

# Supreme Court of Victoria

## Practice Note No. 2

### **EXPERT EVIDENCE IN CRIMINAL TRIALS**

#### **Introduction**

This Practice Note has been developed by the Forensic Evidence Working Group, comprising judges, forensic scientists and legal practitioners (including representatives of the Office of Public Prosecutions, Victoria Legal Aid and the Criminal Bar Association).

The Note has been approved by the judges of the Supreme Court and of the County Court, for introduction on a trial basis from 1 July 2014. It should be read together with s 189 of the *Criminal Procedure Act 2009*.

**Note:** nothing in this Practice Note affects the validity or admissibility of certificates issued in accordance with statutory requirements.

#### **Purposes**

- A. To enhance the quality and reliability of expert evidence relied on by the prosecution and the accused in criminal trials and proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.
- B. To encourage the early identification of issues in dispute that will be the subject of expert evidence.
- C. To improve the utility of expert evidence by ensuring that it is focused on the issues genuinely in dispute.
- D. To make use of existing pre-trial and trial processes at the earliest practicable opportunity to advance these purposes.

#### **Application**

This Practice Note applies to criminal trials in the Supreme and County Courts. Parties to a proceeding which on the commencement of this Practice Note is already listed in either Court should comply with this Practice Note so far as it is practicable to do so without interruption to the progress of those proceedings.

#### **Definitions**

In this practice statement:

- “**expert**” means a person who is required to give or prepare expert evidence for the purposes of:

- (a) a criminal trial; or
- (b) Part 2 or Part 4 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.
- “**commissioning party**” means the party who gives instructions to the expert;
- “**recipient party**” means any other party to whom the expert’s report is provided.
- “**forensic report**” means a report prepared in the course of an investigation into an alleged offence by a person with specialised knowledge or training, setting out the results of a forensic examination in the form of facts or opinions or a combination of both e.g. an autopsy report.
- “**primary expert report**” means an expert report that does not respond to an expert report served by the other party.
- “**responding expert report**” means an expert report that responds to an expert report served by the other party.
- “**observed facts**” are matters that the expert has personally observed e.g. the reaction of a particular substance to being immersed in a solution, or the demeanour of the victim of an alleged sexual assault.
- “**reported facts**” are matters that have been reported to the expert by any other person e.g. the admissions made by the accused, the results of tests performed by other scientists or an agreed statement of facts.
- “**assumed facts**” are matters that the expert has neither seen or been told but has either inferred from observed or reported facts or assumed to be so for the purpose of reaching a conclusion.

### **Expert’s duty to the Court**

- 2.1** An expert has an overriding duty to assist the Court impartially, by giving objective, unbiased opinion on matters within the expert’s specialised knowledge.
- 2.2** This duty overrides any obligation to the commissioning party or to the person by whom the expert is paid.
- 2.3** This duty includes an obligation to inform all parties and the Court promptly if, and whenever, the expert’s opinion changes from that contained in a report served as evidence or given in a statement.
- 2.4** An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.

## **Expert reports and forensic reports**

- 3.1** This Practice Note applies to any expert report—
- (a) upon which the prosecution or an accused proposes to rely at the trial of the accused; or
  - (b) which the prosecution agrees to obtain in response to a request under 3.2, or is directed under 3.6 to obtain.
- 3.2** Where a forensic report has been prepared and served on the accused, the accused may request the prosecution to obtain an expert report in relation to a matter (or matters) that will be contested at the trial of the accused.
- 3.3** If the prosecution rejects that request, or fails to respond to it within a reasonable time, the accused may apply to the court before which the trial will be held for a direction that an expert report be obtained.
- 3.4** The accused must give the prosecution at least 14 days' notice of such an application.
- 3.5** An application under 3.3 may not be made after the date fixed by the court for the filing of the defence response to the summary of prosecution opening, unless the court grants leave.
- 3.6** On an application under 3.3, the Court may direct the prosecution to obtain an expert report in relation to a matter (or matters) that will be contested at the trial of the accused.

## **Content of all expert reports**

- 4.1** All expert reports to which this Practice Note applies (including primary expert reports and responding expert reports) shall state the opinion or opinions of the expert and shall state, specify or provide—
- (a) the expert's name and place of employment;
  - (b) an acknowledgement that the expert has read this Practice Note and agrees to be bound by it;
  - (c) whether and to what extent the opinion(s) in the report are based on the expert's specialised knowledge, and the training, study experience on which that specialised knowledge is based;
  - (d) the material, observed facts, reported facts, assumed facts and other assumptions on which each opinion expressed in the report is based (a letter of instructions may be annexed);

- (e) (i) the reasons for,
- (ii) any literature, research or other materials or processes relied on in support of,
- (iii) a summary of—
- each such opinion;
- (f) (if applicable) that a particular question, issue or matter falls outside the expert's specialised knowledge;
- (g) any examinations, tests or other investigations on which the expert has relied, identifying the responsible laboratory by which, and the relevant accreditation standard under which, the examination, test or other investigation was performed;
- (h) a declaration that the expert has made all the inquiries and considered all the issues which the expert believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld;
- (i) any qualification of an opinion expressed in the report, without which the report would or might be incomplete or misleading;
- (j) any limitation or uncertainty affecting the reliability of
  - (i) the methods or techniques used; or
  - (ii) the data relied on,
 to arrive at the opinion(s) in the report; and
- (k) any limitation or uncertainty affecting the reliability of the opinion(s) in the report as a result of—
  - (i) insufficient research; or
  - (ii) insufficient data.

**4.2** Where an expert is aware of any significant and recognised disagreement or controversy within the relevant field of specialised knowledge, which is directly relevant to the expert's ability, technique or opinion, the expert must disclose the existence of that disagreement or controversy.

### **Additional content of expert reports on certain matters**

**5.1** Where a primary expert report concerns a particular matter (for example, cause of death) and questions are specified in the Schedule in relation to

matters of that kind, the report shall (in addition to complying with 4.1) include answers to those questions.

- 5.2** Where a primary expert report includes answers to such questions, any responding report shall (in addition to complying with 4.1) include answers to the same questions but only insofar as there is disagreement with the answers in the primary expert report.
- 5.3** Nothing in 5.1 or 5.2 prevents a commissioning party from asking additional questions of an expert.

### **Service of expert evidence**

- 6.1** A party wishing to introduce expert evidence must—
- (a) where the report is a primary expert report, serve it on each other party as early as reasonably practicable and, in any event, no less than 60 days before the trial (or inquiry) is listed to commence; or
  - (b) where the report is a responding expert report, serve it on each other party as early as reasonably practicable and, in any event, no less than 14 days before the trial (or inquiry) is listed to commence; and
  - (c) at the time of service of the expert report, provide a copy of any photograph, plan or other document referred to in the report.
- 6.2** A party may not introduce expert evidence if that party has not complied with 6.1, unless—
- (a) every other party agrees; or
  - (b) the Court gives leave.
- 6.3** 6.1 and 6.2 do not apply:
- (a) where a forensic report has been served but the prosecution has not agreed under 3.2, or been required under 3.6, to prepare an expert report; or
  - (b) to proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

### **Access to materials**

- 7.1** If a recipient party so requests, the commissioning party must, subject to 7.3, give that party a copy of, or ensure that the party has a reasonable opportunity to inspect—

- (i) the instructions and material given to the expert by the commissioning party;
- (ii) any notes made by or on behalf of the expert in connection with the preparation of the expert report or (where applicable) the forensic report;
- (iii) a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based or that were carried out in the course of reaching those findings and opinion; and
- (iv) any thing on which any such examination, measurement, test or experiment was carried out.

**7.2** A party may not introduce expert evidence if that party has not complied with 7.1, unless—

- (a) every other party agrees; or
- (b) the Court gives leave.

**7.3** A commissioning party or the expert may withhold material referred to in 7.1 on any basis upon which objection could be taken if the material had been required to be produced under subpoena.

**7.4** Where material is withheld in reliance on 7.3, the commissioning party must ensure that the recipient party is aware of the withholding and the reason for it.

**7.5** The Court may resolve any dispute in relation to the withholding of material under 7.3.

### **Availability of expert to other parties**

**8.1** A party who serves an expert report on another party must—

- (a) promptly inform the expert of that fact; and
- (b) if so requested by a recipient party, arrange for the expert to be available for interview by that party and/or his/her representatives.

**8.2** Unless the Court otherwise orders, the expert is not obliged to consent to be interviewed.

**8.3** When an interview takes place pursuant to a request by a recipient party, the commissioning party is entitled to be present and/or be represented at the interview.

**8.4** Subject to 8.3, the parties may settle the conditions upon which the interview is to be conducted, including as to whether the content of statements made during the course of the interview may be referred to in Court. The Court may resolve any dispute about this.

**8.5** Unless otherwise agreed, the requesting party bears the cost of the interview.

### **Provision to expert of statement of facts**

**9.1** After service of an expert report —

- (a) the parties shall confer in order to determine whether agreement can be reached on a statement of facts (which may include facts which are agreed and facts which are in dispute) to be provided to the expert;
- (b) the expert may be invited by any party to review the expert's findings and opinion(s) in the light of those facts which are agreed and/or facts which are in dispute; and
- (c) any party may at any time formulate specific questions for the expert to address, and the expert may be invited by that party to respond to those questions.

**9.2** Nothing in 9.1 requires the parties to settle an agreed statement of facts.

**9.3** Nothing in 9.1 prevents the parties from conferring and providing an agreed statement of facts before an expert report is filed.

**9.4** After service of an expert report, the Court may convene a hearing to enable the Court or any party to seek clarification of the expert evidence.

### **Pre-hearing discussion of expert evidence**

**10.1** This rule applies where more than one party wants to introduce expert evidence on the same issue or on related issues.

**10.2** The Court may direct the experts to—

- (a) discuss the expert issues in the proceedings; and
- (b) prepare a statement for the Court of the matters on which they agree and disagree, giving their reasons.

**10.3** Except for that statement, the content of that discussion must not be referred to at the trial of the accused without the Court's permission.

**10.4** The Court may convene a hearing at which—

- (a) the Court or any party may seek clarification of any aspect of the expert evidence; and
- (b) the Court may direct the experts to narrow the areas of disagreement.

**10.5** A party may not introduce expert evidence without the court's leave if the expert has not complied with a direction under 10.2 or 10.4.

### **Consecutive or concurrent evidence**

**11.1** Where—

- (a) two or more parties have served expert evidence relating to the same issue or relating to two or more closely related issues;
- (b) the commissioning parties agree; and
- (c) the Court so orders,

evidence may be given by the experts consecutively (ie one after the other) or concurrently (ie with all of the experts present in court, sworn or affirmed at the same time).

**11.2** The procedure to be followed for consecutive or concurrent evidence is to be determined by the Court, with the expectation that the parties will have conferred in advance and attempted to agree on the procedure.

### **Court's power to vary requirements under this Practice Note**

**12.1** The Court may—

- (a) extend (even after it has expired) a time limit under this Practice Note;
- (b) allow the introduction of expert evidence which omits a detail required by this Practice Note.

**12.2** A party who wants an extension of time must—

- (a) apply when serving the expert evidence for which it is required; and
- (b) explain the delay.

### **Review of operation of Practice Note**

**13.1** The operation of this Practice Note will be monitored by the Forensic Evidence Working Group.

**13.2** The Working Group will conduct a consultative review of the Practice Note at the conclusion of the first 12 months of operation (30 June 2015).





## **SCHEDULE**

**Item 1:** Forensic Pathology

**Item 2:** Adult Sexual Assault

## **ITEM 1: FORENSIC PATHOLOGY**

### **STANDARD QUESTIONS TO ADDRESS THE CAUSE OF DEATH IN AN ALLEGED HOMICIDE**

1. What were the key physical findings and diagnoses made following the autopsy in this case?
2. How was the presence of the physical findings ascertained and how were the diagnoses made?
3. What is the cause of death?
4. How did the physical findings and diagnoses made following autopsy in this case lead to the conclusion about the cause of death?
5. Are the physical findings and diagnoses independently verifiable?
6. Do the physical findings and diagnoses rely on observations or information beyond the autopsy? If so, who or what else has been relied upon?
7. Are any of the physical findings due to artefact? (The answer to this may require information about the circumstances; if so, please specify that information).
8. Are the physical findings of injury due to intentional harm by another in this instance? (In the alternative, the expert may prefer to answer the following: Can it be excluded that the physical findings of injury are the result of accident or self infliction in this instance?) How certain is this? (The answer to both elements of this question may require information about the circumstances; if so, please specify that information).
9. Have the findings of injury in this case ever been described in the literature as being caused accidentally, or by self infliction or not due to intentional harm by another? (This question may or may not be relevant, but if it is, its answer may require information about the circumstances; if so, please specify that information)
10. Is the evidence/research base relied on in this case unequivocal and definitive? What are the strengths and weaknesses of the research base? (The answer to this question may require information about the circumstances; if so, please specify that information)
11. If not already built into the answers above, what would the nature and extent of disagreement be, within the discipline of forensic pathology, about the conclusions above?

## **ITEM 2: ADULT SEXUAL ASSAULT**

### **THE SIGNIFICANCE OF GENITAL AND OTHER INJURIES, OR THEIR ABSENCE**

1. What information about the circumstances of the case was provided (including information provided before, during and after the examination) by whom and when?
2. How were the examination findings recorded and where are these records kept?
3. What factors, if any, limited the effectiveness of the consultation or opinion (e.g. access to information, quality of the facility, cooperation of the subject, extent of the examination, language, problems related to specimen collection).
4. What were the clinical findings upon examination of the genitalia?
5. What were the clinical findings of the remainder of the examination, including any non-genital physical injury(ies)?
6. What is the interpretation of the genital findings with regard to any alleged penetration?
7. What other conclusions, if any, arise from the genital findings?
8. What other conclusions, if any, arise from the observed non-genital injury(ies)?
9. What conclusions (if any) follow from the absence of any genital injury(ies)?
10. What conclusions (if any) follow from the absence of any non-genital injury(ies)?
11. Is there any evidence or interpretation that identifies, or contributes to the identification of any implement(s) that caused the injury(ies)?
12. To what extent do the clinical findings corroborate or contradict the history available from the subject, or are neutral in this regard?
13. Are there any sources of information or specific references other than the information and examination findings described above that you have relied on in coming to your conclusion(s)?