

Mandatory sentencing? Use [with] discretion

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Abstract

When asked about sentencing discretion and mandatory sentences, jurors participating in the Victorian Jury Sentencing Study expressed strong support for sentencing discretion and weak support for mandatory sentences despite a belief by jurors that, in general, sentences are too lenient. This strengthens the argument that polls that pose a general question about mandatory sentences or sentencing severity divorced from the context of a specific case are an inadequate and misleading measure of public opinion.

Keywords

Public opinion, mandatory sentences, sentencing discretion.

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Public opinion is often cited as the primary reason for the introduction of mandatory sentencing schemes¹ and for the retention of mandatory sentences of life imprisonment for murder in jurisdictions that have retained it.² However, previous research has shown that the views expressed by the public on sentencing issues are malleable and influenced by the type of questions asked and the contextual information provided. Roberts' review of the international research revealed that support for mandatory sentencing is highest when gauged with a general question.³ However, when the public are provided with illustrative cases or are reminded that under mandatory sentencing all offenders guilty of a particular offence will be given the same sentence regardless of the circumstances of the offence or their individual circumstances, the public are largely in favour of sentences being determined on a case-by-case basis.⁴ In addition, research has revealed strong public attachment to judicial discretion, even if people feel that sentencing 'in general' is too lenient.⁵

The resurgence of mandatory sentencing regimes across Australia in the last decade has invariably been justified as satisfying the public demand for harsher sentences and improving public confidence in the courts.⁶ If elected in November 2018, the Victorian Liberal

¹ Karen Gelb, 'Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentencing' (Sentencing Advisory Council, Victoria, 2006) 21; Adrian Hoel and Karen Gelb, 'Sentencing Matters: Mandatory Sentencing' (Sentencing Advisory Council Victoria, 2008.) <<http://www.sentencingcouncil.vic.gov.au/publications/mandatory-sentencing-research-paper>>.

² Barry Mitchell and Julian Roberts, 'Sentencing for Murder: Exploring Public Knowledge and Public Opinion in England and Wales' (2012) 52(1) *British Journal of Criminology* 141, 142.

³ Julian V Roberts, 'Public Opinion and Mandatory Sentencing: A Review of the International Findings' (2003) 30(4) *Criminal Justice and Behaviour* 483.

⁴ Ibid.

⁵ Mitchell and Roberts, above n 2, 143.

⁶ A comprehensive list of mandatory penalties as at September 2017 is given in Sentencing Advisory Council Tasmania, *Mandatory Sentencing for Serious Sex Offences Against Children*, Final Report No 7 (September 2016) 85–96.

opposition has promised to introduce mandatory minimum sentences for repeat offenders who have a previous conviction for one of eleven violent offences including rape, armed robbery and aggravated burglary.⁷ It has been claimed that introducing mandatory minimum sentences is a response to community views and to listening to people on the streets rather than academics, bureaucrats and judges.⁸

There is a growing body of Australian research on public opinion and sentencing, but peer reviewed research on the public reaction to mandatory sentencing is both limited and predates the recent rash of mandatory sentences. This article aims to help fill that gap using the views of Victorian jurors. Jurors provide a particularly valuable sub-category of public opinion because they have the advantage of seeing an offender as a real person and they are more invested in the sentencing outcome than members of the public at large.

The article begins with an overview of what is meant by mandatory sentencing. Previous public opinion research on mandatory sentences is then briefly summarised. This is followed with a description of the Victorian Jury Sentencing Study, its research method and previously reported findings from the study that provide the background and context for jurors' views in relation to judicial discretion and mandatory sentencing. These results are then discussed and their implications explored.

Mandatory penalties: a continuum

Sentencing discretion is a matter of degree ranging from broad discretion at one end of the spectrum to fixed penalties at the other and structured discretion in-between. At the fixed penalty end there are mandatory penalties, the most rigid of which is a **fixed penalty**. The best known fixed mandatory penalty is life imprisonment for murder – the sentence for murder in South Australia, Queensland and the Northern Territory and in New South Wales if the victim is a police officer. A **mandatory minimum sentence** is created when Parliament specifies the minimum type of sentence⁹ or more commonly, the type and length of sentence that courts *must* impose for a particular offence or offences or for a particular offence if certain conditions are met. A Victorian example is the mandatory minimum term of 3 months imprisonment for causing fire in a country area in extreme weather conditions or 12 months if there is an intent to cause damage.¹⁰ And a recent example is the mandatory minimum of 8 years imprisonment for assault causing death while intoxicated in New South Wales.¹¹ A more flexible variation of a mandatory minimum sentence is when a mandatory minimum is prescribed but there is an exception, such as if the court is satisfied that it is not appropriate or there are exceptional circumstances. A Victorian example is one punch manslaughter, which attracts imprisonment with a minimum non-parole period of 10 years unless a special

⁷ Matthew Guy MP, 'Taking back Our State: The Liberals Nationals Plan to Tackle Violent Re-offending' (Media release 11 April, 2017) <<https://www.matthewguy.com.au/media-release/guy-taking-back-our-state-the-liberal-nationals-plan-to-tackle-violent-re-offending/>>.

⁸ Matthew Guy MP, 'We Need Mandatory Sentencing, Not a Talkfest' (Media release 25 May 2017) <<https://www.matthewguy.com.au/media-release/guy-we-need-mandatory-sentencing-not-a-talkfest/>>.

⁹ For example, a conviction and a term of imprisonment is mandatory for a sexual offence in the Northern Territory: *Sentencing Act (NT)* s 78F.

¹⁰ *Country Fire Authority Act 1958* (Vic), ss 39A, 39C.

¹¹ *Crimes Act 1900* (NSW) s 25B.

reason exists.¹² The Victorian Sentencing Advisory Council refers to these sentences as ‘**statutory minimum sentences**’ to distinguish them from mandatory minimum sentences.¹³ However, in common parlance they are often referred to as mandatory sentences including by politicians promising or introducing the legislation and in the legislation itself.¹⁴

Previous Australian research

Australian research, while limited, echoes international research findings showing that support for mandatory sentences is divided and much depends on how the question is posed. First, poll results and surveys, now rather dated, have shown majority support for mandatory penalties in some surveys and opposition in others.¹⁵ Public support for mandatory sentencing in Australia was explored most comprehensively in Mackenzie’s national multi-phased multi-method study. In the first phase, comprising a nationally representative sample of 6005 Australians, 79% of respondents agreed there should be minimum terms of imprisonment to make sure that judges don’t give sentences that are too lenient and 59% agreed that laws should be written so that judges have less discretion in determining the final sentence (the mass opinion discretion questions).¹⁶ In phase two of the study, 815 respondents were presented with arguments for and against mandatory sentencing. While 91% of respondents chose the policy option of requiring judges to impose a prison sentence on a case-by-case basis rather than requiring judges to impose prison sentences with no choice, the responses to the repeated two mass opinion discretion questions from the phase one survey still elicited majority support for mandatory minimum terms of imprisonment (68%) and a significant

¹² *Sentencing Act 1991* (Vic), s 9C. Under *Sentencing Act 1991* (Vic), s 10AA, a court must impose a term of imprisonment and fix a non-parole period between 6 months and 5 years (depending on the offence and the age of the offender) for assaults on emergency workers, custodial officers and youth justice custodial workers on duty unless ‘special reasons’ exist under s 10A of the Act. In the light of a recent case in which a County Court judge on appeal from the Magistrates’ Court of Victoria imposed non-custodial sentences in lieu of sentences of imprisonment upon two women convicted of relevant offences against ambulance officers because of ‘special reasons’, sentences which were considered by some elements of the media as being far too lenient, the government announced that it intended to severely restrict the scope of the ‘special reasons’ provisions; see *DPP v Warren and Anor* [2018] VCC 689.

¹³ Sentencing Advisory Council, Victoria, *A Quick Guide to Sentencing*, 2018, 35; an earlier publication referred to this sentence as a ‘presumptive minimum’: Adrian Hoel and Karen Gelb, ‘Sentencing Matters: Mandatory Sentencing’ (Sentencing Advisory Council Victoria, 2008) 7.

¹⁴ For example: *Sentencing Act 1997* (Tas) s 16A(1) ‘mandatory imprisonment’ for causing serious injury to a police officer.

¹⁵ Sam Kelton, ‘Advertiser and Sunday Mail Survey Finds 85 per cent of Respondents Want Mandatory Jail for Fatal King Hit’ *Sunday Mail* (Adelaide), 23 February 2014 <<https://www.adelaidenow.com.au/news/south-australia/advertisercomau-survey-finds-85-per-cent-of-respondents-want-mandatory-jail-for-fatal-king-hit/news-story/c0e86dfcaead62d9482ef3b7fb6b38f>>; Mark Furler, ‘Australian Judges way too Soft, and Slow, on Crime;’ *Sunshine Coast Daily*, 2 August 2013 <<https://www.sunshinecoastdaily.com.au/news/1000-years-sounds-good-start-our-killers/1969314/>> reporting 85% supported mandatory sentencing; Tony Wright, ‘Most Oppose Jail Laws, Study Finds’ *The Age (online)* 28 March 2000 <Factiva> : showing a majority (53%) opposed mandatory imprisonment; NT Feather and Jacqueline Souter, ‘Reactions to Mandatory Sentences in Relation to the Ethnic Identity and Criminal History of the Offender’ (2002) 26(4) *Law and Human Behaviour* 417: showing a majority of South Australians favoured mandatory sentences for property offenders.

¹⁶ Geraldine Mackenzie, Caroline Spiranovic, Kate Warner, Nigel Stobbs, Karen Gelb, David Indermaur, Lynne Roberts, Rod Broadhurst and Thierry Bouhours, ‘Sentencing and Public Confidence: Results from a National Survey on Public Opinions towards Sentencing’ (2012) 45(1) *Australian and New Zealand Journal of Criminology* 45, 64 where the two mandatory sentence questions are set out. The responses to the questions are reported here with the permission of Geraldine Mackenzie, the chief investigator on the project.

proportion (43%) still agreed that laws should reduce judicial sentencing discretion.¹⁷ In phase three, of the four small group deliberative sessions tasked with reaching a consensus, one group reached a consensus in favour of mandatory sentences, one a consensus against, one in favour of prescribed minimums rather than mandatory minimums and one were unable to reach a consensus at all.¹⁸

Overall, the results show that public views about mandatory sentences are divided, malleable and inconsistent and that much depends on how the question is asked.

The Victorian Jury Sentencing Study: method and key findings.

Data for this study were obtained from jurors in 124 Victorian County Court trials in four stages from the end of 2013 to the end of 2015.

- In Stage 1, after the verdict and before the sentence, jurors were asked in the Stage 1 Survey to suggest the sentence they thought most appropriate. They were also asked general questions about the severity of sentencing for sex, violent, drug and property offences.
- At Stage 2, jurors were sent the judge's sentencing remarks, a sentencing booklet explaining sentencing options, sentencing principles, some sentencing data and other constraints on sentencing discretion. A second survey asked about the appropriateness of the judge's sentence, questions about aggravating and mitigating factors and questions about sentencing discretion detailed below.
- At Stage 3, 50 jurors were selected for semi-structured interviews which included questions in relation to sentencing discretion and mandatory penalties.
- Finally, in the Stage 4 follow-up survey, some of the questions from the earlier surveys were repeated.

Previously reported key findings were:¹⁹

- At Stage 1, 62% of jurors suggested a sentence which was more lenient than the judge.
- At Stage 2, 87% of jurors said that the judge's sentence was appropriate, including 55% who said it was 'very appropriate'.
- At Stage 2, many of the aggravating and mitigating factors listed in the survey were given weight by jurors.
- However, in the surveys at Stage 1 and 2, a majority of jurors said that in general, sentences for sex, violent and drugs offences were 'too lenient'. For sex and violent offences more than 70% said sentences were too lenient even though at least half had suggested a more lenient sentence than the judge.

¹⁷ Phase two of the study is described in 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, 157 and 165. The responses to the mandatory sentence items are reported here for the first time with the permission of Geraldine Mackenzie, the Chief Investigator on the project.

¹⁸ 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.

¹⁹ Kate Warner, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment & Society* 180.

- A majority of jurors gave at least some weight to each of the listed aggravating and mitigating factors which arose in the cases in the study.

Approach to exploring sentencing discretion and mandatory sentences

Questions relevant to sentencing discretion and mandatory sentences were included in Stage 2 and Stage 3 of the study. In the Stage 2 Survey, jurors were asked:

‘In general, how much discretion (i.e. leeway or flexibility) do you think judges should have in deciding upon an appropriate sentence?’

Possible responses were: ‘a great deal’, ‘a little’ or ‘none at all’.

They were next asked:

‘In your case, do you think the amount of discretion (i.e. lee way or flexibility) the judge had in deciding an appropriate sentence was not enough, about right or too much’.

If they responded ‘not enough’, they were asked what sentencing options should have been available to the judge. If the response was that the judge had ‘too much’ discretion, they were asked which of the following was preferred: ‘a mandatory minimum (a sentence below which the judge cannot go)’, ‘a starting point, baseline or guideline from which the judge can have some flexibility to move up or down depending on the circumstances’, or ‘a mandatory sentence (a specified sentence i.e. one which the judge must impose in all circumstances)’.

The interviews were used to further explore mandatory sentencing in two ways. First, jurors who said there was ‘too much’ discretion were asked to elaborate on their preference for more structured discretion. Secondly, irrespective of the answers to the discretion questions in Survey 2, all jurors were asked their views about ways of structuring discretion. The suggested phrasing for asking this question was:

‘It is sometimes suggested that sentences for particular offences should be more structured – for example, that they should be fixed or at least that there should be a fixed minimum sentence or perhaps a grid with the crime on one axis and prior convictions on another, so you could read off the sentence. Do you think this is a good idea or would you rather a more fluid approach?’

Results

Of the 420 responses to the general question about sentencing discretion, (namely **‘In general**, how much discretion [i.e. leeway or flexibility] do you think judges should have in deciding upon an appropriate sentence?’), 36.9% responded ‘a great deal’; 58.8% ‘a little’ and only 4.3% ‘none at all’. On its own, this indicates very little support for mandatory sentences in the sense of a fixed sentence for a particular offence with no discretion.

The question directed at the sentence for the offender convicted in the juror’s trial also showed little support for mandatory sentences. The amount of discretion the judge had in

imposing that sentence was said to be ‘about right’ by 83.2% of jurors (N=417), with 8.9% responding it was ‘too much’ and 7.9% ‘not enough’. The small number of jurors (N=60) who had said there was ‘too much’ discretion were asked which of three methods they would prefer to reduce the amount of sentencing discretion. A mandatory sentence (‘a specified sentence i.e. one which the judge must impose in all cases’) was the least popular choice with 13 responses or 21.7% of respondents, and ‘a starting point, baseline or guideline from which the judge can have some flexibility to move up or down’ was the most popular with 26 responses (43.3%). A mandatory minimum (‘a sentence below which the judge cannot go’) was selected by 21 or 35% of the jurors who thought the judge had too much discretion.

Those who responded the judge had ‘not enough’ discretion, were able to specify additional ‘sentencing options that should have been available to the judge’. The open-ended responses (N=35) included such things as more drug and other rehabilitative options and wholly suspended sentences. However, they also included responses suggesting that judges should have a broader discretion to make sentences harsher, for example: ‘I feel the median range is too low’ and ‘Should have been able to sentence the offender to a longer term due to the fact that he had re-offended and I believe will continue to offend’. And they also included responses which suggested a more lenient sentence should have been imposed.

Stage 3 interviews: ‘in your case’ views

Four of the fifty interviewed jurors had said that the judge had too much discretion in their case.²⁰ Two of these preferred a mandatory minimum sentence to reduce judicial discretion and two a ‘starting point, baseline or guideline’. However, one of the two jurors who favoured a ‘starting point, baseline or guideline’, Juror 236, indicated in the interview that, having re-read the sentencing booklet, his view had shifted. His response in Survey 2 that the judge had too much discretion ‘was probably an answer from an uneducated person’. He now thought that the judge was the best person to choose an appropriate sentence (having given a neutral response to this in Survey 2). Juror 833, the other juror who, despite nominating a ‘starting point, baseline or guideline’ in Survey 2 to reduce discretion, had ‘strongly’ agreed that the judge was the best person to choose an appropriate sentence. In the interview he indicated that while he supported consistency, he had confidence in judges adopting an individualised approach. He remarked: ‘They know a lot and I trust them ... they seem to be doing the right thing.’

Juror 113 said he supported mandatory minimum sentences because he was thinking of media reports of offenders who had ‘got off scot-free’. However, he did not support a US-style grid, which was ‘too simplistic’. Only Juror 184, who was in favour of mandatory minimum sentences, also supported a grid and he did so on the grounds he thought it would be an effective deterrent.

Juror 113 and Juror 184 were the only jurors of the fifty interviewed who supported a mandatory sentencing scheme. Reasons given by jurors for opposing restricting judicial discretion in this way were that it was too rigid or inflexible; would not account for mitigating factors; it would not work because every case is different; it would lead to injustice (two jurors cited Northern Territory examples); and the view that sentencing needs

²⁰ This was a similar proportion of the interviewees with this response in the Stage 2 responses as a whole.

‘a human element’. Two jurors expressed scepticism about politicians’ motives for introducing mandatory sentences. Juror 434 said,

‘I’m suspicious of politicians’ motives ... I don’t think that they necessarily believe [they work] but they think it might be a popular thing to say.’

There was some support for a grid as ‘a starting point only’ or ‘a guide’, to give ‘a sort of ball-park’ indication. Juror 477 said that as an engineer he was attracted to precision but at the same time saw the need for some flexibility. Others, including a production engineer, an optometrist, and a human resources expert, drew on their occupational experience of the need for discretion in decision-making in endorsing its necessity in sentencing decisions.

Stage 3 interviews: ‘in general’ views

As discussed above, there were a few jurors 18/420 or 4.3% whose response was ‘none at all’ to the general question about how much discretion a judge should have in deciding an appropriate sentence. We interviewed two jurors who gave this response. Both resiled from this view as a general statement. Juror 522 said she favoured wide sentencing discretion but not for violent offences, which reflected her underlying concern that sentences in general were too lenient. She said ‘I do feel everything is a bit lenient these days, society is out of control’. When Juror 111 was asked how he reconciled agreeing that ‘the individual judge is the best person to choose an appropriate sentence for each case’ with his response that in general judges should have no discretion, he said perhaps he should change his mind about mandatory sentences and reserve them for assaults. He added,

‘Yeah, all the fighting and bleeding, ... half of them only go to court and get a smack on the wrist when they’re caught in a fight or get fined a hundred dollars or two hundred dollars. That’s nothing for the kids of today.’

Discussion and concluding comments

Jurors from the Victorian Jury Sentencing Study indicated strong support for sentencing discretion, with 36.9% responding judges should have ‘a great deal’ of sentencing discretion and only 4.3% saying they should have ‘none at all’ (the majority, 59%, supporting ‘a little’ discretion). This is confirmed by the jurors’ reaction to the amount of sentencing discretion in their particular case – they were almost invariably content with the status quo, with 83% responding that the amount of discretion was ‘about right’. Less than 10% favoured restricting judicial discretion and when they did so ‘a starting point, baseline or guideline from which the judge could move up or down’ was more favoured than either a fixed mandatory sentence or a mandatory minimum sentence. As well as providing a richer understanding of jurors’ views of mandatory sentences, the interviews also confirmed support for judicial discretion with only two of 50 interviewed jurors supporting mandatory sentencing.

The interview results suggest that when jurors were given the opportunity to think more about their responses, even fewer than indicated by the quantitative survey findings would support reducing judicial discretion. Moreover, their interview responses suggest that supportive views on mandatory sentencing, where they occur, are linked with the perception

that sentences are too lenient and crime is out of control, and with media portrayals of offenders escaping punishment.

Qualitative analysis of the interview findings showed the concerns that underlie opposition to mandatory sentencing. These concerns about fairness and the inability to respond to individual differences of a case echo the concerns raised by participants in small group deliberations about mandatory sentences that were conducted as part of Mackenzie's national study of Australian attitudes towards sentencing.²¹ Scepticism that mandatory sentences are a political tactic to gain popularity was also apparent in both the jury study and the small group deliberations in the national study, where participants comments included describing mandatory sentencing as a 'political ploy' and 'pander[ing] to people's prejudices and fears ... to help them get elected'.²²

Particularly significant is the finding that even though a majority of jurors expressed the view that in general sentences for sex, violent and drug crime are too lenient,²³ they supported judges having discretion and almost invariably endorsed the amount of discretion the judge had in their particular case. This support for sentencing discretion is also consistent with their responses to the relevance of aggravating and mitigating factors – when the judge noted the existence of any of the listed aggravating and mitigating factors, a majority of jurors gave at least some weight to those factors. Together these results show that support for harsher sentences as a general view does not necessarily mean a lack of support for judicial discretion, a finding which mirrors international research.²⁴ The views of jurors, like those of other members of the public, are much more nuanced.

The questions in our survey were not directly comparable with the mass opinion style questions used in Mackenzie's national study which elicited majority support in the first two phases of the study for mandatory minimum sentences. This could explain the differences in responses between the national study and the jury study. Jurors were also less supportive of mandatory sentences than those who participated in the deliberative sessions in the Mackenzie study. Jurors had not been presented with arguments for and against mandatory sentences as had the participants in the deliberative sessions in the Mackenzie national study, but they had learned about sentencing and sentencing discretion through their involvement as jurors in a real case, deciding what the sentence should be in Stage 1 of the study and evaluating the judge's reasons and reading the sentencing booklet in Stage 2. So they were in a position to give a more informed lay view about sentencing discretion and mandatory sentencing than other members of the public.

Previous research has shown that simple and generalised questions in polls and representative surveys may elicit support for mandatory sentences but more informed, contextual and considered lay views are against it. Results from the Victorian Jury Sentencing Study strongly support the latter part of this statement. The important message is that members of the public can simultaneously hold the view that in general sentences are too lenient and the view that an individualised approach to sentencing is preferable to mandatory sentencing. The former view does not imply support for mandatory sentences.

²¹ Stobbs, Mackenzie and Gelb, above n 18, 231.

²² Ibid.

²³ Warner, Davis, Spiranovic, Cockburn and Freiberg, above n 19.

²⁴ Roberts and Mitchell, above n 2, 143.

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