Looking beyond the lineup: evaluating the fairness of "digiboard" identification evidence for First Nations Peoples

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Research has established that mistaken identification is a "particularly prevalent" cause of wrongful convictions of First Nations persons in Australia.[1] Identification evidence has long been understood to be vulnerable to factors which make it unreliable.[2] The potential for unreliability is compounded in the case of a witness identifying somebody of a different ethnic or racial identity to themselves,[3] and in Australia this has a disproportionate effect on First Nations peoples.[4] For these reasons, the rules relating to the admissibility of identification evidence in criminal trials are important.

Western Australia (WA) has recently introduced a bill which, if passed, will substantially adopt the Uniform Evidence Law (which already operates in the Commonwealth jurisdiction, as well as in New South Wales, Victoria, Tasmania, and both Territories).[5] However, one significant area in which the proposed WA law differs from the Uniform Evidence Law is in relation to identification evidence. In particular, whilst s 114 of the Uniform Evidence Law typically requires identification to occur through an identification parade (also colloquially called a "police lineup"),[6] the proposed WA law does not include such a requirement.[7]

In WA, police typically use "digiboards" when facilitating witness identification. Digiboards are essentially an array of photographs from which the witness can attempt to identify the person they saw connected with the offence. A digiboard usually shows 12 photographs — one of the suspect and the others being fillers (ie, they are similar to a traditional "photo board" used for identification). However, unlike a traditional photo board, digiboard photographs are digitally altered with a computer program to ensure the greatest possible similarity between the suspect and the filler photographs.[8] The proposed WA law enables this practice to continue.

This article considers whether this divergence in the WA law is likely to be consequential for First Nations peoples. Is WA's decision not to require identification parades problematic, or is there no material difference between the identification procedures?

Is digiboard evidence fair for First Nations people?

Courts have observed that, compared to identification parades, digiboards do have some disadvantages. In *Winmar v Western Australia*[9] (*Winmar*) the Western Australian Court of Appeal noted that:

> . . . it is true that it is a two-dimensional image; it is also the case that the image shows only the head and not the whole body, so that potential identifying or exclusionary factors such as height, build, and posture are removed. To that extent the digiboard process has its disadvantages.[10]

These disadvantages may well compound the already unreliable nature of identification and especially cross-cultural identification. However, the court in *Winmar* ultimately decided that:

> . . . this court should firmly reject any suggestion that the digiboard process is inherently inferior to an identification parade. The court should not . . . attempt to discourage the use of the digiboard for identification.[11]

However, there have been cases where digiboard identification evidence has been regarded as unfairly prejudicial to First Nations defendants. For example, in *Western Australia v Garlett*[12] (*Garlett*), the complainant (who was Japanese) told police the alleged offender had "light/white skin". The defence noted that while the complainant made no reference to the alleged offender being Aboriginal, Ms Garlett (the accused, who the complainant selected on the digiboard) "plainly appears to be of Aboriginal descent".[13] The defence argued that:

> . . . each of the 11 other women depicted [on the digiboard] appear to have darker skin than Ms Garlett and none of the digiboard photos depict any person as having white or light skin and [matching other aspects of the description given by the complainant]. . .[14]

Thus, the defence argued that "Ms Garlett's image is the only one that remotely fits the description of the perpetrator".[15] In addition, they pointed out that the photograph of Ms Garlett appeared to have a different hue to the images of the other women, and that she was the only person on the digiboard that had a nose ring.[16]

Ultimately Bowden J excluded the digiboard evidence in the exercise of discretion because its probative value was outweighed by its prejudicial effect.[17] Justice Bowden noted that:

> The reality is that Ms Garlett was not competing with the other images on an equal basis. The viewer of this digiboard is confronted with a board which contains only one image of an Aboriginal [person] with lighter coloured skin. ...[18]

Accordingly, Bowden J found that the probative value of the identification "from a digiboard which contained only one image of a light skinned Aboriginal [person] in circumstances where [the complainant] says the offender was light skinned is minimal",[19] and noted that a jury would be likely to give it more weight than it deserves.[20]

Garlett is a striking example of unfairly prejudicial digiboard evidence sought to be used against a First Nations person. But does it suggest that digiboard evidence is *inherently* problematic for First Nations people? Not necessarily.

The evidence in *Garlett* illustrates that the reliability and fairness of digiboard evidence can be tainted if it is not deployed and designed correctly in the particular circumstances. The unfairness did not arise from an inherent failure in the digiboard process, it arose due to the failure of police to assemble a fair array of "filler" photos. Indeed, Bowden J noted that the police "have the technology to, and should have taken steps to adjust the colour of or desaturate the images so that they displayed similar skin tones".[21]

Relevantly, *Garlett* demonstrates that where the reliability and fairness of a particular identification event is affected by the manner in which it was deployed, this can be dealt with appropriately by judicial discretion.

Are identification parades any different?

Garlett shows that not all identifications obtained by digiboard are reliable, and that where digiboard evidence is assembled improperly this can result in unfairness for First Nations defendants. Importantly, the same is true of identification parades. Indeed, while Gibbs CJ in *Alexander v R*[22] described identification parades as "the most reliable method of identification", his honour provided a caveat that this is only the case "if properly carried out".[23]

For example, in *R v Fisher*[24] (*Fisher*) a witness described the man they saw as being Aboriginal with shoulder-length hair. The police conducted an identification parade involving Mr Fisher and five fillers. However, Mr Fisher was the only person in the lineup who was both Aboriginal and had longer hair. When questioned at trial, one witness explained the process of their selection of Mr Fisher at the lineup as follows:

> . . . Well there were only a couple [of people in the identification parade] with long, like shoulder length hair which one of them was Fijian and the other was the one which I picked.[25]

The Court of Criminal Appeal found that at the identification parade there was an "inherent tendency" for a witness to select "the only person" who matched the two important elements in the description they had provided to police.[26] Accordingly, the court found that the evidence should have been excluded on the basis that its probative value was outweighed by its prejudicial effect.[27]

This demonstrates that the problem which arose in *Garlett* is not confined to digiboard evidence — it can arise equally in an identification parade. Both forms of identification evidence can be unfair, including for First Nations people, if they are not conducted properly.

Conclusion

Identification evidence is notoriously unreliable and can be particularly problematic in criminal trials involving First Nations defendants. But does it matter whether identification evidence is gathered by way of digiboard or identification parade?

Garlett shows that digiboard evidence can be unfairly prejudicial to First Nations defendants where the digiboard is improperly compiled. But similarly, *Fisher* demonstrates that an improperly conducted identification parade can be equally unfair. Ultimately, the reliability of either process comes down to the way it is deployed in the particular case.

These cases demonstrate that police failures can result in unfair prejudice for First Nations defendants, and that this is the case no matter the form of identification evidence. Considered together, these cases also demonstrate why the approach taken in the proposed WA law — not to include an equivalent of s 114 of the Uniform Evidence Law — is not inherently problematic for First Nations people. Indeed, identification evidence will still be subject to review and scrutiny — it will just occur primarily at the mandatory and discretionary exclusions stage (as is the case under both the Uniform Evidence Law and the common law of evidence).

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Footnotes

1. K Roach "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17 *Flinders Law Journal* 243 (Roach). See eg, *Narkle v Western Australia* [2006] WASCA 113; BC200604786.
2. F D Woocher "Did Your Eyes Deceive You: Expert Psychological Testimony on the Unreliability of Eyewitness Identification" (1977) 29 *Stanford Law Review* 969.
3. J Katzman and M B Kovera "Potential Causes of Racial Disparities in Wrongful Convictions Based on Mistaken Identifications: Own-Race Bias and Differences in Evidence-Based Suspicion" (2023) 47(1) *Law and Human Behavior* 23.
4. Roach, above n 1 at 234, 239 and 254.
5. Evidence Act 1995; Evidence Act 1995 (NSW); Evidence Act 2008 (Vic); Evidence Act 2001 (Tas); Evidence Act 2011 (ACT); Evidence (National Uniform Legislation) Act 2001 (NT).
6. See, eg, Evidence Act 1995, s 114.
7. Evidence Bill 2024 (WA), s 132–35.
8. *Winmar v Western Australia* (2007) 177 A Crim R 418; [2007] WASCA 244; BC200709659 at [32].
9. Above.
10. Above, at [47].
11. Above n 8, at [55].
12. *Western Australia v Garlett* [2020] WADC 13; BC202040013.
13. Above, at [47].
14. Above n 12, at [48].
15. Above n 12, at [49].
16. Above n 12, at [50].
17. Above n 12, at [67].
18. Above n 12, at [63].
19. Above n 12, at [62].
20. Above n 12, at [64].
21. Above n 12, at [60].
22. *Alexander v R* (1981) 145 CLR 395; 55 ALJR 355; [1981] HCA 17; BC8100066.
23. Above, at [6].
24. *R v Fisher* [2001] NSWCCA 380; BC200106181.
25. Above, at [8].
26. Above, at [21].
27. Pursuant to Evidence Act 1995 (NSW), s 137.