

DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Criminal Code Amendment Bill 2022

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Mr Speaker, I move that the Bill now be read a second time.

The Criminal Code Amendment Bill 2022 delivers on the Government's clear commitment to strengthen non-fatal strangulation laws, by introducing a new stand-alone criminal offence for strangulation under the *Criminal Code Act (1924)* (the *Criminal Code*).

I have prioritised the development of this important reform, in recognition that non-fatal strangulation, choking or suffocation is a significant form of violence, which can unfortunately be a precursor for escalation in the severity of family and domestic violence.

This is in response to community calls for the strengthening of our laws since the Coroner's 2019 recommendation that the Government consider creating a strangulation offence.

In that case, the Coroner was responding to the tragic homicide of a Tasmanian woman, where it was noted that non-fatal strangulation was a risk factor for homicide, and that increased awareness and a targeted response to the issue are necessary from the medical, policing, counselling and law reform sectors.

The Coroner was concerned that an existing criminal offence involving choking was limited to circumstances where the choking is done with intent to facilitate other offences, and would likely not apply to a variety of situations, including family violence.

In addition, the extensive work of the Sentencing Advisory Council regarding the various laws that operate in other states and territories has informed the development of the amendments.

Accordingly, I am pleased to be progressing this Bill which amends the *Criminal Code* to introduce a stand-alone criminal offence of non-fatal strangulation, choking and suffocation in Tasmania, which recognises the seriousness of this behaviour by allowing it to be charged and prosecuted as a specific crime.

The second key amendment in the Bill relates to the definition of 'consent', to expressly address conduct that is colloquially known as 'stealthing'.

Stealthing is a form of rape, as the victim has not given free agreement to sexual intercourse without a condom, such as circumstances where a person deliberately removes or damages a condom during sexual intercourse, without the knowledge and consent of the other party.

While the criminal behaviour which these amendments address can be prosecuted under existing laws, our Government is mindful of the significant value that specific, targeted offences can have in terms of increasing community education and awareness of criminal behaviour.

This, in turn, leads to positive flow-on effects regarding reporting and prosecuting offences, and providing further support to victims and survivors.

I will now discuss the amendments in more detail.

Strangulation

Mr Speaker, the Bill inserts a new section into the *Criminal Code*, stating that a person who intentionally and unlawfully chokes, suffocates or strangles another person is guilty of a crime.

Strangulation, choking or suffocation is an abhorrent form of violence. It carries risk of serious physical injury and/or death, and can often lead to further family violence behaviour.

This Bill appropriately recognises the seriousness of this conduct so that it can be charged and prosecuted as a specific indictable offence.

Until now, assault has been the main offence charged for non-fatal strangulation.

The development of the Bill took into account the advice on sentencing matters in the Sentencing Advisory Council's 2021 research paper on sentencing for non-fatal strangulation.

This work examined Supreme Court data for the period 2010 to November 2020. In that time, 77 cases were identified where acts of non-fatal strangulation were sentenced, and 54 of them, or 70 per cent, involved family violence.

As the Sentencing Advisory Council (the Council) notes in its advice, its role is to provide me, as Attorney-General, policy advice on sentencing matters, rather than on the merits of stand-alone offences. As such, its commentary on sentencing outcomes was useful to reinforce the gravity of this conduct, and has informed the development of the amendments in the Bill.

In deciding to introduce a stand-alone offence, consistent with the Coronial recommendations of 2019 and the laws of other jurisdictions, I am pleased to say that strangulation charges will now clearly be on an offenders' criminal record.

In consideration of the Council's report, I am also satisfied that strangulation can already be treated as an aggravating factor; but a stand-alone offence goes even further and delivers on the important objective of identifying this conduct as a serious crime, in its own right.

The Council found that sentencing for assault involving non-fatal strangulation has resulted in heavier sentences being imposed, compared to sentencing for assaults generally. That is, there were more sentences of imprisonment imposed for assault involving strangulation. The median sentence of imprisonment imposed was also more than double, namely 24 months compared to 10 months.

Accordingly, the new offence gives 'strangulation' clear recognition as serious criminal behaviour, supporting these sentencing trends.

It is important to clarify that the new offence does not stop prosecutors charging even more serious offences, such as attempted murder, in appropriate cases. This approach ensures prosecutorial discretion is not disturbed.

The crime will be dealt with on indictment in the Supreme Court, with a maximum penalty for *Criminal Code* offences being 21 years' imprisonment.

Importantly, the new offence will apply whether family violence is involved or not.

The crime is also one of 'specific intent', meaning that the Crown must show that the accused intended to cause the act of choking, suffocation or strangulation.

Those acts are not defined in the legislation, so that the words will have their ordinary meanings that change and evolve over time, in line with community expectations. This is intended to capture an appropriate range of conduct without imposing arbitrary requirements, such as the conduct causing a person to stop breathing altogether. It is considered that the inclusion of legislatively defined terms would inappropriately narrow the offence.

The Bill also provides for alternative conviction provisions relevant to other *Criminal Code* offences. That is, the *Criminal Code* provides that a person charged with specified offences may be convicted of an alternative offence instead of the one charged, provided that the evidence establishes that the alternative offence has been committed. The trial Judge must be satisfied that there was sufficient evidence presented at the trial to try or convict the person of the alternative crime or offence.

Mr Speaker, the Bill inserts a new provision for alternative convictions regarding the crime of attempted murder.

The new section 333A provides that upon an indictment for attempting to commit murder, the accused person may be convicted of an unlawful act intended to cause bodily harm, or strangulation.

This addresses a current issue where no alternative conviction provision exists for attempted murder.

Under the Bill, if the jury finds a person not guilty of the crime with which they are charged, they may be convicted of the alternative crime if it is established by the evidence to have been committed.

Similar provisions make strangulation an available alternative conviction on charges of unlawful act intended to cause bodily harm; wounding or causing grievous bodily harm; and persistent family violence.

The Bill also provides for an alternative offence of assault, where a person is charged with strangulation. This will ensure that, in appropriate cases, if a jury was to find a person not guilty of strangulation, a finding of guilt for assault could be made.

The strangulation offence has also been added to Appendix A of the *Criminal Code*, which lists crimes for which an offender may be arrested without warrant. This broadens the arrest power for police regarding the strangulation offence.

Stealth

The Bill also amends the definition of consent in section 2A of the *Criminal Code*, to expressly recognise 'stealthing'.

Tasmania has an expansive and progressive definition of consent. We led the country in introducing strong reforms to define 'consent', by reference to 'free agreement'.

Section 2A incorporates a non-exhaustive list of scenarios in which there can be no free agreement. For example, a person does not freely agree if the person does not say or do anything to communicate consent.

The inclusion of a specific provision for 'stealthing' into this section will provide even further clarity on free agreement to sexual intercourse, building on the existing strengths around our consent laws.

Express recognition of the abhorrent nature of stealthing may assist with education, discourage would-be offenders, and support the making of complaints and prosecutions for sexual offences in appropriate circumstances.

To look at the detail of the provision, a person does not freely agree to an act of sexual intercourse in the specified circumstances. That is, where the person says or does anything to communicate to the other person that a condom must be used for that sexual intercourse, and the other person intentionally does not use a condom, tampers with, or removes the condom, before or during the intercourse.

Sexual intercourse without consent is rape. Consent requires free agreement. By clarifying 'stealthing' as set out in the Bill meaning free agreement has not been given, we are ensuring there is clarity that stealthing is criminal and it can go to proving a charge of rape.

Like strangulation, rape has a maximum penalty of 21 years' imprisonment in the *Criminal Code* and is sentenced in the Supreme Court.

The new subsection expressly states that it does not limit the application of the existing law of free agreement in section 2A(2) to an act of sexual intercourse. That is, the section also contains other non-exhaustive provisions for where a person does not freely agree to an act.

For example, a person does not freely agree to sexual intercourse if the person submits because of fraud, or is asleep or unconscious, or submits because of force or threats.

In closing, broad public and stakeholder consultation was undertaken to inform the development of the Bill, and I thank those who made comments in response to the draft legislation.

In addition, my Department has worked closely with the Office of the Director of Public Prosecutions in the finalisation of this Bill and the elements of the offence.

Mr Speaker, we have listened to our stakeholders and the community in introducing these amendments, which further ensure our laws are strong and robust to protect victim survivors of family violence, and ensure perpetrators are appropriately held to account for any criminal conduct or behaviour.

Mr Speaker, I commend the Bill to the House.