

Committal proceedings

Chapter 4 (Committal Proceeding)

Part 4.1 – ss 96 to 100; Part 4.2 – ss 101, 102; Part 4.4 – ss 107 to 112;
Part 4.5 – ss 118 to 120, 124; Part 4.6 – ss 125 to 127; Part 4.7 – ss 128
to 132, 132A; Part 4.9 – ss 141, 143, 144

Purpose of committal proceedings

- Provides an opportunity for the accused to receive disclosure of the prosecution case and to test whether there is sufficient evidence to support a conviction. The discharge of the accused at the end of a committal is a powerful statement to the prosecuting authorities that the proceeding should not be brought to trial

(Barton v R (1980) 147 CLR 75; Grassby v R (1989) 168 CLR 1; [1989] HCA 45; Williams & Ors v DPP [2004] VSC 516; Fox v DPP [1992] 1 VR 673).

- Apply to both Victorian offences and the prosecution of Commonwealth offences in Victorian courts

(Judiciary Act 1903 s68; Thorp v Abbotto (1992) 34 FCR 366).

Part 4.1 - Preliminary

97 Purposes of a committal proceeding

The purposes of a committal proceeding are—

- (a) to determine whether a charge for an offence is appropriate to be heard and determined summarily;
- (b) to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;
- (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) enabling the accused to put forward a case at an early stage if the accused wishes to do so;
 - (iv) enabling the accused to adequately prepare and present a case;
 - (v) enabling the issues in contention to be adequately defined.

96 When a committal proceeding must be held

A committal proceeding must be held in all cases in which the accused is charged with an indictable offence, except cases where—

- (a) a direct indictment is filed; or
- (b) the charge is heard and determined summarily.

98 When a committal proceeding commences

A committal proceeding commences on the commencement of a filing hearing.

Notes

- 1 See section 6(1) as to when a criminal proceeding is commenced.
- 2 Section 102 provides for the fixing of a date for a filing hearing.

Types of preliminary hearings

100 Hearings in a committal proceeding and attendance of accused

- (1) The hearings that may be held in a committal proceeding are—
- (a) **a filing hearing;**
 - (b) a special mention hearing;
 - (c) a compulsory examination hearing;
 - (d) **a committal mention hearing;**
 - (e) **a committal case conference;**
 - (f) subject to subsection (1A), **a committal hearing.**
- (1A) A committal hearing is not to be held in a committal proceeding to which section 123 applies.
- Note
Section 123 provides that there is to be no cross-examination in certain sexual offence cases.
- (2) An accused must attend all hearings in the committal proceeding against the accused unless excused under—
- (a) section 135, in the case of a committal hearing; or
[On application of accused, court may excuse from committal for specified period]
 - (b) section 330, in any other case. *[Court may excuse a person from attending a hearing.]*

NB. Assessable hearings are in red.

Part 4.2 - Filing hearing

- A committal proceeding is commenced on the commencement of a filing hearing (s98).
- When a charge-sheet containing a charge for an indictable offence is filed, the matter must be listed for filing hearing if it contains a charge that is not triable summarily. The court will also list the matter for a filing hearing if the informant requests a committal proceeding for an indictable offence that is triable summarily (s6, s10).

101 Filing hearing

At a filing hearing, the Magistrates' Court may—

- (a) fix a date for a committal mention hearing;
- (b) fix a period of time for service of a hand-up brief;
- (c) make any order or give any direction that the court considers appropriate.

102 Time limit for filing hearing

The date fixed for a filing hearing must be—

- (a) within 7 days after the charge-sheet is filed, if the accused has been arrested and either remanded in custody or granted bail; or
- (b) within 28 days after the charge-sheet is filed, if a summons to answer to a charge is issued in respect of the accused.

- At the end of a filing hearing, the registrar must provide accused with a notice identifying the committal mention date, and the next steps in the proceeding (*Magistrates' Court Criminal Procedure Rules 2009* Form 33, r49).

Part 4.4 Pre-hearing disclosure of prosecution case

- An accused charged with an offence that cannot be heard and determined summarily, or where charge-sheet requests a committal proceeding, must receive the following information when served with a summons or when a warrant to arrest is executed:
 - a copy of the charge-sheet;
 - details of when and where the matter is listed to be heard; and
 - a summary of Part 4.4;*
 - advice that the accused should seek legal advice and is entitled, if eligible, to legal aid under the *Legal Aid Act 1978*;* and
 - details on how to contact Victoria Legal Aid* (s13, s15).

*Contained in Form 9, *Magistrates' Court Criminal Procedure Rules 2009*.

- A summons for a corporate accused must also state that the court may hold a committal hearing in the absence of the accused (s15).
- The prosecution chooses the evidence it wishes to tender at the committal hearing. Subject to common law disclosure obligations, the prosecution is not required to tender all relevant information. The prosecution may use evidence at the trial that it did not lead in the committal
(*Barton v R* (1980) 147 CLR 75).
- The prosecution must, however, act fairly towards the accused. It should not present the minimum evidence required to secure a committal for trial or hold evidence back for tactical reasons. The prosecution should tender all relevant material
(*R v Basha* (1989) 39 A Crim R 337; *R v Harry; ex parte Eastway* (1985) 39 SASR 203).

Hand-up brief

107 Informant must serve hand-up brief

- (1) Subject to subsection (2), the informant must serve on the accused a hand-up brief that complies with section 110.
- (2) The informant is not required to serve a hand-up brief if he or she has served a plea brief under section 116 and the accused pleads guilty to the charge.
- (3) At the same time as the hand-up brief is served, **the informant must serve on the accused a copy of the criminal record of the accused or a statement that the accused has no previous convictions or infringement convictions.**

108 How hand-up brief must be served

- (1) A hand-up brief must be served at least **42 days** before the committal mention hearing unless—
 - (a) the Magistrates' Court fixes another period for service; or
 - (b) the accused gives written consent to a lesser period for service.
- (2) A hand-up brief must be **served personally** on the accused in accordance with section 391 unless the informant is satisfied that ordinary service is appropriate in all the circumstances.

Note Section 394 provides for ordinary service.

- (3) In considering whether to effect service of the hand-up brief by ordinary service, the informant must consider whether it is an appropriate method of service in all the circumstances as known by the informant including—
 - (a) the nature and gravity of the alleged offence;
 - (b) whether the accused has previously been found guilty or convicted of any similar offence;
 - (c) the period of time that has elapsed since the accused's address for service was ascertained.

109 Copy hand-up brief to be filed and forwarded to DPP

The informant must file a copy of the hand-up brief with the registrar, and, if the DPP is conducting the committal proceeding, forward another copy to the DPP, within 7 days after service of the brief on the accused.

Contents of hand-up brief

110 Contents of hand-up brief

A hand-up brief must contain—

- (a) a notice in the form prescribed by the rules of court—
 - (i) specifying the date of the committal mention hearing; and
 - (ii) explaining the nature of a committal proceeding and the purpose of the various stages; and
 - (iii) explaining the importance of the accused obtaining legal representation; and
 - (iv) advising that the accused has the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (v) providing details of how to contact Victoria Legal Aid; and
 - (vi) describing the effect of section 125(2); and
- (b) a copy of the charge-sheet relating to the alleged offence; and
- (c) a statement of the material facts relevant to the charge; and

Contents of hand-up brief con't

- (d) any information, document or thing on which the prosecution intends to rely in the committal proceeding including—
 - (i) a copy of any statement relevant to the charge signed by the accused, or a record of interview of the accused, that is in the possession of the informant; and
 - (ii) a copy, or a transcript, of any audio-recording or audiovisual recording required to be made under Subdivision (30A) of Division 1 of Part III of the **Crimes Act 1958**; and
 - (iii) a copy or statement of any other evidentiary material that is in the possession of the informant relating to a confession or admission made by the accused relevant to the charge; and
 - (iv) a list of the persons who have made statements that the informant intends to tender at the committal hearing, together with copies of those statements; and
 - (v) if a person has been examined under section 106 and the informant intends to tender a record of that examination at the committal hearing, a transcript of the recording of the examination; and
 - (va) if a person has been examined under Part 4 of the *Major Crime (Investigative Powers) Act 2004* and the informant intends to tender a record of that examination at the committal hearing, a transcript of the recording of the examination; and
 - (vi) if the committal proceeding relates (wholly or partly) to a charge for—
 - (A) a sexual offence; or
 - (B) an offence which involves an assault on, or injury or a threat of injury to, a person—a transcript of any audio or audiovisual recording of a kind referred to in section 367, if the informant intends to tender the transcript at the committal hearing; and
 - (vii) a legible copy of any document which the prosecution intends to produce as evidence; and
 - (viii) a list of any things the prosecution intends to tender as exhibits; and
 - (ix) a clear photograph, or a clear copy of such a photograph, of any proposed exhibit that cannot be described in detail in the list; and
 - (x) a description of any forensic procedure, examination or test that has not yet been completed and on which the prosecution intends to rely as tending to establish the guilt of the accused; and

Contents of hand-up brief con't

- (e) any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence including—
 - (i) a list of the persons (including experts) who have made statements relevant to the alleged offence which the prosecution does not intend to tender at the committal hearing; and
 - (ii) a copy of every statement referred to in subparagraph (i) made by each of those persons or, if the person has not made a statement, a written summary of the substance of any evidence likely to be given by that person or a list of those statements or written summaries; and
 - (iii) a copy of every document relevant to the alleged offence that the prosecution does not intend to tender as an exhibit or a list of those documents; and
 - (iv) a list containing descriptions of any things relevant to the alleged offence that the prosecution does not intend to tender as exhibits; and
 - (v) a clear photograph, or a clear copy of such a photograph, of any thing relevant to the alleged offence that cannot be described in detail in the list; and
 - (vi) a copy of—
 - (A) records of any medical examination of the accused; and
 - (B) reports of any forensic procedure or forensic examination conducted on the accused; and
 - (C) the results of any tests—
carried out on behalf of the prosecution and relevant to the alleged offence but on which the prosecution does not intend to rely; and
- (f) if the committal proceeding relates (wholly or partly) to a charge for a sexual offence, a copy of every statement made by the complainant to any police officer that relates to the alleged offence and contains an acknowledgment of its truthfulness; and
- (g) a copy of, or a list of, any other information, documents or things required by the rules of court to be included in a hand-up brief.

Note

See section 416 as to the prosecution's general obligation of disclosure.

Continuing disclosure obligation

111 Continuing obligation of disclosure

- (1) This section applies to any information, document or thing that—
 - (a) comes into the informant's possession or comes to the informant's notice after the service of the hand-up brief; and
 - (b) would have been required to be listed, or a copy of which would have been required to be served, in the hand-up brief.

- (2) The informant must—
 - (a) serve on the accused a copy of the document or list; and
 - (b) file a copy with the registrar; and
 - (c) if the DPP is conducting the committal proceeding, forward another copy to the DPP—as soon as practicable after the information, document or thing comes into the informant's possession or comes to the informant's notice.

- (3) This section does not apply to a plea brief.

Note

See section 416 as to the prosecution's general obligation of disclosure.

Rules with respect to statements (eg. witness statements)

112 Rules with respect to statements

- (1) A statement that the informant intends to tender in a committal proceeding must be—
 - (a) in the form of an affidavit; or
 - (b) signed by the person making the statement and must contain an acknowledgment signed by that person in the presence of a person referred to in Schedule 3 that the statement is true and correct and is made in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury; or
 - (c) in a form, and attested to in a manner, prescribed by the rules of court.
- (2) If a person under the age of 18 years makes a statement that the informant intends to tender in a committal proceeding, the statement must include the person's age.
- (3) If a person who cannot read makes a statement that the informant intends to tender in a committal proceeding—
 - (a) the statement must be read to the person before he or she signs it; and
 - (b) the acknowledgment must state that the statement was read to the person before he or she signed it.

Note

Section 414 provides for acknowledgment of false statements.

Case direction notice

- At least 7 days before the committal mention date, the accused and the informant or the DPP must jointly file a case direction notice if a hand-up brief was served (s118).
- A case direction notice must be in Form 32 of the Magistrates' Court Criminal Procedure Rules 2009 and signed by the accused and either the DPP or the informant. If the accused is unrepresented and does not cooperate with the case direction notice procedure, the informant or the DPP must file a notice signed only by that party (s118).

118 Case direction notice

- (1) If a hand-up brief is served under section 107, the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant must jointly file with the registrar **a case direction notice at least 7 days before the committal mention hearing.**
- (2) If the accused is not represented by a legal practitioner and does not sign a case direction notice, the DPP or, if the DPP is not conducting the committal proceeding, the informant must file the case direction notice, despite—
 - (a) it not being signed by or on behalf of the accused; and
 - (b) the accused not having participated in any discussion or other activity connected with its preparation.
- (3) If the Magistrates' Court at any time fixes another date for a committal mention hearing, the court may—
 - (a) direct that another case direction notice is to be jointly filed with the registrar by the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant at least 7 days before that date or within any other period that is fixed by the court; and
 - (b) give any direction that it considers appropriate as to the matters to be dealt with by that case direction notice.

Contents of case direction notice

A case direction notice—

- (a) must be in the form prescribed by the rules of court;
- (b) must specify the procedure by which it is proposed that the matter be dealt with or indicate whether an adjournment of the committal mention hearing would assist the parties in determining how the matter should be dealt with;
- (c) must state the names of any witnesses that the accused intends to seek leave to cross-examine, and for each witness the accused must specify—
 - (i) each issue for which leave to cross-examine is sought; and
 - (ii) the reason why the evidence of the witness is relevant to the issue; and
 - (iii) the reason why cross-examination of the witness on the issue is justified;

Notes	1	Section 123 provides that there is to be no cross-examination in certain sexual offence cases.
	1A	At a committal mention hearing, the Magistrates' Court may grant leave to cross-examine a witness on one or more issues. If the Magistrates' Court grants leave to cross-examine a witness, the court must identify each issue on which the witness may be cross-examined. See section 124(6).
	2	If leave to cross-examine a witness is granted under section 124, the Magistrates' Court may grant leave, during the committal hearing, for the accused to cross-examine the witness on other issues. See section 132A.
- (d) must state, in respect of each issue specified in accordance with paragraph (c)—
 - (i) whether the informant consents to or opposes leave being granted in respect of that issue; and
 - (ii) if the informant opposes leave being granted, the reason why leave is opposed;
- (e) may include a statement that the accused requires—
 - (i) specified items listed in the hand-up brief to be produced for inspection or a copy given to the accused on or before the committal mention hearing;
 - (ii) a copy of any information, document or thing specified by the accused that the accused considers ought to have been included in the hand-up brief;
 - (iii) particulars of previous convictions of any witness on whose evidence the prosecution intends to rely in the committal proceeding;
- (f) may include a statement that the accused is prepared, or is not prepared, to proceed or proceed further with the committal hearing while a forensic procedure, examination or test described in the hand-up brief remains uncompleted;
- (g) must be signed by or on behalf of the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant.

Cross-Examination

- The defence may not cross-examine witnesses at a committal hearing unless the court grants leave to do so (s124).
- An accused who wishes to cross-examine a witness will usually apply for leave in the case direction notice and the matter will be determined at the committal mention hearing. The court may allow the accused to apply for leave after the time for filing the case direction notice has passed if satisfied that it is in the interests of justice. The court must consider the reasons for the late application when determining whether it is in the interests of justice (s119, s120).
- If the court allows an accused to make a late application for leave to cross-examine a witness, the accused and the informant or the DPP must jointly file another case direction notice with the registrar at least 7 days before the next committal mention hearing, or within another period specified by the court. This case direction notice does not need to contain details of the procedure proposed for resolving the matter or whether an adjournment is requested (s120).

120 Late application for leave to cross-examine witness

- (1) The Magistrates' Court may permit an accused to apply for leave to cross-examine a witness after the expiry of the period for filing a case direction notice if the court is satisfied that it is in the interests of justice to do so, having regard to the reason why the application was not made before the expiry of the period.

Note Section 123 provides that there is to be no cross-examination in certain sexual offence cases.

- (2) If the Magistrates' Court allows an accused to apply for leave to cross-examine a witness in the circumstances referred to in subsection (1), the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant must jointly file with the registrar another case direction notice—
- (a) at least 7 days before the next committal mention hearing; or
 - (b) within any other period that is fixed by the court.
- (3) Section 119(b) does not apply to a case direction notice required to be filed under subsection (2).

Leave required to cross-examine other witnesses

- (1AA) This section does not apply to a committal proceeding to which section 123 applies.
 Note Section 123 provides that there is to be no cross-examination in certain sexual offence cases.
- (1) A witness cannot be cross-examined without leave being granted under this section.
- (2) In determining whether to grant leave to cross examine a witness, the Magistrates' Court may have regard to whether the informant consents to or opposes leave being granted.
- (3) The Magistrates' Court must not grant leave to cross-examine a witness unless the court is satisfied that—
- (a) the accused has identified an issue to which the proposed questioning relates and has provided a reason why the evidence of the witness is relevant to that issue; and
 - (b) cross-examination of the witness on that issue is justified.
- (4) In determining whether cross-examination is justified, the Magistrates' Court must have regard to the need to ensure that—
- (a) the prosecution case is adequately disclosed; and
 - (b) the issues are adequately defined; and
 - (c) the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged; and
 - (d) a fair trial will take place if the matter proceeds to trial, including that the accused is able adequately to prepare and present a defence; and
 - (e) matters relevant to a potential plea of guilty are clarified; and
 - (f) matters relevant to a potential discontinuance of prosecution under section 177 are clarified; and
 - (g) trivial, vexatious or oppressive cross-examination is not permitted; and
 - (h) the interests of justice are otherwise served.

Notes

- 1 Section 102 of the Evidence Act 2008 provides that credibility evidence about a witness is not admissible (the credibility rule).
- 2 Section 103(1) of the Evidence Act 2008 provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

- (5) In addition to the requirements of subsection (4), if the witness is under 18 years of age, the Magistrates' Court must have regard to—
- (a) the need to minimise the trauma that might be experienced by the witness in giving evidence; and
 - (b) any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding; and
 - (c) any mental, intellectual or physical disability to which the witness is or appears to be subject and of which the court is aware; and
 - (d) the importance of the witness to the case for the prosecution; and
 - (e) the existence or lack of evidence that corroborates the proposed evidence of the witness; and
 - (f) the extent of any proposed admissions; and
 - (g) the probative value of the proposed evidence of the witness; and
 - (h) the issues in dispute; and
 - (i) the weight of the proposed evidence of the witness; and
 - (j) any statements of other witnesses that contradict the proposed evidence of the witness.
- (6) If the Magistrates' Court grants leave to cross-examine a witness, the court must identify each issue on which the witness may be cross-examined.

Part 4.6 - Committal mention and case conference

125

Committal mention hearing

- (1) At a committal mention hearing, the Magistrates' Court may—
- (a) immediately determine the committal proceeding in accordance with section 141, 142 or 143;
 - (b) offer a summary hearing or determine an application for a summary hearing in accordance with section 30;
 - (c) subject to subsection (1A), hear and determine an application for leave to cross examine a witness;
 - (d) subject to subsection (1A), fix a date for a committal hearing;
 - (e) hear and determine any objection to disclosure of material;
 - (f) fix another date for a committal mention hearing;
 - (g) make any other order or give any direction that the court considers appropriate.
- (1A) Subsection (1)(c) and (d) do not apply to a committal mention hearing that is held in a committal proceeding to which section 123 applies.
- Note Section 123 provides that there is to be no cross examination in certain sexual offence cases.
- (2) In considering whether to fix another date for a committal mention hearing to enable the accused to obtain legal representation, the Magistrates' Court must have regard to whether the accused has made reasonable attempts to obtain legal representation.
- (3) In determining any objection to the disclosure of material on the ground referred to in section 45(1)(g), the Magistrates' Court, having regard to whether the accused is legally represented, may order, on any conditions specified by it, that the disclosure be made to—
- (a) the accused's legal practitioner (but not the accused personally); or
 - (b) the accused personally.

Committal mention hearing (timing)

126

Time for holding committal mention hearing

- (1) A committal mention hearing must be held—
 - (a) in the case of a sexual offence, within 3 months after the commencement of the criminal proceeding for the offence; or
 - (b) in the case of any other offence, **within 6 months after the commencement of the criminal proceeding** for the offence—or any other period fixed by the Magistrates' Court under subsection (2).

Note Section 6(1) sets out how a criminal proceeding is commenced.
- (2) The Magistrates' Court may fix a longer period for the holding of a committal mention hearing if the court is satisfied that it is in the interests of justice that another period should be fixed having regard to—
 - (a) the seriousness of the offence; and
 - (b) the reason a longer period is required.
- (3) Subsection (1) does not apply—
 - (a) if the accused has failed to attend in accordance with the conditions of his or her bail; or
 - (b) if a warrant to arrest the accused has been issued and at the end of the period referred to in subsection (1)(a) or (b) (as the case requires) the accused has not been arrested; or
 - (c) if the accused requests that a committal mention hearing be held after the period referred to in subsection (1)(a) or (b) (as the case requires) and the Magistrates' Court is satisfied that in the interests of justice the request should be granted.
- (4) If a committal mention hearing has not been held before the expiry of the period referred to in subsection (1)(a) or (b) (as the case requires), or any longer period fixed under subsection (2), the Magistrates' Court, on the application of the accused, may order the accused to be discharged.

Committal case conference

- The committal case conference is a case management tool.
- Its purpose is to assist in the effective management of the proceeding and the timely resolution of issues. It provides a more informal opportunity for the prosecution, the defence and the court to discuss the case and attempt to identify the key issues to be resolved (*Magistrates' Court Criminal Procedure Rules 2009* r52).

- 127** **Committal case conference**
- (1) The Magistrates' Court may direct the parties to a committal proceeding to appear at a committal case conference to be conducted by a magistrate.
 - (2) Wherever practicable, a committal case conference should be conducted on the date of the committal mention hearing.
 - (3) Evidence of—
 - (a) anything said or done in the course of a committal case conference; or
 - (b) any document prepared solely for the purposes of a committal case conference—

is not admissible in any proceeding before any court or tribunal or in any inquiry in which evidence is or may be given before any court or person acting judicially, unless—
 - (c) all parties to the committal case conference agree to the giving of the evidence; or
 - (d) the proceeding is a criminal proceeding for an offence alleged to have been committed during, or in connection with, the committal case conference.

Part 4.7 – Committal hearing

Overview

- During the committal hearing, the court may hear evidence and determine whether there is evidence of sufficient weight to support a conviction. The court may make any order or give any direction that is appropriate as part of this process (s128).
- In appropriate cases, the court may also allow the matter to proceed as a summary hearing (s128).
 - If the court allows the matter to proceed as a summary hearing, it may use the oral evidence of witnesses, witness statements and documents or exhibits tendered in the committal as evidence in the summary hearing with the consent of the accused. The court must call or recall any witness who are required for cross-examination as part of the summary hearing and the proceeding otherwise continues as a summary hearing (s30).

Evidence

- The committal hearing is conducted primarily on the material contained in the hand-up brief.
- The prosecution or defence may apply for a witness to give oral evidence. The court may allow a witness to give oral evidence if satisfied that it is in the interests of justice for prosecution to call the witness to give evidence-in-chief or if the court has granted leave to cross-examine that witness (s130).
 - If the court allows, witness may be cross-examined and re-examined, provided the court grants leave to do so (s124, s130).
- A witness who is required for cross-examination must usually confine his or her evidence-in-chief to identifying him or herself and attesting to the truthfulness of his or her statement, or the contents of a recording. The court may grant leave if it is in the interests of justice for the witness to supplement the earlier statement or recording by further oral evidence and, in exceptional circumstances, may allow the witness to give the whole of their evidence-in-chief orally (s130).
- The court may also, on the application of a party, allow the statement or transcript of the recording to be read aloud before the witness is asked to attest to its truthfulness or is cross-examined (s130).
- If the court allows a witness to give oral evidence-in-chief or to be cross-examined, the witness must attend court on the date of the hearing, and any subsequent hearing dates unless the court excuses his or her attendance (s129).
- Leave is required to cross examine and cross examination is limited to areas in s 124(6) or examination on different issue approved under s 132A (s132(1)). Court may disallow a question if it is not justified (s132(2)).

Committal hearing

128 **Committal hearing**

At a committal hearing, the Magistrates' Court—

- (a) may offer a summary hearing or determine an application for a summary hearing in accordance with section 30;
- (b) may hear evidence in accordance with section 130;
- (c) if the committal hearing proceeds, must determine, in accordance with section 141, whether there is evidence of sufficient weight to support a conviction;
- (d) may make any order or give any direction that the court considers appropriate.

129 **Attendance of witnesses**

- (1) If leave is granted to cross-examine a witness referred to in section 124 or to call such a witness to give oral evidence-in-chief, the witness must attend on the date to which the committal hearing is adjourned for the witness to give evidence.
- (2) The informant must ensure that the witness attends at the time and place fixed for the giving of evidence by the witness.
- (3) A witness who is required to attend a committal hearing must attend on any date to which the hearing is adjourned unless excused from attendance by the Magistrates' Court.

Note

See section 134 for powers of the Magistrates' Court and inadmissibility of statement etc. when a witness who is required to attend a committal hearing fails to do so.

Giving of evidence by witnesses

- (1) In this section—
- recording** means an audio or audiovisual recording of—
- (a) the evidence-in-chief of a witness; or
 - (b) the compulsory examination of a person under section 106—
- a transcript of which was served in the hand up brief;
- statement** means a statement of a witness, a copy of which was served in the hand-up brief.
- (2) A witness may be called to give evidence at a committal hearing if—
- (a) the Magistrates' Court grants leave under section 124 for the cross-examination of the witness; or
 - (b) having regard to the interests of justice, the Magistrates' Court grants leave to the prosecution to call the witness to give oral evidence-in-chief.
- (3) If the Magistrates' Court grants leave under section 124 to cross-examine a witness, the evidence-in-chief of the witness must be confined to the witness identifying himself or herself (in a manner consistent with section 131) and attesting to the truthfulness of the statement or the contents of the recording, unless the Magistrates' Court gives leave under subsection (4) or (5).
- (4) If it is in the interests of justice, the Magistrates' Court may give leave for a witness referred to in subsection (3) to give oral evidence-in-chief supplementary to the statement or recording.
- (5) If exceptional circumstances exist, the Magistrates' Court may give leave for a witness referred to in subsection (3) to give the whole of his or her evidence-in-chief orally.
- (6) On application by a party, the Magistrates' Court may permit a statement or the transcript of a recording to be read aloud before the witness is asked to attest to its truthfulness or is cross-examined.
- (7) Subject to section 124, a witness who gives evidence-in-chief may be cross-examined and re examined.
- (8) Evidence given at a committal hearing must be recorded in accordance with Part VI of the ***Evidence (Miscellaneous Provisions) Act 1958***.

132 Cross-examination of witnesses

- (1) An accused who obtains leave to cross examine a witness is limited to cross examining the witness on—
- (a) the issues identified under section 124(6); and
 - (b) the issues, if any, in relation to which leave has been obtained under section 132A.
- (2) Without limiting any other power that it has to forbid or disallow questions, the Magistrates' Court may disallow any question asked of a witness in the course of cross-examination in a committal hearing if it appears to the court that—
- (a) the question does not relate to an issue in relation to which leave has been obtained under section 124 or 132A; or
 - (b) the question is not justified.
- (3) In determining whether a question is justified, the Magistrates' Court must have regard to the matters referred to in section 124(4) and (5).

132A Leave to cross-examine witness on different issue

- (1) This section applies if the Magistrates' Court grants leave for the accused to cross-examine a witness under section 124.
- (2) The Magistrates' Court may grant leave for the accused to cross-examine the witness on an issue that was not identified under section 124(6).
- (3) In determining whether to grant leave, the Magistrates' Court may have regard to whether the informant consents to or opposes leave being granted.
- (4) The Magistrates' Court must not grant leave unless the court is satisfied that—
- (a) the accused has identified an issue to which the proposed questioning relates and has provided a reason why the evidence of the witness is relevant to that issue; and
 - (b) cross-examination of the witness on that issue is justified.
- (5) In determining whether cross-examination on an issue is justified, the Magistrates' Court must have regard to the matters referred to in section 124(4) and (5).

Part 4.9 – Determination of committal proceedings

General

- After the close of prosecution case, the court must generally enquire whether the accused intends to call evidence or make submissions.
 - However, if the proceedings relate to a charge for a sexual offence where the complainant was a child or a person with a cognitive impairment when the proceedings commenced, the court must not enquire whether the accused intends to call witnesses (s141).
- If the accused is not represented by a legal practitioner, the court must inform the accused, in a manner likely to be understood by the accused, that he or she may:
 - give sworn evidence him or herself and must then answer questions from the prosecutor or the court;
 - choose to remain silent; or
 - choose to call other witnesses to give evidence, regardless of whether he or she gives evidence, unless the proceedings relate to a charge for a sexual offence where the complainant was a child or a person with a cognitive impairment when the proceedings commenced (ss141(2), (2A)).

- The court must make one of the following orders at the conclusion of all the evidence and submissions:
 - a) if in its opinion the evidence is not of sufficient weight to support a conviction for any indictable offence, **discharge the accused**; or
 - b) if in its opinion the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged, **commit the accused for trial**; or
 - c) if in its opinion **the evidence is of sufficient weight to support a conviction for an indictable offence other than the offence with which the accused is charged**, adjourn the committal proceeding to enable the informant to file a charge-sheet in respect of that other offence and, **if a charge sheet is filed**, must **commit the accused for trial** (s141(4)).
- An accused may elect to stand trial any time after the service on them of a hand-up brief (s123(1)). They must be brought before the court and if the court considers they understand the nature and consequence of the election, court must commit to stand trial in accordance with s 144 (s 143(1), (3), (4)).

Determination of committal proceeding where hand-up brief used

(1) After the evidence for the prosecution is concluded, the Magistrates' Court must enquire—

(a) except in a committal proceeding to which section 123 applies, whether the accused intends to call any witness; and

Note Section 123 provides that there is to be no cross-examination in certain sexual offence cases.

(b) whether the accused intends to make any submission.

(2) If the accused is not represented by a legal practitioner, the Magistrates' Court must—

(a) inform the accused that the accused has the right to answer the charge and must choose either—

(i) to give sworn or affirmed evidence, that is, to enter the witness box, take the oath or make an affirmation and say what the accused wants to say in answer to the charge and then to respond to any questions from the prosecution or the court about the evidence of the accused; or

(ii) to say nothing in answer to the charge; and

(b) except in a committal proceeding to which section 123 applies, inform the accused that whatever choice referred to in paragraph (a) is made, the accused may call any witnesses to give sworn or affirmed evidence for the accused.

(2A) The Magistrates' Court is required to give information referred to in subsection (2) in a manner likely to be understood by the accused.

(3) After giving the information referred to in subsection (2), the Magistrates' Court must ask the accused what the accused wants to do.

(4) **At the conclusion of all of the evidence and submissions, if any, the Magistrates' Court must—**

(a) if in its opinion the evidence is not of sufficient weight to support a conviction for any indictable offence, discharge the accused; or

(b) if in its opinion the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged, commit the accused for trial in accordance with section 144; or

(c) if in its opinion the evidence is of sufficient weight to support a conviction for an indictable offence other than the offence with which the accused is charged, adjourn the committal proceeding to enable the informant to file a charge-sheet in respect of that other offence and, if a charge-sheet is filed, must commit the accused for trial in accordance with section 144.

(5) If the informant does not file a charge-sheet for the other offence within the period of an adjournment under subsection (4)(c), the Magistrates' Court must discharge the accused.

Determination at conclusion of evidence and submissions

- The orders in s 141(4) are the only orders available to the magistrate at the end of a committal. There is **no power to dismiss charges on the basis that it would be contrary to the interests of justice** to allow the charges to proceed or commit the accused for a summary hearing.

(McKenzie & Anor v Magistrates' Court of Victoria (2013) 39 VR 311; [2013] VSCA 81); (Gild v Magistrates' Court of Victoria (2015) 44 VR 446; [2015] VSC 84)

- Strict compliance with the procedure in sections 141(1) to (3) must be complete before the magistrate can validly exercise the jurisdiction to commit the accused to stand trial. Failure to comply with that procedure so renders the committal decision void.

(Strangio v The Magistrates' Court of Victoria [2013] VSC 496; Brygel v Stewart-Thornton [1992] 2 VR 387)

- The court must strictly apply the statutory test of whether to commit the accused to stand trial. The **fairness of any subsequent trial is not a relevant consideration**. A magistrate may not discharge an accused on the basis that any subsequent trial would be an abuse of process

(Grassby v R (1989) 168 CLR 1; [1989] HCA 45).

- The role of a magistrate is to determine whether a reasonable jury could, or could not, convict the accused on the evidence available. This may involve some assessment of the credibility of witnesses and strength of the prosecution case. The assessment is undertaken on the assumption that the **prosecution case is taken at its highest**.

(Forsyth v Rodda (1988) 37 A Crim R 50; Forsyth v Rodda (1989) 42 A Crim R 197).

- The test of "sufficient evidence" is designed to ensure that a person is not committed for trial upon evidence which is so weak that the prospects of conviction are minimal. The magistrate must not, however, assume the role of the jury. He or she is not required to choose between competing hypotheses and only commit the accused for trial if there is no hypothesis consistent with innocence. The role of the magistrate is similar to the role of a judge hearing a "no-case" submission.

(Forsyth v Rodda (1988) 37 A Crim R 50; Thorp v Abbotto (1992) 34 FCR 366; Morriss v R (1993) 68 A Crim R 556).

Determination – where accused elects to stand trial

143 Determination of committal proceeding where accused elects to stand trial

- trial.
- (1) Any time after the service on an accused of a hand-up brief, the accused may elect to stand trial.
 - (2) An election is made by—
 - (a) filing with the registrar a notice in the form prescribed by the rules of court and signed by the accused; and
 - (b) serving a copy of the notice on the informant in accordance with section 392.
 - (3) As soon as practicable after a notice is filed with the registrar under this section, the Magistrates' Court must—
 - (a) if the accused is in custody, direct that the accused be brought before the court; or
 - (b) if the accused is not in custody, direct that a summons to attend or warrant to arrest be issued.
 - (4) On the attendance of the accused before the Magistrates' Court, if the court considers that the accused understands the nature and consequence of the election, the court must commit the accused for trial in accordance with section 144.

Procedure – committing accused for trial

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Procedure before and on committing accused for trial

- (1) Before committing an accused for trial, the Magistrates' Court must, in the manner prescribed by the rules of court, if any—
 - (a) ask the accused whether the accused pleads guilty or not guilty to the charge; and
 - (b) inform the accused that the sentencing court may take into account a plea of guilty and the stage in the proceeding at which the plea or an intention to plead guilty is indicated.
- (2) On committing an accused for trial, the Magistrates' Court must—
 - (a) if the accused was not represented by a legal practitioner in the committal proceeding—
 - (i) explain to the accused the importance of obtaining legal representation for the trial; and
 - (ii) advise that the accused has the right, if eligible, to legal aid under the Legal Aid Act 1978; and
 - (iii) warn the accused that, if the accused wishes to be legally aided, it is the accused's responsibility to make application to Victoria Legal Aid as soon as possible; and
 - (b) explain to the accused, in a manner likely to be understood by the accused—
 - (i) the provisions of section 190 (alibi evidence), if relevant; and
 - (ii) the provisions of sections 342, 344 and 346, if relevant; and
 - (iii) any other information required to be given by the rules of court; and
 - (c) if the accused is a natural person, remand the accused in custody, or grant bail, until trial or a date before trial fixed by the court; and

Notes

1 Section 13 of the Bail Act 1977 prevents the Magistrates' Court granting bail to a person committed for trial on a charge of treason.

2 See section 333 where the accused is undergoing a sentence of detention in a youth justice centre.

- (d) in the case of a corporate accused, order the accused to appear, by a representative or a legal practitioner, on the day on which the trial of the accused is listed to commence or on any other day specified by the court.

Note

See section 252 (offence for corporate accused to fail to appear on day trial listed to commence etc.).

Trial procedure

- The following provisions apply if the accused is committed for trial, or a direct indictment is filed in a superior court
- An indictment must be in writing, signed by the DPP or a Crown prosecutor, and comply with Sch 1 (s 159)
- It may be filed in the County or Supreme Court, having regard to the complexity of the case, seriousness of alleged offence, any particular importance attaching to the case, and any other consideration that the DPP / Crown Pros considers relevant (s 160); note murder, attempted murder, treason must proceed in Supreme Court; note also the Supreme Court may order that the matter be tried in the County Court, or uplift a matter from the County Court (s 167); courts may also transfer to Magistrates' or Children's Court (s 168, 168A)
- Sex offence indictments may be filed within six months after date of committed, or within 14 days if complainant is a child or has a cognitive impairment (s 163)
- Court may order at any time that an indictment be amended (s 165)
- If an indictment contains more than one charge or one accused, the charges must be heard together unless severed under ss 193 or 195
- For rules of service, see ss 171ff

Discontinuing a prosecution

- S 177: the DPP may discontinue a prosecution by announcing the discontinuance in court, or filing notice of discontinuance
- This does not amount to an acquittal: s 177(6)

Pre-trial procedure

- S 179: at any time except during trial, the court may conduct one or more directions hearings
- S 180: the accused may be arraigned at a directions hearing, if an indictment has been filed
- S 181: At a directions hearing, the court may make or vary any direction or order, or do anything the court considers necessary for the fair and efficient conduct of the proceeding. For example, the court may:
 - require the accused to indicate whether he or she is legally represented and has funding for continued representation for the trial;
 - require each party to notify the court of any pre-trial issues it seeks to raise and any pre-trial orders it seeks;
 - set a timetable for the hearing of pre-trial issues or applications for orders;
 - require the parties to estimate the expected length of the trial;
 - require the parties to advise on the estimated number of witnesses, the availability of witnesses other than the accused and any requirements of those witnesses or interpreters;
 - order a party to make, file or serve any written or oral material required for the purpose of the proceeding;
 - determine objections relating to the disclosure of information or material by the prosecution;
 - determine an application for a sentence indication.
- See discussion of Judicial College of Victoria in Victorian Criminal Proceedings Manual at <https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27472.htm>

Documents to be filed

- S 182: 28 days before day 1 of trial, the DPP must file and serve:
 - A summary of prosecution opening, outlining:
 - The manner in which the prosecution will put the case against the accused and
 - The acts, facts, matters and circumstances being relied on to support a finding of guilt
 - A notice of pre-trial admissions
 - Statements of witnesses which ought to be admitted without further proof
- S 183: 14 days after service, the accused must file and serve:
 - Defence response to summary
 - Identifying the acts, facts, matters and circumstances with which issue is taken, and the basis on which issue is taken
 - (but not the identity of any witness, other than any expert witness, to be called by the accused, or whether the accused will give evidence)
 - Response to notice of pre-trial admissions
- Departure from these matters: s 184

Pre-Trial Disclosure - Prosecution

- After committal, the DPP must provide a copy of the transcript of evidence and statements admitted in evidence at the committal, along with a transcript of any recording admitted in evidence (the depositions).
- The prosecution is under a continuing obligation of disclosure (s 185)
- If the prosecution intends to call a witness to give evidence that was not contained in the depositions, the prosecution must serve on the accused and file in court:
 - (a) a notice of intention to call additional evidence; and
 - (b) a copy of the statement of the proposed witness containing the additional evidence or an outline of the additional evidence that the witness is expected to give (CPA 2009 s188(2)).

Pre-Trial Disclosure - Defence

- The defence is under a duty to disclose:
- 1. Expert Evidence
 - The accused must serve on the prosecution and file in court the statement of any expert witness he or she intends to call at least 14 days before the trial is listed to commence. If the statement is not ready at that time, then the statement must be served and filed as soon as possible after it comes into existence (CPA 2009 s189).
 - For proceedings in the County Court, the party calling the witness must provide the witness with a copy of the 'Expert Witness Code of Conduct' at the time of engaging the witness. The expert's report must contain an acknowledgment that the expert has read and complied with the code in preparing the report (*County Court Criminal Division Practice Note*, PNCR 1-2015).

- 2. Alibi

- The accused may not give evidence in support of an alibi personally or adduce such evidence from another witness without the leave of the court unless he or she gave the DPP a "notice of alibi" within the prescribed period (CPA 2009 s190).
- The accused must serve the notice of alibi on the DPP within 14 days of being committed to stand trial. If the accused is indicted on a direct indictment, the notice must be served within 14 days of receiving a copy of the indictment (CPA 2009 s190).
- The notice of alibi must contain the following details:
 - the time and place of the alibi;
 - the name and last known address of any alibi witnesses; and
 - if the name and address of a witness is not known, material information that may assist in locating that witness (CPA 2009 s190).

Pre-trial orders which can be made by the court

- S 192: change of venue
- S 193: separate trial (of charges, and/or of accused)
 - Though note presumption in sex cases that two or more charges will be heard together (s 194)
 - Presumption of severance of conspiracy charge from substantive charge (s 195)
- All other powers retained (s 196)
- Order for legal representation (s 197)

Orders for pre-trial evidence

- S 198: order may be made to pre-record evidence of a witness, if it is reasonably anticipated that the person will be unavailable to give evidence at trial, or the parties agree that the evidence of the person should be taken before trial, or for any other reason the court considers it appropriate
- S 198A: accused may apply to xxn a witness in a sex case, other than a complainant who was a child or cognitively impaired; and the court considers that xxn on a particular issue is justified
- S 198B: accused may apply to xxn a witness; where the court is satisfied that it is necessary to do so in order to avoid a serious risk that the trial would be unfair [note associated abolition of Basha procedure: s 198C]

Pre-trial resolution of issues

- S 199ff: At any time before trial, court may hear and decide any issue with respect to the trial including issue of law or procedure, pretrial ruling, issue of fact, any other orders sought

Sentence Indication

- S 207: Any time after filing of Indictments, the court may indicate if the accused pleads guilty to the charge on the indictment at that time or another charge, the court would or would not (as the case may be) be likely to impose on the accused a sentence of imprisonment that commences immediately (nb this is a more narrow indication than in the Magistrates' Court).
- S 208: only given on the application of the accused, and only with prosecution consent; court may refuse to give an indication
- S 209: the effect of an indication that the court would not impose a sentence of imprisonment that imposes a plea of guilty, followed by an accused pleaded guilty at the first available opportunity, is that the court must not impose a sentence of imprisonment that would commence immediately; note also if the indication is of immediate imprisonment, any ensuing trial must proceed before a different judge

Commencement of trial; arraignment

- Occurs when the accused pleads not guilty on arraignment in the presence of the jury panel (s 210)
- Nb only relates to matter proceeding to trial: accused is arraigned before judge at mention / directions hearing / commencement of plea in mitigation of penalty if they are pleading guilty
- Arraignment is the process in which the court asks the accused whether they are the person named on the Indictment, and reads out each charge and asks whether the accused pleads guilty or not guilty (s 215); if there is a not guilty plea, the accused must be arraigned in the presence of the jury panel, s 217
- See also written pleas: s 216; pleas to alternative offences: s 219
- A refusal to plead permits a court to order that a plea of not guilty be entered on behalf of the accused: s 221

Time limits for commencement of trial

- S 211 Offences other than a sexual offence:
 - (a) within 12 months after the day on which the person is committed for trial in respect of the offence; or
 - (b) if no committal proceeding in respect of the offence is held, within 12 months after the day on which the indictment against the person is filed; or
 - (c) if a new trial is ordered by the Court of Appeal, within 6 months after the day on which the order is made; or
 - (d) Any date extended by the court
- S 212 Sexual offences:
 - (a) within 3 months after the day on which the person is committed for trial in respect of the offence; or
 - (b) if no committal proceeding in respect of the offence is held, within 3 months after the day on which the indictment against the person is filed; or
 - (c) if a new trial is ordered by the Court of Appeal, within 3 months after the day on which the order is made; or
 - (d) Any date extended by the court

Trial procedure

- S 222: a trial Judge may address the jury on the issues that have or are to arise, or any other matters relevant to the jury in performance of its functions, at any time during the trial
- S 223: the Judge may order that copies of relevant documents such as the indictment, summary of prosecution opening and defence response, opening and closing addresses, transcripts, jury guides (see also s 223A), and others, be provided to the jury

Opening addresses

- S 224: prosecutor must give opening address, and must restrict themselves to matters set out in pre-trial documents except in exceptional circumstances
- S 225: after the prosecutor's opening, the accused's legal practitioner must, and a self-represented accused may give a response to the opening, and they must restrict themselves to matters set out in pre-trial documents except in exceptional circumstances

Accused's case

- S 226 After the close of the case for the prosecution, an accused is entitled—
 - (a) to make a submission that there is no case for the accused to answer;
 - (b) to answer the charge by choosing to give evidence or call other witnesses to give evidence or both;
 - (c) not to give evidence or call any witnesses.
- S 230: If the accused intends to call witnesses to give evidence at the trial, the accused must indicate, when called on by the trial judge to do so (a) the names of those witnesses (other than the accused); and (b) the order in which those witnesses are to be called, and may not depart from that indication without the leave of the court.
- S 231: If the accused intends to give evidence, or to call other witnesses on behalf of the accused, or both, the accused is entitled to give an opening address to the jury outlining the evidence that the accused proposes to give or call.

Closing addresses

- S 234: the prosecution may address the jury after the close of evidence, and before the accused's closing address
- S 235: the accused may then address the jury
- S 236: if the accused asserts facts which are not supported by the evidence, the trial Judge may grant the prosecution leave to make a supplementary address

Judge's directions to the jury

- S 238: occur after closing addresses

Alternate verdicts

- See s 239ff
- If the accused pleads guilty during trial, the trial judge may discharge the jury and enter a verdict of guilty; if the prosecution proposes not to lead evidence on a charge on the Indictment, or the Judge has determined that there is no case to answer, the judge may discharge the jury from delivering a verdict on that charge and direct that an entry of not guilty be entered

Miscellaneous

- Related summary offences: s 242
- Unrelated summary offences: s 243
- Late change of counsel for trial: s 249