



18 March 2011

C62, 75.6
RB;rp

The Honourable John Rau MP
Attorney-General
DX 336
ADELAIDE SA

Dear Mr Attorney

Evidence (Identification) Amendment Bill 2011

Thank you for providing the Society with the opportunity to consider the above Bill. We provide the following comments.

We note that the existing law in this State, which is in line with High Court authority, is that parade identification is the best identification procedure. We accept that this is so. We are in general disagreement with the comments accompanying the Bill to the extent that they advocate for photoboard identification to the exclusion of parade identification.

If the Bill is passed in this form, we believe that it will benefit the accused and, we accept, the police by way of providing a saving of resources. The consensus of the Criminal Law Committee (by experience) is that parade identification is much more reliable. The witness is able to view the suspect in three dimensional form and assess factors such as height, build etc.

At the same time we acknowledge that police resources are not finite. Nevertheless, an effective change from parade identification should not be hijacked by the resource issue if it otherwise may lead to less identifications and, therefore, less convictions.

Apart from the resource issue, we acknowledge that in some cases parade identification procedures are not the best for some of the reasons outlined in the comments accompanying the Bill. We believe that the best way forward is for Parliament to implement a legislative regime for identification along the lines of the Commonwealth in the *Crimes Act 1914*. The relevant sections are ss3ZM to 3ZO. We do not suggest that every feature of the Commonwealth regime be picked up but we do recommend certain of them as follows:

- the preservation of the parade identification procedure, but only where it is appropriate; and
- the inclusion in this State of legislative safeguards in respect of both identification procedures.

Identification evidence is fraught with danger of producing the wrong outcome. The attraction to a legislative regime for identification evidence is that it will tend to minimise a miscarriage of justice (either in favour of the State or the accused).

Parade Identification Procedure

Some of the features from ss3ZM and 3ZN we highlight are as follows:

- subject to s3ZM(3) and s3ZN, an identification parade should be held if it is reasonable in the circumstances to do so: s3ZM(2);
- whether it is reasonable will depend on the nature of the offence, the likely importance of identification evidence and the practicality of holding a parade having regard to the suspect's failure to cooperate and the appropriateness of holding a parade (for any reason which could include the difficulty of obtaining a class of people the same or similar size): s3ZM(2A);
- an identification parade should not be held unless the suspect is informed that (a) he/she may refuse to take part, (b) that such refusal may be given in evidence for the purposes of explaining why a parade was not held and (c) evidence may be given in proceedings of an identification of the suspect by other means, including a photograph or photoboard: s3ZM(3);
- the giving of the information above must be recorded by video or audio recording: s3ZM(4);
- the identification parade must be fair: s3ZM(5);
- the parade must consist of at least a certain number of people: s3ZM(6)(a);
- the people who are not the suspect must resemble the suspect in age, height and general appearance and not have features that will be visible that are markedly different from those of the suspect as described by the witness before viewing the parade: s3ZM(6)(b);
- the parade may take place so that the witness can view the parade without being seen if the witness so requests and the parade is video recorded or takes place in the presence of the suspect's choice of person: s3ZM(6)(f);
- if there is more than one witness, they must view the parade alone and not communicate with each other after arrangements for the parade have commenced and before they have viewed the parade: s3ZM(6)(j);
- each witness must be told before the viewing that the suspect may not be in the parade: s3ZM(6)(k);
- if practicable to do so, the parade must be recorded by video recording: s3ZM(6)(l);
- if the parade is not video recorded, it must be photographed in colour and otherwise all steps be taken to record all reasonable steps and everything said and done at the parade: s3ZM(6)(m); and
- for identification parades for suspects under 18, see generally s3ZN.

Photoboard Identification Procedure

We highlight the following features of s3ZO:

- a photoboard identification should only be held if an identification parade is not held (in accordance with the Act): s3ZO(1);
- the witness must be shown photographs of a certain number of people: s3ZO(2)(a);
- each photo of people who are not the suspect must resemble the suspect in age, height and general appearance and not have features that will be visible that are markedly different from those of the suspect as described by the witness before viewing the photos: s3ZO(2)(b);
- the photos must not suggest that they are taken of people who are in custody: s3ZO(2)(ba);
- if practicable, the photograph or picture of the suspect must have been taken or made as soon as possible after he or she was arrested or was considered as a suspect: s3ZO(2)(d);
- the witness must be told that a photograph or picture of the suspect may not be amongst those being seen by the witness: s3ZO(2)(e); and
- the constable must keep, or cause to be kept, a record identifying each photograph or picture that is shown to the witness: s3ZO(2)(f).

Provisions of the Bill

In light of our comments above, we do not support s34AB(1).

In relation to s34AB(3), we are uncomfortable with it in its present form. We recommend that the jury be given a more specific warning about the differences, be they positive or negative, between the parade and other forms of identification. This can be done without making a qualitative comment or suggestion about the reliability of one form of identification compared to the other. For example, a jury could be warned about the fact that a photo identification does not enable the witness to see the suspect in three dimensional form.

I trust these comments are of assistance.

Yours sincerely



Ralph Bönig
PRESIDENT