

Identification Evidence:

Visual Identification Evidence:

- S 114 *Evidence act 2008* (Vic)

What is visual identification evidence?

- ***Evidence Act s114(1)***
 - Visual identification evidence means identification evidence relating to an identification based wholly or partly on what a person *saw* but **does not include picture identification evidence**.

Visual identification is usually done in three ways:

- (a) Identifying the accused in an identification parade (out of court id)***
- (b) Identifying the accused in isolation e.g. in a custody yard, foyer of court (out of court id)
- (c) Identifying the accused when the accused is in the dock in court (in court ID) - a very unreliable form of evidence.

S114(2) Evidence Act:****

- (2) **Visual identification evidence** adduced by the prosecutor is ***not* admissible unless** –
 - (a) An **identification parade** that included the D was **held before the identification was made OR**
 - (b) It would **not have been reasonable** to have held such a **parade OR**
 - (c) The D **refused to take part** in such a parade –
- **and the identification was made without the person who made it having been *intentionally* influenced to identify the defendant**

Victorian Police Manual:

- The Victoria Police Operating Procedures Manual includes instructions for police in relation to photographing suspects.
- Direct means of identification such as through an identification parade is preferred to other means of identification such as photographs.
- **Generally, witnesses will be asked to examine photographs of a suspect only if:**
 - The suspect has refused to participate in an identification parade;
 - A police officer merely has a suspicion about the identity of an offender; or
 - It is not practicable to hold an identification parade.
- **Witnesses must *not* be shown photographs for identification purposes if a suspect is available and an identification parade or other means of direct identification is practicable.**

When is it OK NOT to have held an ID Parade?

1. D refuses to take part in the parade- s114(2)(c) EA:

2. Would not otherwise be reasonable taking into account matters listed in s114(3) EA

Whether reasonable to hold ID parade take into account:

- (a) The kind of offence, and the gravity of the offence, concerned; and
- (b) The importance of the evidence; and
- (c) The practicality of holding an identification parade having regard, among other things—
 - (i) If the accused failed to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and
 - (ii) In any case—to whether the identification was made at or about the time of the commission of the offence; and
- (d) The appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the accused and the person who made the identification

3. 'Unfair' to D to hold ID Parade- s114(4) EA

• Circumstances where it might be unfair to D to hold ID parade include:

- Where required number of persons (minimum 8) resembling the suspect in age, height and general appearance cannot be arranged
- Where D has an unusual or distinguishing characteristic (e.g. a body deformity) which would be more obvious in an identification parade than in a photo board → photo identification may be fairer to the suspect than an identification parade.
- Highly visible tattoo
- Where D is a child or adult incapable of managing their own affairs and no parent, guardian or other responsible adult acceptable to D (not a police officer) is available to attend and observe the parade.

4. Not reasonable – lawyer requested but 'not practicable' to be present- s114(5)

- **s114(5)** If D refuses to take part in ID parade unless his lawyer/other person is present **AND** there are reasonable grounds to believe that it was not reasonably practicable for the lawyer or other person to be present
 - E.g. D in hospital about to die)

→ Statutory presumption that it was not reasonable to have an identification parade at the time → other identification procedures, such as a photo board, can be undertaken

5. Existence of photos – NOT a relevant consideration-s114(6):

- **S114(6)** In determining whether it was reasonable to have held an identification parade, the court is *not* to take into account fact that photos of D are available → police can't use the shortcut of avoiding an identification parade just because they have photos of the D

Picture Identification Evidence:

- **S115 only applies if someone is in custody if not, police can show photos to victim/witness**

Definition s 115(1):

- Identification made wholly or partly by a person “examining pictures kept for the use of police officers”.
- ‘Pictures’ includes photographs: **s115(10)**
- Two dangers associated with identification by photographs are described by Gleeson CJ in **Festa v The Queen (2001)** 208 CLR 593 at [22]:
 - **Displacement effect:** The photograph may displace the witness’s actual memory
 - **Rogues’ gallery effect:** The photograph of a suspect may convey to the jury that the suspect has a criminal history

Picture identification evidence: s 115(5) EA:

(5) Picture identification evidence adduced by the prosecutor is **not admissible if, when the pictures were examined, the accused was in the custody** of a police officer of the police force investigating the commission of the offence with which the accused has been charged, **unless—**

(a) D refused to take part in an identification parade

(b) D’s appearance had changed significantly between the time when the offence was committed and the time when D was taken into that custody; or

(c) It would not have been reasonable to have held an identification parade

- **NB 115(6). In determining if it was reasonable to hold an I.D parade court looks at same criteria set out in s 114(3)(4)(5)(6)- above**

Picture must not suggest that D was in custody: s 115(2) EA:

1. Evidence that the witness picked out D is **not admissible if photo suggests D was in custody at the time of the photo: s 115(2))**
- If this occurs, evidence could also be **excluded** on basis that the **prejudicial effect is greater than probative value: s 137 EA).**

Picture ID evidence: s115(3) EA:

- Picture identification evidence adduced by the prosecutor is **not admissible if picture I.D was done while D was in police custody AND picture was made before D was taken into that police custody.**
- **I.e. General rule:** when suspect is in police custody, identification by showing ‘mug shot’ to victim/witness **must use photo made after suspect was taken into custody**

Exceptions: S115(4) EA:

BUT police can use photo of D taken before s/he was taken into police custody where

- (a) **D’s appearance of D changed significantly between the time of offence and time when D taken into police custody** (e.g. no beard and now has beard); **or**
- (b) **It was not reasonably practicable to make a picture of D after he/she was taken into that custody.**

Dealing with the ‘Rogues Gallery’ effect: S115(2) & s115(7) Warning at request of accused:

WARNING: s 115(7) EA:

(7) If prosecution gets witness to give evidence that D was **identified by police photo**, the **judge must, on the request of the accused**

- (a) *If the picture of D was made after D was taken into that custody: inform the jury that picture was made after D was taken into that custody; or*
- (b) *Otherwise: warn jury that they must not assume that D has criminal record*

Recognition Evidence:

s. 114(3)(d) of the Evidence Act 2008 (Vic), Evidence Act 1995 (Cth):

- **Police may not have to hold an identification parade** (or use a photo board) if they are satisfied that the identifying witness has **‘recognised’ the suspect on the basis of sufficient familiarity.**
- In these circumstances police may get identification by getting witness to make a statement identifying person.
- AFP Guidelines (2017)
- In situations where the identifying witness knows the suspect, even if only by sight, it may ***not be practical, beneficial or fair*** to line this suspect up against a number of individuals unknown to the identifying witness. In such situations, further advice should be sought from DPP.