JUDICIAL CONFERENCE OF AUSTRALIA

OPINION PIECE FOR *THE AGE*

SENTENCING OF OFFENDERS

The sentencing of offenders is a topic in which the community and the media have a legitimate and abiding interest. As a result, it attracts much media scrutiny. It also presents the courts with multi-faceted challenges.

One of these is the necessity to balance often competing considerations. Punishment and rehabilitation are examples. Looked at in isolation, the punishment of the offender may point towards severity; but when the importance of rehabilitation – and therefore the long-term protection of the community – is taken into account, leniency may be indicated. Leniency may also be appropriate in other circumstances. Most Australians, for example, would welcome that shown by the Indonesian Supreme Court to Scott Rush.

Judges and magistrates strive to get the balance right. The public perception is that they too frequently get it wrong. Polls conducted by Australian media mirror 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 show that, in each of these countries, public confidence in the criminal justice system is at critically low levels. The public's view is that the courts are consistently too lenient.

This is, as it ought to be, of great concern to the judiciary. 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.

The solution seems obvious. The courts should be much more punitive. Unfortunately, the reality is a whole lot more complicated.

The research has consistently 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 the two differ, the public tend towards greater leniency.

The most recent research demonstrates this point. On 10 February 2011, the Federal Minister for Home Affairs and Justice (Brendan O'Connor) released *Public judgment on sentencing: final results from the Tasmanian Jury Sentencing Study*. The study is the result of rigorous research into the reaction of jurors to the sentences imposed following trials in which those jurors have been the judges of the facts. It 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, and funded by the Criminology Research Council of Australia. It was the first to consult jurors who participated as jurors in real criminal trials.

The study examined the responses of 698 jurors who between them had participated in 138 such trials. 90% agreed that the sentence delivered in their trial was "very" or "fairly" appropriate. 52% chose a more *lenient* sentence than the one imposed by the trial judge. This is not inconsistent with their acceptance of the judge's decision as appropriate. It is nevertheless noteworthy that, although jurors in "their" trials agreed with the sentence, they remained of the general view that sentences were too light. The myth of leniency is powerful.

The implications are highly significant. First, until some other equally rigorous research produces different conclusions, the judges and magistrates of Australia have no choice but to accept the results of the Tasmanian study. Accordingly they cannot, consistently with the highest obligations of their office, allow themselves to be influenced by those, including some powerful voices in the media, who demand a *general* increase in severity in sentencing (adjustments in particular areas may be appropriate).

Secondly, the media cannot with honesty purport to speak for *informed* public opinion when calling for, or reporting that the public wants, 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 additional punitiveness in sentencing.

The judiciary acknowledges that a free media is an essential element in a free society, and that scrutiny of the courts is part of its job. Judges and magistrates are entitled to ask, in return, that the media not weaken confidence in the administration of justice, and in a vital constituent of our democracy, by criticism which, as the Tasmanian study confirms, is unjustified. The media cannot fairly 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 according 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. 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.

David Harper.

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