Chapter 9
Repeals and Consequential and Other Amendments

Chapter 9 – Repeals and Consequential and Other Amendments

Chapter Overview

Chapter 9 amends various Acts as a consequence of changes introduced by the Act (in this Chapter, referred to as the *Criminal Procedure Act 2009*). It also introduces policy changes to some Acts which deal with aspects of criminal procedure.

The changes fall into four categories. First, there are amendments which repeal provisions where the substance of the provision has been re-enacted in the *Criminal Procedure Act 2009*. Second, there are amendments which repeal obsolete provisions. Third, there are amendments which are substantive in nature (e.g. the introduction of a 6 month time limit for the filing of charges for summary offences in the Children's Court). Fourth, there are amendments which are a direct consequence of substantive changes introduced by the *Criminal Procedure Act 2009*.

In summary, Chapter 9:

- repeals the *Crimes (Criminal Trials) Act 1999*
- repeals various sections of the *Crimes Act 1958* which are either re-enacted in the new Act or where the section is obsolete
- amends the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*
- amends the *Magistrates' Court Act 1989* to provide for a joint committal proceeding in certain cases where an adult and child are charged with offences which could be joined in the one indictment
- amends the *Children, Youth and Families Act 2005* to provide for joint committals in certain cases where an adult and child are charged with offences which could be joined in the one indictment
- amends the *Children, Youth and Families Act 2005* to provide for a 6 month time limit for the filing of charges for summary offences in the Children's Court
- amends the *Appeal Costs Act 1998*
- amends the *Sentencing Act 1991* to provide for a maximum fine that may be imposed for an indictable offence that is heard and determined summarily.

More consequential amendments to the Acts mentioned above, as well as over 130 other Acts across the Victorian statute book, were included in the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*.

Legislative History

The provisions in Chapter 9 are essentially new.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

Part 9.1 – *Crimes (Criminal Trials) Act 1999*

Part Overview

This Part contains one section, which repeals the *Crimes (Criminal Trials) Act 1999*.

Legislative History

The provision is new and has no direct relationship to any earlier provisions.

Discussion

See the discussion of section 421.

421 Repeal

Overview

This section repeals the *Crimes (Criminal Trials) Act 1999*.

Legislative History

The provision is new and has no direct relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Prior to the introduction of the *Criminal Procedure Act 2009*, key provisions relating to criminal procedure were contained in the *Magistrates' Court Act 1989*, the *Crimes Act 1958* and the *Crimes (Criminal Trials) Act 1999*.

The *Criminal Procedure Act 2009* consolidates Victoria's key laws relating to criminal procedure into the one Act, so that the provisions are easier to locate and logically organised.

The *Crimes (Criminal Trials) Act 1999* dealt with aspects of pre-trial procedure and trial procedure. All of the provisions dealing with pre-trial and trial procedure are now dealt with in the *Criminal Procedure Act 2009*. Accordingly, the *Crimes (Criminal Trials) Act 1999* has been repealed.

Part 9.2 – *Crimes Act 1958*

Part Overview

This Part contains one section which repeals various sections of the *Crimes Act 1958*.

The repeals fall into two categories: first, where the substance of the section has been re-enacted in the Act and second, where the section is obsolete and has not been re-enacted. Those in the first category are discussed throughout this guide. Those in the second category are discussed under section 422.

422 Amendment of the *Crimes Act 1958*

Overview

Section 422 repeals various sections of the *Crimes Act 1958*.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 422 repeals various sections of the *Crimes Act 1958*. The repeals fall into two categories: first, where the substance of the section has been re-enacted in the Act and second, where the section is obsolete and has not been re-enacted. Those in the first category are discussed throughout this guide. The second category is discussed below.

Crimes Act 1958 section 379 – Description of Crown property

This section was originally enacted in 1958 and related to a specific problem that existed at the time. New offences created by the *Crimes (Theft) Act 1973* and the procedural provisions in section 73(9) of the *Crimes Act 1958* have rendered it obsolete.

Crimes Act 1958 section 380 – Property under management of body corporate deemed to be property thereof

Section 380 deemed any property that a body corporate managed, controlled or had custody of to be the property of the body corporate for the purpose of a criminal proceeding, against any other person, for an offence in respect of the property.

This specific statement is no longer needed as a result of section 71(2) of the *Crimes Act 1958* which provides that "property shall be regarded as belonging to any person having possession or control of it, or having in it

any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest)."

Crimes Act 1958 section 381 – Money or securities etc. may simply be described as money

This section derives from section 71 of the *Larceny Act 1861* (UK) (24 & 25 Vict. c.96) which appears to have been enacted primarily to overcome highly technical eighteenth century pleading rules in the United Kingdom which have never been part of Victorian law. The repeal of section 381 does not revive the technical pleading rules. For this to occur, Parliament would need to indicate an intention to do so (section 14(2) of the *Interpretation of Legislation Act 1984*). The section also deals with the effect of a description of 'money' in a presentment. It serves no contemporary purpose and has not been re-enacted.

Crimes Act 1958 section 382 – Presentment for stealing etc. documents of title

This section provided that it is sufficient to allege that a document of title to land is or contains evidence of title. The offence to which this procedural provision relates (stealing or fraudulently destroying, etc a document of title to land) was repealed by the *Crimes (Theft) Act 1973*. There is now no reasonable possibility that a person will be charged with such an offence that occurred before 1 October 1974.

Crimes Act 1958 section 389 – No person entitled to traverse or have time to plead

This section provides that the court may adjourn a case to allow an accused time to plead, demur or prepare their defence but that there is no right or entitlement to such an adjournment. The general power of adjournment in section 331 is sufficient to cover this situation.

Crimes Act 1958 section 396 – Not necessary to enquire into accused's land

This section provided that, where a person is presented for treason or an indictable offence, it is not necessary to inquire into their lands or goods, nor whether the person fled for the offence. It is likely that this section was first enacted because of a concern that failure to re-enact it might revive earlier jury functions (i.e. of inquiring into the lands or goods of an accused and inquiring as to whether the accused had fled for the purpose of common law forfeiture). The provision is no longer regarded as necessary because section 14(2) of the *Interpretation of Legislation Act 1984* provides that repeal of a provision of an Act does not revive anything not in force at the time of the repeal.

Crimes Act 1958 section 409 – No need to prove specific intent to defraud in trial relating to instruments

The only offences to which this section directly related were abolished as part of the overhaul of Division 3 made by the *Crimes (Criminal Damage) Act 1978*.

There remains one offence to which this section could technically apply, namely "Threats to safety of aircraft" in section 246E. This is because it is in Division 3 of Part 1 of the *Crimes Act 1958* and includes as an element an intention to injure a person. Section 409 was of no assistance in relation to that offence, because it refers to an intention "to kill or injure all or any of the persons on board an aircraft". It could not be sufficient for a charge for an offence against section 246E simply to prove "an intent to injure" as indicated in section 409. Therefore, section 409 is no longer necessary.

Crimes Act 1958 section 436 – Records to be drawn in amended form

This section provided that if a record is to be drawn up based on proceedings under the *Crimes Act 1958*, it should be based on an amended form of the presentment. This provision is unnecessary.

Crimes Act 1958 section 437 – Judgment not to be reversed because juror not returned as juror

This section provided that a judgment is not to be reversed or stayed simply because a juror has not been returned as a juror by the Juries Commissioner. However, there is no current statutory requirement that a juror be "returned as a juror by the Juries Commissioner".

Crimes Act 1958 section 439 – Payment of fine forwarded to prothonotary

This section required the officer in charge of a prison to forward any money received to pay a fine to the court. This involved antiquated practices and such a requirement is no longer necessary in legislation.

Crimes Act 1958 section 444 – Procedure on disagreement by jury

This section empowered a court to direct that a new trial take place where a jury is discharged upon being unable to reach a verdict after six hours deliberation. This is unnecessary as a result of section 46(2) of the *Juries Act 2000*.

Crimes Act 1958 section 453 – Scale of charges

This section enabled the court to establish a scale of fees for the conduct of business in the criminal jurisdiction. This provision is unnecessary because a power to make rules in relation to costs and fees is already provided for in each court's legislation (i.e. section 140(1) of the *Magistrates' Court Act 1989*, section 78 of the *County Court Act 1958* and section 129 of the *Supreme Court Act 1986*).

Crimes Act 1958 section 456 – Provision as to action against persons acting in pursuance of Act

The history of this section can be traced back to section 412 of the *Criminal Law and Practice Act 1864*. The effect of the provision was that a plaintiff who successfully brought an action against an accused relating to the exercise of powers under the *Crimes Act*

1958 would not be entitled to recover any damages awarded if they had previously rejected an offer from the accused to pay a sum equal to or higher than the damages awarded. These issues are now dealt with under the Supreme Court (General Civil Procedure) Rules 2005 as part of civil procedure and do not need to be referred to in the Act.

Section 456 also contained a limited form of immunity for the agencies that exercise powers under the *Crimes Act 1958* (e.g. the DPP, Crown Prosecutors, members of the judiciary and Victoria Police). These have been rendered redundant by modern forms of immunity in, for example, the *Police Regulation Act 1958* and the *Public Prosecutions Act 1994*.

Crimes Act 1958 section 571 – Jurisdiction of Court of Appeal

This section provided that all jurisdiction and authority in relation to questions of law arising in criminal trials is vested in the Court of Appeal. The section now serves no purpose in light of section 10 of the *Supreme Court Act 1986* and section 85 of the *Constitution Act 1975*.

Crimes Act 1958 section 581 – Notes of evidence on trial

This section related to payment for transcripts. This provision is unnecessary given the current role and practices of the Victorian Government Reporting Service. There is no need for the Act to contain an equivalent provision.

Crimes Act 1958 Schedule 3

Schedule 3 related to section 353(1) of the *Crimes Act 1958*, which provided that a presentment must be in the form contained in Schedule 3. The effect of Schedule 3 is now dealt with in section 159(3) of the Act.

Crimes Act 1958 Schedule 4 – Certificate

Schedule 4 contained a certificate which was relevant to section 357 of the *Crimes Act 1958*. That section dealt with the situation where a person has been committed for trial but the DPP decides not to prosecute. Schedule 4 is no longer relevant in light of the procedure for discontinuing a prosecution in section 177 of the Act.

Crimes Act 1958 Sixth Schedule – Appendix to Presentment Rules

The Appendix to the presentment rules contained in the Sixth Schedule set out forms for certain offences. Some of the offences referred to no longer exist (e.g. malicious wounding contrary to section 19 of the *Crimes Act 1958*). The Appendix itself is also unnecessary in light of the general requirements for charges in Schedule 1 to the Act.

Sections 422, 422A(2), 423, 424 and 425(4) and Schedule 5 to *Crimes Act 1958* were repealed by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*.

Crimes Act 1958 section 422

This section sets out the procedure that applies where facts disclose a more serious offence. Although in its current form this provision is relatively recent (the current wording was introduced in 1981), the provision has a long history that is closely tied to technical rules that related to the distinction between felonies and misdemeanours. Historically, the common law doctrine of merger had the effect that, if the same facts constituted both a felony and a misdemeanour, the misdemeanour merged into the felony. This meant that if a person was put on trial for a misdemeanour, but the evidence at the trial disclosed that the person had actually committed a felony, the trial had to be aborted.

The section is no longer necessary because the particular obstacle posed by the common law doctrine of merger has long been overcome in Victoria by the abolition of the distinction between felonies and misdemeanours.

Crimes Act 1958 section 422A(2)

This section provides that section 422A (which provides for an alternative verdict for certain charges relating to driving) does not restrict the operation of section 421 or 422. The reference to section 422 in section 422A(2) is no longer necessary following the repeal of that section. The reference to section 421 is also no longer necessary. The *Criminal Procedure Act 2009* repeals section 421(2)-(4) of the *Crimes Act 1958*. Only section 421(1) will remain in the *Crimes Act 1958*. Section 421(1) provides alternative verdicts on a charge of murder. The provisions in section 422A are not relevant or connected to section 421(1).

Crimes Act 1958 section 423

This section sets out the alternative verdict of unlawfully wounding. This offence has been repealed from the *Crimes Act 1958*.

Crimes Act 1958 section 424

Section 424 refers to the alternative verdict of administering poison. The offence of administering poison was abolished in 1986. A new offence of administering a substance to another was created at the same time in section 19 of the *Crimes Act 1958*. However, that offence is significantly different from the offence of administering a poison.

Crimes Act 1958 section 425(4)

This section provides alternative verdicts for certain sexual offence charges. Section 425(4) provides that this section does not restrict the operation of section 421 or 422. The reference to section 422 in section 425(4) is no longer necessary following the repeal of that section. The reference to section 421 is also unnecessary as it is not relevant to the operation of section 425.

Part 9.3 – *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

Part Overview

Previously, the appeal provisions relating to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* were located in the *Crimes Act 1958*.

This Part moves those appeal provisions into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, so that the appeal rights are located in the same Act as the substantive processes underlying them.

The procedural and substantive requirements of the appeal rights are also articulated in more detail than in the previous legislation.

Further, the appeal rights have been amended so that they are, as far as possible, consistent with the structure of the appeal provisions in the *Criminal Procedure Act 2009*.

The Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009 expanded on these amendments to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. The procedural and substantive requirements are now consistent across all appeal rights in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (see sections 19A, 24A, 28A, 34, 43A, 57B, 58A, 73H and 73N).

423 New section 14A inserted

Overview

This section inserts a new section 14A into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. The new section deals with an appeal by an accused against a finding that the accused is unfit to stand trial.

Legislative History

The appeal rights provided for in this provision are based on sections 570A and 570C of the *Crimes Act 1958*. However, the provisions have been relocated to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and the procedural and substantive requirements of the appeal rights are articulated in more detail than the previous legislation.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Previously, an appeal by an accused against a finding that the accused is unfit to stand trial was dealt with under section 570C of the *Crimes Act 1958* by applying the procedure in section 570A (appeal against finding of not guilty because of mental impairment) with necessary modifications. As with appeals against verdicts of not guilty because of mental impairment in section 424 (see discussion under that section), this appeal power has been moved into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* so that it is linked to the substantive processes underlying the appeal right.

New section 14A articulates the procedural and substantive requirements of such an appeal rather than relying on a 'necessary modifications' approach. It also follows, to the extent reasonably possible, the structure of the substantive appeal provisions in the Act, particularly sections 274–277.

New section 14A(2) and (3) provide that a notice of application for leave to appeal must be filed within 28 days of the order being made. The Registrar of Criminal Appeals of the Supreme Court must provide the respondent with a copy of the notice within 7 days after it is filed. This follows the same structure and time limits as those which apply to an appeal against conviction (see section 275).

New section 14A(4) requires the Court of Appeal to allow an appeal against a finding of unfitness where:

- the finding of unfitness is unreasonable and cannot be supported having regard to the evidence
- there has been a material error of law
- for any other reason the Court of Appeal considers that the finding should not stand.

Two of the three limbs of this test substantively differ from two of the three limbs of the test in the *Criminal Procedure Act 2009* which applies to an appeal against conviction (see section 276 and also new section 24AA of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (inserted by section 424 of the *Criminal Procedure Act 2009*)).

The first limb contains only a minor difference so that it directly applies to a "finding of unfitness to stand trial" rather than a "verdict of a jury".

The second limb is substantively different. It requires the establishment of a material error, rather than an error which resulted in a substantial miscarriage of justice. A different test applies because:

- a finding of unfitness is an interim step in a criminal proceeding rather than a finding on the ultimate issue of guilt, which makes it more akin to an interlocutory appeal
- a hearing to determine the accused's fitness to stand trial does not involve a hearing of the facts which determine whether the accused is guilty

- the test of "substantial miscarriage of justice" has been used, and case law has developed, on the basis that it applies to the ultimate issue
- by using a different test there is greater scope for developing the most appropriate case law for this particular provision, rather than it being influenced by decisions concerning different situations, namely whether the accused is guilty.

The second limb requires that the error be an error of law. In *M v R* [1994] HCA 63; (1994) 181 CLR 487 McHugh J provided some examples of errors of law: insufficiency of evidence, misdirection or a failure to direct on relevant matters of law and evidence improperly admitted or excluded.

The second limb also requires that the error be a material error. This is to make it clear that a simple technical legal error will not be sufficient to allow an appeal. The error must have been of a kind which was significant in the proceeding and relevant to the finding that the accused was unfit to stand trial. In *TKWJ v R* [2002] HCA 46; (2002) 212 CLR 124 at [70], McHugh J equated 'material error' with 'miscarriage of justice'. This supports the position that 'material error' is a lower test than a 'substantial miscarriage of justice'.

The third limb of the test acts as a general ground to ensure that justice can be done in individual cases. Like the test applied in conviction cases, the third limb of this test has been drafted so that it does not overlap with the other two limbs of the test: it applies "for any other reason". However, like the second limb, this limb adopts a different approach from the conviction test. It does not use 'substantial miscarriage of justice' as the test.

For the same kind of reasons discussed above in relation to the second limb, a different test is used from the conviction test. This residual test enables the court to set aside a finding of unfitness where something significant or important has occurred which affects the appropriateness of the finding.

The options for a court on a successful appeal now cover all of the possible approaches that may be required. New section 14A(6) and (7) provide that, if the appeal is allowed, the court may:

- set aside the finding and remit the matter for trial
- set aside the finding and remit the matter for a rehearing of the issue of whether the accused is fit to stand trial with directions as to how the hearing is to take place (this may be appropriate if, for example, a wrong direction was given to the jury)
- if the court considers that, even though the appeal has been allowed, the accused is unfit to stand trial, affirm the finding and remit the matter for the process under the Act to continue.

The Court of Appeal may, on remitting a matter under this section, give directions as to how the rehearing is to be conducted and remand the accused in custody, grant the accused bail, or make any other order that it considers appropriate for the safe custody of the accused.

Item 39 in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* contains a number of other consequential amendments to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

For example, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* provides for appeal rights against various orders that a court can make. The appeal rights are contained in sections 19A, 24A, 28A, 34, 34A, 57B, 58A, 73H and 73N of the Act. Item 39 amends these appeal provisions to provide that a notice of appeal must be filed 28 days after the relevant order is made and the respondent must be served or provided with a copy of the notice of appeal within 7 days after the day on which the notice is filed. The time periods are consistent with the standardised time periods that apply to the commencement of appeals under Part 6.3 of the *Criminal Procedure Act 2009*.

Item 39 also amends the appeal provisions to provide that, where an appeal is brought by the DPP, the Attorney-General or the Secretary to the Department of Human Services, notice of appeal must be served personally on the respondent because it is a significant new step in the proceeding and the accused may have thought that the matter was finished.

Further, the DPP, the Attorney-General or the Secretary to the Department of Human Services (as applicable) is also required to provide a copy of the notice of appeal to the legal practitioner who last represented the respondent if they can reasonably be identified. Where an appeal is brought by the person subject to an order, the Registrar of Criminal Appeal of the Supreme Court must provide to the respondent(s) a copy of the notice of application for leave to appeal (rather than the person subject to an order serving the notice on the respondent).

Item 39.51 of the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* inserts a new section 76C into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* which provides a specific legislative basis for extending time for filing and serving a notice of appeal with the Court of Appeal. Item 39.51 also inserts a new section 76D in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* which provides that the power of the Court of Appeal to extend time for filing a notice of appeal may be exercised by a single Judge of Appeal in the same manner as it may be exercised by the Court of Appeal.

Item 39.52 of the Schedule inserts two new items (11 and 12) into Schedule 3 to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. These items provide transitional arrangements. The transitional provisions apply where the relevant matter being appealed (which includes certain orders, applications and findings that the accused is unfit to stand trial or is not guilty because of mental impairment) is made or occurs on or after the commencement day (1 January 2010).

424 New section 24AA inserted

Overview

Section 424 inserts a new section 24AA into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. The new section deals with an appeal by a person against a verdict of not guilty because of mental impairment.

Legislative History

The appeal rights provided for in this section are based on sections 570A and 570B of the *Crimes Act 1958*. However, they have been relocated to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and the procedural and substantive requirements of the appeal rights are articulated in more detail than the previous legislation. In addition, the structure of the provision is based on the approach used in other appeal provisions in the Act.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Previously, an appeal by an accused against a verdict of not guilty because of mental impairment was dealt with under sections 570A and 570B of the *Crimes Act 1958*.

As with section 423 (discussed above) this appeal power has been moved into the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, so that it is linked to the substantive processes underlying the appeal right. New section 24AA articulates the procedural and substantive requirements of such an appeal in more detail than the previous legislation. It also follows, to the extent reasonably possible, the structure of the substantive appeals provisions in the *Criminal Procedure Act 2009*, particularly sections 274–277.

New sections 24AA(2) and (3) provide that a notice of application for leave to appeal must be filed within 28 days of the verdict. The Registrar of Criminal Appeals of the Supreme Court must provide the respondent with a copy of the notice of application for leave to appeal within 7 days of the filing of the notice.

New section 24AA(4) requires the Court of Appeal to allow an appeal against a verdict of not guilty because of mental impairment on the same bases as for ordinary appeals against conviction. This reflects the new grounds of appeal in section 276 (discussed in Division 1 of Part 6.3 under that section). The Court of Appeal is required to allow an appeal if satisfied that:

- the verdict is unreasonable or cannot be supported on the evidence
- as a result of an error or an irregularity, there has been a substantial miscarriage of justice
- for any other reason there has been a substantial miscarriage of justice.

Because this appeal is about the ultimate issue in the case, the test follows the conviction appeal test and differs from the test applied in relation to a finding that the accused is unfit to stand trial (discussed above under that section).

However, based on section 570A(4) of the *Crimes Act 1958*, new section 24AA(5) allows the court to dismiss an appeal if the court considers that:

- none of the grounds for allowing the appeal relates to the issue of the mental impairment of the appellant
- the court considers that, but for the mental impairment of the appellant, the proper verdict that would have been made was that the appellant was guilty of an offence other than the offence charged.

New section 24AA(7) provides that, if the Court of Appeal allows an appeal on the ground that the verdict of not guilty because of mental impairment ought not to stand, and considers that the proper verdict would have been guilty of an offence, the Court of Appeal must substitute a verdict of guilty of that offence and may make any order that the trial court could have made.

Under new section 24AA(8), if the Court of Appeal allows the appeal, and new subsection (7) does not apply, it must set aside the verdict and either enter a judgment and verdict of acquittal or order a new trial.

Finally, new section 24AA(9) applies if the Court of Appeal orders a new trial. It allows the Court of Appeal to make any order referred in section 24(1)(a), (b), (c) or (e) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* pending the new trial. Section 24 provides that the court may make the following orders:

(a) an order granting the person bail;

(b) subject to subsection (2), an order remanding the person in custody in an appropriate place;

(c) subject to subsection (3), an order remanding the person in custody in a prison;

(d) if it is of the opinion that it is in the interests of justice to do so, an order—
(i) that the person undergo an examination by a registered medical practitioner or registered psychologist; and
(ii) that the results of the examination be put before the court;

(e) any other order the court thinks appropriate.

Item 39 in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* contains a number of other consequential amendments to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (see discussion under section 423 above).

425 Consequential amendments

Overview

Section 425 makes certain consequential amendments to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* that arise from the new appeal procedures in sections 423 and 424 which replace provisions from the *Crimes Act 1958*.

Legislative History

The provision is new and has no direct relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above. See also the discussion of section 423 in relation to other consequential amendments made to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*.

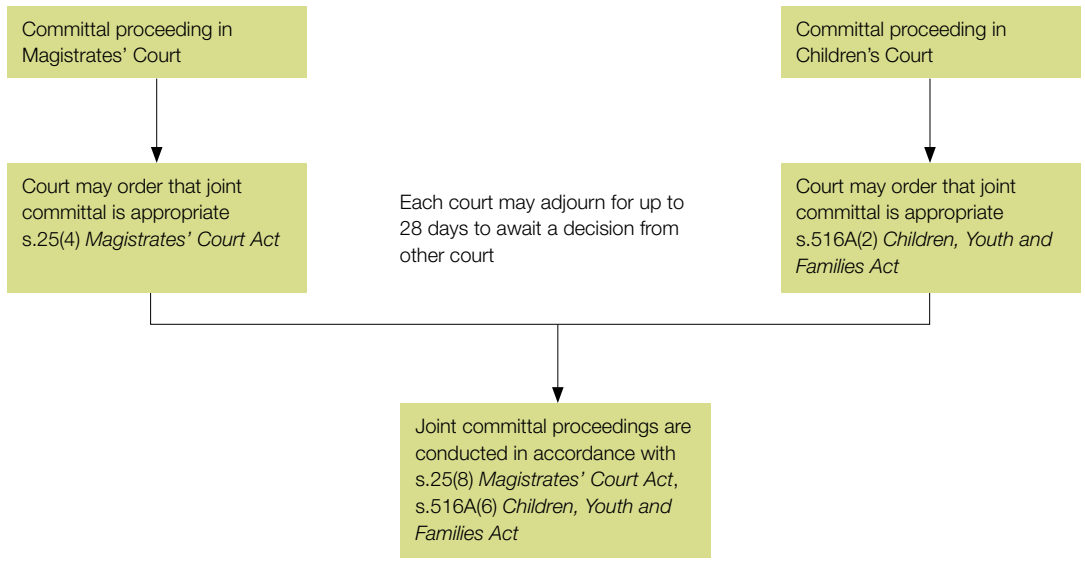
Part 9.4 – *Magistrates' Court Act 1989*

Part Overview

This Part amends the *Magistrates' Court Act 1989* to:

- provide the court with jurisdiction to conduct a joint committal proceeding in certain circumstances where a child and adult are charged with the same offence
- make some consequential amendments to the *Magistrates' Court Act 1989* as a result of changes introduced by the *Criminal Procedure Act 2009*.

Joint Committal Proceedings



LEGEND:

Accused responsibility

426 Joint committals

Overview

Section 426 inserts new section 25(3) and (4) into the *Magistrates' Court Act 1989* to allow the court to make an order for a joint committal proceeding where a child and adult are charged with offences which could be joined in the same indictment. The Magistrates' Court and the Children's Court must both consider this an appropriate way to deal with the charges within their jurisdiction. A mirror provision for the Children's Court process can be found at section 430 of this Act (which creates a new section 516A of the *Children, Youth and Families Act 2005*).

If joint committal proceedings are conducted, the *Children, Youth and Families Act 2005* applies as far as practicable to the child and the *Criminal Procedure Act 2009* applies as far as practicable to the adult.

Legislative History

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

Relevant Rules/Regulations/Forms

For joint committal proceedings:

- under the *Magistrates' Court Act 1989*, see rule 53 and Form 36 of the Magistrates' Court Criminal Procedure Rules 2009
- under the *Children, Youth and Families Act 2005*, see rule 2.05 and Form 5 of the Children's Court Criminal Procedure Rules 2009.

Discussion

The section operates alongside section 430 of the Act, which amends the *Children, Youth and Families Act 2005* to introduce a basic structure in which agreement between the courts can occur to conduct a joint committal proceeding in certain cases where an adult and child are charged with offences which could be joined in the one indictment. Clause 5 of Schedule 1 to the Act provides that charges for ***related offences*** may be joined in the one indictment. Clause 6 of Schedule 1 to the Act provides that an indictment may include charges against more than one accused.

Previously, while a child and adult could be jointly tried in certain circumstances, there was no statutory power for joint committal proceedings.

The Children's Court does not have jurisdiction to hear and determine certain serious indictable offences (such as murder or manslaughter). However it does have jurisdiction to conduct a committal proceeding for these offences. As a result, if there is an adult co-accused, two separate committal proceedings may be held (one in the Children's Court and one in the Magistrates' Court). At the trial stage, a child and co-accused may be tried jointly.

In appropriate cases, the new process allows a joint committal proceeding to be conducted. This is intended to save victims and witnesses the trauma and inconvenience of giving evidence in two separate committal proceedings as well as result in a more efficient use of resources.

A joint committal proceeding may only be held where the charges against each accused could properly be joined in the one indictment. Charges can be joined in the one indictment if they are related offences. Different types of offences may arise in this situation. For example:

- both accused may be charged with the same offence, such as murder
- the child accused may be charged with murder and the adult accused may be charged with being an accessory (after the fact to the murder).

The new provisions recognise the particular vulnerability of children in the criminal justice system in a number of ways. A joint committal proceeding can only be conducted if the child is 15 years or older at the time the proceedings commence. The court must have regard to the age of the child and the Children's Court must agree that a joint committal proceeding is appropriate. Further, when a joint committal proceeding is conducted (in the Magistrates' Court) the requirements of proceedings in the Children's Court must apply to the child as far as is practicable.

The section provides that the child must be of or over the age of 15 at the time the proceeding is commenced and must be charged with an indictable offence which cannot be tried summarily in the Children's Court. These offences are listed in new section 25(3)(b)(ii) of the *Magistrates' Court Act 1989*.

Under new section 25(4) of that Act, the court may order that joint committal proceedings are appropriate, having had regard to matters including:

- the age of the child
- the effect on victims of the offence charged if the committal proceedings were not conducted jointly
- the estimated duration of the committal proceedings if conducted jointly
- the number of witnesses who would be cross-examined by both accused.

New sections 25(5) and (6) of the *Magistrates' Court Act 1989* have been included because this approach is more consistent with the approach taken in the *Children, Youth and Families Act 2005*. These provisions are unnecessary in the *Criminal Procedure Act 2009*. This is because the general provision in section 337 of the Act indicates that, unless the context otherwise requires, "a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion." Further, the Attorney-General's Second Reading Speech in relation to the Act indicated that:

The development of principles of procedural fairness means it is not necessary to refer to the right to be heard. For the kinds of procedures and powers provided in this Bill, this Bill operates in accordance with modern requirements of procedural fairness that a party has a right to be present and make submissions at a court hearing which concerns them.

The reference to 'each party' in section 25(6) of the *Magistrates' Court Act 1989* is a reference to the informant/prosecutor and the adult accused. It does not include a reference to the child accused, nor to the informant/prosecutor of the child accused, neither of whom are parties to the separate proceeding involving the prosecution of the adult accused.

Section 25(7) provides that if the court makes an order that joint committal proceedings are appropriate, it may adjourn the matter for 28 days to enable the Children's Court to consider whether joint committal proceedings are appropriate. It may be that a further adjournment, which can be ordered under section 331 of the Act (in the Magistrates' Court) or section 530 of the *Children, Youth and Families Act 2005* (in the Children's Court), is required in some instances.

If, within that period, the Children's Court also considers that a joint committal proceeding is appropriate, then the provisions in both the *Magistrates' Court Act 1989* and the *Children, Youth and Families Act 2005*, will apply to confer jurisdiction to conduct joint committal proceedings.

The amendments in section 430 of the *Criminal Procedure Act 2009* are structured in the same way. As a result, it does not matter which court is the first to consider the appropriateness of a joint committal proceeding.

When conducting a joint committal proceeding, there will technically be two prosecutors in the case. Given the types of offences involved, the ***DPP*** will usually be prosecuting the adult accused and Victoria Police will be prosecuting the child accused. The DPP has the power "to take over and conduct any proceedings in respect of any summary or indictable offence" if the DPP considers it desirable to do so (see section 22(1)(b)(ii) of the *Public Prosecutions Act 1994*). This is a situation in which the DPP may well reach such a conclusion. As a result, there would be one prosecutor in the case, which is more practical and efficient.

Item 82 of the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* contains transitional provisions for the new joint committal process. The transitional arrangements provide that this new process will apply to committal proceedings if the relevant criminal proceeding (of which the committal proceeding is a part) commenced on or after the commencement of section 426 of the *Criminal Procedure Act 2009*, namely 1 January 2010. See further discussion of transitional provisions in the discussion of Schedule 4 to the *Criminal Procedure Act 2009*.

427 Consequential amendments

Overview

Section 427 contains various consequential amendments to the *Magistrates' Court Act 1989* as a result of new provisions introduced by the *Criminal Procedure Act 2009*.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The *Criminal Procedure Act 2009* consolidates all of the key criminal procedure legislation into one Act. As a result, a number of provisions in the *Magistrates' Court Act 1989* are no longer necessary.

This section repeals provisions in the *Magistrates' Court Act 1989* dealing with commencing a proceeding, summary procedure, committal proceedings, appeals and rehearings as these procedures are now dealt with in the *Criminal Procedure Act 2009*.

This section also amends the power of adjournment in section 128 of the *Magistrates' Court Act 1989*. Previously, section 128 of the *Magistrates' Court Act 1989* gave the Magistrates' Court the power to adjourn all proceedings. Section 331 of the *Criminal Procedure Act 2009* now contains a general power to adjourn criminal proceedings, which applies to all courts. Accordingly, the power of adjournment in section 128 of the *Magistrates' Court Act 1989* has been amended so that it no longer applies to criminal proceedings.

The *Magistrates' Court Act 1989* was also further amended by the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*.

Part 9.5 – *Children, Youth and Families Act 2005*

Part Overview

This Part amends the *Children, Youth and Families Act 2005* to:

- introduce new definitions consistent with definitions used in the *Criminal Procedure Act 2009*
- require proceedings against a child for a summary offence to be commenced within 6 months of the offence
- allow joint committal proceedings where an adult and child are charged in relation to the same offence.

428 Definitions inserted

Overview

Section 428 inserts new definitions in the *Children, Youth and Families Act 2005* as a result of changes introduced by the *Criminal Procedure Act 2009*.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section inserts new definitions, ***DPP*** and ***authorised person*** in section 3 of the *Children, Youth and Families Act 2005*. The definition of DPP is the same as that found in section 3 of the *Criminal Procedure Act 2009*. The definition of authorised person is the same as that found in Schedule 3 to the *Criminal Procedure Act 2009*.

This section also amends the definition of 'sentencing order' in section 3 of the *Children, Youth and Families Act 2005*, so that it is consistent with the definition of ***sentence*** in section 3 of the *Criminal Procedure Act 2009*.

429 New Part 5.1A inserted in Chapter 5

Overview

Section 429 inserts a new Part 5.1A into Chapter 5 of the *Children, Youth and Families Act 2005*, which contains provisions relating to: time limits for filing charges; applications for an extension of time for the commencement of proceedings; the court's power to extend time; and the power to rehear an application for extension of time conducted in the absence of the child.

New section 344A requires a proceeding against a child for a summary offence to be commenced within 6 months of the offence. There are two exceptions. These are:

- where the court extends the time (under new section 344C) on the application of an informant (under new section 344B)
- where the child, after receiving legal advice, gives written consent, and a member of the police force of or above the rank of sergeant, consents to the proceeding being commenced after the expiry of 6 months (under new section 344A(1)(b)).

With respect to indictable offences, new section 344A(2) provides (to avoid any doubt) that a proceeding against a child may be commenced at any time, except where otherwise provided by or under this or any other Act.

Legislative History

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

Relevant Rules/Regulations/Forms

For extension of time for commencement of proceedings for summary offences, see rule 2.04 and Form 4 of the Children's Court Criminal Procedure Rules 2009.

Discussion

Previously the commencement of criminal proceedings in the Children's Court was subject to the same time limits as in the adult jurisdiction. This section reduces the time limit, within which proceedings against a child for a summary offence must be commenced, from 12 months to 6 months from the date of the alleged offence. The general position in relation to indictable offences remains the same (i.e. proceedings for an indictable offence may be commenced at any time).

There are particular considerations in relation to children that make it important for proceedings to be commenced as soon as possible after the offence is alleged to have occurred. It is generally considered that the closer in time the court's response is to the offence, the more effective the response will be on the young person.

There are two exceptions to the requirement that proceedings against a child for a summary offence must be commenced within 6 months of the date of the alleged offence, namely:

- the court can extend the time limit on the application of an informant
- the time limit can be extended if the child consents in writing and a member of the police force of or above the rank of sergeant consents to the proceeding being commenced after the expiry of 6 months (new section 344A(1)(b)).

The ability of the child accused to consent to an extension of time is consistent with the approach taken to adult accused in section 7 of the *Criminal Procedure Act 2009*.

It provides a mechanism in cases involving indictable offences to facilitate a plea by allowing a charge for a summary offence to be filed where this would not otherwise be possible due to the expiry of the limitation period. Pursuant to this exception, a charge for a summary offence could potentially be commenced at any time.

Under section 7 of the *Criminal Procedure Act 2009*, the time limit for an adult accused can be extended where the accused gives written consent and the ***DPP*** or a Crown Prosecutor consent to the proceeding being commenced after the expiry of the time limit.

For a child accused, a member of the police force of or above the rank of sergeant must consent to the proceeding being commenced after the expiry of the time limit (rather than the DPP or a Crown Prosecutor). This difference recognises that, in practice, police ordinarily prosecute offences in the Children's Court. The DPP and Crown Prosecutors are not normally involved. This explicit statutory process is necessary because at common law an accused is incapable of acquiescing to a time-barred charge, even as part of an agreement to plead guilty to a lesser offence (see *R v Tait* [1996] 1 VR 662). This section reverses that position, subject to the preconditions discussed above.

Additional safeguards are included for children. The court must be satisfied that the child has obtained legal advice on the issue and, if not, adjourn the proceeding to enable the child to obtain legal advice. The court must also advise the child that, after obtaining legal advice, the child may withdraw his or her consent to the proceeding. The court may also adjourn the proceeding where the child is under the age of 15 in order to secure the attendance of the child's parent or guardian.

While the new 6 month time limit recognises the importance of a quick response to commencing proceedings against a child, delay may be unavoidable in some cases. For this reason, new section 344C allows the court to extend the time limit on the application of the informant under section 344B. In deciding whether to extend the time limit, new section 344C(2) provides that the court is required to have regard to a range of factors. These include the age of the child, the seriousness of the alleged offence and circumstances in which it was alleged to have occurred, whether the delay in commencing the proceeding was caused by factors beyond the control of the applicant, the length of delay and any other matter that the court considers relevant.

This provides the court with guidance as to the sorts of matters that may be relevant in determining whether to grant an application for extension of time. The court will be more inclined to extend the time limit in a case where:

- important evidence is only identified after 6 months has elapsed
- the application is made shortly after the expiry of the 6 month period
- the charge is at the higher end of seriousness of summary offences.

Conversely, the court will be less likely to extend the time limit where:

- all evidence was available or obtained before 6 months has elapsed
- the application is made shortly before the expiry of the 12 month period
- the charge is at the lower end of seriousness of summary offences.

It should also be noted that, if a child has absconded, a charge can still be filed in court and a warrant sought from the Children's Court. Therefore, if a child accused absconds it should not be necessary to seek an extension of time under section 429 on that ground alone.

It is important to note that, where the court orders an extension under new section 344C, the extension must be to a date within 12 months after the date on which the summary offence is alleged to have been committed.

If the court grants an application to extend the time limit under section 344C in the absence of the child, the child may apply to the court for an order that the determination be set aside and that the application be reheard (under section 344D).

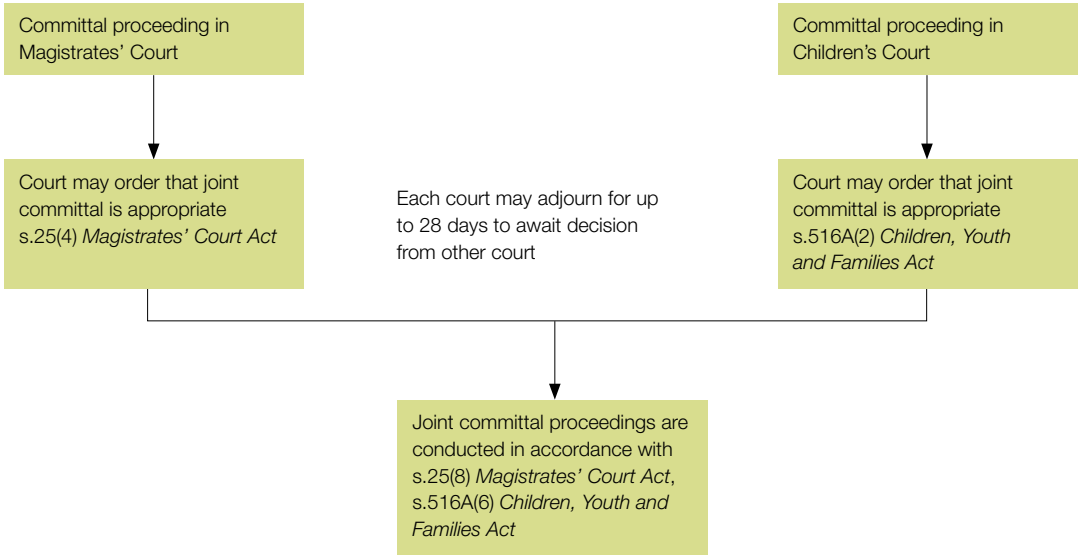
430 New section 516A inserted

Overview

Section 430 inserts a new section 516A into the *Children, Youth and Families Act 2005* which allows joint committal proceedings to be conducted in certain cases where an adult and child are charged in relation to the same offence. The power to conduct a joint committal proceeding is only available where the child is 15 years or older at the time the proceeding is commenced and the offence is one which the Children's Court does not have jurisdiction to hear and determine summarily.

A mirror provision for the Magistrates' Court process can be found at section 426 of the *Criminal Procedure Act 2009* (which inserts new section 25(3)–(8) in the *Magistrates' Court Act 1989*).

Joint Committal Proceedings



Legislative History

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

Relevant Rules/Regulations/Forms

For joint committal proceedings:

- under the *Magistrates' Court Act 1989*, see rule 53 and Form 36 of the Magistrates' Court Criminal Procedure Rules 2009
- under the *Children, Youth and Families Act 2005* see rule 2.05 and Form 5 of the Children's Court Criminal Procedure Rules 2009.

Discussion

The section operates alongside section 426 of the *Criminal Procedure Act 2009*, which amends the *Magistrates' Court Act 1989*. It introduces a basic structure to facilitate agreement between the courts to conduct a joint committal proceeding in certain cases where an adult and child are charged with offences which could be joined in the one indictment. Clause 5 of Schedule 1 to the *Criminal Procedure Act 2009* provides that charges for ***related offences*** may be joined in the one indictment. Clause 6 of Schedule 1 to the *Criminal Procedure Act 2009* provides that an indictment may include charges against more than one accused.

Previously, while a child and adult accused could be jointly tried in certain circumstances, there was no statutory power for joint committal proceedings.

The Children's Court does not have jurisdiction to hear and determine certain serious indictable offences (such as murder or manslaughter). However, it does have jurisdiction to conduct a committal proceeding for these offences. As a result, if there is an adult co-accused, two separate committal proceedings may be held (one in the Children's Court and one in the Magistrates' Court). At the trial stage, a child accused and adult co-accused may be tried jointly.

In appropriate cases, the new process allows a joint committal proceeding to be conducted. This is intended to save victims and witnesses the trauma and inconvenience of giving evidence in two separate committal proceedings as well as result in a more efficient use of resources.

A joint committal proceeding may only be held where the charges against each accused could properly be joined in the one indictment. Charges can be joined in the one indictment if they are related offences. Different types of offences may arise in this situation. For example:

- both accused may be charged with the same offence, such as murder
- the child accused may be charged with murder and the adult accused with being an accessory (after the fact to the murder).

The new provisions recognise the particular vulnerability of children in the criminal justice system in a number of ways. A joint committal proceeding can only be conducted if the child is 15 years or older at the time the proceedings commence. The court must have regard to the age of the child and the Children's Court must agree that a joint committal proceeding is appropriate. Further, when a joint committal proceeding is conducted, the requirements of proceedings in the Children's Court must apply to the child as far as is practicable.

The section provides that the child must be of or over the age of 15 at the time the proceeding is commenced and must be charged with an indictable offence which cannot be tried summarily in the Children's Court. These offences are listed in new section 516A(1)(b)(ii) of the *Children, Youth and Families Act 2005*.

Under section 516A(2) of the *Children, Youth and Families Act 2005*, the court may order that joint committal proceedings are appropriate, having had regard to matters including:

- the age of the child
- the effect on victims of the offence charged if the committal proceedings were not conducted jointly
- the estimated duration of the committal proceedings if conducted jointly
- the number of witnesses that would be cross-examined by both accused.

Section 516A(3) and (4) have been included because this approach is more consistent with the approach taken in the *Magistrates' Court Act 1989*. However, these provisions are unnecessary in the *Criminal Procedure Act 2009* due to section 337 which provides that, unless the context otherwise requires, "a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion." Further, the Attorney-General's Second Reading Speech indicated that:

> *The development of principles of procedural fairness means it is not necessary to refer to the right to be heard. For the kinds of procedures and powers provided in this Bill, this Bill operates in accordance with modern requirements of procedural fairness that a party has a right to be present and make submissions at a court hearing which concerns them.*

The reference to 'each party' is a reference to the informant/prosecutor and the child accused. It does not include a reference to the adult accused, nor to the informant/prosecutor of the adult accused, neither of whom are parties to the separate proceeding involving the prosecution of the child accused.

Section 516A(5) provides that, if the court makes an order that joint committal proceedings are appropriate, it may adjourn the matter for 28 days to enable the Magistrates' Court to consider whether joint committal proceedings are appropriate. It may be that a further adjournment, which can be ordered under section 331 of the Act (in the Magistrates' Court) or section 530 of the *Children, Youth and Families Act 2005* (in the Children's Court), is required in some instances.

If, within that period, the Magistrates' Court also considers that a joint committal proceeding is appropriate, then the provisions in both the *Magistrates' Court Act 1989* and the *Children, Youth and Families Act 2005* will apply to confer jurisdiction to conduct joint committal proceedings.

The amendments in section 426 of the *Criminal Procedure Act 2009* are structured in the same way. As a result, it does not matter which court is the first to consider the appropriateness of a joint committal proceeding.

When conducting a joint committal proceeding, there will technically be two prosecutors in the case. Given the types of offences involved, the ***DPP*** will usually be prosecuting the adult accused and Victoria Police will be prosecuting the child accused. The DPP has the power "to take over and conduct any proceedings in respect of any summary or indictable offence" if the DPP considers it desirable to do so (see section 22(1)(b)(ii) of the *Public Prosecutions Act 1994*). This is a situation in which the DPP may well reach such a conclusion. As a result, there would be one prosecutor in the case, which is more practical and efficient.

Part 9.6 – *Appeal Costs Act 1998*

Part Overview

This Part inserts new sections in the *Appeal Costs Act 1998* to deal with applications for indemnity certificates in three situations:

- by an accused if an interlocutory appeal brought by the accused is successful
- by a respondent if an interlocutory appeal is brought by the prosecution
- by the accused if a case is stated for the Court of Appeal.

431 New sections 15A, 15B and 15C inserted

Overview

Section 431 inserts new sections 15A, 15B and 15C into the *Appeal Costs Act 1998* to deal with applications for indemnity certificates:

- by an accused if an interlocutory appeal brought by the accused is successful
- by a respondent if an interlocutory appeal is brought by the prosecution
- by the accused if a case is stated for the Court of Appeal.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The *Criminal Procedure Act 2009* introduces a new right of appeal against interlocutory decisions. The interlocutory appeal regime is provided for in sections 289–301 of the *Criminal Procedure Act 2009* and is discussed in detail under those sections. This section amends the *Appeal Costs Act 1998* to provide for the new right of appeal.

Appeals against conviction provide a useful analogy for interlocutory appeals. The sorts of issues that will be raised on an interlocutory appeal are a subset of the sorts of issues that are usually raised on an appeal following a conviction.

New section 15A of the *Appeal Costs Act 1998* applies to interlocutory appeals by the accused. The accused is only able to seek an indemnity certificate if they are successful in their interlocutory appeal. This is consistent with the philosophy underlying the *Appeal Costs Act 1998* that the accused should not have to pay for mistakes in the process that led to them incurring additional costs.

An indemnity certificate will also be available for the costs of a 'new trial'. This will only apply in the unusual situation where an ***interlocutory appeal*** is taken during trial and, as a result of the appeal being successful, the current trial has to be abandoned and a new trial commenced.

New section 15B of the *Appeal Costs Act 1998* applies to interlocutory appeals by the prosecution. If an interlocutory appeal is brought by the ***DPP*** it is similar to an appeal against sentence by the prosecution. It is an additional cost that would not normally arise in the proceedings, which the accused must bear. Consistent with the approach to prosecution appeals against sentence in section 15 of the *Appeal Costs Act 1998*, the court may grant an indemnity certificate to the respondent (the accused) for the costs of the appeal irrespective of the outcome of the appeal.

As with appeals by an accused, an indemnity certificate will also be available for additional costs arising from the order for a new trial. This will only apply where an interlocutory appeal is taken during trial and, as a result of the appeal being successful, the current trial has to be abandoned and a new trial commenced.

New section 15C of the *Appeal Costs Act 1998* applies to case stated procedures. The *Criminal Procedure Act 2009* removes the restriction on the procedure only being available on the accused's application. It is now also available on application by the DPP or on the court's own motion. The case stated procedure is provided for in sections 302–308 of the *Criminal Procedure Act 2009* (see discussion of those sections).

Section 15C applies to cases stated by a judge. The case stated procedure can only be utilised if the court approves its use. The types of issues that usually arise in case stated procedures often have benefits for other trials where similar issues arise. As the accused cannot 'win' or 'lose' a case stated procedure, there is no basis for attempting to identify whether the accused won or lost the question of law which was reserved for the consideration of the Court of Appeal.

Consistent with the approach to interlocutory appeals and the *Appeal Costs Act 1998*, new section 15C provides that, irrespective of whether the accused or the prosecution is the applicant or the case is stated on the court's own motion, the Court of Appeal may grant the accused an indemnity certificate in respect of the costs of the appeal.

An indemnity certificate will also be available for the costs of a new trial. This will only apply in the unusual situation where the case stated is taken during trial and, as a result of the appeal being successful, the current trial has to be abandoned and a new trial commenced.

Part 9.7 – *Sentencing Act 1991*

Part Overview

This Part amends the *Sentencing Act 1991* to:

- repeal section 105 of that Act
- introduce maximum fines for a natural person and a body corporate found guilty of an indictable offence heard and determined summarily by the Magistrates' Court.

432 Repeal

Overview

Section 432 repeals section 105 of the *Sentencing Act 1991*.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Previously, section 105 of the *Sentencing Act 1991* provided that a person sentenced for variation or breach of a sentencing order had a right of appeal against sentence. This appeal operated as though the court had, immediately before imposing the sentencing order, found the person guilty or convicted the person of the offence for which the original sentencing order was made and the sentence was a sentence imposed on that conviction or finding of guilt.

As a result of the definition of ***original jurisdiction*** in section 3 of the *Criminal Procedure Act 2009* (particularly in paragraph (e) of the definition) the appeal rights contained in sections 276 and 278 of the *Criminal Procedure Act 2009* apply to proceedings for breach of a sentencing order. This renders the appeal right in section 105 of the *Sentencing Act 1991* redundant.

433 New section 112A inserted

Overview

Section 433 sets a maximum fine of 500 penalty units for a natural person found guilty of an indictable offence heard and determined summarily by the Magistrates' Court, subject to any contrary intention in any Act other than the *Sentencing Act 1991*.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The section sets a maximum fine of 500 penalty units for a natural person found guilty of an indictable offence heard and determined summarily by the Magistrates' Court. The maximum applies irrespective of whether the offence is also punishable by imprisonment.

The same approach is taken in relation to penalties for a body corporate in section 434 of the *Criminal Procedure Act 2009*, which sets a maximum fine of 2500 penalty units for a body corporate.

Section 113A of the *Sentencing Act 1991* limits the maximum term of imprisonment for an indictable offence heard and determined summarily to 2 years, subject to a contrary intention expressed in any other Act. This limit applies despite the fact that a higher maximum penalty applies to the offence when tried in the County Court or Supreme Court. Previously, the *Sentencing Act 1991* did not contain an equivalent maximum financial penalty limit. As a result, there was no consistency between the maximum fines for these offences when they were heard summarily. This affected offences punishable by both imprisonment and fine or by fine only.

The only exception to this general limit is provided in Schedule 2 to the *Criminal Procedure Act 2009* and applies where one of the accused is a natural person charged under section 66B of the *Environment Protection Act 1970*.

Fixing a maximum penalty that applies when an offence is tried summarily also assists the Magistrates' Court in deciding whether to grant summary jurisdiction. The adequacy of available sentencing orders is one of the factors to which the court must have regard when deciding this issue (see section 29(2)(b)).

434 Maximum fine for body corporate

Overview

Section 434 sets a maximum fine of 2500 penalty units for a body corporate found guilty of an indictable offence heard and determined summarily by the Magistrates' Court, subject to any contrary intention in any Act other than the *Sentencing Act 1991*.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section takes the same approach as discussed above in relation to natural persons (see section 433). The higher maximum penalty for a body corporate compared with a natural person reflects the fact that other forms of penalty cannot be imposed on a body corporate. It is also consistent with the approach taken in section 113D of the *Sentencing Act 1991* which provides that, in the absence of a contrary intention, a court may impose a fine on a body corporate that is up to 5 times the amount that the court could impose on a natural person.

This limit applies despite a higher maximum penalty that applies to the offence when tried in the County Court or Supreme Court. Previously, the *Sentencing Act 1991* did not contain an equivalent maximum financial penalty limit. As a result, there was no consistency between the maximum fines for these offences when they were heard summarily. This affected offences punishable by both imprisonment and fine or by fine only.

Generally, fixing a maximum penalty for when the offence is tried summarily also assists the Magistrates' Court when deciding whether to grant summary jurisdiction as the court must consider the adequacy of sentencing orders available to the court (see section 29(2)(b)).

The only exceptions to this general limit are listed in Schedule 2 to the *Criminal Procedure Act 2009*. Exceptions include where a corporate accused is prosecuted for an offence against section 141A of the *Electricity Safety Act 1998* or section 107 of the *Gas Safety Act 1997*. In those circumstances the court may impose a maximum penalty of 10,000 penalty units on a ***corporate accused***. Last, the other exception in Schedule 2 to the *Criminal Procedure Act 2009* is where two or more accused (one of whom is a natural person charged under section 66B of that Act and one of whom is a body corporate) have their charges for indictable offences under the *Environment Protection Act 1970* heard together. In those circumstances, the maximum fine the court may impose on a natural person in respect of a single offence is 2500 penalty units.

Part 9.8 – Miscellaneous Amendments

Part Overview

This Part amends various Acts to:

- reclassify certain indictable offences as summary offences
- repeal the option of a jury trial in section 53(3), 53(5) and 53(6) of the *Summary Offences Act 1966*
- repeal certain provisions concerning sentence indications in the Supreme Court and County Court.

435 Reclassification of certain offences

Overview

Section 435 amends various Acts to reclassify certain indictable offences as summary offences.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

A summary offence is normally punishable by 2 years imprisonment or less. This is reflected in sections 112 and 113A of the *Sentencing Act 1991*. The effect of section 112 is that an offence punishable by 2 years imprisonment or less is a summary offence, unless the contrary intention appears. Section 113A further provides that the maximum term of imprisonment that the Magistrates' Court can impose in respect of a summary offence is 2 years imprisonment.

Consistent with the general approach to the classification of offences, this section amends various Acts to reclassify a number of indictable offences as summary.

The offences outlined below have been reclassified as summary.

- Section 118 of the *Magistrates' Court Act 1989* (pretending to be a justice of the peace). Pursuant to the transitional provision included in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*, this amendment applies to an offence alleged to have been committed on or after the commencement of this section (section 435(1)). If an offence is alleged to have been committed between two dates, one before and one on or after the commencement of this section (section 435(1)), the offence is alleged to have been committed before commencement.

- Section 10(1) and (2) of the *Wrongs Act 1958* (maliciously publishing false defamatory libel knowing it to be false, and maliciously publishing false defamatory libel). Pursuant to the transitional provision included in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*, this amendment applies to an offence alleged to have been committed on or after the commencement of this section (section 435(10)). If an offence is alleged to have been committed between two dates, one before and one on, or after the commencement of this section (section 435(10)), the offence is alleged to have been committed before commencement.
- Section 25 of the *Trade Unions Act 1958* (circulating false copies of union rules with intent to mislead or defraud). Pursuant to the transitional provision included in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*, this amendment applies to an offence alleged to have been committed on or after the commencement of this section (section 435(3)). If an offence is alleged to have been committed between two dates, one before and one on, or after the commencement of this section (section 435(3)), the offence is alleged to have been committed before commencement.
- Sections 3(1), 3(3) and 7 of the *Collusive Practices Act 1965* (collusive tendering, collusive bidding and aiding, abetting etc, in a commission of an offence under the Act, respectively). Pursuant to the transitional provision included in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*, this amendment applies to an offence alleged to have been committed on or after the commencement of this section (section 435(4)). If an offence is alleged to have been committed between two dates, one before and one on, or after the commencement of this section (section 435(4)), the offence is alleged to have been committed before commencement.
- Sections 75 and 78 of the *Goods Act 1958* (signing or dealing with untrue bills of lading). Pursuant to the transitional provision included in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*, this amendment applies to an offence alleged to have been committed on or after the commencement of this section (section 435(5)). If an offence is alleged to have been committed between two dates, one before and one on, or after the commencement of this section (section 435(5)), the offence is alleged to have been committed before commencement.
- Sections 19, 32(1) and 33(3) of the *Therapeutic Goods (Victoria) Act 1994* (making a false statement in an application for registration, failing to inform the Secretary of certain information and failing to comply with a notice given by the Secretary, respectively).
- Sections 55B(5)[9] and 144 of the *Evidence Act 1958* (wilfully and knowingly making a false statement in a certificate or falsely certifying any copies or extracts etc). Pursuant to the transitional provision included in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*, this amendment applies to an offence alleged to have been committed on or after the commencement of this section (section 435(7)). If an offence is alleged to have been committed between two dates, one before and one on, or after the commencement of this section (section 435(7)), the offence is alleged to have been committed before commencement.
- Section 400C of the *Mines Act 1958* which creates a number of offences relating to certificates issued under that Act. Pursuant to the transitional provision included in the Schedule to the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009*, this amendment applies to an offence alleged to have been committed on or after the commencement of this section (section 435(8)). If an offence is alleged to have been committed between two dates, one before and one on, or after the commencement of this section (section 435(8)), the offence is alleged to have been committed before commencement.

436 Option of jury trial removed

Overview

This section repeals the option of a jury trial in section 53(3), (5) and (6) of the *Summary Offences Act 1966* (making a false report to police).

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The offence of making false reports to police in section 53(1) of the *Summary Offences Act 1966* has a maximum penalty of imprisonment for 1 year. It is therefore appropriately classified as a summary offence.

The option of a jury trial for a summary offence (previously provided for in section 53(3), (5) and (6) of the *Summary Offences Act 1966*) was anomalous and has therefore been repealed. There are now no summary offences for which an accused may elect to be tried by a jury. This is consistent with the approach in Victoria to classifying summary and indictable offences.

9. Note, section 55B was repealed by the *Statute Law Amendment (Evidence Consequential Provisions) Act 2009*.

437 Repeal of provisions concerning sentence indications in Supreme Court and County Court

Overview

This section repeals certain provisions concerning sentence indications in the Supreme Court and County Court.

Legislative History

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

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Sentence indication provisions for the Supreme Court and County Court were introduced on a pilot basis by the *Criminal Procedure Legislation Amendment Act 2008*.

Section 2 of the *Criminal Procedure Act 2009* provides that section 437 comes into operation on 1 July 2010. The effect of this provision is that the sentence indication provisions in the Supreme Court and County Court will sunset on 1 July 2010. This is the same date as the sentence indication provisions for the Supreme Court and County Court sunset under the *Criminal Procedure Legislation Amendment Act 2008*.

The provisions in the *Criminal Procedure Legislation Amendment Act 2008* amended the *Crimes (Criminal Trials) Act 1999*, which is repealed by section 421 of the *Criminal Procedure Act 2009*. However, the pilot scheme continues as a pilot scheme under the *Criminal Procedure Act 2009* (see Part 5.6), subject to the sunset provision for the scheme provided by this section.

In contrast, the sentence indication provisions in the Magistrates' Court (which were also introduced by the *Criminal Procedure Legislation Amendment Act 2008*) are not subject to a sunset clause. Sentence indications have been available in the Magistrates' Court since 1993. The amendments simply codified existing practice in that court.

It is important to note that, unlike the sentence indication provisions, the sentence discount provisions (also introduced by the *Criminal Procedure Legislation Amendment Act 2008*) are not subject to a sunset clause. Victorian courts have been required to take a guilty plea into account in determining sentence for more than 20 years. The sentence discount scheme simply provides greater transparency, because the courts are required to state the sentence that would have been imposed if the accused had not pleaded guilty.

438 Repeal of Chapter

Overview

Section 438 provides that Chapter 9 of the Act is repealed on 1 January 2012.

Legislative History

The section is new and has no direct relationship with any earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.