



AUSTRALIAN INSTITUTE FOR STRANGULATION PREVENTION

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Chairperson, AISP



Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
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Submission on the Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020

The Australian Institute for Strangulation Prevention (“AISP”) provides a response to the *Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020*. AISP supports legislative reform that specifically addresses:

- The inclusion of a definition of choking, strangulation and suffocation within section 315A of the Criminal Code (Qld) (*Choking, suffocation or strangulation in a domestic setting*) that accurately defines the mechanism of injury or alternatively incorporates the provisions of section 298 of the Criminal Code Act Compilation Act (Western Australia) as amended on 9 July 2020.
- The removal of a requirement for prosecution to negate “consent” from section 315A of the Qld Criminal Code.

The Australian Institute for Strangulation Prevention (“AISP”)

1. The AISP was launched at Premier’s Hall on 21 August 2019 by the Red Rose Foundation Australia, to provide information, training and education on strangulation which is identified as a high-risk factor and precursor to lethality in domestic and family violence.
2. In October 2019 the Expert Advisory panel members completed the 4 day Masterclass on strangulation prevention in San Diego conducted by the Training Institute for

Strangulation Prevention USA which pioneered a multi-disciplinary approach to addressing the risks to victims and obstacles to prosecution of this known predictor of lethal force and the development of strangulation protocols in hospitals. At the conclusion of that conference a partnership with the Training Institute for Strangulation Prevention USA and AISP was launched. All but 4 States in the USA have non-lethal strangulation offences.

3. The AISP is a dedicated resource committed to the dissemination of information for victims, perpetrators, law enforcement, support service providers, and the community on the physiology of strangulation; information about appropriate medical intervention and an understanding of the issues of power and control that flag this behaviour as a significant safety risk for victims.

The physiology of Non-Lethal Strangulation

4. Intentionally applying pressure to a person's neck impedes both airflow and blood flow to the brain that can result in life threatening internal injuries. Many victims of strangulation have no visible external injuries. It is a weapon of power and control that can render victims unconscious in seconds. Physical symptoms include impaired speech, pain, loss of bladder and bowel control. Oxygen deprivation impedes the brain's capacity to form memories. Injuries include traumatic brain injury; post-anoxic encephalopathy; thrombosis, carotid or vertebral artery dissection that can cause a disabling or fatal stroke; or hyoid bone fracture¹. Death may occur within days, weeks or months after a strangulation event. Many victims do not seek medical treatment or assessment.

The psychology of Non-Lethal Strangulation

5. Strangulation is a gendered phenomenon. It is an exertion of control that signals that the perpetrator has power over whether the victim lives or dies. It is not culturally specific. Victims of strangulation are much more likely to be killed by their intimate partners. The terror experienced by victims can have a significant psychological impact that reduces their capacity to seek medical treatment or access domestic or sexual violence support services. Many victims of strangulation remain in abusive intimate partner relationships which expose them (and children) to an ongoing safety risk. Multi-disciplinary research on strangulation identifies it as a significant precursor to the use of lethal force.
6. A legislative framework that effectively criminalises this high risk behaviour is necessary in the State (and national) campaign to prevent the deaths of people in

¹ Dr Bill Smock, forensic pathologist Louisville, Top 25 Serious Medical Consequences Resulting from Strangulation and the Lateral Vascular Neck Restraint
<https://www.familyjusticecentre.org/wp-content/uploads/2018/01Top-25-Complications-2-19.pdf>

violent domestic and family relationships and to address the physical and psychological harm experienced by children who witness domestic violence.

The need for a definition of strangulation in section 315A of the Criminal Code

7. Section 315A of the Criminal Code makes it a criminal offence to “choke”, “strangle”, or “suffocate” a person in a domestic setting but does not provide a definition of these terms . The definitions in the draft Bill do not distinguish between the different mechanisms of injury between choke and strangle and do not address the obstruction of blood flow. Strangulation and choking are not interchangeable terms.
8. Judicial consideration of strangulation (domestic violence) offences in Queensland (and Australia) has recently led to directions to the jury that a defendant charged with a choking, suffocation or strangulation offence be acquitted where the complainant’s evidence did not establish that the victim had stopped breathing following the decision in *R v Green (No 3) 2019 [ACTSC] 96*; *R v AJB [2019] QDC 169*.
9. The Queensland Court of Appeal in *R v HBZ [2020] QCA 73* applied the “purposive test”² in construing this offence and dismissed an appeal against conviction under section 315 A of the Criminal Code (Qld). The judgment of Mullins JA considered the Explanatory Notes for the Bill that introduced the specific domestic violence strangulation offence in 2016; the purpose of the offence; the recognition of this behaviour as inherently dangerous and a predictive indicator of an escalation in domestic violence offending, including homicide; and the significant penalty (up to seven years imprisonment).
10. In dismissing the appeal in *R v HBZ* Mullins JA (McMurdo JA and Boddice J concurring) held that there had been no misdirection of the jury by the trial judge His Honour Judge Lynham Q.C. on the meaning of “choked” being “*to hinder or stop the breathing of a person*”³.
11. The Court of Appeal judgment distinguished the decision in *R v Green (No 3)*⁴ which considered the Macquarie dictionary online definition of strangle as “*to kill by compression of the windpipe...to kill by stopping the breath in any manner*” . In that case the Court held that a directed acquittal application should be granted as the complainant’s evidence was that the defendant squeezed her neck for 30 seconds or more and she did not lose consciousness “*just got very dizzy*” and prosecution did not allege the “stopping of the breath”⁵.

² The judgment of Kiefel CJ and Keane J in the High Court decision in *R v A2 [2019] HCA 35* was applied.

³ *R v HBZ [2020] QCA 73* at paragraph 21

⁴ *R v Green (No 3) [2019] ACTSC 96*

⁵ *Ibid* Loukas-Karlsson J at pg 21 and pg 46

12. In the comprehensive judgment in *R v HBZ Mullins* JA observed that section 315 A of the Criminal Code (Qld); and its precursor section 315; do not include a statutory definition. For the offence to be effective in addressing the mischief it was intended to address legislative amendment is necessary.
13. Other Australian States and New Zealand have introduced non-lethal strangulation offences which have included provisions that address issues that have arisen after section 315 A was introduced.

LEGISLATIVE PROVISIONS

Queensland

14. The relevant legislative provisions in Queensland are:

“Section 315 Disabling in order to commit indictable offence

*Any person who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of a crime, and is **liable to imprisonment for life**.*

Section 315 A Choking, suffocation or strangulation in a domestic setting

- (1) *A person commits a crime if—*
- (a) *the person unlawfully chokes, suffocates or strangles another person, without the other person’s consent; and*
- (b) *either—*
- (i) *the person is in a domestic relationship with the other person; or*
- (ii) *the choking, suffocation or strangulation is associated domestic violence under the [Domestic and Family Violence Protection Act 2012](#).*

Maximum penalty—7 years imprisonment.

- (2) *An assault is not an element of an offence against subsection (1).*

15. Section 315A is a specific domestic violence non-lethal strangulation offence.

Western Australia

16. The Family Violence Legislation Reform Bill 2019 was assented to by Parliament on 9 July 2020 and introduced section 298 of the Criminal Code Act Compilation

Act (Western Australia) to insert an offence of Suffocation and Strangulation. The section provides a comprehensive description of the unlawful conduct that constitutes strangulation and suffocation however it removed the reference to choking:

“A person commits a crime if the person unlawfully impedes another person’s normal breathing, blood circulation, or both, by manually, or by using any other aid –

(a) blocking (completely or partially) another person’s nose, mouth, or both; or

(b) applying pressure on, or to, another person’s neck.

Penalty

(a) If the offence is committed in circumstances of aggravation, imprisonment for seven years; or

(b) In any other case, imprisonment for five years.

Summary conviction penalty:

(a) In a case to which the Penalty paragraph (a) applies, imprisonment for 3 years and a fine of \$36,000; or

(b) In a case to which the Penalty paragraph (b) applies, imprisonment for 2 years and a fine of \$24000”.

17. The section does not include a requirement to negate consent. The offence does not include chest compression (sitting on a person’s ribcage) that deprives a person of the ability to breathe or forcing an object unto the mouth or throat of a victim to obstruct breathing.

SOUTH AUSTRALIA

18. On 6 December 2018 South Australia passed the Statutes Amendment (Domestic Violence) Act 2018 to amend the Criminal Law Consolidation Act 1935 to create a specific strangulation offence and make body worn camera interviews of a complainant by police admissible in court:

Division 7AA—Choking etc in a domestic setting

20A—Choking, suffocation or strangulation in a domestic setting

(1) A person who is, or has been, in a relationship with another person and chokes, suffocates or strangles that other person, without that other person’s consent, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years

NEW SOUTH WALES

19. New South Wales passed the Crimes Amendment (Strangulation) Act 2014 no 23 to insert a strangulation offence under Section 37 of the Crimes Act 1900. In 2018 section 37 was amended to include as subsection (1A) a strangulation offence that does not require a victim to be rendered unconscious or unable to resist. There is

no specific reference to domestic violence relationships and it is not an element of the offence (or a circumstance of aggravation that would increase the sentence imposed):

“Section 37 Choking, suffocation and strangulation

(1A) A person is guilty of an offence if the person intentionally chokes, suffocates or strangles another person without the other person's consent.

Maximum penalty: imprisonment for 5 years.

(1) A person is guilty of an offence if the person:

(a) intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and

(b) is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

Maximum penalty: imprisonment for 10 years.

(2) A person is guilty of an offence if the person:

(a) chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and

(b) does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, [another indictable offence](#).

Maximum penalty: imprisonment for 25 years. “

NEW ZEALAND

20. In New Zealand the Law Commission Report “Strangulation The Case for a new offence”⁶ reviewed strangulation offences in other jurisdictions and recommended the creation of a new offence which adopts the definition in the Minnesota Penal Code⁷: “*“Strangulation” means Intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person*”. The Crime Act (NZ) 1961 was amended to include an offence of strangulation that sets out the mechanism of injury from 3 December 2018:

189A Strangulation or suffocation

Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person’s normal breathing, blood circulation, or both, by doing (manually, or using any aid) all or any of the following:

(a) blocking that other person’s nose, mouth, or both:

⁶ 7 March 2016 at 34

⁷ Ibid at p34 Section 5.4

*(b) applying pressure on, or to, that other person's throat, neck, or both*⁸.

21. The New Zealand strangulation offence does not specifically refer to a domestic relationship however the Report observes that the Queensland strangulation offence was specific to domestic relationships⁹ and that a definition of “strangles or suffocates” should be enacted. The Report specifically addresses the intentional absence of proof of harm or proof of intent as a requirement for successful prosecution.¹⁰ The amendment is silent on consent and observes that in the absence of statutory provisions the common law principles prevail.

Dictionary Definition – strangulation and choking

22. The definition in Wikipedia of “Strangulation (domestic violence)” provides:
“ Strangulation in the context of domestic violence is a potentially lethal form of assault. Unconsciousness may occur within seconds of strangulation and death within minutes. Strangulation can be difficult to detect and until recently was often not treated as a serious crime. However, in many jurisdictions strangulation is now a specific criminal offense, or an aggravating factor in assault cases. **Differences from choking** Although sometimes the words are used interchangeably, "strangulation" and "choking" are not the same thing. Choking is when air flow is blocked by food or a foreign object in the trachea – something that can be addressed by the Heimlich manoeuvre. Strangulation, by contrast, is defined by reduced air flow and/or blood flow to or from the brain via the intentional external compression of blood vessels or the airway in the neck. Notably, however, many victims of strangulation refer to the assault as "choking". Manual strangulation (i.e., gripping the throat with one's hands) is the most common method of strangulation in intimate partner violence.”

REQUIREMENT TO NEGATE “CONSENT”

23. The AISP supports the removal of the requirement to negate consent from the s315A offence. Most victims are not cognizant of the potentially life-threatening injuries that can be inflicted during strangulation and the prosecution bears the burden of negating consent. The inclusion of a requirement to negate consent for this serious gender based violent offence does not recognize the significant power imbalance between a victim and perpetrator where the offence carries a 7 year or life imprisonment maximum penalty under sections 315 and 315A of the Criminal

⁸ Section 189A: inserted, on 3 December 2018, section 24 the Family Violence (Amendments) Act 2018 NZ (2018 No 47).

⁹ Ibid at Section 5.11 p36

¹⁰ Ibid section 5.18;5.20 and 5.33

Code . A requirement for strangulation survivors to testify against the perpetrator on the absence of consent increases the risk to their safety .

24. Subsection 2 of section 315A specifically provides that assault is not an element of this offence. Section 245 Assault provides: “(1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, **without the other person’s consent, or with the other person’s consent if the consent is obtained by fraud...** is said to assault that other person”.
25. The consent requirement in an assault offence is qualified (if consent is fraudulently obtained) however consent in the strangulation offence does not require informed consent or exclude consent obtained by fraud. A common assault under section 335 carries a maximum penalty of imprisonment for 3 years.
26. Serious violent offences (grievous bodily harm section 317 and section 320A Torture) do not include a requirement to prove that the victim did not consent to injury. A victim cannot consent to being killed under Section 248 of the Code:
- “284 Consent to death immaterial**
- Consent by a person to the causing of the person’s own death does not affect the criminal responsibility of any person by whom such death is caused.”*
27. Strangulation injuries can result in death and permanent disability after the commission of the offence. Section 320A Torture imposes a maximum penalty – 14 years imprisonment and defines “torture” means the intentional infliction of severe pain or suffering”.
28. The AISP supports removal of the words “without the other person’s consent” from section 315A as strangulation can cause internal injuries that can result in death or significant impairment for months after the commission of the offence. Autopsies of strangulation victims reveal brain scarring that chronicles damage from successive incidents of strangulation.

CONCLUSION

The AISP supports legislative amendment of section 315A of the Queensland Criminal Code to define strangulation, suffocation and choking and remove the requirement for prosecution to negate consent by the victim. Legislative reform to the strangulation offence is required so it “*extends to the mischief which ...the statute*

*intended to remedy*¹¹. In the quest to “end offending”¹² clear statements of principle by the legislature on strangulation offences provide clarity for judges; prosecutors and defence lawyers; law enforcement; perpetrators and, as intended by the legislation, the victims of this insidious crime.

Submission by The Expert Advisory Panel
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¹¹ Kiefel CJ and Keane J in R v A2 [2019] HCA 35 at [33]

¹² Taskforce Report title “Putting an end to domestic and family violence in Queensland”
<https://www.csyw.qld.gov.au/resources/campaign/end-violence/about/dfv-report-vol-one.pdf>