

NON-FATAL STRANGULATION (SECTION 315A REVIEW) – SUBMISSION TO THE QUEENSLAND LAW REFORM COMMISSION

I INTRODUCTION

I begin by thanking the Queensland Law Reform Commission (QLRC) for the opportunity to contribute to reviewing section 315A of the *Criminal Code Act 1899* (Qld). As an emerging criminal law researcher and advocate for the prevention of gendered violence, I welcome the investigation. I write in my personal capacity as I continue researching non-fatal strangulation (NFS) amongst LGBTQIA+ communities.

NFS is a lethal form of gendered violence,¹ requiring an improved justice response. Although many Australian jurisdictions have sought to criminalise choking, suffocating and strangling behaviours, challenges arise when determining the accused's state of mind, admissible evidence and the scope of any relevant defences. Moreover, certain communities, including Indigenous, LGBTQIA+, refugee and migrant, disabled and mentally impaired persons may be disproportionately affected by NFS, particularly when interacting with criminal justice agencies as their circumstances may not be fairly ascertained.²

Responding to the QLRC's queries as raised in the Consultation Paper, in my submission, I will contend:

- Proposal One:
 - That the revised offence criminalise behaviours that may foreseeably result in serious injury, grievous bodily harm or death;
 - That the 'without consent' requirement be retained for the less culpable offences;
 - That the 'without consent' requirement be removed for the gravest offence;
 - That consent be defined as 'free, informed and voluntary agreement', with emphasis on the knowledge requirement cognisant of the inherent dangers of strangulation;
 - That NFS only be lawful as self-defence for serious violent crime, and otherwise be treated akin to one-punch laws;
- Proposal Two:
 - That Proposal Two appropriately excludes the listed defences;
- Proposal Three:
 - That the gravest offence remain indictable crime, but the remaining offences be indictable offences triable summarily;
- Proposal Four:

¹ Heather Douglas and Robin Fitzgerald, 'Proving non-fatal strangulation in family violence cases: A case study on the criminalisation of family violence' 25(4) *The International Journal of Evidence & Proof* 350, 350-352; Julia De Boos, 'Non-fatal strangulation: hidden injuries, hidden risks' (2019) 31(3) *Emergency Medicine Australasia* 302, 302.

² Queensland Law Reform Commission (QLRC), 'Non-fatal strangulation: Section 315A Review; A holistic review of the non-fatal strangulation offence' (Consultation Paper, April 2025) ('*Consultation Paper*'); See also Doris Rajan, *A Pedagogy of Solidarity: Indigenous, Refugee Women and Women with Intellectual and Psychosocial Disabilities and Structural Violence* (University of Toronto Press, 2019).

- That evidence requirements be clarified noting that NFS may leave invisible but ever-present injury.

I will now address each submission in turn, referencing both academic material and case law both from within and beyond Australia. In my submission, I have considered both substantive and procedural matters as raised by the Consultation Paper, to ultimately contend that the QLRC's proposal is a powerful starting point for reformation.

II REASONING

A Proposal One: Offences

I begin by applauding that three offences have been created, encompassing NFS in both domestic and non-domestic settings. I believe that the penalties allotted to each of the offences are reasonable, just and proportionate, particularly for Offence 1 as it directly punishes and generally deters family violence. I note that NFS may occur in unison with other forms of physical and sexual violence and urge that the new offences be actively prosecuted alongside other offences. That is, acknowledging the gravity of NFS as it may cause irreversible bodily harm, the offence ought not be implicitly prosecuted by another offence, for example common law assault, if the standard of proving an injury is not satisfied.³

The three new offences ought to criminalise a broad range of conduct, particularly those where the risk of serious injury, grievous bodily harm or death are objectively foreseeable. I believe that the proposed definition of 'restricts respiration and/or blood circulation' is more practical to identify as opposed to the trifecta of 'choking, strangling and suffocating', as reframing the offence in terms of a physical act does away with challenges of statutory interpretation. Additionally, this categorisation of harm is not constricted to any visible or permanent injury as may be currently required. Rather, it acknowledges the longevity of injuries that NFS may cause and enables the principles applicable related offences to be similarly used. For example, by employing the terminology of 'serious injury', the interpretation of this requirement including causation may be consistent with other non-fatal offences against the person. Conversely, the risk of 'death' enables NFS laws to operate more punitively, recognising not only that strangulation is a key indicia in forecasting femicides,⁴ but also that prolonged injuries may indeed yield terminal or irreversible damage.

Moreover, I think that there is potential for NFS to occur in sexual circumstances, particularly amongst young people becoming exposed to violent pornography and dangerous

³ Mark Thomas James J. Ball, 'Intentional Strangulation: The Proper Approach to Sentencing in the Absence of a Sentencing Guideline: *R v Cook* [2023] EWCA Crim 452' (2023) 87(4) *The Journal of Criminal Law* 281, 284.

⁴ Nancy Glass et al., 'Non-fatal strangulation is an important risk factor for homicide of women' (2008) 35(3) *The Journal of emergency medicine* 329, 330.

yet supposedly ‘exciting’ trends as observed on social media.⁵ Although consent to private sexual activities is welcome, noting that historically, the criminal law has marginalised non-heterosexual relationships in such matters,⁶ I believe that if there is an objective risk of serious injury, grievous bodily harm or death, that is, reasonably foreseeable or probable, the offence should be enlivened. Key homicide cases including *R v Stein*, *R v Emmett* and *R v McIntosh* have seen sexual strangulation dangerously yield serious injury or death,⁷ impermissible even if consent is provided for no agreement can excuse conduct dangerous to life nor limb.⁸ Moreover, particular vulnerabilities of the victim ought to be considered as part of this test, as the degree to which one victim may be affected will vary from another.

The relevance of NFS to other forms of sexual violence against women and children ought to be considered, whereby NFS as an accomplice to offences including rape, sexual assault and other contact offences should aggravate the overall sentence. This will ensure that the trauma sustained by the victim is adequately represented. So enters the ‘without consent’ requirement. To balance persons’ rights to bodily autonomy with the need for tighter measures to eliminate gendered violence, I suggest that the ‘without consent’ requirement be retained only for Offences 2 and 3, outright removed for Offence 1. Where a lack of consent is to be proven, I believe that consent should be defined as ‘free, informed and voluntary agreement’.⁹ I emphasise the knowledge requirement as an awareness of the long-term impacts of NFS should be central in deciding whether or not to engage in such sexual activities. This reaffirms the balance between a right to bodily autonomy with the need to prevent NFS cases.

As towards lawful excuses whereby NFS may be permissible, I fear a broad construction. Although self-defence for serious violent crimes including homicides and attempts may be permissible, particularly for Offence 3, I worry that this may enable accused persons to mask their true intention in the name of so-called endangerment. I believe that just as one-punch laws worked to criminalise single-strikes as unlawful and dangerous acts, NFS should be treated similarly. My analogy rests in the fact that both forms of assault involve damage to the head and neck regions as particularly vulnerable sites of the human body.

I support that the offence does not specify intention, recklessness or negligence as a fault element and rather adopts a conduct-oriented approach. I believe that this will allow for a broader scope of harmful conduct to be included and restrict avenues for perpetrators to contest their culpability, particularly in domestic settings contributing to our national crisis of

⁵ Leah S. Sharman, Robin Fitzgerald and Heather Douglas, ‘Prevalence of Sexual Strangulation/Choking Among Australian 18–35-year-olds’ (2024) *Forthcoming Archives of Sexual Behaviour* < Advance online publication: <https://doi.org/10.1007/s10508-024-02937-y>>; Isabella Conte, Leah S. Sharman and Heather Douglas, ‘Choking/Strangulation During Sex: Understanding and Negotiating “Safety” Among 18-35 Year Old Australians’ (Springer, 2025).

⁶ Senthoran Raj, ‘Disturbing disgust: Gesturing to the abject in queer cases’ In *Queering criminology* (Palgrave Macmillan UK, 2016) 83.

⁷ *R v Stein* (2007) 18 VR 376; *R v Emmett* [1999] EWCA Crim 1710; *R v McIntosh* [1999] VSC 358.

⁸ Many cases explore this proposition. See for example *R v Brown* [1994] 1 AC 212; *Pallante v Stadiums Pty Ltd* [1976] VR 331; *R v Wilson* [1996] 3 WR 125; *R v BM* [2018] EWCA Crim 560; *Russell v The Queen* [2023] NSWCCA 272.

⁹ Similar language is adopted by *Crimes Act 1958* (Vic) s 36(1).

family violence. This approach aligns with Australia's stance on coercive control. An exceptional circumstance may be when a person without volition restricts another's airflow or circulation by applying excessive pressure when they honestly believed the victim could endure it, whether by the victim's request or otherwise. In this circumstance, I do believe that the criminal law is right in being strict towards not excusing conduct inherently dangerous to life nor limb.

B Proposal Two: Eliminating Defences

I strongly support the QLRC's proposal as to excluding the listed defences. For Offence 1 as the paradigm offence, as I noted above, removing any defence of consent may be beneficial towards ensuring that strangulation carrying a risk of serious injury, grievous bodily harm or death is appropriately prosecuted.

C Proposal Three: Consent to Jurisdiction

Shifting towards procedural implications, I think that Offence 1 should remain an indictable offence that cannot be tried summarily. This reinforces the gravity of the conduct and may act as a stronger general deterrent.

As for Offences 2 and 3, however, the option to have the indictable matter tried summarily may hasten proceedings, reduce delays, protect victims from multiple rounds of cross-examination and secondary victimisation by juries and otherwise facilitate a more efficient outcome. I do note however that accused persons as the key stakeholder in criminal proceedings must not be denied due process and so opt to keep the consent to jurisdiction requirement to ensure procedural justice.

D Proposal Four: Procedural Implications

Evidence as to injuries resulting from NFS can be difficult to determine.¹⁰ However, as causation requires that the resulting injury have been caused by the accused's conduct, I acknowledge that to be completely rid of an evidential requirement may hinder the pursuit of justice. Although the offences do not explicitly require proof of injury, where evidence is to be tendered, I believe that clarifying the standard of evidence, particularly for injuries many months subsequent to the initial attack, is of assistance to legal practitioners.

¹⁰ Douglas and Fitzgerald (n 1); Jonathan Herring, and Hannah Bows, 'Regulating intimate violence: Rough sex, consent and death' (2021) 41 *Child and Family Law Quarterly* 311; Susan S. M. Edwards and Heather Douglas, 'The Criminalisation of a Dangerous Form of Coercive Control: Non-Fatal Strangulation in England and Wales and Australia' (2021) 8(1) *Journal of International and Comparative Law* 87, 91.

E *Other Matters*

I draw attention again to certain vulnerable persons who may be disproportionately impacted by NFS.¹¹ Especially for NFS occurring in domestic contexts, cultural, social and other barriers may yield a challenging court experience for victims and perpetrators alike. Culturally safe approaches, more generally approaches receptive to persons' diversities, ought to be considered.

III CONCLUDING REMARKS

My submission considers both procedural and substantive changes necessary in reviewing *Criminal Code Act 1899* (Qld) s 3. I thank the QLRC again for their continued advocacy. I am happy to provide further information on my commentary.

¹¹ Heather Lovatt, Vicki Lowik and Nicola Cheyne, *The voices of women impacted by non-fatal strangulation: Summary report–key themes* (Report, 2022).