Penal Populism, Sentencing Councils and Sentencing Policy

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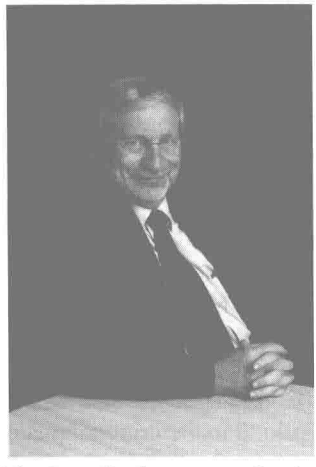

Arie Freiberg is the Chair of the Victorian Sentencing Advisory Council. Professor Freiberg is the Dean of Law at Monash University, after spending ten years as the Foundation Chair of Criminology at the University of Melbourne. With degrees in both Law and Criminology, he has focused his academic attention over the years on topics such as sentencing, confiscation of the proceeds of crime, corporate crime, juries, juvenile justice, sanctions and victimology, among other areas of interest. He is Australia's acknowledged expert in the field of sentencing issues and has undertaken extensive research on sentencing theory, policy and practice. In 2002 Professor Freiberg completed a major review of sentencing for the Victorian Attorney-General, which was published as *Pathways to Justice* (2002). One of the outcomes of this report was the establishment of a Sentencing Advisory Council as an independent statutory body.

Karen Gelb is the Senior Criminologist at the Victorian Sentencing Advisory Council. Dr Gelb obtained her doctorate in Criminology from New York University and is currently the Senior Criminologist for the Sentencing Advisory Council in Victoria, Australia. She spent five years at the National Centre for Crime and Justice Statistics, part of the Australian Bureau of Statistics. Since 2005 Dr Gelb's work at the Sentencing Advisory Council has focused on the issue of public opinion on sentencing, and on developing a suite of methodological tools for the Council's use in measuring public opinion in Victoria. She has also conducted research and policy development work on the issue of detention and supervision of high-risk offenders. Her publications include *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* (2006) and *Recidivism of Sex Offenders* (2007).

The Hon Alan Abadee AM RFD QC is a former Chair of the New South Wales Sentencing Council and is a retired Judge of the Supreme Court of New South Wales. He was admitted to the Bar in 1964 and appointed one of Her Majesty's Council (QC) in 1984. He was also a Deputy Judge Advocate General of the Australian Defence Force between 1996 and 2000. Mr Abadee was the Chairperson of the Sentencing Council from 2003 until April 2006.

Rob Allen is Director of the International Centre for Prison Studies, King's College, London. Between 2001 and 2005 he was the Director of Rethinking Crime and Punishment, an organisation set up by the Esmeé Fairbairn Foundation to raise the level of debate about prison and alternatives to it. He was previously the Director of Research and Development at the National Association for the Care and Resettlement of Offenders and Head of the Juvenile Offender Policy Unit in the UK Home Office. He was a member of the Youth Justice Board for England and Wales from 1998 to 2006 and has extensive experience of international penal reform work, mainly in the field of juveniles and alternatives to prison. Mr Allen also chairs CLINKS, an umbrella body representing charities working in the criminal justice system in England and Wales.

Andrew Ashworth is the Vinerian Professor of English Law at the University of Oxford. In 1993 Professor Ashworth was elected a Fellow of the British Academy and in 1997 he was appointed a QC *Honoris causa*. In 1999 he was appointed a member of the Sentencing Advisory Panel, and in 2002 he became a member of the Criminal Committee of the Judicial Studies Board. Professor Ashworth has published books on criminal law, sentencing, the criminal process and European human rights law, and pursues a wide range of interests in the field of criminal justice.

The Australian Law Reform Commission (ALRC) is a permanent, independent federal statutory corporation. Established in 1975, the ALRC conducts inquiries into areas of law reform at the request of the Attorney-General of Australia. The ALRC is not under the control of government, giving it the intellectual independence and ability to make research findings and recommendations without fear or favour. ALRC recommendations provide advice to government but do not automatically become law. However, the ALRC has a strong record of having its advice taken up, with nearly 80 per cent of its reports having been either substantially or partially implemented.

Richard Frase is the Benjamin N Berger Professor of Criminal Law at the University of Minnesota Law School where he teaches courses, seminars and clinics in criminal law, criminal procedure, comparative criminal procedure and sentencing. He has also taught several times in exchange programs at French and German law schools. Professor Frase is the author or editor of six books and over 50 articles, essays and chapters on various criminal justice topics. His principal research interests are sentencing reform (especially sentencing guidelines in Minnesota and other States), punishment theory and comparative criminal justice.

Nancy Gertner is a Judge of the United States District Court for the District of Massachusetts. Judge Gertner graduated Barnard College and Yale Law School and received her MA in Political Science at Yale University. She practiced for 23

years as a criminal defence lawyer and a civil rights lawyer. During her career as a practising lawyer, she also taught at Harvard and Boston University. In 1994 she was appointed by President William J Clinton to the United States District Court for the District of Massachusetts. She has continued her teaching at Yale Law School, teaching sentencing for the past six years. In addition, she has taught at Boston College, Northeastern University and University of Iowa. She has been the Charles R Merriam Distinguished Professor at Arizona State Law School and lectured on sentencing throughout the United States. Judge Gertner has been on the faculty of the American Bar Association – Central & Eastern European Law Initiative Advisory Council, and is now on its Advisory Board. She has also lectured on women's rights, human rights and criminal law in China, Vietnam, Cambodia, Turkey and Israel.

Mike Hough is Professor of Criminal Policy at the School of Law, King's College London, and Director of the Institute for Criminal Policy Research. He has published extensively on public attitudes to crime and sentencing and has a long-standing interest in research on policing and police effectiveness. Professor Hough has also written on topics including crime prevention and community safety, anti-social behaviour, probation and drugs. Recent publications include *Surveying Crime in the 21st Century* (with M Maxfield), *Understanding Public Attitudes to Crime* (with J Roberts) and *Mitigation: The Role of Personal Factors in Sentencing* (with J Jacobson).

Neil Hutton is co-Director of the Centre for Sentencing Research at the University of Strathclyde and was a member of the Sentencing Commission for Scotland. Professor Hutton is Dean of the Faculty of Law, Arts and Social Sciences at the University of Strathclyde. He is a leading member of the team that developed the Sentencing Information System for the High Court in Scotland. Recent research projects include a study of public knowledge and attitudes to sentencing and punishment in Scotland, and an examination of social enquiry reports and sentencing funded by the Economic and Social Research Council.

David Indermaur is a Senior Research Fellow at the University of Western Australia Crime Research Centre. Dr Indermaur has a PhD in criminology and has worked in the field of corrections and criminology since 1976, teaching in this field in both Canada and Australia. He has published various articles exploring public perceptions of sentencing since 1987 and was a co-author of *Penal Populism and Public Opinion* published in 2003. His current work is largely centred on the evaluation of therapeutic jurisprudence, offender treatment and crime prevention initiatives.

Thérèse McCarthy is the Deputy Chair of the Victorian Sentencing Advisory Council. Ms McCarthy has a long history of involvement with community organisations such as Centres Against Sexual Assault and other Victorian domestic violence and community legal services. She has worked to enhance the relationship between courts and the community in her role as the inaugural Director, Community Relations, Federal Court of Australia and as the Executive Director of Court Network, a Victorian support organisation. Ms McCarthy was an adviser to the Victim and Witness Unit at the International Criminal Tribunal for

the Former Yugoslavia, training support staff in sensitive witness assistance procedures. She has also worked with Amnesty International in Papua New Guinea and, as adviser to the Public Prosecutor there, she assisted in the development and delivery of training programs that implemented new legislation protecting victims in rape trials and improving the understanding of rape law. Ms McCarthy has published in the areas of rape law reform, victim impact statements and "battered woman syndrome".

John Pratt is Professor of Criminology and Reader in Criminology at Victoria University of Wellington, New Zealand. He has published extensively in the field of punishment and corrections, most notably the book *Punishment and Civilization* (2002), and his work has been translated into French and Spanish. Dr Pratt was Editor of the *Australian and New Zealand Journal of Criminology* from 1997 to 2005. His most recent publication is the book *Penal Populism* (2007).

Julian V Roberts is a Professor of Criminology, Faculty of Law, University of Oxford and Assistant Director, Centre for Criminology, University of Oxford. Professor Roberts has explored various empirical and theoretical issues in the area of sentencing and has conducted many original research studies in the field of public opinion, crime and criminal justice. His books include *Punishing Persistent Offenders* (Oxford University Press, forthcoming, 2008); *Understanding Public Attitudes to Criminal Justice* (2005, with M Hough); *The Virtual Prison* (2004); *Public Opinion and Penal Populism* (2003, with M Hough, D Indermaur and L Stalans); *Changing Attitudes to Punishment* (2002, with M Hough) and *Public Opinion, Crime and Criminal Justice* (2001, with L Stalans).

Stephan Terblanche is Professor of Law at the College of Law at the University of South Africa. He was appointed in the Department of Criminal and Procedural Law in 1992, after a career as a magistrate. His research and teaching experience centres on sentencing, with the law of evidence as a secondary interest. Professor Terblanche is the author of the current standard textbook on sentencing in South Africa: *A Guide to Sentencing in South Africa* 2nd edn (2007). His recent articles in South African law journals have focused in detail on the mandatory sentencing scheme that has been in place in South Africa since 1998, as well as the need for sentencing guidelines in that country.

Warren Young is the Deputy President of the New Zealand Law Commission. Dr Young was appointed a full-time Law Commissioner for a term of three years from 3 May 2004. He was appointed Deputy President from 23 May 2005. Prior to that he was Deputy Secretary for Justice for four years, with responsibility for criminal law, criminal justice and crime prevention. From 1980 to 2000, Dr Young was Director of the Institute of Criminology and then a Professor of Law at Victoria University of Wellington. He also served as Assistant Vice Chancellor (Research) for five years. He was a Fulbright Fellow in 1985 and has been a co-author of *Adams on Criminal Law* since 1992.

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Penal populism, sentencing councils and sentencing policy

Arie Freiberg and Karen Gelb

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 indeterminate 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 delegitimisation 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 topic[1] 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".