

About Women's Legal Service

Women's Legal Service Tasmania is a not-for-profit organisation providing free and confidential legal advice and representation to women in all areas of Tasmania.

WLST provides clients with information about their legal and non-legal options, including referral to other legal services and law firms, or to appropriate support services.

WLST represents women from low socio-economic backgrounds, those who are unable to afford legal assistance and those who do not qualify for a grant of legal aid. The majority of our casework is in family law, often with a focus on family violence.

In the north west and northern Tasmania, we are funded to run two Domestic Violence Units with offices in Burnie and Launceston. From these offices we provide outreach and also offer financial counselling and access to a social worker.

WLST is committed to making the legal system more accessible and responsive to the issues affecting women in Tasmania.

We wish to provide you with a submission from our service drawing on our experiences assisting women in Tasmania.

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Submission Supported by Laurel House

This submission has been read and supported by Laurel House.

About Laurel House

The North and North West Tasmanian Sexual Assault Support Service, known as Laurel House, is a not-for-profit, community-based sexual assault support service. We provide sexual assault trauma counselling and support, education and training and advocacy. We provide an inclusive, holistic service that addresses sexual inequalities and abuses by advocating for individual and community change.

Laurel House offers a range of confidential Tasmanian Government funded services that are free to victim-survivors throughout North and North West Tasmania. We offer face-to-face, online and phone counselling to adults, young people and children of all genders, and their family and supporters from our offices in Launceston, Burnie and Devonport and through outreach in rural locations.

Laurel House runs a 24-hour support service including support following recent sexual assault. We offer support through the forensic, medical and legal processes. Laurel House also delivers community, workforce and school-based education, professional training and debriefing.

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INTRODUCTION

Women's Legal Service Tasmania welcomes the opportunity to make a submission in relation to the proposed Criminal Code Amendment Bill ("the Bill"), which intends to introduce a standalone offence for Non-Fatal Strangulation ("NFS"), and clarify the law regarding stealthing.

SUBMISSION

1. Non-Fatal Strangulation

The Women's Legal Service Tasmania supports the new standalone offence of non-fatal strangulation ("NFS") being introduced in Tasmania. The seriousness of this type of offending has not been, to date, adequately captured in existing legislation. Victims of NFS are seven (7) times more likely to be killed by their partner, when compared to victims of family violence where NFS has not occurred¹. It is a warning sign of escalating violence, and women are 13 times more likely to be the victim of it than men², making it a gendered issue, and one of great importance to us at WLST.

1.1 Definition and Impacts

Non-fatal strangulation is a form of asphyxia where blood vessels and/or airways are closed due to external pressure to the neck. This can be achieved through hanging, use of ligatures, or manual application of force (most often with the use of hands). Immediate physical impacts can include loss of consciousness, stroke, seizures, and incontinence. Other physical impacts can include neck pain, bruising, swelling, burst blood vessels in the eyes and under the skin, difficulty breathing and swallowing, and changes to the voice. Ongoing psychological impacts can include PTSD, fear, anxiety, depression, memory loss, nightmares, and dizziness.

Clients of WLST who have experienced NFS described the incident as terrifying, and that they thought they were going to die. They express how powerless they felt, and

¹ Nancy Glass and others "Non-fatal strangulation is an important risk factor for homicide of women" (2008" 35 J Emerg Med 329 (US data)

² Patch, M, Anderson J. C. & Campbell, J. C. (2017) Injuries of women surviving intimate partner strangulation and subsequent emergency health care seeking: an integrative evidence review. *Emergency Nurses Association*, 44(4), 384-393 9 (US data)

that they could do nothing to escape. NFS can also occur in front of children, and sometimes involves children intervening to try to protect the victim.

1.2 Current Offences

Some of the current offences that may capture the act of non-fatal strangulation include:

- **Assault** (section 184 of the *Criminal Code* 1924³, section 35 of the *Police Offences Act* 1935⁴)

In the absence of specific offences, NFS is most commonly charged under the crime of common assault. This is because prosecuting NFS under more serious offences pose difficulties like as establishing intent, and lack of clear physical injuries to the victim.

Assault tends to have lower maximum sentences in comparison to NFS specific offences in the jurisdictions where it has been introduced (for example, in Queensland common assault has a maximum sentence of three (3) years, whereas their offence of NFS has a maximum sentence of seven (7) years). We note NFS will have a maximum sentence of 21 years if introduced in Tasmania under this Bill, which is consistent with other indictable crimes of this nature.

Charging NFS as an assault prevents tracking of NFS statistics and can be a serious impediment to judges being made aware of specific risks when considering bail, sentencing and parole for an offender.

- **Attempted Murder** (section 342 of the *Criminal Code* 1924)

It is difficult to prosecute NFS as an attempted murder, due to the fact there are often very few physical injuries to a person. In addition, the high threshold required to prove an intent to kill or seriously harm often makes this option unavailable to prosecution.

³ Maximum penalty 21 years

⁴ Maximum penalty 12 months, or 2 years for aggravated assault

- **Disabling to Aid the Commission of an Offence** (Section 168 of the *Criminal Code* 1924)

The crime of “Disabling to aid the commission of an offence” does not represent the type of scenarios we see in the clients experiencing family violence presenting at WLST. In order to establish this offence, prosecution need to show the perpetrator *intended* to render someone unconscious by choking or strangling them, in an effort to commit some other offence, or to flee. This offence has not been drafted to deal with the types of cases we see at WLST, especially as they relate to the family violence context.

1.3 Sentencing Guidelines

We acknowledge where NFS has been charged as an indictable offence, the Supreme Court (on appeal) has dealt with it in accordance with the seriousness it demands. For example, in the case of *Hardwick v Tasmania* [2020] TASCCA 2, Martin AJ at [64] states:

“The prevalent and devastating impacts of violence perpetrated against women and children in domestic circumstances are well recognised across Australia by the criminal courts and the wider community. Victims in these cases are vulnerable. The crimes are often committed within the confines of the family home in breach of the sanctity and safety of the home. Choking is a common and dangerous feature. I agree with Estcourt J’s observations in Director of Public Prosecutions v Foster [2019] TASCCA 5 at [26]:

“Strangulation is a form of power and control that can have devastating psychological long-term effects on its victim in addition to a potentially fatal outcome”.”

The Tasmanian Director of Public Prosecutions (“DPP”) Guidelines also reflect the seriousness of viewing and charging NFS as an indictable offence:

“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...

“... Conduct involving persistent smothering, and a loss of consciousness, should properly 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.”

The Supreme Court sentences, along with the DPP guidelines, are a sign NFS should be treated more seriously by the Courts. However, where NFS is not charged as an indictable offence, or not categorised properly by first responders and prosecution, it remains open that an offence of this serious nature can fall through the cracks. A standalone offence, as outlined in the Bill, will go some way to alleviate this problem.

We acknowledge the work of the Sentencing Advisory Council of Tasmania and their report, “Sentencing for Non-Fatal Strangulation” from May 2021 (“the Report”). While the Report found that there was no disparity between sentencing outcomes for NFS when charged as an assault compared to other jurisdictions where NFS had a standalone offence, there are limits to what this information tells us. This doesn’t cover offences dealt with in the Magistrates Court, and it also doesn’t reveal how many offences could have been pursued had a standalone offence been enacted. Sentencing is only one aspect of criminal law, and factors such as setting community standards should not be discounted.

1.4 Benefits of a Separate Charge

Current Tasmanian legislation doesn't adequately capture the seriousness and risks of NFS. The introduction of a new specific offence would, when coupled with education and training, highlight the dangers of NFS to Police and first responders, those working within our court systems, and to members of the public more generally.

1.5 Coronial Report of Jodi Michelle Eaton

In support of a separate offence, we note the Coronial report into the death of Jodi Michelle Eaton, released in 2019, recommends that:

The Tasmanian Government give consideration to the enactment of an indictable offence of choking, suffocation or strangulation applicable to both the domestic violence situation and generally.

Ms. Eaton was killed by Darren Dobson as a result of strangulation on 31 January 2014. Mr. Dobson had a pattern of attempting to strangle women (some of whom were his partners, some were not) dating back to August 1997. He had been sentenced to a wholly suspended sentence of two months' imprisonment for a charge of assault under the *Police Offences Act 1935* for grabbing his partner by the throat in August 2012. He was again charged with common assault under the *Police Offences Act 1935* for choking his partner in February 2013, and was in fact on bail for that offence at the time of Ms. Eaton's murder. A standalone offence potentially could have more accurately tracked and identified Mr. Dobson's offending, and the risks is posed.

1.6 Other Jurisdictions

Queensland, New South Wales, South Australia, Western Australia and the ACT have all introduced a separate NFS offence, and Victoria has committed to the introduction of such laws. In the jurisdictions where it has been enacted, sentences range from between 5-10 years. The Bill, if enacted, will bring Tasmania in line with most other jurisdictions across Australia.

1.7 Criminal Justice Response

The criminal justice system cannot alone solve a complex social issue like family violence. We acknowledge there are limits to the criminal law, and there is a requirement for increased investment in long term cultural change, and the services that support that change. For legislation to be effective it must be part of a wider whole of government approach, including training and education for police, first responders, and healthcare staff. This is the key to the success of any reform. Significant changes and improvements in police and institutional responses to family violence are necessary preconditions to the effective operation of any such legislation.

However, the law is crucial in setting standards of behaviour in our society, and a standalone offence for NFS will clearly communicate to the public the seriousness of this type of offending, and the requirement for an effective criminal justice response.

The implementation of all law reform requires, to some extent, the balancing of rights, responsibilities, and obligations of the individual. A NFS standalone offence prioritises the safety of women, who historically have not had their right to safety protected.

2. Stealthing

WLST supports the new offence of stealthing being introduced in Tasmania. In recent months and years, clients have increasingly approached WLST for advice in relation to stealthing. The clarification of this issue in the *Criminal Code (Tas) 1924* will be of great assistance to women who experience it and want to seek a criminal response.

2.1 Definition and Impact

Stealthing is the non-consensual removal of a condom where sexual intercourse has only been agreed to with the use of a condom.

Women who have consented to have sex with someone with a condom, who learn that one has either not been used or removed, are exposed to the risk of pregnancy and sexually transmitted infection, along with a violation of their bodily autonomy.

2.2 Current Offences

It is currently unlawful to have sexual intercourse with someone without their consent. Consent is interpreted in the s.2A of the *Criminal Code (Tas) 1924* to mean, “free agreement.” Although it is arguable that the crime of stealthing is already captured in the definition of consent, removing any ambiguity around this is crucial, as there is no precedent within Tasmania where stealthing has been successfully prosecuted.

Clients of WLST have relayed to us that when they have attempted to make complaints to Tasmania Police in relation to stealthing, they have been told there were no criminal options available to them. Clearly setting out that removing, tampering, or not wearing a condom without consent is a crime will give options to women who have experienced this violation.

The benefit of clarifying stealthing in law also plays an educative function, and should be coupled with investment in education and training, especially for young people. WLST already work with Laurel House (a sexual assault support service) to deliver training regarding consent, and aims to do so through a gendered lens, highlighting the gendered drivers of sexual violence and abuse. Programs like these are integral to changing community biases and attitudes, as law reform alone cannot solve these complex social issues.

2.3 Views from the Judiciary

The recent Supreme Court case of *State of Tasmania v. JSP*, from October 2019, set out in the Comments on Passing Sentence that:

“The third matter is that the sex was unprotected. There is no suggestion you have any disease, and I have commented that you did not ejaculate. In my

view, the fact that the sex was unprotected is not in this case an aggravating factor.”

The facts of this case involved the sexual assault of the complainant by vaginal intercourse. The Offender was found guilty. The Crown submitted that the fact the Offender did not wear a condom should be an aggravating factor, which the Court rejected. WLST worries that, if left to the Court to determine whether stealthing is a crime under the current law, no progress will be made in successfully prosecuting this type of offending.

While the exposure to STIs and pregnancy should not be underemphasised, the potential harm to a woman from unprotected sex is not solely in the tangible consequences, but the violation of her bodily autonomy, and her ability to make decisions about what risk she is willing to expose herself to. Choices about one’s own body, especially in relation to sex and pregnancy, are at the core of women’s rights.

CONCLUSION

WLST endorses the enactment of a standalone offence for NFS. We concede while there may be other legal options available to prosecute this offence, none fully capture the serious nature of the crime, the terror it induces in its victims, and the ominous warning it gives for future homicide.

In relation to stealthing, we support this amendment to the *Criminal Code*, as it provides clarity regarding consent. It also sets a high standard for community expectations.

We congratulate the Attorney and the Government for implementing both these important law reforms, and listening to advocates with lived experience and specialist services, who represent (both legally and socially) victims/survivors of these offences. Women will, as a result of both these reforms, be better protected by the law.

We also note the significant financial investment, by this Government, to further improve the law through the creation of the crime of persistent family violence, and through the recent criminal law revisions consulted on.

We look forward to continuing to discuss areas of law reform with the Government which arise by virtue of our service delivery. We also look forward to the Government continuing to support and recognise the role of specialist women's services in these important community discussions. Together, we can identify and respond to gaps in the justice system and change the "system response" to gendered violence. We can only achieve this result for the women we serve in partnership with Government.

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