

Legislative Council—No 122

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South Australia

**Criminal Law (Sentencing) (Sentencing
Considerations) Amendment Bill 2011**

A BILL FOR

An Act to amend the *Criminal Law (Sentencing) Act 1988*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Criminal Law (Sentencing) (Sentencing Considerations) Amendment Act 2011*.

5 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

10 Part 2—Amendment of *Criminal Law (Sentencing) Act 1988*

4—Amendment of section 9—Court to inform defendant of reasons etc for sentence

Section 9(1)—delete subsection (1) and substitute:

- 15 (1) A court must, on sentencing a defendant who is present in court (whether in person or by video or audio link) for an offence or offences, state the sentence that it is imposing for the offence or offences and its reasons for imposing that sentence, including (for example) any reason why a sentence that would otherwise have been imposed for the offence or offences has been reduced.

- (1a) Nothing in subsection (1) requires a court to state any information that relates to a person's cooperation, or undertaking to cooperate, with a law enforcement agency.

5—Substitution of section 10

5 Section 10—delete the section and substitute:

9E—Purpose and application of Division

- (1) Except where the contrary intention appears, this Division qualifies rather than displaces the common law principles in relation to sentencing.
- 10 (2) Except where the contrary intention expressly appears, this Division is in addition to, and does not derogate from, a provision of this Act or any other Act—
- (a) that expressly prohibits the reduction, mitigation or substitution of penalties or sentences; or
- 15 (b) that limits or otherwise makes special provision in relation to the way a penalty or sentence for a particular offence under that Act may be imposed.

10—Sentencing considerations

- (1) In determining the sentence for an offence, a court must have regard to such of the following factors and principles as may be relevant:
- 20 (a) the circumstances of the offence;
- (b) other offences (if any) that are to be taken into account;
- (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—
- 25 that course of conduct;
- (d) the personal circumstances of any victim of the offence;
- (e) any injury, loss or damage resulting from the offence;
- (f) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than the victim (if any) of the offence or another offender)—those circumstances;
- 30 (g) the degree to which the defendant has shown contrition for the offence (including by taking action to make reparation for any injury, loss or damage resulting from the offence);
- (h) the degree to which the defendant has cooperated in the investigation of the offence;
- (i) the deterrent effect any sentence under consideration may have on the defendant or other persons;
- 35 (j) the need to ensure that the defendant is adequately punished for the offence;
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- (k) if a forfeiture of property (other than a forfeiture that merely neutralises a benefit that has been obtained through the commission of the offence) is, or is to be imposed, as a result of the commission of the offence—the nature and extent of the forfeiture;
- (l) the character, antecedents, age, means and physical or mental condition of the defendant;
- (m) the rehabilitation of the defendant;
- 10 (n) the probable effect any sentence under consideration would have on dependants of the defendant;
- (o) any other relevant matter.
- (2) In determining the sentence for an offence, a court must give proper effect to the following:
- 15 (a) the need to protect the safety of the community;
- (b) the need to protect the security of the lawful occupants of their home from intruders;
- 20 (c) in the case of an offence involving the sexual exploitation of a child—the need to protect children by ensuring that paramount consideration is given to the need for general and personal deterrence;
- (d) in the case of an offence involving arson or causing a bushfire—
- 25 (i) the need to protect the community from offending of such extreme gravity by ensuring that paramount consideration is given to the need for general and personal deterrence; and
- (ii) the fact that the offender should, to the maximum extent possible, make reparation for the harm done to the community by his or her offending.
- 30 (3) In determining the sentence for an offence, a court must not have regard to any of the following:
- (a) the fact that a mandatory minimum non-parole period is prescribed in respect of the sentence for the offence under this Act or another Act;
- 35 (b) any consequences that may arise under the *Child Sex Offenders Registration Act 2006*;
- (c) the fact that the defendant—
- 40 (i) has not participated in, or has not had the opportunity to participate in, an intervention program; or
- (ii) has performed badly in, or has failed to make satisfactory progress in, such a program.

10A—Reduction of sentences for cooperation etc with law enforcement agency

- 5 (1) A court may declare a defendant to be a defendant to whom this subsection applies if the court is satisfied that the defendant has cooperated or undertaken to cooperate with a law enforcement agency and that the cooperation—
- (a) relates directly to combating serious and organised criminal activity; and
 - (b) is provided in exceptional circumstances; and
 - 10 (c) contributes significantly to the public interest.
- (2) If a defendant to whom subsection (1) applies has pleaded guilty to an offence or offences, the sentencing court may reduce the sentence that it would otherwise have imposed by such percentage as the court thinks appropriate in the circumstances (including, to avoid doubt, a percentage exceeding 40%).
- 15 (3) If a defendant (other than a defendant to whom subsection (1) applies)—
- (a) has pleaded guilty to an offence or offences; and
 - (b) has cooperated or undertaken to cooperate with a law enforcement agency,
- 20 the sentencing court may reduce the sentence that it would otherwise have imposed by up to 40%.
- (4) If a defendant has been found guilty of an offence or offences (other than where the defendant has pleaded guilty to the offence or offences) and has cooperated or undertaken to cooperate with a law enforcement agency, the sentencing court may reduce the sentence that it would otherwise have imposed by up to 20%.
- 25 (5) In determining the percentage by which a sentence is to be reduced under this section, a court must have regard to such of the following as may be relevant:
- (a) the nature and extent of the defendant's cooperation or undertaking;
 - (b) the timeliness of the cooperation or undertaking;
 - (c) the truthfulness, completeness and reliability of any information or evidence provided by the defendant;
 - 35 (d) the evaluation (if any) by the authorities of the significance and usefulness of the defendant's cooperation or undertaking;
 - (e) any benefit that the defendant has gained or is likely to gain
 - 40 by reason of the cooperation or undertaking;

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- (f) the degree to which the safety of the defendant (or some other person) has been put at risk of violent retribution as a result of the defendant's cooperation or undertaking;
- (g) whether the cooperation or undertaking concerns the offence for which the defendant is being sentenced or some other offence, whether related or unrelated (and, if related, whether the offence forms part of a criminal enterprise);
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- (h) whether, as a consequence of the defendant's cooperation or undertaking, the defendant would be likely to suffer violent retribution while serving any term of imprisonment, or be compelled to serve any such term in particularly severe conditions;
- (i) the nature of any steps that would be likely to be necessary to protect the defendant on his or her release from prison;
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- (j) the likelihood that the defendant will commit further offences,

and may have regard to any other factor or principle the court thinks relevant.

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- (6) Nothing in this section affects the operation of sections 15, 16 and 17.

10B—Review of sentences reduced under section 10A

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- (1) A court that has reduced a defendant's sentence under section 10A may, on the application of the Director of Public Prosecutions, review the sentence if satisfied that the defendant has not cooperated with a law enforcement agency in accordance with the terms of any relevant undertaking under that section.
- (2) On a review under subsection (1), the court may do 1 or more of the following:
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- (a) vary the sentence previously imposed on the defendant by increasing the sentence by such percentage as the court thinks fit, having regard to the extent to which the defendant failed to comply with his or her undertaking;
- (b) confirm the sentence previously imposed on the defendant;
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- (c) make any consequential or ancillary orders the court thinks fit.
- (3) Nothing in subsection (2) authorises a court to vary a sentence so that it exceeds the sentence that would, but for the reduction, have been imposed by the court that imposed the sentence.
- 40
- (4) The Director of Public Prosecutions and the defendant are both parties to an application under this section.

10C—Reduction of sentences for guilty plea in Magistrates Court etc

- (1) This section applies—
- (a) if the sentencing court is the Magistrates Court; or
 - (b) if the sentencing court is sentencing in relation to a matter dealt with as a summary offence; or
 - (c) in any other circumstances prescribed by the regulations.
- (2) Subject to this section, if a defendant has pleaded guilty to an offence or offences—
- (a) not more than 4 weeks after the defendant first appears in a court in relation to the relevant offence or offences—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 40%;
 - (b) more than 4 weeks after the defendant first appears in a court in relation to the relevant offence or offences but—
 - (i) if a date has been set for a trial for the offence or offences—not less than 4 weeks before that day; or
 - (ii) in any other case—before the commencement of the trial for the offence or offences,the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%;
 - (c) less than 4 weeks before the day set for trial for the offence or offences, and if the defendant satisfies the sentencing court that he or she could not reasonably have pleaded guilty at an earlier stage in the proceedings because of circumstances outside of his or her control—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%;
 - (d) in any other case—the sentencing court may not reduce the sentence to take account of the plea.
- (3) If—
- (a) the maximum reduction available under subsection (2)(a) does not apply in relation to a defendant's plea of guilty because the defendant did not plead guilty within the relevant period; and
 - (b) the court is satisfied that the only reason that the defendant did not plead guilty within the relevant period was because—
 - (i) the court did not sit during that period; or
 - (ii) the court did not sit during that period at a place where the defendant could reasonably have been expected to attend; or

- (iii) the court was, because of reasons outside of the control of the defendant, unable to hear the defendant's matter during that period,

5 the court may nevertheless reduce the sentence that it would otherwise have imposed as if the defendant had pleaded guilty during the relevant period.

- 10 (4) In determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made within a particular period, a court must have regard to such of the following as may be relevant:

15 (a) whether the reduction of the defendant's sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would shock the public conscience;

20 (b) the stage in the proceedings for the offence at which the defendant first indicated his or her intention to plead guilty (including whether it would, in the opinion of the court, have been reasonable to expect the defendant to have done so at an earlier stage in the proceedings);

(c) the circumstances surrounding the plea;

(d) in the case where the defendant has been charged with more than 1 offence—whether the defendant pleaded guilty to all of the offences;

25 (e) whether or not the defendant was made aware of any relevant matter that would have enabled the defendant to plead guilty at an earlier stage in the proceedings,

and may have regard to any other factor or principle the court thinks relevant.

- 30 (5) Nothing in this section affects the operation of sections 15, 16 and 17.

(6) The Governor may, by regulation, vary the periods set in subsection (2) within which a defendant must plead guilty in order to qualify for a particular maximum reduction of sentence.

- 35 (7) For the purposes of this section, a reference to a defendant appearing in a court will be taken to include a reference to a person appearing in a court on behalf of the defendant.

10D—Reduction of sentences for guilty plea in other cases

- 40 (1) This section applies to a sentencing court other than where section 10C applies.

- (2) If a defendant has pleaded guilty to an offence or offences—
- (a) not more than 4 weeks after the defendant first appears in a court in relation to the relevant offence or offences—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 40%;
 - (b) more than 4 weeks after the defendant first appears in a court in relation to the relevant offence or offences but before the defendant is committed for trial for the offence or offences—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%;
 - (c) during the period commencing on the day on which the defendant is committed for trial for the offence or offences and ending 12 weeks after the first date fixed for the arraignment of the defendant (other than in the circumstances referred to in paragraph (d))—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 20%;
 - (d) during the period commencing on the day on which the defendant is committed for trial for the offence or offences but before the commencement of a trial for the offence or offences and if the defendant satisfies the sentencing court that he or she could not reasonably have pleaded guilty at an earlier stage in the proceedings because of circumstances outside of his or her control—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%;
 - (e) in any other case—the sentencing court may not reduce the sentence to take account of the plea.
- (3) If—
- (a) a maximum reduction available under subsection (2)(a), (b) or (c) does not apply in relation to a defendant's plea of guilty because the defendant did not plead guilty within the relevant period; and
 - (b) the court is satisfied that the only reason that the defendant did not plead guilty within the relevant period was because—
 - (i) the court did not sit during that period; or
 - (ii) the court did not sit during that period at a place where the defendant could reasonably have been expected to attend; or
 - (iii) the court was, because of reasons outside of the control of the defendant, unable to hear the defendant's matter during that period,

the court may nevertheless reduce the sentence that it would otherwise have imposed as if the defendant had pleaded guilty during the relevant period.

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- (4) In determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made within a particular period, a court must have regard to such of the following as may be relevant:
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- (a) whether the reduction of the defendant's sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would shock the public conscience;
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- (b) the stage in the proceedings for the offence at which the defendant indicated his or her intention to plead guilty (including whether it would, in the opinion of the court, have been reasonable to expect the defendant to have done so at an earlier stage in the proceedings);
- (c) the circumstances surrounding the plea;
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- (d) in the case where the defendant has been charged with more than 1 offence—whether the defendant pleaded guilty to all of the offences;
- (e) if the defendant satisfies the court that he or she could not reasonably have been expected to plead guilty at an earlier stage in the proceedings because of circumstances outside of his or her control—that fact;
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- (f) whether or not the defendant was made aware of any relevant matter that would have enabled the defendant to plead guilty at an earlier stage in the proceedings,

and may have regard to any other factor or principle the court thinks relevant.

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- (5) Nothing in this section affects the operation of sections 15, 16 and 17.
- (6) The Governor may, by regulation, vary the periods set in subsection (2) within which a defendant must plead guilty in order to qualify for a particular maximum reduction of sentence.
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- (7) For the purposes of this section, a reference to a defendant appearing in a court will be taken to include a reference to a person appearing in a court on behalf of the defendant.

6—Repeal of section 20

40 Section 20—delete the section

Schedule 1—Transitional provision

1—Transitional provision

The amendments made by this Act to the *Criminal Law (Sentencing) Act 1988* apply to proceedings relating to an offence instituted after the commencement of this Act, regardless of when the offence occurred.

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