

Does New Zealand Need a Specific Criminal Offence for Strangulation?

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I Introduction

On 9 January 2009, 22 year old Sophie Elliott (Sophie) was murdered in her Dunedin family home at the hands of former boyfriend Clayton Weatherston. Sophie died from blood loss after Weatherston inflicted 216 separate injuries to her face and body which included stab wounds from a knife and scissors, and 7 blunt force injuries. Her death was an absolute tragedy that profoundly affected New Zealand and was largely responsible for altering the criminal law of New Zealand.¹ While Weatherston was found guilty of murder and is currently serving life imprisonment,² the lengthy prison sentence will not bring Sophie back to her family. The murder was not the first act of intimate partner violence (IPV) Weatherston had meted out to Sophie. Weatherston had assaulted her twice prior and, in an incident ten days prior to the murder, strangled Sophie by pinning her down crushing her throat with his forearm. This was a telling violent assault that, unbeknown to most New Zealanders, was indicative of the future harm that would befall Sophie.

IPV and family violence³ is entrenched within New Zealand society and is a serious social issue involving verbal, psychological, physical and sexual abuse. New Zealand Police records show nearly 100,000 family violence incidents are reported each year which is only the tip of the iceberg as actual figures are far higher given family violence is significantly under-reported. While family violence is exacerbated by economic, alcohol, drug and mental health issues, it is ultimately based on the abuser using coercive and violent behaviours to control victims. *Strangulation*⁴ is one of the most lethal forms of family violence and it can have devastating psychological effects on victims.⁵ It is a highly effective tactic employed by abusers to control victims because it instils such high levels of fear. Reports of strangulation in family violence situations are disturbingly common and are often accompanied by emotional abuse, verbal threats (often to kill) and extreme violence.

While there are general *crimes against the person* offences in the Crimes Act,⁶ there is no specific criminal offence of strangulation in New Zealand. In June 2014, the Family Violence Death Review Committee (FVDRC) formally recommended New Zealand enacts a

¹ On 26 November 2009 New Zealand Parliament passed the Crimes (Provocation Repeal) Amendment Act 2009, repealing the partial defence of *provocation*.

² *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009: Potter J set the minimum non-parole period at 18 years.

³ The term *family violence* in this paper will adopt the definition outlined by The Task Force on Violence within Families, namely a “broad range of controlling behaviours, commonly of a physical, sexual and/or psychological nature, which typically involve fear, intimidation and emotional deprivation. It occurs within a variety of close personal relationships, such as between partners, parents and children [and] siblings...” <www.msd.govt.nz>.

⁴ The term *strangulation* in this paper will be used unless quoting terms such as *attempted strangulation*, *choking* or *non-fatal strangulation* used by other authors or commentators.

⁵ Casey Gwinn and Gael Strack “Introduction and Overview of Strangulation Cases” in Training Institute on Strangulation Prevention: *The Investigation and Prosecution of Strangulation Cases* (California, 2003) at 1.

⁶ Crimes Act 1961, ss 188-204.

specific criminal offence for *non-fatal strangulation*. The three main reasons provided by the FVDRC for the recommendation are to:⁷

- (1) highlight non-fatal strangulation as a ‘red flag’ (predictor) for future harm and fatality,
- (2) remove the need to prove physical injury to the victim, or intent to injure or kill on the part of the offender, and
- (3) highlight incidents of non-fatal strangulation on an offender’s criminal record.

On July 13 2014, the former Minister of Justice, Judith Collins, supported the FVDRC recommendation stating “family violence involving *attempted strangulation* is a strong indicator that the perpetrator will go on and kill the victim... New Zealand needs to treat attempted strangulation much more seriously... Attempted strangulation is only treated as *male assaults female* and it doesn’t give the judges looking at these cases [an indication of the seriousness of the offence].”⁸ This paper will critically examine each aspect of the FVDRC recommendations and also attempt to determine if Mrs Collins statements are correct.

A definition of strangulation will be outlined as will the potential injuries, psychological harm and its lethality. Identification, investigation and prosecution of strangulation cases can be extremely difficult given it is under-reported by victims, the language used is inconsistent and criminal offences can often be missed by police due a lack of visible injuries. The enactment of new strangulation offences are intended to increase the awareness of the lethality of strangulation and remove some of the barriers that impede obtaining convictions for strangulation, and thereby hold more abusers to account. Strangulation is also now widely accepted as an accurate predictor of future family violence and intimate partner homicide (IPH),⁹ and by obtaining convictions for strangulation it will be possible to immediately identify offenders who pose a high level of risk to victims. This knowledge could be a powerful tool in helping to prevent future violence and IPH.

Forty three states in the United States of America (USA) have enacted offences aimed specifically at strangulation and, while each state in the USA has amended the law very differently, there are key themes that emerge from the various approaches taken. Initial research from the USA suggests strangulation offences are having a positive impact on raising awareness of the lethality of strangulation, protecting victims, and holding abusers to account. This research will be extremely valuable in helping inform debate in New Zealand and identifying the likely benefits involved in enacting new legislation. Arguments against enacting new strangulation offences are also explored and potential risks and unintended consequences are identified. For example, the argument that there are sufficient offences in the Crimes Act to deal with any incidents involving strangulation, and new offences are unnecessary, will be examined in more detail.

⁷ Family Violence Death Review Committee *Fourth Annual Report* (December 2012 to December 2013, Wellington: Health Quality & Safety Commission, New Zealand, 2014) at 101.

⁸ Interview with Judith Collins, former Minister of Justice (Rachel Smalley, Q+A Programme, Television New Zealand, July 13, 2014).

⁹ Gael Strack and Casey Gwinn “On the Edge of Homicide: Strangulation as a Prelude” (2011) 26 *Criminal Justice* 3, 32 at 33; See also Casey Gwinn and Gael Strack, above n 5, at 1.

It is acknowledged domestic strangulation in New Zealand requires further detailed quantitative and qualitative research prior to making any legislative change. However, this paper concludes that the combination of high levels of family violence, the controlling and lethal nature of domestic strangulation and the ability to prevent future harm provides a strong argument to further explore new strangulation offences in New Zealand.

II Strangulation, Power and Family Violence

A Strangulation

There is no single definition of strangulation but is commonly described as “a form of asphyxia (lack of oxygen) characterised by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck.”¹⁰ Using the correct terminology is critical in the reporting, investigation and prosecution of strangulation offences so the seriousness of the offence can be established and the correct charges laid. Casey Gwinn recommends the crime of strangulation should not be labelled *attempted strangulation* as “any intentional pressure on the neck in order to impede air flow or blood flow should be viewed as a potential strangulation assault. The perpetrator did not attempt the assault. He completed it.”¹¹ Strack and Agnew also suggest that:¹²

“In the past, “choking” cases were often minimized by victims, police officers, prosecutors, judges and medical personnel. The lack of visible injury and adequate training caused the entire criminal justice system to unintentionally treat non-fatal strangulation cases (as we now call them) as minor assaults with little or no consequence... *Strangulation* is the proper term to describe what has happened to the victim and by using correct terminology more awareness is brought to the seriousness of the crime.”

As the introduction has shown, the terms *strangulation*, *non-fatal strangulation* and *attempted strangulation* have already been used by different commentators. To complicate the matter even further, victims tend to use different terms again which can result in miscommunication and under-reporting. This issue will be explored further below.

Strangulation can occur without leaving any visible injuries, or leave injuries that are hard to identify, which can lead to both victims under-reporting and authorities minimising the seriousness of the violence. Even when there are no visible injuries some victims have been known to die of brain damage in the days and weeks following the strangulation.¹³ Although the amount of pressure on the neck required to induce unconsciousness or death varies greatly

¹⁰ Lee Wilbur “Survey Results of Women Who Have Been Strangled While in Abusive Relationships” (2001) 21 *Emergency Medicine* 297 at 298.

¹¹ Casey Gwinn “Strangulation and the Law” in Training Institute on Strangulation Prevention: *The Investigation and Prosecution of Strangulation Cases* (California, 2003) at 13.

¹² Gael Strack and Andrew Agnew “Investigation of Strangulation Cases” in Training Institute on Strangulation Prevention: *The Investigation and Prosecution of Strangulation Cases* (California, 2003) at 21-23.

¹³ Alberta Justice and Solicitor General “Domestic Violence Handbook for Police and Crown Prosecutors in Alberta” (Alberta Justice Communications, 2014) 111.

from one person to the next, it “generally only requires 11 pounds¹⁴ of pressure applied for 10 seconds to cause unconsciousness,”¹⁵ and a further 1-2 minutes to go from unconsciousness to death.¹⁶ Doctor Luis Pena states “50 seconds is the point of no return, this is the point where victims bounce back reflexes become inoperative and resuscitation requires emergency medical intervention and victims rarely recover.”¹⁷ The FVDRC also makes it clear there is a fine line between non-fatal and fatal strangulation.¹⁸

Physical injuries caused by strangulation include but are not limited to: blood shot eyes; petechiae; swollen tongue; soreness; redness; abrasions; bruising; loss of consciousness; amnesia; nausea; and vomiting.¹⁹ A number of these injuries are either unknown by investigators, and/or difficult to detect, which makes the investigation and prosecution of the offence challenging. Strangulation can also cause far more serious injuries such as broken vertebrae in the neck, paralysis, brain damage and even death.²⁰ Strangulation can also cause the victim to believe they are going to die which can cause long term psychological issues such as post-traumatic stress disorder, depression and psychosis.²¹

Power and control are key elements in IPV and family violence, and strangulation is a powerful weapon for abusers to dominate and control their family members. In their Fourth Annual Report, the FVDRC state:²²

“IPV is best understood in terms of the coercive and controlling behaviours used by the predominant aggressor in the relationship. Coercion involves the use of force or threats to intimidate or hurt victims and instil fear. Control tactics are designed to isolate and foster dependence on the abusive partner and their lifestyle. Together these abusive tactics undermine a victim’s ability for independent decision-making and inhibit resistance and escape.”

The extremely destructive psychological effect of strangulation is one key factor that sets it apart from other forms of assault within the Crimes Act. Women report vulnerability and fear when they recognise during the strangulation how easy it is for the abusive partner to kill them, and strangulation also reinforced many of the other coercive controlling behaviours

¹⁴ Eleven pounds equals 4.99 kilograms.

¹⁵ Dean Hawley “A Review of 300 Attempted Strangulation Cases Part III: Injuries in Fatal Cases” (2001) 21 *Emergency Medicine* 317 at 320.

¹⁶ Nancy Glass “Non-fatal Strangulation is an Important Risk Factor for Homicide of Women” (2008) 35 *Emergency Medicine* 3, 329-335 <ncbi.nlm.nih.gov>.

¹⁷ Luis Pena “Investigation Strangulation” <www.daltonstate.edu>.

¹⁸ Family Violence Death Review Committee, above n 7, at 98.

¹⁹ See Lee Wilbur, above n 10, at 301; See also Morag McClean *The Identification Care and Advocacy of Strangulation Victims: Information for Front Line Workers and Crisis Advocates* (Victorian Order of Nurses for Canada, 2009) 3 at 6 <www.von.ca>; See also Heather Douglas and Robyn Fitzgerald “Strangulation, Domestic Violence and the Legal Response” (2014) 36 *Sydney Law Review* 231 at 232-233.

²⁰ Heather Douglas and Robyn Fitzgerald “Strangulation, Domestic Violence and the Legal Response” (2014) 36 *Sydney Law Review* 231 at 233.

²¹ Gael Strack and George McClane *How to Improve Your Investigation and Prosecution of Strangulation Cases Part 1*, cited in Archana Nath “Survival or Suffocation: Can Minnesota’s New Strangulation Law Overcome Implicit Biases in the Justice System” (2007) 25 *Law and Equity* 253 at 268.

²² Family Violence Death Review Committee, above n 7, at 17.

they experienced on a daily basis.²³ Strack and Gwinn state “[s]trangulation is a form of power and control that can have a devastating psychological effect on victims, and most abusers do not strangle to kill – they strangle to show they *can* kill.”²⁴ Kristie Thomas also suggests strangulation differs from other forms of IPV because “few abusive behaviours are so closely linked to the possibility of dying and few are so difficult to detect.”²⁵

B *IPV and family violence*

IPV and family violence is embedded throughout New Zealand society with recent figures showing police attended 95,080 family violence incidents in 2013, and at least one criminal offence recorded in 37,880 cases. The number of reported family violence incidents reported has steadily risen since 2006 when there were 61,947 incidents reported to police.²⁶ Within the scene type *dwelling* there were approximately 25,000 recorded assault offences intended to cause injury (not involving sexual offences) each year in 2012 and 2013.²⁷ These figures include approximately 5,900 *male assault female* offences where there is no injury and approximately 3,000 *male assault female* offences where injury had occurred (each year). Conviction rates remain stable at approximately 65 percent.²⁸ Not all family violence incidents or offences are reported to police and the level of under-reporting is significant, with some estimates indicating only 18-20 percent of family violence incidents are reported to police each year.²⁹ On 2013 figures that would put the level of family violence incidents occurring at a staggering 475,000 per year approximately.

Between 2009 and 2012, there were 126 family violence related homicides³⁰ in New Zealand. Sixty three of the homicides were IPH, 37 were child abuse deaths, and 26 were intra-familial deaths.³¹ Of the 63 IPH deaths, 75 percent of the offenders were men and nearly 75 percent of the victims were women.³² Fourteen percent (9) of the 63 IPH deaths involved an act of strangulation as part of the death event,³³ and in 9.5 percent (6) of the cases strangulation was the cause of death. In comparison, in Australia nine percent of all domestic homicides the cause of death was strangulation,³⁴ and in Minnesota (USA), from 1989 to 2005, 13 percent of all women who were murdered, and 17 percent of all children murdered by a family

²³ Kristie Thomas, Manisha Joshi and Susan Sorenson “Do you know what it feels like to drown? Strangulation as coercive control in intimate relationships” (2013) *Psychology of Women Quarterly*, at 11.

²⁴ Gael Strack and Casey Gwinn, above n 9, at 33.

²⁵ Kristie Thomas, above n 23, at 9.

²⁶ New Zealand Family Violence Clearinghouse “Data Summaries” (June 2014) <www.nzfvc.org.nz>.

²⁷ Not all *male assault female* offences are family violence related, and family violence offences also occur outside the scene type *dwelling*, therefore the figures are indicative only <www.nz.stats.govt.nz>.

²⁸ “Conviction rate” relates to the number of charges laid versus the number of convictions obtained.

²⁹ Family Violence Death Review Committee *Third Annual Report* (December 2011 to December 2012, Wellington: Health Quality & Safety Commission, New Zealand, 2013) at 5.

³⁰ The term *homicide* is defined in s 2 of the Crimes Act and includes all culpable deaths including murder and manslaughter.

³¹ Family Violence Death Review Committee, above n 7, at 16.

³² At 39.

³³ At 48 & 98.

³⁴ Andy Chan and Jason Payne *Homicide in Australia: 2008-09 to 2009-10* National Homicide Monitoring Program Annual Report, AIC Monitoring Report 21 (2013) 13 <www.aic.gov.au>.

member were strangled to death.³⁵ A more recent review shows 10 percent of violent deaths in the USA are attributable to strangulation.³⁶ These family violence homicide rates are relatively similar to those in New Zealand which is in stark contrast to the levels of reported domestic strangulation between New Zealand and the USA.

New Zealand Police records for the month of August 2014 reveal approximately 220 family violence victims across the country report having been strangled by their partner at some stage in the past.³⁷ This figure represents 5.5 percent of the Family Violence Reports³⁸ filled out by police and is recorded on a risk assessment tool that determines intimate partner vulnerability factors. The risk assessment tool requires the attending police officer to ask every victim of IPV whether “the aggressor has ever strangled or attempted to strangle you?” Each month the number of victims in New Zealand reporting strangulation in the past has remained relatively steady. In Queensland, Australia, a review of 328 cross-applications for protection orders revealed 11.6 percent of applicant’s alleged strangulation in the relationship.³⁹ The rates of reported strangulation incidents in New Zealand and Australia are significantly lower than the USA. Research in the USA indicates between 30 and 68 percent of women in abusive relationships have experienced at least one strangulation assault by a male partner in their life time, and between 33 to 47 percent of women report that their partner had tried to strangle them in the last year.⁴⁰ A 2005 study by Nancy Glass, of 494 abused women in Chicago, revealed 47.3 percent had experienced choking or strangulation in the last year and 57.6 percent said they had experienced choking or strangulation by their partner in the past.⁴¹ In 2001, Lee Wilbur found that 68 percent of women presenting to a domestic violence programme reported strangulation by their abuser.⁴²

There is a large disparity to New Zealand (5.5%) in reported levels of prior strangulation given the IPH levels between New Zealand and the USA is similar at 10-13 percent. There are a number of possible reasons for this disparity including: under-reporting; inconsistency of language used by victims and police; lack of training and awareness for police; lack of detection of offences; and extremely disparate methods of interviewing victims of IPV. In New Zealand it is anticipated victims would be far less likely to report prior serious violence incidents to police at the time, and normally at the scene, than in the USA research where victims have been interviewed after the event in a safe and secure environment by trained

³⁵ Minnesota Coalition for Battered Women *Special Femicide Report: Strangulation of Women and Children Murdered in Minnesota 1989-2005* (Minnesota, 2005).

³⁶ Gael Strack, George McClane and Dean Hawley “A Review of 300 Attempted Strangulation Cases” Part 1: Criminal Legal Issues (2001) 21 *Emergency Medicine* 3, 303 at 309.

³⁷ New Zealand Police *Family Violence Risk Assessments Report* (August, 2014).

³⁸ Refer Police Form Pol 1314.

³⁹ Heather Douglas and Robyn Fitzgerald, above n 20, at 246 & 249.

⁴⁰ Archana Nath “Survival or Suffocation: Can Minnesota’s New Strangulation Law Overcome Implicit Biases in the Justice System” (2007) 25 *Law and Equity* 253 at 266-267. See also Lee Wilbur, above n 10, at 297-302; G L Roberts “Prevalence Study of Domestic Violence Victims in an Emergency Department: 27 *Annals of Emergency Medicine* (1996) 747-753; and Carolyn Block *The Chicago Women’s Health Study: Risk of Serious Injury or Death in Intimate Violence, A Collaborative Research Project* (Illinois Criminal Justice Information Authority, 2000) <www.icjia.state.il.us>.

⁴¹ Nancy Glass, above n 16, 329-335.

⁴² Lee Wilbur, above n 10, at 297-302.

researchers. It is likely the true strangulation levels in New Zealand are higher than reported and would be closer to the levels seen in the USA.

In 2013, a total of 3,803 applications for temporary protection orders were made in New Zealand to the Family Court.⁴³ Between 2008 and 2010, the number of breaches of non-violence and protection orders recorded by police is approximately 5,000 nationally per year.⁴⁴ Strangulation was identified as one factor of many within a family violence context that helped lead to some temporary protection orders being made final pursuant to s 14 of the Domestic Violence Act 1995.⁴⁵ Although strangulation is identified by the court as a factor to be considered in granting a final protection order, no New Zealand cases reviewed distinguished strangulation from other types of assaults or highlighted the controlling nature and lethality of the act. Strangulation figures reported in protection order applications are not readily available in New Zealand, but as stated earlier, a recent Queensland study showed allegations of attempted murder by strangulation were a feature in up to 11.6 percent of cross-applications for domestic violence protection orders.⁴⁶ In that study Douglas and Fitzgerald found “there was no evidence that an allegation of strangulation is treated differently, or indeed more seriously, by the police and the courts than other types of less serious allegations such as assault.”⁴⁷ Given strangulation is a proven predictor of future violence, combined with the lethality and fear attached to it, strangulation could potentially be an additional mandatory factor for the Family Court to take into account in issuing protection orders under the principles outlined by the Court of Appeal in *Surrey v Surrey*.⁴⁸

C Strangulation as a “red flag” in family violence

Strangulation is now widely recognised as one of the best indicators for predicting future IPV, family violence and IPH.⁴⁹ The FVDRC lists the predictive nature of strangulation as the first reason to enact a strangulation offence so it is important to look at the research behind this claim.⁵⁰ In 1996 the Assistant San Diego City Attorney, Gael Strack, reviewed 300 strangulation cases that had been submitted for prosecution. Strack’s review revealed that victims of prior strangulation are seven times more likely to become homicide victims, and notably, in all but one case the abusers were men.⁵¹ In 2000, Carolyn Block screened 2616 abused women and found that being strangled or choked in a previous domestic

⁴³ New Zealand Family Violence Clearinghouse, above n 26.

⁴⁴ New Zealand Police figures (year-end) show the number of breaches recorded as: 2008 = 4967; 2009 = 5333; and 2010 = 5385 <www.police.govt.nz>.

⁴⁵ See for example *KMW v JBHW* [2012] NZFC 2853 at [7-9]; *JSN v JWMS* [2012] NZFC 5477 at [15]; *TBH v WRH* [2012] NZFC 4870 at [37-38]; and *BEH v WDH* [2012] NZFC 6170 at [10].

⁴⁶ Heather Douglas and Robin Fitzgerald “Legal Processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders” (2013) 36(1) University of New South Wales Law Journal 56 at 75-76.

⁴⁷ Heather Douglas and Robin Fitzgerald, above n 20, at 249.

⁴⁸ *Surrey v Surrey* [2008] NZCA 565 at [118-119].

⁴⁹ Gael Strack and Casey Gwinn, above n 9, at 33. See also Lee Wilbur, above n 10, at 301; and Carolyn Block above n 40.

⁵⁰ Family Violence Death Review Committee, above 7, at 101.

⁵¹ Gael Strack and Casey Gwinn, above n 9, at 33.

violence incident was a risk factor for later being seriously injured or killed.⁵² In a 2005 study involving 933 victims, Nancy Glass found prior strangulation by a woman's male partner was associated with a 6.7 times increase that he would try to kill her in the future, a 7.48 percent increase in the likelihood of him actually killing her. Glass concluded by saying "prior non-fatal strangulation is an important risk factor for homicide of women."⁵³

A number of actuarial risk assessment tools have been developed and refined to determine the likelihood of future IPV, family violence and IPH, and most have been proven to be remarkably accurate. For example, the Danger Assessment, developed by Jacquelyn Campbell in the USA in 1986, is a weighted actuarial lethality risk assessment tool using 20 criteria that has an accuracy rate of 0.9 (ROC) in identifying abusers who are likely to kill their partner.⁵⁴ The Danger Assessment specifically asks IPV victims "does he ever try to choke you?" The Method of Assessment of Domestic Violence Situations (DV-MOSAIC) developed by De Becker and Associates also uses strangulation as one of 46 criteria to determine future risk of IPH, although this model is designed as an assessment and investigation tool as opposed to a predictive tool.

New Zealand Police currently use the Ontario Domestic Assault Risk Assessment (ODARA) actuarial risk assessment tool to determine the likelihood of *future assaults* occurring by the abuser in the family.⁵⁵ The ODARA model has an accuracy validity of 0.77 (ROC) in predicting future IPV and family violence.⁵⁶ While the ODARA model asks victims about previous violence and threats, it does not specifically enquire about strangulation. However, the New Zealand Police also use an intimate partner vulnerability factors questionnaire (Police Form 1314) that has a specific question asking the victim whether "the aggressor has ever *strangled* or *attempted to strangle* you in the past?"⁵⁷ The intimate partner vulnerability factors form has helped raise the awareness of strangulation as a predictor of violence amongst New Zealand Police, but more needs to be done to raise awareness of the lethality of strangulation. The ODARA risk assessment model and the Police Form 1314 are important tools that are likely to save the life of family violence victims in the future, however, it is only the very start of the process. Raising the awareness of the lethality of strangulation and increasing the training and skills of police and key stakeholders is also critical. The term "strangle" in this context could lead the victim to saying "no" to the question if they would not ordinarily use that terminology. The Police Form 1314 could perhaps use the terminology a victim is likely to use, not a term police use.

⁵² Carolyn Block, above n 40.

⁵³ Nancy Glass, above n 16, at 329-335: See also Jacquelyn Campbell "The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide" (2009) 24 *Interpersonal Violence* 4, 653 at 656. Research showed between 67-80 percent of cases has a history of IPV where the partner has been killed.

⁵⁴ Jacquelyn Campbell, at 653. The Danger Assessment study showed a predictive accuracy of 0.9 under the Receiver Operating Characteristic Curve <www.dangerassessment.com>.

⁵⁵ Refer Police Form Pol 1315.

⁵⁶ Janice Roehl "Intimate Partner Violence Risk Assessment Validation Study" National Criminal Justice Reference Service (May 2005) Document 209731 <www.ncjrs.gov>.

⁵⁷ Refer Police Form Pol 1314.

D *Strangulation training for key stakeholders*

The identification, investigation and prosecution of strangulation offences within a family violence context is extremely difficult given the levels of under-reporting, lack of visible injuries and training by key stakeholders. Commentators assert that enacting new offences for strangulation will help raise the awareness of the lethality of strangulation with victims of family violence and will necessitate further education and training for police, support agencies and prosecutors.⁵⁸ Strangulation is often minimised and under-reported by victims both intentionally and unintentionally. For example, victims often down-play the act by using terms like *grabbed*, *choked* or *squeezed* (their throat or neck) and police may miss the importance of the disclosure, and when there are no visible signs of injury a serious offence can go undetected by police.⁵⁹ Consequently the offender is not arrested or prosecuted for the strangulation and the vital warning signs for future family violence and IPH are missed.

In 1996, Gael Strack from the San Diego Office of the City Attorney investigated 300 strangulation cases submitted for prosecution to identify the signs and symptoms of strangulation that could be used to corroborate the victim's allegation of being choked or strangled.⁶⁰ In 50 percent of the cases there were no visible injuries and only 15 percent of the victims had injuries capable of being photographed and used in evidence.⁶¹ Nevertheless, there were documented symptoms of non-visible injuries such as pain when swallowing, nausea, loss of memory, incontinence, and loss of consciousness. It is only through early identification of the signs and symptoms of strangulation by police and support agencies, and a thorough forensic medical examination by trained doctors, that this type of evidence will become available to police and prosecutors in the future. Police must be fully aware of the lethality of strangulation, trained how to identify its signs and symptoms, and trained to investigate strangulation thoroughly to provide the best possible chance of protecting the victims and holding abusers to account. Police must be trained to ask probing non-leading questions, be alert to the language used by victims, be able to identify injuries and gather the available evidence to prosecute the abuser. Victims can be encouraged to seek a forensic medical examination from a trained doctor in order to identify and document visible and non-visible evidence of strangulation.

However, is raising awareness and increasing training in strangulation sufficient reason to change the criminal law? Allison Turkel suggests that "it is not necessary to have a designated crime as long as there is a thorough investigation."⁶² Turkel says the most important aspects of preventing harm, saving lives and holding abusers to account in the legal

⁵⁸ See Nicole Verdi "Releasing the Stranglehold on Domestic Violence Victims: Implications and Effects of Rhode Island's Domestic Assault Statute" (2013) 18 Roger Williams University Law Review 255 at 275; and Archana Nath, above n 39, at 271-273 & 289-290.

⁵⁹ Allison Turkel "And then he choked me": Understanding, Investigating and Prosecuting Strangulation Cases (2007) 2 The Voice 1 American Prosecutors Research Institute, Research and Development Division NDAA.

⁶⁰ Gael Strack, George McClane and Dean Hawley, above n 36, at 309.

⁶¹ At 305.

⁶² Allison Turkel "Understanding, Investigating and Prosecuting Strangulation Cases" (2007) 41 Prosecutor 20 at 22-23.

system is ensuring enforcement officer's awareness of the lethality of strangulation, ensuring there is a thorough well documented investigation and a forensic medical examination is completed by a trained professional. A multi-agency training package could be rolled out to police, support agencies, health and justice sectors to educate staff involved in the identification, investigation and prosecution of strangulation offences. It is recommended this course of action is undertaken whatever the decision is around the legislation. It is possible for the Ministries of Justice, Social Development and Police to run education and awareness campaigns that draw attention to the lethality of strangulation in family violence situations for all stakeholders, and encourages victims to seek help from support agencies and police. The education and awareness programme could be run without any change in legislation, perhaps in conjunction with the very successful "It's not OK" campaign aimed at preventing family violence.

Another significant difficulty in the investigation and prosecution of strangulation cases is that it is common for victims to recant their statement. Where a victim tries to recant Gerald Fineman states "[t]hese cases rely on two key elements for successful prosecution: (1) make the case more dependent on the evidence than it is upon the testimony of the victim, and (2) develop as much corroborating evidence as possible."⁶³ Fineman goes on to recommend that strangulation cases should be treated like a homicide so it doesn't become a homicide. It is therefore incumbent on police to ensure they investigate all allegations of strangulation and family violence thoroughly looking for corroborative evidence in case a recantation of the statement is made. An example of a family violence victim withdrawing her complaint after a serious assault involving strangulation is *Coe v The Queen*.⁶⁴ In this case the victim made a full statement to police the following day but later recanted her statement saying she had made a false complaint. The prosecution went ahead with the trial judge declaring the victim to be a hostile witness and the defendant was convicted of *injuring with intent to injure*,⁶⁵ with the strangulation being noted as an aggravating feature of the assault.⁶⁶ In these instances it is critical police conduct a thorough investigation so the prosecution does not have to rely on the victim's evidence to obtain a conviction.

There are many and varied reasons why a victim will recant their statement. Very often the recantation is driven by fear of retribution and threats by the abuser of more harm to the victim and family. In Canada, criminologist Lise Poupart gave evidence, in *R v Imming*, outlining the phenomenon of domestic abuse victims recanting statements was common and suggests reasons victims also recant due to feelings of insecurity, self-doubt, and not wanting to hurt a loved one.⁶⁷ Early intervention with the victim, providing professional support and counselling, and providing a place of safety for the victim can help limit the likelihood of victims recanting their statements and increase the chances of a successful prosecution.

⁶³ Gerald Fineman "Prosecuting Strangulation Cases" in Training Institute on Strangulation Prevention: *The Investigation and Prosecution of Strangulation Cases* (California, 2003) at 39-42.

⁶⁴ *Coe v The Queen* [2014] NZCA 95.

⁶⁵ Crimes Act, Section 189(1).

⁶⁶ *Coe v The Queen*, above n 64, at [13-14].

⁶⁷ *R v Imming* [2000] RJQ 215.

III Current Offences Covering Strangulation in New Zealand, Canada, The United Kingdom, The United States of America and Australia

A New Zealand Offences and Strangulation

In New Zealand, the closest offence to strangulation is *rendering unconscious* where any person “wilfully and without lawful justification or excuse, stupefies, disables or renders unconscious any other person” and is liable to a maximum of 5 years imprisonment.⁶⁸ The mere act of strangulation is not sufficient on its own to gain a conviction as it is necessary to prove the victim was stupefied, disabled or rendered unconscious. Of real concern is recent figures show this provision is rarely prosecuted by police.⁶⁹ Only seven or eight offences are recorded each year, which questions the effectiveness of the offence given the levels of strangulation being reported within family violence incidents.

There are a range of alternative criminal offences that can be considered for strangulation under the Crimes Act.⁷⁰ A review of New Zealand cases involving strangulation reveals that there is a wide range of approaches to charging abusers depending predominantly on the seriousness of injuries received by the victim, and the intention of the abuser. Only *common assault*, *assault on a child* and *male assaults female* do not require the proof of any injury, or specific intention of the abuser, and are the offences at the lowest end of the scale in terms of maximum terms of imprisonment. As Mrs Collins suggests, strangulation cases at the lower end of the scale tend to be prosecuted as *male assaults female*⁷¹ and more serious cases are prosecuted as *injures with intent*⁷² or *causes grievous bodily harm with intent*.⁷³ For example, in *Kaio v The Queen* the appellant pleaded guilty to one charge of *causing grievous bodily harm with intent*⁷⁴ and was sentenced to six years imprisonment for punching his former partner and wrapping a phone charger around her neck and pulling it tight.⁷⁵ The victim received two black eyes, a broken nose, and facial bleeding and was in hospital for three weeks. The victim impact statement stated the victim feared for her life and had recurrent nightmares.⁷⁶ The Court of Appeal accepted District Court Judge Ingram’s starting point of nine years imprisonment due to the “prolonged nature of the violence, and the type of injuries inflicted.”⁷⁷ In *Clark v The Queen* the appellant was charged with *injuring with*

⁶⁸ Crimes Act, s197.

⁶⁹ In the scene type *dwelling* there were 7 & 8 recorded offences in 2012 & 2013 respectively. However, these figures may not involve strangulation and may include offences such as disabling through the administering of drugs <www.stats.govt.nz>.

⁷⁰ Criminal offences covering strangulation in the Crimes Act range in seriousness from: s 196 *common assault*, punishable by up to 1 year imprisonment; s 194(a) *assault on a child*, and s 194(b) *being a male assaults a female* (2 years); s 193 *assault with intent to injure* (3 years); ss 189(1) & (2) *injures with intent* (5/10 years respectively); ss 188(1) & (2) *wounding with intent* (7/14 years respectively); up to s 173(1) *attempted murder* (14 years).

⁷¹ Section 194(b): See for example *Ferguson v New Zealand Police* CRI-2008-412-9, 10 April 2008.

⁷² Section 189(1) or (2).

⁷³ Section 188(1) or (2).

⁷⁴ Crimes Act, s 188(1).

⁷⁵ *Kaio v The Queen* [2012] NZCA 168 at [3], [5] & [11].

⁷⁶ At [5].

⁷⁷ At [11].

*intent to injure*⁷⁸ where Clark grabbed his partner by the throat and choked her for a short period and was sentenced to two and a half years imprisonment on that charge.⁷⁹ In *B v The Queen* the defendant was charged with *injuring with intent to injure* for strangling the victim into unconsciousness,⁸⁰ and in *Rozenbaum v New Zealand Police* the defendant had been charged with *injures with intent to cause grievous bodily harm* for strangling the victim.⁸¹

However, there are many cases in New Zealand where strangulation is not charged as an assault of any description, is noted as just one act within serious violence cases and is merely seen as an aggravating factor in sentencing. Sections 8 & 9 of the Sentencing Act 2002 are defined broadly enough to allow judges to take strangulation into account as an aggravated feature of the overall offending.⁸² A case of this nature is *R v Te Whetu* where the defendant kidnapped his partner in a vehicle, punched her in the head and hit her head on the dashboard, closed the car door on the victims knee and ankle, tried to strangle her, threatened to kill and struck her in the head with a bottle causing unconsciousness.⁸³ During sentencing on the kidnapping, Duffy J noted the aggravating factors included the act of strangulation (which was not a charge on its own), abuse of trust and emotional harm.⁸⁴ With respect, this approach seriously diminishes the serious and dangerous nature of strangulation and provides a strong argument for change.⁸⁵

Prior strangulation has also been used as a specific type of assault that has been used in prosecutions to show a propensity to commit similar types of offence.⁸⁶ For example, in the Court of Appeal in *Roper v The Queen*, Winkelmann J stated two prior incidents of violence of a potentially fatal type, namely the application of force to the victim's throat, was probative given the victim died from asphyxiation.⁸⁷ Propensity evidence was also admitted in evidence in this case where the force had been applied to the neck and throat of a different victim.⁸⁸ In the Court of Appeal in *B v The Queen*, Courtney J noted the similarity and unique allegations of strangling and burning involving separate victims and admitted the evidence showing propensity for strangulation.⁸⁹

Strangulation has also been seen by the court as an aggravating feature of family violence offences when defendants apply for bail under the Bail Act 2000. For example, in *James v New Zealand Police* the High Court refused bail in circumstances where it was alleged the respondent assaulted his partner by punching her, threatening to kill her and strangling her to

⁷⁸ Crimes Act, s 189(2).

⁷⁹ *Clark v The Queen* [2013] NZCA 63.

⁸⁰ *B v The Queen* [2014] NZCA 244 at [5] & [8(c)].

⁸¹ *Rozenbaum v New Zealand Police* HC Hamilton CRI-2006-419-88, 28 July 2006 at [2] & [4].

⁸² Sentencing Act 2002, ss 8(a) & (b) and 9(1)(a), (d), (e) & (j).

⁸³ *R v Te Whetu* HC Hamilton CRI-2010-019-3093, 28 July 2011 at [9-12]; see also *New Zealand Police v Perenara* DC Kaikohe CRI-2011-029-001338, 6 September 2012 at [23].

⁸⁴ At [55]. See also *The Queen v Thompson* [2014] NZHC 1557 at [9-12] & [39(b)]; *Thurgood v The Queen* [2012] NZCA 23 at [25-26]; and *T v R* CA662/2009, 19 July 2010.

⁸⁵ Note: It is the responsibility of the Crown and New Zealand Police to lay the most appropriate charges.

⁸⁶ Evidence Act 2006, ss 40-43.

⁸⁷ *Roper v The Queen* [2012] NZCA 568 at [28].

⁸⁸ At [30].

⁸⁹ *B v The Queen* [2014] NZCA 244 at [32-33].

unconsciousness on two occasions.⁹⁰ In denying bail Andrews J noted the serious nature of the offending and noted there was a real risk of the victim being in danger if the respondent was released.⁹¹

In recent years there have also been pieces of legislation enacted in New Zealand to provide better protection for victims of family violence. For example, the Domestic Violence Act 1995 was enacted to prevent family violence in New Zealand, empower the court to make protection orders to protect family violence victims and to provide criminal sanctions for breaches of protection orders.⁹² Strangulation and family violence are factors taken into account when the Family Court is deciding on whether temporary protection orders should be granted and whether final protection orders are deemed necessary. A review of the New Zealand protection order cases involving strangulation show judges rely heavily on the level of evidence available of any alleged IPV.⁹³ It is therefore crucial when police are called that all available evidence of assaults and strangulation is collected. It makes it very hard for the Family Court when there are allegations of strangulation, or any assault, and it is just one person's word against another. Convictions for strangulation offences could be another important consideration for the Family Court when deciding whether to approve a protection order.

There is an argument new strangulation offences in New Zealand are unnecessary as sufficient criminal offences already exist within the Crimes Act to deal with any strangulation incidents. Lawyer Steven Bonnar QC says "it seems unnecessary to make [strangulation] a specific crime as it's already catered for within the current law."⁹⁴ It could be argued that *common assault* and *male assaults female* could deal with any strangulation incidents where there is little or no injury, and for more serious strangulation resulting in injury the charges of *injures with intent*, *rendering unconscious* and *wounding with intent* would be available. *Attempted murder* could be used when the strangulation is severe and there is a clear intention to kill the victim. However, this view does not take into account a number of important factors. For example, it is possible to strangle a person, even into unconsciousness, without leaving any visible injuries and without intending to seriously injure or kill that person (albeit death is a serious risk). In that scenario none of the more serious Crimes Act offences are currently available to the prosecution. The most serious offence that could be laid would be *rendering unconscious*, but the most likely charge in those circumstances would be *male assaults female*.

⁹⁰ *James v New Zealand Police* [2013] NZHC 310 at [3].

⁹¹ At [21-23]; See also *Rozenbaum v New Zealand Police* HC Hamilton CRI-2006-419-88, 28 July 2006 at [2] & [4].

⁹² Domestic Violence Act 1995, s 5.

⁹³ See for example *TBH v WRH* [2012] NZFC 4870; *KMW v JBHW* [2012] NZFC 2835; *JSN v JWMS* [2012] NZFC 5477; and *Surrey v Surrey* [2008] NZCA 565.

⁹⁴ Interview with Steven Bonnar QC (Newstalk ZB, 26 June, 2014) <www.newstalkzb.co.nz>.

B Strangulation Offences in Canada and the United Kingdom

Like New Zealand, Canada and the United Kingdom rely on general *offences against the person* and do not have any specific offences for IPV or family violence. However, both Canada and the United Kingdom have general strangulation specific offences. Section 246 of the Canadian Criminal Code specifies any person with “intent to commit an indictable offence ... and attempts by any means to choke, suffocate or strangle another person [is liable]...”, and the offence carries a maximum penalty of life imprisonment.⁹⁵ This provision is used rarely in Canada but a few cases do exist.⁹⁶ The United Kingdom has a similar offence where:⁹⁷

“whosoever shall, by any means whatsoever, attempts to choke, suffocate, or strangle any other person, or shall by any means calculated to choke, suffocate, or strangle, attempts to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony.”

These offences in Canada and the United Kingdom appear to be prosecuted only on rare occasions,⁹⁸ with family violence offences involving strangulation normally being prosecuted as simple *assault* in Canada⁹⁹ and *common assault* in the United Kingdom.¹⁰⁰ For more serious strangulation cases involving injury the offence is normally *causing actual bodily harm* in Canada¹⁰¹ and *assault occasioning actual bodily harm* in the United Kingdom.¹⁰² The difficulty with prosecutions under these offences is normally the difficulty in proving the offender intended to cause an indictable offence, such as sexual violation or robbery, while choking or strangling the victim. It is barriers such as this that have led to the call for significant changes to strangulation offences in the USA.

C Strangulation Offences in the United States of America

Most states in the USA have specific offences of strangulation, and some states also have strangulation offences specific to family violence situations. A review of strangulation

⁹⁵ Canadian Criminal Code RSC 1985, Ch C-46, s 246(a). Note: An *indictable* offence is a serious criminal offence. It is similar to the term *felony* used in the USA. The term *indictable* is no longer used in New Zealand since the enactment of the Criminal Procedure Act 2011 and has been replaced by *category 3 & 4 offences* pursuant to section 6 of the Act.

⁹⁶ See *R v Francisco* [2005] MBCA 110 (30 September 2005); and *R v Betker* (2004) ABQB 482 (23 June 2004).

⁹⁷ Offences against the Person Act 1861 (UK), s 21: Maximum penalty life imprisonment. See *R v Abdroikov* [2006] 1 Cr App R 1; and *R v Enstone* [2002] EWCA Crim 1375.

⁹⁸ Heather Douglas & Robin Fitzgerald, above n 20, at 238.

⁹⁹ At 239. See *R v Aurini* (2010) ABPC 354 (3 November 2010); and *R v Van Oostwaard* [2009] ABPC 358 (4 December 2009).

¹⁰⁰ Criminal Justice Act 1988 (UK), s 39.

¹⁰¹ Criminal Code RSC 1985, Ch C-46, s 267(b).

¹⁰² Offences against the Person Act 1861 (UK), s 47. See *R v AS* [2004] EWCA Crim 2019; *R v Brooks* [2007] EWCA Crim 1785; and *R v Bushnell* [2008] EWCA Crim 1302.

offences in the USA reveals over 30 states have specific legislation naming strangulation or choking as a felony, and 12 further states incorporate strangulation in a variety of ways including sentencing and setting bail.¹⁰³ The USA's criminal codes reveal an extremely wide variety of approaches states have taken for enacting strangulation offences in terms of definition, intention, injury and penalty. Another key difference is whether the offences are specific to the family violence context or have general application. While the variety of approaches makes it difficult to consolidate, it does provide New Zealand with many options when considering enacting strangulation legislation. For the purpose of this paper, due to word restrictions, it will be necessary to try and group states that have approached strangulation legislation in a similar manner, while recognising this approach has its limitations.

Minnesota led the reform in the USA in 2005 and enacted a felony *domestic battery by strangulation* offence that carries a maximum penalty of 3 years imprisonment, a \$5,000 fine, or both.¹⁰⁴ Prior to this offence being enacted a first offence for *domestic battery* was treated as a misdemeanour (minor criminal offence). Subdivision 2 now states "... whoever assaults a family or household member by strangulation is guilty of a felony..." Subdivision 1(b) defines the term "family or household member" and subdivision 1(c) defines strangulation as meaning "intentionally impeding the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person." It is important to note that under this statute there is no requirement for the prosecution to prove any injury to the victim or any specific intention by the abuser other than to strangle the victim.¹⁰⁵

Between 2005 and May 2009, Minnesota charged 3,368 people with felony *domestic battery by strangulation* with 664 charged by the Hennepin County Attorney's Office.¹⁰⁶ A review of Hennepin County's strangulation cases, between August 1 2007 and January 31 2008, revealed 96 cases were prosecuted resulting in: 39 percent convicted for felony strangulation; 38 percent convicted for other felonies including domestic assault; 27 percent lesser domestic violence related convictions; and 11 percent were dismissed.¹⁰⁷ Sixteen percent of defendants served prison time ranging between 15 and 108 months, 54 percent were sentenced to prison time averaging 97 days, and 17% of those convicted of a felony strangulation offence had sentences stayed (essentially meaning probation for 3 years).¹⁰⁸ The number of charges laid represents a significant 61 percent increase from a similar study

¹⁰³ Battered Women's Justice Project "Strangulation Laws" 2014 <www.bwjp.org>. States with no strangulation specific law include: Kansas; Kentucky; Montana; New Jersey; New Mexico; North Dakota; and Pennsylvania.

¹⁰⁴ Minnesota Stat Ann § 609.2247(1) & (2) (Supp 2005) Domestic assault by strangulation.

¹⁰⁵ See for example *Huey v State* NW 2d 2014 WL3700964 (Minnesota App, 15 September 2104); *State v Erickson* NW 2d 2014 WL2178586 (Minnesota App, 3 June 2014); *State v Dyre* NW 2d 2014 WL17558130 (Minnesota App, 5 May 2014); and *State v Le* NW 2d 2014 WL4494279 (Minnesota App, 15 September 2014).

¹⁰⁶ Marna Anderson "WATCH Report Part II: The Impact of Minnesota's Felony Strangulation Law" (2009) at 3.

¹⁰⁷ At 4.

¹⁰⁸ At 6 & 7.

in 2005.¹⁰⁹ St Paul Police Chief, John Harrington, credited the felony strangulation law as an essential element in bringing about the reduction of domestic homicides over the previous two years.¹¹⁰ Marna Anderson concluded the review saying “[t]he review of the 2005 and 2007 strangulation cases indicates that the law continues to have a positive impact on victim safety and offender accountability” and also found the new strangulation laws: enhanced victims safety; held offenders to account; increased general awareness of the severity and potential deadliness of domestic strangulation; increased the awareness of proactive intervention in family violence; and that recovering and recording physical evidence at the scene remains crucial in securing a favourable verdict in protecting victims.¹¹¹

Idaho also enacted a felony *domestic attempted strangulation* offence, namely:¹¹²

- (1) Any person who wilfully and unlawfully chokes or attempts to strangle a household member, or person with whom he or she has a dating relationship... is liable for up to 15 years imprisonment.
- (2) No injuries are required to prove attempted strangulation. The prosecution is not required to show the defendant intended to kill or injure the victim.
- (3) The only intent required is the intent to choke or attempt to strangle.

The maximum penalty of 15 years imprisonment is at the high end of the penalty scale comparatively speaking, particularly given the Idaho legislature made it very clear there was no requirement for the prosecution to prove any injury or any intention other than the act of choking or attempting to strangle.¹¹³ The approach taken to strangulation offences in Minnesota and Idaho seems to appeal to the New Zealand FVDRC given the removal of the significant barriers to prosecution, namely the requirement to prove injury to the victim, or a specific intention of the abuser. The benefits and risks of this approach are discussed below.

Alabama has enacted a class B felony of *domestic violence by strangulation* where “the person commits an assault with intent to cause physical harm, or commits the crime of menacing... by strangulation or suffocation, or attempted strangulation or suffocation against a person within whom the defendant has a qualified (domestic) relationship.”¹¹⁴ Florida also enacted a felony *domestic battery by strangulation* where the person “knowingly and intentionally, against the will of another, impedes the normal breathing or circulation of blood of a family or household member or person within whom he or she is in a dating relationship, so as to create a risk of or cause great bodily harm by applying pressure on the

¹⁰⁹ At 5.

¹¹⁰ Cited in Anderson at 3.

¹¹¹ Anderson, above n 106, at 16.

¹¹² Idaho Code Ann § 18-923 (Supp 2005) Attempted strangulation.

¹¹³ See for example *Joyner v State* 156 Idaho 223, 322 P 3d 305 (Idaho App, 27 March 2014); *State v Allen* 156 Idaho 332, 325 P 3d 673 (Idaho App, 12 May 2014); *State v Carmouche* 155 Idaho 831, 317 P3d 728 (Idaho App, 21 November 2013); *State v Moffat* 154 Idaho 529, 300 P 3d 61 (Ct App 2013); *State v Rinke* P 3d 2014 WL3907918 (Idaho App, 12 August 2014); *State v Smith* P 3d 2013 WL6869863 (Idaho App, 3 July 2014); and *State v Suttle* P 3d 2013 WL6869863 (Idaho App, 31 December 2013).

¹¹⁴ Alabama Code § 13A-6-138 (Supp 2011), further defined in § 13A-6-133(a)-(c) Domestic violence by strangulation or suffocation.

throat or neck of the other person or by blocking the nose or mouth of the other person.”¹¹⁵ The requirement of injury to the victim, and the intention needed by the abuser, is different in each case. Illinois has also enacted both a felony *domestic battery by strangulation* offence,¹¹⁶ as have many other states.¹¹⁷

States such as Connecticut¹¹⁸ and New York have enacted detailed general strangulation specific offences where strangulation is outlined in three separate offences based on the level of injury suffered by the victim. For example, in New York *strangulation in the first degree* is defined as criminal obstruction causing the victim to suffer serious physical injury as a result, and is a class C felony.¹¹⁹ *Attempted strangulation* in the second degree is where “he or she commits the crime of *criminal obstruction* of breathing or blood circulation ... and thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment”, and is deemed a class D felony.¹²⁰ The third provision is *criminal obstruction* and states “a person is guilty of *criminal obstruction* when, with intent to impede the normal breathing or circulation of blood of another person, he or she (a) applies pressure on the throat or neck of such person, or (b) blocks the nose or mouth of such person.”¹²¹ This offence is a class A misdemeanour and is punishable by a maximum of 1 year imprisonment. While there are significant differences in the legal definitions between Connecticut and New York, they each have three tiers of seriousness for strangulation based on the injuries received by the victim. The offences remove any requirement for the strangulation to be involved in a more serious offence; remove any requirement of an intention beyond trying to stop the airway or blood flow; the offences are not limited to the family violence context; and the penalties are similar in ranges for felony and misdemeanour.

More than 2000 people in New York were charged with strangulation offences in the fifteen weeks after the new offences were enacted on 11 November 2010, and that number charged had increased to 11,750 by January 20, 2012.¹²² Eighty three percent of the first 2,000 (1,660) were charged with the misdemeanour *criminal obstruction* and by 2012 the average had settled at 81 percent. Police, prosecutors and victim’s rights advocates hailed the new offences as a success saying the new laws had clearly filled a gap that existed in previous

¹¹⁵ Florida Stat Ann § 784.041 & § 2(a) & (3) (Supp 2007) Domestic violence by strangulation a class 3 Felony.

¹¹⁶ Illinois Comp Stat Ann, Ch 720 § 5-12-3.3 Aggravated domestic battery by strangulation.

¹¹⁷ For further domestic strangulation offences see also: Hawaii Stat §§ 709-906 (1) & (8); Louisiana Rev Stat Ann § 14:35.3 & L (Supp 2007) Domestic abuse battery; Mississippi Code Ann § 97-3-7 (4) (Supp 2010) Aggravated domestic violence, maximum penalty 20 years imprisonment on 3rd and subsequent offence; Missouri Rev Stat § 565.073(1) (Supp 2014) Domestic assault in the second degree; Oklahoma State Ann, title 21 § 644 J Domestic abuse by strangulation: maximum penalty 10 years imprisonment for second or subsequent offence; Rhode Island Gen Laws, title 11, Ch 278-284 § 11-5-2.3 (Supp 2012) Domestic assault by strangulation: maximum penalty 10 years imprisonment; Texas Penal Code § 22.01(Supp 2009) Family violence strangulation or suffocation; Virginia Stat Code § 18.2-51.6 (Supp 2012) Domestic battery by strangulation and § 18.2-58.1 Carjacking; Wyoming Stat Ch 136 § 6-2-509 (Supp 2011) Strangulation: maximum penalty 5 years imprisonment.

¹¹⁸ Connecticut Gen Stat §§ 53a-64aa, 53a-64bb & 53a-64cc (Supp 2007) Strangulation.

¹¹⁹ New York Penal Code § 121.13 (Supp 2010).

¹²⁰ New York Penal Code § 121.12 (Supp 2010).

¹²¹ New York Penal Code § 121.11 (Supp 2010).

¹²² Office for the Prevention of Domestic Violence <www.opdv.ny.gov>.

legislation.¹²³ However, there have been significant issues with *attempted strangulation in the second degree*, with all of the first 19 people charged with the offence escaping conviction.¹²⁴ A full quantitative and qualitative review covering reduction in other types of assault, reductions in family violence or reported strangulations would be required to establish the true success or otherwise of the new offences in New York. It could be potentially misleading to just rely on raw numbers relating to charges. As we will see below, the problems encountered may not lay with the legislation itself, but with how it was implemented.

In 2012 Maine introduced a class B felony of *aggravated assault* causing serious bodily injury or causing bodily injury with reckless indifference to life.¹²⁵ These circumstances specifically define strangulation as one act that will satisfy the ingredients of the offence. The number of charges laid under this provision rose 61 percent between 2011 (29 charges) and 2013 (170 charges). Julia Colpitts, from the Maine Coalition to End Domestic Violence, stated “[t]his is exactly what we were hoping for. For years strangulation was not treated seriously as victim advocates believe it should have been.”¹²⁶ Arizona has also enacted a general *aggravated assault* felony defined as “a person intentionally or knowingly impedes the normal breathing or circulation of blood of another, by applying pressure to the throat or neck, or by obstructing the nose or mouth either manually or through the use of an instrument.”¹²⁷ The main difference here, like New York and Connecticut, is that the law has general application and is not restricted to family violence. Delaware has a similar class E felony which becomes a class D felony if a weapon is used, serious physical injury is sustained or the abuser has a previous strangulation conviction.¹²⁸ Many other states have chosen to amend their strangulation laws so the felony has general application.¹²⁹

Arkansas simply amended the definition of *physical abuse* to include strangulation,¹³⁰ while Nevada now defines strangulation as a form of *battery*¹³¹ and Vermont has amended the

¹²³ New York State Division for Criminal Justice Serves <www.criminaljustice.ny.gov>.

¹²⁴ But see examples for *attempted strangulation in the 2nd degree*: *People v Carte* 113 AD 3d 191, 976 NYS 2d 594 (New York SC, 2 July 2013); and *People v Martinez* 40 Misc 3d 1204(A), 975 NYS 2d 368 (New York SC, 2 July 2013).

¹²⁵ Maine Rev Stat § 208(1)(a) & (c) (Supp 2012) Aggravated assault.

¹²⁶ Interview with Julia Colpitts, Executive Director of the Maine Coalition to End Domestic Violence (David Hench, Portland Press Herald, 1 September 2014).

¹²⁷ Arizona Stat §13-1204 B(1) (Supp 2010) Aggravated assault by strangulation is a class 3 felony but is a class 2 felony if the victim is under 15 years of age.

¹²⁸ Delaware Code, title 11 § 607 (Supp 2010) Strangulation is a class D felony.

¹²⁹ See Indiana Code Ann § 35-42-2-9 (Supp 2006) Strangulation; Massachusetts Gen Law, Ch 265 § 24 (Supp 2014) Strangulation causing bodily injury; Nebraska Rev Stat § 28-101. (Supp 2003) Strangulation; New Hampshire Rev Stat Ann § 631.2(I)(f) & (II)(c) (Supp 2010) Second degree assault by strangulation; North Carolina Gen Stat § 14-32.4 (Supp 2004) Assault inflicting serious bodily injury; Oregon Rev Stat, Ch 122 § 163.187 (1-5) (Supp 2012) Strangulation is a class A misdemeanor but can be a class C felony in committed in presence of child or has aggravated features; South Dakota § 22-18-1.1 & § 8 (Supp 2012) Aggravated assault; Tennessee Code Stat Ann § 39-13-102(a)(1)(c) & (3) (Supp 2011) Aggravated assault; Washington Stat Rev Code § 9A 36.021 (1)(g) & (2) Assault in the second degree; and Wisconsin Stat § 940.235 (1) (Supp 2007) Strangulation and suffocation.

¹³⁰ Arkansas Code § 9-15-403 & § 2(A)(ii) (2011) Definitions; see also § 12-18.103(3)(A)(vii)(c) Interfering with a child’s breathing.

¹³¹ Nevada Stat § 200.481(1)(h) & (2)(b) (Supp 2009).

definition of *serious bodily injury* to include strangulation.¹³² In 2014 Georgia amended their *aggravated assault* provisions to include strangulation, and if the convicted person is a regarded a family member the penalty range is increased.¹³³ California has an offence of *corporal injury* resulting in a traumatic condition and has defined a traumatic condition as injury resulting from strangulation or suffocation.¹³⁴ Michigan¹³⁵ and Massachusetts¹³⁶ have enacted an *attempted murder* offence that specifically defines strangulation as one action that may prove the main offence. Maryland has added strangulation as an aggravating factor in *rape in the first degree*, *sexual offense in the first degree*, and *sexual offense in the third degree*.¹³⁷ Utah only has strangulation offences involving children¹³⁸ and West Virginia has an offence of robbery by partial strangulation or suffocation.¹³⁹ Illinois,¹⁴⁰ Nevada,¹⁴¹ Ohio¹⁴² and Oklahoma¹⁴³ all specifically mention strangulation as an offence the court must consider in bail applications, while California also mentions specific restrictions on persons convicted of strangulation when released from prison on probation.

Lessons Learned from the USA

Casey Gwinn suggests three clear lessons have emerged from the introduction of strangulation specific offences across the USA. First, Gwinn strongly recommends that all strangulation offences should be a presumptive felony, and be investigated and prosecuted as such. Gwinn cites the results in New York as proof that strangulation is not being treated seriously enough given over 80 percent of cases are being prosecuted as misdemeanours.¹⁴⁴ The argument is that only once police, prosecutors and the judiciary realise strangulation is an extremely serious and potentially lethal offence will the offending be dealt with in the appropriate manner.

Second, Gwinn states the definition of strangulation and the wording of the statute are critical for the new strangulation offences to be effective.¹⁴⁵ Gwinn cites Idaho and Texas strangulation statutes as the best in the USA and points to the Texas statute: (1) only requiring a reckless state of mind; (2) makes strangulation and automatic felony; and (3) there is provision for increasing the penalty for repeat offenders.¹⁴⁶ Conversely, Gwinn suggests

¹³² Vermont State Ann, title 13 § 6-1021(2) (Supp 2005).

¹³³ Georgia Code Ann § 16-5-21(a) & (3) (Supp 2014).

¹³⁴ California Penal Code § 273.5 (a) & (c) Corporal injury (domestic). See also Alaska Criminal Law § 11.81.900(b)(15) defining dangerous instruments to include hands involved in strangulation; and Iowa Code § 236.12 & 708.2A Domestic abuse assault now includes strangulation and is a class D felony.

¹³⁵ Massachusetts Gen Law, Ch 265 § 16 (Supp 2006) Attempted murder by strangulation: Maximum penalty 20 years imprisonment.

¹³⁶ Michigan Stat § 750.91 Attempted murder: Maximum penalty life imprisonment.

¹³⁷ Maryland Crim Law § 3-303(a).

¹³⁸ Utah Code § 76-5-109(1)(f)(ii)(I) & (2).

¹³⁹ West Virginia Stat § 61-2-12(a) Robbery.

¹⁴⁰ Illinois Stat, Ch 725 § 5/110-5.1(b)(7).

¹⁴¹ Nevada Stat § 178.484(7)(a)(b) & (17).

¹⁴² Ohio Code § 2919.251(B)(7) (Supp 2005).

¹⁴³ Oklahoma Stat Ann § 5-110-5.1.

¹⁴⁴ Casey Gwinn, above n 11, at 17-18.

¹⁴⁵ At 14-15.

¹⁴⁶ Texas Penal code § 22.01.

some of the problematic statutes are Alabama, Florida, Massachusetts and Michigan due to the level of intention required by the abuser, Maryland due to laws only applying to sexual assaults, Ohio for strangulation only applying to bail laws, and Alaska for requiring the use of a weapon.¹⁴⁷

Third, Gwinn recommends strangulation laws must be accompanied by an implementation plan that delivers multi-agency training programmes to enforcement officers, support agencies, prosecutors and the justice sector.¹⁴⁸ A change in legislation on its own will not achieve the desired results. The research shows merely getting new strangulation offences enacted will not solve the issue of domestic violence on its own and may not make victims safer or increase conviction rates. For example, in April 2014, a Mississippi a man was convicted of domestic violence by strangulation in the Alcorn County Circuit Court, becoming only the second person to be convicted in the state since the new felony strangulation laws were enacted in 2010.¹⁴⁹ This tends to suggest the Mississippi strangulation law has been used infrequently and may not be as effective as some states. A review of *aggravated assault by strangulation* cases filed in Maricopa County Attorney's Office (Arizona), between June 1 and November 30 2011, found that only 14 percent of reported cases went on to be prosecuted.¹⁵⁰ Further investigation revealed that lack of corroboration was the reason the majority of the cases did not proceed. Law enforcement agencies and advocates agreed to fund a medical forensic examination for all family violence cases with a report of strangulation for a six month pilot. The forensic medical examination was conducted by a qualified forensic nurse and was a head to toe examination culminating in a detailed seven page report. During this period comprehensive strangulation education and training was provided to law enforcement, medical personnel and advocates. The result was that the number of strangulation cases filed that went on to prosecution rose from 14 percent to over 60 percent.

In Minnesota, Ramsey County Police were provided with training on the investigation of strangulation offences and the number of reports of family violence based strangulation doubled from 15 to 30 percent as a result of the training.¹⁵¹ The training packages raised investigators and prosecutors awareness of: victims use of language; victims under-reporting; the need to ask probing questions; collection of evidence such as good quality photographs; recording details of injuries and a range of hard to detect symptoms such as petechiae and tongue swelling; and the need for a medical examination by a qualified professional. Archana Nath states that “[d]espite possible implementation problems, there is no doubt that Minnesota’s new strangulation law is a positive step in combating domestic violence and the negative stereotypes and biases that surround it.”¹⁵² Glass, Strack and

¹⁴⁷ Casey Gwinn, above n 11, at 16.

¹⁴⁸ At 16-17.

¹⁴⁹ Mississippi, *Alcorn County v Johnson* <www.djournal.com>.

¹⁵⁰ Jill Rable “National Domestic Fatality Review” Pilot Project to Increase Strangulation Convictions in Domestic Violence Cases, Fall 2012 Newsletter at 2 <www.ndvfri.org>.

¹⁵¹ Susan Gaertner, Ramsey County Attorney “Domestic Assault by Strangulation: Hearing on SF 934, Crime Prevention and Public Safety Commission (2005).

¹⁵² Archana Nath, above n 40, at 294.

Gwinn all call for more education and training for all levels of the legal system in the investigation and prosecution of strangulation offences.¹⁵³ Drawing attention to the prevalence of family violence, the lethality of strangulation, and increasing the training and skill level of key personnel is important if New Zealand wants to make inroads into reducing harm from family violence based strangulation offences.

While it is hard to do justice explaining the different laws in all 50 states in the USA, it is important at least to attempt to identify all the different approaches taken to critically examine their benefits and risks. It is also possible to get a sense of what offences are effective and identify any unintended consequences. For example, by removing the need to prove injury and intention to injure, are key safeguards for accused persons being eroded? This will be discussed further in Chapter IV.

D *Strangulation Offences in Australia*

Similar to New Zealand, all Australian states have criminal legislation where an act of strangulation could be prosecuted under a range of general assault provisions. For example *assault occasioning bodily harm* in Queensland,¹⁵⁴ *aggravated assault* in the Northern Territories,¹⁵⁵ or *intentionally causing serious injury* in Victoria.¹⁵⁶ However, several states in Australia also have strangulation specific offences but, like the USA, the approaches taken are many and varied. In the Australian Capital Territories (ACT) it is a criminal offence to “intentionally or unlawfully (a) choke, suffocate or strangle another person so as to render that person insensible or ... unconscious.”¹⁵⁷ The offence is punishable by a maximum of 10 years imprisonment and if committed to enable the commission of an indictable offence, evading apprehension or preventing investigation of an offence then the offence is punishable by 15 years imprisonment.¹⁵⁸ Only one prosecution has been taken under the latter section, namely *Kien v The Queen*,¹⁵⁹ where Kien was convicted of manually strangling his estranged wife into unconsciousness and then tying a scarf around her neck and pulling it tight. Kien was sentenced to three years and nine months imprisonment specifically on the strangulation charge.

Similar to Canada and the United Kingdom, Queensland has a criminal offence where “any person who, by any means calculated to choke, suffocate, or strangle, with intent to commit or facilitate the commission of an indictable offence ... renders or attempts to render any person incapable of resistance is guilty of a crime and liable to imprisonment for life.”¹⁶⁰ Tasmania¹⁶¹ and Northern Territories¹⁶² both have similar provisions. While Western

¹⁵³ At 289.

¹⁵⁴ Criminal Code Act 1899 (Qld), s 339. See *R v Stemm* [2010] QCA 141 at [8].

¹⁵⁵ Criminal Code Act (NT), s 188(2)(a). See *Hampton v The Queen* [2008] NTCCA 5 at [10].

¹⁵⁶ Crimes Act 1958 (Vic), s 16. See *R v Zanetta* [2008] VSC 614 at [4].

¹⁵⁷ Crimes Act 1900 (ACT), s 27(3).

¹⁵⁸ Section 27(4).

¹⁵⁹ *Kien v The Queen* [2012] ACTCA 25.

¹⁶⁰ Criminal Code Act 1899 (Qld), s 315. See *R v Osborne* [1987] 1 Qd R 96.

¹⁶¹ Criminal Code Act 1924 (Tas), s 168.

Australia has similar legislation it does not use the terms strangulation, choking or suffocation and instead uses the phrase *violence of any kind*.¹⁶³ While there have been several prosecutions under these provisions, Douglas and Fitzgerald state these types of provisions have limited application due to the requirement to prove the strangulation took place to enable the commission of an indictable offence.¹⁶⁴

South Australia and Victoria have no specific strangulation offences but each has general assault and endangerment offences that would encapsulate strangulation. The South Australian endangerment offence requires the person must know the act (strangulation) may endanger life or cause harm and must intend to endanger life, cause harm or be recklessly indifferent about the same. The offence of endangerment is deemed to be aggravated if the victim is a spouse or domestic partner.¹⁶⁵ While no harm is required to be proved the subjective element of this offence, where the person must know of the danger, is a difficult element to prove particularly if the abuser refuses to make a statement. It would therefore be easier to prove the reckless nature of the act rather than a specific intent. Victoria has a similar endangerment offence.¹⁶⁶

On 5 June 2014, New South Wales made amendments to its strangulation legislation but has retained an offence of *choking, suffocation or strangulation* so as to render the other person unconscious, insensible or incapable of resistance, with intent to commit an indictable offence. The offence pursuant to s 37(2) of the Crimes Act (NSW) still carries a maximum penalty of 25 years imprisonment.¹⁶⁷ The requirement to have an intention to commit an indictable offence is similar to the strangulation laws in Canada and the United Kingdom. Importantly though, New South Wales enacted a completely new offence of *choking, suffocation and strangulation* and is punishable by ten years imprisonment. Section 37(1) states:¹⁶⁸

A person is guilty of an offence if they:

- (a) intentionally choke, suffocate or strangle another person so as to render the person unconscious, insensible or incapable of resistance, and
- (b) is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

Significantly, s 37(1) eliminates the need to prove the person choked, suffocated or strangled the victim while intending to commit an indictable offence, and there is only a requirement of the prosecution to prove the strangulation was serious enough to render the victim unconscious, insensible or incapable of resistance. The statute clearly does not go as far as Minnesota and Idaho and remove the requirement to prove injury. The *reckless* component

¹⁶² Criminal Code (NT), s 175: Maximum penalty life imprisonment.

¹⁶³ Criminal Code Act 1913 (WA), s 292: Maximum penalty 20 years imprisonment.

¹⁶⁴ Heather Douglas & Robin Fitzgerald, above n 20, at 241-242.

¹⁶⁵ Criminal Law Consolidation Act 1935 (SA), s 29(1-3) & s 5AA(1)(g)(i)-(ii).

¹⁶⁶ Crimes Act 1958 (Vic), s 22.

¹⁶⁷ Crimes Act 1900 (NSW), s 37(2). See *R v HQ* [2003] NSWCCA 336.

¹⁶⁸ Section 37(1).

of the intention will be much easier to prove than an actual intention to cause the harm required. These provisions are of general application and not restricted to the family violence context. It will be interesting to see how effective the new offence is over the next couple of years.

IV Policy Considerations

Having examined the USA's strangulation legislation, Casey Gwinn's first recommendation is that all offences should be a presumptive felony. There are several potential benefits in New Zealand taking a *crime control* approach to strangulation offences, including: increasing the punishment (retribution) for the offence; holding the abuser to account; denunciation of the conduct as a serious and lethal offence; the deterrence of similar offending; and protection of the victim and society (including preventing further offending). The ability to apply harsher sentences would hold the abuser to account for strangulation offences and would make it clear to New Zealand that strangulation is condemned in our society. A conviction and harsh sentence for strangulation denounces the abusers behaviour and would:¹⁶⁹

“... emphasise that the criminal law is an educative and cohesive force in the community, and through the public nature of punishment of crime, an important symbolic statement as to the extent of society's indignation and condemnation of certain conduct is expressed.”

Increased maximum penalties also provide the court the ability to sentence abusers convicted of strangulation to longer periods of imprisonment and thereby provide immediate and longer protection to victims and the wider community from further violent offending.¹⁷⁰ While the abuser is incarcerated it can also provide valuable time for victims to recover from the strangulation and abusive relationship, and rebuild their lives without living in fear of the abuser.¹⁷¹ The time would also allow support agencies to provide emotional, financial and practical support to victims to make the difficult changes necessary to protect themselves and their family

The FVDRC listed the conviction of the abuser as the third reason an offence of strangulation is required in New Zealand. This is a classic character attribution approach to crime control and has both positive and concerning aspects that need to be considered. On the positive side, a conviction for strangulation would immediately alert police, prosecutors and judges of the danger the abuser poses to current or potential victims. Research has proven that an abuser who has strangled in the past is highly likely to seriously injure or kill a partner in the future. Accepting strangulation is an accurate predictor of future family violence provides an important opportunity to prevent future harm through key stakeholders implementing deeper level interventions. Victim interventions could include: providing assistance for relocation; providing personal and home alarms; securing the family home; obtaining protection orders; and putting emotional support in place. Supporting the victim in this manner is critical in

¹⁶⁹ Hall's Sentencing (NZ) *Sentencing* (online looseleaf ed, LexisNexis) at [I.3.2].

¹⁷⁰ Sentencing Act, s 7(1)(g) – protection of the community.

¹⁷¹ Sentencing Act, s 7(1)(c) – providing for the interests of the victim.

preventing future family violence. Effective interventions with the abuser could include: removing them from the home; arrest; holding the abuser to account by way of prosecution; and ensuring anger management courses and counselling are provided.

A prior conviction for strangulation would also signal to enforcement officers, prosecutors and judges the increased danger posed by the abuser, and that extra care needs to be taken when deciding on future charges, bail, propensity evidence, protection orders or sentencing. The convictions entered against prior abusers who strangle, such as in *Roper v The Queen* and *B v The Queen*, are for generic criminal offences and may not immediately alert police, prosecutors and judges to the imminent danger the abuser poses. It can take some time to dig out the detailed history of a convicted person. Time is of the essence in these situations and can sometimes be the difference between life and death.

Section 7(1)(f) of the Sentencing Act outlines *deterrence* as a factor to consider upon sentencing and is drafted to deter the defendant, and any other person, from committing the same or similar offences. The deterrent effect is another consideration in determining whether strangulation should be a specific criminal offence. In *R v Radich*, Fair J stated:¹⁷²

“[O]ne of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and other persons with similar impulses, that if they yield to them, they will meet with severe punishment... The fact that punishment does not prevent all similar crimes should not obscure the fact that fear of severe punishment does, and will, prevent the commission of many [crimes]...”

Deterrence is likely to have limited impact on preventing strangulation within the family violence context as it often occurs in the privacy of the home where there are few social controls and arguments are often spur of the moment, emotions run high and drugs and alcohol reduce inhibitions. Hall suggests deterrence would appear to have little effect on impulsive actions committed in the heat of the moment ... but may be of considerable value where crime is premeditated...”¹⁷³ Professor Warren Brookbanks correctly questioned whether a new strangulation law would have any deterrent effect stating “[strangulation] is thus an intensely personal crime. It is not usually premeditated. For this reason it may not be readily deterred.”¹⁷⁴ But that is not to say a strangulation offence would have no deterrent effect as some abusers can be quite calculated in their actions and abusers would likely be aware they face a long term of imprisonment for serious offences.

Due process should not be ignored and safeguards for accused persons must be kept in place given there are occasions where false allegations of assault are made against a partner or family members. The *crime control* approach of increasing the number of criminal prosecutions and convictions for strangulation offences poses an element of risk to a free and

¹⁷² *R v Radich* [1954] NZLR 86 (CA) at 87.

¹⁷³ Hall’s Sentencing, above n 165, at [I.3.3].

¹⁷⁴ Warren Brookbanks “Strangulation Law Unlikely to be Violence Deterrence” *The New Zealand Herald* (online ed, Auckland, July 16, 2014).

democratic society. Depending on how proposed strangulation offences are drafted, the normal due process protections in place to protect an accused person's rights and freedoms may be diminished and could increase the risk of innocent people being convicted and imprisoned. For example, by removing the need to prove any injury to the victim, or the intention of the abuser, key safeguards protecting the rights of an accused person would be removed. As discussed above, Idaho now requires no evidence of injury and no evidence of any intention (other than intent to strangle) to prove the felony.¹⁷⁵ While the prosecution in Idaho still retains the burden of proof to prove all ingredients of the offence beyond reasonable doubt, is that sufficient safeguard for an offence that is punishable by up to 15 years imprisonment? However, these risks can be mitigated by conducting thorough investigations, ensuring forensic medical examinations are conducted on victims and drafting legislation in a manner that accords due process the respect it deserves.

However, to provide more protection for victims and their families, and to ensure abusers are held to account for a potentially lethal offence, it is important domestic strangulation is seen as a serious offence in its own right. Due to the unique nature of family violence, with the power and control dynamic, it is recommended any new strangulation offences are restricted to a family violence context as it establishes the main basis for charge. In order to balance the need to protect victims from family violence, and protecting an accused person's human rights, it is recommended New Zealand could enact a two tier domestic strangulation law. Namely, a first tier *domestic strangulation* offence where it is necessary for the prosecution to prove either actual bodily harm, rendering the victim unconscious (including disabling or rendering incapable of resistance), or an intention to cause actual bodily harm. This could be a category four offence punishable by up to 14 years, or even life imprisonment.¹⁷⁶ To complement this offence, a second tier *domestic strangulation* offence (similar to Idaho) could be enacted with no requirement for the prosecution to prove injury or intention. This offence would still be regarded as a serious category three offence¹⁷⁷ and could carry a maximum penalty of three to five years imprisonment.

The tiered approach would recognise the very serious nature of family violence and strangulation, yet also provide balance and discretion to police, prosecutors and the judiciary in deciding on the most appropriate charge depending on injuries to the victim and the intent of the abuser. If this approach were to be accepted it would also require defining the domestic relationships that would be captured within the offence, and a legal definition of strangulation would need to be established.

VI Conclusion

New Zealand has come a long way in the last two decades in how family violence is treated, yet the levels of IPV, family violence and IPH remain unacceptably high. It is important for current and future generations of New Zealanders that family violence of all descriptions is

¹⁷⁵ For example see Idaho, Connecticut, Delaware and Michigan.

¹⁷⁶ Criminal Procedure Act 2011, s 6.

¹⁷⁷ Criminal Procedure Act 2011, s 6.

treated seriously and attracts wide spread condemnation. Julia Tolmie, chairperson of the FVDRC, correctly suggests New Zealand “need[s] a major cultural shift in how we respond to family violence.”¹⁷⁸ Family violence is a unique form of violence that is based around the abuser’s power and control over the victim and family. Strangulation is an extreme form of family violence that can have a devastating physical and psychological impact on victims and often requires significant courage, support and counselling for the victim to leave the relationship and rebuild a new life. For the victim it often means leaving the family home, seeking refuge, taking kids out of school, financial hardship and many other life changing consequences.

New Zealand is fortunate to be able to critically examine new strangulation legislation enacted in the USA over the last decade to determine its impact and effectiveness across a range of measures. Many of the USA’s family violence stakeholders suggest specific strangulation offences are an effective and valuable law enforcement tool to help identify, investigate and prosecute domestic strangulation cases. It is asserted the previous gap in the law, between no charges and murder charges, has been rectified by enacting new strangulation offences in combination with awareness campaigns and multi-agency training packages being implemented.¹⁷⁹ Proponents of new strangulation offences in the USA point to the high numbers of charges and prosecutions for strangulation to show the success of the new offences, for example, the significant level of misdemeanour prosecutions in New York and the success rate for prosecutions in Minnesota. The lessons learned in the USA, namely making strangulation a serious crime, removing any need to prove injury or intention and implementing a multiagency training program for key stakeholders provides sound advice and guidance for New Zealand when contemplating legislative change.¹⁸⁰

The argument that New Zealand has sufficient criminal offences to cover any act of strangulation ignores the unique nature of the family violence context and does not address the power and control dynamic that strangulation brings to a family. The fear of dying at the hands of an abuser is a frightening way to live, and it has been proven that relationship is 7.48 times more likely to end early and violently with the death of the victim.¹⁸¹ The risk of unjustified convictions for abusers can be mitigated by thorough investigations, forensic medical examinations and the burden of proof remaining with the crown.

Strangulation needs to be treated seriously in New Zealand and the unique nature of domestic strangulation provides a sound basis to enact new criminal offences that will send a clear message to all New Zealander’s that it will be treated seriously in the justice sector, and abusers who strangle family members will be held to account with potentially long periods of imprisonment. Most importantly though, new domestic strangulation offences have the potential to prevent family violence and homicide in our community, like the tragic murder of

¹⁷⁸ Interview with Julia Tolmie, Chairperson of the Family Violence Death Review Committee (One News, TVNZ, 26 June 2014) <www.tvnz.co.nz>.

¹⁷⁹ Casey Gwinn, above, n 11, at 16-18.

¹⁸⁰ At 16-18.

¹⁸¹ Nancy Glass, above n 16, at 329-335.

Sophie Elliott. This type of tragedy can be prevented given strangulation is a critical and accurate predictor of future violence and IPH. While it is recommended that further detailed qualitative and quantitative research on domestic strangulation is conducted, the introduction of new domestic strangulation offences in New Zealand would be one important step towards the major cultural shift required to prevent family violence, protect victims, and hold abusers to account.

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