

MLP218 CRIMINAL PROCEDURE

UPDATED FOR 2026

DEFINITION
CASE

IMPORTANT
LEGISLATION

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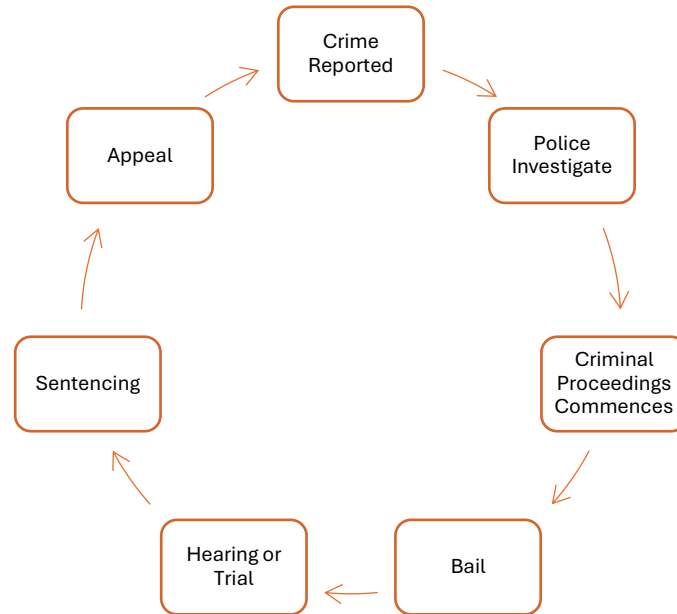
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- *County Court Act 1958* (Vic)
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- *Supreme Court Act 1986* (Vic)
- *Transport (Compliance and Miscellaneous) Act 1983* (Vic)

TOPIC 1: INTRODUCTION TO CRIMINAL PROCEDURE

Criminal Justice System Overview



Concept of a Fair Trial

Jogo v District Court (NSW) (1989) 168 CLR 23 at 56 per Deane K:

The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law. As a matter of ordinary language, it is customary to refer in compendious terms to an accused's "right to a fair trial". I shall, on occasion, do so in this judgment. Strictly speaking, however, there is no such directly enforceable "right" since no person has the right to insist upon being prosecuted or tried by the State. What is involved is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.

Jurisdiction

	Federal	State
Under the <i>Constitution of Australia</i> , criminal law & procedure is largely the responsibility of State and Territory governments:	The Federal Government and the Australian Federal Police have roles about some offences, especially drug trafficking and terrorism	Victorian Parliament makes most of our laws relating to crime and criminal procedure (including penalties and police powers)

Variables that determine what court a criminal matter will be dealt with include:

- Seriousness of the Offence
- The age of the offender

IMMUNITIES – Children

In Victoria, the **minimum age of criminal responsibility was raised from 10 to 12** by the Youth Justice Act 2024 (Vic) ("YJA"), which substantively commenced on 30 September 2025. Nearly all crimes alleged to have been committed by children aged 12 and over but under 18 are dealt with in the Children's Court (Criminal Division), now operating under the YJA 2024.

Under Age 12 (was: under age 10)

Conclusively presumed to be incapable of any criminal offence: *section 10 of the Youth Justice Act 2024 (Vic) (replacing the former rule in s 344 of the Children, Youth and Families Act 2005 (Vic))*.

Note: at **Commonwealth level** the minimum age of criminal responsibility remains 10 — Criminal Code Act 1995 (Cth), s 7.1. The YJA 2024 only operates on State (Victorian) offences.

Transitional provision: charges relating to alleged conduct committed by 10- or 11-year-olds before commencement of the YJA cannot be pursued; ongoing proceedings must cease and any sentence being served is to be discharged (Chapter 19 YJA).

Age 12<14

Doli Incapax: now codified for Victorian offences in section 11 of the Youth Justice Act 2024 (Vic):

A child of 12 or 13 is presumed not to be capable of committing an offence unless the prosecution proves beyond reasonable doubt that, at the time of the alleged conduct, the child knew that the conduct was seriously wrong in a moral sense.

This codification is consistent with *RP v The Queen* [2016] HCA 53 — which remains the leading common-law authority and continues to apply to any conduct outside the scope of s 11 YJA (e.g. Commonwealth offences, where the position is in s 7.2 of the Criminal Code Act 1995 (Cth))

Section 11(4) YJA preserves any common law presumption that may otherwise apply, with the codified statutory test prevailing over the common law to the extent of any inconsistency.

Procedural support for doli incapax (NEW): section 12 YJA — a police officer must have regard to specified matters (including age, capacity and other circumstances) before deciding to charge a 12- or 13-year-old. Section 13 YJA requires review of any such charge.

Note: law reform in Victoria – The age of criminal responsibility will likely be raised to 14 years by 2027 (with exceptions for serious crimes)

Commonwealth Jurisdiction

Conduct that falls under criminal jurisdiction of the Commonwealth law is prosecuted within the State courts.

Judiciary Act 1903 (Cth):

- **Section 68:** grants jurisdiction to State courts to deal with Commonwealth offences.
- **Section 79:** Specifies that when State courts handle commonwealth offences, the procedural and evidentiary laws of the State apply, unless stated otherwise by the Commonwealth Parliament

Conflict between State and Federal Laws

Section 109 of the Australian Constitution – establishes that in instances where State and Federal law conflict, federal law prevails, making the State provision ineffective.

Unanimous Jury Verdict vs Majority

Section 80 of the Australian Constitution – mandates that jury verdicts in federal cases must be unanimous.

CONTRAST: In Victoria, a majority verdict suffices for a guilty verdict.

A person can be convicted under both federal and state law for the same conduct, however they cannot be sanctioned under both for the same conduct

Crimes Act 1914 (Cth)

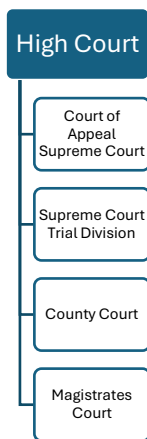
Section 4C – Offences under 2 or more laws

(2) Where an act or omission constitutes an offence under both:

(a) a law of the Commonwealth and a law of a State; or
(b) a law of the Commonwealth and a law of a Territory;

and the offender has been punished for that offence under the law of the State or the law of the Territory, as the case may be, the offender shall not be liable to be punished for the offence under the law of the Commonwealth.

Court Hierarchy in Victoria



Appeals – Criminal Procedure Act 2009 (VIC)

CONVICTED PERSON:

Appeal against conviction and sentence or sentence alone.

- From Magistrates Court to County Court (ss. 254 – 256)
- From County Court / Supreme Court to Court of Appeal (conviction ss. 274 – 277) (sentences ss. 278 – 286)

THE CROWN

Appeal against sentence.

- From Magistrates Court to County Court (ss. 257 – 259)
- From County Court / Supreme Court to Court of Appeal (ss. 287 – 294)

Children: appeal pathways for children sentenced in the Children's Court are now contained in Chapter 8 of the Youth Justice Act 2024 (Vic) (rather than Part 5.5 of the CYFA). The substantive structure (right of appeal to County or Supreme Court Trial Division, further appeal to Court of Appeal with leave) is preserved.

Court Jurisdiction

	Original	Appellate
Magistrates' Ct	Summary Offences Indictable offences heard summarily	X (re-hearing)
County Ct	Indictable offences <i>except</i> murder, attempted murder, certain conspiracies	From Magistrates' Ct appeals against conviction or sentence
Supreme Ct – Trial	Murder, treason, complex indictable offences	On points of questions law from Magistrates' Ct
Ct of Appeal (Supreme Ct)	X	From County Ct and Supreme Ct (Trial) Appeal against conviction/sentence
High Ct	S 75 Constitution (<i>confers original jurisdiction on the HCA</i>)	Appeal against decision of State/Territory Supreme Cts Appeal against High Ct original jurisdiction

Magistrates Court:

Establishment / Jurisdiction

- Created under s 4 of the *Magistrates' Court Act 1989*
- Typically handles the least serious offences.
- Adjudication of guilt or innocence is solely by the magistrate; no juries are involved.
- The maximum penalty that a magistrate can impose for a single state offence is two years.

Procedural Aspects

- **Charge Sheet:** Document detailing the offence a defendant is charged with.
- **Mention Hearing:** Occurs if the charge sheet contains one or more summary offences. The nature of the mention hearing is outlined in Section 53 of the *Criminal Procedure Act 2009 (Vic)*
- **Filing Hearing:** if the charge sheet contains indictable offences that may be determined summarily, the matter may be listed for a mention of filing hearing, depending on whether the informant has requested a committal proceeding.
- **Summary Case Conference:** In some cases, parties may be directed to attend this conference to expedite the disposition of charges.

Participants

- **Prosecutor:** Typically, a police prosecutor who is also a police officer, not necessarily a lawyer
- **Defendant Representation:** Defendants can be represented by a lawyer at their own expense. Unlike higher courts, magistrates cannot order legal aid for defendants. Many defendants represent themselves.

Plea Process

- If the defendant pleads guilty, sentencing typically follows the plea.
- The prosecutor presents a summary of evidence, followed by mitigating and aggravating considerations from both sides
- Most pleas take around 15 minutes

Evidence and Submission

- All testimony is given under oath, subject to Section 13 of the *Evidence Act 2008 (Vic)*
- Defendants can make a submission of “no case to answer” after the prosecution presents its case. This submission succeeds only if the prosecution’s case is very weak (s 66 *CPA*).

Costs

- Magistrates have the discretion to award costs to either the prosecutor or defendant at the end of the case, as per Section 401 of the *Criminal Procedure Act 2009 (Vic)*

Committal Proceedings

substantially reformed by the Justice Legislation Amendment (Committals) Act 2025 (commenced 28 December 2025)

Pre-28 December 2025 framework

- Committal proceedings are an administrative function conducted for matters intended to be heard in higher courts, unless the accused is directly presented for trial
- Primary aim of committal proceedings is to “weed out” weak cases, ensuring valuable court time is not wasted in higher courts

Post-28 December 2025 framework

- The committal test has been ABOLISHED.
- Committal hearings continue to be held but operate purely as case management.

- Section 97 of the Criminal Procedure Act 2009 has been amended; section 141 has been substituted; section 155 (the former committal-test provision) has been repealed.
- Magistrates no longer assess whether the evidence is of sufficient weight to support a conviction.

CRIMINAL PROCEDURE ACT 2009 – SECT 97

Purposes of a committal proceeding

The purpose of a committal proceeding –

- (a) to determine whether a charge for an offence is appropriate to be heard and determined summarily;
- (b) [REDACTED]
- (c) to determine how the accused proposes to plead to the charge;
- (d) to ensure a fair trial, if the matter proceeds to trial, by –
 - (i) Ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;
 - (ii) Enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses;
 - (iii) [REDACTED]
 - (iv) enabling the accused to adequately prepare and present a case;
 - (v) enabling the issues in content to be adequately defined.

Comital hearings: cross-examination restrictions

- Total prohibition on cross-examination of any witness at committal in: sexual offence proceedings; family violence offence proceedings; and stalking proceedings (under s 21A Crimes Act 1958).
- Stricter test for granting leave to cross-examine in all other cases.
- Special hearings have been extended to certain complainants in family violence cases.
- AVL is the default mode of appearance for adult accused persons in custody at committal hearings (amended s 42JA of the Evidence (Miscellaneous Provisions) Act 1958); physical appearance requires application under s 42L(1) of that Act.

Committal Case Conference (Mandatory)

A committal case conference must be held in most indictable matters unless it is in the interests of justice that one not be held.

Standard of Proof

- Prosecution is not required to prove the defendant's guilt beyond a reasonable doubt.

Outcome

Under the new framework, committal hearings result in either:

- The case proceeding to trial in the County Court or Supreme Court (the default if the matter does not resolve at committal); or
- The matter being heard summarily in the Magistrates' Court if appropriate; or
- Discontinuance by the DPP at any stage.

Magistrates no longer commit an accused for trial based on evidence sufficiency, and there is no longer a power to discharge for evidentiary insufficiency at committal. The VLRC's recommendation that magistrates retain a reserve discharge power "on no reasonable prospect of conviction" was not adopted by Parliament.

Direct Indictment

- The power of direct indictment, allowing cases to bypass committal proceedings, to be exercised sparingly and only in compelling circumstances, as per the High Court's ruling in *Barton v The Queen*.

Infringement Court

- The Infringements Court is a specific section within the Magistrates' Court.

- It handles cases involving infringement notices that have not been resolved through the offender paying a fine.

Children's Court

- The Children's Court is responsible for handling criminal and welfare matters concerning children.
- It comprises both a criminal and family division
- The *Children and Young Persons (Appointment of President) Act 2000 (Vic)* – established the Children's Court as an independent entity.
- Despite being separate, it often operates within the premises of the Magistrates' Court

Divisions

- **Family Division:** hears cases related to the protection and care of children and young people at risk
- **Criminal Division:** Deals with matters concerning criminal offences committed by children
- **Children's Koori Court (Criminal Division):** Specialises in criminal matters involving Koori children, excluding sexual offences.

Definition of a Child

- Defined in section 4 of the Youth Justice Act 2024 (Vic) (a child is a person under 18 years of age at the time of the alleged offence).
- The CYFA 2005 definition continues to apply for child-protection / family-division purposes only.
- Jurisdiction of the Children's Court (Criminal Division) is now contained in the Youth Justice Act 2024 (Vic) — primarily Chapter 5 (commencing a proceeding) and Chapters 6 and 7 (procedure and sentencing) (replacing the former references to ss 356 and 516 of the CYFA 2005).

Police-side hierarchy of response for children

The YJA 2024 introduces a statutory hierarchy of police responses to alleged offending by children, requiring police to apply the minimum intervention necessary (ss 92–93 YJA):

- No further action;
- Youth warning (s 95 YJA);
- Youth caution (s 103 YJA);
- Early diversion (referral to the Children's Court);
- Charge.

More serious options can only be taken if alternatives are clearly inappropriate, and reasons must be provided (s 93 YJA). Evidence of the giving of a warning or caution is inadmissible in proceedings against the child (ss 142–144 YJA), and a child's participation in those processes does not rebut the presumption of *doli incapax* (s 146 YJA).

Jurisdiction Enhancement

- Section 20C of the *Crimes Act 1914 (Cth)* enhances the jurisdiction of the Children's Court. It mandates that all Commonwealth offences allegedly committed by children are to be treated as though they are offences against state law.

County Court

The County Court serves as the mid-tier court in the Victorian legal hierarchy. It hears the majority of criminal trials, accounting for 90% of such cases. Criminal jurisdiction is defined in Section 36A of the *County Court Act 1958 (Vic)*

Trial Process

- The judge presides over legal matters, while a jury comprising 12 lay members of the community determines guilt or innocence.

- Verdicts for state offences (excluding murder, treason, and certain drug-related offences) can be reached by a majority vote.

Commonwealth Crimes

- For commonwealth crimes, a unanimous verdict is mandated by section 80 of the *Constitution*.

Appeals

- Appeals from the Magistrates’ and Children’s Court are heard by a judge alone in the County Court.

Supreme Court

Division and Jurisdiction

- Comprises the Trial Division and the Court of Appeal.
- Possesses original and appellate jurisdiction, including all offences committed in Victoria against federal and state laws.
- Holds exclusive jurisdiction over certain serious offences like treason, murder, attempted murder, and child destruction.

Trial Division:

- In criminal matters, a single judge presides with a jury, like the County Court.
- It handles all criminal cases within its exclusive jurisdiction.

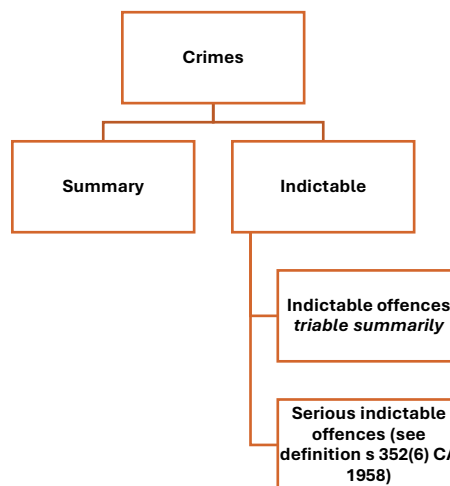
Court of Appeal:

- Typically comprises three Supreme Court Judges but can involve more for significant cases.
- Hears appeals from the Trial Division and County Court.
- Requires leave to appeal, and further appeals from its decisions are directed to the High Court of Australia.

Appeals Process:

- Rights of appeal against conviction are outlined in Section 274 of the *Criminal Procedure Act*.
- Determination of appeal against conviction is detailed in Section 276.

Classification of Crimes



Example Question: Offences codified in the *Crimes Act 1958* (Vic) are summary or indictable offence? And why?

- It is a general rule that all offences are deemed to be indictable under the crimes act (s 2B)
- When identifying the category of an offence should not refer to the *Sentencing Act*
- Instead refer to section 2B of the *Crimes Act*, if the offence is in the act.

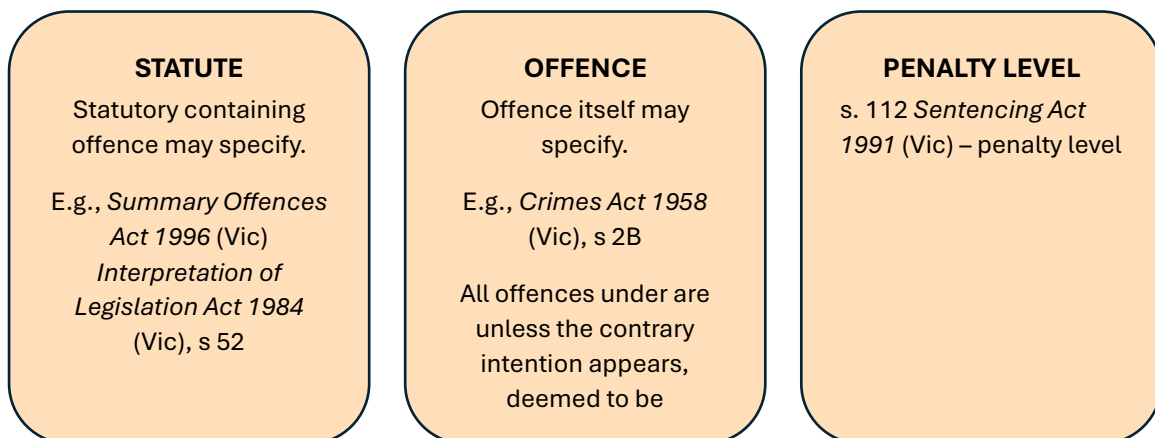
Penalty Level

Set out in section 109 of the *Sentencing Act 1991* (Vic):

Type of Offence	Penalty Level	Max. Term of Imprisonment	Max. Fine
Indictable	1	Life	-
Indictable	2	25 years	3,000 penalty units
Indictable	3	20 years	2,400 penalty units
Indictable	4	15 years	1,800 penalty units
Indictable, TS	5	10 years	1,200 penalty units
Indictable, TS	6	5 years	600 penalty units
Summary	7	2 years	240 penalty units
Summary	8	1 year	120 penalty units
Summary	9	6 months	60 penalty units
Summary	10	-	10 penalty units
Summary	11	-	5 penalty units
Summary	12	-	1 penalty units

The indictable / summary distinction is set out in s 112 of the *Sentencing Act 1991* (Vic):

112 Classification of offences as indictable or summary	
1)	An offence that is described in a provision of an Act (other than the Crimes Act 1958 or the Wrongs Act 1958), subordinate instrument or local law as being level 1, 2, 3, 4, 5 or 6 or as being punishable by level 1, 2, 3, 4, 5 or 6 imprisonment or fine or both is, unless the contrary intention appears, an indictable offence.
2)	Any other offence under an Act (other than the Crimes Act 1958 or the Wrongs Act 1958), subordinate instrument or local law is, unless the contrary intention appears, a summary offence,
3)	If an offence is described as being punishable in more than one way or in one of two or more ways, subsection (1) applies even if only one of those ways is referred to in that subsection.



Indictable offence triable summarily

Offence must be eligible – s 28 CPA

Level 5 or level 5 offence OR Schedule 2 offence

Procedural requirement: s 29(1) CPA

Court must be satisfied that the charge is appropriate to be heard and determined summarily

AND

Accused must consent to summary hearing.

Section 29(2) CPA:

The seriousness of the offence including:

- The nature of the offence; and
- The manner in which the offence is alleged to have been committed, the degree of organisation and the presence of aggravating circumstances; and
- Whether the offence forms part of a series of offences being alleged against the accused; and
- The complexity of the proceeding; and

The adequacy of sentences available to the court, having regard to the seriousness of the offences and the criminal record of the accused; and

Whether a co-accused is charged with the same offence; and
Any other relevant matter.

Section 30 CPA:

Prosecutor or accused must apply to Ct for case to be heard summarily OR Ct may offer to deal with matter summarily.

Schedule 2 CPA 2009 (Vic)

Examples

4.4 Offences under section 74 of the Crimes Act 1958 (theft), if—

- (a) the amount or value of the property alleged to have been stolen does not in the judgment of the court exceed \$100 000; or
- (b) the property alleged to have been stolen is a motor vehicle.

4.5 Offences under section 75 of the Crimes Act 1958 (robbery), if the amount or value of the property alleged to have been stolen does not in the judgment of the court exceed \$100 000.

Classification of Crimes – Commonwealth

Summary Offence	Indictable Offence	Indictable Offence triable Summarily
Imprisonment 12 months or less: s 4H Crimes Act 1914 (Cth) / or not punishable by imprisonment	Imprisonment more than 12 months: s 4G Crimes Act 1914 (Cth)	Max penalty imprisonment 10 years or less OR property offence value of \$5,000 or less: s 4J Crimes Act 1914 (Cth)

6.12 Cth DPP Guidelines – Summary or Indictable

- (a) the nature of the case... circumstances;
- (b) any implied legislative preference for a particular mode of trial;
- (c) adequacy of sentencing options / penalties if case determined summarily;
- (d) any delay, cost and adverse effect upon witnesses
- (e) in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution (by processing summarily) in order to deter similar breaches;
- (f) the greater publicity, and accordingly the greater deterrent effect, of a conviction obtained on indictment;

as well as general criteria relevant to the decision whether to prosecute.

Constitution Basis s 77(iii)	Judiciary Act 1903, s 68 Confers jurisdiction.
Constitutional Limits s. 80 State where offence committed AND indictable offence trial by jury.	Judiciary Act 1903, s 79 State procedure and evidence law applies in Cth matters heard in State courts

Note – Section 4C *Crimes Act 1914* (Cth)

Evidence brief introduction

Don't discuss many rules in the *Evidence Act* because will look at in depth in MLP334 Evidence.

Only expected to use the following sections of *Evidence Act 2008* (Vic):

SECT 90 – Discretion to exclude admissions.

In criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if –

- (a) the evidence is adduced by the prosecution; and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to the accused to use the evidence

SECT 137 – Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

SECT 138 – Exclusion of improperly or illegally obtained evidence.

(1) Evidence that was obtained—

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law—

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

SECT 139 – Cautioning of persons

(1) For the purposes of [section 138\(1\)\(a\)](#), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

- (a) the person was under arrest for an offence at the time; and
- (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
- (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of [section 138\(1\)\(a\)](#), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if—

- (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and
- (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and
- (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if—

- (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or
- (b) the official would not allow the person to leave if the person wished to do so; or
- (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if—

- (a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or
- (b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

***don't need to know ss 55 and 56 – but if can touch on them in exam is great**

SECT 55 – Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates to –

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence.

SECT 56 – Relevant evidence to be admissible.

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible

Example Question:

Constable Pam McGuire is a young and inexperienced (but keen) police officer based at South Melbourne Police Station. Dale Cassidy is on bail for a pending case involving the charge of importing commercial quantities of a border-controlled drug into Australia contrary to the Criminal Code Act 1995 (Cth), s 307.1. The conditions of bail require that he reports every Monday and Thursday to the South Melbourne police station. One Thursday night, Constable McGuire sees Cassidy park his car on a vacant block of land. Cassidy leaves the car and begins a long walk towards the South Melbourne police station. Constable McGuire thinks this is peculiar and, without telling anyone, goes to the car while Cassidy is in the police station. She pries open the boot that was locked. In the boot she finds the body of a man, who has been shot in the head. Assume that McGuire's act in opening the boot was unlawful. Cassidy is charged with murder. *Will the trial judge admit the evidence about Constable McGuire's discovery of the dead body?*

Note: You can assume the search of the car was unlawful. We will cover police powers to search persons and property and seize evidence in week 3.

Issue –

- whether the trial judge will admit the evidence regarding the discovery of the dead body, considering that her act of opening the boot was unlawful

Rule –

- (a) *Evidence Act 2008 (Vic)* – s 138: evidence that was obtained in contravention of an Australian law is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence...

Application –

- Constable McGuire unlawfully pried open the locked boot of Cassidy's car without a warrant or lawful authority which would ordinarily constitute a breach of Cassidy's rights
- However, the evidence discovered by McGuire is highly relevant a murder charge against Cassidy, as it involves the discovery of a dead body.
- Murder is described as the most serious criminal offence (*R v Penisini* [2003] NSWSC 892 at [82]).

Conclusion –

- The judge will most likely exercise discretion under s 138 of the *Evidence Act* to admit Constable McGuire's discovery of the dead body, despite its unlawful acquisition
- Court will need to balance the interests of justice and fairness of the trial in making this decision.

NOTE: sometimes the law deviates so always read the provisions

Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Section 73 - Possession of drug of dependence

(1) A person who without being authorized by or licensed under this Act or the regulations or the Voluntary Assisted Dying Act 2017 or the regulations under that Act to do so has or attempts to have in his possession a drug of dependence is guilty of an indictable offence and liable –

- (a) Where the court is satisfied on the balance of probabilities that –
- (i) The offence was committed in relation to a quantity of cannabis or tetrahydrocannabinol that is not more than the small quantity applicable to cannabis or tetrahydrocannabinol;
 - (ii) elation to a quantity of cannabis or tetrahydrocannabinol that is not more than the small quantity applicable to cannabis or tetrahydrocannabinol;

to a penalty of not more than 5 penalty units;

Example = s 73(1) *Drugs, Poisons and Controlled Substances Act 1981* (Vic)

If a question like this came up in the exam would note:

- This is an indictable offence as described by the act.
- However, it is only 5 penalty units thus not very severe.
- Because of this it would therefore be heard in the Magistrates Court

It is highly unlikely will come across a question like this exam, but always read the provision!!!