

63. Witnesses Whose Evidence May Require a Special Warning (formerly the “Robinson” direction)

63.1 Legislation

[Last reviewed: February 2025]

Criminal Code

[Section 632](#) – Corroboration

Evidence Act 1977

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

[Section 132BAA](#) - Prohibited directions etc. in relation to the reliability of children's evidence

63.2 Commentary

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The *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) amended or inserted the above provisions. The previous prohibition in s 632 of the *Criminal Code* on warning or suggesting to a jury that the law regards any class of persons as unreliable witnesses is now expressed as ‘a judge must not direct, warn or suggest’ this to a jury. Also added to the section is a prohibition on directing, warning, or suggesting to a jury that the uncorroborated testimony of a witness should be scrutinised with great care, or that it would be dangerous or unsafe to convict a defendant on such evidence.

Section 632(3) preserves the possibility for the judge to make ‘a comment on the evidence given in the trial that it is appropriate to make in the interests of justice’.

Section 103ZZB of the *Evidence Act* prohibits a judge from directing, warning or suggesting 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. The section also prohibits a direction, warning or suggestion to the effect that it would be dangerous or unsafe to convict the Defendant on the evidence or that the evidence should be scrutinised with great care.

Section 132BAA of the *Evidence Act* prohibits similar directions, warnings or suggestions in the case of child witnesses. Section 132BAA(c) also prohibits a judge directing, warning, or commenting to the jury about the reliability of a child's evidence solely on account of the child's age.

Sections 103ZZB and 132BAA apply regardless of when the alleged offence occurred, the Defendant was charged, or the proceeding was started (see ss 161 and 163 of the *Evidence Act*).

The common law has considered some classes of witnesses to be, *prima facie*, unreliable. These classes include:

- **Prison informants** - see **Chapter 36 - Out of Court Confessional Statements** and *Pollitt v The Queen* ([1992](#)) [174 CLR 558](#) (see too the discussion in *R v Benedetto* ([2003](#)) [1 WLR 1545](#), [31] – [32], [34] – [38], [48]).
- **Indemnified witnesses** - The need for a warning was found to be particularly acute where the indemnity contained a condition requiring the witness to give evidence in accordance with a statement implicating the Defendant: *R v Falzon (No 2)* ([1993](#)) [1 Qd R 618](#). Contemporary indemnities either give an undertaking not to prosecute for specified offences, subject to the giving of truthful evidence, or provide that statements made in the course of proceedings will not be used in any subsequent prosecution of the witness.
- Witnesses who have had the benefit of a reduced sentence pursuant to s 13A of the *Evidence Act*.

It would be impermissible to direct a jury that any witness is to be regarded as unreliable, or that it would be dangerous or unsafe to convict the Defendant on their uncorroborated evidence, solely because the witness falls into one of the classes identified by the common law.

Section 632(3) may permit a trial judge to identify matters peculiar to the witness and direct the jury they should take these matters into account when assessing the evidence of the witness. If there is a particular reason to question seriously the bona fides of a prosecution witness, such as bad character or hostility or self-interest (see *R v Sinclair & Dinh* ([1997](#)) [191 LSJS 53](#); cf *R v Hayes* ([2008](#)) [QCA 371](#), [84]-[100]), it may be appropriate to draw these matters to the attention of the jury. Other reasons may include a witness whose evidence is important and who has some mental disability which may affect their capacity to give reliable evidence (cf *Bromley v The Queen* ([1986](#)) [161 CLR 315](#)), or a witness whose recollection is likely to be affected by intoxication the result of alcohol or other drugs (cf *Hickey & Komljenovic v The Queen* ([1995](#)) [89 A Crim R 554](#) at [567]-[569] and *R v Morgan* ([1994](#)) [1 VR 567](#)). While each of the mentioned cases turned on a consideration of when a warning of the kind discussed in *Robinson v The Queen* ([1999](#)) [197 CLR 162](#) may be required – a direction now prohibited by the amendments – the reasoning may assist in identifying instances where it is appropriate to draw the peculiar features of a witness to the attention of the jury.

Any directions considered necessary because of delay, and the significant forensic disadvantage which it occasioned for the Defendant, must be in accordance with s 132BA of the *Evidence Act 1977* (Qld). For other directions where there is evidence of

a delay before making a complaint see ss 103ZD (domestic violence offences) and 103ZZ (sexual offences).

In the case of a trial in relation to a sexual offence or domestic violence offence, see also s 94A(4) of the *Evidence Act*. The jury must not be told that the law regards the complainant's evidence as more or less reliable only because of the time taken by the complainant to make a preliminary or other complaint. By s 162 of the *Evidence Act*, s 94A applies to all proceedings whether the alleged offence was committed before or after the commencement of the section.

Also, in the case of sexual offence complainants, a trial judge may make a comment in response to a suggestion by defence counsel to the effect that it would be inherently improbable that the complainant would have behaved as they did if they had been sexually abused.

In *R v Cotic* [2003] QCA 435, the Court of Appeal did not disapprove of a comment by a trial judge along the following lines – although the trial judge in that case told the jury that they could ignore it:

'There are no rules about how people who engage in the sexual abuse of children behave and no rules about how their victims behave. It is dangerous to make assumptions, or apply pre-conceived notions, about how abused children should behave, either generally, or in this particular case'.

See also *R v MCJ* [2017] QCA 11, 52ff.

63.3 Suggested Direction

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(Because the matters which might be peculiar to the witness, and relevant to the assessment of their credit, are variable, there can be no prescribed formula for an appropriate comment pursuant to s 632(3) of the *Criminal Code*. If a comment is appropriate, it will often be sufficient to give it in brief and unelaborated terms).

[The Complainant/witness] is the critical witness in this case. You have heard evidence that they were [identify the matters peculiar to the witness which may bear upon the assessment of their credit, such as intoxication at the time of the events, relevant mental health issues or other matters]. These are things you may take into account when assessing the credibility of the witness and deciding if you accept their evidence.

Suggested directions for certain types of 'suspect' witnesses

(In the case of some other witnesses who are regarded by the common law as unreliable, it may be appropriate to comment on the considerations which could affect the assessment of their credibility. For example):

Indemnified Witness

In this case the prosecution relies on the evidence of [Y], whom, as you have heard, has been given an indemnity against prosecution provided that they gives truthful evidence here. There is a risk, of course, that having been protected from prosecution in that way, [Y] may have an incentive not to depart from the statement they gave to police, whether it is right or wrong, so as not to arouse any suspicions of untruthfulness. And they may wish to ingratiate themselves with the authorities to ensure they maintain their indemnified position. These are things you may take into account when assessing the credibility of the witness and deciding if you accept their evidence.

Witness who has given a s 13A statement

The prosecution relies on the evidence of [Y], who gave a statement to the police which had the effect of reducing their own sentence. Under Queensland sentencing law, sentences may be reduced by the court where the offender undertakes to co-operate with law enforcement authorities by giving evidence against someone else. If an offender receives a reduced sentence because of that sort of co-operation, and then does not co-operate in accordance with [his/her] undertaking, the sentencing proceedings may be re-opened and a different sentence imposed. You can see therefore, that there may be a strong incentive for a person in that position to implicate the Defendant when giving evidence. These are things you may take into account when assessing the credibility of the witness and deciding if you accept their evidence.

Witness with a mental disability

You have heard evidence that [Y] has a long-standing condition of schizophrenia which disposes them to hallucinations and delusions, particularly if they are not keeping up with their prescribed medication. That creates a risk that their evidence might be the result of delusion rather than based in reality. This is something you may take into account when assessing the credibility of the witness and deciding if you accept their evidence.