

Domestic Violence, Sex, Strangulation and the ‘Blurry’ Question of Consent

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journals.sagepub.com/home/clj**Heather Douglas**

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Abstract

A stand-alone strangulation offence was introduced in Queensland, Australia in 2016. One of the elements of the Queensland strangulation offence is that the victim did not consent to the strangulation. This paper reviews the harms and dangers associated with strangulation before overviewing the debates about the use of strangulation during sex. Drawing on focus group discussions conducted with domestic violence support workers and men's behaviour change workers, we discuss four overlapping themes identified in the discussions. These were perceptions that: strangulation during sex is normalised; consent is not informed; it happens in the context of coercive control; and the requirement of consent opens a loophole in the strangulation offence. Considering the issues raised, and the clear risks and harms, we suggest that consideration should be given to whether it is ever possible to consent to strangulation and we consider possible reforms such as following the two-tiered approaches to consent used in the England and Wales law and elsewhere in Australia. We also conclude that law reforms such as these are partial solutions and there is significant need for more community education about the risks and harms of strangulation.

Keywords

strangulation, choking, consent, domestic violence, sexual violence, qualitative research

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Introduction

In recognition of the risks and dangers associated with strangulation in the context of domestic violence, stand-alone offences of strangulation have been introduced in the United States, England and Wales, Canada, New Zealand and Australian states and territories.¹ In 2016 Queensland, Australia introduced a strangulation offence. The offence only applies where strangulation is used in circumstances where the parties are in a ‘domestic relationship’² or where it is associated with domestic violence.³ The absence of the complainant’s consent – ‘without the other person’s consent’ – is an explicitly stated element of the Queensland strangulation offence. To date, there has been no consideration about how the requirement of a lack of consent affects the application of the offence, the responsibility of those accused of strangulation regarding consent or how the strangulation offence interacts with sexual offences. In the context of growing debates about the use of strangulation during sex,⁴ it is perhaps surprising that consent to strangulation has not been considered by the courts in Queensland.⁵ However, the issue is a complex one and the differences between the, arguably sometimes, consensual use of strangulation in sexual encounters versus its non-consensual use as an aspect of domestic abuse may be difficult to untangle. In this article, we aim to shed light on this complicated issue. We draw on focus groups with participants working in both domestic and family violence support services and men’s behaviour change programs to explore how strangulation during sex is raised by their clients who have experienced or perpetrated domestic abuse. The voices of these workers are important because these workers often assist clients to navigate the complex terrain of sex, strangulation, and consent in the context of domestic violence. In the first section we review the harms and dangers associated with strangulation before over-viewing the debates about the use of strangulation during sex. We then explain the Queensland context and offence before considering the results from our focus groups. We identify and consider key themes raised by the participants in the focus groups and, in light of the issues raised, we conclude with some recommendations for practice change and law reform. We conclude that there continues to be a significant need for more community education about the risks and harms of strangulation. We also suggest that, given the risks and harms associated with strangulation, consideration should be given to whether it is ever legally permissible to strangle another person and, connected to this, the need for legal reform.

The Harms and Risks of Strangulation

Irrespective of consent or the lack thereof, the harms and risks associated with strangulation are well-documented. Research in the USA has provided evidence as to the timing of unconsciousness and fatality resulting from strangulation.⁶ After examining filmed hangings, researchers observed that loss of

1. S. Edwards and H Douglas, ‘The criminalisation of a dangerous form of coercive control: Non-fatal Strangulation in England and Wales and Australia’, (2021) 8 (1) *Journal of International and Comparative Law* 87.

2. This includes both a current and former intimate personal relationship), a family relationship or an informal care relationship, see Domestic and Family Violence Protection Act 2012 (Qld) ss.13–20.

3. *Criminal Code, 1899* (Qld) s. 315A.

4. See generally research on this topic lead by Debby Herbenick in the USA, eg: D. Herbenick, L. Guerra-Reyes, C. Patterson, Y.R. Rosenstock Gonzalez, C. Wagner, and N. Zounlome ‘“It was scary, but then it was kind of exciting”: Young women’s experiences with choking during sex’ (2022) 51(2) *Archives of Sexual Behavior* 1103; D. Herbenick, T. Fu, C. Patterson, Y.R. Rosenstock Gonzalez, M. Luetke, D. Svetina Valdivia, H. Eastman-Mueller, L. Guerra-Reyes, and M. Rosenberg ‘Prevalence and characteristics of choking/strangulation during sex: Findings from a probability survey of undergraduate students’ (2023) 71(4) *Journal of American College Health* 1059.

5. As we discuss below two cases, indirect consideration through sex cases, see *R v Brown* [2020] QCA 159 and *R v LAU* [2022] QCA 37.

6. A. Sauvagneau, R. LaHarpe, D. King, G. Dowling, S. Andrews, S. Kelly, C. Ambrosi, J. Guay and V. Geberth, ‘Agonal Sequences in 14 Filmed Hangings With Comments on the Role of the Type of Suspension, Ischemic Habituation, and Ethanol Intoxication on the Timing of Agonal Responses’ (2011) 32 *Forensic Medical Pathology* 104.

consciousness of the person occurred between 8 and 18 s, convulsions between 10 and 19 s, and loss of muscle tone between 1 min and 17 s and 2 min and 45 s.⁷ The short time period for which unconsciousness can occur is troubling. It is still more troubling when considered alongside other research findings that show that a relatively low level of pressure is needed to cause death from strangulation – described as less than that required to open a can of soft drink.⁸ These factors also have implications for the provision and withdrawal of consent. In a highly unethical study published in the 1940s, participants were strangled using an inflatable pressure cuff held around the neck.⁹ They were told they could release the pressure cuff as soon as they wished to. However, the researchers observed that many of the participants' hands appeared to freeze, and they were unable to move to release the cuff or communicate that wish, requiring the researcher to release the pressure.¹⁰ While the research underpinning this study was unethical, it is the only study to demonstrate that while participants may have wanted strangulation to stop, some were unable to move or communicate that desire. This last finding may be important in situations where the strangulation was initially consensual but later became non-consensual.

In the context of consensual strangulation, Shields and Hunsaker have identified that 'a fine line exists between the attainment of cerebral hypoxia for sexual pleasure and unconsciousness that may quickly ensue and lead to inevitable death'.¹¹ Most people do not become unconscious from, and generally survive, strangulation. Research has shown that the frequency of reported loss of consciousness resulting from strangulation has been reported to vary from 9% to 38% in cases of non-fatal strangulation.¹² However, in Australia from 2010 to 2018, suffocation or strangulation was the second most common mechanism of fatal assault in intimate partner femicide, accounting for 12.9% of all deaths.¹³

In recent years, the harms and risks associated with strangulation have become more widely known. Studies observe that a range of clinical symptoms are associated with strangulation, including changes to vision and hearing, sore throat, anxiety, paralysis, pregnancy miscarriage and brain injury.¹⁴ Many survivors of strangulation also report feeling that they were close to death when they were strangled with some reporting post-traumatic stress, depression, suicidality and dissociation as a result of the incident.¹⁵ In the context of intimate partner relationships, strangulation is recognised as a significant risk factor for

7. Ibid. at 106.

8. K. Jordan, J. Murphy, A. Romine and L. Varela-Gonzalez, 'A case of nonfatal strangulation associated with intimate partner violence' (2020) 42 (930) *Advanced Emergency Nursing Journal* 185.

9. R. Rossen, H. Kabat and J.P. Anderson, 'Acute arrest of cerebral circulation in man.' (1943) 50 (5) *Archives of Neurology and Psychiatry* 510. We note that while this study provide this valuable insight it would not receive modern ethical approval, see generally A. Dawson, S. Lignou, C. Siriwardhana and D. O'Mathuna 'Why Research Ethics Should Add Retrospective Review' (2019) 20 (68) *BMC Medical Ethics*.

10. Ibid. at 515.

11. L. Shields and J. Hunsaker, 'Autoerotic asphyxiation' in B. Madea (ed.), *Asphyxiation, suffocation and neck pressure deaths* (Florida, CRC Press, 2020) 292.

12. D. Middtun, 'Involuntary loss of bowel-control in sexual assault with non-fatal strangulation: A case report' (2021) 3 *Forensic Science International: Reports*, 100200.

13. Australian Domestic and Family Violence Death Review Network and Australia's National Research Organisation for Women's Safety, *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018*, Research Report 03/2022 (Sydney, ANROWS, 2022).

14. A. Foley, 'A Strangulation: Know the symptoms, save a life' (2015) 41(1) *Journal of Emergency Nursing* 89, at 89.

M. Funk and J. Schuppel 'Strangulation injuries.' (2003) 102(3) *Wisconsin Medical Journal* 41; L. Kwako, N. Glass, J. Campbell, K. Melvin, T. Barr, and J. Gill, 'Traumatic brain injury in intimate partner violence: A critical review of outcomes and mechanisms.' (2011) 12(3) *Trauma, Violence, & Abuse* 115.

15. H. Douglas and R. Fitzgerald, 'Women's stories of non-fatal strangulation: How should the criminal justice system respond?' (2022) 22(2) *Criminology & Criminal Justice* 270; S. Vella, M. Miller, J. Lambert and M. Morgan "'I felt close to death': A Phenomenological study of female strangulation survivors of intimate terrorism' (2017) 29(4) *Journal of Feminist Family Therapy* 171; H. Bichard, C. Byrne, C. Saville and R. Coetzer 'The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review' (2021) 12 *Neuropsychological Rehabilitation* 1164.

future harm and fatality¹⁶ and is increasingly associated with gendered violence in relationships that are coercive and controlling.¹⁷

Strangulation During Sex

In the context of consensual sex, strangulation, often called choking, has been recognised in BDSM (the acronym refers to bondage and discipline, domination and submission) circles for some time where it is considered an ‘extreme’¹⁸ activity because of its unpredictable outcomes. One review of case studies involving ‘consensual asphyxiation’ found that ‘even in the company of an experienced, sober partner, [it] can be extremely dangerous’.¹⁹ Despite the risks, researchers report that strangulation is gendered, but appears to be common and considered relatively ‘normal’ during sex between young people.²⁰ In a survey of 4352 college students (where 49.9% of respondents were women and 48.6% were men), Herbenick and colleagues found that 33% of women, 22.3% of transgender and gender non-binary participants and 6% of men reported being choked during sex more than five times in their life.²¹ While 26.5% of women reported being choked as did 6.6% of men, choking one’s partner was reported by 5.7% of women and 24.8% of men. Herbenick and colleagues observe:

Taken together, being choked appears to be more common among groups of people who generally hold less social power and who disproportionately experience sexual assault (e.g., cisgender women, TGNB individuals, LGBTQ+ individuals, first year female college students, some racial/ethnic minoritized individuals). However, additional research is needed to understand these relationships.²²

Notably, in a survey of undergraduate students in the USA, the most common behaviours participants considered to be ‘rough sex’ were: choking, hair pulling and spanking during sex.²³ In interviews with male respondents, Herbenick and colleagues found that respondents thought that trust was needed for rough sex but generally they lacked understanding that choking could be damaging.²⁴ In interviews with women college students, Herbenick and colleagues²⁵ found that respondents generally associated choking with rough sex and with a stereotypical expected and desired masculine behaviour. While women reported to Herbenick and colleagues that they had sometimes choked male partners, many also mentioned their ‘small hands or bodies and their inability to affect men physically in the same

16. N. Glass, K. Laughon, J. Campbell, C.R. Block, G. Hanson, P.W. Sharps and E. Taliaferro ‘Non-fatal strangulation is an important risk factor for homicide in women’ (2008) 35 *The Journal of Emergency Medicine* 329.

17. Douglas and Fitzgerald above n. 15 at 272. For obvious reasons, it is difficult to determine whether fatality results from consensual strangulation, however in a number of reported cases courts have accepted that the victim consented to the strangulation before she died, see E. Sheehy, I. Grant and L. Gotell ‘Resurrecting “She asked for it”: The rough sex defence in Canada’ (2023) 60(3) *Alberta Law Review* 651, at 652.

18. E. Craig ‘The Legal Regulation of Sadomasochism and the So-Called “Rough Sex Defence”’ (2021) 37(2) *The Windsor Yearbook of Access to Justice* 402 at 416.

19. K. Bauer, C. Kristina and C. Jackowski ‘Fatal strangulation during consensual BDSM activity: three case reports.’ (2021) 135) *International Journal of Legal Medicine* 347, at 352.

20. Herbenick et al 2023, above n. 4 at 1068.

21. Ibid. at 1065.

22. Ibid. at 1068.

23. D. Herbenick, T. Fu, D. Svetina Valdivia, C. Patterson, Y. Rosenstock Gonzalez, L. Guerra-Reyes, H. Eastman-Mueller, J. Beckmeyer, and M. Rosenberg ‘What is rough sex, who does it, and who likes it? Findings from a probability survey of U.S. undergraduate students’ (2021) 50(3) *Archives of Sexual Behavior* 1183 at 1188.

24. D. Herbenick, L. Guerra-Reyes, C. Patterson, Y. Rosenstock Gonzalez, C. Wagner and N.O.O. Zounlome ‘“If Their Face Starts Turning Purple, You Are Probably Doing Something Wrong”: Young Men’s Experiences with Choking During Sex’ (2022) 48(5) *Journal of Sex & Marital Therapy*, 502 at 506.

25. Herbenick et al., 2023, above n. 4.

way that men can affect women',²⁶ suggesting that women accepted in some way that physical harms associated with strangulation are likely to be gendered.²⁷

According to Sowersby, Erskine-Shaw and Willmott,²⁸ rough sex covers a range of behaviours including 'healthy' sexual fetishes but also extends to more 'problematic' behaviours including fantasies of rape and sexual assault, it can include violence and may include strangulation. Sowersby and colleagues observe there are 'numerous contradictory gendered meanings that cohere around rough sex, sexual violence, and the rough sex defense'.²⁹ Researchers have challenged the narrative of women's agency (and consent) in the context of 'rough sex', including sex that involves strangulation. For example, Edwards argues that there is no evidence that strangulation heightens women's sexual experience but on the contrary 'there is evidence that men routinely use strangulation as a method of assault, that it is a trope and a reality in pornography, that women die in the course of it and that it is part of the misogyny narratives'.³⁰

Some studies have explored the links between reported non-consensual sexual violence and strangulation, finding that between 7.4% and 12% of women who report sexual violence to support and referral services report co-occurring strangulation.³¹ In White and colleagues' study of sexual assaults reported to a sexual assault referral centre in the UK, the prevalence of strangulation was found to be higher, at 18.9%, when the alleged perpetrator was a partner or ex-partner of the victim as compared to those raped by acquaintances of over 24 hours or strangers.³² Snow surveyed 84 women about their experience of non-consensual violence during sex and found that for most women (n 61, 72.6%) the non-consensual violence they experienced during sex included strangulation/choking/pressure to the neck.³³ Snow also identified that 64% of the women interviewed said their partner used sex as a way to control them.³⁴ Non-consensual strangulation is recognised as both a relatively common form of controlling behaviour in the context of domestic violence³⁵ and a form of rough sex.³⁶ Notably, Herring has argued that rough sex should primarily be regarded as a marker of coercive control in relationships and a way of reinforcing patriarchal power in society.³⁷

Research consistently finds that sexual violence is under-reported by victims.³⁸ In Australia, results from the Australian Bureau of Statistics 2016 Personal Safety Survey showed that most (87%) women

26. Herbenick et al., 2022, above n. 4 at 1115.

27. Herbenick et al., 2023, above n. 4 at 1065.

28. C. Sowersby, M. Erskine-Shaw Marianne and D. Willmott 'Masochist or Murderer? A Discourse Analytic Study Exploring Social Constructions of Sexually Violent Male Perpetrators, Female Victims-Survivors and the Rough Sex Defense on Twitter.' (2022) 13 (article 867991) *Frontiers in Psychology* 1.

29. *Ibid.* at 5.

30. S. Edwards, 'Assault, Strangulation and Murder- Challenging the Sexual Libido Consent Defence Narrative.' In A. Reed and A. Bohlander with N. Wake and E. Smith (eds.), *Consent: Domestic and Comparative Perspectives* (Abingdon: Routledge, 2016) 88 at 103.

31. R.R. Zilkens, M.A. Phillips, M.C. Kelly, S.A. Mukhtar, J.B. Semmens, D.A. Smith, 'Non-fatal Strangulation in Sexual Assault: A Study of Clinical and Assault Characteristics Highlighting the Role Of Intimate Partner Violence'. (2016) 43 *Journal Forensic and Legal Medicine* 1; C. Mcquown, J. Frey, S. Steer, G.E. Fletcher, B. Kinkopf, M. Fakler and V. Prulhiere, 'Prevalence of Strangulation in Survivors of Sexual Assault and Domestic Violence' (2016) 34(7) *The American Journal of Emergency Medicine* 1281; C. White, G. Martin, A.M. Schofield and R. Majeed-Ariss, "'I thought he was Going to Kill me": Analysis of 204 Case Files Of Adults Reporting Non-Fatal Strangulation as Part of a Sexual Assault Over a 3 Year Period' (2021) 79 *Journal of Forensic and legal medicine* 102128.

32. White et al., *Ibid.* at 102128, although these figures were lower when compared with a client/sex worker.

33. L. Snow, 'Understanding Women's Experiences of Non-consensual Violence in Sex' In H. Bows and J.Herring (eds.), 'Rough Sex' and the Criminal Law: Global Perspectives (Bradford: Emerald Publishing Ltd, 2023) 133.

34. *Ibid.* 140.

35. Douglas and Fitzgerald above n. 15.

36. Herbenick et al. 2022, above n. 4 at 1184.

37. J. Herring, 'Coercive Control and Rough Sex', in H. Bows and J. Herring, 'Rough Sex' and the Criminal Law : Global Perspectives (Bradford: Emerald Publishing Ltd, 2023) 31 at 48.

38. C. Kruttschnitt, W. Kalsbeen and C. House, *Estimating the Incidence of Rape and Sexual Assault* (Washington: The National Academies Press, 2014) at 153.

who experienced sexual assault by a male did not contact the police.³⁹ It is possible that women may be even more reluctant to report sexual violence that has co-occurred with strangulation to authorities, especially where the victim feels that she has, in the past, consented to strangulation or other forms of BDSM sex.⁴⁰ Researchers who have explored the reporting of sexual violence in kink and BDSM communities identify possible reasons that victims choose not to report including their own perceived stigma and shame associated with the activity.⁴¹

It is well-known that where a woman has experienced sexual assault, she is less likely to report it to authorities when she has no visible injuries.⁴² Therefore, a further reason women are unlikely to report non-consensual strangulation, where it has occurred during sex, is because of a lack of visible injuries, as victim-survivors may assume they will not be believed. Indeed research has shown that women are much more likely to be believed if their experiences of sexual assault are associated with injury⁴³ yet strangulation, even where the woman has become unconscious as a result of it, often does not result in other visible injuries.⁴⁴ For example, in an American review of cases involving 580 adults who reported strangulation during sexual assault and presented for a forensic examination at a hospital, the researchers found that 99% of those reporting were women and 19% of them reported no visible injuries.⁴⁵ Given the underreporting of domestic violence and sexual violence to police,⁴⁶ it is likely that there would be low rates of reporting non-consensual strangulation during sex to police and prosecution authorities – especially where there is no visible injury associated with it.

Criminalisation of Strangulation and the Issue of Consent

Strangulation has long been recognised in the criminal law of English speaking countries.⁴⁷ However, recognition of the dangers and risks specifically associated with strangulation in the context of intimate partner violence has led to strangulation offences being introduced as standalone offences in most American states and in all Australian states and territories.⁴⁸ In recent years, England and Wales,

39. Australian Bureau of Statistics, *Personal Safety – Australia* (Sydney: Australian Bureau of Statistics, 2017). The rates of non-reporting are likely to be even higher among certain groups for example Aboriginal women, see M. Guggisberg 'Aboriginal Women's Experiences With Intimate Partner Sexual Violence and The Dangerous Lives They Live As a Result of Victimization' (2019) 28(2) *Journal of Aggression, Maltreatment & Trauma* 186.

40. D. Cardoso 'Choking Autoerotic Asphyxiation: Reconfiguration of Discourses Around Breath Play' (2022) 19 (7) *The Journal of Sexual medicine* 1069, at 1071, the author points out that where practices are stigmatised people may be reluctant to come forward for care.

41. J. Bowling, S. Wright, J.K. Benson, S. McCabe, A. Mennicke, J. Willard, N. Kissler, H. Good, B. Moody, R. Stambaugh, R.J. Cramer, 'Disclosing and Reporting of Consent Violations Among Kink Practitioners in the United States' (2022) *Violence Against Women* (online first); M. Wilson, E. Spike, G. Karystianis, and T. Butler, 'Nonfatal Strangulation During Domestic Violence Events in New South Wales: Prevalence and Characteristics Using Text Mining Study of Police Narratives' (2022) 28(10) *Violence Against Women* 2259, at 2261.

42. A. Reckdenwald, C. Mandes and K Fernandez, 'The effectiveness of a coordinated response toward nonfatal strangulation in facilitating evidence-based prosecution' (2021) 32(8) *Criminal Justice Policy Review* 816.

43. K. Minter, E. Carlisle, and C. Coumarelos, "'Chuck her on a lie detector"—Investigating Australians' mistrust in women's reports of sexual assault' (Sydney: ANROWS, 2021).

44. C. De Boos, 'Non-fatal Strangulation: Hidden Injuries, Hidden Risks' (2019) 31(3) *Emergency Medicine Australia* 302; Zilkens et al, above n 31 at 3.

45. H. H. Spungen, K.M. Bryan, C.J. Sachs and M.J. Wheeler, M. J. 'Symptoms and Physical Exam Findings in Sexual Assault-Related Non-Fatal Strangulation' (2022) 23(2) *The Western Journal of Emergency Medicine* 268 at 272.

46. Australian Bureau of Statistics, above n 39.

47. See Offences Against The Person Act 1861 (UK) recognized attempts to 'choke, suffocate or strangle another person' in s.21.

48. Edwards and Douglas, above n. 1; *Crimes Act*, 1900 (ACT) ss27(1), 28(2)(a); *Crimes Act 1900 (NSW)*, s37(1A); 37(1); *Criminal Code Act 1983 (NT)*, s186AA; *Criminal Code 1899 (Qld)*, s315A; *Criminal Law Consolidation Act 1935 (SA)*, s20A; *Criminal Code Act 1924 (Tas)*, ss170B, 334AA; Victoria currently has a Bill before Parliament: *Crimes Amendment (Non-fatal Strangulation) Bill 2023* which if passed will introduce discrete offences of strangulation.

Canada and New Zealand have also introduced specific strangulation offences.⁴⁹ There are a variety of approaches to the drafting and interpretation of strangulation offences.⁵⁰ In this paper, we focus on the jurisdiction of Queensland which was an early adopter of the stand-alone strangulation offence. In Queensland the crime of ‘Choking, suffocation or strangulation in a domestic setting’ is set out in the Criminal Code 1899 (Qld), s315A as follows:

- (1) A person commits a crime if—
 - (a) the person unlawfully chokes, suffocates or strangles another person, without the other person’s consent; and
 - (b) either—
 - (i) the person is in a domestic relationship with the other person; or
 - (ii) the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012*.

Penalty—

Maximum penalty—7 years imprisonment.

- (2) An assault is not an element of an offence against *subsection (1)*.

The Queensland strangulation offence has three elements that the prosecution must prove beyond a reasonable doubt. First, the offence requires that the alleged perpetrator of strangulation and the complainant are either in a domestic relationship (which includes both a current and former intimate personal relationship), a family relationship or an informal care relationship⁵¹ or that the incident of strangulation is ‘associated domestic violence’. Associated domestic violence includes circumstances where strangulation is perpetrated against children in the domestic relationship.⁵²

Second, the offence requires that the perpetrator ‘unlawfully chokes, suffocates, or strangles’ the complainant. There is no definition in the legislation, but the courts have interpreted ‘choke, suffocate or strangle’ to mean: ‘There is no choking, if the perpetrator merely puts his or her hands to the neck of the victim. In order to amount to choking, there must be some pressure that results at least in the restriction of the victim’s breathing’.⁵³

Third, the offence requires that the prosecution satisfies the jury that the strangulation was carried out without the victim’s consent. Notably, in the lead up to the introduction of the offence, some submissions to a Queensland government inquiry highlighted concerns associated with the requirement to prove lack of consent to strangulation.⁵⁴ For example, Women’s Legal Service submitted:

The inclusion of this element [consent] will provide a very effective defence to this proposed offence as many women will be mute or frozen in fear at the time that the assault occurs, or the strangulation occurs. We strongly disagree with the inclusion of the non-consensual element as an element of the offence. We actually believe that to include it will pretty well nullify the effectiveness of the offence.⁵⁵

49. Criminal Code Compilation Act 1913 (WA) s. 298; Serious Crime Act 2015 (UK) s. 75A; Criminal Code (RSC 1985, c. C-46) s. 267(c); Crimes Act 1961 (NZ) s. 189A.

50. Edwards and Douglas, above n. 1; V. Bettinson, ‘A Comparative Analysis of Non-Fatal Strangulation Offences: Will the Proposed s. 75A Serious Crime Act 2015 Work for Victims of Domestic Violence and Abuse?’ (2022) 86(2) The Journal of Criminal Law 75 at 76.

51. See *Domestic and Family Violence Protection Act 2012* (Qld) ss.13–20.

52. See *Domestic and Family Violence Protection Act 2012* (Qld) s. 9.

53. *R v HBZ* [2020] QCA 73 (17 April 2020) at [58] per Mullins JA, McMurdo & Boddice JAs concurring.

54. Legal Affairs and Community Safety Committee, Criminal Law (Domestic Violence) Amendment Bill (No.2) 2015, at 12–13.

55. *Ibid*.

There is no statutory definition of consent provided for the strangulation offence in Queensland, neither has there been any judicial consideration of consent in the context of the strangulation offence in Queensland. Common law interpretations of consent associated with assault have identified that it is possible to consent to some level of bodily harm, just how serious the harm or risk of harm can be is unclear. Determining whether the harm can be consented to is likely to depend on a range of factors including the extent of the harm caused or risked, and the purpose of the act.⁵⁶ Judicial pronouncements about the availability of consent as a defence highlight both autonomy and welfare principles.⁵⁷ In *R v Lee*,⁵⁸ the accused was charged with manslaughter by unlawful act, in this case the unlawful act was an 'assault' which was carried out by strangulation during an exorcism. The defendant argued the defence of consent. In considering the lawfulness of the assault, the New Zealand Court of Appeal stated that a trial judge will take account of 'the right to personal autonomy; the social utility (or otherwise) of the activity; the level of seriousness of the injury intended or risked; the level of risk of such injury; the rationality of any consent or belief in consent; and any other relevant factors in the particular case'.⁵⁹ Therefore, the high risks (highlighted earlier) and the types of injuries associated with strangulation are likely to be relevant for considering the issue of consent. Also relevant is that case law has identified that loss of consciousness is 'a really serious injury'.⁶⁰ This suggests that if the common law approach to consent applies, it may be possible, in some cases, that consent to strangulation renders strangulation legally permissible in circumstances where minor bruising or transient breathlessness results, but not where the complainant has lost consciousness. Once lack of consent is shown, and pursuant to Criminal Code 1899 (Qld), s24, the accused may then raise evidence of both honest and reasonable mistake of fact (about the consent) which the prosecution must then disprove.

To complicate matters, the Queensland offence states that assault is 'not an element' of the offence.⁶¹ This statement was added to ensure that the provocation defence, available in Queensland to assault-based offences, would not be available to the offence of strangulation.⁶² However, the statement raises the question of whether, if strangulation is 'not an assault', an alternative definition of consent, such as that related to sexual offences, may be applicable to the offence. In Queensland, similar to most common law jurisdictions,⁶³ where the accused is charged with rape or another sexual offence it will not be sufficient for the prosecution to prove that the victim did not consent, the prosecution will also need to prove that the accused did not have a belief, based on reasonable grounds, that the victim was consenting.⁶⁴

Where there is a history of domestic violence it may be difficult to argue that strangulation was 'rationally' consented to.⁶⁵ However, in Queensland, the requirement for the prosecution to prove lack of

56. *Neal v R* (2011) 32 VR 454.

57. See S.Bronitt and B. McSherry, *Principles of Criminal Law* (Sydney: ThomsonReuters, 2017) at 619–624 for a discussion of consent and sadomasochism.

58. *R v Lee* [2006] 3 NZLR 42 (CA).

59. *R v Lee* [2006] 3 NZLR 42 (CA) p119 [30]. The court found that consent was available in the case as a matter of law, subject to an exclusion on public policy grounds allowed the appeal, quashed the conviction and ordered a retrial. (p125, 126). Note that since the case was heard New Zealand has also introduced a strangulation offence: Crimes Act 1961 (NZ), s 189A.

60. *R v Rhodes* (1984) 14 A Crim R 124.

61. Criminal Code 1899 (Qld), s 315A(2).

62. *Criminal Law (Domestic Violence) Amendment Bill 2016* – Explanatory Note. In Queensland provocation is a partial defence to murder but a complete defence to assault – see Criminal Code 1899 (Qld) s. 269. Notably this suggests that the Queensland parliament identified the offence of strangulation as an assault based offence that could attract the provocation defence in the absence of this addition.

63. See for example Crimes Act 1958 (Vic) s. 36A; Sexual Offences Act 2003 (UK) s.1.

64. See Queensland Criminal Code, 1899 (Qld) s.348, and increasingly the accused is asked to point to steps they took to determine whether the other person was consenting (i.e. affirmative consent), see for example Crimes Act 1958 (Vic) s. 36A.

65. See *R v Lee* [2006] 3 NZLR 42 (CA). See also J. Tolmie 'The Defence of Consent and Rough Sex: A Perspective from New Zealand' (2021) 4 Child and Family Quarterly 8.

consent may create obstacles for the prosecution of the strangulation offence in some cases and, at least, opens the way for cross-examination on the victim's willingness to be strangled within a coercive and controlling relationship.⁶⁶ Depending on how consent is understood in this context it may also open up the possibility that, even if the victim did not consent, the accused person reasonably believed (or honestly and reasonably believed) that the victim did.

Sexual violence is recognised as a common part of the pattern of coercive and controlling behaviour that perpetrators of domestic violence use.⁶⁷ However, it is not clear how often strangulation as part of sex is perpetrated on non-consenting victims in the context of relationships where there is on-going domestic violence. There are some published Queensland cases that have grappled with rough sex and consent.⁶⁸ In some cases, the accused was charged with both raping and strangling his ex-partner as part of ongoing violence in a relationship⁶⁹ and in another of strangling a partner when she refused sex.⁷⁰ Two reported Queensland Court of Appeal (the highest court in Queensland) cases have considered consent where the accused claimed strangulation was part of rough sex.⁷¹ These two cases are considered in turn. Notably both cases involved a prosecution for rape (not strangulation).

In *R v Brown*, the accused was charged with rapes involving strangulation and claimed the victim had consented to 'rough sex'.⁷² The complainant met the appellant, Brown, on Tinder and they communicated via text messages sharing information about themselves. In one text message Brown described himself as 'violent and rough' and the complainant responded that she did not like rough.⁷³ When she asked Brown to describe 'rough', he replied 'Choking. Slapping, general manhandling'.⁷⁴ She responded that she did not want to be choked because it made her feel violated.⁷⁵ Brown also mentioned the possible use of a 'safe word' in his texts, but this was not discussed in any detail. Later the appellant and complainant went to the complainant's house where she accepted there was initial consensual sex but then the appellant became violent, pushing and hitting her. The appellant pressed his hands on the complainant's throat and according to the complainant's evidence was 'pressing down really hard' making it difficult for her to talk.⁷⁶ The appellant asked her 'what's the safe word?' and she said, 'she couldn't remember'.⁷⁷ The appellant was charged with two counts of rape. At trial the defence claimed that the activities were part of a consensual rape fantasy, and the complainant knew the safe word – which would have led Brown to stop the violence – but had not used it.⁷⁸ Brown was convicted on one rape count and acquitted on one count. He appealed successfully against the conviction with the majority

66. Douglas and Fitzgerald, above n. 15; see also J. Tolmie, Coercive control: To criminalize or not to criminalize? (2018) 18(1) Criminology & Criminal Justice 50, at 54

67. S. Tarrant, H. Douglas and H. Tubex, Project 113 Sexual Offences: Background paper. (The Law Reform Commission of Western Australia: Perth, 2022), 6.

68. See for example *R v Kellett* [2020] QCA 199; *R v Johnson* [2015] QCA 270 see also discussion in R. Burgin and J. Crowe, 'A Critique of the 'Rough Sex' Defence in Australian Rape Law', in H. Bows and J. Herring (ed.), 'Rough Sex' and the Criminal Law: Global Perspectives (Bradford: Emerald Publishing Ltd, 2023) 117.

69. *R v SDQ* [2022] QCA 91, *R v DBZ* [2022] QCA 200.

70. *R v RBD* [2020] QCA 136.

71. *R v Brown* [2020] QCA 159; *R v LAU* [2022] QCA 37.

72. *R v Brown* Ibid.

73. Ibid. at [8].

74. Ibid. at [8].

75. Ibid. at [8].

76. *R v Brown*, above n. 71, at [9].

77. Ibid. at [11].

78. See Craig, above n. 18 at 422-423, discussing a similar case in Canada, *R v Hunter*, 2019 NSSC 369. Craig observes that 'the legal obligation to take reasonable steps to ascertain that the complainant was communicating consent before engaging in these violent acts lay exclusively with the accused. To ... attribute ... blame to the recipient of this violence because she failed to sufficiently negotiate a safe word is intensely unjust. It is also legally incorrect' and 'securing broad, advance consent to participate in a S/M [sodomasochism or rough sex] scene does not constitute reasonable steps for purposes of raising an honest but mistaken belief in communicated consent defence'.

of the Court of Appeal finding that some of the matters explored in evidence were ‘supportive of the appellant having engaged in acts which he knew or believed the complainant would consent to as part of their sexual interaction’ and there were discrepancies in the complainant’s evidence which ought to have made the jury entertain a reasonable doubt.⁷⁹ In dissent, Morrison J would have dismissed the appeal, in part because he found that the complainant truly objected and was ‘not playing along in the rape role play’.⁸⁰

In *R v LAU*,⁸¹ the defendant unsuccessfully appealed against convictions of rape. LAU and the complainant had been in a relationship for eight years and had a child together. After separation from LAU the complainant applied for a protection order, LAU was the respondent, and there was a temporary protection order in place at the time of the rapes. At trial LAU accepted that he had been violent to the complainant in the past, including hitting, kicking and strangling her.⁸² There was evidence that the complainant and LAU had engaged in consensual sex in the past but the complainant denied that she had ever asked to be hit or treated roughly during sex, or that she raised the idea of a role play where she would be treated like a dog.⁸³ In contrast, LAU testified that ‘almost all of the sexual aspects of the relationship were at the complainant’s suggestion. She asked him to choke her during sex; to hit her, to be rough and to gag her’.⁸⁴ On appeal, the court found that the jury was entitled to find that LAU lacked credibility regarding his claims about consent and the appeal was dismissed.

These two reported Queensland cases demonstrate that consent to rough sex has been claimed in some cases where rape (involving strangulation) was charged in Queensland. However, in neither case was strangulation specifically charged, nor were the serious risks of harm caused by strangulation or the possibility of consenting to it considered. Rather the focus was ultimately on consent to sex, and the credibility of witnesses.

As noted previously, many incidents of domestic violence and sexual violence are unreported to police and prosecution services, and it is likely that incidents of strangulation during sex that take place in a violent relationship are even less likely to be reported to these agencies. In the following section, we draw on a qualitative study with domestic violence support workers and men’s behaviour change workers to explore their perceptions of how strangulation and consent during sex is raised and considered by their clients.

The Queensland Study

Approach and Methodology

The participants were 35 domestic violence service workers, comprising 16 domestic violence support workers (including counsellors, intake specialists, court support, and social workers), 10 men’s behaviour change programme leaders, six child and family counsellors or child safety workers, and three service managers. All participants delivered services through 11 service providers to domestic violence victims or perpetrators in Queensland within urban, regional, and rural areas. On average, participants had worked in their roles for three years, ranging from three months to 13 years, for the 30 participants who provided this data. This sample of service workers is especially important, given the high likelihood that many survivors of strangulation will not report strangulation to the police or proceed through the legal system.

79. Ibid., at [185]–[187] per Boddice JA (Williams J agreeing).

80. Ibid. at [31].

81. *R v LAU* [2022] QCA 37.

82. Ibid. at [72].

83. Ibid. at [53].

84. Ibid. at [88].

We conducted 12 semi-structured focus groups that took place online via Zoom from June to October 2020. They aimed to explore service providers' knowledge and responses to strangulation, DV workers' perceptions of how the strangulation legislation affects victim-survivors, and their experience of the new legislation on reports of strangulation. Interviews included two to four participants and were typically led by two authors. One participant was interviewed one-on-one due to the absence of other attendees. For longer quotes we have identified the participant by the focus group they participated in (e.g. FG1, FG 2 etc.).

Thematic analysis using an iterative process was employed and followed an iterative six-phase procedure described by Braun and colleagues.⁸⁵ Analysis of the data was led by author 1 with other authors contributing to discussions of theme meanings and label refinement over two meetings. The authors all identify as women that have had varying personal and professional interactions with domestic violence sectors with backgrounds in law (author 1), social and health psychology (author 2) and criminology and sociology (author 3). Ethics approval for this research was granted by the relevant University Human Research Ethics Committee (University of Queensland). All participants provided written and/or verbal consent before the interviews.

Results

In all but two of the focus groups strangulation during sex and the question of consent was discussed by participants. With a focus on this broad issue, thematic analysis generated one overarching theme from the data 'the blurry question of consent' that informed four themes on the perceived difficulty domestic violence service workers faced in working with both victim-survivors and perpetrators who disclosed strangulation during sex as part of their relationship. The four overlapping themes we identified were perceptions that (i) strangulation during sex is normalised, (ii) it's not informed consent, (iii) it's happening in environments of coercive control and (iv) the requirement of consent opens up a loophole in the strangulation offence. We discuss these themes below.

Perceptions That Strangulation During Sex is Normalised

Participants perceived that strangulation during sex was a 'trend', 'the next forbidden' and an 'edgy and dangerous' practice. Participants also said that many people seeking support in the context of the experience of domestic violence and people undertaking behaviour change programs reported that strangulation during sex was common in their relationships. Participants identified that conventional media was promoting the idea that strangulation during sex can be done safely which helped to normalise the practice. Several participants pointed to an article in *Men's Health*⁸⁶ magazine that, according to one participant, 'tells you how to choke safely during sex'. Regarding the *Men's Health* article, a participant commented 'so this is saying to women that this is what men want. And actually, if he's doing it properly, there won't be a risk to you'. Another participant pointed out that strangulation in the context of sex is often called 'other things' in mainstream media, such as choking, and that naming distinguishes the practice as safe as compared to 'strangulation' which is dangerous, when it is essentially the same thing.

85. V. Braun, V. Clarke, N. Hayfield and G. Terry, 'Thematic Analysis', in P. Liamputtong (ed.), *Handbook of Research Methods in Health Social Sciences* (Singapore: Springer 2019) 843.

86. G. Engle, 'Why Some People Are Turned on by Choking During Sex – and How to Do It Safely, According to Experts' 22 July 2020 *Men's Health*, see also D. Herbenick, L. Guerra-Reyes, C. Patterson, J. Wilson, Y.R. Rosenstock Gonzalez, E. Voorheis, M. Whitcomb, R. Kump, E. Theis, E.F. Rothman, K.M. Nelson, M.K. Maas, '#ChokeMeDaddy: A Content Analysis of Memes Related to Choking/Strangulation During Sex.' (2023) 52(3) Archives of Sexual Behavior 1299.

According to some participants another factor contributing to the normalisation of strangulation during sex is its frequent depiction in pornography. For example, women participants supporting victim-survivors of violence commented: 'it's very prevalent on porn. Very prevalent;' 'it's been glorified in porn' and 'young women are watching porn too and it's being normalised'.

Some participants expressed concern that a victim-survivors' belief that strangulation during sex is normal was often founded on information provided by their abusive partner. For example, a participant explained:

When [the female client] explained it, she said to me that he knew the way... She said, he knew exactly where to press, and he knew that if he pressed on the front of my neck ... She explained that if he did it the way he did it, he told her that she would get a high from it, and that it would heighten the experience that she was feeling. That's how he said it to her... (FG4)

Consistently with the perspectives of those participants working with victim-survivors of domestic violence, participants who worked in men's behaviour change programs also identified that their clients often described strangulation during sex as a 'normal sexual practice' and were able to explain in a very detailed way how they did it. For example:

He described in clear detail how you...[press] between these two points and you hold it for this long and then you can stop oxygen or blood and you let go since she's about to orgasm. ... And then the other guys, one of them was saying, yes, all the girls want that. (FG14)

Some participants who worked in men's behaviour change programs also identified that when asked about abuse of their partner and specifically about strangulation, their clients often sought clarification about whether the question related to 'in sex or not in sex? ... they see it as okay in sex' (FG14) suggesting that some of their clients perceive that they use both non-consensual strangulation and consensual strangulation in their violent relationships.

In summary many of the participants in the study reported that strangulation during sex was often understood by their clients as a common and unremarkable part of sexual relations, it was 'normal'.

'It's not Informed Consent'

Across the focus groups, participants who provided support to victim-survivors of domestic violence questioned how their clients understood the concept of consent. Many participants doubted that their clients had any information about the risks of strangulation, or perceived that the information on which clients based their consent was often false, or that consent to strangulation had been obtained from their clients by coercion. Some participants questioned whether it was possible, legally, to consent to something that was potentially lethal, while others identified that in the context of a violent relationship the idea of consent was unclear.

Most commonly participants claimed their clients did not know about the risks associated with strangulation during sex and thus their consent to this activity was, at best, uninformed:

And I know people talk about, well, if a woman wants to give consent maybe she should have that right. But I think it comes down to informed consent, because I don't think people know what they're getting themselves into here. If everyone went to that two-day training by Gail Strack⁸⁷, I can't see anyone consenting after that. (FG2)

87. This refers to training provided by Gail Strack at the *Training Institute on Strangulation Prevention*: <https://www.strangulationtraininginstitute.com/>.

And when we talked to them about it more and explained the risks, they were not aware of those risks. So, it's not informed consent, if you're going to look at consent. I feel quite strongly about there not being consent there because I just think that it waters down the actual behaviour and the risk there if you can or cannot consent to it, if that makes sense. (FG8)

Other participants had concerns that their clients were provided with information about the safety of strangulation which was false or inaccurate and this false information underpinned their consent: 'And at least the women that I've talked to, they've based their decisions on information that actually wasn't accurate for them...'. Perhaps of most concern was that several participants thought that their client's consent was underpinned by coercion:

The other thing ... about consent, is that the first instance was non-consensual but then they have almost to the point of being coerced into thinking that it's okay. And so instances after have become the victim has believed it's been consensual because they've normalised it again. So, it wasn't consensual and then they've been made to believe that it is going forward. (FG8)

Participants also questioned whether it is possible, in law, to consent to something as dangerous as strangulation: 'It just seems to me that how can you consent to potential death in terms of the actions that you're consenting to. I understand it in terms of a sexual practice that some people might choose to engage in, but there's a lot of misinformation about that'. (FG8)

Several participants also commented on the lack of clarity of the concept of consent observing that it 'is often really blurry' for a lot of the women they work with. Participants commented on the guilt and shame that often surrounds victim-survivors' disclosures of strangulation during sex and relatedly the confusion and uncertainty some women expressed about whether or not they have consented in the context of their often-violent relationship.

'We're Working in Environments of Coercive Control'

The participants in this study all work with victim-survivors of domestic violence or people who have used domestic violence, as one participant put it: 'we're working in environments of coercive control. So, often, even the concept of consent isn't something that is part of these women's lives' (FG10). Underlining the general lack of choice that women in violent relationships have, a participant commented:

The woman that ... I recently did the intake with, she said that he just did it. Obviously, she didn't consent, but she couldn't stop him from doing it... But she didn't have any choice. He was much bigger than her. She didn't want it [to] happen... (FG4)

Participants working with people who use violence reported that they sometimes had conversations with their clients about how to understand the boundary between the non-consensual violence they used towards their partner and the consensual violence they used towards that same partner during sex. For example, one participant who worked in a men's behaviour change program commented:

The man might be saying, well yes, in sex, and that's consensual, and he has not disclosed strangulation as physical abuse in that relationship. And, I'll have a discussion with him around, how do you explain the boundary there, between it being a sexual act, and you know, it's not something that happens in the relationship, in a physically abusive way. (FG 5)

Another participant in the same focus group added:

I have absolutely sat with clients, perpetrators, who are telling me they are not physically abusive. They're not violent. When we talk about sexual behaviour, we talk about what's going on. They're disclosing hair-pulling.

They're disclosing strangulation, that's consensual. ... it's being put into this consensual context because within an abusive relationship, it's being normalised. (FG5)

The comments of the participants raise complex questions about survivors' autonomy and how consent can be understood in relationships where there is domestic violence.

The Requirement of Non-Consent Opens up a 'Loophole' in the Strangulation Offence

Participants expressed a variety of interrelated concerns about lack of consent being an element of the Queensland strangulation provision. Concerns included that the requirement of lack of consent created ambiguity in the law making it possible for people who used violence to avoid criminal responsibility, that it would be difficult to disprove consent once it was raised, and that the requirement of lack of consent sent the 'wrong' message to the community given the harms and risks associated with strangulation in the context of domestic violence.

A participant commented that 'I think that consent opens up a loophole as well, legally, because it's... I guess the prosecutor then has to make an argument that she hasn't consented. And you find perpetrators are very good at manipulating as well'. According to another participant the requirement of lack of consent provides opportunities to question victim-survivors' sexual tastes: 'The consent. I'm a bit funny with consent. Because this is an opening to, "she likes it rough"' [FG2]. As several participants commented it can be easy to claim consent but 'difficult' to disprove it: 'All he has to turn around and say is... she wanted it. How are you going disprove that someone consented or not?' (FG 3).

According to participants, a requirement to disprove consent, if it is raised, shifts the burden back to the prosecutor creating an 'extra element ... to prove ...' However, participants observed that simultaneously shifting this burden to the prosecutor also shifts the burden onto the victim-survivor who would likely be required to give evidence about whether they consented. According to some participants, this blame shifting to the victim-survivor is inconsistent with what domestic violence focussed offences, like the strangulation offence, aim to address: 'I just think it's so important to have that extra charge for accountability, because we're always talking about how to shift the blame, the onus, off the women to keep [themselves] safe, onto the men' (FG2).

Across focus groups participants identified the seriousness of strangulation and the difficulty they had in accepting that something so dangerous could be consented to: 'You shouldn't be able to consent to something that could potentially kill you' (FG 2). Aligned with this was many participants' concern that enabling consent to strangulation weakened or misconstrued the seriousness of the offence for victim-survivors:

I just think they need to rethink it in terms of the consent part of it. I think that sends a wrong message generally in terms of... I don't know how many people read legislation, but I think it sends the wrong message to victims. I mean, aside from the legal implications of that, I think that, and I guess this is more from my practice framework, there shouldn't be consent at all. (FG8)

Another participant commented that the requirement of lack of consent regarding the NFS offence also made their work with victim-survivors more complex. This participant observed that despite the risk associated with strangulation, regardless of whether it was associated with sex or not, they also had to respond differently to victim-survivors depending on whether they understood their own experience of strangulation as consensual or not:

Even though the risk is actually the same, we try and work based on what the actual client we're talking to, their experience and whether [it]... was wanted or unwanted. And this is where for me it's really problematic with the actual legislation in terms of consent... at minimum if [consent] has to ... be there, that you need to prove you did consent rather than that you didn't. Because I think that the proportion of people that feel they consent would be much smaller, but my professional preference would be that it wasn't there at all. [FG 8]

This participant points to the tensions they face. On the one hand, the participant accepted the victim-survivor's interpretation of the event and her agency, but on the other hand, the participant expressed concern about the risks and dangers of strangulation. The participant's response is also mediated by the strangulation law which allows for consensual strangulation.

Discussion

Consistent with other research,⁸⁸ across our focus groups participants in our study felt that the use of strangulation during sex was considered 'normal' by many of their clients, despite the fact that it was taking place within violent relationships. Also consistent with other research, participants reported that normalisation was driven by pornography and mainstream media.⁸⁹

However, participants who supported victim-survivors of domestic violence said that some of their clients accepted strangulation as part of their sexual relationships because their violent partners had convinced them it was normal. At the same time, participants who worked with men in behaviour change programs highlighted that some of their clients distinguished consensual strangulation occurring during sex as acceptable compared with non-consensual strangulation in their relationships as domestic abuse and being unacceptable. Given that the people our participants assisted were living in violent and controlling relationships, these dual narratives present a concerning picture. They suggest that at least some violent men use the pretext of normalisation to gain consent to strangulation during sex from victim-survivors or to justify their violence in the context of sex. Notably, studies demonstrate the heightened future risk of serious harm or fatality for domestic violence victim-survivors after being strangled.⁹⁰ However, these studies do not distinguish whether the context of strangulation – during sex or not, or consensual or not – makes a difference to risk assessment. Given the controlling features of strangulation in violent relationships, whether during sex or not and regardless of whether strangulation is perceived to be consensual during sex, it is likely to be equally as risky as strangulation that takes place outside of sex. Furthermore, regardless of the context in which strangulation takes place, the small amount of pressure required to cause harm is the same – so the risk of harm is similar. Also, important to consider is the Rossen and colleagues' study⁹¹ mentioned earlier that found that a person being strangled may not be able to withdraw their consent despite wanting to. This may be of particular concern where, as many participants in our study pointed out, the concept of consent in violent and coercive relationships is 'blurry' and consent is likely often coerced.⁹²

Participants' concerns that their survivor clients' information is gained through unreliable resources, including mainstream media, pornography and from their abusive partners, highlights a need for improved community education about the harms and risks associated with strangulation. Such education should ensure that, especially in violent relationships, community members are made aware that the risks and dangers associated with strangulation during sex are the same as the risks and harms associated with strangulation in other contexts. Without proper information, as many participants in our study pointed out, victim-survivor clients may be uninformed about the risks and dangers of strangulation and as a result their purported consent to it during sex is not informed consent. This research points to the need for greater community education about the potential harms associated with strangulation including in the context of sex.

88. M.A. Beres, L.J. Pearman-Beres and P. Johns, P. Youth Healthy and Safe Relationships: A Literature Review. (Otago: University of Otago, 2020); D. Herbenick, T.C. Fu, P. Wright, P. Bryant, R. Gradus, J. Bauer and R. Jones, 'Diverse Sexual Behaviors and Pornography Use: Findings From a Nationally Representative Probability Survey of Americans Aged 18 to 60 Years' (2020) 17(4) *The Journal of Sexual Medicine* 623 at 630.

89. See generally Herbenick et al. 2023, above n 23.

90. Glass et al., above n. 16.

91. Rossen et al above n. 9 at 515.

92. Herring above n. 37 at 48.

A key concern expressed by many participants was that consensual strangulation is legally permissible in some contexts in Queensland. Some suggested that the requirement to prove absence of consent created a 'loophole'. As noted previously, the Queensland strangulation offence, along with some similar offences in other jurisdictions,⁹³ includes lack of consent as an element of the offence.⁹⁴ Given the structure of the offence, this means that the prosecution must prove there was a lack of consent, or at a practical level if the accused claimed the victim consented to the strangulation, the prosecution would need to disprove that (or disprove that the accused believed the victim consented). This creates an obstacle for prosecution, policing, possibly for support services providing information to their clients and for their clients in deciding whether to make and/or follow through with a complaint to police.

However, a further issue arises given the uncertainty about how consent is understood in the context of strangulation. Given that assault is not an element of the Queensland offence,⁹⁵ it is arguable that common law understandings of consent are not applicable. On this point, it is relevant that the strangulation offence is situated in a different section of the Criminal Code 1899 (Qld) pertaining to assault-based offences. While assault-based offences are located in Chapter 30 (titled 'Assaults'), the strangulation offence is located in chapter 29 (titled 'Offences endangering life or health') of the Criminal Code 1899 (Qld) alongside offences such as torture, grievous bodily harm and wounding. Given the seriousness of the crimes in chapter 29, save for strangulation, they cannot be consented to.⁹⁶ Sexual offences are located in yet another chapter of the Criminal Code 1899 (Qld), chapter 32 (titled 'Rape and sexual assaults') includes a definition of consent⁹⁷ that is specifically applicable to offences in chapter 32.

The placement of the strangulation offence in a chapter which includes a range of serious non-assault/non-sexual assault offences suggests it has a different character to both assaults and sexual offences. At the very least, the appropriate definition of consent is unclear. The language of the strangulation provision shows that in some circumstances consent may render strangulation permissible when it occurs in a domestic relationship or is associated with domestic violence, but it is not clear when and in what context.

Legislative change, incorporating a two-tiered approach, may partially address this uncertainty. In their submission to a government enquiry about the possible introduction of a strangulation offence, Women's Legal Service Queensland (WLSQ) argued against the requirement of consent as either an element or defence to a strangulation offence. WLSQ observed:

If you proceed and do include the element in relation to consent, we believe that thought must be given to whether the definition of consent under the Criminal Code needs to be amended to include the concept of reckless indifference, as it does in New South Wales.⁹⁸

The New South Wales provision referred to takes a two-tiered approach to the strangulation offence. It includes a less serious offence with a penalty of five years for situations where a person strangles another person without their consent; lack of consent is an element of this offence.⁹⁹ However, the provision also includes a more serious offence with a maximum penalty of ten years for circumstances where the offender intentionally or recklessly strangles another so as to render them 'unconscious, insensible or incapable of resistance'¹⁰⁰ and consent is not an element. This approach does not necessarily address the concerns raised by our study participants. The lower tier offence in NSW allows for consensual

93. Criminal Law Consolidation Act 1935 (SA) s 20A.

94. Criminal Code 1899 (Qld) s. 315A.

95. *Ibid.*

96. See Criminal Code 1899 (Qld) Chapter 29.

97. Criminal Code 1899 (Qld), s.348.

98. Legal Affairs and Community Safety Committee, above n. 54.

99. Crimes Act 1900 (NSW), s.37(1A).

100. *Ibid.*

strangulation as long as the victim is not made 'unconscious, insensible or incapable of resistance'.¹⁰¹ The reported loss of consciousness resulting from strangulation is relatively infrequent,¹⁰² yet other harms are common, and risks are high regardless of loss of consciousness.¹⁰³

In the UK, the *Domestic Abuse Act* (UK Act) introduced a two-tiered offence of strangulation in England and Wales in 2021.¹⁰⁴ An offender who intentionally strangles another, resulting in affecting the victim's ability to breathe, commits an offence.¹⁰⁵ The offence includes a defence of consent, although the defence is not available in circumstances where the victim suffers serious harm as a result of the strangulation and the accused intended or was reckless about causing harm.¹⁰⁶ In her review of the England and Wales strangulation offence, Bettinson¹⁰⁷ argues the inclusion of a defence of consent to strangulation adds to the complexity of the offence in England and Wales. Consent is a defence to this offence, the accused would need to provide sufficient evidence of consent and the prosecution would need to disprove consent beyond a reasonable doubt.¹⁰⁸ In circumstances where the offender intended serious harm or was reckless about causing 'serious harm' to the victim via strangulation, consent is not a defence.¹⁰⁹ Serious harm is defined as grievous bodily harm, wounding or actual bodily harm.¹¹⁰ In many strangulation cases it would be difficult to prove grievous bodily harm or wounding. However, actual bodily harm¹¹¹ is broad in scope, it has an 'ordinary' meaning and includes 'any hurt calculated to interfere with the health or comfort of the victim, the hurt need not be permanent, but must be more than transient and trifling'.¹¹² Actual bodily harm may be possible to prove in some strangulation cases, but the difficulty here is that the prosecution would need to prove the form of harm was intended by the accused or the accused was reckless in causing it.¹¹³ This is likely to be difficult in cases involving strangulation during sex. Notably, the UK Act also includes a provision that states that 'it is not a defence that [the victim] consented to the infliction of the serious harm for the purposes of obtaining sexual gratification'.¹¹⁴ However, perhaps surprisingly, this provision applies to various harm-related offences, but does not apply to the strangulation offence.¹¹⁵

A recent Bill for a strangulation offence in Victoria, Australia attempts to navigate some of this complexity.¹¹⁶ The Victorian Bill provides for two tiers of the offence. The more serious offence attracts a ten-year maximum sentence and requires the prosecution to prove that the accused intended to strangle another person, that they intended to cause an injury to that other person, that they did cause an injury to that other person and the other person is a family member.¹¹⁷ Consent is no defence to this charge

101. Ibid.

102. Midttun above n. 12 at 100200.

103. Glass et al., above n. 16.

104. Domestic Abuse Act 2021 (UK), s. 75A.

105. Ibid at s. 75A(1).

106. Domestic Abuse Act 2021 UK, s 70.

107. Bettinson, above n. 50 at 76.

108. Domestic Abuse Act 2021 UK, s. 75A(2).

109. Ibid at s. 75A(3).

110. Ibid at s. 75A (6).

111. Ibid at s. 75A (6)(c).

112. R v Donovan [1934] 2 KB 498.

113. Domestic Abuse Act 2021 UK, s. 75A(3).

114. Ibid. s.71.

115. Ibid. s.71(3).

116. Crimes Amendment (Non-Fatal Strangulation) Bill 2023 (Vic). The Bill has passed and the legislation will be introduced in 2024.

117. Ibid, s. 34AD.

regardless of the context in which it takes place.¹¹⁸ Injury is defined to include physical injury (including unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function) and harm to mental health (including psychological harm).¹¹⁹ Given the range of psychological injuries associated with strangulation¹²⁰ it may be possible to present evidence of injury in a broad range of cases. The difficulty remains in this offence of proving the accused's intent to injure and this may still be an obstacle for the prosecution especially where the strangulation is claimed to have occurred during consensual sex.

The less serious form attracts a maximum five-year offence and requires that the prosecution prove that the accused person 'intentionally and without lawful excuse strangles another person'.¹²¹ Consent is potentially available here, however the form of the consent defence to be applied will depend on whether the behaviour constituted a sexual activity or not. Where the strangulation occurred in the context of sex, the consent defence mirrors the approach taken to sexual offences in Victoria (the prosecution can prove that the complainant did not freely and voluntarily consent. Where this is proven, the accused may argue that they reasonably believed there was consent and escape liability).¹²² Second tier offences of strangulation that are not carried out in the context of sex will be subject to the common law test of consent¹²³ where risk of harm and the purpose of the act can be considered.¹²⁴ At the time of writing, the Victorian Bill has been passed but will not begin operation until later in 2024, so it is too early to predict how it will operate. However, it does, in effect, attempt to recognise the increasingly common behaviour of strangulation during sex.

Conclusion

Regardless of whether strangulation is (initially) consented to, strangulation is a risky and dangerous behaviour.¹²⁵ People can die as a result of a small amount of pressure being placed upon their neck, less than the pressure required to open a can of soft drink,¹²⁶ within 2 minutes.¹²⁷ While sometimes it will not be clear for weeks whether a resulting injury will be serious,¹²⁸ the difference between minor, serious and fatal injury may be a matter of seconds, it is not a calculation that many are able to reliably make. In part this is, no doubt, why the Queensland offence is situated in Chapter 29 'Offences endangering life or health' of the Criminal Code, 1899 (Qld) alongside other serious offences, which cannot be consented to. In some cases, victims may be unable, precisely because they are being strangled, to convey their desire to withdraw their consent.¹²⁹ Currently, the Queensland strangulation offence allows for the possibility that strangulation may be legal where there is consent.¹³⁰ However, our focus groups suggest that this position sends a confusing and inconsistent message: on the one hand

118. Ibid, s. 34AD(2).

119. Ibid, s34AB; Crimes Act 1958 (Vic) s.15.

120. Vella et al, above n. 15.

121. Crimes Amendment (Non-Fatal Strangulation) Bill 2023 (Vic) s. 34AE.

122. Ibid s.34AF, see also ss. 34AG, 34AH, 34AI, 34AJ.

123. Ibid 34AE(3),(4).

124. *Neal v R* (2011) 32 VR 454.

125. Glass et al., above n. 16; M. Patch, J. Anderson and J. Campbell 'Injuries of Women Surviving Intimate Partner Strangulation and Subsequent Emergency Health Care Seeking: A Integrative Evidence Review (2017) 44 Journal of Emergency Nursing 384.

126. Jordan et al., above n 8.

127. Sauvagneau et al., above n. 6 at 106.

128. G.E. McLane, G. Strack and D. Hawley 'A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation and the Surviving Victim' (2001) 21(3) Journal of Emergency Medicine 317.

129. Rossen et al above n 9 at 515.

130. *Criminal Code 1899* Qld, s 315A.

strangulation is extremely dangerous and risky and, on the other hand, where a person consents to it, it may be legally permissible.

In the Queensland context, it is also unclear when consensual strangulation may become unlawful or how consent is defined and understood. The offence was designed to be applied in the context of domestic violence and in domestic relationships,¹³¹ and we know that strangulation in this context carries significantly increased risk, for the complainant, of serious harm and death.¹³² It is difficult to justify the requirement for the prosecution to prove lack of consent in these circumstances.¹³³ Legislative reform is needed to clarify how consent is applicable to the Queensland strangulation offence and indeed whether consent should be available at all given the high risk associated with it.¹³⁴

While we conclude that clarification is needed, we also recognise that criminal law is always a blunt instrument. Any broadening of its scope has implications for the most vulnerable members of the community who are more likely to be prosecuted.¹³⁵ What is perhaps most pressingly needed in this context is community education about strangulation, especially for young people in our communities who may not be aware of its very real and significant risks and dangers.

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131. *Ibid.*

132. McLane et al., n 128.

133. Sheehy et al., above n. 17 at 686.

134. *Ibid.*

135. R. Fitzgerald, H. Douglas, E. Pearce and M. Lloyd, 'The Prosecution of Non-fatal Strangulation Cases: An Examination of Finalised Prosecution Cases in Queensland, 2017 – 2020' (Melbourne: The University of Melbourne and The University of Queensland, 2022) at 3.