

JURY DIRECTIONS

DOMESTIC VIOLENCE & SEXUAL OFFENCES

EVIDENCE ACT 1977 PART 6A DIVISION 3

- SUBDIVISION 1 – GENERAL MATTERS
- Before a jury trial commences, the judge **MAY** request the parties to inform the court whether it is likely that evidence will be adduced in the trial that may require the giving of a direction about all or some of the matters mentioned in subdivision 2. If so advised the judge is not required to form a view at that time whether to give the direction: s.103SA
- The prosecution or defence may, at any time during a trial, ask the judge to direct the jury about domestic violence generally by informing the about all or some of the matters mentioned in subdivision 2, other than s.103ZA: s.103T
- The defence may at any time during the trial ask the judge to direct the jury about self-defence in response to domestic violence by informing the jury about the matters mentioned in s.103ZA, or all or some of the matters in subdivision 2: s.103U
- The judge may direct the jury about domestic violence on his/her own initiative: s.103V
- A judge may give directions before any evidence is adduced, and may repeat them at any time during the trial: s.103W
- In respect of a trial by judge alone, the court's reasoning with respect to any matter in subdivision 2 must, to the extent the court thinks fit, be consistent with how a jury would be directed: s.103X
- This division does not limit the matters the court may direct the jury about, including evidence given by an expert witness: s.103Y

SUBDIVISION 2: CONTENT OF JURY DIRECTIONS

- S.103Z (1) states that a judge **MAY** inform the jury that domestic violence –
 - is not limited to physical abuse and may, for example, include sexual abuse, psychological abuse or financial abuse; and
 - may amount to violence against a person even though it is immediately directed at another person; and
 - may consist of a single act; and
 - may consist of separate acts that form part of a pattern of behaviour.

S.103Z(2)

If relevant, the judge **MAY ALSO** inform the jury that experience shows that –

- people may react differently to domestic violence and there is no typical response to domestic violence;
- it is not uncommon for a person to stay with an abusive partner, or to leave then return to the abusive partner;
- it is not uncommon for a person who has been subjected to domestic violence not to report it or seek assistance to stop it;
- various factors may influence a person in how they respond to, address or avoid domestic violence;
- it is not uncommon for a decision to leave an abusive partner, or to seek assistance, to increase the person's apprehension about harm or risk of harm.

s.103ZA SELF-DEFENCE DIRECTION

- The judge **MAY** inform the jury that self-defence is, or is likely to be, an issue in the proceeding; and
- as a matter of law evidence of domestic violence may be relevant to determining whether the defendant acted in self-defence; and
- 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

S.103ZB EXAMPLES OF DOMESTIC VIOLENCE

The judge **MAY** inform the jury that behaviour, or patterns of behaviour that may constitute DV include, but not limited to:

- placing or keeping a person in a dependant or subordinate relationship;
- isolating a person from family, friends or other sources of support;
- controlling, regulating or monitoring a person's daily activities;
- deprivation or restriction of freedom of movement or action;
- restricting a person's ability to resist violence;
- Frightening, humiliating, degrading or punishing a person;
- compelling a person to engage in unlawful or harmful behaviour

S.103ZCF FACTORS INFLUENCING RESPONSES TO DV

- If the judge has informed the jury about the matters in s.103Z(2)(d), then the jury **MAY** be informed that decisions made by a person subjected to DV may be influenced by matters including, for example:
 - the DV itself; or
 - social, cultural, economic or personal factors, or inequities experienced by the person, including inequities associated with race, poverty, gender, disability or age; or
 - responses by family, the community or agencies to the DV or to any help-seeking behaviour or use of safety options by the person; or
 - 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 options might have been; or
 - further violence, or 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

S.103ZD LACK OF COMPLAINT/DELAY IN COMPLAINT

This section applies if evidence is given , or is likely to be given, or a question asked, or likely to be asked, of a witness that tends to suggest an absence of complaint or delay in making a complaint. (2) states that the judge **MUST** direct:

- (a) That the absence of a complaint or delay in complaining does not, of itself, indicate that the allegation is false; AND
- (b) That there may be good reasons why a complainant of DV may hesitate in making, or refrain from making, a complaint; AND
- (c) Must not direct the jury that the absence or delay is relevant to the complainant's credibility unless there is sufficient evidence to justify the direction.

LACK OF COMPLAINT/DELAY IN COMPLAINT

S.103ZZ states that if evidence is given, or likely to be given, or a question is asked, or likely to be asked, of a witness that tends to suggest a delay in complaint or absence of complaint of the alleged sexual offending, **THE JUDGE MUST:**

- Direct the jury that absence or delay in complaining does not, of itself, indicate that the allegation is false; and
- Must direct the jury that there may be good reasons for a complainant not to complain or hesitate in complaining. Examples are:
 - Being overborne by abuse of a relationship of authority, trust or dependence;
 - Suppression or disassociation from the offence

S.103ZQ WHEN DIRECTIONS MUST BE GIVEN

The judge **MUST** give any one (1) or more of the directions set out in subdivision 3 if there is a good reason to give the direction, or if requested by party, unless there is a good reason not to give the direction.

Division 3 does not limit the matters the court may direct the jury about, including in relation to evidence given by an expert witness:
s.103ZR

SUBDIVISION 3: CONSENT & MISTAKE OF FACT

- S.103ZS states that a judge **MAY** direct that non-consensual activity can occur in many different circumstances, and between different kinds of people including –
 - People who know one another; and
 - People who are married to each other; and
 - People who are in a established relationship with one another; and
 - People of the same or different sexual orientations; and
 - People of any gender identity, whether or not their gender identity corresponds with the sex assigned to them as birth

RESPONSES TO NON-CONSENSUAL SEXUAL ACTIVITY

S.103ZT states that the judge **MAY** direct that:

- there is no typical, normal or proper response to non-consensual sexual activity; and
- People may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything; and
- The jury must avoid making assessment based on preconceived ideas about how people respond to non-consensual activity

LACK OF PHYSICAL INJURY, VIOLENCE OR THREATS

S.103ZU states that the judge **MAY** direct that:

- People who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
- The absence of injury or violence, or threats of injury or violence, does not, of itself, mean that a person is not telling the truth about a sexual offence

RESPONSES TO GIVING EVIDENCE

S.103ZV states that a judge **MAY** direct that:

- Trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about a sexual offence, but others may not; and
- The presence or absence of emotion or distress does not, of itself, mean that a person is not telling the truth about a sexual offence.

BEHAVIOUR & APPEARANCE OF COMPLAINANT

S.103ZW states the judge **MAY** direct that it should not be assumed that a person consented to a sexual activity because the person:

- Wore particular clothing or had a particular appearance; or
- Consumed alcohol or another drug; or
- Was present in a particular location eg a nightclub, or went to the defendant's home; or
- Acted in a flirtatious or sexual manner; or
- Worked as a sex worker

DIRECTION ON MISTAKE OF FACT

- S.103ZX states that a judge may direct that if the concludes that the defendant knew or believed that a circumstance mentioned in s.328AA(1) *Criminal Code* existed in relation to a person, that knowledge or belief is enough to show that the defendant did not reasonably believe that the person was consenting to the act.
- S.348AA(1) lists a large number of circumstances in which a person does not consent to an act, including being asleep or unconscious, so affected by alcohol or drugs as to be incapable of consenting, lacking the cognitive capacity to give consent, being subject to threats or violence etc.

SUBDIVISION 4: OTHER DIRECTIONS TO JURY

S.103ZY applies if there is evidence or questions that tends to suggest a difference in the complainant's account may be relevant to truthfulness or reliability. The judge **MUST DIRECT THE JURY** that experience shows:

- People may not remember all the details of sexual offence or many not describe a sexual offence in the same way each time; and
- Trauma may affect people differently, including affecting how they recall events; and
- It is common for there to be differences in accounts of a sexual offence; and
- Both truthful and untruthful accounts of a sexual offence may contain differences; and
- That it is up to the jury to decide whether the differences are important in assessing the complainant's truthfulness and reliability.

DEFINITION OF “DIFFERENCE”

(A) A GAP IN THE ACCOUNT; AND

(B) AN INCONSISTENCY IN THE ACCOUNT; AND

(C) A DIFFERENCE BETWEEN THE ACCOUNT AND ANOTHER ACCOUNT

LACK OF COMPLAINT/DELAY IN COMPLAINT

S.103ZZ applies if evidence is given/likely to be given or a question asked/likely to be asked that tends to suggest an absence of complaint or delay in making a complaint. **THE JUDGE MUST DIRECT THAT:**

- Absence of complaint or delay in complaining does not, of itself, indicate that the allegation is false; and
- There may be good reasons why a person who does not consent to sexual activity may hesitate in making a complaint, or refrain from complaining. Examples are being overborne by abuse of a relationship of authority, trust or dependence, employing coping strategies such as suppression or disassociation, or fear of ostracism by their community.

THE JUDGE MUST NOT DIRECT THAT ABSENCE OR DELAY IS RELEVANT TO CREDIBILITY UNLESS SUFFICIENT EVIDENCE TO JUSTIFY THAT DIRECTION

EVIDENCE OF POST-OFFENCE RELATIONSHIP

- S.103ZZA states that if evidence is given/likely to be given or a question asked/likely to be asked that after the alleged sexual offence the complainant continued a relationship or continued to communicate with the defendant, **THE JUDGE MUST DIRECT THAT EXPERIENCE SHOWS THAT:**
 - People may react differently to non-consensual activity and there is not typical, normal or proper response to non-consensual sexual activity; and
 - Some people so subjected will never again contact the person while others may continue a relationship or communication; and
 - There may be good reasons why the latter occurs e.g. being overborne, fearing family dissolution or fear of community ostracism.

PROHIBITED DIRECTIONS

- S.103ZZB STATES THAT A JUDGE:
 - **MUST NOT** direct, warn or suggest to jury that complainants who do not complain or delay in complaining are, as a class, less credible than other complainants; and
 - **MUST NOT** direct, warn or suggest to jury in respect of complainants who do not complain or delay in complaining that it would be dangerous or unsafe to convict on the evidence, or that the evidence should be scrutinised with great care.

NO MORE *MARKULESKI* DIRECTION

S.132B states that in a criminal proceeding in which more than 1 offence is charged, the judge **MUST NOT** direct the jury that doubts about the truthfulness or reliability of the complainant's evidence in relation to one charge must be taken into account in assessing truthfulness or reliability generally or in relation to other charges.

Sub-section (2) expressly abolishes any common law rule to so direct.

Sub-section (3) does not prevent a judge from making a comment on the evidence that is appropriate to make in the interests of justice.

PROHIBITED DIRECTIONS RE CHILDREN

S.132BAA states that the judge **MUST NOT:**

- Direct, warn or suggest that children as a class are unreliable witnesses; or
- Direct, warn or suggest that it would be dangerous or unsafe to convict on the uncorroborated evidence of a child, nor that the child's evidence should be scrutinised with great care; or
- Direct, warn or comment to the jury about the reliability of a child's evidence solely on account of the child's age.

DELAY IN PROSECUTING OFFENCE

S.132BA applies if the judge is satisfied the defendant has suffered a **significant forensic disadvantage** because of the delay in prosecuting an offence (which includes delay in reporting the offence).

The mere fact of delay does not establish a significant forensic disadvantage.

In directing the jury, the judge **MUST** inform the jury of the nature of the disadvantage, and the need to take it into account; **BUT MUST NOT WARN OR IN ANY SUGGEST** that it would be dangerous or unsafe to convict the defendant or that the complainant's evidence should be scrutinised with great care.