



BEST PRACTICE GUIDE

Changes to summary procedure in the Magistrates' Court



VICTORIA POLICE



Department of
Justice



Lawyers And
Legal Services



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PLEASE NOTE

The information in this document is provided to assist in understanding the new system and how it should operate in practice. It is not intended to be exhaustive, but provides a general overview. The legislation, rules and legislative guide should be consulted for a complete understanding of the system.





INTRODUCTION

The *Criminal Procedure Act 2009* (the CPA) commenced on 1 January 2010. The provisions of Chapters 2 and 3 of the CPA (and some parts of Chapter 8) make a number of significant changes to summary criminal procedure. These changes are a result of a substantial review designed to improve the operation of summary procedure in Victoria. The changes will have a significant impact on those in the summary crime jurisdiction. Key agencies and people involved will need to familiarise themselves with these changes.

The legislative changes are part of the overall reform objectives for summary procedure. Importantly, the legislative changes offer an opportunity to improve practice across key agencies. Aspects of the new processes, in particular the summary case conference, have already been introduced at the majority of metropolitan courts and will be rolled out into other courts during 2010. The roll out in country Victoria will occur in 2011. Work practices are already changing within Victoria Police, Victoria Legal Aid (VLA) and the Magistrates' Court, as they all recognise the need for collaboration in achieving the common goal of ensuring a smooth transition to the new procedures.

The new reforms will provide an opportunity to focus on timely and just outcomes in summary proceedings generally, while not interfering with fair hearing rights. The anticipated benefits of the reforms include:

- reducing unnecessary delays in charging people and bringing them to court
- providing for early and credible disclosure of the police case
- reducing unnecessary adjournments
- improved access to police early in the process to enable early decision making, whether it be to obtain access to material or to discuss charges with a prosecutor who has the authority to negotiate on charges and summaries.

What follows is a guide to improving practice, in order to facilitate the aims of the reforms.



LEGISLATION OVERVIEW

The new summary procedures apply to proceedings for summary offences and indictable offences triable summarily (s. 28, 29). The basic structure of summary procedure has been retained and all the court events of the previous system – mentions, contest mentions and contested hearings – are still available under the new system. However, reduction in delays can be achieved for example, through three new features of the system:

- the early service of a Notice to Appear
- a tight mandatory time frame within which the informant must file the charge-sheet(s) and serve a copy of a preliminary brief on the accused
- the summary case conference which provides an opportunity for early identification and resolution of contentious issues.

Notice to Appear

The Notice to Appear provides a new (alternative) way to require an adult accused to appear at court (s. 21) but a Notice to Appear does not commence a criminal proceeding (s. 26). Where an informant elects to use this new procedure, a Notice to Appear must be personally served on the accused (s. 21).

The Notice to Appear must state the offence the person is suspected of having committed and in general terms the circumstances of the offending. It must also state the court venue and date on which the person is required to appear (s. 21). “Appear” refers to the accused or their legal representative (s. 328). The court date must be at least 28 days after the date the Notice to Appear is given (personally) to the person suspected of having committed an offence (s.21).

After service of the Notice to Appear on the accused, the informant must file a charge-sheet(s) (or decide not to) within 14 days (s. 22). A proceeding only commences when a charge-sheet is filed. Having filed the charge-sheet(s) the informant must then serve a copy of the preliminary brief within 7 days. If a charge-sheet(s) is not filed within 14 days, the informant must notify the person within 7 days. The notice must be in writing and state that the charge-sheet(s) has not been filed and that the person is not required to appear at court (s. 23).

It is anticipated that this new procedure will primarily be used for non-complex cases where the evidence is not voluminous (for example, theft, willful damage and driving whilst suspended cases). A Notice to Appear can be served anywhere and at any time. For example, about 40% of criminal cases before the Magistrates’ Court are traffic offences. A person suspected of drink driving, driving whilst disqualified, suspended, unlicensed, in a manner dangerous or carelessly, may be served with a Notice to Appear on the spot. The Notice to Appear will look like an Infringement Notice.



Preliminary Brief

The preliminary brief provides sworn early disclosure of the prosecution case. It is compulsory in Notice to Appear cases (s. 24) and optional/by request in other cases. The brief is preliminary because, although it will state the evidence available to the informant (s. 37), it may not contain a copy of all witness statements. Although brief, it will provide comprehensive details of the alleged facts and the evidence supporting the charges. It will include appropriate attachments such as:

- photos
- VicRoads certificates – in driving matters
- repair quotes – where damage is alleged
- medical evidence of a serious injury – where that is alleged in assault cases.

Appendix A provides further best practice examples of the sorts of evidence one might expect to be included in a preliminary brief in different types of matters.

A spare, additional copy of the preliminary brief will always be available at court (at the return date) for the accused or their legal representative.

It is important to note that a preliminary brief can be served in any case irrespective of how that case was commenced (s.35(4)). It is anticipated that preliminary briefs will be served in a significant number of cases that do not commence with a Notice to Appear. The advantage of this approach is that these cases will be listed much earlier than previously.

Summary Case Conferences

The summary case conference involves out of court discussions between the parties (s.54):

- in Notice to Appear cases, before requesting the full brief, or adjourning the case for contest mention or contest (s. 54)
- in other cases by agreement, court order or direction (s. 54).

In Notice to Appear cases, a summary case conference must be held before the accused can request a full brief and apply to adjourn the matter to a contest mention or contested hearing. The purpose of a summary case conference is to identify issues in dispute at an early stage in the proceeding and where possible to resolve those issues. Summary case conferences are out of court discussions that can be conducted by any method suitable to the parties. Therefore they do not need to be conducted at court.

As noted above, a preliminary brief can be served in cases where a Notice to Appear has not been served. Similarly, summary case conferencing is not limited to Notice to Appear cases and may be utilised in all cases. Defence practitioners are encouraged to use case conferencing in any case where issues need to be resolved. Further, s. 54(3) provides that, “the Magistrates’ Court may direct the parties to attend a summary case conference.” The Magistrates’ Court Practice Direction 6 of 2009 confirms that the court’s power to direct parties to conduct a summary case conference will be exercised in all cases where a preliminary brief or a full brief has been served on the accused (or his/her legal representative), prior to the case being listed for contest mention or summary hearing, irrespective of whether a Notice to Appear has been served.

Sentence Indications

To further assist early resolution the CPA provides that the court may give a sentence indication “at any time during a proceeding” including at a mention hearing (s.60). This obviates the need to adjourn to a contest mention hearing for that purpose.



BEST PRACTICE INDICATORS

To make the new procedure work effectively for informants, the prosecution, the accused and his or her representatives, and the court, the following best practice indicators are recommended.

Brief Preparation

The quality of investigation leading to the drafting of the preliminary brief by the informant – with the supervision and support of the Brief and Investigation Support Centre (BISC) – determines the quality of what follows. Staffed by a specialist supervisor with experience in prosecution and investigation, the BISC will provide early and ongoing support to informants in relation to investigation and brief preparation. The specialist supervisor will ensure informants adhere to best practice in brief preparation.

A faster procedure and a shorter brief must be supported by normal, thorough investigation. The credibility, accuracy and adequacy of the preliminary brief will significantly impact upon the potential for early resolution.

The Preliminary Brief

Before submitting a preliminary brief for authorisation the informant must ensure it complies with s.37. The following must be included:

1. The informant's statement, which *must* include:
 - a. a statement of alleged facts based on the evidence available at the time the informant signs their statement (discussed below)
 - b. a description of the background to and the consequences (if known) of the alleged offence
 - c. summary of statements made by the accused to be accurately reported whether made on or off tape including any confession, admission or explanation about the alleged offending
 - d. the witness list to indicate in each case the evidence each witness will give and must indicate whether the witness has made a statement
 - e. the exhibit list to indicate the nature of the exhibit and whether it is in the possession of the prosecution.
2. Any evidentiary certificate issued under any Act likely to be relevant to the alleged offending and available at the time the preliminary brief is served.
3. A copy of the criminal record of the accused or a statement that the accused has no previous convictions.
4. If the informant refuses to disclose anything that must be included in the preliminary brief, a written notice stating the grounds for refusing disclosure.
5. A list of orders that are or will be sought.
6. A copy of the charge-sheet.
7. A copy of a notice in the form prescribed by the rules of court in accordance with s.37(1)(b).

Any other available evidence may be included if it is relevant and would assist the accused to understand the case against him/her. Although it is not a legislative requirement, Victoria Police will also include a copy of the Notice to Appear in the preliminary brief. A credible and adequate preliminary brief is a package designed to assist early decision making. A crucial part of the package is appropriate attachments evidencing the alleged offending. Good examples are provided in the Appendix.



Writing the Statement of Alleged Facts

Section 37(2)(a) requires that the statement of alleged facts includes “reference to the material available to the prosecution to support the alleged facts.” This provides an opportunity to move away from the old style “summary of offence” to a new evidence inclusive statement of alleged facts.

The old style said what the accused allegedly did without reference to the evidence. Now references to evidence will provide a more factual and evidence-based statement. Remember that for the most part, evidence that is relevant and therefore generally admissible concerns *what the witnesses saw and heard*. Physical evidence can be dealt with as in the example below.

A shop theft which previously would have been described in the summary of offence as follows:

“The accused then walked down the aisle, stopped, picked up a bottle of Jim Beam and stuck it down his pants”.

Using the new style, the same event can be described as follows:

“The Loss Prevention Officer **saw** the accused walk down the aisle, stop, pick up a bottle of Jim Beam and stick it down his pants”; or

“The CCTV footage **shows** the accused walking down the aisle...”

The benefits of the new style include:

- stronger evidence-based writing
- avoiding statements that could be seen as being the informant’s version of the facts
- an indication of where the evidence of the alleged fact comes from without the defence having to refer to the witness list to see what the witnesses will say
- increased prospects of early decision making
- a Statement of Alleged Facts in which the prosecutor can have confidence when reading to the court.

Before submitting a preliminary brief for authorisation informants will:

1. check they have accurately attended to all the matters listed above
2. make sure all relevant attachments are included
3. satisfy themselves that the preliminary brief, although not a full brief, is sufficiently comprehensive to allow the Summary Case Conference Manager (SCCM) to conduct a meaningful summary case conference which may contribute to early decision making.

Credible and adequate preliminary briefs will optimise successful case conferencing – the two are inseparable. Better and clearer preliminary briefs are more likely to facilitate early decision making (and reduce the likelihood of further work being required by both parties after this point).

Full Brief

As indicated earlier, a preliminary brief can be served in any case no matter how it commenced. However, in more complex cases a full brief will be prepared and served. Summary case conferencing may of course also lead to early decision making in full brief cases (see the following page).

Following the service of the preliminary brief or the full brief, informants in effect pass the baton to the Summary Case Conference Manager (SCCM).



Summary Case Conferences

The SCCM will know no more about a particular case than the accused's representative seeking to negotiate with her/him. However, armed with a credible and adequate preliminary brief or full brief, the informant – supported by the BISC – has placed both parties in the best position to have meaningful discussions at the summary case conference.

The key to best practice is for parties involved in the summary case conference to be proactive. It will be more efficient for both parties if the summary case conference occurs before court and not at court on the day of the hearing. Work done on a matter in the office, prior to court, will assist early decision making, save time at court and further court events. Therefore, the telephone, email and fax are prime tools.

The following actions by both the accused's legal representative and the SCCM will enhance the possibility of early decision making.

Prior to the Return Date:

1. The SCCM can contact the informant if any issue needs clarification in relation to the facts, attachments and/or orders sought.
2. Where the accused's legal representative is known, the SCCM can establish contact and forward a copy of the preliminary brief or full brief if necessary.
3. It is vital for the accused to contact her/his solicitor or VLA as soon as possible after receiving the preliminary brief or full brief (if not earlier) in order to maximise the possibility of early pre-court case conferencing.
4. When the accused's legal representative has instructions to accept service of documents and is aware of the venue for the return date, the legal representative can establish contact with the relevant SCCM (via telephone, email etc) and request that a copy of the preliminary brief be served upon them.
5. When the legal representative has the preliminary brief, they should obtain instructions before the return date where possible and decide what, if any, further disclosure would assist resolution.
6. If possible, both parties should attempt to complete the summary case conference prior to the return date or at least narrow down the issues in dispute as far as possible.

At Court:

1. If the case does not resolve, both parties need to be clear about the remaining issues in dispute.
2. Where parties are close to agreement, sentence indications may assist decision making.
3. Where further disclosure is sought, both parties should reach agreement about the extent of the disclosure.
4. To avoid unnecessary adjournments, parties should allow sufficient time for further disclosure to be made and then analysed.

After the Case has been Adjourned:

1. SCCMs should arrange for further disclosure material to be obtained in a timely fashion.
2. Once the material has been provided and served, parties should contact each other in order to recommence negotiations.
3. Again, where possible, negotiations should be completed before the next court date.



At the next Court Date:

1. If the case remains unresolved, parties should complete and file a summary hearing request form. The court will then determine the listing of the proceeding.
2. Prior to the hearing date, parties should contact each other to ascertain whether resolution really is out of the question.

The Good Adjournment

In Notice to Appear cases a spare copy of the preliminary brief will be available at court on the return date. Therefore, a case can no longer be adjourned because the accused or their legal practitioner does not have a copy of the brief.

It also means that where a summary case conference could not be conducted before court, it can now be conducted at court on the return date. The idea that an accused is entitled to a couple of initial adjournments without question will be a thing of the past. The accused will no longer automatically obtain an adjournment at the counter.

Generally, adjournments should only occur to advance the progress of the case. Good adjournments will be for:

- a plea hearing
- to obtain further disclosure
- to obtain the full brief
- contest mention
- contested hearing.

Contest Mentions

The CPA retains contest mentions as part of the new summary procedure as they may continue to serve a useful purpose in some cases. However, it is anticipated that fewer cases will require a contest mention given early case conferencing and the availability of sentence indications at any stage in the proceeding.

The Court

It is anticipated that in many cases parties will agree about the conduct of the case. It is the court's function to see that justice is done in every case. It is also the court's responsibility to ensure that all cases are conducted in such a way as to encourage the early resolution of issues balanced against the need for effective and efficient case load management.

The court's listing practice will allow for sentence indications at times when it will help to resolve a case and will not be limited to contest mentions. Remember, the court can give a sentence indication at any time during the proceeding.



SUMMARY

The new summary procedure introduces 3 new features to existing procedure to:

- bring an accused before the court more quickly
- provide early preliminary disclosure of the prosecution case
- encourage earlier decision making.

The main focus of the new summary procedure is early decision making. Defence practitioners are accustomed, as are other parties, to the inherent delays of the current procedure. The demands of the new summary procedure will require a cultural change to engage in early negotiation and early decision making.

Best practice – commencing with informants producing credible and adequate preliminary briefs – should result in meaningful case conferencing. Where the parties are not far apart the availability of an early sentence indication may assist resolution. Other cases will be assisted by further partial disclosure while some will be identified earlier as definite contests and adjourned for contested hearing. In all cases the parties and the court will benefit from earlier listing and determination of cases.



FEEDBACK

The implementation and roll out of the new procedures is being overseen by a multi-agency Steering Group which aims to improve summary proceedings. The Summary Proceeding Steering Group (SPSG) includes:

- Magistrates' Court
- Victoria Police
- Victoria Legal Aid
- Criminal Bar Association
- Criminal Law Section of the Law Institute of Victoria
- Department of Justice (Criminal Law – Justice Statement).

Recognising the significant impact the new procedures will have on their respective agencies and organisations, members of the SPSG are working collaboratively to achieve the common goal of ensuring a smooth transition to the new procedures. This guide is a product of the ongoing discussions between agencies represented on the SPSG. The importance of others joining that discussion and identifying both positives and negatives of the new procedures cannot be overstated.

The SPSG encourages all those working in the summary jurisdiction and using this guide to provide feedback to any of the following people:

Defence Practitioners

Paul Jansen, VLA Senior Solicitor, on 0407 098 033 or paulj@vla.vic.gov.au

Victoria Police

Inspector David Cowan, Project Manager, Brief Integration Project on 9301 6965 or david.cowan@police.vic.gov.au

Magistrates' Court

Brett Cain, State Court Coordinator, Magistrates' Court on 9628 7900 or brett.cain@magistratescourt.vic.gov.au



APPENDIX

There is more to a credible and adequate preliminary brief than meeting the legislative requirements. To satisfy best practice, informants should start with the proposition that the preliminary brief he/she is preparing will need attachments, and if in doubt as to whether to attach a particular item, attach it.

Remember, the opportunity for meaningful case conferencing will be lost unless the preliminary brief provides comprehensive early disclosure.

Here are some examples of attachment Best Practice.

1. Offences against the person

Sam had already had a few drinks before finding himself in a Sports Bar late on a Friday night. A verbal exchange with another patron escalated and Sam hit the victim on the head with a glass bottle. According to the Statement of Alleged Facts, the victim was taken to hospital for treatment. He received 8 staples to his head.

When interviewed, Sam said he couldn't remember the incident. He was charged with intentionally causing injury and recklessly causing injury.

Best Practice

In all violence cases the preliminary brief will include the victim's statement.

Where an injury or serious injury is alleged, attachments should support that claim.

Attached in this case was a copy of:

- the victim's statement
- the informant's hand written notes
- the hospital discharge summary.

2. Property Damage

In March 2009 Tom visited his mother. A short time later, his mother's partner came home and Tom had a heated argument with him. Tom left the premises but not before picking up half a brick and smashing the rear window of the partner's car.

Tom also breached an Intervention Order (his mother being the complainant). He was charged with breaching the Intervention Order and criminal damage valued at \$150.00.

Best Practice

Attached in this case was a copy of:

- the informant's hand written notes
- the Intervention Order
- a quote from an auto-glass repairer for \$150.00 for the damage
- photos of the damage to the rear window.



3. Traffic Offences

In May 2009 Mary was driving along Whitehorse Road, Box Hill. She was intercepted for a routine check which revealed that she was driving whilst her licence was suspended and that she had not notified VicRoads of a change of address within the required 14 days.

She was charged accordingly.

Best Practice

Attached in this case was a copy of:

- the informant's hand written notes
- VicRoads certificates evidencing the offending.

4. Property Offences

In February 2009, Joan went to a supermarket in another suburb. She went in and out 4 times and was eventually challenged by a staff member wanting to search her bag.

Joan ran to her car. She tried to reverse the car with the staff member hanging on to an open door. After about 4 metres of travel Joan stopped. Inside the car was packaged meat valued at \$168.75.

Joan was charged with shop theft, reversing vehicle when unsafe and using an unregistered motor vehicle.

Best Practice

Attached in this case was a copy of:

- the informant's hand written notes
- a supermarket receipt as evidence of the value of the goods
- photos of the handbag and the car
- VicRoads certificate evidencing the expiration of the registration.

Note

In burglary and theft matters informants will not obtain ownership statements unless it becomes an issue in dispute.

Statements will not always be typed and may be in point or dot form. However, either way they will be signed under jurat.



Commissioned by

The Summary Procedure Steering Group (SPSG).

The implementation and roll out of the new procedures is overseen by the SPSG. Its members include:

- Magistrates' Court of Victoria
- Victoria Police
- Victoria Legal Aid
- Criminal Bar Association
- Criminal Law Section of the Law Institute of Victoria
- Department of Justice (Criminal Law – Justice Statement)

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Victoria Legal Aid

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