

Directions About Domestic Relationships and Domestic Violence

Legislation

The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* inserted a new part 6A into the *Evidence Act 1977*. The explanatory notes dealing with the new part 6A appear under the heading “Commentary” below.

This chapter deals only with Part 6A Division 3: Jury directions related to domestic violence.

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Subdivision 1 – General matters

103T - Request for direction to jury about domestic violence

(1) This section applies in relation to a criminal proceeding that is a trial by jury if domestic violence is an issue in the proceeding.

(2) The prosecution or defence may, at any time during the proceeding, ask the judge to direct the jury about domestic violence generally by informing the jury

about all or some of the matters mentioned in subdivision 2, other than section 103ZA.

(3) The judge may give the jury the requested direction unless there are good reasons for not doing so.

103U - Request for direction to jury about self-defence in response to domestic violence

(1) This section applies in relation to a criminal proceeding that is a trial by jury if self-defence in response to domestic violence is an issue in the proceeding.

(2) The defence may, at any time during the proceeding, ask the judge to direct the jury about self-defence in response to domestic violence by informing the jury about—

(a) the matters mentioned in section 103ZA; or

(b) all or some of the other matters about domestic violence mentioned in subdivision 2.

(3) The judge may give the jury the requested direction unless there are good reasons for not doing so.

103V - Judge may direct jury about domestic violence on own initiative

(1) This section applies in relation to a criminal proceeding that is a trial by jury if domestic violence is an issue in the proceeding.

(2) The judge may, on the judge's own initiative and in the interests of justice, inform the jury about—

(a) if self-defence in response to domestic violence is an issue in the proceeding—the matters mentioned in section 103ZA; or

(b) all or some of the other matters about domestic violence mentioned in subdivision

103W - Direction may be given before evidence is adduced and may be repeated

(1) A judge may give a direction under section 103T, 103U or 103V before any evidence is adduced in a proceeding.

(2) The judge may also repeat the direction at any time during the proceeding.

103X - Application of subdivision 2 to trial by judge or magistrate sitting alone

(1) This section applies to a criminal proceeding that is a trial by a judge or magistrate sitting alone.

(2) The court's reasoning with respect to any matter mentioned in subdivision 2 must, to the extent the court thinks fit, be consistent with how a jury would be directed about the matter under subdivision 2 in the particular case.

103Y - No limit of court's duty to direct jury

This division does not limit the matters the court may direct the jury about, including in relation to evidence given by an expert witness.

Subdivision 2 – Content of jury directions about domestic violence

103Z - Content of general direction about domestic violence

(1) The judge in a criminal proceeding who is directing the jury about domestic violence generally may, if relevant, inform the jury that domestic violence—

(a) is not limited to physical abuse and may, for example, include sexual abuse, psychological abuse or financial abuse; and

(b) may amount to violence against a person even though it is immediately directed at another person; and

(c) may consist of a single act; and

(d) may consist of separate acts that form part of a pattern of behaviour that can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial.

(2) If relevant, the judge may also inform the jury that experience shows that—

(a) people may react differently to domestic violence and there is no typical response to domestic violence; and

(b) it is not uncommon for a person who has been subjected to domestic violence to stay with an abusive partner after the domestic violence, or to leave and then return to the partner; and

(c) it is not uncommon for a person who has been subjected to domestic violence not to report domestic violence to police or seek assistance to stop domestic violence; and

(d) decisions made by a person subjected to domestic violence about how to address, respond to or avoid domestic violence may be influenced by a variety of factors; and

Note— See also section 103ZC in relation to the judge informing the jury about factors that may influence a person’s decision-making about how to address, respond to or avoid domestic violence.

(e) it is not uncommon for a decision to leave an intimate partner who is abusive, or to seek assistance, to increase apprehension about, or the actual risk of, harm.

103ZA - Direction about self-defence in response to domestic violence

(1) If the judge in a criminal proceeding is directing the jury about self-defence in response to domestic violence, the judge may inform the jury that—

(a) self-defence is, or is likely to be, an issue in the proceeding; and

(b) as a matter of law, evidence of domestic violence may be relevant to determining whether the defendant acted in self-defence; and

(c) evidence in the trial is likely to include evidence of domestic violence committed by the victim against the defendant or another person whom the defendant was defending.

(2) The judge may also inform the jury that, as a matter of law, evidence that the defendant assaulted the victim on a previous occasion does not mean that the defendant could not have been acting in self-defence in relation to the offence charged.

103ZB - Examples of behaviour, or patterns of behaviour, that may constitute domestic violence

The judge in a criminal proceeding who is directing the jury about domestic violence generally may also inform the jury that behaviour, or patterns of behaviour, that may constitute domestic violence include, but are not limited to, the following—

- (a) placing or keeping a person in a dependent or subordinate relationship;
- (b) isolating a person from family, friends or other sources of support;
- (c) controlling, regulating or monitoring a person's day-to-day activities;
- (d) depriving a person of, or restricting a person's, freedom of movement or action;
- (e) restricting a person's ability to resist violence;
- (f) frightening, humiliating, degrading or punishing a person, including punishing a person for resisting violence;
- (g) compelling a person to engage in unlawful or harmful behaviour.

103ZC - Factors that may influence how a person addresses, responds to or avoids domestic violence

(1) This section applies if the judge in a criminal proceeding who is directing the jury about domestic violence generally informs the jury about the matters mentioned in section 103Z(2)(d).

(2) The judge may also inform the jury that decisions made by a person subjected to domestic violence, about how to address, respond to or avoid domestic violence, may be influenced by matters including, for example—

- (a) the domestic violence itself; or
- (b) social, cultural, economic or personal factors, or inequities experienced by the person, including, for example, inequities associated with race, poverty, gender, disability or age; or
- (c) responses by family, the community or agencies to the domestic violence or to any help-seeking behaviour or use of safety options by the person; or
- (d) the provision of, or failure in the provision of, safety options that might realistically have provided ongoing safety to the person, and the

person’s perceptions of how effective those safety options might have been to prevent further harm; or

(e) further violence, or the threat of further violence, used by a family member to prevent, or in retaliation for, any help-seeking behaviour or use of safety options by the person.

Commentary

Relevant evidence of domestic violence is admissible as evidence in a criminal proceeding: s 103CB of the *Evidence Act 1977*. See also [chapter 70](#) of this Bench Book.

Directions about domestic violence may be given if the prosecutor or defence ask for them to be given – unless there are good reasons for not doing so.

Directions about self-defence in response to domestic violence may be given if the defence asks for them to be given – unless there are good reasons for not doing so.

The judge retains a power to direct the jury about domestic violence, including self-defence in response to it, on the judge’s own initiative.

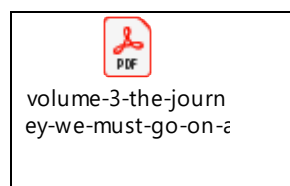
Directions may be given before the evidence is adduced.

The directions may be repeated.

The sections themselves set out the content of the directions required.

The explanatory notes to the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022* read in combination with Volume 3 of the “*Hear her Voice*” report of the Women’s Safety and Justice Taskforce, explain the reasons for the amendments to the *Evidence Act 1977*. For convenience, relevant extracts from the report and the explanatory notes are reproduced below.

The whole of Volume 3 of the report may be found [here](#). The discussion from page 289 is relevant:



From the Taskforce:

Cases involving sexual offences or those committed in a domestic and family violence context often rely largely or entirely on evidence from the victim. This means that the jury must make an assessment about whether the victim is telling the truth and they are therefore satisfied of the guilt of the accused person beyond reasonable doubt. Therefore, it is important that jurors evaluate the competing narratives based upon evidence in a trial, without being influenced by incorrect stereotypes and misconceptions. Judicial directions addressing this are necessary, as they ensure that juries make decisions based upon a correct foundation about the nature of domestic and family violence.

From the explanatory notes:

Amendments to the Evidence Act 1977

Jury directions

The Taskforce found that many members of the community do not understand how the dynamics of DFV may impact on the behaviour of victims of DFV, such as why a victim of DFV may remain in an abusive relationship. The Bill therefore provides the court with a discretion to give jury directions that address misconceptions and stereotypes about domestic violence. The amendments seek to enable juries and judicial officers to be better informed and able to consider evidence of domestic violence that has been raised during a trial. Consistent with the Taskforce’s recommendation 65, these provisions have been modelled upon the relevant provisions in the Western Australian Act.

In *Kritskikh v Director of Public Prosecutions* [2022] WASC 130 Hall J said of the equivalent WA provisions, “The evident purpose of these provisions is to ensure that common misconceptions about the way in which victims of family violence may behave, for example that they will promptly report family violence to the police or will not remain with the perpetrator of violence, are dispelled and not taken into account in the reasoning process [of fact finders]”.

The construction of the Western Australian equivalent provisions was considered by Mazza and Mitchell JJA in *CDO v The State of Western Australia* [2022] WASC 58. In particular, their Honours considered whether the reference to “criminal proceedings in which family violence is an issue” comprehended criminal proceedings where the alleged family violence constituted the charged offence or offences.

In that case, it was the prosecutor who asked for the direction.

The only evidence of family violence came from the complainants in their evidence of the charged acts. The appellant’s trial counsel objected to a family violence direction on the basis that it was unnecessary (because the jury were

already receiving a direction about delay) and that the giving of both directions (delay and family violence) would unfairly bolster the complainants' credibility. The appellant argued that family violence *other than that which is alleged to constitute the charged offence* was required to ground a request for a family violence direction. That argument was rejected. At [169], their Honours said:

... In a case where family violence constitutes the charged conduct as well as a pattern of behaviour that gives context to the evidence of the charged conduct, the section does not provide for a family violence direction to be confined to the latter conduct. Further, the directions about not uncommon reactions and responses to family violence will be most obviously directed to the jury's assessment of a complainant's reaction to charged conduct, and with whether the complainant's conduct after the charged offending is consistent with the charged conduct having occurred. That context counts against an objective legislative intention to exclude charged conduct from the scope of a family violence direction.

Suggested directions

Judges should refer to the direction content stipulated in division 3, part 6A, *Evidence Act 1977* (Qld).

Judges may wish to compare the directions considered in *R v Cotic* [2003] QCA 435, which was endorsed by the Court of Appeal, decades ago, as an appropriate comment or suggestion by the trial judge to the jury that they should avoid pre-conceived notions of how a complainant should behave.