## Legislation

***Jury Act* 1995 (Qld)**

**Section 51 Jury to be informed of charge in criminal trial**

When the jury for a criminal trial has been sworn, the judge must ensure the jury is informed —

(a) in appropriate detail, of the charge contained in the indictment; and

(b) of the jury's duty on the trial.

**Section 69A Inquiries by juror about accused prohibited**

(1) A person who has been sworn as a juror in a criminal trial must not inquire about the defendant in the trial until the jury of which the person is a member has given its verdict, or the person has been discharged by the judge.

Maximum penalty—2 years imprisonment.

(2) Subsection (1) does not prevent a juror making an inquiry being made of the court to the extent necessary for the proper performance of a juror's functions.

(3) In this section—

***inquire*** includes—

(a) search an electronic database for information, for example, by using the internet; and

(b) cause someone else to inquire.

The judge must ensure that the jury is informed in appropriate detail of:

a) the charge contained in the indictment: *Jury Act* s 51

b) the jury's duty on the trial: *Jury Act* s 51

c) the prohibition upon jurors of inquiring about the defendant in the trial: *Jury Act* s 69A.

Although not specifically mentioned by legislation, the judge may also give directions about other matters that will assist the jury, such as:

a) The elements of the offence(s) or as to the defence(s) (if there is consensus about them and it is otherwise considered to be an appropriate case to do so), so that the jury may focus primarily upon them.

b) An opening statement by defence counsel after the prosecutor's opening, if defence counsel wishes to deliver such a statement: *R v Nona* [1997] 2 Qd R 436.

- In *R v Oulds* (2014) 244 A Crim R 443, the Court of Appeal discussed the parameters of an opening statement by defence counsel. Such a statement can identify the issues in dispute and those not in dispute. However, it is not the function of an opening statement to identify the evidence to be called in the defence case, because that is specifically provided for by *Criminal Code* s 619(3).

**Commentary and Suggested Directions**

These draft opening remarks are a guide only and should be amended to deal with the circumstances of the case at hand. For example, they do not include information about circumstantial evidence.

You may consider it necessary to inform the jury about circumstantial evidence before they hear any evidence; or you may consider it more appropriate to instruct the jury about circumstantial evidence once the evidence has been led or to not do it until you deliver the summing up, so that your instructions have context.

The following is an example of an introductory instruction on circumstantial evidence if you wish to include such an instruction in your introductory remarks:

> **Your function is to decide whether the defendant is guilty or not guilty of the charge he faces. That involves considering the facts of the case based**

**on the evidence to be placed before you in this courtroom. The evidence will be presented to you by way of the oral testimony of witnesses, or via exhibits such as photographs or recordings.**

**You may find some facts are directly proved by the evidence presented to you.**

**And it may be that you decide during the course of your deliberations to accept that evidence and, therefore, to accept those facts that are directly proved by it.**

**It might be something a witness heard or saw, or it might be something depicted in a photograph, or something which you hear on a recording.**

**In addition to facts which are directly proved by the evidence, you may also draw reasonable inferences or reasonable conclusions from the facts which you find to be established by the evidence.**

**But whenever you are considering drawing a reasonable inference from facts which you find proved by the evidence, it is important you keep three things in mind:**

- **First, you may only draw *reasonable* inferences based on the facts you find to be proved by the evidence;**
- **Secondly, there must be a logical and rational connection between the facts you find and the inferences you draw; and**
- **Thirdly, if more than one inference is reasonably open, that is, an inference adverse to the defendant – in other words, pointing to his guilt – and an inference in his favour – in other words, pointing to his innocence – you must give the defendant the benefit of the inference in his favour.**

**Let me give you a relatively benign example of drawing a reasonable inference. If you see someone in Melbourne at 10.00 am one day, and then you see the same person in Brisbane at 5.00 pm that same day, the**

**inference is that they have flown to Brisbane. You don't actually know that they have flown from Melbourne to Brisbane; you didn't see them boarding a flight in Melbourne or disembarking in Brisbane, but you may *reasonably infer* that they have flown based on the facts that you actually know, i.e. seeing them in Melbourne at 10.00 am and then in Brisbane at 5.00 pm. You are able to reasonably draw the *inference* that they flew from Melbourne to Brisbane because the only way to get from Melbourne to Brisbane in a few hours is to fly. So that is an example to inferring something from facts you do know and that you accept.**

The specimen opening remarks also do not cater for the conduct of a joint trial. In such a situation, the trial judge might consider making the following opening remark at an appropriate time:

**More than one person is being tried. The separate cases against each of them must be decided solely on evidence admissible against that defendant. Some evidence may be admissible against one and not against the other(s), [or in respect of one charge and not another]. Later, I will give you detailed directions about the evidence in the respective cases.**

These specimen opening remarks refer to the ability of the trial judge to provide the jury with a transcript of the evidence. Earlier editions of these draft remarks have tended to discourage the practice in this State. That may not reflect an accurate statement of the law.

In *R v Tichowitsch* [2007] 2 Qd. R. 462 the Court held that there had been no error of law and no miscarriage of justice where, in the particular circumstances of that trial, the trial judge had provided the jury with the whole transcript of the trial, although edited to exclude those matters which were inadmissible. Williams JA, especially at [9]-[17] (Keane JA and Phillipides J agreeing at [52] and [90]) made a number of observations about relevant considerations in determining whether to provide the trial transcript to the jury. While there is good reason to conclude that transcripts of evidence should not be given to juries as a matter of course, the overriding requirement is that what occurs must be fair and balanced, ensuring that the trial does

not miscarry and that the jury are afforded the best opportunity of arriving at a true verdict.

Where a jury is to be provided with the transcript, it is important that they are provided only with admissible evidence in that transcript. For example, provision of a transcript which contains any passages of discussion in the absence of the jury may cause a miscarriage of justice – see *R v Martinez* [2016] 2 Qd. R. 54. This may require an allocation of duties to the parties to check that the transcript to be provided is complaint.

If the transcript is to be provided, it is recommended that it be revised daily to correct mis-transcriptions. The trial judge should also remind the jury that the transcript is not evidence itself and that they must act on the evidence, using the transcript as an aid to recall that evidence, and that if there is some variance between the evidence and the transcript, it is the evidence that must be acted on. It is matter for the trial judge whether a copy of the transcript is to be provided to each jury member, or if one only is to be allowed into the jury room. The latter approach may discourage over-reliance on the transcript as a substitute for the evidence, but the former approach may allow more broadly informed discussion about the evidence.

**Chapter 4B** of this Bench Book deals with the situation where a judge has decided that a jury ought to receive transcripts of the evidence.

The specimen opening remarks include a direction that, in any communication with the judge, the jury must not disclose the voting numbers in favour of conviction or acquittal. That is because those voting numbers are part of the jury's deliberation and therefore should remain confidential. Where those voting number are disclosed, there is no requirement to inform the parties of them, even where a majority verdict direction is being contemplated - *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27, [35], [42], [45], [53], [54], [58].

If the jury seek assistance by being reminded about the evidence, or parts of it, or for elucidation of some questions of fact which the record of the trial could provide, then it should be given to them - *R v Rope* [2010] QCA 194.

As a general rule, a trial judge should not take a verdict until requests for re-direction have been answered as fully as possible – *R v JX* [2016] QCA 240 per McMurdo P at [33] (North J agreeing). Morrison JA took a different approach at [66]. The approach of the majority was approved in *R v Lyall* [2016] QCA 350, per McMurdo JA at [94]-[96] (Morrison JA agreeing).

Note however that in *R v Ngakyunkwokka* [2023] QCA 85, [88], [93]-[96] the Court considered some interstate authorities, as well as *R v JX*, and concluded that whether a miscarriage of justice has occurred in taking a verdict before answering a jury request for further direction will depend on the circumstances of the case. In that case, there was held to not have been a miscarriage of justice where the question was not on a critical path to the decision of a main issue; where the jury had indicated that they no longer needed assistance and had a verdict; and where there was an obvious rational basis for the change in their position.

The specimen opening remarks include a direction that the jurors must not attempt to investigate the matter or to inquire about anyone involved in the case themselves. It is prudent to repeat that direction, or a shortened form of it, at the end of the first day of the trial and, particularly where the trial has received significant pre-trial publicity and/or publicity during the course of the trial, on subsequent days of the trial.

Where there has been pre-trial publicity, further emphasis than that in the specimen opening remark may be required both at the beginning of the trial and in the summing-up: *R v Bellino & Conte* (1992) 59 A Crim R 322, 343; *R v Glennon* (1992) 173 CLR 592, 603-604, 616, 624. The following additional direction might be given in such a case:

> **You must not use any aid, such as a textbook, to conduct research, and except in this courtroom you must not in any way seek or receive information about questions that arise in the trial or about the accused, or about any witnesses or people mentioned in the evidence (or, if appropriate, the deceased), for example, by conducting research using the internet, or by communicating with someone by phone, text message,**

**email or Twitter, through any blog or website, including social networking websites such as Facebook, LinkedIn and YouTube.**

The directions given by trial judges should underline unequivocally the collective responsibility of jurors for their own conduct: *R v Thompson* [2011] 1 WLR 200.

***SPECIMEN OPENING REMARKS***

*Introduction*

**Members of the jury, by serving on this jury you are performing an important public role. That role imposes some serious responsibilities. What I want to do at this point is to explain some of your roles and duties and jurors and some things about how the trial is likely to proceed. Each of you should have received some written material and seen a film touching on some of these topics. Also, if any of you have been on a jury before you may have some familiarity with what I am about to say but, please be patient. It is important that all jurors get the same message. I will not repeat everything you have read and seen, but some of it bears repeating. While what I say now will touch on some aspects of the law that you must apply in your deliberations, I will give you comprehensive directions about how to approach your deliberations during the summing up, which is given after all the evidence has been heard and after each Counsel has addressed you.**

*Role of judge and jury*

**Your ultimate role in this case is to decide if the defendant is guilty or not guilty. That will be your decision alone, not mine. But it does involve us working together.**

**My job is to ensure the trial is conducted fairly, and in accordance with the law, and to explain the principles of law that you must apply to make your decision.**

**You are the sole judges of the facts in this case. That means that it is you and not me who resolves disputes or differences about matters of fact.**

**You are to reach your decisions about the facts only on the basis of the evidence, in the context of your collective commonsense and experience of the world. You must ignore all other considerations. In particular, you must ignore any feelings of sympathy for, or prejudice against, the defendant or anyone else connected in any way to this trial. Emotion is to play no part in your deliberations.**

**The evidence will be what witnesses say from the witness box and any documents or other materials which are admitted during the trial.** (The statement about the witness box may need to be amended where a child witness's evidence is to be admitted pursuant to *Evidence Act* s 93A and/or a pre-recording of evidence is to be played during the trial.) **While you must keep an open mind until all of the evidence has been placed before you, you will appreciate that you need to pay close attention to the evidence as it is being presented to you including *how* each witness gives evidence. How a witness presents to you and how they respond to questioning, especially in cross-examination where their factual assertions may be tested or challenged, may help you to decide if they are truthful and accurate witnesses.**

**Because you will base your verdicts only on the evidence, it is important that you alert either me or the Bailiff by some means if you are having difficulty hearing a witness or understanding them for any reason.**

**It is up to you to decide what evidence to accept or reject and you can accept all of a witness' evidence, none of it, or accept some and reject some.**

*Burden and standard of proof*

**There are two fundamental principles which apply to every criminal trial. The first is that a defendant is presumed innocent. The second is that a jury may not find a defendant guilty of a criminal offence unless and until the prosecution has satisfied the jury that the defendant is guilty of the offence beyond a reasonable doubt.**

[What follows will need to be amended where the issues in the trial raise a positive defence which places the onus of proof on the defendant, on the balance of probabilities]

**A defendant is *presumed* innocent, does not have to prove *anything*, and is under no obligation to produce any evidence at any stage. He or she can give evidence and they can call evidence in their case if they wish – but they are not obliged to.**

**In reaching your verdict you must consider all of the evidence placed before you – whether it is placed before you by the prosecution or by the defendant. In reaching your verdict, you will ask yourself whether, on the whole of the evidence, the prosecution has satisfied you of the guilt of the defendant beyond a reasonable doubt. The defendant is entitled by law to the benefit of any reasonable doubt that may be left in your mind at the end of your deliberations.**

*Where there are multiple charges:*

**You will see that the defendant/s has/have been charged with a number of offences. They are all being tried together. You will be required to consider each charge separately and return a verdict on each of them. For the moment, you should know that your verdicts don't have to be the same on every charge.**

**You must not be prejudiced against the defendant/s because he/she/they is/are facing a number of charges. All defendants are presumed innocent and treated as being not guilty of any offence unless and until they are proved guilty, regardless of how many charges they face.**

*The charge/s*

**It is alleged by the prosecution that** [defendant's name] **committed the offence/s of** [details of offence/s]**.**

[Where appropriate] **Details of the charge/s appear in a document which my Associate will distribute to each of you.** (This may occur during the

prosecution opening if the prosecutor has prepared the document. Canvass this issue with counsel before the judge's opening remarks.) **It contains some legal language which I will explain to you later.**

**The defendant has pleaded 'not guilty' to that/those charge/s. It is your responsibility to decide whether the defendant is guilty, or not guilty of each charge. You will do that by returning your verdict on each charge separately.**

[Where appropriate, given the number and nature of the charges and all other circumstances of the trial. This will not be necessary in every trial.] **Criminal charges have elements or parts.**

**To find the defendant guilty of a charge, the Crown must prove every element of the offence beyond a reasonable doubt.**

**The charge of [XX] has the following elements …**

**[**Explain the charge**]**

[Where appropriate, given the certainty about which the real issue/s in the trial can be ascertained at the commencement of it. This will not be necessary in every trial.] **It is likely that the critical issues for you in this case will be [**outline issues**].**

*Trial Procedure*

**Shortly, the prosecutor will open the prosecution case, giving you an outline of the case and outlining the evidence the prosecution expects to rely upon.**

**[**If there is to be a defence opening at the start of the trial, add: **Defence counsel will then respond, and that should alert you to the factual disputes you will have to decide.]**

**Then you will hear evidence from the prosecution witnesses. Each barrister will have the opportunity to question those witnesses, if they wish and to the extent that they wish.**

**Once the prosecution has adduced all the evidence it intends to in its case, it will close its case. The defendant will be asked if he/she intends to give evidence or call witnesses. Remember that a defendant has no obligation to give, or call, evidence but he/she may choose to.**

**If that happens, the procedure will be the same as for the prosecution witnesses. The witnesses will be called by defence counsel and each barrister can question those witnesses, if they wish and to the extent that they wish.**

**After all of the evidence has been given, counsel will address you and present arguments to you about the evidence you have seen and heard.**

**Finally, I will 'sum up' the case to you, reminding you of the law that you have to apply during your deliberations and the issues you will need to consider. Then, you will retire to consider your verdict/s.**

***Note Taking***

**Writing materials are available so that you can take notes of the evidence as it is given if you wish. However, be careful not to let detailed note-keeping distract you from hearing and observing the witnesses. Any notes that you take must remain in the court precincts and must not be taken home. The Bailiff will ensure they remain confidential by having them destroyed at the end of the trial.**

***Legal Argument***

**My role is to deal with legal matters. Sometimes, in the course of the trial, a barrister might object to a question asked of a witness or there might otherwise be some legal issue that surfaces. Often, I will be able to deal with the matter immediately but, if I cannot, I will need to hear submissions from the barristers. If that happens, I might ask you to retire to your jury room while I deal with it. This is done not to exclude you from the trial but to ensure that you are not distracted by a legal issue, which is my area not yours. So, if this happens, I ask for your patience.**

*Assistance*

**If you experience a problem related to this trial, please let me know. I will help you as much as I can. If you wish to communicate with me while you are here in the courtroom, write the question down and ask the bailiff to give it to me, or attract my or the bailiff's attention so that the matter can be addressed.**

**If the problem arises when you are not in the courtroom, hand the bailiff a note about it, or else tell the bailiff that there is a matter you wish to raise with me. I will then decide how to deal with it. But do not disclose the voting numbers in favour of conviction or acquittal in any such communication.**

**As you can see, these proceedings are being recorded. It is not the usual practice in Queensland for a jury to be supplied with a copy of the transcript of the evidence. If you need to be reminded of what any of the witnesses said, just give the Bailiff a note identifying the evidence. I can arrange for it to be relayed back to you by some means or, depending on the nature of what you wish to be reminded about, I might consider providing you with a transcript if I consider that to be the appropriate course.**

**If you have a question about the law or the evidence or need additional information about anything, I will attempt to assist you. Reduce your request to writing - pass it on to the bailiff. S/he will give it to me. I will discuss your request with the lawyers and respond to it as soon as possible.**

*Keeping deliberations confidential; no independent investigation*

**As I have said, you must pay careful attention to the evidence, and ignore anything you may hear or read about the case out of court. You may discuss the case amongst yourselves but only amongst yourselves. You must not discuss it, or otherwise communicate about it, with anyone else. This includes using electronic means of communication of any sort, including texting and social media.**

**The reason is this: you are the only people who will determine the outcome of this trial; and solely on the evidence presented here in the courtroom. That evidence has been assessed by the parties prior to trial and will be tested here in Court. Information which someone else tells you or which is in the public arena is not always accurate. It would be unfair for you to act on information which is not in evidence, if only because the prosecution and defence will not have an opportunity to assess and test the accuracy of the information.**

**If anyone else attempts to talk to you about this trial, try to discourage them. Afterwards do not tell any other member of the jury about what occurred but mention the matter to the bailiff when you get back to court so that it can be brought to my attention.**

**Also, it is very important that you do not attempt to investigate the matter or to inquire about anyone involved in the case yourselves. You are jurors; that is, people who will determine the verdict/s based only on the evidence, not investigators. If you conduct your own inquiries, you will not be acting only on the evidence. Conducting private inquiries may result in a false impression of the evidence as, for example a scene where something occurred may have changed over time. There have been instances in the past where a jury has made private investigations and mistrials have resulted, or new trials have been ordered on appeal, hence requiring the further unnecessary expenditure of public money and causing distress to persons involved in the trial.**

**So do not view or visit the locations where the events of the case took place. Do not consult sources such as the internet, newspapers, dictionaries or reference material of any sort for information. If any member of the jury brings in such information, please inform the Bailiff and he/she will alert me to the fact and I will decide how to deal with the issue.**

**Apart from the issue of fairness, it is also an offence for you to either speak about the jury's deliberations with someone not one of your number or**

**conduct your own inquiries about a defendant while you are a juror, or cause someone else to make those inquiries, and I do not want to see any of you investigated or charged with an offence. The fact that it is an offence underlines just how important it is to follow the direction I have just given you.**

**If you have a question or want additional information, rather than conducting your own enquiries submit your request in writing to the Bailiff and I will discuss it with the lawyers and help you if I can.**

*Reserve jurors*

**I want to explain the role of our reserve jurors. The 12 of you who are numbered jurors 1 through 12 are the jury in this case; but we also have […] reserve jurors.** [Here state the reason for using reserve juror/s, for example: **This is anticipated to be a long trial**] **and, should it happen for whatever reason that any juror can't complete their jury service, they can be replaced**]**. Our reserve juror/s will be with the jury the whole time and must pay attention to the evidence and perform the same work but, when the time comes for the jury to retire and consider the verdict/s, they may find themselves excused if one of the first 12 jurors has not been replaced for some reason. I appreciate that may be frustrating (or, perhaps, a relief) but it is a precaution that, in light of** [the reason for using reserve jurors] **and past experience, it is wise to take.**

***The Role of the Foreperson***

**Earlier you heard my Associate say that you should select a jury speaker 'as soon as convenient'. The terms speaker and "foreperson" are interchangeable. The choice of speaker you make early in the trial is not set in stone. You can, as a jury, change your speaker at any time.**

**Their job includes communicating with me about any questions or concerns you as a jury may have during the trial and, at the end of the trial, telling the court what your verdict is. Your speaker may a play a useful part in guiding your discussions in the jury room, but it is a matter for you how**

**you conduct your deliberations. Your speaker has no more rights or powers than any of you, just a few extra jobs.**

***Usual Daily Sitting Hours***

**Daily sitting hours are usually [XX] am until [XX] pm, and [XX] pm to [XX] pm. There will often be a break for morning tea and another in the afternoon. That may sound relaxed compared to your normal working day but you must understand that the lawyers usually have a lot to do outside of the Courtroom, and experience shows that those sitting hours usually means the trial will run more efficiently. You may also find that you appreciate regular breaks – listening closely to the evidence can be more tiring than you expect.**

***Break Before Commencing the Trial***

**We will now have a short break of** [state expected length of break]**. You can let family or work associates know that you have been selected for this jury. Criminal trials are very dynamic creatures and although I cannot give any guarantees, the trial is currently expected to last about** (expected duration of the trial). **That information will allow you to make some general plans with family or work. You will now be taken to your jury room and you can meet your fellow jurors, and settle in. When you return the prosecutor will open the prosecution case.**