

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
CRIMINAL DIVISION

Not Restricted

S CR 2018 0321

IN THE MATTER of the *Witness Protection Act 1991*

and

IN THE MATTER of an Application by the Director of Public Prosecutions under section 10 of the *Witness Protection Act 1991*

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JUDGE: Priest JA  
WHERE HELD: Melbourne  
DATE OF HEARING: 20 December 2018  
DATE OF JUDGMENT: 20 December 2018  
CASE MAY BE CITED AS: Re an Application under section 10 of the *Witness Protection Act 1991*  
MEDIUM NEUTRAL CITATION: [2018] VSC 810 (First Revision 23 May 2019)

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CRIMINAL LAW - Protected witness - Witness deceased - Prosecution seeking to rely on statements and video-recorded re-enactments as exceptions to hearsay in trials for armed robbery and theft - Director of Public Prosecutions seeks disclosure of information regarding witness at trials of accused - Considerations informing order for disclosure - Application granted - *Witness Protection Act 1991* ss 1, 3AAA, 3AA and 10.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Director of Public Prosecutions	Mr N Papas QC with Mr J H Shaw and Ms J Poole	Mr John Cain, Solicitor for Public Prosecutions
For the Chief Commissioner of Police	Mr E Nekvapil and Ms L Hilly	Victorian Government Solicitor's Office

HIS HONOUR:

1 The purpose of the *Witness Protection Act 1991* ('the Act') 'is to facilitate the security of persons who are, or have been, witnesses in criminal proceedings in Victoria or elsewhere in Australia'.<sup>1</sup>

2 So far as relevant, 3(1) defines *witness* as follows:

*witness* means –

...

(c) a person who has made a statement to the Chief Commissioner, another police officer, a member of the police force or service of the Commonwealth or another State or Territory, or an approved authority in relation to an offence against a law of Victoria, the Commonwealth or another State; or

(d) a person who, for any other reason, may require protection or other assistance under this Act.

3 Section 3AAA sets out the central objective of witness protection is to protect those exposed to the risk of injury or death by reason of their participation in, or cooperation with, the criminal justice system:

**3AAA Objective of witness protection**

The central objective of witness protection is to give practical effect to the rule of law and advance the public interest in the efficacy and integrity of the criminal justice system by, as far as reasonably possible, protecting those exposed to a risk of injury or death by reason of their participation in, or cooperation with, the criminal justice system.

4 Various 'witness principles' set out in s 3AA(2) inform the making of any decision, or the taking of any action, by the Chief Commissioner<sup>2</sup> (and others) under the Act, including that:

...

(c) the decision to protect a witness should be determined primarily by reference to the risk incurred by the person as a consequence of the person's participation in, or cooperation with, the criminal justice system;

(d) protection and assistance provided to a witness under this Act should be tailored to the individual circumstances and risk faced by the witness and the community;

(e) the safety of the witness should take priority over the successful conduct

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<sup>1</sup> Section 1 of the Act.

<sup>2</sup> By s 3(1), *Chief Commissioner* means the Chief Commissioner of Police appointed under the *Victoria Police Act 2013*.

of a prosecution; ...

5 The present application is brought under s 10 of the Act with respect to 'Witness T',  
a participant in the Victorian witness protection program established and  
maintained by the Chief Commissioner under s 3A of the Act.

6 Witness T died in late 2013.<sup>3</sup> Before he died, however, he made four statements to a  
Detective – now retired – on 29 February 2012, 2 March 2012, 23 March 2012 and  
24 October 2012, relating to his knowledge of, and his (and others') participation in,  
an armed robbery committed by several men in the first half of the 1990s. He also  
took part in two video-recorded re-enactments on 12 March 2012 and 13 March 2012,  
during which he accompanied police investigators to a number of locations  
connected to the armed robbery and provided them with an explanation of each  
location's relevance, and the activities of various participants in the armed robbery  
at those locations. Witness T also provided statements to police, and took part in re-  
enactments, in the same period in relation to his (and others') parts in a very large  
theft committed a little over a decade ago.

7 Two trials, to be conducted by the same judge, are pending in the County Court. In  
the first trial, relating to the armed robbery in the 1990s, an individual faces an  
indictment charging him with armed robbery, false imprisonment and other  
offences; and in the second trial, a different individual is charged with the theft  
allegedly committed more than a decade ago.

8 In each trial, the prosecution wishes to adduce the evidence in Witness T's  
statements and video-recorded re-enactments, pursuant to the exception to the  
hearsay rule in s 65(2) of the *Evidence Act 2008*. Insofar as relevant, s 65 provides:

**65 Exception – criminal proceedings if maker not available**

- (1) This section applies in a criminal proceeding if a person who made a  
previous representation is not available to give evidence about an  
asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation  
that is given by a person who saw, heard or otherwise perceived the  
representation being made, if the representation –

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<sup>3</sup> His death was not related to his participation in the witness protection program.

...

(c) was made in circumstances that make it highly probable that the representation is reliable; or

(d) was –

(i) against the interests of the person who made it at the time it was made; and

(ii) made in circumstances that make it likely that the representation is reliable.

...

(7) Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends –

(a) to damage the person's reputation; or

(b) to show that the person has committed an offence for which the person has not been convicted; or

(c) to show that the person is liable in an action for damages.

...

9 A voir dire to determine the admissibility of Witness T's statements and video-recorded re-enactments pursuant to s 65(2) was recently before the trial judge.

10 Prior to the voir dire, the informant provided the prosecution with two statements by the retired Detective – dated 28 and 30 November 2018 – and the Detective's notes, which set out his dealings with Witness T. In the course of the voir dire, the prosecution sought to tender these statements and notes. The purpose of their tender was to provide evidence as to the circumstances in which Witness T's representations were made, and to persuade the trial judge that those circumstances 'make it highly probable' that the representations are 'reliable'.

11 During the course of the voir dire, the Chief Commissioner objected to the evidence being adduced. In the result, the prosecution and defence returned the retired Detective's statements and notes to counsel for the Chief Commissioner, and the statements – which had already been tendered – were removed from the County Court file.

12 Pursuant to s 10 of the Act, the Director of Public Prosecutions ('the Director') has

made application to this Court<sup>4</sup> for an order:

That pursuant to s 10 of the *Witness Protection Act 1991*, that the Supreme Court authorise disclosure of information in relation to the witness known as Witness T in the prosecution of [named person] and the prosecution of [named person].

13 The application is made on the following grounds:

- That the disclosure of such information is necessary for the County Court to be able to determine the admissibility of Witness T's statements and re-enactments in the above prosecutions;
- Further, that disclosure of such information is necessary to ensure that the accused are able to cross-examine on the topic of Witness T's status and to ensure a fair trial for the accused.

14 In a supporting affidavit by a solicitor of the Office of Prosecutions who has the overall conduct of the matter subject to the supervision of the Director, it is said:

The prosecution contend that the evidence of Witness T's status (whatever it might be) is highly relevant to the circumstances in which representations were made. It is the prosecution position that the County Court ought to be aware of the circumstances in which Witness T made representations. Further, in order to ensure fair trials to the accused, the defence ought to be permitted to cross-examine on the circumstances in which Witness T made the representations.

15 Counsel for the Chief Commissioner in this Court agreed that the subject-matter of the present application is the disclosure of the information contained in ss 10(1) and 10(5). With some expressed qualifications, counsel for the Chief Commissioner did not oppose the making of the order sought because: first, there are no concerns about the safety of Witness T; secondly, the Chief Commissioner is not aware of any risks to the family of Witness T that might flow from disclosure of the relevant information; and, thirdly, 'all those present' are aware that Witness T was a 'participant'. Counsel urged that in determining the application I be guided by the principles set out by J Forrest J in *Chief Commissioner of Police v ABC*,<sup>5</sup> and in particular that:<sup>6</sup>

... it is important and also in the public interest that those who are

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<sup>4</sup> Section 13 of the Act requires that the application must be heard in closed court.

<sup>5</sup> (2010) 31 VR 176 ('ABC'). See also *Chief Commissioner of Police v YYY* [2013] VSC 473 (Beach J).

<sup>6</sup> ABC, 186 [36].

contemplating entry into the program understand that information concerning their previous identity will not be disclosed unless the court is satisfied:

- (a) that it is in the public interest to do so; and
- (b) that the information to be disclosed is closely examined by the court prior to disclosure.

16 Section 10 of the Act, so far as relevant, provides as follows:

**10 Information not to be disclosed**

- (1) A person must not, either directly or indirectly, make a record of, disclose, or communicate to another person any information relating to the making of an entry in the register of births or the register of marriages under this Act or any information relating to the acquisition of an assumed identity under Division 3, *unless it is necessary to do so* –

...

- (c) *to comply with an order of the Supreme Court; ...*

...

- (5) A person must not, without lawful authority, disclose information in Victoria or elsewhere –
  - (a) about the identity or location of a person who is or has been a participant; or
  - (b) that compromises the security of such a person.

Penalty: Level 5 Imprisonment (Maximum 10 years).

...

- (6) A person must not, without lawful authority, disclose information in Victoria –
  - (a) about the identity or location of a person who is or has been a recognised participant; or
  - (b) that compromises the security of such a person.

Penalty: Level 5 Imprisonment (Maximum 10 years).

- (7) Subsections (5) ... and (6) do not apply to –

- (a) *a disclosure that is authorised or required by an order of the Supreme Court;*  
or

- (b) a disclosure that is made by the Chief Commissioner or a Deputy Commissioner in the lawful performance or exercise of a duty, function or power under this Act or a complementary witness protection law.

- (8) In this section –

*identity* includes any individual characteristics by which a person is recognised, such as their name, nick-name, depiction or physical description, a physical feature or biometric identifier, their personal association with another person or anything that may reasonably lead to their identification;

*participant* includes a person in relation to whom an interim protection declaration has been made;

*recognised participant* includes a person in relation to whom a declaration or order that corresponds to an interim protection declaration has been made under a complementary witness protection law or who has otherwise received interim or temporary protection under a complementary witness protection law.

17 Although s 10 provides no explicit guidance as to the circumstances in which this Court may make the kind of order for disclosure contemplated by the section, it is clear that the court must have regard to the purpose of the Act, which is, as I have observed, to facilitate the security of persons who are, or have been, witnesses in criminal proceedings.

18 Further, in my view the Court must take into account that the central objective of witness protection is, as far as reasonably possible, to protect those exposed to a risk of injury or death by reason of their participation in, or cooperation with, the criminal justice system, whilst endeavouring to give practical effect to the rule of law and the advancement of the public interest in the efficacy and integrity of the criminal justice system.

19 Moreover, I consider that the Court should be guided by the same kinds of considerations which inform the witness protection principles in s 3AA(2), governing decisions made, or actions taken, by the Chief Commissioner (and specified others) under the Act. Hence, I consider it appropriate to take into account as a primary consideration any risk which may be incurred by the witness as a consequence of any disclosure of the information contemplated by s 10 relative to his or her participation in, or cooperation with, the criminal justice system; and to give priority to the safety of the witness in advance of the successful conduct of a prosecution.

20 As I have indicated, Witness T died five years ago. Self-evidently, he is beyond needing protection from being exposed to any risk of injury or death. No order made by this Court under s 10 will put him at risk. Moreover, as I have mentioned, the Chief Commissioner accepts that there will be no risk to Witness T's family as a

result of relevant disclosure.

- 21 On the other hand, having read the relevant Summary of Prosecution Opening for both pending trials – exhibited to a Supplementary Affidavit in Support of the Director’s application – the importance of Witness T’s evidence is undeniable.
- 22 In the first place, since the prosecution seeks to rely on Witness T’s hearsay evidence at trial, the prosecution must bear the onus of showing that Witness T’s representations were made in circumstances that make it highly probable that the representations are reliable.<sup>7</sup> I consider it to be unlikely that the prosecution will be able to satisfy the trial judge that this threshold of admissibility has been met unless the prosecution is able to adduce the evidence contained in the retired Detective’s statements and notes.
- 23 Secondly, even should the prosecution be able to satisfy the trial judge that the threshold for admissibility is met under s 65 of the *Evidence Act 2008*, that is not the end of the matter. Once the evidence is before the jury – assuming that no other sections of the *Evidence Act* have led to its exclusion – questions of reliability and credibility are the province of the jury. So as to secure a fair trial, it is necessary that there be full disclosure of the circumstances in which the relevant evidence was harvested from Witness T.
- 24 There is no risk to Witness T (or his family) if disclosure is ordered, but the fairness of the pending trials – both to the prosecution and defence – will unacceptably be compromised if it is not.
- 25 In those circumstances, the Director’s application must succeed.
- 26 I will make orders accordingly, permitting the Chief Commissioner to disclose information about the identity of Witness T, including any information relating to his acquisition of an assumed identity (if applicable).

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<sup>7</sup> Senior Counsel informed me that he also relied on s 65(2)(d); that is, that the representations were against Witness T’s interests at the time they were made, and were made in circumstances that make it likely that the representations are reliable. I do not pause to consider whether reliance on s 65(2)(d) is, in the circumstances, apt. That is a matter best left to the trial judge.



27 Counsel for the Chief Commissioner submitted that I should make any orders conditional upon compliance by the County Court with s 10A of the Act. I do not intend to do so. Whether an order should be made under s 10A, and, if so, any conditions or limitations of the order, is best left to the good sense of the judge currently seized of the two trials, who, it must be said, will have a better appreciation of the evidence in those trials than does this Court.

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