



Bridging Gaps, Not Leaping Chasms: Trust, Confidence and Sentencing Councils

ARIE FREIBERG 

ACADEMIC ARTICLE



ABSTRACT

Public confidence is crucial to the effective operation of the criminal justice system as it influences the relationship between the public, victims, offenders and the law. It is said to be a requirement of the legitimacy of judicial authority in democracies and is emblematic of broader issues, such as trust in government and its legitimacy.

In the case of courts generally, and the sentencing of those convicted of offences against the criminal law, in particular, loss of confidence can lead to legislative interventions in the judicial process. These often take the form of restrictions on decision-makers' discretion and an undermining of their independence.

A number of jurisdictions have established sentencing councils; an initiative to promote trust and confidence in sentencing. These are organisations, independent of the courts and governments, whose role it is to develop sentencing guidelines, engage in public education, gauge public opinion, conduct research, provide advice to governments in relation to sentencing policy and to collect and publish statistical information on the operation of the sentencing system.

This article examines the role of sentencing councils in promoting trust and confidence in sentencing, and, by extension, in criminal courts themselves. It concludes that, while they do not provide a complete answer to the trust deficit, they do have the potential, over time, to contribute to that important task.

CORRESPONDING AUTHOR:

Arie Freiberg

Chair of the Sentencing
Advisory Councils of
Victoria and Tasmania, AU

arie.freiberg@monash.edu

KEYWORDS:

sentencing; trust;
confidence; courts;
sentencing councils;
guidance

TO CITE THIS ARTICLE:

Arie Freiberg, 'Bridging Gaps, Not Leaping Chasms: Trust, Confidence and Sentencing Councils' (2021) 12(3) *International Journal for Court Administration* 6. DOI: <https://doi.org/10.36745/ijca.421>

The task of sentencing individuals convicted of offences against the criminal law lies at the heart of the criminal justice system. In most jurisdictions, the majority of criminal cases are resolved by pleas of guilty, often following a less than transparent plea negotiation.¹ Criticisms of sentencing often focus what are perceived to be failures of the criminal justice system to protect the community and to deliver justice to victims of crime. Judges allegedly impose unduly lenient or inconsistent sentences and are condemned for being idiosyncratic, unrepresentative and out of touch with community expectations.

Lack of public confidence in criminal justice institutions such as police, prosecutions, the courts and correctional authorities can have significant consequences for the distribution of powers between legislatures, the courts and the executive. It may result in fewer victims willing to report crimes or testify against offenders. It may motivate legislatures to reduce or remove courts' discretion through the introduction of mandatory or presumptive sentences or strict sentencing guidelines, and result in their abolition of parole authorities or limits on their decision-making powers.² As a phenomenon it may be regarded as part of a wider problem of declining trust in public institutions which has seen the rise of penal populism and assaults on experts, elites and science more generally.³

This article examines the complex and changing relationships between legislatures, courts, victims, offenders, the public and the media in relation to sentencing. It argues that newly established bodies such as sentencing councils or commissions can contribute to building trust and confidence in sentencing by bridging the gap between them through engagement, dialogue, information and participation in ways that traditional organisations have been unable to do.⁴ While the evidence to date does not suggest that their work provides a complete answer to the problem of loss of trust in criminal courts, it is clear that, by providing a forum for the development of sentencing policy which is transparent, authoritative, credible and independent, sentencing councils represent a new and important institutional structure that has the potential to foster cooperation and understanding between all participants in the sentencing enterprise.

¹ A. Flynn and A. Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World*. Palgrave Macmillan, Cham, Switzerland 2018.

² A. Freiberg and K. Gelb, Penal populism, sentencing councils and sentencing policy, in A. Freiberg and K. Gelb (eds.), *Penal Populism, Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney 2008, p. 5; A. Freiberg, L. Bartels, R. Fitzgerald and S. Dodd, Parole, politics and penal policy. *Queensland University of Technology Law Review* 18(1) pp. 191–215.

³ Pratt identifies factors such as the decline of deference to authority or establishment figures, including the courts; the decline in trust in politicians and existing political processes; the effect of globalisation, which has weakened “the authority of sovereign states which makes them seem vulnerable to external organizations and forces”; the growth of “ontological insecurity” or general fear and anxiety, possibly fuelled by the increased crime rates between the 1960s and 1980s; the role of the media in misreporting the true nature and levels of crime and punishment; and finally, the democratisation of news media, which has provided the opportunity for the emotive experiences and opinions of ordinary people to become the framework through which crime and punishment is understood, see J. Pratt, Penal Scandal in New Zealand, in Freiberg and Gelb, *supra* note 2, pp. 31–44.

⁴ N. Hutton, Institutional mechanisms for incorporating the public, in Freiberg and Gelb, *supra* note 2, pp. 205–223.

The concepts of 'trust' and 'confidence' are conceptually and empirically problematic, easier to invoke than define. Trust can be regarded as having confidence in or being able to rely on some quality in a person or thing or the truth of a statement. It may refer to trust in others (interpersonal trust), trust in statements or information or trust in institutions.⁵ The terms 'trust' and 'confidence' are often used interchangeably but it can be argued that one leads to the other.⁶ Trust requires the establishment of 'trust norms' the components of which include performance and competence, establishing relationships of respect and concern, accountability, sharing of knowledge, good communication, transparency and independence.⁷ Trust is slow in the making and rapid in its destruction.

Measuring public trust and confidence is not a simple task.⁸ One method uses surveys which ask participants to self-report their perceptions of their trust in courts generally, about different parts of the criminal justice system or about sentencing specifically.⁹ Numerous surveys of this kind have attempted to measure the levels of public confidence in the criminal justice system, with findings over recent years showing that the public has most confidence in police and less in the courts.¹⁰

Lack of confidence in the courts is often attributed to perceived leniency of sentences.¹¹ Two of the most recent public opinion surveys were conducted by the New South Wales Bureau of Crime Statistics and Research and by Marsh et al on behalf of the United Kingdom Sentencing Council.¹² The New South Wales survey found that:

... the majority of respondents were confident that the CJS respects the rights of the accused (72%) and treats the accused fairly (75%), but were less confident that the CJS brings people to justice (55%), deals with cases promptly (30%) and meets the needs of victims (35%). In addition, two out of every three NSW residents believed that sentences imposed on convicted offenders were too lenient.

⁵ A. Wallace and J. Goodman-Delahunty, *Measuring Trust and Confidence in Courts*. *International Journal for Court Administration* 12(3).

⁶ V. Braithwaite, *Understanding and Managing Trust Norms*. *International Journal for Court Administration* 12(3).

⁷ Ibid.

⁸ Wallace and Goodman-Delahunty, *supra* note 5.

⁹ Roberts et al constructed a sentencing confidence scale which asked respondents whether they considered that the judge is the best person to choose an appropriate sentence for each case, were satisfied with the decisions that the courts make, satisfied that the judge has imposed an appropriate sentence most of the time, was in touch with what ordinary people think or whether considered that the penalties imposed were appropriate and the punishment fits the crime: L. Roberts, C. Spiranovic and D. Indermaur, *A country not divided: A comparison of public punitiveness and confidence in sentencing across Australia*. *Australian and New Zealand Journal of Criminology* 44(3) pp. 370–386.

¹⁰ See eg M. Hough and J.V. Roberts, *Confidence in justice: An international review*. Home Office, London 2004.

¹¹ J.V. Roberts and M. Hough, *Understanding public attitudes to criminal justice*. Open University Press, Maidenhead 2005; K. Gelb, *Predictors of confidence: community views in Victoria*. Melbourne, Sentencing Advisory Council 2011.

¹² E. Moore, *Public confidence in the New South Wales criminal justice system: 2019 update*. New South Wales Bureau of Crime Statistics and Research, Sydney; N. Marsh, E. McKay, C. Pelly and S. Cereda, *Public knowledge of and confidence in the criminal justice system and sentencing*. London, Sentencing Council. Gelb, provides an excellent summary of Australian and overseas studies to 2011, see *supra* note 11.

The United Kingdom survey found that that 70% of respondents thought that sentences were too lenient.¹³

Understanding the factors that affect public confidence in the courts and sentencing is key to developing programs or institutions that can improve it. However, public opinion surveys can be blunt instruments in measuring the community's understanding of, and attitudes towards, the criminal justice system. A growing body of research into public attitudes to sentencing and parole that indicates that the public's views are more complex and nuanced than many broad-based surveys suggest and that their views are often founded on myths and misconceptions.¹⁴

Factors that have been identified include the perceived leniency of the courts, inconsistent sentences, a belief that judges were out of touch with the community, a lack of understanding of how judges come to their decisions, of the factors they take into account, the weight given to those factors, the accessibility of sentencing decisions and their comprehensibility. Public perceptions of many of these factors is influenced by individuals' sources of information, such as the media, both public and social, their experience of the criminal justice system, for example as a victim, a juror or a witness, as well as by socio-demographic status.

Courts themselves have made efforts to build or restore public confidence in their work, in the form of public education campaigns, employing court media liaison officers, issuing press releases and summaries of significant cases or those of high public interest, web sites, podcasts¹⁵ and broadcasting the delivery of judgments.¹⁶ However, courts have limited reach and visibility and might not be regarded as disinterested parties. The media, both legacy and social media, are increasingly partisan, and more driven by commercial imperatives than educational imperatives.

In this environment, the potential contribution of sentencing councils to improving levels of public trust and confidence in courts is receiving increased attention.

WHAT ARE SENTENCING COUNCILS?

Sentencing councils, or sentencing advisory councils, sentencing guidelines councils or commissions, are bodies established either informally or by statute that sit between the legislature, the executive and the judiciary.¹⁷ First established in Minnesota in 1980, there are now 19 sentencing commissions in the United States, the latest created in 2006.¹⁸ In the United Kingdom, a Sentencing Advisory Panel was established in

¹³ Though attitudes were more mixed in the focus group discussions, see Marsh et al, *supra* note 12.

¹⁴ For a summary of Australian research into public views of sentencing and parole see L. Bartels, R. Fitzgerald and A. Freiberg, Public opinion on sentencing and parole in Australia, *Probation Journal* 65(3) pp. 269–284; Sentencing Advisory Council, Victoria, *Public opinion about sentencing: a research overview*. <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Public_Opinion_about_Sentencing_Research_Overview.pdf> [all internet URLs accessed on 8 October 2021].

¹⁵ See eg Gertie's law, a podcast produced by the Supreme Court of Victoria, <<https://www.supremecourt.vic.gov.au/podcast>>.

¹⁶ Gelb, *supra* note 11, p. 1.

¹⁷ Freiberg and Gelb, *supra* note 2, p. 7.

¹⁸ R. Frase and K.L. Mitchell, Sentencing guidelines in the United States, in C. Spohn and P.K. Brennan (eds.), *Handbook on Sentencing Policies and Practices in the 21st Century*, Routledge, New York 2020, pp. 43–67.

1998 which led to the Sentencing Guidelines Council in 2003 and ultimately to the Sentencing Council of England and Wales in 2010.¹⁹ Scotland had a council between 2003 and 2006 which was re-established in 2015.²⁰ Councils have been established in Australia in New South Wales (2003),²¹ Victoria (2004),²² Queensland (2010–12, 2016),²³ Tasmania (2010)²⁴ and South Australia 2012–2019. South Korea's Sentencing Commission was established in 2007²⁵ and in 2019 Ireland created a Judicial Council with a mandate to create sentencing guidelines.²⁶ Uganda established a Sentencing Guidelines Committee in 2013²⁷ while other jurisdictions are considering their introduction.

Councils vary in relation to how members are appointed, their composition, their terms of reference, their powers and their lines of reporting. Their histories are diverse and the reasons for their establishment vary widely. The United States councils were established primarily to deal with sentencing disparities and burgeoning prison populations through the creation of sentencing guidelines while the UK council was established to promote consistency in sentencing.²⁸

The United States sentencing commissions also focus primarily on sentencing standards and consistency.²⁹ There is no mention of increasing public confidence in sentencing, although that may well be a by-product of consistent, transparent and proportional sentencing. In Australia, councils were created to provide increased opportunities for community engagement, the provision of better information for the public, the courts and the legislatures and another means for developing public policy. The proposed, but never implemented, New Zealand Sentencing Council had, as one of its aims, to 'inform and educate the public about sentencing and parole policies and decision-making, with a view to promoting public confidence in the criminal justice system.'³⁰

19 <<https://www.sentencingcouncil.org.uk/>>; see also A. Ashworth and J.V. Roberts, *Sentencing guidelines: Exploring the English model*. Oxford, Oxford University Press; J.V. Roberts and L. Harris, Sentencing guidelines outside the United States, in C. Spohn, P.K. Brennan (eds.), *Handbook on Sentencing Policies and Practices in the 21st Century*, Routledge, New York 2020, pp. 68–86.

20 <www.scottishsentencingcouncil.org.uk>.

21 <<http://www.sentencingcouncil.justice.nsw.gov.au/>>.

22 <<https://www.sentencingcouncil.vic.gov.au/>>.

23 <<https://www.sentencingcouncil.qld.gov.au/>>.

24 <<https://www.sentencingcouncil.tas.gov.au/>>.

25 <<https://sc.scourt.go.kr/sc/engsc/index.jsp>>.

26 Judicial Council Act 2019 (Ireland).

27 <<https://www.jlos.go.ug/index.php/component/k2/item/287-sentencing-guidelines-committee>>.

28 Ashworth and Roberts, *supra* note 19, p. 3.

29 See eg Minnesota Sentencing Guidelines Commission: "The MSGC establishes and modifies the Minnesota Sentencing Guidelines, which promote uniform and proportional sentences for convicted felons and help to ensure that sentencing decisions are not influenced by factors such as race, gender, or the exercise of constitutional rights by the defendant": <<https://mn.gov/sentencing-guidelines/about/>>. Similarly, the United States Sentencing Commission states that its aims are to 'reduce sentencing disparities and promote transparency and proportionality in sentencing', <<https://www.ussc.gov/>>.

30 *Sentencing Council Act 2007* (NZ), s 8(d) (repealed).

Their terms of reference include issuing or advising on guidelines or standard non-parole periods; monitoring of adherence or departure from guidelines; considering the cost or effectiveness of sentences; considering the relationship between sentencing and prison populations; advising governments; gauging public opinion; educating the public; collecting and analysing statistics; conducting research generally and consultation with government, the public and interested parties.

Their membership varies widely, with some having a majority of judicial members, some or none at all, victims or victims' representatives, community members, people with experience in the criminal justice system, law enforcement, prosecution and defence lawyers, legal aid, corrections personnel, academics and persons with medical or allied professional backgrounds.

BUILDING TRUST AND CONFIDENCE THROUGH SENTENCING COUNCILS?

Some of the reasons why confidence in the courts in relation to sentencing may be lacking have been outlined above. How can sentencing councils can address these issues through sentencing guidelines, information, education, gauging public opinion and through their deliberative processes?

DISCRETION, CONSISTENCY AND SEVERITY

Public confidence in sentencing is said to be undermined by public perceptions of sentencing as being inconsistent, idiosyncratic and excessively lenient. Yet judicial discretion is regarded as a cornerstone of the judicial task in most common law jurisdictions. While there is a general commitment to treating like cases alike, judges have been invested with a very wide discretion in order to enable them to impose an appropriate sentence in all the circumstances of the case.³¹ In Australia, for example, sentencing is highly discretionary and individualistic, however, jurisdictions vary widely in the amount of discretion given to judicial officers.

Trust and discretion are related. The greater the trust in the courts the more likely it is that they will be invested with a greater degree of discretion. The greater the distrust, the stronger the pressures for mandatory or presumptive sentences.³² While disparities between cases can be accepted, they will only be accepted if the disparities are justified and not based on non-legal factors such as race, gender, ethnicity, geography or the judge's personal proclivities.

Unjustifiable disparities and unacceptable sentencing standards can be addressed through various means that involve sentencing councils. In the United States, the United Kingdom, Scotland and South Korea councils have been established primarily to develop or promulgate sentencing guidelines that are intended promote consistency of approach or outcome in sentencing. The legislation that established the councils of

³¹ *DPP v Dalgliesh* (2017) 262 CLR 428; see also C. Maxwell, Discretionary power and consistency: Is the sentencing discretion different?, in J.N.E Varuhas and S. Wilson (eds.), *The Frontiers of Public Law*, Hart Publishing, Oxford 2019, pp. 297–314.

³² However, a study of jurors' views of sentencing found that, having seen the process at first hand, most jurors would not like to undertake the sentencing task and preferred to leave it to the judge who had the knowledge and experience to impose an appropriate sentence, see A. Freiberg, K. Warner, C. Spiranovic and J. Davis, You be the judge: No thanks!, *Alternative Law Journal* 43(3) pp. 154–159.

England and Wales, Scotland and New Zealand³³ all referred to the need to promote consistency in sentencing³⁴ and public confidence in the criminal justice system.³⁵

Sentencing guidelines can take different forms. Numerical guidelines, such as those in Minnesota or the Federal sentencing system in the United States set out the required or preferred outcomes in the form of numerical grids which reflect factors such as the seriousness of the offence and the offender's prior convictions but which also allow a number of specified factors to be taken into account. Narrative guidelines, such as those in the United Kingdom, have been developed for specific offences or groups of offences, and set out both the factors that the court must take into account as well as providing for a range of sentences for that offence.

Another mechanism for achieving reasonable consistency is the guideline judgment. This is a judgment delivered by an appellate court intended to provide guidance to a sentencing judge on matters of general principle, of the factors that may be taken into account in sentencing for a particular offence or in relation to sanction.³⁶

The theory underlying these guidance mechanisms is that by articulating and publishing the guidelines, the factors that a court should take into account in sentencing are rendered more transparent to offenders, victims and the public and therefore more understandable and possibly acceptable. If guidelines also have the effect of reducing unjustifiable disparities, this may further increase public confidence in the sentencing process. Where the public are involved in both the formulation of the guidelines, for example, where they are represented on the council, and in the consultation process, it is expected that public confidence in sentencing in individual cases will be further enhanced.

While there is some evidence that guidelines can reduce unjustifiable disparities,³⁷ as yet, it is difficult to assess their impact on public confidence in sentencing. Certainly, the self-report study conducted for the Sentencing Council for England and Wales found that a majority of the public and victims of crime who were surveyed said that the existence of sentencing guidelines slightly increased their confidence in the fairness of sentencing. However, when they were presented with guidelines relating

³³ The New Zealand council never became operational.

³⁴ 'Consistency' has different meanings. It can mean consistent outcomes, consistent approaches, consistency with guidelines or consistency with sentencing practices, N. Padfield, Exploring the success of sentencing guidelines, in Ashworth and Roberts, *supra* note 19, p. 32–33.

³⁵ Coroners and Justice Act 2009 (UK), s 120(11); Criminal Justice and Licensing (Scotland) Act 2010 (Scot), s 2; see also Sentencing Council Act 2007 (NZ), s 8(a)(iv) (repealed).

³⁶ See eg *Sentencing Act 1991* (Vic), s 6AC(1) which provides that a guideline judgement may set out the criteria to be applied in selecting among various sentencing alternatives, the weight to be given to the various purposes of sentencing, the criteria by which a court is to determine the gravity of an offence, or to reduce the sentence for an offence, or the weighting to be given to relevant criteria or the appropriate level or range of sentences for a particular offence or class of offence. In Victoria a guideline judgment is given by a Full Bench (5 judges) of the Court of Appeal: *Sentencing Act 1991* (Vic), s 6AD(1)(a). In considering whether to give or review a guideline judgment, the Court of Appeal must have regard to the need to promote consistency of approach in sentencing offenders and 'the need to promote public confidence in the criminal justice system': *Sentencing Act 1991* (Vic), s 6AE(b).

³⁷ S. Krasnostein and A. Freiberg, Pursuing consistency in an individualistic sentencing framework: If you know where you're going, how do you know when you've got there? *Law and Contemporary Problems* 76(1) p. 284. There is some question as to how to measure the success of sentencing guidelines, see Padfield, *supra* note 34.

to specific offence scenarios, their views of whether a sentence was too lenient, too tough or about right, did not markedly change.³⁸

Involving members of the public in experiential exercises, a strategy adopted by a number of sentencing commissions, appears to offer more potential to allay suspicion of the use, or abuse, of sentencing discretion. In these exercises, generally called 'You be the Judge' participants are asked to take the role of a judge in a simulated exercise, either in person or through a video presentation.³⁹ The results tend to show first, that participants are highly disparate in their decisions and, second, that they can gain a better understanding of the factors that are relevant in sentencing and the reasons why different decision-makers may come to different conclusions. An analysis of the on-line version of such a tool also showed that in the majority of cases users imposed sentences that were generally consistent with those imposed by the actual sentence.⁴⁰

LACK OF KNOWLEDGE OR UNDERSTANDING OF SENTENCING

Public confidence is, to a greater or less extent, influenced by what the public understands about sentencing, and a lack of understanding of how the system operates can reduce confidence in it. Myths and misconceptions abound.⁴¹ Knowledge of the criminal justice tends to come mainly from media reports, both print and electronic, talk back radio, social media and, to a lesser extent, from personal experience.⁴² Public media coverage of the criminal justice system tends to be selective, sensationalist and is intended to generate shock, anger and anxiety rather than to inform or educate.

If a lack of knowledge, or a misunderstanding of sentencing results in a lack of confidence, then one method of building confidence is to provide more and accurate information about sentencing. This approach to building public confidence in sentencing is based on what Loader has termed the 'cognitive deficit' perspective.⁴³ This approach makes intuitive sense and is consistent with numerous studies that show that the more information a person has about the sentence imposed the more likely they are to agree with the sentencing imposed by the judge and therefore more likely to increase public confidence.⁴⁴

³⁸ Marsh et al, *supra* note 12 p. 35.

³⁹ See eg <<https://virtualjudge.sentencingcouncil.vic.gov.au/>>; Sentencing Council UK, <<https://www.sentencingcouncil.org.uk/about-sentencing/you-be-the-judge/>>; Queensland Sentencing Advisory Council, <<https://www.sentencingcouncil.qld.gov.au/judgeforyourself/>>.

⁴⁰ D. Byles and C. Gill, Citizen judges. *Law Institute Journal* 88(12) p. 52.

⁴¹ K. Gelb, *Myths and Misconceptions: Public opinion versus public judgment about sentencing*, Melbourne, Sentencing Advisory Council 2006; Sentencing Council UK 'sentencing myths' <<https://www.sentencingcouncil.org.uk/about-sentencing/sentencing-myths/>>; Queensland Sentencing Advisory Council, <<https://www.sentencingcouncil.qld.gov.au/about-sentencing/sentencing-myths>>.

⁴² Moore et al, *supra* note 12, pp. 3 & 16; K. Gelb, *Measuring public opinion about sentencing*, Melbourne, Sentencing Advisory Council 2008.

⁴³ I. Loader, *Playing with Fire? Democracy and the emotions of crime and punishment*, in S. Karstedt, I. Loader and H. Strang, *Emotions, Crime and Justice*, Hart Publishing, London 2011; Marsh et al, *supra* note 12, p. 34; B. Chapman, C. Mirrlees-Black and C. Brawn, *Improving public attitudes to the criminal justice system: the impact of information*, <https://www.prisonlegalnews.org/media/publications/home_office_research_study_245_improving_public_attitudes_on_the_criminal_justice_system_2002.pdf>.

⁴⁴ C. Hamilton and L. Black, *An Evidence Review of Confidence in Criminal Justice Systems*, Dublin, Department of Justice and Equality 2019.

Sentencing councils are both required,⁴⁵ and well-placed, to provide information to a wide variety of audiences and do so in many ways.⁴⁶ Councils that focus on guidelines, can, through the publication of those guidelines and their supporting documents on their web sites, communicate how the sentencing process works to any person who has an interest in it.⁴⁷ They can provide unbiased, accurate and reliable information about sentencing law, the sentencing process,⁴⁸ about the operation of guidelines⁴⁹ and the sentencing practices of the courts in the form of general statistical information,⁵⁰ statistical bulletins,⁵¹ statistical tables, sentencing snapshots or spotlights and sentencing trends.⁵² These councils also conduct research into various aspects of sentencing either on their own motion or in response to requests or references from governments. These reports, unlike many internal government reports, are generally free and open to the public and disseminated through their web sites, podcasts, recordings of events and interviews, Twitter, Facebook, LinkedIn, Pinterest and other outlets.⁵³ Council chairs and other council members give interviews to the media, speak publicly at conferences and seminars in ways that judicial officers are often reluctant to do.

However, increased provision of information is unlikely to be a complete answer to the problem of lack of trust. There is evidence that providing information may only

45 Eg one of the New South Wales Sentencing Council's legislative functions is to educate the public on sentencing matters, *Crime (Sentencing Procedure) Act 1999* (NSW), s 100J.

46 One audience that some councils address is school students. The Victorian Sentencing Advisory Council provides a teacher's guide to its You be the Judge presentations; the Scottish Sentencing Council has developed educational resources for schools, <<https://www.scottishsentencingcouncil.org.uk/about-sentencing/education-resources/>>.

47 The UK Sentencing Council publishes case studies of how guidelines operate for particular offences, <<https://www.sentencingcouncil.org.uk/research-and-resources/publications?s&cat=case-studies>>; see also US Sentencing Commission, *Federal Sentencing: The Basics*, <<https://www.ussc.gov/education/training-resources/federal-sentencing-basics>>.

48 Eg UK Sentencing Council, 'About sentencing', <<https://www.sentencingcouncil.org.uk/about-sentencing/>>; Scottish Sentencing Council, <<https://www.scottishsentencingcouncil.org.uk/about-sentencing/>>; Queensland SAC, <<https://www.sentencingcouncil.qld.gov.au/about-sentencing>>; Victoria Sentencing Advisory Council, <<https://www.sentencingcouncil.vic.gov.au/>>.

49 Eg US Sentencing Commission <<https://www.ussc.gov/topic/reports-glance>>.

50 Victoria Sentencing Advisory Council, <<https://www.sentencingcouncil.vic.gov.au/>>.

51 The UK Sentencing Council has published 49 bulletins that explain current sentencing practices for a wide range of offences, <<https://www.sentencingcouncil.org.uk/publications?s&cat=statistical-bulletin>>; the New South Wales Sentencing Council is required to report annually to the Attorney-General on sentencing trends and practices, see eg *Sentencing Trends and Practices 2018*, <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/annual_reports/Annual%20Report%202018.pdf>.

52 Allen and Hough have been critical of the UK sentencing councils for not having a wider remit to improve public understanding of sentencing and for not having 'public visibility as an authoritative and independent body that can be trusted to speak on matters relating to crime and punishment', R. Allen and M. Hough, *Does it matter? Reflections on the effectiveness of institutionalised public participation in the development of sentencing policy*, in Freiberg and Gelb, *supra* note 2, p. 235.

53 Both the Victorian and Queensland councils have community engagement officers. The Queensland Council has a Manager, Media and Engagement and a Senior Engagement Officer. However, not all information and data can be made public. The US Sentencing Commission provides a guide to public access to its documents and data, <https://www.ussc.gov/sites/default/files/pdf/about/policies/20180814_Public_Access_Documents_Data.pdf>.

have short term effects on changes in attitude⁵⁴ and that there is a ‘perception gap, that is, where the views of survey respondents to individual cases do not generalise to views of the appropriateness of sentencing more broadly.’⁵⁵ The views of the public may also be driven by their cultural and demographic backgrounds as much as their levels of knowledge.⁵⁶

Research also indicates that the community is less influenced by information about sentencing than they are by the emotions aroused by crime and punishment,⁵⁷ and that the development of public policy on sentencing is as much about emotion as it is about evidence.⁵⁸ Armed with this knowledge, sentencing councils can craft their reports and messaging to the public with an eye to the emotional dimensions of their communications, reflecting the dictum that ‘facts tell, emotions sell’, one well known to the media. Council publications often include personal vignettes as well as statistical information in order to address the affective aspects of sentencing.⁵⁹

LACK OF UNDERSTANDING OF WHAT THE PUBLIC, KNOWS, WANTS OR EXPECTS

Public policy is also often built on what legislators believe that the public wants or expects of them. The concept of penal populism, or populist punitiveness, does not refer to public opinion, but to ‘the notion of politicians tapping into, and using, for their own purposes, what they believe to be the public’s generally punitive stance’.⁶⁰ For good public policy to be developed, it is important that an accurate view be gained of what the public’s views or attitudes are and there is ample evidence that the public are not as punitive as some media and politicians would assert.⁶¹

⁵⁴ D. Indermaur, L. Roberts, C. Spiranovic, G. Mackenzie and K. Gelb, A matter of judgement: The effect of information and deliberation on public attitudes to punishment’ *Punishment & Society* 14(2) pp. 147–165.

⁵⁵ K. Warner and J. Davis, Using jurors to explore public attitudes to sentencing, *British Journal of Criminology*, 52, p. 102.

⁵⁶ M. Feilzer, Exploring public knowledge of sentencing practices, in J.V. Roberts (ed.) *Exploring sentencing practice in England and Wales*, Palgrave Macmillan, Cham, Switzerland 2015; Marsh et al, supra note 12, p. 34.

⁵⁷ Loader, supra note 43; A. Freiberg, Affective versus effective justice: Instrumentalism and emotionalism in criminal justice, *Punishment and Society* 32(2), pp 265–278.

⁵⁸ A. Freiberg and W.G. Carson, The limits to evidence-based policy: Evidence, emotion and criminal justice, *Australian Journal of Public Administration* 69(2) pp. 152–164.

⁵⁹ An example of this can be seen in the Victorian Sentencing Advisory Council’s report on ‘crossover kids’ where a case study is provided of a child whose extensive history of offending commenced at the age of 12. The case study documents a history of parental alcohol and substance abuse, family violence, transient accommodation, problematic school attendance, sexual abuse and frequent interactions with child protection authorities. By providing details of the child’s tragic background, readers can obtain a nuanced and detailed understanding of what, on its face, appeared to be a dangerous and lawless teenager, Sentencing Advisory Council, Victoria, ‘Crossover Kids’: *Vulnerable children in the Youth justice system: Report 1: Children who are known to child protection among sentenced and diverted children in the Victorian Children’s Court*, <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf>, p 51.

⁶⁰ A. E. Bottoms, The philosophy and politics of punishment and sentencing, in C. Clarkson and R. Morgan, (eds.), *The Politics of Sentencing Reform*, Clarendon Press, Oxford 1995.

⁶¹ See eg Bartels et al, supra note 14.

Sentencing councils, along with universities and other public organisations,⁶² undertake research on public knowledge of, and attitudes to, sentencing. The Victorian Sentencing Advisory Council has published a series of studies on community views of sentencing⁶³ as well as publishing summaries of public opinion and jury studies conducted by others.⁶⁴ The Sentencing Council in the United Kingdom has published public opinion studies⁶⁵ and one of its major tasks is to gauge public opinion in respect of sentencing guidelines that it is formulating though these generate little public feedback or information on public attitudes to the guideline being proposed or amended.⁶⁶ The Scottish Sentencing Council has published reports on focus groups on youth offending and sentencing⁶⁷ and public perceptions of sentencing.⁶⁸

It is also important that public policy is built on *informed* public opinion, not *any* public opinion. As the then chair of the NSW Sentencing Council, the Hon A R Abadee argued:⁶⁹

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

This makes it important that this research is conducted in tandem with efforts to inform and educate the public about actual sentencing practice.

THE ‘DEMOCRATIC DEFICIT?’

In the past, policy has generally been made by experts in the field. However, while sentencing policy, like public policy generally, is a complex field, it is not one that is, or should be, exclusively the domain of experts. Sentencing councils’ attempts to remedy the ‘democratic deficit’⁷⁰ in sentencing policy takes two forms. One is through their membership, which can be wide and diverse, and the second is through their consultative processes.

In relation to their membership, although generally appointed by governments rather than being elected, council members are likely to be more representative than internal civil service bodies charged with developing sentencing policy. Both Pratt⁷¹ and Hutton have noted that the past three decades have seen a shift in the governance of public affairs ‘away from a directive and paternalistic State to the vision of a State

⁶² See eg the work of the New South Wales Bureau of Crime Statistics and Research: Moore et al, *supra* note 12 and the earlier series of studies conducted by the Bureau noted within.

⁶³ The studies are collected at <<https://www.sentencingcouncil.vic.gov.au/publications-by-topic?categories=102>>.

⁶⁴ Sentencing Advisory Council, Victoria, *Public Opinion About Sentencing: A Research Overview*, <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Public_Opinion_about_Sentencing_Research_Overview.pdf>.

⁶⁵ See Marsh et al and studies cited therein, *supra* note 12.

⁶⁶ The Council has published some 66 reports on its guideline consultations, <<https://www.sentencingcouncil.org.uk/publications?cat=consultations&s&year>>.

⁶⁷ G. Jack, A. Bell and D. Greisbach, *Report of focus groups on youth offending and sentencing*, Scottish Sentencing Council 2019.

⁶⁸ C. Black, R. Warren, R. R. Ormston and C. Tata, *Public Perceptions of Sentencing: National Survey Report*, Scottish Sentencing Council 2019.

⁶⁹ A.R. Abadee, *The role of sentencing advisory councils*, cited in Hutton, *supra* note 4, p 214.

⁷⁰ That is, the under-representation of the community in the formulation of public policy.

⁷¹ J. Pratt, *Penal Populism*, Routledge, London 2006.

that enables public and private organisations to collaborate'.⁷² Recent decades have seen the rise of concepts such as co-production in which public policy is seen as the product of the work of both governments and citizens: a reciprocal process involving both parties. It can refer to the ways in which citizens can be involved in policy making and the planning, delivery and evaluation of services.⁷³ Involving the community in the policy process can increase confidence in sentencing by giving the public voice, validation and respect: decisions that are made following an extensive process of consultation and by a body that represents a wide range of opinion are more likely to be accepted than those made unilaterally or in secret, even if those subject to those decisions run counter to their views or interests.⁷⁴

It is clear that while councils are likely to be more representative than other bodies, they are not fully representative bodies. As Young observes of the proposed New Zealand Sentencing Council that was to be composed of equal numbers of judicial and non-judicial members:⁷⁵

To purport to achieve 'representation' of diverse of the diverse views of a disparate community by five non-judicial members would be a fiction: the best that those five members can achieve is to offer five views that represent a greater diversity of experience, interests and valued than is likely to be provided by the judiciary acting alone. Nor do we consider it necessary to ensure representativeness, as eliciting the range of stakeholder views is precisely the purpose of the public consultation and parliamentary approval process... In short, we consider both non-judicial membership and extensive public consultation to be necessary, but not sufficient, conditions for the success of a Sentencing Council. Ultimately, the purpose of both endeavours is the same – to achieve community confidence that derives from a sense of enfranchisement.

In relation to the second strategy for redressing the democratic deficit, most councils engage in extensive consultative processes which give interested parties, stakeholders and members of the public generally the opportunity to comments on draft guidelines, reports and other materials. In the UK and Scotland, draft guidelines are released for consultation. In the UK the legislation requires that the Council must consult the Lord Chancellor, such persons as the Lord Chancellor may direct, the Justice Select Committee of the House of Commons and any other persons as the Council considers appropriate.⁷⁶ As the Victorian Sentencing Advisory Council observed in its proposal for a sentencing guideline council in that state:⁷⁷

The capacity for sentencing guidelines to promote public confidence in sentencing is likely, in large part, to be determined by the adequacy and breadth of the consultation conducted during the development of sentencing guidelines.

⁷² Hutton, *supra* note 4, p. 206.

⁷³ See <<https://www.anzsog.edu.au/resource-library/research/what-is-co-production>>.

⁷⁴ T. Tyler, *Why people obey the law*, Princeton University Press, Princeton 2006.

⁷⁵ W. Young, Sentencing reform in New Zealand: A proposal to establish a sentencing council, in Freiberg and Gelb, *supra* note 2, p. 187.

⁷⁶ Coroners and Justice Act 2009 (UK), s 120(6).

⁷⁷ Sentencing Advisory Council, Victoria, A sentencing guidelines council for Victoria: Report, <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/A_Sentencing_Guidelines_Council_for_Victoria_Report.pdf>, p. 36

The Queensland Sentencing Advisory Council has developed and published a Stakeholder Engagement Framework which guides its interactions with the public, in light of its aim to inform the Council about community views and improving community confidence in sentencing.⁷⁸ It identifies its stakeholders as being community members, legal agencies, advocacy groups, elected representatives, government department, industry and research associations, unions, community legal centres, schools and the tertiary sector and Indigenous communities and organisations. Its engagement strategy is based on five principles: integrity, transparency, responsiveness, accountability and inclusiveness.

Community engagement must be a two-way process that involves both the provision of accurate and comprehensive information on the one hand and a genuine responsiveness on the part of those conducting the consultations.⁷⁹ Such responsiveness can be demonstrated by specific acknowledgment of consultees in reports, both in general terms and in relation to specific issues where there may be differences of opinion or their views have been highly influential.

However, while it is true that the public is generally afforded the opportunity to participate in consultations, the experience of many councils has been that it is the 'usual suspects' that respond to invitations to comment, these suspects being organised legal bodies, victims' organisations, legal aid bodies, sectional interests and governments. In contrast to the crowds that take to the streets in cases of catastrophic failure of the criminal justice system or seemingly egregious sentencing decisions, the ordinary 'person on the street' is rarely interested in, or sufficiently motivated to, formally respond to the invitations or attend roundtables or forums.

INDEPENDENCE AND TRANSPARENCY

Trust and confidence in an institution partly depend upon a belief that the institution is independent and impartial, qualities that are said to be foundational to the role of the judicial branch of government.

Where governments can be viewed as partisan and, not surprisingly, political, courts as insular and unrepresentative and the media as biased, a sentencing council can be visible, authoritative, unbiased and independent of all the major players in the political sphere.⁸⁰ In many cases, councils' reports can be published directly, without requiring the permission of governments or parliaments. They can communicate with the media, the public, the courts and correctional authorities in a manner that the judiciary and government departments cannot.

CONCLUSION

This article has made a number of suggestions about the role that sentencing councils can play in building trust and confidence in sentencing and, by extension, in the work of criminal courts. However, it is important to note that they are only one of many voices influencing the community's perceptions. As an independent review of the

⁷⁸ <<https://www.sentencingcouncil.qld.gov.au/about-us/stakeholder-engagement>>; see also <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0010/645805/stakeholder-engagement-framework.pdf>.

⁷⁹ Allen and Hough, *supra* note 52 p. 224.

⁸⁰ Allen and Hough, *supra* note 52, p. 238; Hutton, *supra* note 4, p. 235.

Victorian Sentencing Advisory Council observed in 2008, its work could only have a partial impact on levels of public trust and confidence in Victoria's courts because there are a range of factors outside the Council's control affect the achievement of that objective.⁸¹

However, that review did conclude that as a result of the Council's work:⁸²

... there was improved support for sentencing decisions and for sentencing reforms as a result of the efforts of the SAC. Judicial officers and government interviewees felt that SAC's research and consultation efforts had resulted in sentencing reforms which were well grounded and reflecting best practice. Journalists and victims of crime representatives felt that they had a better understanding of sentencing processes and issues as a result of SAC's work which, in turn, should influence their communications with members of the public on sentencing issues.

The gaps, or sometimes chasms, between the courts, the public and governments cannot be spanned in a single bound. Sentencing councils are not radical organisations that can magically transform sentencing into a task that pleases all people at all times. Having emerged slowly, over past four decades, albeit hesitantly and sometimes inconsistently, they have, by 'small, deliberate steps' established themselves as useful adjuncts to existing sentencing institutions. In some jurisdictions, it took political courage to create, or re-create, them in the face of judicial wariness or even antipathy and public skepticism. However, over time, councils have come to play an important and valued role in forging links between courts, communities and governments and slowly building trust and confidence in the sentencing process by being visible, independent, credible, authoritative and inclusive.⁸³ In Valerie Braithwaite's terms, they aim to establish 'trust norms' by being transparent, accountable⁸⁴ and by creating and maintaining relationships of respect and concern with all parties in the criminal justice system.

Each council so far established is unique and is the product of its 'political, social and cultural circumstances'.⁸⁵ To date, none has achieved all of the desirable qualities, qualities that are never likely to be fully realised in practice. Perhaps their role, and their potential, were best summarised by Neil Hutton in 2008 when he wrote that sentencing councils:⁸⁶

... 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

81 Success Works, *Evaluation of Sentencing Advisory Council*, <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Evaluation_of_Sentencing_Advisory_Council.pdf>, p. 81.

82 Ibid, p. 83.

83 Allen and Hough, *supra* note 52, p. 238.

84 Many of the Councils are required to report to their Parliaments or Attorneys-General.

85 Hutton, *supra* note 4, p. 216.

86 Ibid, p. 221.

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.

ACKNOWLEDGEMENTS

My thanks to Kathy Laster, Anne Wallace, Julian Roberts, Anne Edwards and Cynthia Marwood for their comments on earlier drafts of this article.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR INFORMATION

Emeritus Professor Arie Freiberg is Chair of the Sentencing Advisory Councils of Victoria and Tasmania, and is a former long-standing Council member of the Australasian Institute of Judicial Administration. As a criminologist, two of the main foci of his work have been, firstly, the sentencing of criminal offenders and public attitudes to sentencing; and, secondly, the development of new forms of court process informed by theories of therapeutic jurisprudence. He has a strong record of research activity conducted in partnership with the courts and is regularly invited to speak at judicial forums and conferences. arie.freiberg@monash.edu

The phrase 'Bridging the Gap' is used by the Victorian Sentencing Advisory Council to describe its relationship with the community, the courts and governments.

AUTHOR AFFILIATION

Arie Freiberg  orcid.org/0000-0003-0099-3164
 Chair of the Sentencing Advisory Councils of Victoria and Tasmania, AU

TO CITE THIS ARTICLE:
 Arie Freiberg, 'Bridging Gaps, Not Leaping Chasms: Trust, Confidence and Sentencing Councils' (2021) 12(3) *International Journal for Court Administration* 6. DOI: <https://doi.org/10.36745/ijca.421>

Published: 23 December 2021

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