10. Child Witnesses: s 93A Statements

10.1 Legislation

[Last reviewed: December 2024]

Evidence Act 1977 (Qld)

Section 93A – Statement made before proceeding by child or person with an impairment of the mind

Section 99 – Withholding statement from jury room

Section 102 – Weight to be attached to evidence

10.2 Commentary

[Last reviewed: December 2024]

Where a statement admitted pursuant to s 93A is a recorded statement, the jury usually ought to be directed that the evidence is not to be given any greater or lesser weight because it has been received in that way (see for example *R v HCS* [2024] QCA 193).

In *R v Lovell* [2016] QCA 151, [139]-[140], the Court held that where a direction in accordance with s 21AW(2) of the *Evidence Act 1977* (Qld) was given in relation to the pre-recorded evidence of an affected child witness, there was no need in that case for a similar additional direction, expressly in relation to evidence of the same child admitted pursuant to s 93A. However, in *R v HCS* [2024] QCA 193, Davis J, with whom the other members of the Court agreed, referred to the desirability of giving a similar direction in relation to the s 93A recording, even where an appropriate warning was given under s 21AW.

Section 102 of the *Evidence Act 1977* (Qld) provides that when estimating the weight (if any) to be given to a statement admitted pursuant to s 93A, regard is to be had to all the circumstances – including specific matters identified within s 102 – from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement. The provision authorises, in an appropriate case, the giving of directions to a jury on matters relevant to their assessment of the reliability of the evidence, and need be considered, to the extent relevant, in formulating directions to the jury with respect to their consideration of evidence admitted pursuant to s 93A. Such directions will not be required in every case, and no particular form of direction is required (see *R v Flynn* [2010] QCA 254, [56]–[58]). Any direction ought to assist the jury to, and not distract the jury from, focusing on the real issues in the case (see for example *R v HBN* [2016] QCA 341, [27]).

Section 99 of the *Evidence Act 1977* (Qld) permits the judge to withhold a statement admitted pursuant to s 93A from the jury room if there is a risk the jury 'might give the statement undue weight' if given unfettered access to it during deliberations. The discretion must be exercised judicially having regard to relevant considerations (see *R v BEC* [2023] QCA 154, in particular at [147]).

Although tendered as an exhibit, it will usually be inappropriate for a statement admitted pursuant to s 93A to go into the jury room, whereby the jury would have unsupervised access to the contents, and may give undue weight to it as against other evidence (see *R v H* [1999] 2 Qd R 283; *Gately v The Queen* (2007) 232 CLR 208, [95]; *R v BEC* [2023] QCA 154).

While there are points of difference in the consideration of whether a recorded statement and a written statement admitted pursuant to s 93A ought be made available to the jury unsupervised, in the course of their deliberations, similar risks arise for consideration (see *R v BEC* [2023] QCA 154, in particular at [135], [141] and [142]-[147]).

If the statement admitted pursuant to section 93A is permitted to go into the jury room, appropriate warnings to protect against the risk of the jury giving the evidence excessive weight will likely be required. A warning will not be required where such warning would undermine the use sought to be made of the subject evidence by the defence (see for example *R v AGJ* [2024] QCA 124, [59]-[62] and [140]).

See further **Chapter 20 – Tape Recordings, Transcripts and Exhibits** and **Chapter 4B – Where the Jury are to be provided with Transcripts**.

If a judge decides that video-recorded evidence (which is not with the jury in the jury room) should be replayed to a jury, this should occur in open Court with all parties present (see *R v TQ* [2007] QCA 255; (2007) 173 A Crim R 385).

Where the jury ask to rewatch or be reminded of the content of a s 93A statement, the law does not require that a judge dictate to a jury that they also rewatch the cross-examination of the witness (see *R v CCW* [2022] QCA 183, [107]). However, a warning to not give the evidence excessive weight may be required, or at least prudent, and consideration need also be given to reminding the jury of competing evidence, and/or relevant aspects of the defence case. The overarching consideration is whether fairness and balance require such warning or reminder (see for example *R v WBY* [2023] QCA 230, referring to *R v SDL* [2022] QCA 207. See also *R v CCW* [2022] QCA 183).

Where the jury is to be replayed or reminded of evidence, it may also be appropriate to inform the jury at the commencement of the process of what evidence they will be replayed and taken to, and that a verdict will not be accepted until the process has reached its end (see *R v SDL* [2022] QCA 207, [36] referring to *R v Storey* [2021] QCA 265).

10.3 Suggested 93A statement direction

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(This direction is drafted with reference to a recorded conversation between a complainant child and a police officer, that being the most commonly encountered situation where the prosecution will seek to admit a statement pursuant to s 93A. The direction will need be modified to reflect the circumstances**).**

As you know, part of the evidence of the complainant is comprised of [his/her**] recorded conversation with police at the [**place**] police station on [**date**].**

That recording has been played to you as part of the evidence of the complainant.

The presenting of the complainant's evidence in this way comprises the routine practice of the Court. This measure is adopted in every case involving children such as the complainant.

(Consider whether in the circumstances of the case any further direction ought to be given as to matters to be considered by the jury in assessing the reliability of the evidence, as contemplated by section 102 *Evidence Act 1977* (Qld)**).**

10.4 Suggested direction to be given in course of the summing up if it has been decided (for example with the consent of the parties) that a 93A statement is to go into the jury room.

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(Modification will be required if the statement is in written form / is of someone other than the complainant**).**

The video recording of the complainant's evidence [and the transcript**] will be with you when you consider your verdict.**

Ordinarily, these would remain in the courtroom, and are available for you to [view/hear**] in the courtroom, should you wish, during your deliberations. But in this case, both Counsel wish for you to have access to the recording [**and the transcript**] in the jury room, during your deliberations.**

Keep in mind what I said earlier about the transcript. It is someone else's impression of what was said during the recorded interview. The transcript is not evidence and was made available to you as an aid only. It is what you hear on the recording that matters, not what is in the transcript.

Remember that your verdict is to be based on the whole of the evidence. As you will not have all of the other witnesses' evidence with you, in recorded or written form, be careful not to place undue weight on the recorded evidence that is with you because you are able to hear and read it on a number of occasions.

(If a later decision is made, after the completion of the summing up, to allow the jury access to the s 93A statement in the jury room in the course of their deliberations, consider if it would be prudent to also remind the jury of competing evidence, and/or relevant aspects of the defence case**).**