

# Shaping the sentencing agenda: The role of sentencing councils in policy debate and development

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SENTENCING  
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Queensland Sentencing  
Advisory Council  
*Inform. Engage. Advise.*

# Sentencing advisory councils

- What are they?
- Who are they?
- What they are intended to do?
- What they can do
- What they can't do
- What they have not done.

# What are they?

- Bodies established to provide guidance, advice and information about sentencing to governments, courts and the public.
- Diverse membership: judiciary, victims, community members, academics, prosecution, defence lawyers, corrections personnel, law enforcement, psychologists.
- Statutory, administrative, permanent/temporary.
- Appointed by governments.

# Who are they?

- **USA** 23 Commissions: one federal, 22 state; first established in Minnesota in 1978
- **UK:** Sentencing Advisory Panel (1988–2010); Sentencing Guidelines Council (2003–2010), Sentencing Council (2010 +)
- **AUSTRALIA:** New South Wales (2003), Victoria, (2004) Queensland (2010–2012; 2016+), Tasmania (2010), South Australia (2012)
- **SOUTH AFRICA:** (2000) (proposed)
- **NEW ZEALAND:** (2007) (never operational)
- **SCOTLAND** (2003–2006); (2015+)
- **IRELAND:** Proposed 2013; 2017 (private members bill).

# What are they intended to do?

- Advise governments
- Conduct research generally
- Issue or advise on guidelines or standard non-parole periods
- Gauge public opinion
- Educate the public
- Collect and analyse statistics
- Consult with government, the public and interested parties.

# Policy advice and development

- Policy — ‘a course or principle of action adopted or proposed by an organisation or individual’ (OED) [as in ‘government policy’].
- Originally sentencing policy focused on mechanisms designed to structure sentencing discretion and deal with unjustifiable sentencing disparity: guidelines.
- Now policy more broadly: what governments intend to do about crime and sentencing.

# Public confidence and public policy

- The process of decision making is important.
- Political vs legal vs 'expert' or 'deliberative' of decision making.
- Knee-jerk/ad-hoc decisions made under pressure of time or politics.
- Sentencing councils providing considered advice after consultation and deliberation can:
  - delay decisions that should not be made hastily
  - give governments time to consider
  - provide empirical evidence for findings or recommendations
  - recommend a wider range of options
  - legitimate controversial recommendations
  - provide evidence of policy success or failures
  - keep stakeholders engaged.

# Policy inputs

- Councils can only advise on policy — they cannot make or implement it
- Councils' roles:
  - setting the agenda
  - process
  - evidence
  - content
  - communication
  - monitoring and evaluation.



# Setting the agenda

- References from Attorney-General
- Councils with own motion powers can explore a wide range of policy issues that emerge from:
  - their own discussions
  - are raised by the judiciary privately or in judgments
  - public input
  - the media.

# Process

- Councils as ‘policy buffers’ — defusing issues at times of heightened emotion: moral panics, high profile incidents
- ‘Talk now, act later’ — the mirror principle; the fan principle
- Multiple inputs:
  - On councils themselves: diverse membership
  - Consultation process – formal and informal; public and private
  - Policy development process: information papers, consultation papers, draft reports, community panels, online survey.
- Aim to balance professional and public contributions to sentencing and increase legitimacy of policy process and outcomes, increase public confidence in sentencing.

# Evidence: framing the debate

Aim: To provide sound evidence on which to base sentencing policies and practices and increase community confidence in these policies and practices.

Evidence about:

- What the public *actually* thinks about sentencing (cf. media perceptions)
- Sentencing law and practice including sentencing standards
- Purposes of sentencing
- What works, what does not — for example, recidivism studies
- Cost-benefit analyses
- Prison population projections.

The requirement for evidence can improve evidence

# Sentencing information

## Victoria

- Website: over 115,000 sessions (2015–16)
- Snapshots: cited in 55 published decisions of the Higher Courts (2015–16)
- SACStats: 47,000+ page views
  - Changed the nature of the sentencing discourse in Victoria regarding sentencing practices
- 32,000 downloads.

# Policy content: what councils can do

- Provide independent advice on sentencing.
- Attempt to ground sentencing policy in empirical evidence, considered deliberation of options and consideration of a wide range of views.
- VSAC has published over 60 reports; TSAC 8 reports.

VSAC 10<sup>th</sup> anniversary review of legislative responses to council's recommendations (2014).

# Legislative responses

- *Maximum penalties for repeat drink drivers (2005)*: implemented in 2006.
- *Suspended sentences (2006 and 2008)*: phasing out of suspended sentences: introduction of new sentencing orders eg community correction orders (influenced TSAC recommendations on suspended sentences).
- *High risk offenders (2007)* partially implemented.
- *Sentence indication and specified sentencing discounts (2007)* implemented.
- *Maximum penalty for negligently causing serious injury (2007)*: implemented.

# Legislative responses

- *Breaching intervention orders (2008)*: implemented.
- *Driving whilst disqualified or suspended (2009)* partially implemented.
- *Sentencing for offences motivated by hatred or prejudice (2009)* implemented.
- *Maximum penalties for sexual penetration with a child under 16 (2009)* implemented.
- *Sentencing, parole cancellation and confiscation orders (2009)* **recommended no change in law: accepted.**
- *Statutory minimum sentences for gross violence offences (2011)* implemented.

# Legislative responses

- *Baseline sentencing (2012)* partially implemented.
- *Fines and infringement penalties (2014)* partially implemented.
- *Sentencing guidance (2016)* to be partially implemented.



# Influencing judicial sentencing policy

- Guideline judgments: *Boulton* [2014] VSCA 342
  - Role of VSAC in preparing background material, drafting a guideline and making submissions to the Court of Appeal
  - Case has been cited 329 (pro and con)
  - Has resulted in a number of legislative changes.
- Current sentencing practices
  - Detailed analyses of sentencing factors and outcomes.

# Long-term and indirect influences

- Reports are not necessarily written for the short-term
- Research can be re-purposed
- Thorough, comprehensive and credible reports can influence:
  - Public servants and advisers who do not have time to think through complex policy issues
  - Subsequent governments of different political persuasions
  - Subsequent governments of same political persuasion but in changed circumstances
  - Governments in different jurisdictions
  - Academics, law reform bodies, lobby groups, NGOs and media who may influence government policy.

# Communication of policy advice

- Making information available to the public, the courts and governments
- Not dependent on government consent to publish but importance of communication between council and government
- 4,900+ Twitter followers.

# Monitoring and evaluation

- System monitoring: sentencing trends, sentencing outcomes, correctional populations .
- Specific monitoring: provide information about the effects of sentencing reform:
  - What has happened and why:
    - CCO monitoring
    - Contravention of family violence intervention orders
    - Sentence discount for guilty pleas.
- Evaluation: providing information as to whether sentencing reforms have been
  - Effective, efficient and fair.

# What they can't do

- Be truly representative
- Remove the emotional dimensions of sentencing
  - Sentencing is affective as much as it is effective
  - But they can employ 'emotion informed policy' as well as evidence-based policy.
- Defuse all moral panics
  - Governments do not always seek advice and even when they receive it, do not always follow it.
- Contain the effects of egregious, sensational or high profile cases.
- Replace other sources of sentencing advice [ad hoc reviews; LRCs].
- Win elections.

# What they have not done

- Made sentencing a non-political exercise
- Decreased imprisonment rates (but may have slowed increases)
- Undertaken sufficient evaluation studies
- Significantly altered general community views and attitudes about sentencing
- Significantly altered [certain] media depictions of crime and punishment.

# Councils, policy and sentencing

- Sentencing is a political process.
- The separation of powers can provide a series of checks and balances.
- Having an independent, well-resourced and balanced advisory council can provide good advice to the courts, governments and the public in order to:
  - retain or build public confidence in the courts
  - maintain trust in the institutions of sentencing
  - pursue justice even if it cannot ever capture it permanently.

# A testimonial from Chief Judge Michael Rozenes

The council's work has been instrumental in shaping the sentencing landscape in this state and shows the value of having independent, authoritative advice in an area which can be fraught with emotion and is often misunderstood.

The council's advice to government, based on comprehensive research and data analysis, has led to significant changes in the law. The council's involvement has meant that law reform proposals in this area are scrutinised to a much greater extent and provide an opportunity for the public to make an informed contribution to the debate.

In addition, the statistics produced by the council have provided a valuable evidence base for courts in considering current sentencing practices. **In my view, every jurisdiction should have such a body to bring serious expertise to bear as an independent voice on sentencing issues and to promote greater public understanding as to how sentencing works.**





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