

**THE NEW SOUTH WALES BAR ASSOCIATION SUBMISSION ON
SENTENCING AND JURIES (ISSUES PAPER NO.27)**

The New South Wales Bar Association wishes to comment on the New South Wales Law Reform Commission's Sentencing and Juries Issues Paper (IP 27).

The Bar Association recognises the importance of maintaining public confidence in sentencing decisions. However, with one qualification, it opposes the involvement of juries in sentencing. The potential benefits in terms of increased public confidence are substantially outweighed by philosophical and pragmatic considerations.

The one qualification relates to fact finding for the purposes of sentencing. In some situations, it is desirable that a judge be able to ascertain from the jury the precise basis on which it returned a verdict of guilty. However, practical problems arise even here. These will be discussed later in this submission.

The first question raised by the Commission in its list of issues for discussion is: "Q 1 Should jurors be involved directly in the sentencing process?". In general, the answer of the Bar Association is "no". The many reasons why this is so are touched upon in the Issues Paper. Some of the reasons that should be emphasised are:

(a) Inequality. Less than half of one percent of all criminal proceedings involve a jury. The vast majority are dealt with in the Local Court by a magistrate. Even in the superior courts, most persons accused of criminal offences enter pleas of guilty and no jury is empanelled. It is not apparent why the sentencing of the tiny percentage who are found guilty by a jury should be conducted in a different way to the vast majority. Fears held by accused persons regarding juror involvement in sentencing may pressure them to enter pleas of guilty (perhaps to lesser offences) in order to avoid such involvement.¹

(b) Complexity. Sentencing is particularly complex task, involving the balancing of principles which often point in different directions (proportionality, retribution, general deterrence, rehabilitation, totality, parity and so on) and consideration of a large number of factors (including victim impact statements, aggravating circumstances, sentencing guidelines, standard non-parole periods, sentencing statistics and available sentencing options, as well as the offender's past history and general character, psychiatric state, remorse and prospects of rehabilitation). If a jury does not take into account all these matters, the assistance it can provide to a sentencing judge will be significantly reduced. Even if the jury could take into account all these matters, the high probability is that members of the jury would have different opinions regarding sentence, so that the assistance that could be provided to the judge would be marginal.

¹ This appears to be a problem in the United States: IP 27, para 2.43.

(c) Practicality. The more information relevant to the sentencing decision sought to be imparted to the jury, the greater the practical problems that arise. Since much evidence relevant to sentencing could not be obtained until some weeks after verdict, the jury would have to be brought back to hear the evidence. Would all members of the jury be required to attend? If not, the representative nature of the jury may be lost. If compulsory, what if individual jurors had pressing engagements that made it impossible? Jurors may be reluctant to submit to further disruption of their work and family lives. They may be reluctant to involve themselves in sentencing issues. There would be practical difficulties in putting relevant evidence before a jury. The jury would be at greater risk of being influenced by prejudicial media reporting between verdict and sentencing. Serious practical difficulties would arise in the context of joint Commonwealth/State trials and if co-offenders had been tried separately and found guilty by different juries.²

(d) Consequences of secrecy. Given the desirability of keeping consultations between judge and jury secret, concerns will inevitably arise regarding the natural justice of the DPP and offender being shut out of the process. Further, the public will have no idea what views were expressed by the jury and may assume, in the case of apparently lenient sentences, that the judge ignored the view of the jury. Such a view may be wrong. In cases where the judge did take a view which was different to the jury, or members of the jury, the latter might be tempted to make public complaint, leading to further loss of public confidence in the sentencing process.

(d) Dangers of jury compromise. If jurors know, before they resolve the question of guilt, that they will be able to take part in the sentencing process consequent on a verdict of guilty, the danger exists that one or more jurors will put aside any doubts they have regarding guilt because of a belief that a lenient sentence will be imposed.

(e) Public recrimination. Outside the major metropolitan areas, problems of jury anonymity and security can arise. If jurors in country trials are involved in the sentencing process, this may lead to recrimination from members of the public, whether sentences are perceived as too severe or too lenient.

(f) Concerns about current lack of public confidence exaggerated. Claims regarding lack of public confidence in sentencing decisions should be approached with caution. There can be no doubt that particular sentences sometimes generate intemperate public criticism, particularly in talk back radio and the tabloid press. However, the rate of serious crime has plateaued in recent years while the incarceration rate has significantly increased. Studies have also shown repeatedly that when members of the public are given more information about particular cases, they are inclined to consider sentences that have been imposed as appropriate. There is greater public recognition of the complexity of the sentencing process. With greater public education regarding sentencing it is likely that, even without involvement of juries in sentencing, public confidence in sentencing decisions will be retained.

Given the marginal benefits likely to flow from jury involvement in sentencing, they are substantially outweighed by these philosophical and pragmatic considerations. In these circumstances, the Bar Association does not make any submissions regarding particular models of jury involvement (see Q6 – Q19) other than to observe that the questions raised highlight the inherent problems with the proposal.

That said, it is sometimes desirable that a judge be able to ascertain from the jury the precise basis on which it returned a verdict of guilty. For example, a verdict of manslaughter may be returned on a number of alternative bases. More commonly, an offence of “maliciously” committing some act may be satisfied by intention or recklessness, with different levels of culpability attaching. In some cases (*Cheung v The Queen* (2001) 209 CLR 1 is an example) a particular fact which is not an element of the offence may have critical importance in determining an appropriate sentence for the offender. Where a jury has determined the “guilt” of the offender, but may have done so on a particular factual basis which would have real significance for the sentencing of the offender, it is desirable that the sentencing judge be encouraged to clarify that factual basis with the jury.

Nevertheless, practical problems arise even here. How is the judge to clarify that factual basis? Given that the jury need not be unanimous on the reasons that lead to a finding of guilt, what is a sentencing judge to do if there is no jury unanimity regarding factual issues? Partly for these reasons, the current approach in NSW is to discourage judges from asking questions of a jury regarding the factual basis of its verdict (*Isaacs v The Queen* (1997) 41 NSWLR 374).

The Bar Association does not pretend it has the answer to these practical problems. A range of different strategies might be adopted. It encourages the Commission to investigate practical options and invite public comment in a discussion paper. The Association will make a further submission at that point.

As regards possible ways of addressing the issue of public confidence in sentencing decisions (Q 4), other than by jury involvement in those decisions, the Association refers the Commission to the work of the Victorian Sentencing Council in particular. The use by the Council of public consultation, polling, community outreach and education programmes is likely to raise public awareness about sentencing and, over time, improve public confidence in sentencing decisions. As for other possible strategies, the Association is conducting a criminal law conference in September and reform proposals which emerge may be the subject of further submission to the Commission.