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Legislation Scrutiny Committee

GPO Box 3721
DARWIN NT 0801

By Email: LSC@nt.gov.au

84 Hartley Street
PO Box 2109
Alice Springs NT 0871

ABN 98 302 021 142
ACN 302 021 142
ICN No. 4760

FREECALL: 1800 088 884
Phone: 08 8953 6355
Fax: 08 8953 6749
Email: caafllu@caafllu.com.au

Dear Sir/Madam,

**SUBMISSION TO THE LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY LEGISLATION
SCRUTINY COMMITTEE | JUSTICE LEGISLATION AMENDMENT (DOMESTIC AND FAMILY
VIOLENCE) BILL 2019 (NT)**

The Central Australian Aboriginal Family Legal Unit (**CAAFLU**) welcomes the opportunity to make a submission to the Legislative Assembly of the Northern Territory (**NT**) Legislation Scrutiny Committee regarding the proposed *Justice Legislation Amendment (Domestic and Family Violence) Bill 2019 (NT)* (the **Bill**).

1. ABOUT THE CENTRAL AUSTRALIAN ABORIGINAL FAMILY LEGAL UNIT

CAAFLU was established in 2000 and is one of 13 Family Violence Prevention Legal Services currently operating in Australia. CAAFLU's mission is to provide culturally appropriate legal and support services to Aboriginal and Torres Strait Islander people who have experienced, or are experiencing, family violence or sexual assault in Central Australia and the Barkly Region.

2. THE BILL

The NT Government tabled the Bill in Parliament on 28 November 2019. The Bill creates a new offence of choking, strangling or suffocating in a domestic relationship. Section 186AA(1) defines the elements of the offence as:

- (a) the person is in a domestic relationship with another person; and
- (b) the person intentionally chokes, strangles or suffocates the other person; and
- (c) the other person does not consent to the choking, strangling or suffocating and the person is reckless in relation to that circumstance.

In accordance with section 186AA(4), 'chokes, strangles or suffocates' includes where a person:

- (d) applies pressure, to any extent, to the person's neck;



- (e) obstructs, to any extent, any part of the person's:
 - (i) respiratory system; or
 - (ii) accessory systems of respiration;
- (f) interferes, to any extent, with the operation of the person's:
 - (i) respiratory system; or
 - (ii) accessory systems of respiration;
- (g) impedes, to any extent, the person's respiration.

The offence requires the prosecution to prove that consent was not provided and that the defendant was reckless to that circumstance.¹ It is a strict liability offence which carries a maximum penalty of five years imprisonment. To avoid doubt, the offence constitutes 'domestic violence' under section 5 of the *Domestic and Family Violence Act 2007*.

We do note, however, that the definition of "chokes, strangles or suffocates" in the NT Bill is framed more broadly, such that the act of choking, strangling or suffocating can result from 'applying pressure to a person's neck' or 'interfering...with a person's respiratory system'. This mirrors the wording of *Crimes Act 1900* (ACT) but differs slightly to other jurisdictions, such as the proposed Bill in WA, which requires a person to "unlawfully impedes another person's normal breathing, blood circulation, or both". A broader, victim-centric interpretation recognises that choking, strangling or suffocating can occur in different contexts and to varying degrees, including circumstances where the offence is committed without the intention to kill but rather as a tactic to exert power over the victim.

In regards to the inclusion of non-consent as an element to prove the offence, we note the legislative discrepancies between the States and Territories. New South Wales, Queensland and South Australia require proof of an absence of consent, whereas the Australian Capital Territory and the Western Australian Bill rely on the conduct being of an 'unlawful' nature. Although we recognise that this language may be standard wording in other criminal offences, we recommend that the wording of this Bill relating to the element of consent be considered carefully to avoid placing an excessive onus of proof on the prosecution to establish the offence and to ensure that a victim-centric approach is adopted.

The Bill, if passed, will bring the NT in line with South Australia, Queensland, New South Wales and the Australian Capital Territory, facilitating a consistent approach across the country in recognising the seriousness of choking, strangulation and suffocation as a precursor to domestic violence homicide.

3. SUBMISSION

CAAFLU supports the introduction of the *Justice Legislation Amendment (Domestic and Family Violence) Bill 2019* as currently drafted. CAAFLU recognises that there is an urgent need for legislative change to ensure that that the acts of choking, strangulation

¹Explanatory Memorandum, *Justice Legislation Amendment (Domestic and Family Violence) Bill 2019* (NT).

and suffocation receive judicial treatment commensurate to the risk it imposes on victims of domestic violence. As demonstrated by the cases and research, where an act of strangulation has occurred, particularly in the context of domestic violence, there is an inherent danger of further and more serious offending and the creation of a new offence, rather than simply relying on existing criminal offences introduces a penalty for this type of behaviour and recognises the danger of non-fatal strangulation before further escalation. Introducing such an offence will be more effective in holding perpetrators accountable for serious offending and that strangulation is treated commensurate with the risk it creates for the victim and remove the necessity of proving visible injuries or the intent to cause injuries.

South Australia, Queensland, New South Wales and the Australian Capital Territory have created a separate non-fatal strangulation offence, and the Western Australian *Family Violence Legislation Reform Bill 2019* is currently in its second reading stage (see [Annexure A](#) for a comparison of these laws). These laws are designed to recognise strangulation as a heightened risk factor for further perpetration of violence, including domestic homicide. The legislation varies in each jurisdiction with respect to language, application and requirements including, for example, that the NSW and ACT offence do not have a specific nexus to the domestic setting.

The offences of strangulation as contained in current Northern Territory and Tasmania legislation however require proof of an additional element that the conduct was accompanied by an intention to commit a separate indictable offence. Victoria is the only state which has no specific offence of strangulation or choking and relies on general criminal law provisions of injurious behaviour, such as assault. However, there has been a recent push towards the introduction of a stand-alone offence for non-fatal strangulation in both Tasmania and Victoria. If the Bill is not passed, the NT will lag behind in the nation-wide progression towards greater protection of domestic violence victims.

However, we emphasise that in Indigenous communities, victims often experience pressure from families and the wider community not to press charges, have their partners imprisoned or removed from the community and this can lead to hesitation in reporting to the police. Therefore, it is important to take into account these cultural barriers and the existing high rates of family violence among Aboriginal women in the NT and consider legislating for the targeting and monitoring of repeat offenders by the police as well as alternative intervention methods that recognises the importance of family and community ties. Additionally, given concerns have been raised about whether incarceration necessarily improves the safety outcomes for victims, as imprisonment may not deter future domestic violence in the long term, other rehabilitation programs that support behaviour change should also be considered.

The issues raised in this submission, and the examination of other jurisdictions' legislation demonstrate the need for, and widespread acceptance of, laws which establish strangulation as a separate indictable offence. A comparison of the current laws in other Australian states and territories, justifies the wording proposed in the NT legislation, as it takes a broadly similar form.

4. **BACKGROUND AND CONTEXT**

Strangulation is recognised as a significant predictor for homicide of domestic violence victims. The 1996 San Diego Strangulation Study revealed that a woman who has been choked or strangled by her partner is seven times more likely to be murdered by that

person.² It is a form of power which serves to intimidate, coerce, control and physically harm the victim³ – most abusers do not strangle to kill, rather they strangle to show that they can kill.⁴ Reform in this area is crucial as a preventative measure against further and more severe forms of violence, and ensuring that perpetrators are held accountable for their actions.

The introduction of strangulation as a stand-alone offence has been successful in other Australian jurisdictions. In Queensland, there have been 482 prosecutions for strangulation or suffocation in a domestic setting between 2016-2019.⁵ This has also prompted training for first responders on the dangers of non-fatal strangulation, given that strangulation often results in minimal to no visible injury.⁶ Greater awareness of the risks is crucial in order to reduce the misidentification by police and prosecutorial authorities of strangulation as a less serious event.⁷

5. THE CURRENT POSITION IN THE NORTHERN TERRITORY

There is currently no separate offence for strangulation in the Northern Territory. The current laws on strangulation as contained in section 175 of the *Criminal Code Act 1983* (NT) only applies where a person "calculated to choke, suffocate or strangle with the 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" and renders a person "incapable of resistance". Under this provision, the offender, if found guilty is liable to imprisonment for life. However, this provision only operates where the strangulation occurs in the commission of another indictable offence and results in the victim being rendered incapable of resistance. Thus, as the title of the provision suggest, it only operates as a disabling offence rather than one that recognises that strangulation as a serious criminal act in itself, not dependent on the enablement of another criminal act and can inflict long-lasting trauma on a victim without rendering them unconscious or "incapable of resistance".

Alternatively, strangulation may be captured as endangerment offence under Division 3A of the *Criminal Code Act 1983* (NT), or as common assault under Division 5 of the same Act. However, this may conceal the dangers and risks associated with strangulation in the assessment of bail, sentence and parole.

The serious risks associated with such acts was discussed in a Court of Criminal Appeal (NT) case in 1992 when the victim died from a choke hold applied to her neck during sexual intercourse. Justice Angel noted that "a practice involving partially strangling a person by applying pressure to that person's neck is very dangerous" and reiterated the "serious nature of the crime" as well as the "need for general deterrence against acts

² Gael B. Strack and Caey Gwinn, 'On the Edge of Homicide: Strangulation as a Prelude' (2011) 26(3) *Criminal Justice*.

³ Victoria, Royal Commission Into Family Violence (RCFV), (2016).

⁴ Gael B. Strack and Caey Gwinn, 'On the Edge of Homicide: Strangulation as a Prelude' (2011) 26(3) *Criminal Justice*.

⁵<https://www.abc.net.au/news/2019-05-22/strangulation-offences-domestic-violence-cases-law-queensland/11135914?pfmredir=sm>

⁶ Gael B. Strack, George E. McClane and Dean Hawley, 'A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues' (2001) 21 *Journal of Emergency Medicine*, 303.

⁷ Heather Douglas and Robin Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (2014) 36 *Sydney Law Review*, 231.

such as those of the applicant (even if rare and...we have no way of gauging its prevalence or otherwise)".⁸

6. THE POSITION IN OTHER AUSTRALIAN STATES AND TERRITORIES

Non-fatal strangulation is a separate offence in South Australia, Queensland, New South Wales and the Australian Capital Territory. Western Australia is currently in the process of passing the *Family Violence Legislation Reform Bill 2019* which will achieve the same effect. Tasmania has offences of strangulation however require proof of an additional element that the conduct was accompanied by an intention to commit a separate indictable offence. Victoria is the only state which has no specific offence of strangulation. A detailed comparison of these schemes is included at Annexure A of this report.

6.1 General themes and principles

The themes and practices discussed below would likely influence any potential law reform in the NT. There is generally a broad acceptance of the principles which underpin the need for this legislation and its importance for victims, with some variations in language and practical operation.

Outside of the NT, we have identified some general themes which are common across the jurisdictions, namely:

- a) For some jurisdictions in which strangulation is a stand-alone offence, the operation of consent is relevant;
- b) Where these terms are defined in legislation, the interpretation of "choke, strangle or suffocate" is broadly similar across jurisdictions and does not require the victim's breathing to stop, but to be impeded or interfered with;
- c) An element of the offence includes rendering the victim 'insensible', unconscious' or 'incapable of resistance' in some jurisdictions such as NSW; and
- d) Strangulation can act as an aggravating factor for the commission of another indictable offence.

6.2 Variations

The laws, however, are not uniform and there are some fundamental differences between how the laws operate in each of the jurisdictions, namely:

- a) intention to cause harm is only relevant in some jurisdictions;⁹
- b) the domestic setting is relevant in only South Australia and Queensland and extends beyond intimate partner relationships to incorporate family relationships;
- c) the ACT and SA are the only jurisdictions where it is a separate offence to deliberately choke someone into unconsciousness with no intention to kill or commit some other indictable offence;

⁸ *Maurice v The Queen* (1992) 2 NTLR 115, 121-122.

⁹ Relevant in the ACT and NSW; not relevant in QLD and SA.

d) in Queensland, assault is not an element of the unlawful strangulation;

7. COMMENTARY AND INTERNATIONAL JURISDICTIONS

For further background information, media commentary on this topic and the position in international jurisdictions such as the UK, US, New Zealand and Canada have been summarised at Annexure B. Strangulation as a stand-alone offence has been recognised in United States and New Zealand.

There is US data that show victims who have been strangled by their violent partner are seven times more likely to later be killed or seriously harmed than a woman who has been physically assaulted or threatened by a current or former intimate partner but not previously strangled.¹⁰ Further research found that after the introduction of a non-fatal strangulation offence in New York ten years ago, some perpetrators, who had previously avoided any punishment because of a lack of visible injuries, faced criminal sanctions for non-fatal strangulation.¹¹

We emphasise that in Indigenous communities, victims often experience pressure from families and the wider community not to press charges or have their partners imprisoned or removed from the community and this can lead to hesitation in reporting to the police. Therefore, it is important to take into account these cultural barriers and the existing high rates of family violence among Aboriginal women in the NT and consider legislating for the targeting and monitoring of repeat offenders by the police as well as alternative intervention methods that recognises the importance of family and community ties. Additionally, given concerns have been raised about whether incarceration necessarily improves the safety outcomes for victims, as imprisonment may not deter future domestic violence in the long term, other rehabilitation programs that support behaviour change should also be considered in the broader context of sentencing.

Please let us know if you have any questions or require further information about our work.

Yours faithfully

CAAFLU

Aboriginal Corporation



Carol Smith
Principal Legal Officer

¹⁰ Gael B. Strack and Casey Gwinn, "On The Edge Of Homicide: Strangulation As A Prelude" (2020) 26(3) *Criminal Justice*.

¹¹ New York State Division of Criminal Justice Services, *Arrests And Arraignments Involving Strangulation Offenses Nov. 11, 2010 – June 30, 2012* (National Criminal Justice Reference Service, 2012).

ANNEXURE A
JURISDICTIONAL COMPARISON – NATIONAL

AUSTRALIAN CAPITAL TERRITORY

*Crimes Act
1900 (ACT)*

Section 27: Acts endangering life etc

(1) In this section:

choke, a person, includes apply pressure, to any extent, to the person's neck.

strangle, a person, includes apply pressure, to any extent, to the person's neck.

suffocate, a person, includes the following:

(a) obstruct, to any extent, any part of the person's –

(i) respiratory system; or

(ii) accessory systems of respiration;

(b) interfere, to any extent, with the operation of the person's –

(i) respiratory system; or

(ii) accessory systems of respiration;

(c) impede, to any extent, the person's respiration.

(3) A person who intentionally and unlawfully –

(a) chokes, suffocates or strangles another person so as to render that person insensible or unconscious or, by any other means, renders another person insensible or unconscious...

is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

(4) A person who does an act referred to in subsection (3) –

(a) intending to commit an indictable offence against this part punishable by imprisonment for a maximum period exceeding 10 years; or

(b) intending to prevent or hinder his or her lawful apprehension or detention or that of another person; or

(c) intending to prevent or hinder a police officer from lawfully investigating an act or matter that reasonably calls for investigation by the officer;

is guilty of an offence punishable, on conviction, by imprisonment for 15 years.

Section 28: Acts endangering health etc

(1) In this section:

choke, a person – see section 27(1).

strangle, a person – see section 27(1).

suffocate, a person – see section 27(1).

(2) A person who intentionally and unlawfully –

(a) chokes, suffocates or strangles another person...

is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

Case law	<p><i>R v Green (No 3) [2019] ACTSC 96</i></p> <p>Green was charged with two counts of offences under s 28(2)(a) against his mother who he resided with.¹² It was alleged he placed his hands around her neck and squeezed, causing her to feel dizzy, and took a pillow and placed it over her head to smother her.¹³ At this stage, the terms "choke", "strangle" and "suffocate" were not defined in the Act.</p> <p>Loukas-Karlsson J noted at [38] that: "In the ACT, s 28(2)(a) has only arisen in circumstances which did not call for the consideration of the construction of the elements"</p> <p>Thus, Loukas-Karlsson J decided that the "choke", "strangle" and "suffocate" element should be interpreted as "stopping, rather than merely impeding the breath".¹⁴</p> <p>As the evidence was, at its highest, unable to demonstrate that there was a stopping of the breath, Loukas-Karlsson J directed the jury to return two counts of not guilty.¹⁵</p>
Commentary	<p>1. Amendments in 2015</p> <p>The <i>Crimes Act 1900</i> (ACT) was amended by the <i>Crimes (Domestic and Family Violence) Legislation Amendment Bill</i> (ACT) to include s 28(2)(a). The explanatory memorandum states at page 1 that this was "to reflect that strangulation that does not cause unconsciousness is still an act that endangers health".</p> <p>2. The Laws of Australia (current to 1 Nov 2018)¹⁶</p> <p>This commentary noted that "it is surprising that the Australian Capital Territory is the only jurisdiction where it is a separate offence to deliberately choke somebody into unconsciousness where there is no intention to kill or commit some other indictable offence. In the other jurisdictions, the offence of choking, suffocating or strangling is one of ulterior intent, in that there must be an intent to facilitate the commission of a separate indictable offence, or in some cases, to facilitate the flight of an offender after the commission of an offence."</p> <p>3. Amendments in 2019</p> <p>The <i>Crimes Act 1900</i> (ACT) was amended on 15 August 2019 by the <i>Crimes Legislation Amendment Act 2019</i> (ACT) to insert the definitions of "choke", "strangle" and "suffocate" as they now stand in s 27 of the Act. Prior to that the words appeared in s 27(3)(a) and s 28(2)(a) but were not defined anywhere in the Act.</p> <p>The explanatory memorandum to the amending legislation specifically referenced the case of <i>R v Timothy James Green (No 3) [2019] ACTSC 96</i> and stated at page 20 that the interpretation of "choke", "strangle" and "suffocate" in the case "was not the original policy intent". Instead, "the original policy intent was to recognise the serious impacts on long-term health and the increased risk of mortality when any pressure is applied to the neck". Thus, the new definitions were brought in following discussions with representatives from the DPP, ACT and a Forensic Medical</p>

¹² *R v Green (No 3)* (2019) 344 FLR 324, 2.

¹³ *R v Green (No 3)* (2019) 344 FLR 324, 2.

¹⁴ *R v Green (No 3)* (2019) 344 FLR 324, 46.

¹⁵ *R v Green (No 3)* (2019) 344 FLR 324, 85.

¹⁶ Westlaw AU, *Halsbury's Laws of Australia* (online at 16 January 2020) 10 Criminal Offences, '3 Offences Endangering Life or Personal Safety' [10.2.420].

	<p>Specialist from Canberra Health Services "to ensure that the offences reflect the medical and substantial harm to people caused by any degree of choking, strangling or suffocating a person".</p> <p>Since this amending legislation was brought into force on 15 August 2019, there have been no cases to test new definitions.</p>
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NEW SOUTH WALES	
Crimes Act 1900 (NSW)	<p>Section 37 creates three offences in relation to strangulation:</p> <p>s 37(1A) A person is guilty of an offence if the person intentionally chokes, suffocates or strangles another person without the other person's consent.</p> <p>Maximum penalty: imprisonment for 5 years.</p> <p>s 37(1) A person is guilty of an offence if the person:</p> <ul style="list-style-type: none"> (a) intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and (b) is reckless as to rendering the other person unconscious, insensible or incapable of resistance. <p>Maximum penalty: imprisonment for 10 years.</p> <p>s 37(2) makes it an offence to choke, suffocate or strangle another person with intent to commit another indictable offence</p> <ul style="list-style-type: none"> (a) chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and (b) does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, another indictable offence. <p>Maximum penalty: imprisonment for 25 years.</p>
Case Law	<p>1. Daaboul v R [2019] NSWCCA 191</p> <p>The 2019 NSW Court of Criminal Appeal case concerns a charge under s 37(2) and demonstrates the high burden of proof required to prove all the elements of a section 37 offence. At [233], Chief Justice Bathurst states:</p> <p style="padding-left: 40px;">"... the elements of s 37(2) of the Crimes Act 1900 (NSW) requires the jury to be satisfied beyond reasonable doubt, first, that the choking was such as to render the victim unconscious, insensible or incapable of resistance and, secondly, that it was done with the intention of enabling the offender to commit another indictable offence. The jury may well have been satisfied that the choking occurred but not be satisfied beyond reasonable doubt that it had the effect on the complainant required by the section, or that the applicant at the time of the choking had the requisite intention to commit another indictable offence."</p> <p>2. R v Green (No 3) [2019] ACTSC 96</p> <p>The 2019 ACT Supreme Court case considers the effect of the various Section 37 offences. In relation to the s 37(1) and s 37(2) language of "rendering the other person unconscious, insensible or incapable of resistance", an examination of NSW case law shows that this offence often arises in circumstances where the victim has stopped breathing. Further, in relation to the language of "chokes, suffocates or strangles", case law demonstrates that such terms do not require that the alleged perpetrator have an intent to kill. While it is noted that there is limited judicial</p>

	<p>consideration of the language in the new s 37(1A), Justice Loukas-Karlsson does point to extrinsic material that suggests a lower standard of stopping the breath may be adopted.</p>
<p>Commentary</p>	<p>1. Crimes Act 1900 (NSW) – Second Reading Speech</p> <p>The second reading speech of the Attorney General in proposing the new s 37(1) sheds further light on its intended operation. A number of key passages are extracted below:</p> <p>"This offence... will apply to the offender who may not have an intention to kill but simply an intention to overpower."</p> <p>"The phrase 'incapable of resistance' ... addresses the domestic violence scenario when a victim is placed in a state of such fear by the offender's actions that he or she is incapable of resisting the offender."</p> <p>"The new provision under section 37(1)(a) requires an intentional act on behalf of the offender. This both reflects the seriousness of the offence and ensures that unintentional acts when transient or inadvertent suffocation may occur... are not covered. It is not intended to capture such behaviour when both participants have freely entered into the activity and the strangulation is an accidental and unintended incident of that activity. However, intention as to the outcome of the act of strangulation is not required under section 37(1)(b). The offence will be established where an offender is reckless as to whether or not a victim is rendered insensible, unconscious or incapable of resistance as a result of the offender's actions."</p> <p>Similar background is provided by the second reading speech introducing the new form of s 37(2), extracted below:</p> <p>"Two steps will be required for proof of the aggravated offence: the act of strangulation, and the intent to commit a separate offence. An example would be when an offender strangles a victim for the purpose of then sexually assaulting the victim. This definition reflects, but adds greater clarity to, the reference in the current section 37 to 'an indictable offence'."</p> <p>2. Domestic Violence Death Review Team Report¹⁷</p> <p>The Team called for a review of the operation of section 37 by the NSW Attorney General. In particular, they expressed concern that alleged perpetrators of strangulation offences were frequently being charged with common assault or other assault offences, due to the difficulty of proving the elements of section 37.</p> <p>This call for legislative review was echoed by the Redfern Legal Centre in their briefing paper <i>Strangulation in the Context of Domestic Violence</i>. The NSW Department of Justice commenced a review of the operation of section 37 based on these recommendations, which led to the introduction of s 37(1A).</p> <p>Data available from BOCSAR prior to the 2018 amendment introducing s 37(1A) shows that between 2014 and 2018, there were 831 finalised charges under s 37(1), 739 of which were domestic violence offences. Of these charges, 29.7% resulted in a guilty outcome, 16.7% resulted in a not guilty outcome, and 53.5% resulted in an outcome of "other" (including dismissal on mental health grounds, withdrawal by prosecution and other grounds for disposal).</p>

¹⁷ NSW Parliamentary Research Service, *NSW's strangulation offence: Time for further reform?*, Issues Backgrounder No 3 (2018).

Criminal Code 1899 (QLD)

1. Legislation Excerpt

s 315A Choking, suffocation or strangulation in a domestic setting

(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).

2. Statutory Interpretation

Key features of the offence

- The offence is an indictable offence and cannot be heard summarily.
- A higher maximum penalty of 7 years' imprisonment applies.
- The defence of provocation does not apply. Per section 315(2), assault is not an element of this offence and therefore provocation under sections 268 and 269 of the Criminal Code have no application to this offence.
- The term 'domestic relationship' is defined in section 1 of the Criminal Code and incorporates the definition from section 13 of the *Domestic and Family Violence Protection Act 2012* (Qld). It includes an "intimate personal relationship, a family relationship or an informal care relationship, as defined under the Act". "Associated domestic violence" is defined under section 9 and includes domestic violence towards a child of an aggrieved.

Definition of 'choke, suffocate or strangle'

- Established when an offender interferes with or stops the victim's breathing by squeezing the throat using hands or an implement such as a cord or rope, or by smothering. External compression on the throat or windpipe is sufficient to establish the act.¹⁸
- Permanent injury or death is not required for an offence under section 315A to be committed.
- Attempted choking, suffocation or strangulation is captured by the general attempts provision in section 535 of the Criminal Code.

Definition of 'domestic setting'

- A concern that was raised during the consultation process was the use of the term 'domestic setting' in the new offence title 'Choking, suffocation or strangulation in a domestic setting'.
- In the second-reading speech for the Bill, the Attorney-General noted that

¹⁸ *R v AJB* [2019] QDC 169 at [14], [16].

	<p>the use of the term 'domestic setting' is not intended to impose any limitation on the location of offending.¹⁹ While section 35C of the <i>Acts Interpretation Act 1954</i> (Qld) provides that a heading to a section forms part of the section, the term 'domestic setting' is not an element of the new offence. The term therefore must be read in the context of the offence, which provides no qualification on the location of the offending but provides the overall context or circumstances of the offence.</p> <p>3. Legislative Commentary</p> <ul style="list-style-type: none"> • The legislation is specific to Queensland and is not uniform with or complementary to Federal legislation or other State legislation. • While NSW and the ACT provide for offences of strangulation they do not have a specific nexus to the domestic setting. • Tasmania and NT also have offences of strangulation but these offences require proof of an additional element that the conduct was accompanied by an intention to commit a separate indictable offence. • SA, WA and Victoria have no specific offences of strangulation or choking but rather rely on more general offence provisions that deal with injurious behaviour (e.g. assault).
Case Law	<p>1. R v MDB [2018] QCA 283</p> <p>The parties in their sentencing submission relied on three 'comparable' domestic violence cases where the relevant offenders were sentenced to approximately 2-3 years imprisonment for assault occasioning bodily harm (note that the maximum penalty for this offence is also seven years' imprisonment).</p> <p>However during the sentencing review, in reasoning against the applicant's view that the sentence was manifestly excessive in light of the three authorities, the Court of Appeal gave weight to the fact that the creation of a separate offence under section 315A meant that sentences for an assault occasioning bodily harm should not be used as comparable authority:</p> <p>At [46]:</p> <p>"In this case, as at first instance in R v MCW, the learned sentencing judge imposed a sentence for the choking offence which was higher than that submitted by the prosecutor who submitted, by reference to two earlier decisions of single judges of the District Court, that a sentence of not less than two and a half years would be appropriate. As Mullins J said, at [43] of R v MCW, the test of whether the sentence imposed on the applicant was manifestly excessive is not determined by comparing the sentence selected by the sentencing judge with the submissions made by the parties as to the appropriate sentence. Such a submission is merely a statement of opinion. It is a matter for the sentencing judge, in the exercise of their discretion, to impose what they regard as the appropriate sentence, taking into account and balancing all the relevant factors that bear upon the sentence."</p> <p>2. R v MCW [2018] QCA 241</p> <p>In R v MCW at [21]: Deterrence was "a particularly significant factor", in terms of both deterring the applicant from further offending and sending an appropriate message to the community "to indicate that people who commit these offences will be dealt with in an appropriate and salutary way".</p>
Commentary	<p>1. Special Taskforce on Domestic and Family Violence in Queensland</p> <p>On 5 May 2016, Queensland introduced a stand-alone offence for non-fatal</p>

¹⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 April 2016, 1029, (Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills
https://www.parliament.qld.gov.au/documents/hansard/2016/2016_04_19_WEEKLY.pdf).

strangulation.

Under section 315A of the Queensland Criminal Code, a person commits this offence if they unlawfully strangle, suffocate or choke another person without the other person's consent in a domestic setting.

The provision was inserted into the *Criminal Code 1899* (Qld) ("Criminal Code") by the *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld). The Attorney-General and Minister for Justice and Minister for Training and Skills, Yvette D'Ath, introduced the Bill into Parliament following a recommendation of the Special Taskforce on Domestic and Family Violence in Queensland.

The Taskforce was established in September 2014 and was charged with defining the domestic and family violence landscape in Queensland and making subsequent recommendations to the Premier.

The key drivers behind the enactment of a stand-alone offence were discussed in the Taskforce's report published February 2015: *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Taskforce Report).²⁰ In particular, the taskforce noted that non-lethal strangulation within the context of domestic family violence is a predictive indicator of an escalation in violent offending and a significant risk factor for homicide. The report recommended that a separate stand-alone offence was required to recognise this specific behavior.

One of the key goals identified in the Taskforce Report was that the creation of a separate offence would lead to increased criminal prosecutions, reflecting the seriousness of this particular type of offence. This has arguably been achieved with high levels of prosecution and sentencing reported since the creation of the law. Specifically, out of the 482 prosecutions for the offence between 2016-18, 404 were sentenced. In addition, 99.0% of the offenders that were sentenced for strangulation where strangulation was the most serious offence (MSO) pleaded guilty either initially or at a subsequent date.

Secondly, the creation of a stand-alone strangulation offence has led to the imposition of higher sentences. From 2016-18, 97.2% of sentenced offenders who had a strangulation offence (MSO) received a custodial penalty. Only eight offenders received a non-custodial penalty, being a sentence of probation ranging from six months to two years.

For offenders who were sentenced to imprisonment for strangulation (MSO), the average sentence was 1.9 years (median 1.7 years). The longest sentences of imprisonment had a length of four years and the shortest sentence of imprisonment had a length of two months.

The motive behind tougher sentencing was discussed in two recent decisions of the Queensland Court of Appeal in September and October 2018: *R v MCW* [2018] QCA 241 and *R v MDB* [201] QCA 283. In *R v MDB*, the court noted that the creation of a 'separate offence' indicated that the offence of strangulation is objectively more serious than the offence of assault occasioning bodily harm and that such an offence should attract a higher penalty.

See Bowskill J at [45]: In the context of this particular type of domestic violence offending, choking or strangling, the serious and dangerous nature of such an act, the fact that it has been shown to be a predictive indicator of escalation in domestic violence offences, and the concerning prevalence of this act in domestic violence offending all support the need for stern punishment in cases of this kind.

²⁰ Special Taskforce on Domestic and Family Violence in Queensland 2015, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*, Queensland Government, Brisbane.

In addition, deterrence (both personal and general) community protection and denunciation were cited as important factors in sentencing offenders under section 315A. Deterrence for strangulation is a particularly important consideration given that the prevalence of strangling or choking conduct in a domestic setting is a predictive indicator of an escalation in domestic violence offending including homicide.

The creation of a stand-alone offence has also assisted in building a typical 'strangulation offender' profile. According to the Spotlight Report, offenders ranged in age from 15-60 with the average age being 31.8 years and median age being 30.9 years. In addition, 98.3% of the offenders sentenced for strangulation (MSO) were male. Finally, 20.9% of all offenders sentenced for strangulation (MSO) identified as Aboriginal and/or Torres Strait Islander although they only account for 3.8% of Queensland's population aged 10 years or over. Finally, 49% of the finalised proceedings involved a breach of a domestic violence order. Identifying relevant offender characteristics may assist law enforcement and related agencies to readily improve the identification of such conduct, increase perpetrator accountability and improve risk assessment and management for victims.

2. Spotlight Sentencing Report – Queensland Sentencing Advisory Council

In May 2019, the Queensland Sentencing Advisory Council (QSAC) released *Sentencing Spotlight on choking suffocation or strangulation in a domestic setting* (Spotlight Report)²¹ - a research report on sentencing outcomes during the first two years of the stand-alone strangulation offence being in operation.

According to the Spotlight Report, there have been a total of 482 prosecutions for the strangulation offence between 2016-18. 404 of the 482 prosecutions were sentenced.

In 287 of the 404 cases (71%) strangulation was the most serious offence. In the remaining 117 cases, where strangulation was not the most serious offence (MSO), the MSO was an assault occasioning bodily harm.

In 2016-17 only 36 cases had been finalised at a sentencing event. In 2017-18, 251 strangulation (MSO) cases were finalised. The slower rate of sentencing in the first year has been attributed to the fact that indictable offences may take longer to proceed to sentence given that the accused has the right to have the matter heard before a Judge and jury in a higher court.

Offence distribution (out of the 'sentenced pool') across the state:

- 92 in the Brisbane and Ipswich metropolitan area
- 40 in the south of Brisbane and on the Gold Coast
- 40 on the Sunshine Coast
- 25 in the Darling Downs and south-west region
- 40 in central Queensland
- 29 in north Queensland
- 21 in far north Queensland

Offenders ranged in age from 15-60 with the average age being 31.8 years and median age being 30.9 years.

Majority of the offenders sentenced for strangulation (MSO) were male (98.3%).

²¹ Queensland Sentencing Advisory Council, *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting*, Spotlight Report, 2019.

20.9% of all offenders sentenced for strangulation (MSO) identified as Aboriginal and/or Torres Strait Islander, although they account for 3.8% of Queensland's population aged 10 years or over. In addition, Aboriginal and/or Torres Strait Islander offenders were significantly younger (average age=29.2 years, median age=25.2 years).

SOUTH AUSTRALIA

*Criminal Law
Consolidation
Act 1935
(SA)*

Section 20A:

(1) A person who is, or has been, in a relationship with another person and chokes, suffocates or strangles that other person, without that other person's consent, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) However, conduct that is justified or excused by law cannot amount to an offence against this section.

(3) Two people will be taken to be "in a relationship" for the purposes of this section if—

- (a) they are married to each other; or
- (b) they are domestic partners; or
- (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or
- (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or
- (e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or
- (f) 1 is a child and the other is a person who acts in loco parentis in relation to the child; or
- (g) 1 is a child who normally or regularly resides or stays with the other; or
- (h) they are brothers or sisters or brother and sister; or
- (i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or
- (j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or
- (k) 1 is the carer (within the meaning of the Carers Recognition Act 2005) of the other.

(4) If—

- (a) a jury is not satisfied beyond reasonable doubt that a charge of an offence against this section has been established; but
- (b) the Judge has instructed the jury that it is open to the jury on the evidence to find the defendant guilty of an offence of assault; and

	<p>(c) the jury is satisfied beyond reasonable doubt that the offence of assault has been established,</p> <p>the jury may return a verdict that the defendant is not guilty of the offence charged but is guilty of assault.</p>
<p>Commentary</p>	<p>There is no requirement under the Act that harm be intended or caused by the action of choking, suffocation or strangulation.</p> <p>The definition of in a relationship for the purposes of this offence is broader than an intimate relationship and incorporates family relationships such as that between a parent and child and between siblings.</p> <p>This amendment came into force on 1 January 2019 following the <i>Statutes Amendment (Domestic Violence) Bill 2018</i>. The offence came into force on 31 January 2019 with the first person being charged with the offence the following day.²² As at 10 August 2019, 291 people had been charged with choking, strangling or suffocating a partner in South Australia.²³</p> <p>In her second reading speech, Vickie Chapman MP stated in relation to the amendments:</p> <p>'Clause 6 inserts a new stand-alone offence of choking, suffocation or strangulation in a domestic setting. The new offence has a maximum penalty of seven years' imprisonment and will apply if a person who is or has been in a relationship with another person, chokes, suffocates or strangles that person without their consent. There is no requirement that harm be intended or caused. Rather, it is the conscious and voluntary act of choking, suffocation or strangulation that proves the offence.</p> <p>The creation of a new offence, rather than simply relying on existing offences such as causing harm or serious harm, endangering life or attempted murder, serves a number of purposes: firstly, it increases the penalty for this behaviour where no harm is caused; secondly, it recognises the inherent dangerousness of this conduct in a domestic setting and its indication of escalation to domestic homicide; thirdly, it educates police and the community; and, finally, it assists in the assessment of risk to the victim. In addition to the new offence, new subsection (4) provides for an alternative verdict of assault where a jury is not satisfied beyond a reasonable doubt that the strangulation offence has been established.</p> <p>Linked to the new strangulation offence is an amendment to section 10A of the Bail Act 1985 that creates a presumption against bail in certain circumstances. For example, there is a presumption against bail if the applicant is taken into custody relating to a breach of an intervention order that involves physical violence or a threat of physical violence, or where an applicant is charged with an aggravated offence involving physical violence or a threat of physical violence if an aggravating circumstance of the offence is that the applicant is alleged to have contrived an intervention order and the offence lay within the range of conduct that the intervention order was designed to prevent. As strangulation is one of the highest predictors of future serious or fatal domestic violence incidents, the government considers that there should be a presumption against bail for such offences to ensure the continued safety of the victim.'²⁴</p> <p>According to welfare workers in South Australia, strangulation is often used as a form of control. Prior to the legislation being introduced, strangulation was being</p>

²² Lauren Novak, *The Advertiser* (10 August 2019) 'Shocking daily toll of brutal crime'. Source: Westlaw.

²³ Ibid.

²⁴ Vickie Chapman MP, Second reading speech (24 October 2018)
https://www.vickiechapman.com.au/statutes_amendment_domestic_violence_bill

	<p>prosecuted as attempted murder. The new offence aimed to make the chance of a successful prosecution for the offence higher.²⁵</p> <p>In submissions made to SA parliament prior to the new law being introduced, Victims SA submitted that under the Domestic Violence Risk Assessment Tool, when a woman confirms that they have been strangled by their partner, they are allocated the highest risk rating (level 5).²⁶ The group also emphasised that research has shown there is a link between non-fatal strangulation and future homicide.</p>
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TASMANIA	
<p><i>Criminal Code Act 1924 (TAS)</i></p>	<p>1. Legislation Excerpts</p> <p>Section 168: Disabling to aid commission of offence or flight of offender</p> <p><i>Any person who, by any means whatever calculated to choke, suffocate, or strangle, or, by any violent means whatever, renders any person incapable of resistance, with intent thereby to facilitate the commission of an offence, or to facilitate the flight of an offender after the commission or attempted commission of an offence, is guilty of a crime.</i></p> <p>There is no specific penalty specified for this offence. Instead a maximum penalty of 21 years applies as per s389(3).</p> <p>Section 389(3):</p> <p>Subject to the provisions of the Sentencing Act 1997 or of any other statute, and except where otherwise expressly provided, the punishment for any crime shall be by imprisonment for 21 years, or by fine, or by both such punishments, and shall be such as the judge of the court of trial shall think fit in the circumstances of each particular case.</p> <p>2. Statutory Interpretation</p> <p>The elements of the offence are:</p> <ul style="list-style-type: none"> • render person incapable of resistance. • choke, suffocate, or strangle by any means whatever, or • any violent means whatever. • intent to facilitate the commission of an offence, or • intent to facilitate the flight of an offender after the commission or • attempted commission of an offence <p>Strangulation and choking is also considered an aggravating factor in sentencing.</p>
<p>Case Law</p>	<p>1. <i>State of Tasmania v AEP</i></p>

²⁵ Lauren Novak, Advertiser (Australia) (7 October 2018) 'New abuse laws tackle grim reality'.
<https://1.next.westlaw.com/Document/I2f430610836411e8891cd3aeaec7fb6c/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740120000016facf9825404cbc374%3FNav%3DNEWS%26fragmentIdentifier%3DI2f430610836411e8891cd3aeaec7fb6c%26parentRank%3D0%26startIndex%3D101%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=a101e2c49f6ad0f17dc0d156da5f0c87&list=NEWS&rank=115&sessionScopeId=76f75f90a821b6ca6334c9bb741a3a3117ae468732c090a0c398e3b49507241c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29>

²⁶ Page 2: <https://www.victimsa.org/sites/victim/media/pdf/submission-agd-dfva-sa-17082018-signed.pdf>

	<p>Comments on Passing Sentence, Justice Estcourt, 31 July 2019.</p> <p><u>Facts</u></p> <ul style="list-style-type: none"> • Significant acts of domestic violence occurring within a de-facto relationship. • The defendant, now aged 32 years, pleaded guilty to one count of persistent family violence • Actions included multiple instances of strangulation of the complainant (partner of defendant) to the extent that she suffered a seizure and became unconscious. <p>After outlining the instances of domestic abuse which Justice Estcourt noted was an aggravating factor in sentencing, his Honour then specifically outlined the act of strangulation as an aggravating factor.</p> <p>"Less it be thought that grabbing the complainant by the throat and applying pressure is somehow less insidious than punching or kicking, it has been noted in an article entitled Strangulation, Domestic Violence and the Legal Response by Heather Douglas and Robin Fitzgerald published in the Sydney Law Review [2014], that strangulation is a form of power and control that can have devastating psychological long-term effects on its victims in addition to a potentially fatal outcome.</p> <p>Strangulation can cause death quickly with loss of consciousness as occurred to the complainant. It has been suggested that it can occur within 7–14 seconds. Additionally, underlying internal injuries caused by the pressure applied to the throat can cause swelling which may develop gradually over days and airways obstruction causing death may be delayed."²⁷</p> <p>2. State of Tasmania v Brodie Lincoln French</p> <p>Comments on Passing Sentence, Justice Geason, 3 July 2019.</p> <p><u>Facts</u></p> <ul style="list-style-type: none"> • Breach of existing family violence order • Complainant was the partner of the defendant • Complainant was intoxicated and responded to being struck in the face with a bottle by choking the complainant. <p>After outlining other aggravating factors in sentencing such as the assault taking place in front of two children, Justice Geason then specifically outlined the act of choking as an aggravating factor.</p> <p>"The act of choking is a significant aggravating factor as it carries with it the serious risk of harm even death."²⁸</p>
<p>Commentary</p>	<p>There is a push within Tasmania to introduce choking, suffocation and strangulation as a separate offence after Coroner Olivia McTaggart recommended the creation of the offence after the death of Jodi Michelle Eaton.²⁹</p> <p>This suggestion arose due to the lack of applicability of section 168 in domestic violence cases as stated in the coronial report:</p> <p>"In Tasmania, the indictable offence currently provided by section 168 of the Criminal Code Act 1924 requires proof that the choking, suffocation or strangulation</p>

²⁷ State of Tasmania v AEP <https://www.supremecourt.tas.gov.au/sentences/aep/>

²⁸ State of Tasmania v Brodie Lincoln French <https://www.supremecourt.tas.gov.au/sentences/french-b-l/>

²⁹ Investigation into the death of Jodi Michelle Eaton [2019] TASCD 257.

is done with intent to facilitate the commission of an offence or facilitate the flight of an offender after the commission or attempted commission of an offence. As such, it is likely to be inapplicable to the commission of non-fatal strangulation in a variety of situations, including many in the domestic violence setting."³⁰

The suggestion is to adopt the same crime as implemented in NSW, ACT, SA and QLD of choking, suffocation and strangulation as a separate offence punishable by a maximum term of imprisonment of between 5 and 10 years.³¹

Support for this reform has come from the Tasmanian Law Reform Institute,³² Women's Legal Service Tasmania,³³ and Engender Equality.³⁴

The Tasmanian Law Reform Institute shared an article on Facebook titled 'Tasmanian Law Reform Institute backs coroner's call for new choking offence, in wake of Jodi Eaton murder'.³⁵ A spokesperson from the institute is quoted saying "In circumstances where such conduct is often a red flag which indicates a serious escalation of violent conduct in the context of family violence offending, such transparency in the recording of previous conduct is crucial. A specific strangulation offence would clearly, accurately and effectively record such conduct."³⁶

Women's Legal Service Tasmania has written a media release calling for law reform which contain statements from the CEO stating "How many more women need to die before the law in Tasmania is reformed? New South Wales, Queensland, South Australia and the ACT all have strangulation crimes – the Victorian Government has recently committed to reforming the law, and Western Australia is considering a change. Tasmania is lagging behind – law reform is urgently required".³⁷

The chief executive from Engender Equality, a state wide Tasmanian not-for-profit organisation that supports people affected by family violence, was quoted saying choking was common and "It's an ultimate demonstration of someone's power over another person because there are degrees to which you can strangle someone – you can choke them out so that they're simply unconscious or you can choke them to death...it can be an ultimate power-over tactic."³⁸

³⁰ Ibid, 9.

³¹ Ibid.

³² Rob Inglls, 'Tasmanian Law Reform Institute backs coroner's call for new choking offence, in wake of Jodi Eaton murder', *The Examiner* (online, 6 August 2019) <<https://www.examiner.com.au/story/6313617/law-reform-body-backs-coroners-call-for-new-choking-offence/>>

³³ Women's Legal Service Tasmania, 'Call for standalone strangulation, choking and suffocation crime' (Media Release, 7 August 2019) <<http://womenslegaltas.org.au/media-release-call-for-standalone-strangulation-choking-and-suffocation-crime/>>.

³⁴ Emily Baker, 'Tasmanian murder victim's family join coronial push for choking to become a criminal offence' *ABC News* (online, 6 August 2019) <<https://www.abc.net.au/news/2019-08-06/tasmania-choking-laws-push-jodi-eaton-murder/11386284>>.

³⁵ Rob Inglls, 'Tasmanian Law Reform Institute backs coroner's call for new choking offence, in wake of Jodi Eaton murder', *The Examiner* (online, 6 August 2019) <<https://www.examiner.com.au/story/6313617/law-reform-body-backs-coroners-call-for-new-choking-offence/>>

³⁶ Ibid.

³⁷ Women's Legal Service Tasmania, 'Call for standalone strangulation, choking and suffocation crime' (Media Release, 7 August 2019) <<http://womenslegaltas.org.au/media-release-call-for-standalone-strangulation-choking-and-suffocation-crime/>>.

³⁸ Emily Baker, 'Tasmanian murder victim's family join coronial push for choking to become a criminal offence' *ABC News* (online, 6 August 2019) <<https://www.abc.net.au/news/2019-08-06/tasmania-choking-laws-push-jodi-eaton-murder/11386284>>.

	Similarly, an article by Ethan James has been widely circulated throughout the NewsCorp network which states that Tasmania's Attorney-General Elise Archer is considering the recommendation. ³⁹
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VICTORIA	
Legislation	<p>Victoria has no specific strangulation offence, instead the state relies on more general criminal law provisions.</p> <p>Victoria did have a choking offence in a repealed section 20 of the Crimes Act 1958 (Vic).</p>
Case Law	<p>1. <i>DPP v Turner</i> [2017] VSC 358</p> <p>Facts: Manslaughter by beating victim to death with punches and kicks. Accused admitted to choking victim to the point of unconsciousness on previous occasions.</p> <p>Decision: Sentence of 12 years' imprisonment (non-parole 9 years) imposed.</p> <p>On the charge of manslaughter, offender imprisoned for a period of 11 years. On the charge of contravening a family violence intervention order, offender imprisoned for a period of two years.</p> <p>Early plea of guilty expressing sincere remorse served as significant mitigating consideration.</p> <p>Impact: Serious example of crime of contravening family violence protection order in specified manner where an earlier conviction for non-fatal strangulation might have prevented victim's murder.</p> <p>Further, recent judgements in other jurisdictions show courts increasingly have a clear understanding of non-fatal strangulation. In <i>R v MCW</i>, the sentencing judge acknowledged that the victim "could have been dead within seconds" and that the act is "inherently dangerous" and "could easily have caused permanent serious injury or death".</p> <p>This improved knowledge should help judges to make more appropriate decisions about bail, sentencing and parole to help keep victims safe.</p> <p>2. <i>R v Banek</i> [2017] VSC 11</p> <p>Facts: Accused tried to kill former de facto wife by punching, kicking and choking, when attempt failed, accused took up knife and stabbed deceased to death.</p> <p>On a previous occasion, the victim was woken by the accused biting her face. The accused then punched the victim several times before biting her on her back. He started to choke her and she blacked out for a short period of time.⁴⁰ For these significant events in the months preceding the murder the accused was sentenced to a total effective sentence of seven months' imprisonment.⁴¹</p> <p>Decision: Accused convicted and sentenced to 23 years' imprisonment with a non-parole period of 18 years.⁴²</p> <p>While all factors — both mitigating and aggravating — have affected the head</p>

³⁹ Ethan James, 'Law change urged after violent Tas murder' (online, 5 August 2019) <<https://www.inverelltimes.com.au/story/6311827/law-change-urged-after-violent-tas-murder/?cs=9397>>

⁴⁰ *Ibid*, [22] (Croucher J).

⁴¹ *Ibid* [23] (Croucher J).

⁴² *R v Banek* [2017] VSC 11 [142] (Croucher J).

	<p>sentence as well, Croucher J fixed a shorter non-parole period than otherwise principally on account of Mr Banek’s full admissions, early plea of guilty, youth and prospects of rehabilitation.⁴³</p> <p>Impact: example of previous offending which included non-fatal strangulation that research has shown greatly increases the risk of escalated harm or death in an intimate relationships. An earlier conviction for non-fatal strangulation might have prevented victim's murder.</p> <p>3. R v Mulhall [2012] VSC 471</p> <p>Facts: In October 2011, James Mulhall killed Joy Rowley. Mulhall strangled Ms Rowley and smothered her with a pillow.</p> <p>Mulhall had a documented history of violence against previous female partners. In the nine months leading to her death, Rowley had reported incidents of family violence by Mulhall to Victoria Police, including one in which he threatened to kill her with a knife and choked her to the point of unconsciousness.</p> <p>Decision: Sentence of 19 years' imprisonment (non-parole of 16 years) imposed.⁴⁴</p> <p>Mitigating factors that were considered include the accused's remorse, a very early plea of guilty, confessing to the crime and facilitating justice.⁴⁵</p> <p>The mitigating factors have to be balanced against just and appropriate punishment, denunciation and any aggravating features of the crime.⁴⁶ The fact that this occurred in the home where the victim lived and felt safe is an aggravating feature.⁴⁷ That the accused had previously harmed and assaulted the victim in a significant manner and had been charged with that assault indicates that he should have been alert and aware of his responsibility to ensure that he did not place himself in a situation where he may have caused the victim harm.⁴⁸</p> <p>Impact: During the coronial inquest, Victoria Police Assistant Commissioner Dean McWhirter recommended to government the introduction of a stand-alone offence of strangulation. The coroner’s findings conclude: The introduction of a stand-alone offence for strangulation, suffocation or choking in Victoria may significantly help to ensure strangulation is treated commensurate with the risk it poses to victims, and remove the need to prove particular bodily harm or intent to cause injury. Such an offence will more effectively hold perpetrators to account for serious offending. Further, the new offence may build further awareness of the dangers and potential lethality of strangulation among police members, courts and community services practitioners. The coroner does not go as far as recommending the introduction of the new offence. However, many are likely to read this conclusion as an endorsement of it.</p>
<p>Commentary</p>	<p>1. Victorian Government – 2019/20 Community Safety Statement</p> <p>As part of a 2019-20 Community Safety Statement,⁴⁹ the Victorian Government announced that it will deliver legislation for a stand-alone offence of strangulation,</p>

⁴³ Ibid, [143] (Croucher J).

⁴⁴ Ibid, [35] (King J).

⁴⁵ Ibid, [32] (King J).

⁴⁶ Ibid.

⁴⁷ R v Mulhall [2012] VSC 471 [32] (King J).

⁴⁸ Ibid.

⁴⁹ Victoria State Government, *Community Safety Statement 2019-20* (2019).

to enhance the protection of victims and to make it easier to hold offenders to account.⁵⁰ The Community Safety Statement is a shared agreement between the Victorian Government and Victoria Police to reducing crime and keeping Victoria safe. This approach embraces smart, flexible and action-oriented policing, utilising technology and collaborating with government agencies, partners and local communities to keep Victoria safe.

Strangulation is the leading cause of death among women killed by a current or former male intimate partner. In circumstances of family violence, strangulation is rarely an isolated event and often reveals an ongoing and escalating pattern of coercive and controlling behaviour. In Victoria, strangulation was recorded in 4.1 per cent of total family violence incidents in 2017-2018. Males were the perpetrators in 94.6 per cent of these incidents, with most being a current or former intimate partner of the victim.⁵¹

Although strangulation is most common as a form of family violence, it does not only occur in this context. Strangulation is also a common form of violence in sexual assaults, including sexually motivated murder and other assault categories. The new offence will therefore also apply to acts outside of the family violence context.⁵²

The safety statement further commits to strengthen Victoria's police force by increasing the presence of frontline police, while targeting significant issues including family violence.

The 2019-20 Community Safety Statement outlines:

- what the Government and police have been doing;
- what can be seen in the communities;
- key facts and figures;
- new commitments;
- case studies illustrating the changes that can be observed in the communities.

It builds on the strong foundation of the previous two statements, while also demonstrating the Government and Victoria Police's continued efforts to improve how they respond to the changing needs of Victorian communities.

2. Victoria's commitment to a non-fatal strangulation offence will make a difference to vulnerable women⁵³

Details: Why non-fatal strangulation should be a separate offence

Significance: The introduction of the offence in Queensland has underpinned training for first responders, including police, ambulance officers and hospital admissions staff. They now learn about the dangers and risks of non-fatal strangulation, how to ask about it and how to respond.

Information is now included in policy manuals and risk-assessment tools. This helps first responders appropriately use powers such as arrest and detention, make appropriate referrals, and help with safety planning.

While other offences throughout Australian criminal law can be charged when there

⁵⁰ Ibid, 29.

⁵¹ Ibid.

⁵² Victoria State Government (n 1) 29.

⁵³ Heather Douglas, "Victoria's Commitment To A Non-Fatal Strangulation Offence Will Make A Difference To Vulnerable Women" *The Conversation* (2019).

is a non-fatal strangulation, they may be difficult to prove. Evidence of intention to kill or cause serious harm is needed for attempted murder, and this is often hard to find.

3. Victorian government should be wary of introducing a stand-alone offence of non-fatal strangulation⁵⁴

Details: This article discusses a coronial inquest where the State Coroner, Judge Sara Hinchey, said:

The introduction of a stand-alone offence for strangulation, suffocation or choking in Victoria may significantly help to ensure strangulation is treated commensurate with the risk it poses to victims, and remove the need to prove particular bodily harm or intent to cause injury. Such an offence will more effectively hold perpetrators to account for serious offending. Further, the new offence may build further awareness of the dangers and potential lethality of strangulation among police members, courts and community services practitioners.

The authors point out that "the coroner does not go as far as recommending the introduction of the new offence", and further state that there are concerns that introducing new family violence offences such as strangulation may distract attention from systemic failures to properly utilise existing laws, and from police failure to comply with operational policies and procedures related to family violence.

Further, the Victorian government presently faces the significant challenge of overseeing the implementation of the 227 recommendations of the Royal Commission into Family Violence. These recommendations are considered and evidence-based. The introduction of a stand-alone offence of strangulation was not one of these recommendations.

WESTERN AUSTRALIA

*Family
Violence
Legislation
Reform Bill
2019*

1. The Bill

On 27 November 2019, the Western Australian government introduced the Family Violence Legislation Reform Bill 2019 (**Bill**). This Bill amends nine separate pieces of legislation across six separate ministerial portfolios. The Bill is currently in its Second Reading stage.

Of interest to this matter is the proposed introduction of the offence of non-fatal strangulation under the *Criminal Code Compilation Act 1913* (NSW) (**Criminal Code**), as well as the offence of persistent family violence (which may involve non-fatal strangulation).

Clause 6 of the Bill:

- inserts section 298 (Suffocation and strangulation) into the Criminal Code. According to the Explanatory Memorandum, this new offence is committed if a person unlawfully impedes another person's normal breathing, blood circulation, or both, by manually, or by using any other aid: blocking (completely or partially) another person's nose, mouth or both; or applying pressure on, or to, another person's neck
- section 299 (Terms used in relation to section 300 (persistent family violence)). A prescribed offence under this section includes the new section

⁵⁴ Kate Fitz-Gibbon et al, "Victorian Government Should Be Wary Of Introducing A Stand-Alone Offence Of Non-Fatal Strangulation" *The Conversation* (2018).

- 298, or an attempt to commit it; and
- section 300 (Persistent family violence). This new offence is committed if a person persistently engages in family violence – defined in section 299(5) as committing three or more acts of family violence, within a 10 year period, against a person with whom they are in a designated family relationship.

The penalty for the offence is 7 years imprisonment if committed in circumstances of aggravation or, in any other case, 5 years imprisonment.

The summary conviction penalty is 3 years imprisonment and a fine of \$36,000 if committed in circumstances of aggravation or, in any other case, 2 years imprisonment and a fine of \$24,000.

The offence can be heard on indictment, with a maximum penalty of 14 years imprisonment, or summarily, with a maximum penalty of 3 years imprisonment and a fine of \$36,000.

Although the period of the offences must be specified, dates do not need to be specified or the circumstances particularised – this intends to overcome the problem whereby victims of ongoing and prolonged family violence are unable to particularise the acts of family violence perpetrated against them.

If a person is found not guilty under section 300, they may nonetheless be found guilty under section 198.

2. Statutory Interpretation

- An 'act of family violence' is defined as an act that would constitute a prescribed offence (e.g. proposed Criminal Code section 298 suffocation and strangulation) in relation to someone that the person is in a designated family relationship with
- 'Designated family relationship' is defined as a relationship between two persons:
 - Who are, or were, married to each other;
 - Who are, or were, in a de facto relationship with each other; or
 - Who have, or had, an intimate personal relationship with each other
- 'Intimate personal relationship' is defined to include:
 - Persons who are engaged to be married to each other, including a betrothal under cultural or religious tradition; and
 - Persons who date each other, or have a romantic involvement, whether or not the relationship involves a sexual relationship.

ANNEXURE B
JURISDICTIONAL COMPARISON - INTERNATIONAL

CANADA	
Legislation	<p>1. <i>Criminal Code, s 246</i>⁵⁵</p> <p>Everyone who, with intent to enable or assist himself or another person to commit an indictable offence,</p> <p style="padding-left: 40px;">(a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance, or ...</p> <p>is guilty of an indictable offence and liable to imprisonment for life</p> <p><i>Commentary</i></p> <p>Strangulation is an offence when committed with another offence. This provision has been applied in a number of cases where 'choking' was used to enable the commission of a sexual offence.⁵⁶ It has been difficult to demonstrate that choking was carried out in order to enable the commission of an indictable offence.⁵⁷ This provision is not commonly used in domestic violence cases.</p> <p>2. <i>Criminal Code, s 267</i>⁵⁸</p> <p>Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,</p> <p style="padding-left: 40px;">(a) carries, uses or threatens to use a weapon or an imitation thereof,</p> <p style="padding-left: 40px;">(b) causes bodily harm to the complainant, or</p> <p style="padding-left: 40px;">(c) chokes, suffocates or strangles the complainant.</p> <p>3. <i>Criminal Code, s 272(1)</i>⁵⁹</p> <p>(1) Every person commits an offence who, in committing a sexual assault,</p> <p style="padding-left: 40px;">(a) carries, uses or threatens to use a weapon or an imitation of a weapon;</p> <p style="padding-left: 40px;">(b) threatens to cause bodily harm to a person other than the complainant;</p> <p style="padding-left: 40px;">(c) causes bodily harm to the complainant;</p> <p style="padding-left: 40px;">(c.1) chokes, suffocates or strangles the complainant; or</p> <p style="padding-left: 40px;">(d) is a party to the offence with any other person.</p>

UNITED KINGDOM	
Legislation	<p>1. <i>Offences Against the Person Act 1861 (UK), s 21</i>⁶⁰</p> <p>Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or</p>

⁵⁵ *Criminal Code, s 246.*

⁵⁶ See R v Lonechlld [2008] ABPC 263.

⁵⁷ See R v A(J) [2008] ONCJ 195.

⁵⁸ *Criminal Code, s 267.*

⁵⁹ *Criminal Code, s 272(1).*

⁶⁰ *Offences Against the Person Act 1861 (UK), s 21/*

strangle any other person, or shall by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable...to be kept in penal servitude for life.

This provision prohibits strangulation that is committed with intent to commit any indictable offence and the parallel Australian (excl. Vic), Canadian and New Zealand provisions are modelled after this. It provides that the use of strangulation or suffocation in the commission of any indictable offence, is of itself an offence, carrying a potential life sentence and does not require actual physical harm. The offence is listed in Criminal Justice Act.⁶¹ However, Section 21 has rarely formed part of the indictment.

The Court may pass a 2012 extended sentence (EDS) if there is a significant risk of serious harm from future specified offences and either:

- a) the defendant has a Sch 15B conviction (applicable only to defendants aged 18+),⁶² or
- b) the offence would justify a determinate sentence of at least 4 years.⁶³

Courts have discretionary power to make this order when it is necessary to protect the public from sexual harm.⁶⁴

On 3 November 2015, the Law Commission published its scoping report, 'Reform of Offences against the Person'.⁶⁵ The report proposes abolishing this offence (noting it as a 'needlessly specific offence') and not creating a replacement. It suggests that in all cases adequate powers of punishment will be afforded by some combination of one of the offences causing harm and the intended offence itself (eg robbery, rape etc) or attempt to commit that offence.

2. **Serious Crime Act 2015 (UK), s 76**⁶⁶

(1) A person (A) commits an offence if—

- (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
- (b) at the time of the behaviour, A and B are personally connected,
- (c) the behaviour has a serious effect on B, and
- (d) A knows or ought to know that the behaviour will have a serious effect on B.

(2) A and B are "personally connected" if—

- (a) A is in an intimate personal relationship with B, or
- (b) A and B live together and—
 - (i) they are members of the same family, or

⁶¹ *Criminal Justice Act 2003* Sch 15.

⁶² *Criminal Justice Act 2003* Sch 15B.

⁶³ *Criminal Justice Act 2003* s 226A-226B.

⁶⁴ *Sexual Offences Act 2003* s 103A.

⁶⁵ UK Law Commission, *Reform of Offences against the Person* (Report No 361, 2015).

⁶⁶ *Serious Crime Act 2015 (UK)*, s 76.

	<p>(ii) they have previously been in an intimate personal relationship with each other</p> <p>(4) A's behaviour has a "serious effect" on B if—</p> <p>(a) it causes B to fear, on at least two occasions, that violence will be used against B, or</p> <p>(b) it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities. ...</p> <p>(11) A person guilty of an offence under this section is liable—</p> <p>(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both;</p> <p>(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine, or both.</p>
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UNITED STATES	
Legislation	<p>1. United States Code, Title 18 (Crimes and Criminal Procedure), s 113⁶⁷</p> <p>(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:</p> <p>(8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both.</p> <p>(b) Definitions.-In this section-</p> <p>(4) the term "strangling" means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim; and</p> <p>(5) the term "suffocating" means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.</p>

NEW ZEALAND	
Legislation	<p>1. Crimes Act 1961 (NZ), s 189A⁶⁸</p> <p>Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person's normal breathing, blood circulation, or both, by doing (manually, or using any aid) all or any of the following:</p> <p>(a) blocking that other person's nose, mouth, or both:</p> <p>(b) applying pressure on, or to, that other person's throat, neck, or both.</p> <p><i>Commentary</i></p>

⁶⁷ *United States Code, Title 18 (Crimes and Criminal Procedure), s 113.*

⁶⁸ *Crimes Act 1961 (NZ), s 189A.*

	<p>This provision introduces a new offence of strangulation or suffocation, implementing the NZ Law Commission's recommendation in its 2016 report.⁶⁹ The section was inserted on 3 December 2018 by <i>Family Violence (Amendments) Act 2018</i>, s 24.⁷⁰</p> <p>2. Crimes Act 1961 (NZ), s 197(1)⁷¹</p> <p>Every one is liable to imprisonment for a term not exceeding 5 years who, wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person.</p> <p><i>Note:</i> Prior to the introduction of an explicit strangulation offence, strangulation was encompassed by this general prohibition against 'disabling'.</p>
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MEDIA COMMENTARY

MISCELLANEOUS MEDIA COMMENTARY	
<p><u>This is the 'last warning shot' before a man kills his partner</u></p>	<p>SMH, 9 August 2018</p> <p>US studies have shown that a woman whose partner tries to strangle her is eight times more likely to end up dead.</p> <ul style="list-style-type: none"> • Following the death of Joy Rowley in October 2011, Victorian Coroner, Sara Hinchey stated: "The introduction of a stand-alone offence for strangulation, suffocation or choking in Victoria may significantly help to ensure strangulation is treated commensurate with the risk it poses to victims, and remove the need to prove particular bodily harm or intent to cause injury. Such an offence will more effectively hold perpetrators to account for serious offending." • Queensland introduced a stand-alone offence for strangulation in 2016. This has resulted in a dramatic increase in domestic violence charges, created greater awareness and encouraged victims to come forward, knowing that they would be taken seriously. The amendments have also altered the treatment of bail applications and refusals. • In some jurisdictions, the victim must be rendered insensible or unable to resist and/or that the strangulation is committed to enable criminal offences, including rape. The author argues that such laws need to be amended to be more in line with the Queensland position.
<p><u>Spotting the signs of strangulation could save a life. But they're not always obvious</u></p>	<p>ABC, 12 March 2019</p> <ul style="list-style-type: none"> • The side effects of strangulation aren't always obvious to doctors, paramedics or police → recent push for increased training and awareness around non-fatal strangulation. • Side effects can be delayed and severe. Symptoms include: vocal cord dysfunction, memory loss, loss of consciousness, anxiety, paralysis, can miscarriage. • Dr Vanita Parekh (head of Clinical Forensic Medical Services at Canberra Hospital) states that it can be 'very difficult' to spot other signs of non-

⁶⁹ New Zealand Law Commission, *Strangulation: The Case for a New Offence (Report, 2016)*.

⁷⁰ *Family Violence (Amendments) Act 2018*, s 24.

⁷¹ *Crimes Act 1961 (NZ)*, s 197(1).

	<p>lethal strangulation without appropriate training. The visibility of marks varies:</p> <ul style="list-style-type: none"> ○ 50% of people who report an attack will have no marks on their neck; ○ 35% have minor marks; ○ 15% have enough injury to be photographed. <ul style="list-style-type: none"> • A CT angiogram can be used to see injury within the vessels in the neck. Dr Parekh has worked together with Canberra's professional community to develop a training model and encouraged the provision of CT angiograms free of charge to patients affected by domestic violence • QLD-based organisation, Red Rose Foundation, is hoping to follow the ACT's example with free CT angiograms and also provide a state-wide phone line to assist women to identify the affect-effects. • New strangulation laws in NSW have been successful in leading to prosecutions for non-fatal strangulations, which might otherwise not have been prosecuted. There have been around 1,900 charges since the new Act and around 450 imprisonments.
<p><u>Victoria's commitment to a non-fatal strangulation offence will make a difference to vulnerable women</u></p>	<p>The Conversation, 3 July 2019</p> <ul style="list-style-type: none"> • Victoria has joined QLD, NSW, SA and the ACT in introducing a non-fatal strangulation offence. • Introduction of the offence in QLD has prompted training for first responders on the dangers of non-fatal strangulation. There are now policy manuals and risk assessment tools on the appropriate use of powers of arrest and detention, making referrals and helping with safety planning. • Justifications for separate offence: <ul style="list-style-type: none"> ○ In the absence of a specific law, strangulation is typically charged as common assault. This may conceal the dangers and risks associated with strangulation in the assessment of bail, sentence and parole. ○ Some other charges require injuries however strangulation can often leave no visible injuries. • Barriers in implementing a separate offence: <ul style="list-style-type: none"> ○ Imprisonment is not the best rehabilitation method. Supporting behaviour change through support programs requires more resources, however. ○ Imprisonment may not deter future domestic violence in the long term. ○ May lead to higher rates of imprisonment for Aboriginal and Torres Strait Islander people. The high use of imprisonment as a response to strangulation (ATSI is 3.8% of QLD's population is ATSI however account for 21% of offenders sentenced for strangulation) may indicate a lack of sentencing options. • Scope of the QLD offence includes choking, suffocation and strangulation however does not define these terms. This may exclude actions of pushing against the throat.

<p><u>'Stark reality': how NT's justice system is failing Indigenous domestic violence victims</u></p>	<p>The Guardian, 26 September 2016</p> <ul style="list-style-type: none"> • Rate of family violence among Aboriginal women in the NT is almost 23 times that of non-Indigenous women. 60% of assaults in the NT are related to domestic and family violence and 73% of victims are Indigenous women. • NT police commissioner revealed that there were 74,811 reports of domestic and family violence in the past 3 years alone. NT's population is 244,000. There have been 17 deaths related to domestic violence in the NT in the past four years. • Victims face pressure from families in Indigenous communities to not press charges, have partners jailed or removed from the community. The family ties within communities encourage the protection of perpetrators, which in turn can result in a lack of cooperation by the victims with police. The victim may also face threats of having her children taken away by family members. • Jacinta Price, Alice Springs councillor and daughter of former NT minister Bess Price, identified that the primary concern was for an 'open dialogue' about cultural and practical hurdles and forms of oppression in Indigenous communities for women facing violence. Cultural change is required for this to occur. • Coroner Greg Cavanagh held an inquest into the deaths of two Alice Springs women. It has revealed the "stark reality that the criminal justice system fails to protect women from domestic violence". His recommendations include introducing body camera for officers, legislating for the targeting and monitoring of repeat offenders by police, and exploring alternative intervention options that acknowledge the importance of family and community ties.
<p><u>Almost 500 strangulation prosecutions in Queensland since 2016, report reveals</u></p>	<p>ABC, 22 May 2019</p> <ul style="list-style-type: none"> • QLD introduced the offence of choking, suffocation or strangulation in May 2016 following a recommendation made by the Special Taskforce on Domestic and Family Violence. The taskforce found that strangulation was a key predictor of domestic homicide and that a penalty should be applied to account for this heightened risk. • There is no mandatory imprisonment penalty for strangulation in QLD - courts retain discretion and can take aggravating and mitigating factors into consideration. The maximum penalty is 7 years of imprisonment which is the same as assault occasioning bodily harm. • There have been 482 prosecutions for choking, strangulation or suffocation in a domestic setting since the offence was introduced 3 years ago. Of the 287 offenders sentenced, $\frac{3}{4}$ were imprisoned. The average sentence was 1.9 years. Almost half of the cases breached a domestic violence order.