

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

This is a preview. Not all pages are shown.

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

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

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

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

Notes

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

References

- Ashworth, A (2005). *Sentencing and Criminal Justice*. 4th edn, Cambridge: Cambridge University Press.
- Australian Law Reform Commission (2006). *Same Crime, Same Time: Sentencing of Federal Offenders*. Publication No 103. Sydney: Australian Law Reform Commission.
- Bottoms, AE (1995). The Philosophy and Politics of Punishment and Sentencing. In C Clark and R Morgan (eds), *The Politics of Sentencing Reform*. Oxford: Clarendon Press.
- Garland, D (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.
- Gelb, K (2006). *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*. Melbourne: Sentencing Advisory Council.
- Gleeson, M (2004). *Out of Touch or Out of Reach?* Presentation to Judicial Conference of Australia Colloquium, 2 October, Adelaide.
- Pratt, J (2007). *Penal Populism*. London: Routledge.
- Roberts, JV, Stalans, LJ, Indermaur, D and Hough, M (2003). *Penal Populism and Public Opinion: Lessons from Five Countries*. Oxford: Oxford University Press.
- Tonry, M (1996). *Sentencing Matters*. New York: Oxford University Press.