

[Act 2002 No 90]



New South Wales

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The principal objects of this Bill are:

- (a) to establish a scheme of standard minimum sentencing for a number of serious offences, and
- (b) to constitute a New South Wales Sentencing Council to advise the Minister in connection with sentencing matters.

The reforms are aimed at promoting consistency and transparency in sentencing, and promoting public understanding of sentencing.

The Bill sets standard non-parole periods for a number of serious offences. (A non-parole period is the period of a sentence of imprisonment during which the

* Amended in committee—see table at end of volume.

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offender must be detained and cannot be released on parole.) Under the Bill, the sentencing court is to set the standard non-parole period as the non-parole period for an offence included in the proposed scheme unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

A court that sets a non-parole period that is longer or shorter than the standard non-parole period for an offence must make a record of its reasons for doing so, and must identify in the record of its reasons each factor to which it had regard.

The Bill also specifies the purposes of sentencing, and indicates specific aggravating and mitigating factors that a court is required to take into account when determining the appropriate sentence for offences generally.

The Bill also reforms the law dealing with sexual assaults on children by:

- (a) increasing the maximum penalty for sexual intercourse with a child under 10, or attempted sexual intercourse with a child under 10, from 20 to 25 years, and
- (b) removing two redundant offences dealing with homosexual intercourse with a child under 10.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Crimes (Sentencing Procedure) Act 1999* (*the Principal Act*) and to other Acts set out in Schedules 1–3.

Purposes of sentencing

Schedule 1 [1] inserts a new section 3A which sets out the purposes for which a court may impose a sentence on an offender. These purposes are as follows:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,

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- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

Aggravating, mitigating and other factors in sentencing

Schedule 1 [2] replaces existing section 21A with a new section that sets out specific aggravating and mitigating circumstances that are to be taken into account by sentencing courts in determining the appropriate sentence for an offence, if those circumstances are relevant and known to the court. The court is also required to take into account any other objective or subjective factor that affects the relative seriousness of the offence.

The requirement for a court to take into account these aggravating and mitigating factors and other matters applies in sentencing for any offence, not just to the offences that are subject to a standard non-parole period under proposed Division 1A of Part 4 of the Principal Act.

Proposed section 21A (1) makes it clear that the sentencing court may take into account any other matter that it is required or permitted to take into account under any Act or rule of law.

Proposed section 21A (4) provides that a sentencing court is not to have regard to any aggravating or mitigating factor specified in the section if it would be contrary to any Act or rule of law to do so. This provision makes it clear that a rule of law such as the rule expressed in *The Queen v De Simoni* (1981) 147 CLR 383 is not affected. (The High Court in *De Simoni* held that a sentencing court may not take into account circumstances of aggravation that would have warranted a conviction for a more serious offence for which the offender was not charged.)

Proposed section 21A (5) makes it clear that the fact that a specified aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

Setting non-parole period and balance of term of sentence

Schedule 1 [3] replaces existing section 44 with a new section that requires the sentencing court to set a non-parole period for the sentence (the period during which the offender may not be released on parole) before setting the balance of the term of the sentence (that is, the period during which the offender may be released on parole). The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special

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circumstances for it being more. At present section 44 requires the court to set the total sentence and then fix the non-parole period.

The replacement of the existing section is a necessary consequence of the introduction of the scheme of standard non-parole periods. The effect of proposed section 44 is to maintain (by a different method of calculation) the existing presumptive ratio between the non-parole period of a sentence and the period during which the offender may be released on parole.

Schedule 3.2 [1] makes a consequential amendment.

Standard non-parole periods

Schedule 1 [4] inserts a new Division 1A (sections 54A–54D) into Part 4 of the Principal Act. The proposed Division provides for standard non-parole periods for a number of serious offences listed in the Table to the proposed Division.

Proposed section 54A provides that the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to the proposed Division. The offences specified in that Table include murder, wounding with intent to do bodily harm or resist arrest, certain assault offences involving injury to police officers, certain sexual assault offences, sexual intercourse with a child under 10, certain robbery and break and enter offences, car-jacking, certain offences involving commercial quantities of prohibited drugs and unauthorised possession or use of a firearm.

The standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence. The standard non-parole period provides a reference point or benchmark for offences that are above or below the middle of the range of objective seriousness for such an offence.

Proposed section 54B provides that a court sentencing an offender to imprisonment for an offence set out in the Table to the proposed Division is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period. The reasons for which the court may increase or reduce the non-parole period are only matters referred to in proposed section 21A.

The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period, and must identify in the record of its reasons each factor to which it had regard (proposed section 54B (4)).

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Under the Bill, the sentencing process remains one of synthesis of all the relevant factors in the circumstances of the case. The requirement for a court to identify each factor that it takes into account does not require the court to assign a numerical value to such a factor. That is, proposed section 54B does not require a court to adopt a mathematical or multi-stage approach to sentencing.

Proposed section 54C requires a court that imposes a non-custodial sentence for an offence set out in the Table to the proposed Division to make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account.

Proposed section 54D provides that standard non-parole periods do not apply to the sentencing of an offender to imprisonment for life or for any other indeterminate period, or to detention under the *Mental Health (Criminal Procedure) Act 1990*. Standard non-parole periods also do not apply if the offence for which the offender is sentenced is dealt with summarily.

Schedule 3.2 [5] is a consequential amendment that excludes offences that are subject to standard non-parole periods from section 45 of the Principal Act. That section enables a court sentencing an offender to imprisonment to decline to set a non-parole period (that is, the offender will serve the entire sentence in detention with no period of parole).

The proposed amendment avoids the possibility that an offender sentenced under section 45 for an offence subject to a standard non-parole period would actually be subject to a shorter total sentence than an offender who was sentenced for the same offence under proposed section 44.

New South Wales Sentencing Council

Schedule 1 [5] inserts a new Part 8B (sections 100I–100L) into the Principal Act. The proposed Part constitutes a New South Wales Sentencing Council.

The Sentencing Council is to have the following functions:

- (a) advising and consulting with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,
- (b) advising and consulting with the Minister in relation to offences suitable for guideline judgments and the submissions to be made by the Minister on an application for a guideline judgment,
- (c) monitoring, and reporting annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,

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- (d) at the request of the Minister, preparing research papers or reports on particular subjects in connection with sentencing.

The Sentencing Council is to consist of 10 members appointed by the Minister, of whom:

- (a) one is to be a retired judicial officer, and
- (b) one is to have expertise or experience in law enforcement, and
- (c) three are to have expertise or experience in criminal law or sentencing (including one person who has expertise or experience in the area of prosecution and one person who has expertise or experience in the area of defence), and
- (d) one is to be a person who has expertise or experience in Aboriginal justice matters, and
- (e) four are to be persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime.

Schedule 3.2 [2] makes a consequential amendment. **Schedule 1 [7]** inserts a new Schedule 1A into the Principal Act. Proposed Schedule 1A contains provisions relating to the membership and procedure of the Sentencing Council.

Review of proposed Act

Schedule 1 [6] inserts a new section 106 that requires the Minister to review the amendments made by the proposed Act relating to standard non-parole periods as soon as possible after 2 years, and to report the results of the review to Parliament.

Sexual assaults on children under 10 years

Schedule 2 [1] and [2] increase the maximum penalty for sexual intercourse with a child under 10, or attempted sexual intercourse with a child under 10, from 20 years to 25 years.

Schedule 2 [3] removes two redundant offences from the *Crimes Act 1900*. Section 78H of the *Crimes Act 1900* deals with homosexual intercourse with a child under 10 years, and section 78I deals with attempted homosexual intercourse with a child under 10 years. Those offences can already be dealt with under sections 66A (Sexual intercourse—child under 10) and 66B (Attempting, or assaulting with intent, to have sexual intercourse with child under 10) of the *Crimes Act 1900*.

At present, the maximum penalty for attempted sexual intercourse with a child under 10 is 20 years (under section 66B), while the maximum penalty for attempted homosexual intercourse with a child under 10 is 14 years (under section 78I). The

amendments rationalise the maximum penalties for child sexual assault and attempted child sexual assault by providing for the same maximum penalty for child sexual assault and attempted assault, regardless of whether the assault was homosexual in nature.

Effect of failure to comply with Principal Act

Schedule 3.2 [7] inserts a new section 101A that provides that a failure to comply with a provision of the Principal Act may be considered by an appeal court in any appeal against sentence even if the Act declares that the failure to comply does not invalidate the sentence. The proposed section ensures that the courts are not relieved of the obligation to comply with the Principal Act with respect to standard non-parole periods or other matters, but protects the validity of any sentence until such time as the matter is considered by an appeal court.

Suspended sentences and control orders

Schedule 3.1 [1] and [2] and 3.2 [3], [4] and [6] make amendments to provisions of the Principal Act and the *Children (Criminal Proceedings) Act 1987* dealing with the suspension of a sentence of imprisonment or, in the case of a person sentenced under the *Children (Criminal Proceedings) Act 1987*, an order committing the person to the control of the Minister administering the *Children (Detention Centres) Act 1987*.

These amendments are consequential on the substitution of section 44 of the Principal Act by the proposed Act. As noted above, proposed section 44 requires a court to set a non-parole period before setting the balance of a term of imprisonment. At present, a court that makes an order suspending a sentence of imprisonment or a control order is required to set the term of the sentence that is suspended, but is not required to set a non-parole period for that sentence. The proposed amendments will make it clear that a court is to set a non-parole period for a sentence or control order that is to be suspended.

Savings and transitional matters

Schedule 3.2 [8] enables regulations of a savings and transitional nature to be made consequent on the enactment of the proposed Act. **Schedule 3.1 [3] and 3.2 [9]** make provision with respect to the application of the amendments made by the proposed Act to offences committed before the commencement of those amendments, and the application of guideline judgments made before the commencement of any such amendment.