

Law Oration 2018

Are Courts Soft on Crime? Lessons from the Victorian Jury Sentencing Study

Presented by Her Excellency Professor the Honourable Kate Warner AC,
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‘.. sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do.’

[Hon J Spigelman AC, ‘A new way to sentence for serious crime’. Address for the annual opening of the Law Term Dinner of the Law Society of New South Wales, 31 January 2005]

.. ‘The politics of law and order feeds on the abstract, the emotive and the discursive but falters at the specific and the practical.’

[David Brown, ‘Continuity, rupture or just more of the volatile and contradictory’ in John Pratt et al, *The New Punitiveness* (Routledge 2005) 35, 39-40.]

‘If governments were concerned to know what the public think of sentencing practice, a survey of the reactions of jurors to sentences imposed in cases which those jurors had tried could provide interesting information. That could be a useful practical test of whether there is some systemic failure of the process to meet the expectations of well-informed members of the public.’

[Hon Murray Gleeson AC; *Out of Touch or Out of Reach*’ (2005) 7 *Judicial Review* 241]

INTRODUCTION

I would like to acknowledge the Wurundjeri People of the Kulin Nations, the traditional owners of the land on which the Supreme Court stands, and to acknowledge their elders past and present.

Thank you for giving me the opportunity to give an overview of the findings from the three jury sentencing studies and to reflect on results of these studies.

I will begin with a brief discussion of the relevance of public opinion in determining sentencing policy and practice to give some theoretical underpinning to the jury sentencing studies. This is followed by an outline of the main ways in which public opinion on sentencing is measured before explaining the approach we took to using jurors to exploring public opinion on sentencing. The results are then discussed with some observations on their implications. The results section of the paper is divided into jurors’ views on sentencing severity; purposes of punishment; sentencing factors; jurors’ views on a jury role in sentencing and their views of judges.

THE RELEVANCE OF PUBLIC OPINION

Academic commentators, penal theorists, philosophers and criminologists are not agreed on the normative significance of community views in determining sentencing policy and practice. Their views are a sub-set of broader arguments about the role of public opinion in the formation of public policy. On one side of the argument are those who assert that policy

should be guided by public opinion so that the will of the people is respected. On the other side of the argument are those who argue that public policy should be grounded in sound principles and determined by experts.

In the context of sentencing policy and practice, criminal law scholar, Paul Robinson argues that public opinion should play a significant role in sentencing on the grounds of its democratic and crime control value. As to the latter, he argues that a system that distributes punishment in ways that the community considers just gains moral credibility and this translates into greater support for and cooperation with the criminal justice system.¹ He also argues that a criminal law with moral credibility can harness the power of stigmatisation and, if it has legitimacy, it can shape societal norms.

Matt Matravers, a professor of political philosophy, endorses Robinson's views and adds that if punishment is meant to express the community's censure of the offence (the view of many retributivists including Duff, von Hirsch and Matravers) it should reflect the community's judgement of what is deserved.²

Albert Dzur laments the fact that the criminal justice system has become even more opaque to the average citizen and attributes the social distance between lay citizens and the legal domain as fuelling dysfunctional sentencing policy. He views the jury as a means of applying public opinion to the problem of fixing an appropriate sentence to a particular case and addressing the democratic deficit in criminal justice.³

In contrast, Jan de Keijser, a professor of criminology, favours an exclusionary approach to public input. He challenges Robinson's consequentialist (or crime control) arguments for public input into sentencing and argues that a mismatch between public opinion and sentencing practice would not significantly undermine the legitimacy of the criminal justice system. He points out that despite the intense public criticism of sentencing courts in Western countries, the criminal justice systems have not collapsed. He also argues that an informed sample of the public does not represent 'real' public opinion and that dismissing uninformed public views by favouring the findings of more considered and informed techniques could be considered offensive to the general public. It amounts to saying 'we are ignoring your views because they are general and uninformed sentiments'. He makes the point that connecting with public opinion is really only considered desirable when it conforms to the opinion of elite expert groups.

De Keijser concludes that the criminal justice policy and practice should be left to the experts such as criminal policy elites and professional judges. This does not mean there should be no connection between public opinion and sentencing. He considers that judges, much more than a few decades ago, regard themselves as members of the larger community rather than as decision makers isolated from society and are responsive to public opinion. Thus public

¹ Paul Robinson, 'The Proper Role of the Community in Determining Criminal Liability and Punishment' in J Ryberg and J Roberts eds, *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 54.

² Matt Matravers, 'Proportionality Theory and Public Opinion' in J Ryberg and J Roberts eds, *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 33.

³ Albert Dzur, *Punishment, Participatory Democracy and the Jury* (Oxford University Press, 2010).

opinion is considered in an indirect and diffuse way rather than directly importing public opinion.⁴

Mirko Bagaric, an Australian professor of law, also rejects a role for public opinion in sentencing, likening it ‘to doctors basing treatment decisions on what the community thinks is appropriate or engineers building cars, not in accordance with the rules of physics but on what lay members of the community “reckon” seems about right.’⁵ This is, superficially at least, an attractive argument. However, there is a difference between views on sentencing on the one hand and treatment and design decisions made by doctors and engineers on the other. Medical treatment and design are both areas where experts have some ‘epistemic advantage’. There is no such independent answer in the case of deserved punishment for a violation of the criminal law.⁶ What is relevant to harm and blame is not a technical matter governed by physical laws but is a cultural exercise. What is effective, either as a deterrent or rehabilitative response, is an area where experts have an advantage. However, the question of what amounts to a proportionate punishment is central to determining an appropriate sentence, whatever purpose of punishment is selected by the sentencer.

I should add that while Bagaric adopts a generally exclusionary approach to public opinion, he accepts the importance of exploring the community’s shared experience of the effects of crime and allowing this to inform the offence seriousness component of the proportionality principle. In his view this would be sufficient to show that the community is being heeded in relation to sentencing matters and to dilute calls for tougher sanctions.⁷

So should public opinion be taken into account? I agree with Julian Roberts: it is plausible that a sentencing system which ignored public views entirely might ultimately suffer from lower compliance, diminished confidence, less cooperation and weaker penal censure. However, to allow *direct* input is likely to lead to unprincipled, chaotic and inconsistent outcomes. Instead, public input should be limited, indirect and controlled within a professionalised system.⁸

The fact that public opinion is now a significant force in the field of criminal justice policy is also a pragmatic reason for supporting limited input of public views.⁹ When politicians are amending sentencing laws, or promising to do so, they frequently claim that they are doing so on the basis of public opinion and there is an assumption that societal responses to crime should reflect public views. And when the media is criticising a particular sentencing

⁴ Jan de Keijser, ‘Penal Theory and Public Opinion: The Deficiencies of Direct Engagement’ in J Ryberg and J Roberts eds, *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 101.

⁵ M Bagaric and R Edney, ‘The Sentencing Advisory Commissions and the Hope of Smarter Justice’ (2004) 16 *Current Issues in Criminal Justice* 125, 129.

⁶ Matravers, above n 2.

⁷ Mirko Bagaric, ‘Proportionality in Sentencing: The Need to Factor in Community Experience not Public Opinion’ in J Ryberg and J Roberts eds, *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 76, 97.

⁸ Julian Roberts, ‘Clarifying the Significance of Public Opinion for Sentencing Policy and Practice’ in J Ryberg and J Roberts eds, *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 228, 237.

⁹ Jesper Ryberg and Julian Roberts, ‘Exploring the Normative Significance of Public Opinion for State Punishment’ in J Ryberg and J Roberts eds, *On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 1.

outcome as too lenient, the judiciary is portrayed as being out of touch and unresponsive to the public mood.

Public opinion tends to be given as a reason in and of itself to adjust policy or practice. To adopt an exclusionary approach to public opinion or one which only allows community input into the effect of particular crimes on victims is unlikely to satisfy demands for tougher sentences. To say sentencing practice and policy is none of the community's business but a matter only for experts is no longer acceptable. And it is a weak position from which to contest the fact that the media, politicians and their policy makers too often rely upon their own perception of public opinion or shallow assessments of it.

So how should public opinion be ascertained?

CURRENT METHODS FOR EXAMINING PUBLIC ATTITUDES

The critical choice is between 'mass' or 'informed' public opinion and it is measured in a number of ways, namely: media polls, representative surveys, focus groups and deliberative polls.

The problem with mass opinions derived from polls and representative surveys is that research has demonstrated that people have misperceptions about the nature and extent of crime and about court outcomes and these misperceptions are significantly associated with punitiveness and the belief that sentences are too lenient. For example, people tend to perceive crime to be constantly increasing, particularly violent crime; to over-estimate the proportion of recorded crime that involves violence; to over-estimate the proportion of offenders who re-offend; and to under-estimate the severity of sentencing practices.¹⁰

For this reason what is needed is a means of measuring public opinion that is better informed and more thoughtful as opposed to shallow, uninformed and unconsidered responses. Social scientists tend to favour a multi-method approach which combines representative surveys and focus groups, uses different styles of questions and supplies information and context to the questions asked.

Media polls

Mass opinion media polls tend to ask a single question linked to a specific controversial news item such as *The Advertiser* and *Sunday Mail* poll in 2014 which asked South Australians if they supported a minimum mandatory eight-year term of imprisonment for anyone who fatally punched another while under the influence of alcohol or drugs.¹¹ Media polls can be more complex, such as *The Sun Herald* survey that asked members of the public to choose a sentence for the offender in 17 scenarios ranging from murder to criminal damage.¹² Invariably the respondents are an unrepresentative sample of the population.

¹⁰ For a summary of this research see Karen Gelb, *Myths and Misconceptions: Public Opinion Versus Public Judgement* (Sentencing Advisory Council, Victoria, 2006) 13-14; *More Myths and Misconceptions* (Sentencing Advisory Council, Victoria, 2008) 4.

¹¹ Sam Kelton, 'Advertiser and Sunday Mail survey finds 85 per cent of respondents want mandatory jail for fatal king hit' *Sunday Mail*, 23 February 2014, <http://www.adelaidenow.com.au/news/south-australia/advertisercomau-survey-finds-85-per-cent-of-respondents-want-mandatory-jail-for-fatal-king-hit/news-story/c0e86dfcaeead62d9482ef3b7fb6b38f>

¹² Department of Justice, Victoria, *Sentencing Survey: Results of a community consultation*, 2011.

Representative Surveys

This method employs a representative sample of the population and asks a variety of questions via mail, telephone, face-to-face interviews or online surveys. Questions include general top-of-the-head questions similar to those asked in a media poll but they can also be more complex such as when accompanied by contextual information. Examples in the sentencing context include vignettes or a case study which requires the respondent to choose a sentence; or a question which requires the respondent to consider arguments for and against a particular policy such as mandatory imprisonment before answering questions about it.

The Australian Survey of Social Attitudes is the main source of data for the scientific study of social attitudes, beliefs and opinions of Australians. AuSSA 2017 (data collection May 2017 to May 2018) focuses on social networks and social resources. There is only one question on confidence in courts which simply asks for an indication of how much trust the respondent has in Australia's courts. Earlier surveys included some sentencing questions. Lynne Roberts and David Indermaur report that in the AuSSA 2007, 71% of respondents believed that those who break the law should be given stiffer sentences while 43.5% agreed that the death penalty should be the punishment for murder.¹³

The New South Wales Bureau of Crime Statistics and Research conducted surveys on public confidence in the criminal justice system in 2007 and 2012. In the 2012 survey of 2002 NSW residents chosen at random, 66% of respondents thought sentences were too lenient. In 2012 the proportion dropped to 59%.¹⁴

The most sophisticated Australian national representative survey to date is an ARC funded multi-phased, multi-method study by Geraldine Mackenzie and colleagues. In the first phase, comprising a nationally representative sample of 6005 Australians, 59% of respondents thought that sentences were too lenient,¹⁵ (the same result as the 2012 BOCSAR study); and 66% of respondents agreed with the statement that those who break the law should be given stiffer sentences (compared with 71% in AuSSA 2007). However, in contrast, 57% of respondents said they were confident that judges impose an appropriate sentence most of the time.

Focus groups

In the sentencing context, focus groups have been used by sentencing councils including by Victoria's Sentencing Advisory Council. They involve gathering small groups of people together to discuss a particular issue. The group can be presented with information on the issue before discussing it and endeavouring to reach a consensus. In phase three of

¹³ Lynne Roberts and David Indermaur, *What Australians think about crime and punishment: results from the 2007 Survey of Social Attitudes*, AIC Research and Public Policy Series, Report 101, 2009, 18, 20. The survey also found that most underestimated the proportion of convicted burglars who are sent to prison.

¹⁴ Craig Jones et al, 'Public confidence in the NSW criminal justice system' *Contemporary Issues in Crime and Justice*, No 118, NSW Bureau of Crime Statistics and Research, August 2008; L Snowball and C Jones, 'Public confidence in the NSW criminal justice system: 2012 update. *Contemporary Issues in Crime and Justice*, No. 165, NSW Bureau of Crime Statistics and Research, November 2012.

¹⁵ Geraldine Mackenzie et al, 'Sentencing and Public Confidence: Results from a national Australian survey on public opinion towards sentencing' (2012) 45(1) *Australian and New Zealand Journal of Criminology* 45.

Mackenzie's national study, four small groups of 10-12 people first viewed a DVD by a professional broadcaster which covered the arguments for and against two sentencing issues, namely alternative to imprisonment and mandatory sentences of imprisonment. After each presentation they were then asked, as a group, to discuss the arguments presented in the DVD and to present their arguments for their preferred position until a consensus was reached.¹⁶

Deliberative polls

This method combines representative surveys with focus groups. A random sample of the public is surveyed and then a sub-sample of several hundred is brought together for small group discussions with experts before completing a second survey. The best-known example of a deliberative poll in a criminal justice context is James Fishkin's poll which gathered a representative group of 300 participants for a two-day forum during which they were presented with information about criminal justice issues by a series of experts and were then invited to discuss and deliberate on a number of issues. Surveys before and after the event found measurable effects on public attitudes with less punitive and more informed responses after it.¹⁷

It should be noted that there is increasing interest in citizen juries or citizen assemblies by governments as a way of engaging in policy making and restoring trust in public decision making. Examples include the work of the new Democracy Foundation in Australia which has been engaged to undertake a number of deliberative democracy exercises including using citizen juries of randomly selected South Australian residents to consider the use of nuclear waste dumps¹⁸ and the work of the Citizens' Assembly in Ireland, a randomly selected group of 100 Irish citizens which was convened to consider five legal and policy issues between October 2016 and April 2018.¹⁹

WHAT IS PUBLIC OPINION?

Related to the issue of how to measure public opinion is the issue of what is 'public opinion'. For lawyers, an opinion is an inference drawn from facts or a conclusion reasoned from facts. However, its general meaning does not require a basis of fact – an opinion is a personal view, attitude or appraisal about a matter or an idea about something based upon feelings or beliefs.

And there is the 'public' aspect of the phrase. Winston Churchill is reputed to have said: 'there is no such thing as public opinion. There is only published opinion'. As indicated above, social scientists distinguish between mass public opinion or top-of-the-head responses on the one hand and public judgement or informed public opinion on the other and between *individual* opinions of members of the public and the *collective* opinion of the public. It has been argued that to reach an informed opinion or judgement what is needed is: information, deliberation and responsibility taking. It is recommended that following the provision of information, it is discussed, challenged and considered before a final decision is made and

¹⁶ Nigel Stobbs, Geraldine Mackenzie and Karen Gelb, 'Sentencing and public confidence in Australia: The dynamics and foci of small group deliberations' (2015) 48 (2) *Australian & New Zealand Journal of Criminology* 219, 232.

¹⁷ J Fishkin, *The Voice of the People* (Yale University Press, 1995).

¹⁸ See: <https://www.newdemocracy.com.au/our-work/316-sa-cj-nuclear-fuel-cycle>

¹⁹ See: <https://www.citizensassembly.ie/en/>

that responsibility and accountability is engendered for that decision.²⁰ Responsibility taking is much better achieved when respondents are presented with a problem to solve such as a case vignette rather than a simple ‘do you favour x?’ question.²¹

However, it has also been argued that once members of the public become informed, they are no longer expressing ‘public’ opinion. As mentioned above, de Keijser for example, questions whether the informed public is really the public. For this reason, some reviewers of our research have questioned whether the views of jurors are views of the public.

THE JURY STUDIES

THE METHOD

The basic method for each of the jury sentencing studies has been the same: after a guilty verdict and before sentence jurors are given a survey which asks them to choose the sentence they think appropriate for the offender; their views about sentencing in general and demographical questions including age, sex, education level and employment. This is Stage 1. After the judge has imposed sentence, the sentencing remarks are sent to the Stage 1 jurors who agree to participate in Stage 2, together with a short sentencing information booklet and a second survey. This survey asks for a view about the appropriateness of the judge’s sentence, the weight that should be given to a list of aggravating and mitigating factors and repeats the same general questions about sentencing severity. Stage 3 involves interviews with a sample of Stage 2 jurors (50 in the Victorian Study). The Victorian Study and the National Study included a follow-up Stage 4 survey administered 6 months after the return of Survey 2.

In the Tasmanian and Victorian studies all guilty verdict trials were eligible for inclusion. In the Tasmanian Study there were 162 Supreme Court trials (between September 2007 to October 2009) and 698 jurors from 124 County Court trials (between May 2013 and June 2014) and 987 respondents in the Victorian Study. In the National Study, only sex offence trials and violent offence trials were eligible. From 157 trials (between May 2014 and December 2016) 1124 jurors were recruited from all states and territories except Western Australia. The National Study included a control group of 452 persons called up for jury service who were not empanelled on a jury.

In Western Australia we could not get permission from the Attorney-General to use jurors so we used a survey company to recruit 306 members of the public to do the Stage 1 Control Survey as an online survey.

THE MAIN FINDINGS

²⁰ V Price and P Neijens ‘Deliberative Polls: Towards Improved Measures of ‘Informed’ Public Opinion’ (1998) 10 *International Journal of Public Opinion Research* 145.

²¹ David Indermaur, Lynne Roberts, Caroline Spiranovic, Geraldine Mackenzie and Karen Gelb, ‘A Matter of Judgement: The Effect of Information and deliberation on public attitudes to punishment’ (2012) 14(2) *Punishment & Society* 147, 150.

In the discussion of the main findings from the studies, I will focus mainly on the results from the Victorian study but also reference the findings from the earlier Tasmanian study and the national jury study.

Sentence severity comparison: are jurors' preferred sentences more severe or more lenient than those given by judges?

Comparing the jurors' sentence with the judge's sentence, we found 62% of jurors (N=918) were more lenient than the judge.²² This compares with 52% in the Tasmanian study (N=698) and 59% in the national jury study (N=???) sex and violent offences only).²³

We also found that jurors in the Victorian Study were less likely to impose a custodial sentence than judges (84% compared with 92%).

At Stage 2, jurors were sent the judge's sentencing remarks and a second survey which began by asking about the appropriateness of the judge's sentence. Of the 423 jurors in Stage 2 who answered this question 55% said the sentence was very appropriate and 32% said it was 'fairly appropriate'. Similar results were obtained in the Tasmanian study with 90% responding the sentence was appropriate, evenly split between 'very appropriate' and 'somewhat appropriate'.

Does the type of crime make a difference?

Jurors were less likely to be more lenient than the judge in sex offence trials than in trials for violent and other offences (50% versus 71% for violent and 68% for other offences). In the national study we also found jurors from sex offence trials (N=659) were less likely to be more lenient than jurors from violent offence trials (N=96) (58% versus 68%). The Tasmanian study also found that jurors were less likely to be more lenient than the judge for sex offence cases than for property or drug offences but the proportion who were more lenient was very similar for sex and violent offences.

Does the type of sex crime make a difference?

In the Victorian study, sex offences were divided into three groups: sexual offences with adult victims; sexual offences with children aged 12 and older; and sexual offences with children under 12. Analysis showed the pattern for offences with adult victims and sexual offences against victims over 12 was similar to that for sex offences generally, but for sex offences involving child victims under the age of 12, only 36% were more lenient than the judge and 63% were more severe.

²² Kate Warner, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2016) 19(2) *Punishment & Society* 180.

²³ Kate Warner and Julia Davis, 'Using Jurors to Establish Public Attitudes to Sentencing' (2011) 52(1) *British Journal of Criminology* 93.

Type of crime also made a difference in relation to Stage 2 ratings of the appropriateness of the sentence. A higher proportion of jurors thought the judge's sentence was very appropriate in violent and other offence trials combined compared with sex offence trials (61% versus 46%) and in sex offence cases involving victims under the age of 12 only 36% responded the sentence was very appropriate.

Jurors were also more likely to suggest a more severe sentence than the judge in cases of child sexual assault in the Tasmanian study with 62% of jurors choosing a more severe sentence than the judge compared with 32% in cases of adult victims.²⁴ In the National Study 46% chose a more severe sentence than the judge in cases of child sexual assault compared with 23% where the victims were adults.

General views of sentencing severity.

When asked about sentencing in the abstract at Stage 1 the majority of jurors in the Victorian and Tasmanian and National studies felt that sentencing was too lenient for violent, sex and drug offences²⁵ and about right for property offences. Across all of the studies more than 70% said sentences for sex and violent offences were too lenient and was highest for sex offences. In the Victorian Study, 83% said sentences for sex offences were too lenient and for violent offences, 73% (Stage 1).

In the National Study jurors were also asked about four categories of sex offences: child sexual assault (victim under 12); consensual sexual penetration of a young person (12-16); rape (adult victim) and production of child pornography. Responses ranged from 60% too lenient for consensual sexual penetration of a young person to 79% for child sexual assault of a child under 12. Interestingly, in response to the question about sex offences in general, 79% said sentences were too lenient.

In the Victorian study there was little change to jurors' responses at Stage 2 after receiving the sentencing remarks, sentencing booklet and data insert (78% responded sentences for sex offences were too lenient and 76% said sentences for violent offences were too lenient). The responses at Stage 4 were strikingly stable (with 78% for sex offence sentences and 75% for violent offences responding sentences were too lenient).

In the Tasmanian study we did find some shift from Stage 1 to Stage 2 with fewer jurors feeling sentences were too lenient and more responding sentences were about right. However, there was still a majority responding that sentences were too lenient for sex and violent offences.

Implications of severity findings

The findings across the three studies show a stark contrast between jurors' views in a particular case and their views about sentencing in general. When asked about sentencing levels in general, more than 70% of jurors responded that sentences were too lenient for sex and violent offences even though most of them had suggested more lenient sentences than imposed by the judge (or were equally likely to be more lenient than more severe) and most

²⁴ Sentencing Advisory Council Tasmania, *Sex Offence Sentencing*, Final Report (2015), 69.

²⁵ A bare majority in the Tasmanian study (54%) also said sentences for property offences were too lenient; in Victoria 56% felt sentences for property offences were about right; nationally it was 54%.

considered the judge's sentence appropriate. Jurors' sentencing preferences in a real case show that their views are much more closely aligned with judges than their answers to general questions about sentencing severity suggest. This echoes the findings of other studies that use vignettes, detailed facts from court files or presentations of facts to a focus group and compare the public's sentencing preferences with the sentencing decisions of the courts.²⁶

Together, these findings highlight the fact that top-of-the-head views or mass public opinion about the leniency of sentences cannot be taken at face value.

Moreover, the Stage 2 responses to the general leniency questions show that the effects of increased information are limited when it comes to responses to mass opinion type questions.²⁷ When asked simple or abstract questions, respondents tend to recall stereotypical pictures of the worst kind of offenders rather than thinking of the typical offender. This biased process of recall has been labelled the 'availability heuristic'. Questions about sentences in a particular case probe inner attitudes but abstract questions about judicial leniency tap more accessible surface attitudes. It has been explained that these surface attitudes are not based upon accurate information about sentencing practices but reflect broad anxieties and fears about the dangers presented by the contemporary social world, or to put this a little differently, they reflect expressive concerns such as the breakdown of family values and generational anxiety.²⁸

In other words, if you are looking for informed public opinion or considered judgements rather than top-of-the-head responses, answers to mass public opinion-type questions are not the right place to look. We would submit that by engaging jurors in the task of deciding the appropriate sentence for the offender convicted in their trial, jurors are both informed of the details of the offence and invested in the outcome. In responding to questions about that sentence they are exercising considered judgement despite the absence of the element of deliberation. The findings that a majority of jurors suggested a more lenient sentence than the judge and that most considered the sentence very appropriate shows that jurors, a subset of the public, are not clamouring for harsher sentences.

Is there is a punitiveness gap between judges and jurors in relation to child sexual assault?

For child sexual assault offences with a victim under 12, 63% of respondents in the Victorian Study suggested a sentence that was more severe than the judge and only 36% said the sentence was very appropriate. Similarly, in the Tasmanian study a majority of jurors suggested a more severe sentence than the judge's sentence in cases of child sexual assault and only 26% said the judge's sentence was very appropriate. The Victorian findings were relied upon by the Victorian Sentencing Council to support the recommendation of an increase in the sentence for sexual offences involving children through the mechanism of standard sentences.²⁹ This recommendation has been accepted by the Victorian Government and the new laws creating standard sentences commenced on 1 February 2018.

The results from the National Study will allow us to further investigate if this punitiveness gap is confirmed. Our preliminary analysis suggests that while jurors were less likely to be

²⁶ Kate Warner, Julia Davis, Maggie Walter and Caroline Spiranovic, 'Are Judges Out of Touch?' (2014) 25 (3) *Current Issues in Criminal Justice* 729, 730.

²⁷ See also Indermaur et al, n 21.

²⁸ See the discussion in Warner and Davis, n 23, 108-109.

²⁹ Sentencing Advisory Council Victoria, *Sentencing Guidance in Victoria* (2016), 80.

more lenient than the judge in cases of child sexual assault than sex offences with adult victims, jurors were still more likely to be more lenient than the judge than more severe.

Purposes of Punishment

In the Stage 1 of the Victorian survey after inviting jurors to nominate the appropriate sentence for the offender, they were asked to identify ‘the single most important purpose’ that would be achieved by their sentence from a list using accessible language to describe each of the traditional purposes and the statutory purposes in s 5 of the *Sentencing Act 1991* (Vic): retribution or desert, specific deterrence, general deterrence, rehabilitation, incapacitation and denunciation.³⁰ To allow a comparison of jurors’ purpose preferences with judges’ preferences, the judges’ sentencing remarks were analysed to determine the weight given by the judge to the purposes of sentence. We found that judges usually referred to several purposes and the degree of importance could usually be determined from the remarks which were coded using a four-point scale from ‘very important’ to ‘a little weight’. In a third of cases it was possible to determine a single ‘predominant purpose’, and this was also coded.

While jurors’ purpose preferences included each of the statutory purposes without majority support for any particular purpose, they had stronger preferences for retribution and denunciation than any of the consequentialist purposes such as deterrence, rehabilitation and incapacitation.

For judges, general deterrence was the most important purpose³¹ but it was the least important purpose for jurors, whose most favoured purpose was retribution. In the Stage 3 interviews, jurors’ criticisms of judges’ reliance on general deterrence included a lack of evidence of the effectiveness of deterrence; and ineffectiveness because many offenders don’t consider the consequences or know of the penalties. For example, Juror 173 said that general deterrence:

.. would really only work if you put in on a billboard in Fed Square every morning.’

We found that while judges generally prioritised incapacitation in serious offender cases where there was a statutory requirement for judges to do so, jurors did so in only one fifth of these cases. Denunciation was the second most mentioned purpose for judges and for jurors and for drug offences general deterrence was the most important purpose for both judges (as it was for all offences) and jurors. However, in other respects judges’ and jurors’ purpose preferences were not well aligned.

Implication of lack of alignment of judges’ and jurors’ purpose preferences

³⁰ We also included ‘to compensate the victim and/or the community’ in the list but as this was only selected by 2% of jurors and is not included in the list of purposes in the *Sentencing Act 1991* (Vic) s 5(1), this purpose is not included in the subsequent discussion. For a detailed account of this part of the study see: Kate Warner, Julia Davis, Caroline Spiranovic and Arie Freiberg, ‘Why Sentence? Comparing the Views of Judges, Jurors and the Legislature on the Purposes of Sentencing in Victoria, Australia’ *Criminology & Criminal Justice*, Advance access publication, 2017; Kate Warner, Julia Davis and Helen Cockburn, ‘The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes’ (2017) 41 *Criminal Law Journal* 69.

³¹ It was the most common ‘predominant purpose’ the most common ‘very important’ purpose and the most commonly mentioned purpose.

General deterrence and incapacitation are two purposes where there is a lack of alignment between judges and jurors. Our finding that general deterrence was at the bottom of the list of jurors' preferences is not surprising in the light of other research on the public's purpose preferences including Mackenzie's national survey and the Tasmanian jury sentencing study which also show weak support for general deterrence.³² Judges are constrained by legislation and appellate guidance to place reliance on general deterrence and a failure to do so can lead to a successful appeal.³³ Academics, however, make a distinction between system deterrence and marginal deterrence. While it is clear that the criminal justice system as a whole has a deterrent effect, there is no evidence that longer sentences of imprisonment deter better than shorter ones.³⁴ It is interesting that at least some jurors shared this scepticism. There is evidence that some judges are also sceptical of the effectiveness of general deterrence³⁵ but at the appellate level, at least, judges stick to the 'long accepted wisdom' of the effectiveness of general deterrence.³⁶

Academic commentators have given a number of explanations for judicial reliance upon general deterrence including that it is simply 'rhetoric' or 'deterrence speak', a standard way of expressing the harm or wrongfulness of the conduct, or alternatively that judges, who inflict punishment on offenders as part of their daily business, feel the need to believe there is some compensating benefit behind criminal punishment. However, a problem with reliance on general deterrence in individual cases is that it encourages the populist belief that harsher penalties are needed to control crime. Jurors' preference for expressive purposes of punishment and weak support for general deterrence strengthens the arguments in favour of legislatures abandoning it as a sentencing purpose in individual cases and judges moderating their rhetoric (abandoning 'deterrence speak') to bring their sentencing reasons closer to the values of members of the public who have seen the criminal justice system at first hand.³⁷

It was notable that jurors instinctively chose protection of the public as the primary purpose in only one fifth of cases caught by Victoria's serious offender regime. Statutory provisions that prioritise protection of the public over other purposes are generally justified on the basis of responding to community demands for tougher sanctions for serious offenders and are politically attractive for this reason. However, our results suggest that when individual cases are examined, prioritising protection of the public as a sentencing purpose may not be what the community prefers. The results suggest that scaling back the serious offender regime's focus on incapacitation may better reflect the values of the community.

Sentencing Factors

Ascertaining the views of jurors on the relevance of sentencing factors can shed light on how the public views such factors. One of the aims of the Victorian Jury Sentencing Study was to

³² Caroline Spiranovic et al, 'Public Preferences for Sentencing Purposes: What difference does Offender Age, Criminal History and Offender Type Make?' (2012) 12(3) *Criminology & Criminal Justice* 289; Kate Warner, Julia Davis and Maggie Walter, *Jury Sentencing Survey*, Report to the Criminology Research Council, 2010.

³³ Donald Ritchie, *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence*, (Victorian Sentencing Advisory Council, 2011): failure to give sufficient weight to general deterrence was raised in 73.5% of sentencing appeals and was successful in 44% of cases.

³⁴ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed 2015) 83-88.

³⁵ Geraldine Mackenzie, *How Judges Sentence* (Federation Press 2005) 100-102.

³⁶ *Henry v The Queen* (1999) 46 NSWLR 346, Wood CJ at CL at [265].

³⁷ For an expansion of this argument see Warner, Davis, Spiranovic, Cockburn and Freiberg, n 25, 14-16.

explore jurors' views of the relevance and weight of common sentencing factors and to compare their views with those of judges.³⁸

Exploring lay views in relation to sentencing factors is important for two reasons. First, it stimulates debate about the relevance of individual factors and informs reviews of sentencing and the formulation of statutory guidelines or those promulgated by sentencing councils. As British sentencing scholars Julian Roberts, Mike Hough and Andrew Ashworth have argued, where there are conflicts between community and judicial views, this should be resolved by careful analysis to determine whether the former reflect an overlooked principle or merely unprincipled intuition. Secondly, where the views of jurors are not well-aligned with sentencing practice, it is a signal that the community is likely to respond similarly and judges should address this by clearly explaining the rationale for finding such factors aggravating, mitigating or of no relevance.³⁹

Method

Jurors views were obtained by means of questions in the Stage 2 survey and follow-up questions in the interviews. The first question in the sentencing factors section of the Stage 2 survey listed eight commonly arising aggravating factors and ten mitigating factors and asked jurors to indicate the weight given to each factor ('no weight', 'a little weight', or 'a lot of weight') or to indicate if the factor 'did not arise'. The eight listed aggravating factors were:

- abuse of trust or power;
- victim vulnerability due to age or disability;
- substantial harm;
- planning;
- prior convictions;
- offender on bail;
- offender on parole; and
- offender in breach of suspended sentence or community order.

The ten mitigating factors were:

- no prior convictions;
- good character;
- good prospects of rehabilitation;
- remorse;
- youth;
- old age;
- physical illness/impairment;
- family dependence on the offender;
- social disadvantage; and
- childhood abuse.

³⁸ This aspect of the study is reported in Kate Warner, Julia Davis, Arie Freiberg, Caroline Spiranovic and Helen Cockburn, 'Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors' (2018) 92 *Australian Law Journal* 374; Kate Warner, Caroline Spiranovic, Arie Freiberg, Julia Davis and Lorana Bartels, 'Aggravating or Mitigating? Comparing Judges' and Jurors' Views on Four Ambiguous Sentencing Factors' *Journal of Judicial Administration* (in press).

³⁹ Julian Roberts and Mike Hough, Exploring Public Attitudes to Sentencing Factors in England and Wales' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing*, (Cambridge University Press, 2011) 168, 185.

Respondents were also able to add other factors that increased or reduced the seriousness of the offence. A separate question related to four other factors which could be regarded as either mitigating or aggravating, namely mental disorder, intellectual disability, drug addiction and intoxication.

It was the intention to ascertain judges' views by judges completing a form at the time of the sentencing with questions which mirrored the questions asked of jurors about sentencing factors in Survey 2. This was explained at the annual conference for County Court judges prior to start of the study and all judges were written to and provided with hard and electronic copies of the form. Because forms were completed by judges for less than 30% of offenders in the study, the judges' forms were supplemented by two members of the research team using the sentencing remarks to complete forms for each of the remaining offenders. Inconsistencies between the research team were resolved by checking with the remarks and by using N-Vivo analysis of the sentencing remarks which allowed comparison of the coded text for each weighting that was given to each of the factors.

Problems with the data included the subjective nature of the assessment as to whether or not a factor arose (for example 'youth', 'old age', or 'prior convictions') and juror error (for example, entering 'no weight' instead of 'did not arise' and interpreting the question as a general one instead of relating it to the juror's case).

Aggravating and mitigating factors

The findings showed that judges and jurors were alike in giving more weight to aggravating than mitigating factors. For aggravating factors, a majority of judges and jurors gave each of the listed offence-related factors 'a lot of weight'. A majority of judges and jurors also gave each of the listed mitigating factors at least some weight. However, jurors gave less weight than judges to each of these mitigating factors, notably good character, being a first offender, old age, physical illness and family hardship. For example, in cases where the judge had identified the offender as 'old', 38% of jurors gave this no weight in contrast with judges, who gave this factor no mitigatory weight for just 5% of these offenders. The results were similar for ill-health.

M's case illustrates the difference between the approach of judges and jurors to good character and being a first offender. M was convicted of aggravated burglary and kidnapping. The sentencing judge gave a lot of weight to the fact he was a first offender and of good character. We interviewed two jurors from this trial, neither of whom had given any weight to these two mitigating factors. Juror 882 explained why she gave no weight to these factors in these words:

I think in this case because it was so unprovoked and who cares if he was a good family man? He beat the crap out of a guy with a baseball bat for no good reason whatever. So quite frankly I really don't care... if he's great to his kids.

The reluctance of many jurors to give weight to old age is illustrated by this response from Juror 6:

[W]ell hang on, it doesn't matter whether he's 25 years of age or 75 years of age, if he's involved in a crime of that magnitude [conspiring to import drugs] ... he should pay the punishment.

Jurors were a little more likely to give ‘a lot of weight’ to family hardship than judges but less likely to give it ‘a little weight’. When judges gave it ‘a little weight’, they generally did so on the basis of the effect of hardship ‘on the offender’ rather than the direct impact on the family. However, the interviews suggested that jurors treated it as mitigating because of the effect on the offender’s partner and children.

We also found that jurors tended to adopt a broader interpretation of aggravating factors such as breach of trust and prior convictions. For those cases identified by the judge as giving rise to a breach of trust, judges and jurors gave this aggravating factor similar weight. However, jurors regarded it as relevant and aggravating in a broader range of cases such as where a sexual relationship had ended and the judge made no mention of a breach of trust. Interestingly, there was evidence of judges treating breach of trust arising in a date rape scenario although some appellate guidance suggests this situation does not give rise to a trust relationship.⁴⁰

As well as being more likely to give prior convictions ‘a lot of weight’ than judges, they were less likely than judges to give them ‘no weight’ and gave weight to them in cases where the prior convictions were for dissimilar offences.

Delay

A surprising finding from the analysis of the sentencing remarks was that delay was relied upon by judges as a mitigating factor for 46% of the offenders in the study.⁴¹ This made delay the third most common mitigating factor behind good prospects of rehabilitation and good character and ahead of being a first offender. In most cases the amount of weight was classified as ‘some weight’ rather than ‘a lot of weight’ or ‘a little weight’.

Delay was not one of the listed mitigating factors on the judges’ form or in the jurors’ Stage 2 Survey and the question which asked for additional factors that ‘reduced the seriousness of the offence’ was not appropriate to pick up a ‘system consideration’ like delay. Nor was delay listed as a relevant sentencing factor in the booklet accompanying Survey 2. For this reason it is not surprising that few jurors included delay as a mitigating factor. The interviews provided an opportunity to ask jurors their views on delay in the cases in which the judge had relied upon it as a mitigating factor. Jurors’ responses were mixed: some readily agreed with the judge; some did so when the judge’s reasons were explained; some were sceptical and some disagreed with the judge.

Ambiguous sentencing factors

For the question relating to mental disorder, intellectual disability, intoxication and substance abuse, judges and jurors were asked about the relevance of these factors in general and in relation to the offender in the trial. Response options for the specific case were: ‘aggravating’, ‘mitigating’, ‘neutral’ and ‘did not arise’. Analysis of the sentencing remarks showed that judges generally found mental disorder and intellectual disability to be a mitigating factor (in 83% and 70% of cases respectively) and the fifth *Verdins* Principle,

⁴⁰ *R v MAK* [2005] NSWCCA 369 [102]-[103].

⁴¹ For more detail, see Kate Warner, Julia Davis, Caroline Spiranovic and Arie Freiberg, ‘Sentencing Discounts for Delay’ (2018) 42 *Criminal Law Journal* 22.

which mitigates on the basis of the more onerous effect of imprisonment on the offender, was the most often engaged, followed by the sixth *Verdins* Principle (a significant risk of imprisonment adversely affecting mental health). Mental disorder and intellectual disability were aggravating in just one of the cases.

Comparing the responses of judges and jurors in those cases where the judge has indicated that the offender had a mental or cognitive impairment, jurors' most common response was that it 'did not arise'. Mental disorder was said to be mitigating by jurors in only 19% of these cases in contrast with the 83% of cases where judges found it mitigating. For intellectual disability, judges were twice as likely as jurors to find intellectual disability mitigating. The fact jurors' most common response to these conditions was that it 'did not arise' suggests a different and narrower view as to what constitutes a 'mental disorder' or an 'intellectual disability'. For some jurors, at least, none of the following conditions were considered to be a mental disorder: bipolar depression; major depressive disorder, complex post-traumatic stress disorder and complex bereavement disorder.

The interviews supported the inference that many jurors adopted a narrow view of what amounts to mental impairment and also suggested that jurors were not persuaded that the sentence should be mitigated because a mental disorder made imprisonment more onerous. So, the fifth *Verdins* Principle did not appeal to most jurors, who seemed to be looking for a strong connection between the offender's mental condition and the commission of the offence. Even such a connection was not enough for some jurors, who did not appear to be persuaded that the fact that an offender's impaired ability to exercise judgement should be mitigating.

In relation to substance abuse (intoxication and drug addiction) the analysis of the sentencing remarks showed that these conditions were generally neutral but were occasionally aggravating or mitigating in line with appellate guidance. For example, intoxication and drug addiction were aggravating in cases of culpable driving and mitigating where because of abstinence, substance abuse was relevant to prospects of rehabilitation. In one of the cases of marital/acquaintance rape, the offender's intoxication was aggravating but apparently not in others.

Jurors were more likely than judges to find substance abuse relevant, particularly intoxication where a majority of jurors responded that it was aggravating (compared with 14% of judges). The interviews revealed that jurors found intoxication to be aggravating in cases of sexual assault and domestic violence where the judge found it to be neutral or even mitigating.

Implications of the findings in relation to sentencing factors

As mentioned at the beginning of the discussion of sentencing factors, identifying any mismatch between community views and sentencing practice has a dual purpose: first, to provide part of the evidence base for debate and law reform proposals and secondly, to alert the judiciary of the need to clearly explain why certain factors are treated as they are.

- **Jurors are generally not averse to factors of personal mitigation even though they give them less weight than judges.**

The comparison of the listed aggravating and mitigating factors did not reveal any gross mismatch between judges and jurors with roughly similar proportions judges and jurors giving a lot of weight to the aggravating factors and a majority of judges and jurors giving at least some weight to each of the listed mitigating factors. Even though jurors gave the mitigating factors less weight than judges did, they were not averse to giving weight to factors of personal mitigation, suggesting that this subset of the general public embraced an individualised approach to sentencing. These findings are another corrective to the generally punitive response of the public in opinion polls. When confronted with the offender in person and, in many cases, with the offender's family, they tend to support mitigating factors to a greater extent than their responses to general questions about leniency and severity would suggest.

The findings in relation to mental disorder and intellectual disability, two of the 'ambiguous sentencing factors', contrast strikingly with the findings in relation to other mitigating factors. Here there was a clear divergence between judicial and juror views. Rather than a majority of jurors endorsing these conditions as mitigating, only a minority did: 19% in the case of mental disorder compared with 83% of judges. In many cases this difference was because jurors did not recognise diagnoses such as severe depression or PTSD as a 'mental disorder', a finding which has worrying implications in relation to mental health literacy. It is also concerning that jurors seemed to be reluctant to accept impaired ability to exercise judgement as a basis for mitigation and to demand a stronger causal link between the mental or cognitive disorder and the offence. Improving public understanding of mental and cognitive disorders is something that needs to be addressed at a community level.

- **Impact mitigation and the subjective experience of punishment**

A consistent finding across a number of mitigating factors is the tendency for many jurors to be unpersuaded that a factor is mitigating if it makes imprisonment harder to bear. Judicial sentencing practice treats a number of conditions or factors as mitigating on this basis – old age, physical illness, mental disorder, intellectual disability, and the effect of family hardship on the offender. This lack of support for impact mitigation emerged in the interviews as one of the reasons why jurors gave less weight to each of these mitigating factors.

From a normative perspective, it is preferable to justify giving mitigatory weight to factors like old age and physical illness in terms of differences in experienced prison severity (the principle of equal impact) rather than mercy because of mercy's attendant potential for inconsistency and discriminatory application. *Verdins* Principles 5 and 6 can be justified by this principle. Given the principled foundation for impact mitigation in the case of mental and cognitive disorders, old age and illness, it is not suggested that the fact that it does not seem to resonate with some jurors is a reason to abandon it.⁴² In these instances the response to the lack of alignment between judicial and lay views is to suggest that judges should be alert to its lack of appeal and should attempt to explain it with greater clarity and persuasion. In some cases in the study the sentencing judge did not spell out *Verdins* Principle 5 but merely note that it applied.

⁴² Not every characteristic or condition should mitigate on this basis. White collar offenders should not be able to rely upon the fact that they may experience imprisonment more harshly than a recidivist accustomed to the pain of imprisonment. And a drug addict is unlikely to benefit from the principle, although at least during a period of withdrawal, imprisonment would be more painful than is generally the case.

The difference between the rationale that judges and jurors have for making family hardship mitigating has been pointed out. This is a finding that is relevant to the debate about family hardship as a mitigating factor.⁴³ While judges have resisted taking family hardship into account unless the circumstances are exceptional, the analysis of sentencing remarks in this study indicated that Victorian judges tend to give it at least ‘a little weight’ in mitigation in unexceptional cases on the basis that imprisonment is made more onerous for the offender by reason of knowledge of the family hardship. This and impact mitigation more generally raise interesting normative arguments about the theoretical basis for mitigation and the extent to which the subjective experience of punishment should be taken into account. Legal scholars are divided about impact mitigation. One view is that the subjective experience of imprisonment matters in the assessment of punishment severity.⁴⁴ A contrary view is that impact mitigation is objectionable because it strikes at the heart of proportionality.⁴⁵

In the case of family hardship, it has been argued that rather than disrupting the proportionality principle by allowing family impact to be mitigating, a preferable approach would be to focus on reducing the impact on families by providing more support to maintain family contact during the period of imprisonment.⁴⁶ However, in support of the Australian Law Reform Commission’s view that family hardship should be a relevant factor even if not ‘exceptional’, it could be argued that reducing hardship to dependent children is a desirable social consideration and a respectable rationale for a mitigating factor when sentencing an offender who is the primary carer of dependent children. It is also consistent with the *Convention on the Rights of the Child*, art 3.1, which makes the best interests of the child the primary consideration in actions concerning children by courts of law.⁴⁷ Accepting hardship to dependents even if not exceptional is a better match with jurors’ rationale for treating family hardship as mitigating than judges’ reliance on the impact on the offender.

Delay is another factor with a justification for mitigation that lies outside offence seriousness and relates to the subjective experience of punishment. The fairness limb for treating delay as mitigating when it causes anxiety and significant stress posits that this is itself a punishment which fairness dictates should reduce the penalty imposed by the court. This is another factor where the relevance of a mitigating factor may not be immediately apparent to a lay audience and it would benefit from a clear explanation by sentencers. We found that only rarely did judges take the step of explaining why it is that delay causing anxiety and stress to the offender should attract a sentencing discount.

- **The implications of misalignment of judges and juror’s response to substance abuse**

⁴³ See Australian Law Reform Commission, *Same Crime, Same Time*, Report No 103 (2006), 189-190; Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (5th ed, Lawbook Co, 2017) 597-604.

⁴⁴ See for example, Adam Kolber, ‘The Subjective Experience of Punishment’ (2009) 109 *Columbia Law Review* 182.

⁴⁵ Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (3rd ed, Oxford University Press, 2012) 302-304.

⁴⁶ Easton and Piper, n 45.

⁴⁷ See Tamara Walsh and Heather Douglas, ‘Sentencing Parents: The Consideration of Dependent Children’ (2016) 37 *Adelaide Law Review* 135; Hayli Millar and Yvon Dandurand, ‘The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities’ (2018) 29(2) *Criminal Law Forum* 227.

In cases where the offender was intoxicated, 52% of jurors said intoxication was aggravating compared with 14% of judges. The misalignment between judges' and jurors' views provides relevant material for ongoing debates about the relevance of this issue to sentence. The choice to consume alcohol or drugs and the increased risk of offending were put forward by interviewed jurors to justify treating intoxication as aggravating. However, there are principled arguments against treating intoxication as aggravating in cases of crimes of violence including that it implies that intoxicated violence is objectively more serious than sober and deliberately inflicted violence. For this reason it makes sense to leave this mismatch alone, leaving it to sentencers to explain why substance abuse is or is not an aggravating factor assisted by improved appellate guidance.

- **Should we take a broader view of breach of trust?**

In finding breach of trust aggravating, jurors intuitively took a broader view of breach of trust than the law, which limits a breach of trust to a situation where the offender has a particular relationship to the victim equivalent to a 'position of trust'. Merely because the victim has placed trust in the offender in a social context is not enough. Breach of trust was found to be aggravating by jurors in a date rape situation; where the victim and the offender were staying at a friend's place; and where the victim was the offender's estranged partner. It is worth debating, or at least clarifying, whether a breach of trust should extend to violence against a former partner and to a date rape situation.

- **Other insights into first instance sentencing practice**

The primary purpose of soliciting judges' responses to the relevance of sentencing factors and analysing sentencing remarks to determine the factors judges relied upon was to provide data for a comparison with jurors' responses. However, the results also provided insights into first-instance sentencing practice which complement doctrinal analysis of appellate guidance. There appears to be little in the way of recent Australian empirical research analysing how sentencing factors are dealt with in practice at first instance.⁴⁸

Some of these insights have already been discussed, such as the finding that in the cases in which mental or cognitive impairment was mitigating, judges almost invariably relied upon the *Verdins* principles as the basis for mitigation and that the fifth and sixth principles were the most commonly engaged – a finding which has implications for the discussion on impact mitigation.

The findings in relation to delay deserve further comment. First, the prevalence of this factor highlights the endemic problem of delay in the criminal justice system. The fact that courts perceive the need to discount sentences for delay so frequently (for 46% of the offenders in our study) has the potential to undermine public confidence in the criminal justice system. Secondly, it is suggested that appellate guidance should be more explicit about sentencing judges' reasons in relation to delay by requiring an indication of which parts of the period

⁴⁸ Exceptions are a study of the sentencing factors in 178 aggravated burglary cases in Victoria: Sentencing Advisory Council Victoria, *Aggravated Burglary: Current Sentencing Practice* (2011) and a small study of 37 cases heard in the District and Supreme Courts of South Australia: Nina Butrus, 'Judicial Sentencing Considerations in Cases of Violence versus Sexual Offences' (2018) *Psychiatry, Psychology & Law* (Advanced access publication).

between commission of the offence and sentence are relevant; which limb of delay is relevant (fairness or rehabilitation); and because delay is unrelated to offence seriousness, explaining the law's reasons for accepting anxiety and stress as a mitigating factor. In doing so a victim sensitive approach should be taken in cases of delayed complaint in particular.⁴⁹

The analysis of how judges dealt with substance abuse as a sentencing factor is revealing because it tends to support the criticism by some commentators that appellate guidance on the relevance of substance abuse is marked by 'a high degree of uncertainty'.⁵⁰ A recent systematic analysis of five years of Australian appellate sentencing decisions on intoxication has revealed a number of problems with appellate guidance.⁵¹ From the public's perspective, concern with drunken street violence has led to demands that intoxication be a mandatory aggravating factor in such cases.⁵²

We found that the sentencing remarks indicated that drug addiction and intoxication were mostly neutral facts and only occasionally aggravating or mitigating and that when found to be relevant, the cases generally conformed with appellate guidance. However, examples, such as a case of marital rape where intoxication was aggravating and the fact that two of the fifteen judges responded that in general intoxication was aggravating suggests that a systematic review of a much larger sample of first instance decisions is warranted to determine if the existing guidance leads to inconsistency in application.

You Be the Judge – No Thanks!⁵³

Whether or not juries should have a greater role in sentencing has been proposed and debated a number of times since it was raised by Chief Justice Spigelman in 2005. More recently, the Victorian Labor Party, prior to being elected to office in 2014, promised to introduce jury sentencing recommendations for serious indictable offences in order to reflect community expectations of sentencing practice. For this reason, it was decided to include questions in relation to a jury sentencing role in the Victorian Study.

After the questions relating to the juror's preferred sentence and the most important purpose of that sentence in the Stage 1 Survey, jurors were given a four-part question about a jury sentencing role. The question was phrased:

We are interested in finding out whether you think that juries should have a role in sentencing. In your opinion, should any of the following views of jurors be taken into consideration at sentencing?

1. A recommendation as to the type and length/amount of sentence (e.g. 3 years imprisonment)
2. A recommendation as to the range for the length/amount of sentence (e.g. 2 to 3 years' imprisonment)
3. Factors which jurors believe the judge should consider in sentencing

⁴⁹ This is elaborated upon in the delay article, see n 41.

⁵⁰ Bagaric et al, n 43, 390.

⁵¹ Luke McNamara et al, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43 *Monash Law Review* 148.

⁵² By the Thomas Kelly Youth Foundation, see New South Wales Sentencing Council, *Sentencing Alcohol and Drug-fuelled Violence* (2015) 3.

⁵³ See Arie Freiberg, Kate Warner, Caroline Spiranovic and Julia Davis, 'You Be The Judge: No Thanks!' (2018) *Alternative Law Journal* (in press)

4. Other – If other, please specify

The Stage 4 follow-up survey was sent to Stage 2 jurors six months after the completion of the Stage 2 survey. It repeated the same four-part jury role question which was asked in the Stage 1 survey. The quantitative results from the Stage 1 and Stage 4 Surveys showed that a majority of jurors supported a role in relation to recommending factors that the judge should consider in sentencing but not in recommending the type and length of sentence or the range.

It is significant that when asked to discuss their responses in the interview, jurors were more likely to balk at having any sentencing role at all. The most common reason for opposing a role included lack of experience or expertise and other reasons included the difficulty of the task; the risk of inconsistency and unfair outcomes and the risk of jurors being too emotionally involved in the outcome.

Are judges out of touch?

Claims that judges are out of touch with what ordinary people think is a claim frequently made in the context of demands for harsher sentences. It causes concern to judges ‘not just for the sake of frail judicial ego’ but because propagating such reports has an impact on confidence in the criminal justice system.⁵⁴ Whether judges are out of touch is sometimes asked in surveys. It was included in a number of sweeps of the British Crime Survey with up to 80% responding that judges were out of touch with what ordinary people think.⁵⁵ A 2009 Australia-wide survey of public confidence in sentencing asked respondents if they agreed with the statement ‘Judges are in touch with what ordinary people think’ – 58% disagreed with the statement.⁵⁶

The same or a similar question was asked in each of the jury studies. In the Victorian study, rather than a majority disagreeing with the statement, only 25% did so in the Stage 1 survey. Similarly, the Tasmanian study found that only 29% of jurors responded that judges were out of touch at Stage 1, and even fewer did so at Stage 2 (just 18%). In the Tasmanian study the analysis of the interviews on this issue revealed some interesting findings.⁵⁷ First, that even if some jurors perceived judges in general as being somewhat out of touch, this did not necessarily apply to the trial judge in their case – they were unwilling to label their own judge in the same way. Secondly, the comments of some jurors revealed that being ‘out of touch’ was not necessarily a criticism – they did not want the judge to be in touch with uninformed and punitive public views.

Another survey response by jurors which provides a positive evaluation of judges is the fact that 75% of respondents in the Victorian Study agreed that the individual judge is the best person to choose an appropriate sentence for each case. This contrasts with 43% of respondents agreeing with this statement in the Australia-wide sentencing survey.

CONCLUDING COMMENTS

⁵⁴ TF Bathurst, ‘Community Participation in Criminal Justice’ (2012) *Law Society Journal* (March issue) 55, 56.

⁵⁵ C Mirrlees-Black, *Confidence in the Criminal Justice System: Findings from the 2000 British Crime Survey*, Home Office, Research Findings No 137, (2001) London.

⁵⁶ Mackenzie at al, n 15, 52.

⁵⁷ Kate Warner et al, n 26.

Together the responses to the question about the juror's sentencing choice, the appropriateness of the judge's sentence, aggravating and mitigating factors, and a jury role in sentencing, all support the conclusion that jurors, as informed members of the public, are not clamouring for heavier sentences and that they can support individual sentencing decisions, personal mitigation, sentencing discretion and the judge as the most appropriate person to pass sentence but at the same time hold the view that sentences for crimes of violence and sexual offences are too lenient. General questions about sentencing severity/leniency seem to tap into surface feelings rather than informed and thoughtful judgements. As Juror 522 indicated when explaining her apparently contradictory responses:

I do feel everything is a bit lenient these days, society is out of control.

Comparing the views of judges and jurors in relation to the purposes of punishment and sentencing factors revealed some areas where there was a mismatch between judicial and juror views suggesting that this is likely to indicate a misalignment between judicial sentencing practice and lay opinion.

Results which could contribute to sentencing debates include the anchoring points for child sexual assault; jurors' preference for expressive purposes of punishment over general deterrence; the scope of breach of trust as an aggravating factor; and the relevance of family hardship and effects of the sentence on dependent children.

The mismatch between judges and jurors with respect to impact mitigation in particular suggests that this is an area which would benefit from better explanation by sentencing judges in their remarks. And the analysis of sentencing remarks indicated that some areas, such as substance abuse would also benefit for clearer appellate guidance.

Thank you.

