

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
EDELMAN, GLEESON, JAGOT AND BEECH-JONES JJ

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DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

DAVID JOHN SMITH

RESPONDENT

*Director of Public Prosecutions v Smith*  
[2024] HCA 32  
*Date of Hearing: 18 April 2024*  
*Date of Judgment: 11 September 2024*  
M16/2024

## ORDER

- Appeal allowed.*
- Set aside the order made by the Court of Appeal of the Supreme Court of Victoria on 30 November 2023 and, in its place, the reserved questions of law be answered as follows:*

- Did the meeting infringe the principles of open justice as identified in Alec (a pseudonym) v The King [2023] VSCA 208?*

It is unnecessary to answer the question as it does not arise in the proceeding.

- Did the meeting bring the impartiality of the presiding judge into question?*

It is unnecessary to answer the question as it does not arise in the proceeding.



2.

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?*

No.

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?*

It is unnecessary to answer the question as it does not arise in the proceeding.

On appeal from the Supreme Court of Victoria

### **Representation**

L T Brown SC with S C Clancy and J R Wang for the appellant (instructed by Office of Public Prosecutions (Vic))

P F Tehan KC with G J F Chisholm and B A Myers for the respondent (instructed by James Dowsley & Associates)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Director of Public Prosecutions v Smith**

Criminal practice – Questions of law arising before trial – Questions of law referred to Court of Appeal – Case stated – Where accused charged with sexual offences against child under 16 years – Where judge and counsel for both prosecution and accused met with complainant before complainant gave evidence at "special hearing" – Where complainant was a minor – Where s 389E(1) of *Criminal Procedure Act 2009* (Vic) provides that "[a]t a ground rules hearing, the court may make or vary any direction for the fair and efficient conduct of the proceeding" – Where accused not present at meeting and meeting not recorded – Where meeting occurred consequent to recommendation of intermediary appointed under s 389J(1) of *Criminal Procedure Act 2009* (Vic) – Whether meeting authorised by s 389E(1) – Whether meeting inconsistent with principle of open justice – Whether meeting a fundamental irregularity – Whether as a result of meeting fair-minded lay observer might reasonably apprehend that judge might not bring impartial mind to resolution of any issue required to be decided in proceeding.

Words and phrases – "apprehension of bias", "exercise of judicial power", "fair and efficient conduct of the proceeding", "fair-minded lay observer", "fundamental irregularity", "ground rules hearing", "hearing", "impartiality", "intermediary", "introductory meeting", "minor", "principle of open justice", "proper administration of justice", "special hearing", "substantial miscarriage of justice".

*Charter of Human Rights and Responsibilities* (Vic), ss 24, 28, 32.

*Criminal Procedure Act 2009* (Vic), Pts 5.7, 8.2, 8.2A; ss 246, 276, 330, 389B, 389E, 389I, 389J.

*Open Courts Act 2013* (Vic), ss 28, 30.



1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. This appeal concerns the operation of provisions of Pt 8.2A of the *Criminal Procedure Act 2009* (Vic) which apply to criminal proceedings for sexual offences if a witness (including a complainant) is under the age of 18 years or has a cognitive impairment.<sup>1</sup> The grounds of appeal concern whether the Court of Appeal of the Supreme Court of Victoria (Emerton P, Priest and Macaulay JJA) was correct to hold that a meeting between the complainant, the judge, and counsel for both the prosecution and the accused (the accused being the respondent to this appeal), on the day before the judge presided over a special hearing to take the evidence of the complainant, was: (a) not authorised by s 389E of the *Criminal Procedure Act*; (b) inconsistent with the principle of open justice; and (c) a fundamental irregularity in the accused's trial that could not be waived.

2 The appeal must be allowed. As will be explained, the meeting was authorised under s 389E(1) of the *Criminal Procedure Act* and did not give rise to any fundamental irregularity in the criminal proceeding. Although the meeting created a risk of an irregularity because of what could have occurred at the meeting, no such irregularity in fact occurred.

## Background

### *The charge*

3 The accused was charged with three offences of sexual assault of a child under 16 years contrary to s 49D(1) of the *Crimes Act 1958* (Vic) and one offence of sexual penetration of a child under 16 years contrary to s 49B(1) of that Act. A response filed on behalf of the accused under s 183 of the *Criminal Procedure Act* indicated that he would be pleading not guilty to all the charges.

### *The meeting*

4 Purportedly pursuant to the provisions of Pt 8.2A (Ground rules hearings and intermediaries) of the *Criminal Procedure Act*, specifically s 389E of that Act, a judge in the County Court of Victoria, Judge Syme, and counsel for both the prosecution and the accused (as well as, we infer, the appointed intermediary) met with and were introduced to the complainant (who was a minor at the time the

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1 *Criminal Procedure Act 2009* (Vic), s 389A(3). From the commencement of the relevant section of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) on 30 July 2023, those provisions apply to any witness who is a complainant in relation to a charge for a sexual offence. See *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), ss 69, 2(5).

criminal proceeding was commenced and remained so at the time of the meeting), before the complainant gave evidence at a "special hearing" under Pt 8.2 of the *Criminal Procedure Act*.<sup>2</sup> The meeting occurred at the offices of the Child Witness Service. The accused was not present at that meeting, and the meeting was not recorded.

- 5 The meeting occurred as a result of a recommendation in a report of an intermediary appointed under s 389J(1) of the *Criminal Procedure Act*, which recorded that the complainant told the intermediary that it would assist her confidence to meet counsel and the judicial officer in person on the day she was to give evidence if that was possible. At the time of directing that the meeting occur, Judge Syme said that the purpose of the meeting was for the complainant to "say hello", and counsel for the accused confirmed he had no objection to the meeting and that he was content to introduce himself to the complainant at the same time. The accused had not been arraigned at the time of the meeting.<sup>3</sup>

*The special hearing*

- 6 The special hearing required to be conducted under s 370 of the *Criminal Procedure Act* at which the complainant gave evidence, including being cross-examined, occurred before the same judge on the day after the meeting. No mention was made about the meeting during the special hearing.

*Alec (a pseudonym) v The King*

- 7 After the special hearing, the Court of Appeal of the Supreme Court of Victoria (Priest, Walker and Taylor JJA) published reasons for judgment in *Alec (a pseudonym) v The King* ("*Alec*").<sup>4</sup> In that matter the Court of Appeal set aside the conviction of an accused on the ground that a substantial miscarriage of justice occurred because the judge who conducted the special hearing met with the complainant "privately" (that is, in the presence of the intermediary but in the absence of counsel for the prosecution and the accused) in advance of that hearing. The Court of Appeal concluded that the private meeting between the judge and the

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2 *Criminal Procedure Act 2009* (Vic), Pt 8.2, Div 6, provides for special hearings in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence if at the time the proceeding was commenced the complainant was under 18 years of age or had a cognitive impairment (s 369).

3 *Criminal Procedure Act 2009* (Vic), s 217.

4 (2023) 72 VR 161.



3.

complainant was a "fundamental irregularity"<sup>5</sup> which "tainted" the evidence the complainant gave in the special hearing,<sup>6</sup> as it gave rise to a "suspicion [in the sense of an apprehension] of partiality" on the part of the judge.<sup>7</sup> Accordingly, the Court of Appeal set aside the conviction and ordered a re-trial on the basis that, as set out in s 276(1)(b) of the *Criminal Procedure Act*, it was satisfied that "as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice".<sup>8</sup>

*Prosecution applies for questions of law to be reserved*

- 8        After the judgment in *Alec* was published, the criminal proceeding in this matter was listed before a different judge from the judge who had attended the meeting and conducted the special hearing. The accused's counsel submitted that, given the reasoning in *Alec*, the recording of the special hearing should not be admitted into evidence at the trial of the accused and that a new special hearing should be held before a different judge. Counsel for the prosecution submitted that *Alec* was distinguishable on the facts as counsel for both the prosecution and the accused were present at the meeting with the complainant in this matter so the evidence of the recording of the special hearing was admissible evidence in the trial. The prosecution subsequently applied for the County Court to reserve a question of law arising before the trial for determination by the Court of Appeal pursuant to s 302 of the *Criminal Procedure Act*.

*Questions of law reserved*

- 9        The judge deciding the application under s 302 reserved questions of law for determination of the Court of Appeal by order dated 10 November 2023, being satisfied that it was in the interests of justice to do so. Annexure A to the order is a document entitled "Circumstances in which the questions have arisen". This document accords with the requirement in s 305(1) of the *Criminal Procedure Act*, which provides that if "a court reserves a question of law ... it must state a case, setting out the question and the circumstances in which the question has arisen".

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5     *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 164 [20].

6     *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 166 [26].

7     *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 167-168 [32]-[33].

8     *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 168-169 [35]-[38].

4.

10 Annexure B to the order, entitled "Questions of law to be reserved", is in these terms:

"In circumstances where the presiding judge at the special hearing held pursuant to Division 2 of Part 8.2 of the *Criminal Procedure Act 2009* met with the child complainant prior to the complainant giving evidence at the special hearing for the purpose of introducing herself to the child, and where:

- a) the meeting occurred at the offices of the Child Witness Service;
- b) the meeting was not recorded;
- c) the meeting between the complainant and the judge was also attended by the legal representative for the accused and the legal representative for the prosecution;
- d) the meeting occurred with the consent of both the prosecution and defence counsel; and
- e) the accused was not present at the meeting.

**Questions:**

- 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?"

*Court of Appeal's answers to reserved questions of law*

11 The Court of Appeal answered these questions as follows:

Question 1: Yes.

5.

Question 2: Unnecessary to answer.

Question 3: Yes.

Question 4: Yes.

- 12 Priest JA (with whom Emerton P and Macaulay JA agreed) reasoned that: (a) s 389E did not authorise the meeting;<sup>9</sup> (b) the holding of the meeting was "inconsistent with the principle of open justice, an essential element of the administration of criminal justice" in Victoria and "a fundamental irregularity that could not be waived";<sup>10</sup> and (c) "the principle of open justice must be upheld for its own sake", as it is "of critical importance in maintaining public confidence in criminal courts".<sup>11</sup>

### **Charter of Human Rights and Responsibilities**

- 13 The *Charter of Human Rights and Responsibilities* (Vic) ("the Charter"),<sup>12</sup> in s 6(1), provides that "[a]ll persons have the human rights set out in Part 2". Part 2 contains s 24, which provides that:

- "(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) Despite subsection (1), a court or tribunal 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 this Charter."

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9 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [40].

10 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [55].

11 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [57].

12 See s 1(1) of the Charter.

14 Section 28 of the Charter provides that:

"(1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.

...

(3) A statement of compatibility must state –

- (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
- (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

(4) A statement of compatibility made under this section is not binding on any court or tribunal."

15 Section 32 of the Charter is in these terms:

"(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of –

- (a) an Act or provision of an Act that is incompatible with a human right; or
- (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made."

## Open Courts Act

16 The *Open Courts Act 2013* (Vic) provides in s 4 that:

- "(1) A court or tribunal is to have regard to the primacy of the principle of open justice and the free communication and disclosure of information in determining whether to make a suppression order.
- (2) A court or tribunal is only to make a suppression order if satisfied that 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."

17 Section 28 of the *Open Courts Act* is in these terms:

- "(1) In determining whether to make any order, including a closed court order, a court or tribunal 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.
- (2) A court or tribunal should only make a closed court order –
  - (a) that the whole or any part of a proceeding be heard in closed court or closed tribunal; or
  - (b) that only specified persons or classes of persons may be present during the whole or any part of a proceeding –

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."

18 Section 30(1) provides that, subject to s 30(2) and (3), a court or tribunal may order that the whole or any part of a proceeding be heard in closed court or closed tribunal or may order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding. Section 30(2) identifies grounds on which a court or tribunal may make such an order, including "(d) the order is necessary to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence" and "(e) the order is necessary to avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding".

## County Court Act

- 19           The *County Court Act 1958* (Vic) provides, in s 3A, that the "distinction between court and chambers is abolished" and, in s 3B, that "[a]ny judge of the court may exercise at any time and place all the jurisdiction vested in the court". Section 3(1) defines "proceeding" to mean "any matter in the court".

## Criminal Procedure Act

- 20           It is necessary to examine the provisions of the *Criminal Procedure Act* in some detail.

### *General provisions for trial on indictment*

- 21           Section 5 provides that a criminal proceeding is commenced, relevantly, by "(a) filing or signing a charge-sheet in accordance with section 6" or "(b) filing a direct indictment in accordance with section 159". The accused in this case was charged by the filing of a charge-sheet and not a direct indictment.

- 22           By s 158, Ch 5 applies if, relevantly, "(a) an accused is committed for trial under Chapter 4" or "(b) a direct indictment is filed against an accused".

- 23           Part 5.5 of Ch 5 (Pre-trial procedure) includes these provisions:

### **"179 Directions hearing**

At any time except during trial, the court may conduct one or more directions hearings.

...

### **181 Powers of court at directions hearing**

- (1) At a directions hearing, the court may make or vary any direction or order, or require a party to do anything that the court considers necessary, for the fair and efficient conduct of the proceeding.

- (2) Without limiting subsection (1), the court may –

...

- (d) in the case of a trial for a sexual offence in which the complainant was a child or a person with a cognitive impairment when the criminal proceeding was commenced –

9.

- (i) require the prosecutor to advise as to the availability of the complainant, and the accused to advise as to his or her own availability for the special hearing to be held under Division 6 of Part 8.2; and
- (ii) give a direction under section 370(1A) that the special hearing is to be held before the trial or during the trial; and
- (iii) if the special hearing is to be held during the trial, specify the date on which the special hearing is to commence;

...

## **201 Court may decide pre-trial issue without a hearing**

- (1) This section applies if the court is notified of an issue under section 200(1) at least 14 days before the day on which the trial of the accused is listed to commence.
- (1A) The court may decide the issue without an oral hearing and entirely on the basis of written submissions and without the appearance of the parties –
  - (a) if the court is satisfied that it is in the interests of justice to do so; and
  - (b) whether or not the parties consent to the court doing so."

24 Section 201(1B) specifies the matters the court must consider in deciding whether it is in the interests of justice to decide an issue without an oral hearing pursuant to s 201(1A), including "(a) the right of an accused to a fair hearing".

25 "Sexual offence" within s 181(2)(d) has the meaning given in s 4, which includes the offences with which the accused was charged.

26 Part 5.7 of Ch 5 (Trial) includes these provisions:

## **"210 When trial commences**

- (1) A trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with section 217.

...

## **215 Arraignment**

- (1) An accused is arraigned when the court –
- (a) asks the accused whether the accused is the person named on the indictment; and
  - (b) reads out each charge on the indictment and asks the accused whether the accused pleads guilty or not guilty to the charge.
- (2) An accused may be arraigned or re-arraigned at any time.

...

## **217 Arraignment in presence of jury panel**

If an accused has not pleaded guilty to all of the charges on an indictment –

- (a) the accused must be arraigned in the presence of the jury panel or, if a jury panel is split into 2 or more parts under section 30(5) of the **Juries Act 2000**, the first part of the jury panel that is present in court; and
- (b) a jury for the trial must be empanelled from that jury panel."

27 Part 5.8 of Ch 5 (General) includes s 246 as follows:

"An accused must attend all hearings conducted under this Chapter in the criminal proceeding against the accused unless excused under section 330."

28 Section 3 provides that:

"**attend**, in relation to a person, means –

- (a) be physically present in court; or
- (b) if authorised or required to do so under Division 2 or 3 of Part IIA of the **Evidence (Miscellaneous Provisions) Act 1958**, appear or be brought before the court by audio visual link or audio link".



11.

29 Part 8.1 of Ch 8 (Conduct of proceeding) includes s 328 as follows:

"A party to a criminal proceeding may appear –

- (a) personally; or
- (b) by a legal practitioner or other person empowered by law to appear for the party; or

..."

30 Section 329 provides that:

"(1) An accused must appear at every hearing in the criminal proceeding against the accused, unless otherwise provided by this Act or the rules of court.

...

(3) The court may excuse a person from appearing at a hearing."

31 Section 330 is in these terms:

"(1) An accused must attend a hearing in the criminal proceeding against the accused if –

- (a) this Act or the rules of court require the attendance of the accused at the hearing; or
- (b) the accused has been remanded in custody or granted bail to attend the hearing; or
- (c) the court requires the attendance of the accused at the hearing.

...

(3) The court may excuse a person from attending a hearing.

(4) If a person fails to attend when required under subsection (1)(a), (1)(b), (2)(a) or (2)(b), the court may issue a warrant to arrest the person.

(5) If a person fails to attend when required under subsection (1)(c) or (2)(c), the court may issue a warrant to arrest the person if the court

is satisfied that the person has had reasonable notice of the requirement to attend."

32 By s 331(1), a court may adjourn the hearing of a criminal proceeding before the court to any time and place and for any purpose that it considers appropriate.

33 Section 337(1) provides that:

"Unless the context otherwise requires, a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion."

34 Section 337A is as follows:

"(1) In addition to, and without limiting, section 201, a court may determine any issue (other than determining whether an accused is guilty or not guilty) in any criminal proceeding without an oral hearing and entirely on the basis of written submissions and without the appearance of the parties –

(a) if the court is satisfied that it is in the interests of justice to do so; and

(b) whether or not the parties consent to the court doing so.

..."

35 Section 337A(2) specifies the matters the court must consider in deciding whether it is in the interests of justice to decide an issue without an oral hearing, including "(a) the right of an accused to be present at the accused's trial" and "(b) the right of an accused to a fair hearing". Section 337A(3) provides that "[n]othing in this section affects any other power of the court to determine an issue in a criminal proceeding without an oral hearing".

*Witnesses (including complainants) in criminal proceeding relating to sexual offences*

36 Part 8.2 of Ch 8 (Witnesses) includes s 338, which provides that:

"It is the intention of Parliament that in interpreting and applying this Part in any criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, courts are to have regard to the fact that –

...

- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) offenders are commonly known to their victims; and

...".

37 Section 359(1) provides that Div 4 of Pt 8.2 applies to a criminal proceeding that relates (wholly or partly) to a charge for, relevantly, a sexual offence. Section 359(2) states that Div 4 "applies to all witnesses (including complainants) in a criminal proceeding referred to in subsection (1)" and s 359(3) states that Div 4 "applies at any stage of the criminal proceeding, including an appeal or rehearing".

38 By s 360, the court may direct that alternative arrangements be made for the giving of evidence by a witness, including arrangements, for example, "(a) permitting the evidence to be given from a place other than the courtroom by means of closed-circuit television or other facilities that enable communication between that place and the courtroom", "(b) using screens to remove the accused from the direct line of vision of the witness", and "(d) permitting only persons specified by the court to be present while the witness is giving evidence". By s 362(2), if such an arrangement is made under s 360(a), "[a]ny place outside the courtroom where the witness is permitted to give evidence is taken to be part of the courtroom while the witness is there for the purpose of giving evidence" and, by s 362(3), "[t]he court must direct that any evidence given by the witness is recorded".

39 Division 5 of Pt 8.2 includes s 366(1), which states that Div 5 "applies to a criminal proceeding (other than a committal proceeding) that relates (wholly or partly) to a charge for", relevantly, a "sexual offence".

40 By s 367, a "witness may give evidence-in-chief (wholly or partly) in the form of an audio or audiovisual recording of the witness answering questions put to him or her by a person prescribed by the regulations for the purposes of this section". Regulation 6 of the *Criminal Procedure Regulations 2020* (Vic) prescribes, for the purpose of s 367, persons including, for example, "(a) a member of Victoria Police personnel ... who has successfully completed a training course conducted by Victoria Police on the procedures for making a Division 5 recording and examining a witness". The complainant gave evidence in chief under this

process well before the meeting with the judge and counsel for the prosecution and the accused.

41 Under s 368(1), a recording referred to in s 367 "is admissible as evidence in a summary hearing, special hearing or trial in the proceeding as if its contents were the direct testimony of the witness if" certain conditions are met. By s 3, a "special hearing" is a hearing under s 370 and a "summary hearing" is a hearing "conducted in accordance with Part 3.3". "Trial" is not defined but is used in the *Criminal Procedure Act* to describe a trial on indictment as referred to in Pt 5.7 (it being recalled that, by s 210(1), a "trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with section 217").

*Complainants in criminal proceeding relating to sexual offences – special hearings*

42 Section 369(1), in Div 6 of Pt 8.2, provides that Div 6 applies to a trial in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence. Section 369(2) states that Div 6 "applies to a complainant in a criminal proceeding referred to in subsection (1) if, at the time at which the proceeding commenced, the complainant" was under the age of 18 years or had a cognitive impairment. The complainant in this matter was under the age of 18 years.

43 Section 370(1), applicable to the complainant by s 369, provides that, subject to s 370(2), the whole of the evidence (including cross-examination and re-examination) of a complainant must be given at a special hearing under Div 6 and recorded as an audio-visual recording and, in the case of a special hearing before the trial, presented to the court in the form of that recording. Section 370(2) gives the court a power to direct that s 370(1) does not apply in certain circumstances, not relevant to this appeal. The special hearing conducted in this matter occurred before the scheduled trial of the accused.

44 Section 372 regulates the conduct of a special hearing. It provides (as relevant) that:

"(1) At a special hearing –

- (a) the accused and his or her legal practitioner are to be present in the courtroom;
- (b) the accused –
  - (i) is not to be in the same room as the complainant when the complainant's evidence is being taken;

15.

- (ii) is entitled to see and hear the complainant while the complainant is giving evidence and to have at all times the means of communicating with his or her legal practitioner;

...

- (c) no 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;
  - (d) the evidence of the complainant is to be given by means of closed-circuit television or other facilities that enable communication between the room in which the complainant is present and the courtroom;
  - (e) except as provided by this Division, the usual rules of evidence apply.
- (2) The room in which the complainant gives evidence is taken to be part of the courtroom while the complainant is there for the purpose of giving evidence."

45       Section 374(2) provides that, subject to s 374(3), a recording of a special hearing is admissible in evidence as if its contents were the direct testimony of the complainant in the proceeding and, subject to contrary order of the court, in any new trial or appeal from the proceeding and in certain other related matters. By s 374(3), the court may rule as inadmissible the whole or any part of the contents of a recording and, if so, the court may direct that the recording be edited or altered to delete any part of it that is inadmissible.

46       Under s 376(1), a "complainant whose evidence is recorded under section 370 cannot be cross-examined or re-examined without leave".

#### *Ground rules hearings and intermediaries*

47       Part 8.2A (Ground rules hearings and intermediaries) contains Div 1 (Ground rules hearings), ss 389A-389E, and Div 2 (Intermediaries), ss 389F-389K. Part 8.2A was inserted into the *Criminal Procedure Act* by the *Justice Legislation Amendment (Victims) Act 2018* (Vic). In the second reading

speech relating to that Act,<sup>13</sup> the Attorney-General for Victoria made a statement of compatibility as required by s 28 of the Charter, saying that "[i]n my opinion, the Justice Legislation Amendment (Victims) Bill 2017, as introduced to the Legislative Assembly, is compatible with human rights as set out in the charter. I base my opinion on the reasons outlined in this statement."<sup>14</sup> In dealing with s 24 of the Charter, the Attorney-General said in the statement of compatibility:<sup>15</sup>

"A fair trial does not require a hearing with the most favourable procedures for the accused: it must take into account other interests, including the interests of the victim and of society generally in having a person brought to justice. Any limitation on the right to a fair hearing by altering the way that evidence may be presented in court is balanced with these broader considerations."

48 In the second reading speech itself, the Attorney-General said that the "bill contains a number of criminal justice-related reforms, with a particular focus on improving the experiences of witnesses and victims in the criminal justice system".<sup>16</sup> The principal provisions to that end concern the introduction of ground rules hearings and intermediaries.

49 So far as relevant, s 389A(1) provides that Div 1 of Pt 8.2A applies to "a criminal proceeding that relates (wholly or partly) to a charge for – (a) a sexual offence". At the time of the ground rules hearing, s 389A(3)(a) provided that Div 1 of Pt 8.2A applies to a witness (including a complainant) if the witness is a person under the age of 18 years.<sup>17</sup>

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13 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2017. See also *Justice Legislation Amendment (Victims) Bill 2017* (Vic).

14 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2017 at 4355.

15 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2017 at 4356.

16 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2017 at 4359.

17 From 30 July 2023, Div 1 of Pt 8.2A applies generally to a "witness who is a complainant in relation to a charge for a sexual offence". See *Criminal Procedure Act 2009* (Vic), s 389A(3)(b); *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), ss 69, 2(5).

50 By s 389B(1), the court may direct that a ground rules hearing is to be held.<sup>18</sup> Section 389B(3), at the time of the ground rules hearing in this matter, provided that a ground rules hearing must be held if an intermediary is appointed under Div 2 of Pt 8.2A. Under s 389C(1), if a ground rules hearing is to be held, it must be held before the commencement of any hearing at which a witness is to give evidence. Section 389D(1) provides that the following persons must attend a ground rules hearing: (a) a person acting for the prosecution; (b) the legal practitioner representing the accused or, if the accused is unrepresented, the accused; (c) the intermediary appointed for a witness, if any. By s 389D(2), a witness is not required to attend a ground rules hearing. Section 389D(3) provides that the court may make an order that a witness for whom an intermediary is appointed not attend a ground rules hearing.

51 Section 389E(1), contended to be the source of the power for the court to have directed the holding of the meeting in this case, is in these terms:

"At a ground rules hearing, the court may make or vary any direction for the fair and efficient conduct of the proceeding."

52 Section 389E(2) provides that, without limiting s 389E(1), the court may give one or more of certain specified directions, which, for example, include: "(a) a direction about the manner of questioning a witness; (b) a direction about the duration of questioning a witness; (c) a direction about the questions that may or may not be put to a witness".

53 Section 389F(1) provides that Div 2 of Pt 8.2A applies to a witness (including the complainant) other than the accused in a criminal proceeding if the witness is under the age of 18 years at the time at which the proceeding commences or has a cognitive impairment and the criminal proceeding is in a participating venue of a court.

54 Section 389H(1) requires the Secretary to the Department of Justice and Regulation to establish a panel of persons who the Secretary is satisfied are suitable persons to be appointed as intermediaries. By s 389H(2), a person must not be on the panel unless the person has a tertiary qualification in psychology, social work,

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18 At the time of the ground rules hearing in this matter (14 March 2023), s 389AB of the *Criminal Procedure Act 2009* (Vic) had not been enacted. Section 389AB commenced on 30 July 2023. It states that a ground rules hearing is a hearing at which the court "(a) considers the communication, support or other needs of witnesses; and (b) decides how the proceeding is to be conducted to fairly and effectively meet those needs".

speech pathology or occupational therapy or has other prescribed qualifications, training, experience or skills.

55 Section 389I(1) provides that the function of an intermediary is: "(a) to communicate or explain to a witness for whom an intermediary is appointed, questions put to the witness to the extent necessary to enable them to be understood by the witness; and (b) to communicate or explain to a person asking questions of a witness for whom an intermediary is appointed, the answers given by the witness in reply to the extent necessary to enable them to be understood by the person". Under s 389I(2), an "intermediary is an officer of the court and has a duty to act impartially when assisting communication with the witness".

56 Under s 389J(1), the court may appoint an intermediary for a witness from the panel established under Div 2 of Pt 8.2A. By s 389K(1), in "a proceeding in which an intermediary has been appointed, the evidence of the witness must be given in the presence of the intermediary". Section 389K(2) provides that, subject to any direction of the court and rules of court, the evidence of the witness given in the presence of the intermediary must be given in circumstances in which: "(a) the court and any legal practitioner appearing in the proceeding are able to see and hear the witness giving evidence and to communicate with the intermediary; and (b) the jury (if any) is able to see and hear the witness giving evidence (including any assistance given by the intermediary), other than evidence given in accordance with an arrangement made under section 360(a) as directed by the court".

### **Meeting authorised by s 389E(1) of Criminal Procedure Act**

57 By operation of s 32(1) of the Charter, s 389E(1) of the *Criminal Procedure Act*, in common with all provisions of Victorian legislation, is to be interpreted in a way that is compatible with the human rights set out in Pt 2 of the Charter, so far as it is possible to do so consistently with its purpose.<sup>19</sup> This has been said to mean that "[w]here more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the Charter is to be preferred".<sup>20</sup>

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19 See, eg, Pound and Evans, *Annotated Victorian Charter of Rights*, 2nd ed (2019) at [CHR.32.40]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at 13 [27]; *R v DA* (2016) 263 A Crim R 429 at 443 [44].

20 *R v DA* (2016) 263 A Crim R 429 at 443 [44].



58 The general operation of the interpretative principle in s 32(1) of the Charter need not be resolved in this appeal. What is beyond question is that s 32(1) requires "close attention to the particular rights said to be engaged by the statutory provision that falls for interpretation".<sup>21</sup>

59 The relevant right that a person charged with a criminal offence has under s 24(1) of the Charter is to have the charge against them "decided ... after a fair and public hearing". For the reasons below, the meeting between the complainant, the judge and counsel, which occurred pursuant to the direction made under s 389E(1) of the *Criminal Procedure Act*, was not itself a "hearing" and nothing that occurred at the meeting was required to occur in a "hearing" in order to be compatible with the right protected by s 24(1) of the Charter.

60 In *Momcilovic v The Queen*, French CJ said that s 32(2) of the Charter, providing that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision, "does not authorise a court to do anything which it cannot already do".<sup>22</sup> Gummow J also said that "Australian courts must approach the questions presented by the Charter with a clear recognition of two matters: first, the constitutional framework within which those questions are to be decided, and secondly, the fact that, unsurprisingly, both the structure and the text of other human rights systems reflect the different constitutional frameworks within which they operate".<sup>23</sup>

61 Section 24(1) of the Charter, concerning the right of a person charged with a criminal offence or a party to a civil proceeding to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing, is modelled on Art 14(1) of the International Covenant on Civil and Political Rights.<sup>24</sup> The "requirement in s 24(1) that proceedings be 'public' reflects the common law principle of open justice".<sup>25</sup>

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21 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at 64 [195].

22 (2011) 245 CLR 1 at 36 [18].

23 (2011) 245 CLR 1 at 89 [155].

24 See Victoria, Legislative Assembly, *Charter of Human Rights and Responsibilities Bill 2006*, Explanatory Memorandum at 17-18.

25 Pound and Evans, *Annotated Victorian Charter of Rights*, 2nd ed (2019) at [CHR.24.320].

62 The principle of open justice is often invoked in the context of a party seeking a suppression order.<sup>26</sup> That is not the context of the present case. In the decision under appeal, Priest JA identified several key statements about the principle of open justice. For example, as Priest JA recorded,<sup>27</sup> French CJ in *Hogan v Hinch* said:<sup>28</sup>

"An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the *Constitution* courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.

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. This may be done where it is necessary to secure the proper administration of justice."

63 This statement reflects that while "the broad principle is that the Courts ... must ... administer justice in public", the exceptions to this broad principle are "themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done".<sup>29</sup>

64 The importance of open justice as a means to the end of achieving the proper administration of justice is reflected in s 24(1) of the Charter and the provisions of the *Open Courts Act*. Both the *Open Courts Act* and the *Criminal Procedure Act*,

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26 eg, *X v General Television Corporation Pty Ltd* (2008) 187 A Crim R 533; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248; *PQR v Secretary, Department of Justice and Regulation [No 1]* (2017) 53 VR 45. Further, in similar statutory contexts, see *Canadian Newspapers Co v Canada (Attorney General)* [1988] 2 SCR 122; *R v Mentuck* [2001] 3 SCR 442; *R v JJ* (2022) 471 DLR (4th) 577; *Police v O'Connor* [1992] 1 NZLR 87; *Siemer v Solicitor-General* [2013] 3 NZLR 441; *Wilson v R* [2016] 1 NZLR 705.

27 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [33].

28 (2011) 243 CLR 506 at 530-531 [20]-[21] (footnotes omitted).

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

however, expose that because the principle of open justice is a means to an end, it can never be absolute. This is also reflected in the terms of s 24(2) of the Charter, which provides that a court may "exclude ... persons ... from all or part of a hearing if permitted to do so by a law other than this Charter".

65 Under the *Criminal Procedure Act*, every "trial" is a "hearing", although not every "hearing" is a "trial". The *Criminal Procedure Act* distinguishes between types of hearings in a criminal proceeding and the accused's trial on indictment in a criminal proceeding. The *Criminal Procedure Act* treats a "trial" as a specific type of hearing in which the guilt or innocence of the accused is decided. The types of hearings in a criminal proceeding are much broader than a "trial" and include, for example, a hearing in a committal proceeding as specified in s 100, directions hearings as specified in s 179, and pre-trial hearings as specified in ss 199(1) and 202. A trial is regulated by Pt 5.7, in which s 210(1) provides that a trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with s 217.<sup>30</sup> The conduct of a trial is principally regulated by Divs 4-8 of Pt 5.7, which deal with a prosecutor's opening address (s 224), the response of the accused to the prosecutor's opening (s 225), the case for the accused (ss 226-231), the giving of evidence (ss 232-233), closing addresses and judge's directions to the jury (ss 234-238), alternative verdicts and discharge of the jury from delivering a verdict (ss 239-241). These provisions all refer to the "trial" and the "trial judge", not the "hearing" or the "court".

66 Consistently with the use of the term "hearing" in s 24(1) of the Charter, the essential feature of a "hearing" in the context of the *Criminal Procedure Act* is that, unless excused from doing so by the court, the prosecution and the accused "appear" before the court (in any place the court determines under s 3B of the *County Court Act*) to be heard about a proposed exercise of judicial power in respect of a criminal proceeding.<sup>31</sup> A "trial", however, is the hearing (or hearings) in which the charge against the accused is determined (in whole or part). A proposed exercise of judicial power involves a person calling on the court to, or the court of its own motion deciding that it should, give some "binding and

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30 cf, eg, *Criminal Procedure Act 1986* (NSW), s 154. See also *Stephens v The Queen* (2022) 273 CLR 635 at 645 [8], citing *R v Janceski* (2005) 64 NSWLR 10 at 42 [219].

31 *Criminal Procedure Act 2009* (Vic), ss 328, 329.

authoritative decision (whether subject to appeal or not)",<sup>32</sup> judicial power involving the determining of, or the making of directions and orders to facilitate the determining of, "existing rights and duties ... according to law ... by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion".<sup>33</sup>

67 In this case, the direction to hold the meeting made at the ground rules hearing was an exercise of judicial power as it determined that the meeting should be held in order to facilitate the complainant giving evidence at the special hearing. But it was not proposed that, at the meeting, any judicial power be exercised, and, in fact, no judicial power was exercised. As such, and contrary to the submissions for the accused, the meeting itself, in contrast to the ground rules hearing, did not have "the hallmarks of a hearing". No exercise of judicial power of any kind was proposed, or sought, or occurred. At most, the meeting was preliminary to the proposed exercise of judicial power in the special hearing to be held on the day after the meeting.

68 It would be wrong to construe "hearing" in s 24(1) of the Charter to mean only the "trial" of an accused. But it would also be wrong to construe s 24(1) as if "hearing" refers to every circumstance involving the exercise of any power, administrative or judicial, which a court might be called upon to exercise in a criminal proceeding. In conducting (in contrast to directing the holding of) the meeting, the court was not exercising jurisdiction. It was performing a non-judicial function preliminary to the exercise of jurisdiction in holding the special hearing. Given the carefully calibrated scheme of the *Criminal Procedure Act*, there is no basis to construe s 389E(1) more narrowly than its language permits by reason of (non-existent) incompatibility with s 24(1) of the Charter. Section 24(1) of the Charter accordingly furnishes no basis for construing s 389E(1) to exclude power to direct the holding of the meeting.

69 The *Criminal Procedure Act* also contains provisions recognising that certain steps in a criminal proceeding involving an exercise of judicial power do not involve a "hearing" at all. One example is s 247, which enables the court to extend or abridge any time fixed under Ch 5 by order if it is in the interests of justice to do so. Section 247 does not condition the exercise of that power on the

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32 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 414 [306]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553-554 [28].

33 *Thomas v Mowbray* (2007) 233 CLR 307 at 414 [306].

holding of a "hearing" of any kind. The same would be true of certain other powers which the court might be called upon to exercise in a criminal proceeding (eg, a power to adjourn a directions hearing),<sup>34</sup> subject to the requirements of the statutory provisions and of natural justice. It follows that s 181 of the *Criminal Procedure Act* (which provides that, at a directions hearing, a court may make or vary any direction or order, or require a party to do anything that the court considers necessary, for the fair and efficient conduct of the proceeding) is to be understood as facultative in the sense that the court may make such directions or orders at a directions hearing but is not prohibited from making such directions or orders other than at a directions hearing provided that, in so doing, the requirements of the statutory provisions and of natural justice are satisfied. Section 181 is not to be understood as mandating that such directions or orders may be made only at a directions hearing.

70 Further, the *Criminal Procedure Act* contains provisions ensuring that the court has a power to not hold a "hearing" even if a "hearing" would ordinarily be required. For example, for a trial on indictment, s 201(1A) enables the court to decide a pre-trial issue without an oral hearing and entirely on the basis of written submissions in the circumstances specified in s 201(1) (notification of a pre-trial issue at least 14 days before the trial of the accused is listed to commence). This power is exercisable only if the court is satisfied that it is in the interests of justice to do so (s 201(1A)(a)) and whether or not the parties consent (s 201(1A)(b)). Further, as noted, s 337A mirrors s 201 but includes s 337A(3), which states that "[n]othing in this section affects any other power of the court to determine an issue in a criminal proceeding without an oral hearing".

71 These provisions are part of the context in which s 246 of the *Criminal Procedure Act* ("[a]n accused must attend all hearings conducted under this Chapter [Ch 5] in the criminal proceeding against the accused unless excused under section 330") must be considered. Section 330, it will be recalled, imposes a duty on an accused to "attend" all hearings in the proceeding against them, unless excused by the court from attendance, under sanction of a warrant for arrest (the purpose of which, if issued on an accused's failure to attend, would be to bring the person before the court). Having regard to these provisions, the position is that, subject to the requirements of the statutory provisions and of natural justice, the court may: (a) exercise some judicial powers without holding a hearing at all; (b) up to 14 days before the trial of the accused commences, exercise judicial power to decide any pre-trial issue without an oral hearing and on the basis of written submissions if satisfied it is in the interests of justice to do so; and (c) hold a hearing to decide any pre-trial issue and excuse an accused from attending at the

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34 *Criminal Procedure Act 2009* (Vic), s 331.

hearing. Sections 246 and 330 are only engaged if there is in fact a hearing held, which, as noted, involves a proposed or actual exercise of judicial power.

72 The provisions of Pt 8.2A are also to be construed in this overall context. If a ground rules hearing is to be held (see s 389B), then such a hearing is not a hearing "conducted under" Ch 5 as provided for in s 246. Section 246, accordingly, does not apply to a ground rules hearing. This explains s 389D, which relevantly provides that "the legal practitioner representing the accused or, if the accused is unrepresented, the accused" must attend the ground rules hearing. That is, if legally represented, the accused may, but need not, attend a ground rules hearing. Section 389E(1) ("[a]t a ground rules hearing, the court may make or vary any direction for the fair and efficient conduct of the proceeding") reflects the terms of s 181(1) (in respect of directions hearings), albeit that the terms of ss 389E(2) and 181(2) reflect the different stages of the criminal proceeding of those two types of hearing. Importantly, neither s 389E(2) nor s 181(2) limits the directions which can be made under ss 389E(1) and 181(1) respectively. In both cases the words "any direction for the fair and efficient conduct of the proceeding" are to be given their full effect. There is no textual, contextual, or purposive basis to confine these words to, as argued for the accused, "regulating the procedure for hearings in court" and as not extending to directing the holding of an introductory meeting of the kind that took place in this case occurring outside of the court. Contrary to the submissions for the accused, that s 389E(2) identifies matters that relate to the witness's questioning at hearings in court does not indicate that s 389E(1) is so confined. And that Pt 8.2 makes provision for the conduct of a special hearing, regulated by s 372, carries no implication that s 389E(1) in Pt 8.2A is to be confined to matters occurring within such, or any, hearing (as opposed to matters preliminary or ancillary to a hearing intended to facilitate the fair and efficient conduct of that hearing). Any direction for the fair and efficient conduct of the proceeding extends, at least, to directions about matters preliminary or ancillary to a hearing intended to facilitate the fair and efficient conduct of that hearing.

73 The function of an intermediary, in effect, is to ensure that the witness for whom the intermediary is appointed understands the questions asked of them in a hearing (including a trial) and that the witness's answers to those questions are able to be understood by the person asking those questions (s 389I(1)). This is reinforced by s 389I(2) providing that an "intermediary is an officer of the court and has a duty to act impartially when assisting communication with the witness".

74 Given also that an intermediary appointed for a witness must attend a ground rules hearing (s 389D(1)(c)), and that s 389E(2) contemplates certain types of directions being made at a ground rules hearing about the questioning of a witness, Pt 8.2A can be seen to contemplate that an intermediary will inform the court and the parties at the ground rules hearing of any issue relevant to the ability

of the witness to both understand questions that may be asked and provide answers able to be understood by the questioner and the making of any direction to that end.<sup>35</sup> This is necessary to ensure that the intermediary can perform the function of "assisting communication with the witness" (s 389I(2)) at any hearing (including the trial).

75 The intermediary performed their function in this case by informing the court and the parties in the intermediary's report that "it would assist [the complainant's] confidence to meet counsel and the judicial officer in person on the day she gives evidence if this was possible" given her anxiety about giving evidence and difficulty in expressing herself when in conflict with perceived authority figures. Section 389E(1) provided the court with an ample power to enable the intermediary to assist the complainant in communicating her evidence and for the complainant to understand the questions that would be put during the special hearing and the questioner to understand the answers that would be given by the complainant. That power included a power for the judge, counsel for both the prosecution and the accused, and the intermediary, to meet with the complainant before the special hearing. The problem in *Alec* was not a lack of power to arrange and attend such a meeting under s 389E(1); it was that the judge attended a meeting with the complainant privately (that is, in the presence of the intermediary but without counsel for the prosecution and the accused).<sup>36</sup>

76 The risk to which the meeting gave rise was that something might happen at the meeting which could be relevant to a "hearing", including the trial, such as a statement by or some other conduct of the complainant arguably relevant to any issue in the trial, as discussed below. That was a real risk not able to be avoided by the exercise of goodwill on the part of all parties, the judge, the complainant, and the intermediary. But in the circumstances in which the questions of law were reserved, that risk did not eventuate.

77 Had the risk manifested itself during the meeting, it would have been for counsel and the judge to contend with that occurrence during or after the meeting. There is no hint in the circumstances in which the questions of law were reserved that this risk manifested itself during the meeting. It is no answer to this for the accused's counsel to submit in this appeal that the accused does not know what occurred at the meeting because the accused was not present, and the meeting was not recorded. The accused's counsel was present at the meeting and, as an officer

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35 cf *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [43].

36 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 163 [5(3)], 164 [20], 165 [23], 166 [26]-[27].

of the court representing the accused, was (in common with counsel for the prosecution) obliged to bring to the court's attention any such matter (if it existed) for the purpose of the court stating the circumstances in which the questions of law were reserved. The circumstances as stated by the court in respect of which the questions of law arise could not be challenged or gainsaid either before the Court of Appeal or in this appeal.<sup>37</sup>

78 In these circumstances, it also cannot be said, as submitted for the accused, that s 337A of the *Criminal Procedure Act* is the only provision contemplating a judge taking a step in the proceeding outside of a hearing. Nor is the accused assisted by the observation of Lord Diplock that "[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".<sup>38</sup> While Lord Diplock's focus is "proceedings", and "proceeding" is defined in s 3(1) of the *County Court Act* as "any matter in the court", it is certainly not the case that every administrative step in a proceeding is conducted in public. Nor, given the provisions of the *Criminal Procedure Act*, is every exercise of judicial power by the court confined to either a hearing or a hearing in public.

79 The further arguments for the accused, based on *Lawrence v The King*<sup>39</sup> and *Caulfield (a pseudonym) v The King*,<sup>40</sup> that "trial" means the "whole" of a proceeding, and that an accused must be present throughout their trial, are expressed at too high a level of generality to be useful in this case and must be rejected.

80 First, in both those cases, the issue was the absence of the accused from part of the trial, being the passing of sentence. In context, it is apparent from Lord Atkin's statement in *Lawrence v The King* that a trial "has to be conducted in the presence of the accused [and] trial means the whole of the proceedings, including sentence", that, by the "whole of the proceedings",<sup>41</sup> Lord Atkin did not

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<sup>37</sup> eg, *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 155 [34]; *R v AL* (2016) 310 FLR 320 at 322 [5].

<sup>38</sup> *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450.

<sup>39</sup> [1933] AC 699.

<sup>40</sup> [2023] VSCA 76.

<sup>41</sup> [1933] AC 699 at 708.



mean any step in the proceeding whether or not undertaken at a hearing. Similarly, in *Caulfield (a pseudonym) v The King*, while the sentencing judge was passing sentence on the accused (the accused attending the sentencing hearing via an audio-visual link from prison), the audio-visual link ceased working. In the period when the accused was not attending the sentencing hearing via the audio-visual link, the sentencing judge made a relatively lengthy statement to the persons who gave victim impact statements which the sentencing judge described as having "nothing whatsoever to do with the sentence".<sup>42</sup> In the statement to the persons who gave victim impact statements the sentencing judge said, amongst other things, that those persons "ought not feel embarrassed about being the so-called victim of this type of event", "[i]t happens a lot" and:<sup>43</sup>

"This event could not have been discovered without the entire family getting together and telling each other about it and without this gentleman's son recording that conversation. Everything that everybody did, each of those things, were important in getting you here today. You shouldn't be ashamed of that. You should be proud of it. That's all I have to say. Nothing to do with the sentence. It's my private message to you."

81 The appeal against sentence in *Caulfield (a pseudonym) v The King* was based on a miscarriage of justice by reason of, relevantly, a reasonable apprehension of bias on the part of the sentencing judge given the statement to the persons who gave victim impact statements in the absence of the accused.<sup>44</sup> In that context, the Court of Appeal, while dismissing the appeal because, in any event, it would not reduce any of the sentences imposed, said that "[a]s a general rule, any step in a criminal proceeding, including the imposition of sentence should occur in the presence of the accused".<sup>45</sup> Expressed as a general rule, this statement is correct. Moreover, it is correct that a sentence forms part of the "trial" of an accused. The Court of Appeal's reference to "any step in a criminal proceeding" must be understood, in context, to mean any step involving an exercise of judicial power (such as passing sentence) and to be subject to the common law and statutory exceptions in the *Criminal Procedure Act* to the principle against trial in the absence of an accused.

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42 [2023] VSCA 76 at [17].

43 *Caulfield (a pseudonym) v The King* [2023] VSCA 76 at [17].

44 *Caulfield (a pseudonym) v The King* [2023] VSCA 76 at [20].

45 *Caulfield (a pseudonym) v The King* [2023] VSCA 76 at [38] (emphasis added).

82 Second, no authority is to be understood as imposing an absolute rule that an accused must be present throughout their trial to avoid a miscarriage of justice (let alone throughout every administrative or judicial step in a criminal proceeding). Even at common law, there are exceptions to this rule.<sup>46</sup> For example, in *Lipohar v The Queen*, Gaudron, Gummow and Hayne JJ said only that there is "no trial in absentia at common law *in the ordinary course*".<sup>47</sup> The cases on which counsel for the accused relied to support the near-absolute proposition that, barring removal for misbehaviour, an accused must be present at every step in a criminal proceeding, *Lawrence v The King*<sup>48</sup> and *R v Lee Kun*,<sup>49</sup> do not do so. In the former, as noted, Lord Atkin did not mean that an accused must be present at any step in the proceeding whether or not undertaken at a hearing. In the latter, the focus was the attendance of the accused at their trial so that the accused "may hear the case made against him and have the opportunity, having heard it, of answering it".<sup>50</sup>

83 For these reasons, the first ground of appeal must be accepted. The Court of Appeal was wrong to conclude that s 389E(1) of the *Criminal Procedure Act* does not authorise the direction of "a private meeting between a trial judge (whether or not accompanied by counsel) and a witness outside the courtroom".<sup>51</sup> *Alec* does not support that statement. The issue is not lack of power, but (as the reasoning in *Alec* correctly exposes<sup>52</sup>) the apprehension of bias that ordinarily would arise if a judge met a witness in the absence of legal representatives for all parties.

### Principle of open justice

84 The reasoning in *Alec* also correctly situated the principle of open justice in the circumstances of that case. In *Alec*, the Court of Appeal recognised the importance of the principle to the proper administration of justice because "[w]hen

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46 eg, *R v Gee* (2012) 113 SASR 372 at 388 [61]-[62]; *R v Chute [No 4]* (2018) 337 FLR 222 at 243-244 [81]-[82] and the cases cited therein.

47 (1999) 200 CLR 485 at 514 [69] (emphasis added).

48 [1933] AC 699.

49 [1916] 1 KB 337.

50 *R v Lee Kun* [1916] 1 KB 337 at 341.

51 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [40].

52 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 167-169 [32]-[38].

justice is administered in private, the fairness of the process, and the impartiality of the judge, are brought into question".<sup>53</sup> The Court of Appeal in *Alec* quoted<sup>54</sup> from Mason J in *Re JRL; Ex parte CJL* that it "would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which [the judge] has to decide"<sup>55</sup> and that such conduct would also undermine "confidence in the impartiality of the judicial officer".<sup>56</sup>

85 The reasoning of the Court of Appeal in the present case is different. That reasoning severs the principle of open justice (a means to an end) from the end to be achieved by that principle (the proper administration of justice).<sup>57</sup> In so doing it also severs the required connection between the impugned conduct (in this case, the meeting) and a legally justifiable basis upon which a court may find an irregularity capable of constituting either a substantial miscarriage of justice (if a conviction has been entered) within the meaning of s 276(1)(b) or (c) of the *Criminal Procedure Act* or a ground for a permanent stay of a criminal proceeding (before a verdict is entered). Accordingly, the relevant issue was not encapsulated by the first question of law ("[d]id the meeting infringe the principles of open justice as identified in *Alec*") reserved for consideration. That question did not "arise" before or during the trial as s 302(2) of the *Criminal Procedure Act* required. It did not arise because no answer to that question could determine any relevant legal issue in respect of the criminal proceeding. There is no free-standing principle of open justice relied upon in *Alec*. *Alec* is an orthodox decision that, on the facts of the case, there was a miscarriage of justice requiring the conviction to be set aside because the meeting between the judge and the complainant in private gave rise to a reasonable apprehension of bias.

86 Further, and contrary to the submissions for the accused, Judge Syme did not make an order excluding the public from the meeting. Section 28 of the *Open Courts Act* is a power for a court or tribunal to make a "closed court order". A "closed court order" is an order made under s 30 of that Act. Section 30(1)(a) and

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53 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 166 [28].

54 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 166-167 [29]-[30].

55 (1986) 161 CLR 342 at 350.

56 (1986) 161 CLR 342 at 351, quoting *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 at 127.

57 eg, *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [57].

(b) respectively provide that a court or tribunal may "order that the whole or any part of a proceeding be heard in closed court or closed tribunal" and "order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding". No such order was sought or made. Moreover, the references in s 30(1)(a) to "be *heard*" and in s 30(1)(b) to "*during* the whole or any part of a proceeding" indicate that the provision is concerned with the closing of a hearing.<sup>58</sup> Section 31, which imposes a requirement that if a closed court order has been made, the court or tribunal must cause a copy of the order to be posted on a door of the court or tribunal or in another conspicuous place where notices are usually posted at the place where the court or tribunal is being held, reinforces that the focus of the *Open Courts Act* as it relates to closed court orders is the holding of hearings.

87 The only answer which can be given to the first question of law is that it is unnecessary to answer as it does not arise in the proceeding.

### **Impartiality of judge/fundamental irregularity in the trial process**

88 The second question of law also does not arise in the criminal proceeding because it is not capable of determining a relevant legal issue in that proceeding. As explained below, the relevant legal issue cannot be expressed as "[d]id the meeting bring the impartiality of the presiding judge into question" because that is not a recognisable legal test. The relevant question, whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide",<sup>59</sup> is captured by the third question of law.

89 The reference to a "fundamental irregularity" (the language used in *Alec*<sup>60</sup>) in the third question of law, it may be assumed, is intended to distinguish between a fundamental irregularity that necessarily involves a miscarriage of justice (such that an appeal against conviction under s 276 of the *Criminal Procedure Act* must be allowed) whether or not the irregularity realistically could have affected the verdict of guilt, and a non-fundamental irregularity that realistically could not have affected the verdict of guilt (such that there has been no substantial miscarriage of

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58 *Open Courts Act 2013* (Vic), s 30(1) (emphasis added).

59 *Charisteas v Charisteas* (2021) 273 CLR 289 at 296 [11], applying *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

60 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 164 [20], 169 [39].

justice).<sup>61</sup> This, however, is a case in which no trial has occurred and no verdict has been entered. In such a case, the concept of a fundamental irregularity in the process of the trial is logically connected not to the overturning of a conviction, but to the question whether the criminal proceeding should be permanently stayed. It has been said that "a permanent stay will only be ordered in an extreme case and there must be 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'".<sup>62</sup>

90 The fact that the fourth question of law assumed that, if the meeting did involve a fundamental irregularity in the trial process, the remedy might be "for the evidence of the complainant to be taken at a further special hearing conducted before a different judge" indicates that it was not contemplated by any party or the County Court that the irregularity was sufficiently fundamental to result in a permanent stay of the criminal proceeding, or at least not contemplated that such a stay be granted unless on a condition that the stay be dissolved if and when the complainant gave evidence at a fresh special hearing conducted before a judge other than the judge who attended the meeting. This indicates that the real question which arises in the proceeding is whether or not the admission into the trial of the evidence the complainant gave at the special hearing as provided for in s 374(2) of the *Criminal Procedure Act* would constitute a fundamental irregularity in the trial process. Whether understood in this way or in accordance with its literal terms, the third question of law must be answered "no".

91 Neither the occurrence of the meeting (in the unchallengeable circumstances in which and as it occurred) nor the admission into evidence at the trial of the accused of the recording of the special hearing constituted or would constitute a fundamental irregularity in the trial process. This is because, in the circumstances in which and as the meeting occurred, it cannot be concluded that "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".<sup>63</sup>

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61 eg, *HCF v The Queen* (2023) 97 ALJR 978 at 981-982 [1]-[3], 982-983 [7]; 415 ALR 190 at 191-192, 193.

62 *R v Glennon* (1992) 173 CLR 592 at 605 (footnotes omitted), quoting *Barton v The Queen* (1980) 147 CLR 75 at 111. See also *Dupas v The Queen* (2010) 241 CLR 237 at 245 [18].

63 *Charisteas v Charisteas* (2021) 273 CLR 289 at 296 [11], applying *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

92 The test for a reasonable apprehension of bias requires: "(1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer".<sup>64</sup>

93 On this basis, as to issue (1), the only factor which it might be said could lead a judge to resolve any question in the criminal proceeding (including the special hearing which took place after the meeting) other than on its legal and factual merits is that the occurrence of the meeting at the complainant's request or something that occurred at the meeting might suggest some lack of impartiality on the part of the judge towards the complainant.

94 As to issue (2), the only possible connection between that factor and an apprehended deviation from deciding any question in the criminal proceeding (including the special hearing) on its merits is that the occurrence of the meeting at the complainant's request or something that occurred at the meeting might influence the judge, consciously or unconsciously, to err in favour of the complainant or against the accused.

95 Even if that asserted connection is a logical connection (which is doubtful), issue (3) – the assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer – does not yield a conclusion of a reasonable apprehension of bias. The fair-minded lay observer would be taken to know: (a) the basic scheme of Pt 8.2A of the *Criminal Procedure Act*, at least insofar as the role of intermediaries is concerned; (b) that an intermediary is an officer of the court; (c) that the intermediary appointed for the complainant communicated to the court the complainant's request to meet the judge and counsel before the special hearing; (d) that the accused's counsel did not object to the meeting; (e) that the purpose of the meeting was confined to the introduction of the judge and counsel for the accused and the prosecution to the complainant; and (f) that nothing happened at the meeting other than the introduction of the judge

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64 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 at 432-433 [38]; 409 ALR 65 at 77, applying *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8] and *Charisteas v Charisteas* (2021) 273 CLR 289 at 296-297 [11]. See also *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 at 437-438 [67]-[73], 440 [81], 446-447 [119], 455 [163], 455-456 [165], 460 [194], 466 [225], 476 [274], [278], 477 [282]; 409 ALR 65 at 83-85, 87, 96, 108, 114-115, 123, 135-137.

and counsel for the accused and the prosecution to the complainant. In these circumstances it cannot be said that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of any question the judge is required to decide in the criminal proceeding.

96 For these reasons, the answer to the third question of law is "no" and to the fourth question of law is that it is unnecessary to answer the question as it does not arise in the proceeding.

97 As noted, however, the occurrence of the meeting could have resulted in circumstances that affected the fairness of any trial. For example, without the meeting being recorded, it might be alleged that the complainant made a material disclosure, and an issue may arise at a trial as to whether that disclosure was made. If so, this could place counsel and the trial judge in a difficult position. The risk is avoided if no such meetings occur. The risk is minimised if any such meeting is recorded.

#### **Orders and answers to questions of law**

98 The application for special leave to appeal in this matter was granted upon the condition that the Director of Public Prosecutions pay the reasonable costs of the accused in this appeal.

99 The orders to be made are:

- (1) The appeal is allowed.
- (2) The order of the Court of Appeal of the Supreme Court of Victoria made on 30 November 2023 is set aside and, in its place, the reserved questions of law be answered as follows:

1. Did the meeting infringe the principles of open justice as identified in *Alec (a pseudonym) v The King* [2023] VSCA 208?

*It is unnecessary to answer the question as it does not arise in the proceeding.*

2. Did the meeting bring the impartiality of the presiding judge into question?

*It is unnecessary to answer the question as it does not arise in the proceeding.*

Gageler CJ  
Gleeson J  
Jagot J  
Beech-Jones J

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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?

*No.*

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?

*It is unnecessary to answer the question as it does not arise in the proceeding.*



EDELMAN J.

**A private meeting between judge, counsel and witness, excluding the accused**

100 Justice has dimensions of procedure and substance. Amongst the most important aspects of procedure are transparency and procedural fairness. Few things breed more public contempt for a system of criminal justice than when the gatekeeper intentionally closes a gate leading into the Law. One ideal for a system of criminal justice is that, at least until the point at which deliberations begin, any person, including a person convicted, can say "the judge ensured that I saw everything that could have had an impact upon the verdict". This appeal tests the limits of that ideal.

101 In 2023, in *Alec (a pseudonym) v The King*<sup>65</sup> the Court of Appeal of the Supreme Court of Victoria considered circumstances in which a judge in the County Court, who presided over the recording of the evidence of a child complainant at a special hearing,<sup>66</sup> had met privately with the complainant beforehand "to have a brief chat".<sup>67</sup> All counsel knew of the proposed private meeting but none objected to it.<sup>68</sup> Following a trial over which a different judge presided,<sup>69</sup> the Court of Appeal quashed the convictions of the appellant and ordered a new trial, concluding that the private meeting was contrary to the principle of open justice and was a fundamental irregularity in the proceeding.

102 Before the delivery of the decision of the Court of Appeal in *Alec (a pseudonym) v The King*, another private meeting was held—in the present proceeding. The private meeting was attended by a County Court judge ("the presiding judge") and the complainant in this proceeding. The private meeting was held the day before the presiding judge presided over a special hearing involving the recording of the evidence of the complainant. Unlike the circumstances in *Alec (a pseudonym) v The King*, the meeting was also attended by counsel for the prosecution, an instructing solicitor for the prosecution and counsel for the defence. But, again, the accused was excluded from the private meeting. The accused was not given the opportunity to watch the meeting by closed video-link. The meeting was not recorded. The public were not able to be present.

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65 (2023) 72 VR 161.

66 See *Criminal Procedure Act 2009* (Vic), s 370. See generally Pt 8.2, Div 6.

67 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 165 [25].

68 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 166 [26].

69 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 163 [5], fn 5.

103 The present proceeding arises prior to a trial of the accused from a reference to the Court of Appeal of questions of law concerning the private meeting. The Director of Public Prosecutions argued in the Court of Appeal that the private meeting was supported by the statutory power in s 389E(1) of the *Criminal Procedure Act 2009* (Vic), which permitted the court to "make or vary any direction for the fair and efficient conduct of the proceeding". The Court of Appeal held that the private meeting was not supported by the statutory power in s 389E(1). The private meeting was held to be contrary to the principle of open justice and a fundamental irregularity which, as in *Alec (a pseudonym) v The King*, required the complainant's evidence to be recorded at another special hearing before a different judge.

104 The private meeting from which the accused was excluded was a well-intentioned attempt to address an understandable concern with the discomfort of a nervous child complainant before the difficult experience of giving evidence. But there were other ways of addressing this concern.<sup>70</sup> In both *Alec (a pseudonym) v The King* and this proceeding the Court of Appeal was correct that the directions to hold private meetings with the complainants were irregular, particularly as the directions were made, and the private hearings were attended, by the judges who then presided over the special hearings. In neither case did the directions fall within the power under s 389E(1) to make directions "for the fair and efficient conduct of the proceeding". To the contrary, in both cases the meetings caused inefficiency and had the potential to undermine the fairness ideals of the system of criminal justice. This conclusion is powerfully reinforced by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the *Charter of Human Rights and Responsibilities*"<sup>71</sup>).

105 In the present proceeding, what would have happened if the complainant had said something at the private meeting which was relevant to a fact in issue at the trial? If the precise content of that statement were disputed by the complainant, could counsel for the accused have given evidence about it at the trial?<sup>72</sup> Would the accused then have been required to obtain new counsel? Could the judge have referred to their recollection of the statement? What would have happened if comments or conduct by the judge at the private meeting were considered by counsel for the accused as demonstrating an apprehension of bias? Who could have given evidence and been cross-examined on the appeal if the judge refused an

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70 *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 166 [27]. See below at [146], [153].

71 *Charter of Human Rights and Responsibilities*, s 1(1).

72 See *Evidence Act 2008* (Vic), s 43.

application for recusal but the judge's factual account of the comments or conduct at the private meeting was disputed or said to be incomplete?

106 Ultimately, however, in the circumstances of this case, the private meeting, whilst irregular, did not amount to a fundamental irregularity. For the reasons below, the Court of Appeal was correct to answer the questions reserved to the effect that the private meeting was irregular but was not correct to conclude that the private meeting was a fundamental irregularity which required the evidence of the complainant to be retaken at another special hearing before a different judge. Although my conclusion differs from the Court of Appeal in part, my conclusion is heavily dependent upon the limited facts before this Court; I acknowledge the real force in the reasoning of the Court of Appeal and the grave dangers of private meetings in advance of trial that are attended by a judge and a prosecution witness.

### **The four reserved questions and the answers given by the Court of Appeal**

107 The accused, who is the respondent to this appeal, had not yet been arraigned at the time of the private meeting on 14 March 2023. He was due to face a trial commencing on 18 September 2023. An inefficient, but necessary, consequence of the private meeting is that the trial dates for the accused were vacated. Instead, on the application of the Director of Public Prosecutions, four questions of law were reserved by a judge ("the second judge") for determination by the Court of Appeal.<sup>73</sup> The questions reserved were contained in Annexure B to the orders of the second judge. That annexure, and the answers (in bold) given by the Court of Appeal to the questions in the annexure, were as follows:

"In circumstances where the presiding judge at the special hearing held pursuant to Division 2 of Part 8.2 of the *Criminal Procedure Act 2009* met with the child complainant prior to the complainant giving evidence at the special hearing for the purpose of introducing herself to the child, and where:

- a) the meeting occurred at the offices of the Child Witness Service;
- b) the meeting was not recorded;
- c) the meeting between the complainant and the judge was also attended by the legal representative for the accused and the legal representative for the prosecution;
- d) the meeting occurred with the consent of both the prosecution and defence counsel; and

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73 *Criminal Procedure Act 2009* (Vic), s 302(2).

e) the accused was not present at the meeting.

**Questions:**

1. Did the meeting infringe the principles of open justice as identified in *Alec (a pseudonym) v The King* [2023] VSCA 208? **[Yes]**
2. Did the meeting bring the impartiality of the presiding judge into question? **[Unnecessary to answer]**
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? **[Yes]**
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? **[Yes]"**

108 The first question appears to be expressed as a concern only with the principle of open justice. If the first question were read very narrowly it could appear to be abstracted from the more specific question of whether an irregularity occurred on the facts. The question of whether an irregularity occurred is a step towards each of: (i) the third question of whether there was a fundamental irregularity in the trial process; and (ii) the fourth question of whether that irregularity required the complainant's evidence to be retaken.

109 The Director of Public Prosecutions treated the first question in the most abstracted way, relying on Dworkin's view that a principle is distinct from a rule because the former "states a reason that argues in one direction, but does not necessitate a particular decision".<sup>74</sup> The Director quoted from French CJ, who said that the open court "principle is a means to an end, and not an end in itself",<sup>75</sup> and from Viscount Haldane LC, who said that the principle that courts must administer justice in public is subject to exceptions which have "a yet more fundamental principle ... to secure that justice is done".<sup>76</sup>

110 It is no objection to the first question that it might be described as concerned with a "principle" rather than a "rule". It may be that any distinction between principles and rules in the sense that Dworkin described them is a matter of

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<sup>74</sup> Dworkin, *Taking Rights Seriously*, rev ed (2013) at 42.

<sup>75</sup> *Hogan v Hinch* (2011) 243 CLR 506 at 530 [20].

<sup>76</sup> *Scott v Scott* [1913] AC 417 at 437.

degree.<sup>77</sup> Indeed, each of "open justice", an "irregularity" and "a fundamental irregularity" are open-textured concepts with principle-like qualities. Nor is it an objection to the first question that it is not concerned with the "end" of whether "justice is done". The administration of justice is concerned with both process and outcome, the appearance of justice and actual justice. Viscount Haldane LC was right that actual justice is more fundamental than the appearance of justice. But any system of justice should aim for both.<sup>78</sup>

111 It would, however, be an objection to the first question if it purported to invite the Court of Appeal to "pronounce principles in the abstract", divorced from any relevance to the parties.<sup>79</sup> But the question, properly, was not understood in that way by the Court of Appeal. The reference in the first question to the decision in *Alec (a pseudonym) v The King* made clear that the concern of the question was not with open justice in the abstract but with the application of the principle of open justice to the facts of the case to determine whether there is "an error or an irregularity in, or in relation to, the trial".<sup>80</sup> That was, correctly, how the first question was understood by the Court of Appeal.

112 The reference to *Alec (a pseudonym) v The King* in the first question reserved was to the unanimous decision of the Court of Appeal of the Supreme Court of Victoria discussed in the introduction to these reasons. In that case, the appellant's convictions were quashed and the complainant's special evidence was required to be retaken, on the ground that before the taking of that evidence the judge had met privately with the complainant and in the absence of any counsel. The Court of Appeal in that case held that the meeting was "a serious departure from accepted trial process" and that "[i]t occasioned a substantial miscarriage of justice".<sup>81</sup> Those two holdings of the Court of Appeal in *Alec (a pseudonym) v The King* correspond with the first and third questions in this case. As Jagot J said during the oral hearing of this appeal, the "abstract ... question[] of open justice"

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77 Hart, "Postscript", in *The Concept of Law*, 3rd ed (2012) 238 at 261-263. See also Gardner, "Ashworth on Principles", in Zedner and Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in honour of Andrew Ashworth* (2012) 3 at 12-14.

78 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 at 460 [192]; 409 ALR 65 at 114.

79 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 83, quoting *New York v United States* (1946) 326 US 572 at 575.

80 *Criminal Procedure Act 2009* (Vic), s 276(1)(b). See *Weiss v The Queen* (2005) 224 CLR 300 at 314 [35]-[36].

81 See *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 169 [38].

feeds into two questions: "[one,] was there an irregularity; two, was it fundamental?"

113 The Court of Appeal in the present case properly considered the first and third questions together, concluding that the meeting was not merely irregular (as a consequence of the application of the principle of open justice) (question 1) but was "a fundamental irregularity in the trial process, so as to constitute a serious departure from accepted trial processes" (question 3).<sup>82</sup> In the course of answering those questions the Court of Appeal considered the submission by the Director of Public Prosecutions that s 389E(1) of the *Criminal Procedure Act* provided a source of power for the private meeting. The success of such a submission would have meant that the meeting was not irregular. The Court of Appeal rightly rejected that submission.

114 The Court of Appeal did not consider it necessary to answer the second question. The second question is a shorthand expression for, and if necessary could be re-expressed as, whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".<sup>83</sup> Like the first question, the second question is also a step towards the third. An answer to the second question in the affirmative would necessarily require an answer to the third question in the affirmative.<sup>84</sup> In this Court it would not be appropriate to answer the second question for three reasons: (i) there was no substantial written or oral argument on this appeal concerning the second question; (ii) the Director of Public Prosecutions had no specific ground of appeal alleging that the Court of Appeal should have answered the second question, "No"; and (iii) the respondent made no submission that there was a reasonable apprehension of bias by the judge who presided over the special hearing at which the complainant gave evidence.

115 The obvious consequence of the Court of Appeal's answers to questions 1 and 3 was that question 4 was answered to the effect that the evidence of the complainant was required to be taken at a further special hearing conducted before a different judge. The essence of the reasoning of the Court of Appeal on the first and third questions was expressed by Priest JA (with whom Emerton P and

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82 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [58].

83 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]. See also *Charisteas v Charisteas* (2021) 273 CLR 289 at 296 [11].

84 *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 125-126 [98]-[102]; *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 at 459 [188]; 409 ALR 65 at 113; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at 614 [6]. See also *Wilde v The Queen* (1988) 164 CLR 365 at 372-373.

Macaulay JA agreed), who said that "[a]part from recognised common law or statutory exceptions ... no aspect of the administration of criminal justice in this State should ever take place in a private setting".<sup>85</sup>

116 On this appeal, both senior counsel accepted that the fourth question was the "central" or ultimate question. Senior counsel for the Director of Public Prosecutions accepted that "the real issue" was the admissibility of the special hearing recording that had been taken before the same judge who had attended the private meeting from which the accused was excluded. Senior counsel for the respondent accepted that it "must be" the case that the central question (to which the other three questions were ancillary) was whether the evidence at the special hearing was admissible at the trial.

### **The nature of the private meeting direction given by the presiding judge**

117 This appeal was conducted on the assumption that the presiding judge had given a direction at the ground rules hearing on 14 March 2023 to facilitate the private meeting. The relevant facts contained in Annexure A to the order of the second judge do not reveal the precise terms of the directions made by the presiding judge. The facts in the annexure record only that the presiding judge "made directions for the fair and efficient conduct of the proceeding pursuant to s 389E of the [*Criminal Procedure Act*], having regard to the recommendations made by the intermediary".

118 There is no indication in the facts supplied in Annexure A that the directions made under s 389E included a direction that a private meeting be held. The presiding judge's directions were not provided to this Court although the Director of Public Prosecutions argued that the direction fell within the power to make directions under s 389E(1). There may, however, be a basis to suspect that the directions made under s 389E(1) did not include a direction to hold the private meeting.

119 It suffices to proceed on the assumption of the parties to this appeal (and favourably to the Director of Public Prosecutions) that there was such a direction. The only express information about the content of the direction is that given by the second judge in the annexure:

"The prosecutor indicated to the Court that he planned to meet the complainant at the offices of Child Witness Service where the complainant was going to view her [Video and Audio Recorded Evidence] at 2 pm that afternoon. [The presiding judge] indicated that if no one had any difficulty with the proposal [by the complainant that 'it would assist her confidence to meet counsel and the judicial officer in person on the day she gives

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85 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [54].

evidence'], she would meet the complainant at the same time. [The presiding judge] confirmed that the purpose of the meeting was for the complainant to 'say hello'. Defence counsel confirmed he had no objection to the meeting and that he was content to attend to introduce himself to the complainant at the same time."

120 There is real difficulty in identifying from these facts the content of a direction made by the presiding judge concerning the private meeting. Perhaps the best that can be said is that the direction was that an unrecorded, out-of-court meeting would be held, which senior counsel for the Director of Public Prosecutions accepted was part of the criminal proceeding, and which the judge would attend together with the prosecutor, an instructing solicitor for the prosecution, the complainant and the defence counsel.

121 Any direction for the holding of the private meeting must have excluded the accused, at least by implication. Section 372(1)(b)(i) of the *Criminal Procedure Act* prevents the accused from being in the same room as the complainant when the complainant's evidence is being formally taken at a special hearing. It is inconceivable that the accused would be permitted to be present in the same room when the complainant is being informally met, particularly at a meeting which had been requested by the complainant for the purpose of assisting her confidence.

122 Similarly, any direction to hold the meeting must have provided, at least by implication, that the meeting be in private. The meeting was not the subject of any public court listing. As senior counsel for the Director of Public Prosecutions accepted on this appeal, the meeting was not "in a place accessible to the public". Any member of the public present at the ground rules hearing would have heard only that the meeting was going to take place at the offices of the Child Witness Service before the complainant viewed her pre-recorded Video and Audio Recorded Evidence prior to its tender at the special hearing. There was no suggestion that the public could attend. No address, floor, or room number was provided. A member of the public could not reasonably have expected that they could attend the offices of the Child Witness Service, and certainly could not reasonably have expected that they would be admitted and shown the location of the room in which the complainant would view the recording and be greeted beforehand. The only reasonable inference to draw is that the meeting was intended to be, and would have been understood as being, private.

123 As to the subject matter of any direction for the private meeting, there was no suggestion that the subject matter was confined in any way. It is clear that the purpose of the meeting was for the judge to introduce herself to the complainant. But no party to this appeal suggested that any direction for the private meeting contained a prohibition upon the complainant or either counsel raising any legal issue at the private meeting. Nor did any party suggest that there was a self-imposed prohibition upon the presiding judge addressing any legal issues if they happened to be raised in the course of the private meeting. Section 179 of the



*Criminal Procedure Act* might have permitted the presiding judge to do so. Section 179 provides that "[a]t any time except during trial, the court may conduct one or more directions hearings" with the power in s 181(1) to "make or vary any direction or order, or require a party to do anything that the court considers necessary, for the fair and efficient conduct of the proceeding". Whether or not the presiding judge actually made any directions or orders at the private meeting is irrelevant to the question of whether there was any implied restriction upon the subject matter of the direction that was said to have provided for the private meeting to occur.

### **The focus of this appeal**

124 Senior counsel for the parties on this appeal made reference to a cornucopia of different provisions of the *Criminal Procedure Act* but the argument for the Director of Public Prosecutions ultimately reduced to a question of interpretation of the open-textured provision in s 389E(1), which was said to provide the source of power for a judge to hold private meetings in the absence of an accused person. The central question is whether a direction to hold a private meeting that includes the judge and a central prosecution witness, but excludes the accused, can be a direction made under s 389E(1) for the "fair and efficient conduct of the proceeding". If statutory authority under s 389E(1) were provided for the private meeting then the meeting would not be an irregularity in the trial process. If statutory authority were not provided then the principle of open justice dictates the conclusion that the meeting was irregular.

125 The parties made substantial and detailed submissions about the role of the *Charter of Human Rights and Responsibilities* in the interpretation of s 389E(1) of the *Criminal Procedure Act*. As explained below, s 32 of the *Charter of Human Rights and Responsibilities* assumes considerable importance in the interpretation of Victorian legislative provisions.

126 The parties also relied upon s 28 of the *Open Courts Act 2013* (Vic). That provision relevantly requires a court in determining whether to make an order to "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". Section 28 does not bear upon the interpretation of provisions. It concerns the judicial discretion to make orders. Even if the direction for a private meeting were a direction for a "hearing of a proceeding" within s 28, the respondent had no notice of contention, and made no submissions, to the effect that: (i) if s 389E(1) of the *Criminal Procedure Act* created a discretion to make a direction of the nature that was assumed to have been made then s 28 of the *Open Courts Act* imposed a mandatory relevant consideration for the exercise of power to be valid (rather than merely a matter that should be considered); and (ii) the consequences of such a conclusion for the answer to any of the questions stated. For those reasons, the *Open Courts Act* can be put to one side.

**Section 389E(1) of the *Criminal Procedure Act***

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It is necessary to set out s 389E in full:

**"Directions which may be given at ground rules hearings**

- (1) At a ground rules hearing, the court may make or vary any direction for the fair and efficient conduct of the proceeding.
- (2) Without limiting subsection (1), the court may give one or more of the following directions—
  - (a) a direction about the manner of questioning a witness;
  - (b) a direction about the duration of questioning a witness;
  - (c) a direction about the questions that may or may not be put to a witness;
  - (d) if there is more than one accused, a direction about the allocation among the accused of the topics about which a witness may be asked;
  - (e) a direction about the use of models, plans, body maps or similar aids to help communicate a question or an answer;
  - (f) a direction that if a party intends to lead evidence that contradicts or challenges the evidence of a witness or that otherwise discredits a witness, the party is not obliged to put that evidence in its entirety to the witness in cross-examination."

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The legislative description of the function of the ground rules hearing to which s 389E(1) refers has evolved since this proceeding commenced.<sup>86</sup> At the time this proceeding commenced, the ground rules hearing provisions applied to particular proceedings including those that relate to a charge for a sexual offence,<sup>87</sup> and to a witness (including a complainant) who is under 18 years of age or who has a cognitive impairment.<sup>88</sup> When the provisions were introduced, the purpose of a ground rules hearing was described in the Explanatory Memorandum as "to discuss and establish how certain witnesses will be enabled to give their best

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<sup>86</sup> See now *Criminal Procedure Act 2009* (Vic), s 389AB.

<sup>87</sup> *Criminal Procedure Act 2009* (Vic), s 389A(1)(a).

<sup>88</sup> *Criminal Procedure Act 2009* (Vic), s 389A(3).

evidence".<sup>89</sup> The examples of directions set out in s 389E(2) illustrate numerous different directions that can be given by the court concerning the evidence of a relevant witness to enable the witness to give their best evidence at trial.

### **The operation of the *Charter of Human Rights and Responsibilities***

129 Section 32(1) of the *Charter of Human Rights and Responsibilities* provides that "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". "Human rights" in s 32 are those civil and political rights set out in Pt 2 of the *Charter of Human Rights and Responsibilities*.<sup>90</sup> Part 2 includes s 24(1), which provides that:

"A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing."

The various aspects of the s 24(1) right overlap. Independence and impartiality are two concerns of fairness. The public nature of a hearing is apt to reinforce fairness, independence and impartiality.

130 None of the overlapping aspects of s 24(1) is absolute. But like Art 6 of the European Convention on Human Rights, which is expressed in similar terms, any qualifications to the right must "represent[] no greater qualification than the situation calls for".<sup>91</sup> Section 24(2) provides that "[d]espite subsection (1), a court or tribunal 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 this Charter". But the general right established by s 24(1) remains subject to the interpretative mandate in s 32.

### *Three techniques of interpretation and construction*

131 It has been said that s 32 of the *Charter of Human Rights and Responsibilities* does not permit an approach to interpretation that differs from the approach ordinarily undertaken<sup>92</sup> and does not authorise a legislative "function of

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89 Victoria, Legislative Assembly, *Justice Legislation Amendment (Victims) Bill 2017*, Explanatory Memorandum at 13.

90 *Charter of Human Rights and Responsibilities*, s 3(1).

91 *Brown v Stott* [2003] 1 AC 681 at 704.

92 *Momcilovic v The Queen* (2011) 245 CLR 1 at 217 [565].

a law-making character".<sup>93</sup> So much may be accepted, but the approach ordinarily taken to interpretation depends upon the interpretative issue that is raised by a case. In particular, the relevant interpretative technique engaged by s 32 concerns when, and how, a particular statute can be interpreted so that it is consistent with a general result that is desired by another statute.

132 Australian law recognises three techniques by which statutory provisions can be interpreted and construed, consistently with their purpose and also, as far as possible, consistently with a result desired by an enacting Parliament in other, more general, legislation. These techniques are most commonly encountered in the course of assessing the constitutional validity of legislation. The techniques can be described as "reading down", "severance", and "partial disapplication".<sup>94</sup> All three techniques are supported by general Commonwealth, State and Territory legislation that requires interpretation or construction of the legislative provisions of the relevant Parliament, consistently with the legislative purpose, to preserve the constitutional validity of the legislation.<sup>95</sup>

133 The expression "reading down" can be misleading. It suggests that a correct, or proper, interpretation is being discarded in favour of "reading" (interpreting) a provision in a narrower way. The expression should not be understood in this way. As Professor Rishworth KC correctly observes in the context of s 6 of the *New Zealand Bill of Rights Act 1990* (NZ), "it is problematic to speak of more than one meaning of an enactment" because "[t]he idea of multiple meanings flies in the face of the central idea behind human communication, that words are almost always used ... to convey one meaning and not another".<sup>96</sup> Instead, the expression "reading down" should be understood as describing the ordinary technique of interpretation which recognises that sentences have only one meaning but which gives particular weight to important considerations in identifying that meaning, including those that attempt (by legislative direction) to ensure constitutional

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93 *Momcilovic v The Queen* (2011) 245 CLR 1 at 92-93 [171].

94 *Clubb v Edwards* (2019) 267 CLR 171 at 313-322 [415]-[433].

95 *Acts Interpretation Act 1901* (Cth), s 15A; *Acts Interpretation Act 1931* (Tas), s 3; *Acts Interpretation Act 1954* (Qld), s 9; *Interpretation Act 1978* (NT), s 59; *Interpretation Act 1984* (WA), s 7; *Interpretation of Legislation Act 1984* (Vic), s 6; *Interpretation Act 1987* (NSW), s 31; *Legislation Act 2001* (ACT), s 120; *Legislation Interpretation Act 2021* (SA), s 15.

96 Rishworth, "Interpreting Enactments: Sections 4, 5, and 6", in Rishworth et al, *The New Zealand Bill of Rights* (2003) 116 at 143.

validity of the provision. Hence, the technique can also involve interpreting the provision in a broader way, sometimes also called "reading up" or "reading in".<sup>97</sup>

134 Where the statutory provision involves the rights of an individual, the weight given to a reading that achieves consistency between the provision and the right will increase in accordance with the importance of the right and the greater the abrogation of the right that would result from a proposed interpretation.<sup>98</sup> This technique, described at common law as the principle of legality, is reflected in s 32 of the *Charter of Human Rights and Responsibilities*, which demands that weight be given to the civil and political rights set out in Pt 2 of the *Charter*.<sup>99</sup> Like any interpretation, however, the weight given to any of the rights guaranteed in the *Charter of Human Rights and Responsibilities* cannot permit a meaning to be given to a statutory provision that is contrary to the purpose of the provision.

135 The interpretative techniques of severance and partial disapplication are more controversial. In constitutional law, these techniques are similarly directed to achieving an interpretation or construction that is consistent with a result desired by an enacting Parliament so far as it is possible to do so consistently with the purpose of the provision. Hence, both of these techniques have sometimes, confusingly, also been described as "reading down".<sup>100</sup> Where severance occurs in constitutional law, the process involves the interpretation of a single provision, or a statute, as though words contained in a single provision, or an entire provision of a statute, had been struck out with a "blue pencil".<sup>101</sup> It involves "textual surgery" to remove "invalid portions" of legislation.<sup>102</sup> But it is not possible to sever such text if the remainder would cause the purpose of the provision or the statute to

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97 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 547-548 [36]-[37]; Young, "Judicial Sovereignty and the Human Rights Act 1998" (2002) 61 *Cambridge Law Journal* 53 at 56-58.

98 *Hurt v The King* (2024) 98 ALJR 485 at 506 [106]. See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159]; *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34].

99 *Momcilovic v The Queen* (2011) 245 CLR 1 at 50 [51].

100 For instance, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 348 (describing severance as reading down); *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [122] (describing partial disapplication as reading down). See *Thoms v The Commonwealth* (2022) 276 CLR 466 at 495 [75].

101 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 348; *Harrington v Lowe* (1996) 190 CLR 311 at 328.

102 *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at 530 [43].

change.<sup>103</sup> Partial disapplication has a similar effect and is sometimes also described as "severance".<sup>104</sup> But the difference is that the technique of partial disapplication does not ignore or notionally remove any words of the provision. Instead, partial disapplication has the effect of permitting a court to construe the provision so that "a provision too widely or generally expressed should be confined in its operation [application] to so much of the subject it is capable of covering as is constitutionally competent to the legislature".<sup>105</sup> In short, the concern of partial disapplication is with severing part of the "operation" or "application" of a provision rather than severing words of a provision.<sup>106</sup>

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The amendment to the operation of legislation by the technique of partial disapplication (properly so-called), and perhaps also by treating words of a single provision as though they had been severed, required statutory mandate and justification.<sup>107</sup> There was a simple justification for the mandate by Commonwealth, State and Territory interpretation legislation to treat words of a provision as though they had been severed or to treat a provision as partially disappplied in its operation. That justification was that the same power<sup>108</sup> which permits a court to invalidate an unconstitutional provision in its entirety should permit the provision to be partially invalidated by severing words or partially disapplying its operation, provided that the valid remainder retains the same

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**103** *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 27; *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 701.

**104** *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 364-365 (in argument), compare at 370 ("operate in respect of all ships to which [the provisions] might lawfully be applied"); *Harrington v Lowe* (1996) 190 CLR 311 at 326-327.

**105** *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 369.

**106** See, for instance, *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 457 [36]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1020 [73]; 415 ALR 254 at 272.

**107** See *Harrington v Lowe* (1996) 190 CLR 311 at 326-327, referring to *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1, *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689, and *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434. See also *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 370 ("[t]here is ... nothing to prevent Parliament from legislating in this way in order to make its intention clear").

**108** *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89]. See *Marbury v Madison* (1803) 5 US 137.

purpose and substantial operation. But "[t]here is no such justification for judicial invalidation of laws within the scope of legislative power".<sup>109</sup>

137 There might be another role for severance or partial disapplication, beyond limiting the effect of constitutional invalidity, by the operation of s 32 of the *Charter of Human Rights and Responsibilities*.<sup>110</sup> Section 32 acts as a statutory mandate to apply a relevant provision, unless its purpose and context require otherwise, only to those circumstances which are compatible with the civil and political rights set out in Pt 2 of the *Charter of Human Rights and Responsibilities*. Section 32 might provide a mandate, or "added sense of legitimacy",<sup>111</sup> in the process of interpretation to sever, or ignore, words of a provision that are not integral to its purpose. So too, s 32 might mandate a process of partial disapplication which, as Professor Lindell has explained, would result in a court "failing to apply [the provision] ... according to its own terms" as "a matter of statutory construction", rather than failing to apply it as a result of incapacity due to lack of constitutional power.<sup>112</sup>

138 The failure by courts to apply a provision according to its own terms is not disobedient to the intention of Parliament. It is making a necessary choice, according to the terms required by Parliament itself, between the conflicting requirement of a general enactment (s 32) and the application of a particular enactment of the Parliament. But before a general enactment is permitted to prevail over a particular one, great care must be exercised, and institutional respect afforded, by confining the application of techniques of severance or partial disapplication to instances where the full and strict application of the particular enactment would involve serious interference with the core of a right protected by the general enactment. An analogy can be drawn with the approach by which

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109 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 230.

110 Compare *New Zealand Bill of Rights Act 1990* (NZ), s 4(b). See also Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary*, 2nd ed (2015) at 217-218 [7.2.6]-[7.2.7].

111 Kavanagh, "Choosing between sections 3 and 4 of the Human Rights Act 1998: judicial reasoning after *Ghaidan v Mendoza*", in Fenwick, Phillipson and Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (2007) 114 at 140.

112 Lindell, "The statutory protection of rights and parliamentary sovereignty: Guidance from the United Kingdom?" (2006) 17 *Public Law Review* 188 at 203 (emphasis omitted); see also at 189. See also Lindell, "Invalidity, Disapplication and the Construction of Acts of Parliament: Their Relationship with Parliamentary Sovereignty in the Light of the European Communities Act and the Human Rights Act" (1999) 2 *Cambridge Yearbook of European Legal Studies* 399 at 414.

courts ignore statutory words in circumstances where the application of those words could not have been intended by Parliament because it would mean that the provision was "totally irreconcilable with the rest of the statute".<sup>113</sup>

139 In cases of severance or partial disapplication, the process is therefore not one of preserving validity to the greatest extent possible but one of "[r]econciling conflicting provisions [which] will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'".<sup>114</sup> It has been cogently argued that the application by provisions such as s 32 of such interpretative techniques, beyond the principle of legality ("reading down" and "reading in"), was "certainly what was expected by the legislators" of the *Charter of Human Rights and Responsibilities*.<sup>115</sup>

140 The techniques of "reading down", "severance" and "partial disapplication" will not, however, be possible where the purpose and context of the statutory provision indicate that the provision is not compatible with the rights guaranteed in the *Charter of Human Rights and Responsibilities*. Perhaps the most obvious instance of context where the techniques may not be used is where a parliamentary statement has been made recognising incompatibility of the provision with *Charter* rights.<sup>116</sup> The techniques will also be unable to be applied where partial severance or partial disapplication of a provision would leave the remainder of the provision with a different operation from that which the remainder would otherwise have had.<sup>117</sup>

141 The techniques of, on the one hand, "reading down" and applying the principle of legality, and, on the other hand, "severance" or "partial disapplication", are also reflected in the different approaches taken in the United Kingdom when applying s 3 of the *Human Rights Act 1998* (UK), which requires courts of the United Kingdom, "[s]o far as it is possible to do so", to read and give effect to

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113 Kavanagh, "Unlocking the Human Rights Act: The 'Radical' Approach to Section 3(1) Revisited" [2005] *European Human Rights Law Review* 259 at 267, citing Bell and Engle (eds), *Cross on Statutory Interpretation*, 3rd ed (1995) at 93.

114 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70], citing *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360.

115 Gledhill, "Rights-Promoting Statutory Interpretive Obligations and the 'Principle' of Legality", in Meagher and Groves (eds), *The Principle of Legality in Australia and New Zealand* (2017) 93 at 111. See also Australian Capital Territory, Legislative Assembly, *Human Rights Amendment Bill 2007*, Explanatory Statement, cl 5.

116 *Charter of Human Rights and Responsibilities*, s 28(3)(b).

117 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.



legislation in a way which is compatible with the rights guaranteed under the European Convention on Human Rights.

142 In *R (Wilkinson) v Inland Revenue Commissioners*,<sup>118</sup> speaking of the first of these techniques, Lord Hoffmann (with whom the other Law Lords agreed) said that the effect of s 3 was:

"to deem the Convention to form a significant part of the background against which all statutes, whether passed before or after the 1998 Act came into force, had to be interpreted. Just as the 'principle of legality' meant that statutes were construed against the background of human rights subsisting at common law ... so now, section 3 requires them to be construed against the background of Convention rights. There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights."

143 In *Vidal-Hall v Google Inc*,<sup>119</sup> Lord Dyson MR and Sharp LJ said that separately from "[r]eading in to a provision or reading it down" they did "not see why, as a matter of principle, it is impermissible to disapply ... a relatively minor incompatible provision in order to make the measure compatible". In the decision of the House of Lords in *Ghaidan v Godin-Mendoza*,<sup>120</sup> which was relied upon by the Victorian Human Rights Consultation Committee in its report recommending enactment of the *Charter of Human Rights and Responsibilities* as part of the Committee's discussion of the proposed clause which became s 32,<sup>121</sup> it was held that provided that disapplication does not "alter a fundamental feature of the legislation",<sup>122</sup> does not go against "the grain of the legislation"<sup>123</sup> or does not alter the "essential character" of the provision,<sup>124</sup> disapplication under s 3 of the *Human*

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118 [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535.

119 [2016] QB 1003 at 1040 [90].

120 [2004] 2 AC 557.

121 Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005) at 82-83.

122 *Vidal-Hall v Google Inc* [2016] QB 1003 at 1040 [90].

123 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 601 [121].

124 Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 *Law Quarterly Review* 598 at 609.

*Rights Act* could reflect the same approach as courts adopt when applying national law "as far as possible" to be consistent with European law.<sup>125</sup>

**Interpreting s 389E(1) of the *Criminal Procedure Act* in light of ss 24 and 32 of the *Charter of Human Rights and Responsibilities***

*The statutory and extrinsic context of s 389E(1)*

144 Five matters of text and context militate against an interpretation of s 389E(1) that permits the court to direct that a private meeting occur from which the accused is excluded. These five matters, in combination with the operation of ss 24 and 32 of the *Charter of Human Rights and Responsibilities*, lead to an irresistible conclusion that s 389E(1) does not permit the court to direct that a private meeting occur from which the accused is excluded.

145 **First**, the power in s 389E(1) to make directions at a ground rules hearing is expressed in terms that are more constrained than the general directions power in s 181. Like the power in s 389E(1), the general directions power in s 181 permits the court to "make or vary any direction ... for the fair and efficient conduct of the proceeding". But the general directions power also permits the court to "require a party to do anything that the court considers necessary". In this context, senior counsel for the respondent presented a compelling submission that a direction "for" the fair and efficient conduct of the proceeding at a ground rules hearing was concerned with directions for things that would occur during the proceeding itself. By contrast, a direction to compel parties to do things, such as to provide documents, would fall only within the general directions power in s 181.

146 In any event, in light of the omission from s 389E(1) of a power to require any party to do anything that the court considers necessary, it is a surprising interpretation of s 389E(1) for the provision to empower a court to order that a *non-party* be required to do something that might be *unnecessary* (such as a direction that requires the attendance of at least counsel or instructing solicitors at a private meeting when a similar effect might be achieved by commencing the recorded special hearing earlier and informally with the judge and counsel being unrobed and without any formal entrance<sup>126</sup>).

147 **Secondly**, although s 389E(2) does not limit the scope of s 389E(1), it is notable that: the examples in s 389E(2) all concern the conduct of the hearing itself; none concerns private and out-of-court conduct; none requires any step to

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<sup>125</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 574-575 [45], 599 [118]. See *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, particularly at 4159 [8].

<sup>126</sup> See also *Alec (a pseudonym) v The King* (2023) 72 VR 161 at 166 [27].

be taken by the judge themselves; none involves the absence of the accused. The examples are a universe away from directions by the court that the judge and counsel meet with the central prosecution witness in the absence of the accused. Indeed, if the open-textured nature of the phrase "fair and efficient conduct of the proceeding" in s 389E(1) were truly to extend to a private meeting between judge, counsel and a witness in order to assist the confidence of the witness, then it might even extend to a private meeting between only the judge and any witness.

148 **Thirdly**, s 389E(1) must be interpreted against the background that there is, at least, serious doubt concerning whether courts have any general authority to give directions that bind non-parties in relation to any conduct outside the courtroom.<sup>127</sup> The general terms of s 389E(1) contain no indication that the Victorian Parliament intended that judicial directions could be made to bind non-parties such as counsel or the complainant for the specific purpose of attending a private meeting with the judge.

149 **Fourthly**, and assuming (as the parties to this appeal did) that the private meeting was part of the criminal proceeding, the notion that s 389E(1) could permit a direction that excluded the accused from attending part of the proceeding appears inconsistent with the scheme of the *Criminal Procedure Act*, which is scrupulous always to permit, and usually to *require*, the accused to attend hearings that are part of the proceeding. For instance, provision under the *Criminal Procedure Act* requiring the attendance of an accused at a hearing for the purposes of s 330(1)(a) is made by s 246, which provides that "[a]n accused must attend all hearings conducted under this Chapter [Trial on indictment<sup>128</sup>] in the criminal proceeding against the accused unless excused [by the court] under section 330".

150 **Fifthly**, the requirement that the direction be for the "fair and efficient" conduct of the proceeding is not mere surplusage. For instance, there was (and could be) no suggestion that the private meeting in *Alec (a pseudonym) v The King* between only the judge and the complainant could have been the subject of a direction under s 389E(1). In *Re JRL; Ex parte CJL*,<sup>129</sup> Mason J described a fair

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<sup>127</sup> *Hogan v Hinch* (2011) 243 CLR 506 at 533 [24], citing *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 55, 57, *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 477, and *"Mr C"* (1993) 67 A Crim R 562 at 563.

<sup>128</sup> See *Criminal Procedure Act 2009* (Vic), s 158.

<sup>129</sup> (1986) 161 CLR 342 at 350.

system of justice as a system that must be "open, impartial and even-handed". His Honour cited with approval the following observations:<sup>130</sup>

"The sound instinct of the legal profession—judges and practitioners alike—has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither [the judicial officer] nor [the advisers and witnesses] should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."

151 The point that Mason J was emphasising was one of prophylaxis. This reasoning does not draw distinctions between circumstances where both a party and their counsel had been excluded from a private meeting between a judge and a witness and those where only a party had been excluded from a private meeting between a judge and a witness.

152 In *HT v The Queen*,<sup>131</sup> Gordon J applied the same concept, affirming the long-standing approach set out by Lord Diplock<sup>132</sup> that "[a]part from statutory exceptions ... where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule [of open justice], the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice". In this context it is difficult to see how it could ever be necessary "for the fair and efficient conduct of the proceeding" for a judge to direct that there be a

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130 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350-351, quoting *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 at 127.

131 (2019) 269 CLR 403 at 435 [82].

132 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450. See also *Ex parte The Queensland Law Society Inc* [1984] 1 Qd R 166 at 170; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-477; *Nine Network Australia Pty Ltd v McGregor SM* (2004) 14 NTLR 24 at 30-31 [19]; *Hogan v Hinch* (2011) 243 CLR 506 at 534 [26]; *Rinehart v Welker* (2011) 93 NSWLR 311 at 320-321 [27]-[31]; *Deputy Commissioner of Taxation v Karas* (2011) 83 ATR 879 at 881 [4].

private meeting between judge and complainant, attended by counsel but excluding the accused, and without any requirement that the meeting be recorded.

153 No submission was made on this appeal addressing why it was necessary to exclude the accused from seeing or hearing the meeting from a remote location. For instance, an alternative manner of attempting to reduce the discomfort of a child complainant might involve an informal and unrobed (but recorded) greeting between the judge and the complainant as an initial step in a special hearing, where the judge explains the procedure in an informal way and the accused can see and hear the meeting from a location away from the courtroom.<sup>133</sup>

*Is s 32 of the Charter of Human Rights and Responsibilities engaged?*

154 The parties to this appeal made detailed submissions about the semantic meaning of a "hearing" within s 24 of the *Charter of Human Rights and Responsibilities*. The Director of Public Prosecutions submitted that the private meeting was not a hearing and did not engage s 24 of the *Charter of Human Rights and Responsibilities*. A hearing can occur even if the judge does not ultimately make any directions or orders; the possibility that such orders might be made on an occasion where the judge engages in exchanges with counsel will usually be sufficient. And, as explained earlier in these reasons, the direction to hold a private meeting was not said to contain any express or implied constraint upon the presiding judge raising with counsel at the meeting any legal issue that might arise in discussion at the private meeting. Ultimately, without any more detail about what happened at the private meeting it is difficult to conclude whether it was, or was not, a "hearing". But the presence of a judge, counsel for the parties and a central prosecution witness was a pretty good start.

155 Ultimately, it is unnecessary to attempt to resolve this semantic issue. The effect of statutory provisions on protected rights may be difficult to predict in advance, with any conflict between a provision and protected rights often arising incidentally and without facial prominence.<sup>134</sup> Contrary to the submissions of the Director of Public Prosecutions, s 24 of the *Charter of Human Rights and Responsibilities*, like Art 14(1) of the International Covenant on Civil and Political Rights, upon which it was modelled,<sup>135</sup> is not so cabined, cribbed, confined and

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133 *Criminal Procedure Act 2009* (Vic), ss 370, 372. See also ss 360(a), 360(c), 365(1).

134 Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009) at 353, referring to Feldman, "The Impact of Human Rights on the UK Legislative Process" (2004) 25 *Statute Law Review* 91 at 102 and Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *Yale Law Journal* 1346 at 1370.

135 Victoria, Legislative Assembly, *Charter of Human Rights and Responsibilities Bill 2006*, Explanatory Memorandum at 18.

bound-in that the fairness and public nature of a hearing depends only upon events that occur within the hearing itself. Both the fairness and the public nature of a hearing can be significantly compromised by events that occur outside the hearing.

156 An illustration can be given that demonstrates how a private meeting that is not a hearing can compromise the independence, impartiality, fairness or public nature of a later hearing. The illustration is the foreign decision, to which s 32(2) of the *Charter of Human Rights and Responsibilities* encourages consideration, of the Supreme Court of New Zealand in *Wilson v R*.<sup>136</sup> In that case, the Supreme Court considered s 25 of the *New Zealand Bill of Rights Act 1990* (NZ), which relevantly provides for "the right to a fair and public hearing by an independent and impartial court".

157 *Wilson v R* concerned a private meeting between the Chief District Court Judge and two police officers at which the police officers provided the Chief Judge with a letter requesting that an undercover police officer appear in the District Court to be remanded and sentenced by a different judge under an assumed name. The police officers believed that they had obtained the consent of the Chief Judge to that course of conduct. It was not shown that the judge who conducted the hearing at which the undercover officer appeared had any knowledge of the letter or the subterfuge.<sup>137</sup> There was no suggestion that the events during the hearing itself were other than fair or public or that the judge was other than independent or impartial. Nevertheless, as Elias CJ said, the right to a fair and public hearing by an independent and impartial court was compromised by the private meeting.<sup>138</sup> The other members of the Court described the right to a fair and public hearing by an independent and impartial court as one of the reasons that the private meeting was "particularly concerning".<sup>139</sup>

158 The point that *Wilson v R* illustrates about the impact of a private meeting on a public hearing is that the apparently public hearing was not entirely public because the true nature of the hearing could not have been understood without knowledge of the matters raised at the private meeting. The purpose of the private meeting in the present case might have seemed entirely innocuous, as an opportunity for friendly greetings to be exchanged. But the point that *Wilson v R* illustrates is that an unrecorded private meeting can have the potential to impact upon a later hearing.

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136 [2016] 1 NZLR 705.

137 *Wilson v R* [2016] 1 NZLR 705 at 751 [152].

138 *Wilson v R* [2016] 1 NZLR 705 at 751 [152].

139 *Wilson v R* [2016] 1 NZLR 705 at 720 [34]-[35].

*Giving weight to the right to a fair and public hearing*

159 The conclusion supported by each of the five matters of text and context described above is further reinforced by the weight of s 32(1) of the *Charter of Human Rights and Responsibilities*, read in conjunction with s 24, when interpreting a statutory provision such as s 389E(1) of the *Criminal Procedure Act*.

160 In the second reading speech introducing Pt 8.2A of the *Criminal Procedure Act* (including s 389E(1)), the Attorney-General for Victoria made a statement of compatibility,<sup>140</sup> stating that the Part was compatible with the *Charter of Human Rights and Responsibilities*.<sup>141</sup> In discussing s 24, the Attorney-General considered a range of ways in which the s 24 right might be engaged. One example was an amendment to s 389 "to enable evidence to be given from outside Australia by audiovisual link in cases for an offence of 'facilitating sexual offences against children'". The Attorney-General explained that this amendment did not contravene the right to a fair hearing because "[a] fair trial does not require a hearing with the most favourable procedures for the accused; it must take into account other interests, including the interests of the victim and of society generally in having a person brought to justice".<sup>142</sup>

161 Although the Attorney-General adverted to the circumstance where the witness could only be seen by the court and the accused person by audiovisual link, the Attorney-General made no mention of the possibility of a private meeting prior to trial from which an accused person was excluded both physically and virtually, without even access by audiovisual link. That omission is telling. The simple point is that an unrecorded, private meeting between a judge and a witness, which excludes an accused, has the clear potential to compromise the independence, impartiality, fairness or public nature of a later hearing. The private meeting, excluding the accused, which was considered by the Court of Appeal in *Alec (a pseudonym) v The King* had that potential. And, whilst the potential was reduced by the presence of counsel for the accused, there remained potential that the independence, impartiality, fairness or public nature of a later hearing would be compromised by a direction for a private meeting in the terms that were assumed to have been made in the present case.

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140 *Charter of Human Rights and Responsibilities*, s 28.

141 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2017 at 4355.

142 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2017 at 4356.

*Conclusion: a lack of statutory authority under s 389E(1)*

162 For these reasons, s 389E(1) did not empower a direction of the kind that the presiding judge was assumed to have made, requiring a private meeting which was unrecorded and which excluded the accused person. Although s 389E(1) is an open-textured provision, the constraint that the direction must be "for the fair and efficient conduct of the proceeding" has the effect of excluding a direction that will result in unfairness or inefficiency in the conduct of the proceeding. Those terms should be applied, having regard to the five matters of statutory and extrinsic context identified above and to s 32 of the *Charter of Human Rights and Responsibilities*, so as not to extend to any private meeting involving a judge and a witness from which an accused person is entirely excluded. The private meetings in *Alec (a pseudonym) v The King* and in the present case could not, therefore, have been the subject of a direction under s 389E(1). It is therefore unnecessary to consider whether s 389E(1) could otherwise have been partially disapplied from such circumstances, consistently with both ss 24 and 32 of the *Charter of Human Rights and Responsibilities* and the purpose of s 389E(1).

**An irregularity but not a fundamental irregularity**

163 In an important step towards the conclusion that the private meeting between the presiding judge and other players in the trial, but excluding the accused, was an irregularity, Priest JA (with whom Emerton P and Macaulay JA agreed) said in the Court of Appeal that "it is 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, particularly a witness whose evidence is central to the prosecution case".<sup>143</sup> With respect, that reasoning is impeccable. The absence of statutory authority for the presiding judge to make a direction for the private meeting necessarily meant that the meeting was contrary to the principle of open justice and constituted an irregularity in the proceeding.

164 In a valiant submission, senior counsel for the Director of Public Prosecutions analogised between the circumstances of the present case and curial processes such as views, applications determined on the papers, and judicial mediations. None of those examples involves (i) the private and unrecorded participation of the judge and a witness and (ii) the exclusion of the accused. These were the two features which senior counsel for the Director of Public Prosecutions properly accepted on this appeal as problematic. Those problems are the central issue. It would not be irregular if the meeting were open to the public and recorded, particularly if the accused had the opportunity to watch it contemporaneously (although not the opportunity to be physically present). There is a legal term for a meeting, however informal, which parties have the opportunity to watch and which

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143 *Director of Public Prosecutions v Smith* [2023] VSCA 293 at [54].



is attended by a judge and counsel (who might, or might not, make submissions). That term is a "hearing".

165 Although the private meeting was irregular, I do not consider that it was a fundamental irregularity. I reach this conclusion contrary to the approach of the Court of Appeal but recognising that this is a conclusion upon which reasonable minds might differ. The relevant circumstances of this case that militate against a conclusion that the irregularity was fundamental are that: (i) counsel for the accused confirmed in advance of the meeting that he had no objection to the meeting; (ii) counsel for the accused attended the meeting; and (iii) there was no information in the stated case before the Court of Appeal concerning what occurred at the meeting so that no inference can be drawn other than that, as the second judge described the purpose of the meeting, the presiding judge said "hello" to the complainant.

### Conclusion

166 The appeal should be allowed. Question 1 should be reformulated to reflect the issue as it was treated in oral argument. In place of the answers to each of questions 3 and 4 given by the Court of Appeal, there should be substituted the answer, "No". Therefore, the questions should be answered as follows:

1. In light of the principle of open justice was the meeting an irregularity in relation to the trial? **Yes.**
2. Did the meeting bring the impartiality of the presiding judge into question? **Unnecessary to answer.**
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? **No.**
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? **No.**

167 The most crucial point of difference in my reasoning from that of the majority is that I do not accept that s 389E(1) of the *Criminal Procedure Act* empowered the court to direct that a private meeting take place between the judge, counsel and a witness, in the absence of the accused. The reasoning of the majority has the effect that, unless and until it is amended, s 389E(1) of the *Criminal Procedure Act* will confer a discretion upon the Victorian judiciary to give directions for private meetings between a judge and a witness but excluding the accused, at least where those private meetings are also attended by counsel. Whether it would be wise for such directions to be given is another question.