



sentencing
ADVISORY
COUNCIL

SENTENCING FOR NON-FATAL STRANGULATION

RESEARCH PAPER 5

May 2021

About this Research Paper

The Tasmanian Government has asked the Sentencing Advisory Council to provide advice about sentencing for specific non-fatal strangulation offences in other Australian jurisdictions as well as information about cases where non-fatal strangulation, choking or suffocation has been considered as a sentencing factor in Tasmania.

Warning Appendix B contains images of injuries caused by strangulation that may distress some readers.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing issues in Tasmania. At the time that this research paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Mr Vincenzo Caltabiano, Ms Jill Maxwell, Associate Professor Terese Henning, Ms Kate Cuthbertson, Ms Rosalie Martin and Ms Linda Mason SC.

This paper was written by Dr Rebecca Bradfield.

Acknowledgements

The Council would like to thank all those who provided information in relation to this reference, in particular:

- Angela Curtis, Acting Principal Business Performance Analyst, Courts Administration Authority, South Australia
- Randi Taylor, Librarian, Russell Fox Library, ACT Supreme Court
- Stephen Christie, Principal Advisor, Sector Analysis and Modelling, Ministry of Justice New Zealand
- Trish Poletti, Principal Research Officer (Statistics), Judicial Commission of New South Wales
- Don Ritchey, MD, Forensic Pathologist.

Consultation

In the course of the preparation of this paper, the Council consulted with stakeholders to gain further insight about non-fatal strangulation and sentencing responses. The Council held consultation forums with stakeholder representatives from the following organisations:

- Tasmania Legal Aid
- The Law Society
- The Bar Association

- Tasmania Police (Family Violence Unit)
- Sexual Assault Support Services
- Engender Equality
- Women's Legal Service Tasmania
- Victims Support Services
- Communities Tasmania

As part of the consultation process, the Council also met with a representative of the Safe at Home Coordination Unit and the Director of Public Prosecutions, D Coates SC.

The Council also met with the Chief Magistrate, C Geason and the Chief Justice of the Supreme Court, the Hon A Blow OAM.

CONTENTS

About this Research Paper	ii
Information on the Sentencing Advisory Council.....	ii
Acknowledgements.....	ii
Consultation.....	ii
Executive Summary.....	vii
1 Introduction	1
1.1 Terms of Reference.....	1
1.2 Chapter overview.....	2
2 Overview of Non-fatal Strangulation.....	4
2.1 What is strangulation?	4
2.2 Health consequences of non-fatal strangulation	6
2.3 Strangulation and family violence	10
2.3.1 Incidence of non-fatal strangulation in family violence.....	10
2.3.2 Non-fatal strangulation as a risk factor in family violence	12
2.3.3 Non-fatal strangulation in the context of coercive control	13
3 Non-fatal Strangulation in the Tasmanian Criminal Justice System.....	16
3.1 Overview of offences	17
3.2 Sentencing	19
3.2.1 Sentencing options in Tasmania.....	19
3.2.2 Global sentencing and totality.....	19
3.3 The sentencing discretion.....	21
3.4 Approach of the Tasmanian Court of Criminal Appeal to non-fatal strangulation ..	21
3.5 Attempted murder	29
3.5.1 Details of the offence.....	29
3.5.2 Charging guidance for attempted murder	29
3.5.3 Sentencing for the offence of attempted murder in circumstances of non-fatal strangulation	29
3.6 Disabling to aid commission of offence or flight of offender	30
3.6.1 Details of the offence.....	30
3.6.2 Charging guidance for disabling to aid commission of offence or flight of offender	31
3.6.3 Sentencing for the offence of disabling to aid commission of offence or flight of offender in circumstances of non-fatal strangulation.....	31

3.7	Unlawful act intended to cause bodily harm	31
3.7.1	Details of the offence.....	31
3.7.2	Charging guidance for unlawful act intended to cause bodily harm	32
3.7.3	Sentencing for the offence of unlawful act intended to cause bodily harm in circumstances of non-fatal strangulation	32
3.8	Persistent family violence	33
3.8.1	Details of the offence.....	33
3.8.2	Charging guidance for persistent family violence.....	33
3.8.3	Sentencing for the offence of persistent family violence in circumstances of non-fatal strangulation	33
3.9	Assault.....	35
3.9.1	Details of the offence.....	35
3.9.2	Charging guidance for assault.....	37
3.9.3	Sentencing for the offence of assault in circumstances of non-fatal strangulation.....	39
3.9.4	Assaulting a police officer	48
3.10	Affray.....	48
3.10.1	Details of the offence.....	48
3.10.2	Charging guidance for affray	48
3.10.3	Sentencing for the offence of affray in circumstances of non-fatal strangulation.....	49
3.11	Robbery.....	49
3.11.1	Details of the offence.....	49
3.11.2	Charging guidance for robbery offences.....	49
3.11.3	Sentencing for the offence of robbery in circumstances of non-fatal strangulation.....	49
4	Sentencing for strangulation offences in other selected jurisdictions	51
4.1	Queensland	52
4.1.1	The offence(s) and statutory maximum sentence	52
4.1.2	Statistical information	53
4.1.3	Case law	54
4.2	New South Wales	56
4.2.1	The offence(s) and statutory maximum sentence	56
4.2.2	Statistical information	58
4.2.3	Case law	60
4.3	Australian Capital Territory	61
4.3.1	The offence(s) and statutory maximum sentence	61
4.3.2	Statistical information	62

4.3.3 Case law	62
4.4 South Australia	65
4.4.1 The offence(s) and statutory maximum sentence	65
4.4.2 Statistical information	65
4.4.3 Case law	66
4.5 Western Australia	67
4.5.1 The offence(s) and statutory maximum sentence	67
4.5.2 Statistical information	67
4.6 Northern Territory	67
4.6.1 The offence(s) and statutory maximum sentence	67
4.6.2 Statistical information	68
4.7 New Zealand	68
4.7.1 The provision and background to reform	68
4.7.2 Statistical information	69
4.7.3 Case law	70
5 Observations	75
5.1 Addressing the Terms of Reference	75
5.2 The Council's observations.....	78
5.2.1 Proposal 1: Amend the <i>Sentencing Act 1997</i> (Tas) to provide that strangulation and suffocation are aggravating circumstances in relation to an offence	80
5.2.2 Proposal 2: Amend the <i>Family Violence Act 2004</i> (Tas) s 13A to provide for recording of non-fatal strangulation as a particular of a family violence offence on a person's criminal record	81
5.2.3 Proposal 3: Amend the <i>Sentencing Act 1997</i> (Tas) to provide for recording of non-fatal strangulation as a particular of an offence on a person's criminal record in cases that do not involve family violence	82
Appendix A: Summary of Non-fatal Strangulation Offences in Australia and New Zealand	83
Appendix B: Monograph prepared by Donald M Ritchey, MD and provided to the Department of Public Prosecutions.....	89

EXECUTIVE SUMMARY

Background

On the 9 September 2020, the Attorney-General, the Honourable Elise Archer MP referred the matter of non-fatal strangulation, choking or suffocation under the *Criminal Code Act 1924* to the Council for its advice.

The Terms of Reference for this research paper were to undertake research and make observations against the following:

1. In Tasmania, in how many cases and in what circumstances has non-fatal strangulation, choking or suffocation been considered as a sentencing factor and in relation to which offences? What were the sentencing outcomes in those cases?
2. In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence), what have been the sentencing outcomes and, where information is available, what factors have the courts considered in sentencing the offender?
3. In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence) for what other offences was the offender also sentenced at the same court event?
4. Any other observations considered relevant to 1–3.

Accordingly, this paper sets out the sentencing practices in Tasmania for offences involving non-fatal

strangulation as well as sentencing approaches in other jurisdictions that have introduced an offence of non-fatal strangulation.

This paper does not provide advice on the merits of introducing a stand-alone offence of non-fatal strangulation in Tasmania and the Council makes no observations or comment in this regard.

The paper also provides information about the range of other offences for which an offender was sentenced at the same time as the offence involving non-fatal strangulation. Further, it provides information, where available, in relation to sentencing outcomes in other jurisdictions that have introduced an offence of non-fatal strangulation and information about other offences for which an offender was sentenced.

Based on the Council's research and analysis, this paper makes three suggestions for possible reform to sentencing laws in Tasmania to give statutory recognition to the approach of the Court of Criminal Appeal to sentencing in cases involving non-fatal strangulation and to facilitate community education about the seriousness of strangulation.

In order to respond to the Terms of Reference, the Council undertook an analysis of sentencing comments from the Supreme Court of Tasmania for the period 2010 to 30 November 2020 to identify cases where an offender had been sentenced for an offence in circumstances of non-fatal strangulation. Consistent with the various ways in which non-fatal strangulation can be

described, this analysis included searching for words and phrases such as ‘strangle’, ‘strangulation’, ‘choke’, ‘hands around throat’, ‘hands around neck’, ‘suffocation’.

The research also involved analysis of written judgments from the Tasmanian Supreme Court (review of sentences from the Magistrates Court) and Court of Criminal Appeal (appeals from the Supreme Court), as well as judgments that were available from other jurisdictions.

The Council has obtained statistical sentencing data from the following jurisdictions: New South Wales, Queensland, South Australia and New Zealand. It has considered academic literature and reports prepared for government and non-government bodies.

It is noted that data has not been obtained about sentencing practices in the Magistrates Court of Tasmania. Transcripts of comments on passing sentence are not generally published in the Magistrates Court and so it was not possible to search and identify cases where non-fatal strangulation, choking or suffocation were considered as sentencing factors in that jurisdiction.

Key observations

The key findings from the paper addressing the Terms of Reference are as follows:

Term of Reference 1: In Tasmania, in how many cases and in what circumstances has non-fatal strangulation, choking or suffocation been considered as a sentencing factor and in relation to which offences?

- There were 77 cases where acts of non-fatal strangulation were

sentenced in the Supreme Court, and in 54 cases (70.1%) these involved family violence.

- In cases involving intimate partner violence, there was a history of family violence, either against the complainant and/or other female partners in 30 cases (55.6%).
- Assault contrary to the *Criminal Code* (Tas) s 184 was the most commonly charged offence in cases of non-fatal strangulation. This was charged in 66.3% of all cases and 81.5% of family violence cases.
- Other assault offences relied upon were aggravated assault contrary to the *Criminal Code* (Tas) s 183, assault on a pregnant woman contrary to the *Criminal Code* (Tas) s 184A, persistent family violence contrary to the *Criminal Code* (Tas) s 170A where assault is one or more of the incidents relied upon and assault a police officer.
- Typically, where an offender is charged with an assault offence, the offender was also charged with other charges (76.8% of cases) or, in relation to single counts of assault, strangulation was only an aspect of the conduct (78.5% of single counts of assault). Other offences identified were attempted murder, unlawful act intended to cause bodily injury, persistent family violence, aggravated robbery and affray.
- There was also connection between sexual assault and non-fatal strangulation, particularly in the context of family violence.

What were the sentencing outcomes in those cases?

- For all counts of assault contrary to the *Criminal Code* (Tas) s 184 in circumstances involving non-fatal strangulation, 94.7% received a custodial sentence (imprisonment, partly suspended and fully suspended sentence).
- For all counts of assaults that were committed by an intimate partner, 92.9% received a custodial sentence. For all counts of assault, the longest sentence imposed was 42 months (six years and six months' imprisonment). This was a case involving intimate partner violence. The shortest sentence was six months' imprisonment for all assaults and eight months for intimate partner violence. The median sentence in both cases was 24 months' imprisonment.

Additional findings in relation to sentencing in Tasmania

- Over the past five years, as evident in charging practice of the Office of the Director of Public Prosecutions ('DPP') and judicial comment from the Supreme Court, there has been a clear recognition of the seriousness of non-fatal strangulation, particularly in the context of family violence.
- The DPP has issued charging guidelines that provide advice about charging for assault in the context of family violence, in regard to choking, strangulation or smothering. The guidelines state that such conduct is 'grave criminal conduct' and regardless of injury, a charge under the *Criminal Code* (Tas) should be considered. This is contrary to the guidance provided for assault

generally, which stresses the degree of injury caused rather than the risk of injury as the touchstone for charging assault under the *Criminal Code* (Tas) rather than the *Police Offences Act 1935* (Tas). The approach taken by the Office of the DPP to charging is relevant to sentencing as it is determinative of the court in which the matter is heard and the potential maximum penalty that can be imposed.

- The Court of Criminal Appeal has also highlighted the seriousness of strangulation and smothering by focusing on its inherent risk rather than the identification of physical injury resulting from the assault. The Court has also highlighted the unique capacity of strangulation to be used as a means of coercion and control in a domestic relationship. The Court has also recognised the psychological effects of strangulation, as well as its physical consequences.
- The Court of Criminal Appeal has also made strong statements about the need for the Court to protect victims of family violence by imposing severe sentences and has expressly recognised that past sentencing practices for domestic violence were inadequate.
- Sentencing for assault involving non-fatal strangulation has resulted in heavier sentences being imposed than for assault contrary to the *Criminal Code* (Tas) s 184 generally. There were more sentences of imprisonment imposed (47.3% compared to 37.6%) and the median sentence of imprisonment imposed was more than double (24 months compared to 10 months).

Term of Reference 2: In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence), what have been the sentencing outcomes and, where information is available, what factors have the courts considered in sentencing the offender?

Statistical sentencing data was available from South Australia, New South Wales, Queensland and New Zealand.

- In those jurisdictions, the proportion of offenders receiving a sentence of imprisonment varied from 79% in Queensland, 54.6% in New South Wales (58.2% *Crimes Act 1900* (NSW) s 37(1) and 47.9% *Crimes Act 1900* (NSW) s 37(1A)), 42.8% in South Australia and 42.5% in New Zealand.
- In Queensland, the shortest sentence was two months' imprisonment, the longest sentence was 48 months' imprisonment and the median sentence was 24 months.
- In New South Wales, for offences contrary to the *Crimes Act 1900* (NSW) s 37(1), the shortest sentence was two months' imprisonment, the longest sentence was 81 months' imprisonment and the median sentence was 18 months. For offences contrary to the *Crimes Act 1900* (NSW) s 37(1A), the shortest sentence was 2.9 months' imprisonment, the longest sentence was 24 months' imprisonment and the median sentence was 13.5 months.
- In South Australia, there were three sentences of imprisonment imposed with shortest sentence being 25 months' imprisonment and the

longest sentence 52 months' imprisonment.

- Relevant sentencing factors identified in other jurisdictions reflect the aggravating factors emphasised by the Tasmanian Court of Criminal Appeal including the serious and dangerous nature of strangulation, the fact that it has been shown to be a predictive indicator of escalation in domestic violence offences, and its prevalence in the context of domestic violence.
- Other aggravating factors identified have been the strangulation occurring in the domestic context, the vulnerability of complainants, the existence of accompanying threats to kill and the presence of children. Courts have focused on the need for punishment to be imposed to deter (the offender and others) to protect women from violence by men and to recognise the harm inherent in non-fatal strangulation.

Term of Reference 3: In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence) for what other offences was the offender also sentenced at the same court event?

- As with Tasmania, when an offender is sentenced for the offence of non-fatal strangulation, he or she is often sentenced for another offence, commonly assault or assault causing bodily injury and breach of a family violence order. Other offences included breach of bail and property damage.
- In Queensland, there were 404 cases involving strangulation. In 287 of those cases, strangulation was the most serious offence ('MSO') and in only 12.2% of cases was this

the only offence. Additionally, there were 117 cases where strangulation was not the MSO and the offender was sentenced for another offence as the MSO, most commonly assault occasioning actual bodily injury. Other offences commonly sentenced at the time of strangulation (in cases where strangulation was the MSO) include assault, assault occasioning actual bodily injury, breach of a violence order, property damage and breach of bail.

- In New South Wales, there were 406 offenders sentenced in the District and Local Court combined for 438 offences against the *Crimes Act 1900* (NSW) s 37(1) and for 1037 other offences. Only a minority of offenders were sentenced for the strangulation offence alone (10.2% in the Local Court and 3.2% in the District Court). There were 216 offenders sentenced in the Local Court (no cases in the District Court) for 234 offences against the *Crimes Act 1900* (NSW) s 37(1A) and for 666 other offences. In only 9.7% of cases was the strangulation offence the only offence for which the offender was sentenced. As with Queensland, for both offences in New South Wales, common other offences were assault offences, breach of apprehended violence orders, breach of bail and property damage.
- In other Australian jurisdictions, the Council was not able to examine this issue for all cases, but in those cases that were identified, offenders were usually sentenced for multiple counts at the same time as a strangulation offence .
- In New Zealand, offenders were usually sentenced for multiple counts in all of the New Zealand High Court decisions identified. Other offences included assault offences, breach of a protection order and threat to kill.

Term of Reference 4: Additional observations

After reviewing the sentencing approach in Tasmania, and elsewhere, and drawing on the literature concerning non-fatal strangulation, the Council makes the following observations:

- Non-fatal strangulation is recognised as a serious form of criminal conduct by the DPP in the approach taken to charging and by the Supreme Court of Tasmania in sentencing, separate from any physical injury that is caused by the strangulation. There has been recognition of the inherent dangerousness of the conduct as well as its use as a feature of coercive control in the context of family violence.
- There has been a shift in the approach of the court and the Office of the DPP from focusing on physical injuries resulting from strangulation to its potential for serious harm, including lasting psychological harm (regardless of whether there were visible injuries caused as a result of the strangulation).
- Sentencing judges describe the circumstances in which cases of non-fatal strangulation occur as typically involving a number of violent acts as well as verbal abuse. In these cases, the offender may be sentenced for a single count of an offence (usually assault) that

involves numerous acts of violence in the particulars of the count, or multiple offences relating to a series of violent acts.

- In nearly all cases where an offender is sentenced for multiple counts, a global sentence has been imposed.
- There is no noticeable disparity between sentencing for non-fatal strangulation in the Supreme Court of Tasmania and sentencing in Queensland, Australian Capital Territory, South Australia and New Zealand. Sentencing was also similar in New South Wales in terms of the proportion of sentences that were terms of full-time imprisonment.
- Tasmanian courts have made clear statements in sentencing cases about the heightened risk of future and escalated violence and its prevalence in family violence. Sentencing courts have recognised this as a serious form of violence. However, conduct involving non-fatal strangulation is a particular of a general offence such as assault, and so the prevalence of non-fatal strangulation is not readily captured in the statistical data or recorded on an offender's criminal record. There is no 'red flag' created to allow for better risk assessment and increased protection for family violence and other victims.
- As noted, Tasmanian courts have made strong statements about the seriousness of non-fatal

strangulation but this is only apparent from reading the judgments of the court. The Council's view is that the relevance of non-fatal strangulation as an aggravating factor in sentencing should be set out in legislation to provide for greater education of the community.

Accordingly, the Council makes three suggestions that may be considered for possible reforms to sentencing laws in Tasmania. These suggested reforms would allow for a record of strangulation and suffocation to be created and may also provide for community education and a strong statement about the seriousness of non-fatal strangulation/suffocation. The reforms may also allow for improved safety planning as a result of an increased awareness of previous non-fatal strangulation offending:

1. amend the *Sentencing Act 1997* (Tas) to provide that strangulation and suffocation are aggravating circumstances in relation to an offence;
2. amend the *Family Violence Act* (Tas) s 13A to provide for recording of non-fatal strangulation as a particular of a family violence offence on a person's criminal record; and
3. amend the *Sentencing Act 1997* (Tas) to provide for the recording of non-fatal strangulation as a particular of the offence on a person's criminal record in cases other than family violence cases.

1 INTRODUCTION

1.1 Terms of Reference

On the 9 September 2020, the Attorney-General, the Honourable Elise Archer MP, referred the matter of non-fatal strangulation, choking or suffocation under the *Criminal Code Act 1924* to the Council for its advice. The Terms of Reference for this research paper were to undertake research and make observations against the following:

1. In Tasmania, in how many cases and in what circumstances has non-fatal strangulation, choking or suffocation been considered as a sentencing factor and in relation to which offences? What were the sentencing outcomes in those cases?
2. In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence), what have been the sentencing outcomes and, where information is available, what factors have the courts considered in sentencing the offender?
3. In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence) for what other offences was the offender also sentenced at the same court event?
4. Any other observations considered relevant to 1–3.

In previous correspondence with the Council dated 11 May 2020, the Attorney-General indicated that the Tasmanian Government was committed, through its *Safe Homes, Families, Communities: Tasmania's Action Plan for Family and Sexual Violence 2019–2022*, to strengthening the State's legal response to family and sexual violence. It was noted that the Coroner had recommended that the government consider creating a strangulation offence as part of the findings into the death of Jodi Eaton and indicated that the Government was considering the Coroner's recommendation. The Attorney-General also wrote that the Tasmanian Government recognised that non-fatal strangulation, choking or suffocation was a significant form of family violence and domestic violence, and a recognised precursor for escalation in the severity of family and domestic violence, and that for victim-survivors, the health impacts can be severe and lifelong. Noting that other jurisdictions have recently introduced a standalone offence of non-fatal strangulation, choking or suffocation, the Attorney-General expressed the view that further research was required to determine what policy response was best suited to Tasmania's criminal law framework, taking into account the provisions of the *Criminal Code* in relation to sentencing outcomes.

As the Council's general Terms of Reference limit it to providing policy advice on sentencing related matters, this Report does not provide advice on the merits of introducing a stand-alone offence of non-fatal strangulation in Tasmania. The Council makes no comment or observation in this regard.

This paper sets out the sentencing practices in the Supreme Court of Tasmania for offences involving non-fatal strangulation as well as sentencing approaches in other jurisdictions that have introduced an offence of non-fatal strangulation. It also provides information about the range of other offences for which an offender was sentenced at the same time as the offence involving non-fatal strangulation. Based on the Council's research and analysis, it makes three suggestions for possible reform to sentencing laws in Tasmania to give statutory recognition to the approach of the Court of Criminal Appeal to sentencing in cases involving non-fatal strangulation and to facilitate community education about the seriousness of strangulation.

In order to respond to the Terms of Reference, the Council undertook an analysis of sentencing comments from the Supreme Court of Tasmania for the period 2010 to 30 November 2020 to identify cases where an offender had been sentenced for an offence in circumstances of non-fatal strangulation. Consistent with the various ways in which non-fatal strangulation can be described,¹ this analysis included searching for words and phrases such as 'strangle', 'strangulation', 'choke', 'hands around throat', 'hands around neck', 'suffocation'.

Data has not been obtained about sentencing practices in the Magistrates Court of Tasmania. Transcripts of comments on passing sentence are not generally published in the Magistrates Court and so it was not possible to search for and identify cases where non-fatal strangulation, choking or suffocation were considered as sentencing factors for offences heard in that jurisdiction.

The research also involved analysis of written judgments from the Tasmanian Supreme Court (review of sentences from the Magistrates Court) and Court of Criminal Appeal (appeals from the Supreme Court), as well as judgments that were available from other jurisdictions. The Council has also obtained statistical sentencing data from the following jurisdictions: New South Wales, Queensland, South Australia and New Zealand.

The Council considered academic literature and reports prepared for government and non-government bodies.

In the preparation of this paper, the Council has also sought feedback from stakeholders.

1.2 Chapter overview

Chapter 2 sets out an overview of strangulation. It presents a summary of the findings of research that has examined the nature and consequences of strangulation, choking and suffocation from a legal and medical perspective. In addition, it examines non-fatal strangulation specifically in the context of family violence.

Chapter 3 lists the offences that may be charged in Tasmania in circumstances of non-fatal strangulation and provides information about Supreme Court sentencing cases

¹ See Adam Pritchard, Amy Reckdenwald and Chelsea Nordham, 'Non-Fatal Strangulation as Part of Domestic Violence: A Review of Research' (2017) 18(4) *Trauma, Violence and Abuse* 407, 410, 412; Heather Douglas and Robin Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (2014) 36 *Sydney Law Review* 231, 248; Heather Douglas and Robin Fitzgerald, 'Women's Stories of Non-fatal Strangulation: Informing the Criminal Justice Response' (2020) *Criminology and Criminal Justice* DOI: <https://doi.org/10.1177/1748895820949607>:1–17, 6, 8.

identified where an offender was sentenced for an offence in circumstances of non-fatal strangulation in the period 2010 to 30 November 2020.

Chapter 4 provides information about sentencing for strangulation offences in selected other comparable jurisdictions where a non-fatal strangulation offence has been created.

Chapter 5 provides a summary of the key findings from the paper addressing the Terms of Reference and sets out the observations of the Council arising from its research and consultations.

2 OVERVIEW OF NON-FATAL STRANGULATION

This chapter provides a summary of the key findings of research that has examined the nature and consequences of strangulation, choking and suffocation from a legal and medical perspective. In addition, it examines non-fatal strangulation specifically in the context of family violence. This research has demonstrated the inherent risk and seriousness of the conduct, as well as its role in the maintenance of control and fear in a domestic violence context. This has informed the approach of the courts to sentencing in cases where non-fatal strangulation has been identified as an aggravating factor.

2.1 What is strangulation?

Research examining non-fatal strangulation has highlighted the various descriptions given to conduct that amounts to ‘strangulation’ including choking, squeezing a person’s neck, grabbing around the throat, putting hands around throat, being held around the throat, pushed on the neck. These descriptions are used by police and victims,² as well as being evident in the descriptions of strangulation used by sentencing judges.³ Stakeholder consultations also identified the use of terminology such as ‘scruffing’, ‘scragging’, ‘pinning’, ‘shirtfronting’ and ‘throttling’.

From a medical point of view, strangulation is distinguished from smothering and choking. Green, in his 2020 outline of the medical evaluation in non-fatal strangulation cases, makes the following distinctions:

- Suffocation is a broad term encompassing different causes of asphyxia associated with oxygen deprivation.
 - Smothering is asphyxia by obstruction of airflow into the upper air passages including the nose, mouth, and pharynx (eg putting a pillow or hand over a victim’s nose and mouth ...)
 - Choking is asphyxia by obstruction of airflow into the lungs at the level of the voice box (larynx) or windpipe (trachea). This occurs when an object (eg piece of food, popcorn, piece of balloon, small toy) mechanically blocks airflow internally.
 - ...
- Strangulation is asphyxia by closure of the blood vessels and/or air passages of the neck by external compression.⁴

² Douglas and Fitzgerald, ‘Strangulation, Domestic Violence and the Legal Response’ (n 1) 248; Douglas and Fitzgerald, ‘Women’s Stories of Non-fatal Strangulation: Informing the Criminal Justice Response’ (n 1) 6, 8; See Pritchard, Reckdenwald and Nordham (n 1) 410, 412.

³ See [3.4].

⁴ William Green, ‘Medical and Forensic Evaluation in Non-Fatal Strangulation Cases’ in California District Attorneys Association, *Investigation and Prosecution of Strangulation Cases* (CDAAPublications Department, 2020) 116, 120–121.

Campman and Hawley make the following distinction:

Strangulation has been defined as pressure placed upon the neck, such that there is a reduction of blood flow through the brain, or constriction of breathing through the airway in the throat, resulting in disruption of brain function by asphyxiation. Strangulation is a specific type of blunt force injury of the neck. ...

Suffocation is defined as obstructing or restricting breathing by external mechanical forces. Suffocation does not require blunt force injury. It can occur by obstructing air from entering the air passages (smothering) or by keeping the lungs from expanding to take in air by external compression of the chest or abdomen (compression).⁵

In contrast, choking is understood as ‘when something accidentally — most often food — [becomes] lodged in your throat’.⁶ Confusion in relation to the distinction between choking and strangulation has been identified in the literature, which has argued that ‘describing strangulation as “choking” or “grabbing the throat” can minimise the seriousness of the incident and injuries’.⁷ Consultations with stakeholders who assist survivors/victims of family violence indicated that: victims may not recognise the serious nature of the conduct given that it may not result in an injury and so may not disclose it; front-line police may not ask questions about the existence of non-fatal strangulation given the absence of injury; and victims may disclose to police who may not appreciate the seriousness of the conduct described. It was indicated that, anecdotally, there is an increasing recognition of non-fatal strangulation as a risk factor and potentially serious conduct, but that this can be uneven between Tasmania Police personnel.

In the Tasmanian context, Dr Donald Ritchey, a forensic pathologist, has provided information to the Office of the Director of Public Prosecutions (‘DPP’) for use in understanding features relevant to cases of asphyxia, particularly in the context of strangulation. This information also draws a distinction between choking (asphyxia caused by obstruction of a foreign object within the air passages) and strangulation (asphyxia caused by closure of blood vessels and/or air passages in the neck as a result of external pressure on the neck).⁸

⁵ Steven Campman and Dean Hawley, ‘Death by Strangulation or Suffocation’ in California District Attorneys Association, *Investigation and Prosecution of Strangulation Cases* (CDAA Publications Department, 2020) 185, 186.

⁶ Casey Gwinn and Gael Strack, ‘Introduction and Overview of Strangulation and Suffocation Assaults’ in California District Attorneys Association, *Investigation and Prosecution of Strangulation Cases* (CDAA Publications Department, 2020) 1, 12.

⁷ Isobel Holling, *Non-Fatal Strangulation in Cases of Family and Domestic Violence: A Survey in Western Australia’s Metropolitan and Regional Women’s Refuges* (Women’s Council for Domestic and Family Services (WA), nd) 9.

⁸ See Appendix B.

2.2 Health consequences of non-fatal strangulation

Since the pioneering study by Strack, McClane and Hawley in 2001, which examined 300 victims of non-fatal strangulation in San Diego,⁹ there has been emerging research that has examined the health consequences and risk of non-fatal strangulation, particularly in the context of family violence.¹⁰ This research has shown the inherent danger of strangulation and its potential for significant harm. Research shows that strangulation is potentially fatal and can cause unconsciousness within seconds and death within minutes with a relatively small amount of pressure and often no visible injury:

Victims may lose consciousness by any of the following methods: blocking the carotid arteries in the neck (depriving the brain of oxygen), blocking the jugular veins (preventing deoxygenated blood from exiting the brain), or closing off the airway (making breathing impossible). With continuous pressure after unconsciousness, urination has been reported to occur within 15 seconds and defecation within 30 seconds. Seizures have also been reported after pressure has been released as well as during the application of pressure.

The neck is extremely vulnerable. Very little pressure on both the carotid arteries for less than 10 seconds is all that is necessary to cause unconsciousness. If the veins are compressed while the arteries are open and pumping blood, little red spots called petechiae may result from build-up of venous pressure. Petechiae are smooth to the touch and provide evidence of internal injuries even though most visible petechiae will be on the surface of the skin—above the pressure of the chokehold. They form immediately or within seconds. If the pressure is immediately released, consciousness will be regained within 10 seconds. To completely close off the trachea (windpipe), more pressure is required. Brain death will occur in minutes if strangulation persists. It is important to remember that in strangulation cases, often, there are no visible external injuries, even in fatal cases.¹¹

Further, unconsciousness or death can occur with very quickly with little pressure as shown by Table 2.1. As the New Zealand Law Commission observed, very light pressure ‘applied to the neck for as little as 10 seconds can cause unconsciousness ... with brain death [occurring] within four to five minutes if strangulation persists. There is, therefore, a fine line between fatal and non-fatal strangulation’.¹²

⁹ Gael Strack, George McClane and Dean Hawley ‘A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues’ (2001) 21(3) *Journal of Emergency Medicine* 303; George McClane, Gael Strack, and Dean Hawley ‘A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victims’ (2001) 21(3) *Journal of Emergency Medicine* 311; Dean Hawley, George McClane and Gael Strack, ‘A Review of 300 Attempted Strangulations Part III: Injuries in Fatal Cases’ (2001) 21(3) *Journal of Emergency Medicine* 317.

¹⁰ Pritchard, Reckdenwald and Nordham (n 1) 408.

¹¹ Gwinn and Strack (n 6) 15. See also Julia De Boos, ‘Tracheal Perforation from Non-fatal Manual Strangulation’ (2019) 66 *Journal of Forensic and Legal Medicine* 1, 2.

¹² New Zealand Law Commission, *Strangulation: The Case for a New Offence* (Report 138, 2016) 8.

Table 2.1: Pressure and time required to render an adult unconscious by strangulation¹³

Occlusions of neck structures	Pressure (pounds per square inch (PSI))	Time
Jugular veins	4.4 psi	5–10 seconds
Carotid arteries	11 psi	5–10 seconds
Trachea	30 psi	Not reported

In comparison, opening a can of soft drink requires 20 psi and the adult male handshake is 80 to 100 psi with the average maximum grip being 100–120 psi.¹⁴

Importantly, research has shown that despite its potentially serious consequences, strangulation may not result in a visible injury. As observed by Douglas and Fitzgerald, ‘despite findings that NFS [non-fatal strangulation] represents an extreme form of abuse leading to serious internal injuries, leaving some victims very close to death ... , earlier research indicates that NFS often leaves no visible trace’.¹⁵ In a study of 300 strangulation cases in San Diego County, in 50% of cases there was no visible injury at all, and in 35% of cases the injury was not visible enough to photograph.¹⁶ Other studies have also found that a significant proportion of victims have no visible symptoms.¹⁷ Even in fatal cases, there may be no external evidence of injury.¹⁸ However, despite the relative invisibility of symptoms, research suggests that a majority of victims do experience symptoms of strangulation.¹⁹ This has led researchers to highlight the need for greater awareness by police, general practitioners, emergency service personnel and other health providers of the forensic aspects of non-fatal strangulation.²⁰

Studies have identified signs and symptoms of strangulation as outlined in Figures 2.1 and 2.2. Figure 2.1 sets out the signs that may be present following strangulation (a sign is discernible by an objective medical observation or test), while Figure 2.2 sets out the symptoms of strangulation (which are injuries not visible to the naked eye and rely on the patient’s subjective description).²¹

¹³ Gael Strack et al, ‘Investigating Strangulation Cases’ in California District Attorneys Association, *Investigation and Prosecution of Strangulation Cases* (CDAA Publications, 2020) 65, 81.

¹⁴ Holling (n 7) 3.

¹⁵ Douglas and Fitzgerald, ‘Women’s Stories of Non-fatal Strangulation: Informing the Criminal Justice Response’ (n 1) 8.

¹⁶ Strack, McClane and Hawley, ‘A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues’ (n 9); Douglas and Fitzgerald, ‘Strangulation, Domestic Violence and the Legal Response’ (n 1) 235.

¹⁷ See Renate Zilkens et al, ‘Non-fatal Strangulations in Sexual Assault: A Study of Clinical and Assault Characteristics Highlighting the Role of Intimate Partner Violence’ (2016) 43 *Journal of Forensic and Legal Medicine* 1, 3 (49.4%).

¹⁸ Ellen Taliaferro et al, ‘Strangulation in Intimate Partner Violence’ in D Anglin, *Intimate Partner Violence: A Health-based Perspective* (Oxford University Press, 2009) 229; Grace McKee et al., ‘New Perspectives on Risk Factors for Non-fatal Strangulation and Post-assault Imaging’ (2020) *Journal of Interpersonal Violence* 1; Ibid 2.

¹⁹ Zilkens et al (n 17) 3.

²⁰ Ibid 6.

²¹ These images are a resource prepared by the Training Institute on Strangulation Prevention <<https://www.familyjusticecenter.org/downloads/training-institute-on-strangulation-prevention>>. The definitions of signs and symptoms are set out in Green (n 4) 123.

Figure 2.1: Signs of strangulation

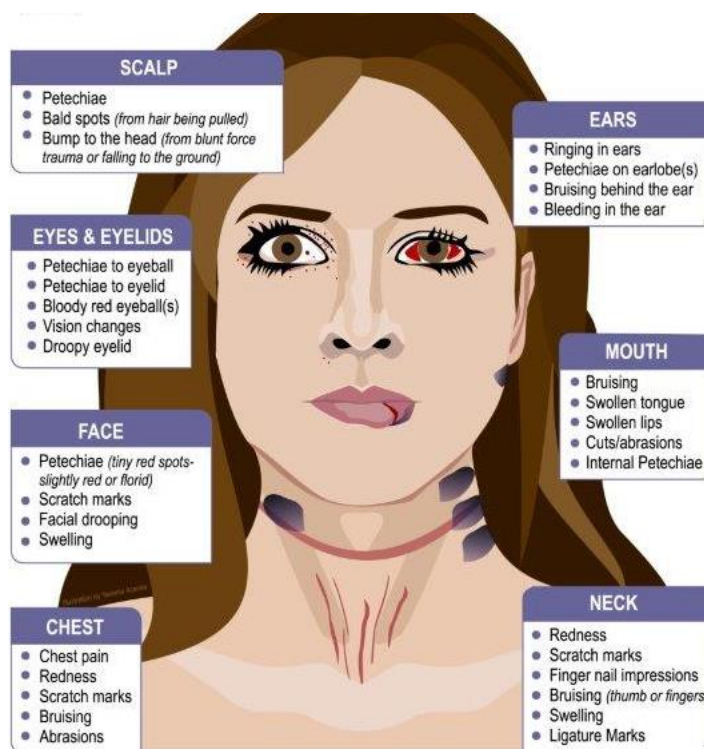
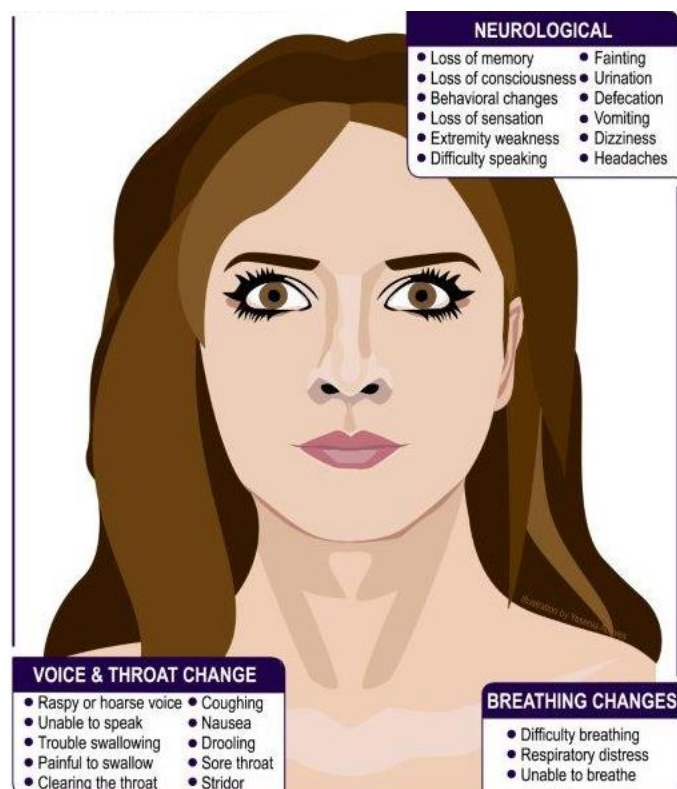


Figure 2.2: Symptoms of strangulation



Tables 2.2 and 2.3 provide a summary of the research literature on symptoms experienced by victims of non-fatal strangulation resulting from direct compression of neck structures and decreased brain oxygenation.

Table 2.2: Symptoms related to direct neck trauma²²

Symptoms related to direct neck trauma	Range (percent)	Median (percent)
Neck pain/sore throat	45–72	55
Changes in breathing/difficulty breathing	5–85	23
Changes in voice	9–58	35
Swallowing difficulty	2–58	27

Table 2.3: Symptoms related to brain asphyxia²³

Symptoms related to brain asphyxia	Range (percent)	Median (percent)
Vision symptoms	3–58	4
Urinary incontinence	1–11	1
'Incontinence'	3.5–8	5
Dizzy/light-headed	9–84	43
Loss of consciousness	9–47	23

Researchers have also contributed to an emerging understanding of the long-term consequences of non-fatal strangulation with studies reporting delays in symptom development ranging from dizziness to loss of consciousness as well as some reports of delayed strokes²⁴ and miscarriage.²⁵ In addition, studies have shown the psychological effects of strangulation including the development of post-traumatic stress disorder, depression and anxiety, suicidal ideation, insomnia and nightmares.²⁶ It has also been recognised that further research is required to understand the gravity of strangulation and its neurological outcomes.²⁷

²² Green (n 4) 130.

²³ Ibid 133.

²⁴ Taliaferro et al (n 18) 222; Green (n 4) 154–155.

²⁵ Jill Messing et al, 'Differentiating among Attempted, Completed, and Multiple Nonfatal Strangulation in Women Experiencing Intimate Partner Violence' (2018) 28(1) *Women's Health Issues* 104, 107; Lee Wilbur et al, 'Violence: Recognition, Management, and Prevention Survey Results of Women Who Have Been Strangled While in an Abusive Relationship' (2001) 21(3) *Journal of Emergency Medicine* 297; Douglas and Fitzgerald, 'Women's Stories of Non-fatal Strangulation: Informing the Criminal Justice Response' (n 1) 2.

²⁶ Michelle Patch, Jocelyn Anderson and Jacquelyn Campbell, 'Injuries of Women Surviving Intimate Partner Strangulation and Subsequent Emergency Health Care Seeking: An Integrative Evidence Review' (2018) 44(4) *Journal of Emergency Nursing* 384, 384; Queensland Health, *A Health Response to Non-lethal Strangulation in Domestic and Family Violence: Literature Review* (2017) 5.

²⁷ Helen Bichard et al, 'The Neuropsychological Outcomes of Non-fatal Strangulation in Domestic and Sexual Violence: A Systematic Review' (2021) *Neuropsychological Rehabilitation* DOI: <https://doi.org/10.31234/osf.io/c6zbv>: 1–42.

2.3 Strangulation and family violence

Research has established that strangulation is a gendered crime.²⁸ It is typically perpetrated by a male on a female, commonly on an intimate partner. This is reflected in the non-fatal strangulation sentencing cases identified by the Council that occurred in the context of family violence, where all but one of the offenders was male. There was one female offender identified and, in this case, the complainant was her female partner.²⁹

In the context of family violence, research shows that strangulation is ‘extremely dangerous in and of itself’ and is also ‘a red flag for future risk’.³⁰ As observed by Queensland Health:

There appears to be broad, international consensus that the occurrence of non-lethal strangulation in domestic and family violence (DFV) situations is a serious act of violence, that it can cause serious psychological and physical harm without any obvious signs on the body, that it is an indication of increasing severity of DFV, and that it is a significant risk factor for future homicide.³¹

In its review, Queensland Health identified three features of non-fatal strangulation that were said to distinguish it from other types of physical assault in the context of family violence:

- (1) that there may be few visible symptoms (as discussed above);
- (2) it had a particular potential to create many health problems for the victim (as discussed above); and
- (3) it demonstrated ‘the perpetrator’s ultimate power to take the life of the victim, an experience likely to cause severe psychological distress’ (discussed below).³²

Stakeholder consultations with those supporting victims/survivors of family violence also stressed the gendered nature of non-fatal strangulation in Tasmania, its insidious nature, and its use as a means of power, control and intimidation.

2.3.1 Incidence of non-fatal strangulation in family violence

Publicly available information about the incidence of non-fatal strangulation in family violence in Australia is relatively scarce. One study, conducted in 2016 in Western Australia, investigated the prevalence of non-fatal strangulation in the context of sexual assaults. The study examined the prevalence of non-fatal strangulation in 1064 women referred to a Sexual Assault Resource Centre following recent sexual assault and found that 79 (7.4%) of participants reported non-fatal strangulation. However, women who were sexually assaulted by their intimate partner reported higher levels of non-fatal strangulation:

²⁸ Pritchard, Reckdenwald and Nordham (n 1) 413.

²⁹ *Tasmania v Johnston*, 7 April 2016 (Wood J).

³⁰ Douglas and Fitzgerald, ‘Strangulation, Domestic Violence and the Legal Response’ (n 1) 235.

³¹ Queensland Health (n 26) 1 (citations omitted).

³² *Ibid* 1 (citations omitted).

Almost a quarter (23%) of the women who reported being sexually abused by an intimate partner also reported NFS [non-fatal strangulation]. The odds of NFS were 8.4 times higher for women sexually assaulted by an intimate partner compared to women reporting sexual assault by a friend/acquaintance and 4.9 times higher ... compared to women assaulted by a stranger.³³

The study found that ‘almost 60% of all alleged sexual assaults involving NFS were by an intimate partner’.³⁴

Another study examined the incidence of non-fatal strangulation in the context of family violence applications. This Queensland study looked at the prevalence of Domestic Violence Order cases where strangulation was alleged by analysing cross-applications (ie both partners were seeking orders) in the period 2008–09 and 2009–10. In the 656 cross-application files which were examined, allegations of strangulation were made by 6.4% of aggrieved partners. Most often these allegations were made by one partner — typically the woman (90%) — against the other partner — typically a man.³⁵ In relation to women who were making cross-applications, nearly 12% of women alleged strangulation.³⁶

This research broadly reflects the findings of research conducted elsewhere. In relation to the available international literature, Douglas and Fitzgerald write, women who experience intimate partner violence ‘commonly report being subjected to non-fatal strangulation by their partners’.³⁷ Internationally, lifetime prevalence for non-fatal strangulation has been estimated to range from 3% to 9.7% with estimates reported as high as 27% and 68% in women with a history of intimate partner violence.³⁸ Messing et al’s study of 1008 women referred by police to the study after experiencing intimate partner violence, found that 79.6% reported some form of strangulation with 37.0% reporting repeated strangulation. Strack et al’s study found that there was a history of family violence in 89% of the cases of non-fatal strangulation examined.³⁹ In New Zealand, the Law Commission reported that ‘strangulation in family violence is not systematically recorded’ but ‘police and women’s refuges report ... that it is very common in family violence’.⁴⁰

In addition, Douglas and Fitzgerald’s analysis of Queensland cases reported that ‘all of the women who alleged strangulation also made allegations of other offences, and most

³³ Zilkens et al (n 17) 3.

³⁴ Zilkens et al (n 17) 4.

³⁵ Douglas and Fitzgerald, ‘Strangulation, Domestic Violence and the Legal Response’ (n 1) 245–246.

³⁶ Heather Douglas and Robin Fitzgerald, ‘Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders’ (2013) 36(1) *UNSW Law Journal* 56, 76.

³⁷ Douglas and Fitzgerald, ‘Women’s Stories of Non-fatal Strangulation: Informing the Criminal Justice Response’ (n 1) 1.

³⁸ Zilkens et al (n 17) 1–2 citing S Sorenson, M Joshi and E Sivitz, ‘A Systematic Review of the Epidemiology of Nonfatal Strangulation, a Human Rights and Health Concern’ (2014) 104 *American Journal of Public Health* 54; N Glass et al, ‘Non-Fatal Strangulation is an Important Risk Factor for Homicide of Women’ (2008) 35 *Journal of Emergency Medicine* 329; Lee Wilbur et al, ‘Survey Results of Women who have been Strangled While in an Abusive Relationship (2001) 21 *Journal of Emergency Medicine* 297.

³⁹ Strack, McClane and Hawley ‘A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues’ (n 9) 305.

⁴⁰ New Zealand Law Commission (n 12) 12.

of these (87%) were violent offences, including other forms of assault, sexual assault and threats of violence and murder'.⁴¹ This reflects the findings of other research that non-fatal strangulation co-exists with threats and other forms of violence in cases of family violence.⁴² Messing et al's study found that women who had been strangled by their partner 'were significantly more likely to be sexually assaulted', and they were also more likely to have a partner who had abused or threatened them with a weapon and 'beat them up'.⁴³

In the Tasmanian context, the Council identified 77 cases where acts of non-fatal strangulation were sentenced in the Supreme Court from 2010 to 30 November 2020, and in 54 cases (70.1%) these involved family violence. As disclosed by the sentencing comments, in cases involving intimate partner violence, there was a history of family violence, either against the complainant and/or other female partners in 30 cases (55.6%). In some cases, the prior violence had included strangulation. For example, in *Tasmania v Jay*,⁴⁴ the offender was sentenced for four assaults on women. He was sentenced for an assault involving strangulation and had previously been convicted of an offence of recklessly causing serious injury, which involved choking. In *Tasmania v Parker*,⁴⁵ the accused was sentenced for grievous bodily harm and assault and had prior convictions for assaults against female partners, including one involving strangulation. Additionally, as discussed at [3.9.3], Tasmanian sentencing cases show (as with other research) that non-fatal strangulation typically does not exist in isolation from other violence.

Consultations with stakeholders who work with victims/survivors of family violence reported the frequency with which incidents of non-fatal strangulation were disclosed to them, even if reports were not made to police.

2.3.2 Non-fatal strangulation as a risk factor in family violence

Strangulation is a method used by men to kill their female partner. The Australian Institute of Health and Welfare (AIHW) identified strangulation/suffocation as the cause of death in at least 8% of intimate partner violence related homicides for the period 2012–13 to 2013–14.⁴⁶ Over the period 1 July 2010 to 30 June 2014, the Australian Domestic and Family Violence Death Review Network reviewed intimate partner homicides in Australia which followed an identifiable history of domestic violence. This research identified strangulation as the means of causing death in 15.7% of the 121 cases in which male homicide offenders killed a female intimate partner.⁴⁷ Research conducted in New South Wales over a longer timeframe by the Domestic Violence Death Review Team (DVDRT) provided a data analysis of the 234 intimate partner domestic violence homicides where the female was killed in the period between 1 July 2000 and 30 June 2019. Again, these were homicides that occurred in a context where

⁴¹ Douglas and Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (n 1) 246.

⁴² Wilbur et al (n 25); Messing et al (n 25) 104.

⁴³ Messing et al (n 25) 107.

⁴⁴ 8 September 2015, Sentencing Comments (Blow CJ).

⁴⁵ 7 December 2015, Sentencing Comments (Pearce J).

⁴⁶ AIHW, *Family, Domestic and Sexual Violence in Australia 2018* (Catalogue No FDV 2, 2018) 77.

⁴⁷ Australian Domestic and Family Violence Death Review Network, *Australian Domestic and Family Violence Death Review Network: 2018 Data Report* (2018) 15.

there was an identifiable history of domestic violence.⁴⁸ The DVDRT reported that suffocation/strangulation was the means of causing death for 13% of women killed by their intimate partner.⁴⁹

Further, research suggests that ‘evidence from across the developed world indicates that non-lethal strangulation in DFV is an indicator of an escalation in the severity of domestic and family violence’.⁵⁰ Research has also shown that non-fatal strangulation is a significant risk factor for future intimate partner homicide.⁵¹ Non-fatal strangulation has been described as ‘on the edge of homicide’⁵² and ‘as important predictors for future lethal violence among women experiencing IPV [intimate partner violence]’.⁵³ Research conducted in the United States by Glass et al, found that ‘[p]rior non-fatal strangulation was associated with greater than six-fold odds ... of becoming an attempted homicide and over seven-fold odds ... of becoming a completed homicide’.⁵⁴ The Queensland Domestic and Family Death Review and Advisory Board analysed intimate partner homicide deaths between 2011 and 2017 using risk factors identified by the Ontario Domestic Violence Death Review Committee as indicating the potential for lethality within an intimate partner relationship.⁵⁵ The Queensland review identified a history of domestic violence as the most commonly identified risk factor (82.1%) with the offender having choked or strangled the victim in the past identified as a lethality risk factor in 29.5% of cases.⁵⁶ This research also highlighted that strangulation was ‘a particularly gendered form of violence in which most perpetrators are men, and nearly all victims are female’.⁵⁷ It also found that in ‘some cases, offenders had a history of perpetrating non-lethal strangulation against multiple former partners which was most often recorded in police files. This information was not, however, easily accessible to officers responding to future reported episodes of violence’.⁵⁸

2.3.3 Non-fatal strangulation in the context of coercive control

As an appreciation of the complexity of family violence has evolved, there is recognition that acts of violence typically occur within a context of coercive and controlling

⁴⁸ NSW Domestic Violence Death Review Team, *Report 2017-2019* (NSW Government, 2020) 8.

⁴⁹ Ibid 11. Similar observations have been made in international jurisdictions, see Julia Long and Heather Harvey, *Annual Report on UK femicides 2018*, 28 <<https://www.femicidecensus.org/>>; Robertson et al, *Living at the Cutting Edge: Women's Experiences of Protection Orders* (New Zealand Ministry of Justice, 2007) 174; New Zealand Law Commission (n 12).

⁵⁰ Queensland Health (n 26) 4; Douglas and Fitzgerald, ‘Strangulation, Domestic Violence and the Legal Response’ (n 1) 233–234.

⁵¹ Douglas and Fitzgerald, ‘Women's Stories of Non-fatal Strangulation: Informing the Criminal Justice Response’ (n 1) 2; Chelsea Spencer and Sandra Stith, ‘Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis’ (2020) 21(3) *Trauma, Violence and Abuse* 527, 536.

⁵² Gwinn and Strack (n 6) 13.

⁵³ Nancy Glass et al, ‘Non-fatal Strangulation is an Important Risk factor for Homicide of Women’ (2008) 35(3) *Journal of Emergency Medicine* 339, 335.

⁵⁴ Ibid 339–330.

⁵⁵ Domestic and Family Violence Death Review and Advisory Board, *Annual Report 2016–17* (2017) 46.

⁵⁶ Domestic and Family Violence Death Review and Advisory Board, *Annual Report 2017–18* (2018) 98.

⁵⁷ Domestic and Family Violence Death Review and Advisory Board (n 55) 57.

⁵⁸ Ibid.

behaviour.⁵⁹ This pattern of abusive behaviour has been conceptualised as ‘coercive control’ and ‘describes patterns of abusive behaviour designed to exercise domination and control over the other party to a relationship’.⁶⁰ It may include a range of behaviours including physical, psychological, emotional or financial abuse’ which has the cumulative effect of depriving the victim of autonomy and independence.⁶¹ The Queensland Domestic and Family Death Review and Advisory Board describes coercive control as:

an ongoing and often relentless pattern of behaviour asserted by a perpetrator which is designed to induce various degrees of fear, intimidation and submission in a victim. This includes the use of tactics such as social isolation, belittling, humiliation, threatening behaviour, restricting resources (i.e. financial) and abuse of children, pets, and relatives, many of which are non-physical in nature’.⁶²

In this way, family violence is understood ‘as a pattern of behaviour aims at coercively controlling the victim rather than discrete incident or set of discrete incidents’.⁶³

In line with this understanding, researchers have constructed non-fatal strangulation through the lens of coercive control. Gwinn and Strack writes that ‘the unique nature of non-fatal strangulation assaults makes it a particularly effective tool of coercive control. With non-fatal strangulation, it is possible to bring someone to the point of believing death is imminent, but then stop, either before or immediately after they lose consciousness’.⁶⁴ This ‘conveys a very powerful and credible threat of imminent death, which is an essential element of establishing and maintaining coercive control’.⁶⁵ In addition to the clear message of power, strangulation is highly personal. It has been described as ‘a very personal way to hurt someone: during frontal manual strangulation, the assailant is facing the survivor (eye-to-eye) while literally squeezing the very life and breath out of the survivor’.⁶⁶

Women who have experienced non-fatal strangulation typically describe a pattern of behaviour where non-fatal strangulation is frequently accompanied by other acts of violence and may also be accompanied by threats to kill.⁶⁷ Research examining women’s experiences has found that non-fatal strangulation was ‘described ... as part of a larger pattern of control, fear and intimidation that they experience in the

⁵⁹ New South Wales Government, *Coercive Control Discussion Paper* (2020) 5–6.

⁶⁰ Ibid 7.

⁶¹ Paul McGorrrery and Marilyn McMahon, ‘Criminalising Coercive Control: An Introduction’ in Marilyn McMahon and Paul McGorrrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 3.

⁶² Domestic and Family Violence Death Review and Advisory Board (n 55) 16–17, 51.

⁶³ Douglas and Fitzgerald, ‘Women’s Stories of Non-fatal Strangulation: Informing the Criminal Justice Response’ (n 1) 2.

⁶⁴ Gwinn and Strack (n 6) 13–14.

⁶⁵ Ibid 14.

⁶⁶ Colleen McQuown et al, ‘Prevalence of Strangulation in Survivors of Sexual Assault and Domestic Violence (2016) 34 *American Journal of Emergency Medicine* 1281, 1283.

⁶⁷ Richard Stanfield and Kirk Williams, ‘Coercive Control Between Intimate Partners: An Application to Nonfatal Strangulation’ 2018 *Journal of Interpersonal Violence* DOI: <https://doi.org/10.1177/0886260518795175>: 1–20, 1, 2, 13–14.

relationship'.⁶⁸ Strangulation was viewed not always an attempt to kill but to control,⁶⁹ with women describing their feeling of vulnerability and sense of powerlessness following strangulation — both as an immediate reaction and as 'last fear'.⁷⁰ This aligns with research examining the behaviour of perpetrators of intimate partner violence which reported that '[t]he results consistently showed a robust empirical relation between perpetrators' death threats and subsequent escalation into nonfatal strangulation as a way of maintaining control through fear and intimidation'.⁷¹ It also aligns with the experiences of victims as reported in the stakeholder consultations that stressed the psychological impact of non-fatal strangulation, separate from any physical injury caused. It was observed that if a victim is held or grabbed around the throat, there may be no physical effects, but there may be significant coercive and psychological impacts, particularly in cases where non-fatal strangulation has occurred before.

More recently, there are indications from the Supreme Court of Tasmania of both the inherently dangerous nature of strangulation as well as its role in domination and control in a family violence context. There has been a shift from a focus on physical injuries resulting from strangulation to its potential for serious harm, including lasting psychological harm (regardless of whether there were visible injuries caused as a result of the strangulation).⁷²

⁶⁸ Douglas and Fitzgerald, 'Women's Stories of Non-fatal Strangulation: Informing the Criminal Justice Response' (n 1) 8. See also Sylvia Vella et al, "'I Felt Close to Death": A Phenomenological Study of Female Strangulation Survivors of Intimate Terrorism' (2107) 29(4) *Journal of Feminist Family Therapy* 171; Martyna Bendlin and Lorraine Sheridan 'Nonfatal Strangulation in a Sample of Domestically Violent Stalkers: The Importance of Recognising Coercively Controlling Behaviours' (2019) 46(11) *Criminal Justice and Behaviour* 1528.

⁶⁹ Pritchard, Reckdenwald and Nordham (n 1) 413.

⁷⁰ Kristie Thomas, Manisha Joshi and Susan Sorenson, "'Do You Know What it Feels Like to Drown?': Strangulation as Coercive Control in Intimate Relationships' (2014) 38(1) *Psychology of Women Quarterly* 124, 130.

⁷¹ Stanfield and Williams (n 67) 14.

⁷² See [3.4].

3 *NON-FATAL STRANGULATION IN THE TASMANIAN CRIMINAL JUSTICE SYSTEM*

Term of Reference 1 requests that the Council provide advice about the number of cases and the circumstances of those cases where non-fatal strangulation, choking or suffocation has been considered as a sentencing factor and in relation to which offences.

This chapter responds to this Term of Reference and details the offences that may be charged in Tasmania in circumstances of non-fatal strangulation. It also provides information about the number of Supreme Court sentencing cases identified where an offender was sentenced for an offence in circumstances of non-fatal strangulation in the period 1 January 2010 to 30 November 2020. It outlines the sentencing options available in Tasmania, the use of global sentencing and the factors that are generally relevant to the sentencing discretion. It then examines Court of Criminal Appeal decisions relating to non-fatal strangulation and provides information about current sentencing practices in Tasmania. Information is also provided about the applicable charging guidelines issued by the Director of Public Prosecutions. Information about charging practice is provided because the offence with which an offender is charged will necessarily be determinative in relation to the sentence imposed. Generally, in relation to offending there are a number of offences that could potentially be charged, with some offences being viewed by the sentencing court as more serious criminal conduct and so likely to receive a longer sentence (for example, attempted murder is a more serious offence than assault). The offence for which a person is charged is also determinative of the court in which the matter is heard (Supreme Court or Magistrates Court) and this will affect the sentence imposed.

As noted, this paper does not provide information about sentencing patterns in the Magistrates Court. This means that the observations about sentencing responses in Tasmania are restricted to a discussion of the approach taken in the Supreme Court. In this way, the paper is necessarily focussed on those non-fatal strangulation cases that have been progressed through the process of reporting by victims, recording by police, charging by prosecution and then sentencing by the Supreme Court. Stakeholders highlighted the reality that from a broader perspective, non-fatal strangulation is a matter dealt with by front line service providers, police, magistrates as well as the Supreme Court. It was observed that the sentencing cases in the Supreme Court are a product of the filtering of cases to only the most serious, harmful and well-evidenced matters. And that a key question that can impact on all stages of the criminal justice response prior to and including sentencing is the perception of whether something is ‘really strangulation’ or ‘just an assault’.

3.1 Overview of offences

In Tasmania, there are a number of offences that may be relevant where a person has strangled, choked or smothered another person without causing death. These include the following offences in the *Criminal Code* (Tas):

- attempted murder (ss 3, 158, 299)
- disabling to aid commission of offence or flight of offender (s 168)
- assault police (s 144)
- acts intended to cause grievous bodily harm (s 170)
- persistent family violence (s 170A)
- aggravated assault (s 183)
- assault (s 184)
- assault on a pregnant woman (s 184A)
- robbery (s 240).

These offences are indictable offences which are more serious offences and are usually heard in the Supreme Court of Tasmania before a judge and jury.⁷³ The maximum penalty for these offences is 21 years' imprisonment or a fine or both.⁷⁴

Other than the *Criminal Code* (Tas) s 168, which creates an offence of disabling to aid the commission of an offence or the flight of an offender and specifically refers to choking, suffocation or strangulation, there is no other specific offence of non-fatal strangulation in Tasmania. Further, as discussed at [3.6.1], the *Criminal Code* (Tas) s 168 is only applicable in particular (and limited) circumstances and so is not an offence that is generally applicable to assaults committed by way of strangulation or suffocation.

There is also an offence of assault that is summary offence contained in the *Police Offences Act 1935* (Tas) s 35. Summary offences are generally less serious offences that are heard in the Magistrates Court. There are different maximum penalties that apply to the summary offence of assault depending on the identity of the victim and/or the circumstances of the offence.⁷⁵

Table 3.1 summarises the cases identified by the Council where the offender was sentenced in the Tasmanian Supreme Court in the period 2010 to 30 November 2020, for an offence involving non-fatal strangulation and the number of these cases that were family violence related. In this context, this paper adopts the definition of family violence

⁷³ In some circumstances a judge can remit matters from the Supreme Court to the Magistrates Court to be tried if the judge is of the opinion that an accused person shall receive adequate punishment, *Criminal Code* (Tas) s 308(1). The maximum penalty a magistrate can impose per charge is 12 months' imprisonment or a fine not exceeding 20 penalty units, s 308(4). There are also some indictable offences that can be tried on indictment or as a summary offence, see *Justices Act 1959* (Tas) ss 71, 72.

⁷⁴ *Criminal Code* (Tas) s 389.

⁷⁵ See [3.9] for more discussion.

in the *Family Violence Act 2004* (Tas) that includes partners and former partners but does not include parents or children.⁷⁶

Table 3.1: Indictable offences sentenced in the Tasmanian Supreme Court 2010–31 October 2020, circumstances of strangulation

<i>Criminal Code</i> offence	Non-fatal strangulation as a basis/an aspect of the charge	Family Violence related
Attempted murder (s 299)	2	1
Disabling to aid commission of offence or flight (s 168)		
Unlawful act intended to cause bodily harm (s 170)	4	2
Persistent family violence (s 170A)	4	4
Assault (s 184)	51	40
Aggravated assault (s 183)	3	1
Assault on a pregnant woman (s 184A)	3	3
Assaulting a police officer in the due execution of his or her duty (s 114)	1	0
Aggravated robbery Aggravated armed robbery (s 240)	5	0
Affray (s 80)	1	0
Total	74	51

There were also two further cases where an offender was sentenced by the Supreme Court for the summary offence of common assault contrary to the *Police Offences Act 1935* (Tas) s 35(1) for non-fatal strangulation, at the same time as sentencing for a *Criminal Code* offence that did not involve non-fatal strangulation.⁷⁷ Both these cases involved family violence.

An analysis of the Tasmanian Supreme Court sentencing comments also showed the connection between sexual assault and non-fatal strangulation, particularly in the context of family violence. In the figures provided in Table 3.1, it is noted that there is one case where the offender was sentenced for a number of offences including attempted murder and attempted rape, in addition to an aggravated assault involving strangulation (assault with intent to rape). There were eight cases where the offender was sentenced for sexual offences and an assault offence in circumstances where the assault involved non-fatal strangulation. Not included in the Table 3.1 was a further case where the offender was sentenced for rape and attempted rape, where the factual circumstances of the rape were that the offender put his hands around the complainant's throat and made it difficult to breathe and so she submitted. In eight of these 10 cases, the offender was the partner or former partner of the complainant.

More details about the specific offences and sentencing for these offences is set out below.

⁷⁶ See s 7(a). There were three cases involving other family members (two involving an assault on the offender's father and one on the offender's niece).

⁷⁷ *Tasmania v James*, 13 August 2019, Sentencing Comments (Porter AJ); *Tasmania v Williams*, 26 April 2018, Sentencing Comments (Wood J).

3.2 Sentencing

3.2.1 Sentencing options in Tasmania

In Tasmania, the sentencing options that are available for the courts in sentencing adult offenders (and young offenders sentenced as adults) are set out in the *Sentencing Act 1997* (Tas) s 7:

A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence —

- (a) record a conviction and order that the offender serve a term of imprisonment; or
- (ab) if the court is constituted by a magistrate or is the Supreme Court or the Court of Criminal Appeal, record a conviction and make a drug treatment order under Part 3A in respect of the offender; or
- (b) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended; or
- (c) record a conviction and make a home detention order under section 42AC in respect of the offender, if the offender has attained the age of 18 years; or
- (d) with or without recording a conviction, make a community correction order under section 42AN in respect of the offender if the offender has attained the age of 18 years; or
- (e) with or without recording a conviction, order the offender to pay a fine; or
- (ea) in the case of a family violence offence, with or without recording a conviction, make a rehabilitation program order; or
- (eb) adjourn the proceedings, grant bail under the *Bail Act 1994* and, by order, defer, in accordance with Division 1 of Part 8, sentencing the offender until a date specified in the order; or
- (f) with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender; or
- (g) record a conviction and order the discharge of the offender; or
- (h) without recording a conviction, order the dismissal of the charge for the offence; or
- (i) impose any other sentence or make any order, or any combination of orders, that the court is authorised to impose or make by this Act or any other enactment.

3.2.2 Global sentencing and totality

A distinctive feature of sentencing practice in Tasmania is the extent of the use of global sentences. Where an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a global or single sentence).⁷⁸ While Tasmanian courts also have the power to impose separate sentences for each offence, in practice, where an offender is convicted of multiple offences, a global order is usually made. Consequently, in most cases, it is not possible to determine the proportion of the total

⁷⁸ *Sentencing Act 1997* (Tas) s 11(1)(a).

sentence that relates to each individual count.⁷⁹ The sentence imposed reflects the totality of the offender's criminal conduct.

In the context of multiple offences, if a judge imposes separate sentences in relation to each or some of the offences, the judge must have regard to the overall or total effect of the sentences.⁸⁰ This was considered by Geason J in *Director of Public Prosecutions v Karklins* ('Karklins'),⁸¹ where his Honour imposed cumulative sentences for multiple offences:⁸²

It was necessary for his Honour to consider the principle of totality in arriving at the single sentence for all charged conduct. This was to ensure the aggregate sentence was "just and appropriate": *Mill v The Queen* (1988) 166 CLR 59 at 63, and to reflect the need for a sentence that does not crush an offender's hope for rehabilitation, and to recognise the compounding effect that an aggregate sentence has on the severity of the total sentence: *Director of Public Prosecutions v Harington* (above) at [27] per Pearce J. However it was also necessary in applying the principle that the learned sentencing judge gave "recognition to the separate harm caused to a victim by the commission of separate crimes": *R v Wilson* [2005] NSWCCA 219 at [38] per Simpson J.⁸³

An analysis of Tasmanian cases where an offender was sentenced in the Supreme Court in the period 2010 to 30 November 2020 for an offence involving non-fatal strangulation reveals that there were 24 cases out of 77 where an offender was sentenced for a single offence (31.1%). In relation to 54 offences that were identified as family violence offences, there were 13 cases where an offender was sentenced for a single offence (24%). However, three of these cases involved sentencing for the offence of persistent family violence (which requires three separate incidents), and so there were only ten cases that involved a single incident of violence (18.5%). In addition, as discussed below, in 78.5% of assault cases where the offender was sentenced for a single offence, the conduct involved an episode of violence that included other assaults as well as non-fatal strangulation.

In relation to the non-fatal strangulation cases involving multiple counts relating to offending under the *Criminal Code* (Tas), a global sentence was imposed in 65 out of the 68 cases (95.6%).

⁷⁹ Note however, in cases of child sexual offences, if the court imposes a single sentence there is a requirement for the court to identify the sentence that would have been imposed for each child sexual offence had separate sentences been imposed, *Sentencing Act 1997* (Tas) s 11(3). In the consultations with stakeholders who supported victims of family violence, victim dissatisfaction with global sentences was highlighted as an issue as the imposition of a single sentence was not seen to provide recognition of the seriousness of the individual offences.

⁸⁰ Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 240.

⁸¹ [2018] TASCCA 6 ('Karklins').

⁸² If more than one sentence is passed, the judge needs to make a determination whether the sentence should be served concurrently (or partly concurrently) or cumulatively. Concurrent sentences mean that the sentences are served at the same time whereas a cumulative sentence means that the sentences are served one after the other. There is a presumption in favour of concurrent sentences in the *Sentencing Act 1997* (Tas) s 15(1), however, courts have a discretion to impose either concurrent, partially concurrent or cumulative sentences, see Warner (n 80) 237–240.

⁸³ *Karklins* (n 81) [80].

3.3 The sentencing discretion

In this paper, the focus of discussion is on the approach taken by courts to sentencing for offences involving non-fatal strangulation. However, in considering the operation of the sentencing discretion, it is observed that the court has wide discretion in imposing sentences on an offender. In imposing a sentence, a number of matters may be taken into account:

- the facts of the case;
- the general aims of punishment;
- the offence (gravity of crime, the harm done, the prevalence of the offence, the degree of participation of the offender);
- the offender's personal characteristics (age, sex, character, mental health, family and employment and general social history);
- the offender's response to the charge (guilty plea, remorse, assistance to authorities);
- effect of the sanction on the offender or others;
- other factors relating to the investigatory or court processes (delay, unfair police practices, availability of correctional or treatment services); and
- whether there is room for mercy.⁸⁴

The process by which courts determine an appropriate sentence is termed 'instinctive' or 'intuitive' synthesis, which means that all considerations relevant to the instant case are simultaneously unified, balanced and weighed by the sentencing judge.⁸⁵ Accordingly, in considering the sentencing statistics set out in this chapter, caution is needed in making any assessment of the appropriateness of sentencing for non-strangulation on this basis alone given that the complexity of the sentencing discretion cannot be appreciated without a full analysis of the cases that make up the sample.⁸⁶

3.4 Approach of the Tasmanian Court of Criminal Appeal to non-fatal strangulation

Recent decisions of the Court of Criminal Appeal that have considered the relevant sentencing principles to be applied in cases of non-fatal strangulation, have recognised the seriousness, in terms of harm caused (actual and potential), as well as the unique capacity of strangulation to be used as a means of coercion and control in a domestic relationship. Since 2018, there have been four decisions of the Court of Criminal Appeal of which three were Crown appeals against the adequacy of the sentence. In all three

⁸⁴ This list is taken from Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson, 3rd ed, 2014) 219–220.

⁸⁵ *Wong* (2001) 2007 CLR 584; *Markarian* [2005] HCA 25; *Hili* [2010] HCA 45.

⁸⁶ *Warner* (n 80) 65–66.

cases, the appeals were successful, and the original sentence was increased.⁸⁷ There was one sentencing appeal by the defendant on the ground that the sentence imposed was manifestly excessive. The appeal was dismissed and the original sentence upheld.⁸⁸

In all four cases, the Court of Criminal Appeal made strong statements about the need for the court to protect victims of family violence by imposing a severe sentence that acts as a deterrent, punishes the offender, expresses disapproval of the conduct and vindicates the victim. The Court has also expressly recognised that past sentencing practices for domestic violence were inadequate in light of changes in community understandings and attitudes about the nature of domestic violence. In doing so, the courts highlighted the dynamics of family violence, the vulnerability of the victim and the circumstances of abuse of power and breach of trust. In addition to clear statements about the seriousness of family violence made by the Court of Criminal Appeal, further consideration was given to assaults involving strangulation/suffocation in this context. In relation to non-fatal strangulation and suffocation, cases show an evolving recognition by the court (informed by medical and other research) of the distinctive nature of this conduct in the context of family violence. In particular, in discussing the harm caused, the most recent judgments of the Court of Criminal Appeal have expressly recognised the inherent risk of strangulation and its role in asserting power and control over the victim. The Court has also highlighted the psychological effects of strangulation, as well as its physical consequences.

The first decision of the Court of Criminal Appeal to consider non-fatal strangulation was *Karklins*.⁸⁹ In this case, the accused pleaded guilty to assault contrary to the *Criminal Code* s 184, three counts of assault on a pregnant woman contrary to s 184A of the *Criminal Code*, five counts of attempting to interfere with a witness contrary to the *Criminal Code* ss 100, 299 and one count of destroying property contrary to the *Police Offences Act 1935* (Tas). The accused assaulted his female partner by headbutting her and strangling her on three occasions (twice until she lost consciousness). This conduct was accompanied by threats to kill her and the baby. He was sentenced to one year and 10 months' imprisonment and the Crown appealed on the basis that the sentence was manifestly inadequate. The appeal was upheld and in resentencing, the Court of Criminal Appeal imposed a single sentence of 22 months' imprisonment for the count of assault and three counts of assault on a pregnant woman. A sentence of 23 months' imprisonment was imposed for the five counts of attempting to interfere with a witness. The sentences were cumulative with an amelioration of the combined effect to reduce the sentence to one of 3 years and 4 months. The sentence was discounted by a further 6 months for the guilty plea.

In relation to the assault offences involving strangulation, a number of aggravating features were identified by the Court of Criminal Appeal:

- At the time the respondent committed the acts of choking to the point of unconsciousness, he had already headbutted her and choked her twice. She was vulnerable, crying, injured and unable to defend herself from further attack;

⁸⁷ *Karklins* (n 81); *Director of Public Prosecutions v Foster* [2019] TASCCA 15; *Director of Public Prosecutions v Johnson* [2020] TASCCA 4 ('Johnson').

⁸⁸ *Hardwick v Tasmania* [2020] TASCCA 2 ('Hardwick').

⁸⁹ *Karklins* (n 81).

- The complainant was frightened for her life and that of her unborn child. She did not know when or if the accused would stop. She thought she would die;
- She lost consciousness on two occasions;
- The accused denigrated her by holding her in front of the mirror by her hair and telling her 'look at who you are';
- She was four weeks' pregnant;
- He left the premises while she unconscious, choosing not to render or procure assistance;
- She received physical injuries, including bruising to her back, bruising and swelling to her eye, and bruising and red marks to both sides of her throat;
- Although the baby was not injured, at the time the complainant did not know this and underwent testing which compounded anxiety and trauma;
- On multiple occasions the accused mentioned the unborn child, indicating that he hoped that she lost the baby and that he would kill her and threatened to kill both the complainant and the baby;
- The offences were committed in a domestic relationship: *Price v Tasmania* [2016] TASCCA 22;
- He had an opportunity to reflect between each attack and to desist and he did not.⁹⁰

In addition to addressing sentencing in context of a domestic violence offence involving non-fatal strangulation, the Court of Criminal Appeal stressed the seriousness with which the court viewed offences of domestic violence more generally. Geason J referred to prior statements from the Tasmanian Supreme Court about domestic violence offences being a breach of trust and considered the sentencing principles that should operate in cases of family violence stating that there is a 'particular importance of general deterrence, denunciation and vindication of the victim'.⁹¹ His Honour referred to case law from other Australian appeal courts, which had identified the following features of family violence that warranted an emphasis on general deterrence as a significant consideration in sentencing for domestic violence:

- It is an insidious, prevalent and serious problem in our society;
- Victim shame and guilt;
- Reluctance for others to become involved in personal relationships;
- Perpetrators failing to have insight into the seriousness of their offending;
- Deleterious ongoing impact on immediate victim, victim's wider family and whole of society.⁹²

⁹⁰ Ibid [50]–[55] Geason J, Blow CJ and Porter AJ agreeing.

⁹¹ Ibid [79].

⁹² Ibid [74] quoting *R v Fairbrother; ex parte Attorney-General* [2005] QCA 103, [23] (McMurdo P).

His Honour also quoted from a New South Wales Court of Criminal appeal decision in *R v Dunn*:

Crimes involving domestic violence have two important characteristics which differentiate them from many other crimes of violence: firstly, the offender usually believes that, in a real sense, what they do is justified, even that they are the true victim; and, secondly, the continued estrangement requires continued threat. These elements also usually mean that the victim never feels truly safe. Unlike the casual robbery, where the victim is often simply in the wrong place at the wrong time, the victim of a domestic violence offence is personally targeted. To my mind these considerations emphasise not only the need for general and personal deterrence but also of denunciation.⁹³

Observations were also made about the extreme caution that is required before giving any weight to a victim's statement about forgiveness of the offender. To give weight to a victim's view that the offender is not imprisoned, was to 'abdicate' responsibility for the court, law enforcement agencies and the community: 'Protection of the particular victim in the particular case is a step towards protection of other victims in other cases'.⁹⁴

His Honour stated that:

Domestic violence is properly regarded as a most serious form of offending, frequently hidden from view, and thus difficult to detect. The court has a symbolic function. Censure for domestic violence should be communicated through the sentences which are imposed. Community attitudes to it are changing: *R v Kilic*. Strong denunciation is called for, and general deterrence is a primary consideration. For crimes which are difficult to detect, the consequences of discovery must be severe enough to counter the perception that their commission is a risk worth taking.⁹⁵

Subsequently, in *Director of Public Prosecutions v Foster*,⁹⁶ the Court of Criminal Appeal increased a sentence of 16 months' imprisonment to two years and six months imprisonment for two counts of assault and one count of demanding property with menaces on the ground that the original sentence was manifestly inadequate. In this case, the complainant was the offender's partner and the two assaults were prolonged and involved strangulation, as well as other violence. In relation to the second assault, the offender demanded money and threatened to kill her by choking. He said he would kill her and her family and then he would burn the house down if she didn't give him the money he wanted. Later in the morning, he drove with the complainant and her children to the bank. He again threatened the children and when the complainant involved the bank manager in seeking to protect the children, he drove away with the children. After some time, he left the children at a park. These offences were not isolated as they occurred in the context of a violent and abusive relationship.

The Court of Criminal Appeal again stressed that it was an aggravating feature that the assaults were committed in the context of domestic violence.⁹⁷ It was also noted that

⁹³ Ibid [75] quoting *R v Dunn* [2004] NSWCCA 41, [47] (Adams J).

⁹⁴ Ibid [78] quoting *Shaw v The Queen* [2008] NSWCCA 58, [27] (Fullerton J; McClelland CJ and Grove J agreeing).

⁹⁵ Ibid [92].

⁹⁶ [2019] TASCCA 15 ('*Foster*').

⁹⁷ Ibid [24] (Estcourt J).

past sentencing practices needed to change to reflect changing community attitudes.⁹⁸ Specifically in relation to strangulation, Estcourt J stated that:

Each of the identified incidents involved vicious and cowardly attacks by the respondent on a woman. Lest it be thought that grabbing the complainant by the throat and applying pressure is somehow less insidious than punching or kicking, it has been noted in an article by Heather Douglas and Robin Fitzgerald entitled 'Strangulation, Domestic Violence and the Legal Response', published in the (2014) 36 (2) *Sydney Law Review* 231, that strangulation is a form of power and control that can have devastating psychological long-term effects on its victims in addition to a potentially fatal outcome.

Choking can cause loss of consciousness and can cause death quickly. It has been suggested that death can occur within seven to fourteen seconds. Additionally, underlying internal injuries caused by the pressure applied to the throat can cause swelling which may develop gradually over days and airways obstruction causing death may be delayed.⁹⁹

General and personal deterrence, denunciation, as well as retribution and vindication of the victim were identified as dominant sentencing concerns in cases of family violence.¹⁰⁰ His Honour stated that 'violent behaviour by men towards women in relationships must be condemned and discouraged. Vulnerable women, such as the complainant, are entitled to the protection of the law against brutal partners, and the community expectation is that such protection will be provided by the courts'.¹⁰¹

In this case, the offender had prior convictions including for family violence and His Honour cited the with approval the approach outlined in *Gregson v Tasmania*:

The appellant is not to be punished again for his prior criminal conduct, but he is not entitled to any leniency. He has a history of violence towards women and, as I have said, the community is greatly disturbed by the prevalence of this type of conduct. Women in domestic circumstances are particularly vulnerable to the abuse of power and breach of trust by violent male partners: *Director of Public Prosecutions v Karklins* [2018] TASCCA 6 per Geason J, at [54]–[60]. Women who become victims in these circumstances, and other potential victims throughout the community, are entitled to such protection as the law is able to provide through the imposition of sentences that will act as both a personal and a general deterrent.¹⁰²

Director of Public Prosecutions v Johnson ('Johnson')¹⁰³ was a further successful Crown appeal against sentence delivered by the Court of Criminal Appeal in 2020. In *Johnson*, the offender pleaded guilty to two counts of assault contrary to the *Criminal Code* (Tas) s 184, a count of stalking contrary to the *Criminal Code* s 192 and the indictable offence of attempting to interfere with a witness. He was also sentenced for a number of summary matters (15 counts of breaching a family violence order and 23 counts of attempting to breach a family violence order). The factual basis for sentencing involved him striking the complainant to the face and pulling clumps of hair from her scalp. He

⁹⁸ Ibid [25] (Estcourt J).

⁹⁹ Ibid [26]–[27] (Estcourt J).

¹⁰⁰ Ibid [30]–[31] (Estcourt J).

¹⁰¹ Ibid [29] (Estcourt J).

¹⁰² Ibid [32] (Estcourt J) quoting *Gregson v Tasmania* [2018] TASCCA 14, [37] (Martin AJ).

¹⁰³ *Johnson* (n 87).

then went to the bathroom for about five minutes. On his return, he verbally abused the complainant, and pushed her face down into a pillow. He held her face down for several minutes and sat on top of her with his legs on either side. She was unable to move and believed that the accused was trying to kill her. He eventually let her go, but then grabbed her arm and said she would never see her girls again. He was sentenced to a global penalty of two years' imprisonment.

On appeal, the sentence was increased to three years imprisonment (which included a nine-month reduction for the guilty plea at the earliest reasonable opportunity). In setting out the relevant sentencing principles, Geason J stated:

Apart from the fact that the offending occurred in breach of court orders intended to protect a vulnerable female, the respondent's conduct involved acts of significant persistent violence including suffocation, followed by persistent attempts to have her drop the charges or refuse to give evidence and stalking. In *Director of Public Prosecutions v Karklins* [2018] TASCCA 6, the insidious nature of such offending and the importance of general deterrence to protecting those vulnerable to it, were emphasised. Offending occurring in the privacy of the home, unseen, and away from help must be met with a penalty that serves as a warning to others that detection and conviction will result in severe consequences.¹⁰⁴

His Honour quoted the words of McMurdo P in *R v Fairbrother; ex parte Attorney General*:

Domestic violence is an insidious, prevalent and serious problem in our society. Victims are often too ashamed to publicly complain, partly because of misguided feelings of guilt and responsibility for the perpetrator's actions. Members of the community are often reluctant to become involved in the personal relationships of others where domestic violence is concerned. Perpetrators of domestic violence often fail to have insight into the seriousness of their offending, claiming an entitlement to behave in that way or at least to be forgiven by the victim and to evade punishment by society. Domestic violence has a deleterious on-going impact not only on the immediate victim but on the victim's wider family and ultimately on the whole of society. It is not solely a domestic issue; it is a crime against the State warranting salutary punishment. The cost to the community in terms of lost income and productivity, medical and psychological treatment and on-going social problems is immense. Perpetrators of serious acts of domestic violence must know that society will not tolerate such behaviour. They can expect the courts to impose significant sentences of imprisonment involving actual custody to deter not only individual offenders but also others who might otherwise think they can commit such acts with near impunity.¹⁰⁵

Further aggravating features were that the offender had an opportunity to pause and reflect upon his conduct between the two attacks. In addition, the assaults occurred 12 days after his release for similar offending.

Geason J also expressly recognised the aggravating nature of the action of suffocation and strangulation:

The fact that the respondent's conduct included suffocation has significance to the assessment of the objective seriousness of the offending. Suffocation should be treated with the same level of seriousness as is afforded strangulation or throttling. Such conduct

¹⁰⁴ Ibid [31].

¹⁰⁵ Ibid [31] quoting *R v Fairbrother; ex parte Attorney General* [2005] QCA 105 [23].

is inherently dangerous, and capable of causing serious consequences within a very short period. It renders victims incapable of acting to protect themselves. As Estcourt J observed in *DPP v Foster* [2019] TASCRA 15 at [26]–[27], it is a form of dominance and control which has the potential to cause grave psychological harm, serious injury and even death.¹⁰⁶

In 2020, in *Hardwick v Tasmania* ('*Hardwick*'),¹⁰⁷ the Court of Criminal Appeal also dismissed an appeal by the accused against a partly suspended sentence of two years and six months' imprisonment with 12 months suspended on the grounds that it was manifestly excessive. In *Hardwick*, the offender and his wife of 22 years had separated, and he had contact with his three children. An arrangement was made for him to spend the weekend with his 10-year-old, but this was cancelled due to the child no longer wishing to stay with her father. The accused was very angry about this and blamed his wife for the child's decision. He went to his wife's house and forcibly gained entry. The complainant and two children tried to barricade themselves in a bedroom, but the accused forced his way in and pushed the complainant to the floor. He then got on top of her and 'placed both hands and arms around her neck and started to choke her'. He squeezed tightly and the complainant had trouble breathing. All three children were then in the room and one of the children tried to pull him away. This was unsuccessful and the accused then punched the complainant to the head and face a number of times and pulled her across the room by her hair. His son continued to try to remove the accused and the accused put his son in a headlock and bit him.

There were injuries sustained by the complainant including cuts, multiple bruises and swelling to her face, head and foot, chest and arms, back and leg. There was also redness and swelling and soreness to both sides of her neck and chest. The sentencing judge noted that in her victim impact statement the complainant 'describes the terror which she experienced when you were choking her. It is clear that she perceived this to be a potentially lethal attack and felt powerless to stop you'.¹⁰⁸ The accused pleaded guilty to aggravated burglary, Code assault and a summary offence of common assault under the *Police Offences Act 1935* (Tas).

In appealing against the sentence, the accused argued that 'in the absence of medical evidence, the sentencing judge placed too much weight on the act of choking and the description of the effects given in the victim impact statement'.¹⁰⁹ In sentencing, the Brett J remarked that:

In a recent sentence ... I made the following points about such conduct. The act of applying pressure to another person's throat can easily result in death or serious injury. Death is most likely to result not from the restrictions of breathing, but from the blockage of the arterial blood supply to the brain, usually as a result of pressure applied to the carotid artery. Attempted strangulation which does not result in death or physical injury, can still have long-term physical and psychological impact, and leave the victim susceptible to ongoing symptoms. In criminal assault such acts are generally used to subdue and force compliance by the victim without any real thought being given to the danger inherent in

¹⁰⁶ Ibid [33].

¹⁰⁷ *Hardwick* (n 88).

¹⁰⁸ Ibid [19] (Martin AJ) setting out the comments of the sentencing judge on passing sentence from *Tasmania v Hardwick*, 4 December 2019, Sentencing Comments (Brett J).

¹⁰⁹ Ibid [49] (Martin AJ).

such conduct. Those dangers were clearly apparent in your actions in this case. Your rage and lack of restraint meant that you had no real capacity to judge or moderate your attack, and the complainant was therefore in real danger of serious injury or worse.¹¹⁰

On appeal, Martin AJ rejected the accused's complaint that the approach of the sentencing judge to the issue of choking was without substance. His Honour considered that there was ample foundation including the facts relating to the circumstances of the offence and the injuries suffered by the victim. In addition, the psychologist who compiled a Forensic Mental Health Assessment for the purpose of bail (and which was provided to the sentencing judge) presented evidence of both the prevalence and danger of choking:

Of particular note, is the allegation that [the appellant] choked the victim. Non-fatal strangulation has received increased attention in family violence risk assessment in the last few years. This is because a large body of evidence shows 50% of female victims of family violence homicide had experienced non-fatal strangulation at least once before they were killed, and evidence from Australian death reviews of family violence have also identified that homicide was preceded by at least one occasion of non-fatal strangulation. Further, there are a number of health consequences associated with non-fatal strangulation, including neck injuries, breathing problems, loss of sensation and speech problems. Because of the potential lethality of strangulation, it can also induce trauma response in victims, including nightmares, flashbacks and anxiety. Based on this evidence, Queensland has introduced a stand-alone non-fatal strangulation offence specifically in the context of family violence, and other jurisdictions (SA, NSW, Vic), have also begun drafting new strangulation laws.¹¹¹

There was an article attached to this Assessment which provided additional information about dangers of strangulation.

Martin AJ observed that the 'dangers of choking have been well documented over many years' and that it

was appropriate, and indeed necessary, for his Honour to have regard to the dangers attached to the conduct of the appellant as part of his overall assessment of the gravity of the criminal conduct. As his Honour observed, the risk of death or serious injury, and of long-term physical and psychological impacts, 'were clearly apparent' in the appellant's criminal conduct.¹¹²

His Honour agreed with the view expressed by the sentencing judge that the choking of the victim was a 'particularly concerning aspect' of the assault and that '[i]n recent years, criminal courts across Australia have come to understand that choking of female victims by male offenders is a prevalent and dangerous feature of violence perpetrated in domestic circumstances'.¹¹³

¹¹⁰ Ibid [50] (Martin AJ) quoting *Tasmania v Hardwick*, 4 December 2019, Sentencing Comments (Brett J).

¹¹¹ Ibid [51].

¹¹² Ibid [52].

¹¹³ Ibid [53].

3.5 Attempted murder

3.5.1 Details of the offence

The offence of murder is contained in the *Criminal Code* (Tas) s 158, and s 299 of the *Code* makes attempted murder a crime. An attempt to commit a crime is defined to mean ‘an act or omission done or made with the intent to commit that crime, and forming a series of events which if it were not interrupted would constitute the actual commission of the crime’.¹¹⁴ This means that in the context of attempted murder, the prosecution must establish beyond reasonable doubt that the accused had the intention to kill.¹¹⁵

3.5.2 Charging guidance for attempted murder

The DPP’s *Prosecution Policy and Guidelines* (‘DPP guidelines’) do not make reference to the circumstances in which it is appropriate to charge a person with attempted murder.¹¹⁶

As noted above, a conviction for attempted murder can only be obtained where it can be established beyond reasonable doubt that the person intended to cause death by their conduct. It is insufficient for a person to intend to cause grievous bodily harm with knowledge that death was likely, or that they knew, or ought to have known, that the conduct was likely to cause death.¹¹⁷

3.5.3 Sentencing for the offence of attempted murder in circumstances of non-fatal strangulation

In the period 2010–2019, the Australian Bureau of Statistics reported 35 victims of attempted murder recorded by police in Tasmania.¹¹⁸ Of these 35 victims, three were recorded as family and domestic violence-related offences.¹¹⁹ In the period 2010 to 31 October 2020, the Council identified seven cases where an offender was sentenced by the Supreme Court for attempted murder. Five of these matters were not family violence related (although one involved a teenager who felt rejected by a girl who was at his school) and two were offences committed against members of the offender’s family (one case involving the offender’s partner and the other the offender’s two children).

Attempted murder by means of suffocation and smothering occurred in two cases. The longest sentence imposed was in a case where the offender attempted to kill his wife and the particulars of the charge included suffocation by hands and smothering with a pillow.¹²⁰ In this case, the offender had cut his wife’s throat while she was asleep by running a kitchen knife with a serrated edge across her throat and inflicting three cuts.

¹¹⁴ *Criminal Code* (Tas) s 2.

¹¹⁵ *Knight v The Queen* (1992) 175 CLR 495, 501 (Mason CJ, Dawson and Toohey JJ); *McGhee v the Queen* (1995) 183 CLR 82, 85–86 (Brennan J). It is noted that the mental element for murder under the *Criminal Code* (Tas) s 157 has a number of alternatives only one of which is an intention to cause death.

¹¹⁶ DPP (Tas), *Prosecution Policy and Guidelines* (2019) (‘DPP guidelines’).

¹¹⁷ These relate to the state of mind that the prosecution can rely on to prove a murder conviction, see *Criminal Code* s 157(1).

¹¹⁸ Australian Bureau of Statistics (‘ABS’), *Recorded Crime – Victims 2019* (2020) Table 6.

¹¹⁹ *Ibid* Table 22. See also ABS, *Recorded Crime – Offenders, Australia, 2018–19* (2020) Table 12.

¹²⁰ *Tasmania v Singh*, 11 November 2016, Sentencing Comments (Pearce J).

His wife then woke up and he grabbed her around the throat and applied pressure so as to strangle her. He then placed a pillow over her head and pushed her face into the mattress. It was an arranged marriage and there had been arguments about financial matters throughout the marriage with this being the substantial motivating factor for the crime. In sentencing, Pearce J observed that cultural issues concerning family, status and reputation were the basis for the fights about money. His Honour stressed the need for punishment and deterrence, as well as community condemnation in imposing a sentence of eight years' imprisonment with a non-parole period of five years in prison.

In the other case, the offender attempted to kill a stranger by strangulation with cable-ties and hitting the victim with a wrench.¹²¹ Crawford CJ described the 'circumstances of the attempted murder [as] chilling, involving an attempt to kill a stranger with sexual overtones'. The offender was sentenced for attempted murder, aggravated burglary, stealing, motor vehicle stealing and possessing a controlled plant — a global sentence of six years' imprisonment with a non-parole period of three years was imposed.

There was one other case identified where the offender strangled the victim during the course of an episode of violence resulting in a conviction for attempted murder, however, strangulation did not form the basis of the attempted murder charge.¹²² In this case, the offender pleaded guilty to aggravated burglary, aggravated assault (that is, an assault with the intention of committing the crime of rape, attempting to commit rape and attempting to commit murder). The offender and the victim were not (and had not been) boyfriend and girlfriend, however, the offender indicated that he had 'tried so hard to get you so many times' but that she had rejected him. He tried to get her take her pyjama pants down and in doing so, squeezed her throat until she could not breathe properly (this gave rise to the offence of aggravated assault). The attempted murder charge arose from his conduct in stabbing the victim several times. In this case, the offender was sentenced to four years and six months' imprisonment.

3.6 Disabling to aid commission of offence or flight of offender

3.6.1 Details of the offence

The *Criminal Code* (Tas) s 168 creates a specific offence of disabling to aid commission of an offence or flight of offender that applies in circumstances of non-fatal strangulation. It provides that:

Any person who, by any means whatever calculated to choke, suffocate, or strangle, or, by any violent means whatever, renders any person incapable of resistance, with intent thereby to facilitate the commission of an offence, or to facilitate the flight of an offender after the commission or attempted commission of an offence, is guilty of a crime.

This offence applies where a person: (1) chokes, suffocates or strangles another person, (2) renders the person incapable of resistance; (3) with an intent to commit a crime or facilitate the flight of the offender. An example of where this offence might apply is where

¹²¹ *Tasmania v Munro*, 25 July 2012, Sentencing Comments (Crawford CJ).

¹²² *Tasmania v CBF*, 4 June 2015, Sentencing Comments (Blow CJ) ('CBF').

a person strangles another with an intent to commit another offence such as rape. The maximum penalty is 21 years' imprisonment or a fine or both.¹²³

3.6.2 Charging guidance for disabling to aid commission of offence or flight of offender

The DPP guidelines state, in the context of assault and family violence, that 'where a person chokes, suffocates or strangles a person and renders that person incapable of resistance with an intent to commit an offence or flee an offence a charge under s168 of the Criminal Code should be preferred'.¹²⁴

3.6.3 Sentencing for the offence of disabling to aid commission of offence or flight of offender in circumstances of non-fatal strangulation

The Council did not identify any cases sentenced in the Supreme Court for an offender convicted of disabling to aid commission of offence or flight of offender.

3.7 Unlawful act intended to cause bodily harm

3.7.1 Details of the offence

The *Criminal Code* (Tas) s 170 creates an offence of committing an unlawful act intended to cause grievous bodily harm. Section 170(1)(a) provides that:

Any person who, with intent to maim, disfigure, or disable any person, or to do any grievous bodily harm to any person, or to resist or prevent the lawful arrest or detention of any person wounds or does any actual bodily harm to any person by any means whatever.

In the context of strangulation, this offence would apply where a person: (1) with an intent to maim, disfigure or disable any person or to do grievous bodily harm; (2) causes actual bodily harm. In other words, this is a specific intent crime that requires proof of an intent to either maim, disfigure or disable or cause grievous bodily harm. There also has to be actual bodily harm caused.

Actual bodily harm is not defined in the *Criminal Code* (Tas). It has been defined by case law to mean that the harm need not be permanent, but it must be more than merely transient and trifling or more broadly in later formulations to mean more than merely transient or trifling.¹²⁵

The maximum penalty is 21 years' imprisonment or a fine or both.¹²⁶

¹²³ *Criminal Code* (Tas) s 389.

¹²⁴ DPP guidelines (n 116) 59.

¹²⁵ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* 598 referring to *R v Donovan* [1934] 2 KB 498, 509 (Stewart LCJ, Swift and du Parc JJ); *DPP v Smith* [2006] 2 All ER 16, 20 (Sir Igor Judge P) and *R v Morris (Clarence Barrington)* [1998] Cr App R 386, 393. Bronitt and McSherry observe 'later formulations suggest that there could be some forms of temporary bodily interference of a transient nature which nevertheless satisfy the definition of bodily harm. An example would be causing momentary sensations of asphyxiation through choking. While transient in its effects, the context of the actions suggests that bodily harm caused is significant and certainly non-trivial': at 598.

¹²⁶ *Criminal Code* (Tas) s 389.

3.7.2 Charging guidance for unlawful act intended to cause bodily harm

The DPP guidelines do not refer to charging for offences against the *Criminal Code* (Tas) s 170. However, it is noted that this offence is a more serious offence than assault under the *Criminal Code* (Tas) s 184 given the requirement to prove an intent to cause harm and a need to prove actual bodily harm. Neither of these are requirements for the offence of assault.¹²⁷

3.7.3 Sentencing for the offence of unlawful act intended to cause bodily harm in circumstances of non-fatal strangulation

In the period 2010 to 30 November 2020, there were four cases identified where an offender was convicted of committing an unlawful act intended to cause bodily harm where the conduct included non-fatal strangulation.¹²⁸ The longest sentence, seven years' imprisonment with a non-parole period of five and half years, was imposed in *Tasmania v Jay*.¹²⁹ This was a family violence case where the offender was sentenced for a single count of unlawful act intended to cause bodily harm, where he kicked, punched and hit the complainant repeatedly to the face. He then commenced strangling her with one hand, holding his other hand over her mouth and nose. He threatened to kill her. The complainant went limp and he stopped strangling her. He continued to kick, punch and pull her hair. This resulted in a laceration to her forehead and skull fracture as well as other facial fractures, fractured ribs and collapsed lungs. He had a prior history of similar offending.

In the other three cases, a sentence of five years' imprisonment was imposed. Two cases (in which the offenders were sentenced together) involved a single count, and the offenders were co-accused who lived in a community house and caused traumatic injuries to the complainant (another resident) by a range of violent behaviour including hitting, kicking, burning and strangulation.¹³⁰ In *Tasmania v Argeropolous*,¹³¹ the offender was convicted of eight counts including five counts of assault, one count of aggravated burglary and two counts of committing an unlawful act intended to cause bodily harm where the conduct consisted solely of strangulation. The victim was his female partner. In sentencing, Estcourt J stated that the second strangulation was more serious than the first because the complainant was trying to escape and he dragged her back inside the unit where he continued to strangle her until she 'most probably lost consciousness'.¹³²

In a further two cases, the offender was convicted of a number of offences including committing an unlawful act intended to cause bodily harm (not relating to strangulation/choking) and an assault offence where the conduct included strangulation/choking.¹³³ One of these cases involved offences committed against the

¹²⁷ See [3.9.1].

¹²⁸ *Tasmania v Madding, Bona and Enslow*, 24 October 2012, Sentencing Comments (Porter J); *Tasmania v Jay* (n 44); *Tasmania v Argeropolous*, 20 April 2015, Sentencing Comments (Estcourt J).

¹²⁹ *Tasmania v Jay* (n 44).

¹³⁰ *Tasmania v Madding, Bona and Enslow* (n 128). The third offender, Bona, received a different sentence.

¹³¹ 20 April 2015, Sentencing Comments (Estcourt J).

¹³² *Ibid*.

¹³³ *Tasmania v Curtis*, 21 December 2017, Sentencing Comments (Brett J); *Tasmania v Price*, 7 April 2016, Sentencing Comments (Porter J).

offender's partner, including setting fire to her, and the offender was sentenced to 10 years' imprisonment.¹³⁴ As a global sentence was imposed, it is not possible to isolate the component of the sentence that related to strangulation.

3.8 Persistent family violence

3.8.1 Details of the offence

This offence was created in the *Criminal Code* (Tas) s 170A in 2018, and the maximum penalty is 21 years' imprisonment or a fine or both.¹³⁵ It creates an offence where a person commits persistent family violence in relation to another person with whom the person is, or has been, in a family relationship.¹³⁶ This means that the person has committed a family violence offence in relation to his or her spouse or partner on at least three occasions.¹³⁷ In cases of strangulation, choking or suffocation, one or more of these occasions may be particularised as an assault.¹³⁸

3.8.2 Charging guidance for persistent family violence

Approval for commencing a prosecution for this offence must be obtained from the DPP.¹³⁹ The DPP guidelines state that 'the charge ... will only be considered where there is serious criminal conduct'.¹⁴⁰ Normally, this would require at least three occasions for serious indictable offences, but in some circumstances, the charge may be authorised where there are two occasions of serious indictable conduct and other serious or sustained summary offences.¹⁴¹

As discussed at [3.9.2], in relation to allegations of assault, a determination needs to be made whether the matter is to be charged on indictment (*Criminal Code* (Tas) s 184) or summarily (*Police Offences Act 1935* (Tas) s 35). In the context of persistent family violence, the DPP guidelines state that 'matters that would ordinarily be charged summarily on complaint will not be relied upon as an occasion'.¹⁴²

3.8.3 Sentencing for the offence of persistent family violence in circumstances of non-fatal strangulation

Since the introduction of the offence in 2018, the Council identified six cases where an offender was sentenced for persistent family violence, and in four of those cases at least one of the occasions was an assault by way of strangulation.¹⁴³

¹³⁴ *Tasmania v Price* (n 133).

¹³⁵ *Criminal Code* (Tas) s 389.

¹³⁶ *Ibid* s 170A(2).

¹³⁷ *Ibid* ss 170A(1), (3).

¹³⁸ See *Tasmania v SJG*, 2 October 2020, Sentencing Comments (Pearce J); *Tasmania v Haintz*, 4 December 2019, Sentencing Comments (Geason J) .

¹³⁹ *Criminal Code* (Tas) s 170A(8).

¹⁴⁰ DPP guidelines (n 116) 32.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*.

¹⁴³ *Tasmania v SJG*, 2 October 2010, Sentencing Comments (Pearce J); *Tasmania v Haintz*, 4 December 2019, Sentencing Comments (Geason J); *Tasmania v AEP*, 31 July 2019, Sentencing Comments (Estcourt J).

In relation to cases involving non-fatal strangulation, the longest sentence imposed was in *Tasmania v SJG*,¹⁴⁴ where the proposed sentence of seven years was reduced to five and a half years' imprisonment with a non-parole period of three years on the basis of the accused's guilty plea. In addition to strangulation, the conduct included rape and other acts of violence and verbal abuse. The accused also had a history of violence against previous partners. In sentencing, Pearce J stated that:

The seriousness of domestic violence has been repeatedly emphasised by this court. It is insidious and a matter of great community concern. The sentence must also acknowledge the element of persistent violence over the course of about nine months which, of itself, adds to the trauma to which the complainant was subject and to your overall criminality. You had the opportunity to reflect on your conduct between each attack, and desist, but you did not. The offences themselves are overlaid with ongoing serious emotional abuse and torment, domineering conduct and intimidation. You abused the trust inherent in domestic relationships. Each of the identified incidents involved the infliction of cowardly attacks on a vulnerable female unable to defend herself, in what should have been the safety of her own home. One of the assaults involved strangulation of the complainant, a particularly dangerous form of attack, and also indicative of the exercise of power and control. The rape was committed in demeaning and humiliating circumstances and you used force to overcome her resistance.

His Honour stressed the need to impose a sentence that would punish the offender, mark society's condemnation of family violence, vindicate the victim and deter the offender and others from such conduct in the future. In view of the offender's history of violence, Pearce J also stated that 'protection of the public [is] a factor of greater than usual importance'.

In *Tasmania v Haintz*,¹⁴⁵ a head sentence of five years' imprisonment was imposed for a count of persistent family violence and 11 counts of breaching a police family violence order. There were six occasions relied on by the prosecution including:

- Punching and slapping the complainant, then locking her in the vehicle and banging her head against the window of the car. The complainant was held against her will for several hours and then dragged from the vehicle. The accused grabbed her by the throat and choked her to the point where she believed she was going to die;
- Striking her face and then grabbing her by the head and banging it into the wall;
- Slapping her face several times and then twisting her wrist while the complainant was holding her daughter. At this time, he made threats to kill the complainant;
- Kicking the complainant's stomach;
- Dragging by hair, hitting her and kicking her and hitting her with sticks. While she was pleading at the accused to stop, he placed his hands around her throat and choked until she lost consciousness;
- Pushing her and then choking her. He continued to apply pressure as he forced her into a different room and made her sit down. He then pinned her arms and

¹⁴⁴ 2 October 2010, Sentencing Comments (Pearce J).

¹⁴⁵ 4 December 2019, Sentencing Comments (Geason J).

threatened to kill her. He then dragged her to the bedroom, started to choke her and slapped her face about 10 times. He punched her in the stomach multiple times with a clenched fist. He struck her legs and then punched her upper body.

The shortest sentence of three years' imprisonment with a non-parole period of 18 months was imposed in *Tasmania v Read*,¹⁴⁶ where the offender was found guilty of one count of persistent family violence and pleaded guilty to four related summary charges. There were nine incidents of unlawful family violence including seven assault (two involving non-fatal strangulation), one of indecent assault and one of damage to property.

3.9 Assault

3.9.1 Details of the offence

Indictable offence – *Criminal Code (Tas)*. There are several assault offences under the *Criminal Code (Tas)* that may be charged in circumstances where a person strangles, chokes or smothers another person. These include assault (s 184), aggravated assault (s 183), assault on a pregnant woman (s 184A) and assaulting a police officer in the due execution of his or her duty (s 114).

The maximum penalty for all these offences is a sentence of imprisonment for 21 years or a fine or both.¹⁴⁷

Central to all these offences is an assault. An assault is defined in the *Criminal Code (Tas)* s 182(1) as:

- (1) an act of intentionally applying force to the person of another directly or indirectly;
- (2) attempting to apply force to the person of another;
- (3) threatening by any gesture to apply force to the person of another;
- (4) an act of depriving another of his or her liberty.

This definition also applies to the offence of assault in the *Police Offences Act 1935 (Tas)* s 35.¹⁴⁸

As with the *Criminal Code (Tas)* s 168, aggravated assault under the *Criminal Code (Tas)* s 183 requires an assault committed with a particular intention. For this offence, the prosecution must prove beyond reasonable doubt that the accused assaulted another person with intent to commit a crime or to resist or prevent the lawful apprehension or detainer of himself or of another person.¹⁴⁹

Other assault offences under the *Criminal Code (Tas)* require an assault committed on a particular class of person. There is a specific assault offence that applies in relation to an assault on a pregnant woman in the *Criminal Code (Tas)* s 184A. In addition to an

¹⁴⁶ 19 December 2020, Sentencing Comments (Brett J).

¹⁴⁷ *Criminal Code (Tas)* s 389.

¹⁴⁸ *Acts Interpretation Act 1931 (Tas)* s 36; *Woolley v Fitzgerald* [1969] Tas SR 65.

¹⁴⁹ *Criminal Code (Tas)* s 183(a). It also a crime for a person who assaults any person in the lawful execution of any process against land or goods, or in the making of any lawful distress, or with intent to rescue any goods taken under such process or distress: s 183(b).

unlawful assault, this offence requires proof of a particular circumstance (pregnancy) and proof that the accused knew that the woman was pregnant. There is also an offence of assaulting a police officer in the lawful execution of his or her duty under the *Criminal Code* (Tas) s 114. In addition to an unlawful assault, this offence requires proof of a particular circumstance (a police officer in the execution of duty). It is not necessary to prove that the accused knew that the person was a police officer.¹⁵⁰

Summary offence – Police Offence Act 1935 (Tas). As noted, assault is also a summary offence contained in the *Police Offences Act 1935* (Tas) s 35. Common assault has a maximum period of imprisonment of 12 months or a fine of 20 penalty units (\$3,440).¹⁵¹

The *Police Offences Act 1935* (Tas) s 35(1B) also creates an offence of aggravated assault where the offender knew that the victim of the offence was pregnant at the time of the offence.¹⁵² In this case, there is an increased penalty of a fine not exceeding 50 penalty units (\$8,600) or imprisonment for a term not exceeding two years.¹⁵³ The increased maximum penalty also applies where the court considers that the assault was of an aggravated nature.¹⁵⁴ There is no statutory definition of ‘aggravated nature’ and the court in sentencing has a discretion to determine whether an assault was of an aggravated nature (and so the increased penalty is applicable). Until 2009, the discretion could only be exercised in cases where the victim was female or a child aged 14 years or under. Now, it applies to all assault regardless of age or gender of the victim.

The meaning of ‘aggravated nature’ was considered in *Hickman v Devine*,¹⁵⁵ where McTaggart M relied on principles derived from prior case authority where it had been stated that “‘circumstances of aggravation’ is an expression incapable of comprehensive inflexible definition. ... The circumstances must be such as to increase the gravity of the offence’.¹⁵⁶ Relevant facts identified were:

- Must be something physically serious
- Physical injury
- Use of a weapon
- Nature of weapon and its potential to inflict fatal injuries
- Disparity in size
- Committed in course of complainant’s employment
- Part of a group attack
- Presence of young children
- Contempt for the victim

¹⁵⁰ However, it is open to the accused to rely on the defence of honest and reasonable mistake, see John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Law Press, 4th ed, 2015) vol 2, 596.

¹⁵¹ *Police Offences Act 1935* (Tas) ss 34B(1), (1A).

¹⁵² *Ibid* s 35(6).

¹⁵³ *Ibid* ss 35(1B), (2).

¹⁵⁴ *Ibid* s 35(2).

¹⁵⁵ [2013] TASMC 35.

¹⁵⁶ *Ibid* [25] quoting *Buckle v Josephs* [1983] FCA 108.

In *Mayne v Tasmania*,¹⁵⁷ the offender entered a plea of guilty to common assault in relation to his conduct of smothering his partner with a pillow. The offender appealed against his sentence. On appeal, Wood J made observations about features of an offence that may amount to ‘aggravating factors’ for the purposes of the *Police Offences Act 1935* (Tas) s 35(2), including that the assault resulted in psychological harm, that it was pre-meditated, that it was committed with the assistance of another offender, or that the victim was particularly vulnerable. In relation to the particular assault in the case, Wood J stated that ‘[a]rguably, there were features of this assault that might qualify the assault as being aggravated for the purposes of s 35(2) and could have been particularised as such.’¹⁵⁸ These features included that the complainant and the offender were in a family relationship, the offence was a family violence offence, and that the assault involved a breach of trust.¹⁵⁹

There are also specific assault offences in relation to a police officer in the execution of his or her duty with the maximum penalty for this offence being a penalty not exceeding 100 penalty units (\$17,200) or a term of imprisonment not exceeding three years.¹⁶⁰ There is also an offence of assaulting a public officer or an emergency service worker with a maximum penalty of a fine not exceeding 50 penalty units (\$8,600) or imprisonment for a term not exceeding two years.¹⁶¹

3.9.2 Charging guidance for assault

The DPP guidelines contain specific guidance on making a determination of charging for assault offences as an indictable or summary offence.¹⁶² These state:

Parliament has enacted the offence of assault contrary to s 35 of the *Police Offences Act 1935* and also as a crime contrary to s 184 of the *Criminal Code*. The former is charged summarily on complaint and the latter is charged on indictment. Thus, in cases of assault a determination must be made whether to charge a person summarily or on indictment.

The dominant consideration is the seriousness of the injuries actually received by the complainant, not what could have happened. It is therefore not the case that every time a weapon (other than a firearm) is used, or a vehicle or vessel appears to have been the instrument used for committing an assault that an indictable charge must be preferred.

However, and illustrating that circumstances will vary greatly and do not lend themselves to inflexible rules, an attack with an axe which has resulted fortuitously in only a nick on the finger of the victim should still be one normally pursued on indictment. The intention of the offender can be a significant, but not dominant, consideration. ...

Identical considerations apply when determining whether a person should be charged with the summary offence of assaulting a police officer contrary to s 34B(1) of the *Police Offences Act 1935* or the indictable offence of assaulting a police officer contrary to s 114 of the *Criminal Code*.

¹⁵⁷ [2017] TASSC 38.

¹⁵⁸ Ibid [28].

¹⁵⁹ Ibid.

¹⁶⁰ *Police Offences Act 1935* (Tas) ss 34B(1), (1A).

¹⁶¹ Ibid ss 34B(2)(a), (2A).

¹⁶² DPP guidelines (n 116) 57–59.

Where the complainant is a police officer who has suffered serious bodily harm so that, upon conviction, s 16A of the *Sentencing Act 1997* applies, generally speaking the alleged offender should be charged on indictment with, at the very least, unlawful assault contrary to s 184 of the *Criminal Code* or assaulting a police officer contrary to s 114 of the *Criminal Code*.¹⁶³

It is noted that under the *Sentencing Act 1997* (Tas) s 16A(1), a mandatory sentence of six months' imprisonment is to be imposed on a person who commits an offence in relation to a police officer while the police officer was on duty and the police officer suffered serious bodily harm caused by or arising out the offence (unless there are exceptional circumstances).

In relation to assault on a pregnant woman, the DPP guidelines indicate that it is not essential to charge as the *Criminal Code* offence on every occasion where the elements of the offence are present. Rather,

[t]he indictable crime should be reserved for situations where:

- The assault would be otherwise indictable. Then the accused's knowledge of the woman's pregnancy is a further aggravating factor and the specific charge will be appropriate.
- The assault was directed at the pregnancy or at the fact that the victim was pregnant or where the assault had a realistic chance of compromising the pregnancy.

Where the assault does not fit these criteria, it can be charged under the *Police Offences Act* (which is not to overlook that not all incidents which technically amount to assault have to be charged in any event) unless there are more serious indictable offences arising out of the same facts, circumstances or relationship, where the *Criminal Code* offence is to be preferred to avoid more than one hearing.¹⁶⁴

Unlike the approach to charging for assault more generally that focuses on the actual injury caused rather than the risk of injury, the DPP guidelines take a different approach in cases of assault involving conduct of choking, smothering or strangulation, particularly in the context of family violence. This has implications for the sentence that may be received because matters dealt with in the Supreme Court under the *Criminal Code* (Tas) have a general maximum of 21 years' imprisonment in comparison to the maximum penalty available in the Magistrates Court for assault under the *Police Offences Act 1935* (Tas). The Guidelines provide:

Assault cases involving choking, smothering or any other form of strangulation, particularly in a family violence context, should be regarded as grave criminal conduct and even where no injury occurs a charge of assault contrary to s184 of the *Criminal Code* should be considered. See *Mayne v Tasmania* [2017] TASSC 38 where Wood J said at [35]:

A relevant consideration is whether the sentence impinges upon the sentencing range for far more serious acts of smothering. I do not consider that that is the case. **Conduct involving persistent smothering, and a loss of consciousness, should properly**

¹⁶³ Ibid 57.

¹⁶⁴ Ibid 58.

be regarded as a grave act of violence. It would warrant an indictable charge of assault contrary to the *Criminal Code*. Without being prescriptive, it may attract a very lengthy term of imprisonment, more than the maximum penalty of two years' imprisonment as an aggravated assault under the *Police Offences Act*. Relevant to the statistics relied upon by the applicant, it should be assumed that the statutory ceiling of 12 months' imprisonment, or even two years for an aggravated assault, does not, and should not, have application to smothering or choking cases leading to a loss of consciousness. (Emphasis added)

Factors to be considered in determining whether to charge an accused with summary or indictable assault in relation to strangulation or suffocation include:

- the length of time of the strangulation or suffocation
- whether the victim became unconscious or received any other injuries
- whether there was additional violence
- whether there was an accompanying threat to kill
- the history of the relationship
- whether children were present

...

Of course, deciding the appropriate category of charge is a matter of judgment not science and investigators and prosecutors will appreciate that the Office welcomes discussion about charging decisions before they are made.¹⁶⁵

3.9.3 Sentencing for the offence of assault in circumstances of non-fatal strangulation

As noted in Table 3.1, there were 51 offenders sentenced for assault under the *Criminal Code* (Tas) s 184 where the conduct (and part of the conduct) involved non-fatal strangulation. These included all cases where the offender was sentenced for assault regardless of whether this was the most serious offence for which the offender was sentenced. In 40 of those 51 cases the assault was a family violence offence (78.4%). In a further two cases, the assault was committed on the offender's father. There was another one case where an offender was sentenced in the Supreme Court for an offence under the *Criminal Code* (Tas) that did not involve non-fatal strangulation, in addition to an offence of assault under the *Police Offences 1935* (Tas) involving non-fatal strangulation.

There were also three cases of assaulting a pregnant woman that involved non-fatal strangulation (all family violence), one case of assaulting a police officer in the execution of his duty (not family violence) and three cases of aggravated assault (one family violence, one complainant was the offender's niece and in one case the offender was infatuated with the complainant).

¹⁶⁵ Ibid 58–59 (emphasis in original). An impetus of the amendment to the DPP guidelines to include a consideration of non-fatal strangulation was the case of *Tasmania v Dobson*, 8 September 2015 (Blow J); *Dobson v Tasmania* [2017] TASCRA 19. In this case, the offender was convicted and sentenced for murder in circumstances where he had a history of serious violence against women, including non-fatal strangulation.

In the DPP's Annual Report, it was observed that typically 'an offender does not only offend by an act of suffocation or strangulation but can also commit other serious criminal conduct'.¹⁶⁶ This observation was confirmed by the Council's analysis of sentencing comments where it was found that few offenders were sentenced solely in relation to an act of strangulation. As shown in Figure 3.1, in relation to all assault offences (assault police, aggravated assault, assault pregnant woman and assault) under the *Criminal Code* (Tas) sentenced in the Supreme Court, there were only 14 out of 58 cases where an offender was charged with a single count of assault under the *Criminal Code* (Tas) (13 cases s 184 and one case s 184A). This means that in 76.8% of cases where an offender was sentenced for an assault charge (assault, assault pregnant woman, aggravated assault, assault police), the offender was sentenced for more than one offence — either multiple assaults or other offences under the *Criminal Code* (Tas) and/or the *Police Offences Act 1935* (Tas).

Figure 3.1: Assault offences under the *Criminal Code* (Tas) sentenced in the Supreme Court 2010 to 30 November 2020 involving non-fatal strangulation, number of counts, family violence offences

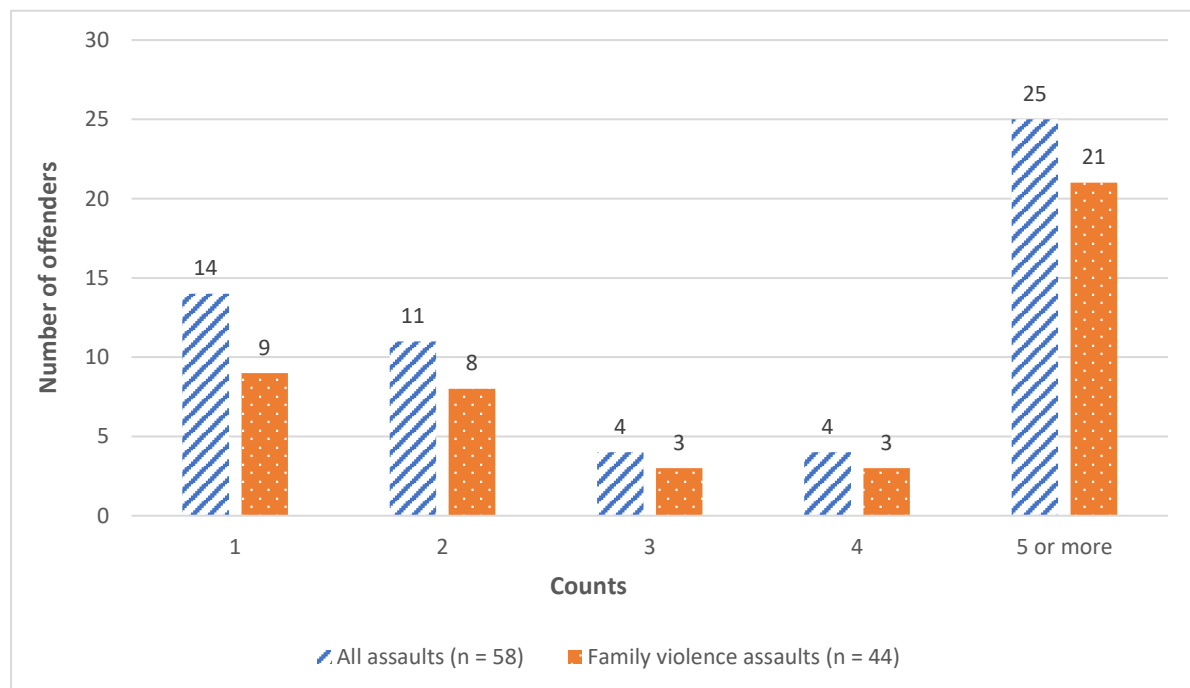


Figure 3.1 also shows that for family violence offences, there were 9 out of 44 cases where an offender was sentenced for a single assault offence. This means that in 80% of cases where an offender was sentenced for an assault charge (assault, assault pregnant woman, aggravated assault, assault police), the offender was sentenced for another offence at that time. The maximum number of additional charges was 41 counts that included stalking, attempting to interfere with a witness and numerous offences of breaching or attempting to breach a family violence order.¹⁶⁷ Another case involved 12 counts including assaulting a pregnant woman, *Criminal Code* assault, three counts of assault under the *Police Offences Act 1935* (Tas), breaching an interim family violence order and breaching bail, 14 counts of rape, 2 counts of aggravated assault, a count of

¹⁶⁶ DPP, *Annual Report 2019–20* (Report, 2020) 11–12.

¹⁶⁷ *Johnson* (n 87).

indecent assault and a count of assault. In this case, the strangulation was a particular of the charge of aggravated assault.¹⁶⁸ Other offences for which an offender was sentenced in conjunction with a *Code* assault offence involving non-fatal strangulation included other *Code* assault charges (not involving non-fatal strangulation), trespass, demand property with menace, unlawfully injuring property, aggravated burglary, assault under the *Police Offences Act 1935* (Tas), attempted murder, act intended to cause bodily harm, cause grievous bodily harm, wounding, aggravated sexual assault, rape and ill-treating a child.

In addition, the examination of the sentencing cases revealed that an act of strangulation was very rarely the only violence inflicted by the offender on the victim that was identified by the sentencing judge as part of the factual basis for sentencing for the assault under the *Criminal Code* ss 184 and 184A. In relation to the 14 cases involving a single count of assault, in only three of those cases was strangulation the only conduct that formed the basis of the assault charge. In regard to the other 11 assaults (78.5%), while strangulation was an aspect of the defendant's conduct, other violent acts were also committed by the defendant as part of the assault. In relation to nine single counts of assaults under the *Criminal Code* ss 184 and 184A committed in the context of family violence, non-fatal strangulation was the only violence inflicted in two cases (22%).

Sentencing for assault (*Criminal Code* (Tas) s 184). As shown in Figure 3.2, in 38 cases an assault involving non-fatal strangulation was the most serious offence for which the offender was sentenced. There were 13 cases involving a single count of assault and 25 cases involving multiple counts for two or more counts of assault where that was the most serious offence, and/or one or more counts of a less serious offence. In relation to assaults contrary to s 184 committed by the accused on his or her female partner, there were eight cases where there was a single count of assault and 20 cases where the offender was sentenced for multiple counts.

All assaults. Figure 3.2 shows that in relation all counts of assault (38 offenders), 47.3% (18 offenders) received a sentence of full-time imprisonment, 23.7% (eight offenders) received a partly suspended sentence of imprisonment, 26.3% (10 offenders) received a fully suspended sentence of imprisonment and 5.2% (two offenders) received a non-custodial sentence. In relation to offenders sentenced for multiple counts, 52% of offenders received a sentence of full-time imprisonment, 24% received a partly suspended sentence of imprisonment, 20% received a fully suspended sentence of imprisonment and 4% received a non-custodial sentence. In relation to offenders sentenced for single counts, 38.5% of offenders received a sentence of full-time imprisonment, 15.4% received a partly suspended sentence of imprisonment, 38.5% received a fully suspended sentence of imprisonment and 7.7% received a non-custodial sentence.

¹⁶⁸ CBF (n 122).

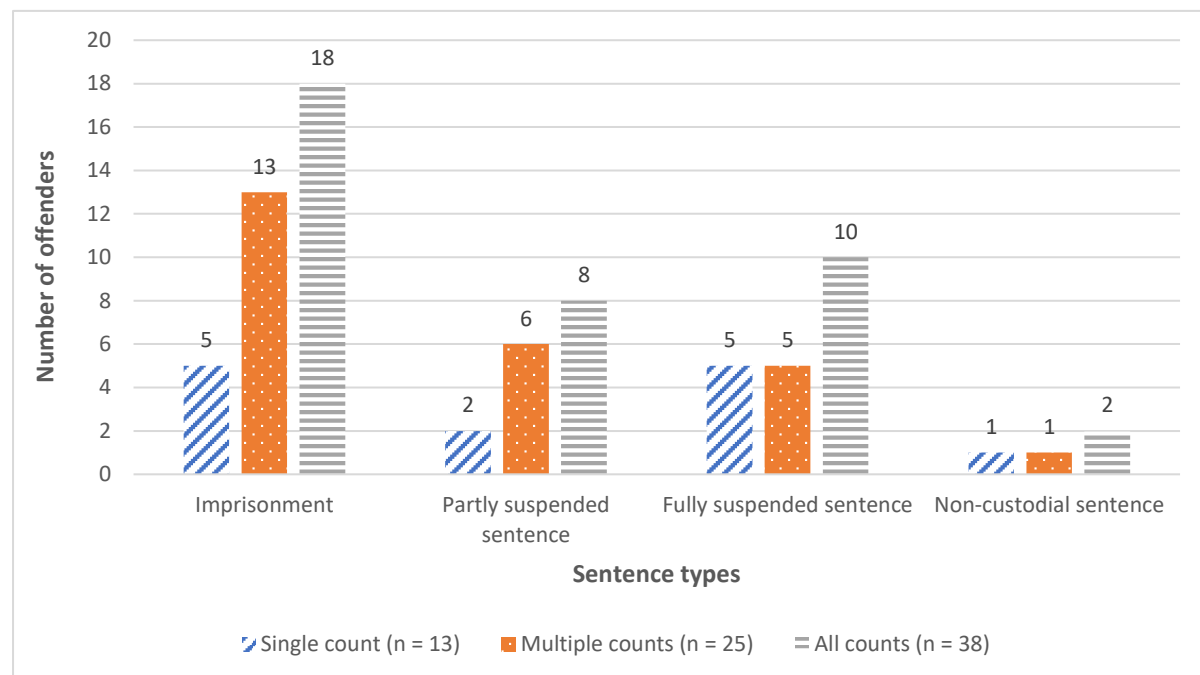
Figure 3.2: Assault *Criminal Code* (Tas) s 184, Supreme Court sentences, 2010 – 30 November 2020, sentence type

Table 3.2 sets out the length of imprisonment imposed for assaults contrary to the *Criminal Code* (Tas) s 184 that involved non-fatal strangulation. The longest sentence imposed was 42 months (three years and six months' imprisonment), the shortest sentence imposed was six months and the median sentence was 24 months (two years) for multiple counts and all counts of assault, and eight months for a single count of assault.

Table 3.2: Assault *Criminal Code* (Tas) s 184, Supreme Court sentences, 2010 – 30 November 2020, length of imprisonment

Counts	Median (months)	Max (months)	Min (months)	Total (no)
Single count	8	28	6	5
Multiple counts	24	42	15	13
All counts	24	42	6	18

Sentencing for assaults involving strangulation can be compared with sentences imposed for all assaults contrary to the *Criminal Code* (Tas) s 184 in the Supreme Court in the period 2010 to 30 June 2017. This comparison shows that sentencing for non-fatal strangulation assault offences resulted in more sentences of actual imprisonment than assaults not involving strangulation and a median sentence that was more than double. In this period, overall, for assault, there were 295 offenders sentenced. There were 111 offenders sentenced to imprisonment (37.6%), 61 sentenced to a partly suspended sentence (20.7%), 94 sentenced to a fully suspended sentence (31.9%) and 29 sentenced to a non-custodial sentence (9.8%). The shortest sentence of imprisonment imposed was 0.13 months' imprisonment and the longest sentence was 42 months (which was a strangulation case). The median sentence was 10 months.

Family violence assaults. Figure 3.3 sets out the sentencing types imposed for assault contrary to the *Criminal Code* (Tas) s 184, involving non-fatal strangulation in respect of

the 28 cases that were committed by an intimate partner (ie family violence related). It shows that in relation all counts of assaults that were family violence related (28 offenders), 46.4% (13 offenders) received a sentence of full-time imprisonment, 17.9% (five offenders) received a partly suspended sentence of imprisonment, 28.6% (eight offenders) received a fully suspended sentence of imprisonment and 7.1% (two offenders) received a non-custodial sentence. In relation to offenders sentenced for multiple counts, 55% of offenders received a sentence of full-time imprisonment, 20% received a partly suspended sentence of imprisonment, 20% received a fully suspended sentence of imprisonment and 5% received a non-custodial sentence. In relation to offenders sentenced for single counts, 25% of offenders received a sentence of full-time imprisonment, 12.5% received a partly suspended sentence of imprisonment, 50% received a fully suspended sentence of imprisonment and 12.5% received a non-custodial sentence.

Figure 3.3: Assault *Criminal Code* (Tas) s 184, Supreme Court sentences, family violence offences, 2010 to 30 November 2020, sentence type

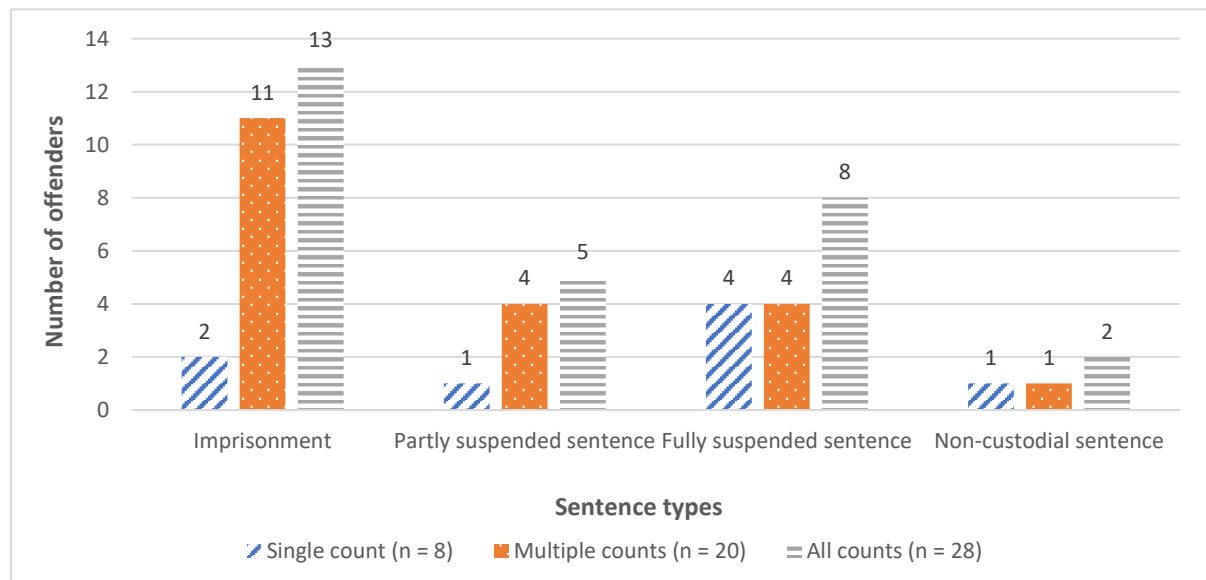


Table 3.3 sets out the length of imprisonment imposed for assaults contrary to the *Criminal Code* (Tas) s 184 that involved non-fatal strangulation in a family violence context. The longest sentence imposed was 42 months (three years and six months' imprisonment), the shortest sentence imposed was eight months and the median sentence was 24 months (two years) for multiple counts and all counts of assault.

Table 3.3: Assault *Criminal Code* (Tas) s 184, Supreme Court sentences, family violence offences, 2010 to 30 November 2020

Counts	Median (months)	Max	Min	Total (no)
Single count	16.5	25	8	8
Multiple counts	24	42	15	20
All counts	24	42	8	28

The longest sentence, which was three years and six months' imprisonment, was imposed in the case of *Tasmania v Delacourt*,¹⁶⁹ in which the offender pleaded guilty to eight counts of assault committed against his former partner over a period of three and half hours. The non-parole period was two years' imprisonment. One of the assaults involved strangling the complainant while threatening to kill her. The complainant turned blue and became unconscious. The other assaults included slapping and striking her face and head, placing a knife to her throat and cutting her hair, applying pliers to her ear, pushing her into the bath and holding her in a headlock. At the time of the assaults, there was an indefinite family violence in place that had been imposed by a court in a previous sentencing hearing for a series of assaults on the complainant. Significantly, these assaults had included grabbing the complainant by the throat. In sentencing, Brett J stated:

Your conduct, as I have described it, was appalling. During a prolonged period, you terrorised your victim and assaulted her brutally and in a manner that was demeaning and humiliating to her. Your threats and violent conduct caused real apprehension that her life, and the lives of others in the house, including your child, were in jeopardy. Your use of weapons on more than one occasion is a serious aggravating factor. A further aggravating factor of some significance is your knowledge of the presence of your son and the complainant's friend's daughter in the premises, and your involvement of those children in your conduct. The facts would suggest that those children were also terrorised by your conduct.¹⁷⁰

While focusing on the terror, fear and humiliation caused by the offender's conduct, specific reference was not made to the strangulation in the identification of aggravating features.

As noted, the median sentence imposed was 24 months' imprisonment and this was imposed in three cases: *Tasmania v Searle*,¹⁷¹ *Tasmania v Wright*,¹⁷² and *Tasmania v French*.¹⁷³

In *Tasmania v French*,¹⁷⁴ the accused pleaded guilty to one count of assault and four counts of breaching a family violence order. An aspect of the violence inflicted during the assault was the accused putting his hands around the complainant's neck and lifting her from the ground. In imposing a sentence of 24 months for the assault offences, Geason J specifically identified choking as 'a significant aggravating factor as it carries with it the serious risk of harm even death'. An additional aggravating feature was that there was a family violence order in place at the time of the assault. His Honour also highlighted the aggravating nature of assaults committed in the context of family violence:

Violence in the context of relationships requires the strongest condemnation by this Court. Violence embraces many different forms, all of which involve a fundamental lack of respect and typically a desire to control others. The nature of this sort of offending is insidious. It is difficult to detect because it goes on in the home. The ease with which

¹⁶⁹ 23 September 2016, Sentencing Comments (Brett J).

¹⁷⁰ Ibid.

¹⁷¹ 24 September 2019, Sentencing Comments, (Brett J).

¹⁷² 18 August 2011, Sentencing Comments, (Evans J).

¹⁷³ 3 July 2019, Sentencing Comments, (Geason J).

¹⁷⁴ Ibid.

powerful, physically strong, dominant people can inflict serious physical and other harm on their partners, and do so privately, requires sentences which deter such behaviour and which demonstrate the Courts refusal to tolerate it.

Following the decisions of the Court of Criminal Appeal (discussed above), there have been other statements made in sentencing comments about the inherent risk of strangulation and smothering and the need for condemnation by the court.¹⁷⁵

In *Tasmania v Searle*,¹⁷⁶ the accused was found guilty of one count of assault and pleaded guilty to a further count of assault and one count of unlawfully injuring property. The offences were committed over a period of two days and were said to 'constitute significant family violence'. The accused had assaulted his partner by pushing her backwards off the couch. He was taken to the police station and then, after his release, returned to the house. Initially, the complainant would not let him in and when she eventually did, he 'burst in, grabbed her around the throat and squeezed'. The complainant was not able to breathe and thought that she may die. He then let her go and drove her head into the mattress. He punched her in the ribs, thigh and around the head multiple times. In sentencing, Brett J stated:

I regard these assaults as very serious. Your conduct is aggravated by the fact that the violence was perpetrated in the presence of your young daughter. Further, the assaults involved brutal and protracted violence. The attempted strangulation is a matter of particular concern. Such conduct is extremely dangerous, and in your angry state you had no real capacity to judge the extent of the force you were using or the possible adverse consequences of your actions. Further, your conduct towards the complainant was extremely demeaning and abusive. All of these aspects place your criminal conduct into a particularly serious category. In my view, there is little, if any, mitigation available to you.¹⁷⁷

His Honour noted that the accused had prior convictions for family violence offences. In addition to sentencing the offender to two years' imprisonment, Brett J also imposed a community correction order of 12 months to commence on the day that he lawfully ceased to be under the sentence of imprisonment. This order included supervision and treatment conditions, as well as participation in the Family Violence Offender Intervention Program and the EQUIPS program.

In *Tasmania v Wright*,¹⁷⁸ the accused was sentenced for two counts of assault as well as unlawfully injuring property, aggravated burglary, evading police, driving while disqualified and contravening the conditions of a notice. This was not a family violence related offence. One of the assault charges related to an assault on a female friend by grabbing her on two occasions to the throat, pointing a syringe in her direction, punching her to the face and holding her by the arms over the course of an extended period. The other assault involved hitting a person not known to the accused with a hammer.

¹⁷⁵ See for example, *Tasmania v Trappes*, 6 June 2018, Sentencing Comments (Brett J); *Tasmania v Petrere*, 23 May 2019, Sentencing Comments (Porter AJ); *Tasmania v Broucek*, 2 August 2018, Sentencing Comments (Geason J). See also, *Tasmania v Brown*, 17 November 2017, Sentencing Comments (Estcourt J).

¹⁷⁶ *Tasmania v Searle* (n 171).

¹⁷⁷ Ibid.

¹⁷⁸ *Tasmania v Wright* (n 172).

Non-custodial sentences were imposed in two cases, and these were both family violence cases: *Tasmania v O'Brien*¹⁷⁹ and *Tasmania v Forward*.¹⁸⁰

In *Tasmania v O'Brien*,¹⁸¹ the offender pleaded guilty to two counts of assault relating to a single incident. He lost his temper and grabbed the complainant by her throat and applied pressure to such an extent that there were bruises and grazes. She then retaliated and hit him in the hand with a baseball bat, for which she was prosecuted for assault. He then grabbed her by the throat on a second occasion and she had difficulty breathing again. In sentencing, Blow CJ made reference to the DPP policy in relation to strangulation offences:

The reason that this is in the Supreme Court and not the Magistrates Court is that the Director of Public Prosecutions has decided that there are too many cases involving people grabbing their partners by the throat and perhaps attempting to strangle them. The strangulation and grabbing by the throat are now regarded as so serious that the charges are brought here to the Supreme Court.

In imposing a fine of \$300, his Honour commented on the offender's youth (19), his employment, plea of guilty, the isolated nature of the assault, and his insight into his anger problems. His Honour noted that the complainant received a conditional discharge for the assault with the bat but thought that 'this [was] a little bit too serious for the case to be disposed of in the same way'.

In *Tasmania v Forward*,¹⁸² the accused pleaded guilty to a single count of assault. The accused and his wife were in the bath together and he asked his wife if she trusted him and she said that she did. He then grabbed her by the throat and pushed her head underwater for around 10 seconds. It was accepted that this was not long enough for her to be 'significantly physically distressed' and that when she tapped his hand, he immediately let her up. In this case, Brett J sentenced the offender on the basis that there was not an ongoing pattern of family violence and that he had no prior convictions. His Honour stated:

I do intend to record a conviction. It seems to me that whatever the reasons for it were, this crime involved significant invasion of the physical integrity of the complainant. Further, as I have already said, the potential consequences of this arrogant act could have been far worse than they actually were. Despite that, I do not think this is a case where punishment beyond the recording of further conviction is necessary.

His Honour imposed a good behaviour bond of two years.

Sentencing for aggravated assault (*Criminal Code (Tas)* s 183) As indicated at [3.1], there were three cases identified where an offender was sentenced for aggravated assault contrary to the *Criminal Code (Tas)* s 183 in relation to an offence that involved non-fatal strangulation, and one of those cases was family violence related.

In all cases, the offender was sentenced for multiple offences and in none of the cases was aggravated assault the principal offence for which the offender was sentenced. In

¹⁷⁹ 2 September 2019, Sentencing Comments (Blow CJ).

¹⁸⁰ 16 September 2019, Sentencing Comments (Brett J).

¹⁸¹ *Tasmania v O'Brien* (n 179).

¹⁸² *Tasmania v Forward* (n 180).

one case, the most serious offence for which the offender was sentenced was attempted murder,¹⁸³ and in the other two cases, the most serious offence was rape.¹⁸⁴ In all cases, a global sentence was imposed.

Although the sentencing comments focused on the totality of the offender's conduct in these cases, there were some specific comments made in relation to the inherent dangerousness of strangulation in *Tasmania v DOA*.¹⁸⁵ In this case, the accused was sentenced for 18 offences, including 14 counts of rape, in relation to his violence towards his niece. In sentencing the offender to a global sentence of nine years' imprisonment, Brett J made comments about the seriousness of the conduct of strangulation and choking:

Another particularly concerning and aggravating aspect of your conduct was your resort to attempted strangulation and other interference with the complainant's capacity to breathe during the course of these events. This occurred when you put your hands around her neck as part of your assaults on her, and also when you forced insertion of your penis into her mouth, which, on occasions, caused her to choke. I have been provided with medical advice and scholarly articles concerning the dangerous nature of these acts. Dr Ritchey, a forensic pathologist, confirms that death can easily result when pressure is placed against the neck, as occurs when a person places his hands around another person's throat and applies pressure. Death is most likely to result not from the restriction of breathing but from the blockage of the arterial blood supply to the brain, usually as a result of pressure applied to the carotid arteries. Such pressure can result in loss of consciousness in approximately 10 seconds, and death or severe injury can follow. Further, research has established that attempted strangulation which does not result in death or even visible injury can have long-term physical and psychological impacts and leave the victim susceptible to ongoing symptoms. In criminal assault, such acts are generally used, as they were by you in this case, to subdue and force compliance by the victim, without any real thought given to the danger inherent in such conduct. Their presence in the violence administered by you in the context of this offending is a highly disturbing and aggravating feature of your conduct, and is also directly relevant to the assessment of impact on the victim.¹⁸⁶

Sentencing for assault on a pregnant woman (*Criminal Code (Tas)* s 184A) The Council identified three cases where the offender was sentenced for assault on a pregnant woman contrary to the *Criminal Code (Tas)* s 184A in circumstances of non-fatal strangulation. All cases were family violence related offences, and in two cases the offence was the most serious offence for which the offender was sentenced.

The longest sentence was imposed in *Karklins*,¹⁸⁷ where the offender was sentenced for a number of offences including three counts of assault on a pregnant woman where the conduct in each involved non-fatal strangulation. This case is discussed in detail at [3.4], and as noted, a single sentence was imposed for the four *Criminal Code* assault offences of 22 months' imprisonment. A sentence of 23 months' imprisonment was imposed for the five counts of attempting to interfere with a witness. The sentences were

¹⁸³ CBF (n 122).

¹⁸⁴ *Tasmania v DOA*, 29 August 2019, Sentencing Comments, (Brett J); *Tasmania v RJB*, 21 April 2016, Sentencing Comments (Tennent J).

¹⁸⁵ 29 August 2019, Sentencing Comments, (Brett J).

¹⁸⁶ Ibid.

¹⁸⁷ *Karklins* (n 81).

imposed cumulatively, with an amelioration for the effect of the combined sentences reducing the sentence to three years and four months. There was a further reduction of a six months as a result of the guilty plea resulting in a final sentence of two years and 10 months' imprisonment.

In the other case, *Tasmania v Stephens*,¹⁸⁸ the circumstances were that during an assault the offender grabbed the complainant in a headlock, he then sat on her and kned her to the stomach and dragged her across the floor. In imposing a sentence of 14 months' imprisonment for single count of assaulting a pregnant woman, Tennent J stressed the seriousness of the offence 'because it has the potential to endanger a second life'.

3.9.4 Assaulting a police officer

As indicated at [3.1], there was one case identified where an offender was sentenced for assaulting a police officer contrary to the *Criminal Code* (Tas) s 114, where the conduct involved non-fatal strangulation.¹⁸⁹ The accused was also sentenced for the summary offence of resisting police. In sentencing, Pearce J made observations about the seriousness of strangulation in this context:

The factors in your favour must be balanced, however, with the need for a sentence which adequately reflects the seriousness of what you did. Violent assaults of police fuelled by drugs is conduct which must be condemned and punished. You inflicted serious violence on one of the officers. Choking is a particularly frightening form of attack. It is fortunate that greater harm was not caused. The community depends heavily on the police force for its safety and security. Police officers are entitled to the protection of the law. They should be able to go about the performance of their duty without being subject to violent assault. Sentences should protect the community by upholding the authority of the police and deterring others from acting towards the police as you did.¹⁹⁰

A sentence of fifteen months' imprisonment was imposed.

3.10 Affray

3.10.1 Details of the offence

The *Criminal Code* (Tas) s 80 creates an offence of taking part in an affray and the maximum penalty is 21 year's imprisonment or fine or both.¹⁹¹ It creates an offence where a person who take part in 'fighting involving 2 or more persons in any public place to the terror of His Majesty's subjects'.

3.10.2 Charging guidance for affray

The DPP guidelines do not refer to charging for offences against the *Criminal Code* (Tas) s 80.

¹⁸⁸ 1 May 2017, Sentencing Comments (Tennant J).

¹⁸⁹ *Tasmania v Fazackerley*, 21 October 2019, Sentencing Comments (Pearce J).

¹⁹⁰ Ibid.

¹⁹¹ *Criminal Code* (Tas) s 389.

3.10.3 Sentencing for the offence of affray in circumstances of non-fatal strangulation

The Council identified one case where an offender was sentenced for affray where an aspect of the offender's conduct involved non-fatal strangulation. In this case, the offender was charged with three counts of assault and one count of affray. The circumstances of the affray were that the offender was in company with three companions when they encountered another group of young men. The offender attempted to head-butt a member of the other group, and also sat on the victim's chest, punching him, trying to choke him and gouging at his eyes. He then punched another member of the other group.¹⁹² A global sentence of 14 months' imprisonment was imposed.

3.11 Robbery

3.11.1 Details of the offence

The *Criminal Code* (Tas) s 240(1) creates the offence of robbery, which is where a person who steals something and at that time uses or threatens to use violence in order to obtain the thing or prevent or overcome resistance of the stealing of that thing. Section 240(2) creates an offence of aggravated robbery, which is where the robbery is committed in company or where it causes bodily harm to any person. Section 240(3) creates an offence of armed robbery and s 240(4) creates the offence of aggravated armed robbery where the offender is armed with a firearm or other dangerous or offensive weapon at the time. The maximum penalty for all these offences is 21 years' imprisonment or fine or both.¹⁹³

3.11.2 Charging guidance for robbery offences

The DPP guidelines do not refer to charging for offences against the *Criminal Code* (Tas) s 240.

3.11.3 Sentencing for the offence of robbery in circumstances of non-fatal strangulation

The Council identified five cases where an offender was sentenced of an offence under the *Criminal Code* (Tas) s 240 and the associated violence involved an act of strangulation (putting the offenders' hands around the victim's neck). These cases were all committed in company and the complainant(s) was not in a family relationship with the offenders.

In three cases, the offender was sentenced for a single count of aggravated robbery and the longest sentence of 20 months' imprisonment was imposed in *Tasmania v Pyke*.¹⁹⁴ In this case, the offender entered the unit of the complainant with another man. The complainant was repeatedly punched in the face and choked by one of the offenders while the other searched the unit for money. It could not be proved which of the men were responsible for the violence, however it was accepted that there was a joint plan to

¹⁹² *Tasmania v Lumley*, 9 June 2011, Sentencing Comments, (Blow J).

¹⁹³ *Criminal Code* (Tas) s 389.

¹⁹⁴ 15 November 2019, Sentencing Comments (Pearce J).

rob the complainant of cash. In the other two cases, *Tasmania v Godfrey and Maryon*,¹⁹⁵ the offenders were co-accused who robbed a taxi driver and were sentenced to six months' imprisonment fully suspended on condition that they commit no offence punishable by imprisonment for two years. A community service order of 120 hours was also imposed.

In the remaining two cases, the offenders were co-accused who were sentenced for aggravated armed robbery and aggravated burglary and global sentences were imposed of four and a half years' and four years' imprisonment respectively. In *Tasmania v Wigg*,¹⁹⁶ the offender was sentenced to four and a half years' imprisonment in circumstances where he and his co-offender had entered the home of a couple while armed with a knife and a sword. One of the offender's put his hands around the throat of one of the complainants and then threatened her with a knife. Other violence included pushing and striking the other complainant to the head. Both complainants were taped to a chair and money and other goods were stolen. In sentencing the co-offender in *Tasmania v Ansell*,¹⁹⁷ Wood J imposed a sentence of four years and nine months' imprisonment. In both cases, in light of the circumstances, Wood J referred to the seriousness of home invasions undertaken with a weapon but did not make specific reference to strangulation in these circumstances.

¹⁹⁵ 11 November 2014, Sentencing Comments (Tennent J).

¹⁹⁶ 2 July 2014, Sentencing Comments (Wood J).

¹⁹⁷ 2 October 2014, Sentencing Comments (Wood J).

4 SENTENCING FOR STRANGULATION OFFENCES IN OTHER SELECTED JURISDICTIONS

Term of Reference 2 requests the Council to provide information about the sentencing outcomes in jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence), and, where information is available, to outline the factors have the courts considered in sentencing the offender. In addition, Term of Reference 3 requests the Council to identify the other offences for which an offender was sentenced at the same court event, in those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence).

This chapter addresses these terms of reference and provides information about sentencing for strangulation offences in selected other comparable jurisdictions where a non-fatal strangulation offence has been created.

Many Australian jurisdictions (Queensland, New South Wales, South Australia, Western Australia, Australian Capital Territory and Northern Territory) have introduced an offence of non-fatal strangulation. In addition, a stand-alone offence exists in New Zealand.

The following sentencing information is provided in relation to these jurisdictions where available:

- (1) statistical information that provides an overview of sentencing patterns for the offences;
- (2) case law setting out the approach taken by courts to sentencing for non-fatal strangulation.

Information is also provided (where available) about other offences for which the offender was sentenced at the same court event.

In setting out the sentencing practices in other jurisdictions, it is important to be aware that inter-jurisdictional comparisons are problematic for a number of reasons: Australian criminal law is not uniform and offence definitions differ between jurisdictions; sentencing laws are not uniform and there are differences in the sentencing options that are available, non-parole periods and parole eligibility provisions differ (difficulties that are compounded by the use of global sentencing in Tasmania); and there are differences with respect to whether the offences are dealt with in the lower or higher courts. These all have an effect on sentencing for a particular offence.

It is also important to keep in mind that there is not a single 'correct' sentence that can be imposed in a given case. Instead, sentencing in each jurisdiction is informed by its particular sentencing legislation and practices. Further, in focussing on judicial comments that have been made in other jurisdictions in relation to the approach to be taken to the offence of non-fatal strangulation, ultimately the sentence imposed is the

result of an assessment of a broader range of sentencing considerations including subjective factors and general sentencing principles that apply in that particular jurisdiction. In addition, as noted, criminal law is not uniform and there are differences in the requirements of strangulation offences across jurisdictions in Australia and in New Zealand. As noted by Gotsis, the offences ‘vary considerably in their degree of inherent complexity’¹⁹⁸ and this has a bearing on the sentences imposed in each jurisdiction.

4.1 Queensland

4.1.1 The offence(s) and statutory maximum sentence

In 2016, Queensland introduced the offence of choking, suffocation or strangulation in a domestic setting into the *Criminal Code* (Qld) s 315A following the recommendations of the Special Taskforce on Domestic and Family Violence in Queensland.¹⁹⁹

The *Criminal Code* (Qld) s 315A creates an offence where a person unlawfully chokes, suffocates or strangles another person without the other person’s consent and there is a domestic relationship.²⁰⁰ Section 315A is an indictable offence that must be heard in the Supreme Court²⁰¹ and has a maximum penalty of seven years’ imprisonment.²⁰²

Prior to the introduction of s 315A, the offence of strangulation only applied where the offender choked, suffocated or strangled with intention to commit or to facilitate the commission of an indictable offence or to facilitate the flight of the offender.²⁰³ In other words, this section was limited to strangulation and choking committed in association with an indictable offence.

Absent proof of that intent, other offences available under the *Criminal Code* (Qld) that might apply in the context of non-fatal strangulation or choking were common assault (maximum penalty three years’ imprisonment), assault occasioning bodily harm (seven years’ imprisonment), grievous bodily harm (14 years’ imprisonment), torture (14 years’ imprisonment) or attempted murder (life imprisonment).²⁰⁴

¹⁹⁸ NSW Parliamentary Research Service, ‘NSW’s Strangulation Offence: Time for Further Reform? *Issues Backgrounder Number 3* (2018) 2. It is noted that there is greater consistency and clarity in the offences in Australian jurisdictions than exists in the United States. For more details about the legislative formulations of offences of non-fatal strangulation in the United States, see Training Institute on Strangulation Prevention, *Legislation Map* <<https://www.strangulationtraininginstitute.com/resources/legislation-map/>> .

¹⁹⁹ The introduction of s 315A followed a report prepared by the Special Taskforce on Domestic and Family Violence in Queensland recommending that the government consider the creation of a specific offence of strangulation: Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence* (Final Report, 2015) Recommendation 120.

²⁰⁰ See *Criminal Code* (Qld) s 315A.

²⁰¹ *EFN v Lehmann and Another* [2017] QSC 77.

²⁰² Note that a bill has been introduced that would increase the maximum penalty to 14 years, *Criminal Code and Another Act (Choking in Domestic Settings) Amendment Bill 2020* (Qld).

²⁰³ *Criminal Code* (Qld) s 315. This offence also exists in Tasmania.

²⁰⁴ Queensland Government, *Discussion Paper: Circumstance of Aggravation and Strangulation* (October 2015) 8.

4.1.2 Statistical information

The Queensland Sentencing Advisory Council released a sentencing snapshot examining the *Criminal Code* (Qld) s 315A setting out the sentencing outcomes for offences finalised in Queensland courts between 2016–17 and 2017–18.

In this period, it found that there were 404 cases for offenders sentenced for the offence of choking, suffocation or strangulation in a domestic setting involving a total of 482 charges.²⁰⁵ In 287 (71%) of those cases, strangulation was classified as the most serious offence ('MSO'). In the remaining 117 cases where strangulation was not the MSO, the MSO was assault occasioning bodily harm in 94 (80%) of those cases.²⁰⁶

In relation to other charges sentenced at the same time as the sentencing for strangulation as the MSO (287 cases), 12.2% of offenders were only dealt with for the strangulation offence, 21.6% had one additional offence and 66.2% had more than one additional offence.²⁰⁷ Table 4.1 sets out the top eight associated offences sentenced with a strangulation as the MSO.

Table 4.1: Top eight associated offences sentenced with a strangulation as the MSO, 2016–17 to 2017–18 (Queensland)

Offence	Number	Percentage
Breach of violence order	141	49%
Common assault	120	42%
Serious assault resulting in injury	112	39%
Property damage, nec*	58	20%
Strangulation	51	18%
Breach of bail	35	12%
Resist or hinder police officer or justice official	27	9%
Other illicit drug offences, nec*	22	8%

Source: *Sentencing Spotlight* 6 Figure 6.

*nec refers to offences that are not elsewhere classified in the Australian Standard Offence Classification.

Additional information about offences sentenced at the same event as sentencing for the offence of strangulation can be obtained from an analysis of sentencing comments from the District Court of Queensland for the period 1 January to 16 September 2020. These comments were available on the Supreme Court Library Queensland website.²⁰⁸ In this period, 45 cases were identified where the offender was sentenced for the offence of strangulation in a domestic setting as the most serious offence and in 20% of cases the offender was sentenced only for the strangulation offence (nine cases). Accordingly, in 80% of cases the offender was sentenced for at least one other offence and the most

²⁰⁵ Queensland Sentencing Advisory Council, *Sentencing Spotlight on Choking, Suffocation or Strangulation in a Domestic Setting* (2019) 3.

²⁰⁶ Ibid.

²⁰⁷ Ibid 6.

²⁰⁸ See Supreme Court Library Queensland <<https://www.sclqld.org.au/caselaw/sentencing-remarks>>.

common offence for which an offender was also sentenced was assault occasioning bodily injury (80.5%) followed by assault (47.2%), wilful damage (36.1%) and breach of a domestic violence order (30.5%).

In the period 2016–17 to 2018–19, 97.2% of offenders who were sentenced for a strangulation offence as the MSO received a custodial penalty with eight offenders receiving a non-custodial penalty. Of those offenders who received a custodial penalty, 219 (79.1%) received a sentence of imprisonment, 30 (10.8%) received a partially suspend sentence of imprisonment and wholly suspended sentences were used in 27 cases (9.7%).²⁰⁹ As shown by Table 4.2, the median sentence of imprisonment imposed was 24 months (two years) with a minimum sentence of two months and a maximum sentence of 48 months.

Table 4.2: Sentence length for strangulation (MSO) 2016–17 to 2018–19 (Queensland)

	Number	Median (months)	Min (months)	Max (months)
Imprisonment	219	24	2	48
Partly suspended	30	20.5	9	36
Wholly suspended	27	18	9	30

Source: *Sentencing Spotlight* 9 Table 5.

4.1.3 Case law

The approach to sentencing for the the offence of choking, suffocation or strangulation in a domestic setting under the *Criminal Code* (Qld) s 315A has been considered in a number of decisions of the Queensland Court of Appeal. In the most recent case, *R v HBZ*,²¹⁰ the offender was sentenced to two years and six months' imprisonment in relation to choking in a domestic setting to be suspended after serving 15 months' imprisonment for an operational period of three years. In relation to the count of common assault, the offender was sentenced to three months' imprisonment. The facts of the case were that the complainant asked her son to wake the offender to let him know that his dog had urinated in the house. He was upset about being woken and was aggressive towards the dog. The complaint then asked him to leave. He left the house but let himself back in with a spare key. He then grabbed the complainant and put his hands around her neck. The complainant said that she struggled for breath and that she was unable to speak, felt pains in her chest and had black spots in her vision.

The offender appealed against these sentences on the ground that they were manifestly excessive. In considering the question of sentencing, the Court of Appeal indicated that:

The gravamen of the offending conduct which the offence seeks to deter is the action of one domestic partner towards the other that is described as either choking, strangling or suffocating the victim and not the consequence of the act. The rationale for the offence is that even though one incident in the domestic context of choking, strangling or suffocating may not result in any serious injury, the conduct must be deterred, because it is inherently dangerous and experience shows that if it is repeated, death or serious injury may eventually result.²¹¹

²⁰⁹ Queensland Sentencing Advisory Council (n 205) 8.

²¹⁰ [2020] QCA 73.

²¹¹ *Ibid* [56].

Mullins JA accepted that the offence in s 315A of the *Criminal Code* was:

to deter a type of offending that was viewed as a precursor to offending with much greater consequences for the victims, including death. That the offending may be committed over a very short period of time will frequently be a characteristic of this offence. The deterrent aspect of sentencing for this offence is not just directed at the offender being sentenced, but more generally, in an attempt to eliminate the dangerous conduct of one domestic partner choking, suffocating, or strangling the other that can easily result in fatal or lasting consequences.²¹²

However, even allowing for the importance of general deterrence, it was considered that the sentence was manifestly excessive and a sentence of two years' imprisonment with a non-parole period of 12 months was imposed. In this case, the trial judge had characterised the offending as an 'overreaction' and it was 'for a short duration'.²¹³ The Court of Appeal distinguished the nature of the offending in *HBZ* from the seriousness of the conduct in the earlier Court of Appeal cases of *R v MCW*²¹⁴ and *R v MDB*.²¹⁵

In *R v MCW*,²¹⁶ the offender was sentenced on two counts of assault occasioning bodily harm, one count of choking, suffocation or strangulation in a domestic setting and a summary charge of contravention of domestic violence order (aggravated offence). He was sentenced to two years and six months' imprisonment for each of the assault charges, three years and six months' imprisonment for the choking offence and three months imprisonment for the summary charges. The sentences were concurrent. The offender appealed this sentence on the grounds that it was manifestly excessive.

The Court of Appeal dismissed the appeal. It observed the offender's lengthy criminal history that included contraventions of domestic violence orders and prior choking offences resulting in the complainant becoming unconscious. In the context of other violence, the offender applied enough pressure in holding the complainant in a chokehold that she could not breathe or move, was terrified and eventually lost consciousness. In rejecting the appeal, Phillippides JA observed that:

The new offence of strangulation directly addresses a particular type of domestic violence, identified as of itself of such a serious and dangerous nature as to attract a maximum penalty of seven years. The offence attracts that maximum because, as stated in the Explanatory Notes, it concerns behaviour that is both inherently dangerous (reflected in this case in the complainant being rendered unconscious) and a predictive indicator of escalation in domestic violence offending, including homicide.²¹⁷

In addressing the seriousness of the offending, it was significant that the complainant lost consciousness, and that this was preceded and followed by an assault occasioning bodily harm. The offender's prior history was also a significant factor in assessing the seriousness of the offending.²¹⁸

²¹² Ibid [72].

²¹³ Ibid [70].

²¹⁴ [2018] QCA 241.

²¹⁵ [2018] QCA 283.

²¹⁶ *R v MCW* (n 214).

²¹⁷ Ibid [3] (Phillippides JA).

²¹⁸ Ibid [41] (Mullins J).

In *R v MDB*,²¹⁹ the offender was sentenced for common assault, threatening violence, assault occasioning bodily harm, choking in a domestic setting, wilful damage and associated summary charges. The incident involved a threat to 'bite [the victim's] face off' and an attempt to bite her, holding a flick knife next to her throat and saying 'what are you going to do', throwing her to the floor, and holding his hand around her throat so that she was unable to breathe or swallow, while punching the floor near her head. There was a history of offending, including attempting to strangle his brother-in-law. A domestic violence protection order was in place at the time of the offending. In relation to the choking offence, he was sentenced to four years' imprisonment concurrent with the sentences imposed for the other offending. The offender appealed on the ground that the sentence for the choking offence was manifestly excessive.

In discussing the approach to sentencing, Bowskill J stated that:

Deterrence, both personal and general, as well as community protection and denunciation, were emphasised as important factors in sentencing offenders under s 315A. ...

In the context of this particular type of domestic violence offending, choking or strangling, the serious and dangerous nature of such an act, the fact that it has been shown to be a predictive indicator of escalation in domestic violence offences, and the concerning prevalence of this act in domestic violence offending all support the need for stern punishment in cases of this kind.²²⁰

Factors identified by the Court of Appeal in justifying 'stern and severe punishment' and dismissing the appeal were:

- The factual circumstances of the offending
- The protected nature of the incident and that he was only deterred and ultimately desisted as a result of the intervention by others
- The physical, emotional and financial impact on the complainant
- The applicant's mature age and serious and concerning criminal history of violence, including a prior attempt to strangle
- The offending was committed in breach of a domestic violence order.²²¹

4.2 New South Wales

4.2.1 The offence(s) and statutory maximum sentence

In 2014, the *Crimes Act 1900* (NSW) was amended to include a strangulation offence where a person intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance and is reckless as to rendering the other person unconscious, insensible or incapable of resistance.²²² This offence is contained in the *Crimes Act 1900* (NSW) s 37(1) and has a

²¹⁹ *R v MDB* (n 215).

²²⁰ *Ibid* [44]–[45].

²²¹ *Ibid* [52].

²²² *Crimes Act 1900* (NSW) s 37(1) as inserted by the *Crimes Amendment (Strangulation) Act 2014* (NSW).

maximum penalty of 10 years' imprisonment. Prior to 2014, the only strangulation offence in the *Crimes Act 1900* (NSW) was limited to circumstances where it was occurred with an intention to commit an indictable offence.²²³

Further review of the New South Wales provisions occurred following concerns raised by the Domestic Violence Death Team in 2015, that despite the high risk involved in strangulation and its relevance as a factor preceding intimate partner homicide, strangulation offences were not being charged under the *Crimes Act 1900* (NSW) s 37(1) but rather were charged as common assault (maximum penalty two years' imprisonment) or assault occasioning actual bodily harm (maximum penalty five years' imprisonment).²²⁴ The review identified difficulties with obtaining convictions for the offence. Data provided by the NSW Bureau of Crime Statistics and Research showed that of the 831 finalised charges under s 37(1), only 247 resulted in an outcome of guilty (29.7%).²²⁵ For those sentenced for an offence against s 37(1) as a principal offence, 82 (50%) were sentenced to full time imprisonment with the average sentence being 11 months.²²⁶

In 2018, the new offence of intentionally choke, suffocate or strangle another person without the other person's consent was created in the *Crimes Act 1900* (NSW) s 37(1A).²²⁷ This has a maximum penalty of five years' imprisonment.²²⁸

Offences against the *Crimes Act 1900* (NSW) s 37(1A) and (1) can be dealt with in the Local Court or the District Court.²²⁹ In the period, 5 June 2014 to 31 December 2019, there were 406 offenders sentenced for a strangulation offence contrary to the *Crimes Act 1900* (NSW) s 37(1), with 343 offenders sentenced in the Local Court (84.5%) and 63 offenders sentenced in the District Court (15.5%). In the period 1 December 2018 to 31 December 2019, there were 216 offenders sentenced for a strangulation offence contrary to the *Crimes Act 1900* (NSW) s 37(1A) and all offenders were sentenced in the

²²³ This offence remains in the *Crimes Act 1900* (NSW) s 37(2) with a maximum penalty of 25 years' imprisonment. The Second Reading Speech for the 2014 offence recognised the limitations of s 37(2) in cases of strangulation in domestic violence contexts due to the need to prove an intention to commit a separate indictable offence and the result was that a majority of strangulation offences were charged as common assault with a maximum penalty of two years imprisonment. Statistics obtained from the Bureau of Crime Statistics and Research showed that the average prison term for domestic violence assault involving strangulation is six months: NSW Parliamentary Research Service (n 198) 79.

²²⁴ Domestic Violence Death Review Team, *Domestic Violence Death Review Team Report 2015–2017*.

²²⁵ NSW Parliamentary Research Service (n 198) 8

²²⁶ Ibid.

²²⁷ *Crimes Act 1900* (NSW) s 37(1A).

²²⁸ In 2017, a statutory report of the NSW Domestic Violence Death Review Team highlighted limitations of the new s 37 in cases where an intention to render the victim unconscious, insensible or incapable of resistance, or to commit another indictable offence was absent, so that alleged offenders were charged with lesser offences like assault with a maximum penalty of two years, see New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2018, Second Reading Speech (Mark Speakman).

²²⁹ *Criminal Procedure Act 1986* (NSW) s 260, Schedule 1 Table 1 Part 1. The matter is to be dealt with summarily by the Local Court unless the prosecuting authority or the person charged elects to have the offence dealt with on indictment.

Local Court. The maximum term of imprisonment that can be imposed in the Local Court is two years.²³⁰

4.2.2 Statistical information

The Judicial Commission of New South Wales has provided information to the Council about the sentencing outcomes for the offences in the *Crimes Act 1900* (NSW) ss 37(1) and 37(1A), as well as other offences sentenced at the same hearing.

In the period 5 June 2014 to 31 December 2019, there were 406 offenders sentenced in the Local and District Court for a total of 438 offences contrary to the *Crimes Act 1900* (NSW) s 37(1) as well as 1267 other offences. The *Crimes Act 1900* (NSW) s 37(1) was the principal offence (most serious offence) for 326 out of 343 offenders sentenced in the Local Court and 34 out of the 63 offenders sentenced in the District Court. For the offenders sentenced in the Local Court, 10.2% (35 offenders) were sentenced only for an offence contrary to the *Crimes Act 1900* (NSW) s 37(1) and 89.8% (308 offenders) were sentenced for multiple offences. Of the offenders sentenced in the District Court, 3.2% (two offenders) were sentenced only for an offence contrary to the *Crimes Act 1900* (NSW) s 37(1) and 96.8% were sentenced for multiple offences.

In the period 1 December 2018 to 31 December 2019, there were 216 offenders sentenced for a total of 234 offences contrary to the *Crimes Act 1900* (NSW) s 37(1A) as well as 666 other offences. The *Crimes Act 1900* (NSW) s 37(1A) was the principal offence for 158 out of 216 offenders sentenced. All these offenders were sentenced in the Local Court, and 9.7% (21 offenders) were sentenced only for an offence contrary to the *Crimes Act 1900* (NSW) s 37(1A) and 90.3% (195 offenders) were sentenced for multiple offences.

Tables 4.3 and 4.4 provide details about the other offences sentenced at the same time as a strangulation offence and show that common assault and assault occasioning actual bodily injury are the offences sentenced most commonly at the same sentencing hearing.

Table 4.3: Top eight associated offences sentenced with strangulation under the *Crimes Act 1900* (NSW) s 37(1), 5 June 2014 to 31 December 2019 (New South Wales)

Offence	Number	Percentage (n = 1037)
Common assault	227	21.9%
Assault occasioning actual bodily harm	196	18.9%
Stalk or intimidate with intent to cause fear of physical or mental harm	144	13.9%
Contravene apprehended violence order	132	12.7%
Destroy/damage property	70	5.7%
Fail to appear in accordance with bail acknowledgement	42	4%
Assault with intent to commit a serious indictable offence on certain officers	33	3.2%
Possess prohibited drug	21	2%

²³⁰ See *Criminal Procedure Act 1986* (NSW) s 267. See *R v Doan* (2000) 50 NSWLR 115.

Table 4.4: Top eight associated offences sentenced with strangulation under the *Crimes Act 1900* (NSW) s 37(1A), 1 December 2018 to 31 December 2019 (New South Wales)

Offence	Number	Percentage (n = 666)
Common assault	137	20.6%
Assault occasioning actual bodily harm	110	16.5%
Stalk or intimidate with intent to cause fear of physical or mental harm	105	15.8%
Contravene apprehended violence order	96	14.4%
Destroy/damage property	66	9.9%
Possess prohibited drug	13	1.9%
Assault with intent to commit a serious indictable offence on certain officers	12	1.8%
Being armed with intent to commit a serious indictable offence	9	1.3%

Although the offences in New South Wales are not limited to the context of family violence (and so apply generally to all conduct involving strangulation), nearly all the offenders who were sentenced for strangulation offences were sentenced for domestic violence related offences. Under the *Crimes Act 1900* (NSW) s 37(1), 378 (93.1%) offences involved domestic violence related offences. There were 216 offenders sentenced for an offence contrary to the *Crimes Act 1900* (NSW) s 37(1A), and 208 (96.3%) of these cases involved domestic violence related offences.

As shown by Table 4.5, in relation to the *Crimes Act 1900* (NSW) s 37(1), based on the number of offences sentenced in both the District and Local Court (n = 438), 58.2% of offences resulted in an offence of imprisonment with a minimum sentence of two months' imprisonment and a maximum sentence of 81 months' imprisonment (six years and nine months). The median sentence was 18 months' imprisonment (one year and six months).²³¹

Table 4.5: Full-time imprisonment and sentence length for strangulation contrary to the *Crimes Act 1900* (NSW) s 37(1), 5 June 2014 to 31 December 2019 by number of offences (New South Wales)

	Number of offences	Number and proportion full-time imprisonment	Median (months)	Min (months)	Max (months)
Local Court	362	181 (50%)	15	2	30
District Court	76	74 (97.4%)	34.5	9	81
Combined	438	255 (58.2%)	18	2	81

In relation to strangulation contrary to the *Crimes Act 1900* (Tas) s 37(1A), as shown by Table 4.6, all matters were sentenced in the Local Court and based on the offences sentenced (n = 234), 112 (47.9%) offences resulted in an offence of imprisonment with a

²³¹ This does not provide information about the aggregate or total effective sentence imposed when an offender is sentenced for multiple offences including a strangulation offence as the most serious or principal offence.

minimum sentence of 2.9 months' imprisonment and a maximum sentence of 24 months' imprisonment (two years). The median sentence was 13.5 months' imprisonment.²³²

Table 4.6: Full-time imprisonment and sentence length for strangulation contrary to the *Crimes Act 1900* (NSW) s 37(1A), 1 December 2018 to 31 December 2019 by number of offences (New South Wales)

	Number of offences	Number and proportion full-time imprisonment	Median (months)	Min (months)	Max (months)
Local Court	234	112 (47.9%)	13.5	2.9	24
District Court	0	n/a	n/a	n/a	n/a

4.2.3 Case law

Available case law considering sentencing for strangulation offences under the *Crimes Act 1900* (NSW) has generally arisen in relation to s 37(1) which requires unconsciousness or a person to be rendered insensible or recklessness as to this occurring. In all cases, the offender was sentenced for multiple offences including the choking offence.

There was one case identified where the choking/strangulation resulted in unconsciousness and a sentence of three years and four months' imprisonment was imposed for the choking offence.²³³ In *R v Leonard*,²³⁴ the offender was sentenced for two offences: assault occasioning actual bodily harm and intentional choking with recklessness as to rendering her unconscious, insensible or incapable of resistance. The victim was his partner, and the offender placed his hands around her neck and pulled her head back so she could not breathe. She feared she would die. He squeezed his hands tightly until she lost consciousness. She suffered bruising, a swollen neck, a hoarse throat, difficulty swallowing and voice changes due to internal swelling. In sentencing, Norrish DJC considered that the offender being a more powerful person, the age difference between the offender and the victim and the fact that it occurred in the victim's home made the offence 'one of considerable seriousness'.²³⁵ It was said not to be the worst offence of its type but as one 'slightly above what could be called the middle range of objective seriousness or at the upper cusp'.²³⁶ Relevant as a mitigating factor was the fact that the offences were not planned.²³⁷ Norrish DJC also observed the changing attitudes to domestic violence by courts and that any 'forgiving' attitude that may have existed in the past arising from the fact that the victim and the offender were in a relationship no longer exists.²³⁸

In four cases, the offender was sentenced on the basis of intentional choking with recklessness as to whether the victim was rendered unconscious. In these cases, the

²³² This does not provide information about the aggregate or total effective sentence imposed when an offender is sentenced for multiple offences including a strangulation offence as the most serious or principal offence.

²³³ A total sentence of four years and five months' imprisonment was imposed for the offending.

²³⁴ [2019] NSWDC 628.

²³⁵ *Ibid* [14].

²³⁶ *Ibid*.

²³⁷ *Ibid* [16].

²³⁸ *Ibid* [19].

longest sentence imposed for the choking offence was two years' imprisonment²³⁹ and the shortest sentence imposed for the strangulation offence was nine months' imprisonment.²⁴⁰ In all cases the offender was sentenced for multiple offences in addition to the strangulation offence including sexual intercourse without consent, assault causing bodily harm, intimidating with intention of causing fear physical or mental harm, destroy property, enter enclosed lands, reckless wounding, contravening an apprehended violence order.

In these cases, aggravating features of the choking offences were identified as being the domestic violence context of the assault, the presence of children and the use of accompanying threats to kill.²⁴¹ It was also stressed that it was important to view the offences within the context of the overall criminal conduct. In *Director of Public Prosecutions (NSW) v Johnson*,²⁴² Stewart LCM stated that:

It is inappropriate for example to consider the choking offence in isolation. It occurred followed a protracted, brutal assault both inside and outside of the offender's home after the victim had been stabbed three times, beaten, kicked and punched, dragged by the hair and had objects thrown at her and dropped on her. ... When considered in context, the offence is extremely serious as the victim was even more vulnerable at the time that she was choked and less in a position to do anything about the attack upon her.²⁴³

Stewart LCM indicated that a head sentence exceeding two years (ie two years and three months) would have been appropriate but that it was necessary to recognise the jurisdictional limit of the Local Court, and so was restricted to a sentence of two years' imprisonment.²⁴⁴

4.3 Australian Capital Territory

4.3.1 The offence(s) and statutory maximum sentence

As with New South Wales, the Australian Capital Territory has distinct offences relating to strangulation that depend on whether or not the person is rendered unconsciousness and the offender's intent. The *Crimes Act 1900* (ACT) s 27(3)(a) creates an offence of intentionally and unlawfully choking, suffocating or strangling another person so as to render that person insensible or unconscious. The maximum penalty for this offence is 10 years' imprisonment. There is an increased maximum penalty of 15 years' imprisonment if a person commits this offence intending to commit an indictable offence (punishable by a maximum period exceeding 10 years) or intending to prevent or hinder his or her lawful apprehension or detention or intending to prevent or hinder a police officer from lawfully investigating an act.²⁴⁵

²³⁹ *R v Peifeng Yu* [2016] NSWDC 257; *Director of Public Prosecutions (NSW) v Johnson* [2015] NSWLC 31.

²⁴⁰ *R v Aloese* [2018] NSWDC 210.

²⁴¹ *R v Peifeng Yu* (n 239) [16] (Tupman J).

²⁴² *R v Johnson* (n 239).

²⁴³ [2015] NSWLC 31 [13].

²⁴⁴ *Ibid* [34].

²⁴⁵ *Crimes Act 1900* (ACT) s 27(4).

In 2015, a new offence of intentional and unlawful choking, suffocation or strangulation of another person was introduced in the *Crimes Act 1900* (ACT) s 28(2)(a) with a maximum penalty of five years' imprisonment.²⁴⁶

The offences under the *Crimes Act 1900* (ACT) ss 27(3)(a) and 28(2)(a) can be dealt with in Magistrates Court or the Supreme Court.²⁴⁷

4.3.2 Statistical information

The Council was not able to obtain any statistical information in relation to the operation of the ACT provisions.

4.3.3 Case law

Choking/strangulation rendering insensible/ unconscious (s 27(3)(a)). There were seven cases identified where the offender was sentenced for the offence of choking, suffocation or strangulation rendering a person unconscious (s 27(3)(a)). In all cases, the offender was sentenced for multiple offences including in one case where the offender was also sentenced for murder. In five of the seven cases, the victim was the partner or former partner of the offender.

As shown in Table 4.7, in examining the sentences imposed for the offence of choking under s 27(3)(a), the minimum penalty imposed was a fully suspended sentence of two years and seven months' imprisonment and the longest sentence imposed was four years and six months' imprisonment.

Table 4.7: Sentence imposed for choking/strangulation rendering insensible/unconscious (section 27(3)(a)) (Australian Capital Territory)

Case	Other offences	Sentence
<i>R v Palmer</i> [2020] ACTSC 13	Burglary Assault occasioning bodily harm	Total sentence was 30 months' imprisonment with 20 months' imprisonment imposed for the choking offence.
<i>R v Laipato</i> [2019] ATCSC 386	Burglary Unlawful confinement	Total sentence of five years and five months' imprisonment with a sentence of one year and eight months' imprisonment imposed for the choking offence
<i>R v KN</i> [2018] ATCSC 111	Assault occasioning actual bodily harm	Two years and seven months' imprisonment for strangulation (reduced from three years due to the guilty plea) and the aggregated sentence was two years and nine months' imprisonment. The sentence was fully suspended and the offender was placed on a three year good behaviour bond

²⁴⁶ The Explanatory Statement and Presentation Speech for the amendment commented on research that showed that non-fatal strangulation is a risk factor for domestic violence and the sentencing limitations in cases where the offender did not lose consciousnesses, with the only alternative charge, when no marks were visible being assault with a maximum penalty of two years' imprisonment, referred to in *R v Cowling* [2019] ACTSC 138 [88]; *R v Green (No 3)* (2019) 276 A Crim R 422 [31].

²⁴⁷ *Crimes Act 1900* (ACT) s 375(1)(b)(ii).

Case	Other offences	Sentence
<i>R v Dillon</i> [2018] ACTSC 164	Murder Infliction of grievous bodily harm Assault occasioning actual bodily harm Threats to kill	Strangulation offence two years and 11 months (overall an aggregate sentence was 41 years and one month imprisonment was imposed).
<i>R v Van Duren</i> [2017] ACTSC 132	Assault occasioning actual bodily harm	Two years' imprisonment was imposed for the choking offence with a total sentence of two years and six months. The sentence of imprisonment was suspended.
<i>R v Watson</i> [2014] ACTSC 395	Intentional infliction of grievous bodily harm Assault occasioning actual bodily harm	Four years and six months' imprisonment (reduced to four years' imprisonment to reflect the plea of guilty) for choking offence.
<i>Lewis v Storey</i> [2019] ACTSC 74	Common assault Assault occasioning bodily harm Possess offensive weapon	Three years imprisonment for the choking offence and this was concurrent with the other sentences imposed.

Factors identified by the court as being aggravating were offences committed in circumstances of domestic violence,²⁴⁸ the potential long term-effects of strangulation,²⁴⁹ accompanying threats,²⁵⁰ the length of time involved in the assault,²⁵¹ and offences committed in breach of court orders.²⁵²

Strangulation/choking (s 28(2)(a)). There were two cases where the offender was sentenced for the offence of choking, suffocation or strangulation (s 28(2)). Again, the offender was sentenced for multiple offences, and in both cases the victim was the partner/former partner of the offender. A sentence of nine months' imprisonment was imposed in one case for the choking offence and an intensive correction order of two years and six months' imprisonment was imposed in the other case. An intensive correction order is a means of serving a sentence of imprisonment while remaining in the community. It sits just below a sentence of full-time imprisonment in the sentencing hierarchy.²⁵³

In *R v Cowling*,²⁵⁴ the offender pleaded guilty to three charges: (1) unlawful confinement with a maximum penalty of 10 years' imprisonment, (2) choking, suffocating or

²⁴⁸ *R v Palmer* [2020] ACTSC 13; *R v Laipato* [2019] ATCSC 386.

²⁴⁹ *R v Palmer* (n 248).

²⁵⁰ *R v Laipato* (n 248); *R v Watson* [2014] ACTSC 395.

²⁵¹ *R v Laipato* (n 248).

²⁵² *R v Watson* (n 250); *R v Palmer* (n 248).

²⁵³ Justice and Community Safety Directorate (ACT), *Intensive Correction Orders: Review Report* (2019) 6.

²⁵⁴ *R v Cowling* (n 246).

strangulation with a maximum penalty of five years' imprisonment and (3) common assault with a maximum penalty of two years' imprisonment.

In making submissions on factors relevant to the objective seriousness of the offence of choking/strangulation, the prosecution noted that there was an absence of authority on the new offence and that factors such as duration, amount of force, extent of obstruction of breath, resulting injuries and other conduct involved should inform objective seriousness. In this case, it was submitted that 'the fact that the victim felt as though she would pass out, the significant length of the choking and the accompanying threats [were] relevant'.²⁵⁵ Defence counsel submitted that that it was not appropriate to give any additional weight to the considerations of seriousness based upon the explanatory statement and that the victim did not lose consciousness during the offence, there was no medical evidence of any physical injury resulting from the offence and no other accompanying physical violence.²⁵⁶ The explanatory statement referred to the research that showed that non-fatal strangulation by a partner is one of the most important predictive risk factors for intimate partner violence as underpinning the new offence.²⁵⁷

In sentencing, Loukas-Karlsson J recognised the research showing the risk posed by non-fatal strangulation in a domestic context and acknowledged that it was a serious offence.²⁵⁸ Her Honour also recognised that '[t]his sort of violence against women must be deterred and must be punished. General deterrence and specific deterrence are both important in this case'.²⁵⁹ Accordingly, it was necessary that the offender received a sentence of imprisonment. However, the issue was whether the sentence could be served by way of an intensive correction order ('ICO'). Factors that pointed to this being an appropriate sentencing order were his plea of guilty, his remorse, his suitability for an ICO, the intensive counselling he had undertaken and his prospects for rehabilitation.²⁶⁰ Overall, the offender was sentenced to a term of four years' imprisonment to be served as an ICO. A sentence of three years' imprisonment, reduced to two years and six months on the basis of the guilty plea, was imposed for the offence of choking.

In *Yeats v Stevens*,²⁶¹ the offender entered pleas of guilty to 10 offences (nine of which were committed against his former partner), including strangulation contrary to s 28(2)(a), assault, assault occasioning actual bodily harm, and property damage. In relation to the strangulation offence, he placed his hand around the victim's throat, pinned her against a wall and lifted her off the ground. She could not breathe nor talk. Again, in sentencing, the dangerousness of applying force to a person's neck was recognised, as was the seriousness and aggravating nature of assaults committed in a family violence context.²⁶² A total sentence of four years and 11 months' imprisonment was imposed. In relation to strangulation, the offender was sentenced to nine months' imprisonment.

²⁵⁵ Ibid [19].

²⁵⁶ Ibid [21].

²⁵⁷ Ibid [88].

²⁵⁸ Ibid.

²⁵⁹ Ibid [100].

²⁶⁰ Ibid [102].

²⁶¹ [2019] ACTMC 4.

²⁶² Ibid [35].

4.4 South Australia

4.4.1 The offence(s) and statutory maximum sentence

In 2019, the offence of choking, suffocation or strangulation in a domestic setting was created in the *Criminal Law Consolidation Act 1935* (SA) s 20A. This provides that '[a] person who is, or has been, in a relationship with another person and chokes, suffocates or strangles that other person, without that other person's consent, is guilty of an offence'.²⁶³ A relationship is defined to include spouses, domestic partners, children, parents, grandchildren, grandparents and siblings. This has a maximum penalty of seven years. This offence can be heard in the Magistrates Court as well as higher courts.

Prior to the creation of the specific strangulation offence, there was no strangulation offence in South Australia and the relevant offence relied on was the offence of assault, which has a maximum penalty of three years' imprisonment for an aggravated offence (which includes an offence committed against a person with whom the offender was or was formerly in a relationship).²⁶⁴

4.4.2 Statistical information

In the period 31 January 2019 to 30 November 2020, there were 513 defendants finalised with one or more charge under the *Criminal Law Consolidation Act 1935* (SA) s 20A(1).²⁶⁵ Of the 513 finalised defendants with at least one *Criminal Law Consolidation Act 1935* (SA) 20A(1) offence:

- 425 (83%) had the *Criminal Law Consolidation Act 1935* (SA) s 20A(1) offence as the most serious offence
- 47 (9%) had an assault offence (under s 20(3) or s 20(4) of the *Criminal Law Consolidation Act 1935* (SA) as the most serious offence
- 388 (76%) were not proceeded with, dismissed or withdrawn.

Of the 425 finalised defendants with a *Criminal Law Consolidation Act 1935* (SA) s 20A(1) offence as the most serious offence:

- 1 was acquitted
- 7 (2%) were found guilty
- 361 (85%) were not proceeded with, dismissed or withdrawn.²⁶⁶

²⁶³ See *R v Fraser* [2020] SASC 127 for a discussion of the elements of the offence under the *Criminal Law Consolidation Act 1935* (SA) s 20A. The *Statutes Amendment (Domestic Violence) Bill* second reading speech highlighted the deficiency in the current law to provide for a legal response where harm was not caused by the choking/strangulation, see South Australia, *Parliamentary Debates*, House of Assembly, 24 October 2018 (Vickie Chapman).

²⁶⁴ *Criminal Law Consolidation Act 1935* (SA) s 5AAA, 20(3)(b).

²⁶⁵ This data was extracted from the Attorney-General's Department Justice Sector Analytics Database and provided to the Sentencing Advisory in an email dated 23 December 2020 from Angela Curtis, Acting Principal Business Performance Analyst to Rebecca Bradfield.

²⁶⁶ It is noted that while 85% of the matters were not proceeded with, dismissed or withdrawn, in many cases fresh information is laid with alternative charges related to the same incident: see *ibid*.

Of the seven defendants found guilty of a *Criminal Law Consolidation Act 1935* (SA) s 20A(1) offence as the most serious offence:

- 3 were sentenced to imprisonment
- 2 received a home detention order
- 1 received a good behaviour bond and 1 entered into an obligation.

In relation to these seven defendants, four matters were heard in the District Court, two in the Magistrates Court and one in the Youth Court.

For the three defendants sentenced to imprisonment for a *Criminal Law Consolidation Act 1935* (SA) s 20A(1) offence, the imprisonment lengths ranged from 767 days (two years) to 1,277 days (3.5 years).

4.4.3 Case law

There were six cases identified where an offender was sentenced for an offence of choking in a domestic setting in the District Court.²⁶⁷

Table 4.8: Sentence imposed for choking in a domestic setting, District Court South Australia

Name	Offences	Sentence
<i>R v Deng Kual Bolo</i> 20 October 2020 (Fuller J)	Strangulation Assault Aggravated threatening to cause harm	Five years, four months and 25 days (global)
<i>R v Fraser</i> 20 October 2020 (Fuller J)	Strangulation	One year and 10 months' imprisonment
<i>R v Beck</i> 27 May 2020 (Fuller J)	Strangulation Aggravated assault causing harm Aggravated threaten to damage property by arson Contravene an intervention order Fail to comply with bail	Three years, three months and 15 days' imprisonment as a global sentence for offences other than intervention order and breach of bail The sentence served on home detention
<i>R v Bradley</i> 2 October 2019 (Beazley J)	Strangulation Contravene an intervention order	Two years six months and 26 days' imprisonment
<i>R v Carthew</i> 14 August 2020 (Fuller J)	Aggravated assault Strangulation Theft Contravene an intervention order	Two years, one month and seven days' imprisonment (strangulation) with a total sentence of two years, 8 months and 23 days' imprisonment
<i>R v Conroy</i> 1 April 2020 (Chivell J)	Assault causing harm Aggravated assault x 2 Aggravated assault causing harm Aggravated assault causing harm with intent to cause harm Aggravated threatening to cause harm x 2 Assault x 2 Strangulation x 3	Four years, eight months, two weeks and five days' imprisonment (global sentence)

²⁶⁷ It is noted that sentencing comments are not available for matters dealt with in the Magistrates Court.

As with other jurisdictions, the sentencing comments highlighted the significance of the strangulation offence occurring in a domestic context, the need for protection of the safety of the community and the vulnerability of women in family violence situations. In five out of the six cases, the offender was sentenced for multiple offences.

4.5 Western Australia

4.5.1 The offence(s) and statutory maximum sentence

An offence of non-fatal suffocation and strangulation was created in the *Criminal Code* (WA) s 298 commencing on 1 October 2020. This offence requires a person to unlawfully impede another person's normal breathing, blood circulation (or both) manually or by using an aid blocking (completely or partially) another person's nose, mouth or both or applying pressure to a person's neck.²⁶⁸

This offence may be tried on indictment in a higher court or summarily in the Magistrates Court.²⁶⁹ If the offence is heard in a higher court, the maximum penalty is seven years if the offence is committed in circumstances of aggravation which includes where the offender is in a family relationship or committed in breach of a restraint order.²⁷⁰ In other cases, the maximum penalty is imprisonment for five years. If the offence is heard in the Magistrates Court, the maximum penalty for an offence committed in circumstances of aggravation is three years' imprisonment and a fine of \$36,000. In other cases, the maximum penalty is imprisonment for two years and a fine of \$24,000.

Prior to the introduction of the *Criminal Code* (WA) s 298, strangulation could be dealt with by a charge of attempted murder (s 282 – maximum penalty is life imprisonment) or the offence of disabling in order to commit an indictable offence (s 292 – maximum penalty is 20 years' imprisonment). Absent proof of these offences, an alternative charge would be common assault contrary to the *Criminal Code* (WA) s 313. This is a summary offence and the maximum penalty if the offence is committed in circumstances of aggravation is imprisonment for three years and a fine of \$36,000, and in other cases, imprisonment for 18 months and a fine of \$18,000.

4.5.2 Statistical information

The Council does not have any information about the sentences imposed for this offence.

4.6 Northern Territory

4.6.1 The offence(s) and statutory maximum sentence

An offence of choking, suffocation or strangulation in a domestic relationship was introduced into the *Criminal Code* (NT) s 186AA in 2020. This offence applies if the

²⁶⁸ In the *Family Violence Legislation Reform Bill 2019* (WA) second reading speech, the Attorney-General highlighted the distinct risk of strangulation in circumstances of family violence, see, Western Australia, *Parliamentary Debates*, House of Assembly, 27 November 2019 (John Quigley).

²⁶⁹ *Criminal Code* (WA) s 5.

²⁷⁰ *Ibid* s 298, 221.

person is in a domestic relationship with the other person, and the person intentionally chokes, strangles or suffocates the other person in circumstances where the other person does not consent to the choking, strangling or suffocating and the person is reckless in relation to that circumstance. The maximum penalty is five years.²⁷¹

Prior to the introduction of the *Criminal Code* (NT) s 186AA, there was a specific strangulation offence that applied if the person choked, suffocated or strangled a person with the intent to commit an indictable offence.²⁷² Other offences of general application such as recklessly endangering life or recklessly endangering serious harm also applied, as did the offence of assault. The maximum penalty for common assault was imprisonment for one year.²⁷³ However, if the person assaulted was female and the offender was male, the maximum penalty was imprisonment for five years.

There is a mandatory sentencing scheme in the Northern Territory for violence offences. If the strangulation offence causes physical harm or involves an offensive weapon, it is a level 5 offence. Level 5 offences have a mandatory minimum sentence of three months actual imprisonment for a first offence and 12 months actual imprisonment for second or subsequent offence.²⁷⁴ In other circumstances, the offence is a Level 3 offence which means that an actual sentence of imprisonment must be imposed for the first offence and a three month mandatory minimum sentence of imprisonment for a second or subsequent offence.²⁷⁵ Exceptional circumstances can apply and there is provision for the court to partly suspended a sentence of imprisonment where the court must impose a sentence of actual imprisonment.²⁷⁶

4.6.2 Statistical information

The Council does not have any sentencing information in relation to this offence.

4.7 New Zealand

4.7.1 The provision and background to reform

An offence of strangulation or suffocation was created in the *Crimes Act 1961* (NZ) s 189A in 2018. This offence requires that a person intentionally or recklessness impede a person's normal breathing, blood circulation or both by blocking a person's nose and/or mouth or applying pressure on or to a person's throat and/or neck. It has a maximum penalty of seven years' imprisonment.²⁷⁷

²⁷¹ In the Justice Legislation Amendment (Domestic and Family Violence) Bill 2019 (NT) explanatory statement, the seriousness of strangulation was identified, see Explanatory Statement, Justice Legislation Amendment (Domestic and Family Violence) Bill 2019 (NT) 1–14, 1, 12.

²⁷² *Criminal Code* (NT) s 175.

²⁷³ *Ibid* s 188.

²⁷⁴ *Sentencing Act 1995* (NT) ss 78CA(1)(b), 78D, 78DA.

²⁷⁵ *Ibid* ss 78CA(3)(a), 78DC, 78DD.

²⁷⁶ See *Ibid* ss 78DG, 78DI.

²⁷⁷ This followed a recommendation of the New Zealand Law Commission, which identified (among other deficiencies in the existing legal position) the limitation of the maximum penalty available in the context of strangulation where an offender was charged with 'male assaults female': see New Zealand Law Commission (n 12) [1.6].

Previously, in cases where strangulation did not result in visible injuries, strangulation was changed as ‘male assaults female’ which had a maximum penalty of two years’ imprisonment.²⁷⁸

4.7.2 Statistical information

In 2018–19, there were 122 people charged with a strangulation/suffocation offence and 43 people convicted (35%), and in 2019–20 there were 916 people charged and 435 people convicted (47%).²⁷⁹ This indicates that there are difficulties in obtaining convictions for the offence. Table 4.9 sets out the most serious sentence received in the period 2018–19 and 2019–20. In the period 2019–20, it shows that 42.5% of offenders received a sentence of imprisonment and 22.5% received a sentence of home detention.

Table 4.9: Number of people convicted of strangulation/suffocation offences, by court and most serious sentence, 2018–2019, 2019–2020

Most serious sentence	2018–2019	2019–2020
Imprisonment	22	185
Home detention	5	98
Community detention	4	69
Intensive supervision	1	43
Community work	6	17
Supervision	4	11
Monetary	0	2
Deferment	0	4
Other	1	1
No sentence recorded	0	5
Total	43	435

Source: Ministry of Justice, Table 8b

In relation to the 22 offenders sentenced to imprisonment in 2018–19, the minimum sentence imposed was 44 days and the maximum sentence was 51 months (1550 days/four years and three months) and the median sentence was 20.3 months (620 days/one year and 8.3 months). In relation to the 185 offenders sentenced to imprisonment in 2019–20, the minimum sentence imposed was four months (120 days) and the maximum sentence was 60 months (1825 days/five years) and the median sentence was 21.8 months (665 days/one year and 9.8 months).²⁸⁰

Home detention periods were shorter. For the five offenders sentenced to home detention in 2018–19, the minimum sentence imposed was six months (180 days), the longest period of home detention was 12 months and the median sentence imposed was six months. In relation to 2019–20, the minimum sentence imposed was one month (30

²⁷⁸ Ibid [4.56].

²⁷⁹ Ministry of Justice, *Offences Related to Family Violence Data Tables*, Table 8a, 5 September 2020.

²⁸⁰ Information provided by Stephen Christie, Principal Advisor, Sector Analysis and Modelling, Ministry of Justice, email to Rebecca Bradfield dated 10 November 2020.

days), the longest period of home detention was 12 months and the median sentence imposed was seven months (210 days).²⁸¹

4.7.3 Case law

The approach to sentencing offenders under the *Crimes Act 1961* (NZ) s 189A is set out in a series of decisions of the New Zealand High Court beginning with *R v Ackland*.²⁸² In this case, the accused was convicted of one charge of strangulation, one charge of assault on a person in a family relationship and one count of assault with a weapon. This was the first appeal from a decision of the District Court imposing a sentence for strangulation as the lead charge. In considering the accused's appeal against sentence of two years and nine months' imprisonment, Cooke J set out the overall approach to sentencing for the new offence that would provide guidance until such time that there was an applicable Court of Appeal decision. Cooke J identified the following key factors as relevant when assessing the seriousness of the offending:²⁸³

- (1) Strangulation in the context of a domestic or intimate relationship/vulnerability of victim: This was due to the greater ongoing scope for, and likelihood of, coercion and control in the context. Further, victims in this context are more likely to die from further violence.
- (2) Threats, particularly threats to kill: The issuing of threats, particularly those including an element of coercion, was part of the adverse impact of the offence on the victim.
- (3) Loss of consciousness: This is an indicator of a longer, purposeful period of strangulation.
- (4) Multiple events: When the offending has formed part of a pattern of one of more events of strangulation, the intimidation and fear by the victim is accentuated and the adverse impacts are exacerbated.
- (5) Other violence/injury: Additional violence is an aggravating factor in much the same way that strangulation has been for other offending such as injuring with intent to injury. Although injury is not necessary of the offence, if injury does in fact occur, it is likely to be aggravating.
- (6) Significant impact on others: A significant impact on other persons, particularly children, may also be an aggravating factor. It is significant if the offence is committed on a person who is known to be pregnant, with consequential effect on the unborn child. It is also aggravating if children are present.
- (7) Breach of protection order: This should attract higher culpability.

Recognising the need for flexibility, particularly in the initial phase of the developing the sentencing pattern for the offence, Cooke J also set out an overall range that may provide some assistance for future courts:

²⁸¹ Ibid. It is noted the 12 months is the maximum period of home detention that can be imposed in New Zealand, see *Sentencing Act 2002* (NZ) s 80A.

²⁸² [2019] NZHC 312.

²⁸³ Ibid [26].

At the lower end would be offending involving strangulation as an intentional result of pressure being applied to the throat for a brief period, potentially without any of the above factors being present. Such offending might attract a starting point of six months to two years' imprisonment.

Offending at the highest end of the range involving a starting point of five to seven years' imprisonment may correspond to the offending described in [5.43] of the Law Commission's report — being offending with a number of the factors. I stress, however, it is not the number of the above factors that is important, but the overall nature and culpability of the offending. The above factors are intended simply to provide some guidance, or a framework for making that assessment.

In between these two categories is the mid-range of cases where a starting point of two to five years may be appropriate. No doubt case law over time will build up to give greater clarity on appropriate starting points for cases within this middle range. But it is important to take into account sentencing cases involving more serious offending that have included strangulation. The concern in relation to strangulation addressed by the new offence mainly arose from those cases where there was a lack of physical injury, or intent to cause that injury, have meant that charges needed to be laid for more minor offences, such as male assaults female. But where there have been strangulation cases involving more serious offending, such as offending under ss 188 [wounding with intent to injure] or 189 [injuring with intent to cause grievous bodily harm or injury] of the *Crimes Act 1961*, these cases will continue to provide considerable assistance.²⁸⁴

The worst case of strangulation described by the Law Commission was as follows:

An example of the worst class of strangulation within scope would feature the hallmarks of coercive or controlling behaviour and the terror we have identified. For example, a perpetrator enters the victim's home in breach of a protection order. After an altercation, he strangles her with his hands on and off for several minutes, leaving her struggling for breath, incontinent and unconscious. The victim thinks she will die and knows that the perpetrator has the power to kill her. Because he invaded her home, after the strangulation, she lives in constant fear for her security and life. As a consequence, he has achieved coercion and control over her.

It is the terror that results from strangulation that is at the heart of this kind of criminal conduct. That terror is likely to seriously affect all aspects of the victim's life. In our view, the terror that results from this "worst class of case" is greater than the harm of a minor injury and at least equivalent to a serious physical injury.²⁸⁵

Based on an assessment of the factors outlined, Cooke J considered that the offending was broadly in the middle of the range and the sentence was not manifestly excessive.²⁸⁶

The approach of Cooke J in *Ackland* was subsequently considered in *Houkamau*²⁸⁷ and *T*,²⁸⁸ where both judges did not disagree with the factors identified by Cooke J but stressed that while the categorisation of offending into bands may be helpful, it was important not to approach to sentencing for strangulation in an overly mechanistic

²⁸⁴ Ibid [30]–[32].

²⁸⁵ New Zealand Law Commission (n 12) [5.43]–[5.44].

²⁸⁶ *R v Ackland* (n 282) [54].

²⁸⁷ [2019] NZHC 2743.

²⁸⁸ [2019] NZHC 3375.

fashion.²⁸⁹ In *Houkamau*, Thomas J noted that it was ‘not the number of the factors ... that [was] important but the overall nature and culpability of the offending’.²⁹⁰ Thomas J stated that ‘[f]amily violence is an extremely complex area and care is needed not to focus unduly, or only, on what might be described as key factors, falling into the trap of a somewhat mathematical approach to the exercise rather a proper consideration of the subtleties of the offending’.²⁹¹ Thomas J stressed that the principal rationale for the new offence was on ‘strangulation being used as a means of achieving coercion and control over the victim’²⁹² and so the need to recognise ‘the subtleties that are often involved in coercive and controlling behaviour, of which strangulation often forms part’.²⁹³ In *T*,²⁹⁴ Doogue J reiterated the views expressed by Thomas J and discussed the policy background to the creation of the offence of strangulation, including the identification of the features of the ‘worst class of strangulation’ by the Law Commission. This involved the ‘hallmarks of coercive or controlling behaviour and the terror’ — including home invasion, breach of protection order, unconsciousness and incontinence, the victim’s belief that they will die and knowledge that the perpetrator has the power to kill.²⁹⁵

Table 4.10 sets out a summary of the relevant factors identified in the High Court decisions that have considered appeals against sentence from the District Court of New Zealand for the offence of strangulation under the *Crimes Act 1961* (NZ) s 189A. These cases were all appeals by the offender against sentence — there were three successful appeals.

Table 4.10: Summary of High Court of New Zealand Appeals against sentence in relation to the *Crimes Act 1961* (NZ) s 189A

Name	Offences	Sentence	Relevant factors
<i>Walker-Oaariki v New Zealand Police</i> [2020] NZHC 1087	Strangulation Assault on a person in a family relationship	26 months’ imprisonment (strangulation) and 3 months (assault) served concurrently	In a domestic relationship Applied force to V’s throat for 4 to 5 seconds V did not lose consciousness Prior violence Only ended after interference by members of the public
<i>Mokaraka v New Zealand Police</i> [2020] NZHC 718	Threatening to kill Strangulation Assault on a person in a family relationship	27 months’ imprisonment (6 month increase for offending other than strangulation)	In a domestic relationship Threat to kill Other violence
<i>Lowery v R</i> [2020] NZHC 667	Assault with intent to injure Strangulation	32 months’ imprisonment	V did not lose consciousness

²⁸⁹ Ibid [35]–[37]; *Houkamau* (n 287) [32].

²⁹⁰ *Houkamau* (n 287) [32].

²⁹¹ Ibid [33].

²⁹² Ibid [31].

²⁹³ Ibid [33].

²⁹⁴ *T* (n 288).

²⁹⁵ Ibid [39].

4 Sentencing for Strangulation Offences in Other Selected Jurisdictions

Name	Offences	Sentence	Relevant factors
	Breach protection order		Serious intimate partner violence Violence over 2 consecutive days Strangulation was preceded by and accomplished through the use of other violence Breach of protection order Harm was significant
<i>Hugenholtz v New Zealand Police</i> [2020] NZHC 659	Strangulation x 2 Threatening to kill Assault with a weapon Assault on a person in family relationship Drive whilst disqualified Dangerous driving Other miscellaneous offences	45 months' imprisonment (starting point of 57 months for violence offences)	Loss of consciousness
<i>Parker v New Zealand Police</i> [2020] NZHC 479	Strangulation 3 x assault on a person in a family relationship 3 x intentional damage	20 months' imprisonment	Strangulation accompanied by a threat (It's not over until I say it is, do you hear me?). This was a means by which sought to exert maximum control and coercion In a domestic relationship Family home with children present Strangulation was culmination of a series of increasingly violent assaults
<i>Milne v New Zealand Police</i> [2020] NZHC 358	Strangulation Assault with intent to injure	29 months' imprisonment (strangulation offence) Reduced on appeal from 32 months' imprisonment (strangulation offence) Concurrent 18 months' imprisonment (assault)	Occasion of him purposely asserting his control Domestic relationship Some additional violence but only to minor degree Young children present but not at risk and very young
<i>T v New Zealand Police</i> [2019] NZHC 3375	Strangulation Assault with intent to injure 2 x Breaching release conditions Intimidation	36 months' imprisonment	V rendered unconscious and incontinent. Factors that are indicators of near fatal strangulation Home invasion Controlling nature of his actions served to isolate

Name	Offences	Sentence	Relevant factors
			the V and heightened sense of helplessness Offending was prolonged and escalated in nature from simple physical assault to more violent physical assault combined with psychological control Impact on V was significant
<i>Jenner v New Zealand Police</i> [2020] NZHC 62	Strangulation Assault with intent to injure Breach of protection order	36 months' imprisonment (strangulation) 18 months' imprisonment concurrent (assault and breach of protection order) Changed on appeal from cumulative	Loss of consciousness Other violence Domestic relationship Threats made during the assault Breach of protection order
<i>Houkamau v New Zealand Police</i> [2019] NZHC 2743	Strangulation Assault on a person in a family relationship	250 hours community service and 12 months supervision (changed from 7½ months home detention)	V did not lose consciousness No children involved Took place in home Following an earlier assault
<i>Ackland v New Zealand Police</i> [2019] NZHC 312	Strangulation Assault on a person in a family relationship Assault with a weapon	33 months' imprisonment	Loss of consciousness Accompanied by a verbal threat of death Prolonged violence In the home and in the presence of young children

5 OBSERVATIONS

This chapter provides a summary of the key findings from the paper addressing the Terms of Reference and sets out the observations of the Council arising from its research and consultations.

5.1 Addressing the Terms of Reference

The Attorney-General required that the Council undertake research and make observations against the following terms of reference:

- 1. In Tasmania, in how many cases and in what circumstances has non-fatal strangulation, choking or suffocation been considered as a sentencing factor and in relation to which offences? What were the sentencing outcomes in those cases?**

In the Tasmanian context, in the period 2010 to 30 November 2020, the Council identified 77 cases where acts of non-fatal strangulation were sentenced in the Supreme Court, and in 54 cases (70.1%) these involved family violence. As disclosed by the sentencing comments, in cases involving intimate partner violence, there was a history of family violence, either against the complainant and/or other female partners in 30 cases (55.6%). In some cases, the prior violence had included strangulation.

The most commonly charged offence in cases of non-fatal strangulation was common assault contrary to the *Criminal Code* (Tas) s 184. This was charged in 66.3% of all cases and 81.5% of family violence cases. Other assault offences relied upon were aggravated assault contrary to *Criminal Code* (Tas) s 183, assault on a pregnant woman contrary to the *Criminal Code* (Tas) s 184A, persistent family violence contrary to the *Criminal Code* (Tas) s 170A where assault is one or more of the incidents relied upon and assault a police officer. Typically, where an offender is charged with an assault offence, the offender was also charged with other charges (76.8% of cases), or, in relation to single counts of assault, strangulation was only an aspect of the conduct (78.5% of single counts of assault). Other offences identified were attempted murder, unlawful act intended to cause bodily injury, persistent family violence, aggravated robbery and affray.

An analysis of the Tasmanian Supreme Court sentencing comments also showed the connection between sexual assault and non-fatal strangulation, particularly in the context of family violence. As noted, there is one case where the offender was sentenced for a number of offences including attempted murder and attempted rape, in addition to an aggravated assault involving strangulation (assault with intent to rape). There were eight cases where the offender was sentenced for sexual offences and an assault offence in circumstances where the assault involved non-fatal strangulation. There was also a further case where the offender was sentenced for rape and attempted rape, where the factual circumstances of the rape were that the offender put his hands around the

complainant's throat and made it difficult for her to breathe and so she submitted. In eight of these 10 cases, the offender was the partner or former partner of the complainant. The association between sexual assault and non-fatal strangulation was also an issue identified in the stakeholder consultations held with those organisations assisting victims/survivors of sexual and family violence.

In relation to offenders sentenced for assault contrary to the *Criminal Code* (Tas) s 184 in circumstances involving non-fatal strangulation, for all counts, 94.7% received a custodial sentence (imprisonment, partly suspended and fully suspended sentence). For all counts of assaults that were committed by an intimate partner, 92.9% received a custodial sentence. For all counts of assault, the longest sentence imposed was 42 months (six years and six months' imprisonment). This was a case involving intimate partner violence. The shortest sentence was six months' imprisonment for all assaults and eight months for intimate partner violence. The median sentence in both cases was 24 months' imprisonment.

There has been recognition by the DPP (in the charging guidelines) and the Court of Criminal Appeal of the seriousness of non-fatal strangulation, particularly in the context of family violence. The DPP has issued charging guidelines that provide advice about charging for assault in the context of family violence, in regard to choking, strangulation or smothering. This states that such conduct is 'grave criminal conduct' and regardless of injury, a charge under the *Criminal Code* (Tas) should be considered. This is contrary to the guidance provided for assault generally, which stresses the degree of injury caused rather than the risk of injury as the touchstone for charging assault under the *Criminal Code* (Tas) rather than the *Police Offences Act* (Tas). As noted, the approach taken by the Office of the DPP to charging is relevant to sentencing as it is determinative of the court in which the matter is heard and the potential maximum penalty that can be imposed. The Court of Criminal Appeal has also highlighted the seriousness of strangulation and smothering by focusing on its inherent risk rather than the identification of physical injury.

Sentencing for assault involving non-fatal strangulation has resulted in heavier sentences being imposed than for assault contrary to the *Criminal Code* (Tas) s 184 generally. There were more sentences of imprisonment imposed (47.3% compared to 37.6%) and the median sentence in terms of the length of imprisonment imposed was more than double (24 months compared to 10 months).

2. In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence), what have been the sentencing outcomes and, where information is available, what factors have the courts considered in sentencing the offender?

There are jurisdictional differences in the sentences imposed for offences of non-fatal strangulation. As noted, this reflects the different sentencing practices in other jurisdictions and differences in the offences of non-fatal strangulation.

Statistical sentencing data was available from South Australia, New South Wales, Queensland and New Zealand, as shown in Table 5.1.

Table 5.1: Sentencing for strangulation offences, South Australia, New Zealand, Queensland and New South Wales.

Jurisdiction	Proportion receiving sentence of imprisonment	Shortest sentence (months)	Longest sentence (months)	Median sentence (months)
Queensland	79%	2	48	24
New Zealand	42.5%	4	60	21.8
New South Wales <i>Crimes Act 1900</i> (NSW) s 37(1)	58.2	2	81	18
New South Wales <i>Crimes Act 1900</i> (NSW) s 37(1A)	47.9	2.9	24	13.5
South Australia	42.8%	25	52	n/a ²⁹⁶

It is also important to note that in several jurisdictions the new offence can be tried on indictment or as a summary offence. This is the case in New South Wales, ACT, South Australia and Western Australia. This limits the maximum sentence length that can be imposed when the offence is dealt with in the summary jurisdiction.

Relevant sentencing factors identified in other jurisdictions reflect the aggravating factors emphasised by the Tasmanian Court of Criminal Appeal including the serious and dangerous nature of strangulation, the fact that it has been shown to be a predictive indicator of escalation in domestic violence offences, and its prevalence in the context of domestic violence. Other aggravating factors identified have been the strangulation occurring in the domestic context, the vulnerability of complainants, the existence of accompanying threats to kill and the presence of children. Courts have focused on the need for punishment to be imposed to deter (the offender and others) to protect women from violence by men and to recognise the harm inherent in non-fatal strangulation.

3. In those jurisdictions that have introduced an offence of non-fatal strangulation (or cognate offence) for what other offences was the offender also sentenced at the same court event?

As with Tasmania, when an offender is sentenced for the offence of non-fatal strangulation, he or she is often sentenced for another offence, commonly assault or assault causing bodily injury and breach of a family violence order. Other offences included breach of bail and property damage.

This has been examined in Queensland, where there were 404 cases involving strangulation. In 287 of those cases strangulation was the MSO, and in only 12.2% of cases was this the only offence. There were also an additional 117 cases where strangulation was not the most serious offence and the offender was sentenced for another offence as the MSO, most commonly assault occasioning actual bodily injury. Other offences commonly sentenced at the time of strangulation (in cases where strangulation was the MSO) included assault, assault occasioning actual bodily injury, breach of a violence order, property damage and breach of bail. In New South Wales,

²⁹⁶ There were only three offenders sentenced for a strangulation offence as the most serious offence.

there were 406 offenders sentenced in the District and Local Court combined for 438 offences against the *Crimes Act 1900* (NSW) s 37(1) and for 1037 other offences. There were 216 offenders sentenced in the Local Court (no cases in the District Court) for 234 offences against the *Crimes Act 1900* (NSW) s 37(1A) and for 666 other offences. As with Queensland, for both offences in New South Wales, other common offences were assault offences, breach of apprehended violence orders, breach of bail and property damage. In other Australian jurisdictions, the Council was not able to examine this issue for all cases, but in those cases that were identified by the Council, usually, an offender was sentenced for multiple counts at the same time as a strangulation offence. In South Australia, in five out of the six cases sentenced in the District Court, the offender was sentenced for multiple offences, typically assault offences. Further, in New Zealand, an offender was sentenced for multiple counts in all of the New Zealand High Court decisions identified. Other offences included assault offences, breach of a protection order and threat to kill.

5.2 The Council's observations

After reviewing the sentencing approach in Tasmania and elsewhere, and drawing on the literature concerning non-fatal strangulation, the Council makes the following observations:

- Non-fatal strangulation is recognised as a serious form of criminal conduct by the DPP in its approach taken to charging, and by the Supreme Court of Tasmania, separate from any physical injury that is caused by the strangulation. There has been recognition of the inherent dangerousness of the conduct as well as its use as a feature of coercive control in the context of family violence.
- There has been a shift from a focus on physical injuries resulting from strangulation to its potential for serious harm, including lasting psychological harm (regardless of whether there were visible injuries caused as a result of the strangulation).
- The circumstances identified by sentencing judges in cases of non-fatal strangulation typically describe a number of violent acts as well as verbal abuse. In these cases, the offender may be sentenced for a single count of an offence (usually assault) that involves numerous acts of violence in the particulars of the count or multiple offences relating to a series of violent acts.
- In nearly all cases where an offender is sentenced for multiple counts, a global sentence has been imposed.
- There is no noticeable disparity between sentencing for non-fatal strangulation in the Supreme Court of Tasmania and sentencing in Queensland, Australian Capital Territory, South Australia and New Zealand. Sentencing was also similar in New South Wales in terms of the proportion of sentences that were terms of full-time imprisonment. Sentencing was also broadly similar when examining sentences based on the minimum sentences imposed with Tasmanian median sentences being longer. The maximum sentence imposed for the *Crimes Act 1900* (NSW) s 37(1A) was also shorter than the maximum sentence imposed for a single count of assault contrary to the *Criminal Code* (Tas) s 184. However,

maximum sentences imposed in New South Wales for strangulation contrary the *Crimes Act 1900* (NSW) s 37(1), which applies when a person is rendered unconscious, insensible or incapable of resisting was longer than the maximum sentence imposed for a single count of assault in Tasmania.

- As indicated, the Council has not considered the issue of whether or not a standalone strangulation offence should be introduced in Tasmania. As required by the Terms of Reference, it has confined itself to a consideration of the sentencing approach to offences involving conduct of non-fatal strangulation. In sentencing cases, clear statements have been made in Tasmanian courts in relation to the heightened risk of future and escalated violence and its prevalence in family violence. It has been recognised by sentencing courts as a serious form of violence. However, conduct involving non-fatal strangulation is a particular of a general offence such as assault, and so the prevalence of non-fatal strangulation is not readily captured in the statistical data or recorded on an offender's criminal record. There is no 'red flag' created to allow for better risk assessment and increased protection for family violence and other victims.
- As noted, strong statements have been made by Tasmanian courts about the seriousness of non-fatal strangulation but this is only apparent from reading the judgments of the court. The Council's view is that the relevance of non-fatal strangulation as an aggravating factor in sentencing should be set out in legislation to provide for greater education of the community.

Accordingly, the Council makes three suggestions that may be considered for possible reforms to sentencing laws in Tasmania. These proposals for reform were supported by those who participated in the stakeholder consultation forums, the Safe at Home Coordination Unit representative and the Director of Public Prosecutions. The suggested reforms would allow for a record of strangulation and suffocation to be created on an offender's criminal record and may also provide for community education and would be a strong statement about the seriousness of non-fatal strangulation/suffocation:

- (1) amend the *Sentencing Act 1997* (Tas) to provide that strangulation and suffocation are aggravating circumstances in relation to an offence;
- (2) amend the *Family Violence Act* (Tas) s 13A to provide for recording of non-fatal strangulation as a particular of a family violence offence on a person's criminal record; and
- (3) amend the *Sentencing Act 1997* (Tas) to provide for the recording of non-fatal strangulation as a particular of the offence on a person's criminal record in cases other than family violence cases.

Particulars provide details or information about the circumstances of the offence so as to give the person reasonable information about the matter complained of.²⁹⁷

Although the Council does not report on sentencing in the Magistrates Court, non-fatal strangulation cases are dealt with in that jurisdiction, and accordingly, it is the Council's view that any sentencing reform should apply in both the Supreme Court and Magistrates Court. This was also supported by those attending the stakeholder forums,

²⁹⁷ *Justices Act 1959* (Tas) s 30(1)(b).

the Safe at Home Coordination Unit representative and the Director of Public Prosecutions.

5.2.1 Proposal 1: Amend the *Sentencing Act 1997* (Tas) to provide that strangulation and suffocation are aggravating circumstances in relation to an offence

This proposal provides for the *Sentencing Act 1997* (Tas) to have a declaratory function in relation to expressly recognising the seriousness of strangulation and suffocation, and so may have a role in educating the community. Generally, aggravating and mitigating sentencing factors relating to the harm caused by the offence and the culpability of an offender are found in common law principles. However, in other jurisdictions, sentence aggravations provision in legislation are common.²⁹⁸ In Tasmania, there are also a small number of sentence aggravation provisions that apply in specific contexts. The *Sentencing Act 1997* (Tas) s 11A sets out aggravating circumstances that are to be taken into account in sentencing certain sexual offenders, and s 11B specifies that in determining the appropriate sentence for an offender, the court is to take into account as an aggravating circumstance in relation to the offence, whether the offence was motivated by racial hatred or prejudice.²⁹⁹ The *Family Violence Act 2004* (Tas) s 13(a) provides that when determining sentence for a family violence offence, a court or judge may consider the presence of a child or knowledge of the complainant's pregnancy as aggravating features.

A similar approach could be adopted for non-fatal strangulation and suffocation, with an amendment being made to the *Sentencing Act 1997* (Tas) to provide that any strangulation or suffocation aspect of an offence is an aggravating feature of generic offences of violence. This approach reflects the statement of the Tasmanian Court of Criminal Appeal, and the approach taken in the DPP guidelines to charging for assaults involving strangulation, choking or smothering in the context of family violence. Such an approach also aligns with the recommendation of the New Zealand Law Commission that strangulation should be included as an aggravating factor in sentencing given that 'any strangulation aspects of ... offending could be understood to increase culpability because of the unique terror associated with it'.³⁰⁰ The Council's view is that this proposal is appropriate to reflect the inherent seriousness of strangulation and may assist in raising public awareness of strangulation and its seriousness.³⁰¹ Legislative recognition of the aggravating nature of strangulation, in this way, has an important communicative and educative role for victims and perpetrators, the broader community as well as those involved in the criminal justice system.

²⁹⁸ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report 14, 2011) 42.

²⁹⁹ The *Sentencing Act 1997* (Tas) s 11A was inserted following recommendations of the Sentencing Advisory Council, Tasmania, *Sex Offence Sentencing* (Final Report 4, 2015). The *Sentencing Act 1997* (Tas) s 11B was inserted following recommendations of the Tasmania Law Reform Institute, *ibid*.

³⁰⁰ New Zealand Law Commission (n 12) 49, Recommendation R4. If this proposal is adopted, the Council's view is that it would be desirable to provide legislative clarity about the scope of the conduct that amounts to strangulation or suffocation so as to give rise to its identification as an aggravating sentencing factor. This was also raised as an issue in the consultations with stakeholders.

³⁰¹ *Ibid* 55–56.

5.2.2 Proposal 2: Amend the *Family Violence Act 2004 (Tas)* s 13A to provide for recording of non-fatal strangulation as a particular of a family violence offence on a person's criminal record

Recording conduct of non-fatal strangulation allows a person's future risk in the context of family violence to be identified and assessed. In this context, as observed by the New Zealand Law Commission:

Even if the people making decisions affecting victim safety are aware of the prevalence and significance of strangulation in family violence, it can be impossible for them to know whether a particular person has a history of strangulation because it is not recorded in Police or criminal records.³⁰²

In Tasmania, while judicial officers and police have an awareness of the significance of strangulation in the family violence context, there is no statutory requirement to have this formally recorded on a person's criminal record. This is information that should be apparent to police, courts and other service providers and should be recorded.

The Council's proposal is that where a court or judge sentences a person for an offence that occurs in a family violence context and a particular of the offence(s) involves strangulation or suffocation then legislation should require that this be identified on a person's criminal record. This approach builds on the legislative framework in set out in the *Family Violence Act 2004 (Tas)* s 13A(1):

If a person pleads guilty to an offence, or is found guilty of an offence, and the court or judge is satisfied that the offence was a family violence offence, the court or judge is to direct that the offence be recorded on the person's criminal record as a family violence offence.

This provision was introduced to strengthen the response to family violence by allowing for the identification of 'a perpetrator's pattern of family violence offending'.³⁰³ This section could be amended to require that the court direct that where an offence is to be recorded on a person's criminal record as a family violence offence and a particular of the offence is an incident of strangulation or suffocation, then that particular should also be recorded on the criminal record.³⁰⁴ The Council also notes that it is necessary that the practical implementation of this proposal (in terms of the way in which it appears on an offender's record) allows for the incident of non-fatal strangulation to be clearly visible and so communicated without the need for any further inquiry about the circumstances of the offending.

This reform would ensure that the courts 'build a progressive record of family violence-related [strangulation] criminal conduct that may be taken into account in bail

³⁰² Ibid 24, see Recommendation R3, 55.

³⁰³ Tasmania, *Parliamentary Debates*, House of Assembly, 14 March 2017, Second reading speech (William Hodgman) 94.

³⁰⁴ The recording of matters on a criminal record follows an administrative process involving the court and Tasmania Police. The process that applies in relation to the *Family Violence Act 2004 (Tas)* s 13(A) in relation to recording of offences as family violence offences proceeds on the basis that this is a direction of the court, which forms part of the outcome of the case that is then provided from the court to Tasmania Police for inclusion on a person's criminal record.

proceedings, sentencing and the trial of subsequent offences'.³⁰⁵ It would allow for a pattern of family violence offending involving strangulation to be identified through documentation. This would allow for improved safety planning as a result of an increased awareness of previous non-fatal strangulation offending. It would also allow for better risk assessment and delivery of programs by service providers who work with perpetrators of family violence. The need for there to be a 'red flag' was strongly communicated by participants in the stakeholder consultations.

5.2.3 Proposal 3: Amend the *Sentencing Act 1997* (Tas) to provide for recording of non-fatal strangulation as a particular of an offence on a person's criminal record in cases that do not involve family violence

In addition, aligned with Proposal 2 in relation to family violence offences, it is suggested that an amendment be made to the *Sentencing Act 1997* (Tas) that would apply in circumstances where the court or judge identifies that any strangulation or suffocation aspect of an offence is an aggravating feature of generic offences of violence, and where the case does not come within the scope of family violence as set out in the *Family Violence Act 2004* (Tas). Amending the *Sentencing Act 1997* (Tas) to require that the court direct that non-fatal strangulation or suffocation be recorded on a person's criminal record as a particular of an offence would allow such cases to be captured. . This would reflect the approach in the *Family Violence Act 2004* (Tas) by requiring that the particular be recorded on an offender's criminal record in cases of family violence offences. Again, this would allow for a clear record to be created of an offender's use of strangulation as a form of violence and provides a 'red flag' that would be easily identifiable in any subsequent police involvement or legal proceedings. It would also allow for improved safety planning and risk assessment by service providers.³⁰⁶

³⁰⁵ New Zealand Law Commission (n 12) 39 referring to Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Response* (ALRC Report 114, 2010) 572.

³⁰⁶ It is noted, for example, that conduct of non-fatal strangulation may not be restricted to violence against female partners, see Olivia McTaggart, *Record of Investigation into Death (Without Inquest)*, 3 July 2019; *Tasmania v Dobson*, 8 September 2015, Sentencing Comments (Blow CJ).

APPENDIX A: SUMMARY OF NON-FATAL STRANGULATION OFFENCES IN AUSTRALIA AND NEW ZEALAND

Jurisdiction	Offence	Provision	Wording of section	Date	Sentence
Australian Capital Territory	Acts endangering life Acts endangering health	<i>Crimes Act 1900</i> (ACT) s 28(2)(a), s 27(1) and (3)	Section 27(1) In this section: choke , a person, includes apply pressure, to any extent, to the person's neck. strangle , a person, includes apply pressure, to any extent, to the person's neck. suffocate , a person, includes the following: (a) obstruct, to any extent, any part of the person's— (i) respiratory system; or (ii) accessory systems of respiration; (b) interfere, to any extent, with the operation of the person's— (i) respiratory system; or (ii) accessory systems of respiration; (c) impede, to any extent, the person's respiration. (3) A person who intentionally and unlawfully— (a) chokes, suffocates or strangles another person so as to render that person insensible or unconscious or, by any other means, renders another person insensible or unconscious; (4) A person who does an act referred to in subsection (3)—	Definition in ss 27(1) and 28(1) inserted in 2019 S 28(2)(a) 2015	Section 27(3)(a) maximum 10 years Section 27(4) maximum 15 years Section 28(2)(a) maximum 5 years

TSAC – Sentencing for Non-fatal Strangulation – Research Paper 5

			<p>(a) intending to commit an indictable offence against this part punishable by imprisonment for a maximum period exceeding 10 years; or</p> <p>(b) intending to prevent or hinder his or her lawful apprehension or detention or that of another person; or</p> <p>(c) intending to prevent or hinder a police officer from lawfully investigating an act or matter that reasonably calls for investigation by the officer;</p> <p>is guilty of an offence punishable, on conviction, by imprisonment for 15 years.</p> <p>Section 28 (2) A person who intentionally and unlawfully—</p> <p>(a) chokes, suffocates or strangles another person</p>		
New South Wales	Choking, suffocation or strangulation	<i>Crimes Act 1900 s 37</i>	<p>Section (1A) – A person is guilty of an offence if the person intentionally chokes, suffocates or strangles another person without the other person’s consent.</p> <p>(1) A person is guilty of an offence if the person—</p> <p>(a) intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and</p> <p>(b) is reckless as to rendering the other person unconscious, insensible or incapable of resistance.</p> <p>(2) A person is guilty of an offence if the person—</p> <p>(a) chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and</p> <p>(b) does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, another indictable offence.</p>	<p>S 37(1) inserted in 2014</p> <p>s (1A) inserted in 2018</p>	<p>Section 37(1A) maximum 5 years</p> <p>Section 37(1) maximum 10 years</p> <p>Section 37(2) maximum 25 years</p>
Northern Territory	Choking, suffocation or strangulation in a domestic relationship	<i>Criminal Code s 186AA</i>	<p>(1) A person commits an offence if:</p> <p>(a) the person is in a domestic relationship with another person; and</p>	2020	Maximum penalty 5 years

			<p>(b) the person intentionally chokes, strangles or suffocates the other person; and</p> <p>(c) the other person does not consent to the choking, strangling or suffocating and the person is reckless in relation to that circumstance.</p> <p>(2) Strict liability applies to subsection (1)(a).</p> <p>(3) To avoid doubt, an offence against this section constitutes domestic violence under section 5 of the <i>Domestic and Family Violence Act 2007</i>.</p> <p>(4) In this section:</p> <p>chokes, strangles or suffocates, a person, includes the following:</p> <p>(a) applies pressure, to any extent, to the person's neck;</p> <p>(b) obstructs, to any extent, any part of the person's:</p> <p>(i) respiratory system; or</p> <p>(ii) accessory systems of respiration;</p> <p>(c) interferes, to any extent, with the operation of the person's:</p> <p>(i) respiratory system; or</p> <p>(ii) accessory systems of respiration;</p> <p>(d) impedes, to any extent, the person's respiration.</p> <p>domestic relationship, see section 9 of the <i>Domestic and Family Violence Act 2007</i>.</p>		
Queensland	Choking, suffocation or strangulation in a domestic setting	<i>Criminal Code</i> s 315A	<p>(1) A person commits a crime if—</p> <p>(a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent; and</p> <p>(b) either—</p> <p>(i) the person is in a domestic relationship with the other person; or</p> <p>(ii) the choking, suffocation or strangulation is associated domestic violence under the <i>Domestic and Family Violence Protection Act 2012</i>.</p> <p>(2) An assault is not an element of an offence against subsection (1).</p>	2016	<p>Maximum 7 years</p> <p>[under 2020 Bill increased to 14 years; makes it a serious violent offence with effect of prisoner serving 80% of sentence of imprisonment. It is mandatory for sentences of 10 years imprisonment</p>

			Note also <i>Criminal Code and Another Act (Choking in Domestic Settings) Amendment Bill 2020</i> inserts definition of choke, strangle and suffocate as in ACT		or more and discretionary for sentences of 5 years but less than 10 years]
South Australia	Choking, suffocation or strangulation in a domestic setting	<i>Criminal Law Consolidation Act 1935</i> (SA) s 20A	<p>A person who is, or has been, in a relationship with another person and chokes, suffocates or strangles that other person, without that other person's consent, is guilty of an offence.</p> <p>However, conduct that is justified or excused by law cannot amount to an offence against this section.</p> <p>(3) Two people will be taken to be in a relationship for the purposes of this section if—</p> <ul style="list-style-type: none"> (a) they are married to each other; or (b) they are domestic partners; or (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or (e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or (f) 1 is a child and the other is a person who acts in loco parentis in relation to the child; or (g) 1 is a child who normally or regularly resides or stays with the other; or (h) they are brothers or sisters or brother and sister; or (i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or (j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or (k) 1 is the carer (within the meaning of the <i>Carers Recognition Act 2005</i>) of the other. 	2019	Maximum 7 years

Tasmania	Disabling to aid commission of offence or flight of offender	<i>Criminal Code</i> s 168	S 168 Any person who, by any means whatever calculated to choke, suffocate, or strangle, or, by any violent means whatever, renders any person incapable of resistance, with intent thereby to facilitate the commission of an offence, or to facilitate the flight of an offender after the commission or attempted commission of an offence, is guilty of a crime.		
Victoria			Under consideration: Consultation questions by Department of Justice and Community Safety		
Western Australia	Suffocation and Strangulation	<i>Criminal Code</i> s 298	<p>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 —</p> <ul style="list-style-type: none"> (a) blocking (completely or partially) another person's nose, mouth, or both; or (b) applying pressure on, or to, another person's neck. <p>Alternative offence: s. 313.</p> <p>S 221 Term used: circumstances of aggravation</p> <p>(1) In this Part — circumstances of aggravation means circumstances in which —</p> <ul style="list-style-type: none"> (a) the offender is in a family relationship with the victim of the offence, other than where subsection (1A) applies; or (b) a child was present when the offence was committed, other than where subsection (1A) applies; or (c) the conduct of the offender in committing the offence constituted a breach of an order, other than an order under Part 1C, made or registered under the Restraining Orders Act 1997 or to which that Act applies; or (d) the victim is of or over the age of 60 years. <p>(1A) This subsection applies if —</p> <ul style="list-style-type: none"> (a) the offender was a child at the time of the commission of the relevant offence; and 	2020	<p>Penalty:</p> <ul style="list-style-type: none"> (a) if the offence is committed in circumstances of aggravation, imprisonment for 7 years; or (b) in any other case, imprisonment for 5 years. <p>Summary conviction penalty:</p> <ul style="list-style-type: none"> (a) in a case to which the Penalty paragraph (a) applies, imprisonment for 3 years and a fine of \$36 000; or (b) in a case to which the Penalty paragraph (b) applies, imprisonment for 2 years and a fine of \$24 000.

TSAC – Sentencing for Non-fatal Strangulation – Research Paper 5

			<p>(b) the only circumstance of aggravation is the offender was in a family relationship with the victim at the time of the commission of the offence, or a child was present at the time of the commission of the offence, or both.</p> <p>(2) In this section — family relationship has the meaning given in the Restraining Orders Act 1997 section 4(1).</p>		
New Zealand	Strangulation or suffocation	<i>Crimes Act 1961</i> (NZ) s 189A	<p>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:</p> <p>(a) blocking that other person's nose, mouth, or both:</p> <p>(b) applying pressure on, or to, that other person's throat, neck, or both.</p>	2018	Maximum 7 years

APPENDIX B: MONOGRAPH PREPARED BY DONALD M RITCHEY, MD AND PROVIDED TO THE DEPARTMENT OF PUBLIC PROSECUTIONS

Warning Appendix B contains images of injuries caused by strangulation that may distress some readers.

Strangulation

This monograph is provided to the Department of Public Prosecutions by forensic pathologist Donald M Ritchey, MD. It is for use in understanding features relevant to cases of asphyxia providing general definitions of terms. It is not intended as testimony or to support a particular case.

Asphyxia is a general term that is also non-specific and refers to death caused by inadequate oxygenation of cells. Asphyxial deaths can loosely be grouped into three categories:

1. **Strangulation** – the topic of this report
2. **Suffocation** - in which there is failure of oxygen to reach the blood and includes for example smothering caused by mechanical obstruction or occlusion of the external airways (the nose and mouth), choking, a type of asphyxia caused by obstruction a foreign object within the air passages and mechanical asphyxia in which there is compression of the chest such that normal respirations cannot occur.
3. **Chemical asphyxia** –refers to inhalation or ingestion of compounds that prevent utilisation of oxygen at the cellular level, the most common example being carbon monoxide. Nitrates and nitrites are powders sometimes used to commit suicide and are ingested causing methaemoglobinaemia.

The topic of this report is strangulation that is a form of asphyxia characterised by closure of blood vessels and/or air passages in the neck as a result of external pressure on the neck. There are three forms of strangulation:

1. Hanging
2. Ligature strangulation
3. Manual strangulation

In all three forms of strangulation the cause of death is cerebral hypoxia (inadequate oxygen in the brain) secondary to compression and occlusion of blood vessel supplying blood to the brain. Major arteries supplying blood to the brain include the internal carotid arteries and the vertebral arteries. Major venous drainage is by way of the jugular veins.

Manual strangulation is caused by pressure of the hand, forearm or other limb against the neck thereby compressing internal structures of the neck. The usual mechanism of death in such attacks is occlusion of the arterial blood supply to the brain. Occlusion of the airway by strangulation is exceedingly rare. Virtually all cases of manual strangulation are homicide in manner. One cannot commit suicide by manual strangulation because as soon as consciousness is lost pressure is released and consciousness is regained.

The carotid arteries by virtue of their location on the front sides of the neck are relatively easily compressed by direct pressure to the front of the neck. In contrast the vertebral arteries are quite resistant to direct pressure. Studies have shown that the amount of pressure necessary to occlude the carotid arteries is approximately 11 pounds. Pressure on the neck in the vicinity of the carotid arteries typically causes unconsciousness in an average of approximately 10 seconds. If the pressure is immediately released consciousness is regained in the subsequent 10-15 seconds.

Venous drainage of the head is by the jugular veins and vertebral venous plexus. Compression of the jugular veins is, relative to compression of the carotid arteries, more easily done with the amount of pressure necessary to occlude the jugular veins estimated to be approximately 4.4 pounds.

When external pressure applied to the neck is sufficient to occlude the venous return but arterial supply to the brain is not completely occluded, the cerebral blood pressure begins to increase dramatically. Asphyxial death can result in such situations when the pressure in the venous system increases to the maximum pressure within the arterial system precluding effective blood flow through the brain resulting in death. This increase in intracerebral pressure is also thought to be the principal mechanism by which petechial haemorrhages are produced. Petechiae are small, typically punctate haemorrhages of the conjunctival linings of the eyes and eyelids and peri-orbital skin. Virtually all fatal cases of manual strangulation have some petechiae in the conjunctivae however the presence of petechiae does not indicate that death was due to strangulation because petechiae can be seen in a number of other conditions including natural disease. Petechiae may also develop in victims of attempted strangulation who do not incur life-threatening degrees of asphyxia.

Occasionally it is claimed that the death of a healthy individual during manual strangulation is unintentional and the result of a so-called reflex cardiac death brought on by stimulation of the carotid sinuses. The carotid sinus is a thickened area of the common carotid artery where it bifurcates in the neck into the external and internal carotid arteries. The carotid sinus contains neural tissue sensitive to pressure and is an important part of the ability of the body to regulate blood pressure and provide a

constant supply of blood to the brain. In normal individuals pressure on the carotid sinus causes only minimal effects with a decrease in heart rate of approximately 6 beats per minute and only a slight reduction in blood pressure, approximately 10mm/Hg. Some individuals however have hypersensitivity to stimulation of the carotid sinuses. In these individuals the heart rate may slow dramatically causing hypotension (low blood pressure), loss of consciousness and rarely fatal ventricular arrhythmia or cardiac standstill/cardiac arrest. It is thought that most of these individuals are elderly with typically advanced natural disease of the heart and its blood vessels but there are cases in the literature of death in otherwise seeming healthy individuals. For these reasons neck compression is an inherently dangerous activity that should be expected to cause severe injury or death.

In most cases of manual strangulation the assailant uses more force than is necessary to subdue and kill his victim. Because of this traumatic injuries are typically seen on the skin of the neck in the form of abrasions, bruises and fingernail marks. Rarely no marks are evident externally. Dissection of the throat at autopsy typically reveals haemorrhage within the layers of muscle on the anterior neck referred to collectively as the strap muscles. Depending upon the age of the victim and the amount of force used, there may also be fractures of the hyoid bone or thyroid cartilage. Both of these structures (hyoid bone and thyroid cartilage) become increasingly calcified with age increasing the risk of fracture during strangulation. While in most cases of manual strangulations there is evidence of both external and internal injury to the neck in some cases there is no injury either externally or internally.

Smothering

Smothering is a form of asphyxia whereby there is occlusion of the external air passages of the mouth and nose. These deaths are most frequently homicide or suicide and only rarely accident.

The most common form of smothering is the suicide whereby a person places a plastic bag over the head. This is also referred to in the forensic literature as suffocation (asphyxia due to lack of oxygen in the environment- the environment being the plastic bag. There are several variations on this theme with suicides committed by people who suffuse inert gases into the bag (helium from party balloon tanks, nitrogen from industrial tanks, or other gases). Frequently persons who perform this act take medicines or drugs (ethanol, benzodiazepines) to induce sedation and reduce anxiety whilst placing the bag over the head that is often secured around the neck. Petechia are almost always absent in these cases because there is no compression of the neck structures and no concomitant increase in intracranial pressures.

Occasionally there are allegations of infant smothering by heavy blankets or bedding placed over their heads or quite commonly when infants are co- sleeping in bed with an adult that may be an exhausted and or intoxicated parent. Occasionally an alcoholic or other person is found face down in a pillow and is found to have high levels of ethanol with or without other CNS depressant drugs. This scenario overlaps with the concept of positional asphyxia.

Gags obstructing the mouth and nose can cause death by smothering. Even if death was not the intent these cases reflect homicides if victims die during the commission of a crime.

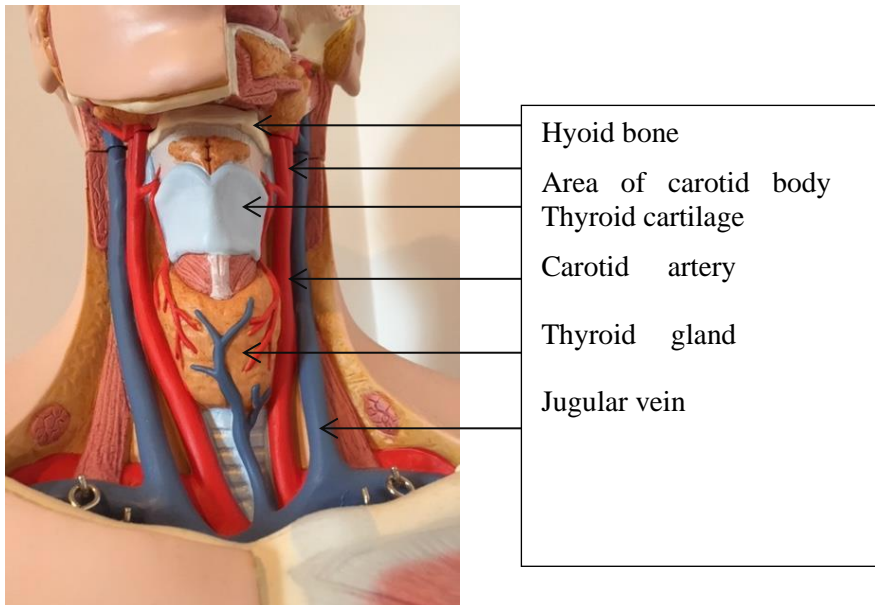
Murders committed by smothering typically involve the use of a pillow placed over the face and pushed down. If a conscious adult is the victim the perpetrator may suffer injuries such as scratches or bruises as the victim struggles to breathe. If a person is sedated or unconscious because of drug or alcohol toxicity there may be no struggle or resistance. Such homicides may leave little evidence of a crime or the evidence may be quite subtle to include small cuts or abrasions of the lips, mucosa and or tongue.

Smothering can also occur by placing a hand over the mouth and nose. The nostrils are typically occluded with one hand and the other hand would occlude the mouth usually in part by holding the jaw shut. Infants and infirm elderly may show little or no injuries in such a scenario. In adults and older children who can resist there may be bruises and or abrasions of the nose, chin, lips and/or mucosa of the oral cavity and tongue.

Glossary of Related Terms

Asphyxia:	a condition arising when the body is deprived of oxygen resulting in unconsciousness or death.
Anoxia:	no blood oxygen.
Hypoxia:	low blood oxygen.
Petechia:	a small red or purple spot caused by bleeding in the skin or lining of the eyes.
Strangulation:	a condition in which a part of the body is compressed causing lack of blood flow; for example a strangulated hernia.
Manual strangulation:	pressure applied to the neck using hands or other body part to apply pressure to the neck causing unconsciousness or death.
Hanging:	a type of strangulation in which a ligature around the neck is tightened by the weight of the body or head.
Ligature strangulation:	a type of strangulation in which a cord or other ligature is used to cause neck compression and unconsciousness or death.
Garrotting:	another name for ligature strangulation.
Smothering:	asphyxia caused by occlusion of the external airways (nose and mouth).

Images



Periorbital petechia of skin in case of mechanical asphyxia



Upward angle of ligature abrasion seen in hanging



Severe injuries of neck in a case of manual strangulation.

Same case as above, neck dissection

Bruises (contusions) of strap muscles

