Commentary

This direction is necessary where evidence of "distressed condition" is led in support of a complainant's evidence that he or she was raped or sexually assaulted. In *R v Rutherford* [2004] QCA 481, the trial judge was held to have erred by not giving an appropriate direction where evidence of this kind had been led.

Until May 2022, the direction included a statement to the effect that it was customary for judges to warn juries that they should attach little weight to distressed condition because it can be easily pretended. In *R v SDQ* [2022] QCA 91, Sofronoff P pointed out at [29]-[30] that such a direction is wrong because the proposition was rejected in *R v Roissetter* [1984] 1 Qd R 477 at 482. That part of the direction has since been deleted.

Whether evidence of distress is admissible as evidence in support of an allegation of sexual assault is a question for the trial judge. If the causal connection or apparent relationship between the distressed condition and the alleged assault is tenuous or remote, the duty of the trial judge is to withdraw it from the jury as a circumstance capable of supporting the complainant: *R v Roissetter* [1984] 1 Qd R 477 per McPherson J at 482. See also *R v Williams* [2010] 1 Qd R 276.

Also, a trial judge may make a comment in response to a suggestion by defence counsel to the effect that it would be inherently improbable that the complainant would have behaved as they did if they had been sexually abused.

In *R v Cotic* [2003] QCA 435, the Court of Appeal did not disapprove of a comment by a trial judge along the following lines – although the trial judge in that case told the jury that they could ignore it:

> There are no rules about how people who engage in the sexual abuse of children behave and no rules about how their victims behave. It is dangerous to make assumptions, or apply pre-conceived notions, about how abused children should behave, either generally, or in this particular case.

See also *R v MCJ* [2017] QCA 11 at 52*ff.*

Draft Direction

> **Evidence has been placed before you of the distressed condition of the complainant** (describe evidence, including time etc)**. The prosecutor submits that you can use this evidence in support of the evidence that the complainant was raped/assaulted by the defendant. It is a matter for you as the sole judges of the facts whether you accept the evidence relating to the complainant's distressed condition. If you do, then you have to ask yourself: was the distressed condition genuine or was the complainant pretending? Was he or she putting on the condition of distress? Was there any other explanation for the distressed**

condition at the time? If you find that the distress was genuine then it may be used by you as evidence that supports the complainant's account.

Where the evidence is led as part of the narrative but is not led in support of the complainant's evidence of being raped.

Evidence has been placed before you of the distressed condition of the complainant (here describe evidence, including time etc)**. The prosecution have led that evidence as part of the narrative of events which it alleges surrounds the act of rape/assault. It is not led in support of the complainant's evidence that he or she was raped/assaulted and must not be used by you for that purpose. It has no relevance to the defendant's guilt. There may be many innocent reasons for the condition at that time, such as: regret after consensual intercourse or sexual contact, or concern about some other issue entirely unrelated to the alleged sexual activity. The complainant's condition may be feigned or exaggerated, and as a matter of common sense and human experience you may think of other reasons based on the evidence. You should therefore disregard the evidence of distressed condition except to the extent that it is part of the narrative of events of that particular day.**