
Why sentence? Comparing the views of jurors, judges and the legislature on the purposes of sentencing in Victoria, Australia

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Abstract

In recent times, parliaments have introduced legislation directing judges to take defined purposes into account when sentencing. At the same time, judges and politicians also acknowledge that sentencing should vindicate the values of the community. This article compares the views on the purposes of sentencing of three major participants in the criminal justice system: legislators who pass sentencing statutes, judges who impose and justify sentences, and jurors who represent the community. A total of 987 Australian jurors in the Victorian Jury Sentencing Study (2013–2015) were asked to

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sentence the offender in their trial and to choose the purpose that best justified the sentence. The judges' sentencing remarks were coded and the results were compared with the jurors' surveys. The research shows that, in this jurisdiction, the views of the judges, the jurors and the legislators are not always well aligned. Judges relied on general deterrence much more than jurors and jurors selected incapacitation as the primary purpose in only about a fifth of 'serious offender' cases where legislators have prescribed community protection be the principal purpose.

Keywords: Public opinion, sentencing purposes, judges, juries

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Modern penal policy recognises that sentencing is no longer just a matter between the state and the offender but is now something that legitimately concerns both individual victims and the wider community as well (Freiberg, 2003). Taking community views on sentencing into account is generally justified on the grounds that courts are part of the society that they serve; and the Victorian Court of Appeal has recently emphasised the need for courts to 'vindicate the properly informed values of the community' when they exercise the power to punish (*WCB v The Queen*, 2010: [34]). It has also been argued that responding to community views will enhance the legitimacy of the law and promote compliance and co-operation with criminal justice agencies. While the extent to which perceptions of legitimacy are likely to have demonstrable consequences is unclear, it

can be conceded that some minimal level of confidence in sentencing is necessary and that one way of promoting it is to ensure some concordance between community views and sentencing practices (Roberts, 2014: 233). Recognising community views can also address the democratic deficit that arises if there is any great disparity between parliaments' or courts' actions and the attitudes, opinions or feelings of the public.

If, as many now accept, sentencing is not simply a punitive process but is also a communicative process, it follows that some insight into public views about sentencing purposes is needed. Roberts has suggested that statutory sentencing purposes might be determined in part to reflect relative levels of community support. For example, if the public is adamantly opposed to retributivism, it would make little sense to privilege this perspective (2014: 229). Likewise, if the public is more focused on the expressive purposes of just punishment and denunciation, there is little point in prioritising instrumental reasons like community protection or general deterrence if the purported reason for doing so is to satisfy community views.

Several studies have explored public preferences for sentencing purposes in Canada (Roberts et al., 2007), England and Wales (Roberts et al., 2009), New Zealand (Paulin et al., 2003) and Australia (Spiranovic et al., 2012). An earlier Victorian study analysed the views of a random sample of 300 Victorians about the purposes of sentencing and found that their 'complex and nuanced' views varied according to the different type of

offender and offence; the respondents, like judicial officers, adopted an individualised approach to sentencing and tailored the principal purpose to the circumstances of the specific case (Gelb 2011:1). This article builds on the earlier studies and contributes to the goal of ascertaining community views by comparing the views of 987 jurors who participated in the Victorian Jury Sentencing Study (2013–2015) with those of the judges who sentenced the offenders in the County Court. Although the views of jurors who have deliberated on a verdict in a criminal trial are not necessarily the same as the raw views of a representative sample of the general public, using jurors has the advantage of reflecting the intuitive response of community members who have been informed by the first-hand experience of the trial.

Statutory Purposes in Victoria

Philosophers and penal theorists have long debated the proper purpose of punishment and there has been on-going uncertainty about which theory of punishment should underpin the sentencing system. The classic contest is between retributivism and utilitarianism with retributivism replacing utilitarianism as the most popular contemporary theory of punishment. While philosophers and penal theorists remain divided over the primary purpose of punishment, legislators have preferred mostly to list the sentencing purposes without specifying which should prevail or identifying a method for resolving conflicts between different purposes in individual cases.

Statements of legislative purposes are found in Canada, England and Wales, New Zealand and Australia (New South Wales Law Reform Commission, 2013: 14–16). In Victoria, the *Sentencing Act 1991* s 5(1) provides that the only purposes for which sentences may be imposed are:

- (a) to punish in a manner and to an extent which is just in all of the circumstances;
- (b) to deter the offender or other persons from committing offences of the same or similar character;
- (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated;
- (d) to manifest the denunciation by the court of the type of conduct with which the offender is engaged;
- (e) to protect the community from the offender, or
- (f) a combination of two or more purposes.

The statutory statement suggests that no particular rationale takes priority. However, in some circumstances, the protection of the community is elevated above other purposes. For example, s 6D of the *Sentencing Act 1991* (Victoria) provides that a court *must* consider the protection of the community from the offender as the principal purpose when sentencing certain ‘serious offenders’ and *may* impose a sentence longer than that which is proportionate to the gravity of the offence. ‘Serious offenders’, in the case of

sexual offenders, are those who have been convicted and sentenced to imprisonment for two or more specified sexual offences in previous or current trials or hearings; and, in the case of violent offenders, are those convicted of one or more specified violent offences.

The Victorian Jury Sentencing Study

- This article reports on sentencing purposes, just one aspect of the Victorian Jury Sentencing Study, which explored jurors' views on sentencing and identified differences between judges and jurors on sentence severity (Warner et al. 2017a), aggravating and mitigating factors, and differences between answers to general questions about sentencing levels and responses to specific cases. In Victoria, jury service is compulsory, juries are randomly selected from the Victorian Electoral Roll, and restrictions on the availability of exemptions in recent years has meant that juries are roughly representative of the Victorian community in terms of age and occupation (Horan 2012:42-43). This article has two aims: the first focuses on jurors' preferences for the statutory sentencing purposes, and the second compares the views of jurors with those of the judges.
- The particular aims and research questions are:

1. To examine jurors' expressed preferences for the statutory sentencing purposes:
 - a) Which purposes do jurors prefer?

- b) Do jurors (who were unaware of the statutory requirements) intuitively prefer incapacitation in cases covered by the serious offender regime?
 - c) Does the type of offence affect the choice of sentencing purpose?
2. To compare juror preferences with those of judges.

The broader goal is to find out whether the approaches to sentencing purposes taken by the legislative and the judicial arms of government are aligned with the expressed views of jurors who have served as representatives of the community.

Method

The Victorian Jury Sentencing Study recruited jurors from 124 trials in the County Court in Victoria between May 2013 and July 2014 and yielded 987 respondents at the first of four stages. The principal offences were:

- Sex offences 38.7%
- Violent offences 32.3%
- Property offences 8.1%
- Drug offences 5.6%
- Other offences 15.3%

Most of the offences were serious offences: of the 124 trials, 90% attracted a custodial sentence (immediate imprisonment or a partial or wholly suspended sentence) for at least one offender. While this breakdown reveals that serious offences, particularly sex offences, are over-represented in our sample when compared with the range of offences seen in lower courts (Australian Bureau of Statistics 2015), this feature does provide the opportunity to see whether jurors naturally selected the purpose of incapacitation, which is mandated by the Victorian legislature in serious offender regime cases.

The Stage One survey was distributed after the guilty verdict. It first invited jurors to nominate an appropriate sentence for the offender and then asked them to identify ‘the single most important purpose’ that would be achieved by their sentence from this list:

1. To make sure the offender gets the punishment they deserve.
2. To teach the offender a lesson so they won’t do it again.
3. To discourage other people from offending by making an example of the offender.
4. To rehabilitate the offender so that they do not offend again.
5. To protect the community by keeping the offender off the streets.
6. To compensate the victim and/or the community.
7. To express the community’s disapproval of the offender’s behaviour.

This list uses accessible language to mirror the traditional purposes of sentence: retribution or desert; specific deterrence; general deterrence; rehabilitation;

incapacitation; restoration; and denunciation. It also reflects the list of permissible sentencing purposes in s 5(1) of the Victorian *Sentencing Act* (with the exception of compensation, which is not in the legislative list). Following Spiranovic et al. (2012, 295), who point out that asking respondents to rate the importance of every possible purpose typically fails to reveal which purpose is seen as the most important (because participants tend to rate every purpose as high in importance), Survey One asked participants to choose only the ‘single most important purpose’.

Survey One also included items assessing perceptions of leniency, punitiveness, confidence in sentencing, and demographic items. After the judge had sentenced the offender, jurors who participated in Stage Two were sent a second survey together with the judge’s sentencing remarks and an information booklet. The items in the Stage Two survey and the follow-up survey from Stage Four are not relevant to the findings reported in this article.

The judges’ sentencing remarks for trials in this study were analysed to determine the weight given to the sentencing purposes (Warner et al. 2017b) and this analysis allows a comparison of judges’ and jurors’ views from the same sample of trials. We found that judges usually referred to several purposes and that the degree of importance could generally be determined from the remarks. Mentioned purposes were coded (using N-Vivo) as very important, important, of some weight or of little weight — and where it

was possible to discern the single predominant purpose, this was also coded. Additional analysis of the judges' sentencing remarks was conducted for this article.

In Stage Three, respondents were selected for interview from those who were willing to participate. The selection of 50 interviewees aimed to obtain a spread of demographics and offence types. Older jurors and jurors from sex offence trials were somewhat over-represented in the interview cohort; however, the Stage One and Stage Three jurors were very similar with respect to education. The semi-structured interviews included a discussion of each juror's reasons for selecting the particular sentence, their reaction to the judge's sentence, and a discussion of the selected purpose of their chosen sentence.

The discussion was recorded, transcribed and analysed using N-Vivo.

Results

1. Juror preferences

a) Which purposes do jurors prefer?

Immediately after sentencing the offender, jurors were asked to select the single most important purpose that they thought the sentence would achieve. The breakdown of the 882 valid responses (22 or 2.2% failed to answer it, and 82 or 8.4% selected more than one purpose) is shown in Figure 1. Almost half of all respondents (48%) selected the expressive or communicative purposes of retribution or denunciation; and retribution

(29%) was the most popular choice. Consequentialist purposes (specific deterrence, general deterrence, rehabilitation, incapacitation and compensation) accounted for 52% of responses. Compensation aside, general deterrence was the least often endorsed as the most important purpose, with less than 10% selecting this as the most important. Compensation is omitted from further analyses given that so few respondents selected it and it is not one of the listed purposes in the legislation.

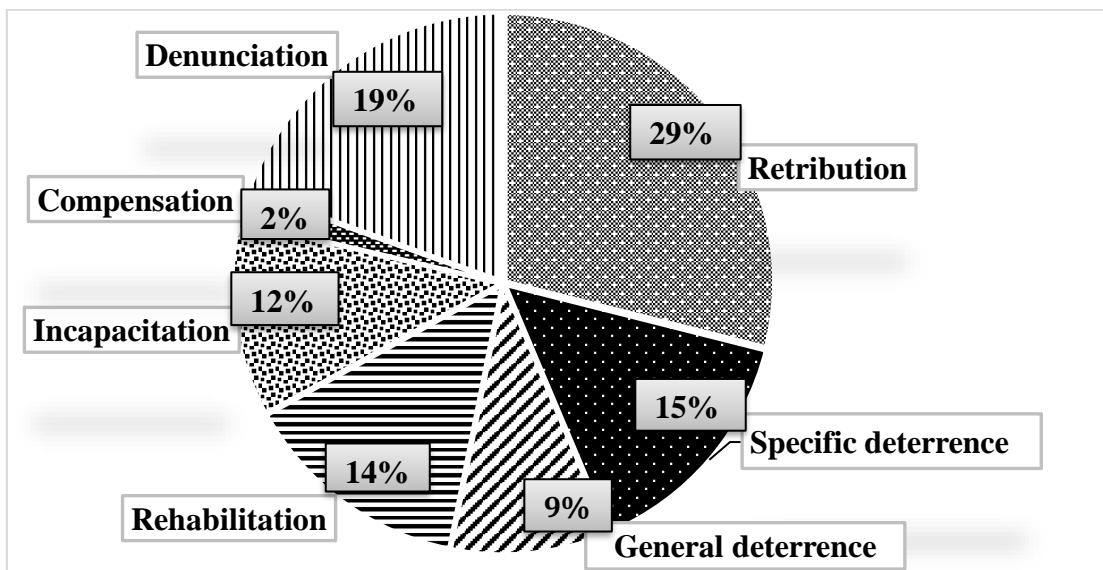


Figure 1. Jurors' (N=882) sentencing purpose preferences

Of the 82 jurors who did not comply with instructions and selected more than one purpose, most selected two or three purposes. As Figure 2 shows, retribution and denunciation were the most often endorsed purposes; and general deterrence the least often endorsed. However, incapacitation was included as a purpose by more than half of

these jurors and was the next most popular purpose after retribution and denunciation, displacing specific deterrence and rehabilitation

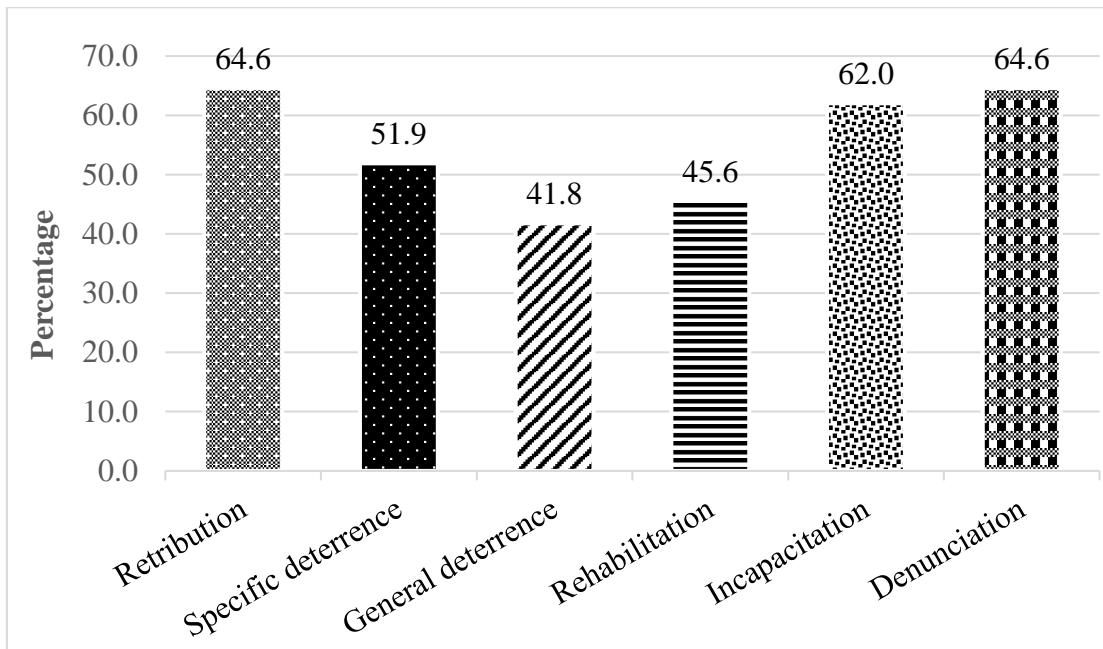


Figure 2. Frequency of endorsement of each purpose where jurors (N=82) selected more than one purpose

The purposes chosen by interviewed jurors reflected a similar pattern to the choices of Stage One jurors, although those choosing denunciation and general deterrence were over-represented. When asked to elaborate on their choice, many added another purpose. This was particularly evident for those choosing retribution; of the 11 jurors interviewed who had selected retribution, around half elaborated by adding another purpose. In some cases these were instrumental purposes: for example, Juror 229 added

that the sentence was needed to protect the child in a case of child sexual assault; and Juror 25 added that as well as matching the severity of the crime, the sentence was needed to deter others. Juror 599, who had nominated retribution as the single most important purpose also mentioned deterrence as well as the benefits of incapacitation.

The interviews also revealed that juror preferences were dominated by a desire to communicate censure, to construct a meaningful response to offending, or to send a message to the offender and society. This included cases when consequentialist purposes had been chosen. As Juror 108 explained in a case of child sexual assault: ‘There had to be a punishment, because if not what’s the message that sends?’ And three of the jurors who had selected general deterrence in drug cases spoke about letting others know of the seriousness of the offence, rather than focusing on the severity of the offence as a deterrent. The interviews suggested that the jurors’ choice of general deterrence was carefully considered and adopted only in selected cases.

b) Did jurors prioritise incapacitation in serious offender cases?

The sample included 24 cases that were caught by the serious offender regime for at least some of the counts, and 17 cases where the serious offender regime applied for at least half of the counts. These cases involved either ‘serious sex offenders’ or ‘serious violent offenders’. This meant that the judge was required to consider protection of the public from the offender as the principal purpose for these counts. We analysed jurors’

responses in the cases where the judge was required in at least half of the counts to prioritise incapacitation (n=126 jurors), to determine whether jurors (who were unaware of the statutory requirement), instinctively selected incapacitation as the most important purpose.

We found that jurors were twice as likely to choose incapacitation as the most important purpose in cases covered by the serious offender provisions compared with cases that did not attract the provisions (20.6% vs 10.5% of jurors). The magnitude of the association between the preference for incapacitation and these serious offender cases was small but practically significant.² For the serious offender cases, incapacitation was the second most popular purpose, with retribution remaining the first. However, while jurors were twice as likely to prioritise incapacitation in serious offender cases compared with other cases, they did so in only one fifth of the cases in which there was a legislative directive to prioritise protection of the public from the offender.

c) Did the type of offence affect the choice of purpose?

² The association between the preference for incapacitation and cases attracting serious offender provisions was statistically significant, χ^2 (1, N=869) = 10.51, $p = .001$ and met the minimum threshold for a “practically” significant effect using Ferguson’s (2009) suggested effect size interpretations for the social sciences, although the effect size was small, Odds ratio = 2.22. In this instance, the odds ratio instead of Cramer’s V was used as a measure of effect size as Cramer’s V may underestimate the magnitude of an association in situations where there is a small proportion of respondents in some cells (Sharpe, 2015).

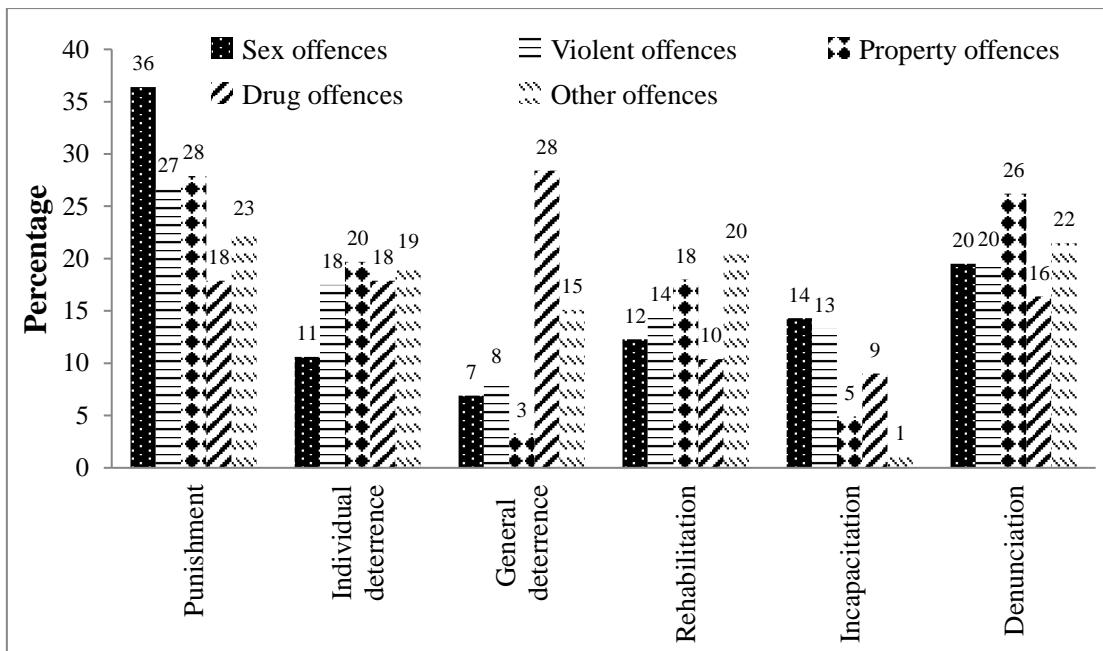
This section reports cross-tabulation analyses of the sentencing purpose preferences of jurors by offence type of the trial. If the offender was convicted of more than one offence, the offence type was classified under the most serious offence. Aggravated burglary was designated as an offence of violence rather than a property offence because all of the aggravated burglary cases included an assault.³

Figure 3 illustrates the frequency of endorsement of each sentencing purpose as most important for each type of offence. It shows that the pattern of responses was strikingly similar for each of the offence categories. With the exception of drug offences (where there was a clear preference for general deterrence), the preference for retribution and denunciation was repeated across all offence types. Juror preference for either retribution or denunciation was not meaningfully associated with offence type.⁴ In contrast, there was a meaningful association between offence type and preference for general deterrence; a higher proportion of jurors chose general deterrence in drug trials (28.4%) compared with other trials combined (8.1%).⁵

³ Aggravated Burglary (s 77 of the *Crimes Act 1958*) does not necessarily involve violence.

⁴ Although jurors in sex offence trials (55.9%) were more likely than jurors in other trials combined (45.3%) to choose either retribution or denunciation, and this association was statistically significant, $\chi^2(1, N=869) = 10.51, p = .001$, the magnitude of the association, Cramer's V = .11, was not at a level considered 'practically' significant (see Ferguson, 2009).

⁵ The association between offence type and preference for general deterrence was both statistically significant, $\chi^2(1, N=855) = 28.85, p < .001$, and practically meaningful with an odds ratio of 4.48 which by Ferguson's (2009) suggested standards is considered a large effect size. In this instance, the odds ratio instead of Cramer's V was used as a measure of effect size as Cramer's V may



Notes: ¹Juror numbers differed by offence type: Sex offences (N=349), violent offences (N=285), property offences (N=61), drug offences (N=67) and other offences (N=93)

Figure 3: Frequency of jurors (N=855) endorsing each purpose by offence type

Furthermore, there was a meaningful association between offence type and preference for incapacitation; jurors in sex and violent offence trials when combined (13.9%) were

underestimate the magnitude of an association in situations where there are a small proportion of respondents in some cells (see Sharpe, 2015).

more likely to endorse incapacitation than jurors in trials for other offences combined (4.5%).⁶

Analysis of the interviews supported the finding that in general there was not a meaningful association between the purpose of the sentence and offence type. It suggested that jurors tended to select the sentencing purposes on the basis of the individual facts of the case or on the basis of a belief in desert or accountability.

2. How do jurors' preferences compare with judges' preferences?

Judges were not asked to specify the single most important purpose of their sentence. However, we were able to analyse their sentencing remarks to determine the degree of importance given to the purposes mentioned. We found that judges usually mentioned between three to four purposes and, in a third of cases, it was possible to rank the single most important purpose. In the other cases, there was more than one very important or important purpose.

⁶ The association between offence type and preference for incapacitation was statistically significant, χ^2 (1, N=855) = 14.13, $p < .001$, and with an odds ratio of 3.40, the association was of moderate magnitude and 'practically' significant (see Ferguson, 2009). The odds ratio was again used as the measure of effects size for the same reasons cited above.

Table 1. Purposes as mentioned by judges as predominant or important (N=135)*

Purpose	Predominant (single)	Very important	Important	Total
Retribution	0	20	17	37
General deterrence	21	38	29	88
Specific deterrence	3	11	19	33
Rehabilitation	1	2	5	8
Denunciation	3	22	28	53
Incapacitation	17	9	7	33

* We received sentencing remarks for 122 of 124 trials in the study. There are 135 sentences because some trials had more than one offender and therefore more than one sentence. In all but eight sentences the judge mentioned at least one sentencing purpose.

Table 1 shows that general deterrence was most likely to be the predominant sentencing purpose for judges, and that it was also the purpose most likely to be very important and important. In contrast, as Figure 1 shows, general deterrence was the least likely purpose to be selected by jurors as the most important purpose. Figure 2 also shows that general deterrence was the least popular purpose for jurors who selected more than one

purpose. General deterrence was at the top of the list for judges but at the bottom for both groups of jurors. Whereas jurors were much more likely to rank retribution as the most important purpose, judges did not rely upon retribution as the predominant purpose in any case. Retribution was only the third most important purpose overall for judges.

There is also a contrast between the ranking given to incapacitation by judges and jurors. After general deterrence, incapacitation was the second most popular predominant purpose for judges; this is unsurprising because there was a statutory requirement to consider incapacitation as the principal purpose in all 17 of these cases. For jurors, however, it was only the fifth ranking purpose.

Denunciation was the second most important purpose for both judges and jurors. But for judges it was well behind general deterrence and it is only when combined with retribution that it came close to general deterrence in importance. Moreover, it was rarely the predominant purpose for judges.

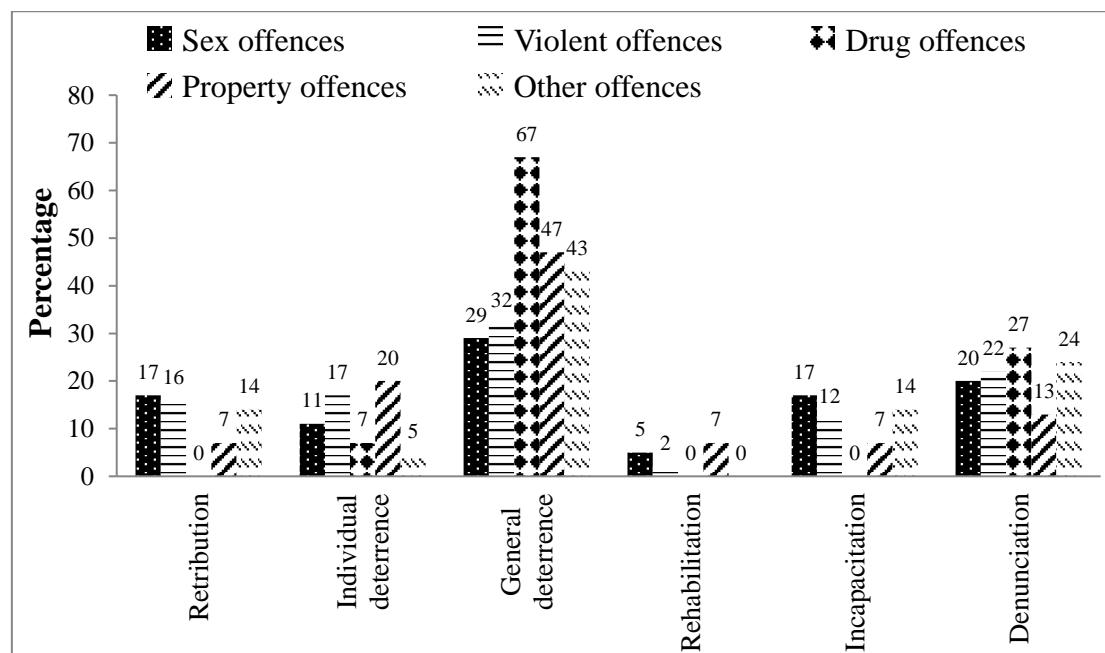
In interviews, some jurors criticised judges who relied on general deterrence. In sentencing a recidivist ice-fuelled armed robber, a judge had said there was a need to protect the public and to deter others from committing similar offences; but Juror 757 commented, ‘I don’t think it is going to deter much. I’m pretty sure that most research shows that deterrence is not effective for most crimes.’ And in another case of armed

robbery Juror 458 questioned the judge's emphasis on general deterrence saying: 'I am not sure of how much a deterrent it is ... people don't think about the consequences.'

Three jurors questioned the effectiveness of general deterrence by claiming the general public are not aware of the penalties. For example, Juror 173 said in an aggravated burglary/assault case that discouraging other people from offending 'would really only work if you put it on a billboard on Fed Square every morning.'

a) Do judges' preferences differ by offence type?

Building on Table 1, which details the judges' mentions of each purpose overall, Figure 4 illustrates the frequency of judges' mentions of each purpose (whether predominant, very important or important) by the type of offence committed.



Notes: ¹The number of judges' mentions of each purpose differed by offence type: Sex offences (n=99), violent offences (N=102), drugs (N=15), property (N=15), other offences (N=21).

Figure 4. Judges' mentions of important purposes by offence type (N=252 mentions of important purposes)

As was the case with jurors, it appears there were no marked differences in judges' mentions of retribution, individual deterrence, rehabilitation and denunciation across offence types. However, judges were more likely to mention general deterrence in each offence category, particularly in drug offence trials.

Discussion

Four major findings emerged:

1. Jurors had stronger preferences for the two expressive purposes of retribution and denunciation, but overall their preferences were almost evenly distributed between the expressive and consequentialist groupings;
2. Even in serious offender regime cases, most jurors did not prioritise incapacitation;
3. Offence type was not generally important to jurors' choice of purpose;

4. The judges' choices of purposes is not aligned with jurors' choices, particularly in relation to general deterrence.

1. Jurors had stronger preferences for the two expressive purposes

Our first research question aimed to discover which sentencing purpose was preferred by jurors; but the group could not easily be categorised as endorsing one purpose to the exclusion of others. Their preferences covered the six traditional sentencing purposes without a majority supporting any particular purpose. However, the two purposes with the highest rankings were the expressive purposes of retribution (29%) and denunciation (19%). The stronger preference for expressive purposes also emerged in the interviews. Individual consequentialist aims were less popular and, compensation aside (2%), general deterrence (9%) was the least popular aim. The overall distribution between the two traditional groupings of expressive or censuring purposes (retribution – or just punishment – and denunciation) and the consequentialist or instrumentalist goals (incapacitation, rehabilitation, compensation, general deterrence, and specific deterrence) was almost evenly spread, with 48% selecting the expressive purposes and 52% selecting the consequentialist purposes. This suggests that the Victorian Parliament's decision not to give priority to one particular sentencing purpose in general cases does accord with juror views.

Previous studies of community views of sentencing purposes have found that views depend upon the nature of the crime, the seriousness of the offence and the offender's age (Gelb 2011: 5; Hough et al., 2009: 15–16). Our study focused on cases in the County Court, which resulted from a plea of not guilty, and consequently, serious offences, particularly sex offences, are over-represented. It is likely that preferences for sentencing purposes would be different for offences heard in the lower courts, which deal with a different set of cases, including not only cases where offenders plead guilty, but also a larger proportion of young offenders, where rehabilitation is the primary purpose of sentencing (see: s 362(1) of the *Victorian Children, Youth and Families Act 2005*).

Studies exploring the public's choice of sentencing purposes have used a variety of approaches. Our approach forced respondents to choose the most important purpose for their case. Despite differences in approach, our finding that retribution was the most popular sentencing purpose accords with findings reported in other studies. In the Tasmanian jury study, 40.6% of jurors ranked 'punishing the offender' as the most important goal (Warner et al., 2010). In the Australian national public opinion survey 'giving them the punishment they deserve' was the most important purpose for repeat offenders (Spiranovic et al., 2012). 'Imposing a just sentence that reflects the seriousness of the crime' was also the most important aim in sentencing adult offenders in a survey from England and Wales (Roberts and Hough, 2005: 217). Retribution was

the most important purpose in sentencing adults in the National Opinion Survey on Crime and Justice in the United States (Flanagan and Longmire, 1996: 69). In a New Zealand survey, retribution was the most common aim for the serious heroin smuggling scenario (22.2%) and was an important aim across all scenarios (Paulin et al., 2003: 55).

General deterrence

The low support for general deterrence in the current study was also found in the Tasmanian jury study, with 9.2% ranking general deterrence first (Warner et al., 2010) and the Australian national public opinion study, where less than 8% selected this purpose in all of the scenarios (Spiranovic et al., 2012). Low support for general deterrence was also found in a Canadian study (Roberts et al., 2007: 86) and in the New Zealand study cited above (Paulin et al., 2003: 55, 61). These results are also consistent with Gelb's Victorian study, which found that 'general deterrence was the least likely to be nominated across the offender and offence types' and concluded not only that 'the criminological research evidence question[s] the effectiveness of deterrence, so too does this random sample of the Victorian community question the importance of deterrence as a purpose of sentencing for a range of offence and offender scenarios' (2011:21).

Denunciation

With 19% of jurors selecting denunciation as the single most important purpose, we found stronger support for denunciation among Victorian jurors than in the Tasmanian jury study where 10.6% ranked it first (Warner et al., 2010: 55). In the Tasmanian study, however, the question was answered at Stage Two, well after the verdict and after the juror had read the judge's sentencing remarks. Denunciation was rarely endorsed in many of the other studies of public preferences for purposes, including the Canadian study (Roberts et al., 2007), the study in England and Wales (Roberts and Hough, 2005) and the New Zealand study (Paulin et al., 2003:55). In the Australian national public opinion study, denunciation was not included as an option. Strong support for denunciation in our study can be explained by the fact that the question related to a real life trial and it was asked immediately after the respondent had convicted the offender when the desire to censure and condemn conduct is likely to be strongest.

Incapacitation

Given the high proportion of sex and violent offences in our study and the fact that approximately one sixth involved the serious offender regime, it is surprising that support for incapacitation was low (12%). However, this relatively low level of support for incapacitation as the primary purpose also accords with the Tasmanian jury study (Warner et al., 2010: 55) where just 6% of jurors ranked it first and in England and Wales where 5% did (Roberts and Hough, 2005: 217). In New Zealand it was the most

important in the aggravated burglary scenario but only 5% mentioned it as the most important aim for three or more scenarios (Paulin et al., 2003: 55, 61). In the Australian national public opinion sentencing survey, incapacitation was at the bottom of the list of purposes for first offenders and, while it was the second most popular choice for serious assault offenders with priors, it was still well behind retribution (Spiranovic et al., 2012: 297).

Rehabilitation

The low level of support for rehabilitation as the primary purpose in this study can be explained by the nature of the cases in the sample. All were relatively serious cases and all were pleas of not guilty, which suggests that the offender had not acknowledged their responsibility for the offence (a matter which could count against their prospects of rehabilitation). Moreover, the fact that we did not have any young offenders (offenders under the age of 18) in our study is significant because other studies have consistently found stronger support for rehabilitation in the case of young offenders (e.g., Spiranovic et al., 2012; Roberts and Hough, 2005).

2. Most jurors did not prioritise incapacitation in serious offender regime cases

Uninhibited by the statutory directive to consider protection of the public as the primary purpose of the sentence, jurors in serious offender regime cases chose this purpose more

often than in other cases, but in only one fifth (20.6%) of all cases covered by the serious offender regime. So, while jurors were twice as likely to select incapacitation as the primary purpose in these cases, it was still less popular than retribution, which was chosen by 34.9% of jurors. This suggests that the serious offender regime covers a broader range of serious violent and sexual offenders than those intuitively chosen by jurors and may go further than is needed to satisfy public anxiety about recidivist offenders.

We have also found that judges in this set of cases did not always acknowledge and refer to the fact that they were required to consider protection of the public as the primary purpose – and even when they did, judges merely gave lip service to this statutory provision (Warner et al. 2017b). This echoed similar findings in an earlier study of Victoria's protective sentencing laws (Richardson and Freiberg, 2004). Thus, not only do judges resist the statutory re-orientation of sentencing purposes in favour of protection of the public in the serious offender regime cases, but jurors also do not instinctively choose this purpose in most cases. Statutory provisions that prioritise incapacitation are generally seen as measures, which, irrespective of their effectiveness, are politically attractive because they give the appearance that tough action is being taken to deal with dangerous offenders. If the regime is intended to show that tough action is being taken to prevent crime, however, it may not necessarily be what

members of the public would require in individual cases. It is another reminder that the ubiquitous perception that the public is punitive should not be accepted at face value.

3. Offence type was not generally important to jurors' choice of purpose

Our results revealed that juror preferences for retribution and denunciation were not meaningfully associated with offence type when effect size was calculated. The only meaningful differences related to the preference for general deterrence in the case of drug offences (when it was the most popular purpose) and the tendency for increased reliance on incapacitation in the case of sex and violent offences (although in these cases it was still much less popular than retribution and denunciation). While the quantitative findings may have obscured differences between offence types, the interviews suggested that jurors' choice of sentencing purpose at Stage One was often strongly influenced by the facts of the case. This accords with the findings of Gelb's Victorian study, which also concluded that members of the public 'appreciate the complexities of sentencing for different types of offender and offence' (2011:1).

Other studies have found a stronger relationship between offence types and purpose preferences (Roberts et al. 2009); Paulin et al., 2003; and Spiranovic et al., 2012). This

is likely to be a result of the difference in method. The vignette method, with its stark differences between types of offence, may produce more artificial results than using jurors in real trials where there are a multitude of differences between the facts in each case. When jurors consider all the nuances (offender characteristics, offence details, etc) it means there is no overall effect of offence type on sentencing purpose. Jurors seem to have made their decisions on a case by case basis and not simply on the basis of the broad offence type.

4. Judges' preferences are not aligned with jurors' preferences

This study allowed a comparison of the jurors' choice of sentencing purposes with the judges' choice of purposes, as indicated in their sentencing remarks from the same sample of trials. While comparing data from a forced single choice of purpose by both judges and jurors would have been preferable, using the jurors' choices of primary purpose and the judges' mentions of important purposes provided a basis for comparing their preferences. Judges and jurors both ranked denunciation as the second most important purpose and both considered general deterrence the most important purpose in drug offence cases; however, in other respects the differences between judges and jurors are striking.

General deterrence was the most popular purpose for judges, but the least popular for jurors. For judges, it was the most common predominant purpose, the most common

very important purpose, and the most common important purpose. It was also the judges' most popular choice of purpose across all offence categories. For jurors, general deterrence was the least popular of the traditional purposes and, when choosing it, jurors were much more selective: only for drug offences did it emerge as the most popular primary purpose. The interviews showed that jurors who relied on general deterrence tended to emphasise its educative effect in underscoring the seriousness of the offence, rather than its potential to encourage desistance through fear of the penalty. In other words, their reasons for choosing general deterrence had overtones of denunciation. The interviews revealed that, while some jurors relied upon general deterrence in addition to their single most important purpose and that they supported the judge's reliance on general deterrence in some cases, jurors were more often critical of the judge's reliance on general deterrence.

The judges' reliance on general deterrence in this study accords with appellate decisions of Australian courts which have long shown strong support for general deterrence and widely endorsed it as an important objective (Freiberg 2014: 250–257). English appellate decisions similarly favour general deterrence, despite academic criticism (Ashworth 2010: 102). It has been suggested that reliance by courts on general deterrence is 'rhetoric' (Ashworth 2010: 82), 'deterrence speak' or merely a standard form of judicial expression which signifies that the conduct is harmful or wrong (Robinson 2008: 83–85). Interviews with Queensland judges show that some judges

admit that ‘general deterrence is a fiction’ and that they use it, despite doubting its efficacy (Mackenzie 2005: 100.102).

Whereas retribution is the most popular single most important purpose for jurors, judges deal with it differently. Retribution did not appear to be at the forefront of the judges’ thinking; it was not selected as the predominant purpose in any case. Rather, it tended to be a supplementary although important purpose (Warner et al. 2017b). There is a difference in wording between the statutory version of retribution (‘to punish an offender to an extent and in a manner which is just in all the circumstances’) and the version used in Survey One (‘to make sure the offender gets the punishment they deserve’) but this difference is unlikely to explain the differences between judges and jurors. We have suggested elsewhere that our findings indicate that judges use retribution (or just punishment) as a limiting principle that applies in every case, i.e., as a reflection of the principle of proportionality rather than as a determining principle (Warner et al. 2017b). Their reluctance to use retribution as the primary purpose of a sentence may be associated with its links with vengeance, which judges prefer to distance themselves from, in favour of a forward looking purpose such as deterrence. Given the difficulties encountered by legal theorists in seeking to resolve tensions between desert and deterrence as justifications for punishment (e.g., Simester et al., 2014), the failure of the courts to embrace desert as a primary justification is not surprising.

In contrast to judges, jurors do not display the same reluctance to invoke retribution and intuitively embrace expressive rationales of desert, censure and denunciation. While the survey endeavoured to force the selection of a single most important purpose, some jurors (8.4%) selected more than one purpose and, in interviews, many respondents added another purpose or two when explaining their choice. While they often rely upon consequentialist rationales, jurors, like judges, appear to approach the sentencing task in an individualised manner, choosing different sentencing purposes depending on the facts of the case, and often relying on a combination of purposes.

Significance of the differences between jurors and judges

Unconstrained by appellate guidance, jurors appear to be less inclined to rely upon general deterrence and more open to scepticism about its effectiveness than judges. This scepticism is supported by the empirical research – there is just no evidence that more severe penalties deter better than less severe ones (Ashworth 2010: 79-80). Given that public opinion studies have shown relatively weak support for general deterrence (e.g. Spiranovic 2012) it seems likely that the jurors' views also reflect public opinion on this issue. Policy makers in Australia have occasionally heeded the academic criticisms of general deterrence and have omitted it from their recommended lists of statutory sentencing purposes (Australian Law Reform Commission, 1988, 18). Judges, however, have chosen to avoid this interpretation of the *Crimes Act 1914* (Cth) s 16A(2) (Bagaric

and Alexander 2011: 272–273, Freiberg 2014: 250) and have continued to rely on general deterrence. English courts responded similarly to the proposition that general deterrence was no longer a legitimate consideration under the 1991 English *Criminal Justice Act* (Ashworth 2010: 101).

As mentioned above, judicial reliance on general deterrence may simply be ‘rhetoric’ (Ashworth 2010: 82), ‘deterrence speak’ or a standard means of expressing the harm or wrongfulness of conduct (Robinson 2008: 83–85). Judicial support for general deterrence may also be explained in part by the possibility that judges, who impose the pain of punishment on their fellow citizens as part of their daily business in the courts, may feel a need to believe that there is some compensating tangible benefit behind the system of imposing hard treatment on those who commit crimes. The continued judicial exposure to the burdensome consequences of criminal punishment may account for the differences between the judges’ views and those of the jurors, who experience only temporary and limited exposure to this harsh aspect of the criminal justice system.

An alternative interpretation of the reliance of judges on general deterrence in the present study is that it is a methodological artefact. Unlike jurors in our study who were forced to choose a primary purpose of sentence, the weight given by judges to each sentencing purpose was determined by the researchers based on an interpretation of sentencing remarks. It is plausible that had judges been required to indicate their

sentencing purpose priority to the research team, the results may have been different. For instance, given the majority of judges' sentences were a custodial sentence; it is plausible that retribution and incapacitation may have been taken as a given in these cases and therefore not explicitly mentioned in sentencing remarks. It is also plausible that judges may have attached significance to general deterrence in reflecting crime reduction, an overarching aim of the criminal justice system. Nonetheless, our analysis of judges' remarks did not support such a conclusion.

The finding that jurors do not often rely on general deterrence as a primary purpose could be an additional argument to persuade policy makers and appellate judges to abandon general deterrence (in the sense of marginal deterrence) as an aim of individual sentences. If, in the face of both public scepticism and the empirical evidence, sentencing judges continue to proceed upon the assumption that punishment deters, it will do nothing to enhance confidence in their sentences.

Conclusion

This study reveals significant differences between the approaches to sentencing purposes taken by the legislature, the judiciary, and community members who have served on juries in Victoria. First, it shows that judges and jurors do not agree on the ranking of purposes. Jurors, who were forced into a choice and even when they refused to be forced, tended to prefer the two expressive purposes of retribution (just

punishment) and denunciation, whereas the judges, who were able to choose freely, tend to rely primarily on the consequentialist purpose of deterrence. Notwithstanding the methodological limitations acknowledged in comparing sentence purpose preferences of judges and jurors in this study, the findings suggest judges who rely so extensively on general deterrence may need to moderate their rhetoric to bring their sentencing reasons closer to the values of members of the public who have seen the criminal justice system at first hand.

Secondly, the results show that the Victorian Parliament's decision not to give priority to any particular purpose in the statutory list is supported by the jurors' responses. Jurors, like the judges, chose their purposes to fit the particular circumstances of each offender's case and supported using an eclectic range of purposes, to the extent that some jurors, despite being instructed otherwise, and most judges added more than one purpose from the list. Thirdly, the jurors' intuitive choices and the judges' approach in the cases covered by the serious offender regime, do not support the legislators' preference for incapacitation in many of these cases. This suggests that legislators, who see the system as a whole, may have gone beyond the instinctive responses of those like judges and jurors, who must decide the fate of individual offenders on a case by case basis.

This study reveals that perspectives and perceptions differ depending on the different roles that the participants play in the criminal justice system. From the system-wide perspective of the legislators who hear calls for action from the media and public opinion surveys, it seems appropriate to respond by adjusting the system to require judges to treat protection of the public from the offender as the primary goal in cases covered by the serious offender regime. However, from the perspective of judges, who have a continuing role in the system and who are required to balance the purposes of sentencing in many individual cases over time, the forward-looking purpose of general deterrence has greater salience, perhaps because it appears to balance the harsher aspects of criminal punishment by promising a tangible benefit to the community. Jurors, who serve only for a limited period, who are less exposed to the system's harshness, but who also decide cases on an individual basis, tend to support the unranked legislative list, but are much less attracted to incapacitation than the legislature and much less committed to the purpose of general deterrence than judges.

This research has illuminated the different perspectives of legislators, judges and jurors on the statutory sentencing purposes in Victoria. It suggests that by abandoning the purpose of general deterrence in individual cases and by scaling back the serious offender regime's focus on incapacitation, the criminal justice system in Victoria would better achieve its goal of vindicating the values of the community it serves.

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References

- Ashworth A (2010) *Sentencing and Criminal Justice*. Cambridge: Cambridge University Press.
- Australian Bureau of Statistics (2015) *Criminal Courts Australia, 2013-2014* (cat no 4513.0). Canberra, ACT: Author.
- Australian Law Reform Commission (1988) Sentencing. Report no 44. Canberra: AGPS.
- Bagaric M and Alexander T (2011) Marginal deterrence doesn't work – and what it means to sentencing. *Criminal Law Journal* 35(1) 269–283.
- Ferguson CJ (2009). An effect size primer: A guide for clinicians and researchers. *Professional Psychology: Research and Practice*, 40, 532–538.
- Flanagan TJ and Longmire DR (1996) *Americans View Crime and Justice: A National Public Opinion Survey*. Los Angeles: Sage.

Freiberg A (2003) The four pillars of justice, Review essay on *Penal Populism and Public Opinion*, Roberts, JV, Stalans, LJ, Indermaur, D and Hough, M New York, NY: Oxford University Press, 2003; 36 *ANZJ Crim* 223–230.

Freiberg A (2014) *Fox & Freiberg's Sentencing, State and Federal Law in Victoria*. 3rd ed. Pyrmont: Thomson Reuters.

Gelb K (2011) *Purposes of Sentencing: Community Views in Victoria*. Melbourne: Sentencing Advisory Council.

Horan J (2012) *Juries in the 21st Century* Sydney: Federation Press.

Hough et al., (2009) *Public Attitudes to the Principles of Sentencing*. Sentencing Advisory Panel Research Report no 6. London: Sentencing Advisory Panel.

Mackenzie G (2005) *How Judges Sentence*. Sydney: Federation Press.

New South Wales Law Reform Commission (2013) *Sentencing*. Report 139. Sydney: NSW Government.

Paulin J, Searle W and Knaggs T (2003) Attitudes to crime and punishment: A New Zealand study. Wellington: Ministry of Justice.

Richardson E and Freiberg A (2004) Protecting dangerous offenders from the community: The application of protective sentencing laws in Victoria. *Criminal Justice* 4, 81–102.

Roberts JV (2014) Clarifying the significance of public opinion for sentencing policy and practice. In Ryberg J and Roberts JV (eds) *Popular Punishment: On the Normative Significance of Public Opinion*. Oxford: Oxford University Press, 228–252.

Roberts JV and Hough M (2005) Sentencing young offenders: Public opinion in England and Wales. *Criminal Justice* 5(3): 211–232.

Roberts JV, Crutcher N and Verburgge P (2007) Public attitudes to sentencing in Canada: Exploring recent findings. *Canadian Journal of Criminology and Criminal Justice* 49: 75–107.

Roberts JV, Hough M, Jacobson J and Moon N (2009) Public attitudes to sentencing purposes and sentencing factors: An empirical analysis. *Criminal Law Review* November 771–782.

Robinson P (2008) *Distributive Principles of Criminal Law: Who Should be Punished and How Much?* Oxford: Oxford University Press.

Sharpe D (2015) Your chi-square test is statistically significant: Now what? *Practical Assessment, Research & Evaluation*, 20, 1–10.

Simester AP, du Bois-Pedain A and Neumann U (eds) (2014) *Liberal Criminal Theory: Essays for Andreas von Hirsch*. Oxford: Hart Publishing.

Spiranovic C, Roberts L, Indermaur D, Warner K, Gelb K and Mackenzie G (2012) Public preferences for sentencing purposes: What difference does offender age, criminal history and offence type make? *Criminology & Criminal Justice* 12(3) 289–306.

Warner K, Davis J, Walter M, Bradfield R and Vermey R (2010) *Jury Sentencing Survey*. Report to the Criminology Research Council. Canberra: Criminology Research Council.

Warner K, Davis J, Spiranovic C, Cockburn H and Freiberg A (2017a) Measuring jurors' views on sentencing: Results from the second Australian jury study. *Punishment & Society* 19(2) 180-202.

Warner K, Davis J and Cockburn H (2017b) The purposes of punishment: how do judges apply a legislative statement of purposes? *Criminal Law Journal* 41(2) 69-85.

WCB v The Queen (2010) 29 Victorian Reports 483.

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