

You be the judge: No thanks!

Alternative Law Journal
2018, Vol. 43(3) 154–159
© The Author(s) 2018
Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/1037969X18792109
journals.sagepub.com/home/altlj



Arie Freiberg

Faculty of Law, Monash University, Australia

Kate Warner

Faculty of Law, University of Tasmania, Australia

Caroline Spiranovic

Faculty of Law, University of Tasmania, Australia

Julia Davis

School of Law, University of South Australia, Australia

Abstract

In the light of proposals to give jurors a sentencing role in response to media portrayals of judges as soft on crime and out of touch, this article reports on a study which explored jurors' thoughts about such a role using survey questions and interviews. Most shied away from such a role.

Keywords

Jury, sentencing role, jurors' views

Judges often get a bad press. They are portrayed as being elitist, unrepresentative, out of touch with the community they are supposed to serve,¹ unduly lenient towards offenders² and unsympathetic to victims. Unfair or not, such criticisms are pervasive and voiced not only by the media but also by academics.³

There have been numerous suggestions as to how such criticisms, if they are well founded, might be met.⁴

If judges are elitist and unrepresentative of the community, they might be elected by the community rather than being appointed by the government of the day as occurs in some jurisdictions in the United States. Alternatively, the public might help select judges by providing their views on a list of potential applicants to the courts as suggested by the Home Affairs Minister.⁵ If they are unsympathetic to victims, victims can be given a greater

¹Geraldine Mackenzie et al, 'Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions Towards Sentencing' (2012) 45(1) *Australian & New Zealand Journal of Criminology* 45, 49; Kate Warner et al, 'Are Judges out of Touch?' (2014) 25(3) *Current Issues in Criminal Justice* 730.

²Julian V Roberts, and Michael Hough, *Public Opinion and the Jury: An International Literature Review* (Ministry of Justice Research Series 1/09, 2009) 35.

³Stephanos Bibas, *The Machinery of Criminal Justice* (Oxford University Press, 2012).

⁴David Indermaur, 'Dealing the Public In: Challenges for a Transparent and Accountable Sentencing Policy' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (The Hawkins Press, 2008) 45.

⁵Michael Koziol, 'Peter Dutton Says the Public Should Help Choose Judges and Magistrates', *The Sydney Morning Herald* (online), 2 February 2018 <http://www.smh.com.au/federal-politics/political-news/peter-dutton-says-the-public-should-help-choose-judges-and-magistrates-20180201-p4yz6z.html>.

Dutton, the Home Affairs Minister in the Australian government, has been highly critical of what he has termed 'pathetically weak' bail and sentencing decisions made by courts in Victoria.

Corresponding author:

Arie Freiberg, Faculty of Law, Monash University, Victoria 3800, Australia.

Email: arie.freiberg@monash.edu

say through victim impact statements which might contain recommendations as to sentence.⁶ If the sentencing process in general fails to reflect community attitudes, then one response may be to involve the public by giving jurors a role in sentencing; a role that they do not have in Australia, but do play in some American states.⁷

The last proposal is based on a number of premises. The first is that jurors are more likely to be representative of the broader community than judges. The second is that the process is likely to be more democratic. Dzur, for example, argues that the social distance between lay citizens and the legal domain has fuelled a dysfunctional sentencing policy. Allowing jurors to be involved in sentencing might bring a fresh eye to the process.⁸ The third premise is that involving jurors is likely to promote confidence in the criminal justice system by giving them, as 'representatives' of the broader community, a voice in criminal justice decision-making. This argument draws on the theory of procedural justice propounded by social psychologist Tom Tyler who suggests that that decisions made by an authority will more likely be perceived as fair and legitimate if those affected, directly or indirectly, are given a voice, validation and respect.⁹ Finally, it is argued that the public lacks confidence in the judiciary because of a perception that sentences handed down by the courts are generally too lenient, particularly for violent crimes.¹⁰ The argument for jury involvement rests on the unfounded assumption that jurors are likely to be more severe in their sentences than judges.¹¹

Proposals for involving jurors in sentencing in Australia

In 2005, the then Chief Justice of New South Wales, James Spigelman suggested¹² that juries could have a greater role in sentencing. This could be effected by allowing or requiring the judge to consult with the jury privately after they had returned their verdict and had heard the submissions

on sentencing. Jurors would provide the sentencing judge (the judge having retained the final authority to sentence) with their views on such matters as the offender's chances of reoffending, prospects of rehabilitation, the gravity of the offence and similar matters.

In 2009, the Victorian Liberal Party called for juries to be given the power to decide the sentences imposed on people convicted of serious crimes on the grounds that it would overcome public concern about lenient punishment of offenders by judges and give the people a say in sentencing.¹³ In 2013, the Victorian Labor party, prior to being elected to office in 2014, committed to introduce jury sentencing recommendations in Victoria for serious indictable offences in order to reflect community expectations in sentencing practice.¹⁴

Chief Justice Spigelman's proposals were examined in detail by the New South Wales Law Reform Commission which rejected jury involvement in sentencing¹⁵ as did the Victorian Sentencing Advisory Council.¹⁶

The reasons for rejecting a greater role for juries in sentencing are based on legal principle, factual, practical and procedural grounds. Briefly summarised, the objections are that:¹⁷

- Jury trials are relatively rare. In Australia, only around 3 per cent of cases are heard in the higher courts and, of those, around 70 per cent are resolved by a plea of guilty, so no jury is involved. The remaining 97 per cent of cases are heard in courts of summary jurisdiction for both adults and children.¹⁸ It is therefore unlikely that involving the jury in sentencing would have any discernible effect on overall sentencing standards.
- There may be some doubt as to whether jury involvement would increase public confidence given that it would involve so few sentences and the fact that jury deliberations would not be public in any case.
- Jurors would require instruction on sentencing law in order to provide them with an understanding of sentencing principles and the options available to them. In cases of sentences

⁶This is not currently the case in most Australian jurisdictions.

⁷Six US states involve the jury in non-capital cases: Jenia Iontcheva, 'Jury Sentencing as Democratic Practice' (2003) 89(2) *Virginia Law Review* 311. In a number of inquisitorial jurisdictions, lay persons are involved in all aspects of a trial, that is, in both determining guilt and imposing sentence; see Gianni Ribeiro and Emma Antrobus, 'Investigating the Impact of Jury Sentencing Recommendations Using Procedural Justice Theory' (2017) 20(4) *New Criminal Law Review* 535, 539.

⁸Albert Dzur, *Punishment, Participatory Democracy, and the Jury* (Oxford University Press, 2012).

⁹Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' in Michael Tonry (ed), *Crime and Justice* (University of Chicago Press, 2003) 283; Tom Tyler and E Allan Lind, *The Social Psychology of Procedural Justice* (Plenum Press, 1988). See also arguments that compliance with the law can be enhanced by reflecting community views, discussed by Julian V Roberts and Jan de Keijser, 'Democratising Punishment: Sentencing, Community Views and Values' (2014) 16(4) *Punishment and Society* 474, 489 who note an argument by Robinson that such an approach would come at a cost of principled sentencing, which is a more important aspect of justice.

¹⁰Ribeiro and Antrobus, above n 7, 538.

¹¹'Studies of juries' views of sentencing do not bear out that assumption: Kate Warner and Julia Davis, 'Using Jurors to Establish Public Attitudes to Sentencing' (2011) 52(1) *British Journal of Criminology* 93; Kate Warner et al, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2016) 19(2) *Punishment & Society* 180.

¹²James Spigelman, *A New Way to Sentence for Serious Crime* (Address for the Annual Opening of Law Term Dinner for the Law Society of New South Wales, Sydney, 31 January 2005).

¹³Paul Austin, 'Liberals Call for Move to "Jury sentencing"', *The Sydney Morning Herald* (online), 9 November 2009 <http://www.smh.com.au/national/liberals-call-for-move-to-jury-sentencing-20091108-i3it.html>.

¹⁴Victorian Labor, 'Jurors to Have a Say in Sentencing under Labor' (Media Release, 4 February 2013) <http://www.viclabor.com.au/media-releases/juries-to-have-a-say-in-sentencing-under-labor/>.

¹⁵New South Wales Law Reform Commission, *Role of Juries in Sentencing*: Report 118 (2007).

¹⁶Sentencing Advisory Council, Victoria, *Sentencing Guidance in Victoria: Report* (2016).

¹⁷See also Roberts and de Keijser, above n 9; John McIntyre, 'The Role of Juries in Sentencing: The Case Against' (2005) 86 *Australian Law Reform Commission Journal* 56.

¹⁸Australian Bureau of Statistics, *People Sentenced: Courts Australia 2015–16*.

of imprisonment, this instruction would include the complexities of the relationship between the head sentence and non-parole period, and, in cases of multiple offences, the principles of concurrency and totality. Sentencing law is extensive and complex and even experienced judges have difficulties in knowing and understanding the law.

- Jurors would need to agree on the factual basis of sentencing, including the role of aggravating and mitigating factors.
- Jurors would need to understand what evidence is admissible or not in pre-sentence reports and victim impact statements.
- There are practical difficulties such as: the time when sentencing submissions would be made, how much time they would take, how information would be provided to the jury, how much extra time such deliberations would take, and how much extra cost would be involved in juror fees and counsel costs. Usually the sentencing phase of a trial takes place sometime after the finding of guilt in order to provide the court with the relevant or required reports, including medical, psychological or psychiatric reports. It would be difficult to reconvene the jury for a hearing at a later date, given their likely conflicting availability.
- There is a likelihood of inconsistent outcomes, given that jurors are not versed in sentencing law and would have little idea of current sentencing practices. Unjustified sentence disparity is often a ground for public concern.
- There is a danger of compromise verdicts if jurors believed that they could convict, but then influence the sentencing outcome.
- There are natural justice concerns: jurors' deliberations would be in secret and they would not be required to provide reasons for their decision as judges do. Grounds for appeal would be difficult to articulate unless juries were asked to justify or explain their decisions.
- There are likely to be difficulties in getting a jury to arrive at a unanimous recommendation. Proposed sentences are likely to be quite diverse among jury members who have little or no knowledge of the law. Would a unanimous recommendation be required, or a majority?
- The added emotional and practical burden of becoming involved in a decision on sentencing might discourage jury service.

This article, one of a series on Victorian juries' views of sentencing,¹⁹ explores whether jurors themselves want to play a larger role in sentencing.



The Victorian study

Data was gathered from 124 Victorian County Court trials in four stages between May 2013 and November 2015. Stage 1 surveys were completed by jurors after a guilty verdict and before the sentence were imposed. After questions relating to the juror's preferred sentence and the most important purpose of that sentence, jurors were given a four-part question about whether juries should have a sentencing role. The question was phrased:

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

[please tick the applicable box – you can select one or more options]

1. A recommendation as to the type and length/ amount of sentence (e.g. three years imprisonment)
2. A recommendation as to the range for the length/ amount of sentence (e.g. two to three years' imprisonment)
3. Factors which jurors believe the judge should consider in sentencing
4. Other – If other, please specify

[The applicable box for each of the items was yes or no.]

The Stage 2 survey was sent to jurors after the judge had imposed sentence, together with the judge's sentencing remarks and a short booklet containing brief information about sentencing principles and some information on sentencing patterns. The Stage 2 survey questions are not relevant to this article.

At Stage 3, 50 jurors from the Stage 2 respondents were selected for semi-structured interviews to elaborate on their survey responses. The interview guide included a section exploring reasons for supporting or opposing a sentencing role for the jury.

The Stage 4 follow-up survey was sent to Stage 2 jurors six months after the completion of the Stage 2 survey. It repeated the same four-part jury role question which was asked in the Stage 1 survey.

Of the 987 Stage 1 respondents, 799 responded to items 1 and 3 and 775 to item 2. There were 153 Stage 4 respondents, 138 of whom responded to items 1 and 2 and 144 responded to item 3 of this question.

¹⁹Other findings from the Victorian study are reported in these publications: Warner et al, above n 11; Kate Warner, Julia Davis and Helen Cockburn, 'The Purposes of Sentencing: How do Judges Apply a Legislative Statement of Sentencing Purposes?' (2017) 41(1) *Criminal Law Journal* 69; Kate Warner et al, 'Why Sentence? Comparing the Views of Jurors, Judges and the Legislature on the Purposes of Sentencing in Victoria and Australia', *Criminology and Criminal Justice* (online version, 10 November 2017); Kate Warner et al, 'Sentencing Discounts for Delay' (2018) 42(1) *Criminal Law Journal* 22; Kate Warner et al, 'Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors' (in press, *Australian Law Journal*, May 2018); Kate Warner et al, 'Mandatory Sentencing? Use [with] Discretion', *Alternative Law Journal* (in press).

Results

Stage 1: 'Top-of-the-head' responses to the four-part question about a jury role

Stage 1 respondents were quite divided about whether jurors should have any role in sentencing or not. A narrow majority thought that jurors should have a role at least in recommending factors that the judge should consider (52 per cent), whereas less than a third thought that juries should have a role in recommending the type and length of sentence (28 per cent) or in recommending a range (32 per cent). Of those who answered all of these questions, a narrow majority answered no to all three questions (51 per cent).

There were 20 responses to the 'other' option for jury involvement in the survey. Most of these responses did not cover additional options but those that did included recommendations on: suspension of the sentence; rehabilitation services; parole conditions; type (but not length) of sentence; and giving a severity rating.

Stage 3: Interviews

The 50 jurors who were interviewed represented a cross-section of jurors in terms of the Stage 1 responses to the second and third items in the questions about a juror's sentencing role and in the proportion responding negatively to all three items (52.6 per cent compared with 51 per cent of Stage 1 respondents). However, the interviewed jurors were less likely to support a role in relation to the first item (type and length of sentence) than the Stage 1 respondents (17.5 per cent versus 28 per cent).

Reasons for opposing a role

There were four main reasons put forward as to why jurors should not play a role in sentencing. Jurors sometimes gave more than one reason.

Lack of expertise or experience: Jurors were aware that they lacked the expertise, background knowledge and experience that judges have. This was the most common reason given and was mentioned by half of the jurors interviewed. As Juror 324 observed:

You haven't seen the spread of cases that are in this area. You know, you're working off the basis of one example and what you've seen on the telly. . . . I don't think that jurors have the capability to make those sorts of decisions.

As other jurors noted, judges are able to compare cases and therefore to be more balanced in their decision. They were aware that their limited exposure to the trial did not equip them to make such a decision.

This task is too difficult: More than a quarter of interviewees cited the difficulty of the task as a reason for opposing involvement. One problem identified was in getting jurors to agree on a sentence, if that were required. Juror 666 stated:

To try and get 12 people to assist in the sentencing on top of the [verdict] – it would be a nightmare because there'd be everything from hanging to three months suspended.

In a similar vein, Juror 648 observed:

I mean, it was hard enough to get a decision . . . There were [jurors] who were red-necked and would have put him away for life. And there were others that would have just given a slap on the wrist. So I think no, no, the juries don't have the background, don't have the training, don't have the knowledge . . . Oh it would have been just too hard. It would have been far, far too difficult.

The other aspect of difficulty related to the demands that would be made on the jury. On top of their participation in the trial, respondents believed that further involvement in the sentencing phase would be too time consuming and onerous.

Unfairness and inconsistency: The judiciary are often criticised for the disparity in sentencing between one case and another and, while the High Court of Australia takes a highly individualistic view of sentencing,²⁰ reasonable consistency is expected of the courts, which are required to treat like cases alike.²¹ Six jurors rejected jury involvement on the ground that it would lead to inconsistency and unfair outcomes. Some located the problem with the composition of the jury:

So one set of jurors happens to have a mix of people that are very harsh, right? And another set of jurors happens to have a group of people that are soft, and you end up with mayhem. . . . It'd be mayhem, right? So you know, it would make a mockery of our judicial system. [Juror 108]

Others were concerned with the possible prejudices that jurors could bring to the task:

Oh no, no, absolutely not, because you're then open to all sorts of prejudices and especially racial prejudices. [Juror 173]

And for a minority, it was linked with disillusionment with the jury:

Not after the jury I was in. . . . It just seemed farcical. I felt like I was in a retarded version of 12 Angry Men or something. [Juror 757]

²⁰*DPP v Dalglish (a pseudonym)* [2017] HCA 41.

²¹*Lowe v The Queen* (1984) 154 CLR 606.

Jurors too emotionally involved: Being too emotionally involved was given as a reason by six jurors. For example, Juror 698 opposed a jury role 'because it's emotional and it's not relevant to the facts and that's the role of the judge'. Juror 637 stated:

[I can say] pretty confidently that I wasn't... emotionally the best person to make a decision at the time it happened... I feel like the jury, and more so for different people in the jury, would be too emotionally affected.

Reasons in favour of a jury role

Fresh eyes: Dzur's view that the public's lack of knowledge is a virtue and that jurors can bring a fresh eye to sentencing was supported by a minority of jurors.²² Juror 63 was of the view that judges could become 'slightly jaded' but Juror 229 summed it up as follows:

You know, this judge has seen cases like this all the time... how can you remove all of that knowledge that you have to look at things afresh. So you get this fresh bunch of people, they've never been involved before, that says 'this is what disturbs us most, this is what is really bad, and this is what we think'.

Community feedback: The remoteness of judges from the community is a common criticism, in relation to which Juror 290 commented that the jury could be one of the judge's resources, 'because that will actually give her a bit of an idea... of community feeling'.

Factors rather than sanctions

Jurors were asked what kinds of factors they had in mind when they supported a jury role in suggesting factors that the judge should consider. Juror 801 responded that in her case she would have liked to suggest that the judge consider the effect on the offender's family and the fact that the offence was committed 'a long time ago'. Juror 253 wanted some input into aspects of the case including aggravating and mitigating factors, while Juror 487 wanted to comment on the seriousness of the offence. Juror 229 would have liked to have had her impressions of the offence and the offender considered by the judge, while Juror 618 would have liked to draw the judge's attention to things such as mitigating factors.

Interviewees who changed their mind

It was striking that many jurors who supported jury involvement in sentencing in the Stage 1 survey changed their mind in the interview. The interviewed jurors had

all completed Stage 2 and therefore had received the judge's sentencing remarks and the sentencing booklet. They were, therefore, better informed about sentencing than at Stage 1. All those who were initially against any role adhered to their Stage 1 responses in the interview. However, 14 jurors, who were in favour of some role at Stage 1, changed their mind and did not recommend any sentencing role for jurors. So, at the interview stage (Stage 3) almost three quarters of jurors opposed any sentencing role for jurors. Their reasons for changing their view appeared to reflect an increased appreciation of the complexity of sentencing and increased confidence in the judges who perform this role, which jurors gained after reading the sentencing remarks and booklet.

Of those who changed their mind, the main reasons proffered by respondents in the interviews mirrored the reasons given for negative responses to the jury role questions in Survey 1, namely that they realised the jury did not have the knowledge or skill to do the job [Juror 878 and Juror 503], that they were too emotionally involved [Juror 25 and Juror 603], that they lacked confidence that the right decision would be made [Juror 25], and difficulty in reaching consensus: 'it's difficult enough to get the verdict without the punishment' [Juror 366].

As explained above, at Stage 4 of this study, jurors were again asked the same question about a jury sentencing role that they had been asked at Stage 1. Analysis revealed that they were statistically *more* likely to support a role for jurors in sentencing at Stage 4 compared with Stage 1. There was an increased likelihood of endorsing each of the items and a reduced proportion responding 'no' to each of the three items, down from 51.5 per cent to 28.9 per cent. This could not be explained by sample attrition at Stage 4 because the Stage 1 responses of the full Stage 1 sample were noticeably similar to the smaller subset of Stage 1 who completed Stages 1 and 4. Even some of the interviewed jurors later changed their mind and supported a jury role at Stage 4, at least in relation to recommending factors that the judge should consider. However, the change from Stage 1 responses for this subset of Stage 4 jurors was less pronounced.

The fluctuating views between the three stages require some comment. The change at Stage 3 (the interview stage) is not surprising. It is known that, when respondents are required to explain their views, this is more likely to engender a considered judgement rather than a mere opinion that is given in response to a survey question.²³ Therefore, as a considered judgement, the opposition of almost three quarters of the interviewed jurors, who were required to explain the reasons for their views, is significant.

That Stage 4 respondents were more inclined to favour a sentencing role than at Stage 1 is harder to explain. It is

²²Dzur, above n 8.

²³David Indermaur et al, 'A Matter of Judgement: The Effect of Information and Deliberation on Public Attitudes to Punishment' (2012) 14(2) *Punishment & Society* 147, 149.

possible that concerns about lack of expertise and the difficulty of reaching a decision had dissipated by Stage 4. And it is important to note that the Stage 4 response was in the nature of an opinion rather than a considered judgement.

Despite the volatility of views of some of the jurors between the stages, the fact remains that at Stage 4 only 38 per cent favoured recommending the type and length of sentence, 41.5 per cent a range, and less than two thirds a role in recommending factors that a judge should consider in imposing a sentence. It is significant that when asked to discuss their responses in the interview and to consider the question more carefully, jurors were most likely to balk at having any sentencing role at all.

Conclusion

Sentencing appears easy from a distance. Tabloid reports of sentences simplify and distort sentencing outcomes. The process of sentencing is, as any sentencing judge will attest, complex, difficult, and intellectually and emotionally taxing.

This study reveals that, having seen the process first-hand, most jurors would not want to undertake the task, and for very good reasons. The interview responses show that the more knowledge jurors had of what sentencing entailed, and the more consideration they gave to the issue, the less likely they were to want to be the judge. Lack of knowledge and experience, the difficulty of reaching a consensus, and the dangers of exacerbating disparities all loomed large in jurors' considered responses to the study's questions and interviews. While a majority of jurors in the surveys expressed a

preference for some role in suggesting factors that a judge should consider, overall, when asked whether they should have a role in recommending the quantum or range of the sentence, the majority said 'no thanks'. There may be many judges who might want to decline the same invitation.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This research was supported by the Australian Government through the Australian Research Council's Discovery Projects funding scheme (project DP130101054). The views expressed herein are those of the authors and are not necessarily those of the Australian Government or Australian Research Council.

Arie Freiberg is Emeritus Professor and former Dean of Law at Monash University.

Kate Warner is Emeritus Professor of Law at the University of Tasmania.

Caroline Spiranovic is a Senior Research Fellow in the Faculty of Law at the University of Tasmania.

Julia Davis is an Associate Professor in the School of Law at the University of South Australia.