

19 June 2025

President Fleur Kingham
Chair
Queensland Law Reform Commission
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By email: [REDACTED]

Dear Chair

Non-fatal strangulation: Section 315A review | A holistic review of the non-fatal strangulation offence

The Bar Association of Queensland (**the Association**) welcomes the opportunity to make submissions to the Queensland Law Reform Commission's Consultation Paper, "A holistic review of the non-strangulation offence" (**the Consultation Paper**).

The Consultation Paper has been considered, and this submission prepared, with the assistance of the Association's Criminal Law Committee.

For convenient reference, this submission repeats the consultation proposals and questions in the order in which they are presented in the Consultation Paper.

In addition to the submissions made in response to the proposals and questions contained in the Consultation Paper, the Association notes that the Commission has not yet completed its research projects 2 and 3. The results of those research projects may better inform the Association's responses to the proposals and questions in the Consultation Paper. The Association looks forward to reviewing the results of research projects 1 and 2 and would appreciate the opportunity to make further comment once the research projects are complete.

Given the preliminary nature of proposals 1 and 2, the Association would also appreciate the opportunity to comment on the proposed offences when drafts are available.

Proposal 1. Section 315A of the Criminal Code should be repealed and replaced with three new offences: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.***

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- ***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.***

Question 1. What are your views on proposal 1?

The Association has two primary concerns with proposal 1. First, it considers that the proposal to replace s 315A with three new offences has the potential to create a legal framework that is unnecessarily complex and shifts focus away from preventing and punishing non-consensual strangulation which occurs in a domestic setting. Second, the Association is concerned that, depending on the way in which the provisions are drafted, there is a real risk that the proposal will have the effect of unnecessarily criminalising a much broader range of behaviours than is required to address the concerns which have led to the review.¹

Focus should remain on unlawful strangulation in a domestic setting

In relation to the first concern, the Association considers that the proposal to replace s 315A with three new offences, each with a different focus, elements and available defences, has the potential to create a legal framework that is unnecessarily complex and not fit for purpose. Given the considerable body of research concerning the risks associated with non-consensual strangulation as an indicator of future violence and homicide in the context of relationships involving domestic and family violence, it is the Association's view that any amended form of s 315A should be focused squarely on the criminalisation of non-consensual strangulation which occurs in a domestic setting. In contrast to offences 2 and 3, which apply in a domestic setting, proposed offence 3 would capture conduct that restricts respiration or blood circulation in much broader settings, such as in the context of a pub fight, a physical restraint by security or law enforcement personnel, on the sporting field or in a therapeutic context. The considerations relevant to the scope of this broader offence are very different to the considerations that are relevant in relation to proposed offences 1 and 2.

Accordingly, it is the Association's view that any amended form of s 315A should only apply to strangulation (or other associated conduct) that occurs in a domestic setting. The Association considers that, if the amended s 315A remains focused on strangulation or associated conduct that occurs in a domestic setting, it would be preferable to create a single offence of unlawfully doing particular conduct in the context of a domestic setting, with a circumstance of aggravation, which increases the maximum penalty, to apply if the conduct restricts respiration and /or blood circulation.

¹ For example, the primary concern of the findings and recommendations of the bodies such as the Special Taskforce on Domestic and Family Violence, the Women's Safety and Justice Taskforce and the Queensland Audit Office in relation to non-fatal strangulation is that it has been found to be a significant lethality indicator in a domestic and family violence context.

In relation to proposed offence 3, the Association considers that a standalone offence that extends beyond domestic settings is not necessary or desirable. In the Association's view, the concerns raised at paragraphs [88] to [95] of consultation paper concerning the scope of what is included in the terms "domestic relationship" and "associated domestic violence" in the current form of s 315A can be adequately addressed by ensuring that the definitions in the new form of the legislation are broad enough to include intimate personal relationships in which non-consensual strangulation have been shown to be a lethality indicator, such as dating relationships.

The Association does not accept that the proposition referred to in paragraph [87] of the consultation paper, that inherent dangers associated with strangulation, "regardless of the circumstances in which it occurs", justify the creation of a standalone offence that extends beyond domestic settings.

The Association strongly supports the approach of the Commission that is outlined in paragraph [25] of the consultation paper, namely, that any recommendations must be evidence-based. In this regard, it is important to note that it is apparent, from paragraph [96] of the consultation paper, that there is no current research to suggest that there is a risk of future violence and homicide posed to people other than intimate partners who experience non-fatal strangulation. Similarly, there is no evidence contained within the consultation paper to support the proposition, outlined in paragraph [100], that offences such as assault occasioning bodily harm do not adequately recognise the inherent seriousness of non-fatal strangulation. Accordingly, it is submitted that unlawful strangulation which occurs outside domestic or intimate settings can be adequately dealt with under the existing criminal provisions in the Code.

If the Commission forms the view that there is evidence to establish that the evidentiary issues identified in paragraph [101] of the consultation paper are a significant concern, such issues could be adequately addressed by including the restriction of respiration and/or blood circulation in the statutory definition of bodily harm.

The Association also notes that that it is unclear from the consultation paper how the three new offences outlined in proposal 1 are intended to interact with each other in practice. For example, it is not clear from the consultation paper whether it is intended for the three new offences to be able to be charged in the alternative. The Association is concerned that, if that were the case, the length and complexity of trials would increase substantially as, in many cases, parties would be attempting to prove or defend three separate offences. The Association notes that increasingly complex trials are likely to further delay the finalisation of matters of this type which, as recognised in the consultation paper, is not in the interests of complainants or defendants. As recognised in the consultation paper, delays in the resolution of matters of this kind can have the effect of re-traumatising complainants.

Unnecessary and unintended criminalisation

The second significant concern that the Association has about Proposal 1 is that, depending on the way in which it is drafted, there is a real risk that the proposal will have the effect of unnecessarily criminalising a much broader range of behaviours than intended. As discussed in more detail below, this risk is heightened if "pressure to the

chest” is conduct which can give rise to an offence and if the element of “without consent” is removed.

In the Association’s view, it is crucial that the existing safeguards to the current offence remain in place, namely, that consent remains an element of the offence and there is no reduction in the availability of the defences.

What must be proved must be clear

The Association agrees that a lack of definitional clarity within s 315A has created and continues to create confusion in practical application of the offence and that this issue should be addressed in the Commission’s recommendations.

Question 2. What conduct should each of the three new offences criminalise?

Conduct and results of conduct

The Association is not opposed to particular conduct and the results of that conduct being elements of the proposed offences. The Association submits that, to avoid a circular definition, the conduct and its result should be distinct, and should not, for example, both relate to circulation. In the Association’s view, the approach referred to, at paragraph [117] of the consultation paper, in which obstructing or interfering with the respiratory system or accessory systems of respiration is treated as conduct, should not be adopted.

Conduct which should be criminalised

The Association considers that a person covering the nose and mouth of another, and a person putting pressure on the neck of another, should be conduct which is criminalised and defined within the Code.

Pressure to the chest

The Association considers that the extension of the offence of non-fatal strangulation to conduct which involves pressure to the chest is neither necessary nor desirable.

The Association considers that, if pressure to the chest were a form of conduct criminalised as a non-fatal strangulation, it would capture a wide range of conduct which is otherwise already punishable as assault or, in more serious incidents, serious assault, assault occasioning bodily harm or grievous bodily harm.

Furthermore, in the Association’s view, it is difficult to foresee how pressure to the chest could be adequately defined without leading to unintended consequences. There are many types of conduct, including lawful conduct, which would involve some application of pressure to the chest. For example, a person playing rugby league might have pressure applied to their chest during a tackle which may cause them to become winded or otherwise out of breath within the rules of the game. The same can be said for a variety of martial arts in which participants use techniques that involve an application of pressure to an opponent’s chest. Similarly, a police, custodial or security officer might be required to place a person in a “bear hug” to remove them from a conflictual situation. A parent or carer might be required to do the same thing to control a dysregulated teenager who is at

risk of causing harm to themselves or others. All of these scenarios would involve the application of pressure to a person's chest and, potentially, a restriction of air or blood circulation but, in the Association's view, such scenarios should not be regarded as criminal behaviour.

Establishing criminality in these types of conduct, and, potentially, whether the action has impacted on the victim's breathing, may require the introduction of an element of intention and/or the production of medical evidence which will in turn lengthen trials and increase delays.

In the Association's view, it is more appropriate that a person who illegally applies pressure to the chest of another continues be charged with common assault, assault occasioning bodily harm or grievous bodily harm. Circumstances of aggravation also exist to reflect added seriousness dependent on whether a person is assaulted during their employment (police, ambulance officer corrective services officer), is a child or an older person or the assault occurs in a domestic setting. The availability of defences to those offences are appropriate to the broad range of circumstances where a charge of assault or greater may result from a person illegally applying pressure to chest of another. It would be undesirable to restrict a person's ability to avail themselves of the more limited defences to strangulation by including a broad category of conduct such as pressure to the chest in any new offence.

Furthermore, the Association agrees with the Commission's stated position in paragraph [25] of the consultation paper that reform to the criminal law must be evidence-based and notes in this regard that paragraph [119] of the consultation paper states *"there is not much information about the risk of lethality from applying pressure to the chest as opposed to the neck"*.

While the Association accepts that a number of Queensland coronial inquests have found that people have died from this kind of conduct, often when pressure is applied to the back while the deceased was lying face down, in the Association's view, that conduct should not be covered by offences dealing with non-fatal strangulation but, instead, would be appropriately captured by other offences, such as manslaughter or murder.

The Association also considers that the basis of any offence of non-fatal strangulation, as a distinct offence separate from other available offences such as assault, serious assault, assault occasioning bodily harm or grievous bodily harm, should reflect the noted predictive nature of strangulation. The explanatory notes to the *Criminal Law (Domestic Violence) Amendment Bill (No 2) 2015*, which introduced the offence of non-fatal strangulation, state:

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.

In the absence of any evidence concerning the risk of future violence or lethality arising from the application of pressure to the chest as opposed to the neck, the Association does not consider it necessary or appropriate for pressure to the chest to fall within a class of offences which are capable of being conduct that amounts to the offence of non-fatal strangulation.

Question 3. What are your views about consent, including:

- *whether the ‘without consent’ requirement should be removed or retained?*
- *the circumstances in which the requirement should apply?*
- *whether lack of consent should be an element or a defence?*
- *how consent should be defined?*

Question 4. When should non-fatal strangulation be lawful?

In the Association’s view, non-fatal strangulation should remain legal where consent is given and the requirement that strangulation occur “without consent” must be retained in all circumstances. The Association considers that the issue of consent must be retained as an element of the offence, rather than being raised as a defence.

If the element of “without consent” is removed, the Association is concerned that large sections of the Queensland community will be subject to criminal sanctions for engaging in otherwise consensual activities. Under such a proposal, non-fatal strangulation risks becoming a strict liability offence. As outlined above, there are many sporting contexts in which conduct that may amount to strangulation fall within the rules of the game, for example, chokeholds in the context of martial arts. Similarly, conduct which involves pressure to the neck or chest which may restrict circulation or breathing may fall outside the rules of the game but not amount to criminal conduct. Examples include an unintentional high tackle in AFL or rugby league or even an on-field melee involving “jumper punches”.

A further issue that is raised in the consultation paper is the prevalence of choking in the context of consensual sexual activities. As has been recognised, reforms to the criminal law must be evidence based and there is no evidence outlined in the consultation paper that engaging in consensual choking (or associated conduct) in the course of consensual sexual activities is an indicator of future violence of any kind within that relationship which is the rationale behind the need for a specific offence of non-fatal strangulation. In contrast, it is noted, in the consultation paper at paragraph [142], that most experiences of non-fatal strangulation were committed as acts of violence not during sexual conduct.

Removing consent as an element of strangulation more closely aligns the offence with grievous bodily harm to which a person cannot consent. There is no evidence to suggest that persons who consent to choking or associated conduct (for example, pressure on the neck that does not restrict breath) in consensual sexual relations are committing grievous bodily harm against each other or that they are suffering from any other adverse health effects as a result of that conduct. If the Commission forms the view that it is not desirable for couples to engage in choking or associated conduct as part of consensual sexual activities due to any inherent risks involved in the restriction of blood circulation or breath, then the answer, in the Association’s view, is increased education about the risks of such conduct not criminalisation.

In the Association’s view, concerns raised in the consultation paper at paragraph [141] about potential difficulties in proving that non-fatal strangulation occurred without

consent in the context of relationships involving coercive control do not justify a blanket removal of the element or any other significant amendments in relation to consent. In the Association's view, such concerns do not appear to take into account recent legislative amendments such as the availability of expert evidence concerning the nature of domestic and family violence; jury directions about the nature of domestic violence, including coercive control; and the introduction of the offence of coercive control, which is likely to also be prosecuted in cases of this kind.

In addition to the concerns raised above, if the onus were reversed on questions of consent or informed consent models were introduced, the Association considers that the following unintended consequences may also flow:

1. increased numbers of disadvantaged or less educated people who don't have access to the resources which would allow them to prove an understanding of the particular dangers of strangulation being charged and potentially convicted of serious criminal offences which, in turn, is likely to contribute further to the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system ;
2. the complexity and length of trials is likely to increase with mistake of fact in respect of consent, regularly, becoming an issue for determination;
3. if a strict liability type model is adopted, parties involved in other legal disputes, such as family court proceedings, could rely on consensual choking during the course of the relationship as the basis of a later criminal complaint in which they will be the only witness.

Proposal 2. 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.

Question 5. What are your views on proposal 2?

Question 6. Are there other defences you think should not apply to one or more of the new offences?

In the Association's view, the existing defences upon which a defendant to a charge of strangulation might rely should remain in place for any new offence(s).

However, if the offence of strangulation is expanded as broadly as it would be following Proposal 1, the defences available should be similarly expanded because of the broad range of conduct it would criminalise.

For instance, if the offence of strangulation is expanded broadly, and encompasses relationships outside a domestic setting, pressure to the chest is included as strangulation or consent is removed as an element of the offence, then the defences available should be expanded widely. The expanded offences would capture, for example, a teacher attempting to restrain a dysregulated child who, in the course of such conduct, may have applied pressure on the chest. In those circumstances, domestic discipline may be a relevant defence. The removal of such defences would be prejudicial and short sighted.

Proposal 3. 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 Children's Court (Magistrate).

Question 7. What are your views on proposal 3?

The Association strongly supports proposal 3.

In the Association's view, resolving matters in the Magistrates Court, where the matter is a plea of guilty, will provide benefits for all involved. The proceedings will be resolved more quickly than by waiting for resolution in the District Court, with a consequent reduction of costs for both the prosecution and defence and time-savings for both parties.

Given the range of penalties that are often imposed on pleas of guilty for such offences, the Association considers that Magistrates will, in most cases, be well placed to deal with such offences within the limits of their jurisdiction. The proposed application of s552D of the *Criminal Code* will mean that, in cases where the Magistrates Court considers the defendant may not be able to be adequately punished on summary conviction, the offence would continue to be resolved in the District Court, which is also appropriate.

Further to the likely cost and time savings, allowing an opportunity for early resolution of these offences, which often involve complex and dynamic relationship circumstances, will be beneficial. Efficient resolution of such offences is likely to limit the trauma experienced by the complainant and allow punishment and rehabilitation to occur earlier than if the matter must be resolved in the District Court.

In the experience of the Association's members, there may be concurrent domestic violence proceedings which are delayed pending the resolution of any charge for non-fatal strangulation. Allowing the earlier resolution of these matters in the Magistrates Court will have a flow-on effect which allows for the earlier resolution of domestic violence proceedings.

As recognised in the consultation paper at [217], an additional benefit of the proposal is that it would allow Aboriginal and Torres Strait Islander peoples who are pleading guilty to a charge of non-fatal strangulation to be sentenced in the Murri Court.

While the Association acknowledges that "pleas of convenience" may increase, if earlier resolution in the Magistrates Court were available, it is more likely that external factors such as social disadvantage make a more substantial contribution to those decisions.

Finally, the Association considers that an additional benefit of having such matters resolve in the Magistrates Court is that time and resources of the District Court will be available for other matters, which must resolve in that Court, to be dealt with more quickly.

Question 8. What reforms to practice and procedure are needed to ensure just and effective operation of the three new offences?

The Association supports an increase in education which increases awareness of the impacts of non-fatal strangulation. In particular, given the increased usage of video evidence collected by police from victim-survivors, an increase in training may reduce the likelihood that the evidence which is collected is disregarded as hearsay or becomes subject to an exclusion application which, in the experience of the Association's members, occurs particularly during early stages of an investigation.

As for judicial directions, the Association does not oppose any new directions the Commission may recommend. However, the Association suggests that the judicial officer be given the discretion as to which directions are appropriate in any given matter, rather than any mandatory directions.

Additionally, the Association supports the increased availability of and access to restorative justice.

The Association would be pleased to answer any more questions the Commission may have and would appreciate the opportunity to make further submissions upon the completion of the Commission's research projects 2 and 3.

Yours faithfully


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