



Australian Government

Australian Law Reform Commission

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Dear Research Director

ALRC Submission: Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to the Committee to inform its consideration of the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015.

One objective of the bill is to amend the *Penalties and Sentences Act 1992* to make provision for domestic and family violence to be an aggravating factor in considering the sentencing of offenders.

In Chapter 6 of its 1988 Report 44, *Sentencing*, the ALRC expressed the view that sentencing legislation should not distinguish between aggravating and mitigating factors, but rather include a non-exhaustive list of factors that are relevant to the exercise of the court's discretion. It reached this conclusion because it considered that some matters could be mitigating in some circumstances, and aggravating in others.

The ALRC considered this question again in Chapter 6 of *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Report 103 and again concluded that federal sentencing legislation should not distinguish between sentencing factors that aggravate the sentence and those that mitigate the sentence—see Rec 6-4. However, the ALRC did recommend that there be a non-exhaustive list of matters that do not aggravate the sentence of a Federal offender—see Rec 6-5. These matters include a plea of not guilty, the fact alone that the offender has a criminal history, the fact that the offender declined to take part in a restorative justice initiative, and the fact that the offender has not cooperated with the authorities.

In Chapter 13 of their joint 2010 report, *Family Violence — a National Legal Response*, the ALRC and the NSW Law Reform Commission considered the question of whether a family relationship between the offender and the victim should be treated as an aggravating factor in sentencing. The commissions endorsed the view expressed in ALRC Report 103 that sentencing legislation should not distinguish between aggravating and mitigating factors. However, the commissions acknowledged that some jurisdictions do prescribe aggravating and mitigating sentencing factors.

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The report recommended that a family relationship between the offender and the victim should not be prescribed as an aggravating sentencing factor, for three reasons. Firstly, the commissions were concerned that removing judicial sentencing discretion could mandate higher penalties in circumstances where they are not just and appropriate. Secondly, they considered that such an approach would make a value judgement about the relative severity of offences committed against family members, as opposed to those committed against strangers, where the relevant conduct may be identical. Thirdly, prescribing a family relationship as an aggravated sentencing factor may duplicate existing sentencing factors—for example, the commission of an offence in the home of a person, in the presence of a child or in the abuse of a relationship of trust or authority.

On the other hand, the commissions considered that it would be appropriate for sentencing legislation to provide expressly that the commission of an offence in the context of a family or domestic relationship should not be treated as a mitigating factor.

The commissions acknowledged that some jurisdictions do prescribe aggravating and mitigating sentencing factors. They suggested that prescribing the existence of a family relationship as an aggravating factor might not precisely target the dynamics of family violence. More appropriate aggravating factors might include the abuse of a relationship of trust or authority, the commission of an offence in a person's home, or the commission of an offence as part of a course of conduct. The report recommended that such matters be further considered by state and territory governments, under the auspices of a national coordinating body.

The ALRC understands that the Criminal Law (Domestic Violence) Amendment Bill (No. 2) would amend the Criminal Code to create an offence of choking, suffocation or strangulation in a domestic setting, and amend other statutes to allow a court to receive a submission from a party on what they consider to be the appropriate sentence for the court to impose. The ALRC has not done any work on these matters in recent times and is therefore unable to offer comment on these aspects of the Bill.

The reports referred to in this submission are available on the ALRC website at www.alrc.gov.au/publications. We trust this submission is of assistance. If you require any further information, please do not hesitate to contact me on (02) 8238 6300.

Yours sincerely,



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