HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS**
Appellant

and

DAVID JOHN SMITH
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The *first* issue is whether there was statutory power for the the trial judge, together with prosecution and defence counsel, to meet with the complainant in the accused's criminal proceeding out of an open court and in the accused's absence. This issue needs to be answered in the context of the body of legislation in Victoria concerning the principle of open justice and the principle that, as a general rule, the accused be present at every step in their criminal proceeding. There is no provision of the *Criminal Procedure Act 2009* (Vic) (**CPA**) which authorises the holding of the meeting which occurred in this case. The meeting was not authorised by s 389E(1) of the CPA.

3. The *second* issue is whether holding the unauthorised meeting gave rise to a fundamental irregularity in the respondent's trial. The respondent submits that it does.

PART III: SECTION 78B NOTICE

4. The respondent does not consider that notice under s 78B of the *Judiciary Act 1903* is required in this case.

PART IV: MATERIAL FACTS

5. The respondent takes no issue with the material facts set out in the appellant's submissions at [8] to [16].

PART V: ARGUMENT

Statutory framework

6. The respondent disagrees with the appellant's submissions at [24]. Section 389AB of the CPA was not in force at the time of the meeting, so it is not relevant.[1] The section was added to the CPA by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) (**2022 Amending Act**).[2] The 2022 Amending Act also changed the definition of a ground rules hearing from 'a hearing conducted in accordance with Division 1 of Part 8.2A'[3] to 'the meaning given by section 389AB'.[4] In addition to introducing s 389AB, the 2022 Amending Act extended ground rules hearings to *all* sexual offence complainants across Victoria.[5] At the time of the ground rules hearing in this case, the regime only applied to child complainants and complainants with a cognitive impairment.[6] Section 389AB relates to an expanded legislative scheme, and the section and its extrinsic materials are not relevant to the construction of s 389E (or the balance of the CPA) as it was at the time of this case.[7]

7. In addition to the statutory regime set out by the appellant at [17] to [26], three other matters should be noted. First, no statute in Victoria states that the trial judge,[8] together with prosecution and defence counsel, can meet with the complainant in a meeting, out of court, and in the absence of the accused. Second, the meeting held by the trial judge was not only governed by the statutory regime set out in Parts 8.2 and 8.2A of the CPA. Chapter 5 of the CPA also applied to the accused's criminal proceeding, of which the meeting was purportedly a part. Third, the *Open Courts Act 2013* (Vic) (**OCA**), the

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[1] *R v Sieders* (2008) 72 NSWLR 417 at 433 – 436 [134].
[2] Section 70 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) ('2022 Amending Act') is a provision of Division 4 of Part 5 of that Act, which came into operation on 30 July 2023. *2022 Amending Act*, s 2(5).
[3] *Criminal Procedure Act 2009* (Vic) s 3 (definition of 'ground rules hearing') ('*CPA'*)
[4] *2022 Amending Act* s 68. See *CPA* (current) s 3 (definition of 'ground rules hearing').
[5] Across all Victorian courts hearing criminal matters.
[6] This is contrary to what the appellant has submitted at [21] and [22], which is the current legislation. At the time of this ground rules hearing (version 92 of the *CPA*), it was not mandatory to hold a ground rules hearing if a witness was a complainant in relation to a charge for a sexual offence. Firstly, ground rules were only for witnesses who were under the age of 18 or had a cognitive impairment: s 389A(3)(b). Secondly, it was for proceedings that related to sexual offences, conduct that constituted family violence, or indictable offences of assault, injury or threat of injury: s 389A(1). Finally, it was only mandatory to hold a ground rules if an intermediary had been appointed: s 389B(3). If an intermediary had not been appointed, it was a discretionary decision for the court: s 389B(1).
[7] *C v Director-General, Department of Youth and Community Services* [1982] 1 NSWLR 65 at 71; *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347, 360 (Tamberlin J); 369 (Lehane J); *R v Sieders* (2008) 72 NSWLR 417 at 433 – 436 [134].
[8] In this case, her Honour Judge Syme.

Charter of Human Rights and Responsibilities Act 2006 (Vic) (**the Charter**), and the *County Court Act 1958* (Vic) (**County Court Act**) also applied to the accused's criminal proceeding. Each of these Acts give statutory expression to the principle of open justice and to the principle that the accused be present at his trial.

The nature and content of open justice in the statutes

8. It is a defining characteristic of courts that they apply procedural fairness, adhere to the open court principle, and give reasons for their decisions.[9] As McLure P states in *Hogan: Ex parte West Australian Newspapers Ltd*: '[t]he rationale for the ordinary rule and the principle of open justice on which it is based is that exposure of court proceedings to public scrutiny is essential for the maintenance of confidence in the integrity and independence of the courts'.[10] The case law refers to the principle interchangeably as a 'principle' and a 'rule'.[11] But when it is said that the principle of open justice is being infringed, what is being infringed is the rule. The rule is that courts adhere to the principle of open justice.

9. In Victoria the principle of open justice is treated as a fundamental rule of the common law. The operation of the principle of open justice as a rule is reinforced in the various statutes where it is given specific application. It is not improper, as the Court of Appeal did in this case, to speak of the principle of open justice being infringed in the way that a rule can be infringed.

Open Courts Act

10. In *WEQ (a pseudonym) v Medical Board of Australia* it was stated that '[t]he [Open Courts] Act recognises and reinforces the principle of open justice, in respect of … the courts. It provides for the primacy of the principle and authorises departure from it only in specified circumstances'.[12]

11. The OCA[13] provides the rule that court proceedings are conducted in public. It also provides the procedure for closing the Court to the public. While variously expressed as

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[9] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 594 [39] citing *Dickason v Dickason* (1913) 17 CLR 50; *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44] (French CJ and Kiefel J). See also below [64].
[10] *Re Hogan; Ex parte West Australian Newspapers Ltd* (2009) 41 WAR 288 at 296 [33].
[11] Ibid 288 at 296 [32].
[12] *WEQ (a pseudonym) v Medical Board of Australia* (2021) 69 VR 1 at 15 [62] (Kyrou and McLeish JJA).
[13] Version No. 58 of 2013, being the version in force at the time of the meeting.

a 'principle'[14] and 'rules of law',[15] the OCA makes clear that open justice operates on courts (and tribunals) in Victoria as a rule governing the conduct of proceedings.

12. The OCA does not limit or otherwise affect other statutes that prohibit or restrict the publication of proceedings or close the courts to the public.[16] It does not affect the closure of the court for a special hearing under s 372(1)(c) of the CPA. But the meeting complained of in this case was not a special hearing governed by s 371(1)(c). Except for laws identifying a complainant in a sexual offence case[17] and laws relating to *sub judice* contempt,[18] there are no provisions of the CPA that, like s 372(1)(c) for a special hearing, prohibit or restrict the publication of ground rules hearings or pre-trial hearings (or 'steps') – such as the meeting – or close such hearings to the public.

13. In determining whether to make any other order, including a closed court order, courts and tribunals[19] must have regard to the primacy of the principle of open justice and the free communication and disclosure of information which *require* the hearing of a proceeding in open court.[20] A court is only permitted to make a closed court order if the specific circumstances of a case make it necessary 'to override or displace the principle of open justice and the free communication and disclosure of information' which require the hearing of a proceeding in open court.[21] Courts and tribunals are similarly confined when determining whether to make suppression orders: they must have regard to the principle of open justice, and are only permitted to make an order if the specific circumstances of the case so require.[22]

14. Subject to s 28, any power or jurisdiction that a court has apart from the OCA is not limited or affected by the provisions relating to closed court orders in the OCA.[23] If there was any power of the trial judge to exclude the public and/or the accused from the meeting, it had to be exercised subject to s 28. Consideration had to be given to whether

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[14] *Open Courts Act 2013 (Vic)* ss 4, 5 and 28 ('*OCA*').
[15] *OCA* ss 8A and 8B.
[16] *OCA* s 8.
[17] *Judicial Proceedings Reports Act 1958* (Vic), s 4(1A).
[18] *John Fairfax & Sons Pty Ltd v McRae* (1995) 93 CLR 351 at 372.
[19] See definition of 'court' at *OCA* s 3, which includes the County Court of Victoria.
[20] *OCA* s 28(1).
[21] *OCA* s 28(2). While the *OCA* does not limit or affect the inherent jurisdiction of the Supreme Court of Victoria (*OCA* s 5(1)), it abrogates any common law power of courts to make an order prohibiting or restricting the publication of information in connection with any proceeding: *OCA* ss 5(2), 5(3), see also s 3 definition of 'court' which includes the County Court.
[22] *OCA* s 4(2).
[23] Under Part 5, *OCA* s 29.

it was necessary to override open justice. The case stated does not reveal any such consideration.

15. Sections 8A and 8B provide for specific situations that do not contravene the rules of law relating to open justice. In particular, a judgement can be sent electronically,[24] provided the parties are given notice[25] *and* it is made available to the public generally or a member of the public on request.[26] Further, if instead of holding a hearing in a court room or hearing room that is open to the public, the court does any of the things listed at s 8B(1) to ensure public access (even remotely), the rules of law relating to open justice will not be contravened.[27]

16. There was no suppression, closed court, or other orders made under the OCA in relation to the meeting in this case.

The Charter

17. The Charter applies to the accused's criminal proceeding.[28] The Court cannot limit (to a greater extent than is provided for under the Charter) or destroy the human rights of any person.[29] A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors set out at s 7(2).[30]

18. Under s 24, the accused had a right to have the charge against him decided by a competent, independent, and impartial court or tribunal after a fair *and* public hearing.[31] A fair hearing includes the right to a public hearing. That the proceedings were open to scrutiny conveys to the accused, the victim, and the general public that the trial was conducted

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[24] *OCA* s 8A(1)(b).
[25] *OCA* s 8A(1)(a).
[26] *OCA* s 8A(1)(c).
[27] Arranging or providing a contemporaneous audio or audio-visual broadcast of the proceeding or hearing to the public (*OCA* s 8B(1)(a)), or hearing at a reasonable time after the conclusion of the proceeding or hearing to the public generally or a member of the public on request (*OCA* s 8B(1)(b)) or arranging or providing a transcript of the proceeding or hearing within reasonable time after the conclusion of the proceeding or hearing to the public generally or a member of the public on request (*OCA* s 8B(1)(c)).
[28] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3 (definition of 'court') ('*the Charter*'). *The Charter* s 6(2)(a) – *the Charter* applies to courts and tribunals to the extent they have functions under Part 2 ('Human Rights') and Division 3 of Part 3 ('Interpretation of Laws'). Under the *County Court Act 1958* (Vic) ('*County Court Act*'), it has jurisdiction to inquire into hear and determine and adjudge all indictable offences (save for a select few): *County Court Act* s 36A(1). Accordingly, the Court's functions are engaged by Part 2 of *the Charter* insofar as they relate to the exercise of that jurisdiction.
[29] *The Charter* s 7(3), what is an 'entity' is not defined, but a court would reasonably fit within that term given its ordinary meaning.
[30] *The Charter* s 7.
[31] *The Charter* s 24(1).

fairly and in accordance with the law.[32] By ensuring the integrity of judges, a public hearing is thought to produce public confidence in the processes and outcomes of judicial proceedings.[33]

19. Having regard to the text of the provision, s 24 is not confined to an accused's 'trial'. Separate provision is made for circumstances in which an accused must be 'tried' at section 25 of the Charter.[34] A 'trial' is not defined for the purposes of proceedings in the County Court.[35] A court may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than the Charter, such as the OCA or the CPA[36] All judgements or decisions made by a court in a criminal proceeding must be made public unless the best interests of a child otherwise require or a law other than the Charter otherwise permits.[37] The case stated does not indicate whether any judgments or decisions were made at the meeting.

20. Parliament can expressly declare that an Act or provision has effect despite being incompatible with one or more of the human rights set out in the Charter, though this must be announced in parliament[38] and must explain the exceptional circumstances that justify it.[39] Such a declaration may only be made in exceptional circumstances.[40] There was no such declaration in relation to s 389E of the CPA. The Statement of Compatibility to the *Justice Legislation Amendment (Victims) Act 2018* (Vic) (**2018 Amending Act**) (which introduced Pt 8.2A into the CPA) made clear in relation to s 25 of the Charter (rights in criminal proceedings) that 'while intermediaries will assist vulnerable witnesses to communicate, they will not limit the rights of the accused'.[41]

21. All statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.[42] That would include s 389E. The case stated is silent as to whether any consideration was given to the accused's Charter rights in the decision to hold the meeting with the witness in his absence. The

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[32] Frank Vincent, 'Open Courts Act Review' (September 2017), [95].
[33] Frank Vincent, 'Open Courts Act Review' (September 2017), [83], citing Jeremy Bentham, *A Treatise on Judicial Evidence* (J W Paget, 1825) 67.
[34] See: *The Charter* ss 25(1)(c) and (d).
[35] The definition that does appear at *The Charter* s 3 relates to the Magistrates' and Children's Courts.
[36] *The Charter* s 24(2).
[37] *The Charter* s 24(3).
[38] At specific times as set out under *The Charter* s 31(5).
[39] *The Charter* s 31(2).
[40] *The Charter* s 31(3).
[41] Victoria, *Parliamentary Debates,* Legislative Assembly, 13 December 2017, 4357 (Mr Pakula).
[42] *The Charter* s 32(1).

appellant seeks to argue that the meeting was not a hearing. They do not confront the implication of their argument: that section 24 of the Charter would not apply to the meeting because it was not a hearing. That is inconsistent with the express provisions of the of the Charter.[43]

Criminal Procedure Act

22. The respondent takes no issue with the summary of legislative provisions referred to in the appellant's submissions at [18] to [26]. The CPA makes exhaustive provision for when the accused is required to attend or appear at a hearing. If the meeting was a 'hearing', Chapters 5 and 8 of the CPA applied.[44]

23. Section 246 requires the accused to 'attend' all hearings conducted under Chapter 5. This includes pre-trial hearings.[45] 'Attend' means to be physically present in court; or to appear or be brought before the court by audio-visual link if authorised or required.[46] The only exception to this is if the accused is excused by the court under s 330. The Explanatory Memorandum stated that s 246 created an 'express presumption' of the accused's presence at all hearings under Chapter 5.[47]

24. Section 330 provides that an accused must attend a hearing in the criminal proceeding against them if the CPA or rules require it, or unless excused by the Court.[48] No distinction is made under s 330 between 'hearings', 'pre-trial hearings' or 'steps.' Section 330 directs attention back to s 246 in the case of hearings held under Chapter 5. The case stated does not suggest the accused was 'excused' from the meeting.

25. Section 329 requires an accused to 'appear' at every hearing unless otherwise provided under the CPA or the rules, or unless excused by the Court: s 329(3).'Appear' is defined in s 328.[49] An accused can 'appear' personally[50] or via a legal practitioner.[51] Conversely,

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[43] In particular *The Charter* ss 6, 31, and 32.
[44] By virtue of *CPA* s 158(a), Chapter 5 applied because the accused was committed for trial under Chapter 4 of the CPA.
[45] At Part 5.5.
[46] *CPA s 3* (definition of 'attend'). The authorisation or requirement the definition refers to is if authorised or required to do so under Division 2 or 3 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).
[47] Explanatory Memorandum, *Criminal Procedure Bill 2008* (Vic), 91.
[48] *CPA* s 330(1)(a); Also, if if they are remanded in custody or granted bail to attend (s 329(1)), or if the court requires their attendance (*CPA* s 329(3)). *CPA* s 330(3) provides the Court's power to excuse the accused.
[49] *CPA* s 3.
[50] *CPA* s 328(a),
[51] *CPA* s 328 (b).

an accused cannot 'attend' via the attendance of their legal practitioner for the purposes of s 246, and the definition of 'attend'.

26. Under Chapter 8, section 337A, which provides for the court to determine issues without an appearance of the parties, is the only section that contemplates a Judge taking a step in the proceeding (as distinct from the parties taking a step) outside of a hearing.[52] *Inter alia* judges must consider the accused's right to be present at their trial and their right to a fair trial in making a decision under that section.[53] It has no application to the meeting that occurred in this case.[54]

27. Section 389E, considered below, does not permit an accused to be excluded from any hearing, or 'step' in the proceeding. Nothing in that section allowed the meeting to be closed to the public or not recorded. The section also does not limit s 246, or any other section of CPA. There are no other provisions that permitted the accused to be excluded from the meeting, if the meeting was caught by the CPA (which, by arguing the meeting is permitted under s 389E, the appellant agrees it was).

County Court Act

28. County Court Judges may exercise all the jurisdiction vested in the Court 'at any time and place'.[55] However, if Judges purport to exercise the jurisdiction of the County Court, their actions must have the features of the Court's jurisdiction. The County Court is a court of record.[56]

29. 'Proceeding' is defined in the County Court Act as 'any matter in the court'.[57] There is no distinction made in the Act between the Court's character as a court of record during a trial or during any other part of a proceeding.

The nature and content of the principle of open justice

30. The respondent agrees with the appellant's summary of open justice at [33] to [36], but reiterates that the rule is that courts adhere to the principle of open justice.[58]

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[52] *CPA* 337A(2).
[53] Ibid.
[54] *CPA* s 201 also provides for pre-trial issues to be determined without an oral hearing, but once again the Court must consider the accused's right to a fair trial, *CPA* s 201(1B)(a).
[55] *County Court Act* s 3B.
[56] *County Court Act* s 35.
[57] *County Court Act* s 3.
[58] See above [8] to [9].

31. The importance of the principle of open justice cannot be understated. Recently, the former Chief Justice of New South Wales, the Honourable TF Bathurst AC opined that the insistence that justice will be administered by courts who are obliged to apply the law and that they do so in public is the real reason why the principle of open justice has been described on some occasions as a 'constitutional principle' going to the heart of our conception of judicial power.[59]

32. Exposing court proceedings to public scrutiny is of particular importance in criminal cases. As Samuels JA expressed it in *Raybos Australia Pty Ltd and Another v Jones*, the emphatic desirability of public scrutiny of criminal trials is due essentially to the need to protect the accused, whose liberty is, or often is, at stake, against prejudice and unfairness.[60]

33. The appellant argues that Priest JA erred in applying the principle of open justice as a rule because 'he 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'.[61]

34. The appellant's analysis of the principle of open justice cites Lord Diplock in *Leveller Magazine*.[62] The appellant seeks to restrict the rule about open courts to 'hearings' and throughout emphasises the word using italics. But Lord Diplock, at the passage cited, did not use the word 'hearings' nor place emphasis on it in the way the appellant does. Lord Diplock in fact states: '[t]he application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly'.[63]

35. Lord Diplock's focus is 'proceedings in the court itself'. The appellant assumes that the rule only applies to *hearings.* They are mistaken. First, whereas there may be a division in the United Kingdom between proceedings in chambers and proceedings in court, this

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[59] TF Bathurst, 'Handbook for Judicial Officers – Independence, accountability and open justice: "Something more, something less": the contemporary meaning of open justice' (NSW, January 2019)' (NSW, 2019). Citing *R (on the application of Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2029] UKSC 41 at [40] and *Scott v Scott* [1913] AC 417.
[60] *Raybos Australia Pty Ltd and Another v Jones* (1985) 2 NSWLR 47 at 61.
[61] Appellant's submissions [53].
[62] Appellant's submissions [38].
[63] *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450.

division is abolished in the County Court of Victoria.[64] It might be said that this meeting by the judge, and counsel, occurred at a location other than the County Court building, and so even the correct citation of Lord Diplock's formulation would not apply as it was not a proceeding 'in a court'. But a judge of the County Court of Victoria may 'exercise at any time and place all the jurisdiction vested in the court'.[65] If the rule as articulated by Lord Diplock applies to proceedings in the court itself, Priest JA was correct to apply the rule to a proceeding involving the judge exercising the jurisdiction of the Court at another location, namely this meeting at the location of the Child Witness Service. If the judge was not exercising the jurisdiction vested in the court, if they were not acting as a judge, what then was this meeting?

Was the meeting a 'step' or a 'hearing'?

36. The appellant characterises the introductory meeting as a pre-trial process or 'step' governed by Parts 8.2 and 8.2A of the CPA.[66] The appellant submits: as the meeting is not a hearing Chapter 5 (requiring the accused's attendance at hearings) does not apply;[67] the meeting arose out of, but was separate to the ground rules hearing;[68] and was separate to the special hearing.[69] The respondent understands the appellant's position is also that the introductory meeting was not part of the accused's trial.[70]

37. A 'step' in a criminal proceeding is not defined by the CPA. All the other 'steps' in a criminal proceeding to which the appellant refers[71] are undertaken by the parties in the proceeding, not the Judge. They are not steps at which anyone could 'appear' or 'attend' (they all involve the filing or exchange of documents by or between the parties). All those steps are provided for in the CPA. None of the other 'steps' in the CPA involve a judge meeting with a witness outside of Court, in the absence of the accused, where that meeting is not recorded.

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[64] *County Court Act 1958* (Vic) s 3A.
[65] *County Court Act 1958* (Vic) s 3B.
[66] Appellant submissions [17] and [51].
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Appellant submissions [51].
[71] At footnote 65 of the appellant's submissions.

38. There is no definition of 'hearings' in the CPA. But the respondent contends that every interaction between a judge, a witness, and the parties provided for in the CPA is a 'hearing'.

39. The appellant at [39] seeks to highlight the use of the word *hearing*, and then uses the term in a technical sense at [49] and [53] to apply to proceedings where 'the court [is] receiving evidence, hearing argument or deciding any issues'.[72] The appellant's focus on the technical aspect of what the 'hearing' is for – and limiting 'hearings' to proceedings done for that purpose – ignores the other commonality: the judge assembling with the parties as a judge to communicate with them or witnesses. The plain meaning of a hearing is that the judge gathers the parties before the court to *hear* from the parties or a witness. 'Hear' means to perceive sound.[73] 'Hear' includes 'to listen to judicially in a court of law'.[74] There is no justification from the words, context or purpose of the CPA to ignore the general meaning of hearings or to confine the term to the technical meaning the appellant adopts.[75] A hearing is a proceeding in the court itself, at any time or place that the judge is exercising the jurisdiction of the court and has assembled the parties or a witness.[76]

40. The meeting had the hallmarks of a hearing: it was part of the proceeding; it involved the judge convening with the legal practitioners and a witness; it involved perceiving sound by observing and interacting with the complainant 'to say hello';[77] and it involved the judge acting judicially by exercising the jurisdiction of the Court. However, it lacks the features of a hearing as required under Victorian statute (set out above). If the judge was exercising the jurisdiction of the court at the meeting, as they must have been if the hearing was part of the criminal proceeding: it was not open to the public (and there was no statutory basis for it to be closed to the public), if it was in a place the public could not attend it was not recorded or broadcast; no record was made of the proceeding of the court; and it was not in the presence of the accused. So, the meeting was not authorised. If the judge was not exercising the jurisdiction of the court at the meeting, what occurred

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[72] Appellant's submissions, [53].
[73] *Oxford English Dictionary* (2nd ed, 1989) 'hear' (def 1a and 1b). See also *Macquarie Dictionary* (8th ed, 2020) 'hear' (def 1).
[74] *Oxford English Dictionary* (2nd ed, 1989) 'hear' (def 6). See also *Macquarie Dictionary* (8th ed, 2020) 'hear' (def 5).
Oxford English Dictionary (online), definition for 'hear', paragraph 6.
[75] Appellant's submissions, [53].
[76] *County Court Act* s 3B.
[77] Case stated [15], CAB 26.

was not in court and there could be no power for the judge to meet and interact with the complainant.

Absence of the accused

41. The accused was not present at the meeting.[78] The meeting occurred the day before the complainant was to give evidence. So, the accused could not provide his lawyer with any instructions he could have given based on the complainant's demeanor during the meeting. It is an essential principle of our criminal law that the trial of an accused for an indictable offence must be conducted in his or her presence.[79] For this purpose trial means the whole of the proceedings.[80] The accused has no 'right' to be absent from his or her trial, subject to cases of necessity. Conversely, the accused has a right to be present at his or her trial, subject to his or her conduct.[81] Misbehaviour by the accused may warrant their removal,[82] but where an accused is not obstructing the business of the Court, judges have no common law power to order that an accused not be present in court. To do so would undermine accused persons' confidence in the administration of justice.[83]

42. The appellant's submission is that because this meeting was a 'step' and not a 'hearing' the requirement of the CPA that the accused is present at his trial does not apply.[84]

43. The appellant questions, at [65] of their submissions, whether the Court of Appeal has in fact expressly extended the principle that the accused is to be present at their trial to pre-trial hearings or steps. However, that submission does not grapple with the words used by the Court of Appeal in *Caulfield (a pseudonym) v The King* (***Caulfield***): '[a]s a general rule, any step in a criminal proceeding, including the imposition of sentence should occur in the presence of the accused'.[85] That *Caulfield* dealt with a plea hearing does not undermine this statement of principle.

44. The respondent takes issue with the appellant's assertion that Emerton P and Priest JA included the principle that an accused has a right to be present at every stage of the criminal proceeding as part of the principle of open justice. There was no conflating of

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[78] Even if the accused or the complainant had to appeared via videolink so as to not be in the same room.
[79] *Lawrence v The King* [1933] AC 699 at 708 (Lord Atkin); *R v Lee Kun* [1916] 1 KB 337 at 341 (Lord Reading).
[80] Ibid. *Caulfield (a pseudonym) v The King* [2023] VSCA 76, [38] (Beach, Kaye and Niall JJA).
[81] *R v McHardie and Danielson* [1983] 2 NSWLR 733 at 739.
[82] *Eastman v R* (1997) 158 ALR 107; 76 FCR 9.
[83] *O'Donnell v Dawe* [1905] VLR 538, 539 (Hodges J).
[84] Appellant's submissions [48]-[51], [64].
[85] *Caulfield (a pseudonym) v The King* [2023] VSCA 76, [38].

the two principles which led to error. Both Emerton P and Priest JA properly saw the principle of open justice as requiring that the criminal proceeding take place in public.

45. The statement by Priest JA at [35] of the Court of Appeal's Judgement (**CAB 39**) should be read in the context of the facts in *Lawrence v The King* (***Lawrence***)[86] and the whole of the judgment of Lord Atkin in that case. The error in *Lawrence* was the alteration of the sentence in chambers by the judge in the absence of the accused at the request of the Solicitor-General. *Lawrence* did give rise to an open justice consideration because the alteration of sentence was not in court; had it been in court the accused would have been present. *Lawrence* emphasised both the principle of open justice and the principle that an accused has a right to be present at every stage of his trial. This was the way in which Priest JA dealt with it.

46. The conduct of a proceeding can raise both the principle of open justice and the principle that an accused has a right to be present at his trial. This is evident in the structure of Chapter 8 of the CPA. In s 389D the accused is not required to attend the ground rules hearing, but that hearing occurs in open court and the public are not excluded. In contrast, s 372 excludes the public from a special hearing and only permits the presence of persons authorised by the court,[87] but requires that the accused is present in the courtroom.[88] They are two separate principles, but where the CPA is concerned with who is present in a courtroom, both the principle of open justice and the principle that the accused has a right to be present at his trial act as safeguards of the integrity of the proceedings. They are related principles, and both are engaged. A meeting held out of open court, that was not recorded, and in the absence of the accused was bound to require the Court of Appeal to deal with both principles, and the Court of Appeal did not erroneously conflate them in their reasoning.

Section 389E did not permit the meeting

The appellant's characterisation of the meeting

47. The appellant argues that the meeting was authorised by s 389E of the CPA. The respondent disagrees. For the reasons set out above at [36] to [40] the meeting was a hearing. The plain words of sections 246 and 330 of the CPA indicate that the legislature

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[86] *Lawrence v The King* [1933] AC 699, 708.
[87] *CPA* s 372(1)(c).
[88] *CPA* s 372(1)(a).

intended to make exhaustive provision for the attendance of an accused at a hearing in their criminal proceeding. That those express words could be displaced simply by construing the meeting as a 'step' rather than a 'hearing', in the absence of clear statutory words to that effect, finds no support in the text of the CPA. Even if the meeting was not a hearing but a 'step' in the criminal proceeding, the accused still ought to have been present. As discussed above at [43] the Victorian Court of Appeal has held that as a 'general rule' any 'step' in a criminal proceeding should occur in the presence of the accused.[89]

48. The appellant's argument that the meeting was not a hearing would take that meeting outside of the operation of Chapter 5, and Part 8.1 of the CPA. It would leave that meeting without any regulation as to its conduct. Such a position is not consistent with the first stated purpose of the CPA: to clarify, simplify, and consolidate the laws relating to criminal procedure.[90] If such a step were contemplated, given the balance of the relevant provisions of the CPA, the accused's attendance (or provision for him to have been excused), would have been provided for.

Section 389E

49. There is no indication within the text or context of Parts 8.2 or 8.2A that a departure from the laws of criminal procedure beyond the matters provided for therein was contemplated or intended by parliament. Section 389E does not expressly provide for a meeting between the judge and the complainant in the absence of the accused, out of court. The appellant argues that section 389E(1) ought to be construed as authorising the introductory meeting having regard to the 'statutory context'.

50. Reading s 389E consistently with Part 8.1 of the CPA, supports a construction that s 389E was intended to regulate the procedure for hearings *in court.* If s 389E were intended to provide for actions of a judge outside of Court in the absence of the accused, one would have expected express legislative words to that effect.[91]

51. The words 'fair and efficient conduct of the proceeding' are not defined in the CPA, but they are also used at s 181 of the CPA, which provides that at a directions hearing, the court may make or vary any direction or order, or require a party to do anything that the

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[89] *Caulfield v the King* [2023] VSCA 76, [38]. See also: *DPP v Smith* [2023] VSCA 293, [35]; *Taupati v the Queen* [2017] VSCA 106, [21].
[90] For the Supreme, County and Magistrates' Courts: *CPA* s 1(a).
[91] Perhaps along the lines of ss 201 or 337A of the *CPA*, or ss 8A and 8B of the *OCA*.

court considers necessary, for the fair and efficient conduct of the proceeding.[92] Section 389E, unlike s 181, does not include the phrase: 'or require a party to do anything that the court considers necessary'. Section 389E empowers the Court to make or vary directions. It does not empower the court to 'do anything.' Sub-section (2) provides for the directions that may be given. While sub-section (2) does not limit sub-section (1), it is relevant to the construction of sub-section (1) that each of the directions at (2) relate to the regulation of the witness's evidence *in court.*

52. The respondent does not cavil with the notion that 'fairness' in the context of s 389E encompasses fairness to a witness during their evidence, as well as fairness to the accused. However, the respondent's submission is that the ambit of s 389E, when read in its proper context, does not permit such a meeting.

53. As part of the relevant context to s 389E, the appellant refers to s 372 governing special hearings.[93] Section 372 (or any of the other provisions regulating special hearings) do not confer legislative imprimatur on the meeting: it was not part of the special hearing. If it was, the accused was required to be present when it occurred. Even at the special hearing, which is designed to 'create an environment that is as protective and private' as possible,[94] the accused is required to be present, the hearing is to be recorded, and takes place in Court. Section 372 does not support a meeting out of court, in the absence of the accused, that is not recorded.

54. The Explanatory Memorandum to the 2018 Amending Act provides that ground rules hearings are used to 'discuss and establish how certain witnesses will be enabled to give their best evidence'.[95] In the explanatory note to s 389B(3), the memorandum provides that where an intermediary is appointed, ground rules hearings 'are essential as they will determine the degree and extent to which the intermediary will interact with the witness and the court'.[96] The memorandum states that s 389E 'does not limit the inherent powers of the courts to make directions or conduct proceedings'.[97] There is no mention of introductory meetings, or any procedural 'step' between the ground rules and special

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[92] *CPA* s 181(2) sets out directions a Court may give, without limiting the Court's powers. Each of those directions concern the actions of the parties, save for (2)(c) which permits the Court to set a timetable for hearing pre-trial issues or applications.
[93] Appellant's submissions, [58].
[94] Appellant's submissions, [58].
[95] Explanatory Memorandum, *Justice Legislation Amendment (Victims) Bill 2017* (Vic), 13.
[96] Ibid 14.
[97] Ibid 15.

hearings. There is no mention of introductory meetings in the Second Reading Speech to the 2018 Amending Act.[98] The intermediary's function is to communicate or explain to a witness questions put to the witness, and to a person asking a witness questions, the answers given by the witness in reply.[99] The Explanatory Memorandum states 'This is only to be done to the extent necessary to enable understanding'.[100] Intermediaries are intended to 'ease some of the stresses of questioning so that vulnerable witnesses are better able to provide accurate evidence'.[101] They are impartial officers of the court.[102] They are not advocates or support workers, their role is to facilitate communication with the witness (both at the police interview and the trial stage)'.[103]

55. In this case, the complainant 'told the intermediary' that it would 'assist her confidence' to meet counsel and the judicial officer 'in person on the day she gives evidence if possible.' (**CAB, 25[11]).** The judge stated the purpose of the meeting was to 'say hello' (**CAB 26, [15]**). There is nothing in the case stated to indicate that there was any discussion with the parties or consideration given by the trial judge as to how the meeting was connected to the fair or efficient conduct of the proceeding. Further, there are no facts that support a finding that in order to fulfill the aims of fairness and efficiency, the meeting had to be outside the courtroom, not be recorded, and take place in the absence of the accused.[104]

56. In the present case, Emerton P engaged the principle of legality in support of the view that there is nothing in the CPA to suggest, outside of an open court hearing, in the presence of the accused, the judge should (or even may) undertake the therapeutic role of putting a vulnerable witness at ease. Emerton P's reliance upon the statement by French

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[98] Victoria, *Parliamentary Debates,* Legislative Assembly, 13 December 2017, 4359 (Mr Pakula): 'Ground rules hearings are a pre-trial process that involve all parties and the judge to address a number of issues, including the manner and content of cross-examination. Ground rules hearings are important in bringing to the attention of lawyers and judicial officers the comprehension capacity and assisting parties to plan their questions. […] If a ground rules hearing is held effectively, there should be less need for an intermediary to intervene during cross-examination'.
[99] *CPA* s 389I.
[100] Explanatory Memorandum, *Justice Legislation Amendment (Victims) Bill 2017* (Vic), 17.
[101] Ibid.
[102] *CPA* s 389I(2).
[103] Victoria, *Parliamentary Debates,* Legislative Assembly, 13 December 2017, 4359 (Mr Pakula). In a criminal proceeding for a charge for a sexual offence (*CPA* s 359(1)(a)), the Court may direct alternative arrangements for the giving of evidence by a witness, and this includes: "permitting a person, chosen by the witness and approved by the court for this purpose, to be beside the witness while the witness is giving evidence, for the purpose of providing emotional support to the witness' (*CPA* s 360(c)). There is a presumption that the Court orders the provision of a support person if the witness is a complainant in such a proceeding (*CPA* s 365(1)).
[104] Accepting that the accused would not be in the same room as the complainant, and so may have to attend the meeting via remote videolink.

CJ in *Hogan v Hinch* was correct. Contrary to the appellant's submissions, the broad power in s 389E(1) should be construed to *not* permit the meeting which was held. At [60], the appellant asserts that the objective of the introductory meeting was 'to ameliorate the complainant's anxiety prior to giving evidence'. The appellant seems to accept that the Judge was undertaking a 'therapeutic role' in conducting the meeting. That is not permitted by s 389E, or its context.

57. The case stated does not permit of the inference that the accused was permitted to attend the meeting, as distinct from his lawyer.[105] At [65] of the appellant's submissions it is submitted the accused waived his right to be present at the meeting. In doing so, the appellant refers to Priest JA in the Court of Appeal: 'the general rule that unless an accused person has waived his or her right to be present – for example by absconding – any step in a criminal proceeding must occur in his or her presence.'[106] Further, as Lander J observed in *R v Jones*: 'It is difficult to imagine a circumstance where an accused has truly waived his right to be present during the trial but has instructed counsel to remain to protect the accused's interest.'[107]

58. There was no waiver by the accused of his right to be present at the meeting. There is nothing in the case stated to suggest the accused was excused from attending the meeting. For an accused to properly waive a right to be present at a hearing the decision to waive must be a well-informed, voluntary, and intentional one. The fact that his counsel had no objection to the meeting, and attended it, does not mean that the respondent waived his right to be present at the meeting.

Principle of legality in construing s 389E

59. As his Honour French CJ noted in *Hogan v Hinch*: 'the principle of legality will favour a construction which *consistently with the statutory scheme,* has the least adverse impact upon the open justice principle'.[108] Regard must be had to the principle of legality in construing s 389E.

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[105] By virtue of the '*Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearing'* (**Pilot Guide**) the accused, as Emerton P said in the Court of Appeal, 'had no choice but to stay away' (CAB 32, Court of Appeal Judgment, [7]). The terms of the Pilot Guide are referred to by Priest JA at [17] of the Court of Appeal Judgment (CAB 34, Court of Appeal Judgment, [17]).
[106] Court of Appeal Judgement CAB 39, [35].
[107] *R v Jones* (1998) 108 A Crim R 399, 414 (Prior and Wicks JJ agreeing).
[108] (2011) 243 CLR 506 at 526 [5] (French CJ). Cited by Emerton P in the Court of Appeal, [9], CAB 32 (emphasis added).

60. The appellant submits there is 'little if any' room for the principle of legality to operate on s 389E(1) because construction choices are not open.[109] However, construction choices *are* open in this case – namely, whether s 389E permitted the meeting to occur. The appellant cannot displace the operation of this fundamental principle of statutory interpretation by submitting their construction of s 389E is correct, in circumstances where the legislation does not expressly provide for that construction, and where that construction, on the respondent's submission, is not consistent with the text and context of the provision.

61. There is no intention expressed, let alone one expressed with 'irresistible clearness' that s 389E was intended to permit an infringement of open justice. This case can be distinguished from *North Aboriginal Justice Agency Ltd v Northern Territory* where the evident statutory object in the legislation considered in that case was to authorise the deprivation of liberty 'and the statutory language in question is squarely addressed to the duration of that deprivation of liberty'.[110] As his Honour Justice Gagelar stated in that case (in dissent) the principle of legality exists to protect from 'inadvertent and collateral alteration' to principles.[111]

62. The objects, terms and context of s 389 do not make plain that the legislature turned its mind to the question of the abrogation or curtailment of open justice that results from a meeting of the kind that occurred in this case. Any such curtailment would be 'inadvertent, and collateral', which the principle of legality exists to protect against.[112] Certainly, the legislature has turned its minds to processes *in court* regarding vulnerable complainants, but those aims cannot produce a construction of s 389E that permits a meeting that infringes the open justice principle.

63. There is no incongruity between s 372 and a construction of s 389E that did not permit this meeting: s 372 explicitly provides for the accused's presence at a special hearing, and for that hearing to be recorded. The only incongruity that would arise would be if s 389E were construed as requiring the complainant and the appellant to be physically in the same room. That has not been suggested.

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[109] Appellant submissions, [61].
[110] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 606 [82].
[111] Ibid [81].
[112] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 606 [81] (Gagelar J (in dissent)).

64. That courts sit in public is an aspect of the rule of law.[113] The open justice principle has been affirmed as 'an essential aspect' or 'characteristic' of the character of state courts.[114] It is enshrined in the OCA, and the Charter. Parliament has not sought to limit the principle by permitting a meeting of the kind that occurred here. Parliament have not said anything about such a meeting at all. It was not permitted by s 389E. To the contrary, parliament has, through the CPA, the OCA and the Charter, made explicit that criminal proceedings are to be held in public, and in the presence of the accused, other than in specific circumstances that are provided for.

Fundamental irregularity

65. The issue which arises under the third question reserved by the case stated is whether the occurrence of the meeting represented a fundamental irregularity in the trial process, such as to constitute a serious departure from accepted trial processes.

66. In *Baini v The Queen*[115] Gageler J considered the similarities and differences in language, and the difference in structure, between section 276 of the CPA and the common form criminal appeal statute.[116]

67. The focus of section 276 of the CPA was sharper in the light of uncertainties that had come about in the application of the common form appeal statute following *Weiss v The Queen.*[117] The criterion in paragraph (b) of section 276(1) that there has been 'an error or irregularity in, or in relation to, the trial' is only satisfied if the appellant establishes that the identified error or irregularity has had the result that there has been a substantial miscarriage of justice. His Honour explained that the first category, relatively narrow in compass, is where the error or irregularity has impacted on some fundamental aspect of trial process: where there has been non-observance of some condition essential to a satisfactory trial. The Explanatory Memorandum to the *Criminal Procedure Bill 2008* (Vic) explained that errors or irregularities of a fundamental kind depriving the appellant

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[113] *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [48].
[114] *Ibid* [49]; *Russell v Russell* (1976) 134 CLR 495; *Dickason v Dickason* (1913) 17 CLR 50*; Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J)*; Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44] (French CJ and Kiefel J).
[115] (2012) 246 CLR 469.
[116] Ibid [42] to [79]. His Honour was in dissent as to the result, but not as to the law.
[117] (2005) 224 CLR 300.

of a fair trial or amounting to an abuse of process ought to result in an appeal being allowed regardless of whether it could have made a difference to the trial outcome.[118]

68. There has been no trial in this case. However, the employment by the Court of Appeal of at least some of the language of criminal appeal legislation is unsurprising given the terms of the third question reserved for the Court's consideration.

69. The meeting did represent a failure to observe the requirements of the criminal trial process in a fundamental respect. The meeting was not authorised by any provision of CPA. It was not in a court. It was not open to public scrutiny. It was in the absence of the accused. The purpose of the meeting was to assist the confidence of the witness in giving evidence, a matter which, outside the confines of an open court hearing, is not the function of the judge. The meeting gives rise to a concern that justice has not been seen to be done. Following the meeting, the next day, the judge presided at the most important part of the trial where the complainant gives evidence and is cross-examined, and the judge may be called upon to decide questions of the admissibility of the complainant's evidence.[119] These factors, taken collectively, were a serious departure from prescribed processes of a criminal trial.

70. The Court of Appeal was correct that the only remedy was for the evidence of the complainant to be taken at a further special hearing before a different judge. This result was inevitable once fundamental irregularity was found for the reasons articulated.[120]

PART VI: NOTICE OF CONTENTION

71. There is no notice of contention or notice of cross-appeal in the case.

PART VII: ESTIMATE

72. The respondent estimates 1 hour will be required for its oral submissions.

Dated 22 March 2024

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[118] Explanatory Memorandum, *Criminal Procedure Bill 2008* (Vic), 102.
[119] *LAL v The Queen* [2011] VSCA 111 at [34] (Buchanan, Hansen and Tate JJA), citing *R v Balick (No 2)* (1994) 75 A Crim R 515, 520 (Cole JA).
[120] Above at [69].

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS**
Appellant

and

DAVID JOHN SMITH
Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the respondent 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 3, 158, 181, 201, 246, 328, 329, 330, 337A, 359, 360, 365, 372, 389D, 389E, 389I,
		Current	ss 3, 389AB
2	*Open Courts Act 2013* (Vic)	15 (incorporating amendments as at 7 September 2022; as in force at the time of ground rules hearing and special hearing)	ss 3, 4, 5, 8A, 8B, 28, 29, 31
3	*Charter of Human Rights and Responsibilities Act 2006* (Vic)	Current	ss 3, 6, 7, 24, 25, 31, 32
4	*County Court Act 1958* (Vic)	191 (incorporating amendments as at 29 March 2022; as in force at the time of ground rules hearing and special hearing)	ss 3, 3B, 35

5	*Evidence (Miscellaneous Provisions) Act 1958* (Vic)	Current	Division 2 or 3 of Part IIA
6	*Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic)	Introduction print.	s 70
7	*Justice Legislation Amendment (Victims) Act 2018* (Vic)	Introductory print	s 25
8	*Judicial Proceedings Reports Act 1958* (Vic)	Current	s 4(1A)
9	*Criminal Procedure Bill 2008 (Vic)*	Introductory print	Explanatory Memorandum
10	*Justice Legislation Amendment (Victims) Bill 2017 (Vic)*	Introductory print	Explanatory Memorandum