

Criminal Law (Domestic Violence) Amendment Bill (no2) 2015
Consultation 2016

29 January 2016.

To the members of the committee,

Thank you for the opportunity to review the draft bill:
Criminal Law (Domestic Violence) Amendment Bill (no2) 2015

I wish to comment on the proposed Part 2 amendment.

This amendment proposes the insertion of a new section 315A titled: *Choking, suffocation or strangulation in a domestic setting*.

I strongly support the introduction of a new offence of non-fatal strangulation.

While strangulation is arguably covered already by common assault, an assault charge underrepresents the seriousness of non-fatal strangulation given the high risk and danger associated with it.¹ It is also true that non-fatal strangulation could in some cases be covered by other forms of assault (eg bodily harm) or grievous bodily harm, however the specific injuries associated with strangulation are often difficult to identify making these charges an uncomfortable fit.² While attempted murder may be an appropriate charge in many cases of non-fatal strangulation the requirement to prove an intention to kill or do grievous bodily harm may be difficult to satisfy.

'Fair labelling' is considered increasingly important in the development of the criminal law.³ It needs to be remembered that the Queensland's criminal code was written largely in 1899 and this was well before domestic violence was properly recognised. Recognising, through criminal justice responses, that strangulation has occurred could contribute to efforts to rehabilitate the offender and protect the victim. It would warn support agencies that the violence has reached a serious level and that the victim is in serious danger. A specific strangulation offence will ensure that strangulation appears clearly on the criminal record of the accused and alert social services and future sentencing judges to the dangerous level of the offender's domestic violence history. Offence specificity also has an educative function, emphasising the particular context and seriousness of strangulation to police and the wider community.

I think it is appropriate that the proposed strangulation offence is not required to be associated with the intention to commit an indictable offence (ie as in s315) as this requirement creates a significant limitation for its application.

¹ Gael B Strack and Casey Gwinn, 'On the Edge of Homicide: Strangulation as a Prelude' (2011) 26(3) *Criminal Justice* 32, 33.

² Amy Schwartz, Strangulation and Domestic Violence: Important Changes in New York Criminal and Domestic Violence Law (19 November 2010) Empire Justice Centre <<http://www.empirejustice.org/issue-areas/domestic-violence/case-laws-statutes/criminal/strangulation-and-domestic.html>>.

³ James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 (2) *Modern Law Review* 217 and Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 (1) *Cambridge Law Journal* 85.

I am concerned however that, especially given the offence requires that the choking/ strangulation/ suffocation must take place 'without the other person's consent', why this offence is limited to the context where 'the person is in a domestic relationship' or it is 'associated domestic violence' (pursuant to 315A(1)(b))? This seems to imply that non-consensual choking, suffocation or strangulation is acceptable by perpetrators against victims with whom they are not in a domestic relationship or where there is no associated domestic violence.

Surely non-consensual choking, suffocation or strangulation is wrong in any context.

An offence of non-fatal strangulation could apply to a range of scenarios, not simply cases of domestic violence, although, many such incidents are likely to be identified in circumstances where men strangle women, and frequently in the context of domestic violence.

While I appreciate the mischief this provision seeks to address is the particular dangers that have been identified in relation to non-fatal strangulation in the context of intimate partner violence,⁴ the provision attends to this issue without the need to identify the context explicitly.

There is a further concern that the requirement that the strangulation takes place within 'in a domestic relationship' or 'the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012*' is an extra element of the offence and one which will need to be proved by prosecution 'beyond reasonable doubt'. This is an extra burden on police and prosecution services that is not justified. Given that the prosecution already need to prove the act of strangulation, choking or suffocation AND the lack of consent it is not clear what benefit is added by the third element of a required context or relationship. Indeed there are risks that narrowing the application of the provision in this way may have unintended consequences including excluding some in dating relationships.

The lack of justification for the requirement of specific relationship or context is also underlined given that pursuant to the proposed amendment to the sentencing legislation, discussed below, the context of domestic violence will be an aggravation for this type of offence in sentencing and higher penalties are likely to be associated with 315A offences that occur in domestic violence settings / relationships.

Sub-section 315A(1) states: *A person commits a crime if -*

(a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent;

In my response to the discussion paper I raised concerns about the requirement of consent in the context of domestic and family violence where the victim/survivor may be subjected to high levels of coercive and controlling behaviour but appreciate that there are policy reasons underlying why a

⁴ See Heather Douglas and Robin Fitzgerald, 'Strangulation, domestic violence and the legal response' (2014) 36(2) *Sydney Law Review* 231 at: <http://www.austlii.edu.au/au/journals/SydLRev/2014/11.html>. A United States study found that 68 per cent of women presenting to a domestic violence advocacy centre reported strangulation by their abuser: Lee Wilbur et al, 'Survey Results of Women Who Have Been Strangled while in an Abusive Relationship' (2001) 21 *Journal of Emergency Medicine* 297, 301. See also Daniel J Sheridan and Katherine R Nash, 'Acute Injury Patterns of Intimate Partner Violence Victims' (2007) 8 *Trauma Violence and Abuse* 281, 283 .

requirement of consent is perceived to be needed here. Specifically that chokeholds and similar behaviour may be used by some consensually in sport and sexual activity and from a policy perspective criminal justice interventions should be limited to non-consensual acts of non-fatal strangulation, choking and suffocation.

Notably also the proposed s315A(2) states that: *An assault is not an element of an offence against subsection (1).*

I think this is important to include this sub-section in the offence as it ensures that provocation (ss268/269 QCC) does not apply as a complete defence to a charge under s315A.

In relation to the proposed **Part 3 amendment** to the *Penalties and Sentences Act 1992* specifically clause 5: I support the inclusion and wording of the proposed provision. It generally reflects recent judgements from Queensland's Court of Appeal⁵ in relation to sentencing in cases involving domestic and family violence.

I would be happy to discuss my comments with members of the committee further if this would be useful.

Yours sincerely,



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⁵ See for example *R v Fairbrother; ex parte A-G (Qld)* [2005] QCA 105 (15 April 2005); *R v. Major; ex parte A-G (Qld)* [2011] QCA 210 (30 August 2011).