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# Queensland Law Society Symposium 2013
# Brisbane Convention and Exhibition Centre
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**The Hon Paul de Jersey AC**
**Chief Justice**

It is as always a great pleasure for me to have the opportunity, ladies and gentlemen, to address you briefly at the commencement of this important annual symposium.

I at once express my sympathy to those of you who may have suffered during and since the recent floods. Two years ago on this occasion I found myself advancing similar sentiments. I express support for practitioners who have lost premises and files and equipment through flooding, and for all of you who have shared the misery inflicted on your clients.

The plenary session topic concerns placement of the Australian profession within the Australian/Asian context. No doubt the speaker will identify prospective challenges.

I have great respect for the Queensland profession, for its integrity, its competence and its expertise. I regularly counsel newly-admitted practitioners as to the importance of continuing professional development. That points up what is I believe another hallmark of an effective practitioner, which is adaptability.

The Queen Elizabeth II Courts of Law manifest good contemporary design and facilities. You may be interested to know we have nevertheless already identified some areas for improvement. We should for example, be able to ‘stream’ courtroom proceedings into other parts of the building, and I am confident that will soon be achieved.

We in the judiciary, with your support, must ensure these excellent new facilities are, in the public interest, fully used. I emphasize our video capacity, which can work great efficiencies.

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Sitting in that brilliant new modern complex, I ask myself from time to time whether our processes are as up-to-date as they should be. We continually hone those processes, through rules of court, practice directions and the like. Their implementation will not ensure expeditious litigation without undue expense absent the full, progressive cooperation of the profession.

Let us recall some of the history on the civil side.

By the 1980s, the cost of litigation in the Supreme Court had become prohibitive. A person of ordinary means would have to mortgage the family home to pay for it. That is regrettably still the case. The worthy pro bono thrusts aside, it was largely that concern which gave impetus to mediation, now so wide-spread.

Has mediation really proved to be a less expensive option? I have reservations about that: and when mediation fails, I imagine potentially worthy claims run the risk of collapse where the additional costs of a trial simply cannot be borne.

I have been an enthusiastic proponent of mediation over many years. It has done wonders for court lists. But I must say I have come to experience some regret over a downside.

I fear, for example, that some settlements which result from mediations may reflect a level of palm tree justice: though, the process being private, one could not definitely say one way or the other. I am also conscious that mediation has become so much the norm, that court advocacy skills are leeching away. And if no settlement results from a mediation, how well equipped are practitioners to implement the processes of litigation these days, especially in relation to the disclosure of documents? Young practitioners especially, may flounder when confronting our “direct relevance” test.

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The disclosure of documents remains the embarrassing albatross of the civil justice system. Its exorbitant cost, in major cases especially, can be grotesque. A disputant confronted by the prospect of expensive multi-million dollar litigation might see attraction in identifying its respective 20 best documents and letting the cards fall where they should. More often than not the other 20,000 disclosable documents will impact minimally. I acknowledge it is easy to pronounce upon these things from a distance.

The unremitting disclosure obligation may, I believe, be pressuring claimants into the arena of mediation. That is not necessarily a bad thing, but it may be a bad thing where the mediation does not exhibit the traditionally paraded advantages, as a relatively inexpensive, expeditious process likely to lead to a just and mutually satisfactory resolution.

Queensland's direct relevance regime for the pre-trial disclosure of documents has worked much more efficiently than its predecessor under *Peruvian Guano*. Its continuing success depends on the profession's implementing the requirement with appropriate rigour.

Over the last couple of years, the court has worked closely with the profession to refine our process for supervised cases (that is, cases where a trial would last more than five days), and it is appropriate that I express thanks today for the QLS contribution led by Justin McDonnell of King and Wood Mallesons. The result of this initiative should see more focus on limiting disclosure of documents and their efficient electronic management, as well as the traditional goal of limiting and defining the scope of any trial by reference to the real issues, and avoiding surprise.

From what I am told and observe, the profession is alive to its responsibility to craft an economically manageable landscape in civil. I look forward to a continuation of that in implementing this new civil initiative.

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More robust regimes are mooted from time to time, such as imposing finite limits on the documents to be disclosed, numbers of witnesses, oral evidence, and length of hearings. Legislative backing would be needed for those things, absent the agreement of the parties.

The prospect of parties agreeing on a strictly abbreviated process leading to a swift, definitive result (excluding appeal, for example) is an interesting one which I would be keen for us to trial. We could only confidently do this with the parties' agreement.

Historically, our courts have dealt with exceptional cases very quickly (in my own case the "world's tallest building" case in 1987). But Judges are rightly astute these days to avoid curtailing procedural rights too far, and it is not clear appeal courts would support any robust limitation.

My having said these things, I believe our present civil approach works reasonably well, but we are heavily dependent on the cooperation of the profession. I am confident that will continue, and embrace the changes which will inevitably ensue on the civil side.

I turn to another area of potential change, and that is in the criminal justice system. We have tended to greet changes in this arena with considerable sceptical trepidation. Some few years ago, the Queensland legislature put an end to the sequestering of deliberating juries, and established the possibility of Judge only trials and majority verdicts. To the apparent dismay of some, perhaps many, the clocks did not stop and the temple curtain was not rent in two.

The Queensland legislature had been circumspect. Majority verdicts are not allowed here on charges of murder, unlike the position in the United Kingdom. That was a concession, one surmises, to the grand criminal justice traditions so entrenched in this jurisdiction.

I have little doubt that as the years, or maybe the decades, roll on, we will here in Queensland be urged to embrace reforms which have been in operation, effectively, in that great basin of legal tradition the United Kingdom, now for a decade or more. Trial judges

in the UK are entitled to comment to the jury, adversely to an accused, for advancing a case for the first time at trial; courts have the discretion to admit evidence of an accused's prior conviction for similar offending; and hearsay evidence is admitted, the residual question being confined to its weight.

I attended a seminar at Warwick University conducted by the UK Judicial Studies Board shortly after the commencement of those – by our terms – radical reforms, most of them introduced in 2003. The mood was sombre.

My recent reading, and discussion with senior judges in London, suggest their reformed system works well. Why, for example, should a jury be denied knowledge that an alleged rapist committed another rape six months earlier, subject to appropriate warning from the Judge, or that an accused charged with fraud has a string of convictions for dishonesty? While I acknowledge the contrary position, many would argue common sense and general life experience would militate in favour of not keeping a jury in the dark about such matters.

I trust the intelligence and wisdom of my fellow citizens. I do not accept a claim that made aware of prior misconduct, jurors would automatically say: he did that so he must have done this.

In a comparatively modest way, we are presently developing a practice direction about the pre-trial management of lengthy criminal trials, trials expected to last 15 days or more. There are many more of those trials these days. The draft practice direction, which is the subject of wide consultation with stakeholders, is premised on early preparation, and the comprehensive disclosure pre-trial, by both parties, of their respective positions.

I believe we have long passed the point where the defence should be permitted to withhold disclosure of its intended trial approach. A criminal proceeding should not in this 21st century amount to a game where the players may keep their cards up their sleeves.

The draft practice direction is intended to go some way towards rectifying that situation. The object is to improve efficiencies in relation to a number of matters: the reliability of the jury's determination, discovering the truth notwithstanding the adversarial context, and economy in the deployment of resources, time and expense.

I expect we would need legislative backing to compel the defence to disclose, fully, pre-trial, the ambit of issues, and I expect that as with majority verdicts, some would howl about erosion of inviolable rights.

Yet in Victoria, which we have tended to regard as fairly conservative in these matters, the *Criminal Procedure Act* 2009 obliges the defence, pre-trial, to serve and file a document "identify(ing) the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken" (s 183) – in other words, fairly comprehensive disclosure of the defence position before the trial begins. That has been the position in the UK for more than a decade, and I note New South Wales is moving in that direction.

I surmise that in this jurisdiction, were that level of pre-trial frankness obligatory, we would see fewer trials, and more pleas of guilty attracting the consequent mitigation in penalty. I suggest they would be true pleas, not expedient pleas.

I acknowledge that cooperation does characterise many criminal proceedings, and we are grateful for that. There is every reason, however, why it should be a hallmark of all such proceedings.

We must remember that the public, paying to maintain the criminal justice system, has legitimate interest in efficiencies, while accepting that must be tempered by the need to respect, support and promote fundamental rights.

But is it justified to summon a jury to twiddle its thumbs at public expense for hours if not days while issues are resolved at the commencement of a trial which could have been dealt with pre-trial under s 590AA of the Criminal Code? Is it justified that a trial be

adjourned, or aborted, because without notice the defence choose at the last minute to rely on a position which, with notice, could have been investigated by the prosecution and met much earlier on? These things happen these days much less frequently than they did 30-40 years ago. But when they do, the public cost, and the inconvenience to many, are simply intolerable consequences.

As that bastion of the rule of law the United Kingdom has been prepared to embrace progressive criminal law reform, and if we accept it has worked well there in the public interest, so should we be prepared to explore arguably desirable change.

As I have said, our current initiative is comparatively modest, and I hope it is ultimately implemented, but the effective operation of even that level of change will depend on the cooperation of the profession, and that will in turn depend on what we call "cultural" change.

I assure you all of the support of the judiciary. And what, you may ask, of ultimate change in the judiciary. Our charter is largely defined and set down, and while there can be innovation – as with flowcharts, computers and the like with juries as but two of many examples – judgments from above do establish substantial constraints, especially in this criminal jurisdiction.

I am as a trial judge continually reassured that my juries reach what I believe to be right results notwithstanding the glazed eyes which meet well motivated but necessarily highly complicated directions on matters like provocation and self-defence. And how disturbing was the research which unearthed jury incomprehension of the meaning of proof "beyond reasonable doubt". The Queensland Law Reform Commission referred in 2009 to a survey which showed 36% of those surveyed believed proof beyond reasonable doubt meant "total proof".

May I draw again on the Victorian experience? I think the Victorian *Jury Directions Bill* 2012, currently before the Legislative Council, marks an interesting step in trying to

simplify the task of juries. Among other things, that Bill sanctions something which was fairly common when I was first appointed to the Supreme Court in 1985, which was to tell juries that a reasonable doubt was a doubt founded in reason, and not something fanciful dreamt up for the purpose of avoiding discharging what would otherwise be an unpleasant duty. Maybe that language is now rather outdated and perhaps patronizing, but the regularity with which juries ask to be told what a reasonable doubt really is, suggests that we do need to be more proactive about this.

At the moment, High Court dictates absolutely forbid it. According to respectable surveys, juries are crying out for help, yet in responding, judges are neutered.

Judges are not allowed to tell juries even the obvious, that a “reasonable doubt” is “a doubt founded upon reason”, or a “rational doubt”, let alone saying it may fall short of 100% scientific exactitude, or that it must surpass what is more probable than not.

Under the Victorian bill, now at the second reading stage in the Upper House, Judges will be permitted to tell juries that proof beyond reasonable doubt surpasses proof of what is probable, whereas it may fall short of proof of “absolute certainty”, and that seems eminently sensible.

Many would say that the abstruseness of a number of the necessary jury directions these days renders them opaque. That is largely the result of judicial cerebration at the appellate level. I think the time may have come for parliament to counter, by easing the task of juries through legislative licence, or not to put too fine a point on it, legislative ‘correction’.

That said, I positively affirm my conviction that by one means or another, juries do regularly work through the facts and the law to reach the right result.

The continuing legitimacy of this process depends on the court’s delivering comprehensible and manageable directions on the law. We may need legislative help

here. What the courts are producing may involve a level of complexity which is incompatible with common-sensical determinations in our criminal courts.

Talking more generally of the challenge to address change, I will not traverse this morning the particular changes in the legal landscape I have witnessed over my 42 year legal career. They range from the utilitarian – carbon paper to computers; to process – imagine 30 years ago a suggestion that evidence be received by telephone or video; to rights – with some accused denied the sight of the colour of the eyes of their accuser.

Critics claim the law is time-warped. It is not. But as with the courts, the profession must be prepared to embrace obviously beneficial change, and not mindlessly shelter behind tradition, however time hallowed.

Materially, the Queen Elizabeth II Courts of Law epitomise best practice, progressiveness, achievement, stability. We must join to ensure that the process – what happens there, and in all of the courts of the State – serves our citizens in the ultimately best way.