Attorney General's Department

Review of section 20A of the Criminal Law Consolidation Act 1935

Government of South Australia
Attorney-General's Department

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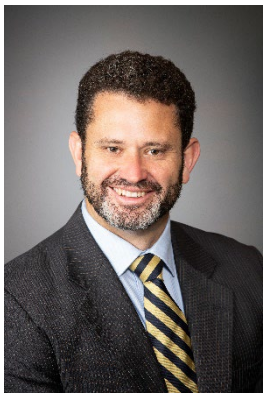

In May 2022, I announced a review into the operation and effectiveness of the section 20A *Criminal Law Consolidation Act 1935* ("CLCA") offence of choking, suffocation or strangulation in a domestic setting.

My department has completed this review, which has considered the operation and effectiveness of the offence, feedback from both South Australia Police (SAPOL) and the Director of Public Prosecutions (DPP) about charging and prosecuting, sentencing remarks and judgments, and data on the numbers of charges laid and prosecuted. Consideration of how other jurisdictions have approached the issue has also provided valuable information.

As a result of the review, I am reassured that our investigative and prosecution agencies are approaching their task in bringing these matters to court seriously and in accordance with the existing legislation. However, it is clear that there is room for improvement to make sure the offence operates as effectively as possible, and provides a powerful criminal justice response to the serious behaviour of choking, suffocating or strangling a person in a domestic setting.

As a result of the review, I have decided to:

- establish a multi-agency working group to consider how to better support complainants involved in domestic violence prosecutions, in the context of the time it takes to proceed to a trial for the s 20A offence. This will help address the high number of matters which are discontinued and ensure that victims are supported throughout the prosecution process including through available legislative mechanisms. The working group will also be tasked with looking at the need for further education about the impact and effects of strangulation, choking and suffocation for the legal community and judiciary.
- address the uncertainty about what prosecutors are required to prove by amending the legislation to clarify the elements of the offence and broaden them. This will make it clear that proof of restriction of breath is not required to establish the offence. This is consistent with the medical information about the inherent dangers in applying pressure to a person's neck as recognised in other jurisdictions. Consultation on a draft Bill will take place later this year.

Hon Kyam Maher MLC
Attorney-General

1. Background and context

Section 20A was inserted into the CLCA by the *Statutes Amendment (Domestic Violence) Act 2018* and commenced on 31 January 2019. It created a new offence as follows:

20A—Choking, suffocation or strangulation in a domestic setting

(1) A person who is, or has been, in a relationship with another person and chokes, suffocates or strangles that other person, without that other person's consent, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

For the purpose of the offence, being "in a relationship" is defined to capture a wide variety of domestic relationships.

Prior to this change, strangulation, choking or suffocation was able to be charged under other offence provisions (such as aggravated assault, causing harm or causing serious harm).

1.1 Why the change was introduced

The second reading speech for the *Statutes Amendment (Domestic Violence) Act 2018* indicates the policy objective underlying the creation of a standalone offence was to:

- apply increased penalties for strangulation, including where no "harm" is caused;
- recognise the dangerousness of the conduct, and its status as a predictor of domestic homicide;
- educate the police and community; and
- assist in victim risk assessment.

A standalone offence also allows better record keeping and tracking of the behaviour, irrespective of conviction. For example, if the charge is ultimately dropped, it can still be disclosed to persons at risk under the Domestic Violence Disclosure Scheme. This scheme allows people at risk of domestic violence to be informed if their partner has a history of domestic violence, and provides for support by specialist domestic violence services to the person if required.

2. How the law has been applied

2.1 Approach to charging/prosecuting

Because the CLCA does not define choking, strangulation or suffocation, when the s 20A offence commenced there was a lack of clarity about what must be proved to successfully prosecute the offence. This issue also arose in other jurisdictions.

About six weeks after the commencement of the s 20A offence in South Australia, the Australian Capital Territory (ACT) Supreme Court considered the ACT equivalent of s 20A, and held that to prove choking, suffocating or strangling had occurred, there must be proof that the accused had *stopped* the victim breathing (as opposed to *impeding or restricting* their breathing): see *R v Green (No 3)*[1].

Although this decision was not technically binding on South Australian courts, it created a strong chance that s 20A would be interpreted in the same way. As a result, the initial approach to charging/prosecuting the offence was to require proof of *cessation of breath*, consistent with the ACT decision of *R v Green (No 3)*[2].

This approach was followed by SAPOL and the DPP when deciding whether to charge and prosecute for the offence until about mid-2020. It changed following a Queensland (QLD) Court of Criminal Appeal decision which considered the QLD equivalent of the offence and held that proof of *hindering or restricting breath*, not complete cessation of breath, was required to establish the offence: see *R v HBZ*[3]. This remains the approach taken in South Australia today. It has been suggested that legislative amendment to clarify the elements of the offence could be helpful.

It is likely that until the HBZ test was adopted, matters were discontinued (or not charged) if cessation of breath could not be proven beyond reasonable doubt, however data is not available to verify the extent to which this may have occurred.

2.2 Number of charges and prosecutions

Data was obtained from the Courts Administration Authority (CAA) for the period 31 January 2019 to 30 April 2022 (that is, from the time the offence commenced until just before the review was announced).

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[1] [2019] ACTSC 96 The judgment date was 14 March 2019; reasons were delivered 11 April 2019.

[2] [2019] ACTSC 96

[3] [2020] QCA 73. Judgment was delivered on 17 April 2020.

The data shows that in that time 1037 defendants were charged with a strangulation offence, with 806 finalised. Of the 806 finalised defendants, 737 (91%) did not proceed to a determination of guilt.[4] 721 (89%) of the 806 were finalised in the Magistrates Court, with 72 (9%) being finalised in the District Court, and 13 in the Youth Court.

Of the 72 matters finalised in the District Court it is worth noting that:

- 13 (18%) of the 72 District Court matters resulted in an acquittal – that is, there was a finding of not guilty following a trial.
- 19 (26%) of the 72 matters resulted in a conviction.
- The remaining 40 (56%) were not proceeded with, withdrawn, or dismissed.

In total, 27 defendants either admitted to their guilt or were found guilty across the Magistrates, District and Youth courts. This includes 22 where the strangulation charge was the "most serious" charge, and a further five where the defendant was also charged with and found guilty of a "more serious" charge at the same time. Of these:

- 17 (63%) were sentenced to immediate custodial imprisonment;
- 4 (15%) were sentenced to home detention;
- 4 (15%) received a suspended sentence of imprisonment;
- 1 (3.5%) received a good behaviour bond; and
- 1 (3.5%) received an obligation (this was the only matter resolved in the Youth Court).

From the above, it can be seen that custodial or community custodial sentences were imposed in all but six cases with well over half of these sentences imposed as immediate terms of imprisonment.

However, the data shows that a high proportion of charges are being discontinued.

2.3 Withdrawal of charges

A major issue impacting on the effectiveness of the s 20A offence is the high number of charges that are discontinued.

Charges may be withdrawn or discontinued for many reasons. These may include the complainant not wanting to proceed, assessment of the evidence not supporting the continuation of the charge, or the matter resolving by pleas to other charges.

[4] These include matters where courts data records an outcome of "not proceeded with", "dismissed" or "withdrawn".

The current South Australian approach requires evidence of hindering or restriction of breath to establish the offence. This means that if a complainant's account does not clearly indicate a restriction on breathing, notwithstanding that a complainant has given an account of having pressure applied to their neck, this might impact on whether the charge proceeds.

Further, due to the nature of the offending, the willingness of the complainant to cooperate with the court process is a significant factor impacting on whether charges proceed. Delays, and the length of time it takes for charges to reach trial in the District Court can also have an impact.

There are a multitude of issues to be explored further on this topic. A multi-agency working group including agencies such as ODPP, SAPOL, the Commissioner for Victims' Rights, the Office for Women and the Courts will consider these issues, with a focus on reviewing and exploring the ways in which complainants may be better supported in light of the usual timeframes for a prosecution of a domestic violence offence to reach trial, including by utilising existing legislative mechanisms.

The working group will also consider the need for education to be provided to prosecution agencies and the judiciary about strangulation, choking and suffocation in the domestic violence context.

2.4 Sentencing

A review of the available sentencing remarks has been undertaken.[5] It shows that sentences ranged from 8 months and 23 days (reduced from a starting point of 20 months) at the lowest end to 6 years and 5 months (reduced from a starting point of 10 years) at the highest, after reductions for early plea discounts and time in custody. 4 sentences were suspended, 4 were ordered to be served on home detention and the remaining 11 were required to be served in a custodial environment.

However, merely referencing the lowest and highest penalties is an oversimplification of the sentencing process. There are various factors impacting on the comparability of sentences.

For example, the factual circumstance of the offending varies markedly, as do the personal circumstances of the offenders. Many of the sentences imposed were for more than one offence, and the sentences were discounted by amounts ranging from 5% to 35%, depending on when the plea was entered. Further some of the sentences were reduced in accordance with the principle of totality, while the time spent in custody on remand can be taken into account in different ways.

[5] This was limited to District Court sentencing remarks, as remarks for matters finalised in the Magistrates and Youth Courts are not readily available

The sentencing remarks explicitly recognise the seriousness of the offence, with the majority referencing the need for personal and general deterrence, and the fact that Parliament has created the stand-alone offence/increased penalties for the conduct.

It appears, on average, that where a notional sentence for the s 20A offence was identified, or where the s 20A offence was the only offence, that a sentence of about 3 years was imposed prior to any reductions.

More recently, the Court of Appeal has considered an appeal against a magistrate's refusal to suspend a sentence for domestic violence offences including a choking offence where the victim blacked out.[6] The Court of Appeal confirmed the primary purpose of sentencing is to protect the community and the victim, the importance in sentencing for domestic violence matters of sending a clear message to the defendant and to the community more generally that family violence cannot be tolerated, and that personal and general deterrence had a heightened significance in such matters. The Court noted that factors supporting suspension (limited antecedents, no previous imprisonment, the significant time already spent in custody, demonstrated remorse and intention to rehabilitate himself) were "comfortably outweighed by the objective seriousness of the offending, particularly the choking offence."[7]

Overall, it appears that the sentences being imposed by the Courts are generally appropriate.

3. How the law is applied interstate

The following is a summary of how other states apply equivalent laws, particularly in relation to the question of how an offence is established. Refer to attachment 1 for detail of the comparable offences.

In both NSW and WA, applying pressure to the neck and thereby impeding either the breath or flow of blood will make out the offence. Note that in NSW, this is via combination of the legislation and a decision of the NSW Court of Appeal[8] which declared that "intentionally chokes" within the meaning of s 37(1A) of the *Crimes Act 1900 (NSW)* means "intentionally apply pressure to the neck so as to be capable of affecting the breath *or the flow of blood to or from the head*" (emphasis added).

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[6] *R v Zacher* [2022] SASCA 83 delivered 25 August 2022.

[7] Ibid at [55]

[8] *GS v R; Director of Public Prosecutions (NSW) v GS* [2022] NSWCCA 65

In NSW the maximum penalty is 5 years,[9] and in WA the maximum penalty is 7 years for an aggravated offence, 5 years for a non-aggravated offence.

In both the ACT and NT, it appears the offence can now be established by intentionally and unlawfully applying pressure to a person's neck (whether that impedes the breath or the flow of blood to the head or not), as well as by obstructing or interfering with a person's respiratory system. In ACT the maximum penalty is 7 years for an aggravated offence or 5 years for a non-aggravated offence.[10] In the NT the maximum penalty is 5 years.

In both Queensland and South Australia proof of restriction of breath continues to be required in accordance with *HBZ*. In both jurisdictions the maximum penalty is 7 years.

In Tasmania it is unclear how offence will be interpreted as it only commenced on 22 August 2022. It does not define choking, strangulation or suffocation or otherwise make any reference to restrictions on breathing or blood flow. There is no maximum penalty specified, as is the usual case in Tasmania.[11]

Victoria is yet to introduce a stand-alone offence.

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[9] For the comparable offence at s 37(1A) of the *Crimes Act 1900 (NSW)*. But note the structure of the offence in NSW differs to the SA offence. In NSW, s 37(1A) was introduced in 2018 to address the issue of choking, strangulation and suffocation in the domestic violence context (although it has not actually been drafted to be limited to that context). It was added into an existing section of legislation dealing with strangulation that had been introduced in 2014 to replace an older offence of "garrotting" (not related to domestic violence). Those existing offences also criminalise choking, suffocating or strangling with the additional element of rendering the person unconscious, insensible or incapable of resistance: s 37(1) maximum penalty 10 years; and a further offence in the same terms as s 37(1) with the additional element of doing so with the intention of enabling themselves to commit an indictable offence: s 37(2) maximum penalty of 25 years. However, it is only in the interpretation of s37(1A) that the NSW Court of Appeal has declared choking is to be interpreted to include the restriction on the flow of blood; it does not automatically extend to s 37(1) or s 37(2).

[10] But note that the structure of the offence differs in ACT, which added choking, strangling and suffocating to their existing offences included under "Acts endangering health etc".It is also included in the "Acts endangering life" offence list with the extra element of rendering the victim insensible or unconscious (like the NSW provisions) This offence has a maximum penalty of 10 years (standard) and 13 years (aggravated).

[11] The Tasmanian Criminal Code does not impose specific penalties for individual crimes. Section 389 of the Code provides for punishment for any crime to be by imprisonment for up to 21 years (subject to the Sentencing Act or where expressly provided).

4. Conclusion and next steps

To ensure the s 20A offence of choking, suffocation or strangulation in a domestic setting is as effective as possible, the Attorney-General has determined that:

- A multi-agency working group will be established, to consider how to better support complainants in domestic violence prosecutions with a view to addressing the high number of matters which are discontinued.

  The working group will also consider the need for further education about the impact and effects of strangulation, choking and suffocation for the legal community and judiciary.
- Changes are proposed to be made to the legislation to clarify elements of the offence and broaden them, so that it is clear that proof of restriction of breath is not required. This is consistent with medical information about the inherent dangers of applying pressure to a person's neck as recognised in other jurisdictions. Consultation on a draft Bill will take place later this year.