

# **Law Reform Submission: Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020**

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## About the Authors

This law reform submission was researched and authored by UQ law students **Thilini Joseph and Lucy Noble-Dickinson** under the academic supervision of the UQ Pro Bono Centre Director, **Monica Taylor**. This submission was prepared for and on behalf of Ending Violence Against Women (EVAWQ), the peak body for sexual violence, women's health, women's refuges and domestic and family violence services in Queensland. Student researchers undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

The UQ Pro Bono Centre and student researchers thank EVAWQ for allowing us to contribute to its vital work.

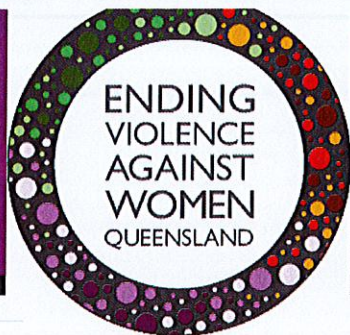


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## ENDING VIOLENCE AGAINST WOMEN QUEENSLAND INC.

Peak Body for Sexual Violence, Women's Health and Domestic & Family Violence

Committee Secretary  
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17<sup>th</sup> July 2020

Dear Committee Secretary,

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

Thank you for the opportunity to comment on the Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020. Overall, we support the proposed amendments to: provide definitions for 'choking', 'strangulation' and 'suffocation'; increase the maximum penalty; and include the offence in the serious violent offences schedule. Additionally, we propose that consent should be removed as an element of the offence.

Ending Violence Against Women Queensland (EVAWQ) is the peak body for violence against women in Queensland, incorporating sexual violence, women's health, women's refuges and domestic and family violence services. We are committed to working with a broad range of stakeholders both government and non-government to end mens violence against women and children.

Below are the keys point we offer in respect to the amendment bill for your consideration.

#### **THE PENALTY**

The current maximum penalty for section 315A of the *Queensland Criminal Code* (QCC) is 7 years. No mandatory imprisonment penalty exists for strangulation in Queensland, and Courts retain wide discretion for deciding the types of penalties imposed for such offences.<sup>1</sup> The proposal is to increase the penalty to 14 years.

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<sup>1</sup> Queensland Sentencing Advisory Council, *Choking, suffocation or strangulation in a domestic setting* (May 2019) 8 <[https://www.sentencingcouncil.qld.gov.au/data/assets/pdf\\_file/0004/614749/sentencing-spotlight-on-choking-suffocating-or-strangulation-in-a-domestic-setting.pdf](https://www.sentencingcouncil.qld.gov.au/data/assets/pdf_file/0004/614749/sentencing-spotlight-on-choking-suffocating-or-strangulation-in-a-domestic-setting.pdf)>.

## Non-fatal Strangulation as an Indicator of Homicide

It is widely documented in academic and medical literature that choking, strangulation, suffocation including any behaviour which obstructs the victim's airway or blood flow by any means, is a key predictor of domestic homicide.<sup>2</sup> The Queensland Domestic and Family Violence Death Review and Advisory Board reported in its 2017-18 Annual Report that choking and strangulation were prevalent in 29.5 per cent of the intimate partner homicides reviewed.<sup>3</sup> This association between prior strangulation and homicide was explained by Coroner Nerida Wilson in the non-inquest findings into the death of Rinabel Tiglao Blackmore, whereby Coroner Wilson stated:

According to the World Health Organisation statistics, ... research [suggests] that the odds of becoming an attempted homicide victim increase by 700 per cent, and the odds of becoming a homicide victim increase by 800 per cent for women who had previously been strangled by their partner.<sup>4</sup>

It is also important to note that strangulation is recognised as a dangerous form of domestic violence against women in particular,<sup>5</sup> with the Queensland Sentencing Advisory Council (QSAC) finding that 98.3% of offenders were male in the 2016-18 sentencing spotlight.<sup>6</sup>

EVAWQ supports the proposed increase in penalty for section 315A to adequately reflect

<sup>2</sup> Ibid 3; *R v MCW* [2019] 2 Qd R 344, [3] (Philippedes JA); *R v MDB* [2018] QCA 283, [45] (Bowskill J); The Taskforce, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Taskforce on Domestic and Family Violence Not Now, Not Ever Report, February 2015) 15, 122, 302 ('*Not Now, Not Ever Report*'); Nancy Glass, Kathryn Laughon, Jacquelyn Campbell, Anna Wolf Chair, Carolyn Rebecca Block, Ginger Hanson, Phyllis W Sharps, Ellen Taliaferro, 'Non-fatal strangulation is an important risk factor for homicide of women' (2008) *Journal of Emergency Medicine* 35(3) 329; Domestic and Family Violence Protection Act 2012 Benchbook (Sixth Edition, October 2019) 62 <[https://www.courts.qld.gov.au/data/assets/pdf\\_file/0020/435026/dv-bench-book.pdf](https://www.courts.qld.gov.au/data/assets/pdf_file/0020/435026/dv-bench-book.pdf)>; Ursula Neumayer-Stewart, 'Has Queensland's Recent Domestic Violence Legislation Been a Success?' *Insight Thomson Reuters* (Legal Commentary and Opinion, 9 August 2019) <<https://insight.thomsonreuters.com.au/legal/posts/has-queenslands-recent-domestic-violence-legislation-been-a-success>>.

<sup>3</sup> Domestic and Family Violence Protection Act 2012 Benchbook (Sixth Edition, October 2019) 61 <[https://www.courts.qld.gov.au/data/assets/pdf\\_file/0020/435026/dv-bench-book.pdf](https://www.courts.qld.gov.au/data/assets/pdf_file/0020/435026/dv-bench-book.pdf)>; National Domestic and Family Violence Bench Book, *Factors affecting risk* (July 2019) <<https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/factors-affecting-risk/>>.

<sup>4</sup> Domestic and Family Violence Protection Act 2012 Benchbook (Sixth Edition, October 2019) 61 <[https://www.courts.qld.gov.au/data/assets/pdf\\_file/0020/435026/dv-bench-book.pdf](https://www.courts.qld.gov.au/data/assets/pdf_file/0020/435026/dv-bench-book.pdf)>.

<sup>5</sup> Manisha Joshi, Kristie A Thomas and Susan B Sorenson "'I didn't know I could turn colors': Health problems and health care experiences of women strangled by an intimate partner' (2012) *Social Work in Health Care* 51(9) 798, 800; Daniel Berrios and Deborah Grady 'Domestic violence: Risk factors and outcomes' (1991) *Western Journal of Medicine* 155(2) 133; Glass et al (n 2); Lee Wilbur, Michelle Highley, Jason Hatfield, Zita Surprenant, Ellen Taliaferro, Donald Smith Jr and Anthony Paolo 'Survey results of women who have been strangled while in an abusive relationship' (2001) *Journal of Emergency Medicine* 21(3) 297.

<sup>6</sup> Queensland Sentencing Advisory Council (n 1) 2.

the severity and lethality of the offender's choice to strangle, choke, suffocate or obstruct the airway or bloodflow of a woman or child.

### **Health Implications of Strangulation**

Even where strangulation does not result in completed homicide, there remain a number of critical health implications that arise from this violent behaviour. A study conducted by Campbell et al.<sup>7</sup> found that non-fatal strangulation can create severe and long lasting negative health outcomes such as carotid artery dissection, strokes and seizures.<sup>8</sup> Other substantial physical (e.g., throat and neck injuries, breathing problems), neurological (e.g., loss of sensation, speech problems, impairments of memory and executive function)<sup>9</sup> and psychological (e.g., PTSD, insomnia, depression) problems are associated with choking, strangulation and suffocation.<sup>10</sup> Consistent with the recognition in the literature that strangulation is part of a cycle of escalating violence,<sup>11</sup> women who reported strangulation were also found to report higher rates of domestic violence across all types of physical, sexual and psychological violence.<sup>12</sup>

Many women who have experienced non-lethal strangulation describe that they have difficulty recalling events which happened before or after the strangulation making it challenging for police to obtain victim testimony as required to successfully prosecute the offence. Additionally external physical markings of the strangulation may not present on the victim. These factors contribute to deficits in the ability for perpetrators to be held accountable for their use of this violence within the judicial system, resulting in women and children survivors remaining at high levels of risk of future harm or homicide.

### **Increasing the Penalty to Increase Perpetrator Accountability**

EVAWQ acknowledges that there are issues associated with the increased penalty (outlined below); however, on balance, we believe the increased penalty goes towards increasing perpetrator accountability and potentially reducing the choice of men to use this

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<sup>7</sup> Jacquelyn Campbell, Nancy Glass, Phyllis Sharps, Kathryn Laughon and Tina Bloom 'Intimate partner homicide: review and implications of research and policy' (2007) *Trauma Violence Abuse* 8(3) 246 cited in Kathleen Monahan, Archana Purushotham and Anat Biegon, 'Neurological Implications of nonfatal strangulation and intimate partner violence' (2019) *Future Neurology* 14(3).

<sup>8</sup> Monahan et al (n 7); Joshi et al (n 5).

<sup>9</sup> Monahan et al (n 7).

<sup>10</sup> Joshi et al (n 5) 801; Wilbur et al (n 5).

<sup>11</sup> Mona Mittal, Kathryn Resch, Corey Nichols-Hadeed, Jennifer Thompson Stone, Kelly Thevenet-Morrison, Catherine Faurot, Catherine Cerulli 'Examining Associations between Strangulation and Depressive Symptoms in Women with Intimate Partner Violence Histories' (2019) *Violence and Victims* 33(6) 1072; Adam Pritchard, Amy Reckdenwald and Chelsea Nordham, 'Nonfatal Strangulation as Part of Domestic Violence: A Review of Research' (2017) *Trauma, Violence & Abuse* 18(4) 407, 413, 419.

<sup>12</sup> Mittal et al (n 11).

type of violence.

EVAWQ strongly supports amendments to the legislation which increases safety for women and children and recognises the evidence-base for increased risk of homicide and long-term physical and mental health impacts of choking, strangulation, suffocation and behaviours designed to block the airway and bloodflow.<sup>13</sup>

Despite well documented research and clinical analysis of long-term physical and mental health impacts the average sentence of perpetrators was 1.9 years imprisonment for strangulation cases finalised from 1 July 2016 to 30 June 2018.<sup>14</sup> Custodial sentences of 4 years imprisonment have been appealed as manifestly excessive in the cases of *R v MCW* [2018] QCA 241 and *R v MDB* [2018] QCA 283, despite the violence occurring within the context of a pattern of abusive conduct. Given that judges have regard to the maximum penalty when ordering a custodial sentence, EVAWQ submits that an increase in the maximum penalty would result in sentences which more adequately reflect the severity of the violent behaviour. The case law regarding sentencing for strangulation has emphasised the importance of personal and general deterrence, in addition to community protection and denunciation, as critical factors highlighted in sentencing.<sup>15</sup> EVAWQ believes that increasing the maximum penalty for this offence will make the offence more consistent with sentencing principles and factors.

### **Potential Unintended Consequences with Increasing the Maximum Penalty**

Furthermore, there may be unintended consequences with increasing the maximum penalty including a potential decline in guilty pleas which currently make up 99 per cent of all plea types.<sup>16</sup> Due to the existing high rates of guilty pleas and the increasing higher sentences recognising the dangerousness inherent to the offence, EVAWQ supports increasing the maximum penalty.<sup>17</sup> It may also be acknowledged that increasing the penalty may see a rise of the accused entering into plea negotiation deals favouring other charges including assault occasioning bodily harm, which in turn fails to identify the defendant's criminal history of strangulation. This is significant as prior non-lethal strangulation offending is a precursor to further future offending often resulting in serious injury or death.<sup>18</sup> Finally, it is also important to note that increasing the maximum penalty

<sup>13</sup> *R v Major; Ex parte A-G (Qld)* [2012] 1 Qd R 465; [2011] QCA 210, [53] (McMurdo P).

<sup>14</sup> Neumayer-Stewart (n 2); Sentencing Advisory Council (n 1) 2.

<sup>15</sup> Explanatory Statement of Compatibility, Criminal Code and Another Act (Choking in Domestic Settings) Amendment Bill 2; *R v MCW* [2019] 2 Qd R 344, [21] (Mullins JA); *R v MDB* [2018] QCA 283, [44] (Bowskill J); *R v Major; Ex parte A-G (Qld)* [2012] 1 Qd R 465; [2011] QCA 210, [53] (McMurdo P).

<sup>16</sup> Sentencing Advisory Council (n 1) 5.

<sup>17</sup> John Robertson (QSAC Chair), *Clear picture of strangulation offenders emerges from first data analysis* (QSAC Media Release, May 2019) 1; *R v MCW* [2018] QCA 241; *R v MDB* [2018] QCA 283.

<sup>18</sup> Heather Douglas and Tanja Stark 'Stories from Survivors: Domestic Violence and Criminal Justice Interventions' (Research Paper, T.C. Beirne School of Law, The University of Queensland 2010) 63-64.

may infringe the offender's right to liberty and security under section 29 of the *Human Rights Act*, particularly subsection (1) which provides that a person must not be subjected to arbitrary arrest or detention.<sup>19</sup> This potential infringement needs to be weighed against the community protection and perpetrator accountability benefits as well as the protection of families under section 26 of the *Human Rights Act*.<sup>20</sup>

Overall, EAWQ supports increasing the maximum penalty to better reflect the seriousness of the offence and continue to hold perpetrators to account.

## SERIOUS VIOLENT OFFENCE SCHEDULE

EAWQ recognise the evidence and research which reflect the seriousness of impacts on victim survivors and believe that this needs to be demonstrated in the inclusion of this offence in the Serious Violent offender Schedule. Consequently, offenders must serve 80 per cent of their imprisonment sentence which would lead to an increase from the current average of 1.9 years served.<sup>21</sup> Subsequently, bringing it in line with inherently dangerous and associated offences including attempted murder, grievous bodily harm with intent and grievous bodily harm, thus meeting the policy objectives of the bill.<sup>22</sup> In conclusion, EAWQ supports the inclusion of this offence in the serious violent offence schedule.

## THE DEFINITION

Section 315A does not currently contain any definitions regarding choking, suffocation or strangulation in a domestic setting. We believe that incorporating definitions within the offence serves to encapsulate the range of experiences described by victim survivors and provides clarity to enable appropriate judicial outcomes.<sup>23</sup> Additionally, the definitions make section 315A consistent with the legislative principle outlined in section 4(3)(k) of the *Legislative Standards Act 1992*.<sup>24</sup>

In the recent case of *R v HBZ* [2020], clinical forensic medical officer Dr Home explained in cross-examination that 'people interpret the difference between choking and strangulation

<sup>19</sup> *Human Rights Act 2019* (Qld) s 29(1).

<sup>20</sup> *Human Rights Act 2019* (Qld) s 26.

<sup>21</sup> *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) s 22, 23, 24.

<sup>22</sup> *Penalties and Sentences Act 1992 Schedule 1 (Serious Violent Offences) Criminal Code* (Qld) s 16 (s 306 QCC), s 20 (s 317 QCC), s 25 (s 320 QCC); Explanatory Notes, Criminal Code and Another Act (Choking in Domestic Settings) Amendment Bill 2020 (Qld) 1.

<sup>23</sup> *R v HBZ* [2020] QCA 73 (Mullins J); Michael Gatenby, 'Choking Amendment Bill 2020' *Gatenby Law* (Legal Commentary, 22 May 2020) <<https://gatenbylaw.com.au/choking-amendment-bill-2020/?fbclid=IwAR1ulwqNj43Kts-mbBOzz2mHCZzuuTkInUMYNxRaHrtTqglhBicY1-K8zsU>>; Explanatory Statement, Criminal Code (Choking In Domestic Settings) And Another Act Amendment Bill 985.

<sup>24</sup> Explanatory Notes, Criminal Code and Another Act (Choking in Domestic Settings) Amendment Bill 2.

differently'.<sup>25</sup> Despite the strong association between strangulation, and its increased lethality and harm, it is often misidentified or minimised by victims, first-responders and the courts.<sup>26</sup> This lack of recognition of the severity and even occurrence of the conduct is critical as it can result in the conduct not being adequately prosecuted. Therefore, a clear, broad definition that encapsulates the low amount of force required to cause severe damage or death is critical in order to prosecute and deter the wide range of conduct which can constitute 'choking', 'strangulation' or 'suffocation'.

A concern with the existence of definitions is that it may enable defence counsel to argue the alleged conduct did not fall within the definition.<sup>27</sup> However, we believe that the incorporation of a definition would allow the seriousness of choking, strangulation or suffocation conduct to be sufficiently recognised, prosecuted and thereby deterred. Therefore, overall we support the inclusion of a definition.

## REMOVAL OF CONSENT

As found in Criminal Code 1899, Section 348 the definition of consent is :

In this chapter,

"**consent**" means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

(2) Without limiting *subsection (1)* , a person's consent to an act is not freely and voluntarily given if it is obtained—

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

When considering the use of power and control tactics used by perpetrators of violence, EVAWQ believe that the consent provisions should be removed as an element of the offence. The consent element fails to acknowledge the nuanced ways in which coercion and intimidation are used by perpetrator of violence against women. For example, a woman experiencing domestic and family violence may not object to abuse in order to prevent the perpetrator attacking their children, or to avoid an alternative act or violence by the perpetrator, therefore consent has not been provided in the context of the definition and the ability to evidence the lack of consent to endure perpetrator accountability through the justice system is undermined. Moreover, other jurisdictions in

<sup>25</sup> R v HBZ [2020] QCA 073, [17].


<sup>26</sup> Wilson (n 15) 26; The Taskforce (n 2) 302.

<sup>27</sup> The Taskforce (n 2) 303.

Australia do not have the element of consent in similar offences, and where they do, it may hinder the effectiveness of the offence. For these reasons, EVAWQ advocates for the element of consent to be removed from this offence.

Thank you again for the opportunity to provide a submission on this amendment Bill.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'A Butcher', with a horizontal line extending from the end.

**Dr Anne Butcher**  
**President**  
**Ending Violence Against Women Queensland**



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