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**NON-FATAL STRANGULATION: AN ANALYSIS
OF THE IMPLICATIONS OF A NEW OFFENCE**

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Abstract

In March 2016 the Law Commission (the Commission) released its report Strangulation: The Case for a New Offence. It made several recommendations including that a specific offence of non-fatal strangulation should be enacted. This paper discusses how well the recommendations will work in practice. This paper argues that, although the Commission's recommendations will go a long way towards meeting its three main objectives – raising awareness of the dangerousness of strangulation, addressing the current lack of accountability of perpetrators of strangulation and keeping the victims of strangulation safe – there are important considerations yet to be addressed. They include issues relating to: charging inconsistency where there is choice to be made between pursuing a specific strangulation charge or a current generic offence charge; noting family violence on offenders' records where strangulation is involved in a family violence context but the offender is charged with a generic offence instead of the strangulation offence; the weight of strangulation as an aggravating factor to be considered in sentencing; and, the extent of operational changes. The paper concludes that a non-fatal strangulation offence should be implemented, but that important related issues must be addressed if the reform objectives are to be met.

Key Words

Strangulation, non-fatal strangulation, family violence, intimate partner violence

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I Introduction

Strangulation is a form of violence that constitutes very serious criminal behaviour. It is a highly gendered form of violence used to instill fear and exert coercive control over victims.¹ In particular, strangulation plays a unique role in family violence between intimate partners.² Research indicates that strangulation occurs more frequently than generally supposed.³ Its impact has been underestimated. The dangers associated with strangulation are serious. Victims can lose consciousness within seconds and die within minutes.⁴ It is also an important risk indicator for intimate partner homicide.⁵

It is common for strangulation to leave no visible injuries, making it difficult to prosecute.⁶ Serious violent crimes are covered in Part 8 of the Crimes Act 1961 and generally require a particular intention on the part of the perpetrator or a specific harm to be proven. In strangulation offences, these requirements are often hard to satisfy. Consequently, many instances of strangulation are charged as "male assaults female".⁷ This offence does not reflect the seriousness of the offending and only has a maximum penalty of two years' imprisonment.

This paper will consider the current proposal to criminalise non-fatal strangulation. It will discuss the recent recommendations of the Law Commission ("the Commission")

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¹ Adam J Pritchard and others "Improving Identification of Strangulation Injuries in Domestic Violence: Pilot Data from a Research-Practitioner Collaboration" (2016) FC 1 at 15.

² Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December* (Family Violence Death Review Committee, June 2014) at 99.

³ Pritchard and others, above n 1, at 2.

⁴ Family Violence Death Review Committee, above n 2, at 98.

⁵ Nancy Glass and others "Non-Fatal Strangulation is an Important Risk Factor for Homicide of Women" (2008) 35(3) J Emerg Med 329 at 335.

⁶ Pritchard and others, above n 1, at 2-3.

⁷ Crimes Act 1961, s 194.

on this issue in the report *Strangulation: The Case for a New Offence* ("the Report")⁸ and how the recommendations might work in practice.

The Commission's Report responded to the Family Violence Death Review Committee's recommendation that the Government should consider amending Part 8 of the Crimes Act 1961 to include a separate non-fatal strangulation offence.⁹

In its Report, the Commission made several recommendations including that a specific offence of non-fatal strangulation should be enacted, with a maximum term of seven years' imprisonment. Other recommendations included noting family violence on offenders' criminal records where they are found guilty of strangulation in a family violence offence and amending s 9 of the Sentencing Act 2002 to include strangulation as an aggravating factor that must be taken into account in sentencing.

The final recommendations concerned the implementation of a number of operational changes. They included amending the police family violence incident report (POL 1310) to include a specific strangulation question, amending the National Intelligence Application (NIA) to record specifically whether strangulation was alleged in a family violence incident and ensuring police who attend family violence call-outs receive appropriate education on strangulation.

The paper argues that the enactment of a non-fatal strangulation offence will fill a gap in the existing criminal justice framework and offer the prospect of holding perpetrators properly accountable. However, it points to important issues that are yet to be addressed.

The choice to be made between laying a specific strangulation charge or a current generic offence charge is likely to lead to charging inconsistencies, which could further be undermined by plea negotiations. The recommendation that family violence should be noted on offenders' criminal records where they are found guilty of the strangulation offence should be extended to include incidents of strangulation that are

⁸ Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016).

⁹ Family Violence Death Review Committee, above n 2, at 101.

charged as generic offences but still occur within a family violence context. The weight to be given to strangulation as an aggravating factor and the impact it should have on existing guideline judgments has yet to be determined. It is also important that evidence gathering practices are improved. Victims should routinely undergo medical assessments to assess their need for medical treatment. Medical assessments should be fully documented to improve the evidence available to the prosecution and in turn to increase the likelihood that perpetrators are more often held accountable for their actions.

This paper has two substantive parts. Part II discusses the rationale behind the proposed new offence of non-fatal strangulation. It outlines the dynamic that strangulation adds to family violence and analyses the current difficulties with prosecuting strangulation and the consequent lack of perpetrator accountability. Part III discusses the Commission's seven recommendations and how they might work in practice.

II The Rationale for Establishing a Non-Fatal Strangulation Offence

A Strangulation – A Dangerous Form of Violence Between Intimate Partners

In its Fourth Annual Report, the Family Violence Death Review Committee ("the Committee") discussed the use of strangulation in family violence following its review of family violence homicides between 2009 and 2012.¹⁰ The Committee recommended that the Government should consider enacting a separate strangulation offence.¹¹

Strangulation is a highly gendered form of violence used between intimate partners. Largely, men are the perpetrators and women the victims.¹² The frequency with which strangulation occurs has long been recognised by those dealing with family violence victims. Researchers and policy makers have become aware of its prevalence

¹⁰ Family Violence Death Review Committee, above n 2, at 98.

¹¹ Family Violence Death Review Committee, above n 2, at 101.

¹² Pritchard and others, above n 1, at 15.

more recently.¹³ In New Zealand nine of 63 intimate partner deaths (14 per cent) between 2009 and 2012 involved strangulation.¹⁴

Strangulation constitutes very serious offending. Victims can lose consciousness within five to 10 seconds and die within four to five minutes.¹⁵ Those who survive this potentially lethal form of violence are likely to experience negative long-term physical and mental impacts.¹⁶ However, to the untrained eye, strangulation frequently leaves only minor injuries and sometimes no external evidence at all, even when the incident has been life threatening.¹⁷

Perpetrators use strangulation for its psychological effects. It is used to instill terror; the inability to resist and the inability to breathe are particularly frightening.¹⁸ Perpetrators often use strangulation to show their victims that they *can* kill them, which instills in the victim's mind the perpetrator's lethality and their own vulnerability.¹⁹ It is an effective form of intimidation, coercion and control.²⁰

Strangulation is also a red flag for future violence and fatality.²¹ Women who have been strangled are seven times more likely to be killed in a future attack.²² The Committee found that many homicide victims had strangulation histories, with 50 per cent being subject to multiple strangulations.²³

¹³ Pritchard and others, above n 1, at 2.

¹⁴ Family Violence Death Review Committee, above n 2, at 98.

¹⁵ Family Violence Death Review Committee, above n 2, at 98.

¹⁶ Pritchard and others, above n 1, at 2.

¹⁷ Law Commission, above n 8, at 4.

¹⁸ Kristie A Thomas, Manisha Joshi and Susan B Sorenson "Do you Know What It Feels Like to Drown?" Strangulation as Coercive Control In Intimate Relationships" (2014) 38(1) PWQ 124 at 125.

¹⁹ Thomas, Joshi and Sorenson, above n 18, at 126.

²⁰ Thomas, Joshi and Sorenson, above n 18, at 125.

²¹ Glass and others, above n 5, at 335.

²² Glass and others, above n 5, at 329.

²³ Family Violence Death Review Committee, above n 2, at 98.

B Current Problems Prosecuting Strangulation in the Criminal Justice System

Problems related to the prosecution of strangulation in the criminal justice system include: issues relating to evidence gathering; problems with the process of recording strangulation; difficulties proving the elements of existing offences; and, problems with charging consistency.

Sufficient evidence of strangulation is an important part of successful prosecutions. As mentioned above, strangulation can leave limited evidence. The problem of lack of evidence is exacerbated by the fact that police may not ask if strangulation has occurred if there are no visible signs of it.²⁴ Victims themselves may not specifically mention strangulation. When strangulation results in loss of consciousness, victims experience dizziness, amnesia and confusion, which make it difficult for them to recall the incident.²⁵ Even if victims of family violence do recall the incident, they may not want to give evidence against their abusers or want their partners to be charged, especially with a serious offence.

A 2001 San Diego study of 300 strangulation cases revealed problems regarding evidence gathering.²⁶ The study found that many victims were recorded as having no visible injuries and often the injuries of those who had visible injuries were considered too minor to be photographed.²⁷ The quality of the photographs was also poor with 60 per cent of them being regarded as unusable.²⁸ The study revealed that police reports did not thoroughly document the strangulation. Many merely stated the victim was "choked".²⁹ Victims, however, described different ways in which they were choked. They stated whether one hand was used or two hands, if they were put in a chokehold, or whether a ligature was used.³⁰ They also stated whether they were

²⁴ Law Commission, above n 8, at 23.

²⁵ Law Commission, above n 8, at 8.

²⁶ Gael B Strack, George E McClane and Dean Hawley "A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues" (2001) 21(3) *Emerg Med* 303 at 303.

²⁷ Strack, McClane and Hawley, above n 26, at 303.

²⁸ Strack, McClane and Hawley, above n 26, at 303.

²⁹ Strack, McClane and Hawley, above n 26, at 305.

³⁰ Strack, McClane and Hawley, above n 26, at 305.

strangled on the ground, on a bed or sofa, or against a wall, and whether the perpetrator said anything during the attack.³¹ Such information not only helps evaluate possible injuries but also helps provide prosecutors with more compelling evidence.³²

Strangulation is associated with a wide range of signs and symptoms; these can be subtle, internal or delayed.³³ Visible signs of strangulation such as redness, cuts and thumbprints are easier to recognise and document than signs such as voice changes, confusion and involuntary urination, which are more subtle.³⁴ Internal symptoms can include: difficulty breathing and swallowing; neck or throat pain; tinnitus; cognitive changes; and, fracturing of the hyoid bone, larynx, and tracheal rings.³⁵ Petechiae (hemorrhages) can appear a few hours after the event, oedema (swollen tissue) in the neck can appear 24-48 hours after the event³⁶ and bruising can take several days to appear.³⁷ Medical examinations can reveal injuries not initially found by police.³⁸ The Commission noted, however, that thorough medical assessments are rarely carried out on family violence victims.³⁹

The Commission highlighted some problems with the process of recording strangulation. There is currently no specific strangulation question on the family violence incident report (POL 1310), which is used when police attend call-outs.⁴⁰ If

³¹ Strack, McClane and Hawley, above n 26, at 305.

³² Gael B Strack, George E McClane and Dean Hawley "A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim" (2001) 21(3) Emerg Med 314.

³³ Law Commission, above n 8, at 9.

³⁴ Pritchard and other, above n 1, at 6.

³⁵ Donald J Smith, Trevor Mills and Ellen H Taliaferro "Frequency and Relationship or Reported Symptomology in Victims of Intimate Partner Violence: The Effect of Multiple Strangulation Attacks" (2001) 21(3) J Emerg Med 323 at 327.

³⁶ Smith, Mills and Taliaferro, above n 35, at 327.

³⁷ Law Commission, above n 8, at 10.

³⁸ Strack, McClane and Hawley, above n 26, at 306.

³⁹ Law Commission, above n 8, at 18.

⁴⁰ Law Commission, above n 8, at 24.

strangulation is alleged, it is only noted in the narrative part of the report.⁴¹ Moreover, there is no uniform way to describe strangulation.⁴² It has been described as "he put pressure on her neck", "he grabbed her around the throat" and "he choked her".⁴³

Following a call-out, police transfer information about the incident into the National Intelligence Application (NIA).⁴⁴ The fact there is no uniform way of describing strangulation means it is not systematically coded in the NIA.⁴⁵ This makes it difficult to search electronically for strangulation and easily identify strangulation incidents.⁴⁶ When a charge is laid, information from the NIA is transferred to the Ministry of Justice's Case Management System (CMS)⁴⁷, which is used for information on the charges and criminal history when judges make decisions.⁴⁸

The Commission highlighted the risk that strangulation, as part of an offender's criminal history, can be overlooked in the current process.⁴⁹ Judges are unlikely to know about previous incidents of strangulation unless they are pointed out by police.⁵⁰ However, police will only know about incidents of strangulation if they are spotted in the narrative of incidents recorded on the NIA.⁵¹ The current process of recording strangulation is problematic, as those making decisions affecting the victim's safety, such as judges making bail or protection orders, may not know when strangulation has been used.⁵²

The Commission pointed to the current difficulty in proving elements of offences in which strangulation has occurred. The serious violent crimes in Part 8 of the Crimes

⁴¹ Law Commission, above n 8, at 24.

⁴² Law Commission, above n 8, at 24.

⁴³ Law Commission, above n 8, at 25.

⁴⁴ Law Commission, above n 8, at 25.

⁴⁵ Law Commission, above n 8, at 25.

⁴⁶ Law Commission, above n 8, at 25.

⁴⁷ Law Commission, above n 8, at 25.

⁴⁸ Law Commission, above n 8, at 25.

⁴⁹ Law Commission, above n 8, at 25.

⁵⁰ Law Commission, above n 8, at 25.

⁵¹ Law Commission, above n 8, at 25.

⁵² Law Commission, above n 8, at 25.

Act 1961 require proof of harm or a particular intention, which can be difficult to obtain in strangulation offences.⁵³ However, even when elements are made out, the defendant may only receive a minor charge that does not reflect the offending or may receive no charge at all.⁵⁴

It is difficult to prosecute strangulation in more serious offences that require a "wound" or an "injury" to have been inflicted, such as "wounding with intent to cause grievous bodily harm"⁵⁵ and "injuring with intent to cause grievous bodily harm",⁵⁶ because it is difficult to prove "wounding" and "injury".⁵⁷ Strangulation may not leave visible signs of "wounding", which requires breaking of the skin,⁵⁸ or "injuring", which is defined as "actual bodily harm".⁵⁹ These offences also require an element of intention to "wound" or "injure".⁶⁰ Perpetrators often use their hands in the act of strangulation, which makes it hard to prove that a "wound" or "injury" was intended.⁶¹ Furthermore, these offences are mainly concerned with physical harms and do not give sufficient weight to the psychological harm of strangulation.⁶²

While other offences may also be relevant in prosecuting strangulation, they pose a number of difficulties. Use of "assault with a weapon"⁶³ requires the meaning of "weapon" to be stretched to include parts of the human body.⁶⁴ Rendering someone unconscious can be charged under the offence of "disabling",⁶⁵ but it is difficult to prove loss of consciousness in a contested fact hearing.⁶⁶ Use of "attempted murder"⁶⁷

⁵³ Law Commission, above n 8, at 7.

⁵⁴ Law Commission, above n 8, 26.

⁵⁵ Crimes Act, s 188(1).

⁵⁶ Crimes Act, s 189(1).

⁵⁷ Law Commission, above n 8, at 28.

⁵⁸ *R v Waters* [1979] 1 NZLR 375 at 378 per McMullin J.

⁵⁹ Crimes Act, s 2(1).

⁶⁰ Law Commission, above n 8, at 28.

⁶¹ Law Commission, above n 8, at 29.

⁶² Law Commission, above n 8, at 28.

⁶³ Crimes Act, s 202C.

⁶⁴ Law Commission, above 8, at 30.

⁶⁵ Crimes Act, s 197.

⁶⁶ Law Commission, above n 8, at 30.

involves showing that the perpetrator intended to kill the victim, which is difficult in cases where the intention was to intimidate and coerce the victim.⁶⁸

Consequently, perpetrators are often charged with lesser assault charges. Assault offences, such as "common assault"⁶⁹ and "male assaults female",⁷⁰ do not require proof of injury or a particular intention.⁷¹

The Family Violence Death Review Committee found that 16 out of 29 strangulation assaults were reported to police.⁷² Charges were laid in 11 instances, with the most common being "male assaults female".⁷³ Only six of the 29 cases resulted in convictions.⁷⁴ The Committee was of the opinion that a charge of "male assaults female" seriously downplays an extremely dangerous and potentially lethal form of violence.⁷⁵

The Commission agreed and concluded that, because strangulation is commonly charged as "male assaults female", sentences imposed on defendants are low in relation to the severity of their offending.⁷⁶

The cases of *R v Barrett*⁷⁷ and *Waitai v R*⁷⁸ illustrate problems with charging consistency. In *Barrett* the defendant throttled the victim knowing that she had suffered a previous brain injury.⁷⁹ During the incident, the defendant also hit the

⁶⁷ Crimes Act, s 173

⁶⁸ Law Commission, above n 8, at 29.

⁶⁹ Crimes Act, s 196.

⁷⁰ Crimes Act, s 194.

⁷¹ Law Commission, above n 8, at 7.

⁷² Family Violence Death Review Committee, above n 2, at 100.

⁷³ Family Violence Death Review Committee, above n 2, at 100.

⁷⁴ Family Violence Death Review Committee, above n 2, at 100.

⁷⁵ Family Violence Death Review Committee, above n 2, at 100.

⁷⁶ Law Commission, above n 8, at 22.

⁷⁷ *R v Barrett* [2008] NZCA 474.

⁷⁸ *Waitai v R* [2014] NZHC 2116.

⁷⁹ At [6].

victim with a curtain rod, kicked her and pulled her hair.⁸⁰ The defendant was charged with "injuring with intent to cause grievous bodily harm" and sentenced to six years' imprisonment.⁸¹ In comparison, the defendant in *Waitai* put his pregnant partner in a chokehold until she could no longer breathe.⁸² This was repeated at least twice.⁸³ The defendant told the victim that he wanted her to "black out".⁸⁴ He was charged with "male assaults female" and only received 12 months' imprisonment.⁸⁵ The judge in *Waitai* noted, "if the charge had not been reduced from the more serious charge of injuring with intent, the starting point adopted could ... have been readily justified".⁸⁶ The initial starting point was 18 months imprisonment.⁸⁷

The fact that there is often a lack of obvious physical evidence of strangulation and problems with evidence gathering practices contribute to the difficulty of proving elements of existing serious violence offences. However, even when the elements of the offence can be made out, police may still only lay a minor charge of "male assaults female". This leads to inconsistent charging and lack of perpetrator accountability.

III An Analysis of the Law Commission's Recommendations

In the Report, the Commission's objectives for reform were to "raise the awareness of the dangerousness of strangulation", "provide better criminal justice mechanisms to hold perpetrators to account" and "keep the victims safe".⁸⁸

Its recommendations included introducing a new offence of non-fatal strangulation, noting family violence on offenders' criminal records, making strangulation an

⁸⁰ At [6].

⁸¹ At [1]-[3].

⁸² At [4].

⁸³ At [4].

⁸⁴ At [4].

⁸⁵ At [42].

⁸⁶ At [28].

⁸⁷ At [42].

⁸⁸ Law Commission, above n 8, at 52.

aggravating factor to be taken into account in sentencing, and introducing several operational changes.⁸⁹ While enacting a specific non-fatal strangulation offence is the Commission's main recommendation, its other recommendations are key to meeting the objectives of reform.

A Introduction of a Non-Fatal Strangulation Offence

The first recommendation is to enact a specific offence of non-fatal strangulation. The Commission recommended that:⁹⁰

Part 8 of the Crimes Act 1961 should be amended to make a person who strangles or suffocates another person liable to imprisonment for a term not exceeding seven years.

The second recommendation is "in that offence, "strangles or suffocates" should mean impedes normal breathing or circulation of the blood by intentionally applying force on the neck or by other means".⁹¹

Strangulation is commonly described as the obstruction of blood vessels or air passages in the neck, caused by external pressure to the neck, which results in asphyxia (a lack of oxygen to the body).⁹² Suffocation, however, is not limited to external pressure to the neck. It simply involves the "restriction of breathing resulting in a lack of oxygen to the brain".⁹³

The strangulation offence proposed by the Commission will cover a broad range of situations. The proposed offence goes beyond what is commonly understood as strangulation, that is, external pressure to the neck causing asphyxia. The offence will cover situations where suffocation is involved, for example, where the victim's mouth

⁸⁹ Law Commission, above n 8, at 3.

⁹⁰ Law Commission, above n 8, at 3.

⁹¹ Law Commission, above n 8, at 3.

⁹² H Douglas and R Fitzgerald "Strangulation, Domestic Violence and the Legal Response" (2014) 36 Syd LR 231 at 232.

⁹³ Law Commission, above n 8, at 38.

or nose is covered, or where the perpetrator sits or lies on the victim's chest (sometimes known as "burking").⁹⁴

While the offence could be narrowed to only cover situations commonly associated with strangulation (external pressure to the neck), this would overlook non-fatal suffocation that also occurs within family violence. The Commission stated that a new offence of non-fatal strangulation should extend to suffocation, as suffocation is also used to intimidate, control and coerce victims and demonstrate the perpetrator's ability to kill the victim.⁹⁵ Victims of suffocation are likely to experience the same intense vulnerability and same terror as a result of being unable to breathe as victims of strangulation. As with strangulation, suffocation, for instance through burking, can leave limited physical evidence and perpetrators are often not held accountable.⁹⁶

It is important not only that the new offence has a broad application, but also that the prosecution need not prove a particular intent on the part of the perpetrator or establish that a specific kind of harm was caused. Such requirements create unnecessary barriers for the prosecution.

In the proposed strangulation offence, the prosecution will only need to prove the intentional use of means which impeded "normal breathing or circulation",⁹⁷ not that it was the intention of the perpetrator to impede "normal breathing or circulation", or that the perpetrator understood the risk of this and continued anyway.⁹⁸ That is, only basic intent is required.⁹⁹ The Commission stated that the intention to strangle can be

⁹⁴ Law Commission, above n 8, at 38. See for example *Greathead v R* [2014] NZCA 49 (where the defendant forced one hand into the victim's mouth and with the other hand, held her nose to prevent her from breathing); and *R v Wilson* HC Greymouth CRI 2004-018-000522, 17 February 2005 (where the defendant knelt on the victim's back for a significant period of time).

⁹⁵ Law Commission, above n 8, at 38.

⁹⁶ Law Commission, above n 8, at 38.

⁹⁷ Law Commission, above n 8, at 37.

⁹⁸ Law Commission, above n 8, at 37.

⁹⁹ Law Commission, above n 8, at 38.

inferred from the conduct proved, as accidental pressure to the neck is "extremely unusual".¹⁰⁰

The prosecution will also not be required to prove a particular harm such as unconsciousness, a serious injury, or a coercive or controlling effect on the victim.¹⁰¹ Intentionally strangling the victim will be sufficient.

The Commission noted concerns with introducing a specific offence of non-fatal strangulation, but concluded that introducing a specific offence will fill a gap in the criminal justice system and will not "unreasonably increase the complexity of the existing framework".¹⁰²

The strangulation offence can be covered by generic offences in the current system. Where two or more charging options are available, a specific and a generic offence charge, inconsistent charging practices may result, as some offenders are charged with the strangulation offence and others with a generic offence.¹⁰³ If the charging consistency issue is not addressed, it is questionable whether a new offence can be justified, especially if operational issues were to be tackled to enable strangulation to be better dealt with in the current criminal justice system.

It is unclear how a specific offence of strangulation, if enacted, will be charged in practice. It is likely that the choice of charge will vary according to the facts of the case. Important factors to be taken into account will be what charge the evidence can establish, the maximum penalty of the charge and what the defendant is willing to plead to. Whether any other violence was involved will also be an important consideration.

If strangulation was the main or only form of violence in the incident the specific charge and a generic charge will be options. If strangulation was used in the course of

¹⁰⁰ Law Commission above n 8, at 38.

¹⁰¹ Law Commission, above n 8, at 38.

¹⁰² Law Commission, above n 8, at 58.

¹⁰³ Law Commission, above n 8, at 57.

other violence, the strangulation part of the offence may be included in the charge addressing the other violence involved.

In a situation where strangulation was the main form of violence and there is enough evidence to make out strangulation, then it is likely that the defendant will be charged with strangulation, as the penalty of seven years' imprisonment is relatively high. The generic offences with a penalty higher than seven years imprisonment are "aggravated wounding",¹⁰⁴ "injuring with intent to cause grievous bodily harm",¹⁰⁵ "wounding with intent to cause grievous bodily harm"¹⁰⁶ and "attempted murder".¹⁰⁷ However these offences require a particular intention on the part of the perpetrator and specific kinds of harm to be established, which makes them more difficult to prove than an offence of strangulation that does not require a specific harm and only requires a basic level of intention. Moreover, if an intention to cause grievous bodily harm from strangulation can be made out, then a charge of "attempted murder" may be considered.

If there is limited evidence to support a charge of strangulation, it is more likely that a charge of "male assaults female"¹⁰⁸ will be laid. This offence only has a maximum penalty of two years imprisonment. Currently, where there is limited evidence to prosecute wounding or injuring with intent to injure, offenders are often charged with "male assaults female".¹⁰⁹ A similar situation could result when there is insufficient evidence to support a strangulation offence. If a generic offence of wounding or injuring with intent cannot be made out, it is unlikely to be possible to make out strangulation, as evidence of a "wound" or "injury" caused from the application of force to the neck will generally be required.

¹⁰⁴ Crimes Act, s 191(1).

¹⁰⁵ Crimes Act, s 189(1).

¹⁰⁶ Crimes Act, s 188(1).

¹⁰⁷ Crimes Act, s 173(1).

¹⁰⁸ Crimes Act, s 194.

¹⁰⁹ Law Commission, above n 8, at 33.

In cases where strangulation is part of an offence that includes other violence, the situation will be different. In the case of *R v Grant*,¹¹⁰ where the defendant strangled the victim but also stomped on her head, stabbed her with a comb and gouged her eyes, the defendant was charged with "causing grievous bodily harm with intent to cause grievous bodily harm".¹¹¹ This offence has a maximum penalty of 14 years imprisonment.¹¹² The defendant received four and a half years' imprisonment.¹¹³ In such cases, the "criminality" of strangulation could be covered by serious charges targeting other aspects of the violence.¹¹⁴

The charge to which the defendant is willing to plead guilty also has an impact on the outcome. In situations in which the defendant is willing to plead guilty to a lesser charge rather than defend a more serious charge, the benefits of introducing this new offence will be undermined. In the case of *Waitai v R*¹¹⁵ mentioned above, even though the evidence of strangulation supported a more serious charge, the charge was downgraded from "injuring with intent to injure" to "male assaults female".¹¹⁶ Operational changes, to be discussed later, will play an important role in reducing issues related to plea bargaining. If police document evidence better and refer victims for medical assessments more consistently, and if the extreme seriousness of strangulation is better understood, prosecutors will be motivated to pursue more serious charges.

The Commission recommended a maximum penalty of seven years' imprisonment. Maximum penalties "reflect the seriousness of the worst class of case covered by the offence" and should "be proportionate to other penalties within the same Act and to analogous offences in other Acts".¹¹⁷

¹¹⁰ *R v Grant* DC Dunedin CRI-2011-212-193, 2 July 2012.

¹¹¹ At [8]-[10].

¹¹² Crimes Act, s 188(1).

¹¹³ At [36].

¹¹⁴ Law Commission, above n 8, at 17.

¹¹⁵ *Waitai v R*, above n 78.

¹¹⁶ At [7].

¹¹⁷ Law Commission, above n 8, at 41.

A maximum penalty of seven years' imprisonment is equivalent to maximum penalties for the offences of "wounding with intent to injure"¹¹⁸ and "aggravated injuring".¹¹⁹ The offence, in terms of penalty, is less serious than the offences of "wounding with intent to cause grievous bodily harm"¹²⁰ and "injuring with intent to cause grievous bodily harm",¹²¹ which have maximum penalties of 14 years and 10 years imprisonment respectively, but more serious than "injuring with intent to injure"¹²² and "assault with a weapon"¹²³ that both carry maximum penalties of five years' imprisonment.

The terror resulting from strangulation led the Commission to conclude that the harm was "greater than the harm of a minor injury and at least equivalent to a serious physical injury".¹²⁴ By contrast, the offence of "disabling"¹²⁵ has a maximum penalty of five years' imprisonment. While both the offences of disabling and strangulation have similarities in that the victim may lose consciousness, the Commission considered the terror caused by strangulation to be more serious and thus deserving a higher maximum penalty.¹²⁶

The maximum term of imprisonment of seven years is relatively high, especially compared to the offence "injuring with intent to injure",¹²⁷ which carries a maximum of five years imprisonment. A high penalty will help meet the objective of sending a clear message about the dangerousness of strangulation.

There will however be various drawbacks in setting a high penalty. The motivation to defend a charge with a high penalty will be greater and it is more likely to be resisted. This will make it harder for the prosecution to make out the charge. Perpetrators will

¹¹⁸ Crimes Act, s 188(2).

¹¹⁹ Crimes Act, s 191(2).

¹²⁰ Crimes Act, s 188(1).

¹²¹ Crimes Act, s 189(1).

¹²² Crimes Act, s 189(2).

¹²³ Crimes Act, 202C.

¹²⁴ Law Commission, above n 8, at 42.

¹²⁵ Crimes Act, s 197.

¹²⁶ Law Commission, above n 8, at 42.

¹²⁷ Crimes Act, s 189(2).

not want to face a more serious charge with a higher penalty, so it is likely that guilty pleas will be entered for lesser charges. This may lead to a continuation of the current situation in which strangulation is charged as the lesser offence of "male assaults female" with a maximum term of imprisonment of two years.¹²⁸ Moreover, if defendants are not charged with strangulation, but with another offence such as "male assaults female", the strangulation offence may not be recorded and flagged on offenders' criminal records. This undermines the safety of victims.

If the maximum penalty was lower, the strangulation offence might be less contested by defendants and consequently easier for prosecutors to make out. Arguably problems related to plea bargaining would also not be as apparent, as the motivation to avoid the charge would not be as high. A specific non-fatal strangulation offence, even with a lower penalty, would still achieve the "labelling" effect.

The enactment of a specific crime has a labelling effect whereby there is an increased awareness and understanding of the crime.¹²⁹ The enactment of a specific offence of strangulation will highlight the seriousness of strangulation. It will increase awareness and knowledge of strangulation, including its signs and symptoms and associated risks, amongst police, judges and other people dealing with victims of family violence.¹³⁰ The labelling effect will therefore help meet the Commission's objectives of reform, as enacting a strangulation offence will highlight the dangerousness of strangulation. This will help keep victims safe, as those dealing with victims of family violence will be more likely to ask if there has been strangulation and subsequently help victims receive medical treatment and support.¹³¹

In Minnesota, the enactment of a specific strangulation crime raised awareness of strangulation and increased the likelihood of those dealing with family violence taking steps to protect victims.¹³² Police also conducted more thorough

¹²⁸ Crimes Act, s 194.

¹²⁹ Law Commission, above n 8, at 53.

¹³⁰ Law Commission, above n 8, at 53.

¹³¹ Law Commission, above n 8, at 53.

¹³² Heather Wolfgram *Watch Report Part I: The Impact of Minnesota's Felony Strangulation Law* (WATCH, January 2007).

investigations.¹³³ If a strangulation crime is enacted in New Zealand it is likely that evidence will be better documented, as it will be possible to lay a more serious charge. This will help meet the objective of holding perpetrators to account.

In its report, the Commission stated that enacting the offence would lead directly to an improvement in police training, as the legislation would provide an educational framework.¹³⁴ It would help ensure that police understood the seriousness of strangulation and its lack of visible injuries. It would prompt police to document evidence of strangulation and refer victims for medical treatment.

A new offence can be justified, according to the Legislative Advisory Committee Guidelines, if "it will successfully address the policy objectives" and "those objectives cannot be achieved equally or better by other mechanisms".¹³⁵ It can be argued that other mechanisms to address strangulation are already available and that the Commission's objectives could be met in part by making operational changes. However, enacting a specific offence of non-fatal strangulation will make a significant contribution to meeting the Commission's objectives. It will, on balance, provide a more effective criminal justice mechanism than those currently available and will raise awareness about the lethality of strangulation.

Introducing an offence, however, does not in itself keep victims safe. The Commission's third recommendation seeks to address the future safety of victims.

B Noting Family Violence on Offenders' Criminal Records

The Commission's third recommendation is that:¹³⁶

The Crimes Act should be amended to require that, if a person pleads guilty to the strangulation offence or is found guilty of the strangulation offence, and the court is satisfied that the offence was a family violence offence, the

¹³³ Wolfgram, above n 132.

¹³⁴ Law Commission *Strangulation*, above n 8, at 53.

¹³⁵ Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (2014) at ch 1.

¹³⁶ Law Commission, above n 8, at 3.

court must direct that the offence be recorded on the person's criminal record as a family violence offence.

This recommendation is based on New South Wales legislation - the Crimes (Domestic and Personal Violence) Act 2007.¹³⁷ It is intended to meet the objective of keeping victims safe.

The recommendation will help ensure potential future harm is acknowledged and appropriate decisions are made to meet the objective of keeping victims safe. The Commission stated that it is important that "judges, when making decisions about an offender on matters like bail and protection orders, know when a previous strangulation offence was committed in family violence circumstances".¹³⁸ There is a risk of a future fatal attack for victims of strangulation within a family violence relationship.¹³⁹ The risk will not be evident from a charge of strangulation if family violence is not noted on the criminal record, unless police or prosecutors bring the information to the judge's attention.¹⁴⁰ The recommendation provides judges with information on previous strangulation incidents.

The section on problems prosecuting strangulation outlined current problems relating to the recording of strangulation. This recommendation will rely on police documenting and recording strangulation at family violence call-outs, ensuring strangulation is recorded in a uniform way and adequately transferring information to the CMS.

The recommendation requires that family violence be noted on offenders' criminal records if they plead guilty or are found guilty of a strangulation offence. However, if the offender is instead charged with a generic offence, but strangulation is involved, it will be equally important for it to be noted that strangulation occurred in a family violence context. The fact that strangulation is involved and the offence is a family violence offence highlights the vulnerable position of the victim. If strangulation is

¹³⁷ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12.

¹³⁸ Law Commission, above n 8, at 55.

¹³⁹ Law Commission, above n 8, at 55.

¹⁴⁰ Law Commission, above n 8, at 55.

alleged, but not admitted or proved, however, strangulation in a family violence context may not be noted on the offender's criminal record; steps should be taken to ensure that it is.

It will also be beneficial to note strangulation on the offender's record when strangulation does not occur in a family violence context, for example when it occurs in a sexual assault. Those dealing with the offender should know that the offender has used a serious and potentially lethal form of violence. In saying this, however, if the offender is charged with a generic offence, whether in a family violence context or not, but it is proven or admitted that strangulation occurred, it is not clear how the noting of this information on offenders' records will actually be done.

C Strangulation as an Aggravating Factor in Sentencing

In its fourth recommendation, the Commission proposes amending section 9 of the Sentencing Act 2002 to include strangulation as an aggravating factor to be taken into account in sentencing.¹⁴¹

The Sentencing Act 2002 provides a number of aggravating and mitigating factors that judges must consider when sentencing offenders. The Commission proposes that strangulation is added to the list of aggravating factors. The judge will be required to consider whether the use of strangulation increases the perpetrator's culpability.¹⁴² A separate specific offence signals that strangulation in itself should be criminalised.¹⁴³ Its inclusion as an aggravating factor for sentencing will emphasise the fact that the use of strangulation increases culpability.¹⁴⁴ This meets the objective of demonstrating the danger and seriousness of strangulation.

The recommendation will also help meet the objective of improving perpetrator accountability as it will ensure that strangulation is not overlooked as an important

¹⁴¹ Law Commission, above n 8, at 3.

¹⁴² Law Commission, above n 8, at 50.

¹⁴³ Law Commission, above n 8, at 49.

¹⁴⁴ Law Commission, above n 8, at 49.

element in a generic offence.¹⁴⁵ It is also more likely that any evidence of strangulation will be documented carefully and less likely that strangulation will be removed from the summary of facts.¹⁴⁶ Nevertheless, for strangulation to be considered as an aggravating factor it will still have to be admitted or proven in the offence. This means that the prosecution will still have the burden of establishing that strangulation occurred, unless it is admitted by the defendant.

How successfully this recommendation will work in practice is unclear. It is likely that there will again be problems with charging consistency – choosing between the specific offence and the generic offence (with strangulation as an aggravating factor). Guidance will need to be given in relation to the degree to which sentences should be uplifted in recognition of strangulation. Importance will also need to be placed on how strangulation is recorded if it is charged as an aggravating factor.

Strangulation as an aggravating factor will be considered when sentencing offenders for generic offences.¹⁴⁷ If both the recommendations of enacting a specific offence and adding strangulation as an aggravating factor are adopted, the prosecution will have to decide whether to pursue the specific strangulation offence or the generic offence. The problems with charging consistency discussed in the section on introducing a specific strangulation offence will similarly apply. The charge chosen will depend on what charge can be supported by the evidence, the maximum penalties of the charges concerned and what the offender is willing to plead to. The decision will be based on the facts of each case.

Charging strangulation as an aggravating factor may be chosen where the other violence involved is serious, as in offences involving grievous bodily harm or sexual assault. For example, in the case of *R v Cant*,¹⁴⁸ the defendant was charged with "assault with intent to commit sexual violation"¹⁴⁹ and sentenced to six and a half years' imprisonment. The defendant followed a woman who was walking home at

¹⁴⁵ Law Commission, above n 8, at 49.

¹⁴⁶ Law Commission, above n 8, at 49.

¹⁴⁷ Law Commission, above n 8, at 50.

¹⁴⁸ *R v Cant* HC Auckland CRI 2006-004-26731, 20 May 2010.

¹⁴⁹ Crimes Act, s 129(2).

around 2:30 am.¹⁵⁰ He pushed her into a garden, tried to undo her jeans and demanded sex.¹⁵¹ During the event, the defendant placed a hand around the victim's throat and another hand on her knee.¹⁵² In cases such as this, acknowledging strangulation as an aggravating element in the offence will be beneficial. It will highlight the seriousness of strangulation and may increase the perpetrator's culpability.

At the other end of the scale, strangulation may be part of an offence where the defendant is willing to accept a lesser charge of "male assaults female". Strangulation as an aggravating factor will also be beneficial in these circumstances; the judge will have discretion as to whether strangulation increases culpability over and above the criminality of the behaviour for which he or she is convicted.¹⁵³ However, there are likely to be difficulties with offences that have low maximum penalties such as "male assaults female", which only has a maximum penalty of two years' imprisonment. The low maximum penalty means that there will be limited scope for an aggravating factor of strangulation to be taken into account and contribute substantially to the final sentence.¹⁵⁴ There will need to be guidance as to how judges should exercise discretion when considering aggravating factors in low maximum penalty offences.

The existing "guideline judgments" (previously known as tariff decisions) will need to be amended and extended in order to accommodate a new aggravating factor of strangulation. The guideline judgments issued by the Court of Appeal provide guidance as to important factors to be taken into account in sentencing and the weight of those factors for particular offences.¹⁵⁵ They are intended to provide assistance to both judges and counsel on sentencing for particular offences.¹⁵⁶ The guideline judgments of *R v Taueki*,¹⁵⁷ which considered sentencing of cases that involve serious

¹⁵⁰ At [23].

¹⁵¹ At [23].

¹⁵² At [23].

¹⁵³ Law Commission, above n 8, at 50.

¹⁵⁴ See, for example, *Waitai v R* [2014] NZHC 2116.

¹⁵⁵ Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [SAC6].

¹⁵⁶ Robertson, above n 155, at [SAC6].

¹⁵⁷ *R v Taueki* [2005] 3 NZLR 372; (2005) 21 CRNZ 769 (CA).

violence and *R v AM*,¹⁵⁸ which considered sentencing of sexual violation cases, are most relevant.

In *R v Taueki* the Court outlined particular features of offending contributing to the seriousness of a grievous bodily harm offence. The features included: extreme violence; premeditation; serious injury; use of weapons; attacking of the head; multiple attacks; home invasion; and, victim vulnerability.¹⁵⁹ The Court stated that the sentencing judge would consider the factors that applied in the case and identify the appropriate "sentencing band" and starting point within that "band".¹⁶⁰ There are three bands; the first band has a starting point range of three to six years, the second five to 10 years and the third nine to 14 years.¹⁶¹ The appropriate band and the starting point within that band are largely determined by how many of the aggravating factors are present. The Court stated that the starting point should be at the lower end of band one where none of the aggravating factors was present, but that where one or more factors are present, the starting point should be higher.¹⁶² Violence that is extreme or life threatening should not be considered under band one.¹⁶³ Strangulation can be considered as a life-threatening form of violence and will thus justify a starting point in band two or three.

The second band is appropriate for grievous bodily harm offending that involves two or three of the aggravating factors.¹⁶⁴ The third band normally involves three or more of the aggravating factors in serious offending and where the "combination of factors is particularly grave".¹⁶⁵

The Court acknowledged that these bands are only guidelines, that they should be used flexibly and that the starting point should always reflect the culpability of the

¹⁵⁸ *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750, (2010) 24 CRNZ 540.

¹⁵⁹ At [31].

¹⁶⁰ At [31].

¹⁶¹ At [34].

¹⁶² At [36].

¹⁶³ At [36].

¹⁶⁴ At [38].

¹⁶⁵ At [40].

offending.¹⁶⁶ If strangulation is involved, the judge should have discretion as to whether the strangulation is taken into account and if it is, what band of offending is justified. The band chosen is likely to depend on other aggravating factors present in the offending and the particular characteristics of the strangulation, for example, whether the victim lost consciousness, how many times the victim was strangled and what kind of injuries were sustained. The terror and other psychological effects of strangulation will also need to be considered. Guidance as to how judges should exercise discretion in considering strangulation as an aggravating factor will be needed.

Similarly the Court in *R v AM* identified aggravating factors and bands of offending for the offences of rape and sexual violation by unlawful sexual connection.¹⁶⁷ This guideline judgment will have to be amended and extended to accommodate strangulation as an aggravating factor.

If this recommendation is adopted it will be important that information is recorded and made available on sentencing decisions where strangulation is an aggravating factor. The Commission emphasised the importance of recording information, in particular ensuring that any previous instances of strangulation are on the offender's record so that the risk of future fatal attacks can be considered.¹⁶⁸

In circumstances where the defendant is charged with a generic offence and strangulation is an aggravating factor in that offence, it will be crucial that information regarding the strangulation aspect of the offence is accessible to the judge. If a defendant is coming up for bail but only the generic charge is available, the safety of victims is less likely to be considered. Recording strangulation as an aggravating factor to be taken into account will ensure that the seriousness of strangulation is properly recognised and will ensure that perpetrators are held fully accountable, especially in future related decisions.

¹⁶⁶ At [42].

¹⁶⁷ At [34]-[120].

¹⁶⁸ Law Commission, above n 8, at 50.

D Operational Changes

The Commission made a number of recommendations relating to operational changes. Its fifth recommendation is that the "Police family violence incident report (POL 1310) should be amended to include questions designed to screen for strangulation".¹⁶⁹ The sixth recommendation is that the "Police National Intelligence Application (NIA) should be amended to record specifically whether or not a family violence incident included an allegation of strangulation".¹⁷⁰ The final recommendation is that:¹⁷¹

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.

Ensuring that police ask whether strangulation was involved in an incident will help meet the Commission's objectives of ensuring perpetrators of strangulation are held accountable and keeping victims safe. Asking whether strangulation has occurred and subsequently documenting any signs and symptoms of it will provide prosecutors with compelling evidence. It will also ensure that victims of strangulation receive appropriate support and medical attention.

The San Diego study highlighted room for improvement in identifying and documenting strangulation.¹⁷² The Commission's research also indicated that frequently police do not ask if strangulation has occurred if signs of strangulation are not present and victims themselves do not mention strangulation if more obvious injuries from other forms of violence are present.¹⁷³ However, the police *Family*

¹⁶⁹ Law Commission, above n 8, at 3.

¹⁷⁰ Law Commission, above n 8, at 3.

¹⁷¹ Law Commission, above n 8, at 3.

¹⁷² Strack, McClane and Hawley, above n 26.

¹⁷³ Law Commission, above n 8, at 23.

*violence policy and procedures*¹⁷⁴ document indicates that police are aware of strangulation as a form of violence and do check for signs of strangulation. The document instructs police, if they suspect strangulation, to complete accurate written documentation and obtain high quality photographs at the time of the occurrence and again 24 - 48 hours later.¹⁷⁵ It also notes that strangulation can be used as a repetitive control technique and that there is a link between strangulation and further serious violence and homicide.¹⁷⁶ Furthermore, it notes that strangulation victims should seek urgent medical attention, as the physical effects (including death), may not take effect for some time after the event.¹⁷⁷

Ensuring allegations of strangulation are specifically noted in the NIA under recommendation six will ensure that when police and prosecutors refer to the NIA for information on call-outs and previous offending, to inform bail decisions or protection orders, previous strangulation is apparent on the record. If there is a history of strangulation, the risk of future fatality can be considered and appropriate action can be taken to help ensure victims are kept safe.¹⁷⁸

In summary, the fifth and sixth operational changes will help ensure the process of recording strangulation is improved and that strangulation is recorded in a uniform way.

The seventh recommendation, will give those who deal with family violence victims a better understanding of strangulation. The Commission stated that education would cover:¹⁷⁹

- the prevalence of strangulation in family violence;

¹⁷⁴ New Zealand Police "Family violence policy and procedures" (March 2015) Pacific Prevention of Domestic Violence Programme (PPDVP) <www.ppdvp.org.nz>.

¹⁷⁵ At 21.

¹⁷⁶ At 21.

¹⁷⁷ At 21.

¹⁷⁸ Law Commission, above n 8, at 50.

¹⁷⁹ Law Commission, above n 8, at 51.

- the signs and symptoms of strangulation, including the fact that, while half of victims may not present with any outwardly visible signs, there may be other indicators that can be identified with proper assessment;
- the effect of strangulation as a method of intimidation, control and coercion; and
- the associated risk of a future fatal attack

A better understanding of the characteristics and risks of strangulation and its seriousness will increase the sensitivity with which victims of family violence are dealt with, and increase their future safety. It will also improve evidence gathering practices and consequently increase the likelihood that perpetrators are held accountable.¹⁸⁰

While the Commission's operational and educational recommendations will contribute substantially to meeting the Commission's objectives for reform, there is no recommendation that addresses the need for victims of family violence to be routinely referred for medical assessments.

The Commission reported that it is rare for victims of family violence to receive medical assessments,¹⁸¹ but it does not recommend any operational changes specifically to increase the number of strangulation victims who receive medical assessments. This is a weakness in the Commission's report. While medical assessments can be time-consuming and costly, they not only ensure that victims' injuries are properly treated and that the victim understands how serious strangulation is, but they also provide compelling evidence of strangulation for the prosecution. If strangulation is alleged, police need to refer victims of family violence for medical assessments. Operational changes need to be made to ensure that medical assessments are routinely undertaken. The information derived from medical assessments will help ensure that offenders are charged with the strangulation offence and the charge is not undermined by plea bargaining.

¹⁸⁰ Law Commission, above n 8, at 51.

¹⁸¹ Law Commission, above n 8, at 18.

There is a marked difference between how police and medical professionals explain and document injuries. In one case, a police officer described an injury as "red abrasions to the neck" while a physician described the same injury as "multiple linear contusions to both sides of the neck with overlying redness, mild edema and tenderness".¹⁸² A better description of the injury adds weight to the evidence for the prosecution.¹⁸³

Dr Clare Healy discusses how GPs should approach treating patients who have been subject to strangulation. The size, shape, place and characteristics of each injury should be documented, together with other important information including: how the patient was strangled; how long it lasted; how many times it occurred; any vocal changes; difficulty swallowing, breathing or talking; loss of consciousness; and, loss of bowel or bladder control.¹⁸⁴ The mental health of the victim and any psychological injuries should also be noted. When victims have been abused it is important that emotional support is provided, risk is assessed and information is provided on local specialist agencies.¹⁸⁵

Front line health professionals should establish whether the victim is in need of medical attention and immediately identify risks of: airway problems; hidden injuries; the extent of brain damage from loss of blood and oxygen supply; and, whether the victim lost consciousness.¹⁸⁶

Dr Healy acknowledges that victims of family violence may feel uncomfortable disclosing certain information due to shame, embarrassment and low self-esteem.¹⁸⁷

¹⁸² Strack, McClane and Hawley, above n 26, at 306.

¹⁸³ Gael B Strack and GE McClane *How to Improve your Investigation and Prosecution of Strangulation Cases* (September 2007) at 11.

¹⁸⁴ Clare Healy "Making a Difference after Family Violence" *New Zealand Doctor* (New Zealand, 17 December 2008) at 20.

¹⁸⁵ Healy, above n 184, at 21.

¹⁸⁶ Victorian Order of Nurses for Canada *The Identification, Care and Advocacy of Strangulation Victims: Information for Front Line Workers and Crisis Advocates* (May 2012) at 8.

¹⁸⁷ Healy, above n 184, at 21.

Patients who have experienced strangulation may minimise the event and direct questions may be required.¹⁸⁸

Operational changes are critical to ensuring that perpetrators are held accountable under the proposed offence of non-fatal strangulation.

IV Conclusion

Strangulation constitutes serious criminal behaviour. It is a highly gendered form of violence used between intimate partners to instill fear and control victims.¹⁸⁹ It can be lethal and is an important risk indicator for future fatality.¹⁹⁰ However, there are difficulties with the prosecution of strangulation under the current offences in Part 8 of the Crimes Act 1961 due to the frequent lack of physical evidence of strangulation.¹⁹¹

This paper has analysed the Commission's recommendations for reform relating to non-fatal strangulation and discussed how they are likely to work in practice. In particular it has explored the new strangulation offence and highlighted the importance of accompanying operational changes.

The paper argues that the Commission's recommendations should be adopted and in particular that a non-fatal strangulation offence extending to suffocation should be enacted. However it points to important issues that have yet to be addressed.

While enacting a new non-fatal strangulation offence will raise awareness about the dangerousness of strangulation and provide a better criminal justice mechanism to hold perpetrators accountable, there are issues around charging consistency, which could further be undermined by plea negotiations. Where two or more charging

¹⁸⁸ Healy, above n 184, at 21.

¹⁸⁹ Pritchard and others, above n 1, at 1.

¹⁹⁰ Glass and others, above n 5, at 335.

¹⁹¹ Law Commission, above n 8, at 33.

options are available, a specific strangulation offence charge and a generic offence charge, inconsistent charging practices may result.

Introducing an offence does not in itself help keep victims safe; the Commission's third recommendation addresses this issue. The future safety of victims will be improved with the noting of previous incidents of strangulation in a family violence offence on offenders' criminal records. When decisions such as bail or protection orders are made, judges will be able to consider the offenders' criminal record and make appropriate decisions.¹⁹² If an offender is charged with a generic offence, whether in a family violence context or not, but it is proven or admitted that strangulation occurred, this should also be noted on offender's records.

The recommendation that s 9 of the Sentencing Act 2002 be amended to take strangulation as an aggravating factor into account in sentencing provides an effective way of acknowledging the seriousness of strangulation and gives judges' discretion as to whether strangulation should increase defendants' culpability.¹⁹³ However there are issues relating to the recommendation to be resolved. Guideline judgments will have to be amended and extended. How much of an impact strangulation should have on sentencing will need to be established. Furthermore, if strangulation is taken into account as an aggravating factor, how this will be recorded on offenders' records also needs to be established.

The operational changes recommended by the Commission will help keep victims safe as police and other front line workers will be more aware of strangulation and its risks and effects, and consequently look for signs of strangulation or ask whether it was involved.¹⁹⁴ It is particularly important that evidence gathering practices are improved. Referring victims for medical assessments and documenting the findings, while not specifically recommended, is key to ensuring that prosecutors have the necessary evidence to support charges against offenders. Limited evidence makes it difficult for prosecutors to make out charges and hold perpetrators accountable. The

¹⁹² Law Commission, above n 8, at 55.

¹⁹³ Law Commission, above n 8, at 50.

¹⁹⁴ Law Commission, above n 8, at 51.

success of the proposed legislation will be compromised if the recommended operational changes are not fully implemented.

Despite some concerns surrounding the new offence of non-fatal strangulation, its enactment can be strongly justified. Non-fatal strangulation constitutes very serious criminal conduct. A gap in the current criminal justice framework means perpetrators are not being held accountable. Enacting the new offence will highlight the seriousness of strangulation and educate individuals dealing with victims of family violence and the general public, as well as enable perpetrators to be held properly to account. If the new offence is implemented together with all the required associated operational changes it will fill a serious gap in the current criminal justice system.

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Word Count

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