

OUTLINE OF TRIAL PROCESSES

<u>Stage of proceeding</u>	<u>Summary</u>	<u>Relevant law</u>
<i>Pre-trial legal argument</i>	<p>In some cases, before a jury trial can start, there are legal issues which need to be addressed. For example, there may be legal questions about whether some of the evidence that the prosecution seeks to present is admissible (or allowable) under the rules of evidence, or how certain evidence can be used. Sometimes questions that the prosecutor or defence wish to ask a witness require leave of the court to be asked. Many of these issues are decided before a jury is empanelled to hear the evidence. The judge decides the issue after hearing submissions from the parties. The party raising the issue usually makes the first submission, followed by the other party responding to that submission. The first party then replies if there is something additional to raise.</p> <p>Evidence law is derived from a combination of statute (Acts of Parliament) and the common law (cases decided by Courts).</p> <p>Sometimes there are issues about the law or the facts that require the judge to make a decision before the trial commences with the jury. The judge might need to hear evidence from a witness before the trial. The judge will hear the evidence, make findings about facts and apply the law after hearing submissions from both parties. This evidence does <u>not</u> form part of the evidence in the trial, and the jury is not present at this stage.</p> <p>If the accused or the prosecution is not happy with a ruling made by the judge during the pre-trial argument or during the trial, that party may seek leave to appeal that decision in the Court of Appeal. This is called an interlocutory appeal. The rules relating to this are set out in the <i>Criminal Procedure Act 2009</i>, at sections 295-301. There are also cases decided by the Court of Appeal regarding this type of appeal.</p>	<p><i>Criminal Procedure Act 2009</i> <i>Evidence Act 2008</i></p> <p><i>Criminal Procedure Act 2009</i>, Chapter 5, Part 5.1 to 5.6, Chapter 6 Division 4, Chapter 8 Part 8.1 – 8.3</p> <p><i>Evidence Act 2008</i>, Part 3 - Admissibility of evidence</p>
<i>Arraignment</i>	<p>Arraignment is the formal process by which an accused admits to being the person named on the indictment and pleads to the charges on the indictment. The charge/s will be read out to the accused in open court by the judge's associate and the accused will be required to enter a plea of guilty or not guilty.</p> <p>The accused must be arraigned in the presence of the jury panel, and the jury for the trial must be empanelled from that panel.</p> <p>If the accused pleads not guilty to any charge on arraignment in the presence of the jury panel, the date of the formal arraignment is recorded by the court and marks the beginning of their trial.</p>	<p><i>Criminal Procedure Act 2009</i>, ss 215-221</p>

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Jury Empanelment	<p>When a person is selected for jury service, through a legal document called a summons, they must attend the Jury Commissioner’s Office. This group of prospective jurors is called the jury pool, and for each case where a jury is needed, prospective jurors are randomly selected from the jury pool to form a jury panel.</p> <p>An accused person cannot ask questions of or about the people in the jury panel before or during the empanelment process. Jurors for a trial are selected randomly by ballot from the jury panel. When a juror is randomly selected, the associate will state the juror number and the juror’s occupation.</p> <p>An accused has the right to challenge a prospective juror. An accused can challenge up to three potential jurors, after their number has been called, without needing to provide a reason. This means that the potential juror is immediately and permanently excluded from being a juror on the trial.</p> <p>For every challenge afterward, the accused must show cause for the challenge, that is, provide a reason to the Judge for why the juror should be excluded.</p> <p>The prosecution and judge also has a right to stand aside prospective jurors, which only temporarily excludes them from the panel of jurors who may be selected.</p>	<i>Juries Act 2000</i>
Opening Addresses	<p>The trial commences with the Judge’s opening remarks to the jury. The judge addresses the jury to explain the trial process and the jury’s role in that process. The judge may set out the approaches that the jury should take to assessing the evidence, for example regarding the credibility of any witnesses. The judge may also ask the jury to select a ‘foreperson’, who will be the spokesperson if the jury has any questions during the trial and when the jury delivers its verdict.</p> <p>After the judge’s opening remarks, an opening address is made to the jury by the prosecution and the accused is entitled to make a defence response .</p> <p>The purpose of the <u>prosecution opening</u> is to outline the prosecution case so the judge, jury and the defence can hear an outline of the evidence the prosecution will lead in the trial.</p> <p>The <u>defence’s response</u> is to identify the issues in dispute between the prosecution and defence, rather than addressing general matters about how the jury should approach the case. If the defence has filed and served a ‘response to the prosecution opening’, the defence response made to the jury must not depart from what is set out in that document, unless the Judge finds there are exceptional circumstances.</p>	<p><i>Criminal Procedure Act 2009, s 222</i></p> <p><i>Criminal Procedure Act 2009, s 224,</i></p> <p><i>Criminal Procedure Act 2009, s 225</i></p> <p><i>Duong v the Queen [2017] VSCA 78.</i></p>

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	<p>In the prosecution opening address and the defence response, the parties should <u>not</u> address the jury about the way in which they might approach the evidence. These matters may be discussed in closing addresses. The Judge may interrupt an opening address or defence response if an inappropriate comment is made.</p>	
<p>Prosecution case</p>	<p>The prosecution presents its entire case first, before the defence presents its case. The prosecution presents its case by calling witnesses to give evidence in response to questions by the prosecution. This is called evidence in chief.</p> <p>The prosecution generally decides the order in which witnesses are called.</p> <p>Defence has the opportunity to test the evidence of each witness by cross-examining the witness. This involves asking questions about the evidence that the witness has given and putting the defence case to the witness (see below*).</p> <p>Once cross-examination is complete, the witness may be re-examined by the prosecutor. Questions in re-examination are limited to what has arisen from questions in cross-examination. The defence cannot ask further questions after that without leave from the judge,</p> <p>*Important: When cross-examining a witness, the cross-examining party must put (i.e., say or explain) to the witness the nature of the case upon which it is proposed to rely to contradict the witness's evidence, so that the witness has the opportunity to offer an explanation and lead any evidence in rebuttal.</p> <ul style="list-style-type: none"> • Example: A prosecution witness gives evidence in chief that he saw the accused steal some money. The defence wants to argue in its closing address that the witness is lying because he does not like the accused. To satisfy the <i>Browne v Dunn</i> rule, defence must ask or put to the witness in cross-examination separate propositions that the witness knows the accused, that they dislike the accused, that they are lying about what they saw for that reason, and that they did not see the accused steal any money. The witness then has an opportunity to respond. Defence may then argue in its closing address to the jury that the witness should not be believed and that their evidence is a lie. <p>Where the charges relate to a sexual offence or family violence offences, s357 of the <i>Criminal Procedure Act 2009</i> prohibits the accused him or herself personally cross-examining a protected witness. A protected witness may be the alleged victim, a family member of the alleged victim, a family member of the accused or any other person the Court declares to be a protected witness. In certain circumstances the Court may order Victoria Legal Aid to provide legal representation for the purposes of cross examining a protected witness. If the accused refuses such help the accused will not be allowed to put evidence before the court which contradicts that witness.</p>	<p><i>Criminal Procedure Act 2009, ss232 - 233</i></p> <p><i>The 'Browne v Dunn rule'</i></p> <p><i>Criminal Procedure Act 2009 ss353-358</i></p>

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Defence case	<p>When the prosecution has finished its case, the accused may do any of the following:</p> <ol style="list-style-type: none"> (1) make an argument that there is no case to answer on the evidence presented in the prosecution case; (2) give evidence or call evidence from other witnesses; or (3) choose not to give evidence or call any witnesses. <p>The accused does <u>not</u> have to present any evidence to support their case. The accused does <u>not</u> bear the burden of proving that he or she is not guilty, unless he or she raises a specific defence to the charge (such as self-defence).</p> <p>If the accused elects to give evidence or call witnesses, the prosecution must also satisfy the <i>Browne v Dunn rule</i>*.</p>	<p><i>Criminal Procedure Act 2009, ss226-231</i></p> <p><i>Re No Case to Answer see Doney v R (1990) 171 CLR 207</i></p>
Jury directions	<p>After all the evidence in the case has been put before the jury, the jury leaves the courtroom and the parties make submissions to the judge on what directions ought to be given by the judge to the jury to guide the deliberation process (for example, how to treat particular evidence). The types of direction that a judge can give are contained in the <i>Jury Directions Act 2015</i>.</p> <p>In general, the <u>prosecution and defence</u> are responsible for requesting the judge to give a particular direction.</p> <p>Section 13 of the <i>Jury Directions Act 2015</i> provides that a self-represented accused is assumed to have asked for all directions that may be available, and does not require the accused to request directions, subject to the trial judge finding good reasons for not giving a particular direction.</p> <p>Other than under section 13 of the <i>Jury Directions Act</i>, if the judge wishes to give a direction that the parties have not requested, the judge must raise this for discussion with the parties. The judge must not give a direction that has not been requested unless there are ‘substantial and compelling reasons’ for not doing so.</p> <p>The judge must give a direction requested by a party unless there are good reasons for not giving it.</p> <p>For all types of directions that may be requested and given, see <i>Jury Directions Act 2015, Parts 4 – 7</i></p> <ul style="list-style-type: none"> • note: <i>Jury Direction Act 2015, Part 5</i> – directions in proceedings that relate to sexual offences 	<p><i>Jury Directions Act 2015, s12</i></p> <p>ss 15-16</p> <p>s 14</p>
Closing addresses	<p>Once the prosecution case and the defence case (if any) are complete (that is, all proposed evidence has been given), and after the discussion about the directions to be given to the jury, both parties may each make a closing address. The prosecution makes their closing address first.</p>	<p><i>Criminal Procedure Act 2009, ss234 - 237</i></p>

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	The arguments in the closing addresses must be based upon the evidence that the jury heard or has seen in court. The prosecutor must <u>not</u> comment on any failure of the accused to give evidence.	<i>Evidence Act 2008, s20</i>
Judge's Charge of the Jury	After the prosecution and defence have made their closing addresses. the judge also addresses the jury, summing up the evidence that was presented in the case, and giving any directions under the law as to how the jury should assess the evidence, including the requested directions. This is called charging the jury.	<i>Criminal Procedure Act 2009, s 238</i>
Jury Deliberation and Verdict	<p>Once all of the evidence has been heard, the prosecution and defence have made their closing addresses, and the judge has charged the jury and given all appropriate directions, the jury then retires to consider its verdict in the jury room.</p> <p>The jury may come back into the courtroom during their deliberations to ask questions of the judge, seek further directions from the judge or be reminded of certain evidence that was presented. That can be done by replaying audio-visual recordings of the evidence.</p> <p>When the jury have reached their verdict, the verdict is taken in open court in the presence of the judge. The associate asks two questions of the foreperson:</p> <ol style="list-style-type: none"> 1. Have you agreed upon your verdict? (the foreperson will answer yes) 2. What do you say on Charge 1 of [name of charge] do you find [Name of Accused] guilty or not guilty? <p>When a jury returns a verdict of guilty on any or all of the charges, the accused is found guilty and it is entered into the records of the Court.</p> <p>When a jury returns a verdict of not guilty on all of the charges, the accused is acquitted of the offences and is released unconditionally.</p> <p>If the jury are unable to reach a verdict on a charge, they can be discharged from giving a verdict on that charge. If that happens there can be another trial on that charge, with a different jury.</p>	
Post-trial: Plea hearing & Sentence	If the accused is found guilty on any of the charges, there will then be a sentencing (or plea) hearing, in which the prosecution and defence make sentencing submissions to the judge. The judge must impose sentence on the offender.	

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Further resources	<p>In Victoria, the three main Acts relevant to a criminal trial are the <i>Juries Act 2000</i> (Vic), the <i>Criminal Procedure Act 2009</i> (Vic) the <i>Evidence Act 2008</i> (Vic), and the <i>Jury Directions Act 2015</i> (Vic). Acts can be found and downloaded for no charge from the following websites:</p> <p>www.austlii.edu.au www.legislation.vic.gov.au/</p> <p>Decisions in other cases can also be found at www.austlii.edu.au</p> <p>Information about the elements of offences and other matters regarding the trial procedure can be found using the following online resources:</p> <p>Victorian Criminal Charge Book - https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm Victorian Criminal Proceedings Manual - https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm Uniform Evidence Manual - https://www.judicialcollege.vic.edu.au/eManuals/UEM/index.htm#26880.htm</p>
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