



Crimes Amendment (Strangulation) Bill 2014

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Second Reading

Debate resumed from 27 May 2014.

The Hon. DAVID CLARKE (Parliamentary Secretary) [5.28 p.m.], on behalf of the Hon. John Ajaka: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Crimes Amendment (Strangulation) Bill 2014.

The bill amends the Crimes Act 1900 to introduce an additional strangulation offence in New South Wales and to simplify and modernise the existing offence of strangulation under the Crimes Act.

Strangulation is a potentially fatal act, which causes significant physical and psychological trauma to victims. It is prevalent in domestic violence incidents. The use of strangulation in this context is a recognised indicator of the risk of further harm to victims of domestic violence, including homicide.

The Government gives the highest priority to the safety of victims of domestic violence. The Department of Police and Justice leads the Domestic Violence Justice Strategy, bringing together justice agencies to ensure a coordinated approach, with high standards of service to victims and a strong emphasis on holding perpetrators accountable for this appalling crime. The Minister for Women has also recently announced the "It Stops Here" domestic framework for reform, which will improve the way government and non-government services work together to secure the safety of victims and their children.

The Director of Public Prosecutions [DPP] has raised concerns with government as to the adequacy of the current provisions concerning strangulation in section 37 of the Crimes Act. The DPP identified two obstacles under the current provisions in appropriately charging and prosecuting strangulation.

Firstly, section 37 has limited application in many domestic violence cases because it requires an intention to commit a separate indictable offence, such as sexual assault or robbery. Where the assault itself is the act of strangulation or choking, section 37 in its current form cannot apply.

Secondly, more serious assault charges such as assault occasioning actual or grievous bodily harm are difficult to establish because they rely on proof of particular bodily harm. However, many people who survive strangulation have minimal visible external injuries, despite the seriousness of the offence.

An insidious aspect of strangulation incidents is the significant fear and psychological damage that can be inflicted on a victim without any physical injuries being apparent. Regardless of an actual loss of consciousness, assaults of this nature which involve the exercise of extreme psychological control can be terrifying to the victim. The trauma suffered by a victim of strangulation can be invisible, yet both devastating and long term.

As a result of the shortcomings of the current strangulation provision in the Crimes Act, 70 per cent of domestic violence assaults involving strangulation are charged as common assault in New South Wales. Common assault attracts a maximum penalty of two years imprisonment. Statistics obtained from the Bureau of Crime Statistics and Research show that the average prison term for domestic violence assault involving strangulation is six months.

These penalties do not reflect the seriousness of behaviour which can induce unconsciousness within 10 seconds, and death within four to five minutes.

In response to these shortcomings, the Government proposes to expand the application of section 37 of the Act by creating a new simple offence of strangulation. The provision will also retain an aggravated form of the offence, which

is an updated form of the existing section 37. It will apply where the offence is accompanied by an intent to commit a separate indictable offence.

A similar two-tiered approach to strangulation offences is provided by the Crimes Act in the Australian Capital Territory.

The Government has undertaken targeted consultation with those who apply, prosecute and defend these offences. Comments on the new offences were sought from the Director of Public Prosecutions, Public Defenders, the NSW Police Force and the Legal Aid Commission. All stakeholders supported an amendment to section 37 to create a simple offence of strangulation, and to retain an aggravated form of strangulation involving intent to commit another indictable offence.

We are confident that the bill is a considered and appropriate response to the shortcomings in the present legislation. Dealing with these offences with revised and simplified offence provisions will lead to more sentences being imposed on offenders which reflect the seriousness of domestic violence and the long-term impact of this particular behaviour. Further, more accurate records of these type of offences will be kept, and awareness of this type of offending raised in the legal and medical fields. Legislative recognition of this type of offending may ultimately assist domestic violence victims in reporting this often hidden form of abuse.

I now turn to the substantive provisions of the bill:

Item [1] of schedule 1 repeals the current section 37 offence and replaces it with two separate offences.

The first offence is the proposed section 37 (1). It is a new offence that will apply if a person intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and where the person is reckless as to rendering the other person unconscious, insensible or incapable of resistance. This offence will therefore apply to the offender who may not have an intention to kill but simply an intention to overpower.

This phrase "incapable of resistance" is part of the current strangulation provision. It is retained in the new provisions, and emphasises that actual unconsciousness is not a requisite element of the offence. This addresses the domestic violence scenario where a victim is placed in a state of such fear by the offender's actions that he or she is incapable of resisting the offender. It avoids the evidentiary difficulty of proving a lack of consciousness when the only prosecution witness may be the person who was unconscious.

The new provision under section 37 (1) (a) requires an intentional act on behalf of the offender. This reflects both the seriousness of the offence and ensures that unintentional acts where transient or inadvertent suffocation may occur—for example, during a sporting activity such as wrestling or judo—are not covered. It is not intended to capture such behaviour where both participants have freely entered into the activity and the strangulation is an accidental and unintended incident of that activity.

However, intention as to the outcome of the act of strangulation is not required under section 37 (1) (b); the offence will be established where an offender is reckless as to whether or not a victim is rendered insensible, unconscious or incapable of resistance as a result of the offender's actions.

Any attempt to commit the offence under section 37 (1) may be dealt with under section 344A of the Act. That section provides that a person who attempts to commit an offence under the Act for which a penalty is provided is liable to the same penalty. This means that a person who attempts to choke the victim but is stopped in the act may be liable for prosecution and subject on conviction to the same maximum penalty as had the act been completed.

Importantly, unlike the existing section 37, the proposed basic offence does not require proof of an intention to commit any other offence. The act of strangulation alone will be sufficient.

The new offence carries a maximum penalty of 10 years imprisonment. This is consistent with the Crimes Acts of other Australian jurisdictions, which also make a distinction between assault occasioning bodily harm and strangulation, the latter of which attracts higher penalties. It is also consistent with the distinction in the Act between the seriousness of strangulation and other forms of assault. In particular, the Act makes a clear distinction between the seriousness of assaulting a person with intent to commit a serious indictable offence, attracting a maximum penalty of five years imprisonment, and strangling a person with intent to commit an indictable offence, attracting a maximum penalty of 25 years imprisonment.

The second offence is in the proposed section 37 (2). It does not substantively change the existing offence under section 37 of the Act, but simplifies that offence in a manner and with language consistent with the language of the new simple offence. Section 37 (2) will apply if a person chokes, suffocates or strangles another person so as to render the other person insensible, unconscious or incapable of resistance, and does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, another indictable offence.

As with the simple offence, an attempt to commit the offence, that is, where someone tries and fails to choke, suffocate or strangle a victim to commit another indictable offence is covered by the general attempt provision of section 344A of the Act.

The aggravated offence carries a maximum penalty of 25 years imprisonment, consistent with the existing penalty in section 37.

Subsection 37 (3) provides that "another indictable offence" in section 37 (2) means an indictable offence other than an offence against this section. This makes clear that the act itself of choking, suffocation or strangulation will not

constitute the other indictable offence which is sought to be committed. Two steps will be required for proof of the aggravated offence: the act of strangulation, and the intent to commit a separate offence. An example would be where an offender strangles a victim for the purpose of then sexually assaulting them. This definition reflects, but adds greater clarity to, the reference in the current section 37 to "an indictable offence". It reflects the existing application of the offence.

Recklessness as to the outcome of the strangulation is not expressly provided in the aggravated offence because the offence already incorporates a clear intention attached to the outcome of the strangulation, that is, the commission of another indictable offence.

Schedule 2 of the bill makes consequential amendments.

Item [1] of schedule 2 provides that the simple offence be included in table 1 of schedule 1 to the Criminal Procedure Act 1986 (indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise). If tried summarily in the Local Court a maximum penalty of two years imprisonment will therefore apply to the simple offence. An aggravated offence under the new proposed section 37 (2) will continue to be dealt with on a strictly indictable basis.

Item [2] of schedule 2 amends the Criminal Procedure Regulation 2010 to replace the reference to the current section 37 as a category 2 personal violence offence, for the purpose of eligibility assessment for the forum sentencing program, with the new aggravated offence in section 37 (2).

Item [3] of schedule 2 replaces the reference to the current section 37 offence with reference to the new section 37 (2) provision in the definition of sexual offences referred to in section 7 (4) of the Criminal Records Act 1991.

Providing offences that will enable appropriate charging and sentencing of strangulation will recognise the seriousness of this type of violence.

The bill sends a clear message that acts of violence involving strangulation will be met with appropriately strict penalties. It represents another important part of this Government's continuing support for victims of domestic violence in this State.

I commend the bill to the House.