NQWLS responses to Non-fatal strangulation: Section 315A review

Proposal 1

Q1 – We agree with proposal 1 for the following reasons:

- Proposed offence 1 reflects the seriousness of NFS in a domestic setting and acknowledges this type of offence is a precursor to lethality.

  We support removing the words 'chokes, suffocates or strangles' from the elements of the offences, however, leaving these words as a heading to the offence is important. We hear that there are many methods of terrorising a victim and interfering with her ability to breath/ her blood supply that would not fit neatly into one of these words. However, leaving the words in the heading will allow victims, perpetrators, and the general community to immediately understand the terrifying style of conduct that forms the gravamen of the offending.

  Finally, we have no issue with raising the maximum sentence to 14 years in these matters to reflect the seriousness of the offence and the potential for future lethality (and also presumedly in the hope raising the maximum lifts the actual penalty imposed.)

- Proposed offence 2 is extremely necessary in our view. We believe it will lead to more convictions, less trials, and significantly more victim satisfaction with the justice system. All of this could lead to more complaints being made from victims who do not report offending due to their lack of trust in the justice system and the fear they will not be believed.

  This proposed offence captures matters that are currently out of reach of section 315A. Having an offence that does not require an (obvious) result/injury or where the proof of such a result is too difficult to prove beyond reasonable doubt, will allow this type of terrifying conduct to be charged for what it is and not, for example, as an assault (if at all.)

  We cannot stress enough how meaningful this will be for victims to have this type of conduct recognised as an offence of strangulation, and not a more generic assault offence. NFS has a markedly different quality to other assaults. It is deeply disturbing and chilling behaviour that traumatises victims, often making them fear for the lives. The psychological effects can be ongoing and are not visible as an injury or 'result'.

  Comments were made at the roundtable the writer attended, that the introduction of this offence would lead to more case conferencing where defendants agree to plead to this offence rather than the offence requiring conduct *and result* in order

to avoid the possibility of the higher sentence. While this may be true, we believe most victims would prefer a conviction for the offence with the smaller maximum, if it avoids a hearing and still recognises the unique harm they have suffered at the hands of the perpetrator.

Many victims, in our view, will not understand the distinction between the elements of the two offences or the difference in maximum penalties. They *will* care about being believed, not having to endure cross-examination, the shorter time they spend waiting for an outcome, and having the person who has terrorised them convicted of an offence that recognises what they have experienced. We predict more women will be confident to come forward as complainants as word of successful prosecutions filters into the community.

The maximum penalty of seven years is in line with the current maximum in s315A. We have no issue with seven years being set as the maximum for this offence.

- Proposed offence 3 is also necessary to capture matters that are currently out of reach of section 315A. It is unacceptable that no offence currently exists that effectively addresses conduct of this terrifying nature when there is no domestic relationship between the offender and victim.

  The status quo does not reflect the modern world where, for example, dating apps are extensively used for casual encounters that do not meet the definition of a domestic relationship. It is likewise unacceptable that victims of this insidious type of offending who do not know their attacker, can never have their attacker convicted of a NFS offence.

  The maximum penalty of 10 years is appropriate in our view as it traverses the middle ground between the risk of future lethality that strangulation poses in domestic relationships, and the conduct-only offence of proposed offence two.

Q3 – We are firmly of the view that 'without consent' should be removed from NFS.

We echo other stakeholders' views that no one would willingly consent to the potential harm that can result from strangulation, suffocation and choking. The possible consequences, even for those who supposedly consent, are too serious.

We have the permission to share the story of [redacted]: Her 15-year-old son was fooling around with other boys waiting for their martial art lesson to commence. The latest game was to choke each other to see who could last the longest before tapping out. [redacted] son was regarded as the best in the game as he could hold out the longest. In a life-changing few moments, his and his family's life changed forever. [redacted] son suffered a catastrophic injury

that has left him severely disabled, requiring full-time care to lift and turn him in his bed, toilet him and feed him through a peg in his stomach. This incident occurred 22 years ago and lasted but a few moments however, this young boy's was irrevocably changed.

We simply do not believe that truly informed consent occurs before NFS is engaged in. Consent, where all possible consequences are known, understood, and properly considered does not exist. Please note that we do not believe consent to more conventional sexual practices is widely understood and freely given.

This is particularly so in First Nations communities where sexual activity often commences at very young ages with vulnerable young girls. Consent remains an academic concept in these communities (and in the broader community), regardless of the model of consent employed at law. The reality is often widely different to what is imagined by the drafters of legislation.

It is well known that NFS has become so prevalent in the younger generation that it has become the expected norm. We invite the Commission to visit the website of the *Breathless* campaign to read comments by young women about this practice who simply go along with it (often without any discussion) because it is perceived to be a normal part of sex.

Over the years we have assisted many women and girls who have told us about sexual activities involving NFS they have engaged in (some have described NFS as 'breath play' or 'choking'.) Usually, we encounter these women and girls in our role as duty lawyers at the Special Domestic Violence Court.

It is our experience that so-called consensual NFS occurs between parties that feature a significant power disparity; specifically, coercively controlling relationships where other forms of domestic violence designed to exert control and dominance are present. We must question whether consent to NFS obtained in these relationships has truly been given freely or is simply another manifestation of control?

Our final comment is that removing the notion of consent to unlawful NFS from the offence sends a strong message to the community that this type of sexual activity is never safe and should not be considered normal. It seems highly contradictory that on the one hand NFS is considered so risky that when it occurs without consent it attracts very high maximum penalties, and yet a young woman or girl can supposedly give her consent to the same practice.

Proposal 2

Q5 – We agree with proposal 2 to remove reliance on provocation, prevention of the repetition of insult, and domestic discipline. We note that other possible defences were raised in the roundtable that also ought not be available to NFS, such as prevention of a breach of peace, compulsion, etc. It is difficult to conceive of a scenario where these defences are reasonable in the circumstances. They are not in line with community expectations and shift the emphasis to the victim's behaviour, away from the offenders.

Proposal 3

Q7 – We firmly agree with the proposal that adult offenders who plead guilty being sentenced in the Magistrates Court. Proceedings for NFS are far too long and too onerous on victims. It is a regular occurrence that the women we are support in NFS prosecutions as complainants cannot make it through to the end of the process and withdraw their complaint. This happens even in the face of compelling evidence. To have proceedings hanging over them for an average of 14 months (for a guilty plea), causes immeasurable distress and disruption to a victim. Any changes that shorten that time should be adopted.

We believe that whether a NFS matter is finalised in the Magistrates Court or District Court will be of little importance to most victims. The benefits in real-life practical terms of having matters dealt with closer to the actual offending and in a much timelier manner, far outweigh any argument that such a serious indictable offence must be finalised in a higher court.