



Women's Health Tasmania

Submission to the
Criminal Code
Amendment Bill 2022

18th February 2022

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About Women's Health Tasmania

Women's Health Tasmania (WHT) is a state-wide health promotion service. Our mission is healthy Tasmanian women. We provide health promotion activities and projects. We are also a key voice for women's health in Tasmania and undertake policy development, advocacy and sector development.

We use the WHO social determinants model of health to guide our work. We see health as a holistic state of wellbeing that is determined by "the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life."¹

As a health service we've seen firsthand how family violence can impact women in ways that make the distinction between physical and psychological harm seem inadequate to describe harm.

We've worked with women who are, many years after leaving violent relationships, still working to rebuild their sense of self and navigate the effects of trauma on their mental and physical health. These health impacts echo for women, their children, and their communities. Everyone is impacted by family violence and our health, justice and social and community supports have a crucial role in working together to end family violence and protect victim-survivors.

Summary of WHT's position

The proposed Criminal Code Amendment Bill 2022 introduces two new offences:

- Non-fatal strangulation by creating section 170B in the criminal code
- A new subsection in s2A Consent – to include that there is no 'free agreement' where 'stealth' has occurred.

Section 170B – Non-fatal Strangulation as a separate offence

Women's Health Tasmania supports the introduction of s 170B as a separate offence. The creation of a standalone offence in its current form:

- Recognises the voices of survivors of non-fatal strangulation and the advocacy of specialist family violence services
- Demonstrates to the community, the judiciary, and police the seriousness of non-fatal strangulation
- Increases awareness of NFS as a 'red flag' for future homicide or serious injury
- Codifies what is already recognised in sentencing guidelines and judicial rulings as a dangerous tactic of family violence.

WHT supports the introduction of section 170B. It represents a win for victims and a deep acknowledgement of the seriousness of NFS. However, WHT also has several concerns around the efficacy of this law in the current justice context. Our recommendations relating to section 170B are:

- A definition of NFS should be included in the reforms. A clear, broad definition provides clarity and ensures its use as a tactic of family violence is properly appreciated.

¹ World Health Organisation, *Social Determinants of Health*. 2022. https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 accessed at 16/02/2021.

- Concerns around the evidentiary burden of NFS need to be addressed. We suggest that education and collaboration with the health sector around identifying, responding to and documenting NFS as a means of ensuring opportunities for collecting evidence are not lost.
- Reform of the Tasmanian Justice system is required. A Specialist Family Violence Court model should be implemented for Tasmania.

Section 2A – ‘Stealthing’

WHT supports the introduction of section 2A to add ‘stealthing’ to the definition of consent. The addition of this section provides a high degree of clarity to the law of consent. It removes the ‘grey area’ of consent from the law, and can provide the community with a strong statement about sexual assault and the importance of consent in all facets of sexual activity.

WHT has concerns that the law will not create positive community change and awareness, unless there is a concerted effort to fund and support community education about the law and what it means for consent.

Our recommendations relating to section 2A are:

- The education work around sex and consent that is already being carried out by specialist services in the sector be supported and extended.
- The Government should invest in a broader community awareness campaign about stealthing and its unlawfulness. Both evidence based and co-design methods can produce effective, targeted campaigns.
- That training for police, legal professionals, health care workers and other first responders be developed and implemented – specialist services could be supported to undertake this work.

Key issues in family violence and health

Health impacts of family violence

Family violence is a gendered issue – more women than men report family and intimate partner violence. An estimated 1 in 6 (17%, or 1.6 million) women and 1 in 16 (6.1%, or 0.5 million) men had experienced physical or sexual violence from a current or previous cohabiting partner since the age of 15.²

Intimate partner violence is the number one risk factor contributing to the disease burden of Australian women aged 18-44 years.³ Women who experience family violence are more likely to experience poor health outcomes including, mental health issues, physical functioning and chronic pain than women who don’t.⁴ Children raised amid intimate partner violence are also more likely to

² Australian Bureau of Statistics. *Personal Safety, Australia*. 2017.

<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>

³ Webster, K. 2016. *A preventable burden: Measuring and addressing the prevalence and health impacts of intimate partner violence in Australian women* (ANROWS Compass, 07/2016). Sydney: ANROWS.

⁴ Loxton D, Dolja-Gore X, Anderson A & Townsend N. 2017. *Intimate partner violence adversely impacts health over 16 years and across generations: a longitudinal cohort study*, PLoS ONE 12(6):e0178138. Accessed at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0178138>; Gartland, D., Giallo, R., Woolhouse, H., Mensah, F., & Brown, S. J. 2019. Intergenerational impacts of family violence-mothers and children in a large prospective pregnancy cohort study. *EClinicalMedicine*, 15, 51-61. Accessed at <https://www.sciencedirect.com/science/article/pii/S2589537019301476>

experience poor health outcomes, including links to behavioural and cognitive issues.⁵ Every year, there are around 6500 hospitalisations for injuries identified as being related family and domestic violence.⁶

Non-fatal strangulation presents a serious risk to life and health

Non-fatal strangulation is a tactic of family violence, and it causes a range of devastating health impacts. Strangulation and suffocation are the cause of death in 12% of cases where a woman is killed by her intimate partner.⁷ NFS is now widely seen as a 'red flag' for increased risk of a woman being killed. Where NFS by an intimate partner occurs, women are at least seven times an increased risk of being killed by the partner or ex-partner.⁸

The physical health impacts of NFS can be both short and long term. As Zilkens et al outline, clinical signs of NFS can "include neck and chin bruises and abrasions; neck swelling; petechial bruising of the face, eyelids, conjunctivae, scalp and neck; subconjunctival haemorrhages; and signs of cerebral anoxia such as agitation and memory loss."⁹ Victims may describe neck pain, difficulty breathing, difficulty swallowing or speaking, loss of consciousness, incontinence, memory loss, visual changes and tinnitus after NFS has occurred.

There are also a range of neurological and psychological impacts of NFS in family violence and sexual assault.¹⁰ NFS is linked to acquired brain injuries, seizures, motor and speech disorders, and paralysis.¹¹ The long-term psychological impacts included post-traumatic stress disorder, depression, anxiety, suicidality, and dissociation.¹²

Injuries arising from NFS may not be visible at all or may become apparent in the days and weeks following the assault.¹³ Even where there are no immediate visible injuries, some victims have died several weeks or months after the attack because of blood clots, stroke and brain damage caused by the strangulation.¹⁴

⁵ Murray, A. L., Kaiser, D., Valdebenito, S., Hughes, C., Baban, A., Fernando, A. D., & Eisner, M. 2020. The intergenerational effects of intimate partner violence in pregnancy: mediating pathways and implications for prevention. *Trauma, Violence, & Abuse*, 21(5), 964-976.

⁶ This number includes all forms of family violence – not just those relating to intimate partners, but partners or ex-partners were most likely to have caused the injury. *Examination of Hospital Stays as a Result of Family Violence 2010-11 and 2018-19*. Australian Institute of Health and Welfare. 2020. <https://www.aihw.gov.au/reports/domestic-violence/examination-of-hospital-stays-due-to-family-and-do/summary>

⁷ Sharman, L. S., Douglas, H., & Fitzgerald, R. 2021. *Review of domestic violence deaths involving fatal or non-fatal strangulation in Queensland*. The University of Melbourne/The University of Queensland, page 5 accessed at <https://minerva-access.unimelb.edu.au/bitstream/handle/11343/290204/Published%20Sharman%20Douglas%20Fitzgerald.pdf?sequence=2>

⁸ Zilkens, R. R., Phillips, M. A., Kelly, M. C., Mukhtar, S. A., Semmens, J. B., & Smith, D. A. 2016. Non-fatal strangulation in sexual assault: A study of clinical and assault characteristics highlighting the role of intimate partner violence. *Journal of forensic and legal medicine*, 43, 1.

⁹ Ibid.

¹⁰ Bichard, H., Byrne, C., Saville, C. W., & Coetzer, R. 2021. The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review. *Neuropsychological rehabilitation*, 1-29.

¹¹ Ibid.

¹² Ibid.

¹³ Zilkens et al. 2016. page 1.

¹⁴ Douglas, H., & Fitzgerald, R. 2020. Women's stories of non-fatal strangulation: Informing the criminal justice response. *Criminology & Criminal Justice*, 1-17. DOI: 10.1177/1748895820949607

Hearing lived experience

The voices of survivors of family violence tell us that the experience of non-fatal strangulation is terrifying. In family violence, NFS is used to show the victim that the perpetrator has the power of life or death over the victim.¹⁵ NFS rarely happens in isolation. Women who have experienced NFS report that NFS was one of many forms of violence done to them.¹⁶ In family violence situations, NFS is part of a continuum of coercive and violent tactics that perpetrators use to control, punish, humiliate and intimidate their victims.

The trauma of family violence can be profound. The mental health impacts of trauma are well established and include anxiety, depression, complex PTSD.¹⁷ We are now increasingly aware of the physical health implications of psychological trauma, as well as its role in intergenerational cycles of violence, poor health, substance misuse and socio-economic inequity.¹⁸

We welcome the proposed legislation. Our colleagues in the sector have written convincingly of the many merits of this law. We add to this work by emphasising the incredible individual, family and community toll that family violence has on health. Non-fatal strangulation carries with it particular harms and risks that make creating it as a standalone, indictable offence an appropriate and important measure.

Key issues regarding section 170B

Defining Non-Fatal Strangulation

The Criminal Code Amendment Bill 2022 should include a legal definition of non-fatal strangulation.

The inclusion of a definition means certainty. Further, it means that the Tasmanian legislature can define the offence in a way that makes it clear that *any* use of NFS is serious. NFS in family violence is not only employed by perpetrators as a way of causing physical harm, but also as a way of instilling fear in the victim and ‘emphasising the perpetrator’s control over the victim.’¹⁹ NFS can involve the restriction of breathing and the application of a lot of force on the delicate tissues of the neck. However, the seriousness of the assault and the degree of physical harm caused is not the crux of whether NFS has occurred.

In recognition of this, some jurisdictions have included broad definitions of ‘strangle’ that include the ‘application of pressure’ to a person’s neck.²⁰ Western Australia is the most recent jurisdiction to introduce NFS provisions.²¹ It defines NFS in the following way:

“A person commits a crime if the person unlawfully impedes another person’s normal breathing, blood circulation, or both, by manually, or by using any other aid –

¹⁵ Jess Hill, *See What You Made Me Do: Power, Control and Domestic Abuse*. 2019. Black Inc. Pages 33-34.

¹⁶ Sharman et al. 2021. Page 14.

¹⁷ Van der Kolk, B. 2014. *The body keeps the score: Mind, brain and body in the transformation of trauma*. Penguin UK.

¹⁹ Edwards, S. S., & Douglas, H. 2021. The criminalisation of a dangerous form of coercive control: Non-fatal strangulation in England and Wales and Australia. *Journal of International & Comparative Law*, 8, 87. Page 111.

²⁰ Crimes Act 1900 (NSW) s.27.

²¹ Edwards & Douglas (2021). Page 111.

- (a) Blocking (completely or partially) another person’s nose, mouth or both, or;
- (b) Applying pressure on, or to, another person’s neck.”²²

By contrast Queensland has not included a definition, instead relying on the courts to define NFS.²³ As a result, the offence currently requires a that there was a ‘restriction of the victim’s breathing’.²⁴ This narrower definition implies that the seriousness of the offence flows from the degree to which the strangulation stops breathing.²⁵ While this could certainly be a consideration in sentencing, it should not be the key to whether the offence is made out.

For section 170B to advance its goals of protecting women and children, it should be defined broadly to include women’s lived experience of non-fatal strangulation. For example, the definition should include situations where the perpetrator places their hand on the throat of the victim, applies pressure but does not restrict breathing. Further, women do not always use the word ‘strangle’ to talk about NFS. They may instead describe “pushing on the neck”, “grabbing by the neck” or being “held around the throat”.²⁶

A clear definition of NFS, that is broad enough to include the many ways in which a perpetrator may use NFS and how it might be experienced or named by a victim, equips the justice system to understand NFS on the continuum of tactics employed by perpetrators of family violence.

Defining the offence in relation to its prevalence in family violence should be addressed more strongly. According to the Justice Department website, the new offence will apply “whether family violence is involved or not.” We are concerned that this could be at cross-purposes with the stated objective of the law. It could lead the judiciary to provide for a narrower definition of the law out of a concern that the law would criminalise behaviours in the general community, which, while unlawful, may not warrant this degree of sentencing and criminalisation.

Identifying and proving non-fatal strangulation

There are issues around identifying and proving NFS. While victim testimony can be a source of evidence, there are several issues with this that relate to NFS in the context of family violence.

First, the hidden nature of family and intimate partner violence means that there may be no third party to corroborate the offence.²⁷ Secondly, memory loss can be associated with NFS, and this can impact the perceived reliability of victim testimony.²⁸ In this context, police and health care workers can play a role in identifying, documenting and responding to NFS.

The degree to which there are physical, external signs of strangulation (such as bruising, swelling or petechiae)²⁹ should not be the rubric of assessment for first responders or police. In 50% of cases

²² Criminal Code Compilation Act 1913 (WA) s 298.

²³ Edwards & Douglas. 2021. Page 110.

²⁴ Ibid.

²⁵ R v HBZ [2020] QCA 73 [56]-[57].

²⁶ Douglas & Fitzgerald. 2020. Page 8.

²⁷ Ibid.

²⁸ Ibid, page 9.

²⁹ Australian Institute of Strangulation Prevention. *Strangulation Prevention Training March 2019*. Citing *Intimate Partner Violence*, Oxford University Press. 2009. Accessed at <https://strangulationprevention.com.au/wp-content/uploads/2019/08/Strangulation-Training-Program-March-2019-v3.pdf>

there may be no visible external signs of injury.³⁰ However, in the absence of training, responders may not know what to look for or how to assess the seriousness of NFS.³¹

While it is possible to prosecute NFS based on witness testimony, it will strengthen witness' contribution to have comprehensive evidence collected closer to the time of disclosure.³²

Addressing family violence requires intersectoral responses.³³ The NFS legal reforms provide an opportunity for work to be done at the intersection of health and justice around family violence. Healthcare workers, first responders and police need to understand the non-visible signs of NFS and be equipped to document information that can be relevant evidence.³⁴ Comprehensive screening tools are needed for NFS that can be relevant and useful in health and justice sectors. Such a tool could support victims to access medical assessment sooner and provide stronger evidence for court proceedings.

This calls for health and justice sectors to work together so that there can be a robust understanding of how to identify NFS and respond appropriately.

Tasmanian needs Justice Reform: Specialist family violence Courts

The efficacy of the law may also be inhibited by the difficulties of navigating the family violence legal system. The current experience of family violence justice is marked by delays and a lack of court infrastructure to assist victims to participate safely. A specialist family violence court should be created and resourced appropriately.

Much of the research highlights the ambivalence of victim-survivors in testifying against their partners or former partners in criminal cases generally.³⁵ The dynamics of coercive control can be pernicious and difficult to break away from and some women may still be partnered with the perpetrator of violence. Other women may manage their own and their children's safety by not participating with the criminal justice system.³⁶ Delays in court processes exacerbate this ambivalence. For example, WHT has been made aware of an instance where the court delays have given a perpetrator time to convince a victim to come back into the relationship and refuse to cooperate with police.

³⁰ Edwards & Douglas. 2021. Page 93, citing Strack, McClane and Hawley.

³¹ (Patch, Anderson & Campbell, 2018, p. 391) – in that heather douglas article

³² Douglas, H. 2008. The criminal law's response to domestic violence: what's going on?. *Sydney Law Review*, 30(3), 439-469. Page 453. Accessed at https://www.researchgate.net/profile/Heather-Douglas-4/publication/43508593_The_Criminal_Law's_Response_to_Domestic_Violence_What's_Going_On/links/53d808ca0cf2a19eee80083c/The-Criminal-Laws-Response-to-Domestic-Violence-Whats-Going-On.pdf

³³ J. Sherrard, J. Ozanne-Smith, I. Brumen, V. Routley & F. Williams. *Domestic Violence: Patterns and Indicators*. Monash University Accident Research Centre - Report #63 – 1994. Page 4. Accessed at <https://www.monash.edu/muarc/archive/our-publications/reports/muarc063>

³⁴ In NSW, research is being undertaken to understand how health systems can support victim-survivors of NFS and family violence when they present to emergency departments. ANROWS, *An Exploration of what enables NSW Health emergency department to treat and support domestic and family violence victims who have experienced non-fatal strangulation*. <https://www.anrows.org.au/project/an-exploration-of-what-enables-new-south-wales-health-emergency-department-staff-to-treat-and-support-to-domestic-and-family-violence-victims-who-have-experienced-non-fatal-strangulation/>

³⁵ Douglas. 2008.

³⁶ Ibid. Page 442-3.

In Victoria, a specialist family violence court has been established since October 2019. The roll-out of SFVC across Victoria is requiring significant infrastructure upgrades to court buildings. These upgrades place victim-survivor experiences of court processes at their core. They include “separate entrance/exit for victim survivors, safe waiting areas and interview rooms, remote witness facilities and child friendly spaces.”³⁷ The specialist court also provides court personnel, including magistrates, that are specially trained to respond to family violence. It also provides for an integrated team of workers who are focused on helping people through the family violence court system.

Tasmania should make implementing a specialist family violence court system it’s priority. However, it must be adequately resourced. A specialist family violence court means that cases involving NFS can be heard in ways that are timely, place victim-survivor safety at their core, and provide adequate, trauma aware support.

Key issues for S2A Consent – Stealthing

Stealthing is the act of removing a condom before or during sexual intercourse without that person’s consent.

A recent study from a Melbourne sexual health clinic found that 32% of women and 19% of men who have sex with men reported an experience of stealthing.³⁸ Media reports and evidence from frontline services indicate stealthing is a common practice in Australia.³⁹

The Criminal Code Amendment Act 2022 adds stealthing to the definition of consent. Under the proposed changes consent is negated where a person

- Does not use a condom
- Tampers with a condom
- Removes a condom

before or during sex and the other person has made it clear that a condom must be used for sexual intercourse.

Benefits of the changes

A key benefit of the changes is that it makes it clear that stealthing is a violation of consent. This is important because stealthing is sometimes described as a legal ‘grey area’ and there is a lack of community awareness that stealthing is a violation of consent.⁴⁰

Further, there are individuals who engage in stealthing, not because of a ‘lack of awareness’ but because they are reckless about consent or actively want to engage in stealthing because it is a violation of consent. In interviews with victim-survivors of stealthing women have described their

³⁷ Department of Social Services. Specialist Family Violence Courts and Family Violence Contact Centre, Victoria. 2021. <https://plan4womenssafety.dss.gov.au/initiative/specialist-family-violence-courts-and-contact-centre/>

³⁸ Latimer, R. L., Vodstrcil, L. A., Fairley, C. K., Cornelisse, V. J., Chow, E. P., Read, T. R., & Bradshaw, C. S. (2018). Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia. *PLoS one*, 13(12), e0209779.

³⁹ New South Wales Law Reform Commission. 2018. Consent in relation to sexual offences. *Consultation Paper*, 21. Paragraph 5.62.

⁴⁰ Triple J Hack Program. ‘Is this Rape?’ The legal grey area around prosecuting ‘stealthing’ in Australia. 2017. <https://www.abc.net.au/triplej/programs/hack/stealthing-and-the-law/8489348>. SBS Online. Calls for ‘Stealthing’ to be criminalised across Australia after ACT reform. 2021. <https://www.sbs.com.au/news/calls-for-stealthing-to-be-criminalised-across-australia-after-act-reform/97d1e986-7111-4c6d-8cf7-89f241598769>

experiences of the perpetrator's behaviour as disrespectful and selfish.⁴¹ Another study of stealthing shows that there sometimes can be a link between 'hostility' towards women and history of sexual aggression.⁴²

For women and others who experience stealthing the law reform shines a light on their experience. It can assist them in naming the harm done and provide validation of help-seeking behaviour and interactions with sexual assault support services. It represents a firm commitment by our community and the government to take a stand against sexual assault in all its forms.

Building community awareness can create lasting change

While the changes are welcome, there must be relevant and accessible community education on this matter. Simply adding the law will not increase community awareness unless there is targeted, relevant education and awareness raising campaigns.

Our colleagues in the sector are already engaged in this important work. The Sexual Assault Support Service runs school education programs with school students and school communities that is aimed at encouraging respectful and ethical sexual decision making. Laurel House has partnered with Women's Legal Service to deliver consent education to school students in the North of the state.

The LINK youth health service, based in Hobart, has developed a pilot project in partnership with Legal Aid Tasmania. The Sex and Consent project uses a co-design method to empower young people in schools to develop their own sex and consent campaigns that are relevant to their experiences and their school.

These programs have a strong capacity to change the problematic cultural norms that surround sex and consent, especially with young people. We recommend that their efforts be bolstered by further investment by the Government, and that the investment is sustainable and adequate for this work. Positive social and cultural change, change that lasts, requires long-term investment.

Awareness raising and cultural change also needs to be fostered beyond school communities and not only target young people. WHT believes that there needs to be a community wide campaign, that communicates that stealthing is against the law and how to respond to it. This campaign should include targeted training for police, health and legal professionals. Specialist services will need to be adequately resourced to handle the inevitable increase in demand for counselling, support and information that may flow from increased community awareness about

A range of services should be consulted on this education and campaign, including those in communities that face specific barriers to disclosing sexual assault, for example, organisations that work with sex workers, the LGBTIQ+ community, culturally and linguistically diverse communities and those living with disability to ensure that community and targeted education is relevant and accessible.

⁴¹ Tarzia, L., Srinivasan, S., Marino, J., & Hegarty, K. (2020). Exploring the gray areas between "stealthing" and reproductive coercion and abuse. *Women & health, 60*(10), 1174-1184.

⁴² Davis, K. C. (2019). "Stealthing": Factors associated with young men's non-consensual condom removal. *Health psychology, 38*(11), 997.