

Preliminary Complaint

In this case, there is evidence of the complainant’s preliminary complaint(s)¹ 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.²]

¹ The definition of preliminary complaint is in s 4A of the *Criminal Law (Sexual Offences) Act* 1978. 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 complainee. The Court said (at [68]), “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.”

² *R v HBR* [2017] QCA 193 at [73].

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.³

Evidence of complaint (from or through the complainant and/or from or through the person or persons who received the complaint), in cases involving offences of a sexual nature is admissible as an exception to the general rule that evidence of previous consistent statements is not admissible.⁴

³ This direction derives from *R v Ashley* [2005] QCA 293.

⁴ Section 4A(2), *ibid*. The section overturns the previous law as to what judges can say about fresh complaint to a jury, but does not appear to affect the requirement for a “*Longman*” direction where appropriate; and nor does it appear to specifically affect or prohibit comments by counsel about recent or late, or no, complaint; nor to require a judge to give any positive directions, nor prohibit a judge from performing her/his duty to remind the jury of the arguments of each party. The section reads:

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 interest of justice.
- (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).”

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”.

Use of Preliminary Complaint Evidence

In *R v LSS*,⁵ 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 “[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 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.⁶ Davies JA and Jerrard JA 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...[C]onsistency 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.”⁷

The evidence of complaint must be “about the alleged commission of the offence” and not in relation to uncharged acts: *R v NM* [2013] 1 Qd R 374; *R v PAS* [2014] QCA 289; *R v KAW* [2020] QCA 57 at [33]-[39].

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, 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” (at [26]).

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 should be used, e.g. in relation to a particular count or counts.

⁵ [2000] 1 Qd R 546; [1998] QCA 303 at [15] (citations omitted); see also *Papakosmas v The Queen* (1999) 196 CLR 297; (1999) 73 ALJR 1274 at 1279.

⁶ *R v RH* [2005] 1 Qd R 180 at [13].

⁷ *Ibid* [23].

It bolsters the credit of the complainant and can be used only for that purpose in relation to the specific counts.⁸

The lapse of time in making a complaint may require the trial judge to warn the jury about the danger of convicting without some other supporting evidence.⁹

⁸ *R v LSS* [2000] 1 Qd R 546; [1998] QCA 303 at [14].

⁹ *Jones v The Queen* (1997) 191 CLR 439 at 445 (that is, give a “*Longman* direction”; see the suggested directions at 65.1).