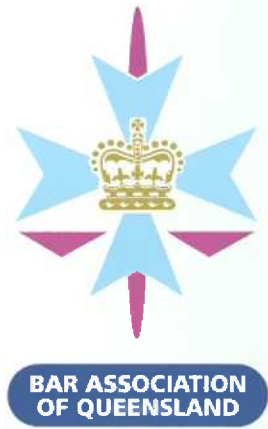


CLH:dgr



17 February 2016

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

By email: lacsc@parliament.qld.gov.au

Dear Sir

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

The Bar Association of Queensland (“the Association”) thanks the Legal Affairs and Community Safety Committee for inviting submissions regarding the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 (“the Bill”).

The Association notes the three key objectives of the Bill as follows –

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

As to the first two of those objectives, the Association provided a submission in response to a Discussion Paper released by the Department of Justice and Attorney-General during the consultation phase. That submission (“the submission regarding the Discussion Paper”) is attached, and what follows should be read in conjunction with it.

Clause 5 - Amendment of the *Penalties and Sentences Act 1992* by insertion of new subsection 9 (10A) - Domestic and family violence to be treated as an aggravating factor

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Clause 5 of the Bill introduces an additional sentencing guideline by inserting subsection 9 (10A) of the *Penalties and Sentences Act* in the following terms –

In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.

Examples of exceptional circumstances –

1. the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
2. the offence is manslaughter under the Criminal Code, section 304B

The Association notes that such an amendment reflects the approach supported in the submission regarding the Discussion Paper. Importantly, the amendment preserves judicial discretion, to the greatest extent possible, in sentencing offenders according to the particular facts and circumstances of their case.

Clause 3 - Amendment of the Criminal Code by insertion of new section 315A - Choking, suffocation or strangulation in a domestic setting

Clause 3 of the Bill inserts a new offence into the Criminal Code. Section 315A will provide –

- (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).

The Association reiterates the submissions made in paragraphs 6 to 9 of the submission regarding the Discussion Paper. In particular, the Association does not support the codification of a new offence in circumstances where existing offences (and maximum penalties) adequately comprehend acts of choking, suffocation and strangulation and provide for an appropriate range of penalties. Further, the Association reiterates the submission that there are difficulties in defining the targeted conduct.

In respect of subsection 315A(2), which will act to preclude an accused person relying on the defence of provocation, the Association submits that unfair and perhaps unintended consequences flow to accused persons and victims.

The aim of the new offence

The Association appreciates that section 315A aims to target particular conduct, that is said to be predictive of risk, by the creation of a new offence. The Explanatory Notes to the Bill state –

The new strangulation offence and the significant penalty attached, reflect that this behavior 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.¹

And further –

The introduction of a new offence is justified to protect vulnerable members of our community, identifying this predictive violent domestic conduct, denounce this type of offending and provide adequate deterrence to perpetrators of this type of offending.²

The Association considers it unlikely that the creation of a specific offence, with a maximum penalty equivalent to that for assaults occasioning bodily harm will further deter perpetrators, or add to the existing capacity of Courts to denounce the conduct. As discussed further below, the existing regime of offences and penalties (particularly with the amendment to section 9 of the *Penalties and Sentences Act* achieved by clause 5 of the Bill) is apt to achieve those objectives.

The additional objective of the proposed new offence is to facilitate a means of gathering information and statistics with the aim of identifying future risk. While the Association considers measures to reduce the risk of harm to victims important, the creation of a new, and unnecessary, offence is not an appropriate means (nor the only available means) by which to meet the objective.

As the Association earlier submitted, there are a number of agencies such as police, which may be in a position to include detailed information relating to acts of domestic and family violence specifying acts of choking, suffocation or strangulation into existing systems such as QPrime.

Further, the establishment of an independent body to analyse crime statistics could assist in generating and sharing the information about predictive domestic violence

¹ Explanatory Notes, page 2.

² Explanatory Notes, page 3.

conduct in order to increase protection for victims. The Association notes that the Queensland Government has stated its commitment to establishing such a body.³

Existing offences and penalties

As to the existing regime, the offences of assault, assault occasioning bodily harm and grievous bodily harm were recognised in the Discussion Paper and mentioned in the Association's previous submission. In addition, the Association points to offences of attempted murder, murder or manslaughter that might be charged in cases involving alleged choking, suffocation and strangulation in a domestic and family context.

That existing range of offences carry maximum penalties ranging from three years imprisonment (for common assault), to seven years imprisonment for assault occasioning bodily harm (or 10 years where a circumstance of aggravation exists), to life imprisonment for grievous bodily harm, attempted murder, murder and manslaughter.

That demonstrates that the maximum penalties for existing offences are apt to deter and punish relevant offenders at least to the same extent as the proposed new offences, except where the offending constitutes no more than a common assault.

Further, the amendment of section 9, contemplated by the new (10A), will oblige sentencing courts to treat conduct that amounts to choking, suffocation or strangulation when committed in a domestic and family context, whatever the offence charged.

Put simply, there is no need for a new offence to elevate penalties in light of the new, prescribed aggravating factor.

Difficulties with definitions

Section 315A does not attempt to define the terms 'choking', 'suffocation' or 'strangulation'. The Association considers that that has the potential to complicate litigation in a way that is unnecessary given existing provisions, and counter-productive to the interests of victims.

An exhaustive analysis of definitions for the terms 'choking', 'suffocation' and 'strangulation' has not been undertaken for the purpose of this submission, however a review of relevant definitions contained in the Butterworths Medical Dictionary⁴ underscores the potential problems. Each of the terms used is the subject of a separate definition as set out below –

³ <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2015/5515T464.pdf>

⁴ Critchley, M (Ed). Butterworths Medical Dictionary, 2nd Ed.

***Choking** – The feeling of strangulation resulting from the presence in any one of the upper respiratory tracts of a foreign body or morsel of food, or from inspiration of any unbreathable gas or vapour, so that the passage of air to the lungs is partially or entirely prevented.*

***Suffocation** – Interference with respiration which causes deprivation of air. It usually refers to obstruction to the entrance of air into the mouth, nose, larynx or trachea by mechanical impediments, and so includes smothering, overlying, foreign bodies in the air passages, the result of natural disease, accident or intention, and the effect of irrespirable gases.*

***Strangulation** – 1. The condition of being strangulated, as in e.g. a hernia. 2. Extreme compression or compression of the trachea or of any part, causing a suspension of respiration or congestion in the part, from which death may result. 3. A state of excessive constriction. Manual strangulation. Strangulation by the hand, necessarily either accidental or homicidal, owing to the impossibility of maintaining a self-strangling hold to the moment of death.*

While the use of the three terms might well ‘cover the field’ of conduct targeted, their use and medical definitions at least has the potential to invite argument. Such argument might involve medical evidence and evidence from a complainant in circumstances where, if charges were brought under existing provisions, the conduct might clearly fall within the broader definitions of, for example, assault, or grievous bodily harm.

Excluding the defence of provocation

Subsection 315A(2) provides that an assault is not an element of an offence of choking, suffocation or strangulation in a domestic setting. The Explanatory Notes are silent as to the policy objective of the subsection, however it is tolerably clear that it is to exclude the availability of the defence of provocation (under section 269 of the Criminal Code).

The defence of provocation is presently available as a complete defence to persons accused of common assault and assault occasioning bodily harm (section 269 Criminal Code) and, to reduce liability for murder to manslaughter (section 304 Criminal Code). The defence is not available in cases of grievous bodily harm or attempted murder.⁵

The availability of the defence of provocation has been the subject of legislative amendment as it relates to killing in a domestic relationship. Section 304 of the Criminal Code was amended in 2011 to address a recommendation made by the Queensland Law Reform Commission (QLRC) in its report – ‘*A review of the excuse of accident and the defence of provocation*’. The Explanatory Notes to the Criminal Code and Other Legislation Amendment Bill 2010 states –

⁵ *Kaparonowski v R* (1973) 133 CLR 209; *McGhee v R* (1995) 183 CLR 82

The QLRC recommended that the defence be recast to address its bias and flaws, in particular: to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the defence cannot be based on words alone or conduct that consists substantially of words; to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based on the deceased's choice about a relationship; and to place the onus of proof upon a defendant seeking to rely on the partial defence.⁶

The recommendation was given effect by amendments to section 304 of the Criminal Code which now relevantly provides that the defence does not apply (to reduce murder to manslaughter), other than in circumstances of a most extreme and exceptional character, if the provocation is based on words alone, or if –

- (a) a domestic relationship exists between 2 persons; and
- (b) one person unlawfully kills the other person (the deceased); and
- (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done –
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or
 - (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will by a change to the nature of the relationship.

Where a victim has not been killed, the proposed subsection 315A(2) unfairly excludes the defence of provocation altogether and only in respect of one type of domestic violence – choking, suffocation and strangulation.

That means that an offender who assaults his or her partner by beating, for example, will retain the availability of the defence (under section 269), while an offender charged under section 315A will not. The Association considers that that is not only fundamentally unfair, it gives rise to an inference that other types of domestic violence are less serious (or considered to be less serious by the legislature).

If the defence of provocation is to be altered in a way that advances the interests of victims of domestic violence, the Association submits that amendment should be made in such a way as to apply to all types of assaults that constitute domestic and family violence.

The Association further submits that the types of provocation excluded from the operation of the defence should be limited to those identified by the QLRC and set out in section 304; that is, to provocation based on words alone and provocation based on the victim's choice about the relationship. As in section 304, the defence should, in fairness to the accused, remain available in circumstances of an extreme and exceptional character.

⁶ Criminal Code and Other Legislation Amendment Bill 2010, Explanatory Notes, page 3.

Amendment of section 15 *Penalties and Sentence Act 1992* – Information on sentence

The Association wholeheartedly supports this amendment, which seeks to reverse the effect of the decision in *Barbaro & Zirilli v The Queen* [2014] HCA 2. The Association agrees that the practical advantages of the amendments include improving consistency in sentencing and assisting courtroom efficiency.⁷

The Association thanks you for your consideration of these submissions, and is available to elaborate further if required.

Yours faithfully



Christopher Hughes QC
President

encl

⁷ Explanatory Notes, p.2.

SLD;dgr

3 November 2015

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E-MAIL

Dear Sir

Re: Circumstance of aggravation and strangulation offence

Thank you for inviting the Bar Association of Queensland (“the Association”) to provide a submission in relation to the discussion paper, ‘Circumstance of aggravation and strangulation.’

Due to the short timeframe this is a succinct submission.

The Association advises that it is available to elaborate further on this submission if required.

The Department of Justice and Attorney General has now requested submissions relating to the discussion paper.

Circumstance of aggravation

1. There are already offences in the Criminal Code that deal with any offending behaviour that arises from abusive relationships. It needs to be understood why, offenders in the abusive relationship context are not being charged, if this is happening. It is certainly the experience of our Members that charges often do not flow. There may be good reasons. These need to be understood.
2. Separately, if the police are not charging any offender with the simpliciter offence, adding an aggravated offence cannot be a solution.
3. Further, adding an aggravated circumstance may result in significant unintended consequences. There may be fewer pleas of guilty, resulting in more trials, perhaps in the District Court depending on the penalty provisions. This consequence would result in complainants being required to give evidence and be open to cross-examination.

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4. It is quite likely that an amendment to section 9 of the *Penalties and Sentences Act* 1992 could adequately meet the objectives of recommendation 118.
5. The Association would be supportive of such an approach as this approach maintains, to the greatest extent possible, judicial discretion in sentencing. Further there are often unique factual issues in individual sentencing matters. The Association considers that Judges are best placed to make those decisions on a case-by-case basis.

New offence of strangulation

6. The discussion paper seeks further submissions relating to the creation of a specific offence of strangulation.
7. The discussion paper outlines the reason for the creation of a new offence as being that strangulation is a predictive risk factor for more severe domestic and family violence¹ therefore a separate and discrete offence of 'strangulation' is warranted.
8. It is appreciated that this form of force often features in violent intimate relationships.
9. However, the Association does not support the codification of such an act because it is likely to be counter-productive:
 - a. First, as the discussion paper recognises, the Criminal Code (Qld) assault, bodily harm and GBH provisions adequately comprehend such conduct;
 - b. Second, there will be difficulties in defining strangulation. For example, is it to be hands around a neck? But what then of the perpetrator familiar with martial arts techniques who strangles not by hands on the neck, but by the use of the victim's own clothing? That same perpetrator may also be able to exert force by applying their knee to the victim's neck; and
 - c. Third, defining strangulation would give defence Counsel the opportunity to cross-examine and then submit that the actions are not, beyond reasonable doubt, within the definition.

Independent Agency to Address Crime Statistics

10. The Association takes this opportunity to make a related and subsidiary point which is that the State ought to consider the establishment of an independent agency to analyse crime statistics.

¹ Page 8 of the discussion paper

11. It is accepted that information sharing about predictive violent domestic conduct should increase protection for victims.
12. The Association considers that this issue has not yet been properly mapped or thoroughly analysed. It is far from clear that all relevant information is accurately captured at this time.
13. There are a number of agencies, such as police, who may be in a position to include detailed information relating to acts of domestic and family violence specifying acts related to strangulation or choking in eg. QPrime. Such data capture would lead to improved analysis of the issues thereby informing new legislation as needed.
14. At this time there is a gap in the infrastructure for policy making in the crime, policing and justice area as recognised and accepted data is not available to policy makers.
15. Such infrastructure should be designed to facilitate policy making and the preparation of legislation for consideration by Parliament on the basis of trusted and objective evidence. No government agency exists to provide that evidence to the public service agencies, to Parliament or to the public in Queensland.
16. As a model, the Association draws attention to the Bureau of Crime Statistics and Research (“BOCSAR”)² in New South Wales. BOCSAR was established in 1969. It, and its long term Director, Don Weatherburn, have developed extraordinary reputations for the quality of their research, their publications and the advice they are able to offer.
17. BOCSAR is nestled in the Department of Justice. Nonetheless, its independence has been respected which has allowed it to carry out the high quality work and develop its strong reputation.
18. In a recent symposium³ discussing gender parity issues one of the unifying themes was that gender parity cannot be achieved without addressing domestic or family violence. An issue common to many of the speakers was the need for statistics, data and research to assess the current situation affecting gender parity.
19. Barriers to data and statistics collection include funding, mode of collection, geographical limitations and the absence of a cohesive approach to data collection.

² See http://www.bocsar.nsw.gov.au/Pages/bocsar_aboutus.aspx (accessed 27 July 2015)

³ The ANZ Papua New Guinea Gender Parity Symposium was held in the week of 12 October in Canberra, Sydney and Brisbane.

20. The Association would urge the establishment of a body like BOCSAR to ensure that policy making in the future will have access to trusted information and ensure evidence based policy making becomes the reality in Queensland.

Thank you for your consideration of this submission.

Yours faithfully

A black rectangular redaction box covering the signature of Shane Doyle QC.

Shane Doyle QC
President

From: [Donna Rea](#)
To: [Legal Affairs and Community Safety Committee](#)
Subject: Submission - Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015
Date: Wednesday, 17 February 2016 7:01:00 PM
Attachments: [image001.png](#)
[S45C-6e16021718490.pdf](#)

Dear Research Director

Attached please find a submission from Mr Christopher Hughes QC, President, Bar Association of Queensland in relation to the above submission.

The Association realises the lateness of this submission to the Legal Affairs and Community Safety Committee and respectfully ask the Committee to consider the Association's submission on this important issue.

Kind regards
Donna Rea



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