

## **Non-fatal Strangulation and Suffocation**

Rory Kelly and David Ormerod<sup>1</sup>

### Abstract

*Strangulation is a gendered act of violence that can form part of a pattern of domestic abuse. The government supported amendment to the Domestic Abuse Act 2021 inserts a new offence of strangulation or suffocation into the Serious Crime Act 2015. We argue there is a compelling case for a new offence based on the need to acknowledge and signal the multifaceted harms and wrongs of strangulation. Drawing on the recently enacted strangulation offences in New Zealand and Australia, we detail the important work that will need to be done by criminal justice actors to increase the impact of the new offence in practice.*

### **Introduction**

Strangulation is typically a form of violence committed by men against women.<sup>2</sup> It can cause primal fear, serious physical harm and psychological harm. It is often a controlling behaviour that is widespread,<sup>3</sup> and “widely recognised [as] a common feature of domestic abuse and a well-known risk indicator.”<sup>4</sup> As Baroness Newlove recently explained:

---

<sup>1</sup> UCL, Faculty of Laws. We are grateful to Susan Edwards, Lyndon Harris, Karl Laird and Lucia Zedner for their comments on earlier drafts. We are also grateful to Yvette Tinsley, Kim McGregor, Heather Douglas, and Kris Gledhill for discussion and their assistance with comparative materials. Finally, our thanks to Chloe Reddock for excellent research assistance.

<sup>2</sup> A recent study by Catherine White and others found 96.6% of patients were female and 98% of alleged perpetrators were male. The descriptors employed follows the medical context of the study. C. White et al, ‘I thought he was going to kill me’: Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period’ [2021] 79 J Forensic Leg Med 102128. On the gender and context specific nature of strangulation see also S. Edwards, ‘The strangulation of female partners’ [2015] Crim. L.R. 949. We note Susan Edwards’s many publications over decades on this issue, including recently in Counsel magazine:

<https://www.counselmagazine.co.uk/articles/strangulation-false-narratives-of-consent>.

<sup>3</sup> See the Written Evidence: We Can’t Consent To This, ‘Consent Defences and the Criminal Justice System’ (Written evidence – further submission (DAB73) 2020), at paras 4.2.3. Potentially 2 million UK women have experienced such assaults.

<sup>4</sup> Centre for Women’s Justice, ‘The need for an offence of non-fatal strangulation’ (Written evidence (DAB06) 2020); see Baroness Newlove: “Victims of non-fatal strangulation are seven times more

“It is estimated that 20,000 women per year—or 55 women every day—who have been assessed as high risk and suffer physical abuse have experienced strangulation or attempted strangulation.”<sup>5</sup>

Following the important work of the Centre for Women’s Justice,<sup>6</sup> the case for a new offence attracted significant support in both Houses of Parliament.<sup>7</sup> On 1 March 2021, as a result of an amendment tabled by Baroness Newlove a new offence of “non-fatal strangulation or suffocation” was inserted into the Domestic Abuse Bill.

That legislation is now enacted and the offence is thereby inserted into section 75A of the Serious Crime Act 2015. The offence requires that a person (A) intentionally strangles another person (B), or does any other act to B that affects B’s ability to breathe and constitutes battery of B. Consent to the strangulation is a defence unless B suffered serious harm (grievous bodily harm, wounding, or actual bodily harm) and A intended to cause B serious harm or was reckless as to causing such harm to B. In this article we examine the need for such an offence and offer a critical assessment of the provision as enacted. We begin with an overview of the context. In section I we draw in particular on that research and recent work of the New Zealand Law Commission<sup>8</sup> and the experience in New South Wales in introducing a similar offence,<sup>9</sup> to conclude that though existing offences may well provide for acts and consequences of strangulation, there was a clear and compelling case for a new offence in England. In section II we examine the provision as enacted. This includes discussion of whether ‘strangulation’ should have been defined and what role consent will play in the offence. We also consider how well this new offence will fit within our broader criminal law, criminal processes and sentencing regimes. Finally, in section III we draw some conclusions from our discussion.

## I. The case for a new offence

---

likely than other domestic abuse victims to go on to be killed”, HL Deb 5 January 2021, vol 809, cols 20-130.

<sup>5</sup>HL Deb 5 January 2021, vol 809, cols 20-130.

<sup>6</sup> See also the written submissions of We Can’t Consent To This ‘Domestic Abuse Bill’ (Written evidence (DAB20) 2020) and We Can’t Consent To This, ‘Consent Defences and the Criminal Justice System’ (Written evidence – further submission (DAB73) 2020).

<sup>7</sup> See Domestic Abuse Bill Deb 16 June 2020, cols 329-380.

<sup>8</sup> New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016).

<sup>9</sup> Crimes Act 1961, s. 189A, strangulation or suffocation.

### *The present law's protection*

There are sensible reasons for criminal offences of general application. We do not want a proliferation of overly specific offences such as stealing a book as compared to stealing a computer, or murder with a rock as compared to murder with a knife.<sup>10</sup> The Law Commission recognised as much in its recent report on *Reform of Offences Against the Person*.<sup>11</sup> The Commission also acknowledged that the primary argument in favour of adopting more specific offences is that:

“some means of causing injury... rightly attract an especially high level of public disapproval. It is therefore just that people who are guilty of them are labelled appropriately, and where necessary given a higher sentence.”<sup>12</sup>

With this context in mind, we begin by examining whether existing offences dealt adequately with strangulation.

An act of strangulation of another will constitute a battery, and may also constitute assault occasioning actual bodily harm (s. 47 OAPA), or grievous bodily harm caused maliciously (s. 20 OAPA) or intentionally (s. 18 OAPA). The more specific offences of coercive control or attempting to choke, in order to commit any indictable offence may also apply.<sup>13</sup> There is no doubt that a strangulation - which for present we can treat as meaning any holding of the neck - constitutes battery since it necessarily involves A, intentionally or recklessly, inflicting unlawful force on B.<sup>14</sup> That is, of course, subject to the absence of a lawful reason for the use of such force. It is conceivable that A might seize at someone's neck to restrain them in self-defence. It is also quite possible for B to consent to such contact in a

---

<sup>10</sup> Cf. the perspectives of J. Horder, 'Rethinking non-fatal offences against the person' [1994] 14(3), O.J.L.S. 335-351 and J. Gardner, 'Rationality and the Rule of Law in Offences Against the Person' [1994] 53 CLJ 502.

<sup>11</sup> Law Commission, *Reform of Offences Against the Person* (Law Com No 361, 2015) paras 4.14 - 4.33.

<sup>12</sup> Law Commission, *Reform of Offences Against the Person* (Law Com No 361, 2015) para 4.28. The reason for this higher level of disapproval may itself be context dependent. In the present context, we consider factors related to harm, risk of harm and wrongfulness later in this section.

<sup>13</sup> Section 21 OAPA. Note the Law Commission recommended repeal of that section: Law Commission, *Reform of Offences Against the Person* (Law Com No 361, 2015) para 9.27.

<sup>14</sup> *Rolfe* (1952) 36 Cr. App. R. 4. We recognise that the conduct under scrutiny may include a wide range of physical conduct which impedes breathing - gripping the neck, holding something over the mouth and nose, etc.

game or sadomasochistic encounter. Battery is triable summarily, must be prosecuted within 6 months,<sup>15</sup> and the maximum penalty is currently six months.<sup>16</sup>

Similarly, a great many instances of strangulation will constitute ABH because the requirement of bodily harm is satisfied by any injury calculated to interfere with the health or comfort of the victim that is more than ‘transient or trifling’.<sup>17</sup> CPS guidance from 2020 provides examples to include extensive and severe bruising, and injuries leading to a loss of consciousness.<sup>18</sup> The issue of consent in s. 47 is more complex. Following *Brown*,<sup>19</sup> factual consent to strangulation that causes ABH during sexual activity is not lawfully valid consent.<sup>20</sup> Consent to strangulation in some other contexts may be lawfully valid - as in contact martial arts.

In more extreme cases, one of the general offences of causing grievous bodily harm in the 1861 Act will apply if there is ‘really serious harm’.<sup>21</sup> Liability will also turn on the *mens rea*: for s. 18 GBH needs to be intended; for s. 20 malice as to merely some harm is sufficient. The CPS maintain that life-changing injuries should be dealt with as GBH and that those injuries that require significant medical treatment may indicate that the injury amounts to GBH.<sup>22</sup> Again, the issue of consent needs to be addressed. It is lawful to consent, in some circumstances, to even the intentional infliction of GBH that might arise from physical contact with the neck (e.g. fitting a neck brace during medical treatment, or applying a neck hold in martial arts). One can also consent to reckless infliction of ABH or GBH in some contexts (e.g. through other sports such as rugby).

Section 21 of the 1861 Act makes it an offence to attempt to choke, strangle or suffocate another in order to commit any indictable offence. By way of example, the offence could be charged if A attempted to choke B so as to commit a sexual offence. The Law

---

<sup>15</sup> Magistrates’ Courts Act 1980, s. 108. See also, The Home Office and Ministry of Justice, ‘Domestic Abuse Bill’ (Second Supplemental Memorandum, 2021), para 38..

<sup>16</sup> Criminal Justice Act 1988, s. 39.

<sup>17</sup> *DPP v Smith* [2006] EWHC 94 (Admin).

<sup>18</sup> *T v DPP* [2003] Crim. L.R. 622.

<sup>19</sup> [1994] 1 A.C. 212; see the discussion in D. Ormerod and K. Laird, *Smith, Hogan and Ormerod’s Criminal Law* (16<sup>th</sup> ed, OUP 2021), Ch 16, 000 [pages available at proofs].

<sup>20</sup> Cf. the view taken by Carr J at Nottingham CC in *R v Morton* (2017) 14 July, Nottingham CC), A was charged with unlawful act manslaughter having caused B’s death by strangulation in the course of what he argued was consensual sex. Carr J, as she then was, left the issue of consent to the jury on the basis that the relevant authorities do not impose a blanket prohibition on consent being relevant to A’s liability in such circumstances.

<sup>21</sup> *Sidhu* [2019] EWCA Crim 1034 per Green LJ.

<sup>22</sup> CPS, ‘Offences against the Person, incorporating the Charging Standard’ (6 January 2020): <https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard>.

Commission has recommended repeal, describing this as “a prime example of a needlessly specific offence”.<sup>23</sup> This specificity makes the offence somewhat of a red herring for present purposes. Though s. 21 targets strangulation, its applicability is greatly narrowed by its ulterior intent requirement.<sup>24</sup> In some cases no doubt, A may strangle B with a view to suppressing resistance from B so that another offence can be committed.<sup>25</sup> In such cases the further offence (and whichever offence against the person is represented by the strangling) can be charged. If the further offence is not in fact committed, then the strangling may be evidence of an attempt to commit that further offence (which attempt can be charged alongside the battery or OAPA offence fulfilled by the act of strangulation). The fact that we regard s. 21 as of limited value and application should not be read as indicating any reservation about the enactment of a new strangulation offence.

It is right that we also note the offence of coercive control, introduced by section 76 of the Serious Crime Act 2015.<sup>26</sup> The offence may cover incidents of strangulation, but does not target such behaviour specifically. It requires proof of repeated or continuous controlling or coercive behaviour and only applies in the context of those who are in an intimate personal relationship; or where D and V live together and are in a relevant relationship (being married, civil partners, parents of the same child etc: see s. 76(6) and (7)).

Against this criminal law context, it is also important to acknowledge the other (albeit limited) steps taken in the criminal justice system to recognise the seriousness of strangling. The above-mentioned CPS Guidance cites strangulation as a factor which makes a battery

---

<sup>23</sup> Law Commission, *Reform of Offences Against the Person* (Law Com No 361, 2015) paras 8.42 and 8.48.

<sup>24</sup> See also the ordering critique of the offence made by Jess Philips MP: if D commits the sexual offence first, and then strangles V the offence would not apply, Domestic Abuse Bill Deb 16 June 2020, col 334.

<sup>25</sup> See C. White et al, ‘I thought he was going to kill me’: Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period’ [2021] 79 J Forensic Leg Med 102128.

<sup>26</sup> See generally, D. Ormerod and K. Laird, *Smith Hogan and Ormerod’s Criminal Law* (16<sup>th</sup> ed, OUP 2021), p00 [at proofs]; P. McGorry and M. McMahon ‘Criminalising “the worst” part: operationalising the offence of coercive control in England and Wales’ [2019] Crim. L.R. 957. See generally M. Burton, *Legal Responses to Domestic Violence* (1<sup>st</sup> ed, Routledge-Cavendish 2009); N. Groves and T. Thomas, *Domestic Violence and Criminal Justice* (1<sup>st</sup> ed, Routledge 2014); E. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2009); V. Tadros, ‘The Distinctiveness of Domestic Abuse: A Freedom Based Account’ (2004-5) 65 La. L. Rev 989; S. Edwards, ‘Coercion and Compulsion - Re-Imagining Crimes and Defences’ [2016] Crim. L.R. 876. V. Bettinson and C. Bishop, ‘Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?’ (2015) 66 NILQ 177.

more serious and thus more appropriately dealt with as ABH as opposed to a battery.<sup>27</sup> In addition, in 2020 the Sentencing Council consulted on new guidelines for assault offences, which recognised that where strangulation was a factor the offence is one of higher culpability and thus attracts a more severe sentence “because it gives rise to an inference that the offender intended to cause a high level of harm.”<sup>28</sup> This factor would be relevant for battery, ABH and GBH offences amongst others.

### *The arguments for a further, specific, strangulation offence*

Concern has long been raised that strangling is not treated seriously within the English criminal justice system.<sup>29</sup> There appears an important disconnect between how strangulation could be treated under general offences and how it was treated. Based on their substantial work with domestic abuse services, the Centre for Women’s Justice report that where strangling is charged, it tends to be charged as a battery<sup>30</sup> despite the latest CPS guidance (above). Similarly, the Victims’ Commissioner and Domestic Abuse Commissioner have recently reported that: “non-fatal strangulation is currently significantly under-charged across the UK .... This is a systemic issue and the law as it stands is not fit for purpose.”<sup>31</sup> These observations echo findings of the New Zealand Law Commission (NZLC), which reported that “more serious charges are the exception and are laid only when there is other violence or evidence of injury.”<sup>32</sup>

As the discussion above illustrates, there are clearly numerous offences that may be prosecuted when a person strangles another, and the criminal justice system is moving to acknowledge the particular wrong of strangling. Despite this, good reasons for a new

---

<sup>27</sup> CPS, ‘Offences against the Person, incorporating the Charging Standard’ (6 January 2020):

<https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard>.

<sup>28</sup> Sentencing Council, ‘Assault Offences: Consultation’ (April 2020) p. 49. Compare to the discussion of the use of weapons and weapon equivalents in *JDL* [2018] EWCA Crim 1766, [2018] Crim L.R. 1018.

<sup>29</sup> See S. Edwards, *Sex and Gender in the Legal Process* (Blackstone 1996) p. 185.

<sup>30</sup> CWJ 13-15. See also New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016).

<sup>31</sup> Victims Commissioner, ‘Commissioners endorse non-fatal strangulation amendment to the Domestic Abuse Bill’ (2021): <https://victimscommissioner.org.uk/news/commissioners-endorse-non-fatal-strangulation-amendment-to-the-domestic-abuse-bill/>. For an excellent and wider review of existing offences, see H. Douglas and R. Fitzgerald ‘Women’s stories of non-fatal strangulation: Informing the criminal justice response’ [2020] *Criminology & Criminal Justice*.

<sup>32</sup> New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016), paras 3.15-3.20.

strangulation offence have been advanced. A new offence is, it is argued, needed to acknowledge, label, and signal the multi-faceted harms and wrongs of non-fatal strangulation and choking.<sup>33</sup>

The NZLC began its assessment of the case for a new offence by commenting that across numerous jurisdictions strangulation has been typically prosecuted as a minor offence against the person “as if it were a push or shove”.<sup>34</sup> On deeper consideration, this seems wholly inadequate. Strangling has all the attributes of an offence against the person: it can result in varying degrees of harm to include loss of consciousness and brain damage<sup>35</sup> (and ultimately death although such cases are not our focus). Furthermore, strangulation has numerous additional facets that confirm its particular seriousness.

First, strangulation can induce a ‘primal fear’ and helplessness in victims.<sup>36</sup> In a study by Catherine White and others, 36.6% of individuals examined reported that whilst being strangled they thought they were going to die.<sup>37</sup> Indeed, the vast majority of respondents to a recent study by Stand up to Domestic Abuse felt they were going to die whilst being strangled: “I felt like my head was going to explode, I was gasping for air and trying to scream and shout but could not make any real noise and felt totally helpless...”<sup>38</sup>

Secondly, strangulation can have wider psychological consequences for the victim. The Centre for Women’s Justice Studies reported psychological outcomes to include PTSD, depression and suicidality.<sup>39</sup> The NZLC likewise reported that: “Strangulation also has a

---

<sup>33</sup> Cf. V. Tadros, ‘The Distinctiveness of Domestic Abuse: A Freedom Based Account’ [2005] 65 La. L. Rev. 989.

<sup>34</sup> New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016), para 1.4.

<sup>35</sup> Centre for Women’s Justice, ‘The need for an offence of non-fatal strangulation’ (Written evidence (DAB06) 2020), para 7.

<sup>36</sup> H. Bichard et al, ‘The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review’ [2021] *Neuropsychological Rehabilitation* p. 4. This language was also picked up by Jess Philips MP in Parliamentary debate: Domestic Abuse Bill Deb 4 June 2020, col 332.

<sup>37</sup> C. White et al, ‘I thought he was going to kill me’: Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period’ [2021] 79 *J Forensic Leg Med* 102128.

<sup>38</sup> J. Monckton, ‘Non-Fatal Strangulation’ (Stand up to Domestic Violence 2020) p. 7: <https://sutda.org/wp-content/uploads/Non-fatal-strangulation-Survey-June-2020-.pdf>.

<sup>39</sup> Centre for Women’s Justice, ‘The need for an offence of non-fatal strangulation’ (Written evidence (DAB06) 2020), para 8. The CWJ drew on the thorough analysis of Helen Bichard and others: H. Bichard et al., ‘The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review’ [2021] *Neuropsychological Rehabilitation* 4.

predictably serious effect on victims' psychological and emotional wellbeing...the long-term impact can be sufficiently devastating that victims commit suicide".<sup>40</sup>

Thirdly, non-fatal strangulation is often a serious coercive and controlling behaviour. This point was eloquently conveyed by the then Stephens LJ in a recent Northern Irish Court of Appeal case.

“Strangulation is an effective and cruel way of asserting dominance and control over a person through the terrifying experience of being starved of oxygen and the very close personal contact with the victim who is rendered helpless at the mercy of the offender. The intention of the offender may be to create a shared understanding that death, should the offender so choose, is only seconds away. The act of strangulation symbolizes an abuser's power and control over the victim, most of whom are female.”<sup>41</sup>

Fourthly, there is a risk of very serious harm when a person is strangled. Strangulation may cause the victim to lose consciousness within seconds and brain death can occur within four-five minutes of persistent strangulation.<sup>42</sup> There is also well-documented evidence of vagal inhibition (cardiac arrest) occurring very swiftly.<sup>43</sup> Helen Brichard and others write that strangulation may also pose a risk of delayed serious outcomes to include stroke and miscarriages.<sup>44</sup>

Fifthly, there are issues of reporting and detection. Strangulation, as with other types of domestic abuse, may be seriously underreported.<sup>45</sup> Even where strangulation is reported there is a risk that the victim will not be in a position to convey the full weight of the harm and trauma it has caused. Symptoms will not necessarily be obvious. White et al report that

---

<sup>40</sup> New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016) para 2.11.

<sup>41</sup> *Allen* [2020] NICA 25 [47]. See also, Stand up to Domestic Abuse study pp. 7-8; Centre for Women's Justice, 'The need for an offence of non-fatal strangulation' (Written evidence (DAB06) 2020), para 5; H. Douglas and R. Fitzgerald 'Women's stories of non-fatal strangulation: Informing the criminal justice response' (2020) *Criminology & Criminal Justice*; ; Domestic Abuse Bill Deb 16 June 2020, col 332.

<sup>42</sup> New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016) para 2.2, citing G. Strack, G. McClane and D. Hawley, 'A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim' [2001] 21(3) *Emerg Med* 314.

<sup>43</sup> See S. Edwards, 'The Strangulation of Female Partners' [2015] *Crim. L.R.* 949 at 957.

<sup>44</sup> H. Bichard et al, 'The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review' [2021] *Neuropsychological Rehabilitation* 4, pp. 18-20.

<sup>45</sup> Compare New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016), para 2.20.

less than half (46.6%) of patients in their study reporting non-fatal strangulation had an attributable injury to their neck or head that was evident at the time of their examination.<sup>46</sup> Furthermore, the consequences of strangulation may be delayed and there is the risk that the additional harm and trauma from a caused loss of consciousness will go undetected if it is for a short duration.<sup>47</sup> There are also associated impacts of the loss of consciousness with significance for the criminal process, including that the victim may not fully recall the strangulation due to cognitive effects such as amnesia and confusion.

Finally, and by no mean least, there is evidence that women who have been strangled by a current or ex intimate partner are at a significantly increased likelihood of being killed than women who have been abused, but not strangled. Nancy Glass and others found that when a women had been strangled there was a greater than seven-fold increase in the likelihood that she would be killed in a future attack and a greater than six-fold increase she would be the victim of attempted homicide.<sup>48</sup>

This catalogue of additional risks, harms and wrongs demonstrates that a prosecution and conviction for a battery, or even a more serious, general offence against the person would not adequately reflect the serious implications of strangulation; worse, it would hide them.<sup>49</sup> By comparison, a new and specific offence, if appropriately enforced, could convey the true gravity of strangulation.

What the limits of the present law and these specific mischiefs point towards is the need for an offence that would provide an appropriate label - 'non-fatal strangulation or suffocation'. The advantages flowing from this would not only be theoretical.<sup>50</sup> A new

---

<sup>46</sup> C. White et al, 'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period' [2021] 79 J Forensic Leg Med 102128, p. 8.

<sup>47</sup> The Chief Victim's Commissioner for NZ reports that "up to fifty percent of strangulation victims will have no obvious injuries and that there may be a delayed onset of symptoms (some serious or fatal), usually within 72 hours, and some symptoms can emerge years later." See G. Strack, G. McClane and D. Hawley 'A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim' [2001] 21(3) Emerg Med 314.

<sup>48</sup> New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016), para 2.26-2.31. See also N. Glass et al., 'Non-fatal strangulation is an important risk factor for homicide of women' [2008] 35(3) J Emerg Med 329.

<sup>49</sup> Our claim is not that every incidence of strangulation will present all of these features. See V. Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' [2005] 65 La. L. Rev. 989, pp. 1007-1009 and compare J. Gardner and S. Shute 'The wrongfulness of rape' in J. Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (Oxford, Clarendon Press 2000).

<sup>50</sup> On the value of fair labelling generally, see J. Horder, *Ashworth's Principles of Criminal Law* (9<sup>th</sup> ed, OUP 2020); J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) MLR 217.

offence would have an important signalling function to actors in the criminal justice system. It would emphasise just how serious a crime strangulation is and the risks it poses particularly against women and particularly in the context of domestic abuse.<sup>51</sup> A new offence may also allow for more appropriate sentencing outcomes. If minor offences against the person are charged inappropriately, judges will be limited in their ability to impose a sentence proportionate to the severity of strangling. Such undercharging may have other consequential affects such as on the decision to adduce bad character in a later prosecution or in assessments of dangerousness. A strangulation offence would thus be an exemplar of the sort of behaviour that the Law Commission envisaged as justifying a specific offence.<sup>52</sup>

The creation of a new offence is expected to serve as a catalyst for new training and education of all those in the criminal justice system as to the significance of the conduct involved.<sup>53</sup> Though our focus is on the case for, and form of, a new offence, we recognise that it should be part of a wider scheme of reform.<sup>54</sup> It is also possible that the enactment of the new offence will increase awareness across the general public of the specific harms and risks involved in strangulation. By comparison, the new strangulation offence in New Zealand, has, according to the Chief Victims Advisor to the Government, precipitated better police training and practice on strangulation and consequently a greater willingness of women to report strangulation.<sup>55</sup> The new offence could also stimulate more specific training for medical professionals to ensure more focussed reports for immediate (and future) use in the forensic setting and more directed support for victims. A new offence could thus have value as an impetus for wider awareness of the harms caused and risked by strangulation.

---

<sup>51</sup> See H. Douglas and R. Fitzgerald ‘Women’s stories of non-fatal strangulation: Informing the criminal justice response’ (2020) *Criminology & Criminal Justice* on the importance of having strangulation appear on the offender’s criminal record.

<sup>52</sup> See Law Commission, *Reform of Offences Against the Person* (Law Com No 361, 2015) paras 4.15-4.33.

<sup>53</sup> See, for instance, The Explanatory notes to the House of Lords Amendments, ‘Domestic Abuse Bill: Explanatory notes on Lords Amendments’ (House of Commons 2021), para 133. See also C. White et al, ‘I thought he was going to kill me’: Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period’ [2021] 79 *J Forensic Leg Med* 102128, p. 9; Kim McGregor Letter.

<sup>54</sup> See comments of the Domestic Abuse Commissioner in Rajeev Syal, ‘Non-fatal strangulation to carry five years in prison under reforms’ (*The Guardian*, March 2021): <https://www.theguardian.com/society/2021/mar/01/non-fatal-strangulation-to-carry-five-years-in-prison-under-reforms>.

<sup>55</sup> Kim McGregor Letter. The Letter does not discuss male reporting. This is not unexpected because the evidence base is still developing and male victims are a significant minority.

## II. The Domestic Abuse Act

Against the background of the discussion above, in this section we examine the structure of the new offence. The development of an offence of strangulation / suffocation is to be commended but we identify several aspects of the drafting that will call for further clarification from the courts and ideally further CPS, Sentencing Council, Judicial College, and police guidance.

We recognise that such an offence can take diverse forms - as illustrated by the very different strangulation offences recently enacted in New Zealand<sup>56</sup> and New South Wales.<sup>57</sup> Our primary focus is on a constructive analysis of the offence Parliament has created rather than a comparative retrospective on what might have been. We do however conclude by sketching one alternative, we suggest simpler, means by which strangulation could have been criminalised.

### *The section*

#### *“Strangulation or suffocation*

#### 75A Strangulation or suffocation

- (1) A person (“A”) commits an offence if—
- (a) A intentionally strangles another person (“B”), or
  - (b) A does any other act to B that—
    - (i) affects B’s ability to breathe, and
    - (ii) constitutes battery of B.”

A has a defence of consent unless the conduct amounted to serious harm (defined as actual bodily harm wounding or GBH) and D intended or was reckless as to causing that harm. the maximum penalty is 6 months summarily and 5 years on indictment. The single offence is

---

<sup>56</sup> The Crimes Act 1961, s. 189A, introduced in 2018. It was based on the NZLC report above and see also the New Zealand Law Commission, *Understanding Family Violence: Reforming the Criminal Law relating to Homicide* (NZLC R139, 2016).

<sup>57</sup> See H. Douglas and R. Fitzgerald ‘Women’s stories of non-fatal strangulation: Informing the criminal justice response’ [2020] *Criminology & Criminal Justice*.

given extraterritorial reach for UK nationals and those habitually resident in England and Wales.<sup>58</sup>

The offence might immediately be broken down into its 2 forms, although of course there is only one offence.

*(1)(a) The strangulation version*

	<b>Actus reus</b>	<b>Mens rea</b>
<b>Conduct</b>	Strangulation	Intention
<b>Circumstances</b>	Another person	None
<b>Consequences</b>	-	-
<b>Defence applies</b>	(i) V consents and no serious harm caused or (ii) V consents and serious harm caused	(i) None  (ii) D lacked intent or recklessness as to causing serious harm

*(1)(b) The battery version*

	<b>Actus reus</b>	<b>Mens rea</b>
<b>Conduct</b>	Any act to V	Voluntary
<b>Circumstances</b>	Another person	None

---

<sup>58</sup> It is also included in Crime and Disorder Act 1988, s. 29 as an offence that can be racially or religiously aggravated.

<b>Consequences</b>	(i) Results in a touching of V, and (ii) affects B's ability to breathe	(i) Intention or recklessness  (ii) None specified
<b>Defence applies</b>	(i) V consents and no serious harm caused  or (ii) V consents and serious harm caused	(i) None  (ii) D lacked intent or recklessness as to causing serious harm

(i) ***Defining Strangulation / Suffocation***

The offence is headed 'strangulation or suffocation', but the former term is undefined, and the latter term is not used. Instead, any work on defining 'strangulation' has been left to the courts. That aside, where the allegation is that A has strangled B, the offence is beguilingly straightforward. The explanatory notes state the alternative form of the offence can include but is not limited to, suffocation.<sup>59</sup> It relies on the rather awkward two-part alternative: A does an act which affects B's ability to breathe and which constitutes a battery of B, but at least in that form the offence will pose few problems of definition.

Although Parliamentary background papers are at pains to emphasise that the term 'strangulation' bears its ordinary meaning,<sup>60</sup> and the courts may apply *Brutus v Cozens*<sup>61</sup> to achieve that end, it may have been easier to attempt a statutory definition. Douglas and Fitzgerald have warned that, "without a clear definition of NFS [Non-fatal strangulation] in the legislation there is a risk that NFS will be interpreted narrowly, for example, to require complete stoppage of breath or that unconsciousness results."<sup>62</sup> What matters for present

<sup>59</sup> 'Domestic Abuse Bill: Explanatory notes on Lords Amendments' (House of Commons 2021), para 77. The explanatory notes and section heading are clearly permissible aids to construction.

<sup>60</sup> The Home Office and Ministry of Justice, 'Domestic Abuse Bill' (Second Supplemental Memorandum, 2021), para 39; 'Domestic Abuse Bill: Explanatory notes on Lords Amendments' (House of Commons 2021), para 77.

<sup>61</sup> [1973] AC 854.

<sup>62</sup> H. Douglas and R. Fitzgerald 'Women's stories of non-fatal strangulation: Informing the criminal justice response' [2020] Criminology & Criminal Justice.

purposes is whether the courts will be required to provide a definition of strangulation under s. 75A. There is no definition of the term ‘strangulation’, ‘suffocation’ or ‘choking’ in interpreting section 21 of the 1861 Act that would be relied on. In the Northern Ireland case of *Allen*, Stephens LJ offered the following definition: “Strangulation is a form of asphyxia (lack of oxygen) characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck.”<sup>63</sup>

Definitions have also been offered in the academic literature<sup>64</sup> and in law reform proposals<sup>65</sup> as well as in many other jurisdictions. Some overseas offences have been drafted with specific reference to “choke, strangle etc” with no explicit requirement as to what, if any, effect this must have on the breathing. In *Green (No 3)*, the Supreme Court of the Australian Capital Territory interpreted such a section as to require the *cessation* of breathing not just its impediment.<sup>66</sup> As a result, the legislation was amended and now provides that “strangle” includes applying “pressure, *to any extent*, to the person's neck” (emphasis added).<sup>67</sup>

In yet other examples, offences have included elements directed at both the means and consequence of impeding breathing. The New Zealand Crimes Act 1961, s. 189A creates an offence of ‘strangulation or suffocation’ where a person intentionally or recklessly impedes “another person’s normal breathing, blood circulation, or both, by doing (manually, or using

---

<sup>63</sup> *Allen* [2020] NICA 25 [47]. See also the judgment of the Supreme Court in *Stocker v Stocker* [2019] UKSC 17 which considers in detail, the meaning of ‘tried to strangle’ in defamation proceedings, or perhaps more accurately, the methodology of establishing the meaning of this term.

<sup>64</sup> C. White et al, ‘I thought he was going to kill me’: Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period’ (2021) 79 J Forensic Leg Med 102128: “the obstruction of blood vessels and/or airway by external pressure to the neck resulting in decreased oxygen supply to the brain.”

<sup>65</sup> The NZLC proposed ‘strangle or suffocates’ should be defined as “impedes normal breathing or circulation of the blood by intentionally applying force on the neck or by intentionally using other means”: New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016), para 5.16.

<sup>66</sup> [2019] ACTSC 96 [46]-[47]. Compare, *R v HBZ* [2020] QCA 73 per Mullins JA at [56]-[59]: “In order to achieve the purpose of the introduction of this offence, “chokes” must be construed as the act of the perpetrator that hinders or restricts the breathing of the victim and does not require proof that breathing was completely stopped...”.

<sup>67</sup> Crimes Act 1900, s. 27; cf. Crimes Act 1900, s. 37 (NSW). The OED definition of strangulation is “The action or process of stopping respiration by compression of the air-passage, esp. by a sudden and violent compression of the windpipe; the condition of being strangled by such compression”. This may be underinclusive and may give rise to the same issue as in *Green (No 3)*.’

any aid) all or any of the following: (a) blocking that other person’s nose, mouth, or both: (b) applying pressure on, or to, that other person’s throat, neck, or both.” That degree of specificity stands in contrast to the New South Wales offences, also recently introduced, criminalising “choking, suffocation and strangulation” without further definition of those terms.<sup>68</sup>

Parliament could have drawn on a number of examples if it had preferred to define the terms ‘strangulation’ and ‘suffocation’. Perhaps the rationale behind leaving ‘strangulation’ undefined in the offence is that the breadth of the battery form of the offence may mean that in practice, any borderline incidents of strangulation are swept within the offence. It may also apply to cases in which A causes asphyxia by pressure to the chest or other actions that may have the effect of impeding the respiratory system. Cases in which the prosecution would choose to rely on the strangulation offence rather than a general OAP that involve a battery but do not affect B’s ability to breathe (i.e. those not falling within the second form of the offence) *and* that could not be defined as “strangling” seem unlikely. Even so, the lack of definition may come at the price of making the offence overly broad as discussed in *iv* below.<sup>69</sup>

**(ii) “Unconsciousness or other harm”**

Though strangulation is undefined, it is clear that B does not need to become unconscious<sup>70</sup> or suffer any prescribed level of harm beyond their breathing being affected. Such a requirement would stretch the common understanding of the term, make the offence less practicable, and misrepresent the experiences of victims on which the offence was founded. It would be perverse to describe a case where A had grabbed the neck of B and cut off their air supply as attempted strangulation<sup>71</sup> or a simple battery because B had not lost

---

<sup>68</sup> Crimes Act 1900, s. 37 (NSW).

<sup>69</sup> The government is of the view there is no ECHR difficulty with the offence in terms of its breadth or otherwise. See The Home Office and Ministry of Justice, ‘Domestic Abuse Bill’ (Second Supplemental Memorandum, 2021), para 36 et seq.

<sup>70</sup> In contrast to, for example, the position in New South Wales where the Crimes Act 1900, s 37 as amended creates separate offences in which (1A) D “chokes, suffocates or strangles another person” without consent (5 years); (1) D chokes suffocates or strangles “render[ing] the other person unconscious, insensible or incapable of resistance” and is “reckless as to that consequence” (10 years); or (2) D chokes, suffocates or strangles, and thereby renders unconscious etc with intent to commit another indictable offence (25 years). For background to the offence see: NSW Parliamentary Research Service, ‘NSW’s strangulation offence: Time for further reform?’ (2018).

<sup>71</sup> Cf. *R v Hollaway* [2016] NSWCCA 166 42.

consciousness. Douglas and Fitzgerald - who conducted in-depth interviews with victims of strangulation - write,

“Women who fight back and avoid breathlessness and unconsciousness should not be viewed as less at risk than others who experience NFS [non-fatal strangulation] in the context of IPV [intimate partner violence].”<sup>72</sup>

The absence of a requirement of unconsciousness or any prescribed harm above impeded breathing - as either a standalone element or integral to the interpretation of ‘strangles’ - will enhance the practical value of the offence. In its report, the NZLC recommended that a new offence should not require loss of consciousness or serious injury because these harms do not occur within all incidences of strangulation in the context of family violence, and even when the victim does lose consciousness difficulties of proof could undermine effective prosecutions.<sup>73</sup> Douglas and Fitzgerald likewise conclude that a successful prosecution for strangulation should not require proof of serious injury or unconsciousness:

“Even when women have experienced the NFS as a traumatic event and feared for their lives they may report neither loss of consciousness nor visible injury as a result of NFS. Importantly also, most women in this study did not attend a doctor or a hospital after their experience of NFS, so medical records of the event may not be available.”<sup>74</sup>

We do not underestimate the challenges that may arise in securing testimony from B about the offending, as in other offences of violence perpetrated in coercive and controlling contexts.<sup>75</sup>

None of that is to deny that proof of serious harm or unconsciousness, where that has occurred would be of clear significance at sentencing (section ix below). We do not think that this conclusion is disingenuous. We support a new offence of strangulation in reliance on the inevitable risk of serious harms involved whilst also maintaining that proof of such harm is not a necessary prerequisite.

---

<sup>72</sup> H. Douglas, R. Fitzgerald, ‘Women’s stories of non-fatal strangulation: Informing the criminal justice response’ [2020] *Criminology & Criminal Justice*, p. 13.

<sup>73</sup> New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016) 5.18-5.19.

<sup>74</sup> H. Douglas, R. Fitzgerald, ‘Women’s stories of non-fatal strangulation: Informing the criminal justice response’ [2020] *Criminology & Criminal Justice*, p. 12.

<sup>75</sup> See M. Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (OUP 2009).

(iii) *Mens rea*

The *mens rea* of the “strangulation” form of the offence is clear: A must intentionally strangle B. The *mens rea* of the “battery version” of the offence is not stated explicitly, but B’s act must constitute a battery. As such, A must either intentionally or recklessly inflict unlawful force on B.<sup>76</sup> Applying orthodox principles, unless the prosecution specifically allege intentional strangulation,<sup>77</sup> A’s voluntary intoxication will not be an impediment to successful prosecution.

The drafting does not make clear whether, in relation to the battery form of the offence, in addition to the intentional or reckless battery A must have *mens rea* as to B’s ability to breathe being affected by his conduct. Consider, for instance A pinning B to the ground by kneeling on her chest. Here A would intend (or be reckless as to) infliction of unlawful force, but would they necessarily realise they were affecting B’s ability to breathe?<sup>78</sup> Given the statutory silence on the matter, it is arguable that the presumption of *mens rea* applies so that A would not be liable for the strangulation offence in these circumstances, but merely for battery (leaving aside for present purposes the issue of consent and belief in consent).

This debate has been played out in other jurisdictions. In the New Zealand offence, there is an explicit requirement that A intended or was reckless as to impeding B’s breathing and/or circulation. That is contrary to the recommendation made by the NZLC that it should be sufficient that D has intended or been reckless as to the act of strangulation with no additional *mens rea* as to the impediment of breathing required.<sup>79</sup>

Looking at the matter more broadly from a policy perspective, the offence is of general prohibition and is a serious one: it is triable either way and has a maximum sentence of five years’ imprisonment. Against that, strangulation, particularly the strangulation of women as an act of domestic abuse, is of such social concern that there is a strong argument that the

---

<sup>76</sup> *Venna* [1976] QB 421.

<sup>77</sup> *Majewski v DPP* [1977] AC 443.

<sup>78</sup> We note section 8 of the Criminal Justice Act 1967 provides that when a court or jury is not bound to infer D ‘intended or foresaw a result of his actions by reasons only of its being a natural and probable consequence of those actions’.

<sup>79</sup> The NZLC stated: “The only matter that the prosecution must prove is that means were intentionally used that had the result of impeding normal breathing or circulation. It would not need to prove that the defendant intended to impede breathing or circulation, or even that he or she understood the risk of that and did it anyway.” New Zealand Law Commission, *Strangulation: The Case for a New Offence* (NZLR R138, 2016), at para 5.17.

presumption of *mens rea* may be rebutted for this offence.<sup>80</sup> This issue seems certain to require resolution by the Court of Appeal.

*(iv) Breadth of the offence*

The offence may be overinclusive in two senses: it may apply in circumstances that should not trigger any criminal liability and it may apply in circumstances that although legitimately the business of the criminal law, should not be dealt with as strangulation or suffocation.<sup>81</sup> First, take the example of A squeezing into a busy tube. In so doing, A presses into B, who asks A to move to no effect and endures the marginal restriction on his ability to breath for the rest of the journey. This would be a battery that might satisfy the alternative conduct element of the proposed strangulation offence. Though unpleasant, this is not the sort of incident that should be dealt with by a strangulation offence and it is not immediately obvious that it should be the subject of the criminal law at all. Liability might be avoided by reliance on the consent of B or at least A's belief in such consent.<sup>82</sup>

Secondly, imagine that A punches B on the nose. This would be a clear battery that would affect B's ability to breath, but it is neither strangulation nor suffocation. If prosecuted for the strangulation/suffocation offence, A may be subject to a more stigmatising label and a greater sentence than deserved. This overbreadth is a result of the offence not defining strangulation or choking and instead relying on a very broad alternative conduct element in the battery form of the offence. Prosecutors may be left with difficult decisions at the borderline of a battery or strangulation. Suppose, for example, A grabs at B's neckline in an argument and quickly shoves B. B's description of the incident, "he grabbed my collar *and tried to strangle me*", may have particular significance.<sup>83</sup> The courts are unlikely to be able to offer significant assistance by defining 'strangles' given the alternative conduct element.

The breadth of the offence could have been readily addressed by Parliament if it had been minded to adopt definitions of 'strangulation' and 'suffocation'. The CPS now

---

<sup>80</sup> We note that it should not be taken for granted that the presumption of mens rea will be upheld. See eg *Lane and Letts* [2018] UKSC 36; and, more pertinently, *AG's Ref (No 1 of 2020)* [2020] EWCA Crim 1665.

<sup>81</sup> The lead account of over criminalisation and the problems it poses is D. Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford, OUP 2008).

<sup>82</sup> *Collins v Wilcock* [1984] 3 All ER 374; *Pegram v DPP* [2019] EWHC 2673 (Admin).

<sup>83</sup> We are grateful to S. Edwards for this point. See generally on criminal law as empowering prosecutors, see W. Stuntz, 'The Pathological Politics of Criminal Law' [2001] 100 Mich L.R. 505.

shoulders the burden of avoiding overly broad application of the offence in practice both through its charging decisions and any future guidance on the offence. If an incident that falls far from common understanding of strangulation or suffocation were to be prosecuted under the new offence, it would risk unfairness to the defendant as explained above.<sup>84</sup> It would also risk undermining the legitimacy of the offence. On the other hand, police and prosecutors may feel substantial pressure to pursue all allegations of strangling. Future guidance will inevitably be necessary (presumably by amendment to the recently updated prosecutorial guidance on charging offences against the person). To help meet these challenges in individual cases, the CPS may wish to incorporate indicative examples of where a prosecution for strangulation / suffocation would be more appropriate than a prosecution for a more general OAP and vice versa.

The CPS will also have to consider the extent to which the offence overlaps with other offences against the person. This requires care. At its widest, the strangulation offence could be committed by A impeding B's breathing by battery being reckless merely as to the battery. Although proof of the offence always involves proof of a battery,<sup>85</sup> it does not always involve proof of ABH, and even less GBH. Conversely, proof of GBH or ABH will not always involve proof of a strangulation or impediment of breathing. Such guidance will need to reflect the broader context of prosecution decision making in domestic abuse cases.

#### (v) *Consent*

It is no surprise that the issue of consent proved controversial<sup>86</sup> in the course of the Parliamentary debates on the offence.<sup>87</sup> The issue is likely to be controversial in the application of the offence with a tension between the need to respect the autonomy of those

---

<sup>84</sup> As a matter of construction, the courts can have regard to the section heading. Compare *Uddin* [2017] EWCA Crim 1072.

<sup>85</sup> It is difficult to conceive of cases in which A intentionally strangles without battering B.

<sup>86</sup> Again, this is an issue that has been controversial elsewhere. The New Zealand offence makes no mention of consent meaning it will be left to the jury unless withdrawn by the judge; in NSW, in contrast, the absence of consent is an explicit element of the offence. The NZ approach to consent is very different from that in *Brown*. See *Lee* (2006) 22 CRNZ 568 and J. Tolmie, 'Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making' [2012] Crim. L.R. 656.

<sup>87</sup> Baroness Newlove, 1653-4, Lord Marks, 1656, Lord Wolfson, 1660, HL Deb 10 March 2021, vol 810, cols 1626-1794.

who wish to engage in practices that risk harm and the need to protect against abuse.<sup>88</sup> The provision deals explicitly with the role of consent:

- (2) It is a defence to an offence under this section for A to show that B consented to the strangulation or other act.
- (3) But subsection (2) does not apply if—
  - (a) B suffers serious harm as a result of the strangulation or other act, and
  - (b) A either—
    - (i) intended to cause B serious harm, or
    - (ii) was reckless as to whether B would suffer serious harm.
- (4) A is to be taken to have shown the fact mentioned in subsection (2) if—
  - (a) sufficient evidence of the fact is adduced to raise an issue with respect to it, and
  - (b) the contrary is not proved beyond reasonable doubt.

Although the drafting of subs (2) and (3) appears awkward, the intention is clearly to replicate the current common law position on consent to offences against the person.<sup>89</sup> Factual consent to battery is lawfully valid. Factual consent to ABH or worse is not lawfully valid unless the harm is caused in the course of an exceptional activity recognised by the courts (e.g. surgery, sport). Given the lack of clarity in the common law on consent (at least as to the categories of exception in which consent is valid) in offences against the person<sup>90</sup> (leaving aside the policy underpinning it), simply enacting *Brown* may have been a simple but unsatisfactory approach.

---

<sup>88</sup> See the evidence, *We Can't Consent To This*, 'Consent Defences and the Criminal Justice System' (Written evidence – further submission (DAB73) 2020), para 4.2.4, reporting that women's claims to have been strangled were dismissed by police on the basis that: "you could have consented". See also the NZ case (*CA338/16*) v R [2017] NZCA 83 at [46]–[48], where B 'consented' to her finger being broken with a hammer by her partner as the price for staying in a relationship with him. The Court withdrew consent from the jury.

<sup>89</sup> The Explanatory Notes make this explicit, 'Domestic Abuse Bill: Explanatory notes on Lords Amendments' (House of Commons 2021), paras 78-79.

<sup>90</sup> See D. Ormerod and K. Laird, *Smith Hogan and Ormerod's Criminal Law* (16<sup>th</sup> ed, OUP 2021) ch 16.

Two questions arise. Has this created incoherence with the approach to consent generally and will it create problems in practice? In relation to the first issue, there has been no indication that the offence is seeking to change the rules; on the contrary it is seeking to reflect the current law. Although there are many good reasons to criticise the common law approach and its incoherence,<sup>91</sup> what is important for present purposes is that no further incoherence should be created.<sup>92</sup> There is some concern in that regard. First, it is not necessarily true that the structure reflects the common law: consent at common law is treated as an element of the offence;<sup>93</sup> consent in the new offence is a specific defence. That has theoretical foundations in respect for autonomy. There is a practical point too: it might be possible for A to argue that the Crown has failed to disprove consent at common law irrespective of the obligation on him to raise evidence of it under s. 75A.

As regards the application of the offence there may be more practical challenges for the courts to resolve. The defence is unavailable if the prosecution proves: (i) that serious harm was caused; (ii) that A was at least reckless as to causing serious harm; and (iii) that the ‘serious harm’ arises from either the strangulation or battery impeding breathing. How easy will proof of those be?

Section 75A(6) provides that “serious harm” is at least ABH.<sup>94</sup> In other words, wherever A’s strangulation and/or ‘battery impeding breathing’ amounts to more than transient or trifling harm - the test for ABH<sup>95</sup> - consent is invalid. On the basis of the medical evidence above, it seems that a substantial proportion of cases in which there is some restriction of breathing will, as a matter of fact, cause such harm.

Where such “serious” harm is caused, and A has satisfied the evidential burden regarding consent,<sup>96</sup> the prosecution must also prove that A was at least reckless as to causing

---

<sup>91</sup> For compelling criticisms of the decision in *Brown* see D. Kell, ‘Social Disutility and Consent’ [1994] 14 OJLS 121; M. Giles, ‘*R v Brown*: Consensual Harm and the Public Interest’ [1994] 57 MLR 101; M. J Allen, ‘Consent and Assault’ [1994] 58 J Crim Law 183; N. Bamforth, ‘Sodomasochism and Consent’ [1994] Crim. L.R. 661; P. Alldridge, *Relocating Criminal Law* (Ashgate 2000) 122 et seq.

<sup>92</sup> Parliamentary papers make clear the intent was to reflect the common law: see The Home Office and Ministry of Justice, ‘Domestic Abuse Bill’ (Second Supplemental Memorandum, 2021), para 40.

<sup>93</sup> Lord Woolf CJ stated that “it is a requirement of *the offence* that the conduct itself should be unlawful”, *Barnes* [2005] EWCA Crim 3246, [16], [2005] Crim. L.R. 381 and commentary. See also G. Williams, ‘Consent and Public Policy’ [1962] Crim. L.R. 74, 75.

<sup>94</sup> The use of that term is prone to confuse when ‘really serious harm’ is already a term of art used as part of the description of the level of GBH sufficient for murder.

<sup>95</sup> *T v DPP* [2003] Crim. L.R. 622.

<sup>96</sup> S 75A(4) makes explicit that A only bears an evidential burden.

serious harm. This may be less straightforward than imagined. Note that there is no explicit requirement for A to have any *mens rea* as to the impediment of breathing by the acts of strangulation or battery. If A claims he was unaware even of the risk of impeding breathing by his actions, it will be more difficult to rely on the natural inference that anyone impeding breathing must be aware of the associated risks that might constitute ABH. We noted above the ambiguity over a requirement of *mens rea* as to B's breathing being affected. Even if the courts conclude that there is no such requirement, the defendant's awareness of that risk may be important in establishing the offence.

A further potential issue arises in relation to sports, and for martial arts in particular. At common law, consent to ABH or GBH (or the risk of them) is legally valid when within the rules of regulated sports. In *Brown* their lordships were clear that factual consent in boxing would legitimise even intentional GBH.<sup>97</sup> What then of the martial arts bout where A has B in a neck-hold? We suggest that even if that amounts to "serious harm" as per the meaning of s. 75A, if the neck-hold is within the rules of the sport there is a strong argument that A should be able to rely on B's consent, and/or A's belief in consent to avoid liability.

On its face the offence does not appear to allow for such a reading. It sets out a rule, that consent is a defence, and then an exception to criminalise serious harm done with appropriate *mens rea*. On such a reading the section does not clearly meet its purpose of reflecting *Brown* because no mention is made of categories, like boxing, where consent to more serious harm is lawfully valid. Yet this does not necessarily mean that those exceptional categories in which consent to ABH or worse, as recognised in *Brown* are inapplicable in the strangulation offence. These categories, like defences, have historically been developed through the common law. Can the section be understood to have left such exceptional categories to the common law and thus relevant in an appropriate case? Lord Wolfson, Under-Secretary of State for Justice, on second reading stated:

"Importantly, exceptions that are recognised separately under the common law in relation to sports and other activities will not be affected and will also apply here. In such cases, where serious harm is caused the courts will consider this offence inapplicable where an existing public policy exemption applies."<sup>98</sup>

---

<sup>97</sup> See also M. James, 'Consent: Revisiting the Exemption for Contact Sports' in A. Reed and M. Bohlander (with N. Wake and E. Smith) (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017).

<sup>98</sup> HL Deb 10 March 2021, vol 810, cols 1626-1794, Lord Wolfson 1661.

Such a reading would not undermine the core purposes of the offence and it would avoid the unintentional criminalisation of activities in sports like Brazilian Jiu Jitsu and judo (strangulation), and rugby and boxing (battery affecting breathing). If such exceptions cannot be read into the offence, it may also call into question the government's conclusion that the new offence is human rights compliant.<sup>99</sup> The relevance of the existing exceptions to *Brown* may well be an issue that requires analysis in the Court of Appeal.

As a matter of fairness to the defendant, and to maintain coherence with the present law we would urge the introduction of CPS guidance to deter the charging of the offence in contexts it was not intended to regulate, such as the sports listed above. In the same way that we argued above that charging a punch to the nose under the new offence would risk bringing it into disrepute, so too would charging someone with strangulation occurring within the rules of a judo match. This was not the purpose of the offence and may undermine its legitimacy, which could have wider deleterious consequences.

Although the drafter has been explicit in considering the implications for consent, it is less clear whether other defences will automatically apply. There is, for example, no reference to the need for the intentional strangulation to be unlawful. That would have made interpretation easier by making it obvious that a neck hold used in self-defence would not be criminal.

**(vi) *Belief in consent***

The proposed offence does not explain the relevance of A's belief that B was consenting. Should A have a defence to a charge of strangulation where, aside from denying an intent or recklessness as to serious harm, A can provide evidence of a genuine belief or a reasonable belief in consent? Many of the arguments deployed to justify the higher reasonable belief requirement for sexual offences may apply here: it would not impose a significant burden on A to ascertain consent and there are potentially catastrophic consequences for B.<sup>100</sup> In addition, the nature of the behaviour is such that it is far less likely to occur by accident in the way that some other forms of physical contact might.

---

<sup>99</sup> The Home Office and Ministry of Justice, 'Domestic Abuse Bill' (Second Supplemental Memorandum, 2021), para 36-49.

<sup>100</sup> See J. Temkin and A. Ashworth 'The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent' [2004] Crim. L.R. 339, 340-342 and the remarks of the then Hughes LJ in *B(MA)* [2013] EWCA Crim 3 [28], [37].

It is to be presumed that a genuine belief in consent will be sufficient for the new strangulation offence. This is the basic position at common law.<sup>101</sup> If that is correct, a practical difficulty with the strangulation offence is that it will, in many cases we anticipate, appear on an indictment alongside charges of general OAP and sexual offences. It will, in such cases, be necessary to direct the jury, and for them to follow, different approaches as between the offences. That already occurs where for example D is charged with rape and assault and claims that he had V's consent to the hit as part of their consensual "rough" sex.<sup>102</sup> Where A has a reasonable belief in relevant consent to what would otherwise be a sexual offence, they will be acquitted. By comparison, only a genuine belief in relevant consent is required to be acquitted of an OAP. Bows and Herring write:

"The different consent rules create conceptual and operational confusion in cases where there are both offences against the person and sexual offences on the indictment relating to the same incident."<sup>103</sup>

In practice, it is not clear how significant the difference is between a genuine and reasonable belief in the context of strangulation. When considering self-defence, the Privy Council stated in *Beckford*:

"whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held."<sup>104</sup>

A reasonable jury, properly directed, may be circumspect of A's claim that he believed B consented to the specific and dangerous act of strangulation or suffocation where A did not provide good reason for this belief. Jury directions will have to be carefully constructed to guide juries carefully on both: (a) the different requirements for belief in consent for strangulation and sexual offences when they are both charged; and (b) the need for juries to consider carefully whether a genuine belief in consent to strangulation was held by the

---

<sup>101</sup> *Morgan* [1976] A.C. 182; *Konzani* [2005] EWCA Crim 706, *Beckford* [1988] A.C. 130.

<sup>102</sup> See e.g. *Gabbai* [2019] EWCA Crim 2287.

<sup>103</sup> [2020] 84(6) J. Crim. L. 525, 530.

<sup>104</sup> [1988] A.C. 130, and see Criminal Justice and Immigration Act 2008, s.76.

defendant.<sup>105</sup> There is scope for the Judicial College to add guidance to the *Crown Court Compendium*.

**(vii) *Parties to the offence?***

Some jurisdictions have created offences of strangulation / suffocation that apply only in the context of specified relationships.<sup>106</sup> For instance, the Queensland offence applies where A and B are in a domestic relationship or the choking, suffocation, or strangulation is “associated domestic violence”.<sup>107</sup> In South Australia, A must be in, or have been in, a relevant relationship with B<sup>108</sup> and the section provides a list of relevant relationships to include marriage, domestic partners, being a child of the other, and intimate personal relationships. By comparison, the section 75A offence does not require a domestic context or a particular relationship between A and B.

We recognise the grave threat of strangulation as an act of domestic violence and particularly by men against women, but for at least two reasons we suggest that Parliament is right not to have limited the offence to that setting. First, any such limit may in fact make it harder to prove an offence of strangulation where it happened in the context of a relevant relationship. A may argue that though they strangled B, they were not in a requisite relationship and could not be convicted of strangulation, but only battery. Secondly, strangulation can occur where A and B do not know each other or where they are just acquaintances or on a first date. A study by White et al analysed case files of patients at a sexual assault referral centre from January 2017 to December 2019. Of the 204 cases where strangulation occurred, in 23 A and B were acquaintances of less than 24 hours, 42 were acquaintances of greater than 24 hours and 29 were strangers.<sup>109</sup> The generality of the proposed offence would avoid complexity and appeals, and better reflect the fact that strangulation can, and does, occur outside the setting of existing relationships. In addition, the

---

<sup>105</sup> Clearly the more reasonable the basis for the belief the more likely it was genuinely held. See equivalent guidance in Judicial College, ‘The Crown Court Compendium’ (2020) Ch 18-3.

<sup>106</sup> An earlier iteration of the strangulation offence would have been limited to the context of domestic abuse: Baroness Williams of Trafford, ‘Domestic Abuse Bill: Government Amendments For Committee’ (2021), p. 2..

<sup>107</sup> Section 315A, Criminal Code 1899 (QLD).

<sup>108</sup> Criminal Law Consolidation Act 1935 (SA), s 20A.

<sup>109</sup> C. White et al, ‘I thought he was going to kill me’: Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period’ [2021] 79 J Forensic Leg Med 102128, p. 24.

domestic context of an incident of strangulation would form an important part of the sentencing exercise both with respect to assessing the seriousness of the offence and the risk posed by the offender. We return to sentencing in the next section.

*(viii) Sentencing*

A person who commits the strangulation offence may be subject to a maximum sentence of five years' imprisonment. By comparison, the maximum for battery is six months' imprisonment and the maximum for both actual bodily harm and inflicting grievous bodily harm is five years. The Code for Crown Prosecutors specifies prosecutors should select charges that, amongst other factors, "give the court adequate powers to sentence".<sup>110</sup> A benefit of setting the maximum at five years is thus that prosecutors have further reason to select a charge of strangulation over battery.<sup>111</sup>

However, the maximum sentence is identical to that for ABH.<sup>112</sup> Setting an identical maximum risks prosecutors using more general offences - ABH or in cases where the harm caused amounts to GBH (s.20). The ABH charge arguably has less onerous requirements of proof. This could undermine one of the principal purposes of reform: creating an offence that will signify the particular wrongs and risks of strangulation. One present factor and one possible development may mitigate the risk of prosecutors charging familiar OAPA offences carrying the same maximum penalties. First, the Code for Crown Prosecutors provides that prosecutors should select charges which reflect the seriousness of the offending.<sup>113</sup> That may guard against charging only ABH. Secondly, although the maximum for strangulation and ABH are the same, it is within the power of the Sentencing Council to set starting points for strangulation offences at a higher level in any future sentencing guideline.<sup>114</sup>

---

<sup>110</sup> CPS, 'The Code for Crown Prosecutors' (2018) para 6.1:

<https://www.cps.gov.uk/publication/code-crown-prosecutors>.

<sup>111</sup> For argument in favour of a review of maximum sentences, see R. Kelly 'Reforming Maximum Sentences and Respecting Ordinal Proportionality' [2018] Crim. L.R. 450.

<sup>112</sup> By comparison, the NZ offence has a seven year maximum contrasting with the three year maximum for the types of charges previously used such as 'Male Assaults Female'.

<sup>113</sup> CPS, 'The Code for Crown Prosecutors' (2018) para 6.1:

<https://www.cps.gov.uk/publication/code-crown-prosecutors>.

<sup>114</sup> Compare the starting points and category ranges in the guidelines for ABH and inflicting GBH, both of which have a five year maximum: Sentencing Council, 'Inflicting grievous bodily harm' (2011); Sentencing Council, 'Assault occasioning actual bodily harm' (2011).

We acknowledge that five years is a considerable maximum and the offence can be committed in a broad range of circumstances. At one end of the spectrum, it would be proved by A causing a vulnerable victim serious physical and psychological harm in an attack that formed part of a pattern of domestic abuse.<sup>115</sup> On the other, it could theoretically capture the underground example above. How then is a sentencing judge to arrive at an appropriate sentence in a given case? Clearly, the Sentencing Guidelines are the source of guidance, but in this instance four current sentencing guidelines may be of relevance.

First, the *General Guideline* applies when sentencing offences for which there is no offence specific guideline.<sup>116</sup> The Guideline sets out relevant information on aggravating and mitigating factors, which we draw on below. It also explains that when forming a provisional sentence for an offence without a specific guideline, the court should take account of the maximum sentence, relevant Court of Appeal judgments,<sup>117</sup> and definitive guidelines for analogous offences.

This brings us to the second set of guidelines which, given their broadly analogous nature, may be relevant: the guidelines for assault offences.<sup>118</sup> As above, new assault guidelines were consulted on in 2020. The proposed guidelines reference strangulation as a factor increasing culpability. It is, however, important that incidences of the new offence are prosecuted and sentenced as strangulation and not just as another type of assault.

The third guideline that may be of relevance is the general *Domestic Abuse Guideline*. Many incidences of strangulation are acts of domestic abuse and manifestations of wider patterns of domestic abuse. The Council's guideline on domestic abuse emphasises both the seriousness of domestic abuse and its cumulative impact.

“The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. [...] Domestic abuse is rarely a one-off incident and it is the cumulative and interlinked physical, psychological, sexual,

---

<sup>115</sup> Indeed, in some cases an additional charge of GBH would also be appropriate to provide the sentencing judge with sufficient sentencing powers to deal with the case.

<sup>116</sup> Sentencing Council, ‘General guideline: overarching principles’ (2019).

<sup>117</sup> Though the guideline specifically focuses on relevant judgments of the CACD, the comments of Stephens LJ in the NICA may well be of value when constructing an appropriate sentence.

<sup>118</sup> At the time of publication, the guidelines remain those that came into effect 2011.

emotional or financial abuse that has a particularly damaging effect on the victims and those around them.”<sup>119</sup>

The problem then for the sentencer is not a lack of information, but the dispersal of important potentially applicable information amongst multiple guidelines. Indeed, in certain cases the guideline for controlling or coercive behaviour in an intimate or family relationship may also be of relevance.<sup>120</sup> There is a clear case for an offence specific guideline for the new strangulation offence to streamline the existing guidance and make sure appropriate sentences are imposed. There is also scope for judicial training which could also usefully detail and emphasize the particular harms and wrongs of strangulation to better prepare judges to sentence for the strangulation offence.

Until such a time as a new guideline can be produced, the following general principles - drawn from the abovementioned guidelines and wider literature on strangulation - may be of some assistance. We emphasise the guidance offered below is not seen as holistic or as a replacement for future work on an offence specific guideline. As will be clear from the factors listed, good investigation which makes appropriate use of medical evidence will be imperative.

- Though the assault guidelines may be of broad relevance, strangulation should not be sentenced as if it had been prosecuted as a standard assault or OAPA offence. To do so would be to ignore the deliberate charge selection for this offence and risk imposing a sentence that did not reflect the distinctive and more serious harms of strangulation and the culpability of strangling another.
- When assessing the harm caused / risked by strangulation, the judge should ensure they account for the broader harms that strangulation may entail such as internal injury, significant pain, long-lasting psychological harm, unconsciousness, and primal fear. Greater judicial awareness of these factors will be vital.
- When assessing the offender’s culpability, the judge should pay careful attention to whether the behaviour was controlling; an incidence of domestic abuse; part of a pattern of controlling or abusive behaviour;<sup>121</sup> and whether the offender targeted a vulnerable victim.

---

<sup>119</sup> Sentencing Council, ‘Overarching principles: domestic abuse’ (2018) paras7-9.

<sup>120</sup> Sentencing Council, *Controlling or coercive behaviour in an intimate or family relationship* (2018).

<sup>121</sup> Where D has also been convicted of controlling or coercive behaviour in an intimate or family relationship, particular care will be needed to avoid double counting.

- Factual consent to a lesser degree of harm than that caused will not necessarily reduce seriousness. This will be a fact sensitive assessment. In some cases, the harm done may unintentionally and minimally go beyond that to which A and B had agreed. However, A may also secure B's consent to a lesser harm, to allow for the opportunity to do serious harm without factual consent. Such circumstances would give rise to a number of factors which would raise the culpability of the offender significantly: planning, abuse of trust, and the vulnerability of the victim.
- Aggravating factors that may be of particular relevance in the context of strangulation include: the restraint, detention or degradation of the victim; the offence being committed in the presence of others (especially children); steps taken to prevent the victim reporting an incident, obtaining assistance and/or from supporting the prosecution; failure to respond to warnings or concerns expressed by others about the offender's behaviour; the offence being committed on licence or while subject to court order(s);<sup>122</sup> and the offence being committed in a domestic context.

As to mitigation, previous good character<sup>123</sup> may be of less relevance than is typically the case in assaults for two reasons. The first is that strangulation is a serious offence. The second is that when strangulation occurs in a domestic context, good character in a public setting is of less weight particularly when there is a pattern of domestic abuse. Indeed, where an offender has used their apparent good character to facilitate or conceal the strangulation this is an aggravating factor. Strangulation is a risk factor for further serious violence and homicide.<sup>124</sup> It is thus appropriate that an extended sentence is available when sentencing for the offence.<sup>125</sup> This is not to say that those who commit the offence should be presumed dangerous.<sup>126</sup> Yet an extended sentence should be available where a person can be shown to present a risk of serious harm that can be addressed by such a sentence and by no lesser intervention.<sup>127</sup>

---

<sup>122</sup> See H. Douglas and R. Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' [2014] Syd Law Rev 11.

<sup>123</sup> As distinct from the absence of relevant previous convictions.

<sup>124</sup> See discussion and sources in Section 1 above.

<sup>125</sup> Domestic Abuse Act 2021, Sch 2, para 12.

<sup>126</sup> Compare L. Harris and R. Kelly, 'A dangerous presumption for risk-based sentencing?' (2018) 134(Jul) L.Q.R.353.

<sup>127</sup> On the problems and limits of risk assessment at sentencing generally, see M. Tonry, *Doing Justice, Preventing Crime* (OUP 2020) ch 7.

The questions of whether the offender is dangerous and what sentence should be imposed are distinct.<sup>128</sup> It may be that an appropriate sentencing package in some cases would be a determinate sentence and a behaviour order. A number of behaviour orders may plausibly be imposed on conviction for strangulation to include the more general criminal behaviour order<sup>129</sup> the new domestic abuse protection order;<sup>130</sup> a restraining order;<sup>131</sup> or a sexual harm prevention order.<sup>132</sup> Where a person who has been convicted of strangulation does pose a risk of future harm, in imposing the appropriate order, careful attention should be given to which order also signals the risk the offender poses so that is recorded and allows police and courts to respond most effectively in the future. The requirements to impose the listed behaviour orders vary and so do the conditions that may be imposed as part of them.<sup>133</sup> It is thus imperative that the prosecution give careful thought to which, if any, of the orders is most appropriate on the facts. The Sentencing Council could also usefully set out the range of orders that may be available in any future guideline. It should also be noted that both a restraining order and a domestic abuse protection order are available on acquittal.<sup>134</sup>

**(ix) *An aggravated offence model***

In light of the issues raised on overbreadth, *mens rea*, consent and belief in consent, it is worth querying whether the model of strangulation offence enacted was optimal. In particular, we approach the question bearing in mind the overarching aims: to have an offence that labels appropriately, can be prosecuted effectively, maintains maximum coherence with the broader criminal law and allows for appropriate sentencing. Could those purposes have been more successfully fulfilled by an offence based on a wholly different model that combined aggravating existing offences with statutory definitions of ‘strangling’ and ‘suffocation’?

An example might be:

---

<sup>128</sup> L. Harris and S. Walker, ‘Difficulties with dangerousness: determining the appropriate sentence - Part 2’ [2018] Crim. L.R. 782.

<sup>129</sup> Sentencing Act 2020, s. 330

<sup>130</sup> Domestic Abuse Act 2021, s 31.

<sup>131</sup> Sentencing Act 2020, s. 359.

<sup>132</sup> Sentencing Act 2020, s. 43.

<sup>133</sup> See generally A. Ashworth and R. Kelly 2021, *Sentencing and Criminal Justice* (7<sup>th</sup> edn, Hart 2021) ch. 11; L. Harris and S. Walker, *Sentencing Principles, Procedure and Practice 2021* (Sweet & Maxwell 2020) ch. 5.

<sup>134</sup> Protection from Harassment Act 1997; s. 5A; Domestic Abuse Act 2021, s 31(5).

*“Battery aggravated by strangulation:*

Where a person, A, (1) commits an offence of battery on B; (2) A’s conduct involved strangulation or suffocation of B; and, (3) A intended or was reckless as to impeding B’s breathing thereby, the maximum penalty shall be 2 years on indictment.”<sup>135</sup>

A similarly worded provision could have provided for an offence with a maximum of, say, 7 years for strangulation by s. 47 ABH and 10 years where s. 20 GBH arose from strangulation.<sup>136</sup>

This model would better reflect the particular severity of strangulation through the offence labels and heightened maxima.<sup>137</sup> It would present less risk of overcriminalisation. The *mens rea* would be clear, as would the position on intoxication and other defences. Complete consistency with the present (admittedly incoherent) law on consent (and belief in consent) in offences against the person is guaranteed since these aggravated offences would apply only where the full offence (i.e. a non-consensual) battery, ABH, or GBH was proved. There would be enhanced incentives for investigators to seek evidence of the strangulation and for prosecutors to charge these aggravated offences as they offer higher maximum penalties. Admittedly, it would be necessary to include two counts on the indictment (basic and aggravated), but a conviction for the basic offence against the person would therefore always be possible without consideration of included alternatives.

The strangulation offence is now enacted and it is more valuable to offer constructive analysis of its provisions, but the relative clarity and apparent simplicity in operation of such an aggravated offence model cannot be ignored.

### **III. Conclusion**

The new strangulation offence marks an important recognition of the multifaceted harms and wrongs of strangling another person. It is appropriate that the Domestic Abuse Act was the vehicle for this new offence. Strangulation is often a severe form of domestic abuse. The offence was drafted at pace. There are well-recognised risks of legislating in haste, even

---

<sup>135</sup> We are not attempting to provide a statutory draft.

<sup>136</sup> This model was suggested to officials in the course of the Bill progressing through Parliament.

<sup>137</sup> Here we limit ourselves to sketching one possible approach to reflecting the severity of strangulation in practice. We do not suggest the indicative maxima are necessarily ideal or indeed that those available for the general offences against the person are necessarily appropriate.

for compelling cases - and there is no question that this is such a cause. It is too easy for the legislature, in the heat of forging a provision to encounter powerful public expectations, to lose sight of the wider criminal justice implications and consequences for autonomy. As Lord Anderson wisely cautioned in debate, “counterterrorism also teaches us that hurried law can be bad law.”<sup>138</sup>

We do not suggest the new strangulation offence is bad law, but it is clear that training and guidance will be needed to make it effective in practice. Guidance for police officers on recognising and responding to possible strangulation will be vital<sup>139</sup> as for other investigators and the judiciary.<sup>140</sup> Given the breadth of the new offence, the CPS will need to provide careful guidance on when an offence of strangulation or a more general OAP will be more appropriate. The Court of Appeal may face a number of important interpretive questions including on the *mens rea* of the battery version of the offence and on the relevance of belief in consent. The Sentencing Council could usefully draw on its recent work on both OAP and domestic abuse to draft an offence specific guideline. Important work then remains to be done across the criminal justice system.

To conclude on a positive note, one of the most important influences of the creation of the new offence may also be the raising of awareness in broader society.<sup>141</sup> The reform may mean that strangulation is less likely to be normalised as an acceptable act or trivialised as lesser violence. Strangulation is a serious and distinct harm, and it is imperative it is treated as such.

---

<sup>138</sup> HL Deb 5 January 2021, vol 809, cols 20-130, col 92.

<sup>139</sup> This was a specific recommendation of the NZLC - Police who attend family violence call-outs should receive education about the prevalence, signs, symptoms and lethality of strangulation. Similar education should also be offered to judges who undertake criminal law or family law work.

<sup>140</sup> See the operational changes recommended by the NZLC; see the experience in US H. Wolfgram ‘Watch Report Part I: The Impact of Minnesota's Felony Strangulation Law’ (WATCH 2007).

<sup>141</sup> It is uncertain how many prosecutions will follow. The Explanatory Notes on the Lords Amendments state that “it is not possible to estimate the number of cases that are likely to be prosecuted and the associated costs to the criminal justice system. It is anticipated that the number of cases will increase when the new offence comes into force due to the publicity surrounding its introduction”: ‘Domestic Abuse Bill: Explanatory notes on Lords Amendments’ (House of Commons 2021).