

Committals: dealing with the winds of change

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This Bill will make changes to Victoria's criminal procedure laws to enhance efficiency, reduce delays and protect victims and witnesses. The Bill will do so by streamlining committal processes while preserving the core functions of the existing committal system to achieve early and appropriate resolution of cases, and by strengthening protections for victims and witnesses.

- Second reading speech, 30 October 2024

I The current framework

The purposes of a committal proceeding are broad and are currently governed by s 97 of the *Criminal Procedure Act 2009* (**the Act**):

- (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 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. Enable the accused to adequately prepare and present a case.
 - v. Enabling the issues in contention to be adequately defined.

An accused may make an application for cross-examination of witnesses at committal. This application must be made in writing in a Case Direction Notice (i.e. a Form 32), governed by s 119 of the Act. That notice must specify, for each witness sought for cross examination:

- Each issue for which leave to cross-examine is sought.
- The reason why the evidence of the witness is relevant to the issue.
- The reason why cross-examination of the witness on the issue is justified.

Section 124 sets out matters to which a magistrate must have regard in deciding whether to grant leave, including whether the evidence is of sufficient weight to support a conviction.

Pursuant to s 123 of the Act, a magistrate must not grant leave for cross-examination of **any** witnesses in a proceeding for a sexual offence if, at the time the proceeding was commenced, the complainant was a child or a person with a cognitive impairment.

The practice for pre-trial examination of witnesses in cases captured by s 123 of the Act has been to make an application to the trial court pursuant to s 198A of the Act. The test for the granting of leave under s 198A mirrors the test under s 124 for the grant of leave.

The determination of a committal is governed by s 141(4) of the Act. At the conclusion of all the evidence and submissions, if any, the Magistrates' Court must:

- (a) If the evidence is not of sufficient weight to support a conviction for any indictable offence, discharge the accused;
- (b) If 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 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 offence and, if the charge-sheet is filed, commit the accused for trial.

Evidence will not be of sufficient weight to support a conviction if the accused will not have a case to answer at trial. This means that the test governing a 'no case' submission, including for cases that are wholly circumstantial, apply to the committal test.¹

II The new framework

Parliament has recently amended the committal system, passing the *Justice Legislation (Committals) Act 2025*. The amendments will go into operation on 28 December 2025.

¹ Cf. *DPP v Iliopoulos & Ors (Ruling No 3)* [2016] VSC 132 at [7] – [9].

The most significant changes brought about by the amendment are as follows.

The following provisions of the current framework are **repealed**:

- Section 97(b) and (d)(iii), governing the purposes of a committal (see above).
- Section 124(4)(c), being 'whether the evidence is of sufficient weight to support a conviction' as a consideration in whether to grant leave to cross-examine a witness.

In addition, the requirements for case direction notices (i.e. Form 32s) will be more stringent. Section 119 has been amended to require that, in place of the 'relevance' and 'justification' requirements, an applicant will be required to set out:

- ii. How cross-examination of the witness on the issue is directly and substantially relevant to that issue;
- iii. The reasons why, in the interests of justice, the witness should be cross-examined on that issue; and
- iv. Why the accused is of the view that the reasons referred to in subparagraph (ii) are '**substantial reasons.**'

Section 123 has been broadened, prohibiting the grant of leave to cross-examine witnesses in proceedings that relate wholly or partly to a charge for:

1. **All** sexual offences.
2. Family violence offences (i.e. a case where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008*).
3. Offences against s 21A(1) of the *Crimes Act 1958* (stalking).

The requirements for applications under s 198A in those cases has been amended to reflect identically the new application requirements for cross-examination at committal.

New provisions, ss 127B and 127C, will act in the same way as the expanded s 123, i.e. to prohibit committal proceedings for offences not within the jurisdiction of the County Court (where all accused are adults charged with an applicable offence). These offences include:

- Murder.
- Attempted murder.
- Manslaughter.

Section 198A has been expanded to allow for applications to the Supreme Court for pre-trial cross-examination in cases captured by the new ss 127B and 127C.

Finally, s 141 of the Act, governing the determination of a committal, has been substituted by a provision requiring the Magistrates' Court to either:

- (a) If there is to be no cross-examination of witnesses, commit the accused for trial at the end of the committal mention hearing; or
- (b) If there is to be cross-examination of witnesses, commit the accused for trial at the end of the committal hearing.

In short, the amendment has **three** significant practical effects:

1. Leave to cross-examine witnesses will only be granted in a significantly reduced number of cases, following more difficult applications, likely on narrower issues.
2. Leave to cross-examine witnesses in all sexual offence cases, family violence cases, stalking cases, and homicide cases will be prohibited.
3. The committal test is abolished.

III Similar provisions in other jurisdictions: a guide to 'substantial reasons in the interests of justice'

New South Wales

Committals in New South Wales are governed by the *Criminal Procedure Act 1986*.

The default procedure for admitting evidence at committal is the tendering of statements. A magistrate may, on application pursuant to s82(1), direct the attendance at the committal of a person whose evidence is referred to in the brief of evidence or other prosecution materials.

The test for whether to make such a direction is at s82(5): the Magistrate may give a direction only if satisfied that there are **substantial reasons** why, **in the interests of justice**, the witness should attend to give oral evidence.

The interpretation of **substantial reasons in the interests of justice** may provide some guide to the threshold test for applications for cross-examination under the new Victorian framework.

In *Sim v Magistrate Corbett & Anor* [2006] NSWSC 665 the NSWSC judicially reviewed a decision not to direct witnesses to give oral evidence under the then equivalent provision. At [20] the Court set out the principles relevant to the test for 'substantial reasons.'

1. *The purpose of the legislation is to avoid delays in the criminal process by unnecessary or prolix cross-examination at committal.*
2. *The onus is on the defence to satisfy the Local Court that an order should be made directing the attendance of witnesses.*
3. *The process is an important part of the committal proceedings. The refusal of an application may have a significant impact upon the ability of the defendant to defend himself. As well, the prosecution has a real interest in ensuring only appropriate matters are sent for trial.*
4. *In relation to matters falling within s 91² of the Criminal Procedure Act 1986, the defendant must show that there are reasons of substance for the defendant to be allowed to cross-examine a witness or witnesses.*
5. *The obligation to point to substantial reasons is not as onerous as the reference to “special reasons” in s 93; nevertheless it raises a barrier, which must be surmounted before cross-examination will be permitted.*
6. *Each case will depend on its own facts and circumstances. It is not possible to define exhaustively or even at all what might, in a particular case, constitute substantial reasons. It may be a situation where cross-examination may result in the discharge of the defendant or lead to a successful no-bill application; it may be a situation where cross-examination is likely to undermine substantially the credit of a significant witness. It may simply be a situation where cross-examination is necessary to avoid the defendant being taken by surprise at trial. The categories are not closed and flexibility of approach is required in the light of the issues that may arise in a particular matter.*
7. *Substantial reasons might exist, for example, where the attendance of a witness is sought to enable cross-examination in respect of a matter which itself might give rise to a discretion or determination to reject evidence at trial.*
8. *The expression “substantial reasons” is not to be ascertained by reference to synonyms or abstract dictionary definitions. The reasons advanced must have substance in the context of the committal proceedings, having particular regard to the facts and circumstances of the particular matter and the issues, which critically arise or are likely to arise in the trial.*

The committal test in NSW has been abolished since the decision in *Sim*.³ Some caution should be exercised in direct application to the new Victorian framework.

Queensland

² Section 91 was equivalent at the time of *Sim* to the current s82 of the *Criminal Procedure Act 1986*.

³ Cf. *Criminal Procedure Act 1986*, s 96.

Committals in Queensland are governed by the *Justices Act 1886*.

The default procedure for determination of the committal is the tendering of statements. A magistrate may give a direction under s83A(5AA) requiring the prosecution to call the maker of a statement to give oral evidence or be made available for cross-examination on the written statement.

The test for whether such a direction should be given is at s 110B: no direction under s83A(5AA) must be given unless the magistrate is satisfied that there are **substantial reasons** why, in the interests of justice, the maker should attend to give oral evidence.

In *Peter James Agnew v Thacker and Commissioner of Police* [2019] QSC 161, the QSC judicially reviewed a decision not to direct witnesses to give oral evidence under s83A(5AA).

The Court considered the Explanatory Notes to the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010*, which streamlined committals in Queensland: those notes reflect that the Bill was based on the NSW framework and the principles in *Sim*. The Court noted those matters identified in *Sim* that might amount to ‘substantial reasons’:

1. That cross-examination may result in the applicant’s discharge or a “no bill”.
2. That it may substantially undermine the credit of a significant witness.
3. That it is necessary to avoid the defendant being taken by surprise at trial.
4. That it concerns a matter which could give rise to a discretion to reject evidence at trial.⁴

Some caution must be exercised in looking to the Queensland authorities for guidance, as a committal test still exists in that jurisdiction.⁵ The purpose of committals in Victorian framework has been significantly narrowed under the change to s 97 of the Act.

The continued relevance of s124(4) in applications to cross-examine at committal

While the above will hopefully provide some useful guidance on this issue, the interstate decisions outlined above will not perfectly translate to the interpretation of the amended CPA.

One reason for this is continued relevance of s124(4), which after amendment will read:

⁴ *Peter James Agnew v Thacker and Commissioner of Police* [2019] QSC 161 at [38].

⁵ *Justices Act 1886*, s108.

(4) In determining whether there are substantial reasons why in the interests of justice, the witness should be cross-examined on an issue, 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

(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;

Accordingly, these matters (with which we are all familiar) will continue to be of relevance and will now inform whether the substantial reasons test has been met and so focus will need to be brought to these issues on any application to cross-examine and during the course of any subsequent committal hearing.

IV Practical tips as to how to deal with the impact of the changes

In order to properly adapt to the significant legislative changes outlined above will, for some practitioners, mean drastic changes in the approach taken towards committal matters for many years.

The following matters are worth keeping in mind:

1. The ability to cross-examine witnesses pre-trial has *not* been abolished for the vast majority of non-sex offences. There is no presumption in the legislation that committal hearing where witnesses are called are to become rare or exceptional events.
2. Obtaining the leave of the court to cross-examine (in any court) is going to require far more extensive preparation and a more in-depth understanding of the factual and legal issues in a given case than what was required under the existing legislation.
3. The impact of the legislation on the early stages of indictable proceedings is that in-depth case preparation is going to have to be undertaken at a much earlier stage in proceedings than may have been previously necessary. More detailed attention to the formulation of your case at a much earlier stage is going to be necessary in order to make a persuasive application for leave to cross-examine at a committal.
4. Applications to cross-examine will require more than simply the 'identification' of one or more 'topics' for cross-examination, but more likely there will be a need to articulate with precision the specific lines of questioning (if not actual questions to be asked) and a cogent argument as to:

- i. How the proposed cross-examination is directly and substantially relevant to a specifically identified issue; and
 - ii. Why it can be said that there are substantial reasons that such cross-examination is in the interests of justice.
5. Ensuring proper disclosure will now be more crucial than ever. In many cases it may be necessary to seek and obtain full disclosure of all prosecution material *prior* to making an application to cross-examine at committal. Under the new legislation, section 110 of the CPA will codify that ‘relevant’ material to be provided as part of the hand-up brief will now be defined to include “any information, document or thing that might reasonably be expected to undermine the case for the prosecution or assist the case for the accused.” That definition is in line with common law principles.⁶
6. Practitioners should keep in mind that duty of disclosure of the Crown “in its broadest sense” includes investigating and prosecuting authorities.⁷ Information material to the defence that is in the possession of investigating police at the time of trial is to be regarded as in possession of the Crown.⁸
7. The abolition of the committal test means that it now seems inevitable that there will be a significant increase in the number of matters that proceed to trial. Be prepared. And prepare your clients.
8. Case Management processes in the County and Supreme Courts (in particular case conferences) should always be kept in mind as alternative pathways to have the prosecution take a more realistic approach to what an appropriate resolution may consist of in a given case.
9. Don’t panic.

Disclosure: This guide is for informational and educational purposes only and should not be considered legal advice. The content is designed to provide general insights and strategies but does not replace professional legal consultation

⁶ *R v Farquharson* (2009) 26 VR 410, 464 [213] (Warren CJ, Nettle and Redlich JJA); *Roberts v The Queen* [2020] VSCA 277, [127] (T Forrest and Osborn JJA and Taylor AJA) (‘Roberts’).

⁷ *Roberts v The Queen* (2020) 60 VR 431, 444 [56]

⁸ *Roberts v The Queen* [2020] VSCA 277, [127]