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Dealing the public in: challenges for a transparent and accountable sentencing policy

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Introduction

Calls for the courts more accurately to reflect public opinion can be seen as one of the signs of a crisis of confidence in the courts. Although it is debatable whether the term “crisis” is appropriate for such a perennial problem, there is little doubt there is a problem to be addressed here at both the political and judicial level. The fundamental problem concerns perceptions, not only that sentencing is out of touch with popular opinion, but that it lacks coherence and is neither transparent nor accountable outside an elite group. The problem has been around for some time and is clearly on the minds of many governments, as indicated by the range of inquires and mechanisms that have been developed in response to the crisis. Various proposals have been developed and applied to address the lack of confidence.¹ Some of the proposed solutions involve “dealing the public into” the process of forming sentencing policy and these comprise the focus of this chapter. The present discussion touches on the role of sentencing advisory bodies.

The chapter begins with an overview of developments designed to accommodate the public into the formation of sentencing policy in England and Wales, Australia and New Zealand. Sentencing advisory bodies in these and similar countries have tried to involve the public in a variety of ways including directly appointing community members and inviting public comments on released documents. It will be argued in the third section of this chapter that these mechanisms are not sufficient to achieve the goal of including the public into the sentencing review or policy-formation process in any meaningful way. When we consider what has been developed elsewhere as suitable frameworks for public participation, the current efforts appear to be at best piecemeal and at worst tokenistic. Most importantly these efforts do not appear to be based on a careful analysis of the nature of public disenchantment with sentencing. In the fourth section it will be argued that the problem of public mistrust of the courts has particular social and political dimensions that need to be addressed in shaping a strategy of public engagement. In the fifth section of the chapter some of the obstacles that must be overcome to enable a genuine process of public participation are outlined. It is concluded that a robust and transparent process of providing for public participation will require an approach and mechanisms that are likely to be beyond the capacity of sentencing advisory bodies as they are currently structured. However, there are other imperatives that may result in

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- 19 However there are particular challenges here, with various individuals and groups claiming special authority to represent sub-sectors of the general public. The degree to which individuals may actually represent fairly the interests of the sub-group or even be said to be a representative of the group are all subject to question. If representative sub-groups are to be given a special role in the formation of sentencing policy there needs to be an explicit rationale for how the interests of the group are actually articulated, particularly where there is no formal process of election (see Catt and Murphy, 2003).
- 20 For discussion and examples of multi-layered strategies for involving the public, see Catt and Murphy (2003); Renn et al (1993); or Rowe and Frewer (2005).
- 21 See for example, Durham, Elrod and Kinkade (1996) who found that support for the death penalty changed substantially when respondents were placed in more of a decision-making role and were presented with a vignette of a case rather than a simple “do you favour ...?” question. Similar results were documented by Doob and Roberts (1983) and Indermaur (1987).
- 22 For example evidence using the reformed public opinion surveys was recently used by the New Jersey Death Penalty Study Commission in its report released on 2 January 2007 to build its case that the death penalty no longer enjoyed public support and should be abolished in that State (<www.njleg.state.nj.us/committees/dpsc_final.pdf>).
- 23 Indermaur (1987); Doob and Roberts (1983). For example, in one study (Indermaur, 1987) the proposal was put that offenders serving sentences of less than three months in prison not be sent to prison but rather spend the time at an “attendance centre” engaging in programs designed to address their offending behaviour. Most respondents expressed agreement with this proposal.
- 24 This number represents a response rate of 74 per cent of those approached (Luskin et al, 2002).
- 25 The quote comes from an article by Allen (2003, p 5) and was cited by Green (2006, p 132) as “‘a comedy of errors’ in which policy and practice is not based on a proper understanding of public opinion and that same opinion is not based on a proper understanding of policy and practice”.
- 26 It is precisely this point that Canovan (1999) argues is at the heart of the problem of populism, as democracy naturally requires institutions such as the court play an important “detached” role of administering justice. However, these institutions cannot then satisfy the other aspect of democracy which she describes as “redemptive”. This tension, Canovan argues, is an inevitable and perennial dilemma establishing the grounds whereby populism exploits the gap between the “promise” and the “performance” in democracy.
- 27 In Toronto on 5 January 2006: <<http://www.cbc.ca/story/canadavotes2006/national/2006/01/05/elxn-harper-crime.html>>.
- 28 Levels of public punitiveness have changed little in Canada, the US, the United Kingdom or Australia over the past 25 years (Roberts et al, 2003; Indermaur and Roberts, 2005). Hough and Roberts (2004) provide an authoritative international review of the problem of lack of confidence in the criminal justice system and reveal some consistent trends across western nations. For findings on the low level of trust in the courts in Australia, see Bean (2005).
- 29 For example, Cuppleditch and Evans (2005) found that in the United Kingdom two year re-offending rates exceed 50 per cent for all community-based dispositions apart from community punishment orders which were approximately 40 per cent.
- 30 Bishop and Davis (2002) provide a description and a critique of models for describing public participation in policy including the ones mentioned here.
- 31 Part of the problem is that the individuals or groups invited in may or may not be representative of a sub-section of the population. They are only rarely elected in any formal sense. So, even if a pluralist model is considered the best way to integrate some alternative community input, there is no way of assessing whether the identified interests are being fairly represented.

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