"Criminal trial – tackling procedural constraints to improve efficiency and expedite the process"
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Introduction

India and Queensland both enjoy the benefits of codification of their criminal law. I offer some brief observations on the history of the respective Codes.

Queensland

The substantial author of the Queensland Criminal Code was Sir Samuel Griffith. He drafted the Code from 1893 to 1898, and it came into force on 1 January 1901. Throughout that period of drafting, Griffith was Chief Justice of Queensland. It was in 1903 that he was appointed the first Chief Justice of the High Court of Australia, a position he held for 16 years until 1919.

Embarking on the drafting, Griffith noted that:

> "… the written criminal law of Queensland … is scattered through nearly 250 statutes, while the unwritten portion of the criminal law, which forms a very large part of it, is only to be found in the books of writers on the subject of the criminal law of England, or in decisions of courts of criminal jurisdiction."

> (in a letter to the Attorney-General dated 29 October 1897 where he forwarded his draft Code – Queensland Parliamentary Papers CA 89 – 1897 at (iv)).

Hence Griffith's mild admonition:

> "It must seem strange to the ordinary mind that in the present stage of civilisation a great branch of the law, by which everyone is bound, and which is understood to be definitely known and settled, should not be reduced to writing in such a form that any intelligent person able to read can ascertain what it is."
> (ibid)

And so Griffith was emboldened to codify the criminal law of Queensland, an initiative which would have impact world-wide. While extolling the virtues of codification Jeremy Bentham style, Griffith did note inherent problems and:

> "remarked that codification is a very different thing from consolidation. The latter is a comparatively easy though laborious work, consisting merely in the collection and orderly arrangement of existing statutory provisions. Codification includes all this, but includes a complete statement of all the principles and rules of law applicable to the subject matter."
> (from a paper entitled "*Criminal Responsibility: A Chapter from a Criminal Code*" which Griffith presented to a meeting of the Australasian Association for the Advancement of Science on 12 January 1898)

Griffith began by compiling a digest of all statutory offences known to be in force in Queensland, numbering about 1,000. He was an Italophile, sharing this with his friend Sir William Macgregor, who by chance was in possession of the Italian Penal Code, also known as the "Zanardelli Code" of 1888. In 1894, Macgregor, then Administrator of British New Guinea, and later Governor of Queensland, gave Griffith a copy of the Zanardelli Code, together with an Italian dictionary. Griffith made use of that Code, in conjunction with the English draft Bill of 1880 and the Code of the State of New York of 1881. The influence of the Zanardelli Code was considerable if not primary. As put by Griffith:

> "I have derived very great assistance from this Code which is, I believe, considered to be in many respects, the most complete and perfect penal code in existence." (letter to Attorney-General of 29 October 1897)

The Zanardelli Code was extraordinarily influential: not only for Griffith's Code, but also the Codes of Venezuela, Chile, Argentina and Cuba (from a paper delivered by Cullinane J at Sorrento in December 1990). It was a "true Code", comprising a general part, a series of principles defining criminal responsibility, and the delineation of specific offences and defences. Griffith's first complete draft of 1897 demonstrated with clarity the derivation of each of its components. The right hand side of the page presents a column containing the proposed provision, and the left, a column specifying the source of the clause.

In December 1898, the Queensland Government convened a Royal Commission to examine Griffith's draft Code. There was division of opinion on only two matters. The Bill encountered a few problems in its passage through Parliament, but fittingly, at a time when Griffith was acting Governor of the State, the Bill finally passed and received royal assent, by Griffith's own hand, on 28 November 1899.

The Griffith Code, perhaps better styled the "Griffith-Zanardelli" Code, became a model adopted, if with adaptation, by many other regimes, some of this migration fostered by the British Colonial Office: Papua, then British New Guinea in 1902, New Guinea in 1921, the Solomon Islands, Fiji, the Seychelles, Nigeria, Kenya, Uganda, Tanganyika, Nyasaland, Northern Rhodesia, Zanzibar, Gambia and Botswana. Cypress, Israel and Palestine adopted parts of the Code, with the Italian Professor Cadoppi describing the Penal Code of Palestine as a "nephew" of the Griffith Code.

The Griffith Code has served Queensland remarkably well: the satisfaction of the people of Queensland and their Governments has been enduring. Following enactment in 1899, it was not comprehensively reviewed for as long as 95 years. Some more years passed

before updating to include offences like stalking and torture, thrown up by the vicissitudes of 21st century life.

India

The Indian Penal Code had come into effect 41 years before the Griffith Code, in 1860, and like the Griffith Code, drew some inspiration from the advocacy of Jeremy Bentham. The Indian Law Commissioners were led in their drafting exercise by Thomas Babington Macaulay, and the drafting took place over the period 1835 to 1837. TB Macaulay is of course well known for his "*History"* and *"Lays of Ancient Rome*".

In an address given in Brisbane on 19 July 2002 ("*The Queensland Criminal Code: From Italy to Zanzibar*"), Sir Harry Gibbs, former Chief Justice of the High Court of Australia, relates an anecdote confirming Macaulay's early command of words,

> "foreshadowed when he was a four year old child and hot coffee was spilled over his legs. In response to an anxious enquiry as to his condition, he replied: 'Thank you, Madam, the agony is abated.'"

It may be, by the way, that Sir Samuel Griffith was less than perfectly accomplished in Italian. Rather amazingly, he also found time for drama, translating Dante's "*Divine Comedy*", although it must be conceded that drew little praise. The New South Wales politician Sir Julian Salomans reportedly asked Griffith to inscribe his copy "*From the Author*", as "he would not like anyone to think he had stolen it, still less bought it" (Sir Harry Gibbs: "*The Inaugural Sir Samuel Walker Griffith Memorial Lecture*" (1984) LSJ 286, 290).

In the year 2002, Sir Harry Gibbs made these observations in relation to TB Macaulay's approach:

> "Macaulay was a public official and politician rather than a practising lawyer, and professed to have little regard for the technical rules of the law. He felt himself free to depart from the language of the existing law and from doctrines which he thought irrational, and acknowledged the assistance which he had obtained from the French Penal Code, and also from a Code

> which had been drafted by Edward Livingstone and submitted in 1826 to the legislature of Louisiana, although not enacted there. Amongst other innovations, he rejected the principle of felony-murder and enlarged the scope of provocation and self-defence, made truth a defence to criminal defamation, and provided that nothing is an offence if it causes harm so slight that no ordinary person would complain of it."

The effectiveness of the Indian Penal Code was confirmed, other matters aside, by its migration to a number of former British colonies in Asia and Africa.

I will of course focus, in now addressing my subject, on the Queensland experience. I propose covering some areas of change to procedural positions which would have obtained at the time of the inauguration of Queensland's Criminal Code. The obvious purpose of those changes has been to meet perceived contemporary needs.

In assessing the possible application of such changes in other jurisdictions, it may be relevant to know that the State of Queensland is served by a Supreme Court of 25 judges, a District Court of 37 judges and 86 Magistrates. The Supreme Court sits in Brisbane, the capital city, with resident judges in three other cities. The Supreme Court sits in 11 centres outside Brisbane, the District Court in 44 centres, and Magistrates at 132 centres. The population of Queensland exceeds 4 million. In terms of size, the State of Queensland is equivalent to the British Isles and western Europe taken together, five times the area of Japan, five times the US State of Texas, and approximately half the size of India (though comparatively underpopulated, of course). Last year, the Supreme Court in Brisbane disposed of 971 criminal matters.

In what follows, I will raise a number of issues, passing chronologically, as it were, through the criminal process.

1. **Committals**

At the end of the 19th century, a committal hearing would invariably have preceded a trial. The purpose of a committal is for a Magistrate or Justice to determine, administratively, whether there is sufficient evidence to warrant a defendant's standing trial. It can 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 has changed in two respects.

In recent decades, defendants have been actively encouraged not to engage, at committal hearings, in the testing of evidence which has frequently turned out to be a waste of time and resources. One approach has been to encourage the early entry of pleas of guilty.

Where a defendant accepts that he should be committed for trial, or agrees to what is 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 can lead to a substantial reduction in any penalty ultimately imposed, especially following a plea of guilty.

This judicial approach has been 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, concerns 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 applicable legislative provisions are in Annexure "**A**".

2. Committal to trial: avoiding delay

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.

The relevant provision is in Annexure "**B**".

3. **Pre-trial communication between prosecution and defence**

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 that will be secured through the committal process. But the prosecution will not unusually assemble additional evidence post-committal.

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 is 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".

The relevant provisions are in Annexure "**C**".

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.

4. Pre-trial hearings

When our Criminal Code commenced, 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 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 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.

These provisions are collected in Annexure "**D**".

Further streamlining, secured in 1997, concerned disclosure by the defence. An accused person then became obliged to give advance particulars of any alibi to the prosecution, within 14 days from the date of committal. The section provides that an accused person may not adduce evidence in support of an alibi, where notice of alibi has not been given, unless the court otherwise gives leave. A similarly motivated provision obliges an accused person, intending to adduce expert evidence in relation to an issue, to give the prosecution, as soon as possible, the name of the expert and his or her finding or opinion, and as soon as practicable before the trial, a copy of the expert's written report.

Those provisions are contained in Annexure "**E**".

5. Early instruction of 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 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 set of guidelines taken from the Supreme and District Courts Benchbook, in relation to this matter, is in Annexure "**F**".

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 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. The legislative provision is in Annexure "**G**".

6. Early intimation of defence

The traditional approach to the criminal trial reserves to the defence the right to sit back and await proof: there is 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 raise 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, in fairly recent times, 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. See Annexure "**H**". 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.

Increasingly frequent also, is the entry of a plea at arraignment to a lesser charge, whereupon the trial on the graver charge proceeds. For example, a plea of not guilty to murder may be entered, but guilty to manslaughter. In the event of ultimate conviction for manslaughter only, the circumstance that that plea had been entered would ordinarily be taken into account in relation to penalty.

Pleas of guilty aside, the defence attitude in Queensland is increasingly one of cooperation to ensure a streamlined trial. Part of the philosophy may be an appreciation that a jury will 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.

The burden on the prosecution has in Queensland been reduced in certain specific areas, where the onus of proof has been cast statutorily onto the defence. This applies, for example, in relation to some drug crime. Proof that a dangerous drug was at the relevant time in a place occupied by an accused is conclusive evidence the drug was in that person's possession "unless … [he or she] shows that he or she then neither knew nor had reason to suspect that the drug was [there]". See Annexure "**I**".

7. Representation of the accused

Another ordinary expectation is that an accused person, especially if facing a serious charge, will be represented at trial by counsel. In most cases in Queensland, that expectation is met, with Legal Aid funding the defence, or a lawyer appearing on a pro bono basis.

In 1992, in *Dietrich v The Queen* (1992) 177 CLR 292 (Annexure "**J**"), the High Court of Australia held that although the common law of Australia did not recognise the right of an accused to be provided with counsel at public expense, a court should in a serious case use its powers of adjournment, or postponement, or stay the trial, pending the availability of legal representation.

There regrettably will always be cases where an intransigent accused refuses legal representation and insists on self-representation. That imposes considerable burdens on the trial judge, in relation to which there is no easy solution.

One particular situation creates difficulties. Take the case of an unrepresented accused who seeks to cross-examine a child witness in a sexual offence case. From 1977, the law of evidence in Queensland has prohibited such cross-examination. The court is statutorily obliged to arrange for the provision of legal assistance, and it is the lawyer who will cross-examine the protected witness. But if the accused refuses that legal assistance, then there is an absolute prohibition on his cross-examining in person. See Annexure "**K**". This has been a response to a strongly held view that vulnerable witnesses should not be subjected to unnecessary pressure or harassment.

8. Presence of accused throughout trial

The Queensland Criminal Code has always provided that the trial must take place in the presence of the accused person. There is however an exception. If the accused conducts

himself so as to render the continuance of the trial in his presence impracticable, the court may order his removal and direct the trial to proceed in his absence. See Annexure "**L**".

A difficulty arose where the court held a view or inspection, and the accused person was in strict custody. In high security situations, great inconvenience sometimes attended ensuring the presence of the accused at the scene, and the defence was sometimes concerned the jury may be intimidated by an impression of high security, with a substantial police presence for example, and draw an adverse inference about the accused. The Queensland *Jury Act 1995* now provides that a view "must be held in the presence of the judge, and the parties and their lawyers or other representatives are entitled to be present". In the result, if an accused in a high security situation insists on being present, that must occur, but it will suffice if he is given an opportunity to be present. See Annexure "**M**".

9. The tradition of oral evidence

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. See Annexure "**N**".

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. See Annexure "**O**".

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 has 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 (Annexure "**P**"), but it is a facility used more these days than previously.

The production of certificates can obviate the need for the prosecution to call large swathes of complex technical evidence. The Queensland *Evidence Act* was recently amended to provide for certificates as to DNA analysis, in particular. Any intended challenge to such a certificate must be notified in advance of the hearing day. See Annexure "**Q**".

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". See Annexure "**R**". 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. We have not yet in Queensland adopted electronic records for criminal trials, although appeals are sometimes conducted on the basis of an electronic record.

10. Testing of evidence by cross-examination

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. See Annexure "**S**". 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 have 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.

See Annexure "**T**".

The High Court of Australia recently considered the legitimate limits on cross-examination in *Libke v The Queen* [2007] HCA 30, in the course of which their Honours made observations on various species of objectionable questioning: offensive questioning, comments, compound questions, cutting off answers before they are completed, argumentative questions, questions resting on controversial assumptions, etc. The court also discussed the position and responsibilities of a Crown prosecutor. Heydon J said:

> "There were many respects in which the cross-examination of the appellant was in breach of ethical duties flowing from the position of the cross-examiner as counsel for the prosecution, and in breach of other ethical duties. For present purposes, what is important is that those breaches were also breaches of rules established by the law of evidence. While breaches of these evidentiary rules do not often result in appeals being allowed, while there are relatively few reported cases about them, and while writers have given less attention to them than to more fashionable or interesting subjects, there is no doubt that they exist and no doubt that they are well settled." (para 118)
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> "A cross-examiner is entitled to ask quite confined questions, and to insist, at the peril of matters being taken further in a re-examination which is outside the cross-examiner's control, not only that there be an answer fully responding to each question, but also that there be no more than an answer. By these means a cross-examiner is entitled to seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the client or the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers

evidence which that witness may have failed to give in chief. To this end, a cross-examiner is given considerable power to limit a witness's answers and to control the witness in many other ways." (para 119)

11. Manner of instruction of jury

A jury at a criminal trial in Queensland in 1899 would have been instructed only orally. That is unsurprising given the then state of technology and communications.

These days, the landscape is much more open. Contemporary juries take notes of the evidence, and submissions and summing up. Flow charts may be presented, in the course of the judge's instruction to the jury. Overhead presentations not infrequently occur. In Queensland we have reached the position where judges now from time to time accede to a jury's request to be provided with a transcript of the proceeding: sanitised, necessarily, to exclude matters the subject of voir dires etc. Juries also from time to time request the provision of a copy of the judge's summing up. That has occurred in Queensland. With the provision of the transcript, and a transcript of the judge's direction, the query traditionally raised is whether it might not unduly focus the attention of jurors on particular directions. The underlying acknowledgment is that jurors bring reason and common sense to their deliberation.

12. Confining the jury to the evidence

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". See Annexure "**U**".

13. **An informed summing up**

An assumption no longer tenable – if it ever existed, is that a judge may responsibly sum up to the jury on the basis simply of experience, uninformed by such things as – detailed notes of the evidence, comprehensive recourse to the relevant provisions of the Code and the cases which relate to them, a careful note of the submissions of counsel, and a previously compiled comprehensive summation of the case. The greater length of many modern trials itself militates against any less than careful detailed approach.

Modern expectations in Australian jurisdictions demand much of a judge in the crafting of his or her direction to the jury. Our Queensland Supreme and District Courts Benchbook, like those of other jurisdictions, contains sample directions designed to assist in most instances. An extract covering the general directions is in Annexure "**V**".

14. **The deliberating jury**

In Queensland, after a jury has been directed to retire to consider its verdict, the jurors must not separate. See Annexure "**W**". In national terms, that situation is pretty much unique to Queensland.

There is practical consequent difficulty, from time to time, and not infrequently, in arranging accommodation for jurors in appropriate circumstances late at night. This issue is now being reconsidered. Absent the risk of jeopardy to the integrity of the process, the issue of convenience to jurors militates strongly in favour of allowing a jury to separate at that stage. That has now been the position in many Australian jurisdictions, and the United Kingdom, for many years, without resultant difficulty.

15. **Unanimity**

Another traditional position, still current in Queensland, is that the verdict of a jury must be unanimous. See Annexure "**X**".

In most Australian jurisdictions the requirement for unanimity has to some extent or other been abandoned. One may legitimately query whether, if the lack of unanimity is the result of the intransigent attitude of one juror, the requirement for unanimity is defensible, but to establish that factual position would necessitate surveying "hung" juries, and there is no survey material on that to this point in Queensland.

The experience in the District Court in Queensland has been that "hung" juries are not infrequent, suggesting a need for such a survey. But to date it has not occurred. It must also be said however that there is an apparently strong view within the Queensland legal profession and parts of the courts that departure from the principle of unanimity would be retrograde.

16. **The nature of the verdict**

The traditional approach has been that a general verdict suffices. But the Queensland Criminal Code has always provided that where the conviction may depend "upon some specific fact", or where "the proper punishment to be awarded upon conviction may depend upon some specific fact", the court may require the jury to find that fact specially. See Annexure "**Y**". There is basis for feeling the power to require a special verdict is these days more frequently exercised. The rationale of a verdict of guilty of manslaughter where the charge is murder, may for example be highly relevant: the failure of the Crown to negative provocation or self-defence, or the failure of the Crown to establish intent (where there is evidence, say, of heavy intoxication).

17. **When is a juror's contribution complete?**

Of course it is formally complete with the delivery of the verdict. But in Queensland in recent times we have recognised the worth, with a view to improving our jury system, of

asking jurors about their experience. This is inherently problematic because of the fundamental confidentiality of jury deliberations. But the Queensland *Jury Act* now provides that on application by the Attorney-General, the Supreme Court may authorise "the conduct of research projects involving the questioning of members or former members of juries", and the publication of the results of that research. The research projects which have been conducted to date under that aegis have led to some streamlining of the system. See Annexure "**Z**".

Mention should also be made of a service recently introduced, providing professional psychological counselling for jurors on request, and at the expense of the State; and also s 119B of the *Criminal Code*, introduced in 2002 creating the crime of retaliation against a juror, punishable by a maximum seven years imprisonment, where a person "without reasonable cause, causes, or threatens to cause, an injury or detriment to a…juror or a member of (the juror's) family…in retaliation because of…anything lawfully done by the juror…in any judicial proceeding." (The provision also embraces judicial officers and witnesses.)

Conclusion

In Queensland, in the last part of the nineteenth century, there were comparatively few criminal trials, and comparatively few judges (on 1 January 1900 the Supreme Court comprised only Griffith CJ, Chubb, Real and Power JJ) – and jurors. There were fewer constraints on the process. There was a reduced expectation as to celerity. There was no doubt a much broader licence to the defence to test the Crown with all its intensive might. There would never have been any suggestion but that an accused person must be allowed to see the colour of the eyes of even his vulnerable child witness accuser.

Our subsequent developments in Queensland have been informed by considerations of efficiency within the criminal justice process, sensitivity to the position of victims and other vulnerable participants, and recognition of the vital public role played by jurors.

The resultant limitations have been carefully wrought, and implemented without major adverse ramification. The result is a criminal justice system vastly indebted to Sir Samuel Griffith, with minimal adjustment to meet the needs of our developing society – and that they have been minimal really goes to vouch-safe the Griffith legacy.