Maintaining A Sexual Relationship With a Child s 229B (Offences between 3 July 1989 and 1 July 1997)

The prosecution must prove that:

1. **The defendant did an act defined as an offence of a sexual nature in relation to the child on three or more occasions. In this case the prosecution relies on the offences of [**as pleaded in the indictment as substantive offences OR, where the prosecution is proceeding only with the offence of maintaining,[1] the offences of (as particularised by the prosecution)**]. These acts are all offences of a sexual nature.[2] [**Here refer to the elements required to be proved for each discrete sexual offence[3] OR if the offences are charged in the indictment as substantive offences, refer the jury to the directions already given in relation to them**].**

   If the prosecution has proved that the defendant did an act on three or more occasions, it does not matter that the dates or exact circumstances of those occasions are not disclosed by the evidence.

   Before you can be satisfied of this element, you must all agree as to the same three or more offences.[4]

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1 As a result of the High Court's judgment in *KBT v The Queen* (1997) 191 CLR 417 at 423, the circumstances in which the prosecution will proceed with a maintaining charge without specified substantive offences on the same indictment, will be rare.

2 An offence defined in s 210(1)(e) or (f) (exposing a child to an indecent object, film etc or taking an indecent photograph or visual image of a child) cannot constitute an offence of a sexual nature for the purpose of establishing any of the three occasions necessary. In *R v Bradfield* [2012] QCA 337, the conviction was quashed because the directions did not distinguish between the counts on the indictment which related to sexual acts and those which did not, leaving open the possibility that a jury member may have convicted on the basis of an offence of the latter kind.

3 It may be more logical and helpful to the jury to direct as to the elements of any substantive offences before giving directions on the maintaining charge. Such an approach would allow the jury to understand what is meant by "an offence of a sexual nature" and also the direction on the meaning of "unlawful" when considering the directions on this offence.

4 *KBT at* 423. In *R v S* [1999] 2 Qd R 89, a case in which the complainant gave evidence that the appellant had engaged in certain conduct every night for 5 months, the Court of Appeal held (distinguishing *KBT*) that the failure of the trial judge to instruct the jury as to the need to agree on the commission of the same three acts would not have made a difference. Again in *KRM v The Queen* (1999) 105 A Crim R 437, 438, the Victorian Court of Appeal distinguished *KBT* on the basis of the identical nature of the acts alleged by the complainant, notwithstanding that she was unable to specify separate occasions. An appeal to the High Court was unsuccessful; but there was no ground of appeal argued in relation to the failure of the trial judge in the circumstances of that case, to direct the jury that they must all agree on the same three acts: *KRM v The Queen* (2001) 206 CLR 221.

If you cannot be satisfied of the same three or more occasions, the charge of maintaining has not been established.

2. That an unlawful relationship of a sexual nature has been maintained.[5]

[5] It is of concern whether the offence is simply established by the proof of the three separate occasions or whether something more in terms of a continuous relationship also needs to be proved. Would proof of three occasions separated by long periods of time be sufficient?

In *R v Kemp (No. 2)* [1998] 2 Qd R 510, Macrossan CJ, 511 said:

> "In the general aspect of its case, the Crown will have to prove that between the complainant and the accused there existed a relationship which had an unlawful sexual nature. Use of the term 'relationship' implies a continuity of contact in which both parties are involved; the sexual element will be the particular character of the relationship which will appear. Evidence of conduct occurring between the two parties, if it pointed to the existence of a sexual character in their relationship during the specified period, would be direct evidence of an aspect of this offence."

Pincus JA, 512:

> "The subsection (s 229B(1A) now s 229B(2)) does not say, nor imply, that the offence of maintaining an unlawful relationship must necessarily be held proved if the three acts mentioned in subs [(2)] are proved; it is easy to imagine circumstances in which those three acts could be proved without necessitating the conclusion that there was such a relationship as the section contemplates."

Mackenzie J, 518:

> "The offence created by s 229B is unusual in that it combines the requirements of proving at least some degree of habituality (maintaining a sexual relationship) and of proving at least three acts constituting an offence of a sexual nature, committed during the period over which it is alleged that the sexual relationship was maintained. Both these elements must be proved beyond reasonable doubt. The offence is neither an offence completed upon the commission of three discrete acts of a sexual nature, nor an offence defined solely in terms of a course of conduct or state of affairs. It combines elements of both."

In *R v S* [1999] 2 Qd R 89, the Court of Appeal noted, 91:

> "The statement in the joint judgment in *KBT* that 'the actus reus of the offence is as specified in subsection (1A) rather than maintaining an unlawful sexual relationship' may, with respect, be capable of producing a somewhat surprising result in a case where, for example, the three acts in question all occurred in the course of the same day… It would in those circumstances be difficult to regard the accused as 'maintaining a sexual relationship', according to the natural meaning of those words, over so short a period."

Some direction on the meaning of the term relationship needs to be given so that the jury are told of this additional feature of the offence. The trial judge in *KRM v The Queen* (2001) 206 CLR 221 told the jury:

> "Now, relationship is a position where one person holds with respect to another, on account of some social or other connection between them and 'maintain' is to continue, to carry on, or keep up. The Crown must therefore prove an offence of an ongoing nature."

Some of the High Court thought this might have been overly generous to the accused but some direction is necessary that it must be proved that a relationship existed.

The suggested direction should be expanded to include the necessity of proving a "relationship" involving continuity or habituality of conduct.

3. **That the relationship of a sexual nature was unlawful – that is, it was not justified, authorised or excused by law.**[6]

4. **That the defendant maintained such a relationship with the child.**

   Maintained carries its ordinary meaning. That is carried on, kept up or continued. It must be proved that there was an ongoing relationship of a sexual nature between the defendant and the complainant. There must be some continuity or habituality of sexual conduct, not just isolated incidents.

5. **That the defendant was an adult – defined as a person of or over the age of 18 years.**

6. **That the complainant was a child; that is, under 16.**[7]

If the prosecution is relying on evidence of other alleged sexual conduct of the defendant which is not the subject of a specific charge, then the trial judge should have regard to the joint judgment of Fitzgerald P and Shepherdson J in *Kemp* [1997] 1 Qd R 383, and the judgment of the Court of Appeal in *Kemp (No. 2)* [1998] 2 Qd R 510, and consider giving a further direction in terms set out below. See also *HML v R* (2008) 235 CLR 334; [2008] 82 ALJR 723 and the directions concerning Evidence of other Sexual (or violent) Acts or other "Discreditable Conduct" at No. 66.1.

It may also be appropriate to give a *Longman* warning: see discussion under *Longman* Direction.

If the prosecution does lead such evidence in a case in which it also relies on specific offences charged in the indictment to prove the charge of maintaining, it is suggested that a further direction be given to the jury in these terms.

> **In this case, as well as the specific counts in the indictment, the prosecution relies on the evidence of the child of other alleged acts of a sexual nature to establish that the defendant maintained a sexual relationship with the child. The child has not been able to be specific about when or under what circumstances those acts occurred.**
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> **If you have a doubt about the specific offences then you should only convict the defendant on the basis of the evidence of the other alleged acts if after carefully**

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[6] In relation to the direction on "unlawful", although it is difficult to imagine a situation where a sexual relationship with a child could be authorised, justified or excused by law (except, perhaps, where the parties were married), it is appropriate, out of an abundance of caution, to give the usual direction as to the meaning of the term.

[7] If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the defendant believed on reasonable grounds that the child was of or above the age of 16 years at the commencement of the period in which the defendant maintained the relationship (s 229B(1D)). See also s 229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

scrutinising the evidence of the child you are satisfied beyond reasonable doubt that the defendant did these acts during the period alleged in the indictment.[8]

A reasonable doubt with respect to the complainant's evidence on any specific count should be taken into account and considered by you in your assessment of the complainant's credibility generally; however, it remains a matter for you as to what evidence you accept and what evidence you reject.[9]

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8 This form of direction attempts to reconcile the judgments in *Kemp* and *Kemp (No 2)*.

9 See *R v Markuleski* (2001) 52 NSWLR 82, *R v M* [2001] QCA 458, *R v S* (2002) 129 A Crim R 339, [2002] QCA 167 and *R v D* [2002] QCA 445. See directions at No 34.