Measuring jurors’ views on sentencing: Results from the second Australian jury sentencing study

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Abstract

This paper presents the results of the Victorian Jury Sentencing Study which aimed to measure jurors’ views on sentencing. The study asked jurors who had returned a guilty verdict to propose a sentence for the offender, to comment on the sentence given by the judge in their case and to give their opinions on general sentencing levels for different offence types. A total of 987 jurors from 124 criminal trials in the County Court of Victoria participated in this mixed-method and multi-phased study in 2013-2015. The results are based on juror responses to the Stage One and Stage Two surveys and show that the views of judges and jurors are much more closely aligned than mass public opinion surveys would suggest.

Keywords

Sentencing, public opinion, punitiveness

Criminal punishment has long been seen as a necessary evil that must be justified by principle, carried out for good reasons and inflicted only when deserved. The criminal law reflects the values of the community and so, in a democracy, the views of members of that community are often considered to be relevant when setting appropriate limits on the levels of criminal punishment (Cullen et al 2000). Judges who sentence individual offenders and governments who control sentencing through legislation have shown a willingness to respond to community demands and values (Gleeson 2005, Schulz 2010). However, because uninformed opinion cannot provide a sound basis for determining such matters, the problem facing both arms of government is finding a reliable method of measuring community views. This article presents the key findings of an innovative study conducted in the Australian state of Victoria between 2013-2015, which asked 987 jurors who had returned a guilty verdict in a criminal trial to propose a sentence for the offender and to comment on the sentence given by the judge in their case. The results suggest that, except in cases involving the sexual abuse of children under 12
years of age, judges in Victoria can take comfort in the fact that in general their sentences are in line with members of the public who have been selected for jury service.

Despite the broad agreement that some degree of public input into sentencing policy and practice is desirable (Roberts 2014, 228) and that any gap between judicial practice and community views needs to be addressed, if only to correct public misperceptions (Roberts 2011), the question of how best to gather and interpret these community views has not been easily answered (Yankelovich and Friedman 2011, Ryberg and Roberts 2014). Research on public opinion reveals that responses vary depending on the methods used by the researchers and the amount of information given to the participants. When members of the public are asked to assess general sentencing levels via representative surveys, between 70 and 80% reply that the sentences given by judges are too lenient (Doob and Roberts 1988; Hutton 2005; Gelb 2006: 11; Mackenzie et al, 2012) but these results have been criticised as being based on ignorance about sentencing and the kinds of crimes and offenders that are typically dealt with by the courts (Gelb 2006, 2008). Indeed, when more detailed individual scenarios are presented and respondents are invited to ‘be the judge’ in a specific case, members of the public do not appear to be as punitive as the representative surveys suggest (Diamond & Stalans 1989; Mirrlees-Black 2002; Stalans 2002; Roberts et al 2003; Hutton 2005; Lovegrove 2007). This conclusion has not always been accepted by some sections of the media or politicians who continue to attack judges and call for tougher sentencing in the name of ‘the public’ (Lasry 2009; Schulz 2010; Warren 2010).

Both methods of collecting opinion have been criticised. Some social scientists contend that the picture of punitive public opinion is simply a ‘methodological artefact’ of the representative polling process (Gelb, 2006; Hough and Kirby, 2013). Others argue that methods encouraging a more considered response do not truly elicit mass public opinion but rather present the views of an unrepresentative, highly selected sample that has been converted by participating in the research into adopting the views of the elite (de Keijser 2014). This creates a dilemma because basing policy on views founded on ignorance or bias cannot attract the public confidence needed to increase legitimacy and compliance.

Sentencing is an important matter of public policy, so if the public is to be ‘dealt in’ to these discussions (Indermaur 2008) better ways to gather and assess community views are needed. The method adopted in the Victorian Jury Sentencing Study asks jurors who
have delivered a verdict of guilty to take their public role as representatives of the community one step further by participating in a four stage mixed method study designed to elicit their views on sentencing the offender in their trial. This approach has the advantage of anchoring the respondents into real sentencing exercises and exposing them to a truly representative set of serious cases rather than allowing them to rely on misperceptions caused by constant exposure to ‘highly selective and nonrepresentative’ media accounts of crime that focus on ‘the violent and extreme’ (Diamond and Stalans 1989:87), or even worse, those presented in fiction and drama (Fazio and Marsh 2006).

Most studies seeking public opinion have not been conducted in the context of real trials that confront the participants with choosing a sentence for a flesh and blood offender. The views elicited from jurors about sentencing the offender in their trial can less easily be dismissed as a ‘temporal glitch’ created by social scientists or as the views of a group that has been transformed into judges or elites (de Keijser 2014). Jurors performing their civic duty have a stronger claim to retaining their identity as members of the community and consequently their views may carry greater authority.

This study extends the first Australian jury sentencing study conducted in Tasmania in 2007-2009, which found that just over half of the respondents suggested a more lenient sentence than the judge, and that after being informed of the sentence, 90% said that it was either very appropriate or somewhat appropriate (Warner and Davis 2011). The Australian judiciary has shown great interest in the Tasmanian study. They have quoted the findings to counter claims that the public is clamouring for harsher sentences and to urge judges and magistrates not to be influenced by demands for a general increase in the severity of penalties (Harper 2011; Gray 2011; Bell 2014, 2015; French 2015). It has also been cited by the Attorney-General of Victoria (Clark 2013) and noted in parliamentary research service briefs (Roth 2014; Parliament of Victoria 2014), suggesting that both judges and members of parliament see practical value in this research which provides an empirical foundation for those who argue against penal populism.

The Victorian study uses the jury method to answer questions raised by the earlier study. In particular, it explores in more detail the gap between judges and jurors on severity issues and other matters relevant to sentence including jurors’ reactions to questions about the weight that should be given to aggravating and mitigating factors. This latter point is of interest for two reasons. First, statutory sentencing bodies in
England and Wales have commissioned research on public opinion to inform their judgements about factors relevant to sentence for the purpose of formulating sentencing guidance (Hough et al 2009; Roberts and Hough 2011). Secondly, many jurisdictions have placed sentencing factors on a statutory footing and law reform bodies can be called upon to review these factors (e.g. Australian Law Reform Commission 2006; New South Wales Law Reform Commission 2013). Sentencing in Australia is governed by judge-made common law principles as amended by legislation and advice from law reform bodies and sentencing advisory councils is often informed by public opinion research.

The state of Victoria was chosen not only because it is a larger, more multi-cultural jurisdiction than Tasmania but also because it has a highly efficient jury system that includes a compulsory debrief for jurors after their verdict, which has the potential to generate a higher response rate. This project uses jurors to explore:

- any differences between judges and jurors in terms of severity, including any preference for custodial sentences versus non-custodial sentences and the magnitude of the difference between judges and jurors;
- opinion about sentencing for different offence types; and
- opinion on the relative importance of aggravating and mitigating factors.

Method

Sample/Participants

The Victorian Study included 124 trials (112 from the capital city Melbourne, eight from Geelong and four from Bendigo, two major regional centres) which yielded 987 participants.

A majority of jurors was male (58%) and the mean age was 44.9 years (SD = 14.1). Compared with the 2011 Australian Bureau of Statistics (ABS) census sample of the adult Victorian population, our sample over-represented those aged 35 to 64 (64% our sample vs 50.9% ABS sample) and underrepresented those aged 18-24 (7.4% of our sample vs 12.4% of ABS sample) and 75 years and older (0.8% our sample vs 8.7% ABS sample). Our sample under-represented females (42.3% our sample vs 51.5% ABS sample).
sample) and over-represented those with higher educational backgrounds (76.0% our sample vs 56.6% ABS sample completed year 12 and 81.3% our sample vs 53.3% ABS sample had obtained post-secondary qualifications) and those in higher income brackets (33.9% our sample vs 13.1% ABS sample in the top two tiers of income, namely $78,000 or more per annum before tax). Like the adult Victorian population (66.7% ABS sample), the majority of our sample (77.7%) was born in Australia but overseas-born residents were slightly under-represented.

Given the possibility that there were some eligible trials in which none of the invited jurors participated in our study, the response rate can only be estimated for Stage One. On the basis that a panel of 12 jurors would have participated in each of the 124 trials included in the study, it is estimated that the response rate for Stage One is 66.33% \[987/(124*12)*100\].

The breakdown of the principal offences in the 124 trials is:

- Sex offences 38.7%
- Violent offences 32.3%
- Property offences 8.1%
- Drug offences 5.6%
- Culpable driving 4.0%
- Other offences 11.3%

Therefore, more than 70% of trials included in this study were for sex or violent offences. This breakdown is not representative of all the cases that come before the County Court because the majority of sentencing cases heard are guilty pleas – over a five year period, only 12% of proven offences resulted from a contested trial (Sentencing Advisory Council, Victoria, 2015) and different offences had very different plea rates. Rape, for example, had a not guilty plea rate of 46% of proven charges (n=471) whereas theft had a not guilty plea rate of 11.2% (n=3651).

**Materials**

Here we provide details only of Surveys One and Two and items directly relevant to the central aims of this paper.²

Stage One Survey
The Stage One survey was divided into three major sections. In section A, respondents were provided with a list of sentencing options available to judges in Victoria and were asked, among other things, to suggest a sentence for the offender in their trial. Section B comprised items assessing perceptions of leniency in sentencing for specified offence types and other validated scale items from the National Public Confidence in Sentencing Survey (Roberts et al 2011) assessing punitiveness and confidence in sentencing. Section C mainly comprised demographic items that were included to assess the representativeness of our sample.

Stage Two Survey

Survey Two had three main sections, although here we report only on section A, which contained items relevant to this paper. In section A, jurors were asked to rate the appropriateness of the judge’s sentence and to indicate the level of weight that should be given to a list of aggravating and mitigating factors listed by the researchers, with an option for other factors to be identified by the jurors.

Stage Two Sentencing Booklet

The sentencing booklet, as in the Tasmanian study, comprised jurisdictionally specific information on:

- the purposes and principles of sentencing;
- relevant sentencing factors (i.e. factors related to the nature and circumstances of the offence, the circumstances of the offender, responses to the charges and post-offence factors);
- the range of sentencing options for adult offenders set out by s 7 of the Sentencing Act 1991 (Vic); and
- current sentencing ranges (i.e. statistics on the penalties imposed for a selected number of crimes – rape, armed robbery, causing serious injury recklessly and burglary during the five year period of 2007-08 to 2011-12).\(^3\)

Procedure

The mixed-method, multi-phased design of this study is broadly based on the Tasmanian Jury Sentencing Study; it combines surveys with in-depth interviews to yield
quantitative and qualitative data. However, new survey instruments and interview schedules were designed to explore the unique research questions in this study, and a fourth follow-up phase was added to explore the durability of any possible changes in attitudes over time. Here we report briefly on procedures only for the Stage One and Stage Two surveys.

The sample of cases consisted of all trials that resulted in a guilty verdict in the Victorian County Court\(^4\) from May 2013 to June 2014. Before recruiting jurors, permission to conduct the study was obtained from the Attorney-General under s 78(8) of the Jury Act 2000 (Vic). All jurors in trials over the study period were informed about the project and were invited to participate by the judge in trials where a guilty verdict was returned. The Stage One survey was administered by court staff as a paper based survey. The Stage Two survey was a paper survey that was posted by mail only to those who agreed in Survey One to continue. Jurors agreeing to participate in Stage Two were posted Survey Two, a copy of the judge’s reasons for the sentence, a sentencing booklet comprising specific information on sentencing in Victoria and a data insert providing recent statistics on the penalties imposed for the principal offence committed by the offender. The response rate for Stage Two was 43.2% of Stage One respondents. Many more jurors had indicated a willingness to participate in Stage 2 (87.1% of the Stage 1 respondents). However, the delay between verdict and sentence, at times many months, is likely to have affected the response rate.

**Results**

*Research Question One – Are jurors’ preferred sentences more severe or more lenient than those given by judges?*

To compare juror sentences with those of the judge we classified the sanctions in order from least to most severe:

1. Dismiss with or without a conviction\(^5\)
2. Adjourned undertaking on condition of good behaviour with or without a conviction
3. Fine
4. Community based order (CBO) with at least one of the following requirements (if judge and juror gave a different type of CBO, severity from least to most severe is):
   a. Treatment/therapy options
   b. Supervision by a corrections officer
   c. Community work

5. Wholly suspended sentence

6. Immediate imprisonment (whether partly suspended or not) – any time served in prison was considered more severe than a wholly suspended sentence.

If either the judge or the juror had specified a combination sentence, comparisons of severity were based on the most serious component of the sentence (e.g. if imprisonment and a fine were selected, the sentence would be coded as imprisonment). Where both the judge and juror chose a sentence of the same type, the comparison was based on the quantum of punishment in the case of community based orders, suspended sentences and imprisonment.

A comparison of the judge’s sentence with the juror’s preferred sentence was possible for 918 jurors. Of these 918 jurors:
   • 61.7% were more lenient than the judge;
   • 2.4% were equally severe; and
   • 35.9% were more severe.

Based on the trials where a comparison between judge and juror was possible (i.e. 115 trials, 902 jurors), judges imposed a custodial sentence (i.e. an immediate or suspended sentence of imprisonment) in 92.2% of trials, whereas 84.1% of jurors overall imposed a custodial sentence. This difference was statistically significant, $\chi^2 (1, N = 1,017) = 5.17, p = .02$, but the effect size was small, $Phi = .07$.

Jurors were not present for the sentencing submissions, so they made their sentencing selection without knowing whether the offender had a criminal record, a matter which was known to the sentencing judge. To determine whether this knowledge gap contributed to the jurors’ more lenient choices, we analysed sentences for offenders with and without relevant prior convictions. Overall, jurors were more likely to
recommend a sentence that was more lenient than the judge in trials where the offender had relevant priors (70%) compared with trials where the offender had no relevant priors (57%), χ² (1, N = 869) = 36.96, p < .001. This would suggest that the jurors’ tendency towards greater leniency than the judge could in part be explained by judges taking into consideration relevant priors, but the effect size was small (Phi = -.13) and the association appeared to be moderated by offence type as explored below. We also analysed the data to see if the knowledge gap in relation to prior convictions explained the finding that jurors were more likely than judges to select a non-custodial sentence. For offenders with no relevant priors, judges imposed a non-custodial sentence in 8.4% of cases compared with 14.5% of jurors who selected a non-custodial sentence, χ² (1, N = 707) = 3.56, p > .05 and the effect size was small (Phi = .07). The small effect size suggests that there is little difference between judges and jurors in their preference for custodial or non-custodial sanctions.

In addition to comparing judge and juror sentences at Stage One, we also examined juror ratings of the appropriateness of the judge’s sentence at Stage Two after they had been informed of the judge’s sentence. For the 423 jurors answering this question in Survey Two, the overall ratings of the judge’s sentence were:

- Very appropriate 54.8%
- Fairly appropriate 31.9%
- Fairly inappropriate 10.4%
- Very inappropriate 2.8%

Hence, the majority of jurors (86.7%) thought the judge’s sentence was appropriate.

Due to the possibility that those jurors who proceeded to Stage Two may differ in important ways from jurors who chose not to proceed, we compared these two groups on two measures of Stage One leniency. Independent samples t-tests indicated there were no differences between Stage One only and Stage Two jurors on Stage One mean scores for perceptions of leniency in sentencing for sex (St1onlyM = 4.29, St1only SD = .81, S2M = 4.31, S2SD = .79), t(939) = -3.37, p < .05, d = -.02, violent (St1onlyM = 3.97, St1only SD = .78, S2M = 4.02, S2SD = .76), t(937) = -1.12, p > .05, d = -.06, drug (St1onlyM = 3.66, St1only SD = .99, S2M = 3.77, S2SD = .97), t(930) = -1.67, p > .05, d = -.11, or property (St1onlyM = 3.50, St1only SD = .77, S2M = 3.53, S2SD = .74), t(928) = -5.8, p < .05, d = -.04, offences. Chi-square analysis indicated there was no overall
difference in the proportion of Stage One only and Stage Two jurors who were more lenient \( (S1 \text{ only } 60.4\% \ S2 \ 63.3\% ) \), the same in severity \( (S1 \text{ only } 2.8\% \ S2 \ 1.9\% ) \) or more severe \( (S1 \text{ only } 36.9\% \ S2 \ 34.8\% ) \) than the judge, \( \chi^2 (2, N = 918) = 1.22, p > .05, \text{Phi} = .04. \)

**Research Question Two – What is the magnitude of the difference between the sentences given by judges and jurors?**

In cases where both the judge and juror selected a prison sentence for the same offender it was possible to explore the magnitude of difference between both sentences. In these instances, we compared the juror’s prison sentence in months with the length of the judge’s prison sentence in months. Data were available for this comparison for a total of 503 jurors. Based on the length of prison sentence, 57.9% of jurors were more lenient than the judge, 3.8% were the same in severity and 38.4% were more severe. The median difference in months when the judge’s prison sentence was subtracted from the juror’s prison sentence was -12.0 indicating that overall jurors were on average more lenient than the judge by 12 months with respect to the length of prison sentences.

Jurors who were more lenient than the judge recommended a prison sentence, which on average was half (50.5%) the length of the judge’s prison sentence. For jurors who were more severe, the judge’s prison sentence on average was less than two-thirds (60.1%) the length of the juror’s recommended sentence. An alternative way of examining the magnitude of the difference is to compare the mean difference in months between judge and juror prison sentences for jurors who were more lenient and jurors who were more severe. An independent samples t-test\(^8\) indicated that the mean difference in juror and judge sentences did not differ significantly (lower bound -1.37 and upper bound 0.12 for 99% Confidence Interval) between jurors who were more lenient \( (M = 5.94, SD = 2.23) \) and jurors who were more severe \( (M = 6.57, SD = 3.54) \), \( t(292.51) = -2.19, p > .01 \) and the effect size was small \( (d = -0.26). \)

**Research Question Three – Does the type of crime affect the proportion of jurors who are more lenient or more severe than the judge?**

As demonstrated in Figure 1, the tendency towards leniency appeared to differ depending on the type of crime committed by the offender. More jurors were more lenient in violent and other offence trials combined (69.6%) when compared with sex
offence trials (49.7%), $\chi^2 (1, N = 918) = 15.63, p < .001$, but the magnitude of this association, the effect size, was small ($\Phi = -.20$).

Notes:
1 ‘Other’ offence trials included trials for property, drug and culpable driving.

Figure 1. Comparison of juror and judge sentence severity by offence type\(^1\) (N = 918).

Although the magnitude of the association between offence type and juror leniency was weak, it was of interest to see whether juror leniency differed according to the type of sex offence and whether it may explain this pattern of greater juror leniency in violent and other offence trials when compared with sex offence trials. For this, sex offences were divided into three types; (1) rape and aggravated sexual assault (all non-consensual contact sex offences involving adults), (2) child sexual assault of children aged 12 years and older), and (3) child sexual assault involving children aged under 12. The age of child victims (under and over 12) was chosen because in Victoria sexual assault of children under 12 attracts a higher maximum penalty (Crimes Act 1958, s 45(2)(a)). Of the 48 sex offence trials included in this study, three could not be classified using this system because sentencing remarks containing the necessary information for...
classification were not released. There were, however, 45 trials classified by sex offence type which yielded a combined sample of 342 jurors. As illustrated in Figure 2, jurors were more likely to conform to the overall pattern of juror leniency in cases involving rape and aggravated sexual assault and also child sexual assault of children aged 12 and older, but this pattern was reversed in that the majority of jurors were more severe in cases involving child sexual assault of children under 12. Chi-square analysis confirmed a higher proportion of jurors were more lenient than the judge in other sex offence trials (58.1%) when compared with child sexual assault trials with victims under 12 (36.0%), $\chi^2 (1, N = 342) = 15.45, p < .001$ and the effect size was small ($\Phi = -.21$).

'Number of jurors varied by sex offence type – rape and aggravated sexual assault (n = 124), child sexual assault involving a child 12 or older (n = 93), child sexual assault involving a child under 12 (n = 125).

Figure 2. Comparison of juror (N = 342) and judge sentence severity by sex offence type.
Juror leniency was also examined via survey items assessing perceptions of leniency in general for broad offence type categories. In comparison to Figure 1, which shows that the majority of jurors were more lenient than judges when recommending a sentence for violent and other offences and that there was an even split between jurors who were more lenient and more severe for sex offences, Figure 3 indicates that, when asked about sentencing in the abstract, the majority of jurors felt that it was too lenient for violent, sex and drug offences and about right for property offences. For sex offences, the most common response was that they were much too lenient.

![Figure 3](image)

**Notes:** “Don’t know” responses were treated as missing data. The total number of valid cases for analysis differed for violent (N = 939), property (N = 930), drug (N = 932) and sexual (N = 941) offences.

Figure 3. Stage One juror ratings of leniency in sentencing for violent, property, drug and sexual offences.

Although not reported here in detail, as this is not a focus of the current paper, it is noteworthy that there was little difference in juror responses to these general questions about sentencing across Stages One and Two and that the majority of jurors in Stage Two, after receiving the judge’s sentencing remarks, the sentencing booklet and data
insert, still expressed the view that sentencing was too lenient for violent (75.7%), sex (78.2%) and drug (63.7%) offences and about right (50.4%) for property offences.

In addition to examining juror leniency and perceptions of general leniency by offence type, we examined whether Stage Two juror ratings of the appropriateness of the judge’s sentence in their trial differed by offence type. A higher proportion of jurors thought the judge’s sentence was very appropriate in violent and other offence trials combined (61.3%) when compared with sex offence trials (45.7%), $\chi^2 (1, N = 423) = 10.05, p = .002$ but the effect size was small ($\Phi = -.15$).

This analysis by type of sex offence showed that a higher proportion of jurors in cases involving either rape or child sexual assault of children aged 12 and older (52.8%) compared with jurors in trials involving child sexual assault of children under 12 (35.7%) thought the judge’s sentence was very appropriate, $\chi^2 (1, N = 164) = 4.31, p = .04$ but again the effect size was small ($\Phi = -.16$).

**Research Question Four – What are jurors’ views on the relative importance of aggravating and mitigating factors?**

It is of interest for sentencing authorities to know how members of the public view the factors traditionally used by judges to assess the seriousness of offences and the offender’s degree of blameworthiness. Figure 4 shows the weighting given to the eight possible aggravating factors listed in the survey when they arose and Figure 5 shows the weighting given to the ten possible mitigating factors. They demonstrate that jurors attributed a lot of weight in general to aggravating factors when they arose, but tended to attribute no weight or only a little weight to mitigating factors when they arose. A paired samples t-test confirmed that jurors on average attributed significantly more weight to aggravating factors ($M = 2.50, SD = 0.48$) when compared with mitigating factors ($M = 1.81, SD = 0.52$), $t(403) = 19.65, p > .001$ (lower bound 0.63 and upper bound 0.77 for 95% Confidence Interval) and the effect size, calculated using means and standard deviations, was large ($d = 1.38$).
Notes:

1 Juror ratings based on trials where the juror indicated the factor had arisen in their trial; Abused Trust Power (n = 309), Victim Vulnerable (n = 285), Injury/Harm/loss Substantial (n = 377), Planned/organised (n = 266), Prior Convictions (n = 272), Offender on Bail (n = 94), Offender on Parole (n = 83), Offender on Susp Sent Or CCO (n = 89).

Figure 4. Stage Two juror ratings of how much weight the judge should attribute to aggravating factors where they arose in a juror’s trial

Figure 4 shows that the four factors relating to the offence (abused trust/power; victim vulnerable; injury, harm or loss was substantial; and planned/organised offence) were invariably given more weight than the four factors relating to the offender (prior convictions; offender on bail; or parole; or on a suspended sentence or community order). Where these facts arose, abuse of trust and the fact that injury, harm or loss was substantial were most often given a lot of weight – by over 70% of jurors. In contrast, prior convictions were given a lot of weight in just 53% of cases where they arose as a factor.
The finding that only 53% of respondents gave prior convictions a lot of weight when it arose was rather surprising in the light of sentencing research which shows that sentencers and members of the public ascribe a high level of importance to criminal history. A possible explanation is that jurors interpreted the question on prior convictions as including prior unrelated convictions. When data were analysed to include only those cases where the judges’ sentencing remarks indicated that the offender had relevant prior convictions, 76.5% (n=115) of jurors said that prior convictions should be given a lot of weight.

Figure 5. Stage Two juror ratings of how much weight the judge should attribute to mitigating factors where they arose in a juror’s trial

Notes: Juror ratings based on trials where the juror indicated the factor had arisen in their trial; First time offended (n = 273), Offender good character (n = 313), Good prospects rehab (n = 347), Offender showed remorse (n = 264), Offender young (n = 254), Offender old (n = 246), Offender Physical Illness/Impaired (n = 218), Family dependent on offender (n = 253), Offender socially disadvantaged (n = 281), Offender Physically/Sexually Abused (n = 193).
None of the mitigating factors was endorsed by a majority as attracting a lot of weight. Where it arose, good prospects of rehabilitation was most often endorsed as attracting a lot of weight by jurors (30%) and a majority (54%) thought the fact that the offender was of good character deserved a little weight. A majority did not regard the fact that the offender was old or young as a mitigating factor, with 61% and 52% respectively responding it should be given no weight. Almost one half (46%) stated that remorse should be given no weight at all.

Discussion

In general jurors are not demanding harsher sentences

The fact that 62% of jurors suggested a more lenient sentence than the judge, that only 36% were more severe and that a majority (87%), when informed of the sentence, considered it either very appropriate (55%) or fairly appropriate (32%), shows that in terms of relative severity the views of judges and jurors are much more closely aligned than mass public opinion surveys would suggest. It is a finding that accords with other studies that have used vignettes to compare the views of judges with members of the public (Diamond and Stalans 1989; Lovegrove 2007; Hutton 2005; de Keijser, Koppen and Elfers (2007) and with other jury studies (Gwin 2010; Warner and Davis 2011).

This finding shows a greater tendency for jurors to be more lenient than in the Tasmanian Jury Study where 52% of jurors selected a more lenient sentence than the judge (Warner and Davis 2011). In part this could be explained by the fact that in Tasmania the jurors had heard the sentencing submissions, so they, like the judges, knew whether the offender had a prior record when they suggested their sentences. However, while prior convictions are likely to be treated as an aggravating factor, the plea in mitigation is also likely to reveal counterbalancing mitigating factors. In other words, failing to hear the plea in mitigation works both ways. Comparing the judge’s sentence with the juror’s choice of sentence in cases with or without prior conviction reveals that jurors were more likely to be more lenient than the judge even in cases where the offender had no prior convictions, with 57% selecting a more lenient sentence. Victorian jurors were also more likely to say the judge’s sentence was very appropriate than Tasmanian jurors, where 45% considered it very appropriate (Warner and Davis 2011) compared with 55% in the current study.
The conclusion that jurors tend to be more lenient than the judge is a stronger finding than in the Tasmanian study because this study reports on the difference between judge and juror sentences in more detail. While there was little difference between judges and jurors with respect to their choice of custodial or non-custodial sanctions, when they did select a custodial sentence, jurors were on average more lenient than the judge by 12 months, and the magnitude of the difference between the more lenient jurors and the judge and the more severe jurors and the judge was negligible. It was not the case that the more lenient jurors were only marginally more lenient compared with the more punitive jurors. These findings can be used, together with other research which shows that members of the public respond relatively leniently in terms of their recommended sentence in a particular case, to counter the claim that the public is demanding more severe sentences across the board.

*Child sexual abuse is an exception*

While our overall comparison of the judges’ sentences with the jurors’ sentences suggests that there is not a large punitiveness gap between juror and judicial opinion, a significant exception exists in relation to child sexual assault of children under 12. Almost half (49%) of the jurors in sex offence trials suggested a more severe sentence compared with about a quarter in violent offence trials (28%) and other trials (26%). When sexual offences were further subdivided it was found that this difference was because jurors were more punitive in cases of child sexual assault of victims under 12. For this category, 63% (almost two thirds) suggested a more severe sentence. In other words, where sentences for sexual assault of children under 12 were excluded from sex offences, the pattern of responses for sex offences was more similar to the pattern of responses for violent and other offences. For other sex offences, jurors’ sentences were more likely to be more lenient than the judges’ sentences (58%) and the pattern of responses was closer to the pattern for violent (71%) and other offences (68%). A more punitive response to sex offence cases involving victims under 12 was also found at Stage Two with only 36% considering the sentence very appropriate compared with 53% for other types of sex offence and 54.8 % overall.

The split between more lenient and more severe jurors’ sentences (50% and 49% respectively) compared with the judge in sex offence cases is strikingly similar to the Tasmanian study (48% for each in the Tasmanian study). However, the contrast between sex offences and other trials was more marked in this study than in the
Tasmanian study where the pattern of responses for sex and violent offence sentences was similar – that is, similar proportions of jurors suggesting more lenient and more severe sentences for sex and violent offences. The finding in the Tasmanian study that jurors were more likely to suggest a more severe sentence than the judge in cases of child sexual assault is replicated in the current study although the category of child sexual assault was broader in the Tasmanian study and included older child victims where the perpetrator was in a position of authority (Sentencing Advisory Council, Tasmania, 2015, 69). The sample size for jurors involved in sex offence trials is much larger than in the Tasmanian study – and is based on 45 sex offence trials and 342 jurors compared with 22 sex offence trials and 109 jurors in the Tasmanian study (Sentencing Advisory Council, Tasmania, 2013) strengthening the findings of a more punitive attitude towards child sexual assault of young victims compared with judicial sentences.

This finding has significant policy implications. For example, in June 2016 the Victorian Sentencing Advisory Council published two reports that drew on the findings of the Tasmanian and Victorian jury sentencing studies to support their conclusions that there was a lack of public confidence in sentencing practices for sexual offences, in particular those against young victims. The Council recommended that legislative guidance in the form of ‘standard sentences’ was required to increase the severity of sentences for these offences. These recommendations were accepted by the government which has committed to give effect to them through legislation (Sentencing Advisory Council, Victoria 2016a; Sentencing Advisory Council, Victoria 2016b). The fact that jurors in Victoria were dissatisfied with the sentences in cases of children under 12 provided evidence that there is a punitiveness gap between judges and the public with respect to this offence that cannot be dismissed as a methodological artefact or a product of a lack of information. It supplements earlier research on public perceptions of offence seriousness in Victoria which found that sexual offences against young children were of utmost concern to participants (Sentencing Advisory Council, Victoria, 2012, 55).

Jurors’ sentencing choices and views on judicial sentences in sex offence cases reveal a much more nuanced response to sex offences than responses to abstract questions about whether sex offence sentencing was too lenient, too tough or about right. It is beyond the scope of this paper to explain why so many respondents said sentencing for sex offenders was too lenient (83% at Stage One and 78% at Stage Two) and yet half of those jurors involved in a sex offence trial had suggested a more lenient sentence than
the judge. However, a later paper will analyse the interviews to identify the kinds of offenders that jurors were thinking about when they answered the abstract question.

*Aggravating and mitigating factors*

The analysis of jurors’ views on the relevance and weight of the listed aggravating and mitigating factors suggests that jurors give much more weight to aggravating factors relating to the *offence* than they give to aggravating factors related to the *offender* or to mitigating factors in general. In particular, the two factors that weigh most heavily are abuse of power and trust and the fact that the injury or emotional harm to the victim was substantial. However, offender-related aggravating factors (such as prior convictions or breach of parole) are less often given a lot of weight. Personal mitigating factors (e.g. where the offender is old) are even less often given a lot of weight. And the finding that a majority of jurors said that no weight should be given to old age or youth is contrary to sentencing principle and practice (Freiberg, 2014, 352-360). Public opinion research on aggravating and mitigating factors has been relatively sparse, at least until quite recently (Roberts and Hough 2011, 171). Unlike many United States jurisdictions and the United Kingdom, Australia does not have sentencing commissions that set sentencing guidelines and it is therefore not possible for findings such as these to be translated directly into sentencing practice. However, it is useful for Australian legislatures and policy makers to know what community members think about sources of aggravation and mitigation. Several reasons why such surveys can be useful have been suggested, including the fact that if courts rely upon sentencing factors considered inappropriate by the public, this will exacerbate criticism of the sentencing process. And at the very least, understanding public views can provide an opportunity to ‘correct misperceptions about sentencing factors’ (Roberts and Hough 2011: 171), to explain more carefully why a particular factor is treated as it is, and to influence individual sentencers in their sentencing behaviours.

Our study asked jurors how much weight the judge should have placed on the listed factors that arose in their case and included a column where they could indicate whether any factor had not arisen. However, the number of responses indicating that the factor had arisen was suspiciously high in some cases (e.g. 246 for old age). It is likely then that some respondents answered this as a general question. Nevertheless, the responses do give an indication of juror views of the relevance of these factors and may therefore illuminate wider community views.
Our finding that jurors placed more weight on aggravating than mitigating factors accords with findings from a study of a representative sample of respondents from England and Wales commissioned by the Sentencing Advisory Panel which reported an asymmetry in public attitudes to sentencing factors, with aggravating factors being more central than mitigating factors (Roberts and Hough, 2011, 183). However, our questions were phrased in terms of weight (no weight, a little weight and a lot of weight) whereas in the study for the Sentencing Advisory Panel the question asked whether the specified aggravating factor always, often, sometimes or never increased offence seriousness. For mitigating factors, respondents were asked whether the factor should result in a more lenient sentence in all, most, some or no cases. In relation to youth as a mitigating factor, our finding that a majority (52%) did not regard youth as mitigating is similar to their finding that 57% considered the fact that the offender was young (aged 18) should never result in a more lenient sentence (Roberts and Hough 2011). In our study jurors were more likely to give old age, remorse and absence of prior convictions less weight as a mitigating factor than participants in the study for the Sentencing Advisory Panel. For remorse, 46% in our study said remorse should be given no weight compared with 23% in the study described by Roberts and Hough (2011).

Participants in the current study appear to give less weight to prior criminal history than participants both in the study commissioned for the Sentencing Advisory Panel and other studies (Roberts and Hough 2011: 175). In the current study 53% of jurors said prior convictions should be given a lot of weight, whereas Roberts and Hough (2011: 174) report that 65% of participants responded that prior convictions always make the crime more serious. However, when asked about prior unrelated convictions, only 38% of their participants said that this circumstance always increased the seriousness of the crime. When we analysed only cases where the offender had relevant prior convictions, 76.5% of jurors gave them a lot of weight; a result that is more consistent with other research.

In a study using a convenience sample in Victoria, Lovegrove reported that, in contrast to other studies, participants gave more weight to personal mitigation, found numerous matters to be mitigating and adopted a global approach which aggregated individual factors (Lovegrove 2011). While Lovegrove explained his findings on the basis that his method presented the offender as a ‘living person’, it could also be explained by the fact that the offenders in the selected cases for his study all had ‘potentially strong claims to
mitigation’ (Lovegrove 2011: 43; and see Roberts et al 2011). Our study results are more closely aligned with those of Roberts and Hough (2011) than Lovegrove’s.

**Jurors as community representatives**

Recruiting jurors to explore informed public opinion on sentencing has the attraction of using members of the public who have been randomly chosen from the electoral roll to perform an important civic and symbolic duty. However, the value of using jurors’ views may be diluted if juries are not truly representative of the public or if the group of jurors who chose to participate produces a biased sample. From the comparison of the demographic information collected in this study with ABS Census data on the adult Victorian population, it appears that with respect to demographics, our sample is at least as representative of the general Victorian population as other comparable samples, such as a recent Victorian Sentencing Advisory Council (VSAC) study of randomly selected Victorians (Gelb, 2011). This study comprised 1,200 survey respondents aged 18 years and older, randomly selected from Electronic White Page Entries. Like the present sample of jurors, the VSAC sample, despite being randomly selected, was predominantly male (54%), older (median age of 54 years) and more highly educated (48% had undertaken some tertiary education) when compared with 2006 ABS Victorian population census data. In our sample, jurors also tended to be over-representative of those from higher income brackets (a variable not reported in the VSAC study). Nonetheless, Gelb (2011) concluded that the characteristics of the VSAC sample were consistent with the characteristics of samples from other studies (including other smaller scale VSAC studies of Victorians as well as the Australia-wide National Public Confidence in Sentencing Survey (Roberts et al 2011) which also randomly selected respondents from Electronic White Page Entries) and that the VSAC sample was therefore reasonably representative of the broader Victorian public. On this basis, it would be reasonable to conclude likewise that our sample of jurors is reasonably representative of the broader Victorian public.

A comparison of our jurors’ responses with those from a major Australian representative study also shows that the views of our sample are broadly aligned with community views on general sentencing levels. In a nation-wide Australian study 79% responded that sentences for ‘violent crimes, like robbery and rape’ were too lenient (Mackenzie et al 2012: 53) compared with 72.7% of Stage One jurors who thought sentences for violent offences were too lenient and 83.2% of jurors who thought sex
offence sentences were too lenient (as shown in Figure 3 above). The similarity in responses between juror participants and the national survey, combined with the similarity in demographics between our sample and the Victorian population, suggests that the jury method offers a useful addition to the suite of methods currently used to consult with members of the public on sentencing matters.

Conclusion

The jury method provides a useful addition to the range of methods for investigating public opinion about sentencing. In Australia, but apparently not in Britain, it is possible to ask jurors to disclose the sentence they would consider appropriate in their case, to give their reaction to the judge’s sentence and to discuss factors they consider relevant to sentence. This approach has the advantages of covering sentencing practice across a range of offences and assessing offence and offender characteristics more comprehensively than is possible with more traditional research methods and of making use of a sample which has the same level of information about the offence as the judge. The staged approach used in this study enabled additional information about the offender to be provided at Stage Two as well as the information about past sentencing patterns that is available to judges.

The first results of the Victorian Jury Sentencing Study confirm earlier findings suggesting that top-of-the-head surveys showing dissatisfaction about judicial leniency cannot be taken at face value and reveal that the community is not as uniformly punitive as polls suggest. The comparison of judicial sentencing practice with jurors’ views suggests that much of the dissatisfaction with sentencing severity stems from a lack of alignment between sentencing levels and public opinion in relation to sex offences and sex offences involving child victims under 12 in particular. This has policy implications in Australia where sentencing commissions have an advisory rather than a direct role in creating sentencing guidelines. Proposals for changes in sentencing guidance in Victoria, whether by way of legislatively imposed presumptive sentences or judicially
developed quantitative guidelines, have, and can in the future, use our results to support adjustments to current sentencing practices.

The results of jurors’ views of aggravating and mitigating factors reveal that jurors give more weight to aggravating factors than mitigating factors and more weight to aggravating factors relating to the offence than the offender. Later papers will compare the weight given by the judge and jurors in relation to these factors and will flesh out the quantitative results with qualitative findings from the interviews. They will explore in more depth the reasons why these members of the community are more likely to suggest a more lenient sentence than the judges and why, when informed of the sentence, a significant majority approve of the sentences given by the judges in Victorian courts.

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Notes

1 The ABS figures were calculated using the TableBuilder Pro database ‘2011 Census - Counting Persons, Place of Usual Residence’ and were based on the proportion of the Victorian population aged 18 years and older.

2 Copies of the surveys and sentencing booklet are available from the authors upon request.

3 This was based on Sentencing Snapshots published by the Victorian Sentencing Advisory Council.

4 The County Court is the major trial court for indictable offences. The most serious cases are heard in the Supreme Court but form a minority of the cases that go to trial.

5 Dismissal or unconditional release is the softest sentencing option in Australia. It is also an option in England and Wales (where it called absolute discharge).

6 Comparisons were not possible where for instance both the judge and juror had selected a prison sentence but the juror had not indicated the length for the prison sentence.
The majority of judge sentences and juror recommended sentences were either a prison sentence or community based order and so, in the majority of cases, to be classified as the same in severity, a juror must have specified the exact same length of prison or community based order as the judge.

To correct for non-normality, a square root transformation was applied to the dependent variable, difference in months between judges’ and jurors’ prison sentences. As a square root transformation was applied, the interpretation of positive and negative values remains the same, meaning higher values indicate a higher degree of difference/discrepancy whereas lower values indicate a lower degree of difference/discrepancy.

References


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