

34. Separate Consideration of Charges – Single Defendant

34.1 Legislation

[Last reviewed: September 2024]

Evidence Act 1977 (Qld)

[Section 132B](#) - Prohibited direction in relation to doubts regarding truthfulness or reliability of complainant's evidence

[Section 163](#) - Application of ss 132B and 132BAA to criminal proceedings

34.2 Commentary

[Last reviewed: September 2024]

Separate consideration of charges

In *R v Doolan* [\[2014\] QCA 246](#), McMurdo P at [39] (Gotterson JA and Atkinson J agreeing) held that:

'Almost invariably whenever charges are joined, it is incumbent on the trial judge to direct the jury to consider each charge separately and evaluate the evidence on that charge to decide whether each juror is satisfied beyond reasonable doubt that the prosecution has proved the elements of the charge. The jury should also be directed that the evidence in relation to each charge is different so the verdict need not be the same.'

Where there are separate charges involving different Complainants and the evidence is not cross-admissible, the jury must be specifically directed that the evidence relating to one Complainant cannot be used in support of the case in relation to the other Complainant (*R v CBM* [\[2014\] QCA 212](#)).

Markuleski direction

Section 132B of the *Evidence Act 1977 (Qld)* was amended by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024 (Qld)* upon proclamation of the relevant parts on 23 September 2024. The transitional provision, s 163 of the *Evidence Act*, in effect provides that the amendments take effect from proclamation, regardless of when the offence is alleged to have been committed.

In its amended form, s 132B effectively prohibits the giving of a Markuleski direction. More precisely, it prohibits the trial judge directing 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': s 132B(1). It does expressly allow the trial judge to make a comment on the evidence that is appropriate to make in the interests of justice: s 132B(3).

The obligation remains on the trial judge to identify the relevant issues, to relate those issues to the relevant law and facts of the case, and to outline the main arguments of Counsel in the summing up (*R v Mogg* (2000) 112 A Crim R 417; [2000] QCA 244, [54] and [73]; *R v FAC* [2012] QCA 213, [31]–[34]). Where the Defendant's case involves a general attack on the Complainant's credibility and reliability, the trial judge must be alert to the prohibition in s 132B.

Evidence of each charged and/or uncharged act as circumstantial evidence of charged acts

In *R v Bauer (a pseudonym)* [2018] 266 CLR 56; [2018] HCA 40, the High Court said at [50]:

'Since proof of an accused's commission of a sexual offence against a complainant on one occasion makes it more likely that the accused may have committed another, generally similar sexual offence against the complainant on another occasion, at least where the two are not too far separated in point of time, where an accused is charged with a number of counts of generally similar sexual offences against a single complainant the several counts may ordinarily be joined in a single indictment and so tried together. In such cases, evidence of each charged act is admissible as circumstantial evidence in proof of each other charged act and, for the same reason, evidence of each uncharged act is admissible in proof of each charged act.'

Even though the 'Markuleski direction' has been abolished by legislative amendment, this statement remains good law and the direction should be given when the circumstances of the trial make it appropriate.

In *Director of Public Prosecutions v Roder (a pseudonym)* (2024) 98 ALJR 644; [2024] HCA 15 at [1], [2] and [31] the High Court held that it would be an error for a trial judge to direct a jury that they must be satisfied beyond reasonable doubt of the occurrence of acts, whether charged or uncharged, before they could be used for tendency purposes. Although the issue was raised in the context of Victorian legislation, the Court also considered the matter at large.

The Court observed, at [37]:

'...it follows from the nature of tendency evidence that, in a case where the prosecution relies on both uncharged and charged acts to establish an alleged tendency of the kind under consideration here, a single separate tendency direction should ordinarily be given. Such a direction should not direct or invite the jury to make findings in respect of charged conduct, but instead should indicate the evidence relied on to support the alleged tendency, direct the jury to

consider whether they are satisfied of the alleged tendency and then advise the jury that, if they are so satisfied, they can use that tendency in considering whether it is more likely that the accused committed the specific offences with which he or she is charged. Careful directions should be given to the jury as to the requisite onus and standard of proof as well as to the contents of the elements of the offence and the need for separate consideration of each charge.’

It is suggested that, in order to avoid confusion with the differing standards of proof of the tendency evidence and the elements of the charged offences, the giving of a single separate tendency direction might be best delivered prior to the elements of the offences being explained to the jury.

34.3 Suggested Directions

[Last reviewed: September 2024]

Separate consideration of charges

Separate charges are preferred. You must consider each charge separately, evaluating the evidence relating to that particular charge to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved its essential elements. You will return separate verdicts for each charge.

The evidence in relation to the separate offences is different, and so your verdicts need not be the same.

(Where the elements of the offences are different, add or substitute the sentence below).

The elements of the offences are different, and so your verdicts need not be the same.

Evidence of each charged and/or uncharged act as circumstantial evidence of charged acts

As I have mentioned, the Defendant is charged only with the [refer to number] offences in the indictment. I will refer to the acts which form the basis of those charges as the charged acts.

(Where appropriate the following may be added): **The prosecution has also adduced evidence of what I will call uncharged acts. Those uncharged acts are [describe the uncharged acts relied on by the prosecution].**

The Crown relies on the evidence of each charged act as evidence that the Defendant had a sexual interest in the Complainant and was willing to give effect to that interest.

(Again, where appropriate, the following direction on uncharged acts may be added):
The Crown also relies on the evidence of each uncharged act as evidence that the Defendant had a sexual interest in the Complainant and was willing to give effect to that interest.

If you are satisfied that a particular act was done by the Defendant [as appropriate, whether charged or uncharged], that finding may make it more likely that the Defendant committed an offence charged in the indictment, but only if you are satisfied that the act was done because the Defendant had a sexual interest in the Complainant that [he/she] was willing to give effect to.

If you are so satisfied, you may use that finding in considering whether the Defendant committed the offences charged in the indictment.

The evidence of each charged act [or, where appropriate, an uncharged act] must not be used in any other way. It would be completely wrong to reason that, because a particular act was done by the Defendant [where appropriate, whether charged or uncharged], [he/she] is generally a person of bad character, and for that reason, must have committed the other offences.

If based upon a conclusion that a particular act was done by the Defendant [where appropriate, whether charged or uncharged], you are satisfied that the Defendant had a sexual interest in the Complainant, it does not inevitably follow that you would find [him/her] guilty of other counts on the indictment. You must always decide whether, having regard to the evidence relevant to a particular count, the offence charged has been established beyond reasonable doubt.