Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

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Mr Peter Russo MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
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By email:

LACSC@parliament.qld.gov.au

17th July 2020

RE: CRIMINAL CODE (CHOKING IN DOMESTIC SETTINGS) AND ANOTHER ACT AMENDMENT BILL 2020

Dear Peter,

We welcome and appreciate the opportunity to make a submission in relation to the *Criminal Code (Choking in Domestic Settings) and Another Act Amendment Bill* 2020\

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the

key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Clause 3 Insertion of 315A(3) to provide definitions for 'choke', 'strangle' and 'suffocate'.

Section 315A of the Criminal Code currently describes the offence of non-lethal strangulation without a specific definition of the words 'choke', 'suffocate' or 'strangle'. The Queensland Court of Appeal case *R v HBZ* [2020] QCA 73 ("*HBZ*") has presently settled the definition of 'choke' to be used in the Queensland Courts to be "*the act of the perpetrator that hinders or restricts the breathing of the victim and does not require proof that breathing was completely stopped, although the hindering or restriction of the breathing would encompass the stopping of the breathing*." We note that *HBZ* is currently under appeal.

'Choke', 'suffocate' or 'strangle' have fairly precise medical definitions, for example the evidence given in *R v Green (No 3)* in the ACT Supreme Court[1] was that the medical definitions of 'choke', 'suffocate' or 'strangle' were [with line breaks inserted for clarity]:[2]

> *…strangulation is where you have external compression to the neck. So that's an externally applied pressure.*
>
> *Choking is when an object is placed within the airway so that you have got a major airway called your trachea and something goes down that way and you often see that when somebody has - the food's gone down the wrong way - they might cough.*
>
> *And suffocation is where your nose and mouth are covered so that you can't breathe.*

Those definitions are more precise than the more interchangeable dictionary definitions discussed in *HBZ* and *Green*.

We note the proposed s 315A(3) which would include: 'Choke', a person, includes apply pressure to the person's neck. 'Strangle', a person, includes apply pressure to the person's neck. 'Suffocate', a person, includes the following: (a) obstruct, any part of the person's (i) respiratory system; or (ii) accessory systems of respiration; (b) interfere with the operation of the person's (i) respiratory system; or (ii) accessory systems of respiration; (c) impede the person's respiration.[3]

As noted by the Court of Appeal in *HBZ*, the rationale for the offence is that even though one incident in the domestic context of choking, strangling or suffocating may not result in any

[1] *R v Green (No 3)* 2019 ACTSC 96 ('*Green*')
[2] Evidence of Dr Parekh referred to a paragraph [27] in *Green.*
[3] Section 315A(3) as presently drafted reflects the drafting in section 27(1) of the Crimes Act 1900 (ACT).

serious injury, the conduct must be deterred, because it is inherently dangerous and experience shows that if it is repeated, death or serious injury may eventually result.

In our submission if there were to be legislative intervention for the definition, it should be to properly reflect the medical definitions and to retain as a list as any one or all three of those actions may be involved in partial or full hindrance of airways.

Clause 3 Increasing the maximum penalty of 7 years imprisonment and replacing it with 14 years imprisonment.

Any significant changes to the Criminal Law should be evidence based and should be proportionate in effect and capable of producing real change. Broadly speaking, similar provisions in the other states and territories of Australia have five to ten year maximum sentences. We are not aware of evidence based research that points to 14 year maximums being more effective than 7 year maximums.

The horrifying attack on Hannah Clarke and her three children would not be addressed by this legislation. A murderous offender who had already decided that he was not going to go to jail and had included suicide in his plan is not going to be deterred by a fourteen year maximum sentence in place of a seven year maximum sentence. The impact of jail sentences, including the substantial cost that could be better spent on remedial programs, has to be weighed against the evidence of no or low benefit for other types of offenders.

While jails are suitable places for the containment of offenders who need containing, jail is not the ideal environment to create kindler gentler spouses and partners, both because of the nature of the cohort in correctional facilities and the very limited programs available in jail. The protection of the community is better served by an emphasis on rehabilitating offenders and on addressing offending behaviour. The lack of suitable programs in the jails prompted Recommendation 18 in the Final Report of the Queensland Parole System Review:[4]

> *Queensland Corrective Services should deliver a greater variety of rehabilitation programs to address the specific and complex needs of women and Aboriginal and Torres Strait Islander prisoners and offenders and increase the availability of those programs.*

There are successful programs in the community that have turned around offending behaviour but those cannot be accessed in correctional facilities. We are aware of the better sentencing options in New South Wales, where a Community Corrections Order is available to address strangulation offences and which provides access to the much wider array of programs available in the community. In the medium to long term, that better sentencing option is going to increase the safety of spouses and children and their wider families.

[4] W. Sofronoff QC, Queensland Parole System Review Final Report, para 447, ("Sofronoff Report") available at https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf

Clause 5 Declaration as a Serious Violent Offence

We note the logic of characterising serious choking as a serious violent offence. We do however reiterate the importance of retaining other sentencing options and leaving open the opportunity for more effective sentencing options, such as Community Corrections Orders, which would create more protective outcomes.

Yours faithfully,

Shane Duffy
Chief Executive Officer