

4B. Where the Jury are to be Provided with Transcripts

4B.1 Legislation

[Last reviewed: September 2024]

Nil.

4B.2 Commentary

[Last reviewed: September 2024]

It is now settled law that a trial judge has the power to provide the jury with all or part of the transcript of evidence to consider when they deliberate (*R v Tichowitsch* [\[2007\] 2 Qd R 462](#)). While the decision to provide the jury with a transcript is one for each judge to make in the context of the trial, it is necessary to exercise caution to avoid unfairness. 'The overriding considerations must be that of ensuring the jury are in the best position to arrive at a true verdict, and ensuring that the accused receives a fair trial' (*R v Tichowitsch* [\[2007\] 2 Qd R 462](#), [9]).

Relevant considerations will include the following:

It is our legal tradition that evidence at a criminal trial is oral for the most part, and during the oral evidence of a witness the jury has a chance to form views about their credibility and about the reliability of the evidence they are giving (*R v Taylor* [\[2017\] QCA 169](#), [16]). If the jury are provided with a transcript of the evidence, they should be reminded to recall, and have regard to, the impression they had of the witnesses as they testified.

Care must be taken to ensure the transcript given to the jury contains only a record of the evidence. It would be an irregularity risking a miscarriage of justice for the jury to be given a transcript of discussions that occurred in their absence (*R v Martinez* [\[2016\] 2 Qd R 54](#); [\[2015\] QCA 169](#), [15]-[16], [29]-[30], [41]-[42]). This may extend to excising from the transcript discussions which occurred in the presence of the jury, but which concerned such matters as an objection, an impermissible question, or an irrelevant answer.

If only a partial transcript is to be provided, consideration should be given to reminding the jury of other relevant parts of the evidence. At the least, the jury should be reminded that they are to decide the case based upon all of the evidence they have heard, and not just the portion recorded in the transcript they have been given (*R v Tichowitsch* [\[2007\] 2 Qd R 462](#), [11]; *R v Taylor* [\[2017\] QCA 169](#), [16]; cf. *R v LAK* [\[2018\] QCA 30](#), [35]).

Complications may arise where part of the evidence comprises out of court statements of a witness made admissible by section 93A of the *Evidence Act 1977* (Qld), or

evidence recorded before the trial pursuant to sections 21A or 21AK of the *Evidence Act 1977* (Qld). Usually, neither the recordings nor transcripts of such evidence would go into the jury room (*R v H* [1999] 2 Qd R 283; *Gately v R* [2007] HCA 55; (2007) 232 CLR 208); *R v BEC* [2023] QCA 154, [114] ff.). The rationale for such an approach seems to be to guard against the jury giving undue weight to the evidence recorded in the transcript they have in the jury room, at the expense of the rest of the evidence in the trial. The risk may not be acute if the jury are given a transcript of all the evidence in the trial. But it remains the case that the recordings themselves should not usually go into the jury room (cf. *R v Peniamina* [2018] QSC 283, [24]; *R v Tichowitsch* [2007] 2 Qd R 462, [16]).

In cases where the evidence is substantial, care must be taken to not ‘overwhelm’ the jury with material (*R v Tichowitsch* [2007] 2 Qd R 462, [14]; cf. *R v OT* [2017] QCA 257, [35]-[36]).

The decision to provide the jury with a transcript of the evidence should be made early in the trial. If the jury are to be provided with a transcript of the evidence, arrangements need to be made for the review and editing of the transcript. The attached protocol drafted by Burns J provides a starting point for the preparation of the jury transcript (see Appendix A below). It should be adapted to suit the circumstances of the case. For instance, in a shorter trial, the daily review of the transcript may be unnecessary. It may also be convenient to provide the jury with more than one copy of the transcript. The critical issue will be to ensure that both parties have an opportunity to consider, and suggest corrections to, the transcript before it goes to the jury.

When a transcript of evidence is provided, it will be necessary to direct the jury about its limitations. It would usually be appropriate to give such directions, at least in a truncated form, during the judge’s opening remarks to alert the jury that they will be given a transcript. In the summing up the jury should be given the full direction.

4B.3 Suggested Directions

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(For inclusion in the judge’s opening remarks to the jury).

As you probably know, what is said in court is recorded. From that recording a transcript will be prepared – usually daily. Sometimes there are delays, but we will get the transcript progressively as the trial proceeds.

You will be provided with a hard copy of the transcript of what is said by the witnesses during the trial to assist as an aid during your deliberations. It will only contain what is said by the witnesses, and I will arrange for anything that is not evidence to be removed from it, such as what I am saying now.

That may take a bit of time, but I will make sure that you receive an “evidence only” transcript for each day of evidence as soon as it is to hand [or at some other point as arranged for the trial].

It is important that you always keep in mind that a transcript is not evidence. It is merely an aid for your use. The evidence is what you hear the witnesses say when they give evidence in the trial. The transcript will be provided to you to help you recall the evidence of the witnesses when you deliberate.

But it is essential that you do not give any evidence more weight than it deserves merely because there is an aid to your recall of the evidence which is in written form. It is important to recall the evidence as it was given during the trial and what, if anything, you thought about the reliability of the evidence as you heard it.

You will have one [or more] [copy/copies] of the transcript and it will always remain in the jury room. It may not be taken home. A folder with numbered dividers will be provided to house the transcript, along with an index to the contents identifying where the transcript of each witness’s evidence can be found.

The binder and its contents, just like your notebooks, will be destroyed at the conclusion of the trial.

(Suggested direction for summing-up)

You have been given a transcript of the evidence in the trial. As I have already said, it is important that you always keep in mind that a transcript is not evidence. It is merely an aid for your use. The evidence is what you heard the witnesses say when they gave evidence in the trial. The transcript is to help you recall the evidence of the witnesses.

Bear in mind, also, that a transcript is only ever at best another person’s opinion of what can be heard on the recording. It is what the person typing up the transcript believed he or she could hear. Usually, the transcript will be fairly accurate, and the parties have been given the opportunity to consider and correct the transcript. But even then, that does not mean that the transcript is perfectly accurate. I am yet to see a transcript that is 100 per cent accurate, despite any amount of revision – so caution is required on your part.

The critical thing to remember, and to act on, is that if you see something in the transcript which is different to what you heard a witness say, you must act on what you heard the witness say, not on the transcript.

Also, you are not restricted to the transcript. You may, for example, decide that you would like to hear the audio [or video where available] recording of a witness's evidence or part of a witness's evidence. In that event, all you need to do is to let me know the part you would like to hear played to you. I will discuss how we can help with the lawyers, and we will then all come back here to listen to the audio [or video] of that part.

Lastly, you should not give any evidence more weight than it deserves merely because there is an aid to your recall of the evidence which is in written form. It is important to recall the evidence as it was given during the trial and what, if anything, you thought about the reliability of the evidence as you heard it.

You [have/will have] one [or more] [copy/copies] of the transcript and it will always remain in the jury room. It may not be taken home. A folder with numbered dividers will be provided to house the transcript, along with an index to the contents identifying where the transcript of each witness's evidence can be found.

The binder and its contents, just like your notebooks, will be destroyed at the conclusion of the trial.

4B.4 Appendix A – Suggested Protocol where a Transcript is to be Provided

[Last reviewed: September 2024]

1. Within one business day of the receipt by the parties of the transcript, counsel will confer for the purpose of agreeing (if possible) on any revisions to the transcript. A schedule of those agreed revisions must then be prepared. The schedule must be emailed to the associate to the trial judge and handed up to the court at the first available opportunity in the absence of the jury.
2. If agreement cannot be reached on any of the revisions, the trial judge will resolve any such disagreement after hearing submissions from the parties and, if necessary, by having recourse to the audio recording of the relevant part or parts of the evidence.
3. The associate to the trial judge will then prepare an 'evidence only' copy of the transcript incorporating the revisions. Only the evidence shall appear. Any part of the proceeding that has taken place in the absence of the jury, and other parts as appropriate, will be excised.
4. As soon as the 'evidence only' transcript has been revised by the associate, a tracked version will be emailed to counsel.
5. On receipt of the tracked version, counsel should consider whether it faithfully incorporates the revisions and, further, that it only contains a transcript of the evidence. Counsel should then confer with a view to authorising a joint email to be sent to the associate to the trial judge indicating their agreement to the tracked version or, where they do not agree, indicating any area of disagreement.
6. Once there is agreement on the tracked version, the changes will be accepted by the associate to the trial judge and a 'clean copy' saved in PDF format and emailed to each counsel.
7. The transcript will, as soon as convenient in the trial, be received as an exhibit for identification and marked 'TFI1', 'TFI2'. This will be the basis of the copies of the transcript to be provided to the jury.
8. A folder with numbered dividers will be provided to the jury to house the evidence only transcript. The associate to the trial judge will prepare an index to the contents to be provided to the jury by the bailiff and update the index as and when required.
9. Only one copy of the transcript will be provided to the jury. It shall remain in the jury room at all times for the jury to use and be destroyed at the conclusion of the trial.