

## The Role of Sentencing Advisory Councils

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The Latin expression *cui bono*, which translates who is benefited or to whom is it a gain, can be utilised in relation to issues concerning the establishment of sentencing councils or similar bodies. It is hoped that this paper will perhaps provide some of the answers.

It is an opportune time to present a paper of this type at a conference of this nature. Firstly, the NSW Sentencing Council (the first of its kind in Australia) has now been in operation for some three years and provides, at least in its operations, some idea of what is expected from such a body when issues of establishing such a body are considered. Such issues include how it ought to be structured and what should be its functions. I have not addressed cost benefit and budgetary considerations. Nevertheless there is a relationship between functions and funding since the proper discharge of functions is dependant upon appropriate resourcing and resources depend upon functions. Secondly, the Australian Law Reform Commission (ALRC) in its recent Discussion Paper 70, *Sentencing Federal Offenders*, discussed the issue of whether there was a need to establish a federal sentencing council. There is currently no such body at a federal level. Ultimately the ALRC expressed its views in the following terms:

In general it is undesirable to propose the establishment of 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 has come to the preliminary view that the three primary functions of sentencing councils—research, advice and rule making—are currently being performed by other bodies, will be performed by other bodies if the proposals in this Discussion Paper are implemented, or are not needed in the federal criminal justice system.<sup>2</sup>

The Commission formed the view that it was not necessary to establish a federal sentencing council.

It is convenient to briefly refer to the ALRC's Discussion Paper now. The Discussion Paper postulates that a measure that may promote better sentencing decisions is the establishment of a sentencing commission or advisory council. It makes reference to sentencing bodies both in Australia and overseas and asserts that an objective of such bodies includes, inter alia, promoting consistency in sentencing. The Discussion Paper acknowledges that the constitutions and functions of these bodies can vary greatly.

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<sup>1</sup> The views expressed in this paper are endorsed by the NSW Sentencing Council.

<sup>2</sup> ALRC Discussion Paper 70, *Sentencing Federal Offenders*, at paragraph 19.30.

Just briefly by way of background information, Australia has two established sentencing bodies – the NSW Sentencing Council and the Victorian Sentencing Advisory Council. The NSW Sentencing Council was a first for Australia, and was closely followed by the formation of the Victorian Sentencing Advisory Council. Both Queensland and Tasmania have considered the establishment of a sentencing body.<sup>3</sup> Other sentencing councils and commissions throughout the world include: the English Sentencing Advisory Panel and Sentencing Guidelines Council; the United States Federal Sentencing Commission (with a significant number of similar bodies established by some American states); and the Scottish Sentencing Commission.

When looking closer at the objective of promoting consistency in sentencing, it is perhaps more clearly an objective of some of those sentencing councils or commissions which have, as their main or primary function, the development and promulgation of sentencing guidelines with associated rule making or delegated power from the legislatures that established them to do so. The United States Sentencing Commission<sup>4</sup> and the United Kingdom Sentencing Guidelines Council are examples of such sentencing bodies judicially led and significantly judicially predominated in terms of membership. In contrast to the United States and United Kingdom bodies is the Scottish Sentencing Commission, which is a non-statutory body, established by the Scottish Executive with a specific remit to advise, review and make recommendations on specific stated topics and subjects. More significantly, the two sentencing councils established in Australia, the NSW Sentencing Council and the Victorian Sentencing Advisory Council, neither have specific or delegated powers in relation to rule making or indeed in relation to sentencing guidelines. It is thus not entirely the full story to speak of the NSW Sentencing Council or the Victorian Sentencing Advisory Council as having an objective of promoting consistency in sentencing although such an objective is at least indirectly present.

It is correct to assert that the structures, constitutions and functions of sentencing councils or commissions, whether overseas or in NSW and Victoria, vary greatly. They also illustrate that one cannot necessarily make any generalised assumptions as to the primary or other functions of sentencing councils. Both Councils established in Australia operate within a statutory framework with their remit fixed by legislation. These Councils may be perceived as discrete special purpose bodies with special composition and functions to give effect to the statutory aims in their establishment. The Victorian Council's functions are far more extensive than those given to the NSW Sentencing Council at the same time recognising, to some extent, that some of the Victorian Council's functions are presently exercised in NSW by the Judicial Commission, BOCSAR and to an extent, the NSW Law Reform Commission. So too the titles of sentencing bodies vary which in turn perhaps conceals rather than reveals the role and statutory functions of such bodies. Nothing turns on their titles. Thus it would be a misdescription to describe a body with delegated power as merely an advisory Council. The difference is one of terminology rather than an indication of functions.

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<sup>3</sup> *Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005 (QLD)* (which failed to pass through the Queensland Parliament); K Warner, *Sentencing – Issues Paper No 2* (2002) Tasmania Law Reform Institute. The Tasmanian Law Reform Institute hopes to release its final report on sentencing in the first half of 2006.

<sup>4</sup> The US Sentencing Commission also has statutory obligations extending beyond the formulation of national sentencing guidelines including educational functions in part performed in NSW by the Judicial Commission under the *Judicial Officers Act 1986* and in Victoria under the *Judicial College of Victoria Act 2001*.

With respect though I do join issue with the ALRC's view that the three "claimed" primary functions of sentencing councils: research, advice and rule making (particularly the latter), are being performed or are capable of being performed in Australia, or in NSW and Victoria, by existing bodies. At a federal level the existing bodies that the ALRC may perhaps have had in mind include:

- The ALRC itself,
- The ABS (specifically the National Centre for Crime and Justice Statistics),
- The Australian Institute for Judicial Administration,
- The National Judicial College of Australia, and
- The Judicial Conference of Australia.

Between them, these bodies seem to cover areas of research, advice, education (both judicial and public) and to an extent, they engage with the media. However, none of these bodies have the type of rule making power analogous to sentencing bodies in England or the United States. Then again, the sentencing bodies in existence at the State level (the Victorian and NSW Sentencing Councils) do not have such a rule making power either.

One thing seems clear: none of the federal bodies just referred to, nor any bodies at the state level, have the type of broad based membership which is deliberately distinctive of both the NSW and Victorian Sentencing Councils. They have been legislatively structured to meet particular specifications. Under the NSW legislation, Parliament has structured the Council to ensure that there are no serving judges but that its membership should consist of those experienced or expert in different areas of sentencing and in the criminal justice system. Membership must also include four representatives of the general community including at least two having expertise or experience with victims of crime. In addition, none of the above bodies operate solely in the specialised area of sentencing or have special functions in relation to such. It is true that it is desirable to avoid duplication and overlap. However this is being done in NSW by the Sentencing Council. It meets quarterly with the NSW Judicial Commission, the Bureau of Crime Statistics and Research, the NSW Law Reform Commission and the head of the Criminal Law Review Division (CLRD) to discuss matters of mutual interests and projects.<sup>5</sup> That said, the Council's independent role is a separate and distinct one.

The ALRC's Discussion Paper outlines arguments for and against sentencing councils. Some commentators expressed support for sentencing councils on the basis that they are one step removed from political processes and can therefore provide more objective information to legislators and courts on how the sentencing process should develop and at the same time permit greater community input into sentences.<sup>6</sup> In particular the objective of promoting greater community input into sentences, inter alia, reflects the views of both the NSW and Victorian Attorney General's in relation to the establishment of their respective sentencing councils.

In the second reading speech to the legislation establishing the Council the NSW Attorney General said:

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<sup>5</sup> The NSW Sentencing Council has a statutory power to consult and seek advice and information from the Judicial Commission and BOCSAR: section 100J(4) of the *Crimes (Sentencing Procedure) Act*. This power is not exclusive.

<sup>6</sup> ALRC Discussion Paper 70 at paragraph 19.28.

The government is confident that this new sentencing council will provide invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice in NSW.<sup>7</sup>

This observation perhaps provides the explanation for the deliberate structuring of the Council to exclude predominantly sentencers or ex-sentencers!

The NSW Attorney General has also stated in an article for the NSW Judicial Commission that he hopes the Sentencing Councils 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>8</sup> Speaking of the Victorian Sentencing Advisory Council the Victorian Attorney General said, perhaps to similar effect:

The establishment of a sentencing advisory council will allow properly ascertained and informed public opinion to be taken into account in the criminal justice system on a permanent and formal basis... and the Council will provide greater transparency and accountability in the criminal justice system and stimulate balanced public debate on sentencing issues.<sup>9</sup>

It is these views in particular that essentially provide the rationale and reason for the establishment of sentencing councils or commissions, their constitution and functions. There is nothing to suggest that the functions of either the NSW Sentencing Council or the different more expanded functions of the Victorian Sentencing Council can be performed by existing agencies in those states or more significantly by bodies constituted by such councils with their diverse membership and experience and collective wisdom. In any event I believe any opposition to the establishment of a federal body ought not to be made on the basis of assumptions as to functions without such being identified or known, or as to membership of such a body, or indeed whether it may be assumed that existing agencies or bodies may be able to necessarily discharge them. As to whether such agencies should or may do is in any event perhaps a political decision involving considerations not confined to what may be thought to be assumed as any primary functions. In both cases of NSW and Victoria, Parliament has set up discrete councils as the expert body to advise the Attorney General on matters falling within their functions acknowledging at the same time the existence of other bodies or agencies who may also have an involvement or responsibilities for sentencing issues or aspects of such. Thus there is a number of advisors on sentencing issues, of which the NSW Sentencing Council may be but one.

#### Public Opinion and Public Confidence in the Criminal Justice System and Sentencing

Judges accept that the rule of law in a community depends upon the maintenance of public confidence in the administration of (criminal) justice with such being a recurrent theme. The public's attitude to the way judges impose sentences determines to a substantial extent the state of public confidence in the administration of justice.<sup>10</sup> As Chief Justice Spigelman has said:

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<sup>7</sup> The Hon Bob Debus, Hansard, NSW Legislative Assembly, Second Reading 23/10/2002.

<sup>8</sup> The Hon Bob Debus, 'The NSW Sentencing Council – Its Role and Functions' (2003) 15 (6) *Judicial Officers Bulletin* 45-47 at 46.

<sup>9</sup> The Hon Robert Hulls, Hansard, Victorian Legislative Assembly, 20/03/2003.

<sup>10</sup> The Hon JJ Spigelman AC, 'Free, strong societies arise from participatory legal systems' *The Sydney Morning Herald*, 16 May 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>11</sup>

To this list I would add also membership of such bodies as sentencing councils structured in a way similar to those in NSW and Victoria.

So also is it a recurrent theme recognised by legislatures and the judiciary that “informed” public opinion on sentencing matters is one of considerable importance. In some respects public opinion and public confidence are closely related matters. It is of considerable importance that some body exist to not only gauge informed public opinion but to also participate in its creation. Gauging public opinion and creating such are in some ways two sides of the one coin. Sentencing councils given appropriate information and educative functions can do both. The charge of being out of touch is most frequently levelled at judges by way of complaint about sentences of offenders.<sup>12</sup> Sentencing councils play a role in respect of such concerns. Sentencing is an area of sensitivity in which there is a potential for conflict on several fronts between the legislature and the courts; between the courts and/or legislature and the political media; between the legislature and/or the courts and public opinion. Such potential, or even actual conflict, impacts upon public confidence in the administration of the criminal justice system.

In *Markarian v The Queen*<sup>13</sup>, McHugh J recently observed:

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>14</sup>

In relation to public opinion a court is not well placed to estimate with precision the impact of any particular legislation upon public opinion.<sup>15</sup> As Sir Anthony Mason has observed, as with other aspects of the law, the relationship between the courts and public opinion is undefined. Because it is undefined it is not well understood, not only by lay people but also by lawyers and politicians.<sup>16</sup> So also is public opinion said to be a deceptively simple concept and it is probably fair to say that there is no generally shared public opinion in respect of most of the day to day work in the courts.<sup>17</sup> As Sir Anthony Mason also said in his speech, because the courts are concerned with maintaining public confidence in the administration of justice,

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<sup>11</sup> The Hon JJ Spigleman AC, ‘Free, strong societies arise from participatory legal systems’ The Sydney Morning Herald, 16 May 2005.

<sup>12</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.

<sup>13</sup> (2005) 215 ALR 213.

<sup>14</sup> (2005) 215 ALR 213 at 236.

<sup>15</sup> *Baker v The Queen* (2004) 210 ALR 1 at 23 per Kirby J.

<sup>16</sup> The Hon Sir Anthony Mason, ‘The Courts and Public Opinion’ Parliament House, Canberra, 29<sup>th</sup> March 2002.

<sup>17</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.

judges cannot dismiss public opinion as having no relevance in the work of the courts.<sup>18</sup> Sentencing councils similarly have a role to play in this area.

Nevertheless in England sentencing judges can take into account community views on sentencing generally as distinct from community views on the sentence to be imposed in a particular case.<sup>19</sup> In Australia “public responses” to sentencing have a legitimate impact in the way explained by McHugh J in *Markarian*. That said, there are difficulties in a court ascertaining public responses to sentencing or even ascertaining what is informed public opinion based on the law and relevant sentencing principles. These difficulties do not confront bodies such as sentencing councils given appropriate statutory functions. Equally I also believe that it is not sufficient as some might claim that one way of determining what people across a State might believe is to merely look to the actions of Parliament and/or just legislative trends.

I have already referred to the matter of the views of the Attorney Generals of Victoria and NSW and the importance of both public opinion and the role of sentencing councils in respect of such. In Victoria express provision is made for the Council to gauge public opinion.<sup>20</sup> In NSW the Attorney General has also expressed his belief that the Council’s reports will “impact upon and influence public opinion.” It is clear that councils with adequately conferred powers and functions can play a role in educating, informing and enhancing informed public opinion and indeed political opinion as well as engaging such. The actual experience, expertise and knowledge of Council members of the general community will also be of significance in this area.

As to public confidence this also is, as I have said, a recurring theme. Public confidence (and community expectations) also provides a rationale for guideline judgments. Guideline judgments were also designed to reinforce public confidence in the integrity of the process of sentencing and indeed guideline judgments, formally so labelled, may assist in diverting unjustifiable criticism of sentences imposed in particular cases.<sup>21</sup> As to the latter point sentencing councils with appropriate functions may have at least an indirect role to play in assisting, through education and information, neutralising any overall general concern (but not in particular cases). In Victoria (but not in NSW) there is express statutory provision that the Court of Appeal, when considering the giving of a guideline judgment, must have regard to the need to promote public confidence in the criminal justice system as well as to the need to promote consistency of approach in sentencing and the views of the Sentencing Advisory Council.<sup>22</sup>

In NSW legitimate community expectations to which McHugh J referred to in *Markarian*, are also relevant to issues concerning, in particular, setting the length of standard non parole periods. So much was made clear in NSW by the Attorney General in his Second Reading Speech when he spoke of community expectations as to what penalty would reflect the gravity of the objective seriousness of the offence. The NSW Sentencing Council has a statutory function in this area.

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

<sup>19</sup> *R v Secretary of State for the Home Department, ex p. Venables* [1997] 3 All ER 97

<sup>20</sup> Section 108C of the *Sentencing Act 1991* (VIC).

<sup>21</sup> *R v Jurisic* (1998) 45 NSWLR 209.

<sup>22</sup> In England there are similar provisions, section 170(5) of the *Criminal Justice Act 2003* (UK).

So far as I am aware there are no empirical studies revealing the extent to which, if at all, guideline judgments have impacted upon public confidence or public opinion in relation to sentencing in England. Indeed there is a lacuna on views in Australia as to public opinion on sentencing and public confidence in the criminal justice system. It is too early to say in relation to the new sentencing guidelines recently issued by the UK Sentencing Guidelines Council established under the *Criminal Justice Act 2003*. What may be noted is that Halliday in his report<sup>23</sup> (which expressed no conclusions on the relationship between guidelines and public opinion) commented that giving the public information about crime and sentencing has a “positive effect.”<sup>24</sup> He noted that the informed public and the general public differed little in their view of the purpose of sentencing with the general public wanting a reduction in crime. Those that had received information in some format were significantly less worried about being a victim of crime and had more confidence in the criminal justice system in a number of respects. Next there have been no empirical studies as to the impact or effect of guideline judgments on public confidence in NSW since their introduction in 1998. As regards to the NSW statutory standard non parole period scheme, no empirical studies have been done in relation to its impact upon public opinion or public confidence in sentencing.

Halliday also noted that research had indicated public knowledge about sentencing was generally poor with a linkage to negative perceptions of sentencing practice. A survey of the general public (1022 interviews) confirmed low levels of knowledge about sentencing and misperceptions about current practices.<sup>25</sup> This would tend to provide further support for the view that a legitimate function of sentencing councils is that of informing and educating the public.

In the USA in 1999 the United States Sentencing Commission contracted with Rossi and Berk to prepare a report, *Public Opinion on Sentencing Federal Crimes*, (over 10 years after the US Sentencing Commission first promulgated sentencing guidelines in 1987). The report summarised the sentencing data of a national survey of public opinion on sentencing for federal crimes (1737 American households). The report examined connections between public views and sentencing guidelines (which in the USA are generally of the numerical kind). It expressed views that there is “every reason to expect that guideline sentences and popular views on sentencing will not be far apart.” It noted in particular three major points. First, what are “just” sentences? One goal of the Sentencing Commission is to provide “just punishments” for those who are convicted. In the eyes of the citizenry what is important in the construction and adjustment of a sentencing system is that is concerned with appearing “just.” Secondly, public views on sentencing are not (and likely should not be) the major criterion in constructing a sentencing system. Global public assessments of sentencing practices in respect of sentencing guidelines may have built in ambiguity not differentiating between different kinds of crime and different types of criminals. Issues of what information is offered to the public raise similar issues. The report also centred on “atypical” cases appearing in courts. The report was limited in punishment alternatives offered to respondents. For example, the study did not include home detention offences resulting in fines nor were cost issues raised with those interviewed. Thirdly, Rossi & Berk’s empirical study appears to have demonstrated that the Federal US Sentencing Commission guidelines,

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<sup>23</sup> Halliday (July 2001) *Making Punishment Work: Report of a Review of the Sentencing Framework for England and Wales* London: The Home Office.

<sup>24</sup> Halliday (July 2001) *Making Punishment Work: Report of a Review of the Sentencing Framework for England and Wales* London: The Home Office at p114.

<sup>25</sup> See also 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.

issued pursuant to delegated power from Congress, have produced sentences that are as harsh as those that the public would like to see imposed.

That said it is interesting to note that the US Sentencing Commission guidelines have succeeded in reducing judge-to-judge disparity within the judicial districts of the Federal Courts. However researchers have found significant disparities between sentences imposed on similarly situated defendants in different districts and different regions of the country and inter-district disparities appear to have grown larger in the guidelines era particularly in drug cases.<sup>26</sup> The issue of federal offenders being sentenced differently according to the state or jurisdiction in which they are dealt with (“regional disparity”) is discussed by the ALRC. By way of an aside, the matter of disparity in sentencing in Australia (guidelines aside) for federal offences in different Australian states by state Courts exercising federal jurisdiction, is taken up in the recent ALRC Discussion Paper. As the ALRC also stated, it is not opposed to guideline judgments in principle, but also noted that the High Court’s decision in *Wong v The Queen*<sup>27</sup> has created a climate of uncertainty around guideline judgments which does not provide a firm foundation for law reform in this area.<sup>28</sup> It does not recommend use of guideline judgments in relation to federal offences “at this time”.

I have not in this paper addressed or pursued the question as to whether sentencing guidelines should be dealt with by bodies such as councils or commissions to be found overseas.<sup>29</sup> The matter of whether the United Kingdom model represents the future of the type of body such as the NSW Sentencing Council, is an issue that has been raised.<sup>30</sup>

This paper will now compare and contrast the different models of sentencing bodies including their various roles, membership, level of independence, and their relationship with other arms of government and the public.

### **NSW Sentencing Council**

The NSW Sentencing Council is constituted under Part 8B of the *Crimes (Sentencing Procedure) Act 1999*, as amended by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. The Sentencing Council is a non-departmental, independent and impartial body and it first met in March 2003. Its establishment came amidst other sentencing reforms including a new section in the *Principal Act* setting out the purposes for which a court may impose a sentence, and a scheme of standard non-parole sentencing. The Council is potentially positioned to act as a conduit between the decision makers and those affected by decisions, i.e. the general community and others.

Since its formation, the Sentencing Council has reported<sup>31</sup> to the Attorney General on a number of particular matters including:

- abolishing prison sentences of six months or less;
- promoting consistency in sentencing in the Local Court;

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<sup>26</sup> Bowman F, ‘Sentencing: What’s at Stake for the States? The Failure of the Federal Sentencing Guidelines: A Structural Analysis’ (2005) 105 *Columbian Law Review* 1315

<sup>27</sup> (2001) 207 CLR 584.

<sup>28</sup> ALRC Discussion Paper 70, at paragraph 21.34.

<sup>29</sup> See United Kingdom Sentencing Guidelines Council and United States Federal Sentencing Commission.

<sup>30</sup> Dr John Anderson, ‘Guideline Judgments and Standard Minimum Sentencing’, National Judicial College of Australia Conference - Sentencing Principles, Perspectives and Possibilities, Canberra, February 10-12 2006.

This is an issue already recognised by the author.

<sup>31</sup> Pursuant to section 100J (1) (d)

- considering whether “attempt” and “accessorial” offences should be included in the standard non-parole sentencing scheme; and
- considering whether further firearm offences should be included in the standard non-parole sentencing scheme.

The *Crimes (Sentencing Procedure) Act 1999* is administered by the Attorney General. Sections 100 I and 100 J concern the constitution and functions of the Sentencing Council.

Section 100 I constitutes the Sentencing Council. It consists of 10 members appointed by the Attorney General for fixed terms. He/she may remove them for reasons set forth in legislation. The members are drawn from varying and specified backgrounds reflecting diverse interests and experiences. The section provides that of the members appointed by the Attorney General:

- one is to be a retired judicial officer;
- one is to have expertise or experience in law enforcement;
- 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),
- one is to be a person who has expertise or experience in Aboriginal justice matters;<sup>32</sup> 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.

It may be noted that membership is from within and without the criminal justice system excluding current sentencers.

The current members of the NSW Sentencing Council, and I mention their names to highlight their diverse backgrounds, experience and expertise, are:

<b>Hon Alan R Abadee RFD QC</b>	Retired Judge of the Supreme Court of New South Wales and Chairperson under section 100 I (2)(a).
<b>Hon J P Slattery AO QC</b>	Retired Judge of the Supreme Court of New South Wales and represents the NSW Bar Association. Appointed Deputy Chairperson under Schedule 1A Clause 2.
<b>Mr N R Cowdery AM QC</b>	NSW Director of Public Prosecutions. Member with expertise or experience in the area of prosecution.
<b>Mr Peter Zahra SC</b>	Senior Public Defender. Member with expertise or experience in the area of defence.
<b>Assistant Commissioner Chris Evans</b>	NSW Police. Member with expertise or experience in law enforcement.
<b>Mr Howard W Brown OAM</b>	He is one of the four members who represent the general community and heads the Victims of Crime Assistance League (VOCAL).

<sup>32</sup> There is currently a vacancy in the office of Council member with expertise or experience in Aboriginal justice matters. This vacancy is expected to be filled shortly.

<b>Mrs Jennifer Fullford</b>	Mrs Fullford is one of four members of the Sentencing Council who represent the general community.
<b>Ms Martha Jabour</b>	Ms Jabour is one of four members of the Sentencing Council who represent the general community and heads the Homicide Victims Support Group (HVSG).
<b>Mr Ken Marslew AM</b>	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”.

I believe that it is important that sentencing councils (particularly those with significant community representation) be advised or informed of proposals (if any) to implement their advice and reports. 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.

Having identified membership there is my personal belief that an additional valuable member of any sentencing council would be a person with expertise or experience in corrective services. There is no statutory institutional representative in NSW. Nevertheless corrective service issues and parole issues are very much relevant and regularly considered by the Council.

Importantly in NSW, the members are appointed in a personal capacity. They do not act as representatives of any particular profession or voluntary or special interest groups or viewpoint. They may perhaps coincidentally wear two hats but not at the same time! This position, in this respect, is similar to that in Victoria, USA and the United Kingdom.

To add, the NSW Sentencing Council in fulfilling the above functions, is supported by a small secretariat consisting of an executive officer and administrative officer. It has its own office accommodation and administers its own budget.

Section 100 I (3) provides that Schedule 1A has affect with respect to the members and procedures of the Sentencing Council. Schedule 1A provides that the retired judicial officer appointed under s 100 I (2)(a) is to be the Chairperson of the Sentencing Council. The Attorney General may also appoint another member of the Sentencing Council as the Deputy Chairperson.

Section 100 J 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. This is unlike the situation in Victoria between the Victorian Sentencing Advisory Council and the Court of Appeal and formerly in England from 1989 to 2003 between the Sentencing Advisory Panel and the English Court of Appeal. As to an example of guideline judgments given in England on appeal against sentence where the Court of Appeal (Criminal Division) in giving a guideline judgment as to the appropriate levels of sentencing found the guidance of the Sentencing Advisory Panel useful in deciding them is to be found in *Keating*.<sup>33</sup>

As can be seen one of its function is to act as an advisor and consultant to the Attorney General on certain sentencing issues and as the Attorney General said in the Second Reading Speech:<sup>34</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 functions of the Council should be viewed in the context of its position within the NSW criminal justice system. The Council is one of a small group of NSW government agencies that has or may have responsibilities for sentencing issues. These groups 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 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. The Council has a working relationship with each of the above agencies, which is maintained by regular meetings and thus, inter alia, avoids duplication and overlap.

Despite being a discrete special body established by Parliament to advise, consult or report to the Attorney General in accordance with its statutory remits, the Council has no special statutory status or standing among those other advisory bodies or agencies who have involvement or responsibilities on sentencing issues or, for example, as the principal advisor on such functions as it possesses. A similar observation may perhaps be made in relation to the status and standing of the Victorian Sentencing Advisory Council.

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

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<sup>33</sup> *R v McInerney and Keating* [2003] 2 Cr.App.R.(S) 39.

<sup>34</sup> The Hon. Bob Debus MP, Attorney General *Hansard* Legislative Assembly, 23/10/2002.

Attorney General and then the Attorney general 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 or conclusive on the Sentencing Council in formulating its advice. Further there may be 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 accepted that the Council was perhaps bound to come up with ideas that are "controversial or out of left field." The Council has done this in the exercise of its functions. Further, it is also appropriate to mention that in discharging its functions the Council may express views in principle properly recognising that cost benefits and funding is a matter 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 such may facilitate, particularly if published, informed public discussion.

At the present time the Minister is reviewing the *Act*, including the standard non-parole provisions, to determine whether, inter alia, policy objectives remain valid.<sup>35</sup> The extent to which such review impacts or may impact upon the Councils functions remains to be seen.

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 NSW under the Council's current statutory functions, the Council "advises and consults" with the Attorney General in relation to particular sentencing issues. The Council has limited power to initiate matters, even in relation to its prescribed areas of involvement.<sup>36</sup> It has no reporting role viz Parliament and no role with the Court of Criminal Appeal in relation to expressing views on the giving or revising of a guideline judgment, its role on that subject being that of an advisor or consultant to the Attorney General who may bring an application for a guideline judgment.

#### Guideline judgments

The Council's statutory function in relation to guideline judgments needs to be understood in a particular local statutory context. The statutory effect of a guideline judgment is that such should be taken into account. That is a complete statement of its effect. It is only to be taken into account as a "sounding board" or guide, not as a rule or presumption. A guideline cannot be impermissibly prescriptive. It should not be taken to usurp the function of the legislature or inappropriately intrude upon the exercise of the sentencing discretion of the trial judge.<sup>37</sup>

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<sup>35</sup> Sections 105 and 106 of the *Crimes (Sentencing Procedure) Act 1999*

<sup>36</sup> Section 100J of the *Crimes (Sentencing Procedure) Act 1999*

<sup>37</sup> *Jurisc* (1998) 45 NSWLR 209.

In 1998 the parliament gave statutory recognition to guideline judgments assuming that the Court had the power and jurisdiction which it had exercised in *Jurisc*<sup>38</sup> to formulate guideline judgments.

It is appropriate to mention some matters perhaps relevant to the councils guideline judgment function under section 100 J (1)(b). In respect to the matter of guideline judgments in NSW the Court of Criminal Appeal may give a guideline judgment of its own motion or on the application of the Attorney General.<sup>39</sup> The Council has no direct dealings with the Court or vice versa. In neither case must the Court seek the views of the Sentencing Council and in neither case has the Council a function to express its views to the Court. The Sentencing Council's guideline judgment function involves it advising and consulting with the Attorney General (either at the request of the Attorney General or of its own motion). The Attorney General is not required by legislation or under any statutory duty to advise or consult with the Council before applying for a guideline judgment. Several other matters may be noted. First the Court may decline to give a guideline judgment as a matter of discretion or if it considers it inappropriate to do so (for example lack of experience in relation to the offence<sup>40</sup> or a wish to see, in the case of a new statutory offence, some case law develop showing inter alia the type of penalties regularly imposed). A similar discretion is reserved in Victoria.<sup>41</sup> There is also thus perhaps a threshold problem associated with seeking a guideline judgment for example a new offence.

Next, there may appear to be no right to seek leave to the High Court from the grant or refusal to give a guideline judgment particularly in relation to a guideline judgment application brought by the Attorney General. It is arguably not a matter.<sup>42</sup> Guideline judgments do not lay down binding precedents.<sup>43</sup> That said it may be that the question of leave might be dependent upon whether it is in a matter where a guideline judgment is considered in an appeal against sentence involving parties and not in a guideline judgment brought by the Attorney General pursuant to section 37. These are some of the considerations that may be relevant to the exercise of the Sentencing Council's guideline judgment function.

There is no express provision in NSW that requires the Court of Criminal Appeal in considering the giving of a guideline judgment, to have regard to for example the need to promote consistency of sentencing or the need to promote public confidence in the criminal justice system. This is contrasted to the position in Victoria and England.<sup>44</sup> That said, as Chief Justice Spigelman made clear in *Jurisc*, statutory provisions aside, guideline judgments are designed not merely to promote consistency in sentencing but also to reinforce "public confidence in the integrity of the process of sentencing." This is a matter recognised by the Council.

Finally in NSW there is no statutory duty of the part of the Court of Criminal Appeal, if it decides to give a guideline judgment, to notify the Council and consider any written views

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<sup>38</sup> (1998) 45 NSWLR 209

<sup>39</sup> Sections 37A and 37 respectively of the *Crimes (Sentencing Procedure) Act 1999*

<sup>40</sup> See *Re: Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* (2002) 137 A Crim R 196 and section 40 of the *Crimes (Sentencing Procedure) Act 1999*.

<sup>41</sup> Section 6AB(6) of the *Sentencing Act 1991* (Vic)

<sup>42</sup> See *Wong and Leung v. The Queen* (2001) 207 CLR 584

<sup>43</sup> *Jurisc* (1998) 45 NSWLR 209; *Henry* [1999] NSWCCA 111

<sup>44</sup> In Victoria see section 6AE of the *Sentencing Act 1991*. In England the Sentencing Guidelines Council inter alia must have regard to such matter including the views communicated to the Council by the Sentencing Advisory Panel; Section 170(5) of the *Criminal Justice Act 2003* (UK).

provided by it or corresponding function on the Council to state in writing to the Court its views in relation to the giving of a guideline judgment. This is perhaps in part explained by the Council's statutory advisory role on guideline judgments being with the Attorney General. This is contrasted with the Victorian situation.<sup>45</sup>

Finally a few words about guideline judgment themselves. Perhaps they may be described as being of a quantitative or numerical kind and of a qualitative or "in principle" type. In the three years that the NSW Sentencing Council has been in operation there have been no applications for numerical guideline judgments or giving of such by the Court. This in part reflects considerations arising from the High Court's decision in *Wong and Leung v. The Queen*<sup>46</sup> where the Court (or at least a number of judges) called into question certain aspects of guideline judgments in NSW, particularly in relation to numerical guidelines. These particular views have also been acknowledged by the Council in considering its guideline judgment function. Subsequently NSW legislation in relation to guideline judgments was amended. In *R v. Whyte*<sup>47</sup> the Court's power to also issue a "numerical" guideline was restated and affirmed. That said, in *Markarian v. The Queen* some relevant observations by McHugh J (in discussing the courts sensitivity to legislative trends) in relation to the statutory system of guideline judgments (and standard non-parole schemes) are perhaps worth noting.

In New South Wales there is also a statutory system of guideline judgments and standard minimum non-parole periods that give more specific guidance in common offences and operate as a starting point from which departure is intended to be the exception or at least require explanation. In recent times, both methods have been used to increase the prevailing median sentence for particular classes of offences.<sup>48</sup>

His Honour did not cast doubt upon their legality or validity in sentencing as part of trends to which a sentencing judge could have regard. In fact his reference to the statutory system of guideline judgments could perhaps be interpreted as supportive in his view also of the validity of numerical guideline judgments. As I have said the ALRC has also said, regardless of the merits of guideline judgments, *Wong v The Queen* appears to have cast doubt on their constitutional validity at the federal level in certain circumstances and that its decision has created a climate of uncertainty around guideline judgments. This 'climate of uncertainty' is a consideration in determining when or whether advice should be given to bring a numerical guideline judgement application. So also are the provisions of section 40 of the *Crimes (Sentencing Procedure) Act* (and the case law) a relevant consideration of any advice by the Council. These problems perhaps raise questions as to whether sentencing guidelines should be fixed by bodies exercising delegated powers and not by way of guideline judgments as determined by the Court.

#### Standard non-parole scheme – Division 1A of the *Crimes (Sentencing Procedure) Act 1999*

In relation to the exercise of its functions in relation to the standard non-parole scheme it is also appropriate to make some observations. It is not inappropriate to note that since the introduction of the scheme in 2003 no further offences have been added to the scheme. Again in relation to such, adding new offences to the scheme (and as to the proposed length) the Council has an advisory and consultative role to the Attorney General. There is no

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<sup>45</sup> See section 6AE(c) of the *Sentencing Act 1991* (VIC)

<sup>46</sup> (2001) 207 CLR 584

<sup>47</sup> (2002) 55 NSWLR 252

<sup>48</sup> (2005) 215 ALR 213.

obligation for the Attorney General to consult with the Council before adding a matter nor as to the length of standard non-parole period for any offence to be added.

That said it seems possible the legislature can express a view about a need to increase sentencing, not so much by altering the maximum penalty, as by fixing a standard non-parole period for an offence it adds to the table. Parliament can prescribe such penalty as it thinks fit for the offence it creates. Indeed the legislature can perhaps even add an offence to the table rather than request the Attorney General to seek a guideline judgment for such.

The law in relation to the standard non-parole scheme provisions has been discussed extensively in *R v. Way*.<sup>49</sup> That said some live issues of statutory construction appear to have been recognised in the special leave application to the High Court, but it concluded that that vehicle was not the one to decide them. The issues concern the interpretation of the words “middle of the range” and “objective seriousness”.<sup>50</sup> In respect of some existing offences in the table there may be few cases or limited information. There may be problems for the Council in giving advice in relation to newly created offences where there is no middle of the range or any relevant statistical or other information or even in respect to existing offences where there may similarly be a lack of information. Further one should note the pending review of the operation of the standard non-parole period scheme.<sup>51</sup>

Nevertheless as recently as *Markarian v. The Queen*, McHugh J recognised the role of not only the statutory system of guideline judgments but also that of the standard non-parole periods as a “starting point” in cases to which such apply.<sup>52</sup>

#### Monitoring and reporting annually to the Minister

The Sentencing Council reports annually to the Minister on sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments.<sup>53</sup> This is a statutory function performed not at the specific request of the Attorney General. Other reports and research papers are at the request of the Attorney General. After reporting the Council’s role is discharged and it is for the Attorney General to authorise or permit publication or take such action as he/she considers appropriate. There is no legislative requirement for such report (or any other report of Council) to be laid before parliament and/or for publication after such has been done.

#### Consultation and Committees

In the exercise of its functions the Council is given the express statutory right to consult with, and may receive information and advice from the Judicial Commission and BOCSAR.<sup>54</sup> The statutory consultation right is not “exclusive” of consultation with others. The Council exercises this statutory right for suitable and appropriate purposes and is in regular consultation particularly with the Judicial Commission.

The Council may, with the approval of the Minister, establish a Committee to assist it in connection with the exercise of its functions. It has done this on one occasion where it had a

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<sup>49</sup> (2004) 60 NSWLR 168

<sup>50</sup> These words are contained in section s 54A(2) of the *Crimes (Sentencing Procedure) Act 1999*

<sup>51</sup> Section 106 of the *Crimes (Sentencing Procedure) Act 1999*.

<sup>52</sup> At the present time the Attorney is reviewing the operation of the standard non-parole scheme in accordance with section 106 of the *Act*.

<sup>53</sup> Section 100J(1)(c) of the *Crimes (Sentencing Procedure) Act 1999*

<sup>54</sup> Section 100J(4) of the *Crimes (Sentencing Procedure) Act 1999*

committee to assist in relation to the preparation of its report on abolishing prison sentences of six months or less.

Unlike Victoria, the NSW Council is not a body corporate, has no express contracting power nor has a power to appoint honorary or paid consultants. That said, in the discharge of its functions it consults with, obtains and considers views on matters of persons or bodies as it may determine and select. There is also a wealth of and breadth of experience within the composition and constitution of the body which enables it to provide contemporary views and advice. In addition, to assist in keeping abreast with sentencing issues and that which is relevant, the Council also regularly invites distinguished guest speakers to address the Council. The Council also exchanges views and discusses matters with its Victorian counterpart.

### **Victorian Sentencing Advisory Council**

The Victorian Sentencing Advisory Council was formed in July 2004 and is a body corporate<sup>55</sup> with a board of directors established by section 108B of the *Sentencing Act 1991* (Vic). The Victorian Government has committed significant funds to the Council over 4 years. Its stated aims are to strengthen the sentencing process and to encourage and incorporate community input into sentencing.<sup>56</sup> It will perform functions in Victoria, in some instances, performed separately in NSW by the Judicial Commission, BOCSAR and in some circumstances the Law Reform Commission.

Since its formation, the Victorian Council has published a number of papers including:

- An issues paper, discussion paper and interim report on suspended sentences;
- A report on maximum penalties for repeat drink driving offences;
- Seven “sentencing snapshots”;
- Various fact sheets, media releases, information papers, and corporate publications including the Council’s Annual Report.

The Victorian Sentencing Council has a number of current projects including on suspended sentences (the Council hopes to release its final report in 2006) and its International Conference in July 2006 on 'Sentencing and the Community: Politics, Public Opinion and the Development of sentencing policy'.

As will be discussed later in this paper, the breadth of the Victorian Council’s current projects is indicative of its broader statutory functions and budgetary resources and absence of other criminal justice agencies as in NSW.

The Victorian Sentencing Advisory Council is constituted by a board of directors (not less than 9 or more than 12) and reflects the need to reflect different statutory qualifications and experience both within and without the criminal justice system. The Council has currently 12 members, from diverse backgrounds, appointed by the Victorian Attorney General:<sup>57</sup>

- Professor Arie Freiberg (Chairperson) (senior academic);
- Carmel Arthur (Operation of the criminal justice system);
- Carmel Benjamin AM (Community issues affecting courts);

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<sup>55</sup> Section 108B(2)(a) of the *Sentencing Act 1991* (VIC)

<sup>56</sup> 2003-2004 Victorian Budget: Media Releases <[www.budget.vic.gov.au](http://www.budget.vic.gov.au)>

<sup>57</sup> Section 108F of the *Sentencing Act 1991* (VIC)

- Noel Butland (Operation of the criminal justice system);
- Bernie Geary OAM (Operation of the criminal justice system);
- David Grace QC (Highly experienced defence lawyer);
- Andrew Jackomos (Community issues affecting courts);
- Therese McCarthy (Community issues affecting courts);
- Professor Jenny Morgan (Member of a victim of crime support or advocacy group);
- Simon Overland (Operation of the criminal justice system);
- Jeremy Rapke QC (Highly experienced prosecution lawyer);
- Barbara Rozenes (Member of a victim of crime support or advocacy group).

Like NSW there are no sentencers as members of the Council and appears to be for reasons earlier stated. Nor is it judicially led.

Under section 108C its functions are:

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

The above functions are broader and in various respects different to those of the NSW Sentencing Council in terms of whom it may consult with, and to whom it may provide information. However like NSW, the Council has no delegated rule making powers. Again these functions are best viewed in the context of the criminal justice system it is operating in i.e. certain functions of the Victorian Council are, in NSW, fulfilled by BOCSAR and the Judicial Commission. The Judicial College of Victoria may perhaps however work closely with the Victorian Council in relation to some of its functions.<sup>58</sup> Even making this allowance the functions remain more extensive than in NSW.

The Victorian Council (unlike the NSW Council) has a relationship with not only the courts and the Minister but also with Parliament itself. It is required to comply with an information requirement of either House of Parliament or Parliamentary Committee.<sup>59</sup>

One area where the Victorian Council has a particularly broader function than that of NSW relates to guideline judgments. The Victorian Council has a function:

- to state in writing to the Court of Appeal its views in relation to the giving or review, of a Guideline Judgment.

There is therefore a direct relationship between the Council and the Court. The Victorian Court of Appeal retains the power to promulgate guidelines on considering and hearing an

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<sup>58</sup> The Judicial College of Victoria commenced in November 2002. Its role includes judicial education.

<sup>59</sup> Section 108 P of the *Sentencing Act 1991* (VIC)

appeal against sentence, but has the benefit of the views of a diverse body, including broad community based representation and representation of those involved in the criminal justice system, in exercising its powers in relation to guideline judgments. There is no power in the Attorney General to apply for such a guideline judgment. The Council does not have the power to initiate guideline judgments, in the sense of proposing to the Court that it give or revise a guideline. A guideline judgment may only be given by the Court on its own motion or on application by a party to the appeal against sentence.<sup>60</sup> However, the Court must notify the Council when it decides to give or review a guideline judgment, and has an obligation to consider the Council's views<sup>61</sup> as was the situation involving the relationship between the English Court of Appeal and the Sentencing Advisory Panel between 1998 and 2003. Further unlike the position in NSW the Court in considering the giving of a guideline judgment not only must have regard to the need to promote consistency in sentencing but also the need to promote public confidence in the criminal justice system and any views stated by the Council (section 6AE). This provision is similar to a provision in England where by the new Sentencing Guidelines Council must, in determining sentencing guidelines (not guideline judgments), consider views conveyed by the Sentencing Advisory Panel. As yet, the Victorian legislation on guideline judgments has not been exercised.

### **Scottish Sentencing Commission**

Similar to the NSW Sentencing Council and the Victorian Sentencing Advisory Council, the Scottish Sentencing Commission is of an advisory nature. It is not a statutory body and note it is not called a 'council' rather a 'commission'. Its remits are on specific topics. The Scottish Executive set up the Commission under its policy statement, *A Partnership for a Better Scotland* in November 2003.

Stated in the policy statement were the topics the Executive desired the Sentencing Commission to review and make recommendations on:

- the use of bail and remand
- the basis on which fines are determined
- the effectiveness of sentencing in reducing offending
- the scope to improve consistency of sentencing
- the arrangements for early release from prison and suspension of short term prisoners or release.

The Commission is an independent, judicially led sentencing body. Its 16 members, whilst not required to, come from diverse backgrounds:

- Judges (2 members);
- Sheriffs (2 members);
- Police (1 member);
- Lawyers (3 members);
- Social workers (2 members);
- The general community (2 members);
- Victims support (1 member);
- Academia (2 members); and
- The Scottish prison service (1 member).

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<sup>60</sup> Section 6AB(1) of the *Sentencing Act 1991* (VIC).

<sup>61</sup> Sections 6AE(a) and s 6AE(c) of the *Sentencing Act 1991* (VIC).

Since its establishment the Commission has furnished one Report on the use of bail and remand in April 2005. In June 2005 it furnished a Consultation Paper on early release of prisoners and their supervision on release.

Whilst little information is available as to precisely how the Commission operates, one can glean from materials on its web site that despite being linked to the Executive arm of government it maintains transparency and independence. Correspondence between the Commission and the Scottish Justice Minister concerning recommendations of the Commission are available to view on the Commission's web site.

### **Sentencing Guidelines Council and Sentencing Advisory Panel – England and Wales**

The scheme of sentencing guidelines in England was recently reviewed in the *Criminal Justice Act 2003*, which transferred the function of issuing guidelines from the Court to the Sentencing Guidelines Council.

From the time of their introduction in 1981 the English Courts had been developing guideline judgments in individual cases through which it set out general principles to be observed by Courts when sentencing.<sup>62</sup> The enactment of the 2003 legislation saw the establishment of the Sentencing Guidelines Council and the continuance of the Sentencing Advisory Panel. The Sentencing Advisory Panel had earlier been established to provide information and advice on suitable guidelines to provide information and advice on suitable guidelines for different categories of offence (sections 80-81 of *Crimes & Disorder Act 1998*).<sup>63</sup> Under the 2003 Act the Panel has moved from its original establishment function of working with the Court of Appeal to working alongside and with the Sentencing Guidelines Council. The Court of Appeal no longer has a role in relation to guidelines and no longer issues guideline judgments. The Victorian Councils guidelines role reflects very much the earlier roles of the English Court of Appeal and the current Sentencing Advisory Panel. Created by statute the Council and the Panel are independent non-departmental public bodies sponsored by the Home Office and the Department for Constitutional Affairs. They are independent from Parliament and the Executive in relation to the work they do. Both the Council and the Panel are responsible for promoting consistency and transparency in sentencing. They work together to research, consult and publish guidelines for the courts on how to apply the law with regard to sentencing and in promoting clear and effective sentencing.

The English Sentencing Guidelines Council has rule making powers and in that respect its role is different to that of the NSW, Victorian and Scottish sentencing bodies. The Sentencing Guidelines Council is judicially led and predominately constituted by sentencers which perhaps reflects this difference in its role. As the Chief Justice, Lord Woolf, observed:

What I hope the Council will do is to assist in taking questions as to the levels of sentencing out of the political arena.<sup>64</sup>

The Council is responsible for framing guidelines relating to sentencing offenders which may be general in or limited in nature and in the framing of guidelines on the allocation of criminal matters between the magistrates courts and Crown courts. There are currently 12 members of the Sentencing Guidelines Council, of whom eight are judicial members,

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<sup>62</sup> See for example *R v. Clark* (1982) 4 Cr App Rep (S) 197

<sup>63</sup> *R v McInerney and Keating* [2003] 2 Cr.App.R.(S) 39

<sup>64</sup> Lord Woolf, 'A New Approach to Sentencing' (2003) 15(3) *Judicial Officers Bulletin* 17.

representing every tier of Court. The four non-judicial members are to have experience in one of the following areas:

- Policing;
- Criminal prosecution (the DPP is a member);
- Criminal defence; and
- Promotion of the welfare of victims of crime.

Council members serve in a personal capacity.

There are three mechanisms which trigger the consideration of whether to issue or review a guideline:<sup>65</sup>

- Where a proposal to frame a sentencing guideline is received from the Secretary of State;
- Where a proposal to frame a sentencing guideline is received from the Sentencing Advisory Panel; and
- On the Council's own motion.

Regardless of the mechanism by which the Council comes to decide issuing or revising a guideline, the Council must have regard to the views communicated to it by the Panel.<sup>66</sup> To enable the Panel an opportunity to communicate its views, the Council must notify the Panel when it decides to frame or revise any sentencing guidelines.<sup>67</sup>

Where the Council prepares or revises sentencing guidelines it must publish them in draft form, consult with the Secretary of State, and consult with other persons or bodies as directed by the Lord Chancellor. It may then, after making any appropriate amendments, issue the guidelines as “definitive guidelines”.<sup>68</sup> Every court is under a duty to “have regard to” definitive guidelines in sentencing an offender, where relevant to an offender’s case.<sup>69</sup> As the Lord Chief Justice said in its recent joint Annual Report 2004/2005:

It is important to note that while the guidelines have to be taken into account by sentencers and therefore will strongly influence their decisions, they do not direct they simply guide.<sup>70</sup>

It has been said that the English guidelines provide a bridge between the decisions of Parliament and those of the Courts, with Parliament creating the framework in which sentencing takes place by setting maximum sentences for different offences and by creating different offence categories.<sup>71</sup>

The membership of the Panel is more diverse than that of the Sentencing Guidelines Council. It is chaired by Professor Martin Wasik and has fourteen members including judges, academics, criminal justice practitioners and others from outside the criminal justice system.

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<sup>65</sup> Sections 170(2) and (3); s 170(4) of the *Criminal Justice Act 2003* (UK).

<sup>66</sup> Section 170(5)(e) of the *Criminal Justice Act 2003* (UK).

<sup>67</sup> Section 171(1) of the *Criminal Justice Act 2003* (UK).

<sup>68</sup> Section 170(8) and (9) of the *Criminal Justice Act 2003* (UK).

<sup>69</sup> Section 172(1) of the *Criminal Justice Act 2003* (UK).

<sup>70</sup> Sentencing Guidelines Council and Sentencing Advisory Panel, joint Annual Report 2004/2005 at 4.

<sup>71</sup> Sentencing Guidelines Council and Sentencing Advisory Panel, joint Annual Report 2004/2005 at 7.

The Lord Chancellor in consultation with the Secretary of State and the Lord Chief Justice has appointed them all.

The functions of the Panel are broader than that of the Sentencing Guidelines Council. The Panel is an independent body responsible for encouraging consistency in sentencing throughout the courts of England and Wales. The Panel also commissions its own objective research and reports annually to both the Home Office and the Department for Constitutional Affairs.

It is interesting to note that the Sentencing Guidelines the Council has been proactive. It has perceived itself as having a significant opportunity to provide guidelines in relation to new offences and new sentences before the courts start to take use of them. In publishing guidelines it has also provided advice on new sentences e.g. community orders and suspended sentences introduced under the *Criminal Justice Act 2003* which came into effect in April 2005. Such guidelines have been in advance of Court of Appeal decisions in relation to such and have been issued to promote a consistent approach by sentencers. Two points maybe made, firstly that consistency has been received in the sense of approach and not results. Secondly, it perhaps reflects a continuance of the approach of the English Court of Appeal reflected as early as 1982 in *R v Clarke*,<sup>72</sup> a case concerned with the introduction of suspended sentences by new legislation. The Court did not feel that it was necessary for it to acquire experience of the new legislation before issuing a guideline, a view perhaps somewhat different to that adopted by the Western Australian Supreme Court in *GP*<sup>73</sup> and by the NSW Court of Criminal Appeal in *Jurisc*<sup>74</sup> and *Attorney General Application No 2 of 2002*.<sup>75</sup> Its approach reflected a view that a guideline can always be “revised” in the light of experience in its implementation. As Lord Woolf commented the guidelines issued by the Council represent a first step in what he suspects to become a “comprehensive set of sentencing guidelines to cover the whole of criminal law.”<sup>76</sup>

### **The United States Sentencing Commission**

The United States Sentencing Commission is a federal sentencing commission. In addition, the United States has some 24 state based sentencing commissions and councils.<sup>77</sup> In the United States one way legislatures have addressed the perceived problem of too much judicial discretion by sometimes creating Sentencing Commissions armed with delegated authority to make more uniform judicial exercise of the sentencing discretion. A second way of addressing too much sentencing discretion is by directly limiting the use by judges (or by a Commission) of particular factors in sentencing either by specifying how a particular factor will affect the sentence imposed or by specifying how a Commission should use a particular factor when writing up a guideline.<sup>78</sup>

Some States have voluntary guideline systems in which judges are required to perform guideline calculations but are not required to sentence in accordance with the result. Other

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<sup>72</sup> (1982) 4 Cr App Rep (S) 197

<sup>73</sup> (1997) 93 A Crim R 351

<sup>74</sup> (1998) 45 NSWLR 209

<sup>75</sup> (2002) 137 A Crim R 196

<sup>76</sup> 2004-2005 Joint Annual Report of the Sentencing Guidelines Council and Sentencing Advisory Panel at 4.

<sup>77</sup> There are currently 24 members of the National Association of State Sentencing Commissions. The list of members can be viewed through the United States Sentencing Commission’s website:

[www.ussc.gov/states/nascaddr.htm](http://www.ussc.gov/states/nascaddr.htm)

<sup>78</sup> *Apprendi v New Jersey* 530 US 466 per Breyer J (dissenting) at 2.

States have voluntary guidelines in which judges need not apply the rules at all.<sup>79</sup> Sentencing Commissions are usually appointed by relevant legislatures to draw up “numerical” guidelines for determinative sentencing. Composition of such Commissions vary, as do the functions. Members are typically appointed by the Executive.

Like the Sentencing Guidelines Council in the UK, the United States Sentencing Commission has rule-making powers. The Commission was formed in 1984 by the *Sentencing Reform Act 1984* and is an independent agency within the judicial branch of government. Its main purposes are to:

- Establish sentencing policies and practices (including sentencing guidelines) for federal courts. This includes evaluating the effect of sentencing guidelines;
- Advise Congress and the Executive in developing effective and efficient crime policy. This includes recommending appropriate modifications of law and procedure;
- Collect, analyse and distribute information on federal crime and sentencing. This includes establishing a research and development program on sentencing issues; and
- Serve as an information resource for Congress, the Executive branch, the courts, criminal justice practitioners, the academic community and the public.<sup>80</sup>

One of the Commissions main tasks is to publish sentencing guidelines which are designed to:

- Incorporate the purposes of sentencing;
- Provide certainty and fairness in sentencing by avoiding unwarranted disparity between offenders with similar characteristics convicted of similar criminal conduct. The guidelines must, however, permit judicial flexibility and are not binding;
- Reflect, to the extent practicable, advancements in the knowledge of human behaviour as it relates to the criminal process;
- The guidelines produced are numerical in nature.<sup>81</sup>

The membership of the United States Sentencing Commission reflects its rule-making nature. Initially it was judge dominated reflecting a body of experts i.e. sentencers were needed to draft appropriate guidelines. Congress recognised that guideline rules would require monitoring and modification over time and that sentencing rules guidelines required expertise and some insulation from politics hence the reference to political parties.

It consists of seven voting members each appointed by the President for six-year terms serving in a personal capacity. Three of the Commissioners may be federal judges and no more than four may belong to the same political party. Initially the statute provided that at least three of the members be judges but in 2003 this was changed so that no more than three could be judges and, more significantly, abolished the requirement that any member be a judge. In *Mistretta v US*<sup>82</sup> (a lead judgment on judges performing extra judicial duties) the United States Supreme Court rejected a challenge constitutionally to the *Sentencing Reform Act* establishing the Commission on the basis of improper legislature delegation and violation

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<sup>79</sup> Bowman F, ‘Sentencing: What’s at Stake for the States? The Failure of the Federal Sentencing Guidelines: A Structural Analysis’ (2005) 105 *Columbian Law Review* 1315.

<sup>80</sup> Précis of “An overview of the United States Sentencing Commission” from USSC website.

<sup>81</sup> Précis of “An overview of the United States Sentencing Commission” from USSC website

<sup>82</sup> (1998) 488 US 361.

of the separation of powers doctrine and upholding a judge's right to serve as a member of the Commission. It did so upon the basis that the extra judicial assignment undertaken did not offend the integrity of the judicial branch. I would note in passing this approach in *Mistretta* was inter alia considered by the High Court in *Grollo v Palmer*,<sup>83</sup> *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*<sup>84</sup> (cases that may have relevance to the question of whether sentencing guidelines should be fixed by non judicial bodies including member judges exercising delegated powers rather than by court judgments). I would add, the Attorney General is an ex officio member as is the Chair of the US Parole Commission. Members are subject to removal by the President on statutory grounds. There is no institutional representative of the defence bar.

Some history leading up to the establishment of the United States Sentencing Commission is worthy of note to illustrate that different cultural factors, traditions, and circumstances impacted upon its establishment.

Before the guideline federal sentences were both "indeterminate" and very heavily dependent on the almost unfettered discretion of the trial, federal, district court judges.

The drive to a determinate system (determinate in "real time" sentencing) was, inter alia, directing concerns that the indeterminate system left a great deal of unqualified, unfettered discretion to individual judges to sentence defendants to prison terms falling within the statutory range and a need to address unwarranted disparity in sentencing between similarly situated offenders committing the same offence and having similar criminal histories. This in turn led to inconsistency. The *Sentencing Reform Act* reflected a move towards determinate sentencing. The guidelines are what in Australia we would refer to as quantitative or numerical not qualitative as in principle guidelines.

As I have said in 1984 the United States Sentencing Commission was established as an independent body within the Judicial Branch. It was driven in part by the view that previously unfettered sentencing discretion and the lack of uniformity inherent in any system of pure discretion afforded to federal judges needed to be structured. The Commission was given the power to promulgate binding sentencing guidelines which would establish a range of determinate sentences for all categories of federal offences and defendants according to specific and detailed factors. The federal guidelines are not statutes. The rules they set forth are administrative in nature. The rules do not create a new set of legislatively determined sentences and do not establish minimum penalties for individual crimes. The legislation made all sentences technically determinable and guidelines binding on the Courts. The legislation also:

- authorised limited appellant review of sentence;
- promulgated determinative sentence guidelines with obligations to review and revise periodically;
- provided for the Commission to make recommendations to Congress whether grades of maximum penalties should be modified;
- provided for powers of wide consultation; and
- education of judges in the techniques of sentencing (a role not dissimilar to the NSW Judicial Commission) i.e. to educate judicial officers on sentencing techniques;

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<sup>83</sup> (1995) 184 CLR 348.

<sup>84</sup> (1996) 189 CLR 1.

- annual reporting to Congress analysing guideline operation and their evaluation
- recommending to Congress appropriate modifications of substantive criminal case and sentencing procedures;
- establishing a research and development program on sentencing issues.

Other innovations under the guidelines system involved abolition of parole.

The binding or mandatory aspect of the guidelines was recently in 2005 held to be unconstitutional as, inter alia, they infringed the constitutional protection of trial by jury and were read down by the Supreme Court holding them to be effectively advisory only.<sup>85</sup> Under the approach of the Court federal courts, while not bound to follow the guidelines, must consult them and take them into account when sentencing (a position now somewhat similar to that in England, NSW and Victoria). The Court reaffirmed the constitutionality of the Commission (see *Mistretta*) and maintained all of the Commissions other statutory obligations.

In some ways the Commission may be seen to create a three-way relationship between the judiciary, the legislative and the executive in the USA. Achieving consistency in approach to sentencing and creating greater uniformity among judges, was found not to be served by the leaving of a great deal of unqualified and unguided discretion to the judiciary. On such analysis it might be thought that part of the demand for guidelines was based upon cultural and legal problems arising in particular under the indeterminable system with very restricted rights of appeal. Unlike Australia it might be thought that the common law in America or the appellate system involving sentence appeals had played a limited role in determining sentencing principles or laying down a principled system of sentences. Indeed this point (and the point as to differences) is made in the Halliday Report<sup>86</sup> when Halliday set forth the reasoning why there was no “principle transportable model for guidelines from the USA that would lend themselves to the prevailing circumstances in England and Wales and to secure the discrete outcomes.”

What might also be said is that there are no necessary transportable models for sentencing councils in Australia as and between the various States or even federally. Different factors not merely cultural, traditional and circumstances are involved in part. So are issues of different needs social, economic and political factors as will the existence or otherwise of bodies or agencies participating in sentencing issue concerns. One size does not necessarily fit all!

*Cui bono* from sentencing councils or similar bodies? Perhaps this paper has thrown some light on the subject.

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<sup>85</sup> *United States v Booker* 125. S. Ct. 738 (2005)

<sup>86</sup> Halliday (2001) "*Making Punishment Work: Report of a Review of the sentencing Framework for England and Wales*" London: The Home Office at 56