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Looking around, I do not see anyone bleeding, bruised or visibly distressed, which suggests to me that you may have arrived here without being mugged. Perhaps your streets do not need reclaiming, and I do not suppose you all live at Killara.

On an occasion like this I cannot possibly adequately cover the law and order policies of both sides of politics. It would take all day. I will do my best, but the constraints of time require that I concentrate upon the most contentious of the competing policies, both of which deal with the sentencing of offenders. I am talking about the Government's sentencing guidelines law, and the oppositions grid sentencing proposal.

In my view, and I think I can speak for most barristers at the criminal bar, both concepts are deeply flawed and should be abandoned.

SENTENCING GUIDELINES

On 12 October 1998 The Court of Criminal Appeal delivered the *Jurisic* judgment which allowed an appeal by the DPP against a home detention penalty imposed upon a man who pleaded guilty to 3 charges of dangerous driving occasioning grievous bodily harm.

In the process of upholding the Crown appeal the Court established guidelines for sentencing judges in such cases. They were

- a non custodial sentence should be exceptional
- with a plea of guilty, an aggravating factor involving the conduct of the offender should normally lead to a custodial sentence of not less than 3 years where death was involved, and 2 years where serious injury was involved.

Long before *Jurisic* the Court of Criminal Appeal expressed views as to what were appropriate minimum sentences in a variety of cases; *Jurisic* was an extension of an existing process. The Court recognised that the sentencing judge should retain a broad discretion. The Chief Justice noted that public criticism of particular sentences or excessive leniency is sometimes justified. The guidelines were an attempt to promote consistency without unduly fettering judicial discretion. Nothing in the judgment was an encouragement to either the DPP or the Attorney General to approach the Court for anything in the nature of an advisory opinion in the absence of a real case.

Unfortunately, it all happened during the developing law and order debate in an election campaign. Almost immediately the Attorney General announced that he was considering legislation to permit the Attorney General to go to the Court for guidelines, and legislation was swiftly introduced and passed in December 1998.

In light of the decision in *Juriscic*, the Act is unnecessary and would seem to serve little practical purpose.

Shortly put, the Act gives the Court of Criminal Appeal jurisdiction to give guidelines judgments in respect of particular offences, in the absence of any case before the Court and in the absence of any contradictor except the Senior Public Defender if he or she were interested enough to turn up.

On 21/10/98 the Bar Association's then research officer Matthew Darke observed that he feared the proposal would drag the Court into an election contest, and said

"It is quite possible that the major parties would seek electoral gains by promising to refer certain offences to the Court of Criminal Appeal for sentencing guidelines".

On 9/11/98 in a joint statement the Law Society and the Bar Association condemned the proposed legislation and said it created a danger of political pressure being placed on the state's highest criminal court.

Mr Darke's views, and the joint statement, were delivered with considerable prescience.

On 1 March 1999 the Premier - not the Attorney General - issued a news release informing the world that the "Carr Labor Government" - not the Attorney General - would ask the NSW Court of Criminal Appeal to develop clear and consistent sentencing guidelines covering six major classes of crime, namely

Break enter and steal

home invasion

drug importation

child sexual assault

sexual assault and

high range drink - driving offences

The Premier went on to say that

"We've heard the community, we've heard their concerns about sentencing and we've acted on those concerns.

That is why our plans are believable and achievable."

There was a time when the Attorney General retained a function independent of executive government to make his own decisions consistently with the interests of justice. Unfortunately the Premier's news release disclosed a proposal the very antithesis of what might be expected if the Attorney General were considering an application to the Supreme Court.

The Government made the decision and made it for naked political ends, to seek votes in an election campaign.

It was apparent from the beginning that the Act had the potential to be a vehicle for political interference in the judicial process. If we had to have such a law, it is beyond comprehension that the DPP was excluded from the process. After all, the major reason for establishing the office of

DPP was to keep politics out of the system. The holder of the office could act independently of government.

Whilst the *Director of Public Prosecutions Act* did not take away the Attorney General's traditional functions, it gave to the DPP the responsibility of day to day administration of the criminal justice process. In the second reading speech on 1 December 1986, Mr. Sheahan said that the creation of the office meant

"The general responsibility for the prosecution of serious criminal offences in this State will be vested in a single person, who is politically independent"

and

"It is crucial that the community has confidence in the way criminal justice is administered. It must not only be impartial, efficient and free from political and personal interference, but, as well, must be seen to be so. Those bills are designed to ensure that all of those objectives are maintained."

The noble principle so enunciated seems to have escaped the attention of the drafter of the *Criminal Procedure Amendment (Sentencing Guidelines) Act* . It is legislation we could do without. Why?

- because of the exposure to political interference I have spoken about;
- because it is inconsistent with principle to ask the Court to rule on appropriate sentences in a factual vacuum, and thereby to give advisory opinions;
- because it is without value to ask the Court to rule on appropriate sentences in the absence of a real contradictor or opponent, who would present argument as to what the guidelines should be, having regard to the facts in the case before the Court;
- because it is difficult to accept to expect that the Senior Public Defender will have either the time, resources or the inclination to assist a purely hypothetical process. The Public Defender has real, not hypothetical, clients to look after;
- finally, because the DPP is excluded from making any contribution to such applications.

The animus between the Premier and Mr Cowdery is notorious. Is this Act the thin end of the wedge?

GRID SENTENCING

In spite of statements to the contrary, the practical effect of the Coalition's sentencing policy would be to

- -substantially and significantly interfere with the judicial discretion in the sentencing process
- -require judges and magistrates to sentence according to a mathematical formula with little scope for a proper regard to the importance of subjective and individual factors
- -generally increase sentences

The character of the offender, the extent of culpability and the effect on victims would be given no significant weight. The proposal was first announced on 13/5/98 by the then opposition leader Mr Collins who said amongst other things:

In our first term of Government, we will introduce a new Sentencing Act, based on the Grid Sentencing system used successfully in 15 American States.

I put the cross benches on notice that today's criminal law package is an issue on which we seek a mandate at the coming State election.

Grid sentencing sets out in table form the sentence that should be imposed, based on the seriousness of the offence and the offender's criminal record.

Judges will then be required to impose the penalty published in the grid.

It's simple. The worse the offence and the longer the record, the tougher the penalty.

If judges choose to impose a sentence outside that specified in the grid, they must give a written reason for doing so and make it public in handing down their judgment.

It's all about making judges more accountable to the public. And imposing the penalties the community demands.

The Car Government's own Law Reform Commission says the Grid Sentencing scheme will produce more consistency and certain penalties.

The policy was re-announced on 18 March 1999 by the Shadow Attorney General Mr Hannaford. He said, amongst many other things, that the Consistent Sentencing System (or Grid System) would have this advantage, that

the transparency of sentencing is increased and community understanding of the process of sentencing is enhanced by ensuring the normal penalty range is public knowledge and by requiring judges to give reasons for departing from the guideline sentence.

With respect, it is mere nonsense to suggest that a law whereby executive government puts its thumb on the scales of justice is going to make judges "more accountable" or the system "more transparent." Quite the reverse.

I do not understand how a sentencing judge in New South Wales can be made more accountable than he or she now is. I do not understand how the system could be made more transparent.

Firstly, in the vast majority of cases involving adults, judges and magistrates sit in public courts where anyone can go in and watch. The world's press is free to publish an account of the proceedings.

Secondly, again in the vast majority of cases involving adults, judges and magistrates are obliged

to publish detailed reasons for why they decide to impose a particular sentence. They must do so publicly.

Thirdly, if either the person sentenced, or the DPP, is aggrieved by the nature or length of the sentence, the Court of Criminal Appeal will determine the issue, It sits in public. It hears argument from both sides in public. It publishes its judgments publicly. Anyone can attend its proceedings, including the world's press.

Short of putting judges in a glass case in Martin Place while they write their judgments, it is not easy to see how present sentencing procedure can be any more transparent, or judges more publicly accountable.

The Minnesota Sentencing Guidelines tell us that

The presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by locating the appropriate cell of the Sentencing Guidelines Grid. The grid represents the two dimensions most important in current sentencing and releasing decisions- offense severity and criminal history.

The offender is sentenced according to where two objective facts meet on the grid:

The severity rating of the offence

The criminal record of the offender.

Offences are arrayed into ascending levels of severity from 1 to 10. The weight assigned to each prior felony sentence is arbitrarily determined according to its severity level.

The nature of the conviction determines the severity level on the vertical axis. The offender's

criminal history score determines the appropriate location on the horizontal axis. The presumptive fixed sentence is found at the intersection of the column defined by the criminal history score and the row defined by the offence severity level.

There is a presumption that the penalty so formulated will apply. Above the black line on the grid you go to prison.

Mr Hannaford's news release claims that courts will retain absolute discretion on the penalty to be imposed but will be required to justify any departure from the guidelines.

With respect, the proposition that courts will retain "absolute discretion" is farcical. The Minnesota guidelines make it perfectly clear that the discretion to depart from the presumptive sentence will be restricted to "*a small number of cases where substantial and compelling aggravating or mitigating factors are present*"

and

"The aggravating or mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favour of the guideline sentence".

In large measure the process destroys the judicial discretion. It effectively requires judges to be little more than computers. It prevents significant recourse to many of the subjective facts surrounding an offender and his or her background which may mitigate or aggravate a sentence, except for the offender's criminal history. Similarly, the effect on the victim is largely disregarded. It is a concept entirely foreign to our perception of sentencing justice.

In the context of the present debate it is significant that the Minnesota Grid System was introduced in a context where many judges were locally elected and therefore subjected to direct community pressure, where the system was not transparent but opaque, because judges rarely gave detailed reasons for sentences, where because of the local election system sentences were wildly idiosyncratic and where the gaol population was disproportionately black. There was little or no supervision of the length of sentences by an appellate court, as there is in Australia.

The grid system was rejected by most of the American States. It caused an explosion in the prison population. It has caused a considerable increase in secret plea bargaining because prosecutors have to cut deals to reduce court backlogs and pressures on the gaol system. This hardly assists transparency. On the other hand it shifted discretion to prosecutors, who can

achieve a pre-ordained result under a grid system by laying a particular charge. Exposure of the judicial reasoning process would be largely unnecessary; anyone can point to two intersecting lines on a grid. A judge's reasoning would be necessary only in one of those exceptional and compelling cases where the judge proposed to depart from the presumptive sentence.

In support of its grid sentencing policy, the Coalition's news release called in aid some comments of the Chief Justice in *Jurisc*; extracted entirely from their context in a judgment which, while setting guidelines, preserved the broad judicial discretion. It also called in aid some comments in the NSW Law Reform Commission's 1996 report, on sentencing. It might be relevant to observe that in its report the Commission decisively rejected the proposal that a grid system might usefully be introduced in NSW. The Commission rejected the validity of the findings of the Bureau of Crime Statistics about sentence disparity, also relied upon by Mr Hannaford.

There is a further very practical problem with the introduction of grid sentencing in NSW. It could not apply to federal offences. Section 16A of the *Commonwealth Crimes Act* provides that in respect of federal offences, a court must impose a sentence appropriate in all of the circumstances to the offence, and must take into account a large number of relevant considerations including (for example) the degree to which the offender showed contrition, whether the offender pleaded guilty and the person's character and antecedents.

I offer the opinion, free of charge, that grid sentencing under NSW law would be inconsistent with the *Commonwealth Crimes Act*, and therefore rendered invalid by the operation of section 109 of *The Constitution*.

Such a dichotomy between state and federal offences would be a touch ironic, as well as discriminatory. In a state where the Leader of the Opposition has vowed to be tough on drug offenders, the person charged with importing a tonne of heroin would be excluded from the grid process, and would have the benefit of a consideration of all the subjective factors contemplated by section 16A.

The pattern of perceived inconsistency in sentencing, and public disquiet thereby caused, is itself an elusive concept, with respect to all Mr Carr, Mr Hannaford and the Chief Justice. The Court of Criminal Appeal did a great deal before *Jurisc* to ensure a measure of consistency, which it achieved. Perception of what the public perceives derives largely from the news media and talk back radio.

The Chief Justice of WA recently observed

The media only tend to report sentencing decisions which are either perceived to be lenient or those which are severe. Many decisions which are unremarkable are simply not reported.

The New South Wales Law Reform Commission observed in its 1996 Discussion Paper on Sentencing that

Without full facts it is likely that the public's view of sentencing will be based on a conception of crime which is distorted by stereotypes, often involving images of violence which is fuelled by an erroneous belief that the crime can be punished away. This means that at least the polls for conducting surveys of community attitudes require a high degree of sophistication.

Even though the reasons for a particular sentence are usually published in detail by the judge, it is rare indeed for the press to publish the detail, so public perception necessarily focusses upon what the journalist considers to be the bits likely to attract public perception.

If I were forced to choose between the Government's guidelines policy, and the opposition's grid sentencing policy, I would have to settle for the guidelines. Bad as the law is, it at least retains the judicial discretion. Some policies talk about mandatory minimum sentences. A good example of the evil wrought by mandatory minimum sentences is the NT *Sentencing Act* which provides minimum sentences for persons over 17, for offences against property, that is:

1st offence 14 days imprisonment

2nd offence 90 days

3rd offence 1 year

A person aged 15 or 16 with 1 prior conviction is liable to a mandatory minimum of 28 days. It has had bizarre consequences. For example, the gaoling of a 17 year old school student who voluntarily told the police he had stolen some yo yos and computer games from a Darwin toy shop, a 20 year old man with no convictions who went to gaol for 14 days for stealing \$9 worth of petrol and a young woman gaoled for 14 days for stealing a can of beer.

It is a law causing considerable distress amongst aboriginal communities, at whom it is aimed. It ought to be an object lesson for our legislators.

The idea that longer and longer prison sentences will improve social order is badly flawed and unsupported by any empirical evidence. It is the product of sterile, sometimes desperate, political thinking. Let me conclude this segment with 2 quotations.

Firstly, the NSW Law Reform Commission's Sentencing Report where the commissioners said;

"Full time imprisonment is the gravest sanction, the deprivation of liberty is the most serious form of punishment that can be imposed under our law. In reality, imprisonment involves much more than this. The Commission cannot shut its eyes to the oppressive and brutalising effect that the prison environment can have on inmates, and not surprisingly it is a fundamental principle of sentencing at common law that imprisonment is the punishment of a last resort to be imposed only where a non-custodial sentence is inappropriate"

And George Zdenkowski;

"Parliament is ill equipped to deal with sentencing issues in a rational manner. It blows with every irrational breeze. Courts have problems reflecting public opinion as well. Should it be the courts or parliament that must struggle with contending forces in the community? There is no consensus about that. Whatever mechanism you use is really an attempt to set up an impartial process to be the arbiter. I fall on the side of the courts because I trust them to do the job better than I do Parliament."

But the policies for heavier sentences continue to tumble out. It is difficult to effectively appraise them because they come so quickly, in the form of press statements on the run.

The Shooters Party intends, I think, to introduce legislation by which the penalty for armed robbery will increase if the offender was armed. I do not profess to understand it. Armed robbery is robbery under arms, and already carries a maximum penalty of 25 years. Mr Tingle said that

"Under my plan it will make it very dangerous for criminals to carry guns. Don't forget they are pretty gutless people."

With respect, whatever the policy is, it again rests on the baseless assumption that longer sentences will deter criminals. Gutless or not, a person committing an armed robbery to obtain money for desperately needed heroin is unlikely to stop and quietly contemplate Mr Tingle's amendment to the *Crimes Act* if it becomes law. But both Government and Coalition appear to support the concept.

The Government would legislate to put syringes in the same category as guns for the purpose of armed robbery. We don't quarrel with that; the extent to which an offender, using syringes to terrify a shopkeeper, should be sentenced, should remain in the discretion of the courts.

The Coalition wants to impose mandatory life sentences on anyone who murders a police officer or prison officer because of his or her occupation, regardless of circumstance. Murder is a crime against human life, not particular sorts of human life. I think legislation which discriminates in its evaluation of human life is offensive. I cannot think it will have the slightest effect in reducing the risks to which police and prison officers are subject.

I applaud the Democrat's policy on sentencing. They may be "bleeding hearts" (to quote Mr Tingle) but there is no gainsaying their policy that governments should "change the perception of prisons as the solution to crime".

JURY TRIALS

On the one hand Mr Hannaford says that a jury is the adjudicator in the adversarial context of the court. On the other, he says the Coalition will enable juries to actively question witnesses and increase juries' access to materials to assist their deliberations. Either juries remain as adjudicators, or they descend into the arena and take over the active questioning of witnesses and the conduct of trials. Whoever dreamed this up should quietly contemplate the true function of a jury, and the increased workload on the Court of Criminal Appeal if the proposal became law.

I do not know what is contemplated by "increasing juries' access to materials to assist their

deliberations". What materials? Is he proposing some sort of administrative change, or an amendment to the *Evidence Act*?

DIMINISHED RESPONSIBILITY

The Opposition's policy document states that the NSW Coalition will;

abolish the defence of diminished responsibility, except in cases of genuine psychiatric or mental disorder, thereby allowing juries to decide whether a person committed the offence.

I do not know what this is intended to mean. The partial defence of diminished responsibility was abolished on 3 April 1998 and was replaced by a new partial defence of "substantial impairment by abnormality of mind". The defence rests upon proof of an abnormality of mind arising from an underlying condition. It involves a finding that the offender would, but for the abnormality of mind, be guilty of murder.

To me, the policy is meaningless so I cannot comment further.

MAJORITY VERDICTS

Finally, they are at it again with majority verdicts in criminal cases, as though experience dictates that a necessary reform of the criminal law is to do away with the need for unanimity in jury verdicts. The rationale seems to be found in the statement that

Hung juries, where the jurors have been unable to agree on verdict have been increasing each year to the extent that now around 10% lead to a mis-trial.

But there is no evidence that a significant proportion of the mistrials is because of one recalcitrant juror, nor that the majority always want to convict. Indeed, a report of the Bureau of

Crime Statistics and Research in 1997 found to the contrary.

A conviction following a jury trial means there has been a finding beyond reasonable doubt by all twelve jurors. That is trial by jury as we presently have it. A conviction following a jury trial where only a majority need be satisfied beyond reasonable doubt would be the product of a different and inferior system.

Section 80 of the Constitution requires trial on indictment of an offence against a law of the Commonwealth to be by jury. In 1993 the High Court in *Cheatle's* case held unanimously that trial by jury meant trial by the twelve, that is, they must attain unanimity before reaching a verdict. The High Court observed that

there is a significant difference in nature between a deliberative process in which a verdict can be returned only if consensus or agreement is reached by all jurors, and a process in which a specified number of jurors can override any dissent and return a majority verdict.

Unless the Constitution is amended, jury verdicts on the trial of federal offences will always require unanimity. It would be a strange and discriminatory system if NSW law provided for majority verdicts on the trial of state offences. We would have the same practical problem as we would have with grid sentencing.

The ordinary punter receives real protection under the law by the requirement that a verdict of guilty can be returned only if the jury reach that conclusion beyond reasonable doubt. If some or only one member of the jury cannot be so satisfied, there cannot be a conviction. Where is the protection if the minority view can be ignored, and the jury convict by majority? Juries are not local committees, able to decide issues by mere majority. Providing for majority verdicts would cheapen the process and impose upon us all an inferior system of trial by committee.

From time to time politicians and journalists become seized with the curious notion that the requirement of unanimity in jury trials is an obstruction to the system of justice. On 7 February 1989 the "Herald" editor asserted that on cost alone there was a strong case for verdict by majority, provided that in the case of murder unanimity should still be required. It seems strange reasoning. If cost alone were the criterion, we should abolish trials altogether. To suggest that unanimous verdicts should be required in murder trials, but not in trials for less serious offences, immediately reveals a sense of unease at the prospect of a person facing life imprisonment upon conviction by a mere majority. Why should the unease be any the less if the penalty happens to be 10 or 20 years?

It cannot be assumed (as some do) that whenever juries fail to agree, it is the acquitters who are wrong. In 1996 a Sydney jury trying a man called Souleyman failed to agree in respect of charges of murder and manslaughter. It appears the majority wanted to convict. The disagreement provoked some outcry and seems to have moved Mr Tink to introduce a Bill providing for majority verdicts. Ironically, on Souleyman's second trial the jury acquitted him of both murder and manslaughter, on the same evidence. Which of the jurors at the first trial were right?

Other states have majority verdicts. There is no reason why New South Wales should copy the worst aspects of other systems. Let us not turn juries into mere committees.

JUDGES

The Coalition proposes to appoint 2 more judges to the Supreme Court, 4 to the District Court, 1 to the Land & Environment Court and 20 additional magistrates to the Local Court. We cannot but concur. It proposes to implement *performance standards* for all courts. I do not know what that means, so I am unable to comment.

DIETRICH

I applaud Mr Hannaford's policy of expressly recognising the *Dietrich* principle that a fair system requires that people on trial must be adequately defended, and for increasing the legal aid budget.

END

I hope our criminal justice system survives the election.