

Penal Populism, Sentencing Councils and Sentencing Policy

Editors

Arie Freiberg Karen Gelb

H A W K I N S P R E S S

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Introduction

This book is the product of a conference held in Melbourne, Australia in July 2006 that brought together members of the public, public servants, criminologists, judicial officers and members of sentencing advisory boards, panels, councils or commissions from around the world to discuss the relationship between politics, public opinion and the development of sentencing policy, but with particular reference to the role of these emergent advisory bodies.

A decade ago such a conference would not have taken place. While sentencing commissions have been in existence in the United States since the late 1970s, when the Minnesota Sentencing Guidelines Commission was established (Frase, Chapter 6), their primary rationale was the structuring of sentencing discretion. This need arose following years of criticism of indeterminacy and unfettered sentencing and administrative discretion in relation to sentencing and parole release decisions.

There are currently 19 sentencing commissions in the United States at State and federal levels whose primary role is to create, monitor or advise on sentencing guidelines for the courts, though more have been established and not survived. As Frase notes, they vary widely "in their purposes, design, scope, and operation" (Frase, Chapter 6). The creation of similar councils or panels in England in 1998 (Sentencing Advisory Panel; Ashworth, Chapter 8) and 2003 (Sentencing Guidelines Council) and Scotland in 2003 (Sentencing Commission for Scotland; Hutton, Chapter 10) was a major development in these jurisdictions where judicial sentencing discretion has been more constrained than in the United States and where there has been a long tradition of appellate review.

There is an abundance of literature on sentencing commissions, sentencing guidelines and sentencing discretion that traverses significant issues such as the distribution of sentencing authority between the legislature, the judiciary and executive bodies, the scope and nature of discretion, the relationship between sentencing commissions and the legislature, the constitutionality of guidelines and other matters. The purpose of the conference was not to rehearse these issues, important as they are, but to examine these bodies through a different conceptual lens, namely the relationship between "the public", public opinion, and the development of sentencing policy.

Most of the sentencing councils discussed in this book were born out of a paradoxical political and social environment. While the early development of the

Minnesota Sentencing Guidelines Commission presaged the more recent explosion of such bodies, these more recent councils have arisen during a fraught period in our history. The judiciary is coming under increasing attack as the public claims a greater voice in the criminal justice system; politicians feel that elections cannot be won without a tough "law and order" stance; yet, paradoxically, crime rates are decreasing.

As a response to the many crises that inevitably arise within such a complex environment, sentencing councils have been established around the world. As Freiberg (Chapter 11) notes:

In the sometimes heated political environment in which debates about sentencing policy may take place, the Council can play a useful role in defusing issues by taking on contentious matters and considering them in a calmer atmosphere and over a longer period when some of the emotion produced by the original event has dissipated.

Chapters 6 through 14 of this book introduce us to the key purposes, functions and roles of the various sentencing councils. They were all created with a long-term function of defusing political crises and of attempting to balance the various interests of the judiciary, the public, politicians and the media.

The emergence of sentencing councils

The particular impetus for this conference was the emergence of newer bodies in New South Wales in 2003 and Victoria in 2004 whose purpose was not solely to develop sentencing guidelines, but to deal with sentencing matters more broadly and to involve a wider range of parties in the development of sentencing policy. In particular, the Victorian Sentencing Advisory Council was established following a review that was specifically required to consider whether there were mechanisms that could be adopted to incorporate more adequately community views into the sentencing process (Freiberg, Chapter 11).

The reasons underlying this change of focus in the creation and functions of sentencing advisory bodies are important. As both Hutton and Pratt (Chapter 3; Pratt, 2007) note, the past three decades have seen a shift in the governance of public affairs "away from a directive and paternalistic State to the vision of a State that enables public and private organisations to collaborate" (Hutton, Chapter 16). This is evident in a number of areas of public policy, of which the criminal justice system is only one. It has been driven by many factors including the delegitimation of both the judiciary and "experts" and the rising influence of the media.

David Garland has identified several currents of social change that have affected the development of penal policy and that are relevant to our discussion of penal populism and the role of sentencing councils in the development of sentencing policy. These broad currents include: the decreased importance of rehabilitation in penal institutions; the reappearance of retribution as a generalised policy goal; the increased salience of public fear of crime as a characteristic of contemporary culture; the new and urgent emphasis on protecting the public; the public loss of confidence in criminal justice; and the development of a highly charged political discourse around crime and justice (Garland, 2001, pp 8-20).

Pratt (Chapter 3) identifies a number of underlying causes that he considers to have brought about the dramatic changes to the distribution of penal authority: the decline of deference to authority or establishment figures, including the courts; the decline in trust in politicians and existing political processes; the effect of globalisation, which has weakened "the authority of sovereign states which makes them seem vulnerable to external organizations and forces"; the growth of "ontological insecurity" or general fear and anxiety, possibly fuelled by the increased crime rates between the 1960s and 1980s; the role of the media in misreporting the true nature and levels of crime and punishment; and, finally, the democratisation of news media, which has provided the opportunity for the emotive experiences and opinions of ordinary people to become the framework through which crime and punishment is understood. In his chapter Pratt illustrates these forces in the New Zealand context, showing how the "emotive, ad hoc and volatile forces of populism can now override scientific expertise and the rationalities of penal bureaucracies".

Public opinion

Public opinion, however defined, has clearly become more salient. As Michael Tony has noted, "sentencing matters" (Tonry, 1996). Since Professor Anthony Bottoms coined the term "populist punitiveness" in 1993 (Bottoms, 1995), the discourse concerning the relationship between politicians, the public, public opinion and sentencing policy has been more focused by bringing together the literature on public opinion with that of the development of sentencing policy (Roberts, Chapter 2). "Populist punitiveness" is a phrase that pervaded the conference. Bottoms used the term not to refer to public opinion *per se*, but rather "the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance" (Bottoms, 1995, p 40). Populist punitiveness, Bottoms argued, was not only crucial to an understanding of the increasing imprisonment rates characteristic of a number of Western countries, but was embedded in a number of other social changes characterising modernity, one of the most important of which is a widespread sense of insecurity into which politicians feel free to tap.

The impact on sentencing law of public opinion, mediated or unmediated, is clearly evident across the jurisdictions surveyed. In all of them, laws such as sex offender registration and community notification schemes, "three strikes and you're out" provisions, and increased mandatory minimum and maximum sentences have been introduced as legislative responses to a perceived punitive public (Freiberg, Chapter 11).

Most of these initiatives have not come from law reform commissions, parliamentary committees or other governmental advisory bodies; they have come from public pressure expressed sometimes directly on the streets, more often through the print and electronic media, through political pressure directly applied to political parties and indirectly through the ballot box at election time and, in some countries, through propositions placed on ballots and similar citizen-initiated referendum processes (Pratt, Chapter 3). Whereas law reform has traditionally been the province of technical experts and public officials, mediated through the parliamentary political process, over the past few decades the dynamic of law

reform has altered and, in the area of sentencing, it appears to have become less technical and more demotic or more democratic.

Some of the changes effected through these means have been large and profound. Some have been short-lived and ineffective. Some have signalled major shifts in sentencing philosophy and practices while others have proved to be counterproductive. In most of these jurisdictions, prison populations have burgeoned, with the attendant burden on the public purse. Bending to the perceived punitive desires of the public may be electorally popular, but it comes with high financial and social costs.

What is the significance of this? Pratt (Chapter 3) suggests that these changes are "symptomatic of a new axis of power which has come into play and which significantly reorganises both the terms of penal debate and who is allowed to contribute to this" – that popular commonsense has become a "privileged driver of policy". There is little value in criticising politicians for being "political" or for listening to their constituents; politicians in a democracy have a duty to be responsive to the public. Public opinion defines the boundaries of what is acceptable (and therefore possible) in public life. As Roberts notes: "There is general agreement that the criminal justice system should be responsive to the community that it was created to protect", a fact also noted by the Halliday review of sentencing in the United Kingdom (Roberts, Chapter 2).

The difficulties in determining the nature and relevance of "public opinion" in relation to sentencing form the first part of this book. The work (over many decades) of Roberts, Doob, Hough, Indermaur and others has explored methodological problems in gauging public opinion and has reported on public attitudes to issues such as the adequacy of sentences, the principles of punishment and other sentencing issues (for a brief overview of this body of work, see Gelb, Chapter 5). Time and again, researchers have emphasised the importance of distinguishing between "the findings of social scientific public opinion research and more volatile impressions of public mood, usually based on newspaper headlines or the like" (Pratt, Chapter 3), between "attitudes" and "judgments" and between hastily formed views and deliberated responses to properly contextualised questions (Indermaur, Chapter 4; Gelb, Chapter 5). In particular, the extensive body of evidence built by these researchers has convincingly shown that people who seem to be punitive when asked for "top-of-the-head" responses to simplistic, abstract questions, become far less punitive when allowed to provide a considered, thoughtful response to more detailed information about a specific case. This is the difference between mass "public opinion" and informed "public judgment".

Even if "public opinion", or preferably "public judgment", can be ascertained in relation to a particular sentencing issue, should it be relevant to court decision-making, to institutional decision-making and to the political process? If so, how? Roberts (Chapter 2) poses two fundamental questions in relation to the courts:

- (1) To what extent should courts consider public opinion when imposing sentence?
- (2) Are community views a legitimate *general* consideration at sentencing?

Roberts notes the tension present in the relationship between community views and the determination of sentence. On the one hand, courts are expected to

impose sentences that are not radically inconsistent with public expectations. On the other hand, public opinion is not a legally recognised factor at sentencing. Reviewing the evidence from the United Kingdom and Canada, he does not find any conclusive evidence that sentencing trends – that is, individual sentencing decisions or aggregate sentencing trends such as prison populations – reflect changes in public opinion. However, at the political or sentencing policy level, he finds stronger evidence that public opinion has influenced the evolution of sentencing policy, particularly following moral panics or extensive media coverage of an emotive issue. In such instances, policy shifts have exhibited a certain asymmetry, moving in a more punitive direction to reflect the views of an allegedly punitive public.

The distinction between individual sentencing decisions (both at first instance and on appeal) and sentencing policy is not necessarily well understood by the public. Individual sentencing involves a decision to allocate a sanction in a specific instance, while sentencing policy relates to issues concerning the relationship between legislatures, the courts, the executive and sentencing commissions/councils. In both instances, the public expects a certain degree of responsiveness. Sentencing decisions and sentencing policy that are made outside the framework of community perceptions are seen as being "out of touch". Chief Justice Murray Gleeson of the High Court of Australia addressed this issue in a speech to the Judicial Conference of Australia Colloquium in October 2004. It is particularly useful to consider his comments, as opportunities to hear directly from judges themselves on issues of public opinion are rare.

The Chief Justice begins by accepting that judges are expected to know, and be conspicuously responsive to, community values (Gleeson, 2004, p 1). But he then poses a series of questions that is immediately relevant for our discussion of the role of sentencing councils in the development of sentencing policy:

How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Should they develop techniques for obtaining feedback from lawyers or litigants? And what kind of opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is it that judges ought to be in touch with? ... Whose values should we know and reflect?

Chief Justice Gleeson's questions reflect the difficult role faced by sentencing councils around the world. Regardless of their specific remit, councils that are obliged to consider community views when developing their guidelines or their policy advice are faced with the precise challenges illustrated by the Chief Justice. Overcoming these challenges is a critical function of sentencing councils, especially in the current climate of low public confidence in both the criminal justice system in general and the courts in particular.

Public confidence

Public attitudes to the courts and the criminal justice system as institutions are crucial to an understanding of the shifts in sentencing power between the legislature, the courts and the executive, but particularly away from courts through the

use of mandatory and minimum sentences and strict sentencing guidelines. Both Indermaur (Chapter 4) and Pratt (Chapter 3) refer to a crisis of confidence or legitimacy in the courts, but suggest that the problem is chronic rather than acute. Indeed, public confidence in the courts has been consistently lower than levels of confidence in the police, prisons or the criminal justice system as a whole for many decades. The status of judges and the courts has gradually been eroded by constant media polls and reports that the courts are “soft on crime” and therefore failing to protect the community. Roberts (Chapter 2) notes that, in England, some newspapers have published the names and photographs of “soft” judges who are accused of failing their duty to their community. Canadian legislation has introduced the notion of a “judicial registry” that will record sentences imposed and allow people to identify “lenient” judges – those who impose sentences far below the statutory maximum.

The problem of public confidence in the courts is, of course, wider than the problems of sentencing. A conference held in Canberra, Australia in February 2007 on this topic¹ identified other factors that also contribute to what is perceived to be a major issue for the modern judiciary. These included: issues of judicial appointment, demeanour and accountability; perceptions of outcome and process expressed by victims of crime; the role of the media; the adversarial nature of the process; and the ability of courts to explain themselves to the public.

This issue forms the foundation for the work of many of the sentencing councils discussed in this book. Indermaur (Chapter 4) suggests that the primary rationale for formalising public input into sentencing policy remains political: “Where the judgments of the court appear to disregard public sensitivities there is good copy for the media, ammunition for the opposition and trouble for the government”. But Roberts (Chapter 2) notes that the desire on the part of legislatures to establish stronger links between the criminal justice system and the community is consistent with a broader movement to make public services more responsive to the communities they serve. In conjunction with greater community consultation comes a need for greater community education about the principles and practices of sentencing. Roberts (Chapter 2) suggests that “the challenge to sentencing commissions and legislatures is clear: to ensure some degree of community engagement in the sentencing process without descending into populist punitiveness”.

Recognising that public opinion is influential in the development of sentencing policy, the Victorian government invested the Sentencing Advisory Council with the statutory function of gauging public opinion. Gelb’s chapter (Chapter 5) reports on a project by the Council:

[T]o ascertain and analyse the current state of knowledge about public opinion on sentencing on both a national and international level. The project was designed to examine and critically evaluate both the substantive issues in the area (what we know about public opinion on sentencing) and the methodological issues in this field (how we measure public opinion on sentencing).

The purpose of the project was to create a range of methodological tools that could be used by the Council to gauge public opinion in relation to the various sentencing issues that form the core of its work. The project was significant because of its attempt to collect, summarise, interpret and disseminate a large

amount of academic literature to a broader public and professional audience who would not be acquainted with it. The ensuing report (Gelb, 2006) has been well received in Victoria, particularly by judicial officers, who find it useful to validate their own intuitions and understandings and to provide them with information they otherwise would not have time to obtain. The report is one of the most frequently accessed on the Council’s website, indicating a broad interest in public perceptions of sentencing.

Public opinion polls and other survey methodologies are only some of the tools used to gauge public views and attitudes. Public opinion can be ascertained through formal consultative mechanisms, law reform bodies, referenda or plebiscites, through jury sentencing and the work of lay magistrates. Over recent years, victims’ views have been recognised and institutionalised through representation on parole boards and other release authorities with determinative, rather than advisory, powers alone.

Sentencing advisory bodies

The next step in the process of recognising broader community views has been the establishment of advisory bodies such as sentencing councils and law reform bodies with public membership. Ashworth (2005) and others have argued that because the current system of developing sentencing policy has produced a “democratic deficit” it is necessary to broaden the range of “perspective, expertise and experience that is required for a robust sentencing policy that is acceptable to the community” (cited in Hutton, Chapter 16).

Part 2 of this book examines the role of advisory councils, commissions, panels or boards in the development of sentencing policy with a view to exploring their relationship with the community rather than the courts. It provides an overview of the way in which the public, and public opinion, have been formally incorporated into the development of sentencing policy.

Chapters 6 to 14 provide detailed information on the background and operation of existing bodies (the United States Federal Sentencing Commission and those in Minnesota, England and Wales, New South Wales and Victoria), proposed bodies (in both South Africa and New Zealand) and Scotland’s defunct sentencing body. Chapter 15 provides an extract from a report by the Australian Law Reform Commission (2006) which rejected the establishment of a federal sentencing council on the grounds that the work of such a council was already being, or could be carried out, by other existing bodies.

There are similarities among these sentencing councils: all occupy a place somewhere between the legislature, the executive and the judiciary, and all act to some degree as a buffer between public and media calls for punitive responses to crises and a more considered legislative response. But what is striking about these various councils is their heterogeneity, which is not surprising given that they have been developed for different purposes at different times and in different political, cultural and legal contexts. As a result they vary on dimensions such as terms of reference, membership and consultation.

Some of the sentencing bodies discussed in this book are statutory, some administrative, some permanent, some temporary. Bodies that are required to

develop guidelines may have an ongoing remit, while others such as the Sentencing Commission for Scotland were designed from the start to have a limited lifespan. Others will likely continue to exist as long as the government of the day finds them politically and socially useful – it is presumed that they will continue to operate until such time as they are no longer deemed necessary.

Some of the bodies are appointed by the executive, some by more formal means. None is democratically elected. There are significant differences in the relationships between commissions and the legislature, particularly in the United States, and between commissions and the courts, both sentencing courts and courts of appeal. Some must report through the executive (such as in New South Wales) while others can report directly to the community (Victoria).

The specified functions of the councils vary according to the degree of delegation of authority accorded them in legislation. Some can initiate references themselves while others can only respond to requests from the executive or the courts.

Terms of reference vary widely between bodies and include:

- issuing or advising on guidelines or standard non-parole periods;
- monitoring of adherence or departure from guidelines;
- considering the cost or effectiveness of sentences;
- considering the relationship between sentencing and prison populations;
- advising governments;
- gauging public opinion;
- educating the public;
- collecting and analysing statistics;
- conducting research generally; and
- consulting with government, the public and interested parties.

Some of these terms of reference have a more pragmatic focus, such as examining the costs of various sentencing options or the impact of sentences on corrective services, while others allow for a broader investigation of sentencing issues via general research and consultation.

Membership of these bodies varies widely in scope and balance. Some are heavily weighted towards judicial members (Sentencing Guidelines Council, United Kingdom), while others have none (Sentencing Advisory Council, Victoria). Non-judicial members include: victims' representatives; community members; people with experience in the criminal justice system (in areas such as risk assessment, reintegration of offenders into society and the impact of the criminal justice system on minorities); prosecution and defence lawyers; academics; corrections personnel; and sometimes legislators. Some members are appointed to be formal representatives of organisations or interest groups, others as individuals who have a particular background. As Hutton notes, membership rarely includes people with no background or experience with the criminal justice system at all, that is, truly a member of the "general public". "Public", in this context, tends to mean "non-legal".

Councils, governments and the public

The relationships between public opinion and governments, and between councils and non-government organisations, are complex. Most sentencing councils have formal or informal mechanisms for consulting with the public. Some recognise that sentencing communication is not a one-way process: if public opinion is to be taken into account in the development of sentencing policy, then it should be "informed". Accordingly, if public opinion is to be valued, then governments, councils, non-government organisations and even academia all have a responsibility to be involved in providing the public with information about the operation of the criminal justice system. This was the primary focus of the *Rethinking Crime and Punishment* project in the United Kingdom that commenced in 2001, which is referred to in Indermaur's chapter (Chapter 4) and is discussed by Allen and Hough (Chapter 17). It is also an important part of the work of the Victorian Sentencing Advisory Council (Freiberg, Chapter 11) and, since 2006, the New South Wales Sentencing Council (Abadee, Chapter 9).

The two American commissions discussed in this volume were designed to deal with the problem of sentence guidance rather than with incorporating the public into the sentencing policy process, though indirectly they were responses to crises in confidence in the sentencing process itself. The authors of the chapters on Minnesota (Frase, Chapter 6) and the United States Sentencing Commission (Gertner, Chapter 7) were asked to reflect on the issue of public involvement rather than on sentencing guidelines per se, and their contributions illustrate the secondary role that this aspect has had on the work of these bodies.

Frase reflects on the desired balance between public and professional dominance of sentencing policy formulation, and concludes that, ultimately, "each jurisdiction must decide, in light of its traditions and current conditions, how to balance democratic values and public participation with fair and rational sentencing policy formulation". Gertner notes that the United States Sentencing Commission was designed "to do what Congress had been unable to do, namely resist public pressure to punish disproportionately whatever the 'crime du jour' happened to be". She goes on to highlight the ironic reality that came to be – that the public "was not remotely as punitive, remotely as vengeful ... as Guideline sentences required".

The English Sentencing Advisory Panel was the first to be established outside the United States (in the English speaking jurisdictions). As Ashworth notes (Chapter 8), its primary purpose was to draft sentencing guidelines, consult widely on them and advise the Court of Appeal. Its work, and that of the Sentencing Guidelines Council, is thus focused on the structuring of sentencing discretion through guidelines. The major issues are not so much the role of such bodies vis à vis the community, but the relationships between the courts, Parliament, the executive and the Council/Panel in relation to the creation of guidelines and determining appeals. In this instance the "democratic deficit" was remedied by giving Parliament a great role in scrutinising draft guidelines, rather than by including more community representatives in their memberships.

Ashworth describes the process of consultation with organisations that the Panel is required to consult, as well as with others who might be particularly interested in the topic of the guideline under consideration. He concludes that:

The English guideline system places a considerable premium on ascertaining the opinions of members of the public. In the first place, three of the members of the Panel are members of the public who have no other connection to the criminal justice system. Secondly, the Panel conducts a wide public consultation on its provisional proposals. Thirdly, the Panel occasionally commissions research on public attitudes to specific kinds of crime. And fourthly, the Council also conducts a public consultation on its draft proposals for guidelines. Whether the frequency of consulting the public translates into greater public influence on the formulation of guidelines and, ultimately, on sentencing practice is difficult to assess. Most of the responses to consultations, and often the most closely reasoned responses, come from legal organisations or from individuals involved in the sentencing process (be it judges, barristers, police officers, probation officers or magistrates). But the consultation and research on rape demonstrates that the attitudes of the public (including victims) can have a significant effect.

The second council to be established outside the United States was that in New South Wales in 2002 and, as its first Chair notes, it "was no mere copy or mimic of any sentencing body, council or commission that had been earlier established overseas" (Abadee, Chapter 9). The Council was created as part of a package of sentencing reforms responding to public disquiet over what were perceived to be inadequate sentences, and its main task was to establish a scheme of standard minimum sentences for a number of serious offences. This form of sentence was a response to calls for mandatory minimum sentences that would have more severely constrained judicial discretion. The involvement of the public in the development of sentencing policy and the expectation that this would bolster public confidence in the sentencing process was another, albeit subsidiary reason for its creation. Abadee concludes that the Council has indeed "contributed to the strengthening of public acceptance and understanding of the sentencing process and the maintenance of confidence in that process".

The third body to be established outside the United States, the Sentencing Commission for Scotland, had limited terms of reference and a limited lifespan, both reflecting Scottish political accommodations at the time (Hutton, Chapter 10). As Hutton observes, the driving force was not the broad purpose of increasing public involvement but the delivery of a series of reports that could fit into the government's legislative program. Its public input was limited and when it completed its reports it quietly went out of existence. Hutton argues that the case of Scotland "shows very well how the work of a sentencing institution can be subject to the pressure of political forces". He concludes that "absolute independence is impossible and the precise contours of independence will depend on local political and cultural conditions". Despite a recommendation for the creation of a new body to promote sentencing reform in Scotland, nothing has eventuated.

The Victorian Sentencing Advisory Council (Freiberg, Chapter 11; McCarthy, Chapter 12) was also the product of a long political process, partly concerned with sentencing discretion and the role of the courts, and partly with political legitimacy and responsiveness to the community. A dominant reason for its establishment was that it would be a mechanism to incorporate community views into the sentencing process: it is probably singular in this respect. Compared to most of the other bodies, its terms of reference are broader and its independence of the

courts and the executive greater. Its summary aim – to "bridge the gap between the community, the courts and government by informing, educating and advising on sentencing issues" – encapsulates this unusual role. As Freiberg (Chapter 11) concludes:

The Council is an experiment in the incorporation and institutionalisation of diverse voices in the development of sentencing policy, both through its constitution and its processes. Though such a body can never be truly representative, its representation is wider than many similar councils and its legitimacy, if it has some, derives from this diversity. It also derives from the perhaps vain attempt to ground sentencing policy in empirical evidence, research, thorough and considered deliberation of options and respectful consideration of professional and community views.

The New Zealand Law Commission had the advantage of reviewing the experiences of all of the other bodies and fashioning one suitable for its polity while addressing the problems of its criminal justice system. Young (Chapter 13) outlines the proposal for a Council in New Zealand that is primarily concerned with sentencing guidelines. The proposed guidelines would be based not on the "grid" systems common in the United States, but instead on the work of the Sentencing Guidelines Council in the United Kingdom, with guidelines being created for specific offence types. The proposal was made against the backdrop of a rapidly increasing prison population, community disenfranchisement and a "perhaps misguided belief that the judiciary who have been responsible for determining sentence severity are out of touch with the public mood". While the Council is not intended to be representative of the community in terms of its membership, it is envisaged that it will undertake extensive public consultation and parliamentary approval processes for each of its draft guidelines. The purpose of such consultation is to achieve the community confidence that derives from a sense of enfranchisement.

The South African Law Reform Commission's proposal for a Sentencing Council for South Africa has never been acted upon (Terblanche, Chapter 14). In form and purpose, it was closest to the United States and English bodies, with a focus on the production of sentencing guidelines. The proposed shifting of sentencing authority from the courts to an independent body was probably too radical a move. As Terblanche notes, the Commission did not address the role of public opinion, rather, it "was happy that public opinion could be expressed through the various institutions that could compel the Council into establishing or revising guidelines, and through the fact that the general public is entitled to approach the Council towards the same purpose". With regard to sentencing commissions and councils more generally, Terblanche concludes that one needs to "remain realistic about the extent to which they can transform sentencing practices". Indeed, as Michael Tonry has observed, "there have been many more failed sentencing commissions than successful ones" (Tonry, 1991, p 314; cited in Terblanche, Chapter 14).

Legitimation, blame shifting or policy buffer?

In his chapter Indermaur argues that the problems of sentencing generally and the legitimacy of the criminal justice system will not be solved by involving the public in the process of developing sentencing policy, especially through sentencing councils. He suggests that the involvement of public members on councils, in addition to processes of public consultation, can only be cynical symbolic exercises in participation without substantive effect, aimed at "defending, embellishing or reinforcing existing power arrangements" (Indermaur, Chapter 4). The term "public education", in his view, is a cipher for bringing the public around to the correct way of thinking, for doing things "to" rather than "with" the public. For Indermaur, sentencing councils are a limited form of interest group pluralism, not genuine public participation.

His argument has a number of elements. First, that public confidence in the criminal justice system can be maintained without public involvement. Secondly, he argues that current methods of public consultation and participation in relation to sentencing are simplistic and inadequate and that the methodologies that have been employed in other areas of public controversy could be employed in this context. Indermaur then outlines those elements of the process that can properly include the public in policy formulation (Indermaur, Chapter 4):

[A] well thought out consultation strategy; accurate, sensible and comprehensive measures of public preferences; integration of public preferences with existing and proposed sentencing frameworks; and publication of the results in a way that is accessible to all.

Hutton (Chapter 16) argues that sentencing bodies may perform a wider range of functions than merely involving the public or broadening the formal inputs into the development of sentencing policy. These functions include: legitimisation (the decisions of a broader body, following an inclusive consultative process are more likely to be accepted than unilateralist, secretive, executive decisions); blame shifting and credit claiming (if it fails it is the fault of the council/commission; if it succeeds, it shows the wisdom of the government); cost containment; and political crisis management. This last function is noted by both Abadee in New South Wales (Chapter 9) and Freiberg in Victoria (Chapter 11). Abadee writes:

[I]n circumstances where a controversial sentencing issue arises, an opportunity exists for the Council to be utilised to deal with it by the Minister seeking its reports or views. This may have the advantage of neutralising the sensational or emotive issue, allowing time for calm informed consideration of such an issue and avoiding a reactive or potentially unprincipled response to an issue that may be stoked by media reporting.

The concept of sentencing councils acting in this way as "policy buffers" is further discussed below.

McCarthy (Chapter 12), reflecting on her background in working against gender-based violence and her membership of the Victorian Sentencing Advisory Council, discusses the potential for the Council to reduce "sex discrimination in sentencing through accurate understandings of the etiology and nature of gender-based violence" through "open engagement between gender-based violence advocates, the judiciary and the community". By challenging simplistic populist

approaches (more punishment and retribution) to the problem of gender-based violence, McCarthy regards the Council's community engagement and education roles as important means to alter both community attitudes and sentencing practices. Adopting a more optimistic approach than Indermaur, her chapter argues that:

[The establishment of the Council] has created new possibilities for reform and dialogue that presage non-discriminatory, inclusive and relevant sentencing policy that takes account of individuals and the interests of the wider community, formerly excluded, in ways that could not and have not been contemplated in the past.

Allen and Hough (Chapter 17) use the case of the United Kingdom to illustrate how sentencing policy can be swept away in a tide of penal populism in the wake of a moral panic. They suggest that this case can provide some useful lessons on how not to engage with the public on issues relating to penal policy. Although they admit to "moments of deep pessimism" about the ability of sentencing councils to contain the development of sentencing policy based on subscription to penal populism, they believe that is essential that independent councils continue to be used to defuse such political crises. According to Allen and Hough, sentencing councils must "ensure that there is greater public understanding of sentencing" and must work to improve relations among the key players in the criminal justice system.

Sentencing councils and penal populism

In an era of penal populism, a political and social minefield is created when political crisis management results in the clashing of stakeholder interests. The reality for sentencing councils is that they must navigate this minefield in order not only to produce thoughtful recommendations or guidelines, but also to survive. The discussions in this book illustrate the difficulties facing sentencing councils as they act to counter the knee-jerk legislative responses that may be made in the name of penal populism.

Sentencing councils may be seen as "policy buffers" within the complex and inter-woven relationships that exist among the executive, the judiciary, the public and the media. In an era of penal populism, where the vast majority of the public learns about crime and the criminal justice system from the media, a combination of sensationalist reporting practices and populist political responses to moral panics has resulted in widespread myths and misconceptions about sentencing (Gelb, Chapter 5).

Penal populism and its perceptions of a punitive public are of particular concern given the recent world-wide fall in crime rates. The powerful role of the single, sensational case on which such perceptions are founded is illustrated in the case of Minnesota (Fraser, Chapter 6), where sentence severity increased despite the State's lack of a tabloid newspaper, despite its progressive political climate and despite its falling crime rates.

Within the context of penal populism, attempts to develop sentencing policy are fraught with danger for sentencing councils that must find a balance between responsive politicians, an entrenched judiciary, an often inflammatory press and an increasingly vocal public that is not always well informed. The sentencing council

can defuse the tension existing between quick political responses to public outcries and the careful creation of fair and thoughtful sentencing policy. In this sense, the sentencing council acts as a "policy buffer" to dampen the forces of "blind populism" (Roberts et al, 2003, p 180). Allen and Hough (Chapter 17) suggest that, in fulfilling this role:

[Sentencing councils] will turn out to be of real value if they prove able to interrupt the way that governments privilege perceived public opinion about the desirability of ever harsher sentences over other considerations including the effect of measures in reducing and preventing crime.

In addition, the sentencing council can respond to, and influence, public opinion via its educative role. While not all the bodies discussed in this book are charged with such a role, the promulgation of accurate and up-to-date information on sentencing policy and practice would seem to be a key function of those bodies designed to promote and disseminate advice and information on sentencing. The recent addition of such a role to the New South Wales Sentencing Council (Abadee, Chapter 9) is clearly indicative of the understanding that education and information can play a major role in improving public perceptions of, and confidence in, the criminal justice system.

In a time when the public is more active, more demanding of a role in the criminal justice system and more interested in holding the judiciary accountable, the sentencing council can create a climate in which people are more interested and more informed in the debate on the development of sentencing policy.

Notes

- 1 For more information on the issues covered at this conference, see <http://law.anu.edu.au/nissl/courts_prog.pdf>.

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The Victorian Sentencing Advisory Council: incorporating community views into the sentencing process

Arie Freiberg¹

Introduction

Sentencing is as much about politics as it is about law or criminology. It is as much about the emotional, affective and symbolic elements of crime, order and safety as it is about the rational, effective and instrumental aspects of law-making, judging and the disposition of offenders (Pratt, 2000; Freiberg, 2001). Sentencing has a cathartic as well as a utilitarian function (Stannard, 2002) and it is a process that is played out not only in the courts but in the broader arena of public opinion.

The transformation of the criminal justice system from a bi-polar to a multi-lateral process has been evident for over four decades. Until the 1960s, the traditional adversarial paradigm of criminal justice primarily involved two parties, the state and the offender. The rise of the victims' movement in that decade thrust the hitherto "forgotten party" in crime into the justice arena through the provision of support services to victims of crime, such as state-funded financial compensation, restitution and counselling services. Later, as the movement became more organised and conceptually coherent, victims' views became institutionalised through mechanisms such as victim impact statements, victim representation on parole boards and other release authorities and victim/public registration and notification schemes such as Megan's law. Eventually, the justice paradigm itself has evolved to centre the victim in the process through the development of restorative justice forums such as family group conferences, sentencing circles and victim/offender mediation schemes (Freiberg, 2003).

At the same time, the voices of those indirectly affected by crime, the observers, the readers of newspapers and consumers of electronic media, were increasing in volume as the increasing crime rates of the 1960s, 1970s and 1980s were unsettling their lives and appeared to be unresponsive to rehabilitatively oriented government interventions. Pratt (2002) has argued that the detachment of penal bureaucracies from public opinion exposed politicians to criticism from broader and vocal constituencies who could mobilise the media and possibly influence election outcomes. He referred to the growing and powerful symbiosis between the public and politicians as a "new axis of penal power" (Pratt, 2002, p 181) and he has illustrated the force of that power by developments in sentencing law in New Zealand (Pratt, this volume).

The face of sentencing has changed significantly over recent years. Law reform initiatives have been as much the product of quick political responses to moral panics as they have of the traditional sources of law reform commissions, parliamentary committees or other government advisory bodies. Public pressure for change is manifested sometimes directly on the streets, more often through the print and electronic media, indirectly through the ballot box at election time and, in some countries, directly through propositions placed on ballots and similar citizen-initiated referendum processes.

Examples of governmental responses to what has been perceived to be a more punitive public opinion – populist, or popular, provisions – include: Megan's law, Sarah's law and other sex offender notification and registration schemes; sexual offender orders; sexual offender restraining orders; sexual offences prevention orders; three strikes laws; mandatory, and mandatory minimum, sentences; standard non-parole periods; boot camps; anti-social behaviour orders; increased maximum penalties; political disenfranchisement of offenders; transfers of juveniles to adult jurisdictions; indefinite sentences and continued detention provisions; and matrix and grid sentencing.

The historical role of the Victorian public in the policy process

The Victorian community has never been excluded from the policy-making process. In general, the community is directly involved in policy-making through the traditional approach taken by standing and ad hoc commissions and inquiries that invite public comment and that consult widely. In addition, "community attitudes" are indirectly taken into account in sentencing via the roles of parliamentary representatives, as the maximum penalties that they set for offences are intended both to reflect the level of communal abhorrence of these offences and to act as directives to sentencers about how to weigh the gravity of offending in the cases before them.

In Victoria in the late 1970s and early 1980s, State government inquiries into the sanction of community service and the system of parole and remissions sought the community's views on new sentencing initiatives. In the mid-1980s, a Sentencing Committee chaired by a retired Supreme Court judge, Sir John Starke QC, was established to review sentencing policy and practice (Victorian Sentencing Committee, 1986). That Committee sat for three years and undertook an extensive series of public consultations eventually leading to the enactment of the *Sentencing Act 1991* (Vic).

In its 1988 Report, the Sentencing Committee strongly recommended that a Judicial Studies Board be established in Victoria, arguing that its major benefit would be to provide a structured method of learning and keeping abreast of changes in the sentencing process. Its recommendations were accepted by the government; the *Judicial Studies Board Act 1990* (Vic) came into operation on 20 November 1990. The functions of the Board were (*Judicial Studies Board Act 1990* (Vic) s 5):

- (a) to conduct seminars for judges and magistrates on sentencing matters;
- (b) to conduct research into sentencing matters;

- (c) to prepare sentencing guidelines and circulate them among judges and others;
- (d) to develop and maintain a computerised statistical sentencing database for use by the courts;
- (e) to provide sentencing statistics to judges, magistrates and lawyers;
- (f) to monitor present trends, and initiate future developments, in sentencing;
- (g) to assist the courts to give effect to the principles contained in the *Sentencing Act 1991* (Vic);
- (h) to consult with the public, government departments and other interested people, bodies or associations on sentencing matters; and
- (i) to advise the Attorney-General on sentencing matters.

The Board was not intended to be inclusive of the public, but was comprised of seven members appointed by the Governor-in-Council and included: the Chief Justice of the Supreme Court or another judge of that court nominated by the Chief Justice, who was the chairperson; another judge of the Supreme Court appointed by the Chief Justice; the Chief Judge of the County Court or nominee; the Chief Magistrate or nominee; and two people nominated by the Attorney-General of whom at least one had to be, or had to have been, employed by a tertiary institution as a member of the academic staff at a level not lower than senior lecturer. The Board had the power to appoint as many research officers as were necessary for its proper functioning. However, term of reference (h) required it to "consult with the public". Despite its legislative and governmental support, the Board never became fully operational and was abolished in 1996. It was an idea whose time had not yet come.

Other efforts have been made to include the Victorian public in the policy-making process. In the mid-1990s, the (conservative) Liberal/National Party government conducted a newspaper survey in an attempt to gauge public opinion on the appropriate sentence for a range of serious offences. In 1996 the Victorian Community Council Against Violence (VCCAV) was asked by the government to inquire into community knowledge and views in relation to sentencing. It was asked to give particular consideration to identifying the community's level of knowledge of sentencing, how the community gains its knowledge of sentencing, community perceptions of the purpose of sentencing, and community expectations, concerns and suggestions in relation to sentencing (VCCAV, 1997).

The 2002 Victorian Sentencing Review

Between 1992 and October 1999 Victoria was governed by a radically conservative government that was elected on, and implemented, a strong "law and order" agenda (Fox, 1993). It introduced laws for indefinite sentences and required community protection to be placed ahead of proportionality in the sentencing of certain groups of recidivist sexual and violent offenders (*Sentencing Amendment Act 1993* (Vic)). In 1994 it legislated to allow for the receipt of victim impact statements and to require consideration of victims' interests as part of the statutory sentencing guidelines (*Sentencing (Victim Impact Statement) Act 1994* (Vic)). In 1996 it abolished the non-functioning Judicial Studies Board and in 1997 it

expanded the serious offender provisions by adding serious drug offenders and serious arson offenders and generally increased statutory maximum sentences for a range of offences (Fox and Freiberg, 1999, pp 6-7). By the end of its term nearly half its prison population was housed in private prisons.

In style, the government tended to be unilateralist rather than consultative. Where it did consult on sentencing matters, it listened to victim advocacy groups rather than prisoners' rights organisations, civil liberties groups and academic commentators who had had a greater voice in the development of criminal justice policy under the previous Labor government. In addition the Liberal/National government had abolished the Victorian Law Reform Commission soon after it came into office. It had little time for institutionalised law reform that it regarded as being captive to the legal profession and other entrenched defenders of the status quo.

The election of a Labor government in late 1999, partly on a platform of being more responsive to community concerns, was followed a year later by the commissioning of a review of sentencing laws addressing six broad terms of reference relating to maximum penalties for the offence of child stealing, sentencing for drug offences and drug-related offences, sentencing options, sentence indication and spent convictions (Freiberg, 2002). The fourth Term of Reference contained three parts, requiring the reviewer to determine:

1. whether any mechanism could be adopted to incorporate community views into the sentencing process more adequately;
2. whether superior courts in Victoria should adopt a practice of publishing guideline judgments on various categories of offences; and
3. the extent to which a proposed judicial studies institute should be responsible for the collection, analysis and publication of sentencing statistics and other sentencing information for the assistance of magistrates and judges.

In 2000, as seems always, there was great public concern over sentencing and strong pressure on governments to increase maximum penalties and to deal more harshly with offenders. The new government saw the sentencing review as a mechanism through which it could develop a public dialogue on an issue that was politically sensitive and on which non-conservative parties could be seen as vulnerable. Being regarded as "soft on crime" was not regarded as electorally advantageous.

After extensive consultation following the publication of two Discussion Papers, the final report of the review was submitted in 2002. The consultation process produced the predictable public concerns with sentencing: the purposes of sentencing; the length of prison sentences; early release schemes; the role of victims; and the adverse effects of the criminal justice system on mentally disordered and intellectually disabled offenders. It highlighted the need for an ongoing mechanism of feedback and review of sentencing that could replace episodic and reactive reviews, usually born out of a penal crisis or moral panic.

Recommending a Victorian Sentencing Advisory Council

In relation to institutional arrangements, the 2002 Sentencing Review was aware of the failed experiment with the Judicial Studies Board in Victoria just a few years earlier, and of developments in other jurisdictions, particularly the United States Sentencing Commission (Gertner, this volume) and State sentencing commissions whose primary function was to draft sentencing guidelines for the courts (Frase, this volume). Public representation on, and input into, those bodies was limited and their tasks relatively narrow. The Review found that a better model for a Victorian body was the United Kingdom's Sentencing Advisory Panel, established in 1999. Although it was set up to provide advice and information to the Court of Appeal in respect of guideline judgments, its membership was broader than that of the United States Commissions and its consultation requirements were very wide, partly in order to democratise the decision-making process (Ashworth, this volume).

For a number of reasons, the context for the introduction of a Council in Victoria was very different from the environment of just a few years earlier and from overseas or interstate experiences. First, there appeared to be a strong imperative for an ongoing body that would have members of the public on it and that would have public consultation, and the gauging of public opinion, as part of its remit. However, the Review was concerned that "public opinion" be properly ascertained, rather than being guessed at through the obvious, but misleading sources of the daily press.

Secondly, the Review found that Victorian sentencing statistics were in a very poor condition and that the State lacked an independent bureau of crime statistics and research such as existed in New South Wales (Bureau of Crime Statistics and Research), South Australia (Office of Crime Statistics and Research) and Western Australia (Crime Research Centre). Absent such a body, a sentencing council could fill that void at least in relation to sentencing data.

The Sentencing Review, released in March 2002, recommended the establishment of a Council of 12-15 members drawn from diverse sources: the judiciary; ex-judicial officers; the Bar, solicitors, prosecution and legal bodies; corrections; police; victims' groups, persons or bodies; academics; and persons involved in social policy or social services. A wide range of tasks was envisaged for the Council, such as (Freiberg, 2002, p 198):

- conducting research into sentencing matters;
- undertaking and disseminating research about rehabilitation and treatment programs;
- providing information and feedback, especially to the judiciary, on the effectiveness of different sentencing options;
- providing information about recidivism rates, program completion and breach rates in relation to conditional orders;
- conducting analyses of different sentencing reform scenarios, including the impact on sentencing patterns and changes to sentencing options;
- providing information about the costs of sentencing;

- providing sentencing statistics to judges, magistrates and lawyers and others, including information regarding current sentencing practice as required by *Sentencing Act 1991* (Vic) s 5(2)(b);
- assisting the courts to give effect to the principles contained in the *Sentencing Act 1991*;
- monitoring present trends in sentencing, locally, nationally and internationally and suggesting future developments;
- monitoring imprisonment rates and regularly reviewing the direct and underlying causes of changes in the prison population;
- undertaking studies of whether and, if so, how sentencing practices differ in different levels of courts and geographically;
- consulting with the public, government departments and other interested people, bodies or associations on sentencing matters;
- gauging public opinion on sentencing;
- advising the Attorney-General on sentencing matters generally and responding to particular matters which may be referred to it relating to sentencing law and practice; and
- monitoring the implementation of sentencing reform.

The creation of the Sentencing Advisory Council Statutory functions

In a ministerial statement entitled *A Fair, Accessible and Understandable Justice System* (Victoria, *Hansard*, 18 April 2002, p 993) the Attorney-General accepted a number of the recommendations of the review including the establishment of the Sentencing Advisory Council. A Bill was introduced into the Legislative Assembly in September 2002 (Sentencing (Further Amendment) Bill 2002) but lapsed because of the election held later that year. Two of the primary reasons put forward by the Attorney for the creation of the Council were that it would "allow properly ascertained and informed public opinion to be taken into account in the criminal justice system on a permanent and formal basis" and it would "promote greater transparency and accountability in the criminal justice system and stimulate balanced public debate on sentencing issues" (Victoria, *Hansard*, 12 September 2002, p 206).

Following the re-election of the Labor party in November 2002, the Bill was re-introduced in March 2003 as the *Sentencing (Amendment) Act 2003* establishing the Council as an independent statutory authority with the following functions (*Sentencing Act 1991* (Vic) s 108C):

- (a) to state in writing to the Court of Appeal its views in relation to the giving, or review, of a guideline judgment;
- (b) to provide statistical information on sentencing, including information on current sentencing practices, to members of the judiciary and other interested persons;
- (c) to conduct research, and disseminate information to members of the judiciary and other interested persons, on sentencing matters;

- (d) to gauge public opinion on sentencing matters;
- (e) to consult, on sentencing matters, with government departments and other interested persons and bodies as well as the general public; and
- (f) to advise the Attorney-General on sentencing matters.

In the debate on the Bill, the major concerns that were expressed related to the paucity of sentencing statistics in Victoria and the role of the Council in producing them, and the need for guideline judgments and the role of the Court of Appeal in their formulation. The National Party, in opposition, was particularly concerned over the separation of powers: specifically, whether having a non-judicial body such as the Council with a legislative mandate to be involved in the formulation of a judgment would breach the doctrine of the separation of powers. Despite these reservations, the legislation was supported in principle by the Opposition parties and formally came into operation on 1 July 2004.

Membership

The Council is comprised of up to 12 members, appointed by the Governor-in-Council on the recommendation of the Attorney-General: two with broad experience in community issues affecting courts; one with experience as a senior member of the academic staff of a tertiary institution; one who is a member of a victim of crime support or advocacy group; at least one highly experienced prosecution lawyer and one highly experienced defence lawyer; and the remainder are people who have experience in the operation of the criminal justice system (*Sentencing Act 1991* (Vic) s 108F(1) and (2)). The Council was structured in such a way as to facilitate broad community input and a balance of views. Members are appointed for terms of three years and the inaugural council was selected following an open advertisement calling for applications. The Council was never intended to be partly or totally judicial and has no existing or past judicial officers on it, although the criteria would allow it to do so under the rubric of "experience in the operation of the criminal justice system".

The announcement of appointments to the Council in August 2004 was greeted by criticism from victims of crime groups who protested that the Council was not sufficiently representative of victims of crime (Ross, 2004). The announcements took place at a time of great public anger over the perceived leniency of a recently imposed suspended prison sentence on a person convicted of rape (Strong, 2004; McCarthy, this volume). The major tabloid newspaper in Victoria, the *Herald Sun*, ran a series of articles highly critical of both the Council and the sentence. The Attorney-General's response was that the Council was a *sentencing* advisory council, not a *victims'* advisory council (Houlihan and Ross, 2004), but he nonetheless referred the matter of suspended sentences to the Council for consideration and advice (this is further discussed below). Later that month, the resignation of one of the inaugural appointees due to her appointment to another body allowed the Attorney to appoint the widow of a murdered policeman to the Council, an appointment that was welcomed by victims' groups (Silverster, 2004). Notwithstanding this appointment, victims of crime set up a "rebel" sentencing advisory group, called the "People's Sentencing Advisory Council", comprised of the families of murdered victims and other victims of crime (Wilkinson, 2004). The group did not survive long beyond its initial public statements.

The Council meets monthly and is supported by a Secretariat of 12 staff of various disciplinary backgrounds: law, social science, statistics and criminology.² Its work reflects the view that sentencing is more than a legal issue. The Council is required to report to Parliament annually (Sentencing Advisory Council, 2005c; 2006b).

Early in its life the Council agreed to a summary statement of its aim, as being "to bridge the gap between the community, the courts and government by informing, educating and advising on sentencing issues" (Sentencing Advisory Council, 2006b, p 6). It also agreed to a set of guiding principles, which are:

- demonstrating integrity through evidence-based information and advice;
- adopting an inclusive, consultative, and open approach to [its] work;
- maintaining independence in the process of building a bridge between government, the judiciary and the community;
- being responsive to the needs of stakeholders; and
- supporting and developing staff.

Discharging its functions

The principles of independence, inclusiveness and evidence-based policy have underpinned all the work of the Council as it discharges its various functions.³

Guideline judgments

Although widely used and accepted in other jurisdictions, particularly in the United Kingdom (Ashworth, this volume), guideline judgments are highly contentious in Victoria, where the "intuitive" or "instinctive" synthesis approach to sentencing has prevailed. The Victorian Sentencing Committee's Report in 1988 had recommended in favour of guideline judgments and a 1990 Bill contained provisions that empowered the Full Court to hand down such judgments, but it was opposed by a majority of Supreme Court judges and did not make its way into the 1991 Act.⁴ The High Court has been similarly antipathetic to this more structured approach to sentencing.⁵ The Court of Appeal reaffirmed its opposition to guideline judgments and was supported by the influential Criminal Bar Association (Freiberg, 2002, pp 210-11).

Despite this opposition, and the 2002 Sentencing Review's recommendation not to proceed until there was more support from the legal community, the Attorney included provisions for guideline judgments on the grounds that it would promote greater consistency of approach in sentencing, provide "an opportunity for appellate judges to share their collective experience with primary judges and articulate unifying principles to guide the exercise of judicial discretion" (Victoria, *Hansard*, Legislative Assembly, 2003, p 479).

The *Sentencing Act 1991* (Vic) allows the Court of Appeal, on its own initiative or on an application made by a party to the appeal, to give or review a guideline judgment, even if it is not necessary for the determination of the appeal (s 6AB).

A guideline judgment may set out the criteria to be applied in selecting among various sentencing alternatives, the weight to be given to the various purposes of sentencing, the criteria by which a court may determine the gravity of the offence, the criteria that may be used to reduce the sentence for an offence and the weighting that is to be given to relevant criteria (s 6AC). Omitted from the list of what might be considered by the Court of Appeal, that was suggested by the Sentencing Review, was that which referred to "the appropriate level or range of sentences for a particular offence or class of offence" (Freiberg, 2002, p 216). This considerably restricts the scope of guideline judgments in Victoria and significantly distinguishes the possible work of the court from what is being done in other jurisdictions.

Under the statutory scheme, the Sentencing Advisory Council plays a major role in the development of a guideline judgment. The Act provides that if the Court of Appeal decides to give or review a guideline judgment it must notify the Council and consider any views stated in writing by the Council. It must also give the Director of Public Prosecutions (or its representative) and Victoria Legal Aid (or its representative) an opportunity to appear and make a submission on the matter (s 6AD). The Court is then required to have regard to these views (s 6AE(c)).

Community input into the sentencing process in this respect can occur through the membership of the Council itself as well as through the Council's consultative process. To date, the Court of Appeal has not yet decided to give a guideline judgment.

Statistical information

The sorry state of Victoria's statistical framework has already been suggested. For some years the Department of Justice had issued sentencing data for the Supreme and County Courts and the Magistrates' Court, but this series ended in 1996 with the cessation of the Department's Case Flow Analysis section. It was not until 2001 that a Court Services Branch was established and in 2003 two publications were produced that provided Supreme and County Court and Magistrates' Court data for the years 1996 to 2002. Two further reports were published in 2004. These publications provided descriptive data only, with little analysis.

In 2003 a Courts Statistical Services Unit was created to provide statistical data and information about courts, including sentencing statistics, to a wide range of consumers. The data provided by the Courts Statistical Services Unit often form the foundation of the Council's own publications and research; the Council is thus reliant on the comprehensiveness and accuracy of the data provided by the Unit. The Council's function is not to produce statistical sentencing data but to provide sentencing information. This aspect of the Council's work is intended to:

1. inform the public and others about what is happening in sentencing;
2. inform its own research into sentencing trends and issues;
3. provide greater transparency of the judicial and correctional process; and
4. provide a basis for sociological critique or research into potential law reform.⁶

One of the Council's first tasks was to work with the Courts Statistical Services Unit in the Department of Justice to obtain sentencing data and to ensure their

reliability – a task that turned out to be far larger and more complex than anticipated. It absorbed a great deal of staff time in both organisations.

Having satisfied itself that it had reliable data, the Council has produced a series of *Sentencing Snapshots*, whose purpose is to provide information about sentencing trends for specific offences. Section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires a court to have regard to "current sentencing practices" in sentencing, but little such information has been available. At the time of writing, 30 snapshots have been produced covering the most serious and common offences in the higher (Supreme and County) courts. They provide information for a five-year period on: the number of people sentenced; sentence types and trends; the age and gender of people sentenced; sentence types by gender and age; principal and total effective sentences; and the length of non-parole periods. These are updated periodically on the Council's website and are distributed in hard copy to the courts and the legislature and to other interested parties.

Although the Victorian courts have found reference to other cases to be of limited assistance in considering whether there is error in the exercise of the sentencing discretion, they have started to refer to the *Snapshots* for the purpose of determining whether a particular form of sentence (for example, custodial or non-custodial) is appropriate, or at least not to be considered manifestly adequate or inadequate.⁷

The sentencing monitoring section of the Council's website also provides a major contribution to public knowledge of the operations of the criminal justice system. These data, presented in graphical and tabular form, provide historical and comparative data about the flow of people through Victoria's criminal courts, as well as sentencing trends for the higher courts, the Magistrates' Court and the Children's Court, and trends in the composition of the State's prisoner and youth detainee populations and community corrections populations.⁸

The Council has also undertaken substantial statistical analysis for a number of specific projects arising from, or referred to it by, other reviews, reports or agencies. For example, arising from the Victorian Law Reform Commission's (VLRC) *Defences to Homicide: Final Report* (VLRC, 2004) and from a request from the Attorney-General, the Council has undertaken to determine the feasibility of establishing a comprehensive database on homicide incidents and sentencing in Victoria over the past 10 years. This database is intended to contain information relating to the characteristics of homicide incidents, perpetrators and victims, as well as sentencing and appeal outcomes.

Conducting research

Unlike other law reform bodies, such as the Victorian Law Reform Commission, the Council is able to undertake projects that it determines to be valuable. Ideas for projects to date have come primarily from Council members and staff and from the courts. The Council has made it a practice to meet regularly with the heads of jurisdiction of the Victorian courts to seek their views on the types of projects that they consider to be the most critical.

The first completed project of this kind emerged from concerns expressed by the Magistrates' Court over the perceived inadequacy of maximum penalties for repeat drink drivers. This resulted in a Report released in September 2005

(Sentencing Advisory Council, 2005a) recommending an increase in statutory maximum penalties, although the Council noted that these measures were only part of a response to the larger social problem of drink-driving. The Council's recommendations were accepted by the government and were enacted in the *Road Legislation (Projects and Road Safety) Act 2006* (Vic).

Following the recommendations of the Victorian Law Reform Commission (VLRC, 2004), the *Crimes (Homicide) Act 2005* (Vic) abolished the partial defence of provocation for homicides committed after 22 November 2005. Defendants charged with a murder committed after that date have lost the right to raise the partial defence of provocation, which previously would have reduced a conviction of murder to manslaughter. Judges now have to consider the relevance of any provocative conduct on the part of the deceased in determining an appropriate sentence for the crime of murder, which is a more serious offence. One of the Council's projects examines how provocation has featured in sentencing decisions for non-fatal offences in Victoria and for homicide in jurisdictions where the substantive defence of provocation has been abolished, and looks at interstate and international authorities to extract the sentencing principles that have been applied in such instances.

Gauging public opinion

One of the Attorney-General's terms of reference to the Sentencing Review queried whether there were mechanisms that could more adequately incorporate "community views" into the sentencing process. The relationship between politics, public opinion and the development of sentencing policy is problematic and intriguing.

The 2002 Sentencing Review noted (Freiberg, 2002, p 188):

Accurately determining the "community's views" on any issue, let alone sentencing, is a difficult task and there are many professional organisations whose job it is to ascertain it. Whether for political parties, commercial organisations, lobby groups or others, it is understood that good policy and successful marketing strategies must be founded on sound, scientific methods. These require both quantitative and qualitative data, an understanding of the nature of the sampling process and accepted tools of analysis.

Public opinion polls often fail these simple requirements. Simplistic, unscientific surveys can result in spurious or inaccurate conclusions regarding the community's views, but these are often used by the media and others to demonstrate support for their particular policies. It is not difficult to manipulate public opinion by the use of poorly framed questions, simplistic scenarios and unrepresentative samples.

The Review suggested that the development of sentencing policy required a system that permitted "properly informed" and "properly ascertained" public opinion to be taken into account. "Properly informed" meant that respondents should be aware of the reality of crime and punishment, and "properly ascertained" required the use of some scientific methodology (Freiberg, 2002, p 190).

Section 108C(1)(d) of the *Sentencing Act 1991* (Vic) requires the Council to gauge public opinion. One of the Council's first projects in this area was to undertake research that aimed to describe the current state of knowledge about

public opinion on sentencing and to identify the methods by which public opinion could be measured (Sentencing Advisory Council, 2006b, p 21). This resulted in the publication entitled *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* (Gelb, 2006; Gelb, this volume). The paper was circulated to all members of the Victorian judiciary and all members of Parliament. The research has been presented at a number of conferences and the research paper has proved very popular in both print and electronic versions.

In undertaking almost every one of its references, the Council engages with the public generally, with victims' groups and with professional groups, and through these processes obtains feedback on a range of general and specific issues. In this way, the views of segments of the public can be ascertained and, over time, these can be aggregated into a broader and more nuanced understanding of the range and complexity of community views on a variety of sentencing issues.

The Council regards the measurement of "community attitudes" or "public opinion" as a reciprocal and ongoing exercise. As noted above, public opinion that is useful for the development of public policy should be properly informed. The Council thus sees public education as a critical aspect of its work. It aims to achieve this goal in a number of ways.

The Council's website is the major mechanism by which it disseminates information. The site provides information about sentencing in Victoria in a simple, structured and accessible manner as well as providing its publications free of charge. The information provided relates to the principles of sentencing, sentencing factors, the range of sentencing options, the court system, guideline judgments, the sex offenders register, the parole system, victims of crime and sentencing, and sentencing statistics for the higher courts, the Magistrates' Court and the Children's Court. It also provides responses to frequently asked questions and provides links to other similar organisations, services for victims of crime and relevant publications. The website has proved popular and in 2005-06 over 17,000 individual visits had been made (Sentencing Advisory Council, 2006b, p 24).

The Council has created an interactive exercise entitled "You be the Judge" that is aimed at improving participants' understanding of the sentencing process and its complexities. The session takes the form of the presentation of a brief vignette, based on a real case in the courts, to which the audience is invited to respond by imposing a sentence and indicating briefly the reasons behind their decision. The Socratic discussion that follows, supported by written materials and a Powerpoint presentation, examines the factors that a judge must consider when imposing sentence and the difficulties in reconciling the various needs of the state, the defendant and the victim, not to mention the various aims of sentencing (Sentencing Advisory Council, 2006b, p 23). This exercise has been presented in schools, for community groups, for victim and offender support services, for teachers and for the general public during events such as Law Week in Victoria, which is a community legal education program that is conducted every year.

As the reach of this personal exercise is, of necessity, limited, the Council has explored with professional organisations how the session could be developed and incorporated into high school curricula. Ideally, the session could be run online and interactively.

Unlike the United Kingdom Sentencing Advisory Panel, which is required by law to obtain and consider the views of bodies approved by the Lord Chancellor after consultation with the Home Secretary and the Lord Chief Justice (*Criminal Justice Act 2003* (UK) s 171(3)(a)), the Council is not statutorily required to consult with any persons or bodies. However, the Council's consultative processes have been developed over the three years of its operation to ensure that it obtains a wide range of views on its work.

As would be expected in a relatively small jurisdiction, where the "usual suspects" of those who work in the criminal justice system are relatively well known to each other, the Council has established strong links with a range of organisations that are regularly consulted. These include: the Criminal Bar Association; the Law Institute of Victoria; Victoria Police; Victoria Legal Aid; the Director of Public Prosecutions; the Federation of Community Legal Centres; Youthlaw; various community legal services; the Mental Health Legal Service; victims of crime organisations; Victorian Centres Against Sexual Assault; drug and alcohol services and many others. The Council also consults with other government organisations involved in sentencing, particularly Corrections Victoria, and with judicial officers, both formally and informally. Consultees' views are usually extensively reflected in the Council's reports, even if their specific recommendations have not been adopted.

One group that has not been extensively consulted is offenders, past and present, which is surprising, given that sentencing is ultimately concerned with the disposition of offenders. In its reference on sentence indication schemes and sentence discounts, the Council has surveyed offenders on their experiences with, and attitudes to, these issues and has formalised its links with the Victorian Association for the Care and Resettlement of Offenders, which works with, though does not represent, offenders.

The process undertaken in relation to the contentious suspended sentence reference well illustrates the Council's approach to consultation. The Council first released a preliminary Information Paper, followed by a Discussion Paper that invited public comment. This took the form of several community fora around the State, as well as a series of specialist round tables that focused on issues such as offenders with a mental illness or intellectual disability, offenders with drug and alcohol problems, young offenders and sex offenders. In addition, focus groups were held with victims of crime and with representatives of victims, and there were also individual meetings with interested people. The Council's website also contains the facility for people to make either general comments or specific submissions on a particular project.

The Council employs a full-time Community Engagement Officer whose role is to ensure that all of these consultation activities are effective, innovative and reach as broadly as possible to all interested groups. As well, the Community Engagement Officer is responsible for the Council's public education programs, making sure that, wherever possible, the opinions it gleans through consultations are well informed. It is also conscious of the vast gap that can exist between the often obscure language of the law and public understanding of the criminal justice system. To ameliorate this difficulty, the Council tries to ensure that its

documentation is both accessible and comprehensible to a non-legal audience. This often entails publication of different versions of documents with different levels of detail.

Advising the Attorney-General

The Attorney-General may seek advice from the Council on matters relating to sentencing but he cannot compel the Council to provide it. The Council has proved to be a useful addition to the array of advisory bodies available to the Attorney, including his own department, the Victorian Law Reform Commission and the Parliamentary Law Reform Committee. As a continuing body it can, and has, built up the expertise to deal with a narrower range of issues than is dealt with by more comprehensive law reform bodies; as a body with statutory independence, it may have more legitimacy than internal governmental agencies.

As discussed above, sentencing reform is sometimes the product of moral panics (Cohen, 2002) and scandals. These events provide the worst possible context for law reform, whether they relate to child sexual abuse, drug use, gang warfare, asylum seekers, child killers or inadequate sentencing. As Pratt has argued in this volume, penal populism can create a cycle of controversy, panic or alarm, political reaction, more controversy or alarm, ad hoc responses, legislative intervention, dismay at the failure of the (ill-considered) responses, more panic, more interventions and so on until some more rational or effective response is developed (or another moral panic supersedes the previous one). In the sometimes heated political environment in which debates about sentencing policy may take place, the Council can play a useful role in defusing issues by taking on contentious matters and considering them in a calmer atmosphere and over a longer period when some of the emotion produced by the original event has dissipated.

The Attorney has sought advice from the Council on six matters between 2004 and mid-2007: suspended sentences, sentence indication and sentence discounts, sentencing trends for homicide cases, continuing detention for high-risk offenders, maximum penalties for preparatory offences and maximum penalties for the offence of negligently causing serious injury. The first of these references was the result of public concern over a suspended sentence of imprisonment for rape⁹ that resulted in a protest by several thousand people on the steps of Parliament House with calls for mandatory minimum sentences and the restriction or abolition of suspended sentences. This occurred almost immediately after the Council had started operating.

The 2002 Sentencing Review had examined the use of suspended sentences in Victoria (Freiberg, 2002, ch 4) and had recommended their abolition – a recommendation that the Attorney-General had rejected at the time. However, in August 2004, the public mood had changed, or at least the public mood as represented by some of the media, and the Attorney's reference requested advice on the current use of suspended sentences and whether "reported community concerns about their operation" indicated a need for reform, and if so, what those reforms might be. The Attorney expressed particular interest in the views of the community, including victims of crime, on this issue (Sentencing Advisory Council, 2006b, p 11), thus reflecting the original purpose of the Council as

a mechanism for incorporating community views into the development of sentencing policy.

The Council's response involved extensive community and professional consultation, including meetings with victims' groups, which resulted in the publication of an Interim Report (Sentencing Advisory Council, 2005b). After extensive community debate on this report, the Council released Part I of a Final Report (Sentencing Advisory Council, 2006a) that dealt with restrictions on the use of suspended sentences but left open the question of wider reforms to the sentencing options currently available to the courts. The Part I recommendations were, to a large extent, enacted in the *Sentencing (Suspended Sentences) Act 2006* (Vic).

The Council's second request from the Attorney was on sentence indication and specified sentence discounts. The issue of sentence indication had initially been referred to the 2002 Sentencing Review, but had ultimately been withdrawn from its consideration. The Attorney noted that there was substantial support for such processes and that they were seen as ways of improving criminal procedure, in particular for victims of sexual assault (Sentencing Advisory Council, 2007a).

Another request related to the highly contentious issue of continuing detention of offenders who have completed their sentence but who are considered to continue to pose a serious risk to the community if released. This issue emerged from public concern over the release, or pending release, of notorious offenders who had been characterised by some elements of the media as "fiends" and "monsters", and from the example set by other jurisdictions that had recently enacted similar legislation to deal with such cases (*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Dangerous Sexual Offenders Act 2006* (WA)). Although Victorian law already had provisions for incarcerating dangerous sexual and violent offenders indefinitely (*Sentencing Act 1991* (Vic) s 18A) and for monitoring child-sex offenders following their release from prison (*Serious Sex Offenders Monitoring Act 2005* (Vic)), the issue was whether further powers were needed in relation to such offenders. Once again, a request to the Council was seen as a mechanism by which highly contentious issues could be carefully considered over a longer period and in a more temperate environment (Sentencing Advisory Council, 2007b; Gelb, 2007).

Another reference before the Council related to maximum penalties for preparatory offences such as being armed with criminal intent, loitering with intent to commit an indictable offence and going equipped to steal. The project arose from concerns by Victoria Police about recent court rulings relating to these offences and about the perceived inadequacy of the sentences imposed. This reference was indicative of the fine line that the Council has to tread between providing advice as to substantive criminal law questions (that is, the nature and adequacy of these offences as preventive tools) and providing advice on specific sentencing issues (whether changing the maximum penalties would have a deterrent or incapacitative effect). In the case of preparatory offences, the Council recommended against any changes in the statutory maximum penalties (Sentencing Advisory Council, 2007c).

Conclusion

The Victorian Sentencing Advisory Council is an innovative organisation performing the functions of a specialised law reform commission, bureau of statistics, sentencing guidelines panel and public education body combined. It was designed for a particular polity, at a particular time to deal with both local and broader issues of sentencing policies and practice. It is a body that is able to see sentencing as a wider matter than simply the pronouncements of judicial officers in court. To that extent, it reflects a criminological, rather than legal, view of the sentencing process.

The Council is an experiment in the incorporation and institutionalisation of diverse voices in the development of sentencing policy, both through its constitution and its processes. Though such a body can never be truly representative, its representation is wider than many similar councils and its legitimacy, if it has some, derives from this diversity. It also derives from the perhaps vain attempt to ground sentencing policy in empirical evidence, research, thorough and considered deliberation of options and respectful consideration of professional and community views.

In operation for only three years, it is too early to evaluate the success of the Council in terms of its own goals and statutory purposes. If legitimacy and usefulness are to be measured by references to the Council made in the press, by formal requests arising from government, by the legislative implementation of its recommendations and by the proposed referral of contentious issues by both sides of politics, then the Council has succeeded in occupying a hitherto vacant space in the political and social discourse on sentencing.

Notes

- 1 Chair, Sentencing Advisory Council. Some of the material in this chapter is drawn from the Sentencing Advisory Council's Annual Reports and the Council's website. The views expressed in this chapter are personal and do not purport to represent the views of the other members of the Council.
- 2 A Chief Executive Officer, a criminologist, four legal officers, two statistical officers, a community engagement officer, a publications officer and two administrative support staff.
- 3 Though the Council is statutorily independent of government in the sense that Council members are appointed by the Governor-in-Council for fixed terms, Secretariat staff members are appointed under public service conditions and the Chief Executive Officer is responsible to the Director of Court Services, a senior executive officer in the Department of Justice. Funding is provided by that Department.
- 4 See also *Ngiri & Tiong* [2000] VSCA 78.
- 5 *Wong & Leung* [1999] HCA 64; *Makarjian* (2005) 79 ALJR 1048.
- 6 For further information, see the SAC website: Sentencing Statistics.
- 7 *Bangard* [2006] VSCA 313; *Fevalecki* [2006] VSCA 212; *Ioane* [2006] VSCA 84; *Ross* [2006] VSCA 223.
- 8 All these pages can be accessed at the Council's website: <www.sentencingcouncil.vic.gov.au>.
- 9 *Sims* [2004] VSCA 129.

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