



FOLEY'S | LIST

Issue, Relevance and Justification: Preparation of Form 32 and Section 198A Applications*

* Or, how to survive a Form 32 or Section 198A argument!

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Foley's List

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Applications – what are they for?

- Seeking pre-trial cross-examination of key witnesses – either in the Magistrates’ Court or in the relevant trial Court (County or Supreme)
- Application in writing
- Setting out - issue, relevance and justification
- Opportunities for challenge:
 - By the prosecution in writing before the Form is filed with the Court
 - By the bench
- Consequences of getting it wrong
 - Frazzled advocates
 - Potentially compromising your client’s trial or opportunities for resolution

Where to start? With the legislation

- Section 97 *Criminal Procedure Act 2009*

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.

A Form 32 is a Case Direction Notice

- Section 119 *Criminal Procedure Act 2009* cont:

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;

A Form 32 is a Case Direction Notice cont.

- 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.

Test for granting leave

- Section 124 *Criminal Procedure Act 2009*

Leave required to cross-examine other witnesses

1AA. This section does not apply to a committal proceeding to which section 123 applies.

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.

Test for granting leave cont.

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.

.....

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.

Form 32 – application for a committal

- Non-sexual offence matters
- Sexual offences where the complainant is an adult and has no cognitive impairment
- To be filed at least 7 days before the committal mention* (s118 CPA)
 - Beware the Magistrate who puts you to the back of the list if you file late or refuses to hear your application at all and adjourns the matter
- Set out for each witness you seek to XXN (s119(c) CPA)
 - 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;
- Seek any disclosure you need before committal (in order to XXN) and consider whether you need to wait for forensics (s119(e) and (f))

What does the Magistrate have to consider?

- Court must not grant leave unless:
 - 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 (s124(3)(a) CPA)
 - XXN is justified (s124(3)(b) CPA)
- In considering if justified, Court must have regard to need to ensure:
 - prosecution case is adequately disclosed (s124(4)(a) CPA)
 - issues are adequately defined (s124(4)(b) CPA)
 - evidence is of sufficient weight to support a conviction for the charged offence (s124(4)(c) CPA)
 - fair trial will take place if the matter proceeds to trial, including that the accused is able adequately to prepare and present a defence (s124(4)(d) CPA)
 - matters relevant to a potential plea of guilty are clarified (s124(4)(e) CPA)
 - matters relevant to a potential discontinuance of prosecution under section 177 are clarified (s124(4)(f) CPA)
 - trivial, vexatious or oppressive cross-examination is not permitted (s124(4)(g) CPA)
 - the interests of justice are otherwise served (s124(4)(h) CPA)

What if the witness is a child?

- Section 124(5) *Criminal Procedure Act 2009*
- 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.

Sex offences - what about kids and cognitively impaired complainants?

- Committals in these matters have been abolished – see s123 CPA
- BUT ... there remains a power to seek an order for pre-trial XXN as long as you are not seeking to XXN the complainant
- Section 198A
- Set out for each witness you seek to XXN (s198A(3) CPA)
 - 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 person on the issue is justified
- Court must not make the order sought in the application unless:
 - 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.

Hang on a
minute ...
haven't we
seen this
before?*

- * Can't I just run my committal in the County Court?
 - Oh no no no no no ... sorry
 - It depends on the Judge you ask
 - More on this later

So ... what's the
issue?

- Draft your Form 32 or Form 198A carefully
- After thoroughly analysing all the materials
- With a close eye on your trial strategy (or discharge submission in the right case)

Most key issues arise out of an analysis of the elements and potential defences

- The intention or state of mind of the accused at the relevant time;
- Whether the accused acted in self-defence;
- Whether the injury sustained was serious;
- Causation of injuries;
- Whether the accused was a trespasser;
- Identification;
- Factual dispute;
- The credibility and reliability of a witness;
- Whether the accused engaged in a deception or intended to permanently deprive another of the property;
- The accused's knowledge of the complainant's age;
- Whether a complainant had a motive to lie;
- Role of the accused;
- Whether an accused was involved in (assisted, encouraged or directed) offending by a co-accused

Consider issues of admissibility of evidence

- These may be relevant for subsequent pre-trial argument.
- Examples include:
 - Lawfulness of arrest;
 - Admissibility of interview;
 - Reliability of an admission;
 - Lawfulness of a search;
 - Continuity of evidence;
 - Circumstances in which a previous representation was made;
 - Incriminating conduct;
 - Matters going to the admissibility of expert evidence.

Other issues

- 'Nature and extent of allegations' - if allegations are complex or extensive, or some but not all allegations are conceded
- 'Proper disclosure of the prosecution case' – especially for XXN of Informant

Relevance and Justification

- Next – relevance
 - Set out why XXN is relevant to the issues in question
- Then – justification
 - Set out why XXN on that issue is justified
- It often makes sense to combine relevance and justification
- XXN on an issue may be justified by a particular topic in combination with:
 - The witness is the principal witness or the only witness capable of giving evidence about a certain matter or issue;
 - Inconsistencies between the evidence of the witness and other witnesses on a particular issue;
 - Omissions, lack of detail or the witness having failed to explain how they arrived at a conclusion;
 - Factors bearing on their reliability and credibility that arise on the material;
 - Factors set out in section 124(4) (eg adequate disclosure of pros case; adequately defining issues; evidence of sufficient weight to support conviction; to ensure fair trial; clarifying matters for guilty plea; potential discontinuance; interests of justice)

Some examples

Sexual offending – child complainant

Complaint witness

Issues:

- Nature and extent of conduct alleged to have been committed by accused (particularly allegation of penetration), credibility and reliability of complainant.

Relevance and justification:

- The prosecution case relies heavily upon the credibility and reliability of the complainant. This witness is a school staff member to whom the complainant disclosed the allegations. The witness and the complainant had two relevant conversations on the train on the way to a school excursion and it is unclear from the statement of the witness whether they had any further interaction on the way back to school.
- Cross-examination of this witness as to her contact with the complainant on that day, the conversations she had with the complainant, her observations of the complainant's demeanour, the preparation of her notes, the circumstances of making her statement, any related factual matters and any other matter arising from that cross-examination, is relevant to the above issues and is therefore justified.

Examples cont.

Fraud

Business associate of accused

Issues:

- Nature and extent of fraud allegations against accused, including whether the accused obtained property, intended to permanently deprive others of that property, used deceit to obtain property, used or made false documents, intended false documents to be accepted as genuine, intended persons to be prejudiced by acceptance of false documents; reliability and credibility of this witness, proper disclosure of prosecution case.

Relevance and Justification:

- This witness is the brother-in-law of the accused and gives evidence in support of charges 1, 2, 3, 4 and (indirectly) 6. This witness and XXXXXXXXX both give different accounts of a conversation between them about these prior to their statements being made. Cross-examination of this witness as to that conversation, the making of his statement, the extent to which his company performed work for ZZZZZZZZZZ and other matters going to credibility/reliability bears on the main issues and is therefore justified.

Examples cont.

ICSI

Complainant

Issues:

- Identity, conduct of the accused, reliability/credibility of this witness, extent of injury.

Relevance and Justification:

- This witness is the complainant. He states that he and his friends XXXXX and YYYYY consumed three jugs of beer between them. His evidence is that he did not see who hit him, but that following the offence he had a conversation in the car park with the accused. The account of this conversation given by the complainant differs substantially from the account given by the accused. This witness can also give evidence about the extent of his injury and whether he did have plastic surgery which is not clear from the other evidence on the brief. Cross-examination of this witness is therefore justified because it bears on the issues as set out above.

Examples cont.

Informant

Fraud

Issues:

- Nature and extent of fraud allegations against accused, including whether the accused obtained property, intended to permanently deprive others of that property, used deceit to obtain property, used or made false documents, intended false documents to be accepted as genuine, intended persons to be prejudiced by acceptance of false documents; reliability and credibility of witnesses, proper disclosure of prosecution case.

Relevance and Justification:

- This witness is the informant and has the conduct of the investigation. The informant has filed charges alleging that the accused obtained property by deception and made false documents. Cross-examination as to the investigation, the taking of statements and gathering of evidence, the evidence relied upon by the informant to prove the elements of the offences charges, and disclosure of the prosecution case bears on the main issues and is therefore justified. Cross-examination as to these matters will also narrow the issues in dispute between the parties.

Arguing the application

- Sometimes you will meet no opposition – from the OPP or the bench
- Other times the OPP will agree and the bench doesn't
- Or the OPP oppose and the bench agrees with you
- Reasonable (and unreasonable) minds can differ
- Be ready to argue about it
 - Preparation, preparation, preparation
 - Know the materials
 - Know what you intend to ask the witness
 - Know what you want to say to a jury about the witness
 - Prepare your XXN as you prepare your Form 32/Form 198A
 - Can be helpful to set out the particular questions you would ask of a child witness on the application

Differences of approach

- Some may say the County Court takes a more 'rigorous' approach
- There is certainly a focus on the abolition of committals and a view that s198A does not provide you with a County Court 'committal'
- Depending on the Judge, they may take to your Form 198A with a liberal red pen, reducing it from your carefully prepared list of issues to a mere 5 or 6 questions
- If you need to issue subpoenas or have disclosure issues – sort these out **before** you leave the Magistrates' Court and before you sign the Certificate of Committal Readiness

Tips and tricks

- Clarity – a clear and well-prepared form will have a greater chance of success. You should know the materials better than the Court and your application should reflect this knowledge
- If the bench don't understand what you are asking for and why, they probably won't grant leave
- Sometimes a preamble before the list of witnesses can assist to clarify exactly why you want a committal and what you are going to explore
- Try to draw your Form 32 or Form 198A broadly – both as to witnesses and list of issues
 - It is easier to advise that a witness is no longer required than to ask for an extra at the last minute
 - If something has been overlooked, you may seek leave to ask a witness about an additional matter during the running

Example preambles

- Eg. The key issue in this matter is identity. The accused is alleged to have punched another patron at XXXXXXXX in Maribyrnong on XXXXXXXX, which he denies. The accused therefore seeks to proceed to a contested committal proceeding. The reliability of the civilian prosecution witnesses is also in issue due to their intoxication, and the extent of the injury sustained by the complainant requires clarification.
- Eg. It is alleged that the accused obtained money by fraudulent means from six different complainants. The facts said to form the basis of these acts and the credibility of the complainants and a number of other witnesses are firmly in dispute. The accused therefore seeks to proceed to committal. It is noted that one person named by some of the witnesses, XXXXXXXX has not yet made a statement but is expected to do so. Should he make a statement prior to the committal, an application will be also made to cross-examine him.

What about s198, s198B and s198C?

- Aren't there other 198 sections? How do you tell them apart?
- Section 198 allows you to take trial evidence prior to trial – eg if a witness is likely to be unavailable at the trial or for other reasons (eg rogue witness)
- Section 198B is an order for limited preparatory XXN – either pre-trial or during trial – in the absence of the jury
 - It has a very similar test to s198A and applies to all offences
 - It effectively replaces basha hearings (which are abolished by s198C)
 - Application must set out the issue and the purpose of the proposed questioning (s198B(2))
 - The court must not make the order for XXN unless the court is satisfied that it is necessary to do so in order to avoid a serious risk that the trial would be unfair (s198B(3)) – having regard to the purposes of committal set out in s97 and the limits on XXN of a witness at committal (s198B(4))

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