

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

Explanatory Notes

Short title

The short title of the Bill is the Criminal Law (Domestic Violence) Amendment Bill (No.2) 2015.

Policy objectives and the reasons for them

On 28 February 2015, the Special Taskforce on Domestic and Family Violence in Queensland (the Taskforce) released its report, *Not Now, Not Ever: Putting an End to Domestic Violence in Queensland* (the Taskforce Report). The Taskforce Report contained a number of recommendations to increase perpetrator accountability, including that the Queensland Government:

- introduce a circumstance of aggravation of domestic and family violence to be applied to all criminal offences (recommendation 118); and
- consider the creation of a specific offence of strangulation (recommendation 120).

In accepting recommendations 118 and 120, the Queensland Government made a commitment to consult relevant legal and community stakeholders to explore the best means to achieve the objective of these recommendations. To facilitate this consultation, on 12 October 2015 a Discussion Paper was publicly released. Consultation on the Discussion Paper closed on 20 November 2015.

The Bill makes amendments to the Criminal Code and *Penalties and Sentences Act 1992* to address Taskforce recommendations 118 and 120 based on feedback received on the Discussion Paper.

On 12 February 2014, in the judgement of *Barbaro & Zirilli v The Queen* [2014] HCA 2 (Barbaro), the High Court of Australia held that prosecutors were not permitted to make a submission to the court during a sentence hearing on the appropriate sentence, or the bounds of the range of appropriate sentences, to be imposed by the court. This decision led to significant change to the established and longstanding practice in Queensland which will be restored by the Bill.

Achievement of policy objectives

The Bill will achieve its objectives by amending:

- the *Penalties and Sentences Act 1992* to make provision for domestic and family violence to be an aggravating factor on sentence;
- the Criminal Code to create an offence of choking, suffocation or strangulation in a domestic setting; and

- the *Penalties and Sentences Act 1992* and the *Youth Justice Act 1992* to allow a court to receive a submission from a party on what they consider to be the appropriate sentence or sentence range for the court to impose.

An aggravating factor increases the culpability of an offender which means that the offender should receive a higher sentence within the existing sentencing range up to the maximum penalty for the offence. The amendment reflects community attitudes about the seriousness of criminal offences that occur in a domestic and family context and makes these offenders more accountable.

The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide. The Taskforce noted the importance of identifying this conduct to assist in assessing risk to victims and increasing protections for them.

The practical advantages of the amendments to address *Barbaro* include improving consistency in sentencing and assisting in courtroom efficiency.

Alternative ways of achieving policy objectives

The policy objectives are underpinned by the findings in the Taskforce Report. The Taskforce undertook extensive consultation in preparing its report. Informed by this thorough consultation process, the Taskforce ultimately determined that legislative reform represented the best way of achieving the policy objectives.

The Discussion Paper, which was released by the Department of Justice and Attorney-General for public consultation, contained an analysis of Taskforce recommendations 118 and 120 and posed specific questions to elicit views of stakeholders on the best way to achieve the underlying objectives of these recommendations.

Whilst not a literal implementation of Taskforce recommendation 118, the Bill represents the legislative response that received wide support from stakeholders who responded to the Discussion Paper, on the basis that it most effectively delivers on the objectives underpinning the recommendation (that offenders are held to account for their domestic violent offending). It is proposed that the impact of the amendment to section 9 of the *Penalties and Sentences Act 1992* will be evaluated by the Queensland Sentencing Advisory Council, once reinstated, as part of a reference to consider the impact that maximum penalties have on the commission of domestic violence offences.

There is no alternative way to achieve the policy objective to restore the longstanding sentencing practice in Queensland displaced by the High Court in *Barbaro*.

Estimated cost for government implementation

Any costs arising from these legislative amendments will be met from existing agency resources. The future allocation of resources will be determined through normal budgetary processes.

Consistency with fundamental legislative principles

Clause 3 of the Bill amends the Criminal Code to create a new offence of choking, suffocation or strangulation in a domestic setting. The offence has a maximum penalty of seven years imprisonment.

This amendment constitutes a potential infringement of the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals (section 4(2)(a) of the *Legislative Standards Act 1992*) by exposing offenders to a new offence with a higher maximum penalty for choking, suffocation or strangulation conduct in a domestic and family violence context.

The Taskforce Report notes that in addition to its inherent dangerousness, strangulation is a predictive risk factor for more severe domestic and family violence, including homicide. The introduction of the new offence is justified to protect vulnerable members of our community, identify this predictive violent domestic conduct, denounce this type of offending and provide adequate deterrence to perpetrators of this type of offending.

Clause 5 of the Bill amends section 9 of the *Penalties and Sentences Act 1992* to provide that the commission of a domestic violence offence is an aggravating factor that the court must have regard to in determining the appropriate sentence for an offender. The provision is moderated to exclude exceptional circumstances to avoid unintentional consequences on victims.

The provision will allow the court to impose a penalty at the higher end of the range of appropriate sentences while retaining their judicial discretion. By increasing sentences, this provision potentially breaches the fundamental legislative principle in section 4(2)(a) of the *Legislative Standards Act 1992*, that requires that legislation has sufficient regard to the rights and liberties of individuals.

The introduction of the aggravating factor is considered justified to protect vulnerable members of our community, denounce this type of offending and provide adequate deterrence to perpetrators of this type of offending.

Clauses 7 and 10 clarify that amendments to section 15 of the *Penalties and Sentences Act 1992* and to the *Youth Justice Act 1992* apply to the sentencing of an offender after commencement, irrespective of whether the offence or conviction occurred before or after commencement. This means that the amendments have partial retrospective application. While retrospectivity is ordinarily a breach of fundamental legislative principles, this approach is justified on the basis that it is consistent with the common law that procedural laws are construed so as to operate retrospectively and apply to events that have occurred in the past that are presently before the court. The general rule is that the procedural law applying in a court proceeding is the procedural law in place on the day of the proceeding. Therefore, the amendments are consistent with this approach.

Consultation

The Taskforce undertook extensive consultation in preparing its report. The consultation process included meeting with 367 different groups of victims, service providers and community leaders. This consultation informed the Taskforce recommendations, which are being implemented through this Bill.

In accepting recommendations 118 and 120, the Queensland Government made a commitment to consult relevant legal and community stakeholders to explore the best way to achieve the objective of these recommendations. A Discussion Paper for public consultation seeking comment on the options for reform was released.

A total of 20 submissions were received on the Discussion Paper from key legal, police and community stakeholders, an academic and some private individuals. Among stakeholders that responded to Taskforce recommendation 118, there was wide support for an amendment to section 9 of the *Penalties and Sentences Act 1992*. There were divergent views regarding the implementation of recommendation 120. Some stakeholders considered the existing law sufficient and did not support the creation of a new strangulation offence, while others supported a new offence.

Amendments addressing Barbaro have been sought by some legal stakeholders.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland and is not uniform with or complementary to legislation of the Commonwealth or another State.

While New South Wales and the Australian Capital Territory provide for offences of strangulation they do not have a specific nexus to the domestic setting. Tasmania and the Northern Territory also have offences of strangulation but these offences require proof of an additional element that the conduct was accompanied by an intention to commit a separate indictable offence.

South Australia, Western Australia and Victoria have no specific offences of strangulation or choking but rather rely on more general offence provisions that deal with injurious behaviour.

No other Australian jurisdictions have introduced legislation to address Barbaro.

Notes on provisions

Part 1 Preliminary

Clause 1 states that, when enacted, the Bill will be cited as the *Criminal Law (Domestic Violence) Amendment Act (No. 2) 2015*.

Part 2 Amendment of Criminal Code

Clause 2 provides that Part 2 amends the Criminal Code.

Clause 3 inserts new offence provision, section 315A, into the Criminal Code. New section 315A (*Choking, suffocation or strangulation in a domestic setting*) has two limbs, both of which need to be satisfied in order to establish the offence. The first limb is that a person, unlawfully chokes, suffocates or strangles, without consent, another person. The second limb requires that either the offender is in a domestic relationship with the victim, or, the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012*.

The term *domestic relationship* is defined in section 1 of the Criminal Code. The Criminal Code definition adopts the definition of *relevant relationship* contained in section 13 of the *Domestic and Family Violence Protection Act 2012* which is: an intimate personal relationship; a family relationship; or an informal care relationship (as defined under *Domestic and Family Violence Protection Act 2012*).

The term *associated domestic violence* is defined in section 9 of the *Domestic and Family Violence Protection Act 2012*.

The offence, once established, is a crime punishable by a maximum penalty of seven years imprisonment.

Assault is not an element of this offence. The consequence of this is that the defence of provocation under sections 268 and 269 of the Criminal Code have no application to the new offence.

Part 3 Amendment of Penalties and Sentences Act 1992

Clause 4 provides that Part 3 amends the *Penalties and Sentences Act 1992*.

Clause 5 amends section 9 (Sentencing guidelines) of the Act to state that when determining the appropriate sentence for an offender convicted of a domestic violence offence, a court must treat the fact that it is a domestic violence offence as an aggravating factor unless the court considers it not reasonable because of the exceptional circumstances of the case. The provision sets out two examples of when an exceptional circumstance might arise.

Clause 6 amends section 15 (Information on sentence) of the Act to restore the sentencing practice that existed in Queensland prior to 12 February 2014. The amendment allows a court to receive a sentencing submission, from a party to the proceedings, that it considers appropriate to enable it to impose the proper sentence.

A sentencing submission is defined to include a sentence, or range of sentences, considered appropriate for the court to impose by that party and is intended to reflect the practice before Barbaro.

Clause 7 is a transitional provision to clarify that the amendment to section 15 applies to all sentences post-commencement.

Part 4 Amendment of Youth Justice Act 1992

Clause 8 provides that Part 4 amends the *Youth Justice Act 1992*.

Clause 9 amends section 150 (Sentencing principles) to restore the sentencing practice that existed in Queensland prior to 12 February 2014. The amendment allows a court sentencing a child to receive a sentencing submission, from a party to the proceedings, that it considers appropriate to enable it to impose the proper sentence or make the proper order.

A sentencing submission is defined to include a sentence, or range of sentences, considered appropriate for the court to impose by that party and is intended to reflect the practice before Barbaro.

Clause 10 is a transitional provision to clarify that the amendment to section 150 applies to all sentences post-commencement.