Discussion Paper

Circumstance of aggravation and strangulation

October 2015

Queensland's reform program to end domestic and family violence

Queensland Government

Background

On 28 February 2015, the Special Taskforce on Domestic and Family Violence (the Taskforce) provided its report, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (the report) to the Honourable Annastacia Palaszczuk MP, Premier and Minister for the Arts.

The report contains 140 recommendations on how the Government and the Queensland community can better address and reduce domestic and family violence.

On 18 August 2015, the Queensland Government released its response to the report. All 121 Taskforce recommendations directed to Government have been accepted, and the Queensland Government has indicated support for the 19 recommendations directed to the non-Government sector.

A number of recommendations are aimed at ensuring that perpetrators of domestic and family violence are appropriately held to account for their offending. Recommendations 118 and 120 relate specifically to criminal law reform. These recommendations and associated Government responses are detailed below:

Recommendation	Government Response
Recommendation 118: That the Queensland Government introduce a circumstance of aggravation of domestic and family violence to be applied to all criminal offences.	**Accepted** The Queensland Government supports the need to hold perpetrators of domestic and family violence to account and to reinforce the nature and seriousness of this type of offending. Consultation will occur with relevant legal and community stakeholders to explore the best means to achieve the objective of this recommendation.
Recommendation 120: That the Queensland Government considers the creation of a specific offence of strangulation.	**Accepted** The Queensland Government recognises that non-lethal strangulation is a high risk indicator of future domestic and family violence related homicides. Consultation will occur with relevant legal and community stakeholders to consider ways to improve the legal response to this serious criminal conduct.

Criminal Law (Domestic Violence) Amendment Act 2015

On 15 September 2015, the Queensland Government introduced the Criminal Law (Domestic Violence) Amendment Bill 2015. The Bill contains amendments to the *Justices Act 1886* (Justices Act), Criminal Code, *Evidence Act 1977* (Evidence Act), *Penalties and Sentences Act 1992* (PSA) and *Domestic and Family Violence Protection Act 2012* (DFVP Act) to increase perpetrator accountability and protection for victims of domestic and family violence by:

- increasing maximum penalties for breaches of domestic violence orders (Taskforce Recommendation 121)
- enabling notations to be made on charges for criminal offences to indicate that they occurred in a domestic violence context and provide for similar notations on a person's criminal history upon conviction (Taskforce Recommendation 119), and
- ensuring that victims of domestic violence giving evidence about the commission of an offence by the perpetrator, automatically fall within the definition of a "special witness" under the Evidence Act (which then gives the court discretion to make a range of orders or directions to support the witness when giving evidence including, for example, allowing evidence to be given via video-taped recordings) (Taskforce Recommendation 133).

Purpose of this discussion paper

The purpose of this paper is to seek feedback on Taskforce report recommendations 118 and 120 and the best ways to achieve the outcomes underpinning them.

Making a submission

All comments and submissions must be made in writing. In providing comments or a submission please refer to the relevant question number and provide reasons and supporting details for your response. Please feel free to comment on other issues which are not raised in the Consultation Paper.

Please provide any comments or submissions by **Friday 23 October 2015**:

- **By email**: DFVCriminalConsultation@justice.qld.gov.au
- **By post**: Strategic Policy and Legal Services
  Department of Justice and Attorney-General
  GPO Box 149
  Brisbane QLD 4001

An electronic version of this consultation paper is available at: www.getinvolved.qld.gov.au.

Privacy Statement

Any personal information in your comment or submission will be collected by the Department of Justice and Attorney-General (DJAG) for the purpose of informing implementation of the Taskforce report recommendations 118 and 120. DJAG may contact you for further consultation on the issues you raise. Your submission and/or comments may also be provided to others with an interest in the review, for example, the Queensland Parliament Communities, Disability Services and Domestic and Family Violence Prevention Committee.

Submissions provided to DJAG in relation to this Discussion Paper will be treated as public documents. This means that they may be published on the DJAG website together with the name and suburb of each person making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Recommendation 118: That the Queensland Government introduce a circumstance of aggravation of domestic and family violence to be applied to all criminal offences

The Taskforce report recommended creating a new and specific circumstance of aggravation of domestic and family violence to attach to any offence in the Criminal Code so as to increase the maximum penalty for the offence.

The Taskforce's view was that this would ensure the seriousness of domestic and family violence is acknowledged and that perpetrators of such violence are held to account. An increase in penalties reflects community attitudes that domestic and family violence is unacceptable and strong penalties are required to condemn and deter this behaviour.

What is a circumstance of aggravation?

Under the Criminal Code, a 'circumstance of aggravation' is defined in section 1 to mean any circumstance where an offender is liable to a greater punishment (i.e. maximum penalty) than the offender would be liable if the offence were committed without the existence of that circumstance.

A 'circumstance of aggravation' must be charged in the indictment (or bench charge sheet) and becomes a matter that the Crown must prove beyond a reasonable doubt. Specifically, section 564(2) of the Criminal Code provides that if any circumstance of aggravation is intended to be relied on it must be charged in the indictment. A similar provision is contained in section 47 of the Justices Act.

Similarly, the amendments in the Criminal Law (Domestic Violence) Amendment Bill 2015 provide for charges for any criminal offence to indicate that they occurred in a domestic and family violence context and for convictions to be recorded as such on a person's criminal history.

Creation of a circumstance of aggravation

Scope of circumstance of aggravation

The Taskforce report does not specifically recommend any particular construction for the circumstance of aggravation but essentially envisages proving that the offender was in a family and domestic relationship with the victim of the offence.

A primary consideration in the construction of the circumstance of aggravation is determining its scope. To provide the most complete protection for victims against domestic and family violence a sufficiently broad definition of that relationship is required.

One proposed construction is to create a new Chapter in the Criminal Code which applies a new circumstance of aggravation to any indictable offence under the Criminal Code where:

- the offender did or omitted to do an act that constitutes an offence under the Criminal Code, and
- that act or omission constitutes domestic violence, associated domestic violence or a contravention of the DFVP Act.

A benefit of this approach is consistency across Queensland legislation in how a domestic and family violence related offence is defined. However, this covers a broad range of conduct and a circumstance of aggravation with such a broad scope may have the unintended consequence of capturing conduct not contemplated by the Taskforce in making their recommendation.

Another option, to avoid unintended consequences, is to also require additional evidence that the offence was committed as part of a pattern of controlling, coercive or dominating behaviour. It could be argued that evidence of this additional factor would provide an even higher level of justification for

treating an offence as aggravated due to, in part, the inability of a victim to extract herself or himself from the violent conduct. This would necessarily involve proving additional matters to the criminal standard of proof (i.e. beyond reasonable doubt).

It is not intended that the circumstance of aggravation will replace or limit the operation of those offences in which a familial or guardianship relationship is already a circumstance of aggravation (for example: section 208(2)(i)&(ii) Sodomy, section 210(4) Indecent treatment, section 215(4) Carnal knowledge, section 216(3) & (3A) Abuse of person with impairment of the mind, section 222 Incest).

Q1. How should the parameters of a domestic relationship be defined?
Q2. Do you consider that the breadth of the first proposed construction could give rise to capturing unintended conduct? If so, please provide examples.
Q3. Should there be a documented history of domestic and family violence (i.e. past domestic violence orders) or is it simply sufficient that the relationship between the accused and the victim is a domestic relationship?
Q4. Does a circumstance of aggravation remove the need for notations to be made on charges and criminal histories for those offences as introduced by the Criminal Law (Domestic Violence) Amendment Bill 2015?

Penalty provided by the circumstance of aggravation

The penalty provided for the circumstance of aggravation could take a number of forms. One approach could be to apply a generic increase to the maximum penalty for the basic offence. For example, the circumstance of aggravation would have the effect of increasing the existing penalty for existing offences by two years imprisonment. An example would be that the offence of common assault carries a maximum penalty of three years imprisonment. Where the circumstance of aggravation is proven, the maximum penalty would be five years imprisonment.

It is noted that the increased maximum penalty may affect the jurisdiction in which the offence may be heard and determined. For example, a common assault which is currently heard and decided in the Magistrates Court summarily under section 552A of the Criminal Code will need to be dealt with in the District Court.

Q5. Do you consider that a generic maximum penalty increase is the best way to reflect higher punishment for the circumstance of aggravation?
Q6. If you support this proposal what do you consider to be the appropriate maximum penalty increase to the circumstance of aggravation?

Impacts on victims

The evidence that will be required to establish the circumstance of aggravation will inevitably form part of the evidence given by the victim. However, it is not envisaged that this will add greatly to the burden of the victim in giving evidence. This is because, broadly-speaking, victims of a domestic criminal offence already provide evidence of relationship to the accused in the course of contextualising the offending conduct.

It is also important to note that the generic application of a circumstance of aggravation means it will apply equally to all persons convicted of the offence. That is, in practice, recommendation 118 will apply to an abused partner who pre-emptively assaults their abusive partner or seemingly “without provocation” does so, and is convicted. For example, an abused wife would be unable to rely on the history of abuse within the relationship to mitigate her conduct and further, the existence of that relationship would subject her to a higher maximum penalty than had she assaulted a stranger. However, this concern may be addressed by the proposal above to include a requirement in the circumstance of aggravation that the offence was committed as part of a pattern of controlling, coercive or dominating behaviour.

Q.7. For victims who commit indictable offences in retaliation or self-defence, should there be mitigating provisions to ensure the circumstance of aggravation is not applied in these circumstances?

Limitations on applying a circumstance of aggravation to life offences

One of the key underpinning objectives of this recommendation is to increase the maximum penalty for an offence committed in the domestic context. Achieving this outcome is problematic for Criminal Code offences that already carry a maximum penalty of life imprisonment.

Queensland Criminal Code offences that already carry a maximum penalty of life imprisonment include attempted murder, rape, disabling in order to commit indictable offence and burglary (i.e. break and enter a dwelling with intent to commit an indictable offence). The offence of murder itself carries a mandatory punishment of life imprisonment. There is no higher maximum penalty than life imprisonment.

Application of the circumstance of aggravation to life offences would provide no legislative basis upon which the courts could impose higher sentences for domestic offending.

The offences carrying a maximum penalty of life imprisonment could be excluded from the application of the circumstance of aggravation. As an alternative, consideration could be given to the inclusion of domestic and family violence as an aggravating factor for life offences in the PSA. This would require a sentencing magistrate or judge to consider the domestic and family violence circumstances when determining an appropriate penalty.

Q.8 What do you consider is the appropriate way to treat existing life offences if a new circumstance of aggravation is introduced?
(a) Do you support the exclusion of life offences from the circumstance of aggravation?
(b) Do you support an amendment to section 9 of the PSA to signal to the judiciary that a higher penalty within the range that is proportionate for offences that carry a maximum penalty of life imprisonment?

Commonwealth criminal offences

It should be noted that legislative reform to the Queensland criminal law to introduce a circumstance of aggravation would not apply to offences under the Commonwealth Criminal Code. Offences under the Commonwealth Criminal Code are sometimes charged in relation to domestic and family violence conduct. Some of the Commonwealth offences relevant to domestic violence relate to the use of carriage and postal services to, among other things, make threats and harass. For example, a person may be charged with a carriage service offence for sending abusive text messages. While the incidence of Commonwealth offences being charged in relation to domestic matters is less frequent than state charges, this creates some inconsistency in sentencing for domestic and family violence offences.

An alternative approach

The above discussion demonstrates the challenge, complexity and limitations in creating a generic circumstance of aggravation that attaches to domestic violence conduct.

An option to overcome these difficulties, yet still deliver the important underpinning objectives of recommendation 118, lies in amendment of the PSA.

Consideration could be given to amending section 9 of the PSA which sets the sentencing framework for all offenders aged 17 years and over in Queensland, to provide that the court **must** have regard to whether the offence constitutes an act of domestic and family violence, in determining the appropriate sentence for an offender.

The proposal complements and bolsters the factors to which the court already has regard under the PSA in determining the appropriate penalty. For example, the nature and seriousness of the offence, in particular any physical, mental or emotional harm done to a victim, the victim impact statement and the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence.

This approach would allow the court to impose sentences at the higher end of the range for **any** offence committed in a domestic or family context, even offences with a maximum penalty of life imprisonment. This approach therefore ensures a consistent approach to the sentencing of all offences committed in a family or domestic context.

It should be noted that the Taskforce considered the option of creating an aggravating factor in sentencing under the PSA (i.e. requiring a sentencing judicial officer to give heavier weight to the severity of the offence if it were committed within the context of domestic and family violence). In keeping with the Taskforce's vision to ensure the seriousness of domestic violence is acknowledged and that perpetrators of such violence are held to account, the Taskforce considered that the provision of a higher maximum penalty was preferred.

Q.9 Do you consider that an amendment to section 9 of the PSA would adequately meet the objectives underpinning recommendation 118? If not, why not?

Recommendation 120: That the Queensland Government considers the creation of a specific offence of strangulation

The Taskforce report notes that in addition to its inherent dangerousness, strangulation is a predictive risk factor for more severe domestic and family violence including homicide.

The report states[1] that the introduction of a separate and discrete offence for strangulation, which is not limited by association with a further crime, has the principal objectives of:

- achieving information-sharing about predictive violent domestic conduct (strangulation) to better inform risk assessment and increase protection for victims, and
- increasing punishment for the act of non-fatal strangulation.

The current Queensland position on non-fatal strangulation

Currently a person who, in the context of a domestic relationship, commits an act of non-fatal strangulation or choking against another person, can be charged, depending on the force used, the intent in committing the act and the injury sustained by the victim, with a number of existing offences. This includes common assault (section 335), assault occasioning bodily harm (section 339), grievous bodily harm (section 320), torture (section 320A) disabling in order to commit an indictable offence (section 315) and attempted murder (section 306).

These offences cover factual scenarios ranging from a verbal threat to choke (common assault) to a strangulation accompanied by an intent to kill the victim (attempted murder). The maximum penalties for the offences range from 3 years imprisonment for common assault to life imprisonment for disabling in order to commit an indictable offence or attempted murder.

Section 315 of the Criminal Code provides the following offence that specifically references the act of strangulation:

> ***'Disabling in order to commit indictable offence***
> *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.'*

As noted in the report[2], the offence in section 315 of the Criminal Code is limited to acts of strangulation and choking committed in association with an intention to commit another criminal offence, for example sexual assault or robbery. The use of this provision has limitations in cases of strangulation in the domestic context.

Further, the DFVP Act allows the court to impose an order where it is satisfied that an order is necessary or desirable to protect an aggrieved person from domestic violence. The definition of '*domestic violence'* includes behaviour that is physically or sexually abusive, threatening or coercive, or behaviour that in any other way controls or dominates another person. Whilst not specifically referenced, strangulation is covered by this expansive definition.

There can be no question that the act of non-fatal strangulation is covered by a number of existing criminal offence provisions in Queensland ranging from common assault to attempted murder.

[1] At p.302
[2] At p.302

Being a "code jurisdiction", the general approach to offence creation under Queensland's Criminal Code is not to create a series of highly specific offences to apply only to particular and confined factual scenarios but rather to establish overarching offences of general application to a wide range of factual scenarios. As a general proposition, creation of a new offence in the Criminal Code is not warranted where there is no identifiable legislative gap in the existing offences.

In the Australian Law Reform Commission and New South Wales Law Reform Commission report: *Family Violence - A National Legal Response*[3] consideration was given to whether or not there was a need to create new criminal offences to deal with domestic and family violence. The Commission's stated view[4]: "*that new offences are justified only where it can be established that the mischief sought to be addressed cannot be adequately dealt with under the existing legislative framework."*

Q.10 Do you think that non-fatal strangulation is adequately provided for in the existing range of criminal offences?

Non-fatal strangulation in other jurisdictions

New South Wales

On 28 May 2014, the New South Wales Parliament passed the *Crimes Amendment (Strangulation) Act 2014* (the Act). The Act amended the *Crimes Act 1900* (NSW) to introduce a strangulation offence.

The new offence applies if a person intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance. The offence carries a maximum penalty of 10 years imprisonment.

The new offence complemented an existing offence of strangulation where an intent to commit a separate indictable offence is required. The reasons for creation of this new offence were to overcome deficits in the existing law in recognising strangulation appropriately and to reflect the insidious seriousness of the conduct[5].

In contrast to Queensland, New South Wales is a "common law jurisdiction" where the bulk of the criminal law remains based on the common law, with some partially expressed in legislation. The New South Wales offence is clearly designed to capture examples of strangulation that in themselves pose a greater risk of immediate physical endangerment. The requirement in the New South Wales offence that the strangulation render the victim unconscious is limiting and would therefore fail to capture some examples of domestic strangulation.

Other Australian jurisdictions

Similar to Queensland, Tasmania and Northern Territory have in their respective Criminal Codes an offence of strangulation that is tethered to an intention to commit a separate indictable offence.

South Australia, Western Australia and Victoria have no offence that specifically relates to strangulation or choking, just offences that deal more generally with injurious behaviour.

Australian Capital Territory has a strangulation offence[6] that does not have to be committed in the pursuit of a further offence. However, that offence is limited in a different way, in that the strangling or choking must render the victim '*unconscious*' or '*insensible*'.

[3] Report No. 114 (2010)
[4] Ibid, page 587
[5] Second reading speech, New South Wales Legislative Council Hansard and Papers 28 May 2014, pp.29225-29227
[6] S.27(3) *Crimes Act 1900* (ACT)

New Zealand

The New Zealand Government recently referred the question of whether or not to create a specific offence of non-fatal strangulation in their criminal legislation to the New Zealand Law Commission. The reference forms part of a range of family violence initiatives that the Minister for Justice (NZ) has initiated. The purpose of the reference is to focus on the creation of the new crime in the family violence context, given the potential strangulation poses for future abuse. The Commission is scheduled to report to the Minister for Justice on the 31 March 2016.

Canada

Canada's Criminal Code provides for an offence involving strangulation with an intention to commit an indictable offence in addition to a range of general offences of violence. This is not dissimilar to Queensland's current position. In recognition of the prevalence of strangulation in domestic violence, the Canadian Government in 2006 reviewed the adequacy of the existing offences in reflecting the seriousness of strangulation conduct; and considered whether a discreet strangulation offence not tethered to the commission of another indictable offence, should be created.

The 2006 review report[7] ultimately determined that the existing Criminal Code provisions provided adequate scope to address strangulation and did not recommend creation of a discrete offence. Instead, the report recommended improved training of police and prosecuting authorities to ensure that strangulation matters are charged and prosecuted effectively.

A new strangulation offence in Queensland?

As previously discussed, there has been considerable national and international focus on the significance of strangulation in the domestic context: New South Wales has enacted a discrete strangulation offence; and the New Zealand Government has referred the issue of criminalising non-fatal strangulation within a domestic relationship to the Law Commission for consideration.

A 2012 report of United Nations Women also recommended that legislation should provide specific penalties for strangulation, given the prevalence of the conduct and its significance as a precursor to death[8].

Currently in Queensland, where strangulation is charged as an offence, the fact that the criminal conduct was strangulation is not evident on the face of an offender's criminal history. It only becomes evident to prosecuting authorities if enquiries are made to the Queensland Police Service (QPS) seeking further information on the particular entry on the criminal history. A specific offence will overcome this by isolating and identifying this particular behaviour. This will create a more accurate reflection of the offender's prior conduct on the face of the criminal history.

One option would be to create another tier in the existing section 315 of the Criminal Code such that intentional strangulation (without the intent to commit a further indictable offence) is an offence in its own right, with a maximum penalty lower than the existing section 315 offence of 10 years imprisonment (for example five years imprisonment).

The issue with this approach, and indeed a stand-alone offence, is the risk of unintended capture of a range of conduct within the provision. For example, people consensually participating in sporting activities (e.g. certain martial arts where choke holds are utilised) would be potentially captured. There is no public interest in capturing this conduct. A way to ensure this does not happen is to ensure that assault is an element of the new offence.

[7] Uniform Law Conference of Canada, Report of the Criminal Section Working Group on Strangulation, May 2006 at p 15

[8] UN WOMEN: *Felony Strangulation and Other Provisions 2012, http://www.endvawnow.org/en/articles/print/834*

Another option is to make strangulation a circumstance of aggravation of the offence of common assault in section 335 of the Criminal Code. Doing this will ensure that only non-consensual strangulation will be captured while preserving the defences available to assault offences (including provocation).

Given that common assault itself carries a maximum penalty of three years imprisonment, a higher maximum penalty of five years could be enshrined in legislation to signal that the legislature intends the Court to impose higher sentences for the conduct. In cases where there has been significant injury occasioned as a result of the strangulation other offence provisions are available to adequately reflect the harm done. Further, a charge of attempted murder is open if the strangulation is accompanied by the requisite intention. A conviction under this provision would also ensure that "strangulation" would appear in the short title of the offence in a criminal history report.

Q.11 Do you support amending section 315 of the Criminal Code to create a new offence of intentional strangulation with a maximum penalty of five years imprisonment? If not, why not?

Q.12 Alternatively, do you support creating strangulation as a circumstance of aggravation of the offence of common assault? If not, why not?

An important issue to note is the possible consequences to the victim in the creation of a new offence. In the report of the Australian Law Reform Commission and New South Wales Law Reform Commission: *Family Violence - A National Legal Response*[9], it was observed that: *"a blunt penal response can escalate violent behaviour and fail to address its causes"*[10].

The report stated that this form of legal response can have adverse consequences to Indigenous people given that Indigenous people are generally over-represented in domestic violence crime. There is also a possibility that victims may be exposed to criminal prosecution in circumstances where they retract their original complaint of abuse (as sometimes happens given the complex dynamics of domestic violence).

It is possible that in this circumstance a victim may become open to criminal prosecution for providing false testimony. It has been recently reported[11] that in New South Wales 20 Indigenous women were prosecuted for false testimony or public mischief, and in some cases imprisoned, because they retracted their statements/complaints made in domestic crime matters. The charges in these cases were not the result of police investigation into the retraction of the claims; instead using the women's own statements to convict them. Whether this risk is outweighed by the imperative to denounce the offending is a matter for serious contemplation.

Other possible justice system responses to strangulation

The Taskforce report importantly notes[12] that strangulation is a predictive risk factor for more severe domestic and family violence and even homicide. This position has gained wide acceptance through Australian and International studies.

When recently reviewing the sufficiency of their existing criminal offences, Canada determined not to create a discrete offence of strangulation, instead recommending training of law enforcement and prosecuting authorities to improve existing criminal justice responses to strangulation.

In Queensland, there may similarly be scope to improve the criminal justice response to strangulation and to recognise the significance of strangulation as a predictor of future violence. Timely identification

[9] Report No. 114 (2010)
[10] Ibid p.562
[11] Natasha Robinson, Mercy plea for jailed mum living in fear, the Australian, 6 May 2013; Natasha Robinson, No change for domestic violence policy, The Australian May 10, 2013
[12] at page 302

of this conduct by relevant agencies is essential to prevent future incidents of escalated violence, including domestic homicide.

Q.13 Do you support the development of improved responses to strangulation rather than, or in addition to, a legislative response? If so, what is your preferred approach?

Conclusion

The Queensland Government is committed to collaborating with the community to ensure sustainable changes are made to realise the vision of a Queensland free from domestic and family violence.

The Queensland Government supports the need to hold perpetrators of domestic and family violence to account and to reinforce the nature and seriousness of this type of offending. This Discussion Paper raises two key areas of reform to achieve this and improve the criminal justice system response in Queensland. The views of all Queenslanders on this Discussion Paper are sought and welcomed.