

Criminal Procedure Act
**Chapter 2 - Commencing a Criminal
Proceeding**

Criminal proceedings in Victoria are commenced by (s5)

- filing or signing a charge-sheet;
- filing a direct indictment; or
- the direction of a court that a person be prosecuted for perjury.

Proceedings are commenced by charge-sheet when (s6)

- the charge-sheet is filed with a registrar of the Magistrates' Court;
- the charge-sheet is filed with a bail justice, if the accused was arrested without a warrant and released on bail; or
- the charge-sheet is unsigned, if a summons to answer a charge is issued by a police officer or a public official, rather than the court, at that time.
- A charge sheet must-
 - (a) be in writing; and
 - (b) be signed by the informant personally; and
 - (c) comply with Schedule 1.

Schedule 1 – Charges on a charge-sheet or indictment

- Statement of offence - charge must state offence the accused is alleged to have committed.
- Statement of particulars – ordinary language, give reasonable information as to the nature of the charge.
- Statutory offence – offence created by an Act or subordinate instrument.

- Eg:
- CHARGE 1 The Director of Public Prosecutions charges that ABC at SUBURB in Victoria on the 20th day of August 2020 stole X ITEM belonging to ALLEGED VICTIM.
- Statement of Offence – Theft contrary to s 74 of the Crimes Act 1958

- CHARGE 2 The Director of Public Prosecutions charges that ABC at SUBURB in Victoria on the 20th day of August 2020 robbed ALLEGED VICTIM of certain property namely IDENTIFY PROPERTY and at the time had with him an offensive weapon namely a NAME WEAPON.
- Statement of Offence – Armed Robbery contrary to s 75A of the Crimes Act 1958

- Exceptions, exemptions – need not be specified in a charge.
- Course of conduct charge – a charge for an offence that involves more than one incident of the offence.
- Joinder of charges – may contain charges for related offences, whether against the same or different accused.
- Charge against multiple accused – may name each of those accused in the charge for the offence regardless of degree of participation.
- Names of witnesses must be included on the indictment.

Part 2.2 – Charge sheet and listing of a matter

Time limits for filing a charge-sheet (s7)

- A proceeding for a **summary offence** must be commenced within 12 months after the date on which the offence is alleged to have been committed except where –
 - (a) otherwise provided by or under any other act; or
 - (b) the accused and the DPP or Crown Prosecutor provides consent.
- A proceeding for an **indictable offence** may be commenced at any time and may be heard and determined summarily even though the proceeding may have been commenced more than 12 months after the date on which the offence is alleged to have been committed.

Order for amendment of a charge sheet (s8)

- The Magistrates Court at any time may order that a charge-sheet be amended in any manner that the court thinks necessary, unless the required amendment cannot be made without injustice to the accused.
- An amendment of a charge sheet that has the effect of charging a new offence cannot be made after any expiry period.

Errors in a charge sheet (s9)

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

Listing of a matter in the Magistrates' Court (s10)

- a charge-sheet containing a charge for a **summary offence** must be listed for a mention hearing.
- a charge-sheet containing a charge for an **indictable offence that may be heard and determined summarily**, the proceeding may be listed for a mention hearing or a filing hearing having regard to any request for a committal proceeding included on the charge-sheet.
- a charge-sheet containing a charge for an **indictable offence** that may **not** be heard and determined summarily must be listed for a filing hearing.

Note:

- a mention hearing is the first hearing for a charge that will be heard and determined summarily.
- a filing hearing is the first stage of a committal proceeding.

Place of hearing (s11)

- A criminal proceeding in the Magistrates' Court is to be heard at the venue of the court that is nearest to –

- (a) the place where the offence is alleged to have been committed; or

- (b) the place of residence of the accused – except where otherwise provided by this or any other Act or by nomination.

A criminal proceeding in the Magistrates' Court is not invalid only because it was conducted at a venue of the court than the venue referred to in subsection (1) or nominated under subsection (2).

Part 2.3 – Notifying accused of court appearance

Court may issue summons or warrant to arrest (s12)

- On the filing of a charge-sheet, an application may be made to a registrar of the Magistrates' Court for the issue of –
 - (a) a summons to answer the charge directed to the accused; or
 - (b) a warrant to arrest in order to compel the attendance of the accused – unless a notice to appear has been served on the accused under Division 2.
 - An application may be made by the informant personally, by someone on behalf of the informant or by post.
 - On an application, the registrar must, if satisfied that the charge discloses an offence known to law, issue –
 - (a) a summons to answer the charge; or
 - (b) subject to subsection (5), a warrant to arrest.
- (5) A registrar of the Magistrates' Court must not issue in the first instance a warrant to arrest, unless satisfied by sworn or affirmed evidence, whether oral or by affidavit, that –
- (a) it is probably that the accused will not answer a summons; or
 - (b) the accused has absconded, is likely to abscond or is avoiding service of a summons that has been issued; or
 - (c) a warrant is required or authorised by any other Act or for other good cause.

Summons or warrant to be accompanied by charge-sheet and notice when served (s13)

- A summons or a warrant to arrest on service or execution must be accompanied by a copy of the charge-sheet and a notice prescribing;
 - (i) if the charge is for an indictable offence that may not be determined summarily or the charge-sheet contains a request for a committal proceeding; and
 - (ii) if the charge is for any other indictable offence or a summary offence a summary of Division 3 of Part 3.2 (pre-hearing disclosure of prosecution case); and
 - (iii) advice that the accused should seek legal advice and that the accused has the right, if eligible, to legal aid; and
 - (iv) details of how to contact Victoria Legal Aid.

Police or public official may issue a summons (s14)

- a police officer or public official may, after signing a charge-sheet containing a charge, issue a summons to answer the charge.
- a police officer or public official must file the charge-sheet and summons with the appropriate registrar within 7 days after signing the charge sheet.
- if filed outside 7 days the court may strike out the charge.

Contents of a summons (s15)

- a summons must direct the accused to appear at the venue of the Magistrates' Court on a specified date and at a specified time to answer the charge.
- a summons for an indictable offence served on a corporate accused must state that if the accused does not appear the court may proceed to hear an indictable offence that may be heard and determined summarily in the absence of the accused or may conduct a committal proceeding in the absence of the accused.

Personal service of summons (s16)

- Except where otherwise expressly enacted, every summons must be served personally on the accused at least 14 days before the return date or in the case of an indictable offence with a filing hearing at least 7 days before that date.

Chapter 3 - Summary Procedure

Part 3.1 When a summary hearing may be held

- summary offences are to be heard and determined by this chapter (s27).
- **Indictable offences that may be heard and determined summarily (s28)** if s29 is satisfied -
 - an offence referred to in Schedule 2;
 - an indictable offence that is;
 - a level 5 or level 6 offence; or
 - punishable by level 5 or level 6 imprisonment or fine or both; or
 - punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 1200 penalty units or both.
- Note: level 5 offence is punishable by 10 years imprisonment maximum and a level 6 offence is punishable by 5 years imprisonment maximum.

Examples of Sch 2 offences

- Crimes Act 1958:
- Offences under section 17 of the Crimes Act 1958 (causing serious injury recklessly), except an offence alleged to have been committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty within the meaning of section 10AA of the Sentencing Act 1991 .
- Offences under section 74 of the Crimes Act 1958 (theft), if—
- (a) the amount or value of the property alleged to have been stolen does not in the judgment of the court exceed \$100 000; or
- (b) the property alleged to have been stolen is a motor vehicle.
- Offences under section 75 of the Crimes Act 1958 (robbery), if the amount or value of the property alleged to have been stolen does not in the judgment of the court exceed \$100 000.

When a summary offence may be heard and determined summarily (s29)

- if the court considers it **appropriate** to be determined summarily having regard to matters in subsection (2) and the **accused consents** to a summary hearing.
- Magistrates' Court must have regard to;
 - (a) seriousness of offending including
 - (i) nature of the offence; and
 - (ii) the manner in which the offence is alleged to have been committed, the apparent degree of organisation and the presence of aggravating circumstances; and
 - (iii) whether the offence forms part of a series of offence being alleged against the accused; and
 - (iv) the complexity of the proceeding for determining the charge; and
 - (b) the adequacy of sentence available to the court, having regard to the criminal record of the accused; and
 - (c) whether a co-accused is charged with the same offence; and
 - (d) any other matter that the court considers relevant.
- A legal practitioner appearing for an accused may on behalf of the accused consent to a summary hearing for an indictable offence.

Procedure for indictable offence that may be heard and determined summarily (s30).

- Informant or accused may apply for a summary hearing s29(1).
- Magistrates' Court may offer a summary hearing under s29(1).
- Application may be made before Magistrates Court' to determine whether to commit the accused for trial.
- If application is made before the hearing of any evidence the Magistrates' Court may seek from the prosecutor or informant an outline of evidence and any other information the court considers relevant. Any statement made by the prosecutor or informant is not admissible in evidence.
- If the Magistrates' Court grants a summary hearing the hearing and determination of the charge must be conducted in accordance with Part 3.3.

(7) Subject to subsection (8) if a committal hearing commences; and the Magistrates' Court subsequently grants a summary hearing the court may with the consent of the accused, admit as evidence in the summary hearing – the oral evidence of any witness, the statement of any witness and any document or exhibit.

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

Part 3.2 Procedure before summary hearing

Division 1 – General

Court may change place of hearing (s31)

- If the Magistrates' court considers that a fair hearing cannot be had or for any other appropriate reason the court may order the hearing be held at another place or venue.

Accused entitled to copy of charge-sheet and particulars (s32)

- Accused entitled to a free copy of charge-sheet from the informant or appropriate registrar and reasonable particulars of the charge from the informant.

Division 2 – Pre-hearing disclosure of prosecution case

When preliminary brief is to be served (s35)

- If required by s24 the informant must serve a preliminary brief on the accused.
- Accused by written notice to the informant may request that a preliminary brief be served.
- Informant must serve preliminary brief on the accused within 14 days of receipt of the written request.

Contents of preliminary brief (s37)

- Copy of charge-sheet;
- Notice explaining this section and section 84, explain the importance of obtaining legal representation, advising that the accused has the right, if eligible, to legal aid and provide details on how to contact Vitoria Legal Aid.
- Statement made by the informant personally that complies with subsection (2) and section 38.
- Evidentiary certificate relevant to the offence and available at the time of service.
- Copy of the accused criminal record or a statement that the accused has no previous convictions or infringement convictions at that time.
- If the informant refuses disclosure a written notice is required under s45 identifying the grounds for refusing disclosure.
- A list of any other orders that will be sought.

- (2) A statement of the informant must be a complete and accurate statement of the material available to the prosecution at the time the statement is sworn or affirmed, signed or attested and must include –
- (a) statement of alleged facts on which the charge is based; and
 - (b) description of the background to and consequences of the alleged offence; and
 - (c) summary of any statement made by the accused concerning the alleged offence including any confession or admission; and
 - (d) a list of names of all the persons who may be called by the prosecution as witnesses at the hearing, indicating whether those persons have made statements; and
 - (e) a list of any things the prosecution may tender as exhibits and whether they are in the possession of the prosecution.

Requirements for informant's statement in preliminary brief (s38)

- A statement by the informant must be in the form of an affidavit; or signed by the informant and contain an acknowledgement signed in the presence of a person referred to in Schedule 3 that the statement is true and correct; or in a form, and attested to in a manner, prescribed by the rules of the court.

When full brief must be served (s39)

- Accused by written notice to the informant may request a full brief.
- Request may be made if a preliminary brief is served within 21 days after the date on which the charge-sheet is filed, at any time after a summary case conference is held; or in any other case, at any time after the criminal proceeding has commenced.
- If the accused gives notice the informant must serve a full brief on the accused 14 days before the contest mention hearing or if a contest mention is not held, the summary hearing.
- The Magistrates' Court by order may vary the date for full service of a full brief.

Contents of a full brief (s41)

• Unless earlier disclosed, a full brief must contain –

- A notice - explaining this section and section 83; explaining the importance of obtaining legal representation; advising that the accused has the right, if eligible, to legal aid and provide details on how to contact Victoria Legal Aid; and
- a copy of the charge-sheet relating to the alleged offence; and
- a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions; and
- any information, document or thing on which the prosecution intends to rely at the hearing of the charge including—
 - a copy of any statement relevant to the charge signed by the accused, or a record of interview of the accused, that is in the possession of the informant; and
 - a copy, or a transcript, of any audio-recording or audio-visual recording; and
 - copy or statement of any other evidentiary material that is in the possession of the informant relating to a confession or admission made by the accused relevant to the charge; and
 - a list of the persons the prosecution intends to call as witnesses at the hearing, together with a copy of each of the statements made by those persons; and
 - a legible copy of any document which the prosecution intends to produce as evidence; and
 - a list of any things the prosecution intends to tender as exhibits; and
 - a clear photograph, or a clear copy of such a photograph, of any proposed exhibit that cannot be described in detail in the list; and
 - a description of any forensic procedure, examination or test that has not yet been completed and on which the prosecution intends to rely as tending to establish the guilt of the accused; and
 - any evidentiary certificate issued under any Act that is likely to be relevant to the alleged offence.

Contents of full brief continued (s41)

- any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence including—
 - a list of the persons (including experts) who have made statements or given information relevant to the alleged offence but who the prosecution does not intend to call as witnesses at the hearing; and
 - copy of every statement made by each of those persons or, if the person has not made a statement, a written summary of the substance of any evidence likely to be given by that person or a list of those statements or written summaries; and
 - a copy of every document relevant to the alleged offence that the prosecution does not intend to tender as an exhibit at the hearing or a list of those documents; and
 - a list containing descriptions of any things relevant to the alleged offence that the prosecution does not intend to tender as exhibits at the hearing; and
 - a clear photograph, or a clear copy of such a photograph, of any thing relevant to the alleged offence that cannot be described in detail in the list; and
 - a copy of— (A) records of any medical examination of the accused; and (B) reports of any forensic procedure or forensic examination conducted on the accused; and (C) the results of any tests— carried out on behalf of the prosecution and relevant to the alleged offence but on which the prosecution does not intend to rely; and
 - a copy of any other information, document or thing required by the rules of court to be included in a full brief.
- if the informant refuses to disclose any information, document or thing that is required to be included in the full brief, a written notice that the informant refuses disclosure under section 45, identifying the ground for refusing disclosure.

Continuing obligation of disclosure (s42)

- Informant must serve on the accused a copy of any information or document that comes into the informant's possession after service of a preliminarily brief or full brief as soon as practicable.

Accused may make request for material not provided (s43)

- Accused may give the informant a written request for copies of any statements made or information given by persons, a copy of anything in the full brief, inspection of exhibits at a time and place agreed between the accused and informant, particulars of previous convictions of any witnesses.
- Request can be made at any time after service of preliminary brief or full brief.
- Request must be made 7 days before a contest mention hearing or if content mention hearing is not held the summary hearing.

Inspection of exhibits that include child abuse material where the accused is legal represented (s43A)

- A request under s43 relates to an exhibit or part of an exhibit that is child abuse material and the accused is legally represented, the accused may request inspection of that exhibit by the accused's legal practitioner (but not the accused personally).

Informant must comply with request or state grounds for refusal (s44)

- Within 7 days of receiving a request under s43 the informant must comply with the request or serve on the accused written notice that the informant refuses to comply with the request, identifying the grounds for refusing disclosure.
- The Magistrates' Court may vary the time limit in this section.

Grounds on which informant may refuse disclosure (s45)

- That disclosure would or would be reasonably likely to –
 - prejudice the investigation of a contravention or possible contravention of the law or prejudice the enforcement or proper administration of the law;
 - prejudice the fair hearing or the impartial adjudication of a case;
 - disclose or enable a person to ascertain the identity of a confidential source of information;
 - disclose methods or procedures for preventing, detecting, investigating or dealing with matters arising out of contraventions or evasions of the law the disclosures of which would prejudice the effectiveness of those methods or procedures;
 - endanger the lives or physical safety of persons engaged in, or in connection with, law enforcement or persons who have provided confidential information;
 - endanger the life or physical safety of a person referred to in s43 or a family member as defined in the *Family Violence Protection Act 2008*;
 - result in the disclosure of child abuse material to the accused personally.

Accused may apply for order requiring disclosure (s46)

- if the informant has served on the accused a statement of grounds refusing disclosure under s45 or the informant has failed to give disclosure in accordance with this Division.
- The Magistrates' Court may order for the informant to disclose any information, document or thing in accordance with a request under s43.
- The Magistrates' Court may order, on any conditions specified by it, that disclosure be made to the accused legal practitioner or the accused personally with respect to the ground in s45(1)(g) – child abuse material.

Rules with respect to statements (s47)

- The statement referred to in s41 which the informant intends to tender at the hearing of the charge if the accused does not appear must be in the form of an affidavit or signed by the person making the statement and contain an acknowledgement signed in the presence of a person referred to in Schedule 3 that the statement is true and correct or in a form and attested to in a manner prescribed by the rules of the court.
- If a person under 18 makes a statement which the informant intends to tender the statement must include the persons age.
- If a person who cannot read makes a statement which the informant intends to tender, the statement must be read to he or she before he or she signs it and the acknowledgment must state the statement was read to the person before he or she signed it.

Division 3 – Preliminary disclosure of case of accused

Expert evidence (s50)

- If the accused intends to call a person as an expert witness at the hearing the accused must serve on the informant and file in court a copy of the statement of the expert witness at least 7 days before the contest mention, or if there is not contest mention 7 days before the summary hearing or if the statement is not in existence as soon as it becomes in existence.
- The statement must contain the name and business address of the witness, the qualifications of the witness to give evidence as an expert, and set out the substance of the evidence it is proposed to adduce including the opinion of the witness on the acts, facts, matters and circumstances on which the opinion is formed.

Alibi evidence (s51)

- the section applies to a represented accused at a summary hearing.
- Accused must not without the leave of the court give evidence personally or adduce evidence from another witness in support of an alibi unless the accused has given notice of the alibi within the period in subsection (3).

(3) a notice of alibi is given by serving the notice on the prosecutor or the informant – at least 7 days before the contest mention, or if there is no contest mention 7 days before the summary hearing, if the notice is not in existence as soon as it comes into existence.

- A notice of alibi must contain - particulars as to the time and place of the alibi and the name and last known address of any witness to the alibi; and if the name and address of the witness is not known any information that may be of assistance in finding the witness.
- If the name and address of the witness is not included in the notice, the accused must not call the person to give evidence in support of an alibi unless the court is satisfied that the accused took reasonable steps to ensure the name and address were ascertained.
- If an accused is notified by the informant that a witness in an alibi notice has not been traced, the accused must give written notice to the informant, without delay, of any further information which might be of material assistance to finding the witness.
- The court must not refuse leave if it appears that the accused was not informed of the requirements of this section.
- If an accused gives notice of an alibi and the prosecutor requests an adjournment the court must grant the adjournment for a period that appears to the court to be necessary to enable investigation of the alibi unless it appears that to do so would prejudice the proper presentation of the case of the accused.

Offence to communicate with alibi witness (s51)

- A person acting for the prosecution, or a police officer must not communicate with that person directly or indirectly with respect to the charge or any related matter before the conclusion of the proceeding, including any rehearing, without the consent and presence during the communication of the legal practitioner of the accused, or if not legally represented, the accused.
- Does not apply to a person the accused has been notified may be called as a witness for the prosecution at the summary hearing.

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

Mention hearing (s53)

- At a mention hearing, the Magistrates' Court may if the offence is an indictable offence that may be heard summarily, grant a summary hearing; proceed immediately to hear and determine the charge; fix a date for a contest mention hearing; fix a date for a summary hearing of a charge; make any other order or give any direction the court considers appropriate.

Documents to be provided by police at first mention hearing (s53A)

- applies if informant is a police officer.
- copy of preliminary brief, or a copy of the full brief (if prepared).
- if neither the preliminary of full brief is prepared – a copy of the charge-sheet and a statement of the alleged facts and either a copy of the criminal record of the accused or statement that the accused has no previous convictions or infringement convictions known at the time.
- does not apply to a proceeding for a traffic camera offence.

Summary case conference (s54)

- A conference between the prosecution and the accused for the purpose of managing the progression of the case including –
 - identifying and providing to the accused any information, document or thing in the possession of the prosecution that may assist the accused to understand the evidence available to the prosecution; and
 - Identifying any issues in dispute; and
 - Identifying the steps required to advance the case; and
 - any other purposes prescribed by the rules of the court.
- If a preliminary brief is filed within 21 days after the date on which the charge-sheet is filed, a summary case conference must be conducted before the charge is set down for contest mention or summary hearing; or a request for a full brief is made under s39.
- Nothing in this section prevents a summary case conference from being conducted at any other time if the parties agree.
- If the accused is not represented the Magistrates' Court may dispense with the requirement to conduct a summary case conference.
- Evidence of anything said or done in the course of the summary case conference; or any document produced solely for the purpose of the summary case conference is not admissible in any proceeding before any court or tribunal or any inquiry in which evidence is or may be given by any court or person acting judicially unless – all parties to the summary case conference agree to the giving of the evidence; or the proceeding is a criminal proceeding for an offence alleged to have been committed during, or in connection with, the summary case conference.

Contest mention hearing (s55)

- applies to a proceeding for a summary offence or an indictable offence that may be heard and determined summarily.
- the Magistrates' Court may between the return date and the day on which the charge is heard, from time to time conduct a contest mention hearing.
- at a contest mention hearing the Magistrates' Court may –
 - require the parties to provide an estimate for the hearing of the charge;
 - require the parties to advise as to the estimated number and the availability of witnesses (other than the accused) for the hearing of the charge and whether any witnesses are from interstate or overseas;
 - request each party to indicate the evidence that party proposes to adduce and to identify the issues in dispute;
 - require the accused to advise whether the accused is legally represented and has funding for continued legal representation up to and including the hearing of the charge;
 - require the parties to advise whether there are any particular requirements of, or facilities needed for, witnesses and interpreters;
 - order a party to make, file in court or serve (as the case requires) any written or oral material required by the court for the purposes of the proceeding;
 - allow a party to amend a document that has been prepared by or on behalf of that party for the purposes of the proceeding;
 - require or request a party to do anything else for the case management of the proceeding.
- The accused must attend all contest mention hearings.

Part 3.3 – Summary Hearing

Division 1- Joint or separate hearing of charges

Multiple charges on a single charge-sheet or multiple accused named on a single charge-sheet (s56)

- If a charge-sheet contains more than one charge, the charges must be heard together unless an order is made under s58.
- If a charge-sheet names more than one accused, whether in the same or separate charges, the charge or charges against all accused must be heard together unless an order is made under s58.
- A separate charge-sheet must be filed for each accused.

Joint hearing of charges on separate charge-sheets (s57)

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

Order for separate hearing (s58)

- If a charge-sheet contains more than one charge, the Magistrates' Court may order that any one or more of the charges be heard separately.
- If a charge-sheet names more than one accused, the Magistrates' Court may order that charges against a specified accused be heard separately.
- The Magistrates' Court may make an order if the court considers that—
 - (a) the case of an accused may be prejudiced because the accused is charged with more than one offence in the same charge-sheet; or
 - (b) a hearing with co-accused would prejudice the fair hearing of the charge against the accused; or
 - (c) for any other reason it is appropriate to do so.

Division 2 – Diversion Program

Adjournment to undertake diversion program (s59)

- does not apply to an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but does not include the incurring of demerit points or an offence against section 49(1) of the Road Safety Act 1986.
- at any time before taking a formal plea from an accused for a summary offence or indictable offence that may be heard and determined summarily –
 - the accused acknowledges to the Magistrates' Court responsibility for the offence; and
 - it appears appropriate to the court, which may inform itself in any way it considers appropriate, that the accused should participate in a diversion program;
 - and both the prosecution and the accused consent to the court adjourning the proceeding for this purpose
 - the court may adjourn the proceeding for a period not exceeding 12 months to enable the accused to participate in and complete the diversion program.
- accused's acknowledgement of responsibility is inadmissible as evidence in a proceeding for that offence and does not constitute a plea.
- if an accused satisfactorily completes a diversion program – no plea to the charge is taken, the court must discharge the accused without any finding of guilt.
- if an accused does not satisfactorily complete the diversion program the accused is subsequently found guilty and the court must take into account the extent to which the accused complied with the diversion program when sentencing the accused.

Division 3 – Sentence Indication

Court may give sentence indication (s60)

- At any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Magistrates' Court may indicate that, if the accused pleads guilty to the charge for the offence at that time, the court would be likely to impose on the accused –
 - A sentence of imprisonment that commences immediately; or
 - A sentence of a specified type.
- The Magistrates' Court may decide not to give a sentence indication if the court considers there is insufficient information before it of the impact of the offence on any victim of the offence.

Effect of sentence indication (s61)

- If a sentencing indication is given and the accused pleads guilty to the charge at the first available opportunity the court, when sentencing the accused for the offence, must not impose a more severe type of sentence than the type of sentence indicated.
- If a sentencing indication is given and the accused does not plead guilty at the first available opportunity the court that hears and determines the charge must be constituted by a different magistrate, unless all the parties otherwise agree.
- A sentencing indication does not bind the court on any hearing before the court constituted by a different magistrate.
- A decision to give or not give a sentence indication is final and conclusive.
- An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.
- This section does not effect any right to appeal against sentence.

Division 4 – entering a plea

Legal practitioner may enter plea on behalf of accused (s63)

Refusal to plea (s64)

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

Pleading to course of conduct charge (s64A)

- meaning of 'course of conduct charge' clause 4A of Schedule 1.

(2) This section applies if an accused, on being asked to plead to a course of conduct charge, informs the court that they—

- would plead guilty to the charge if it related only to a specified period falling within the period to which the charge set out in the charge-sheet relates; and
 - would plead not guilty to the charge insofar as it relates to any other period within the period to which the charge set out in the charge-sheet relates.
- If an accused informs the court in accordance with subsection (2) and the court is satisfied that, having regard to that information, it is not appropriate for the accused to be asked to plead to the charge, the court may adjourn the proceeding to allow a fresh charge-sheet to be filed relating only to the specified period referred to.
 - If a fresh charge-sheet is filed and the accused does not plead guilty to the charge as set out in that charge-sheet, a further fresh charge-sheet may be filed that sets out the original charge or an amended version of that charge.
 - If the accused does not plead to that charge, the Magistrates' Court may order that a plea of not guilty be entered on behalf of the accused unless it considers that it is not in the interests of justice to do so.

Division 5 – opening addresses

Parties may give opening addresses (s65)

- With the leave of the court, the prosecutor may give an opening address to the court on the prosecution case against the accused; and the accused may give an opening address to the court in response to the prosecutor's opening address.
- The Magistrates' Court may limit the length of the opening addresses.

Division 6 – case for the accused

Accused entitled to respond after the close of prosecution case (s66)

- after the close of the prosecution case the accused is entitled to make a submission there is no case for the accused to answer; to answer the charge by choosing to give evidence or call other witnesses to give evidence or both; not to give evidence or call any witnesses.

Election when accused is legal represented (s67)

- at the close of the prosecution case the Magistrates' Court may question the legal practitioner to determine which options referred to in s66 the accused elects to take.

Election when accused is not legally represented (s68)

- At the close of the prosecution case the Magistrates' Court must inform the accused, in a manner that is likely to be understood by the accused, that the accused has the right to answer the charge and must choose either to give sworn evidence or say nothing to the charge.
- In either case the accused may call any witnesses to give sworn evidence for the accused.
- After giving the information to the accused the Magistrates' Court must ask the accused what the accused wants to do.

Procedure for joint hearings if no case submission made (s69)

- After the close of the prosecution case the accused who wishes to make a submission that there is not case to answer must do so at that time.
- If, after the Magistrates' court has ruled on all no case submissions, charges against 2 or more accused remain to be determined, each accused must advise the court, in response to questioning under s67 and s68, which of the options referred to in s66 the accused elects to take.

Questioning to determine the proper course of the proceeding (s70)

- if the accused intends to call witnesses to give evidence the accused must indicate when called on by the Magistrates' Court to do so the name of those witnesses; and the order in which those witnesses are to be called.
- the accused must not present the case of the accused differently to the way indicated without the leave of the court.

Opening address of accused at beginning of case for the accused (s71)

- if the accused intends to give evidence, or to call other witnesses on behalf of the accused, or both, the Magistrates' Court may grant leave to the accused to open the case for the accused if the court considers it appropriate to do so.
- opening address must be before the accused gives evidence or calls any other witnesses.
- the Magistrates' Court may limit the address of the accused.
- the accused is not required to give evidence before any other witnesses.

Evidential burden on accused for exceptions (s72)

- if an Act or subordinate instrument creates an offence and provides any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence; and the accused wishes to rely on the exception, exemption, proviso, excuse or qualification—
 - the accused must present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish the exception, exemption, proviso, excuse or qualification.
- No proof in relation to an exception, exemption, proviso, excuse or qualification is required on the part of the informant unless the accused has presented or pointed to evidence.
- If satisfied that it is in the interests of justice to do so, the Magistrates' Court may allow the prosecutor to re-open the case for the prosecution in order to adduce evidence in rebuttal of evidence presented or pointed to by the accused.

Division 7 – Closing Addresses

Prosecutor's closing address (s73)

- After the close of all evidence; and before the closing address of the accused.
- Magistrates' Court may limit the address of the Prosecutor.

Closing address of the accused (s74)

- After the close of all evidence; and after the closing address of the Prosecutor.
- Magistrates' Court may limit the address of the accused.

Supplementary address by the prosecutor (s75)

- If in the closing the accused asserts facts which are not supported by any evidence that is before the court, the court may grant leave for the Prosecutor to make a supplementary address to the court.
- A supplementary address is confined to reply to the accused's assertion.
- The Magistrates' Court may limit the length of a supplementary address.

Division 8 – determination of charge

Option of finding of attempt (s76)

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

Division 9 – Criminal record

Criminal record (s77)

- A criminal record must contain, in relation to each previous conviction—
 - the date of the previous conviction; and
 - the court in which the previous conviction took place; and
 - the place of sitting of that court; and
 - the offence committed; and
 - the sentence imposed.
- A criminal record must contain, in relation to each infringement conviction—
 - the date on which the infringement notice took effect as a conviction; and
 - the offence specified in the notice; and
 - the amount specified in the notice as the penalty for the infringement; and
 - any other penalty that results from the operation of the notice.
- A criminal record is inadmissible as evidence against the person to whom it relates in a proceeding for an offence unless the criminal record is signed by— a police officer; or a Crown Prosecutor; or a member of staff of the Office of Public Prosecutions who is a legal practitioner; or in the case of a proceeding commenced by an informant—a person who is entitled to represent the informant and is a legal practitioner; or a public official.

Note

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

Proof of previous convictions and infringement convictions by criminal record (s78)

- If a person is found guilty of an offence in a summary hearing, the prosecution may provide to the court the criminal record, if any, of the person.
- The court must ask the person whether the person admits the previous convictions and infringement convictions set out in the criminal record.
- If the person admits to a previous conviction or infringement conviction, the court may sentence the person accordingly.
- If the person does not admit to a previous conviction or infringement conviction, the prosecution may lead evidence to prove the previous conviction or infringement conviction.
- A legal practitioner appearing for the person may, on behalf of the person, admit a previous conviction or infringement conviction set out in the criminal record.

Division 10 – non appearance of a party

Non- appearance of informant (s79)

- the court may dismiss the charge or adjourn the proceeding on any terms it considers appropriate.

Non-appearance of an accused charged with a summary offence (s80)

- If the accused does not appear in answer to a summons to a charge for a summary offence the court may – if the summons was served (ordinary service s394) direct the summons be served personally; or proceed to hear and determine the charge in the accused's absence; or adjourn the proceeding on any terms that it considers appropriate.
- If an accused fails to attend to answer bail the court may - proceed to hear and determine the charge in the accused's absence; or adjourn the proceeding on any terms that it considers appropriate.

Non-appearance of accused charged with an indictable offence (s81)

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

Non-appearance of corporate accused charged with indictable offence (s82)

- If a corporate accused does not appear in answer to a summons to answer to a charge for an indictable offence that may be heard and determined summarily, the Magistrates' Court may hear and determine the charge summarily in the absence of the accused if—
 - the court is satisfied that the charge and the return date in relation to it have been brought to the notice of the accused; and
 - the court considers that the charge is appropriate to be determined summarily—
 - even though the accused has not consented to a summary hearing.
- if the Magistrates' Court finds a corporate accused guilty in its absence, the court must cause written notice of any sentence imposed by it to be served on the accused.

Admissibility of evidence in absence of accused where full brief served (s83)

- If Magistrates' Court proceeds to hear and determine a charge in the absence of the accused and the informant has served a full brief on the accused the following are admissible as if their contents were a record of evidence given orally –
 - any statement a copy of which has been served in the full brief;
 - any exhibit or document referred to in a statement which is admissible.
- The Magistrates' Court may rule as inadmissible the whole or any part of a statement or of any exhibit or document referred to in a statement.
- The criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions, when served in a full brief, is only admissible for the purpose of sentencing.
- The Magistrates' Court can hear and determine the charge in the absence of the accused on the basis of sworn evidence given by the or on behalf of the informant if the informant has not served a full brief on the accused.

Admissibility of evidence in absence of accused where preliminary brief served (s84)

- If the Magistrates' court proceeds to hear and determine a charge in the absence of the accused; and the informant has served a preliminary brief on the accused at least 14 days before the date of the hearing; and the Magistrates' Court considers that the matter set out in the preliminary brief disclose the offence charged the following are admissible in evidence, despite the rule against hearsay –
 - the informant's statement in the preliminary brief;
 - any exhibit referred to in the informant's statement.
- If the court considers that the matters set out in the preliminary brief do not disclose the offence charged, the court may require the informant to provide additional evidence.
- The additional evidence is inadmissible unless –
 - It is in the form of written statements that comply with s38; and
 - A copy of each statement has been served on the accused at least 14 days before the Magistrates' Court considers the additional evidence.
- The Magistrates' Court may rule as inadmissible the whole or any part of a preliminary brief, a statement or an exhibit.
- The criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions, when served in a full brief, is only admissible for the purpose of sentencing.
- The Magistrates' Court can hear and determine the charge in the absence of the accused on the basis of sworn evidence given by the or on behalf of the informant if the informant has not served a preliminary brief on the accused.

Limitations on sentencing in absence of the accused (s87)

- the court must not make a custodial order.
- the court finds the accused guilty on the basis of a preliminary brief – the court must not make an order for a fine exceeding 20 penalty units and the total sum of orders for fines must not exceed in the aggregate 5- penalty units; and the total sum of orders for the payment of restitution or compensation must not exceed \$2,000.
- The court cannot make an order requiring the accused consent for example a community correction order.
- if it is likely to result in an ordering requiring the consent of the accused the court must adjourn the proceeding to enable the accused to attend or be brought before the court to answer the charge; and may issue a warrant to arrest the accused.
- The court must serve written notice on the accused of an order of the court and their right to apply for a rehearing of the charge if the court has imposed a sentence in the absence of the accused.

Chapter 6 (Appeals and Cases Stated)

Part 6.1 – ss 254 to 259, 263 to 268;

Part 6.2 – ss 272, 273;

Divisions 1 and 2: Appeals from the Magistrates' Court

- Part 6.1 creates the following rights of appeal from the Magistrates' Court:
 - Appeal by offender against conviction and sentence (s 254(1));
 - Appeal by offender against sentence (s254(2));
 - Appeal by DPP against sentence (s257(1)); and
 - Appeal by DPP against offender's failure to fulfil an undertaking (s260).
- Appeals are commenced by filing the relevant notice of appeal with the Magistrates' Court at any venue (s255(1) (Offender), s258(1) (DPP - sentence), s261 (DPP - undertaking)).
- Appeals from the Magistrates' Court are to the County Court (s254(1)).
 - The exception is that if the Magistrates' Court was constituted by the Chief Magistrate who holds commission as a County Court judge, then the appeal is to the Supreme Court (s254(2)).
- Apart from appeals against the failure to fulfil an undertaking, appeals from the Magistrates' Court are **de novo appeals**.
 - The offender is not bound by his or her plea in the Magistrates' Court and the County Court judge must hear and determine the matter afresh.
 - The informant presents his or her case first and carries the burden of proof for a second time, and does not derive any benefit from his or her earlier success.
 - Further, the appellant does not need to show that the decision below was affected by error

(Sweeney v Fitzhardinge (1906) 4 CLR 716; [1906] HCA 73; Mr and Mrs X v Secretary to the Department of Human Services [2003] VSC 140; Neill v County Court of Victoria [2003] VSC 328; R v Longshaw (1990) 20 NSWLR 554; Lukatela v Birch (2008) 164 ACTR 24; [2008] ACTSC 99).
- On a hearing de novo, the appellant and respondent are not limited to presenting the evidence that they presented in the court below. A party could change its formulation of the case or its defence. In addition, the matter is determined on the law as it stands at the date of the appeal
- (Mr and Mrs X v Secretary to the Department of Human Services [2003] VSC 140; Neill v County Court of Victoria [2003] VSC 328; R v Longshaw (1990) 20 NSWLR 554).*
- The judge on the appeal is sitting and exercising jurisdiction as a magistrate
- (See Camilleri's Stock Feeds v Environmental Protection Authority (1993) 32 NSWLR 683; Builders Licensing Board v Sperway Constructions (1976) 135 CLR 616; [1976] HCA 62; Victorian Stevedoring and General Contracting v Dignan (1931) 46 CLR 73; [1931] HCA 34).*

254 Right of appeal

- (1) Subject to subsection (2), a person convicted of an offence by the Magistrates' Court in a criminal proceeding conducted in accordance with Part 3.3 may appeal to the County Court against—
- (a) the conviction and sentence imposed by the court; or
 - (b) sentence alone.

Note See the definitions of conviction and sentence in section 3.

- (2) If the Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, the appeal is to be made to the Trial Division of the Supreme Court.

255 How appeal is commenced

- (1) An appeal under section 254 is commenced by filing a notice of appeal with a registrar of the Magistrates' Court at any venue of the Magistrates' Court within 28 days after the day on which the sentence of the Magistrates' Court is imposed.
- (2) A copy of the notice of appeal must be served on the respondent in accordance with section 392 within 7 days after the day on which the notice is filed.
- (3) A notice of appeal must—
- (a) state whether the appeal is against conviction and sentence, or sentence alone; and
 - (b) be in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires.
- (4) A notice of appeal must include a statement in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires and signed by the appellant to the effect that the appellant is aware that on the appeal the court may impose a sentence more severe than that sought to be appealed.
- (5) A notice of appeal must also include an undertaking signed by the appellant in the manner prescribed by the rules of the County Court or the Supreme Court, as the case requires—
- (a) subject to paragraph (ab), to appear at the County Court to proceed with the appeal at a place and on a day fixed or to be fixed by the registrar of the County Court and to appear at the County Court for the duration of the appeal; and
 - (ab) in the case of an appeal referred to in section 254(2), to appear at the Supreme Court to proceed with the appeal at a place and on a day fixed or to be fixed by the Prothonotary of the Supreme Court and to appear at the Supreme Court for the duration of the appeal; and

- (b) to give written notice without delay to the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires of any change of address of the appellant from that appearing in the notice of appeal.
- (6) Before accepting a notice of appeal, a registrar of the Magistrates' Court must—
 - (a) give to the person seeking to file the notice of appeal a notice in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires to the effect that on the appeal the court may impose a sentence more severe than that sought to be appealed against; and
 - (b) if the person seeking to file the notice of appeal is not the proposed appellant, be satisfied that the proposed appellant has signed the statement required to be included in the notice of appeal by subsection (4).
- (7) A notice of appeal filed under this section must be transmitted to the County Court or the Supreme Court, as the case requires.

256

Determination of appeal

- (1) An appeal under section 254 must be conducted as a rehearing and the appellant is not bound by the plea entered in the Magistrates' Court.
- (2) On the hearing of an appeal under section 254, the County Court or the Supreme Court, as the case requires—
 - (a) must set aside the sentence of the Magistrates' Court; and
 - (b) may impose any sentence which the court considers appropriate and which the Magistrates' Court imposed or could have imposed; and
 - (c) may exercise any power which the Magistrates' Court exercised or could have exercised.
- (3) On the hearing of an appeal under section 254, the court must warn the appellant, as early as possible during the hearing, that the appellant faces the possibility that a more severe sentence may be imposed than that imposed by the Magistrates' Court.
- (4) The court may backdate a sentence imposed under subsection (2) to a date not earlier than the date of the sentence of the Magistrates' Court that was set aside on the appeal.
- (5) A sentence imposed under subsection (2) is for all purposes to be regarded as a sentence of the County Court or the Supreme Court, as the case requires.

257 DPP's right of appeal against sentence

- (1) Subject to subsection (1A), the DPP may appeal to the County Court against a sentence imposed by the Magistrates' Court in a criminal proceeding conducted in accordance with Part 3.3 if satisfied that an appeal should be brought in the public interest.
- (1A) If the Magistrates' Court was constituted by the Chief Magistrate who is a dual commission holder, the appeal is to be made to the Trial Division of the Supreme Court.
- (2) The DPP must not bring a further appeal against a sentence imposed by the County Court or the Trial Division of the Supreme Court, as the case requires.

258 How appeal is commenced

- (1) An appeal under section 257 is commenced by filing a notice of appeal with a registrar of the Magistrates' Court at any venue of the Magistrates' Court within 28 days after the day on which the sentence of the Magistrates' Court is imposed.
- (2) A copy of the notice of appeal must be served personally on the respondent in accordance with section 391 within 7 days after the day on which the notice is filed.
- (3) A notice of appeal must—
 - (a) state the general grounds of appeal; and
 - (b) be in the form prescribed by the rules of the County Court or the Supreme Court, as the case requires.
- (4) The DPP must provide a copy of the notice of appeal to the legal practitioner who last represented the respondent in the criminal proceeding to which the appeal relates, if that legal practitioner can reasonably be identified.
- (5) A notice of appeal filed under this section must be transmitted to the County Court or the Supreme Court, as the case requires.

Determination of DPP's appeal

- (1) An appeal under section 257 must be conducted as a rehearing and the respondent is not bound by the plea entered in the Magistrates' Court.
- (2) On the hearing of an appeal under section 257, the County Court or the Supreme Court, as the case requires—
 - (a) must set aside the sentence of the Magistrates' Court; and
 - (b) may impose any sentence which the court considers appropriate and which the Magistrates' Court imposed or could have imposed; and
 - (c) may exercise any power which the Magistrates' Court exercised or could have exercised.
- (3) In imposing a sentence under subsection (2), the court must not take into account the element of double jeopardy involved in the respondent being sentenced again, in order to impose a less severe sentence than the court would otherwise consider appropriate.
- (4) The court may backdate a sentence imposed under subsection (2) to a date not earlier than the date of the sentence of the Magistrates' Court that was set aside on the appeal.
- (5) A sentence imposed under subsection (2) is for all purposes to be regarded as a sentence of the County Court or the Supreme Court, as the case requires.

Division 4 - Procedure

Late notice to file appeal

- Where a late notice is filed (appeal by offender /appeal by DPP on sentence – after the 28 day period in ss255(1); 258(1)), the Court may grant leave if it considers that:
 - a) the failure to file a notice of appeal within the time period was due to exceptional circumstances; and
 - b) the court is satisfied the respondent's case would not be materially prejudiced because of the delay (s263).
- A party must show that the *failure to file* the notice of appeal was due to exceptional circumstances. The court is not concerned with whether the facts of the case or the merits of the appeal involve exceptional circumstances (*Schwerin v Equal Opportunity Board* (1994) 2 VR 279; *Hughes v Morgan* [1998] VSC 147).
- In addition, the judge is not concerned merely with the length of the delay. The judge must consider whether the delay materially prejudices the respondent's case (*Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337).
- If leave to appeal is refused, then the court must strike out the appeal and any sentence is reinstated (s263).

Late notice of appeal deemed to be application for leave to appeal

- (1) A notice of appeal filed after the end of the period referred to in section 255(1) or 258 is deemed to be an application for leave to appeal on the grounds stated in the notice.
- (2) The County Court or the Supreme Court, as the case requires, may grant leave to appeal under subsection (1) and the appellant may proceed with the appeal if—
 - (a) the court considers that the failure to file a notice of appeal within the period referred to in section 255(1) or 258 was due to exceptional circumstances; and
 - (b) the court is satisfied that the respondent's case would not be materially prejudiced because of the delay.
- (3) If the court does not grant leave to appeal under subsection (2), the court must strike out the appeal.
- (4) If—
 - (a) the County Court or the Supreme Court, as the case requires, strikes out an appeal under subsection (3); and
 - (b) the appellant had been sentenced to a term of imprisonment or detention by the Magistrates' Court—

the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires, may issue, in accordance with the Magistrates' Court Act 1989, a warrant to imprison the appellant and may recall and cancel that warrant.
- (5) If an appeal is struck out under subsection (3)—
 - (a) the sentence of the Magistrates' Court is reinstated and may be enforced as if an appeal had not been commenced but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay; and
 - (b) the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires, must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal; and
 - (c) the making of an order striking out an appeal discharges the undertaking of the appellant to proceed with the appeal.

Stay of sentence and bail pending appeal

- An appeal or application for leave to appeal by an offender from the Magistrates' Court acts as a stay of the sentence but not the conviction when:
 - (if the appellant is not in custody because of the sentence), when he or she files the notice of appeal and signs the undertaking in s255(5); or
 - (if the appellant is in custody because of the sentence), when appellant files the notice to appeal, signs the undertaking in s255(5) and enters bail (s264).
- An offender may apply to the Magistrates' Court for bail pending appeal. He or she must give reasonable notice of the bail application to the respondent. The Magistrates' Court must grant or refuse bail as if the appellant were accused of the charge he or she is appealing and was being held in custody for the offence charged. The Bail Act 1977 applies to this determination with any necessary modifications (s265).
- If the court strikes out offender's appeal for failure to appear under s267 and later reinstates the appeal, any application for bail may be made to the County Court (s267).

264 Stay of sentence

(1) If an appellant appeals against sentence and is not in custody because of that sentence, the appeal operates as a stay of the sentence (but not a conviction in respect of the sentence) when the appellant files the notice of appeal and signs the undertaking referred to in section 255(5).

(2) If an appellant appeals against sentence and is in custody because of that sentence, the appeal operates as a stay of the sentence (but not a conviction in respect of the sentence) when—

- (a) the appellant files the notice of appeal and signs the undertaking referred to in section 255(5); and
- (b) the appellant enters bail, if bail is granted under section 265.

(3) This section is subject to section 29 of the **Road Safety Act 1986**.

265 Bail pending appeal

(1) If an appellant is in custody because of the sentence appealed against and wishes to be released pending the appeal, the appellant—

- (a) may apply to the Magistrates' Court to be released on bail; and
- (b) if he or she makes an application under paragraph (a), must give reasonable notice of the application to the respondent to the appeal.

(2) If an application is made under subsection (1), the Magistrates' Court must either grant or refuse bail as if the appellant were accused of an offence and were being held in custody in relation to that offence and, for this purpose, the **Bail Act 1977** (with any necessary modifications) applies.

Abandonment of Appeal

- An appellant may abandon an appeal by filing a notice of abandonment in prescribed form with the County Court or the Supreme Court (as the case may be).
 - An offender who appeals against conviction and sentence, but does not pursue the appeal against conviction, must give written notice to the court and the respondent in prescribed form that the appeal against conviction only is abandoned (s266).
- If the sentence under appeal included a term of imprisonment or detention and the offender is not in custody, then he/she may abandon the appeal by surrendering to the registrar of the County Court or the Prothonotary of the Supreme Court (as the case may be) and immediately filing a notice of abandonment of appeal in the prescribed form. The registrar may then issue a warrant to imprison the offender in accordance with the *Magistrates' Court Act 1989* (s266).
- The court must not set aside an order under s266(4) striking out an appeal (s266(6)).
- The consequences of the court striking out an appeal are set out in s266(5):
 - a) the sentence of the Magistrates' Court is reinstated and may be enforced as if an appeal had not been made but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay; and
 - b) the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal; and
 - c) the making of an order striking out an appeal discharges the undertaking of the appellant to proceed with the appeal.

Abandonment of appeal

- (1) Subject to subsections (2) and (3), an appeal to the County Court or the Supreme Court, as the case requires, may be abandoned by filing a notice of abandonment of appeal, in the form prescribed by the rules of the applicable court, with the applicable court.
- (2) If an appellant appeals against both conviction and sentence but does not pursue the appeal against conviction, the appellant must give written notice to the court and the respondent that the appeal against conviction is abandoned.
- (3) An appellant who has been sentenced to a term of imprisonment or detention but who is not in custody may abandon the appeal by—
 - (a) surrendering to the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires; and
 - (b) immediately filing a notice of abandonment of appeal in accordance with subsection (1).
- (3A) If a person surrenders to the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires, in accordance with subsection (3), the registrar or Prothonotary may issue, in accordance with the Magistrates' Court Act 1989, a warrant to imprison the person.
- (4) If an appellant abandons an appeal, the court must strike out the appeal.
- (5) If an appeal is struck out under subsection (4)—
 - (a) the sentence of the Magistrates' Court is reinstated and may be enforced as if an appeal had not been made but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay; and
 - (b) the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal; and
 - (c) the making of an order striking out an appeal discharges the undertaking of the appellant to proceed with the appeal.
- (6) The court may not set aside an order under subsection (4) striking out an appeal.

Failure to appeal

- When the offender fails to appear at the time listed for the hearing of an appeal where he or she is the appellant, the court may strike out the appeal or adjourn the proceedings on any terms it considers appropriate (s267(1)).
- When the court strikes out an appeal due to the offender's failure to appear and the offender had been sentenced to a term of imprisonment or detention by the Magistrates' Court, the registrar of the County Court or the Prothonotary of the Supreme Court (as the case requires) may issue a warrant to imprison the offender in accordance with the *Magistrates' Court Act 1989*. The registrar or Prothonotary may also recall and cancel that warrant (s267).
- The court may set aside the order striking out an appeal due to the appellant's failure to appear if the appellant satisfies the court that the failure was not due to his or her fault or neglect (s267).
- The appellant must serve a notice of the application on the respondent a reasonable time before making the application. This notice must be served in the same manner as a notice of appeal (s267(4),(5)).
- If the court grants the application to set aside the order striking out the appeal, it must order the reinstatement of the appeal subject to any appropriate costs order and may require the appellant to give a further undertaking to proceed with the appeal (s267(6)).
- On reinstatement of the appeal, the appeal once again operates as a stay of the sentence but not the conviction, subject to s29 of the Road Safety Act 1986, when:
 - the appellant signs the further undertaking, if he or she is required to do so; and
 - the appellant enters bail, if he or she is in custody because of the sentence and the Magistrates' Court grants bail pending the appeal (s267(7)).

- If the respondent to a DPP appeal fails to appear at the time listed for the appeal, the court may adjourn the proceeding on any terms it considers appropriate or, if satisfied that the respondent received the notice of appeal in accordance with s258 or s261 of the Act, it may hear and determine the appeal in the absence of the respondent. If the court adjourns the proceeding and is satisfied that notice was given in accordance with s258 or s261, it may issue a warrant to arrest the respondent and bring him or her before a judge of the court (s268(2)).
- The Act does not contain any specific provisions concerning the failure of the DPP to appear on an appeal. Historically, this is an exceptionally unusual situation and is unlikely to arise.
- NB. this is a requirement that the accused **appear** at the appeal. Unless otherwise required to do so due to a court order, condition of bail or remand, or the requirement of an Act or the rules of court, the accused **does not need to personally attend** the appeal
(s330; *Hamilton v Pickering* (2014) 42 VR 681; [2014] VSC 399).

Appellant's failure to appear

- (1) If an appellant (other than the DPP) fails to appear at the time listed for the hearing of the appeal, the County Court or the Supreme Court, as the case requires, may—
 - (a) strike out the appeal; or
 - (b) adjourn the proceeding on any terms that it considers appropriate.
- (1A) If—
 - (a) the County Court or the Supreme Court, as the case requires, strikes out an appeal under subsection (1)(a); and
 - (b) the appellant had been sentenced to a term of imprisonment or detention by the Magistrates' Court—

the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires may issue, in accordance with the Magistrates' Court Act 1989, a warrant to imprison the appellant and may recall and cancel that warrant.
- (2) If an appeal is struck out under subsection (1)(a)—
 - (a) the sentence of the Magistrates' Court is reinstated and may be enforced as if an appeal had not been commenced but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay; and
 - (b) the registrar of the County Court or the Prothonotary of the Supreme Court, as the case requires must give to the respondent or to the respondent's legal practitioner a copy of the order striking out the appeal; and
 - (c) the making of an order striking out an appeal discharges the undertaking of the appellant to proceed with the appeal.
- (3) The court, at any time, may set aside an order striking out an appeal because of the failure of the appellant to appear, if the appellant satisfies the court that the failure to appear was not due to fault or neglect on the part of the appellant.
- (4) An application under subsection (3) to set aside an order may be made at any time on notice in writing to the respondent served a reasonable time before the making of the application.
- (5) Notice under subsection (4) must be served in the same way as a notice of appeal.

- (6) If the court grants an application under subsection (3), the court—
 - (a) must order the reinstatement of the appeal subject to the payment of any costs that the court considers appropriate; and
 - (b) may require the appellant to give a further undertaking to proceed with the appeal.
- (6A) An application under section 265 for bail pending the reinstated appeal may be made to the County Court or the Supreme Court, as the case requires.
- (7) On the reinstatement of an appeal under subsection (6), the appeal operates as a stay of the sentence (but not a conviction in respect of the sentence) when—
 - (a) if required, the appellant signs the undertaking referred to in subsection (6)(b); and
 - (b) if the appellant is in custody because of the sentence appealed against and bail is granted under section 265, the appellant enters bail.
- (8) Subsection (7) is subject to section 29 of the Road Safety Act 1986.

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Respondent's failure to appear on appeal by DPP

- (1) If a respondent to an appeal under section 257 or 260 by the DPP fails to appear at the time listed for the hearing of the appeal, the County Court or the Supreme Court, as the case requires—
 - (a) may adjourn the proceeding on any terms that it considers appropriate; or
 - (b) if satisfied that notice of the appeal has been given in accordance with section 258 or 261, as the case may be, may hear and determine the appeal in the absence of the respondent.

Note The County Court or the Supreme Court, as the case requires cannot impose a sentence that requires the consent of the respondent, for example a community correction order, in the absence of the respondent.

- (2) If the County Court or the Supreme Court, as the case requires adjourns the proceeding and is satisfied that notice of the appeal has been given in accordance with section 258 or 261, as the case may be, the court may issue a warrant to arrest the respondent and to bring the respondent before the judge who issued the warrant or any other judge of the court.

Part 6.2 – Appeal from Magistrates’ Court to Supreme Court on Question of Law

- A party to a criminal proceeding (other than a committal proceeding) in the Magistrates’ Court may appeal as of right to the Supreme Court on a question of law from a final order of the Magistrates’ Court (s272(1)).
 - Appeals under s272 are only available concerning questions of law that are involved in the final order of the court (*Transport Accident Commission v Hoffman* [1989] VR 197; *Wong v Carter* [2000] VSCA 53). This may include some interlocutory decisions that relate to the admission of evidence (*Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460; *Johnson v Poppeliers* (2008) 20 VR 92; [2008] VSC 461).
- Questions of law: Whether the court identified the relevant legal test; Whether the court applied the correct legal test; Whether there was any evidence to support a finding of fact; Whether the facts found fall within the statute properly construed (*DPP v Burns* [2017] VSC 570, [14]). The question of whether there was any evidence to support a finding of fact can be expressed as (a) whether there was ‘any evidence upon which the magistrate might, as a reasonable person, come to the conclusion’ reached; or (b) whether the finding was open (*DPP v Burns* [2017] VSC 570, [15]).
- If the informant is a police officer and wishes to appeal under s272, the appeal may only be brought by the DPP on behalf of the informant (s272(2)).
- A person commences an appeal by filing a notice of appeal with the Trial Division of the Supreme Court within 28 days of the date the impugned order was made (s272(3)). The appellant must serve a copy of the notice of appeal on the respondent within 7 days of filing (s272(5)).

- An appeal under s272 does not operate as a stay of any order of the Magistrates' Court, unless the Supreme Court orders otherwise (s272(6)).
- After hearing and determining the appeal, the court may make any order it thinks appropriate. An order other than an order remitting the proceeding may be enforced as an order of the Supreme Court. The court may also grant a stay of the order or may admit an accused to bail (s272(9)-(11)). The court may remit the matter to the Magistrates' Court with or without any direction in law, or may deal with the matter itself, depending on the state of the evidence and the needs of justice (s272. See also *DPP v Parsons* [1993] 1 VR 1).
- If the Supreme Court finds an error of law, but is satisfied that the accused did not lose a chance of acquittal that was open, it may dismiss the appeal. The court may undertake its own evaluation of the evidence on the record and must take into account the natural limitations involved in such a review (*Walford v McKinney* [1997] 2 VR 353; *Engebretson v Bartlett* (2007) 16 VR 417; [2007] VSC 163; *Knox v Bible* [1907] VLR 485; *Thomas v Campbell & Ors* (2003) 9 VR 136; [2003] VSC 460).
- A party that brings an appeal under s272 abandons finally and conclusively the chance to appeal to the County Court in relation to that proceeding (s273).

Appeal to Supreme Court on a question of law

- (1) A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to the Supreme Court on a question of law, from a final order of the Magistrates' Court in that proceeding.
- (2) If an informant who is a police officer wishes to appeal under subsection (1), the appeal may be brought only by the DPP on behalf of the informant.
- (3) An appeal under subsection (1) is commenced by filing a notice of appeal in accordance with the rules of the Supreme Court within 28 days after the day on which the order complained of was made.
- (4) A copy of the notice of appeal must be served on the respondent in accordance with subsection (5) within 7 days after the day on which the notice of appeal was filed.
- (5) A copy of the notice of appeal must be served—
- (a) personally on a respondent who was the accused in accordance with section 391; or
 - (b) on a respondent who was the informant in accordance with section 392.
- (6) An appeal under subsection (1) does not operate as a stay of any order made by the Magistrates' Court unless the Supreme Court otherwise orders.
- (7) An appeal commenced after the end of the period referred to in subsection (3) is deemed to be an application for leave to appeal under subsection (1).
- (8) The Supreme Court may grant leave under subsection (7) and the appellant may proceed with the appeal if the Supreme Court—
- (a) is of the opinion that the failure to commence the appeal within the period referred to in subsection (3) was due to exceptional circumstances; and
 - (b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.
- (9) After hearing and determining the appeal, the Supreme Court may make any order that it thinks appropriate, including an order remitting the case for rehearing to the Magistrates' Court with or without any direction in law.
- (10) An order made by the Supreme Court on an appeal under subsection (1), other than an order remitting the case for rehearing to the Magistrates' Court, may be enforced as an order of the Supreme Court.
- (11) The Supreme Court may provide for a stay of the order or for admitting any person to bail as it considers appropriate.

Appeal on question of law precludes appeal to County Court

If a person appeals under this Part to the Supreme Court on a question of law, that person abandons finally and conclusively any right under this or any other Act to appeal to the County Court in relation to that proceeding.