Chapter 5
Trial on Indictment

Chapter 5 – Trial on Indictment

Chapter Overview

Chapter 5 regulates the procedures for all jury trials under the following Parts:

Part 5.1 – Introduction

Part 5.2 – Indictment and Place of Trial

Part 5.3 – Notifying Accused of Indictment

Part 5.4 – Discontinuing a Prosecution

Part 5.5 – Pre-trial Procedure

Part 5.6 – Sentence Indication

Part 5.7 – Trial

Part 5.8 – General

Important definitions (found in section 3) related to this Chapter include: ***arraignment***, ***direct indictment***, ***commencement of trial*** and ***trial judge***.

The Act also allows for interlocutory appeals to be taken before or during trial on important points of law, evidence and procedure. The procedures for interlocutory appeals are in Part 6.3, commencing at section 295.

Important general powers relevant to trial procedures (e.g. the power to adjourn proceedings and the power to issue warrants) are in Chapter 8. In particular, many of the special rules relating to the giving of evidence by witnesses in ***sexual offence*** cases contained in Part 8.2, apply to trials.

The following flowchart gives an overview of the processes that the Chapter creates, including links through to other relevant parts of the Act (e.g. interlocutory appeals).

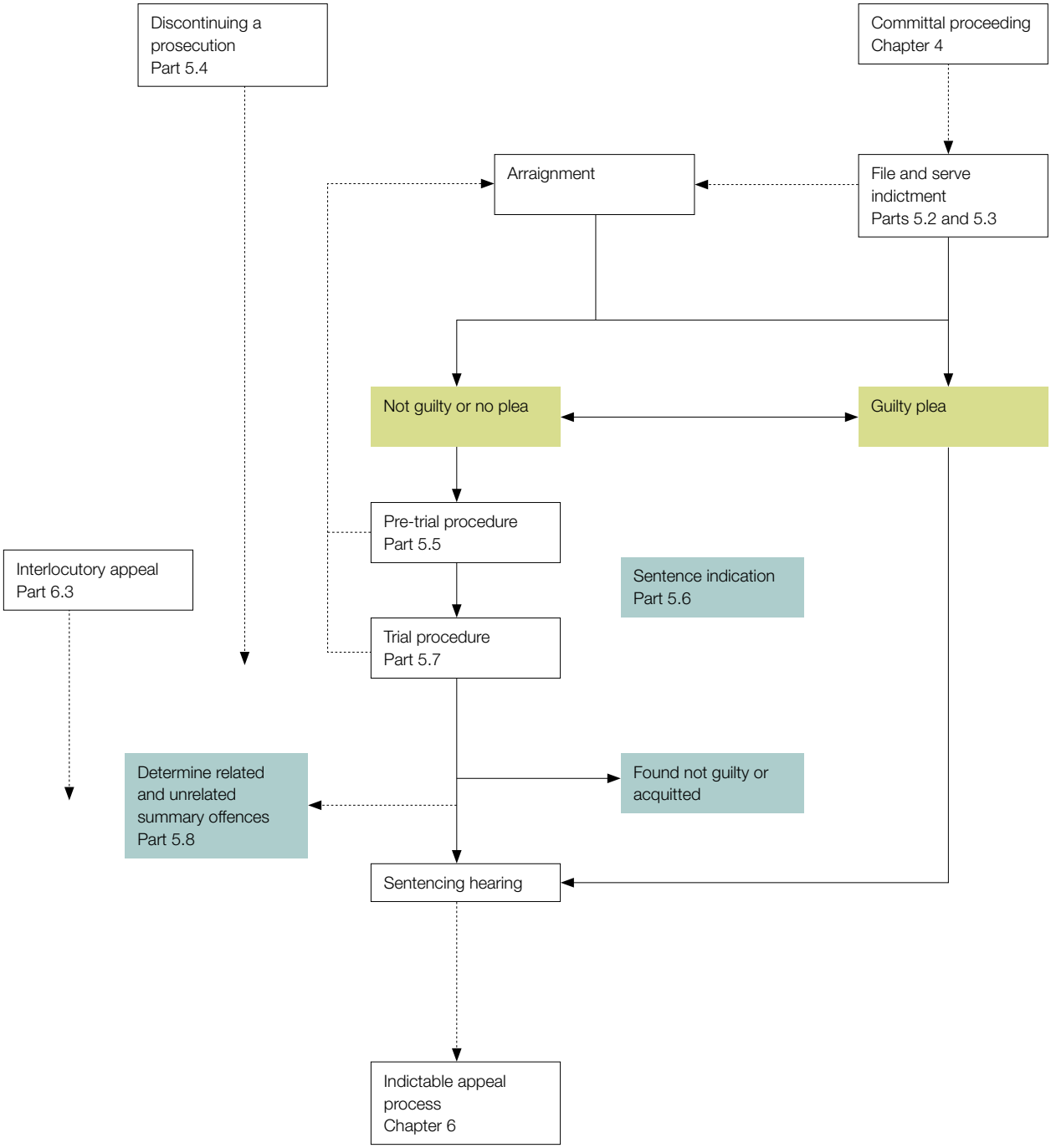
Trial on Indictment

LEGEND:

Court responsibility

Accused responsibility

Optional process


Discontinuing a prosecution Part 5.4
Committal proceeding Chapter 4
Arraignment
File and serve indictment Parts 5.2 and 5.3
Not guilty or no plea
Guilty plea
Pre-trial procedure Part 5.5
Interlocutory appeal Part 6.3
Sentence indication Part 5.6
Trial procedure Part 5.7
Determine related and unrelated summary offences Part 5.8
Found not guilty or acquitted
Sentencing hearing
Indictable appeal process Chapter 6

Legislative History

Many provisions in Chapter 5 are based on provisions from the *Crimes Act 1958* and the *Crimes (Criminal Trials) Act 1999*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Trial procedure has traditionally been a mixture of common law and legislation. Typically, legislation developed to overcome specific problems with the common law. As a result, the range of statutory provisions in force immediately before the Act commenced was neither complete nor particularly consistent. Without attempting to be a code, Chapter 5 is structured so as to walk the reader through the trial process in a basic chronological order starting with committal for trial and finishing with sentencing after a jury verdict. The Chapter is designed to continue to operate alongside existing common law and fair trial principles.

The Chapter applies to trials in both the County Court and the Trial Division of the Supreme Court. Differences in procedure and practice between those two courts are usually reflected in practice directions. This Chapter incorporates provisions from the *Crimes Act 1958* and the whole of the *Crimes (Criminal Trials) Act 1999*. However, those processes have been amended and adapted in order to create a coherent regime. See the *Ready Reckoner Previous Law to Criminal Procedure Act 2009* which identifies what has happened to the substance of each relevant provision in those Acts.

Overall, the Act takes the approach that there is one criminal proceeding and the jurisdiction of an individual court will be enlivened at different times during that proceeding. This means that in indictable proceedings, the filing of an indictment (previously known as a 'presentment') does not formally commence proceedings where there has been a committal for trial, but does commence proceedings where there has been no committal for trial (i.e. a ***direct indictment***, as defined in section 3).

The issue of when a criminal proceeding commences was highlighted by a recent decision of the Court of Appeal in *R v Taylor (No. 2)* [2008] VSCA 57 (*Taylor (No. 2)*), which concerned the interpretation of the phrase "any proceeding that commences" in section 607 of the *Crimes Act 1958*. The essential question was whether, in relation to a jury trial, the proceeding commenced on the filing of the presentment or with the filing of the initial charges in the Magistrates' Court.

Contrary to the position of both parties, the court held that the proceeding had commenced when the presentment was filed. It further held that, on a retrial, a new proceeding commenced with the filing of a new presentment. The reasoning applies to any new presentment filed, whether as a result of a severance or by filing over.

To clarify this issue section 5 of the Act provides that a criminal proceeding is commenced by filing a charge-sheet in the Magistrates' Court, by filing a direct indictment, or by a court direction that a person be tried for perjury. The filing of an indictment that is not a direct indictment (i.e. where the ***accused*** was committed for trial on a charge in the indictment or for any related offence) will not commence proceedings; it will simply enliven proceedings that already exist.

Before *Taylor (No. 2)*, this approach was consistent with the generally held view of the status of proceedings where an indictment is filed after a committal for trial, as acknowledged in *Taylor (No. 2)* citing *R v Kelly* [1921] VLR 489 (FC), at paragraph 17.

The approach in *Taylor (No. 2)* also creates a difficult gap between committal for trial and the filing of the indictment. It tends to suggest that no court is seized of the matter during that time as there is no underlying proceeding.

Such a gap causes difficulties for several reasons:

- It is inconsistent with the approach that the Act takes of viewing criminal procedure as one process.
- It does not sit easily with the fact that the accused has been committed to a particular court for trial and will be on bail (or in custody) to appear in that court.
- It creates conceptual and practical difficulties for the court in dealing with matters during that period such as pre-trial issues, sentence indications and directions hearings.

The court in *Taylor (No. 2)* also relied on section 4(4) of the *Crimes (Criminal Trials) Act 1999*, upon which section 164 of this Act is based, and provided that, on the filing of a new presentment, the 'proceedings' on the previous presentment are stayed. The Court of Appeal considered that section 4(4) meant that each indictment represented the termination of the old proceeding and the commencement of a new one.

However, the Act treats criminal procedure as one process. Consistent with this approach, the filing of a first indictment after committal or a subsequent indictment (whether by way of filing over or otherwise), will represent a step in an existing criminal proceeding, rather than the commencement of a new one.

In order to clarify this, the Chapter:

- expressly applies when either an accused is committed for trial or a direct indictment is filed (see section 158)

- makes it clear that a ***direct indictment*** (but no other kind of indictment) commences a criminal proceeding (see sections 161 and 162)
- provides that a fresh indictment does not commence a new proceeding but does discontinue the proceedings for the same offence or a related offence on the earlier indictment (see section 164).

The definition of ***direct indictment*** in section 3 also makes it clear that an indictment is only a direct indictment if the ***accused*** was not committed for trial on any of the charges in the indictment, or for any related offence.

The transitional arrangements for this Chapter (set out in Clauses 8 and 9 of Schedule 4 to the Act) also operate on the basis that there is one criminal proceeding. Subclause 8(1) of Schedule 4 provides that the provisions in Chapter 5 apply to any proceeding where the accused is committed to stand trial, or is directly indicted on or after 1 January 2010. This transitional provision is of broad (and ongoing) application. It applies to all new matters. Subclause 8(2) clarifies that where a proceeding commenced before the commencement day but to which Chapter 5 applies, that proceeding is deemed to be a criminal proceeding commenced under Chapter 2 of the Act. Subclause 8(2) aligns with the approach adopted in this Act that there is one proceeding.

There are several exceptions to this general transitional provision which mean that some provisions apply more quickly. These are discussed in sections 168, 216 and 241 in this Chapter and also in Schedule 4 to the Act.

Subclause 9(1) of Schedule 4 to the Act provides that where a new trial or further hearing is ordered on appeal, the Act applies to the new trial or hearing. This provision minimises the complexity that might arise if the previous laws continued to apply to a trial some years after the commencement day (for example, if there was a trial under previous laws, an appeal and then a new trial held).

Subclause 9(2) of Schedule 4 provides that the exception to this is where the new trial or hearing is ordered on an ***interlocutory appeal*** or case stated (discussed in Chapter 6). In that situation, to avoid changing the relevant criminal procedure laws in the middle of a trial or potentially within days of the previous trial, the new Act does not apply.

Chapter 5 also:

- creates a more clearly defined pre-trial period and extends the powers of the court to resolve issues and make orders during that period (see discussion in relation to Part 5.5)
- codifies and modernises the DPP's power to discontinue a prosecution (see discussion in relation to Part 5.4)
- defines when a trial commences (see discussion in relation to section 210)
- modernises historical language, for example:
  - 'presentment' becomes 'indictment'
  - 'further presentment' becomes 'criminal record'
  - *'nolle prosequi'* becomes 'discontinue a prosecution'
  - *'autrefois acquit/convict'* become 'previous acquittal/conviction'
  - *'demurrer'* becomes 'application to quash a charge'.

Part 5.1 – Introduction

Part Overview

This Part contains only section 158 and relates to the application of the Chapter.

158 Application of Chapter

Overview

This section confirms that the trials Chapter applies from committal for trial or the filing of a ***direct indictment***.

Legislative History

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

Relevant Rules/Regulations/Forms

For the application of Order 2 to this Chapter, see rule 2.01 of the County Court Criminal Procedure Rules 2009.

Discussion

This section declares that the Chapter applies when a person is committed for trial or a direct indictment is filed.

As discussed in detail in the Chapter 5 overview, the Court of Appeal in *Taylor (No. 2)* held that filing a presentment (now an 'indictment') commences a new criminal proceeding, even when the ***accused*** has been committed for trial. This created a conceptual gap between committal for trial and the filing of the indictment. It tended to suggest that no court is seized of the matter during that gap as there is no underlying proceeding.

This section closes that gap consistent with the underlying philosophy that the Act takes in viewing criminal procedure as one process. It also widens the period of time during which the trial court can case manage the proceeding and hear and determine pre-trial issues (see discussion of how the Act deals with when and how a criminal proceeding is commenced in section 5).

At a more technical level, the section means that the procedures in the Chapter are presumptively available at any time after the events set out in this section, unless they are expressly limited to certain time periods (e.g. a sentence indication can only be given under section 207 after an indictment has been filed). Previously, a number of provisions expressly provided for when a particular power or process was available. The approach in the Act has allowed for simpler drafting.

Part 5.2 – Indictment and Place of Trial

Part Overview

This Part gathers together core provisions in relation to indictments and provides for where a trial is to take place. The following flowchart sets out the process for filing indictments, including related powers (e.g. amendment of indictments), set out in this Part. It also includes references to the process of serving indictments and securing the attendance of the accused in court. Those processes are in Part 5.3.

159 DPP or Crown Prosecutor may file an indictment

Overview

This section gives the ***DPP*** or a ***Crown Prosecutor*** the power to file an indictment.

An indictment is a written document that contains charges that the accused faces which must, if the accused pleads not guilty, be tried before a jury. Under the Act, only the DPP or a Crown Prosecutor can file an indictment and therefore put a person on trial. There are two kinds of indictment in the Act:

- an indictment that contains a charge on which the accused was committed for trial, or a charge for a ***related offence*** (defined in section 3)
- a ***direct indictment*** (defined in section 3) which is an indictment that does not contain a charge on which the accused was committed for trial (or a charge for a related offence).

A direct indictment will be used in two different situations. First, when the Magistrates' Court refuses to commit the accused for trial but the DPP disagrees with that decision. Second, and much more rarely, where there has been no committal proceeding at all. The definition of direct indictment is discussed in detail under section 3.

Legislative History

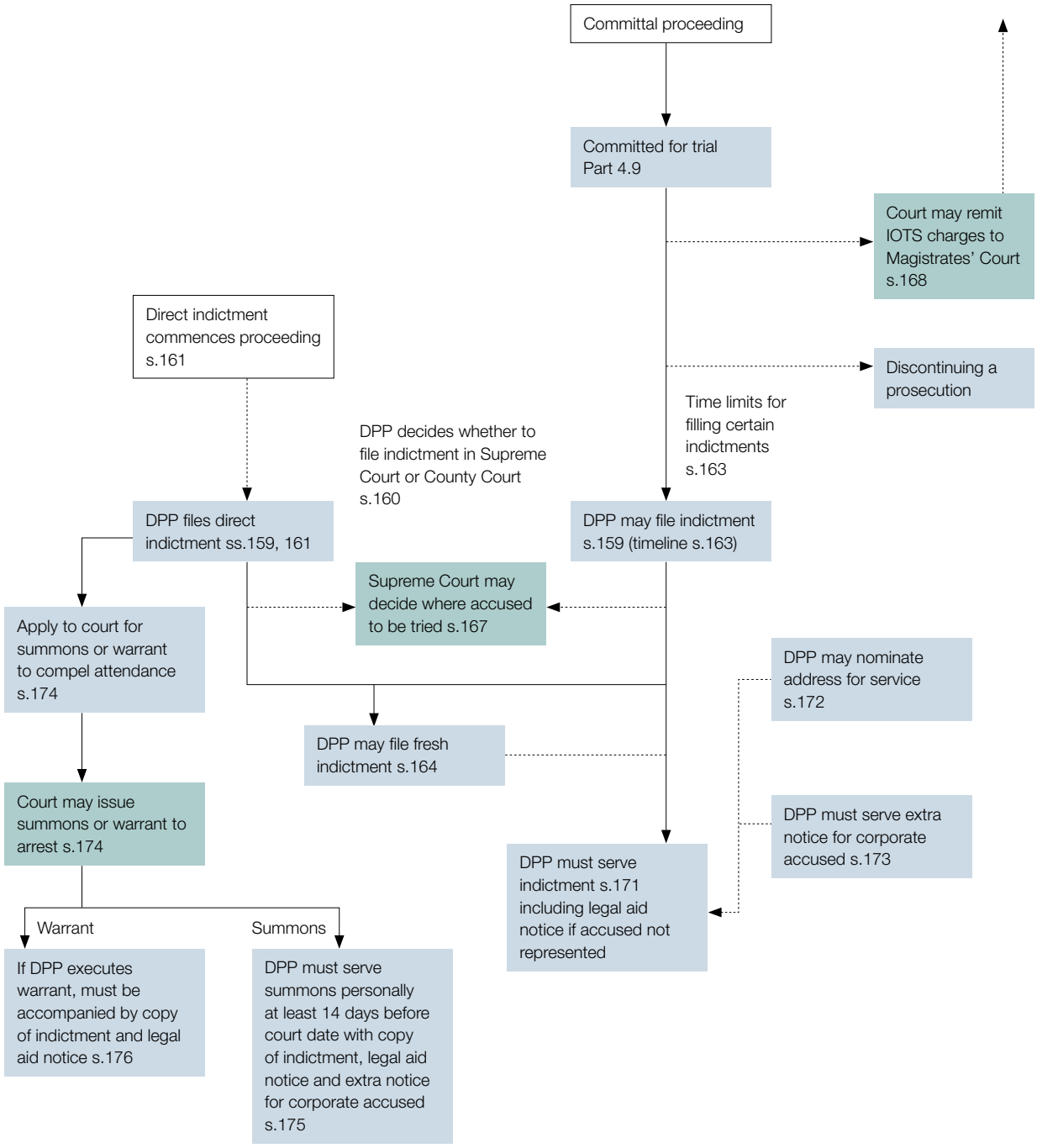
This section is based on section 353(1) and rule 1 of the Sixth Schedule to the *Crimes Act 1958*. It has been substantially redrafted and incorporates changes to terminology, which are discussed in more detail below.

Relevant Rules/Regulations/Forms

For filing an indictment see, rule 4.02 of Order 4 of the Supreme Court (Criminal Procedure) Rules 2008.

In the County Court, see rule 2.02 of the County Court Criminal Procedure Rules 2009 and also the County Court Criminal Procedure Practice Note.

Filing and Serving an Indictment



LEGEND:

Court responsibility | Prosecutor responsibility | Optional process

Discussion

Previously, a written document containing a charge or charges (previously called 'counts') alleged against an accused was referred to as a 'presentment'. The accused is tried by a jury on the charges in that document. The Act replaces 'presentment' with the term 'indictment' to refer to this document.

Most other Australian jurisdictions use the term 'indictment' rather than 'presentment'. Victoria traditionally used presentment because indictment was reserved for the system of indictment before a grand jury. This procedure was available only in Victoria and has been abolished by the Act (see section 253). Therefore, the word indictment can now be used here as it is in other jurisdictions.

Traditionally, the prosecution 'made presentment' against the accused and that act commenced the trial process. Making presentment involved the prosecutor handing the presentment to the trial judge's associate and the trial would then immediately commence. This process reflected the fact that there was limited pre-trial disclosure and no requirement to advise an accused of the charges that they were to face at trial. Legal and evidential issues were argued and ruled on during trial.

This process is far removed from modern case management techniques and the development and acceptance of the importance of giving an accused early notice of the charges against them and of full disclosure. In an attempt to rationalise the notion of 'making presentment' with contemporary case management practices, the rules of court previously deemed a presentment to have been filed once presentment had been made. They also required the presentment to be lodged with the associate of the Judge before whom presentment was to be made who in turn was required to forward it to the prothonotary or registrar (depending on the court). See further, rule 4.03 (2), (3) and (4) of the Supreme Court (Criminal Procedure) Rules 2008 and rule 11.04 (2), (3) and (4) of the County Court Miscellaneous Rules 1999.

The Act simplifies this rather complex practice by removing the process of 'making presentment'. The indictment is simply a document and that document is brought to the court's attention by being filed, with the technical requirements for filing to be determined by the relevant court (in rules or practice directions).

The Act removes the need for the separate 'notice of trial' process and the complexities previously contained in rules, by requiring all indictments to be filed (see section 171 for the obligation on the ***DPP*** to then serve the indictment on the accused).

Section 159(1) confirms that an indictment can be filed at any time unless the Act sets specific time limits, which it does in section 163. Section 163 sets time limits for all indictments that follow an accused being committed for trial. That leaves a direct indictment, which can be filed at any time. The definition of ***direct indictment*** is discussed in detail under section 3.

This section is expressly subject to the powers of the DPP and a ***Crown Prosecutor*** contained in the *Public Prosecutions Act 1994*, and to any limitations on those powers in that Act.

Under section 159(2), indictments have to comply with Schedule 1 to the Act. This provides for a simplified set of requirements for the content, form and particulars of charges in indictments (note that Schedule 1 also applies to charges on a charge-sheet in the Magistrates' Court). Schedule 3 to the *Crimes Act 1958* has not been re-enacted. As a result, there are no forms for particular charges, or for an indictment generally. This will provide flexibility to the DPP in drafting indictments, particularly given the modern practice of giving copies of the indictment to juries.

Note that, as an indictment must be 'in writing' and 'signed', it could be filed electronically using sections 8 and 9 of the *Electronic Transactions (Victoria) Act 2000* with the consent of both parties to the transaction, namely the DPP and the court.

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

Overview

This section gives the DPP discretion as to which court an indictment should be filed in and sets out mandatory criteria for the exercise of that discretion.

Legislative History

This section is based on section 353(7) and (8) of the *Crimes Act 1958* with minor changes to drafting and structure. This has been separated into its own section to reflect the discrete nature of the discretion.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

There are no substantive changes to this power. While the Supreme Court has jurisdiction to hear all indictable offences, the County Court's jurisdiction is limited by section 36A(1) of the *County Court Act 1958*. The primary offences that are within the Supreme Court's exclusive jurisdiction are treason, murder and attempted murder. See section 167 for the Supreme Court's power to, in effect, override the DPP's decision under this section.

161 Direct indictment commences criminal proceeding

Overview

This section provides that the filing of a direct indictment commences a criminal proceeding.

Legislative History

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

Relevant Rules/Regulations/Forms

For filing an indictment see, rule 4.02 of Order 4 of the Supreme Court (Criminal Procedure) Rules 2008.

In the County Court, see rule 2.02 of the County Court Criminal Procedure Rules 2009 and also the County Court Criminal Procedure Practice Note.

Discussion

This section, along with section 162 has been included in the Act to make it clear precisely when a criminal proceeding commences. See the discussion in the Chapter 5 Overview which explains why this approach has been taken.

A ***direct indictment*** is an indictment where the accused has not been committed for trial on the offence charged, or a ***related offence***. In accordance with the definition of ***direct indictment*** in section 3, 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

The definition of ***direct indictment*** is discussed in more detail in section 3.

162 Filing of any other indictment does not commence criminal proceeding

Overview

This section declares that an indictment other than a direct indictment does not commence a criminal proceeding.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section, along with section 161 have been included in the Act to make it clear precisely when a criminal proceeding commences. See the discussion in the Chapter 5 overview which explains why this approach has been taken.

163 Time limits for filing certain indictments

Overview

This section provides time limits for filing indictments in cases where the accused has been committed for trial. These are:

- for ***sexual offences*** where the complainant is a child or cognitively impaired, within 14 days of committal
- for all other sexual offences, at least 28 days before trial
- for all non-sexual offence cases, within 6 months of committal.

Legislative History

This section is based on section 353(2) of the *Crimes Act 1958* and section 4(2) of the *Crimes (Criminal Trials) Act 1999*. However, the time limits have all been brought into the Act, rather than being in regulations. Section 4(2)(1) of the *Crimes (Criminal Trials) Act 1999* (presentment must be filed 14 days before first directions hearing) has not been re-enacted.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 163(3)(a) uses the phrase "before the day on which the trial is listed to commence". This phrase is used throughout the Act to describe time limits that flow backwards from a proposed trial date. See also section 210 which defines when a trial formally commences.

The note to this section refers to the court's general power, in section 247, to extend or abridge time limits under this Chapter.

Although the requirement to file an indictment 14 days before the first directions hearing has not been re-enacted, the court has broad case management powers under section 181 at directions hearings. Equally, section 247 can be used to abridge the time for filing an indictment. In combination, these sections give the court the power to ensure that indictments are filed early, if that is necessary for proper case management.

It is important to note that the definition of ***sexual offence*** in section 3 has changed in order to provide a single consistent definition rather than the different definitions which were previously found in various pieces of legislation. See the more detailed discussion of this issue under section 3.

As a result, this section now also applies to the sexual servitude offences in subdivision (8EAA) of Division 1 of Part 1 of the *Crimes Act 1958*, and indictments containing these offences must now comply with the time limits in the section.

164 Filing of fresh indictment

Overview

This section declares and preserves the power of the ***DPP*** to file a ***fresh indictment*** even though that may happen after the time limits for filing indictments in section 163 have expired.

Legislative History

This section is based on section 4(3) and (4) of the *Crimes (Criminal Trials) Act 1999*. The language has been changed so that it no longer refers to proceedings being 'permanently stayed' (for reasons discussed below). For clarity, it also expressly defines ***fresh indictment***.

Relevant Rules/Regulations/Forms

For filing an indictment see, rule 4.02 of Order 4 of the Supreme Court (Criminal Procedure) Rules 2008.

In the County Court, see rule 2.02 of the County Court Criminal Procedure Rules 2009 and also the County Court Criminal Procedure Practice Note.

Discussion

This section makes it clear that the time limits in section 163 do not prevent the ***DPP*** from filing a fresh indictment, namely an indictment which includes a charge or charges for the same offence or a ***related offence*** (discussed under section 3).

Such an indictment will be filed where, in the course of proceedings, there is a need to file an indictment that is different from the original indictment filed (this is traditionally described as 'filing over' the original indictment), for example:

- where counts are severed
- where an order for separate trials is made
- where plea negotiations result in agreed changes to counts
- where the jury in a trial is unable to agree on some counts but has returned verdicts on others
- where, as a result of, for example new evidence, further review of the evidence or a mistake coming to light, the DPP wishes to file an amended indictment. Note that the ability of the DPP to file an amended indictment is separate to the power of the court to order an amendment under section 165, which is required if the amendment is to be made during trial.

As discussed in detail in the Chapter 5 overview, the Court of Appeal in *Taylor (No. 2)* held that a filed over presentment commences a new criminal proceeding. One of the reasons for that conclusion was the language of section 4(3) and (4) of the *Crimes (Criminal Trials) Act 1999* which described the proceedings on the original indictment as 'permanently stayed'. To avoid this problem, the Act describes the original indictment as 'discontinued' which more accurately reflects the fact that while that document no longer has any force, the criminal proceeding which it represented continues.

165 Order for amendment of indictment

Overview

Section 165 provides a broad discretion to allow the court to order that an indictment be amended, unless the change would cause injustice to the accused. Section 165(2) ensures that the amended indictment is valid for all purposes.

Legislative History

This is based on section 372(1) and (2) of the *Crimes Act 1958*. The requirement that the indictment be 'defective' has been removed (discussed below), as has the requirement that the order be noted on the indictment. The noting of orders is a matter for the court and does not need to be legislated.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section now provides a broad power for the court to order that an indictment be amended. As discussed under section 164, the DPP in Victoria can, as a matter of absolute discretion, file a fresh indictment before trial, effectively giving the DPP the power to amend indictments. This contrasts with the position in, for example, New Zealand, where the Crown must apply for leave to amend an indictment.

The power in section 165 has its main application during trial where leave is required in order to amend an indictment. Previously, it was technically possible for the ***DPP*** to enter a *nolle prosequi* during trial and therefore circumvent the need to seek leave to amend (although this has not been the practice of the DPP in Victoria). The process to discontinue a prosecution (which replaces *nolle prosequi*) is now formally unavailable during trial (discussed in more detail under section 177). If the DPP wants to end a trial without verdict then he or she must either make a successful application for a discharge of the jury or indicate an intention not to proceed, in which case an acquittal can be entered. Section 241 allows the judge to enter such an acquittal on the record rather than directing the jury to return a verdict of acquittal.

In summary, the Act proceeds on the basis that once a trial commences the indictment is final unless the court orders an amendment, and the trial should end with either a verdict or the discharge of the jury.

The amendment power in this section may also be used where the accused objects to the form of the indictment and the error can be fixed by amendment. Similarly, an amendment can be made where it is efficient to do so, for example where the amendment is minor and the trial is commencing shortly. This avoids the need for a new indictment to be prepared and signed in accordance with section 159. However, as it becomes more common to give the jury a copy of the indictment (in accordance with section 223) this may become a less common reason to use this section.

As noted, the forerunner to this section (section 372(1) and (2) of the *Crimes Act 1958*) required that the indictment be 'defective' before an amendment could be ordered. This requirement has been removed from section 165 in order to create a more flexible discretion and avoid technical arguments about what 'defective' means.

The phrase 'without injustice to the accused' has been carried over and there is no reason why the principles that have developed in relation to amendment should not continue to apply. In particular:

- Whether there will be injustice to the accused depends on the stage of trial that the application to amend is made. It will be easier to justify an amendment early in the trial rather than later – *R v Evans & Doyle* [1999] VSC 489.
- Nonetheless, an amendment can be made at any time during trial, although there is conflicting authority as to whether that includes after verdict – *R v Dossi* (1918) Cr App R 158 (in which it was held that an amendment was available post verdict so long as it was immaterial to the verdict); *R v Burns* (1920) 20 SR (NSW) 351 (in which it was held that there can be no amendment after verdict).
- When the amendment occurs after the ***arraignment***, the accused should ordinarily be re-arraigned, and certainly if the amendment substantially alters the elements of the offence, or the particulars representing the elements of the offence (*Maher v R* [1987] HCA 31; (1987) 163 CLR 221).
- There is some conflict in the authorities as to whether an amendment that involves substituting/adding a new charge or substantially altering an existing charge can be made and, if so, when (see e.g. *R v Hult* (1903) 6 WALR 56 c.f. *R v Hall* [1968] 2 QB 788). However, the broad nature of the discretion in this section would support the view that such amendments are technically permissible, but less likely to be ordered than more minor amendments as a matter of discretion.
- The power to amend applies to indictments containing common law offences in the same way as to statutory offences; *R v Hoser* [1998] 2 VR 535.
- The 'injustice to the accused' can be ameliorated by granting an adjournment of the trial (either with or without discharging the jury) to allow the accused to prepare to meet the amendment.

As discussed throughout this guide, the Act takes the same approach to issues across jurisdictions unless there is a good reason for a difference. See section 8 for a nearly identical provision in relation to charge-sheets in the Magistrates' Court.

See also section 412 which gives a broad, catch-all power to amend documents relevant to criminal procedure. However, that section does not include charges as the specific power in section 165 includes a further protective requirement that the amendment not cause 'injustice to the accused'.

Section 337 allows an amendment under this section to be made on the court's own motion or on the application of a party.

166 Errors etc. in indictment

Overview

Section 166 prevents technical errors from being used to invalidate an indictment.

Legislative History

This section is based on section 375 of the *Crimes Act 1958*. It also deals with the subject matter of section 370 of that Act but in a different way, discussed in more detail below.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Previously, section 370 of the *Crimes Act 1958* provided that a presentment was not "open to any objection" if it complied with rules under the *Crimes Act 1958.* The Act is less prescriptive. It requires that indictments comply with Schedule 1 without setting forms or rules for the way in which charges for certain types of offences are drafted. Section 166(1) takes a different approach to the issue of validity. It provides that an indictment is not invalid only by reason of a failure to comply with Schedule 1. This approach is designed to allow decisions as to the validity of indictments to focus on issues of substance rather than of technical compliance.

The tools for determining substantive objections to the form of an indictment are found in section 199(1)(c) of the Act which expressly allows an application to quash a charge in an indictment to be heard and decided before trial (replacing the historical language of a *demurrer*), and in section 165; which allows for amendment of an indictment provided the amendment will not cause injustice to the accused.

Section 166(2) re-enacts the substance of section 375 of the *Crimes Act 1958* in relation to errors as to time and date. However, it modernises the historical language used. The substance of the provision is the same; indictments are not invalid because of mistakes about time or date, subject to the important exception where time is an element of the offence. Again, this should be viewed as part of a package with section 165 which allows an indictment to be amended as long as such amendment will not cause injustice to the accused.

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

Overview

Section 167 allows the Supreme Court to move cases between the Supreme and County Courts, effectively allowing the court to overrule the DPP's decision as to which court to file the indictment in, under section 160.

Legislative History

This section is based on section 359(1) of the *Crimes Act 1958*. The remainder of that section dealt with change of venue other than between the County and Supreme Courts. That topic is now covered in section 192 of the Act.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This power is ordinarily used for trial list management purposes. For example, in regional courts where judges sit on circuit, this power can be useful where one court completes its allocated trial work within the session and can take work from the other.

Section 359(4) of the *Crimes Act 1958* allowed an order of this kind to be made *ex parte*, which is no longer the case. Section 337 of the Act allows an order under this section to be made on the court's own motion or on the application ofa party.

168 Court may transfer certain charges to Magistrates' Court

Overview

This section allows indictable offences that can be heard summarily to be transferred back to the Magistrates' Court if the accused consents and the court considers it appropriate. This power cannot be exercised during trial.

Legislative History

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

Relevant Rules/Regulations/Forms

For the transfer of an offence that a magistrate refused to hear and determine summarily, see rule 82 of the Magistrates' Court Criminal Procedure Rules 2009.

Discussion

Before the Act, when an accused was committed for trial or plea for an indictable offence triable summarily, there was no mechanism for the charge to be referred back to the Magistrates' Court for a summary hearing by that court. This section provides such a power.

While it is not anticipated that the power will be used very often, it is designed to provide case management flexibility where the reason for the matter proceeding in the County Court or Supreme Court no longer exists, for example:

- where purely indictable charges against an accused are withdrawn by the ***DPP*** and the remaining charges are indictable offences which are triable summarily
- where an accused initially elects to go to trial but changes their mind and is willing to proceed summarily (and the offences are ones which are within the jurisdiction of the Magistrates' Court)
- where the charge that the DPP decides to proceed with is significantly different (involving lesser offences) than those on which the accused was committed for trial.

The accused's consent is required before a charge can be remitted. This protects the accused's right to trial by jury for an indictable offence. However, in order to ensure that the process cannot be used to delay proceedings, an accused will not be able to elect trial by jury once a matter has been remitted to the Magistrates' Court under this section (see subsection (3)).

The accused's consent is necessary but not sufficient and the court still has to have regard to the matters in section 29(2) (used by the Magistrates' Court in deciding whether to offer a summary hearing in the first instance).

If a charge of this kind went through a committal proceeding as the result of an express decision by the Magistrates' Court under section 29 to not offer the accused a summary hearing (e.g. because it considers the matter to be too serious) it will ordinarily be inappropriate for the County Court or Supreme Court to remit the matter back.

However, the section does include a limited exception, but only where there has been a significant change of circumstances. This exception does not create a general review process for decisions by the Magistrates' Court to decline to offer a summary hearing, rather it provides greater flexibility in case-management, where appropriate.

As a result, section 168(2) provides that the court must not transfer "...unless there has been a significant change in the charges faced by the accused or in the prosecution case against the accused". This gives the court flexibility to order transfers in appropriate cases while ensuring that Magistrates' Court decisions under section 29 are generally final.

In order to avoid delays after the trial begins, the remittal power cannot be exercised during trial. Section 337 allows an order under this section to be made on the court's own motion or on the application of a party.

In addition to transferring a charge, section 168(4) provides that the transferring court may order the accused to appear before the Magistrates' Court on a specified date, or make remand or bail orders.

Subclause 8(3) of Schedule 4 to the Act provides that on and from the commencement day (1 January 2010), section 168 (this section), applies to an accused committed for trial before the commencement day.

169 Place of hearing of criminal trial

Overview

This section declares the long-standing principle that a charge should presumptively be heard in a place closest to the place where the offence is alleged to have been committed.

Legislative History

There is no direct statutory predecessor to section 169(1) in relation to trial courts. It is based on a modified and simplified version of clause 1 of Schedule 2 to the *Magistrates' Court Act 1989* and the definition of 'proper venue' in section 3 of that Act. Section 11(1) of the Act provides an almost identical regime in the Magistrates' Court.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The proposition that a criminal trial should presumptively be held closest to the place where an offence is committed is longstanding (see e.g. *R v Giddings* [1916] VLR 359). The policy underlying the presumption is that allegations of criminal offending should be determined within the community that the offences are said to most directly touch.

This section formalises that rule. It effectively means that, while the prosecution retains a discretion as to which court (i.e. County or Supreme) the indictment will be filed in (under section 160), the trial itself must be held at the court location closest to the commission of the offence. A comparable rule is found in section 80 of the the *Commonwealth of Australia Constitution Act 1900* in relation to federal indictments which requires that a trial be heard in the State where the offence is alleged to have been committed.

Where an offence or offences are committed at a number of places, or where it is not possible to be certain where an offence was committed, it is expected that the trial will be held at the place which has the strongest geographical connection to the alleged offending for consistency with the principle underlying this section.

As indicated in section 169(1), the court has the power to order a change of place of trial under section 192.

Section 169(2) makes it clear that a failure to comply with the section does not render the trial invalid. This is designed to avoid any suggestion that a failure to comply is a fundamental defect in the trial rendering it a nullity.

170 Multiple charges or multiple accused on single indictment

Overview

This section provides that where the ***DPP*** has chosen to include more than one accused or more than one charge in an indictment, those charges have to be tried together unless the court orders otherwise.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is part of a simplified approach to multiple accused and multiple charges. It declares that the decision to include multiple accused and multiple charges in an indictment is for the prosecution, subject to the court's power to order otherwise.

Prior to the Act, presentment rule 2 (in the Sixth Schedule to the *Crimes Act 1958*) provided that charges could be joined in the same presentment if they were founded on the same facts or form or were part of a series of offences of the same or similar character. The presentment rules contained no statement about multiple accused, which were left to be dealt with by the common law. The final piece in the legislative puzzle was the confusing section 363 of the *Crimes Act 1958*, which allowed separate abettors and accessories to be included in the same presentment even in the absence of the primary offender. This combination of provisions gave no certainty or consistency to the way in which these issues were to be managed.

Regardless of the statutory confusion, rational and coherent principles to determine disputes about multiple accused and multiple charges have been developed (discussed in detail under section 193). The new simpler procedure in the Act is not intended to alter those principles, but to place them within a more coherent framework. In summary:

- Clause 5 of Schedule 1 allows multiple accused and multiple charges to be included in the same indictment. The only statutory criterion at this stage is that the charges must be for ***related offences***.
- Clause 6 of Schedule 1 confirms that a charge can name a number of accused regardless of the level or nature of the participation alleged against each.
- Section 170 (i.e. this section) confirms that where multiple accused and multiple charges are included in the same indictment, they must be tried together unless an order to the contrary is made under section 193 or 195.
- Section 193 provides the power to order a separate trial either in relation to multiple accused or multiple charges. Section 194 and 195 provide further specific rules in relation to sexual offences and conspiracy charges respectively.
- Section 199(1)(c) allows such applications to be decided at any time between committal for trial and the ***commencement of trial*** (along with many other orders).
- Section 200 requires the parties to notify the court (and discuss with each other) if an application is intended.

Part 5.3 – Notifying Accused of Indictment

Part Overview

The process for notifying the accused of an indictment has been simplified and reflects the second part of the simple two-stage process whereby the ***DPP*** first files the indictment (under section 159) and then serves it on the accused.

This process removes the need for the traditional 'notice of trial' and 'notice to prefer presentment' which are based on outmoded trial procedures which assumed that the accused would not be formally presented until the trial commenced. The notices mentioned above were a response to that situation in order to ensure that the accused was notified of trial. However, with time limits for filing indictments and more active case management during the pre-trial period, there is now no need for that more complicated system. The DPP will simply file and then serve an indictment.

The most significant change from previous law in this Part is found in sections 174 – 176 which simplify the very old fashioned process for bringing an accused to court on a ***direct indictment***.

171 Copy indictment to be served

Overview

This section requires the DPP to serve an indictment on the accused as soon as practicable after it has been filed. A notice must also be served as well if the accused is unrepresented and stricter service rules apply if there has not been a committal hearing.

Legislative History

This section is based on, and consolidates and simplifies, section 353(2A) of the *Crimes Act 1958*, rule 4.03(2), (3) and 4 of the Supreme Court (Criminal Procedure) Rules 2008 and rule 11.04 (2), (3) and (4) of the County Court Miscellaneous Rules 1999.

Relevant Rules/Regulations/Forms

For the notice to accompany a copy of the indictment to be served on an unrepresented accused see:

- rule 4.03 in Order 4 of the Supreme Court (Criminal Procedure) Rules 2008 and Form 6-4A
- rule 2.03 and Form 2A of the County Court Criminal Procedure Rules 2009.

Discussion

Service of the indictment must be done 'as soon as practicable' after filing. If the accused is unrepresented, a notice must also be served in the form prescribed in the rules of court. It should be noted that the requirements

for the content of that form have changed to include express reference to the right to be informed of an entitlement to legal aid in section 25(2)(e) of the *Charter*. It will be open to the ***DPP*** to decide whether to include the notice as part of the indictment or as a separate document. It should be noted that the Act does not re-enact the requirement to include on the indictment advice to the accused (in prescribed and old fashioned language) about legal representation.

For non-direct indictments (which are the vast majority of cases), the default position of ***ordinary service*** under section 394 applies. As well as a range of other service methods, this includes service in any way agreed between the parties.

Where a ***direct indictment*** has been filed, section 171(2) provides that the indictment must be personally served on the accused in accordance with section 391. This requirement reflects that a direct indictment commences a criminal proceeding and should be brought to the accused's notice in a more formal way. There are a number of ways of effecting ***personal service***. They include service on an accused's legal practitioner where written notice has been given to the informant or the prosecution.

Section 174 allows the DPP to apply for a summons or warrant when a direct indictment has been filed. When served or executed, the summons or warrant must have a copy of the indictment attached. That will ordinarily suffice for service under section 171(2) although the section makes it clear that a direct indictment must be personally served even when the DPP does not apply for a summons or a warrant (e.g. because of an agreement with the accused to serve the indictment without the need to issue process).

172 DPP may nominate address etc. for service of documents

Overview

This section allows the ***DPP*** to nominate service details on or with an indictment.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is permissive. It allows the DPP to nominate service details. This can be done on a notice accompanying an indictment or, for ease of reference, on the indictment itself. The section includes specific reference to email and fax in order to make it clear that electronic forms of service are acceptable if nominated.

The section is designed to complement section 392, which provides for how documents are to be served on the prosecution (including on the DPP). Section 392(3)(d) and (e) specifically allow the DPP to be served by any method nominated under this section and section 392(3)(da) permits service upon the DPP through a document exchange. The fact that the DPP does not nominate an electronic mode of service with the indictment does not prevent electronic service otherwise permissible under the *Electronic Transactions (Victoria) Act 2000*, including fax and email. This point is made clear in the note to section 392.

173 Extra notice for corporate accused

Overview

This section requires the DPP to give extra notice to a ***corporate accused*** of two issues:

- the date on which the corporate accused is required to appear
- the fact that the trial can be held in the absence of the corporate accused.

Legislative History

This section is based on section 353(2B) of the *Crimes Act 1958*. However, the previous reference to the date of the accused's 'arraignment' has been replaced with a general reference to the date on which the accused is required to ***appear***, for reasons discussed below.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is part of a series of provisions which deal with the management of cases involving corporate accused. In combination, those provisions create the following structure for indictable charges:

- A corporate accused cannot be compelled to ***attend*** before the court as it has no physical manifestation.
- A corporate accused can ***appear*** by a representative in accordance with section 334.
- The Magistrates' Court can conduct a committal proceeding in the absence of a corporate accused if the accused has had adequate notice of the committal hearing (see section 154).
- On committing a corporate accused for trial, the magistrate must order the accused to appear on the day on which the accused's trial is listed to commence or on any other day specified by the court (see section 144(2)(d)).

- If the ***corporate accused*** is committed for trial in its absence, the ***DPP*** (or the informant if the DPP does not act) must give notice to the corporate accused of the committal, the date which the accused must ***appear*** and the fact that the trial can be heard in the accused's absence if it does not appear (see section 148).
- Section 173 (i.e. this section) requires notice to be given to a corporate accused with the indictment but only if the section 148 notice was not given.
- It is an offence under section 252 for a corporate accused to fail to appear as ordered under section 144(2)(d), or on any other date ordered by the court.
- Section 214 allows the court to try a corporate accused in its absence, and to hear related summary offences.

This broadly reflects previous provisions. The key difference is that previously the date on which the corporate accused was required to appear was the 'arraignment'. In order to reflect contemporary case management, the corporate accused can now be required to attend on any day (e.g. at a directions hearing).

The ways in which a corporate accused can be served are set out in section 393.

174 Compelling attendance when direct indictment filed

Overview

This section simplifies the process for compelling the attendance of an accused where a ***direct indictment*** has been filed. The DPP applies for the issue of either a summons or a warrant. Presumptively, a summons is preferred, unless certain preconditions (set out in section 174(3)) are met.

Legislative History

This issue was previously dealt with in sections 66 and 67 of the *Magistrates' Court Act 1989*. However, as discussed below, the process has been substantially simplified and changed.

Relevant Rules/Regulations/Forms

For a summons under section 174(2)(a) of the Act, see rule 2.04(1) and Form 2B of the County Court Criminal Procedure Rules 2009.

For a warrant to arrest under section 174(2)(b) of the Act, see rule 2.04(2) and Form 2C of the County Court Criminal Procedure Rules 2009.

Discussion

In practice, sections 66 and 67 of the *Magistrates' Court Act 1989* have been used in cases where the accused either does not (or does not have to) attend court after an indictment has been filed. Such cases include in particular:

- when an indictment is filed but the accused is not currently subject to any legal process. For example where there has not been a committal proceeding, or where there was one but the accused was not committed for trial. These are now captured by the definition of ***direct indictment***
- when an accused is committed for trial in the ordinary way but absconds at some stage pre-trial.

However, there has been controversy as to which of these two situations the sections were genuinely designed for. They were based on sections 20 and 21 of the *Magistrates' (Summary Proceedings) Act 1975*. The notable difference between the two Acts is that the earlier provisions used the phrase "a person who is at large, whether the person is on bail or not", whereas the latter provisions simply refer to "a person who is at large". The earlier version suggests that a person can be "at large" and also on bail. That would lend some support to the proposition that the sections could be used in absconder cases as well as direct indictment cases.

Sections 66 and 67 of the *Magistrates' Court Act 1989* were used by the Crown in absconder cases until the late 1990s. At that stage, the ***DPP*** formed the view that the sections were in fact designed to deal only with direct indictment cases. That view is consistent with the detailed procedural protections in the sections which do not appear appropriate for simple absconder cases, but rather for situations where there is no other underlying legal process in relation to the charge.

The sections themselves were also complex. They required the DPP to obtain a certificate from the registrar or prothonotary to satisfy a judge of the same court of a matter within the knowledge of the registry (and apparent on the face of the file). Such processes are outdated in light of current case management practices.

As a result, the Act simplifies the processes for dealing with both direct indictment cases and absconder cases.

In relation to direct indictment cases, this section provides for a simple summons and warrant process. When a direct indictment is filed against an accused the court must, on the application of the DPP, issue a summons requiring the accused to attend court at a specified date and time. The summons must be served with a copy of the indictment and, if the accused fails to ***attend***, a warrant can be issued (for the interplay between service of the indictment under this section and the general obligation to serve an indictment see the discussion in relation to section 171).

A warrant can be issued instead of a summons, but only where the ***DPP*** can demonstrate, for example, that the accused is avoiding service or is a flight risk. As with a number of processes under the Act, this process is almost identical to the process for issuing a summons or warrant in the Magistrates' Court in relation to a ***charge-sheet***.

This also removes the need for a 'notice of trial' which previously added an additional layer of complexity to how a proceeding was commenced. Under the Act, where there has not been a committal, it is the filing of the indictment that commences the proceeding and the summons or warrant that compels attendance.

Absconder cases are dealt with under section 330, which applies across the Act and simply permits a court to issue a warrant whenever an accused fails to ***attend*** court when required to do so. Further, section 411 provides that, when an accused is arrested on such a warrant, they must, if practicable, be brought before the court which issued the warrant rather than the Magistrates' Court.

175 Service of summons

Overview

This section provides that a summons issued under section 174 after a ***direct indictment*** is filed must be served personally and accompanied by a copy of the indictment and any notices required to be given under section 171(1) (to an unrepresented accused), or a notice to a ***corporate accused*** in the same terms as that given under section 173.

Legislative History

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

Relevant Rules/Regulations/Forms

For service of notice and summons, see rules 2.03 and 2.04 and Forms 2B and 2C of the County Court Criminal Procedure Rules 2009.

Discussion

See section 391, which sets out how a document can be personally served.

176 Warrant to be accompanied by indictment and notice

Overview

This section provides that a warrant issued under section 174 after a ***direct indictment*** is filed must be accompanied by a copy of the indictment and any notice required to be given under section 171(1) (to an unrepresented accused).

Legislative History

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

Relevant Rules/Regulations/Forms

For the form of notice required to accompany a copy of an indictment see:

- Form 6-4A of the Supreme Court (Criminal Procedure) Rules 2008
- Form 2A of the County Court Criminal Procedure Rules 2009.

Discussion

Section 411 provides that, when an accused is arrested on any warrant, they must, if practicable, be brought before the court which issued the warrant rather than the Magistrates' Court.

Part 5.4 – Discontinuing a Prosecution

Part Overview

This Part deals with the new statutory power to discontinue a prosecution. Section 177 sets out how to discontinue a prosecution and section 178 provides for how to deal with a person who is in custody when a prosecution is discontinued.

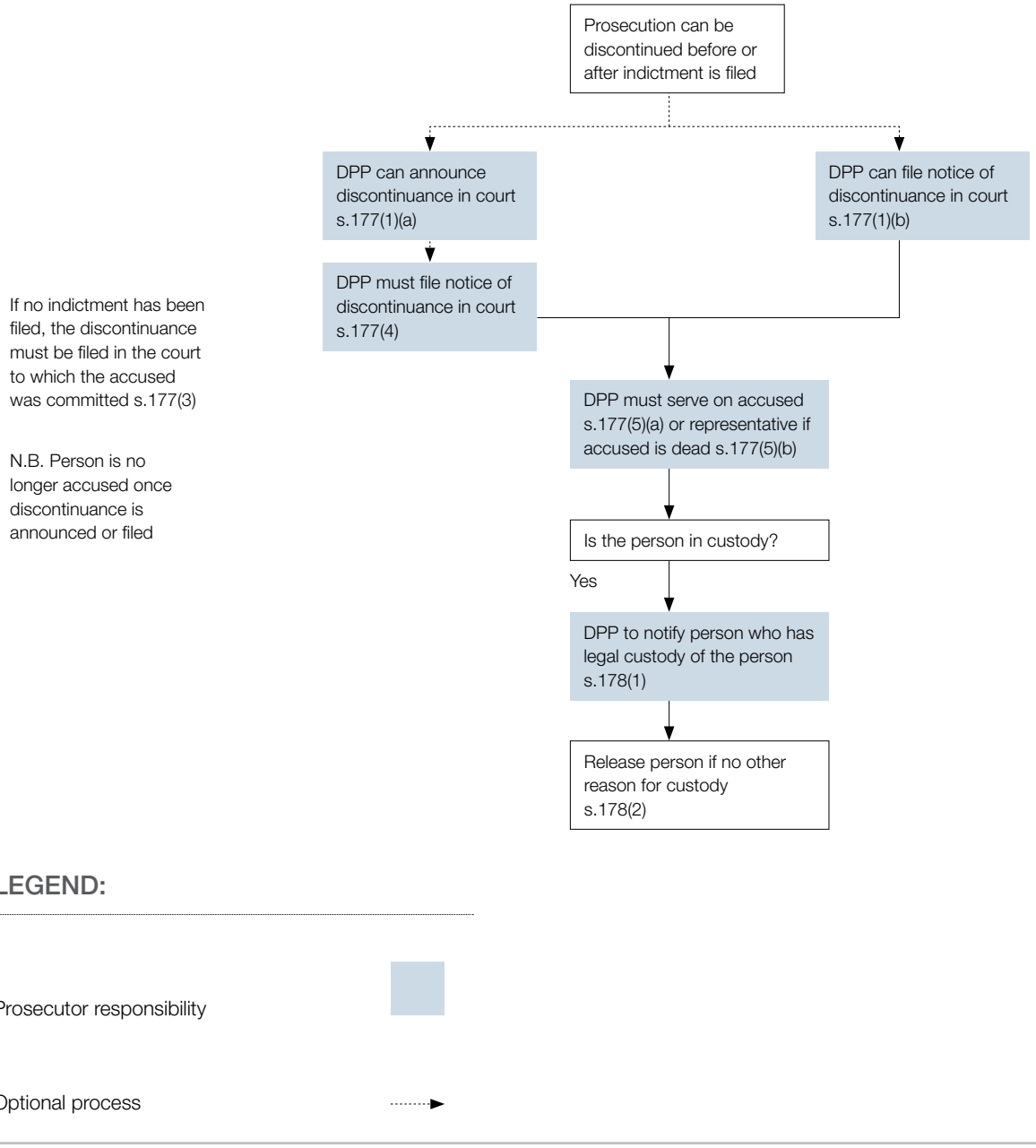
The following flowchart summarises the process created by this Part.

177 DPP may discontinue a prosecution without adjudication

Overview

This section codifies the common law power of *nolle prosequi*. It allows the ***DPP*** to discontinue a prosecution at any time other than during trial. The section requires that a discontinuance be in writing (whether or not it is first announced in open court). It also requires the notice to be served on the accused. Finally, as with a *nolle prosequi*, a discontinuance is not an acquittal.

Discontinuing a Prosecution



Legislative History

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

Relevant Rules/Regulations/Forms

For filing of notice of discontinuance, see rule 2.05 of the County Court Criminal Procedure Rules 2009 and also the County Court Criminal Procedure Practice Note.

Discussion

The term *nolle prosequi* literally translates to 'will not prosecute'. The power to enter a *nolle prosequi* derives from the royal prerogative. However, it came to be able to be exercised by the Attorney-General or, much more commonly, by the ***DPP***. It brings a prosecution to an end but does not amount to an acquittal and thus does not prevent subsequent prosecution for the same or similar charges (see *R v Swingler* [1996] 1 VR 257).

The *nolle prosequi* power has been replaced by this section which expressly empowers the DPP to discontinue a prosecution. This is consistent with the goals of modernising the language of criminal procedure and ensuring that the Act is as comprehensive as reasonably possible. Following this amendment, section 25(1) of the *Public Prosecutions Act 1994* has been repealed as it is no longer necessary. The power to discontinue a criminal proceeding, expressly vested in the DPP by this section, retains all the basic features of the *nolle prosequi*.

The word 'discontinue' has been chosen because:

- it is already used in the statute book to describe the ending of a prosecution, and in some contexts as a direct synonym for *nolle prosequi*; see, e.g. section 23(7) and (9) and section 27 of the *Public Prosecutions Act 1994*, section 9 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*
- the derivation 'discontinuance' can be used as a direct substitution for '*nolle*' in the commonly used phrase 'enter a *nolle*'.

This process captures most of the remaining features of the common law *nolle prosequi* power, with some modifications. In particular:

- a charge can be discontinued other than during trial (discussed in more detail below)
- a charge can be discontinued regardless of whether an indictment has been filed
- a discontinuance does not amount to an acquittal
- a discontinuance can be announced in open court or filed by way of written notice of discontinuance
- if the discontinuance is announced in open court, the DPP must then, as soon as practicable, file written notice of discontinuance
- a written notice of discontinuance must be personally signed by the DPP. It must also, as soon as practicable, be served on the accused
- where the accused is dead, the notice must be served on the legal practitioner last known to be acting for the accused or, if there is no lawyer known to have been acting, on the accused's next of kin (if known).

This procedure only applies to indictable charges. Charges for related or unrelated summary offences which are before the County Court or the Supreme Court can simply be withdrawn in the same way that summary charges are dealt with in the Magistrates' Court (see further discussion in relation to section 242).

As noted above, the power will not be available during trial. This is a change in that the *nolle prosequi* power was technically available during trial, although there was some debate as to whether it was available after the close of the DPP case (*R v Jell; ex parte Attorney-General* [1991] 1 Qd R 48). In other jurisdictions it has been common for the DPP to use the power during trial in order to force a retrial in a case for tactical reasons. However, this approach has not been taken in Victoria and the Act cements that practice by preventing the DPP from discontinuing a prosecution during trial. This approach also ensures that a prosecution can still be discontinued if a trial commences but the jury is discharged before verdict, or after a retrial is ordered on appeal.

Previously, a *nolle prosequi* could only be entered after an indictment had been filed. Thus, in cases where the DPP elected not to file an indictment after the accused was committed for trial, notice of that intention was simply given to the court and the accused, either in writing or in open court. Although not technically a *nolle prosequi*, this practice was often referred to in that way. In contrast, the new power in this section applies whether or not an indictment has been filed. This is consistent with the Act's approach and treats the filing of an indictment after committal for trial as a step in an existing criminal proceeding, rather than commencing a fresh criminal proceeding (see discussion in the Chapter 5 overview)

The power to discontinue a prosecution will vest only in the DPP and not the Attorney-General (who will retain the common law *nolle prosequi* power, which is rarely exercised by the Attorney-General). The *Public Prosecutions Act 1994* has been amended to reflect the changes to the *nolle prosequi*/discontinuance procedures in this Act. For example a special decision under section 3 of the *Public Prosecutions Act 1994* is now defined to include a decision "to discontinue a prosecution" (as defined in Part 5.4 of the Act).

178 Release from custody on discontinuance of prosecution

Overview

This section requires the ***DPP*** to notify the relevant authorities that a prosecution has been discontinued so that a prompt decision can be made as to whether the person should be released from custody.

Legislative History

This section has some relationship to section 357 of the *Crimes Act 1958*. There is a significant change in that the obligation to notify is now placed on the DPP rather than the court. However, as discussed below, this reflects current practice.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 357 of the *Crimes Act 1958* enabled the Attorney-General or the DPP to grant a certificate to a judge or judges of the Supreme Court who would, in turn, issue a warrant ordering that a person (who has been committed for trial) be released from prison. This procedure was not relied upon in practice. Rather, the Office of Public Prosecutions sent a letter to Corrections Victoria advising that the DPP had decided not to proceed with the matter. In addition, the new section 177 power to discontinue a prosecution removes the distinction in process between ending a prosecution before or after an indictment is filed.

For these reasons, section 178 provides that, if a prosecution is discontinued and the accused is in custody, the DPP must immediately notify the person who has legal custody of the accused, of the discontinuance. The accused is to be released provided there is no other basis for their detention. This approach means that the certificate previously set out in Schedule 4 to the *Crimes Act 1958* is no longer necessary, and it was not re-enacted. The word 'notify' has been used to provide flexibility in process.

Part 5.5 – Pre-trial Procedure

Part Overview

This Part is designed to create a clear, demarcated pre-trial period for case-management purposes. It applies at any time between committal for trial (or filing the indictment in ***direct indictment*** cases) and the ***commencement of trial*** (see the Chapter 5 overview for a more detailed discussion of the beginning of this time period and section 210 in relation to when a trial commences).

Victoria's previous criminal procedure laws were drafted (in the main) on the historical basis that an accused is committed for trial and that the trial will commence on that date. However, that is not how cases proceed in practice and there is often significant case management between committal and trial. The creation of a formal 'pre-trial' Part is designed to both recognise that practice and to encourage increased early identification and resolution of important trial related issues.

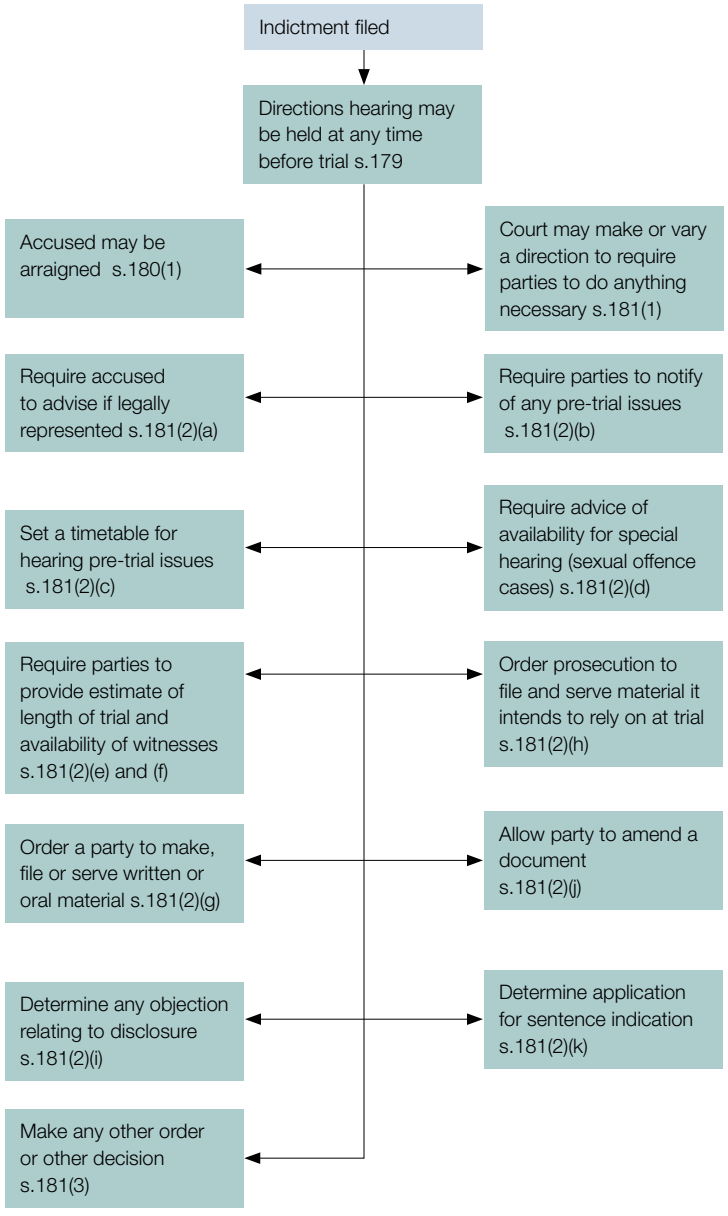
Broadly, the approach to pre-trial procedure is based on the following:

- Directions hearings are primarily a tool for reviewing cases, gathering information and planning for the resolution of pre-trial issues and for trial. However, substantive orders can also be made at directions hearings.
- Substantive orders, rulings and directions can be made either at a directions hearing, or at any other time before trial set by the court (generically described as pre-trial hearings).
- A broad range of issues and orders can be decided pre-trial. This includes issues of law, procedure and evidence, as well as any specific orders that can be made in relation to a trial. In order to tie in with the new interlocutory appeals regime (see the Division 4 overview in Part 6.3 and the definition of ***interlocutory decision***), pre-trial determinations of any sort are broadly referred to as 'decisions'.

The procedures are designed to encourage communication between the parties and early identification of issues. They pick up and strengthen the notification and disclosure provisions of the *Crimes (Criminal Trials) Act 1999* (see in particular section 200 of this Act).

The importance of pre-trial disclosure obligations has been reflected in Division 2. Such obligations can be enforced through the pre-trial processes, in particular through new powers at directions hearings (see section 181).

Directions Hearings



LEGEND:

Court responsibility

Prosecutor responsibility

The pre-trial procedure Part is divided into a series of Divisions designed to walk the reader through the available processes:

Division 1 – Directions Hearings

Division 2 – Pre-trial Disclosure

Division 3 – Orders

Division 4 – Procedure for Pre-trial Orders and Other Decisions

It should be noted that, under section 404, costs can be awarded against a party (including against a legal practitioner) for a failure to comply with any of the requirements of this Part (i.e. the whole of Part 5.5). This contrasts with the position once the trial starts, at which stage no costs can be awarded.

Division 1 – Directions hearings

Division Overview

This Division sets out provisions related to directions hearings, which are the central case management hearing in pre-trial proceedings. The powers of the court at a directions hearing are represented in the flowchart on the previous page, but discussed in detail in relation to the relevant sections following in this guide.

179 Directions hearing

Overview

This section declares that the court may conduct a directions hearing at any time other than during trial.

Legislative History

This section is a simplified version of sections 4(1) and 5(1) of the *Crimes (Criminal Trials) Act 1999*. The reference in section 5(1) to the court's own motion is unnecessary due to the general declaration to that effect in section 337.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The directions hearing is the primary pre-trial case management tool under the Act. This section ensures that one can be held at any time other than during trial. When read in combination with section 158 (which declares that the Chapter 5 applies on committal for trial), it is clear that a directions hearing can be held regardless of whether an indictment has been filed or not. As noted above, section 337 applies to ensure that a directions hearing can be held on the court's own motion or on the application of either party.

It should be noted that, under section 404, costs can be awarded against a party (including against a legal practitioner) for a failure to comply with any of the requirements of this Part (i.e. the whole of Part 5.5). This contrasts with the position once the trial starts, at which stage no costs can be awarded.

180 Accused may be arraigned at a directions hearing

Overview

This section indicates that the accused can be arraigned at a directions hearing and provides for a truncated ***arraignment*** process where not guilty pleas are intimated.

Legislative History

This section is a simplified version of section 5(2) and (3) of the *Crimes (Criminal Trials) Act 1999*.

Relevant Rules/Regulations/Forms

For recording the date of arraignment see:

- rule 2.09 of the County Court Criminal Procedure Rules 2009
- rule 4.12 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

The major difference between this section and its predecessor (discussed above) is that this section no longer uses the word 'arraignment'. The use of that word became problematic as a result of uncertainty as to when a trial formally commenced. This issue is discussed in more detail in the Chapter 5 overview.

The uncertainty arose because of the common law approach to the formal commencement of trial as being when the accused is arraigned and by a plea of not guilty, formally 'joins issue with the Crown' (see *R v Talia* [1996] 1 VR 462).

Section 5(2) of the *Crimes (Criminal Trials) Act 1993* (later replaced by its 1999 equivalent) required that the accused be 'arraigned' at the beginning of the first directions hearing. As a result, the trial could technically commence at the first directions hearing which would usually be many months before the trial actually commenced in the way in which most people would understand it to.

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 in no way limited the requirement that the accused be arraigned prior to the commencement of trial.

It also 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 was intended to overcome the uncertainty with arraignment

being tied to commencement of trial. However, there remained divergent practice, 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.

This Act now defines when a trial commences as being when the accused is arraigned before the jury panel (see section 210 and the discussion following). As a result, there is no risk that any earlier 'arraignment' will be taken to commence the trial. Early arraignment can be a useful case management tool and the Act allows it to be used flexibly, for example, by removing the mandatory requirement to take pleas at the beginning of a directions hearing previously found in section 5 of the *Crimes (Criminal Trials) Act 1999*. To put this issue beyond doubt, section 215 describes the process of arraignment and confirms that the accused can be arraigned more than once and at any stage of proceedings.

181 Powers of court at directions hearing

Overview

This section gives the court broad case management powers. Section 181(1) provides a very broad declaration that the court can make any order or require parties to take any step necessary for the "fair and efficient conduct of the hearing". A list of examples of those powers follows, and includes the power to:

- require the parties to provide information, including notifying evidential, legal or procedural issues
- set timetables for pre-trial hearings
- require documents and material to be filed
- determine disputes about disclosure of material
- determine applications for sentence indications
- make any order or other pre-trial decision on any issue of law, evidence or procedure.

Legislative History

This section is based on section 5(4) and (5) of the *Crimes (Criminal Trials) Act 1999*. It has been broadened and new powers added. It should also be noted that section 5(7) (which required the accused to be present at the first directions hearing) has not been re-enacted as the issue of when the accused must ***attend*** is now dealt with in sections 330 (the general provision) and section 246 (in relation to trial proceedings specifically).

Relevant Rules/Regulations/Forms

Rule 2.06 of the County Court Criminal Procedure Rules 2009 and rule 4.08 of the Supreme Court (Criminal Procedure) Rules 2008 provide a 'without prejudice' type protection for the accused at a directions hearing or pre-trial conference or case conference (as the case may be). See also, the County Court Criminal Procedure Practice Note.

Discussion

The powers at directions hearings have been broadly drafted in order to place the directions hearing at the centre of the pre-trial case management process. Courts have used different names for case management hearings (e.g. the 'case conference' in the County Court) but there is no reason why such hearings cannot be treated as directions hearings for the purposes of the court's powers.

The key changes to the powers at a directions hearing are:

- Section 181(1) now provides a very broad case management power. Importantly, the specific powers in section 181(2) are examples of the exercise of that broad power and the introductory words ("without limiting subsection (1)") make it clear that the examples do not limit the scope of the general power. This approach allows the trial court to develop and use new case management approaches and tools (whether through rules or practice notes) on a flexible basis without statutory restriction.
- Section 181(2)(b) allows the court to require the parties to advise the court of any pre-trial issues or orders that the parties intend to raise under section 199(1). The range of issues that fall into that section is now very broad and includes any issues of law, evidence and procedure. The section makes it clear that the court may order such notification regardless of the timeframes for notification of pre-trial issues set out in section 200(3). For these purposes, it is sufficient to note that the obligation to notify arises in relation to issues, regardless of whether a party intends to raise them before or during trial (see section 200 for more detailed discussion of the obligation to notify pre-trial issues). The court's power to require notification of issues at a directions hearing is likely to be interpreted consistently with that intention.
- Section 181(2)(c) allows the court to set a timetable for the hearing of pre-trial issues. This is a further tool designed to facilitate and encourage important issues of law, evidence and procedure to be determined pre-trial. Such early determination allows the lengthy period of time before trial to be fully utilised thereby reducing the time needed for arguments during and immediately preceding trial (discussed in more detail under section 199).
- Section 181(2)(i) allows the court to determine any objection relating to the disclosure of material by the prosecution. This power is one of a number of provisions in the Act that create a more explicit statutory regime for prosecution disclosure in indictable proceedings. This regime is discussed in more detail in relation to section 182, but the following indicates how this power fits into that regime:

  - Section 185 requires the prosecution to serve any material that comes into its possession after committal for trial that would have had to have been included in a hand-up brief before committal. In ***direct indictment*** cases, the obligation is to serve all such material in the possession of the prosecution at the time the indictment is filed. This section excludes material already disclosed.
  - Sections 186 and 187 provide specific processes for the disclosure of personal details and prior convictions of prosecution witnesses.
  - Section 416 confirms that nothing in the Act derogates from any other duty of disclosure, and also protects grounds for refusing to disclose that arise under any other Act or rule of law. Section 336 confirms that a party to a criminal proceeding can issue a subpoena for a witness in accordance with the rules of court.
- Section 181(2)(i) (i.e. this section) allows the court to resolve all disputes about disclosure. This will include disputes arising in relation to any of the above obligations, including those arising outside of this Act but protected by section 416.
- The availability of an express power to resolve disclosure disputes removes much of the need for the (comparatively cumbersome) subpoena process to be used, particularly where the material is in the prosecution's possession (DPP or police). It will be open for such disclosure disputes to be resolved by simple application to the court and hearing of the issue on the merits. Having examined the contested material (if necessary to resolve the dispute) the court would order either disclosure, partial disclosure or non-disclosure of the material that is the subject of the application.
- Section 181(2)(k) is included to avoid doubt. The provision makes it clear that an application for a sentence indication can be heard and decided at a directions hearing.
- Section 181(3) provides a broad power to deal with trial related decisions and orders. Many of these substantive or other decisions are provided for in Divisions 3 and 4 of this Part. In particular, section 199 allows any issues of law, evidence or procedure to be decided pre-trial. Section 181(3) is one of a series of declarations in this Part designed to ensure that trial related decisions and orders can be made at any stage of proceedings and are not limited in the way they were previously (for example section 391A of the *Crimes Act 1958* limited the determination of questions of law to after arraignment). The Act removes such limitations to allow flexible case management.

Decisions made pre-trial on issues of law, procedure or evidence can be appealed before or (in exceptional circumstances) during trial under the interlocutory appeals process in Division 4 of Part 6.3 (discussed in detail under section 295).

It should be noted that section 3(1)(c) and 3(1A)-(1E) of the *Judicial Proceedings Reports Act 1958* prohibits reporting of some aspects of a directions hearing.

Also note that, under section 404, costs can be awarded against a party (including against a legal practitioner) for a failure to comply with any of the requirements of this Part (i.e. the whole of Part 5.5). This contrasts with the position once the trial starts, at which stage no costs can be awarded.

Division 2 – Pre-trial disclosure

Division Overview

This Division contains provisions dealing broadly with issues of disclosure. However, within that description are three discrete sub-topics:

- the pre-trial exchange of the summary of prosecution opening and the defence response (sections 182–184)
- prosecution disclosure of material and information relevant to the charges (sections 185–188)
- defence disclosure of expert statements and alibi evidence (sections 189–191).

The following flowchart identifies how those obligations and processes fit together.

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

Overview

This section requires the prosecution to file and serve a summary of the key aspects of its case, together with any evidence that it considers should be admitted by consent.

Legislative History

This section is based on section 6 of the *Crimes (Criminal Trials) Act 1999* with minor changes to drafting and cross-references.

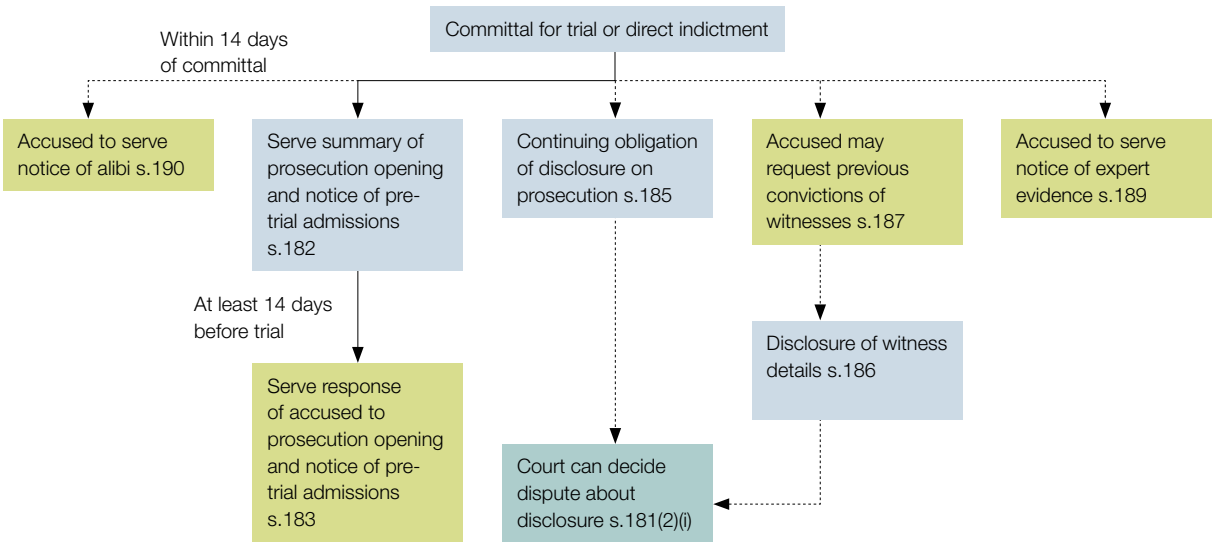
Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The prosecution is required to file and serve its opening and notice of pre-trial admissions 28 days "before the trial is listed to commence". This differs from the approach taken in the *Crimes (Criminal Trials) Act 1999* which required the notice to be filed not less than 28 days "before the trial is due to commence", with that phrase defined in section 3 as meaning the day on which the accused is due to be put in the charge of the jury. As explained in more detail in relation to section 210 (when trial commences), this Act takes a different approach. A trial commences when the accused pleads not guilty on

Pre-Trial Disclosure



arraignment before the jury panel. Time limits calculated back from the ***commencement of trial*** (such as that in this section) are put in terms of the day in which the trial is 'listed to commence'. This means that when a number of trials are listed for a single block of court time (with the final order to be determined on the day or during that block of time) the prosecution opening will be due at least 28 days before the date of listing for all of those trials.

Although described as an 'opening', the prosecutor at trial is not limited to a verbatim account of the document filed, but is limited to the matters set out in the opening (see section 224). However, the document must include:

- the manner in which the case will be put
- the acts, facts, matters and circumstances being relied on to support a finding of guilt.

A substantial departure from the opening is only permitted:

- if notice is given before trial under section 184
- if the trial has started:
  - if leave is given by the ***trial judge*** to depart during the prosecution opening under section 224 on the basis that there are 'exceptional circumstances'
  - if leave is given by the trial judge under section 233 to introduce evidence that represents a substantial departure from the filed opening.

The section also requires a notice of pre-trial admissions to be filed and served. Essentially, this is a list of relatively technical aspects of the evidence that the ***DPP*** considers could be admitted by consent. The notice provides the opportunity for the accused to consent or not.

The accused is required to respond to both documents in writing under section 183 no later than 14 days before trial the day on which the trial is listed to commence.

It is important to be aware that different procedures apply with respect to trials for sexual offences (and, in some cases, indictable offences which involve an assault, or injury or a threat of injury) and certain witnesses. Aspects of these procedures, set out in Part 8.2, also relate to disclosure of prosecution materials (for example, a recording of a witness's pre-recorded evidence-in-chief).

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

Overview

Section 183 requires the accused to file and serve a summary of the key aspects of its case, together with any evidence that it considers should be admitted by consent.

Legislative History

This section is based on section 7 of the *Crimes (Criminal Trials) Act 1999* with minor changes to drafting and cross-references.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section requires the accused to respond in writing to the prosecution opening under section 182. The response requires a level of detail. In particular, the accused is required to respond to each act, fact, matter and circumstance with which issue is taken and the basis on which issue is taken.

Similarly, the accused is required to respond to the notice of pre-trial admissions by identifying which aspects of the listed evidence remain in issue, and the basis on which they are in issue. Section 184 of the *Evidence Act 2008* also allows the accused to admit matters of fact and section 191 of the same Act enables the parties to agree to (i.e. not dispute) a fact.

The response must be filed and served at 14 days before the trial is listed to commence (see the discussion of this phrase in relation to sections 210 and 182).

A substantial departure from the accused's response under this section is only permitted:

- if notice is given before trial under section 184
- if the trial has started:
  - if leave is given by the ***trial judge*** to depart during the oral response to the prosecution opening under section 225 on the basis that there are 'exceptional circumstances'
  - if leave is given by the trial judge under section 233 to introduce evidence that represents a substantial departure from the filed response.

184 Intention to depart at trial from document filed and served

Overview

Section 184 allows either party to give notice of an intention to depart substantially from a document filed under this Part, but it is primarily directed at the prosecution opening under section 182 and the accused's response under section 183. Notice under this section must be given before the trial commences, otherwise leave must be sought under sections 224, 225 or 233.

Legislative History

This section is based on section 8(4) of the *Crimes (Criminal Trials) Act 1999*. However, it is made clear that the section only applies pre-trial. During trial, leave must be sought as noted above.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

185 Continuing obligation of disclosure

Overview

Section 185 obliges the prosecution to disclose anything that would have been included in a ***hand-up brief*** in a committal proceeding:

- if such material comes into the possession of the prosecution after committal for trial
- if such material is in the possession of the prosecution at the time a ***direct indictment*** is filed, or comes into the prosecution's possession after filing.

Exceptions are provided for if the material has already been provided to the accused or if the material cannot reasonably be copied (in which case it must be made available for inspection).

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

For obvious reasons, the committal disclosure process is the principal source of pre-trial prosecution disclosure. Before this Act, there was no statutory reference to substantive disclosure post-committal, which was instead dealt with in accordance with the prosecutor's duty of fairness as accurately described in the DPP's *Policy on Disclosure*, at paragraph 5.3:

> *The obligation to disclose is an ongoing one. If information comes to light that was not available at the time the original defence request or the reason by which disclosure was declined ceases to be then disclosure should be made by the prosecution without the need for an additional request from the defence.*

This section does not provide a detailed, codified model for disclosure in trial courts, nor does it derogate from existing disclosure obligations. Instead, it provides a statutory expression of basic disclosure obligations that are linked to the disclosure requirements in committal proceedings. It is designed to reflect existing and uncontroversial disclosure obligations at common law arising from the prosecutor's duty of fairness. As noted below, section 416 confirms that nothing in the Act derogates from any other duty of disclosure, and also protects grounds for refusing to disclose that arise under any other Act or rule of law.

The obligation applies after an accused has been committed for trial or if the accused was not committed for trial after a ***direct indictment*** has been filed. Any information or material in the committal disclosure categories that is in the prosecution's possession must be served on the accused as soon as is reasonably practicable, unless it has previously been disclosed (in the ***hand-up brief*** or otherwise). The committal disclosure categories are found in section 110 (and are discussed in detail in the commentary to that section). For these purposes, the hand-up brief categories are divided into material the prosecution intends to rely on and material relevant to the charge that the prosecution does not intend to rely on.

This section is a central part of the Act's approach to disclosure in trial proceedings. It is designed to clearly articulate disclosure obligations and provide a simple process to resolve disclosure disputes as an alternative to the use of subpoenas. The approach can be summarised as follows:

- Section 185 (i.e. this section) requires the prosecution to serve any material that comes into its possession after committal for trial that would have had to have been included in a hand-up brief before committal. In direct indictment cases, the obligation is to serve all such material in the possession of the prosecution at the time the indictment is filed. This section excludes material already disclosed.
- Sections 186 and 187 provide specific processes for the disclosure of personal details and prior convictions of prosecution witnesses.
- Section 416 confirms that nothing in the Act derogates from any other duty of disclosure, and also protects grounds for refusing to disclose that arise under any other Act or rule of law. This can be important, for example, where the prosecution is entitled to delay or refuse disclosure at common law as a result of witness safety concerns.
- Section 336 confirms that a party to a criminal proceeding can issue a subpoena for a witness in accordance with the rules of court.
- Section 181(2)(i) allows the court to resolve all disputes about disclosure. This will include disputes arising in relation to any of the above obligations, including those arising outside of this Act but protected by section 416.

The availability of an express power to resolve disclosure disputes removes much of the need for the (comparatively cumbersome) subpoena process to be used, particularly where the material is in the prosecution's possession (DPP or police). It will be open for such disclosure disputes to be resolved by simple application to the court and hearing of the issue on the merits. Having examined the contested material (if necessary to resolve the dispute) the court may order either disclosure, partial disclosure or non-disclosure of the material that is the subject of the application.

186 Disclosure of address or telephone number of witness

Overview

This section regulates the disclosure of personal details of witnesses. The prosecution is not permitted to disclose witness names, addresses and other details unless those details cannot identify a particular person, or the details are relevant to the offence charged and disclosure presents no risk to safety or welfare.

However, disclosure of such details may be ordered by the court on the application of either party. The court must consider the same matters as the prosecution. However, the court may also order disclosure if there is a risk to safety but that is outweighed by the interests of justice (which must include consideration of both the accused's right to prepare properly for trial, and the privacy interests of the witness).

Legislative History

This section is new in relation to trial proceedings.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is new in relation to trial proceedings, but is based on Schedule 5 clause 8(2)-(4) of the *Magistrates' Court Act 1989* which related to committal proceedings. However, the test in that clause has been significantly modified in order to recognise the privacy interests of witnesses. The reasoning underlying those amendments is discussed under section 114.

Section 186 is an example of the Act's consistent approach to procedures between jurisdictions, unless there is a good reason to vary them. Unlike the position before the Act, an almost identical test is now provided for in relation to summary proceedings (in section 48) and in relation to committal proceedings (see sections 114 and 131).

Disputes about the use of this section by the prosecution can be resolved under the general power to resolve disputes about disclosure found in section 181(2)(i).

187 Previous convictions of witness

Overview

This section regulates disclosure of ***previous convictions*** of prosecution witnesses. The accused may request particulars of previous convictions. However, that request can be refused if the previous conviction is irrelevant to the proceeding. If the prosecution withholds such particulars on this basis then it must nonetheless advise the accused of the existence of those convictions. Note 2 confirms that the court can determine objections about disclosure under section 181(2)(i), which will include disputes under this section.

Legislative History

This section is new in relation to trial proceedings.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is new in relation to trial proceedings and is based on Schedule 2 clause 1A(3) to the *Magistrates' Court Act 1989* which applied in summary proceedings.

This is an example of a procedure for which the same test now applies in different jurisdictions, unlike the position before the Act. An almost identical test is provided for in section 45(3) (in relation to summary proceedings) and in section 122(3) (in relation to committal proceedings).

In trial proceedings, the section is consistent with the existing DPP's *Policy on Disclosure* captured in the following statements, which appear at paragraphs 5.2.12 and 5.2.13 respectively:

> *The general rule is that the Crown should disclose to the defence all material in its possession that may tend to assist the defence case. Such material would include relevant prior convictions, particularly in cases where the credibility of a witness may be in issue, if the prior conviction could reasonably be seen as capable of affecting the witness's credibility. The obligations of the Prosecution may be stated that at least, in trials on presentment or indictment, the prosecution should inform the defence of any conviction of every proposed witness whose credibility may be in issue, if proof of any such conviction may reasonably be seen as capable of affecting the witness's credibility. It is irrelevant that counsel or instructing solicitor or any other person directly engaged in the prosecution of the particular charge is unaware of any relevant conviction, for it is for the prosecution to make the necessary enquiries on computer or otherwise, although it could not be suggested that their obligations go further.*
>
> *The defence may request that the prosecution provide details of any criminal convictions recorded against a prosecution witness. Such a request should be complied with where the prosecutor is satisfied that the defence has a legitimate forensic purpose for obtaining this information, such as where there is a reason to know or suspect that a witness has prior convictions.*

188 Prosecution notice of additional evidence

Overview

This section requires the ***DPP*** to file and serve notice of additional evidence that the prosecution intends to call at trial. This includes both new witnesses and new evidence from existing witnesses.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section formalises the DPP's previous practice of giving formal notice (called a notice of additional witness), to the court and to the accused, of evidence to be called at trial that did not form part of the depositions. ***Depositions*** is defined in section 3 of the Act as the transcript of evidence from any committal hearing and the statements tendered as part of the ***hand-up brief***.

This notice complements the general obligation to disclose relevant material in section 185 in that it requires that evidence to be relied upon at trial must be specifically identified.

Although there is no express time limit for serving the notice, section 185 provides that a relevant document should be disclosed as soon as practicable after it comes into the prosecution's possession.

The broad powers of the court at a directions hearing, including the power to direct a party to file any document, will allow this section to be used as a case management tool.

It is important to be aware that different procedures apply with respect to trials for sexual offences (and, in some cases, indictable offences which involve an assault, or injury or a threat of injury) and certain witnesses. Aspects of these procedures, set out in Part 8.2, also relate to disclosure of prosecution materials (for example, a recording of a witness's pre-recorded evidence-in-chief).

189 Expert evidence

Overview

Section 189 requires the accused to file and serve a statement of any intended expert witness 14 days before trial or as soon after that time as the statement comes into the accused's possession. The section also sets out basic requirements for the content of such a statement.

Legislative History

This section is based on section 9 of the *Crimes (Criminal Trials) Act 1999*. The only change is the reference to when the trial is 'listed to commence' rather than "due to commence". This change is consistent with the new definition of ***commencement of trial*** in section 210.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section reflects existing obligations. For consistency across the Act, defence disclosure of expert statements in summary proceedings is dealt with in an almost identical fashion (in section 50).

As noted in the section itself, section 177 of the new *Evidence Act 2008* (which commenced on the same day as this Act) provides for certificates of expert evidence to be admissible where they are served at least 21 days prior to a hearing. Certificates that comply with section 177(1) of the *Evidence Act 2008* are also likely to comply with section 189(2). Therefore service of such a certificate is likely to fulfil the accused's obligations under this section. However, that result does not necessarily flow. It should also be noted that section 177 of the *Evidence Act 2008* does not require a certificate to be filed in court whereas a statement under section 189 of this Act must be filed.

190 Alibi evidence

Overview

This section requires the accused to file and serve a notice of alibi evidence within 14 days of being committed for trial or receiving a ***direct indictment***. The section sets out basic requirements for the content of the notice, requires the accused to assist the ***DPP*** to locate an alibi witness in some circumstances, and provides for an adjournment of trial if an alibi notice needs to be investigated by the DPP. Alibi evidence (including from the accused) is not admissible if this section is not complied with, unless the court gives leave for the evidence to be called regardless of the non-compliance.

Legislative History

This section is based on a combination of section 47 of the *Magistrates' Court Act 1989* and section 399A of the *Crimes Act 1958*. In relation to trial proceedings, the substance of the obligation has not changed, although the section has been reworked to make it clearer and simpler.

Relevant Rules/Regulations/Forms

For the form of a notice of alibi, see rule 4.11 and Form 6-4E of the Supreme Court (Criminal Procedure) Rules 2008.

For notice of alibi, see rule 2.07 of the County Court Criminal Procedure Rules 2009.

Discussion

Separate alibi provisions were previously found in the *Magistrates' Court Act 1989* and the *Crimes Act 1958*. As the Act harmonises procedures across jurisdictions, the term ***evidence in support of alibi*** is defined in section 3 of the Act and this section is consistent with section 51, the alibi provision in the summary hearing chapter.

The accused's obligation to file and serve notice of alibi evidence under this section has not changed in substance from the previous requirement. Therefore, the same approach is likely to be taken to this issue under the Act. In particular:

- whether to grant leave to adduce alibi evidence when the section has not been complied with (see, e.g. *R v Sullivan* [1971] 1 QB 253)
- the extent of particulars to be provided (see, e.g. *R v Sorby* [1986] VR 753).

It is an offence under section 191 for the prosecution to communicate with a named alibi witness.

191 Offence to communicate with alibi witness

Overview

This section prevents the prosecution from communicating directly or indirectly with an alibi witness named in a notice under section 190 unless the accused consents to the communication. The restriction does not apply if the alibi witness is also a prosecution witness (see discussion below).

Legislative History

This section is based on section 399B of the *Crimes Act 1958*. However, under that section a contravention was deemed to be a contempt of court whereas this section treats it as a stand-alone offence with a designated maximum penalty. There is a new exception for prosecution witnesses named as alibi witnesses.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This offence provision has been amended to avoid the possibility of notices being used to prevent the prosecution from communicating with its own witnesses. Under section 399B of the *Crimes Act 1958*, any person acting for the prosecution or a member of the police force was absolutely prohibited from communicating with the person named in an alibi notice unless the accused or their legal practitioner was present.

Section 399B of the *Crimes Act 1958* was introduced in May 1976 following the recommendations of the Law Reform Commission (LRC).

The LRC report noted that prior to trial the defence had no obligation to disclose that it intended to rely on an alibi, thereby often taking the DPP by surprise at trial. This resulted in the DPP being unable to conduct investigations in relation to the particulars of the accused's alibi and made it difficult for the DPP to cross-examine witnesses at trial in order to test the veracity of the accused's alibi.

The LRC recommended that an accused be required to give notice of alibi evidence, including particulars and any witnesses in support of the alibi, prior to trial. It also recommended that there be a safeguard, namely that police be prohibited from communicating with alibi witnesses, to ensure they were not pressured or influenced.

However, the application of this provision was unclear where the defence named the alleged victim (the complainant) or a prosecution witness as an alibi witness. In particular, whether this had the effect of restricting access by the police and prosecution to the complainant or prosecution witness.

The situation arose in *R v Boris Beljajev* [2006] VSC 413 (*Beljajev*). In that case, the defence had provided a notice of alibi listing three DPP witnesses, whose statements had been included in the prosecution brief.

The DPP raised a number of arguments against the notice of alibi namely that:

- it was the intention of Parliament that the sections apply solely to defence witnesses who supported the accused's alibi and not to DPP witnesses
- the operation of section 399B could prevent the DPP from testing the reliability of its own witnesses as they would effectively be 'quarantined' and unavailable for interview
- the intention of the notice of alibi was to prevent the DPP from having access to their witnesses.

Coldrey J rejected the DPP's proposition that the effect of the notice was to prevent the DPP from having access to its own witnesses. Instead he interpreted the words "any other person" in section 399A and "proposed witness" in section 399B to mean only witnesses proposed to be called by the accused and not DPP witnesses that the accused could cross-examine at trial.

While that result avoided the immediate problem, the interpretation adopted by Coldrey J is not the only one available on the face of the section. An exception based on *Beljajev* has been provided in section 191(2) in order to ensure that the position is clear on its face.

The prohibition on contact in this section applies until the conclusion of the proceeding, including any new trial. This is designed to ensure that the protections are not lost because a retrial is ordered.

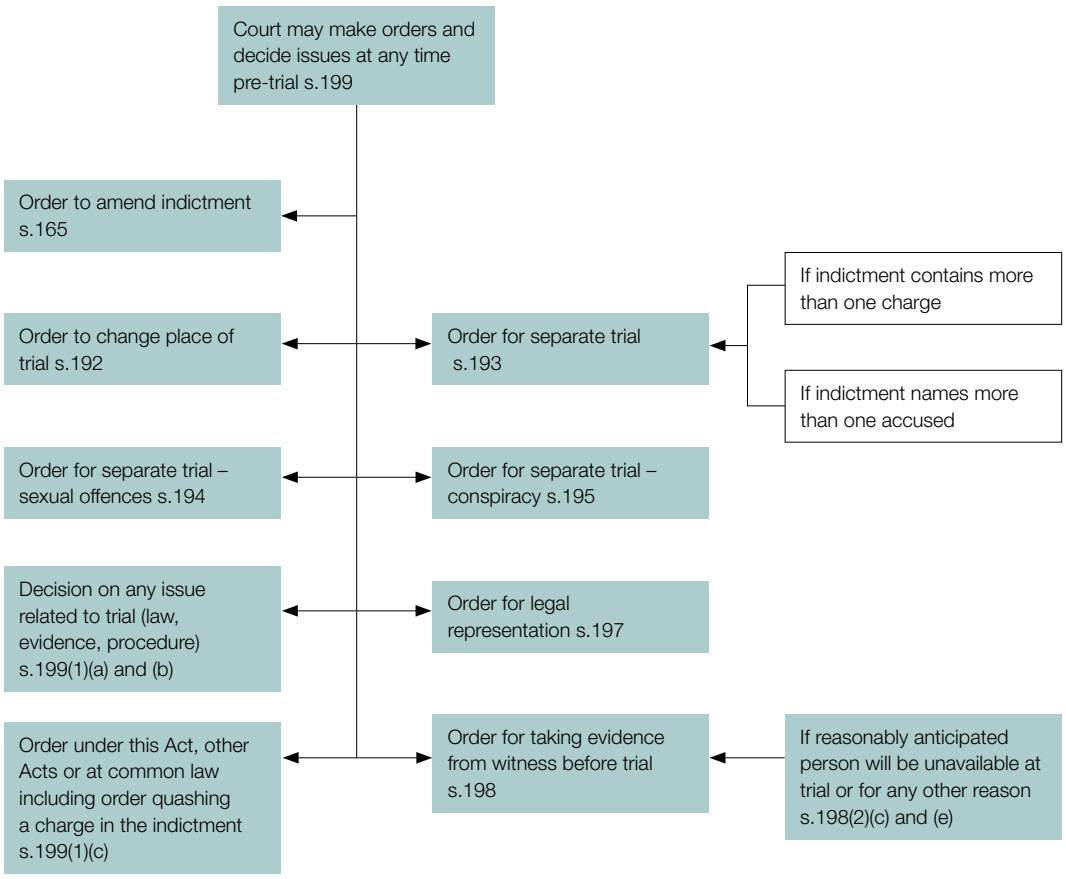
Traditionally, a breach of this prohibition by the prosecution did not prevent the prosecution from calling evidence from witnesses spoken to as a result of the breach (see *R v Sorby* [1986] VR 753). This section does not alter that position, although the admissibility of such evidence will now fall to be determined under the *Evidence Act 2008*.

Division 3 – Orders

Division Overview

This Division gathers together provisions related to specific orders that the court can make pre-trial. It is important to note that section 213 makes it clear that these orders can also be made during trial, although the Act is designed to encourage significant issues of law, evidence and procedure to be heard and decided before trial. The following flowchart sets out the orders that can be made under this Division, and also includes reference to relevant powers and processes elsewhere in the Act.

Orders and Other Decisions



LEGEND:

Court responsibility

192 Power to change place of trial

Overview

This section provides a power to the court to change the venue of a trial. It should be noted that this power is designed to deal with a change in geographical place as opposed to a transfer between the Supreme Court and the County Court (that power is contained in section 167).

Legislative History

This section is based on section 359 of the *Crimes Act 1958*. However, the power has been substantially simplified. While section 359 dealt with both transfer between the Supreme and County Courts and changes in the place of trial, this section only deals with the latter.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The power to change place of trial is expressed in broad terms in paragraph (b). The reference in paragraph (a) reflects the fact that ordinarily change of venue will turn on whether a fair trial can or cannot be had in the original place of trial.

In that sense, this simplified section is not designed to alter the principles that have been developed in relation to change of venue. In particular, the longstanding presumption underlying any question of venue is that a criminal trial should be held closest to the place where an offence is committed (see e.g. *R v Giddings* [1916] VLR 359). The policy underlying the presumption is that allegations of criminal offending should be determined within the community which the offences are said to most closely touch. This proposition is formalised in section 169 and trials must be heard closest to the location of the alleged offending unless an order is made under this section.

Against that background, it is expected that existing approaches and principles, informed by the fair trial rights in sections 24 and 25 of the *Charter of Human Rights and Responsibilities Act 2006* (the *Charter*), will be applied to this simpler statutory regime. Traditionally the onus of satisfying the court that change of venue is appropriate rests on the party seeking the change (see *R v Cattell* [1968] 1 NSWR 156) and the Act itself provides no reason to depart from that approach.

The question of change of venue most often arises when a trial has received significant publicity, particularly locally. A key question is whether the risk of an unfair trial as a result of such publicity can be removed by a judicial direction to the jury (or by an adjournment) before disturbing the important principle that justice should be administered in the community most affected by the alleged offending.

However, change of venue issues can also arise for other reasons. For example:

- where no one central to the alleged offending (e.g. the alleged victim and the accused) live near the location of the alleged offending, in particular in relation to historical sexual offending
- for practical reasons such as witness convenience and whether facilities may be available in a larger centre that are not available in a smaller centre (see discussion by Nettle J in *R v Iaria and Panozzo* [2004] VSC 96)
- where, notwithstanding that a fair trial can in fact be had, there will be a public perception to the contrary (see e.g. *Cording v Trembath* [1921] VLR 163).

Previously, section 388 of the *Crimes Act 1958* restricted the ability to challenge a change of venue. That section provided that "no person shall…take any objection in any court to any order [for change of venue]…to any matter or thing set out or appearing on the face of the record". The Act does not re-enact any equivalent restriction on a challenge to a change of venue. In reality, the only types of proceedings which section 388 would have prevented are judicial review proceedings or an appeal against conviction. However, it is incongruous that this restriction expressly existed in relation to this issue, but not in relation to many other orders that could be made in the criminal process. There is also no need for a general statutory bar to judicial review given that it is actively discouraged by the High Court and almost never employed in criminal proceedings. Further, there is no good policy reason why an erroneous decision as to change of venue should not at least be able to be argued as part of an appeal against conviction, on the basis that a refusal to change venue may have resulted in an unfair trial.

However, the more important reason for not re-enacting any restriction on appeal is to ensure that change of venue decisions can be the subject of an interlocutory appeal under section 295. There is a broad test as to what types of decisions are amenable to ***interlocutory appeal***, as discussed in more detail in relation to that section. The restrictions come in the test for certification by the ***trial judge*** and leave by the Court of Appeal. Those restrictions mean that such appeals will only be allowed to proceed where resolution of the issue will reduce the need for a trial, trial time generally or the risk of a retrial. It is conceivable that a wrong decision about change of venue could result in a retrial following a successful appeal against conviction and, as a result, that an interlocutory appeal could be appropriate in some circumstances.

193 Order for separate trial

Overview

This section gives the court power to:

- order that charges against a single accused in an indictment are split into two or more indictments and therefore into two or more trials (commonly referred to as severance)
- order that two or more accused who have been named together in the same indictment have separate trials.

Legislative History

This section is based on section 372(3) and (5) of the *Crimes Act 1958*, in relation to multiple charges against a single accused, with some changes in terminology and simplification. Previously, there was no equivalent statutory power to order separate trials in multiple accused cases and, in that respect, this section is new.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is part of a clearer approach in the Act to issues of multiple charges and multiple accused. In summary:

- Clause 5 of Schedule 1 allows multiple accused and multiple charges to be included in the same indictment. The only statutory criterion at this stage is that the charges must be for ***related offences***.
- Section 170 confirms that where multiple accused and multiple charges are included in the same indictment, they must be tried together unless an order to the contrary is made under section 193 or 195.
- Section 193 (i.e. this section) provides the power to order a separate trial either in relation to multiple accused or multiple charges. Section 194 and 195 provide further specific rules in relation to sexual offences and conspiracy charges respectively.
- Section 199(1)(c) allows such applications to be decided pre-trial (along with many other orders), as well as during trial.
- Section 200 requires the parties to notify the court and each other if an application is intended.

This section simplifies and modernises the power of the court to sever charges against a single accused. Previously, section 372(3) of the *Crimes Act 1958* provided that a court may order separate trials if the accused may be "prejudiced or embarrassed in his defence" by reason of being charged with more than one offence or for any other reason. Case law in this area refers only to prejudice (see e.g. *R v Bell* [1962] VR 135). The phrase "embarrassed in his defence" does not have a contemporary meaning and has been removed. This change is designed to reflect existing principles rather than to change them.

The section also codifies the common law power to order separate trials where more than one accused is named in the indictment, if a joint trial would prejudice the fair trial of the accused. As noted above, the ***DPP*** is only entitled to join charges against multiple accused where the charges are ***related offences*** (as defined in section 3). The primary test for ordering separate trials is whether trial with a co-accused would "prejudice the fair trial of the accused". This wording has been chosen to reflect and complement common law principles in relation to this issue. In particular:

- The wide definition of ***related offence*** will allow multiple accused to be joined in a single indictment as could previously occur. This is effectively where the allegations arise out of the same or a related set of facts (see *Rintel v R* [1986] WAR 175) and would include allegations of truly joint offending. It may also include other situations such as where the alleged victim is the same person (e.g. where the offences are closely linked by time and place; see *Mackay v R* [1977] HCA 22; (1977) 136 CLR 465.
- Severance will often need to be considered where evidence is admissible only against accused A but implicates accused B. The key question will continue to be whether the prejudice to accused B can be ameliorated by judicial direction to the extent that a fair trial is still possible (see *R v Ditroia and Tucci* [1981] VR 247).

The primary tests for separate trials (prejudice to a fair trial) are complemented by a general additional ground in section 193(3)(c) (if for any other reason it is appropriate to do so).

To avoid doubt, section 193(4) provides that this power can be exercised before or during trial. Section 337 enables it to be exercised on the application of a party or on the court's own motion.

The specific power of adjournment that was contained in section 372(4) of the *Crimes Act 1958* is unnecessary, due to the general power of adjournment in section 331, and has not been re-enacted.

194 Order for separate trial – sexual offences

Overview

This section creates a presumption that charges for sexual offences will be tried together if they have been included in the same indictment. The presumption is not rebutted only because evidence is not cross-admissible between the charges.

Legislative History

This section is based on section 372(3AA) – (3AC) of the *Crimes Act 1958*. There have been no substantive changes to the section.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This presumption in relation to sexual offences was introduced by the *Crimes (Amendment) Act 1997*. It has been noted by the Court of Appeal that the 'manifest intention' of the amendments was to modify the rule of practice that allegations of sexual offences against separate complainants should not be tried together unless there was evidence in relation to one complainant which was cross-admissible in relation to another (see *R v KRA* [1999] VSCA 157).

However, the Court of Appeal has interpreted and applied the provision in a way which makes it clear that cross-admissibility of evidence remains an important factor in deciding whether such charges should be tried together or separately. Winneke P in *R v Papamitrou* [2004] VSCA 12; (2004) 7 VR 375 indicated that cross-admissibility of evidence was;

> *…a powerful factor influencing the discretion. The capacity to ensure a fair trial for the accused must always be the dominant consideration governing the exercise of the discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused.*

This provision is in near identical form to section 372(3AA) – (3AC) of the *Crimes Act 1958*, and it is expected that the same principles will continue to apply to the exercise of the discretion. The centrality of the fairness of the trial to an accused is highlighted by the fact that the operation of the *Charter* is expressly saved in section 194(2). However, it remains the case that charges in relation to separate complainants for sexual matters should not be automatically severed simply on the basis of non-admissibility, if judicial directions as to the proper use of evidence can be given (see e.g. *R v Taylor* [2006] VSCA 53).

The definition of ***sexual offence*** in section 194(1) is an extension of the definition in section 3, in order to add offences in clause 1 of Schedule 1 to the *Sentencing Act 1991*. Consequently, it is broader than the definition that applies to the rest of the Act.

195 Order for separate trial – conspiracy

Overview

This section reverses the presumption that charges in a single indictment should be tried together (section 170) where a conspiracy to commit an offence is alleged as well as the actual commission of that same offence. A court *must* order severance unless it is in the interests of justice to try the charges together.

Legislative History

This section is based on section 372(3A) of the *Crimes Act 1958*. There have been no substantive changes to the section.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section reflects the traditional common law position that a conspiracy to commit an offence should not be tried at the same time as a charge for the substantive offence (i.e. for the charge that is the subject of the conspiracy). This reflects the likelihood that evidence on the conspiracy count will be inadmissible on the substantive count. However, the section also allows for the charges to be heard together where the interests of justice require it.

196 Other powers of court not affected

Overview

This section saves any other power that the court has to amend an indictment, or to order separate trials.

Legislative History

This section is based on section 373 of the *Crimes Act 1958*, without substantive change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section ensures, to avoid doubt, that the named sections do not create a code and therefore prevent the operation of any similar power at common law.

197 Order for legal representation for accused

Overview

This section prevents a court from staying or adjourning a trial because the accused has been refused legal representation. To balance that position, it allows the court to order that Victoria Legal Aid provide legal assistance to the accused. Victoria Legal Aid has rights of appearance and appeal.

Legislative History

This section re-enacts section 360A of the *Crimes Act 1958* without substantive alteration.

Relevant Rules/Regulations/Forms

For further information concerning unrepresented accused, see rule 4.06 of the Supreme Court (Criminal Procedure) Rules 2008.

Also see the County Court Criminal Procedure Practice Note.

Discussion

This section prevents the court from staying or adjourning a trial because an accused has been refused legal assistance. It was enacted to deal with problems highlighted in the High Court's decision in *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292, in which it was held that if the ***trial judge*** forms the view that a fair trial is unlikely because of the accused's inability to obtain legal representation, a stay of proceedings may be ordered. This can create a stalemate if legal aid is refused in a case where the court considers that legal assistance is necessary to ensure a fair trial. Section 197 creates a circuit breaker for this problem by empowering the court to order Victoria Legal Aid to provide legal assistance to an accused.

Before making such an order, the court must be satisfied that the accused cannot afford the full cost of private legal representation. It would be inappropriate for the prosecution to be actively involved in such determinations and, as a result, the Act requires the accused to satisfy the court of the accused's inability to afford representation. This onus on the accused does not breach the right to be presumed innocent as it does not relate to an element of an offence.

The Statement of Compatibility for the Act discussed this section, noting that it ensures that charges are resolved by a jury rather than being stayed due to lack of representation, by empowering a court to order legal assistance which in turn enhances access to legal representation. The Attorney-General considered that this strikes the correct balance and does not limit the right to a fair hearing. However, in order to ensure that the phrase "despite any rule of law to the contrary" in section 197(1) is not taken as a provision overriding the *Charter of Human Rights and Responsibilities Act 2006*, the *Charter* is expressly excluded from that phrase.

198 Order for taking evidence from a witness before trial

Overview

This section gives the court a much broader power than previously existed to order that evidence be taken from a witness, and recorded, pre-trial.

Legislative History

This section has its origins in section 11 of the *Crimes (Criminal Trials) Act 1999*. It has been substantially broadened, as discussed below.

Relevant Rules/Regulations/Forms

For the form of the application for an order for taking evidence from a witness before trial, see rule 2.08 for Form 2E of the County Court Criminal Procedure Rules 2009.

Discussion

Under section 11 of the *Crimes (Criminal Trials) Act 1999*, an application for evidence to be recorded before trial could only be made where the witness did not provide a deposition (whether by oral evidence or sworn statement) or give evidence at a compulsory examination hearing. This reflected the original intention of section 11 which was to provide a forum for testing evidence not relied upon at a committal hearing.

This section has been broadened so that, as well as being available for witnesses who were not part of the committal process, it will also be available in other situations in which it may be sensible to record evidence pre-trial, notwithstanding the fact that the witness was included in the committal proceeding. Essentially, those situations are where it is likely or desirable that the witness not give evidence in person at trial. Pre-recording can therefore provide the best evidence from the witness which can be played at trial. It also provides an opportunity to the opposing party to cross-examine the witness before trial in such cases.

However, it should be noted that this section does not determine the ultimate admissibility of any evidence that is pre-recorded. Admissibility will be determined under the exceptions to the hearsay rule in the *Evidence Act 2008* and/or the common law. This section simply provides an opportunity to preserve evidence, subject to a ruling on its admissibility. Under the expanded powers under the Act to resolve evidential issues before trial (see section 199), both pre-recording and admissibility can, if convenient, be dealt with at the same time. It should also be noted that section 232(1)(c) allows the trial judge to permit a person to give evidence by audio or audiovisual recording, and if unanticipated issues arise during trial, to order the witness to ***attend*** before the court (under section 232(2)(b)). This can be an alternative to a ruling on the strict admissibility of the recording of evidence taken under section 198 (this section) in appropriate cases.

The first two listed circumstances (in section 198(2)(a) and (b)) relate to witnesses not called or relied upon during a committal proceeding.

The new circumstances described in the remaining subsections are:

- section 198(2)(c), where it is reasonably anticipated that the witness will be unavailable at trial
- section 198(2)(d), where the parties consent. This will, presumably, occur when the parties agree either that it is appropriate that an issue be explored in evidence before trial, or where it is agreed that the witness can be excused from attending trial, subject to the witness's evidence being pre-recorded and played

- section 198(2)(e), if for any other reason, the court considers it appropriate. This recognises the intended flexibility of the power. It could be used, for example, to take evidence from a busy professional witness, whether for the accused or the DPP. It could also be used to preserve evidence from a vulnerable witness at a particular point in time.

It is important to note that, even where the circumstances in section 198(2) exist, under section 198(4) the court must also be satisfied that taking the evidence is in the interests of justice.

This broad power can also be used to conduct what is known as a 'Basha Inquiry' (originally described in *R v Basha* (1989) 39 A Crim R 337) in which the defence is permitted to cross-examine a new witness in the absence of the jury prior to any evidence being called at trial. This can now be done under section 198(2)(a) or (2)(b) which relates to witnesses not part of the committal proceeding, or under section 198(2)(d) where the witness's statement was handed-up but information has come to light which makes cross-examination of the witness prior to trial appropriate.

Section 198(5) makes it clear that the court may make directions as to how the evidence is to be given (e.g. with cross-examination and re-examination) and recorded (e.g. by video recording) by reference to the *Evidence Act 1958*.

An application for an order to take evidence pre-trial is subject to the notification requirements in section 200. The court's broader case management powers at a directions hearing (in section 181) may also be used in relation to such an application. In combination, these powers allow the court and the parties to identify evidence that should be taken pre-trial and reduce witness unavailability as a reason for delaying trials, particularly at the last minute.

The wording of section 198(1) makes it clear that the court may make an order to take evidence before trial only on the application of a party, not on the court's own motion (see section 337).

Separate provisions relating to the taking of evidence from witnesses prior to trials for sexual offences are contained in Part 8.2.

Division 4 – Procedure for pre-trial orders and other decisions

Division Overview

This Division sets out the process for dealing with pre-trial decisions. It includes the broad power to decide issues and make orders pre-trial, and the strengthened obligation to notify the other party and the court of pre-trial issues. The following flowchart sets out these processes, which are discussed in detail in relation to the relevant sections in this guide.

Deciding Pre-Trial Issues

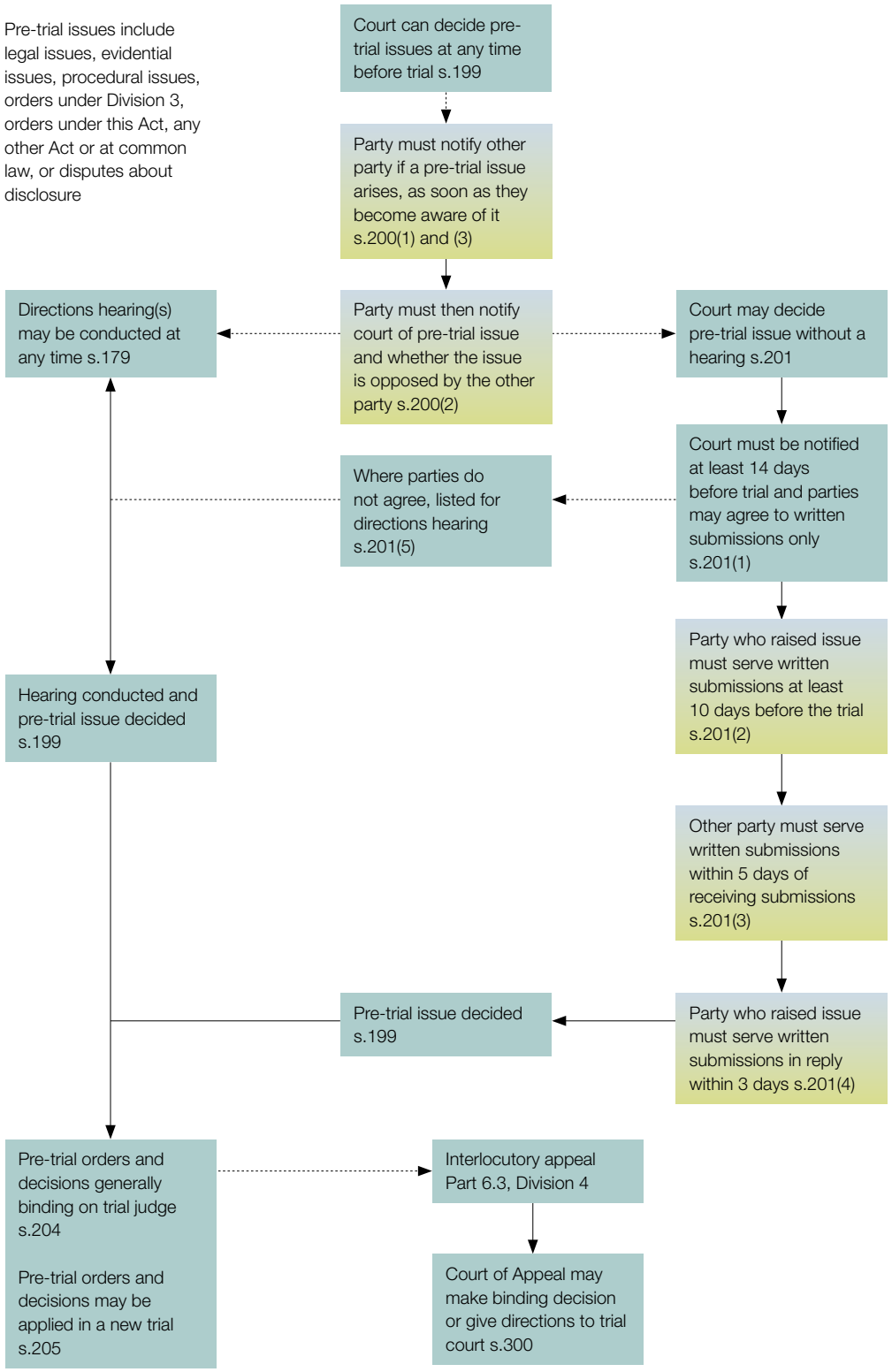
LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

Optional process


Pre-trial issues include legal issues, evidential issues, procedural issues, orders under Division 3, orders under this Act, any other Act or at common law, or disputes about disclosure
Court can decide pre-trial issues at any time before trial s.199
Party must notify other party if a pre-trial issue arises, as soon as they become aware of it s.200(1) and (3)
Party must then notify court of pre-trial issue and whether the issue is opposed by the other party s.200(2)
Directions hearing(s) may be conducted at any time s.179
Court may decide pre-trial issue without a hearing s.201
Court must be notified at least 14 days before trial and parties may agree to written submissions only s.201(1)
Where parties do not agree, listed for directions hearing s.201(5)
Party who raised issue must serve written submissions at least 10 days before the trial s.201(2)
Hearing conducted and pre-trial issue decided s.199
Other party must serve written submissions within 5 days of receiving submissions s.201(3)
Party who raised issue must serve written submissions in reply within 3 days s.201(4)
Pre-trial issue decided s.199
Pre-trial orders and decisions generally binding on trial judge s.204
Pre-trial orders and decisions may be applied in a new trial s.205
Interlocutory appeal Part 6.3, Division 4
Court of Appeal may make binding decision or give directions to trial court s.300

199 Court may make orders and other decisions before trial

Overview

This section provides an extended power for courts to make any decision or other order at any time before trial, that is, at any stage between committal for trial and ***commencement of trial***. The court may hear and decide issues including:

- any issue of law
- any issue of fact or mixed law and fact that a judge is entitled to determine
- an application for any order that can be made in relation to a trial under this Act, any other Act, or at common law
- any other issue with respect to the trial (to avoid doubt about the intended breadth of the section).

Any decision made before trial pursuant to this section has the same effect as if it was made during trial, but nothing in the section limits any power of a ***trial judge*** to make orders or other decisions after a trial has commenced.

Legislative History

This section is based on parts of section 5 of the *Crimes (Criminal Trials) Act 1999* in the way in which powers are described. However, the ability to make pre-trial decisions has been significantly expanded. As a result, the section also incorporates the substance of what was section 391A of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Introduction

This section is central to the way in which the Act facilitates and encourages early identification and resolution of important issues. The following shows, broadly speaking, how it fits into this overall approach:

- Directions hearings are the primary tool for reviewing cases, gathering information and planning for the resolution of pre-trial issues and for trial. However, substantive orders, directions and other decisions can also be made at directions hearings. Stronger case management powers are given to judges at directions hearings (see section 181).
- A broad range of issues and orders can be decided pre-trial. That includes issues of law, procedure and evidence, as well as any specific orders that can be made in relation to a trial (see section 199 i.e. this section).
- The parties are obliged to notify each other and the court of trial issues, whether or not they intend to raise them at or during trial (see section 200).
- Pre-trial decisions are presumptively binding on a trial judge. It is expected that a change of evidence or other circumstances will be required before a trial judge would depart from a pre-trial decision (see sections 203 and 204).

An important purpose of this section is to remove technical barriers to the use of the whole pre-trial period for deciding issues related to a trial. It provides opportunities for better use of the lengthy period between committal and trial, rather than reserving all issues to be dealt with immediately before trial or during trial. Early resolution of important issues (e.g. admissibility of key evidence, severance or change of venue) can:

- reduce the length of trials by avoiding unnecessary breaks during trial to resolve those issues
- reduce delays where the decision on a key issue leads to, for example, the withdrawal of charges or to guilty pleas or a combination of the two.

This section is also designed to work in with the case management powers at a directions hearing, and the extended obligations on the parties to notify both each other and the court of issues and orders.

Timing of pre-trial decisions

This section (as with the whole Part) is not restricted to the period of time before a first trial. They are also designed to operate following an abandoned trial, or between a successful appeal and a retrial. The phrases “pre-trial” and “before trial” should be understood in that way.

As noted, this section removes technical limitations on pre-trial decisions. Previously, section 391A of the *Crimes Act 1958* allowed “any question with respect to the trial” to be determined after the accused is arraigned but before the jury is empanelled. In 1983, when this section was introduced, it represented a significant shift from the previous situation in which a jury was often empanelled and then kept aside for a significant period of time (often days) while issues of law, evidence and procedure were resolved. The response was to resolve those issues after arraignment (that is, after the trial had technically commenced at common law see e.g. *R v Talia* [1996] 1 VR 462) but before empanelment. The opening up of this gap between commencement and empanelment has been part of the cause for confusion around when a trial technically commences (which the Act resolves in section 210).

Although a significant trial management technique at the time, the result of the section 391A approach is that important issues were often resolved in the days leading up to the trial proper getting underway, rather than utilising the lengthy period of time well before trial.

Section 5 of the *Crimes (Criminal Trials) Act 1999* technically achieved much of what this section aims to achieve in that it allowed a range of issues to be determined at a directions hearing, which could be held at any time after a presentment was filed. However, the section 391A approach has remained the primary approach, which may reflect the lack of integration of the *Crimes (Criminal Trials) Act 1999* regime into the other primary criminal procedure statutes. This section achieves that integration and extends the operation of section 5 by:

- not limiting such decisions to directions hearings (opening the way for separate pre-trial hearings, with or without evidence)
- not limiting such decisions to a point in time after the presentment (now indictment) is filed
- using broader language to describe the types of decisions that can be made before trial. This includes replacing 'questions' with 'issues' in order to avoid much of the technical argument that has traditionally accompanied what is or is not a 'question of law'.

Relationship with interlocutory appeals

The ability to decide all issues before trial is also important for the operation of the interlocutory appeals regime introduced by the Act (discussed in detail in relation to section 295). The interlocutory appeals model is designed to make it significantly easier to bring an ***interlocutory appeal*** before trial rather than during trial. One of the central criteria for leave to bring an interlocutory appeal is the extent of the disruption to the trial process (see section 297(1)(a)), which will ordinarily be less the earlier the appeal is to be brought.

The forensic advantage of an interlocutory appeal over a post-conviction appeal, for both parties, should encourage early resolution of pre-trial issues under this section. For the accused, success on a particular point in a post-conviction appeal may not result in a retrial because the Court of Appeal may consider that there has been no 'substantial miscarriage of justice'. However, success on the same point in an interlocutory appeal will result in the trial being conducted in accordance with the appeal decision, therefore improving the accused's forensic position at trial. For the ***DPP***, the forensic advantage is more acute as it does not have a post acquittal appeal right (other than a Director's reference under section 308, which does not alter the outcome of the trial).

These forensic advantages, combined with leave to appeal on an interlocutory basis being easier to obtain at the pre-trial stage, are designed to encourage and support the parties to seek and obtain pre-trial decisions early (at least on important legal and evidential issues) under this new extended power.

In *R v Wei Tang* [2009] VSCA 182 the Court of Appeal, in anticipation of interlocutory appeals being available under the Act, endorsed the need for issues of "fundamental importance" to be identified and resolved before the trial commences.

The link between this section and interlocutory appeals also explains the language adopted to describe what are commonly variously described as 'rulings', 'orders', 'judgments', 'determinations' etc. Instead, the Acts uses 'decision' and 'decide'. Even where orders are referred to (as in the heading to this section) they are described in a way which makes it clear that 'orders' are a subset of 'decisions'. This ensures that interlocutory appeals are available (subject to certification and leave) in relation to all ***interlocutory decisions***.

Effect of pre-trial decisions

Section 199(3) declares, to avoid doubt, that decisions made under this section have the same effect as if they are made after the trial commences. Section 199(4) ensures, again to avoid doubt, that this section does not limit any other power of the court to make orders or other decisions.

Subsequent sections deal with the status of decisions made under this section at trial and at retrial. There is no requirement that the judge who makes the pre-trial decision will be the ***trial judge***. The Act proceeds on the assumption that in those circumstances the decision will bind the trial judge (see section 204). This is consistent with the uncontroversial proposition that judges of the same court should not review each others' decisions, unless there has been a material change of circumstances. The fact that there may be a material change of circumstances (ordinarily because the evidence at trial changes the factual basis on which the decision was made) is catered for in section 204 which allows the trial judge to depart from the earlier decision if to do otherwise would be contrary to the interests of justice.

Where it seems likely that a decision cannot properly be taken until evidence is heard at trial, then an issue can be left until trial itself. However, there is no reason in principle why decisions that were previously made under section 391A of the *Crimes Act 1958* just before trial, should not all be amenable to being taken earlier. For example, a decision on the admissibility of a confession ordinarily will not need to wait until, or shortly before, a trial commences.

Other orders: common law/other Acts/special pleas

It should be noted that section 199(1)(c) provides that orders can be made under any Act or at common law. This ensures the pre-trial processes in the Act can be used to manage any trial related issues, regardless of their legal basis. In particular, it allows applications for a stay of proceedings for abuse of process to be heard and decided pre-trial. This subsection also expressly includes "an application to quash a charge in the indictment". There are a number of bases upon which an application to quash an indictment can be made (including, e.g. lack of authority and duplicity). An application to quash an indictment is often referred to as a *demurrer*. Fox notes that such an application can be made pre-trial or when the accused pleads (*Victorian Criminal Procedure*, 2005, paragraph 8.2.4).

Applications to quash indictments have been included as an explicit part of the pre-trial process as they can be made pre-trial and are issues of law decided by a judge without a jury.

Special pleas are in a similar category. These include *autrefois acquit* and *convict*, challenge to jurisdiction, previous pardon and immunity. Fox notes that such pleas must be heard by a jury if there are issues of fact to be determined (*Victorian Criminal Procedure*, 2005, paragraph 8.6.5), although in relation to some special pleas (*autrefois convict* and *acquit*) it has been assumed that a jury must be empanelled to determine the plea (see *R v Gamble* [1947] VLR 491). In order to avoid the need for a jury, the sorts of issues dealt with by special plea are often used as the basis of a submission that the proceedings are an abuse of the court's processes warranting a stay of proceedings.

The Act refers to special pleas in section 218 by simply confirming that they can be entered on ***arraignment***. This is not limited to arraignments before the jury panel (as described in section 217). Accordingly, special pleas can be taken at a pre-trial arraignment (see sections 215(2) and 180) and determined by a judge under this section (as either an issue that can lawfully be decided without a jury under section 199(1)(b) or an application that can be made at common law under section 199(1)(c)), unless the judge decides that the particular special plea needs to be decided by a jury.

200 Disclosure of pre-trial issues

Overview

This section requires the parties to notify each other and the court of any pre-trial issues that they intend to raise, whether they intend to do so before or during trial.

The notification process requires the party to:

- notify the other party of any pre-trial issues or orders sought to find out whether there will be a dispute over the issue or order (i.e. whether it will need a ruling)
- notify the court of the issue or order sought, including whether the issue is in dispute or the order will be opposed.

Both of these notifications must be given as soon as possible after the party becomes aware of the issue and at least 14 days before trial. The former is not subject to the latter.

Legislative History

This section is based on section 10(1) and (2) of the *Crimes (Criminal Trials) Act 1999* with significant changes. The new section is not limited to 'questions of law', the parties are obliged to discuss the issue before notifying the court of the issue and the time within which notifications must be made has been changed.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section significantly strengthens the obligations on the parties to notify each other and the court of issues relating to the trial. It is part of an overall approach designed to facilitate and encourage early resolution of pre-trial issues, as discussed in relation to other sections:

- Directions hearings are the primary tool for reviewing cases, gathering information and planning for the resolution of pre-trial issues and for trial. However, substantive orders, directions and other decisions can also be made at directions hearings. Stronger case management powers are given to judges at directions hearings (see section 181).
- A broad range of issues and orders can be decided pre-trial. That includes issues of law, procedure and evidence, as well as any specific orders that can be made in relation to a trial (see section 199).
- The parties are obliged to notify each other and the court of trial issues, whether or not they intend to raise them at or during trial (see section 200, i.e. this section).
- Pre-trial decisions are presumptively binding on a ***trial judge***. It is expected that a change of evidence or other circumstances will be required before a trial judge would depart from a pre-trial decision (see sections 203 and 204).

Case management can be less effective if the court and the parties are not aware of what needs to be managed. This section gives a firm statutory basis to the obligations on the parties to notify each other and the court of pre-trial issues.

In contrast to section 11 of the *Crimes (Criminal Trials) Act 1999*, this section is not limited to disclosure of 'questions of law' – a phrase which has given rise to technical arguments about its scope for many years. Instead, what must be notified are any issues falling within section 199(1)(a)–(d), which includes any issue in respect of the trial, particularly any issue of law, evidence or procedure. Importantly, the cross-reference is to section 199(1)(a)–(d) specifically, which prevents any argument that the notification requirement relates only to issues that are intended by the party to be resolved pre-trial. This point is put beyond doubt by the words "… whether before or during trial".

The philosophy underlying this approach is that the court should be made aware of potential issues in order to properly case manage them. Having been notified, the court can then give directions as to how the issue or order is to be decided, including setting a timetable under section 181(2)(c).

The timing of the obligation has also been changed. Whereas in section 11, notification had to occur at least 14 days before trial, it must now be done as soon as possible after the party becomes aware of the issue, and

no later that 14 days before the day on which the trial is listed to commence. That is, a party who becomes aware of an issue two months out from trial and only notifies the other party and the court 14 days beforehand will be in breach of this obligation. This change is designed to encourage issues to be identified and resolved earlier than immediately before trial (discussed further in relation to section 199).

The other significant change is that the party raising the issue must first notify the other party with a view to establishing whether this issue will be disputed or the order opposed. This is consistent with the Act's approach to encouraging discussion between the parties on important issues and, in turn, making the most of court resources to deal only with genuine disputes. Where there are multiple parties, notification should be given to all parties.

The section does not include any form of notification that must be given, either to the other party or to the court. A court may prescribe such a form in rules or leave the form of notification to the parties.

201 Court may decide pre-trial issue without a hearing

Overview

This section allows the parties to agree to an issue notified under section 200(1) being decided on the papers and sets a timetable for the filing of written submissions for that to occur.

Legislative History

This section is based on section 10(3)-(7) of the *Crimes (Criminal Trials) Act 1999*. It has been reworded and applies to a wider range of pre-trial issues (see section 200(1)), not only to questions of law.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

202 Hearing of application for exclusion of evidence

Overview

Where the accused applies to have evidence excluded, this section allows the court to order that the accused call their evidence before the prosecution calls its evidence.

Legislative History

This section is based on section 391B of the *Crimes Act 1958*. The section has been simplified and the limitation in section 391B to evidence being excluded "solely in the exercise of a discretion" has been removed. The section empowers the court to determine the order of evidence to be taken, regardless of the basis for exclusion.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section relates to situations where the court hears evidence in order to determine the admissibility of evidence. Traditionally, this occurred by *voir dire* in the absence of the jury during trial. The section removes any doubt about the court's power to determine the order in which evidence is to be taken. There is limited authority on this power, however, it is expected that the court would order the accused to call evidence first where the evidence was said to be inadmissible on the basis of factual assertions on which no evidence had yet been given. The court may, in such circumstances, consider it appropriate for the accused to lay an evidential foundation before requiring evidence from the prosecution.

203 Judge at pre-trial hearing need not be trial judge

Overview

This section makes it clear that pre-trial decisions do not have to be made by the ***trial judge***.

Legislative History

This section is based on section 12(1) of the *Crimes (Criminal Trials) Act 1999*, without substantive change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Together with section 204, this section ensures that pre-trial decisions do not have to made by the trial judge. Although it is based on an existing section, the increased focus on pre-trial resolution of issues in the Act gives it greater significance.

204 Pre-trial orders and other decisions generally binding on trial judge

Overview

This section makes pre-trial decisions presumptively binding on the trial judge, unless the interests of justice require otherwise.

Legislative History

This section is based on section 12(2) of the *Crimes (Criminal Trials) Act 1999*, without substantive change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This is the companion provision to section 203. It creates a presumption that a pre-trial decision binds the ***trial judge***. This is consistent with the uncontroversial proposition that judges of the same court should not review each others' decisions, unless there has been a material change of circumstances. The fact that there may be a material change of circumstances (ordinarily because the evidence at trial changes the factual basis on which the decision was made) is catered for in section 204 which allows the trial judge to depart from the earlier decision if to do otherwise would be contrary to the interests of justice. Where it seems likely that a decision cannot properly be taken until evidence is heard at trial then an issue may need to be left until trial itself.

205 Pre-trial orders and other decisions may be applied in new trial

Overview

This section allows the court in a new trial to apply pre-trial orders and other decisions made before or during an earlier trial, unless the order or other decision is inconsistent with an appeal ruling or to apply it would not be in the interests of justice.

Legislative History

This section is based on section 21 of the *Crimes (Criminal Trials) Act 1999* with limited changes to terminology and structure.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section preserves the use of pre-trial rulings in 'new trials'. A new trial in this context will include retrials following a jury being discharged (e.g. as a result of being unable to agree or because a mistrial is declared) and retrials following a successful appeal against conviction.

206 Procedure if prosecution proposes not to lead evidence

Overview

This section creates a procedure for the prosecution to agree, pre-trial, to offer no evidence against the accused resulting in an acquittal being entered.

Legislative History

This section is based on the second part of section 391 of the *Crimes Act 1958*, which has been modified to enable it to be used at any stage before trial.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The key difference between the process under this section and a discontinuance under section 177 (previously called a *nolle prosequi*) is that the first amounts to an acquittal (and therefore the accused cannot be charged again for the offence) whereas the second does not (and the accused can be charged again).

Under section 391 of the *Crimes Act 1958*, the power was needed because the trial had formally commenced with arraignment and, without this process, a jury would still need to be empanelled and directed to return a verdict of not guilty where the prosecution chose not to proceed (e.g. because of an adverse ruling under the section 391A process).

This situation is now covered by a new power in the Act, which allows the trial judge to enter a verdict of not guilty even after the trial has commenced (see section 241). However, this section has been retained and given a slightly different purpose. It can be used pre-trial where the ***DPP*** intends to end a prosecution but agrees that the appropriate outcome is an acquittal rather than a discontinuance. The only prerequisite is that the accused must be arraigned and plead not guilty, which can now occur at any time as a result of the operation of sections 215(2) and 180.

It is important to note the distinction between this process and discontinuing a prosecution. A discontinuance is where the DPP decides not to continue with a prosecution. No reasons are required for that decision and it cannot be reviewed unless its use amounts to an abuse of the court's process. In contrast, the procedure in this section amounts to the DPP deciding to continue with a case but to substitute the offering of no evidence for the trial process, with the result that an acquittal is entered, there being no way in which the case can be proved in the absence of evidence. The section uses the phrase "proposes to lead no evidence" which was also found in section 391 of the *Crimes Act 1958* to ensure that this process is understood in the same way, that is, as an alternative to discontinuing a prosecution.

However, in order to make it completely clear that the DPP can discontinue a prosecution even though they may have literally decided to lead no evidence, section 206(5) provides that the section does not limit the power to discontinue.

Part 5.6 – Sentence Indication

Part Overview

A statutory sentence indication process was introduced in Victoria by the *Criminal Procedure Legislation Amendment Act 2008* and it has been re-enacted in this Part without substantive change. The previous very long provision has been divided into three sections, consistent with the approach generally in the Act to limit the length of sections and to ensure that sections (where possible) deal with a single topic.

The background to this issue is contained in the Sentencing Advisory Council (SAC) Discussion Paper, *Sentence Indication and Specified Sentence Discounts* published in January 2007, and in SAC's final report on the same topic in September 2007.

SAC considered that the early identification of pleas of guilty is critical to reducing delay in the criminal justice system. A plea of guilty can also benefit victims of crime because it means they do not have to give evidence in court and the process of closure can be achieved more quickly.

The Council observed that if people plead guilty at the earliest possible stage, this can:

- lead to a speedy resolution of charges
- decrease the number of trials
- make the criminal justice system more efficient and reduce delays
- minimise trauma to victims of having to appear in court and give evidence under cross-examination
- spare witnesses the time and stress of appearing in court
- lessen offenders' anxiety by speeding up the time between charge and disposition, and lessen the risk to the offender of pleading guilty and getting an unexpectedly harsh sentence
- reduce the amount of time spent in prison for remand prisoners.

Sentencing indications when combined with a requirement to articulate the discount given for a plea of guilty were designed to enable and encourage an accused who was going to plead guilty in any event, to do so at an early stage in proceedings. The requirement to articulate the discount given for a guilty plea is found in section 6AAA of the *Sentencing Act 1991*.

The purpose of a sentence indication is to clarify the accused's prospects on sentence so that the accused can make an early decision about whether or not to plead guilty. Providing a transparent indication on a likely sentence outcome may assist an accused in deciding to plead guilty at an earlier stage in proceedings. Informal sentencing indication processes for contested summary matters in the Magistrates' Court have been available since 1993 (formalised in sections 60 and 61 of this Act).

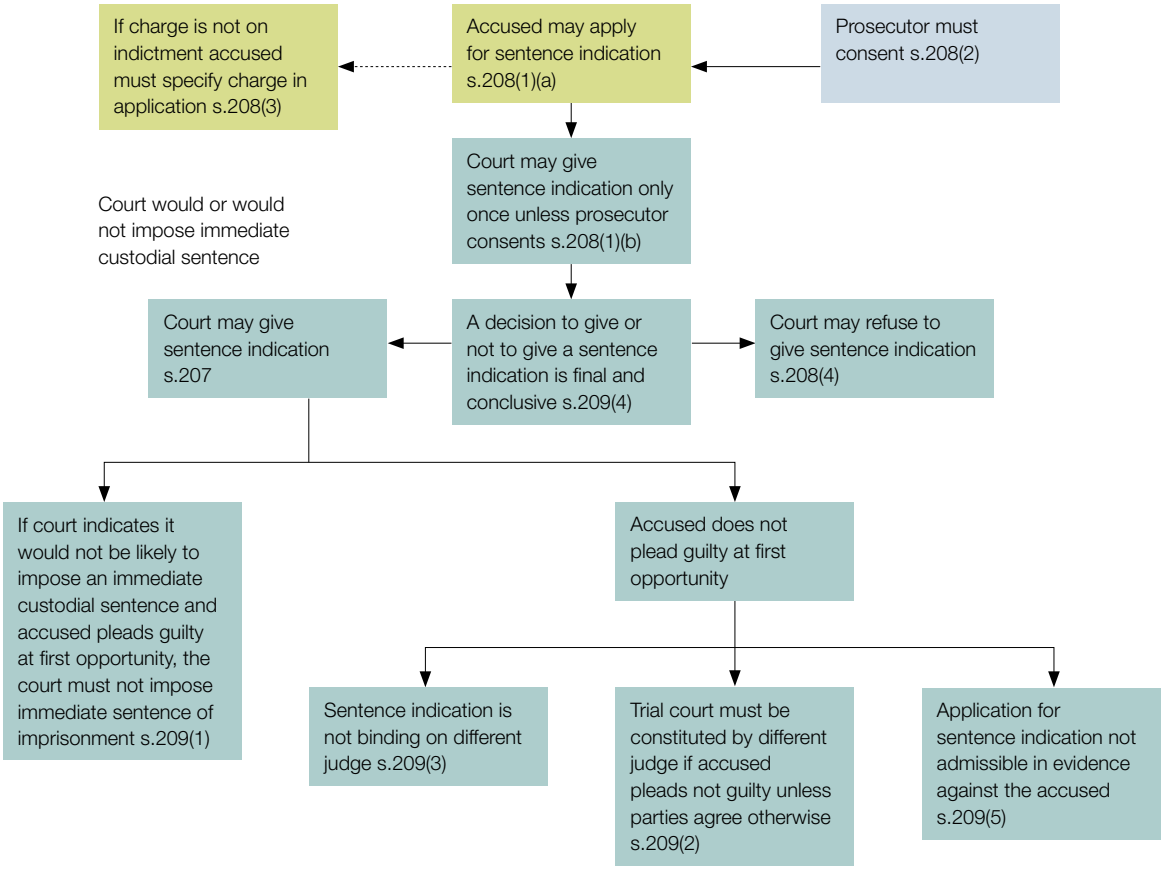
SAC recommended that sentence indications for indictable matters be permitted in limited situations. Specifically, the process only allows the court to indicate whether the accused might or might not be subject to an immediately servable term of imprisonment. Accordingly, the key features of the process in this Part are:

- An indication may only be provided once, unless the prosecution agrees to a second or subsequent indication (section 208(1)(b)).
- An indication will only be given on the request of the accused (section 208(1)(a)).
- An indication will only be given with the consent of the prosecution (section 208(2)).
- The court has unfettered discretion to refuse to provide a sentence indication. If given, it is binding on the court and is not appealable or reviewable (sections 208(4) and 209(4)).
- An indication is limited to whether the accused will receive an immediately servable term of imprisonment (section 207).
- If the accused pleads guilty at the first possible opportunity following an indication then the court is bound to follow the indication (section 209(1)).
- If the accused does not plead guilty at the first possible opportunity following an indication then the judge who gave the indication cannot preside at the trial, unless the parties agree (section 209(2)).
- No other judge is bound to follow an indication (section 209(3)).
- The application for a sentence indication, and its outcome, are inadmissible against the accused (section 209(5)).

SAC will review the operation of the sentence indication process. As a result, these sections have a sunset date of 1 July 2010 (by a combination of section 437 (which provides for the repeal of these sections) and section 2(2) (which provides for section 437 to commence on 1 July 2010).

The following flowchart sets out the sentence indication process.

Sentence Indication



LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

Optional process

207 Court may give sentence indication

Overview

This section gives the court the power to give a sentence indication.

Legislative History

This section is based on section 23A(1) of the *Crimes (Criminal Trials) Act 1999* without change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview of this Part.

208 Application for sentence indication

Overview

This section sets out the mechanics of how to apply for a sentence indication, including that it cannot be done without the prosecutor's consent and that the court can refuse to give an indication.

Legislative History

This section is based on section 23A(2)-(5) of the *Crimes (Criminal Trials) Act 1999* without change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview of this Part for the background and functioning of the sentencing indication process.
It should be noted that section 208(3) provides a mechanism for an indication to be made in relation to a charge that is not in the indictment. However, given that the prosecution has to consent to the application, such an indication is only likely to be given when the prosecution has indicated a willingness to consider accepting a guilty plea to that (alternative) charge.

209 Effect of sentence indication

Overview

This section sets out what the effect of a sentence indication is. In particular, that the indication is binding if the accused pleads guilty shortly after it is given. It also makes it clear that an indication only binds the judge who gives it, and that a decision to give or refuse to give an indication is final and conclusive.

Legislative History

This section is based on section 23A(6)-(11) of the *Crimes (Criminal Trials) Act 1999* without change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview of this Part.

Part 5.7 – Trial

Part Overview

The trial Part is structured in Divisions which capture the key stages of the trial process. The order of those Divisions broadly reflects the chronological flow of the trial.

Division 1 – Preliminary

Division 2 – Arraignment

Division 3 – Assisting the Jury

Division 4 – Opening Addresses

Division 5 – Case for the Accused

Division 6 – Giving of Evidence

Division 7 – Closing Addresses and Judge's Directions to the Jury

Division 8 – Alternative Verdicts and Discharge of Jury from Delivering Verdict

The following flowchart sets out the trial processes under this Part, including references to other relevant processes in the Act.

The key features of this Part are:

- changes in terminology. In previous trial provisions (in the *Crimes Act 1958* and the *Crimes (Criminal Trials) Act 1999*) there was inconsistency in the way the terms 'court', 'trial judge' and 'jury' were used. For example, the prosecutor gave an opening address 'to the court', whereas the same prosecutor gives a closing address 'to the jury'. Traditionally, the 'court' in a jury trial is constituted by both the trial judge and the jury because the jury is responsible for the facts and the trial judge responsible for the law, although its meaning will depend on context. This Part adopts more consistent terminology differentiating between the 'jury' and 'trial judge' rather than simply referring to the 'court'
- recognition of important steps. There are events which regularly occur during trials which previously had no statutory recognition. The best example is the trial judge's charge (or directions) to the jury which are now recognised in section 238
- simplification of processes. Some processes (particularly in the *Crimes Act 1958*) were complex and did not necessarily reflect existing or preferred practice. See, for example, section 231, which deals with the process to be followed at the start of the case for the accused
- evidential provisions. A number of evidential provisions have not been re-enacted as the topics they covered are now dealt with in the *Evidence Act 2008*. See, for example, section 18 of the *Crimes (Criminal Trials) Act 1999* which dealt with disallowing questions in cross-examination

Trial Procedure

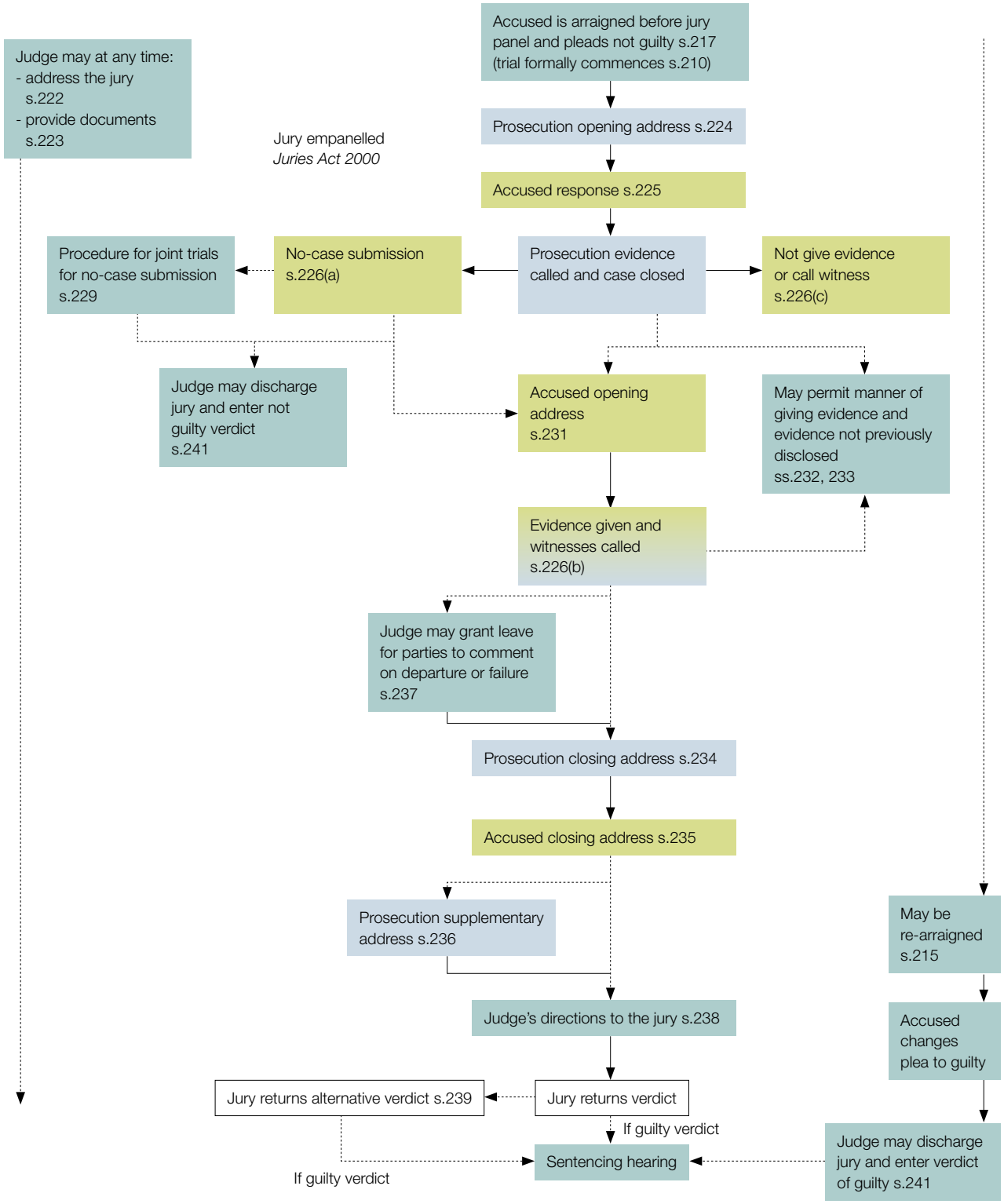
LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

Optional process


Accused is arraigned before jury panel and pleads not guilty s.217 (trial formally commences s.210)
Judge may at any time:
- address the jury s.222
- provide documents s.223
Jury empanelled
Juries Act 2000
Prosecution opening address s.224
Accused response s.225
Procedure for joint trials for no-case submission s.229
No-case submission s.226(a)
Prosecution evidence called and case closed
Not give evidence or call witness s.226(c)
Judge may discharge jury and enter not guilty verdict s.241
Accused opening address s.231
May permit manner of giving evidence and evidence not previously disclosed ss.232, 233
Evidence given and witnesses called s.226(b)
Judge may grant leave for parties to comment on departure or failure s.237
Prosecution closing address s.234
Accused closing address s.235
Prosecution supplementary address s.236
May be re-arraigned s.215
Judge's directions to the jury s.238
Accused changes plea to guilty
Jury returns alternative verdict s.239
Jury returns verdict
If guilty verdict
Judge may discharge jury and enter verdict of guilty s.241
Sentencing hearing
If guilty verdict

- new procedures. The Part introduces new processes designed to improve the functioning and efficiency of trials, namely:
  - section 229 creates an explicit process for the procedure in joint trials at the end of the prosecution case
  - section 241 removes the need for directed verdicts
  - section 216 allows guilty pleas to lengthy indictments to be taken in writing if the parties and the judge agree
  - section 210 declares when a trial commences.

Division 1 – Preliminary

Division Overview

This Division covers important preliminary issues including:

- when a trial commences
- time limits for commencing trials
- powers of the ***trial judge***
- trying a corporate accused in its absence.

210 When trial commences

Overview

This section declares when a trial formally commences, namely when the accused pleads not guilty before the jury panel. If the jury panel is split (because it is too big to manage in one go) then section 210(2) declares that the trial commences when the accused pleads not guilty before the first part of the jury panel present in court.

Legislative History

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

Relevant Rules/Regulations/Forms

For recording of time and date of ***arraignment*** see:

- rule 4.12 of the Supreme Court (Criminal Procedure) Rules 2008
- rule 2.09 of the County Court Criminal Procedure Rules 2009.

Discussion

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 that occur 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 word "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. As a result, the trial could arguably have technically 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 in no way limited 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 the uncertainty with arraignment being tied to commencement of trial. However, there remained divergent practice, 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. The section 391A procedure has been significantly reformed in section 199 of this Act, in a way which no longer requires a 'window' to be maintained 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 the trial commencing as it does not include jury selection and empanelment.

Section 210 now uses the entry of not guilty pleas on ***arraignment*** before the jury panel to mark the commencement of the trial. This approach also maintains broad consistency with the common law.

As a result of defining the ***commencement of trial*** in that way, the time limits that work backwards from a predicted trial date throughout the Act have been changed so as to refer to the day on which the trial is 'listed to commence'. This phrasing is designed to link these pre-trial steps to a date that is both definite and which 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. However, when those trials actually commence is often determined by how long other scheduled trials take and the relative priority of the trials listed.

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

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

Other sections which form part of this overall approach are:

- 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.

211 Time limit for commencing trial for offences other than sexual offences

Overview

This section requires that trials commence within the following limits:

- within 12 months of committal for trial
- if there is no committal, within 12 months of the ***direct indictment*** being filed
- if the Court of Appeal orders a retrial, within 6 months of the order being made.

Any of these time limits can be extended under section 247.

Legislative History

This section is based on section 353(3) of the *Crimes Act 1958*. However, while section 353(3) referred to time limits prescribed in regulations, this section brings the time limits into the Act. Paragraph (c) is new (discussed below).

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

There have been no changes to the time limits for the commencement of trial following committal or ***direct indictment***. The Act contains a new definition of commencement of trial which is contained in section 210.

An additional time limit for commencing trials after successful appeal to the Court of Appeal has been added. Previously, there were no time limits within which such trials must commence. Given the time involved in the appeal process, there are benefits in ensuring that such retrials are heard as a matter of priority, as well as ensuring compliance with section 25(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006*.

Section 277(2) requires the Court of Appeal, if it orders a new trial, to order that the accused ***attend*** on a specified date before the trial court, which can then set a trial date. This is designed to avoid delay in cases coming back before the trial court to be case managed.

It should also be noted that the time limits in this section relate to when the trial actually commences (for which see section 210), rather than when a trial is 'listed to commence'.

Importantly, section 247 allows the court to extend the time limits in this (and other) sections both before and after the expiry of the time period.

212 Time limits for commencing trials for sexual offences

Overview

This section requires that trials for sexual offences commence within the following limits:

- within 3 months of committal for trial
- if there is no committal, within 3 months of the ***direct indictment*** being filed
- if the Court of Appeal orders a retrial, within 3 months of the order being made.

Any of these time limits can be extended under section 247.

Legislative History

This section is based on section 359A of the *Crimes Act 1958*. However, it has been significantly reworked and simplified and a time limit in relation to retrials following appeal has been added.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

There have been no changes to the substance of the time limits for trials of ***sexual offences*** following committal or ***direct indictment.***

Section 359A of the *Crimes Act 1958* had become particularly complicated as a result of the addition of subsection (2AAA) which included separate reference to charges for a sexual offence where the complainant was a child or was cognitively impaired. Even though the time limits were the same in those cases (3 months), they were separately referred to in order to make it clear that the jury had to be empanelled within 3 months. This was to avoid uncertainty about when a trial formally commenced. The Act now resolves this issue by providing a new definition of ***commencement of trial*** in section 210 (there is further discussion of this issue under that section). As a result, there is no need for separate time limits in those types of cases.

Section 3 of the Act now contains a definition of ***sexual offence*** that applies to this section. This definition is broader than in section 359A(1) (adult complainants) and slightly broader than in section 359A(6) (children and cognitively impaired complainants). Previously, section 359A(1) did not include a number of sexual offences, without apparent justification. Although section 359A(6) included many of those, it did not include offences of sexual servitude under subdivision 8EAA of the *Crimes Act 1958*. This approach led to the inconsistencies highlighted in the following table.

Time limits to commence a trial – sexual offences		
Complainant	Applicable offence	Time limit
Adult complainant	Offences in sections 38, 39, 44, 45, 47, 47A, 51, 52 or 57	3 months
Adult complainant	Offences in 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	All offences against subdivisions 8A to 8E	3 months
Child or person who is cognitively impaired	Subdivision 8EAA	12 months

The Act provides that the 3 month time limit now applies to all offences in subdivisions 8A-8EAA (or earlier corresponding enactments), as well as an attempt to commit those offences, or an assault with intent to commit any of those offences. Although there is a broadening of the offences to which this section applies, they represent a very small proportion of cases taken in the County Court and are unlikely to have a significant impact on listing.

An additional time limit for commencing trials after successful appeal to the Court of Appeal has been added. Previously, there were no time limits within which such trials must commence. Given the time involved in the appeal process, there are benefits in ensuring that retrials are heard as a matter of priority, as well as ensuring compliance with section 25(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006*.

Section 277(2) requires the Court of Appeal, if it orders a new trial, to order that the accused ***attend*** on a specified date before the trial court. This is designed to avoid delay in cases coming back before the trial court to be case managed, and a trial date set.

Importantly, section 247 allows the court to extend the time limits in this (and other) sections both before and after the expiry of the time period. However, section 247(2) prohibits an extension of time for commencement of trial for a sexual offence of more than 3 months.

213 Powers of trial judge not affected

Overview

This section declares that a ***trial judge*** can, during trial, make any order or other decision that can be made pre-trial. It also makes it clear that the Act does not limit any powers of a trial judge at common law.

Legislative History

This section is new and has no direct relationship to any previous provision.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

As discussed in the Part 5.5 overview, the Act creates an express pre-trial period and empowers the court to make a broader range of orders before trial. This section is included to avoid doubt and make it clear that a ***trial judge*** can exercise any of those powers during trial, and that the Act does not limit or remove any existing powers.

214 Non-appearance of corporate accused at trial

Overview

This section allows the court to try a ***corporate accused*** in its absence as long as the court is satisfied that the accused had proper notice of the proceeding.

Legislative History

This section is new in relation to trial proceedings.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

A ***corporate accused*** can be tried in its absence at common law. A number of previous provisions (also repeated in the Act) require notices to be given to a corporate accused specifically warning that it may be tried in its absence (e.g. section 353(2)(b) of the *Crimes Act 1958*). In summary proceedings, the express power to try an accused in its absence was contained in section 54A of the *Magistrates' Court Act 1989* and is now found in section 82 of this Act. For completeness, this section provides for the same procedure in trial proceedings.

This section forms part of an overall approach to dealing with a corporate accused in indictable matters which can be summarised as follows:

- A corporate accused cannot be compelled to ***attend*** before the court as it has no physical manifestation.
- A corporate accused can ***appear*** by a representative in accordance with section 334.
- The Magistrates' Court can conduct a committal proceeding in the absence of a corporate accused if the accused has had adequate notice of the committal hearing (see section 154).
- On committing a corporate accused for trial, the magistrate must order the accused to appear on the day on which the accused's trial is listed to commence or on any other day specified by the court (see section 144(2)(d)).
- If the corporate accused is committed for trial in its absence, the ***DPP*** (or the informant if the DPP does not act) must give notice to the corporate accused of the committal, the date which the accused must appear and the fact that the trial can be heard in the accused's absence if it does not appear (see section 154).
- Section 173 requires notice to be given to a corporate accused with the indictment but only if the section 148 notice was not given.
- It is an offence under section 252 for a corporate accused to fail to appear as ordered under section 144(2)(d), or on any other date ordered by the court.
- Section 214 (i.e. this section) allows the court to try a corporate accused in its absence, and to hear related summary offences.

By making this power express, the Act should not be taken to limit other common law powers that the court has to conduct trials in the absence of a non-corporate accused.

Division 2 – Arraignment

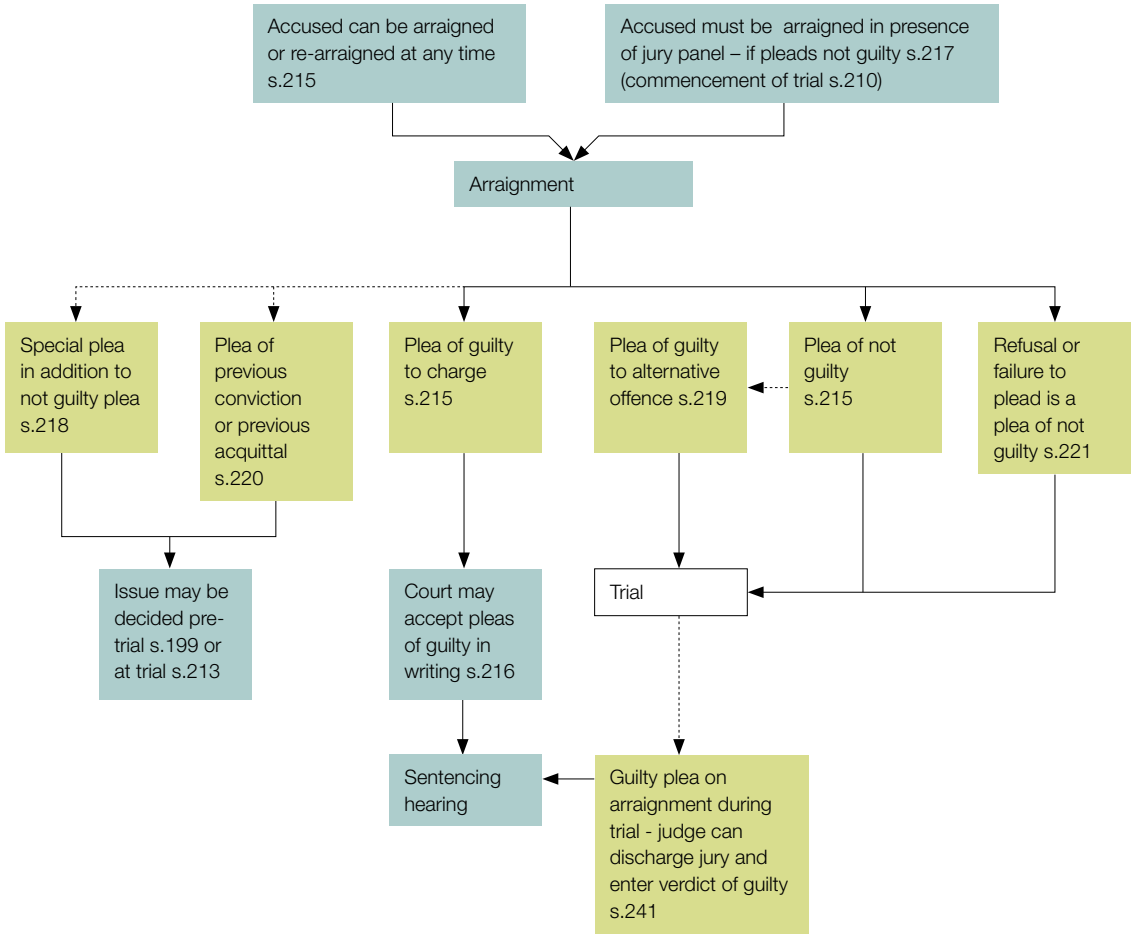
Division Overview

As discussed under section 210, arraignment has a confused history. This Division gathers together key provisions on arraignment which are based on the following principles:

- ***Arraignment*** is a general term describing a process where the accused pleads guilty or not guilty to each charge (section 215).
- Arraignment can happen at any time before or during trial, and as many times as required (section 215(1)).
- It is only arraignment before the jury panel which formally commences a trial (sections 210 and 217).
- Arraignment can be truncated for convenience in certain circumstances (section 216 and 180).

The following flowchart sets out the arraignment process.

Arraignment



LEGEND:

Court responsibility

Accused responsibility

Optional process

215 Arraignment

Overview

This section describes the process for arraigning an accused and confirms that ***arraignment*** and re-arraignment can occur at any time.

Legislative History

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

Relevant Rules/Regulations/Forms

For recording of time and date of arraignment see:

- rule 4.12 of the Supreme Court (Criminal Procedure) Rules 2008
- rule 2.09 of the County Court Criminal Procedure Rules 2009
- County Court Criminal Procedure Practice Note.

Discussion

This section performs two functions:

- It describes what ordinarily happens at an arraignment, which provides a foundation for truncated processes in some circumstances, namely for not guilty pleas at a directions hearing (section 180(2)) and guilty pleas to a lengthy indictment (section 216).
- It confirms that an arraignment can happen at any time and on multiple occasions. This is now possible because of the approach that the Act takes to defining when a trial formally commences (see the discussion in relation to section 210).

216 Written pleas of guilty may be accepted

Overview

This provides a new process for lengthy indictments. If both parties and the court agree, guilty pleas can be taken in writing if the accused has pleaded guilty to at least one charge on arraignment.

Legislative History

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

Relevant Rules/Regulations/Forms

For written notice of guilty plea under section 216(1)(b) of the Act, see rule 4.13 and Form 6-4F of the Supreme Court (Criminal Procedure) Rules 2008.

For notice of intention to plead guilty, see:

- rule 2.10 and Form 2F of the County Court Criminal Procedure Rules 2009
- County Court Criminal Procedure Practice Note.

Discussion

This is a new case management tool. Previously, it could take a long time to arraign an accused on indictments with multiple charges. This is particularly an issue in fraud and dishonesty cases.

This section allows guilty pleas to be entered by 'written notice' signed by the accused. There is no form required for this notice, and it could be done by the accused simply endorsing a copy of the indictment.

It is important to note that the procedure is only available where the accused has pleaded guilty to at least one charge orally. This recognises the symbolic importance of a plea in open court, as well as the real importance of such a step to the accused and to victims of crime.

The process can only be used where the prosecution consents and the court considers it appropriate, having regard to the number of charges. The discretion is designed to be broad and the judge will retain discretion not to allow the process to be used, even in multiple charge cases, for other good reasons (e.g. relating the nature of the offending).

Importantly, section 216(3) confirms that such pleas have the same effect as a plea on arraignment. As a result, an application to vacate a guilty plea will need to be made on the same basis regardless of the method.

Subclause 8(3) of Schedule 4 to the Act provides that on and from the commencement day (1 January 2010), section 216 (this section) applies to an accused committed for trial, or against whom a presentment was filed, before the commencement day. The presentment is treated as if it were an indictment filed under this Act.

217 Arraignment in presence of jury panel

Overview

This section requires that, if there are charges remaining on an indictment, the court must arraign the accused in the presence of the jury panel. As noted in note 1, it is this step which formally commences the trial.

Legislative History

This section is new but is related to section 391 of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

For recording of time and date of arraignment see:

- rule 4.12 of the Supreme Court (Criminal Procedure) Rules 2008
- rule 2.09 of the County Court Criminal Procedure Rules 2009
- County Court Criminal Procedure Practice Note.

Discussion

This section operates in conjunction with section 210 which declares that a trial formally commences when there is an ***arraignment*** under this section in front of the jury panel. The reasons for this approach are discussed in detail in section 210.

From a practical perspective, where the accused intends to defend one or more charges in an indictment, the matter is listed for trial. A jury panel will be summoned for the trial under the *Juries Act 2000* from which the jury for the accused's trial will be selected. This section requires that the accused be arraigned before that jury panel (i.e. before the process of empanelment begins).

The section also caters for the situation where the jury panel is split because it is too big to manage in court at one time (see section 30(5) of the *Juries Act 2000*).

In that case, the accused must be arraigned before the first part of the panel present in court. It will be a matter for the ***trial judge*** to decide whether the accused should be arraigned before each subsequent part of the panel, however, it is only the arraignment before the first part which commences the trial.

218 Special pleas in addition to plea of not guilty

Overview

This section declares that a special plea can be entered as well as a not guilty plea.

Legislative History

This section is based on section 390A(1) of the *Crimes Act 1958*. However, it has been simplified and the reference to *demurrer* removed. A *demurrer* is, in essence, an application to quash a charge in the indictment. Such applications are well suited to being dealt with as a pre-trial application (rather than as the equivalent of a plea, often called a 'plea in bar'). As a result, they are expressly included in the orders that the court can make pre-trial under section 199(1)(c). Such orders can also be made during trial by operation of section 213, which provides that all orders that can be made pre-trial can also be made during trial.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Special pleas are pleas other than guilty or not guilty. They are often technical in nature and include *autrefois acquit* and *convict* (a claim of a ***previous conviction*** or acquittal on the charge), challenge to jurisdiction, previous pardon and immunity. Fox notes that they are required to be heard by a jury only if there are issues of fact to be determined (*Victorian Criminal Procedure*, 2005, paragraph 8.6.5), although in relation to some special pleas (*autrefois convict* and *acquit*) it has been assumed that a jury must be empanelled to determine the plea (see *R v Gamble* [1947] VLR 491). In order to avoid the need for a jury, the sorts of issues dealt with by special plea have often been used as the basis of a submission that the proceedings are an abuse of the court's processes warranting a stay of proceedings.

This section deals with special pleas by simply confirming that they can be entered in addition to a plea of not guilty. This is not limited to arraignments before the jury panel (as described in section 217). Accordingly, they can be taken at a pre-trial arraignment (see sections 215(2) and 180) and determined by a judge under this section (as either an issue that can lawfully be decided without a jury under section 218(1)(b), or as an application that can be made at common law under section 218(1)(c)), unless the judge decides that the particular special plea needs to be decided by a jury.

Beyond providing for that flexibility, the Act does not change the substantive common law relating to special pleas generally, or to any particular type of special plea.

219 Plea of guilty to alternative offence

Overview

This section creates a process where the accused can plead to an alternative offence, even if that alternative is not included in the indictment. It is then dealt with as if it had been in the indictment as an alternative.

Legislative History

This section is based on section 390A(2) of the *Crimes Act 1958*, although it has been slightly restructured.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

There is no substantive change to this process. The accused can plead guilty to any legally available alternative to a charge in the indictment. It has the same effect as if the prosecution had chosen to include that alternative charge in the indictment. For example, the accused may be charged only with murder but, when arraigned, can plead not guilty to murder and guilty to manslaughter, as an alternative.

An alternative plea can either be accepted or not by the prosecution. If it is accepted then the primary charge is not proceeded with and the case proceeds to sentencing. This can be a way of giving effect to an agreement between the prosecution and the accused as to how to resolve the case. The primary charge can then be discontinued under section 177, or the prosecution can indicate an intention to lead no evidence either before trial (section 206) or during trial (section 241).

Where a plea under this section is not accepted, a conviction is not recorded for it. This reflects the fact that it is for the prosecution to determine which charges an

accused will face. However, evidence of the plea can be led to prove acceptance by the accused of the essential facts which underlie the plea (see *R v Broadbent* [1964] VR 733). An accused will usually want the jury to know that they accept responsibility for a lesser charge. The jury will be entitled to acquit the accused on the charge in the indictment and convict on the alternative charge. As the case proceeds as if the alternative charge has been included in the indictment under section 219(2), it is not open for the ***trial judge*** to order that guilt for the alternative charge not be considered under section 240.

The Act does not change the approach to what an alternative offence is and that will continue to include lesser included offences, statutory alternatives and common law alternatives.

220 Form of plea of previous conviction or previous acquittal

Overview

This section indicates how the accused may enter a plea of previous acquittal or ***previous conviction***.

Legislative History

This section is based on section 394 of the *Crimes Act 1958*, however, the section has been simplified and the language modernised from Norman French to English.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section re-enacts the substance of the pleas of *autrefois acquit* and *autrefois convict*. However, this language is historical (Norman French) and literally translates to 'I have been acquitted' or 'I have been convicted'. Consistent with the goal of modernising historical language, the section instead refers to a 'plea of previous conviction or previous acquittal'. The language has also been modernised in this way in Western Australia (see section 17 of the *Criminal Code Act 1913* (WA) and section 126 of the *Criminal Procedure Act 2004* (WA)).

The principles to be applied to such pleas are purely common law and are expressly saved by section 220(2). This saving has been included to avoid doubt, in light of the name change.

221 Refusal to plead

Overview

This section provides that if the accused does not plead (either by being silent or refusing to plead) then that is treated as a plea of not guilty.

Legislative History

This section is based on section 392 of the *Crimes Act 1958*. However, the language has been modernised by removing reference to a person standing "mute of malice or will".

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This is a simplified version of a historical provision. Traditionally, this section also formed an important part of deciding whether an accused person was fit to plead or stand trial (see, *Ngatayi v R* [1980] HCA 18; (1980) 147 CLR 1). The issue of whether a person was "mute of malice or will" or mute by "visitation of God" (which could form the basis of a finding of unfitness to stand trial) was a matter for the jury empanelled to hear the plea. Whether an accused person is fit to stand trial is now determined under Part 2 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

As a result, this section now simply operates automatically to allow a trial to proceed as if a not guilty plea had been entered. It requires no ruling, either from the trial judge or from the jury.

While this provision may apply to an ***arraignment*** before a judge alone or before a jury panel, in practice, its primary purpose is where this occurs before a jury panel at the commencement of a trial. If an accused does not answer at an earlier arraignment (before a judge alone) it will be clear that the case needs to go to trial but it will not be necessary to formally enter a plea of not guilty until the accused is arraigned before the jury panel and the trial therefore commences.

Division 3 – Assisting the jury

Division Overview

This is a new Division, designed to identify and encourage techniques to assist juries during trial.

222 Judge may address jury

Overview

This section confirms the trial judge's entitlement to address the jury at any stage of trial in order to help them understand the process or to give a direction of any sort.

Legislative History

This section incorporates section 14 of the *Crimes (Criminal Trials) Act 1999*, but has been significantly broadened in scope.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

In practice, trial judges often speak to the jury before the prosecution makes its opening address. This practice helps juries to understand the trial process and commonly includes information about sitting hours, the way evidence will be given, who the participants are and basic propositions of law relevant to all trials, such as the onus and standard of proof. Similarly, judges are free to address the jury at any stage during the trial to assist the jury with any issues that may have arisen. This practice helps juries and has been formally recognised in this section.

This section also provides a formal basis for the giving of directions during trial (see section 222(c)). The advantage of such directions is that they can be given contemporaneously with the situation that gives rise to them and therefore ensures that the jury is not distracted by, for example, inadmissible evidence.

223 Jury documents

Overview

This section provides a broad power for a ***trial judge*** to order that copies of documents be given to the jury at any stage during the trial. A number of examples of types of documents are listed. Section 223(2)(l) extends the power to "any other document that the trial judge considers appropriate".

Legislative History

This section is closely modelled on section 19 of the *Crimes (Criminal Trials) Act 1999*. Section 223(1) has been modified to add the words "at any time during the trial" to make it clear that the power is not limited by time. Section 223(1)(i) has also been extended to include audio or audiovisual recordings of evidence to cater for technological advances.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

It is becoming increasingly common for a jury to be given documents to help them to understand a case as it proceeds. However, this is a relatively modern phenomenon. Traditionally, the jury did not even receive a copy of the presentment (now indictment).

International jury research has identified significant advantages of giving written materials to a jury (see e.g. New Zealand Law Commission, *Juries in Criminal Trials* Part Two, Volume 2, Preliminary Paper 37 (1999), pages 51-2). The Victorian Law Reform Commission in its initial *Jury Directions: Consultation Paper* (2008) also identified the benefits of juries being provided with a set of materials (including a summary of the elements of the offence) during trial. The VLRC recommended that trial judges be permitted and encouraged to provide the jury with documents known as the Outline of Charges and the Jury Guide immediately before the calling of evidence and immediately after the conclusion of final addresses, respectively. The aim of the Outline of Charges would be to identify the elements of the offences with which the accused is charged and indicate which of those elements are disputed. The Jury Guide, on the other hand, would contain a series of questions of fact to guide the jury to a verdict. The law that is relevant to these determinations would shape the questions posed for the jury.

A cross reference in the section refers to section 29(4) and section 50 of the *Evidence Act 2008*, which allow for evidence to be produced in summary form where appropriate. This section operates to allow such material to go to the jury.

The section allows the jury to receive a transcript (or other recording) of the evidence given. This reflects the fact that transcripts are now significantly more accurate than they used to be. Providing transcripts to juries has become common in many jurisdictions on the basis that the jury should not be restricted from having access to the best available record of the evidence. Given that counsel and judges rely heavily on the transcript during the trial, it seems incongruous that the ultimate fact finder should be deprived of this resource and left to rely on memory and notes. Indeed, the High Court has recognised (in *Butera v Director of Public Prosecutions (Vic)* [1987] HCA 58) that it may be appropriate to give the transcript to the jury in some cases. It has also been emphasised that this decision should be substantially informed by the need to give the most assistance possible to the jury in performing its function (see *R v JWM* (1999) 107 A Crim R 267).

In Victoria, the transcript is given on occasions to the jury, but usually as the result of a specific request by the jury rather than at the initiative of the parties or the trial judge. More often, a portion of the evidence is read to the jury, or the relevant part of the evidence is played to them from the recording of the trial.

The Victorian Court of Appeal has recently considered the issue of written materials, particularly transcripts. In *R v Thompson* [2008] VSCA 144 (*Thompson*), the issue was discussed in this way by Justice Redlich:

> *It was not long ago thought that the step of providing a jury with written material, though a matter within the discretion of the trial judge, should not be taken lightly.[79] It is now a much more frequent occurrence in jury trials. It will not be uncommon for a trial judge to conclude that the jury will be assisted by having aspects of the charge provided in writing in addition to the oral direction. The written material may relate to the law that the jury is to apply,[80] the issues, the evidence,[81] the arguments of the parties or any of the other matters specified in section 19 of the Crimes (Criminal Trials) Act 1999 (Vic). But circumspection is called for in the provision*

to the jury of selective written material to ensure that it does not disturb the essential balance in the oral charge between prosecution and defence case. The recent decision of the High Court in Gassy v The Queen [2008] HCA 18 [82] although concerned with a supplementary oral direction, illustrates the inherent danger of disturbing that balance.

The more voluminous the written material given to the jury, the more onerous and time consuming the jury's task may become as some or all of them may, in the absence of instruction to the contrary, assume an obligation to read it. Transcript may be provided to them.[83] But if it is thought necessary by a trial judge to provide a transcript to the jury of all of the evidence, some direction is called for as to the way it should be used. Usually the explanation given for providing the transcript is to enable them to check particular pieces of evidence about which they have some uncertainty. If the trial judge provides the jury with a transcript, some instruction may be required concerning the accuracy of the transcript when, as is now common place, time will not have been taken on each day of the trial to deal with inaccuracies in the transcript.[84] It should be borne in mind that jury questions, raised in open court have in the past, proved to be a most reliable means of dealing with any uncertainties that the jury have as to the evidence given.

The directions suggested by Justice Redlich in *Thompson* were confirmed recently in *R v Gose* [2009] VSCA 66. However, this is an issue on which the Court of Appeal's position and guidance has been evolving in recent years and may continue to evolve.

Division 4 – Opening addresses

Division Overview

This Division provides for opening addresses at the beginning of the trial. It does not deal with the accused's opening address at the beginning of the defence case (for which see section 231).

To put these addresses into a practical context:

- after the jury has been empanelled, the ***trial judge*** usually addresses the jury to introduce them to the trial process, the participants and to provide some basic directions on points of law and procedure. This address is not mandatory but is now expressly authorised under section 222
- the prosecutor must then give an opening address to the jury under section 224
- the accused must, if represented, give a response to the prosecution opening. If not represented then this address is optional
- the prosecution then calls its first witness.

The philosophy underlying these requirements is that opening addresses by both parties at the beginning of the trial is a good way to identify the real issues for the jury. In order to avoid surprises, the content of the addresses is limited by reference to the written summary of prosecution opening and the accused's response which will have been filed and exchanged earlier, under sections 182 and 183.

224 Opening address by prosecutor

Overview

This section requires the prosecution to give an opening address on the prosecution case before any evidence is called. The content of the address is restricted to matters set out in the written summary of prosecution opening (served and filed earlier), unless there are exceptional circumstances. However, the prosecutor does not simply have to read out that summary and the trial judge can limit the length of the address.

Legislative History

Parts of this section are based on sections 8(1)–(3) of the *Crimes (Criminal Trials) Act 1999*. The general obligation to give an opening address is new, however the power of the trial judge to limit the length of the prosecution opening was previously located in section 13(2) of the *Crimes (Criminal Trials) Act 1999*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section formalises the role of the prosecution opening and declares it to be mandatory. The opening address is described as being on the prosecution case. This is intended to be a broad statement of the purpose of the opening address which does not change existing law or practice.

The express power of the trial judge to limit the length of a prosecution opening in section 224(5) is new. The same power now exists in relation to all addresses to juries, whether by the prosecution or the accused.

225 Response of accused to prosecution opening

Overview

This section provides for the accused to present a response to the prosecution opening, immediately following the prosecution opening address under section 224 and before any evidence is called. It must be limited to the content of the written response to the prosecution opening (served and filed earlier) unless there are exceptional circumstances. However, the accused does not simply have to read out that summary and the trial judge can limit the length of the response.

Legislative History

This section is based on sections 8(1)-(3) and 13 of the *Crimes (Criminal Trials) Act 1999*. However, the section now only requires a response to the prosecution opening if the accused is represented.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is based on sections 8(1)-(3) and 13 of the *Crimes (Criminal Trials) Act 1999*. However, section 13(1) requires the accused to give a response to the prosecution opening in all cases. Section 255 changes that position so that an unrepresented accused is not obliged to, but may, give a response. However, if the accused is represented then a response must be given.

The ancillary procedural rules are the same as for a prosecution opening; the address must be limited to the content of the written response which would have been filed and exchanged earlier, unless there are exceptional circumstances. The ***trial judge*** can also limit the length of the response.

Division 5 – Case for the accused

Division Overview

This Division simplifies provisions relating to what happens after the close of the prosecution case. In particular Division 5:

- clarifies and declares the accused's entitlements and obligations at the end of the prosecution case (sections 226 to 228)
- provides a new procedure governing the order and timing of defence cases in multiple accused trials (section 229)
- simplifies the procedure to be followed at the beginning of the defence case (sections 230 to 231).

226 Accused entitled to respond after close of prosecution case

Overview

This section sets out the accused's options at the end of the prosecution case. It should be noted that while section 226(b) and (c) are mutually exclusive, (a) can operate with either (b) or (c) as a no-case submission ordinarily precedes the decision to give or call evidence, or to remain silent.

Legislative History

This section is similar in content to a combination of sections 397 and 398 of the *Crimes Act 1958*. However, it sets out each of the options in more detail and the language has been modernised.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section does not change the accused's entitlements at the end of the prosecution case. It declares them in a way that is consistent with what must be said to an unrepresented accused about their options under section 228.

The section also provides statutory recognition of the entitlement to make a submission that there is no case for the accused to answer. The order of the subsections reflects the fact that this submission can and should be made before an election is made as to whether to give and/or call evidence. The principles that will apply to a no-case submission are not changed by this section. They will continue to be assessed consistently with the test in *Doney v R* [1990] HCA 51*; (1990) 171 CLR 207*.

Previously, if a no-case submission was successful then the jury would be directed to deliver a verdict of not guilty. Section 241 now allows a judge to enter the verdict of not guilty in these circumstances.

227 Election when accused is legally represented

Overview

This section allows the trial judge to question a represented accused's legal practitioner as to the accused's election between the options in section 226.

Legislative History

This section is based on section 418(d) of the *Crimes Act 1958*. However, it only applies to a represented accused.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section provides a simple mechanism for a represented accused to make an election as to whether to make a no-case submission and whether to give and/or call evidence (the options listed in section 226). A similar mechanism for an unrepresented accused follows in section 228. The order in which these mechanisms operate is modified in joint trials, for which see section 229.

228 Election when accused is not legally represented

Overview

This section provides a mechanism for an unrepresented accused to make an election as to whether to make a no-case submission and whether to give and/or call evidence (the options listed in section 226). It provides a simplified form of words for the explanation and questions that must be asked of the accused.

Legislative History

This section is based on a combination of sections 398 and 418(d) of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

229 Procedure for joint trials if no-case submission made

Overview

This section provides the process when there is more than one accused and a no-case submission is made:

- All submissions that there is no case to answer must be made at the close of the prosecution case.
- After those submissions have been heard, an election is made by the first named accused on the indictment in accordance with section 227 or 228 (depending on whether the accused is represented).
- The other accused do not have to make an election until the previous accused's case has finished. This follows the order of the indictment.
- The order of defence cases can be changed by order of the ***trial judge***.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The order of defence cases in joint trials was previously governed by a mix of common law and practice resulting in uncertainty of process, in particular around the correct approach to no-case submissions and indications as to whether evidence is to be given or called.

To the extent that a consistent common law approach could be identified, it was confusing and difficult to justify. The common law approach was essentially that in a multiple-accused trial, at the end of the DPP case:

- if the first-named accused in the presentment wishes to do so, a no-case submission is made
- if that submission is unsuccessful (or not made), the first named accused is asked whether they intend to give or call evidence
- the second-named accused does not need to advise whether they will give or call evidence until after the end of the case for the first accused
- if the second-named accused wishes to make a submission that there is no case to answer, the Judge will not ordinarily entertain that application until after the evidence of the first-named accused has been given or called
- the same applies to each subsequent accused (if any).

The proposition that the second-named accused should not have to elect whether to give or call evidence until after the first-named accused has given or called evidence is unexceptional. The evidence of the first-named accused is, as a matter of law, evidence against the second-named accused in the trial and it would be wrong to require an accused to make an election without being aware of all of the evidence that will be available against them.

However, it is the fourth of these propositions which causes problems. It means that the situation can arise where, on the DPP evidence, there is no case for an accused to answer, yet the trial proceeds on the basis that sufficient defence evidence may be led to bolster the DPP case to a point where a no-case submission would fail.

The origins of this approach are discussed in *R v Faure & Corrigan* [1978] VR 246 and *R v Webster* [1974] VR 457 (*Webster*). These cases focus primarily on the history of the common law rule rather than the policy underlying the rule. The only policy justification is found in *Webster* at 459 where Menhennit J noted that "the evidence by or for the accused person may throw light on the total crime and all issues involved".

There are two main reasons why the approach in those cases has been changed in this section:

- In light of the *Charter* affirmation of the presumption of innocence, it is inappropriate for a trial to proceed if, on the DPP case, the evidence is not capable of supporting a verdict of guilty.
- It leads to unequal treatment of accused persons in the following ways:
  - within a joint trial it capriciously advantages the first accused in that they can make a no-case submission based solely on the DPP evidence whereas the second accused cannot necessarily do so.

– it disadvantages accused persons in joint trials over those tried alone in that it provides a method for a co-accused's statement to bolster an otherwise inadequate DPP case, which could not be done in a trial alone.

Instead, this section provides that for joint trials, at the end of the DPP case, no-case submissions (if any) may be made by all accused persons. Each defence case (if any) will then run in turn with an election not required until the preceding defence case has been closed.

230 Questioning to determine proper course of proceeding

Overview

This section applies after the election is made in accordance with section 227 or 228 (depending on whether the accused is represented), if the accused elects to call evidence. If so, the accused must tell the ***trial judge***:

- who the witnesses are
- what order they are to be called in.

The case must proceed in the way indicated by the accused, unless the trial judge gives leave to do otherwise.

Legislative History

This section combines the substance of the whole of section 17 of the *Crimes (Criminal Trials) Act 1999* with the prohibition on departing from the indication given to the trial judge in section 418(d) of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

231 Opening address of accused

Overview

This section sets out the process to be followed if the accused decides to give or call evidence. The accused may give an opening address outlining the evidence that the accused intends to call. Such an address must be given before any evidence. As with all addresses, the trial judge can limit its length. Section 231(4) confirms that the accused need not be the first witness (although, as discussed below, that is the usual practice).

Legislative History

Section 231 is mostly new, and allows the accused to give an opening address even if he or she is the only defence witness. Section 231(4) is based on section 418(c)(i) of the *Crimes Act 1958*, but has been simplified and substantially reworked.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 418 of the *Crimes Act 1958* was a confusing section and does not appear to have reflected either existing or preferred practice.

In contrast, section 231 of the Act provides a simple process, as outlined above. It makes a significant change in that the accused is now entitled to make an opening address even if they are the only defence witness. Further, every opening address must be given before any evidence is called, regardless of whether the accused is the only witness or not.

These changes highlight the issue of whether the accused must always be the first witness or not. Section 418(c)(i) previously provided that "the accused may be called as a witness at such stage as he may think fit after the close of the evidence for the prosecution and either before or after the opening". Arguably, the two parts of the quoted portion are inconsistent. The first part indicates that the accused can give evidence at any time, including after any other witness has given evidence. The second part suggests that the accused's options are limited to before or after the opening address, but still before anyone else gives evidence.

The first interpretation is preferred by Fox in *Victorian Criminal Procedure* (Fox, 2005, paragraph 8.8.16) and is consistent with the common law position (see *R v RPS* [1997] NSWSC 305, affirmed in *RPS v R* [2000] HCA 3). This position has been retained in section 231(4). However, that is not intended to detract from the almost invariable practice that the accused gives evidence first unless, for convenience, a non-contentious witness (e.g. an expert) is interpolated. It will remain open to a trial judge to comment adversely if the accused gives evidence after the evidence of a contentious witness.

Division 6 – Giving of evidence

Division Overview

This Division contains only two provisions. This reflects the fact that the Act commenced at the same time as the *Evidence Act 2008* and care has been taken to avoid evidential issues being dealt with in both pieces of legislation. What remains are trial-specific rules about evidence. In particular, the substance of the following sections has not been re-enacted because the topics are covered in the *Evidence Act 2008*:

- Section 359(7) of the *Crimes Act 1958* allowed for the admission of evidence of the accused's previous convictions. This issue is comprehensively covered by the *Evidence Act 2008*. Section 110 of the *Evidence Act 2008* deals with the admissibility of evidence of bad character and section 178 provides for how evidence of previous convictions is to be given.
- Section 18 of the *Crimes (Criminal Trials) Act 1999* dealt with controlling certain types of cross-examination. However, this topic is covered by section 41(3)(b) of the *Evidence Act 2008* which allows a trial judge to control, among other things, repetitive or oppressive questions. The remaining part of section 18 relates to controlling irrelevant questioning, a topic which is covered by section 55 of the *Evidence Act 2008*.

232 Manner of giving evidence

Overview

Section 232 provides for a series of non-traditional modes by which evidence can be given by leave. These are:

- for any witness, by reading a statement out, but only with the consent of both parties. This assumes the physical presence of the witness
- for an expert witness, presenting visual or audiovisual material. This mode of giving evidence does not preclude examination and cross-examination before or after the material is presented
- for any witness, by playing an audio or audiovisual recording. This assumes that the witness will not be present in court, however, the ***trial judge*** has the power to order that the witness ***attend*** if unanticipated issues arise
- for any witness, in any other manner that the trial judge considers may assist.

Legislative History

This section is based on section 20 of the *Crimes (Criminal Trials) Act 1999*, with slight changes. The words "physically appear" have been replaced by ***attend*** in section 232(2)(b) and section 232(3) refers to the *Evidence Act 2008*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is designed to allow and encourage evidence to be given in non-traditional ways in appropriate cases. Traditionally, evidence is given orally with the witness present in court. However, different modes of giving evidence, both for convenience (e.g. if the evidence is not contentious) and to best assist a jury (e.g. simplifying complex expert evidence) are increasingly used. When the powers in this section are being used, care needs to be taken to distinguish between the admissibility of hearsay evidence (which this section does not deal with) and different modes of presenting evidence.

Section 232(1)(a)–(c) deal with particular situations where evidence in a non-traditional form can be used:

- Section 232(1)(a) confirms the practice of a witness reading a prepared statement where the parties agree. This can be useful both to save time, and to ensure that inadmissible evidence is not given by the witness.
- Section 232(1)(b) allows for an expert to use a visual or audiovisual presentation as part of their evidence. This reflects the fact that expert evidence is often technical and juries can be assisted by different modes of presentation. Section 232(2)(a) confirms the expectation that the witness will still be present in court and examination and cross-examination can occur in the usual way.
- Section 232(1)(c) applies to all witnesses and allows evidence to be given by playing an audio or audiovisual recording. This power is slightly different to the others in that it allows for the witness not to be present in court. Section 232(2)(b) confirms that if unanticipated issues arise that the witness can be required to attend. This power has the potential to be used in conjunction with the expanded power to pre-record evidence before trial in section 198.

Section 232(1)(d) then allows evidence to be given "in any other manner that the trial judge considers may be of assistance". This language is consistent with the focus of this section which is on helping the jury to understand evidence. However, it is expected that the discretion will always be exercised consistently with the accused's fair trial rights.

Section 232(3) also protects the operation of:

- section 29 of the *Evidence Act 2008* which allows for evidence to be given in narrative form, or by charts, summaries and other explanatory material
- section 50 of the *Evidence Act 2008* which provides for the production of voluminous evidence in summaries.

The goal of sections 29, 50 and this section are complementary. They are designed to allow for evidence to be given in different forms where that will assist the jury and the efficient operation of the trial.

Section 232(3) confirms that this section does not affect the operation of Division 6 of Part 8.2 of the Act which provides for special hearings for pre-recording evidence. These are stand-alone regimes for the mode of evidence for particular complainants in trials for sexual offences.

233 Introduction of evidence not previously disclosed

Overview

Section 233(1) requires the parties to seek leave from the court if they intend to introduce evidence at trial which represents a 'substantial departure' from:

- the prosecution opening filed under section 182
- the accused's response filed under section 183.

Section 233(2) provides for leave to be given to the prosecution to call evidence after the close of the prosecution case if the accused gives evidence that could not reasonably have been foreseen.

Legislative History

This section is based on section 15 of the *Crimes (Criminal Trials) Act 1999* without substantive change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is part of a series of provisions (re-enacted from the *Crimes (Criminal Trials) Act 1999*) which are designed to require the parties to disclose an outline of their cases before trial and not depart from that broad outline without leave. See the discussion in relation to sections 182–183 in this guide. The ***trial judge*** is able to comment on a departure, in some circumstances, under section 237.

It should also be noted that section 184 allows a party to give notice *before trial* of an intention to depart from the written material filed. If that is done, then leave will not be required under this section.

Section 233(3) expressly saves any other power of a trial judge to allow the prosecution to re-open its case. The common law on this issue is broadly consistent with the section in that an application to re-open the prosecution case at common law ordinarily turns on whether the evidence to be rebutted was reasonably foreseeable. However, there are other situations in which the common law will continue to apply to permit re-opening. For example, where the accused leads evidence in support of a defence on which the accused has the onus of proof (see e.g. *Taylor v Armour & Co Pty Ltd* [1962] VR 346) or when a technical matter of proof has been overlooked (see e.g. *Hansford v McMillan* [1976] VR 743).

Division 7 – Closing addresses and judge's directions to the jury

Division Overview

Continuing with the chronological approach of this Chapter, this Division deals with events that occur after all of the evidence has been given. They include:

- prosecution closing address and supplementary closing address (sections 234 and 236)
- accused closing address (section 235)
- trial judge's directions to the jury, also known as the 'charge' (section 238).

234 Prosecution closing address

Overview

This section allows the prosecution to give a closing address after all of the evidence has been given but before the defence closing address. As with all addresses under the Act, the trial judge can limit the length of the closing address.

Legislative History

Section 234 is based on section 417(1) and (2) of the *Crimes Act 1958*. However, it has been reworked and simplified.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The prosecution is entitled to close "for the purpose of summing up the evidence". This is the same language previously used in section 417 of the *Crimes Act 1958* which has been retained as there is no intention in this section to change the nature and function of the prosecution closing. Principles that have developed over time to regulate the proper conduct of a prosecution closing will continue to apply.

Section 234(2) refers to section 236 which allows the prosecution to give a supplementary address after the accused's closing address in very limited circumstances.

235 Closing address of the accused

Overview

This section allows the accused to give a closing address after all of the evidence has been given and after the prosecution's closing address. As with all addresses under the Act, the trial judge can limit the length of the closing address.

Legislative History

Section 235 is based on section 418(c)(ii)B of the *Crimes Act 1958*. However, it has been reworked and simplified.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The accused is entitled to close "for the purpose of summing up the evidence". This is the same language previously used in section 418 of the *Crimes Act 1958* and has been retained as there is no intention in this section to change the nature and function of the defence closing. Principles that have developed over time to regulate the proper conduct of a closing will continue to apply.

236 Supplementary prosecution address

Overview

This section provides that the ***trial judge*** may permit the prosecution to give a supplementary address after the accused's closing address. However, this can only happen when the accused has asserted facts for which there is no evidence before the jury. The supplementary address must only reply to the assertion. As with all addresses under the Act, the trial judge can limit the length of the supplementary address.

Legislative History

Section 236 is based on section 417(3) of the *Crimes Act 1958*, although the language has been simplified.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section provides a statutory basis for the prosecution to respond where the accused has asserted facts and there is no evidence before the jury to support those facts. It is a rarely exercised power, given that the trial judge can comment on any such assertion by the accused.

237 Comment on departure or failure

Overview

This section allows the trial judge to comment to the jury, or allow a party to comment to the jury, on:

- the fact that a party has substantially departed from the pre-trial written summary of their case
- any failure by a party to comply with Part 5.5 which relates to pre-trial obligations of the parties.

Leave cannot be given to a party to comment unless the comment is not likely to produce a miscarriage of justice. Such departures or failures cannot support an inference of guilt unless in the same circumstances an inference of guilt could be drawn from a lie. Similarly, a failure to comply with Part 5.5 cannot add to the prosecution case unless in the same circumstances, a failure of the accused to give or call evidence could legitimately add to the prosecution case.

Legislative History

Section 237 is based on section 16 of the *Crimes (Criminal Trials) Act 1999*. However, the reference in section 16(3) to the state of the law before the commencement of this section has been removed.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

As noted above, section 16(3) of the *Crimes (Criminal Trials) Act 1999* previously referred to the use that could be made of certain facts by a jury before the commencement of this section. At the time it was enacted, that would have referred to the common law as it existed. As this Act commenced at the same time as the *Evidence Act 2008*, a re-enactment of that position would require the court to consider an out of date evidential regime. Instead, it is intended that the conclusions the court must reach should not be limited to a particular point in time but should be allowed to follow the development of the law of evidence concerning when an inference of guilt may be drawn.

238 Judge's directions to the jury

Overview

This section requires the judge to direct the jury before the jury retires to consider its verdict.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

An important step in the trial process is the judge's 'charge' to the jury. As a matter of law, such a charge is mandatory and a failure to give it would inevitably result in a successful appeal against conviction. Accordingly, this section gives statutory recognition to this requirement.

The judge is required to give directions to the jury necessary to enable the jury to properly consider its verdict. This formulation is designed to give sufficient

flexibility to capture the current content and function of the 'charge'. This will ordinarily include, but not be limited to, an introduction to the respective roles of judge and jury, directions on the law, identification of issues, summary of the evidence, summary of the arguments of counsel and guidance to the jury on returning verdicts. The inclusion of this provision is not designed to require a ***trial judge*** to do any more than is already required. This section simply recognises this important step, rather than trying to regulate its content.

As is made clear in the Explanatory Memorandum to the Act, this section is not intended to limit the trial judge's ability to address or direct the jury at any other stage of the trial. This intention is confirmed by section 222, which provides that the trial judge can address the jury at any time during trial for a number of purposes including giving a direction to the jury as to any issue of law evidence or procedure.

Division 8 – Alternative verdicts and discharge of jury from delivering verdict

239 Alternative verdicts on charges other than treason or murder

Overview

This section allows the jury to find the accused guilty of necessarily included offences, even where they are not included on the indictment. To avoid doubt, section 239(2) makes it clear that this process applies to attempts to commit the offence charged.

Legislative History

This section is based on section 421(2) and (3) of the *Crimes Act 1958* with minor changes in terminology.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The *Crimes Act 1958* contains a series of provisions (sections 421 and 422A–435) dealing with alternative verdicts. Most of these provisions relate to specific offences, and will remain in the *Crimes Act 1958* pending completion of the Department of Justice, Criminal Law – Justice Statement review of offences. The exception is section 421(2), (3) and (4) of the *Crimes Act 1958*, which apply to offences generally and have been incorporated into this Act (in this section and section 240). Two of the other provisions (sections 423 and 424) are obsolete, and have been repealed. See further, the discussion in relation to section 422 in the guide.

See also section 219 which allows the accused to plead guilty to an alternative charge on ***arraignment*** even if it is not included in the indictment.

240 Judge may order that guilt in respect of alternative offences is not to be determined

Overview

This section allows the trial judge to direct that the jury not consider an alternative charge that it would otherwise be entitled to consider under section 239.

Legislative History

This section is based on section 421(4) of the *Crimes Act 1958* with minor changes in terminology.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section allows the trial judge to decide whether lesser included offences should be left to the jury in the interests of justice, even where they are technically available under section 239 or section 421(1) of the *Crimes Act 1958* (alternatives to murder charges). The principles that have developed under section 421(4) of the *Crimes Act 1958* will continue to apply (see e.g. the discussion in *Gammage v R* [1969] HCA 68; (1969) 122 CLR 444).

241 When judge may enter finding of guilty or not guilty

Overview

This section provides a new power for a trial judge to enter verdicts during trial without the need to direct the jury to return verdicts:

- where the accused changes their plea to guilty during trial (verdict of guilty entered)
- where the judge decides at the end of the prosecution case that there is no case for the accused to answer (verdict of not guilty entered).

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Previously, where an accused pleads guilty to a count in the presentment during trial; or the trial judge accepts a no-case submission, or the DPP decides to offer no evidence the jury is required to deliberate and return a verdict. For a guilty plea that would inevitably result in a verdict of guilty and in a no case/no evidence situation the trial judge would direct the jury to find the accused not guilty.

The process of requiring a jury to return verdicts in this situation can be unwieldy and confusing for a jury. The inevitability of the outcome is reflected in the fact that juries are often not asked to leave the court to deliberate and they are not told that they can refuse to follow the trial judge's direction. The sorts of directions that may be needed to explain to a jury why they are required to return an inevitable verdict are set out by Cummins AJA in *R v Vasic* [2005] VSCA 38.

A particular difficulty arose in trials where more than 12 jurors had been empanelled. Section 48 of the *Juries Act 2000* required that jurors be balloted off to leave a jury of 12 to return a verdict in either situation (guilty plea or directed acquittal). The balloted jurors then returned to continue with the trial. This process is unwieldy and unnecessary and makes the task of jurors more difficult and confusing.

In addition to the practical issues identified, there is a strong argument that a jury should not be required to deliver a verdict where the outcome is effectively already known. This is consistent with the idea that juries should only be called upon to determine actual disputes.

Guilty pleas during trial

A verdict must be taken in relation to a guilty plea as the jury is in charge and there is no other available legal mechanism for the plea to be accepted and a conviction entered. The authorities confirm that position due to the lack of any other legal mechanism to accept the plea. Further, they do not refer to any policy reasons why a verdict is necessary (see, for example, *R v Paprounas* [1970] VR 865).

An alternative mechanism by which the trial judge accepts the plea without the need for a verdict already exists in New South Wales (see section 157 of the *Criminal Procedure Act 1986* (NSW)) and in New Zealand as a matter of practice.

To address this, section 241 provides a new process so that where, during a trial, an accused is re-arraigned on a charge and pleads guilty, the trial judge may discharge the jury from delivering a verdict on that charge, accept the plea of guilty and convict the accused.

Directed acquittals

The basis for requiring a jury verdict in relation to a directed acquittal after a no-case submission, is also based on the absence of any legal mechanism to do otherwise (once the jury is in charge it must deliver the verdict; *R v Paprounas* [1970] VR 865).

As a result, it remains possible for a jury not to acquit regardless of the direction to acquit. This possibility is described by Fox (*Victorian Criminal Procedure*, 2005, page 286) as theoretical and the only cited example occurred in 1957 (*Raspor v R* [1958] HCA 30; (1958) 99 CLR 346).

The process of requiring a verdict suffers from the same difficulties as directed guilty verdicts on a change of plea; the futility and potential confusion of requiring a jury to deliver an inevitable verdict and the need to ballot and then return jurors under section 48 of the *Juries Act 2000*. The other situation in which directed acquittals occur is where the accused pleads guilty on re-arraignment during trial and the prosecution decides to offer no evidence (or no further evidence) on other counts.

To capture both of those situations, section 241 allows for the jury to be discharged and a verdict of not guilty entered where either the prosecution indicates an intention not to lead evidence (usually as the result of a guilty plea to another charge or charges) or the judge rules in favour of the accused on a no-case submission.

Subclause 8(3) of Schedule 4 to the Act provides that on and from the commencement day (1 January 2010), this section applies to an accused committed for trial, or against whom a presentment was filed, before the commencement day. The presentment is treated as if it were an indictment filed under this Act.

The ***DPP*** may apply to review a decision that the accused has no case to answer by way of a case stated (under section 308) if an issue of law was involved. An ***interlocutory appeal*** could also be taken, if the Court of Appeal granted leave to do so under section 295, on the basis that the decision that the accused has no case to answer is an ***interlocutory decision***. However, it would be necessary for the appeal to be decided before the acquittal was entered if it was to have a substantive effect on the trial result.

Part 5.8 – General

Part Overview

This Part deals with three discrete topics:

Division 1 – Related and unrelated summary offences

Division 2 – Criminal records

Division 3 – Powers and obligations.

Division 1 – Hearing of charges for related and unrelated summary offences

This Division sets out the process by which a trial court can also deal with summary offences, both related and unrelated.

The following flowchart sets out how these processes work, and they are discussed in more detail in relation to each section.

242 Summary offence related to indictable offence

Overview

This section sets out a new process for charges for ***related summary offences*** to be dealt with by the trial court. The trial court can take guilty pleas for such charges, or hear the charges where they are contested based on the evidence given at trial, in the depositions or based on further evidence with the court's leave.

Legislative History

This section deals with the same subject matter as section 359AA of the *Crimes Act 1958*, which has been substantially reformed. The Act takes a new approach to ***related summary offences***.

Relevant Rules/Regulations/Forms

See County Court Criminal Procedure Practice Note.

Discussion

Previously, where a person was tried in the County Court or Supreme Court for an indictable offence, any related summary charges (i.e. for summary offences which arise out of the same facts and circumstances, or offences which are of the same character, as the principal indictable offence) were adjourned *sine die* (without fixed date) in the Magistrates' Court pending the outcome of the proceedings for the indictable offence.

In some cases the summary offences were not re-listed after the indictable offence was finalised, so they remained adjourned indefinitely in the Magistrates' Court. There may be many reasons for this. For example, the

Determining Related and Unrelated Summary Offences

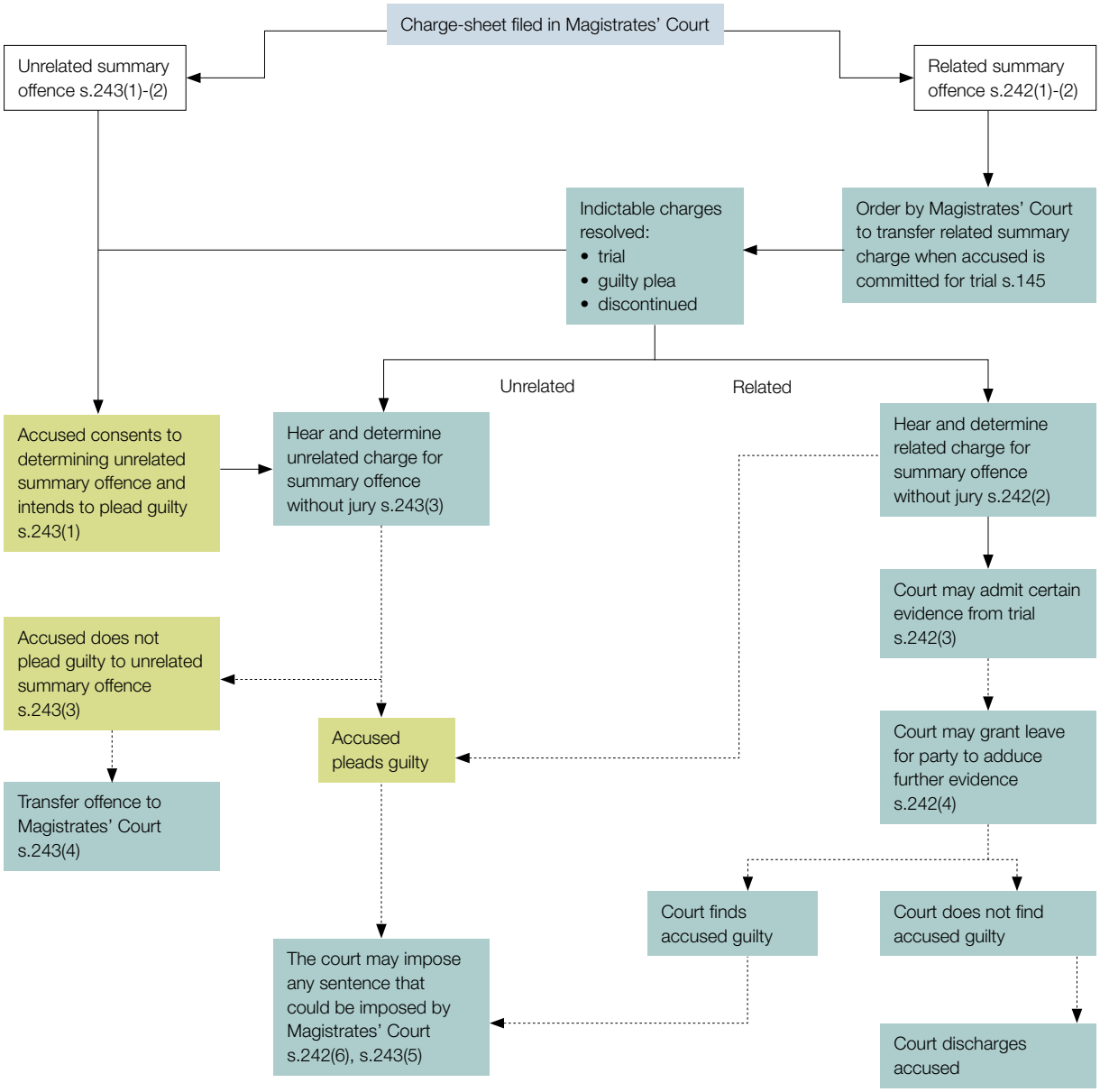
LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

Optional process


Charge-sheet filed in Magistrates' Court
Unrelated summary offence s.243(1)-(2)
Related summary offence s.242(1)-(2)
Order by Magistrates' Court to transfer related summary charge when accused is committed for trial s.145
Indictable charges resolved:
• trial
• guilty plea
• discontinued
Unrelated
Related
Accused consents to determining unrelated summary offence and intends to plead guilty s.243(1)
Hear and determine unrelated charge for summary offence without jury s.243(3)
Hear and determine related charge for summary offence without jury s.242(2)
Court may admit certain evidence from trial s.242(3)
Accused does not plead guilty to unrelated summary offence s.243(3)
Accused pleads guilty
Court may grant leave for party to adduce further evidence s.242(4)
Transfer offence to Magistrates' Court s.243(4)
Court finds accused guilty
Court does not find accused guilty
The court may impose any sentence that could be imposed by Magistrates' Court s.242(6), s.243(5)
Court discharges accused

accused may have been convicted of the indictable offence and the informant formed the view that there was no need to spend any further time and resources on pursuing the summary offences. In other cases, the summary charges may have been laid as alternatives to the indictable offence and it was not necessary to pursue those offences where the accused was convicted of the indictable offence. Nevertheless, there are cases where it is desirable to pursue the summary offences.

However, leaving related charges (regardless of their fate) unresolved in the Magistrates' Court is not ideal and the Act proceeds on the basis that related offences should ordinarily remain together and be dealt with as a package.

Previously, the County and Supreme Courts had only very limited powers to deal with summary offences. Section 359AA of the *Crimes Act 1958* provided that, if the County Court or Supreme Court was dealing with an indictable offence, the court could also hear and determine any charge against the same accused for a summary offence. However, this was subject to various qualifications. In particular, the accused was required to state an intention to plead guilty to the summary offence, and consent to the summary offence being dealt with by that court.

This section gives the County Court and Supreme Court broader scope to deal with a summary offence if that offence is related to an indictable offence which is before the court (see the definitions of ***related offences*** and ***related summary offence*** in section 3). Allowing such summary offences to be heard with indictable offences in the County Court and Supreme Court is more efficient and can save parties significant time and expense by reducing the need for multiple sentencing hearings. It may also increase clarity and certainty in the sentencing process. The sentencing court can sentence an offender in relation to the totality of his or her offending. This may be particularly useful in cases where the accused wishes to plead guilty to all pending charges against them.

The main features of the Act's approach to related summary offences are:

- Where, under section 145, an accused is committed for trial for an indictable offence, all related summary offences must also be transferred to the trial court unless the parties agree that they should remain in the Magistrates' Court (under section 145(3)).
- The trial court has the power to deal with the related summary offences once the accused:
  - pleads guilty to an indictable offence or
  - is found guilty or not guilty of an indictable offence at trial.
- If the accused pleads guilty to the related summary offences then he or she can be sentenced at the same time as for the indictable offences. In this way sentencing can take into account all relevant charges and provide a complete picture of the criminality of the offending.
- If the accused pleads not guilty to the related summary offences then the trial court can hear and determine those charges without a jury.
- Critically, the judge hearing the summary charges can take as given the evidence that was heard during the trial. If there was no trial, then the judge can take as given the evidence contained in the depositions. If extra evidence is needed then that can be given but only with leave under section 242(3). This process means that many related summary offences will be able to be dealt with quickly and efficiently by a judge already well aware of the evidence underlying the charges.
- Subject to the ability to use trial or depositions evidence, the same practices and procedures that apply to summary hearings in the Magistrates' Court (to the extent that those practices and procedures are appropriate) apply to these hearings.
- In sentencing for related summary offences, the judge has all sentencing options open that would have been available in the Magistrates' Court.
- Section 242(5) allows the judge to refer the charges for related summary offences back to the Magistrates' Court if they are of the view that it is appropriate to do so. While most charges should be able to be quickly dealt with, there may be related summary offences that could take considerable time to determine (e.g. where a number of additional witnesses would be needed). Accordingly, section 242(5) enables related charges to be sent back to the Magistrates' Court where there is a good reason to do so.

The ***DPP*** will 'take over' the conduct of related summary offences post committal (see section 22 of the *Public Prosecutions Act 1994*). This will allow these charges to be case managed together with the indictable charges. It may also mean that fewer related charges proceed, with the DPP able to make a decision as to whether the criminality of the offending is appropriately reflected by the indictable charges and, if so, to withdraw the summary charges. If such charges are not to proceed then it will be open to the prosecution to simply withdraw the charge or offer no evidence on the charge as would be the case if the summary charges were heard in the Magistrates' Court. There is no need, for example, for the process to discontinue an indictable offence under section 177 to be followed (which is limited to charges on indictment in any event).

As ***related summary offences*** will have been transferred under section 145, there is no need for the charges to be re-filed in the trial court. Indeed, based on sections 5 and 6 of the Act, there is no statutory basis for summary charges to be filed other than in the Magistrates' Court (a point also made in the note to section 243).

It is important to note that there are full appeal rights against conviction and sentence on related summary offences. The right of appeal is to the Court of Appeal and is the same process as for charges on indictment. Sections 274 and 278 (appeal against conviction and sentence respectively) apply to an ***originating court*** which is defined in section 3 to mean the Supreme Court or County Court in their ***original jurisdiction*** which, in turn, is defined to include a proceeding under this section for a related summary offence.

Unrelated summary offences can also be dealt with by a trial court but in much more limited circumstances as set out in section 243.

If a charge for a related summary offence is proposed to be filed after an accused has been committed for trial (or if a ***direct indictment*** is used) the charge-sheet must be filed in the Magistrates' Court and then transferred to the trial court.

The approach in the Act is similar to that in sections 166, 167, 168 and 169 of the *Criminal Procedure Act 1986* (NSW). These sections allow related summary offences to be dealt with by the District Court or the Supreme Court in the course of that court's consideration of the related indictable offence and include similar evidential and procedural provisions.

243 Unrelated summary offence

Overview

This section allows the Supreme Court or County Court to deal with ***unrelated summary offences*** where the accused consents and indicates an intention to plead guilty. The Supreme Court or County Court can only deal with such charges if a guilty plea is then entered. If the accused does not plead guilty then the charge must be transferred back to the Magistrates' Court.

Legislative History

This section is based on section 359AA(2) and (3) of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

For transfer of a charge for an unrelated summary offence, see rule 2.11 and Form 2G of the County Court Criminal Procedure Rules 2009. See also, the County Court Criminal Procedure Practice Note.

For transfer of a summary offence that is not a related summary offence to the Supreme Court or the County Court, see rule 83 of the Magistrates' Court Criminal Procedure Rules 2009.

Discussion

This section takes the same approach as section 359AA of the *Crimes Act 1958* to the hearing and determination by the Supreme Court or County Court of a charge for a summary offence that is *not* related to the charge for the indictable offence. In other words, the accused must consent and intend to plead guilty to the summary offence. This power is useful where the accused wishes to have all outstanding charges dealt with in a single sentencing process.

It is important to note that there are full appeal rights against conviction and sentence on unrelated summary offences. The right of appeal is to the Court of Appeal and is the same process as for charges on indictment. Sections 274 and 278 (appeal against conviction and sentence respectively) apply to an ***originating court*** which is defined in section 3 to mean the Supreme Court or County Court in their original jurisdiction which, in turn, is defined to include a proceeding under this section.

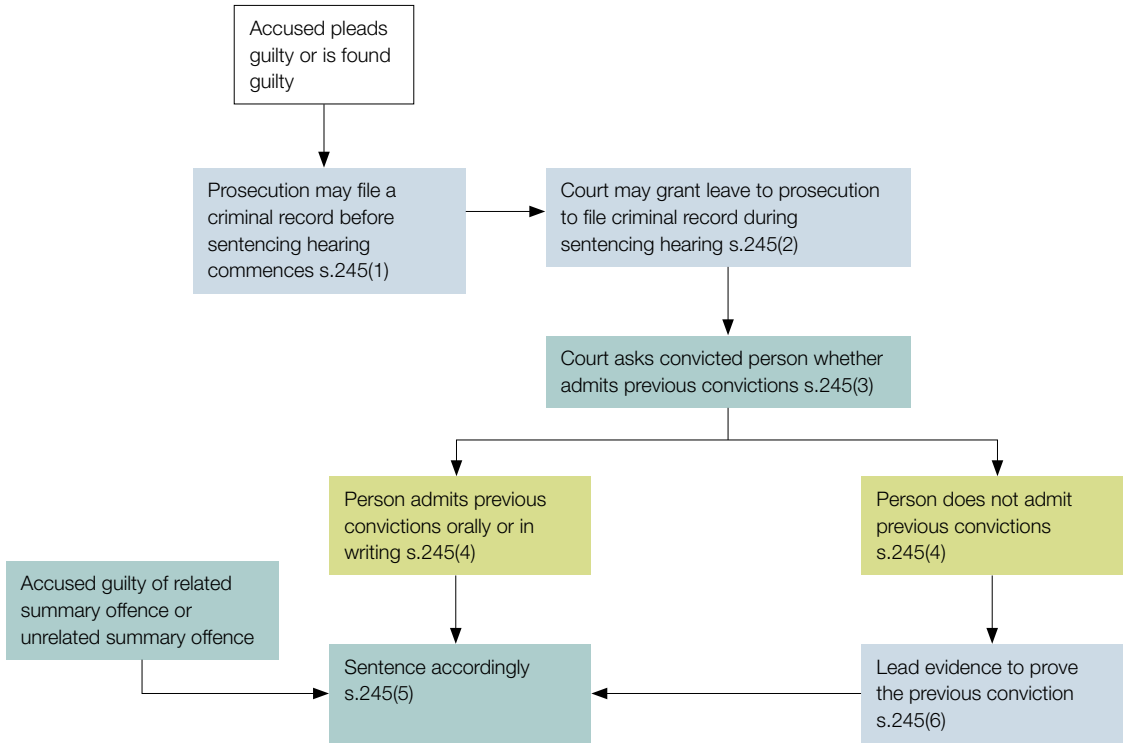
The note to section 242(2) makes it clear that the summary charge must still be filed in the Magistrates' Court and uplifted under this section, rather than filed directly in the Supreme Court or County Court.

See section 242 for a new process for the trial court to deal with related summary offences which must now be transferred with the committal for trial and can be heard by the trial court even on a not guilty plea.

Division 2 – Criminal record

This Divisions sets out how previous convictions are to be asserted, admitted and proved at a sentencing hearing. The following flowchart sets out the process, which is explained in more detail in the relevant sections in the guide.

Sentencing Hearing



LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

244 Criminal record

Overview

Section 244 sets out the requirements for a ***criminal record*** to remove the need for a 'further presentment' to be re-typed and filed. A document will be a criminal record under this section and therefore able to be relied on by the prosecution if it:

- contains the details about the accused's previous convictions set out in section 244(1)
- is signed by a member of the police force, a ***Crown Prosecutor*** or a legal practitioner with the OPP.

Legislative History

This section is based on section 376 of the *Crimes Act 1958* but provides for a simplified process. It removes the need for Schedule 3 to the *Crimes Act 1958*, which has been repealed.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section describes what a criminal record is. Section 245 sets out the process for using a criminal record at sentencing.

Previously, prior convictions were alleged in the Supreme Court and County Court in the form of a further presentment. This reflected the fact that, historically, if the accused disputed the alleged previous convictions, the jury was responsible for determining the issue. This requirement has since been overridden by legislation so that the issue is now determined by the judge.

The procedures for alleging and proving an accused's criminal history were set out in sections 376, 395 and 401 of the *Crimes Act 1958*. The provisions were difficult to follow. In practical terms, section 376 required each of the previous convictions to be re-typed from the Law Enforcement Assistance Program (LEAP) criminal history report (which sets out the accused's criminal history) onto the form of the further presentment set out in Schedule 3 to the *Crimes Act 1958*. The LEAP report is provided by Victoria Police to the ***DPP*** and the Office of Public Prosecutions.

This procedure was unnecessarily time consuming and no longer served the function for which it was designed, especially since proof of previous convictions has become a matter for the judge rather than the jury. Under this section it is no longer necessary to include the accused's criminal history in a further presentment. Instead, it will be sufficient to file the accused's criminal record. Section 244(1)(a)–(e) sets out what must be included in a criminal record however, the requirements are sufficiently flexible to capture advancements in the technology and/or practice of recording previous convictions by the police. The requirements are based on those in section 395(6)(a) of the *Crimes Act 1958*.

A ***criminal record*** is defined in section 3. This definition includes a ***previous conviction***. A criminal record does not include a subsequent conviction.

Section 244(2) also provides that a record may contain, if other offences were taken into account when the sentence was imposed, a statement to that effect and the offences (including the number of offences) taken into account. Section 244(2) reflects and complements section 100(11) of the *Sentencing Act 1991*.

Section 244(3) requires a criminal record to be signed by a member of the police force, a ***Crown Prosecutor*** or a member of staff of the Office of Public Prosecutions who is a legal practitioner or the informant or, in certain circumstances, a ***public official***. This is to ensure that there is a level of quality control over the content of criminal records.

245 Proof of previous convictions by criminal record

Overview

This section allows the prosecution to file a criminal record (see section 244) at any time between the filing of the indictment and commencement of the sentencing hearing. It can be filed after the sentencing hearing commences but only with the court's leave.

Section 245(3)–(6) provide that the accused must be asked if they admit the convictions. The admission can be made orally or in writing. If the accused does not admit one or more of the convictions then the prosecution can choose to prove the conviction using the certificate process in section 178 of the *Evidence Act 2008*.

Legislative History

This section covers the same subject matter as section 395 of the *Crimes Act 1958*. However, the process has been completely overhauled. Section 401 of the *Crimes Act 1958* related to proving previous convictions when they were in dispute. A simple certificate process is now provided in section 178 of the *Evidence Act 2008* and so section 401 has not been re-enacted.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 5(2)(f) of the *Sentencing Act 1991* requires a court to have regard to a person's previous character when sentencing. Section 6(a) of that Act provides that in determining the character of an offender a court may consider the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender. Given the importance of previous convictions to the sentencing process, this section provides a simple method to ensure that a criminal record is filed and admitted before it is used. It should be noted that section 245(4) allows for previous convictions on a criminal record to be admitted orally or in writing. The 'in writing' requirement would be satisfied by the accused signing a copy of the criminal record itself with an acknowledgment of its correctness.

The section proceeds on the assumption that the criminal record should be filed well before sentencing. However, a mechanism has been included to allow the prosecution to file a criminal record after the commencement of the sentencing hearing, but only with the leave of the court. This is to cover situations where, for example, a criminal record may become available during or after the sentencing hearing. An example of this would be a case in which there is some delay in obtaining a record of conviction from another state or country.

Division 3 – Powers and obligations

246 Attendance of accused at hearings

Overview

This section requires the accused to ***attend*** all hearings under this Chapter unless excused. This will include, for example, directions hearings, pre-trial hearings and trial proceedings.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is part of the new approach that the Act takes to when an accused person is required to ***attend*** (be physically present at court) and when an appearance (by a representative) will suffice. The operation of this new approach is discussed in detail in relation to section 329.

For these purposes, it should be noted that section 330(3) allows the court to excuse the attendance of an accused who is otherwise obliged to attend under this section. The requirement to attend can be enforced by the issuing of a warrant to arrest the accused under section 330(4) if they fail to attend. It should be noted that section 411 requires that an accused arrested under warrant should presumptively be brought before the court that issued that warrant, rather than to the Magistrates' Court.

247 Power to extend or abridge time

Overview

This section provides a broad power to the court to extend or abridge any time fixed in this Chapter (including any time already extended or abridged). There is a restriction on extending the time within which a trial for a ***sexual offence*** must commence under section 212, that is, an extension of time cannot be longer than 3 months.

The following procedural rules apply to the extension or abridgment:

- An express order under this section is not needed if a court ruling or direction provides for the extension or abridgment.
- Time can be extended before or after the particular time limit expires.
- More than one extension can be granted.
- No material has to be filed in support of an application, unless the court requires it.

Legislative History

This section is a combination of the substance of section 22 of the *Crimes (Criminal Trials) Act 1999* and sections 353(5)-(6B) and 359A(2)-(6) of the *Crimes Act 1958*. It applies to all time limits in the trials chapter.

Relevant Rules/Regulations/Forms

See the County Court Criminal Procedure Practice Note.

Discussion

This section provides a simple power to extend or abridge time. It will be used most commonly in relation to the time limits for filing indictments (section 163) and the time limits for commencing trial (sections 211 and 212), although it is not restricted to those time limits.

Section 247(3) ensures that, if the court makes a ruling or gives a direction the effect of which is to extend or abridge time, an express order under this section does not need to be made.

The section does not re-enact section 353(6A) or section 359A(4) of the *Crimes Act 1958* which provided that such applications could be made orally. However, unless an application is expressly required to be in writing (e.g. by filing a prescribed form) there is nothing preventing it from being made orally. Had these express provisions been re-enacted, an argument could be made that other applications and orders, absent an express oral power, needed to be in writing.

It should be noted that section 337 allows an order under this section to be made on the court's own motion or on the application of the parties.

248 Parties must inform Juries Commissioner of certain events

Overview

This section requires the parties to tell the ***Juries Commissioner*** whether and when a jury will be required for trial.

Legislative History

This section is based on section 23 of the *Crimes (Criminal Trials) Act 1999* without change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

249 Counsel required to retain brief for trial

Overview

This section requires a legal practitioner instructed to appear at trial to notify the court of that fact at least 7 days before trial.

It also prevents the legal practitioner from pulling out of the trial within 7 days of the day it is listed to start, unless given leave by the court. If the legal practitioner's withdrawal is unreasonable then costs can be awarded against them.

Legislative History

This section is based on section 27 of the *Crimes (Criminal Trials) Act 1999* without substantive change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

250 Complaints about legal practitioners

Overview

This section allows the court to complain to the Legal Services Commissioner about a legal practitioner's conduct if they do not comply with a requirement under Part 5.5 (pre-trial procedure), including any direction given at a directions hearing. It also applies to a failure to comply with a costs order made against the practitioner under sections 404 or 410.

Legislative History

This section is based on section 28 of the *Crimes (Criminal Trials) Act 1999*, without significant change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

251 Judge at earlier trial not prevented from presiding at later trial

Overview

This section declares that a judge at a first trial or other trial related hearing (like a directions hearing) can still preside over a retrial even if they made a potentially contentious ruling in relation to the earlier trial.

Legislative History

This section is based on section 29 of the *Crimes (Criminal Trials) Act 1999*, without significant change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

252 Offence for corporate accused to fail to appear

Overview

This section makes it an offence for a ***corporate accused*** to:

- fail to comply with an order under section 144(2)(d), namely an order at the end of a committal hearing for the accused to appear before the Supreme Court or County Court
- fail to appear at any other hearing when directed to appear by the court.

Legislative History

This section is based on clause 24B of Schedule 5 to the *Magistrates' Court Act 1989*, but has been extended to apply to any order for the corporate accused to appear as ordered.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This offence provision is the final piece in the approach that the Act takes to the appearance of a corporate accused in indictable proceedings. This approach creates the following structure:

- A corporate accused cannot be compelled to ***attend*** before the court as it has no physical manifestation.
- A corporate accused can ***appear*** by a representative in accordance with section 334.
- The Magistrates' Court can conduct a committal proceeding in the absence of a corporate accused if the accused has had adequate notice of the committal hearing (see section 154).
- On committing a corporate accused for trial, the magistrate must order the accused to appear on the day on which the accused's trial is listed to commence or on any other day specified by the court (see section 144(2)(d)).

- If the corporate accused is committed for trial in its absence, the ***DPP*** (or the informant if the DPP does not act) must give notice to the corporate accused of the committal, the date which the accused must appear and the fact that the trial can be heard in the accused's absence if it does not appear (see section 148).
- Section 173 requires notice to be given to a corporate accused with the indictment but only if the section 148 notice was not given.
- It is an offence under section 252 (i.e. this section) for a corporate accused to fail to appear as ordered under section 144(2)(d), or on any other date ordered by the court.
- Section 214 allows the court to try a corporate accused in its absence, and to hear related summary offences.

This broadly reflects previous provisions. The key difference is that previously the date on which the ***corporate accused*** was required to ***appear*** was the 'arraignment'. In order to reflect contemporary case management, the corporate accused can now be required to ***attend*** on any day (e.g. at a directions hearing). This is also why the offence has been extended beyond the date of arraignment.

The offence will be a purely summary offence.

253 Abolition of grand jury procedure

Overview

This section abolishes the grand jury procedure in Victoria.

Legislative History

This section is new and has no relationship to earlier provisions. It has the effect of rendering section 354 of the *Crimes Act 1958* redundant.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Until this section was enacted, a private citizen could apply to the Supreme Court for the summonsing of a grand jury (under section 354 of the *Crimes Act 1958*) if:

- a magistrate has refused to commit an accused for trial after a committal hearing
- the ***DPP*** has refused to present the accused for trial notwithstanding that they have been committed to stand trial by a magistrate.

The grand jury then decided whether the accused should be indicted to stand trial.

The provision was first introduced in Victoria in 1864 and has been used only 10 times since then. When the provision was introduced, ultimate prosecutorial discretion rested with the Attorney-General, not with the independent and specialist DPP, as is now the case. Before the Act, Victoria was the only state in Australia in which the grand jury procedure still existed. The grand jury was abolished in England, the country of its origin, in the 1940s.

The abolition of the grand jury procedure will mean that decisions on whether to prosecute an indictable offence in the Supreme Court or the County Court will be made only by the DPP or a ***Crown Prosecutor***.