

CONTENTS

Chapter 5: Bail	5
Bail application: which court	5
Presumption of bail	5
Exceptional circumstances	5
Unacceptable risk	6
Show cause	7
Conditions of bail	9
Application to vary conditions	9
Breach of conditions	10
If bail refused	10
Granting bail	10
Bail hearing	11
Sureties	11
Chapter 6: Fingerprinting	13
Power to take fingerprint	13
Before fingerprinting police must inform of rights	13
Record information given	13
Procedural issues	13
Reasonable force	13
Destruction of fingerprints	14
Destruction of child fingerprints	14
Children 15-17 years	14
Children between 10-15	15
Admissibility of fingerprint in evidence when breach	16
Chapter 6: Forensic procedures	17
Definitions	17
Requesting forensic procedure	17
Caution before forensic procedure	17
Senior police officer authorisation	18
Order from Magistrates' Court	18
Interim order for evidence likely to be lost	19
Court order after conviction for forensic procedure offence	19
Procedural issues	19
Warrant to arrest for hearing of application for compulsory procedure	19
Reasonable force	19
Taking of sample	19
Taking of intimate sample	19
Destruction of forensic samples	19
Volunteers	20
Children 10-17	21
Children under 10	21
Admissibility of sample in evidence where breach	21
Chapter 7: Police questioning	23
Right to question	23
Cautioning suspect in custody (Vic)	24
Cautioning suspect in custody (Cth)	25
Failure to caution	26
Suspect's rights when in custody	27
Vulnerable suspects	31
Privilege against self-incrimination	32
Recording of police questioning	33
More than one interview	34

Confessional evidence.....	36
When accused disputes confession or its voluntariness.....	36
Non-compliance/breach of procedural requirements (judicial discretion Vic).....	36
Non-compliance/breach of procedural requirements (judicial discretion Cth).....	42
Types of admissions admissible in absence of procedural compliance).....	42
Chapter 8: Identification evidence	43
ID evidence often unreliable.....	43
Types of ID evidence.....	43
Police power to photograph.....	44
ID parades.....	44
In-court ID.....	45
Dangers of ID evidence.....	46
Statutory limits (excluding ID evidence).....	46
Visual ID evidence.....	46
Picture ID evidence.....	47
Voice ID.....	49
Judge warnings.....	49
Judicial discretions to exclude ID evidence.....	51
Chapters 4 & 9: Trial of indictable offences	53
Parties involved in a trial of an indictable offence.....	53
Accused.....	53
Complainant.....	55
Counsel.....	56
Judge.....	60
Witness.....	61
Jury.....	62
Committal proceedings.....	62
Summary.....	62
Purpose.....	62
Benefits.....	62
Disclosure pre-committal.....	63
Hand-up briefs.....	63
When charged with indictable offence and summary offence.....	64
Time limits.....	64
Where committal proceedings not held.....	64
Hearings that may be held in committal proceeding.....	65
Victims.....	65
Cross-examination by defence at committal.....	65
Confession/admission during committal.....	67
Evidence ruled inadmissible during committal.....	67
Results from committal.....	67
After committal.....	67
Indictment.....	68
Summary.....	68
Direct indictment.....	68
Time limits.....	69
Indictments.....	69
Trials.....	69
Pre-trial disclosure of documents.....	69
Arraignment.....	71
Trial procedure.....	72
Jury empanelled.....	72
Formal commencement.....	72
Pre-trial rulings binding on trial judges.....	72

Prosecution does not lead evidence.....	72
Discontinuance of prosecution.....	72
Discontinuance vs not leading evidence.....	73
Summary of trial process.....	73
No case to answer.....	74
Pleas by the accused.....	74
Change of plea.....	75
Double jeopardy.....	76
Common law rule against double jeopardy.....	76
Commonwealth.....	77
Statutory exceptions.....	78
Chapter 9: Machinery of prosecution.....	81
Differences between trials and summary hearings.....	81
Decision to prosecute.....	81
Deciding which court.....	82
Trial location.....	83
Joinders.....	83
Plea negotiation.....	85
Sentence negotiation and indications.....	87
Discontinuing a prosecution.....	90
Private prosecutions.....	91
Chapter 11: The jury system.....	93
Introduction.....	93
Jury selection.....	93
Pre-trial.....	93
At trial.....	94
Obtaining more information about potential jurors.....	97
Juror decision-making.....	97
Secrecy of jury deliberations.....	97
Decision based only on evidence.....	98
Sequestration.....	99
Jury bias.....	99
Time for decision.....	99
Unanimous / majority verdict.....	99
Number of jurors.....	100

Chapter 5: Bail

→ There is an assumption to receive bail because of the resumption of innocence and right to liberty.

1 Bail application: which court

- Further applications for bail are made to the court to which the accused is remanded to appear **s 18(3)**
- When an accused is charged with treason, bail application is to be made to the Supreme Court: **s 13(2)(a)**
- When an accused is charged with murder, bail application is to be made to the Supreme Court OR the magistrate who commits the person for trial for murder: **s 13(2)(b)**

2 Presumption of bail

Bail Act 1977 (Vic)

S 4 –

- (1) Any person **accused of an offence** and being held in custody in relation to that offence **shall be granted bail**

Exceptional circumstances:

Shall be **refused** bail unless **exceptional circumstances** exist –

- Murder: s 4(2)(a)
- Treason: s 4(2)(a)
- A drug offence listed below: s 4(2)(b)(i), (ia), (ii) and (iii)

Legislation:

- (2) A court shall **refuse bail** –

(a) In the case of a person being charged with treason or murder

(b) In the case of a person being charged with –

- (i) ss 71, 71AA, 72 or 72A of the Drugs, Poisons and Controlled Substances 1981 (or conspiring to commit any offences under 79(1))

(ia) trafficking in relation to a commercial quantity of a drug of dependence (s 71 of the above act)

(ii) ss 231(1), 233A or 233B(1) of Customs Act 1903 (Cth) where it is committed in relation to narcotic goods in commercial quantity

(iii) ss 307.1, 307.2, 307.5, 307.6, 307.8 or 307.9 of the Cth Criminal Code in commercial quantity

UNLESS the court is satisfied that **exceptional circumstances** exist which justify the grant of bail.

NOTE: Even if D shows exceptional circumstances it is still possible for bail to be denied because D is an *unacceptable risk* under s4(2)(d)(i).

Cases:

- Onus on D to prove exceptional circumstances 'in the nature of, or forming an exception, unusual, out of the ordinary, special' – ***DPP (Cth) v Tang & Others (1995)***

Granted –

- ***R v Cox [2003]*** – C showed that there were exceptional circumstances, there was also no unacceptable risk; factors considered *in combination* to amount to this decision:
 - Crown case not particularly strong
 - Applicant previously of good character
 - A co-accused had been granted bail (principle of parity)
 - Protective custody a more onerous form of incarceration
 - Delay to trial uncertain duration but possibly > 18 months
 - D married, 3 children (all < 10), had prospect of employment
 - D had psychiatric condition (depression) which would be exacerbated by prison
- ***Mockbel [2002]*** – agreed that there were unacceptable circumstances due to:
 - Police involved being investigated for corruption and trial delay up to 3 years.However, bail was opposed on the grounds of him being an unacceptable risk due to:
 - His wealth
 - Extensive overseas connections (including family)Bail **was granted** by balancing these factors against exceptional circumstances.

Refused –

- ***R v Benbrika & Ors [2008]*** – charged with 11 terrorism offences. Failed to demonstrate exceptional circumstances on the basis of:
 - Physical illness
 - Mental distress
 - Lack of sunlight
 - In custody for 2 and a half yearsBecause of the seriousness of the charges, the strength of the crown case and the stage of the trial.
- ***DPP (Cth) v Abbott [1997]*** – having a large sum of money in the form of a surety is not enough to grant exceptional circumstances.

Unacceptable risk:

S 4(2)(d)(i) – if the court is satisfied that there is an **unacceptable risk** that the accused if released on bail would:

- fail to surrender himself into custody in answer to his bail
- commit an offence whilst on bail
- endanger the safety or welfare of members of the public
- interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person

S 4(3) – Whether the circumstances constitute an **unacceptable risk**, the court shall have regard to relevant matters including -

- (a) the nature and seriousness of the offence;
- (b) the character, antecedents, associations, home environment and background of the accused;
- (c) the history of any previous grants of bail to the accused;
- (d) the strength of the evidence against the accused;
- (e) the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail;
- (f) any conditions that might be imposed to address the circumstances which may constitute an unacceptable risk.

Strategies for minimising 'unacceptable risk'

1. Imposing **conditions** of bail
2. Requiring the accused to obtain a **surety**

Show cause:

(4) Where the accused is charged with one of the following offences–

*the Court shall **refuse bail** unless the accused **shows cause** why his detention in custody is not justified and in any such case where the court grants bail the court –*

NOTE: Even where D can 'show cause', may still be an **unacceptable risk under s 4(2)(d)(i).**

Indictable offence while awaiting trial for another indictable offence

- (a) With an indictable offence that is alleged to have been committed while he was at large awaiting for trial for another indictable offence;

Stalking

- (b) With an offence against s 21A(1) of Crimes Act 1958 (stalking) and –
 - (i) If the accused has within the preceding 10 years been convicted or found guilty of an offence against the section in relation to any person or an offence in the course of committing which he or she used or threatened to use violence against any person; or
 - (ii) The court is satisfied that the accused on a separate occasion used or threatened to use violence against the person whom he or she is alleged to have stalked, whether or not the accused has been convicted or found guilty of, or charged with, an offence in connection with that use or threatened use of violence; or

Domestic violence

- (ba) with an offence against s 37, 37A, 123, 123A or 125A of the Family Violence Protection Act 2008 of contravening a family violence intervention order or family violence safety notice (as the case requires) in the course of committing which the accused is alleged to have used or threatened to use violence, and –

- (i) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of committing which he or she used or threatened to use violence against any person; or

the court is satisfied that the accused on a separate occasion used or threatened to use violence against the person who is the subject of the