

# **The NSW Sentencing Council**

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## **Sentencing and the Community Politics, Public Opinion & the Development of Sentencing Policy**

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The constitutions and functions of sentencing councils vary greatly, both overseas and in Australia. There are different understandings as to the appropriate structures and functions of sentencing councils or commissions. Much may depend upon whether the body is to be given delegated rule making power, for example the fixing of sentencing guidelines, or even whether the Council is to have mixed functions including rule making functions. Different factors, not merely cultural or traditional, are also involved. Social, economic and political factors may all play a part. Further, the existence of other bodies or agencies participating in sentencing concerns may also be a relevant consideration. It is not surprising that the recent Australian Law Reform Commissions (ALRC) Report 103, *Same Crime, Same Time: Sentencing Federal Offenders* stated:

A significant number of stakeholders supported the establishment of a federal sentencing council. There was some disagreement about the tasks such a body should perform.<sup>3</sup>

One might also observe that there is also a relationship between functions and funding since the proper discharge of the Council's functions is dependant upon proper resourcing and resources depend upon functions.

There is no transportable model for sentencing councils or commissions based on experiences or situations elsewhere. Thus in relation to the establishment of the NSW Sentencing Council in 2002, its constitution and statutory functions followed no other model. It was no mere copy or mimic of any sentencing body, council or commission that had been earlier established overseas.

As to the need for state sentencing councils I would note in passing the very recent observation of the ALRC in its Report No103 that:

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.<sup>4</sup>

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<sup>2</sup> The views expressed in this paper are endorsed by the NSW Sentencing Council.

<sup>3</sup> Australian Law Reform Commission, Report No 103 *Same Crime, Same Time: Sentencing Federal Offenders*, June 2006 at [19.29].

<sup>4</sup> Australian Law Reform Commission, Report No 103 *Same Crime, Same Time: Sentencing Federal Offenders*, June 2006 at [19.33].

The NSW Sentencing Council is constituted under Part 8B of the *Crimes (Sentencing Procedure) Act 1999* (the *Act*), as amended by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. Its establishment came amidst a number of substantive amendments to the *Act*. The explanatory note to the Bill stated that the principal objects of the *Act* were to:

- a) Establish a scheme of standard minimum sentencing for a number of serious offences; and
- b) To establish a NSW Sentencing Council to advise the Attorney General in connection with sentencing matters.

The establishment of both were the first of their kind in Australia.

The Second Reading Speech of the Attorney General provides some guidance as to the rationale and reason for the establishment of the Sentencing Council. The Attorney General said:

The government is confident that this new Sentencing Council will provide an invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice in NSW.<sup>5</sup>

Later, in July 2003, the Attorney General hoped:

The Sentencing Council's collective experience, expertise, independence and ability to consult with others will contribute to the strengthening of public acceptance and understanding of the sentencing process and the maintenance of confidence in that process.<sup>6</sup>

I might here observe that the rationale for the establishment of the Sentencing Council is somewhat different in terms to the measures referred to in the ALRC Report 103: being that the establishment of a sentencing commission or council to advise on matters relating to sentencing "may promote better sentencing decisions".<sup>7</sup>

At the time of the establishment of the Council there were in NSW several bodies already playing a role in relation to advising on sentencing issues. Such bodies include:

- the Judicial Commission of NSW;
- the NSW Bureau of Crime Statistics and Research (BOCSAR);
- the NSW Law Reform Commission;
- the NSW Crown Advocate; and
- the Criminal Law Review Division of the Attorney General's Department.

It might reasonably be thought that by establishing the Council, Parliament considered the Council should be a discrete "expert" special purpose body that would advise and

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<sup>5</sup> The Hon Bob Debus, Hansard, NSW Legislative Assembly, Second Reading 23/10/2002.

<sup>6</sup> The Hon Bob Debus, 'The NSW Sentencing Council – Its Role and Functions' (2003) 15 (6) *Judicial Officers Bulletin* 45-47 at 46.

<sup>7</sup> Australian Law Reform Commission, Report No 103 *Same Crime, Same Time: Sentencing Federal Offenders*, June 2006 at [19.33].

consult with the Attorney General on sentencing matters falling within its statutory functions, whilst acknowledging at the same time, the existence of other bodies or agencies that may also have an involvement or responsibility for sentencing issues or aspects of such. Nevertheless, even allowing for the roles of such bodies or agencies the Council's statutory functions are (and have been shown by experience) to be of a restrictive nature.

It is for the Attorney General to decide whether to consult or seek advice from one or more of these bodies or agencies on one or more sentencing matters. Despite being a discrete special body the Council has no special status or standing among those other advisory bodies or agencies who have involvement or responsibilities regarding sentencing issues. That said, the Council continues a working relationship with each of the above agencies, which is maintained by regular meetings and thus, inter alia, avoids duplication and overlap. In this connection there should be noted the provision of s100J(4) of the *Act* which permits the Council, in the exercise of its functions, to consult with, receive and consider information from the Judicial Commission and BOCSAR. This the Council regularly does at the same time as not treating the statutory consultation right as being "exclusive" of a right to consult others. In particular in relation to the exercise of its stated functions to prepare reports at the request of the Attorney pursuant to s100J(1)(d), the Council not only relies upon its own wealth and breadth of knowledge and experience, but also obtains and considers views of interested persons and bodies as it may determine and select.

### **Membership**

A characteristic of the NSW Sentencing Council that perhaps sets it apart from other bodies and agencies in NSW is its diverse membership. The constitution and structure of the Council in a way very much reflects the stated rationale and reasons for its establishment. Its members are chosen from specified fields with different backgrounds in accordance with the statutory requirements. Section 100I(2) constitutes the Council:

*The Sentencing Council is to consist of 10 members appointed by the Minister, of whom:*

- (a) one is to be a retired judicial officer, and*
- (b) one is to have expertise or experience in law enforcement, and*
- (c) three are to have 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), and*
- (d) one is to be a person who has expertise or experience in Aboriginal justice matters, and four are to be persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime.*

The current members of the NSW Sentencing Council are:

- **The Hon James Wood AO QC**

Retired Judge of the Supreme Court of New South Wales; former Chief Judge of Common Law and Chairperson under section 100I(2)(a).

- **The Hon J P Slattery AO QC**

Retired Judge of the Supreme Court of New South Wales and represents the NSW Bar Association. Appointed Deputy Chairperson under Schedule 1A Clause 2.

- **Mr N R Cowdery AM QC**

NSW Director of Public Prosecutions. Member with expertise or experience in the area of prosecution.

- **Mr Peter Zahra SC**

Senior Public Defender. Member with expertise or experience in the area of defence.

- **Assistant Commissioner Chris Evans APM**

NSW Police. Member with expertise or experience in law enforcement.

- **Mr Howard W Brown OAM**

He is one of the four members who represent the general community and heads the Victims of Crime Assistance League (VOCAL).

- **Mrs Jennifer Fullford**

Mrs Fullford is one of four members of the Sentencing Council who represent the general community.

- **Ms Martha Jabour**

Ms Jabour is one of four members of the Sentencing Council who represent the general community and heads the Homicide Victims Support Group (HVSG).

- **Mr Ken Marslew AM**

Mr Marslew is one of four members of the Sentencing Council who represent the general community and heads the victims of crime group “Enough is Enough Anti-Violence Movement”.

- **Mr Norman Laing**

Mr Laing is a barrister and the representative on the Council with expertise or experience in Aboriginal justice matters.

Each of the members are appointed in and serve in a personal capacity. The members do not act as representatives of any particular profession, voluntary or special interest group or viewpoint. For example, while the Director of Public Prosecutions is a member of the Council he is in fact a member by reason of having expertise or experience in the area of prosecution.

One of its great strengths is the Council’s constitution and actual membership. Many of the members have in fact expertise and experience in the criminal law area (for example, the DPP, the Senior Public Defender and former judicial officers) as well as actual experience of the criminal justice system as informed members of the general community. Its 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. The Attorney General may seek a report or advice from it on a sentencing issue, which 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.

Despite the diverse and varied backgrounds, experiences and expertise of the Council members, the Council has been able to achieve a shared common and general outlook in relation to sentencing issues. This has been a notable feature of its existence and is a matter of some significance. The Council has achieved a 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.

What perhaps should also not be overlooked is that Council members inform and educate each other participating in robust debate on sentencing issues. They have had the opportunity of perhaps informing and educating each other in a real tangible way arising from participating in the Council as an actual member. Indeed, Council membership also assists in keeping abreast of contemporary issues and the like not only through its members but also through the acceptance of invitations to address the Council by distinguished guests. Each member becomes better informed with the corresponding expression of not merely informed views and opinions but also conveyance of more informed views of the criminal justice system in their own private capacity to their own constituencies and the public. Members have access to the resources associated with their specific fields and different backgrounds.

Although the right balance of membership has been well achieved, nevertheless it is my view, indeed a shared belief, that an additional valuable member for the Council could perhaps be a person with expertise or experience in corrective services. There is no such institutional representative on the NSW Council. Nevertheless, because Corrective Services and Parole service issues are very much relevant and regularly considered by the Council, a useful additional Council member with this expertise would be beneficial.

### **Functions and Operation**

Section 100J sets forth the functions of the NSW Sentencing Council:

- (a) to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length;*
- (b) to advise and consult with the Minister in relation to*

- (i) *matters suitable for guideline judgements and*
- (ii) *submissions to the CCA made by the Attorney General in guideline proceedings;*
- (c) *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; and*
- (d) *at the request of the Minister, prepare research papers or reports on particular subjects in connection with sentencing.*

Section 100J makes clear that the NSW Sentencing Council advises and consults directly with the Attorney General and not otherwise. It has no direct dealings or contact with the Court itself even in respect to guideline judgments. It has no direct dealings with the Parliament. Nowadays Parliament has a large input into sentencing not only by way of penalties it prescribes as maximum penalties but also by detailed legislative prescription as to principles of sentencing to be applied.<sup>8</sup> That said the Council is not normally asked to express views as to the maximum penalty with Parliament providing such as it thinks fit for offences it creates or offences already created.

As has been said, but is perhaps worth repeating, a stated aim for establishing the Council by the Attorney General was:<sup>9</sup>

*..to 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.*

The advisory nature of the Council and a function of offering wider community contribution to sentencing law is reflected in the composition of the Council. Indeed, four of its members are drawn from the community, with three in fact pre-eminent in victims of crime interests.

The statutory functions of the Council are of a limited kind. To what extent, if at all, the functions will remain the same or will change may be influenced by outstanding reviews of the *Act* pursuant to ss105 and 106,<sup>10</sup> which presumably will also address the matter of the Council's role and functions. One may also note that the *Act* itself provides for the possibility of change by way of s100J(3). Since the establishment of the Council three years ago no new or additional functions have been conferred.

The NSW Sentencing Council does not have a right to initiate advice to the Attorney General on sentencing matters generally. With respect to the Sentencing Council's independence under subsection 100J (1)(a) and (b), the Sentencing Council furnishes its advice to the Attorney General and then the Attorney decides and determines to what extent, if at all, he/she will adopt, accept and implement that advice. In this sense one can postulate that in the discharge of its functions the Sentencing Council may have regard to and bring into account the Attorney General's known or "advanced" indications, views and intentions, even though such will not be decisive nor conclusive on the Sentencing Council in formulating its advice. There may be

<sup>8</sup> See paper presented by The Hon Chief Justice Murray Gleeson AC, 'Out of Touch or Out of Reach' at Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004.

<sup>9</sup> The Hon. Bob Debus MP, Attorney General *Hansard* Legislative Assembly, 23/10/2002.

<sup>10</sup> Section 106 is confined to the review of the standard non-parole period provisions of the *Act*.

occasions when the Sentencing Council in discharging its statutory remit will furnish controversial advice and put forward controversial proposals. Indeed at its launch the Attorney General even acknowledged that the Council was perhaps bound to come up with ideas that are “controversial or out of left field.” The Council has come up from time to time with ideas meeting such description.

It is also appropriate to mention that in discharging its functions the Council may express views in principle, properly recognising that cost benefits and resourcing are matters for others. Nevertheless, the Council fairly recognises that in providing advice such may impact upon the whole of government and may have budgetary consequences. So also does it recognise that many of its recommendations are significant, even if not immediately implemented, because they may facilitate, particularly if published, informed public discussion and the formation of informed public opinion. Indeed, such recommendations may also assist and educate the lawmakers themselves and be relevant to informed political debate in relation to them.

The NSW Sentencing Council does 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. Its functions do not include conducting independent research and disseminating information to interested persons or bodies, including Parliamentary committees, sentence makers or to bodies other than the Attorney General.

In discharging its functions the Council has furnished two different classes of reports to the Attorney General. The first is a report falling within section 100J(1)(c) of the *Act*, being a report prepared annually on “sentencing trends and practices” including the operation of standard non-parole periods and guideline judgments. This report is prepared by the Council in accordance with the *Act*, absent any request from the Attorney.

The second class of reports includes those prepared at the Attorney’s request on particular subjects in connection with sentencing.<sup>11</sup> The published major reports are as follows:

- Abolishing prison sentences of six months or less;
- How best to promote consistency in sentencing in the Local Court;
- Whether “attempt” and “accessorial” offences should be included in the standard non-parole sentencing scheme;
- Whether further firearm offences should be included in the standard non-parole sentencing scheme; and
- Seeking a guideline judgment on suspended sentences.

At present the Council is reporting on the effectiveness of fines as a sentencing option, paying particular attention to the relationship between driving licence sanctions for fine default and subsequent imprisonment.

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<sup>11</sup> See section 100J(1)(d).

The Sentencing Council may, with the approval of the Attorney, establish committees to assist in connection with the exercise of any of its function. It has done this on one occasion when it established a committee in respect of its major project relating to the abolition of prison sentences of six months or less. The committee, under the Chair of the Sentencing Council, consisted of senior representatives of relevant government departments and agencies together with individuals and bodies considered to have particular expertise or knowledge valuable to consideration of the issue.

In the past the Council has received submission requests from various Parliamentary Committees. The Council has declined to accept such considering that its statutory functions did not extend to putting “submissions” to such bodies. The statutory provisions restrict indeed the promotion of the Council’s role with other persons or bodies. Nevertheless the Council’s published reports have been accessible to all who are interested in reading and considering them (the public, the media, Parliament and other interested persons or bodies).

The Council accepts that in relation to its report recommendations, to assist with implementation, there is a consultative process to permit a whole of government response as well as necessary time for such to take place. It also accepts that whilst its recommendations on some or all may not be accepted, the reports will nevertheless aid and assist in informed debate. The Council understands that there may be delay in publication of its reports for good and valid reasons. Nevertheless, in order for its reports to be available for public or parliamentary consideration, timely publication is of importance so that informed consideration of the issues can be taken into account. Non-publication of reports or non-timely publication may carry the consequence of denying relevant information to lawmakers, courts and informed public discussion and debate.

There are some examples of the relevance and influence of the Councils reports in relation to the formation of public opinion and debate. The Legislative Council Standing Committee on Law and Justice in its Final Report, *Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations* (March 2006), referred frequently to the Council’s reports on *Abolishing Prison Sentences of Six Months or Less* (August 2004) and *How Best to Promote Consistency in Sentencing* (June 2004). In relation to the ‘six month sentence’ Report, the Standing Committee expressed support for the Council’s particular recommendations to make all community based sentencing options available uniformly throughout NSW without the need for dealing with its primary recommendation. Thus, through its published reports the Council is able to contribute to the knowledge and education of the legislators, and indeed to the community, by facilitating and contributing to informed public discussion.

So also does the publication of reports add to the Sentencing Council’s profile, status and standing with legislators and the public. Inclusion on the Council’s web site permits knowledge to be available even internationally. For example, the Scottish Sentencing Commission has advised that the Sentencing Council’s Report on *How Best to Promote Consistency in Sentencing in the Local Court* was of particular relevance and interest.

I believe also that it is important that sentencing councils, particularly those with significant community representation, be advised or informed of proposals (if any) to implement their advices and recommendations. I consider that this is relevant to maintaining the ongoing interest of members in Council participation, which for many is a form of community service. Members should be made to feel that they are making a worthwhile and effective contribution to the administration of the criminal justice system. Under utilisation of the Council carries with it its own consequences.

Some observations on measuring the performance of the Council's functions should be noted. As already mentioned the Council when established had conferred upon it limited and specific statutory functions. So also was it accepted that in respect of sentencing issues it would share an advisory and consulting role with other statutory bodies and agencies. In respect of its advising and consulting role in relation to guideline judgments several summary points may be made. First, in respect of such work, for good and valid reasons (see my earlier paper), in the time of the Council's existence there have been no numerical or quantitative guideline judgment proceedings instituted. The Council, with or without the Attorney's request, may give advice in relation to matters suitable for a guideline judgment. The difficulties in the path of instituting numerical guideline judgments do not need repeating. The point to be made is that one potential function of the Council in fact has not been a permissive function performed. In respect of what I might refer to as qualitative or in principle sentencing guideline judgment the one guideline judgment sought was instituted by the Attorney General namely the *Attorney General's Application No 3 of 2002* [2004] NSWCCA 303 prior to the Council's establishment and the Council was not involved. The Council has reported and given advice in respect to one other guideline judgment matter concerning criteria for suspended sentences and for reasons stated advised against the institution of proceedings primarily on the basis that despite the substantive merits any application could be faced with threshold discretionary problems in the path of success.<sup>12</sup>

A further area of work in respect of which the Council was given a foundation function to provide advice to the Attorney General was in relation to offences suitable for standard non parole periods and their proposed length. In relation to such matters advice may also be given to the Attorney General with or without his request. The Council has furnished a report to the Attorney in relation to, inter alia, whether further firearm offences should be included in the standard non-parole scheme. That said no further offences have been added to the scheme since its inception. Without going into explanations one may note that the failed special leave application in *R v Way*<sup>13</sup> has left open issues concerning the interpretation of the words "middle of the range of objective seriousness". As pointed out in my earlier paper there may be problems for the Council in giving advice in respect to newly created offences where there is no middle of the range or other relevant information. Also to be noted is the outstanding and pending review of the standard parole scheme under section 106 of the *Act*. The Attorney is reviewing its operation presently. The point to be made is that again in a de facto sense there has been a limited function or role for the Council to play in relation to the standard non-parole scheme.

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<sup>12</sup> For further discussion please see an earlier paper of the author: 'The Role of Sentencing Councils' presented at the National Judicial College of Australia Conference: *Sentencing – Principles, Perspectives and Possibilities*, Canberra, February 2006 at pp 12-14. Paper can be accessed at <http://www.lawlink.nsw.gov.au/sentencingcouncil>

<sup>13</sup> [2004] NSWCCA 131

As to both guideline judgments and the standard non-parole scheme it may also be noted there are no empirical studies as to the impact upon public opinion or public confidence of the guideline judgment or standard non-parole scheme in NSW.

The history of the Council's operation of its functions has been very much related to its limited role to prepare, at the request of the Attorney, research papers or reports on particular subjects in connection with sentencing under s100J(1)(d) and its annual reports under s100J(1)(c). Again as indicated the work on subjects in connection with sentencing is shared with other agencies or bodies, with the Attorney retaining the full right to determine when and with whom, if at all, he chooses to consult.

The functions and operation of the Council not only reflect those legislatively described above but also the stated views of the Attorney General in his Second Reading Speech<sup>14</sup> when he spoke of the Council providing an invaluable opportunity for the wider community to make a contribution to the development of sentencing law and practice in NSW. In my earlier paper I said:

As to the matter of the Council being established to provide an invaluable contribution to the development of sentencing law and practice (and the participation in doing so) the importance of doing so cannot be underestimated.

As Chief Justice Spigelman observed in 2005:

The participation by members of the public in the process of the administration of justice whether as parties, witnesses or jurors constitutes a crucial mechanism for ensuring that trust in the administration of justice remains at a high level.<sup>15</sup>

One can perhaps add to this participation list, participation through membership of the Sentencing Council!

Indeed that participatory view is and has also been reflected in not only the composition of membership of the Council but also in part in the discharge by Council of those limited statutory functions conferred. However when looking at the so called participatory role of jurors one can see historically such declining as a significant contribution in the process of the administration of criminal justice. The Council establishment coincides with evidence of the reduced use of the jury.

Chief Justice Gleeson observed in 2004<sup>16</sup> that:

The best way of seeing that the public are informed about the working of the criminal justice system is through the jury system...The maintenance of the jury system for the trial of serious crimes, and especially crimes of violence, is a vital means of keeping the public and criminal justice in touch.

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<sup>14</sup> The Hon Bob Debus, Hansard, NSW Legislative Assembly, Second Reading 23/10/2002.

<sup>15</sup> The Hon JJ Spigleman AC, 'Free, strong societies arise from participatory legal systems' The Sydney Morning Herald, 16 May 2005.

<sup>16</sup> The Hon Chief Justice Murray Gleeson AC, 'Out of Touch or Out of Reach' speech delivered at Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004.

However the figures would tend to suggest that the role of the jury is diminishing, effectively eliminating through the jury system, a way of informing the public about the working of the criminal justice system. As the NSW Law Reform Commission has observed in its recent Report 111, *Majority Verdicts* (2006), the great majority of all criminal cases finalised in 2003 were dealt with in the Local Court with very few criminal cases being prosecuted before a jury. Just 2.68% of matters were finalised in the superior courts, with 0.5% of cases overall proceeding to a defended hearing either before a judge or jury.

Indeed, one might think that a body such as the NSW Sentencing Council, constituted with a significant cross section of the community as members, is well placed to provide to the public some of the information referred to. With adequate functions the Council could fill, perhaps helping in part, the vacuum left by the diminishing use of the jury as a forum for keeping the public in touch with the administration of the criminal justice system.

### **Council's relationship with the Courts**

As regards the relationship with the Courts, there is no direct statutory relationship. There is no provision for the Council's written views to be sought by the Court in relation to the exercise of its guideline judgement jurisdiction or corresponding function of the Council to furnish such.

In the relatively brief period of its existence to date there has been no citation by the Courts' judgments of published reports of the Sentencing Council. Presumably it is but a matter of time before the Council's published reports (like those of the Law Reform Commission for example) will be cited.

Nevertheless the Council's role with the Courts is perhaps a more indirect one in the sense that its reports and operations will impact and play a role in terms of influencing public debate, creation of informed public opinion and the reflection of legitimate community expectations, standards and values. As was observed by McHugh J in *Markarian v The Queen*:

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.<sup>17</sup>

The Council's published reports can perhaps be utilised to assist on the matter of legitimate community expectations, standards and values.

Indeed to the extent that the Council plays a role in enhancing public confidence the Council has a further role with the Courts. As has been said by Sir Anthony Mason, modern courts are more concerned to take account of public confidence as an element of judicial making than the courts were in the past.<sup>18</sup> Further, as Sir Anthony Mason

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<sup>17</sup> (2005) 215 ALR 213 at 236.

<sup>18</sup> The Hon Sir Anthony Mason, 'The Courts and Public Opinion' Parliament House, Canberra, 29<sup>th</sup> March 2002.

has also observed that because the courts are concerned with maintaining public confidence in the administration of justice, judges cannot dismiss public opinion as having no relevance in the work of the courts. A difficulty is that in relation to public opinion, as Kirby J has observed, a court is not well placed to estimate with precision the impact of any particular legislation upon public opinion.<sup>19</sup> As Chief Justice Gleeson has also observed in his *Out of Touch or Out of Reach* speech in 2004, whilst public opinion is a deceptively simple concept there is no generally shared public opinion in respect of most of the day-to-day work in the courts. Indeed in respect to courts from time to time referring to “community values” they may create an impression that such values are clear and discernible. Sometimes a judge might be attributing his or her personal values to the community with little empirical justification for a belief that those values are widely shared.<sup>20</sup> The point sought to be made is that in the ascertainment of public opinion on a particular subject matter falling within the subject of sentencing, the Sentencing Council, with its important spectrum of representation including wide informed community based representation, has an indirect role in assisting the court by reflecting, inter alia, informed public opinion. The same observation may be made in relation to community values as well. Indeed the views reflected through its reports may likewise also assist the lawmakers.

### **Conclusion**

The NSW Sentencing Council has been in existence for over three years. When established it was the first of its kind in NSW with its own particular constitution and stated functions. Its existing functions have perhaps limited the Council’s full potential consistent with its established aims. It is not surprising that operational experience and practice has identified issues, particularly as to functions that could usefully be visited and further addressed to permit the Council to even better perform and discharge the purposes and reasons for which it was established, and to further enhance the opportunity of the wider community to make a major contribution to the development of sentencing law and practice in New South Wales.

There are some identifiable issues that might be considered of value to address such as:

- whether the Council should have such powers to initiate projects and to advise the Attorney general on sentencing matters generally and of its own motion;
- powers in relation to reporting and publication and for tabling of its reports;
- powers to providing information on sentencing matters to “other interested persons”;
- powers to gauge public opinion on sentencing matters;
- powers to fulfil an educative/informative role in relation to sentencing matters (including the public and even Parliament);
- its relationship with Parliament and Parliamentary Committees;
- wider powers of consultation; and
- a direct relationship with the Court itself in relation to the Courts responsibility for framing and revising guidelines and indeed issues in connection with the Courts discretionary power to decline a guideline judgment.

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<sup>19</sup> *Baker v The Queen* (2004) 210 ALR 1 at 23 per Kirby J.

<sup>20</sup> *Neindorf v Junkovic* (2005) 80 ALJR 341 per Gleeson CJ at 345.

It is not appropriate for me to presently express views on these matters. Whilst there is the statutory power pursuant to s100(J)(3) to add additional functions, as I have said, none have been added during the Council's existence. The existence of such a provision in the establishing legislation could suggest it was originally contemplated that additional functions could well be conferred. That said the *Act*, including presumably the Council's position, is currently being reviewed.<sup>21</sup> It is not appropriate to either pre-empt the review findings or discuss these matters further. It is sufficient that they have been identified.

Three years after its establishment the Council has been shaped from an initial body of ten members from diverse backgrounds into a well functioning and informed cohesive body that has through its works and reports provided, so far as its functions permit, timely advice and service to the Attorney General, the community and the criminal justice system. It has contributed to the strengthening of public acceptance and understanding of the sentencing process and the maintenance of confidence in that process.

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<sup>21</sup> By reviews pursuant to ss 105 and 106 of the *Act*.