Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?

★

NEIL MORGAN†

1998 saw escalating divisions of opinion between the judiciary and the government on sentencing matters. These culminated in a Bill which proposed to severely curtail judicial discretion and to develop, by means of regulations, a sentencing 'matrix'. Supporters of the matrix proclaim that it will enhance accountability, transparency and justice. This paper shows that it will achieve none of these objectives.

IN October 1998, two important Bills on sentencing were presented to the Parliament of Western Australia. The Sentence Administration Bill 1998 (WA) and the Sentencing Legislation Amendment and Repeal Bill 1998 (WA) involve surgery to remission, parole and other early release orders, and draw heavily on the traditional influences of other Australian jurisdictions and the United Kingdom.[1] The Sentencing Legislation Amendment and Repeal Bill also includes a radical proposal for what the Attorney-General has called a sentencing 'matrix'. The official rationale of the matrix is to provide greater 'accountability and transparency'[2] in the sentencing process and to promote greater consistency. The proposal draws on

† Director of Studies, Crime Research Centre, The University of Western Australia. I would like to record my thanks to Professor George Zdenkowski for his constructive comments on this paper.

1. The Bill was preceded by a substantial period of consultation and discussion by a committee chaired by the Chief Judge of the District Court: see KJ Hammond *Report of the Review of Remission and Parole* (Perth: Ministry of Justice, 1998).
2. 'A-G Ministerial Media Statement' 28 Oct 1998 (<http://www.wa.gov.au/cabinet/mediast/dg98-44/fossente.html>).

United States influences and, if fully implemented, will involve fundamental structural change to the criminal process. The proposed model also has the potential to be adopted — in part or whole — in other jurisdictions. As such, it is of both national and international significance.

Under the heading 'Amendments about Appropriate and Consistent Sentencing', the Sentencing Legislation Amendment and Repeal Bill envisages a three-stage process in developing a matrix. The first stage will require the courts to 'indicate' and 'report' upon the extent to which each factor affected the sentence. The second stage will involve the publication by the Executive of 'benchmarks' or 'indicative sentences', but will leave the courts with a degree of flexibility to depart from such sentences. The third stage will be a regime of 'presumptive' sentences from which it will be extremely hard to depart. Reaction in Australia has been predictable: the matrix has caught the eye of a number of politicians, including the Opposition parties in New South Wales.[3] However, it has attracted strong opposition from the judiciary in Western Australia, most notably in the unprecedented form of a report to Parliament by the Chief Justice.[4]

In the United States, there is considerable variation between jurisdictions in terms of the form of sentencing grids and the processes behind their development. Generalisations are therefore somewhat precarious, but it is accepted that the first grid system, introduced in Minnesota in 1980, was a principled response to problems inherent in indeterminate sentencing regimes. In Western Australia, sentencing practices and procedures are quite different and the proposal for a matrix appears to be driven primarily by political considerations, underpinned by strident criticism of the courts. This paper argues that, in substance, these criticisms are unproven or exaggerated, but that the courts do appear seriously to have misread the situation. They should have done more — particularly through guideline judgments — to redress public concerns and to render their practices more accessible. The paper then shows that the process by which the matrix legislation has been developed to date fails to satisfy criteria of accountability and transparency and compares unfavourably with the processes adopted in jurisdictions such as Minnesota. However, flawed processes do not necessarily produce flawed outcomes and the remainder of the paper therefore examines the substance of the matrix legislation on its merits. This analysis shows that the Sentencing Legislation Amendment and Repeal Bill is poorly drafted and that, contrary to its purported

3. R Hogg 'Mandatory Sentencing Legislation and the Symbolic Politics of Law and Order' (1999) 22 UNSWLJ 262; G Zdenkowski 'Mandatory Imprisonment of Property Offenders in the Northern Territory' (1999) 22 UNSWLJ 302.

4. DK Malcolm *Sentencing Legislation Amendment and Repeal Bill 1998 and Sentence Administration Bill 1998* (Perth, 26 Nov 1998). The Court of Criminal Appeal of New South Wales has also strongly protested against such an approach: *R v Jurisic* (1998) 101 A Crim R 259.

objectives, the proposed scheme is likely to make the system less transparent and accountable by leaving too much to regulations rather than legislation, and by making pre-trial decisions the key to the outcome of cases. It also argues that the matrix, in its projected form, may not survive constitutional challenge and will promote discriminatory sentencing practices. Overall, the Bill provides a recipe for injustice, and for dangerous levels of political control of sentencing.

DEVELOPING A SENTENCING MATRIX

1. What would a matrix look like?

At this stage it is difficult fully to evaluate the proposals because the Bill is couched in general terms and there has been no public consultation on the proposed shape of the matrix.[5] Initially, the aim is to produce 'formulae' for the sentencing of specific offences.[6] The longer-term aim may well be for a system which traverses the whole range of criminal offences, along the lines of the sentencing grids that exist in a number of United States jurisdictions. Following the introduction of the Minnesota grid, numerous other States have introduced guideline systems[7] and Federal Guidelines came into force in 1987. Oregon's grid, which was introduced in 1989, is rumoured to have provided some of the thinking behind the proposed matrix.

Copies of the Minnesota and Oregon grids are reproduced as an Appendix to this article.[8] Both involve a two-dimensional graph, drawn up by reference to the gravity of the current offence and the offender's criminal history. Courts do not exercise a broad discretion, subject to the statutory maximum and the parameters set by previous court decisions. Instead, in a manner somewhat reminiscent of a 'road mileage chart', they find the box at which the gravity of the offence and the offender's 'criminal history score' intersect. This box provides a relatively narrow range within which the court can sentence without the sentence being deemed a 'departure' from the grid. In addition, in both Minnesota and Oregon, the court can depart from this range for good reason, and subject to appellate review. It should be stressed that although the grids look simple, they are based on long-term

5. Infra pp 270-271.
6. Infra esp pp 284-285.
7. There are at least 15 such guideline systems in the US. Several states have considered but rejected the introduction of guideline systems, but some of these have established Sentencing Commissions to consider and evaluate issues of concern: see RS Frase 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report' in C Clarkson & R Morgan (eds) *The Politics of Sentencing Reform* (Oxford: OUP, 1995) 171-172. See also infra n 52.
8. Infra pp 291-292.

planning and on complex provisions with respect to calculating offence seriousness and criminal record.

2. Why a matrix?

(i) The introduction of the United States grids

The development of guideline systems in the United States was 'preceded by a period of widespread dissatisfaction with, and attempts to reform, the traditional system of indeterminate sentencing'.[9] Officially, indeterminate sentencing reflected a rehabilitative approach to sentencing, but its 'dark underside' was incapacitation.[10] Courts and parole boards had broad and largely unfettered discretionary powers. Sentences often had no fixed limits and release depended on whether the person was 'fit for release'. Since the time actually served in prison bore no necessary relationship to the gravity of the offence, inconsistency was inevitable. The case of George Jackson provides a poignant example.[11] When he was 18 years of age, he assisted in the robbery of $70 from a petrol station by driving the getaway car. For this, he received a sentence of 'one year to life' and spent over 10 years in prison, 7˚ years of which were in solitary confinement. He was eventually shot dead in the course of a prison riot. His co-offender had been released after three years.

The problems were compounded by the fact that appellate review of sentences was very rare. Since sentences were so open-ended, there was nothing for a court to review in terms of the judge's exercise of discretion, and appeals tended to arise only in cases involving constitutional questions or breaches of specific statutory requirements.[12] Overall, the situation was such that Judge Marvin Frankel was moved to write of the 'lawlessness of sentencing'.[13]

The reaction to these problems was a clarion call — which appealed to a broad spectrum of opinion — for sentences to be re-oriented and to be based on 'just deserts' principles; in other words, for the gravity of the offence to be the crucial consideration rather than anticipated rehabilitative outcomes. In simple terms, the United States sentencing grids involved a reaction, in the name of desert-based principles, to the vagaries of indeterminate sentencing. For different reasons,

---

9. Frase supra n 7, 170.
10. DG Parent *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines* (Stoneham MA: Butterworths, 1988) 15.
11. GL Jackson *Soledad Brother: The Prison Letters of George Jackson* (London: Cape, 1971); GL Jackson *Blood in My Eye* (London: Cape, 1972).
12. Frase supra n 7, 171.
13. Frankel coined the phrase in his influential critique: *Criminal Sentences: Law Without Order* (New York: Hill & Wang, 1973).

sentencing grids also met the concerns of divergent interest groups — conservative and liberal, academic and legal.

(ii) Western Australia

The sentencing regime in Australia has always been very different from the United States, and, especially in the late 1990s, it would be absurd to call it 'lawless'. This State has never had a system founded on indeterminacy, and 'desert' has long been the central principle, at least in the 'limiting retributivist' sense that the gravity of the offence sets an upper limit to the permissible sentence.[14] Desert is now enshrined as the primary consideration in legislation[15] and indeterminate sentences are only used in the most exceptional of circumstances.[16] There is also a reasonably comprehensive system of appellate review, by way of both prosecution and defence appeals,[17] which has generated an explosion of caselaw on sentencing principles and practice during the past decade.

Since the conditions which underpinned the development of the United States sentencing grids are notable only by their absence in Australia, the question arises: Why is a matrix necessary? In answering this question, it may be noted that although the United States guideline systems began life in Minnesota as instruments of principle, they have proved extremely vulnerable to political pressure.[18] In Western Australia, it is hard to avoid the conclusion that, right from the outset, the matrix has been driven by law-and-order politics. The Attorney-General first announced his proposals in broad terms in July 1998, in the aftermath of a public rally to protest about 'home invasions' involving elderly victims and the perceived inadequacy of sentences. A crucial element of the debate has been an unrelenting political and media portrayal of the judiciary as out-of-touch, unresponsive and unaccountable.

---

14. For High Court cases: see especially *R v Veen (No 1)* (1979) 143 CLR 458; *R v Veen (No 2)* (1988) 164 CLR 465; *R v Baumer* (1988) 166 CLR 51. For classic statements of 'limiting retributivism': see HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: OUP, 1968); N Morris *The Future of Imprisonment* (Chicago: CUP, 1974). For a useful collection of readings on different versions of retributivism: see A Ashworth & A Von Hirsch (eds) *Principled Sentencing: Readings on Theory and Policy* 2nd edn (Oxford: Hart Publishing, 1998).
15. Sentencing Act 1995 (WA) s 6(1).
16. Sentencing Act 1995 (WA) ss 98-101; *R v Chester* (1988) 165 CLR 611; *R v Clinch* (1994) 72 A Crim R 301; *R v Lowndes* (1997) 95 A Crim R 516.
17. This system has some limitations, but has long been better balanced than some jurisdictions such as England where there was traditionally no right of appeal against sentence on the part of the prosecution, and appeals are now based on references by the Attorney-General.
18. See A Doob 'The US Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There' in C Clarkson & R Morgan supra n 7, 199; A Von Hirsch 'Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards' in Clarkson & Morgan supra n 7, 149, 166.

It would be foolish to dismiss such criticism as mere crude politics. It is important to acknowledge that such concerns exist and to attempt to evaluate the current and proposed systems in the light of these criticisms. In addition to concern that sentences are too 'soft',[19] four main themes have emerged:

- **Accountability**: the current system, based on (unelected) judges exercising broad discretion is not sufficiently accountable.
- **Consistency**: there is inconsistency in sentencing.
- **Transparency and misunderstanding**: the current system is inaccessible and not readily open to public scrutiny. This contributes to a lack of understanding.
- **Responsiveness**: The judges are, or appear to be, unresponsive to public concerns about certain types of crime and impose unjustly lenient sentences.

Before considering whether 'the sentencing matrix will provide a better system',[20] as measured by these considerations, two preliminary questions arise. First, is the current system inconsistent, unresponsive and lacking transparency? Secondly, does the process by which the matrix legislation has been developed itself meet reasonable criteria of accountability and transparency?

3. Responsiveness, transparency and consistency: the current system

(i) Sentencing statistics

A 'transparent' system ought to be based upon accurate statistical data which allow for current sentencing practices to be understood and for trends to be evaluated. From 1990 onwards, the Crime Research Centre at The University of Western Australia has published statistics and its annual *Crime and Justice Statistics for Western Australia* contain data on the proportionate use of different sentencing options in the higher courts. However, the statistics with respect to sentence length and to lower court practices are limited.[21] In his Report to Parliament, the Chief Justice noted that he had, on numerous occasions over the past decade, requested

19. I do not, in this paper, debate 'numbers' in the sense of what level of sentence is appropriate for any given offence or whether sentences for certain crimes are too lenient. Such issues cannot be answered in absolute and purely objective terms, but depend on a complex interplay of considerations, including the philosophy of punishment that is adopted, judgments about 'penal values' (eg, whether 3 years is regarded as a short or long sentence), systems of early release (eg, parole and remission) and the relevance of various factors (eg, guilty pleas, age and remorse).
20. 'A-G Ministerial Media Statement' 26 Nov 1998 (<http://www.wa.gov.au/cabinet/mediast/dg98-48/fosmatri.html>).
21. For discussion of the data which are available: see infra pp 266-267.

the Ministry of Justice to collate data on sentence length.[22] His pleas consistently met with the response that this was either too difficult or that there were insufficient resources. In a volte-face which says much about the politicisation of sentencing, the task became one which could be resourced and done as soon as the Attorney-General proposed the matrix. As a result, in February 1999, the Ministry published statistics with respect to sentence lengths in the higher courts for April-September 1998 and, in July 1999, published figures for the whole of 1998.[23]

Two general points emerge from this saga. First, there is no statistical evidence to sustain generalised complaints about current sentencing practices. Secondly, although the courts are being criticised for lack of transparency, the Executive failed, until after the introduction of the matrix legislation, in its duty to collate and disseminate data to make the system more accessible.

(ii) 'Firming up' sentences

It is interesting, however, that the limited available statistics, read with recent cases, give the lie to criticism that the courts have been unresponsive. In several areas of public concern, the Court of Criminal Appeal has stated that sentences need to be 'firmed up' by taking less account of mitigating factors.[24] These include sentences for dangerous driving,[25] burglary,[26] robbery[27] and offences relating to the supply of hard drugs.[28]

It is difficult to assess the impact of these initiatives. The recent Ministry of Justice data cannot be compared with earlier years and only deal with the higher courts.[29] Problems are also caused by changes to offence definitions. For example,

---

22. Malcolm supra n 4, 4-5.
23. WA Ministry of Justice (Policy and Legislation Division) *Sentencing Statistics Apr-Sept 1998* (Feb 1999); and *Sentencing Statistics 98* (<http://www.wa.gov.au/division/policy/SentStat/1998.pdf>).
24. The courts tend to adopt this process of reasoning in order to avoid criticism that they are imposing exemplary or disproportionate sentences. The theory is that, by receiving less credit by way of mitigation, the person simply receives a sentence which is closer to the 'proportionate sentence'. For a classic statement of this approach: see *Peterson* (1983) 11 A Crim R 164, Burt CJ.
25. *R v Stebbings* (1990) 4 WAR 538, 540. See also *Ainsworth v D (a child)* (1992) 7 WAR 102; *R v S (No 2)* (1992) 7 WAR 434; *R v McKenna* (1992) 7 WAR 455. For a detailed discussion of these and other cases: see N Morgan 'The Courts Respond to the Carnage on our Roads' in R Harding (ed) *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* 2nd edn (Perth, UWA Crime Research Centre, 1995).
26. *R v Pezzino* (1997) 92 A Crim R 135, Franklyn J 138, White J 148, following hints that this would happen in *R v Little* (unreported) WA CCA 3 Feb 1997 no BC9700404.
27. *R v Miles* (1997) 17 WAR 518; *R v Jeffree* (unreported) WA CCA 1 May 1998 no BC9801248.
28. Eg *R v Darwell* (1997) 94 A Crim R 35 on offences involving the supply of Ecstasy tablets.
29. Ministry of Justice supra n 23.

some offences which are now dealt with as aggravated burglary would, at one time, have been robbery.[30] However, the Crime Research Centre statistics clearly show an upward trend in areas of public concern. In particular, median sentences in the higher courts for burglary, assaults and drug dealing offences (other than cannabis) increased significantly between 1995 and 1997.[31]

(iii) Appeals as a performance indicator

In his Report to Parliament, the Chief Justice wrote that the number of appeals provides 'the only objective measure of dissatisfaction' with sentences.[32] He emphasised the small number of appeals from sentences imposed in the District and Supreme Courts (113 in 1997-1998) compared with both the total number of offenders sentenced (2 500 to 3 000 per annum) and the total number of sentences imposed (4 500 to 5 000). Of these 113 appeals, only 25 were allowed.

Certainly, these figures do not suggest widespread dissatisfaction about sentencing practices from within the system. However, there are three reasons to be cautious about using the number of appeals as a 'performance indicator'. First, the number and outcome of appeals may reflect the limited power of appeal courts to alter sentences, especially on Crown appeals.[33] Secondly, decisions with respect to appeals may be based on considerations of cost rather than satisfaction with the outcome. Finally, such statistics may rather miss the point; the question may be one of general perception rather than the views of the legal profession. The Attorney General has vigorously exploited this point:

> The public and Parliament will always be on one side and the judges and the legal profession will always be on the other. No amount of talking, I think, will ever resolve that.[34]

The tenor of these comments raises some important questions of principle with respect to Ministerial and Parliamentary responsibility. It can surely be argued

---

30. Following amendments in 1996, the circumstances of aggravation for 'aggravated burglary' include doing bodily harm or threatening to kill or injure a person: Criminal Code s 400.
31. AM Ferrante, NSN Loh & JA Fernandez *Crime and Justice Statistics for Western Australia: 1997* (Perth: UWA Crime Research Centre, 1998) 71. The Ministry of Justice's figures also suggest increasing use of imprisonment for such offences: see Ministry of Justice *Sentencing Statistics 98* supra n 23.
32. Malcolm supra n 4, 5-6.
33. An appeal court will not interfere with a sentence simply because it believes the sentence is insufficient or excessive. It will only alter a sentence if the judge acted on a wrong principle or imposed a *manifestly* excessive or inadequate sentence. Double jeopardy principles also operate to limit the extent to which appellate courts are prepared to alter sentences on a Crown appeal: *R v Tait* (1979) 46 FLR 386, 387-388; *R v Grein* (1988) 35 A Crim R 76, 78.
34. Media statement supra n 20.

that an Attorney-General, as the leading law officer in the State, should attempt to assist in communicating judicial sentencing practices rather than adopt such a simplistic and divisive position as to the 'sides' on which different parties will 'always be'. Nevertheless, an important question remains: have the courts, and especially the Supreme Court, done enough to communicate general sentencing policies and practices?

(iv) Guideline judgments: a missed opportunity

Over the past decade, the Court of Criminal Appeal has, on a number of occasions, collated previous decisions and stated the range of sentences commonly imposed for particular offences (notably sexual assault[35] and burglary[36]). These initiatives have been extremely important in practice but, like the 'firming up' cases, they are not generally known outside a small core of criminal justice practitioners. None has received media coverage and some are not even reported in the Law Reports.

In October 1998, in *R v Jurisic,*[37] the Court of Criminal Appeal of New South Wales attempted to redress criticisms similar to those which have been expressed in Western Australia. Spigelman CJ openly acknowledged that public concerns about consistency and levels of sentencing had some basis. He said it was time for a 'sharp upward movement' in penalties for dangerous driving causing death or serious injury[38] and issued a guideline judgment for the sentencing of such offences. He also encouraged the legal profession to seek such judgments in future cases.[39] Guideline judgments were pioneered by the English Court of Appeal in the 1980s[40] and differ significantly from traditional sentencing appeals in that they go beyond the confines of the case in hand and provide general narrative guidelines for future cases. They perform a particularly useful function in that they promote greater consistency and transparency, but leave the courts with sufficient flexibility to take account of the particular facts of the case. In both England and New South Wales, guideline judgments have been developed on the initiative of the courts and without express statutory authority.

---

35. *R v Podirsky* (1989) 43 A Crim R 404.
36. *R v Cheshire* (unreported) WA CCA 7 Nov 1989 no BC8900866.
37. Supra n 4.
38. Ibid, 276.
39. Ibid, 269. In a most unusual move, the Court even produced a separate paper 'to assist legal practitioners in assisting the Court's formulation of future guideline judgments'. That paper consists of a general discussion of guideline judgments, a list of such judgments (mainly from England), a selection of references to academic articles and copies of a number of those articles.
40. For general discussions of the English experience: see LT Wilkins 'Sentencing Guidelines to Reduce Disparity' [1980] Crim LR 201; A Ashworth 'Techniques of Guidance on Sentencing' [1984] Crim LR 519.

The media response to *Jurisic* was overwhelmingly favourable, especially to the Spigelman CJ's attempt to demystify sentencing:

> The profession should be proud of him – but, more significantly, the community should be heartened that, at last, there is a leading lawyer whose background and interests have been broad enough to give him the capacity to understand its concerns and to find a way within the system to meet them.[41]

In May 1999, the Court of Criminal Appeal of New South Wales issued its second guideline judgment with respect to armed robbery sentences. This attracted less publicity but was again well-received.[42]

The Western Australian Court of Criminal Appeal has statutory authority to issue guideline judgments.[43] On at least five occasions, the Court has been invited to issue such judgments and in four cases the Director of Public Prosecutions attempted to set the ball rolling by drafting possible guidelines.[44] On every occasion, the Court has declined to issue a guideline judgment and has not engaged in detailed discussion of the proposed guidelines. When subjected to detailed analysis, the reasons which the Court has given appear evasive and unconvincing.[45]

---

41. B Smith 'Courting Change With Care' *Financial Review* 16 Oct 1998, 24. See also G Zdenkowski 'Judging the Judgments' *Sydney Morning Herald* 15 Oct 1998; E McWilliams 'Sentencing Guidelines: Who Should Be the Arbiter — the Judiciary or Parliament?'(1998) 36(11) NSW Law Soc Journ 48-52. D Spears 'Structuring Judicial Discretion: Sentencing in the *Jurisic* Age' in 'Mandatory Sentencing Legislation: Judicial Discretion and Just Deserts' (1999) 22 UNSWLJ 295.
42. *R v Henry* (unreported) NSW CCA 12 May 1999, 111; see A Phelan 'Armed Robbers on Five Year Notice' *Sydney Morning Herald* 13 May 1999.
43. Sentencing Act 1995 (WA) s 143. Shortly after *Jurisic*, and at a time when the Opposition was calling for a 'sentencing grid', the NSW Parliament inserted a new Part 8 into the Criminal Procedure Act 1986 (NSW) to allow the Attorney-General to request guidelines on the sentencing of particular types of offence. The Government promised that the Attorney-General would seek guidelines in areas of particular concern. The Chief Justice of NSW has indicated his intention to attempt more guideline judgments both with respect to particular types of offence (as in the legislation) and, if appropriate, with respect to particular types of sentence or groups of offenders: see JJ Spigelman *Sentencing Guideline Judgments* (Sydney: National Conference of District and County Court Judges, 24 Jun 1999).
44. The 4 cases in which the DPP sought guideline judgments are *R v GP* (1997) 93 A Crim R 351; *R v Simcock* (unreported) WA CCA 27 May 1997 no BC9702419; *R v Kerr* (unreported) WA CCA 9 July 1997 no BC9703769; *R v Lowndes* (1997) 95 A Crim R 516. In *R v Halliday* (unreported) WA CCA 3 Apr 1998 BC9801130, defence counsel sought a guideline judgment.
45. For a detailed evaluation of these reasons: see N Morgan & B Murray 'What's in a Name: Guideline Judgments in Australia' (1999) 23 Crim LJ 90, esp 100-107. Briefly, the main reasons given by the Court have been: 'lack of experience' in the area (this could be seen as an argument in *favour* of guideline judgments); that the proposed guideline is 'obvious' (which misses the public-relations significance of a statement); that there was 'no error or inconsistency' in the sentence (there is no reason why an error needs to exist for a guideline

The Court's stance appears to reflect two main considerations. First, judicial culture tends to be suspicious of and to resent any apparent constraints on sentencing discretion. This is exemplified by the insistence of some judges that sentencing is a matter of 'instinctive' or 'intuitive' synthesis and that sentences do not need to be constructed by reference to clear 'tiers' or 'stages'.[46] Some judges assert that the process by which a sentence is reached does not matter; what really matters is whether the sentence itself is 'proportionate'.[47] Even assuming that this is right in terms of the outcome of individual cases, there are consequences for the system as a whole. The notion that judges, by dint of their special status and wisdom, are able to sentence by 'instinct' or 'intuition'[48] does nothing to demystify sentencing and much to inhibit a sense of accessibility and accountability. Secondly, the Court's attitude suggests a misconception about guideline judgments. If properly constructed, such judgments do not unduly inhibit sentencers and provide a means of 'structuring rather than restricting discretion'.[49]

More generally, the Supreme Court of Western Australia seems to have underestimated the extent to which appearances may count almost as much as substance. In substance, the Court has done a great deal in terms of levels of sentence, response to public concerns and discussion of general principles, but it has appeared rather under-equipped to deal effectively with recent media and political criticism. Clear guideline judgments on burglary and robbery would have provided the basis for a stronger and more effective response. So too would more direct language; in this regard, it may be noted that the language in *Jurisic* (a 'sharp upward movement in penalties') is markedly simpler and less legalistic than the West Australian cases ('firming up by taking less account of mitigating factors').

In January 1999, the Chief Justice launched an important initiative whereby, on an experimental basis, the Supreme Court summarises its reasons for sentences and distributes these summaries to the media. With effect from July 1999, this initiative

---

judgment to be issued); and that there are 'too many factual variations' between cases to attempt guidelines ('total' guidance is not possible but some general guidance is both possible and desirable).

46. There is a clear difference of opinion within the Supreme Court on this question: see eg *R v Punch* (1993) 9 WAR 486; *R v Verschuren* (1996) 17 WAR 467. The Court of Criminal Appeal in Victoria has even said that 'instinctive synthesis' is the only correct approach and that it would be *wrong in principle* to use a 'tiered' approach to sentencing: see *R v Williscroft* [1975] VR 292, 299-300; *R v Young, Dickenson and West* (1990) 45 A Crim R 147.
47. See especially Murray J's views in *Punch* and *Verschuren,* ibid.
48. Summarised by one commentator as the notion 'that judges are uniquely qualified to set sentences and, presumably, despite the different experiences, values and personalities of individual judges, that the sentences imposed are just': M Tonry 'Sentencing Reform Across National Boundaries', in Clarkson & Morgan supra n 7, 270.
49. *Jurisic* supra n 37, Spigelman CJ 267.

has been extended to District Court sentences. Such initiatives are certainly welcome, but they fall some way short of the value to be gained from well-structured guideline judgments.

4. Accountability and transparency: the process of matrix construction

The hallmark of sentencing law reform in the United States, and especially of the development of guidelines, has been the establishment of sentencing commissions. In Minnesota, for example, a Sentencing Guideline Commission was set up in 1978, following a long period of detailed consultation and political debate on possible options for reform.[50] The Commission was well-funded and independent, representing a cross-section of relevant parties. Its members were the Chief Justice, two District Court judges, the Commissioner for Corrections, the Chair of the Minnesota Corrections Board, a prosecutor, a defence lawyer and two laypeople.[51] The Commissioners were supported by full time staff — initially 15 people, later reduced to seven. The Commission's first task was to draw up the guidelines, a two year process based on extensive consultation. Subsequently, the Commission has performed the crucial role of monitoring and evaluating the impact of the guidelines.[52]

In Western Australia, the enabling legislation has been drafted at speed and, at the time of writing, had attracted little serious Parliamentary scrutiny. In what must have been a deliberate policy decision, key stakeholders, including the judiciary, the Director of Public Prosecutions, defence counsel and the Parole Board have been completely excluded from the process. There has been no input from Aboriginal organisations and no attempt to provide any projection as to the likely impact of the new regime on Aboriginal imprisonment rates. In his Report to Parliament, the Chief Justice expressed concern at the exclusion of the District and Supreme Court judges:

> The failure to consult was in clear breach of long-standing conventions acknowledged by the Hon Attorney-General of a requirement to consult the head of the relevant court regarding any legislation which would affect the jurisdiction of the court or the manner in which such jurisdiction should be exercised. The failure to consult in respect of this legislation on the sentencing matrix provisions is all the

50. For detailed discussion: see Parent supra n 10, chs 1-3.
51. Ibid, 28.
52. In the US there is now a Federal commission and there are 21 State-based commissions (Alaska, Arkansas, Delaware, Florida, Kansas, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia and Washington).

> more remarkable because of the dramatic nature of the proposed reforms and their potential impact on the work of the courts.[53]

At this stage, there has been no public discussion about the establishment of a Sentencing Commission or its equivalent. This secretive process compares unfavourably with both the United States experience and with other areas of sentencing reform in this State.[54] To judge by the Attorney-General's reaction to the Chief Justice's report, the prospects for sustained and genuine consultation appear bleak:

> The judges have always made it clear that they oppose any restriction on their discretion.... They do not like it, and the Government always knew that they would not like it. However, it is a matter of whether Parliament should make these sentencing laws, or the judges.... While I understand the objections that the judges and some lawyers may have, the people of Western Australia are concerned about the current sentencing laws and are demanding changes.[55]

THE TERMS OF THE MATRIX LEGISLATION

The Bill contemplates a three-stage process. This section summarises those stages and attempts to work out what each is likely to involve. Later sections explore some more general problems to which the legislation gives rise.

1. Stage One: Reporting offences and sentencing reports

Under stage one, regulations can prescribe an offence as a 'reporting offence'.[56] In such a case, the courts will be required to provide a sentencing report which: (i) sets out each 'mitigating, aggravating or other factor' that was taken into account; (ii) indicates the degree to which each of these factors and the maximum penalty (and the minimum penalty, if any) affected the sentence; and (iii) provides any other information required by the regulations.[57]

At the time of writing, it is difficult to know exactly what stage one will entail. The crucial question is what is meant by the requirement that the court must

---

53. Malcolm supra n 4, 1-2. The report continued: 'By letter to the Attorney-General dated 23 October 1998, the Chief Judge of the District Court and I noted a news report regarding a media statement by him on 21 October 1998 referring to the fact that the Government was "close to finalising a Matrix Sentencing Bill". The letter sought an opportunity to discuss the matter as soon as possible.... No reply was received.'
54. For example, the Sentencing Act 1995 (WA) was preceded by extensive consultation with the judiciary and other groups, and the proposed changes to parole and remission have been the subject of consultation and a public report: see Hammond supra n 1.
55. Media Statement supra n 20.
56. Cl 101A-B.
57. Cl 101C-D.

indicate the degree to which all the various factors affected the sentence (see (ii), above). If it means that every factor must be precisely quantified in numerical terms, it clearly involves a dramatic departure from existing practice. Currently, the courts are required by legislation to quantify any discount for 'assistance to the authorities'[58] and the Court of Criminal Appeal has held that the extent of any discount for a guilty plea must be stated.[59] Otherwise, there is no need for 'quantification'. However, it appears likely that stage one contemplates a somewhat less precise indication. This interpretation is consistent with the fact that this is only the first stage and that the Bill uses very different language (especially the word 'formula') with respect to stages two and three.[60]

Even if the latter approach is adopted, it appears that the days of 'intuitive synthesis' are numbered and that sentences will, at the very least, have to be more structured, perhaps by reference to a number of 'tiers'. Some judges already do this to a significant extent. A very good example is *R v McKenna*.[61] This case involved an offence of manslaughter for which the maximum sentence is 20 years' imprisonment. Seaman J said that the starting point was 16 years, to reflect the 'criminality of the applicant's behaviour, the need to protect the community and the need for deterrence both personal and general'.[62] His Honour then looked to mitigation. He stated that a 'very substantial' reduction was required to reflect the offender's youth. A 'modest' reduction for the 'almost inevitable' guilty plea and for signs of remorse meant that an eight year sentence was the appropriate sentence.

For reasons of both substance and appearance, Seaman J's analysis appears preferable to a process of 'intuitive synthesis';[63] it provides clear points of comparison for future cases and it is no coincidence that it has provided the starting point for later cases. Consequently, although the notion that judges should 'report' to the Executive on sentencing practices may be objectionable,[64] I do not object to promoting a 'tiered' approach — provided this is all that is intended. The problem is that, as things stand, it is far from clear what stage one will involve.

---

58. In the event that an offender does renege on any promise, the case can be referred back to court and the sentence adjusted in accordance with the terms of the original sentence. This was introduced by amendments to s 8 of the Sentencing Act 1995 (WA) in 1998.
59. Neither of these considerations has anything to do with the objective seriousness of the offence, but they operate to reduce sentences from what would otherwise be appropriate in order to assist the smooth running of the criminal process. Consequently, although the weight to be attached to such factors will vary according to the circumstances, they should be readily quantifiable.
60. Infra pp 273-277.
61. Supra n 25.
62. Ibid, 468.
63. For more detailed discussion of the case and of Seaman J's reasoning: see N Morgan 'The Courts Respond to the Carnage on Our Roads' in Harding supra n 25, 14, esp 28-32.
64. Infra pp 287-289.

2. Stage Two: Regulated offences and indicative sentences

In stage two, regulations can prescribe 'regulated offences'.[65] In such cases, the court must first apply a 'prescribed method' in order to arrive at 'an indication of the appropriate sentence' (the 'indicative sentence').[66] It must then decide upon the 'actual sentence' which is to be imposed.[67] Finally, it must furnish a sentencing report which: (i) sets out the indicative sentence; (ii) sets out each aggravating, mitigating or other factor that was taken into account in arriving at the indicative sentence and the actual sentence; (iii) sets out the degree to which each of these factors and the maximum, and (if any) the minimum, penalties affected both the indicative and actual sentences; (iv) explains, in the prescribed manner, the reasons for any difference between the actual and indicative sentences; and (v) provides any other information required by regulations.[68]

Again, the Bill is scant on detail and leaves much to future regulations. In terms of the sentencing method, it merely states that the indicative sentence may be 'determined in accordance with a prescribed formula or in such other manner as may be prescribed.' The use of the word 'formula' seems to indicate that stage two will involve a substantial degree of numerical calculation in advance of consideration of the case itself. However, in working out the limitations of this, it is important to consider stage two in the context of the Bill as a whole. With respect to stage three, the Bill specifically states that regulations may provide 'for prescribed factors to be taken into account or ignored, or to be taken into account to a particular degree, in determining the relevant sentence'.[69] By necessary implication, regulations cannot go this far in stage two. As with stage one, however, it is far from clear what stage two will actually entail.

Although the courts would have to explain any departure from the indicative sentence, it would appear that in stage two they retain reasonable freedom of movement. Reasons for departure would, of course, be subject to appeal and one would expect that the same general rules about appeals would apply as under the current system. In other words, an appeal would generally succeed only if the 'actual sentence' was shown to be 'manifestly excessive or inadequate'. The difference, of course, would be that, in addition to the factors traditionally considered on appeal, the 'indicative sentence' would play an important role in determining the outcome.

---

65. Cl 101E.
66. Cl 101F.
67. Cl 101G.
68. Cl 101H.
69. Cl 101J(2)(b).

3. Stage Three: Controlled offences and relevant sentences

(i) Sentencing according to a prescribed method

In stage three, regulations may prescribe 'controlled offences',[70] in respect of which courts will have little discretion. Whereas stage two involves the prescription of a method for arriving at *an indication* of the appropriate sentence, stage three involves a method to be applied to arrive at *the* appropriate sentence (called the 'relevant sentence').[71] As we have seen, regulations can also be more detailed than in stage two in that they may provide for 'factors to be taken into account or ignored, or to be taken into account to a particular degree.' The Bill suggests that the relevant sentence can take one of three forms.[72] First, it may involve just one option (eg, a fine of $10 000). Secondly, it may involve a limited range within one sentencing option (eg, a fine of $10 000 – $20 000). Finally, it may encompass a combination of options within pre-defined ranges (eg, a fine of $10 000 – $20 000 and/or 12–24 months by way of a community based order).

When sentencing a person for a 'controlled offence', the court must first determine the 'relevant sentence' and then impose the 'actual sentence'.[73] The court can only depart from the relevant sentence if such a sentence would be 'so unreasonable that it would be unjust to impose that sentence'.[74] However, the Bill states that the relevant sentence is not unreasonable if it was arrived at by application of the prescribed method:

> The relevant sentence cannot be considered as being unreasonable to the extent to which it was arrived at by —
> (a) taking into account or ignoring a factor; or
> (b) taking a factor into account to a particular degree,
> as required by the sentencing method.[75]

It is clear that, as a result of this clause, tightly-structured regulations with respect to sentence ranges, and relevant or irrelevant considerations, could effectively negate any apparent discretion on the part of the sentencing court, and would not permit departures to the extent that they are permitted under the Minnesota and Oregon grids.

---

70. Cl 101I.
71. Cl 101J.
72. The Bill does not spell this out very clearly but this summary is derived from an analysis of cll 101O to 101R. See more fully infra pp 275-276.
73. Cl 101L(1).
74. Cl 101L(2).
75. Cl 101L(3). For comparison with Minnesota, where approximately one in six sentences involves a departure from the grid, see Frase supra n 7.

The court must provide a comprehensive sentencing report akin to that in stage two. However, if the court does not impose the relevant sentence, it must explain 'why [it] considered that imposition of the relevant sentence would be unjust' and the reasons for the sentence actually imposed.[76]

(ii) Appeals

The proposed appeal system also imposes significant constraints on departures from the relevant sentence. In the event that the actual sentence is less severe than the relevant sentence, and the prosecution appeals, 'the onus is on the offender to show cause ... why the actual sentence should not be quashed and a more severe sentence imposed'.[77] Similarly, if the actual sentence is more severe and the defence appeals, the onus is on the prosecution to 'show cause' why a less severe sentence should not be passed. These are peculiar and unprecedented provisions. First, the mere fact of an appeal by one party seemingly gives rise to a presumption that the appeal should be allowed in that party's favour. This will cause particular problems in the case of prosecution appeals, when the onus will be on the offender to 'show cause' why the trial judge was right. This will place offenders — particularly if they are unrepresented — in a difficult position. Secondly, the requirement to 'show cause' is far from clear. Although such language might be apposite in the context of threshold questions at the preliminary stages of a civil case, it is a quite inappropriate basis for determining the substance of a criminal appeal.

(iii) More severe/less severe?

Section 39 of the Sentencing Act 1995 (WA) lays down a general ranking or hierarchy of sentences. A court must not use any given option unless it is satisfied, having regard to the general principles of sentencing contained in the Act, that it would be inappropriate to use any of the preceding options. Working upwards from the least serious option, the basic rank order is: (i) impose no sentence; (ii) conditional release order (CRO); (iii) fine; (iv) community based order (CBO); (v) intensive supervision order (ISO); (vi) suspended imprisonment; and (vii) immediate imprisonment.[78]

It was both appropriate and helpful for Parliament to have structured judicial discretion by setting out this general ranking of sentences. However, the courts

76. Cl 101M.
77. Cl 101N.
78. The situation is more complicated than this in that the first four options may also be combined with a 'spent conviction order', the purpose of which is to relieve a person of the consequences of the conviction. See generally N Morgan 'Business as Usual or a New Utopia? Non-Custodial Sentences under Western Australia's New Sentencing Laws' (1996) 26 UWAL Rev 364.

retain considerable flexibility as a consequence of the wording of section 39 (which requires consideration of what is 'appropriate') and the general principles of sentencing in the Act (which involve a balancing of factors). Stage three would translate this general ranking into a far more rigid, formula-bound question: was the actual sentence 'more severe' or 'less severe' than the relevant sentence? The Bill seeks to address this question in extraordinarily convoluted provisions extending to six pages.

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.[79] Under the current system — and in accordance with the provisions of the Sentencing Act 1995 (WA) relating to the fine[80] — 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.[81] 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.

4. Summary

Generally, the matrix legislation is so open-ended that it is hard to be sure quite what it will involve. By stage three it becomes, in places, quite unintelligible and obviously flawed. This serves to illustrate an important point: as soon as the matrix legislation attempts to provide detail, it starts to crumble. The likely response to such criticism is that this is only the first version of the Bill, and that the problems can be corrected in future drafts. However, such an argument simply generates another criticism: the fact that such a draft has reached the stage of a Government-sponsored Bill, is indicative of a sloppy process of law reform.

It is now necessary to step back from the wording of the legislation and to consider a number of general issues. It will be shown that serious problems arise with respect to the structure and effects of the proposed scheme.

ACCOUNTABILITY AND TRANSPARENCY: HOIST WITH ITS OWN PETARD?

1. Regulations and the use of sentencing reports

The matrix legislation heralds a breathtaking shift in power away from the courts and into the realm of statutory regulations. In summary, the legislation would permit regulations to: (i) prescribe the offences which are subject to the new reporting regime (whether as reporting, regulated or controlled offences); (ii) set the detailed requirements for sentencing reports for all three categories of offence; (iii) in the case of regulated offences, prescribe the method by which the indicative sentence is to be determined; (iv) in the case of controlled offences, determine what factors are relevant to sentencing and the weight, if any, to be attached to such factors; (v) extend the matrix approach from adult courts to the Children's Court; and (vi) abolish or amend regulations in the future.

Allied to this, the Bill in effect requires the courts to 'report' to the Executive through the use of sentencing reports. It is clearly intended that the Executive will monitor sentencing practices and that it can act on its findings by introducing or amending sentencing methods and formulae.[82]

Advocates of the matrix contend that it renders the system more transparent and accountable because sentencing becomes a matter within the control of an elected Parliament rather than the judges.[83] However, genuine accountability is a matter of substance, not of formal structures or simplistic catch-phrases, and there

82. See infra pp 287-290 for discussion on the constitutionality of the proposed scheme.
83. Media Statement supra n 20.

are profound difficulties with the proposed model. Generally, regulations come into force simply when they are gazetted and do not need to be specifically approved by Parliament. The Bill does require regulations in the third stage to be laid before and approved by Parliament. However, laying regulations before Parliament involves far less scrutiny than a Bill and full legislative debate. Even more important, most of the groundwork for stage three will already have been laid, especially in stage two, without any prerequisite for parliamentary scrutiny. The ultimate paradox is that regulations may be less transparent than court cases in that: '[t]he element of public scrutiny involved when a sentence is passed in open court ... is missing'.[84]

The effect of the proposed scheme is to leave crucially important matters to Executive (and therefore political) control, without even the filtering scrutiny of a body such as a sentencing commission. Given the failure to spell out even the bare bones of the legislative scheme in a coherent and competent manner, it is particularly worrying to contemplate how the detail will be addressed in the context of little-scrutinised regulations. It is also hard to believe that any government will be able to resist the temptation, at election time, of tampering with regulations. Indeed, a track record of increasing sentences by amending regulations would obviously become a significant law-and-order 'performance indicator'.

2. Skeleton legislation: leaving basic questions to regulations

Questions must be raised about the balance between primary legislation and regulations. Legislation should not be cluttered up with unnecessary detail but, equally, Parliament should not delegate a matter to regulations unless the key parameters of legislative policy are clearly set out in the enabling legislation. In the words of Professor De Smith: 'Skeleton legislation is justifiable only in order to deal with a state of dire emergency ... or a quite exceptional situation'.[85] By leaving the substance of the matrix to future regulation, the proposed scheme fails this basic constitutional test.

In this context, it is particularly striking that, whilst six pages of the Bill are devoted to the attempt to produce quasi-mathematical formulae with respect to sentence severity, far more difficult issues of principle which confront the courts every day have simply not been addressed. Two of the most obvious are the question of an offender's criminal record and the problem of multiple offenders.

---

84. Malcolm supra n 4, 13.
85. SA De Smith *Constitutional and Administrative Law* 3rd edn (London: Penguin, 1977).

(i) Criminal record

If a 'formulaic' approach to sentencing is adopted, it is important that there should be a clear, principled and workable approach to determining the relevance of an offender's criminal record. This is particularly true if the intention is to model the matrix on the two-dimensional North American grids. Any formula which is adopted must take account of the seriousness as well as the number of any previous convictions.[86] Once a formula has been decided upon for the calculation of a 'criminal history score', profoundly difficult questions of principle arise as to how to weight this relative to the 'seriousness of the offence.' These are matters to which sentencing commissions in a number of US States have given long and detailed consideration, and upon which there are wide differences of opinion. For example, the Oregon and Minnesota grids use different methods to calculate 'criminal history score' and the Minnesota grid places significantly greater weight on that score than Oregon.[87] In Western Australia, the question of criminal history has special pertinence given the gross over-representation of Aboriginal people in the criminal justice system, many of whom have long criminal records littered with minor public order and property offences.[88]

(ii) Multiple offenders

Multiple offenders — in other words, offenders who need to be sentenced on one occasion for a number of offences — also pose potential problems. A large number of offenders fall into this category and complex sentencing principles are at stake. The courts currently attempt to impose sentences which, when taken as a whole, reflect the totality of the offending behaviour.[89] This is not a matter of simply adding up all the individual sentences and ordering them to be cumulative. Nor is it a matter of ordering them all to run concurrently. Instead, the court may order some sentences to run concurrently and others cumulatively; alternatively, under the terms of the Sentencing Act 1995 (WA), it may order sentences to be

---

86. Eg, in Minnesota criminal history score is based on four matters: a weighted measure of prior felony sentences; a limited measure of prior misdemeanour/gross misdemeanour sentences; a limited measure of any prior serious juvenile record; and a 'Custody Status' measure indicating whether the offender was under supervision when the current offence occurred.
87. See the grids infra pp 291-292. For detailed analysis: see A Von Hirsch supra n 18.
88. Also see infra pp 284-286 on the fact that criminal records are to some extent a 'construct' of discretionary decisions at the pre-trial stage in the criminal process rather than an objective measuring post.
89. See M Wells *Sentencing for Multiple Offenders in Western Australia* (Perth: UWA Crime Research Centre, 1992); *R v Jarvis* and *R v Bowman,* discussed by I Morgan 'Sentences of Imprisonment — Rationale and Application of the Totality Principle' (1994) 18 Crim LJ 363.

partly cumulative and partly concurrent.[90] The whole point behind this reform was the recognition that the sentencing of multiple offenders is not a matter which can be reduced to mathematical formulae but is a matter of evaluative judgment. An obvious problem for any matrix system is that 'pure maths' would appear to suggest either wholly concurrent or wholly cumulative sentences. The former would lead to unduly lenient sentences; the latter would result, like the United States Federal Guidelines, in extraordinarily long sentences, potentially extending well beyond the offender's lifespan.[91]

3. The redistribution of discretion

One of the implicit assumptions of the matrix proposal (as with other proposals for constraints on sentencing discretion through mandatory or mandatory minimum sentences) is that, if judicial discretion is removed or restricted, the system will become more certain, predictable and accountable. However, sentencing decisions are part of a process and the parameters of a case are set by discretionary decisions on the part of police and prosecuting authorities. For example, a particular set of facts could give rise to a charge of assault occasioning bodily harm (in which case, consent and provocation could result in an acquittal) or of unlawful wounding (in which case consent and provocation are relevant only to sentence). In the case of 'multiple offenders', the prosecution may need to decide whether to use specimen charges or to charge all possible offences. Issues can also arise as to whether all the charges will be heard together or on separate occasions.

There is ample evidence that, by removing or limiting discretion at one stage in the process, mandatory sentences and sentencing grids make such pre-trial decisions even more crucial than they are already to the outcome of a case.[92] These decisions are, of course, made behind closed doors and, unlike court cases, are not subject to formal processes of public justification and scrutiny. A striking example of the redistributive effects of mandatory sentences was revealed in Arizona

90. Sentencing Act 1995 (WA) s 88.

91. See generally Doob supra n 18. The US Federal Sentencing Guidelines recently generated trenchant judicial criticism from the US Court of Appeals in California. Two young men were sentenced for their involvement in multiple counts of armed robbery. As a result of the requirements for consecutive sentences, one received 95 years' imprisonment and the other almost 50 years' imprisonment. A majority of the Appeal Court judges saw these sentences as grossly disproportionate, unjust and pointless and felt it necessary to write what was, in effect, a plea for legislative change: see *USA v Harris* (unreported) USA Ct App, 9th circ, 9 Sep 1998 no 96-101416; *USA v Steward* (unreported) US Ct App, 9th circ, 9 Sep 1998 no 96-101418.

92. See Hogg supra n 3; Zdenkowski supra n 3; AW Alschuler 'Sentencing Reform and Prosecutional Power' (1978) 126 Uni Pennsylvania L Rev 550; M Tonry 'Sentencing Commissions and Their Guidelines' in *Crime and Justice: A Review of Research* Vol 17 (Chicago: CUP, 1993) 137.

in the early 1990s. A very high proportion of cases — almost a quarter of all felonies — were charged as inchoate offences (ie, attempts or conspiracies) rather than completed crimes. It is not the case that the Arizonan police are particularly adept at 'nipping crimes in the bud' or that criminals there are especially inept. The simple fact is that inchoate offences were not subject to the mandatory structure which applied to completed crimes and, as a result, charges were routinely 'bargained down'.[93]

It is true that Australia does not have a formalised plea bargaining system but pre-trial negotiation is commonplace and is often tied into questions of plea. For example, it is quite common for those charged with complex corporate offences to agree to plead guilty to a limited number of offences in return for other charges being dropped. Similarly, defendants may plead guilty to non-aggravated as opposed to aggravated offences (eg, sexual assault as opposed to aggravated sexual assault, or burglary as opposed to aggravated burglary). A sentencing matrix, involving either fixed or far more limited sentencing options, will dramatically increase the importance of such negotiations with respect to the seriousness of the current offences. Over time, negotiating skills will also have a profound impact on the construction of a person's record. Quite apart from the danger of undue pressure on defendants and prosecutors to strike a deal, the net result will be a reduction in the transparency and accountability of the criminal process as a whole.[94]

4. Projected impacts and future monitoring

The avowed purpose of the matrix is to increase accountability and transparency. To achieve this aim, there should be appropriate evaluation criteria and mechanisms which satisfy the following minimum requirements:(i) a statement, at the outset, of the specific aims of the system; (ii) a projection of the impact of the new laws in key areas of concern, including imprisonment rates in general and Aboriginal imprisonment rates in particular; (iii) an effective system for gathering and processing relevant data; and (iv) an independent system for monitoring and evaluating the data.

The third of these parameters — the need for better data collection — has been acknowledged. However, even if better data gathering systems and processes are set in place for the future, including through the proposed sentencing reports, the problem remains that current 'base data' are inadequate for the purposes of comparison. The other parameters have been ignored or brushed aside. Apart from sweeping generalisations about accountability and consistency, the aims of the matrix

93. K Knapp 'Arizona: Unprincipled Sentencing, Mandatory Minima and Prison Overcrowding' (1991) 2 Overcrowded Times 10.

94. See infra pp 285-287, on the effects of 'redistribution' on 'justice' and the dangers of discriminatory sentencing practices.

have not been spelt out. Although Ministry of Justice personnel are working on projections with respect to prison population levels, these projections have not been released. When asked about the projected impact of the various reforms, the Attorney-General stated that any figures would be 'merely hypothetical'.[95] This contrasts with the development of sentencing grids in a number of North American States, including Minnesota and Oregon, where correctional capacity played an important role in structuring penalty levels. It may also be noted that in Virginia, proposals for sentencing change must be accompanied by a 'Prison Impact Statement'. Finally, there is no sign of any independent monitoring agency being established.

5. Summary

The matrix legislation fails, on multiple counts, to live up to its proclaimed objectives. It does not address fundamental questions and leaves far too much to the murky realm of regulations. Far from being more transparent, the proposed system heightens the significance of deals which have been struck behind closed doors. It is remarkable that, in this managerial era of 'benchmarking', 'performance indicators' and so on, there has been no attempt to provide projections as to the impact of the scheme and no proper acknowledgment of the need to do so. The situation is all the more problematic given the gross overcrowding which already exists in the State prison system.[96]

CONSISTENCY AND JUSTICE

In his Report to Parliament, the Chief Justice argued that it is impossible for the courts to do justice in individual cases if their discretion is unduly fettered.[97] In other words, pre-ordained sentences or narrow sentence ranges do not permit the courts to take account of the variations which exist between individual cases. These propositions cannot be fully explored within the confines of this article but some important points must be made.

---

95. *The West Australian* 3 Dec 1998. The lack of public projections is a particular problem given that the early stages of the matrix legislation may well coincide with major changes to parole and remission. Under the parole and remission reforms, it is likely that the current one third remission will be abolished and that sentencers will be required to reduce the sentences which they currently impose in order to accommodate that change. It will be crucial that a mechanism is developed to test the impact of each of these reforms, not just of the reforms as a whole.

96. For discussion of overcrowding and other issues in the context of a major incident (ie, riot) at Casuarina Prison on Christmas Day 1998: see L Smith, D Indermaur, S Boddis & C Smith *Report of the Inquiry into the Incident at Casuarina Prison on 25 December 1998* (Perth: Ministry of Justice, 1999).

1. The redistribution of discretion

It has already been shown that the redistribution of discretion from judges to pre-trial decisions renders the system as a whole less transparent and accountable. This redistribution also serves to undermine 'just deserts' in that the ultimate sentence will depend less on the objective circumstances of the offence and more on the negotiating skills of a defendant (or lawyer) and the readiness of prosecutors to enter negotiations.

2. The structure of the criminal law and the rules of criminal law reform

All the major criminal offences embrace a huge range of different acts. For example, assuming the victim complies, a schoolyard threat of 'Hand over your Mars Bar or else!' is robbery, just as much as a handbag snatch accompanied by a violent bashing.[98] To superimpose a matrix on the current structure of criminal offences would therefore negate the basic principle that sentences are to be commensurate with the 'seriousness of the offence'[99] and would subvert rather than promote justice.

Even though this point is obvious, it has not always been recognised. For example, the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA) largely missed the hard core of serious offenders at which it was aimed, catching instead several persistent but less serious offenders. Much of the reason for this was that a wide range of offences could trigger the Act. Most notoriously, these included assaulting a public officer, an offence which can range from a minor push in the course of a public order dispute to a planned, serious and sustained attack.[100] Similarly, California's 'three strikes' sentencing laws saw a sentence of 20 years' imprisonment imposed on a persistent but rather petty criminal who was convicted of the robbery of a small amount of pizza.[101]

Since the matrix cannot be based simply on existing offence definitions, it is essential that more detailed criteria be spelt out. One option would be to develop a more sophisticated grading of offences within the Criminal Code 1913 (WA) and other legislation by specifying aggravating and mitigating factors in greater detail. In many instances, our criminal laws already provide for a general offence and then

97. Malcolm supra n 4, esp 11.
98. Another good example is criminal damage (the maximum sentence is 10 years' imprisonment but the majority of such offences are very minor). For examples under the Northern Territory's mandatory sentencing laws: see Zdenkowski supra n 3.
99. Sentencing Act 1995 (WA) s 6.
100. Harding supra n 25.
101. *Los Angeles Times* 18 Sept 1994.

set down aggravating factors.[102] Hitherto, this has always been a matter requiring legislation, and such legislation has usually followed a process of consultation.[103] It should be recognised that the matrix legislation effectively changes the rules of law reform in that aggravating factors can now be provided simply by regulation. It must also be remembered that the tighter the matrix, and the more precise the predicted result, the more the system will encourage bargained outcomes.

3. Facially neutral: racially discriminatory?[104]

On the face of it, the proposed matrix is not discriminatory. Indeed, it appears to be the very opposite in that it would give less scope for individual prejudices to affect a sentence. However, local and international experience suggests that mandatory sentences and sentencing grids tend to be discriminatory in practice. Here in Western Australia, the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA) affected Aboriginal defendants quite disproportionately[105] and Aboriginal children constituted a staggering 80 per cent of cases involving the 'three strikes' burglary laws from February 1997 to May 1998.[106] The structure of the matrix causes concern in several ways.

First and foremost, serious problems arise from the fact that the proposed matrix will not involve a thoroughgoing review of sentences across the board akin to that which occurred under the United States grid systems. In the United States, the introduction of the sentencing grids forced reform agencies seriously to consider questions of 'ordinal proportionality'; in other words, it required different types of offence to be ranked relative to each other. The matrix legislation anticipates a piecemeal approach. It can be predicted with virtual certainty that the offences which will be selected will be those which have attracted particular media concern, such as robbery, burglary and motor vehicle offences. These will inevitably be offences in which lower socio-economic groups, and especially young indigenous people, are over-represented. It is far less likely that there will be any attention to fraud and other white-collar crimes, and minor burglaries may well attract heavier sentences than even relatively serious frauds. In that sense, the system will lose a sense of 'ordinal proportionality'.

---

102. Examples of this include sexual assault, indecent assault, stealing and burglary.
103. Eg, many of the reforms to the Criminal Code during the past 15 years can be traced to M Murray *The Criminal Code: A General Review* (Perth, 1983). Murray J, as he now is, was then Crown Counsel.
104. The heading is taken from Tonry supra n 92.
105. Harding supra n 25.
106. C Stokes *Three Strikes and You're In: Mandatory Minimum Sentences for Repeat Home Burglars in Western Australia* (unpublished LLB Honours thesis — Perth: UWA, 1998). For further discussion and international examples, see M Tonry 'Mandatory Penalties' in M Tonry (ed) *Crime and Justice: A Review of Research* (Chicago: CUP, 1992) Vol 16, 243.

Since the matrix will, at least initially, target only selected offences, a situation will arise in which quite different rules may apply to different offences. For example, regulations may state that a certain factor (eg, 'remorse', 'loss of status' or 'exceptional hardship' arising from a sentence of imprisonment) is to be ignored in the context of the offences of burglary and robbery. However, in the absence of regulations to the contrary, those factors will continue to have some influence in other areas, including company and commercial fraud.

The problems are compounded by the fact that the initial levels of sentence will be subject to change and it is obvious that changes are most likely to occur in areas of public concern. This is likely further to erode the parameters of 'ordinal proportionality', as sentences for 'controlled offences' spiral upwards and other sentences remain static. An example of this problem is found in the United States Federal Sentencing Guidelines. After a series of changes, a transaction involving 5 grammes of 'crack' cocaine can now attract the same mandatory penalty (5 years' imprisonment) as 500 grammes of powder cocaine.[107] Despite the moral panic about 'crack', it has been held in some United States courts that the two substances are pharmacologically indistinguishable. But the young and the poor, especially African Americans, are disproportionately high consumers of 'crack' cocaine. Powder cocaine is the drug of choice amongst the higher echelons of society.

THE POSITION OF THE COURTS

If the matrix legislation proceeds, it may be subject to challenge on several grounds. It will be particularly interesting to see how the courts are portrayed in their response to such challenges, given that they have already stated their opposition to the scheme through the Chief Justice's Report to Parliament.

1. Some lessons from history

History shows that inflexible sentencing regimes generate pressure on courts to find escape mechanisms in order to avoid injustice. During the 18th century, in an effort to protect the interests of the propertied classes, English law prescribed the mandatory death penalty for numerous minor property offences.[108] In order to avoid unjust and draconian consequences, juries frequently committed 'pious perjury'. In other words, they would either acquit the accused or return a verdict of

107. M Tonry *Malign Neglect* (Oxford: OUP, 1995) 188-190.

108. Classic discussions of such practices are to be found in D Hay 'Property, Authority and the Criminal Law' in D Hay, P Linebaugh & EP Thompson (eds) *Albion's Fatal Tree: Crime and Society in 18th Century England* (London: Allen Lane, 1975); EP Thompson *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975).

guilty of a less serious, non-capital offence. It seems likely that the same situation — no doubt under a different epithet — will occur with a matrix. Suppose, for example, that a person is charged with manslaughter as a result of driving in a grossly negligent manner. In such a case, the alternative verdict of dangerous driving causing death will be left to the jury. At present, the jury will be aware that dangerous driving is a less serious offence; they may also be aware, in general terms, that a lower penalty will probably apply. Under a matrix scheme, they will know far more precisely what the sentence will be. It is highly unlikely that members of a jury could put this out of their minds in considering their verdict.

The 18th century also witnessed very strict adherence to matters of procedure and proof. More recently, this was a feature of both the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA) and the 'three strikes' burglary laws that were introduced in 1996.[109] The matrix will raise similar problems. For example, if the sentence hinges, in part at least, on the offender's 'criminal history', that will have to be proved to the satisfaction of the court. In stage three, where regulations may prescribe how much weight, if any, is to be given to a particular factor, it will become necessary for the court to decide in very precise terms whether a particular factor has been established or not. The terms of the regulations will also be strictly interpreted. Suppose, taking the example suggested earlier, that regulations state that an offender's 'loss of status' is no longer to be taken into account. There will, no doubt, be detailed debate on what 'loss of status' means and defence counsel will try to dress up the same basic issue under a different rubric. These matters are likely to be time-consuming, onerous and expensive.

2. Constitutional and human rights challenges

It is also likely that the introduction of a matrix will see challenges based upon broader principles. One potential avenue for challenge would involve arguments based on Australia's international human right obligations; but, at the present time,

---

109. Eg, under the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA) the courts got into lengthy debates about whether a person had been 'convicted' on the previous occasions or had been dealt with without a formal conviction: see N Morgan 'The Sentencing Act 1992: Subverting Criminal Justice' in Harding supra n 25. Under the 'three strikes' burglary laws, the courts faced a problem in that offenders' criminal records did not categorise burglaries into residential and non-residential. Naturally, the courts have insisted on strict proof that the previous 'strikes' were residential. Another example of strict interpretation lies in the fact that the Young Offenders Act 1994 (WA) permits the court to make an 'intensive youth supervision order' with, or without, making an order for detention. In a number of 'three strikes' burglary cases, the Children's Court has held that it is possible, under s 101 of the Act, to impose an intensive supervision order, with detention, but to order immediate release under a 'conditional release order'. See also *R v G (a child)* (1997) 94 A Crim R 586 (on the meaning of a 'conviction') and *R v P (a child)* (1997) 94 A Crim R 593 (on 'stale' convictions).

in the absence of State or federal legislation giving clear effect to those principles, such a challenge may involve drawing a rather long bow.[110]

There is little doubt, however, that the new laws will, if pursued in their present form, be subject to constitutional challenge. The arguments involved in such a challenge would be complex and can only be briefly sketched here.[111] The Chief Justice sowed the seeds of a possible challenge in his Report to Parliament. He commented that the provisions with respect to sentencing reports and the intention to rely on regulations constituted a 'substantial interference' with the statutory power of the courts 'to determine their own procedures by the promulgation of rules of court and practice directions.' He then stated that —

> the various reporting requirements ... represent ... an attempt by Parliament to impose upon judges executive or administrative functions incompatible with judicial independence.[112]

The High Court has held that although mandatory penalties may be highly undesirable, they are not per se unconstitutional.[113] However, if the current proposals had arisen with respect to Commonwealth laws, the separation of powers doctrine would have provided the basis for a possible challenge. The Commonwealth Constitution entrenches a separation of judicial power from executive and legislative powers. To give effect to this, section 71 provides that the judicial power of the Commonwealth is to be vested in federal courts. The two main consequences of this are that federal judicial powers can only be given to courts[114] and that courts cannot be vested with legislative or executive functions unless this is merely incidental to the exercise of judicial power.[115] Although the delineation of judicial and non-judicial powers can appear somewhat artificial,[116] the High Court has continued to give effect to this distinction. Under the Commonwealth Constitution, therefore, it could well be argued that a scheme which requires courts to 'report' in a prescribed form to the Executive and which permit detailed

---

110. For an overview of the human rights issues: see M Wilkie 'Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective' (1992) 22 UWAL Rev 187; Zdenkowski, supra n 3.
111. For a useful overview relating to mandatory sentences in general: see M Flynn 'Fixing a Sentence: Are There Any Constitutional Limits?' (1999) 22 UNSWLJ 280.
112. Supra n 4; cf *DPP v Kable* (1996) 189 CLR 51.
113. *Palling v Corfield* (1970) 123 CLR 52; *R v Sillery* (1981) 180 CLR 353; *Cobiac v Liddy* (1969) 119 CLR 257.
114 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.
115. *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330.
116. *R v Joske* (1974) 130 CLR 87, Barwick CJ and Mason J; *Hilton v Wells* (1985) 157 CLR 57 Mason and Deane JJ.
117. *R v S (a child)* (1995) 12 WAR 392.

sentencing regulations would be unconstitutional on the basis that it effectively gives a judicial function to the Executive.

The basis of a challenge under State laws is less obvious because it is clear from two previous challenges to State sentencing laws, in Western Australia[117] and New South Wales,[118] that there is no separation of powers doctrine at State level akin to that which exists under Commonwealth law. However, *DPP v Kable* does open up another, more restricted line of argument. In essence, the majority of the High Court held in *Kable* that, although there is no separation of powers doctrine at the State level, there are limits to the extent to which State courts can be required to perform non-judicial functions. The majority noted, in particular, that by vesting State courts with powers in respect of Commonwealth matters, the Constitution anticipates an 'integrated judicial system'. Consequently, State courts should not be required to exercise powers which are incompatible with the exercise of the judicial power of the Commonwealth.[119]

It is this line of argument that the Chief Justice floated in the earlier quotation when he referred to the matrix imposing 'executive' functions on the judiciary. However, the matrix really appears to involve the reverse side of the coin. In other words, the real question may be not so much whether executive functions can be imposed on the courts as whether the Executive can, in effect, take over judicial functions by prescribing regulations for the courts and requiring reports. If this is the real question, it might appear at first sight to be more difficult to argue that the 'purity' of the courts has been infringed in the sense suggested in *Kable*, especially when it is clear that mandatory sentences are not unconstitutional. It may also be noted that the High Court recently refused to grant special leave to appeal in the case of a female first offender who had been sentenced under the Northern Territory's mandatory sentencing laws to a term of 14 days' imprisonment for two very trivial offences.[120]

It is not clear, therefore, whether a constitutional challenge would succeed. However, there are strong grounds for arguing that the proposed matrix is different from those mandatory sentencing schemes which have been upheld. Although it must be accepted that Parliament has the right to fix mandatory sentences or minimum sentences for *specific offences* by legislation, the matrix scheme is based squarely upon general regulations made by the Executive and also on the previously unknown notion that the courts must report to the Executive. The scheme as a whole therefore involves a structure in which the courts are, in a sense, made answerable to the Executive. Viewed in this way, the matrix involves a systemic

118. *DPP v Kable* supra n 112.
119. See generally P Johnston & R Hardcastle 'State Courts: The limits of *Kable*' (1998) 20 Syd LR 214.
120. *Wynbyne v Marshall* (1997) 117 NTR 11, discussed by Flynn supra n 112.

attack on the structure and independence of the courts; it can well be argued that this attack is so fundamental that it undermines the ability of the courts to act or to appear to act independently of the Executive.

CONCLUSION

It is hard to avoid the conclusion that law-and-order politics has jumped well ahead of itself with the proposal for a sentencing matrix. It is easy and 'politically saleable' to talk of a matrix and to recite the mantras of accountability, transparency and consistency. However, the need for a matrix has not been properly established, and the complexity of the issues does not appear to have been understood or acknowledged. As they stand, the current proposals are both unnecessary and dangerous.

As the problems of the Bill become obvious, it becomes less likely that the matrix will proceed in its present form. However, the political reality is that the government will, at the end of the day, want to rescue something from the package, perhaps at least stage one and possibly stage two. It would also be naive to think that concerns about consistency, transparency and accountability will somehow evaporate. To that end, the Court of Criminal Appeal should seriously — and as a matter of urgency — revisit the notion of guideline judgments in order to provide clear and substantive guidance for the lower courts, and also to communicate and 'market' sentencing policies more effectively to the public.

If it is not too late, it is also now incumbent on all parties to consider how best to address issues of sentencing reform on a long-term, non-partisan basis, because it is clear that successful sentencing reform hinges on the cooperation and agreement of all relevant stakeholders.[121] In this respect, it is particularly unfortunate that attention has focused only on the deceptively simple 'outcome' of a 'sentencing grid', and that little or no attention has been given to the processes which lay behind the development of the better examples of United States grids, such as those in Minnesota and Oregon. Nor does it seem that much attention has been given to the fact that these grids permit departures (running in Minnesota at around 16 per cent).[121] Sentencing commissions in the United States have been variable — good, bad and indifferent — but if the aim is systematic reform of long-term value, there is merit in considering the establishment of an independent and properly funded Sentencing Advisory Body with expertise and representation from all relevant groups. This body should be empowered to examine and report upon issues of concern on the initiative of either the courts or the government of the day. There is no merit in political knee jerks or in the politics of 'divide and rule'.

---

121. Tonry supra n 48.
122. Frase supra n 7.

Appendix: Minnesota sentencing guidelines grid

SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
MURDER – 2ND DEGREE (INTENTIONAL MURDER; DRIVE-BY SHOOTINGS)	X	306 *299-313*	326 *319-333*	346 *339-353*	366 *359-373*	386 *379-393*	406 *399-413*	426 *419-433*
MURDER – 3RD DEGREE MURDER – 2ND DEGREE (UNINTENTIONAL MURDER)	IX	150 *144-156*	165 *159-171*	180 *174-186*	195 *189-201*	210 *204-216*	225 *219-231*	240 *234-246*
CRIMINAL SEXUAL CONDUCT - 1ST DEGREE ASSAULT - 1ST DEGREE	VIII	86 *81-91*	98 *93-103*	110 *105-115*	122 *117-127*	134 *129-139*	146 *141-151*	158 *153-163*
AGGRAVATED ROBBERY – 1ST DEGREE	VII	48 *44-52*	58 *54-62*	68 *64-72*	78 *74-82*	88 *84-92*	98 *94-102*	108 *104-112*
CRIMINAL SEXUAL CONDUCT – 2ND DEGREE	VI	21	27	33	39 *37-41*	45 *43-47*	51 *49-53*	57 *55-59*
RESIDENTIAL BURGLARY SIMPLE ROBBERY	V	18	23	28	33 *31-35*	38 *36-40*	43 *41-45*	48 *46-50*
NON-RESIDENTIAL BURGLARY	IV	12	15	18	21	24 *23-25*	27 *26-28*	30 *29-31*
THEFT CRIMES (OVER $2500)	III	12	13	15	17	19 *18-20*	21 *20-22*	23 *22-24*
THEFT CRIMES ($2500 OR LESS); CHECK FORGERY ($200 – $2500)	II	12	12	13	15	17	19	21 *20-22*
SALE OF CONTROLLED SUBSTANCE	I	12	12	12	13	15	17	19 *18-20*

NOTES

The solid numbers in each cell represent presumptive sentences in months. The italicised numbers denote the range within which the judge may sentence without the sentence being deemed a departure. The judge is allowed to depart from the range to reflect the particular circumstances of the case, and subject to appeal.

Presumptive **immediate** commitment to state prison. First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

Presumptive **stayed** sentence (generally a disposition similar to a suspended sentence for the duration indicated in the box. Conditions may be imposed).

modified version of the Minnesota sentencing grid. The full grid can be found at <http://www.msgc.state.mn.us/index.htm>.

Appendix: Oregon sentencing guidelines grid

In white blocks, numbers are presumptive prison sentences expressed as a range of months. In gray blocks the presumptive sentence is one of probation. The numbers represent 'sanction units'. These govern the conditions which may be imposed.

SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE									
		Three or more person felonies (juvenile or adult)	Two person felonies (juvenile or adult)	One person felony plus one or more non-person felony	One adult or juvenile person felony and no other felony	Four or more adult non-person felonies	Two or three adult non-person felonies	4+ adult 'A' misdos or one adult non-person felony or 3+ juvenile non-person felonies	No more than 3 adult 'A' misdos or two juvenile non-person felonies	No juvenile felonies or adult 'A' misdos	
		A	B	C	D	E	F	G	H	I	PROBATION
	MURDER	11	225-269	196-224	178-194	164-177	149-163	135-148	129-134	122-128	120-121	60 months
	MANSLAUGHTER I, RAPE I, ASSAULT I, ARSON I	10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60	
	RAPE I, ASSAULT I, KIDNAPPING II, ARSON I, BURGLARY 1, ROBBERY 1	9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36	
	MANSLAUGHTER II, SEX ABUSE I, ASSAULT II, RAPE II, DRUGS-MINORS	8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18	36 months
	EXTORTION, COERCION, PRISON ESCAPE I	7	31-36	25-30	21-24	19-20	16-18	180-90	180-90	180-90	180-90	
	ROBBERY II, ASSAULT III, RAPE III, PROPERTY CRIMES (more than $50 000)	6	25-30	19-24	15-18	13-14	10-12	180-90	180-90	180-90	180-90	
	ROBBERY III, THEFT BY RECEIVING, PROPERTY CRIMES ($10 000-$49 000)	5	15-16	13-14	11-12	9-10	6-8	180-90	120-60	120-60	120-60	24 months
	PROPERTY CRIMES ($5 000 – $9 999), DRUGS-CULT/MANU/DELIV	4	10-11	8-9	120-60	120-60	120-60	120-60	120-60	120-60	120-60	
	ABANDON CHILD, PROPERTY CRIMES ($1 000 – $4 999)	3	120-60	120-60	120-60	120-60	120-60	120-60	90-30	90-30	90-30	
	WELFARE FRAUD, PROPERTY CRIMES (less than $1 000)	2	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	18 months
	BIGAMY, DRUGS-POSSESSION	1	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	90-30	

This is a slightly modified version of the Oregon sentencing grid. Full details can be found at <http://arcweb.sos.state.or.us/rules/OARS_200/OAR_213/213_tofc.html>.