Jury Directions – a closer look

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Commission

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The Purpose of this Paper

This paper has two purposes: first, to assist people and organisations in preparing their submissions by providing a summary of the proposals in the Consultation Paper (***Paper***), and, second, to offer a refined version of some of those proposals.

Following the publication of the Paper in late September 2008, the commission has met with various groups. In light of these discussions, as well as our further consideration of the issues, we have refined some of our proposals.

This document contains details of those refined proposals and identifies some specific issues that merit debate. A number of questions accompany each proposal or issue. The commission would be grateful to receive submissions that address some or all of these questions.

The deadline for submissions has been extended to 30 January 2009.

Legislation

Issue #1: Jury Directions legislation should be enacted.

In the Paper, the commission stated:

> *Our central reform proposal is that the law governing the directions and warnings that a trial judge gives to a jury in a criminal trial be set out in one piece of legislation.*[1]

The commission goes on to propose that the legislation should make the majority of jury directions discretionary and that it should provide guidance about the content of directions, initially those that have caused problems, but subsequently developing to encompass all directions. These proposals are dealt with below. The initial question, however, is whether there should be legislation at all.

Legislation appears desirable for two major reasons:[2]

- ***Simplification –*** Legislation provides an opportunity to simplify the law relating to jury directions, both generally and in relation to specific directions.
- ***Organisation and accessibility –*** The law of jury directions is scattered across numerous decisions of the appellate courts, supplemented by legislation. All of the relevant law could be placed in a single piece of legislation, organised in a logical fashion. This would make it easier for practitioners and judges to locate and apply the law, thereby reducing the chance of error or omission.

[1] See Consultation Paper, 93.
[2] Ibid.

Questions:

1.1 Should there be jury directions legislation?

1.2 If not, what are the benefits of maintaining the common law of jury directions?

Issue #2: Legislation should take the form of a code.

Legislation could take the form of an ordinary statute or a code. Both would provide the benefits discussed above.[3]

The crucial difference between a code and an ordinary statute is breadth: a code excludes the operation of the common law.[4] A code would permit the development of a new policy basis for the law of jury directions, drawing on common law experience to the extent deemed appropriate. That new basis could emphasise trusting the judge, jury and counsel to carry out their proper roles in the trial process.[5]

Failure to exclude the common law is likely to result in new legislation being interpreted in line with pre-existing practice,[6] whereas a code would promise a 'fresh start' in the law of jury directions.[7]

Two major difficulties that arise when replacing the common law with a code are ensuring that the code is comprehensive and establishing a method for dealing with 'unforeseen cases'.[8] While it may take many years to complete a code, substantial change might be achieved quickly by the introduction of guiding principles and new directions in specific areas where the need for reform can be readily identified. Incremental change would be possible thereafter.

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[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] See eg: the treatment of s 61(2) of the *Crimes Act 1958* (Vic) by the Full Court of the Supreme Court of Victoria in *R v Kehagias* [1985] VR 107, 110 - 111. Cf. the decision in *Papakosmas* (1999) 196 CLR 297, however, where the High Court accepted that the *Evidence Act 1995* (NSW) mandated a new approach to evidence of recent complaint.
[7] See Consultation Paper, 94.
[8] Broadly, there are two methods for dealing with unforeseen cases: on the one hand, the code can permit resort to the common law where the code does not deal with a matter. On the other hand, the code might require judges to devise their own responses. For example, a provision of the proposed Canadian Evidence Code provided:

> *Matters of evidence not provided for in this Code shall be determined in the light of reason and experience so as to secure the purpose of this Code.*

Questions:

2.1 Should jury directions and warnings legislation be a code?

2.2 What are the risks of excluding the common law?

2.3 How should a code deal with unforeseen cases?

Proposal #1: Most directions to be discretionary

In the Paper, the commission stated:

> *All of the circumstances in which the trial judge is required or required not to direct the jury should be set out in legislation.*[9]

The commission proposes that, apart from a small and identified class of mandatory directions, all directions ought to be discretionary.[10] The class of mandatory directions would include standard procedural directions (e.g. burden of proof, standard of proof), as well as directions about the elements of the offences charged and any defences raised. The obligation to charge the jury in accordance with the principles in *Alford v Magee* (1952) 85 CLR 437 would remain.[11] It is arguable that some evidentiary directions should also be mandatory, if the risks associated with that kind of evidence justify a warning in every case. Identification and propensity evidence are examples of categories of evidence that may warrant a mandatory direction under a new code.

Currently, most evidentiary warnings are mandatory in practice, if not in law. In law, most evidentiary warnings are required only if the failure to give them creates a perceptible risk of a miscarriage. In practice, however, the consequences of failing to give a warning are so profound that judges will simply give them, regardless of whether they actually consider there is a 'perceptible' risk. This practice causes a number of problems:

- ***Potential prejudice to the accused*** – There may be circumstances in which an accused would prefer that a warning not be given. Presently, trial judges must largely ignore the views of the accused in deciding whether a direction is required. [12]

[9] See Consultation Paper, 93.
[10] Ibid, 94 – 95.
[11] Although the ambit of the *Alford v Magee* obligation would be clarified. See Proposal 3 below.
[12] See, e.g. *R v Hartwick, Clayton and Hartwick* (2005) 14 VR 125, where counsel for the accused specifically requested that the judge not give a complete consciousness of guilt warning. See also Consultation Paper, 69.

- ***Potential prejudice to the Crown*** – Mandatory warnings are required even where other evidence suggests that the warning is unnecessary in the specific case.[13]
- ***Promoting unnecessary directions*** – Failure to give a mandatory jury direction is an error of law, almost invariably leading to a retrial. Trial judges are therefore inclined to give directions of questionable usefulness to the jury in order to avoid the risk of a retrial.[14] Unnecessary directions are likely to confuse jurors.

Whether a direction, other than a small number of mandatory directions, is required in a particular case should be a matter for the discretion of the trial judge, based on the need to ensure a fair trial.[15] The commission proposes that the primary obligation to seek directions should lie with counsel, although the judge would be empowered to give any direction considered necessary for a fair trial.

Questions:

3.1 Should most directions be discretionary?

3.2 Which directions should be mandatory?

3.3 Should new legislation specify factors to be considered by a trial judge when deciding whether to exercise a discretionary power to give a jury direction?

Contents of directions

Proposal #2: Content of some directions to be codified

In the Paper, the commission stated:

> *The content of some of the directions that the trial judge is required to give to the jury should be set out in legislation.*

[13] See *Doggett v R* (2001) 208 CLR 343 where the trial judge was required to give a warning about the unreliability of a witness' memory, even though the witness' evidence was corroborated by other evidence. See also Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2nd ed., 2004), 351 – 352.

[14] See *R v Cuenco* (2007) 16 VR 118, 127 per Maxwell P, noting that trial judges will 'err on the side of caution'.

[15] The commission proposes that the trial judge be required to give those directions 'necessary to ensure a fair trial'. Some respondents have suggested that it might be preferable to phrase the requirement in terms of avoiding a miscarriage of justice. A third possibility might be 'unless there are good reasons for [not] doing so.' We welcome submissions on this question.

It is important that directions be simplified in order to minimise error and to increase the capacity of jurors to understand them.

In the Paper, we identified two directions that are particularly problematic because of their complexity and the number of appeals they generate: consciousness of guilt and propensity. We are also considering the content of the direction concerning identification evidence.

Issue #3: The need for ongoing reform

Reform of the content of all jury directions is beyond the capacity of the current reference. There may be value in giving an expert body the tasks of developing new directions and monitoring the effectiveness of the proposed new code.

This function could be given to the Judicial College of Victoria which currently prepares the model jury directions in the Criminal Charge Book. The task of developing new directions is, however, legislative in nature. That role may not be well suited to a body established to provide judicial education.

An alternative is to establish a Criminal Justice Council, comprised of judges, practitioners, academic lawyers and others, to take responsibility for the ongoing reform of jury directions. This body could also be given responsibility for devising means of improving communication with jurors to enhance understanding of the directions they are given.

Questions:

4.1 Is an oversight body necessary or desirable?

4.2 Who should have the responsibility for overseeing the implementation and development of the Code?

Issue #4: Identification evidence

Eyewitness visual identification evidence is notoriously difficult because the confidence or apparent credibility of an eyewitness does not necessarily correlate with the accuracy of that person's evidence. Mistakes involving eyewitness visual identification evidence have contributed to a significant number of miscarriages of justice.[16]

The challenges posed by identification evidence have led to the development of extensive jury directions. The rule of practice regarding identification evidence was developed by the High Court in *Domican v the Queen*.[17] The Judicial College of Victoria Charge Book provides useful guidance about the content of identification evidence warnings. In recent appeals involving identification evidence the argument has been made that the trial judge failed to apply the law to the evidence in a particular case. [18]

[16] See Gibbs J in *Kelleher v the Queen* (1974) 131 CLR 534.
[17] (1992) 173 CLR 555.
[18] *R v Abbouchi* [2008] VSCA 171; *R v Conci* [2005] VSCA 173.

The Uniform Evidence Act will not change the content of identification warnings. When it commences operation, the *Victorian Evidence Act 2008* will provide that the judge must warn the jury about the special need for caution before accepting identification evidence, and of the reasons for that need for caution. The relevant section of the Uniform Evidence Act has been interpreted to mean that a warning must be given only where the reliability of the identification evidence is disputed.[19]

While the Uniform Evidence Act does not stipulate the contents of an identification warning, it does provide that there is no need to use a particular form of words when advising the jury about the special need for caution before accepting identification evidence. In New South Wales, where the Uniform Evidence Act has been in operation for 13 years, the courts have continued to rely on the common law approach to identification warnings.[20] It is timely to consider whether the common law identification warning can be simplified and improved.

Questions:

5.1 Is the standard charge book warning too complicated?

5.2 How could identification evidence directions be simplified?

5.3 Are there other ways to improve identification evidence directions?

Issue #5: Consciousness of guilt to be simplified

The consciousness of guilt warning described in *Edwards v R*[21] requires the trial judge to identify all evidence capable of bearing a consciousness of guilt inference and place it within its proper context.[22]

This obligation appears to be drawn from the line of cases where evidence of lies was used as corroboration of a witness' evidence. It borrows much of the technicality of that approach.[23] The actual warning portion of an *Edwards* direction is usually relatively brief when compared to the amount of time that must be devoted to identifying and contextualising the alleged incriminatory conduct.

The technical approach mandated by *Edwards* risks smothering the warning in the surrounding contextual information. The complexity of the test creates the risk that the jury will not focus on the central issue which is the actual validity of drawing an inference adverse to the accused. In addition, when applying the

[19] *Dhanhoa v the Queen* (2003) 217 CLR 1.
[20] *R v Eldridge* [2002] NSWCCA 205;. *R v Coe* [2002] NSWCCA 385.
[21] (1993) 178 CLR 193.
[22] The obligation to contextualise the conduct requires the trial judge to identify potential innocent explanations for the conduct, regardless of whether anyone has raised them.
[23] See further Consultation Paper, 64 – 66.

Edwards test, a trial judge is required to formulate innocent explanations for the alleged incriminatory conduct, providing fertile ground for error.

The commission suggests that the obligation to identify and contextualise the evidence should be removed from the consciousness of guilt warning. By doing so, the warning would be simplified, drawing attention to the actual risk concerned, that of jumping to the conclusion that a person committed a crime because of evidence that they had engaged in suspicious conduct.

Question:

6.1 Should the obligation on the trial judge to identify and contextualise items of consciousness of guilt evidence be removed by legislation?

Issue #6: Propensity to be simplified

The current common law propensity direction informs the jury that they may use propensity evidence when considering the credit of the accused, but not to determine whether the accused is guilty of the crime(s) charged.
Research indicates that directions in which a jury is instructed to use evidence for a specified purpose only, known as 'limited use' directions, are not likely to be effective.[24] This appears to be particularly true where the restriction is at odds with the juror's view of how the evidence may be used, such as in relation to propensity reasoning.[25]

Some instruction to a jury on how to use propensity evidence is desirable. The jury could be told that propensity evidence alone cannot justify a conviction. It may be helpful to direct the jury that while they can engage in propensity reasoning,[26] it would be unfair to find the accused guilty on that basis alone.[27]
An example of a simplified propensity direction was included in Appendix D of the Paper ("the Leach model").

The commission suggests that the propensity direction be simplified by recasting it in terms of fairness and the weight to be given to evidence, rather than the current rule which requires the jury to be given a direction that they are prohibited from engaging in propensity reasoning.

[24] See, among others, Lieberman and Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology, Public Policy and the Law* 677.
[25] Ibid.
[26] This is permissible under s 398A of the *Evidence Act 1958* (Vic) and would continue to be permissible under s 97 of the *Evidence Act 2008* (Vic) when it comes into force.
[27] See Consultation Paper, 51 – 52.

Questions:

7.1 Should the propensity direction be simplified as suggested?

Issue #7: Consolidated directions

One suggestion that has emerged over the course of consultation is that certain groups of individual directions might be consolidated into a single direction. This suggestion provides an alternative to simplifying individual directions and has the potential to effect more far reaching reform.

It has been suggested, for example, that consciousness of guilt evidence is a species of circumstantial evidence and that judges might simply give a circumstantial evidence direction in cases where consciousness of guilt evidence is led.[28]

In the area of sexual offences there are a number of directions which are thematically similar (e.g. warnings regarding prior conduct, such as uncharged acts, propensity and similar fact evidence; delay warnings, such as those required by *Longman*, *Kilby* and *Crofts*; and credibility-related warnings, such as distress and recent complaint). Consolidation may reduce the number of directions that must be given.

There are risks, however, in consolidating a number of discrete directions. The difficulties associated with particular kinds of evidence might not be adequately explained to the jury. Incorporating consciousness of guilt into circumstantial evidence, for example, might result in consciousness of guilt evidence being relied upon more readily by the jury.[29]

Questions:

8.1 Could consciousness of guilt be incorporated into a circumstantial evidence direction?

8.2 Could propensity be incorporated into a 'multiple acts' direction with uncharged acts and similar fact evidence?

8.3 In either case, what would be the risks of consolidating the directions?

8.4 What other directions might be addressed together in a single direction?

[28] This approach was sometimes taken prior to *Edwards v R*. See *R v Charlton* [1972] VR 758.

[29] It is current practice in Victoria to direct that juries should be satisfied of consciousness of guilt evidence beyond reasonable doubt: *R v Ciantar* (2006) 16 VR 26. By contrast, individuals items of circumstantial evidence need not be proven beyond reasonable doubt unless they are an indispensable part of the jury's reasoning: *Chamberlain v R (No. 2)* (1984) 153 CLR 521.

Issue #8: What form should simplified directions take?

It is necessary to consider how simplified directions would be presented in legislative form.

The required content of directions could be set out in detail, or the essential elements could be included in a ***checklist***, leaving it to the judge to determine the specific wording in each case. This latter option provides for the minimum content of each direction, but otherwise permits the trial judge to direct the jury in whatever terms he or she sees fit.[30]

The law could contain ***model directions*** similar in form to the directions currently prepared by the Judicial College of Victoria.[31] Another alternative would be to include specific forms of words in legislation that must be used in particular directions. These so-called ***pattern directions*** are used in the United States. The commission does not presently favour this option, however, as it appears to have significant adverse effects on juror comprehension.

Questions:

9.1 Which of these models is the most appropriate format for statutory directions?

9.2 Are there other models that should be considered?

Issue identification and associated matters

Proposal #3: *Alford v Magee* should be restated in the legislation

In the Paper, the commission stated

> *The legislation could restate the Alford v Magee obligation as simply as possible to ensure that trial judges concentrate on telling the jury about the 'real issues' and briefly summarise the evidence that is relevant to the findings of fact that they must make when determining those 'real issues'.*[32]

The precise nature of the obligation imposed upon trial judges by the common law to direct the jury about the 'real issues' in a case is unclear. Greater clarity may be achieved by stating the *Alford v Magee* principles in legislation so that trial judges know what is required of them. While the extent of the obligation to summarise the evidence is particularly uncertain, the High Court has not

[30] Provided, of course, that the terms used do not undercut the direction itself.
[31] This approach could also be used in conjunction with the checklist approach, i.e. if legislation adopted a checklist approach, the JCV could prepare a simplified instruction that met the checklist criteria.
[32] See Consultation Paper, 99.

criticised the practices in Queensland, WA, SA or the NT where judges tend to deliver much shorter summaries than is the case in Victoria.

The legislative restatement might contain the following principles:

1. The trial judge must direct the jury about the elements of any offences charged by the prosecution.
2. The trial judge must direct the jury about the elements of any lesser offences open on the evidence, unless there are good reasons for not doing so.
3. The trial judge must direct the jury about the elements of any defences raised by the accused person which must be negatived by the prosecution or affirmatively proved by the accused person.
4. The trial judge must direct the jury about all of the verdicts open to them on the evidence.
5. The trial judge must direct the jury about the findings they must make with respect to the elements of each offence in order to find the accused person guilty of the offences charged or any lesser offences.
6. The trial judge must direct the jury about the evidence which is relevant to the findings they must make with respect to the elements of each offence.
7. The extent to which the trial judge must direct the jury about the elements of an offence depends upon the trial judge's determination of the real issues in the case.
8. The extent to which the trial judge must direct the jury about the evidence depends on the trial judge's determination of the real issues in the case.
9. The real issues in a case are those essential findings of fact that in the opinion of the trial judge are contested by the parties.
10. The trial just must direct the jury that they must find the accused not guilty if they cannot make any of the findings of fact referred to in paragraph 5 beyond reasonable doubt.
11. The trial judge is under no obligation to direct the jury about the elements of the offence (or defence) other than to comply with these requirements.
12. The trial judge is under no obligation to direct the jury about the evidence other than to comply with these requirements.
13. The trial judge is under no obligation to direct the jury about the arguments advanced by counsel in the course of addresses, or to summarise those arguments, but may refer to those arguments if the trial judge is of the opinion that the jury's understanding of the real issues may be enhanced by doing so.

Questions:

10.1 Do these principles adequately describe the obligations of the trial judge when directing the jury about the real issues in a case?

Issue #9: An express power to dispense with evidence summaries

Trial judges ought to be given an express power to dispense with giving an evidence summary in appropriate cases.[33] NSW trial judges already have this power.

In consultation, this option has received some support. Some people have even suggested that there should be a presumption in favour of not summarising the evidence.

Questions:

11.1 Should trial judges have a power to dispense with evidence summaries in appropriate cases?

11.2 Should there be a presumption be in favour of giving evidence summaries or against them?

Proposal #4: Counsel should assist in identification of issues prior to trial

In the Paper, the commission stated

> *A document known as an 'Aide Memoire' should be introduced to assist in the identification of issues.*[34]

The commission has proposed that counsel should be required to agree upon an 'aide memoire', or jury guide, prior to the empanelment of the jury. This document would set out the elements of the offence(s), including any relevant statutory definitions, and any affirmative defences raised by the accused. Counsel would be required to indicate those elements of the offence (or the defence) that were in dispute. The document would be given to the jury to assist them to follow the evidence and to identify the contested issues in the trial. It would also provide a framework for the judge when preparing the charge to the jury.

A very similar document is provided to the jury at the commencement of some trials in New Zealand, together with a copy of the indictment and a list of the

[33] See Consultation Paper, 83.
[34] Ibid.

names of witnesses, accompanied by an identifying note (e.g., "police officer", "pathologist'). The document provides space for the jurors to make notes.

The initial obligation to prepare the document would lie with the prosecution. Defence counsel would have the right to object to the prosecution's description of the elements of an offence and to suggest amendments. In the event of a dispute about the description of the elements, the trial judge would determine the contents of the document. Defence counsel would be required to indicate which elements were in dispute.

In consultation, the proposal concerning this document has received strong support. One consistent theme, however, has been a dislike of the term 'aide memoire'. Possible alternatives include 'Jury Guide' or 'Jury Aid'.

Questions:

12.1 Is an aide memoire, or jury guide, likely to be useful?

12.2 Should the document be prepared by counsel but settled by the trial judge if counsel cannot agree upon its contents?

Legislation – grounds of appeal

Proposal #5: Right of appeal restricted where point not taken below

In the Paper, the commission stated

> *The appeal provisions should restrict the capacity of people convicted at trial from raising points of law on appeal which were not raised, and could have been raised, during trial.*[35]

Trial judges are aware of the fact that the law of jury directions is strictly enforced by the appellate courts. Failure to give a warning, or giving a warning in the wrong terms, is likely to result in an order for a retrial if the case goes to appeal. It appears that some trial judges give a very large number of directions in order to minimise the chances of a retrial.

This practice is more likely to confuse than to assist juries. Further, if the law is reformed to provide a trial judge with a discretionary power to determine, following a request by counsel, whether a particular evidentiary direction is required in the circumstances of a case, the discretionary nature of the power will be illusory if it is permissible to argue on appeal, as it is at present, that a direction ought to have been given even though it was not requested at trial. An approach that seeks to provide an appropriate balance between making counsel

[35] Ibid.

responsible for the manner in which a case is conducted at trial and ensuring that the accused person receives a fair trial is considered below.

Issue #10: Unsought directions presumed unnecessary with onus on the appellant to show lack of direction led to denial of fair trial

The fact that a discretionary direction was not sought at trial would create a rebuttable presumption that the direction ought not to have been given in the exercise of the judge's discretion unless the appellant satisfies the court on appeal that the absence of this direction led to the denial of a fair trial.

If most directions become discretionary, the accused should bear the onus of demonstrating on appeal that the failure to give a particular direction that was not sought at the trial resulted in a trial that was not fair.[36]

Rule 4 of the *Criminal Appeal Rules* (NSW) requires that leave be granted to raise an appeal ground concerning a direction about which no complaint or exception was taken at trial. That procedure (with an application for leave to add such a ground of appeal to be heard by a single judge of appeal in advance of the appeal hearing) may be usefully adopted in Victoria.

Questions:

13.1 Should counsel's failure to seek a discretionary direction create a rebuttable presumption that the direction was unnecessary?

13. 2. Should it be necessary for the appellant to demonstrate denial of a fair trial (or substantial miscarriage of justice) before allowing an appeal on the basis that a particular direction not sought at trial ought to have been given?

13.3 Should leave be required to raise a direction-based ground of appeal when the matter was not raised at trial?

Proposal #6: The rule in *Pemble's case* be confined to its original scope.

The rule in *Pemble's*[37] *case* concerns one aspect of the trial judge's duty to ensure a fair trial. It requires the judge to instruct the jury about all of the verdicts open to them on the evidence in a case. Subsequent decisions have extended that duty so that a trial judge is now required to instruct the jury about any matters where the evidence permits them to find for the accused. This

[36] Alternatively, the obligation could be imposed employing the present language of the proviso to s.568(1) of the *Crimes Act*, requiring the appellant to establish that a substantial miscarriage of justice has occurred.
[37] (1971) 124 CLR 107.

includes potential defences which the accused's counsel has chosen not to put to the jury because of conflict with the 'primary' defence.

In the Paper, the commission proposed that the trial judge would generally be required to direct the jury only about lesser included offences and defences that had been raised by defence counsel. There may be cases where the trial judge is required to direct on defences not raised by counsel. The question is in what circumstances should a trial judge be obliged to do so?

Question:

14.1 Should the rule in Pemble's case be confined to homicide cases?

14.2 Should trial judges ever be required to direct on lesser included offence or defences not raised by counsel?

14.3 If so, in what circumstances should they be required to do so?

Timing of the charge

Issue #11: The trial judge should be empowered to delay giving the charge.

Currently, the trial judges usually charge the jury immediately after counsel's addresses. This means that trial judges have limited opportunity to prepare a charge that complies with the *Alford v Magee* requirements, most particularly relating the evidence to the real issues in a case. In addition, the judge has little opportunity to prepare written materials to assist the jury.

Trial judges could be given a discretionary power to delay charging the jury in appropriate cases.

Question:

15.1 Should a trial judge be permitted to delay giving the jury charge?

Issue #12: The trial judge should be empowered to 'split' the charge in appropriate cases.

Under current procedure, counsel address the jury at the conclusion of the evidence and the judge then charges the jury.

In Arizona, courts have adopted the procedure of letting the judge direct the jury about various procedural matters and the issues in the case at the conclusion of the evidence. Counsel then address the jurors about the evidence. Following those addresses, the trial judge then directs the jury about any further issues, including correcting any misstatements or omissions by counsel concerning the evidence and directing on any alternative verdicts. This approach places more responsibility on counsel to address the jury about the evidence, rather than leaving it to the judge to summarise all of the evidence in a case.

The commission suggests that this approach merits consideration because it requires counsel to focus upon the issues in dispute.

Questions:

16.1 Should Victorian judges be permitted to split the charge?

Education and training

Issue #13: Consideration should be given to an accreditation scheme for trial counsel

Many criminal barristers are highly skilled professionals. Suggestions have been made, however, that some counsel are appearing in cases for which they do not have adequate experience or expertise.[38]

It is timely to consider some form of specialist accreditation procedure for barristers who appear in criminal trials. There is already a successful specialist accreditation scheme for criminal law solicitors.

Questions:

17. 1. Is specialist accreditation for barristers who appear in criminal trials desirable?

17.2 How might such a scheme work?

Issue #14: Consideration be given to a Public Defender scheme

The commission has suggested that consideration be given to the establishment of a Public Defender scheme. Public defenders would be the 'defence equivalent'

[38] See eg: Geoff Strong, 'Ex-judge asserts failure of justice', The Age (Melbourne) 10 October 2008, reporting remarks by former Supreme Court Judge the Hon. Professor, George Hampel, QC.

to the Crown Prosecutors: barrister employed on a full-time basis to appear in criminal trials.

Questions:

18.1 Is a Public Defender scheme worth pursuing?

18.2 What barriers do you see to the implementation of such a scheme, if adopted?

Issue #15: Increased training for judges sitting on criminal matters

Conducting a criminal trial can be a difficult exercise for even the most highly skilled and experienced people. Although the data indicates that many of the retrials in the period 2000 – 2007 arose from decisions by highly experienced trial judges, there is little doubt that inexperience and lack of training contribute to the risk of error.

Keeping up to date can be challenging for all judges at a time when the criminal justice system is experiencing considerable change. All judges may be assisted by training that deals with the practical application of new laws.

Questions:

19. 1 Are judges receiving adequate training in delivery of jury charges?

19.2 If not, how could judges be trained to deliver jury charges?

19.3 Should judges be required to receive specialist training in criminal law before sitting on criminal matters?