



By Kassie James

I was fascinated to read of the proposal of NSW Chief Justice Spigelman¹ that a system be developed in which judges consult with juries about sentencing. The consultation process

would be in camera and protected by secrecy provisions and would involve the trial judge discussing relevant issues with the jury after evidence and submissions on sentence, and prior to determining sentence. This is a brave and intriguing proposal (and given that His Honour does not do criminal trials it occurred to me that perhaps one of his brethren on the criminal bench had taken his car space).

The reasoning behind the proposal is that the consultative process will facilitate the public's understanding of the sentencing process and therefore improve the confidence of the public in the administration of justice. The process may well achieve this, but I fear it may also operate to destroy the confidence of all of us in the jury system. The reason the jury system has survived for so long is because secrecy provisions prevent us from having any insight into their reasoning process – we suspect they are in the jury room determining

a person's fate with rock/scissors/paper ...but we DON'T WANT TO KNOW about it.

His Honour noted that the public's perception and (mis)understanding of the legal process not only impacted on public confidence in the administration of justice; it could impede the administration of justice.

This is evident in the case of Mamdouh Habib. Many Australians have firm opinions in relation to his guilt or innocence. Unfortunately however, many fail to understand that in a civilised society guilt or innocence has nothing to do with an entitlement to procedural justice. More unfortunately, the Australian government has actively blurred what should be a very clear delineation in an effort to divert attention from its own conduct by focusing on the conduct of Habib.

Those of us who understand the distinction between guilt or innocence and a right to procedural fairness have an obligation to ensure there is appropriate investigation into the government's handling of this matter. More importantly though, we need to do all we can to educate the public about the danger of affording procedural justice only to those who appear to "deserve" it. ■

Note: 1 Opening of the 2005 Law term dinner, Sydney 31 January 2005. *A new way to sentence for serious crime.*

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