SUPREME COURT
OF QUEENSLAND

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Chief Justice

"The evolution of the modern criminal trial: a plethora of change"

My topic is borne of the view that longevity and self-improvement are not mutually exclusive considerations. Australian jurisdictions exercise criminal justice systems which have in most cases been in operation for substantially more than a century. I speak today, unsurprisingly, from the perspective of Queensland's, which reached 150 years of age in the year 2011.

Such systems notwithstanding their age do change, to reflect modifications in community standards and expectations, and to describe the changes as gradual and incremental can disguise what are sometimes in fact quite substantial changes.

I propose this morning to mention a little of the history of the criminal trial system in Queensland, and how that system has been modified over recent decades to accommodate newly-emerging trends.

It is convenient to start with the committal.

At the end of the 19th century, a committal hearing would invariably have preceded a trial. The purpose of a committal was for a Magistrate or Justice to determine, administratively, whether there was sufficient evidence to warrant a defendant's standing trial. It could be useful in filtering out weak Crown cases, identifying guilty pleas early in the piece, and ensuring disclosure of the Crown case to the defence.

The practice in Queensland changed dramatically.

In the latter part of the 1990s, defendants were actively encouraged not to engage, at committal hearings, in the testing of evidence which frequently turned out to be a waste of time and resources. One approach was to encourage the early entry of pleas of guilty.

Where a defendant accepted that he should be committed for trial, or agreed to what was termed a "hand up committal" (where the relevant statements of witnesses are tendered without the need for any oral evidence), that level of cooperation in the administration of justice led to a substantial reduction in any penalty ultimately imposed, especially following a plea of guilty.

That judicial approach was adopted to meet a trend towards unnecessarily protracted oral examination at committals. No doubt that was intended to uncover any chink in the prosecution armour, but more often than not was a mere fishing expedition, inconvenient for the witnesses and often unproductive for the defendant.

The second major change in relation to committals in Queensland concerned the evidence of children in relation to sexual offences.

The *Evidence Act 1977* now requires that the evidence-in-chief of a child witness must be given only in statement form, without the child being called as a witness. A child witness may be cross-examined, but only if strict conditions are satisfied. The presiding Magistrate must be satisfied that the party seeking to cross-examine the child has identified an issue to which the questioning would relate, has provided a reason why the evidence of the child would be relevant to that issue, has explained why the evidence disclosed by the prosecution does not address that issue, and has identified the purpose and general nature of the questions to be put. Also, the Magistrate must be satisfied the interests of justice cannot adequately be satisfied by leaving cross-examination of the child about that issue to a trial. The Magistrate is obliged to have regard to the vulnerability of children, and the undesirability of calling a child as a witness at a committal proceeding. The Magistrate is obliged to give reasons for his or her decision on the application. Also, the

Magistrate must consider ways of reducing any distress or trauma to a child in giving evidence, such as by using an audiovisual link.

These limitations were introduced following a report of the Queensland Law Reform Commission, inspired by expressions of community concern over perceptions some child and other vulnerable witnesses were being harassed while under cross-examination at committals. The result is that while the evidence is not tested at committal, the vulnerable are protected. The legislature struck that balance.

The most recent development in Queensland has been restricting the right of an accused to require a person to give oral evidence and be cross-examined at a committal. This is now generally subject to leave, unless the accused is unrepresented.

What then of proceeding from committal to trial?

An assumption in the early life of the Queensland Criminal Code would have been that once committed for trial, a defendant would be brought promptly before a jury, and his fate determined. But because the decision actually to prosecute rested not with the committing court, or the court to which a defendant was committed, but with a Crown Prosecutor, the court was not in a position to control the timing, in order to ensure a defendant was not subjected to delay.

Accordingly, the Criminal Code was amended in 1997 to oblige the Director of Public Prosecutions or a Crown Prosecutor to present an indictment no later than six months after the date on which the defendant was committed for trial. The court may extend time, if for example it becomes apparent that necessary evidence will not be available in time, or the defendant has absconded and is not likely to be found before the expiration of that six month period, or for some other reason it is impracticable to present the indictment. But if time is not extended, and the period of six months expires without the presentation of an indictment, the defendant is entitled to be discharged from the consequences of the committal.

There is ground now to debate whether that six month period should be shortened, to ensure that defendants who will not be granted bail are not held on remand for unduly lengthy periods – allowing especially for a possibility of acquittal.

Once a trial proceeding is formally constituted, a streamlined pre-trial process is highly desirable. For example, a trial may be fractured, or at least disrupted, if the defence is not apprised sufficiently early of the evidence it has to meet. Ordinarily in the past that was secured through the committal process. But the prosecution would not unusually assemble additional evidence post-committal. With the reduction in committals, further safeguard became necessary.

In the year 2003, the Queensland Criminal Code was amended to incorporate a set of provisions comprehensively prescribing the prosecution's duty of disclosure. The basic obligation was expressed to include "an ongoing obligation … to give an accused person full and early disclosure of … all evidence the prosecution proposes to rely on in the proceeding, and all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person".

There is a related consideration. Our experience points up a prime need for the early briefing of counsel. Ideally, counsel should be briefed sufficiently early to be able to review the evidence prior to the drafting and presentation of the indictment, and on both sides, to facilitate the communication of the attitude of the defence generally, and specifically, to identify areas of factual consensus or dispute. Where trials are disrupted or founder, the late briefing of counsel on one side or the other will not infrequently have contributed. The proper resourcing of the prosecution service and legal aid bears on this.

I spoke earlier of disclosure by the prosecution. I have spoken on other occasions this year about the desirability of disclosure, sufficiently in advance of a trial, on the part of the defence. We are working towards more comprehensive such disclosure in Queensland in

complex trials, at this stage via a practice direction. I personally think there is much to commend the *Victorian Criminal Procedure Act* 2009 which obliges an accused pre-trial to "identify acts, facts, matters and circumstances" in the prosecution disclosure "with which issue is taken and the basis on which issue is taken". That comprehensive requirement may presumably only be secured legislatively. At present in Queensland, legislation obliges defence disclosure only in relation to alibi and expert evidence.

The traditional approach to the criminal trial reserved to the defence the right to sit back and await proof: there was no need to cooperate with the prosecution by making admissions for example, or narrowing the issues generally, or specifically identifying any particular defence focus. While the prosecution of course retains the burden of proof, that rather luxurious approach has become increasingly untenable.

In particular, there is now a seriously recognised need to keep trials within reasonable limits. In a chapter in "*Crime and the Criminal Justice System in Australia: 2000 and Beyond*" (2000) Butterworths, eds D Chappell and P Wilson, a commentator, John Willis ("*The Processing of Cases in the Criminal Justice System*") gives examples of the "mega" or "super" trial phenomenon:

> "In Victoria, in *R v Grimwade & Wilson* (1995) 1 VR 163 the trial took 676 days from arraignment to verdict and involved 294 sitting days and over 22 months. And that was a re-trial, the first trial having been aborted after some 33 weeks. In *R v Higgins* (1994) 71 ACrimR 429, the trial took some 17 months with 222 court sitting days. In New South Wales, in *R v Annakin* (1998) 17 NSWLR 202, the trial took some 14 months." (pp 149-150)
> …
> "…In *R v Wilson and Grimwade*, at the second trial, some 2,780 pages of transcript of the evidence given at their first trial was read to the jury, the reading taking some 10 calendar weeks and involving 31 sitting days." (p 153)

Obviously enough trials of that magnitude have raised issues as to the capacity of juries to assimilate vast bodies of evidence, quite apart from the enormous disruption of their personal lives. Again consistently with a contemporary judge's managerial approach,

various expedients have been adopted with a view to keeping criminal proceedings within reasonable limits.

For example, the system has been fashioned to encourage guilty persons to admit their guilt at an early stage. In 1992, the penalties and sentencing legislation in Queensland expressly provided, for the first time, that when sentencing an offender who has pleaded guilty, a court "must" take the guilty plea into account, and "may" reduce the sentence accordingly. The legislation also encourages cooperation with the authorities, such as by giving evidence in a proceeding against another. The regime is designed to minimise the prospect of retaliation for such cooperation within, say, a prison environment.

Pleas of guilty aside, the defence attitude in Queensland is I believe increasingly one of cooperation to ensure a streamlined trial. Part of the philosophy may be an appreciation that a jury will simply not be impressed if it sees time being wasted, and where it identifies a defence attitude as the reason. In an appropriate case, the defence may be invited to make a statement about what matters are in issue at the conclusion of the prosecutor's opening. Sometimes pre-hearing discussions will lead to a defence preparedness to delineate at the outset the limits of the trial.

We strive now to minimize disruption to trials through legal debate in the absence of the jury.

When our Queensland Criminal Code commenced in 1901, any debate about the adequacy of the charges on an indictment, or about the admissibility of evidence or the course of the trial, would have taken place after the empanelling of the jury and before the prosecutor's opening address. As the years progressed, there was growing acknowledgment of the unacceptability particularly of keeping juries waiting during those periods, which were possibly quite extended.

The Criminal Code was therefore amended in 1997 to provide for pre-trial directions hearings. The only pre-condition is that an indictment has been presented. A major

advantage of this course is that the jury has not at that stage been empanelled. The range of matters which may be dealt with at these hearings is quite extensive, covering applications for stay of the indictment, in relation to the joinder of accused or charges, questions as to the admissibility of the evidence to be led, provision for any psychiatric or other medical examination of the accused, the exchange of expert reports, and "encouraging the parties to narrow the issues and any other administrative arrangements to assist the speedy disposition of the trial" – consistently with the contemporary judge's "managerial" approach. The provisions say that a direction or ruling given is binding unless the trial judge "for special reason" gives leave to re-open it. Also, such a direction may not be subject to interlocutory appeal, although it may be raised as a ground of appeal against conviction.

And so we progress from committal and pre-trial issues to trial and the critical issue of instructing the jury.

When I first joined the Supreme Court of Queensland in 1985, the only instruction given by a trial judge to the jury was given following counsel's addresses and immediately prior to the jury's retirement, that is, the traditional "charge".

Within a few years, it fortunately became the practice for judges in Queensland to speak to their juries on a range of matters at the very commencement of the trial. The topics generally covered now, at that stage, are personae, the nature of the verdict, the burden and standard of proof, what is evidence, the judge's function, the jury's function, that the jury is to attend only to the evidence, without outside influence or investigation, the order of events, an admonition that the jury should keep an open mind, that jurors may take notes, some guidance in a preliminary way as to the assessment of evidence, and as to the role of the bailiff.

A judge may also at that preliminary stage provide the jury with some basic instruction as to the elements of the offence charged, and as to the likely shape of the trial, especially if the defence has identified the real issues.

At an even earlier stage, Queensland jurors will have been given some introductory explanation of the process. Prospective jurors are provided with a handbook, and they watch a video in which professional actors illustrate court room and jury room procedure. Needless to say, the content of the handbook and the video are authorised by the judges.

It is convenient to mention here a reform secured in 1995 in relation to the empanelment of Queensland juries. The *Jury Act* was then amended to remove the unlimited right of challenge to jurors which had prevailed during the first round of jury empanelment. It was thereafter limited to eight peremptory challenges for each of the Crown and the defence. That has very substantially reduced the time taken in many cases for jury empanelment, and has saved a lot of money court budgets otherwise had to bear.

We are now immersed in the trial. Let us consider the way the evidence is led.

There has been considerable departure in Queensland from the traditional approach, under which all of the evidence at the trial was given orally, in the presence of the accused.

Increasingly, for example, the evidence of vulnerable witnesses, especially children, is recorded prior to trial. Video recording is used. The presiding judicial officer may direct that the child witness, when giving that evidence, be located in a room other than the courtroom (in which the accused is present). The evidence thus given becomes the evidence admitted at the trial, subject to a limited capacity in the trial court to authorise further examination.

The current form of the *Evidence Act* contains a number of provisions about children giving evidence by link from a room remote to the courtroom, and if in the courtroom, being obscured from the accused person by the use of screens.

A fundamental assumption of the criminal justice process as traditionally crafted was that an accused person must enjoy a full capacity to test the evidence advanced against him.

As we have seen, contemporary conditions in Queensland have produced serious restrictions on cross-examination in certain situations, for example, the cross-examination of vulnerable child witnesses in relation to sexual offences.

More generally as to sexual offences, in the 1970s in Queensland, the Parliament acknowledged a need to control cross-examination of complainants in rape cases. This curtailment arose from a view that, in effect, complainants were through cross-examination sometimes being bullied out of their allegations. There was a feeling the road for complainants had become so discomforting that legitimate complaints of rape in particular were not being advanced or pursued.

In the result, the Parliament decreed that "the court shall not receive evidence of and shall disallow any question as to the general reputation of the complainant with respect to chastity". The court's leave was required for any cross-examination of the complainant as to her sexual activities with anyone, and as to the reception of evidence about sexual activities of the complainant with anyone. A grant of leave was dependent upon the court's satisfaction that the evidence would have "substantial relevance to the facts in issue or be proper matter for cross-examination as to credit". These rules curtailed the length of rape trials, as well as fulfilling their primary function of upholding the privacy of a complainant's personal life so far as the interests of justice allow.

There has always been a discretion in the court to control cross-examination in criminal trials. These days, it is more robustly exercised – or probably should be.

In Queensland, the *Evidence Act* says that the court may disallow a question as to credit "if the court considers an admission of the question's truth would not materially impair confidence in the reliability of the witness's evidence". Further, "improper" questions may be disallowed. In determining whether a question is improper, the court "must" take into

account any mental, intellectual or physical impairment of the witness, and any other relevant matter, including age, education, level of understanding, cultural background or relationship to any party to the proceeding.

On the other side, the version of an accused person is almost invariably now provided by means of videoed records of interview with police. That feature radically reduced the avenue for challenge of confessional material, which accounted for much time at criminal trials in earlier times. Also, admissions are often made to avoid the calling of non-contentious evidence. The Criminal Code has always allowed for that, but it is a facility used more these days than previously.

The manner of giving evidence has changed. Not infrequently, non-contentious evidence is now given in Queensland by telephone or video link. The Criminal Practice Rules are permissive, in providing that "the court may decide to receive evidence or submissions by telephone, video link or another form of communication in a proceeding". Video links are used extensively in bail applications where a prisoner is unrepresented.

To aid their comprehension of the evidence, whether given orally, within the courtroom or from outside, or in documentary form, juries are now often provided with aids: computer generated recreations of crime scenes, three dimensional modelling, booklets of copies of plans and exhibits etc.

It is very much in the interests of both the prosecution and defence that jurors have a clear understanding of both factual and legal issues. That is especially so in this day and age, where recent decades have witnessed the need for increasingly complex directions on some defences, notably provocation and self-defence. Various jurisdictions are examining the possible simplification of jury directions, which is a most desirable goal, but the High Court jurisprudence amounts to an extremely heavy constraint.

Critics of the modern jury system sometimes argue that jurors lack the intellectual capacity to make the increasingly complicated determinations which now arise. But empirical

studies suggest it is not so much the intellectual capacities of the jurors which is problematic, but rather, the manner in which the material is presented. We are increasingly recognizing the need to reassess the way we communicate with jurors, to multiply the techniques we use to ease the jury's fact finding process. Charts, flow sheets, written summaries, video re-enactments, computer-based crime scene analysis, increasingly a feature of our approach, are movements in that direction.

We also need to be alive to the differences among the generations and age groups in the manner in which information is best assimilated. Juries increasingly include members of generations X and Y. Whereas "baby boomers" most generally have informed themselves by listening and reading the printed word, younger citizens are generally more interested in electronic forms of communication: the internet, mobile phones etc. The prospect of best informing your subject will be enhanced if you use his or her preferred means of communication. Juries reflect a mix of ages, and so the means of communicating with them could involve a mix of techniques.

Technology raises endless possibilities. We have a full capacity for technology trials in the Queen Elizabeth II Courts of Law in Brisbane. The well-publicized trials of Dr Patel and defendants involved in Wickenby prosecutions proceeded that way, with counsel, accused, judge and each juror having access to a computer, with all documents managed and displayed electronically.

Then we proceed beyond the evidence and Counsel's addresses to the summing up to the jury, and there is only one aspect of that which I again mention.

A particular feature of the Judge's direction to the jury is the inhibition, absent legislation, on a trial judge's offering any assistance to the jury as to the meaning of the phrase "beyond reasonable doubt". I personally favour the provision in the *Victorian Jury Directions Act* 2013 which authorizes a judge to tell the jury, in effect, that proof beyond reasonable doubt surpasses proof on the balance of probabilities, but may fall short of

proof to the point of absolute certainty, while surpassing imaginary, fanciful or unrealistic doubt.

And what of our jurors' interface with the external world?

An absolutely fundamental assumption basing the integrity of the process has always been that juries obey the judge's admonition that they must have regard only to the evidence given in court. The case law has thrown up instances of jurors conducting independent enquiries, and the internet squarely raises the prospect of computer-savvy jurors making private enquiries in relation to the accused person in particular.

While Australian courts have proceeded to this point on the confident basis that jurors will in this respect follow the judge's direction, some Australian legislatures have sought to reinforce that position with statutory prohibitions on extrinsic research. For example, Queensland's *Jury Act* ordained in 1995 that a juror "must not enquire about the defendant … until the jury of which the person is a member has given its verdict". The term "enquire" is defined to include "searching an electronic database for information, for example, by using the internet".

Other recent changes in Queensland have been allowing a deliberating jury to separate, and the provision for judge only trials. Also, as with many other Australian jurisdictions, we now provide a professional psychological counselling service for former jurors, at the expense of the State.

I have offered this traverse of change in Queensland, and much of it has also taken place in other jurisdictions, to confirm how substantially the criminal trial system has been modified over recent years and decades.

Change will inevitably continue, and I am on record as expressing the view that we should be prepared to explore arguably desirable further change based on experience in the United Kingdom and elsewhere.

Our systems must not be left to stagnate in vacuums. They will operate best in the public interest if they are continually monitored and refined, and that process is best informed by drawing on experience in cognate jurisdictions as well as our own.