

South Australia

Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007

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) (Dangerous Offenders) Amendment Act 2007*.

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.

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

4—Amendment of section 3—Interpretation

Section 3(1), definition of *sentence*, (c)—delete "or extending" and substitute:
, extending or negating

5—Amendment of section 10—Matters to be considered by sentencing court

- (1) Section 10(1)—after paragraph (e) insert:
 - (eaa) the need to give proper effect to the policy stated in subsection (1b);
- (2) Section 10(1)(i)—delete paragraph (i)
- (3) Section 10—after subsection (1) insert:
 - (1a) However, a court, in determining sentence for an offence, must disregard any mandatory minimum non-parole period prescribed in respect of the sentence under this Act or another Act.
 - (1b) A primary policy of the criminal law is to protect the safety of the community.

6—Amendment of section 11—Imprisonment not to be imposed except in certain circumstances

Section 11(1)(b)—delete "primary policy stated in section 10(2)" and substitute:
policies of the criminal law stated in section 10

7—Amendment of section 23—Offenders incapable of controlling, or unwilling to control, sexual instincts

Section 23—after subsection (2a) insert:

- (2b) The Attorney-General may make an application under subsection (2a) in respect of a person serving a sentence of imprisonment whether or not an application to the Supreme Court to have the person dealt with under this section has previously been made (but, if a previous application has been made, a further application cannot be made more than 12 months before the person is eligible to apply for release on parole).

8—Amendment of section 30—Commencement of sentences and non-parole periods

Section 30(2)—delete subsection (2) and substitute:

- (2) If a defendant has spent time in custody in respect of an offence for which the defendant is subsequently sentenced to imprisonment, the court may, when sentencing the defendant, take into account the time already spent in custody and—
 - (a) make an appropriate reduction in the term of the sentence; or
 - (b) direct that the sentence will be taken to have commenced—
 - (i) on the day on which the defendant was taken into custody; or
 - (ii) on a date specified by the court that occurs after the day on which the defendant was taken into custody but before the day on which the defendant is sentenced.

9—Amendment of section 32—Duty of court to fix or extend non-parole periods

- (1) Section 32(5)—after paragraph (a) insert:
 - (ab) if fixing a non-parole period in respect of a person sentenced to life imprisonment for an offence of murder, the mandatory minimum non-parole period prescribed in respect of the offence is 20 years;
- (2) Section 32(5)—after paragraph (b) insert:
 - (ba) if fixing a non-parole period in respect of a person sentenced to imprisonment for a serious offence against the person, the mandatory minimum non-parole period prescribed in respect of the offence is four-fifths the length of the sentence;
- (3) Section 32—after subsection (5) insert:
 - (5a) If a person is sentenced under section 18A to the 1 penalty for a number of offences and a mandatory minimum non-parole period is prescribed in respect of the sentence for 1 or more of those offences, the non-parole period fixed in relation to the sentence imposed under that section must be at least the length of the prescribed mandatory minimum non-parole period.
- (4) Section 32(10)—after paragraph (b) insert:
 - (ba) a reference to an *offence of murder* includes—
 - (i) an offence of conspiracy to murder; and
 - (ii) an offence of aiding, abetting, counselling or procuring the commission of murder; and
- (5) Section 32(10)—after paragraph (c) insert:
 - (d) a *serious offence against the person* means—

- (i) a major indictable offence (other than an offence of murder) that results in the death of the victim or the victim suffering total incapacity; or
 - (ii) a conspiracy to commit an offence referred to in subparagraph (i); or
 - (iii) aiding, abetting, counselling or procuring the commission of an offence referred to in subparagraph (i); and
- (e) a victim suffers ***total incapacity*** if the victim is permanently physically or mentally incapable of independent function.

10—Insertion of section 32A and Part 3 Division 3

After section 32 insert:

32A—Mandatory minimum non-parole periods and proportionality

- (1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.
- (2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—
 - (a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or
 - (b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.
- (3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:
 - (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
 - (b) if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;
 - (c) the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.
- (4) This section applies whether a mandatory minimum non-parole period is prescribed under this Act or some other Act.

Division 3—Dangerous offenders

33—Interpretation

(1) In this Division—

serious sexual offence means any of the following offences where the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:

(a) —

- (i) an offence under section 48, 49, 56, 58, 59, 60, 63, 63B, 66, 67, 68, 72 or 74 of the *Criminal Law Consolidation Act 1935*; or
- (ii) an attempt to commit or an assault with intent to commit any of those offences;

(b) an offence against the law of another State or a Territory corresponding to an offence referred to in paragraph (a).

(2) For the purposes of this Division—

(a) an offence will be taken to have been committed in *prescribed circumstances* if, in the opinion of the Attorney-General—

- (i) the offence was committed in the course of deliberately and systematically inflicting severe pain on the victim; or
- (ii) there are reasonable grounds to believe that the offender also committed a serious sexual offence against or in relation to the victim of the offence in the course of, or as part of the events surrounding, the commission of the offence (whether or not the offender was also convicted of the serious sexual offence); and

(b) a reference to an *offence of murder* includes—

- (i) an offence of conspiracy to murder; and
- (ii) an offence of aiding, abetting, counselling or procuring the commission of murder.

(3) No proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question a decision of the Attorney-General under subsection (2).

33A—Dangerous offenders

(1) If a person has been convicted, whether before or after the commencement of this Division, of an offence of murder and the offence was committed in prescribed circumstances, the Attorney-General may, while the person remains in prison serving a sentence of imprisonment, apply to the Supreme Court to have the person declared to be a dangerous offender.

- (2) An application cannot be made under subsection (1) more than 12 months before the person is eligible to apply for release on parole.
- (3) The Court must give the person at least 14 days written notice of the date on which it intends to conduct the proceedings to determine the application.
- (4) If the Court is of the opinion that a report from the Parole Board may assist the Court in determining an application under this section, the Court may direct the Board to hold an inquiry and report to the Court.
- (5) The Parole Board may exercise such powers as are conferred on the Board under Part 6 of the *Correctional Services Act 1982* as are necessary or expedient for, or incidental to, the purposes of an inquiry under subsection (4).
- (6) Each of the following persons is entitled to appear and be heard in proceedings under this section and must be afforded a reasonable opportunity to call and give evidence, to examine or cross-examine witnesses, and to make submissions to the Court:
 - (a) the person (personally or by counsel);
 - (b) the Director of Public Prosecutions;
 - (c) the Commissioner for Victims' Rights.
- (7) The paramount consideration of the Court when determining an application under this section must be to protect the safety of the community (whether as individuals or in general).
- (8) The Court may also take the following matters into consideration when determining an application under this section:
 - (a) any relevant remarks made by the court in passing sentence;
 - (b) the degree to which the person has shown contrition for the relevant offence;
 - (c) the behaviour of the person while in prison;
 - (d) any rehabilitation of the person while in prison;
 - (e) the willingness of the person to co-operate with an inquiry (if any) by the Parole Board under this section;
 - (f) any reports tendered, and submissions made, to the Court under this section;
 - (g) the likelihood of the person committing a serious sexual offence, an offence of murder or some other serious offence of a violent nature should the person be released from prison;
 - (h) whether the non-parole period imposed by the court when sentencing the person for the relevant offence was reduced as a consequence of the commencement of the *Statutes Amendment (Truth in Sentencing) Act 1994*;

- (i) the character, antecedents, age, means and physical or mental condition of the person;
 - (j) the probable circumstances of the person after release from prison;
 - (k) any other matters that the Court thinks are relevant.
- (9) If the Court is satisfied, on the balance of probabilities, that the release from prison of the person to whom the application relates would involve a serious danger to the community or a member of the community, the Court must—
- (a) declare the person to be a dangerous offender; and
 - (b) order that the non-parole period fixed in respect of the sentence of imprisonment for the murder be negated.
- (10) A person who has been declared to be a dangerous offender under this section—
- (a) will serve his or her sentence of imprisonment as if the fixing of a non-parole period in respect of that sentence of imprisonment had been declined by order of the court under section 32; and
 - (b) may not make an application under that section for the fixing of a non-parole period for at least 12 months after having been so declared.

33AB—Appeal

- (1) An appeal lies to the Full Court against a decision by the Supreme Court—
 - (a) to make a declaration and order under this Division; or
 - (b) not to make a declaration and order under this Division.
- (2) An appeal under this section may be instituted by the Attorney-General or by the person to whom the particular decision relates.
- (3) Subject to a contrary order of the Full Court, an appeal cannot be commenced after 10 days from the date of the decision against which the appeal lies.
- (4) On an appeal, the Full Court may—
 - (a) confirm or annul the decision subject to appeal;
 - (b) remit the decision subject to appeal to the Supreme Court for further consideration or reconsideration;
 - (c) make consequential or ancillary orders.

33B—Division does not affect Governor's powers etc in relation to parole

Nothing in this Division has any effect on the powers and authorities conferred on, or vested in, the Governor in relation to parole.

11—Transitional provision

An amendment made by Part 2 of this Act to the *Criminal Law (Sentencing) Act 1988* applies whether the offence to which a sentence of imprisonment or non-parole period relates was committed before or after the commencement of that Part.