IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B76 of 2010

BETWEEN

BBH

Applicant/Appellant

AND

THE QUEEN

Respondent

APPLICANT/APPELLANT'S SUBMISSIONS

Filed on behalf of the Applicant / Appellant
BOE WILLIAMS
PO Box 5151
West End QLD 4001

Date of Filing: 10 June 2011
Tel (07) 3511 7575
Fax (07) 3511 7979
Ref Renée Williams

Part I: Certification

1 These submissions are in a form suitable for publication on the Internet.

Part II: Issue

2 There are two matters for consideration:

(a) Is evidence of discreditable conduct[1], regardless of the forensic purpose for which it is admitted, admissible in a criminal trial when there is a reasonable view of that evidence which is consistent with the innocence of the defendant?[2]

(b) In any event was the evidence of W admissible in this trial?

Part III: Section 78B of the *Judiciary Act 1903*

3 Consideration has been given to s 78B of the *Judiciary Act 1903* (Cth) and no notice should be given.

Part IV: Citations

4 The citation for the judgment of the Court of Appeal is *R v BBH* [2007] QCA 348 (***'CA'***).

Part V: Facts

5 The applicant stood trial before a jury in the District Court of Queensland (Dick SC DCJ) on an indictment charging him with one count of maintaining an unlawful sexual relationship with a child ('the maintaining count'),[3] seven counts of indecent treatment[4] and four counts of sodomy.[5]

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[1] The term 'discreditable conduct' is used in these submissions in the way the term was used by Gleeson CJ (at 349 [1], 354 [12]) and Hayne J (at 382 [104]-[105]) in *HML v The Queen* (2008) 235 CLR 334 (***'HML'***). See however the caveats placed on the use of that term by Kiefel J in *HML* at [492].

[2] As was held in *HML* by Hayne J at 383 [106], with whom Gummow and Kirby JJ agreed.

[3] With circumstances of aggravation: s 229B of the *Criminal Code Act* 1899 (Qld) ("*Code*").

[4] With circumstances of aggravation: s 210 of the *Code*.

[5] Section 208 of the *Code*.

6 The evidence at trial is summarised at *CA* [5]-[27]. In essence, the applicant's daughter ('the complainant') testified that, from when she was aged about four years old until she was 15, the applicant digitally penetrated her vagina, performed oral sex upon her and sodomised her. She made her first complaint when she was 17 years old. The facts referable to the individual offences were identified as particulars of the maintaining count, which averred that the offence continued for that entire period. The complainant also alleged that 'a lot' of sexual acts took place during this period.[6]

7 On 17 May 2007, the applicant was acquitted by the jury of three indecent
10 treatment counts which were alleged to have occurred when the complainant was aged between 4 to 14 years old. He was convicted of the maintaining count, four counts of indecent treatment and four counts of sodomy. He was sentenced to 10 years imprisonment, of which 8 must be served prior to his being eligible for release on parole.[7]

8 The Crown relied upon two pieces of evidence from sources other than the complainant. First, her younger brother 'W' gave evidence of something he observed when on a camping trip at his uncle's farm when he was 'approximately 11 years old' (when the complainant was 12). He first recalled this incident in an interview with police about 10 years later. Second, there was evidence from the complainant's mother of something the
20 applicant said to her in relation to their children including the complainant. The detail of this latter evidence is set out in *Appendix A* ('the complainant's mother's evidence'), however the focus of these submissions will be on W's evidence.[8]

9 W's evidence included:[9]

> MR VASTA: Tell me what you saw when you got back there?-- There was the caravan up on the landing with my sister standing behind it, bent over and my father sitting on the back grate to the van looking at my sister, and my sister only had a shirt on. She didn't have anything on from the waist down.
> Where was your father's hand?-- It was on her side, on her waist.

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[6] T41 L25.
[7] Section 161A of the *Penalties & Sentences Act* 1992 (Qld) and s 182 *Corrective Services Act* 2006 (Qld).
[8] The complainant's mother's evidence was not the subject of any appeal to the Court of Appeal below or included in the original special leave application.
[9] T71 L43 – T72 L6 (evidence in chief).

And how far away was her – if you could just tell us again, your sister's bending down. Is it, as it were, touching her toes? Or how was she bending?-- Yeah, it was almost as if she was touching her toes, and she was about six inches away from my father.

HER HONOUR: And he was sitting on something, you said?--Yeah, a grate. At the back of the van there was a steel grate.

MR VASTA: And you say he was six inches away. What part of his body was closest to her bottom area?-- Besides his hand? His face.

10 Under cross-examination, W agreed that he saw nothing 'untoward about the event',[10] and was concerned that the police were incorrectly construing the event at the time he was asked to sign a statement in respect of the incident. He further agreed that he had previously contacted his father's girlfriend to voice his concern and volunteered that what he saw was consistent with an innocent act on the part of his father 'namely looking for a bee sting or ant bite' on the complainant:[11]

MR NOLAN: Correct, okay. Was your father, when you saw him, fully clothed?-- He didn't have a hat on.
No, but he had-----?-- Yes.
When you saw him with your sister bending forward, he had every other item of clothing that one would normally wear?-- Yes.
I don't mean a suit and tie, and I'm sure you understand what I mean?-- Yes, I do.

In fact what you saw was consistent with him perhaps looking for some sort of a bee sting or an ant bite or something of that sort?-- That's correct.

And you said that to Lisa [surname removed], I would suggest, who is his current partner?-- Yes.
In fact to get the picture correct, you rang her after the West Australian police spoke to you, but before you signed the statement. Do you recall that?—No.

Well, can I put this conversation to you and ask you whether in fact it's true – the effect of what I'm putting is true. You indicated to her they'd been around and you were concerned because what you saw was quite consistent with innocent – an innocent act on his part, namely looking for a bee sting or an ant bite or so on. Do you recall ever saying that?-- Yes.

And I take it what you said to her was true?-- Yes.

And you said to her that you were worried about signing it because of that reason.

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[10] T75 L19-24 (cross-examination).
[11] T74 L12-54 (cross-examination).

> Do you remember saying that to her?-- Yes, I do, due to a – how do I say – difference of perspective.
>
> Sure. You also, I would suggest, said to her – or she put to you that, 'Why are you doing this to your father", and you said, 'Look he's' – these are my words, not yours, but 'big enough to look after himself, but I will support my sister.' Is that a correct synopsis of what you said?-- More or less, yes.

And in re-examination by the Crown prosecutor:[12]

> MR VASTA: But this conversation about a bee sting or an ant bite, how did that, as it were – who was the one who suggested bee stings and ant bites?-- I was.
> Did you speak to your father in that conversation?-- I don't believe so.

11 The complainant testified that there was 'at least one' sexual act committed by the applicant at her uncle's farm 'that she could remember'.[13] She agreed that this event occurred where she was 'lying down … and he would play with her vagina'.[14] However, when a description of the event described by W was put to her with the question: 'Nothing like that ever happened at the farm?' the complainant replied: 'No, not that I can remember'.[15]

12 The applicant gave evidence at the trial denying the complainant's accusations. He also denied that any untoward incident had occurred at his brother's farm.[16]

13 The admission of W's evidence was contested at trial and challenged in the Court of Appeal. The Crown submitted that W's evidence could be used in the trial on two bases:[17]

> MR VASTA: It's being led for this reason: Count 1 is a maintaining. The Crown says that what the brother saw is an act – an indecent act. It is possible that it can be used as one of the three if the jury find that that has occurred. Secondly it is led for – as evidence of guilty passion. It is something that the brother saw notwithstanding the fact that the complainant doesn't attest to it.

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[12] T76 L8-13 (re-examination).
[13] T53 L8-15.
[14] T53 L18-24.
[15] T53 L25-30.
[16] T118 L35-48.
[17] T4 L19-25.

14 The trial judge admitted the evidence, with the explanation that:

> The probative value of the evidence is that if the jury accept it, it goes to show a guilty passion between the accused and the complainant. Such evidence is regularly allowed in matters of this nature. I rule that the evidence is admissible.[18]

15 Her Honour made her ruling before becoming aware of W's belief as expressed above in paragraph [10]. Her Honour was not asked to, and did not revisit the ruling after this evidence was elicited.

16 The Crown prosecutor addressed the jury in respect of both pieces of evidence in the following terms.[19]

> There's more, there's more. [W]'s evidence....
>
> Bending over in front of him, no pants on, no skirt on, no underpants on, bending over so that her bottom is six inches away from his face, his hand on her hip. Now, a lot of criticism of accepting that story, but let's think about this. If you are 10 years of age, your parents are going though a divorce, you love your father and you come across this, how is it that you resolve that as a 10 year old? Do you resolve it in your own mind, "Ah, you know, oh, look, that's all right, dad's – dad's obviously – he's looking for an itchy bite or a bee sting, or something like that." Isn't that easier for you as a 10 year old to process in your mind than, "My father is molesting my sister"? Isn't that what's happened, because young [W], he really doesn't tell anyone, he keeps that to himself, as it were locks it away, but then when he hears what [the complainant] is now saying, when these allegations, as it were, become knowledge, because the police have become involved, well, what he remembers takes on a totally different connotation. And, sure, he may have phoned the partner and so on. How is it – how would you be as a child, as a son of a man whom you love, whom you wanted, but you realise, "Hey, this is what he has done to my sister," and of course he's torn and of course if it would be as he would rather not have anything to do with it. But, as he says, not so much, "I'm sticking up for my sister, I'm telling the truth. I'm telling the truth. I'm going to come there and I'm going to swear on the Bible as to what did happen, what I saw." Ladies and gentlemen, what the evidence of [W] tells you is that this man did have, did have the secret passion, the guilty passion for his daughter.

17 The trial judge directed the jury in respect of this evidence as follows:[20]

> HER HONOUR: The other evidence that I need to give you a specific direction about is the evidence from the mother and from [W]'s evidence of what he saw on

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[18] T66 L27-31.
[19] T141 L10-14.
[20] T167-168; T175. There is a further passage at T178.

> the camping trip. That evidence has been called by the prosecution because they say it is evidence of the relationship between the complainant and the accused and part of the background against which evidence of their conduct or the accused's conduct falls to be evaluated, that it gives you a true and realistic context which will assist you in deciding whether the complainant's evidence against the accused in respect of the charges is true. Put another way, they say it's evidence capable of establishing the guilty passion or the sexual interest by the accused in the complainant, or by proving an unnatural or unexpected relationship of sexual intimacy between the father and the daughter.
>
> But before you can use it in that way you must be satisfied of these things: first of all, you must be able to satisfy that it's honest evidence, so that the mother is telling the truth about it, what she saw, or that [W] is telling the truth, is being honest about it. That it's reliable. That they haven't been mistaken about it, that they are accurate about what they saw. Then you must be satisfied that what it was that they saw does show a sexual interest, you know, an unnatural or unexpected natural interest by father and daughter and that it doesn't have an innocent explanation. If you were satisfied of these things, then the prosecution say the existence of the relationship demonstrated by those incidents helps you evaluate and decide that the complainant's evidence is true. They are not charges in themselves, that's the way in which the evidence is sought to be used.
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> ...
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> HER HONOUR: So they are the charges, and so you will see that it rests on what you make of her evidence and what you make of the evidence of the mother and [W], and whether you think they were honest and accurate, what they described didn't have an innocent explanation, and do support the prosecution's case and her case that there was an unnatural sexual relationship occurring.

18 Her Honour also told the jury[21] that in addition to the charged acts, which could be used by them as proof of the maintaining offence, the 'uncharged acts' which could also be so used were those described in the evidence of the complainant. That is, the evidence of W (and that of the complainant's mother) was not left to the jury as proof of the maintaining charge. A re-direction was not sought by the prosecutor on this latter part of the direction.

19 The Court of Appeal[22] endorsed the trial judge's approach to the admissibility of W's evidence (at *CA* [39]-[40]), citing an earlier decision of that Court, *R v E*[23] as authority. No reference was made to *Pfennig v The Queen* (1995) 182 CLR 461 ("***Pfennig***") nor was

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[21] T182 L25-47.
[22] Keane and Holmes JJA and A Lyons J.
[23] [1999] QCA 58 at [18].

there any application of the 'test' there expounded. Further, and despite the manner in which her Honour put the case to the jury, Keane JA (as his Honour then was) held that W's evidence was 'also relevant in that it tended to establish the maintaining offence, in that it revealed a sexual relationship between the appellant and the complainant' at *CA* [41]. The judgment of Dixon J (as his Honour then was) in *O'Leary v The Queen* (1946) 73 CLR 566 at 577-578 was cited in support of this proposition.[24]

20 On 13 May 2011, the applicant's application for special leave was referred[25] to an enlarged Full Court of this Court for argument as on an appeal.

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Part VI: Argument

21 The primary question for this Court is whether W's evidence was admissible at the applicant's trial.[26]

22 This Court in *Pfennig, Phillips v The Queen* (2006) 225 CLR 303 (***'Phillips'***) and *HML* has consistently identified that the central requirement for admission of (this sort of) evidence is relevance.[27] It must possess some 'particular probative quality' with a 'strong degree of probative force', which has 'a material bearing on the issues to be tried'.[28] Evidence is relevant if 'if it bears directly or indirectly on the probability of a fact in issue'.[29]
20 It is not possible to discuss the probative force of the evidence without identifying the way in which it may be used and the issue to which it relates.[30]

23 Identity was not in issue in this trial. Whether there was a 'relationship'[31], such that the applicant had the opportunity to commit the offences in question, was also not in issue

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[24] The scenario there considered – 'a connected series of events occurred [on the day of the offence charged] which should be considered as one transaction' – has no applicability here. See also the discussion of *O'Leary* by Kiefel in *HML* at [497] where the evidence was more likened to *res gestae* evidence.
[25] By Gummow, Crennan and Bell JJ.
[26] Although the evidence from the complainant's mother was not objected to or considered below, its admissibility ought to be determined by reference to the same principles.
[27] *Pfennig* at p 481.
[28] *Phillips* [54].
[29] *HML* per Crennan J at [423].
[30] *HML* per Kiefel J at [491].
[31] cf. *HML* [426]; *B v The Queen* (1992) 175 CLR 599; *R v Ball* [1911] AC 47; *S v The Queen* (1989) 168 CLR 266 and *Harriman v The Queen* (1989) 167 CLR 590.

and could not have been – the applicant was the custodial parent of the complainant for most of the period in question. The issue at trial was whether the conduct alleged by the complainant occurred.

24 An assessment of the relevance, cogency and 'probative quality'[32] of W's evidence, if accepted as true, must include regard to the following:

(a) What W saw, at its height, did not constitute a criminal offence.

(b) Nor did it amount to an act 'defined to constitute an offence of a sexual nature' for the purposes of the maintaining count.[33]

(c) It was not a particular of any count on the indictment.

(d) It did not bear similarity – striking or otherwise – to any indecent act alleged by the complainant.

(e) The incident occurred when W was about 11 years old, and was first recalled to police, more than a decade later.

(f) W himself was, at the least, uncertain as to when the incident occurred. He explained inconsistent evidence given by him on this point by saying: 'it was several years ago and I was only a child at the time'.[34]

(g) W interpreted what he saw as innocuous, and offered explanations for what he saw which were completely innocent, and did so to the applicant's girlfriend before he was called to give evidence on the issue.

(h) There was no other evidence, and none from the complainant herself, which supported the event having occurred.

25 All W was able to give is a snapshot of an incident. Whether or not the incident recalled by him was sexual in nature is 'equivocal' and certainly not an 'inevitable' conclusion.[35] It is not the only reasonable conclusion available. W himself offered at the trial his belief that the conduct was innocuous. Whilst his belief may not be decisive of there being a reasonable view of this evidence consistent with the applicant's innocence, it is a helpful demonstration of the manner in which such a view might be formed.

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[32] *Phillips* [54] and the cases cited at footnote 39 in that passage.
[33] As s 229B of the *Code* required as at the time of this trial.
[34] T73 L1-22.
[35] cf. *HML* [174] per Hayne J.

26 There are competing views as to how it should be determined whether any particular conduct is of a sexual nature. For example, at one point in *HML*, Hayne J suggests that where the matter is 'equivocal', if a connotation of sexual interest 'is reliant on other evidence of separate acts demonstrating that interest, evidence of the conduct would not be admissible'.[36] The alternative approach is as set out in *Pfennig* at p 483 and as later noted in *HML* by Hayne J at [170] and Heydon J at [279].[37]

27 In either event, before it could properly be characterised as evidence which showed that the applicant had a sexual interest, or a 'tendency to engage in acts with the complainant such as those charged'[38] it must unequivocally bespeak such an interest. This evidence did not.[39]

The 'test' for admissibility - Pfennig, Phillips & HML

28 In any case, the evidence was admitted and the jury told that they could use it as part of the process of reasoning towards guilt. Given the manner in which they were instructed, it might be categorised either as 'relationship evidence' in the sense discussed in *Pfennig*[40] or as evidence used to show a 'sexual interest' in the sense discussed in *HML*.[41] The question is whether it was admissible for such purposes.

29 The Court in *Pfennig* considered the admissibility of 'propensity evidence' – that is, evidence disclosing the commission of uncharged offences, regardless of the use to which the evidence is sought to be put – and reviewed the relevant authorities to that point. Relevantly for present purposes, Mason CJ, Deane and Dawson JJ stated:

> In this Court, in conformity with earlier English authorities,[42] it was accepted that propensity evidence is not admissible if it shows that the accused has a propensity or disposition to commit a crime or that he or she was the sort of person likely to commit the crime charged. But it was accepted that it is admissible if it is relevant in some other way, that is, if it tends to show that the accused is guilty of the offence

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[36] *HML* [111] per Hayne J.
[37] cf. *HML* [510] – [511] per Kiefel J.
[38] *HML* [506] per Kiefel J.
[39] Nor does the evidence of the complainant's mother, including because that the allegation applied to all of the children not just the complainant.
[40] At 483-4.
[41] At [400] per Hayne J; and at [506] per Keifel J.
[42] *Makin v Attorney-General (NSW)* [1894] AC 57.

charged for some reason other than that he or she has committed offences in the past or has some criminal disposition... (480-1)

It was also accepted that, in order to be admissible, propensity evidence must possess "a strong probative force" or the probative force of the evidence must clearly transcend the prejudicial effect of mere criminality or propensity... (481)

... for propensity ... evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged ...(481-2)

Where the propensity ... evidence is in dispute, it is still relevant ... [but] the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed... (482)

Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused.[43] Here "rational" must be taken to mean "reasonable"[44] and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle... (483)[45]

...the trial judge ... must recognize that propensity evidence is circumstantial evidence and that, as such, it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances. More than that, the evidence ought not to be admitted if the trial judge concludes that, viewed in the context of the prosecution case, there is a reasonable view of it which is consistent with innocence ...(485)

30 In *Phillips,* which involved evidence from several different complainants, the Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) stated that 'nothing said in these reasons should be understood as indicating any view about whether it is necessary, or

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[43] *Hoch v The Queen* (1988) 165 CLR 292; *Sutton v The Queen* (1984) 152 CLR 528; *Harriman v The Queen* (1989) 167 CLR 590.

[44] *Peacock v The King* (1911) 13 CLR 619; *Plomp v The Queen* (1963) 110 CLR 234.

[45] cf. *HML* [455] per Crennan J.

would be desirable, to revisit what is said by this court in *Pfennig*'.[46] The Court also said that *Pfennig* 'does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences with which he or she is charged'.[47]

31 Notwithstanding the admonition in *Phillips* at 322 [59]–[60] which injuncted intermediate courts of appeal[48] from seeking to 'vary, qualify or ignore a rule established by a decision of this Court'[49], that is what seems to have occurred in this case. As observed above, the Court of Appeal did not in this case mention *Pfennig* or its principles. Rather, reliance was placed on one of its own decisions[50] which stated that such evidence was 'relevant to the issue of whether there was sexual attraction'. In both instances the Court paid no regard to prejudice or the availability of a reasonable explanation.

32 If the *Pfennig* test is applied, regard must be had to the assumption that the prosecution case (as revealed in the other evidence) may be accepted by the jury. It is also necessary, in this case, to proceed on the basis that W's evidence – and that must mean all of it, including under cross examination – would be accepted as true. The question is not whether W's evidence, standing alone, would demonstrate the guilt of the applicant. Rather, it is whether, when viewed in the context just described, there is a reasonable view of his evidence which is consistent with innocence.[51] Therefore, if there is a reasonable view of the evidence consistent with innocence and the evidence cannot only be viewed as consistent with guilt in light of the other evidence in the case, the evidence will be inadmissible.

33 At no stage during the trial, and nowhere in the judgment of the Court of Appeal[52], has any assessment been made as to the inherent probative value of the evidence nor has

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[46] At 323 [61].
[47] Ibid, 323-4.
[48] *R v O'Keefe* [2000] 1 Qd R 564; *R v PS* [2004] QCA 347.
[49] *Phillips* 322 [60].
[50] *R v E* [1999] QCA 58 at [18] where the conduct was unquestionably sexual in nature.
[51] *Phillips v The Queen* (2006) 225 CLR 303 at 323-4, cited in *HML* per Hayne J at 385 [118].
[52] The comment by Keane JA at *CA* [41] falls well short of a ruling that fulfilled these obligations. cf. *Wu v the Queen* (1999) 199 CLR 99 at 124 [71].

there been any attempt to weigh the prejudice or otherwise explore any innocent hypotheses. Had this been done, in accordance with the approach endorsed in *HML* by Hayne J, with whom Gummow and Kirby JJ agreed then the evidence would have been ruled inadmissible.

34 The evidence of W was inadmissible and her Honour's ruling an error of law. The trial in being tainted by such evidence resulted in a miscarriage of justice.[53]

Part VII: Applicable statutes

10 See *Appendix B*.

[53] Section 668E(1) of the *Criminal Code* (Qld).

Part VIII: Orders sought

(1) Special leave granted.

(2) Appeal allowed.

(3) Verdicts set aside.

(4) Convictions quashed.

(5) Retrial ordered.

Dated: 10 June 2011

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Bret Walker
P 02 8257 2527
F 02 9221 7974
maggie.dalton@stjames.net.au

Peter Callaghan
P 07 3369 7900
F 07 3369 7098
callaghansc@8petrieterrace.com.au

Andrew Boe
P 07 3511 7567
F 07 3369 7098
aboe@8petrieterrace.com.au

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Renée Williams
Boe Williams
Solicitor for the Applicant

30 **P** 07 3511 7575
F 07 3511 7979
rwilliams@boewilliams.com.au

Appendix A
The evidence from the complainant's mother

Ruling before the trial judge: T9, L9-39

"MR VASTA: ...what I wanted to lead was this: paragraph 9, "[BBH] and I would be having sexual intercourse and [BBH] would pull [W] or [the complainant] in" – and I don't care about [W]. It can just simply be referred to [the complainant] – "would call [W] or [the complainant] in and say, 'Give Mummy a hug.' I wouldn't yell for them to leave because they thought they may have been in trouble, so I used to say things like, 'Go outside and play.'"
HER HONOUR: I don't get that. Was this whilst sex was happening?
MR NOLAN: While they were having intercourse.
HER HONOUR: That probably goes to guilty passion as well.
MR NOLAN: I'm not objecting to that. As much as I'd like to-----
HER HONOUR: Yes, of course. But I don't think you can.
MR NOLAN: No, I don't think so either.
MR VASTA: That's all I wanted to lead from her.
HER HONOUR: We've settled that one. You both understand that.
MR NOLAN: Yes. That's about it.
MR VASTA: I think that's about it."

The complainant's mother's evidence: T78, L40-57

"Anything else that you saw?—There were occasions where we would – as husband and wife we were sharing the same bed – bedroom, and he would get quite amorous early in the mornings and sometimes we would have intercourse in the mornings. At some of these occasions he would call the children into the bedroom and try to get me to give them a cuddle or, you know, he would say to them, "Give Mum a cuddle" while he was having sex with me from behind.
Well, in particular I'm asking about [the complainant]?—She was one of the children that he would call in.
And when they could come into the room, what if anything would you do or say?—Well, so that I didn't alarm them unduly and make them think that they'd done something wrong, I would just generally tell them to go and start getting dressed or go and – go to the toilet or go and have some breakfast, or just anything I could think of to get them to go out of the room."

Addresses: T141, L11-27

Mr Nolan did not address on the issue.

"MR VASTA: ... Ladies and gentleman, what the evidence of [W] tells you is that this man did have, did have the secret passion, the guilty passion for his daughter.
But's he's not the only one who says that. The mother, [DH], says exactly the same thing. Picking her up when she was little, rubbing her thigh in a manner that makes a mother quite disgusted but looking at her at the same time. Inviting the children into bed when

he's there with the mother, inviting the children into bed.
Now, ladies and gentleman, that's the mother telling you this. When you think about it, isn't that very eerie, very eerie? It was something that the mother didn't want to happen but it was something that he wanted to do. Isn't that very eerie when you consider the incident with the woman [MC]? I will come back to that."

Directions: T167, L27-37

"The other evidence that I need to give you a specific direction about it's the evidence from the mother and from[W]. That is the evidence form the mother talking about the rubbing of the thigh in a way when the child was very young that made her uncomfortable, the calling the children into the bedroom while sexual intercourse was happening, and [W]'s evidence of what he saw on the camping trip. That evidence has been called by the prosecution because they say it is evidence of the relationship between the complainant and the accused and part of the background against which evidence of their conduct or the accused's conduct falls to be evaluated, that it gives you a true and realistic context which will assists you in deciding whether the complainant's evidence against the accused in respect of the charges is true. Put another way, they say ... evidence capable of establishing the guilty passion or the sexual interest by the accused in the complainant, or by proving an unnatural or unexpected relationship of sexual intimacy between the father and the daughter.

But before you can use it in that way you must be satisfied of these things: first of all, you must be able to satisfy that it's honest evidence, so that the mother is telling the truth about it, what she saw, or that [W] is telling the truth, is being honest about it. That it's reliable. That they haven't been mistaken about it, that they are accurate about what they saw. Then you must be satisfied that what it was that they saw does show a sexual interest, you know, an unnatural or unexpected natural interest by father and daughter and that it doesn't have an innocent explanation. If you were satisfied of those things, then the prosecution say the existence of the relationship demonstrated by those incidents helps you evaluate and decide that the complainant's evidence is true. They are not charges in themselves, that's the way in which the evidence is sought to be used."

***R v BBH* [2007] QCA 348**

"[21] The complainant's mother gave evidence that she observed the appellant stroking the complainant's upper thigh when the complainant was a young child. The complainant's mother also said that, on some mornings, the appellant would call the children into the bedroom while he was having sexual intercourse from behind and say to the children: "Give Mum a cuddle". The appellant also told her that sometimes he would call the complainant in to give him a cuddle and that he would have an erection while she was lying on top of him."

Appendix B
Applicable Statutes

Index

Section 35 of the *Judiciary Act* 1903 (Cth)

35 Appeal from courts of States

(1) The jurisdiction of the High Court to hear and determine appeals from:

(a) judgments of the Supreme Court of a State, whether given or pronounced in the exercise of federal jurisdiction or otherwise; or

(b) judgments of any other court of a State given or pronounced in the exercise of federal jurisdiction whether in civil or criminal matters, is subject to the exceptions and regulations prescribed by this section.

(2) An appeal shall not be brought from a judgment, whether final or interlocutory, referred to in subsection (1) unless the High Court gives special leave to appeal.

(5) The foregoing provisions of this section have effect subject to any special provision made by an Act other than this Act, whether passed before or after the commencement of this section, preventing or permitting appeals from the Supreme Courts of the States in particular matters.

Section 668D of the *Criminal Code Act* 1889 (Qld)

668D Right of appeal

(1) A person convicted on indictment, or a person convicted of a summary offence by a court under section 651, may appeal to the Court—

(a) against the person's conviction on any ground which involves a question of law alone; and

(b) with the leave of the Court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) with the leave of the Court, against the sentence passed on the person's conviction.

(2) A person summarily convicted under section 651 may appeal to the court, with the leave of the court, against the sentence passed on conviction, including any order made under that section.

Section 668E of the *Criminal Code Act* 1889 (Qld)

668E Determination of appeal in ordinary cases

(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

Offence Provisions
Sections 208, 210, 216, 229B *Criminal Code Act* 1889 (Qld)

Count 1: Section 229B of the *Criminal Code Act* 1889 (Qld). Maintaining a sexual relationship with a child under 16 years between 3 July 1989 and 31 March 1999.

Offence provision as it existed at the relevant time

Period	**Reprint No. / Amending Legislation**	**Text of section**
3 July 1989 – 3 July 1997	Inserted into the *Criminal Code Act* 1889 (Qld) by s 23 of the *Criminal Code, Evidence Act and Other Acts Amendment* 1989 (Qld) As it appears in Reprint No. 1	**Maintaining a sexual relationship with a child under 16** **229B.**(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years. **(1A)** A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions. **(1B)** If in the course of the relationship of a sexual nature the offender has committed an offence of a sexual nature for which the offender is liable to imprisonment for 5 years or more but less than 14 years, the offender is liable in respect of maintaining the relationship to imprisonment for 14 years. **(1C)** If in the course of the relationship of a sexual nature the offender has committed an offence of a sexual nature for which the offender is liable to imprisonment for 14 years or more, the offender is liable in respect of maintaining the relationship to imprisonment for life. **(1D)** If the offence defined in subsection (1) 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 accused person 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 person maintained the relationship in issue. **(2)** A person may be charged in 1 indictment with an offence defined in subsection (1) and with any other offence of a sexual nature alleged to have been committed by the person in the course of the relationship in issue in the first mentioned offence and the person may be convicted of and punished for any or all of the offences so charged. **(2A)** However, where the offender is sentenced to a term of imprisonment for the first mentioned

Period	Reprint No. / Amending Legislation	Text of section
		offence and a term of imprisonment for the other offence an order shall not be made directing that 1 of those sentences take effect from the expiration of deprivation of liberty for the other. (3) A prosecution for an offence defined in subsection (1) shall not be commenced without the consent of a Crown Law Officer.
4 July 1997 - 31 March 1999	Amended by s 33 of the *Criminal Law Amendment Act* 1997 (Qld) As it appears in Reprint No. 1C	**Maintaining a sexual relationship with a child under 16** **229B.(1)** Any adult who maintains an unlawful relationship of a sexual nature with a child under the prescribed age is guilty of a crime and is liable to imprisonment for 14 years. (2) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the accused person, as an adult, has, during the period in which it is alleged that he or she maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions. (3) If in the course of the relationship of a sexual nature the offender has committed an offence of a sexual nature for which the offender is liable to imprisonment for 14 years or more, the offender is liable in respect of maintaining the relationship to imprisonment for life. (4) If— (a) the offence of a sexual nature mentioned in subsection (2) is alleged to have been committed in respect of a child of or above 12 years; and (b) the offence is defined under section 208 or 2098; it is a defence to prove that the accused person believed throughout the relationship, on reasonable grounds, that the child was of or above 18 years. (5) If— (a) the offence of a sexual nature mentioned in subsection (2) is alleged to have been committed in respect of a child of or above 12 years; and b) the offence is one other than one defined under section 208 or 209; it is a defence to prove that the accused person believed throughout the relationship, on reasonable grounds, that the child was of or above 16 years. (6) A person may be charged in 1 indictment with an offence defined in this section and with any other offence of a sexual nature alleged to have been committed by him or her in the course of the relationship in issue in the first mentioned offence and he or she may be convicted of and punished for any or all of the offences so charged. (7) However, where the offender is sentenced to a term of imprisonment for the first mentioned offence

Period	Reprint No. / Amending Legislation	Text of section
		and a term of imprisonment for the other offence an order shall not be made directing that 1 of those sentences take effect from the expiration of deprivation of liberty for the other. **(8)** A prosecution for an offence defined in this section shall not be commenced without the consent of a Crown Law Officer. **(9)** In this section— **"prescribed age"** means— (a) to the extent that the relationship involves an act defined to constitute an offence in section 208 or 209—18 years; or (b) to the extent that the relationship involves any other act defined to constitute an offence of a sexual nature—16 years.

Current offence provision

Period	Reprint No. / Amending Legislation	Text of section
1 December 2008 – present	Amended to its present form by s 43 of the *Criminal Code and Other Acts Amendment Act* 2008 (Qld) As it appears in Reprint No. 7	**Maintaining a sexual relationship with a child** **229B. (1)** Any adult who maintains an unlawful sexual relationship with a child under the prescribed age commits a crime. Maximum penalty—life imprisonment. **(2)** An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period. **(3)** For an adult to be convicted of the offence of maintaining an unlawful sexual relationship with a child, all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed. **(4)** However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship— (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts. **(5)** If the child was at least 12 years when the crime was alleged to have been committed, it is a defence to prove the adult believed on reasonable grounds the child was at least the prescribed age. **(6)** An adult can not be prosecuted for the crime without a Crown Law Officer's consent. **(7)** An adult may be charged in 1 indictment with—

Period	Reprint No. / Amending Legislation	Text of section
		(a) the offence of maintaining an unlawful sexual relationship with a child (the ***maintaining offence***); and (b) 1 or more other offences of a sexual nature alleged to have been committed by the adult in relation to the child in the course of the alleged unlawful sexual relationship (the ***other offence or offences***). **(8)** The adult charged in 1 indictment as mentioned in subsection (7) may be convicted of and punished for any or all of the offences charged. **(9)** However, if the adult is— (a) charged in 1 indictment as mentioned in subsection (7); and (b) sentenced to imprisonment for the maintaining offence and for the other offence or offences; the court imposing imprisonment may not order that the sentence for the maintaining offence be served cumulatively with the sentence or sentences for the other offence or offences. **(10)** In this section— ***offence of a sexual nature*** means an offence defined in section 208, 210 (other than section 210(1)(e) or (f)), 215, 222, 349, 350 or 352. ***prescribed age***, for a child, means— (a) if the unlawful sexual relationship involves an act that constitutes, or would constitute (if it were sufficiently particularised), an offence defined in section 208—18 years; or (b) in any other case—16 years.

Count 2 (*acquitted*): Section 216 of the *Criminal Code Act* 1889 (Qld). Indecent treatment of a child under 16 years on a date unknown between 4 July 1987 and 6 July 1988.

Offence provision as it existed at the relevant time

Period	**Reprint No. / Amending Legislation**	**Text of section**
4 July 1987 – 6 July 1988		**Indecent Treatment of Girls under Sixteen** **216.** Any person who unlawfully and indecently deals with a girl under the age of sixteen years is guilty of a misdemeanour, and is liable to imprisonment with hard labour for five years. If the girl is under the age of fourteen years he is liable to imprisonment with hard labour for seven years. It is a defence to a charge of the offence defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen years. The term 'deal with' includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.

Current offence provision

This section was repealed in its entirety by s14 of the *Criminal Code, Evidence Act and Other Acts, Amendment Act* 1989 (Qld) No. 17.

Count 3 (*acquitted*): Section 210 of the *Criminal Code Act* 1889 (Qld). Indecent treatment of a child under 16 years, Lineal Descendent, Under Care, Under 12, on dates unknown between 4 July 1989 and 6 July 1991.

Offence provision as it existed at the relevant time

Period	**Reprint No. / Amending Legislation**	**Text of section**
4 July 1989 – 6 July 1991	Amended by s12 of the *Criminal Code, Evidence Act and Other Acts Amendment Act* 1989 (Qld) No. 17	**Indecent treatment of children under sixteen** **210.** Any person who – (1) unlawfully and indecently deals with a child under the age of sixteen years; (2) unlawfully procures a child under the age of sixteen years to commit an indecent act; (3) unlawfully permits himself to be indecently dealt with by a child under the age of sixteen years; (4) wilfully and unlawfully exposes a child under the age of sixteen years to an indecent act by the offender or any other person; (5) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of sixteen years, is guilty of an indictable offence. If the child is of or above the age of twelve years, the offender is guilty of a misdemeanour, and is liable to imprisonment for five years. If the child is under the age of twelve years, the offender is guilty of a crime, and is liable to imprisonment for ten years. If the child is, to the knowledge of the offender, his lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his care, he is guilty of a crime, and is liable to imprisonment for ten years. If the offence is alleged to have been committed in respect of a child of or above the age of twelve years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of sixteen years. A person may be convicted of an offence defined in this section upon the uncorroborated testimony of one witness, but the Court shall warn the jury of the danger of acting on such testimony unless they find that it is corroborated in some material particular by other evidence implicating that person. The term 'deals with' includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

Current offence provision

See below at page 26.

Counts 4 (*acquitted*), 5, 7, 9, 11: Section 210 of the *Criminal Code Act* 1889 (Qld). Indecent treatment of a child under 16 years, Lineal Descendent, Under Care, on dates unknown between 4 July 1997 and 31 March 1999.

Offence provision as it existed at the relevant time

Period	**Reprint No. / Amending Legislation**	**Text of section**
4 July 1997 – 31 March 1999	As it appears in Reprint No. 1C	**Indecent treatment of children under 16** **210.(1)** Any person who— (a) unlawfully and indecently deals with a child under the age of 16 years; (b) unlawfully procures a child under the age of 16 years to commit and indecent act; (c) unlawfully permits himself or herself to be indecently dealt with by a child under the age of 16 years; (d) willfully and unlawfully exposes a child under the age of 16 years to an indecent act by the offender or any other person; (e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed written matter; (f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years; is guilty of an indictable offence. **(2)** If the child is of or above the age of 12 years, the offender is guilty of and is liable to imprisonment for 10 years. **(3)** If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years. **(4)** If the child is, to the knowledge of the offender, his or her lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his or her care, the offender is guilty of a crime, and is liable to imprisonment for 14 years. **(5)** 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 accused person believed, on reasonable grounds, that the child was of or above the age of 16 years. **(6)** In this section— **"deals with"** includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

Current offence provision

Period	Reprint No. / Amending Legislation	Text of section
8 December 2005 – present	Amended by s 166 of the *Justice and Other Legislation Amendment Act* 2005 (Qld) As it appears in Reprint No. 5B	**Indecent treatment of children under 16** **210** (**1**) Any person who— (a) unlawfully and indecently deals with a child under the age of 16 years; or (b) unlawfully procures a child under the age of 16 years to commit an indecent act; or (c) unlawfully permits himself or herself to be indecently dealt with by a child under the age of 16 years; or (d) wilfully and unlawfully exposes a child under the age of 16 years to an indecent act by the offender or any other person; or (e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or (f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years; is guilty of an indictable offence. (**2**) If the child is of or above the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years. (**3**) If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 20 years. (**4**) If the child is, to the knowledge of the offender, his or her lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his or her care, the offender is guilty of a crime, and is liable to imprisonment for 20 years. (**5**) 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 accused person believed, on reasonable grounds, that the child was of or above the age of 16 years. (**6**) In this section— ***deals with*** includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

Counts 6, 8, 10, 12: Section 208 of the *Criminal Code Act* 1889 (Qld). Unlawful sodomy on dates unknown between 4 July 1997 and 31 March 1999.

Offence provision as it existed at the relevant time

Period	**Reprint No. / Amending Legislation**	**Text of section**
4 July 1997 – 8 December 1997	As it appears in Reprint No. 1C	**Unlawful sodomy** **208.** (1) Any person who— (a) sodomises a person under 18 years; or (b) permits a male person under 18 years to sodomise him or her; or (c) sodomises an intellectually impaired person; or (d) permits an intellectually impaired person to sodomise him or her; commits a crime. Maximum penalty—14 years imprisonment (2) The offender is liable to imprisonment for life if the offence is committed in respect of— (a) a child under 12 years; or (b) a child, or an intellectually impaired person, who is to the knowledge of the offender— (i) his or her lineal descendant; or (ii) under his or her guardianship or care. (3) For an offence defined in subsection (1)(a) or (b) alleged to have been committed in respect of a child who is 12 years or more, it is a defence to prove that the accused person believed, on reasonable grounds, that the person in respect of whom the offence was committed was 18 years or more. (4) It is a defence to a charge of an offence defined in subsection (1)(c) or (d) to prove— (a) that the accused person believed on reasonable grounds that the person was not an intellectually impaired person; or (b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the intellectually impaired person.

Period	Reprint No. / Amending Legislation	Text of section
9 December 1997 – 31 March 1999	Amended by s 3 of the *Justice and Other Legislation (Miscellaneous Provisions) Act* 1997 (Qld) As it appears in Reprint No. 2A	**Unlawful sodomy** **208.** **(1)** Any person who— (a) sodomises a person under 18 years; or (b) permits a male person under 18 years to sodomise him or her; or (c) sodomises an intellectually impaired person; or (d) permits an intellectually impaired person to sodomise him or her; commits a crime. Maximum penalty—14 years imprisonment. **(2)** The offender is liable to imprisonment for life if the offence is committed in respect of— (a) a child under 12 years; or (b) a child, or an intellectually impaired person, who is to the knowledge of the offender— (i) his or her lineal descendant; or (ii) under his or her guardianship or care. **(3)** For an offence defined in subsection (1)(a) or (b) alleged to have been committed in respect of a child who is 12 years or more, it is a defence to prove that the accused person believed, on reasonable grounds, that the person in respect of whom the offence was committed was 18 years or more. **(4)** It is a defence to a charge of an offence defined in subsection (1)(c) or (d) to prove— (a) that the accused person believed on reasonable grounds that the person was not an intellectually impaired person; or (b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the intellectually impaired person.

Current offence provision

Period	Reprint No. / Amending Legislation	Text of section
1 December 2008 - present	Amended by s 38 of the *Criminal Code and Other Acts Amendment Act* 2008 (Qld) As it appears in Reprint No. 7	**Unlawful sodomy** **208 (1)** A person who does, or attempts to do, any of the following commits a crime— (a) sodomises a person under 18 years; (b) permits a male person under 18 years to sodomise him or her; (c) sodomises a person with an impairment of the mind; (d) permits a person with an impairment of the mind to sodomise him or her. Maximum penalty—14 years imprisonment. **(2)** For an offence other than an attempt, the offender is liable to imprisonment for life if the offence is committed in respect of— (a) a child under 12 years; or (b) a child, or a person with an impairment of the mind, who is to the knowledge of the offender— (i) his or her lineal descendant; or (ii) under his or her guardianship or care. **(3)** For an offence defined in subsection (1)(a) or (b) alleged to have been committed in respect of a child who is 12 years or more, it is a defence to prove that the accused person believed, on reasonable grounds, that the person in respect of whom the offence was committed was 18 years or more. **(4)** It is a defence to a charge of an offence defined in subsection (1)(c) or (d) to prove— (a) that the accused person believed on reasonable grounds that the person was not a person with an impairment of the mind; or (b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the person with an impairment of the mind.