SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

MINORITY REPORT OF HON PETER FOSS MLC AND HON BILL STRETCH MLC OF THE

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

SENTENCING LEGISLATION AMENDMENT AND REPEAL BILL 2002 AND THE SENTENCE ADMINISTRATION BILL 2002

Report 18 - Minority

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1 OVERVIEW

1.1 The *Sentencing Amendment Act 2000*, Pt. 2, Div. 1, inserted in the *Sentencing Act 1995*, a new Part 14A entitled "Sentence reporting and formulation". This Part contained four new divisions which were:

- Division 1 — Reporting of sentences.
- Division 2 — Reporting of variations from indicative sentences.
- Division 3 — Comparison of actual sentences with indicative sentences.
- Division 4 — Application of this Part to the sentencing of young persons.

1.2 These divisions contained 16 new clauses namely 101A to 101P which introduced a number of measures intended to make criminal sentencing more open, fair and understandable. The *Sentencing Amendment Act 2000* was assented to on December 6 2000 but following a change of Government has not been proclaimed.

1.3 The new Part 14A proceeded on the basis, supported by evidence in Victoria, that much of the public dissatisfaction with sentencing is based on a lack of comprehension of the sentencing process. Within the legal profession, dissatisfaction rested on the concern that whilst most judges sentenced about a predictable mean, there were other judges whose sentences consistently varied from the norm and who had gained a reputation as either "harsh" or "soft" judges.

1.4 In Melbourne, following a period when the public had been up in arms about individual sentencing decisions, a newspaper conducted a survey in which readers were given a large number of sentencing scenarios and asked to suggest what sentence they would apply, given the range of sentencing options provided by Parliament.

1.5 When readers were considering just one set of facts in isolation they tended to criticise judges and suggest that they were too lenient. However, the situation was quite different when they had to suggest sentences based on a wide variety of offences and relevant background facts.

1.6 Interestingly, on average, when confronted with what is the real problem in sentencing - being fair relatively as between different offenders and offences, the readers

suggested sentences which were either equivalent to, or even slightly less than the sentences actually imposed by judges in the particular cases from which the examples were drawn.

1.7 This is undoubtedly the real problem in sentencing and the hardest element of it. It is important not to lose sight when sentencing a particular offender, of what the effect will be on the whole structure of sentencing. This relativity is also a constant problem for the legislature when setting penalties, even though its task is probably a lot simpler.

1.8 Another important point is that setting the task for the readers was itself an educative process and at the conclusion of the exercise, the participants would have better understood the problems facing the judiciary.

1.9 The problem of consistency is one that also concerns the judiciary. With the increasing use of computers in the judicial system and the capacity to develop large databases and present differing views of the database by simple query, it was obvious that the possibility of presenting judges with the sentencing information of many other cases in a simple but meaningful way would be helpful.

1.10 New South Wales tackled this in a very expensive and labour-intensive way. They had each set of reasons for sentencing analysed by teams of lawyers who read them and decided what factors the judge had taken into account when sentencing and the degree to which the judge had relied on them.

1.11 The disadvantages of this were the delay in obtaining the information after the sentence was passed, the fact that it was another lawyer's view of what had influenced the judge – rather than the judge's view and it was also extremely expensive. However, even with all these disadvantages, the clear benefit of a judicial sentencing information system to aid judges and assist in consistency was clear and the Western Australian judiciary started to agitate for a similar system in Western Australia.

1.12 The former Attorney General, Hon Peter Foss QC MLC, agreed to this, and a system commenced design in Western Australia. It was named "JSIS".

1.13 The concept was as follows. Into the database would be entered:

- the factors affecting each sentence passed and the degree of effect;
- statutory information relating to that offence – maximum sentence, minimum sentence; and
- the text of the reasons for sentencing for each case.

1.14 When the database was queried, the judge would select the offence, select the mitigating and aggravating factors and their degree of importance and set a number of other selectable parameters.

1.15 The data was then presented in a number of ways but probably the most useful starting point was a graph presenting all previous decisions with those factors. This, as would be expected, usually presented as a bell curve with one axis being measured in severity of sentence and the other in numbers of cases in that range. As the number of cases relied upon for any particular graph would vary depending on the offence and mitigating and aggravating factors, the graph would also indicate the statistical reliability in light of the number of cases. Obviously, the longer the system was used and the more cases that were entered, the more reliable the data.

1.16 Having been presented with the curve, the judge could click on any part of the curve to get the names of the cases represented by that range of sentence and, with a further click, could read the actual cases.

1.17 This in many ways is just a far quicker and more reliable way of doing what the judge normally has to do relying on poor quality printed indexes and his or her own memory.

1.18 Thus far, it was very similar to the New South Wales system. The main difference was in the method of entry. It was intended that the judges would decide for themselves what the reasons for their decision meant and record those reasons as they passed sentence. They would have a list of possible factors (drawn up by the judges) and varying degrees of severity (expressed in a manner they found acceptable) and could in addition to selecting from them, add any other factors not contained on the list.

1.19 The judge's reactions to this suggestion were, predictably, varying and included:

- complete acceptance, particularly from the computer literate, as a sensible means of ordering their thoughts and securing an efficiency advantage;
- total rejection not only of the concept of stating the factors but also of using JSIS at all;
- rejection on the basis that sentencing was an art not a science and could not be reduced to those terms – it could only be divined by years of experience in the field; and
- complaints that their workload was already too high and this would add another administrative burden and take too long to do – especially on pleas of guilty.

1.20 The objections seemed not to stand up to scrutiny. Presumably, judges were spending the time in thinking about a sentence before sending someone to jail for several years – even on a guilty plea. If this suggested process required longer time for consideration than the current process, then presumably there was a bit of "shooting from the hip" going on in sentencing by some judges.

1.21 However, some judges were using the proposed system for their own purposes to assist in trialing the system and had found it took relatively little time. They found filling in the form was a useful aide memoire as to work they were obliged to do by the law in any event. In addition, the time savings in finding appropriate cases when the system was fully functional would eventually deliver more effective judicial time to actually research the results.

1.22 When it was proposed that this information should be provided to the Ministry of Justice and possibly eventually be publicly available, there were two further responses:

- refusal, on the basis that the judiciary should not have to report to the Executive; and

- reluctance, on the basis it could lead to appeals if the factors entered in the sheet were different from those given in the reasons.

1.23 The first objection is to our mind, indefensible. Judges already enjoy an enormous exemption from normal public accountability in order to ensure that they can make judicial decisions that are independent of the Executive. This freedom is an essential part of our judicial system but it is not granted for the benefit of the judiciary but for the citizens whom they serve and who come before them.

1.24 Those same citizens are entitled to be informed of the workings of the system as far as that can be achieved without influencing their decisions. Requiring judges to prepare a succinct and, to the public, understandable statement of their reasons, is no more unreasonable than the requirement that they state their reasons at length in essay form. This seemed more an objection on the grounds of an assault on their dignity than their independence.

1.25 We hasten to indicate, that this was not a generally expressed point of view but it was an objection to unanimity and consensus implementation.

1.26 The second objection is rather alarming. If there was a significant difference in the factors stated in the reasons and those noted, we believe that there should be an appeal. It would be most improper if a judge harboured secret factors.

1.27 If it turned out that an Appeal Court did not comprehend the difference between detailed reasons and a concise tabulation then an amendment to the sentencing laws could be made.

1.28 In the light of this, the former Attorney General, Hon Peter Foss QC MLC, introduced the provisions referred to above.

2 DIVISION 1

2.1 Division 1 set up a scheme for the reporting of sentences under a sentencing report. Not every sentence had to be reported – only those prescribed ("reporting offences") and it could be varied from court to court, so that what was reportable in one court need not be in another. This allowed a staged introduction so that the most efficient and least disruptive introduction could occur.

2.2 Section 101D related to the contents of a sentencing report and stated:

> *The sentencing report for a reporting offence must —*
>
> *(a) set out each mitigating, aggravating or other factor that was taken into account in arriving at the sentence; and*
>
> *(b) indicate the degree to which —*
>
> *(i) each of those factors;*
>
> *(ii) the maximum penalty for the offence; and*
>
> *(iii) the minimum penalty (if any) for the offence,*
>
> *affected the sentence.*

2.3 So far, this is hardly radical or very difficult. In fact, it would seem to be the bare minimum that one could reasonably expect from a sentencing judge.

2.4 Section 101C permitted regulations to provide for the use of computers in preparing the reports.

2.5 The then Shadow Attorney General (now Attorney General, Hon J McGinty MLA) described these amendments as complex and unworkable and for that reason by clause 32 of the Sentencing Legislation Amendment and Repeal Bill 2002 seeks to repeal the *Sentencing Amendment Act 2000*.

2.6 The minority of the Committee considers that the Attorney General, Hon J McGinty MLA, has taken a doctrinaire and perversely negative attitude to these provisions and cannot have examined their practical implementation. The minority of the Committee also notes that despite the Act having been passed in 2000 by the Parliament, the

Attorney General has made no move to implement the law because of this view, nor until now to repeal it. The minority considers that Parliament does not provide proclamation provisions in order for a Minister to refuse to implement the will of Parliament because he disagrees with it, but to provide time so that it may be implemented.

2.7 The minority of the Committee recommends that this Division not be repealed and that it be implemented as soon as possible.

3 DIVISION 2

3.1 Division 2 provides for what are called indicative sentences. These follow the same process as reporting offences in that they may be prescribed – both as to the offence and the court.

3.2 It also allows for a sentencing method to be prescribed. It was intended that to develop this the Minister should use the information obtained under Division 1 (that is the judge's own statistical sentencing patterns including aggravating and mitigating factors). It also provides for a sentencing report.

3.3 Section 101H virtually follows section 101D, but with the following addition:

> *101H. Contents of sentencing reports for regulated offences*
>
> …..
>
> *(d) if the actual sentence is not the same as the indicative sentence, explain, in the prescribed manner, the reasons for the difference between the actual sentence and the indicative sentence; and*
>
> *(e) provide any other information required by the regulations.*

3.4 Again, this does not appear to be radical or unreasonable. The range of sentences to be prescribed would have been derived from the actual sentences and factors set by the judges themselves. It imposed no impediment on imposing whatever sentence the judge thought fit to impose but it required an explanation if the judge departed from the mean (taking into account all aggravating and mitigating factors). This does not depart from what the judge is required by law to do already, except in the method of presentation and the fact that a prescribed standard was to be referred to.

3.5 The Attorney General has taken a similar view with regard to this Division and it is also proposed that it be repealed.

3.6 The minority of the Committee recommends that this Division not be repealed and that it be implemented as soon as possible.

4 DIVISION 3

4.1 Division 3 is probably the only Division that can be described as complicated. It is complicated in the sense that it explains to the judiciary what is meant by the words *"…more or less severe"*. This is because there are varying sentencing options – such as community supervision orders and imprisonment and varying lengths for which they can be imposed.

4.2 This is well within the capability of judges and lawyers to understand and need not affect defendants. The Act provides for them to be told the result of the application.

4.3 It is on this Division that the Attorney General has really seized to condemn the whole legislation. We think he is throwing out the real benefit of the legislation because of one division that does not affect the defendant or the public.

4.4 The minority of the Committee recommends that this Division not be repealed and that it be implemented as soon as possible.

5 DIVISION 4

5.1 Division 4 applies all the previous Divisions to young offenders and sets out the young offenders' scale equivalents.

5.2 Especially in the light of the Attorney General's criticism of the Children's Court, it seems strange that he does not want to adopt this. It would enable him to solve his concerns as to inconsistencies in sentencing.

5.3 The minority of the Committee recommends that this Division not be repealed and that it be implemented as soon as possible.

6 CONCLUSION

6.1 The public finds it very difficult to understand the sentencing process. When this complaint was raised with the legal profession we are disappointed to say that a former president of the Law Society replied that the sentencing process was open to everyone and that all the courts were open - all a citizen had to do was sit down the back of the court and listen to the reasons for sentencing. This suggestion ignores the fact that most people do not have the time to sit in court all day until they finally absorb the mysteries of sentencing. Furthermore, the language used by judges may be perfectly clear to judges and lawyers but is quite esoteric and is mystifying to the layman.

6.2 The proposed sentencing information system would enable the public to have access to the same graphic information as the judges. The public would be far better able to grasp whether a particular sentence is within the mean or above or below it by looking at a graph. This would also be assisted by the judge's special sentencing report

explaining why the judge had sentenced outside the standard deviation, if that was the case. With this easier comprehension of the process and the capacity to move around the statistics for each type of offence, there would be a far better chance that they would be able to learn about the sentencing process. This would give better communication between the judiciary and the public and provide a better understanding by the public of the difficult task the judiciary face.

Recommendation of Minority

Recommendation 1: The minority of the Committee recommends that the Bills be passed subject to the recommendations of the Committee upon which it has said they should be subject, and to the following additional amendment:

Clause 32 of the Sentencing Legislation Amendment and Repeal Bill 2002 be amended in the following manner:

Page 38, line 15 - To insert after "2000" -

" other than Part 2 Division 1 ".

Page 38, line 15 - To insert after "repealed" -

" and such provisions as are by this section preserved from repeal shall come into operation on the day 6 months after this Act is assented to ".

Hon Peter Foss MLC

Date: May 23 2003

Hon Bill Stretch MLC

Date: May 23 2003