

# Justice Legislation Miscellaneous Amendments Bill 2019

## Introduction Print

### EXPLANATORY MEMORANDUM

#### Clause Notes

##### Part 1—Preliminary

- Clause 1 sets out the purposes of the Bill, which are—
- to amend the **Supreme Court Act 1986** to make further provision about costs in group proceedings and to make other minor amendments to that Act;
  - to amend the **Local Government Act 1989** to provide for the effect of the purported exercise of functions, powers or duties by certain bodies and for related matters;
  - to amend the **Magistrates' Court Act 1989** to provide for the effect of acts or decisions of certain persons purporting to occupy the office of reserve magistrate and for related matters;
  - to make minor and technical amendments to the **Criminal Procedure Act 2009**, the **Evidence Act 2008**, the **Evidence (Miscellaneous Provisions) Act 1958**, the **Oaths and Affirmations Act 2018**, the **Professional Standards Act 2003** and the **Sentencing Act 1991**.
- Clause 2 provides for the commencement of the Bill, which is the day after the day on which it receives the Royal Assent.

## Part 2—Amendment of Supreme Court Act 1986

- Clause 3 substitutes the year "2015" for "2005" in section 33A, in the definition of *Chapter I of the Rules*. As a result, a reference in Part 4A to Chapter I of the Rules means the Supreme Court (General Civil Procedure) Rules 2015.
- Clause 4 inserts new subsection (2) in section 33ZD of the **Supreme Court Act 1986**. New subsection (2) provides that subsection (1)(b) is subject to any order made under new section 33ZDA, inserted by clause 5. Subsection (1)(b) provides that the Court may not order a group member or sub-group member to pay costs in a group proceeding, except as authorised by section 33Q or 33R.
- Clause 5 inserts new section 33ZDA (Group costs orders) in the **Supreme Court Act 1986**, in response to the Victorian Law Reform Commission's recommendation in its *Access to Justice—Litigation Funding and Group Proceedings Report* that Part 4A of the Act be amended to provide the Supreme Court with the power to order, on application by a representative plaintiff, a common fund for a litigation services fee, where the fee is calculated as a percentage of any recovered amount and liability for payment is shared by all class members.

Under new section 33ZDA(1) the Court may, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, order that—

- the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage amount (set out in the order) of any amount recovered in the proceeding; and
- the plaintiff and group members must share liability for payment of those legal costs.

*Plaintiff* is defined in existing section 33A of the **Supreme Court Act 1986** to mean a person who commences a group proceeding as a representative party or a person who is substituted under section 33T(1) or 33W(3) of that Act.

*Group member* is defined in existing section 33A of the **Supreme Court Act 1986** to mean a member of a group of persons on whose behalf a group proceeding has been commenced.

In accordance with section 3 of the **Supreme Court Act 1986**, *law practice* has the same meaning as in the Legal Profession Uniform Law (Victoria). *Law practice* is defined in section 6 of Schedule 1 to the **Legal Profession Uniform Law Application Act 2014** to mean—

- a sole practitioner; or
- a law firm; or
- a community legal service; or
- an incorporated legal practice; or
- an unincorporated legal practice.

The words "if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding" reflect the wording used in existing section 33ZF of the **Supreme Court Act 1986** (General power of court to make orders).

New section 33ZDA(2) provides that if a group costs order is made, the law practice representing the plaintiff and group members—

- is liable to pay any costs ordered to be paid to the defendant in the proceeding; and
- must give security for the defendant's costs in the proceeding if the Court so orders.

New section 33ZDA(3) provides that the Court may amend a group costs order during the course of the proceeding, which includes (but is not limited to) amending the percentage ordered under new subsection (1).

New section 33ZDA(4) provides that new section 33ZDA has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria). This is a reference to section 183 of Schedule 1 to the **Legal Profession Uniform Law Application Act 2014**.

New section 33ZDA(5) defines *group costs order* as an order made under new section 33ZDA(1), and *legal costs* as having the same meaning as in the Legal Profession Uniform Law (Victoria). *Legal costs* is defined in section 6 of Schedule 1 to the **Legal Profession Uniform Law Application Act 2014** to mean—

- amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services—including disbursements but not including interest; or
- without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person—including disbursements but not including interest.

### **Part 3—Amendment of Local Government Act 1989**

Clause 6 inserts new section 252 into the **Local Government Act 1989**.

New section 252(1) provides that any act or omission of an invalidly established Municipal Electoral Tribunal in the exercise of any function, power or duty during the relevant period, has the same force and effect as it would have had if the Municipal Electoral Tribunal had been validly established.

New section 252(2) confers on affected Municipal Electoral Tribunal members, the same protection and immunity that would have applied to them had the Municipal Electoral Tribunal been validly established.

New section 252(3) defines *relevant body* and *relevant period*.

### **Part 4—Amendment of Magistrates' Court Act 1989**

Clause 7 inserts new sections 141, 142, 143 and 144 into the **Magistrates' Court Act 1989**.

New section 141 defines *affected person* to mean any person who was appointed as an acting magistrate on 19 July 2011 or 6 March 2012 and who was later taken to hold the office of reserve magistrate due to amendments in the **Courts Legislation Amendment (Reserve Judicial Officers) Act 2013**. It also defines *relevant period* to mean any period during which the person purported to occupy the office of reserve magistrate, but did not validly occupy that office.

New section 142 provides that the acts or decisions of an affected person during the relevant period have the same effect as if that person had validly occupied the office of reserve magistrate.

New section 143(1) provides that a right, duty or liability to which new section 142 applies is, and must be regarded as always having been, exercisable or enforceable as if it were a right, duty or liability conferred, imposed or affected by an act or decision of a person who validly occupied the office of reserve magistrate.

New section 143(2) clarifies that the rights, duties and liabilities conferred, imposed or affected by new section 142 include the right of a person who was a party to a proceeding or purported proceeding in which a decision was made to appeal against the decision or apply for a review of the decision.

New section 144 confers on affected reserve magistrates, the same protection and immunity that would have applied to them had they validly occupied the office of reserve magistrate.

## **Part 5—Amendment of Criminal Procedure Act 2009**

### **Division 1—Amendments relating to intermediaries and indictable offences that may be heard and determined summarily**

Clause 8 substitutes section 389F(1) of the **Criminal Procedure Act 2009**, which provides that Division 2 of Part 8.2A (Intermediaries) applies to a witness who has a cognitive impairment at the time at which the proceeding commences.

This amendment clarifies that the intermediaries program may be accessed if a witness is cognitively impaired at the time they give their evidence, which may be at any stage of the criminal proceeding. This is consistent with section 389F(2) of the **Criminal Procedure Act 2009**, which provides that Division 2 of Part 8.2A applies at any stage of the criminal proceeding. It is possible for a witness to be assessed as not having a cognitive impairment at the time the proceeding commences, and for that assessment to change at a later stage in the proceeding. The intention is to ensure that a witness benefits from the use of an intermediary where they have a cognitive impairment at the time of giving their evidence, regardless of how they were assessed at the time the proceeding commenced.

Clause 9 substitutes item 4.6 of Schedule 2 to the **Criminal Procedure Act 2009** (Indictable offences that may be heard and determined summarily).

New item 4.6 clarifies that both financial and non-financial forms of the burglary offence under section 76 of the **Crimes Act 1958** may be heard and determined summarily, except where the offence involves an intent to steal property the value of which exceeds \$100 000.

- Clause 10 makes a statute law revision in the heading to section 4 of the **Criminal Procedure Act 2009**, to italicise "sexual offence".
- Clause 11 corrects the case reference in the note at the foot of section 389E(2)(f) of the **Criminal Procedure Act 2009** to *R v Ferguson* (2009) 24 VR 531.

#### **Division 2—Other miscellaneous amendments**

- Clause 12 amends section 54(7) of the **Criminal Procedure Act 2009**, which currently provides that evidence of conduct engaged in during a summary case conference, or of a document prepared solely for a summary case conference, is inadmissible in a proceeding unless consented to by all parties to the case conference. This amendment will allow evidence of offending alleged to have been committed during, or in connection with, a summary case conference, to be admissible in a criminal prosecution for that offending, without requiring the accused's consent. Clause 14 makes the equivalent amendments to committal case conferences.
- Clause 13 amends section 123 of the **Criminal Procedure Act 2009** to clarify that, despite anything to the contrary in Part 4.5 of that Act, the Magistrates' Court must not grant leave to cross-examine a witness in a committal proceeding that relates (wholly or partly) to a charge for a sexual offence, if one or more complainants in relation to a sexual offence charge is a child or a person with a cognitive impairment.

Section 123 is intended to be read together with section 100(1A), which provides that no committal hearing may be held in a proceeding to which section 123 applies. The combined effect of these provisions is that no committal hearing may be held in a case in which a complainant for a sexual offence charge is a child or a person with a cognitive impairment, regardless of whether the case also involves an adult complainant without a cognitive impairment.

Three examples are included to clarify the types of proceedings to which amended section 123 does and does not apply.

- Clause 14 amends section 127(3) of the **Criminal Procedure Act 2009**, which currently provides that evidence of conduct engaged in during a committal case conference, or of a document prepared solely for a committal case conference, is inadmissible in a proceeding unless consented to by all parties to the case conference. This amendment will allow evidence of offending alleged to have been committed during, or in connection with, a committal case conference, to be admissible in a criminal proceeding relating to that offending, without requiring the consent of the accused. Clause 12 makes the equivalent amendments to summary case conferences.
- Clause 15 amends section 198A(2) of the **Criminal Procedure Act 2009**, which currently allows an accused to apply to cross-examine witnesses (other than a complainant) before trial in a sexual offence proceeding in which a complainant is a child or a person with a cognitive impairment. This amendment broadens section 198A(2) to allow an accused in such proceedings to apply to cross-examine an adult complainant before trial.
- Amended section 198A(2) will not allow an accused to apply to cross-examine a complainant before trial, where that complainant was a child or a person with a cognitive impairment when the criminal proceeding commenced.
- Clause 16 amends section 344 of the **Criminal Procedure Act 2009**, which lists the timeframes for filing and serving an application for leave to cross-examine a complainant, or have evidence admitted concerning their sexual activities (other than those to which the charge relates) under section 342. New paragraph (ba) clarifies that an accused may apply for leave under section 342 in relation to pre-trial cross-examination under an order made pursuant to section 198A, or limited preparatory cross-examination under an order made pursuant to section 198B.
- New paragraph (ba) provides that these applications must be filed with the County Court or Supreme Court, as the case requires, and served on the DPP at least 7 days before the cross-examination.

### **Division 3—Transitional provision**

- Clause 17 inserts new section 455 at the end of Chapter 10 of the **Criminal Procedure Act 2009**. This is a transitional provision. Subsections (1) and (2) provide that amendments to sections 54 and 127 made by clauses 12 and 14 of this Bill only apply to criminal offences allegedly committed on or after the day on which the amendments come into operation.
- Subsection (3) provides that substituted item 4.6 of Schedule 2 to the **Criminal Procedure Act 2009** (which is amended by clause 9 of this Bill) applies to criminal proceedings commenced on or after the commencement of that amendment, irrespective of when the offence is alleged to have been committed. The intention is to not affect proceedings that have already commenced.

### **Part 6—Amendment of other Acts**

#### **Division 1—Amendment of Evidence Act 2008**

- Clause 18 substitutes the note at the foot of section 4 of the **Evidence Act 2008** to remove the non-exhaustive list of examples, which are not necessary for the operational effect of the note and may cause confusion.
- Clause 19 amends section 160(1) of the **Evidence Act 2008** to provide that a postal article sent by prepaid post to a person at an Australian address is presumed to have been received on the seventh working day after having been posted.
- This amendment brings the Victorian provision into line with other Australian jurisdictions, and responds to a reduction in the frequency of Australia Post postal services.

#### **Division 2—Amendment of Evidence (Miscellaneous Provisions) Act 1958**

- Clause 20 amends section 4 of the **Evidence (Miscellaneous Provisions) Act 1958** to provide the County Court, in a civil or criminal proceeding before the County Court, with the power to make an order for the issue of a commission for the examination of a witness at any place in Victoria.

Previously, the Supreme Court had to make an order for the issue of a commission for the examination of a witness at any place in Victoria for a proceeding before the County Court.

Subclause (2) provides the County Court with the power to make such an order for a proceeding before the County Court.

The intention is to remove the unnecessary and burdensome requirement for a party in the County Court to obtain a commission of evidence order from the Supreme Court.

Subclauses (3) and (4) make consequential amendments.

### **Division 3—Amendment of Oaths and Affirmations Act 2018**

- Clause 21 inserts a note at the foot of section 36 of the **Oaths and Affirmations Act 2018** to clarify that the offence of making a false statutory declaration is an indictable offence that may be heard and determined summarily.
- Clause 22 inserts a note at the foot of section 47 of the **Oaths and Affirmations Act 2018** to clarify that the offence of presenting a false copy of a document for certification is an indictable offence that may be heard and determined summarily.
- Clause 23 substitutes the note at the foot of section 48 of the **Oaths and Affirmations Act 2018** to refer to the definition of *original document* in section 3 of that Act, and to clarify that the offence of certifying certain copies of documents in that section is an indictable offence that may be heard and determined summarily.

### **Division 4—Amendment of Professional Standards Act 2003**

- Clause 24 amends section 52A of the **Professional Standards Act 2003**, which provides for the delegation powers of the Victorian Professional Standards Council.

The Council is established under the **Professional Standards Act 2003**. Currently, the Council may delegate certain functions to the Secretary of the Department of Justice and Community Safety or a person employed as an executive under Part 3 of the **Public Administration Act 2004**. The amendment will allow the Council to delegate these functions to the Secretary of the Department of Justice and Community Safety or any person employed under Part 3 of the **Public Administration Act 2004**. This expands the Council's delegation power to include

non-executive employees, which reflects how these kinds of financial authorisations and delegations are structured.

#### **Division 5—Amendment of Sentencing Act 1991**

- Clause 25 makes a statute law revision to section 5B(1)(b) of the **Sentencing Act 1991** to replace "; or" with a full stop and repeals section 5B(1)(c) of that Act, which makes an erroneous reference to section 162 of that Act, a transitional provision applicable to the **Sentencing (Community Correction Order) and Other Acts Amendment Act 2016**.
- Clause 26 makes the following statute law revisions—
- in section 69FA(b) of the **Sentencing Act 1991**, "or 15E" is inserted after "section 15" to correct a cross-reference;
  - in section 165 of the **Sentencing Act 1991**, "165A" is substituted for "165" to correct a cross-reference; and
  - in clause 1(1) of Schedule 3A to the **Sentencing Act 1991**, "to a" is omitted where secondly occurring to correct a typographical error.

#### **Part 7—Repeal of this Act**

- Clause 27 provides for the automatic repeal of this amending Act on 1 December 2021. The repeal of this Act does not affect in any way the continuing operation of the amendments made by this Act (see section 15(1) of the **Interpretation of Legislation Act 1984**).