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Thank you to the Conference organisers again for the opportunity to speak today on the fascinating topic of jurors and their involvement or otherwise in the sentencing process. Unfortunately, I don't have a PowerPoint presentation today so you'll just have to put up with *me*.

I might start by referring to what was effectively the Commission's end point on the topic, Report 118, that we released in August of last year. It represents more than twelve months research and consultation and contains three recommendations, the main one being that juries should retain their current role as determiners of facts leading to a verdict, and shouldn't be involved in sentencing to any greater extent.

Today I'll attempt briefly to outline four major topics, first how the review came about, secondly the major issues that we considered and that were raised in submissions, thirdly the factors that led to our recommendation, and finally the question that remains which is, if jury involvement in sentencing is not the answer what other measures can be taken to better inform public opinion on sentencing matters, and to inject that opinion back into the criminal justice system.

The genesis of our review was a speech made by Chief Justice Spiegelman, now a much heralded speech, at the opening of Law Term Dinner for the Law Society of New South Wales a couple of years ago. In that speech, the Chief Justice suggested a number of possible improvements to sentencing procedures, including the idea that juries play a role beyond their current one as finders of fact determining an accused's guilt or innocence. As you'll know, Australian juries currently have no direct role in deciding the nature and severity of the penalty; they may have an indirect role in effecting a sentence, by making a recommendation of leniency, or providing answers to specific questions rather than a general verdict of guilty or not guilty, sometimes referred to as a 'special' verdict.

Key to the Chief Justice's suggestion was his view of the importance of public confidence in the administration of justice. He considered that the unique position of jurors as members of the public, with the capacity to make decisions that directly affect criminal justice outcomes, does more to maintain high levels of trust and confidence than any other factor. As such, he proposed that an enhanced role for jurors in the sentencing process may address public criticisms frequently expressed concerning perceived leniency of sentences handed down by judges who are out of touch with matters that matter to ordinary citizens.

The essence of the proposal is that following a guilty verdict jurors might participate in confidential discussions with the judge, in the absence of the parties and their counsel. Jurors could then offer their views on issues such as the offender's chance of rehabilitation, the likelihood of reoffending, and the gravity of the offender's conduct.

The Chief Justice was also of the view that sentencing decisions may be improved if judges could find from jurors the facts on which the verdict was based. This is an issue, particularly in manslaughter decisions, where a number of bases for a verdict to a jury and it's often up to the judge to second-guess what the actual basis of the verdict is, and while that doesn't matter as far as the verdict is concerned it can have sentencing implications.

So, this was a context in which Bob Debus, the former New South Wales Attorney-General, asked the Commission to consider the question of jury involvement in sentencing. I should make it clear that we were never, ever asked to investigate the question of full jury sentencing, that is allowing jurors to be the ultimate arbiters of appropriate penalties; our brief was only to research the desirability of judges consulting with jurors before making their sentencing decisions.

The review obviously raised many, many issues. I've only got time to mention two today, those being that of public confidence – since the Chief Justice placed so much importance on this as a reason for the suggestion, and then the practical issues to [do] with implementing the proposal. I'll try not to go over territory that we've heard from the earlier speakers, but so far as public perception of, and confidence in, sentencing is concerned, a few things have to be kept in mind: in order to know if a reform initiative would result in an improvement in perception and confidence levels, we need to have an idea of the current state of play, and when talking about a concept that's as amorphous and fluid as public opinion or confidence, it's very difficult to tell perception from reality.

Public confidence is also something that can be easily manipulated by whomever controls and filters information, which is generally the media, and in the case of sentencing information this is generally a worry, since usually only select details of the most outrageous examples of sentencing disparity are ever reported. It creates a perception that the whole system's deeply flawed and out of touch with community expectations, as we heard earlier, and while violent crime spirals out of control.

I don't mean to sound like I'm 'media-bashing', which is something the Commission's often accused of, [as] it's totally understandable from a media perspective since this is what sells papers, but it's not helpful in increasing public awareness about how sentencing actually occurs. Nor is it helpful from a reform perspective, since we've got a situation where the media tells the public what to think, often based on misinformation, and then purports to convey the public's view. This is often taken up by decision makers, particularly during law and order campaigns that tend to increase in intensity and momentum with the coming of each state and federal election, but none of these perceptions concerning escalating crime rates and lenient sentences are actually borne out when subjected to study.

The research in Australia and overseas has consistently shown that when presented only with tabloid headlines and asked whether sentences are too lenient people tend to agree. That feeling is also heightened when they read reports about high crime levels, but as study participants receive more information about how sentences are actually determined, rates of imprisonment and non-custodial sentencing options, and the fact that crime levels have plateaued and, in fact, fallen in some areas, they're much more likely to be less punitive, and this backs up the research that Kate and Julia were talking about earlier. In fact, [in] most cases study participants agreed with the

sentence handed down by the judge and in some cases thought that the judge was too harsh.

It's also interesting to note that the submissions we received from members of the public were universally supportive of judicial sentencing. That's not to say judges are always right; they can and they do get it wrong, nor is it the case that public perception, even if it's misconstrued, is not important, but what it does suggest is a disconnect between what we assume the public thinks about sentencing and the views actually held by informed members of the public. We came to the conclusion that we need to find out more about the nature of informed public opinion before making any changes based on untested assumptions.

Leaving public confidence aside for the moment, the second major issue we considered was that of how involving the jury in sentencing can actually be implemented. According to the Chief Justice's proposal, following a jury trial that ends with a guilty verdict a consultation would occur between the judge and at least some of the jurors who delivered the verdict. In order to protect the secrecy of jury deliberations, that led to the verdict, the consultation would need to happen in secret. The judge would then consider the jurors' views, along with all the other factors that he has to consider in sentencing, and decide on an appropriate penalty.

The views expressed in most submissions we received were concerned about the following issues – I'll run through these really quickly, since they're documented in the Report and I'm conscious of time – the most significant concern raised was the potential to import elements of unfairness into the trial, fears of bias and inconsistency were raised, since jurors views would be based not on an impartial assessment of law and sentencing practice but on personal views and experience and decisions made on an ad hoc basis. Of course, some of these concerns could be allayed, depending on the nature of the jury's involvement. If they were only going to be asked questions about why they reached their verdict then the issue of consistency may not be such a problem but other problems would arise, such as the usefulness of the exercise. It's entirely conceivable that twelve jurors could reach the same verdict by twelve different paths, which would make the judge none the wiser about the reasons for their verdict.

There's also the danger that this type of consultation could be seen as a token gesture. In fact, one submission referred to the proposal as 'Jury Sentencing Light', while another suggested that judges might as well listen to talkback radio. [laughter] There was also concern that involving juries in sentencing could compromise the deliberations leading up to the verdict as jurors may feel less free to express their views, knowing that they'll have to divulge them to a judge later on. Furthermore, some submissions worried that the verdict itself might even be compromised, and by this they meant that jurors who would otherwise be inclined to support a not guilty verdict may vote to convict if they feel that they'd have a say in obtaining a lenient sentence later on. At the very least, there were concerns that jurors would be distracted from their central role as fact finders if questions of sentencing became conflated with those of guilt or innocence. [00:30:49]

The biggest sticking point with the proposal was the secrecy of the consultation. It was considered necessary, to protect against disclosure of jury determinations and also of the identity of individual jurors, however many saw it as cutting across the

principle of transparent and open justice. The parties and members of the public, and the appeal courts, have the right to know the full basis on which sentencing decisions are made, but judges would be prevented from disclosing details of jury consultations. Some felt that this would open up new grounds for appeal, and the secret nature of consultations also means that people have no way of knowing whether or not the judge took the jury's views into consideration, which would work against the goal of boosting public confidence.

The issue of unfairness to juries themselves was also voiced as a big concern, because it's a big enough ask that jurors sacrifice time, money, work commitments, family commitments, for the duration of a trial and for some, as we heard earlier, the details of the trial are the most horrific things that they've ever heard in their life, and they'll want to get out of there as soon as possible; they just may not want to take on the extra role. This view was actually unanimously expressed in the submissions we received from former jurors, who felt that it was harrowing enough deciding someone's fate, and that they weren't qualified to comment on sentencing issues, and wanted the responsibility to remain with judges.

Interestingly, some saw this as an attempt [by] judges to pass the buck for unpopular decisions onto jurors ... [laughter] ... and in the case of a majority verdict also places the lone juror in a fairly unenviable position.

At a practical level, the question of timing is significant; at what point, following the verdict, should jurors be consulted? Obviously, it's logistically easier if it's immediately afterwards, as all the jurors are available and are already there, but they don't have the benefit of hearing sentencing submissions and other information that's relevant to sentencing but wasn't raised during the trial. So, if the consultation weren't to occur until the sentencing hearing – this is often at least six weeks after the date of the verdict – jurors would be better informed but they'd need to reconvene, which may mean that not all the jurors will be able to attend, which again undercuts, perhaps, the effectiveness of that type of consultation, [being] particularly problematic in rural areas.

There is also the potential for jurors to be influenced by friends and family, and media reports, in the time lag between verdict and sentencing. There were many other practical problems and questions of cost and delay that I haven't got time to go into but [which] are in the report.

In light of all these factors it should come as no surprise that we rejected the proposal to incorporate the direct involvement of juries into the sentencing process. The idea met with universal opposition, in all the submissions we received and all the interest groups with whom we spoke. As we expected, bodies such as the Bar Association and the Law Society were no fans of the proposal, and current and former judges we heard from were vehemently opposed to the idea. But, what really resonated with us were the objections of the people who'd previously served as jurors and simply didn't want the added burden.

During the course of the review we looked at experiences overseas, in countries that have involved jury sentencing to some extent, and David outlined some of those earlier, notably America where jury sentencing has existed in some states such as Virginia since the War of Independence, and exists in all cases where capital

punishment is an option. In European nations, that have panels of lay assessors that sit alongside professional judges and determine questions of verdict and sentence, we also looked at the system proposed to be introduced in Japan, however the legal and constitutional environments in those countries are so different from our own that importing any elements, looking at any comparisons, is largely unhelpful, without making significant structural changes to our system. The number and the strength of the arguments put to us, and the lack of any real impetus for a change of this type, combined to rob the proposal of any, kind of, push-pull factor.

An interesting aspect is that this review generated a huge amount of media coverage. We had a front page of the Daily Telegraph the day that our Issues paper was released; we were very proud of that. It was talked about extensively in talkback radio, but we weren't deluged with submissions supporting the proposal. In fact, as I said, all the submissions but one were opposed to the idea, and that submission just said 'we like the idea' but didn't give any reasons for it.

Ultimately, it was our view that involving the jury directly in sentencing will not fulfil the goals of increasing public confidence in sentencing, or help to improve sentencing decisions. Wherever there's a hint of bias, inconsistency or unfairness public perception is likely not to be positive.

I want to make it clear that in rejecting the jury sentencing proposal we are not saying that the concerns raised by the Chief Justice about public confidence are not valid, or that judges wouldn't benefit from having the input of informed public opinion. We just don't think that direct participation by individual jurors in individual trials is the way to go about achieving this, particularly considering that jury trials account for less than 1% of all criminal trials. Judges across the board should have the benefit of informed public opinion, and not just those presiding over individual trials.

A more holistic and long-term approach is needed, which brings me nicely to my final point: if not jury sentencing, well, what then? I noted earlier the studies about the effect on juror perceptions of exposure to information [that], again, backs up the research that we heard about earlier, and the fact that we don't know enough about what former jurors and members of the public actually think about sentencing.

Bridging that information gap is crucial before any reform initiatives, such as jury sentencing, should be implemented, and this is the crux of our second and third recommendations; we're of the view that more qualitative empirical study needs to be done to determine where public opinion lies on things such as non-custodial sentences – when are they appropriate? What other sentencing options should there be? How first-time offenders should be considered, what should happen to repeat offenders, all these kinds of issues need to be considered. A study of this type was undertaken by the Victorian Sentencing Advisory Council in 2006, called "Myths and Misconceptions; Public Opinion Versus Public Judgment About Sentencing", but more work needs to be done and I'm really glad to hear that more work *is* being done.

One of the major findings of the Victorian study was that people knew very little about sentencing procedures, and in our final recommendation we put forward the view that public education about how sentences are actually determined now would help to bridge that gap between loosely held public perception and informed judgment. The means of distributing information to the public has never been more

accessible or affordable and some of the avenues include sentencing councils, which exist in some states and territories. In New South Wales the Sentencing Council's functions have recently been expanded to include gauging public opinion on sentencing matters, and fulfilling an educative role within the community.

Other means could include release by the courts of summaries of sentencing judgments in more easily understood form; it happens in a very small number of cases but it isn't routine practice. The production of more plain English publications, describing how sentencing works, public surveys and forums, and cooperation between the media and criminal justice officials in getting more accurate and balanced information about sentencing to the public – good luck with that one. [laughter]

It's our view that sentencing should be seen as a fluid process, striving to maintain fairness and consistency while at the same time taking note of changing social values, but not being enslaved by them. The challenge that lies ahead is to ensure that that balance is maintained, and hopefully this is a good start to the debate.

Thank you again for the opportunity to speak, and for your attention.