



26 May 2021

Ms Elizabeth Lee MLA
Shadow Attorney-General
ACT Legislative Assembly
196 London Circuit
Canberra ACT 2601

Via email: LEE@parliament.act.gov.au

Dear Ms Lee

CRIMES (FAMILY VIOLENCE) LEGISLATION AMENDMENT BILL 2021

Thank you for seeking the Human Rights Commission's views on the Crimes (Family Violence) Legislation Amendment Bill 2021 ('the Bill'). The Commission welcomes your efforts to bring this important issue to the attention of the assembly. We set out our comments in relation to the Bill below.

Aggravated offences involving family violence in the *Crimes Act 1900*

The Commission shares concerns that current sentencing of family violence matters does not meet the ACT community's expectations and is out of step with other Australian jurisdictions which condemn family violence through aggravation of family violence offences or the provision of higher maximum penalties for family violence offences. The Commission considers legislative reform necessary to ensure that sentencing outcomes adequately reflect the severity of family violence.

Clause 15 of the Bill makes the offences listed in proposed s 48C aggravated offences if the offence is a family violence offence and/or where the victim-survivor is a protected person under an FVO and the defendant is the FVO respondent. While the Commission welcomes this proposal as a positive step, we note it would have practical effect in very few cases given that most family violence matters involve different offences. For example, the proposed s 48C would have no effect on the sentencing outcome in *R v UG* [2020] ACTCA 8 (*R v UG*) where the offender was found guilty of property damage, aggravated dangerous driving, common assault, making a demand with threat to kill and possession of offensive weapon with intent, as these offences are not listed in the proposed s 48C.

Given the wide-ranging nature of family violence, which includes physical, sexual and psychological violence, it is possible for any offence to be committed in a family violence context. Importantly, psychological abuse can be just as harmful—if not more harmful—than physical abuse. In this context, it can be extremely difficult to distinguish which are the more ‘serious’ family violence offences.

The Commission therefore seeks legislative reform to ensure that sentencing outcomes adequately reflect the severity of family violence for all offences committed in a family violence context. Subject to requirements of the *Human Rights Act 2004* (HR Act), this includes consideration of measures to make all offences committed in a family violence context an aggravated offence or to make family violence an aggravating factor in sentencing for all offences. We draw your attention to measures in other jurisdictions, for example, Queensland where the *Penalties and Sentences Act 1992* (QLD) states that when an offence is a domestic violence offence it is an aggravating factor in sentencing unless the court considers it is not reasonable;¹ and South Australia where the *Criminal Law Consolidation Act 1935* (SA) differentiates between the penalty for an aggravated offence and the penalty for a basic offence and states that an offence is an aggravated offence if the offender committed the offence knowing the victim was a person with whom they have been in a relationship.²

In the alternative, the Commission recommends reform to at least a broader range of offences committed in a family violence context in order for the Bill to have practical effect. This would include offences that commonly arise in a family violence context and that are known to cause significant harm to victims, such as assault and sexual offences in parts 3, 3A and 5 of the *Crimes Act 1900* (ACT).

Should these measures be considered they must of course be developed in a manner that is consistent with the HR Act. Relevant safeguards would include retaining appropriate sentencing discretion to enable justice to be done in individual cases.

Consideration of family violence in s 33 of the *Crimes Sentencing Act 2005*

Case law demonstrates that ACT courts currently can, and do in some cases, consider family violence as a relevant factor to be considered in sentencing under s 33(1) of the *Crimes Sentencing Act 2005*.³ Therefore, while the specific inclusion of family violence in s 33(1) will importantly assist in addressing the uncertainty raised by the court’s finding in *R v UG*, and perhaps ensure that the nature of family violence is recognised more consistently in sentencing, it is unlikely to have a significant practical impact on sentencing in family violence matters. We further note that s 33(4) expressly provides that “[t]he fact that any relevant factor is known to the court does not require the court to increase or reduce the severity of the sentence for the offence”.

Nevertheless, the Commission still welcomes legislative measures that recognise the dynamics of family violence and supports in principle amending s 33(1)(a) to “the nature and circumstances of the offence (including any family violence)”. We note however that the Explanatory Statement indicates that the proposed s 33(1)(a) will “...require a sentencing court, when deciding how to sentence an

¹ *Penalties and Sentences Act 1992* (QLD) s 9(10A).

² *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g), s 5AA(4a).

³ For example *R v Elson* [2020] ACTSC 264 and *Penelope Maher v Sonney Morrison* [2020] ACTMC 26.

offender for an aggravated offence involving family violence, to consider the nature and circumstances of the offence, including any family violence” and that this does not reflect the wording of the legislative provision which applies to all offences, not just the proposed aggravated offences. The Explanatory Statement should instead clarify that s33(1) including the proposed s 33(1)(a) applies to all offences.

The Commission further supports in principle the proposed section s 33(1)(xa) “if a family violence order under the *Family Violence Act 2016* is in force against the offender—that fact” however we note that clarity in regards to the victim being the protected person or a child of the protected person would be beneficial. The Explanatory Statement again appears to restrict this amendment to the proposed aggravated offences and it should instead clarify that s33(1) including the proposed s 33(1)(xa) applies to all offences.

We finally reflect that any significant sentencing reform should be informed by community consultation, including with Aboriginal and Torres Strait Islander communities, and with consideration of any potential impact on victim-survivor safety. It should also be noted that sentencing reform must not sit in isolation from other considerations of victim-survivor safety such as the effective monitoring of community-based sentencing options including intensive correction orders.

Once again, we thank you for seeking our feedback on this bill. In line with the Commission’s usual practice, we note that we will make a copy of this letter available on our website.

Yours sincerely,



Dr Helen Watchirs OAM
President and Human
Rights Commissioner



Heidi Yates
Victims of Crime
Commissioner