

Criminal procedure - Trial stage

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Summary

Background

The trial stage is the third stage of criminal proceedings and takes place following the case management memorandum (CMM) process. (See the '[Review stage](#)' chapter for information about the CMM process). The trial stage involves all matters from review up to and including either a judge-alone trial or a jury trial.

It is within this stage that the Crown assumes responsibility for any elected jury trials not on the Crown list (see information on '[Crown involvement](#)' in the 'Administration stage' chapter). Formal statements are filed by the Crown for all jury trials prior to the callover.

Purpose of this chapter

This chapter is targeted towards prosecutors but will also assist the O/C case and others involved in the trial process. More detailed information relating to O/C case file preparation is contained in the '[Prosecution file and trial preparation](#)' chapter.

This chapter outlines:

- matters to consider when preparing for judge-alone trials
- procedures for the conduct of judge-alone trials
- proceeding with a trial in the absence of the defendant
- the responsibilities of prosecutors and O/C cases when working with witnesses and victims
- the processes involved with jury trials.

The information in the chapter is a reference starting point only. Refer to the [Criminal Procedure Act 2011](#) (CPA), [Criminal Procedure Rules 2012](#) and associated regulations for full guidance.

Trial stage

The trial stage is the fourth of these five stages of criminal proceedings:



Statutory references

All references in this chapter to the "Act" or to the "CPA" are to the [Criminal Procedure Act 2011](#) (CPA), and references to the "Rules" or the "CPR" are to the [Criminal Procedure Rules 2012](#), unless otherwise stated.

Other criminal procedure-related chapters

These linked chapters deal with the various stages of the criminal process:

- Criminal procedure - [Introduction and jurisdiction](#)
- Criminal procedure - [Commencement of proceedings](#)
- Criminal procedure - [Administration stage](#)
- Criminal procedure - [Review stage \(CMM process\)](#)
- Criminal procedure - Trial stage
- Criminal procedure - [Disposition](#)
- Criminal procedure - [Costs orders](#).

Different processes apply to youth. See the '[Youth justice](#)' Police Manual chapter for details.

Related information

See other Police Manual chapters with information related to criminal procedure:

- [Youth justice](#)
- [Bail](#)
- [Charging decisions](#)

- [Criminal disclosure](#)
- [Prosecution file and trial preparation](#)
- [Family harm policy and procedures](#)
- [Adult diversion scheme](#)

See also the [Police Prosecution Service professional development page](#) on the intranet for PPS training resources that may assist with trial preparation.

Diagram: Criminal Procedure Act - procedure overview

See Criminal procedure - [Introduction and jurisdiction](#) for a diagram illustrating the processes following the commencement of proceedings.

Preparing for judge-alone trials

Preparing prosecutions of category 1-3 judge-alone trials

All category 1-3 judge alone trials are prosecuted by the Police Prosecution Service unless the Crown has assumed responsibility for the prosecution.

The preparation phase is one of the most important tasks in prosecuting a case. It follows the case management discussions held with the defence lawyer. During the [case review stage](#) a file analysis is required for all prosecutions proceeding to trial. Both the file analysis and case management memorandum assist prosecutors preparing for trial.

Before entering the court room for a judge-alone trial, set time aside to review each file carefully. Consider:

- what the prosecution must prove
- the strength of the case
- possible defences
- agreements made through the CMM and case review
- the case theory
- the cross-examination strategy
- witnesses' specific needs, including any Evidence Act 2006 applications, relevant to the case.

Some of these questions will have already been considered and documented. Where remedial action or further enquiries were highlighted following case review, an additional review of those matters is required.

Additional information to assist prosecutors preparing for a judge-trial is available on the Police intranet [Home> Training>Police Prosecution Service professional development](#).

Pre-trial hearings

Where a pre-trial ruling is required and no application has been filed, the prosecutor must file the application as soon as practicable after becoming aware of the issue.

Any pre-trial application mentioned, or identified through the review stage and not finalised at the case review hearing will be determined at a pre-trial hearing if granted, or at the trial, depending on the judge's ruling.

Formal written statements(FWS)

Check that all evidence contained in the FWS is admissible. In some instances, where the original witness statement fulfils the requirements of a FWS a separate FWS of evidence may not be required. Do not include in the FWS (O/Cs) or lead (prosecutors) any evidence from the witness that is inadmissible.

The prosecutor must be advised where necessary, of any matter relating to a particular witness that may affect their evidence. For example, a witness may have some impediment or be unlikely to 'come up to brief' because of hostility.

Defences

Consider likely defences when preparing the file. While the issues in contention may have been narrowed through the CMM process, continued liaison with the defence lawyer may also assist.

Justification and excuse

The prosecution is required to prove beyond reasonable doubt all the elements of the offence. It is not however required to disprove every possible defence, irrespective of whether there is evidence to support such a defence.

If there is some evidence which might support a particular defence however, so that it is possible for a court to acquit on the basis of that defence, the prosecution case must be sufficient to exclude the defence beyond reasonable doubt.

The onus of proving the defendant's guilt remains on the prosecution, and if the defence evidence, together with all the other evidence, leaves the judge in reasonable doubt, then the defendant is entitled to be acquitted.

A simple way of describing the onus borne by the parties in those sorts of situations is that the defence bears an evidential onus to raise the possibility that a court could acquit on the basis of the relevant defence, and the prosecution bears the overall onus of establishing guilt beyond reasonable doubt. For example, if the defendant is charged with an offence that he acted without a reasonable excuse, and subsequently produces evidence showing that the defendant had a reasonable excuse, it is for the prosecution to prove beyond reasonable doubt that the excuse was not reasonable.

Employees preparing files for prosecution must be mindful of the fact that the legal burden of proof rests on the prosecution. In particular, they should clearly identify in every case, any excuse etc raised by the defendant or others in interview or that can reasonably be anticipated and, to the extent possible, advise how that excuse etc may be rebutted through direct evidence or cross-examination.

Refer also to *R v Tavete* [1988] 1 NZLR 428, *R v Somerfield* [2009] NZCA 231.

Exhibits

Be aware of the exhibits and who will produce them. If there are a number of exhibits, use a list to show the order in which they will be produced and the name of the witness producing them.

Orders relating to items seized

Where necessary, an order for forfeiture or disposal of exhibits or items seized may be required on conviction. See sections [149-163](#) of the Search and Surveillance Act 2012 and the '[Procedures applying to seized and produced things](#)' chapter for further information.

Legal research

Prosecutors must have a copy of relevant legislation for the hearing and where possible, of the leading relevant cases. Contact the [PPS legal adviser](#) if assistance is required finding this.

Discussions with O/C case

Discuss the case with the O/C case prior to a defended hearing. This assists in identifying any issues or problems with the case, before the hearing.

Interviews with prosecution witnesses by the defence

Defence counsel has the right to interview anyone, including prospective prosecution witnesses. Similarly, the prosecutor can interview defence witnesses, if they know who they are. As a professional courtesy, you should advise defence counsel that you intend to approach a defence witness.

However, while defence counsel has the right to interview any witness, the witness can refuse to discuss the matter. Where necessary, you should warn a witness of a possible approach by the defence and explain that they:

- are free to discuss the matter with the defence counsel
- can decline to be interviewed, and if they wish, direct defence counsel to the O/C case
- can, if interviewed:
 - have any other person present
 - request a copy of any notes taken or statement signed by them.

Assure them that, if they wish to speak to defence counsel, Police will be available to accompany them and support them at any interview.

Police employees asked to provide interviews

Any Police employee requested by the defence to provide an interview should discuss the matter with the local District Prosecutions Manager before any interview takes place.

Defence misconduct during interviews of prosecution witnesses

If you become aware of alleged inappropriate conduct by defence counsel in the interviewing or attempted interviewing of a prosecution witness, promptly report the circumstances to the District Prosecutions Manager to consider further action.

Conduct of judge-alone trials

Part 5 of the CPA governs the conduct of trials.

Opening statement

In a judge-alone trial, neither the prosecutor nor the defendant may make a full opening statement unless directed by the judge, other than a short outline of:

- the charge(s) the defendant faces, by the prosecutor
- the issue(s) at the trial, by the defendant.

Where the prosecutor believes that an opening statement will assist the court, leave must be sought from the judicial officer. Complex prosecutions or matters involving a large number of witnesses are examples of when it may be appropriate to seek leave to give an opening statement.

Order for presenting evidence

Unless the court directs otherwise, the prosecutor and the defendant must call evidence in this order:

- the prosecutor may adduce the evidence in support of the prosecution case
- the defendant may adduce any evidence they wish to present
- subject to section 98 of the Evidence Act 2006, the prosecutor may adduce evidence in rebuttal of evidence given by or on behalf of the defendant.

Without limiting the above, the court may give the defendant leave to call one or more witnesses (e.g. an expert witness) immediately after the prosecutor has called a particular witness or witnesses.

Any evidence tendered to disprove an alibi may, subject to any directions by the court as to the time when it is to be given, be given before or after evidence is given in support of the alibi.

Unless the court directs otherwise, neither party may address the court on the evidence given by either party. However, the defendant, whether or not they intend to call evidence, may address the court at the end of the prosecutor's case to submit that the charge should be dismissed.

Decision of the court

Following the hearing of evidence and any submissions, the court must consider the matter and may find the defendant guilty or not guilty.

The court must give reasons for its decision and may, if it thinks fit, reserve its decision. If the court reserves its decision, it must:

- give it at any adjourned or subsequent court sitting, or
- record the decision, authenticate it, and send it to the registrar.

If a decision is sent to the registrar, the registrar must deliver it at a time and place they determine. A reserved decision delivered by the registrar has the same force and effect as if given by the court on that date. The reasons for the court's decision may accompany the court's decision or be given later.

Proceeding in the absence of the defendant

Category 1 offences

If the defendant fails to appear on a category 1 offence when required to be present, and the prosecutor appears, the court may determine the matter in the defendant's absence.

If the court proceeds in the defendant's absence, the defendant's lawyer, if present, may continue to represent the defendant. Any evidence of a fact or opinion that would be admissible if given by oral evidence is also admissible if given by way of an affidavit or a formal statement in these circumstances. A formal statement admitted as evidence must be treated as evidence on oath given in a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

If the defendant is found guilty in their absence, the court may proceed to sentence them. The defendant may be advised of the result by notice of the court with an opportunity to apply for a rehearing within 15 working days of the notice.

(ss [118](#), [119](#), [124](#), [126](#) CPA)

Infringement notices

If a defendant disputes an infringement notice, a notice of hearing is issued and a copy served on the defendant. The notice of hearing is treated as if it were a category 1 charging document and the copy served, as a summons requiring the defendant's attendance in court.

If the defendant fails to appear on a notice of hearing, the matter may be determined in their absence in same manner as any other category 1 offence.

(ss [118](#), [119](#), [124](#), [126](#) CPA & s [21](#) Summary Proceedings Act 1957)

Category 2-4 offences

In limited circumstances, it may be possible to proceed with a trial in the defendant's absence for category 2-4 offences. The [Solicitor-General's Prosecution Guidelines](#) provide guidance on when this may be appropriate. Examples include:

- where the offending is particularly traumatic, e.g. sexual or violent offending, and the prospect of giving evidence is especially distressing; or
- where there are multiple co-defendants who have attended for trial and wish to have the charges heard.

Notwithstanding these examples, the prosecutor must be able to identify clear public interest factors rendering it demonstrably in the interests of justice to proceed in the absence.

If the court **is** satisfied the defendant has a reasonable excuse for non-attendance, the court can proceed with the trial only if satisfied the defendant's absence will not prejudice their defence.

If the court **is not** satisfied the defendant has a reasonable excuse for non-attendance, the trial may proceed in the defendant's absence if it is in the interests of justice to do so. These matters must be considered when determining the interests of justice:

- any information available to the court about the reasons for the defendant's absence
- any issues that the defendant has indicated are in dispute and the extent to which their evidence is critical to an evaluation of those issues
- the likely length of any adjournment, given the particular interests of victims and witnesses that a trial takes place within a reasonable time of the events to which it relates and the effect of any delay on the memories of witnesses
- the nature and seriousness of the offence
- the interests of any co-defendant.

A judge-alone trial in the defendant's absence proceeds in the same manner as it would if the defendant were present.

Before attempting to proceed in the defendant's absence, you should request the matter be stood down temporarily to enquire as to the reasons for the absence. If there is any doubt or concern about an application to proceed in the defendant's absence, seek advice from a Senior Prosecutor, Principal Prosecutor or District Prosecutions Manager.

A warrant to arrest the defendant may be issued when the defendant fails to appear for trial irrespective of whether the court proceeds

in their absence. However, a defendant may not be sentenced on a category 2-4 matter in their absence.

Related information

See also:

- warrants to arrest (see information on arrest warrants in the '[First appearance](#)' section of the 'Administration stage' chapter)
- adjournments (in the '[Administration stage](#)' chapter)
- amending charges (in the '[Commencement of proceedings](#)' chapter).

Withdrawal or dismissal of charges

If a charge is withdrawn by leave, there is no bar to further proceedings for the same matter. When a matter is dismissed for any reason, including when no evidence is offered without opening the case, further proceedings are prohibited unless a narrow set of circumstances apply (e.g. a [tainted acquittal](#)).

If there is an intimation from the judge, or an application from the defence, that the charge be dismissed, the prosecutor should seek leave to withdraw the charge if they believe that there should be an ability to recommence the prosecution.

It may be desirable to seek the withdrawal of the charge(s) if one or more key witnesses fail to appear and there is insufficient other evidence to proceed without the evidence, an adjournment is not possible and a hearsay application is unlikely to succeed. (ss [146](#), [147](#), [151-156](#) CPA)

Looking after witnesses

Prosecutor's responsibilities

Although you may have appeared in court many times, remember the witness may be giving evidence for the first time. Recalling your own nervousness when you first gave evidence or appeared as a prosecutor will help you appreciate the genuine fear many witnesses feel.

The witness' welfare is in the hands of the prosecutor and the O/C case and you will undoubtedly influence their future attitude toward the Police and the justice system. It is your responsibility to put witnesses at ease before a hearing, although the O/C case plays some part by explaining courtroom procedure at the time of the initial interview or when serving the summons. They must also ensure the witness is present at the hearing.

Summons

As soon as possible following the setting of the trial date, witnesses must be summonsed to appear. The court requires a [POL 275](#) witness list and an application for summons with the witness details to enable a summons to be issued and served. (Access the [POL 275](#) in Police Forms> Prosecutions).

The courts will prepare and issue the summonses within 3 working days of receiving the Police request for summons on the [POL 275](#). Police should arrange service of witness summonses as soon as practicable to give witnesses sufficient notice of the date they are required to attend trial. Best practice is to ensure there is at least 3 working days between service and the attendance date.

Before the trial

If possible, try to speak with each witness before the trial. A lack of proper advice often results in a well-intentioned, truthful witness being unfairly embarrassed. A nervous witness is also more likely to have a lapse of memory. The interests of justice are served when witnesses are aware of court procedure before entering the witness box and give their evidence in a relaxed, truthful manner.

Suggestions for putting witnesses at ease

Suggestions to put the witness at ease:

- Introduce yourself.
- Show the witness where they will be giving evidence and the best stance to adopt (side on but turned slightly toward the bench).
- Explain the need to speak loudly and slowly and to watch the clerk, so their evidence can be heard and recorded.
- Politely point out that it is essential to speak the truth.
- Explain that the judge and defence counsel will probably ask questions and they will need to listen carefully.
- Suggest they pause and mentally check the answer before replying to a question. Point out that some witnesses reply hastily and then are embarrassed by having to retract or modify their answers.
- Advise that if, after pausing, they don't know or are uncertain of the answer, they should say so.
- Advise them that, if they don't understand the question, they should say so.
- Ask them if they have any questions or concerns.
- Ask them to read any signed statement they made to refresh their memory.
- Ensure they are aware of the manner in which the evidence will be elicited.

Preserving evidence integrity

When preparing a witness for court it is important that Police are not perceived as telling a witness what evidence to give. Be careful not to put words into the witness' mouth or leave yourself open to a complaint of encouraging a witness to mislead the court. It is acceptable to ask a witness what they will say in answer to a particular question but it is not acceptable to tell them what the answer to a particular question should be.

To safeguard the integrity of evidence, the O/C case must also advise witnesses not to discuss their evidence with other witnesses while waiting to give their own evidence or after they have given their evidence and been excused from the court.

Vulnerable witnesses

Pay particular attention to the care and consideration of witnesses who are more vulnerable to the pressures of giving evidence, for example:

- children
- complainants in sexual cases
- family violence victims
- people with disabilities
- people for whom English is not a first language.

The court provides services to assist witnesses such as interpreters, screens, and the option of remotely given evidence. As applications for these services may need to be made to the court pre-trial, it is important to discuss concerns with the prosecutor and Victim Adviser of Court Services at an early stage and well in advance of the hearing.

Where a complainant is aged below 18 years, the O/C case must advise the prosecutor at an early stage of the age and the preferred mode of evidence for that witness. (Refer [s107 Evidence Act 2006](#)).

See the '[Administration stage](#)' chapter for information about witness name suppression.

Witnesses leaving the country

If the O/C case learns that a witness is intending to leave New Zealand before giving evidence, the matter must be urgently discussed with the prosecutor so an alternative mode of evidence may be applied for.

During the hearing

When in court, the prosecutor must keep the witness informed of what will happen next. Use phrases like:

- "Thank you Ms Smith, would you please answer any questions from Mr Jones" (indicating the defence counsel).
- "I have no re-examination. Does Your Honour have any questions?"

The prosecutor's assistance should not end when the witness' evidence is given. You can also help/ liaise with the O/C case about such things as transport arrangements and the speedy payment of expenses. This promotes goodwill and encourages people to offer their services again.

Witness expenses

A witness giving evidence is entitled to witness expenses as set out in the [Witnesses and Interpreters Fees Regulations 1974](#).

The O/C case is responsible for:

- ensuring any witness expenses to be paid by Police, are paid
- completing the expense claim form on behalf of the witness and getting it signed by the prosecutor
- ensuring the claim form is submitted.

Expense claims by Police as witnesses

Police employees called as witnesses for the Crown cannot claim witness fees or allowances but may be paid allowances and/ or refunded expenses if travel is required.

Employees summonsed as witnesses in an official capacity by a party other than the Crown, must recover any fees, allowances or expenses from the party responsible for the summons and deliver it to their district's business services manager for payment to the public account. The employee is entitled to be paid allowances or refunded expenses if travel is required.

Employees summonsed as witnesses in a private capacity:

- should claim any expenses incurred from the party responsible for the summons
- must attend in their own time and take any absence from duty as days off, annual leave or leave without pay.

Further information

Refer to the '[Victims \(Police service to victims\)](#)' Police Manual chapter for information about Police legal responsibilities for victims at

court.

The Ministry of Justice has publications or information for court users on their [website](#) including these brochures:

- Speaking Maori in Court
- Using sign language in Court
- Let's talk Court
- Off to Court - being a witness
- Off to Court - supporting a young witness.

Police conduct as witnesses

Professional conduct

Employees as witnesses must remember that they are representing the New Zealand Police. Police evidence is often vital to the prosecution case and in cases of wider public interest, a focus of media attention.

Police employees giving evidence must do so in a clear and concise manner that reflects the professional standards of Police and [Police values](#). Under cross examination by defence counsel, maintain the same unbiased and fair presentation of evidence to avoid any perception that Police are being obstructive to the court.

When mistakes are made

If a situation arises where Police may have made a mistake during the investigation or perhaps some action that should have been undertaken was overlooked:

- inform the prosecutor of any potential issues before the hearing so they are fully briefed and prepared to deal with the issue should it arise
- be open and honest with the court as to the circumstances.

Often a frank and open acknowledgement of a mistake made will effectively blunt defence criticism of Police action.

Criticism of Police evidence/witness

Where any criticism of Police evidence/witness is received from the court, the prosecutor must notify the PPS Regional Manager in writing outlining the issue(s) that arose. The PPS Regional Manager must then assess the appropriate level of further escalation of the matter. The '[No surprises policy](#)' must also be adhered to during this process.

The Director: PPS must be notified of all serious criticisms.

Police witnesses for the defence or non-Police cases

Where a Police employee is summonsed or elects to give evidence, other than as a Police prosecution witness, they must as soon as practical before the hearing:

- forward a copy of the summons to their supervisor or, if no summons has been received, inform their supervisor that they have been called or intend to give evidence, and
- submit a report on the nature of the evidence they are likely to be called upon to give. The report should also outline any documents (e.g. reports, emails, briefs of evidence) being used in giving evidence.

Employees appearing in court proceedings that have **no** connection to their employment in the New Zealand Police must not wear their Police issued uniform. The uniform is a 'statement' of authority and it is not appropriate to wear it when their employment is not a factor in the hearing (e.g. disputes tribunal, child custody (Family Court), civil matter). It is not necessary to furnish a report as to the nature of the evidence they may be called upon to give, as they are there in a private capacity and not in uniform.

If the matter is being prosecuted by the Crown or Police, the prosecutor should be advised at an early stage by the employee who is planning to give evidence.

See also the restrictions on wearing uniform when called by the defence or in non-Police cases, in the '[Dress standards for court](#)> [When must/must not uniform be worn in court](#)' section of the '[Uniform, dress standards and appearance](#)' chapter.

Crown prosecutions and jury trials

Overview

When the Crown is required to appear to prosecute defendants either due to the offence category, offence type, or an election, the prosecution file must be delivered to the local office of the Crown Solicitor as soon as practicable. The Crown may assume responsibility for a file as early as following the first appearance for category 4 matters or as late as following the case review hearing for jury trials not on the Crown list. (Refer to '[Crown involvement](#)' in the 'Administration stage' chapter for detailed information on when the Crown will assume responsibility).

Early liaison

As with any prosecution, early and thorough preparation and disclosure will assist the prosecution and the defence. As soon as the file is transferred to the Crown, the O/C case should liaise with the allocated Crown prosecutor to discuss the prosecution.

If the prosecution is a judge-alone trial prosecuted by the Crown due to the Crown Regulations, the file must be prepared in the same way as in any other judge-alone matter. However, the prosecution liaison will be with the Crown.

Local liaison and communication protocols with the office of your local Crown Solicitor must be followed. Consult with your Police Prosecution Service office to ensure you are aware of the requirements in your district.

Filing exhibits

Police file exhibits on behalf of the Crown to preserve the chain of custody. Exhibits should be filed in the trial court no later than one week before the date upon which a trial is scheduled to commence.

The exceptions to this are:

- video interviews and transcripts, which should be filed with the formal statements ([r5.5 CPR](#))
- any documentary exhibits and any other exhibit that the Crown would rely on to survive an application for discharge, which should be filed with the formal statements so pre-trial applications may proceed at short notice. This is important because exhibits may be held at local Police stations some distance from the trial court, making transfer at short notice difficult.

Exhibits should be filed with a POL 2116 (Located in Police Forms> Prosecutions). Once filed, a copy of the [POL 2116](#) stamped by the receiving registrar should be emailed to the Crown prosecutor and defence counsel, so everyone has a complete record of what has been filed.

Jury process

Prosecutions that proceed along the jury trial path commence in the same way as any other prosecution and follow the same process as a prosecution proceeding to a judge-alone trial until the case review hearing.

Following the case review hearing, formal statements must be filed by the Crown no later than 25 days before callover. Exhibits are filed by the O/C case, or the exhibits officer when there is one, in close proximity in time to the filing of formal statements. Refer to the '[Prosecution file and trial preparation](#)' chapter for detailed information on preparing and filing formal statements.

As with a judge-alone trial, it is essential that witnesses are kept up to date with the case progress and any witness related issues communicated to the prosecutor in a timely manner.

Diagram: Jury process

This diagram highlights the jury process from case review through to disposition.

