SUBMISSION TO THE QUEENSLAND LAW REFORM COMMISSION

NON-FATAL STRANGULATION: SECTION 315A REVIEW

A HOLISTIC REVIEW OF THE NON-FATAL STRANGULATION OFFENCE

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OVERVIEW

The overarching question that needs to be addressed in this Review is whether the Queensland Law Reform Commission's Consultation paper on s 315A non-fatal strangulation has established a case for reform. In other words, in what demonstrable ways is s 315A failing? What purported omissions or weaknesses in s 315A need addressing?

On its face, the statistics reproduced in the Consultation paper appear to support the argument that s 315A is effective in bringing perpetrators to justice. For example, on page 12 of the Consultation paper it is stated that from July 2022 to June 2024, there were 1,856 non-fatal strangulation charges on indictment in the District Court of which 54.3% (n=1008) resulted in a plea of guilty. Significantly, 37.9% (n=704) were dismissed or withdrawn by the prosecution. Thus, only 7.8% of cases went to trial. This leads to the conclusion that where the police have the evidence, a guilty plea is very likely to be the result. So, is the basis of the argument for reform of s 315A based on the inability of the Crown to adduce sufficient evidence to secure a conviction? This begs the question whether the real issue is the cogency of the evidence presented in court rather than the wording of s 315A itself? Is it a question of the strength of the medical evidence and the speed of reporting?

Additionally, for comparative purposes, it would have been useful if the QLRC had included similar statistics for other offences against the person such as common assault and bodily harm. How else can these statistics be judged?

The QLRC is recommending that s 315A be repealed and be replaced with three offences, two of which would apply to domestic settings, and one would apply beyond domestic settings. Again, on its face, this proposed three-offence model for non-fatal strangulation appears to be unnecessary based on the alternative suite of offences already available to the police ranging from common assault and assault occasioning bodily harm to grievous bodily harm and attempted murder. Indeed, on page 16 of the Consultation paper it is acknowledged that where non-fatal strangulation charges are replaced with another charge, they are usually replaced by common assault and assault occasioning bodily harm.

A more technical critique of the wording of the proposed three-offence model for non-fatal strangulation is that there is no indication in the Consultation paper that the QLRC proposes to deviate from the standard *Criminal Code 1899* (Qld) formula of making the conduct punishable by virtue of simply stating the nature of the unlawful act or omission and remaining silent on the fault element because no mental or fault element is necessary, as exampled by s 315A below.

> 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).

The absence of a fault element amounts to an offence of strict liability by default and is not in conformity with High Court authority in *He Kaw Teh v The Queen* (1985) 157 CLR 523 that courts should not impose strict liability in the absence of a clear and express indication in the legislation.

Contrast s 315A above with a more modern Code such as the *Criminal Code 1983* (NT) which has adopted the nomenclature of the *Criminal Code 1995* (Cth), as exampled by s 186AA.

186AA Choking, strangling or suffocating in a domestic relationship

(1) A person commits an offence if:

(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.

Maximum penalty: Imprisonment for 5 years.

(2) Strict liability applies to subsection (1)(a).

(3) To avoid doubt, an offence against this section constitutes domestic violence under section five of the *Domestic and Family Violence Act 2007*.

(4) In this section:

'chokes, strangles or suffocates', a person, includes the following:

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

(b) obstructs, to any extent, any part of the person's:

(i) respiratory system; or

(ii) accessory systems of respiration;

(c) interferes, to any extent, with the operation of the person's:

(i) respiratory system; or

(ii) accessory systems of respiration;

(d) impedes, to any extent, the person's respiration.

'domestic relationship', see section 9 of the *Domestic and Family Violence Act 2007*.

Thus, it can be readily seen that under s 186AA(1)(b) above, the fault element of intention is specified for the conduct of choking, strangling or suffocating the other person. Then, under s 186AA(1)(c) above, the fault element of recklessness is specified regarding the person being reckless as to the circumstance that the other person does not consent to the choking, strangling or suffocating. Finally, strict liability is applied under s 186AA(2) to subsection (1)(a) the person is in a domestic relationship with another person.

New South Wales has adopted a similar approach to that of the Northern Territory in specifying the fault element of intention for the act of choking, suffocating or strangling and recklessness for the result of the act, as found in s 37(1) of the *Crimes Act 1900* (NSW).

> (1) A person is guilty of an offence if the person -
>
> > (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.

The difficulty with the failure of the *Criminal Code 1899* (Qld) to specify a fault element in offences has been identified as far back as 1961, with Dixon CJ's classic demolition of the architecture of the *Criminal Code 1899* (Qld) in *Vallance v The Queen* (1961) 108 CLR 56.

Vallance was charged with unlawful wounding. The question the High Court had to determine was the relationship between the offence of unlawful wounding and s 13(1) of the *Criminal Code 1924* (Tas) which was derived from s 23 of the *Criminal Code 1899* (Qld) and expressed in the following terms:

> No person shall be criminally responsible for an act unless it is voluntary and intentional; nor … for an event which occurs by chance.

Dixon CJ attacked Sir Samuel Griffith's Code by declaring that 'an examination of the Code, in an attempt to answer what might have been supposed one of the simplest problems of the criminal law [the place of intention on a charge of unlawful wounding], leaves no doubt that little help can be found in any natural process of legal reasoning' (*Vallance v The Queen* (1961) 108 CLR 56, 58).

Dixon CJ then applied s 13(1) - which he took to be saying that all the acts of the defendant that formed the elements of the offence had to be voluntary and intentional - to the offence of unlawful wounding and concluded that the wounding must be voluntary and intentional (not reckless). This then led Dixon CJ to level further criticism at the architect of the *Criminal Code 1899* (Qld), namely, 'that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially' (*Vallance v The Queen* (1961) 108 CLR 56, 61).

Griffith's original version of s 23(1)(b) stated that 'a person is not criminally responsible for an event that occurs by accident' (s 13 used the word 'chance' rather than 'accident'), but the current version of s 23(1)(b) has adopted the reasonably foreseeable consequences test.

> (b) an event that -
>
> > (i) the person does not intend or foresee as a possible consequence; and
> >
> > (ii) an ordinary person would not reasonably foresee as a possible consequence.

This means that in the absence of a specified fault element in the offence, the underlying or *sub-silentio* fault element in the *Criminal Code 1899* (Qld) is negligence. By contrast, the underlying fault element in the *Criminal Code 1995* (Cth) is recklessness which assumes that a conscious awareness of risk is a necessary threshold for criminal liability.

While it is acknowledged that s 315 Disabling in order to commit indictable offence of the *Criminal Code 1899* (Qld) below does contain the fault element of intention, this applies to

committing or facilitating an indictable offence rather than the act of choking, suffocating or strangling.

> Section 315 Any person who, by any means calculated to choke, suffocate, or strangle, and with 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, renders or attempts to render any person incapable of resistance, is guilty of a crime, and is liable to imprisonment for life.

Indeed, there is almost a complaint that the fault element of intention is included in s 315 judged by the following comments at paragraphs 102 and 103 on page 28 of the Consultation paper.

> 102. While non-fatal strangulation beyond domestic settings is already an offence under s 315, it is infrequently used and charges are rarely successful. Between July 2022 and June 2024, only 51 s 315 charges were laid. Of those, only 9 resulted in a conviction. We have heard that this is because certain elements of the offence can be difficult to prove, in particular, the requirement for intent.
>
> 103. Our proposed new offence 3 would operate alongside s 315. It does not require the person to have engaged in non-fatal strangulation with intent to commit or facilitate commission of an indictable offence, or facilitate flight of an offender. Proposed offence 3 would also not require the person to have done so to render or attempt to render the person incapable of resistance.

Significantly, the proposed new offence 3 omits the requirement for intent completely. One could reasonably conclude that the QLRC's approach is being driven by a desire to secure a greater number of convictions by lowering the standard of proof to one of strict liability.

The QLRC needs to consider whether in 2025 offences should be written in positive rather than negative terms, requiring the inclusion of fault elements and the repeal of s 23 which starts with the quite outdated 19th century jurisprudence of: 'Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for …' The Griffith formula of using for every offence the term 'unlawfully', which is defined in s 291 as without authorisation, justification or excuse, needs to be abandoned and substituted with positive language identifying the fault elements that constitute the offence as one would expect in a modern Code like the *Criminal Code 1995* (Cth).

CONSULTATION PROPOSALS AND QUESTIONS

P1 Section 315A of the Criminal Code should be repealed and replaced with three new offences:

• Offence 1: unlawfully doing particular conduct that restricts respiration and/or blood circulation in the context of a domestic setting. This offence would prescribe a maximum penalty of 14 years' imprisonment.

• Offence 2: unlawfully doing particular conduct in the context of a domestic setting. This offence would prescribe a maximum penalty of 7 years' imprisonment.

• Offence 3: unlawfully doing particular conduct that restricts respiration and/or blood circulation. This offence would prescribe a maximum penalty of 10 years' imprisonment.

Q1 What are your views on proposal 1?

The proposal is lopsided as regards the balance between physical and fault elements. The proposal focuses exclusively on expanding the physical elements by including the term 'doing particular conduct' which presumably will be defined in broad terms and not be limited to any list of matters used in any proposed definition. Typical language employed might be as follows: 'Without limiting the matters that the court may take into account when applying the term "doing particular conduct" in subsection x, it is to take into account … '

By contrast, the proposal retains the antiquated Griffith Code language of 'unlawfully' defined in negative terms in s 291 as without authorisation, justification or excuse. No fault element is proposed making the offence one of strict liability. The principal defence to an offence of strict liability is mistake of fact which is found in s 24 of the *Criminal Code 1899* (Qld).

> 24 Mistake of fact
>
> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

For a further discussion of s 24, see the author's answer to Q3 in the context of s 348A.

As discussed in the Overview, the QLRC needs to recognise that offences should be written in positive rather than negative terms, requiring the inclusion of fault elements. In this regard, the author considers that if s 315A is to be repealed it should be replaced not by the three proposed offences put forward by the QLRC but by s 186AA of the *Criminal Code 1983* (NT).

Q2 What conduct should each of the three new offences criminalise?

It follows from the answer in Q1 above that the author does not support proposal 1, which makes the answer to Q2 redundant. The definition of 'chokes, strangles or suffocates' in s 186AA(4) of the *Criminal Code 1983* (NT) above is quite sufficient.

Q3 What are your views about consent, including:

• whether the 'without consent' requirement should be removed or retained?

The 'without consent' requirement should be retained. Given the inherent risks associated with the nature of the act of non-fatal strangulation, consent is a necessary safeguard.

• the circumstances in which the requirement should apply?

The requirement should apply in all circumstances as per previous answer.

• whether lack of consent should be an element or a defence?

This is a misleading question because it is phrased in binary terms, whereas the issue of lack of consent is always an element but can also be a defence. The Crown must always prove there was a lack of consent to the act which makes consent an element to the offence. If the defendant

is putting forward the defence of mistake of fact under s 24, then as mistake of fact only requires an evidential onus then the Crown must negative the defence beyond reasonable doubt subject to s 348A discussed below.

• how consent should be defined?

Consent should be defined consistently with the relevant statutory language in s 348 (free and voluntary agreement, may be withdrawn at any time), s 348AA Circumstances in which there is no consent, and s 348A Mistake of fact in relation to consent, particularly subsection (3) A belief by the person that another person consented to an act is not reasonable if the person did not, immediately before or at the time of the act, say or do anything to ascertain whether the other person consented to the act.

Section s 348A(3) inserts a model of positive consent into the *Criminal Code 1899* (Qld) which should apply to non-fatal strangulation offences.

Q4 When should non-fatal strangulation be lawful?

Only when positive consent is established under s 348A(3) above.

If the thrust of the question is directed at certain physical acts between adults conducted in private which are designed to heighten sexual gratification, then the same standard of positive consent should apply as when establishing positive free and voluntary agreement was given when dealing with rape and sexual assault matters.

P2 The existing defences in the Criminal Code of provocation to assault (s 269), prevention of repetition of insult (s 270), and domestic discipline (s 280) should not apply to the three new offences.

Q5 What are your views on proposal 2?

It is not immediately apparent why these three defences should not apply to the three new proposed offences. Under s 315A(2), an assault is not an element of an offence against subsection (1). Section 315, which does not state an assault is not an element of the offence, is to be retained under the QLRC proposals, but the proposed offence 3 is to contain the same language as s 315A(2). In seeking to extend the number of precluded defences, the QLRC appears to be identifying a pejorative hierarchy of offences to justify singling out non-fatal strangulation as of sufficient dangerousness to warrant its exclusion from these three defences. One wonders why a heavy blow to the head (eggshell skull) is less dangerous than non-fatal strangulation?

For example, s 314A Unlawful striking causing death refers to striking another person to the head or neck, where striking a person means to directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument. A person who is struck in this manner may not die but suffer grievous bodily harm. Why then should the three nominated defences which the

QLRC is proposing should not apply to its proposed three new non-fatal strangulation offences also not apply to grievous bodily harm where the force has been applied to the head or neck?

The three nominated defences proposed to be excluded by the QLRC are set out below.

> 269 Defence of provocation
>
> (1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
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> (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

For present purposes, the important word in s 269 is 'assault'. The QLRC is proposing non-fatal strangulation is such a unique and dangerous form of 'assault' that s 269 should be excluded as a defence. The QLRC's Consultation paper is not convincing or persuasive in proposing to categorise assaults based on degrees of dangerousness with non-fatal strangulation at the summit. The seriousness of any assault depends on the particular circumstances, including the physical strength of the perpetrator, the physical and medical characteristics of the victim, and where relevant the type of weapon involved. It is simplistic to approach any categorisation of dangerous assaults based on the type of offence *per se*.

Similar comments apply to s 270 and s 280.

> 270 Prevention of repetition of insult
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> It is lawful for any person to use such force as is reasonably necessary to prevent the repetition of an act or insult of such a nature as to be provocation to the person for an assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
>
> 280 Domestic discipline
>
> It is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances.

As to s 280, the author previously offered the following opinion in regard to Q21 of the QLRC's Consultation Report reviewing particular defences.

"The test in s 280 is objective: such force as is reasonable under the circumstances. On its face, the test appears fair and depends for its operation on (a) how the police make decisions as to whether to prosecute, and (b) how the courts interpret the word 'reasonable'. It would appear from the QLRC Consultation Report that s 280 has been used as the basis for the decision by police not to charge a parent in 571 cases (pages 73-74 [402]), which indicates that cases under s 280 rarely come before the courts.

The foregoing would tend to show that rather than repeal s 280 and open a Pandora's Box of what constitutes 'reasonable under the circumstances' in an attempt to limit the application of s 280, the better approach would be to focus on police procedures and bringing more cases before the courts to test judicial interpretation of 'reasonable under the circumstances'."

In the present context, of specifically excluding non-fatal strangulation offences from s 280, why should these offences be considered more dangerous than a stepfather throwing a small child against a hard object by way of correction, discipline, management or control? Indeed, as the incidence of attacks by pupils on teachers rises, particularly teenage males against female teachers, why is it necessary to second guess the type of force that might be reasonable under the circumstances?

More generally, consistent with the author's answer to Q1 which expressed the opinion that s 186AA of the *Criminal Code 1983* (NT) should replace s 315A rather than the three new proposed offences put forward by the QLRC, s 188AA makes no reference to an assault not being an element of an offence which the author considers to be the better view.

Q6 Are there other defences you think should not apply to one or more of the new offences?

No, for the reasons given in the answer to Q5.

P3 Adult perpetrators who plead guilty should be sentenced in the Magistrates Court:

• unless the perpetrator elects otherwise

• subject to the Magistrate's overriding discretion.

Legally represented child perpetrators should continue to be able to consent to have their case tried or sentenced in the Childrens Court (Magistrate).

Q7 What are your views on proposal 3?

Proposal 3 makes eminent sense, especially as regards the use of scarce court resources and finalising the matter in the timeliest manner.

Q8 What reforms to practice and procedure are needed to ensure just and effective operation of the three new offences?

Not applicable given the author does not support the repeal of s 315A and its replacement by the proposed three new offences.

CONCLUSION

In a nutshell, for the reasons already given, Queensland would be best served if the wording of 186AA of the *Criminal Code 1983* (NT) replaced s 315A of the *Criminal Code 1899* (Qld).

First, future amendments to the *Criminal Code 1899* (Qld) should be phrased in positive and not negative terms by including fault elements and definitions of those fault elements should be specified in the Code. The essence of a Code is that a person should be able to read the wording of a particular offence and understand the nature of criminal responsibility under that

section of the Code. The absence of fault elements in the *Criminal Code 1899* (Qld) undermines the criterion of clarity required for a Code.

By contrast to a modern Code like the *Criminal Code 1995* (Cth) and the *Criminal Code 1983* (NT), the *Criminal Code 1899* (Qld) uses the term 'unlawfully' for offences, the meaning of which a person reading the Queensland Code would be unable to determine unless directed to s 291 where the phrase without authorisation, justification or excuse is to be found. Even then, the reader would have to be further redirected to s 23(1)(b) and have the reasonably foreseeable consequences test explained.

The sub-title to the Consultation paper is: 'A holistic review of the non-fatal strangulation offence.' Any holistic review needs to commence with the fundamentally flawed architecture of the *Criminal Code 1899* (Qld). In this regard, the QLRC should revisit its Report No 64 (September 2008) entitled "A review of the excuse of accident and the defence of provocation" and in particular reconsider its recommendation 10-1 on page 9 as follows:

> 10-1 Section 23(1)(b) of the Criminal Code (Qld) should continue to excuse a person from criminal responsibility for an event that occurs by accident.

Secondly, a simple comparison between s 315A and s 186AA reveals how the latter meets a basic Criminal Code objective of comprehensiveness. There is a limited definition of choking, suffocating or strangling in s 315A(1A) of the *Criminal Code 1899* (Qld), as opposed to the far more comprehensive and detailed definition found in s 186AA(4) of the *Criminal Code 1983* (NT).

Thirdly, s 186AA does not attempt to exclude any possible defences or second guess the circumstances of any particular case. By contrast, s 315A(2) excludes provocation under s 269 by virtue of not requiring an assault to be an element of an offence against subsection (1). The QLRC's proposals seek to extend the excluded defences further to include s 270 Prevention of repetition of insult and s 280 Domestic discipline.

Overall, the QLRC has not established a strong case to repeal s 315A. Any new offence to replace s 315A should follow s 186AA of the *Criminal Code 1983* (NT) as an exemplar.