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# Update Summary

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**UPDATE 214** **JULY 2024**

## CRIMINAL LAW INVESTIGATION AND PROCEDURE VICTORIA

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# Update 214

## Updated commentary

Mirko Bagaric has made the following updates to Chapter 27B Evidence Act

Section 38 Commentary: Unfavorable witnesses

- *ZL v R [2023] NSWCCA 279*; updated discussions and commentary; main issue on appeal was whether the prosecution should seek leave to cross-examine the complainant where their evidence is contrary to the Crown opening and closing address

Section 65 Commentary:

- Meaning of witness unavailable; *Gesler v State of Tasmania* [2023] TASCCA 10
- Section 65(2)(b) – where the representation was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication: updated references and commentary;
- Regarding the meaning of 'shortly after': *Moore (a pseudonym) v The King* [2023] VSCA 236

65(2)(c) – where the representation was made in circumstances that make it highly probable that the representation is reliable

Magistrate Gregoy Connellan has made the following updates to Chapter 15 Electronic Surveillance

- Collateral challenge to a warrant and admissibility; A trial judge has no power to examine material provided in support of an application for telecommunications interception warrant and a surveillance devices.

- Application mala fides – bad faith, fraud or improper purpose; updated references and commentary; *Commissioner of AFP v Magistrates' Court of Victoria & Di Pietro* [2011] VSC 3

- Legal professional privilege; updated commentary
- Subpoenas and orders for discovery - challenging the validity of warrant; updated references and commentary; *Murphy v The Queen* (1989) 167 CLR 94
- The legal principles to be applied on a subpoena to produce documents were set out in *Commissioner of AFP v Magistrates' Court of Victoria & Di Pietro* [2011] VSC 3

Section 6 commentary

- Insertion of new section; "interception"

- New references and commentary pertaining to interception
- The *Telecommunications (Interception and Access) Act 1979* does not define 'interception". However, s 6(1) sets out when a communication is the subject of interception
- Updated references and commentary; *R v Metcalfe* the complainant installed an application on her phone that recorded telephone conversations. Held the communication had already passed over the telecommunications system by the time it was recorded.
- (2018) 338 FLR 357; [2018] NTSC 45; *R v Metcalfe* (2018) 338 FLR 357
- Meaning of 'private conversation' updated references and commentary;

Section 11 Commentary

- Elements of the offence; updated commentary and references; the accused knew or was reckless as to whether the record or report was made by use of a listening, optical surveillance, or tracking device.
- *Farm Transparency International Ltd v New South Wales* [2022] HCA 23
- *Protection of the lawful interests of the person making it: updated references and commentary;* Discussing the expression 'lawful interest' in the context of the *Listening and Surveillance Devices Act 1972 (SA)*
- *Thomas v Nash* (2010) 107 SASR 309; [2010] SASC 153

Section 19 Commentary

- Authorise entry onto premises; updated references and commentary; *R v Cranston (No 6)* [2020] NSWSC 1777.
- A significant difference between the Victorian Act and the Commonwealth Act is contained in s 18(5) of the Commonwealth Act which deals with interference with property of a person 'not the subject of the investigation' and 'premises not specified in the warrant'.

Chapter 35 Summary Trials

- Amendment to charge; updated commentary and references
- The leading case on amendment pursuant to s 8 CPA is *Fox v Director of Public Prosecutions* (*Fox*)
- *Fox v Director of Public Prosecutions* [2022] VSCA 38; s 9(1) provided clear legislative intention a charge-sheet containing a charge that fails to comply with Schedule 1 clause 1(b) is not rendered invalid by such a failure
- Amendment to a charge – example cases including earlier enactments; updated commentary.

- Application for a rehearing; The power provided by s 79 remains available to the court even after a guilty plea has been entered, the charges have been found proven and the issue of sentence is yet to be determined.
- S 79 Criminal Procedure Act updated references and commentary

Chapter 14C Search and Seizure

- Victorian statutory search powers; insertion of new section, bring article before court to be dealt with according to law.
- International searches and mutual co-operation; updated references and commentary; No statutory power or authority is necessary for international assistance in a criminal matter by Australia to a foreign country.
- Challenging validity of a search warrant; updated commentary; the scope to seek judicial review of the issue of a search warrant has been significantly limited by legislation.
- Rule of strict compliance; updated commentary: there is a well-established public interest in protecting the anonymity of police informers; *Madafferi v R* [2021] VSCA; *Ryan v State of Victoria* [2015] VSCA 353
- Client Legal Privilege; updated commentary and references, The *Evidence Act 2008* provides that communications and documents containing client legal privilege (CLP) shall not be adduced and provides for circumstances where CLP is lost and the CLP evidence can be adduced.
- *Giurina v Director of Public Prosecutions & Anor* [2020] VSCA 54
- Victorian Search Powers; New provisions relating to the Crimes Act 1958, 465AAAA- 465AAE
- Insertion of new section relating to Magistrates' Court Act 1989: Bring article before court to be dealt with according to law; updated commentary relating to duty of magistrates court.

Magistrate Greg Connellan has added the following updates to **Road Safety Act 1986**

- SECTION 47A COMMENTARY
- [RSA.47A.20] Order declaring laws of other States and Territories to be corresponding laws

See Order declaring laws of other States and Territories to be corresponding laws. See discussion at [RSA.49.1100] "Second or subsequent offence and corresponding law". Note a similar Order declaring interstate drink-driving offences is provided for in s 25(1) in relation to the obligation of the Secretary to cancel and disqualify pursuant to s 25(3).

The current Order pursuant to s 25(1) is that made by the Minister on 6 November 2020 and published in the *Victoria Government Gazette* (No S577, 17 November 2020), p 1 - 25. The Order is set out at [MO.60].

- [RSA.49.480] Prescribed OFT device, procedures and operators

*Jongsma v Bartels* [2023] VCC 1107 at [45] per Blair J, held the phrase '*use by a person*' in the regulation contemplates the person required to furnish the oral fluid sample will use the fresh oral fluid collection unit and not the person requiring the sample.

- [RSA.49.2480] Elements – s 49(1)(e) – requirement under s 55(2) – Updated commentary

- [RSA.49.2500] Elements – s 49(1)(e) – requirement under s 55(2AA)- Updated commentary

Magistrate Greg Connellan has added the following updates to Chapter 14B Identification

- [ID.1020] Criminal investigation powers- new commentary

- Where a person is taken in custody for an offence police may request the person's name and address before commencing any questioning or investigation and before administering the caution and informing the person of their rights. The person's answer would be admissible in any subsequent contested hearing if relevant to a fact in issue. The person's answer is not improperly obtained for the purposes of 138(1)(a) of the *Evidence Act 2008* as defined in s 139(1)(c) of that Act.

- [ID.2190] Definitions – Evidence Act 2008- updated commentary

- The limitation on admissibility imposed by s 115(2), if the pictures "suggest that they are pictures of persons in police custody", does not apply to other forms of non-police custody.

- [ID.2300] Visual identification evidence and identification parade evidence – s 114 of the Evidence Act 2008- updated commentary

The requirement the identifying witness not be intentionally influenced applies to all visual identification evidence, not just identification parade evidence, and is not limited to intentional influence by investigators. In *Fowkes v The King* the Court of Appeal considered whether an identifying witness was intentionally influenced if the particular influence applied did not have a causative effect because the witness would have identified the accused irrespective of the influence applied. The Court found:

> As to that, we consider that the proper interpretation of s 114(2) dictates that, although the exercise of the influence need not have been the sole, or even predominant, factor in having the relevant effect, it is evident that it must have a material effect. Thus, to influence someone is to have a material effect on that person. By its terms, s 114(2) requires it to be demonstrated that the

identification was made without the person making the identification 'having been intentionally influenced' to identify the accused. Expressed in the passive voice, that requirement is directed to the state of mind of the person who made the identification. Thus, the identification evidence is not excluded if the intentional influence, sought to be exerted over the witness, did not have a material effect on the identification by the witness of the accused.

In *Fowkes* the Court also considered the requirement the influence must be intentional. It concluded the intention was clearly required to be that of the person exerting influence which meant "*the person exercising the influence must do or say something that was intended to have a material effect on the person making the identification of the accused person*."

There is no discretion involved where evidence does not satisfy the requirements of s 114(2). The evidence is not admissible unless it satisfies the requirements. The onus rests on the prosecution to establish, on the balance of probabilities, the identification witness was not intentionally influenced. The prosecution must establish either there was no intentional influence exerted or that any influence sought to be exerted did not have any material effect on the witness' identification of the accused.

- [ID.2320] Identification by pictures – s 115 of the Evidence Act 2008- updated commentary

- The *Evidence Act* is blind on the distinction between civilians and police officers when it comes to the person who is making an identification. The same requirements apply to a police witness of identification as apply to a civilian witness of identification. It might be said a police officer who goes to the police photo database and recognises an alleged offender must know they are photos of persons in police custody. However, if it does not appear from something in the nature of photos themselves, without considering the context in which they were examined, they are of persons in police custody then s 115(2) will not apply to exclude them. It is the appearance given by the pictures, not the actual custodial status of the person depicted, that is the focus if the issue of admissibility dealt with by s 115(2). Indeed, unlike s 115(3) and (5), the requirements of s 115(2) apply regardless of whether the accused is in custody at the time the pictures are examined.

- [ID.2500] The opinion rule – specialised knowledge and expert evidence of identification- updated commentary

*Ali v The Queen* the prosecution called evidence from an expert witness in rebuttal on the issue of 'unconscious transference'. 'Unconscious transference' was said to arise when a person sees somebody and mistakenly attributes that sighting to a different person they had seen earlier. In *Ali* the complainant had given a description of her assailant that did not match the accused, but had significant similarity to a witness and neighbour of the complainant who gave evidence he came out of his house and called out to the complainant as she fled from her assailant. The complainant did not stop in

response to her neighbour's call. She later told police she did not know who the person she saw in the street was, and was not sure it was her assailant. Significantly, it appears from the Court of Appeal decision the complainant never identified the accused as the person she described and, on strict analysis, her description was not evidence of identification. The accused argued the complainant was an entirely reliable and credible witness and her description of her attacker ought to be accepted. The Court of Appeal accepted the expert witness' evidence ought not to have been admitted as it created an unfairness for the accused because the complainant was not recalled to enable her evidence to be tested by the accused in light of the rebuttal evidence. The expert witness' evidence was of a general nature in the sense it did not involve any assessment of the complainant. The Court concluded the prosecution had not established any evidentiary foundation for the application of the expert evidence. Whilst the Court did not determine whether the expert evidence was inadmissible because of its general nature, it stated it was inclined to the view it was not rendered inadmissible on this basis. Nevertheless, the Court was not satisfied this irregularity in the trial resulted in a substantial miscarriage of justice and dismissed the appeal.

- [ID.2520] Applying the exclusionary rule – probative value outweighed by unfairly prejudicial effect- Updated Commentary

- On: Matters to be considered by a trial judge:

- The quality of identification evidence must be considered when assessing the probative value of such evidence and doing so "does not breach the injunction in IMM that reliability and credibility must be put to one side.

The way an accused will test the identification evidence before the jury is relevant to whether the unfair prejudice to the accused outweighs its probative value. This can apply to exclude evidence even where its probative value is high. Where testing of the identification evidence would necessarily mean otherwise inadmissible evidence, such as the accused's criminal associates, prior history or involvement with police and corrections, the unfair prejudice may outweigh evidence of significant probative value.

The composition of a photo-board used for the purposes of identification may give rise to issues of unfair prejudice. The High Court observed: Unfair prejudice may be occasioned because evidence has some quality which is thought to give it more weight in the jury's assessment than it warrants or because it is apt to invite the jury to draw an inference about some matter which would ordinarily be excluded from evidence. The 'rogues' gallery' effect of picture identification evidence creates a risk of the latter kind because the appearance of some photographs kept by the police may invite the jury to infer that the accused has a criminal record.

- [ID.3220] Development of Australian case law – challenging admissibility- Updated Commentary

In *R v Juric* Nettle J observed:

There remains the question of whether the statistical evidence should be excluded on the basis that a probability of one in twenty or one in seven is statistically insignificant, but of considerable prejudicial effect. ..... As the decision of the Court of Appeal in this case implies, the difficulties which attach to potentially misleading or confusing evidence should ordinarily be dealt with by the use of appropriate directions. Nevertheless, there must and does come a point at which some technical evidence has the capacity to be so misleading or confusing, whatever directions may be given about it, that its probative value is exceeded by its prejudicial effect. At that point it is to be excluded from the jury.

In my opinion, one reaches that point in this case with the statistical calculation that it is twenty times more likely that the DNA came from the deceased and the accused than that it came from the deceased and some one else drawn from the Caucasian population of Victoria. That seems to me to be evidence that is so inherently capable of misleading or confusing the jury, whatever directions may be given, that it should be excluded.

- [ID.3260] Presenting the significance of the results- updated commentary

In *Ali v The Queen* the Victorian Court of Appeal observed:

> The prosecutor's fallacy involves the 'transposition of the conditional'; that is, it takes a statement about the probability of one thing (X) relative to another (Y), and inverts it to a statement about the probability of Y relative to X. In the DNA context, the prosecutor's fallacy takes the 'random match probability' — in the present case, the probability of a DNA match if the defendant was the (or a) source of the DNA (which is evidence that an expert is properly able to give) — and inverts it to a probability that the defendant is the (or a) source, given the DNA match (which is not evidence an expert is properly able to give).

The manner in which the significance of the results of DNA analysis is presented to a jury is a matter that requires careful consideration by the parties and the court. Expert witnesses use different methods, including slides and graphs to assist a jury to understand the technical explanations they are providing. These difficulties were considered in *Vyater v The Queen* where, after setting out extracts from the expert witness' evidence to the jury of the DNA Analysis procedure, the Court of Appeal observed:

> Having reviewed the slides together with the oral evidence, however, we found the technical explanations difficult to understand and we would assume that jurors would have similar difficulties. This prompts us to question whether it is either realistic or necessary to expect a jury to understand the science of DNA profiling, as distinct from the 'evaluative opinion' conveyed as a likelihood ratio or its verbal equivalent.

In *Vyate*r the Court also considered the expert witness' evidence, given during cross-examination, explaining why a particular likelihood from a glove was so low in

circumstances where the likelihood ratio from a safety mask was 100 billion to one. In regard to that part of the expert witness' evidence the Court of Appeal observed:

> In our respectful opinion, this explanation — while scientifically orthodox — would also have been very difficult for a lay juror to understand. It required an appreciation of the process of cross-multiplication' of the various likelihoods of occurrence at the various sites in the DNA profile and, more particularly, of how the result of that 'multifactorial' process can be affected both by the number of available sites and by the relative (lack of) frequency of particular DNA types. Even if this technical explanation were capable of being understood, we doubt that it would have assisted a juror to make sense of the difference in probative force between a likelihood ratio of 26 to 1 and a ratio of 100 billion to 1.

Despite these concerns regarding the perceived difficulties the jury would have had understanding the expert evidence the Court of Appeal concluded there was little risk of the disputed low likelihood ratio evidence being overvalued by the jury given the exemplary directions given by the trial judge. The Court concluded that given the other circumstantial evidence relied on by the prosecution the probative value of the contentious DNA evidence was high. This was so in the context of the evidence because the description it was 'distinctly more probable' the accused contributed to the DNA profile taken from the glove in issue was justified and provided 'moderate support' for the prosecution hypothesis even though the likelihood ratio for that DNA match was low. The reasons of the Court reinforce the significance and probative value of DNA will depend heavily on other circumstantial evidence, other evidence about the accused and the approach taken by an accused to the prosecution case.