



## Client Newsletter

### Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012

April 2012

#### Background

The issue of procedurally defective affidavits first arose in the case of *DPP v Marijanecvic*.<sup>1</sup> That case involved three accused who were charged with a number of drug offences. Much of the evidence against the accused was obtained pursuant to search warrants issued under the *Drugs, Poisons and Controlled Substances Act 1981*. It was revealed during the trial that these affidavits had not been properly sworn but rather, had been signed in the presence of an Inspector authorised to take affidavits.

In *Marijanecvic*, the trial judge applied s 138 of the *Evidence Act 2008* and ruled all the evidence gathered pursuant to the warrants inadmissible. The DPP unsuccessfully appealed this ruling in the Court of Appeal.

In the subsequent months, it was revealed that the practice of not swearing affidavits correctly was widespread within the force, with a large number of members taking advantage of an amnesty by stating that they have not been swearing affidavits correctly.

While the courts in a number of more recent cases considering s 138 have elected to admit evidence despite procedural defects in affidavits, the Government has elected to enact retrospective legislation to ensure that evidence obtained pursuant to a procedurally defective affidavit can no longer be the subject of an application to exclude pursuant to s 138.

#### Summary

The recently enacted *Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012* has amended Victorian evidence law to ensure that evidence obtained prior to 12 November 2011 and pursuant to procedurally defective affidavits will not be excluded from criminal proceedings. However the current requirements for swearing or affirming an affidavit remain unchanged and should be strictly complied with.

#### The Amending Act

The *Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012* (**the Amending Act**) amends the *Evidence (Miscellaneous Provisions) Act 1958* (**the Act**) to remedy the failure of some Victoria Police members to properly swear affidavits.

The Amending Act applies only to affidavits made before 12 November 2011 and any subsequent actions or proceedings undertaken in reliance on those affidavits. It provides for the following:

1. Affidavits are now deemed to be properly sworn or affirmed where the affidavit has been signed by the deponent and signed by a person authorised to witness affidavits under s 123C of the Act.<sup>2</sup> These affidavits will now be deemed to be validly sworn or affirmed despite any failure to comply with procedures for the making of affidavits, including (but not limited to):

- 1.1 A failure to make an oral oath or affirmation;
  - 1.2 A failure to complete the jurat in accordance with s 126 of the Act; and
  - 1.3 A failure to properly witness the signing of the affidavit.
2. Where an affidavit or other instrument has been relied on by a court or other person for the issue of a warrant, summons, order or other process, the document sought is not invalid even if it was not validly sworn or affirmed.<sup>3</sup>
  3. The fact that an affidavit has not been validly sworn or affirmed is to be disregarded for the purposes of determining whether or not to admit evidence in a criminal proceeding that was obtained in reliance on the affidavit.<sup>4 5</sup>

Despite these retrospective changes, it is important to understand that the requirements in respect of affidavits and statutory declarations going forward have not changed. Affidavits are still required to be sworn or affirmed in accordance with the Honourary Justice Office's *Guidelines for Authorised Witnesses* (October 2011). Before making or witnessing any affidavit or statutory declaration in the future, it is essential that you familiarise yourself with these requirements.

The consequences of failing to comply with the *Guidelines* have also become more serious, as the Amending Act has now created a new offence of making a false or misleading statement as to the circumstances in which an affidavit was sworn or affirmed. This offence applies to any false or misleading statement made on and after 1 March 2012. Post this date, anyone who falsely signs or witnesses that an affidavit has been sworn, witnessed or affirmed when it has not been is liable for a penalty of up to 10 penalty units.<sup>6</sup> This offence also applies if anyone makes a false or misleading statement concerning the validity of an affidavit.

This means that it is critically important that anyone signing or witnessing an affidavit understands the requirements as expressed in the *Guidelines* and executes those requirements correctly.

If you remain unsure about any aspect of the legislative requirements, then it is important that you clarify your understanding prior to making or witnessing any documents.

If you require advice on any aspect of the requirements or the Amending Act, then please contact VGSO for assistance.

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<sup>1</sup> [2011] VSCA 355

<sup>2</sup> Section 165(1) of the Act.

<sup>3</sup> Section 165(2) of the Act.

<sup>4</sup> Section 165(3) of the Act.

<sup>5</sup> However we note that the judicial discretion to exclude evidence or to stay a criminal proceeding in the interests of justice has not been affected by the changes.

<sup>6</sup> Section 126B of the Act.

## For further information

For further information or legal advice on any issues raised in this newsletter contact:

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