

IP 27

**Sentencing and
juries**

June 2006

New South Wales. Law Reform Commission.

Sydney 2006

ISSN 1031-0002 (Issues Paper)

National Library of Australia

Cataloguing-in-publication entry

New South Wales. Law Reform Commission.

Sentencing and juries.

Bibliography

ISBN 0 7347 26236

1. Criminal procedure – New South Wales. 2. Sentences (Criminal procedure) – New South Wales I. New South Wales. Law Reform Commission. (Series : Issues paper (New South Wales. Law Reform Commission),27).

345.9440772

Table of Contents

Terms of reference	vi
Participants.....	vii
Submissions	viii
Issues for Discussion	ix
1. Introduction.....	1
OVERVIEW	2
THIS PAPER	2
Submissions invited.....	2
Structure of this paper	2
JURY TRIALS IN AUSTRALIA	3
SENTENCING - GENERAL PRINCIPLES AND CURRENT PROCEDURES.....	3
The sentencing hearing	4
Factors judges may consider	4
Aggravating and mitigating factors.....	6
Victim Impact Statements.....	7
Sentencing guidelines.....	8
Purposes of sentencing	9
Constraints on sentencing discretion	10
Sentencing options.....	11
Non-parole periods.....	12
Reaching a sentencing decision.....	13
Who may have input into sentencing?.....	15
Courts	15
Parliament.....	15
The parties	16
Victims.....	16

Specialist bodies	16
The media and the public.....	18
The jury.....	19
2. Juries and sentencing: the current position	21
INTRODUCTION.....	22
RECOMMENDATIONS FOR LENIENCY	23
ASKING JURIES TO DETERMINE SPECIFIC FACTS RELEVANT TO SENTENCING	25
JURY SENTENCING IN THE UNITED STATES	28
Overview	28
Current position	31
Jury sentencing in capital offences.....	31
Jury sentencing in non-capital offences	34
Recent Supreme Court rulings	37
Ongoing debate	38
3. A more direct role for juries in sentencing?.....	41
INTRODUCTION.....	42
PUBLIC PERCEPTIONS AND SENTENCING.....	44
The importance of public opinion	44
Difficulty in ascertaining a “true” indication of public confidence ...	45
Research into public perceptions of sentencing.....	46
Media and public opinion.....	49
JURY INVOLVEMENT IN SENTENCING	50
Potential impact on public confidence.....	51
Potential impact on sentencing decisions	52
Potential impact on jurors	54
MEANS OF INVOLVING THE JURY.....	55
Clarifying the facts supporting a guilty verdict.....	56

Benefits of the proposal	57
Problems with the proposal.....	58
Asking the jury to express opinions following conviction.....	59
LOGISTICAL QUESTIONS.....	60
Potential for inconvenience and delay	60
Question of timing	62
Jurors' information needs.....	63
Procedural issues	63
Tables	69
Table of cases	70
Table of legislation.....	73
Bibliography.....	77

TERMS OF REFERENCE

In a letter to the Commission received on 25 February 2005, the Attorney General, the Hon R J Debus MP asked:

That the NSW Law Reform Commission inquire into and report on whether or not a judge in a criminal trial might, following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing.

In conducting this inquiry the Commission should have regard to:

- 1. the jury decision making process, including the jury's role in determining guilt or innocence of the accused, and the secrecy and protection of jury deliberations;**
- 2. the judicial sentencing process, and the enhancement of public confidence in the administration of justice.**

The Commission may also report on any related matters that arise in the context of its inquiry.

PARTICIPANTS

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Associate Professor Jane Goodman-Delahunty

The Hon Greg James QC

Professor Michael Tilbury

The Hon James Wood AO QC (Commissioner-in-charge)

Officers of the Commission

Executive Director	Mr Peter Hennessy
Legal Research and Writing	Ms Donna Hayward
	Mr Leslie Katz
Librarian	Ms Anna Williams
Desktop Publishing	Mr Terence Stewart
Administrative Assistance	Ms Wendy Stokoe

SUBMISSIONS

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this Issues Paper.

All submissions and enquiries should be directed to:

Mr Peter Hennessy,
Executive Director
NSW Law Reform Commission

Postal addresses: GPO Box 5199, Sydney NSW 2001
or DX 1227 Sydney

Street Address: Level 17, 8-12 Chifley Square, Sydney NSW

Email: nsw_lrc@agd.nsw.gov.au

Contact numbers: Telephone (02) 9228 8230
Facsimile (02) 9228 8225
TTY (02) 9228 7676

The closing date for submissions is 1 September 2006.

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Issues Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked “confidential” will be determined in accordance with the Freedom of Information Act 1989 (NSW).

Other publication formats

The Commission is committed to meeting fully its obligations under State and Commonwealth anti-discrimination legislation. These laws require all organisations to eliminate discriminatory practices which may prevent people with disabilities from having full and equal access to our services. This publication is available in alternative formats. If you have any difficulty in accessing this document please contact us.

ISSUES FOR DISCUSSION

Q1.

Should jurors be involved directly in the sentencing process?

Q2.

What are the benefits and detriments of jury involvement in sentencing?

Q3.

What would be the likely effect of jury involvement on public confidence in the sentencing process?

Q4.

Is there a more effective way of addressing the issue of public confidence in sentencing decisions, and if so, what should it be?

Q5.

What effect would jury involvement be likely to have on sentencing decisions?

Q6.

How should consultation between judges and jurors be conducted? For example, should the consultation be a structured one, where the jury answers specific questions put to them by the judge, or should there be more open discussion?

Q7.

What sort of questions should a sentencing judge be able to ask a jury?

Q8.

Should jurors be asked to clarify the reasons for their guilty verdict? Why or why not?

Q9.

Are there other ways that jurors can be involved in the sentencing process?

Q10.

How can judges protect the secrecy of jury deliberations while consulting with the jury on aspects of sentencing?

Q11.

Should it be compulsory for jurors to participate in the sentencing process?

Q12.

What is the minimum number of jurors required to give the judge a fair and accurate indication of the jury's views on sentencing?

Q13.

What should happen if the minimum number of jurors cannot be assembled for the sentencing hearing within a reasonable period following conviction of the offender?

Q14.

At what stage following a guilty verdict should the jury be consulted as to their views on sentencing?

Q15.

Should jurors receive access to all the information that the sentencing judge would have, including any Victim's Impact Statement and sentencing guidelines? In what format should this information be presented?

Q16.

To what extent should the judge explain sentencing law and practice to the jury?

Q17.

Should each juror be consulted regarding his or her views on sentencing, or should the foreperson convey the jury's views to the judge? If there is disagreement among jurors as to the appropriate approach to sentencing, should all views be presented to the judge, or only a unanimous or majority view?

Q18.

What should happen if the jurors cannot agree on the questions left to them by the judge, or on the opinions that they wish to offer?

Q19.

What should happen if a juror refuses to disclose his or her views?

Q20.

Do you agree that consultation between the judge and jury should occur in private without the presence of counsel for both sides? Should all aspects of the consultation be kept secret (eg, the number of jurors consulted), or only some aspects, and if so, which ones?

Q21.

Should the defendant be able to request that the jury not be involved in the sentencing process? If so, in what circumstances?

1. Introduction

- Overview
- This paper
- Jury trials in Australia
- Sentencing - general principles and current procedures

OVERVIEW

1.1 On 31 January 2005, his Honour James Spigelman AC, Chief Justice of the Supreme Court of New South Wales, delivered an address entitled “A New Way to Sentence for Serious Crime”.¹ In that speech, the Chief Justice suggested various improvements to current sentencing procedures. One of those suggestions was to investigate the possibility of involving the jury in the sentencing process. This would enhance the jury’s role beyond that of fact-finders determining the accused’s guilt or innocence.

1.2 The Attorney General saw merit in exploring the Chief Justice’s ideas further. Accordingly, he referred the matter to the Commission on 25 February 2005. The Terms of Reference require the Commission to investigate whether the presiding judge in a criminal trial by jury “might, following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing”.

THIS PAPER

Submissions invited

1.3 This is the first publication released by the Commission during the course of this reference. As an Issues Paper, it is designed to promote debate, consultation and feedback. We have not yet reached a conclusion on the issues raised by the Chief Justice in his speech. We invite submissions on the questions asked in Chapter 3 of this paper, and regarding any other matter related to the role of the jury in the sentencing process.

Structure of this paper

1.4 In this chapter, we give an overview of the current sentencing process to provide a context for the Chief Justice’s proposal. In Chapter 2, we look at the way in which the jury can currently provide indirect input into sentencing as part of delivering a guilty verdict. We also examine the position in the United States by way

1. The Honourable JJ Spigelman AC, Chief Justice of New South Wales, “A New Way to Sentence for Serious Crime”, Address for the Annual Opening of Law Term Dinner for the Law Society of New South Wales (31 January 2005).
See «www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_310105».

of comparative study, since juries there have had a direct role in determining sentences for well over two hundred years. Finally, we discuss and pose questions concerning all aspects of the Chief Justice's proposal in Chapter 3.

JURY TRIALS IN AUSTRALIA

1.5 In Australia, most cases are dealt with before the Local Courts, where they are heard by a magistrate sitting alone. In NSW in 2004, 135,497 matters were finalised in the Local Courts, compared with 3,623 matters being finalised in the District and Supreme Courts.² Of those matters finalised in the District and Supreme Courts, only 622 were defended hearings, heard either before a judge and jury, or a judge sitting alone.

SENTENCING - GENERAL PRINCIPLES AND CURRENT PROCEDURES

1.6 Section 80 of the Commonwealth Constitution enshrines the right of a person charged with one or more offences against Commonwealth law to have the trial of those offences heard before a jury, where they are tried on indictment. However, that right to trial by jury extends only to the determination of guilt or innocence.³ In all States and Territories of Australia, a judicial officer, and only a judicial officer, can impose a sentence on an offender once his or her guilt has been established.⁴

1.7 A conviction for an offence may occur either through the accused entering a plea of guilty, or following a trial in which the accused has been found guilty beyond reasonable doubt. Where an offence is tried without a jury, the judge or magistrate will determine both the verdict and the appropriate punishment.⁵

-
2. BOCSAR, NSW *Criminal Court Statistics 2004*, Annual Report, Tables 1.3 and 3.6 (see www.lawlink.nsw.gov.au/bocsar/ll_bocsar.nsf/vwFiles/ccs04.pdf).
 3. See *Savvas v The Queen* (1995) 183 CLR 1. That right also extends only to offences under Commonwealth law. The *Jury Act 1977* (NSW) is the statutory basis for jury trial procedure in NSW.
 4. There is a wealth of authority for this point, but see generally *R v De Simoni* (1981) 147 CLR 383 at 392; *Kingswell v The Queen* (1985) 159 CLR 264 at 276; *Savvas v The Queen* (1995) 183 CLR 1 at 8; *Cheung v The Queen* (2001) 209 CLR 1 at [14] and [16].
 5. Note that all trials in the Local Courts will be held without a jury: jury trials occur only in the Supreme and District Courts.

Should the offence be tried on indictment before a jury, the jurors will determine the question of guilt before being discharged. The presiding judge will alone determine the sentence, following an examination of relevant considerations.

The sentencing hearing

1.8 The sentencing hearing will generally be held a few weeks after the trial has concluded. This gives the Probation and Parole Service, or the Department of Juvenile Justice,⁶ time to prepare any reports that have been requested by the court, or are required by law, concerning the offender's background, time in detention, and prospects of rehabilitation. The hearing is generally held in open court,⁷ and any member of the public, including the jurors who decided the verdict, may attend the sentencing hearing. Both the defence and the prosecution have the opportunity to present oral or documentary evidence at the hearing. The defence counsel may call witnesses to attest to the offender's general good character, psychiatric state, remorse, and prospects of rehabilitation. These matters may be tested or contradicted by evidence called by the prosecution.

Factors judges may consider

1.9 Judges have a wide discretion in determining the appropriate level of penalty in each case.⁸ A judge must have regard to a number of factors, such as the nature of the crime and the maximum penalty for a particular offence specified by statute.⁹ Judges also have access to information about sentencing precedents and statistics through the Sentencing Information System ("SIS").¹⁰ This assists in achieving consistency, and in

6. See *Children (Criminal Proceedings) Act 1987* (NSW) s 25.

7. *R v Foster* (1992) 25 NSWLR 732. Exceptions exist where the offender is a child (*Children (Criminal Proceedings) Act 1987* (NSW) s 10); or where the Court has directed that the proceedings be held in camera, eg, in a trial involving a prescribed sexual offence (*Criminal Procedure Act 1986* (NSW) s 291A).

8. The desirability of having broad judicial discretion has been espoused by the courts and elsewhere: see, eg, *R v Whyte* (2002) 55 NSWLR 252; and New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) ("NSWLRC Report 79") at para 1.7.

9. For the relevance of the statutory maximum, see *Markarian v The Queen* (2005) 215 ALR 213, where the High Court discussed the reasoning involved in the process of sentencing. See also para 1.34 below.

10. See para 1.43 for more information concerning the SIS.

ensuring that the sentence passed falls within the appropriate range.

1.10 Judges will apply the general principles of sentencing when determining appropriate penalties in each case. For example, one of the factors judges will consider when sentencing is proportionality: that is, ensuring that the punishment fits the crime.¹¹ Consistency between sentences is also an important principle. For example, judges look to be fair when imposing sentences to avoid inappropriate disparities between punishments given to co-offenders. They also endeavour to achieve consistency by ensuring that the sentence is within the range for similar offences.¹²

1.11 Another factor is the totality of the sentence. If an offender is convicted of more than one offence, he or she will receive more than one sentence. The judge will determine the appropriate sentence for each offence, consider questions of cumulation or concurrence, and determine whether the aggregate sentence is just and appropriate for the overall level of criminal behaviour. The approach of making the individual sentences wholly or partially concurrent is now preferred to that of lowering some or all of the sentences below that which would otherwise be appropriate.¹³ On occasions, the judge may also be required to take into account any additional offences that the offender acknowledges and asks to be considered.¹⁴

1.12 In addition to these general principles, judges will also have regard to any aggravating or mitigating factors that may exist in each specific case.¹⁵

11 *Veen v The Queen (No 2)* (1988) 164 CLR 465; *R v Whyte* (2002) 55 NSWLR 252 at [152]; and *Bugmy v The Queen* (1990) 169 CLR 525. For a detailed discussion of proportionality, see New South Wales Law Reform Commission, *Sentencing* (DP 33, 1996) (“NSWLRC DP33”) at para 3.35-3.37.

12. See *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295; and *R v Morgan* (1993) 70 A Crim R 368 at 371. See also NSWLRC DP 33 at para 3.38-3.40.

13. See *Pearce v The Queen* (1998) 194 CLR 610; *Postiglione v The Queen* (1997) 189 CLR 295; and *R H McL and The Queen* (2000) 74 ALJR 1319. See also the *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4, Division 2.

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3, Division 3. See also *Markarian v The Queen* (2005) 215 ALR 213.

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21 and s 21A.

Aggravating and mitigating factors

1.13 The aggravating and mitigating circumstances to which a judge will have regard are set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW). The judge may decide on a penalty at the higher end of the scale depending on whether the following aggravating factors are present:

- the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation;
- the offence involved the actual or threatened use of violence, or of a weapon;
- the offender has a record of previous convictions,¹⁶ or the offence was committed while the offender was on conditional liberty in relation to another offence or alleged offence;
- the offence was committed in company, or was part of a planned or organised criminal activity;
- the offence involved gratuitous cruelty;
- the injury, emotional harm, loss or damage caused by the offence was substantial;
- the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability);
- the offence was committed without regard for public safety;
- the offender abused a position of trust or authority in relation to the victim;
- the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bank teller or service station attendant); or
- the offence involved multiple victims or a series of criminal acts.¹⁷

16. Although only for the limited purposes noted in *R v Shankley* [2003] NSWCCA 253.

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

1.14 The mitigating factors that may result in a lower penalty are:

- the injury, emotional harm, loss or damage caused by the offence was not substantial;
- the offence was not part of a planned or organised criminal activity;
- the offender was provoked by the victim, or was acting under duress;
- the offender does not have any record (or any significant record) of previous convictions;
- the offender was a person of good character;
- the offender is unlikely to re-offend, or has good prospects of rehabilitation, whether by reason of the offender's age or otherwise;
- the offender has shown remorse for the offence by making reparation for any injury, loss or damage or in any other manner;
- the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability;
- a plea of guilty by the offender (as provided by s 22);
- the degree of pre-trial disclosure by the defence (as provided by s 22A); or
- the offender provided assistance to law enforcement authorities (as provided by s 23).¹⁸

1.15 A judge may also consider the length of time the offender has already spent in custody in relation to the offence, and compliance with obligations under any community service order, good behaviour bond or intervention program order.¹⁹

Victim Impact Statements

1.16 In certain circumstances, a judge may consider a victim impact statement ("a VIS") in determining an appropriate sentence. As the name suggests, a VIS is a document prepared by, or on behalf of, a victim of crime, describing the impact that the crime has had on the life of the victim or the victim's family. The court may only receive a VIS in relation to an offence heard on indictment that resulted in the death of, or actual physical bodily harm caused to, the victim; or an offence resulting in actual or

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24.

threatened violence, including sexual assault.²⁰ There is no obligation on the victim to prepare a VIS,²¹ or on the court to receive or consider one.²² However, where the victim has died as a direct result of the crime for which the offender has been convicted, and the victim's family has prepared a VIS, the court must receive and acknowledge the VIS, and may make any comment on it that it considers appropriate.²³

1.17 If the court chooses, it may receive and consider a VIS at any time after conviction and prior to sentencing.²⁴ The court may make the VIS available to the prosecutor, the offender or any other person, subject to any conditions it considers appropriate.²⁵ The victim, or a representative of the victim, may read all or part of the VIS to the court during the sentencing hearing.²⁶

Sentencing guidelines

1.18 Judges may also consider any relevant sentencing guidelines.²⁷ In NSW, the Attorney General may request the Court of Criminal Appeal to consider delivering a guideline judgment on a particular question of law, without the need for an appeal on that matter to have been brought before the Court.²⁸ Alternatively, the Court may give a judgment of its own motion.²⁹ Guideline judgments may indicate appropriate factors to consider when sentencing for specific offences, but may not be made with respect to particular offenders.³⁰

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29.

22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28.

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3). Where the crime involves the death of a victim, a VIS by a member of the family which deals only with the effect of the death upon the family, has been held to be irrelevant to the sentence being imposed: *R v Previtera* (1997) 94 A Crim R 76; and *R v Bollen* (1998) 99 A Crim R 510.

24. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5).

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.

27. In NSW, guideline judgments are underpinned by formal, legislative requirements: see *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3, Division 4.

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37. The Court is not required to give a guideline judgment if it considers it inappropriate to do so: s 40.

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37A.

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37(3).

1.19 Guideline judgments serve as templates for structuring judicial discretion. They are not binding on judges, but act as an additional factor that judges must consider in exercising their sentencing discretion.³¹ The judgments are intended as a tool to enhance sentencing consistency, while not detracting from the need for judges to exercise discretion when determining penalties based on the particular facts and circumstances of each case.³² In introducing the legislative scheme in 1998, the Government stressed the balance between sentencing consistency and the free exercise of judicial discretion as being crucial to maintaining public confidence in the justice system.³³ Since 1998, guideline judgments have been handed down in relation to seven areas of law.³⁴

Purposes of sentencing

1.20 In deciding on an appropriate sentence, a judge would also keep in mind the purposes of the penalty. The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the court may impose a sentence on an offender for the following purposes:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other persons from committing similar offences;

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 42A.

32. For a discussion of the function and operation of guideline judgments, see the Hon JJ Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876; and *R v Whyte* (2002) 55 NSWLR 252.

33. See NSW, *Parliamentary Debates (Hansard) Legislative Assembly*, 28 October 1998 at 9190. This was the Second Reading Speech introducing the *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* (NSW). That Act was subsequently repealed and incorporated into the *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3, Division 4.

34. Those areas are: Dangerous driving (*R v Jurisic* (1998) 45 NSWLR 209; reformulated in *R v Whyte* (2002) 55 NSWLR 252; Armed robbery (*R v Henry* (1999) 46 NSWLR 346); Drug importation (*Wong & Leung* (1999) 48 NSWLR 340; overruled in *Wong v The Queen; Leung v The Queen* (2001) 76 ALJR 79); Break, enter and steal (*R v Ponfield* (1999) 46 NSWLR 327); Effect of a guilty plea on sentence (*Thomson & Houlton* (2000) 49 NSWLR 383); Effect of an admission of guilt relating to other offences (*Attorney General's Application No 1 of 2002* (2002) 56 NSWLR 46); and high range prescribed content of alcohol (*Attorney General's Application No 3 of 2002* (2004) 6 NSWLR 305). A further application by the Attorney General requesting guidelines relating to assault on a police officer was refused by the Court of Criminal Appeal (*Attorney General's Application No 2 of 2002* [2002] NSWCCA 515).

- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender; and
- (g) to recognise the harm done to the victim of the crime and the community.³⁵

Constraints on sentencing discretion

1.21 In *Cheung v The Queen*, Justice Kirby set out the four relevant constraints on a sentencing judge's discretion.³⁶ First, a judge must act within, and in accordance with, any applicable statutory provision. Secondly, an offender may only be sentenced for an offence regarding which he or she has pleaded guilty, or been convicted by a court.³⁷ Consistent with this, a judge may only consider evidence during sentencing that has been agreed upon by both counsel or proved by the prosecution,³⁸ and may only rely on evidence that has been made known to the offender.³⁹

1.22 Next, where the jury has delivered a verdict, a judge must not impose a sentence that conflicts with that verdict.⁴⁰ Where there is more than one possible basis for the jury's verdict, the judge must determine the factual basis for the verdict,⁴¹ by reference to the evidence which is before the Court at the sentencing hearing.⁴² The sentencing judge may form his or her own view of the facts upon which the jury based their decision, provided this does not conflict with the jury's verdict.⁴³

1.23 Finally, judges must be satisfied beyond reasonable doubt of those facts which are adverse to the accused, upon which any

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

36. (2001) 209 CLR 1 at [99].

37. *R v De Simoni* (1981) 147 CLR 383.

38. *R v O'Neill* [1979] 2 NSWLR 582.

39. *Stanton v Dawson* (1987) 31 A Crim R 104.

40. *R v Ford* (1994) 75 A Crim R 398; *R v Harris* (1961) VR 326; *R v Isaacs* (1997) 41 NSWLR 374.

41. This can often be a difficult task, as noted by the Chief Justice in his speech. See para 2.9-2.17 for further discussion on this point.

42. *R v O'Neill* [1979] 2 NSWLR 582; *Chow v DPP* (1992) 28 NSWLR 593.

43. *Savvas v The Queen* (1995) 69 ALJR 564; *Maxwell v The Queen* (1996) 184 CLR 501.

sentence is based.⁴⁴ Judges must also give reasons for the sentences they impose, setting out the facts they considered to be aggravating or mitigating factors.⁴⁵

Sentencing options

1.24 Following a plea or a finding of guilt, the court determines the appropriate penalty. In some instances, usually relating to the least serious of offences, the court may, without proceeding to a conviction, direct that the charge be dismissed.⁴⁶ The Court may also make an order discharging the offender on the condition that he or she enters into a good behaviour bond,⁴⁷ or agrees to participate in an intervention program, and comply with that program.⁴⁸

1.25 Where the court determines that some form of penalty is warranted, it must decide between custodial and non-custodial options. In some circumstances, that choice may be limited by statute, since imprisonment is not available as a choice for all offences. Where a custodial sentence is available, the court should only sentence an offender to prison after having considered all other alternatives.⁴⁹ If the Court determines that no penalty other than imprisonment is appropriate, it must determine what the length of that sentence should be. Then, the Court must consider any available alternatives to serving the sentence of imprisonment by way of full-time custody.⁵⁰ Judges determine the nature and length of any custodial sentence having regard to the subjective and objective factors discussed above.⁵¹

1.26 Imposing a custodial sentence does not always mean that the offender must serve that sentence on a full-time basis. Where an offender is sentenced to imprisonment for a period of not more

44. Matters favourable to the accused need only be proved on the balance of probabilities. For a more detailed explanation of the role of fact finding in sentencing, see *Weininger v The Queen* (2003) 212 CLR 629.

45. *R v O'Neill* [1979]2 NSWLR 582; and *R v SG* (2003) NSWCCA 220.

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

47. For a period of up to 2 years: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b).

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(c) and Part 8C.

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

50. *R v Douar* (2005) NSWCCA 455.

51. See para 1.9-1.23. The statutory provisions governing sentencing procedures for imprisonment are contained in the *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4.

than three years, the court may direct that the sentence be served by way of periodic detention.⁵² Where the sentence of imprisonment is not more than 18 months, the court may make a home detention order.⁵³

1.27 In other cases, non-custodial sentencing options may be available. They include community service orders,⁵⁴ good behaviour bonds,⁵⁵ suspended sentences,⁵⁶ deferred sentences,⁵⁷ fines,⁵⁸ and non-association or place restriction orders.⁵⁹

Non-parole periods

1.28 When sentencing an offender to imprisonment for an offence, a Court is first required to set a non-parole period for the sentence. This refers to the minimum period for which the offender must be kept in detention in relation to the offence. The Court must then set the balance of the term of the sentence. That balance must not exceed one-third of the non-parole period, unless the Court decides that there are special circumstances for increasing it, in which case the Court must provide reasons for that decision.⁶⁰

1.29 A Court may not set a non-parole period for a sentence if the term of imprisonment is six months or less.⁶¹ Where the Court imposes a sentence of imprisonment for a term of three years or less, being a sentence that has a non-parole period, it must make an order directing the release of the offender on parole at the end of the non-parole period.⁶²

52. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6 and Part 5.

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7 and Part 6.

54. The court may order an offender complete up to 500 hours of community service: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8 and Part 7.

55. A good behaviour bond may extend for up to 5 years: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9 and Part 8.

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12.

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.

58. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 2 Division 4.

59. These are orders preventing the offender from associating with a specified person, or frequenting or visiting a specified place or district, for a stated amount of time: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A and Part 8A.

60. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44. The meaning of “special circumstance” was considered in *R v Simpson* (2001) 53 NSWLR 704 and *R v Way* (2004) 60 NSWLR 168.

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

62. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.

1.30 When the offence is one which falls within the category of offences for which standard non-parole periods have been prescribed by statute, then that is the non-parole period which is to be set. However, the Court may determine that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period prescribed for that offence.⁶³

Reaching a sentencing decision

1.31 The task of reaching a decision as to an appropriate sentencing option is a difficult and complex one. Judges in NSW must draw on a vast body of accumulated knowledge, including:

- the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Crimes Act 1914* (Cth)⁶⁴;
- a significant body of case law illustrating the sentencing principles discussed above;⁶⁵
- the sentencing ranges for each offence in respect of which an offender is convicted;
- any relevant guideline judgments;
- an understanding of sentencing statistics and their relevance; and
- an awareness and understanding of the significance of any mitigating factors that may be specifically relevant to the offender (for example, the opportunities, or lack thereof, for rehabilitation, potential hardships that may be faced by offenders with life-threatening illnesses, etc).

1.32 In determining an appropriate sentence, judges for the most part use one of two competing methodologies.⁶⁶ The first, known as the “two stage” or “two tier” approach, refers generally to the

63. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4, Division 1B. For the application of these provisions, see *R v Way* (2004) 60 NSWLR 168, and *R v Davies* (2004) NSWCCA 319.

64. When sentencing offenders convicted of offences against Commonwealth law.

65. See para 1.9-1.30.

66. These categorisations are general only, and do not otherwise limit the exercise of judicial discretion: see *Markarian v The Queen* (2005) 215 ALR 213 at [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

practice of first considering the more objective circumstances of the offence, such as the gravity of the crime, to determine a notional starting point for sentencing within the allowable statutory range for a particular offence. Then, that starting point is adjusted following consideration of the more subjective factors relating to the particular circumstances of the offender, resulting in the final sentence determination.⁶⁷ For example, a judge may decide that a certain sentence is appropriate considering the circumstances of the offence committed, and then discount a proportion of the sentence if the offender has entered a guilty plea.⁶⁸

1.33 The alternative approach is known as “instinctive synthesis”, whereby judges consider all of the relevant factors simultaneously and arrive at one final sentence determination. Which of these methodologies is preferred has long been the subject of debate.⁶⁹ Both approaches have been criticised: the two stage approach for being too mathematically rigid and more likely to give rise to errors; and the instinctive synthesis method for lacking sufficient precision and transparency to enable the reasons for the sentence to be clearly understood.

1.34 In the recent case of *Markarian v The Queen*,⁷⁰ the majority of the High Court stated that much confusion surrounds the terms and attempts to define and categorise them, and that there can be no universal rule stating that one method should always be adopted over the other.⁷¹

In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed....

[I]t cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix

67. Note that legislation sometimes requires judges to take a two step approach by specifying how much a sentence has been discounted due to certain factors: see *Crimes Act 1914* (Cth) s 21E.

68. See *Thomson & Houlton* (2000) 49 NSWLR 383 and *R v Sharma* (2002) 54 NSWLR 300 for the effect of a guilty plea on sentencing.

69. See, eg, *AB v The Queen* (1999) 198 CLR 111; *Wong and Leung v The Queen* (2001) 207 CLR 584; *Cameron v The Queen* (2002) 209 CLR 339; *R v Sharma* (2002) 54 NSWLR 300; *R v Whyte* (2002) 55 NSWLR 252; and *Markarian v The Queen* (2005) 215 ALR 213.

70. (2005) 215 ALR 213.

71. *Markarian v The Queen* (2005) 215 ALR 213 at [36] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

the time which an offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression "instinctive synthesis" may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge.⁷²

Who may have input into sentencing?

1.35 While it is the judiciary who ultimately determine penalties in each case, others also play a role in sentencing. That role may be an over-arching one: setting the policies that guide sentencing law and practice; or may be specifically related to penalty outcomes in particular cases.

Courts

1.36 Obviously, the courts, through judicial officers, have the most direct involvement in sentencing by imposing penalties in each case where an offender pleads guilty to, or is convicted of, an offence. As well as sentencing in individual cases, the courts also establish sentencing precedent, particularly by issuing guideline judgments.⁷³

Parliament

1.37 Judicial discretion in selecting appropriate sentences exists subject to the power of Parliament to enact legislation setting maximum penalties for criminal offences, and restricting the type of penalty available for certain offences. Generally in New South Wales, as well as in other Australian jurisdictions, there has been

72. *Markarian v The Queen* (2005) 215 ALR 213 at [37] and [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

73. See discussion at para 1.18-1.19 above.

resistance to the idea of Parliament curtailing judicial discretion by prescribing minimum penalties for offences. However, in 1999, Parliament introduced minimum life sentences for murder and for serious drug trafficking offences in certain circumstances,⁷⁴ and standard non-parole periods for certain offences.⁷⁵

The parties

1.38 During the trial, counsel for both sides tender evidence, much of which will be relevant to sentencing in the event that the defendant is found guilty. At the sentencing hearing, the prosecution and defence counsel may present further evidence concerning the offender's subjective circumstances. This may include evidence as to character, prior convictions, psychiatric or psychological status, potential hardship arising from the manner in which the sentence will be served, previous performance on parole, etc, with a view to persuading the judge to hand down either a lenient or more severe sentence.

Victims

1.39 People who have been the victims of certain crimes, or who have lost family members as a result of a violent crime, may have some input into the sentencing process by preparing a Victim's Impact Statement. The circumstances in which a VIS may be relevant are discussed at paragraph 1.16-1.17 above.

1.40 Victims of crime may also be assisted by groups such as the Enough is Enough Anti-Violence Movement, the Victims of Crime Assistance League (VOCAL), or the Homicide Victims Support Group.⁷⁶ In addition to providing support for victims, these groups lobby for recognition of victims' rights in the criminal justice system. Representatives from these groups are members of the Sentencing Council of NSW.

Specialist bodies

1.41 The Sentencing Council of NSW was established in 2003 to provide independent advice to the Government on sentencing policy and practice. Set up under the *Crimes (Sentencing*

74. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61; see also *R v Merritt* (2004) 59 NSWLR 557.

75. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4, Division 1A.

76. Although these groups would not normally be allowed to participate in the sentencing procedure themselves.

Procedure) Act 1999 (NSW),⁷⁷ the Sentencing Council is comprised of representatives from the judiciary, the police, the criminal bar (both prosecutors and defenders), community representatives, victims' rights advocates and an Aboriginal justice specialist.⁷⁸ The Council's main functions are to advise and consult with the Attorney General in relation to offences suitable for standard non-parole periods and for guideline judgments; to monitor, and report annually on, sentencing trends and practices; and to prepare reports to the Attorney General (upon request) on particular aspects of sentencing law.⁷⁹

1.42 The Attorney General welcomed the establishment of the Sentencing Council, noting the likelihood of it generating robust debate and controversial recommendations. He observed that the Sentencing Council "will provide an invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice".⁸⁰ To date, the Sentencing Council has prepared reports on the effect of abolishing short prison sentences, the application of standard non-parole periods to certain offences, and how best to achieve consistency in sentencing in the Local Courts.⁸¹ It currently has a reference in relation to fines.

1.43 The Judicial Commission also has input into sentencing. In addition to organising and supervising the continuing education and training of judges in NSW, the Judicial Commission assists the courts in achieving consistency in sentencing.⁸² In carrying out this task, the Judicial Commission maintains databases (such as the Judicial Information Research System "JIRS",⁸³ and the SIS)⁸⁴. The Judicial Commission also produces judicial officers' bulletins and empirical studies of sentencing practice across NSW courts. Other, more generalist, research organisations, such as this

77. Part 8B. For information concerning the Sentencing Council's functions, membership and publications, see «www.lawlink.nsw.gov.au/sentencingcouncil».

78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I.

79. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J.

80. New South Wales, *Parliamentary Debates* (Hansard), Legislative Assembly, *Crimes (Sentencing Procedures) Amendment (Standard Minimum Sentencing) Bill 2002* (NSW), Second Reading Speech by the Hon RJ Debus MP, Attorney General (23 October 2002) at 5818.

81. See «www.lawlink.nsw.gov.au/sentencingcouncil» for details.

82. See «www.jc.nsw.gov.au».

83. Dealing with sentencing principles and practice.

84. Dealing with sentencing statistics.

Commission,⁸⁵ the Bureau of Crime Statistics and Research,⁸⁶ and the Criminal Law Review Division within the Attorney General's Department,⁸⁷ have also reported on aspects of NSW sentencing law and policy.

The media and the public

1.44 The media play an important role as a conduit of information between the justice system and the community. They are in a position to inform the public about sentencing decisions and practices, and to encourage public debate. As such, they are able to guide and comment upon public opinion in relation to sentencing outcomes and practices, and to affect public confidence levels in the criminal justice system.

1.45 In *Markarian v The Queen*,⁸⁸ Justice McHugh recently observed:

Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.⁸⁹

1.46 The positive and negative impact of the media in relation to sentencing issues is noted by the Chief Justice in his speech, and is discussed further in Chapter 3 of this paper.

85. See, eg, NSWLRC Report 79; NSWLRC, *Sentencing: Aboriginal Offenders* (Report 96, 2000); NSWLRC, *Sentencing: Corporate Offenders* (Report 103, 2003). The Commission has also recently delivered *Sentencing: Young Offenders* (Report 104, 2006).

86. Examples of fairly recent BOCSAR publications dealing with sentencing issues include S Moffatt, D Weatherburn and J Fitzgerald, "Sentencing Drink Drivers: The Use of Dismissals and Conditional Discharges" (2004) 81 *Crime and Justice Bulletin*; J Fitzgerald, "Trends in Sentencing in the New South Wales Criminal Courts: 1990-2000" (2001) 62 *Crime and Justice Bulletin*; and J Baker, "Are the Courts Becoming More Lenient? Recent Trends in Convictions and Penalties in NSW Higher and Local Courts (1998) 40 *Crime and Justice Bulletin*. For a full list, see «www.lawlink.nsw.gov.au/bocsar».

87. See «www.lawlink.nsw.gov.au/clrd» for further details.

88. (2005) 215 ALR 213.

89. (2005) 215 ALR 213 at [82].

The jury

1.47 Australian jurors play no direct or defined role in determining an appropriate sentence for the offender whom they have found guilty. However, they may indirectly affect a sentence handed down to an offender in a number of ways. For example, a jury may return a guilty verdict with a recommendation to the judge that the offender be treated with leniency with respect to the sentence he or she is given. While the judge must consider the expression of such a view and treat it with respect, he or she is not bound by it when determining the sentence.⁹⁰ Jurors may also have an indirect impact on sentencing, for example, where they deliver a special verdict, or a verdict of guilty on an alternative count. The ways in which jurors can currently have a peripheral effect on sentencing through their verdicts is discussed in Chapter 2.

90. *Whittaker v The King* (1928) 41 CLR 230.

2. **Juries and sentencing: the current position**

- Introduction
- Recommendations for leniency
- Asking juries to determine specific facts relevant to sentencing
- Jury sentencing in the United States

INTRODUCTION

2.1 This chapter discusses the role the jury currently plays in determining sentences in criminal trials. As noted in the previous chapter, there is no formally defined role for the jury in the sentencing process.¹ On the contrary, it has long been considered fundamental to the fair and effective administration of justice in Australia that the jury's role be limited to finding the facts that support their verdict, and that it is the responsibility of the judge to determine the appropriate sentence.²

2.2 However, there are currently a number of ways in which the jury might provide indirect input into sentencing in the course of their role as fact finders during the trial. This chapter discusses three of those ways in detail: namely, the jury's ability to recommend mercy or leniency; and the situation whereby jurors return a verdict on an alternative count to that primarily charged; and where jurors are invited to return a special verdict by which they answer specific questions of fact that may also have an impact on sentencing. These types of jury involvement in sentencing occur during the course of delivering a verdict. A further possible avenue of jury involvement in the sentencing process can occur *after* the jury has returned a guilty verdict, and the judge asks the jury to clarify the reasons for that verdict. As this issue is inextricably linked with the Chief Justice's proposal, it is discussed in the following chapter.

2.3 While the debate about jury involvement in the sentencing phase is restricted to academic circles in this country, it has been long-standing practice in other jurisdictions. For example, in some parts of the United States, juries not only make recommendations regarding appropriate sentencing, but are responsible for imposing the sentence. Although such a system is not being proposed here, we examine the nature of, and rationale for, jury sentencing in the United States by way of comparison and contrast with the practice in New South Wales. Also, the United States models might provide

-
1. In *Cheung v The Queen* (2001) 209 CLR 1, Gleeson CJ, Gummow and Hayne JJ noted that trial by jury in this country does not include sentencing by a jury: at [6]. It was held that there was no requirement under the Commonwealth Constitution for the jury to be asked to state the basis on which a guilty verdict was reached, or for it to decide contested facts relevant to sentencing.
 2. *Cheung v The Queen* (2001) 209 CLR 1.

useful guidance on procedural issues, such as how and when judges can consult with the jury.

RECOMMENDATIONS FOR LENIENCY

2.4 When a jury returns a verdict of guilty, it may, if it chooses, recommend to the judge that the offender be given leniency. That recommendation does not constitute part of the verdict.³ There is no legislative recognition in NSW of the jury's right to recommend leniency.⁴ However, a number of cases have referred to the power, either explicitly or implicitly.⁵ The definitive High Court statement can be found in *Whittaker v The King*,⁶ where Justice Isaacs said:

[i]t is of course the duty of a judge who has the difficult task of determining the proper sentence to be imposed upon a person convicted of a crime to take into his consideration a recommendation by the jury for mercy. But it must be emphasised that it is not part of the verdict; it does not bind the trial judge; it operates only as a recommendation, and the responsibility in the interests of society to impose an appropriate sentence commensurate with the seriousness of the crime remains with the trial judge. It in no way absolves the trial judge from the duty of considering the circumstances of the crime independently for himself, and it in no way requires him to put any remote or strained interpretation upon the facts to find some justification for the rider.⁷

2.5 The weight given to such a recommendation will depend on individual judges and the circumstances of each case.⁸ Since jury recommendations are not binding, a plea for mercy is only one of a number of factors a judge will need to consider when deciding on an appropriate penalty.⁹ Indeed, the courts have cautioned against

3. *R v Tappy* [1960] VR 137.

4. The Australian Capital Territory is the only Australian jurisdiction to have legislated the jury's power to recommend leniency: see *Crimes Act 1900* (ACT) s 342.

5. See, eg, *Myerson v The King* (1908) 5 CLR 596; *R v Dickson* (1865) 4 SCR (NSW) 298; *R v Tappy* [1960] VR 137; *Whittaker v The King* (1928) 41 CLR 230; *R v West* [1979] Tas R 1; *R v Harris* [1961] VR 236; *R v Wingrove* (1936) 53 WN (NSW) 118.

6. (1928) 41 CLR 230.

7. (1928) 41 CLR 230 at 240.

8. Some courts are more dismissive of jury recommendations on the grounds that punishment is the province of the judge not the jury: see *R v Tappy* [1960] VR 137.

9. The other factors a judge must consider are discussed at para 1.9-1.23.

trial judges relying too heavily on what they perceive to be the jury's finding of fact behind a recommendation for mercy:

Human nature being what it is, such recommendations are not always based upon reason or upon logic. They may be based upon all kinds of considerations, and such things as sentiment, a spirit of compromise, a misunderstanding of the true situation, and a host of other things, may be responsible for them. A Judge is not bound to act upon such a recommendation, if, in his opinion, the circumstances do not justify it, and if the jury in the present case had been asked upon what they based their recommendation—and I think that it is to be regretted that they were not asked— it might have appeared that it did not rest upon any substantial basis and was not entitled to be given any real weight.¹⁰

2.6 The above quotation raises the issue of whether or not the judge should ask the jury their reasons for making a recommendation of mercy. In *R v Wingrove*,¹¹ the NSW Court of Criminal Appeal determined that, where the recommendation is framed in a way that throws doubt on the basis for the jury's guilty verdict, the judge should ask the jury what they mean by recommending that the offender be treated leniently. However, apart from this limited circumstance, the Court was of the view that a judge should not make further enquiries of a jury that qualifies a verdict by way of a recommendation for leniency.¹² The broader question of whether a judge should ask a jury to clarify the basis of a verdict to convict is discussed in the following chapter.¹³

2.7 Neither the judge, nor counsel for either side, may expressly invite the jury to make a comment as to the leniency of the sentence should they choose to convict the defendant.¹⁴ Generally, a jury is not even informed, either before retiring to deliberate or upon returning to deliver their verdict, of their right to recommend that the judge impose a lenient sentence should they choose to convict. Nor are they informed of the possible sentencing options or the maximum available sentence. In Report 48, we recommended that, while the power of a jury to express an opinion as to leniency should be preserved, so too should the current practice of not informing the jury of this power, unless they ask whether they may

10. *R v Whittaker* (1928) 28 SR (NSW) 411 at 420 (Street CJ). See also *R v Millward* (1931) 23 Cr App R 119.

11. (1936) 53 WN (NSW) 118.

12. *R v Wingrove* (1936) 53 WN (NSW) 118 -119.

13. See para 3.38-3.45.

14. *R v Black* [1963] 1 WLR 1311.

qualify their verdict in such a manner.¹⁵ This is to mitigate against the temptation to deliver a compromise guilty verdict: that is, finding the defendant guilty on the condition that a lenient punishment be imposed.¹⁶ Similar considerations apply to the practice of not disclosing to the jury details of the sentence and the sentencing options that are available.

2.8 Presumably, the power of a jury to make a recommendation as to the leniency of sentence also extends to making a recommendation that the judge impose a sentence at the more severe end of the scale. However, we are not aware of any cases where this has occurred.

ASKING JURIES TO DETERMINE SPECIFIC FACTS RELEVANT TO SENTENCING

2.9 It is the primary role of the jury to determine whether or not the evidence presented during the trial leaves them satisfied beyond reasonable doubt that the defendant committed a specific offence, or offences, listed on the indictment. Sometimes, the jury is presented with alternative offences, which may be expressly charged, or available as statutory alternatives. In such a case, the jury must decide whether the facts support a finding of guilt in relation to offence A or offence B, or neither offence. Since offence A and offence B are likely to have different maximum penalties prescribed by statute, the jury's finding of guilt regarding one offence but not the other, indirectly affects the sentence the offender may receive. In this way, jurors can have de facto involvement in sentencing as a by-product of their role as determiners of guilt.

2.10 The jury's general guilty verdict will not always reveal the facts found to have been proven. While this does not affect the verdict, the answers to these facts may be significant in determining the appropriate sentence. A classic example is the difference between murder and manslaughter. Where a jury decides an offender is guilty of manslaughter but not of murder, it is not always clear whether that verdict was returned because the jury had a doubt as to whether the offender had the requisite intention or state of mind required for murder, or whether some

15. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986), ("NSWLRC Report 48") Recommendation 73.

16. NSWLRC Report 48 at para 8.15. See para 3.36 for a discussion of the danger of jury sentencing leading to compromise verdicts.

other factor, such as provocation, excessive self defence, intoxication or substantial impairment by abnormality of mind, was involved. Since the penalty for manslaughter can vary considerably depending on the presence or absence of these (and other) factors, it may be useful for a judge to know the basis for the jury's findings.¹⁷

2.11 In certain circumstances, a judge may invite the jury to deliver a special verdict by answering specific questions concerning issues of fact which arise in the trial.¹⁸ The courts have held that, while it is open to juries to deliver special verdicts, they may only answer specific questions of fact that relate to the elements of the offence identified on the indictment, and not those matters that relate to sentence only.¹⁹ In *Kingswell v The Queen*,²⁰ the defendant was charged with conspiring to import narcotics into Australia under s 233B of the *Customs Act 1901* (Cth). That section stated that a person found guilty of that offence was punishable as provided by s 235 of the *Customs Act 1901* (Cth). The appropriate penalty provided for under s 235 depended on the Court being satisfied of a number of factual matters, including the quantity of the narcotics involved. One of the questions raised in *Kingswell* was whether the matters of fact to be determined under s 235 were elements of the offence (due to the combined operation with s 233B), or were matters that related only to sentencing.

2.12 The High Court ruled that the jury was not empowered to give a special verdict relating to the facts identified in s 235 as circumstances of aggravation relevant to sentencing, as they were not issues pertaining to the elements of the offence in s 233B as specified on the indictment. In his judgment, Justice Brennan stated:

-
17. The issue of whether the judge may consult with the jury *after* their verdict is the essence of the Chief Justice's proposal, and as such, is discussed in the following chapter. Here, we look at the jury's ability to influence sentencing as part of their verdict.
 18. See *Thompson v The Queen* (1989) 169 CLR 1 at 30. In *Cheung v The Queen* (2001) 209 CLR 1, Gleeson CJ, Gummow and Hayne JJ stated that it was not necessary to decide whether a jury could be compelled, as distinct from invited, to return a special verdict, as this had not been raised in submissions by either side: at [19].
 19. See *Kingswell v The Queen* (1985) 159 CLR 264; *Cheung v The Queen* (2001) 209 CLR 1; and *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238.
 20. (1985) 159 CLR 264.

A jury which is charged to try the issues on an indictment is not at liberty to find facts which are not pertinent to those issues. It has long been established that, if a jury returns a special verdict, its verdict must be confined to the issues which it is sworn to try, else a finding on any other issue is... void.²¹

2.13 In *Cheung v The Queen*,²² a jury found Cheung guilty of having been knowingly concerned in the importation into Australia of a commercial quantity of heroin. The trial judge then imposed a sentence based on his findings as to the extent of Cheung's involvement in the crime. On appeal, it was argued on Cheung's behalf that denying the jury the right to determine facts that are critical to the type and length of the sentence imposed is a denial of the right to a jury trial under s 80 of the Commonwealth Constitution.²³

2.14 The High Court discussed the respective roles of the judge and jury as finders of facts relevant to sentencing. In the course of this discussion, the High Court confirmed that the role of the jury is to determine the matters of fact on which issue is joined by a plea of not guilty. The issue of whether a special verdict should have been obtained from the jury to clarify its view of the facts was raised in oral argument, but was not argued at trial or on appeal, and so was not considered in detail by the High Court. However, Justice Kirby expressed cautious approval of asking jurors specific questions of fact to ensure, as closely as possible, that the sentence is in line with the basis for the jury's verdict:

... at least where the potential difference for sentencing is as substantial as it was in this case, it is desirable, and certainly permissible, to seek from the jury answers to questions (or a special verdict) concerning the basis upon which they have convicted the prisoner.²⁴

2.15 It was also suggested that, where possible, defendants could be charged with alternative offences, so that a jury's decision to convict on one but not the other, would make the basis of their verdict clear for the purposes of sentencing.²⁵ Further, some

21. *Kingswell v The Queen* (1985) 159 CLR 264 at 287. Although Justice Brennan's judgment in this case was a dissenting one (on other grounds), the reasoning of the majority does not imply error in the passage quoted.

22. (2001) 209 CLR 1.

23. Section 80 provides for the right to trial by jury for defendants charged on indictment with Commonwealth offences.

24. *Cheung v The Queen* (2001) 209 CLR 1 at [133] (Kirby J).

25. *Cheung v The Queen* (2001) 209 CLR 1 at [71-74] and [86] (Gaudron J).

members of the Court were sympathetic to the view that the prosecution should frame the indictment as specifically as possible to enable the jury to make its views clear on each factual issue relevant to the offence.²⁶

2.16 However, all arguments advocating a greater role for the jury in sentencing failed in *Cheung's* case. The High Court held that the nature of the accused's motive for becoming involved in the crime, and the extent of his involvement, while relevant to sentencing, was not an element of the particular offence charged and not, therefore, a matter to be resolved by the jury.²⁷ In rejecting the Constitutional argument, the Court stated that the:

procedure involved the trial judge, following a jury verdict of guilty, reviewing the evidence for himself for the purpose of making findings on matters of fact which were necessary for sentencing, and which were not resolved by the jury's verdict. Such a procedure does not involve any infringement of a right to trial by jury. It involves the application of well-established principles as to the division of functions which are, and were in 1900, an aspect of trial by jury.²⁸

2.17 The majority were of the view that, while the jury would have heard evidence relevant to sentencing issues, and some jurors may have relied on some of that evidence in deciding the guilty verdict, the jury can, and should, in no way be seen as deciding all facts of possible relevance to sentencing.²⁹

JURY SENTENCING IN THE UNITED STATES

Overview

2.18 American juries have had a role in sentencing ever since the War of Independence in 1776, which ended English rule over the American colonies. In the early days of the colony, people were suspicious of the arbitrary power exercised by Crown appointed judges, and were eager to cast off the vestiges of English colonial

26. *Cheung v The Queen* (2001) 209 CLR 1 at [132] (Kirby J) and [160] (Callinan J).

27. *Cheung v The Queen* (2001) 209 CLR 1 at [7] (Gleeson CJ, Gummow and Hayne JJ).

28. *Cheung v The Queen* (2001) 209 CLR 1 at [55] (Gleeson CJ, Gummow and Hayne JJ).

29. *Cheung v The Queen* (2001) 209 CLR 1 at [7] (Gleeson CJ, Gummow and Hayne JJ).

rule.³⁰ The early colonists saw juries as being far better suited than judges to determine the extent to which the defendant's behaviour deviated from the socially accepted norms. In many colonies, decisions as to guilt and punishment were a joint effort, with county justices of the peace, grand juries and judges all having a say in the defendant's fate. Up until the last few years of the eighteenth century, punishment for felony offences was usually by way of death, rather than discretionary terms of imprisonment, with the primary motive being retribution. Consequently, a jury's guilty verdict would often be delivered along with the command that the defendant be hanged "by the neck until dead".³¹

2.19 In practice, however, very few executions were carried out. In Virginia, for example, the judge and the governor commuted many death sentences imposed by the jury.³² Dissatisfaction with this somewhat haphazard form of sentencing, led to calls for the introduction of other penalties, besides death, that judges, juries and governors could consistently enforce.³³

2.20 In 1786, Pennsylvania was the first state to introduce discretionary terms of hard labour for certain offences, in addition to having the death penalty for others. At the same time, Pennsylvania also became the first state to give judges the power to decide terms of imprisonment for non-capital offences.³⁴ In 1796, Virginia also adopted discretionary terms of imprisonment, but chose to keep the jury as the sentencing authority for all capital and non-capital criminal offences.³⁵ Other states chose between the jury sentencing and judge sentencing models almost immediately upon attaining statehood and entering the Union.³⁶

2.21 Jury sentencing reaching its zenith in the mid to late nineteenth century. This period coincided with the growing fear of

30. For an account of the history of jury sentencing in America, see J Iontcheva, "Jury Sentencing as Democratic Practice" (2003) 89 *Virginia Law Review* 311; A Lanni, "Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?" (1999) 108 *Yale Law Journal* 1775; Nancy J King, "The Origins of Felony Jury Sentencing in the United States" (2003) 78 *Chicago-Kent Law Review* 937; and M Hoffman, "The Case for Jury Sentencing" (2003) 52 *Duke Law Journal* 951.

31. This was certainly the case in Virginia: see King (2003) at 947.

32. See King (2003) at 947-950.

33. See King (2003) at 950.

34. See King (2003) at 937.

35. See King (2003) at 937 and Iontcheva at 317.

36. Although some states adopted jury sentencing well after their entry into the Union: see Lanni at 1790-1791.

an unrepresentative judiciary and gathering momentum for judicial elections. Juries were viewed as offering “a better safeguard against unfair sentences than a single judge”, and represented the embodiment of the ideal of a decentralised democracy”.³⁷ By 1919, fourteen of the forty-eight American states allowed juries to deliver sentences in relation to non-capital criminal offences.³⁸

2.22 However, the popularity of jury sentencing began to decline. This was due to a combination of factors. First, the increasing complexity of litigation signalled a need for judicial interpretation and decision-making “bound by precedent and expounded in written opinions”.³⁹ Secondly, the codification of many laws and the move towards federalisation rendered the local input of juries less significant. Further, the growth of the law schools in the nineteenth century resulted in a legally trained professional elite, creating a knowledge gulf between the role of lawyers and lay people.

2.23 The early twentieth century also saw a change in attitudes towards crime and punishment. Defendants were given the power to waive their right to trial by jury, and the growing practice of plea bargaining resulted in a greater number of guilty pleas, removing the need for a jury trial. The establishment of parole and probation systems further eroded the popularity of jury sentencing, with the length of prison terms being based on professional opinions as to the rehabilitation prospects of the offender.⁴⁰ However, non-capital jury sentencing fell to its lowest ebb following the rise of determinate sentencing in the 1970s and 1980s. Public desire to be tougher on crime and promote consistency in punishments for similar crimes led some states to introduce mandatory sentencing, and mathematical formulas and grids for prescribing sentences, that allow for only limited discretion, even by judges.⁴¹ As a result, an increasing number of states abandoned the practice of jury sentencing for non-capital offences, leaving the current number of jury sentencing states at six.⁴²

37. See Iontcheva at 318 and 323.

38. See Iontcheva at 319.

39. See Iontcheva at 324.

40. See Iontcheva at 324-327.

41. See Iontcheva at 327-330.

42. King (2003) at 937. See para 2.30-2.37 below for details.

Current position

Jury sentencing in capital offences

2.24 The historical role of the jury in determining the appropriateness of the death penalty has been preserved in many United States jurisdictions. In relation to federal offences, the *United States Code* provides that, where an offender has pleaded, or been found to be, guilty of an offence punishable by death,⁴³ a separate hearing will be held to determine if the death penalty is appropriate.⁴⁴ That hearing is to be conducted before the same jury that determined the offender's guilt, or, if the offender pleaded guilty or was convicted by a judge sitting alone, a jury may be empanelled specifically for the purpose of determining the appropriateness of the death penalty.⁴⁵ The accused may request that the sentencing hearing not take place before a jury, in which case the sentence will be determined by a judge sitting alone.

2.25 The sentencing hearing is like a mini-trial, during which the prosecution and defence counsel present to the jury aggravating and mitigating factors, respectively. Aggravating factors include whether the offence was committed in a cruel, heinous or depraved manner; or was the result of substantial planning and premeditation; or committed for pecuniary gain. Further aggravating factors would exist where the offender has prior convictions for similar, or other serious offences; where the death of the victim occurred while the offender was committing another crime; or where the victim was particularly vulnerable due to age, youth or infirmity, or was a high public official.⁴⁶ In mitigation, the defence may argue that the offender was acting under duress, a severe mental or emotional disturbance, or an impaired capacity to appreciate the wrongfulness of his or her actions. Additional mitigating factors may include the lack of any prior convictions; that the offender played only a minor role in committing the offence, or that there are equally culpable offenders; that the victim consented in the conduct that led to his or death; or any other factors concerning the offender's background and character that would justify a sentence other than death.⁴⁷

43. As provided under 18 *United States Code* s 3591.

44. 18 *United States Code* s 3593(b).

45. 18 *United States Code* s 3593(b)(1) and (2).

46. See the full list of aggravating factors in 18 *United States Code* s 3592(b), (c) and (d).

47. 18 *United States Code* s 3592(a).

2.26 The prosecution must prove the presence of any aggravating factors beyond reasonable doubt, while the defence need only establish mitigating factors on the preponderance of information.⁴⁸ The jury (or the judge if there is no jury) must decide unanimously whether the aggravating factors found to have been proved sufficiently outweigh all of the established mitigating factors. In the absence of any mitigating factors, the jury must decide whether the aggravating factor or factors alone are sufficient to justify a sentence of death. If the jury are unable to reach a unanimous decision, the judge shall determine whether the offender should be sentenced to death, to life imprisonment without the possibility of parole, or to some lesser sentence.⁴⁹ The difficulty that juries can face reaching a unanimous decision on the death penalty was highlighted in the recent sentencing of Zacarias Moussaoui for offences concerned with his involvement in the attacks of September 11, 2001.⁵⁰

2.27 In addition to the federal provisions, thirty-eight state jurisdictions have the death penalty as a sentencing option for certain types of murder offences, and other specified, serious offences, such as treason.⁵¹ In all of those jurisdictions, where a jury trial was conducted resulting in a guilty verdict, the jury will have some form of involvement in the sentencing process. This was made certain in *Ring v Arizona*,⁵² where the United States Supreme Court determined that only juries, and not judges, could find the existence of aggravating factors necessary to invoke the death penalty. The degree of jury involvement varies from state to state. For example, juries in Alabama, Delaware, Florida and Indiana have more of an advisory role than juries in other states, with judges making the ultimate sentence determination.⁵³ In all

48. 18 *United States Code* s 3593(c).

49. 18 *United States Code* s 3593(e).

50. See M Coultan, "Americans divided over Moussaoui verdict" *Sydney Morning Herald* (Friday, 5 May 2006 at 7); and P Hirschhorn, "Jury spares 9/11 plotter Moussaoui" (accessed at «www.cnn.com/2006/LAW/05/03/moussaoui.verdict/»).

51. The offences that are punishable by death vary between capital punishment states.

52. 122 S Ct 2428 (2002). The Court extended the ruling in *Apprendi v New Jersey* 530 US 466 (2000) to capital proceedings, by deciding that denying juries the power to decide the facts on which a death sentence is based is a contravention of the Sixth Amendment to the US Constitution (guaranteeing the right to a fair trial): see para 2.38-2.40 for a discussion of the *Apprendi* decision.

53. *Ring v Arizona* 122 S Ct 2428 (2002) at 2449.

capital sentencing jurisdictions, including federal proceedings, judges may impose a lesser sentence than that recommended by the jury, but may not increase the sentence beyond the jury's finding.⁵⁴

2.28 Capital punishment has been found to have a Constitutional basis. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”. While the Courts have determined that capital punishment as a penalty for deliberate murder *per se* is not considered to be “cruel and unusual punishment”, its application may be outlawed by the Eighth Amendment in some circumstances. In *Furman v Georgia*,⁵⁵ the Supreme Court struck down the capital punishment statutes of Georgia and Texas on the grounds that they facilitated discriminatory and arbitrary life and death decisions, and were therefore unconstitutional. The Court declared that, in order to avoid being caught by the “cruel and unusual punishment” clause, sentencing procedures for capital punishment must be structured so as to avoid arbitrariness and capriciousness. To that end, sentencing juries should be provided with sufficient direction and guidance to structure their discretion, so that the full circumstances of each case, and each offender, can be thoroughly considered.

2.29 As a result of the *Furman* decision, courts and legislatures have been vigilant in ensuring that sentencing juries receive appropriate guidelines to guard against the arbitrary and disproportionate imposition of the death penalty.⁵⁶ In general terms, this meant revising state criminal statutes to specify aggravating and mitigating factors (similar to the federal provisions discussed above) to which sentencing authorities may have regard when considering the appropriateness of the death penalty. It also meant separating the verdict and sentencing stages into two distinct hearings, so that jurors do not hear prejudicial evidence concerning the defendant's character and prior convictions until after the verdict has been delivered.

54. See *Ring v Arizona* 122 S Ct 2428 (2002). Judges may stipulate that a maximum term of life imprisonment should have a lifetime non-parole period: 18 *United States Code* s 3594. Note that while judges, appellate courts and State Governors may in fact make the final decision in capital cases, juries must not be told that the ultimate responsibility for determining the death penalty rests with an authority other than them: see *Caldwell v Mississippi* 472 US 320 (1995).

55. 408 US 238 (1972).

56. See *Gregg v Georgia* 428 US 153 (1976).

Jury sentencing in non-capital offences

2.30 In contrast to the widespread practice of jury sentencing in capital cases, juries in non-capital cases have direct involvement at the sentencing stage in only six states. In Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia, juries decide on appropriate sentences for offenders convicted of offences for which discretionary terms of imprisonment, fines, or both, are available. In reality, jury sentencing occurs in only a very small number of non-capital cases,⁵⁷ since over ninety percent of matters are plea bargained.⁵⁸

2.31 In all of these states, the same jury that delivered the guilty verdict determines the sentence the offender will receive.⁵⁹ However, there is significant variation between the states in terms of jury sentencing practice. For example, there are differences between the states as to whether or not a defendant may elect to be sentenced by a judge rather than a jury,⁶⁰ and also in relation to the types of offences that may be sentenced by juries. Further, the sentencing options that jurors may select from differ from state to state,⁶¹ as does the issue of whether or not the sentences are subject to parole.⁶²

2.32 The most significant variation between jury sentencing states is whether or not the trial is separated into two distinct stages for determining guilt and punishment. Five of the six jury sentencing states have a bifurcated format: meaning that the sentencing takes

57. It is estimated that approximately 4000 United States juries hand down sentences for non-capital offences each year: see N King and R Noble, "Felony Jury Sentencing in Practice: A Three-State Study" (2004) 57 *Vanderbilt Law Review* 885 at 887.

58. Iontcheva at 355. Plea bargaining involves a deal between the prosecuting and defence attorneys, whereby the accused agrees to plead guilty, but to a lesser offence than the one with which he or she was initially charged. In some states, a defendant may still choose to be sentenced by a jury even after entering a guilty plea. However, this is almost never done in practice for fear of upsetting the bargain struck with the prosecution: see Iontcheva at 355 and King and Noble at 894.

59. See Iontcheva at 354.

60. For example, in Kentucky and Arkansas, the defendant cannot be sentenced by a judge following a jury trial unless the prosecution consents: King and Noble at 903-904 and 934. Virginian law prohibits judicial sentencing following a guilty verdict at a jury trial: King and Noble at 919.

61. See para 2.34 below.

62. King and Noble at 891-892.

place in a separate proceeding after the trial has concluded.⁶³ Consequently, juries only hear evidence specifically relevant to sentencing after they have convicted the defendant.⁶⁴ At the sentencing hearing, juries will hear evidence of any aggravating or mitigating factor, and details of the offender's prior criminal record.⁶⁵ In Missouri, jury sentencing only operates in relation to trials for first offenders.⁶⁶ Judges in Missouri impose sentences on offenders with prior convictions.⁶⁷

2.33 In Oklahoma, a combination of the bifurcated and the unitary schemes exists. Under a unitary scheme, the jury decides issues of guilt and sentence at the same time. The unitary scheme has been criticised due to its potential prejudicial effect. If information relevant to sentencing but not to guilt (such as evidence of prior convictions) is given to the jury before they deliver their verdict, there is a significant danger that the two issues could become confused in the minds of the jurors and the verdict could be prejudiced. However, if sentencing information is not given, then jurors must make a decision as to sentencing without full knowledge of all of the evidence.⁶⁸ In an attempt to avoid some of these pitfalls, Oklahoma only uses unitary proceedings for first offenders, and bifurcates proceedings for defendants with a criminal history.⁶⁹ Criticism of unitary jury sentencing proceedings caused the Missouri legislature to abandon the practice in 2003.⁷⁰

2.34 Sentencing juries deliberate in secret, and must decide unanimously on the appropriate sentence.⁷¹ In doing so, they

63. Those states are Arkansas, Kentucky, Missouri, Texas and Virginia.

64. See Iontcheva at 354-355.

65. Iontcheva at 354-355.

66. N J King, "How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared" (2004) 2 *Ohio State Journal of Criminal Law* 195 at 195.

67. See Lanni at 1792. See also The Hon R J Jackson, "Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest" (1999) 55(1) *Journal of the Missouri Bar* 14.

68. See Lanni at 1791-1792.

69. King (2004) at 195

70. King (2004) at 195. For a critique of jury sentencing in Missouri, see the Hon R J Jackson, "Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest" (1999) 55(1) *Journal of the Missouri Bar* 14. Note that the US Supreme Court declared unitary capital proceedings to be unconstitutional: *Furman v Georgia* 408 US 238 (1972).

71. Iontcheva at 355.

generally select a specific term of imprisonment from within a broad statutory range, with very little assistance provided.⁷² However, the power of the jury to determine a sentence is not without limits. Sentencing juries do not have access to the full range of penalties that may be imposed by judges. For example, in some jury sentencing states, jurors are limited to imposing sentences of imprisonment. They have no authority to suspend sentences, recommend probation, or refer offenders to any non-custodial alternatives such as referral to drug treatment or other rehabilitation programs.⁷³ Consequently, the unavailability of these sentencing options means that jury sentences for some offences tend to be higher than judicially imposed penalties, even though the jury may wish to be more lenient.⁷⁴

2.35 Nor is the jury's say necessarily final. Judges may alter or suspend a jury's sentence in most states.⁷⁵ For example, in Kentucky, Virginia, Arkansas and Missouri, a judge may reduce a jury's sentence if it is considered unduly harsh, but may not increase it unless it fails to comply with relevant sentencing statutes.⁷⁶ However, research in some states, particularly Kentucky and Arkansas, has revealed a general reluctance by judges to modify jury sentences.⁷⁷ The researchers attribute this reluctance to a combination of factors, namely: genuine judicial confidence in the jury as a "superior assessor of the appropriate punishment";⁷⁸ a willingness to allow the jury to take responsibility for sentencing decisions;⁷⁹ and the view that jury sentencing helps to divert more cases away from the courts.⁸⁰ Attitudes appear to be more ambivalent in Virginia, with one court having described jury sentencing as little more than offering an "advisory opinion or first-step decision".⁸¹

2.36 Sentencing juries do not have access to all of the information available to the judge. For example, as a general rule, juries do not

72. King and Noble at 892. For example, jurors in a rape trial in Virginia must select a sentence anywhere between five years and life: see King (2004) at 197.

73. King and Noble at 900 and 911.

74. King and Noble at 912.

75. See Lanni at 1792.

76. See King and Noble at 892, and Jackson at 16-17.

77. King and Noble at 901-902, 908, 918-919.

78. King and Noble at 941.

79. Note that judges in both Arkansas and Kentucky are popularly elected.

80. King and Noble at 941-946

81. See Lanni at 1793; and Iontcheva at 355.

receive access to sentencing guidelines.⁸² Nor are they provided with other relevant statistics concerning parole or sentencing trends for similar offences.⁸³ In some states, juries are only informed about an offender's eligibility for parole, and not given any other information about the likelihood of actual release. Juries may impose sentences at the harsher end of the scale based on the erroneous assumption that an offender who is eligible for parole will only serve a fraction of that time before automatically being released.⁸⁴ In many jury sentencing states, jurors also lack information about more lenient alternatives to incarceration.⁸⁵

2.37 Accordingly, juries are hampered in their ability to recommend sentences that are consistent and in context with the criminal justice system as a whole. This is particularly problematic since jurors, unlike judges, lack broad sentencing experience. They must recommend penalties based on the experience of a single isolated case, possibly drawing on their somewhat uncertain recollection of what may have occurred in other cases that have attracted the public attention, or even personal prejudice. The disparity in the information received by judges and jurors can, in some jurisdictions, result in juries imposing higher sentences than judges who are more informed.⁸⁶ The lack of information given to sentencing juries is considered, even by advocates of jury sentencing, to be one of the greatest drawbacks of the current system in the United States.⁸⁷

Recent Supreme Court rulings

2.38 Until recently, the issue of jury sentencing in the United States had lain dormant. However, a series of decisions by the United States Supreme Court have re-energised the debate concerning jury sentencing for non-capital offences. In the case of *Apprendi v New Jersey*⁸⁸, the defendant was convicted before a jury of a firearms offence carrying a maximum penalty of ten years imprisonment. The trial judge was of the view that the offence also

82. Iontcheva at 355; King and Noble at 893, 913-914, 928-30. Note that this is in stark contrast to juries in capital cases, where it has been held to be constitutionally required to provide sufficient sentencing guidelines: see para 2.28-2.29 above.

83. Iontcheva at 355 and King and Noble at 893-894.

84. King and Noble at 914-916, and 928-929.

85. King and Noble at 911 and 931.

86. King and Noble at 899-900, and 910-911. This trend can be used by the prosecution to lever a guilty plea from the defendant.

87. See Iontcheva at 359 and 366-372.

88. 530 US 466 (2000).

involved elements of racial hatred, which he felt justified imposing a penalty greater than the statutory maximum. On appeal, the Supreme Court overruled the trial judge's decision, stating that only the jury could determine whether facts existed that warranted enhancing the sentence above the statutory maximum.

2.39 The Court reaffirmed this principle in *Blakely v. Washington*⁸⁹, holding that the constitutional right to trial by jury in a criminal trial, enshrined in the Sixth Amendment, included not only the right to have a jury decide guilt or innocence, but also the facts upon which any sentence enhancement is based.⁹⁰

Ongoing debate

2.40 Prior to the *Apprendi* and related decisions, jury sentencing in non-capital matters was regarded by most commentators in the United States as an anachronistic hang-over from post colonial times.⁹¹ However, these cases have reignited the debate in America over the role the jury should play in sentencing in relation to non-capital offences.⁹² While *Apprendi* is authority for the proposition that sentencing decisions following jury trials may only be based on facts that have been determined by the jury, it does not expressly determine whether or not sentencing decisions must be made by a judge or a jury. However, some commentators have argued that *Apprendi* and *Blakely* could reverse the historical drift away from jury sentencing and open the way for the reintroduction of non-capital jury sentencing across the board.⁹³

2.41 Jury sentencing in non-capital cases has been described by some as one of the "least understood procedures in American criminal justice".⁹⁴ Critics in the United States claim it to be costly, time-consuming, unnecessary and antiquated; that jurors lack the

89. 124 S Ct 2531 (2004).

90. Note the different approach taken by the High Court of Australia in *Cheung v The Queen* (2001) 209 CLR 1, discussed at para 2.13-2.17 above.

91. See Lanni at 1776 and Jackson at 14.

92. See, eg, MKB Darmer, "The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries" (2005) 56 *South Carolina Law Review* 533; E Lillquist, "The Puzzling Return of Jury Sentencing: Misgivings About Apprendi" (2004) 82 *North Carolina Law Review* 621; JJ Prescott and S Starr, "Improving Criminal Jury Decision Making After the Blakely Revolution" (2005) University of Michigan Law School, Working Paper Series No 39 (accessed at «www.law.bepress.com/umichlwps/olin/art39»).

93. See, eg, Hoffman.

94. King and Noble at 887.

expertise of judges, which can lead to disproportionate or inconsistent sentences that are based on prejudice rather than solid evidence.⁹⁵ Others note that the criminal justice systems in jury sentencing states do not provide non-capital sentencing juries with sufficient power and information to enable their effective functioning.⁹⁶

2.42 Jury sentencing advocates are of the view that the arguments voiced against jury sentencing, such as jurors' lack of expertise and inability to handle complex issues, amount to a mistrust of the jury system as a whole.⁹⁷ Some claim that the perceived problems with non-capital jury sentencing could be addressed by importing many of the procedures already in place for capital cases: such as giving jurors clear instructions as to aggravating and mitigating factors, access to relevant sentencing guidelines, and more rigorous appellate review.⁹⁸ In response to piecemeal mandatory sentencing laws derived from political pressure and public opinion polls, supporters argue that jury sentencing may be the "most direct and least distorting mechanism to conform criminal sanctions to community sentiment".⁹⁹

2.43 Others researchers have reached a more pragmatic conclusion, noting that non-capital jury sentencing is not an "obscure and curious appendage of an earlier age".¹⁰⁰ However, studies in three jury sentencing states have revealed that its practice bears little relation to the democratic ideals on which it is was traditionally based.¹⁰¹ Rather than setting a benchmark reflecting community expectations, researchers found that jury sentencing is favoured by prosecutors as a means of encouraging

95. See Jackson and the arguments advanced in Hoffman at 985-991

96. See, generally, King (2004).

97. See Iontcheva at 315; and Lanni.

98. See Iontcheva at 359; Lanni at 1802; and Hoffman at 1000-1011.

99. See Lanni at 1802.

100. King and Noble at 889.

101. The study involved interviews with judges, prosecutors and defence attorneys from Arkansas, Kentucky and Virginia: see King and Noble at 890.

guilty pleas.¹⁰² The study also found that jury sentencing can operate as a convenient tool to place accountability for any unpopular sentencing policy on jurors rather than criminal justice officials.¹⁰³ This is especially the case in jurisdictions with an elected judiciary.¹⁰⁴ The researchers believe that this discrepancy between theory and practice has implications for reformers in the United States, regardless of whether they seek to replace jury sentencing with judicial sentencing, or to strengthen the current powers of sentencing juries.¹⁰⁵

102. The concept of a “plea discount” (whereby the defendant receives a lesser penalty upon pleading guilty than would otherwise have been imposed following a trial resulting in a conviction) is a pervasive feature of American criminal justice. Consequently, many defendants prefer to plead guilty and be sentenced by a judge rather than risk the unpredictability of being tried and sentenced by a jury: see King and Noble at 895-940.

103. King and Noble at 889.

104. As one commentator put it: “Judges are elected, jurors are votes”: King and Noble at 933.

105. King and Noble at 889 and 949-962.

3. A more direct role for juries in sentencing?

- Introduction
- Public perceptions and sentencing
- Jury involvement in sentencing
- Logistical questions
- Means of involving the jury
- Issues for discussion

INTRODUCTION

3.1 The Chief Justice observed in the opening of the Law Term Dinner Speech, that public confidence in the administration of justice is one of the matters that is essential to government.

The direct involvement as decision-makers of members of the public, in their capacity as such, does more to ensure the maintenance of a high level of trust and confidence in the administration of justice than, perhaps, any other single factor.¹

He went on to say that:

[s]entencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way that judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

3.2 In a different context, the Chief Justice has also cautioned that sentencing involves “a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction.” He also noted that those who are involved in the sentencing process should not be distracted from this task by the transient pressures of short term unpopularity with the outcome of their decisions.²

3.3 As noted earlier, the task of an Australian jury is completed once a verdict has been delivered,³ leaving the judge alone to determine the appropriate penalty. The concern which arises is whether criticism of sentencing and public perceptions of penalties being too lenient and out of step with community expectations, risks leading to an apparent decline in acceptance of, and confidence in, the fairness of sentencing decisions made by judges. While recognising that some of this criticism is ill-founded, and

-
1. The Honourable JJ Spigelman AC, Chief Justice of New South Wales, “A New Way to Sentence for Serious Crime”, Address for the Annual Opening of Law Term Dinner for the Law Society of New South Wales (31 January 2005). See «www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_310105».
 2. The Honourable JJ Spigelman AC, Chief Justice of New South Wales, Address to the Parole Authorities Conference (10 May 2006). See «www.lawlink.nsw.gov.au/sc/sc.nsf/pages/SCO_spigelman100506»
 3. Or, in the case of a hung jury, where no verdict can be delivered and the jury is discharged.

that there is a danger in the selective media reporting of sentences, the Chief Justice nevertheless acknowledged the damage it can do, not only to public confidence, but also to the overall effectiveness of the justice system. The Chief Justice suggested that one way of addressing this may be to provide an opportunity for the jury to play a role in the sentencing process, with a view to enhancing public confidence in it.

3.4 The essence of the Chief Justice's proposal is that, after a jury has found an accused person guilty of a particular criminal offence, the jury should continue to have a role in a process of in camera consultations with the trial judge before any sentence is imposed on the accused. The proposal raised for consideration would require that the jury involved in the consultation would be composed of at least some of the members of the jury that delivered the verdict in the particular case:

It is not appropriate or desirable to create some kind of artificial jury composed of persons who have not had to decide the critical question of guilt. A jury that has had to turn its collective mind to the determination of guilt has had to focus in a direct, and not merely advisory way, on elements critical to the sentencing task. This focus cannot be artificially created.

3.5 The Chief Justice did not suggest that the jury should actually determine the sentence, as occurs in some United States jurisdictions.⁴ Rather, the suggestion was that the judge should discuss relevant issues with the jury after evidence and submissions on sentence have been received, before the judge decides on the sentence. The consultation between judge and jury proposed was one that would be conducted in camera and protected by secrecy provisions.

3.6 The Chief Justice did not put forward the proposal as a means of increasing the level of sentences, and made it clear that he did not believe that it would have that effect. He offered the view that the process of consultation would improve the quality of sentence decision-making both jury decision-making and enhance public confidence in sentencing. He suggested that judges would welcome assistance from a spectrum of opinion reflecting a diversity of experience. He observed that the sentencing process could be improved by a judge being able to draw on a broad range

4. See para 2.18-2.43 for a comparative look at jury sentencing in the United States.

of experience. Further, the Chief Justice considered that enabling judges to consult with jurors as to the actual reasons for the jury's guilty verdict, which are currently concealed by the secrecy surrounding their deliberations, would assist the sentencing process.

3.7 Chief Justice Spigelman put forward the suggestion as to an enhanced jury role in sentencing tentatively, noting that many issues needed to be resolved if any such proposal were to be implemented. For example, consultation between judge and jury could intrude upon the secrecy of jury deliberations. Furthermore, there would be resource implications in recalling jury members at the sentencing stage, with logistical difficulties arising from the delay which necessarily occurs between the delivery of the verdict and the sentence.⁵

3.8 We now consider in detail the following issues raised by the Chief Justice's speech:

- Public perceptions concerning the current sentencing process, and how that impacts on public confidence.
- The likely effect that introducing a role for jurors in sentencing would have on public confidence levels, sentencing decisions and the jurors themselves.
- The type of input that jurors should have, eg, being asked by the judge to explain why they found the defendant guilty, or giving their views on questions that relate directly to sentencing.
- The practical and procedural questions that would need to be resolved before any proposal for involving the jury in the sentencing process could be implemented.
- Whether there are any Constitutional constraints in relation to any such proposal.

PUBLIC PERCEPTIONS AND SENTENCING

The importance of public opinion

3.9 Public perception can be a most powerful tool: often acting as a catalyst for reform and influencing the decisions of policy

5. See para 1.6-1.47 for a description of the current sentencing process.

makers.⁶ So far as the criminal justice system is concerned, the perception in many countries is that violent crime is spiralling out of control, that judges are out of touch with reality, and that sentences are far too lenient for the crimes being committed.⁷ In NSW, initiatives such as the NSW Sentencing Council, by providing a forum for community views on sentencing, and the guideline judgments scheme, by aiming to promote consistency in sentencing principle and appropriate levels of sentencing, can be seen as attempts to improve public confidence.

3.10 The primary reason for suggesting a direct role for the jury in sentencing is to respond to negative public perceptions and to promote greater public confidence in the criminal justice system. However, before considering any such reform to sentencing practice, it would be useful to examine the nature of public opinion concerning sentencing, and the factors that fashion, or at least impact upon, that opinion.

Difficulty in ascertaining a “true” indication of public confidence

3.11 Discussion about public opinion and levels of public confidence often proceed on the basis that it is a definable and tangible concept. It is generally taken for granted that media reports of public opinion on certain subjects are accurate and well-founded. However, research has shown that public opinion is far more diverse than the impression given through the media.⁸ It is also quite malleable, and can be changed and manipulated depending on the facts presented and the questions asked. For example, an opinion poll on whether the death penalty should be reintroduced would be likely to have a higher “yes” response rate following a particularly gruesome murder, than if it were conducted during a less newsworthy period.

-
6. D Indermaur, “Public Perceptions of Sentencing in Perth, Western Australia” (1987) 20 *Australian and New Zealand Journal of Criminology* 163 at 163.
 7. For a detailed analysis of the complexity of public opinion and its impact on sentencing law and policy in Australia and overseas, see J Roberts, L Stalans, D Indermaur and M Hough, *Penal Populism and Public Opinion – Lessons from Five Countries* (Oxford University Press, New York, 2003).
 8. See discussion below at para 3.11-3.21.

3.12 Studies from around the world reveal that the rate of serious crime has plateaued over the last decade,⁹ while the incarceration rate is gradually increasing.¹⁰ Despite this, public dissatisfaction with the criminal justice system's response to crime continues to gather momentum.¹¹ Research has looked at the reasons for this apparent disparity between statistics and perception. Studies have asked whether it indicates that the public are becoming more punitive in their approach, whether judges actually are out of touch with public views, or whether other factors are operating to create a public perception that does not reflect what is actually happening in the courts.

Research into public perceptions of sentencing

3.13 In 1987, the Australian Institute of Criminology conducted a study into public attitudes to crime and punishment.¹² That study surveyed a random sample of 2551 people, seeking their views on appropriate sentencing options in response to particular fact situations. The results showed that, in general, better educated and/or wealthy people tended to be more lenient in their views than poorer and/or less well educated people, the elderly took a more punitive approach than younger people, while males supported harsher sentences more often than females.¹³ Overall, however, the results reflected a diversity of opinion, with no single

-
9. See NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics 2005* (released 10 April 2006); see also the interactive Crime Trends Tool accessed at «www.bocd.lawlink.nsw.gov.au/bocd/cmd/crime_trends/». See also Roberts, Stalans, Indermaur and Hough at 11-12.
 10. See J Fitzgerald, "Trends in Sentencing in the New South Wales Criminal Courts: 1990-2000" 62 *Crime and Justice Bulletin* 1 (BOCSAR, November, 2001). See also Roberts, Stalans, Indermaur and Hough at 19.
 11. See Roberts, Stalans, Indermaur and Hough; and Indermaur (1987) at 163; see also United Kingdom Parliament, "Public Attitudes Towards Sentencing: Research Findings" at «www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmhaff/486/...». In a recent New Zealand survey, respondents were asked to rate the job done by a number of criminal justice officials. Judges, along with the prison service, received the lowest rankings: see J Paulin, W Searle and T Knaggs, *Attitudes to Crime and Punishment: A New Zealand Study* (December 2003, Ministry of Justice, Wellington, New Zealand) accessed at «www.justice.govt.nz/pubs/reports/2003/publicattitudes».
 12. J Walker, M Collins and P Wilson, "How the public sees sentencing: an Australian survey" *Trends and Issues in Crime and Criminal Justice* (No 4, April 1987, Australian Institute of Criminology).
 13. Walker, Collins and Wilson at 6.

set of views regarding appropriate punishments being shared across the community. The authors considered this diversity to be an acknowledgement among members of the public of the complexity of the sentencing process: a fact they felt was often unrecognised by the tabloid press.¹⁴

3.14 In the United Kingdom, jurors in 2321 cases were asked whether or not the sentence handed down regarding the cases on which they served were roughly what they were expecting. Nearly one third (32%) believed that they were, with the same percentage of people having formed no opinion as to what an appropriate sentence would be. The remaining third who considered the sentence unsatisfactory were divided between those felt it was less severe than they would have liked (23%), and those who believed the sentence to be less lenient than it should have been (14%).¹⁵ These statistics support findings showing the diversity of public opinion regarding sentencing.¹⁶

3.15 A Canadian study yielded interesting results pointing to the complex nature of public opinion. When asked whether offenders convicted of particular crimes were treated too harshly or too leniently by the courts, a significant majority of respondents felt that the courts were too lenient.¹⁷ However, when asked whether the appropriate solution to Canada's prison overpopulation was to build more prisons or to impose more non-custodial sentences, respondents overwhelmingly chose the latter option.¹⁸ While these responses may appear inconsistent, commentators account for this by reason of the following:

- People significantly overestimate the incidence of violent crime, and underestimate the severity of current sentencing practices, and therefore think the courts' response to be

14. Walker, Collins and Wilson at 6.

15. M Zander and P Henderson, *The Royal Commission on Criminal Justice: The Crown Court Study* (Research Study No 19, 1993) at para 8.8.3.

16. See also United Kingdom Parliament, "Public Attitudes Towards Sentencing: Research Findings" at «www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmhaff/486/...».

17. See AN Doob and JV Roberts, "Public punitiveness and public knowledge of the facts: some Canadian surveys" in N Walker and M Hough, *Public Attitudes to Sentencing: Surveys from Five Countries* (Gower Publishing Co Ltd, Great Britain, 1988) at 111-113. See also JV Roberts and AN Doob, "Sentencing and Public Opinion: Taking False Shadows for True Substances" (1999) 27(3) *Osgoode Hall Law Journal* 491 at 494-496 and 497-499.

18. Doob and Roberts in Walker and Hough at 113; Roberts and Doob at 504.

inadequate. People are also more likely to support more severe sentences if they feel victimised by the fear of crime.¹⁹ These findings have been duplicated in studies in Australia,²⁰ New Zealand,²¹ and the United Kingdom.²²

- Survey results will more accurately reflect the type of question asked, the context in which it was asked, and the amount of information provided, rather than a definitive indication of public opinion.²³
- Most people receive the majority of their information about the courts and sentencing through the mass media, whose reporting of such issues is, at best, disproportionate and superficial, and at worst, biased and inaccurate.²⁴

3.16 This last point became evident in further Canadian research, which tested people's reaction to particular sentences based on the amount of information they received concerning each case. Those who read only media accounts were much more inclined to feel that the sentence imposed was too lenient, particularly where the media had been critical of the judge. However, people who had access to court documents relating to the same case, which set out the full facts of both sides, were much more content with the decision of the trial judge. In fact, a number of people felt that the sentence was too harsh.²⁵ Consequently, the researchers conclude that the superficial portrayal of public views in the Canadian media does not do justice to the complexity of the public's actual opinion.²⁶ These same results have been found in Australia,²⁷ the

19. M Hough, H Lewis and N Walker, "Factors associated with 'punitiveness' in England and Wales" in Walker and Hough at 210-211.

20. Indermaur (1987) at 175-177.

21. Paulin, Searle and Knaggs.

22. N Walker, M Hough and H Lewis, "Tolerance of Leniency and Severity in England and Wales" in Walker and Hough at 185-186.

23. See also Indermaur (1987) at 163.

24. Doob and Roberts in Walker and Hough at 113-133; Roberts and Doob at 499-501. See also Indermaur (1987) at 164. A study in the United Kingdom revealed that 91% of people surveyed gained most of their information about crime from the print and electronic media. That study also found that readers of the tabloid press were more likely to hold punitive views regarding sentencing than other readers: M Hough, H Lewis and N Walker, "Factors associated with 'punitiveness' in England and Wales" in Walker and Hough at 212-213.

25. Doob and Roberts in Walker and Hough at 124-133; Roberts and Doob at 501.

26. Doob and Roberts in Walker and Hough at 131-132.

United Kingdom,²⁸ and the United States²⁹: showing that people are much more inclined to consider sentences to be appropriate, and more open to alternatives to imprisonment, when they are made fully aware of the facts of particular cases.

Media and public opinion

3.17 As the Chief Justice pointed out in his speech, the media play a significant role in relaying, shaping and distorting public opinion. Systematic allegations by the media of leniency in sentencing are not only ill-informed, but also chip away at public confidence and skew public perception.³⁰ The Chief Justice acknowledged that mistakes in sentencing occasionally do occur. Unfortunately, these tend to be the only examples highlighted in the media, giving the impression that those decisions are widespread and typical. This may have the ironic, and unintended, effect not only of creating an unwarranted fear of crime and lack of confidence in the criminal justice system, but also of dissipating the deterrent purpose of sentencing by sending a message to would-be offenders that there is a significant chance they will not be punished severely.

3.18 This issue has also been discussed by the Chief Justice of Victoria, who speaks from personal experience when describing the sentencing process as “stressful, worrying and gut wrenching”.³¹ Like Chief Justice Spigelman, Chief Justice Warren has welcomed community debate on sentencing, and recognised the importance of public confidence in the sentencing process. However, she too noted that the media may distort the public’s view of sentencing by selective reporting. While this is to some extent the nature of the news media, when it comes to sentencing, it cannot possibly convey the full picture as presented to the judge.

27. Indermaur (1987); J Walker, M Collins and P Wilson, “How the public sees sentencing: an Australian survey” *Trends and Issues in Crime and Criminal Justice* (No 4, April 1987, Australian Institute of Criminology).

28. A Ashworth and M Hough, “Sentencing and the Climate of Opinion” (1996) *Criminal Law Review* 776; see also Zander and Henderson.

29. See Roberts, Stalans, Indermaur and Hough. See also M J Hindelang, *Public Opinion Regarding Crime: Criminal Justice and Related Topics* (US Department of Justice, Law Enforcement Assistance Administration, 1975).

30. See The Hon JJ Spigelman, “Sentencing Guideline Judgments” (1999) 73 *Australian Law Journal* 876 at 880.

31. Her Honour Justice Marilyn Warren, Chief Justice of Victoria “Sentencing Opinion Piece” (11 April 2005) (see «www.supremecourt.vic.gov.au»).

3.19 By their very nature, the news media provide the public with information that is new, or out of the ordinary, and therefore worthy of comment. Since offenders convicted of violent crimes are newsworthy, and since sentencing is the most visible aspect of the trial process, it is not surprising that sentencing decisions are a fertile source for media reports. It is also not surprising that only the most salacious details of a select few cases are ever reported.

3.20 It is right and necessary that the media report on crime and punishment and generate public debate. In doing so, they also have a responsibility to report the truth to ensure that debate is fully informed. We acknowledge that court documents can be bulky and difficult to understand, which does not translate well with the news media's need to present clear, timely and interesting stories. However, stories on sentencing are often scant on detail to the point of inaccuracy, and fail to present a balanced picture. This can slant public opinion unfairly, and create unwarranted fear by suggesting that crime is out of control, and that the courts continually flout public opinion by imposing excessively lenient sentences. In this way, while claiming to reflect public opinion, the media are in fact creating it with no realistic or accurate basis. This can feed into the legislative and policy process, since no policy maker wants to be seen as unresponsive to public views, or as soft on crime.³²

3.21 As Chief Justice Spigelman noted, there is as much point in complaining about selective media reporting as there is in complaining about the weather. However, with an issue based as solidly on public opinion as the one under discussion, it is important to at least acknowledge that what we take for granted as representing public opinion, may not in fact be all that it appears.

JURY INVOLVEMENT IN SENTENCING

3.22 In this section, we discuss the broad concept of involving the jury in the sentencing process.³³ We note the advantages and disadvantages of jury involvement, with particular reference to the potential impact on public confidence, on sentencing decisions, and on the jurors themselves.

32. For a discussion on the media's influence on public opinion and sentencing policy, see Roberts, Stalans, Indermaur and Hough at ch 5.

33. The details of how the proposal might be implemented are discussed at para 3.37-3.63 below.

Potential impact on public confidence

3.23 Media reports following the Chief Justice's speech indicate that victim's groups generally regard the proposal to require judges to canvass the views of jurors before deciding on a sentence to be a positive move, providing judges with a "reality check".³⁴

3.24 The underlying assumption of those groups is that the public would have greater confidence in the sentencing decisions made by judges, if they had direct access to community expectations about appropriate penalties, as conveyed through the jury members. In this way, it is thought that the public may be less likely to feel that sentencing decisions are out of step with public opinion on crime and sentencing.

3.25 On the other hand, however, there is reportedly a concern among the legal profession that the proposal could lead to more uncertainty and anxiety than it resolves.³⁵ There are a number of practical difficulties with the proposal, discussed below at paragraph 3.50-3.65, which, if not redressed, could actually have a negative impact on public confidence. For example, because it is proposed that the consultations between the judge and jury be secret, there would be no way of accurately conveying to the public what was said by jury members, and whether the jury's views were reflected at all in the ultimate sentence.

3.26 Further, as noted above, it is arguable that the commonly held view that sentencing practice has become far too lenient is based largely on perception, generated through the media, rather than reality. As also discussed above, research consistently indicates that people are much more inclined to agree with the sentences handed down by judges when they are apprised of all of the facts and background. Should this research be borne out in practice, then jurors, who would be aware of all aspects of the case, having heard the arguments for both sides, may be more likely to support a sentence that would match that favoured by the judge.

3.27 Should this trend emerge, there are two possible, and conflicting, outcomes so far as public confidence is concerned. First, public confidence may increase as people would be reassured that judges are not as out of step with public opinion as portrayed in

34. M Pelly, "Lawyers uneasy over plan for jury sentencing role" *Sydney Morning Herald* (2 February 2005).

35. M Pelly, "Lawyers uneasy over plan for jury sentencing role" *Sydney Morning Herald* (2 February 2005).

the media, when that public opinion is fully informed. However, the second, and arguably more likely, outcome is that public confidence would continue to falter as there would be no dramatic increase in sentence severity, and the perception of excessive leniency would remain. The danger with this possible outcome is that not only would judges continue to be publicly criticised for their sentencing decisions, but the jury would be implicated as well. This could have the unintended irony of eroding public confidence in the jury system, rather than increasing confidence in the sentencing process.

Potential impact on sentencing decisions

3.28 As the Chief Justice noted in his speech, jury involvement in sentence determination may result in sentences that better reflect community expectations by encompassing a broader range of opinions. He also referred to what some judges describe as the “difficulty and loneliness” of the sentencing task, and expressed the view that many judges would welcome the assistance of jurors’ opinions.³⁶ In particular, the Chief Justice considered that juries could assist on matters relevant to sentencing by offering opinions on the gravity of the crime, or the chance of the offender committing a similar crime.³⁷

3.29 However, many commentators doubt the efficacy of any proposal involving the jury in the sentencing process, and its impact on sentencing decisions. Some feel that jurors may take into account irrelevant or unrealistic considerations when expressing their opinions. For many on the jury panel, sitting through a trial will have been their closest, and possibly first, exposure to the criminal law, and, particularly in cases involving gruesome evidence, will be the worst thing they have ever seen. The fear has been expressed that this could lead to “mob sentencing”, with jurors wanting retribution and recommending that judges impose sentences at the most severe end of the scale, regardless of any mitigating factors.³⁸

36. See discussion at (2005) 29 *Criminal Law Journal* 355 at 362.

37. The benefits and drawbacks of involving the jury in this manner are discussed at para 3.46-3.49.

38. J McIntyre, “The role of juries in sentencing” (2005) 86 *Reform* 56 at 56; M Pelly, “Give jury a say in sentence: top judge” *Sydney Morning Herald* (1 February 2005); and “Sentencing Could Benefit from Jury Input: NSW Chief Justice” (2 February 2005):

3.30 Chief Justice Spigelman stated in his speech that he did not propose jury involvement in sentencing with the aim of introducing harsher sentences. Indeed, he referred to studies, discussed at paragraph 3.13-3.16 above, that indicate jurors are not significantly more harsh in the views on sentencing than judges. In any event, under the possible system identified by the Chief Justice, jurors would only express opinions, with the final decision to be made by the judge.

3.31 Opponents of jury involvement in sentencing also believe that it would result in a lack of consistency in sentencing, which would in turn impact on public confidence.³⁹ It can be difficult enough to get twelve jurors to agree on a verdict, let alone a sentencing option.⁴⁰ Once again, this may not be of tremendous concern, since the ultimate decision is to be made by the judge and not the jurors. However, if the jury's views are truly to be taken into account by the judge, it is argued that there may still be an element of disagreement or inconsistency.⁴¹

3.32 This raises the related consideration of how effective the proposal would ultimately be. Would hearing the diverse opinions of twelve people actually help a judge reach a more accurate conclusion than he or she would otherwise have reached after examining the evidence and hearing submissions?⁴² If the role of the jury in sentencing is confined to the advisory role proposed by the Chief Justice, would it ever be more than a token gesture?

Potential impact on jurors

3.33 In his speech, the Chief Justice noted that jurors are often interested in the sentencing process, with some attending the sentencing hearings following the trials in which they participated. However, others have argued that having an interest in the

(see «www.findlawaustralia.com.au/news»).

39. McIntyre at 56.

40. An example is the recent experience of the United States jury in the sentencing of Zacarias Moussaoui for his role in the terrorist attacks of September 11, 2001. It was reported that the jury had difficulty in reaching a unanimous decision on many of the issues involved: see M Coultan, "Americans divided over Moussaoui verdict" *Sydney Morning Herald* (Friday, 5 May 2006 at 7); and P Hirschhorn, "Jury spares 9/11 plotter Moussaoui" (accessed at «www.cnn.com/2006/LAW/05/03/moussaoui.verdict/»).

41. (2005) 29 *Criminal Law Journal* 355 at 365.

42. McIntyre at 56.

process is different from wanting, or being compelled, to attend a sentencing hearing and actively participate.⁴³ Not all jurors want to be involved at this level. Having already given up days, or weeks, of their time during the trial, jurors may be reluctant to submit to further disruption of their work and family lives.

3.34 It is also argued that the primary role of the jury as determiners of guilt is difficult enough. Requiring jurors to have input into sentencing could serve as a further distraction and add to their stress levels.⁴⁴ Opponents of the proposal also consider it to be too difficult a task for jurors, who have no legal training, no experience in sentencing, and are unaware of typical sentences and trends.⁴⁵ Sentencing involves an instinctive understanding of legislation, principles, trends and guidelines, which jurors do not have.⁴⁶ Some suggest that it would be “unnecessary, time-consuming, and expensive to educate every jury member on the intricacies of sentencing law” which, it is argued, would need to happen if the consultation process is to be meaningful.⁴⁷ Moreover, there is the problem of the jury being influenced by their perceptions of the community reaction to the offence, as portrayed by the media during the interval between verdict and sentence, which can sometimes be quite intense and vitriolic.

3.35 These arguments, however, may be overstating the problem. According to the model discussed by the Chief Justice, the jury’s role would be an advisory one only: limited to answering specifically targeted questions, such as the prospects of re-offending, or the perceived gravity of the offence, or the reasons for their verdict. While jurors would need to have a basic understanding of the sentencing process and their role in it, it does not follow that they would need to be aware of every intricacy of sentencing law and practice.⁴⁸ The information that jurors may need to have access to if they have a role in sentencing is discussed at paragraph 3.57-3.58 below.

43. McIntyre at 57.

44. M Pelly, “Lawyers uneasy over plan for jury sentencing role” *Sydney Morning Herald* (2 February 2005); K Gibbs “NSW Chief Justice advises greater role for jurors” (11 February 2005) at <www.lawyersweekly.com.au/articles/b4/0c02c9b4.asp>; McIntyre at 57.

45. McIntyre at 56.

46. McIntyre at 56.

47. McIntyre at 56. See also Australian Law Reform Commission, *Sentencing of Federal Offenders* (Discussion Paper 70) at para 13.90-13.91.

48. See (2005) 29 *Criminal Law Journal* 355 at 364.

3.36 Perhaps the most cogent argument against the proposal, so far as the impact on jurors is concerned, is the possibility that knowing they will have a role in sentencing may influence the jury's verdict. Commentators have expressed concern that involving jurors in two stages of the criminal justice process may prejudice their primary role in determining the verdict. Jurors who may be having trouble reaching a decision could compromise on their verdict. For example, some jurors may decide to agree to convict a defendant, in circumstances where they would otherwise remain doubtful, because they believe they will have a role in convincing the judge to impose a lenient sentence.⁴⁹ There is also the related fear that expanding the jury's role in sentencing would lead jurors to consider external, or even irrelevant, facts when determining the verdict. However, as noted in the previous chapter, it not always possible under the present system to know the evidence on which the jury bases its verdict.

MEANS OF INVOLVING THE JURY

3.37 Having discussed the broad concept of greater jury involvement in the sentencing process, we look in this section at the ways in which such involvement could be facilitated. In the previous chapter, we note that there have been occasions where judges have asked jurors to answer specific questions of fact as part of their verdict, in certain circumstances, provided those facts related to essential elements of the offence, and not to sentencing matters alone. Here, we examine the possibility that jurors should be able to answer questions following their guilty verdict that relate solely to sentencing, such as how serious they believe the offence to be, and the likelihood of the offender committing the same offence again. We also look at the propriety and possible consequences of judges asking jurors to disclose the facts on which their guilty verdict was based.

Clarifying the facts supporting a guilty verdict

3.38 As discussed in Chapter 2, a guilty verdict may not always reveal which aspects of the offender's conduct the jury found to be proven beyond reasonable doubt, or what the jury believed about the offender's mental state. At present, the sentencing judge must "fill in the gaps" by forming his or her own view of the facts upon which the jury based their decision. The main constraint on the

49. (2005) 29 *Criminal Law Journal* 355 at 363; McIntyre at 56.

sentencing judge in this respect is that the sentence must not conflict with the jury's verdict,⁵⁰ and must not take into account any matters of aggravation which could amount to a more serious offence.⁵¹

3.39 The issue of judges asking jurors questions concerning the reason for their verdict is a contentious one, and has been raised for discussion on previous occasions.⁵² In certain cases involving manslaughter, where the jury's verdict could have been based on a number of possible scenarios, courts have raised the possibility that the jury should be asked to disclose the reason for its verdict.⁵³ The risks involved in asking jurors to clarify the reasons for their verdict were summed up by Justice Stephen:

Care must no doubt be taken to ensure both that the foreman clearly understands the nature of the question and that he is fully capable of answering it, that is, that he in fact knows what are the grounds which have led his fellow jurors to their verdict. If there has been no unanimity as to grounds or if individual jurors have not disclosed, and may, indeed, not be prepared to disclose, their grounds the foreman cannot of course, supply the information sought. It should be made clear to him that his function is only to answer to the best of his ability the question asked, ensuring that, if answered, it does truly reflect the jury's unanimous view. The question should, of course, be so confined as to ensure that it does not invite any spontaneous general disclosure of the jury's deliberations.⁵⁴

3.40 As noted in the previous chapter, Justice Kirby has also given qualified support to the idea, in relation to a drug importation case, provided proper safeguards are put in place to protect the secrecy of jury deliberations.⁵⁵ However, the NSW Court of Criminal Appeal has indicated that, while trial judges have the

50. *Savvas v The Queen* (1995) 69 ALJR 564.

51. *R v De Simoni* (1981) 147 CLR 383.

52. See, eg, New South Wales Law Reform Commission *Criminal Procedure: The Jury in a Criminal Trial* (Discussion Paper 12, 1985) ("NSWLRC DP12"); New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986) ("NSWLRC Report 48") at para 8.16-8.20; and Australian Law Reform Commission, *Sentencing of Federal Offenders* (2005, Issues Paper 29) at para 11.58-11.61.

53. *Veen v The Queen (No 1)* (1979) 143 CLR 458; and *R v Low* (1991) 57 A Crim R 8.

54. *Veen v The Queen (No 1)* (1979) 143 CLR 458 at 466.

55. *Cheung v The Queen* (2001) 209 CLR 1 at [133]. See para 2.14.

power to ask jurors the reasons for their verdict, this is not a practice that should be encouraged.⁵⁶

3.41 This Commission previously considered this issue two decades ago. In Discussion Paper 12, we tentatively proposed that:

where alternative bases for a conviction (which have different consequences for sentencing) are left to a jury, the judge should endeavour to determine which basis the jury accepted. ... [I]n such cases, the judge should direct the jury in the summing-up to consider on which ground the verdict is based. When the verdict is rendered in such a way that the ground accepted is not clear, the judge should first ask the foreman whether the jury reached a unanimous view as to which ground it accepted. If the foreman affirms that the jury was unanimous on this issue, the judge should then ask which ground was accepted. The judge should then be bound, in sentencing, by the jury's view of the facts.⁵⁷

3.42 In Report 48, we considered there to be merit in the proposal that the determination of sentence should reflect the jury's finding of facts. However, the Commission could not agree on how the jury should be questioned as to the basis for its verdict, and so deferred making a recommendation.⁵⁸

Benefits of the proposal

3.43 Clearly, the major benefit of the proposal to question the jury as to the reasons for its verdict is to take some of the “guess work” out of sentencing, where there are a number of bases on which the jury could have convicted the defendant. This could assist judges to impose sentences that more accurately reflect the nature and degree of the offender's wrongdoing as found by the jury. It could also uncover potential defects in the jury's decision-making process, which the trial judge could point out to the appeal court.⁵⁹

Problems with the proposal

3.44 The NSW Court of Criminal Appeal listed the following problems associated with asking questions of a jury concerning their verdict:

1. To inform the jury, in the course of a summing-up, that they will later be invited to answer a question, or

56. *R v Isaacs* (1997) 41 NSWLR 374 at 379-380. See also *Cheung v The Queen* (2001) 209 CLR 1 at [18].

57. NSWLRC DP12 at para 9.17.

58. NSWLRC Report 48 at para 8.19-8.20.

59. (2005) 29 *Criminal Law Journal* 355 at 362.

questions, as to the basis of the verdict, may distract them from their task of seeking unanimity on a general verdict, and provoke unnecessary confusion and disagreement as to the basis of the verdict.

2. The jury's response to any such question may be unclear. A response that indicated two grounds of decision might, depending upon the circumstances, indicate that the jury were unanimous on both grounds, or that some jurors adopted one ground, and the remainder adopted another. The response may create more uncertainty than previously existed.
3. There may be various possible views of the evidence in a case; different jurors may adopt different views and yet, consistently with their directions, reach a common verdict. To invite them to refine their verdict may be productive of mischief.
4. There is a substantial risk that the jury will be invited to make a decision upon which they have not been properly addressed by counsel.
5. Where there are two or more accused the jury might choose to answer the question with respect to one or more and not with respect to another or others. This would be invidious.
6. The judge may be embarrassed if he or she does not agree with the jury's answer to the question.
7. Where two or more partial defences are advanced, if the jury were to come to a conclusion favourable to an accused on the first defence they considered, they might not consider the other or others; if that occurred, an answer to the question might convey a false impression of having considered and rejected the other or others.⁶⁰

3.45 A further drawback is that consultation between the judge and jury may undermine the secrecy of jury deliberations, as details of the decision-making process may be revealed.⁶¹ Commentators have described it as "vital for the protection of jurors and to the administration of justice that jury members may speak freely, anonymously and confidentially without fear of later judicial scrutiny".⁶² Jury deliberations may also be prejudiced if they are later to be exposed to public criticism on the basis that the reasoning may appear contentious or to involve some degree of compromise.

60. *Isaacs v The Queen* (1997) 41 NSWLR 374 at 379-380.

61. (2005) 29 *Criminal Law Journal* 355 at 363; McIntyre at 57.

62. McIntyre at 57.

Asking the jury to express opinions following conviction

3.46 One element of the Chief Justice's proposal was that judges should be able to ask jurors their opinions on matters pertaining directly to sentencing, which may not have been relevant for their verdict in relation to guilt. The questions could be in relation to submissions brought before the sentencing hearing, including those which were of a subjective nature. Examples of the type of information identified, include opinions as to the likelihood of the offender re-offending, the chances of rehabilitation, and the gravity of the conduct involved.

3.47 This would involve a departure from the current position at common law, discussed in the previous chapter, in three respects.⁶³ First, it involves the jury in helping determine matters of sentencing only. Secondly, it provides for a role for the jury following delivery of the verdict, even though it has been assumed, as a matter of law, that once they have delivered a verdict, their role is concluded. Thirdly, it would involve the jury in giving an advisory, non-binding opinion, which would not be reflected in a verdict.

3.48 The advantage of jury involvement is that sentencing judges might have greater confidence that the sentences they hand down reflect contemporary social values. This would be especially relevant in cases where there are complicating or extenuating circumstances that may mitigate against either the gravity of the offence or the severity of the sentence. For example, in cases where an offender has been convicted of manslaughter involving euthanasia, or following years of domestic violence abuse, public opinion may tend towards a more lenient sentence being imposed than would otherwise be the case.⁶⁴

3.49 The disadvantage is that there is likely to be a diversity of opinion among jurors, which may ultimately be of little assistance to the sentencing judge. There is no way of knowing whether or not the opinion of twelve people drawn randomly from the community does, in fact, reflect contemporary social values. Nor is there any way of knowing whether or not the opinion may be based on a juror's personal experience, prejudice or bias, or represents an impartial and independent assessment of the evidence and

63. See para 2.2-2.17.

64. Issues such as these naturally involve competing questions of public policy and differences in personal beliefs.

submissions presented during the sentencing hearing. Ironically, this is more likely to be the case in relation to offences involving contentious social issues, such as the examples in the above paragraph, where judges could benefit most from greater exposure to public opinion.

LOGISTICAL QUESTIONS

3.50 As the Chief Justice noted in his speech, his proposal gives rise to a number of practical issues that need to be resolved.

Potential for inconvenience and delay

3.51 At paragraph 3.33-3.36, we discussed the potential impact of the Chief Justice's proposal on jurors, noting that not all members of a jury panel may want to participate in sentencing the offender they have just convicted. The Chief Justice referred in his speech to recalling "such proportion of the jury as is able to return to hear the evidence on sentencing". This gives rise to the possibility that a judge could consult, on matters of sentencing, with less than the full complement of jurors who determined the verdict. This in turn raises the question whether jury participation in sentencing ought to be voluntary, or compulsory unless it is not possible or practical for jurors to attend.

3.52 Compulsory attendance at a sentencing hearing would involve further inconvenience for jurors and greater administrative costs.⁶⁵ Moreover, recalling a jury panel for sentencing purposes is not the same as empanelling jurors in the first place. Originally, twelve jurors are chosen at random from a large pool of candidates. The trial date is set, and the selection of the jury fits around that date. In sentencing, however, only the twelve defined people who delivered the particular verdict are eligible. Accordingly, the sentencing hearing, or at least the consultation between the judge and jury on sentencing issues, would need to be held at a time when the maximum number of jurors would be able to attend if the exercise is to be of any benefit. Given that sentencing hearings usually involve a delay sometimes of six weeks or more from the conclusion of the trial, in order to prepare the necessary evidence and secure the availability of the participants, the additional need

65. McIntyre at 57.

to recall as many jury members as possible could contribute to further delay.⁶⁶

3.53 It may not be possible or practicable for all of the jurors to attend. Some may die, or fall ill or have commitments outside of the jurisdiction. This raises the issue of the minimum number of jurors needed to make consultation on sentencing fair and worthwhile. Should jury participation in sentencing proceed if less than half of the original panel are available at the time of the sentencing hearing? While jurors are currently required to agree unanimously on a verdict,⁶⁷ they need not agree on their interpretation of the facts leading to the verdict. Consequently, hearing from only a few of the jury panel at the sentencing stage may not give the judge the full picture of the facts on which the guilty verdict was based, which is one of the primary rationales for securing jury involvement.

3.54 There would also need to be some parity between sentencing hearings. For example, questions of fairness could arise where one offender was sentenced after the judge heard the views of twelve jurors, and another was sentenced at a separate hearing where a lesser number of jurors were available for consultation. While it is certainly desirable to expedite the sentencing process, this must occur within the bounds of procedural fairness.⁶⁸

Question of timing

3.55 Some of the issues discussed above could be addressed by the timing of the jury's involvement in the sentencing process. As previously noted, the sentencing hearing takes place weeks, or even months, after the jury delivers its guilty verdict. In the interim, jurors may forget their exact reasons for reaching the views they did during their deliberations. More significantly, jurors may be influenced in the meantime by factors external to the evidence presented at trial and due to be brought at the sentencing hearing.⁶⁹ This would be particularly likely in high profile cases

66. See McIntyre at 57.

67. Although the Government has announced that majority verdicts will be introduced in criminal trials in NSW: see K Burke and M Pelly, "Law waves goodbye to 12 angry men" *Sydney Morning Herald* (10 November 2005); and D Fisher, "An end to hung juries – Laws introduced to allow majority verdicts" *Daily Telegraph* (10 November 2005).

68. Procedural fairness issues are discussed at para 3.59-3.64 below.

69. McIntyre at 57.

with extensive media coverage. The problems inherent with jurors having virtually instant access through the Internet to prejudicial information about their cases has been highlighted in recent decisions before the NSW Court of Criminal Appeal.⁷⁰ These difficulties would be compounded in the time lag between verdict and sentencing.

3.56 An alternative is for the judge to consult with the jury as to their views on sentencing immediately following delivery of a guilty verdict. This would have the advantage of not requiring the jury to be recalled at a later date, and so avoid the associated delay and problems with juror unavailability. The evidence from the trial, and the reasons why they chose the verdict they did would be fresh in their minds. However, the major drawback of this approach is that the jury would not have access to potentially important information specifically on sentencing that was not presented at the trial. Nor would they have the opportunity to hear submissions on sentencing brought by counsel for both sides relating to aggravating or mitigating factors, or to the subjective considerations that are a critical part of the sentencing process. As a result, their input would be less valuable to the sentencing judge.

Jurors' information needs

3.57 At the sentencing hearing, information that has a bearing on the type and length of penalty an offender should receive is presented to the court. That information will generally differ from the evidence brought forward during the trial, given that it is intended for a different purpose. This is particularly the case with any Victim's Impact Statement, or a report from the Probation and Parole Service or Department of Juvenile Justice, if required.

3.58 In our *Majority Verdicts* Report, we examined the question of jurors' information needs during a trial. We looked at studies revealing that jurors generally found it quite difficult to understand the law and the evidence, and were assisted in their

70. *R v K* (2003) 59 NSWLR 431, and *R v Skaf* (2004) 60 NSWLR 86. The issue of jury access to prejudicial reports is also discussed in See M Chesterman, J Chan, S Hampton, *Managing Prejudicial Publicity* (February 2001, Justice Research Centre, Law and Justice Foundation of NSW). See also Her Honour Justice Virginia Bell, "How to Preserve the Integrity of Jury Trials in a Mass Media Age" (Speech at the Supreme and Federal Courts Judges' Conference, 27 January 2005) accessed at «www.lawlink/supreme_court/11_sc.nsf/SCO_speech_bell_270105».

comprehension by receiving clear instructions from the judge, preferably at the start of the trial and in writing.⁷¹ It also helped if jurors were made aware of the ability to take notes and ask questions of the judge. Even though jurors would not be expected to be the ultimate decision makers, nevertheless, consideration would still need to be given to the type of information jurors would receive during the sentencing phase, and the manner in which it is presented, if jurors are to make a meaningful contribution to sentencing.

Procedural issues

3.59 The issue of how the consultations are to be conducted also needs to be resolved. The Chief Justice's proposal contemplates that the judge should consult with members of the jury in private as to their views on certain aspects of sentencing, after they had listened to the evidence presented during the sentencing hearing. This would have the benefit of protecting jurors, and guarding against intrusions into the secrecy of jury deliberations. However, critics of the proposal claim that the secrecy of the consultations would be a denial of natural justice and run contrary to the tradition of justice being run in an open court.⁷²

3.60 It is unclear the extent to which the secrecy provisions would, or should, apply. The proposal identified by the Chief Justice left open the suggestion that a trial judge would be able to inform an appeal court of any possible errors in the jury's decision-making process which were revealed as a result of consultations on sentencing. If so, this would undermine the requirement that the consultations be held in camera, and intrude into the veil of secrecy that has been observed in relation to jury deliberations. On the other hand, if judges were restricted in the ability to report the content of the discussions to the appeal court, or include details of the consultation in the reasons for the sentence handed down, then the extent to which the jury's views were taken into consideration in determining the sentence would remain unknown. In this event, the consultation process would be likely to have little impact on public confidence.

3.61 The structure of the consultations also needs to be addressed. For example, would all jurors need to be consulted at the same

71. NSWLRC, *Majority Verdicts* (Report 111, August 2005) at para 4.17-4.46.

72. McIntyre at 57.

time? Should the judge have to consult individually with all of the jurors able to attend the sentencing hearing, or should the foreperson speak on behalf of the jurors? As noted earlier, while jurors may agree with each other on the verdict, they may each hold a different view of the facts on which the verdict was based, or on other matters of relevance to sentencing. Consequently, consulting only with a spokesperson may give the judge an incomplete picture of the jury's views. On the other hand, it is questionable how useful a judge would find twelve different opinions on the facts pertinent to sentencing.

3.62 At paragraph 3.51-3.52 above, we discussed the issue of whether or not jurors should be compelled to participate in sentencing. If it is compulsory for jurors to attend the sentencing hearing, what should happen if one or more of the jurors attends but refuses to reveal their views on sentencing issues, or reasons for supporting a guilty verdict?

3.63 Another issue that needs to be considered is whether or not a defendant should be able to ask that the jury not be involved in the sentencing process. Apart from raising questions of parity, matters of public policy would also be involved. If jury input into sentencing were to be adopted as a means of ensuring that sentences reflect community values, should the public interest in jury involvement in sentencing outweigh the defendant's wish to be sentenced by a judge alone? Further, it may be more likely that offenders convicted of particularly gruesome crimes, such as rape, murder or child sexual offences, would seek to avoid the involvement of the jury in sentencing.

3.64 Finally, it is not unusual for Commonwealth and State offences to be heard together in the one trial. In its current examination of sentencing of federal offenders, the Australian Law Reform Commission has provisionally proposed that juries should not be involved in the sentencing process.⁷³ Should this be accepted, and some form of jury involvement be implemented at State level, it would create an uneasy synthesis in trials involving both Commonwealth and State offences. Juries would be able to deliver a guilty verdict regarding both types of offences, but only have a sentencing role with regard to State offences.

73. Australian Law Reform Commission, *Sentencing of Federal Offenders* (2005, Discussion Paper 70) preliminary view expressed at para 13.94-13.95.

3.65 We are not aware of any Constitutional barriers to juries performing an advisory role in the sentencing process.

ISSUES FOR DISCUSSION

Q1.

Should jurors be involved directly in the sentencing process?

Q2.

What are the benefits and detriments of jury involvement in sentencing?

Q3.

What would be the likely effect of jury involvement on public confidence in the sentencing process?

Q4.

Is there a more effective way of addressing the issue of public confidence in sentencing decisions, and if so, what should it be?

Q5.

What effect would jury involvement be likely to have on sentencing decisions?

Q6.

How should consultation between judges and jurors be conducted? For example, should the consultation be a structured one, where the jury answers specific questions put to them by the judge, or should there be more open discussion?

Q7.

What sort of questions should a sentencing judge be able to ask a jury?

Q8.

Should jurors be asked to clarify the reasons for their guilty verdict? Why or why not?

Q9.

Are there other ways that jurors can be involved in the sentencing process?

Q10.

How can judges protect the secrecy of jury deliberations while consulting with the jury on aspects of sentencing?

Q11.

Should it be compulsory for jurors to participate in the sentencing process?

Q12.

What is the minimum number of jurors required to give the judge a fair and accurate indication of the jury's views on sentencing?

Q13.

What should happen if the minimum number of jurors cannot be assembled for the sentencing hearing within a reasonable period following conviction of the offender?

Q14.

At what stage following a guilty verdict should the jury be consulted as to their views on sentencing?

Q15.

Should jurors receive access to all the information that the sentencing judge would have, including any Victim's Impact Statement and sentencing guidelines? In what format should this information be presented?

Q16.

To what extent should the judge explain sentencing law and practice to the jury?

Q17.

Should each juror be consulted regarding his or her views on sentencing, or should the foreperson convey the jury's views to the judge? If there is disagreement among jurors as to the appropriate approach to sentencing, should all views be presented to the judge, or only a unanimous or majority view?

Q18.

What should happen if the jurors cannot agree on the questions left to them by the judge, or on the opinions that they wish to offer?

Q19.

What should happen if a juror refuses to disclose his or her views?

Q20.

Do you agree that consultation between the judge and jury should occur in private without the presence of counsel for both sides? Should all aspects of the consultation be kept secret (eg, the number of jurors consulted), or only some aspects, and if so, which ones?

Q21.

Should the defendant be able to request that the jury not be involved in the sentencing process? If so, in what circumstances?

Tables

- Table of cases
- Table of legislation

Table of cases

<i>AB v The Queen</i> (1999) 198 CLR 111	1.33
<i>Apprendi v New Jersey</i> 530 US 466 (2000)	2.27, 2.38, 2.40
<i>Attorney General's Application No 1 of 2002</i> (2002) 56 NSWLR 46	1.19
<i>Attorney General's Application No 2 of 2002</i> [2002] NSWCCA 515	1.19
<i>Attorney General's Application No 3 of 2002</i> (2004) 6 NSWLR 305	1.19
<i>Blakely v. Washington</i> 124 S Ct 2531 (2004)	2.39
<i>Bugmy v The Queen</i> (1990) 169 CLR 525.....	1.10
<i>Caldwell v Mississippi</i> 472 US 320 (1995)	2.27
<i>Cameron v The Queen</i> (2002) 209 CLR 339	1.33
<i>Cheung v The Queen</i> (2001) 209 CLR 1	1.6, 1.21, 2.1, 2.11, 2.13 2.17, 3.40
<i>Chow v DPP</i> (1992) 28 NSWLR 593.....	1.22
<i>Director of Public Prosecutions v Nasralla</i> [1967] 2 AC 238.....	2.11
<i>Furman v Georgia</i> 408 US 238 (1972)	2.28-2.29
<i>Gregg v Georgia</i> 428 US 153 (1976)	2.29
<i>Kingswell v The Queen</i> (1985) 159 CLR 264.....	1.6, 2.11-2.12
<i>Lowe v The Queen</i> (1984) 154 CLR 606.....	1.10
<i>Markarian v The Queen</i> (2005) 215 ALR 213	1.9, 1.11, 1.32-1.34, 1.45
<i>Maxwell v The Queen</i> (1996) 184 CLR 501	1.22
<i>Myerson v The King</i> (1908) 5 CLR 596.....	2.4
<i>Pearce v The Queen</i> (1998) 194 CLR 610	1.11
<i>Postiglione v The Queen</i> (1997) 189 CLR 295	1.10-1.11
<i>R v Black</i> [1963] 1 WLR 1311.....	2.7
<i>R v Bollen</i> (1998) 99 A Crim R 510.....	1.16

<i>R v Davies</i> (2004) NSWCCA 319	1.30
<i>R v De Simoni</i> (1981) 147 CLR 383.....	1.6, 1.21, 3.38
<i>R v Dickson</i> (1865) 4 SCR (NSW) 298	2.4
<i>R v Douar</i> (2005) NSWCCA 455.....	1.25
<i>R v Ford</i> (1994) 75 A Crim R 398	1.22
<i>R v Foster</i> (1992) 25 NSWLR 732	1.8
<i>R v Harris</i> (1961) VR 326.....	1.22, 2.4
<i>R v Henry</i> (1999) 46 NSWLR 346.....	1.19
<i>R v Isaacs</i> (1997) 41 NSWLR 374.....	1.22, 3.40, 3.44
<i>R v Jurisic</i> (1998) 45 NSWLR 209.....	1.19
<i>R v K</i> (2003) 59 NSWLR 431	3.55
<i>R v Low</i> (1991) 57 A Crim R 8.....	3.39
<i>R v Merritt</i> (2004) 59 NSWLR 557	1.37
<i>R v Millward</i> (1931) 23 Cr App R 119.....	2.5
<i>R v Morgan</i> (1993) 70 A Crim R 368	1.10
<i>R v O'Neill</i> [1979]2 NSWLR 582	1.21-1.23
<i>R v Ponfield</i> (1999) 46 NSWLR 327	1.19
<i>R v Previtera</i> (1997) 94 A Crim R 76	1.16
<i>R v SG</i> (2003) NSWCCA 220.....	1.23
<i>R v Shankley</i> (2003) NSWCCA 253.....	1.13
<i>R v Sharma</i> (2002) 54 NSWLR 300.....	1.32-1.33
<i>R v Simpson</i> (2001) 53 NSWLR 704.....	1.28
<i>R v Skaf</i> (2004) 60 NSWLR 86	3.55
<i>R v Tappy</i> [1960] VR 137	2.4-2.5
<i>R v Way</i> (2004) 60 NSWLR 168.....	1.28, 1.30
<i>R v West</i> [1979] Tas R 1	2.4
<i>R v Whyte</i> (2002) 55 NSWLR 252	1.9-1.10, 1.19, 1.33
<i>R v Wingrove</i> (1936) 53 WN(NSW) 118.....	2.4, 2.6

R H McL and The Queen (2000) 74 ALJR 1319..... .1.11

Ring v Arizona 122 S Ct 2428 (2002)2.27

Savvas v The Queen (1995) 183 CLR 11.6, 1.22, 3.38

Stanton v Dawson (1987) 31 A Crim R 104 1.21

Thomson & Houlton (2000) 49 NSWLR 383..... 1.19, 1.32

Thompson v The Queen (1989) 169 CLR 1 at 30..... .2.11

Veen v The Queen (No 1) (1979) 143 CLR 4583.39

Veen v The Queen (No 2) (1988) 164 CLR 465 1.10

Weininger v The Queen (2003) 212 CLR 6291.23

Whittaker v The King (1928) 41 CLR 2301.47, 2.4-2.5

Wong & Leung (1999) 48 NSWLR 3401.19, 1.33

Wong v The Queen; Leung v The Queen (2001) 76 ALJR 791.19

Table of legislation

Commonwealth

Constitution Act

s 80 1.6, 2.13

Crimes Act 1914 1.31

s 21E 1.32

Customs Act 1901

s 233B 2.11-2.12

s 235 2.11-2.12

New South Wales

Children (Criminal Proceedings) Act 1987

s 10 1.8

s 25 1.8

Crimes (Sentencing Procedure) Act 1999 1.13, 1.20, 1.31

s 3A 1.20

s 5(1) 1.25

s 6 1.26

s 7 1.26

s 8 1.27

s 9 1.27

s 10 1.24

s 10(1)(b) 1.24

s 10(1)(c) 1.24

s 11 1.27

s 12 1.27

s 17A 1.27

s 21 1.12

s 21A.....	1.12
s 21A(2)	1.13
s 21A(3)	1.14
s 22.....	1.14
s 22A.....	1.14
s 23	1.14
s 24	1.15
s 27.....	1.16
s 28	1.16
s 28(1)	1.17
s 28(3)	1.16
s 28(5)	1.17
s 29	1.16
s 30A.....	1.17
s 37.....	1.18
s 37(3)	1.18
s 37A.....	1.18
s 40	1.18
s 42A.....	1.19
s 44	1.28
s 46.....	1.29
s 50.....	1.29
s 61	1.37
s 100I.....	1.41
s 100J	1.41
Part 2, Division 4.....	1.27
Part 3, Division 3.....	1.11
Part 3, Division 4.....	1.18-1.19

Part 4	1.25
Part 4, Division 1A	1.37
Part 4, Division 1B	1.30
Part 4, Division 2.....	1.11
Part 5	1.26
Part 6	1.26
Part 7	1.27
Part 8	1.27
Part 8A	1.27
Part 8B	1.41
Part 8C.	1.24
Criminal Procedure Act 1986	
s 291A	1.8
Criminal Procedure Amendment (Sentencing Guidelines) Act 1998	1.19
Jury Act 1977	1.6
Australian Capital Territory	
Crimes Act 1900 s 342	2.4
United States	
18 United States Code	
s 3591	2.24
s 3592(a)	2.25
s 3592(b)	2.25
s 3592(c)	2.25
s 3592(d).....	2.25
s 3593(b)	2.24
s 3593(b)(1)	2.24

s 3593(b)(2)	2.24
s 3593(c)	2.26
s 3593(e)	2.26
s 3594	2.27

Bibliography

Bibliography

ASHWORTH A AND HOUGH M, "Sentencing and the Climate of Opinion" (1996) *Criminal Law Review* 776

AUSTRALIAN LAW REFORM COMMISSION, *Sentencing of Federal Offenders* (2005, Issues Paper 29)

AUSTRALIAN LAW REFORM COMMISSION, *Sentencing of Federal Offenders* (2005, Discussion Paper 70)

BAKER J, "Are the Courts Becoming More Lenient? Recent Trends in Convictions and Penalties in NSW Higher and Local Courts (1998) 40 *Crime and Justice Bulletin*.

BUREAU OF CRIME STATISTICS AND RESEARCH, NSW *Criminal Court Statistics 2004*, Annual Report

BUREAU OF CRIME STATISTICS AND RESEARCH, NSW *Recorded Crime Statistics 2005*

CHESTERMAN M, CHAN J, HAMPTON S, *Managing Prejudicial Publicity* (February 2001, Justice Research Centre, Law and Justice Foundation of NSW)

DARMER MKB, "The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries (2004-2005) 56 *South Carolina Law Review* 533

FITZGERALD J, "Trends in Sentencing in the New South Wales Criminal Courts: 1990-2000 (2001) 62 *Crime and Justice Bulletin*

HALPHEN A, "A Public Voice in Sentencing?" (2003) 27 *Criminal Law Journal* 157

HINDELANG MJ, *Public Opinion Regarding Crime: Criminal Justice and Related Topics* (US Department of Justice, Law Enforcement Assistance Administration, 1975)

HOFFMAN MB, "The Case for Jury Sentencing" (2003) 52 *Duke Law Journal* 951

HORAN J, "Perceptions of the Civil Jury System" (2005) 31(1) *Monash University Law Review* 120

- INDERMAUR D, “Public Perception of Sentencing in Perth Western Australia” (1987) *Australian and New Zealand Journal of Criminology* 163.
- IONTCHEVA J, “Jury Sentencing as Democratic Practice” (2003) 89 *Virginia Law Review* 311
- JACKSON RL, “Missouri’s Jury Sentencing Law: A Relic the Legislature Should Lay to Rest” (1999) 55(1) *Journal of the Missouri Bar* 14
- KING NJ, “The Origins of Felony Jury Sentencing in the United States” (2003) 78 *Chicago-Kent Law Review* 937
- KING NJ, “How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared” (2004) 2 *Ohio State Journal of Criminal Law* 195
- KING NJ & NOBLE RJ, “Felony Jury Sentencing in Practice: A Three-State Study” (2004) 57 *Vanderbilt Law Review* 885
- LANNI A, “Jury Sentencing in Non-Capital Cases: An Idea Whose Time Has Come (Again)?” (1999) 108(8) *The Yale Law Journal* 1775
- LEADER-ELLIOTT I, “Instinctive synthesisers in the High Court” (2002) 26 *Criminal Law Journal* 6
- LILLQUIST E, “The Puzzling Return of Jury Sentencing: Misgivings About Apprendi” (2004) 82 *North Carolina Law Review* 621
- MCINTYRE J, “The role of juries in sentencing” (2005) 86 *Reform* 56
- MOFFATT S, WEATHERBURN D AND FITZGERALD J, “Sentencing Drink Drivers: The Use of Dismissals and Conditional Discharges” (2004) 81 *Crime and Justice Bulletin*
- NEW SOUTH WALES LAW REFORM COMMISSION, *Criminal Procedure: The Jury in a Criminal Trial* (Discussion Paper 12, 1985)
- NEW SOUTH WALES LAW REFORM COMMISSION, *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986)
- NEW SOUTH WALES LAW REFORM COMMISSION, *Majority Verdicts* (Report 111, August 2005)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing* (Discussion Paper 33, 1996)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing* (Report 79, 1996)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing: Aboriginal Offenders* (Report 96, 2000)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing: Corporate Offenders* (Report 103, 2003)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing: Young Offenders* (Report 104, 2006)

PAULIN J, SEARLE W AND KNAGGS T, *Attitudes to Crime and Punishment: A New Zealand Study* (December 2003, Ministry of Justice, Wellington, New Zealand)

PRESCOTT JJ AND STARR S, "Improving Criminal Jury Decision Making After the Blakely Revolution" (2005) University of Michigan Law School, Working Paper Series No 39

ROBERTS JV AND DOOB AN, "Sentencing and Public Opinion: Taking False Shadows for True Substances" (1999) 27(3) *Osgoode Hall Law Journal* 492

ROBERTS JV, STALANS L, INDERMAUER D AND HOUGH M, *Penal Populism and Public Opinion – Lessons from Five Countries* (Oxford University Press, New York, 2003)

SPIGELMAN JJ, "Sentencing Guideline Judgments"(1999) 73 *Australian Law Journal* 876

WALKER N AND HOUGH M, *Public Attitudes to Sentencing: Surveys from Five Countries* (Gower Publishing Co Ltd, Great Britain, 1988)

WALKER J, COLLINS M AND WILSON P, "How the public sees sentencing: an Australian survey" *Trends and Issues in Crime and Criminal Justice* (No 4, April 1987, Australian Institute of Criminology)

ZANDER M AND HENDERSON P, *The Royal Commission on Criminal Justice: The Crown Court Study* (Research Study No 19, 1993)