

## Summary: *COVID-19 Omnibus (Emergency Measures) Act 2020*

The following is a short summary of the provisions of the *COVID-19 Omnibus (Emergency Measures) Act 2020* ('*COVID Act*') as it relates to the operations of Victorian courts and tribunals. It is not intended to be exhaustive or authoritative, the relevant provisions of the *COVID Act* are definitive.

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### Introduction and Legislative History

The *COVID-19 Omnibus (Emergency Measures) Act 2020* ('*COVID Act*') was introduced on 23 April 2020 to address the coronavirus crisis in Victoria. This passed both Houses of Parliament on the same day and received Royal Assent on 24 April 2020. The *COVID Act* commenced on 25 April 2020.

The *COVID Act* changes how courts, corrections and the justice system operate through introducing temporary amendments to Justice legislation that alter court procedures and hearings, authorising regulations to be made that will disapply or modify the application of Justice legislation, and bringing forward commencement of some of the 2019 rental reforms.

Almost every section of the *COVID Act* is intended to sunset six months after commencement, except for provisions relating to the commencement of other legislation, namely:

- Most of the provisions of the *Environment Protection Amendment Act 2018* (Vic) will now be pushed back to commence on 1 July 2021 or earlier by proclamation; and
- The rental reforms will be delayed until 1 January 2021 to accommodate disruptions due to the pandemic.

### Regulations for Justice Acts

The *COVID Act* will now allow the Governor in Council, on the recommendation of the Attorney-General, to make regulations that disapply or modify the application of a Justice Act,<sup>1</sup> that concerns any matter relating to:

- (a) arrangements for or with respect to any proceeding in a court or tribunal, including a pre-trial proceeding;
- (b) the conduct of a proceeding in a court or tribunal;
- (c) arrangements for or with respect to any proceeding, inquiry or investigation being conducted or carried out by an integrity entity;
- (d) a specified date or time frame that must be met;
- (e) the process applying to applications for bail;
- (f) the method or processes by which conditions of bail are monitored or enforced;
- (g) the method or processes by which a specified order or instrument is administered, monitored or enforced;
- (h) the process by which orders, judgments, rulings, reasons, determinations, decisions or findings of a court or tribunal are issued (including their certification and transmission);
- (i) the process by which a warrant is issued (including its certification and transmission);
- (j) the method or processes by which a warrant is enforced;
- (k) the process by which family violence intervention orders (including family violence interim orders) or family violence safety notices are issued (including their certification and transmission), and the method or processes by which they are monitored or enforced;
- (l) the witnessing, execution or signing of legal documents such as affidavits, statutory declarations, deeds, powers of attorney, contracts or agreements, undertakings and wills;
- (m) the process by which a document is given or issued;
- (n) the service of documents;
- (o) the certification of documents;
- (p) the lodgement, submission or filing, or inspection, of documents.

These regulations may be as general or limited as necessary, and will override any other Act, regulation or other law to the contrary.<sup>2</sup>

The Attorney-General may only recommend that regulations be made if she is of the opinion it is consistent with health advice or health directions, and is reasonable:

- (i) to protect the health, safety or welfare of persons in relation to the administration of justice or law; or
- (ii) for the effective or efficient administration of justice or law; or
- (iii) in relation to the conduct or carrying out of a proceeding, inquiry or investigation by an integrity entity.

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<sup>1</sup> Which is any legislation administered by the Attorney-General or the Ministers for Corrections, Police and Emergency Services, Victim Support or Youth Justice.

<sup>2</sup> Save for the Constitution and Charter of Human Rights and Responsibilities.

Additionally, the Attorney-General must only make a recommendation that relates to the conduct of proceedings in a court or tribunal with the consent of the relevant head of jurisdiction, and the consent of integrity entities and heads in relation to regulations that relate to them.

*Further reading: Part 2.1, COVID Act*

*Affected legislation: Justice Acts and subordinate legislation (as defined by section 3).*

### Bail Amendments

The *COVID Act* introduces changes to bail procedures by inserting a new Part 6 into the *Bail Act 1977* (Vic), allowing a person to appear personally or by having a legal practitioner or another person empowered by law appear for them. It also allows for an appearance by audio visual link or audio link to constitute an appearance for the purposes of the *Bail Act*.

*Further reading: Part 3.2, COVID Act*

*Affected legislation: Bail Act 1977* (Vic)

### *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

The *COVID Act* introduces changes to court procedures for the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, allowing the question of a person's fitness to stand trial (or an appeal on that question) to be determined on the balance of probabilities by the court.

Should the court find that the accused is fit to stand trial, the trial must be commenced or resumed in accordance with usual criminal procedures, including any modifications to those procedures by the *COVID Act*.

Separately, the Court may also order a special hearing by judge alone where the offence is a Victorian offence and the court considers that it is in the interests of justice to do so. This may be ordered on the court's own motion or on application by the prosecution or an accused. All findings available to a jury are available to the judge, and the judgment must include the principles of law applied by the judge, and the facts on which they relied.

A party may appeal from the decision regarding special hearing by judge alone.

The court may also decide any issue or matter in relation to the following entirely on the written submissions and without the appearance of the parties:

- a review of a custodial supervision order directed under section 27(2);
- an application under section 31 for variation or revocation of a custodial supervision order;
- a further review of a custodial supervision order directed under section 32(5) or 33(2);
- a major review of a supervision order under section 35;
- a review of a custodial supervision order directed under section 38ZI(2);
- an application under section 38ZN for the variation or revocation of either a custodial supervision order or a non-custodial supervision order;
- a further review of a custodial supervision order directed under section 38ZO(3); and
- a further review of a non-custodial supervision order directed under section 38ZP(2)

An investigation or a special hearing must be conducted under these amendments irrespective of:

- when the question of the person's fitness was raised;
- when the offence charged is alleged to have been committed;
- when the criminal proceeding was commenced; and
- when the accused was found unfit to stand trial.

Any investigation or a special hearing commenced under these amendments will continue under these amendments despite the sunset clause.

*Further reading: Part 3.7, COVID Act*

*Affected legislation: Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*

### Criminal Procedure

The *COVID Act* introduced changes to criminal matters where an accused is committed for trial or a direct indictment is filed against an accused.

At any time except during trial, the court may order that one or more charges in an indictment be tried by the trial judge alone, without a jury, if:

- each charge is for a Victorian offence;
- each accused consents;
- the court is satisfied that each accused has obtained legal advice on whether to give that consent, including legal advice on the effect of the order; and
- the court considers that it is in the interests of justice to make the order.

This may be ordered on the court's own motion or on application by the prosecution or an accused and is not an interlocutory decision. The trial judge may make any decision that could have been made by a jury, and the judgment must include the principles of law applied by the judge, and the facts on which they relied. A party may appeal from the decision regarding trial by judge alone.

A trial by judge alone commences when the accused pleads not guilty on arraignment before the trial judge, and the accused is found guilty of the offence at the moment the trial judge delivers a guilty verdict.

Other provisions applying to jury trials do not apply.

The court is now also allowed to decide any issue in any proceeding, or determine any proceeding, entirely on the written submissions and without the appearance of the parties. This does not apply to a prescribed issue or proceeding.

The Court may only do so where:

- the court is satisfied that it is in the interests of justice to do so; and
- whether or not the parties consent to the court doing so.

In determining whether it is in the interests of justice to decide an issue or determine a proceeding entirely on the written submissions, the court must have regard to:

- the nature of the issue or proceeding; and
- the right to a fair hearing; and
- whether the parties have had the opportunity to obtain legal advice; and
- whether the parties consent to the court doing so.

This provision applies after the six month sunset period if the court has determined to decide or determine under that section and has not yet so decided or determined.

Separately, new provisions have been introduced to allow AV or audio links for criminal proceedings, such as ground rules hearings.

*Further reading: Part 3.8, COVID Act*

*Affected Legislation: Criminal Procedure Act 2009 (Vic)*

### Evidence

All appearances that would otherwise require a physical appearance may now appear through AV link, or audio link subject to technical requirements and a direction by the court.

A court, on its own initiative, may direct that a child accused appear by AV link, if the court is satisfied that the appearance by audio visual link is

- necessary for the purposes of the court's case management generally;
- consistent with the interests of justice; and
- reasonably practicable in the circumstances.

Any order or direction made continues to apply after the repeal until the end of the hearing or proceeding in respect of which the order or direction was made, subject to any further order or direction of the court.

*Further reading: Part 3.9, COVID Act*

*Affected Legislation: Evidence (Miscellaneous Provisions) Act 1958 (Vic)*

### Family Violence and Personal Safety

Family Violence and Personal Safety interim extension orders will now expire after three months instead of 28 days.

Separately, there are changes to the framework for VCAT to hear applications to reduce or terminate a fixed term rental agreement by protected persons under a FVIO or PSIO. These are 2018 amendments that have been brought forward to commence now:

- The applicant no longer has to be a protected person under a FVIO or PSIO; the criteria is now open to persons subjected to family violence, and a parent or guardian of child exposed to family or personal violence.
- VCAT must now take into account matters relevant to family violence or personal violence.
- VCAT must now hear applications within 3 business days or the next available sitting day after.

*Further reading: Parts 3.10, 3.15, 4.2, COVID Act*

*Affected Legislation: Family Violence Protection Act 2008 (Vic); Personal Safety Intervention Orders Act 2010 (Vic); Residential Tenancies Act 1997 (Vic)*

### Supreme Court

The *COVID Act* introduces changes to court procedures for the Supreme Court, allowing the court to decide any issue in any proceeding, or determine any proceeding, entirely on the written submissions and without the appearance of the parties. This does not apply to criminal proceedings or issues in a criminal proceeding, and any other prescribed issue or proceeding.

The Supreme Court may only do so where:

- the court is satisfied that it is in the interests of justice to do so; and
- whether or not the parties consent to the court doing so.

In determining whether it is in the interests of justice to decide an issue or determine a proceeding entirely on the written submissions, the court must have regard to:

- the nature of the issue or proceeding;
- the right to a fair hearing;
- whether the parties have had the opportunity to obtain legal advice; and
- whether the parties consent to the court doing so.

This provision applies after the six month sunset period if the Court has determined to decide or determine under that section and has not yet so decided or determined.

Separately, the judges of the court may exercise the power to make Rules of Court by means of a majority of them (not including any reserve Judge, Associate Judge or reserve Associate Judge) agreeing to the proposed Rules.

*Further reading: Part 3.17, COVID Act*

*Affected Legislation: Supreme Court Act 1986 (Vic)*

### County Court

The *COVID Act* introduces changes to court procedures for the County Court, allowing the court to decide any issue in any proceeding, or determine any proceeding, entirely on the written submissions and without the appearance of the parties. This does not apply to criminal proceedings or issues in a criminal proceeding, and any other prescribed issue or proceeding.

The County Court may only do so where:

- the court is satisfied that it is in the interests of justice to do so; and
- whether or not the parties consent to the court doing so.

In determining whether it is in the interests of justice to decide an issue or determine a proceeding entirely on the written submissions, the court must have regard to:

- the nature of the issue or proceeding;
- the right to a fair hearing;
- whether the parties have had the opportunity to obtain legal advice; and
- whether the parties consent to the court doing so.

This provision applies after the six month sunset period if the court has determined to decide or determine under that section and has not yet so decided or determined.

*Further reading: Part 3.5, COVID Act*

*Affected Legislation: County Court Act 1958 (Vic)*

### Magistrates' Court

Magistrates' Court registrars will receive additional powers, including the power to:

- abridge or extend the bail of a person who has been granted bail in relation to a criminal proceeding;
- adjourn, abridge or extend the adjournment of a criminal proceeding; and
- otherwise change the time or place at which a criminal proceeding is listed before the Court

Separately, the court must not remand an accused in custody for more than 8 clear days unless:

- both the accused and the informant consent; or
- the accused does not consent but—
  - the accused is not a child or an Aboriginal person;
  - the Court does not consider that the person is a vulnerable adult;
  - the Court is satisfied that it is not reasonably practicable to have the matter return to the Court within 8 days; and
  - the Court is satisfied that the longer period of remand is consistent with the interests of justice.

The court may consider a person to be a vulnerable adult even if the court cannot identify the particular impairment referred to in section 3AAAA of the *Bail Act 1977*.

If an accused has been granted bail and has not yet been released, and the proceeding has been adjourned for more than 8 clear days; the remand warrant must direct the relevant person to bring the accused before the court at the end of 8 clear days (unless in the meantime the accused is released on bail).

*Further reading: Part 3.12, COVID Act*

*Affected Legislation: Magistrates' Court Act 1989 (Vic)*

### Children's Court

The *COVID Act* introduces changes to procedures for sentencing children by inserting a new Part 8.5A, Division 3 into the *Children, Youth and Families Act 2005 (Vic)*.

For pre-sentence reports where the court had ordered, but not received or considered, a pre-sentence report in respect of a person under 21 immediately before the commencement of the *COVID Act*, the court may now receive an 'oral pre-sentence report' in lieu of the usual report.

The Secretary to the Department of Justice and Community Safety ('DJCS') may now give an oral pre-sentence report in respect of a person if:

- (a) the court or appellate court is satisfied that it is not reasonably practicable for a pre-sentence report to be prepared due to the impact of the COVID-19 pandemic; and
- (b) a previous pre-sentence report has been prepared in respect of the person during the 6-month period before the day on which the court or appellate court proposes to order an oral pre-sentence report;<sup>3</sup> and
- (c) the person consents to the giving and consideration of an oral pre-sentence report instead of a pre-sentence report; and
- (d) the Secretary to the Department of Justice and Community Safety consents to the giving and consideration of an oral pre-sentence report instead of a pre-sentence report; and
- (e) the court or appellate court is satisfied that it is in the interests of justice to consider an oral pre-sentence report instead of a pre-sentence report in passing sentence on the person.

The court or appellate court may on its own motion order the whole or any part of an oral pre-sentence report be given in closed court; or order that only persons or classes of persons specified by it may be present during the oral pre-sentence report.

The DJCS Secretary must provide a summary of the information in that report to the person and their lawyer if it is reasonably practicable to do so before the giving of an oral pre-sentence report, unless the DJCS Secretary considers it prejudicial to the physical or mental health of the person.

Separately, the requirements in the *Children, Youth and Families Act 2005* relating to physical appearances for proceedings such as conciliation conferences are amended to allow for attendance by audio link or audio visual link, participate by oral or written submissions, or for the court to deal with the matter in the absence of the person.

*Further reading: Part 3.3, COVID Act*

*Affected Legislation: Children, Youth and Families Act 2005 (Vic)*

## VCAT

VCAT's Rules Committee may now make rules regulating the practice and procedure of the Tribunal in a meeting held by remote means or any other procedures that VCAT may decide. The quorum requirements will still apply.

*Further reading: Part 3.18, COVID Act*

*Affected Legislation: Victorian Civil and Administrative Tribunal Act 1998 (Vic)*

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<sup>3</sup> This does not apply where the person is of or over the age of 20 years and 6 months on the day on which the Court or appellate court proposes to order an oral pre-sentence report.



## Open Courts

Courts may now make a modified access and procedure order ('MAP Order') that:

- (a) requires that the proceeding or hearing must be held—
  - (i) with or without the appearance of the parties; or
  - (ii) by audio visual link or audio link;
- (b) permits a specified person, or a person of a specified class, to be present (whether in person, or by audio visual link or audio link) for the whole or part of the proceeding or hearing;
- (c) prohibits a specified person, or a person of a specified class, from being present (whether in person, or by audio visual link or audio link) for the whole or part of the proceeding or hearing;
- (d) confers on the presiding judicial officer or member discretion regarding the matters described in paragraph (a), (b) or (c);
- (e) specifies the conditions applying to a discretion described in paragraph (d) (including by specifying the circumstances in which the discretion may be exercised).

The head of a jurisdiction or head of list may make a MAP order for a specified proceeding or hearing, or a specified class of proceeding or hearing, in their jurisdiction or list respectively. When making a MAP order, the head of jurisdiction or list must:

- consider the guiding principles; and
- consider any health directions made in relation to the COVID-19 pandemic; and
- be satisfied that the contents of the MAP order are required to maintain public health during the COVID-19 pandemic.

The head of jurisdiction or list may grant an exemption at the request of a presiding judicial officer or member for a specific proceeding or hearing. Where there is any inconsistency, the MAP order made by the head of jurisdiction prevails to the extent of the inconsistency. A failure to comply with a MAP order does not affect the validity of anything done in, or the outcome of, the proceeding or hearing.

Separately, using AV broadcasts or transcripts of proceedings or reasons online will not breach the rules relating to open justice.

*Further reading: Part 3.14, COVID Act*

*Affected Legislation: Open Courts Act 2013 (Vic)*

## Sentencing

The Magistrates' Court may now attach an electronic monitoring requirement to a community correction order and vary a CCO to reflect this requirement.

For pre-sentence reports where the court had ordered, but not received or considered, a pre-sentence report in respect of a young offender immediately before the commencement of the *COVID Act*, the court may now receive an 'oral pre-sentence report' in lieu of the usual report.

The DJCS Secretary may now give an oral pre-sentence report in respect of a person if:

- (a) the court or appellate court is satisfied that it is not reasonably practicable for a pre-sentence report to be prepared due to the impact of the COVID-19 pandemic;

- (b) a previous pre-sentence report has been prepared in respect of the person during the 6-month period before the day on which the court or appellate court proposes to order an oral pre-sentence report;<sup>4</sup>
- (c) the person consents to the giving and consideration of an oral pre-sentence report instead of a pre-sentence report;
- (d) the Secretary to the Department of Justice and Community Safety consents to the giving and consideration of an oral pre-sentence report instead of a pre-sentence report; and
- (e) the court or appellate court is satisfied that it is in the interests of justice to consider an oral pre-sentence report instead of a pre-sentence report in passing sentence on the person.

The DJCS Secretary must provide a summary of the information in that report to the prosecutor, any legal practitioner representing the young offender, and the young offender and any other person if the court considers appropriate.

*Further reading: Part 3.16, COVID Act*

*Affected Legislation: Sentencing Act 1991 (Vic)*

### Oaths and Affirmations

The *COVID Act* introduces changes to the *Oaths and Affirmations Act 2018*, stating that:

- All requirements for written signatures and initialling may now be satisfied by doing so by electronic means
- All requirements for physical presence may now be satisfied by performing doing it by means of audio link or audio visual link
- All requirements for original documents may now be satisfied by a scanned hard copy or an electronic copy

The authorised affidavit taker must, now also state the following in the jurat where relevant:

- that the affidavit, as signed and notated by the authorised affidavit taker, was signed or initialled by the deponent by electronic means;
- that specified things in respect of the affidavit were done by means of audio link or audio visual link;
- that the affidavit, jurat or other document is a scanned hard copy or an electronic copy, not an original.

If a court considers that it is desirable, in the interests of justice, to admit a purported affidavit in evidence in particular proceedings, the court may do so if satisfied that:

- compliance with the requirements of the *Oaths and Affirmations Act 2018* (including the modifications) in relation to the purported affidavit was not reasonably practicable; and
- the purported affidavit states the reasons why compliance with those requirements was not reasonably practicable.

*Further reading: Part 3.13, COVID Act*

*Affected Legislation: Oaths and Affirmations Act 2018 (Vic)*

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<sup>4</sup> This does not apply where the person is of or over the age of 20 years and 6 months on the day on which the Court or appellate court proposes to order an oral pre-sentence report.

### Other sections

The *COVID Act* also contains provisions relating to other topics of varying relevance to the operation of courts and tribunals. For further details, they can be found at:

- Youth Parole Board (Part 3.3)
- Isolation in Youth Detention (Part 3.3)
- Prisons and management (Part 3.4)
- Fines and time served orders (Part 3.11)
- Tenancy Arrangements and COVID-19 reasons (Parts 4.1, 4.3)
- Education and Teaching (Part 5.1)
- Local Government (Part 5.3)
- Parliamentary Committees (Part 5.4)
- Planning and Environment – inspection and panel hearings (Part 5.5)
- Nursing & Midwifery (Part 5.6)
- Workplace Injury Rehabilitation and Compensation, and Accident Compensation (Part 5.7)