



Non-fatal strangulation: Section 315A review

Our terms of reference

Background paper 1

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Postal address: PO Box 13312, George Street Post Shop, Brisbane, QLD 4003

Telephone: (07) 3564 7777

Email: LawReform.Commission@justice.qld.gov.au

Website: [www.qlrc.qld.gov.au](http://www qlrc.qld.gov.au)

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Introduction

This is the first publication in our Non-fatal strangulation: Section 315A review.

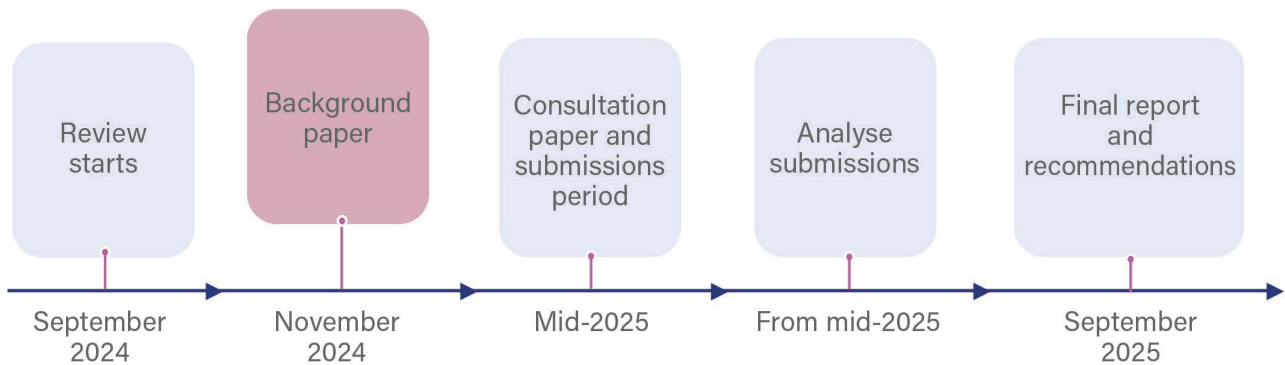
The paper outlines our review process and introduces our terms of reference. It explains the current law and the background to the review.

The paper identifies some key issues for consideration and **invites feedback on what issues we should look at in the review**. Information on how to give us feedback is on the next page.

The paper is accompanied by supporting resources, which are available on our [website](#). These resources include a timeline of relevant reforms and developments, tables comparing non-fatal strangulation offence laws in Australia, a table comparing maximum penalties for the non-fatal strangulation offence with selected Queensland offences, and a review fact sheet.

Our review process

Figure 1: Review timeline



1. Our review started on 5 September 2024.
2. We have not yet formed any views. We invite you to **give us feedback** on any issues you think the review should address. This will help us identify the key issues and inform our work for this review. We will consider all the feedback we receive in response to this paper, along with our own research.
3. There will be several opportunities to participate in the review, including consultations and public events. We will release a consultation paper in mid-2025 calling for formal submissions.
4. To help inform our review, we will research how non-fatal strangulation charges progress through the criminal justice system and reasons why they are and are not successfully prosecuted.
5. We will give our final report with recommendations to the Attorney-General by 30 September 2025.
6. You can send us feedback or register your interest in the review by emailing qlrc-nfsreview@justice.qld.gov.au. All our publications and review updates, including information about events, will be available on our [website](#).

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What we are asked to do

7. The former Attorney-General asked us to examine and make recommendations about the offence of 'Choking, suffocation or strangulation in a domestic setting' in section 315A of the Criminal Code (the 'non-fatal strangulation offence'), and applicable procedural rules and practices.
8. We are asked to recommend if:
 - the terms 'chokes', 'suffocates' and 'strangles' should be defined and, if so, how
 - the requirement that the choking, suffocation or strangulation ('non-fatal strangulation') must occur 'without the other person's consent' should be removed or amended
 - the offence should apply to conduct that is not committed between those in a domestic relationship or is not 'associated domestic violence' under the Domestic and Family Violence Protection Act 2012
 - the current maximum penalty of seven years imprisonment reflects the gravity of the conduct
 - the offence should be able to be finalised in the Magistrates Court.
9. Our terms of reference ask us to have regard to several matters, including:
 - the findings and recommendations of the Special Taskforce on Domestic and Family Violence, the Women's Safety and Justice Taskforce and the Queensland Audit Office
 - the experiences of victims, survivors and their families in the criminal justice system
 - the views and research of relevant experts, including those with specialist expertise in criminal law and domestic and family violence ('DFV'), and the experiences of victims and survivors
 - developments, equivalent legislation and research in other jurisdictions
 - the compatibility of recommended reforms with the Human Rights Act 2019 (including balancing the rights of victims and accused persons).
10. This review is about the way in which the offence is framed and subsidiary practices and procedures.
11. The review does not consider whether the offence should be included as a 'serious violent offence' under the Penalties and Sentences Act 1992.
12. The full terms of reference are available on our [website](#).

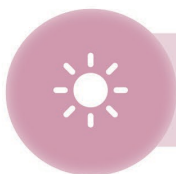
Guiding principles

13. We propose five principles to guide our consideration of the review's issues and help develop recommendations for reform of the law, practice and procedure.

	1. CLARITY The non-fatal strangulation offence should be clear, certain and easy to understand
	2. EVIDENCE-BASED The non-fatal strangulation offence should be informed by evidence, including expert knowledge and lived experience
	3. JUSTICE The non-fatal strangulation offence should promote just outcomes, be fit for purpose and protect human rights, including rights in criminal proceedings
	4. DFV AND COERCIVE CONTROL The non-fatal strangulation offence should recognise the unique position of non-fatal strangulation in DFV contexts, including its status as an indicator of future lethality and the impact of coercive control
	5. TRAUMA-INFORMED The non-fatal strangulation offence should promote a trauma-informed, culturally-sensitive and age-appropriate approach to investigation and prosecution

14. The principles are informed by our terms of reference, core criminal justice and rule of law principles, and the medical effects and social realities of non-fatal strangulation (particularly in DFV contexts).
15. The disproportionate impact of criminal laws and sentencing on Aboriginal peoples and Torres Strait Islander peoples and communities also informs the principles.¹ Aboriginal peoples and Torres Strait Islander peoples are over-represented as defendants and victim-survivors of non-fatal strangulation. Our examination of the offence should consider the unique lived experiences of Aboriginal peoples and Torres Strait Islander peoples, including the effect of systemic inequity and intergenerational trauma.

Principle 1: Clarity



The non-fatal strangulation offence should be clear, certain and easy to understand.

16. Clarity and certainty in the law is a rule of law principle that enables people to know and understand the law that applies to them. This is essential for defendants, victim-survivors and witnesses. All elements of the non-fatal strangulation offence should be clear, certain and easy to understand, and facilitate effective criminal justice responses.

Principle 2: Evidence-based



The non-fatal strangulation offence should be informed by evidence, including expert knowledge and lived experience.

17. The best available evidence should inform reform of the non-fatal strangulation offence (and applicable procedural rules and practices). This includes evidence from:
 - those with expertise (including medical expertise) in the review's issues, including non-fatal strangulation and DFV
 - those with lived experience as victim-survivors of non-fatal strangulation, and families of victim-survivors
 - DFV support workers
 - Aboriginal and Torres Strait Islander victim-survivors, defendants and their families and communities
 - our original research about the investigation, prosecution and sentencing of non-fatal strangulation cases. This will include analysis of court data, trial transcripts and sentencing remarks, and focus groups and interviews with police, prosecutors, defence lawyers and victim-survivors
 - experiences in other jurisdictions.

Principle 3: Justice



The non-fatal strangulation offence should promote just outcomes, be fit for purpose and protect human rights, including rights in criminal proceedings.

18. All legislation, including criminal laws, must have sufficient regard to individuals' rights and liberties, and any reforms should be compatible with human rights (see discussion at [23] below).
19. The criminal law and justice system must reconcile and balance complex considerations, including the interests of victims and their families, defendants and the community.
20. To promote just outcomes and be fit for purpose, the non-fatal strangulation offence must be appropriate in scope and prescribe an appropriate penalty.

Principle 4: DFV and coercive control



The non-fatal strangulation offence should recognise the unique position of non-fatal strangulation in DFV contexts, including its status as an indicator of future lethality and the impact of coercive control.

21. The non-fatal strangulation offence should recognise that:
 - non-fatal strangulation in DFV contexts is a dangerous form of coercive control

- non-fatal strangulation causes intense fear in victim-survivors and has been likened to waterboarding and torture
- non-fatal strangulation is one of the best predictors of subsequent severe violence and homicide in DFV contexts,² with non-fatal strangulation victim-survivors over seven times more likely to be murdered than DFV victim-survivors who have not been strangled.³

Principle 5: Trauma-informed



The non-fatal strangulation offence should promote a trauma-informed, culturally-sensitive and age-appropriate approach to investigation and prosecution.

22. Criminal justice system personnel should:
- understand the health consequences and social risks of non-fatal strangulation for victim-survivors, particularly in DFV contexts
 - understand the realities of non-fatal strangulation, including in DFV contexts (for example, that non-fatal strangulation is a dangerous form of coercive control and will not necessarily result in visible injuries)
 - promote the physical, psychological and relational safety of non-fatal strangulation victim-survivors
 - be culturally sensitive, appropriately responding to the cultural needs and perspectives of non-fatal strangulation victim-survivors and defendants
 - respond in a way that is age appropriate.

Compatibility with human rights

23. The terms of reference requires us to consider the compatibility of our recommendations with the Human Rights Act 2019.⁴ This is reflected in our guiding principles, particularly principle 3.
24. The human rights recognised in the Human Rights Act 2019 are derived from, and additional to, the rights and freedoms recognised by international law.
25. Under the Act, human rights must be considered by:⁵
- Government when developing policies and when acting and making decisions
 - parliament when making new laws
 - courts and tribunals when interpreting laws or acting in their administrative capacity.
26. Laws, actions and decisions are compatible with human rights under the Act if they:⁶
- do not limit a human right or
 - limit a human right 'only to the extent that is reasonable and demonstrably justifiable' in a 'free and democratic society based on human dignity, equality and freedom'.
27. A limit is reasonable and justifiable under the Act depending on several factors. These include the nature and importance of preserving the human right that is limited, the nature and importance of the limit's purpose, and whether there are 'less restrictive and reasonably available ways' to achieve that purpose.⁷

28. We have not determined if any human rights are limited or if any limits are reasonable and justifiable. We have identified the following rights (under the Human Rights Act 2019 and international conventions) as potentially relevant both to our consultation processes and resulting recommendations for reform in this review:

- the right to recognition and equality before the law
- the right to life
- the right to protection from torture and cruel, inhuman or degrading treatment
- the right to take part in public life
- the right to privacy and reputation
- the right to the protection of families and children
- cultural rights, including cultural rights of Aboriginal peoples and Torres Strait Islander peoples
- the right to liberty and security of person
- the right to a fair hearing
- the right to minimum procedural guarantees in criminal trials, other rights in criminal processes and particularly to protect children involved in criminal processes
- the right to education
- the right to health.

The current law

29. We are reviewing the non-fatal strangulation offence found in s 315A of the Criminal Code:

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.

- (1A) For subsection (1) and without limiting the subsection, a person is taken to choke, suffocate or strangle another person if the person applies pressure to the other person's neck that completely or partially restricts the other person's respiration or blood circulation, or both.
- (2) An assault is not an element of an offence against subsection (1).

30. For adults, the non-fatal strangulation offence must proceed to a higher court for trial or sentence.⁸ It cannot be tried or sentenced in the Magistrates Court. If the defendant is a legally represented child, this charge may be heard summarily, in the Childrens Court, if the child consents.⁹
31. Tables comparing the non-fatal strangulation offences in Australia are available as supporting resources on our [website](#). These tables:
- summarise the elements of each non-fatal strangulation offence and whether the offences can be finalised in Magistrates-level courts
 - present the text of each offence, their maximum penalties and definitions (if any) of 'chokes', 'suffocates' and 'strangles', and explain the domestic relationships to which the offences apply.

Background to the review

Special Taskforce on Domestic and Family Violence

32. The non-fatal strangulation offence was introduced in 2016. It gave effect to recommendation 120 of the report of the Special Taskforce on Domestic and Family Violence (the 'Special Taskforce'). The Special Taskforce was asked to define the DFV landscape in Queensland and make recommendations to inform development of a long-term vision and strategy for Government and the community to rid the state of DFV.¹⁰
33. The Special Taskforce recommended that the Government consider the creation of a specific offence of strangulation. The Government accepted this recommendation.¹¹
34. The Explanatory Notes to the Criminal Law (Domestic Violence) Amendment Bill (No 2) 2015 (which introduced the non-fatal strangulation offence) explained that:¹²

The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide. The [Special Taskforce] noted the importance of identifying this conduct to assist in assessing risk to victims and increasing protections for them.

Women's Safety and Justice Taskforce

35. The Women's Safety and Justice Taskforce (the 'Taskforce'), established in 2021, made similar findings about the risks of strangulation for DFV victim-survivors. The Taskforce noted that perpetrators use strangulation to exert power and control over victim-survivors, sending a clear statement of their willingness and ability to kill the victim.
36. The Taskforce explained that strangulation is 'a particularly difficult form of physical violence to prove because roughly half of all strangulation events leave little or no visible injuries'.¹³ The Taskforce also noted the over-representation of Aboriginal peoples and Torres Strait Islander peoples specifically in cases of non-fatal strangulation.¹⁴

Queensland Audit Office

37. In 2022, the Queensland Audit Office ('QAO') found that finalisation rates for the non-fatal strangulation offence have usually been around 800 to 900 per year. Of the finalised charges, 51% resulted in a conviction, with the remainder not resulting in a finding of guilt (for example, because their case was dismissed or they were found not guilty at trial).¹⁵
38. The QAO recommended the Department of Justice and Attorney-General ('DJAG') and the Queensland Police Service ('QPS') identify why a high proportion of prosecutions for the non-fatal strangulation offence are unsuccessful. DJAG agreed to identify 'any issues that may be contributing to unsuccessful prosecutions and that may require a legislative response'.¹⁶
39. The QAO also noted that neither QPS nor DJAG have evaluated how effective non-fatal strangulation charges and prosecutions are at preventing subsequent violence against victim-survivors.¹⁷



Other relevant developments

40. The Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024 introduced a non-exhaustive definition of 'chokes', 'suffocates' and 'strangles'. These terms had not previously been legislatively defined but had been judicially considered. We consider the definition further at [50].
41. In 2022, the Queensland Sentencing Advisory Council ('QSAC') recommended that s 315A should be included in the reformed 'serious offences scheme' under the Penalties and Sentences Act 1992, given the conduct involved has the 'potential to lead to serious long-term harm'.¹⁸ The Government is yet to respond to that recommendation.
42. In 2020, the Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill (a private member's Bill) was introduced to Parliament. It unsuccessfully sought to amend the non-fatal strangulation offence by introducing definitions for 'chokes', 'suffocates' and 'strangles', doubling the maximum penalty available, and including the offence as a 'serious violent offence' for the purposes of the Penalties and Sentences Act 1992.
43. A 2018 coronial inquest recommended a review of s 315A to determine if it adequately deals with strangulation where pressure on a nerve in the neck interrupts regular heartbeat and decreases blood pressure which reduces blood circulation to the brain, resulting in loss of consciousness or death. The Coroner noted this would require both legal and medical consultation.¹⁹ He also recommended the Attorney-General consider if a public awareness campaign was necessary to educate about the dangers of neck compression in DFV cases.²⁰
44. Despite the introduction of s 315A, the Domestic and Family Violence Death Review and Advisory Board ('DFVDRAB') has noted that more needs to be done and recommended comprehensive and appropriate training for first responders (including police and ambulance officers), medical professionals, other service providers and legal practitioners.²¹ The Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence made similar recommendations about DFV training for police officers.²²
45. The DFVDRAB has recommended examination of the role of clinical forensic evidence in securing non-fatal strangulation convictions, with a view to improving and standardising processes.²³ It has also noted the need for increased community awareness about the dangers of non-fatal strangulation and the need to seek medical treatment after such conduct.²⁴
46. A timeline showing reforms and developments relevant to the non-fatal strangulation offence is available on our [website](#).

Key issues

47. Our terms of reference identify five key issues in this review (see [8]).
48. The following sections look at each of these issues in more detail. Other potentially relevant considerations are then briefly examined.

Definition of 'chokes', 'suffocates' and 'strangles'

- Should 'chokes', 'suffocates' or 'strangles' be defined by the conduct involved, the results of the conduct, or both?
 - If defined by the conduct, should it include:
 - applying pressure to the person's neck
 - blocking the person's nose and/or mouth
 - obstructing or interfering with the person's respiratory system more generally (including their windpipe, airways and lungs) and accessory systems of respiration (the muscles that aid the main breathing muscles)
 - applying pressure to the person's chest
 - something else?
 - If defined by the results of the conduct, should it include:
 - impeding, restricting or hindering respiration or breathing
 - impeding, restricting or hindering blood circulation
 - something else?
 - Should the terms be defined individually or collectively? Exhaustively or non-exhaustively?
49. Australian definitions of 'chokes', 'suffocates' and 'strangles' (defined in legislation or by courts) refer to either, or both, the conduct (or act) involved or the results of that conduct. A table comparing Australian legislative definitions can be found on our [website](#).
 50. Queensland's definition of 'chokes', 'suffocates' and 'strangles' currently applies to restricting either breathing or blood flow (the result of conduct), where this is done by applying pressure to the person's neck (the conduct or act). The definition is collective (the phrase is defined, rather than individual terms) and non-exhaustive (not limited to the conduct and results of conduct specified in the definition).
 51. Defining 'chokes', 'suffocates' and 'strangles' in legislation might clarify the scope of those terms and avoid narrow interpretation (such as the need for complete stoppage of breath or unconsciousness).²⁵ However, some suggest legislative definitions might inappropriately narrow the offence.²⁶
 52. If the terms are legislatively defined, some suggest the definition must capture the range of ways non-fatal strangulation occurs, focusing on the 'act of restraint of the neck and restriction to circulation of blood and breathing' not consequences such as visible injury, stopping breath or unconsciousness.²⁷ The offence was introduced to protect DFV victim-survivors from future violence (including homicide) so the offence was intended to capture any physical act of strangulation, rather than results of that act.²⁸ However, the Court of Appeal has held that the results of the act can be used as evidence to prove that the act of strangulation occurred.²⁹

53. Definitions might affect the evidence needed to prove the offence. For example, if the definition includes ‘restricting breath’ or ‘applying pressure on the neck’, the victim-survivor could give relevant evidence, lessening the importance of medical evidence in non-fatal strangulation cases. This is because the presence (or absence) of visible injuries neither supports nor refutes restriction of breath.³⁰ If the definition includes ‘restricting blood flow’, medical experts might instead need to testify. We discuss evidentiary issues in non-fatal strangulation cases further at [150].

Queensland law

54. Section 315A was amended in 2024. For the purposes of the offence (but without limiting that offence):³¹
- a person is taken to choke, suffocate or strangle another person if the person applies pressure to the other person’s neck that completely or partially restricts the other person’s respiration or blood circulation, or both.
55. During the debate of that amendment, it was noted that, while non-fatal strangulation offences lodged in the Magistrates Court have increased in the last 12 months, the number of those convicted was not at a threshold that victim-survivors would expect. It was suggested that this was due to a lack of legislative clarity about the definition.³²
56. Before the amendment, ‘chokes’, ‘suffocates’ and ‘strangles’ were not defined in legislation. In *R v HBZ*, the Court of Appeal held that ‘chokes’ means:³³
- the act of the perpetrator that hinders or restricts the breathing of the victim and does not require proof that breathing was completely stopped ... Even if the restriction of the breathing, as a result of the action of choking the victim, is of short duration, without any lasting injury and does not result in a complete stoppage of the breath of the victim, that will be sufficient.
57. However, uncertainty continued as to whether the term extended to hindering the victim’s blood circulation. In *R v WCA*, the defendant argued that he had applied a chokehold designed to restrict the victim’s circulation, not their breathing.³⁴ The Court of Appeal considered there was evidence of restricted breathing and as such it was unnecessary to consider if the definition extended to hindering blood circulation.³⁵
58. A 2020 Bill unsuccessfully sought to insert definitions for ‘choke’, ‘suffocate’ and ‘strangle’ into the Criminal Code,³⁶ adopting the Australian Capital Territory approach (we discuss this definition at [60]). These amendments were thought necessary to address the ambiguity of undefined terms.³⁷

Law in other jurisdictions

59. The Northern Territory, Victoria, Western Australia and the Australian Capital Territory legislatively define ‘chokes’, ‘suffocates’ and ‘strangles’. South Australia, New South Wales and Tasmania do not. Courts in South Australia and New South Wales have considered the terms, but Tasmanian courts have not.
60. The definitions of ‘chokes’, ‘suffocates’ and ‘strangles’ in the Northern Territory, Victoria and the Australian Capital Territory are similar, defined non-exhaustively to include both conduct and results of that conduct, namely:³⁸
- applying pressure, to any extent, to the person’s neck (conduct)
 - obstructing any part or interfering with the operation, to any extent, of the person’s:
 - respiratory system, or

- accessory systems of respiration (conduct)
 - impeding, to any extent, the person's respiration (result of conduct).
61. The Northern Territory and Victoria define these terms collectively (rather than individually) and conduct that satisfies one aspect of the definition will meet the definition of the phrase.³⁹ In the Australian Capital Territory, the terms are defined individually.⁴⁰
62. In Western Australia, the terms 'chokes', 'suffocates' and 'strangles' are not used in the offence. Instead, the specified conduct and results of that conduct are integrated, exhaustively, into the offence, namely:⁴¹
- impeding another person's normal breathing, blood circulation, or both (result of conduct), 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 (conduct).
63. This definition is almost identical to the definitions in New Zealand and Minnesota in the United States.⁴²
64. The Australian Capital Territory's legislative definitions were introduced to address the Supreme Court of the Australian Capital Territory's decision in *R v Green*. That case held that breath must be completely stopped (not just restricted) to 'choke', 'suffocate' and 'strangle'.⁴³ The legislative definitions were designed to reflect the 'medical and substantial harm to people caused by any degree of strangulation'.⁴⁴
65. The Northern Territory definition was also introduced to address *R v Green*.⁴⁵ Similarly, the Victorian and Western Australian definitions (to not require the complete stopping of breath or blood circulation) sought to overcome other Australian courts' interpretations that required completely stopping a person's breath.⁴⁶
66. In South Australia, the District Court has held that 'chokes', 'suffocates' and 'strangles' means conduct that stops, hinders or restricts the complainant's respiration.⁴⁷ South Australian courts are yet to determine if the terms extend to stopping, hindering or restricting blood circulation. This definition focuses on the result of the conduct, rather than the act. The South Australian Attorney-General's Department has proposed clarifying and broadening the definition to make it clear that proof of restriction of breath is not needed, but rather that the offence reflects 'the inherent dangers of applying pressure to a person's neck'.⁴⁸
67. In New South Wales, the terms are not legislatively defined.⁴⁹ Consistent with the intended scope of the offence, the New South Wales Court of Criminal Appeal interpreted 'intentionally chokes' as requiring proof of conduct capable of affecting the breath, or blood flow to or from the head.⁵⁰
68. In England and Wales, the non-fatal strangulation offence applies to strangulation or 'any other act' that affects the person's ability to breathe and constitutes battery, that is, application of unlawful force (this refers to both conduct and results of that conduct).⁵¹ 'Strangulation' is not legislatively defined.
69. In contrast, Northern Ireland and New York's non-fatal strangulation offences apply only to conduct. In Northern Ireland, the offence captures pressure applied to the throat or neck, or anything that amounts to battery.⁵² In New York, the offence criminalises applying pressure to the throat or neck, or blocking the nose or mouth of the person.⁵³ However, in both jurisdictions, the prosecution must also prove that the defendant intended to (or, in Northern Ireland, was reckless as to whether their conduct would) affect the normal breathing or blood circulation of the victim-survivor (regardless of the result).

70. In Canada, non-fatal strangulation is not a standalone offence, but is one of several alternative elements for the offences of ‘assault with a weapon or causing bodily harm’ and ‘sexual assault with a weapon, threats to a third party or causing bodily harm’.⁵⁴ ‘Chokes’, ‘suffocates’ or ‘strangles’ are not legislatively defined.
71. In the United States, jurisdictions have taken different approaches to ‘chokes’, ‘suffocates’ and ‘strangles’. Minnesota and New York have been discussed. In Alabama, ‘strangulation’ means ‘intentionally causing asphyxia by closure or compression of the blood vessels or air passages of the neck as a result of external pressure on the neck’. ‘Suffocation’ means ‘intentionally causing asphyxia by depriving a person of air or by preventing a person from breathing through the inhalation of toxic gases or by blocking or obstructing the airway of a person, by any means other than by strangulation’.⁵⁵ ‘Asphyxia’ is not defined.
72. In West Virginia, ‘asphyxiate’ means ‘restricting the normal breathing or circulation of blood by the application of pressure on the chest or torso’.⁵⁶ The non-fatal strangulation offences in some other United States jurisdictions (such as Indiana and Kansas) also extend to application of pressure to the victim-survivor’s chest or torso.⁵⁷ Idaho’s offence applies to choking or attempting to strangle another. While these terms are not legislatively defined, the provision states that no injuries are needed to prove attempted strangulation.⁵⁸

The ‘without consent’ requirement

- Should the non-fatal strangulation offence retain the ‘without consent’ requirement? Does this depend on whether the domestic setting scope (see [92]) is retained?
 - If the requirement should be retained, should the form of consent differ depending on whether the non-fatal strangulation occurs during, or is itself, sexual activity?
73. Queensland’s non-fatal strangulation offence requires the non-fatal strangulation to occur ‘without the other person’s consent’.⁵⁹ Our terms of reference ask us to consider if this should be removed or amended.
74. Some consider the ‘without consent’ requirement problematic as non-fatal strangulation is a dangerous form of coercive control which often occurs in the context of DFV relationships.⁶⁰ In such circumstances, the victim-survivor’s ability to give informed consent is ‘likely to be highly constrained’.⁶¹ This may impact the prosecution’s ability to prove lack of victim-survivor consent, opening the door to cross-examination about the victim-survivor’s willingness to be strangled (especially if strangulation occurred during sex).⁶²
75. Some suggest that no one should be able to consent to non-fatal strangulation and that inclusion of a ‘without consent’ element undermines the seriousness of the act and its consequences (including serious, potentially long-term, adverse health effects or even death).⁶³ Strangulation can be fatal even with brief moderate pressure.⁶⁴
76. This is pertinent to strangulation that occurs during sex, which has become normalised, particularly among young people. Such practices tend to be gendered (women are more likely than men to be strangled, men are more likely than women to strangle their partner, and trans and gender diverse people are more likely than women and men to both be strangled and to strangle).⁶⁵ Many who engage in sexual strangulation believe that it can be done safely.⁶⁶
77. Many young people who engage in sexual strangulation explicitly consent. Sometimes, consent to future strangulation is negotiated during previous sexual encounters.⁶⁷ In Queensland, consent in the context of sexual offending means ‘free and voluntary agreement’ (although Queensland will soon be moving to an affirmative consent model).⁶⁸ Some argue

that consent to be strangled 'cannot be free and voluntary if the person is not aware of the potential risk and harm of the behaviour'.⁶⁹ A survey of undergraduate students found that 28% of participants who had been strangled during sex reported negative consequences from strangulation and 15% of those who had strangled their partner during sex reported observing negative consequences.⁷⁰

78. One reason for introducing the non-fatal strangulation offence in Queensland was to increase community awareness about non-fatal strangulation and its risks, particularly in the context of DFV.⁷¹ However, many young people may not even be aware that non-fatal strangulation is an offence in Queensland.⁷² As such, criminalisation alone may not adequately increase community awareness of the dangers of strangulation — instead, education may be needed.⁷³
79. While many young Australians engage in consensual strangulation during sex, some report that consent to strangulation during sex was not given beforehand (that is, strangulation was non-consensual).⁷⁴ Non-fatal strangulation is increasingly used in the context of sexual assaults and sexual violence, and non-consensual sexual strangulation has been used in the lead up to DFV homicides.⁷⁵ In some cases where it has been alleged that non-fatal strangulation occurred during rape and sexual assault, the defence has claimed that the complainant consented to such activity.⁷⁶
80. Police may not believe or act on claims that strangulation was non-consensual during sex if the victim-survivor has a history of rough sex preferences.⁷⁷

Queensland law

81. In Queensland, the prosecution must prove the victim-survivor did not consent to non-fatal strangulation for the offence to have been committed.
82. Previously, concerns were raised that a non-fatal strangulation offence could capture 'people consensually participating in sporting activities (for example, certain martial arts where choke holds are utilised)'.⁷⁸ To avoid this, assault could be made an element of the offence, as the definition of assault requires the application of force to be without the other person's consent.⁷⁹ However, Edwards and Douglas have argued that, where non-fatal strangulation offences are limited to domestic settings, a 'without consent' requirement is not needed to address the concern of 'unintended capture of sporting-related strangleholds'.⁸⁰
83. Queensland cases have not yet considered consent in the context of the non-fatal strangulation offence. It is unclear if the common law approach to consent applies or if some other definition of consent (such as that applicable to sexual offences) applies. At common law in the context of assault, a person can consent to some level of bodily harm but cannot consent to serious bodily harm (including unconsciousness). Taking this approach, consent may make strangulation lawful where it results in minor bruising or transient breathlessness, but not unconsciousness. Depending on the definition of consent, the defendant may be able to raise a defence that they reasonably believed (or honestly and reasonably believed) that the victim-survivor consented, even if they did not consent.⁸¹

Law in other jurisdictions

84. Like Queensland, in South Australia, the Northern Territory and New South Wales (as well as Canada) non-fatal strangulation must occur without the other person's consent to be an offence.⁸²
85. In Victoria, consent to the conduct may be a lawful excuse to a non-fatal strangulation offence depending on the nature of the offending.

86. If the person intentionally choked, suffocated or strangled a family member (the 's 34AE offence'),⁸³ consent is a lawful excuse, but the form of the defence differs depending on the context.
87. If the non-fatal strangulation occurs during (or is) sexual activity, a statutory defence applies.⁸⁴ This defence will arise if the complainant said or did something to indicate their free and voluntary agreement to engage in the conduct, or the defendant reasonably believed this occurred (the affirmative consent model that applies to rape and other sexual offences in Victoria).⁸⁵ This defence 'recognises that sexual non-fatal strangulation is an increasingly common practice, particularly amongst young Victorians'.⁸⁶
88. In all other circumstances, the common law defence of consent applies.⁸⁷ To successfully use this defence, the defendant must believe that the complainant consented (even if this belief is not reasonable).⁸⁸ This defence was included to ensure that the offence:⁸⁹
- does not inadvertently punish legitimate conduct between family members, such as occurs during contact sport, medical procedures, hugging, massages and tattoos and other bodily adornment.
89. If the person intentionally choked, suffocated or strangled a family member, intended to cause injury and injury was caused (the 's 34AD offence'),⁹⁰ consent is never a lawful excuse.⁹¹ 'Injury' means temporary or permanent physical injury or harm to mental health, and includes unconsciousness, disfigurement, substantial pain, impairment of bodily functions and psychological harm, but not emotional reactions (such as distress, grief, fear or anger, unless they result in psychological harm).⁹²
90. Removing consent as a lawful excuse for the s 34AD offence was intentional, recognising that 'non-fatal strangulation which intentionally causes injury is an inherently high-risk activity which cannot be done safely'.⁹³ England, Wales and Northern Ireland take a similar approach — consent is a defence to non-fatal strangulation unless the victim-survivor suffered serious harm and the defendant intended or was reckless as to this.⁹⁴
91. Unlike Queensland, the offences in Western Australia, the Australian Capital Territory and Tasmania (as well as New Zealand and most United States jurisdictions) do not require the non-fatal strangulation to be without the other person's consent.⁹⁵ An offence will have been committed in these jurisdictions even if the other person consented to the conduct. Like Victoria, Western Australia did not include lack of consent as an element because 'this conduct is inherently dangerous. As a matter of policy, a person should not be able to consent to a life-threatening act of this nature.'⁹⁶

The domestic setting scope

- Should the non-fatal strangulation offence retain the domestic setting scope? Does this depend on whether the 'without consent' requirement (see [73]) is retained?
 - If the scope should be retained, are the definitions of 'domestic relationship' and 'associated domestic violence' adequate?
 - If the scope should not be retained, should the fact that the non-fatal strangulation occurred in a domestic setting be an aggravating circumstance for the purposes of sentencing?
92. We have been asked to consider if Queensland's non-fatal strangulation offence should apply to conduct beyond that in a domestic relationship or 'associated domestic violence' under the Domestic and Family Violence Protection Act 2012.

93. Non-fatal strangulation in the DFV context is particularly risky for victim-survivors as it is a predictive indicator of an escalation in DFV offending and future homicide. However, some suggest limiting non-fatal strangulation offences to domestic settings may produce anomalies. In circumstances outside domestic settings, the prosecution may be limited to charging the defendant with assault which fails to capture the inherent seriousness of non-fatal strangulation, regardless of the circumstances in which it occurs.⁹⁷ In one reported Queensland case, the defence argued on appeal (amongst other things) that there was doubt as to the domestic relationship element of the non-fatal strangulation offence.⁹⁸
94. If the offence continues to be limited to domestic settings, the terms ‘domestic relationship’ and ‘associated domestic violence’ may not be appropriate. A table summarising the scope of these terms is found on our [website](#). For example, the terms may not adequately capture some of the relationships particularly relevant to young people (such as dating relationships or relationships started over apps and social media). The terms may also not adequately capture certain relationships in Aboriginal communities, Torres Strait Islander communities and culturally and linguistically diverse communities.
95. Non-fatal strangulation occurs amongst young people. QSAC found that between when the offence was introduced and 30 June 2023, 2.4% of offenders sentenced for non-fatal strangulation were children (all boys with an average age of 16.4 years, the youngest being 14 years).⁹⁹
96. Other research shows that Aboriginal peoples and Torres Strait Islander peoples (especially women) are over-represented at all stages of the criminal justice process in non-fatal strangulation cases.¹⁰⁰ For example, according to a sample of Queensland Office of the Director of Public Prosecutions (‘ODPP’) case files finalised from 2017 to 2020 where the defendant was charged with non-fatal strangulation:¹⁰¹



Aboriginal and Torres Strait Islander defendants in that sample were less likely to receive bail than non-Indigenous defendants.

97. QSAC found that 26.5% of people sentenced for the offence identified as Aboriginal and Torres Strait Islander, above the average of 19.7% for all offences.¹⁰² QSAC also found the rate of sentenced strangulation offences was over three times higher in Queensland’s northern regional areas compared to the metropolitan area.¹⁰³
98. Aboriginal and Torres Strait Islander young people are also over-represented as non-fatal strangulation defendants and offenders. Of cases finalised between 2016–17 and 2019–20, Aboriginal and Torres Strait Islander young people accounted for 42% of all people aged under 18 who were charged with non-fatal strangulation and 47% of all people aged under 18 who were sentenced for the offence.¹⁰⁴

Queensland law

99. Queensland's non-fatal strangulation offence currently requires the non-fatal strangulation to occur between those in a domestic relationship or to be 'associated domestic violence' under the Domestic and Family Violence Protection Act 2012.
100. Queensland's offence was limited to the domestic setting context to address concerns that the offence may capture unintended conduct, such as law enforcement, security and sport.¹⁰⁵

Law in other jurisdictions

101. Like Queensland, the non-fatal strangulation offences in South Australia, the Northern Territory and Victoria (as well as many United States jurisdictions) are limited to domestic relationships of some kind. The specific terms and their scope differ between jurisdictions. A table outlining the types of relationships in each Australian jurisdiction is found on our [website](#).
102. In some United States jurisdictions, the non-fatal strangulation offences apply to a broader range of relationships than in Queensland. For example, the offences in Alabama and Idaho apply to current and former dating relationships. The offences in Alabama, Idaho and Minnesota also apply to household members, although in Alabama this refers only to romantic or intimate co-residents.¹⁰⁶
103. Victoria limits its non-fatal strangulation offences to conduct that occurs between family members to ensure that the offences do not inadvertently capture conduct outside the scope of intended reforms, with 'community groups who are already over-represented in the criminal justice system likely to be disproportionately affected'.¹⁰⁷ Victoria's definition of 'family member' is intended to be broad and flexible, to ensure the offence's scope keeps up with contemporary community values and expectations. The definition is intended to accommodate broader culturally recognised family relationships, such as those among Aboriginal peoples and Torres Strait Islander peoples and their communities, as well as a variety of committed relationships, even if these are not romantic or that of blood relatives (for example, long term housemates who share household expenses, chores and who socialise together).¹⁰⁸
104. A number of jurisdictions do not limit their non-fatal strangulation offences to domestic settings.¹⁰⁹ Western Australia and the Australian Capital Territory instead created circumstances of aggravation to recognise the particular risk of non-fatal strangulation in the context of DFV, namely, if:
 - the offender and complainant are in a family relationship (unless the offender is a child) (Western Australia)¹¹⁰
 - the conduct involves family violence (defined to mean various types of abuse committed by a person in relation to a family member, or that a child hears, sees or is exposed to) (the Australian Capital Territory).¹¹¹
105. Western Australia's non-fatal strangulation offence also makes it a circumstance of aggravation if a child was present during the offending (unless the offender is a child). Circumstances of aggravation increase the maximum penalty available if the defendant is found (or pleads) guilty to the offence. We discuss the penalties available for non-fatal strangulation offences in Australia at [121].
106. A table outlining the types of relationships captured by the terms 'family relationship' (in Western Australia) and 'family member' (in the Australian Capital Territory) is found on our [website](#).

Maximum penalty

- Does the maximum penalty of seven years imprisonment adequately reflect the gravity of the offending conduct? If not, what would an appropriate penalty be?
 - Does the current maximum penalty result in any adverse consequences? Are there potential adverse consequences of prescribing a maximum penalty that is more or less than seven years?
107. Queensland's non-fatal strangulation offence prescribes a maximum penalty of seven years imprisonment. We have been asked to consider if this reflects the gravity of non-fatal strangulation offending.
108. Davis J has commented that 'in some cases of choking a maximum of seven years imprisonment may seem insufficient'.¹¹² However, where death or serious harm results, charges that attract higher maximum penalties are available.
109. If found guilty of a non-fatal strangulation offence, offenders will almost certainly receive a custodial sentence. Since the introduction of the offence to June 2023, 98.7% of people sentenced for the non-fatal strangulation offence received a custodial penalty (compared to 15.9% across all offences in Queensland since 2016–17).¹¹³ In 2022–23, 99.4% of people sentenced for the non-fatal strangulation offence received a custodial penalty.¹¹⁴
110. From introduction of the offence to June 2023, the average imprisonment length for non-fatal strangulation was two and a half years, although sentences were as long as six and a half years and as short as two months. The average length of imprisonment has increased over time from two years in 2016–17 to 2.7 years in 2022–23. While QSAC found that average imprisonment lengths were the same regardless of whether the offender identified as Aboriginal or Torres Strait Islander,¹¹⁵ other research suggests that Aboriginal offenders and Torres Strait Islander offenders are proportionately more likely to receive a custodial penalty than non-Indigenous offenders.¹¹⁶
111. Where offenders are sentenced to a period of imprisonment, some feel that imprisonment lengths are too short and give victim-survivors a 'short window of opportunity for safety'.¹¹⁷ Others suggest that the almost certain prison sentence if found guilty, and the high chance that non-fatal strangulation defendants will be refused bail and remanded at first instance, may contribute to the high levels of complainant withdrawals (we discuss complainant withdrawal in non-fatal strangulation cases further at [156]). As such, more penalty options (particularly those that support and encourage behaviour change while focusing on victim-survivors' safety) may improve victim-survivors' engagement with the criminal justice system.¹¹⁸
112. Some have questioned if imprisonment does make individual victim-survivors of non-fatal strangulation safer in the longer term as most non-fatal strangulation offenders probably do not have access to prison-based support and rehabilitative programs.¹¹⁹ This is because over half of non-fatal strangulation defendants are remanded in custody before their matter is finalised where they have usually not entered a plea and therefore are not given access to rehabilitative programs.¹²⁰ If sentenced, some offenders are then released into the community based on time served on remand and are unable to access prison-based rehabilitative programs, or the period they do spend in prison post-sentence is likely to be too short to access such programs. QSAC found that just over half of those sentenced for non-fatal strangulation between 2016–17 and 2018–19 committed a new offence after being sentenced for non-fatal strangulation, the most common offence being contravening a domestic violence order.¹²¹

113. Some argue that imprisonment for non-fatal strangulation ‘serves to disconnect individuals from communities and support networks, which is particularly problematic for First Nations people’ and ‘fails to account for the diversity of offenders’ and victims’ circumstances and the complexity in circumstances surrounding [DFV]’.¹²²
114. Where non-fatal strangulation defendants are less than 18 years old, they are more likely to have a charge of non-fatal strangulation sentenced instead of discontinued or found not guilty, compared to all other age groups.¹²³ However, the most common sentence for child defendants is probation, followed by detention.¹²⁴
115. Many non-fatal strangulation charges are negotiated to an alternative charge (such as common assault or assault occasioning bodily harm). These charges are less likely to attract a sentence of imprisonment and, if imprisonment is ordered, are more likely to result in shorter average sentence lengths.¹²⁵
116. Courts have identified features such as the short duration of the event, the low level of pressure applied, the lack of injury or the unplanned nature of the event as relevant for sentencing.¹²⁶ However, these features are difficult to prove and some question the weight they should be given. As such, the ‘approach to sentencing [non-fatal strangulation] may need further consideration and guidance in the Australian context’.¹²⁷

Queensland law

117. Currently, the maximum penalty for the non-fatal strangulation offence in Queensland is seven years imprisonment, which is the same maximum penalty as unlawful stalking committed in a domestic relationship.¹²⁸ Stalking has been argued to pose a similar risk for DFV victim-survivors as non-fatal strangulation and both stalking and non-fatal strangulation have been argued to be dangerous forms of coercive control.¹²⁹ Despite this, Queensland’s new coercive control offence, which comes into effect in May 2025, carries a higher maximum penalty of 14 years imprisonment.¹³⁰ A table comparing the maximum penalty for Queensland’s non-fatal strangulation offence with maximum penalties for selected offences in Queensland is found on our [website](#).
118. In reported Queensland non-fatal strangulation cases, non-fatal strangulation was often charged alongside common assault (with a maximum penalty of three years imprisonment), assault occasioning bodily harm (with a maximum penalty of seven years imprisonment if not committed with a circumstance of aggravation) and rape (with a maximum penalty of life imprisonment).¹³¹
119. To reflect the inherently dangerous nature of non-fatal strangulation, a 2020 Bill unsuccessfully sought to increase the maximum penalty for the non-fatal strangulation offence from seven years to 14 years imprisonment.¹³²
120. We note QSAC’s expertise when it comes to sentencing and will, to the extent possible, collaborate with QSAC when considering the maximum penalty issue.

Law in other jurisdictions

121. The maximum penalties available for non-fatal strangulation offences throughout Australia vary widely, as Figure 2 shows.

Figure 2: Maximum penalties available for non-fatal strangulation offences in Australia.



Notes: There are two non-fatal strangulation offences in Victoria and New South Wales. ^ indicates the less serious offence, while # indicates the more serious offence. * indicates the maximum penalty available if circumstances of aggravation are proved.

122. As with all indictable offences in Tasmania, the non-fatal strangulation offence prescribes a maximum penalty of 21 years imprisonment.¹³³ This is the highest maximum penalty for non-fatal strangulation offending in Australia.
123. South Australia prescribes a maximum penalty of seven years imprisonment.¹³⁴ This penalty was introduced because:¹³⁵
 - it was important that the offence had a penalty more than five years so that it would be a 'major indictable offence' (which must be dealt with in the District Court or Supreme Court)
 - the offence does not require harm to have been caused
 - the same penalty existed for Queensland's non-fatal strangulation offence.
124. The Northern Territory, Western Australia and the Australian Capital Territory non-fatal strangulation offences prescribe maximum penalties of five years imprisonment.¹³⁶ However, the maximum penalties available in Western Australia and the Australian Capital Territory increase to seven years if the offence is aggravated. We discuss relevant circumstances of aggravation at [104]. The maximum penalty of five years imprisonment in the Australian Capital Territory allows non-fatal strangulation charges to be heard in the lower courts, ensuring the Supreme Court only deals with the most serious non-fatal strangulation offending.¹³⁷
125. In Victoria and New South Wales, maximum penalties differ depending on the nature of the non-fatal strangulation offence charged, with higher maximum penalties available for more serious conduct.
126. In Victoria, the maximum penalties available are five years imprisonment (for the s 34AE offence) and 10 years imprisonment (for the s 34AD offence).
127. Similarly, in New South Wales, if the person intentionally chokes, suffocates or strangles another without their consent, the maximum penalty available is five years imprisonment.¹³⁸ This increases to 10 years if the person intentionally chokes, suffocates or strangles another so as to render them unconscious, insensible or incapable of resistance, and they are reckless as to this consequence.¹³⁹ While this offence was introduced to respond to non-fatal strangulation

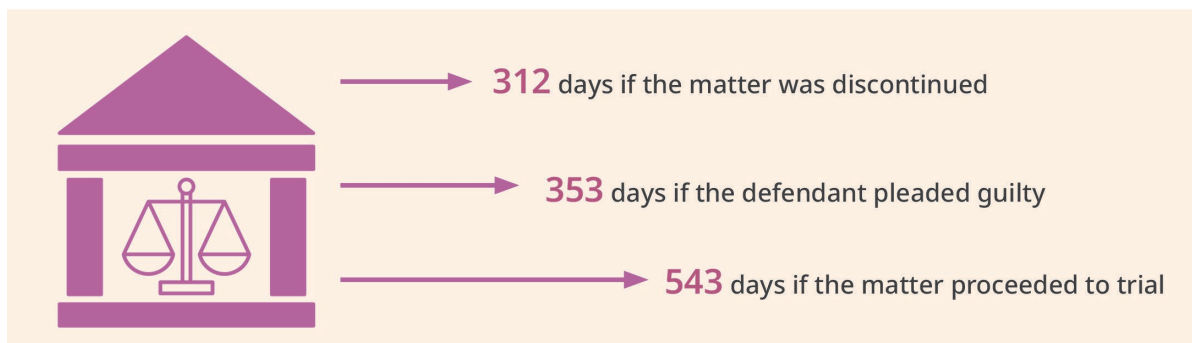
in DFV contexts,¹⁴⁰ it goes beyond s 315A, instead incorporating elements of Queensland's s 315 offence ('disabling in order to commit indictable offence').

128. The penalty of 10 years imprisonment was prescribed in New South Wales because it was consistent with penalties in other Australian jurisdictions that also prescribed higher maximum penalties for strangulation compared to assault occasioning bodily harm. It was also consistent with the distinction in the Crimes Act 1900 (NSW) between the seriousness of assaulting with intent to commit an indictable offence (which prescribed a maximum of penalty of five years imprisonment) and strangling with intent to commit an indictable offence (which prescribed a maximum of penalty of 25 years imprisonment).¹⁴¹
129. Elsewhere, maximum penalties also vary widely. Maximum penalties range from five years imprisonment in England and Wales to seven years in New Zealand, 10 years (for assault with a weapon or causing bodily harm) or 14 years (for sexual assault with a weapon, threats to a third party or causing bodily harm) in Canada, and 14 years in Northern Ireland.¹⁴² In the United States, maximum penalties range from one year to life in prison.¹⁴³

Finalisation in the Magistrates Court

- Should non-fatal strangulation charges be able to be finalised in the Magistrates Court in Queensland?
 - If yes, in what circumstances?
130. We have been asked to consider whether and, if so, in what circumstances Queensland's non-fatal strangulation offence should be able to be finalised in the Magistrates Court.
 131. Some support the ability of Magistrates Courts to finalise non-fatal strangulation charges because:¹⁴⁴
 - removing the need to proceed to the higher courts would likely result in less delay in finalising charges (reducing the time by about half). The longer a matter takes, the more likely victim-survivors will disengage from the criminal justice process.
 - the current average sentence length for non-fatal strangulation charges (2.7 years in prison) is within the upper penalty limit of the Magistrates Court's jurisdiction (a maximum of three years in prison).
 - it would allow Aboriginal offenders and Torres Strait Islander offenders to be sentenced in the Murri Court, a specialist court designed to rehabilitate and reintegrate offenders while also addressing cultural considerations and intergenerational trauma.
 132. If non-fatal strangulation charges could be heard in the Magistrates Court, some suggest that this would need to be conditional, for example, only allowed if the defendant is pleading guilty and lacks prior DFV-related convictions.¹⁴⁵ Magistrates must already abstain from dealing with a charge if they think any sentence they could make would be inadequate.¹⁴⁶

133. Non-fatal strangulation charges take a long time to finalise. Between 2016–17 and 2019–20, on average it took:¹⁴⁷



134. Where non-fatal strangulation was the most serious offence sentenced, Aboriginal offenders and Torres Strait Islander offenders had, on average, significantly shorter times to finalise cases (249 days) than non-Indigenous offenders (315 days). Similarly, Aboriginal offenders and Torres Strait Islander offenders who pleaded guilty had their matters finalised, on average, 40 days earlier than non-Indigenous defendants (323 days compared to 363 days).¹⁴⁸
135. A sample of ODPP case files finalised from 2017 to 2020 showed that the average non-fatal strangulation case completion time from ODPP file opening to finalisation was 276 days (around 9.2 months).¹⁴⁹ While the range of case durations was similar in both Brisbane and regional chambers, cases in regional chambers were finalised, on average, 85 days sooner than cases in Brisbane.¹⁵⁰
136. The ODPP case file research also found that around 41% of complainants in those case files withdrew from the prosecution of non-fatal strangulation.¹⁵¹ In these cases, the non-fatal strangulation charge was either replaced with an alternative charge or discontinued. Longer processing times likely resulted in more stress to non-fatal strangulation complainants and a higher likelihood they would withdraw from the prosecution.¹⁵² We discuss complainant withdrawal further at [156].
137. As discussed above at [96], Aboriginal peoples and Torres Strait Islander peoples are over-represented at all stages of the criminal justice system process for non-fatal strangulation offending. However, because non-fatal strangulation charges must be heard in the District Court, proceeding through the Murri Court is not an option.

Queensland law

138. Currently, non-fatal strangulation charges against adult offenders must be tried or sentenced in a higher court, not the Magistrates Court. If the defendant is a legally represented child, they can consent to have their case heard summarily in the Childrens Court.

Law in other Australian jurisdictions

139. Some Australian jurisdictions allow lower-level courts to try or sentence non-fatal strangulation charges in some circumstances and others do not: see Table 1.

Table 1: Jurisdiction over non-fatal strangulation charges throughout Australia.

State or territory	Lower-level court jurisdiction?	If yes, in what circumstances?
Queensland ¹⁵³	No, for adult defendants. Yes, for child defendants.	The child defendant must consent and be legally represented.
South Australia ¹⁵⁴	No, for trials. Yes, for sentencing.	The defendant must plead guilty and the prosecutor and defendant must consent.
Australian Capital Territory ¹⁵⁵	Yes	The prosecution must elect.
Northern Territory ¹⁵⁶	Yes	The prosecutor and defendant must consent and the court must consider the charge should be heard and determined summarily.
Victoria ¹⁵⁷	Yes	The prosecutor must consent and the court must consider that the charge is appropriate to be heard summarily.
Tasmania ¹⁵⁸	Yes	The defendant must apply and the judge must consider the punishment given will be adequate for the circumstances of the case.
New South Wales ¹⁵⁹	Yes	Must be heard summarily unless the prosecutor or person charged elect otherwise.
Western Australia ¹⁶⁰	Yes	Must be tried summarily unless before the defendant pleads guilty, the prosecutor or defendant applies and the court decides that the charge is to be tried on indictment.

Other considerations

140. In addition to the five key issues specified in our terms of reference, we have identified other relevant considerations.

Unlawful' and 'intentional'

- If the 'without consent' requirement and/or domestic setting scope are removed from Queensland's offence, does the 'unlawful' requirement ensure that the offence does not capture conduct, such as in law enforcement, security and sporting contexts?
- Would requiring the non-fatal strangulation to be 'intentional' achieve this aim?

141. The non-fatal strangulation offences in many Australian jurisdictions (including Queensland) require the non-fatal strangulation to be 'unlawful'. Reforms to the Australian Capital Territory's non-fatal strangulation offence included this element to address 'the issue of benign pressure to the neck' in the same way that the term 'unlawfully' prevents benign

conduct constituting an assault.¹⁶¹ In New South Wales, 'intentionally' was included to serve a similar function.¹⁶²

Defences or excuses

- If the 'without consent' requirement and/or domestic setting scope are removed from Queensland's offence, does a requirement that the conduct occur without lawful excuse ensure that the offence does not capture conduct, such as in law enforcement, security and sporting contexts?
 - If yes, what defences and excuses should be available?
142. While Queensland's offence captures only 'unlawful' non-fatal strangulation, defences and excuses can justify or excuse otherwise unlawful conduct.
143. South Australia's legislation states that 'conduct that is justified or excused by law cannot amount' to a non-fatal strangulation offence. This was intended to exclude the offence applying to, for example, sporting events and applying pressure to the neck to save someone's life.¹⁶³
144. Both non-fatal strangulation offences in Victoria require the conduct to occur 'without lawful excuse'.¹⁶⁴ This was included to ensure common law defences (including lawful arrest and conduct in the course of everyday life) as well as certain statutory defences (self-defence, duress and sudden or extraordinary emergency¹⁶⁵) are available for the offence.¹⁶⁶ However, Victorian legislation provides that the defence of mistaken but honest and reasonable belief that the person was not a family member is not available for either offence, nor is the excuse of consent for the s 34AD offence.¹⁶⁷ While the excuse of consent is available for the s 34AE offence, as discussed above at [87], this excuse is regulated by statute.¹⁶⁸
145. A specific statutory defence to a s 34AD charge is also available if the conduct occurs in the course of a procedure carried out in good faith for medical or body modification purposes.¹⁶⁹
146. In Queensland, assault is not an element of the non-fatal strangulation offence, which means that the provocation defence (under ss 268 and 269 of the Criminal Code) does not apply.¹⁷⁰

Guiding principles in the legislation

- Should Queensland's non-fatal strangulation legislation include a set of guiding principles to assist the court in interpreting and applying the offence?
 - If yes, what should these guiding principles be?
147. Queensland's non-fatal strangulation offence does not currently refer to guiding principles to which the court must have regard when interpreting and applying the non-fatal strangulation offence.
148. Victoria's non-fatal strangulation reforms do.¹⁷¹

Victoria's guiding principles

- Non-fatal strangulation by a current or former intimate partner indicates that the person is statistically more likely to be killed by that partner
- In DFV circumstances, non-fatal strangulation can indicate an ongoing and escalating pattern of coercive and controlling behaviours

- Even very short or individual instances of non-fatal strangulation can show the physical dominance and control of the person using violence over the victim and create an atmosphere of fear and compliance
- Non-fatal strangulation will not always leave physical signs or injuries, and it can result in physical signs or injuries that only appear weeks or months later.

Evidence

- What kinds of evidence are useful for proving non-fatal strangulation?
 - Does evidence gathering in non-fatal strangulation cases need to be improved? How?
 - Are there any other evidentiary issues that arise in non-fatal strangulation cases?
149. Around 50% of non-fatal strangulation charges result in a finding of guilt, while most of the remaining charges are discontinued.¹⁷² A potential reason for this is issues with evidence.
150. Research frequently raises evidentiary issues in non-fatal strangulation cases. Around half of strangulation victims develop visible external injuries.¹⁷³ These injuries may not appear until hours or days after the non-fatal strangulation or may be difficult to observe on those with darker coloured skin.¹⁷⁴ Other injuries, such as brain injury, miscarriage or stroke, may be further delayed. Lack of visible external injuries can make it difficult to prove strangulation occurred and, in cases where such injuries are present, these may be too minor to photograph with sufficient quality or be ambiguous as to whether strangulation was the cause.¹⁷⁵
151. Some lawyers believe the medical evidence given in non-fatal strangulation cases is 'ambivalent at best'.¹⁷⁶ Other lawyers consider that medical evidence is most pertinent in the most serious of non-fatal strangulation cases but, in such cases, usually a more serious charge is laid.¹⁷⁷
152. Accordingly, accurate and comprehensive recording of statements and symptoms, in addition to injuries, by medical professionals and other first responders (including police) can be crucial evidence.¹⁷⁸ When talking about their experience of non-fatal strangulation, a sample of victim-survivors described invisible injuries (such as memory loss) and their subjective experiences (such as feeling as if they could not breathe) more often than visible injuries.¹⁷⁹ The lack of visible injuries may be one reason that some victim-survivors choose not to seek medical assistance nor report the conduct to police.¹⁸⁰
153. Prosecution of non-fatal strangulation may also be challenging because usually there are no third-party witnesses or, if witnesses are present, they are often children.¹⁸¹
154. In Queensland's reported non-fatal strangulation cases, the prosecution has adduced a variety of evidence to prove strangulation. In most cases, this evidence has come from the victim-survivor. It has also included evidence from medical professionals who assessed the victim-survivor following the strangulation event, medical experts who testified as to the nature of non-fatal strangulation (and that it may leave no visible injuries), first responders (including police) and other witnesses. Despite this, the District Court of Queensland has held that, in certain non-fatal strangulation cases, the best available evidence will be the complainant's testimony as to whether their breathing was restricted, even if other evidence is presented at trial.¹⁸²
155. Where defendants plead guilty, complainants usually do not need to give evidence. More robust evidence collection in non-fatal strangulation cases may encourage more guilty pleas.

Complainant withdrawal

- Why might complainants withdraw or disengage from the prosecution of non-fatal strangulation?
 - How might victim-survivors' engagement with the criminal justice system in non-fatal strangulation cases be improved?
156. A large proportion of complainants withdraw from the prosecution of non-fatal strangulation. Some suggest that this is more likely to occur for non-fatal strangulation than other DFV-related charges.¹⁸³
157. Victim-survivors may withdraw their complaint (whether formally or by changing their story, refusing to testify or becoming uncontactable) because:¹⁸⁴
- they fear the defendant, being isolated from family and friends, or other risks (such as deportation)
 - they are influenced by the defendant or others to do so
 - of their emotional or material connection to the defendant
 - they want to move on with their lives and avoid a lengthy trial process.
- Some of these concerns can be heightened because, if convicted, most non-fatal strangulation offenders receive a sentence of imprisonment.¹⁸⁵
158. Research also shows that non-fatal strangulation victim-survivors may not receive adequate information about bail and the court process, which may lead some to disengage from the process.¹⁸⁶ A supportive prosecutor, victim-survivor support, more penalty options (including those that support and encourage behaviour change) and reduced finalisation times may help to keep non-fatal strangulation complainants engaged.¹⁸⁷

Children

- Do particular issues arise when children are victim-survivors, witnesses or defendants of non-fatal strangulation charges?
 - Do particular issues arise when children are required to give evidence in non-fatal strangulation cases?
 - Are existing practices and procedures sufficient to protect children who give evidence in non-fatal strangulation cases? If not, how could those practices and procedures be improved?
 - Do children (as victim-survivors or witnesses) have adequate support following non-fatal strangulation?
159. Research shows that children may be involved in non-fatal strangulation cases as victim-survivors, witnesses and defendants.¹⁸⁸ Academics note that 'children have been identified as a small but extremely vulnerable group of direct victims of [non-fatal strangulation] in the context of DFV'.¹⁸⁹ However, there is little available research about child non-fatal strangulation victim-survivors (including how best to identify such events and support children following being strangled). Research shows that lack of evidence gathering is a particular issue where children have been strangled.¹⁹⁰
160. Where children saw the strangulation of another person, some suggest that they should be protected from giving evidence, especially if the complainant and defendant are their parents.¹⁹¹ If children must give evidence, others suggest that the best interests of the child

(and victim-survivor) should be seriously considered in deciding whether to pursue that charge.¹⁹² Victim-survivors may choose not to proceed with non-fatal strangulation prosecutions (and defendants may plead guilty) to protect their children from giving evidence.¹⁹³

161. Academics suggest that further consideration of the kinds of support children may need after seeing someone being strangled is required, given this could be particularly traumatic.¹⁹⁴

References

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Queensland Law Reform Commission
Level 30, 400 George Street, Brisbane QLD 4000
PO Box 13312, George Street Post Shop, Brisbane QLD 4003
P: (07) 3564 7777 | E: LawReform.Commission@justice.qld.gov.au
[www.qlrc.qld.gov.au](http://www qlrc.qld.gov.au)
