



Queensland

Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010

Act No. 48 of 2010



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Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010

Act No. 48 of 2010

An Act to amend the Penalties and Sentences Act 1992 to establish a Sentencing Advisory Council, to provide for the making of guideline judgments by the Court of Appeal, and for other particular purposes

[Assented to 5 November 2010]

The Parliament of Queensland enacts—

1 Short title

This Act may be cited as the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010*.

2 Commencement

This Act commences on a day to be fixed by proclamation.

3 Act amended

This Act amends the *Penalties and Sentences Act 1992*.

4 Amendment of s 4 (Definitions)

Section 4—

insert—

‘*council* means the Sentencing Advisory Council established under section 198.

court, for part 2A, see section 15AA.

guideline judgment, for part 2A, see section 15AA.’.

5 Amendment of s 9 (Sentencing guidelines)

(1) Section 9(5)—

omit, insert—

‘(5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—

(a) the principles mentioned in subsection (2)(a) do not apply; and

(b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

‘(5A) For subsection (5)(b), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.’.

(2) Section 9—

insert—

‘(8) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to—

(a) the nature of the previous conviction and its relevance to the current offence; and

(b) the time that has elapsed since the conviction.

‘(9) Despite subsection (8), the sentence imposed must not be disproportionate to the gravity of the current offence.

‘(10) In this section—

actual term of imprisonment means a term of imprisonment served wholly or partly in a corrective services facility.

corrective services facility see the *Corrective Services Act 2006*, schedule 4.’.

6 Insertion of new pt 2A

After part 2—

insert—

‘Part 2A Guideline judgments

‘15AA Definitions for pt 2A

‘In this part—

Attorney-General includes the nominee of the Attorney-General.

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chief executive officer of Legal Aid Queensland includes the nominee of the chief executive officer of Legal Aid Queensland.

court means the Court of Appeal.

director of public prosecutions includes the nominee of the director of public prosecutions.

guideline judgment means a judgment that—

- (a) is declared to be a guideline judgment by the court; and
- (b) contains guidelines to be taken into account by courts in sentencing offenders being guidelines applying—
 - (i) generally; or
 - (ii) to a particular court or class of court; or
 - (iii) to a particular offence, or class of offence, including under a Commonwealth Act; or
 - (iv) to a particular penalty or class of penalty; or
 - (v) to a particular class of offender.

guideline judgment for an offence under a Commonwealth Act means a guideline judgment to the extent it relates to an offence under a Commonwealth Act.

guideline proceeding means—

- (a) that part of a proceeding relating to the giving or review of a guideline judgment under section 15AD; or
- (b) a proceeding, or part of a proceeding, under section 15AE on an application for the giving or review of a guideline judgment under that section.

review, a guideline judgment, means—

- (a) confirm the guideline judgment; or
- (b) vary the guideline judgment; or
- (c) revoke the guideline judgment; or
- (d) substitute a new guideline judgment for the guideline judgment.

‘15AB Powers of court to give or review guideline judgments

- ‘(1) The court may give or review a guideline judgment—
- (a) on its own initiative under section 15AD; or
 - (b) on an application under section 15AE.
- ‘(2) However—
- (a) a guideline judgment for an offence under a Commonwealth Act may be given or reviewed only in a proceeding where the guideline judgment relates to a matter in the proceeding; and
 - (b) the court must comply with section 15AC.

‘15AC Limitations for guideline judgments

- ‘(1) A guideline judgment, other than a guideline judgment for an offence under a Commonwealth Act, must be consistent with Queensland law.
- ‘(2) A guideline judgment for an offence under a Commonwealth Act must—
- (a) be consistent with Commonwealth law; and
 - (b) set out non-binding considerations to guide the future exercise of discretion and not purport to establish a rule of binding effect; and
 - (c) articulate principles to underpin the determination of a particular sentence and not state the expected decisions in a future proceeding.

‘15AD Guideline judgments on own initiative

- ‘(1) The court may, on its own initiative—
- (a) give or review a guideline judgment, other than a guideline judgment for an offence under a Commonwealth Act, in a proceeding and whether or not the court considers giving or reviewing the guideline

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judgment is necessary for the purpose of determining the proceeding; and

- (b) pronounce the guideline judgment separately or by inclusion in any judgment the court considers appropriate.

‘(2) The court may, on its own initiative—

- (a) give or review a guideline judgment for an offence under a Commonwealth Act in a proceeding and only if the court considers giving or reviewing the guideline judgment is necessary for the purpose of determining the proceeding; and
- (b) pronounce the guideline judgment only by inclusion in the judgment for the proceeding.

‘15AE Guideline judgments on application

‘(1) The following persons may apply to the court for a guideline judgment to be given or reviewed—

- (a) the Attorney-General;
- (b) the director of public prosecutions;
- (c) the chief executive officer of Legal Aid Queensland.

‘(2) For subsection (1), the application is not required to be an application in a proceeding.

‘(3) Also, on an appeal after a person is convicted, the person may apply to the court for review of a guideline judgment to the extent it contains a guideline that is relevant in the circumstances.

‘(4) The application may include submissions in support of the application.

‘(5) The court may, on an application under this section—

- (a) give or review a guideline judgment, other than a guideline judgment for an offence under a Commonwealth Act, whether or not this is necessary for the purpose of determining a proceeding; and

-
- (b) pronounce the guideline judgment separately or by inclusion in any judgment the court considers appropriate.
- ‘(6) The court may, on an application under this section—
- (a) give or review a guideline judgment for an offence under a Commonwealth Act only if the court considers giving or reviewing the guideline judgment is necessary for the purpose of determining a proceeding in relation to the offence; and
 - (b) pronounce the guideline judgment only by inclusion in the judgment for the proceeding.

‘15AF Right of appearance in a guideline proceeding

- ‘(1) The following persons may appear in a guideline proceeding—
- (a) the Attorney-General;
 - (b) the director of public prosecutions;
 - (c) the chief executive officer of Legal Aid Queensland.
- ‘(2) Also, for a guideline proceeding in which the court is giving or reviewing a guideline judgment relevant to an appeal before the court against the sentence of a convicted person, the convicted person may appear in the guideline proceeding.
- ‘(3) Without limiting subsection (1) or (2), a person who may appear under subsection (1) or (2) may—
- (a) oppose or support the giving or reviewing of the guideline judgment by the court; and
 - (b) make submissions in relation to the framing of the guidelines to be contained in the guideline judgment; and
 - (c) inform the court of any relevant pending appeal against sentence; and
 - (d) assist the court in relation to any relevant matter.

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‘15AG Powers of Attorney-General or director of public prosecutions

- ‘(1) Nothing in the *Director of Public Prosecutions Act 1984* or any Act or law prevents, or in any way limits, the exercise of a power conferred on the director of public prosecutions under section 15AE or 15AF.
- ‘(2) Without limiting subsection (1), in exercising a power conferred on the director of public prosecutions under this section, the director is not, despite the *Director of Public Prosecutions Act 1984*, section 10, responsible to, or subject to the direction of, the Attorney-General.
- ‘(3) Nothing in any Act or law prevents, or in any way limits, the performance of a function conferred on the Attorney-General under section 15AE or 15AF.

‘15AH Relevant considerations before giving or reviewing guideline judgment

- ‘(1) If the court is considering giving or reviewing a guideline judgment, the court must—
 - (a) consider—
 - (i) the need to promote consistency of approach in sentencing offenders; and
 - (ii) the need to promote public confidence in the criminal justice system; and
 - (b) notify the council and consider the written views of the council given within the reasonable period stated in the notification.
- ‘(2) However, the court does not have to notify the council under subsection (1)(b) if—
 - (a) the court is considering giving or reviewing a guideline judgment relevant to an appeal before the court against the sentence of a convicted person; and
 - (b) the court considers that the time taken to notify the council and consider its views would result in an injustice to the convicted person.

‘15AI Procedural requirements if court decides to give or review guideline judgment

- ‘(1) This section applies if the court decides to give or review a guideline judgment.
- ‘(2) The court must—
- (a) for any guideline proceeding—notify the following persons of their right to appear before the court in the guideline proceeding—
 - (i) the Attorney-General;
 - (ii) the director of public prosecutions;
 - (iii) the chief executive officer of Legal Aid Queensland; and
 - (b) if the court is giving or reviewing a guideline judgment relevant to an appeal before the court against the sentence of a convicted person—notify the convicted person.
- ‘(3) If the court has received the written views of council under section 15AH(1)(b), the court must give a copy of the council’s views to the persons mentioned in subsection (2)(a) and (b).

‘15AJ Discretion of court preserved

- ‘(1) Nothing in this part—
- (a) limits any power or jurisdiction of the court to give or review a judgment providing guidance on matters relating to sentencing that the court has apart from this part; or
 - (b) requires the court to give or review a guideline judgment if it considers giving or reviewing a guideline judgment inappropriate.
- ‘(2) If, on an application under section 15AE, the court decides not to give or review a guideline judgment, the court must give reasons for its decision.

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‘15AK Use of evidence in giving or reviewing guideline judgments

‘Nothing in the Criminal Code, section 671B limits the evidence or other matters the court may take into consideration in giving or reviewing a guideline judgment and the court may inform itself in the way it considers appropriate.

‘15AL Relationship between guideline judgments and other sentencing matters

‘A guideline in a guideline judgment—

- (a) is additional to anything else required under part 2; and
- (b) does not limit or otherwise affect any requirement under that part.’.

7 Amendment of s 161B (Declaration of conviction of serious violent offence)

Section 161B—

insert—

‘(5) For subsections (3) and (4), if an offender is convicted on indictment of an offence—

- (a) that involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or

- (b) that caused the death of a child under 12 years;

the sentencing court must treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence.’.

8 Insertion of new pt 12

After part 11—

insert—

‘Part 12 Sentencing Advisory Council

‘Division 1 Establishment and functions

‘198 Establishment

‘The Sentencing Advisory Council is established.

‘199 Function to state views to Court of Appeal

- ‘(1) The council has the function of stating in writing to the Court of Appeal its views on the giving, or review, of a guideline judgment within the meaning of part 2A.
- ‘(2) For subsection (1), the council may state its views on the following—
 - (a) whether a guideline judgment should be given or reviewed;
 - (b) the content of the guideline judgment.

‘200 Other functions

- ‘(1) The other functions of the council are—
 - (a) if requested by the Attorney-General, to advise the Attorney-General on matters relating to sentencing; and
 - (b) to provide information to the community to enhance knowledge and understanding of matters relating to sentencing; and
 - (c) to publish information relating to sentencing; and
 - (d) to research matters relating to sentencing and publish the results of the research; and
 - (e) to obtain the community’s views on sentencing and particular matters relating to sentencing.
- ‘(2) To assist in performing its functions under subsection (1), the council may consult with the judiciary, government

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departments, any person or class of person and any other entity or class of entity.

‘(3) In this section—

publish includes give information to the judiciary, government departments, any person or class of person and any other entity or class of entity.

‘201 Powers of council

‘The council has the powers necessary or convenient to perform its functions or incidental to the performance of its functions.

‘Division 2 Membership

‘202 Membership of council

‘(1) The council consists of 12 members appointed by the Governor in Council, by gazette notice, on the recommendation of the Attorney-General.

‘(2) The Attorney-General is to recommend persons the Attorney-General considers have expertise or experience relevant to functions of the council, for example, in relation to any of the following—

- (a) victims of crime;
- (b) justice matters relating to Aboriginal or Torres Strait Islander people;
- (c) justice matters relating to domestic and family violence;
- (d) vulnerable persons facing the criminal justice system;

Examples of vulnerable persons—

- persons suffering mental illness
- persons who have an intellectual or other disability
- persons who have a substance abuse problem
- homeless persons

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- (e) law enforcement;
 - (f) crime prevention;
 - (g) criminal prosecutions;
 - (h) criminal defence representation;
 - (i) civil liberties;
 - (j) corrective services, including offender rehabilitation;
 - (k) juvenile justice matters;
 - (l) criminal justice policy;
 - (m) criminal law, including sentencing;
 - (n) criminology.
- ‘(3) In this section—
- corrective services* see the *Corrective Services Act 2006*, schedule 4.

‘203 Chairperson and deputy chairperson

- ‘(1) The Governor in Council may, on the recommendation of the Attorney-General, appoint—
- (a) a member of the council to be chairperson of the council; and
 - (b) another member to be deputy chairperson of the council.
- ‘(2) A member may be appointed as the chairperson or deputy chairperson at the same time as the person is appointed as a member and by the same gazette notice.
- ‘(3) Subject to this division, the chairperson or deputy chairperson holds office for the term, ending not later than his or her term of appointment as a member, stated in his or her appointment as chairperson or deputy chairperson.
- ‘(4) The deputy chairperson is to act as chairperson—
- (a) during a vacancy in the office of the chairperson; and

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- (b) during all periods when the chairperson is absent from duty or for another reason can not perform the duties of the office.

‘203A Conditions of appointment

- ‘(1) A member of the council holds office for the term, not more than 3 years, stated in the member’s instrument of appointment.
- ‘(2) A member is entitled to the fees and allowances fixed by the Governor in Council, and otherwise holds office under the conditions of appointment fixed by the Governor in Council.

‘203B Vacation of office of council member

‘The office of a member of the council becomes vacant if the appointed member—

- (a) resigns office by signed notice given to the Attorney-General; or
- (b) is removed from office as a member under section 203C.

‘203C Removal from office of council members

‘The Governor in Council may remove an appointed member from office if—

- (a) the member is mentally or physically incapable of performing the member’s duties; or
- (b) the member is convicted, including by summary conviction, of an indictable offence; or
- (c) the Governor in Council is satisfied the member has neglected the member’s duties or performed the member’s duties incompetently or inefficiently.

‘203D Defects in appointment of members

‘A decision of the council is not invalidated by—

- (a) a defect or irregularity in the appointment of a member of the council, including in the appointment of the chairperson or deputy chairperson; or
- (b) a vacancy in the membership of the council.

‘Division 3 Proceedings

‘203E Conduct of business

‘Subject to this division, the council may conduct its business, including its meetings, in the way it considers appropriate.

‘203F Quorum

‘A quorum for a meeting of the council is 7 members.

‘203G Presiding at meetings

- ‘(1) The chairperson is to preside at all meetings of the council at which the chairperson is present.
- ‘(2) If the chairperson is not present at a meeting, the deputy chairperson is to preside.
- ‘(3) If neither the chairperson nor deputy chairperson is present at a meeting, a member of the council chosen by the members is to preside.

‘203H Conduct of meetings

- ‘(1) A question at a council meeting is decided by a majority of the votes of the members present.
- ‘(2) Each member present at the meeting has a vote on each question to be decided and, if the votes are equal, the member presiding also has a casting vote.
- ‘(3) A member present at the meeting may abstain from voting.
- ‘(4) The council may hold meetings, or permit members to take part in meetings, by using any technology that reasonably

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allows members to hear and take part in discussions as they happen.

Example of use of technology—

teleconferencing

- ‘(5) A member who takes part in a meeting under subsection (4) is taken to be present at the meeting.

‘203I Minutes

‘The council must keep minutes of its proceedings.

‘Division 4 Other matters

‘203J Staff

- ‘(1) Subject to the council’s budget, the staff necessary to enable the council to perform its functions may be employed.
- ‘(2) Staff of the council are to be employed under the *Public Service Act 2008*.

‘203K Council may engage persons to help in performing functions

- ‘(1) Subject to the chief executive’s approval, the council may engage persons with suitable qualifications and experience to help the council in performing its functions.
- ‘(2) The engagement may either be in an honorary capacity or for remuneration.

‘203L Reports

- ‘(1) The council must report in writing to the Attorney-General as follows—
- (a) each financial year, by the date requested in writing by the Attorney-General;

- (b) otherwise, as requested in writing by the Attorney-General from time to time.
- ‘(2) The report under subsection (1)(a)—
- (a) must include information about—
 - (i) performance of the council’s functions, in particular about the provision of information to the community to enhance knowledge and understanding of matters relating to sentencing; and
 - (ii) the work to be undertaken by the council in the future in the performance of the council’s functions; and
 - (b) must be tabled in the Legislative Assembly by the Attorney-General within 14 sitting days after the Attorney-General receives it.’.

Schedule Minor amendments

section 3

1 Section 51(b), after ‘Act’—

insert—

‘1999’.

2 Section 187, heading, after ‘holding’—

insert—

‘Queensland’.

3 Section 195(6), ‘the *Passports Act 1938 (Cwlth)*’—

omit, insert—

‘the *Australian Passports Act 2005 (Cwlth)* and the *Foreign Passports (Law Enforcement and Security) Act 2005 (Cwlth)*’.

4 Section 196, heading—

omit, insert—

‘196 Regulation-making power’.

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