Evidence of Other Sexual or Discreditable Conduct of the Defendant

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 s 132B of the *Evidence Act* 1977 (Qld).

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.[1]

Where a *Longman* direction[2] 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.

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.[3]

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.[4]

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,

[1] *HML v The Queen* (2008) 235 CLR 334 at 387 [123] ("*HML"*).

[2] *Longman v The Queen* (1989) 168 CLR 79 (*"Longman"*).

[3] *HML* (2008) 235 CLR 334 at 389 [129].

[4] *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].

particular or unusual feature.[5] 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.[6]

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.[7] 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:

> "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."[8]

Moreover, the Court also said 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."[9]

Where the defendant is charged with an offence under s 229B of the *Criminal Code* (maintaining an unlawful sexual relationship), 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.[10]

In cases in this category, the appropriate directions to the jury will be as follows, as 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].

> **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.]**

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[5] 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].

[6] 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.

[7] 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].

[8] *R v Bauer* (2018) 92 ALJR 846 at [86].

[9] Ibid [80].

[10] *R v UC* [2008] QCA 194 at [3].

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.][11]

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.

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 one 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."[12] Kiefel J cautioned that where the evidence is admitted for this purpose, a jury must be directed as to the limits on the

[11] See Direction 34 for a *Markuleski* direction.

[12] *HML* (2008) 235 CLR 334, at 502 [513].

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.[13]

Where evidence is admitted *only* for this purpose, then 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.**

If the evidence of other acts is tendered for *both* purposes, the more stringent test for admissibility (*Pfennig*) must necessarily be applied.[14] In such a case, a direction along the lines of that in category one would be given, together with a statement such as this:

> **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.**

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.[15] 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 different direction is required in cases within the third category, where the evidence is admitted under s 132B of the *Evidence Act* 1977 (Qld).

Evidence of a domestic relationship, admitted under s 132B of the Evidence Act

In a criminal proceeding against a person for an offence defined in chapters 28 to 30 of the *Criminal Code*, s 132B of the *Evidence Act* provides that relevant evidence of the history of the domestic relationship between the defendant and the complainant is admissible evidence. 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

[13] Ibid at 502 [512], [513]. See also s 130 of the *Evidence Act* 1977 (Qld).

[14] Ibid at 499 [503].

[15] *R v R* (2003) 139 A Crim R 371; [2003] QCA 285 at [31], [43]-[44] and [59].

does not apply.[16] Importantly however, s 132B 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.[17] 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.[18]

Again, 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.**

[16] *R v Roach* (2009) 213 A Crim R 485 at 490 ("*Roach"*); [2009] QCA 360 at [14].

[17] *Roach* at 492-493 [19]-[23].

[18] *Roach* at 495 [30] applying *Shepherd v The Queen* (1990) 170 CLR 573.