Strangulation, Domestic Violence and the Legal Response

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Abstract

In risk assessment tools used by domestic violence workers and police, strangulation, short of causing death, is considered a 'red flag' for future serious abuse and fatality. This article discusses the risks and concerns associated with non-fatal strangulation and examines current legal responses to it in Australia, the United States and Canada. Drawing on a study of court files involving domestic violence protection orders, the authors consider how strangulation allegations made by those applying for protection orders are responded to by police and courts in Queensland. The authors conclude with a reflection on current policy and legislative approaches to non-fatal strangulation in Australia and make suggestions for law reform.

I Introduction

In June 2013, photographs of English art collector Charles Saatchi apparently strangling his then wife, celebrity chef Nigella Lawson, outside a London restaurant, made front page news around the world.[1] It was subsequently reported that Lawson had not made a formal complaint to police; instead Saatchi had visited Scotland Yard and been 'cautioned' for assault.[2] Allegations of strangulation or 'choking' are not uncommon in domestic violence cases, and such allegations are usually made by women. In risk assessment tools used by domestic violence workers, strangulation, short of causing death, is considered a 'red flag' for future serious abuse and fatality. This article begins with a discussion of the risks and concerns associated with non-fatal strangulation,[3] before considering current legal responses to strangulation in the United States, where there has been significant law reform, and Canada, where the possibility of law reform has been considered.

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1 Sunday People, 'Nigella Lawson photos: See shocking picture of Charles Saatchi repeatedly squeezing TV chef's throat', *Mirror* (online), 18 June 2013 <http://www.mirror.co.uk/news/uk-news/nigella-lawson-photos-see-shocking-1955564>.

2 See, eg, Jessica Wright, 'Outrage as Australian DJ Chides "Cowering" Nigella', *Sydney Morning Herald* (online), 17 June 2013 <http://www.smh.com.au/entertainment/tv-and-radio/outrage-as-australian-dj-chides-cowering-nigella-20130617-2odb7.html>; Jan Moir, 'St Nigella, that "Tiff" and One Image that Can't Be Ignored', *Daily Mail* (online), 21 June 2013 <http://www.dailymail.co.uk/femail/article-2345520/Nigella-Lawson-tiff-image-CANT-controlled-Jan-Moir.html>.

3 In referring to strangulation throughout this article, we are referring to non-fatal strangulation unless otherwise explained.

The article proceeds to review the Australian legislative response to strangulation before presenting and considering data from a Queensland study of domestic violence protection orders (the Queensland study), undertaken by the authors. The Queensland study sheds light on how strangulation allegations made by those applying for protection orders are being dealt with by police and some courts in the State. The article concludes with a reflection on current policy and legislative approaches to strangulation in Australia and considers whether law reform may be appropriate.

II Strangulation and Risk

Both legal and medical studies have begun to emphasise the importance of strangulation in the context of responding to domestic violence.[4] Strangulation, sometimes referred to as choking[5] or garrotting,[6] is defined as the obstruction of blood vessels and/or airflow in the neck leading to asphyxia.[7] Strangulation is now established as a predictive risk factor for future severe domestic violence and for homicide, and it is commonly alleged by women who have experienced domestic violence.[8] As discussed further below, strangulation is a relatively common cause of domestic violence-related homicide. The prevalence and high risk associated with it in the context of domestic violence underlines the need to consider how legal responses should best be framed.

Strangulation is a significant concern for at least two reasons. First, it frequently affects the long-term health of the victim.[9] Victims who have survived a strangulation incident often report a range of clinical symptoms including neurological and psychiatric symptoms such as loss of consciousness, paralysis, loss of sensation, vision changes, memory loss, anxiety and post-traumatic stress

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4 Archana Nath, 'Survival or Suffocation: Can Minnesota's New Strangulation Law Overcome Implicit Biases in the Justice System?' (2007) 25 *Law & Inequality* 253, 254.

5 Linda Bullock et al, 'Abuse disclosure in Privately and Medicaid-funded Pregnant Women' (2006) 51 *Journal of Midwifery and Women's Health* 361; Allison Turkel, '"And then He Choked Me": Understanding, Investigating, and Prosecuting Strangulation Cases', *The Voice* (National Center for the Prosecution of Violence Against Women, 2007) <http://www.ndaa.org/pdf/the_voice_vol_2_no_1_08.pdf>. Note, 'choking' is actually a blockage of the windpipe by food or other object: see Gael Strack and George McClane, 'How to Improve your Investigation and Prosecution of Strangulation Cases' (National Family Justice Center Alliance, 1998, updated January 2003 and September 2007).

6 See *Crimes Act 1900* (NSW) s 37; *R v Day* (2000) 115 A Crim R 80.

7 Kenneth V Iserson, 'Strangulation: A Review of Ligature, Manual, and Postural Neck Compression Injuries' (1984) 13 *Annals of Emergency Medicine* 179.

8 A United States study found that 68 per cent of women presenting to a domestic violence advocacy centre reported strangulation by their abuser: Lee Wilbur et al, 'Survey Results of Women Who Have Been Strangled while in an Abusive Relationship' (2001) 21 *Journal of Emergency Medicine* 297, 301. See also Daniel J Sheridan and Katherine R Nash, 'Acute Injury Patterns of Intimate Partner Violence Victims' (2007) 8 *Trauma Violence and Abuse* 281, 283; Heather Douglas and Tanja Stark, *Stories from Survivors: Domestic Violence and Criminal Justice Interventions* (The University of Queensland, 2010) 21.

9 See Amy Schwartz, *Strangulation and Domestic Violence: Important Changes in New York Criminal and Domestic Violence Law* (19 November 2010) Empire Justice Centre <http://www.empirejustice.org/issue-areas/domestic-violence/case-laws-statues/criminal/strangulation-and-domestic.html>.

disorder (see Table 1).[10] Some women have experienced pregnancy miscarriage after strangulation.[11] Swelling of the tissues of the neck can occur up to 36 hours after an incident leading to obstruction of the airway and long-term vocal change or dysfunction.[12] 'Thyroid storm', a life-threatening condition, has also been associated with strangulation, and can occur days after a person has apparently recovered from the initial incident of strangulation.[13] Even where there are no visible injuries, some victims have died as long as several weeks after the attack, as a result of the brain damage caused by lack of oxygen during the strangulation.[14]

Table 1: Signs and Symptoms of Strangulation.[15]

Tiny red spots (petechiae) on the face and neck or under the eye lids and around the eyes	Cognitive changes including amnesia or memory loss, confusion, restlessness or agitation
Difficulty in swallowing or a 'thick' feeling in the throat (swelling of the tongue)	Breathing changes, difficulty breathing, shortness of breath
Raspy or hoarse voice	Neck or throat pain
Cough	Bruising or swelling inside the lips
Loss of consciousness or near loss of consciousness	Conjunctival haemorrhage (eyes are blood red)
Victim thought they would die	Tinnitus (ringing in the ears)
Reported loss of control of bowel or bladder at the time of the assault	Scratch marks or bruising in the jaw line, clavicles and around the neck
Redness, abrasions, bruising on chin from lowering chin to protect neck	Impressions on the skin that may indicate a ligature or object
Nausea and vomiting	

Second, the risk to the victim of more serious injury or death is increased dramatically once the victim has experienced strangulation at the hands of their

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10 Wilbur et al, above n 8, 301. See *Ellis v Mitchell* [2008] QDC 103 (28 February 2008) for a discussion of the injuries associated with strangulation.

11 Wilbur et al, above n 8, 301.

12 Maureen Funk and Julie Schuppel, 'Strangulation Injuries' (2003) 102(3) *Wisconsin Medical Journal* 41, 42–3.

13 Jesus Ramirez et al, 'Thyroid Storm Induced by Strangulation' (2004) 97 *Southern Medical Journal* 608; Christian M Custodio and Jeffrey R Basford, 'Delayed Postanoxic Encephalopathy: A Case Report and Literature Review' (2004) 85 *Archives of Physical Medicine and Rehabilitation* 502.

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

15 Based on Morag McLean, *The Identification, Care and Advocacy of Strangulation Victims: Information for Front Line Workers and Crisis Advocates* (Victorian Order of Nurses for Canada, 2009, rev 2012) 3, 6 <http://www.von.ca/pdf/special_projects/STRANGULATION_PROTOCOL_Final_May_2012.pdf>; IACP National Law Enforcement Policy Center, *Domestic Violence* (Concepts and Issues Paper, International Association of Chiefs of Police, 1996, revised 2006) 2 <http://www.readbag.com/dcjs-wv-grant-programs-stop-vawa-documents-publications-iacp-domestic-violence-concepts-issues>.

intimate partner or former intimate partner.[16] Significant research about the prevalence of, and risks associated with, strangulation has taken place in the United States. In 2000, Block et al published the results of *The Chicago Women's Health Risk Study*.[17] The *Chicago Study* conducted domestic violence screening for 2616 women who attended a hospital or health service for treatment in the Chicago area in 1995–96. The study found that having been choked in a previous domestic violence incident was a risk factor for later being seriously injured or killed.[18] Strack and Gwinn state that there are a number of findings about non-fatal strangulation incidents that are now common knowledge.[19] These include that there are often no visible injuries as a result of strangulation and yet there are often internal injuries; that the strangulation can have long-term physical and psychological impacts; that strangulation is a gendered crime (perpetrators are almost always men and victims are almost always women);[20] and that victims of strangulation are much more likely eventually to become homicide victims.[21]

In 2001, Strack, McClane and Hawley[22] published a pivotal study in the United States, which contributed to significant law reform in a number of American states.[23] Their study reviewed 300 cases of domestic violence involving non-fatal strangulation. The cases had all been submitted to the San Diego Attorney's office for prosecution. Almost all of the victims were women, and almost all of the perpetrators were their victim's current or former male intimate partner. In most cases, the perpetrator had used his hands to strangle the victim.[24] In most cases (89 per cent), there was a prior history of domestic violence.[25] The study made a number of significant conclusions, including that police needed improved training to recognise strangulations and that: 'Strangulation is a form of power and control that can have devastating psychological long-term effects on its victims in addition to a potentially fatal outcome.'[26]

The links between the risk of further serious injury and death subsequent to an attempted strangulation has been of particular interest to a number of researchers. In one study, researchers concluded that the odds of becoming a homicide victim as a result of further domestic violence were increased by 800 per

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16 Gael B Strack and Casey Gwinn, 'On the Edge of Homicide: Strangulation as a Prelude' (2011) 26(3) *Criminal Justice* 32, 33. See also Laura Richards, *Findings from the Multi-agency Domestic Violence Murder Reviews in London* (Association of Chief Police Officers of England, 2003).

17 Carolyn R Block et al, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence: A Collaborative Research Project* (Illinois Criminal Justice Information Authority, 2000) <http://www.icjia.state.il.us/public/pdf/cwhrs/cwhrs.pdf> ('*Chicago Study*').

18 Ibid 277.

19 Strack and Gwinn, above n 16, 35.

20 See also Wilbur et al, above n 8, 299; Walter S DeKeseredy, *Violence Against Women: Myths, Facts, Controversies* (University of Toronto Press, 2011) 6, 49.

21 See also Wilbur et al, above n 8, 302.

22 Gael B Strack, George E McClane and Dean Hawley, 'A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues' (2001) 21 *Journal of Emergency Medicine* 303.

23 This is discussed further below.

24 Strack, McClane and Hawley, above n 22, 305.

25 Ibid 305–6.

26 Ibid 308.

cent for women who had previously experienced strangulation by their partners.[27] However, despite the high risk of subsequent fatal harm associated with strangulation, Turkel suggests that attempted strangulation is often misunderstood or misidentified by police and prosecutorial authorities as something far less serious.[28] This may be partly because attempted strangulation is often minimised by victims who do not understand the seriousness of the incident, precisely because it may not leave a visible injury and they often do not think they require medical attention.[29] Victims also regularly describe strangulation as 'a grabbing of the throat' or 'choking' rather than 'strangulation',[30] and this language may also downplay the seriousness. The effects of strangulation may also be minimised or missed by investigators such as doctors and police because of a lack of awareness of signs and symptoms.[31] While in about half of all cases victims will show no visible injury, there will usually be temporary symptoms.[32] The fact that the more serious effects of non-fatal strangulation may not emerge until days or weeks after the event may result in difficulties in identifying and determining cause and effect.[33] In her study of domestic homicides, Buckingham found that there was often a lack of appropriate risk assessment of actions of the perpetrator leading up to a homicide.[34] Her study concluded:

> Law that is unresponsive to primary domestic violence 'red flags' engenders injustice for battered victims and defendants and calls into question the quality and effectiveness of domestic violence victim protection in the courts.[35]

Robertson et al's research, undertaken in New Zealand, has recognised strangulation as a significant factor in lethality risk assessment.[36] They found that strangulation was a common claim in domestic violence cases and the authors recommended strangulation should have the highest risk rating for further violence and death of its victims.[37]

Strangulation is of course not only a red flag for future risk, but is also extremely dangerous in and of itself. It is a common cause of death in intimate

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27 See Nancy Glass et al, 'Non-fatal Strangulation Is an Important Risk Factor for Homicide of Women' (2008) 35 *Journal of Emergency Medicine* 329; see also Wilbur et al, above n 8, 302.

28 Turkel, above n 5, 1.

29 McLean, above n 15, 3.

30 Turkel, above n 5, 1. See also Karen Busby, 'Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions' (2012) 24 *Canadian Journal of Women and the Law* 328, 338, where she observes that in Canada the use of language such as 'choking' minimises the potential lethality of a strangulation complaint.

31 Strack and McClane, above n 5, 6

32 IACP National Law Enforcement Policy Center, above n 15, 2.

33 Strack, McClane and Hawley, above n 22.

34 Judith Buckingham, 'Romantic and "Real Life" Relationships in Criminal Law: Reconstructing Red Flags for Dangerousness/Lethality' [2010] *New Zealand Law Review* 93.

35 Ibid 92.

36 Neville Robertson et al, *Living at the Cutting Edge: Women's Experiences of Protection Orders: Volume 2 What's to be Done? A Critical Analysis of Statutory and Practical Approaches to Domestic Violence* (Ministry of Women's Affairs, 2007) 74, 174 <http://research.waikato.ac.nz/CuttingEdge/VolTwo.pdf>.

37 That is, alongside recent separation and threats to kill: ibid 174; see also 282 for 'Risk and Lethality Assessment Worksheet'. At the time the New Zealand study was conducted, strangulation was not listed in the highest risk category.

partner homicides. Dobash et al's recent study found that 37 per cent of men who killed their intimate female partner used strangulation in the course of the killing.[38] Australian statistics show that in the two-year period from 2008 to 2010, five per cent of all homicides were caused by 'strangulation/suffocation' while nine per cent of domestic homicides were caused by 'strangulation/suffocation'.[39]

III Strangulation and the Criminal Law

The laws of assault in Australian states,[40] Canada[41] and New Zealand[42] were modelled largely on the *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100 ('*UK Act*'). While the *UK Act* has been substantially amended and there have been significant developments in other Commonwealth countries, the 1861 *UK Act* continues to underlie the approach of many Commonwealth countries to the laws of assault. Essentially, in the United Kingdom, Australia, Canada and New Zealand, there is a range of overlapping assault-type offences available depending on whether there is aggravation, which includes causing particular harm and assaulting or harming particular classes of people.[43] Over time, other offences have

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38 R Emerson Dobash et al, 'Lethal and Nonlethal Violence against an Intimate Female Partner: Comparing Male Murderers to Nonlethal Abusers' (2007) 13 *Violence Against Women* 329, 345. Turkel reports that, overall, 10 per cent of violent deaths in the United States are attributable to strangulation; see Turkel, above n 5. It has been found that 13 per cent of domestic violence homicides involved 'a death factor' of asphyxia; see Office of the Chief Coroner, Province of Ontario, *2011 Annual Report: Domestic Violence Death Review Committee* (2012) 6 <http://www.mcscs.jus.gov.on.ca/stellent/groups/public/@mcscs/@www/@com/documents/webasset/ec160943.pdf >; J Stephan Stapczynski, 'Strangulation Injuries' (2010) 31 *Emergency Medicine Reports* 193.

39 Andy Chan and Jason Payne, *Homicide in Australia: 2008–09 to 2009–10 National Homicide Monitoring Program Annual Report*, AIC Monitoring Report No 21 (2013) 13 <http://www.aic.gov.au/media_library/publications/mr/21/mr21.pdf>. For examples see: *R v Diver* [2008] VSC 399 (24 September 2008); *R v Meyn (No 5)* [2012] NSWSC 1590 (3 December 2012); *R v McKinnon* [2002] QCA 185 (30 May 2002); *R v Glattback* [2004] QCA 356 (1 January 2004); *R v Hillier* [2004] ACTSC 81 (19 March 2004). In a 2006 interview, New Zealand Police Inspector Rob Veale points to a higher figure of 14 per cent of homicides in New Zealand resulting from strangulation, and of these killings 23 per cent of victims are women: 'Getting a Grip on Strangulation' (2006) 8 *Te Rito News* 11.

40 With the exception of Victoria where a different model was introduced in 1985: see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson, 3rd ed, 2010) 562.

41 See Uniform Law Conference of Canada, *Report of the Criminal Section Working Group on Strangulation* (2006) 3–7 <http://www.ulcc.ca/en/criminal-section/98-criminal-section-study-papers/1294-strangulation>.

42 See *Crimes Act 1961* (NZ) ss 188–204, esp s 197, 'Disabling': the provision identifies that where a person 'wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person', that person is liable to a period of imprisonment not exceeding five years. This provision does not specify strangulation or choking as the cause of stupefaction or unconsciousness, but the results of the action (ie stupefaction and unconsciousness) could occur from strangulation. In this sense, the provision is similar to the *Crimes Act 1900* (ACT) s 27(3) (discussed below). New Zealand law is not discussed in detail in this article as it is very similar to Australian law and there have not, to date, been any specific reviews of the law on strangulation in New Zealand.

43 Model Criminal Code Officers Committee, Standing Council on Law and Justice, *Model Criminal Code*, 'Chapter 5: Non Fatal Offences Against the Person' (Report, September 1998) 1 <http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/mcloc_mcc_chapter_5_non-fatal_offences_against_the_person_report.pdf>.

been introduced to address perceived limitations. For example, in the 1990s, various offences of stalking[44] were introduced throughout a number of common law jurisdictions, and Queensland has also introduced a criminal offence of torture.[45] Below, we consider the approach to non-fatal strangulation in the United States, where there have been major reforms, and in Canada, where there has been some consideration of the role of law in response to strangulation in the domestic violence context. Finally, we consider the legislative response to strangulation in Australia.

A *United States*

Nearly 30 American states have now introduced penal laws directly addressing strangulation.[46] Laws in some states apply specifically to strangulation in a domestic violence context, while others have introduced general offences of strangulation. In 2004, the Hennepin County Domestic Fatality Review Team recommended the introduction of a specific offence of strangulation for application in the context of domestic violence. Their report found that 'strangulation is often one of the last abusive acts committed by a violent domestic partner before murder'.[47] In 2005, Minnesota enacted legislation making domestic abuse strangulation a felony punishable by up to three years' imprisonment.[48] A 2009 review of the impact of the Minnesota legislation concluded:

> The review of the 2005 and 2007 felony strangulation cases indicates that the law continues to have a positive impact on victim safety and offender accountability. Violent domestic abusers are being charged with a crime that accurately conveys the core element of the assault and reflects its seriousness rather than avoiding prosecution or being initially charged with a lesser crime.[49]

In her study involving interviews with justice personnel — including police, judicial officers and lawyers — about their views of the Minnesota strangulation laws, Heather Wolfgram concluded that the law increased awareness about the potential lethality of strangulation among justice personnel.[50]

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44 For an overview, see The National Council to Reduce Violence against Women and their Children, *Domestic Violence Laws in Australia* (Commonwealth of Australia, 2009) 171–80.

45 See, eg, *Criminal Code* (Qld) s 320A.

46 Associated Press 'States Cracking Down on Strangulation Attempts' *USA Today* (online), 13 May 2013 <http://usatoday30.usatoday.com/news/nation/story/2012-05-13/strangulation-crackdown-law/54935268/1>. See also Kathryn Laughon, Nancy Glass and Clause Worrell, 'Review and Analysis of Laws Related to Strangulation in 50 States' (2009) 33 *Evaluation Review* 358. For a compiled list of United States strangulation laws as at 2008, see also National Center for the Prosecution of Child Abuse and The Battered Women's Justice Project, 'Strangulation Matrix' (2007–08) <http://www.bwjp.org/files/bwjp/articles/State_Strangulation_Matrix.pdf>.

47 Hennepin County Domestic Fatality Review Team, *A Matter of Life and Death* (2007), cited in Betty Taylor, *Dying to Be Heard: Domestic and Family Violence Death Reviews* (Discussion Paper, Domestic and Family Violence Death Review Action Group, 2008) 20.

48 Minn Stat § 609.2247 (2013). For an overview, see Kelly Francis, 'Minnesota's New Domestic Abuse Strangulation Statute' (2008) 65(8) *Bench & Bar of Minnesota* 8.

49 Marna Anderson, *WATCH Report Part II: The Impact of Minnesota's Felony Strangulation Law* (WATCH, 2009) 16.

50 Heather Wolfgram, *The Impact of Minnesota's Felony Strangulation Law* (WATCH, 2007) 22.

In 2010, New York added three discrete varieties of strangulation offences to its criminal law: criminal obstruction of breathing or blood circulation; strangulation causing loss of consciousness or physical injury or impairment; and strangulation causing serious physical injury.[51] The offences do not require a specific form of intent and the 'criminal obstruction of breathing or blood circulation' version of the strangulation charge does not require a specific form of injury. While these laws were introduced to address the unique features of strangulation in the domestic violence context, the offences can be applied beyond this context.[52] Between the commencement of the law in New York in November 2010 and February 2011 a total of 2003 arrests involving a suspected offence of strangulation were reported with men comprising 94.03 per cent of suspects.[53] Wheeler's recent research has found that 45.9 per cent of those arrested were black and 21.1 per cent were Hispanic, suggesting that the application of these offences is highly racialised.[54]

B *Canada*

The Canadian *Criminal Code* s 246 states:

> Every one who, with intent to enable or assist himself or another person to commit an indictable offence,
>
> (a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance…
>
> is guilty of an indictable offence and liable to imprisonment for life.[55]

The provision requires that the strangulation is undertaken with the intention to enable the commission of an indictable offence. The provision has been applied in a number of cases where 'choking' was used to enable the commission of a sexual offence.[56] However, in some cases where the charge has been laid, it has been difficult to demonstrate that the choking was carried out in order to enable the commission of an indictable offence.[57] This may explain why the provision is not commonly used in domestic violence cases.[58] However, in a few cases the courts

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51 NY Penal Law §§121.11–121.14 (Consol 2014); see Andrew Wheeler, *Arrests and Arraignments Involving Strangulation Offenses Nov 11, 2010 – June 30 2012* (New York State Division of Criminal Justice Services, 2011) 4.

52 Schwartz, above n 9.

53 Wheeler, above n 51.

54 Ibid 4.

55 *Criminal Code*, RSC 1985, c C-46, s 246 ('*Criminal Code*').

56 *R v Lonechild* [2008] ABPC 263. See Busby above n 30, 358: in her analysis of *R v JA* [2011] SCR 440, a sexual assault prosecution involving strangulation to the point of unconsciousness, Busby concludes, in part, that in spousal sexual assault prosecutions in Canada strangulation is not taken seriously and may be misinterpreted in some cases as part of consensual sexual activity.

57 *R v A(J)* [2008] ONCJ 195. See Busby above n 30, 342, where she observes that in Canada 'strangulation has been rarely prosecuted as a separate or aggravating offence'.

58 RESOLVE <http://umanitoba.ca/centres/resolve/whoweare.html> reports that its analysis of domestic violence criminal cases for the Winnipeg jurisdiction for 2008–09 included 29 'choking' cases out of

have found the offender guilty of an offence pursuant to s 246 of the Canadian *Criminal Code* when choking is one aspect of domestic violence to the victim.[59] Generally, in Canadian cases involving domestic violence and choking, the perpetrator has been charged with assault,[60] although at least one Canadian prosecutorial authority recommends cases of strangulation be investigated as attempted homicides or aggravated assaults.[61]

In recognition of the significant use of strangulation by perpetrators of domestic violence, and in response to the legislative developments in the United States, a working group was established by the Canadian government to 'examine the feasibility of creating a distinct offence of strangulation as a general intent offence, and to assess whether existing provisions adequately address the seriousness and significance of this specific conduct'.[62] The working group's report was released in 2006 and was based on an examination of 89 cases in which criminal offences had been prosecuted where strangulation was alleged. Of these cases, 54 were family violence cases, and in these, charges included attempted murder, assault, aggravated assault and assault causing actual bodily harm.[63] The report reviewed existing Canadian law and examined developments in the United States law. It suggested that increased emphasis on the seriousness of strangulation, coupled with the use of expert testimony to help explain the particular risks of strangulation, may result in more serious offences, such as aggravated assault, being charged, which better reflect the risks and blameworthiness associated with strangulation.[64] The report concluded that:

> while there is support … for the proposition that strangulation may serve as a marker for increased risk of future violence, this proposition is not without controversy … while a discrete offence of strangulation may assist in documenting prior history of this type of assault, that basis alone is insufficient to justify the creation of a new offence.[65]

C *Australia*

The Australian Law Reform Commission, in conjunction with the New South Wales Law Reform Commission, recently reviewed Australian legal responses to domestic and family violence.[66] In the *LRC Report* there was only one mention of

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2019 cases, and in 2009–10 there were 19 cases of 'choking' out of 1921 cases: email communication with Alysha Jones, researcher at RESOLVE (18 September 2013), on file with the authors.

59 *R v Francisco* [2005] MBCA 110 (30 September 2005) [13]; *R v Betker* (2004) ABQB 482 (23 June 2004).

60 See, eg, *R v Aurini* (2010) ABPC 354 (3 November 2010); *R v Rahaman* (2007) ONCJ 523 (6 November 2011); *R v Bois* [2009] MBCA 70 (15 June 2005); *R v Van Oostwaard* [2009] ABPC 358 (4 December 2009).

61 Alberta Justice and Solicitor General, above n 14, 86.

62 Uniform Law Conference of Canada, above n 41, 1.

63 Ibid 3–4.

64 Ibid 8.

65 Ibid 15.

66 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response Final Report*, Report No 114 (2010) <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114> ('*LRC Report*').

strangulation.[67] In the context of a discussion of the development of criminal law defences, the *LRC Report* referred to a rather extraordinary case where the male defendant claimed he had strangled his female partner to death in response to the years of economic and psychological abuse she had perpetrated towards him. He was found guilty of manslaughter.[68]

Two important legal responses to domestic violence in Australia are criminal prosecution and civil domestic violence protection orders. These responses are discussed in turn below.

1 *Criminal Law*

Australian criminal law relating to offences against the person in all states and territories includes a wide variety of offences, which are associated with varying degrees of penalty.[69] Many existing offences such as assault, assault causing bodily harm, grievous bodily harm or assault resulting in serious harm and attempted murder could be charged in situations where strangulation is carried out. However, at the point of police intervention when strangulation has been inflicted, there may not be any clear evidence of injury. In many cases, it is likely that assault will appear to be the most appropriate charge. Such a charge may understate the level of harm and provides no indication to those viewing the criminal record of the accused (such as police involved with defendant in future matters) of the degree of danger to the victim.

As in Canada, most Australian jurisdictions include an offence that criminalises strangulation perpetrated in order to carry out other serious offences; some offences require that the strangulation actually renders the person unconscious. These offences were included in all states and territories long before concerns about strangulation in the context of domestic violence cases were considered. For example, the *Crimes Act 1900* (ACT) includes a strangulation offence that, although it does not require that the strangulation is undertaken to further another offence, requires that the victim is rendered 'insensible' or 'unconscious'. It states:

> A person who intentionally and unlawfully
>
> (a) chokes, suffocates or strangles another person so as to render that person insensible or, by any other means, renders another person insensible or unconscious …
>
> is guilty of an offence punishable, on conviction, by imprisonment for 10 years.[70]

In the Australian Capital Territory, there is only one reported case involving prosecution under the provision. Kien had separated from his wife, the victim, and

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67 Ibid 631.

68 *DPP (Vic) v Sherna* [2009] VSC 526 (20 November 2009).

69 Model Criminal Code Officers Committee, above n 43.

70 *Crimes Act 1900* (ACT) s 27(3); pursuant to *Crimes Act 1900* (ACT) s 27(4), if the act is done for the purpose of committing an offence, evading lawful apprehension, or preventing investigation of the offence, then the penalty is increased to 15 years.

she had subsequently obtained a domestic violence protection order. After the separation, and in breach of the domestic violence order, Kien visited the family home and had an argument with the victim. The argument ended with Kien striking the victim with a chair, then placing

> his hands around her throat, choking her until she was unconscious and causing her to fall to the ground. While she was on the ground, Mr Kein got up and retrieved a scarf … from her bedroom. He then wrapped and tied it around her neck, using both hands to pull the ends of the material down toward the floor.[71]

The eldest child heard the argument and had unknotted the scarf and arranged for police and ambulance to be called.[72] Originally charged with attempted murder, Kien ultimately pleaded guilty to several charges including breach of the protection order, intentionally inflicting actual bodily injury[73] and choking his wife so as to render her unconscious.[74] He was sentenced to serve a total of four years and seven months' imprisonment, with a non-parole period of three years and one month. Specifically on the choking charge he was ordered to serve a sentence of three years and nine months' imprisonment.[75] Kien appealed, unsuccessfully, against the severity of sentence. The Court of Appeal found that 'the offences were serious … They were committed in the context of continuing contact with the victim which she clearly did not welcome.'[76]

Kien's case began as one of attempted murder rather than strangulation, but it is likely that most incidents of strangulation or choking in the Australian Capital Territory are charged as assaults, and are dealt with in the magistrate's courts, despite the existence of the specific strangulation provision in the Australian Capital Territory.[77] This may be because in most cases of strangulation the victim is not rendered unconscious. The Australian Capital Territory's approach thus has a very limited application.

In New South Wales, *Crimes Act 1900* (NSW) s 37, titled 'Attempts to choke etc (garrotting)', states:

> Whosoever:
>
> by any means attempts to choke suffocate or strangle any person, or
>
> by any means calculated to choke suffocate or strangle, attempts to render any person insensible unconscious or incapable of resistance,
>
> with intent in any such case to enable himself or herself or another person to commit, or with intent in any such case to assist any person in committing, an indictable offence, shall be liable to imprisonment for 25 years.

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71 *Kien v The Queen* [2012] ACTCA 25 (24 May 2012) [4].
72 Ibid [9].
73 *Crimes Act 1900* (ACT) s 23.
74 Ibid s 27(3)(a).
75 *Kien v The Queen* [2012] ACTCA 25 (24 May 2012) [7].
76 Ibid [34] (Refshauge, Burns and Lander JJ).
77 See, eg, *R v Burdon* [2011] ACTSC 90 (1 June 2011), especially finding 2 and [177], where Burdon was found to have assaulted his then partner by choking her.

In a number of cases in New South Wales the offence of attempted strangulation has been charged alongside sexual offences on the basis that the strangulation has been attempted in order to assist in the commission of the sexual assault.[78] The application of the NSW strangulation offence in the context of domestic violence cases may be significantly limited by the requirement that the strangulation is carried out with the intent to enable the commission of another indictable offence. However, the case of *Munn v The Queen*[79] provides an example of how it could be charged in this context.

Munn had a relationship with the victim for some time. The victim had tried to leave the relationship on a number of occasions but had, each time, been persuaded to return. The victim described Munn as possessive and persistent.[80] On the night before the offences took place, the couple had an argument and the victim told Munn she no longer wanted to be in a relationship with him. The next day Munn went to the victim's home. She attempted to drive away, but then allowed Munn into her car. He assaulted her in the car and she lost control of the car eventually coming to a stop whereupon Munn began to try to strangle her to the point where she may have lost consciousness.[81] At sentencing, the judge described the victim's injuries as consistent with 'choking'; these included pinpoint haemorrhages to her face from the neck up and subconjunctival haemorrhages to both eyes and bleeding from her nose.[82] Munn was found guilty of attempt to strangle with intent to commit an indictable offence: maliciously inflict grievous bodily harm[83] and assault occasioning actual bodily harm.[84] In relation to the strangling offence, the judge sentenced the accused to serve a period of imprisonment of nine years, with a non-parole period of five years and six months.[85] This sentence was unsuccessfully appealed, the Court of Appeal finding that the injuries were 'serious and significant'.[86] It is possible then for this charge to be laid in a context where the accused tries to choke the victim with the intent to, for example, carry out an assault on her. However, the charge would not be applicable where the victim was 'merely' strangled without being connected to the perpetrator's intention to carry out another indictable offence.

Queensland,[87] Tasmania[88] and Northern Territory[89] have provisions similar to New South Wales. For example, *Criminal Code 1899* (Qld) s 315 states:

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78 See, eg, *R v Cutrale* [2011] NSWCCA 214 (22 September 2011); *McKechnie v The Queen* [2006] NSWCCA 13 (19 February 2006); *R v MW* [2007] NSWCCA 291 (16 October 2007); *R v HQ* [2003] NSWCCA 336 (31 October 2006).

79 [2009] NSWCCA 218 (30 September 2009).

80 Ibid [15].

81 Ibid [18].

82 Ibid [22].

83 *Crimes Act 1900* (NSW) s 37.

84 Ibid s 59(1).

85 He was sentenced to serve 18 months' imprisonment for the assault charge. Overall the sentence imposed was 10 years with a non-parole period of six years and six months: *Munn v The Queen* [2009] NSWCCA 218 (30 September 2009) [11].

86 Ibid [57].

87 *Criminal Code* (Qld) s 315: penalty maximum life imprisonment.

88 *Criminal Code 1924* (Tas) s 168.

89 *Criminal Code* (NT) s 175: maximum of life imprisonment. Note also that under *Criminal Code* (NT) ss 174B–E it may be possible to charge strangling under endangerment provisions.

> Any person who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of a crime, and is liable to imprisonment for life.

There is also a similar provision in Western Australia; however in the Western Australian provision there is no specific reference to strangulation or choking — rather the provision refers to 'violence of any kind'.[90] In Queensland, the offence under *Criminal Code 1899* (Qld) s 315 has sometimes been charged in the context of sexual offences.[91] In this context, there has been some discussion of the meaning of 'resistance' in the provision. In *R v Osborne*[92] the defendant squeezed the neck of his victim and in doing so he attempted to render the victim incapable of resistance with the intent to commit an indecent assault.[93] The Court of Appeal found that a call for help is a form of resistance, as Connolly J stated: 'To apply manual pressure to the neck is calculated to choke and to prevent calling for assistance and is therefore calculated to render the victim incapable of this type of resistance.'[94] Connolly J observed that for a 'woman or girl' calling for help may be a more effective form of resistance than attempts at physical self-defence.[95] While this interpretation could assist in the application of the offence in the context of domestic violence, the requirement that the strangulation must be associated with the intention to commit an indictable offence creates a limitation for its application. For example, choking to further a breach of a domestic violence order (a summary offence) would not be captured,[96] although choking undertaken to further an assault could be charged under the *Criminal Code 1899* (Qld) s 315. In South Australia and Victoria there is no offence that refers specifically to strangulation or choking.

Some jurisdictions provide endangerment offences that may be applicable to strangulation. For instance, South Australia includes endangerment offences under the *Criminal Law Consolidation Act 1935* (SA) s 29(1)–(3) that could encompass strangulation. These offences require that the person carrying out the particular act — which could be an 'act' of strangulation — knows that the act may endanger life, cause serious harm or harm and the person must intend to endanger the person's life, or cause the person serious harm or harm or be recklessly indifferent about whether the person's life is endangered or serious harm or harm is caused. These offences are aggravated if the victim is or was a spouse or domestic partner.[97] The South Australian provisions contain a subjective element of knowledge that may be difficult to prove. The alternative of 'reckless indifference'

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90 *Criminal Code Act 1913* (WA) s 292: maximum penalty 20 years' imprisonment.
91 See *R v Osborne* [1987] 1 Qd R 96; *R v Lansbury* [1988] 2 Qd R 180.
92 [1987] 1 Qd R 96.
93 Ibid 97.
94 Ibid 98.
95 Ibid.
96 See, eg, *Wilson v Queensland Police Service* [2008] QDC 7 (31 January 2008); *CCR v Queensland Police Service* [2010] QDC 486 (3 December 2010).
97 Ibid s 5AA(1)(g)(i)–(ii).

in the context of carrying out strangulation would, however, presumably be easier to demonstrate.

In Victoria, two relevant endangerment offences provide that a person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death[98] (or serious injury)[99] is guilty of an indictable offence. The penalties associated with these offences are relatively low[100] and the circumstances of the offence for many of the offenders charged under this provision have involved driving a car in a manner that has endangered others.[101] However, the Victorian offences could be applied to strangulation and, relevantly, these offences do not require the victim to suffer harm. The Victorian provisions have both a subjective and objective element.[102] It may be difficult to argue that an ordinary person would understand the 'appreciable risk' of death or serious harm as a result of strangling a person perhaps only for a few seconds.[103] Further, general endangerment offences have been severely criticised on the basis that they are 'unjustifiable and unnecessary', that they are too broad (in part because they do not always require the commission of an unlawful act), and can lead to overcriminalisation.[104]

2 *Domestic Violence Legislation*

All Australian jurisdictions provide legislation (domestic violence legislation) that allows a person who fears domestic violence to apply for a civil protection order from a court.[105] The *LRC Report* recommended that state and territory domestic violence legislation should include examples of harm such as stalking, intimidation and economic abuse;[106] strangulation, as noted earlier, was not mentioned by the *LRC Report* in this context. Several jurisdictions now provide examples in their domestic violence legislation, along with definitions, of specific forms of domestic

98 *Crimes Act 1958* (Vic) s 22.

99 Ibid s 23.

100 Ibid s 22, maximum penalty 10 years' imprisonment; s 23 maximum penalty five years' imprisonment.

101 See, eg, *R v Roach* [2005] VSCA 162 (8 June 2005); *DPP (Vic) v Walden* [2003] VSCA 139 (12 September 2003); *Bogdanovich v The Queen* [2011] VSCA 388 (25 November 2011). The Northern Territory *Criminal Code* previously included a general endangerment provision (s 154), but this was repealed and has been replaced with a group of offences focused on motor vehicles and endangerment: see *Criminal Code* (NT) s 174B–D.

102 See *R v Nuri* [1990] VR 641; Bronitt and McSherry, above n 40, 604.

103 See discussion of appreciable risk in *R v Abdul-Rasool* (2008) A Crim R 556, 562 [19], [21].

104 CMV Clarkson, 'General Endangerment Offences: The Way Forward?' (2005) 32 *University of Western Australia Law Review* 131, 143–4. See also Jenny Blokland, 'Dangerous Acts: A Critical Appraisal of Section 154 of the Northern Territory *Criminal Code*' (1995) 9 *Criminal Law Journal* 74; David Lanham, 'Danger Down Under' [1999] *Criminal Law Review* 960.

105 *Family Violence Protection Act 2008* (Vic); *Domestic Violence and Protection Orders Act 2008* (ACT); *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic and Family Violence Act 2007* (NT); *Domestic and Family Violence Protection Act 2012* (Qld); *Family Violence Act 2004* (Tas); *Restraining Orders Act 1997* (WA).

106 *LRC Report*, above n 66, 17.

violence, including intimidation and stalking.[107] Increasingly, Australian domestic violence legislation also includes a definition of economic abuse as a form of domestic violence.[108] While the domestic violence legislation in all Australian jurisdictions identifies physical abuse as a form of domestic violence, no Australian domestic violence legislation refers specifically to strangulation.

IV The Queensland Study of Allegations of Strangulation and Implications for Legal Response

A recent study of domestic violence protection orders ('DVO') in Queensland provides an opportunity to understand the prevalence, police engagement and final court outcomes of DVO cases where strangulation is alleged.[109] The study focuses in particular on 'cross-applications' — or mutual orders being sought by both partners against each other — and so allows examination of gender differences in perpetration and protection order outcomes when strangulation allegations are involved. In the following analyses, we focus particularly on the role of police and the outcome of protection order applications where there are allegations of strangulation made by women in the 'cross-application' partnerships. In an initial descriptive examination of the data we look for differences both within gender: comparing women who allege strangulation to those who do not; and between genders: comparing women who allege strangulation to their male partners. In addition to the individual characteristics of the aggrieved and respondent partners, we assess patterns in police involvement and DVO application outcomes. In an associated qualitative analysis, we explore whether and how alleged strangulation may be different from other types of allegations in the way it is treated by the police and the courts in civil protection order matters.

A *Methods*

The authors examined court files dealing with cross-applications in two Queensland Magistrates Courts (Brisbane and Beenleigh) over the period of two financial years: 2008–09 and 2009–10. The study was undertaken with the aim of addressing a clear gap with respect to information about cross-applications, and an overview of this study is published elsewhere.[110] In total, we examined 656 cross-application files derived from 328 heterosexual couples. In the following analysis, we make comparisons between cases containing allegations of strangulation and

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[107] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 4, 7–8; *Domestic and Family Violence Act* (NT) ss 5–8; *Domestic and Family Violence Protection Act 2012* (Qld) s 8; *Family Violence Act 2004* (Tas) s 7; *Restraining Orders Act 1997* (WA) s 6.

[108] *Domestic and Family Violence Act 2007* (NT) s 8; *Domestic and Family Violence Protection Act 2012* (Qld) s 8; *Family Violence Act 2004* (Tas) s 8; *Family Violence Protection Act 2008* (Vic) s 6; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8 defines 'abuse' and also includes a definition of 'unreasonable and non-consensual denial of financial, social or personal autonomy'.

[109] Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders' (2013) 36 *University of New South Wales Law Journal* 56. We thank the Department of Justice and Attorney General (Qld) for providing us with access to Magistrates Court data.

[110] Ibid.

those without such allegations. The data were collected from the detailed DVO application (Form DV1 — Queensland Protection Order Application). The form provides a large amount of detail about the aggrieved, the respondent and the incident that occurred, and may present this information from the perspective of the aggrieved, where the application is privately lodged, or of the police, where they have lodged on behalf of the aggrieved. As a result, information about cross-applications captured through the DV1 form represents a valuable research tool, and one method to understand strangulation from the point of view of the police, respondent and the aggrieved. In addition, the information on the DV1 form provides the basis of the evidence brought before a magistrate to determine the outcome of the order. Thus, in a real sense, it is part of the decision-making process with respect to domestic violence generally and strangulation more specifically.

B *Context and Overview of the Strangulation Cases*

An allegation of strangulation was made by 6.4 per cent (n = 42) of all aggrieved partners in the sample, which far outweighed allegations of attempted murder by other means (less than 1 per cent, n = 4). Among those who alleged strangulation, the allegation was most often made by one partner — typically the woman (90 per cent, n = 38) — against the other partner — typically the man. An allegation by both partners against each other occurred for only one couple in the sample. Overall, a much greater proportion of the total sample (12 per cent) of aggrieved women alleged strangulation than was the case for aggrieved men (1 per cent).

All women who alleged strangulation also made allegations of other offences, and most of these (87 per cent, n = 33) were violent offences, including other forms of assault, sexual assault and threats of violence or murder. The male partners of the 38 women who alleged strangulation also made allegations of violent offences (84 per cent, n = 32) — and most commonly assault (76 per cent, n = 29). In fact, for one-third of these men (32 per cent, n = 12), assault was the only allegation made. In roughly 16 per cent of cases (n = 6), the men alleged a non-violent offence alone, including property damage, verbal harassment and/or fraud/theft.

Women who alleged strangulation were not significantly different to women who alleged other kinds of offences; for example, other forms of assault, sexual assault, threats of violence and murder, intimidation, verbal harassment, stalking, fraud, theft and property damage. Both groups were statistically equally likely to be born in Australia (78 per cent and 72 per cent, respectively), non-Aboriginal or Torres Strait Islander ('non-ATSI') (95 per cent and 92 per cent, respectively), and of the same mean age (33 years). There were also similarities in the characteristics of the men who allegedly resorted to strangulation and those who were alleged to have committed other offences. For example, men who allegedly strangled their partners were equally likely (79 per cent) to be Australian-born as those who were alleged to have committed other offences, nearly equally likely to be non-ATSI (97 per cent and 95 per cent, respectively), and had an equivalent mean age of 36 years.

There was some indication that male alcohol consumption was more likely to be associated with an allegation of strangulation than other offence types (χ^2 = 4.045 df = 1, $p<0.05$). A significantly greater proportion (37 per cent, n = 14) of women who alleged strangulation also reported that their partners had consumed alcohol at the time of the incident than women who made other allegations (22 per cent, n = 64).

DVO applications can be lodged privately, by the aggrieved person, or by the police acting on behalf of the aggrieved person. Previous evidence shows that police lodge on behalf of the aggrieved person in a significant proportion of cross-applications, and that when police are involved in this way there are implications for the ultimate success of the order.[111] Among the 38 women who alleged strangulation and their partners, police were more likely to lodge on behalf of the woman than her partner (χ^2 = 9.272, df = 1, $p<0.01$). However, police were involved for high proportions of both parties: nearly three-quarters (74 per cent, n = 28) of women who alleged strangulation, and more than two-thirds of their male partners (68 per cent, n = 26). Moreover, the picture of police involvement did not change, whether strangulation was alleged or not. Thus, police lodged three-quarters (74 per cent) of applications for both women who alleged strangulation and those who did not, and similarly, police lodged roughly equivalent proportions of applications for men whose partners alleged strangulation (68 per cent) and those whose partners did not (70 per cent).

Possible outcomes of a DVO application include: the order being made, by the court or by consent; or not made, as a result of dismissal by the court or withdrawal on the part of the aggrieved. Overall, applications for both partners were made, by consent or by the court, for a large proportion (78 per cent) of all applications in the study.[112] The data with respect to outcomes and allegations of strangulation show similar patterns in outcomes; that is, no statistical differences for women irrespective of whether they alleged strangulation or not. Orders were made, either by consent or by the court, for 86 per cent (n = 33) of women who alleged strangulation and 81 per cent (n = 289) of those who made other allegations. In contrast, male partners were slightly more likely (χ^2 = 3.074, df = 1, $p<0.1$) to have had their orders made when their partners made an allegation of strangulation than when they did not (87 per cent and 73 per cent, respectively). Both partners in a couple had their orders made against each other in a greater proportion (78 per cent) of cases where the woman alleged strangulation than when the woman did not allege strangulation (69 per cent), though these differences did not reach statistical significance. Overall, results related to DVO outcomes provide no evidence that allegations of strangulation made by women are treated differently, or perhaps more seriously, than other allegations made by women. Nor is there evidence that women's allegations of strangulation are associated with an increased likelihood for their male partners to have their own applications dismissed or for them to withdraw their application.

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111 Ibid 77.
112 Ibid 78.

C *Themes Arising in the Qualitative Data*

While the descriptive overview of the data above indicates that there were no significant differences in protection order outcomes for women who have alleged strangulation, some differences were apparent in our examination of the detailed descriptions of the incidents provided on the DVO application. First, we were interested to examine whether the observed similarity in outcomes for women who had been strangled and their partners who had suffered other alleged offences was a result of the possibly ambiguous way strangulation had been described in the DVO application by the police or the aggrieved (for example, as 'choking'). More specifically, we examined whether the act of strangulation was clearly discernible from the description of the incident in the DVO application. In all 38 cases where women had allegedly been strangled, the descriptions of strangulation were unambiguous — or clearly discernible from the description provided in the application — irrespective of whether the application was lodged privately, by the aggrieved woman, or by the police on behalf of the woman. Examples of the ways that strangulation was described in different police-lodged applications include: 'strangulation to the point of unconsciousness occurred', '[he] choked [her] until she couldn't talk', '[he] squeezed [her] neck with both hands', '[he] took [her] by the throat squeezing to restrict her breath', '[he] took [her] t-shirt, twisted it to tighten it around her throat', '[he] took [her] by the throat and did not release until a witness intervened', '[he] grabbed [her] around the throat with both hands, pushed her on the boot of the car until she felt she could not breath', and '[he] put his shin on her throat to choke her'. Strangulation was similarly evident in applications lodged by women themselves, for example: '[he] grabbed me by the throat in the shower', and '[he] used his body weight to pin me, and had his hands around my throat ... [he] let me breath after I agreed with him'.

Second, we looked at the qualitative descriptions to assess whether there was any indication that women's alleged behaviours were equivalent in severity to men's use of strangulation. In many of these cases, women's violence was described by police as relatively minor, but could reflect the kind of 'defensive behaviour' that Johnson has described as 'violent resistance'.[113] Examples of police descriptions of women's retaliatory or defensive behaviour that directly followed strangulation included: '[she] fought back by scratching him on the back', '[she] pushed him into the clothes rack', '[she] bit him on the hand', '[she] had a steak knife and cut him', or '[she] smashed a glass and cut his face'. In some cases the woman's use of violence came before strangulation, but was part of a back-and-forth exchange, for example, one police-lodged application indicated:

> [He] and [she] had been drinking alcohol at a party prior to returning home. A verbal argument about their relationship issues escalated to a loud yelling match. She slapped him and hit him with a broom on the left hand, causing

[113] Michael P Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Northeastern, 2008) 10; see also Marianne Hester, 'Who Does What to Whom? Gender and Domestic Violence Perpetrators' (Report, University of Bristol in association with the Northern Rock Foundation, 2009) <http://www.nr-foundation.org.uk/wp-content/uploads/2011/07/Who-Does-What-to-Whom.pdf>.

> bleeding. He grabbed her around the neck resulting in several red marks. She bit him on the right hand, which made him release his grip.

When men privately lodged a DVO application against their partners, they similarly alleged that their partners had engaged in behaviours like scratching, biting and hitting, but also pointed to women's initiating behaviours and other provocations that might account for the need for their own violent behaviour; for example: '[she] hit me and taunted me to hit her back', '[she] was unfaithful', '[she] had been drinking', '[she] has been diagnosed with depression and OCD throughout the relationship', '[she] stole money from the joint account', or 'she poured sugar into my petrol tank'.

D *What the Queensland Study Shows*

Although the data, aimed at assessing DVO cross-applications, provides a particular view of domestic violence cases that may come before the magistrates courts (that is, where both partners are alleged to have engaged in some form of domestic violence), the results do indicate that women were more likely by far to have made allegations of strangulation, and overall, more than one in 10 (12 per cent) of the women in the sample had allegedly suffered strangulation. The qualitative information from the DV1 form provides evidence that incidents of strangulation were clearly described by the aggrieved, and often noted by the officer. However, there was no evidence that an allegation of strangulation is treated differently, or indeed more seriously, by the police and the courts than other types of less serious allegations such as assault.

V Discussion: Policy, Practice and Law Reform in Australia

The lack of particular attention paid to strangulation by police and magistrates, as suggested in the Queensland study, may point to the need for better training for domestic violence workers, police, and magistrates, in relation to recognition of strangulation injuries and their seriousness. Considering the focus on strangulation in the United States, it is surprising that strangulation has received such little attention in Australia. Particularly surprising, perhaps, is the absence of discussion about strangulation in the recent *LRC Report*. However, the *LRC Report*, along with Australia's *National Plan to Reduce Violence against Women and Their Children*,[114] has provided the impetus for renewed attention to law and practice reform around domestic violence.[115]

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[114] Department of Social Services, *The National Plan to Reduce Violence against Women and Their Children (2010–2022)* (2010) Australian Government <http://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children>.

[115] For example, Western Australia has recently announced a comprehensive review of domestic violence laws, see: Law Reform Commission of Western Australia, *Project 104 Family and Domestic Violence* (27 August 2013) <http://www.lrc.justice.wa.gov.au/P/project_104.aspx?uid=8914-2176-0890-7360>.

Several Australian states already promote risk assessment tools that identify strangulation as a key indicator of increased risk of being harmed by domestic and family violence. These tools are used by police and others working in the domestic violence field.[116] For example, the current Queensland Police Service *Operational Procedures Manual* identifies strangulation in the highest risk category as a 'category 1 risk factor'.[117] On investigating domestic violence, the manual recommends that a risk assessment should be undertaken with the aggrieved person and results of the risk assessment should be recorded.[118]

Lawyer Gael Strack and medical specialist George McClane have developed a number of recommendations for police training that could also usefully be provided to domestic violence workers and magistrates.[119] Their recommendations include that strangulation cases should be treated seriously, including undertaking a careful interview with the victim. They recommend a number of specific questions that should be asked and that a thorough investigation for evidence of injury should be undertaken. Specific questions that may elicit relevant information and indicate strangulation and its effects include: 'Have you noticed a change in your voice or speech? ... Are you having difficulty speaking or breathing? … Did you feel dizzy or as though you might pass out?'[120] Turkel echoes many of the suggestions made by Strack and McClane, but she also points to the need for wider education so that victims can also identify the effects of strangulation (see Table 1) and understand its seriousness.[121] Increased awareness and understanding about strangulation and its associated injuries and symptoms may ensure that strangulation is taken seriously. In turn, this may result in improved safety planning and justice responses both in the civil and criminal sphere. For example, cross-orders may not be an appropriate outcome where strangulation is alleged. Greater police knowledge may ensure that victims are interviewed appropriately about strangulation and this should result in clearer recording of incident and injury. With greater understanding, police may decide to follow up with victims a few days after an alleged strangulation to make sure that the victim is safe, that the most accurate information is recorded, and the most appropriate charge is laid.

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116 See the *Domestic Violence Protective Assessment Framework (DV-PAF)* in Queensland Police Service, *Operational Procedures Manual* (30 August 2013) 68 <http://www.police.qld.gov.au/services/OperationalPolicies/opm.htm>; Department for Child Protection Family and Domestic Violence, *Common Risk Assessment and Risk Management Framework* (Western Australian Government, 2011) 15 <http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/CRARMF.pdf>; Victorian Department for Communities, *Family Violence Risk Assessment and Risk Management* (Victorian Government, 2007) 73 <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0006/581757/risk-assessment-risk-management-framework-2007.pdf>, which recognises '[h]as ever tried to choke the victim' as a significant risk factor, and further explains, '[s]trangulation or choking is a common method used by male perpetrators to kill female victims'; Northern Territory Government, *Family Safety Framework: Practice Manual* (2013) 17 <http://www.pfes.nt.gov.au/~/media/Files/Police/Family%20Safety%20Framework/Final%20FSF%20Alice%20Springs%20Practice%20Manual.ashx>.

117 Queensland Police Service, above n 116, 68.

118 Ibid 12.

119 Strack and McClane, above n 5.

120 IACP National Law Enforcement Policy Center, above n 15, 3; see also Alberta Justice and Solicitor General, above n 14, 88–9.

121 Turkel, above n 5.

The high level of attention that has continued to be focused on strangulation in the United States appears to be in part due to the work of domestic violence death review teams. These teams investigate deaths where there is a history of domestic violence, or where a person is killed by their intimate partner, to try to identify risk factors and help develop prevention strategies. In the United States, the links between strangulation and homicide are regularly re-emphasised in death reviews.[122] Such death review processes are now common, and even entrenched, in many United States states, but are relatively new and experimental in Australia. Five Australian states have domestic violence death review processes in place, although they utilise different approaches and have varying degrees of administrative and financial support.[123] In her argument for a death review system to be established in Queensland, Betty Taylor recommended that strangulation as a risk factor for homicide should be considered and information should be collected so data could be gathered.[124] The New South Wales Domestic Violence Death Review Team was established in 2010. Strangulation has already featured strongly in the deaths they have reviewed. In the review of deaths for the 2011–12 year, it was noted that when women were killed by their intimate partner, the highest number of deaths were attributable to strangulation.[125] However, perhaps because data around acts of strangulation leading up to homicide is not specifically collected, reviews carried out in relation to domestic violence related homicides in Australia have, so far, not identified previous histories of strangulation. Such information may help emphasise the risks associated with strangulation and in turn encourage those working on the ground to pay attention to the issue so that appropriate safety planning can be ensured.

UN Women has recommended that legislation should provide specific penalties for strangulation, observing that many victims of domestic violence have experienced strangulation and that it is often a precursor to death.[126] As observed earlier, strangulation, despite its dangerousness, often leaves no visible injury and due to the lack of reference to strangulation in criminal codes and statutes in Australia, under current criminal laws strangulation may not even be considered as serious as a punch.[127] The limitations of current strangulation-related offences, such as the need for strangulation to be carried out to further other serious

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122 Nadia David, *Exploring the Use of Domestic Violence Fatality Review Teams* (Issue Paper No 15, Australian Domestic & Family Violence Clearinghouse, 2007) 5. See also Richards, above n 16, reporting on death reviews undertaken in London that identified strangulation as a risk factor for homicide.

123 See Lyndal Bugeja et al, 'The Implementation of Domestic Violence Death Reviews in Australia' (2013) 17 *Homicide Studies* 353, 359–66; currently NSW, Victoria, Queensland, South Australia and Western Australia have teams operating.

124 Taylor, above n 47, 37.

125 New South Wales Death Review Team, *Annual Report 2011–2012*, (New South Wales Coroners Court, 2012) 43, 54 <http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/_assets/coroners/m401601l5/dvdrt_annual_report_final_october_2012x.pdf>. Note that the first Death Review Report of the Coroners Court of Victoria did not mention strangulation (or choking): *Victorian Systemic Review of Family Violence Deaths (First Report)* (2012) <http://www.coronerscourt.vic.gov.au/resources/54bbc2f9-bb23-45c0-9672-16c6bd1a0e0f/vsrfvd+first+report+-+final+version.pdf>.

126 UN Women, *Felony Strangulation and Other Provisions* (2012) <http://www.endvawnow.org/en/articles/834-felony-strangulation-and-other-provisions.html>.

127 See Stapczynski, above n 38, 196.

offending or the need for unconsciousness to result, have been discussed. Given developments in the United States around strangulation, it may be timely to consider the development of criminal offences in Australia that respond specifically to strangulation in the domestic violence context. While there has been significant consideration by scholars about the failure of criminal law to respond to domestic violence because of its focus on discrete incidents rather than the course of conduct,[128] the act of strangulation is perhaps more amenable to a criminal justice response precisely because of its discrete nature.

The recent *LRC Report* did not discuss the introduction of a strangulation offence, although it did consider the role of criminal justice responses to domestic violence and possible reforms.[129] The *LRC Report* observed that 'a blunt penal response can escalate violent behaviour and fail to address its causes' and can have particularly adverse consequences for Indigenous people.[130] Overall, the *LRC Report* concluded that it was 'premature' to recommend any new forms of domestic violence offending.[131] While one of the key themes that arose in submissions was that a new offence would provide 'direction and guidance', the *LRC Report* concluded that creating new offences was only one way to do this; other ways included recommendations directed at sentencing and the development of domestic violence courts.[132] However, as observed, the *LRC Report* did not consider strangulation.

In the 2000 report of the Queensland Taskforce on Women and the *Criminal Code*, there was no mention of strangulation.[133] However, the Taskforce did discuss whether a specific domestic violence offence should be introduced in Queensland. It suggested four options as alternatives: introducing an offence of 'male assault female' in the *Criminal Code 1899* (Qld); including gender as a circumstance of aggravation; introducing a similar but separate offence of torture (*Criminal Code 1899* (Qld) s 320A) specifically aimed at domestic violence; and, finally, including an example alongside the current offence of torture to show how it could be applied in domestic violence cases.[134] Submissions to the Taskforce overwhelmingly rejected the idea of introducing an offence of 'male assault female', most commonly on the basis that women would be stereotyped as victims.[135] There was less consensus between submissions in relation to the other suggestions. Ultimately, the Taskforce concluded there should be further investigation into the creation of a course of conduct offence similar to torture for

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128 Russell P Dobash and Rebecca Emerson Dobash, 'Abuser Programmes and Violence against Women' in Wilma Smeenk and Marijke Marlsch (eds), *Family Violence and Police Response: Learning from Research Policy and Practice in European Countries* (Ashgate, 2005) 191; Heather Douglas, 'Not a Crime Like any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal* 220, 221; *LRC Report*, above n 66, 565.

129 See *LRC Report*, above n 66, ch 13.

130 Ibid 562.

131 Ibid 587.

132 Ibid.

133 Although the Taskforce reported that some respondents who took part in a phone-in established by the Taskforce alleged 'choking': see Office of Women's Policy, *Report of the Taskforce on Women and the Criminal Code* (Queensland Government, 2000) 76.

134 Ibid 77.

135 Ibid.

domestic violence. The Taskforce explained that the main aim of such an offence would be to increase the use of criminal charges in response to domestic violence (rather than relying simply on protection orders). The Taskforce was also of the view that such an offence would be clearly identifiable as an offence related to domestic violence and that the change in legislation could lead to changes in police practice.[136] Although the Taskforce unanimously agreed that an example should be added to the current offence of torture to show how it could be applied in domestic violence cases,[137] this has not occurred.

There are some risks associated with the introduction of a new offence. As the United States experience shows, the accused in almost half of the prosecutions of strangulation in 2010–12 in New York State were African-American men.[138] In Australia, Indigenous people are similarly already over-represented in domestic violence and criminal prosecution statistics.[139] There is a danger that they will be over-represented in prosecutions of any new strangulation offence. There is also a real possibility that women victims, especially Indigenous women, may be charged with criminal offences, as a result, for example, of retracting the contents of statements they have made to police.[140] However, it is not clear that either of these issues would be exacerbated (or improved) with the introduction of a strangulation offence.

VI Conclusion

Perhaps the introduction of the charge of stalking throughout common law countries provides a relevant parallel. Stalking offences were introduced in large part because of the concern that stalking was often a prelude to violent behaviour against intimates.[141] This is also the case with strangulation. As with strangulation, most stalking victims are female and most stalking perpetrators are male.[142] Stalking is also a well-recognised risk factor for further abuse, such as threats and physical assault, and it is incorporated in most domestic violence risk assessment tools, although it is not considered as dangerous as strangulation.[143] Given the

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136 Ibid 80.

137 Ibid.

138 Wheeler, above n 51, 4.

139 See generally Joy Wundersitz, 'Indigenous Perpetrators of Violence: Prevalence and Risk Factors for Offending' (Research and Public Policy Series No 105, Australian Institute of Criminology, 2010).

140 In 2013, it was reported that 20 Aboriginal women had retracted statements they had made to police and were charged with false testimony or public mischief: see Natasha Robinson, 'Mercy Plea from Jailed Mum Living in Fear', *The Australian* (online), 6 May 2013 <http://www.theaustralian.com.au/news/nation/mercy-plea-from-jailed-mum-living-in-fear/story-e6frg6nf-1226635622946>; Natasha Robinson, 'No change for domestic violence policy', The Australian (online), 10 May 2013 <http://www.theaustralian.com.au/national-affairs/state-politics/no-change-for-domestic-violence-policy/story-e6frgczx-1226638949155#>.

141 Paul E Mullen, Michele Pathé and Rosemary Purcell, *Stalkers and Their Victims* (Cambridge University Press, 2008) 226. A further reason was the media attention placed on high-profile victims of stalking.

142 Michele Pathé and Paul E Mullen, 'The Impact of Stalkers on Their Victims' (1997) 170 *British Journal of Psychiatry* 12.

143 See Queensland Police Service, above n 116, 68; Department for Child Protection Family and Domestic Violence above n 116, 66; Victorian Department of Communities, above n 116, 54.

particularly high risks associated with non-fatal strangulation, it may be timely to consider the introduction of a specific strangulation offence. This may address a gap in the legislative landscape, ensure that appropriate charges are laid and penalties applied, assist in highlighting the issue, and help to ensure records of strangulation are kept, leading to better risk assessment. For similar reasons, it may be appropriate to identify strangulation as a form of domestic violence in definitions of domestic violence in civil protection order legislation.