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## **Institutional Mechanisms for Incorporating the Public into the Development of Sentencing Policy**

**Professor Neil Hutton**

### **Sentencing Policy**

The development of sentencing policy has become problematic over the last thirty years or so in most western democracies. There are a number of different but related aspects to this. There is a perception that the public have steadily diminishing confidence in judges as sentencers. Survey evidence from a number of jurisdictions suggests that the public see judges as out of touch and their sentencing as overly lenient. Over the same period, prison populations in the same jurisdictions have risen steadily. In the US this has sometimes been deliberately engineered by politicians through legislation and the manipulation of sentencing guidelines, but in other jurisdictions, for example in the UK, sentencing appears to have become more punitive because judges, exercising their discretion, have sent more people to prison for longer. Professor Sir Anthony Bottoms (1995) has coined the phrase “populist punitiveness” to characterise this transformation. Law and order is at the top of the political agenda and political parties feel obliged to “talk tough” for electoral purposes.

There is, however, another side to this story. Research using techniques such as focus groups and deliberative polling, shows that the public are not as punitive as survey data suggests. When people are given a case to deal with, provided with background information about criminal justice and allowed to engage in dialogue with each other, they are less punitive and more constructive and rational in their approach to sentencing (Hutton 2005). Under the conditions of a deliberative poll: accurate information, open debate and expert facilitation, it appears to be possible to stimulate rational debate about penal policy amongst the public. The trouble is it is not possible to reproduce these conditions at a national level. At this level, debate takes place through the mass media, the volume of information available is overwhelming and perplexing and political representatives have to try to win our votes. Indermauer and Hough (2002) have made a number of suggestions as to how we can try to change

public attitudes largely through the provision and dissemination of information about sentencing and punishment to improve public knowledge and understanding. These are worthy aims, but the issue is not just about changing attitudes or providing better information, it is about the wider problem of the growing disenchantment with democratic politics.

### **Political Disenchantment**

Penal policy is only a small part of the political field, although one to which politicians have become hyper-sensitive. Concerns about the decline in public engagement in politics goes beyond penal issues and encompasses all areas of policy. Stoker (2006) argues that people have become cynical and disillusioned with politics. Mass representative democracy has been one of the greatest achievements of the last century. It is now perceived to be failing. Part of the reason for this, according to Stoker, is that people have lost sight of some of the main characteristics of politics. It rarely delivers what it promises, it is untidy and it is never final. The processes of compromise and reconciliation that characterise political activity mean that it is “designed to disappoint”. The values of the market economy and the fusing of reporting and commentary in the media have led to unrealistic expectations being placed on politics. Politics is represented as constantly failing to deliver and the result is a culture of cynicism. Penal policy is almost a paradigmatic example of this. Although sentencing policy can at best have a tiny impact on crime, the assumption underpinning most public discourse is that tougher punishment is the answer to the problem of crime. It is perhaps not surprising that cynicism develops as impossible targets are not achieved.

Stoker’s solution to disenchantment is to develop a “politics for amateurs”. He argues that people want their voices to be heard and want to influence, but that they do not want to necessarily become more actively engaged or involved in the political process. He is therefore critical of those who want to develop a more deliberative politics and focuses instead on proposals to revive representative democracy. These proposals go well beyond the scope of this chapter. However, following Stoker’s manifesto, I argue in what follows that the development of a new generation of sentencing institutions offers at least some potential for the development of a more

rational approach to penal policy. These institutions can help the judiciary to explain their decisions and thus improve accountability, can provide politicians with some shelter from the emotionally charged media discourses of crime and punishment, can enable the judiciary to participate in policy making alongside other criminal justice experts and knowledgeable members of the public, can provide more effective information about sentencing and can engage with the general public more directly.

### **Multi-Level Governance**

Over the last twenty five years or so, governments across the English speaking world have developed new approaches to the governance of public affairs. There has been a shift away from a directive and paternalistic State to the vision of a State which enables public and private organisations to collaborate (Bevir 2005). This can be seen in all areas of public policy, including health and education.

In criminal justice, there has been a significant shift of responsibility from the State to various agencies and the development of partnerships between public organisations and the voluntary sector. This has been seen in the fields of community policing (Rosenbaum 1994), crime prevention (Crawford 1999), community safety, and restorative justice (Bazemore 2000, Braithwaite 2002, Matthews and Pitts 2001). Garland (2001) has argued that this characterises an attempt by State institutions to shift the responsibility for crime control away from conventional state institutions and at least partly on to communities. Governments realised that high levels of crime were here to stay and that there was little that state institutions, “issuing sovereign commands to obedient subjects” (Garland 2001, p205) could do to change this. Effective government required harnessing the power, knowledge, and organisational capacity of communities. This applied not just to criminal justice but to almost all areas of government activity, such as education, health care, welfare and economic development. In fact, the shift of responsibility to communities occurred relatively recently in the field of crime control and even more recently with respect to the sub-field of sentencing.

The development of sentencing institutions which sit somewhere between legislatures and the courts began in the United States in the early 1980s with the development of state sentencing commissions. England and Wales introduced a Sentencing Advisory Panel in 1999 and a Sentencing Guidelines Council in 2003. In the early years of the 21<sup>st</sup> century, other western jurisdictions have introduced or proposed a range of sentencing institutions which although distinctive, share common features.

This chapter reviews the development of institutions which incorporate the public in the development of sentencing policy. I only deal with a selected range of western English-speaking jurisdictions, partly because they share certain features in common and partly because of my own ignorance of continental European and other jurisdictions<sup>1</sup>. The chapter concentrates on the various forms of sentencing commission and council that have been adopted (or proposed in some cases) in England and Wales, Scotland, Australia, New Zealand, South Africa and the United States which have been reviewed in the preceding chapters of this volume. In what follows, three main issues are addressed: The first concerns the political legitimacy of sentencing. How can sentencing institutions contribute to the distribution of authority and sharing of power over sentencing policy amongst legislators, executives, judges and other criminal justice agencies? The second, related issue concerns the incorporation of the public into the development of sentencing policy. To what extent is sentencing a “legal” decision and how, if at all, can sentencing institutions be used to enable the public to contribute to the development of sentencing policy? In particular how, if at all, can sentencing institutions confront the challenges posed by the dramatic politicisation of crime and punishment that has developed over the last thirty years? The third issue concerns the contribution which sentencing institutions can make to the development of a rational and efficient approach to sentencing policy.

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<sup>1</sup> For details of the sentencing commission work in Belgium see van zyl Smit (2004). For a discussion in English of the development of sentencing guidance in the Netherlands, largely through the prosecution service, see Terblanche (2003)

## **The Distribution of Authority over Sentencing**

What exactly is sentencing policy, where is it to be found and who has the authority to make sentencing policy? These are large political questions which concern the relationships between legislatures, judges, sentencing commissions/councils and the public more broadly. The term “sentencing policy” suggests a more coherent project than is usually found in practice. Sentencing policy may be found in the following sorts of places: legislation, sentencing guidelines, guideline judgements from a court, reported sentencing decisions of first instance cases, decisions of appeal courts, sentencing textbooks and encyclopaedias, research studies of sentencing practices, decisions of parole boards, political speeches and so on. Sentencing policy in any jurisdiction is rarely coherent and is in a constant state of flux.

Sentencing decisions do not just take place in courts. Many actors play a part in sentencing including legislators, prosecutors, judges, parole board members and officials from a range of executive agencies such as prisons, probation and social work (Chanenson, 2005). There is a common misconception that judges have sole authority over sentencing decisions; this is never the case even in those jurisdictions where judges exercise very wide discretion. Sentencing always takes place within a legally authorised structure. Judges make the sentencing decision within the regulatory legal framework although in many jurisdictions, prosecutors, parole officials or others will have made decisions about a case prior to the sentencing decision of the judge. Judges exercise varying degrees of discretion. At one extreme, the US Federal Guidelines permit judges virtually no discretion, at the other, a jurisdiction like Scotland, with no tradition of sentencing reform, allows judges very wide discretion. In between these extremes, there exists considerable variation. All US state guidelines systems (with the single exception of the federal Sentencing Guidelines of the United States Sentencing Commission) leave varying degrees of space for the exercise of discretion by judges. The development of sentencing policy thus involves multiple actors and takes place in many settings. In the language of some political scientists, these actors might be described as the stakeholders in sentencing (Bevir 2005).

There is also diversity in the distribution of authority over sentencing (Reitz 1998). Not only is there the widespread misunderstanding that judges are the only actors who have authority over sentencing decisions but also there is the view that judges are the only actors who should have this authority (the latter is a view often held by judges themselves).

The Sentencing Report from the Review of the Model Penal Code in the United States provides one example of how authority over sentencing has been distributed in one jurisdiction (Reitz 1998). Under the 1962 Penal Code, the legislation provided for a maximum penalty of 10 years for a second degree felony such as aggravated assault. The judge could select a sentence of between one and three years which was a minimum term of imprisonment, that is, the legislature fixed the first twelve months of the sentence, the court could fix up to 24 months on top of this. Parole Boards could decide that an offender sentenced to 12 months could serve 10 years in prison. Prison officials could award between 20-40 per cent good time credits. Post-release terms of supervision of between 1-5 years could be set by the Parole Board. Revocation of parole, under the non-reviewable authority of the Parole Board, could result in further incarceration of up to 5 years. This demonstrates that authority over the sentence actually served is distributed amongst different institutions. In considering how the public have been or might be incorporated into sentencing decisions it is therefore important to bear in mind the framework of authority over sentencing, how any public involvement fits into this framework and what impact on sentencing outcomes public incorporation might have. However, ultimately, legislatures can have the final say over sentencing policy and can pass legislation which judges are required to implement.

### **Strengths and weaknesses of the distribution of authority**

One main advantage of a wide distribution of authority over sentencing is that there are a number of checks on the power of any single institution. This may be a good thing where the liberty of a citizen is being removed or curtailed. On the other hand, the involvement of a multiplicity of agencies can lead to a lack of clarity, consistency and accountability. There is plenty of evidence that the public is very ill informed about sentencing and the “truth in sentencing” movement is further evidence of the

demand for a simpler and more straightforward relationship between the decision of a judge and the length of time an offender will serve in custody. Despite reforms of sentencing conducted by sentencing commissions in the United States, sentencing remains in many jurisdictions a complex process with authority vested in a range of institutions. The public debate in England over the sentence passed on a violent sex offender, Craig Sweeney, is an example of the confusion which can exist, even in a case where, at least to a lawyer, the decision is both clear and defensible. The judge passed a life sentence on the offender who had a previous serious related conviction. The judge had to indicate the earliest point at which this life sentence could be reviewed by the Parole Board. After considering the seriousness of the offence and the personal circumstances of the offender, the judge indicated a term and then deducted one-third in recognition of the plea of guilty which had been tendered. This left the minimum time to be served before review at five years. This was widely misreported as the maximum period of time the offender would serve and the parents of the victim were given wide media coverage expressing their outrage at this (misunderstood) sentence<sup>2</sup>.

### **Symbolic Function of Sentencing**

Another advantage of the distribution of authority over sentencing is that it is made easier for sentencing to serve a range of often mutually contradictory purposes or functions. One of these is the symbolic function of reproducing the boundaries of moral tolerance in a society (Durkheim 1933). It may be socially useful to have a severe maximum penalty enacted in legislation for a violent offence. It may also be useful for judges to impose a severe sentence in court. This allows the public expression of outrage at the commission of a serious offence (Pettit 2002). On the other hand, it may also be socially useful and desirable that courts very seldom use maximum penalties and usually sentence well beneath that maximum and also useful that legislation provides that prisoners can be released into the community having served a particular proportion of the custodial sentence imposed in court. Where the authority of sentencing is distributed over a number of different institutions, it is easier to manage these contradictions. However, where certainty of sentencing is

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<sup>2</sup> See Home Office (2006) Making Sentencing Clearer.



given priority, and where there is a public demand that authority over the administration of the sentence become more centralised this becomes more difficult. Where authority is concentrated in fewer authorities, for example with the sentencing judge or with a legislature, there will be a tendency for sentencing to become more severe and for prison populations to rise because the public demands for severity are perceived to over-ride contradictory demands for more rational administration of punishment or for the exercise of parsimony or restraint in the allocation of punishment.

Sentencing institutions enable authority over sentencing to be more widely distributed between the different branches of government and the other stakeholders involved in the institution. At the same time, the institution can also help to resolve potential confusion because it offers a more effective means of public communication about sentencing and penal policy than that which is available to the courts or the political representatives.

### **The Relation between Sentencing Institutions and Legislatures**

The conventional democratic expression of the “public voice” in sentencing policy has been heard through the legislature. In the United States and in many European jurisdictions, the executive has to work hard to persuade the legislative authority to pass a Bill. In England and Wales, the executive typically has an easier task (Tonry 2003). Legislation provides powers for sentencers and sentencing commissions/councils and sets outer limits for their use, for example, the setting of statutory maximum penalties, mandatory minimum sentences and “three strikes” provisions. However within these limits sentencing practice has been characterised by the exercise of considerable discretion.

Typically governments respond to a perceived public demand for changes in sentencing by introducing legislation which is debated and passed through the legislature. This approach to the regulation of sentencing has a number of weaknesses. Where mandatory minimum penalties are imposed, this can diminish the authority of judges, sentencing commissions and parole boards. Legislatures have neither the time, the attention span nor the expertise to deliver any fine tuning of punishments or

sentencing systems. Politicians are more vulnerable to perceived shifts in public opinion, particularly following a shocking case. All of these factors can generate sentencing policy which is inconsistent, excessively severe, unpredictable and disconnected from any evidence about its effects. The introduction of sentencing institutions can provide relief from the immediate demands of electoral politics.

In general, United States Commissions tend to have a significant degree of authority over the development of sentencing guidelines although there is considerable variation<sup>3</sup>. The Minnesota Commission (the first established in 1980) began with the assumption that the guidelines produced by the commission would become effective unless the legislature voted otherwise, although in later years the legislature took back some of this delegated power (see Frase, this volume). By contrast, in Washington State, the legislature has dominated the processes of revising guidelines (Frase 2005) (Barkow, 2005).

The Sentencing Guidelines Council in England and Wales has the authority to produce guidelines which do not have to be ratified by parliament. The proposed sentencing councils in New Zealand and South Africa would have the power to implement guidelines. In New Zealand, the legislature could either accept or reject the comprehensive set of guidelines but would not have the power to change individual guidelines. In South Africa, the key proposals recommend that “the different arms of government enter into a new partnership” (SALC, 2000, p xxi). The proposed sentencing council will publish sentencing guidelines in the Government Gazette, but they would not be legislated through Parliament (see Terblanche this volume). The Australian councils do not have powers to make guidelines nor does the proposed Advisory Panel on Sentencing in Scotland, although this body has the power to propose guidelines to the Appeal Court. In these latter jurisdictions the power to develop guidelines, if it exists, resides with the judiciary.

There is considerable variation in the power over sentencing policy granted to sentencing institutions by legislatures. This can best be explained by local cultural, political and social conditions. The “independence” of a sentencing institution from

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<sup>3</sup> The recent cases of *Blakeley* and *Booker* in the US have challenged the legality of sentencing guidelines. For a recent overview of this see Berman (2005).

its political masters is rarely absolute. A representative from the executive, with observer status, attends the Sentencing Guidelines Council for England and Wales, which is otherwise a judicial body with considerable political independence. This practice has been recommended in the proposals for a New Zealand Sentencing Council and also in the recommendations for an Advisory Panel on Sentencing in Scotland (APSS). The stated aim of this recommendation from the Sentencing Commission for Scotland was “to facilitate communication between the executive and the APSS”. The proposed South African Council would not include a representative from the executive, but the Council would be obliged to consult with the executive.

Barkow (2005) has argued that it is useful for independent sentencing institutions to have good lines of communication with the executive. There would be little point in a commission producing proposals which were so politically controversial that they stood no chance of being acceptable to the executive. Barkow reminds us that ultimately the executive could pass legislation which could nullify politically unacceptable sentencing guidelines. It therefore makes sense pragmatically, that an independent commission should have good lines of communication with the executive. At the same time the independence of the institution allows a range of parties to participate in the development of sentencing policy.

### **Public Participation in Sentencing Institutions**

The demand for increased public participation in the development of sentencing policy comes at least in part from a perception of public dissatisfaction with existing policy.

### **Public Opinion and Sentencing Policy**

The last fifteen years have seen sharp rises in prison populations across many if not all western jurisdictions. The “populist punitiveness” thesis (Bottoms 1995) attempts to explain this phenomenon in terms of the response of politicians to perceived popular demands for increased penal severity as reflected in survey research and as represented in tabloid headlines. Law and order has risen to the top of the political agenda and political parties have tried to ensure that they cannot be portrayed by their

rivals as being “soft” on crime. This has been particularly marked in majoritarian democracies such as the United States and the United Kingdom (Green 2006) where law and order has become a major focus of political debate between two adversarial political parties. There has been considerable debate about how the methodologies chosen to measure public opinion and attitudes can themselves influence what they are supposed to be measuring (Hutton 2005). An approach which combines a range of methods is likely to provide the most accurate representation of public opinion (Green 2006). Recent research into public knowledge and attitudes to punishment and sentencing has cast doubt on the argument that the public is becoming ever more punitive. The use of focus groups and deliberative polling methodologies to gather information about public attitudes shows that when provided with information and given an opportunity to engage in dialogue with each other and with experts, peoples’ views on punishment are more moderate and more rational than survey data suggest (Roberts and Hough 2002; Matthews, 2005). There is also support for this argument from a variety of recent public consultation exercises conducted in the United Kingdom, such as the Halliday Report (Home Office 2001), the Coulsfield Report for the Esmee Fairbairn Foundation Rethinking Crime and Punishment program, research commissioned by the Scottish parliament Justice Committee (Anderson et al 2002) and research commissioned by the Sentencing Advisory Panel in England and Wales into public attitudes to house burglary which informed the guideline judgement issued in 2002 (McInerney and Keating).

The implication from this body of work is that there would be considerable public support, at least in the UK, for a more rational approach to penal policy making. It is also worth noting that alongside the dramatic rises in prison populations, there have simultaneously been more “liberal” penal developments including restorative justice, therapeutic justice and risk/needs assessment (Hutchinson 2006). This provides further evidence for the existence of a public constituency which supports a more rational, evidence based approach to penal policy and practice. The political challenge is to find a means of involving the public in penal policy making in a forum which creates space for rational debate away from the harsh spotlight of tabloid journalism and electoral politics.

Judges recognise the need to take some account of public opinion in their sentencing decision making. They also recognise that the legitimacy of the courts depends on the confidence of the public. In those jurisdictions where judges are not elected, they have been appointed to pass sentence on behalf of the public as a matter of trust. United Kingdom survey research has consistently shown declining confidence in judges and the courts for a number of years (Roberts and Hough 2005), but judges and courts have been slow to address this issue. Of course, judges are not in a good position to do this. Judges cannot respond to media criticism of their decisions in individual cases. Nor does the discourse of individualised sentencing allow judges to talk about consistency and explain how their sentence in a particular case relates to sentencing for similar cases (Hutton 2006).

Politicians appear to pay considerable attention to public opinion as represented in the mass media, with scant regard to whether or not it is an accurate representation of public views. One of the main tasks given to Sentencing Commissions/Councils has been public communication as a means of informing public opinion (Indermauer and Hough 2002). This is explicitly part of the remit of the Victoria Sentencing Advisory Council.

Guideline judgements may have the capacity to improve public confidence and in some jurisdictions, this has been a justification for their introduction but there is little evidence about their impact on public confidence. In England and Wales for example there is no information on the extent to which guidelines are followed because there is no monitoring. However, the ability to explain a sentence by reference to a guideline, whether it adheres to the guideline or departs from the guideline, does offer judges an opportunity to give an account of their sentencing decisions, which is not available where guidelines do not exist.

David Green (2006) makes a number of useful proposals for fostering the conditions to generate public judgment (rather than shallow “public opinion”). These include extending the use of deliberative polling and reforming political and journalistic cultures. Sentencing institutions may have a small role to play in fostering the conditions for public judgement that Green argues are desirable. These institutions are politically independent and are thus to at least some extent sheltered from the

immediate demands of the contemporary political and media world. They also offer the judiciary an institutional opportunity to participate with the public in the debate over sentencing and penal policy, something which their judicial office does not normally permit. These institutions may also be able to perform other functions which will foster more rational public judgment. They may be able to consult the public using deliberative polls or focus groups, they may be able to collect and disseminate information on sentencing patterns, sentencing effectiveness, the use of parole and early release and so on. None of these guarantees a more rational approach to penal policy. As Barkow notes, politicians can always “get tough” if they judge that the electoral climate requires it. However these sentencing institutions at least offer an opportunity for the development of a more rational approach to penal policy.

### **What does public participation mean?**

What sections of the community are included in “the public”? Commissioners are usually appointed by the executive branch and are therefore independent, in so far as they are not directly elected. In the United States, elected representatives are always in a minority and there is always a balance between the two main parties. The membership of most of the US state sentencing commissions (there are 31 commissions Frase 2005) is set out in statute and usually includes judges, prosecutors, defence lawyers, corrections officials, members of the public who may or may not be representatives of victims’ organisations and sometimes legislators. The incorporation of the public into the development of sentencing policy in United States commissions seems now to be entirely uncontroversial, although far from universal. While there is considerable diversity in the details of the powers, remits and budgets of commissions, there appears to be a general acceptance of the need to include representation from the public. This appears to be mostly from those with expertise in some area of criminal justice practice or from members of the public who represent an interest group, very often a victims’ organisation.

In the proposals for the New Zealand Council, there is a clear intention to ensure that sections of the community beyond the judiciary have an important part to play in the development of sentencing policy. Non-judicial members will be in a majority on the Council. The “lay” involvement in the Council; is to come from those with relevant

expertise. Public involvement is not by elected representatives, nor by self-selecting volunteers but by non-judicial experts.

One of the main aims of both the NSW Council and the Victoria Council is to enable wider public views to be taken into account in the development of sentencing policy in the hope that public acceptance, understanding and confidence in sentencing will be improved. It is hoped that this will also contribute to enhanced accountability and transparency in sentencing practice.

The Hon A R Abadee, chair of the NSW Sentencing Council, has argued,

“It is of considerable importance that some body exists to not only gauge informed public opinion but to also participate in its creation.”

(Abadee 2006, p 5)

The reference to *informed* opinion and the role of a sentencing council in its creation are interesting. This suggests that Abadee has a concern about the potential influence of ill-informed public opinion on sentencing policy, and recognises the need for a public institution which has a responsibility for public education about sentencing issues. Both Australian Councils have public representation, and there is a statutory obligation to include representatives of victims organisations.

The Sentencing Guidelines Council in England and Wales is in effect a judicial body with no representation from the public. The Sentencing Advisory Panel, on the other hand, does have significant representation from members of the public with expertise in various aspects of criminal justice. The proposed Advisory Panel on Sentencing for Scotland includes representatives of the public with criminal justice expertise. The South African Council includes representatives from the prosecution and correctional authorities and a “sentencing expert”.

Most sentencing institutions appoint people with expertise and/or experience in criminal justice. Membership of sentencing institutions is rarely drawn from the general public and in this sense is very different from most jury systems.

Why is this? One explanation may be that the development of sentencing policy and/or sentencing guidelines is seen as a complex technical task which requires specific knowledge, skills and expertise. Expertise is seen as more important than “representativeness”. It is important that people have the knowledge, experience and skills to contribute to good quality decision making about sentencing policy. In most institutions, for example in Victoria, members are explicitly appointed as individuals and not as representatives of particular organisations or interests.

For some, this will continue the perceived “democratic deficit” in sentencing. Indemaer (this volume) argues that despite their claims, sentencing institutions do not effectively incorporate public views. In no sense do the public members of these institutions “represent” the wider public. The inclusion of representatives from special interest groups does not resolve this difficulty. Even where the sentencing institution consults the public more widely, there is little evidence that public views expressed in consultation exercises have any significant impact on the development of policy. This is not so much a criticism of sentencing institutions as a broader criticism of the way in which democratic institutions work, or do not work, to involve the public in making decisions about public policy. Stoker (2006) argues that there has been a decline in levels of public participation in politics and that a culture of disillusionment and cynicism has developed. He reviews research evidence which shows that people do not want to become more actively engaged in politics, although they do want to be consulted and have the opportunity to express their views. Stoker’s solution to political cynicism is not to try to engineer a deeper level of participation from the public but rather to try to use political institutions to engage people in a “lighter way” which he describes as “politics for amateurs”. “Amateurs” do things because they are interested or care rather than for financial reward. Amateurs may also be characterised as “unskilled” but there is a difference between amateurs with some levels of skill, knowledge and competence and those who do not have these qualities. In the field of sentencing policy, judges, civil servants and politicians might be characterised as “professionals” but in the residual category of “amateurs” there is a big difference between the skills and competences of an experienced prison governor or senior criminal justice social worker or the director of a criminal justice charity, and someone who works in a shop and has no experience of criminal justice. This is not to say that the views of unskilled amateurs are not relevant or important, just that some



amateurs have different skills to offer the policy making process. Sentencing Institutions tend to be populated with skilled amateurs, with expertise. The practical work of a sentencing institution involves tasks such as digesting large amounts of information, making judgements, contributing to informed debate, reaching compromises with others, etc. Not everyone has these skills but the work of an institution would be very hard if it was populated by people who don't have them. The criteria for appointing lay people, amateurs, to a sentencing institution should concern the capacities required to contribute to good quality decision making in such a body. However sentencing institutions should also enable different sorts of "amateurs" to participate in their work. These institutions should engage with the public using a range of methods including deliberative polling, focus groups and surveys. The Sentencing Advisory Panel in England and Wales already does some work of this nature. Sentencing institutions should also be involved in engagement by providing information, education and training. A good example is the outreach work done in schools and communities by the Victoria Sentencing Council with their "You be the Judge" programme.

The incorporation of the public into the development of sentencing policy is therefore best achieved through the development of a sentencing institution which has a degree of independence from the other branches of government (legislature, executive and judiciary). It should involve both "professionals" and "skilled amateurs" and should also engage more widely with the public using a wide range of methods. Indemauer is probably right to argue that none of the sentencing institutions developed so far have achieved all of these desiderata. However, institutions are products of their political, social and cultural circumstances. Even if one was to set out the ideal arrangements for a sentencing institution, these are unlikely ever to be fully realised in practice.

### **Sentencing Institutions, Judicial Discretion and Public Participation**

While it might be politically desirable to involve the public in the development of sentencing policy, do the public have the necessary skills? Is sentencing a task for legal professionals or do "amateurs" have something to contribute? Before considering these questions, it is useful to focus on the nature of the sentencing

decision itself. What does judicial discretion in sentencing mean and is it incompatible with the provision of sentencing guidelines?

There is a widespread misunderstanding about the extent to which sentencing commission guidelines affect judicial discretion in the United States. In seven states guidelines are voluntary and not subject to appeal, although in some of these jurisdictions judges are required to give reasons for departures. In some of these jurisdictions compliance rates tend to be high (for example, 79 per cent compliance in Virginia). In those states where guidelines are “legally binding”, there remains considerable variation. In practice, in most of these states review by the appeal court is “highly deferential” and even in jurisdictions like Minnesota where a considerable body of substantive appellate case law has developed, judges still retain considerable discretion (Frase 2005). There is also considerable variation amongst commissions over the decisions each system seeks to regulate including parole release, the use of intermediate sanctions (community sanctions), and the revocation of probation or supervised release.

Frase (2005) argues that all commissions share the goals of eliminating unwarranted disparities in sentencing and promoting more rational sentencing policy formation, “decision-making that is at least partially insulated from short term political pressures.” (Frase 2005 p1202). Again, however, the authority of the Commission over sentencing varies. In Minnesota, offenders receive good time credit of up to one third of their guideline prison term, but in many states the sentence reduction for good conduct cannot exceed fifteen per cent.

Despite the many important differences between state guidelines systems, Frase (2005) argues that there are also some pervasive similarities shared by most commissions (which are also, he argues, probably desirable features for any would-be successful sentencing commission). These include: recognition that sentencing must reflect a range of purposes, theories and functions which will change over time; agreement that guidelines need to be developed, implemented, monitored and revised by a permanent, broadly based and independent sentencing commission; extensive use of resource impact assessments; the need to keep guidelines simple; and the value of distributing sentencing authority between various institutions and actors (Reitz 1998).

The New Zealand Law Commission argues that judges should cease to exercise a monopoly over the quantum of punishment. The current system produces what Ashworth has described as a “democratic deficit” (Ashworth 2005, 57). It does not allow for the range of “perspective, expertise and experience that is required for a robust sentencing policy that is acceptable to the community”. It is not desirable that judges are required to be the sole judge of the public and political mood, because it places them in the political spotlight for their decisions in individual cases. In the same vein, the Commission proposes that the Chair of the Sentencing Council should not be a judge because the Chair would be required to promote and defend the policies of the Council and this is not an appropriate function for a judge.

The New Zealand proposals thus recognise that there is a distinction to be drawn between sentencing decisions in individual cases and broad statements of sentencing policy. Judges alone should make the sentencing decisions in individual cases. This is conceived as the independent, impartial exercise of judgment. However this judicial task is to be carried out within a sentencing policy framework which is to be designed by a Council with judicial members but also with members drawn from those with a wider range of relevant experience. Parliament would retain the power to pass legislation governing sentencing, but the fine detail of sentencing policy would be delegated to a body independent from the executive branch, with individual sentencing decisions made by judges within the framework set by the Council.

This chapter began by acknowledging the popular misconception that sentencing is a task performed exclusively by judges with the further assumption that most judges are legally qualified. Leaving aside for a moment the very significant role played by lay judges (magistrates in England to take one example), there is a perception that passing sentence is a “legal” decision. From this perspective, to involve the “public” in this decision making or in the development of the policy which is perceived to underpin the individual sentencing decisions, is to add a distinctive quality to the decision making, a quality that is distinctively non-legal. So one debate concerns the extent to which sentencing is a “legal” decision and to what extent members of the public without a legal qualification or training can legitimately participate in sentencing. This debate tends to assume that lawyers are experts and the public are non-expert.

Being a non-expert is perceived to be a characteristic of the concept of “lay-ness”. However, when one looks at the composition of sentencing commissions and councils, at the members of the public who have been incorporated into the sentencing policy making process, one finds that most of these people are experts though usually not legally qualified experts. They almost always possess considerable expertise either in criminal justice or in a closely related area of public life. In this case the relevant distinction is between legal expertise and other sorts of expertise. The distinction is also between elected representatives, non-legal experts appointed by elected representatives, and legally qualified persons similarly appointed. It is very rare to find the “ordinary” disinterested member of the public being invited to participate in the making of sentencing policy (Barkow and O’Neill 2006, Barkow 2005).

Comment [k1]: I don't get this sentence

### **To what extent is sentencing a “legal” decision?**

All jurisdictions have rules which govern the sentencing decision. In those jurisdictions where there are sentencing guidelines, there are rules which prescribe whether the guidelines are voluntary or prescriptive, whether judges can depart from the guidelines and if they do, under what circumstances. In non-guideline jurisdictions, legislation typically provides sentencers with powers and defines maximum and sometimes minimum penalties and otherwise leaves judges to exercise fairly extensive discretion in sentencing a particular case. Once these rules, of whatever kind, have been observed, Ashworth (2005) identifies four groups of factors which may enter the sentencer’s thought processes when using discretion to make a sentencing decision in a particular case:

1. Views on the facts of the case.
2. Views on the principles of sentencing, (the seriousness of the offence, the relative weight of aggravating and mitigating factors, the aims and effectiveness of different types of sentence).
3. Views on crime and punishment, (the aims of sentencing, the causes of crime, the effects of sentencing).
4. Characteristics of sentencers (age, class, race, gender, religion, political beliefs and so on).

Taking the fourth point first, there is considerable evidence that the views and attitudes which people hold about crime and punishment are related to their social class background, level of education and to a lesser extent, their age. Judges in most jurisdictions come from an educated middle class background and tend to be middle aged or older and to that extent represent a fairly homogeneous group. This is only a problem for those who would argue that judges should somehow be more representative of the community. A counter argument is that judges should be professionals able to distance themselves from their prejudices and make rational and disinterested judgements. This is a question of what makes good quality sentencing decisions.

Moving to the other three points, it is arguable that anyone may have views about these issues. Those with experience of criminal justice may have developed their views from a different knowledge base from those with only second-hand knowledge of the system. Indeed, this expertise may be a valuable contribution to the development of sentencing policy. However the point is that legal training does not provide an objective set of “views” about the aims of punishment or the assessment of seriousness. In other words there is nothing distinctively “legal” about sentencing decisions once the discretionary stage of the decision is reached. This is not to deny that sentencers develop a “professional frame of reference” (Hutton 2006) as part of their working practice which helps to develop a degree of consistency in sentencing. However, this is developed through their professional practice and it does not derive from any more precise manipulation of legal rules or principles. There is no reason why lay persons may not develop similar practices and there is evidence that lay magistrates in England and Scotland do exactly this.

In other words, there is nothing distinctively “legal” about applying views about punishment, sentencing, seriousness and blameworthiness to reach “just” sentencing decisions. There is therefore no reason why lay people should not be able to make sensible sentencing decisions nor to contribute to the formulation of sentencing policy. This does not mean that there are no skills required to do the job. Making sentencing decisions requires balancing the desire for consistency with sensitivity to the facts of each case, and it requires the ability to assess the relevance of large

amounts of information and to make delicate judgements about seriousness, culpability, and the relative weights to be attached to aggravating and mitigating factors. Both legally qualified and lay judges are likely to be assisted in these difficult tasks by the provision of a system of sentencing guidelines which allows discretion to be exercised within a structure which provides an element of consistency. This issue is recognised by the report of the New Zealand Law Commission whose report conceives of sentencing as two separate but related tasks. The production of broad sentencing guidelines is a task for an independent council, in which the public have a role to play alongside judges. The choice of sentence in an individual case is a task for a judge. There is a difference between sentencing in an individual case and the development of an overall sentencing policy.

### **Sentencing Institutions and the Management of Correctional Resources**

In the United States Barkow and O'Neill (2006) have asked why legislators in many state jurisdictions have delegated power to sentencing commissions to make sentencing policy. Delegation is usually done to shift responsibility for a policy area away from the executive in areas where the executive wants to avoid choosing between powerful interest groups. The government can take credit for success and allocate blame for failure to the delegated agency. Garland has argued that this shift of responsibility for criminal justice policy making has been a characteristic of governments in the United Kingdom and the United States over the last thirty years. However Barkow argues that, when it comes to sentencing policy, all the powerful interest groups are on the same side. They all favour tougher punishment. The only groups arguing against this are politically marginal, such as prisoners' groups or liberal intellectuals. Why then is sentencing policy delegated to commissions when the risks of failure are low? One argument is that the executive places a value on expertise and believes that a specialised body with the capacity to collect and analyse large quantities of data and to make detailed and sophisticated policy choices, can provide a more effective policy. Barkow and O'Neill argue that this argument is limited in its explanatory force. Sentencing is not seen by the public as the province of experts and indeed legislators frequently pass sentencing legislation without the benefit of advice from either the general public or experts. When the political climate rewards punitive legislation, why delegate the task? Barkow and O'Neill's research

identifies a range of political and economic factors which help to answer this question. One reason might be to avoid the long-term financial costs of tougher sentencing policies in terms of increased expenditure on prisons and corrections. Commissions can also provide an attractive means of limiting judicial discretion particularly where judges exercise wide discretion. This might also be the case in a jurisdiction where judges retain high status and exercise considerable political power (such as Scotland and Victoria in Australia). Barkow and O'Neill expected to find that commissions would be used less frequently where judges were elected rather than appointed and were therefore likely to be influenced by the same electoral demands that apply to legislators. However, their research found the opposite: a stronger correlation between elected judges and sentencing institutions than between appointed judges and these institutions. This difference, they argue, is likely to be explained by legislative concerns with costs which were the main driving force behind the development of sentencing institutions. As elected judges would be as likely to drive up sentences as elected politicians, resort to a commission may be a way of trying to control costs. It is perhaps no co-incidence that those jurisdictions which either have developed sentencing institutions or have proposed these institutions are those in majoritarian democracies where law and order has begun a major focus of party political contest between two dominant parties<sup>4</sup>. They may represent an attempt by politicians both to deflect attention away from the government and an attempt to seek an alternative institutional approach to sentencing policy which can put a brake on corrections budgets.

**Comment [k2]:** Can this para be divided? It's very long

All US states with permanent sentencing commissions conduct assessments of the impact of guidelines on prison populations. These assessments are made possible by the more predictable nature of guidelines-based sentencing and by the staff and resources available in a state sentencing commission. Only the proposed New Zealand council has followed this approach. The Australian institutions have no formal remit to consider the cost or effectiveness of sentences. The proposed South African Commission has these powers as does the SGC in England and Wales although it is difficult to see how the impact of sentencing guidelines on correctional budgets can

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<sup>4</sup> Cavadino and Dignan (2006) characterise the same jurisdictions as "neo-liberal" in their typology. They argue that neo-liberal states are more punitive and provide some tentative explanations for this. They acknowledge that their analysis shares much in common with that of Downes and Hansen (2006) and Beckett and Western (2001).

be accurately forecast unless there is a comprehensive system of guidelines. United States Commissions routinely model the impact of guidelines, indeed this has arguably been one of the most politically significant functions of these commissions. Similarly, only in the United States is there routine monitoring of adherence or departure from guidelines. No other sentencing institution appears to carry out this function. This is a point worth further discussion. If the introduction of commissions and guidelines is seen as the introduction of managerialism into criminal justice, then it is perhaps notable that the evaluation/monitoring/performance measurement that is a crucial part of most other areas of public sector management has not been transferred to sentencing institutions, at least not outside the United States. This raises the issue of how to measure the effectiveness of sentencing institutions.

### **Effectiveness of Sentencing Institutions**

While from a theoretical perspective there might be good arguments to support the development of sentencing institutions as a means of getting around the problems of populism and political disenchantment to try to develop a more rational approach to penal policy, how would we know whether they were effective? If we continue to measure public attitudes to sentencing and punishment using traditional survey methods, it is unlikely that the development of sentencing institutions will have much impact, at least in the short to medium term (Hutton 2005). Attitudes to sentencing and punishment are complex and have deep roots. They are not likely to be radically changed by a relatively modest institutional change.

Where sentencing institutions are able to develop a comprehensive set of sentencing guidelines and have the resources and political will to monitor adherence to these, as has occurred in some US states, then some measures of impact can be calculated. Analysis of sentencing under the Minnesota Guidelines suggests that the prison population of that state has risen much more slowly than might have been expected were the guidelines not there.

This is not the case for other states, where politicians have been able to exercise their influence to use the guidelines to increase levels of punishment. In other jurisdictions, such as England and Wales, rising prison populations have been



generated by judges sending more people to prison for longer. Sentencing institutions do not have a particularly strong record in generating rational penal policy. Ultimately, the value of sentencing institutions depends more on a belief in the capacity of human societies to develop new institutional ways of doing politics to replace those methods which no longer work. The construction of a new process might be at least as important as the outcome.

## **Conclusion**

This chapter has argued that for those who are concerned about the rising prison populations across western jurisdictions, and who would like to see the development of a more rational sentencing policy, these recently developed and proposed sentencing institutions offer an opportunity. They offer judges a forum in which they can contribute to the development of policy, something for which they have no current institutional arrangements in most jurisdictions. They offer politicians an element of protection from febrile law and order politics, particularly in majoritarian democracies, and a tool to control rising correctional costs. They offer experienced criminal justice practitioners, penal reformers and academics the opportunity to work with the judiciary to develop more rational policies. They offer an opportunity to provide information to the public, to educate the public and to engage with the public in ways which are very difficult for courts and politicians to do by themselves. The problems of public disillusionment with politics and the growth of populist policy making are shared across western jurisdictions and have deep cultural roots. They will not be easily solved. However the increased interest in building new sentencing institutions is evidence that there are at least some grounds for hope that more rational approaches to penal policy can be developed.

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