Sentencing Councils: An Overview of Models from Australia, New Zealand and the United Kingdom

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KEY QUOTES

Because the courts are concerned with maintaining public confidence in the administration of justice, judges cannot dismiss public opinion as having no relevance at all to the work of the courts.


Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.

*Markarian v The Queen* [2005] HCA 25 para [82]; (2005) 215 ALR 213 per McHugh J at 236

You would be aware that the New South Wales and Victorian Governments have established Sentencing Councils as advisory bodies and that similar bodies exist in foreign jurisdictions including England and Scotland.

The NSW Sentencing Council was established in 2003 while the Victorian Sentencing Advisory Council was established the following year, so sufficient time has passed for the relevance and efficacy of these organisations to be assessed. It would seem to be the unanimous view of all informed commentators and stakeholders that the two organisations have performed exceedingly well, albeit within the strictures of the legislation governing their creation, responsibility, structure and operation.

I believe that the time has come for the Queensland Government to consider the introduction of a similar body and I urge you to consider this as a matter of priority.

Edited version of a letter from Ian Berry, then President, Queensland Law Society to then Queensland Attorney General, Kerry Shine MP, as published in ‘Sentencing: A new option?’, *Proctor*, 29(1), February 2009, pp 5-6

The new body will have the opportunity to provide input into guideline judgments prepared by the Court of Appeal on the appropriate sentencing range for a particular offence . . . . It will help bridge the gap between community expectation, the courts and government in deciding criminal penalties. The government acknowledges community concerns about sentencing and recognises that sometimes, it may seem that the sentence does not fit the crime. But the public should have confidence in our independent judicial system, which has served our state well for 150 years, and in the independent discretion exercised by judges in determining sentences based on all the facts and circumstances relevant to a particular case.

1. INTRODUCTION

In January 2009, Mr Ian Berry, then President of the Queensland Law Society (QLS), in a letter to the Queensland Government, an edited version of which was subsequently published in *Proctor*, urged the Queensland Government to establish, as a matter of priority, a Sentencing Council in Queensland, similar to the bodies already existing in New South Wales and Victoria. Specifically, Mr Berry argued that:

Through no fault of the judiciary, it must be acknowledged there is a feeling in the wider community that there is a disconnection between what people might consider appropriate sentences for crimes – especially crimes of violence – and what sentences are imposed.

The ‘law and order’ debate which has always been a drearily predictable feature of election campaigns during which governments and oppositions opportunistically and cynically try and outbid each other to demonstrate that they are ‘tough on crime’ now seems to be a constant feature of political life.

If the public is to feel that it has some direct ‘ownership’ of sentencing policy and that its views will receive serious consideration by a respected, impartial, independent and influential body, it will go a long way towards public acceptance and understanding of the administration of justice and the due processes.

A properly constituted Sentencing Council does provide the machinery for ongoing rational consideration of sentencing issues.

The proposal received a mixed reception. In a response for the *Courier Mail*, Legal Aid Queensland [LAQ] voiced its support for a “politically independent body” to “help educate the public about punishments for crimes” but indicated that it would not want to see a body “that undermined judicial independence”.

The Chief Justice Paul de Jersey of the Supreme Court did not welcome the proposal for a sentencing council, stating:

I know that from time to time, particular sentences are criticised, but if they are out of kilter then they are corrected on appeal ... I have not heard any consistent call for reform of this process, let alone a clamour. Public confidence in the process rests in its independence. We have independent judges, fully informed about relevant circumstances, exercising their discretion within well-established parameters and I question whether the involvement of an external body ... would enhance public confidence in sentencing outcomes.

The Bar Association of Queensland [BAQ] vice-president, Michael Byrne QC, was reported as commenting that the BAQ “had full confidence in the judiciary but was ‘open to consider any initiative proposed by the Attorney-General’”.

Subsequently in February 2010, Queensland’s Attorney-General, Hon Cameron Dick MP, announced that legislation to establish a Sentencing Council in Queensland would be introduced by the end of 2010 after consultation with key stakeholders. The model proposed to be implemented would, said the Attorney-General, integrate “the best features of similar bodies in Victoria and New South Wales”, described as having already drawn “widespread public and professional support”.

The concept of a Sentencing Council for Queensland, is not, however, new. A Private Member’s Bill, the Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005 (Qld) was introduced by then Liberal Party Spokesperson for Attorney-General and Justice, Mr Mark McArdle MP, in 2005. However, the Bill failed to be passed by Parliament, the Beattie Labor Government opposing it at the time as “unnecessary and fundamentally flawed”.

This *e-Research Brief* (e-RBR or e-brief) is intended for use as a background resource document about the proposals (past and present) for a Sentencing Council in Queensland, and the operation of sentencing councils in the Australian jurisdictions referred to (with approval) by Berry above, together with subsequent developments (such as the Bill to establish a sentencing council for Scotland, currently before the Scottish Parliament and the recent (January 2010) announcement that such a council will be set up in Tasmania). The *e-Research Brief* includes reference to both practical and theoretical perspectives, looking at how sentencing councils have been, or have been proposed to be, constituted and the philosophy behind their establishment.
The objectives, functions, structure (eg membership), outcomes and impacts (eg reports produced and
government responses, where provided) of defunct, existing or proposed sentencing councils are described,
and supplemented by selected commentary on their operation, where available.

To set the scene for the discussion which follows, selected key quotes about sentencing have been presented
at the outset of this e-Research Brief. Opinions and views about issues including sentencing principles and
practice, the public’s role in developing sentencing policy and the concept of a Sentencing Council for
Queensland, from academics, judicial officers, legislators, victims of crime and the general community are also
interwoven throughout the text. In the concluding remarks to the e-brief, benefits and criticisms commonly
attributed to sentencing councils generally are re-stated and/or summarised for the reader’s consideration.

Information in this e-Research Brief is current to 30 June 2010.

2. OVERVIEW

Sentencing bodies, variously described as Sentencing Councils, Commissions, Committees or Panels are now
a feature of a number of jurisdictions, not only at state level in Australia but also overseas, in New Zealand,
England and Wales, and in the United States.10

The Same Crime, Same Time: Sentencing of Federal Offenders Report 103, released by the Australian Law
Reform Commission (ALRC) in 2006, expressed the view that, although the sentencing bodies established in
Australia (then, as now, sentencing councils in Australia existed only in New South Wales and Victoria) and
overseas usually included a similar objective, namely to promote consistency in sentencing, their constitutions
and functions varied to a great extent.11 Freiberg and Gelb, in the introductory chapter to Penal Populism,
Sentencing Councils and Sentencing Policy (their edited collection of papers originally given at the 2006
Victorian Sentencing Advisory Council’s Conference and published in 2008), reach a similar conclusion. Their
overview of similarities and differences between the various sentencing commissions, advisory panels or
councils is instructive and accordingly is reproduced in full below (note that there have subsequently been
changes, some major, some of a more incremental nature, in various jurisdictions - such as England (the
development of the English system is outlined later in this e-Research Brief):

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
differ on dimensions such as terms of reference, membership and consultation.

Some of the sentencing bodies discussed in [Freiberg and Gelb’s] 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 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 the 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 no judicial members (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 [the author of Chapter 10 in Freiberg and Gelb’s book] notes, membership rarely includes people with no background or experience with the criminal system at all, that is, truly a member of the “general public”. “Public” in this context, tends to mean non-legal.12

(Note: the English Sentencing Guidelines Council comprised the Chair (the Lord Chief Justice), seven judicial members and four non-judicial members. This body has since been repealed and replaced by a new Sentencing Council, the judicial versus non-judicial membership of which is in the ratio of 8:6; the Chair is appointed from among the judicial members.)

In view of the above, it is perhaps not surprising then that Berry, in his letter to the Attorney-General, acknowledged that the structure and powers of a Sentencing Council for Queensland would require discussion and deliberation. However, he made a number of suggestions worth noting, as follows, focussing, in particular, on the representative make-up of such a council and its relationship with Government:

How such a Sentencing Council should be constituted is a matter for debate, but if it is to have widespread support and appreciation, it should be broad-based.

Ideally, the chair should be a retired senior judicial officer and members could include the following or their representatives – the Chief Justice, the Chief Judge of the District Court, the Chief Magistrate, the presidents of the Law Society, Bar Association and Council for Civil Liberties or representatives, the Police Commissioner, the Director-General of Corrective Services, the Director-General of the Department of Justice and Attorney-General, the Director-General of the Department of Child Safety, the Director of Public Prosecutions, the Public Defender and the Director of Legal Aid.

From the wider community, it would be important to have, for example, experts on indigenous justice issues and juvenile justice, a representative of victims of crime and well-respected community representatives.

It is appreciated that establishment of a Sentencing Council in Queensland would require a careful consideration as to what its membership and statutory powers - if any - should be and that it should not proceed without a thorough investigation of how the concept is working elsewhere and what the community thinks of the idea.

Certainly, the Government would not be obliged to accept all or even any recommendations made by a Sentencing Council to Government and the existence of the council would not, and should not, usurp the democratic right of political parties to formulate sentencing policies as part of their platforms.

It would be a matter for the public to determine – in the event of any disagreement between a council recommendation and a political undertaking – which was the most responsible and relevant.13

The next section looks in more detail at sentencing councils, or proposed councils, in specific jurisdictions, both in Australia and overseas. Within Australia, the failed Private Member’s Bill in Queensland is outlined first, followed immediately by a discussion of the position in New South Wales and Victoria, due to the focus that has been placed on the models implemented there, for example, by Berry in his letter to the Queensland Attorney-General (above and see the opening quote) and by the Attorney-General himself (above).

3. COMPARATIVE PERSPECTIVES

AUSTRALIA

Queensland

Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 200514

The Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005 (Qld), introduced as a
Private Member’s Bill into the Queensland Parliament on 11 May 2005, sought to amend the *Penalties and Sentences Act 1992* (Qld), to establish a Sentencing Advisory Council to “allow community input into sentencing as a whole”.

The proposed *functions* of the Sentencing Advisory Council were to:

- state in writing to the Court of Appeal its views in relation to sentencing guidelines and principles;
- provide statistical information on sentencing to members of the judiciary and other interested persons;
- conduct research and gauge public opinion on sentencing matters; and
- consult with government departments, other interested persons and bodies, as well as the general public and advise the Minister on sentencing matters.

Under the Bill it was proposed that the *membership* of the Sentencing Advisory Council would consist of 9 to 12 members appointed by the Governor in Council with the following qualifications and/or experience:

- two people having broad experience in community issues affecting courts;
- a person with experience as a senior member of the academic staff of a tertiary institution;
- a member of a victim of crime support or advocacy group;
- a highly experienced prosecution lawyer;
- a highly experienced defence lawyer; and
- at least three, but no more than six, people experienced in the operation of the criminal justice system.

The Debate on the Bill

The Bill failed at its 2nd Reading on 29 September 2005. Government Members’ reasons for not supporting the Bill, gleaned from the contributions to the debate (*Hansard*, pp 3031-3046), included arguments that:

- the Bill was “unworkable in the context of current sentencing practices” and “fail[ed] to recognise that it is the role of the elected parliament to determine the appropriate sentencing framework for our courts to work within”. (*Hon L Lavarch MP*, p 3031);

- it should be the function of the legislation, and not that of an unelected council, “to reflect the community’s expectations on the purposes of sentencing and principles to be applied”. (*Hon L Lavarch MP*, p 3031);

- the “parliament actually determines the sentences that are to be imposed for different categories of offences”. So, if Members of Parliament consider penalties need to be altered “they can move an amendment to the Criminal Code or to the Penalties and Sentences Act in order to effect exactly that result”. (*Hon D Wells MP*, p 3039);

- the establishment of a sentencing advisory council could “seriously compromise the discretionary powers of the judiciary”; its proposed function to give the Court of Appeal its views in relation to sentencing guidelines and principles “could be interpreted as an attempt to instruct the courts on what the council considers to be the public’s expectations of sentencing, placing the courts under moral pressure to at least partly assimilate the council’s views into their practice” (*Mr K Shine MP*, p 3034); “The sentencing function is a judicial function and, as such, should be administered by judicial officers subject to the relevant law”. (*Mr K Shine MP*, p 3035);

- the current sentencing principles “reflect and respect the fundamental constitutional principle of the separation of powers – the executive from the legislature and the judiciary”. (*Mr G Wilson MP*, p 3037);

- “The legislature works generally and prospectively. It states the rules in advance and then steps back. The judiciary works specifically and retrospectively. It applies enactments of parliament to determine if they have been breached in specific cases in respect of which it has heard all the evidence. This proposed committee sits uncomfortably between those two roles. It would not serve the interests of justice”. (*Mr D Wells MP*, pp 3039-40)

Mr McArdle MP, who introduced the 2005 Private Member's Bill, raised the issue of a Sentencing Council for Queensland again in 2007 in a letter published in at least two regional newspapers: see *Daily Mercury*, 12
See also Opposition Deputy Leader Mr Springborg’s comments in the wake of the Attorney-General’s recent announcement that a Sentencing Council will be created in Queensland: “Community “sentencing council” to advise on legal punishments”, ABC News, 8 February 2010.

New South Wales

Background

Established in 2003 under a new Part 8B (and Schedule 1A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (CSP Act), inserted by the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW), the New South Wales Sentencing Council was the first Sentencing Council in Australia. According to Abadee, the Council’s inaugural Chair, the establishment of the NSW Sentencing Council was not based on any particular model.

The New South Wales Sentencing Council was initially established as “part of a package of sentencing reforms responding to public disquiet over what were perceived to be inadequate sentences”. The purpose behind these reforms, as stated in Parliament when the amending legislation was introduced, was to give guidance and structure to judicial discretion with the aim of promoting consistency and transparency in sentencing and promoting public understanding of the sentencing process. In relation specifically to the new Sentencing Council, in his Second Reading speech then NSW Attorney-General, Hon (Bob) RJ Debus, who introduced the Bill, stated that he was confident that it would provide an “invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice in New South Wales”.

As well as establishing the NSW Sentencing Council, the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act also introduced standard non-parole periods (i.e. standard minimum sentences) for designated serious offences (including murder; wounding etc with intent to do bodily harm or resist arrest; sexual intercourse with a child under 10: ss 54A-54D). As will be seen below, the Council was given a specific function with respect to standard non-parole periods. The 2002 amendments also added a statement of the purposes of sentencing to the CSP Act (s 3A) and expanded upon factors relevant to sentencing (s 21A).

For more information and comment on the Sentencing Council and other reforms introduced by the 2002 amending Act, see:

- Peter Johnson SC ‘Reforms to NSW Sentencing Law - The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002’, A Paper for a Seminar conducted by the Judicial Commission of New South Wales (Presented 12 March 2003; Revised 14 March 2003) (Note: Johnson’s paper also provides citations to a number of other articles published after the legislation was passed but even before it had commenced.)

The Sentencing Council’s functions

Under s 100J of the Crimes (Sentencing Procedure) Act 1999 the functions of the New South Wales Sentencing Council, which came into operation on 17 February 2003, currently include:

- to advise and consult with the Minister (the responsible Minister is the Attorney-General) in relation to offences suitable for standard non-parole periods and their proposed length;
- to advise and consult with the Minister in relation to matters concerning guideline judgments and guideline proceedings (Section 36 of the Crimes (Sentencing Procedure) Act defines a guideline judgment as meaning a judgment that is expressed to contain guidelines, that apply generally or specifically to eg particular courts or offences, or particular classes of offenders to be taken into account by courts when sentencing offenders);
- to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments;
- at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing; and
- to educate the public about sentencing matters.

Section 100(J)(3) also confers a power to add additional functions.

The educative function

Writing in 2006, Abadee commented that no new functions had been added since the Council’s inception but...
identified a number of issues that might usefully be addressed, including the fact the NSW Sentencing Council did not have:

... express statutory functions in terms of any educative role in relation to sentencing matters or gauging public opinion on sentencing matters, although its actual representation perhaps is reflective of a capacity to give effect to informed views on these matters.28

The current legislation now includes a function for the Council “to educate the public about sentencing matters” as paragraph (e) of s 100J(1) (the final listed function). The addition was inserted by the Crimes and Courts Legislation Amendment Act 2006 (NSW); the new provision commenced operation in February 2007.29

The research and educative function illustrated

A notable example of both the Council’s research and educative roles in operation relates to research on public confidence in the criminal justice system undertaken by the Council jointly with the NSW Bureau of Crime Statistics and Research, and which includes a seminal survey of community attitudes in NSW towards the criminal justice system. Following the publication of significant survey findings - that sentences imposed by the courts were felt to be too lenient, but also that knowledge of crime and justice issues was poor and that most respondents wanted to learn more about the sentencing process, the Sentencing Council began a program of public information forums (process of justice forums). For further information, see:

Reports

- Public confidence in the NSW criminal justice system - Research report, Monograph 2, May 2009

Media Releases


News articles

- ‘Justice is judged in the court of public opinion’, Herald (Newcastle and Hunter), 10 July 2009 (by former Supreme Court Judge James Wood, then chair of the NSW Sentencing Council)

The example above also illustrates how, in exercising its functions, the Sentencing Council may consult with, and receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General’s Department (or any like agency that may replace either of those agencies) (s 100J(4)).

The advisory functions

In relation to the Council’s advisory functions, note that s 100J(2) specifically provides that any advice the Sentencing Council gives to the Attorney-General may be given at the Minister’s request or minus any such request. It is, however, entirely the A-G’s prerogative whether he accepts, or implements, the advice given, in whole or in part, or at all.30 However, Abadee has suggested that advice (or reports – see below) sought by the A-G:

... may be more readily accepted, by policy makers and indeed by the public, because it emanates from a Council constituted and structured so as to reflect community views, opinions, standards and legitimate expectations. Thus in 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. Such may have the advantage of neutralising the sensational or emotive issue, allow time for calm informed consideration of such and avoid a reactive or potentially unprincipled response to an issue that may be stoked by media reporting.31

The reporting functions

In discharging its reporting functions, the Council produces two types of reports –

- annual reports on sentencing trends and practices as required by s 100J(1)(c) of the Act; and
- research papers or reports on sentencing issues which the Attorney-General is empowered
to seek under s 100J(1)(d).

The Council's membership

By virtue of s 100I Crimes (Sentencing Procedure) Act 1999, 15 members are now appointed by the responsible Minister to the Sentencing Council. (Originally, the legislation provided for only 10 members; this was subsequently increased to 13 in 2006 and to its current number in 2009.) Specifically, section 100I(2) provides for the Sentencing Council to have what Abadee has described as a quite varied composition, currently comprising:

- a retired judicial officer;
- a person having expertise or experience in law enforcement;
- four persons with expertise or experience in criminal law or sentencing (of whom one is to have expertise or experience in the area of prosecution and one is to have expertise or experience in the area of defence);
- a person who has expertise or experience in Aboriginal justice matters;
- four persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime;
- a person who has expertise or experience in corrective services (added in 2006) (The Council itself was of the opinion that "an additional valuable member for the Council could perhaps be a person with expertise or experience in corrective services" ... this being because Corrective Services and parole issues were regularly considered by the Council);
- a person who has expertise or experience in juvenile justice (added in 2006);
- one representative of the Attorney General's Department (added in 2006);
- a person who has academic or research expertise or experience of relevance to the functions of the Sentencing Council (added in 2009).

Outcomes

Since its inception, the New South Wales Sentencing Council has published reports on matters as diverse as sentencing for alcohol-related violence (its most recent report and an issue of obvious social significance), sentencing aboriginal offenders, provisional sentencing for children, and the principles and practices governing reductions in penalties at sentencing.

In relation to its statutory function under s 100J(1)(d) (refer above), the Council has received requests for further information from the Attorney-General on topics such as the effectiveness of fines as a sentencing option, the pros and cons of periodic detention, penalties for sexual assault offences and, most recently, standard non-parole periods and guideline judgments, including the identification of sexual offences that might justify an application for a guideline judgment.

All the Council's research reports are available on its website, together with its Annual Reports in which it reports on its activities together with sentencing trends and practices, under the 'Publications' tab or the 'Current Projects' tab.

Comment

As "the first of [its] kind in Australia", the New South Wales Sentencing Council attracted considerable attention, as indicated by the papers cited or referred to above.

Three years after the Council's establishment, Abadee reflected on its structure and functions; for readers' consideration, an extract is provided below, followed by links to the full text of Abadee's paper, prepared for the Victorian Sentencing Advisory Council's Conference held in July 2006, and to the updated version of that paper published in the collection of papers edited by Freiberg and Gelb.

[The Council's] actual membership is diverse and reflects a cross-section of different views from within the community and the criminal justice system. Such representation can justifiably give rise to general public confidence in the Council and the quality of its views and advice. Indeed, the Council is not merely a participant in the criminal justice system but also an ally of it. The Council is an independent and impartial body. It has no direct dealings with Parliament or the Courts.

...
high level of consensus in respect of most of its advice and views. Indeed, it might be thought that the very existence of such a body (with its significant community base membership coupled with criminal justice policy professionals) would not only enhance public confidence in its role and function but also provide a vehicle for Parliament to refer controversial sentencing issues for consideration. The last three years has seen the Council shaped into a well functioning and cohesive well informed body providing valuable contributions to the development of sentencing law and practice in NSW and to the strengthening of public acceptance and understanding of the sentencing process.42


To view a news clip published when the Council was just commencing, see ‘No-jail plan for minor criminals’, Sydney Morning Herald, 19 June 2003.

Finally, a cross-section of news clips from 2008-2010, provided courtesy of the NSW Parliamentary Library, provides some more recent perspectives on the work of the Council, including responses to, and specific initiatives proposed or introduced as a result of, various of its recommendations:

- ‘NSW shrugs off treatment of pedophiles’, Australian, 7 May 2010
- ‘How killer grows up key to sentence’, Daily Telegraph, 30 November 2009
- ‘Limits on plea deals’, Daily Telegraph, 28 November 2009
- ‘Plea bargain changes aim to give victims a greater say’ Sydney Morning Herald, 27 November 2009.

Victoria

Background

Amendments to the Sentencing Act 1991 (Vic) by the Sentencing (Amendment) Act 2003 (Vic) established the Victorian Sentencing Advisory Council, following the Pathways to Justice: Sentencing Review by Professor Arie Freiberg in March 2002. Under the terms of reference, the Review was specifically required to consider whether there were mechanisms that could be adopted to “more adequately incorporate community views into the sentencing process.” The Review recommended a number of improvements to the sentencing system overall, including the establishment of a Sentencing Advisory Council (Recommendation 48) for which it envisaged a wide range of tasks (see below):45

- 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 the Victorian Sentencing Act 1991;
- assisting the courts to give effect to the principles contained in the Sentencing Act;
- 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.

In September 2002, the Sentencing (Further Amendment) Bill 2002 was introduced into the Victorian Legislative Assembly but subsequently lapsed when the state election was called later that year. Following the re-election of the Labour Party in November 2002, the Bill was re-introduced in March 2003 as the Sentencing (Amendment) Bill 2003. The Bill made provision for both the creation of a Sentencing Advisory Council as an independent statutory authority and for the Victorian Court of Appeal to have the power to issue guideline judgments (defined as judgments, expressed to contain guidelines to be considered by courts in sentencing offenders) (although the 2002 Freiberg review had recommended that guideline judgments themselves not be introduced until there was broad judicial and professional support for them (Recommendation 49)).

In his Second Reading speech to introduce the 2003 legislation, the Attorney-General, Hon R Hulls MP, stated that the establishment of a Sentencing Advisory Council and the introduction of guideline judgments constituted major steps towards delivering the Government’s commitment to providing improved justice services to the Victorian community and enhancing public confidence in the justice system. Key reasons specifically advanced for the establishment of a Sentencing Advisory Council itself 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 “promote greater transparency and accountability in the criminal justice system and stimulate balanced public debate on sentencing issues.”

The Sentencing Advisory Council’s functions

Under the amendments to the Sentencing Act 1991, under which the Sentencing Advisory Council became operational on 1 July 2004, the Council has the following functions (s 108C):

- to state in writing to the Court of Appeal its views in relation to the giving, or review, of a guideline judgment;
- to provide statistical information on sentencing, including information on current sentencing practices, to members of the judiciary and other interested persons;
- to conduct research, and disseminate information to members of the judiciary and other interested persons, on sentencing matters;
- to gauge public opinion on sentencing matters;
- to consult, on sentencing matters, with government departments and other interested persons and bodies as well as the general public;
- to advise the Attorney-General on sentencing matters.

The Council may perform its functions, and exercise its powers, within or outside Victoria.

The Council and the Court

If the Court of Appeal decides to give or review a guideline judgment, it is required by legislation to notify the Sentencing Advisory Council and to set a timeframe within which the Council should respond with any written views: Sentencing Act 1991, s 6AD. (In practice, it would appear that the Council might prepare a draft of the proposed guideline judgment, including relevant statistics and research, and consult on it with the community and other interested parties. Issues raised via consultation might be utilised to refine the guideline if needed, before the Council presented back its views to the Court of Appeal. In this manner, the Council can provide a means whereby informed community opinion can be incorporated into the sentencing process.) Ultimately, however, there is no requirement for the Court of Appeal to give a guideline judgement in the first place: see s 6AB(6) and, under the legislation, any decision to give a guideline judgment must be a unanimous decision of the judges hearing the appeal: s 6AB(4).

The Victorian Council’s relationship with the courts can be contrasted with the position in New South Wales where the Sentencing Council advises and consults only with the Minister (the Attorney-General), not with the court, with respect to guideline judgments: s 100J (b); ie note also Abadee’s comments:

The Council has no direct statutory relationship with the courts. There is no provision for the Council’s
written views to be sought by the court in relation to the exercise of its guideline judgment jurisdiction or corresponding function of the Council to furnish such a guideline.\textsuperscript{52}

The Council’s membership

In Victoria, the Sentencing Advisory Council is established as a body corporate and a Board of Directors is responsible for the management of its affairs: Sentencing Act 1991, ss 108B & 108F(3).

Under s 108F(1), that Board comprises a minimum of 9 and a maximum of 12 members from a range of backgrounds, as follows:

- two must be people who have, in the opinion of the Attorney-General, broad experience in community issues affecting courts;
- one must have experience as a senior member of the academic staff of a tertiary institution;
- one must be a person who is a member of a victim of crime support or advocacy group;
- one must be a person who, in the opinion of the Attorney-General, is a highly experienced prosecution lawyer;
- one must be a person who, in the opinion of the Attorney-General, is a highly experienced defence lawyer;
- the remainder must have experience in the operation of the criminal justice system.

The Directors are appointed by the Governor in Council on the nomination of the Attorney-General: Sentencing Act 1991, s 108(F)(2).

Outcomes

Work completed by the Sentencing Advisory Council is outlined in its Annual Reports available online while sentencing statistics compiled by the Council (on matters including sentencing trends, adult and young offender prisoner populations, persons serving correctional orders other than imprisonment and sentencing and corrections data) are also published on its website. Media releases by the Council, together with a news archive of items the Council has featured on its home page, are also available on the website.

Arie Freiberg, who has described the Council as an “experiment in the incorporation and institutionalisation of diverse voices in the development of sentencing policy, both through its constitution and its processes”,\textsuperscript{53} has evaluated its operation (to 2006) against its statutory functions in a paper reproduced in the collection edited by Freiberg and Gelb and referred to previously – a link is provided below:


For another perspective on the work of the Council, see:


(Both Arie Freiberg and Therese McCarthy are current members of the Victorian Sentencing Advisory Council, with Professor Freiberg being the Chair.)

For more recent, selected media commentary on specific work undertaken by and/or recommendations by the Sentencing Advisory Council, see:

- ‘Sentencing ban is poor judgment’, Age, 18 May 2010
- ‘Brumby in backflip on suspended sentences’, Age, 14 May 2010
- ‘Wife bashers to face behavioural program’, Age, 24 June 2009
- ‘Seizure of cars gets support in roads push’, Age, 1 May 2009
- ‘True justice at a discount’, Herald Sun, 5 August 2008
- ‘Hulls slams judges’ Herald Sun, 4 August 2008
- ‘Home prison urged’, Herald Sun, 18 April 2008
On a more general note is Berry’s overview and assessment in the Proctor article that may be said to have renewed the debate in Queensland:

The Victorian Sentencing Council has performed some major and important work such as producing reports on complex sentencing issues, publishing previously unavailable statistical analyses, undertaking education programs, launching new publications and holding seminars and conferences on the development of sentencing policy. It seeks submissions from the public and organisations on various projects it is undertaking and actively promotes public debate.

Again, it would be hard to argue against this pro-active approach to encourage true community participation in sentencing policy.54

Tasmania

In June 2008 the Tasmanian Law Reform Institute released its Final Report No 11: Sentencing,55 the key recommendation of which was that an independent statutory Sentencing Council be established in Tasmania: Rec 92 at p 249 of the Report; see also the related Media Release. On 29 January 2010, Hon Lara Giddings MP, Labor Attorney-General, announced that a Sentencing Council would be established, with functions including research on sentencing, gauging public opinion on sentencing and advising the Attorney-General on sentencing.56 Advertisements seeking expressions of interest in the positions of Chair on the Council and community representatives, of which there were to be two, were to be circulated shortly thereafter: see:

- Hon Lara Giddings MP, Attorney-General (Tasmania), ‘Community to have greater say in sentencing’, Media Release, 29 January 2010

The Tasmanian Parliament was subsequently prorogued; a state poll was held on 20 March 2010. During the election campaign, the Liberal Party, as part of its ‘Tough on Crime’ election policy, re-iterated its own commitment to a Sentencing Advisory Council and stated that, under a Hodgman Liberal Government, the first two references to the Sentencing Advisory Council would be to review the range of penalties currently available for sex offences and to suggest an appropriate penalty range for their proposed additional category of serious assaults; see also ‘Sentencing Advisory Council: What the Tasmanian Liberals will do’. Following a close election, it was announced on 8 April 2010 that the Tasmanian Liberal party had been unsuccessful in forming government. Tasmanian Labor Premier David Bartlett now leads a minority government which includes two non-Parliamentary Labor Party (PLP) members, after Nick McKim and Cassy O’Connor from the Greens accepted invitations to join the Cabinet.

To date, no further information has been able to be obtained about progress towards the implementation of a Sentencing Advisory Council for Tasmania.57

At federal level

The Australian Law Reform Commission (ALRC) has considered the merits of sentencing councils generally and the question of establishing such a council at federal level, in particular, on more than occasion, but with quite different outcomes. In its Report 103: Same Crime, Same Time: Sentencing of Federal Offenders, tabled in September 2006, by which time sentencing councils had been established at state level in both NSW and Victoria, the Commission stated (paras 19.33-19.34):

In the ALRC’s view, the functions discharged by state sentencing councils in Australia are to be commended. Better sentencing decisions and sound evidence-based policies can be promoted by disseminating sentencing statistics, analysing sentencing trends and conducting broad community consultation.

However, these functions do not necessarily require the establishment of a new body at the federal level. In general it is undesirable to establish new government agencies unless there is a compelling case to do so, particularly where new functions can be performed effectively by existing agencies. In order to justify the establishment of a federal sentencing council it would be necessary to show that the functions to be performed by the council were necessary at the federal level and were not being, or could not be, performed by other bodies.

The ALRC concluded that three key functions of sentencing councils ie research, advice and rule making were currently being performed by other bodies (or would be performed by other bodies if recommendations in its Report were implemented) or (in the case of rule making) were not appropriate in the federal criminal justice system (para 19.34).
The ALRC’s Report 103 was the final report in the ALRC’s second inquiry into the sentencing of federal offenders which commenced in 2004. The first inquiry began in 1978 but did not conclude until a decade later with the publication of ALRC Report 44: Sentencing. That report recommended the establishment of a federal sentencing council whose primary function would be to provide judicial officers with detailed, comprehensive information to promote consistency in sentencing federal and Australian Capital Territory offenders; additional functions proposed were to advise government, monitor sentencing practices and provide information to the public (para 275). That its role was envisaged as advisory, rather than prescriptive, appears evident from the listed functions (above), the ALRC’s reference to the contingent nature of the support for the concept of a sentencing council which had been expressed during the course of the Commission’s consultation process (paras 273-274), and the Commission’s own comment (para 274) that:

The introduction of a sentencing council with only an advisory role would clearly not limit judicial discretion in sentencing. Nor would it limit Parliament in prescribing maximum penalties and sentencing options.

For background material on the second inquiry, including links to the Issues Paper and Discussion Paper, see:


For additional information on the first inquiry, see:

- Sentencing of Federal Offenders (Interim report) (ALRC Report 15), The Commonwealth Prisoners Act (Interim report) (ALRC Report 43) and Sentencing (ALRC Report 44) (Summary by title of final report) (cf ALRC Report 15 which also recommended a national sentencing council but one with a more prescriptive role as it was envisaged that the council would review sentencing practices and issue broad, although still non-mandatory, guidelines indicating the range of penalties that might be applied to particular categories of federal offences and offenders: ALRC Report 15, paras 442-455).

**OVERSEAS**

New Zealand

In New Zealand (NZ), in response to concerns about an increasing prison population, and following recommendations of that jurisdiction’s Law Commission (the counterpart of Australian Law Reform Commissions), the Sentencing Council Act 2007 (NZ) established a Sentencing Council as an independent statutory body (s 5). The Council of 10 is comprised almost equally of judicial and non-judicial members (s 10); members are appointed for initial terms of up to five years but may serve one further term provided that the total of the initial and further term doesn’t exceed seven years (s 11; Schedule 1, cl 3). In addition, the NZ legislation makes provision for the appointment of official observers to the Council (namely, an employee each from the Ministry of Justice and the Department of Corrections) (s 11; Schedule 1, cl 19). (Note the notion of an independent observer is a feature apparently adopted from the English model – see 167(9) of the UK Criminal Justice Act 2003 and now see Schedule 15, para 6 of the new Coroners and Justice Act 2009.)

Other notable features of the NZ model include the requirement for the Council to publicly notify its draft guidelines (including in daily newspapers and on the Internet) (s 13(1)) and take submissions (s 13(2)), and the wide power given it to consult on its draft guidelines – “as it sees fit, with any person or body, by any appropriate means” (s 14). The Act also explicitly provides for parliamentary scrutiny of the guidelines with the New Zealand Parliament empowered to disallow guidelines, by resolution of the House (ss 17-22), as had been recommended by the New Zealand Law Commission (paras 111-114 & Rec 22), on the grounds that if the:

- goal of changing the nature of the law and order debate is to be achieved, there must be some political ownership of the [sentencing] guidelines […]. The alternative is that it is too easy to use sentencing as a rhetorical political device.

For further information on the history and operation of the New Zealand system, see -

- New Zealand Law Commission, Sentencing and parole review (home page)
- Terms of Reference
- Reforms to the Sentencing and Parole Structure: Consultation Draft - NZLC PP_0 (Preliminary Paper), April 2006
- Press Release, 15 August 2006
• Sentencing Council Bill and related documents
• Sentencing Council Act 2007
• ‘Sentencing—Sentencing Council and Guidelines’, 6 August 2008 Hansard, Question by Lynne Pillay (Labour - Waitakere) to the Minister of Justice.

See also the review article by Warren Young, ‘Sentencing reform in New Zealand: A proposal to establish a sentencing council’, in Arie Freiberg and Karen Gelb (eds), Penal Populism, Sentencing Councils and Sentencing Policy, Chapter 13, pp 179-190.

Comment
The NZ Law Commission (whose recommendations led to the establishment of the NZ Sentencing Council) had originally looked at the UK experience when conducting its deliberations, with its terms of reference specifically including:

... to consider:

the advantages of providing greater guidance to judges on the exercise of their sentencing discretion, and appropriate mechanisms for achieving this (including whether New Zealand would benefit from the establishment of a body such as the UK Sentencing Guidelines Council).


As we shall see (below, when the evolution of sentencing practice in England is considered) the UK has in turn looked to the New Zealand model (as also has Scotland).

England
Recent Developments
In recent developments in England, two separate but closely related bodies, the Sentencing Advisory Panel (SAP), originally established in July 1999 under the Crime and Disorder Act 1998 (UK) and the Sentencing Guidelines Council (SGC), established under the Criminal Justice Act 2003 (UK) (CJA) (see s 167 and also s 168) in the wake of the release of the White Paper entitled Justice for All (CM 5563), have been consolidated to form a unified Sentencing Council for England and Wales. The changes are contained in Part 4, Chapter 1 and Schedule 15 of the Coroners and Justice Act 2009.

For information on the prior history of English sentencing guidelines generally (to which there have been a number of significant changes since the mid-1990s) and in particular about the development, roles and functions of the SAP and the SGC, see:

• Andrew Ashworth, ‘English sentencing guidelines in their public and political context’, Chapter 8 in Arie Freiberg and Karen Gelb (eds), Penal Populism, Sentencing Councils and Sentencing Policy, Hawkins Press, Sydney, 2008, pp 112-125 (Professor Andrew Ashworth, QC was the Chairman of the SAP prior to its recent abolition.)

See also:

• Sentencing Guidelines
• Sentencing Advisory Panel
• Sentencing Guidelines Council.

To read the Bill for the Coroners and Justice Act and/or related material, to follow the progress of the Bill through all its stages, or for backgrounding to the changes made by the Coroners and Justice Act, which received Royal Assent on 12 November 2009, see:

Bill and related material

• Coroners and Justice Bill 2008-09 (the Bill’s home page)
• Bill documents – Coroners and Justice Bill 2008-09 (eg the Bills documents page includes links to the Explanatory Notes to the Bill)

House of Commons Research Papers

• ‘Coroners and Justice Bill: Crime and Data Protection’ House of Commons Research Paper
To read the Act itself, see:

- **Coroners and Justice Act 2009 c. 25.**

Core provisions in Schedule 15 of the Act dealing with the Sentencing Council’s constitution and the appointments of a Chair and members came into force on 1 February 2010: see The Coroners and Justice Act 2009 (Commencement No 3 and Transitional Provision) Order 2010, made 25 January 2010. Briefly, the Schedule provides for a 14 person Sentencing Council for England and Wales, comprised of 8 judicial and 6 non-judicial members (Sch 1, para 1), with the Chair to be a judicial member (Sch 1, para 2).

Sections 118-136 which establish the Council (see specifically, s 118) and govern its operations, as well as providing for the abolition of the prior SGC and SAP (s 135), came into force on 6 April 2010: see Coroners and Justice Act 2009 - key provisions commencing on 6 April 2010. In summary, the unified Sentencing Council, an independent non-departmental public body, will be responsible for drawing up sentencing guidelines, either of its own initiative (s 120) or following proposals from the Lord Chancellor or the Court of Appeal (s 124). The Council will also have an enhanced role to collect sentencing data and to assess resource implications. Specifically, it has been given some notable new duties including:

- a requirement to publish an accompanying resource assessment when it publishes draft guidelines or issues new definitive guidelines; the resource assessment must set out the Council’s view of the likely effect the guidelines will have on the demand for prison places, and on the resources required for probation provision and youth justice services (s 127); and
- a requirement to evaluate the impact of Government legislative or policy proposals on correctional resources, at the Lord Chancellor’s request (s 132).

### The nature of the sentencing guidelines

In another key change, under the new arrangements, the courts, which to date had been required to “have regard to” sentencing guidelines, will now be required to “follow” the guidelines, unless it would be contrary to the interests of justice to do so: s 125.

Both the establishment of a unified Sentencing Council, and the move away from sentencing guidelines which are advisory only to a new stronger presumptive approach whereby a stricter “departure test” must be satisfied before relevant guidelines are departed from, reflect the recommendations of a Working Group set up in December 2007 and tasked with examining the advantages, disadvantages and feasibility of a structured sentencing framework (such as US-style sentencing grids) and sentencing commission. The Working Group published its report in July 2008, together with a summary of responses from its consultation process (a consultation paper had been issued in March 2008); for further information, see: UK. Ministry Of Justice, Sentencing Commission Working Group Report.

### The role of parliament

Another issue of note, and which had also been addressed by the Working Group and in earlier reports, revolves around Parliament’s role in the process. In its Report, the Working Group considered whether sentencing guidelines should be required to be approved by Parliament, as is the position in New Zealand. However, ultimately, a majority did not recommend that the guidelines be placed before Parliament for approval on the grounds that this would constitute “a fundamental departure from the accepted relationship between the judiciary and the legislature” (Sentencing Commission Working Group Report, para 4.4) (see also Chapter 8, especially paras 8.20-8.26, where the minority and majority views are summarised). Prior to the new (2009) Act, the position was that draft guidelines prepared by the now abolished Sentencing Guidelines Council were considered by the Justice Select Committee of the UK House of Commons (as part of its responsibility for scrutiny of the Ministry of Justice). The Working Party did suggest that, if it were decided that sentencing guidelines should not be put to Parliament for approval (as per the majority recommendation), consideration might nonetheless be given to enhancing Parliament’s then existing role in scrutinising draft guidelines (para 8.26). Elsewhere, other commentators, Professor Hough and Jessica Jacobsen, have recommended, in their
Creating a Sentencing Commission for England and Wales: an opportunity to address the prison crisis, that sentencing guidelines be presented to Parliament on a negative resolution procedure, in addition to the Justice Select Committee reviewing guidelines.67

Under s 120 of the legislation ultimately passed by the UK Parliament, unless urgency dictates otherwise (as provided for in s 123), the Sentencing Council is required to publish draft guidelines and consult widely including with the public, criminal justice practitioners, Government Ministers and the Parliament (through the Justice Select Committee). The imposition of a statutory duty on the Sentencing Council to consult the Justice Select Committee when drafting sentencing guidelines was the result of a Government amendment agreed to during the House of Commons Committee stage.68 See also the views expressed by the Justice Select Committee itself in its Report Sentencing Guidelines and Parliament: building a bridge and the Government Response thereto.

For more details about the UK changes overall, see the circular by the Ministry of Justice, ‘Coroners and Justice Act 2009 - key provisions commencing on 6 April 2010’ (Circular 2010/06).

For a comment on the new framework, see ‘Sentencing Council: judges told that justice is safe from “tramline” sentencing’, The Times Online, 3 June 2010.

Scotland69

Historically, the Scottish legislature has been viewed as reluctant to interfere with judicial discretion. Sentencing practice operates mainly on a case by case basis, with reference to the wide experience of the sentencers (ie the judicial officers) themselves and judgments of the High Court of Justiciary (the High Court) (the highest court in the Scottish three-tier criminal court system, which sits both as a court of first instance and as a court of appeal (the Appeal Court)); in criminal cases, it affords the only court of criminal appeal. There are no sentencing guidelines per se but the Appeal Court has power under provisions in the Criminal Procedure (Scotland) Act 1995, to pronounce guideline judgments,70 although this power has not been extensively utilised.71

During the past decade, sentencing practice in Scotland has been considered on a number of occasions.

The Sentencing Commission for Scotland, an independent judicially-led body, was established in 2003 by the Scottish Executive under its policy statement ‘A Partnership For A Better Scotland’. The Commission was dissolved in 2006, never having being envisaged as a permanent body.72

The Commission was given a specific remit, to review and make recommendations to the Scottish Executive on a number of criminal justice issues (see below), including, notably, consistency in sentencing:

- the use of bail and remand;
- the basis on which fines are determined;
- the effectiveness of sentences in reducing re-offending;
- the scope to improve consistency of sentencing;
- the arrangements for early release from prison, and supervision of prisoners on their release.

As work progressed, the Sentencing Commission for Scotland focused predominantly on the issue of the use of bail and remand.73

The Sentencing Commission comprised individuals representing a range of areas including the judiciary, police service, social work, legal profession, governors of prisons, academic research and victim support agencies.74

The Sentencing Commission released four reports corresponding to its remit (above):

- Use of bail and remand (April 2005)
- Early release from prison and supervision of prisoners on their release (January 2006)
- Basis on which fines are determined (June 2006)
- The Scope to improve consistency in sentencing (August 2006).

Related material can be accessed from the ‘Publications’ tab on the website.

In relation to the issue of the effectiveness of sentences in reducing re-offending, it was agreed by the Minister for Justice that, rather than being treated in a separate report, this was a matter which should permeate all of the Commission’s deliberations.
The Sentencing Commission, having completed its remit, was dissolved on 1 November 2006. Commenting in 2006, Neil Hutton, who was a Commission member, noted that it was at that time still too early to fully assess the Commission’s impact; nonetheless, he believed that the report on arrangements for prisoners’ early release and their supervision upon release had, until then, had “the greatest public impact, measured in terms of media coverage”. For further information about the Sentencing Commission and its projects, see the website which still exists today. Today, in retrospect, it might be thought that it is the Commission’s report on consistency in sentencing which has had the greatest influence in the public policy arena as will become clear from the discussion below. In that report, The Scope to Improve Consistency in Sentencing, the late Lord Macfadyen, the Commission’s Chair, stated in his foreword:

> It is generally accepted that there should be consistency in sentencing at every level of our courts. That is an aspect of fairness and justice. These principles demand that similar crimes committed in similar circumstances by offenders whose circumstances are similar should attract similar sentences.

Consistency in sentencing is thus important not only to the offender, but also to those directly affected by the crime and to the public, since a perception of inconsistency in sentencing is likely to lead to a loss of public confidence in the criminal justice system. ... [Guidelines] would, we consider, promote and encourage consistency of approach, and thus improve consistency in sentencing, while preserving the important element of judicial discretion.

Ultimately, the report recommended the creation of a statutory body of about 10 members - the Advisory Panel on Sentencing in Scotland (APSS) (Recs 7 & 8, paras 9.14 & 9.17) to be responsible for the preparation of draft sentencing guidelines for consideration by the Appeal Court of the High Court (Rec 12, para 9.22). In his Foreword, the then Chair outlined how it was envisaged the body would operate:

> The APSS would be responsible for the necessary research and consultation, and for framing the draft guidelines. The adoption of these guidelines, however, with or without modification, would be a matter for the Appeal Court. The membership of the APSS would have a strong judicial component, but it would also include people who would bring other relevant skills and experience to its work. In that way, the recommendations of the APSS would reflect a breadth of experience and thorough investigation, while the role of the Appeal Court in deciding whether to approve draft guidelines would ensure that sentencing remained essentially a judicial function. We envisage that the introduction of sentencing guidelines would be a gradual process.

The system for the preparation and adoption of sentencing guidelines which was recommended was viewed by the Sentencing Commission as complementary to the existing, but little-used, power of the Appeal Court to pronounce guideline judgments.

Another body, the Scottish Prisons Commission, was subsequently established by the present Scottish Government to examine the purpose and impact of imprisonment in Scotland. In July 2008 it released the report Scotland’s Choice: Report of the Scottish Prisons Commission among whose 23 recommendations was the specific proposal that “[t]o drive forward consistency and improve the effectiveness of sentencing”, the Scottish Government should establish an independent National Sentencing Council (NSC) to develop clear sentencing guidelines that could be applied nationwide (para 3.21). The Prisons Commission argued:

> In the current Scottish system, judges decide what to do in individual cases in the context of limited guidance from the Court of Appeal. There is great merit in judges having wide discretion - not least because this keeps politics out of individual sentencing decisions. However, it is possible to let judges have discretion in individual cases without sacrificing consistency and public accountability. In many other jurisdictions, penal codes are established by legislation or bodies are set up to provide sentencing guidelines. (para 3.21)

> The best way to address the problem of disparities in sentencing - which exists partly because judges get little guidance about sentencing and have little information about how their peers practice sentencing - is to use the National Sentencing Council to help to make the principles and practice of sentencing more transparent and explicit. (para 3.22)

In September 2008, the Scottish Government published a consultation paper Sentencing Guidelines and a Scottish Sentencing Council: Consultation and Proposals. The consultation did not revisit the work carried out by either the Sentencing Commission or the Prisons Commission, the Government stating that it supported the view taken by both these bodies that there was a need to establish a statutory body to give effect to sentencing guidelines. (At the time of the last Scottish General Election, support for the creation of a new Sentencing Council had also been made plain in the Government’s election manifesto). 77

Instead, the consultation paper set out plans for the establishment of a Scottish Sentencing Council (para 1.4). In particular, the Consultation Paper noted the existence of sentencing guidelines (with varying degrees of prescription) in a number of jurisdictions, such as England and Wales, numerous states in the USA, and various
countries in Western Europe. Also of particular interest, given the recent UK changes (discussed previously) under which the NZ departure rule has been adopted, is the interest also taken by Scotland in features of the New Zealand model eg in its manner of establishment:

In developing our policy in this area we have taken particular notice of the model proposed by the New Zealand Law Commission in its report Sentencing Guidelines and Parole Reform, and the subsequent Sentencing Council Act which came into force in November 2007 and provides for the establishment of a statutory Sentencing Council. The New Zealand model is particularly attractive given the country's similarity to Scotland in terms of population and legal system (for example, New Zealand, like Scotland, is predominantly a common law jurisdiction). ...

While it would be possible to set up some sort of Sentencing Council on a purely administrative basis, we do not consider that this is the best option. To give the Council and the product of its work the weight and status that we believe it should have, we think that the new body, and the guidelines that it promulgates, should be underpinned by statute. (para 1.14)

Over 40 responses to the consultation were received with a majority of those in favour of the proposals put forward.

On 5 March 2009, the Scottish Government introduced the Criminal Justice and Licensing (Scotland) Bill to Parliament (the Bill has since undergone some amendments; relevant key changes are outlined below). Among other things, the legislation makes provision for the creation of a Scottish Sentencing Council, a proposal which is acknowledged in the Policy Memorandum to the Bill to be the outcome of recommendations originally made by the judicially-led Sentencing Commission (this body's central recommendation in its 2006 report, The Scope to Improve Consistency in Sentencing (discussed earlier), was the creation of a procedure for giving effect to sentencing guidelines). 79

In the Policy Memorandum to the Bill the Government's objectives in seeking to establish the Sentencing Council are stated to be: "[t]o help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system" (para 12) while the Bill itself states the Council's specific objectives to be to promote consistency in sentencing practice, to assist the development of policy as regards sentencing and to promote awareness and understanding of sentencing policy and practice (cl 4).

The proposed Scottish Sentencing Council's composition

Under the Bill, the Sentencing Council proposed for Scotland will consist of a mix of judicial, legal and lay members, chaired by the Lord Justice Clerk (Sch 1, cl 1) (the second most senior judge in Scotland) and members’ terms of office are not to exceed 5 years (Sch 1, cl 4). However, during debate on the Bill at the Committee stage, the proposed composition of the Council was altered so as to shift the balance between judicial and non-judicial (legal and lay) members towards judicial members; the ratio became 6:6: see Sch 1, cl 1 of the Bill (as amended at Stage 2). 81

The nature of the guidelines

As originally introduced, the Bill provided for the establishment of a Scottish Sentencing Council which would prepare sentencing guidelines for the criminal courts and to whose guidelines those courts would be required to “have regard”. That is, the Scottish Bill has incorporated the test which England and Wales have only recently decided to strengthen; cf the new UK legislation which has adopted the stricter departure test used by the NZ sentencing body (refer to the earlier discussion). Although some changes have been made to the Bill as it progresses through the Scottish Parliament’s legislative process, this test (set out in cl 7) remained in the Bill (as amended at Stage 2).

The Council’s status

However, in a crucial change, following concerns about the impact of sentencing guidelines on judicial discretion, amendments were made to recast the Scottish Sentencing Council as an advisory body and to provide that sentencing guidelines prepared by the Council will only take effect after formal endorsement by the High Court: see new cl 6A of the Bill (as amended at Stage 2). 82

For more details about the Scottish proposals, readers should consult the following sources:

- **Criminal Justice and Licensing (Scotland) Bill** (SP BILL 24) Bill (as introduced) and related material, including the Policy Memorandum (SP Bill 24-PM) and the Explanatory Notes and accompanying documents eg a Financial Memorandum (SP Bill 24-EN)

- ‘Criminal Justice and Licensing (Scotland) Bill: Scottish Sentencing Council’, SPICe Briefing: 09/35, 7 May 2009 (This briefing paper was prepared by the Scottish Information Service (the Scottish equivalent of our Parliamentary Library’s Research and Information Service; it provides information on the Scottish criminal courts, their sentencing powers and appeals;
current sentencing guidance and practice in Scotland; the background to the proposals to establish a Scottish Sentencing Council; relevant provisions of the bill and the operation of sentencing guidelines in England and Wales.)

- SPICe briefing on the Bill (Parliamentary Consideration prior to Stage 3) 'Criminal Justice and Licensing (Scotland) Bill: Stage 3', SPICe Briefing 10/35, 4 June 2010
- Bill (as amended at Stage 2)
- The Official Report and Minutes of Chamber proceedings at Stage 3. (The Stage 3 debate was held and completed on 30 June 2010; the Bill passed on 30 June 2010).
- the Bill’s homepage.

To track the progress of the Bill, click here.

4. CONCLUDING REMARKS

Viewed in a broad context, sentencing councils can be seen as one of a number of interventions designed to address perceived inconsistencies and/or leniency in sentencing, examples of which include the introduction of victim impact statements, mandatory minimum terms, statutory maximum penalties and indefinite sentences, “three strikes” legislation and the development of sentencing guidelines.83 Proponents of sentencing councils argue that such bodies are removed from political processes and can: promote the development of sentencing principles; recommend changes to make sentencing more socially defensible and scientifically based; allow greater community input into the sentencing process and ensure that the media receives accurate information about sentencing. Opponents on the other hand, argue that not only do sentencing councils constitute unnecessary bureaucracy, they:

- have the capacity to displace Parliament in determining an appropriate sentencing framework, and to interfere with the exercise of judicial discretion, and
- may place the courts under moral pressure to assimilate the council’s views and to determine sentences according to statistical norms rather than individual circumstances.84

For additional perspectives on the role, perceived benefits and disadvantages of sentencing councils, and on sentencing policy and practice generally, including the impact of public opinion, see eg:

ENDNOTES

1  The letter was obtained by the *Courier Mail* which cited extracts from it in the following articles, both by Margaret Wenham, ‘Public views to be heard – Sentencing review’, *Courier Mail*, 26 January 2009 and ‘Pollies side-stepped – Mixed response to Sentencing Council’, *Courier Mail*, 27 January 2009, p 9.


3  Berry, p 5.

4  See Legal Aid Queensland Chief Executive Jenny Hardy, as reported in Wenham, ‘Pollies side-stepped – Mixed response to Sentencing Council’ and also the text of the *Response for the Courier Mail Re: QLS calls for sentencing council*, dated 23 January 2009, on Legal Aid Queensland’s website under archived Media Releases.


7  Hon Cameron Dick MP, Attorney-General and Minister for Industrial Relations, ‘Community to be given greater say on criminal sentences’, *Media Statement*, 7 February 2010.


9  See Berry, p 5. His comments are reproduced in the opening quotes to this *e-Research Brief*.


13  Berry, p 6.

14  The Private Member’s Bill was also discussed in an earlier Queensland Parliamentary Library publication by Robyn Moore, ‘Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005 (Qld)’, *Hot Topics – On the Notice Paper*, No 2002/11, July 2005.


The relevant legislation was assented to on 22 November 2002; with provisions commencing in February 2003. See the Historical notes, ‘Table of amending instruments’ at the end of the current version of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*.


See the Historical notes, ‘Table of amending instruments’ at the end of the current version of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*; and also Johnson, para 2.


See the Historical notes, ‘Table of amending instruments’ at the end of the current version of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*.


By the *Criminal Legislation Amendment Act 2009 (NSW)* (Act No 27 of 2009), Schedule 1.5 [2]-[4] at [2].


This provision, and the two preceding it, were added by the Crimes and Court Legislation Amendment Act 2006, see Schedule 1.9 [5]-[6] at [6].


See also Berry’s comment about this inquiry at page 6 of the Proctor article.

most recently, see the Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (assented to on 28 June 2010, but not commenced as at 28 June 2010) and based on recommendations contained in the Sentencing Council’s 2007 report on Review of Periodic Detention. For additional background information (eg Explanatory Notes, Hansard extracts), go to the Bill’s home page; for status information, click here.


Section 6AC of the Victorian Sentencing Act 1991 provides that guideline judgments may set out, for the guidance of the courts in sentencing offenders, the criteria that might be applied in choosing between sentencing options; the weight to be given to the various purposes of sentencing; the criteria by which a court is to determine the gravity of an offence or which may be used to reduce the sentence for an offence; the weighting to be given to relevant criteria; and any other matter consistent with the Sentencing Act 1991.


Berry, p 6.

An Issues Paper on issues in sentencing had also been circulated, back in August 2002.


Based on enquiries made of the Tasmanian Parliamentary Library in late May 2010.


The Sentencing Council Act was assented to on 31 July 2007 and came into force from 1 November 2007 – see the assent and commencement information preceding the text of the Act, and see 2 of the Act and the accompanying annotation in the latest reprint of the Act as published on the New Zealand legislation site.

To be specific, the New Zealand Council’s membership is composed of 5 judges, the Parole Board chair and 5 members who are not judges.


The issue had also been addressed by Lord Carter, whose work had led to the establishment of the Sentencing Commission Working Group in December 2007. Lord Carter had identified, as one option for improving the balance between supply and demand in relation to prison places, a Sentencing Commission whose primary task would be to develop a comprehensive set of indicative ranges for sentences (ie a structured sentencing framework or guidelines framework) which should be subject to Parliamentary approval – see variously Lord Carter's Review of Prisons, *Securing the Future: proposals for the effective and sustainable use of Custody in England and Wales*, December 2007; Chapter 1 'Introduction', *Sentencing Commission Working Group Report*; the UK House of Commons Library, *Coroners and Justice Bill: Crime and Data Protection* House of Commons Research Paper 09/06, 22 January 2009, p 71.

It should also be noted that it separated this issue from resources issues noting that, while in New Zealand, the guidelines must be approved by Parliament, on the other hand, there is "no duty to have regard to resources in framing them" (Sentencing Commission Working Group Report, para 8.20).


See further the *Sentencing Commission for Scotland* website.


See paras 1.2 & 1.4 of the *Scottish Government’s Consultation paper*.

The Bill reached Stage 2 on 11 May 2010 and has been amended; see the SPICe briefing on the Bill (Parliamentary Consideration prior to Stage 3): *SB 10-35 Criminal Justice and Licensing (Scotland) Bill: Stage 3 (507KB pdf posted 04.06.2010)*. Pages 7-8 specifically deal with the changes made that affect the proposed Sentencing Council.

See paras 1.1 & 1.11 of the *Scottish Government’s Consultation paper* and the statement in the Policy Memorandum to the Bill (para 13). The policy memorandum also refers to the relevant recommendation in the *Scottish Prisons Commission’s report* (para 16).

The High Court is presided over by the Lord Justice General (the principal judge) and the Lord Justice Clerk; these two officers usually sit as chairpersons in the courts of criminal appeal: see *High Court of Justiciary – Introduction* and *Scottish Courts - Introduction*.

See the SPICe briefing on the Bill (Parliamentary Consideration prior to Stage 3), *SB 10-35 Criminal Justice and Licensing (Scotland) Bill: Stage 3*, p 8.

See also the SPICe briefing on the Bill (Parliamentary Consideration prior to Stage 3), *SB 10-35 Criminal Justice and Licensing (Scotland) Bill: Stage 3*, p 7.

The advantages and disadvantages cited are drawn from the ALRC’s *Report No 103: Same Crime, Same Time: Sentencing of Federal Offenders*, pp 489-490. Notably, key criticisms cited by the ALRC are sourced from the Queensland Legislative Assembly’s debates on the unsuccessful 2005 Private Member’s Bill discussed earlier in this *e-Research Brief*. However, significant arguments for and against the creation of sentencing councils are canvassed in most of the reports mentioned in this *e-Research Brief*, whether published either before or after the federal report.