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## **Submission of the**

**NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES**

**to the**

**NSW Law Reform Commission**

**Inquiry into**

**Sentencing and juries**

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## **Executive Summary**

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1. The NSW Council for Civil Liberties (CCL) does not support the current proposal to allow judges to consult with the jury on aspects of sentencing once a guilty verdict has been reached. The Council agrees with many of the criticisms levelled at the idea and summarised in Issues Paper 27 of the NSW Law Reform Commission.
2. While such a change might increase public confidence in the administration of justice and sentencing in particular, the NSW Council for Civil Liberties feels that any advantage would be outweighed by the possible distortions of the trial process and sentencing phase. The Council does not believe that such a change would produce any more consistent or significantly different sentencing outcomes.
3. In the context of a political race to prove which party is tougher on crime, and despite the fact that the issue was raised by Chief Justice Spigelman himself, this question must be considered with the greatest care in order to avoid it becoming just another political football. Attention must also be paid to the rights of accused parties, lest they be trampled in the name of political and popular expediency.
4. The Council for Civil Liberties also feels that the practical difficulties of implementing such a scheme cannot be overcome without creating far more serious dysfunctions in the trial process.

## 1. Should jurors be involved directly in the sentencing process?

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5. Sentencing is a complicated process. As many judges have admitted, it is a lonely and gut-wrenching process. It involves a complicated set of rules and sources which the judge must synthesize in order to come to a decision. As shown by *Markarian v. The Queen* (2005 – 215 ALR 213), even at the highest level the process which judges should adopt is not set in stone.
6. The very fact that such a complex set of rules exists demonstrates that it is practically impossible to educate every single jury so that they can give considered advice to the judge on sentencing.

## 2. Benefits & Detriments

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- *Q2 What are the benefits and detriments of jury involvement in sentencing?*
7. The idea of allowing the judge to consult the jury on sentencing is based on the notion that this will give the judge direct access to community sentiment. However, the Council for Civil Liberties feels that the US example is instructive in this case. There, juries have either been consulted or indeed been responsible for sentencing for over 200 years. And the criticisms levelled at this system, based on practical experience, are severe: the process is costly, time-consuming, unnecessary, antiquated and rooted in historical prejudices, the juries lack the expertise, experience and information to give useful advice or decisions to the judge.

## 3. Likely effects of jury involvement

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- *Q3. What would be the likely effect of jury involvement on public confidence in the sentencing process?*
  - *Q5. What effect would jury involvement be likely to have on sentencing decisions?*
8. These two questions are linked.
  9. The main driver for Justice Spigelman's suggestion is his desire to positively influence public opinion regarding the criminal justice system. As noted in the Issues Paper, 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.

10. Even if the proposal were to go ahead in the form suggested by Justice Spigelman – which involves juries simply giving non-binding advice to the judge – the NSW CCL strongly believes that sentencing outcomes would change little. As shown by numerous studies quoted in the Issues Paper, even if the public perception is that sentences are too lenient, when ordinary citizens and juries are given all the facts of a case, they often come to the same conclusion as the judge on penalties (or even feel that the judge has been too heavy-handed). Thus public perceptions and the media coverage of it would change little, defeating the main purpose of the scheme – and at what cost?
11. In the CCL's view, the recent introduction of the Sentencing Council fulfils exactly the same function: allowing the judge to have a more direct connection with public sentiment so as to be able to inject it into the sentencing process. At the same time the practicalities of allowing the judge to consult a jury, and possibly subverting the very notion of the jury as a decider of fact (the criticism that giving the jury responsibility to advise on sentencing may draw their minds away from arguments for innocence is a cogent one), far outweigh any supposed benefit.

#### **4. A more effective way?**

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- *Q4. Is there a more effective way of addressing the issue of public confidence in sentencing decisions, and if so, what should it be?*
12. Justice Spigelman and the Attorney-General have identified a significant problem with the criminal justice system. Where justice is not being perceived to be done, there is a serious dysfunction in the system.
  13. However, the NSW CCL would argue that allowing judges to consult juries on sentencing is not an effective solution. Numerous existing studies show that the dysfunction involves a lack of communication. Public perception is strongly influenced by media. The depiction of the justice system by the media is incomplete and misleading.
  14. The answer must therefore lie in communicating with the public. Giving them the facts, just as a jury has the facts before it, and allowing them to see that justice is being done. Instead of trying to educate the successive groups of 12 individuals who make up our juries on the complexities of the sentencing process, the government (not the courts) should be trying to educate the entire public.
  15. The means are there: never before have governments been able to reach out so easily, cheaply and effectively to the population and provide information. The Internet and associated audio-visual tools are there waiting to be used. The NSW CCL strongly recommends that the government take advantage of them.
  16. Then justice can not only be seen to be done, but also be *understood*.