

Criminal Procedure Act 2009

Legislative Guide

CRIMINAL LAW – JUSTICE STATEMENT



DEPARTMENT
OF JUSTICE



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Contents

Foreword	13
Introduction	14
Acknowledgments	15
Chapter 1 – Preliminary	18
1 Purposes	18
2 Commencement	18
3 Definitions	19
accused	19
appeal	19
appellant	19
appeal period	19
appear	20
attend	20
appropriate registrar	22
arraignment	22
cognitive impairment	22
commencement of trial	22
compulsory examination hearing	23
contest mention hearing	23
conviction	24
corporate accused	24
criminal record	24
Crown Prosecutor	25
depositions	25
direct indictment	25
DPP	27
evidence in support of alibi	27
filing hearing	27
full brief	28
hand-up brief	28
in detention	28
indictable offence that may be heard and determined summarily	28
informant	28
infringements registrar	29
interlocutory appeal	29
interlocutory decision	29
Juries Commissioner	29
legal practitioner	29
mention hearing	30
notice to appear	30
ordinary service	30
originating court	30
original jurisdiction	30
personal service	30
plea brief	31
police gaol	31
preliminary brief	31
previous conviction	31
prison	31
proceeding	32
public official	32
related offences	32
related summary offence	32
responsible person	32
return date	33
sentence	33
sexual offence	33
special hearing	36
summary case conference	36
summary hearing	37
trial judge	37
Victoria Legal Aid	37
youth justice centre	37
4 References to Parts	37
Chapter 2 – Commencing a Criminal Proceeding	40
Part 2.1 – Ways in which a Criminal Proceeding is Commenced	41
5 How a criminal proceeding is commenced	41
Part 2.2 – Charge-sheet and Listing of Matter	42
6 Commencement of a criminal proceeding in the Magistrates' Court	42
7 Time limits for filing a charge-sheet	44
8 Order for amendment of charge-sheet	44
9 Errors etc. in charge-sheet	46

10 Listing of matter for mention hearing or filing hearing in the Magistrates' Court	46
11 Place of hearing.....	48
Part 2.3 – Notifying Accused of Court Appearance.....	49
12 Court may issue summons or warrant to arrest	49
13 Summons or warrant to be accompanied by charge-sheet and notice when served	50
14 Police or public official may issue summons.....	50
15 Contents of summons	51
16 Personal service of summons	51
17 Summons for summary offence may be served by ordinary service.....	52
18 Informant must nominate address etc. for service of documents	52
19 Extension of return date if summons not served	53
20 Adjournment of proceeding on application of accused.....	53
21 Police or public official may serve notice to appear	55
22 Notice to appear lapses unless charge-sheet filed within 14 days.....	56
23 Notice to be given on lapsing.....	56
24 Preliminary brief to be served if charge-sheet filed.....	57
25 Non-appearance of accused served with notice to appear	57
26 Notice to appear does not commence proceeding	58
Chapter 3 – Summary Procedure	60
Part 3.1 – When a Summary Hearing May Be Held.....	62
27 Summary offences.....	62
28 Indictable offences that may be heard and determined summarily.....	62
29 When an indictable offence may be heard and determined summarily.....	63
30 Procedure for indictable offences that may be heard and determined summarily.....	65
Part 3.2 – Procedure before Summary Hearing	66
31 Court may change place of hearing	66
32 Accused entitled to copy of charge-sheet and particulars.....	66
33 Unrepresented accused who requires legal advice.....	67
34 Return of property	67
35 When preliminary brief is to be served.....	69
36 How preliminary brief must be served	70
37 Contents of preliminary brief	71
38 Requirements for informant's statement in preliminary brief.....	72
39 When full brief must be served.....	72
40 How full brief must be served.....	73
41 Contents of full brief.....	73
42 Continuing obligation of disclosure	74
43 Accused may make request for material etc. not provided	74
44 Informant must comply with request or state grounds of refusal	75
45 Grounds on which informant may refuse disclosure	75
46 Accused may apply for order requiring disclosure	76
47 Rules with respect to statements.....	76
48 Disclosure of address or telephone number of witness	77
49 Informant may place material on database.....	77
50 Expert evidence.....	78
51 Alibi evidence	78
52 Offence to communicate with alibi witness.....	79
53 Mention hearing.....	79
54 Summary case conference	81
55 Contest mention hearing.....	83
Part 3.3 – Summary Hearing	85
56 Multiple charges on single charge-sheet or multiple accused named on single charge-sheet	87
57 Joint hearing of charges on separate charge-sheets.....	87
58 Order for separate hearing.....	88
59 Adjournment to undertake diversion program	89
60 Court may give sentence indication	93
61 Effect of sentence indication	93
62 Charge to be read or explained to accused before plea	95
63 Legal practitioner may enter plea on behalf of accused	96
64 Refusal to plead.....	96
65 Parties may give opening addresses.....	96
66 Accused entitled to respond after close of prosecution case	97
67 Election when accused is legally represented.....	97
68 Election when accused is not legally represented.....	98
69 Procedure for joint hearings if no-case submission made	98
70 Questioning to determine proper course of proceeding	98
71 Opening address of accused at beginning of case for the accused	99
72 Evidential burden on accused for exceptions etc.	99
73 Prosecutor's closing address	100
74 Closing address of the accused.....	101
75 Supplementary address by prosecutor	101

76 Option of finding of attempt	101	107 Informant must serve hand-up brief	127
77 Criminal record	103	108 How hand-up brief must be served	127
78 Proof of previous convictions by criminal record	103	109 Copy hand-up brief to be filed and forwarded to DPP	127
79 Non-appearance of informant	106	110 Contents of hand-up brief	128
80 Non-appearance of accused charged with summary offence	106	111 Continuing obligation of disclosure	129
81 Non-appearance of accused charged with indictable offence	107	112 Rules with respect to statements	129
82 Non-appearance of corporate accused charged with indictable offence	107	113 Rules with respect to recordings	129
83 Admissibility of evidence in absence of accused where full brief served	108	114 Disclosure of address or telephone number of witness	129
84 Admissibility of evidence in absence of accused where preliminary brief served	108	115 Inspection of exhibits	130
85 Non-appearance of accused — <i>Infringements Act 2006</i>	109	116 Informant may serve and file plea brief	130
86 Proof of criminal record in absence of accused	109	117 Contents of plea brief	132
87 Limitations on sentencing in absence of accused	110	Part 4.5 – Case Direction	132
Part 3.4 – Rehearing	111	118 Case direction notice	133
88 Right to apply for rehearing	112	119 Contents of case direction notice	134
89 Notice of intention to apply for rehearing	112	120 Late application for leave to cross-examine witness	134
90 Service of notice	112	121 Adjournment without appearance of parties	134
91 Stay of sentence etc.	112	122 Compliance with request to copy or inspect items or disclose previous convictions of witness	135
92 Court may order rehearing	113	123 No cross-examination of certain witnesses in sexual offence cases	136
93 Failure to appear on application	113	124 Leave required to cross-examine other witnesses	136
94 Automatic rehearing in certain cases	113	Part 4.6 – Committal Mention and Case Conference	137
Chapter 4 – Committal Proceeding	116	125 Committal mention hearing	137
Part 4.1 – Preliminary	119	126 Time for holding committal mention hearing	139
95 Definition	119	127 Committal case conference	139
96 When a committal proceeding must be held	119	Part 4.7 – Committal Hearing	140
97 Purposes of a committal proceeding	119	128 Committal hearing	140
98 When a committal proceeding commences	119	129 Attendance of witnesses	142
99 Time limit for determining certain committal proceedings for a sexual offence	120	130 Giving of evidence by witnesses	142
100 Hearings in a committal proceeding and attendance of accused	120	131 Disclosure of address or telephone number of witness	143
Part 4.2 – Filing Hearing	121	132 Cross-examination of witnesses	143
101 Filing hearing	122	133 Special rules applicable to sexual offences	144
102 Time limit for filing hearing	122	134 Failure of witness to attend committal hearing	144
Part 4.3 – Compulsory Examination	122	135 Court may permit accused to be absent from committal hearing	144
103 Application for order	124	136 Accused who absconds etc. during a committal hearing	145
104 Order for compulsory examination hearing	124	137 Accused (natural person) absent at close of prosecution case	145
105 Notice of compulsory examination order to be served	124	138 Procedure on accused's attendance after absence	146
106 Compulsory examination hearing	125	Part 4.8 – Evidence in Committal Proceeding	146
Part 4.4 – Pre-hearing Disclosure of Prosecution Case	125	139 Admissibility of non-oral evidence	146

140	Procedure if accused makes admission of relevant fact or matter	147
Part 4.9 – Determination of Committal Proceeding		
141	Determination of committal proceeding where hand-up brief used	149
142	Determination of committal proceeding where plea brief used	149
143	Determination of committal proceeding where accused elects to stand trial	149
144	Procedure before and on committing accused for trial	150
Part 4.10 – Procedure After Committal		
145	Transfer of summary offences that are related offences on or after committal	151
146	Documents to be forwarded to DPP	152
147	Accused entitled to copies of depositions and exhibits	152
148	Absent corporate accused to be notified of committal	153
Part 4.11 – Taking Evidence After Accused Committed for Trial		
149	Application for order that evidence be taken after committal	154
150	Determination of application	155
151	Attendance of witness	155
152	Taking of evidence after committal	156
Part 4.12 – General		
153	Special mention hearing	157
154	Non-appearance of corporate accused	157
155	Nature of committal proceeding	158
156	Nothing in Chapter affects certain powers of DPP ..	158
157	DPP may give directions for release of property tendered in evidence	159
Chapter 5 – Trial on Indictment		
Part 5.1 – Introduction		
158	Application of Chapter	166
Part 5.2 – Indictment and Place of Trial		
159	DPP or Crown Prosecutor may file an indictment	166
160	Choice of Supreme Court or County Court for filing an indictment	168
161	Direct indictment commences criminal proceeding	168
162	Filing of any other indictment does not commence criminal proceeding	169
163	Time limits for filing certain indictments	169
164	Filing of fresh indictment	170
165	Order for amendment of indictment	170
166	Errors etc. in indictment	171
167	Supreme Court may order that accused be tried in County Court or Supreme Court	172
168	Court may transfer certain charges to Magistrates' Court	172
169	Place of hearing of criminal trial	173
170	Multiple charges or multiple accused on single indictment	173
Part 5.3 – Notifying Accused of Indictment		
171	Copy indictment to be served	174
172	DPP may nominate address etc. for service of documents	175
173	Extra notice for corporate accused	175
174	Compelling attendance when direct indictment filed	176
175	Service of summons	177
176	Warrant to be accompanied by indictment and notice	177
Part 5.4 – Discontinuing a Prosecution		
177	DPP may discontinue a prosecution without adjudication	178
178	Release from custody on discontinuance of prosecution	180
Part 5.5 – Pre-trial Procedure		
179	Directions hearing	182
180	Accused may be arraigned at a directions hearing	182
181	Powers of court at directions hearing	183
182	Summary of prosecution opening and notice of pre-trial admissions	184
183	Response of accused to summary of prosecution opening and notice of pre-trial admissions	186
184	Intention to depart at trial from document filed and served	186
185	Continuing obligation of disclosure	186
186	Disclosure of address or telephone number of witness	187
187	Previous convictions of witness	188
188	Prosecution notice of additional evidence	188
189	Expert evidence	189
190	Alibi evidence	189
191	Offence to communicate with alibi witness	190
192	Power to change place of trial	192
193	Order for separate trial	193
194	Order for separate trial – sexual offences	193
195	Order for separate trial – conspiracy	194
196	Other powers of court not affected	194
197	Order for legal representation for accused	194

198	Order for taking evidence from a witness before trial.....	195	232	Manner of giving evidence	221
199	Court may make orders and other decisions before trial	198	233	Introduction of evidence not previously disclosed ...	222
200	Disclosure of pre-trial issues	200	234	Prosecution closing address.....	222
201	Court may decide pre-trial issue without a hearing..	201	235	Closing address of the accused.....	222
202	Hearing of application for exclusion of evidence.....	201	236	Supplementary prosecution address.....	223
203	Judge at pre-trial hearing need not be trial judge	201	237	Comment on departure or failure	223
204	Pre-trial orders and other decisions generally binding on trial judge	201	238	Judge's directions to the jury	223
205	Pre-trial orders and other decisions may be applied in new trial.....	202	239	Alternative verdicts on charges other than treason or murder	224
206	Procedure if prosecution proposes not to lead evidence	202	240	Judge may order that guilt in respect of alternative offences is not to be determined.....	224
Part 5.6 – Sentence Indication	203		241	When judge may enter finding of guilty or not guilty	224
207	Court may give sentence indication	205	Part 5.8 – General	226	
208	Application for sentence indication.....	205	242	Summary offence related to indictable offence.....	226
209	Effect of sentence indication	205	243	Unrelated summary offence	229
Part 5.7 – Trial	206		244	Criminal record	230
210	When trial commences	208	245	Proof of previous convictions by criminal record.....	231
211	Time limit for commencing trial for offences other than sexual offences.....	209	246	Attendance of accused at hearings.....	232
212	Time limits for commencing trials for sexual offences.....	210	247	Power to extend or abridge time.....	232
213	Powers of trial judge not affected.....	210	248	Parties must inform Juries Commissioner of certain events	232
214	Non-appearance of corporate accused at trial	211	249	Counsel required to retain brief for trial.....	233
215	Arraignment.....	213	250	Complaints about legal practitioners	233
216	Written pleas of guilty may be accepted.....	213	251	Judge at earlier trial not prevented from presiding at later trial.....	233
217	Arraignment in presence of jury panel	213	252	Offence for corporate accused to fail to appear	233
218	Special pleas in addition to plea of not guilty.....	214	253	Abolition of grand jury procedure	234
219	Plea of guilty to alternative offence.....	214	Chapter 6 – Appeals and Cases Stated	236	
220	Form of plea of previous conviction or previous acquittal	215	Part 6.1 – Appeal from Magistrates' Court to County Court	237	
221	Refusal to plead.....	215	254	Right of appeal	240
222	Judge may address jury.....	215	255	How appeal is commenced	240
223	Jury documents.....	216	256	Determination of appeal.....	241
224	Opening address by prosecutor.....	217	257	DPP's right of appeal against sentence.....	242
225	Response of accused to prosecution opening	217	258	How appeal is commenced	242
226	Accused entitled to respond after close of prosecution case	218	259	Determination of DPP's appeal	243
227	Election when accused is legally represented.....	218	260	DPP's right of appeal – failure to fulfil undertaking ...	244
228	Election when accused is not legally represented....	219	261	How appeal is commenced	245
229	Procedure for joint trials if no-case submission made	219	262	Determination of DPP's appeal – failure to fulfil undertaking	245
230	Questioning to determine proper course of proceeding.....	220	263	Late notice of appeal deemed to be application for leave to appeal	246
231	Opening address of accused	220	264	Stay of sentence.....	246
			265	Bail pending appeal	246

266	Abandonment of appeal	246	298	How interlocutory appeal is commenced	281
267	Appellant's failure to appear	247	299	Adjournment of trial if leave to appeal given	281
268	Respondent's failure to appear on appeal by DPP	248	300	Determination of appeal.....	282
269	One notice of appeal for 2 or more sentences	248	301	Determination of interlocutory appeal to be entered on record	283
270	Appeal against aggregate sentence	248	302	Reservation of question of law	284
271	Appeal to County Court authorised by other Acts	249	303	Adjournment if question of law reserved	286
Part 6.2 – Appeal from Magistrates' Court to Supreme Court on a Question of Law			304	Refusal to reserve question of law.....	287
272	Appeal to Supreme Court on a question of law.....	249	305	Case to be stated if question of law reserved.....	287
273	Appeal on question of law precludes appeal to County Court.....	250	306	General powers of Court of Appeal on case stated.....	287
Part 6.3 – Appeal and Case Stated from County Court or Trial Division of Supreme Court to Court of Appeal.....			307	Judgment to be entered on record	288
274	Right of appeal against conviction	252	308	DPP may refer point of law to Court of Appeal.....	288
275	How appeal is commenced	254	309	Sentence not stayed during appeal period.....	290
276	Determination of appeal against conviction.....	255	310	Bail pending appeal	291
277	Orders etc. on successful appeal.....	257	311	Stay of certain orders during appeal period.....	291
278	Right of appeal against sentence imposed by originating court	258	312	Execution of order for forfeiture or destruction of property.....	292
279	How appeal is commenced	260	313	Extension of time for filing or serving notice of appeal or notice of application for leave to appeal.....	293
280	Determination of application for leave to appeal under section 278.....	260	314	Abandonment of appeal	293
281	Determination of appeal.....	261	315	Powers which may be exercised by a single Judge of Appeal.....	293
282	Orders etc. on successful appeal.....	262	316	Trial judge may be required to provide report on appeal	294
283	Right of appeal against sentence of imprisonment imposed by County Court on appeal from Magistrates' Court.....	262	317	Production of documents, exhibits or other things ..	294
284	How appeal is commenced	262	318	Order for examination of compellable witness	294
284A	Determination of application for leave to appeal under section 283.....	263	319	Evidence of competent but not compellable witness	294
285	Determination of appeal.....	263	320	Reference of question to special commissioner	295
286	Orders etc. on successful appeal.....	264	321	New evidence – effect on sentence	295
287	Right of appeal – inadequate sentence	264	322	Sentence in absence of offender	296
288	How appeal is commenced	266	323	Bail following appeal	296
289	Determination of Crown appeal.....	266	324	Warrants.....	296
290	Orders etc. on successful appeal.....	268	325	Ancillary orders of originating court	296
291	Right of appeal – failure to fulfil undertaking	269	326	Expenses of assessors and special commissioners.....	296
292	How appeal is commenced	269	Chapter 7 – Reference to Court of Appeal on Petition for Mercy		300
293	Determination of Crown appeal – failure to fulfil undertaking	269	327	Reference by Attorney-General.....	300
294	Powers of Court of Appeal on successful appeal.....	270	Chapter 8 – General		302
295	Right of appeal against interlocutory decision.....	276	Part 8.1 – Conduct of Proceeding		302
296	Review of refusal to certify	279	328	Appearance.....	302
297	When leave to appeal may be given.....	280	329	When accused etc. is required to appear at hearing	304
			330	When accused etc. is required to attend hearing	305

331 Power to adjourn proceeding	305	363 When court must direct use of closed-circuit television or other facilities for complainant	319
332 Transfer of accused between place of detention and court	306	364 When court must direct use of screens for complainant	319
333 Power to return accused to youth justice centre	306	365 When court must direct presence of support person for complainant	320
334 Proceedings against bodies corporate	306	366 Application of this Division	320
335 Interpreter	306	367 Use of recorded evidence-in-chief	321
336 Subpoenas and witness summonses	307	368 Admissibility of recorded evidence-in-chief	321
336A Victim who is a witness entitled to be present in court	308	369 Application of Division	322
337 Court may act on application or on own motion	308	370 Special hearing for pre-recording evidence	322
Part 8.2 – Witnesses	309	371 Time limits for special hearing	323
338 Guiding Principles	310	372 Conduct of special hearing	323
339 Application of Division	310	373 Form in which recording of special hearing is to be tendered	324
340 Definition	311	374 Admissibility of evidence from special hearing	324
341 Prohibition on questions and evidence concerning complainant's chastity	311	375 Jury warning as to recording of special hearing	325
342 Restriction on questions and evidence concerning complainant's sexual activities	311	376 Cross-examination of complainant	325
343 Admissibility of sexual history evidence	312	377 Exception to hearsay rule – previous representations made by complainant under 18 years	325
344 Application for leave	312	378 Application of Division	327
345 Application for leave out of time	312	379 Admissibility of recording of complainant's evidence	327
346 Contents of application for leave	313	380 Prosecution to give notice of intention to tender recording	327
347 Waiver of requirement to apply for leave in writing	313	381 Admission of recording of evidence of complainant	328
348 Hearing of application for leave	313	382 Jury warning as to recorded evidence of complainant	328
349 Determination of application for leave during summary hearing, committal proceeding or trial	314	383 Attendance of complainant	328
350 Determination of application for leave during sentencing hearing	314	384 Direct testimony in addition to recording	329
351 Court must state reasons if leave granted	314	385 Cross-examination of complainant	329
352 Limitation on sexual history evidence	315	386 Form in which recording of complainant's evidence is to be tendered	330
353 Application of Division	315	387 Exception to hearsay rule	330
354 Definitions	316	388 Evidence of specialised knowledge in certain cases	330
355 Court may declare witness to be protected witness	316	389 Audiovisual link evidence from overseas in certain proceedings	331
356 Protected witness not to be cross-examined by accused in person	316	Part 8.3 – Service of Documents	332
357 When accused is not legally represented	316	390 General rules as to service	334
358 Jury warning concerning legal representation for cross-examination	317	391 Personal service	334
359 Application of Division	318	392 Service on informant or DPP	335
360 Alternative arrangements for giving evidence	318	393 Service on company, registered body, incorporated association or other body corporate	336
361 Jury warning concerning alternative arrangements	319	394 Ordinary service	336
362 Evidence given by closed-circuit television or other facilities	319	395 Personal service satisfies ordinary service	337
		396 Last known place of residence or business	337

397 Order for substituted service.....	338	428 Definitions inserted	360
398 Who may effect service.....	338	429 New Part 5.1A inserted in Chapter 5.....	360
399 Proof of service.....	338	430 New section 516A inserted.....	361
Part 8.4 – Costs	339	Part 9.6 – Appeal Costs Act 1998	364
400 Right to be heard.....	339	431 New sections 15A, 15B and 15C inserted	364
401 Costs in Magistrates' Court	339	Part 9.7 – Sentencing Act 1991	365
402 Notice to appear.....	340	432 Repeal.....	365
403 Convicted accused to pay filing fee.....	340	433 New section 112A inserted.....	365
404 Costs in the Supreme Court and County Court.....	341	434 Maximum fine for body corporate	365
405 Costs order	341	Part 9.8 – Miscellaneous Amendments	366
406 Costs on appeal to County Court	341	435 Reclassification of certain offences	366
407 Costs on abandonment of appeal to County Court	341	436 Option of jury trial removed	367
408 Costs on appeal from Magistrates' Court to Supreme Court on a question of law.....	342	437 Repeal of provisions concerning sentence indications in Supreme Court and County Court	368
409 No costs on appeal to Court of Appeal or on new trial	342	438 Repeal of Chapter	368
410 Costs liability of legal practitioner	342	Chapter 10 – Savings and Transitional Provisions	370
Part 8.5 – Miscellaneous	343	439 Savings and transitional provisions	370
411 Issue of warrant to arrest	343	Schedules	370
412 Power to amend when there is a defect or error	343	Schedule 1 – Charges on a Charge-sheet or Indictment	370
413 Transfer of charge to court with jurisdiction.....	344	1 Statement of offence	370
414 Acknowledgement of false statement	344	2 Statement of particulars.....	371
415 Court may direct that a person be prosecuted for perjury.....	345	3 Statutory offence	371
416 Disclosure of material by prosecution.....	345	4 Exceptions, exemptions etc.....	371
417 Court fees not payable by accused.....	346	5 Joinder of charges.....	372
418 Supreme Court – limitation of jurisdiction	346	6 Charge against multiple accused	373
419 Rules of court	347	7 Descriptions generally.....	374
420 Regulations	347	8 Description of persons.....	374
Chapter 9 – Repeals and Consequential and Other Amendments	350	9 Description of document	374
Part 9.1 – Crimes (Criminal Trials) Act 1999	351	10 Description of property	375
421 Repeal.....	351	11 Statement of intent to deceive, injure or defraud	375
Part 9.2 – Crimes Act 1958	351	12 Perjury, subornation of perjury, etc.	375
422 Amendment of the <i>Crimes Act 1958</i>	351	13 Names of witnesses to be included on indictment	375
Part 9.3 – Crimes (Mental Impairment and Unfitness to be Tried) Act 1997	354	Schedule 2 – Indictable Offences that may be Heard and Determined Summarily	376
423 New section 14A inserted.....	354	Schedule 3 – Persons who may Witness Statements in Preliminary Brief, Full Brief or Hand-up Brief	377
424 New section 24AA inserted	356	Schedule 4 – Savings And Transitional Provisions	378
425 Consequential amendments	357	1 Definitions.....	379
Part 9.4 – Magistrates' Court Act 1989	357	2 General transitional provision	379
426 Joint committals	358	3 Renumbering.....	379
427 Consequential amendments	359	4 References to superseded provisions	379
Part 9.5 – Children, Youth and Families Act 2005	360	5 Commencing a criminal proceeding.....	380
		6 Summary procedure.....	380

7 Committal proceeding	381
8 Trial.....	382
9 New trial or further hearing.....	382
10 Appeals	382
11 Petitions for mercy.....	383
12 Witnesses.....	383
13 Costs	384
14 Power to amend when there is a defect or error	384
15 Transfer of charge to court with jurisdiction.....	384
16 Perjury.....	385
17 Transitional regulations.....	385

Diagram Contents

Accused Required to Attend or Appear?	20	Filing and Serving an Indictment	167
Commencing a Criminal Proceeding.....	40	Discontinuing a Prosecution	178
Summons, Warrant and Arrest.....	43	Directions Hearings	181
Process – Mention Hearing or Filing Hearing?	47	Pre-Trial Disclosure	185
Notice to Appear	54	Orders and Other Decisions.....	191
Summary Procedure.....	61	Deciding Pre-Trial Issues.....	196
Disclosure.....	68	Sentence Indication	204
Mention Hearing	80	Trial Procedure.....	206
Summary Case Conference.....	82	Arraignment.....	212
Contest Mention Hearing	84	Determining Related and Unrelated Summary Offences	226
Joint or Separate Hearing of Charges	86	Sentencing Hearing	230
Diversion	90	Appeal from Magistrates' Court	238
Sentence Indications	92	Appeal to County Court Against Conviction and/or Sentence by Person Convicted	239
Summary Hearings	94	DPP Appeal to County Court Against Sentence.....	242
Entering Pleas	95	DPP Appeal to County Court Against Sentence – Failure to Fulfil Undertaking.....	244
Sentencing Hearing	102	Appeal to Supreme Court on a Question of law	250
Non-appearance of a Party.....	105	Appeal from County Court and Supreme Court to Court of Appeal	251
Rehearings	112	Offender Appeal Against Conviction.....	253
Committal Proceeding	116	Offender Appeal Against Sentence	259
Filing Hearing.....	121	DPP Appeal Against Sentence - General Appeal	265
Compulsory Examination Process	123	DPP Appeal Against Sentence – Failure to Fulfil Undertaking.....	268
Hand-up Brief Process	126	Interlocutory Appeals.....	272
Plea Brief Process	131	Certification Process for Interlocutory Appeals	277
Case Direction Notice	133	Cases Stated.....	284
Committal Mention Hearing	138	Accused Required to Attend or Appear?	303
Committal Case conference	140	Joint Committal Proceedings.....	357
Committal Hearing.....	141	Joint Committal Proceedings.....	362
Commit For Trial	148		
Taking Evidence After Committal.....	154		
Trial on Indictment	162		

Foreword

From the Attorney-General

A 21st century criminal justice system demands a 21st century legislative and procedural framework. That is why one of the major priorities of the Government's Justice Statement process has been to overhaul and modernise the *Crimes Act 1958* and criminal procedure in the most far-reaching reform of our criminal law framework in Victoria's history.

The *Criminal Procedure Act 2009* (the Act) is one of the ground-breaking results of that process. Overhauling three Acts which deal with criminal procedure, it consolidates them into one cohesive, streamlined piece of legislation with laws which are clear, consistent, fair, and accessible.

The Act introduces new procedures to create efficient and flexible case management processes and uses a plain English approach which farewells the use of Latin and Norman French, so mystifying to non-lawyers (and possibly many lawyers as well). In a move consistent with the spirit and purpose of the new Act, criminal proceedings will now be brought in the name of the DPP rather than the Queen, reflecting the expectations of a 21st century society.

The Government understands that the commencement of the Act means significant change for those working in the system. In keeping with our objective of clarity, this guide will help those working in the criminal justice system to navigate the new legislation.

The successful implementation of the reforms requires broad participation to ensure system-wide and effective change. Cultural change is essential if we are to get the full benefit of the new laws. With this in mind, my department has worked closely with participants across the justice system to ensure coordination and collaboration in implementing the changes that these new laws represent.

I wish to thank everyone who has contributed to the development of these reforms. This guide is the product of many hours of meticulous work by the Criminal Law – Justice Statement team in the Department of Justice, as is the legislation that prompted it.

It is therefore my privilege to present this guide to you; and look forward to continuing to work with all those across the system to give Victorians the 21st century criminal law framework that they demand and deserve.

ROB HULLS MP
Attorney-General

From the Secretary

The Department of Justice brings together a number of agencies to prevent, detect and prosecute crimes, support victims of crime, dispense justice, and manage offenders in correctional settings.

The department's mission is to protect and keep people safe, and shape a justice system that is fair for all Victorians. For this, the fair and efficient operation of the criminal justice system is essential.

Rationalising, clarifying and modernising criminal procedure laws is one of the most far-reaching reform projects undertaken in Victoria.

To assist criminal justice system participants in effectively transitioning to the new laws, the Department of Justice has led and facilitated the implementation of the *Criminal Procedure Act 2009*.

In addition to training, updating ICT and operating procedures, it is essential to provide information about the new laws. This guide is an important component of the implementation process.

This reform process depends upon commitment from many people over a number of years who envision a better criminal justice system. I would like to join the Attorney-General in thanking the many people from within the department, the courts, Victoria Police and the legal profession who have contributed to this reform. I wish people well with the transition to the new laws and encourage them to make full use of them.

PENNY ARMYTAGE
Secretary

Introduction

Overview of the Criminal Procedure Act 2009

The *Criminal Procedure Act 2009* (the Act) was passed by Parliament in February 2009. The *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* was passed in November 2009. The objective of the Act is to consolidate and reform Victoria's main criminal procedure laws. The Act is part of a larger review of the *Crimes Act 1958*, identified as a key initiative in the Attorney-General's 2004 *Justice Statement*, and in *Justice Statement 2* (2008). With more than 1500 amendments over the last 50 years, the *Crimes Act 1958* was no longer logical or coherent.

The Act consolidates criminal procedure laws previously contained in four separate Acts (*Crimes Act 1958*, *Crimes (Criminal Trials) Act 1999*, *Evidence Act 1958* and *the Magistrates' Court Act 1989*). As far as is possible, the Act adopts a chronological approach which walks the reader through the whole of the criminal process from the commencement of a proceeding, through hearing processes to appeal processes.

There are a number of important changes to the drafting of the Act.

The Act modernises the language used, removing old-fashioned language (including Latin and Norman French words) and replacing them with clear and readily understood words. 'Indictment' replaces 'presentment' and the prosecution may 'discontinue a prosecution' rather than enter a '*nolle prosequi*'. Throughout the Act, a modern and consistent drafting approach is used. The Act abolishes redundant and obsolete laws (e.g. the grand jury procedure). The Act harmonises similar procedures and uses consistent terminology across jurisdictions (e.g. a person charged with a crime is now referred to as the 'accused' in all jurisdictions).

The Act takes a new approach to articulating procedural issues such as:

- whether an order can be made on the application of a party or on the court's own motion
- the entitlement for each party to be present and to be heard
- the requirement to give notice to another party
- whether an application may be made orally.

Previously, a small number of provisions expressly articulated some or all of these procedural requirements; however, the vast majority did not. The Act adopts a consistent approach. These kinds of procedural

protections will apply in accordance with the principles of procedural fairness. Therefore, they are not referred to in the Act unless there is a special reason for doing so.

The Act also takes a different and more consistent approach to the conferral and description of discretions. A range of phrases were previously used including 'in the interests of justice', 'as the court thinks fit', 'if the court thinks appropriate', 'if it considers necessary' and 'if desirable' or a combination of several of these and/or similar phrases. This reflects different historical drafting styles. The differences between the discretions conferred by such phrases are not clear and in many instances the different words used appear to convey the same meaning.

The Act replaces these different words and phrases with the more modern and most commonly used words and phrases. This means that 'appropriate' and 'interests of justice' are the primary descriptions used to confer and describe discretions. Flexibility is still important and there are several instances where 'necessary' is used to convey a different meaning.

The Act also makes substantive changes and improvements to criminal procedure:

- Notice to appear, preliminary brief and summary case conference procedures are now available in the Magistrates' Court.
- The Act streamlines and simplifies disclosure regimes and harmonises, where appropriate, the provisions relating to summary, committal and trial disclosure.
- The Act clarifies when a trial commences, encourages early identification and determination of pre-trial issues, allows written guilty pleas and streamlines court procedure during trial.
- The Act improves special procedural and evidentiary provisions that apply to complainants and witnesses in sexual offence and family violence cases. New provisions allow the evidence of an adult complainant in a sexual offence trial to be recorded and used if needed at a subsequent trial.
- The County Court and Supreme Court have new powers to deal with related summary offences.
- New clearer and simpler tests for appeals against conviction and sentence will apply and 'sentencing double jeopardy' will no longer apply to DPP appeals against sentence. The new interlocutory appeals framework will allow important issues to be appealed before trial.

- The Act reduces time limits for the commencement of proceedings for summary offences in the Children's Court from 12 months to 6 months.
- In certain limited circumstances, the Magistrates' Court and the Children's Court may conduct joint committal proceedings where there is a child and adult co-accused.
- New service provisions create a consistent set of rules for service of all documents in criminal proceedings.
- The Act uses consistent time limits and consistent descriptions of those time limits.
- The Act introduces a consistent approach to the maximum limit on fines for indictable offences heard and determined summarily.

To implement all of these changes, the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* amended 139 Acts. This involved two main types of consequential amendments namely:

- modernising language and terminology; and
- updating cross-references to Acts or provisions repealed by the *Criminal Procedure Act 2009*.

The *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* also introduced a clear and comprehensive criminal appeals framework to the *Children, Youth and Families Act 2005*, based on the new appeals framework in the *Criminal Procedure Act 2009*.

Using the Legislative Guide

This legislative guide is intended to assist those who will use and work with the Act. The structure of the legislative guide mirrors the structure of the Act. The guide provides an overview of each chapter of the Act. In addition, for each section of the Act, the guide contains an overview, legislative history and detailed explanation.

This legislative guide was developed as a result of funding provided by the Legal Services Board. The support of the Board is gratefully acknowledged.

Flowcharts are used throughout the guide to map the processes in the Act, particularly those new processes (like interlocutory appeals) or significantly changed processes (like disclosure in summary proceedings). The guide also contains two Ready Reckoners. These documents trace the connections (if any) between the Act and previous law. There are two Ready Reckoners; they enable the reader to trace the connections between the laws using either the Act or the previous laws as a starting point.

Other resources that may be of assistance in understanding the Act include the Attorney-General's Second Reading Speeches and the Explanatory Memorandum for the *Criminal Procedure Act 2009* and the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*. Summaries of the main changes to criminal procedure are also available at www.justice.vic.gov.au. In addition, the Judicial College of Victoria's Victorian Criminal Proceedings Manual is available at www.judicialcollege.vic.edu.au.

Development of the Legislative Guide and the Criminal Procedure Act 2009

The Act was developed in consultation with the Criminal Law Justice Statement Advisory Group, which consists of representatives of the Supreme Court, the County Court, the Magistrates' Court, the Children's Court, the Victorian Director of Public Prosecutions and the Office of Public Prosecutions, Victoria Legal Aid, Victoria Police, the Law Institute of Victoria, the Victorian Bar, the Criminal Bar Association, the Commonwealth Director of Public Prosecutions, and several Specialist Advisory Groups, comprised of representatives of Advisory Group members.

Many other groups contributed to the development of the Act, in particular, the community legal sector, government departments and statutory agencies.

Implementation of the reforms introduced by the Act has required a vast amount of work in the areas of education and training, policies and procedures, and information technology systems. This work has been undertaken by the Implementation Coordination Group, led by the Department of Justice, and comprised of representatives of Criminal Law Justice Statement Advisory Group members.

The Criminal Law – Justice Statement team in the Department of Justice has been responsible for the development of the Act, and members of this team have contributed in the areas of policy and implementation, and in particular, to writing and publishing this legislative guide.

I would like to thank all of these individuals; their expertise, commitment and collaboration over a number of years has been invaluable in the development of this important initiative.

GREG BYRNE

Director

Criminal Law – Justice Statement

Acknowledgments

From 2005 to 2009, many people from the following courts and organisations contributed to the development of the *Criminal Procedure Act 2009* including the following:

Supreme Court:

Chief Justice Warren, Justice Maxwell (President of the Court of Appeal), Justice Eames, Justice Vincent, Justice Redlich, Justice Bongiorno, Justice Coghlan, C Downey, A Cockayne

County Court:

Chief Judge Rozenes, Judge Smallwood, Judge Punshon, Judge Howard, Judge Sexton, Judge Hannan, Judge Taft, K Spillane, W Collins

Children's Court:

Judge Grant (President), Judge Coate (Fmr. President), Magistrate Power, L de Morton, R Hastings

Magistrates' Court:

Chief Magistrate Gray, Magistrate Rozencwajg, S Shields, R Challis

Director of Public Prosecutions:

J Rapke QC, P Coghlan QC (Fmr. DPP)

Office of Public Prosecutions:

B Gardner, S Ward, G Barr, H Freyne

Victorian Bar:

D Neal SC, P Priest QC, M Croucher, M Halse

Criminal Bar Association:

J Champion SC (Chair), S Shirrefs SC (Fmr. Chair), T Trood

Victoria Legal Aid:

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S Burchell, M Weatherson

The Department for Primary Industries:

D Flynn (who coordinated the project involvement of statutory entities and departments which have a prosecutorial function)

Justice Policy (Department of Justice):


P Murphy

**Criminal Law – Justice Statement
(Department of Justice):**

M Briggs, J Crundall, S Dellamarta, S Farrow, K Giles, S Holt, P Jobling-Baker, S Krasnostein, M Maddigan, C Marcs Lloyd, P Mutha-Merrennege, C Pardy, V Tipping, C Tobin, K Zissermann.

Chapter 1

Preliminary

The background of the page is composed of several geometric shapes. A large, light teal rectangle occupies the top half. Below it, a dark teal shape, which is a parallelogram or a trapezoid, extends across the width of the page. To the left of this dark teal shape, there is a small, light blue triangle. The overall design is minimalist and modern.

Chapter 1 – Preliminary

Chapter Overview

Chapter 1 sets out the purposes of the Act and when the Act commences. It also contains definitions of terms that are used in the Act.

1 Purposes

Overview

This section sets out the purposes of the Act.

Legislative History

This section is new and has no direct relationship to any earlier provisions.

Discussion

The purpose of this section is to outline some of the key purposes of the Act. While this is not an exhaustive list, it provides a brief overview of some of the main changes.

The Act is the result of a comprehensive review and overhaul of Victoria's main criminal procedure laws. Five central themes to this review and overhaul were identified by the Attorney-General in his Second Reading Speech:

- Consolidation of provisions concerning criminal procedure found in the *Crimes Act 1958*, *Crimes (Criminal Trials) Act 1999* and the *Magistrates' Court Act 1989*. The relevant provisions in these Acts were sometimes in the body of the legislation and at other times in schedules. The Act brings these provisions together and structures them in a logical and coherent manner.
- Harmonisation of similar issues that are dealt with in different jurisdictions so that, where possible, common issues are dealt with in a single provision. For example, the power of adjournment that exists in all jurisdictions is now a single section, see section 331. The Act also achieves greater consistency in the terminology and structure of similar provisions across jurisdictions, for example, in relation to pre-hearing disclosure.
- Abolition of provisions which are now obsolete, such as the procedure for indictment by grand jury.
- Rationalisation of provisions that were enacted over the years to deal with particular issues that may no longer be relevant to current practice. The Act rationalises provisions to ensure that the underlying purpose and intent of the provision is clear.

- Modernisation of existing provisions that are drafted in a dense and obscure style, using archaic language. The Act adopts a modern drafting style, using words and phrases that are in contemporary use and that are readily understandable.

- The Attorney-General identified a further objective in his Second Reading Speech for the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*:

- Consolidation of overlapping provisions to make them clearer and easier to understand. For example, provisions from the *Evidence Act 1958* that relate specifically to the giving of evidence in sexual offence cases are now located in Part 8.2 of the Act.

As well as overhauling existing criminal procedure laws, the Act introduces a number of new procedures to improve the operation of the criminal justice system. Section 1 captures some of these new procedures including: the notice to appear process, an interlocutory appeals framework, a power to transfer summary charges to the County Court or the Supreme Court for determination, and a 6 month time limit for filing charges in the Children's Court. Detailed discussions of these changes are found under the relevant sections in this guide.

Modernisation is a central objective of the Act, made clear by the Attorney-General in his Second Reading Speech:

This Bill introduces major improvements to Victoria's criminal procedure laws by overhauling existing laws and introducing substantial policy improvements. The new laws are clear, consistent, fair and accessible. The Bill builds upon existing systems and introduces new procedures to create clear, efficient and flexible case management processes.

As society and the criminal justice system change, criminal procedure laws must continue to adapt to meet these new challenges. This Bill provides the sound platform that we need to do this.

2 Commencement

Overview

This section sets out when the Act commences.

Legislative History

This section is new and has no direct relationship to any earlier provisions.

Discussion

The Act received Royal Assent on 10 March 2009, meaning that Chapter 1 of the Act came into effect on 11 March 2009.

Section 437 of the Act, which relates to the repeal of the sentence indications scheme in the Supreme Court and County Court, comes into operation on 1 July 2010. This reflects the sunset clause in section 12 of the [Criminal Procedure Legislation Amendment Act 2008](#).

The remaining sections of the Act came into operation on the date proclaimed.

Commencement is also connected to transitional arrangements. Savings and transitional provisions for the Act are located and discussed in Schedule 4 to the Act.

The commencement day for the Act is 1 January 2010.

3 Definitions

Overview

This section defines terms that are commonly used in the Act.

Legislative History

The definitions draw on terms used in the [Crimes Act 1958](#), the [Crimes \(Criminal Trials\) Act 1999](#) and the [Magistrates' Court Act 1989](#).

Discussion

Previously, definitions of terms were scattered throughout the [Crimes Act 1958](#), the [Crimes \(Criminal Trials\) Act 1999](#) and the [Magistrates' Court Act 1989](#).

In different jurisdictions, different terms were used to describe similar issues relating to criminal procedure. For example, the term 'defendant' was used in the Magistrates' Court to describe a person charged with an offence while the County Court and the Supreme Court used the term 'accused'.

The objective of this section is to provide a single definition for commonly used terms to ensure that provisions are clear, consistent and easy to understand throughout the Act.

accused

Legislative History

This definition is based in part on the definition of 'defendant' in section 3(1) of the [Magistrates' Court Act 1989](#).

Discussion

Previously, the term 'accused' was usually used in relation to a person charged on presentment and appearing before the County Court or the Supreme Court.

In contrast, a person charged and appearing before the Magistrates' Court was usually described as a 'defendant'.

In the [Magistrates' Court Act 1989](#), 'defendant' is defined as both a person charged with a criminal offence (whether indictable or summary) and a person against whom a civil proceeding has been brought. In the [Crimes Act 1958](#) and the [Crimes \(Criminal Trials\) Act 1999](#) the term 'accused' or 'accused person' is used to describe a person charged with an offence.

The Act uses the term **accused** throughout. This is consistent with the approach taken in human rights instruments such as Article 10 of the [International Covenant on Civil and Political Rights](#), which refers to 'accused' persons in relation to criminal proceedings. Sections 22 and 23 of the Victorian [Charter of Human Rights and Responsibilities Act 2006](#) (the Charter) also refer to an 'accused person' and to an 'accused child' respectively.

The term 'defence' was used in the [Crimes \(Criminal Trials\) Act 1999](#) to refer to the defendant and any legal practitioner representing the defendant. The Act does not distinguish between the accused's legal practitioner and the accused, on the basis that it is clear from the context that a reference to the party includes a reference to any legal practitioner representing the party.

appeal

appellant

appeal period

Legislative History

These definitions are new and have no direct relationship to any earlier provisions.

Discussion

The definition of **appeal** includes an application for leave to appeal. An appeal, in its ordinary sense, may not be understood to include an application for leave to appeal. However, for the purposes of the Act it is important that it does. For example, Chapter 6 of the Act includes an application for leave to appeal against conviction at trial in section 275. This is referred to as an appeal to ensure consistency throughout this Chapter.

The definition of **appeal period** relates to stays of sentences. Section 309 of the Act expressly recognises the presumption that a sentence passed in the Supreme Court or the County Court is not stayed when an appeal (which includes an application for leave to appeal) is made to the Court of Appeal. In order to provide certainty in its application, the section provides that a sentence is not stayed during the appeal period, which is the time between the commencement of an appeal and its determination. Further discussion of the new presumption created by the Act follows section 309 (Sentence not stayed during appeal period).

appear

attend

Legislative History

These definitions are new and have no direct relationship to any earlier provisions.

Discussion

The Act draws a distinction between the words **attend** and appear. Attend is used throughout the Act to refer to a person being physically present in court and appear to describe when a person need not be physically present in court, if they are represented.

Previously, there was a lack of consistency as to when an accused could appear and when they were obliged to attend. The approach significantly differed between different stages of the criminal process.

For example, the commonly accepted position as set out in *Victorian Criminal Procedure* (Fox, 2005, page 174) was that the accused's attendance (unless on bail) was not required for summary proceedings (whether for purely summary offences or indictable offences triable summarily) to be valid; an appearance was sufficient. However, the statutory basis for this position was not particularly clear. Section 41 of the [Magistrates' Court Act 1989](#) drew an apparent distinction between a summary offence, in respect of which a warrant could be issued if the accused did not 'appear' on summons, and indictable offences, where a warrant could be issued if the accused did not 'attend' on summons.

For consistency, the Act works on the basic proposition that an accused is required to appear at all hearings. They will also be required to attend if they are bailed or remanded in custody to any court date. Importantly, the Act also requires the accused to attend in both committal (see section 246) and trial (see section 100(2)) proceedings unless excused.

The Act's approach is intended to reflect current law and practice as much as possible, to make the law clearer and to provide flexibility where the accused's attendance or non-attendance will be useful for case management purposes.

The presumption in favour of appearance is now provided for in section 329. The section also gives the court the flexibility to excuse an accused's attendance when it would otherwise be required or to require an accused's attendance (on reasonable notice) when an appearance would otherwise suffice.

This issue is discussed in more detail at sections 328 to 330. The following flowchart also appears in the discussion following those sections, and sets out the relationship between the obligation to attend and to appear.

Accused Required to *Attend* or *Appear*?

LEGEND:

Court responsibility

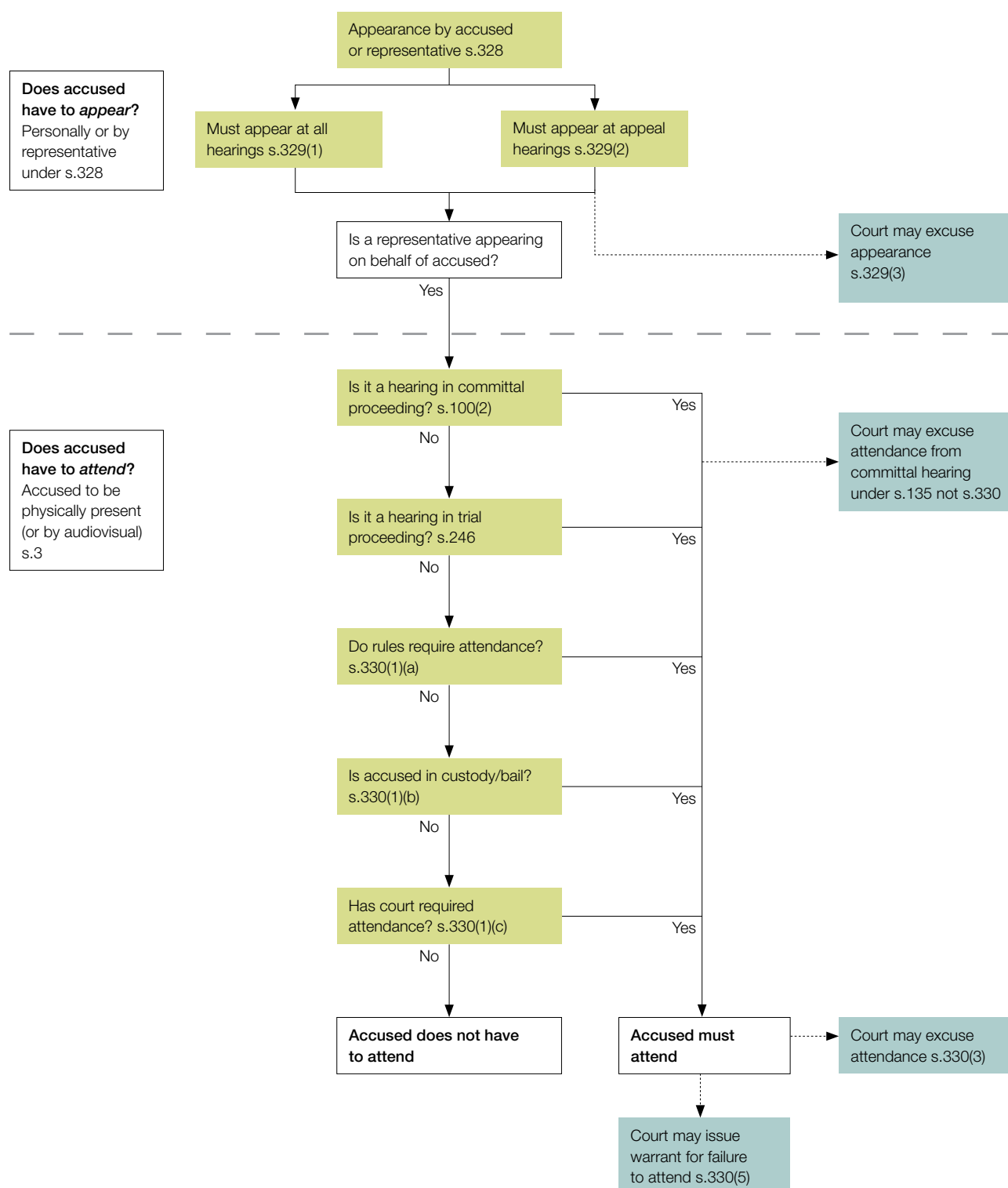


Accused responsibility



Optional process





appropriate registrar

Legislative History

This definition is based on the definition of ‘appropriate registrar’ in section 3(1) of the *Magistrates’ Court Act 1989*. The reference to proper venue in that definition has been amended to refer to section 11 – Place of hearing.

Discussion

Appropriate registrar is the registrar at the Magistrates’ Court where a proceeding is to be heard (in accordance with section 11) or transferred to (in accordance with section 31).

This definition is relevant to the filing of a charge-sheet in section 14 and the power of the registrar to extend or adjourn a return date in sections 19(2) and 20.

A different term – the registrar – is used for the purposes of committal proceedings, and is defined in section 95 of the Act. This is because the venue of the Magistrates’ Court at which a charge-sheet is filed will not necessarily be the venue at which a committal proceeding is held. Therefore the reference to appropriate registrar is not relevant to Chapter 4 of the Act.

arraignment

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The meaning of **arraignment** is set out in section 215 and considered in detail in the discussion following that section. This definition is significant as part of the Act’s approach to resolving uncertainty as to whether an arraignment could be considered to be the **commencement of trial**. What constitutes the commencement of trial is now prescribed in section 210 of the Act and a detailed discussion follows that section.

cognitive impairment

Legislative History

This definition is based on the definition of ‘cognitive impairment’ in the *Crimes (Criminal Trials) Act 1999*.

Discussion

The definition of ‘cognitive impairment’ was inserted into the *Crimes (Criminal Trials) Act 1999* by the *Crimes (Sexual Offences) Act 2006*. The definition remains the same for the purposes of the Act.

The definition is relevant to the special provisions in the Act relating to children and people with a **cognitive impairment** including:

- section 99 (Time limits for determining certain committal proceedings for a sexual offence)
- section 123 (Cross-examination of certain witnesses)
- section 163 (Time limits for filing certain indictments)
- Division 5 of Part 8.2 (Use of recorded evidence-in-chief of children and cognitively impaired witnesses in sexual offence and assault matters)
- Division 6 of Part 8.2 (Procedure and rules for children and cognitively impaired complainants).

commencement of trial

Legislative History

This definition is based, in part, on the definition of the ‘day on which the trial is due to commence’ in section 3 of the *Crimes (Criminal Trials) Act 1999*, which was defined in that Act as the “day on which the accused is due to be put in the charge of the jury”. This approach has been substantially changed, as discussed below.

Discussion

The definition of **commencement of trial** refers to section 210 of the Act, which defines when a trial commences as, “when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with section 217.”

The question of when a trial formally commences has been unclear in Victoria for reasons that are discussed below.

The need to define when a trial commences is important in relation to:

- a number of pre-trial procedures that are tied to the commencement of trial (e.g. prosecution openings under section 182 and defence responses under section 183)
- the time limit for filing an indictment for sexual offences in section 163
- the time limits for when different types of trial must commence in section 211
- providing a clear division in the Act between steps that occur at trial and those occurring prior to trial.

Before the Act, the commencement of trial could mean two different things:

- At common law the formal commencement of trial is when the accused is arraigned and by a plea of not guilty, formally “joins issue with the Crown.” This definition remains current in Victoria (see *R v Talia* [1996] 1 VR 462).

- Section 3 of the *Crimes (Criminal Trials) Act 1999* defined the ‘day on which the trial is due to commence’ as being the “day on which the accused is due to be put in the charge of the jury”.

This approach arose in part from the use of the term ‘arraignment’ in section 5(2) of the *Crimes (Criminal Trials) Act 1993* (later repealed). The 1993 Act required that the accused be ‘arraigned’ at the beginning of the first directions hearing. Therefore it was arguable that the trial could technically have commenced at the first directions hearing.

The *Crimes (Criminal Trials) Act 1999* attempted to clarify the issue by providing that, while an accused must plead at a first directions hearing, this did not limit the requirement that the accused be arraigned prior to the commencement of trial. This process of pleading at the directions hearing was no longer called an ‘arraignment’.

The definition of ‘the day on which the trial is due to commence’ as being the day on which the accused is due to be put in the charge of the jury in the 1999 Act was also intended to overcome uncertainty as to whether an arraignment commenced the trial. However, divergent practice remained, with some considering that a plea entered at a directions hearing formally commenced the trial while others considered that the arraignment must be before the jury panel to formally commence the trial.

Before 1983, arraignment was the appropriate trigger for the commencement of trial because there was usually no delay between arraignment (which always took place before the jury panel) and empanelment of the jury. However, that changed with the introduction of section 391A of the *Crimes Act 1958* in 1983, which allowed for questions of law and other matters relevant to the trial to be determined after arraignment but prior to the empanelment of the jury.

Section 199 of the Act significantly reforms the section 391A procedure. There is now no need to maintain a window of time between arraignment and empanelment. This created an opportunity to choose a definite event which commences a trial.

The event chosen needed to be close in time to when, as a matter of common understanding, a trial commences. Although there are different views on this point, it appears to be generally accepted that the empanelling of the jury forms part of the trial.

However, the *Crimes (Criminal Trials) Act 1999* reference to the point at which the accused is “put in the charge of the jury” does not accurately reflect that common understanding of when a trial commences, as it does not include the selection and empanelling of the jury.

This Act now marks the **commencement of a trial** using the entry of a not guilty plea on arraignment before the jury panel. This approach also maintains broad consistency with the common law.

Defining the commencement of trial in this way has allowed time limit provisions that work backwards from a predicted trial date to refer to the day on which the trial is “listed to commence”. This phrase is designed to link these pre-trial steps to a definite date that represents the earliest date on which the trial may in fact commence. In practice, a number of trials may be listed to commence on a certain date at the beginning of a block of trial time. When those trials actually commence is often determined by the length and relative priority of other scheduled trials.

Where the trial does not commence on the listed date, the required pre-trial steps will already have been taken. Therefore the time between the listed date and the actual commencement of trial will be available to determine pre-trial issues, if required.

By confirming that the only arraignment that commences a trial is an arraignment before the jury panel, earlier arraignment becomes available as a case management tool without any suggestion that this involves the formal commencement of the trial.

Sections 215 and 217 also form part of this overall approach.

Section 215 describes what an arraignment is and confirms that the accused can be arraigned and re-arraigned at any time. Note that section 180 confirms that the accused can be arraigned at a directions hearing and provides a truncated process of arraignment in certain circumstances.

Section 217 requires that an accused who has not pleaded guilty to all charges in an indictment must be arraigned before the jury panel.

compulsory examination hearing

Legislative History

This definition is new, however the compulsory examination procedure in section 106 is based on section 56A of the *Magistrates’ Court Act 1989*.

Discussion

This definition relates to a hearing under section 106 of the Act. Section 106 sets out the procedure for the conduct of a **compulsory examination hearing**, which is a step that may arise in a committal proceeding under Chapter 4.

contest mention hearing

Legislative History

This definition is new, however the contest mention provision in section 55 of the Act is based on clause 3A of Schedule 2 to the *Magistrates’ Court Act 1989*.

Discussion

This definition refers to a hearing under section 55 of the Act. A **contest mention hearing** is often conducted in a summary proceeding before a case goes to a defended summary hearing. A more detailed discussion of the contest mention system, including the powers of the court at such a hearing, follows section 55.

conviction

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition of **conviction** is relevant to Chapter 6 (Appeals), in particular, the right to **appeal** against conviction both from the Magistrates' Court and from the Supreme Court or County Court.

Under Division 1 of Part 3 of the [Sentencing Act 1991](#), a court that finds a person guilty of an offence has a discretion as to whether or not to record a conviction, in certain circumstances.

Section 8(3)(b) of the [Sentencing Act 1991](#) provides that a finding of guilt without the recording of a conviction has the same effect, for the purpose of appeals against sentence, as if a conviction had been recorded. Section 567 of the [Crimes Act 1958](#) previously referred only to the right of a person to appeal against conviction without specifying whether this included a finding of guilt but no record of conviction.

In [R v Celep \[1998\] VSC 262](#), the Court of Appeal held that a person who had been found guilty by a jury had a right to appeal the conviction under section 567 where the verdict had been accepted by the court, even though no conviction was formally recorded.

The definition of **conviction** reflects the same approach. A conviction occurs when the court accepts a plea of guilty or a verdict of guilty. The decision of the court to record or to not record that conviction is a separate matter under the [Sentencing Act 1991](#). It is important to note that this definition does not apply to other chapters and that the question of when a person is convicted other than for appeal purposes will continue to be governed by common law principles.

In [Maxwell v R \[1996\] HCA 46](#), the High Court was concerned primarily with the principle of *autrefois convict*, but it set out the framework for deciding whether and when a person is formally convicted:

The question of what amounts to a conviction admits of no single, comprehensive answer. Indeed, the answer to the question rather depends upon the context in which it is asked (see Cobiac v Liddy (1969) 119 CLR 257 at 271). On the one hand, a verdict of guilty by a jury or a plea of guilty upon arraignment has been said to amount to a conviction. On the other hand, it has been said that there can be no conviction until there is a judgment of the court, ordinarily in the form of a sentence, following upon the verdict or plea.

The High Court made it clear that, in the context of *autrefois convict*, it is the entry of the plea or verdict that amounts to a conviction. In other contexts (e.g. the calculation of time) there must also be a 'formal acceptance' by the court of the plea or verdict, ordinarily by incorporation into an order of the court.

Whether there has been such a formal acceptance is a matter of fact. For example, it was held in [DPP v McCoid \[1988\] VR 982](#) that if the judge remands the accused for sentence, that represents an acceptance of the plea or verdict and therefore there will have been a conviction.

corporate accused

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

Previously, in both the [Magistrates' Court Act 1989](#) and the [Crimes Act 1958](#) the term 'body corporate' was used to describe a corporate accused. The Act refers to a body corporate charged with an offence as a **corporate accused**. This description is used where the section applies only to a corporate accused. In other places a reference to an 'accused' will include both an accused who is a natural person and a corporate accused.

criminal record

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

A **criminal record** sets out all **previous convictions** of a person and must comply with the requirements of section 77 if the case is a summary proceeding in the Magistrates' Court, or section 244 if it is for an indictable offence in the Supreme Court or County Court.

The **criminal record** replaces the practice of alleging prior convictions in a ‘further presentment’ previously found in section 376 of the *Crimes Act 1958*. A more detailed discussion of the basis for the new procedure is set out in sections 77 and 244.

The prosecution retains a discretion not to include prior convictions in a criminal record if they are, for example, old, minor or otherwise not relevant.

Crown Prosecutor

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The *Public Prosecutions Act 1994* provides for the appointment of the Chief Crown Prosecutor, Senior Crown Prosecutors and Crown Prosecutors, as well as setting out their respective functions and powers.

The definition of **Crown Prosecutor** is important as there are several references to Crown Prosecutor in the Act. For example, in section 159 a Crown Prosecutor (in the name of the **DPP**) may file an indictment. A Crown Prosecutor may also sign a criminal record in section 244(3) of the Act.

depositions

Legislative History

This definition is based on the definition of ‘depositions’ in section 3(1) of the *Magistrates’ Court Act 1989*.

Discussion

The definition of **depositions** in the Act is worded slightly differently to the definition in the *Magistrates’ Court Act 1989*. The term ‘tendered’ is replaced by “admitted in evidence”, for consistency with section 139 of the Act – Admissibility of non-oral evidence. However, this is not intended to change the meaning of depositions from its previous meaning.

The definition is relevant to sections 188 (Prosecution notice of additional evidence) and 242(3) (Summary offence related to indictable offence).

direct indictment

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition of **direct indictment** relates to sections 161 and 174 of the Act. In summary, an indictment will be a direct indictment where it does not include a charge, or a charge for a **related offence**, on which the accused was committed for trial. As a result, a direct indictment formally commences a criminal proceeding (see section 6). The following table sets out what is, and is not, a direct indictment.

Background to filing indictment	Is it a direct indictment?
The accused was committed for trial and the indictment contains a charge on which the accused was committed for trial.	No
The accused was committed for trial and the indictment contains a charge for a related offence .	No
The accused was committed for trial but the indictment does not contain any charges on which the accused was committed for trial or any related offences .	Yes
There was a committal proceeding but the accused was not committed for trial on any charges.	Yes
There was no committal proceeding at all.	Yes

How does the Act apply to a mixed indictment?

A ‘mixed indictment’ is an indictment which contains a charge(s) on which the accused was committed for trial (or a related offence) and a direct indictment charge(s) (e.g. where they were discharged at committal on that charge and any charge for a ‘related offence’).

Under the *Crimes Act 1958* it was possible for one presentment to contain counts for offences on which the accused had been committed for trial and counts for offences on which the accused had been directly presented. As Fox states, “[e]ach count in a presentment is, for the purpose of evidence and verdict, a separate indictment.” (Fox, *Victorian Criminal Procedure*, 2005, paragraph 8.2.8).

This Act does not change that situation.

Clause 5 of Schedule 1 to the Act indicates that an indictment may contain charges for related offences. Section 193 provides that where an indictment contains more than one charge, the court may order that the charges be tried separately. Sections 194 and 195 deal with joint and separate trials for indictments containing charges for: sexual offences; and conspiracy and commission of an offence, respectively. For many provisions, it does not matter whether the indictment (or charges in the indictment) is a **direct indictment** or not (e.g. orders for a separate trial (sections 193–195), the power to amend an indictment (section 165); and filing of a fresh indictment (section 164)).

A mixed indictment is best viewed as one indictment (or one document) even though the history of the charges, and the source of the power to include each charge in an indictment, may be different. However, the Act may apply differently to charges in the indictment depending on whether they are direct indictment charges or not. If an indictment contains charges with different requirements, both requirements must be complied with. This can be achieved by following the most onerous procedure of the two requirements or the procedure with the most safeguards.

The different requirements that can arise are set out in the following table.

Process	Requirements	Reasons for following particular requirement
Time limits for filing certain indictments (s.163)	The time limits for filing an indictment only apply to charges on which the accused was committed for trial. There are no statutory time limits for filing a direct indictment .	As there are no statutory time limits for filing a direct indictment , compliance with the time limits for charges on which the accused was committed for trial will be sufficient.
Indictment to be served on accused (s.171)	<ul style="list-style-type: none"> • ordinary indictment – a copy must be served (by ordinary service) • direct indictment – a copy must be personally served 	By personally serving a mixed indictment, all requirements will be satisfied (s. 395 provides that personal service satisfies a requirement for ordinary service).
Time limit for commencing a trial (other than sexual offences) (s.211)	<ul style="list-style-type: none"> • ordinary indictment – trial must commence within 12 months of the date on which the accused was committed for trial (s.211(a)) • direct indictment – trial must commence within 12 months of the day on which the accused was committed for trial (s.211(b)) 	It is virtually inevitable that in this situation these two events will occur on different days. Time runs from whichever event occurs first in time. This must be determined on a case by case basis. The most common scenario will be that an accused will be committed for trial on some charges and directly indicted on others (at the time the indictment is filed). In this situation the most relevant time limit will be the first one to expire, namely the day on which the accused was committed for trial. The power of the court to extend time applies to each charge on the indictment.
Time limit for commencing a trial for a sexual offence (s.212)	<ul style="list-style-type: none"> • ordinary indictment – trial must commence within 3 months of the date on which the accused was committed for trial (s.212(a)) • direct indictment – trial must commence within 3 months of the day on which the accused was committed for trial (s.212(b)) 	It is virtually inevitable that in this situation these two events will occur on different days. Time runs from whichever event occurs first in time. This must be determined on a case by case basis. The most common scenario will be that an accused will be committed for trial on some charges and directly indicted on others (at the time the indictment is filed). In this situation the most relevant time limit will be the first one to expire, namely the day on which the accused was committed for trial. The power of the court to extend time applies to each charge on the indictment.

Example 1

On 1 March 2010, the accused is committed for trial for the offence of indecent assault. This is a **sexual offence** but the complainant is not a child or person with a cognitive impairment. Therefore, the indictment must be filed within 28 days of the date of committal (s.163(3)). On 25 March 2010, an application for extension of time is granted for a further 28 days. On 10 April 2010, an indictment is filed containing an additional offence which was not part of the committal proceedings. The accused is directly indicted on this charge.

Example 2

The accused was committed for trial on 1 March 2010. The trial for this charge must be held within 3 months (s.212(3)) because indecent assault is a **sexual offence**. The direct indictment was filed on 10 April 2010. The time limit for the directly indicted charge (if it is also a sexual offence) is 3 months from the date of filing the indictment (s.212(b)). The indictment containing both charges is served personally on the accused.

On 25 May, the prosecution seeks an extension of time for the commencement of the trial which is now listed to commence on 20 July. The prosecution seeks the extension of time (s.247(1)) in relation to all charges on the indictment to 25 July 2010. All charges in the indictment now have the same time limits. The trial is adjourned to 16 August 2010. A further extension of time is granted to 25 August 2010. This extension applies to all charges on the indictment and is an extension of not more than 3 months (s.247(2)).

Victorian criminal procedure is adopted for Commonwealth offences tried in Victorian courts (see High Court case of *Rohde v Director of Public Prosecutions* [1986] HCA 50; (1986) 161 CLR 119) by way of analogy. This is based on sections 68(1) and 79 of the *Judiciary Act 1903* (Cth) which provide that a state or territory's laws relating to procedure apply to commonwealth offences tried in that state.

It is unnecessary to refer to the Commonwealth DPP in the Act given the constitutional effect of state legislation on the Commonwealth, as well as the jurisprudence and provisions of the *Judiciary Act 1903*.

This approach means that references to the **DPP** will be treated as analogous to the Commonwealth DPP, unless there are special reasons why they should not be.

evidence in support of alibi**Legislative History**

This definition is based on the definition in section 399A(7) of the *Crimes Act 1958*.

Discussion

This definition is a central feature of the alibi process which is set out in sections 51 and 52 (in relation to summary proceedings) and sections 190 and 191 (in relation to trial procedures) of the Act.

Provisions relating to alibi evidence were previously contained in section 47 of the *Magistrates' Court Act 1989* (in relation to summary matters) and sections 399A and 399B of the *Crimes Act 1958* (in relation to trials). The Act includes general provisions relating to alibi evidence which largely replicate the original provisions.

filing hearing**Legislative History**

This definition is new and has no direct relationship to any earlier statutory provisions. Previously, filing hearings were provided for in rules 3.02 and 4.02 to 4.05 of the *Magistrates' Court (Committals) Rules 1999*. They are now included in the Act as they represent an important stage in a committal proceeding.

Discussion

The definition of **filing hearing** refers to section 101 of the Act, which provides that the court may fix a date for the committal hearing, a time for service of the hand-up brief and make any order or give any direction that it considers appropriate. A filing hearing will be the first court event in a committal proceeding under Chapter 4. Section 6(4) allows an informant to request a committal hearing when a charge-sheet includes an indictable offence (i.e. an offence that can be the subject of a committal proceeding). Section 10 then sets out the process by which the court lists a matter for a filing hearing.

DPP**Legislative History**

This definition is based, in part, on the definition of 'prosecutor' in section 3 of the *Crimes (Criminal Trials) Act 1999*.

Discussion

The *Public Prosecutions Act 1994* governs the role of the **DPP** as well as the DPP's powers of delegation and the role of the Office of Public Prosecutions. The DPP is appointed under Part IIIA of the *Constitution Act 1975*.

The definition of 'prosecutor' in section 3 of the *Crimes (Criminal Trials) Act 1999* includes the DPP for the Commonwealth. The Act does not include the Commonwealth DPP in the definition of **DPP** because the Act (as a piece of state legislation) cannot directly confer powers on commonwealth actors such as the Commonwealth DPP.

full brief

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition of **full brief** refers to section 41 of the Act, which lists the contents of a full brief.

The full brief is a key component of the new, comprehensive disclosure regime in summary proceedings, introduced by the Act in Division 2 of Part 3.2. A more detailed discussion of the contents of the full brief, and when it is likely to be used, follows section 41.

hand-up brief

Legislative History

This definition is new and is based on provisions in the *Magistrates' Court Act 1989*.

Discussion

The definition of **hand-up brief** refers to section 110 of the Act, which sets out the contents of a hand-up brief.

The hand-up brief is the primary mechanism for disclosure in committal proceedings. A more detailed discussion of the hand-up brief follows section 110.

in detention

Legislative History

This definition is based on section 361(4) of the *Crimes Act 1958*.

Discussion

The definition of **in detention** is relevant to section 332 (Transfer of accused between place of detention and court). This section provides that a person who has legal custody of an accused in detention must transfer the accused to and from court whenever necessary. It is also referred to in section 391(3) in relation to **personal service**.

indictable offence that may be heard and determined summarily

Legislative History

This definition is new and has no direct relationship to any earlier provisions. Section 28(1) is based on section 53 of the *Magistrates' Court Act 1989*.

Discussion

The definition refers to section 28(1) of the Act, which identifies the different types of **indictable offences that may be heard and determined summarily**. This categorisation is important for deciding whether offences are to be heard and determined summarily (i.e. in the Magistrates' Court) or indictably (i.e. after a committal proceeding to determine whether there is sufficient evidence for a trial in the Supreme Court or County Court).

informant

Legislative History

This section is based on the definition of 'informant' in section 3(1) of the *Magistrates' Court Act 1989*.

Discussion

An **informant** is defined as a person who commences a criminal proceeding in the Magistrates' Court. This is consistent with the definition in the *Magistrates' Court Act 1989*.

A criminal proceeding in the Magistrates' Court can be commenced in the ways set out in section 6 of the Act. There is no restriction on who can commence a proceeding in the Magistrates' Court, but that person is usually a member of the police force or a **public official**.

A large number of sections in the Act refer to the **informant** by giving the informant certain obligations (e.g. to disclose material) or rights (e.g. to refuse to disclose material on certain grounds under section 45).

However, it is important to note that only a small number of sections require the informant to do something personally. The primary example is section 12 which requires an informant to apply personally for a warrant to arrest. As a result, there is nothing preventing steps being taken by another person on behalf of the informant in accordance with ordinary principles of agency. This is particularly relevant for police cases where the day to day conduct of a prosecution is increasingly managed by police prosecutors. The Act does not prevent this from occurring. The steps which can be taken on behalf of an informant include serving or receiving documents, withdrawing charges or negotiating on summaries.

An exception to this broad agency approach is made in relation to who may **appear** on behalf of an informant in court where section 328(c) recognises the role of police prosecutors explicitly. This is necessary because ordinary agency principles do not extend to an entitlement to appear on behalf of another person in court.

infringements registrar

Legislative History

This section is based on the definition of ‘infringements registrar’ in section 3(1) of the *Magistrates’ Court Act 1989*.

Discussion

Infringements registrar is relevant to the definition of **proceeding**, discussed below.

interlocutory appeal

interlocutory decision

Legislative History

These definitions are new and have no direct relationship to any earlier provisions.

Discussion

These definitions support the new interlocutory appeals regime, which is discussed in more detail below in relation to Division 4 of Part 6.3 and, in particular, following section 295. In essence, the new regime allows important decisions, made before or during a trial in the Supreme Court or County Court, to be appealed immediately rather than waiting until the trial is finished. The right of appeal is subject to strict rules requiring judge certification and leave from the Court of Appeal.

The purpose of the definition of **interlocutory appeal** is to allow references to this new process in other parts of the Act.

The broad definition of **interlocutory decision** is central to the interlocutory appeals regime. It avoids technical arguments about what sorts of decisions, orders or rulings can be appealed, as discussed in more detail in relation to Division 4 of Part 6.3.

The reference to a stay of proceedings in the definition of **interlocutory decision** has been included to avoid doubt, rather than to suggest that a decision on a stay would not ordinarily fall into the broad primary definition. This is confirmed in the Explanatory Memorandum to the Act.

This approach reverses the effect of *Smith v R* [1994] HCA 60; (1994) 181 CLR 338. In that case, the High Court held that the Court of Appeal did not have power to overturn a permanent stay, granted by Vincent J to five police officers charged with murder. That decision was based on section 17A of the *Supreme Court Act 1986* which has been amended to accommodate interlocutory appeals.

Item 116 of the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* amends section 17A(3) of the *Supreme Court Act 1986* to replace a reference to Part VI of the *Crimes Act 1958* (repealed by the Act) with reference to Part 6.3 of Chapter 6 of the Act. Part 6.3 of Chapter 6 deals with appeals and case stated procedures from the County Court and the Trial Division of the Supreme Court to the Court of Appeal. Division 4 of Part 6.3 of Chapter 6 makes specific provision for interlocutory appeals.

Juries Commissioner

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition is relevant to section 246 of the Act which requires parties to inform the **Juries Commissioner** of any event which may affect whether or not a jury will be required or when a jury will be required.

legal practitioner

Legislative History

This definition is based, in part, on the definition of ‘legal practitioner’ in the *Magistrates’ Court Act 1989* and *Crimes (Criminal Trials) Act 1999*.

Discussion

The definition distinguishes between an Australian lawyer and an Australian legal practitioner. Under the *Legal Profession Act 2004*, an Australian lawyer is a person who is admitted to the legal profession. An Australian legal practitioner is an Australian lawyer who holds a current practising certificate.

Section 2.2.2 of the *Legal Profession Act 2004* generally prohibits any person from engaging in legal practice if the person is not an Australian legal practitioner (i.e. if the person does not hold a current practising certificate).

Section 2.2.2(2) lists persons who are exempt from this rule and includes a person employed by the **DPP** or a public authority. This exemption is relevant to criminal procedure as it covers, for example, employees of the Office of Public Prosecutions.

For the purposes of the Act, the definition of **legal practitioner** includes an Australian legal practitioner as well as a person who is exempt from holding a practising certificate under section 2.2.2(2)(g) of the *Legal Profession Act 2004*.

mention hearing

Legislative History

This definition is new and has no direct relationship to any earlier provisions. Section 53 is also new and has no direct relationship to any earlier provisions.

Discussion

The definition refers to a hearing under section 53, which sets out what powers the Magistrates' Court may exercise at a **mention hearing**.

A more detailed discussion of mention hearing is set out under section 53 of the Act.

notice to appear

Legislative History

This definition is new and has no direct relationship to any earlier provisions. Section 21 is also new and has no direct relationship to any earlier provisions.

Discussion

The **notice to appear** is a new and alternative method to require a person to **appear** at court.

A more detailed discussion of the notice to appear is set out in the discussion of section 21 of the Act.

ordinary service

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition of **ordinary service** forms part of the Act's new approach to service, discussed in detail in relation to Part 8.3. The Act consistently refers to ordinary service unlike the *Magistrates' Court Act 1989* which refers to service by 'ordinary post'.

Section 394 of the Act sets out how ordinary service may be effected, namely by:

- sending a copy of a document by ordinary pre-paid post to the last known place of residence or business of the person
- if the person is represented by a legal practitioner, sending a copy by pre-paid ordinary post to the business address of the legal practitioner
- delivering a copy of the document into the legal practitioner's document exchange facilities
- in any other manner agreed to by the parties.

It should be noted that under section 395, personal service will also satisfy the requirements of ordinary service.

Different rules apply to service on the informant or on the DPP (see section 392).

A more detailed discussion of ordinary service follows section 394.

originating court

original jurisdiction

Legislative History

These definitions are new and have no direct relationship to any earlier provisions.

Discussion

The definitions of **originating court** and **original jurisdiction** are related and are intended to clarify which proceedings can be appealed to the Court of Appeal under Part 6.3.

Originating court is referred to in relation to appeal rights in sections 274, 278, 287 and 291 (rights of appeal against conviction and sentence). This definition identifies the court from which an appeal can be made by reference to the County Court or Trial Division of the Supreme Court when exercising their original jurisdiction.

The definition of **original jurisdiction** is intended to capture all criminal proceedings heard in the County Court or Trial Division of the Supreme Court at first instance (i.e. not already on appeal or review from any other court). It clarifies that this will include the determination of related and unrelated summary offences in the Supreme Court or the County Court (see sections 242 and 243) as well as proceedings for contempt or breach of a sentencing order, such as a community based order (under section 47(1) of the *Sentencing Act 1991*).

This clarification of appeal rights renders section 105 of the *Sentencing Act 1991* redundant, so that section has been repealed (see section 432).

personal service

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition forms part of the Act's new approach to service, discussed in detail at Part 8.3.

Section 391 sets out how **personal service** may be effected, namely by:

- giving a copy of the document to the person to be served
- if they do not accept it, putting it down in their presence
- leaving a copy at the person's last known or usual place of residence with a person who appears to be over 16 years
- if a person is in detention by sending a copy by registered post to the place of detention
- if a legal practitioner provides written notice that they have instructions to accept personal service by:
 - giving a copy of the document to the legal practitioner
 - leaving a copy of the document at the ordinary place of business of the legal practitioner
 - sending a copy of the document by registered post to the ordinary place of business of the legal practitioner.

Different rules apply to service on the informant or on the DPP (see section 392).

A more detailed discussion of personal service follows section 391.

plea brief

Legislative History

This definition is new and has no direct relationship to any earlier provisions. Section 117 is based, in part, on clause 5 of Schedule 5 to the *Magistrates' Court Act 1989*.

Discussion

The definition of **plea brief** refers to section 117 of the Act, which lists the required contents of a plea brief.

Plea brief is a shortened disclosure brief used in committal proceedings where an accused intends to plead guilty to the charge(s). A more detailed discussion of plea brief follows section 117.

police gaol

Legislative History

This definition is based on the definition of 'police gaol' in section 3(1) of the *Magistrates' Court Act 1989*, which refers to the definition in the *Corrections Act 1986*.

Discussion

The Act also refers to the definition in the *Corrections Act 1986*. Part 3 of that Act sets out that any premises or place that is not a prison may be appointed to be a **police gaol** by Order of the Governor in Council. This definition is relevant to the definitions of **in detention** and **responsible person** in section 3 of the Act.

preliminary brief

Legislative History

This definition is new, though the content of the **preliminary brief** in section 37 draws from the content of the outline of evidence in section 37A of the *Magistrates' Court Act 1989*.

Discussion

The definition of **preliminary brief** refers to section 37 of the Act, which sets out the content of the preliminary brief.

A preliminary brief is a new, shortened disclosure brief that is available in summary proceedings, and is compulsory in some types of cases. It is part of a new approach to prosecution disclosure introduced by the Act. A more detailed discussion of preliminary brief follows section 37.

previous conviction

Legislative History

This definition is based, in part, on the definition of 'previous conviction' in section 376(4) of the *Crimes Act 1958*.

Discussion

The definition of **previous conviction** includes a prior conviction or a finding of guilt by a court. It expressly excludes previous convictions that have been set aside, namely those which have been:

- set aside on appeal
- entered in the Magistrates' Court but not recorded in the County Court as the result of a successful appeal
- set aside for the purposes of a rehearing in the Magistrates' Court.

This definition is relevant to the definition of **criminal record** (see sections 77 and 244).

prison

Legislative History

This definition is based on the definition of 'prison' in section 3(1) of the *Magistrates' Court Act 1989*, which refers to the definition in the *Corrections Act 1986*.

Discussion

The Act also refers to the definition in section 10 of the *Corrections Act 1986*, which provides that any premises may be appointed as a **prison** by Order of the Governor in Council.

This section is relevant to the definitions of **in detention** and **responsible person**, as well as section 331 which relates to notifying a person in prison of an adjournment.

proceeding

Legislative History

This definition is based on the definition of 'proceeding' in section 3(1) of the *Magistrates' Court Act 1989* with minor modifications.

Discussion

The definition relates only to the Magistrates' Court.

The purpose of the definition is to ensure that administrative decisions pertaining to a proceeding are not mistaken for commencing the proceeding.

The Act adopts a new, clearer approach to the commencement of proceedings. This is set out in section 5 which clarifies that a proceeding is commenced (for the purposes of the Magistrates' Court) by filing and signing a charge-sheet.

public official

Legislative History

This definition is based, in part, on the definition of 'public official' in section 30(1A) of the *Magistrates' Court Act 1989*.

Discussion

There are a number of statutory agencies and public authorities that prosecute criminal offences in the Magistrates' Court. The Act defines **public official** to capture people employed by such agencies which have the authority to prosecute.

The definition of **public official** is particularly relevant to section 14 which enables a public official to issue a summons to answer to a charge and section 21 which enables a public official to serve a notice to appear. It is also relevant to section 77, which provides that a public official may sign a criminal record.

related offences

Legislative History

This definition is based on section 4(4) and (5) of the *Crimes (Criminal Trials) Act 1999* which is consistent with clause 2 of the Sixth Schedule to the *Crimes Act 1958* (Joining of charges in one presentment).

Discussion

The definition of **related offence** is relevant to several processes in the Act.

The Act introduces a new procedure that enables the Magistrates' Court to transfer a summary offence that is related to an indictable offence to the court to which the accused has been committed for trial. The definition of **related offence** captures an offence that is founded on the same facts as the indictable offence, or forms part of a series of offences of the same or similar character. A more detailed discussion of this new procedure can be found at sections 145 and 242.

Related offence is relevant to the filing of a direct indictment. A **direct indictment** is defined in section 3 of the Act as an indictment filed against an accused who has not been committed for trial in respect of the offence charged in the indictment or a related offence.

The definition is also used in clause 5 of Schedule 1 which allows multiple accused and multiple charges to be included in the same indictment but only where the charges are for related offences. This issue is discussed in more detail in relation to section 170.

related summary offence

Legislative History

This section is new and has no direct relationship to any earlier provisions.

Discussion

Section 145 requires the Magistrates' Court to transfer a charge for a summary offence that is related to an indictable offence to the court to which the accused has been committed for trial.

Once the charge has been transferred it is referred to as the **related summary offence**. This is relevant to section 242 which sets out the procedure for determining a related summary offence in the County Court or Supreme Court.

responsible person

Legislative History

This definition is new and draws on section 361(4) of the *Crimes Act 1958*.

Discussion

The definition of **responsible person** is relevant to section 332 (Transfer of accused between place of detention and court). Section 332(3) provides that if the court orders that an accused be brought before the court, the responsible person must cause the accused to be brought before the court in accordance with the order.

return date

Legislative History

This definition is based on the definition of ‘mention date’ in section 3(1) of the *Magistrates’ Court Act 1989*.

Discussion

The Act simplifies and rationalises the terms used for different hearings in the Magistrates’ Court. Previously, the term ‘mention date’ was used to describe the first hearing in either the summary or committal stream. This could be either a mention hearing or a filing hearing depending on whether it was a summary or committal proceeding. This resulted in confusion as ‘mention date’ could be interpreted as relating only to a mention hearing in a summary proceeding.

The Act distinguishes between the allocation of matters in the summary stream and the committal stream, so a more neutral term has been used to describe the first hearing in both of these streams, namely **return date**. In summary, a **return date** will be:

- in the summary stream, the first mention hearing
- in the committal stream, the filing hearing.

sentence

Legislative History

This definition is based in part on the definition of ‘sentencing order’ in section 3(1) of the *Magistrates’ Court Act 1989* and section 566 of the *Crimes Act 1958*.

Discussion

The Act adopts a single, inclusive definition of **sentence**.

The previous two definitions (noted in the legislative history above) had a substantial degree of overlap. The words “means any order made by the court following a finding of guilt” in the *Magistrates’ Court Act 1989* definition have not been included in the Act definition because it appears to cover orders that are not intended to be sentences. For example, Part 3 of the *Sentencing Act 1991* includes many orders that are made by a court following a finding of guilt that are not intended to be sentences (see sections 18P(2), 18Q(2), 18ZQ(1)(a) and 18ZY(3)).

The Act retained the inclusive approach in previous definitions to ensure that there is flexibility in the application of the definition. This in turn allows the boundaries of the definition to be determined by the courts as the need arises.

The definition includes the recording of a conviction. This reflects that whether or not a conviction is recorded, particularly for less serious offending, is an important issue in the sentencing process.

sexual offence

Legislative History

This definition is based, in part, on the definition of ‘sexual offence’ in section 3(1) of the *Magistrates’ Court Act 1989*.

Discussion

Introduction

The Act brings together criminal procedure laws previously located in the *Crimes (Criminal Trials) Act 1999*, the *Magistrates’ Court Act 1989*, the *Crimes Act 1958* and the *Evidence Act 1958*.

The differences in these Acts arise from the changes that have been made to procedure in sexual offence cases, which are a result of a number of major reviews by the Victorian Law Reform Commission (VLRC) (first in 1989–1991 and then in 2004). Over the years, the VLRC’s recommendations have been implemented by the introduction of legislation to amend or create new procedural provisions for sexual offence cases. Many of the inconsistencies arise from these changes over the years.

Previous position

The *Magistrates’ Court Act 1989* definition of ‘sexual offence’ included:

- offences against subdivisions 8A to 8E in Part I, Division I of the *Crimes Act 1958*
- attempts to commit those offences
- assaults with intent to commit those offences.

The definition applied to criminal procedure in the Magistrates’ Court, particularly in relation to time limits for holding a committal proceeding in sexual offence cases and the cross-examination of certain witnesses in such cases. Some processes in Schedule 5 to the *Magistrates’ Court Act 1989* used a different definition, for example, time limits for holding a committal mention.

The definition was inserted by the *Crimes (Sexual Offences) Act 1991*, which was based largely on the recommendations of the VLRC in 1989–1991. However, a reference to sexual offences in relation to time limits for committal mentions was introduced in 1989, and in relation to committal proceedings, in 2006.

The *Crimes (Criminal Trials) Act 1999* definition simply adopted the definition of ‘sexual offence’ in section 3(1) of the *Evidence Act 1958*, which is the same as the *Magistrates’ Court Act 1989* definition. The *Crimes (Criminal Trials) Act 1999* definition of ‘sexual offence’ applies to time limits for filing indictments.

Crimes Act 1958

The *Crimes Act 1958* defined 'sexual offence' in a number of different places. One definition of 'sexual offence' which related to criminal procedure is section 359A(1)(a), which sets a 3 month time limit for commencing a trial in respect of a sexual offence. 'Sexual offence' for the purpose of this section included a narrower group of offences from subdivisions 8A–8D of the *Crimes Act 1958*, as well as attempts to commit those offences or assaults with intent to commit those offences.

Section 359A did not apply to the following offences in the *Crimes Act 1958*:

- compelling sexual penetration (section 38A)
- assault with intent to rape (section 40)
- indecent act with 16 or 17 year old child (section 49)
- facilitating sexual offences against children (section 49A)
- other sexual offences (subdivision 8E)
- sexual servitude offences (subdivision 8EAA).

This select group of offences was inserted by the *Crimes (Sexual Offences) Act 1991*. They could be considered the more 'serious' sexual assault offences, however there is no explanatory material which reveals why this group of offences was selected. Prior to 1991, the section related only to the offence of sexual penetration of a child under the age of 16 (section 45).

The application of section 359A was broadened by the *Justice Legislation Amendment (Sex Offences Procedure) Act 2008*, which amended the section to include a requirement that a trial for a sexual offence commence within 3 months where the complainant was a child or a cognitively impaired person at the time proceedings commenced. The definition of 'sexual offence' for the purposes of the amendment is broader than section 359A(1) and includes: *all* offences against subdivisions 8A–8E, attempts to commit those offences, and assaults with intent to commit those offences.

The inconsistencies are highlighted in the table below which shows the different time limits for trial for different categories of sexual offence.

Complainant	Applicable offence	Time limit
Adult complainant	Sections 38, 39, 44, 45, 47, 47A, 51, 52 or 57	3 months
Adult complainant	Sections 38A, 40, 49, 49A, subdivision 8E and subdivision 8EAA	12 months
Child or person who is cognitively impaired at the time proceedings are commenced	Subdivisions 8A to 8E	3 months
Child or person who is cognitively impaired	Subdivision 8EAA	12 months

Section 372 of the *Crimes Act 1958* relates to the presumption that where multiple charges for sexual offences are listed in the same indictment, the charges are to be tried together. The definition of 'sexual offence' adopted for this section was much broader than the *Magistrates' Court Act 1989* and the *Crimes (Criminal Trials) Act 1999* definitions. It included offences to which clause 1 of Schedule 1 to the *Sentencing Act 1991* applies. That clause sets out sexual offences for the serious sexual offender provisions of the *Sentencing Act 1991*. It includes, for example, offences against the *Prostitution Control Act 1994* and the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995*.

This Act

The Act adopts a single definition of **sexual offence** that is broadly consistent with the definitions in the *Magistrates' Court Act 1989*, the *Crimes (Criminal Trials) Act 1999* and section 3 of the *Evidence Act 1958*. It includes:

- offences in subdivisions 8A–8EAA of the *Crimes Act 1958*
- attempts to commit those offences
- assaults with intent to commit those offences.

The only change from those definitions is the inclusion of sexual servitude offences (subdivision 8EAA of the *Crimes Act 1958*).

The sexual servitude offences were introduced in 2004 as part of the *Justice Legislation (Sexual Offences and Bail) Act 2004*. That Act inserted new offences to deal with trafficking in women and children from overseas for forced prostitution and sexual exploitation. These are also serious sexual offences.

However, the new offences in subdivision 8EAA were not included in the common definition of 'sexual offence'. As a result, child complainants in sexual servitude cases were not covered by the special procedures created for children in the *Crimes Act 1958* or the *Evidence Act 1958*.

To address this issue, the Act expands the definition of 'sexual offence' to include subdivision 8EAA offences so that the procedural provisions also apply to sexual servitude offences.

Following this discussion is a table outlining the relevant sections of the Act that apply to sexual offence cases. As these provisions are mainly taken from the *Magistrates' Court Act 1989*, the *Crimes (Criminal Trials) Act 1999* and the *Evidence Act 1958*, the definition is consistent with their scope, apart from the addition of subdivision 8EAA offences.

Two provisions which have changed in scope are sections 126(1)(a) and 212 of the Act. Unlike section 359A(1) of the *Crimes Act 1958*, section 212 is not limited to *serious* sexual offences. It simply refers to **sexual offence** as it is defined in section 3 of the Act. The impact of this change is to broaden the 3 month time limit for commencement of trial to apply to a wider range of sexual offences.

The same approach has been taken in section 126(1)(a) in relation to time limits for holding a committal mention hearing in sexual offence cases. This was previously found in clause 4(2) of Schedule 5 to the *Magistrates' Court Act 1989* which adopted the same definition as that used in section 359A(1). The scope of this section has broadened in the same way as section 212, discussed above.

The approach in the Act creates consistency and simplicity. In all situations except one, the new definition applies. The exception is section 194 (Order for separate trial – sexual offences) which is based on section 372(3AA) of the *Crimes Act 1958*. Like its predecessor, section 194 contains a specific extension of the definition of **sexual offence** to offences in clause 1 of Schedule 1 to the *Sentencing Act 1991*, to avoid limiting its application.

The following table sets out, in summary form, the impact on each of the key processes in the Act as a result of the change to a consistent definition of **sexual offence**.

Section of the Act	Heading	Content	Previous Section	Change in scope of definition
Section 126 (1)(a)	Time limits for holding committal mention hearing	Must be within 3 months of commencing a criminal proceeding in the case of a sexual offence	<i>Magistrates' Court Act 1989</i> Sch 5 cl.4(2)	Now applies new, broader definition discussed above.
Section 99(1)	Time limits for determining certain committal proceedings for a sexual offence	Must be within 2 months of final committal mention hearing	<i>Magistrates' Court Act 1989</i> Sch 5 cl.10A	No change except addition of sexual servitude offences (subdivision 8EAA).
Section 123	No cross-examination of certain witnesses in sexual offence cases	Court must not grant leave to cross-examine in a proceeding for sexual offence – if witness is a complainant child or cognitively impaired and statement made or evidence recorded	<i>Magistrates' Court Act 1989</i> Sch 5 cl.11A	No change except addition of sexual servitude offences (subdivision 8EAA).
Section 133	Special rules applicable to sexual offences	Lists who may be present while complainant is giving evidence	<i>Magistrates' Court Act 1989</i> Sch 5 cl.17	No change except addition of sexual servitude offences (subdivision 8EAA).

Section of the Act	Heading	Content	Previous Section	Change in scope of definition
Section 163(2) and (3)	Time limits for filing certain indictments	(2) Indictment to be filed within 14 days unless extension granted (complainant child or cognitively impaired) (3) In all other sexual offence cases at least 28 days from the day on which the trial is listed to commence	<i>Crimes (Criminal Trials) Act 1999</i> s.4(2)(aa)	No change except addition of sexual servitude offences (subdivision 8EAA).
Section 194	Order for separate trial – sexual offence	Charges on same indictment should be tried together	<i>Crimes Act 1958</i> s.372 (3AC)	No change except addition of sexual servitude offences (subdivision 8EAA). Note, this section has extended the definition of sexual offence .
Section 212	Time limits for commencing trial for sexual offences	Trial must commence within 3 months from when a person is committed for trial, or 3 months from filing direct indictment .	<i>Crimes Act 1958</i> s.359A(1)	Now applies new, broader definition discussed above.
Part 8.2	Witnesses	Special rules and procedure for the giving of evidence by witnesses and complainants in sexual offence and family violence proceedings	<i>Evidence Act 1958</i> ss.37A to 37E, 41A to 41E and 41G to 41H	Previous sections have been clarified and consolidated. See detailed discussion at Part 8.2.

special hearing

Legislative History

This definition is new and has no direct relationship to any earlier provisions. This definition relates to provisions in Part 8.2, which was inserted into the Act by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*.

Previously, these provisions were located in the *Evidence Act 1958*. However, that Act did not contain a definition of the term.

Discussion

This definition relates to the special rules pertaining to witnesses in criminal proceedings for sexual offences.

At a **special hearing** the oral testimony of a witness (examination-in-chief, cross-examination and re-examination) in a trial is audiovisually recorded. A special hearing is conducted for trials that relate (wholly or partly) to a charge for a sexual offence where the complainant is under the age of 18 years or has a cognitive impairment.

For a more detailed discussion of special hearings see Division 6 of Part 8.2.

summary case conference

Legislative History

This definition is new and has no direct relationship to earlier definitions, although the term was used in the *Crimes (Criminal Trials) Act 1999*.

Discussion

The definition of **summary case conference** refers to section 54 of the Act, which sets out the purpose of a summary case conference and when it must be conducted.

A summary case conference is a new process for encouraging, and in some cases requiring, the parties to a summary matter to discuss it out of court early in the proceedings in order to attempt to resolve it or decide how it will proceed. A more detailed discussion of summary case conferences follows section 54.

summary hearing

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

A **summary hearing** is held in a summary proceeding. It is the actual hearing at which the charge is determined by calling evidence. Previously, this particular step in a proceeding did not have a clear statutory name. It was commonly referred to as either a 'defended hearing' or a 'contest'.

Summary hearings are discussed in more detail in relation to Part 3.3 of the Act.

trial judge

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition of **trial judge** is relevant to Part 5.7 of the Act which sets out procedure at trial and the powers of the trial judge.

The Act distinguishes between a judge who presides over pre-trial proceedings and a trial judge who presides over the trial.

Victoria Legal Aid

Legislative History

This definition is new and has no direct relationship to any earlier provisions.

Discussion

The definition is relevant to a number of sections in the Act, particularly the right of the accused to be informed of the contact details of **Victoria Legal Aid** either in a charge-sheet (see section 13) or disclosure briefs such as the preliminary brief and full brief (see sections 37 and 41).

It is also relevant when an accused is unrepresented, for example section 144 of the Act, which requires the court to warn the accused that it is their responsibility to apply for legal aid.

Finally, it applies to section 197, which allows the court to order Victoria Legal Aid to provide representation to an accused in a trial.

youth justice centre

Legislative History

This definition is based on the definition of 'youth justice centre' in section 3(1) of the *Magistrates' Court Act 1989*.

Discussion

The definition is relevant to the definition of imprisonment in section 283 of the Act which includes detention in a **youth justice centre**. It is also relevant to section 333 – Power to return accused to youth justice centre.

4 References to Parts

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

