

Non-fatal strangulation offence consultation paper feedback

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Summary

No to Violence (NTV) and Domestic Violence Victoria (DV Vic) welcome the opportunity to provide our feedback on Victoria's proposed stand-alone strangulation offence. We commend the Victorian Government for highlighting the serious issue of non-fatal strangulation in the context of family violence (FV), as well as the impacts of non-fatal strangulation on victim survivor's physical and psychological health and emphasising the association of non-fatal strangulation with FV risk and serious injury.

NTV and DV Vic would, however, like to highlight that FV, including non-fatal strangulation is not simply a matter for the civil and criminal legal systems to identify and respond to. Rather, FV is a complex social problem that all segments of the Victorian community play a role in addressing [1].

The proposal of a non-fatal strangulation offence to address FV harms is not unique to our jurisdiction. Such offences have been introduced as a means of addressing high risk FV in New South Wales, Queensland, and all but six states in the United States. While we welcome and strongly support the Victorian Government's objectives of supporting the safety of victim survivors and increasing perpetrator accountability, there is limited evidence that stand-alone strangulation offences in Australian and international jurisdictions has achieved these objectives [2]. Additionally, there is evidence from the United States that increasing prison terms for FV offences may act as a disincentive for reporting offences to police among victims [3]. While punishment plays an important role in setting normative standards in society, and NTV and DV Vic welcome the strengthening of accountability measures for perpetrators who use violence and abuse towards their families, attempting to stop FV perpetration through criminal sanction alone, without also addressing behaviour change needs, is likely to increase offending rather than deter it [4, 5].

Our organisations remain focused on increasing positive outcomes for victim survivors of FV and welcome undertakings by the Victorian government that leads to this outcome. Our organisations, however, remain unconvinced by the emergent data from either Australian or international jurisdictions that stand-alone strangulation offences deter perpetrators from engaging in this behaviour or increase victim survivor safety over and above FV-informed policing and prosecution strategies [6].

About our feedback

Our feedback is guided by the consultation questions provided by the Victorian Department of Justice and Community Safety. Answers herein are the result of conversations between NTV and DV Vic policy and research teams and represent points of consensus between our two organisations. We provide this feedback with an understanding that the Victorian government has committed to implementing a stand-alone strangulation offence. We provide the following feedback in a pro-active, collaborative, and solutions-focused spirit and welcome any opportunities to work with the Department in order to ameliorate any unintended consequences and fulfill the stated objectives of the legislation.

Our feedback contends that non-fatal strangulation occurs, in the majority of cases, within the context of FV. Furthermore, non-fatal strangulation has been established by both medical and legal scholarship as a predictive risk factor for future severe FV and homicide [7, 8]. Therefore, when non-fatal strangulation is identified, it is likely to be at a point of severe violence, abuse, and control. It is essential that this context is understood by those tasked to investigate and respond to non-fatal strangulation, especially with regard to questions of intent and consent. There will however be instances in which non-fatal strangulation occurs outside of the context of FV, which makes questions of consent and intent more pertinent. NTV and DV Vic encourage the Department to take an affirmative consent approach to evaluating such questions.

Responses to consultation questions

1. Is it appropriate to prohibit choking and suffocation in Victoria's new offence, or should the focus remain on non-fatal strangulation alone?

NTV and DV Vic believe that it is appropriate to prohibit choking and suffocation in Victoria's proposed new offence, but such behaviours should be included under the umbrella term of non-fatal strangulation. Our organisations' preference for such an approach is associated with the risk of legal defences arguing against the seriousness of one act in comparison to another. We believe it is important for the legislation to remain focused on the act of restricting air to a victim's airways irrespective of the precise methods used. We believe outlining a definition of non-fatal strangulation in clear precise language which provides context and examples (as the New Zealand legislation does) should enable all parts of the judiciary and extrajudicial stakeholders to adequately interpret the legislation so long as guidance, training, and supervision are also included as part of the implementation process.

2. Is a definition of the actions that constitute non-fatal strangulation (as in the New Zealand legislation) helpful in applying the law or is it preferable to leave such terms undefined in legislation?

A definition of the actions that constitute non-fatal strangulation is essential for administering and enforcing the proposed law effectively. It is essential that non-fatal strangulation is affirmatively defined in clear, concise language with as little ambiguity as possible. If there is ambiguity in the definition this may be exploited by legal defences and the purposes of the

offence may be undermined. It is also essential to outline what constitutes the offence and behaviour that sits outside of the offence in order to protect against the unintended criminalisation of innocent parties and other unintended consequences.

As the impetus for the proposed legislation emerged from the coronial inquest into the death of Joy Rowley - a victim of ongoing FV characterised by coercive control - we believe a definition inclusive of FV, in which most non-fatal strangulation occurs, is essential. In particular, it is important that the proposed legislation captures the gendered, powered, and patterned contexts in which the vast majority of FV and non-fatal strangulation occurs.

We welcome the Department's emphasis on mitigating potential unintended consequences of the proposed legislation. Our organisations believe that if the definition contained in the proposed legislation is outlined in concise language, with illustrative examples, and contextual background, this is likely to ameliorate most unintended consequences that may arise from the proposed legislation.

3. Are there challenges for justice, health and family violence sectors in implementing this offence if these terms are undefined in legislation?

Leaving terms undefined risks wide margins of interpretation. Such variance may result in different stakeholders implementing policies and practices that do not align with or support other parts of the system or the broader aims of the legislation. However, NTV and DV Vic would caution that relying on legislation alone to implement necessary changes to policy and practice across sectors is unlikely to be sufficient. The reform regime that has been undertaken in the Victorian FV sector since 2016, is an exemplar of the necessity of change management strategies, training and supervision when undertaking law and policy reform. NTV and DV Vic would like to draw the Department's attention to the Information Sharing Scheme sections of The Family Violence Reform Implementation Monitor reports [9, 10]. These sections outline the barriers and facilitators of rolling out legislation across sectors which are likely to be relevant to the proposed legislation. Specifically, we advise the Department to consider the need for change management strategies in the implementation of the proposed legislation and consider the challenges of implementing legislation over various sectors that play different and sometimes conflicting roles in the judicial and extrajudicial landscape of Victoria.

4. Do you have any views about the mental element (state of mind) of the person committing an offence of non-fatal strangulation?

Focus should remain on the harm to victims irrespective of the mental element. The legislation and the sentencing that it attracts ought to convey the seriousness of the act of non-fatal strangulation. However, NTV and DV Vic believe the mental element should factor into sentencing, as it does under the *Crimes Act* (1958) (s18). NTV and DV Vic assert that the proposed non-fatal strangulation legislation should reflect the distinction made in s18 between intentionally and recklessly causing injury.

We believe Coroner Sara Hinchey's call for a definition of non-fatal strangulation that does not necessitate a specific injury be caused is optimal, as such, intentionality should not denote

an intention to cause a specific injury. However, we do believe there is value in distinguishing intention to commit non-fatal strangulation and an offence of recklessly committing non-fatal strangulation which attracts a lesser penalty. We also recommend a further distinction of non-fatal strangulation that occurs in a FV context and non-fatal strangulation that occurs in other contexts. We call for this distinction for the primary reason that consent in the context of a coercive controlling relationship is a misnomer and consequently, evaluating whether a victim has consented to a particular behaviour is fatuous. Though consent cannot be granted in such cases, questions are still likely to remain about the intent of the perpetrator and further investigation will be required to establish if the act of non-fatal strangulation has occurred intentionally or recklessly.

In cases that occur outside of a FV context, questions of consent and intent are both likely to be pertinent. In evaluating the consent of a victim, NTV and DV Vic strongly recommend guidance that adopts interpretive principles that cohere with affirmative consent principles. These principles specifically outline that consent is ongoing, mutual, and arrived at by the free and voluntary agreement of all parties [11].

5. Should the accused know that the other person is not consenting? Or reasonably believe the other person is not consenting?

In cases in which a perpetrator is subjecting a victim to ongoing FV, explicit and implicit behaviours of coercion and control become normative. In such circumstances, a perpetrator may view a victim as freely consenting to a particular act that he desires, because he and the victim do not share equal power and the relationship has come to be characterised by control of one party over another. It is also possible that a victim may acquiesce to the desires of a perpetrator as a means of avoiding further violence. Because of both possibilities, and as highlighted in Q.4, a lack of consent should be the assumption of non-fatal strangulation that occurs in the broader context of FV. Additionally, assessing the self-reported beliefs of an accused about the consent or lack of consent of a victim in the context of FV are likely to elicit responses that are influenced by cognitive distortions, dissonance, and defensiveness [12, 13].

Under s.36 of the *Crimes Act 1958* “consent” is defined to mean “free agreement”. In the context of FV it is impossible for a victim survivor to agree to any (presumably sexual) act, let alone one that involves strangulation. We believe that the definition of consent contained in the *Crimes Act* ought to apply to the proposed non-fatal strangulation legislation. Furthermore, we believe that “affirmative consent” principles, in which unequivocal agreement to engage in a particular act is given by both (equal) parties is essential when assessing whether consent has been given [14]. Again, in the context of FV, such affirmative consent is impossible.

In cases where non-fatal strangulation occurs outside of a broader pattern of FV, we believe that the communicative and affirmative standard of consent ought to be applied, and we urge the department to provide guidance that eschews notions of “resistance and force” that have characterised, for example, rape definitions in the past [15]. When assessing whether an accused had a reasonable belief that the other party was consenting, affirmation of consent should be assessed, rather than evidence of physical force or resistance. The lack of physical resistance from the other party or lack of physical force from the accused should *not* be used

as evidence of consent. Parties should only be deemed to be consenting when evidence of free mutual agreement can be established.

6. Will requiring proof of lack of consent raise any issues for victims, investigators or the courts?

No more than it already does in other contexts. Though somewhat out of scope for the present consultation, in general, NTV and DV Vic recommend that the judiciary seek evidence that an accused has sought consent rather than focusing on whether a victim has given it. Otherwise, this may lead courts' to attempting to evaluate the "legitimacy" of an individual's subjective experience. Feminist scholars such as Rachael Burgin and Wendy Larcombe have explored the consequences of these processes, suggesting that they lead to re-traumatisation and reluctance to report experiences of victimisation. Instead, many feminist legal scholars and affirmative consent advocates argue the role of the courts ought to be to establish the perpetrator's level of legal culpability. NTV and DV Vic concur with this line of thinking and encourage the Department to move towards establish an accused's culpability rather than a victim's legitimacy.

7. Do you believe that a maximum penalty of five years' imprisonment and/or 600 penalty units is appropriate? Why/why not?

We believe that the proposed maximum penalty upholds the *sentencing principles of parsimony, proportionality, and parity*, and thus, in general NTV and DV Vic support the recommendation of a maximum of 600 penalty units. However, we remain sceptical about the proposed legislations capacity to uphold some of the *purposes* that underlie sentencing, in particular, the purpose of *rehabilitation*. As is outlined in the sixth edition of the highly influential *Psychology of Criminal Conduct*, when seeking change to any antisocial and violent conduct, there is a need for human services involvement [16]. This is because human services are better placed than corrections services to address the actual causes of such conduct. While we believe that the purposes of *just punishment, deterrence, denunciation, and community protection* are potentially all served by the recommended penalty, we remain concerned that the proposed penalty offers no opportunity for rehabilitation.

When deliberating on sentencing, we recommend a distinction be made between non-fatal strangulation that occurs due to reckless conduct and non-fatal strangulation that occurs due to intentional conduct. We believe that intentional conduct should attract a more severe penalty than reckless conduct, mirroring the distinction made in s18 of the *Crimes Act 1958*.

8. What changes are needed to ensure that participants in the family violence, health and criminal justice systems recognise the signs and significance of non-fatal strangulation?

There is a greater need in policy, practice and guidance to emphasise the context of FV, in which the majority of non-fatal strangulation occurs. Without such an understanding of FV context, there is a risk of incident-based approaches to the investigation of non-fatal strangulation, in turn, making misidentification more likely [6]. There is also a need for training to be undertaken with police that emphasises the seriousness of non-fatal

strangulation without minimising more subtle and lower risk forms of FV [2]. This is important for two main reasons, firstly, earlier intervention with offenders of FV is likely to reduce the cumulative harm perpetrated against victim survivors, and secondly, earlier intervention before patterns of violence and abuse have taken hold is likely to result in more effective and less intensive behaviour change and rehabilitation interventions with perpetrators [17]. The government ought to be cautious that in implementing the proposed law, the government's broader goals of FV prevention and early intervention are not inadvertently undermined.

There is a need for key stakeholders to recognise the signs of strangulation and understand how to engage both victim survivors and perpetrators in safe, trauma, gender, and violence informed conversations that explore such behaviours. The Victorian Institute for Forensic Medicine are experts in identifying the physical signs of both victimisation and perpetration of non-fatal strangulation. This organisation is well placed in providing guidance to key stakeholders in recognising the physical signs of strangulation. NTV and DV Vic on the other hand, are experts in exploring FV with perpetrators and victims respectively. Training with key workforces (including police), who are likely to be engaging with victims and perpetrators of non-fatal strangulation, is an essential step in recognising the signs and significance of non-fatal strangulation as well as understanding how to engage with clients who may have perpetrated or been victimised by such behaviours.

Lastly, any proposed legislation that may result in the incarceration of offenders ought to also consider the rehabilitation needs of offenders. Where possible, especially in circumstances where perpetrators have offended in the family context only, community corrections orders coupled with evidence-based treatment should be favoured over incarceration. This is due to offenders in lower risk categories tending to make greater change in community settings than in custodial settings [16, 18]. Imprisonment or indeed any type of criminal sanction, cannot be relied upon to change the violent and abusive behaviour of FV perpetrators, this change occurs in evidence-based treatment programs [18].

Improvements in the rehabilitation of FV perpetrators remains a priority of NTV in particular, but a goal that the whole sector, community, and most importantly, existent and potential victim survivors stand to benefit from. Further development, investment, and evaluation of intervention programs is required if the root causes of FV and non-fatal strangulation are to be addressed by the Victorian government.

9. What changes are needed to ensure that the signs and significance of non-fatal strangulation are recognised by the public at large?

NTV and DV Vic propose the Victorian government develop a set of three public health/primary prevention campaigns which seek to address the professionals most likely to come into contact with victim survivors and perpetrators of non-fatal strangulation (e.g. Nurses); girls and women at most risk of being victimised; and boys and men most at risk of perpetrating non-fatal strangulation. We believe such an approach may serve as a means of accessing the key audiences that the Victorian government needs to engage with. The campaigns should seek to engage all three audiences in their own language, avoid shaming or victim blaming, and steer away from the use of technical or convoluted language. NTV and DV Vic currently deliver training to specialist and non-specialist workforces in recognising and responding to signs of FV (including non-fatal strangulation). NTV and DV Vic are also experts

in engaging both perpetrators and victim survivors in difficult conversations exploring violence and abuse, both organisations are therefore well-placed to assist in helping develop messaging and campaign strategies.

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