HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

DAVID JOHN SMITH
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The *Criminal Procedure Act 2009* (Vic) (**CPA**) provides for vulnerable complainants in criminal proceedings relating to sexual offences to give their evidence at a "special hearing" prior to trial. The complainant's evidence at a special hearing is recorded, and the recording is admitted into evidence in a trial as if its contents were the direct testimony of the complainant. The CPA also provides for a "ground rules hearing" to take place before a special hearing. Section 389E(1) of the CPA provides that at a ground rules hearing the court can make or vary any direction for the fair and efficient conduct of the proceeding.

3. In a criminal proceeding against the respondent, it was agreed at a ground rules hearing that the judge, the prosecutor and defence counsel would meet the child complainant at the offices of the Child Witness Service for a quick introduction prior to the complainant giving evidence at a special hearing scheduled to occur the next day. The respondent was present when this was agreed to at the ground rules hearing but was not present at the introductory meeting.

4. The *first* issue is whether such a meeting was permissible. This raises questions about the scope and application of the principle of open justice, and the interaction between the principle and s 389E(1) of the CPA. The appellant submits that the Court of Appeal

erred in finding that the introductory meeting infringed the principle of open justice. The meeting was authorised by s 389E(1).

5. If the introductory meeting was not authorised, the *second* issue is whether it has given rise to a fundamental irregularity in the forthcoming trial of the respondent, at which the complainant's recorded evidence was to be admitted. The appellant submits that it has not.

PART III: SECTION 78B NOTICE

6. The appellant does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISION BELOW

7. The decision of the Court of Appeal of the Supreme Court of Victoria (**CAB 30**) has not been reported. The medium neutral citation is *Director of Public Prosecutions v Smith* [2023] VSCA 293.

PART V: MATERIAL FACTS

8. The material facts are set out in the case stated by the County Court of Victoria[1] (**CAB 24**). This Court is confined to those facts and any implications that may be drawn from them.[2]

9. The respondent is to be tried in the County Court on an indictment charging him with four sexual offences against a child under 16 years of age. As the complainant is a child, the procedural provisions in Pt 8.2, Div 6 and Pt 8.2A of the CPA apply to the taking of her evidence (**CAB 24 [1], [4]-[5]**[3]). In accordance with those provisions, the complainant gave the whole of her evidence at a "special hearing"[4] conducted prior to the scheduled commencement of the trial. The complainant's evidence was recorded (**CAB 27 [20]**), with a view to being admitted into evidence in the respondent's trial as if its contents were the direct testimony of the complainant.[5]

10. On the day before the special hearing, the judge who was to preside over the special

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1 Pursuant to CPA, s 305.

2 *R v Rigby* (1956) 100 CLR 146 at 150-152 (the Court); *R v Assange* [1997] 2 VR 247 at 250, 253 (Hayne JA, Vincent and Coldrey AJJA agreeing); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [52] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

3 There is a typographical error in paragraph 5 of the case stated. The reference to Part 8.2 should read Part 8.2A.

4 See [19] below.

5 CPA, s 374(2).

hearing conducted a "ground rules hearing".[6] The respondent was present at the ground rules hearing, as was his counsel and the prosecutor (**CAB 25 [13]**).

11. An "intermediary",[7] who had produced an assessment report about the complainant's needs in giving evidence after a referral from the prosecution, was also present (**CAB 25 [8]-[9], [13]**). The intermediary's report recorded that the complainant had anxiety about giving evidence and had told the intermediary that it would assist her confidence to meet counsel and the judge in person on the day she was to give evidence (**CAB 25 [10]-[11]**).

12. The prosecutor informed the court that he was meeting the complainant that afternoon at the offices of the Child Witness Service. The respondent's counsel indicated that he had no objection to the presiding judge and himself also meeting with the complainant at that time. It was agreed that the judge, the prosecutor and defence counsel would all attend the Child Witness Service for a very quick meeting with the complainant. The judge confirmed that the purpose of the meeting was for the complainant to "say hello" (**CAB 26 [15]-[16]**). The judge formally appointed the intermediary pursuant to s 389J of the CPA, and made directions for the fair and efficient conduct of the proceeding pursuant to s 389E of the CPA having regard to the recommendations made by the intermediary (**CAB 26 [17]**).

13. The judge, the prosecutor and the respondent's counsel proceeded to meet with, and be introduced to, the complainant at the offices of the Child Witness Service that afternoon. The respondent was not present and the meeting was not recorded (**CAB 26 [18]**). The special hearing was conducted the following day in the presence of the intermediary.[8] No issue was subsequently raised about the introductory meeting, and the meeting was not referred to during the special hearing (**CAB 26 [19]**).

14. After the special hearing took place (and before the respondent's trial was to commence), the Court of Appeal of the Supreme Court of Victoria handed down judgment in *Alec (a pseudonym) v The King*.[9] The applicant in *Alec* had been convicted of sexual offences against a child. The complainant's evidence had been recorded at a special hearing and then admitted into evidence at the applicant's trial. Prior to the special hearing, the judge had met with the complainant for an introduction, on the

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6 See [21]-[25] below.
7 See [26] below.
8 See CPA, s 389K(1).
9 [2023] VSCA 208.

recommendation of the intermediary made during the ground rules hearing. Neither the prosecutor nor defence counsel were present at that meeting. The Court of Appeal in *Alec* referred to the principle of open justice, stating that it "requires court proceedings to be held in public; or, in cases where exceptions to that general rule are tolerated — such as in cases of alleged sexual offending — to be otherwise open to scrutiny".[10] The Court held that the meeting gave rise to a suspicion of partiality.[11] The meeting was "incompatible with the fundamental tenets of the system of criminal justice in this State", constituted "a serious departure from accepted trial process", and occasioned a substantial miscarriage of justice.[12] The applicant's convictions were set aside and the Court stated that, at any new trial, the complainant's evidence must be taken again before a different judge.[13]

15. In light of *Alec*, the County Court vacated the trial date in this proceeding and reserved the following four questions of law for determination by the Court of Appeal:[14]

    1. Did the meeting infringe the principles of open justice as identified in *Alec (a pseudonym) v The King* [2023] VSCA 208?
    2. Did the meeting bring the impartiality of the presiding judge into question?
    3. Did the occurrence of the meeting represent a fundamental irregularity in the trial process, such as to constitute a serious departure from accepted trial processes?
    4. If the answer to questions 1, 2 and/or 3 is in the affirmative, is the only remedy for the evidence of the complainant to be taken at a further special hearing conducted before a different judge?

16. In its judgment handed down on 30 November 2023 (**CAB 30**), the Court of Appeal answered questions 1, 3 and 4 "yes", and question 2 "unnecessary to answer".

PART VI: ARGUMENT

Statutory framework

17. The introductory meeting took place within a pre-trial process governed by the statutory regime within Pts 8.2 and 8.2A of the CPA. It is therefore essential to understand the operation of that regime.

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10 [2023] VSCA 208 at [28] (Priest, Walker and Taylor JJA).
11 *Alec* [2023] VSCA 208 at [32] (Priest, Walker and Taylor JJA).
12 *Alec* [2023] VSCA 208 at [38] (Priest, Walker and Taylor JJA).
13 *Alec* [2023] VSCA 208 at [38] (Priest, Walker and Taylor JJA).
14 Pursuant to CPA, s 302.

18. Part 8.2 of the CPA contains provisions concerning the taking of evidence in criminal proceedings that relate (wholly or partly) to a sexual offence. The opening provision of Pt 8.2 sets out "guiding principles": s 338. It records the intention of Parliament that in interpreting and applying the provisions of Pt 8.2, courts are to have regard to a number of matters, including that sexual offences are significantly underreported, and that a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment: s 338(b) and (c).

19. Division 6 of Pt 8.2 contains procedures and rules for children and cognitively impaired complainants. The evidence of a complainant who was under the age of 18 years at the time a proceeding for a sexual offence commences, or who has a cognitive impairment, must, unless the court directs otherwise, be given at a "special hearing" and recorded as an audiovisual recording: ss 369 and 370(1), (2). The special hearing may occur before or during the trial: s 370(1A). In the former case, the complainant's evidence is presented to the court during trial in the form of the recording: s 370(1)(b). Subject to a ruling to the contrary, a recording of a special hearing is admissible in the proceeding as if its contents were the direct testimony of the complainant: s 374(2)(a), (3).

20. At a special hearing, the accused and his or her legal practitioner are to be present in the courtroom, and if the special hearing is during the trial the jury are also to be present: s 372(1)(a), (ba). The accused is not to be in the same room as the complainant, but is entitled to see and hear the complainant while they are giving evidence: s 372(1)(b). No other person, other than a person authorised by the court, is to be present in the courtroom or the same room as the complainant when the complainant's evidence is being taken: s 372(1)(c). The evidence of the complainant is to be given by means of facilities that enable communication between the room in which the complainant is present and the courtroom: s 372(1)(d). The room in which the complainant gives evidence is taken to be part of the courtroom for the purpose of the special hearing: s 372(2).

21. Part 8.2A deals with "ground rules hearings" and the appointment of "intermediaries". It was introduced to "protect and empower vulnerable witnesses to give their best

evidence",[15] thereby facilitating a less stressful experience for vulnerable witnesses and a more efficient trial.[16] Division 1, relating to ground rules hearings, applies to all complainants in proceedings for sexual offences, as well as witnesses in such proceedings who are under the age of 18 years or have a cognitive impairment: s 389A(1), (3). Division 2, relating to intermediaries, applies to all witnesses in criminal proceedings who are under the age of 18 years or have a cognitive impairment, provided the proceeding is in a participating venue of a court: s 389F(1). Thus, Pt 8.2A applies to children and persons with a cognitive impairment who are giving evidence as a complainant in proceedings for sexual offences, and in that application its provisions support the special hearing process.

22. A ground rules hearing must be held if a witness is a complainant in relation to a charge for a sexual offence: s 389B(3)(b). It must take place before the commencement of any hearing (such as a special hearing) at which the witness is to give evidence: s 389C(1).

23. At a ground rules hearing, the court can make (or vary) any direction for the fair and efficient conduct of the proceeding: s 389E(1). Without limiting the power in s 389E(1), the court may give directions about the duration of questioning and about questions that may or may not be put to the witness: s 389E(2).

24. The purpose of ground rules hearings indicated by these provisions has been confirmed by s 389AB, which was inserted into the CPA on 30 July 2023[17] (that is, after the ground rules hearing in the respondent's proceeding). Section 389AB provides that a ground rules hearing is a hearing at which the court considers the communication, support or other needs of witnesses and decides how the proceeding is to be conducted to fairly and effectively meet those needs. As the explanatory memorandum makes clear, it is intended that at a ground rules hearing the court will consider and make arrangements to cater for the "needs" of a witness in a broad sense.[18]

25. A ground rules hearing must be attended by a person acting for the prosecution, the legal practitioner representing the accused (or the accused if unrepresented), and any

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15 Explanatory Memorandum, Justice Legislation Amendment (Victims) Bill 2017 (Vic) at 13. See also *PJ v The King* (2023) 111 NSWLR 414 at [47], where Basten JA (Walton J agreeing) described the dominant purpose of the equivalent New South Wales intermediary scheme as being to protect child witnesses from the trauma of giving evidence, so far as it is reasonably possible to reduce that trauma.

16 Second reading speech for the Justice Legislation Amendment (Victims) Bill 2017 (Vic): Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2017 at 4359.

17 By s 70 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

18 Explanatory Memorandum, Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic) at 62.

intermediary appointed for the witness: s 389D(1). The witness is not required to attend the ground rules hearing and the court may make an order that a witness for whom an intermediary is appointed not attend a ground rules hearing: s 389D(2), (3).

26. The power to appoint an intermediary is found in s 389J(1). The function of an intermediary is to communicate or explain questions put to the witness to the extent necessary to enable those questions to be understood, and to communicate or explain to a person questioning the witness the answers given by the witness to the extent necessary to enable them to be understood by the questioner: s 389I(1). The intermediary is an officer of the court and has a duty to act impartially when assisting communication with the witness: s 389I(2). The witness's evidence must be given in the presence of any appointed intermediary: s 389K(1).

The Court of Appeal's approaches to the principle of open justice

27. Priest JA gave the leading judgment in the Court of Appeal, with which both Emerton P and Macaulay JA agreed. Priest JA identified the principle of open justice as an "ingrained", "deeply embedded" and "fundamental" principle of the criminal law drawn from the common law (**CAB 38 [31], 39 [34]-[35]**). It finds recognition in s 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***), which provides that a person charged with a criminal offence has the right to have the charge decided by a competent, independent and impartial court or tribunal after a fair and public hearing (**CAB 38 [32]**). His Honour described the principle as requiring "criminal proceedings to take place in public", subject to limited exceptions (**CAB 38 [33]**). His Honour also included within the scope of the principle the "general rule" that any step in a criminal proceeding must occur in the presence of the accused (**CAB 39 [35]**).

28. Priest JA observed that the manner in which criminal proceedings are conducted in Victoria is largely prescribed by the CPA. After setting out the terms of s 389E, his Honour concluded that nothing in the provision authorised, either directly or by necessary implication, a meeting between a trial judge and a witness (whether or not accompanied by counsel) outside the courtroom (**CAB 40-41 [39]-[40]**). It was "anathema to the principle of open justice" that a judge could have a non-public communication with a witness in the course of a criminal proceeding (**CAB 45 [54]**). Since the meeting was "inconsistent with the principle of open justice, an essential element of the administration of criminal justice in this State", it was "a fundamental irregularity that could not be waived" (**CAB 46 [55], [58]**).

29. In Emerton P's short concurring judgment (with which Macaulay JA also agreed), her Honour stated that it was a "central tenet" of the administration of criminal justice that proceedings be conducted in open court and in the presence of the accused (**CAB 31 [6]**). That was reinforced by s 24(1) of the *Charter*. Her Honour stated that a scheme directed to ensuring that vulnerable witnesses are supported to give their best evidence "should not be taken to impinge on the principle of open justice unless a departure is permitted or endorsed by express statutory language or by clear implication from the language of the statute" (**CAB 31-32 [6]**). In support of this proposition, Emerton P cited three judgments discussing the principle of legality.[19] Her Honour quoted the statement of French CJ in *Hogan v Hinch* that "[t]he principle of legality will favour a construction which, consistently with the statutory scheme, has the least adverse impact upon the open justice principle"[20] (**CAB 32 [9]**). Her Honour concluded that the CPA could not be construed so as to permit a judge to leave the confines of the courtroom to speak privately to a witness in the absence of the accused (**CAB 33 [10]**).

30. The Court of Appeal judgments are replete with references to the principle of open justice, but they contain little analysis of the content of the principle and how it is to be applied.

31. As to the content of the principle, both Priest JA and Emerton P included within the scope of the principle the requirement that a criminal proceeding take place in the presence of the accused. As will be developed below, by doing so the Court of Appeal erroneously conflated two separate issues.

32. As to how the principle is to be applied, while Emerton P concurred with Priest JA, their Honours' judgments take different approaches to the invocation of the principle. Priest JA appears to have applied the principle of open justice to the introductory meeting and, having found that the meeting infringed the principle, concluded that s 389E did not authorise it. In contrast, Emerton P invoked the principle of legality to favour a construction of the CPA with "the least adverse impact" upon the principle of open justice, although that construction was not expressly identified. These differing

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19 *Plaintiff S157/2022 v The Commonwealth* (2003) 211 CLR 476 at [30] (Gleeson CJ); *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *X7 v Australian Crime Commission* (2013) 249 CLR 92 at [158] (Kiefel J).

20 (2011) 243 CLR 506 at [5].

approaches underscore the observation that use of the expression "the principle of open justice" may obscure rather than enlighten.[21]

The nature and content of the principle of open justice

33. In *Scott v Scott*,[22] an early leading exposition of the principle of open justice,[23] Viscount Haldane LC described the "broad principle" that the courts must administer justice in public.[24] The holding of hearings in public is an essential aspect of the character of courts, such that to require a court invariably to sit in closed court is to alter the nature of the court.[25] In Victoria, the principle is enshrined in the *Open Courts Act 2013* (Vic), which requires a court to have regard to the primacy of the principle of open justice in determining whether to make suppression and closed court orders under that Act.[26] The principle is also reflected in s 24(1) of the *Charter*. "Departure" from the principle of open justice has been said to require "exceptional" circumstances.[27]

34. In order to properly apply the principle in a given case, it is necessary to understand its rationale, its objective, and its nature as a principle that manifests in specific requirements or rules.

35. In *Hogan v Hinch*, French CJ explained the two-fold rationale for the principle: it secures the benefit that flows from subjecting court proceedings to public and professional scrutiny; and it maintains public confidence in the courts by ensuring that they appear to be independent and impartial.[28]

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21 *Re Hogan; Ex parte West Australian Newspapers Ltd* (2009) 41 WAR 288 at [30] (McLure P, Owen and Miller JJA agreeing).

22 [1913] AC 417.

23 The history of the principle of open justice was traced by Kirby P in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50-53. See also Garth Nettheim, "The Principle of Open Justice" (1984) 8 *University of Tasmania Law Review* 25 at 26-39.

24 *Scott v Scott* [1913] AC 417 at 437.

25 *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J), 532-533 (Stephen J); *Hogan v Hinch* (2011) 243 CLR 506 at [20] (French CJ), [90]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

26 *Open Courts Act 2013* (Vic), ss 4, 28.

27 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [49] (French CJ); *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 at [55] (the Court).

28 *Hogan v Hinch* (2011) 243 CLR 506 at [20] (French CJ). See also *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450 (Lord Diplock); *Zhao* (2015) 255 CLR 46 at [44] (the Court); *Open Courts Act*, s 1(aa).

36. The paramount objective of the principle is that "justice is done".[29] It is "a means to an end, and not an end in itself".[30] It has "long been accepted" at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers, where necessary to secure the proper administration of justice.[31] At common law, there are recognised categories of cases where the principle will yield to an overriding public interest, such as where publicity would destroy the subject matter of the litigation.[32] And while Parliament may not be able to require a court to invariably sit in closed court, it can create exceptions to the general requirement that a court sit in public.[33] As French CJ stated in *Condon v Pompano Pty Ltd*, "[h]istorically evolved as they are and requiring application in the real world, the defining characteristics of courts are not and cannot be absolutes".[34]

37. The cases refer to open justice as both a "principle" and a general or ordinary "rule".[35] In the taxonomy of Ronald Dworkin,[36] a principle "states a reason that argues in one direction, but does not necessitate a particular decision",[37] whereas legal consequences follow automatically when a rule is contravened.[38] Principles may be reduced by the common law to specific and justiciable rules and remedies. This is the case for the principle of natural justice, which manifests in the hearing rule and the bias rule.[39] Breach of those rules will ordinarily lead to the granting of relief, such as an order restraining a decision-maker whose conduct has given rise to an apprehension of bias

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29 *Scott v Scott* [1913] AC 417 at 437 (Viscount Haldane LC).

30 *Hogan v Hinch* (2011) 243 CLR 506 at [20] (French CJ). See also at [87] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), quoting *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 549 (Isaacs J).

31 *Hogan v Hinch* (2011) 243 CLR 506 at [21], see also [46] (French CJ). See also *HT v The Queen* (2019) 269 CLR 403 at [42], [43], [46] (Kiefel CJ, Bell and Keane JJ), [83] (Gordon J).

32 *Scott v Scott* [1913] AC 417 at 437 (Viscount Haldane LC); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [41] (Gummow, Hayne, Heydon and Kiefel JJ), quoting *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 at 157 (Deane J).

33 *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J); *K-Generation* (2009) 237 CLR 501 at [49] (French J); *Hogan v Hinch* (2011) 243 CLR 506 at [27] (French CJ), [90]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

34 (2013) 252 CLR 38 at [68].

35 See, eg, *Scott v Scott* [1913] AC 417 at 437 (Viscount Haldane LC); *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J); *Leveller Magazine* [1979] AC 440 at 450 (Lord Diplock); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [70] (French CJ).

36 Ronald Dworkin, 'The Model of Rules I' in *Taking Rights Seriously* (2013 ed) ch 2.

37 Ronald Dworkin, 'The Model of Rules I' in *Taking Rights Seriously* (2013 ed) ch 2 at 42.

38 Ronald Dworkin, 'The Model of Rules I' in *Taking Rights Seriously* (2013 ed) ch 2 at 41.

39 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [68] (French CJ); *HT* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ).

from proceeding to hear the matter.[40] However, Parliament can validly legislate to modify those rules.[41]

38. In the case of the principle of open justice, Lord Diplock described two requirements deriving from the principle: that *hearings* in a proceeding should be held in open court to which the public is admitted, and that, at least in criminal proceedings, all *evidence* communicated to the court should be communicated publicly.[42]

39. The first of the requirements is usually the focus of the principle. It is reflected in s 28 of the *Open Courts Act*, which refers to the principle as "requir[ing] the hearing of a proceeding in open court". So expressed, s 28 makes clear that the requirement applies to *hearings* in a proceeding. This is also reflected in statements in the cases that what is required is that "the hearing … take place in open Court";[43] that courts "sit in public";[44] that the law attaches high significance to "the concept of the hearing in open court" and to "open hearings";[45] and that the principle of open justice is affected "by requiring a court to hear certain classes of evidence or argument in private".[46] The requirement that hearings be conducted in open court is concerned to ensure that a court should not receive evidence, hear argument or decide issues other than in an open manner.[47] Where a court sits in closed court without the power to do so, there is an irregularity which may render orders made by the court voidable or void, depending upon the nature of the court and the construction of any relevant statute.[48]

40. The second requirement referred to by Lord Diplock is less frequently discussed. It is at least partly subsumed by the first, broader requirement: evidence ought to be received by the court in hearings, and it therefore should be communicated publicly. One corollary of this second requirement is that the interests of open justice are engaged by a request by the public for access to material on the court file that has been

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40 See, eg, *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 (Gibbs CJ), 357 (Mason J), 371 (Brennan J).

41 *SDCV v Director-General of Security* (2022) 96 ALJR 1002 at [53]-[54], [67] (Kiefel CJ, Keane and Gleeson JJ), [136]-[137], [150] (Gageler J), [174] (Gordon J), [229] (Edelman J), [313] (Steward J).

42 *Leveller Magazine* [1979] AC 440 at 450.

43 *Scott v Scott* [1913] AC 417 at 439 (Viscount Haldane LC).

44 *Hogan v Hinch* (2011) 243 CLR 506 at [20] (French CJ).

45 *Russell v Russell* (1976) 134 CLR 495 at 532 (Stephen J).

46 *K-Generation* (2009) 237 CLR 501 at [49] (French CJ).

47 See, eg, the requirement at common law that reasons and orders be delivered in open court, which has now been modified by statute: *Bodycorp Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd* [2018] VSCA 33 at [71]-[105] (Ferguson CJ, Whelan and McLeish JJA); *Open Courts Act*, s 8A(1).

48 See *McPherson v McPherson* [1936] AC 177 at 203-204 (Lord Blanesburgh for the Privy Council); *Russell v Russell* (1976) 134 CLR 495 at 506 (Barwick CJ), 521 (Gibbs J); *Lednar v Magistrates' Court* (2000) 117 A Crim R 396 at [411] (Gillard J); *Ho v Loneragan* [2013] WASCA 20 at [31]-[42] (Pullin, Newnes and Murphy JJA); *Bodycorp Repairers* [2018] VSCA 33 at [78]-[90] (Ferguson CJ, Whelan and McLeish JJA).

admitted into evidence, although whether access is granted will depend upon whether there are competing considerations relevant to the administration of justice.[49] In contrast, the public does not have a general right of access to court documents,[50] and the principle of open justice is not engaged where the public seeks access to material on the court file that has not been admitted into evidence.[51] Again, the concern is with public access to the evidence upon which a court makes its decisions, and not to every aspect of a proceeding.

41. It is evident from this survey of the rationale, objective and requirements of the principle of open justice that it is concerned with openness to the public. Openness to an accused engages different principles. The withholding of evidentiary material from an accused may constitute a denial of procedural fairness.[52] The holding of a trial in the absence of the accused may impinge upon the accused's right to a fair trial.[53] While as a practical matter the same set of circumstances may raise issues relating to both open justice and these other principles, they need to be considered separately having regard to their distinct rationales.

42. There are three possible levels at which a court may apply the principle of open justice.

43. The *first* is that its requirements may be applied as rules to a given set of circumstances.[54] Thus there is a rule that a court ordinarily conduct its hearings in open court, because a departure from that requirement leads to specific consequences: orders made in closed court without authority will be voidable or void.[55] However, the rule is not absolute. It is subject to exceptions at common law and Parliament may create further exceptions.[56]

44. The *second* way in which the principle may be applied is as a relevant, but not determinative, consideration in the court's exercise of an express or implied power. For example, under s 30 of the *Open Courts Act*, a court may make a closed court order if satisfied as to one or more specified grounds, including where the order is necessary

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49 *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [41]-[42] (the Court).
50 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [29] (Spigelman CJ, Mason P and Beazley JA agreeing).
51 *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [40] (the Court); *HT* (2019) 269 CLR 403 at [81] (Gordon J).
52 See, eg, *HT* (2019) 269 CLR 403 at [27] (Kiefel CJ, Bell and Keane JJ), [57] (Nettle and Edelman JJ), [66] (Gordon J).
53 *R v Gee* (2012) 113 SASR 372 at [73]-[78] (Gray and Sulan JJ).
54 See *Open Courts Act*, ss 8A(1) and 8B(1), referring to "any rule of law relating to open justice".
55 See above at [39].
56 See above at [36].

to prevent prejudice to the proper administration of justice. In doing so, the court must have regard to the primacy of the principle of open justice.[57] Similarly, a court may be guided by the principle of open justice in determining an application for access to court documents. In these examples, open justice is a *Dworkinian* principle and not a rule.[58] It may need to be balanced with a competing public interest that may prevail.[59]

45. The *third* way in which the principle may be applied is in the process of statutory construction, through the principle of legality. The principle of legality protects not only rights or freedoms, but also "fundamental principles", "systemic values" and "the general system of law".[60] In *Hogan v Hinch*, French CJ stated that the principle of legality would "favour a construction which, consistently with the statutory scheme, has the least adverse impact upon the open justice principle and common law freedom of speech".[61]

46. It is only apt to speak of the principle of open justice being "infringed" when applying the requirements of the principle as rules.[62] The language of "infringement" is not apt in the second and third applications of the principle, where it may yield to other considerations in the public interest or to contrary legislative intention.

47. In the present case, the question of whether the introductory meeting infringed the principle of open justice required a closer analysis of the scope and application of the principle than that conducted by the Court of Appeal.[63]

The introductory meeting did not infringe the principle of open justice

The nature of the introductory meeting

48. The CPA draws a distinction between a proceeding, hearings within the proceeding, and the trial. A "criminal proceeding" relevantly commences with the filing of a

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57 *Open Courts Act*, s 28.

58 *Ryde Local Court* (2005) 62 NSWLR 512 at [29]-[30] (Spigelman CJ, Mason P and Beazley JA agreeing).

59 See *SDCV* (2022) 96 ALJR 1002 at [88] (Kiefel CJ, Keane and Gleeson JJ), referring to this kind of balancing exercise.

60 *X7* (2013) 248 CLR 92 at [86]-[87] (Hayne and Bell JJ), [158] (Kiefel J); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [84] (Hayne J), [176] (Kiefel J), [313] (Gageler and Keane JJ).

61 (2011) 243 CLR 506 at [5], see also [27]. See also *K-Generation* (2009) 237 CLR 501 at [49] (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at [444] (Heydon J).

62 cf *K-Generation* (2009) 237 CLR 501 at [10] (French CJ) and *Hogan v Hinch* (2011) 243 CLR 506 at [19] (French CJ), referring to the open justice principle being infringed by a statutory provision and court orders, respectively.

63 That involved a question of law: see *Gurnett v Macquarie Stevedoring Co Pty Ltd (No 2)* (1956) 95 CLR 106 at 113 (Dixon CJ, dissenting but not on this point); cf *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at [8], [39] (the Court).

charge-sheet[64] and from that point, steps taken in the prosecution of the accused are steps in the proceeding.[65]

49. Hearings are a subset of steps in a proceeding, as made evident by provisions which refer to a "hearing in the criminal proceeding".[66] In addition to ground rules hearings and special hearings, the CPA provides for filing hearings (s 101), committal mention hearings (s 125), compulsory examination hearings (s 104), committal hearings (s 128), directions hearings (s 179), and hearings to determine pre-trial issues such as an application by the accused for the exclusion of evidence (s 202). There is no definition of "hearing" in the CPA, but the types of steps identified as hearings broadly involve the making of procedural orders, the taking of evidence, or the determination by the relevant court of issues of fact or law.

50. The trial is a particular phase of a criminal proceeding, which commences when the accused pleads not guilty on arraignment in the presence of the jury panel.[67] It is a particular kind of hearing in the criminal proceeding.

51. In this case, the introductory meeting was a step in the criminal proceeding, which had commenced with the filing of the charge-sheet against the respondent. However, it was not a hearing. It arose out of, but was separate to, the ground rules hearing. It was also separate to the special hearing that took place the next day. It took place at a time when the trial of the accused had not yet commenced.

The introductory meeting did not infringe any requirement of the principle of open justice

52. The approach of Priest JA was to apply the principle of open justice as a rule.[68] His Honour erred in two respects in his approach.

53. *First*, his Honour failed to appreciate that the relevant rule that he sought to apply, namely that hearings be conducted in open court, did not extend to a step in a criminal proceeding that is not a hearing.[69] The introductory meeting was not a hearing under the CPA or of the kind described in the cases. It did not involve the court receiving evidence, hearing argument or deciding any issues. Steps in a criminal proceeding that

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64 CPA, s 5(a).

65 Examples of such steps include the service of the hand-up brief (CPA, s 107), the filing of the disclosure certificate (s 110A), the filing of the case direction notice by which the accused may seek leave to cross-examine witnesses at committal (ss 118-119), and the filing of the prosecution opening and defence response (ss 182-183).

66 CPA, ss 329, 330.

67 CPA, s 210(1).

68 See above at [27]-[28].

69 See above at [39].

are not hearings may engage other rights, principles and rules, such as the right to a fair trial and the hearing and bias rules. But the requirements of the principle of open justice do not provide the correct lens through which to consider such issues.

54. *Second*, insofar as his Honour relied upon a requirement that the respondent be present at the introductory meeting, that is distinct from the requirements of open justice.[70] The issue of the respondent's absence is dealt with separately below.[71]

55. The introductory meeting therefore did not infringe any requirement of the principle of open justice, and Priest JA was wrong to find otherwise.

Section 389E authorised the introductory meeting

56. In contrast to Priest JA, Emerton P applied the principle of open justice in the process of statutory construction.[72] However, the text of s 389E(1), considered in light of its statutory context and purpose, did not support her Honour's construction of s 389E(1) as not authorising the introductory meeting.

57. Section 389E(1) empowers the court at a ground rules hearing to make (or vary) "any" direction "for" the fair and efficient conduct of the criminal proceeding.[73] "Any" and "for" are broad terms. "For" means, relevantly, "with the object or purpose of".[74] Thus, on its face, s 389E(1) authorises any direction with the object or purpose of ensuring the fair and efficient conduct of the proceeding.

58. The concept of a "fair" proceeding in s 389E(1) encompasses a proceeding that is fair to a vulnerable witness who may have difficulties giving their best evidence. This is plain from the examples of directions in s 389E(2), which relate to the questioning of witnesses. It is also supported by the statutory context. The ground rules hearings provisions apply to complainants and witnesses who are considered vulnerable. Those provisions support the special hearing process. That process is characterised by significant and intentional departures from conventional criminal procedure and fundamental common law rules. The public is excluded from the special hearing: s 372(1)(c). The vulnerable complainant gives evidence from a remote facility, and the

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70 See above at [41].
71 See below at [63]-[65].
72 See above at [29].
73 As Priest JA acknowledged (**CAB 38 [33]**), an inferior court also has implied powers to do everything necessary for the effective exercise of its criminal jurisdiction. Whether the County Court's implied powers extended to authorising the introductory meeting raises issues of statutory construction similar to those that arise in construing s 389E: see *Grassby v The Queen* (1989) 168 CLR 1 at 16-17 (Dawson J, Mason CJ, Brennan and Toohey JJ agreeing).
74 *Macquarie Dictionary* (online), definition of "for", paragraph 1.

accused is not permitted to be in the same location as the complainant: s 372(1)(b), (d). These features of the process are intended to create an environment for taking evidence that is as private and protective as possible, so that vulnerable victims of sexual offences are not dissuaded from making complaints: see s 338.

59. Of course, ensuring fairness to a vulnerable witness may also serve the interests of the accused.[75] As Emerton P acknowledged, "[i]t is clearly in the interests of the administration of justice that vulnerable witnesses not feel intimidated, overawed or confused when giving their evidence" (**CAB 32 [9]**).

60. Having regard to the statutory context, s 389E(1) should be construed as authorising the introductory meeting that took place in this case. The meeting was consistent with the special hearing process that Pt 8.2A of the CPA was intended to support. The fact that the meeting took place in the absence of the public is consistent with the requirement that the special hearing be closed to the public, and with the legislative intention to allow vulnerable complainants to have as much privacy as possible. The fact that the introductory meeting took place at the Child Witness Service is consistent with the fact that a child complainant gives evidence in a special hearing from a remote facility. The objective of the introductory meeting — to ameliorate the complainant's anxiety prior to giving evidence — advanced the purpose of the statutory regime. In that regime, Parliament has turned its attention to the balance between open justice and the competing public interest in ensuring vulnerable complainants are able to give their best evidence. The balance has been struck in favour of closing the court to the public when vulnerable complainants are giving evidence. It would be incongruous with that regime for the broad power in s 389E(1) to be construed so as *not* to permit a brief introductory meeting between the judge, the prosecutor, defence counsel and a vulnerable complainant, for the purpose of supporting the vulnerable complainant to give their best evidence at a special hearing.

61. For those reasons, there is little, if any, room for the principle of legality to operate on s 389E(1) by reference to the principle of open justice. The principle of legality applies "where constructional choices are open"[76] and that is not the case here. In any event, the principle of legality would have no work to do because s 389E(1), when construed as authorising an introductory meeting of the kind that took place in this case, has no

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75 See *Ward (a pseudonym) v The Queen* (2017) 54 VR 68 at [11] (Maxwell P and Redlich JA).

76 *K-Generation* (2009) 237 CLR 501 at [49] (French CJ). See also *Northern Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ).

adverse impact on the requirements, rationale or objective of the principle of open justice.[77] It does not contravene either of the requirements derived from the principle, namely that hearings be held in open court, and that evidence be communicated to the court publicly.[78] A construction that permits the meeting to occur does not undermine the rationale for the principle: ensuring that proceedings are open to scrutiny and that courts appear to be independent and impartial.[79] The presence of the prosecutor and defence counsel ensures the introductory meeting remains open to scrutiny, and also maintains the court's appearance of impartiality. Both counsel are able to take a record of what occurs at the meeting, and each is in a position to raise concerns about anything that transpires at the meeting. Further, in permitting the court to make directions for an introductory meeting where it is *fair* and efficient for the conduct of the proceeding, s 389E(1) is consistent with the ultimate objective of the principle of open justice, which is to ensure that justice is done.[80]

62. Thus, contrary to Emerton P's judgment, the principle of legality cannot and does not alter the construction of s 389E(1) reached having regard to text, context and purpose. Section 389E(1) authorised the introductory meeting that took place in this case. No "infringement"[81] of the principle of open justice could be said to arise because of the application of the principle of legality.

The respondent was not required to be present at the meeting

63. It remains to address the Court of Appeal's concerns about the absence of the respondent from the introductory meeting. Priest JA identified two reasons for attaching significance to the absence of the respondent from the meeting. The first was the "general principle that the trial should be held in the presence of the defendant unless absolutely necessary" (**CAB 39 [35]**). The second was that s 246 of the CPA required the respondent to attend any hearing in the criminal proceeding against him, unless excused from attendance by the court (**CAB 39-40 [36]**). However, neither of those matters required the respondent's presence at the introductory meeting.

64. Section 246 of the CPA provides that an accused must attend "all hearings conducted under [Chapter 5 of the CPA] in the criminal proceeding", subject to the Court's power

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77 See above at [45]. A similar approach and conclusion would be required under the interpretive obligation in s 32(1) of the *Charter* as applied to the right in s 24(1): *Momcilovic* (2011) 245 CLR 1 at [51] (French CJ); *Slaveski v Smith* (2012) 34 VR 206 at [23] (Warren CJ, Nettle and Redlich JJA).

78 See above at [38]-[40].

79 See above at [35].

80 See above at [36].

81 Noting that it is not apt to speak of an "infringement" in this context: see above at [46].

to excuse an accused from attending a hearing under s 330(3). However, the introductory meeting was not a hearing conducted under Chapter 5. It was not a hearing in the criminal proceeding.[82] Chapter 5 specifically provides for certain types of hearings, such as directions hearings (s 179) and hearings for applications for the exclusion of evidence (s 202). The introductory meeting was not one of those hearings. Section 246 therefore did not apply.

65. There is a general principle that the trial for an indictable offence should ordinarily be conducted in the presence of the accused.[83] There is no trial in absentia at common law in the ordinary course.[84] That principle extends to sentence.[85] However, none of the authorities cited by Priest JA expressly extends the principle to pre-trial hearings or steps.[86] In any case, as Priest JA acknowledged (**CAB 39 [35]**), an accused person can waive his or her right to be present.[87] That occurred in this case. The respondent was present (and represented by counsel) at the ground rules hearing at which it was agreed that the meeting occur. He raised no objection to the meeting, nor did he request that arrangements be made for him to observe the meeting. There is nothing in the facts of the case stated to suggest that he was denied the ability to observe the meeting.

The meeting was not a fundamental irregularity in the respondent's trial

66. Priest JA held that because the holding of the meeting was inconsistent with the principle of open justice, it was a fundamental irregularity that could not be waived (**CAB 46 [55]**). Consequently, the only "remedy" was for a further special hearing to be conducted before a different judge (**CAB 47 [61]**). There was no other analysis in the judgments relevant to questions 3 or 4 of the reserved questions.

67. It is implicit in the brief reasons that the irregularity the Court of Appeal considered to have arisen from the introductory meeting could only be addressed by not permitting the evidence recorded at the special hearing to be adduced in the respondent's trial, and that the admission of that evidence would give rise to a substantial miscarriage of

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82 See above at [48]-[51].

83 *Lawrence v The King* [1933] AC 699 at 708 (Lord Atkin); *Tongahai v The Queen* (2014) 241 A Crim R 217 at [20] (Basten JA, Fullerton and Davies JJ agreeing).

84 *Lipohar v The Queen* (1999) 200 CLR 485 at [69] (Gaudron, Gummow and Hayne JJ).

85 *Lawrence* [1933] AC 699 at 708 (Lord Atkin); *Caulfield (a pseudonym) v The King* [2023] VSCA 76 at [38] (Beach, Niall and Kaye JJA).

86 *Caulfield* [2023] VSCA 76, while referring at [38] to "any step in a criminal proceeding" (cited at **CAB 39 [35] fn 31**), concerned the absence of the accused from part of the plea hearing due to the failure of an audiovisual link.

87 *R v Abrahams* (1895) 21 VLR 343 at 346 (Williams J); *Taupati v The Queen* [2017] VSCA 106 at [20]-[26] (Redlich, Santamaria and Ferguson JJA).

justice in any appeal against conviction without the need to consider the effect of the irregularity upon the jury's verdict.[88]

68. The appellant's primary contention is that the introductory meeting was not an irregularity. Even if that is not accepted, the Court of Appeal's analysis of the consequences of any irregularity was wrong.

69. There is no suggestion that the introductory meeting affected the evidence given by the complainant in the special hearing, or that the admission of that evidence would give rise to unfairness. There is no basis upon which a court could rule the recording inadmissible pursuant to s 374(3). Neither the mandatory and discretionary exclusions in ss 135, 137 and 138 of the *Evidence Act 2008* (Vic), nor any common law discretion to exclude evidence that would render the respondent's trial unfair,[89] is engaged.

70. Nor did the Court of Appeal find that the introductory meeting gave rise to any reasonable apprehension of bias (**CAB 46-47 [59]**). No such apprehension could arise given the context of the statutory regime, the presence of both the prosecutor and defence counsel, and the respondent's consent to the meeting.[90] There was therefore no irregularity that vitiated the court's jurisdiction to conduct the special hearing.[91]

71. At most, the introductory meeting could give rise to a procedural irregularity in the respondent's trial. However, the remedy applied by the Court of Appeal was not directed to, and could not cure, such an irregularity. It was instead directed towards an evidentiary irregularity — the wrongful admission of evidence — that did not arise.

72. If a procedural irregularity arises in a criminal proceeding, the power to grant a permanent stay of the proceeding may be available. The power may be exercised where there is a "fundamental defect" of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences,[92] or that is "so profound as to offend the integrity and functions of the court".[93] The Court of Appeal

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88 CPA, s 276; *Baini v The Queen* (2012) 246 CLR 469 at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [65] (Gageler J).

89 See *Police v Dunstall* (2015) 256 CLR 403 at [48] (French CJ, Kiefel, Bell, Gageler and Keane JJ), [59] (Nettle J). The *Evidence Act 2008* (Vic) does not affect the operation of the common law discretion, if it exists: s 9(1).

90 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Charisteas v Charisteas* (2021) 273 CLR 289 at [11] (the Court); cf *LAL v The Queen* [2011] VSCA 111 at [26]-[31] (Buchanan JA, Hansen and Tate JJA agreeing).

91 See *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 at [26] (Kiefel CJ and Gageler J), [92] (Gordon J), [121] (Edelman J), [304] (Jagot J).

92 *Dupas v The Queen* (2010) 241 CLR 237 at [18] (the Court).

93 *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [106] (Kiefel CJ, Bell and Nettle JJ).

did not consider these stringent tests when considering whether the introductory meeting gave rise to a fundamental irregularity in the respondent's trial. Those tests cannot be met by the circumstances of the introductory meeting.

73. Nor could any procedural irregularity said to arise from the introductory meeting give rise to a substantial miscarriage of justice in any appeal against conviction. Regardless of how the respondent's trial unfolds, such an irregularity could not be said to go "to the root of the proceedings",[94] to be "a serious breach of the suppositions of the trial"[95] or "a serious departure from the prescribed processes of trial",[96] or to mean that the proceedings "have so far miscarried as hardly to be a trial at all".[97] The introductory meeting was a brief and benign interaction between the judge, the respondent's counsel, the prosecutor and the complainant. It did not involve the taking of any evidence, the making of any submissions or the determination of any issues. There is no suggestion that anything transpired during the meeting that has occasioned the respondent any unfairness or otherwise affected his ability to receive a fair trial.

PART VII: ORDERS SOUGHT

74. The appellant seeks the following orders:

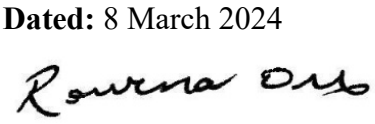
(1) Appeal allowed.

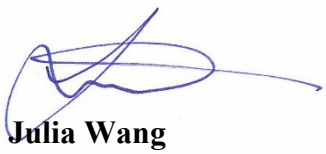
(2) Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 30 November 2023 and, in its place, order that the reserved questions of law be answered: (Q1) No (Q2) No (Q3) No (Q4) Unnecessary to answer.

PART VIII: ESTIMATE OF TIME

75. It is estimated that the appellant will require 2.5 hours for oral submissions.

Dated: 8 March 2024





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94 *Wilde v The Queen* (1988) 164 CLR 365 at 372-373 (Brennan, Dawson and Toohey JJ).
95 *Awad v The Queen* (2022) 275 CLR 421 at [77] (Gordon and Edelman JJ).
96 *Baini* (2012) 246 CLR 469 at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), see also [65] (Gageler J).
97 *Wilde* (1988) 164 CLR 365 at 373 (Brennan, Dawson and Toohey JJ).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

DAVID JOHN SMITH
Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Criminal Procedure Act 2009* (Vic)	92 (incorporating amendments as at 1 January 2023; as in force at time of ground rules hearing and special hearing)	ss 5, 101, 104, 125, 128, 179, 202, 210, 246, 276, 302, 305, 329, 330, 338, 369-376, 389A-389K
		Current	
2.	*Open Courts Act 2013* (Vic)	Current	ss 1, 4, 8A, 8B, 28, 30
3.	*Charter of Human Rights and Responsibilities Act 2006* (Vic)	Current	ss 24, 32
4.	*Evidence Act 2008* (Vic)	Current	ss 9, 135, 137, 138