

Preliminary Complaint

Legislation

4A Criminal Law (Sexual Offences) Act 1978

4A Evidence of complaint generally admissible

- (1) This section applies in relation to an examination of witnesses, or a trial, in relation to a sexual offence.
- (2) Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.
- (3) Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.
- (4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.
- (5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.

Note –

See also the Criminal Code, section 632 and the Evidence Act 1977, section 132BA.

- (6) In this section—
complaint includes a disclosure.
preliminary complaint means any complaint other than—
 - (a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or
 - (b) a complaint made after the complaint mentioned in paragraph (a).

Example—

Soon after the alleged commission of a sexual offence, the complainant discloses the alleged commission of the offence to a parent (**complaint 1**). Many years later, the complainant makes a complaint to a secondary school teacher and a school guidance officer (**complaints 2 and 3**). The complainant visits the local police station and makes a complaint to the police officer at the front desk (**complaint 4**). The complainant

subsequently attends an appointment with a police officer and gives a formal witness statement to the police officer in anticipation of a criminal proceeding in relation to the alleged offence (**complaint 5**). After a criminal proceeding is begun, the complainant gives a further formal witness statement (**complaint 6**).

Each of complaints 1 to 4 is a preliminary complaint. Complaints 5 and 6 are not preliminary complaints.

Section 132BA Evidence Act 1977

132BA Delay in prosecuting offence

- (1) This section applies in relation to a criminal proceeding in which there is a jury.
- (2) The judge may, on the judge's own initiative or on the application of a party to the proceeding, give the jury a direction under this section if the judge is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting an offence the subject of the proceeding.
- (3) For subsection (2), a significant forensic disadvantage is not established by the mere fact of delay in prosecuting the offence.
- (4) In giving the direction, the judge—
 - (a) must inform the jury of—
 - (i) the nature of the disadvantage; and
 - (ii) the need to take the disadvantage into account when considering the evidence; but
 - (b) must not warn or in any way suggest to the jury that—
 - (i) it would be dangerous or unsafe to convict the defendant; or
 - (ii) the complainant's evidence should be scrutinised with great care.
- (5) However, the judge need not give the direction if there are good reasons for not doing so.
- (6) The judge must not, other than under this section, give the jury a direction about the disadvantages suffered by the defendant because of the effects of delay in prosecuting the offence.
- (7) In this section—

delay, in prosecuting an offence, includes delay in reporting the offence.

Commentary

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 at [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 at [37] and *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] QCA 22 at [19]-[35], 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 at [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 [12]) that “The 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 [13]) 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 [23]) 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 [68]), “Evidence by the complainant of a preliminary complaint, if unsupported by the evidence of a complaine, 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*.

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 at [14].

Suggested Directions

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 her/his 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.

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

[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.]

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 does not mean that of necessity you must reject [the complainant's] evidence. Some inconsistency is to be expected, because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time, to tell a slightly different version each time.