HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 28 Mar 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M16/2024
File Title:	Director of Public Prosecutions v. Smith
Registry:	Melbourne
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	28 Mar 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

DAVID JOHN SMITH
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

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

PART II: REPLY

Issues

2. The Court of Appeal held that the *Criminal Procedure Act 2009* (Vic) (**CPA**) did not authorise an introductory meeting between a judge and complainant in the presence of the prosecutor and defence counsel and in the absence of the accused: **AS [28]-[29]**; and see **RS [2]**. At various points, the respondent appears to make submissions going to the different issue of whether the judge properly exercised any power to meet with the complainant: see **RS [14], [21], [55]**. In the absence of a notice of contention (**RS [71]**), these submissions are not relevant in the appeal.

The nature and content of the principle of open justice

3. The respondent describes the principle of open justice as giving rise to a "rule … that courts adhere to the principle of open justice": **RS [8], [30]**. This is circular. It is unclear what it means to "adhere to the principle of open justice", or what the consequences may be for failure to abide by this rule. The respondent appears to reject any distinction between open justice as a principle and as a rule (**RS [8], [11]**), but does not respond to the appellant's submissions at **AS [43]-[45]** about the different ways in which open justice may be applied. The respondent's assertion at **RS [11]** that the *Open Courts Act 2013* (Vic) uses "principle" and "rule of law" interchangeably when referring to open justice is incorrect. The Act describes the principle of open

justice in a broad way in s 1(aa), by reference to its rationale. The Act then makes clear that the principle may manifest in requirements (s 28) or rules of law (ss 8A, 8B). This is consistent with the appellant's conceptual framework at **AS [43]-[45]**.

4. Ultimately, it appears that the respondent conceives of open justice as a rule that all "proceedings in the court itself", not just hearings, must take place in open court to which the public has access: see **RS [30], [34]-[35]**. The phrase "proceedings in the court itself" is taken from Lord Diplock's statement of the rule in *Attorney-General v Leveller Magazine Ltd*.[1] The respondent submits that his Lordship was not referring to a hearing (**RS [35]**), notwithstanding the words "in the court itself".[2] The respondent does not address the cases cited in **AS [39]** that describe open justice by reference to hearings. The respondent also does not address the *Open Courts Act* in this context: see **AS [39]**. The Act states that the principle of open justice requires "the *hearing* of a proceeding in open court" (emphasis added): s 28(1), (2). On the respondent's argument, the Act must, contrary to what was stated in *WEQ (a pseudonym) v Medical Board of Australia*,[3] enshrine a narrower conception of the requirements of open justice than at common law: see **RS [10]**. The respondent's submissions do not explain this incongruity. The respondent's assertion that the Act "provides the rule that court proceedings are conducted in public" (**RS [11]**) does not reflect the provisions of the Act.

5. That the open court requirement is limited to hearings is supported by s 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). As **RS [18]** notes, and consistently with the common law and the *Open Courts Act*, s 24(1) of the *Charter* enshrines a right to a "fair and public *hearing*" (emphasis added).[4] The section does not advance the respondent's argument, other than as another embodiment of the ordinary or general rule that hearings be open to the public: see **AS [37]-[39]**; *contra* **RS [19]-[21]**.

---

1 [1979] AC 440 at 450.

2 It is unclear how the *County Court Act 1958* (Vic) ss 3A and 3B could bear upon the proper understanding of Lord Diplock's words: *contra* **RS [35] fns 64-65**.

3 (2021) 69 VR 1 at [62] (Kyrou and McLeish JJA).

4 The respondent submits that "[a] fair hearing includes the right to a public hearing" (**RS [18]**), but it is plain from the use of the word "and" in s 24(1) that the section considers a "public" hearing to be a separate and additional requirement to a "fair" hearing: see also **AS [41]**.

6. That the requirement of open justice is for *hearings* to ordinarily be conducted in open court is therefore supported by both case law and statute. This then raises the question of what a "hearing" is, and whether the introductory meeting was a hearing.

7. The respondent submits that the introductory meeting "had the hallmarks of a hearing" but "lack[ed] the features of a hearing as required under Victorian statute": **RS [40]**. The respondent submits that 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": **RS [40]**. The respondent uses the phrase "proceeding in the court itself" to mean any proceeding "involving the judge exercising the jurisdiction of the Court": **RS [35]**. Thus, the respondent's definition of a "hearing" reduces to two limbs: (1) the judge is exercising the jurisdiction of the court; and (2) the judge has assembled the parties or a witness.

8. As to the first limb, the respondent appears to equate the exercise of jurisdiction with "acting as a judge": see **RS [35]**. It may be accepted that a hearing is one setting in which a judge acts in his or her role as a judge. There are, however, various situations in which a judge may perform his or her role "on the papers" or otherwise outside the courtroom.[5] The fact that the judge was acting as a judge at the introductory meeting therefore does not answer the question of whether the meeting was a hearing. The respondent's suggestion (**RS [19]**) that it is possible that a judgment was given or decision was made at the introductory meeting finds no basis in the facts of the case stated.[6]

9. As to the second limb, it is the appellant's submission that, in order to constitute a hearing, the judge's assembly of the relevant individuals must have a purpose directed to the receipt of evidence, the hearing of argument, the making of orders or the deciding of issues: see **AS [49]**. In contrast, the introductory meeting was merely for the complainant to "say hello": **CAB 26 [15]**. And even if the assembly of the judge, prosecutor, defence counsel and the complainant without a relevant purpose was thought to necessarily constitute some form of "hearing" (which it should not be), there would be no basis for such a "hearing" to engage the rationale for the principle of open justice: **AS [61]**.

---

5 See, eg, CPA ss 201 and 337A; *Judiciary Act 1903* (Cth) s 16.

6 No issue was raised about the introductory meeting at the special hearing the next day: **CAB 26 [19]**. As noted at **AS [8] fn 2**, this Court is confined to the facts of the case stated and any implications that may be drawn from them.

10. Contrary to the respondent's submissions, acceptance that the meeting is a step in the proceeding that does not constitute a hearing does not "leave that meeting without any regulation as to its conduct": **RS [48]**. For example, the bias rule derived from the principle of natural justice applied to the meeting, although the meeting in this case did not give rise to any apprehension of bias: **AS [70]**.

Construction of s 389E

11. The respondent's submissions emphasise the absence in s 389E(1) and the extrinsic materials of any express reference to an introductory meeting of the kind that took place here: **RS [49]-[50], [54]**. Those submissions do not address the breadth of the text in s 389E(1) that the court "may make … any direction": cf **RS [51]** seeking to contrast s 181(1). Section 389E(1) was intended to authorise a broad range of measures that address a vulnerable witness's needs to ensure the fair and efficient conduct of the proceeding: **AS [57]-[60]**. That purpose would not be achieved if the provision were required to list every possible such measure.

12. The respondent appears to implicitly accept that, in light of s 372, it would be incongruous to require *the public* to be permitted access to the introductory meeting: see **RS [53], [63]**. In those circumstances, it is unclear how the principle of open justice can have any work to do. The respondent's arguments about the principle of legality, while framed as being related to open justice (**RS [59], [64]**), instead focus on the presence of the accused (**RS [53], [63]**). This is a conflation of what the respondent accepts (**RS [46]**) are separate principles with distinct rationales: see **AS [41]**.

13. The appellant does not accept that the judge in this case was undertaking a "therapeutic role": *contra* **RS [56]**. Rather, the judge was acting in accordance with a direction made under s 389E(1) for the fair and efficient conduct of the proceeding.

Other matters

14. The respondent's submission that the right of an accused to be present extends beyond his or her trial to pre-trial steps is based entirely upon the broad language used in *Caulfield (a pseudonym) v The King*:[7] **RS [43]**. The Court in *Caulfield* did not purport to determine the scope of the right and did not consider pre-trial steps. *Caulfield* is an unsound basis for significantly expanding a common law right that has long been

---

7 [2023] VSCA 76 at [38] (Beach, Niall and Kaye JJA). **RS [47] fn 89** also cites *Taupati v The Queen* [2017] VSCA 106 at [21] (Redlich, Santamaria and Ferguson JJA), but that passage does not contain anything supporting the extension of the right to pre-trial steps.

understood to be concerned with an accused's presence at trial and sentence: **AS [65]**.

15. The respondent's submissions appear to assume that if the meeting was a hearing, s 246 of the CPA would apply: **RS [47]**. However, this does not address the language of s 246, which requires the accused to attend all hearings "conducted *under*" Chapter 5 (emphasis added).

16. To be clear, the appellant's submission regarding the construction of s 389E(1) does not depend upon s 389AB: cf **RS [6]**.[8] Section 389AB merely confirms[9] the construction of s 389E(1) reached by considering text, statutory context and purpose at the time of the ground rules hearing in this case: **AS [57]-[60]**.

Dated: 28 March 2024



Rowena Orr
Solicitor-General for Victoria
(03) 9225 7798
rowena_orr@vicbar.com.au

Stephanie Clancy
Crown Prosecutor
(03) 9603 7666
stephanie.clancy@opp.vic.gov.au

Julia Wang
(03) 9225 6439
julia.wang@vicbar.com.au

---

8 On the use of later legislation to shed light on the construction of earlier legislation, see, eg, *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626 (Dixon, Evatt and McTiernan JJ); *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 77 (Latham CJ), 85-86 (Dixon J); *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255 (Dawson J); *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539 (McHugh J); *Commissioner of State Revenue (Vic) v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at [51]-[52] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284 at [141] (Hayne J). See also the review of the authorities in *R v Sieders* (2008) 72 NSWLR 417 at [118]-[128] (Campbell JA, James and Johnson JJ agreeing).

9 The expansion of the ground rules regime to all sexual offence complainants (referred to at **RS [6]**) was not intended to alter the operation of the regime: Explanatory Memorandum, Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic) at 62.