

17 July 2020

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE 4000

Only by email: lacsc@parliament.qld.gov.au

Dear Committee Secretary,

Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020

We thank you for the opportunity to make this submission to the inquiry into the *Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020 (Bill)*.

Background

1. Caxton Legal Centre (**Caxton**) is Queensland's oldest community legal centre. Caxton's vision is for a just and inclusive Queensland.
2. We are an independent, non-profit community legal centre providing free legal advice, representation, social work services, information and referrals to low income and disadvantaged persons in need of relief from poverty, distress, misfortune, destitution and helplessness.
3. Caxton has a long history of providing legal advice, representation and social work support to both aggrieved victims and respondent perpetrators of domestic violence. We currently operate several specialist and generalist programs which support victims and perpetrators of domestic violence including:
 - 3.1. Domestic Violence Duty Lawyer Service at the Brisbane Magistrates Court;
 - 3.2. Family Advocacy and Support Service;
 - 3.3. Seniors Legal and Support Service;
 - 3.4. Men's Bail Support Program;
 - 3.5. Coronial Legal Assistance Service;
 - 3.6. Human Rights and Civil Law Practice.

4. In the 2019/20 financial year 28% of our clients across all programs identified that they were experiencing domestic and family violence either as victims or perpetrators.

Proposed Amendments

5. The Bill proposes two amendments to the *Criminal Code 1899 (Qld)* (Criminal Code) and also amends the *Penalties and Sentences Act 1992*.
6. We note that the Explanatory Notes provide the policy objectives of the Bill as being to:
 - 6.1. Strengthen the offence of choking, suffocation or strangulation in a domestic setting (non-lethal strangulation offence) as provided for in s. 315A of the Criminal Code;
 - 6.2. Address the ambiguity of the words 'choke', 'suffocate' or 'strangle' which are not defined in s. 315A of the Criminal Code;
 - 6.3. Increase the maximum penalty for the non-lethal strangulation offence to adequately punish offenders and deter other persons from committing the same offence;
 - 6.4. Recognise the seriousness of the non-lethal strangulation offence by classifying the offence as a serious violent offence.
7. We strongly agree that non-lethal strangulation is a very serious offence which has a significant impact on the long-term health of the victim¹ and dramatically increases the risk of the victim experiencing more serious injury or death at the hands of the perpetrator.²
8. We further confirm appropriate sentencing alongside other intervention models strengthens the accountability of perpetrators of domestic and family violence.
9. However, we do not support the proposed amendments because, for the reasons set out below, we do not consider that the amendments will achieve the policy objectives.

Increase in maximum penalty

10. We do not support increasing the maximum penalty from 7 years imprisonment to 14 years imprisonment as we consider that it would not meet the desired objective of deterring other persons from committing the same offence nor would it protect the safety of the victim/survivor in the long term.
11. Our work with victims/survivors of domestic violence indicates that victims/survivors expectedly feel safer while the perpetrator of that violence is in prison. The period a

¹ Douglas, Heather and Fitzgerald, Robin. Strangulation, domestic violence and the legal response *Sydney Law Review* Vol. 36, No. 2, Jun 2014: [231]-254 at 232

² Ibid. at 233

perpetrator is in prison can afford a victim/survivor time to escape to safety and re-establish housing, employment and support networks.

12. However, based on our work with both victims/survivors and perpetrators, we identify numerous issues associated with increased prison terms that are relevant in concluding whether or not this reform will achieve deterrence or safety objectives:

Safety Objectives

- 12.1. The safety of victim/survivors relies on many systems working together to support ongoing safety and a more integrated response is more likely to lead to safer outcomes for victims/survivors³.
- 12.2. Whilst recommendations⁴ made by researchers to integrate systems to achieve safety objectives remain outstanding, the use of increased prison terms is a blunt instrument to apply in order to achieve safety outcomes that genuinely need a properly funded and sophisticated response across multiple domains.
- 12.3. Victims/survivors are more likely to be safer if they trust the policing and justice system response to their complaints and there is no evidence base (that we are aware of) which confirms that extended prison terms result in increased confidence of victims/survivors in the system.

Deterrent Objectives

- 12.4. Despite repeat offending of domestic and family violence, unsophisticated perpetrators of domestic and family violence are not moderating their behaviour based on knowledge of offences, associated lengths of sentences or predictions about how their behaviour may or may not land them in one or another category of offences.
- 12.5. There is growing recognition of the complex dynamics within abusive relationships whereby simple models of deterrence may undermine efforts to deter and protect⁵.

³ Griffith Criminology Institute, *Evaluation of the Specialist Domestic and Family Violence Court Trial in Southport*, February 2017.

⁴ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*, 2015. See also Meyer S 2014. Victims' experiences of short-and long-term safety and wellbeing: Findings from an examination of an integrated response to domestic violence. *Trends & issues in crime and criminal justice* no. 478. Canberra: Australian Institute of Criminology. <https://www.aic.gov.au/publications/tandi/tandi478>

⁵ Awareness of increased penalties may deter victims/survivors from reporting incidents.

- 12.6. There is widespread agreement amongst researchers⁶ that achieving a long-term reduction in domestic violence requires increased investment in primary prevention.
- 12.7. There is compelling evidence that a focussed deterrence model⁷ may have success in reducing different forms of violence because instead of relying on traditional deterrence activities (prosecution and punishment) it relies on a highly structured approach to targeting offenders (and victims) and the actions taken under this approach influences deterrence behaviour more than punishment severity⁸
13. The Queensland Sentencing Advisory Council (QSAC) have published a *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting*⁹ which examines the sentencing outcomes for choking, suffocation or strangulation in domestic setting offences under s. 315A of the Criminal Code finalised in Queensland courts between 2016-17 and 2017-18.
14. The Sentencing Spotlight indicates that 99% of offenders sentenced in relation to an offence under s. 315A (where the s. 315A offence was the most serious offence) pleaded guilty, either initially or at a subsequent date. 97.2% of sentenced offenders who had a strangulation offence (where the s. 315A offence was the most serious offence) received a custodial penalty.
15. If the penalty is increased to 14 years imprisonment, there may be fewer people charged with the offence who would plead guilty. This may lead to victims/survivors having to go through the arduous and often traumatising experience of a trial.
16. The issue of increased focus on criminalisation as a strategy to respond to domestic violence is particularly important to consider for Aboriginal and Torres Strait islander people who may disproportionately experience higher rates of increased imprisonment terms.
17. The Sentencing Spotlight reveals that despite only representing 3.8 per cent of Queensland's population aged 10 years and over, people who identified as Aboriginal or Torres Strait Islander accounted for 20.9 per cent of all offenders sentenced for strangulation (where the s315A offence was the most serious offence). Additionally, it was found that Aboriginal and/or Torres Strait Islander offenders were significantly

⁶ Webster et al, *Australians' attitudes to violence against women and gender equality: Finding from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, 2018

⁷ Braga AA, Weisburd D & Turchan B, *Focused deterrence and crim control: An updated systemic review and meta-analysis of the empirical evidence* *Criminology and Public Policy* 17(1): 205-250, 2018. See also Abt T & Winship C, *What works in reducing community violence: A meta-review and field study for the Northern Triangle*. Washington, DC: United States Agency for International Development, 2016.

⁸ Kennedy DM, Kleiman MAR & Braga AA, *Beyond deterrence: Strategies of focus and fairness*. In N Tilley & A Sidebottom (eds), *Handbook of crime prevention and community safety*. Oxfordshire: Routledge: 157–182, 2017.

⁹ Queensland Sentencing Advisory Council, *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting* accessed at

https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0004/614749/sentencing-spotlight-on-choking-suffocating-or-strangulation-in-a-domestic-setting.pdf on 6.07.2020

younger (median age = 25.2 years) compared with non-Aboriginal and/or Torres Strait Islander offenders (median age 31.8 years).

Change to definitions

18. In our view it is not necessary to define the words ‘choke’, ‘suffocate’ and ‘strangle’ in section 315A.
19. The words, given their plain meaning, encompass a wide range of acts that apply pressure to the neck or throat region.
20. We are concerned that defining the words could have the unintended consequence of limiting the acts which fall within the scope of the offence.
21. In *R v HBZ* [2020] QCA 73 Justices McMurdo, Mullins and Boddice considered an appeal against conviction and sentence for an offence under section 315A.
22. Mullins JA with whom Justices McMurdo and Boddice agreed set out in some detail the law regarding the interpretation of the words ‘choke’, ‘suffocate’ and ‘strangle’ in section 315A.
23. Justice Mullins found:¹⁰

[56] The gravamen of the offending conduct which the offence seeks to deter is the action of one domestic partner towards the other that I described as either choking, strangling, or suffocating the victim not the consequence of the act. The rationale for the offence is that even though one incident in the domestic context of choking, strangling or suffocating may not result in any serious injury, the conduct must be deterred, because it is inherently dangerous and experience shows that if it is repeated, death or serious injury may eventually result.

[57] With the benefit of the approach of the majority judges in *A2* [*R v A2* (2019) 93 ALJR 1106], the interpretation of ‘chokes’ in s 315A in context and in light of the extrinsic material does not result in any ambiguity. In order to achieve the purpose of the introduction of this offence, ‘chokes’ must be construed as the act of the perpetrator that hinders or restricts the breathing of the victim and does not require proof that breathing was completely stopped, although the hindering or restriction of the breathing would encompass the stopping of breathing. The act of choking will not be proved, unless there is some detrimental effect on the breathing of the victim, because otherwise it would not constitute the act of choking. Even if the restriction of the breathing, as a result of choking the victim is of short duration, without any lasting injury and does not result in a complete stoppage of the breath of the victim, that will be sufficient, as the offence is directed at deterring that type of conduct from occurring at all.

¹⁰ *R v HBZ* [2020] QCA 73 at [56] – [57]

24. We understand that this matter is currently the subject of an application for special leave to the High Court of Australia. Any legislative change should await that Court outcome and the High Court's guidance on this important threshold issue.
25. We also refer to the findings of Coroner O'Connell in the inquest into the death of Tracey Ann Beale. Coroner O'Connell found that Ms Beale died due to fatal injuries received when restrained by her husband in a chokehold in a domestic violence setting. The issue that arose in this inquest concerned vasovagal reflex and whether this neck compression was covered by section 315A of the Criminal Code.
26. Coroner O'Connell made a recommendation¹¹:

That the Attorney-General, after allowing submissions from appropriate interested parties, review Criminal Code s.315A to determine if it is adequate to deal with the incidence of so-called vasovagal reflex, and whether the types of neck compression specified in the provision should be defined in the legislation.

27. The Attorney-General responded to this recommendation on 16 January 2019.¹² The Attorney-General stated:

The coroner also suggests that consideration be given to whether all forms of neck compression are adequately covered by the existing offence. The terms *choke*, *suffocate* and *strangle* are not defined in the Criminal Code. The ordinary meaning of these words clearly contemplates the act of squeezing or constricting the neck area...

Defining the terms in the Criminal Code is undesirable given the potential to unintentionally limit and exclude conduct. In Queensland, offences are generally drafted for broad and encompassing application. Terms are generally defined only when there is a need to overcome ambiguity or to deliberately limit application.

28. Given the interpretation of the provision by the Queensland Court of Appeal and that the words have been construed to have broad meaning, capturing a wide range of acts we do not consider that there would be any benefit achieved by defining the words 'choke', 'strangle' or 'suffocate' and in fact, such definition could limit the application of the section.

Classifying offence as serious violent offence

29. We oppose the classification of the non-lethal strangulation offence as a 'serious violent offence'. This represents a form of mandatory sentencing.

¹¹ Findings in the Inquest into the death of Tracy Ann Beale 28 March 2018 accessed at https://www.courts.qld.gov.au/_data/assets/pdf_file/0017/561212/cif-beale-ta-20180328.pdf on 7.07.2020 at [39]

¹² Queensland Government Response to the Inquest into the death of Tracey Ann Beale accessed at https://www.justice.qld.gov.au/_data/assets/pdf_file/0003/613326/qgr-beale-ta-20190514.pdf on 7.07.2020

30. Mandatory sentencing is not just unfair because it doesn't allow for individual circumstances. The evidence shows that it simply doesn't work. This is because, as a matter of principle, it assumes that every offence and every offender are the same or very similar which is patently not the case. Mandatory sentencing doesn't achieve the purposes of sentencing and it doesn't stop reoffending. What's more, it often has unintended consequences.
31. For example, and as set out above, most criminal cases, are resolved by a plea of guilty. Even if only a small percentage of those offenders decided to have a trial, our criminal justice system would simply collapse. If an offender knows that no matter what plea she or he enters, the punishment is likely to be the same because of some mandatory sentencing law, there is much less incentive to plead guilty. Ordinarily, a plea of guilty will lead to a lesser sentence because it saves the State money and may also be evidence of remorse which is important to the issue of re-offending.
32. We do not support any kind of mandatory sentencing because mandatory sentencing fetters judicial discretion in sentencing and undermines the individual right to justice and equality before the law.
33. Mandatory sentencing laws disproportionately impact on the most vulnerable and marginalised members of our society as they remove judicial discretion to bring about justice in individual cases.
34. Again, we are concerned that such a measure would disproportionately impact Aboriginal and/or Torres Strait Islander people.
35. We also note the view of the Queensland Law Society that "mandatory sentencing reduces the proportion of pleas of guilty, thus increasing court costs and court delays¹³.

This submission was prepared by Cybele Koning, CEO and Klaire Coles, Director, Coronial and Custodial Justice Practice. Please do not hesitate to contact Cybele Koning by telephone to [REDACTED] or by email to [REDACTED] or Klaire Coles by telephone to [REDACTED] or by email to [REDACTED] if you have any questions regarding this submission or if we can be of any further assistance to the Committee.

Yours faithfully



Caxton Legal Centre Inc.

¹³ Queensland Law Society *Mandatory Sentencing Laws Policy Position* accessed at https://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper on 07.07.2020