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**Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
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Submission in Response to

Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020

The Red Rose Foundation provides a response to the *Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020* and specifically addresses the following:

- The inclusion of a definition of strangulation and suffocation within 315A (*Choking, suffocation or strangulation in a domestic setting*)
- The removal of ‘consent’ from the 315A Choking, suffocation or strangulation in a domestic setting)

The Red Rose Foundation

The Red Rose Foundation Australia is a Brisbane based, national organisation with a specific focus on addressing the issues surrounding domestic violence deaths including homicide, suicide and accidental deaths arising from incidents and or / histories of domestic violence. Research informs that the majority of domestic violence deaths are predictable and preventable. The focus of the foundation is to address systemic gaps in service systems through training,

education and research. We are cognisant of the strong links between domestic violence, child abuse and sexual violence.

The board of the Red Rose Foundation comprises professionals drawn from sector management, legal profession, violence prevention consultancy and research all who have vast experience and expertise across both domestic violence and sexual assault. Board members are drawn from Queensland, New South Wales, and Victoria.

The Red Rose Foundation has led the campaign to have a legislative and a health response to non-lethal domestic violence related strangulation for many years.

The key projects of the Red Rose Foundation are:

- Establishment of the Australian Institute for Strangulation Prevention
- Partnership with the Training Institute for Strangulation Prevention USA
- The Red Bench Project
- Red Rose Rallies/Vigils Australia
- Domestic & Family Violence Specialist Training
- Provision of practice seminars/forums
- Crisis Intervention and support for women experiencing high risk domestic violence especially non lethal strangulation through SOS (Survivors of Strangulation)
- Research Partnership with Central Queensland University on the immediate and long term impact of domestic violence related strangulation.

Our work on the critical issue of strangulation has been extensive. We advocated to have a legislative response for many years and were pleased to see a recommendation addressing strangulation included in the *Not Now Not Ever Report*. In 2016, the Criminal Code 1899 was amended to include Sect 315A *Choking, suffocation or strangulation in a domestic setting*.

Since then, the Red Rose Foundation has provided expert training across Australia on recognising and responding to non lethal training including training and workshops to Police, Magistrates, Health Professionals including doctors, ambulance officers, social workers, community based workers and many others.

In August 2019, The Red Rose Foundation established and launched the Australian Institute for Strangulation Prevention to provide a national institute for the development of training, research and best practice.

In 2019 a MOU outlining a formal alliance with the Training Institute for Strangulation Prevention in San Diego was signed forging a partnership for the further development of resources, training and research.

Non-Lethal Domestic Violence Strangulation

Women who have been strangled/choked as part of the abusive pattern of behaviour perpetrated against them, are being deemed to be 800%, more likely to be a victim of domestic homicide whether by strangulation or other forms of lethal assault. (Glass et al 2008)

Research informs statistically, in 50% of cases of strangulation there are no observable injuries and in many cases where the victim has been rendered unconsciousness and as a result they have no memory of the assault. This makes it so much easier for the perpetrator to escape a charge of strangulation as victims often have difficulty making statements or recalling the event with memory lapses, distorted thinking, confusion and anxiety. While many services now are documenting non - lethal strangulation, from our observations there is no specific change in the type of responses offered to victims who need longer term trauma informed support not a brief crisis intervention.

Non-lethal Strangulation: Some Facts

- Strangulation” is defined as “the obstruction of blood vessels and/or airflow in the neck resulting in asphyxia and or carotid dissection.
- Death can occur days or weeks after the attack due to carotid artery dissection and respiratory complications such as pneumonia, acute respiratory distress syndrome (ARDS), and the risk of blood clots travelling to the brain (embolization).”
- Loss of consciousness can occur within 5 to 10 minutes (seconds); death within minutes.
- 35% of strangulation victims are strangled during sexual assault. (Glass et al)
- Only half of victims have visible injuries, and of these, only 15 percent could be photographed.” The most common visible injuries are neck bruising and “petechial spots,” which show up on the face, scalp, mouth, earlobes, eyelids, and eyeballs of choked victims.
- Strangulation also causes damage to the victim’s throat, making breathing, swallowing, coughing, and talking difficult. Infrared forensic cameras can document the tissue damage in the throat.
- Psychological injury includes PTSD, depression anxiety, suicidal ideation, memory problems, amnesia and nightmares. (Source: Training Institute for Strangulation Prevention USA)

A US study found that post-concussion symptoms might last for 6 months to a year or more. The study indicated 24-60% of patients reported new symptoms at a 3 month follow up, 25% reported symptoms at a six month follow up and 10-15% of patients reported symptoms post injury. (Wilson et al, 2009)

- 84% of victims had experienced multiple strangulations
- 82% had lost consciousness
- 58% of non-fatal strangulation sexual assault cases involved intimate partners
- 25% had experienced strangulation during pregnancy
- Less than 50% had sought medical assistance and of those who did the majority were misdiagnosed. (Wilson et al, 2009)

The need for a clear definition of strangulation to be included in 315A of the Criminal Code.

The Red Rose Foundation welcomes the opportunity to respond to the ***Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020***

It is vitally important there is legislative change to include a definition of strangulation and suffocation into 315A. However, we propose that such a definition needs to be comprehensive and based on factual information about the nature and context of these serious and potentially lethal forms of violence.

Section 315A of the Criminal Code makes it a criminal offence to “choke”, “strangle”, or “suffocate” a person in a domestic setting. It carries a maximum penalty of 7 years’ imprisonment.

Section 315A does not provide a definition of ‘choke’, ‘suffocate’ or ‘strangle’ and there has been uncertainty about what level of conduct is required to fall within the provision.

- 1) At a recent District Court hearing in Townsville, 30th August 2019, Judge Coker directed the jury to return a verdict of not guilty. This direction was not based on the innocence of the accused but rather a lack of agreement and expert understanding of strangulation. RvAJB

The court heard that “*As is clear from the section itself, there is not definition of the words ‘choke’ ‘suffocate’ or ‘strangle’ and those words are not otherwise defined within provisions of the Criminal Code.’*

The court than referred to a strangulation case from the ACT whereby the definition contained within the Macquarie Dictionary was used as a substitute definition. The conclusion of the court was the definition is a cessation of an ability to draw breath in any way, not simply a restriction in the ability to draw breath.

Judicial consideration of strangulation (domestic violence) offences in Australia has recently led to a number of directions that a defendant charged with a choking, suffocation or strangulation offence be acquitted where the complainant's evidence did not establish that the victim had stopped breathing¹.

- 2) The Queensland Court of Appeal in *R v HBZ* [2020] applied the “purposive test” in interpreting legislative provisions and dismissed an appeal against conviction on a charge under section 315 A of the Criminal Code (Qld). The judgment of Mullins JA canvassed the principles for interpretation of legislation and the Explanatory Notes for the Bill that introduced the specific strangulation (in a domestic violence setting) offence in 2016.

Mullins JA applied the reasoning of Kiefel CJ and Keane J in the High Court decision in *R v A2* and considered **the purpose** of the introduction of the new strangulation offence; the recognition of this behaviour as inherently dangerous and a predictive indicator of an escalation in domestic violence offending, including homicide; and the significant penalty (up to seven years imprisonment). The judgment refers to section 14A of the *Acts Interpretation Act 1954 (Qld)* which provides that:

“In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation...”

In dismissing the appeal Mullins JA (McMurdo JA and Boddice J concurred) held that there had been no misdirection of the jury by

the trial judge on the meaning of “choked” being “*to hinder or stop the breathing of a person*”.

3) Coronial Inquest and Coroner’s Recommendation Re death of Tracy Beal 28th March 2019 (Dept. Justice, 2019)

Tracy Beale, 45, died the morning of January 21, 2013, after she was allegedly put in a chokehold by her husband James Andrew Beale,

The Coroner’s Report stated the medical cause of death as possible asphyxia/ possible vaso-vagal inhibition

On the 28th March 2019 Coroner David O’Connell delivered the findings of the inquest into the death of Tracy Beale and made the following recommendation.

That Attorney-General, after allowing submission from appropriate interested parties, review Criminal Code s.315A to determine if it is adequate to deal with the incidence of so call vasovagal reflex, and whether the types of neck compression specified in the provision should be defined in the legislation

Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill 2020

1) Definition

Strangulation is a form of asphyxia characterised by closure of the blood vessels and/or air passages of the neck, as a result of external pressure on the neck or throat. (Dr Bill Smock: 2019)

Smothering is defined as obstruction of air passages above the epiglottis including nose, mouth and pharynx. Choking is obstruction of the air passages below the epiglottis. Dr William Smock 2019

Death can occur days or weeks after the attack due to carotid artery dissection and respiratory complications such as pneumonia, acute respiratory distress syndrome (ARDS), and the risk of blood clots travelling to the brain (embolization).

Definitions of Strangulation in Law

In those jurisdictions where an offence of strangulation has been established, a definition of strangulation and suffocation has been included in the legislation.

Queensland followed international law in the drafting of 315A yet did not provide a definition of strangulation or suffocation within 315A.

Sample of the definition included in other Statutes are:

1. United States

FED. TITLE 18 USC § 113. ASSAULT WITHIN MARITIME AND TERRITORIAL JURISDICTION

(a) *Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:*

(8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both.

(b) *Definitions— In this section—*

(4) The term “strangling” means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim; and

(5) The term “suffocating” means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.

2. New Zealand

New Zealand introduced a strangulation specific domestic violence offence in December 2018 introduced to the Crimes Act 1961 section 189A strangulation or suffocation):

“Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person’s normal breathing, blood circulation, or both, by doing (manually, or using any aid) all or any of the following:

(a) *blocking that other person’s nose, mouth, or both;*

(b) *applying pressure on, or to, that other person’s throat, neck, or both.”*

3. Western Australia

1. The Family Violence Legislation Reform Bill 2019 was assented to by Parliament on 9 July 2020 and introduced section 298 of the Criminal Code Act Compilation Act (Western Australia) to insert an offence of Suffocation and Strangulation. The section provides a comprehensive description of the unlawful conduct that constitutes strangulation and suffocation however it removed the reference to choking:

“A person commits a crime if the person unlawfully impedes another person’s normal breathing, blood circulation, or both, by manually, or by using any other aid –

(a) *blocking (completely or partially) another person’s nose, mouth, or both; or*

(b) *applying pressure on, or to, another person’s neck.*

The WA legislation does not include applying pressure to the throat which is also strangulation and should be included.

4. California

California Penal Code 273.5 includes a Duty to Warn provisions for police (*to warn the victim that strangulation may cause internal injuries and encourage the victims to seek medical attention*)

Removal of “Consent”

The Red Rose Foundation is seeking the removal of *without the other person’s consent* from the 315A Choking, suffocation or strangulation in a domestic setting)

Currently 315A states:

- (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 Act 2012

We would argue that consent to strangulation is not informed consent if the person is unaware of the high risk of lethality associated with strangulation.

There is a growing trend with the rise of violent pornography, that strangulation is seen as part of sexual activity. Once considered erotic sex, this is no longer the case. There are now widespread concerns regarding the defense of “rough sex gone wrong” which has been used in several murder trials.

In the UK, 60 women were killed by men who claimed the women were “consenting” parties to strangulation during sex. Previous trials demonstrate these claims are successful and can result in lesser charges, lighter sentences or, most recently, no prosecution at all.

The UK will ban “rough sex gone wrong” defense making the rough sex defense inexcusable as well as including strangulation in their amended domestic abuse legislation.

Queensland was the first State in Australia to adopt strangulation laws. Most Australian States have now followed and adopted similar laws. Western Australian has recently amended the Criminal Code to include an offence of strangulation which does not include “consent”

The Red Rose Foundation asks that ‘consent’ be removed from 315A.

I provide this submission for your consideration.

Betty Taylor

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References

District Court of Queensland, 2019.RvAJB
<https://archive.sclqld.org.au/qjudgment/2019/QDC19-169.pdf>

Glass N., Laughon K., Campbell J., Block CB., Hanson G., Sharps PW., Taliaferro E., (2008) *Non-fatal strangulation is an important risk factor for homicide of women. Violence: Recognition, Management and Prevention* 35(No., 3): 329- 335, 2008.

Government Publishing Office, *FED. TITLE 18 USC § 113. ASSAULT WITHIN MARITIME AND TERRITORIAL JURISDICTION*, viewed at
<https://www.govinfo.gov/app/details/USCODE-2011-title18/USCODE-2011-title18-partI-chap7-sec113>

Justice Department, 2019, Inquest into the Death of Tracy Ann Beale
https://www.courts.qld.gov.au/_data/assets/pdf_file/0017/561212/cif-beale-ta-20180328.pdf

Kann California Law Group, California Corporate Injury Law: Penal Code 273.5PC <https://www.kannlawoffice.com/spousal-abuse.html>

New Zealand Legislation, Crimes Act 1961: As amended 2018
Viewed at
<http://www.legislation.govt.nz/act/public/1961/0043/latest/LMS13899.html>

Strack, G. & Gwinn, C., (2011), On The Edge of Homicide, published in *Criminal Justice Vol26 No3 Fall 2011*, American Bar Association