Parliamentary Committees

Criminal Law (Domestic Violence) Amendment Bill (No.2) 2015

Report No. 23, 55th Parliament
Legal Affairs and Community Safety Committee
March 2016

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Acknowledgements

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Abbreviations

ALRC	Australian Law Reform Commission
BAQ	Bar Association of Queensland
Bill	Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015
FLP	fundamental legislative principle
Criminal Code	*Criminal Code Act 1899* (Qld)
department	Department of Justice and Attorney-General
DFVP Act	*Domestic and Family Violence Protection Act 2012* (Qld)
DJAG	Department of Justice and Attorney-General
QAILS	Queensland Association of Independent Legal Services
QIFVLS	Queensland Indigenous Family Violence Legal Service
taskforce	Special Taskforce on Domestic and Family Violence in Queensland, chaired by The Honourable Quentin Bryce AD CVO, established on 10 September 2014
taskforce report	Special Taskforce on Domestic and Family Violence in Queensland report, *Not now, not ever: putting an end to domestic and family violence in Queensland,* published 28 February 2015
WLS	Women's Legal Service (Qld)

Chair's foreword

This Report details the examination by the Legal Affairs and Community Safety Committee of the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015.

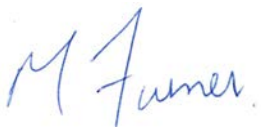
The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament in accordance with section 4 of the *Legislative Standards Act 1991*.

The committee recommends that the Bill be passed.

On behalf of the committee, I thank those who lodged written submissions on this Bill and participated in the committee's hearings and meetings. I also thank the Department of Justice and Attorney-General for the support they have provided the committee during this inquiry.

In particular, I thank all members of the committee for their efforts during this Inquiry and Committee Office staff for the support they have provided us.

I commend this report to the House.



Mark Furner MP

Chair

1. Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (the committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Police Service
- Fire and Emergency Services
- Training and Skills.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- for subordinate legislation – its lawfulness.

1.2 Inquiry process

On 2 December 2015, the Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills, introduced the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 (Bill) into the House. In accordance with Standing Order 131 of the Standing Rules and Orders of the Legislative Assembly, the Bill was referred to the committee for detailed consideration. By motion of the Legislative Assembly the committee was required to report to the Parliament by 7 March 2016.

The committee invited written submissions from the public and from identified stakeholders, to be received by 4.00 pm on 1 February 2016.

The committee received 20 submissions (see Appendix A for a list of submitters).[2]

The committee received a written briefing on the Bill and subsequent advice on issues raised in submissions from the Department of Justice and Attorney-General (the department) in February 2016. The department also provided an oral briefing during public committee proceedings at Parliament House in Brisbane on 24 February 2016.

The committee invited witnesses to give evidence and respond to questions on the Bill at a public hearing in Brisbane on 24 February 2016 (see Appendix B for a list of public hearing witnesses).

1 *Parliament of Queensland Act 2001* (Qld), section 88 and Standing Order 194.

2 View Submissions: http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/13-CriminalLawDVAB215

1.3 Policy objectives of the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015

Objectives of the Bill

The key objectives of the Bill are to:

- make provision for domestic and family violence to be an aggravating factor on sentence by amending the *Penalties and Sentences Act 1992* (Qld)
- create a new offence of choking, suffocation or strangulation in a domestic setting by amending the Queensland's *Criminal Code Act 1899* (Qld) (the Criminal Code)
- allow a court to receive a submission from a party on what they consider to be the appropriate sentence or sentence range for the court to impose.

Reasons for the Bill

Prompted by increasing numbers of domestic violence incidents in Queensland, a Special Taskforce on Domestic and Family Violence in Queensland (the taskforce), chaired by The Honourable Quentin Bryce AD CVO, was established by the previous government on 10 September 2014. The taskforce was requested to deliver a report to the Premier of Queensland by 28 February 2015.

On 28 February 2015 the taskforce released its report *Not now, not ever: putting an end to domestic and family violence in Queensland* (taskforce report).[3] As part of its consultation process, the taskforce conducted community meetings, surveys and focus groups around Queensland and received numerous written and formal submissions. The taskforce also considered the findings of two recent inquiries related to the issue of domestic violence, namely the 2014 Legal Affairs and Community Safety Committee's *Report No.82 - Inquiry on strategies to prevent and reduce criminal activity in Queensland*,[4] and the final report of the Queensland Child Protection Commission of Inquiry, headed by Commissioner Tim Carmody and released in June 2013.[5]

The taskforce made 140 recommendations intended to shape a domestic and family violence strategy to achieve a long term vision where, '*Queenslanders can live free from violence from a partner or family member, and where children do not have to see or experience family violence*'.[6]

The government accepted all 121 recommendations directed at government in its 18 August 2015 response to the report. In response to one of the taskforce's recommendations, the government has established the Domestic and Family Violence Implementation Council to monitor the implementation of recommendations by the taskforce and implement the Queensland Domestic and Family Violence Prevention Strategy.[7]

The government has addressed a number of taskforce recommendations for legislative reform. The Criminal Law (Domestic Violence) Amendment Bill 2015 was introduced on 15 September 2015 to address recommendations 119, 121 and 133 of the taskforce report. Proposed amendments in the bill included increasing maximum penalties for breaches of domestic violence orders under the *Domestic and Family Violence Protection Act 2012*, and enabling charges for criminal offences to indicate that they occurred in a domestic violence context. The bill also proposed that convictions for domestic violence offences be noted on a person's criminal history. The bill was passed on 15 October 2015.[8]

[3] Special Taskforce on Domestic and Family Violence in Queensland, *Not now, not ever: putting an end to domestic and family violence in Queensland*, Queensland, February 2015, pp 56-57.

[4] http://www.parliament.qld.gov.au/documents/committees/LACSC/2014/CrimeInquiry2014/rpt-082-28Nov2014.pdf

[5] http://www.justice.qld.gov.au/corporate/justice-initiatives/carmody-report-recommendations

[6] Taskforce report, p 18.

[7] Queensland Government, *Domestic and Family Violence Implementation Council*, February 2016.

[8] *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld).

On 2 December 2015, the government introduced the Criminal Law (Domestic Violence) Amendment Bill (No.2) 2015 (the Bill) in which two more recommendations from the taskforce report are now addressed.

In introducing the Bill, the Attorney-General explained that:

> *The reforms in the bill I am introducing today make further changes to increase perpetrator accountability based on two recommendations in the Bryce task force report following consultation with key stakeholders. These recommendations provide for the introduction of a circumstance of aggravation of domestic and family violence to be applied to all criminal offences so as to increase the maximum penalty for the offence—this is recommendation 118—and for the consideration of the creation of a specific offence of strangulation, recommendation 120.*[9]

The Attorney-General also advised that consultation was undertaken by the Department of Justice and Attorney-General on these two taskforce recommendations and that, to facilitate consultation, a discussion paper was released by the department on 12 October 2015. Twenty submissions were received.[10]

Not related only to domestic violence offences, the Bill also makes changes to the *Penalties and Sentences Act 1992* (Qld) and the *Youth Justice Act 1992* (Qld) to restore Queensland's longstanding sentencing practice whereby a court has the discretion to hear submissions from both parties to a matter in respect of appropriate sentencing. This practice had ceased since 2014 in response to a High Court decision.[11]

1.4 Background

Circumstance of aggravation

The taskforce report's recommendation 118 was that the Queensland government introduce a circumstance of aggravation of domestic and family violence to be applied to all criminal offences. A circumstance of aggravation increases the maximum penalty for offences, as defined in the *Penalties and Sentences Act 1992* (Penalties and Sentences Act).[12]

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

A 'circumstance of aggravation' must be charged in the indictment and becomes a matter the Crown must prove beyond reasonable doubt.

The taskforce report did not specifically recommend any particular construction or manner for the circumstance of aggravation to apply to a domestic violence setting. The government's discussion paper outlined a number of challenges and limitations in creating a generic circumstance of aggravation in the context of domestic violence. These include the possibility that a generic and broad-ranging charge could capture conduct not contemplated by the taskforce such as certain sporting activities; and the possibility that the charge could apply equally to all persons convicted of the offence. This may mean that an abused partner who pre-emptively assaults their abusive partner would be convicted without being able to rely on the history of previous abuse to mitigate the conduct.[13]

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9 Hansard transcript, 2 December 2015 (Introductory speech) p 3082.
10 Hansard transcript, 2 December 2015 (Introductory speech) p 3082.
11 *Barbaro & Zirilli v The Queen* [2014] HCA 2.
12 Taskforce report, p 305.
13 Queensland Department of Justice & Attorney-General, *Discussion paper: circumstance of aggravation and strangulation*, October 2015, p 5.

The discussion paper put forward an option to overcome the stated difficulties and still achieve the objectives of recommendation 118: it recommended the government consider amending section 9 of the Penalties and Sentences Act to make provision for domestic and family violence to be an aggravating factor 'on sentence', rather than attaching a circumstance of aggravation to any offence in the Criminal Code. The amendment to the Penalties and Sentences Act would provide that the court must have regard to whether the offence constitutes an act of domestic and family violence when determining the appropriate sentence for an offender.[14]

The court already has to consider a number of factors under the Penalties and Sentences Act when determining an appropriate penalty for an offender. These include the severity of the offence, the harm done to the victim and the effect of the offence on any child directly exposed to, or a witness to, the offence. According to the discussion paper, the proposed measure would allow the court to impose sentences at the higher end of the range for any offence committed in a domestic or family violence context.[15]

Specific offence of strangulation

Evidence considered by the taskforce noted that strangulation and choking in a domestic context are a strong predictive indicator of escalation in violent offending, including homicide.[16] The taskforce, and the subsequent discussion paper produced by the department, noted the importance of identifying or flagging this behavior to assist in assessing an offender's criminal history and the potential risk to victims.

The measure previously introduced by the *Criminal Law (Domestic Violence) Amendment Act 2015,* specifically in relation to recording domestic and family violence related convictions in response to taskforce recommendation 119, aims to provide a system for identifying offender history.

The government's subsequent discussion paper noted that there may be scope for a more tailored response to the offence of strangulation in a domestic violence context in the criminal justice system.

Submissions on penalty or range of penalties

This legislative amendment is not related specifically to domestic and family violence reform. The Bill contains amendments to restore a longstanding sentencing practice in Queensland, whereby courts have the discretion to hear submissions from parties as to what they consider to be the appropriate penalty or the range of appropriate penalties to be imposed at sentence.

In February 2014, the High Court of Australia in *Barbaro & Zirilli v The Queen* held that prosecutors were not permitted to make a submission to the court during sentencing proceedings on the appropriate sentence or the bounds of the range of appropriate sentences to be imposed by the court.[17] The decision resulted in a significant change to sentencing practice in Queensland.

The amendments to the Penalties and Sentences Act and the *Youth Justice Act 1992* (Youth Justice Act) revive the ability of the court to receive a submission from a party to the proceedings, on what they consider to be the appropriate penalty or the range of appropriate penalties to be imposed at sentence.

While this amendment may be related to the measures to amend section 9 of the Penalties and Sentences Act to make provision for domestic violence to be considered an aggravating factor on sentence, the measure would be applicable to all courts in sentencing for all matters, and therefore applies much more broadly than to matters involving domestic violence.

[14] Queensland Department of Justice & Attorney-General, Discussion paper, p 6.
[15] Queensland Department of Justice & Attorney-General, Discussion paper, p 7.
[16] Taskforce report, p 302.
[17] *Barbaro & Zirilli v The Queen* [2014] HCA 2.

1.5 Consultation on the Bill

The explanatory notes to the Bill state that the taskforce undertook extensive consultation in preparing its report including meeting with 367 groups of victims, service providers and community leaders.

The government advised that it had consulted specifically in regard to the implementation of taskforce recommendations 118 and 120 (to which the Bill is responding) and released a discussion paper for public consultation[18]. Twenty submissions (not publicly available) were received from key legal, police and community stakeholders, an academic and some private individuals.[19]

According to the explanatory notes, amongst those who responded to taskforce recommendation 118, circumstances of aggravation, there was wide support for an amendment to section 9 of the Penalties and Sentences Act. There were divergent views regarding the implementation of taskforce recommendation 120, creation of a specific offence of strangulation, with some in support of the creation of the new strangulation offence and others considering the existing law sufficient.

The explanatory notes report that amendments addressing *Barbaro* have been sought by some legal stakeholders.[20]

1.6 Outcome of committee considerations

Standing Order 132(1)(a) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends that the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 be passed.

Committee comment

The committee requests the Attorney General, in her second reading speech on the Bill, respond to concerns of submitters in relation to consent (including the concept of reckless indifference), the application of the terms "domestic setting" and "domestic relationship" in the proposed Section 315A offence, attempted offences and the Bill's application and effect on juveniles.

[18] Queensland Department of Justice & Attorney-General, Discussion paper, October 2016.
[19] Explanatory notes, p 4.
[20] Explanatory notes, p 4.

2. Examination of the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015

The committee's examination of the Bill is discussed in this section.

2.1 Circumstance of aggravation (clause 5)

The Bill would amend section 9 of the Penalties and Sentences Act to make provision for domestic and family violence as an aggravating factor on sentence, to indicate the intent that domestic violence offences should be met with harsher sentences.[21]

The Criminal Code provides when and what circumstances of aggravation can be considered in a particular offence. The broad definition of a circumstance of aggravation provided in the Criminal Code is:

> *[C]ircumstance of aggravation means any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance.*[22]

A circumstance is then considered 'aggravated' as defined in the Code in respect of that offence. For example, section 339 of the Criminal Code (Assaults occasioning bodily harm) provides that where an offender is, or pretends to be, armed with a dangerous weapon, or is in company of one or more others, the maximum penalty is 10 years imprisonment, rather than seven years imprisonment if those circumstances do not apply. The section notes that the Penalties and Sentences Act also states a circumstance of aggravation for an offence against that section.

A circumstance of aggravation must be charged by the prosecution and therefore becomes a matter that must be proved beyond reasonable doubt.[23]

Here though, the Bill proposes an alternative approach, providing for an aggravating factor that must be considered on sentence. During the public hearing the department advised that this has a different effect from an aggravating circumstance applied to an offence: the aggravating factor does not have to be charged by the prosecution and be proved beyond reasonable doubt as part of proving the offence. Once proven, the effect is that the context of domestic and family violence applies to the offence and the sentence is to be considered at the higher end of the range of sentencing for that offence.[24]

The department advised that there would be no prohibition on what can be relied upon in sentencing to establish that the context of domestic and family violence existed in respect of an offence, stating in the hearing that defence may rely on 'any material' to make a case.[25] The department had previously noted that the existence of an order made under the *Domestic and Family Violence Prevention Act 2012* (DFVP Act) is admissible with the leave of the court.[26]

The government proposes that the impact of the amendment to the Penalties and Sentences Act will be evaluated by a reconstituted Sentencing Advisory Council:

> *…as part of a reference to consider the impact that maximum penalties have on the commission of domestic violence offences. This will enable the government to have a clear*

[21] Queensland Department of Justice & Attorney-General, Discussion paper, October 2015, p 2.
[22] Criminal Code, s 1.
[23] Hansard transcript, 2 December 2015 (Introductory speech), p 3082.
[24] Hansard transcript, public briefing, 24 February 2016, pp 2-3.
[25] Hansard transcript, public briefing, 24 February 2016, p 5.
[26] Department response to submissions, 15 February 2016, p 5.

> *evidence base on what works in sentencing perpetrators of domestic and family violence so as to guide future law reforms.*[27]

The Attorney-General advised the Parliament that there was widespread support from stakeholders who responded to the department's discussion paper in relation to the proposed amendment.[28]

In respect of this amendment, general support was indicated by those who provided written submissions to this Inquiry. The BAQ had previously raised concerns, but these were addressed by the Bill's proposal and it notes:

> *…the amendment preserves judicial discretion, to the greatest extent possible, in sentencing offenders according to the particular facts and circumstances of their case.*[29]

At the committee's hearing the department clarified the BAQ's earlier objection:

> *I understand the Bar Association's objection was in relation to the literal implementation of recommendation 118, which was to apply across the entire Criminal Code offence book an add-on aggravating circumstance which would elevate each of the maximum penalties for individual offences. I understand their objection was that, if the effect was to increase the maximum penalties, the likelihood of people pleading guilty would decrease.*[30]

However, support for this amendment was not universal. The ALRC expressed the view that sentencing legislation should not distinguish between aggravating and mitigating factors, but rather include a non-exhaustive list of factors that are relevant to the court's discretion. Some reasons for this stance include:

- the concern that removing judicial sentencing discretion could mandate higher penalties when they are not just or appropriate
- that consideration of the domestic violence context of an offence would lead to a value judgement about the relative severity of offences committed against family members as opposed to those committed against strangers
- that prescription of a family relationship as an aggravated factor may duplicate existing sentencing factors.[31]

The Women's Legal Service (WLS) and the Queensland Association of Independent Legal Services (QAILS) supported making domestic violence an aggravating factor on sentence as proposed by the amendment, subject to '*ongoing monitoring by the relevant departments that considers the impact on victims of domestic violence and if there are any unintended consequences*'.[32]

The Queensland Indigenous Family Violence Legal Service (QIFVLS) proposed in its written submission that the amendment should contain an exhaustive definition for 'serious domestic violence' when referring to exceptional circumstances, including such offences as: '*any physical assault occasioning bodily harm, unlawful wounding, grievous bodily harm, acts intended to cause grievous bodily harm or attempted murder*'. This suggestion was not supported by the department in their response to this submission on the basis that the concept of exceptional circumstances is familiar to the courts already, and best assessed on a case-by-case basis.[33]

[27] Hansard transcript, 1 December 2015 (Introductory Speech), p 3083.
[28] Hansard transcript, 1 December 2015 (Introductory Speech), p 3083.
[29] Submission no. 19, p 2.
[30] Hansard transcript, public hearing, 24 February 2016, p 3.
[31] Submission no. 4, p 2.
[32] Submission no. 3, 28 January 2016.
[33] Department response to submissions, p 8.

In its written submission and during the public hearing, QIFVLS took the stance that the proposed circumstance of aggravation involving amendment to the Penalties and Sentence Act be extended to apply to the Youth Justice Act, reporting instances of young offenders committing domestic violence offences against their girlfriends. According to the QIFVLS, there should be '*a high-level sentence where it is compulsory that a juvenile successfully engage in ending domestic violence and family violence programs so that we can get away from that core offending behaviour*'.[34]

2.2 New offence of choking, suffocation or strangulation in a domestic setting (clause 3)

Current law

A person who unlawfully chokes, suffocates or strangles another person can now be charged under the Criminal Code with the offence dependent on the force used, the intent in committing the act, and the injury sustained by the victim. It would likely be one of the following offences:

- Common assault (section 335)
- Assault occasioning bodily harm (section 339)
- Grievous bodily harm (section 320)
- Torture (section 320A)
- Disabling in order to commit an indictable offence (section 315)
- Attempted murder (section 306).[35]

The department advises:

> *These offences cover factual scenarios ranging from a verbal threat to choke (common assault) to a strangulation accompanied by an intent to kill the victim (attempted murder). The maximum penalties for the offences range from 3 years imprisonment for common assault to life imprisonment for disabling in order to commit an indictable offence or attempted murder.*[36]

Section 315 of the Code, 'Disabling in order to commit indictable offence', specifically relates to strangulation. It provides:

> *Any person who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of a crime, and is liable to imprisonment for life.*[37]

At the public hearing the BAQ noted that the section 315 offence accounts for acts committed with an intention to commit another indictable offence, such as sexual assault or robbery.[38] Professor Heather Douglas, from the University of Queensland's TC Beirne School of Law, found this aspect of the current offence wanting, saying '*this requirement creates a significant limitation for its application'*.[39] The QIFVLS spokesperson reported at the public hearing that she had never seen charges using the offence in its current form.[40]

[34] Hansard transcript, public hearing, 24 February 2016, p 17.
[35] Queensland Department of Justice & Attorney-General, Discussion paper, p 8.
[36] Queensland Department of Justice & Attorney-General, Discussion paper, p 8.
[37] Criminal Code, s 315.
[38] Hansard transcript, public hearing, 24 February 2016, p 12.
[39] Submission no. 8, p 1.
[40] Hansard transcript, 24 February 2016, p 16

Intent of new offence

The taskforce noted that many of the submitters who related personal stories as part of the Inquiry had had these acts inflicted upon them and identified the importance of identifying this conduct to assist in assessing risk to victims and increasing protections for victims.[41] The WLS confirmed to the committee that it is 'very common' for clients of their service to have been victims of non-fatal strangulation in the context of a domestic violence relationship.[42] The WLS considers that such an act '*sends a very effective message to their victims that they have ultimate control over them and whether the victims live or die. It is a very serious and intentional act*'.[43]

Professor Heather Douglas also expressed support for the introduction of a new offence of non-fatal strangulation. She argues in her written submission that recognition through criminal justice responses that strangulation has occurred could contribute to efforts to rehabilitate the offender and protect the victim. She states:

> *It would warn support agencies that the violence has reached a serious level and that the victim is in serious danger. A specific strangulation offence will ensure that strangulation appears clearly on the criminal record of the accused and alert social services and future sentencing judges to the dangerous level of the offender's domestic violence history. Offence specificity also has an educative function, emphasising the particular context and seriousness of strangulation to police and the wider community.*[44]

The taskforce recommended the government consider the establishment of a new and separate offence of non-fatal strangulation because strangulation was a key predictor of domestic homicide. It also noted there were strong arguments against the creation of a specific offence.[45] These are discussed below.

The taskforce objective in recommending consideration of a new offence was to support the goal of holding perpetrators to account for their behaviour and:

- achieve information sharing about predictive violent domestic conduct (strangulation) to better inform risk assessment and increase protection for victims; and
- increase punishment for the act of non-fatal strangulation.[46]

In response to the department's consultation process on these amendments, there were 'divergent views' to the discussion about the legislative approach that should be taken to strangulation.[47]

The Attorney-General advised in her introductory speech that:

> *In light of the divergence of views that has emerged during consultation, a new offence is proposed but has been framed with a view to addressing a number of the difficulties raised by those stakeholders who did not support a new offence. For example, limiting application to a domestic and family violence context should address the concerns about the unintended capture of a range of conduct such as law enforcement, security and sport. The bill therefore amends the Criminal Code to create a new offence of choking, suffocation or strangulation in a domestic setting. The new offence will apply if a person,*

[41] Taskforce report, p 302.
[42] Submission no. 3, p 1.
[43] Hansard transcript, public hearing, 24 February 2016, p 6.
[44] Submission No. 8, p 1.
[45] Taskforce report, p 303.
[46] Taskforce report, p 302.
[47] Explanatory notes, p 4.

> *without consent, chokes, suffocates or strangles a person that they are in a domestic relationship with or that constitutes associated domestic violence. The offence will have a maximum penalty of seven years imprisonment. This offence and the significant penalty attached reflect the serious and dangerous nature of the offending behaviour and recognise the importance of deterring this prevalent conduct.*[48]

The explanatory notes to the Bill indicate the government sees that creating the new offence of non-fatal strangulation in a domestic setting would achieve the taskforce's objective:

> *The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide. The Taskforce noted the importance of identifying this conduct to assist in assessing risk to victims and increasing protections for them.*[49]

Further, the notes advise:

> *The introduction of the new offence is justified to protect vulnerable members of our community, identify this predictive violent domestic conduct, denounce this type of offending and provide adequate deterrence to perpetrators of this type of offending.*[50]

Professor Douglas submitted that there were difficulties in terms of satisfying the elements of the existing offences in cases of non-fatal strangulation:

> *While strangulation is arguably covered already by common assault, an assault charge underrepresents the seriousness of non-fatal strangulation given the high risk and danger associated with it. It is also true that non-fatal strangulation could in some cases be covered by other forms of assault (eg bodily harm) or grievous bodily harm, however the specific injuries associated with strangulation are often difficult to identify making these charges an uncomfortable fit. While attempted murder may be an appropriate charge in many cases of non-fatal strangulation the requirement to prove an intention to kill or do grievous bodily harm may be difficult to satisfy.*[51]

On the other hand, the BAQ did not support the creation of a new offence. It submitted that:

> *The Association considers it unlikely that the creation of a specific offence, with a maximum penalty equivalent to that for assaults occasioning bodily harm will further deter perpetrators, or add to the existing capacity of courts to denounce the conduct….the existing regime of offences and penalties (particularly with the amendment to section 9 of the Penalties and Sentences Act which would be achieved by clause 5 of the Bill) is apt to achieve those objectives.*
>
> *The additional objective of the proposed new offence is to facilitate a means of gathering information and statistics with the aim of identifying future risk. While the Association considers measures to reduce the risk of harm to victims important, the creation of a new, and unnecessary, offence is not an appropriate means (nor the only available means) to achieve those objectives.*[52]

[48] Hansard transcript, 2 December 2015 (Introductory speech) p 3083.
[49] Explanatory notes, p 2.
[50] Explanatory notes, p 3.
[51] Submission no. 8, p 1.
[52] Submission no. 19, p 3.

This is consistent with advice in the government's November 2015 discussion paper that the ALRC and NSW Law Reform Commission's 2010 report '*Family Violence – A National Legal Response*' expressed the position '*that new offences are justified only where it can be established that the mischief sought to be addressed cannot be adequately dealt with under the existing legislative framework*'. The BAQ considers that the existing legislative framework in Queensland is adequate to deal with these acts.

The discussion paper also notes that:

> *Being a 'code jurisdiction' the general approach to offence creation under Queensland's Criminal Code is not to create a series of highly specific offences to apply only to particular and confined factual scenarios but rather to establish overarching offences of general application to a wide range of factual scenarios. As a general proposition, creation of a new offence in the Criminal Code is not warranted where there is no identifiable legislative gap in the existing offences.*[53]

The BAQ suggested that the inclusion of more detailed information relating to domestic violence could be added to existing reporting systems of stakeholders such as the Queensland Police Service, and could achieve the stated objective of assisting to identify and protect victims.[54]

The BAQ reiterated at the public hearing that creating an aggravating circumstance of domestic and family violence on sentence, as is the effect of clause 5, would achieve the objective of increasing penalties in any event and therefore the creation of a domestic violence specific offence was not necessary nor would it have a deterrent effect:

> *The association's position in the submission is that the addition of a new offence is unlikely to have any real effect on deterrence. There are already more serious consequences that flow from other existing penalties. It is my experience and the experience of my colleagues that there continue to be cases of homicides and domestic relationships to suggest that not even the supposed deterrent factor of a mandatory life imprisonment term is enough to deter some people. In the end, in considering the merits of this proposed new offence, the deterrent factor or its impact on victims coming forward would not be the most important consideration in my view.* [55]

Broadly speaking, with the exception of the BAQ as outlined above, submissions to the committee's Inquiry into the Bill considered that the creation of a new offence was desirable.

Some submitters considered that the new offence should not be limited to 'a domestic setting'. This concern was addressed in respect of both the title of the new offence, and the element of the offence specifying the necessary domestic relationship between the offender and the victim.

One concern about the title of the offence including the term 'domestic setting' was that because the title of a section in an Act is to be used in interpreting the section, the provision potentially excludes its application to offences committed within domestic relationships but in public places.[56] The WLS submission points out that:

> *Domestic violence, especially post separation is not limited to domestic settings or violence in the home but can take place in public places, in restaurants, at contact handovers, in front of courts and at workplaces. We believe therefore the words 'domestic setting' should be removed.*[57]

[53] Department of Justice & Attorney-General, Discussion paper, p 9.
[54] Submission no. 19, p 3.
[55] Hansard transcript, public hearing, 24 February 2016, p 14.
[56] For example, submission 7.
[57] Submission no. 3, p 3.

The department made it clear that 'domestic setting' did not relate to the geographic location, as demonstrated by the following exchange:

> ***Miss Barton: …*** *So my understanding from your response is that domestic setting does not refer to a particular location but rather to provide for the existence of a relationship between the victim and the alleged perpetrator. I just wanted to clarify that ahead of the appearance of the Women's Legal Service today. Domestic setting refers merely to the existence of the relationship and that is the definition of domestic setting?*
>
> ***Ms Hughes:*** *That is exactly so. It is intended to be a context of the relationship. Certainly it is not an element of the offence that it occur in a domestic home or such.*[58]

At the public hearing the WLS advised that the broader issue is that:

> *Non-fatal strangulation should really be a crime across-the-board in Queensland for anyone who engages in that kind of activity. What we would say is that it is probably going to be domestic violence relationships that are more commonly going to be subject to the use of this offence and that you are making it harder for domestic violence victims by making it an extra element of the offence that needs to be prove beyond reasonable doubt. We just think that this is an activity that really everyone should not be engaging in, although acknowledging that it is probably more in domestic violence relationships that it occurs.*[59]

Restricting the offence to a domestic context is considered further below in respect of the relevant **element** of the proposed new offence.

Elements of the proposed offence[60]

All of the elements of a criminal offence must be proven beyond reasonable doubt for a conviction to be made.

The proposed new offence of *Choking, suffocation or strangulation in a domestic setting* would provide that a person commits a crime if:

- The person unlawfully chokes, suffocates or strangles another person, without the other person's consent; and
- either –
  - The person is in a domestic relationship with the other person; or
  - The choking, suffocation or strangling is associated domestic violence under the *Domestic and Family Violence Protection Act 2012* (DFVPA)

The offence would attract a maximum penalty of seven years imprisonment.

An assault is **not** an element of the offence. This has the effect of removing the possibility of a defence of provocation because that defence is only applicable to an offence where an assault is an element.[61]

[58] Hansard transcript, 24 February 2016, p 5.
[59] Hansard transcript, 24 February 2016, p 8.
[60] Clause 3, inserting proposed new s 315A to the Criminal Code.
[61] Criminal Code, s 269.

Unlawfully chokes, suffocates or strangles another person

The BAQ raised concerns about potential difficulties with a lack of definition for 'choking', 'suffocation' and 'strangulation' in its written submission, suggesting that the omission may complicate litigation by inviting argument, potentially involving medical evidence and evidence from complainants:

> *In circumstances where, if charges were brought under existing provisions, the conduct might clearly fall within the broader definition of, for example, assault, or grievous bodily harm.*[62]

In an issue previously not raised by the department's discussion paper or by written submissions to this Inquiry, the WLS expressed some doubt at the public hearing that the proposed offence would apply to neck compression, stating that in matters which result in death, '*there is a difference in the cause of death between matters involving strangulation and death by neck compression*'. The WLS suggested the committee seek expert assistance to ensure the proposed offence is wide enough to cover all harm resulting from such an act.[63]

The BAQ also expressed concern that the new offence '*might in fact have the unintended consequence of saying to the community that domestic violence by placing the hands around the throat is more serious than being hit with an object or punched in the face.'* [64]

On this, the department advised:

> *That definition has been taken largely from an existing offence under section 315 of the Criminal Code which, as noted by the task force report, is an offence of strangulation with intent to commit a further indictable offence. We have adopted that language because it is well understood by the court. The meaning of the words 'suffocation', 'choking' and 'strangulation' are well understood and have been considered by the court. We consider that those words will meet the policy objectives of covering strangulation related offences that occur within a domestic environment and will therefore meet the objectives of the task force report recommendation No. 120.*[65]

Without the other person's consent

According to the WLS, the defence that consent was given, or reasonably understood to have been given, is frequently relied upon as a defence to offences relating to sexual assault and rape.[66] Concerns have been raised during this Inquiry that as in those offences, the inclusion of consent as an element of the new offence will give rise to extended legal argument to the detriment of victims. For example the WLS at the public hearing advised:

> *The inclusion of this element will provide a very effective defence to this proposed offence as many women will be mute or frozen in fear at the time that the assault occurs or the strangulation occurs. We strongly disagree with the inclusion of the non-consensual element as an element of the offence. We actually believe that to include it will pretty well nullify the effectiveness of the offence. If you proceed and do include the element in*

[62] Submission no. 19, p 5.
[63] Hansard transcript, public hearing, 24 February 2016, p 7.
[64] Hansard transcript, public hearing, 24 February 2016, p 12.
[65] Hansard transcript, public hearing, 24 February 2016, p 3.
[66] Hansard transcript, 24 February 2016, p 6.

> *relation to consent, we believe that thought must be given to whether the definition of consent under the Criminal Code needs to be amended to include the concept of reckless indifference, as it does in New South Wales.*[67]

The BAQ expressed a different perspective:

> *Yes, the defence of consent could be raised, as it is in rape cases. But it is important to remember that consent is an element of an assault, so for an assault to be unlawful it needs to be without consent. Of course, the touching of the body in any way with consent cannot be criminalised. So there needs to be that safeguard for people who do engage in behaviours that might not be considered mainstream but are nonetheless consensual. So it must be the case for an accused person who says that the touching by whatever means in a particular case was consensual to raise that. The success of that defence of course will depend on the circumstances. For example, where there has been significant violence or implements used or other clear indicators of a lack of consent, then that defence is bound to fail.*
>
> *Another defence that is raised in the context of disputes about consent particularly in rape cases is that an accused person had an honest and reasonable mistake as to fact. The victim says that she was not consenting and the accused perpetrator says, 'I thought that she was.' In order for that defence to be successful, a jury has to be satisfied that the mistake was not only honestly held but reasonable which might address the representative from the Women's Legal Service's concern about the definition in Queensland not using the words of the New South Wales legislation as to recklessness. Of course, a jury of 12 sensible people will fairly easily put to one side a claim of honest and reasonable mistake when clearly the mistake is unreasonable with regard to the other circumstances.*[68]

The QIFVLS shared the BAQ view:

> *I have heard the submissions today by both the Women's Legal Service and the Bar Association, and I am quite cognisant of both. As it currently is, I believe that the courts are quite flexible in what they understand to be consent. I know that there are trial directions that are given to juries in relation to what is consent and what is not consent. I believe that the system currently is working and a jury properly directed, if the matter were to go to trial, could reach a proper conclusion based on the evidence before it.* [69]

<u>The person is in a domestic relationship with the other person or the violence is associated domestic violence under the DFVP Act.</u>

While concerns are discussed above that the title of the new offence limits it to domestic contexts and that it should apply more broadly, this element of the offence cements the domestic context. Professor Douglas expressed concern the offence would be limited to the context of where 'the person is in a domestic relationship', or it is 'associated domestic violence'. She states '*surely non-consensual choking, suffocation or strangulation is wrong in any context'* and submits that this provision will add an extra burden on police and prosecution services to prove there is a domestic violence context. The provision may also have unintended consequences such as excluding dating relationships.[70]

[67] Hansard transcript, public hearing, 24 February 2016, pp 6-7.
[68] Hansard transcript, public hearing, 24 February 2016, p 13.
[69] Hansard transcript, public hearing, 24 February 2016, p 18.
[70] Submission no. 8, p 2.

This was reiterated at the public hearing by the WLS stating that '*some dating relationships, housemates, people who may engage in stalking and are under a misapprehension that they are in a relationship*' will be excluded from the current drafting of the proposed offence.[71]

Evidentiary issues were also raised. Both Professor Douglas and the WLS were concerned that meeting the evidential requirements to establish that a domestic relationship exists or that the violence occurred in context of a relationship as defined under the DFVP Act (which has a civil standard of proof – that is, the balance of probabilities) to the standard of proof required in a criminal proceeding (that is, beyond all reasonable doubt), will be difficult to do.[72]

The department advised it did not anticipate there would be any particular evidentiary problems, and noted that where an order made under the DFVP Act exists it is admissible as evidence the relationship falls within the DFVP Act definition.[73]

The QIFVLS shared that view, as is highlighted by the following exchange from the public hearing:

> ***Mr KRAUSE:*** *Do you see any issues with the prosecution having to establish that a strangulation attempt occurred within a domestic relationship, as is proposed in the bill, particularly given your experience?*
>
> ***Ms Schwartz:*** *No, I do not believe so. The only issue is really given that because we are moving from a civil jurisdiction into a criminal jurisdiction the burden of proof changes to beyond reasonable doubt.*[74]

<u>Assault is not an element of the offence</u>

The proposed new offence would expressly provide that assault is not an element of the offence. The department advised that this reflects a policy decision by the government to remove the availability of a provocation defence: that is, a defence that the victim provoked the offender to commit the offence.[75]

The BAQ had concerns about this:

> *I think the fundamental unfairness to accused people is that the defence is removed for one particular type of conduct whereas it is available to defendants in other cases. For example, the defence of provocation is open to a person in a domestic relationship who beats his partner with an iron rod and causes her serious bruising. A person who, on the other hand, puts the hands to the throat loses the right to use the defence.*[76]

The department advised:

> *It was a deliberate policy decision to exclude the defence of provocation. It is reflective of research which supports that strangulation in a domestic setting is a peculiar risk of further and sometimes fatal domestic violence. There are other offences of violence within the code—for example, wounding—which do not have assault as an element which exclude*

[71] Hansard transcript, public hearing, 24 February 2016, p 6.
[72] Submissions 7, 3.
[73] Department response to submissions, p 5.
[74] Hansard transcript, public hearing, 24 February 2016, p 16.
[75] Criminal Code, s 269.
[76] Hansard transcript, public hearing, 24 February 2016, p 14.

> *provocation, and there is justification in this case to recognise the seriousness and the serious consequences of the offending by excluding provocation.*[77]

Attempted choking, suffocation or strangulation

In its written submission, QIFVLS requests that the proposed clause should include attempted choking, suffocation or strangulation, in addition to actual choking, suffocation or strangulation. It argues that an attempt to commit the act should '*attract the same maximum penalty and to give weight to Parliaments intent to punish this category of offending*'.[78]

The department responded to this request by drawing attention to the current provision at section 535(3) of the Criminal Code which provides that an attempt to commit an indictable offence will carry a punishment equal to one-half of the relevant maximum penalty; and stated that this punishment 'adequately' provides for such offences.[79]

During the public hearing QIFVLS reiterated there should be an offence of attempted choking suffocation and strangulation because, if the government does not specify an attempt specifically, 'an attempted choking, suffocation or strangulation would only attract three and a half years'. QIFVLS questioned whether this penalty was a reflection of the taskforce's recommendation to strengthen penalties for domestic violence offences.[80]

2.3 Submissions on penalty or range of penalties (clauses 6 and 9)

In addition to the measures relating specifically to domestic and family violence reform, the Bill also contains amendments to restore the sentencing practice in Queensland whereby courts have the discretion to receive a submission from both the defence and the prosecution on what they consider to be the appropriate penalty or the range of appropriate penalties to be imposed at sentence.

In February 2014, the High Court held in *Barbaro* that prosecutors were not permitted to make a submission to the court during sentencing proceedings on the appropriate sentence or the bounds of the range of appropriate sentences to be imposed by the court.

In *Barbaro*, the High Court considered:

- Does a judge's refusal to hear a prosecution submission as to sentencing range amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?

- Does a judge's refusal to hear a prosecution submission as to sentencing range – in circumstances where the making of the submission formed part of an agreement between the Crown and the offender that predicated the offender's plea of guilty - amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?[81]

The High Court held by majority that:

> *… it is neither the role nor the duty of the prosecution to proffer some statement of the bounds within which a sentence may be imposed. It is for the sentencing judge alone to decide what sentence will be imposed. The practice which resulted from the decision in MacNeil-Brown was therefore wrong in principle and should cease. The Court held that*

[77] Hansard transcript, public briefing, 24 February 2016, p 3.
[78] Submission no 18, p 1.
[79] Department response to submissions, p 6.
[80] Hansard transcript, public hearing, 24 February 2016, p 16.
[81] http://www.hcourt.gov.au/assets/cases/m3-2013/M3-2013.pdf

> *because the prosecution's submission as to an available sentencing range is no more than a statement of opinion, it was not unfair for the sentencing judge to have refused to receive such a submission. The Court also held that this refusal did not amount to a failure to take into account a relevant consideration in sentencing the applicants.*[82]

R v MacNeil-Brown was a case heard in the Court of Appeal of the Supreme Court of Victoria in 2008.[83] That court '*held that if a sentencing judge asked, the prosecution was bound to submit what the prosecution considered to be the available range of sentences that could be imposed on an offender*'.[84]

Barbaro raised concerns that the term 'range' was seen as actually setting the limits of available penalties, potentially giving rise to appeals where a sentence was outside the range submitted. The department advised that:

> *… in Queensland, prior to Barbaro, a submission to the court as to sentence range was, at its highest, indicative of where the limits of falling into appealable error may lie and was not a definitive statement.*[85]

Since *Barbaro*, prosecutors only draw the attention of the sentencing judicial officer to the facts to be found, the relevant sentencing principles to be applied, and any comparable decisions.[86] The amendments in the Bill return to the previous and longstanding practice where such submissions were provided for the assistance of the court, and aim to improve consistency in sentencing and courtroom efficiency.[87]

The *Barbaro* decision relates to sentencing in criminal proceedings in Australia, and does not apply to penalties in civil proceedings.[88]

The amendments would apply to both the Penalties and Sentences Act and the Youth Justice Act.

The explanatory notes advise that no other Australian jurisdiction has implemented legislation to abrogate the effects of the *Barbaro* decision.[89]

Stakeholder views

Strong support was given by those who submitted to this Inquiry for this amendment. For example, the Bar Association of Queensland advised:

> *The Association wholeheartedly supports this amendment, which seeks to reverse the effect of the decision in Barbaro….The Association agrees that the practical advantages of the amendments include improving consistency in sentencing and assisting courtroom efficiency.*[90]

[82] http://www.hcourt.gov.au/assets/publications/judgment-summaries/2014/hca2-2014-02-12.pdf

[83] *R v MacNeil-Brown* (2008) 20 VR 677

[84] http://www.hcourt.gov.au/assets/publications/judgment-summaries/2014/hca2-2014-02-12.pdf

[85] Queensland Department of Justice & Attorney-General, Discussion paper, p 3.

[86] Queensland Department of Justice & Attorney-General, Discussion paper, p 2.

[87] Hansard transcript, 2 December 2015 (Introductory speech) p 3084.

[88] *CFMEU v Director, Fair Work Building Industry Inspectorate,* [2015] HCA 46.

[89] Explanatory notes, p 4.

[90] Submission no. 19, p 7.

Some submissions may have misunderstood the purpose and effect of the amendments, as they expressed concerns about the desirability of victims of domestic violence to give information to a court about their experience with a view to that assisting the court to determine an appropriate sentence.

For example, the Queensland Domestic Violence Services Network was supportive of the Bill's amendment of the Penalties and Sentences Act, in that allowing a stakeholder to make a submission on an appropriate sentence was worthy of inclusion. But there was a cautionary note in the submission: '*in our experience, a female victim is often too traumatised and fearful to make such a recommendation in a court of law, in the presence of her abuser*'.[91]

In the context of the title of the Bill this misunderstanding is not unexpected; however the amendment would be applicable to all courts in sentencing for all matters, and therefore applies much more broadly than just to matters involving domestic violence. The department advises that:

> *A victim's ability to give this information to the sentencing judge, often in the form of a victim impact statement, is provided for in the Penalties and Sentences Act 1992 and the Victims of Crime Assistance Act 2009 and applies to all victims of offences against the person.*[92]

The Commonwealth Director of Public Prosecutions (CDPP) submitted that the amendments should explicitly state they do not apply to Commonwealth offences which may be heard in Queensland courts. The amendments would apply only to sentencing proceedings under the Queensland Criminal Code. The CDPP states:

> *Given the inapplicability of the proposed amendment to proceedings for sentencing Commonwealth offenders, it would be preferable to make this clear in the legislation itself. There is a precedent for such a reference. In the Criminal Code (Qld) there is explicit reference to the inapplicability of the procedure for judge only trials to Commonwealth criminal prosecutions. Section 615D of the Code provides as follows:*
>
> *This chapter division [i.e. chapter 62 division 9A of the Code] does not apply to –*
>
> *(a)…*
>
> *(b) a trial on indictment of any offence against a law of the Commonwealth.*
>
> *A similar provision could be inserted in the PSA to ensure that the inapplicability of the law to Commonwealth sentencing proceedings was explicitly stated.*[93]

The department does not support the CDPP's suggestion, considering that such an express provision in the Penalties and Sentences Act (or Youth Justice Act) in respect of these amendments could add confusion to the statutory interpretation of other provisions in both Acts that equally do not apply to Commonwealth sentences but are not explicitly excluded.[94]

White Ribbon Australia was supportive of this amendment, stating it will '*allow courts to receive submissions from a party so as to enhance the evidence that can be presented to assist the judicial investigation and decision making*'.[95]

[91] Submission no. 10.

[92] Department response to submissions, p 10.

[93] Submission no. 13, p 2.

[94] Department response to submissions, p 11.

[95] Submission no. 6, p 2.

3. Compliance with the Legislative Standards Act 1992

Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals[96]
- the institution of parliament.[97]

New offence of strangulation

Clause 3 of the Bill inserts new section 315A(1) into the *Criminal Code* to provide that a person commits a crime if they unlawfully choke, suffocate or strangle another person, without that person's consent, where the person is in a domestic relationship with the other person, or where the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012.* The maximum penalty for a breach of section 315A is seven years imprisonment.

Subsection 315A(2) specifically states that assault is not an element of an offence against subsection (1). The consequence of this is that the defence of provocation available under sections 268 and 269 of the *Criminal Code* does not apply as a complete defence to a charge under the new section 315A offence.

Potential FLP issues

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

Excluding the availability of the defence of provocation for offences against section 315A would mean that persons charged with a section 315A crime are not entitled to rely on defence provisions which may be available to persons charged with other domestic violence/assault offences.

Similarly, a person accused of choking/strangulation/suffocation now could potentially (depending on the circumstances and the extent of the injuries sustained by the victim) be charged with assault occasioning bodily harm for which they could claim provocation as a complete defence to the charges, whereas that option would not be available to them after the commencement of section 315A if they are charged under that provision.

As the defence of provocation will not be available for a person charged with a breach of new section 315A the new provision will leave an accused with less avenues for defence than if they were charged with assault occasioning bodily harm under the current regime in respect of that same offending conduct.

Given the maximum penalty for a breach of section 315A is incarceration for seven years, the omission of a common avenue for defence has obvious implications for the rights and liberties of individuals charged with a section 315A offence.

As noted above, the defence of provocation could be relied upon under the current legislative regime by a person accused of an act or acts of either choking, strangulation or suffocation if they were charged with assault occasioning bodily harm in respect of their actions.

[96] *Legislative Standards Act 1992*, s 4(2)(a).
[97] *Legislative Standards Act 1992*, s 4(2)(b).

Similarly, a person could be accused of committing a violent domestic assault on a victim and be charged with common assault or assault occasioning bodily harm and have a defence of provocation open to them which would not be available to a person charged with offences against section 315A.

The removal of defence options for some accused persons and not others means that there is potential for a disparity in how defendants are treated by the justice system even where both have committed serious acts of domestic violence.

The inequity of treatment and its implications for the rights and liberties of accused individuals is drawn to the attention of the Legislative Assembly.

Sentencing submissions

Clause 7 inserts new section 239 (transitional provision) into the Penalties and Sentences Act to state that amendments to section 15 (which allow sentencing submissions to be made) apply for sentencing an offender even if the offence or conviction happened before the commencement of the *Criminal Law (Domestic Violence) Amendment Act (No.2) 2015* (the Act).

Clause 10 inserts new section 368 (transitional provision) into the Youth Justice Act to state that amendments to section 150 (which allow sentencing submissions to be made) apply for sentencing a child even if the offence or conviction happened before the commencement of the Act.

Potential FLP issues

Section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively.

The explanatory notes state in relation to clauses 7 and 10:

> *Clauses 7 and 10 clarify that amendments to section 15 of the Penalties and Sentences Act 1992 and to the Youth Justice Act 1992 apply to the sentencing of an offender after commencement, irrespective of whether the offence or conviction occurred before or after commencement. This means that the amendments have partial retrospective application. While retrospectivity is ordinarily a breach of fundamental legislative principles, this approach is justified on the basis that it is consistent with the common law that procedural laws are construed so as to operate retrospectively and apply to events that have occurred in the past that are presently before the court. The general rule is that the procedural law applying in a court proceeding is the procedural law in place on the day of the proceeding. Therefore, the amendments are consistent with this approach.*[98]

Comment

As advised by the explanatory notes, the retrospectivity of clauses 7 and 10 is consistent with the common law, being that the procedural law applying to a court matter is that procedure that is law at the time of the proceeding.

Accordingly, the potentially retrospective application facilitated by clauses 7 and 10 is not a breach of fundamental legislative principles.

[98] Explanatory notes, p 3.

New offence provisions

Clause	Offence	Proposed maximum penalty
3	Inserts new section 315A(1) into the Criminal Code A person commits a crime if— (a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent; and (b) either— (i) the person is in a domestic relationship with the other person; or (ii) the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012*. (2) An assault is not an element of an offence against subsection (1).	7 years imprisonment

3.1 Explanatory notes

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a considerable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendix A – List of Submissions

01	Zoe Martine Moore
02	Queensland University of Technology
03	Women's Legal Service
04	Australian Law Reform Commission
05	UnitingCare Community
06	White Ribbon Australia
07	Queensland Association of Independent Legal Services
08	Professor Heather Douglas, University of Queensland
09	Working Against Violence Support Service
10	Queensland Domestic Violence Services Network
11	PeakCare Qld
12	Ending Violence Against Women Queensland Inc.
13	Commonwealth Director of Public Prosecutions
14	Soroptimist International Brisbane Inc.
15	Queensland Family and Child Commission
16	Australian Association of Social Workers
17	Relationships Australia
18	Queensland Indigenous Family Violence Legal Service
19	Bar Association of Queensland
20	Protect All Children Today Inc.

Appendix B – List of Witnesses

In order of appearance before the committee:

Public Briefing – Brisbane, 24 February 2016

Department of Justice and Attorney-General

Mrs Imelda Bradley, Acting Assistant Director-General, Strategic Policy and Legal Services
Ms Julie Rylko, Acting Principal Legal Officer
Ms Jo Hughes, Acting Principal Legal Officer
Ms Kristine Deveson, Acting Senior Legal Officer

Public Hearing – Brisbane, 24 February 2016

Women's Legal Service

Ms Angela Lynch

Bar Association of Queensland

Ms Julie Sharp

Queensland Indigenous Family Violence Legal Service

Ms Thelma Schwartz, Principal Legal Officer