

SENTENCING MATRIX BILL 1999

Committee

The Chairman of Committees (Hon J.A. Cowdell) in the Chair; Hon Peter Foss (Attorney General) in charge of the Bill.

Clause 1: Short title -

Hon N.D. GRIFFITHS: This Bill has been examined by the Legislation Committee. I trust that members have read the report as a whole and in particular the minority report, which succinctly sets out the evidence and arguments which were set out in the report as a whole. The evidence provided to the Legislation Committee can lead to one conclusion only; namely, the Bill is another idiosyncratic folly of Hon Peter Foss, the Attorney General. It follows on, frankly, from his ministerial follies in Health with his purchaser-provider schemes, and his idiosyncratic treatment of the arts. Now we have this rather strange piece of legislation - the Sentencing Matrix Bill. It is an indication that the Attorney is headed for mandatory retirement. This is, at the very least, the third strike against his ministerial performance. I will not detain the Committee by going through the Legislation Committee's report in detail. However, I refer members to the introduction of the minority report. The Attorney General is quoted in the report as follows -

"The main problem was not the sentences themselves - in 99% of cases these were appropriate and the maximum penalties should be reserved for extreme cases - but the public's obvious lack of understanding and concern about sentencing"

This Bill is playing on public unease; it is base politics and bad public policy and it should go no further.

Hon PETER FOSS: It is probably indicative of the Opposition's attitude to legislation that members do not bother to attend meetings of the Legislation Committee because they have more pressing business in Bermuda.

Hon N.D. Griffiths: That is an outrageous comment and a lie.

Hon PETER FOSS: You make outrageous comments about me while I have to sit in silence.

The CHAIRMAN: The Attorney will address the Chair.

Hon PETER FOSS: I sit in silence while Hon Nick Griffiths makes the most outrageous comments about me.

The CHAIRMAN: The Attorney General is to be commended for sitting in silence, as should all members when others have the call.

Hon PETER FOSS: He does not like the truth being pointed out. The issues he raised in his minority report were dealt with during the committee's final hearing, from which he chose to absent himself. I can understand why he felt being in Bermuda took priority over being in Western Australia. I also understand why he felt it was more important than dealing with sentencing. However, I find it objectionable that, despite his failure to attend the committee meeting, he feels it is appropriate to issue a report criticising the very issues dealt with at that meeting.

Hon N.D. Griffiths: Stop telling lies, you stupid fool!

The CHAIRMAN: Order!

Hon PETER FOSS: The member was not there.

The CHAIRMAN: The Attorney General will come to order! Hon Nick Griffiths will have the right of reply shortly.

Hon Nick Griffiths: You are a fool and a liar.

Hon PETER FOSS: I thank the chairman for his interruption. The member is obviously sensitive.

Hon N.D. Griffiths: I am not sensitive at all.

Hon PETER FOSS: The member should be quiet if he is not sensitive.

Hon N.D. Griffiths: I just do not like you telling lies.

Hon PETER FOSS: I will tell the Committee how the member absented himself from the Legislation Committee meeting that dealt with the matters of concern to him. He then had the gall -

Hon B.K. Donaldson: He was there before he went to Bermuda.

Hon N.D. Griffiths: Get on your knees, you little liar.

Hon B.K. Donaldson: Hon Nick Griffiths was there.

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Hon PETER FOSS: I apologise to Hon Nick Griffiths. Hon Giz Watson was absent.

Hon N.D. Griffiths: You are outrageous. Why not read the document?

Hon PETER FOSS: Let us deal with the report. The most important issue is the member's comments. He said -

The Bill fails to provide a clear consistent sentencing regime that the public will be able to understand.

We know that the public does not understand the current regime. The judiciary has stated that the biggest problem is that the public does not understand it.

Hon N.D. Griffiths: That is your fault.

Hon PETER FOSS: It is my fault that we have not educated every person in Western Australia to be a lawyer! Hon Nick Griffiths could be Marie Antoinette saying, "Let them eat cake!" That is his solution. His solution is that people should educate themselves to become lawyers so that they will understand this esoteric matter. Perhaps if we do not understand surgery we should -

Hon N.D. Griffiths: Tell us about Order of the Day No 36 on the Notice Paper.

Hon PETER FOSS: We will get to that. Why not teach everyone to become a lawyer? When I asked the District Court judges to tell us when they were sentencing people under particular circumstances, they refused to do that and said it was not up to the court to report to anyone. They did not regard themselves as being in any way accountable to any other part of the process. The reason they are so commonly misunderstood is that they talk in their own esoteric language. Their knowledge of the law and sentencing is arcane. The reality of the matter is that the current system is very satisfactory to lawyers and to judges, but it is totally inexplicable to the public. Hon Nick Griffiths does not have any problem with the fact that not all of the sentences are satisfactory. He seems to think that is perfectly okay. The reality of the matter is that criminal lawyers would tell him that they already know the judges who consistently sentence high and the judges who consistently sentence low. However, the public does not know. Not only are some people being inadequately sentenced, but also some people are being excruciatingly over-sentenced. The public has no capacity to judge that.

When the Government first suggested the matrix, the President of the Law Society of Western Australia said that anyone can sit in the back of the court. Are the judges suggesting that if the people of Western Australia want to know something about sentencing, they should sit in the back of the court? First of all, I do not think many people have the time to sit in the back of the court for a sufficient amount of time to be able to comprehend what is coming through; and even if they did have the time, they would not be able to understand it, because it is all in arcane legal language. Hon Nick Griffiths knows that people do not understand sentencing, and he quoted me as saying they do not understand it. However, he is not prepared to do one single thing to explain it. He just dismisses the sentencing matrix by saying it does not provide a system that will make the courts more accountable and consistent in sentencing - a bald statement, with no argument and justification.

Hon N.D. Griffiths: You represent the Government. You are the initiator of this policy. It is your job to provide the policy. It is not the Opposition's job. We say yea or nay. We can amend. What you have proposed does not do the job. What you are seeking to do is all very well, and that is why the matter was supported at the second reading stage, but the fact of the matter is that the overwhelming evidence before the committee was to the effect that what you propose is not achievable.

Hon PETER FOSS: That is an interesting statement. Hon Nick Griffiths is saying that the evidence before the committee was overwhelming. However, it completely underwhelmed the majority of the committee. The majority of the committee missed it. The only people who were able to pick it up were Hon Nick Griffiths, just before he left for Bermuda, and Hon Giz Watson, who was not there.

Hon N.D. Griffiths: You are a fool.

Hon PETER FOSS: It was so overwhelming that Hon Giz Watson must have absorbed it through her skin, because she was not there; and Hon Nick Griffiths was so overwhelmed with the evidence that he cannot even cite what it was. He just says that the Bill fails to provide a system that will make the courts more accountable and consistent in sentencing. What has really happened is that the Labor Party has had a bit of internal turmoil, because one half of the Labor Party is serious about doing something about sentencing, and the other half is not.

Hon E.R.J. Dermer interjected.

The CHAIRMAN: Order! Hon Ed Dermer will come to order. I will not countenance any more of this form of interjection. Is that clear?

Hon PETER FOSS: It is interesting, because I remember that when Hon Nick Griffiths lost his shadow portfolio - it is pretty terrible to lose a shadow portfolio in the way that Hon Nick Griffiths managed to lose it -

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one of the first statements made by Mr McGinty was that we need something like a sentencing matrix. We certainly do. Everyone knows that we need something like this.

There are significant elements in the Labor Party which do not agree that this Parliament should do anything serious to address sentencing laws. Those elements do not want anything that might mean that people would start receiving sentences. The Opposition has suggested that maximum sentences should be increased, yet the evidence shows that changing maximum sentences does not have any significant effect on the sentences that are imposed.

In his report, Hon Nick Griffiths said that the public does not understand the sentencing process. The Government has shown a clear way in which this Parliament can deal with the sentencing process. However, the member does not want the public to know about it. He is happier that it does not know about it. That seems to be the way a lot of the Labor Party's policies are going at the moment. That was shown when this House was dealing with workplace agreements. The last thing the Opposition wanted to say was exactly what it would do. We all listened with rapt attention to find out the Labor Party's position on that issue. The fact is that the Labor Party's position depends on who is listening at the time. That is the case with sentencing. Out in the public, the Labor Party wants to do something about sentencing. In here, when it comes to the crunch, it does not want to do anything because Caucus has said, "No, you do not dare do anything about sentencing."

This legislation will have some effect on sentencing. Most importantly, it will have an effect on accountability because it will require that judges tell us, in a form that can be understood by everyone - the ordinary people, not just lawyers - what they are doing. It was demonstrated in the committee that judges have a computer system - which they had wanted for years - with which they can key in an offence, the aggravating and mitigating factors, the degree to which those apply, and then can press the button to access sentencing details from other cases. Not only do they have individual cases that they can read, but also they have that information in graphical form, which shows them the range of sentences that apply. Does that not sound useful? The judges have said that this system will greatly speed up their work, improve their sentencing and make it easier for them to understand what it is all about. It is a system that judges say will make all these things easier. All we are saying is, "How about sharing that with the public? How about telling the public, in the same fashion that you put it into a computer, what you are doing? Even more radical, why not let the public look over your shoulder to see the graph, which it may find just as informative as you do." That is what this Bill provides - that the judges make the judicial sentencing information system available to the public. In the same way that the system tells judges the span and range of sentences, it will tell the public. How radical it is that this Government should make this arcane knowledge available, in an easy form, to the public. What do Hon Nick Griffiths and Hon Giz Watson say about it? They say that the Bill fails to provide a system that will make the courts more accountable and consistent in sentencing. However, some of the complaints we have heard are that if this system is published, judges will move their sentencing towards the centre. The judges who sentence high or low will move towards the middle, towards the mean sentence for an offence. That is one of the complaints against this idea! Yet this was one of the complaints made in committee. What is the answer that is given? It is that the Bill fails to provide a system that will make the courts more accountable and consistent in sentencing. It is extraordinary how somebody can be so overwhelmed by the evidence as to give the Bill the opposite effect to some of the evidence that was given. Hon Nick Griffiths says that the Bill fails to provide a clear, consistent sentencing regime. One of the complaints about the current system is that it requires consistency in sentencing. However, the Opposition says that it would like more discretion.

The fact is that the Bill allows that discretion. It allows the same discretion that judges have, but when somebody steps outside that area - which is slightly different - it actually points that fact out to people. There is no harm in that, if they have a good reason and they can state what the reason is. They know what it is; it is there. They say, "We cannot have the public understanding this arcane knowledge; that would be terrible." Despite some of the complaints being quite the opposite of what the minority of the court says, that is what they have said. Then the report states -

The Bill fails to give Parliament more control over the sentences that will be imposed - rather that is given to the Executive.

That is the great furphy. In case Hon Nick Griffiths did not read that far in the Bill, one of the matters he might recall being dealt with during the final hearing, the third stage - which is the only one that controls the sentencing as opposed to reporting it to the public - requires the affirmative vote of both Houses of Parliament to take effect. I happen to think that Parliament is a different institution from the Executive, but the Executive can come to this Parliament and put up a proposition and sometimes it does not get the support of the House. That has been known to happen. However, if it does get the support of the House, it then has the will of Parliament. This is specifically being made so that the final stage - the only stage which controls the sentencing - is done by the affirmative vote of both Houses of Parliament. It is easier to do it that way rather than amend the Bill on every

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occasion. I gave very good reasons for that. My concern was that if at any stage it did appear, despite the best endeavours of Parliament - I have known Parliament to get things wrong - the process is so long, if we get it wrong, it would be far better to have it processed where it could be removed quickly.

Paragraph 4 states -

There is substantial evidence that clarity and consistency in sentencing is being achieved in New South Wales by the use of JIRS (NSW) and SAS in conjunction with guideline judgements.

Let us deal with some of those issues. First of all, we do not have any guideline judgments in Western Australia, despite the fact that we gave the Court of Appeal the capacity to do that. One could say that we should complain about the criminal -

Hon B.K. Donaldson interjected.

Hon PETER FOSS: That is right. There is not a great deal happening out there, but we have none in Western Australia. We could complain and ask, "Why don't they use that power?" Perhaps I should state why they do not use that power. The reason given by the court for not using that power is that it does not have sufficient data. In cases that have been brought before the court, which was asked for guideline judgments by the former Director of Public Prosecutions, it said that it was not given sufficient broad-range data. That is strange. Is that not the very thing that we are saying in this Bill we need to have so that we can provide it back to them? Is that not the very thing that this Bill is saying - give us the data and we can feed it back? It seems to me that the reason the court is complaining that it cannot make guideline judgments is that it is not doing the very things that were asked of it in stages 1 and 2. The reason the court lacks that data and the reason we do not have guideline judgments is that we do not have something like stages 1 and 2 of this Bill.

In New South Wales a group of people in the backroom is coming up with these ideas. That is a really good system. It seems to be one of those cosy systems that if the lawyers do it, it is all right. Here we have a whole lot of lawyers in the backroom, combing through the cases and working out what they say - not the judges publicly committing themselves to what they have done, but people coming along afterwards and trying to work it out empirically - and then getting together and having already worked it out themselves, coming up with figures, which they have again done in the backroom. That is then handed to the judges and they give a guideline judgment - they have something which is good. Frankly, I think they have something that is disgraceful. Here is a system that is being run by backroom boys and lawyers without any involvement from the public and without any accountability to the public. This, in paragraph 4, is what Hon Nick Griffiths would prefer. One gets the feeling he is making it up as he goes along. He is trying to come up with a reason to justify those members of his party who do not want to do anything serious about sentencing. That is despite the fact that Mr McGinty has stated that something like matrix sentencing is needed. He is dead right. That is exactly what is needed. Some members of Caucus do not agree. I continue -

The Bill is a skeleton Bill. It involves the delegation of legislative power to an extent that the real substance and operation of the relevant law is contained in regulation. The Bill gives greater control to the Executive rather than the Parliament.

I will not repeat my earlier arguments; suffice to say, as the member knows, that no control takes place until stage 3 is reached. Stage 3 does not take place until the positive and affirmative vote of both Houses of Parliament is achieved. Did the member not read the Bill? Did he not attend the meetings? Does he not know what is the proposition? Of course he knows. It does not alter the fact that he is happy to pick up any argument that happens to be flying past at the time, stick it in his report and claim it as his. Paragraph 6 states -

There is the potential of constitutional challenge, which in itself is capable of generating uncertainty. The various reporting requirements may be seen as representing an attempt to impose upon judges, executive or administrative functions incompatible with judicial independence.

I love that! I had the privilege, the weekend before last, of attending a seminar on mandatory sentencing at the University of New South Wales.

Hon N.D. Griffiths: One of your dear loves - at taxpayers' expense.

Hon PETER FOSS: Not a cent. A seminar is held every year at the University of New South Wales. Two former Chief Justices of the High Court, the Chief Justice of New South Wales, a Federal Court judge, various professors and doctors, a raconteur from the United Nations and others attended. I heard the same arguments about the constitutional arrangements being raised by some of the people at the seminar. A good speech was made by a former Chief Justice of the High Court. The speech covered all the previous High Court decisions.

Hon N.D. Griffiths: Who was that?

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Hon PETER FOSS: Sir Anthony Mason. He delivered a very good paper. I recommend it to Hon Nick Griffiths. By the time he has finished reading it he should be able to forget about paragraph 6. I note that there is the potential for constitutional challenge - everything has the potential to be a constitutional challenge. Sir Anthony Mason has made it quite clear that it would not succeed. That is the point I was trying to get across. There are constitutional challenges all the time. People are always appealing to the High Court. Every time it happens there is uncertainty. It does not mean that one does nothing in the meantime. I recommend Sir Anthony Mason's paper to Hon Nick Griffiths. I think it will put his mind at rest so he will not be quite so concerned about it. People are always making similar statements, but I do not think they should be given that much credence.

They are the broad statements that have been made to justify the Labor Party's change of policy. There is nothing unusual in that. We have seen it in every aspect of Labor Party policy. The Labor Party issues a public policy that is based on what it thinks people want to hear. We know that eventually, somewhere along the line, the Labor Party will return to its true style and it will be told what to do by its executive. We all know who controls members opposite. They are all smiling now as they have got through their preselections and they do not have to be quite so nice to certain people at the moment.

Hon N.D. Griffiths: That is your pet folly.

Hon PETER FOSS: A pet folly!

Grid sentencing has been introduced extensively across the United States. The programs in that country are not as subtle as this one. During the mandatory sentencing seminar I attended, many people stated that one of the big problems with discretionary sentencing is the inconsistency in sentencing. In my paper I quoted from a Victorian academic. He said that when judges apply the broad sentencing principles to determine sentences in particular cases, the majority rely on an unreasoned sense of justice and rough and ready rules of thumb.

People were complaining about the inconsistency in discretionary sentencing, and somebody came up with an idea during this. A system is needed whereby the type of case can be set out, together with all the mitigating and aggravating factors, in a grid. It sounded very similar to what we are putting forward here. I went to the conference in Melbourne of the Australian Institute of Judicial Management, which was organised by the Standing Committee of Attorneys General. It was a very good conference, and the Western Australian District Court did very well in the practical ways of running a court. During that conference, a person representing the Commonwealth Director of Public Prosecutions said exactly the same thing. I had a look at some of the judicial people present. Many people called for some form of consistency in sentencing and asked why mitigating and aggravating factors could not be taken into account, to let people know what range of sentences they can expect.

What is it about sentencing that has to be made so arcane? Why is a lawyer needed to find out what sort of sentence is likely to be imposed? Why are lawyers the only people who can speak the language? Lawyers used to conduct their cases in law French. Everybody else was speaking English, but in courts in England, they spoke law French. Many of the Latin parts of law were still being taught when I was in law school, and a lot of them still exist in cases. Why Latin? Why law French? Because the law has had this continual desire to be obscure to the public, to be an arcane form of knowledge. Sentencing is one area that is still being held onto grimly, as if there were something special, secret and artistic about it, as opposed to its being a matter of doing equal justice to people for equal offences and equal background. If it can be worked out, there is no reason why it should not be written down. The Government sees no reason for not telling people what is being done. Stage 1 and stage 2 impose no obligation on a judge other than to tell the public what he is doing. Members should look at what a horrified reaction that got. What an outrageous request, or order, from Parliament it is to ask judges to tell people what they are doing! The first stage simply requires the judge to explain why a sentence was imposed, to explain the balance between the maximum sentence set by Parliament and the aggravating and mitigating factors. Some of the excuses will be that this will take too long. Somebody is being sent to jail for four years, and it will take too long to tell him why! That is outrageous. What do they think they are doing? Does Hon Nick Griffiths think that a person who will be sent to jail for four years does not have the right to have the judge spend at least another 10 or 15 minutes telling him why?

Hon Tom Helm: Just tell him three strikes and he's in!

Hon PETER FOSS: At least they can understand that. One of the good points about the three-strikes rule is that at least they know why they have been sentenced to 12 months' imprisonment.

Hon Helen Hodgson: You cannot tell us how many people have been sentenced under the three-strikes rule because the courts do not know.

The CHAIRMAN: Order! This is not a joint participation session; the Attorney General has the floor.

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Hon PETER FOSS: The first stage is merely saying to judges that they must tell us what they are doing. We know they can do it, because they already use a method of recording.

Hon N.D. Griffiths: It is a very long and verbose short title speech.

Hon PETER FOSS: Good.

Hon Tom Helm: It is not good, but it is very long.

Hon Ljiljana Ravlich: Will it increase the penalty?

Hon PETER FOSS: We will get to that when we get to stage 3. If members stop interrupting me, we might move on.

I would have thought that a person who is receiving a sentence of imprisonment could at least ask whether it involved any extra time. I do not believe there will be any extra time, because of the processes currently in place for judges' benefit to speed up their processes by computerising some of the recording of their decisions.

The second stage does not have any impact on the ability of judges to sentence. All it says is, "This is what your fellow judges have found in a particular offence. These are the mitigating factors and these are the aggravating factors; your fellow judges have sentenced within this range." The Bill is saying that if judges sentence differently from their fellow judges, they have to say why. Is it an onerous obligation on judges who depart from historical sentencing for a particular matter with a particular set of aggravating and mitigating circumstances to tell people why they are departing from what their fellow judges do? What an outrageous request that would be! All of this is dismissed by Hon Nick Griffiths and is seen as some sort of ploy. The fact is the demands that are made in this Bill are being made around Australia in forums in which these issues are being seriously discussed. The concern that people have is that even a discretion is not meant to be at someone's whim. Discretionary sentencing must be according to the rules that have been set. We want to make that process overt and patent, so that people can see it. The report refers to clause 4, proposed division 1 and states that although the Bill establishes a process that may provide sentencing data on sentencing by the courts which was not previously available, this is better dealt with by adopting a system similar to that which exists in New South Wales. In New South Wales people other than the judge come along afterwards and try to work out what the judge has done. It is extremely expensive, as one would expect, to have a whole lot of people busily trying to work out after the event what the judge was saying. Surely if one really wanted to know what was in the judge's mind, one would ask the judge. Who would set up a system whereby, instead of asking the person who did something, they would ask everybody else? What would be the normal way to go about finding out whether, for instance, Mr Chairman was doing something for a particular reason? Would we ask 33 other people in the Chamber why they thought the Chairman did something or would we ask you, Mr Chairman? I would have thought, Mr Chairman, that the best way to find out - knowing you would answer us truthfully - would be to ask you and you could tell us.

Hon Derrick Tomlinson interjected.

The CHAIRMAN: Hon Derrick Tomlinson will come to order and cease interjecting on the Attorney General.

Hon PETER FOSS: Paragraph 8 in part reads -

The difficulty is in the requirement to indicate the degree to which each mitigating, aggravating or other factor is taken into account . . .

Judges are already doing that. To say it is too difficult is to ignore the reality: They are doing it. Paragraph 8 continues -

This is unclear. Sentencing should not be a mathematical exercise.

That is an interesting statement. I would sincerely hope sentencing is a scientific exercise. I believe there is some truth about the way in which sentencing is carried out, as I quoted earlier, in that when judges apply the broad sentencing principles to determine sentences in particular cases, the majority largely relies on an unreasoned sense of justice and rough and ready rules of thumb. Therefore, Hon Nick Griffiths opts for an unreasoned sense of justice and a rough and ready rule of thumb rather than ask judges to be exact about why someone was sent to prison for four years. He appears to believe that at least the sentence cannot be criticised because one does not know how it was arrived at. Paragraph 9 in part reads -

The Bill may be applied to Magistrates Courts.

Hon Nick Griffiths knows the Bill may be applied to the Magistrate's Court. Paragraph 9 continues -

The evidence of the Chief Magistrate makes it clear that it would be difficult to report on sentences in the detail envisaged by the Bill.

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There are two interesting aspects about that paragraph. Having heard the Chief Magistrate talk about the Bill, it is clear he had not read it.

Hon N.D. Griffiths: That is fairly outrageous!

Hon PETER FOSS: I have heard the former Chief Magistrate talk about it and he had not read it.

Hon N.D. Griffiths: If somebody does not agree with you, you accuse that person of not having read something. You are outrageous!

Hon PETER FOSS: No, the reason I say that is that he was plainly talking about the United States system of matrices and he could not see any difference between the two.

Hon N.D. Griffiths: Where did you get the idea for this; was it not on the Oregon Trail?

Hon PETER FOSS: Not the Bermuda Triangle; I can tell the member that much.

Hon N.D. Griffiths: I wish you had gone to the Bermuda Triangle; you would not have come back.

Hon PETER FOSS: Why did Hon Nick Griffiths come back then?

The CHAIRMAN: Order! Members must address the short title rather than members' travel interests or prospects.

Hon PETER FOSS: It is clear that it may apply to the Magistrate's Court but members will be aware that another provision provides for the Magistrate's Court to deal with the majority of their concerns because there is a need for consistency in the Magistrate's Court; the Criminal Lawyers Association make that quite clear. A process has already been provided for in the Sentencing Act to allow the Chief Stipendiary Magistrate to issue a check list of sentences to be used and I regard that as the principal method by which we proceed. That does not mean that an occasion may not arise when offences come within this Bill and it would be silly to try to pre-empt or leave out those cases now; however, no doubt, another mechanism is capable of being used for the majority of cases. The fact that it has a potential to be used on every single case does not mean that it would be used on every single one; plainly, it would be used when it is necessary to do so. It is also clear that the majority of criminal cases to which this Bill applies would come before the District Court. It would not apply so much to cases in the Supreme Court as it has a regime and does not deal with many criminal cases. The Magistrate's Court uses far more a rule of thumb and we have already inserted a provision for the use of the Chief Stipendiary Magistrate. That does not mean that it may not be necessary and, if it is necessary, it can be used. Paragraph 10 in part reads -

There are difficulties in reporting with respect to multiple offences and dealing with the totality principle . . .

Clearly, the Bill does not deal with the totality principle. However, it is well known that each offence must be sentenced when judges sentence people. The totality principle is a difficult area and a significant number of cases have involved that principle. We will be in a better position to deal with that difficulty when the information starts to come in. This Bill does not purport to deal with the totality principle and is in no way affected by the Bill. The present method is to sentence people on each conviction and the totality of the sentence is worked out on how many convictions are concurrent and how many are consecutive. That is in no way affected by the matrix system and that principle will continue to apply. It is a furphy to say that the Bill does not deal with it. It purposely does not deal with it. Paragraph No 11 reads -

The Bill has the potential to impact adversely on the fast track system of the District Court.

I have no idea where on earth that notion came from.

Hon N.D. Griffiths: It came from the Chief Judge.

Hon PETER FOSS: I know it came from the Chief Judge. I have no idea on what basis the suggestion was made. I was not referring to who made it. The report is based on assumptions about the consequences of the matrix system. Exactly the same principle as the fast track principle can be built into the system; that is, a discount can be granted for an early plea. The matrix will mirror the present system. The only difference is that it must be reported. How can reporting the first half have any impact on the fast track system? It has none whatsoever.

Paragraph No 12 reads -

The Bill has the potential to impose inappropriate administrative or executive functions on the Judiciary.

The judiciary is obliged to do some of its own reporting if it wishes to use the judicial sentencing information system, which the Chief Justice has been indicating for years he wants to use. Is it inappropriate to provide that

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information when the judiciary needs that information to use the JSIS? How can it be inappropriate for one purpose and not inappropriate for another? Too many people shot from the hip in response to the proposed matrix system before they worked out how it would apply.

Paragraph No 13 reads -

The observations with respect to Division 1 are relevant to Division 2.

Or, as the case may be, irrelevant.

The next two paragraphs read -

14. Division 3 is the grid system in operation.
15. It gives the Executive, not Parliament, the control. The lack of a capacity to amend the regulations means that parliamentary control is less than would be the case when Parliament deals with normal primary legislation such as a bill.

There is nothing to stop Parliament introducing a Bill or a regulation. The Parliament has the power to do that now under the Interpretation Act, although it is unlikely Parliament would do that. Regulations must be passed by both Houses of Parliament. However, the matrix will allow for the necessary flexibility if anyone has any concerns about its operation. We know how long it takes for legislation to be passed by this House. For the matrix system to operate, alterations must be made fairly quickly. Parliament will have complete control over it because only Parliament can allow regulations to be passed. I acknowledge that it will be difficult for Parliament to suddenly increase all the penalties. However, that is appropriate because, as we know, changes should not be made which make fundamental differences to the imprisonment rate, without some involvement by government due to the significant cost that will flow from that. If changes are to be made, they require the support of the Executive.

The system will work. It will give Parliament the ultimate control over regulations. It will not lead to bidding wars or to situations that will be most inapplicable in relation to criminal law.

Hon Ljiljanna Ravlich: Will the matrix lead to increased penalties?

Hon PETER FOSS: That will be up to Parliament; it is a decision which members will make. The matrix is a tool.

Hon Ljiljanna Ravlich: So, in effect, is the answer no, unless it is agreed to by Parliament?

Hon PETER FOSS: The biggest problem with increasing penalties in certain cases is knowing what they should be increased from and to what extent. If, for example, everybody thinks that the penalty for a certain offence should be two years longer than it is, the first issue to be determined is what penalty applies now? At present that cannot be determined.

Hon Tom Helm: How can you say someone deserves to get two years longer?

Hon PETER FOSS: Parliament believes, for example, that prison sentences for crimes committed against seniors should be longer than they are now. How does one do that? The maximum penalty cannot just be increased. Members will find that the statistics indicate that changing the maximum sentence has no effect on the sentence handed down in court. Difficulties arise if a minimum sentence is set. There are two alternatives with minimum mandatory sentences. There can be a real minimum - that is, a penalty which deals with the minimum set of events. Otherwise, it can be set at the medium sentence. The problem then is that it would be too large for the minimum set of events. Minimum mandatory penalties can be difficult to set in a way that works. Maximums do not change the sentence applied, and minimum sentences pose problems.

A penalty is needed which is tailored; that is, it takes into account the sentencing and the aggravating circumstances. Taking the case involving a badly injured senior, the penalty should take into account the mitigating factors: The offence was committed, say, by a young person who, on a first offence, acted completely out of character and was unlikely to do it again. Those two elements may or may not arise in the one case. Nevertheless, that is the sort of appreciation needed. A tariff would apply for that situation. It would be largely known only to judges and lawyers, not to the public. What would happen if Parliament wanted to add another two years' tariff for that situation? Suppose the tariff for the example I gave was a year in jail. Parliament may think that in view of all the offences for which a certain sentence applies, a further year's or two years' imprisonment should apply. How can Parliament say that? How can it change it? There is nothing to change. The current system imposes only a mandatory minimum sentence or increases the maximum penalty. We know that changing the maximum has little effect on the sentence applied and that mandatory minimums are difficult to frame unless they apply to far-out cases.

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Let us take the three-strikes legislation. It is hard to envisage an adult appearing before the court for his or her third chance - it might be for 70 offences - and not receiving 12 months' imprisonment. When one thinks of the misery and upset caused by home burglary, it is hard to understand why a 12-month sentence should not apply for a third appearance. The offender is likely to get a longer sentence. The minimum case is picked in setting the mandatory minimum sentence.

Hon Tom Helm: Do not worry about whether it is a drug or drink-related offence.

Hon PETER FOSS: If it were, it would probably send up the sentence a little more. If it were a mandatory minimum sentence, it would be a minimum. This must be the minimum sentence imposed. A court may impose more. Statistics indicate that in many cases the courts impose more than the minimum sentence for a third appearance. The number of sentences of less than one years' imprisonment has decreased, and the number of sentences of more than one year has increased. The entire sentence structure has moved.

The point is that if Parliament believes an area of criminality should be treated more seriously and offenders in that area of criminality should receive increased sentences, it has no toll to impose that view on the courts. The courts can decide that crimes against seniors require a greater tariff. They have that capacity, but Parliament does not.

Hon Ljiljanna Ravlich: You are saying that the matrix will not result in an increase in penalties; however, it will provide a vehicle for the Parliament to make a decision to increase both minimums and maximums, should it see it as being required.

Hon N.D. Griffiths: Or decrease.

Hon PETER FOSS: I have always made it clear that the Parliament will be given the tool to do that. That is why I disagree with the statement made by Hon Nick Griffiths. If one were to believe Hon Nick Griffiths' report, the legislation would allow the Executive to do that, but it does not; it allows Parliament to do that. It gives Parliament a tool for increasing penalties should it wish to do so. No penalty is contained within it. The Sentencing Act is, to a large extent, a way of dealing with the courts' handling of sentences. This started as an amendment to the Sentencing Act.

Hon Ljiljanna Ravlich: Why would we not just amend the Criminal Code and increase the penalties there?

Hon PETER FOSS: I thought I had just dealt with that.

Hon Ljiljanna Ravlich: I thought you might have, too.

Hon PETER FOSS: I will briefly go over it again.

Hon Helen Hodgson: You don't need to deal with it again.

Hon PETER FOSS: I had dealt with that.

Hon Derrick Tomlinson: Why don't you do that?

Hon N.D. Griffiths: We will read it in *Hansard*.

Hon Tom Helm: We do not like filibusters, do we?

Hon PETER FOSS: No, I will not repeat it. I thought Hon Ljiljanna Ravlich was here when I said that.

Hon Ljiljanna Ravlich: I was.

Hon N.D. Griffiths: Now I know why the hours of the sitting of the House were extended.

Hon PETER FOSS: Hon Ljiljanna Ravlich has picked up a matter that the minority report did not pick up: It is not the Sentencing Matrix Bill that increases the penalties; it is the tool which will give Parliament the capacity to do it. At the moment, Parliament lacks the tool to do it for two reasons: First, it does not have the information necessary to make the change, which is also a problem of the Court of Appeal, because it does not have the information to give a guideline judgment. Secondly, the Parliament does not have a way of setting a range of sentences, other than the current method, which is so wide that it means nothing. The maximum sentence for home burglary is 18 years, so all the offenders get two years. I think two years is the median.

Obviously, Parliament does not have a very direct impact on the range of sentences; it has a very indirect impact, unless there is a minimum mandatory sentence. As I said, I do not believe that is a very satisfactory tool. If members want to pick out a particular issue like crimes against seniors, they will find that there is no point in our raising the maximum sentence because it will have almost no impact on the actual sentences. The only way to have some impact on crimes against seniors is to find out what penalties are being imposed and then say that from now on this is what the range will be. There are still some let-outs, because it allows the court to go above or below that range if it believes the interests of justice require it to do so. There are consequences of that, but it

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is not absolute in its terms. However, it has a remarkably strong impact on the range. It still leaves a range, because the court will have the capacity to move within that range. As was pointed out by Hon Ljiljanna Ravlich, paragraph 15 is wrong.

Hon N.D. Griffiths: A “misrepresentation” is what the member said.

Hon PETER FOSS: She has picked it up very well; she has picked the member up immediately.

Hon N.D. Griffiths: You are such a sensitive little soul.

Hon PETER FOSS: Hon Nick Griffiths is the sensitive one. He should not get too upset because the members in his party room pick him out as having made a very poor argument. We know there is division in the member’s party room.

Hon Ljiljanna Ravlich interjected.

Hon PETER FOSS: Hon Ljiljanna Ravlich should not apologise; she is pretty good.

Hon N.D. Griffiths: Why don’t you stop yelling and screaming?

Hon Ljiljanna Ravlich: You need -

The CHAIRMAN: Order! This is not a duet; it is a monologue.

Hon PETER FOSS: The matrix involves the court’s reporting to the Executive through the use of sentencing reports. The reports are to the Executive, not Parliament. The regulations in the first two stages come into force simply when they are gazetted and do not need to be specifically approved by Parliament. Regulations are the province of the Executive and may be disallowed by Parliament. The Bill provides for regulations in division 3, sentencing according to a prescribed method. However, these regulations cannot be amended. They are the property of the Executive. In one sense, Parliament may have more control over the sentences that will be imposed in that it can say yes or no to any regulation proposed under section 101. However, parliamentary control is more effective with the traditional method of using primary legislation to set maximum or minimum penalties or, from time to time, with the use of mandatory enactments.

Having said that it is more effective than parliamentary control, we have just been through the reasons that it is very ineffective in parliamentary control. It means that Parliament can pass all this legislation and it can be completely ignored. That is the concern that we and the public have. Parliament can certainly do all these things; Parliament has control. It can pass or not pass the legislation; it can amend it. However, the courts can totally and utterly ignore that legislation, and I think the figures attached to the majority of courts indicate that, to a large extent, it is.

Hon N.D. Griffiths: But you say otherwise.

Hon PETER FOSS: No, I do not.

Hon N.D. Griffiths: Yes, you do.

Hon PETER FOSS: No. I say that lawyers and I think the sentences are adequate in 99 per cent of cases. That does not mean that the courts are paying the slightest attention to Parliament. The fact is that the operation of the courts allows them to disregard Parliament. It may well be that Parliament does not agree with the courts. I am one of the group who understands the arcane language of the law, and I think that the majority of the sentences imposed are appropriate to the particular case. That does not mean that I think that Parliament is being listened to. There is a world of difference between what we, as lawyers, think is the right sentence and what Parliament thinks is the right sentence. That is from where the true indignation has come.

The thing that fascinated me about the mandatory sentencing debate was that judicial independence was referred to, and it was said that mandatory sentencing is an assault on judicial independence. First of all, the High Court of Australia has said that it is not. The people who say that seem to have lost track of the relative roles of judges and Parliament. They seem to have lost track of why we talk about having judicial independence. The real reason that we have judicial independence is to stop the Executive determining whether a person should be found guilty or not guilty and determining in a particular case what a person’s penalty will be. This all came about because one of the standard things that used to happen, even going back to the period after the Glorious Revolution, was that whenever there was a change in government, the members of the previous Government were all prosecuted, usually for treason, and they all had their heads chopped off. One of the standard methods of dealing with people in the community opposing the Government was to prosecute them, normally for sedition.

Hon Derrick Tomlinson: A Pakistani tradition.

Hon PETER FOSS: Yes. Hon Derrick Tomlinson has pointed out that it is alive and well in certain parts of the world, such as Pakistan. It is one of the reasons that Fox’s Libel Act was brought in - not to stop people being

sued for libel but to stop them being prosecuted for libel, because libel and sedition were the classic ways for Governments to suppress opposition. Treason and attainder were the classic ways to knock off the heads of the members of the former Government. Therefore, the need for a system of law under which judges would make their decision according to the law and not according to the political needs of the Government - the rule of law - was a very important matter. However, that was not to say that Parliament should not have the right to say what the tariff would be.

We also believe that the essential element of our democracy is that our laws should be made by Parliament, and that the laws Parliament makes should be enforced by judges. They should not enforce another law that they think better suits them. Judicial independence is not a right of judges; it is a right to justice. If justice is not done, the right of independence of judges is not only wasted, but also corrupted. All too often people have lost sight of justice and gone after the trappings of the way justice is secured. As I said in my paper, it is similar to the donkey on Palm Sunday who thought that all the palms and adulation were for him, not the person on his back. Judges must recognise that they are the mules that carry justice; they are not justice itself. We need a system whereby judicial independence is supported for the justice it delivers. Judicial independence is supported to maintain the rule of law. Judges must enforce the law declared by Parliament. They may not like the law. However, as with the rule of law, the rule of Parliament provides people with a way to deal with things they do not like; that is, by changing the representatives in Parliament. People have the right to do that whether they think the law is too lenient or too severe. One of the problems is that it is regarded as wrong for Parliament to set the range of tariffs. Life sentence is a potential penalty for murder and wilful murder, yet nobody suggests that interferes with judicial independence.

Hon B.K. Donaldson: The chief justice wanted Parliament to clarify that.

Hon PETER FOSS: The chief justice said he thought that was unfair of Parliament. He said there should be just one sentence for wilful murder and murder; that is, strict security life imprisonment with no parole, and everything else should be determined by the exercise of executive clemency. He thought it was asking judges too much to require them to distinguish between strict security and not strict security and between no parole and various degrees of parole. I understand that might be a difficult question; however, I thought that is what judges are paid to do. His argument has a certain logic: A person is rendered liable to a particular sentence and the Executive decides the length of his prison term. That is how the initial grid system started in the United States. People were sentenced to 20 years or life imprisonment. Obviously, not all remained in jail for that length of time. A parole system was started, and people were let out through the use of a grid and executive clemency. Somebody suggested that it be imposed up front, and prisoners are now sentenced on the basis of the grid system.

The committee's minority report states -

The matrix system - a grid system - will not be open and accountable:

"It is wrong to assume that the justice system will be rendered more transparent and accountable simply by restricting judicial discretion.

This Bill will render the justice system more open and accountable because judges will be required to state the particular aggravating and mitigating factors and explain why they depart from the results of the matrix. This evidence was given by Mr Neil Morgan, who was referring to the systems in the United States. I continue -

... pre trial decisions by police and prosecuting authorities become the ultimate determinant of the case ...

Why would that happen? That might be the case in the United States because of the nature of its grids. However, it will not happen here. The charges will be the same as they are now and the determinant will be the facts that emerge in the case, as it is now. There will be no difference. I continue -

that will give enormous power to the pre trial decisions.

That might be true in the American system, but not in the Australian system. It is a criticism of the American system, and one that the Government took into account when drafting this. It is a fair criticism of the American system, but it is irrelevant. The pre-trial decisions will make no difference whatsoever, and the method of pre-trial charges will not change. The system will be exactly the same; the facts as they emerge will determine the ultimate penalty. I quote again -

Importantly, the decisions are made behind closed doors and are less open to public scrutiny than are decisions of the court".

That is the American matrix, not ours. I continue -

The meaning of ‘to show cause’ in respect of an appeal under #101N, is unclear. The appeal procedures turn on a comparison between a relevant sentence and an actual sentence. The appeal procedures rely on the practicality of Division 4 to have any sense.

That is an interesting statement. I thought the expression “to show cause” is well-known terminology in the law. It requires exactly what the words say when a case is being appealed. There has been much misunderstanding about this. If a sentence is within the grid, it can still be appealed because the ordinary rules apply to the appeal. Appeals can be made for all sorts of reasons. If the sentence is below the matrix, the only person who will appeal is the Director of Public Prosecutions. The prisoner will not appeal the decision because he was sentenced an amount below the matrix and, therefore, the court should raise it. The DPP has discretion on whether or not to appeal. The problems identified at the seminar on mandatory sentencing by judges in New South Wales related to the difficulties of the Crown appealing. We know that it is difficult for the prosecution to appeal, and that one of the inconsistencies in sentencing comes from inadequate sentences.

If the sentence is too large, we have an excellent system for appeals. If it is too small, the capacity for the Crown to appeal is extremely limited. If the sentence falls on the wrong side, it is extremely difficult to satisfy the needs of justice. Quite apart from the matrix, there are difficulties with the appeals made by the Crown against inadequate sentences. The matrix legislation will make it more consistent and will get away from the problem of inadequate sentences. The DPP must decide whether to appeal. It may very well be that the judge will give satisfactory reasons for departing from the matrix. Those satisfactory reasons are available to the DPP and the public. The judge may single out an unusual case. Despite all the other judges and Parliament taking the view that the sentence should be in a particular range, the judge may have the view that it is an unusual case and give his reasons for departing from the matrix. If, having given those reasons, he satisfies the public and the DPP, that is it. If he does not satisfy the public and the DPP, he must satisfy the Court of Appeal; that is a reasonable state of affairs.

Of course, no-one will gripe at the suggestion that excessive penalties should be easily appealable. Judges do go over the range. I know of some of them because I receive letters about it. Members will not find letters to the newspaper about them, nor hear of them on talkback radio. The newspaper will not display headlines criticising the judge, but I get the anguished letters, usually from the grandparents whose grandchild has been given a nasty sentence. It is worrying. Even though it is easy for the criminal or the accused to appeal, our current system still has some problems.

I am in two minds as to whether tables are good, but the table has at least illustrated the issue and caused people to ask questions. The cases were purposely picked out by parliamentary counsel because they were difficult. The drafting does not affect the meaning. The meaning is clear: The table gives practical examples of its application. Parliamentary counsel is in two minds about whether items that do not have legislative effect but which are intended to have illustrative effect should be put into the Bill. Personally, I agree with the school of thought that items should not be included in a Bill unless they have legislative effect, although perhaps a table like that in an explanatory memorandum raises questions that enable one to explain why it works. The cases that arise will not necessarily be as complex as those in the table. The most complex examples were given to try to illustrate how the legislation will work.

The essential point is that when Parliament sets a range, it is indicating that the Sentencing Act already contains a series of gradations from one kind of penalty to the next. People have difficulty comprehending that if someone moves from gradation one to gradation two - from a community-based order to imprisonment, for example - if the offence warrants imprisonment, it warrants at least the lowest period of imprisonment. If a court thinks an offence warrants more than a community-based order, it should at least be the lowest period of the imprisonment. It cannot say it requires a longer sentence of the lesser type of imprisonment in the hierarchy of sentences and just keep cranking that up without moving to the next gradation. I suspect that the reality of the matter is that courts do that with the types of penalties they impose. They do not give unlimited expansion to community service orders, for example, and move from a 12-month community service order, to a 24-month order, then a 36-month order and so on. The courts do not keep jacking up the period of community supervision a person gets; they move on to imprisonment. People do not move up to 12 years of community service order and then after that get one year’s imprisonment. The sentence moves by a quantum leap from one type to another. It moves from a maximum of one type of sentence to the minimum of the next one. That has been written into the Bill and that is how it works.

We have certainly tried to include the most difficult examples in the table. It has no legislative effect. I do not have any problem with whether it is in the Bill. It is a matter of the parliamentary system.

Hon N.D. Griffiths: It is supposed to explain, and it confuses.

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Hon PETER FOSS: It does not confuse. Parliamentary counsel purposely picked the hardest examples for illustration. The table is a drafting matter and certainly not something I asked to be put in the Bill. It is not part of the scheme and is not essential to the legislation. I suspect that parliamentary counsel tried to work it out for himself, came up with a grid and thought he might as well include in the Bill to illustrate the sort of situations he had worked out. He drafted it to make sure it gave the right result. From that point of view it is useful.

Hon N.D. Griffiths: It is very useful.

Hon PETER FOSS: It was useful to him because he was able to see that, mathematically, the legislation works. The drafting had to be done very carefully because one example might work and from that we might think it works for all. If we do not try enough examples, we cannot find out whether the wording is appropriate. One of the good things about the table is that the examples indicate that the wording holds up and gives the right effect.

Hon Derrick Tomlinson: The wording holds up very well indeed. That is why the table becomes redundant.

Hon PETER FOSS: I agree. The table is useful for parliamentary counsel to determine that the wording holds up well. Having done that, we probably no longer need the table.

Hon B.K. Donaldson: We understand the written word.

Hon N.D. Griffiths: If you say it often enough you might believe yourself.

Hon PETER FOSS: Hon Derrick Tomlinson has made it very clear.

Hon N.D. Griffiths: He is very loyal, and that is commendable.

Hon PETER FOSS: He said that the words hold up. It is an excellent piece of drafting in its sparsity of language and its exactness of operation.

Hon N.D. Griffiths: That is an accurate description of the minority report.

Hon B.K. Donaldson: The majority also said that.

Hon N.D. Griffiths: The content of the majority report is good, save for its conclusion.

Hon PETER FOSS: People have missed the point of clause 4 in that the matrix will provide a range within which the sentence must fall. Those handing down sentences do not need to know the law behind it - they can simply sentence within the range stipulated. The court must use the matrix. Clause 4 is the tool for Parliament and this gives effect to that tool. The matrix itself is simple and those involved will hand down sentences within the stipulated range. However, a mechanism must be behind the matrix to enable it to work. I do not see it as a problem. Those handing down sentences will know that they must stick within the range and that if they go outside it, there will be consequences.

I have spent some time dealing with the minority report because those involved should not be able to get away with this lack of any underlying explanation. On the other hand, the majority report goes into great detail. I congratulate the chairman and members of the committee for their thorough research of the matter. The questions asked of me when I returned for my second appearance before the committee - I confess that I had forgotten Hon Nick Griffiths was there - indicated that the committee had arrived at an understanding of how this legislation would work. One of the biggest problems we have had throughout this process - it happens with many pieces of legislation; this is not unique - is that people have jumped to conclusions about the legislation. Their comments have been based on what they think is in it, not on what is in it.

The interesting difference between my two appearances before the committee is that on the second occasion the committee had obviously done a lot of homework and members were familiar with the legislation and its intent. It may contain the same matrix as that in the American legislation - there is no doubt that that was its origin - but the big difference is that, in formulating this legislation, we took into account the criticisms of the grid legislation. The criticisms of the American legislation were dealt with in the drafting of this legislation. It is not a coincidence; it is because we were well aware of that criticism when formulating this legislation.

I have attended two seminars - one under the auspices of the Standing Committee of Attorneys General and the other under the auspices of the University of New South Wales. Neither was in favour of any limitation of judicial discretion. At both seminars people said we need a system that allows people to get a clear idea of why they are being sentenced. We need a system where sentencing ceases to be an esoteric and arcane art; people have some idea before sentencing about where they will end up, taking into account all the mitigating and aggravating factors; and there is some consistency in sentencing.

There is inconsistency in sentencing; and anyone who says otherwise is wrong. Lawyers will say, particularly in the Magistrate's Court, but also in the District and Supreme Courts, that some judges have a particular bias. It is not necessarily always for the defendant or always for the prosecution. Judges have particular areas of

abhorrence or vulnerability, where they will either get stuck into a person or let a person off. We have known that for many years, and we usually know why those judges have that particular hard spot or soft spot. However, that is hardly justice, and that is hardly satisfactory to the public. The most unsatisfactory element of our current situation is that it is not amenable to public understanding. Hon Nick Griffiths' suggestion that I teach the public to understand it misses the point. We need to educate the judges to give their information in a way that is amenable to the public. This is the first step.

Hon B.K. DONALDSON: I could not let this opportunity go past without making some comments. It is important to look at pages 38 and 39 of the fifty-third report of the Standing Committee on Legislation, as they list the imprisonment penalties for most serious offences in the superior courts in 1997-98 and 1998-99. The graphs on those pages were supplied in colour, which gave a much clearer indication, and I wanted to include then in colour. Unfortunately, although I am the chairman of that committee, I was overruled, which goes to show that democracy does work in that committee. The graphs show clearly the low sentences, because, as the Attorney General pointed out, the Parliament of Western Australia has at different times placed emphasis on the statutory penalties for different types of offences. We are not arguing about judicial discretion. We believe that should occur. It is interesting to look at the consistency of sentencing during that period. The penalties did not change much during those two years; there was hardly any movement. Therefore, a de facto grid system is already being exercised by the courts. To me, that stood out more clearly than anything else. It is almost a grid system in its own right. Therefore, whether the judges in Western Australia believe in it or not, in their own mind, when they are assessing the sentence that should be imposed, they are effectively using a grid system. I would love to see the graph for 1999-2000; I bet it would not be too much different.

Appendix 11 at page 155 is headed "Sentencing Factors Worksheet". This is part of the sentencing information system. The committee had the opportunity twice of looking at that package. A subcommittee went to New South Wales to look at the sentencing information system that has been in operation in that State for 10 years. We know that the judiciary wanted a sentencing information system in Western Australia. Some members of the judiciary are being dragged, kicking and clawing at the woodwork, towards this system. Yet certain members of the judiciary think that it is not a bad idea. Those people are using this work sheet. They will probably put in other factors at some stage, but at the bottom they indicate the sentences they imposed. That is given to a clerk - it is not very difficult - and the information is fed into the system. This tick-a-box arrangement helps the judiciary. However, they already have that information in their heads. Pages 38 and 39 show me that they ticked off, in their minds, exactly what was going on before the sentence was imposed. In an overwhelming number of cases, there is no problem. One offence that gets up people's noses more than anything else is home burglary. This is the crime that affects more people in the wider community than any other serious offence. It is something that occurs with some consistency. When I studied this, I could not believe just how close we already are to a grid system.

On page 99 of the Report of the Standing Committee on Legislation in relation to the Sentencing Matrix Bill 1999, under the heading "Commencement of Division Three," the Attorney General is quoted as saying during evidence -

I firmly believe we may never need to use the third stage of the matrix.

The Attorney General illustrated that this evening when he said that the most important part of the Bill was that it would provide a database. That is what the sentencing information system is all about. When the database is established it will allow people to look at the consistency that is already evident in sentencing. The grid could easily be set up. This will not remove judicial discretion. It may fetter that judicial discretion, but that discretion will still remain. Hon Peter Foss went on to say, at paragraph 9.66 -

My preference is go through stage one and to get the information, then to stage two and to publish it, and then to stage three to do what we want to do with it.

It is a phased arrangement and that is how the committee viewed it when it took, and deliberated on, the evidence. The committee knew of the three stages. It felt that it was the appropriate pathway to go down. I do not have a problem with it. It was wrong and misleading of some people who gave evidence to the committee to continually say that this would remove judicial discretion. That is an absolute load of rubbish. Anyone who says that should have a good look at other grid or matrix-sentencing systems around the world that clearly show that judicial discretion remains. It always will.

Hon Ljiljanna Ravlich asked whether the Parliament could impose or set higher sentences through this system. Yes, it could. However, irrespective of what this Parliament thinks, she should take a good look at some of the sentences that have been imposed under the statutory penalties. This is what people ask. I wanted the two colour graphs from this report printed on the front page of *The West Australian*. It would shock many people in Western Australia if they knew how pathetic some of the sentences imposed in Western Australia are. I say that,

but I was not in the court. That is why I respect judicial discretion. However, that is what people want to find out about.

The judiciary is paid an awful lot of money and enjoys the most wonderful superannuation packages. No-one denies that. They have a heavy responsibility within our society and we must ensure that they are free from temptation, which is a problem in other countries. I do not have an argument with the judiciary receiving good remuneration. However, at the end of the day, they cannot set themselves up as the sole font of knowledge. I believe too many of them have trapped this away in their minds and made some decisions. Interestingly, they have been almost consistent in the sentences that they have imposed over this two-year period. I would like to see the information for the years before then and this last year, which is not yet available. I do not have a problem. I supported this Bill from day one. We have made some changes to it.

Secondly, the guideline judgments and the arguments in favour thereof on page 141 far outweigh the arguments against; then there is appendix 6 on page 139 in relation to arguments in favour of and against sentencing grids; and on page 140, arguments against sentencing grids. I am only a layperson and I was absolutely amazed. I guess some lawyers would find this untenable because there is too much certainty within the court. They would not be able to argue for days on end over technicalities and points of law and make big arguments to the judge in order to win a case or get a reduced sentence. This will speed up the court process, which is long overdue.

Hon GIZ WATSON: I rise to oppose the short title of this Bill and reaffirm the minority report by the Standing Committee on Legislation. It was a useful opportunity in committee to look at this legislation over an extended period, and nothing in that process has changed my opinion that this Bill is fundamentally ill-conceived and is a political exercise to fulfil the Government's objective of looking tough on crime. When considering this legislation in committee, I began to feel more and more that it was about smoke and mirrors and tying up a lot of people's time and energy in trying to address something that was not only ill-conceived but poorly drafted. As the minority report clearly indicates, it does not achieve the stated intentions. The details of the minority report have been addressed in the previous debate by Hon Nick Griffiths and the Attorney General, and I would rather address the broader issues about why this whole approach to the issue of sentencing is merely a distraction by this Government from addressing the real issues to do with the causes of crime in this State; that is, issues relating to under-funding of education and health, and the whole question of drug use and alienation.

Having had the opportunity to visit New South Wales as part of this committee and have discussions with various people, one of the things that struck me about the different approach that had been taken in New South Wales was that it involved the judiciary in developing the reporting system and it also involved the judiciary in the outcome and the design of that reporting system. I agree that there is nothing wrong with having a better reporting system and a clearer method of compiling statistics or information about sentencing. Indeed, that would address some of the criticisms of consistency, et cetera.

The system has been in place for a while and it is clear that it has widespread support. The approach in this Bill is to use it as a means of launching an attack on the judiciary. It is a highly antagonistic approach. I reiterate the point made by Hon Nick Griffiths that the Attorney General has stated that in 99 per cent of cases, sentences are appropriate. The issue is with the public perception of sentencing. None of the witnesses that appeared before the committee spoke in favour of the Bill. There were many submissions that the perception of what was a fair and reasonable sentence would not be resolved by this legislation.

In the minority report, it is the Greens' opinion that the Bill provides for the Executive, rather than the Parliament, to promulgate the regulations and to establish the sentencing principles and policy issues that are traditionally dealt with by primary legislation. There is the potential for constitutional challenge as the Bill may require administrative duties that are not prescribed. I quote from the committee's report under the section "Incompatibility of Function" -

- 4.23 The essence of the argument of the Chief Justice was that the various reporting requirements might be the subject of constitutional challenge as representing an attempt by Parliament to impose upon Judges executive or administrative functions incompatible with judicial independence.
- 4.24 This argument appears to be based on the doctrine developed by the High Court in the recent case of *Kable v DPP*. The essence of that doctrine prohibits the Legislature from conferring jurisdiction or functions requiring courts to act incompatibly with the integrity, independence and impartiality required of a court exercising the judicial power of the Commonwealth. The "incompatibility of function" test applies irrespective of, and quite independently from, the separation of powers doctrine although it appears to have the same effect.

Even if this legislation were to be successful it could be subject to a challenge on that issue. A lot of discussion by the committee was in respect of whether the Bill will restrict judicial discretion. I am of the opinion that it

will. Even those members who had the majority position on the report agreed that there would be a fettering of judicial discretion. Argument centred on how much fettering was reasonable. The point was made that the matrix seeks to impose a mathematical formula on sentencing.

If the intention of the Bill is to present, among other things, a position of getting tough on crime, it must be said that there is no conclusive evidence that the certainty or toughness of penalties, which the Bill may or may not affect, will improve things. The record of this Government shows that there is a clear intention to toughen penalties. There is no evidence that increased certainty or toughness of penalties has a deterrent effect on crime. I reiterate the concern about the impact on the District Court. We heard evidence about the disruption to the fast track system, which is currently operating reasonably well to reduce the backlog in the court.

Hon HELEN HODGSON: Earlier today there was a horse race, in which a horse named Diatribe competed. A lot of early money was on that horse, which did not bring anything home. I have looked at the committee report, and I have reviewed what happened at the second reading stage of this Bill, and my opinion of the Bill at that stage has not been changed by the evidence brought together by the committee. I appreciate the work done by the committee, which received a lot of evidence and considered it in good faith. However, even the majority report identifies some serious shortcomings, and for those reasons I agree with the minority report. The Australian Democrats will not be agreeing to the short title of this Bill.

The second reading speech acknowledges that this Bill gives Parliament more control over sentencing. The quote from the second reading speech is referred to on page 6 of the committee report, where it says that the policy and principles are to give Parliament more control over the sentences that will be imposed. The intent of the Bill is quite clear from this. While the report states that the Bill is not technically contrary to the principle of the separation of powers, the evidence quoted in the report indicates that it is contrary to the way in which the judiciary has operated in respect of the application of that doctrine. The difference between politicians and the judiciary needs to be established clearly. The politicians set the parameters, and the judges operate within those parameters. As politicians, we should not use the setting of those parameters to score political points, and we should not expect judges to become political operatives, working within a grid-like framework to achieve the policy objectives set by a Government.

Paragraph 2.8 of the committee report refers to the observations in relation to judicial discretion in its report on the Sentencing Bill 1995. Five years ago the committee examined this issue and said that it considered it undesirable to restrict judicial discretion, where discretion is required to better serve the interests of justice. To turn around now and set up a framework which will limit that discretion is contrary to the findings of that report five years ago. Outside the committee process, I have not received a single submission that is in favour of the sentencing matrix. I refer specifically to the report that was tabled in this House in which the Chief Justice took the unprecedented step of reporting directly to this Chamber rather than going through the minister's office. I have submissions from the Western Australian Bar Association, the Criminal Lawyers Association, and the Prisoners Action Support Service. I note that on the retirement of Justice Heenan from the bench a large write-up in the newspaper last Saturday discussed the issue of the sentencing matrix. Justice Heenan is quoted as saying -

I think it's crazy - the idea of providing a precise penalty for a particular offence is fraught with problems.

Further on he says -

"The public should trust us to do our job," he said.

"It does require trust but if people can't trust their judges who can they trust? And whom do they want to do the job of sentencing criminals? You can't leave it to the politicians."

As a politician, I do not want that job. The judiciary is trained to do it and has the responsibility to do it. The matrix is so complex that very few people can understand the legislation. With all due respect to the Standing Committee on Legislation, its report is of little help. Paragraphs 2.22 and 2.23 of the committee's report read -

The Committee observes that, aside from references in the Bill to 'degree', 'prescribed formulae' and 'method', there is no *specific* indication in the Bill as to the form or content of the mechanism to be employed to achieve the stated principles.

...

The Committee observes that it is difficult to fully evaluate provisions of the Bill . . . , as there is no public draft of the regulations. Regulations promulgated under the Bill could cover a whole range of criminal offences similar to the sentencing grids in the United States . . . Accordingly comments . . . are based on what has occurred in other jurisdictions, notably in the United States.

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Even after an 18-month inquiry into the Bill, the committee is unable to enlighten us on exactly how the matrix will operate, except by reference to what the Attorney General has told us is his intention. Based on that, if I do not understand the legislation I will not vote for it. I hope that other members in this Chamber feel the same way.

The principles set out in the Bill are not sufficiently precise to allow us to interpret them. The black letter law could turn out to be quite different from what we are told it will be. The Bill provides for the inappropriate delegation of authority from the Parliament to the Executive through the use of regulations. I enjoyed the discussion on the skeleton Bill in the report, because I was not aware that phrase existed to explain what is happening here. I acknowledge that the regulations are subject to an affirmation regime, and the Attorney General did refer to this in his comments. However, I believe an affirmation regime should come into being by way of a Bill, so that we know what we are debating. The only advantage in using regulations is that they take effect immediately, which means that in effect any non-affirmation would mean that they are already in place. I am trying to recall - it is so long ago - whether that has been modified in this application. If it has to come to both Houses of Parliament, it should be brought to us in the proper way, and in the correct and normal manner, rather than by having a delegation from the Parliament to the Executive.

I agree with the need for sentencing to be more fully explained to the general public. However, this is already under way and we do not need the matrix to deal with that. Western Australia already has the highest imprisonment rate in the country, an increase in the length of sentences, a lot of information available on the Internet, and the power to appeal inappropriate sentences. I notice that the Director of Public Prosecutions said that that power existed, although the Attorney General is quoted as saying that there are problems with that, and seems to be trying to minimise that as a tool in sentencing. We already have a capacity for guideline judgments. I remember asking in this place some two years ago whether any guideline judgments had been issued. At that date none had been issued and I understand from the Attorney's comments earlier this evening that still none have been issued. The Judicial Sentencing Information System (WA) - an information management system - is currently being developed. According to the committee report, that system, which is under way, will improve access to information by members of the public.

Hon Peter Foss: Not the public, only judges.

Hon HELEN HODGSON: Why do we need a Sentencing Matrix Bill? If it is for judges and not the public, it would require very little modification to make it available to the public.

Hon Peter Foss: That is what this Bill does.

Hon HELEN HODGSON: I am sorry, the Attorney General goes far beyond access to the public with this Bill. This Bill is fatally flawed. The Australian Democrats said that in the second reading debate 18 months ago and we have seen no reason to change our minds in the time that has elapsed or from the committee report that has been presented today.

Hon PETER FOSS: To answer the member's last point, the JSIS is for judges only. That is one of the problems I have struck, as I believe the information from the JSIS should be available to the public. It is objectionable that judges say that it is their personal information and it should not be available to the public. That is the way they put it and I find that unacceptable. The first of the two stages of this Bill provides that information to the public. The first part relates to the raw data of individual cases and the second part to the assembled data of individual cases.

Hon Helen Hodgson: You don't need a Bill to do that.

Hon PETER FOSS: We do because judges flat out refuse to do it. One of the reasons we brought this Bill into the Parliament is that I tried to get this information out to the public. I asked the judges to tell me and they refused. When I asked the judges if they had any objections in principle to the idea that they should be required to assemble information and report on individual cases, they said that was perfectly all right. When I asked why they would not do it, they said they were not going to. That is the sort of accountability judges have. They cannot object to the principle. How could they object to the principle? However, there is no way they will be told to do it and they will not do it if they are asked.

I must say that I had tremendous cooperation from the Chief Judge but the rest of the judges refused to cooperate. The high tone taken by members when they talk about principle is objectionable. I would have thought a basic principle is accountability and informing people of what sentencing is all about. As far as judges are concerned, and until we legislate otherwise, the information from the JSIS is theirs and members will not get it. There is no way they can get it through asking questions, either.

Hon Ljiljanna Ravlich: We cannot get information from you through questions.

Hon PETER FOSS: Of course not, because Hon Ljiljanna Ravlich will notice that judges are independent.

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Hon Ljiljanna Ravlich: I am talking about any area.

Hon PETER FOSS: There is no way under the Westminster system that I am entitled to that information unless we as a Parliament decree they will give it. Like it or not, members will not get that information and it certainly will not be given to me.

It was said that we should put faith in guideline judgments. I point out that Western Australia does not have any; New South Wales has three. One of the reasons judges refuse to make guideline judgments in this State is that they say the Director of Public Prosecutions cannot produce the data. One of the reasons he cannot produce the data is that we do not know what the judges are doing. One of the reasons we do not know what the judges are doing is that they refuse to tell us.

I found Hon Giz Watson's speech very helpful. However, I want to correct a few matters that are based on a misunderstanding of the system. The report is a sentencing report in the court, not a report to the Executive. The Sentencing Act already contains a requirement for judges to provide reports on certain matters, but not in the format provided for by this Bill. This scheme is no different. Many people seem to think that some sort of secret report will be sent to the Attorney General. We are seeking to impose an obligation on judges to explain their reasons for sentencing at the time of sentencing. It is a judicial duty, not an administrative duty. Under general law, judges must give a reason for their actions. This Bill will simply dictate the format by which they do that.

Hon Giz Watson asked about the effect of chapter 3 and whether it would have any effect on the States. Chapter 3 will have an effect on the States to the extent that they are exercising federal jurisdiction. The High Court has pulled back from the position to which it was heading concerning chapter 3. It is very important that we understand the situation.

As I said at the seminar two weeks ago, the requirements this Bill will impose on judges will in no way infringe on what we can reasonably ask judges to do. Parliament will not make decisions about sentences. The difference between the role of judges and the role of a Parliament is that Parliament, for example, can set a life sentence for murder.

Progress reported and leave granted to sit again, pursuant to standing orders.