

JUDICIAL CONFERENCE OF AUSTRALIA

OPINION PIECE FOR THE *HERALD SUN*

SENTENCING OF OFFENDERS

Law week is an ideal time for judges and magistrates to re-issue a standing invitation. Come and see the courts at work – not only in Law Week, but at any time. If you can, watch a criminal trial from beginning to end. Listen to the prosecutor tell the jury what, according to the prosecution, the case is about. Hear the evidence. See the jury return with the verdict. If the accused is convicted, listen to what is said about penalty. Assess for yourself what the punishment should be. Listen as the judge pronounces sentence.

There is a 90% chance, if you do all this, that you and the judge will agree. That may come as a shock. You probably think that the courts are way too lenient. But what you have heard about sentencing comes from the more newsworthy trials, and you will never have been told as much as you will know if you cover a full hearing.

Members of the jury cover the entire hearing up to verdict. In Tasmania, as part of a carefully designed research project, 698 jurors in 138 cases which resulted in a verdict of guilty stayed on not only to hear the arguments put to the judge about punishment, but then to hear the judge give her or his reasons for the sentence he or she imposed. And 90% of those jurors agreed that the chosen penalty was “very” or “fairly” appropriate. 52%, including many who agreed that the verdict was appropriate, chose a more *lenient* sentence than the one handed down by the judge.

This is nowhere near what the public generally think about sentences. Polls conducted in Australia match those taken in the UK, Canada and the US. The results, according to the Sentencing Advisory Council of Victoria, have been consistent since the mid 1980’s. They portray a community which believes that judges and magistrates are persistently too lenient. In each of these countries public confidence in the criminal justice system is, for this reason, at critically low levels.

This is, as it ought to be, of great concern to the judges and magistrates of Australia. The public have a right to expect that justice will be administered in ways which the public find acceptable. The punishment of offenders is the most sensitive, and most frequently publicised, of all the myriad of decisions made by the courts. If the public believe that judges and magistrates consistently fail in that one aspect of their job, community confidence in the courts’ overall ability to administer justice may fall to levels which prevent them from fulfilling their role as an essential component of democratic governance.

One solution seems obvious. The courts should be much more punitive. Unfortunately, the reality is a whole lot more complicated. The same international and Australian research which revealed public dissatisfaction has, with equal consistency, demonstrated that the more the public knows about the considerations

which influence sentencing decisions, the less punitive the public becomes. Crucially, almost all those members of the public who know as much as the judge, accept the judge's decision. To the extent that they differ, the public tends towards greater leniency.

The Tasmanian jury study proves this point. Its results were released on 10 February this year by the Federal Minister for Home Affairs and Justice (Brendan O'Connor) in a document called *Public judgment on sentencing: final results from the Tasmanian Jury Sentencing Study*. The study itself was led by Professor Kate Warner of the Faculty of Law at the University of Tasmania and Dr Julia Davis, a member of the School of law at the University of South Australia. It was funded by the Criminology Research Council of Australia. It was the first to consult jurors who participated as jurors in real criminal trials.

The implications are highly significant. One is that *informed* members of the community do not want increasingly harsh penalties. Equally, the media cannot legitimately suggest that, in order to retain or win back the confidence of the people, the courts must heed calls for a general increase in severity. Thirdly, politicians ought not to fashion their policies on the basis that an informed public is calling for ever stiffer sentences. Finally, judges and magistrates must do more to get the facts about sentencing, including the facts about individual sentencing decisions, into the public arena.

The judiciary calls on the media to assist. We acknowledge that a free media is an essential element in a free society, and that scrutiny of the courts is part of its job. We are entitled to ask, in return, for balance in the reporting of the work of the courts. We ask, in other words, that the media not weaken confidence in the administration of justice, and in the courts as a vital constituent of our democracy, by criticism which, as the Tasmanian study confirms, is unjustified. The media cannot accurately portray the courts as disappointing informed public opinion by being generally too lenient in the punishments they impose. Judges and magistrates are sworn to do justice according to law, not to public whim or private vengeance. It does democracy no service if the judiciary is attacked for doing its duty.

As part of Law Week, Courts Open Day will be held on Saturday 21 May, when the Supreme Court will open its doors to the public. Along with a mock trial, and a presentation by judges, the Sentencing Advisory Council is to hold an interactive session entitled "You be the judge". Participants will assume the role of the judge, participate in a sentence hearing, and experience the process of deciding upon an appropriate punishment. You will be welcome.

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