



**MINORITY REPORT OF  
HON NICK GRIFFITHS MLC AND HON GIZ WATSON MLC**

**STANDING COMMITTEE ON LEGISLATION**

**IN RELATION TO THE**

**SENTENCING MATRIX BILL 1999**

**Report 53 – Minority**

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**INTRODUCTION**

*“Sentencing is so often misunderstood but a Matrix will not help”* – Chief Judge.<sup>1</sup>

*“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”* – The Hon. Peter Foss QC, MLC, Attorney General.<sup>2</sup>

*“Parliament might legislate on something like this. It wants all the information so it will put it in the Act, but it has Buckleys hope of getting it. Then what do you do? Then everyone looks bad. That is my practical point of view”* – Chief Magistrate.<sup>3</sup>

*“Grid sentencing, I think, places a political thumb on the scales in a way which is foreign to our conceptions of the rule of law and which will have continuing repercussions for the role of the independent judiciary.”*<sup>4</sup>

**GENERAL OBSERVATIONS**

1. The Bill fails to provide a clear consistent sentencing regime that the public will be able to understand.
2. The Bill fails to provide a system that will make the courts more accountable and consistent in sentencing.
3. The Bill fails to give Parliament more control over the sentences that will be imposed - rather that is given to the Executive.

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<sup>1</sup> *Evidence*, His Honour Kevin J Hammond, Chief Judge of the District Court of Western Australia (Perth, June 9 1999) p 6.

<sup>2</sup> *Evidence*, Hon P G Foss QC MLC, Attorney General, Minister for Justice (Perth, July 28 1999) and paragraph 5.23 of the report.

<sup>3</sup> *Evidence*, Mr Con Zempilas, Chief Stipendiary Magistrate, Magistrates Court of Western Australia (Perth, June 23 1999) 5.

<sup>4</sup> The Hon Justice Michael Adams, *University of New South Wales Law Journal*, vol 22 No. 1 (1999 Launch of NSW Journal Forum), p 261.

4. There is substantial evidence that clarity and consistency in sentencing is being achieved in New South Wales by the use of JIRS (NSW) and SIS in conjunction with guideline judgements.<sup>5</sup>
5. 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. It gives greater control to the Executive rather than the Parliament.
6. 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.<sup>6</sup>

#### **CLAUSE 4, PROPOSED DIVISION 1 – DISSENT FROM RECOMMENDATION 1**

7. 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.
8. The difficulty is in the requirement to indicate the degree to which each mitigating, aggravating or other factor is taken into account in arriving at the sentence. This is unclear. Sentencing should not be a mathematical exercise.
9. The Bill may be applied to Magistrates Courts. 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.
10. There are difficulties in reporting with respect to multiple offences and dealing with the totality principle – see the discussion in Chapter 7 of the report.
11. The Bill has the potential to impact adversely on the fast track system of the District Court.
12. The Bill has the potential to impose inappropriate administrative or executive functions on the Judiciary.

#### **CLAUSE 4, PROPOSED DIVISION 2 – DISSENT FROM RECOMMENDATION 2**

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

#### **CLAUSE 4, PROPOSED DIVISION 3 – DISSENT FROM RECOMMENDATION 5**

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.

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<sup>5</sup> See Chapter 6 of the report in relation to New South Wales.

<sup>6</sup> See Chapter 4 of the report.

16. The matrix (grid) involves the courts 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.
17. 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 regulations proposed under #101J, however the traditional method of using primary legislation to set maximum or minimum penalties or from time to time the use of mandatory enactments is more effective in terms of parliamentary control.
18. 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. ... pre trial decisions by police and prosecuting authorities become the ultimate determinant of the case ... that will give enormous power to the pre trial decisions. Importantly, the decisions are made behind closed doors and are less open to public scrutiny than are decisions of the court”.*<sup>7</sup>
19. 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.

#### **CLAUSE 4, PROPOSED DIVISION 4 – DISSENT FROM RECOMMENDATIONS 6 AND 7**

20. Division 4 is nonsensical, impractical, unclear and inconsistent.
21. The table provided on page 17 of the Bill demonstrates that what is in the Bill is neither clear nor consistent. The fact that the Committee resolved (Recommendation 6) that the table be deleted illustrates the point. The table is said to demonstrate the ease with which the material can be clearly understood. The table is confusing.
22. To quote Mr Neil Morgan “as soon as the Matrix legislation attempts to provide detail, it starts to crumble”<sup>8</sup>. He is being too kind. Refer to Appendix A to this minority report for further explanation of the difficulties to be encountered in applying Division 4.<sup>9</sup>
23. The table clarifies the operation of Division 4 by demonstrating clearly its lack of clarity.

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<sup>7</sup> Evidence, Mr Neil Morgan, Director of Studies, Crime Research Centre, University of Western Australia (Perth, October 20 1999) 3.

<sup>8</sup> Neil Morgan, 'Accountability, Transparency and Justice: Do we need a Sentencing Matrix?' (1999) 28 *Western Australian Law Review* 259, 278.

<sup>9</sup> Ibid at 276 – 277.

**CLAUSE 4, PROPOSED DIVISION 5 - DISSENT FROM RECOMMENDATION 8**

24. The general observations with respect to the inappropriateness of the Matrix grid system apply.

**CLAUSES 5 – 8: DISSENT FROM RECOMMENDATION 9**

25. The general observations with respect to the inappropriateness of the Matrix grid system apply.

**MINORITY RECOMMENDATION**

**That the Bill be defeated.**



Hon Nick Griffiths MLC

Date:

11. 10 . 00



Hon Giz Watson MLC

Date:

11. 10 . 00

## MINORITY REPORT - APPENDIX A

### Extract from an article by

**Neil Morgan, 'Accountability, Transparency and Justice: Do we need a Sentencing Matrix?' (1999) 28 *Western Australian Law Review* 259, 276 –277**

In cases where the prescribed method provides for one type of sentence to be imposed, the intention is simply to follow the ranking contained in the Sentencing Act 1995 (WA); in other words, a sentence is more severe if it is higher up the rankings. At first sight, this might seem simply to accord with the current position. However, two examples show that things will change significantly. Suppose, first, that regulations prescribe a 'relevant sentence' of a short CBO for six months, involving only a 'supervision requirement' (ie, reporting on a fortnightly basis to a community corrections officer). Under the Bill, the court will not be able to impose a punitive fine of a substantial amount (say, \$10 000) on the curious basis that the fine is by legislation deemed to be 'less severe'. Under the current system, and in accordance with the general ranking in section 39, the court would be able to impose a fine if it decides, on working down the list, that this would be 'appropriate'. The inverse situation is also a problem. Suppose that the 'relevant sentence' is a fine of \$5 000, but the court considers that this is unrealistic given the offender's limited means. It will not be possible for the court to impose a CBO instead; as the Bill makes clear, even a six month CBO is considered more severe than a \$10 000 fine.<sup>79</sup> Under the current system — and in accordance with the provisions of the Sentencing Act 1995 (WA) relating to the fine<sup>80</sup> — the court would have the room to decide that a fine is not appropriate and to move down the list to a CBO.

Even greater difficulties arise with respect to combinations of penalty. On this, the wording of the Bill is so convoluted that it comes as a relief to find a Table which provides concrete examples.<sup>81</sup> However, as the following examples from the Table demonstrate, that relief is short-lived.

### **Example 1: The relevant sentence is a 'fine of \$10 000 to \$20 000 or a CBO of 12 to 24 months' duration'**

According to the Table:

1. An actual sentence of a \$15 000 fine would be the same as the relevant sentence. This seems right.

79. Table to cl 101R.

80. Sentencing Act 1995 (WA) s 53.

81. The Table is appended to cl 101R.

2. An actual sentence of a \$25 000 fine would be '*more severe*'. This also seems right.
3. An actual sentence of a \$25 000 fine *coupled with a conditional release order* for 15 months would be '*less severe*'.
4. A fine of \$2 000 coupled with a 24 month CBO would be '*more severe*'.
5. A fine of \$20 000 coupled with a 20 month CBO would be '*less severe*'.

The third of these propositions must be wrong; how is it possible that a simple fine of \$25 000 would be '*more severe*' than the relevant sentence (see proposition 2) but that a fine of the same amount, coupled with a conditional release order, would be '*less severe*'? There also seems to be no logic behind the fourth proposition being '*more severe*' and the fifth being '*less severe*'.

In considering a second example from the Table, it is also worth examining the curious effects of the proposed appeal system:

**Example 2: The relevant sentence is a 'fine of \$10 000 to \$20 000 or a CBO of 12 to 24 months or six to nine months' imprisonment'**

According to the Table:

1. A fine of \$20 000 or a CBO of 24 months would be regarded as the same as the relevant sentence; in other words, these sentences could be imposed without further justification. This is clearly right.
2. Logic would suggest that a combination of these two options — that is, a fine of \$20 000 coupled with 24 months by way of a CBO — would be '*more severe*' than the relevant sentence. Astonishingly, the Table informs us that it would be *less severe*. If the court did impose such a sentence, and there was an appeal, the onus would presumably be on the offender to 'show cause' why the court should not impose a '*more severe*' sentence. The '*more severe* sentence' would be achieved by quashing one of these components.
3. An actual sentence of a \$20 000 fine, coupled with eight months' imprisonment, would be '*less severe*' than the relevant sentence. Again, in the event of an appeal, the onus would be on the offender to show cause why a '*more severe*' sentence (perhaps involving a fine alone and quashing of the prison sentence) should not be imposed.
4. However, an actual sentence involving a \$20 000 fine, coupled with nine months' imprisonment, would be '*more severe*'. In this instance, the extra one month's imprisonment would switch the onus to the prosecution in the event of an appeal.