

Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010

Explanatory Notes

Objectives of the Bill

The primary objectives of the *Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010* (the Bill) are:

- to establish a Sentencing Advisory Council for Queensland;
- to give the Queensland Court of Appeal power to issue guideline judgments; and
- to strengthen the penalties imposed upon repeat offenders; child sexual offenders; and offenders who commit violence upon a young child and/or who cause the death of a young child.

Reasons for the Bill

The Bill continues the Government's commitment to the ongoing modernisation and reform of the Queensland legal system.

The criminal justice system plays an important role in creating a safe community for Queenslanders. It is vital that the community has confidence in the sentencing process.

Sentencing Advisory Council

The creation of a Sentencing Advisory Council will help bridge any gap between community expectations, the courts and government on the complex issue of sentencing criminal offenders. The Council will: encourage balanced public debate about sentencing issues; inject community opinion into the sentencing process; and foster confidence in the sentencing system.

Guideline judgments

Conferring jurisdiction on the Queensland Court of Appeal to issue guideline judgements will enhance public confidence in the integrity of the sentencing process and further support consistency of approach in

sentencing criminal offenders. It will provide a means by which the Court ‘can give guidance to the primary judges charged with the exercise of judicial discretion’ (*Wong v The Queen* [2001] HCA 64, per Chief Justice Gleeson).

Child sexual offenders

Strengthening the penalties imposed upon child sexual offenders complements the existing legislative measures aimed at the protection of our most vulnerable members of the community; recognises the inherent seriousness of any form of indecent treatment upon a child; reflects the lasting and potentially devastating impact this conduct may have upon the young victim; and ensures that the need for general deterrence, punishment and reflection of the community’s condemnation of the conduct are at the forefront when passing sentence.

Repeat offenders

Queensland Corrective Services confirm that of the prisoners under sentence as at 30 June 2009, 60.92% of the males and 47.8% of the females had previously served an actual term of imprisonment. Strengthening the penalties imposed upon repeat offenders will signal community expectation with regards to recidivism and reinforce the Government’s position regarding offenders who continue to demonstrate an attitude of disobedience of the law.

Violence to young children

The community rightly has a keen interest in the penalties imposed upon offenders who commit violence upon a young child and/or who cause the death of a young child. These cases generate a strong emotive response. The intention is to ensure that sufficient weight is placed upon the age of the victim and genuine recognition made of their special vulnerability. The disproportionate position of an adult to that of a young child and the comparative level of force needed to cause significant harm to a young child as distinct from another adult, must be recognised by the court in deciding whether to declare the offender to be convicted of a serious violent offence.

Achievement of the Objectives

The Bill amends the *Penalties and Sentences Act 1992* by:

- Establishing a Sentencing Advisory Council for Queensland;

- Conferring jurisdiction on the Court of Appeal to issue guideline judgments;
- Amending section 9 to incorporate two judicial sentencing principles currently applied by the Queensland courts when sentencing criminal offenders, namely:
 - that offenders convicted of an offence of a sexual nature in relation to a child under 16 years must serve an actual term of imprisonment unless there are exceptional circumstance; and
 - that in determining the appropriate sentence for a repeat offender, previous relevant convictions must be treated as an aggravating factor (however, the sentence imposed must remain proportionate to the gravity of the current offence); and
- Amending section 161B to ensure that in the case of an offender convicted of an offence of violence against a young child or an offence that caused the death of a young child, the 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.

Sentencing Advisory Council

The composition of the Sentencing Advisory Council ensures a broad based membership, enables community representation, and recognises the importance of the sentencing process to Aboriginal and Torres Strait Islander people and vulnerable Queenslanders in light of their over-representation in the criminal justice system.

The Sentencing Advisory Council will have the functions of:

- stating in writing to the Court of Appeal its views on the giving, or review, of a guideline judgment;
- if requested by the Attorney-General, to advise the Attorney-General on matters relating to sentencing;
- to provide information to the community to enhance knowledge and understanding of matters relating to sentencing;
- to publish information relating to sentencing;
- to research matters relating to sentencing and publish the results of the research; and
- to obtain the community's views on sentencing and particular matters relating to sentencing.

In performing its functions, the Council may consult with the judiciary, government departments and any other person or entity.

Guideline judgments

A guideline judgment is to be taken into account by the court in sentencing criminal offenders. It contains guidelines which may apply generally; or to a particular offence or class of offence, including under a Commonwealth Act; or to a particular penalty or class of penalty; or to a particular court or class of court; or to a particular class of offender.

The legislative framework ensures that the Court retains the discretion whether or not to give or review a guideline judgment. The Court may do so on its own initiative or on the application of the Attorney-General or Director of Public Prosecutions or the Chief Executive Officer of Legal Aid Queensland. On an appeal after a person is convicted, the person has the right to seek a review of a guideline judgment relating to their particular appeal. When the Court of Appeal is considering whether to give or review a guideline judgment, the Court must notify the Council and consider its written views, unless the Court considers that the time taken to notify the council and consider its views would result in an injustice to the convicted person.

Child sexual offenders

The amendment gives permanency to a current Queensland sentencing principle and reflects the Government and community expectation in relation to the commission of any offence of a sexual nature in relation to a child who is under 16 years. It ensures that the imposition of an actual term of imprisonment is required. Judicial discretion is also ultimately preserved.

Repeat offenders

The amendment is consistent with the principle referred to by the majority of the High Court in *Veen v The Queen (No. 2)* (1988) 164 CLR 465. The intention is not to punish the offender twice for the same offence or to impose a sentence which is disproportionate to the gravity of the instant offence. The criminal history of the offender is relevant to show '*whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law*' (*Veen v The Queen (No. 2)* at paragraph 14). In the case of the latter, the court should elevate the

prospective penalty within the common law sentencing range for that conduct.

Violence to young children

The amendment will strengthen, when appropriate, the penalties imposed upon offenders convicted of an offence of violence against a young child or an offence that caused the death of a young child, without fettering judicial discretion in deciding whether to declare the offender to be convicted of a serious violent offence. Maintaining judicial discretion in this process is essential given that there will be cases where the community, despite the tragic consequences of the conduct, would not expect such a severe sanction.

The reference to a *child under 12 years* is consistent with the approach adopted in the Criminal Code where certain offending is aggravated by virtue of the victim being under twelve years and where a child under twelve years is legally incapable of giving consent. These provisions acknowledge the special vulnerability of young children and the need to legislatively protect them.

Estimated Cost for Government Implementation

The costs of establishing the Sentencing Advisory Council will be absorbed within existing Department of Justice and Attorney-General funding.

It is not anticipated that the proposed amendments to section 9 of the *Penalties and Sentences Act 1992* and Part 9A of the *Penalties and Sentences Act 1992* will require supplementation.

Consistency with Fundamental Legislative Principles

There may be an argument that clause 5, sub clause (1), which amends section 9 of the *Penalties and Sentences Act 1992* with regard to child sexual offenders, does not have sufficient regard to the rights and liberties of individuals as required by the *Legislative Standards Act 1992*.

The amendment represents a current Queensland sentencing principle (*The Queen v Pham* [1996] QCA 3; and *R v Quick ex parte Attorney-General* (2006) 166 A Crim R 588 per Chief Justice de Jersey and Justice Chesterman).

It is considered that whilst the amendment may adversely affect the rights and liberties of certain offenders it is justified in order to protect the community, in particular the most vulnerable members, from the risk posed by such offenders. Potential injustices will be avoided by restricting the amendment to ‘adult’ offenders and in providing that the court can take a lack of age disparity into account when considering the exceptionality of the offence.

Consultation

Ongoing consultation with the following government departments and agencies occurred on the policy objectives underpinning the Bill and/or on its development: the Department of the Premier and Cabinet, Queensland Treasury, the Department of Community Safety, the Department of Communities, and the Queensland Police Service.

Consultation has also occurred with the Chief Justice of the Supreme Court, President of the Court of Appeal, Chief Judge of the District Court, Chief Magistrate, Bar Association of Queensland, Queensland Law Society, Director of Public Prosecutions, Legal Aid Queensland, Queensland Council for Civil Liberties and the Women’s Legal Service.

Notes on Provisions

Clause 1 establishes the short title to the Act as the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010*.

Clause 2 provides that the Act will commence on a day to be fixed by proclamation.

Clause 3 provides that the Act amends the *Penalties and Sentences Act 1992*.

Clause 4 amends section 4 to include the definition of *council*, *Court* and *guideline judgment*:

‘*Council*’ is a reference to the Sentencing Advisory Council.

‘*Court*’, for Part 2A, is defined in new section 15AA. It means the Court of Appeal.

‘*Guideline judgment*’, for Part 2A, is defined in new section 15AA.

Clause 5 amends section 9 to insert two new sentencing guidelines.

Sub clause (1) omits section 9(5) and inserts a new section 9(5) and subsection (5A).

Section 9(5) provides that in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the principles mentioned in subsection (2)(a) do not apply and the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

Section 9(5A) provides that 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.

‘*Actual term of imprisonment*’ is defined in the newly inserted section 9(10).

‘*Exceptional circumstances*’ is not defined as the phrase is one with which the courts are familiar and the circumstances that may amount to “exceptional” are best assessed on a case-by-case basis. In *R v Quick; ex-parte Attorney-General*, Chief Justice de Jersey observed ‘...those features are not unusual. Neither is the aggregation of them. As synonyms for “exceptional”, the *Macquarie Dictionary* offers *unusual and extraordinary*’ (paragraph 7) and Justice Chesterman said that ‘*to qualify as “exceptional” the circumstances of the offender or the offence must be properly identifiable as truly out of the ordinary, or extraordinary*’ (paragraph 34). A corresponding approach to interpretation is intended.

In deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child. The lack of disparity in age between the offender and the child will be relevant, for example, where the conduct involved consensual, albeit unlawful, sexual contact between a young offender aged 17 years and a child aged just less than sixteen years.

Sub clause (2) inserts subsections (8), (9) and (10).

Subsection (8), read in conjunction with subsection (9), provides that in determining the appropriate sentence for a repeat offender, 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: the nature of the previous conviction, its relevance to the current offence and the time that has elapsed since the conviction. However, the penalty imposed must not be disproportionate to the gravity of the current offence.

Subsection (10) contains definitions relevant to section 9, namely ‘*actual term of imprisonment*’ and ‘*corrective services facility*’.

Clause 6 inserts a new Part 2A, which provides the legislative framework for Guideline Judgments.

Section 15AA is the definition section for Part 2A. The term *Attorney-General, Chief Executive Officer of Legal Aid Queensland, Court, Director of Public Prosecutions, guideline judgment, guideline judgment for an offence under a Commonwealth Act, guideline proceedings, and review* has been defined.

‘*Guideline judgment*’ means a judgment that is declared to be a guideline judgment by the Court and contains guidelines to be taken into account by courts in sentencing offenders being guidelines applying generally; or to a particular court or class of court; or to a particular offence or class of offence, including under a Commonwealth Act; or to a particular penalty or class of penalty; or 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 that part of proceeding relating to the giving or review of a guideline judgment under section 15AD (*Guideline judgement on own initiative*) or proceeding, or part of proceedings, under section 15AE (*Guideline judgment on application*).

To ‘*review*’ a guideline judgment means to confirm, vary or revoke the guideline judgment, or substitute a new guideline judgment for the guideline judgment.

Section 15AB confers power on the Court to give or review a guideline judgment on its own initiative under section 15AD or on an application under section 15AE. 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. The Court must comply with section 15AC.

Section 15AC outlines the limitations for guideline judgments.

In relation to State offences, the Court is unfettered in its power to issue guideline judgments other than being subject to the requirement that the guideline judgment must be consistent with Queensland law. In relation to Commonwealth offences, in appreciation of the potential constitutional issues, the guideline judgment must: relate to the particular matter before

the Court (as provided for in section 15AB(2)(a)); be consistent with Commonwealth law; set out non-binding considerations to guide the future exercise of discretion but not purport to establish a rule of binding effect; and articulate principles to underpin the determination of a particular sentence but not state the expected decisions in future proceedings.

Section 15AD enables the Court to give or review a guideline judgment on its own initiative.

Section 15AD provides that the Court may, on its own initiative, 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 judgment is necessary for the purpose of determining the proceeding; and pronounce the guideline judgment separately or by inclusion in any judgment the Court considers appropriate.

Where the guideline judgment relates to State offences and is being given or reviewed by the Court on its own initiative, the following is intended:

- the guideline judgment can be given or reviewed in any proceeding before the Court;
- the guideline does not have to relate to the proceedings in which it is being given; or be necessary for the purpose of determining the matter before the Court or be necessary for the purpose of determining any other matter pending before the Court at that time;
- the guideline may be pronounced as part of the judgment of a matter or pronounced separately to the judgment but nevertheless delivered as part of the proceeding.

Section 15AD further provides that the Court may, on its own initiative, 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 pronounce the guideline judgment only by inclusion in the judgment for the proceeding.

Where the guideline judgment relates to Federal offences and is being given or reviewed by the Court on its own initiative, the following is intended:

- the guideline must relate to the proceeding in which it is being given;

- the guideline must be necessary for the purpose of determining the matter before the Court;
- the guideline must be pronounced as part of the judgment of that matter.

Section 15AE provides for a guideline judgment on application.

It provides that the Attorney-General, Director of Public Prosecutions or Chief Executive Officer of Legal Aid Queensland may apply to the Court for a guideline judgment to be given or reviewed, and the application is not required to be an application in a proceeding. The application may include submissions in support of the application. The intention is that the application for a guideline judgment may be made at any time and separately to any proceeding before the Court, or may be made as part of a proceeding before the Court.

Section 15AE also provides that, on an appeal after a person is convicted, the person may apply to the court for review of a guideline judgment to the extent that it contains a guideline that is relevant in the circumstances. The intention is to enable a convicted person to make an application for a review of a guideline judgment (not for the giving) and only when the guideline judgment relates to that appeal matter.

Section 15AE further provides that the Court may, on application, give or review a guideline judgment, other than a guideline judgment for an offence under a Commonwealth Act, whether or not it is necessary for the purpose of determining a proceeding, and pronounce a guideline judgment separately or by inclusion in any judgment the Court considers appropriate.

Where the guideline judgment relates to State offences and is being given or reviewed by the Court on application, the following is intended:

- the guideline judgment can be pronounced by the Court in a separate proceeding;
- the guideline judgment can be pronounced by the Court in any proceeding before the Court;
- the guideline does not have to relate to the proceedings in which it is being pronounced;
- the guideline does not have to be necessary for the purpose of determining the matter before the Court or necessary for the purpose of determining any other matter pending before the Court at that time;

- the guideline may be pronounced as part of the judgment of a matter or pronounced separately but nevertheless delivered as part of the proceeding.

Section 15AE further provides that the Court may, on application under this section, 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 pronounce the guideline judgment only by inclusion in the judgment of the proceeding.

Where the guideline judgment relates to Federal offences and is being given or reviewed by the Court on application, the following is intended:

- the guideline must relate to the proceeding in which it is being pronounced;
- the guideline must be necessary for the purpose of determining the proceeding in which it is being pronounced;
- the guideline must be pronounced as part of the judgment of that proceeding.

Section 15AF provides a right of appearance in a guideline proceeding to the Attorney-General, the Director of Public Prosecutions, the Chief Executive Officer of Legal Aid Queensland, and, 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. A person who may appear in a guideline proceeding may - oppose or support the giving or review of the guideline judgment; make submissions in relation to the framing of the guidelines to be contained in the guideline judgment; inform the Court of any relevant pending appeal against sentence; and assist the Court in relation to any relevant matter.

Section 15AG provides that nothing in the *Director of Public Prosecutions Act 1984* or any Act or law prevents, or in any way limits, the exercise of power conferred on the Director of Public Prosecutions under section 15AE or section 15AF. Without limiting subsection (1), the Director of Public Prosecutions is not, despite the *Director of Public Prosecutions Act 1984* section 10, responsible to, or subject to the direction of, the Attorney-General. Furthermore, 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 section 15AF.

Section 15AH provides that if the Court is considering giving or reviewing a guideline judgment, the Court must consider the need to promote consistency of approach in sentencing offenders and the need to promote public confidence in the criminal justice system. The Court must also notify and consider the written views of the Sentencing Advisory Council given within the reasonable period stated in the notification. However, the Court does not have to notify the Council if 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 the Court considers that the time taken to notify and consider the views of the Council would result in an injustice to the convicted person.

Section 15AI sets out the procedural requirements when the Court decides to give or review a guideline judgment. For any guideline proceeding, the Court must notify the Attorney-General, the Director of Public Prosecutions and the Chief Executive Officer of Legal Aid Queensland, of their right to appear. If the Court is giving or reviewing a guideline judgment relevant to an appeal before the Court against the sentence of a convicted person, the Court must notify the convicted person of their right to appear.

Section 15AI further provides that, if the Court has received the written views of the Council under section 15AH(1)(b), the Court must give a copy of those views to the persons who have a right of appearance in the guideline proceedings.

Section 15AJ makes it clear that nothing in this Part limits the ability of the Court to provide guidance on matters relating to sentencing which it has apart from this Part. The Court retains the discretion whether or not to give or review a guideline judgment. If, on an application under section 15AE, the Court decides not to give or review a guideline judgment, the Court is required to give reasons for its decision.

Section 15AK provides that the Court is not limited in the evidence or other matters that it may take into consideration in giving or reviewing a guideline judgment, and may inform itself in the way it considers appropriate.

Section 15AL provides that a guideline in a guideline judgment is additional to that required to be taken into account under Part 2 and does not limit or otherwise affect any requirement under that Part.

Clause 7 amends section 161B to insert subsection (5).

Subsection (5) provides that for subsections (3) and (4) [where the making of a serious violent offence declaration is discretionary], if an offender:

- is convicted on indictment of an offence that involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or
- is convicted on indictment of an offence 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.

The reference in sub section 5(a) to ‘*violence against a child under 12 years*’, is intended to encapsulate any degree of violence, as compared to the reference to ‘*serious violence against another person*’ in section 161B(4).

The inclusion of sub section (5)(b) ensures that such considerations extend to the situation where an offender is convicted on indictment of an offence that caused the death of a child under 12 years, but where the circumstances of the offence did not involve violence, for example section 328A *dangerous operation of a vehicle*.

Clause 8 inserts a new Part 12, which provides the legislative framework for the Sentencing Advisory Council (the Council).

Section 198 establishes the Council.

Section 199 provides that 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. The Council may state its views on whether a guideline judgment should be given or reviewed and the content of the guideline judgment.

Section 200 sets out the other functions of the Council, which are to advise, inform research, educate and gauge public opinion about sentencing matters. In performing its functions, the Council may consult with the judiciary, government departments, any person or class of person and any other entity or class of entity.

Section 201 provides that the Council has the powers necessary or convenient to perform its functions or incidental to the performance of its functions.

Section 202 provides that the Council consists of twelve members appointed by the Governor in Council on the recommendation of the Attorney-General.

The Attorney-General is to recommend persons that the Attorney-General considers have expertise or experience relevant to the functions of the Council, for example in relation to the following areas – victims of crime; justice matters relating to Aboriginal or Torres Strait Islander People; justice matters relating to domestic and family violence; vulnerable persons facing the criminal justice system; law enforcement; crime prevention; criminal prosecutions; criminal defence representation; civil liberties; corrective services, including offender rehabilitation; juvenile justice matters; criminal law, including sentencing; criminology.

Section 203 provides for the appointment of a chairperson and deputy chairperson of the Council. The deputy chairperson is to act as the chairperson during a vacancy in the office of the chairperson and during all periods when the chairperson is absent from duty or for another reason cannot perform the duties of the office.

Section 203A provides the conditions of appointment for members of the Council. A member holds office for a term of not more than three years. A member is eligible for re-appointment at the end of the term. 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.

Section 203B provides that a member vacates their office if the member resigns or is removed under section 203C. Resignation is by a signed notice given to the Attorney-General.

Section 203C provides the conditions under which the Governor in Council may remove an appointed member from office, namely the member is mentally or physically incapable of performing their duties; or the member is convicted, including by summary conviction, of an indictable offence; or the Governor in Council is satisfied that the member has neglected their duties or performed their duties incompetently or inefficiently.

Section 203D ensures that a decision of the Council is not invalidated by a defect or irregularity in the appointment of a member, or by a vacancy in the membership of the Council.

Section 203E provides that, subject to Division 3, the Council may conduct its business, including its meetings, in the way it considers appropriate.

Section 203F establishes that a quorum for a meeting of the Council is 7 members.

Section 203G provides that the chairperson is to preside at all meetings at which the chairperson is present but if absent, the deputy chairperson is to preside. If neither the chairperson nor the deputy chairperson is present, a member of the Council is chosen by the members is to preside.

Section 203H provides that the decisions of the Council are by a majority vote of the members present. If the votes are equal, the member presiding has the casting vote. A member may abstain from voting. The Council may hold meetings, and permit members to take part in meetings, by using any technology that reasonably allows members to hear and take part in discussions as they happen. A member who takes part in a meeting by such means is taken to be present at the meeting.

Section 203I requires the Council to keep minutes of its proceedings.

Section 203J provides that the Council is supported in the performance of its functions by a body of remunerated staff. The staff are employed under the *Public Service Act 2008*.

Section 203K enables the Council, subject to the chief executive's approval, to engage persons with suitable qualifications and experience to help the Council in performing its functions. The engagement may either be in an honorary capacity or for remuneration.

Section 203L provides that the Council must report annually, in writing, to the Attorney-General. The report must include information about the performance of its functions, in particular about the provision of information to the community to enhance knowledge and understanding of matters relating to sentencing; and the work to be undertaken by the Council in the future. The Attorney-General must table the annual report in the Legislative Assembly within 14 sittings days after the Attorney-General has received it. The Council must also report, in writing, to the Attorney-General as requested from time to time, for example in the performance of their statutory function in section 200(1)(a).

The Schedule makes minor drafting amendments.