

Evidence of Other Sexual or Discreditable Conduct of the Defendant

Legislation

Note that although the legislation referred to in this chapter concerns evidence of domestic violence only, this chapter does not only deal with evidence of domestic violence (as discreditable conduct). It also deals with evidence adduced to prove the defendant's sexual interest in a complainant, or relationship evidence led to prove something else (such as, for example, hostility between the defendant and the complainant/deceased).

Evidence Act 1977 (Qld)

Division 1A Evidence of domestic violence

103CA What may constitute evidence of domestic violence

- (1) For this part, evidence of domestic violence may include, but is not limited to, evidence of any of the following matters—
 - (a) the history of the domestic relationship between a person and an intimate partner or family member of the person, including—
 - (i) domestic violence committed by the intimate partner or family member against the person; or
 - (ii) domestic violence committed by the person against the intimate partner or family member;
 - (b) the cumulative effect of domestic violence, including the psychological effect, on a person or an intimate partner or family member of the person affected by the violence;
 - (c) social, cultural or economic factors that affect a person, or an intimate partner or family member of the person, who has been affected by domestic violence;
 - (d) responses by relatives, the community or agencies to domestic violence, including further violence that may be used by an intimate partner or family member to prevent, or in retaliation for, any help-seeking behaviour or use of safety options by a person;
 - (e) ways in which social, cultural or economic factors have affected any help-seeking behaviour undertaken by a person, or the safety options realistically available to the person, in response to domestic violence;
 - (f) ways in which domestic violence by an intimate partner or family member towards a person, or the lack of safety options, was exacerbated by inequities experienced by the person, including,

for example, inequities associated with race, poverty, gender identity or expression, sex characteristics, disability or age;

- (g) the general nature and dynamics of relationships affected by domestic violence, including the possible consequences of separation from a person who commits domestic violence;
 - (h) the psychological effect of domestic violence on people who are or have been in a relationship affected by domestic violence;
 - (i) social or economic factors that affect people who are or have been in a relationship affected by domestic violence.
- (2) This section does not limit *the Domestic and Family Violence Protection Act 2012*, section 8(3).

103CB Evidence of domestic violence

- (1) Relevant evidence of domestic violence is admissible as evidence in a criminal proceeding.
- (2) Without limiting subsection (1), the evidence of domestic violence may relate to—
 - (a) the defendant; or
 - (b) the person against whom the offence was committed; or
 - (c) another person connected with the proceeding.

103CC Expert evidence of domestic violence

- (1) Expert evidence about domestic violence is admissible in a criminal proceeding.
- (2) Evidence given by an expert may include—
 - (a) evidence about the nature and effects of domestic violence on persons generally; and
 - (b) evidence about the effect of domestic violence on a particular person who has been subjected to domestic violence.
- (3) For this section, an expert on the subject of domestic violence includes a person who can demonstrate specialised knowledge, gained by training, study or experience, of a matter that may constitute evidence of domestic violence.

103CD Ultimate issue and common knowledge rules abrogated

Evidence of an expert's opinion given under section 103CC is not inadmissible only because the opinion is about—

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

See Division 1 for the definitions for Part 6A.

Note in particular the definition of “domestic violence” and “domestic relationship” in Schedule 3 of the *Evidence Act 1977*:

domestic violence see the *Domestic And Family Violence Protection Act 2012*, section 8

domestic relationship means a relevant relationship under the *Domestic And Family Violence Protection Act 2012*, section 13

Commentary

This section deals with the following categories of evidence:

- (a) Evidence which is adduced to prove a sexual interest of the defendant in the complainant.
- (b) Evidence of the relationship between the defendant and the complainant which is adduced for another purpose.
- (c) Evidence of a history of a domestic relationship, which is admitted under section 103CB of Part 6A of the *Evidence Act 1977* (Qld).

(Note: section 103CB was introduced by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*. That Act repealed section 132B of the *Evidence Act 1977*, which allowed for relevant evidence of a domestic relationship to be admitted as evidence in criminal proceedings for the offences defined in Chapter 28 to 30 of the Criminal Code only. The explanatory notes to the bill explain that the Women’s Safety and Justice Taskforce concluded that there was no logical reason to restrict the admissibility of evidence of domestic violence to proceedings for a limited range of offences only. Also, evidence of domestic violence is admissible, whether it relates to the defendant, the person against whom the offence was committed, or another person connected with the proceeding.)

The directions to the jury will differ according to the category of the evidence. In sexual offence cases, the purpose of the tender will often be obvious, such as where it is evidence of other sexual acts by the defendant involving the same complainant. When the purpose is less obvious, it should be discussed with counsel before it is tendered, because if it is in the first category, its admissibility will depend upon the test in *Pfennig v The Queen* (1995) 182 CLR 461 (“*Pfennig*”) at 483, as was confirmed in *R v Bauer* (2018) 92 ALJR 846, at 861-862, [52]. It is possible that the evidence may be relevant for more than one reason, which again should be revealed by a discussion with the prosecutor: *HML v The Queen* (2008) 235 CLR 334 at 387 [123] (“*HML*”).

Where a *Longman* direction, see *Longman v The Queen* (1989) 168 CLR 79, is appropriate for the charged acts, it would usually be appropriate for other conduct which is relied upon to prove a sexual interest in the complainant. In such cases, the generalised nature of the evidence about other conduct, as well as the delay, will be

relevant in warning the jury. The warning about this other conduct of the defendant can be added to the *Longman* direction at No 69.

(a) Evidence to prove a sexual interest of the defendant in the complainant.

Evidence of other sexual conduct of a defendant towards the complainant is sometimes referred to as evidence of uncharged acts. However it is best to avoid the term “uncharged acts” in the summing up, because the term might invite speculation about why no charges were laid: *HML* ([2008](#)) [235 CLR 334](#) at 389 [129].

In single complainant cases, the rationale for the admission of evidence of other sexual conduct by the defendant towards the complainant is that, at least when taken in combination with other evidence, it may establish the existence of a sexual attraction to the complainant and a willingness to act on it, which assists to eliminate doubts that might otherwise attend the complainant’s evidence of the charged acts: *Bauer v The Queen* ([2018](#)) [92 ALJR 846](#) at 860-861 [49] (“*Bauer*”); *HML* ([2008](#)) [235 CLR 334](#) at 352-353 [6]-[7], 354 [11], 358-359 [25]-[27], 382-384 [103], [109]-[110], 425-426 [277]-[278], 478-480 [425]-[433], 494-495 [492]-[493], 500-502 [506], [510], [512].

To be admissible in single complainant cases (when the conduct involves only that complainant), it is unnecessary that the uncharged acts have about them some special, particular or unusual feature, of the kinds described in *IMM v The Queen* ([2016](#)) [257 CLR 300](#) and *Hughes v The Queen* ([2017](#)) [92 ALJR 52](#), as the Court held in *R v Bauer* ([2018](#)) [92 ALJR 846](#) at 860 [49]. A sexual interest in the complainant may be proved also by evidence of other conduct of the defendant which is not itself a sexual act. See for example, *HML* ([2008](#)) [235 CLR 334](#) at [172]-[174] and *R v Douglas* ([2018](#)) [QCA 69](#). Evidence of statements by the defendant in a pretext telephone call may be such as to evidence a sexual interest in the complainant, because of apparent admissions by the defendant in the conversation about other sexual conduct towards the complainant: see for example *R v IE* ([2013](#)) [QCA 291](#) and *R v BCQ* ([2013](#)) [240 A Crim R 153](#); [2013] QCA 388.

On one view, it would seem preferable that the jury be instructed not to act upon evidence of a sexual interest unless they are satisfied of that fact beyond reasonable doubt. That being the majority view in *HML* (see, particularly, at [247]); cf *Bauer* at 869 [86], which referred to the position in New South Wales where “tendency” evidence of this kind is admissible on a less demanding test than common law test according to *Pfennig*. In *HML*, Hayne J (Gummow and Kirby JJ agreeing) held that the standard of beyond reasonable doubt had to be applied in order to “reflect... the legal basis for ... admission [of the evidence]”: at [132]. On the other hand, in *Bauer*, after referring to the practice in New South Wales which should no longer be followed, the High Court said at 869 [86]:

“Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt.”

Moreover, the Court also said at 868 [80] that “[o]rdinarily, proof of the accused’s tendency to act in a particular way will not be an indispensable intermediate step in reasoning to guilt”.

Where the defendant is charged with an offence under s 229B of the *Criminal Code* (previously called “Maintaining a sexual relationship with a child” but now called “Repeated sexual conduct with a child” as per s 16 *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*), the evidence of a sexual act may be directly relevant in the proof of that charge and it may also be relevant to prove a sexual interest upon which the defendant was prepared to act: *R v UC* [2008] QCA 194 at [3].

In cases in this category, the appropriate directions to the jury should be moulded to the particular issues of the case. Detailed guidance for directions of this kind is contained in the judgment of Hayne J in *HML* at [123]-[133].

(b) Relationship evidence not admitted to prove a sexual interest

In *HML*, Kiefel J explained that “relationship evidence” is admissible for two purposes. One is to show the sexual interest of the defendant in the complainant, making it more likely that the defendant committed the offences (category (a) above). The other purpose is the more limited one of “providing answers to questions which might naturally arise in the minds of the jury, such as questions about the complainant’s reaction, or lack of it, to the offences charged, or questions about whether the offences charged were isolated events”: *HML* (2008) 235 CLR 334, at 502 [513]. Kiefel J cautioned, at 502 [512], [513], that where the evidence is admitted for this purpose, a jury must be directed as to the limits on the use to which the evidence can be put, and where it is not considered that a direction could overcome the potential for misuse of the evidence, it should not be admitted on this basis. See also s 130 of the *Evidence Act 1977* (Qld). If the evidence of other acts is tendered for *both* purposes, the more stringent test for admissibility (*Pfennig*) must necessarily be applied. *Ibid* at 499 [503].

(c) Evidence of violence in a domestic relationship

See Part 6A of the *Evidence Act 1977*, especially section 103CB.

If there is evidence of violence by the defendant, this may explain the relationship between the defendant and the complainant, and why he or she was deterred from complaining. It may also explain a non-consensual submission to sexual offending, because of fear: *R v R* (2003) 139 A Crim R 371; [2003] QCA 285 at [31], [43]-[44] and [59]. In cases of that kind, the purpose of the evidence should be explained to the jury, and they should be told that if this violence did occur, they should not conclude from it that the defendant was a person who was likely to have committed the offences charged.

A “domestic relationship” means a relevant relationship under the *Domestic and Family Violence Protection Act 2012* (Qld), s 13. In cases of this kind, the *Pfennig* test of admissibility does not apply: *Roach v R* (2011) 242 CLR 610 at 621 [30], [37]-[39]; 627 [55].

Importantly however, s 103CB refers to *relevant* evidence, and the prosecution must explain the relevance of the evidence to the particular case. It may be relevant, although its purpose is to demonstrate that the defendant had a propensity to commit the act of violence against the complainant which is the subject of the charge: *Roach* at 625 [45]. Except where the evidence constituted an indispensable link in the chain of proof, the conduct, which is the subject of the history of the domestic relationship, need not be proved beyond reasonable doubt: *Roach* at 626 [49].

The necessity for the prosecution to identify the purpose of the evidence and the importance of clear directions by the trial judge was emphasised in *Roach* (French CJ, Hayne, Crennan and Kiefel JJ) at 625 [47]:

“The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true.”

In *R v LBD* [\[2023\] QCA 266](#) Mullins P (Bond JA and Crow J agreeing) said at [52]:

“Where there are multiple uncharged acts of violence relied on to establish propensity of a defendant to commit offences of different types, a trial judge would usually assist the jury by identifying which of the uncharged acts, if accepted by the jury, would relate to which of the offences.”

Her Honour set out at [53] the matters that need to be covered in a direction dealing with relationship evidence as context and as evidence of propensity to commit acts of violence.

Suggested Direction

The defendant is charged with the [number] offences set out in the indictment.

The prosecution has led evidence of the conduct with which the defendant is charged. In addition, the prosecution has led evidence of other incidents in which the complainant says that there was sexual conduct by the defendant towards him/her.

[Describe the evidence upon which the prosecution relies in this respect.]

The prosecution relies on this other evidence to prove that the defendant had a sexual interest in the complainant and was prepared to act upon it.

The prosecution argues that this evidence makes it more likely that the defendant committed the offence [or offences] with which he/she is charged.

You can only use this other evidence if you are satisfied beyond reasonable doubt that the defendant did act as that evidence suggests, and that the conduct demonstrates that he/she had a sexual interest in the complainant which he/she was willing to pursue.

If you are not satisfied of those things, beyond reasonable doubt, then that may affect your assessment of the complainant's evidence about the acts which are the subject of the offences with which the defendant is charged. [As I have already explained or as I will explain later.] (See Chapter 34 for a *Markuleski* direction.)

If you do not accept that this evidence proves, to your satisfaction, that the defendant had a sexual interest in the complainant, you must not use the evidence in some other way to find that the defendant is guilty of the offences with which he/she is charged.

And if you are satisfied that one or more these other acts did occur [or there was this other conduct] and that this conduct does demonstrate a sexual interest of the defendant in the complainant, it does not follow that the defendant is guilty of the offence/offences which are charged. You cannot infer only from the fact that this other conduct occurred that the defendant did the things with which he/she is charged. You must still decide whether, having regard to the whole of the evidence, the offence(s) charged has/have been proved to your satisfaction beyond reasonable doubt.

Where relationship evidence is admitted for context and not to prove sexual interest, a direction could be given as follows:

You have heard evidence of other conduct which has taken place between the defendant and the complainant, which the prosecution says is necessary to explain what occurred in the incidents which are the subject of the alleged offences. You must understand that the relevance of this

evidence is limited. If you accept this evidence, it does not make it more probable that the defendant committed the alleged offence(s). This evidence is relevant only to answer questions which you might naturally have about the background to the incidents which the prosecution allege were the charged offences.

Where relationship evidence is received both for context and to prove sexual interest an additional direction could be given as follows:

The prosecution says that if you are satisfied that these other acts occurred, they would also assist in your understanding of the background to the incidents which are the subject of the alleged offences. It is for you to decide whether the evidence assists you in that way. But you cannot use the evidence at all unless you are satisfied, beyond reasonable doubt, that the other act(s) occurred. Again, you cannot infer only from the fact that the other act(s) occurred that the defendant did the things with which he/she is charged.

Where evidence of a violent relationship is received, subject to the facts of a particular case, a direction might be given as follows:

The defendant is charged with [one count of (eg) assault occasioning bodily harm]. The prosecution has led evidence of the history of the relationship between the defendant and the complainant, in which it is said that the defendant did these things [detail]. The prosecution relies upon this evidence to show that the defendant had a propensity or tendency to commit acts of violence against the complainant in circumstances where [detail]. It is for you to decide whether you are satisfied that this other conduct occurred and, if so, what you make of it. You must not decide that the defendant is guilty from only this evidence. If you are not satisfied that it shows a propensity or tendency to commit an offence of the type which is alleged in this case, you must not use it to assess whether the defendant is guilty of the offence charged. You may think that if the defendant did these other things it reflects poorly upon his character; but that does not matter if you do not think that it demonstrates a propensity to commit this type of offence.

If evidence of domestic violence is relevant to another purpose, such as explaining why the complainant failed to complain or why they submitted to the alleged criminal conduct of the defendant without protest, then a direction must be crafted accordingly.

Note: counsel may request relevant jury directions about domestic violence as provided for in Division 3 of Part 6A of the *Evidence Act 1977* (see s 103T). A trial judge may give relevant directions from that Division of their own initiative (see s 103V). The content of those directions is set out in the provisions themselves: see Subdivision 2 of Part 6A.

See also chapter 52A of this Bench Book.