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1 February 2016

To:

Legal Affairs and Community Safety Committee

Parliament House

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**Submission on the Criminal Law**

**(Domestic Violence) Amendment Bill (No. 2) 2015**

**Background:**

1. Soroptimist International works to ensure that the voices of women and girls around the world are included in international decision making and the policy setting within Australia. Soroptimist International is active at all of the major United Nation centres around the world maintaining a network of permanent representatives. The organisation holds a General Consultative Status with the United Nations Economic and Social Council and maintains official relations with several agencies and technical bodies.
2. Soroptimist International recognises that the eradication of domestic and family violence is an essential part of achieving equality for women around the world, including within Australia.
3. As an advocacy body for women, the members of the Brisbane Club of Soroptimist International advocate for long term, effective, and workable solutions to the issues surrounding domestic and family violence.

**Summary:**

4. In relation to the *Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015* ("the Bill") amending the *Criminal Code 1899* ("the Code") and the *Penalties and Sentences Act 1992* ("the PSA"), the members of the Brisbane Club of Soroptimist International of South Queensland submit that:
  - 4.1. The introduction of a specific domestic violence strangulation

- offence is unnecessary as the current charge options cover this conduct;
- 4.2. The amendments to section 9 of the PSA are welcomed, but could provide greater judicial guidance of what the risk factors are in a domestic violence setting;
- 4.3 It is our view that an amendment to section 9 of the PSA with risk factors including strangulation, would adequately implement the objectives of the *Not Now Not Ever* Report concerning a strangulation offence in a way that reflects community expectations, without the many complicating features section 315A entails;
- 4.4 While not supporting the need for a separate strangulation offence, if section 315A is introduced, we submit that:
- 4.4.1 Section 315A ought not be limited to a domestic setting;
- 4.4.2 Section 315A(1)(a) should be amended to include conduct that is “calculated” to choke, suffocate or strangle;
- 4.4.3 Section 315A(1)(b) that requires a domestic relationship, or associated domestic violence, should not be an element of the offence;
- 4.4.4 If 315A(1)(b) remains an element, we submit that there should be a threshold provision that requires a current *Domestic and Family Violence Protection Order* (“Order”) so that the Criminal Courts need not engage in a fact finding exercise of when the section applies, and to avoid unintended consequences in applying the section; and
- 4.4.5 If 315A(1)(b) remains an element, its application ought to be limited to acts committed by perpetrators of domestic and family violence, not an aggrieved, victim or survivor of domestic and family violence.
5. This submission is consistent with our stated position in our submission dated 20 November 2015 to the *Special Taskforce on Domestic and Family Violence: Recommendations 118 and 120*.<sup>1</sup>

### **Amendments to the PSA**

6. As outlined below, there needs to be careful consideration of the threshold issues of what type of domestic violence relationship applies to enliven this section.
7. However, some of the issues raised below are less problematic under the PSA amendments because the standard of proof on sentence is on the balance of probabilities (section 132C of the *Evidence Act*) and would be consistent with the

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<sup>1</sup> Wherein we submitted that:

- 1.1. Though criminal law reform is an important aspect of addressing domestic and family violence, increasing the criminalisation by introducing a non-fatal strangulation offence was both unnecessary as the charging regime adequately allows for this conduct to be charged presently, and, to overlook rehabilitation programs and courses for perpetrators of domestic and family violence fails to address the social issue of domestic and family violence;
- 1.2. Amendment to section 9 of the *Penalties and Sentences Act* when sentencing an offender was more appropriate than introducing a general circumstance of aggravation; and
- 1.3. If non-fatal strangulation was introduced, it could more readily be added under section 9 of the *Penalties and Sentences Act* or be added as a second sub section to the offence of *Common Assault*.

standard adopted under the *Domestic and Family Violence Protection Act* (section 145) in determining if an Order ought to be made.

8. Further, because a Defendant acknowledges wrong doing in the domestic setting by the plea of guilty or finding of guilt, the domestic violence application is accepted on sentence.
9. If introduced, we submit that more meaningful guidance could be provided to judicial officers in sentencing domestic and family violence offenders.
10. This guidance may include a non-exhaustive list of some of the risk factors known to be associated with domestic and family violence offending.
11. This is currently done for some other offenders.<sup>2</sup>
12. The list may include considerations of, *inter alia*:
  - 12.1. The impact on the victim;
  - 12.2. Harm suffered by the victim or other persons;
  - 12.3. Nature of the offending;
  - 12.4. Where the complainant is a female, whether the offending occurred against the victim while pregnant;
  - 12.5. Whether there is choking, suffocation or strangulation alleged in the current offence, or in past offending;
  - 12.6. Threats of harm with weapons or firearms;
  - 12.7. Number of previous violent offences or domestic violence offences; and
  - 12.8. Any other matter considered relevant.
13. These and other matters, have been considered by the Australian Law Reform Commission *Family Violence – A National Legal Response*<sup>3</sup>.

**Conclusion and Recommendation:**

**It is the view of the members of the Brisbane Club of Soroptimist International of South Queensland that amendment to section 9 as outlined above adequately meets the needs of the community, and avoids the need to have a separate strangulation offence in section 315A. The amendment of section 9 could include some of the known risk factors in domestic violence offending, including stangulation.**

<sup>2</sup> For example, when sentencing offenders for violent offence (ss 9(3) PSA), offences of a sexual nature against children (ss 9(4) and 9(6) PSA) and child images offenders (ss 9(7) PSA).

<sup>3</sup> Part 13 generally; Website accessed 20 November 2015 <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>

**No need for a separate strangulation offence under section 315A**

14. While recognising the seriousness of non-fatal strangulation in a domestic and family violence setting, the members of Soroptimist International do not support the introduction of a strangulation offence, and submit that the intention of the *Not Now Not Ever* Report recommendations can more readily be achieved through other means, such as the proposed amendment to section 9 of the PSA.
15. It is our view that police responses and training as to the appropriate charge to lay, education for the prosecuting entities on which charges to pursue and to recognise risk factors in a domestic violence setting, are essential matters for consideration.
16. We also feel that rehabilitation programs are an essential part of overcoming domestic and family violence, which remains largely unaddressed to date.

**Conclusion and Recommendation:**

**We feel that non-fatal strangulation is adequately covered by the existing provisions of the *Criminal Code* and there is little need to introduce a new section because there already exists a wide range of offences open, for the police and the prosecution authorities to consider when charging an offender.**

**Issues with the removal of “calculated” in section 315A(1)(a)**

17. While the introduction of the proposed section 315A includes choking, suffocation or strangulation to be “unlawfully” done, the exclusion of the requirement that the conduct or acts be “calculated to choke, suffocate, or strangle” that is present in the existing section 315<sup>4</sup> is significant.
18. At law, “calculated” means that a person must be “likely” to choke, suffocate or strangle a person, but need not “intend”<sup>5</sup> to choke, suffocate or strangle.
19. This omission from the new section 315A, means that the complainant must, in essence, ***in fact*** be choked, suffocated or strangled which poses substantial evidentiary obstacles.
20. This, it is submitted, creates a high standard to meet and decreases the effectiveness of what was intended in the *Not Now Not Ever* Recommendations. It also, could be properly charged as attempted murder and this makes section 315A largely un-necessary.

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<sup>4</sup> “*Criminal Code 1899 - SECT 315, 315 Disabling in order to commit indictable offence 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.*”

<sup>5</sup> *R v Lansbury* [1988] 2 Qd R 180; 33 A Crim R 12

**Conclusion and Recommendation:**

**Section 315A(1)(a) should be amended to include conduct that is “calculated” to choke, suffocate or strangle.**

***No need for a limitation of strangulation to occur in a domestic setting***

21. The proposed section 315A(1)(b) introduces the element that the defendant must either under subsection (i) “*be in a domestic relationship with the other person*”, or under subsection (ii) “*that the choking, suffocation or strangulation is associated domestic violence under the Domestic and Family Violence Protection Act 2012.*”
22. We are concerned of the need to limit a strangulation offence purely to those acts that occur in a domestic setting.
23. If there is an overriding general public interest in introducing a strangulation offence, the offence ought not to be limited to only domestic relationships or domestic scenarios.
24. There are, we submit, other members of the public who should be entitled to be protected from strangulation offending, not merely those in domestic settings or those to which section 315 may apply.
25. We also note that making this an element of the offence means that if challenged successfully, the Defendant would be acquitted which undermines the intent in introducing the section.

***Need for a Domestic Violence and Family Protection Order (“Order”)***

26. The absence of a threshold requirement for there to be an Order for this element to be satisfied is highly problematic.
27. For example, if there is no such requirement to have regard back to the existence of the Domestic and Family Violence Protection Order, any argument between a couple that escalates into this type of criminal offence, where that relationship had *never* previously been characterised by any violence or offending, nor been subject to any complaint of domestic or family violence, would come within the section.
28. This is particularly so where under the Bill a “domestic relationship” under the Code is referable back to section 13<sup>6</sup> of the *Domestic and Family Violence Protection Act 2012* (“DFVP Act”) which is extremely broad in application such that any ‘couple’ could be captured by this definition.
29. The types of scenarios captured by this element on one view are very broad which makes many persons liable to be charged, including aggrieved persons or children in a

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<sup>6</sup> “DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 2012 - SECT 13 - Meaning of relevant relationship - 13 A relevant relationship is— (a) an intimate personal relationship; or (b) a family relationship; or (c) an informal care relationship.”

home environment.

30. Women (or men) who are victims or survivors of domestic and family violence who are charged with any of the assault type offences are typically charged as a result of reactive offending against the perpetrators of domestic and family violence. It is our view that these persons ought not to be at risk of being charged with this offence. However, because the proposed section does not specify that the complainant be an aggrieved person or named person protected under an Order, they may also be liable to be charged.

***Difficulties for the Criminal Courts in fact finding of when s 315A(1)(b) applies***

31. Section 315A(1)(b)(ii) is not entirely compatible or consistent in effect with 315A(1)(b)(i).
32. In 315A(1)(b)(i), requires a “domestic relationship” and is referable back to section 13<sup>7</sup> of the DFVP Act” and is extremely broad such that any ‘couple’ could be captured by this definition.
33. In section 315A(1)(b)(ii), reference back to section 9<sup>8</sup> of the DFVP Act specifically refers to conduct by a “Respondent”<sup>9</sup> which suggests that there must be an Order, however, reference to section 8(1)<sup>10</sup> of the DFVPA uses no such term. Thus, it seems, under the DVFPA a “Respondent” is a person against whom an Order is in force, or, a person against whom an order **may be made** under the DFVPA.<sup>11</sup>
34. The practical effect is that where there is no Order in place, the Criminal Court would be required to engage in a fact finding exercise of whether an Order **may be made** under the DVFPA, that is, to embark on the process of determination under the DVFPA.
35. This is an enquiry the Criminal Court ought not be required to undertake in a trial and there is a considerable risk of unfair and anomalous decisions being made, as demonstrated by the following scenarios:

**35.1. What about a case where a Defendant successfully resisted a DFVP**

**Application in the civil jurisdiction?** There is a considerable risk in the section

<sup>7</sup> “DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 2012 - SECT 13 - Meaning of relevant relationship - 13 A relevant relationship is— (a) an intimate personal relationship; or (b) a family relationship; or (c) an informal care relationship.”

<sup>8</sup> “DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 2012 - SECT 9 - Meaning of associated domestic violence - Associated domestic violence means behaviour mentioned in section 8(1) by a **respondent** towards— (a) a child of an aggrieved; or (b) a child who usually lives with an aggrieved; or (c) a relative of an aggrieved; or (d) an associate of an aggrieved.”

<sup>9</sup> “Defined in the Schedule by reference to section 21(3) which provides: DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 2012 - SECT 21 - Who is an aggrieved and who is a respondent .... (3) A respondent means a person against whom a domestic violence order, or a police protection notice, is in force or **may be made under this Act**.

<sup>10</sup> “DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 2012 - SECT 8 - Meaning of domestic violence (1) Domestic violence means behaviour by a person (the first person) towards another person (the second person) with whom the first person is in a relevant relationship that— (a) is physically or sexually abusive; or (b) is emotionally or psychologically abusive; or (c) is economically abusive; or (d) is threatening; or (e) is coercive; or (f) in any other way controls or dominates the second person and causes the second person to fear for the second person’s safety or wellbeing or that of someone else.”

<sup>11</sup> See section 21(3)



being applied that would create anomalous decisions applying different standards of proof for an Order (on balance) compared to a criminal charge (beyond reasonable doubt) in determining if the second element applies. Where a court must embark on a new fact finding exercise in the Criminal jurisdiction when the DVFPA matter has been determined elsewhere, it undermines the court processes and creates unfairness to a Defendant;

- 35.2. **What about an Order that is made without admissions by a Defendant?** By virtue of section 51 of the *Domestic and Family Violence Protection Act* there is no obligation on the decision maker who made the Order to be satisfied whether any act of domestic or family violence in fact occurred before making the consent order. This has the potential, in our view, to be unfair to an accused person who is being dealt with in a criminal proceeding;
- 35.3. **What about a Temporary Protection Order that was made where the Defendant was not provided an opportunity to appear?** These Orders can be made before service is even effected on the Respondent pursuant to sections 27, 34 and 36 of the *Domestic and Family Violence Protection Act*. This has the potential, in our view, to be unfair to an accused person who is being dealt with for the charge;
- 35.4. **What about an aggrieved person or named person under an Order who has just been attacked and / or beaten by a perpetrator of domestic and family violence and responds by strangulation, choking or suffocation?** The absence of the requirement for a Defendant to also be a Respondent under and Order means that this victim and would face this charge, despite the intended effect of the *Not Now, Not Ever* Report to target perpetrators of ongoing domestic and family violence. Further, the exclusion of assault as an element excludes provocation for these persons to rely on at a trial.
36. We submit that if introduced, there must be a threshold provision that requires:
- 36.1. There to be an Order in place; and
  - 36.2. That Order is a Final Order (i.e. made after a hearing or by consent); or
  - 36.3. If an Order is made without admissions or if there was at the time of the offence a Temporary Protection Order, the Defendant must establish on balance that there was no relationship to which either parts of section 315A(1)(b) apply.
37. By framing a threshold requirement in this way, it imposes a responsibility on a Respondent who agreed to be bound by a civil order knowing its possible criminal implications, and provides fairness to those who are subject to other orders.
38. The shifting of the onus is present in the Code in other provisions.
39. A threshold provision also:
- 39.1. Removes the necessity of the Criminal Courts to engage in fact finding

exercises;

39.2. Removes the risk of anomalous or inconsistent decisions being made; and

39.3. Reduces the risk of unintended application of the section to victims or survivors of domestic and family violence.

40. The shifting of the onus onto the Respondent / Defendant is also similar in effect to a breach of an order under the *Dangerous Prisoners (Sexual Offenders) Act* where the person who breached the order must demonstrate to the court their continued release is justified and where the breach of the order is also a criminal offence – sections 22 and 43AA .

**Conclusion / Recommendations:**

**While not supporting the need for a separate strangulation offence, if section 315A is introduced:**

- **Section 315A ought not be limited to a domestic setting;**
- **Section 315A(1)(b) that requires a domestic relationship, or associated domestic violence, should not be an element of the offence;**
- **If 315A(1)(b) remains an element, there should be a threshold provision;**
- **If 315A(1)(b) remains an element, its application ought to be limited to acts committed by perpetrators of Domestic and Family Violence Protection, not an aggrieved, victim or survivor of domestic and family violence;**
- **If introduced, there should be a threshold provision that requires:**
  - **There to be a Domestic and Family Violence Order in place; and**
  - **The Order be made is a Final Order; or**
  - **If the Order is made without admissions or if there was at the time of the offence a Temporary Protection Order, the defendant must establish on balance that there was no relationship to which either parts of section 315A(1)(b) apply.**

**Conclusion:**

41. Our members provide strong support for domestic and family violence reform and would be pleased to discuss the matter further. We are happy to be involved in any additional consultation that may take place, on this submission and on later reviews of the Act and surrounding infrastructure.



42. We support the eradication of domestic violence, and advocate for effective, workable and long term solutions to the issues, as outlined in this submissions.

43. We would be pleased to participate in the consultation process further.

Kind regards,

*Norah Blunden*

**Norah Blunden**

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