

Changes To The Law Surrounding Sexual Offences – Jury Directions

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Division 4 Jury directions—corroboration

18 Amendment of s 632 (Corroboration)

Section 632(2) and (3)—

omit, insert—

- (2) On the trial of a person for an offence, a judge must not direct, warn or suggest to the jury—
 - (a) that the law regards any class of persons as unreliable witnesses; or
 - (b) in relation to the uncorroborated evidence of a witness—
 - (i) that it would be dangerous or unsafe to convict the defendant on the evidence; or
 - (ii) that the evidence should be scrutinised with great care.

Note—

See also the [Evidence Act 1977](#), sections 94A, 103ZZB, 132BAA and 132BA.

- (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice.

S 59 Insertion of new pt 6B

Division 3 Jury directions related to sexual offences

Subdivision 1 Preliminary

103ZO Application of division

- (1) This division applies in relation to a criminal proceeding—
 - (a) that is a trial by jury or by a judge sitting alone; and
 - (b) that relates, wholly or partly, to a charge of a sexual offence.
- (2) For a trial by a judge sitting alone, the court's reasoning with respect to any matter mentioned in subdivision 3 or 4 must, to the extent the court thinks fit, be consistent with how a jury would be directed about the matter under subdivision 3 or 4 in the particular case.

Subdivision 2 General matters

103ZP Judge may request indication from parties

- (1) Before the criminal proceeding commences, the judge may request that the prosecution and defence counsel (or, if the defendant is unrepresented, the defendant) each inform the judge of whether it is likely that evidence will be adduced in the trial that would require the giving of a direction under subdivision 3 or 4.
- (2) If the judge is informed under subsection (1) that it is likely that evidence will be adduced that would require the giving of a particular direction, the judge is not required to form a view, at that time, about whether to give that direction.
- (3) Nothing in this section prevents the prosecution, defence counsel or the defendant from later requesting, or making submissions in relation to, the giving of a direction about which the judge was not informed under subsection (1).

103ZQ When directions under subdivisions 3 and 4 must be given

- (1) The judge must give any 1 or more of the directions set out in subdivision 3 in the criminal proceeding—
 - (a) if there is a good reason to give the direction; or
 - (b) if requested to give the direction by a party to the proceeding, unless there is a good reason not to give the direction.
- (2) If the judge is to give a direction under subdivision 3 or 4, the direction must be given at the earliest time in the criminal proceeding that the judge determines is appropriate.
- (3) However, subsection (2) does not prevent the judge from giving a direction under subdivision 3 or 4 at any time during the criminal proceeding, including—
 - (a) before any evidence is adduced in the proceeding; and
 - (b) in the judge's summing up to the jury.
- (4) The judge may repeat a direction under subdivision 3 or 4 at any time in the criminal proceeding.
- (5) The judge is not required to use a particular form of words in giving a direction under subdivision 3 or 4.

103ZR No limit of court's duty to direct jury

This division does not limit the matters the court may direct the jury about, including in relation to evidence given by an expert witness.

Subdivision 3 Directions to jury—consent and mistake of fact

103ZS Direction about circumstances in which non-consensual sexual activity occurs

The judge may direct the jury that non-consensual sexual activity can occur—

- (a) in many different circumstances; and
- (b) between different kinds of people including—
 - (i) people who know one another; and
 - (ii) people who are married to one another; and
 - (iii) people who are in an established relationship with one another; and
 - (iv) people of the same or different sexual orientations; and
 - (v) people of any gender identity, whether or not their gender identity corresponds with the sex assigned to them at birth.

103ZT Direction about responses to non-consensual sexual activity

The judge may direct the jury that—

- (a) there is no typical, normal or proper response to non-consensual sexual activity; and
- (b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything; and

Note—

Under the Criminal Code, section 348AA(1)(a), for the purposes of chapter 32 of the Code, a person does not consent to an act if the person does not say or do anything to communicate consent.

- (c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

103ZU Direction on lack of physical injury, violence or threats

The judge may direct the jury that—

- (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence; and
- (b) the absence of injury or violence, or threats of injury or violence, does not, of itself, mean that a person is not telling the truth about a sexual offence.

103ZV Direction on responses to giving evidence

The judge may direct the jury that—

- (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about a sexual offence, but others may not; and
- (b) the presence or absence of emotion or distress does not, of itself, mean that a person is not telling the truth about a sexual offence.

103ZW Direction on behaviour and appearance of complainant

The judge may direct the jury that it should not be assumed that a person consented to a sexual activity because the person—

- (a) wore particular clothing or had a particular appearance; or
- (b) consumed alcohol or another drug; or
- (c) was present in a particular location; or

Examples—

- 1 The person attended a nightclub.
- 2 The person went to the defendant's home.

- (d) acted in a flirtatious or sexual manner; or
- (e) worked as a sex worker.

103ZX Direction on mistake of fact in relation to consent

The judge may direct the jury that if the jury concludes that the defendant knew or believed that a circumstance mentioned in the [Criminal Code](#), section 348AA(1) existed in relation to a person, that knowledge or belief is enough to show that the defendant did not reasonably believe that the person was consenting to the act.

Subdivision 4 Directions to jury—other

103ZY Direction on differences in complainant's account

- (1) This section applies if evidence is given, or likely to be given, or a question is asked, or likely to be asked, of a witness that tends to suggest a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability.
- (2) The judge must direct the jury—
 - (a) that experience shows—
 - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and
 - (ii) trauma may affect people differently, including affecting how they recall events; and
 - (iii) it is common for there to be differences in accounts of a sexual offence; and
 - (iv) both truthful and untruthful accounts of a sexual offence may contain differences; and
 - (b) that it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.
- (3) In this section—

difference, in an account, includes—

 - (a) a gap in the account; and
 - (b) an inconsistency in the account; and
 - (c) a difference between the account and another account.

103ZZ Direction on lack of complaint or delay in making complaint

- (1) This section applies if evidence is given, or likely to be given, or a question is asked, or is likely to be asked, of a witness that tends to suggest—
 - (a) an absence of complaint in relation to the commission of the sexual offence the subject of the criminal proceeding by the complainant; or
 - (b) delay by the complainant in making a complaint in relation to the commission of the sexual offence.
- (2) The judge—
 - (a) must direct the jury that absence of complaint or delay in complaining does not, of itself, indicate that the allegation that the sexual offence was committed is false; and
 - (b) must direct the jury that there may be good reasons why a person who does not consent to a sexual activity may hesitate in making, or may refrain from making, a complaint about a sexual offence; and
 - Examples of good reasons—*
 - 1 The person was overborne by the abuse of a relationship of authority, trust or dependence.
 - 2 The person has employed strategies to cope with the sexual offence such as suppression or disassociation from the offence.
 - 3 The person has a fear of ostracism from their community.
 - (c) must not direct the jury that absence of complaint or delay in complaining is relevant to the complainant's credibility unless there is sufficient evidence to justify the direction.
- (3) If the criminal proceeding also relates to a domestic violence offence alleged to have been committed by the defendant against the same complainant, the judge may—
 - (a) also give a warning under section 103ZD; or
 - (b) give a single warning to address both types of offences.
- (4) In this section—

domestic violence offence see section 103B.

103ZZA Direction on evidence of post-offence relationship

- (1) This section applies if evidence is given, or is likely to be given, or a question is asked, or is likely to be asked, of a witness that tends to suggest that, after the sexual offence the subject of the criminal proceeding is alleged to have been committed, the complainant—
 - (a) continued a relationship with the defendant; or
 - (b) otherwise continued to communicate with the defendant.
- (2) The judge must direct the jury that experience shows that—
 - (a) people may react differently to non-consensual sexual activity and there is no typical, normal or proper response to non-consensual sexual activity; and
 - (b) some people who are subjected to non-consensual sexual activity will never again contact the person who subjected them to the activity, while others—
 - (i) may continue a relationship with that person; or
 - (ii) may otherwise continue to communicate with that person; and
 - (c) there may be good reasons why a person who is subjected to non-consensual sexual activity—
 - (i) may continue a relationship with the person who subjected them to the activity; or
 - (ii) may otherwise continue to communicate with that person.

Examples of good reasons—

- 1 The person was overborne by the abuse of a relationship of authority, trust or dependence.
- 2 The person fears family dissolution.
- 3 The person has a fear of ostracism from their community.

Prohibited Directions

Subdivision 5 Prohibited directions

103ZZB Prohibited directions etc. in relation to credibility of complainant's evidence

The judge in the criminal proceeding—

- (a) must not direct, warn or suggest to the jury that complainants who do not make a complaint or who delay in making a complaint are, as a class, less credible than other complainants; and
- (b) must not direct, warn or suggest to the jury in relation to the evidence of complainants who do not make a complaint or who delay in making a complaint—
 - (i) that it would be dangerous or unsafe to convict the defendant on the evidence; or
 - (ii) that the evidence should be scrutinised with great care.

Prohibited Directions

Division 5 Prohibited directions

65 Insertion of new ss 132B and 132BAA

After section 132A—

insert—

132B Prohibited direction in relation to doubts regarding truthfulness or reliability of complainant's evidence

- (1) In a criminal proceeding in which more than 1 offence is charged, the judge must not direct the jury that if the jury doubts the truthfulness or reliability of the complainant's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally or in relation to other charges.
- (2) Any rule of common law under which a judge is required or permitted to give the jury a direction mentioned in subsection (1) is abolished.
- (3) This section does not prevent a judge from making a comment on the evidence given in the proceeding that it is appropriate to make in the interests of justice.

132BAA Prohibited directions etc. in relation to reliability of children's evidence

In a criminal proceeding the judge must not—

- (a) direct, warn or suggest to the jury that children as a class are unreliable witnesses; or
- (b) direct, warn or suggest to the jury in relation to the uncorroborated evidence of a child—
 - (i) that it would be dangerous or unsafe to convict the defendant on the evidence; or
 - (ii) that the evidence should be scrutinised with great care; or
- (c) direct, warn or comment to the jury about the reliability of a child's evidence solely on account of the child's age.

Section 132BA – Significant Forensic Disadvantage From Delay

Section 132BA does not purport to overrule the objective of a *Longman* direction, but does regulate the language that can be used by the trial judge in doing so: *R v BDJ* [2022] QCA 108 at [30]. In *R v DBZ* [2022] QCA 200 at [46], the court cited with approval in *Anderson v Tasmania* [2020] TASCCA 11 at [71] and *Gahani v The Queen* [2022] NTCCA 13 at [155-168].

- a. In *Anderson v Tasmania* [2020] TASCCA 11 at [71], Porter AJ (with whom Blow CJ and Brett J agreed) reviewed a number of cases from jurisdictions with a similar provision. His Honour concluded (inter alia) that “*it is not necessary to prove anything beyond the loss of or inability to obtain evidence that may have been exculpatory*”.
- b. In *Gahani v The Queen* at [167], the court reviewed the authorities and distilled the following principles:
 - i. ‘Significant’ in the phrase ‘significant forensic disadvantage’, means ‘important’ or ‘of consequence’.
 - ii. The disadvantage must be of a *forensic* nature; that is one suffered in challenging, producing or giving evidence or in conducting the case.
 - iii. The onus rests on an accused to satisfy the court that they have suffered a significant forensic disadvantage because of the consequences of delay.
 - iv. It is the consequences of the delay that require consideration, not the length of the delay itself. The relevant disadvantage must be identified, and must have been actually suffered, as distinct from a possibility of it having been suffered; there must be more than mere supposition.
 - v. It is not necessary to prove anything beyond the loss of or inability to obtain evidence that *may* have been exculpatory.
 - vi. Any direction must alert the jury to, and help them understand, the nature and potential consequences of the delay; it should assist the jury in how they approach their task in light of the difficulties.
 - vii. There will be disadvantages as a consequence of delay which do not warrant a direction.

Directions – 103CB (Evidence of DV)

In *R v LBD* [2023] QCA 266 at [21], the Court of Appeal stated that new section 103CB of the *Evidence Act*

“is in substance to the same effect as s 132B but not limited to offences in chapters 28-30.”

In that case, the Court developed the following direction at [53]:

The matters which needed to be covered in the direction to deal with the relationship evidence as context and also as evidence of the appellant’s propensity to commit acts of violence against the complainant when they were arguing were:

- a. the evidence of the uncharged acts of violence had limited relevance to the jury’s task of deciding whether the prosecution had proved beyond reasonable doubt each of the four counts;
 - b. the uncharged acts were relied on by the prosecution to give context to the incidents which were the subject of the four counts that the jury had to decide as, without hearing the full history of the relationship, the allegations which were the subject of the four counts might seem to have occurred “out of the blue”;
 - c. the uncharged acts were also relied on by the prosecution to show that the appellant had a propensity or a tendency to commit acts of violence against the complainant in heated arguments or conflicts;
 - d. it was for the jury to decide whether they were satisfied that any of the uncharged acts of violence occurred and, if it did, what the jury made of it, ie whether the jury relied on it solely to understand the context for the complainant’s evidence of the incident the subject of the relevant count or whether the jury also relied on it for showing the propensity of the appellant to commit acts of violence against the complainant when they were having a heated argument;
 - e. if the jury rejected the evidence of any of the uncharged acts, the jury must put that evidence aside;
 - f. if the jury did not consider that any one or more of the uncharged acts of violence demonstrated the propensity of the appellant to commit acts of violence against the complainant when they were having a heated argument but merely showed him to be a poorly behaved partner or of poor character, that was an irrelevant consideration to the jury’s task and the jury must put the evidence of the uncharged act or acts aside;
 - g. if the jury accepted that any of the uncharged acts showed the appellant’s propensity for violence against the complainant when they were arguing, the jury could use that propensity in assessing the complainant’s evidence on the relevant count, as that propensity for violence against the complainant may have made it more likely that the complainant’s evidence on that count was credible and reliable;
 - h. even if the jury were satisfied of that propensity of the appellant, the jury could not reach a verdict of guilty on the relevant count unless they were satisfied that the complainant’s evidence proved the elements of the relevant count beyond reasonable doubt.
4. That was a case of violence but it may serve as a framework, *mutatis mutandis*, in directions in cases of sexual assault. What is important is that the crown identifies the relevance of the evidence in the case so the trial judge can appropriately direct the jury as to the use that can be made of such evidence.