

## ***A Review of Jury Directions*** **Report No 66, 2009**

### **Summary of Report**

#### ***General***

1. Juries — made up of non-lawyers — have the most difficult task in the trial of many serious criminal offences: to determine whether the defendant is guilty. Numerous studies have shown that juries are too often confused or unsure about the law that they have to apply and the issues that they must resolve. To help give jurors the assistance that they need and deserve to reach their verdicts on the evidence and in accordance with the law, the Queensland Law Reform Commission has recommended a suite of reforms, some requiring statutory change and some requiring changes to the practices adopted by judges and lawyers in preparing and presenting criminal cases to juries.

#### ***Statutory reforms***

2. A series of measured changes should be made to the regime of pre-trial disclosure that will require defendants (in response to notices from the prosecution) to outline the general nature of their defences, and to disclose which aspects of the prosecution case are denied or are not in contention. Judges should have the power to waive or modify any of these requirements to meet the needs of justice in any particular case.

3. The new provisions should NOT require defendants to identify any evidence on which they intend to rely, nor whether they will call any evidence or testify themselves, except to the extent that this is already required under the Criminal Code (Qld).

4. Any default by a defendant in complying with this disclosure regime may be taken into account by a judge when sentencing the defendant (if convicted) and by the court in any appeal by any convicted defendant. Non-compliance may also result in the denial of the right to lead particular evidence.

5. Judges should be required to invite defendants (if represented) to make an opening statement at the close of the prosecution's opening address, though no defendant should be required to make an opening statement at that time.

6. Judges should be expressly permitted to address the jury at any time on the issues in the trial; the relevance to the conduct of the trial of any pre-trial admissions, directions or rulings determined prior to the start of the trial; and any other matter relevant to the jury in the performance of its functions and its understanding of the trial process, including giving a direction to the jury on any issue of law, evidence or procedure.

7. Judges should be expressly permitted to order, at any time during the trial, that copies of any of a wide range of written and other aids be given to the jury in any form that the judge considers appropriate. This would include schedules, chronologies, charts, diagrams, summaries or other explanatory material; transcripts of evidence or audio or audiovisual recordings; any of the judge's directions to the jury; any document setting out decision trees, flowcharts or checklists of questions for consideration by the jury; and any other document or aid that the judge considers appropriate.

8. Both the prosecution and the defendant (if represented) should be required to inform the judge before the start of the summing up which directions concerning specific defences and warnings concerning specific evidence they wish the judge to include in, or leave out of, the

summing up. However, the judge should not be obliged to give any direction that is not requested unless, in the judge's view, it is required in order to ensure a fair trial. In appeals asserting any misdirection or inadequate direction of the jury by the judge, the court should be required to take into account which directions and warnings were and were not requested by the parties when determining an appeal and the application of the proviso in section 668E(1A) of the Criminal Code (Qld).

9. The implementation of the recommended pre-trial disclosure regime will need to be considered in the light of the Government's adoption of the recommendations in the Moynihan Report to ensure consistency in approach and implementation.

10. There should be an urgent review of legal aid funding to remove any disincentive that might operate to discourage the early preparation of criminal defences.

11. The Commission also recommends some reforms to specific jury directions and warning:

(a) by replacing the exclusionary rule in *Pfennig v The Queen* (2008) 235 CLR 334 in relation to propensity evidence with a provision that evidence should not be inadmissible simply because it shows that the defendant has engaged in other criminal acts or misconduct, and by specifying the content of warnings about propensity evidence;

(b) by simplifying warnings about post-incident conduct by defendants and warnings following delay in prosecution (Longman warnings), and by limiting the circumstances in which those warnings must be given;

(c) by removing prejudicial terminology from those warnings, and from warnings about unreliable evidence and evidence from unreliable witnesses; and

(d) by clarifying directions about choosing a jury speaker and removing any suggestion that juries need to select a speaker quickly.

### **Reforms of practice and culture**

12. Juries should be informed as early as practicable during any trial of the issues that they will have to decide, the issues that have been admitted or are otherwise not in dispute, and the overall context in which these issues arise.

13. Generally, at the start of the trial the jury should be provided with written material on the burden and standard of proof; the roles of the judge and jury; the elements of each offence charged (and any alternative charge) and each defence (to the extent that defences have been identified by the defendant); and admissions, agreed facts or other matters about which there is no dispute between the parties.

14. Wherever possible, the jury should be informed of matters not in dispute in an agreed statement of facts or similarly neutral manner by the judge.

15. A summing up to a jury should culminate in a series of factual questions for the jury to consider in reaching its verdict in which the legal issues in the case (such as the elements of the offence and any specific defences) are embedded. Jury directions and warnings should be re-worked into an integrated summing up that avoids long statements of law and relates the evidence (and the limits to which some of it may be used by the jury) directly to the questions of fact which the jury must determine in order to reach its verdict. These integrated directions should be supplemented, wherever appropriate, by written guides to the law, directions and questions to be answered by the jury.

16. The Queensland Supreme and District Court Benchbook is a valuable resource that should continue to be refined and relied on by judges and practitioners. The Commission, however, recommends some specific reforms to the model directions in the Benchbook in relation to a jury's rights to ask questions, 'beyond reasonable doubt' and non-unanimous verdicts.