



Current Legal Issues Seminar Series 2010  
Banco Court  
Thursday 14 October 2010, 5.30pm

Commentary on Professor Arie Freiberg's Paper on "The Victorian  
Sentencing Advisory Council, Engaging the Community"

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**The Hon Paul de Jersey AC**  
**Chief Justice**

We are indebted to Professor Freiberg for his presentation. My first engagement with the prospect of the establishment in this State of a sentencing advisory Council occurred some years ago. Rather out of the blue, as I was driving to the airport to pick up my 90 year old mother who was returning from Townsville to Brisbane, a journalist telephoned asking for a comment on the Queensland Law Society President's proposal for the establishment of a Council here.

Fortunately I knew something about the approach of the Victorian Council, because I had previously attended a most helpful seminar on that subject in Melbourne.

I was subsequently reported as expressing opposition to the establishment of a Council here, on the ground it would be unnecessary, and because the financial resources would better be deployed into direct court services.

I was nevertheless impressed by two particular capacities in the Victorian Council: first, its research capability, for example into the frequency of particular offending, bearing on the need for deterrence; and second, its educative function in relation to the community.

As to the former, sentencing courts and appellate courts are often told of the need for deterrent sentences, but not given reliable information about the extent of such offending, such as would justify, say, a lifting of the tariff otherwise applicable.



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As to community education, a better informed community may be more likely to understand the sentencing process and appreciate the reasoning behind particular sentences imposed. It is fairly clear that trenchant public criticism of particular sentences erodes confidence in the process, although in my experience that is a temporary phenomenon fairly soon overtaken by the resilience of the system and probably the realisation that the controversial cases account for a miniscule fraction of the sentencing work daily accomplished in the courts of the State.

But it is the fact that insufficiently informed criticism of the work of the sentencing courts continues, and no doubt that has fed our government's interest in establishing a comparable Council here.

I continue to support those potential capacities for a Queensland Council. I have been impressed this evening to hear of the Victorian Council's contribution to legislative reform. It is reassuring to see that Council providing an informed basis for desirable reform.

As to guideline judgments, it is interesting that none has been given in Victoria over some years. Again, that more structured mechanism in the Court of Appeal could be potentially useful, notwithstanding the appeal court in Queensland has over the years given a number of judgments of comparable status.

We have heard that one of the research objectives of the Victorian Council is to gauge public opinion. That is I would think a daunting task. Judges regard themselves as generally in tune with such community expectations as may reliably be gauged. An example is the need for strong sentences to deter crimes of personal violence. But beyond such fairly obvious matters we may run the risk of riding the unruly horse of public policy or opinion.



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I recall in this context the counsel of Sir Samuel Griffith in *Deakin v Webb* (1904) 1 CLR 585, 625 as to how courts should not proceed:

"I hope that the day will never come when this court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions. If it does so, it will be perhaps the practice, if ever there is a court weak enough, to adjourn the argument simply in order that public meetings may be held, leading articles written in the newspapers, and pressure brought to bear to compel the court to shirk its responsibility, and cast its duty upon another tribunal."

Those words are as apt, a century later, as they were at the inauguration of the High Court. Public policy is potentially an unruly horse, as is determining the public interest on which it is based.

The parliament of this State has commendably respected the wisdom that appropriate results are best secured through the exercise of a comprehensively informed but generally unfettered judicial discretion. This is an area where Judges are acutely conscious of the need to gauge reasonable community expectations. The legislature has been prescriptive to the extent of imposing maximum penalties and, for example, listing considerations to which the sentencing Judge must have regard. But beyond that, it generally falls to the Judge to determine penalty, and he or she would hope thereby to reflect the public interest. Judges are sometimes criticized for undue leniency, where the passion of the moment blurs appreciation of the conscientiousness with which the Judge has approached the task. Judges cannot bend to every breeze that blows. As Brennan J said in *Dietrich v R* (1992) 177 CLR 292, 319, "contemporary values" which should relevantly inform the judicial process are not "the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest



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group. They are the relatively permanent values of the Australian community." But the difficult question remains, how are those relevant values to be gauged"

We will need to be careful to ensure that our sentencing advisory council does not become a de facto further Court of Appeal. It will need to refrain, for example, from comment on the adequacy of particular sentences, because that is a matter for the Court of Appeal, and such comment could have the potential to erode confidence in the work of the courts in both the trial divisions and at appellate level. I acknowledge however that the Council's role is of broader intent.

Drawing from what we have heard of the Victorian experience, I consider that our Council has the potential to make valuable contributions to community understanding of what is a critically important process. At a more particular level, it should contribute substantially to the information which courts may be given as to the prevalence of particular types of offending and though with some more difficulty, as to community expectations in relation to outcomes.

Again, I express thanks to Professor Freiberg for informing us so helpfully about the Victorian experience in particular.