

68. Preliminary Complaint

68.1 Legislation

[Last reviewed: September 2024]

Evidence Act 1977

[Section 94A](#) – Admissibility of preliminary complaint in sexual offences and domestic violence offences.

[Section 103B](#) – Meaning of domestic violence offence.

[Section 103ZD](#) – Direction about lack of complaint or delay in making complaint.

[Section 103ZY](#) – Direction on differences in complainant’s account.

[Section 103ZZ](#) – Direction on lack of complaint or delay in making complaint.

[Section 103ZZB](#) – Prohibited directions etc. in relation to credibility of complainant’s evidence.

[Section 132BA](#) – Delay in prosecuting offence.

[Section 162](#) – Application of s 94A to sexual offences and domestic violence offences charged before commencement.

Criminal Code

[Section 632](#) – Corroboration.

68.2 Commentary

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Legislative overview

The legislative basis for the admission of preliminary complaint evidence was previously found in s 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld). Subject to one significant difference, it is now found at s 94A of the *Evidence Act 1977* (Qld) upon proclamation of the relevant parts of the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld).

Notably, in the new provision, preliminary complaint evidence is also admissible in relation to a ‘domestic violence offence’, which is defined for those purposes at s 103B of the *Evidence Act 1977*. It is likely that earlier case law on s 4A will be of equal application to s 94A.

However, the transitional provision, s 162 of the *Evidence Act 1977*, provides that s 94A only applies to proceedings charged after the proclamation date, regardless of when the alleged offending occurred. As a consequence, preliminary complaint evidence is only admissible in relation to a 'domestic violence offence' that is not also a sexual offence where the Defendant is charged after the proclamation date.

Prior to the recent amendments proclaimed in July 2024, the right to make a comment on the Complainant's evidence had been regulated, in part, by s 632 of the *Criminal Code* and s 132BA of the *Evidence Act 1977*. Upon proclamation, that right is now also regulated by an amended s 632 of the *Criminal Code* and ss 103ZD, 103ZZ and 103ZZB of the *Evidence Act 1977*, which variously require certain directions to be given concerning any delay in the making of a complaint and proscribe the trial judge making certain comments concerning the delay in making complaints. Also, s 103ZY of the *Evidence Act 1977* now mandates certain directions be given where there is a difference in the Complainant's account that may be relevant to the Complainant's truthfulness or reliability. There is no transitional provision applying to these amended and inserted provisions concerning directions and comments, and so they take effect from the date of proclamation.

What amounts to preliminary complaint evidence

To be admissible as preliminary complaint evidence, the evidence of complaint must be 'about the alleged commission of the offence' and not in relation to acts that are not the subject of the specific charges before the Court (*R v NM* [2013] 1 Qd R 374; *R v PAS* [2014] QCA 289; *R v KAW* [2020] QCA 57, [33]-[39]). Evidence of complaint about conduct that is consistent with the charged offence/s is admissible as preliminary complaint evidence, even though it cannot be precisely shown to be a complaint about the charged conduct (*R v BCZ* [2016] QCA 232, [37]; *R v SDL* [2021] QCA 14).

Section 4A(6) provides that a complaint includes a disclosure. A disclosure may be made by conduct, rather than a verbal statement (*R v Foster* [2014] QCA 226). In *R v AW* [2005] QCA 152 at [26], the Court of Appeal held that a disclosure, for the purpose of s 4A(6), also includes 'a revelation or disclosure after questioning, even questioning which might suggest a particular response.'

One of the examples of a preliminary complaint in s 4A is where 'the complainant visits the local police station and makes a complaint to the police officer at the front desk.' In *R v BDI* (2020) 3 QR 348, 356-361, the Court of Appeal considered the meaning of a 'formal witness statement.'

In *R v Bryce* [2021] QCA 145 at [20], it was held that a complaint made after the Complainant had been interviewed by police but failed to disclose any offending by the Defendant was admissible as preliminary complaint because there had been no formal statement provided.

In *R v DBA* [\(2012\) 219 A Crim R 408](#); [\[2012\] QCA 49](#) a complaint about a distinct passage of conduct was held to be admissible as preliminary complaint evidence even though an earlier formal statement had been made to police concerning other conduct.

In *R v IH* [\[2021\] QCA 247](#) at [33]-[34] and [37], hearsay evidence was held to be admissible as it provided the context to 'how and when' the preliminary complaint was made in terms of s 4A(2). However, caution needs to be exercised when admitting this style of evidence for this purpose.

Use of Preliminary Complaint Evidence

In *R v LSS* [\[2000\] 1 Qd R 546](#), [15] Thomas JA said:

'The limited basis upon which such evidence may be received and used has been well established in Australia since *Kilby*...Its effect is confined to showing consistency of statement or conduct, the evidence having itself no probative value or capacity to prove the truth of what is said (or written). The familiar direction given in summings up is that such evidence constitutes a buttress to the credit of the complainant but that it does not independently prove anything [cf *Kilby*, 472]'

In *R v RH* [\[2005\] 1 Qd R 180](#) the Court of Appeal noted (at 184) that '[t]he wording of s 4A(4) is in precise terms and it should not be given any wider operation than those words strictly construed require'. The Court agreed (at 184) that a direction should be given that evidence of preliminary complaints is not evidence of the matters complained of; that is, such evidence does not constitute proof of the commission of the offences in question. Davies JA and Jerrard JA (at 186) agreed that the limited use the jury might make of the evidence of preliminary complaints was ...

'... only as [they] related to the respective complainant's credibility...consistency between the accounts repeated by the ... witnesses [who heard them] and that given by the relevant complainant child would be something the jury could take into account as possibly enhancing the likelihood that that child's evidence (given in chief by way of the provision of s 93A of the *Evidence Act 1977* and in person in cross-examination) was true. Likewise directions would be appropriate that inconsistency between the terms of the complaint on one occasion and on another could be considered as possibly reducing the likelihood that the complaints...were accurate and a truthful description of events which really happened'.

In *R v VN* [\[2023\] QCA 184](#) at [204] it was observed that the impugned direction on preliminary complaint evidence was sufficient because it conveyed the use to be made of this type of evidence to ensure that the jury did not treat the evidence as confirmatory of the prosecution allegations. It was also observed that there is 'no general requirement for the trial judge to summarise the preliminary complaint evidence in detail, nor to articulate specifically any inconsistencies.' However, it is

suggested that the need to do so may arise depending on the nature of the inconsistencies and their potential impact on the determination of the issues.

In *R v Van Der Zyden* [2012] 2 Qd R 568 the Court of Appeal held that a Complainant may give evidence of preliminary complaint in the absence of evidence of complaint by the recipient. The Court said (at 586), '*Evidence by the complainant of a preliminary complaint, if unsupported by the evidence of a complainee, may serve to buttress the credit of the complainant if the complainant is believed, even though it suffers from a want of corroboration*'.

The appropriateness of a direction under ss 4A(4) and (5) concerning any delay in complaining is now regulated by s 132BA of the *Evidence Act 1977*.

In Cases of Multiple Offences

In cases involving multiple offences of a sexual nature, it may be clear that the evidence of preliminary complaint is admissible only in relation to one or some of the offences. In such circumstances, it is incumbent upon the trial judge to give directions as to how it bolsters the credit of the complainant and can be used only for that purpose only in relation to those specific counts (*R v LSS* [2000] 1 Qd R 546, [14]).

68.3 Suggested Directions

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In this case, there is evidence of the Complainant's preliminary complaint(s) to [name of recipient of information] on [date or event] that [describe substance of preliminary complaint/s].

That evidence may only be used as it relates to the Complainant's credibility. Consistency between the account of [insert name of person to whom preliminary complaint made] of the Complainant's complaint and the Complainant's evidence before you is something you may take into account as possibly enhancing the likelihood that [his/her] testimony is true.

However, you cannot regard the things said in those out-of-court statements by the Complainant as proof of what actually happened. In other words, evidence of what was said on that occasion may, depending on the view you take of it, bolster the Complainant's credit because of consistency, but it does not independently prove anything.

Likewise, any inconsistencies between the account of [insert name] of the Complainant's complaint and the Complainant's evidence may cause you to have doubts about the Complainant's credibility or reliability.

(Where there is a conflict between the version of the Complainant and that given by a witness, it may be necessary to identify factors that are relevant to the assessment of the evidence such as the passage of time between the date of the conversation and when the witness was first asked to recall it. Whether there is a conflict in the accounts may depend on the assessment by the jury of the reliability of the Complainant and the preliminary complaint witness).

Whether consistencies or inconsistencies impact on the credibility or reliability of the Complainant is a matter for you.

Inconsistencies in describing events are relevant to whether or not evidence about them is truthful and reliable, and the inconsistencies are a matter for you to consider in the course of your deliberations. But the mere existence of inconsistencies in the complainant's account, if you find there are any, does not mean that of necessity you must reject [his/her] evidence.

[Insert here directions conforming to s 103ZY of the *Evidence Act 1977* (see **Chapter 46 – Prior Inconsistent Statements**) or remind the jury of what has earlier been said in compliance with that provision].

Longman/delay directions – ss 132BA, 103ZD, 103ZZ AND 103ZZB

(Where submissions are made or the evidence raises the issue of delay in the making of the preliminary complaint - ss 103ZZB, 103ZB or 103ZZ of the *Evidence Act*).

There is evidence of a delay of about [insert approximate period of delay] between the [last of] the alleged offending and the first preliminary complaint. (As appropriate): it has been suggested to you that this is a relevant feature for your consideration [or] you need to understand how this evidence of delay can be used in your deliberations.

The delay in complaining [or, as the case may be, the failure to complain] about the [domestic violence offending/sexual offending] does not, of itself, indicate that the complaint about the offending is false. You must remember that there may be good reasons for a person [not to complain/to delay in making a complaint] about this style of offending conduct. It could be to do with the nature of the relationship between the Defendant and the Complainant, it could be a means adopted the Complainant to deal with what [he/she] alleges occurred, or there could be many other good reasons that would explain the [failure to complain/the delay in complaining].

(Where there is sufficient evidence to justify the direction – ss 103ZD(2)(c) and 103ZZ(2)(c)):

Although the [failure to complain/delay in complaining] does not of itself indicate that the complaint of the offending was false, you have before you the following evidence:

[Insert here the evidence that raises the appropriateness of the direction].

It is a matter for you whether you accept any or all of that evidence, but if you accept the totality of it, you may consider whether the [failure to complainant/delay in making a complaint] in fact detracts from your assessment of the Complainant's credibility. If you find it does, you may take that into account in determining the Complainant's credibility overall. If it does not, you must put it to one side when assessing the Complainant's credibility overall.