11. Historically, complaints that the sentencing judge gave inadequate or excessive weight to certain sentencing factors could be treated as either discrete grounds, or as particulars of a complaint that the sentence was manifestly excessive or inadequate (see, e.g. *R v Stratton* (2008) 20 VR 539; [2008] VSCA 130; *R v RGG* [2008] VSCA 94; *R v Bernath* [1997] 1 VR 271). In 2009, the Court of Appeal moved from that position to saying that complaints about weight can only be treated as particulars of a ground of manifest excess or inadequacy (*DPP v Terrick* (2009) 24 VR 457; [2009] VSCA 220; *Pesa v R* [2012] VSCA 109; *Scerri v R* [2010] VSCA 287; *Smith v The Queen* [2020] VSCA 159, [10]).
12. More recently, courts have further disapproved of reliance of particulars of a ground of manifest excess or inadequacy as of ‘little or no utility’. This is because the grounds of manifest excess or inadequacy do not require the court to determine whether the alleged factors were improperly weighed, but whether, in the judgment of the appellate court, the sentence is manifestly too long or too short (*DPP v Weybury* [2018] VSCA 120, [50]; *DPP v Cramp* [2019] VSCA 174, [56]).
13. Despite this, counsel may draw attention to any aspect of a sentencing judge’s reasoning which is said to account for the supposedly excessive sentence. Persuading the court that the sentencing judge materially misstated the seriousness of an offence provides a strong position to establish manifest excess (*Smith v The Queen* [2020] VSCA 159, [9]–[15]).
14. Similarly, argument that is directed to the particular matters of fact or principle that the appellant claims were given too much or inadequate weight may be particularly important and effective to persuade the court that the sentence imposed was outside the available range (see *Kulafi v The Queen* [2021] VSCA 369, [50]).
15. If the court concludes that the sentence was manifestly excessive or inadequate, then it might be inferred the judge had given too much or too little weight to a particular factor. But it will rarely be possible or necessary to reach a definitive conclusion on that issue (*Lord v The Queen* [2018] VSCA 52, [8]).
16. A complaint about the operation of the parity principle is usually assessed in the same manner as a complaint that the sentence is manifestly inadequate or excessive. The question for the appellate court is whether it was reasonably open for the trial judge to differentiate or fail to differentiate in the manner the judge did (*Hilder v The Queen* [2011] VSCA 192, [38]; *Ryan v The Queen* [2016] VSCA 255, [42]).
17. A party can appeal against individual sentences, the orders for cumulation and the non-parole period, but not the total effective sentence alone. The court may allow an appeal and impose different sentences on individual counts while still imposing the same non-parole period (*R v Boucher* [1995] 1 VR 110; *R v Bolton & Barker* [1998] 1 VR 692; *R v Lomax* [1998] 1 VR 551).
18. Where the court considers an appeal against multiple sentences imposed on an indictment, the sentencing discretion for other offences may be reopened if the appellant demonstrates error in relation to *any* of the sentences imposed. Sentencing can be an integrated process and defects in one sentence may require the court to adjust other sentences (Compare *R v Gill* [2010] VSCA 67; *DHC v R* [2012] VSCA 52 and *Smith, Garcia & Andreevski v R* [2012] VSCA 5).
19. However, once leave has been given in relation to one sentence only, if the offender demonstrates error (especially manifest excess) in relation to that sentence, the prosecution cannot invite the court to re-open the sentencing discretion in relation to the other sentences on the basis that it is necessary to ensure a just and appropriate total effective sentence (*Salmi v The Queen* [2020] VSCA 250, [47]–[50]). It appears that where the prosecution believes that one sentence (especially the base sentence) may be vulnerable on appeal, but other sentences have been compressed to give effect to the principal of totality or to avoid double punishment, it may be necessary to cross-appeal those other sentences in case the primary complaint is successful, or argue that leave should be refused on the basis that the error should not affect the total effective sentence.

20. When the Court of Appeal is resentencing an offender following a successful appeal, the Court may need to determine whether any changes in the underlying sentencing laws are relevant, or whether the Court of Appeal applies the law as it stood when the offender was first sentenced. The Court considered this issue in *Younger v R* [2017] VSCA 199 at [44]–[57] in relation to amendments to *Sentencing Act 1991* s 44 (which governs when imprisonment may be combined with a CCO), but did not reach a concluded view.
21. Once an application for leave to appeal is heard and determined on the merits and passes into record, a party cannot bring a second appeal. There is no distinction between a case that involves an application for leave to appeal, and a determination following the grant of leave, assuming in each case that the earlier decision was made following a consideration of the merits of the case (*R v GAM (No 2)* (2004) 9 VR 640; [2004] VSCA 117; *Visser v The King* [2023] VSCA 10, [97]–[98], [104]–[105]).

Definition of 'sentence'

22. Section 3 of the CPA 2009 defines a 'sentence' as including:
- (a) the recording of a conviction; and
 - (b) an order made under Part 3, 3A, 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
 - (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.
23. This definition includes terms of imprisonment, community based orders and fines, as well as non-parole periods, aggregate sentences and orders for cumulation or concurrency.
24. The definition of sentence does not include “total effective sentence” or “head sentence”. That term is defined separately and refers to the total sentence the offender will serve after giving effect to orders for cumulation or concurrency (CPA 2009 s 3; *Ludeman, Thomas & French v R* (2010) 31 VR 606; [2010] VSCA 333; *R v Boucher* [1995] 1 VR 110).
25. Prior to the *Criminal Procedure Amendment Act 2012*, where an offender applied for leave to appeal against a sentence (see 20.4.2.1 Appeal by Offender), the court was required to determine whether to grant leave in respect of any particular sentence, regardless of whether the error could have any effect on the total effective sentence (*Ludeman, Thomas & French v R* (2010) 31 VR 606; [2010] VSCA 333). The amending act modified s 280(1)(b) so that the Court of Appeal may now refuse leave if there is no reasonable prospect that it would reduce the total effective sentence.
26. However, if leave is granted, it has been suggested that there is no power for the court hearing the substantive appeal to dismiss the appeal, or revoke leave, where, having found error, the court considers that the total effective sentence should not be reduced (see *Hawke v The Queen* [2019] VSCA 276, [17]–[25]; *Palmisano v The Queen* [2021] VSCA 124, [34]).
27. A grant of leave to appeal against sentence extends to a grant of leave to challenge any consequential orders, such as a non-parole period and orders for cumulation or concurrency of that sentence, without need for a separate grant of leave (*Ludeman, Thomas & French v R* (2010) 31 VR 606; [2010] VSCA 333).
28. Due to the definition of "sentence", an offender who wishes to challenge the total effective sentence should formulate a ground of appeal that particularises the individual sentences and orders for cumulation that he or she wishes to challenge, when asserting that the total effective sentence is manifestly excessive or inadequate (*Ludeman, Thomas & French v R* (2010) 31 VR 606; [2010] VSCA 333; *DPP v Jones* [2013] VSCA 330).

29. *Confiscation Act 1997* s 142 provides that various orders under that Act may be appealed as if they were, or were part of, the sentence imposed in respect of the relevant offences.
30. Section 142 picks up the sentence appeal processes in the *Criminal Procedure Act 2009*, but does not make the orders part of the ‘total effective sentence’ for the purpose of *CPA 2009* s 3. This means that where a number of individual sentences or the cumulation orders were not affected by the *Confiscation Act 1997* order, the appellate court hearing an appeal against sentence may exercise the power in *CPA 2009* s 280(1)(b) and (3) to refuse leave, on the basis that the *Sentencing Act* orders would not be changed and so there would be no change to the total effective sentence, but amend the ‘sentence’ first imposed by reducing or removing the *Confiscation Act 1997* order. Whether it is appropriate to do so will depend on the facts of an individual case, particularly whether the *Confiscation Act 1997* orders influenced the total effective sentence (*Zakhour v The Queen* [2022] VSCA 63, [60]–[82]).

Last updated: 17 March 2023

20.4.2.1 Appeal by Offender

1. A person sentenced for an offence in the County Court or the Trial Division of the Supreme Court in its original jurisdiction may bring an appeal against sentence to the Court of Appeal if that court gives leave to appeal (*CPA 2009* s 278).⁷¹⁷
2. A party applies for leave to appeal by filing a notice of application for leave to appeal and written case in accordance with the rules of court and *Supreme Court of Victoria*, Practice Note SC CA 1 within 28 days of the day on which the person was sentenced. The Registrar of Criminal Appeals must then provide a copy of the notice and written case to the respondent within 7 days of filing (*CPA 2009* ss 279, 284).
3. The notice of application for leave to appeal must be in Form 6-2B of the *Supreme Court (Criminal Procedure) Rules 2017* and must briefly state the grounds or proposed grounds of the appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 2.05). The written case must comply with the requirements of *Supreme Court of Victoria*, Practice Note SC CA 1, [9.4]. For more information, see 20.4.1A Powers and Procedures.
4. The notice must specifically identify the sentence(s) which are challenged on the appeal. A ground of appeal which merely refers to ‘the sentence’ is not sufficient to constitute a valid notice, if the sentencing court imposed more than one sentence (see *DPP v Keller* [2021] VSCA 334, [58]–[66], where this conclusion was reached in relation to the relevantly identical provisions governing Crown appeals in *CPA 2009* ss 287–288).
5. The Court of Appeal is usually constituted by a single judge for applications under s 278 or s 283 for leave to appeal against sentence. The Act specifies that the court may refuse leave if:
 - There is no reasonable prospect that the Court of Appeal would impose a less severe sentence than the sentence first imposed; or
 - There is no reasonable prospect that the Court of Appeal would reduce the total effective sentence (*CPA 2009* s 280).
6. Section 280(1)(b) was introduced by the *Criminal Procedure Amendment Act 2012* to reverse the previous position which required the court to decide whether to grant leave in relation to each ground without considering whether any error would affect the total effective sentence (*Ludeman, Thomas & French v R* (2010) 31 VR 606; [2010] VSCA 333).

⁷¹⁷ Due to similarities between appeals from the original jurisdiction of the County Court and appeals from the appellate jurisdiction of the County Court, this section contains references for both types of appeals. See also 20.4.2.2 Appeal to Court of Appeal after appeal from Magistrates' Court.

7. The way in which the applicant has framed the grounds of appeal does not affect the operation of s 280(1). Where there is a ground of appeal which challenges the sentences, cumulation orders and non-parole period, a court may exercise the discretion in s 280 to limit a grant of leave to only that part of the sentence which may be varied on the hearing of the full appeal. For example, where the total effective sentence is lenient, the court might grant leave only to that part of grounds of appeal which challenge the non-parole period (see *Kruger v The King* [2022] VSCA 244, [52]–[61]).
8. As an offender cannot directly appeal the total effective sentence imposed (see Definition of Sentence (above)), the court must decide whether to allow the appeal in relation to each individual sentence for which the court has granted leave to appeal. A decision to allow an appeal only re-opens the sentencing discretion in relation to the particular sentences affected by the error and does not automatically re-open all sentences imposed on the same indictment (*Ludeman, Thomas & French v R* (2010) 31 VR 606; [2010] VSCA 333). However, in some cases, defects in one sentence may require the court to adjust other sentences (see *R v Gill* [2010] VSCA 67; *DHC v R* [2012] VSCA 52 but c.f. *Smith, Garcia & Andreevski v R* [2012] VSCA 5).
9. If the court refuses leave on the basis that there is not likely to be any change to the total effective sentence, the judge may amend the sentence first imposed by substituting a less severe sentence and make any other orders that should be made (CPA 2009 s 280(3)). This allows the single judge on the leave hearing to correct any errors in individual sentences without needing a full appeal hearing to correct inconsequential errors.
10. If the Court grants leave to appeal, it 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 (CPA 2009 ss 281(1), 285(1)).
11. In any other case, the Court must dismiss the appeal (CPA 2009 ss 281, 285).
12. In assessing whether “there is an error in the sentence first imposed”, the court must determine whether there is a vitiating error. It is not necessary try to determine the actual impact of the error, but the court must consider the capacity of the error to have affected the sentence. An error will not be material if the court is satisfied that the mistake could not have materially affected the decision (*Johns v The Queen* [2020] VSCA 135, [83]–[88]; *Baxter v The Queen* [2007] NSWCCA 237, [19]; *Gillespie v The Queen* [2018] VSCA 151, [53]).
13. The Court of Appeal may increase the sentence on an appeal by an offender if it is satisfied there is error in the first sentence and a different sentence should be imposed. However, it must warn the appellant, as early as possible during the hearing, that he or she faces the possibility of an increased sentence. This gives the offender the opportunity to seek to abandon the appeal (*Neal v R* (1982) 149 CLR 305; [1982] HCA 55; CPA 2009 ss 281, 285).
14. An appellate court must take care to ensure that the warning does not suggest prejudgment of the case and does not appear to be a threat to discourage a person from pursuing a meritorious appeal (*RHMCL v R* (2000) 203 CLR 452; [2000] HCA 46 per Kirby J).
15. Once the Court finds that there was error in the sentence first imposed, it must reconsider the sentence afresh on the basis of the material before the original sentencing judge along with any additional evidence of the accused’s progress to rehabilitation since sentence. This includes evidence of events which occurred between sentencing and the appeal, including the offender’s progress in custody and current mental state. However, any other evidence is subject to the principles which govern “fresh evidence” (*Bass v R* [2014] VSCA 350, [176]; *Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37, [43]; *Betts v R* (2016) 258 CLR 420; [2016] HCA 25 at [11]–[12]).
16. That reconsideration exercise will allow the court to decide whether “a different sentence should be imposed”. If the appellate court decides that the sentence should be at least that imposed by the original sentencing court, then it may dismiss the appeal on the basis that it has not been satisfied that a different sentences should be imposed (see *Rogerson v The Queen [No 2]* [2022] VSCA 154, [86]–[92]).

17. When the Court allows an appeal, it must set aside the sentence imposed and either:
 - (a) impose the sentence, whether more or less severe, that it considers appropriate; or
 - (b) remit the matter to the originating court (*CPA 2009 s 282*).
18. When the Court imposes its own sentence, it may make any other order that it considers ought to be made (*CPA 2009 ss 282, 286*).
19. If the Court remits the matter, it may give directions concerning the further conduct of the matter, including whether it should be heard by the same or a different judge. The sentencing court must comply with those directions (*CPA 2009 ss 282, 286*).
20. The Court will only exercise the power to remit a matter sparingly and in exceptional circumstances. It may be appropriate to do so when the sentencing judge's reasons are so brief that the court cannot reliably determine whether a different sentence should have been passed (see *R v McKittrick* [2000] VSCA 131; *R v Roberts* [2000] VSCA 46).
21. The Court of Appeal may impose or vary a sentence, even if the offender does not attend the hearing of the appeal or application for leave to appeal (*CPA 2009 s 322*).⁷¹⁸

Last updated: 1 January 2023

20.4.2.2 Appeal to Court of Appeal after appeal from Magistrates' Court

Appeals by an accused

1. A person may also seek leave to appeal to the Court of Appeal against a sentence of imprisonment imposed by the County Court or Supreme Court (as the case requires) on an appeal from the Magistrates' Court under ss 256, 259 or 262 of the *CPA 2009*, only if the Magistrates' Court did not impose a sentence of imprisonment (*CPA 2009 s 283*).
2. This type of appeal is available regardless of whether it was the offender or the Crown that appealed the decision, including Crown appeals due to failure to fulfil an undertaking (*CPA 2009 s 283*. See also *DPP v Shoan* [2007] VSCA 220).
3. For the purpose of s 283:

imprisonment includes detention in a youth justice centre or youth residential centre, but does not include imprisonment in default of payment of a fine (*CPA 2009 s 283*).
4. A suspended sentence is a sentence of imprisonment for the purposes of s 283. A person therefore cannot appeal under s 283 if the County Court replaces a suspended sentence with a non-suspended sentence (*R v SA* (2001) 3 VR 109; [2001] VSCA 117).
5. For this type of appeal, a notice of appeal for leave to appeal in Form 6-2C of the *Supreme Court (Criminal Procedure) Rules 2017* must be used.
6. This type of appeal follows similar procedures to an appeal against sentence from the County Court in its original jurisdiction and the procedure is discussed in 20.4.2.1 Appeal by Offender.
7. Prior to amendments introduced by the *Criminal Procedure Amendment Act 2012*, the court could refuse leave to appeal if there was no reasonable prospect that the court would impose a less severe sentence than that imposed by the court below. Since those amendments, the court must consider whether:

⁷¹⁸ For practical reasons, the court cannot impose a sentence that requires the consent of the accused in his or her absence. Sentences such as community correction orders can only be imposed with the consent of the offender (see *Sentencing Act 1991 s 37*).

- There is no reasonable prospect that the court would impose a less severe sentence than the sentence first imposed; or
- There is no reasonable prospect that the court would reduce the total effective sentence despite there being an error in the sentence imposed by the court (CPA 2009 s 284A).

DPP appeals

8. Following amendments introduced by the *Justice Legislation Miscellaneous Amendment Act 2018* which commenced on 28 October 2018, the DPP has a limited right of appeal following an offender's appeal from the Magistrates' Court. This right of appeal only applies if the Supreme Court or the County Court, on the appeal, made a finding:
 - (a) under sections 5(2H)(a), (b), (c), (d) or (e) of the *Sentencing Act 1991*; or
 - (b) under section 10A of that Act that a special reason exists (CPA 2009 s 290A(1)).
9. The effect of this provision is to give the prosecution a right of appeal to the Court of Appeal where, following an offender's appeal from the Magistrates' Court, the intermediate court on the appeal applied an exception to a mandatory minimum sentence provision.
10. As with other DPP appeals to the Court of Appeal, the DPP must consider that there is error in the sentence imposed, that a different sentence should be imposed and be satisfied that an appeal should be brought in the public interest (CPA 2009 s 290A(2)).
11. An appeal under s 290 must be brought within 28 days by filing a notice of appeal in accordance with the rules of court. The notice of appeal must be signed by the DPP personally. A copy of the notice must be served personally on the offender within 7 days after the notice is filed, and a copy must be provided to the legal practitioner who last represented the offender in those proceedings, if that practitioner can reasonably be identified (CPA 2009 s 290B).
12. The Court of Appeal must allow the appeal if satisfied that there is error in the sentence imposed and a different sentence should be imposed. In making this assessment, the Court of Appeal must not take into account any element of double jeopardy (CPA 2009 s 290C). This is the same test that applies for other DPP appeals to the Court of Appeal (compare CPA 2009 s 289).
13. If the Court of Appeal allows the appeal, it must set aside the sentence of the County Court or Supreme Court and impose the sentence it considers appropriate. It may also make any other order it considers appropriate. In making this determination, the Court again must not take into consideration any element of double jeopardy (CPA 2009 s 290D).

Last updated: 31 August 2020

20.4.2.3 Crown Appeal Against Inadequate Sentence

1. The DPP may appeal as of right against a sentence imposed in the Trial Division of the Supreme Court or the County Court in its original jurisdiction 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 (CPA 2009 s 287).
2. Section 287(b) of the CPA 2009 does not create a discrete requirement that the DPP must satisfy the court that the appeal is in the public interest. Parliament has conferred a broad discretion on the director and the common law recognises that many components of the prosecutorial process are not subject to review (*DPP v Energy Brix* (2006) 14 VR 345; [2006] VSCA 116; *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46. But see *Harkness v Banks* [2023] VSC 588).

3. However, when deciding whether to bring an appeal, the Director must have regard to the common law principles concerning double jeopardy on Crown appeals. The Director must be satisfied that the case involves clear and egregious error and that the sentence is so disproportionate as to shock the public conscience and undermine public confidence in the sentencing process (*DPP v Karazisis, Bogtstra & Kontoklatsis* (2010) 31 VR 634; [2010] VSCA 350; *DPP v Bright* [2006] VSCA 147; *R v Diep* (1994) 76 A Crim R 66)
4. The Director's state of satisfaction of the circumstances identified in s 287 is not justiciable. A party cannot challenge the Director's decision to bring the appeal through judicial review, or as a challenge within the appeal arguing that the appeal is invalid as the Director could not lawfully have formed that state of mind (*DPP v Currie & Daniels* [2021] VSCA 272, [63]–[70]).
5. The situations in which Crown appeals should be brought include:
 - (a) where a sentence reveals such manifest inadequacy or inconsistency in sentencing standards as to constitute error in principle;
 - (b) where it is necessary for a court of criminal appeal to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons;
 - (c) to enable the courts to establish and maintain adequate standards of punishment for crime;
 - (d) to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected;
 - (e) to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience;
 - (f) to ensure, so far as the subject matter permits, that there will be uniformity in sentencing (*R v Clark* [1996] 2 VR 520 at 522 (citations omitted)).
6. The Crown commences an appeal under s 287 by filing a notice of appeal and written case in accordance with the rules of court and *Supreme Court of Victoria*, Practice Note SC CA 1 within 28 days after the day on which the sentence was imposed.
7. The notice must specifically identify the sentence(s) which are challenged on the appeal. A ground of appeal which merely refers to 'the sentence' is not sufficient to constitute a valid notice, if the sentencing court imposed more than one sentence (*DPP v Keller* [2021] VSCA 334, [58]–[66]).
8. The DPP must sign the notice of appeal personally (*CPA 2009 s 288*).
9. The requirement that the DPP must sign the notice personally means that the DPP cannot delegate the function of deciding whether to bring the appeal. It does not require the Director be physically responsible for writing or affixing the signature. Instead, the Director can authorise another person to attach the Director's electronic signature to the notice of appeal (*DPP v Currie & Daniels* [2021] VSCA 272, [46]).
10. Any written case on a Crown appeal must, as far as practicable, comply with the requirements of a written case set out in *Supreme Court of Victoria*, Practice Note SC CA 1.
11. The notice of appeal must set out the jurisdictional basis for the appeal. This will usually take the form of a statement in the notice of appeal that the Director is satisfied that there is an error in the sentence originally imposed, that a different sentence should be imposed and that it is in the public interest to bring the appeal. The prosecution should take care to ensure that all three components from *CPA 2009 s 287* are included in the statement of jurisdictional fact in the notice of appeal (*DPP v Borg* [2013] VSCA 181).
12. The notice of appeal must set out in full and precise terms the grounds of appeal the DPP intends to rely upon at the hearing and may only be amended with leave of the court. Revision of the grounds of appeal or written case is rarely permitted in Crown appeals. The Registrar may invite revision if it would assist the Court and the Crown may apply to the Registrar for permission to revise. Modification of appeal grounds outside the revision process requires the leave of the Court and may lead to the matter being taken out of the list.

13. The Crown must serve a copy of the notice of appeal and written case on the respondent personally within 7 days of filing and must also provide a copy to the legal practitioner who previously represented the accused, if that practitioner can reasonably be identified (*CPA 2009 s 288*).
14. Within 7 days of serving the notice, the DPP must file an affidavit of service and a copy of the notice of appeal and written case (*Supreme Court (Criminal Procedure) Rules 2017 r 2.15(3)*).
15. Within one month of serving the notice of appeal, written case and transcript of plea and sentence, the respondent may file and serve a written case in response (*Supreme Court (Criminal Procedure) Rules 2017 r 2.15(4)*).
16. The court 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 (*CPA 2009 s 289(1)*).
17. In any other case, the court must dismiss the appeal (*CPA 2009 s 289*).
18. If the court allows the appeal, it must set aside the sentence imposed and impose the sentence, whether more or less severe, that it considers appropriate. The court may also make any other order it considers ought to be made (*CPA 2009 s 290*).
19. In *DPP v Clunie* [2016] VSCA 216 at [19]–[22] the Court restated the three stages of considering a Crown appeal against sentence:

On appeal, this Court must thus determine:

 - (a) whether there has been an error in the sentence first imposed?
 - (b) if yes, whether a different sentence should be imposed? and
 - (c) if yes, what alternative sentence is appropriate?

The first issue logically requires an examination both of the reasoning towards sentence and the sentence actually imposed.

The second issue raises the possibility that the residual discretion of the Court of Appeal not to resentence should be exercised.

The third issue gives rise to all the factors bearing on the discretionary exercise potentially involved in a sentencing decision, with the exception of double jeopardy.

Both the second and third factors need to be considered in the light of the circumstances existing at the date of the determination of the appeal.
20. For a time, it was thought that a material error in sentencing was not enough to found a successful Crown appeal, and that in all cases the Crown was required to show that the sentence was manifestly excessive (see *DPP v Chatterton* [2014] VSCA 1). This approach has now been disapproved. In *DPP v O'Neill* (2015) 47 VR 395; [2015] VSCA 325 at [103]–[108] the Court of Appeal set forth the following principles for the resolution of Crown appeals:
 - The notion that Crown appeals should be rare and exceptional no longer applies;
 - The Crown can rely on both patent and latent errors, as explained in *House v R*;
 - The error “must raise a matter of principle that needs to be addressed for the governance and guidance of sentencing courts, or in order to establish or maintain proper sentencing standards. This is a limiting purpose which does not extend to the correction of sentencing errors relating only to the particular case. The limiting purpose provides a framework within which to assess the significance of factors relevant to the exercise of the residual discretion whether the court should refuse to intervene”.

- Where a specific error is established, the Crown does not also need to show that the sentence was manifestly inadequate. However, a Crown appeal should not be brought on specific error alone unless the Crown can show that the error had a “significant material effect on the sentence imposed”. The degree of impact, and whether the sentence is manifestly inadequate, will be highly relevant to whether the Court exercises the residual discretion to refuse to intervene (see also *DPP v Clunie* [2016] VSCA 216 at [25]–[27]; *DPP v Bowen* [2021] VSCA 355, [52]–[53], [71]. But compare *DPP (Vic) v Hudgson* [2016] VSCA 254 at [118]).
21. The CPA 2009 abolished the common law principle of double jeopardy in Crown appeals against sentence. The court may not take into account any element of double jeopardy when:
 - Determining whether there is error in the sentence first imposed;
 - Determining whether to exercise the residual discretion to refuse the appeal despite proof of sentencing error; or
 - Determining the appropriate sentence to impose after allowing a Crown appeal (CPA 2009 ss 289, 290; *DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350).
 22. This prohibition on taking into account double jeopardy considerations is designed to modify the principle that double jeopardy operated as a fetter at the three stages identified above (*DPP v Borg* [2013] VSCA 181. See *R v Clark* [1996] 2 VR 520; *Everett v R* (1994) 181 CLR 295; [1994] HCA 49; *R v Osenkowski* (1982) 30 SASR 212; *DPP v Oversby* [2004] VSCA 208; *DPP v Bright* [2006] VSCA 147; *Griffiths v R* (1977) 137 CLR 293; *R v Allpass* (1993) 72 A Crim R 561
 23. According to the second reading speech, the Act removed double jeopardy as a sentencing consideration on Crown appeals because:

[t]his existing common-law consideration can distort sentencing practices because the sentence imposed by the Court of Appeal will not reflect the sentence that it considers should have been imposed in the first place. This can reduce the guidance provided by Court of Appeal sentences to other courts and the effectiveness of DPP appeals against sentence.

Further, this approach does not take into account other relevant and counterbalancing policy considerations, such as the interests of the community and the victim, in the courts sentencing offenders to appropriate sentences (*Victorian Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4986).
 24. The abolition of sentencing double jeopardy principles means that the appellate court:
 - No longer considers the element of distress and anxiety that respondents to Crown appeals are presumed to experience;
 - May not exercise its residual discretion not to intervene due to that distress and anxiety;
 - May not reduce the sentence that it believes is otherwise appropriate due to that distress and anxiety; and
 - May not take the frequency of Crown appeals into account as a sentencing principle applicable in an individual case by taking any of the above steps (*R v JW* (2010) 77 NSWLR 7; [2010] NSWCCA 49; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194; *DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350).
 25. Despite the abolition of double jeopardy, Crown appeals are not a mirror image of appeals by offenders. The court retains a residual discretion not to intervene even if satisfied that there is an error in the sentence first imposed and that a different sentence should be imposed (*DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350; *DPP (Cth) v Bui* (2011) 32 VR 149; [2011] VSCA 61).
 26. Factors that may inform the exercise of this residual discretion include:

- The court’s reluctance to intervene even in cases of manifest inadequacy where the accused has already been released, or reached the end of his or her sentence (*DPP (Cth) v Vestic* [2008] VSCA 12; *R v MD & Ors* [2005] NSWCCA 342; *R v Smith* [2006] NSWCCA 129; *DPP v Telford* [2010] VSCA 118; *DPP (Cth) v Masange & Kachunga* [2017] VSCA 204);
 - Where the purpose of Crown appeals, to lay down principles to guide sentencing, can be adequately served by identifying the error without disturbing the sentence (*DPP v Harvey* [2023] VSCA 234, [59]);
 - The effect of delay between sentencing and the appeal as a mitigating factor (*DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350);
 - Considerations of parity, especially if the Crown has not sought to appeal against the sentence imposed on a co-offender (*DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350);
 - Rehabilitation between sentencing and the appeal, as the court will examine the circumstances of the offender as at the date of the appeal (*DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350);
 - The obligation to provide procedural fairness to the offender by not expanding the scope of issues before the court on the appeal, such as where the Crown seeks to raise an issue for the first time on the appeal (*DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350; *DPP v O’Neill* (2015) 47 VR 395; [2015] VSCA 325 at [107]);
 - The need to ensure that prosecution appeals do not unduly limit the capacity of sentencing judges to exercise mercy (*R v Osenkowski* (1982) 30 SASR 212); and
 - The court’s reluctance to expose an offender to an increased sentence when the conduct of the prosecutor before the sentencing judge contributed to the error (*DPP v Bulfin* [1998] 4 VR 114; *Everett v R* (1994) 181 CLR 295; [1994] HCA 49; *R v Tait & Bartley* (1979) 24 ALR 473; *R v Morris* [1993] 2 VR 192. See also *R v MacNeil-Brown & Piggott* (2008) 20 VR 677; [2008] VSCA 190; *CMB v AG (NSW)* (2015) 256 CLR 346; [2015] HCA 9).
27. For a time, it was also thought that procedural fairness meant that if the Court of Appeal identified that sentencing practices were manifestly inadequate, the residual discretion should be exercised so as not to affect the current respondent (*DPP v DDJ* (2009) 22 VR 444; *DPP v Werry* (2012) 37 VR 524; *Ashdown v R* (2011) 37 VR 341). This approach has now been disapproved. If the Court of Appeal determines that sentencing practices have been inadequate, it must correct the sentence under appeal (*DPP v Dalgliesh* (2017) 262 CLR 428).
28. Courts have identified several circumstances in which a prosecutor’s error will lead to the court exercising the residual discretion, including:
- Where the prosecution makes a concession that a particular sentence is within range (*DPP v Karazisis, Bogtstra & Kontoklotsis* (2010) 31 VR 634; [2010] VSCA 350);
 - Where the court indicates the proposed form of sentence and the prosecution fails to submit to the court that such a sentence would be manifestly inadequate (*CMB v AG (NSW)* (2015) 256 CLR 346; [2015] HCA 9).
29. Courts will closely consider the circumstances and context of the prosecution’s position on the plea to decide whether the prosecutor’s errors or omissions caused the sentencing error. In the case of a defence submission that could lead a judge into error, the court will consider whether the prosecution should have responded to that particular submission. A passing reference, which the sentencing judge had not asked the prosecution to respond to and which was inconsistent with the prosecution’s other submissions, is less likely to be treated as an implied concession which contributes to error (see *DPP (Cth) v Masange & Kachunga* [2017] VSCA 204 at [36]–[46]; *DPP v Conos* [2021] VSCA 367, [9]–[11], [79]–[87]).

30. The prosecution carries the onus of persuading the court to impose a different sentence. This includes the onus of persuading the court not to exercise the residual discretion not to intervene (*CMB v AG (NSW)* (2015) 256 CLR 346; [2015] HCA 9). However, this does not mean the residual discretion is exercised by default. There must be circumstances which justify the Court leaving a sentence which it considers erroneous undisturbed (*DPP v Harvey* [2023] VSCA 234, [60]).
31. The abolition of sentencing double jeopardy only removes the element of *presumed* distress and anxiety suffered by an offender standing for sentence a second time. The court must take into account any evidence of actual stress and anxiety (*R v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194; *DPP (Cth) v Bui* (2011) 32 VR 149; [2011] VSCA 61).
32. The sentencing principle of double jeopardy also does not apply to appeals against sentence for Commonwealth offences, as the obligation under *Crimes Act 1914* s 16A to impose a sentence that is "of a severity appropriate in all the circumstances" does not allow for an automatic discount when reviewing a sentence on appeal. The section also does not provide a basis for incorporating principles relevant only when re-sentencing on an appeal (*Bui v DPP (Cth)* (2012) 244 CLR 638; [2012] HCA 1).
33. The Court of Appeal may impose or vary a sentence, even if the offender does not attend the hearing of the appeal or application for leave to appeal (*CPA 2009* s 322).⁷¹⁹

Last updated: 8 December 2023

20.4.2.4 Crown Appeal Due to Failure to Fulfil Undertaking

1. The DPP may appeal as of right to the Court of Appeal against a sentence imposed in the Trial Division of the Supreme Court or the County Court in its original jurisdiction if:
 - the offender's sentence was less severe because he or she gave an undertaking to assist law enforcement agencies after sentencing; and
 - the DPP considers that the offender failed, wholly or partly, to fulfil that undertaking (*CPA 2009* s 291).
2. The Crown commences an appeal under s 291 by filing a notice of appeal and written case in accordance with the rules of court and *Supreme Court of Victoria*, Practice Note SC CA 1 within 28 days of when the accused is sentenced. The DPP must sign the notice of appeal personally (*CPA 2009* s 292). The written case must comply with the requirements set out in *Supreme Court of Victoria*, Practice Note SC CA 1.
3. The notice of appeal must set out in full and precise terms the grounds of appeal the DPP intends to rely upon at the hearing. Revision of the grounds of appeal or written case is rarely permitted in Crown appeals. The Registrar may invite revision if it would assist the Court and the Crown may apply to the Registrar for permission to revise. Modification of appeal grounds outside of the revision process requires the leave of the Court and may lead to the matter being taken out of the list.
4. The Crown must serve a copy of the notice of appeal and written case on the respondent personally within 7 days of filing and must also provide a copy to the legal practitioner who previously represented the accused, if that practitioner can reasonably be identified (*CPA 2009* s 288).
5. Within 7 days of serving the notice, the DPP must file an affidavit of service and a copy of the notice of appeal and written case (*Supreme Court (Criminal Procedure) Rules 2017* r 2.15(3)).

⁷¹⁹ For practical reasons, the court cannot impose a sentence that requires the consent of the accused in his or her absence. Sentences such as community correction orders can only be imposed with the consent of the offender (see *Sentencing Act 1991* s 37).

6. Within one month of receiving the notice of appeal, written case and transcript of plea and sentence, the respondent may file and serve a written case in response (*Supreme Court (Criminal Procedure) Rules 2017* r 2.15(4)).
7. The Court of Appeal may allow the appeal if it considers that the respondent failed, wholly or partly, to fulfil the undertaking he or she gave (*CPA 2009* s 293).
8. Undertakings to give evidence should not be interpreted narrowly. A witness may breach an undertaking to give evidence in accordance with his or her statement by failing to co-operate or act in good faith. Further, the witness may breach the undertaking by intentionally undermining his or her own credibility by giving false evidence (*DPP v S (No 2)* [2009] VSCA 127).
9. If the Court of Appeal allows the appeal 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 to the respondent to fulfil the undertaking (*CPA 2009* s 294(1)).
10. Section 294(2) states that in re-sentencing the offender, the Court of Appeal may not take into consideration any element of double jeopardy involved in sentencing an offender for a second time. This requirement appears to be in the Act out of an abundance of caution. At common law, double jeopardy considerations did not apply to Crown appeals due to an offender's failure to fulfil an undertaking, as the appeal was due to circumstances of the respondent's own making (see *DPP (Cth) v Haunga* (2001) 4 VR 285; [2001] VSCA 73; *DPP v Kolalich* [2006] VSCA 208; *R v Hammond* [2001] NSWCCA 34; *DPP v Mann* [2006] VSCA 228; *DPP v Akkari* [2003] VSCA 98).
11. The court should not exercise the power to re-sentence in a punitive manner, or to punish the offender for resiling from the undertaking. The power exists to correct a sentence that was wrongly discounted for future assistance that did not occur (*R v Al-Sayad* (2003) 57 NSWLR 659; [2003] NSWCCA 232; *DPP v Akkari* [2003] VSCA 98; *R v O'Brien*, Unreported, NSWCCA, 10 June 1993).
12. The Crown does not need to demonstrate sentencing error on an appeal under s 291. The sentencing discretion is re-opened once the court is satisfied that the respondent failed to fulfil his or her undertaking to assist law enforcement authorities (*DPP v Kolalich* [2006] VSCA 208. See also *CPA 2009* s 293).
13. When the sentencing discretion is re-opened, the onus is on the respondent to demonstrate exceptional circumstances for why the court should not impose an increased sentence (*DPP v S (No 2)* [2009] VSCA 127).
14. Generally, it is appropriate to impose a more severe sentence after the court finds that an offender has failed to honour his or her undertaking. However, in exceptional cases, the court may find that it is not appropriate to impose any different sentence. This may occur when the sentencing judge gave inadequate weight to the undertaking (see *DPP v Kolalich* [2006] VSCA 208; *DPP v DJT* [2005] VSCA 270).
15. When re-sentencing, the Court of Appeal does not start with a clean slate. It may not impose a sentence greater than that which the original sentencing judge would have imposed, but for the undertaking. The court must consider the sentencing judge's reasons and it will generally not be appropriate to impose a *less severe* sentence on re-sentencing (*DPP v Mann* [2006] VSCA 228; *DPP v S (No 2)* [2009] VSCA 127).
16. An offender's fear of the consequences of giving evidence is not a reasonable excuse for failing to fulfil an undertaking to give evidence. By giving the undertaking, an offender accepts the risks associated with giving evidence (*DPP (Cth) v Haunga* (2001) 4 VR 285; [2001] VSCA 73; *R v Parsons* (1992) 74 A Crim R 172; *DPP v Mann* [2006] VSCA 228).

17. However, proof that the respondent received threats of harm if he or she gave evidence may be relevant for the limited purpose of assessing the respondent's character and determining the appropriate sentence. An offender who abandons an undertaking to give evidence because of a fear for his or her safety is different to one who, after reflection, decides not to help the authorities. Threats may therefore moderate, but not nullify, the need to impose a harsher sentence. In exceptional cases, such as where the conduct of prison authorities contributed to the threats, it may be appropriate to maintain the original sentence (*DPP v DJT* [2005] VSCA 270; *R v Hammond* [2001] NSWCCA 34; *R v DV* [2005] NSWCCA 319; *R v Al-Sayad* (2003) 57 NSWLR 659; [2003] NSWCCA 232; *R v Bagnell & Russell*, Unreported, NSWCCA, 10 June 1994; c.f. *R v Mann* [2006] VSCA 228).
18. The Court of Appeal may impose or vary a sentence, even if the offender does not attend the hearing of the appeal or application for leave to appeal (CPA 2009 s 322).⁷²⁰

Commonwealth Offences

19. Appeals on the basis that an Commonwealth offender has failed to fulfil an undertaking are dealt with under s 21E of the *Crimes Act 1914* (Cth), which states:

⁷²⁰ For practical reasons, the court cannot impose a sentence that requires the consent of the accused in his or her absence. Sentences such as home detention orders or a community-based orders can only be imposed with the consent of the offender (see *Sentencing Act 1991* ss 18ZW, 36).

(1) Where a federal sentence, or a federal non-parole period, is reduced by the court imposing the sentence or fixing the non-parole period because the offender has undertaken to co-operate with law enforcement agencies in proceedings, including confiscation proceedings, relating to any offence, the court must:

(a) if the sentence imposed is reduced – specify that the sentence is being reduced for that reason and state the sentence that would have been imposed but for that reduction; and

(b) if the non-parole period is reduced – specify that the non-parole period is being reduced for that reason and state what the period would have been but for that reduction.

(2) Where:

(a) a federal sentence is imposed or a federal non-parole period is fixed; and

(b) the sentence or non-parole period is reduced because the offender has undertaken to co-operate with law enforcement agencies as described in subsection (1); and

(c) after sentence, the offender, without reasonable excuse, does not co-operate in accordance with the undertaking;

The Director of Public Prosecutions may, at any time while the offender is under sentence, if the Director of Public Prosecutions is of the opinion that it is in the interests of the administration of justice to do so, appeal against the inadequacy of the sentence or of the non-parole period.

(3) Where an appeal is begun under this section against the inadequacy of a sentence, or of a non-parole period, that was reduced because of a person's undertaking to co-operate with law enforcement agencies, the court hearing the appeal:

(a) if it is satisfied that the person has failed entirely to co-operate in accordance with the undertaking – must substitute for the reduced sentence or reduced non-parole period the sentence, or non-parole period, that would have been imposed on, or fixed in respect of, the person but for that reduction; and

(b) if it is satisfied that the person has failed in part to co-operate in accordance with the undertaking – may substitute for the reduced sentence or reduced non-parole period such a sentence, or such a non-parole period, not exceeding in length the sentence that could be imposed, or the non-parole period that could be fixed, under paragraph (a), as it thinks appropriate.

(4) In subsection (1):

Confiscation proceedings includes:

(a) proceedings for forfeiture orders, pecuniary penalty orders, literary proceeds orders and restraining orders under the *Proceeds of Crime Act 2002*; and

(b) proceedings for forfeiture orders, pecuniary penalty orders and restraining orders under the *Proceeds of Crime Act 1987*; and

(c) proceedings for restraining orders and pecuniary penalty orders under Part XIII of the *Customs Act 1901*.

20. While courts have not firmly resolved the question, it appears that the DPP carries the onus of proving beyond reasonable doubt that the accused had no reasonable excuse for failing to fulfil the undertaking (*DPP (Cth) v Haunga* (2001) 4 VR 285; [2001] VSCA 73).
21. The court must make a value judgment to determine the appropriate sentence in light of all relevant events surrounding the failure to fulfil the undertaking (*DPP (Cth) v Haunga* (2001) 4 VR 285; [2001] VSCA 73; *DPP (Cth) v Johnson* [2012] VSCA 38).
22. The purpose of section 23E is not to punish the offender for failing to fulfil the undertaking, but to restore the sentence that would have been imposed if the offer of future assistance had not been made (*DPP (Cth) v Johnson* [2012] VSCA 38).
23. While a court will often be reluctant to require an offender on parole to resume the custodial portion of a sentence on a Director's appeal, that reluctance does not apply on appeals against a failure to fulfil an undertaking. This is because the appeal follows from the offender's own actions (*DPP (Cth) v Johnson* [2012] VSCA 38).
24. An offender's fear of the consequences of giving evidence is not a reasonable excuse for failing to fulfil an undertaking to give evidence. By giving the undertaking, an offender accepts the risks associated with giving evidence against another offender (*DPP (Cth) v Haunga* (2001) 4 VR 285; [2001] VSCA 73; *R v Parsons* (1992) 74 A Crim R 172; *DPP v Mann* [2006] VSCA 228).
25. Unlike appeals under s 291 of the CPA 2009, the Court *must* impose the sentence that would have been imposed but for the undertaking if the accused *wholly* fails to fulfil the undertaking. If the accused only *partly* fails to fulfil the undertaking, then the court may impose a sentence up to the one that would have been imposed by the sentencing judge if the accused had not given the undertaking (*Crimes Act 1914* (Cth) s 21E).

Last updated: 31 August 2020

20.4.3 Interlocutory Appeals

1. Division 4 of Part 6.3 of the CPA 2009 gives a party to a proceeding for the prosecution of an indictable offence the right to seek leave to appeal against an interlocutory decision.
2. An interlocutory decision is defined as:

... 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 proceedings (CPA 2009 s 3).⁷²¹
3. The breadth of this definition is confirmed by the Explanatory Memorandum, which states:

An interlocutory decision as defined in Clause 3 is defined broadly to avoid technical arguments about what judgments or orders and other types of decisions are capable of being appealed.
4. The term "interlocutory decision" is not limited to *inter partes* adjudications, or a "judgment or order" (compare *Criminal Appeals Act 1912* (NSW) s 5F and see *Wells v R* (No 2) [2010] VSCA 294 per Weinberg JA). It can include a judge's decision whether to recuse him or herself due to an apprehension of bias (*GP v R* (2010) 27 VR 632; [2010] VSCA 142).
5. However, the definition does not include a decision to uphold a no case to answer submission. It is a fundamental common law principle that the Crown has no right of appeal against an acquittal following a trial on indictment and there is no indication that the definition in section 3 was intended to produce such a fundamental change (*DPP v Singh* (2012) 34 VR 364; [2012] VSCA 167).

⁷²¹ The express mention of the decision to grant a permanent stay a proceeding appears to be designed to overturn the decision in *Smith v R* (1994) 181 CLR 338; [1994] HCA 60.

6. The interlocutory appeal provisions also do not cover an order or a refusal to order that VLA provide representation under CPA 2009 s 197, as that is not an order made in the proceeding. If the order is made or refused by the Supreme Court, only VLA can bring an appeal, while orders made in the County Court can be challenged by way of judicial review either by an accused or by VLA (*Cook v The Queen* [2019] VSCA 87; CPA 2009 s 197(7); *Victoria Legal Aid v Beljajev* [1999] 3 VR 764).
7. Similarly, an interlocutory appeal is not available where the accused pleads guilty on arraignment and later applies to withdraw that plea. The interlocutory appeal provisions are premised on there being a trial, while a plea of guilty on arraignment removes the need for a trial. An accused who wishes to challenge the court's refusal to allow him or her to withdraw a guilty plea must bring an appeal against the conviction itself (*Ruiz v The Queen* [2021] VSCA 154, [13]–[14], [20]).
8. Further, the interlocutory appeal process is not available as part of an appeal to the County Court conducted under Part 6.1 of the CPA 2009, even if the appeal is in relation to indictable offences that were heard and determined summarily. The context of s 295 demonstrates that the interlocutory appeal process is limited to trials on indictment (*Tran v Stevenson* [2021] VSCA 198, [19], [27]–[28], [46]).
9. The interlocutory appeal provisions represent a departure from the common law opposition to the fragmentation of criminal proceedings. They are an exceptional process, should be strictly confined and should be reserved for unusual cases. They are not designed to allow for challenges to routine evidentiary rulings made in the ordinary course of a trial (*DPP v Wise* [2016] VSCA 173, [5]; *DPP v Pace* (2015) 45 VR 276; [2015] VSCA 18 at [24]–[26]; *R v DG*; *DG v R* (2010) 28 VR 127; [2010] VSCA 173 at [29]; *Peterson v The Queen* (2019) 57 VR 521, [6]–[8]; *Marston v The King* [2022] VSCA 253, [6]; *Harris v The Queen* [2017] VSCA 316, [56]–[59]).
10. When interlocutory appeals were first introduced, the Court of Appeal warned that issues under the *Charter of Human Rights and Responsibilities Act 2006* were generally not suitable for interlocutory appeals. Such matters were thought to require extensive research and would likely result in increased disruption to the trial (*Wells v R (No 2)* [2010] VSCA 294; *R v Chaouk* (2013) 40 VR 356). Now, many aspects of the Charter are well-understood and the Court of Appeal is more willing to consider Charter arguments on an interlocutory appeal (*Baker v DPP* [2017] VSCA 58 at [36]).
11. *Supreme Court of Victoria Practice Note SC CA 2*, [5.2] sets out procedural rules for interlocutory appeals. Where a party intends to seek leave for an interlocutory appeal, the Practice Note instructs the party to contact the Registry as soon as reasonably practicable and notify the Registry of the following:
 - (a) The name of the Judge who made the interlocutory decision;
 - (b) the names of all parties and their legal representatives (both solicitors and counsel);
 - (c) contact details for the parties' legal representatives and availability of their trial counsel;
 - (d) the dates of the hearings relevant to the interlocutory decision and application for certification, and the dates on which the Judge made the interlocutory decision and ruled on certification;
 - (e) the offence(s) for which the accused is being prosecuted;
 - (f) the status of the trial proceedings;
 - (g) whether the accused is in custody and, if so, how long they have been in custody and whether they wish to attend the interlocutory appeal hearing;
 - (h) a realistic estimate of the time required for oral submissions for the interlocutory appeal (bearing in mind that the application for leave to appeal or review may be treated as the hearing of the appeal); and
 - (i) the nature of any material or documents tendered or referred to in submissions before the Judge regarding the interlocutory decision.

12. The Notice of Application for Leave to Appeal Against Interlocutory Decision or the Notice of Application for Review of Refusal of Judge to Certify must be signed by the applicant or the applicant's legal practitioner and be filed electronically in searchable PDF unless otherwise directed by the Court, or prohibited by *Supreme Court (Criminal Procedure) Rules 2017* r 1A.01 (*Supreme Court of Victoria*, Practice Note SC CA 2, [4.1], [7.2], [8.2]).
13. The applicant is responsible for serving the Notice on the respondent in accordance with CPA 2009 s 392 or s 394 as appropriate. The Court of Appeal Registry will not serve the document (*Supreme Court of Victoria*, Practice Note SC CA 2, [7.4], [8.5]).
14. Unless directed to do so, no affidavit is required in support of the Notice (compare *Supreme Court (Criminal Procedure) Rules 2017* r 3.05). Instead, the Registrar may direct the parties to file an agreed document setting out a succinct narrative history of the matter. The Registrar will also direct each party to file and serve a summary of contentions (which does not need to include a summary of facts) which will:
 - (a) outline the contentions relied upon in support of each ground of appeal
 - (b) refer to relevant authorities and legislation; and
 - (c) unless the Registrar otherwise permits, not exceed five A4 pages of 12 point type, 1 ½ spaced, including footnotes of no less than 10 point type; and
 - (d) be signed by counsel, or if counsel is not retained, by the applicant's solicitor or, if the applicant is not legally represented, then by the applicant personally. The signature of counsel or solicitor must be accompanied by their name in type below their signature (*Supreme Court of Victoria*, Practice Note SC CA 2, [10.1]–[10.5]).
15. The Registrar will specify the date by which each party must file and serve its document. Ordinarily the applicant will be required to file and serve first (*Supreme Court of Victoria*, Practice Note SC CA 2, [10.3]).
16. A party must file and serve a list of authorities which they expect to refer to during the appeal. The party is not required to also file copies of authorities unless directed to do so (*Supreme Court of Victoria*, Practice Note SC CA 2, [13.1]–[13.3]).

Certification by Trial Judge

17. A party can only seek leave to appeal if the judge who made the interlocutory decision certifies:
 - Either:
 - If the decision concerns the admissibility of evidence, that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;⁷²² or
 - If the decision does not concern the admissibility of evidence, that the decision is sufficiently important to the trial to justify it being determined on an interlocutory appeal; and
 - If the decision was made after the trial commenced, either:

⁷²² It appears that there is no scope for an accused to seek certification regarding a decision to exclude exculpatory evidence, as the decision that this evidence is inadmissible cannot "eliminate or substantially weaken" the prosecution case.

- That the issue in question could not reasonably be identified before the trial; or
 - The party was not at fault in failing to identify the issue in question (CPA 2009 295(3)).
18. For many years, it was thought that, even if a judge is satisfied that the relevant limbs of s 295(3) are met, the judge must also consider whether the interlocutory decision is attended by sufficient doubt to warrant an appeal. On this approach, a judge should refuse to certify any interlocutory decision where the appeal would be hopeless or the decision is not attended by sufficient doubt (*MA v R* (2011) 31 VR 203; [2011] VSCA 13; *McDonald v DPP* (2010) 26 VR 242; [2010] VSCA 45; *Wells v R* (No 2) [2010] VSCA 294; *R v Bufton* (Ruling No 2) [2019] VSC 264)
 19. The Court of Appeal has now held that this approach was wrong. A consideration of merits is not a separate step, but a consideration in whether the decision is of sufficient importance to warrant an interlocutory appeal (*Males v The Queen* [2021] VSCA 159, [46]). Further, when the decision concerns the admissibility of evidence, there is no scope for the judge to consider whether the decision was attended by sufficient doubt. The decision whether to certify depends only on whether the evidence meets the statutory test – ‘that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case’ (*Thomas v DPP* [2021] VSCA 269, [6]–[7]).
 20. A request for certification to a judge of the County Court must be in Form 2H. The judge’s decision regarding certification must be entered into the records of the court (*County Court Criminal Procedure Rules 2019* r 2.11).
 21. Chapter 14 of the *County Court Criminal Division Practice Note* PNCR 2-2022 set out the process in the County Court for seeking certification.
 22. The judge who made the interlocutory decision must determine an application for certification as soon as practicable after the request is made (CPA 2009 s 295).
 23. Unlike many decisions in the trial process, it is normally not appropriate for a judge to issue a certificate simply because the parties agree. The judge must independently assess whether the criteria for a certificate are met (*DPP v BB & QN* (2010) 29 VR 110; [2010] VSCA 211; *MA v R* (2011) 31 VR 203; [2011] VSCA 13).
 24. The decision of whether or not to certify must be accompanied by concise but adequate reasons that will enable the Court of Appeal to review the decision regarding certification. The reasons must address how the interlocutory decision meets or fails to meet the tests in s 295(3). The Court of Appeal will refuse leave to appeal to appeal if it determines that certification was wrongly granted (*CGL v DPP* (No 2) (2010) 24 VR 482; [2010] VSCA 24; *McDonald v DPP* (2010) 26 VR 242; [2010] VSCA 45; *GP v R* (2010) 27 VR 632; [2010] VSCA 142; *DPP v BB & QN* (2010) 29 VR 110; [2010] VSCA 211).
 25. While s 295(3) draws a distinction between decisions which concern the admissibility of evidence and decisions which do not concern the admissibility of evidence, a judge must consider the substance of a decision when determining the appropriate test for certification. In substance, decisions regarding cross-admissibility of evidence may affect the whole conduct of the trial. Where a cross-admissibility decision is bound up with a decision whether to order separate trials, the judge should treat the matter as one governed by the test in s 295(3)(b) (*PNJ v DPP* (2010) 27 VR 146; [2010] VSCA 88 at [33]).
 26. If the judge certifies the matters required under s 295(3), a party may seek leave to appeal by filing a notice of application for leave to appeal in Form 6-3A of the *Supreme Court (Criminal Procedure) Rules 2017* with the Registrar of Criminal Appeals. The notice must state in precise terms the proposed grounds of appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 3.03).
 27. The applicant must serve a copy of the notice on the respondent within the time for filing the notice of appeal. Filing and service must take place:
 - If the trial has not commenced and is not due to commence for at least 10 days, within 10 days after the day the judge made the interlocutory decision, or in any extension of that period;

- If the trial commences within 10 days after the day on which the interlocutory decision was made, within 2 days after the day on which the trial commences, or within any extension of that period; and
 - If the trial has already commenced when the interlocutory decision is made, within 2 days after the day on which the judge made the interlocutory decision, or within any extension of that period (*CPA 2009 s 298*).
28. The interlocutory appeal process is designed to allow the parties to challenge specific decisions by the trial judge. Parties must ensure that the real issue is articulated before the trial judge. Failure to do so:
- Undermines the purpose of the certification process;
 - Deprives the Court of Appeal of the trial judge's views on the real issue;
 - Deprives the Court of Appeal of the opportunity to consider the real issue before the hearing (*DPP v BDX & Anor (No 2)* (2010) 27 VR 536; [2010] VSCA 134).

Evidence that "Eliminates or Substantially Weakens the Prosecution's Case"

29. A party that wishes to seek leave to appeal an interlocutory decision concerning the admissibility of evidence requires certification from the judge who made the decision "that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case" (*CPA 2009 s 295(3)(a)*).
30. This provision applies both to decisions to admit evidence and to exclude evidence. If the evidence is admitted, then the judge must determine what effect the hypothetical exclusion of the evidence would have had on the prosecution's case (*CGL v DPP (No 2)* (2010) 24 VR 482; [2010] VSCA 24; *MA v R* (2011) 31 VR 203; [2011] VSCA 13).
31. This certification requirement imposes a threshold test to limit the kind of evidentiary decisions that may be challenged on an interlocutory appeal. Interlocutory appeals are not suitable vehicles for challenging routine evidentiary rulings (*Harris v R* [2017] VSCA 316, [56]; *DPP v Paulino* [2017] VSCA 38, [7]–[10]; *DPP v Pace* (2015) 45 VR 276; [2015] VSCA 18, [26]).
32. Where the evidentiary ruling concerns whether evidence is inadmissible due to *Evidence Act 2008 s 137*, the appeal is governed by the principles in *House v R* (1936) 55 CLR 499 and can only succeed in the event of specific error or if the judge's decision was not open. This is a stringent test which should be considered by trial judges when deciding whether to certify a decision and by parties deciding whether to bring an interlocutory appeal (*Harris v R* [2017] VSCA 316, [59]).
33. It is not sufficient that the exclusion of evidence may "significantly" weaken the prosecution's case. An interlocutory appeal is justified only in relation to "major" or "very important" pieces of evidence (*ZL v R* [2010] VSCA 345; *DPP v Wise* [2016] VSCA 173, [11]).
34. This is a stringent test. The prosecution's case will only be "substantially weakened" if the exclusion of the evidence would cause the prosecution to seriously reconsider whether the case should proceed (*CGL v DPP (No 2)* (2010) 24 VR 482; [2010] VSCA 24) or if the prosecution case "depends entirely" on the challenged evidence (*THD v R* [2010] VSCA 115), or if the exclusion of the evidence "could realistically be expected to affect the outcome" (*DPP v Paulino* [2017] VSCA 38, [9]–[10]; *DPP v Weaver* [2019] VSCA 26, [36]–[37]; *Peterson v The Queen* (2019) 57 VR 521, [13]). Earlier authorities which took a broader view on the test should no longer be followed (compare *ZL v R* [2010] VSCA 345; *DPP v Martin* [2016] VSCA 219; *Russel v R* [2016] VSCA 196).

Decisions that are of Sufficient Importance to Justify an Interlocutory Appeal

35. If an interlocutory decision does *not* concern the admissibility of evidence, the certification test is whether the decision "is otherwise of sufficient importance to the trial to justify it being determined on an interlocutory appeal" (*CPA 2009 s 295(2)(b)*).
36. Like the test in relation to decisions about the admission of evidence, this test is designed to limit interlocutory appeals to questions of "very real significance to the trial" (*Frazier v R* [2017] VSCA 370 at [31]).

37. This test is designed to limit interlocutory appeals to cases involving issues of “very real significance” (*Lewis v The Queen* [2018] VSCA 40, [42]).
38. In determining whether the decision is of sufficient importance, a judge must consider the purpose of an interlocutory appeal. The process exists in part to reduce the number of retrials by allowing the Court of Appeal to correct erroneous decisions before the commencement or conclusion of a trial. A judge must consider to extent to which court time and resources would be wasted if the decision is found to be erroneous and is not immediately appealed (*Stannard v DPP* (2010) 28 VR 84; [2010] VSCA 165; *UR v R* [2011] VSCA 152).
39. If the decision meets the statutory description, the judge must certify and does not have a residual discretion to refuse to certify (*McDonald v DPP* (2010) 26 VR 242; [2010] VSCA 45).
40. A judge must, however, make a value judgment when determining whether the decision is of sufficient importance. Factors that may be relevant include:
- Whether a different decision would render the trial unnecessary; and
 - Whether an interlocutory appeal would have sufficient prospects of success (*McDonald v DPP* (2010) 26 VR 242; [2010] VSCA 45).
41. When considering whether the proposed appeal has sufficient prospects of success, the judge will consider whether the decision is attended by sufficient doubt. The judge may refuse to certify if the appeal would be manifestly hopeless or even if the decision is attended by some doubt (*McDonald v DPP* (2010) 26 VR 242; [2010] VSCA 45; *Wells v R* [2010] VSCA 100; *Frazier v R* [2017] VSCA 370 at [32]).
42. As the Court of Appeal explained in *Frazier v R* [2017] VSCA 370 at [32]:
- When asked to certify, the judge must assess as best he/she can just how important the issue(s) the subject of the interlocutory decision will be to the trial, based on what the judge knows at that stage about the respective cases of prosecution and defence. One approach to assessing importance may be to pose the counterfactual question: If I had come to a different decision on the interlocutory application, how significantly would that have affected the trial?
- And, in the case of a refusal to certify, it is likely to assist this Court (should the refusal be challenged) if the judge expresses a view (as this judge did) about the strength of the arguments advanced by the losing party.
43. The following matters may attract certification under this test:
- Decisions concerning whether the prospective trial judge must stand aside due to an apprehension of bias (*GP v R* (2010) 27 VR 632; [2010] VSCA 142);
 - Decisions concerning severance of an indictment (*PNJ v DPP* (2010) 27 VR 146; [2010] VSCA 88; *CGL v DPP* (2010) 24 VR 486; [2010] VSCA 26; c.f. *DAO v R* (2011) 81 NSWLR 568; [2011] NSWCCA 63)
 - Decisions concerning the elements of an offence, or the matters that the prosecution must prove (*REE v R* [2010] VSCA 124);
 - Decisions concerning whether to grant a stay of proceedings (*GP v R* (2010) 27 VR 632; [2010] VSCA 142; *Wells v R* [2010] VSCA 100)
44. In contrast, the decision to refuse leave to withdraw a plea of guilty is not of sufficient importance to justify an interlocutory appeal, as the saving of court time the interlocutory appeal process provides is minimal (*Stannard v DPP* (2010) 28 VR 84; [2010] VSCA 165; *UR v R* [2011] VSCA 152).

Leave to Appeal

45. The Court of Appeal may only grant leave to bring an interlocutory appeal if it is satisfied that it is in the interests of justice to do so.⁷²³ When determining whether to grant leave, the court must consider:
- (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 (CPA 2009 s 297(1)).
46. In addition, the court may only grant leave to appeal after the trial has commenced if it is satisfied that the reasons for granting leave clearly outweigh the disruption to the trial (CPA 2009 s 297(2)). Where the application is brought at a late stage of the trial, it will be rare that the reasons for granting leave would outweigh the inevitable disruption that would be caused to the trial (see *ML v R* [2011] VSCA 193; *Gony v The King* [2023] VSCA 201).
47. While the court has no formal role in reviewing a decision to certify (in contrast to its role in reviewing a refusal to certify), a finding that the interlocutory decision does not meet the relevant tests in s 295(3) will mean that it will not be in the interests of justice to grant leave to appeal (*Wells v R* [2010] VSCA 100; *CGL v DPP (No 2)* (2010) 24 VR 482; [2010] VSCA 24; *McDonald v DPP* (2010) 26 VR 242; [2010] VSCA 45).
48. In deciding whether to grant leave to appeal, the court will consider whether the appeal will contribute to the efficient use of limited resources within the criminal justice system. The court will consider the extent to which court time and resources will be wasted if the decision is later found to be erroneous. In the case of a short trial (such as one that will take, at most, five days), those considerations are not of the same weight and the fragmentation of the trial process caused by the interlocutory appeal introduces its own costs and delays (*MA v R* (2011) 31 VR 203; [2011] VSCA 13; *Finn v R* [2011] VSCA 68; *SD v R* [2011] VSCA 76; *Singh v R* (2011) 33 VR 1; [2011] VSCA 263).
49. The court expects parties to think the whole matter through to its eventual conclusion and may not grant leave when an interlocutory appeal is brought prematurely (*Finn v R* [2011] VSCA 68).
50. While interim rulings on the admissibility of evidence are useful for the parties, it is not suitable to grant leave for an interlocutory appeal against an interim ruling that is made on an artificial basis that does not correspond to the reality of how the trial will proceed (*KJM v R* [2011] VSCA 151).
51. The Court of Appeal is also reluctant to grant leave to appeal evidentiary rulings of the kind routinely made in trials. Allowing appeals against routine evidentiary rulings provide a strong incentive to systemic abuse (*Wells v R (No 2)* [2010] VSCA 294; *MA v R* (2011) 31 VR 203; [2011] VSCA 13).
52. Interlocutory appeals are only an appropriate vehicle for challenging existing lines of authority in exceptional cases (*DPP v BCR* [2010] VSCA 229).

⁷²³ A single judge of the Court of Appeal may exercise this power (CPA 2009 s 315).

53. The nature of the appeal is relevant to the decision whether or not to grant leave. Applicants face greater difficulty persuading a court to grant leave to appeal against a discretionary decision where the appeal is governed by the principles *House v R* (1936) 55 CLR 49, than if the court must decide the relevant issue for itself (*MA v R* (2011) 31 VR 203; [2011] VSCA 13).

Application to Review Refusal to Certify

54. If the trial judge refuses to certify a matter under s 295(3), the party that requested certification may apply to the Court of Appeal in accordance with the rules for a review of the trial judge's refusal (CPA 2009 s 296).⁷²⁴
55. An application to review the refusal to certify must be in in Form 6-3B of the *Supreme Court (Criminal Procedure) Rules 2017* and must be filed with the Registrar of Criminal Appeals. The notice must state in precise terms the grounds on which review is sought (*Supreme Court (Criminal Procedure Rules) 2017* r 3.04).
56. The applicant must serve a copy of the notice on the other party. Filing and service must take place:
- If the trial has not commenced and is not due to commence for at least 10 days, within 10 days after the day on which the judge refuses to certify, or in any extension of that period;
 - If the trial commences within 10 days of when the judge refuses to certify, within 2 days after the day on which the trial commences, or in any extension of that period; and
 - 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 in any extension of that period (CPA 2009 s 296).
57. On an application to review a judge's refusal to certify under s 296(1), the Court of Appeal-
- (a) must consider the matters referred to in section 295(3); and
 - (b) if satisfied as required by section 297, may give the applicant leave to appeal against the interlocutory decision (CPA 2009 s 296(4)).
58. Applications to review certification are therefore also applications for leave to appeal. The court may determine both questions in the one hearing.
59. A challenge to the failure to certify is determined in accordance with *House v The King* (1936) 55 CLR 499; [1936] HCA 40 principles. The applicant must show that the trial judge acted on a wrong principle, took into account an irrelevant consideration, mistook the facts, failed to take into account a relevant consideration or reached a plain unreasonable result such that error may be inferred (*DPP v Wise* [2016] VSCA 173 at [12]; *Tuite v R (No 2)* [2015] VSCA 180 at [33]; ; *Frazier v R* [2017] VSCA 370, [7]–[8]).
60. While the matter has not been finally determined, it is likely that an interlocutory appeal will be incompetent unless a party can either secure certification from the trial judge or successfully challenge the failure to certify for an interlocutory appeal (see *Tuite (No 2) v R* [2015] VSCA 180, [27]–[34]). This places a considerable barrier on any attempt by the defence to challenge the rejection of evidence, as such a decision falls outside the terms of the certification grounds in CPA 2009 s 295(3).
61. Certification is no mere formality. The Court of Appeal will place considerable weight on the trial judge's decision regarding certification. Recently, the Court of Appeal expressed concern about a high incidence of applications to review refusal to certify. As the Court explained, the legislature did not intend that a refusal should routinely be the subject of challenge. The jurisdiction to challenge a refusal to certify should be invoked responsibly and sparingly (*Frazier v R* [2017] VSCA 370, [8], [33]–[36]; *Peterson v The Queen* (2019) 57 VR 521, [9]–[10]).

⁷²⁴ A single judge of the Court of Appeal may exercise this power (CPA 2009 s 315).

Adjournment to Allow Interlocutory Appeal

62. If the trial has already commenced when the Court of Appeal grants leave, the trial judge must adjourn the trial without discharging the jury if that is reasonably practical, until the appeal has been determined (CPA 2009 s 299).

Determination of Appeal

63. Section 300 of the CPA 2009 explains how the Court of Appeal determines interlocutory appeals:
- (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 (CPA 2009 s 300).
64. The standard of appellate review can differ between interlocutory appeals and post-convictions appeals. Review of the admissibility of tendency and coincidence evidence on an interlocutory appeal is governed by the principles in *House v R* (1936) 55 CLR 499, even though the same principles may not apply on a post-conviction appeal (*KJM v R (No 2)* (2011) 33 VR 11; *DAO v R* (2011) 81 NSWLR 568; *CEG v R* [2012] VSCA 55).
65. *House v The King* principles similarly apply to many other admissibility decisions, such as whether to allow evidence to be used as incriminating conduct, whether evidence is admissible under *Evidence Act 2008* s 65 and whether evidence should be excluded under *Evidence Act 2008* s 137 (see *Lewis v The Queen* [2018] VSCA 40; *Bray v The Queen* (2014) 46 VR 623; *Norris & Ross v The Queen* [2018] VSCA 137, [41]).
66. The Court of Appeal may treat the hearing for leave to appeal or application to review the trial judge's refusal to certify as the hearing of the appeal. If the court grants leave, it may treat the notice of application for leave to appeal or application for review of refusal to certify as the notice of appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 3.06).
67. After the Court of Appeal decides the case, the Registrar of Criminal Appeals must transmit the decision to the trial court. The trial court must enter the decision on the court record (CPA 2009 s 301).

20.4.4 Reservation of a Question of Law (Case Stated Procedure)

1. Division 5 of Part 6.3 of the CPA 2009 allows a court to reserve a question of law that arises before or during a trial or on an appeal from the Magistrates' Court for the Court of Appeal (CPA 2009 ss 302, 302A).
2. The court may only exercise this power before or during the trial, or on the hearing of the appeal. As a plea of guilty removes the need for a trial, this procedure is not available to answer questions of law arising after a plea of guilty in the higher courts (*R v Judge Hewitt; ex parte Attorney-General for the State of Victoria* [1973] VR 484).
3. The court may reserve a question of law if it is satisfied that it is in the interests of justice to do so. Similar considerations apply to reserving a question of law on a trial or on an appeal from the Magistrates' Court. The court must consider:
 - the extent of any disruption or delay to the trial process that may arise if the question of law is reserved;
 - whether the determination of the question of law may-
 - render the trial or hearing unnecessary;
 - substantially reduce the time required for the trial or hearing;
 - resolve a novel question of law that is necessary for the proper conduct of the trial or hearing; or
 - in the case of questions reserved in relation to a trial, reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial (CPA 2009 ss 302(2), 302A).
4. The issues that need to be decided on a case stated should be identified long before a trial is due to begin. It is not appropriate for a party to wait until shortly before the start of the trial to seek to raise a question of law and invoke the case stated procedure (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [7]).
5. The court may exercise this power on the application of a party or on the judge's own motion (see CPA 2009 s 337).
6. If the court reserves a question of law, it must state a case for the Court of Appeal, setting out the question of law and the circumstances in which that question has arisen. It must also sign the case stated and transmit it to the Court of Appeal. The Court of Appeal may also return a case stated for amendment, and the originating court must amend the case stated as required (CPA 2009 s 305).
7. Alternatively, if the court refuses to reserve a question of law, a party may apply to the Court of Appeal for an order calling on the originating court and the respondent to show cause why the question of law should not be reserved. On this application, the Court of Appeal may order the trial court to reserve the question of law or may refuse the application with or without costs. The trial court must comply with an order to reserve a question of law and must follow the process described above as if it had granted the original application to reserve a question of law (CPA 2009 s 304).
8. Once the case is stated, the Court of Appeal may hear and determine the question of law in the stated case and may remit the question and determination back to the originating court (CPA 2009 s 306).
9. The trial court may not reserve a question of law once the trial has commenced unless the reasons for doing so clearly outweigh any disruption to the trial (CPA 2009 s 302). If the court does reserve a question of law after the trial commences, it must adjourn the trial without discharging the jury until the question of law has been determined, if that is reasonably practical. In addition, where a court reserves a question of law arising on an appeal to the County Court, the court must adjourn the hearing if reasonably practicable until the question has been determined (CPA 2009 s 303).

10. The Court of Appeal may refuse to answer questions in a case stated if it does not have jurisdiction to answer the question or if it is otherwise inappropriate to answer one or more of the questions (see *R v Garlick* [2006] VSCA 127; *Furze v Nixon* (2000) 2 VR 503; [2000] VSCA 149; *R v Assange* [1997] 2 VR 247; *DPP (Cth) v JM* (2012) 37 VR 1; [2012] VSCA 21).
11. After the Court of Appeal decides the case, the Registrar of Criminal Appeals must transmit the decision to the court which reserved the question. The court must then enter the judgment and order on the court record (CPA 2009 s 307).
12. The procedural rules set out in *Supreme Court of Victoria*, Practice Note SC CA 2 (which are designed for interlocutory appeals) apply with suitable adjustments to the Case Stated procedure (*Supreme Court of Victoria*, Practice Note SC CA 2, [15.1]). See 20.4.3 Interlocutory Appeals for more information on *Supreme Court of Victoria*, Practice Note SC CA 2.

Limitations on the Case Stated Procedure

13. The case stated procedure is very limited and is constrained by a number of rules designed to prevent a party seeking the answer to hypothetical questions. It is not a substitute for an appeal (*Furze v Nixon* (2000) 2 VR 503; [2000] VSCA 149; *Wallin v Judge Curtain* (1998) 100 A Crim R 506; *DPP (Cth) v JM* (2012) 37 VR 1; [2012] VSCA 21).
14. The stated case must be in the correct form. The judge must state his or her ultimate findings of fact, but not the evidence or his or her conclusions of law. The findings of fact include the facts found by inference. The stated case must also demonstrate how the question of law arose (*R v Garlick* [2006] VSCA 127; *R v Assange* [1997] 2 VR 247; *Industrial Equity v Commissioner for Corporate Affairs* [1990] VR 780).
15. The stated case may also include findings of fact made for the limited purpose of the case stated. These findings of fact may consist of the particular factual matters which the prosecution seeks to assert, even if some of those facts are disputed. Stating a case in this way does not make the associated questions hypothetical or inappropriate to answer. Instead, making findings of fact for this limited purpose facilitates the determination of how the law applies to particular facts (*DPP (Cth) v JM* (2013) 250 CLR 135; [2013] HCA 30; *DPP v Acme Storage Pty Ltd* [2017] VSCA 90, [5]).
16. Findings of fact made for the purpose of a case stated can include findings regarding an accused's state of mind (*DPP (Cth) v JM* (2013) 250 CLR 135; [2013] HCA 30).
17. General or abstract questions about the legal meaning of a word or phrase are not appropriate for resolution on a case stated, unless such general questions arise before or during a trial. Instead, a stated case must identify particular findings of fact so that the Court of Appeal can determine, as a question of law, the legal significance of those findings of fact (*DPP (Cth) v JM* (2013) 250 CLR 135; [2013] HCA 30).
18. A distinction exists between a question of law and whether the trial judge made an error of law. The purpose of the case stated procedure is to assist the trial judge discharge their responsibility to try the case with a jury rather than to correct error (*Chief Commissioner of Police v Crupi* [2023] VSCA 245, [85]–[86]).
19. A stated case should only ask questions of law that arise in the case. If a party does not seek to raise a particular issue, then it is not appropriate to reserve a question about that issue (*DPP v Acme Storage Pty Ltd* [2017] VSCA 90 at [50]–[52]; [86]–[87]; [88]–[90]; [91]–[92]).
20. On a stated case, the Court of Appeal cannot receive additional evidence, examine the transcript or make additional findings of fact or draw inferences. It must determine the matter based on the facts included in the stated case (*R v Rigby* (1956) 100 CLR 146; *Furze v Nixon* (2000) 2 VR 503; [2000] VSCA 149; *Industrial Equity v Commissioner for Corporate Affairs* [1990] VR 780; *R v AL* [2016] VSCA 156).

21. While the Court of Appeal cannot draw additional *inferences* from the established facts on a case stated, it may find *implications* in the stated facts. An inference is an independent ultimate fact that would impermissibly add to the stated case. In contrast, an implication is a fact that the trial court meant to specify, even if it did not do so expressly. The difference between an *inference* and an *implication* is subtle and can cause confusion (*R v Rigby* (1956) 100 CLR 146; *Merchant Service Guild of Australasia v The Newcastle and Hunter River Steamship Co Ltd (No 1)* (1913) 16 CLR 591).
22. As the court is only concerned with ultimate facts and not evidentiary facts, it is generally not appropriate to recite the evidence in the stated case, or attach transcripts of evidence as an annex to a stated case. This process would leave the appellate court to guess which evidence was accepted. Similarly, the trial judge should not specify the competing contentions of the parties, as this does not involve making findings of fact. Instead, the trial court must clearly state its findings of fact and should not leave the appellate court to ascertain those findings from the judge's reasons for decision. However, the evidence itself may be relevant if the question of law relates to the admissibility of particular evidence, or whether evidence is legally sufficient to make a finding of fact (*Furze v Nixon* (2000) 2 VR 503; [2000] VSCA 149; *Wallin v Judge Curtain* (1998) 100 A Crim R 506; *R v Rigby* (1956) 100 CLR 146; *DPP v Acme Storage Pty Ltd* [2017] VSCA 90 at [13]–[14]; *R v AL* [2016] VSCA 156).
23. It is notoriously difficult to comply with the rules of the case stated procedure. Appellate courts commonly identify the following errors in attempts to use the case stated process:
- The purported question of law did not arise in the proceeding, or before or during the trial;
 - The question impermissibly seeks the answer to a hypothetical, or seeks an advisory opinion;
 - The question asked is not a pure question of law, but is a mixed question of fact and law;
 - The stated case does not contain the ultimate facts necessary to answer the question.
24. Several of these difficulties exist in tension with one another. In particular the need to ground a dispute within a particular factual context to avoid the question being hypothetical can detract from the need for the question to be a pure question of law (*Chief Commissioner of Police v Crupi* [2023] VSCA 245, [55]–[56]).
25. Trial judges should take note of the difficulties identified above and draft a stated case precisely (see *R v Assange* [1997] 2 VR 247; *DPP v B* (1998) 194 CLR 566; [1998] HCA 45; *R v Garlick* [2006] VSCA 127; *Industrial Equity v Commissioner for Corporate Affairs* [1990] VR 780; *Connor & Mendes v Pittaway* [1969] VR 335).
26. A question that is cast in general terms or that is not expressly linked to the facts in the proceedings is most likely one that did not arise in the proceeding. The case stated process is not a vehicle for defining the limits to a power and it will not usually be appropriate to ask the broad question of whether a purported power exists. The more appropriate question is whether the power can be exercised in the circumstances of the case (*DPP v B* (1998) 194 CLR 566; [1998] HCA 45).
27. In exceptional cases, it may be possible to use the case stated process to challenge factual findings by asking whether the contested factual findings were open (see *R v Peters* [2018] VSCA 115, [38]).
28. However, there are limits to the ability to ask whether a particular factual finding is open. It is not appropriate for the case stated procedure to invite the appellate court to review the material and make its own factual conclusions. Asking whether a particular discretionary or evaluative judgment, which involves identifying and weighing competing interests, was open may involve such impermissible fact finding. Further, the judgment in *R v Peters* where the stated case asked whether a particular finding was open has been criticised due to its failure to consider the distinction between an appeal on a question of law and a reserved question and its failure to apply the prohibition on drawing inferences of fact from the case stated (*Chief Commissioner of Police v Crupi* [2023] VSCA 245, [91]–[97]).

29. The case stated process is not the only mechanism for bringing a matter before the Court of Appeal for early resolution. *CPA 2009* s 199 allows a judge to make a preliminary determination of a question of law and dissatisfied parties can test that determination by bringing an interlocutory appeal. A judge making a preliminary determination under section 199 can make assumptions of fact (*DPP (Cth) v JM* (2012) 37 VR 1; [2012] VSCA 21). This will often be better process for the early resolution of a contested legal issue than the case stated process, as the Court of Appeal will then have the benefit of the judge's reasoning.
30. However, the interlocutory appeal process is limited to the parties. Where a third party wishes to challenge a decision, such as a decision relating to a subpoena or public interest immunity, the case stated procedure may be the only available option (see, e.g., *Chief Commissioner of Police v Crupi* [2023] VSCA 245).

Reservation of Questions of Law Under the Charter

31. Under the *Charter of Human Rights and Responsibilities Act 2005*, a court may refer a question of law relating to the Charter or the interpretation of legislation in accordance with the Charter to the Supreme Court or the Court of Appeal. Section 33 of the Charter states:
- (1) If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter, that question may be referred to the Supreme Court if—
 - (a) a party has made an application for referral; and
 - (b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court.
 - (2) If a question has been referred to the Supreme Court under subsection (1), the court or tribunal referring the question must not—
 - (a) make a determination to which the question is relevant while the referral is pending; or
 - (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.
 - (3) If a question is referred under subsection (1) by the Trial Division of the Supreme Court or by the County Court, the referral is to be made to the Court of Appeal.
 - (4) Despite anything contained in any other Act, if a question arises of a kind referred to in subsection (1), that question may only be referred to the Supreme Court in accordance with this section (*Charter of Human Rights and Responsibilities Act 2005* s 33).
32. As s 33(4) of the Charter indicates, this referral process operates to the exclusion of any other referral process. A party must therefore use this process if a question of law arises concerning the effect of the Charter and can not bring an application under s 302 of the *CPA 2009* if the question of law concerns the effect of the Charter. In particular, a party could not apply to the Court of Appeal under s 304 for an order calling on the lower court and the respondent to show cause why the question of law should not be reserved for determination by the Court of Appeal.
33. It is unclear whether s 33(4) also excludes the DPP right to refer a point of law under s 308. Given that s 33(1) would not be well suited to address a question of law after an acquittal, it seems likely that s 33(4) would be read down to preserve the application of s 308.
34. So far, this procedure has not been used. It is therefore uncertain how it operates and whether it is subject to the same limitations as the case stated procedure.

35. In the statement of compatibility for the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009*, the Attorney-General stated:
- The bill amends section 33 [of the *Charter*] to enable issues to be referred directly from the County Court to the Court of Appeal. This amendment makes this process similar to the process used for cases stated under the *Criminal Procedure Act*. This amendment engages and promotes the right to review by expediting the process for obtaining an authoritative judgment from the Court of Appeal which can, in turn, be of broad use where the issue in question is common to a number of trials or civil proceedings.
36. This suggests that courts reserving a question under s 33 of the *Charter* must comply with the limitations on the case stated procedure described above.

DPP Referral of Question of Law

37. Under s 308 of the *CPA 2009*, the DPP may refer a question of law arising in a proceeding if a person is acquitted of any or all charges in:
- a trial on indictment in the Supreme Court or the County Court; or
 - on an appeal against conviction or sentence from the Magistrates' Court
38. The Court of Appeal must consider the point of law and give its opinion (*CPA 2009* s 308).
39. This procedure is only available on a question of law that arose in the proceeding. It does not "enable the director to set in train a roving judicial commission on a particular branch of the law" (*Attorney-General's Reference (No. 3 of 1994)* [1998] AC 245). However, a question may arise in a proceeding even if it was not in controversy between the Crown and the accused. It is only necessary that the judge decided the question in the proceeding (*DPP Reference No 2 of 1996* [1998] 3 VR 241).
40. This process allows the DPP to seek clarification of a point of law that has caused confusion or possible injustice in the past.⁷²⁵
41. The opinion of the Court of Appeal on the reference only affects future cases and does not affect the respondent's acquittal (*CPA 2009* s 308; *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410).
42. The court should endeavour to conceal the identity of the respondent, who should not suffer public opprobrium if the court rules that he or she was wrongly acquitted (*Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410; *DPP Reference No 2 of 1996* [1998] 3 VR 241).
43. The acquitted person who appears in person or by a legal practitioner as contradictor is entitled to reasonable costs as settled by the Costs Court (*CPA 2009* s 308).
44. The power of the DPP to refer a point of law is not limited to matters *arising in the trial*. Under s 308, the DPP may refer any point of law that arose *in the proceeding* (*CPA 2009* s 308. Compare *DPP v B* (1998) 194 CLR 566; [1998] HCA 45).
45. The order of the court on a DPP referral may be appealed to the High Court (*Mellifont v Attorney-General* (1991) 173 CLR 289; [1991] HCA 53).

Commonwealth Case Stated Procedure

46. Division 3 of Part X of the *Judiciary Act 1903* contains a case stated procedure for Commonwealth indictable offences. This procedure operates in tandem with the Victorian procedure, which is picked up by s 68(2) of the *Judiciary Act 1903* (Cth) (*R v Gee* (2003) 212 CLR 230; [2003] HCA 12).

⁷²⁵ For example, *Commonwealth Director of Public Prosecutions Reference No 1 of 2008* (2008) 21 VR 111; [2008] VSCA 214, *Director of Public Prosecutions Reference No 1 of 2004* (2005) 12 VR 299; [2005] VSCA 172 and *Director of Public Prosecutions Reference No 2 of 2001* (2001) 4 VR 55; [2001] VSCA 114 concerned the elements of offences, and *Director of Public Prosecutions Reference (No 1 of 1984)* [1984] VR 727, *Mellifont v Attorney-General* (1991) 173 CLR 289; [1991] HCA 53 and *Director of Public Prosecutions Reference No 2 of 1996* [1998] 3 VR 241 concerned the admission of evidence.

47. A person charged on indictment for an indictable Commonwealth offence may apply to the court to reserve a question of law that arises in the trial for the consideration of the Full Court of the Supreme Court (*Judiciary Act 1903* (Cth) s 72). In Victoria, the Court of Appeal fulfils the role of the Full Court.
48. The trial judge must reserve the question of law identified in the application if the accused applies before verdict. The court may also act on its own motion to reserve a question before or after judgment (*Judiciary Act 1903* (Cth) s 72).
49. It is usually undesirable to stay a trial after reserving a question of law. The judge may continue with the trial and take the verdict (see *Bull v R* (1974) 131 CLR 203). If the accused is convicted, the court may either pronounce judgment and delay execution, or it may postpone judgment until the question is considered by the Court of Appeal (*Judiciary Act 1903* (Cth) s 72).
50. The prosecution may also require a trial court to state a case if the accused is convicted and the court arrests judgment at the trial. The Court of Appeal may then either affirm or reverse the order arresting judgment (*Judiciary Act 1903* (Cth) s 76).
51. On the hearing of a reserved question of law, the Court of Appeal must give the Crown and any convicted accused the opportunity to present arguments and the court may:
- (a) affirm the judgment given at the trial; or
 - (b) set aside the verdict and judgment and order a verdict of not guilty or other appropriate verdict to be entered; or
 - (c) arrest the judgment; or
 - (d) amend the judgment; or
 - (e) order a new trial; or
 - (f) make such other order as justice requires;
- or the Court may send the case back to be amended or restated (*Judiciary Act 1903* (Cth) s 73).
52. Under this procedure, the court may not set aside a conviction due to improper admission of evidence if the evidence was merely of a formal character or was not material. In addition, the court may not set aside a conviction due to improper admission of evidence for the defence (*Judiciary Act 1903* (Cth) s 75).

Last updated: 8 December 2023

20.4.5 Stay of Sentences Under Appeal

1. Section 309 of the *CPA 2009* states:
- (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.
2. Restitution and compensation orders under the *Sentencing Act 1991* are stayed pending an appeal under Part 6.3, unless the Supreme Court or County Court directs otherwise. If the order is stayed and the conviction is set aside on the appeal, then the order does not take effect unless the Court of Appeal orders otherwise (*CPA 2009* s 311).

3. In addition, orders for the forfeiture or destruction of property other than orders under the *Confiscation Act 1997* must not be enforced during the appeal period, unless earlier forfeiture or destruction is permitted by any other law (CPA 2009 s 312).

Last updated: 20 April 2010

20.4.6 'Fresh Evidence' and 'New Evidence'

1. The law draws a distinction for the purpose of appeals between 'fresh evidence' and 'new evidence' (*Bowden v The Queen* (2017) 54 VR 135, [32]).
2. Evidence is only "fresh evidence" if it was not available to a party in the exercise of reasonable diligence at the time of the trial (*R v Kucma* (2005) 11 VR 472; [2005] VSCA 58; *Lawless v R* (1979) 142 CLR 659; *Mickelberg v R* (1989) 167 CLR 259; [1989] HCA 35; *Ratten v The Queen* (1974) 131 CLR 510, 515–519).
3. In contrast, evidence which was available in the exercise of reasonable diligence is characterised as 'new evidence' (*Lawless v The Queen* (1979) 142 CLR 659).
4. The court may look at whether the evidence is available to the accused as a practical matter. Where a witness is unwilling at the time of trial to give evidence, the evidence from that witness, even if known to the accused, will not necessarily be 'available' (*Weng v R* [2013] VSCA 221). However, the appellate court will consider what steps the defence had taken to secure the evidence, including whether reasonable diligence required the defence to subpoena the witness and seek to question the witness, at least on a pre-trial hearing (*Martin v The Queen* [No 2] [2019] VSCA 60, [65]).
5. Courts must extend great latitude when assessing whether the accused was able to obtain evidence for use in a trial (*Ratten v R* (1974) 131 CLR 510; [1974] HCA 35).

Appeals against conviction

6. Fresh evidence is admissible⁷²⁶ on an appeal against conviction if the evidence:
 - is admissible;
 - is "fresh evidence";
 - appears credible or plausible; and
 - has sufficient relevance and cogency (*R v Nguyen & Tran* [1998] 4 VR 394; *R v AHK* [2001] VSCA 220; *R v Kucma* (2005) 11 VR 472; [2005] VSCA 58).
7. At least in relation to appeals against conviction, these four requirements are not rigid and absolute. The fundamental question is whether there has been a substantial miscarriage of justice (*Weng v R* [2013] VSCA 221; CPA 2009 s 276).
8. On an appeal against conviction on the basis of fresh evidence, the court may find a miscarriage of justice if there is a significant possibility that the evidence, if believed, would have led the jury, acting reasonably, to acquit (*Bowden v The Queen* (2017) 54 VR 135, [36]; *Lawless v The Queen* (1979) 142 CLR 659, 675–676; *Visser v DPP (Cth)* [2020] VSCA 327, [189]–[194]).

⁷²⁶ Note, however, that the High Court does not have power to receive fresh evidence (*Davies & Cody v R* (1937) 57 CLR 170; *Mickelberg v R* (1989) 167 CLR 259; [1989] HCA 35).

9. In contrast, if the evidence is ‘new evidence’ (and so could reasonably have been obtained for the trial), the appeal will only be allowed if the new evidence shows that the appellant is innocent, or raises for the appellate court a reasonable doubt about the appellant’s guilt. In assessing whether the evidence raises a reasonable doubt about guilt, the appellate court undertakes essentially the same task when there is a ground of appeal that a verdict is unreasonable or cannot be supported by the evidence. The appellate court must review the whole of the evidence (including the new evidence) and decide whether, if the new evidence had been before the jury, the jury must have had a reasonable doubt about guilt (*Bowden v The Queen* (2017) 54 VR 135, [2]–[6]; *Visser v DPP (Cth)* [2020] VSCA 327, [189]–[194]).
10. In summary, the difference between the ultimate test for fresh evidence and new evidence is that when evidence is ‘fresh’, the court is deciding whether the jury might have had a reasonable doubt, if the evidence had been led. In contrast, the test for new evidence is whether the jury must have had a reasonable doubt, if the evidence had been led (*Bowden v The Queen* (2017) 54 VR 135, [6]).
11. The distinction between fresh and new evidence applies both to conventional appeals against conviction and referrals of petitions for mercy which must be determined by the court as if it were an appeal (*CPA 2009 s 327*; *Visser v DPP (Cth)* [2020] VSCA 327, [192]–[194]).
12. In assessing the potential impact of fresh evidence, the court will consider whether the evidence is capable of belief by a jury acting reasonably. However, this is not always considered separately, and the Court’s assessment of the credibility of the evidence is part of the analysis of whether, taking the fresh evidence and the trial evidence together, there is a significant possibility that there would have been an acquittal (see *Bloomfield v The Queen* [2020] VSCA 241, [84]–[92]).
13. Under this approach, the court will consider the credibility of the evidence on the view most favourable to the accused which the appellate court considers the jury could reasonably have taken. It is not necessary to find that a jury is likely to accept the evidence (*Mickelberg v R* (1989) 167 CLR 259; [1989] HCA 35 per Toohey and Gaudron JJ; *Rodi v Western Australia* (2018) 265 CLR 254, [37]; *Bloomfield v The Queen* [2020] VSCA 241, [91]–[92]).
14. The court will also examine the hypothetical question of whether the evidence would have affected the result at the original trial. The court does not speculate on whether the accused would be convicted at a new trial (*R v Kucma* (2005) 11 VR 472; [2005] VSCA 58; *R v Roberts* (2004) 9 VR 295; [2004] VSCA 1).
15. In some cases, if the fresh evidence is believed, then an acquittal may be inevitable. In others, fresh evidence may be obviously true, but have little bearing on the outcome (*R v Bloomfield* [2020] VSCA 241, [86]).
16. Where the fresh evidence consists of a key witness recanting his or her evidence given at trial, the ordinary tests for fresh evidence must be qualified. Courts must act with extreme caution upon evidence of a witness recanting his or her evidence, as this change of position may not reveal that the evidence at trial was unreliable. The court will carefully assess the witnesses’ asserted reasons for changing his or her evidence and the significance of the witnesses’ evidence at the trial. It may also be necessary to call the witness in the appeal hearing and examine the witness to explore the reasons for recanting his or her previous evidence (*R v AHK* [2001] VSCA 220; *Fram v R* [2013] VSCA 96).

Appeals against sentence

17. The following principles guide the reception of fresh evidence on an appeal against sentence:
 - (i) the new evidence must relate to events which have occurred since the sentence was imposed;
 - (ii) the evidence must demonstrate the true significance of facts in existence at the time of the sentence;
 - (iii) the evidence will not be admitted if it relates only to events which have occurred after sentence and which show that the sentence has turned out to be excessive;
 - (iv) the new evidence may be admissible even though the applicant did not refer to the pre-existing state of affairs in the course of the plea;

(v) upon the admission of the new evidence, it is unnecessary to determine whether the original sentence was vitiated by error, or whether it was manifestly excessive; and (vi) the question is whether, on all of the material now before the Court, any different sentence should be substituted to avoid a miscarriage of justice.

The consistent approach of this Court has been to treat the sentencing discretion as reopened once it has been concluded that the fresh evidence throws significant new light on the pre-existing facts. The Court must determine what is the appropriate sentence on the basis of all of the material then before it (*R v Duy Duc Nguyen* [2006] VSCA 184 at [36]–[37]. See also *R v Rostom* [1996] 2 VR 67; *R v Eliassen* (1991) 53 A Crim R 391; *R v WEF* [1998] 2 VR 385; *R v Alashkar* (2007) 17 VR 65; [2007] VSCA 182; *R v McLeod* (2007) 16 VR 682; [2007] VSCA 183).⁷²⁷

18. As Brooking JA explained in *R v Babic*:

The suggestion that some subsequent event has made a sentence, appropriate when passed, excessive is a matter for consideration by the Executive in the exercise of the prerogative of mercy, not by an appellate court (*R v Babic* [1998] 2 VR 79, 80–81).

19. The principles which govern the admissibility of fresh evidence do not apply to evidence of the accused's progress to rehabilitation between sentence and appeal where error is established. Evidence of rehabilitation is permitted as a matter of course once the appellate court has decided to re-open the sentencing discretion (*Betts v R* (2016) 258 CLR 420; [2016] HCA 25 at [11]–[12]; *Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37).

20. Fresh evidence on an appeal may demonstrate that the sentence was manifestly excessive, even if the sentence was appropriate on the material available at the time of sentence (*R v Rostom* [1996] 2 VR 67).

21. The Court of Appeal must not increase a sentence on the basis of evidence that was not given at the trial or sentencing hearing, unless:

- on an appeal under s 291 of the Act, the evidence relates to the offender's failure to fulfil an undertaking to assist law enforcement authorities;
- the sentencing court was misled at the sentencing hearing concerning a material fact and an increase in sentence is necessary in the interests of justice; or
- on an appeal under s 290A, the County Court or Supreme Court was misled as to a material fact and an increase in sentence is necessary in the interests of justice (CPA 2009 s 321).

Last updated: 30 August 2021

20.4.7 Video evidence on appeals

1. In determining whether to allow an appeal, an appellate court may view video records of:

- The VATE interview of a witness;
- The accused's record of interview;
- Surveillance footage;
- A witness' evidence in the trial (see *R v El Moustafa* [2010] VSCA 40, [43]).

⁷²⁷ Note that ss 281, 285 and 289 of the CPA 2009 modified the previous test for when the court would allow an appeal against sentence. Previously, there was no express requirement to show error, though this was often necessary as a matter of practice (see CPA 2009, Explanatory Memorandum, clause 281). Principle (v) from *R v Duy Duc Nguyen* may be inconsistent with the new legislative scheme.

2. In *SKA v The Queen*, French CJ, Gummow and Kiefel JJ stated that there was no general obligation on appellate courts to view a recording of evidence. There must be something in the case, such as some feature of the evidence that can only be identified visually or by sound, which is identified by a party as important and which cannot be discerned from the transcript. Such cases are likely to be exceptional, and the forensic purpose of viewing the recording should be identified by the parties, rather than independently by the court (*SKA v The Queen* (2011) 243 CLR 400 [31]; *Pell v The Queen* (2020) 268 CLR 123, [36]; c.f. *R v El Moustafa* [2010] VSCA 40).
3. The recognition in *M v The Queen* (1994) 181 CLR 487 of a jury's advantage in seeing and hearing witnesses could resolve a doubt experienced by an appellate court was not merely a reflection of technological limitations of the time. Instead, it reflected the functional or constitutional demarcation between the jury and the appellate court. This demarcation has not changed by the fact that video recordings of witnesses are now available (*Pell v The Queen* (2020) 268 CLR 123, [38]).
4. A party that calls for the court to view a video recording must be ready to assist the court by identifying particular aspects of the recording which are relevant to the issues in the case. Appellate proceedings are adversarial and not inquisitorial, and so counsel must identify the relevant material and how the court should use that material. In addition, an invitation that the court view a recording without submissions on what parts of the recording are relevant has implications for procedural fairness, as the court may need to reconvene to raise with the parties any views it has formed based on the recording (*Pate v The Queen* [2019] VSCA 170 [72]–[77]).

Last updated: 1 January 2023

20.5 Petitions for Mercy

1. A person who is convicted on indictment, found unfit to stand trial or found not guilty because of mental impairment may petition the Attorney-General for an exercise of the royal prerogative of mercy and the Attorney-General may:
 - refer the whole case to the Court of Appeal; or
 - refer any point arising in the case to the judges of the Trial Division of the Supreme Court (CPA 2009 s 327).
2. If the Attorney-General refers the whole case to the Court of Appeal, it must hear and determine the matter as if it were an appeal by the petitioner following a grant of leave to appeal. The court applies the same principles and procedures as in an ordinary appeal under Part 6.3 of the CPA 2009, except that the court is not bound by any previous decision dismissing an appeal or refusing leave to appeal (*Supreme Court (Criminal Procedure) Rules 2017* r 2.26; *Re Ratten* [1974] VR 201; *Re Matthews and Ford* [1973] VR 199; *Re MJR* (2000) 1 VR 119; [2000] VSCA 44).
3. The court must consider all questions of fact and law and determine whether the petitioner can establish one of the appeal grounds in s 276(1). In undertaking this process, the court may receive fresh evidence without imposing a requirement to obtain leave (CPA 2009 s 327; *Mickelberg v R* (1989) 167 CLR 259; [1989] HCA 35; *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68; *R v Chard* [1984] AC 279).
4. On the appeal, the petitioner is not limited to the ground listed in the petition. He or she may raise additional grounds and does not require a further reference from the Attorney-General or need to seek leave from the Court of Appeal (*Re MJR* (2000) 1 VR 119; [2000] VSCA 44).
5. While the court is not bound by an earlier decision, it will only re-adjudicate on a ground that an appellate court has previously considered if there is some material that makes reconsideration necessary or desirable (*Re MJR* (2000) 1 VR 119; [2000] VSCA 44; *Re Ross* (2007) 19 VR 272; [2007] VSC 572; *Re Matthews and Ford* [1973] VR 199; *Mickelberg v R* (1989) 167 CLR 259; [1989] HCA 35 per Toohey and Gaudron JJ).
6. It is currently unclear whether a court must apply the common law and standards of fairness and justice that existed at the time of the original decision or at the time of reviewing the petition (see *Re Ross* (2007) 19 VR 272; [2007] VSC 572; c.f. *R v Bentley* [1998] EWCA Crim 2516).

7. In contrast, if the Attorney-General refers a point to the judges of the Trial Division, those judges or any 3 of them must consider the petition and provide their advice to the Attorney-General (CPA 2009 s 327). This process is very rarely used. It gives rise to practical difficulties concerning the identification of the relevant evidence and may raise constitutional issues as it calls on judges of the Supreme Court to act in an administrative capacity by providing advice to the Attorney-General (*Re Ross* (2007) 19 VR 272; [2007] VSC 572).
8. A petition for mercy is available in respect of conviction or sentence and may even be brought by a person who pleaded guilty (*Re MJR* (2000) 1 VR 119; [2000] VSCA 44).

Last updated: 31 August 2020

20.6 Judge's Report

1. When a case is under appeal, the Registrar of Criminal Appeals may require the trial judge to provide a report containing his or her opinion on the case or any point arising in the case. The trial judge must comply with a request for a report promptly (CPA 2009 s 316; *Supreme Court (Criminal Procedure) Rules 2017* r 2.42).
2. The report provides the Court of Appeal with the insight of the judge who was familiar with the atmosphere of the trial. Such familiarity may reveal matters that are not readily discernable from the transcript. The report may also allow the judge to address complaints of specific error, such as a failure to take into account a relevant consideration, but not to interpret or re-interpret his or her published reasons (*R v JMV* [2001] VSCA 219; *R v O'Brien & Gloster* [1997] 2 VR 714).
3. A report is not a vehicle for the judge to expand on his or her reasons or to defend his or her previous decision. Robust or adversarial language in a report may, in some cases, be evidence of bias or support an apprehension of bias (*R v Ahmet* (1996) 86 A Crim R 316; *R v Juric* (2002) 4 VR 411; [2002] VSCA 77; *R v Groom* [1999] 2 VR 159; [1998] VSCA 146; *R v Miceli* [1998] 4 VR 588; *R v RPS* (2000) 199 CLR 620; [2000] HCA 3).
4. It is also not appropriate for the judge to express his or her view about whether any of the grounds of appeal should succeed. The Judge's Report should not reflect on whether the directions were fair, or whether impugned directions affected the outcome of the trial. It may also not be appropriate to comment on whether a witness appeared convincing or credible, when the court is called on to determine whether the verdict was open on the evidence (*Raimondi v R* [2013] VSCA 194).
5. The Court of Appeal may determine an appeal without a judge's report if it thinks it appropriate to do so (*Supreme Court (Criminal Procedure) Rules 2017* r 2.42). It will give the judge's views such weight as is appropriate in the circumstances of the case. This may depend on whether the judge's view is based on his or her advantage in seeing the witnesses give evidence or other matters that are not available to the Court of Appeal (*R v Paxton* [1983] VR 178; *R v Marziale*, Unreported, VSCA, 18 April 1996; *R v Franks* [1999] VSCA 39; *R v JMV* [2001] VSCA 219; *SKA v R* (2011) 243 CLR 400; [2011] HCA 13).
6. Where the trial judge reports on matters that the appellate court is equally capable of deciding for itself from reading the transcript, then the trial judge's opinion will generally be given little weight. However, if the judge's opinion touches matters that cannot be determined from the transcript or are partially concealed from the appellate court, then the appellate court will likely give the report more weight provided the judge explains the basis for his or her opinion (*GAP v R* [2011] VSCA 173; *SKA v R* (2011) 243 CLR 400; [2011] HCA 13).

Last updated: 31 August 2020

21 Applications to set aside previous acquittals

1. This chapter examines the power of the Court of Appeal under Chapter 7A of the CPA 2009 to set aside a previous acquittal or ordering that a previous acquittal is not a bar to a prosecution where:
 - The acquittal was tainted;

- Fresh and compelling evidence becomes available; or
- The accused is charged with an administration of justice offence connected with the original trial (CPA 2009 ss 327H, 327L, 327M, 327N).

Last updated: 1 May 2012

21.1 Overview

1. Chapter 7A of the *Criminal Procedure Act 2009* was introduced by s 17 of the *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011*. The amending Act commences operation on 1 July 2012, or earlier by proclamation.
2. The amending Act implements the COAG model double jeopardy reform which have been implemented in New South Wales, Western Australia, South Australia and Queensland.
3. Chapter 7A allows the Court of Appeal to remove the bar to a prosecution posed by a plea of previous acquittal (*autrefois acquit*) in limited circumstances where it is satisfied that a new trial will be fair. The Chapter also prohibits the police from reinvestigating a person unless the DPP first grants permission. The DPP may only grant permission to reinvestigate a person if satisfied that there is likely to be sufficient new evidence and that the previous acquittal will not be a bar to the prosecution of a person as a result of the reinvestigation.
4. The DPP may only make a single application to set aside a previous acquittal.
5. The transitional provisions for Chapter 7A state that it applies to any acquittal, even if it occurred before the commencement of the amending Act (CPA 2009 s 441(4)).

Last updated: 1 May 2012

21.2 Limit on reinvestigation

1. Subject to an exception for circumstances where urgent action is required, a police officer may not conduct or authorise the conduct of a reinvestigation of an offence where a person has been previously acquitted unless the DPP (or a delegate under s 327E(9)) gives written authorisation (CPA 2009 s 327E).
2. The DPP (or delegate) may authorise a reinvestigation if:
 - (a) He or she is satisfied that there is, or is likely to be, sufficient new evidence of the commission of the offence to warrant the reinvestigation and it is in the public interest to proceed; and
 - (b) In the DPP's opinion, the previous acquittal would not be a bar to the trial of a person for an offence that may be charged as a result of the reinvestigation (CPA 2009 s 327E(4)).
3. Section 327E(4)(b) requires the DPP to make an evaluation of the prospect of persuading the Court of Appeal to make an order under Chapter 7A to allow a prosecution to proceed despite the existence of a previous acquittal.
4. A police officer may, on the authorisation of a senior member of or above the rank of superintendent, conduct a reinvestigation if the member of the police force and the senior member reasonably believe that urgent action is required to prevent the reinvestigation being substantially and irrevocably prejudiced and it is not practical to obtain the DPP's authorisation in the circumstances (CPA 2009 s 327E(5), (6)).
5. A police officer may also conduct a reinvestigation without the authorisation of a senior member of or above the rank of superintendent if he or she reasonably believes that urgent action is necessary and it is not reasonably practicable to obtain the authorisation of either the DPP or a senior member (CPA 2009 s 327E(7)).
6. The CPA 2009 defines 'reinvestigation' in relation to an offence of which a person has previously been acquitted as:

- (a) The questioning and search of the acquitted person;
- (b) Conducting a forensic procedure on the acquitted person or taking that person's fingerprints;
- (c) Searching the property or premises owned or occupied by the acquitted person and seizing any thing found in or on the premises;
- (d) Using surveillance devices in accordance with the *Surveillance Devices Act 1999*; or
- (e) Doing anything authorised by a warrant issued under Part 2-5 of the *Telecommunications (Interception and Access) Act 1979* (Cth) (CPA 2009 s 327E(1)).

Last updated: 5 March 2015

21.3 Procedure to set aside previous acquittal

1. Chapter 7A allows the DPP to file a direct indictment which may only proceed if the court authorises the prosecution despite the existence of a relevant previous acquittal (CPA 2009 s 327F).
2. The acquittals which may be challenged or set aside under Chapter 7A include:
 - A verdict of not guilty (but not a verdict of not guilty because of mental impairment);
 - An entry of not guilty made on the direction of the trial judge (see CPA 2009 s 241(2));
 - A judgment of acquittal entered by the Court of Appeal on an appeal (CPA 2009 s 327B).
3. Within 28 days of filing a direct indictment under CPA 2009 s 327F, the DPP must file a notice of application to the Court of Appeal for an order setting aside the previous acquittal or removing the previous acquittal as a bar to the accused being tried on the indictment and authorising the prosecution to continue (CPA 2009 s 327H).
4. The notice of application to the Court of Appeal must specify whether it is based on:
 - A tainted acquittal;
 - Fresh and compelling evidence; or
 - An administration of justice offence (CPA 2009 s 327H).
5. The notice of application must be signed personally by the DPP and must be served personally on the accused within 7 days of filing (CPA 2009 s 327H).
6. The DPP must also provide a copy of the notice to the legal practitioner who represented the accused in the proceeding which resulted in the previous acquittal (CPA 2009 s 327H).
7. A judge of the Court of Appeal or the Registrar of Criminal Appeals may extend the time within which the DPP may file or serve the notice of application if it is in the interests of justice to do so (CPA 2009 s 327I).
8. If the DPP fails to make the application within 28 days or within any extension of that period, the DPP must discontinue the prosecution within 14 days of the expiry of the 28 day time limit, or the extension (CPA 2009 s 327K).

Applications in relation to tainted acquittals

9. Section 327L of the CPA 2009 provides that the Court of Appeal may allow a second trial on the basis of a tainted acquittal if 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 matters that the court considers relevant (CPA 2009 s 327L)

10. In the context of similar legislation, the United Kingdom Court of Appeal has held that the principles underlying the prohibition on double jeopardy at common law are not a relevant consideration when determining whether the new trial will be fair. UK courts have held that while there may be particular cases that give rise to matters closely connected to the principles underlying the common law prohibition, these considerations will be fact specific and the court cannot resurrect the principle of finality under the rubric of ensuring a fair trial (*R v A* [2008] EWCA Crim 2908).

11. An acquittal is 'tainted' if:

(a) The accused or another person has been convicted of an administration of justice offence in connection with the trial that resulted in the acquittal; and

(b) It is more likely than not that, but for the commission of that offence, the accused would have been convicted of the original offence at trial (CPA 2009 s 327D).

12. The Act defines an 'administration of justice offence' exclusively as:

- Perjury or subornation of perjury;
- Perverting or attempting to pervert the course of justice, or conspiracy to pervert the course of justice;
- Bribery of a public official, where the public official is a judge of the County Court or the Supreme Court;
- An offence against the law of a place outside Victoria which corresponds to the offences listed above and is substantially similar (CPA 2009 s 327B).

13. This provision may be relevant where the charge and conviction of the accused for the administration of justice offence does not directly challenge the acquittal. For example, proof of perjury in relation to an alibi given at a trial might be established without controverting the earlier acquittal (See, e.g., *R v McDermott* (1899) 24 VLR 636; *Chitwood v United States* (1910) 178 FLR 442).

Applications in relation to fresh and compelling evidence

14. The Court of Appeal may grant an application to allow a second trial on the basis of fresh and compelling evidence if the court is satisfied that:

(a) The original offence was:

(i)

der and statutory murder contrary to *Crimes Act 1958* s 3A;

Mur

(ii)

spiracy, Incitement or Attempt to commit murder;

Con

(iii)	slaughter;	Man
(iv)	place manslaughter (by either a body corporate or as attributable to an officer)	Wor
(v)	d homicide;	Chil
(vi)	micide by firearm;	Ho
(vii)	n causing death;	Arso
(viii)	ficking in a large commercial quantity of a drug of dependence;	Traf
(ix)	ivation of a large commercial quantity of a narcotic plant;	Cult
(x)	e, compelling sexual penetration or armed robbery where the offence was committed in circumstances of:	Rap
	(i) ure;	Tort
	(ii) sing really serious injury to the victim; or	Cau
	(iii) atening to cause death or really serious injury to the victim; or	Thre
(xi)	offence substantially similar to those listed above against a previous enactment or the law of a place outside Victoria corresponding to one of the above offences;	An
(b)	There is ‘fresh and compelling evidence’ against the accused in relation to that offence; and	
(c)	It is likely that a new trial would be fair, having regard to-	
	(i) length of time since the offence was allegedly committed;	The
	(ii) ther the police or prosecution failed to act with reasonable diligence or expedition in making the application for a second trial; and	Whe
	(iii) other matters the court considers relevant.	Any

15. In the context of similar legislation, the United Kingdom Court of Appeal has held that the principles underlying the prohibition on double jeopardy at common law are not a relevant consideration when determining whether the new trial will be fair. UK courts have held that while there may be particular cases that give rise to matters closely connected to the principles underlying the common law prohibition, these considerations will be fact specific and the court cannot resurrect the principle of finality under the rubric of ensuring a fair trial (*R v A* [2008] EWCA Crim 2908).
16. The Act separately defines the terms ‘fresh’ and ‘compelling’.
17. Evidence is ‘fresh’ if it was not adduced at the first trial and could not with the exercise of reasonable diligence have been adduced at the trial (CPA 2009 s 327C(1)(a)).

18. Evidence is 'compelling' if it is reliable, substantial and highly probative in the context of the issues in dispute at the trial of the alleged offence (CPA 2009 s 327C(1)(b)).
19. For evidence to be highly probative, it must first be relevant and admissible. However, it does not need to be direct or irresistible evidence of guilt, such as a post-acquittal confession. Circumstantial evidence such as DNA evidence or tendency evidence may meet the test of being 'highly probative' (R v A [2008] EWCA Crim 2908; R v Dobson [2011] EWCA Crim 1255).
20. The existence of a realistic defence argument that may undermine the reliability of the fresh evidence does not necessarily stop the Court of Appeal from overturning an acquittal. Instead, the court must make a fact specific decision, based on the proposed evidence and the suggested issues in the case to determine whether the prosecution has met the statutory burden of showing that the evidence is reliable, substantial and highly probative (see R v Dobson [2011] EWCA Crim 1255).
21. Assessing whether the evidence is compelling does not require the court to take the evidence at its highest. As part of the test, the court must determine for itself that the evidence is reliable and it is not enough that the evidence might be reliable (R v B(J) [2009] EWCA Crim 1036; R v (G), B (S) [2009] EWCA Crim 1207).
22. Evidence that would be admissible at a new trial may be fresh or compelling even if it was not admissible at the time of the original trial that resulted in the acquittal (CPA 2009 s 327C(2)). This allows the DPP to apply for a new trial on the basis of changes in the law of evidence that would admit evidence that had been excluded at the original trial.
23. It is not inherently unfair to order a second trial on the basis of an accused's confession that was made before the commencement of the *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011*. Public confidence in the courts may be damaged where a court refuses to allow a second trial on the basis that the evidence arose due to the accused's reliance on the rule against double jeopardy (see R v D [2006] EWCA Crim 1354).

Applications in relation to administration of justice offences

24. The Court of Appeal may grant an application to allow the DPP to prosecute a person for an administration of justice offence in relation to a previous acquittal if the court is satisfied that-
 - (a) The principal offence was an indictable offence at the time it was allegedly committed;
 - (b) There is fresh evidence against the accused that he or she committed an administration of justice offence in relation to the acquittal;
 - (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 was allegedly committed;
 - (ii) Whether the police or prosecution failed to act with reasonable diligence or expedition in making the application for a second trial; and
 - (iii) Any other matters the court considers relevant (CPA 2009 s 327N).
25. In the context of similar legislation, the United Kingdom Court of Appeal has held that the principles underlying the prohibition on double jeopardy at common law are not a relevant consideration when determining whether the new trial will be fair. UK courts have held that while there may be particular cases that give rise to matters closely connected to the principles underlying the common law prohibition, these considerations will be fact specific and the court cannot resurrect the principle of finality under the rubric of ensuring a fair trial (R v A [2008] EWCA Crim 2908).
26. Evidence is defined as 'fresh' if it was not adduced at the first trial and could not with the exercise of reasonable diligence have been adduced at the trial (CPA 2009 s 327C(1)(a)).

27. This process allows the Court of Appeal to set aside the aspect of double jeopardy identified by the High Court in *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55.

Outcome of successful application

28. If the Court of Appeal is satisfied of the matters required under ss 327L, 327M or 327N, then the court may make an order under s 327O.
29. In the case of applications based on a tainted acquittal or fresh and compelling evidence, the court may order that the previous acquittal be set aside or removed as a bar to the accused being tried on the indictment and that the prosecution of the charge may continue (CPA 2009 s 327O(1)).
30. Where the court is satisfied of the matters under s 327N, the court may order that the previous acquittal be removed as a bar to the accused being tried for the administration of justice offence and that the prosecution of the charge may continue (CPA 2009 s 327O(2)).
31. If the court is not satisfied of the matters required under ss 327L, 327M or 327N, or that a fair trial is not likely, the court must order that the charge in the direct indictment be permanently stayed (CPA 2009 s 327O(4)).
32. Where there are multiple offences alleged in the direct indictment, the Court of Appeal must make separate orders in relation to each offence (CPA 2009 s 327O(5)).
33. If the Court of Appeal is satisfied under any 2 or more of sections 327L, 327M and 327N, the DPP must elect to prosecute either the administration of justice offence or the principal offence of which the accused was acquitted. The DPP cannot proceed with both offences (CPA 2009 s 327P).

Last updated: 1 May 2012

21.4 Prohibition on multiple applications for fresh trials

1. The DPP can only make a single application under s 327H in relation to an acquittal (CPA 2009 s 327J). This prevents repeated applications to set aside an acquittal.
2. In addition, the DPP cannot make an application for a new trial on the basis of fresh and compelling evidence in relation to an acquittal resulting from a trial allowed under Chapter 7A (CPA 2009 s 327H(3)).

Last updated: 1 May 2012

21.5 Conduct of the trial

1. Chapter 7A of the CPA 2009 also imposes the following restrictions on the conduct of the trial where the Court of Appeal makes an order allowing a direct indictment to proceed despite the existence of a previous acquittal.
2. First, the trial court cannot significantly change the offence charged in the indictment (CPA 2009 s 327Q).
3. Second, during the trial, the prosecution must not refer to the fact that the Court of Appeal was satisfied that there was fresh or fresh and compelling evidence against the accused (CPA 2009 s 327R(a)). This prohibition reduces the risk that the jury at the accused's second trial will be influenced by the decision to allow the trial (compare *R v D* [2006] EWCA Crim 1354).
4. Finally, the prosecution must not refer to the fact that the Court of Appeal was satisfied that it is more likely than not that, but for the commission of an administration of justice offence, the accused would have been convicted of the principal offence (CPA 2009 s 327R(b)).

Copyright and Acknowledgements

The *Criminal Procedure Act 2009* commenced on 1 January 2010. To assist judicial officers and court users to understand these changes, the Judicial College of Victoria, in conjunction with a Judicial Editorial Committee (“the Committee”), has published a new Victorian Criminal Proceedings Manual.

This new manual explains the operation of the *Criminal Procedure Act 2009* and incorporates relevant common law principles and interpretative statements from existing authorities. The manual also expands the range of resources offered by the College for Victorian judicial officers conducting criminal proceedings by complementing the Victorian Criminal Charge Book, the Victorian Sentencing Manual and the Uniform Evidence Manual. Cross-references to these publications assist online users to find accurate and relevant information in the correct publication.

The Committee and the College both wish to express their thanks to the Honourable Paul Mullaly QC, previously of the County Court. Judge Mullaly was the author of the Victorian Trial Manual, which has been an invaluable resource for Victoria’s trial judges for many years, and which provided the foundation for this new publication. The Victorian Criminal Proceedings Manual updates, reorganises and expands upon that foundation, but does not replicate all aspects of the Trial Manual.

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The researcher is Mr Matt Weatherson.

Feedback or suggestions for improvement are welcome and may be emailed to info@judicialcollege.vic.edu.au.

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