Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia

There is an expanding body of research measuring public perceptions of the criminal justice system's responses to offenders in general and sex offenders in particular. However, less is known about public attitudes to the factors that the law classifies as aggravating, mitigating or merely neutral. This article presents key findings from the National Jury Sentencing Study, which sought to address this gap in knowledge in the case of sex offences using two groups: 343 jurors who had returned a guilty verdict (jurors); and 149 members of the public called for jury service who were not selected for a trial (non-jurors). The study shows that, in general, the public's intuitive views of sentencing factors are well-aligned with judicial sentencing practice – a finding which contradicts the stereotypical view of the public as particularly punitive towards sex offenders. Some differences in views on factors such as good character and absence of remorse did appear and potential responses to this divergence are discussed.

INTRODUCTION

This article begins by explaining why comparing legal views of sentencing factors in sex offence cases with the views of members of the public is a research question worth pursuing. It then discusses previous research on the issue before describing the approach used in this study to explore the question. After providing an overview of the results, we discuss the most striking similarities and differences between judges and our respondents, together with a closer analysis of some of the factors and the significance and implications of the findings.

There are two benefits in informing criminal justice professionals about public views on the relevance of sentencing factors. First, it is valuable information for sentencing reviews, and formulating sentencing guidance, including appellate or statutory guidance and guidelines promulgated by sentencing councils. Secondly, where such research reveals a mismatch between public views and sentencing practice, this divergence should be resolved by careful analysis to determine whether public views could be accommodated by changing the law's approach. Prominent sentencing scholars have criticised the law's failure to articulate a coherent rationale for aggravation and mitigation.[1] Consequently, we have not uncritically assumed that the law's approach to a factor should prevail.

If public views about whether particular factors should aggravate or mitigate a sentence cannot be accommodated on the basis of principle or policy, any divergence between these intuitive views and sentencing practice serves to highlight those factors which need a clearer explanation of the rationale for the law's treatment of a factor as aggravating, mitigating or neutral.[2] This task falls to sentencing councils and judges. Sentencing councils have a mandate to improve public confidence in the criminal justice system by enhancing public

[1] Andreas von Hirsch, "Foreword" and Julian Roberts, "Punishing More or Less: Exploring Aggravation and Mitigation at Sentencing" in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing*, (Cambridge University Press, 2011) xv, 17; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 203-204; Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Lawbook, 7th ed, 2019) 512-522.

[2] Julian Roberts and Mike Hough, "Exploring Public Attitudes to Sentencing Factors in England and Wales" in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing*, (Cambridge University Press, 2011) 168, 185.

understanding of sentencing.[3] Judges, too, have a role in improving public understanding of sentencing. The increasing trend for sentencing remarks to be made publicly available gives judges an opportunity to explain the relevance of sentencing factors in their reasons for sentence. Judges themselves have acknowledged their responsibility to make their reasoning in sentencing cases accessible to the public.[4] Appellate judges also have a role in assisting sentencers. The guidance they provide should promote consistency in sentencing by providing clarity around factors (such as delay and absence of remorse) that are susceptible to different views. Clear and consistent interpretation of sentencing provisions relating to sentencing factors is an important aspect of such guidance.

In summary, wherever one stands on the controversial issue of the normative significance of public opinion of sentencing,[5] there is value in exposing similarities and disparities between lay views and the law's view about the relevance of sentencing factors. If lay views of aggravating and mitigating factors are similar to judges' views, then this finding would support other research showing that the gap between the public and judges is not as wide as public opinion polls on sentencing leniency suggest.[6]

PREVIOUS RESEARCH

Public opinion research has examined many aspects of sentencing, but research on the factors which justify a more severe or lenient sentence is not as extensive. Much of it has been conducted for sentencing councils or their equivalent. More than 30 years ago, research for the Canadian Sentencing Council asked a sample of respondents whether various factors should 'always', 'sometimes' or 'never' be taken into account in sentencing.[7] The three most commonly endorsed aggravating factors were premeditation, extent of harm to the victim and prior criminal history. Research for the Sentencing Advisory Panel for England and Wales used a similar approach, asking a large representative sample of the public about 15 aggravating and 13 mitigating factors.[8] The aggravating factors which respondents most commonly said should 'always' increase the seriousness of the offence were: use of a weapon, victim vulnerability, and planning. There was considerable support for legally recognised mitigating factors with over half of respondents believing that 12 of the 13 mitigating factors listed should result in a more lenient sentence at least some of the time.

A different approach was taken in another study of attitudes to sentencing sexual offenders by the Sentencing Council of England Wales. Using focus groups and vignettes, personal information about the offender and the nature of the offence was gradually introduced to aid debate about aggravating and mitigating factors.[9] Planning and previous convictions emerged as important aggravating factors, while participants were reluctant to accept the mitigatory relevance of either a plea of guilty or the good character of the offender. A more recent study for the Sentencing Council asked participants about the relative importance of a list of

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[3] Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy*, (Hawkins Press, 2008).
[4] *R v Koumis* (2008) 18 VR 434.
[5] Jesper Ryberg and Julian V Roberts (eds), *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014).
[6] Lorana Bartels, "Sentencing Review 2018-2019" (2019) 43 *Criminal Law Journal* 355.
[7] Julian Roberts, *Public Opinion and Sentencing* (Department of Justice, Canada, 1988).
[8] Roberts and Hough, n 2.
[9] Carol McNaughton Nicholls et al, *Attitudes to Sentencing Sexual Offences* (Sentencing Council Research Series 01/12, 2012)

sentencing factors.[10] The severity of the offence and harm caused to the victim were consistently rated as the most important factors that the judge should take into account and 'if a defendant pleads guilty' was consistently placed near the bottom end of the scale. Recent research by the Scottish Sentencing Council on public perceptions of sentencing asked about the relevance of three factors: prior convictions (90% responded that they were aggravating); lack of remorse (82% said it was aggravating); and a plea of guilty (54% said it should make no difference).[11]

A study from the United States by Robinson and colleagues examined the effect of extra-legal punishment factors, defined as factors unrelated to harm, culpability, deterrence and incapacitation, on lay assessments of the appropriate punishment using vignettes. They found only a minority supported these factors.[12] Old age for example, was supported on average only by less than a quarter of participants.[13] Other empirical research has focused on the relevance of sentencing factors in first instance sentencing decisions,[14] which complements legal scholarship on appellate and statutory guidance on aggravating and mitigating factors.

An Australian jury sentencing study conducted in Victoria aimed not only to survey the views of jurors about aggravating and mitigating factors for the offence in their trial but also to compare their views with the judges' approach to those factors.[15] It found that the views of judges and jurors on aggravating factors were very similar, but judges gave slightly more weight to breach of trust, victim vulnerability, and substantial injury to the victim, while jurors gave slightly more weight to planning, prior convictions and breaches of parole, bail or sentence. Jurors also took a broader view of breach of trust, giving it weight in a wider range of cases. Judges and jurors gave the most weight to the same three mitigating factors: the offender's youth, being a first offender, and having good prospects of rehabilitation. However, judges were twice as likely to give 'a lot of weight' to being a first offender and to good character. Jurors were also much more likely to find intoxication aggravating than judges[16] and while delay was the third most common mitigating factor for judges, it was rarely mentioned by jurors.[17] In terms of personal mitigation, jurors showed little support for reducing a sentence on the basis of the greater impact of the sentence on the offender because of characteristics such as old age, ill-health, mental disorder or delay causing emotional stress.

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[10] Nicola Marsh et al, *Public Knowledge of and Confidence in the Criminal Justice System and Sentencing: a Report for the Sentencing Council* (August 2019).
[11] Carolyn Black et al, *Public Perceptions of Sentencing: National Survey Report* , Scottish Sentencing Council (2019).
[12] Paul Robinson, Sean Jackowitz and Daniel Bartels, "Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse and Other Such Discretionary Factors in Assessing Criminal Punishment" (2012) 65(3) *Vanderbilt Law Review* 737.
[13] Robinson, Jackowitz and Bartels, n 12, 789.
[14] For a summary of this see Kate Warner et al, "Aggravating and Mitigating Factors in Sex and Non-violent Cases" (under review).
[15] Kate Warner et al, "Aggravating and Mitigating Factors on Sentencing: Comparing the Views of Judges and Jurors" (2018) 92 *Australian Law Journal* 374.
[16] Kate Warner et al, "Aggravating or Mitigating? Comparing Judges and Jurors Views on Four Ambiguous Sentencing Factors" (2018) 28 *Journal of Judicial Administration* 51.
[17] Kate Warner et al, "Sentencing Discounts for Delay" (2018) 42 *Criminal Law Journal* 22.

THE CURRENT STUDY

Building on the Victorian Jury Sentencing Study, the National Jury Sentencing Study reported in this article provides an opportunity to explore jurors' perceptions of sentencing factors in sex offence cases in particular, and to supplement them with the views of members of the public who used vignettes. Given that sex offender sentencing gives rise to the greatest public disquiet, and that it appears to be the area where judicial and public views are most likely to be divergent, exploring lay and legal views of sentencing factors for sex offences warrants further investigation.

METHOD

The method for this multi-stage national study builds on previous jury sentencing research in Australia,[18] but sought to focus on sex offence cases and to include the views of non-jurors, as well as jurors across all Australian states and territories. Between 2014 and 2016, jurors were recruited from 128 sex offence and 31 non-sexual violent offence trials in each of the Australian states and territories except Western Australia.[19] The non-juror group was recruited from members of the public summoned for jury duty who were not selected on a jury. The Stage 1 survey had the same core questions for each group of participants; however, non-jurors who had not served on a trial were presented with one of ten scenarios that were based on real cases, nine of which involved sex offences. [20]

At the end of the Stage 1 survey, respondents were invited to participate in Stage 2; and this article draws on the responses in sex offence trials and vignettes from that stage. If Stage 1 respondents agreed to continue, they were sent the judge's sentencing remarks, a sentencing booklet and the second survey. In the case of jurors, the sentencing remarks were those for the offender(s) convicted in their trial. For non-jurors, the sentencing remarks were taken from the real case on which the scenario in Survey 1 was based. The sentencing booklet included information about sentencing principles, sentencing purposes and sentencing factors, as well as information about sentencing options and current sentencing practice. Jurisdiction-specific sentencing statistics for the offence in the participant's trial or scenario were added to the booklet.

The Stage 2 survey contained questions about the appropriateness of the sentence imposed by the judge in the participant's case and then focused on the sentencing remarks. The opening statement to the relevant questions in the section used for this article explained that in deciding a sentence, a judge is required to consider a number of factors and then listed 11 commonly recognised aggravating and 12 mitigating factors.[21] Respondents were asked to go through the lists and to give their own views on how much weight the judge should have placed on each of the factors ('no weight', 'a little weight'; ' a lot of weight' or if the factor 'did not arise').

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[18] Kate Warner and Julia Davis, "Using Jurors to Explore Pubilc Attitudes to Sentencing" (2012) 52 *British Journal of Criminology* 93; Kate Warner et al, "Measuring Jurors' Views on Sentencing: Results from the Second Australian Study" (2017) 19 *Punishment & Society* 18.

[19] In Western Australia, the Attorney-General did not provide approval to conduct research with jurors. An online sample was surveyed instead, using the first survey only.

[20] More details of Stage 1 of the study are given in Kate Warner et al, "Juror and Community Views of the Guilty Plea Sentencing Discount: Findings From a National Australian Study" *Criminology & Criminal Justice*. https://doi.org/10.1177/1748895820956703.

[21] The surveys can be viewed on the University of Tasmania Law School's website: see "sample materials" at https://www.utas.edu.au/law/research/the-jury-projects.

The listed aggravating factors (explained as factors that have the effect of increasing the severity of the sentence) were:

- 'pre-planning or premeditation';
- 'sustained or repeated assault on the same person';
- 'victim particularly vulnerable',
- 'offender was on bail, parole or probation etc';
- 'abuse of power/trust';
- 'threatened/actual use of weapon';
- 'previous relevant convictions';
- 'threats to prevent victim reporting the incident';
- 'extent of physical injury';
- 'extent of emotional injury'; and
- 'more than one victim'.

The listed mitigating factors (explained as factors generally related to the offender's personal circumstances that can decrease the severity of the sentence) were:

- 'old age of offender';
- 'genuine remorse';
- 'offender undergoing treatment';
- 'the offence was not premeditated/was impulsive';
- 'currently in, or prospects of work/training';
- 'loss of job or reputation';
- 'difficult/deprived background';
- 'mental disorder/disability';
- 'physical illness';
- 'good character';
- 'lack of maturity affecting responsibility'; and
- 'sole/primary carer of dependent relative(s)'.

Participants were also asked to specify any other aggravating or mitigating factors that were relevant to the sentence in the case.

At the end of the survey, jurors were asked if they were willing to be interviewed. Twenty jurors were selected for interview, 18 from sex offence trials. The interviews included a discussion of the sentencing factors in the case.

Each judge in the participating trials was asked to complete a form (the judge's ranking form) with the same lists of aggravating and mitigating factors that were included in Survey 2. The response of judges to this part of the study was disappointing with only 18 forms received from the 157 trials included in the study for which we had sentencing remarks. To enable a comparison between judges' treatment of sentencing factors and jurors' views, the researchers used the sentencing remarks to complete a judge's ranking form for each offender.[22] This was also done for the vignettes.

[22] The remarks with forms were also coded and the comparison helped inform the coding exercise for the remainder of trials without a completed judge's form. The judge's form was accepted where there was disagreement between our coding and the form, except where the judge indicated a factor did not arise when the remarks expressly indicated that it did.

It is acknowledged that the researcher-completed forms are an imperfect replica of what judges may have entered, so considerable care was taken with this task. Two of the authors independently completed the forms and then, working together, checked them for inter-rater reliability, resolving any differences by consulting the sentencing remarks. The qualitative analysis software Nvivo was also used to compare consistency in coding particular factors. The analysis and coding was informed by the law's approach to the factor. For example, because absence of remorse is regarded by the law as neutral, when it was mentioned by the judge it was coded as neutral unless the judge expressly or by clear implication indicated that it was aggravating. Subjectivity in coding a factor such as 'relevant prior convictions' was avoided by including prior convictions as arising if the judge stated the offender had prior convictions, whether or not weight was given to them.

It is also acknowledged that 'instinctive synthesis', the approach to sentencing dictated by the High Court in *Wong v The Queen*[23] and *Markarian v The Queen*,[24] which neither requires nor permits judges to set out in mathematical terms the weight to be accorded any particular factor, may appear to be an obstacle to assessing whether the sentencing judge gave 'a little' or 'a lot of weight' to a factor that is mentioned as arising. As a consequence of this approach, the Victorian Court of Appeal in *DPP (Vic) v Terrick*[25] said:

> The proposition that too much – or too little – weight was given to a particular sentencing factor is almost always untestable. This is so because quantitative significance is not to be assigned to individual sentencing considerations.

However, judges are permitted, and do in practice, frequently indicate whether a lot or a little weight is given to a particular factor by stating, for example, that it is of 'overwhelming importance'[26] or a matter of 'serious aggravation'.[27] And in relation to a factor such as good character, it is widely acknowledged that this can be of 'significant or minimal' weight and courts do not hesitate to give qualitative descriptions to the amount of weight it is given.[28] By adopting categories such as 'a lot of weight', 'a little weight' and no weight', the authors had confidence in assessing the amount of weight given within these broad categories. When the judge said that the offence involved a 'substantial', 'significant' or 'gross' breach of trust, this was coded as 'a lot of weight'. If delay was 'a powerful factor in mitigation' it was coded as 'a lot of weigh' but 'I take delay into account in a limited way' was coded as 'a little weight'. 'In a limited way' was found to be a common way of expressing how much weight was given to a mitigating factor. Where there was no express indicator of the weight given to a mentioned factor in the sentencing remarks, the two authors responsible for the coding used the context, the sentence imposed and their combined knowledge of sentencing law and practice to determine whether a factor was given 'a little', 'a lot of weight' or 'no weight'. It was also found that the NVivo coding assisted this process.

ANALYSIS

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[23] (2001) 207 CLR 584.
[24] (2005) 228 CLR 357.
[25] (2009) 24 VR 457, [5].
[26] *Saunders v The Queen* [2010] VSCA 93, [13] (in relation to prior convictions).
[27] *R v Esposito* [2000] SASC 182, [20] (in relation to planning).
[28] *R v Knoote-Parke* (2016) 125 SASR 13, [75].

Additional aggravating and mitigating factors mentioned either by the judge or added by respondents to the open-ended questions were sorted and coded into thematic categories. The analysis of the sentencing remarks produced additional factors more often than they were entered by jurors in the surveys. For judges, 78% mentioned additional aggravating factors and 90% additional mitigating factors, whereas only 24% of jurors added aggravating factors and 12% mitigating factors (the pattern was similar for judges and non-jurors).[29]

For the purposes of the comparison between judges and our lay participants, whether a factor arose or not was dictated by the judge's sentencing remarks. This was necessary to avoid respondent error such as entering 'no weight' instead of 'did not arise'. Examining the juror and non-juror responses to the survey revealed this to be a common error and for this reason the 'no weight' and the 'did not arise' responses were combined. At the same time, instances were noted separately where respondents gave weight to a factor which, according to the judge, did not arise – this can indicate a different interpretation of that factor by a lay person.

Of the 128 sex offence cases almost half (59 cases) were Victorian; almost one in five from Queensland (24 cases); between 9 and 15 cases in each of South Australia, Tasmania, the ACT and New South Wales, and just one from the Northern Territory. As with the jurors, the largest proportion of non-jurors were recruited from Victoria. The jurors interviewed were from Victoria, New South Wales, Tasmania and the ACT. The qualitative data in relation to sentencing factors in the sex offence cases were analysed using N-Vivo software.

RESULTS

Aggravating factors

Table 1 compares the weight given to the listed aggravating factors by judges and jurors in the cases where each of the factors arose according to the sentencing remarks. The factors are listed in order according to the frequency of which each factor arose.[30] The table shows that in general, for both judges and jurors the listed factors were more likely to attract 'a lot of weight' than 'a little weight'. The three most commonly arising aggravating factors were 'extent of emotional injury', 'vulnerability of victim' and 'abuse of power or trust'. In the light of the fact that the cases were all sex offences, this finding is not surprising.

Table 1: Views of judges and jurors on the weight given to aggravating factors

	Judges (N=128)				Jurors (N=343)			
	No. of cases where judge said arose	A lot of weight (%)	A little weight (%)	No weight (%)	No. of jurors*	A lot of weight (%)	A little weight (%)	No weight/ Did not arise %
Listed factor								
Extent of emotional injury	118	81	14	5	327	85	12	3

[29] Some of the factors mentioned by jurors were difficult to code into thematic categories for example, e.g. 'a lack of action by the church' (added as an aggravating factor).

[30] Threatened or actual use of a weapon has been excluded from the table as there were only three cases where this arose.

Vulnerability of victim	98	71	22	6	227	88	8	4
Abuse of power or trust	93	85	12	3	251	96	3	1
Sustained or repeated assault	77	70	29	1	224	85	8	7
Prior (relevant)** convictions	49	18	41	41	136	43	15	42
Threats to prevent reporting	24	54	46	0	73	66	12	22
Extent of physical injury	24	33	54	13	59	71	19	10
More than one victim	21	81	19	0	62	89	3	8
Pre-planning or premeditation	20	50	25	25	54	78	13	9
Offender on bail, parole or probation	9	33	56	11	23	65	9	26

* this is the number of jurors in those cases where the judge said the factor arose.
** all prior convictions were included, not merely relevant prior convictions (as explained above) .

The results show a lot of similarity in the weight given to most of these factors by judges and jurors:

- for most factors (except 'relevant prior convictions', 'offender on bail, parole or probation' and 'extent of physical injury'), a majority of both judges and jurors gave the factor 'a lot of weight' in the cases in which this factor was present;
- both judges and jurors gave the most weight to 'abuse of power or trust', 'more than one victim', 'extent of emotional injury' and 'vulnerability of victim'; and
- when 'a lot of weight' and 'a little weight' were combined the similarities between judges and jurors were even more striking.

The differences between jurors and judges were that:

- jurors were more likely to give 'a lot of weight' to all factors; and
- jurors were much more likely to give 'a lot of weight' to prior convictions (41% vs 18%) and 'offender on bail, parole or probation' (65% vs 33%) and 'extent of physical injury' (71% vs 54%).

The same analysis was done for non-jurors who were allocated one of the nine sex offence vignettes (N=149). This showed similar patterns of similarities and differences between judges and lay responses: a majority of judges and non- jurors gave a lot of weight to all aggravating factors except prior convictions;[31] and non-jurors, like jurors, gave more weight to each of the aggravating factors than judges. There was also a similarity between jurors and non-jurors in the proportions giving a lot of weight to each of the aggravating factors – breach of trust was the factor given the most weight by both groups (96% for jurors and 92% for non-jurors).

[31] There were no vignettes with an offender on bail, parole or probation.

For both groups of participants, some respondents gave weight to a factor in a case in which the judge had not indicated that the particular factor arose. For example, for abuse of power or trust there were 71 jurors and 54 non-jurors who gave a lot or a little weight to this factor in additional cases, suggesting that lay respondents took a broader view of breach of trust than the judges. This issue will be discussed in more detail below.

Mitigating factors

Table 2 compares the views of judges and jurors in relation to the weight given to the listed mitigating factors.[32] In general, for judges and jurors, mitigating factors were more likely to attract 'a little weight' rather than 'a lot of weight'.

Although the general pattern of giving 'a little' rather than 'a lot of weight' was similar for judges and jurors, there were differences – most notably that judges more often gave 'good character' and 'lack of maturity affects responsibility' (i.e. youth) both 'a lot' and 'a little weight'. For these two mitigating factors, jurors were three and five times more likely, respectively, to give no weight to them. Furthermore, although it does not emerge in the table below, in the cases where judges gave good character weight, fewer than half of jurors did (48%).

As set out in Table 2, judges were more likely to give weight in mitigation than jurors for 'physical illness', 'genuine remorse' and 'loss of job or reputation but it was rarely more than 'a little weight'. Perhaps surprisingly, for some factors, namely 'difficult or deprived background', 'mental disorder or disability' and 'old age', jurors were more likely to give the factor 'a lot of weight'

The comparison between the judges and non-jurors shows a similar pattern to Table 2, with mitigating factors more likely to attract 'a little' rather than 'a lot' of weight for both judges and respondents. And similarly, non-jurors were less likely than judges to give weight to good character but more likely to give weight to 'difficult or deprived background', 'mental disorder or disability' and 'old age'.

[32] The offender undergoing treatment and sole/primary carer for dependent arose in less than 10 trials, so were omitted.

Table 2: Views of judges and jurors on the weight given to mitigating factors

		Judges (N=128)				Jurors (N=343)		
	No. of cases where judge said arose	A lot of weight %	A little weight %	No weight %	No. of jurors*	A lot of weight %	A little weight %	No weight / Did not arise %
Listed factor								
Good character	71	20	65	16	179	15	36	49
Difficult or deprived background	38	3	50	47	122	12	56	32
Mental disorder/disability	37	0	57	43	121	14	43	43
Old age	36	8	61	31	104	18	45	37
Physical illness	33	9	55	36	92	9	37	54
Not premeditated or was impulsive	30	3	67	30	65	29	37	34
In, or has prospects of, work/training	28	14	46	39	78	10	28	62
Loss of job or reputation	25	4	48	48	53	4	30	66
Lack of maturity – affects responsibility	11	55	36	10	30	13	33	53
Shows genuine remorse	10	0	60	40	21	5	29	67

* this is the number of jurors in those cases where the judge said the factor arose.

Additional aggravating and mitigating factors

Coding the additional factors from the judges' remarks into thematic categories produced a list of 36 aggravating factors. Many of these were not mentioned by jurors. Although jurors had received the sentencing remarks before completing Survey 2, as noted above, only a fifth added an aggravating factor.

The only aggravating factors to attract more than five responses from jurors were age disparity (n=18), no remorse (n=11) and plea of not guilty (n=9). If the factors identified had been specifically listed it is likely that many more jurors would have responded that weight should be given to each of these factors. It is noteworthy that some jurors considered that a plea of not guilty and absence of remorse should be aggravating. Neither is a legally recognised aggravating factor. Absence of remorse was frequently mentioned by judges (in 59% of cases); in most cases it was coded as a neutral factor although the judge appeared to treat this factor as aggravating in 15% of cases (e.g. G57, where it was included in a numbered list of aggravating factors).

For non-jurors, lack of remorse was mentioned by eight participants and was the most commonly mentioned additional aggravating factor. It was mentioned by the judge in the sentencing remarks in four of the vignettes but coded as neutral in each case. A plea of not guilty was also added as an aggravating factor by another non-juror.

Coding of the additional mitigating factors mentioned by judges produced a list of 31 mitigating factors and 19 factors for jurors. The most frequently mentioned factors that were given weight by judges were an absence of relevant prior convictions (which was given weight in 96% of the 73 cases in which this factor was present) and delay (given weight in 71% of the 45 cases in which it was present). No jurors added the former as a mitigating factor and only three added the latter. Delay was given mitigatory weight by the judge in the sentencing remarks for one of the vignettes, but none of the non-jurors added it as a mitigating factor.

DISCUSSION

The results of our analyses were notable for the similarities between judges and lay respondents in relation to their treatment of sentencing factors. However, there were also differences. The most striking similarities and differences and their implications are discussed below, with additional quantitative and qualitative analysis offered to provide further insight to the findings.

The contrast between weight given to aggravating and mitigating factors: a shared asymmetry

Judges, jurors and non-jurors were much more likely to give a lot of weight to aggravating than mitigating factors. This shows that, for all cohorts, facts relating to the offence are more relevant than facts relating to the offender. Only two of the listed aggravating factors were offender-related (prior convictions and offender on bail etc). In contrast, all but one of the listed mitigating factors ('not premeditated or impulsive') related to the offender rather than the offence. This same asymmetry was found in the Victorian Jury Sentencing Study[33] and has been observed in studies of public attitudes to sentencing factors in Britain.[34]

The relative importance of aggravating factors versus mitigating factors is not something that emerges from sentencing texts, which give equal attention to aggravating and mitigating factors. While the asymmetry in the weight given to aggravating and mitigating factors is a logical consequence of the dominance of the sentencing principle of proportionality, it shows how an empirical study of sentencing factors can shed light on sentencing practice, complementing doctrinal accounts. It thereby illuminates both judicial thinking about the myriad factors they are required to weigh in the sentencing calculus and the way that the community perceives the relative weight of these factors.

For judges and lay respondents, breach of trust, emotional injury, victim vulnerability, multiple victims and repeated assault were the most prominent aggravating factors

Ranking of the most prominent aggravating factors showed a striking similarity between judges and both groups of lay respondents. For both groups, abuse of power or trust was most often given 'a lot of weight'. As noted, jurors and non-jurors tended to give more weight to aggravating factors than judges did, with jurors giving breach of trust 'a lot of weight' in 96% of cases (and non-jurors doing so in 92% of case), while judges did so in 85% of cases (falling to 75% in cases relating to the vignettes). The Victorian Jury Sentencing Study, which covered the full range of offence types, also found that jurors mirrored judges in

[33] Kate Warner et al, n 15, 387.
[34] Roberts and Hough, n 2, 183.

giving most weight to the same three listed factors in that study, namely, breach of trust, victim vulnerability, and substantial injury.[35] In relation to breach of trust, it was found that many jurors gave weight to breach of trust in circumstances not recognised by the law, which requires a particular relationship equivalent to a 'position of trust' for breach of trust to be an aggravating factor.[36] There must be a special relationship which transcends the private law duties arising between persons in the community. Merely because the victim has trusted the offender, such as in a date scenario, does not give rise to a trust relationship.[37] However, there were cases in the Victorian Study where judges had relied upon a breach of trust in such a situation.[38]

The current study, with its focus on sex offences provided an opportunity to further explore the way breach of trust is dealt with by judges and jurors. We found that some cases where breach of trust was given weight by the judge were outside the parameters of a trust relationship; for example, a case of child sexual assault where the offender was a guest of the victim's mother (D4). Similarly, in another case, the offender sexually assaulted his friends' daughter during his visit to their house when he stayed overnight (A9). The judge said the offender was not in a position of trust but added:

> On the other hand, a house-guest who takes advantage of his friends' hospitality to make sexual advances to their underage daughter has certainly, in my view, abused their hospitality.

There were 71 jurors who treated abuse of power or trust as an aggravating factor in cases where, according to the judge, it did not arise. These included: cases where the victim was an adult and the offender and victim were acquaintances; date rape scenarios; and cases of child sexual assault where the victim had confided in an adult, had accepted a lift or was a guest of the victim's parent. The 54 non-jurors who gave weight to abuse of power or trust covered four of the five vignettes where this factor did not arise according to the judge, including a vignette where a taxi driver sexually assaulted an intoxicated young woman whom he saw lying in the street and the judge expressly rejected the submission his status as a taxi driver was an aggravating factor.[39] This confirms the finding from the Victorian Study that lay respondents' perception of a breach of trust is much broader than the law's assessment.

While it is not suggested that breach of trust should encompass all situations where the victim has trusted the offender or the offender has breached the usual private law duties owed by members of a community, it is at least arguable that the values of fidelity, respect and loyalty, which the law is attempting to affirm by imposing greater penalties on those who breach a position of trust,[40] are relevant in cases of child sexual assault where an offender sexually assaults the child of a friend. The analysis of sentencing remarks and the lay responses to this

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[35] Warner et al, n 15, 377, 378

[36] Arie Freiberg, *Fox and Freiberg's Sentencing* (Thomson Reuters, 3rd ed, 2014) 325, citing *Suleman v The Queen* [2009] NSWCCA 70 [22].

[37] *R v MAK* [2005] NSWCCA 369 [102]-[105]. In both the Victorian and this study, there were a few cases where the judge relied upon a breach of trust in cases outside a strict trust relationship: Warner et al, n 17, 378, 387; Warner et al, n 14.

[38] Warner et al, n 15, 378, 387.

[39] This vignette was based on *Ali v The Queen* [2013] VSCA 294, where the sentencing judge erred in treating status of a taxi driver as aggravating and the sentencing remarks were amended to correct this.

[40] Bagaric, Alexander and Edney, n 1, 296.

factor suggests that this is a factor which would benefit from reframing and clarifying by appellate guidance.[41]

Lay responses to many mitigating factors (such as old age, disadvantaged background and mental disorder) counter the stereotypical view of the public as particularly punitive in relation to sex offenders

While the weight given by judges and jurors to old age, difficult or disadvantaged background and mental disorder was similar, it was surprising that both jurors and non-jurors were more likely to give these factors of personal mitigation 'a lot of weight' than judges. This contrasts with the Victorian Study which found jurors less likely than judges to give old age and social disadvantage a lot of weight and more likely to give these factors no weight.[42] Jurors in the Victorian study were also much less likely than judges to treat mental disorder as mitigating.[43] The US study by Robinson and colleagues of extra-legal punishment factors found little support for old age as a mitigating factor. Given that the current study relates to sex offences and that the public tends to be more punitive towards sex offenders and child sex offences in particular, our finding warrants further discussion of old age, social disadvantage and mental disorder.

Although jurors were more likely than judges to give old age 'a lot of weight', as Table 2 shows, whether weight was given to this factor or not was similar. The cases where old age was a factor and where jurors were interviewed throw more light on the varied response to this factor. B11 was a case where a priest had sexually assaulted a pupil at his boarding school in the 1980s. The judge gave a little weight to his age., but J107, who gave it 'no weight', said in interview, 'four years is a long time for a 70-year-old man, but so be it'. J146 was more sympathetic in a case where the offender sexually assaulted two children of a family friend and neighbour and gave 'a little weight' to old age, as did the judge. J146 said:

> I suppose, in a sense, it's always hard when you think of somebody in their older age being brought to justice for things that occurred long ago. So there's a tendency in a sense, to want to just weigh that a little bit.

The fact that old age was considered to make re-offending less likely was relevant to J340 in a case where the judge gave no weight to this factor. She said, 'The fact that he was older, yeah, 69, ... I don't think. .. he was a danger'. In a different case, where the judge had given 'a little weight' to the offender's age, J745 gave the same reason for giving weight to the fact the offender was 67, saying 'considering his age and all that, I don't think [re-offending] is a likelihood'. The judge explained that the offender's age was mitigating, on the basis that imprisonment would be harder for an older person than a younger one. In the same case, J750 had given old age 'a little weight' in his survey. However, at interview, he said,

> I'm a bit on the fence with that one. I can see the logic ... it would be harder for him.. But on the other hand, you know, there's an argument of consistency, you know, two people do the same thing, should they be penalised the same way?'

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[41] Compare *R v Major* [2001] WASCA 46 [2], where the Court accepted that there was a breach of trust where the offender was a friend of the victim's parents and *R v WR* [No 5] [2015] ACTSC 258 [12] and A9, which suggest something more is needed than friendship.
[42] Warner et al, n 15, 383. 384.
[43] Warner et al, n 16, 58.

The only vignette where old age was a factor was a case of a 69-year-old priest convicted of nine counts of sexually assaulting three children over a period of five years. Although the judge did not mention old age as a mitigating factor, the majority of respondents who received this vignette gave it at least a little weight, suggesting a greater degree of community sympathy towards older sex offenders than would typically be assumed.

Old age is a well-recognised mitigating factor but, as this study confirms, it tends to be given a little weight, rather than a lot of weight by judges and is sometimes given no weight. That more weight is not given to this factor by the courts has attracted some criticism.[44] Although our findings suggest judicial practice is reasonably well aligned with public views, it also indicated that there is room for judges to give more weight to this factor.

A difficult or disadvantaged background is frequently relied upon in pleas in mitigation and is a legally recognised mitigating factor.[45] However, it has been argued that it should have less relevance in the case of sexual offences, because of 'the devastating effect that these offences often have on the lives of the victims, plus the fact that all people are aware of the heinous nature of such crime, militates against a sentencing discount for these offences'.[46] We found that judges gave this factor 'a little weight' in just half of cases where it was mentioned and there was just one case where it was given a lot of weight. It was surprising to find that jurors were somewhat more generous than judges on this factor, as were the non-jurors.

For those offenders identified by the judge as having a mental disorder, weight was given to this as a mitigating factor in 57% of cases – all only 'a little weight'. The same proportion of jurors gave this mitigating weight (57%); however, some gave it 'a lot of weight' (14%) with 43% giving it 'a little weight'. There was a similar pattern for the non-jurors. Interestingly, the Victorian Study produced a quite different result, with a striking contrast between judges and jurors.[47] Whereas judges in that study found mental disorder to be mitigating in 83% of cases, jurors did so in only 19% of cases and their most common response was that a mental disorder did not arise. In those cases where judges had identified a mental disorder, 65% of jurors said a mental disorder 'did not arise'. Interviews supported the finding that jurors took a much narrower view of what constitutes a mental disorder than judges, as well as being less likely to accept that a mental disorder is mitigating.[48] The different results between the judicial response to offenders with a mental disorder in the current research and the Victorian Study suggests that Victorian courts may be more likely to treat mental disorder as mitigating than judges in other jurisdictions, possibly as a result of the Victorian Court of Appeal's decision in *R v Verdins*.[49] This was confirmed by checking the jurisdiction of the cases where mental disorder was found to be mitigating, four out of five of which were from Victoria.

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[44] Bagaric, Alexander and Edney, n 1, 435.
[45] *Bugmy v The Queen* (2013) 249 CLR 171; see also The *Bugmy* Bar Book, available at: https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx.
[46] Bagaric, Alexander and Edney, n 1, 426.
[47] Warner et al, n 16, 58.
[48] Warner at al, n 16, 63.
[49] (2007) 16 VR 269.

Lay respondents place more weight on prior convictions than judges

The legal relevance to sentence of prior convictions has long been controversial.[50] To allow prior convictions to be aggravating suggests that an offender is being punished again for past offending. Different approaches have been taken by both courts and legislatures[51] to the treatment of an offender's prior criminal record. In practice, however, prior convictions, particularly for similar offences, can be given weight. This is explained on the basis that, while a prior record for similar offending is not itself aggravating, it can increase the moral culpability of the offender, indicate a dangerous propensity, and/or highlight the need for more weight to be placed on specific deterrence. At the same time, unless there is statutory authorisation, the sentence must not be disproportionate to the objective gravity of the current offence.[52]

Research in other jurisdictions has shown the public regards prior convictions as an important sentencing factor.[53] The jury sentencing studies have provided an opportunity not only to assess the public's view of the relevance of prior offences, but compare this with judge's treatment of prior convictions. In the current study, we found that jurors were more likely than judges to give 'a lot of weight' to prior convictions: 43% vs 18%; for non-jurors, the figure was 36% vs 25%). However, the proportion of jurors and judges giving no weight to prior convictions was very similar, showing that differences between judges and lay respondents related to whether they should be given 'a lot' rather than 'a little' weight. The Victorian Jury Sentencing Study also found a similar pattern, with jurors more likely to give priors a lot of weight but similar proportions of judges and jurors finding prior convictions aggravating overall.[54]

The fact that lay respondents intuitively find prior convictions aggravating and tend to give this factor more weight than judges, suggests that judges should explain that an offender should not be punished again for past offending and that, while relevant, the effect of previous convictions must be constrained by the seriousness of the current offending (the principle of proportionality). Where applicable, courts should also explain why little weight is given to prior dissimilar offending or stale convictions. In discussing the relevance of prior offending, judges could take the opportunity to counter the naïve belief that more punishment will lead to less crime.

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[50] Australian Law Reform Commission, *Same Crime, Same Time*, Report 103 (2006) 202-205.
[51] The *Sentencing Act 1995* (WA) s 7(2) provides that a prior criminal record is not aggravating, whereas the *Crimes (Sentencing Procedure) Act* (NSW) s 21A(d) provides it is.
[52] Bagaric, Alexander and Edney (n 1) 271-273.
[53] Julian Roberts, *Punishing Persistent Offenders* (Oxford University Press, 2008) 167-172; McNaughton Nicholls et al, n 9; Marsh, n 10.
[54] Warner et al, n 15, 379.

Lay respondents place much less weight on good character than judges

As noted above, jurors were more than twice as likely as judges to give no weight to good character.[55] Non-jurors were also much more likely to give no weight to this factor. This reflected the finding in the Victorian Study, which included all offence types.[56]
Two of the cases with interviews illustrate the difference between jurors and judges. F6, a decorated firefighter with long service to the community, was convicted of rape of a female acquaintance after a party. The judge treated his prior good character as a 'significant factor in mitigation'. However, J47 gave it only 'a little weight' and, in discussion, explained her reasoning:

> So I thought, ..maybe it was a once-off and he might not do it again, but I don't know. .. [his] service medals or whatever he got was, is not probably not relevant to what happened on the night … but I think it's probably appropriate that it is taken into account in the severity of sentence.'

G64 illustrates a case where the juror gave no weight to good character. Over a period of almost two years, the offender sexually assaulted the teenage daughter of a woman he was in a relationship with. The judge gave some weight to good character, on the basis of his good work record, including being in the Army for 20 years, his care of his mentally ill daughter and her child, and character references. However, J745 gave no weight to good character and confirmed this when interviewed. When asked if he would give the person who had been living a criminal life the same sentence as a hard-working family man, he responded to the effect that, while bad character was aggravating, good character was neutral. In his words:

> Well, of course, a hardened criminal would more easily be (re)offending and so you would have to make more effort to preserve – to preserve society from these people. But, other than that I don't see any difference myself. I mean it's a – no, the crime is the crime. You are judging the crime.

J750 from the same trial agreed that no weight should be given to his good deeds, saying: 'I don't think he should necessarily have less punishment for that'.

There seems to be little research which has looked at public attitudes to the relevance of good character. The study of attitudes to sentencing sexual offences conducted for the Sentencing Council of England Wales found that focus group participants 'on balance' thought that the offender's character (e;, whether they were in employment, had a family, were of good standing in the community) should not be taken into account as a mitigating factor.[57] In Robinson and colleagues' US study, only 15% of respondents supported mitigation on grounds of good deeds.[58]

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[55] In coding the judges' sentencing remarks, good character and absence of priors convictions were coded separately. Absence of prior convictions was not listed as a mitigating factor and none of the respondents added it. To test whether they may have conflated absence of priors with good character, thereby exaggerating the difference between judges and jurors, we added the 'no relevant priors cases' to the 'good character' cases for the comparison. As it produced the same pattern, we reported only the good character comparison.
[56] Warner, n 15, 381.
[57] McNaughton Nicholls et al, n 9, 56.
[58] Robinson, Jackowitz and Bartels, n 12, 820.

Common law and statute recognise good character as a mitigating factor. Decisional law has limited the weight that can be given to it where the evidence has disclosed that the offender committed a series of undetected offences for a lengthy period or where the offender's good character and position has facilitated the commission of the offences.[59] In five Australian jurisdictions, statutory provisions have gone further than limiting the weight that can be given to good character (and an absence of prior convictions), by prohibiting any weight being given to it, if it was of assistance to the offender in committing child sexual offences, although only New South Wales and South Australia had enacted such laws at the time of the trials in our research.[60]

Some academic commentators have challenged the relevance of good character as a mitigating factor, arguing that the conceptual basis for its relevance is weak – namely that a person who is in other respects 'morally good' is less deserving of punishment. Critics argue that this is socially inequitable and privileges those who have the opportunity to make valuable social contributions. A person should not be treated more leniently because of his or her social position.[61] Wolf and Bagaric argue that character should be abolished as a consideration in sentencing, because taking into account good character is unfair in the absence of evidence that 'each individual has a distinctive, immutable morality that can be observed and measured and that consistently dictates their behaviour'.[62] Others have claimed that reliance on good character over-emphasises the values of family, community and employment, at the expense of minimising the effects of child sexual assault on the victim and diminishing the censuring role of the sentence.[63]

The conceptual basis for taking into account the fact that the offender has no prior convictions is stronger than for good character. It recognises offending as an isolated lapse, acknowledging human frailty and yet showing respect for the offender as a rational person capable of responding to censure and ensuring that their future conduct conforms to the law.[64] Of course, where there are multiple offences committed over a significant period, as can often be the case with child sexual assault, this will have no application.

Do the intuitive responses of this study's participants support limiting the relevance of good character to its negative aspect, namely an absence of prior offending? Although our respondents were less likely than judges to give weight to good character, it was given some weight by jurors in half of the cases where good character was identified by the judge (and in 70% of cases by non-jurors). Even in cases where the judge did not refer to good character, some jurors considered it mitigating (mostly in cases where the offender had no relevant prior convictions). While inclined to give good character less weight than judges do, lay

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[59] Bagaric, Edney and Alexander, n 1, 454-455.
[60] See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A), introduced in 2008; *Sentencing Act 2017* (SA) s 11(4) (previously *Criminal Law (Sentencing) Act 1988* (SA), s 10(3)(ba)), introduced in 2014; *Sentencing Act 1991* (Vic) s 5AA(1), introduced in 2018; *Crimes (Sentencing) Act 2005* (ACT), s 34A, introduced in 2018; *Sentencing Act 1997* (Tas) s 11A(2), introduced in 2016. The Royal Commission on Institutional Child Sexual Offences made this recommendation: Criminal Justice Report 2017, Parts VII-X, 299.
[61] Kate Warner, "Sentencing Review 2008-2009" (2010) 34 *Criminal Law Journal* 16, 19-20.
[62] Gabrielle Wolf and Mirko Bagaric, "Nice or Nasty?: Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals' Disciplinary Proceedings" (2018) 44 *Monash University Law Review* 567, 590.
[63] Nicole Stevens and Sarah Wendt, "The 'Good' Child Sex Offender: Construction of Defendants in Child Sexual Abuse Sentencing" (2014) 24 *Journal of Judicial Administration* 95.
[64] Warner, n 53 18; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 178.

respondents' views differ. This diversity of views is clearly shown in the five vignettes where the judges gave weight to good character: a majority of respondents gave it 'a little weight', a quarter gave it 'no weight' and a smaller proportion gave it 'a lot of weight'. While there are strong arguments to support excluding good character as a mitigating factor in all but its negative aspect of a lack of prior convictions, there seems to be public support for leaving judges with a discretion. However, if judges wish to better align their approach to public views, our results suggest there is room for giving good character less weight than judges generally do. In the alternative, our findings may suggest the need for judges to more clearly articulate their rationales for giving this factor significant weight when this is done.

Delay as a mitigating factor does not seem to resonate with the public

Although delay has not been given statutory recognition as a mitigating factor and is not in itself mitigatory, it is well established at common law that a significant delay in processing a case between the detection of the offence and the sentencing of the offender can result in a reduction in the penalty.[65] There are two main justifications for allowing a sentencing discount: fairness and rehabilitation. Where delay, which is not attributable to the offender, causes significant anxiety and stress, this is in itself is punishment and fairness dictates that it should lead to a reduction in the severity of penalty (the fairness limb of the rule).[66] In addition, if the offender has shown considerable progress towards rehabilitation during the delay, this will reduce the need for specific deterrence and hence justify a penalty reduction (the rehabilitation limb).[67]

Delay was one of the most common mitigating factors relied upon by judges; it was given weight in 25% of all cases and in 71% of cases in which the judge mentioned that there was a delay between the commission of the offences and the sentence. But delay was added as a mitigating factor by only three jurors in the cases where judge identified a delay. Delay was a mitigating factor in one of the vignette cases, but was not added by any of respondents. Interviewed jurors tended to be dismissive of discounting the sentence on grounds of delay. In one case (G24), the judge gave weight to a two-year delay because the offender was 18 at time of offence, but 20 at sentence. J320 did not regard delay as mitigating, commenting:

> I just thought, well, if that's his behaviour two years ago, what's he been doing for the last two years, you know, if he's been – he got away with it for a certain time. Has he been doing the same sort of things since?

In a case of sexual assault of a student by a priest (G20), the judge regarded a 12-year delay between complaint to the police and sentence as a 'strong mitigating factor', on the basis of intervening rehabilitation and anxiety and stress. This was discussed with J273, who was adamant that neither ground justified delay being regarded as mitigating.

J10 was a juror in the trial of B1, an offender convicted of sexually assaulting two girls – his friend's daughter and her friend. The judge regarded the delay of 16 years since the complaint and trial, without evidence of re-offending, as an important mitigating factor. While J10 had included the lengthy period of no offending as a mitigating factor on his form, at interview he was less sure that this should be mitigating and said that 'it depends on the crime'.

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[65] Freiberg, n 29, 429-433; Bagaric, Alexander and Edney, n 1, 456-462.
[66] Freiberg, n 29, 430, Bagaric, Alexander and Edney, n 1, 458.
[67] Freiberg, n 29, 430-431; Bagaric, Alexander and Edney, n 1, 459.

These findings mirror those of the Victorian Jury Sentencing Study, where delay was one of the most commonly relied upon mitigating factor by judges, but was rarely mentioned by jurors, while those interviewed tended to be sceptical about giving it weight.[68]

Delay is not a factor which relates to the offence or the personal circumstances of the offender and the reasons why the law treats it as mitigating may not be obvious to members of the public. Despite the judge indicating that it was a mitigating factor in 32 cases and in one of the vignette cases, it was rare that it was picked up as a factor by respondents. While a clear and succinct explanation may not convince a lay audience that delay should be mitigating, the failure of our respondents to endorse it as mitigating suggests that such an explanation for why it is mitigating is warranted. Moreover, this is a factor which would benefit from more detailed examination by appellate courts. Bagaric has argued that the 'doctrinal underpinnings of delay have not been carefully examined, and the principle is not firmly grounded'. He asserts that neither of the existing rationales (fairness and rehabilitation) justify its preservation as a mitigating factor.[69] Our findings suggest that abolishing it as an independent sentencing factor, as he suggests, would not appear to conflict with public sentiment.

Respondents tended to view a plea of not guilty and lack of remorse as aggravating factors rather than neutral

As explained above, neither a plea of not guilty nor a lack of remorse is legally recognised as an aggravating factor; rather, they are neutral factors. And yet, aside from disparity in age between offender and victim, an absence of remorse and plea of guilty were the most frequently mentioned additional aggravating factors by jurors. Furthermore, for non-jurors, absence of remorse was the most frequently mentioned additional aggravating factor. In the interviews, absence of remorse was commented on by a number of jurors. In a case of marital rape (F2), J3, who had added 'no remorse shown' as an aggravating factor in Survey 2, commented that the 'judge points out [in her remarks] that there was absolutely no remorse', apparently interpreting the judge's statement in her sentencing remarks that '[the offender] has not demonstrated remorse then or since' as suggesting this was an aggravating factor. J340 added as an aggravating factor in a case of child sexual assault (G25), 'he made no statement in his defence, he showed no emotion at all in court'. At interview, G25 added, 'He showed nothing. He was just totally blank throughout'.

Responses to the Stage 1 survey, reported elsewhere, suggest that lay respondents are more comfortable with an enhancement for a not guilty plea than a discount for a plea of guilty.[70] However, to make a not guilty plea an aggravating factor blatantly flouts the presumption of innocence and is unacceptable in principle. Do the same objections apply to a lack of remorse? The conventional Anglo-Australian position is that, while remorse is a well-

[68] Warner et al (n 17) 25; *Tones v The Queen* [2017] VSCA 118 [36]-[43].
[69] Mirko Bagaric, "An Argument for Abolishing Delay as a Mitigating Factor in Sentencing" (2019) 40 *Adelaide Law Review* 725, 752.
[70] Warner et al, n 20.

recognised mitigating factor, its lack can only be a neutral factor.[71] However, in Scotland and some US jurisdictions, it is accepted as an aggravating factor.[72] And there is public support for this view – a recent Scottish study found that 82% of respondents felt lack of remorse should be an aggravating factor.[73] This raises the question of whether public sentiment could be accommodated by allowing an absence of remorse to be aggravating. Our findings that absence of remorse was frequently mentioned by judges in their sentencing remarks and did appear to be treated as aggravating, rather than as neutral, in 15% of cases suggests that even some judges can regard it as deserving of a sentence enhancement. However, the argument that, as a post-offence factor, it is not relevant to culpability or harm supports the conventional view that it is only a neutral factor. While it could arguably be relevant to prospects of rehabilitation and specific deterrence on the basis that an offender who lacks remorse is more likely to re-offend, the counter-argument is that there is no strong evidence that a remorseless offender is more likely to re-offend. It is difficult to justify the relevance of an absence of remorse beyond using it to rebut a claim of remorse or evidence in support of something else that is aggravating.

CONCLUSION

Our comparison of lay perceptions of the relevance of sentencing factors with the approach taken by judges has produced several instructive findings relating to sentencing, namely, public confidence in sentencing, advice about crafting sentencing remarks, and material which is relevant to reviews of sentencing factors.

First, even in the case of sex offender sentencing, the offences which reportedly cause most community concern, there is considerable alignment between the public and judges with respect to sentencing factors. Judges and lay people give more weight to aggravating factors than mitigating factors and are agreed about the most important aggravating factors. While judges were more likely to give weight to most of the listed mitigating factors, the only factor which was much more likely to attract 'a lot of weight' from judges was lack of maturity or youth. The finding that members of the community were just as, if not more, amenable to treating factors such as old age, disadvantaged background and mental disorder as mitigating is further evidence to counter the stereoptical view of a punitive public.

Secondly, there were some noticeable differences between judicial and lay views deserving of attention by judges when making their sentencing remarks. Some of these differences highlight the need for judges to ensure that they clearly explain the rationale for the law's approach to the relevant factor, in order to improve public understanding of sentencing and to help deflect public criticism. As anticipated, lay respondents gave more weight to prior convictions than judges. This supports the views of those who favour retaining it as an aggravating factor. It is also highlights the fact that judges could usefully explain in their sentencing remarks not merely *that* priors are relevant, but *why* they are relevant, and explain

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[71] Freiberg, n 29, 408, Bagaric, Edney and Alexander, n 3, 258. The *Penalties and Sentences Act 1992* (Qld) s 9(3)(i), 6(h) and 7(e) provides that remorse and lack of it are relevant to child sex offences and certain violent offences but this has not been interpreted as reversing the common law position: *R v Wharley* (2007) 175 A Crim R 253 [17].

[72] Black et al (n 11) 16, where lack of remorse is listed as a common aggravating factor. See also Jules Epstein, "Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding 'Lack of Remorse' Testimony and Argument in Capital Sentencing Proceedings" (2004) 14 *Temple Political & Civil Rights Law Review* 45, 50.

[73] Black et al, n 11, 16.

that, in taking into account prior convictions, offenders should not be punished twice for their previous offences.

As in the Victorian Jury Sentencing Study, we also found that the justification for delay as a mitigating factor may not be immediately apparent to members of the public. Accordingly, this is another factor which warrants judges explaining the reasons why it is mitigating, if not reconsideration of its doctrinal underpinnings by appellate courts.

Our results, supported by Scottish research, suggest that public perception supports making absence of remorse an aggravating factor. This is an area where there is a stark divergence between the law's approach and public sentiment. And yet, judges frequently mention this factor in sentencing remarks, usually without explaining that it is a neutral, rather than an aggravating, factor. In crafting their sentencing remarks, judges should ensure that they explain this and note that its only relevance is to rebut a claim of remorse or to substantiate a separate aggravating factor.

Good character (as distinct from a clear record) is a controversial mitigating factor which has been challenged by some sentencing scholars. The law's approach is to allow at least some weight to this factor, unless the offender's good character has facilitated the commission of the offence. Although our results show the public response to this factor is less generous than the judicial response, they do not support ousting consideration of good character entirely.

This article demonstrates the value of empirical research that seeks to understand the complexity of public opinion on sentencing. Our findings show that members of the public are less punitive than commonly assumed, even when it comes to as reviled a cohort as sex offenders, and highlight the need to ensure that sentencing practice and policy are based on actual, rather than presumed, opinion. However, it also reveals that there are some divergences between lay and judicial views on specific sentencing factors that would benefit from a clearer explanation for a lay audience and others (such as giving more weight to old age and less to good character and abolishing delay as a mitigating factor) where public views could be accommodated consistently with a rational and principled approach to sentencing factors.

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