



New South Wales

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 No 90

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New South Wales

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 No 90

Act No 90, 2002

An Act to amend the *Crimes (Sentencing Procedure) Act 1999* to provide for standard minimum sentencing and to constitute a New South Wales Sentencing Council; to amend the *Crimes Act 1900* with respect to sexual assaults on children; and for other purposes. [Assented to 22 November 2002]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92 and other Acts

The *Crimes (Sentencing Procedure) Act 1999* and other Acts specified in Schedules 1–3 are amended as set out in those Schedules.

Schedule 1 Principal amendments to Crimes (Sentencing Procedure) Act 1999

(Section 3)

[1] Section 3A

Insert after section 3:

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender 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,
- (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.

[2] Section 21A

Omit the section. Insert instead:

21A Aggravating, mitigating and other factors in sentencing

(1) General

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

- (a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,
- (b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

- (c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) **Aggravating factors**

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation,
- (b) the offence involved the actual or threatened use of violence,
- (c) the offence involved the actual or threatened use of a weapon,
- (d) the offender has a record of previous convictions,
- (e) the offence was committed in company,
- (f) the offence involved gratuitous cruelty,
- (g) the injury, emotional harm, loss or damage caused by the offence was substantial,
- (h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),
- (i) the offence was committed without regard for public safety,
- (j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,
- (k) the offender abused a position of trust or authority in relation to the victim,

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- (l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bank teller or service station attendant),
 - (m) the offence involved multiple victims or a series of criminal acts,
 - (n) the offence was part of a planned or organised criminal activity.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(3) **Mitigating factors**

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- (a) the injury, emotional harm, loss or damage caused by the offence was not substantial,
- (b) the offence was not part of a planned or organised criminal activity,
- (c) the offender was provoked by the victim,
- (d) the offender was acting under duress,
- (e) the offender does not have any record (or any significant record) of previous convictions,
- (f) the offender was a person of good character,
- (g) the offender is unlikely to re-offend,
- (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
- (i) the offender has shown remorse for the offence by making reparation for any injury, loss or damage or in any other manner,
- (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
- (k) a plea of guilty by the offender (as provided by section 22),

- (l) the degree of pre-trial disclosure by the defence (as provided by section 22A),
 - (m) assistance by the offender to law enforcement authorities (as provided by section 23).
- (4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.
- (5) The fact that any such 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.

[3] Section 44

Omit the section. Insert instead:

44 Court to set non-parole period

- (1) When sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).
- (2) 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 circumstances for it being more (in which case the court must make a record of its reasons for that decision).
- (3) The failure of a court to comply with subsection (2) does not invalidate the sentence.
- (4) Schedule 1 has effect in relation to existing life sentences referred to in that Schedule.

[4] Part 4, Division 1A

Insert after Division 1:

Division 1A Standard non-parole periods

54A What is the standard non-parole period?

- (1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.
- (2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.

54B Sentencing procedure

- (1) This section applies when a court imposes a sentence of imprisonment for an offence set out in the Table to this Division.
- (2) When determining the sentence for the offence, the court 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.
- (3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.
- (4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.
- (5) The failure of a court to comply with this section does not invalidate the sentence.

54C Court to give reasons if non-custodial sentence imposed

- (1) If the court imposes a non-custodial sentence for an offence set out in the Table to this Division, the court must 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.
- (2) The failure of a court to comply with this section does not invalidate the sentence.
- (3) In this section:
non-custodial sentence means a sentence referred to in Division 3 of Part 2 or a fine.

54D Exclusions from Division

- (1) This Division does not apply to the sentencing of an offender:
 - (a) to imprisonment for life or for any other indeterminate period, or
 - (b) to detention under the *Mental Health (Criminal Procedure) Act 1990*.
- (2) This Division does not apply if the offence for which the offender is sentenced is dealt with summarily.

Table Standard non-parole periods

| Item No | Offence | Standard non-parole period |
|---------|--|----------------------------|
| 1A | Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation | 25 years |
| 1 | Murder—in other cases | 20 years |
| 2 | Section 26 of the <i>Crimes Act 1900</i> (conspiracy to murder) | 10 years |

| Item No | Offence | Standard non-parole period |
|----------------|---|-----------------------------------|
| 3 | Sections 27, 28, 29 or 30 of the <i>Crimes Act 1900</i> (attempt to murder) | 10 years |
| 4 | Section 33 of the <i>Crimes Act 1900</i> (wounding etc with intent to do bodily harm or resist arrest) | 7 years |
| 5 | Section 60 (2) of the <i>Crimes Act 1900</i> (assault of police officer occasioning bodily harm) | 3 years |
| 6 | Section 60 (3) of the <i>Crimes Act 1900</i> (wounding or inflicting grievous bodily harm on police officer) | 5 years |
| 7 | Section 61I of the <i>Crimes Act 1900</i> (sexual assault) | 7 years |
| 8 | Section 61J of the <i>Crimes Act 1900</i> (aggravated sexual assault) | 10 years |
| 9 | Section 61JA of the <i>Crimes Act 1900</i> (aggravated sexual assault in company) | 15 years |
| 9A | Section 61M (1) of the <i>Crimes Act 1900</i> (aggravated indecent assault) | 5 years |
| 9B | Section 61M (2) of the <i>Crimes Act 1900</i> (aggravated indecent assault—child under 10) | 5 years |
| 10 | Section 66A of the <i>Crimes Act 1900</i> (sexual intercourse—child under 10) | 15 years |
| 11 | Section 98 of the <i>Crimes Act 1900</i> (robbery with arms etc and wounding) | 7 years |
| 12 | Section 112 (2) of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation) | 5 years |
| 13 | Section 112 (3) of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation) | 7 years |
| 14 | Section 154C (1) of the <i>Crimes Act 1900</i> (car-jacking) | 3 years |

Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 No 90

Schedule 1 Principal amendments to Crimes (Sentencing Procedure) Act 1999

| Item No | Offence | Standard non-parole period |
|---------|--|----------------------------|
| 15 | Section 154C (2) of the <i>Crimes Act 1900</i> (car-jacking in circumstances of aggravation) | 5 years |
| 15A | Section 203E of the <i>Crimes Act 1900</i> (bushfires) | 5 years |
| 16 | Section 24 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug | 10 years |
| 17 | Section 24 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug | 15 years |
| 18 | Section 25 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug | 10 years |
| 19 | Section 25 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug | 15 years |
| 20 | Section 7 of the <i>Firearms Act 1996</i> (unauthorised possession or use of firearms) | 3 years |

[5] Part 8B

Insert after Part 8A:

Part 8B New South Wales Sentencing Council

100I Constitution of New South Wales Sentencing Council

- (1) There is constituted by this Act a New South Wales Sentencing Council.
- (2) 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 (of whom one is to have expertise or experience in the area of prosecution and one is to have 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.
- (3) Schedule 1A has effect with respect to the members and procedure of the Sentencing Council.

100J Functions of Sentencing Council

- (1) The Sentencing Council has the following functions:
 - (a) to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,
 - (b) to advise and consult 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) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,
 - (d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing.
- (2) Any advice given to the Minister by the Sentencing Council may be given either at the request of the Minister or without any such request.
 - (3) The Sentencing Council has such other functions as are conferred or imposed on it by or under this or any other Act.
 - (4) In the exercise of its functions, the Sentencing Council may consult with, and may receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General's Department (or any like agency that may replace either of those agencies).

100K Committees of Sentencing Council

- (1) The Sentencing Council may, with the approval of the Minister, establish committees to assist it in connection with the exercise of any of its functions.
- (2) It does not matter that any or all of the members of a committee are not members of the Sentencing Council.
- (3) The procedure for the calling of meetings of a committee and for the conduct of business at those meetings is to be as determined by the Sentencing Council or (subject to any determination of the Council) by the committee.

100L Staff of Sentencing Council

The Sentencing Council may, with the approval of the Minister, arrange for the use of the services of any staff or facilities of a government department or a public or local authority.

[6] Section 106

Insert after section 105:

106 Review of Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002

- (1) In this section:
standard non-parole provisions means the provisions of Division 1A of Part 4, as inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*.
- (2) The Minister is to review the operation of the standard non-parole provisions to determine the effect of those provisions.
- (3) The review required by this section is to be undertaken as soon as possible after the period of 2 years from the commencement of the standard non-parole provisions.
- (4) A report on the outcome of the review required by this section is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.

[7] Schedule 1A

Insert after Schedule 1:

Schedule 1A Provisions relating to membership and procedure of New South Wales Sentencing Council

(Section 100I)

1 Definition

In this Schedule:

member means any member of the Sentencing Council.

2 Chairperson and Deputy Chairperson

- (1) The member appointed under section 100I (2) (a) is to be the Chairperson of the Sentencing Council.
- (2) The Minister may, from time to time, appoint another member of the Sentencing Council as the Deputy Chairperson of the Council.

3 Terms of office of members

Subject to this Schedule, a member holds office for such period (not exceeding 3 years) as may be specified in the member's instrument of appointment but is eligible (if otherwise qualified) for re-appointment.

4 Remuneration

A member (other than a member who is employed in the public sector) is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

5 Deputies of members

- (1) The Minister may, from time to time, appoint a person to be the deputy of a member, and the Minister may revoke any such appointment.
- (2) In the absence of a member, the member's deputy may, if available, act in the place of the member.
- (3) For the purposes of this clause, a vacancy in the office of a member is taken to be an absence of the member.

6 Vacancy in office of member

- (1) The office of a member becomes vacant if the member:
 - (a) dies, or
 - (b) completes a term of office and is not re-appointed, or
 - (c) resigns the office by instrument in writing addressed to the Minister, or
 - (d) is removed from office by the Minister under this clause, or

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- (e) is absent from 4 consecutive meetings of the Sentencing Council of which reasonable notice has been given to the member personally or by post, except on leave granted by the Minister or unless the member is excused by the Minister for having been absent from those meetings, or
 - (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
 - (g) becomes a mentally incapacitated person, or
 - (h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.

(2) The Minister may at any time remove a member from office.

7 Filling of vacancy in office of member

If the office of any member becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

8 Effect of certain other Acts

- (1) Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of a member.
- (2) If by or under any Act provision is made:
 - (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
 - (b) prohibiting the person from engaging in employment outside the duties of that office,

the provision does not operate to disqualify the person from holding that office and also the office of a member or from accepting and retaining any remuneration payable to the person under this Act as a member.

9 General procedure

The procedure for the calling of meetings of the Sentencing Council and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Sentencing Council.

10 Quorum

The quorum for a meeting of the Sentencing Council is 6 members.

11 Presiding member

- (1) The Chairperson (or, in the absence of the Chairperson, the Deputy Chairperson, or, in the absence of both, a member elected to chair the meeting by the members present) is to preside at a meeting of the Sentencing Council.
- (2) The presiding member has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

12 Voting

A decision supported by a majority of the votes cast at a meeting of the Sentencing Council at which a quorum is present is the decision of the Sentencing Council.

13 First meeting

The Minister may call the first meeting of the Sentencing Council in such manner as the Minister thinks fit.

Schedule 2 Amendment of Crimes Act 1900 No 40 relating to child sexual assault

(Section 3)

[1] Section 66A Sexual intercourse—child under 10

Omit “imprisonment for 20 years” from the section.
Insert instead “imprisonment for 25 years”.

[2] Section 66B Attempting, or assaulting with intent, to have sexual intercourse with child under 10

Omit “imprisonment for 20 years” from the section.
Insert instead “imprisonment for 25 years”.

[3] Sections 78H and 78I

Omit the sections.

Schedule 3 Consequential amendments

(Section 3)

3.1 Children (Criminal Proceedings) Act 1987 No 55

[1] Section 33 Penalties

Insert “the non-parole period and the balance of” after “the extent to which it deals with setting” in section 33 (1B).

[2] Section 41A Provisions applicable where control order suspended subject to good behaviour bond

Insert “the non-parole period and the balance of” after “in relation to setting” in section 41A (3) (b).

[3] Schedule 2 Savings and transitional provisions

Insert after clause 11:

Part 9 Provisions consequent on enactment of Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002

12 Offences to which amending Act applies

- (1) The amendments made to this Act by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* do not apply to offences committed before the commencement of the amendments.
- (2) Part 7 of Schedule 2 to the *Crimes (Sentencing Procedure) Act 1999* also has effect for the purposes of the application of the *Crimes (Sentencing Procedure) Act 1999* to offences dealt with under Division 4 of Part 3 of this Act.

3.2 Crimes (Sentencing Procedure) Act 1999 No 92

[1] Section 3 Interpretation

Omit “section 44 (1) (b)” from the definition of *non-parole period* in section 3 (1).

Insert instead “section 44 (1)”.

[2] Section 3 (1)

Insert in alphabetical order:

Sentencing Council means the New South Wales Sentencing Council constituted under Part 8B.

[3] Section 12 Suspended sentences

Insert “the non-parole period and the balance of” after “the extent to which it deals with setting” in section 12 (3).

[4] Section 12 (4)

Omit “In that case, any non-parole period set for the sentence ceases to have effect when the order under this section is made.”.

[5] Section 45 Court may decline to set non-parole period

Insert “(other than an offence set out in the Table to Division 1A of this Part)” after “imprisonment for an offence” in section 45 (1).

[6] Section 99 Consequences of revocation of good behaviour bond

Insert “the non-parole period and the balance of” after “in relation to setting” in section 99 (1) (c) (ii).

[7] Section 101A

Insert after section 101:

101A Effect of failure to comply with Act

A failure to comply with a provision of this Act may be considered by an appeal court in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence.

[8] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

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

[9] Schedule 2, Part 7

Insert after Part 6:

Part 7 Provisions consequent on enactment of Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002

45 Offences to which amending Act applies

- (1) Except as provided by subclause (2), the amendments made to this Act by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* do not apply to offences committed before the commencement of the amendments.
- (2) Sections 3A and 21A of this Act, as inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, apply to the determination of a sentence for an offence whenever committed, unless:
 - (a) a court has convicted the person being sentenced of the offence, or

- (b) a court has accepted a plea of guilty to the offence and the plea has not been withdrawn,
before the commencement of the section concerned.
- (3) Section 21A of this Act, as in force immediately before its repeal by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, continues to apply as if it had not been repealed to the determination of a sentence for an offence in respect of which:
 - (a) a court has convicted the person being sentenced of the offence, or
 - (b) a court has accepted a plea of guilty to the offence and the plea has not been withdrawn,
before that repeal.
- (4) In this clause:
convict includes make a finding of guilt.

46 Application of existing guideline judgments

A guideline judgment made before the commencement of any amendment to this Act made by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* continues to have effect, except to the extent to which it is inconsistent with this Act, as so amended.

[Second reading speech made in—
Legislative Assembly on 23 October 2002
Legislative Council on 19 November 2002]