SUPREME COURT
OF QUEENSLAND

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Conducting Criminal Trials – the Queensland Courts' Experience

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I am talking, as you know, about changes in criminal trial procedure in Queensland. I do so from the perspective of a survivor of those changes, because just about all of them have happened since I started criminal practice as a young lawyer in 1982. It's also a period, those three and a half decades, when the paths of our two jurisdictions had only recently diverged, with independence for Papua New Guinea in 1975.

At that time, your country and Queensland had operated on Sir Samuel Griffith's Code for three quarters of a century, and even today our two Criminal Codes remain very similar in their terms. Until independence both our jurisdictions had appeals to the High Court of Australia. Some of the cases on the interpretation of the Criminal Code which I studied as a student emanated from Papua New Guinea, like *Timbu Kolian* and *Evgeniou,* both cases on the accident excuse under s 23 of our Code, now s 24 of yours.

When I began prosecuting as a barrister in 1984, a criminal trial in Queensland would not have looked much different from a criminal trial 50 years earlier. There wouldn't have been a woman prosecuting and there would not have been women on the jury, because even though they had been able to serve as jurors since 1923, it was not until 1945 that a woman was first empanelled.

But still, in 1984, women prosecutors were rare, and so in fact were women jurors, because until 1995 any woman could seek exemption by jury service purely by reason of her gender, without more, and most did. Of course, I am beginning here with the major and striking difference between our trial systems; in Queensland the jury is the foremost decider of criminal guilt. I am a great adherent of the jury system and will talk more about the way it has changed in Queensland, but I also recognise that it is the source of some of our greatest challenges in a digital age. That is something I will come back to as well.

Essentially, then, from the Queensland perspective, very little in the Code and the Evidence Act, the Jury Act and other sources of criminal practice had changed over the 20th Century up until 1984. But since then, there has been unprecedented change, which seems to me to be becoming increasingly rapid – although that may be a function of age – that phenomenon by which every year seems shorter. In fact most of those changes happened in the last two decades during which I have been a judge, so that the landscape of criminal trial advocacy would look very different to me now should I ever return to the Bar.

There are three drivers, as I see it, of this change. The first is essentially a change in social attitudes, especially when it comes to sexual offending, and offences involving children; the second is the effect of technological advances which can be both beneficial and damaging; and the third is the simple issue of scarcity of resources, which has made streamlining trial procedures essential. Those three drivers and their effects are not independent; one may contribute to the achievement of another, but often there is a tension between them; the results of one may be counterproductive to another.

To begin with the first driver, of changes in social attitudes; this has led to a great number of alterations over the last couple of decades in the way that trials are conducted. One example is that husbands and wives are now compellable to give evidence against each other and to disclose communications made during the marriage; the same changes, I understand, were made here in 2002 by the *Criminal Code Sexual Offences Amendment Act*.

Another manifestation of changing attitudes with a very significant impact on court procedures has resulted in very similar measures to those under your Evidence Act. It flows from the recognition of the particular vulnerability of certain groups of witnesses: child witnesses; people disadvantaged by physical and/or intellectual disability; and complainants in sexual offence and domestic violence cases. As in your jurisdiction, that recognition has led to the development of different ways of protecting those witnesses, through use of closed courts, permitting

the presence of support persons, obscuring the accused from the view of the witness, provision for video recording of evidence prior to trial or giving of evidence through video link. There is this difference: in relation to children who are witnesses, their evidence can only be taken by video recording prior to the trial; there is no judicial discretion involved.

The use of video links and video recording, of course, are possible because of developments in technology, the second driver of change I have mentioned. With those measures has come, in our system, the need to give special directions to juries not to draw inferences of guilt because they are used. That again is another complication for trial judges: there have unfortunately been a succession of cases where appeals were upheld and matters had to be re-tried because judges forgot that the presence of a support person required that direction.

There is no equivalent set of provisions to protect vulnerable people, other than children, who may actually be the defendant at a criminal trial. While a court may take steps to accommodate people with disability for example who are charged with criminal offences, there is not statutory provision requiring that result, the exception as I have mention is where a child is the accused; the Evidence Act gives the judge the same options in respect of them as for a vulnerable witness. Should the child give evidence, the judge has the options of permitting a support person, requiring the evidence to be video recorded or any of the other means I have mentioned. I think, from my reading of your Evidence Act, that the same would apply here.

Another change we share with you has been the prohibition of questioning of complainants in sexual offence cases about their sexual histories without the leave of a judge, which will only be obtained if the cross-examination is shown to be relevant and necessary. Also in Queensland now, access can't be got to counselling records for a sexual offence complainant without leave, on showing a judge that the production of the records is going to result in probative evidence which couldn't be gotten some other way. Both the cross-examination and access to counselling records require applications with a necessary demand on judicial time.

We have a provision similar to yours prohibiting cross-examination by an alleged perpetrator who is unrepresented. There are some differences: our provision covers a very wide range of witness: Children, mentally impaired people and victims of sexual and serious violent offences can't be cross-examined. And in our jurisdiction the court has to arrange for a lawyer from Legal Aid to be retained for the purpose of the cross-examination. That too can be time-consuming and lead to delay, particularly when a defendant sacks his lawyer mid-trial. And of course the jury has to receive a special warning not to draw any adverse inference from the adoption of the procedure. These modifications to the law to protect witnesses are all good things, but they certainly add to the complexity of trial management and to the length of trials.

In other ways which aren't necessarily the result of legislation, courts have become a great deal more considerate of the circumstances of the

people who appear before them, both as witnesses and as accused. Queensland was, I think, the first Australian state to develop an equal treatment bench book which gives information about different groups, religious beliefs, cultural practices, ethnic backgrounds and areas of disadvantage and how it may affect an individual from that group when they appear in court. The Bench Book also gives guidance as to ways in which different beliefs, practices or needs may reasonably be accommodated by a court.

For example, Courts are much more likely to take an adjournment now to allow a Muslim defendant to pray as necessary. As you can imagine there is a particular focus on people of Aboriginal and Torres Strait Islander heritage, particularly non-urban people who may face cultural or language barriers in court.

In that regard, one thing which is part of your law which is not of ours is the recognition of custom. But there are some elements of it in relation to Indigenous people; so for example in considering the defence of provocation, Aboriginality may be a significant factor in relation to the defendant's objective circumstances.

Returning to language barriers, my court is just now developing a set of guidelines for how a court should manage cases in which interpreters are required, which may of course also extend beyond language translation to circumstances where a deaf person requires an interpreter.

These are all developments which were not within contemplation when I was a young criminal lawyer. Trial procedure was heavily standardised with almost no capacity, let alone inclination, to deal with the needs of individuals. But again all these things require extra attention, are likely to involve pre-trial hearings in order to sort out what procedure will be adopted, and have created a much more managerial role for a trial judge.

There is another contemporary phenomenon, which is that we are more likely to encounter a self-represented defendant than ever before. They are often, indeed usually, people who are entitled to legal aid but choose to represent themselves, either because of disagreements with their legal representatives, who in some cases have made the mistake of trying to introduce them to reality, or because they fancy they can do a better job, or both. I don't quite know why it is that we see more unrepresented defendants than we did 20 years ago. I suspect we may be dealing with a more entitled generation who feel they can demand much more of their lawyers, publically funded though they are, than the defendants of two decades ago.

It may also be, and here I bring in technology as a villain, because they have looked at social media and got the idea from others that court advocacy is really not a difficult thing to do. A third reason I suspect, is that judges, in their efforts to make court rooms more accessible and less intimidating places, are just not as frightening as the judges of my youth who were apt to give short shrift to defendants who thought they

could and should speak for themselves without much regard for the formalities of the law.

Whatever the causes, again we have had to adapt. Our Supreme and District Court bench book gives assistance as to the things that need to be explained to an unrepresented defendant at the beginning of the trial as to jury selection, examination of witnesses, cross-examination and address. The Bench Book, by the way, is also a development of the last two decades in Queensland. When I started as a judge in 2000, a more experienced judge who was feeling kindly might give a new judge a checklist of things to look out for in a trial. But it was very much the case that new judges were thrown in the deep end, particularly those who had never practiced in crime.

Very early in my judicial career I was put to work with a more senior judge and a couple of District Court judges putting together a bench book to help with court procedure and the sorts of directions one has to give to juries. Those directions are useful even if a jury is not involved in the case, because they set out the elements of the offence and defences available under the Code.

And speaking of offences and defences and the effects of social attitudes: Sometimes more progressive social attitudes have led to greater complication in the criminal law, as for example in relation to the defence of provocation, where a judge must now tell a jury that a minor sexual assault cannot constitute provocation except in exceptional

circumstances, although it still remains the case that an ordinary physical assault can. That arose out of a particular case in which a man was convicted of manslaughter rather than murder possibly because he had raised a defence that the deceased had provoked him by making a homosexual advance to him. It resulted in a social media campaign and an online petition and, as is becoming more commonly the case when such campaigns are mounted, the law was changed.

I say nothing as to the merit of alterations such as this; simply that in a jury system the task of a trial judge has become more complicated because of a need to instruct juries about exceptions to defences and then exceptions to the exceptions. I note that your provocation provisions remain in the form that I recall when I was a barrister.

The Qld Criminal Code when I began practice was still very much in the same form in which Griffith wrote it, but amendments made because of social pressure have accumulated in recent years. The sheer number of offences has increased; most recently for example, the Queensland parliament introduced into our Criminal Code an offence of murder by reckless indifference. That is likely to mean that what would have been manslaughter trials will now become murder trials and there will be more trials rather than guilty pleas, because in Queensland murder carries a mandatory life sentence.

The second area of change is the streamlining of trials, partly because there is something in the adage, justice delayed is justice denied, but

also because the leisurely approach of the past is simply not affordable. Part of that streamlining is in the process of empanelling juries. It used to be that on the first calling over of a panel of 36 or so jurors, both prosecution and defence could challenge as many of the jurors as they liked. If 12 were not selected then, there was another run through with 8 challenges. That could take the best part of a morning. It could also distort things somewhat. I can recall prosecuting a trial in which there weren't very many women on the jury panel, and because the defence was able to make so many challenges, it proved simply impossible for me to get any of them through and I ended up with an all-male jury. I wasn't very happy about it because the charge was bigamy. All of that ended in 1995, when the system was changed so that each side only had eight peremptory challenges.

Another change in the ways that juries are managed, is that they are given more information. It used to be that effectively they were not told anything until the judge gave them directions at the end of the trial, just before they retired to consider their verdict. Now they are given an explanation of things they need to know at the outset of the trial: of their role, the judge's role, how to approach evidence, the standard of proof and so on.

Another more recent change is the majority verdict which avoids the need of a retrial when there is one hold out juror. In 2008, the Jury Act was amended to allow majority verdicts of 10 or 11 of the 12 jurors, except for charges that carry a mandatory life sentence, which is

essentially murder, and trials for Commonwealth offences. It actually was thought when that was introduced that it would result in more convictions because there was a notion that hung juries were usually the result of a solitary juror holding out for an acquittal, but in fact the reverse has been true. It seems more commonly there is one juror hell-bent on conviction notwithstanding that the other eleven have a reasonable doubt.

And another development since 2005 is the ability for a judge to conduct a trial without a jury where it is in the interests of justice. Usually that is because of publicity which will make it difficult to find unaffected jurors.

Another area of change relates to exchange of information. The prosecution is now under an obligation to give full disclosure of all their information as early as possible. The defence now must hand over any expert reports it's going to rely on. When I was a junior prosecutor the defence could turn up with a pathologist to give evidence about the cause of death or a psychiatrist to establish an insanity or automatism defence and the first that the prosecutor would hear of it was as the opinion was being expressed in court, which gave almost no opportunity to rebut it. Now those reports must be provided in advance of trial.

Another advance is that legal points are argued at pre-trial hearings rather than at trial. To have that is particularly important in our system because we have juries, so that it is more unfortunate if they are kept waiting while the trial, having started, is delayed by legal argument. But

in any event, there is a good deal to be said to having it resolved in advance of trial, what charges can be heard together, whether accused have separate trials and, particularly, what evidence can be led.

A particular efficiency preoccupation has been with procuring early pleas of guilty and removing the frustration of everyone getting ready for trial and the Court's time set aside for a trial, only to have the defendant plead guilty on the day of trial. In 1992 the incentives for pleading guilty were formalised in our *Penalties and Sentencing Act* by recognition that a timely plea of guilty should attract a discount in sentence. There is a considerable emphasis at criminal mentions or appearances on requiring practitioners to make their client's intentions clear as early as possible, and emphasising early contact between the defence and the Crown, but we have never been able entirely to overcome the problem of the late plea.

And finally I come to technology. One enormous change brought about really because of the findings of the Fitzgerald Inquiry into police corruption, was the recording of police interviews with suspects. When I began practice in the criminal law, most trials started with argument about whether a police record of interview in typewritten form should be admitted into evidence. There were allegations, many of which had substance, that records of interview had been signed under physical duress. In other cases, it was said that police had invented admissions in unsigned records of interview, or recorded in their police note books a practice known as verballing. The police position was usually that the

accused had been obliging enough to admit guilt but not to sign the record.

Police were extremely resistant to the notion of recording their interviews, but in fact when they began to do so the number of allegations that confessions were improperly procured dropped away very considerably. There are still some challenges to video recorded interviews to do with things said to have occurred before the video commenced, but the numbers are minuscule compared with those in the past. That has been a very considerable time-saver for courts. I am baffled that there are still American jurisdictions, which presumably have the means, but which have not adopted the practice.

I have already mentioned that the evidence of child witnesses is video recorded. The default position under the *Evidence Act* is that experts give evidence by video link or telephone; in other words they will not appear in person unless the court is satisfied in the interests of justice that they should so. It is also quite common for lay witnesses testify by link-up if their evidence is not particularly contentious or they are in remote parts of the state. Trials are more high tech in other ways: the prosecution in an unlawful killing case is much more likely now to have a computer-generated interactive crime scene video for the jury.

We have some capacity for electronic trials, usually used in fraud cases, so that documents are managed and displayed electronically with everyone looking at a computer screen. It needs much greater refinement, to allow better search capacity and the ability to highlight

and note-take on electronic documents. There are other flaws in the system; it is not uncommonly the case that the prosecution will attempt to play a police recording and find that the court systems are not compatible with theirs.

For the future, it seems obvious that we will need to move to a system where documents can readily move electronically between the Director of Public Prosecutions' Office, the Legal Aid Office, the courts and police; but harking back to the resource issue, funds for obviously needed modernisation are hard to come by. I noticed earlier this year that Lord Burnett, the Lord Chief Justice of England and Wales, lamented in a speech that the digital capacity of English courts lagged far behind those of Papua New Guinea. I share his pain.

I should mention that technological developments used in investigation don't always lend themselves to greater speed. We find that in drug trials, particularly, there are massive amounts of intercepted electronic communications so that days can be spent in trials listening to tapes of not very bright drug traffickers discussing their transactions.

A considerable downside of the internet age for a jury system like ours is the effect of pre-trial publicity and jurors making their own enquiries. It is virtually impossible to detect when the latter has occurred, unless the juror who has been looking up the history of the accused on the internet is rash enough to say something about it to the other jurors, and then it

comes to light. It is a constant concern and has caused trials to be aborted and appeals to be upheld.

Another problem is this: the media are much less responsible then they were 20 or 30 years ago. They will cheerfully put to air or print prejudicial information about an accused when once they would have appreciated that nothing should be published once a person had been charged. A particularly problematic phenomenon is the fad for cold case podcasts. For example, an Australian newspaper ran a podcast about the alleged killing by a teacher of his wife in the early 1970's, and in the course of the podcast they also explored alleged sexual assaults by various other teachers on students at the same school. The podcast continued even after the man was charged with his wife's murder. It had 28M downloads and was the number one Australia podcast. It seems improbable that he will be able to have a jury trial in which none of the jury members already have a view about his guilt or innocence.

Those are difficulties which the PNG system will not have to face, but there are other contemporary problems which you probably share with us. The criminal load in Queensland courts has been on the rise for the last six years. We need more court staff, more judges, we are always looking for smarter ways to do things, but there is a limit to how efficient you can be without more human resources.

In summary, trial procedure has become both more sophisticated, principally in the use of technology, and more complicated over my life in

criminal practice. Because we have a jury system, those changes have a more profound impact on us then they might in your jurisdiction. We are still working with 12 human beings who are lay people and we need to adapt our procedures around them. In many ways the system has become more efficient, but in others it has become more cumbersome. But I have to say, while trial procedure has become more complex, it has also become more compassionate, and I'm glad of that.