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STRANGULATION

THE CASE FOR A NEW OFFENCE

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STRANGULATION

THE CASE FOR A NEW OFFENCE

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

Honourable Sir Grant Hammond KNZM – President

Honourable Dr Wayne Mapp QSO

Honourable Douglas White QC

Helen McQueen

The General Manager of the Law Commission is Roland Daysh

The office of the Law Commission is at Level 19, 171 Featherston Street, Wellington

Postal address: PO Box 2590, Wellington 6140, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 471-0959

Email: com@lawcom.govt.nz

Internet: www.lawcom.govt.nz

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7 March 2016

The Hon Amy Adams
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R138 – STRANGULATION: THE CASE FOR A NEW OFFENCE

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is written in a cursive style.

Sir Grant Hammond
President

Foreword

The Commission has been asked to report on a possible new crime of strangulation. This Report discharges that obligation.

The Commission has considered:

- (a) the rationale for establishing such a crime;
- (b) if a crime of non-fatal strangulation is to be created, what the appropriate elements of the offence should be;
- (c) what the maximum penalty should be having regard to the structure and terms of other offences in the Crimes Act 1961; and
- (d) whether there are other legislative or operational options that would better address the concerns the proposed crime is intended to address.

This reference forms part of a range of initiatives the Minister of Justice is considering in respect of family violence. The current government has made the scourge of family violence in New Zealand one of its highest priorities. The Police deal with over 100,000 family call-outs per year. Studies have shown that strangulation, often to the point of unconsciousness, is a common form of family violence. It is a dreadful tool for coercion and control within a domestic relationship. It is not well accommodated within the existing offences in the Crimes Act.

This particular form of attack, which is not limited to family violence, has been criminalised in a number of countries (for instance, almost three-quarters of American states). It has been better investigated in these jurisdictions, and is understood as being an important indicator of lethality risk. In the Commission's view, it is appropriate and suitable for inclusion in our Crimes Act as a new offence. It meets the usual criteria for the establishment of a new crime.

The Commission has had the benefit of consultation with a broad range of people and agencies who operate particularly in the family violence sector and who represent both the victims and perpetrators of family violence, including the Police, members of the judiciary, women's refuges, prosecuting and defence counsel and academics specialising in family violence. A list of these people and agencies can be found at Appendix B.



Sir Grant Hammond
President

Acknowledgements

We are grateful to all the people and organisations that provided input during this review. We would especially like to thank the members of our expert advisory group—Annabelle Markham, Ang Jury, Judge Caren Fox, Elisabeth McDonald, Helen Cull, John Billington, Julia Tolmie and Tusha Penny. A list of those with whom we consulted can be found in Appendix B of this Report.

The lead Commissioner for this project was Judge Peter Boshier and, upon his resignation, Dr Wayne Mapp. The Senior Legal and Policy Advisers were Linda McIver and Bridget Fenton.

While Helen McQueen and the Honourable Douglas White QC held warrants as Law Commissioners from 9 February 2016, they did not participate in this project, which was largely completed prior to that date.

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Summary of recommendations

STRANGULATION OFFENCE

- R1 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.
- R2 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.

NOTING FAMILY VIOLENCE ON THE CRIMINAL RECORD

- R3 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 court must direct that the offence be recorded on the person’s criminal record as a family violence offence.

AGGRAVATING FACTOR FOR SENTENCING

- R4 Section 9 of the Sentencing Act 2002 should be amended to include strangulation as an aggravating factor that must be taken into account in sentencing.

OPERATIONAL CHANGES

- R5 The Police family violence incident report (POL 1310) should be amended to include questions designed to screen for strangulation.
- R6 The Police National Intelligence Application (NIA) should be amended to record specifically whether or not a family violence incident included an allegation of strangulation.
- R7 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.

Chapter 1

Introduction

- 1.1 For most of us, family provides the nurturing and security from which we draw strength and flourish. However, for far too many New Zealanders, it is not this. It is a place of violence, intimidation, coercion and control. Each year, the Police deal with over 100,000 incidents of family violence—one every five and a half minutes—and the number is growing.¹ Yet, reported family violence is merely the “tip of the iceberg”. Much family violence goes unreported. Around half of all homicides are committed by a family member, three-quarters of those by men.
- 1.2 In the past decade, there has been a rapid growth internationally in understanding the role played by strangulation in family violence. It is now known to be very common, particularly between intimate partners. The harm caused by strangulation ranges from struggling to breathe, to loss of consciousness, to death. The psychological impact on victims can be devastating. It is often said that, while the abuser may not be intending to kill, he is demonstrating that he can kill. It is unsurprising that strangulation is a uniquely effective form of intimidation, coercion and control.
- 1.3 Two key factors distinguish strangulation from most other forms of family violence. First, it is an important risk factor for a future fatal attack by the perpetrator.² Victims of family violence who have been strangled have seven times the risk of going on to be killed than those who have suffered other forms of violence but not strangulation. People who make decisions about the victim or the perpetrator (particularly judges) need to understand that risk so that they make decisions that will help to keep the victim safe. Second, it characteristically leaves few marks or signs, sometimes even when it has been life threatening. That presents unique challenges for prosecution and contributes to the dangerousness of strangulation being underestimated and the perpetrators not being held appropriately accountable.
- 1.4 It is principally this second factor (combined with an increased understanding of the first) that has led many other jurisdictions to conclude that their criminal justice systems were failing adequately to prosecute and hold perpetrators accountable. Typically, strangulation was either not being prosecuted at all or it was being charged as a minor violent offence, as if equivalent to a push or shove. This prompted those jurisdictions, particularly in the United States and Australia, to enact specific offences with higher maximum penalties than the offences tended to be prosecuted as previously, and with elements of proof tailored to the harms and intentions characteristic of strangulation. In addition to better holding perpetrators accountable, these new offences are seen as a way to highlight the dangerousness of strangulation in family violence circumstances.

1 “Statistics” It’s Not OK < www.areyouok.org.nz > .

2 Nancy Glass and others “Non-fatal strangulation is an important risk factor for homicide of women” (2008) 35 J Emerg Med 329.

THE NEW ZEALAND CONTEXT

Family Violence Death Review Committee

- 1.5 The impetus for this Report is a recommendation in the Fourth Annual Report of the Family Violence Death Review Committee (FVDRC), which was published in June 2014. The FVDRC is one of several statutory death review committees established under the auspices of the Health Quality and Safety Commission and charged with reviewing particular categories of deaths in order to learn how to prevent them. In its Report, the FVDRC discussed strangulation as a feature of family violence and recommended that the Government consider enacting a separate crime to address it.
- 1.6 The FVDRC's recommendation followed an intensive review of family violence homicides in New Zealand over the period 2009–2012 and 17 in-depth regional reviews of selected death events. That examination demonstrated that strangulation was often minimised by practitioners and even by victims. More specifically, the FVDRC found that:
- strangulation was commonly reported in the abuse histories of the homicide victims examined;
 - many of the victims had been subjected to multiple previous instances of strangulation;
 - just over half of the instances of strangulation were reported to Police;
 - just over one-third resulted in charges with most of those charges being “male assaults female”; and
 - only six out of the 29 cases of strangulation reviewed resulted in convictions with the most serious conviction being for “male assaults female”.
- 1.7 The FVDRC thought that a specific strangulation offence would highlight the risk of fatality that accompanies strangulation, facilitate a more effective criminal justice response and highlight incidents of strangulation on the offender's criminal record.

Government family violence initiatives

- 1.8 Also in 2014, the Minister of Justice and the Minister for Social Development announced that family violence and sexual violence are amongst their top priorities and undertook a package of initiatives.³ One of the key initiatives was publication in August 2015 of a discussion document about strengthening the legislative response to family violence. Within the scope of review are the Domestic Violence Act 1995, the Care of Children Act 2004, the Crimes Act 1961, the Bail Act 2000 and the Sentencing Act 2002.
- 1.9 Submissions on that document closed in September 2015, and a report is likely in mid-2016.

3 Cabinet Paper *Progress on the Work Programme of the Ministerial Group on Family Violence and Sexual Violence* (22 July 2015) SOC 15/68.

Law Commission projects on family violence and sexual violence

1.10 In addition to that package, the Minister Responsible for the Law Commission asked us to consider the rationale for the creation of a separate crime of non-fatal strangulation. This was one of three family violence or sexual violence projects referred to the Commission. The other two were:

- **Alternative models for prosecuting and trying criminal cases**

We were asked to identify best practice for improving the court experience for complainants, with a particular focus on sexual offence cases. We recommended:

- establishing an alternative process outside of court for resolving sexual violence cases (such as in situations where the victim wants to maintain a relationship with the perpetrator);
- improving the court experience for victims of sexual offending by mechanisms such as statutory time limits to ensure speedier case resolution, introducing less traumatic methods for complainants to give evidence at trial and piloting a specialist sexual violence court with expert judges and lawyers who are trained and accredited in dealing with sexual violence cases; and
- establishing a Sexual Violence Commission to coordinate and oversee wraparound care and services for victims of sexual violence.

This reference was tabled in Parliament in December 2015.

- **Victims of family violence who commit homicide**

This Report examines how the criminal justice system responds to victims of family violence when they face criminal charges for killing their abusers. In particular, it looks at options for amending the defence of self-defence and introducing a partial defence to murder.

This reference is likely to be tabled in Parliament prior to 30 June 2016.

THIS PROJECT

1.11 The terms of reference for this project, which are in Appendix A, were concluded in July 2015. They require us to consider whether a crime of strangulation should be created, or whether other legislative or operational options would better address the concerns the proposed crime is intended to address. We must report by 31 March 2016.

1.12 Given the tight timeframe and the relatively technical nature of the reference, we decided to conduct targeted consultation rather than publishing an issues paper for public comment as is our usual practice. A list of the people and organisations we consulted is in Appendix B. The consultees represented a broad range of stakeholders, including refugees, defence and prosecution counsel, Police, health practitioners, judges, academics and the Ministry of Justice.

1.13 We found broad support for a separate offence of strangulation. Some consultees stressed that the labelling effect of a specific offence would help to increase understanding of this particular problem. Others thought it would assist the prosecution of strangulation. A couple of consultees were initially not in favour of a separate offence because, as a matter of principle, they preferred generic offences, but they conceded that there was a case for a separate offence in this instance.

OUR RECOMMENDATIONS

- 1.14 We have no doubt that strangulation often constitutes very serious criminal behaviour and that its impact has, until recently, been underestimated.
- 1.15 We have also found that there is a particular problem charging the many instances of strangulation that do not result in visible injury. Those instances may result in significant internal or psychological signs and symptoms that often go undocumented. The current framework of serious violent crimes in Part 8 of the Crimes Act 1961 does not cater well to prosecutions for this type of behaviour because the framework requires proof of harm or of a particular intention on the part of the perpetrator, which cannot be easily determined. As a consequence, this offending tends to be charged as “male assaults female”, which does not require proof of injury or a special intention but carries a maximum penalty of only two years. We do not think that charge reflects an appropriate level of accountability for many cases of strangulation.
- 1.16 While other jurisdictions have enacted a specific strangulation offence to address this problem and raise the profile of strangulation in family violence circumstances, the Law Commission has generally been sceptical of specific offences that can be adequately covered by other generic offences because they can result in inconsistent charging practice and inappropriate under-charging.⁴ The recommendations previously made around the Crimes Act’s scheme of offences against the person were, however, not adopted, and the Crimes Act continues to have a range of offences from the generic to the specific.⁵
- 1.17 The general principle in a code-type statute, like the Crimes Act, is that most offences should be generic (for example, homicide or assault) to avoid a slide into a chaotic plethora of specific offences that the instrument was designed to avoid. Nevertheless, in a fast-changing world, new phenomena or understandings may emerge or be identified to warrant the law’s intervention if they are not already adequately catered for. A code-type statute cannot be entirely static. The Legislation Advisory Committee Guidelines indicate that such a new offence can only be justified if it can be shown that:⁶
- it will successfully address the policy objectives; and
 - those objectives cannot be achieved equally or better by other mechanisms.
- 1.18 Strangulation satisfies those criteria for reform. We consider that a separate strangulation offence will be a more effective criminal sanction than the current suite of offences and will increase awareness of the lethality of strangulation. In these ways, a new offence will also help to increase the safety of victims of family violence.
- 1.19 In addition to a new offence, we recommend that the Sentencing Act 2002 be amended to include strangulation as an aggravating factor. This will emphasise the future risks associated with strangulation, and when strangulation is charged under a generic offence, it may increase the sentence imposed. Finally, we also recommend that the Police make a number of operational changes designed to ensure that strangulation is identified and recorded in such a way that it is apparent in subsequent searches of the records relating to the perpetrators.

4 Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes against the person* (NZLC R111, 2009) at iv.

5 Current specific violence offences include “male assaults female”, s 194(2); “acid throwing”, s 199; “assault with a weapon”, s 202C; and “female genital mutilation”, s 204A.

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

Chapter 2

Background

WHAT IS STRANGULATION?

- 2.1 Strangulation is the interference with blood or airflow by external pressure to the neck, leading to asphyxia (lack of oxygen supply to the body). The clinical sequence of a victim’s experience of strangulation may begin with difficulty breathing, dizziness and severe pain, followed by loss of consciousness. A victim described being strangled in this way:⁷
- I’m taking the pain, and I’m biting; I bit up my lips so hard I bit the whole [lip], all this is, this is gone, gone that’s how bad [I bit it]. [My daughter] didn’t know. She was there ... it was like his whole finger is, like went up in there, and you can feel the imprint of his nails ... and I can feel the bleeding, dripping, and you can just feel just feel it, and like, all right, this is my death warrant right here, and you cannot, you can’t talk.
- 2.2 Three to five kilograms of pressure—roughly that recommended for very light polishing of a motor vehicle⁸—applied to the neck for as little as 10 seconds can cause unconsciousness. A person will regain consciousness if pressure is released, but brain death can occur within four to five minutes if strangulation persists.⁹ There is, therefore, a fine line between fatal and non-fatal strangulation. The Family Violence Death Review Committee (FVDRC) observes that the danger inherent in strangulation “can be appreciated when it is understood that the brain needs a continuous supply of oxygen”.¹⁰ Without that, brain cells—which are not regenerative—malfunction and die.¹¹
- 2.3 If a person is strangled to the point of unconsciousness, they may lose temporary control of their bladder and bowel and, afterwards, suffer cognitive changes like amnesia, confusion and agitation.¹² These effects can go hand in hand so that a victim is left with evidence of an assault but cannot recall it. One of the groups we have consulted with described a victim who had passed out during a strangulation assault and lost bladder control but, when Police arrived, did not remember how that had happened.
- 2.4 Strangulation is commonly described as “choking” or “throttling”. It can be distinguished from suffocation, which involves interference with a person’s ability to breathe but not necessarily by application of force to the neck.¹³

7 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 PWQ 124 at 130.

8 Susan B Sorenson, Manisha Joshi and Elizabeth Sivitz “A Systematic Review of the Epidemiology of Nonfatal Strangulation, a Human Rights and Health Concern” (2014) 104(11) Am J Public Health 54 at 54.

9 Gael B Strack and GE McClane *How to Improve your Investigation and Prosecution of Strangulation Cases* (1999) at 3.

10 Family Violence Death Review Committee *Fourth Annual Report* (2014) at 98.

11 At 98.

12 See H Douglas and R Fitzgerald “Strangulation, Domestic Violence and the Legal Response” (2014) 36 Syd LR 231 at 233.

13 Sometimes, “non-fatal strangulation” is mistakenly described as “attempted strangulation”. However, it is more correct to describe any pressure applied to the throat or neck that impedes normal breathing or circulation of the blood as strangulation. Attempted strangulation, therefore, is where no pressure was actually applied to the neck despite intent to do so and an action was taken to accomplish that intent. This would be very difficult to prove. A “non-fatal strangulation” is where pressure was applied to the throat or neck but it did not result in death.

- 2.5 Usually, strangulation is performed “manually”—with the hands—but it can also be performed with a ligature (like a rope), by hanging or “posturally”, where the neck is put over an object and pressure applied.¹⁴ United States researchers who studied several hundred cases found that the vast majority involved manual strangulation, with victims describing being strangled with hands, an arm or by way of a choke hold.¹⁵
- 2.6 The relative ease with which a person can strangle another is due to the anatomy of the neck. The larynx is made up of cartilage (not bone), and the neck accommodates the carotid arteries (which are at the side of the neck and carry oxygenated blood from the heart and lungs to the brain) and the jugular veins (which carry deoxygenated blood from the brain back to the heart). A strangled person may lose consciousness because the carotid arteries are blocked (and so the brain is deprived of oxygen) or the jugular veins are blocked (and so deoxygenated blood cannot leave the brain) or the airway is blocked (so the person cannot breathe).¹⁶

SIGNS AND SYMPTOMS OF STRANGULATION

- 2.7 Whether or not a victim loses consciousness, strangulation can cause what has been described as a “uniquely wide” range of adverse effects.¹⁷ During an assault, a victim may feel her legs go weak and her eyes “pop”, and afterwards may experience various symptoms and signs.¹⁸ Many tell-tale signs and symptoms are subtle, latent or delayed. This poses problems for medical and law enforcement personnel, as we discuss below.
- 2.8 The symptoms of strangulation include:¹⁹
- breathing changes and shortness of breath;
 - difficulty with swallowing or a “thick” feeling in the throat, and neck and throat pain;
 - cough;
 - nausea or vomiting;
 - cognitive changes; and
 - tinnitus (ringing in the ears).
- 2.9 The signs of strangulation may include:²⁰
- bruising or abrasions to the neck, clavicle or jaw line, which may include ligature marks (if the abuser used a rope or other ligature);
 - scratch marks on the neck (“defensive” wounds from the victim trying to ward off the attack);
 - “petechiae”, which are small spots caused by blood leaking from capillaries;

14 Strack and McClane, above n 9, at 3; and Maureen Funk and Julie Schuppel “Strangulation Injuries” (2003) 402(3) Wis Med J 41 at 42.

15 Gael B Strack, George E McClane and Dean Hawley “A review of 300 attempted strangulation cases part I: criminal legal issues” (2001) 21 J Emerg Med 303 at 305.

16 Strack and McClane, above n 9, at 3.

17 Sorenson, Joshi and Sivitz, above n 8, at 54.

18 Symptoms include effects or feelings that may not be objectively visible, while signs include features that are able to be identified by others.

19 The signs and symptoms we list here are drawn from Victorian Order of Nurses for Canada *The Identification, Care and Advocacy of Strangulation Victims: Information for Front Line Workers and Crisis Advocates* (2012). See also Douglas and Fitzgerald, above n 12.

20 “Special Collection: Traumatic Brain Injury and Domestic Violence: Understanding the Intersections” VAWnet < www.vawnet.org > .

- subconjunctival haemorrhage, which occurs when a tiny blood vessel breaks beneath the clear surface of the eye, resulting in a red mark; and
 - hypoxic brain injury, caused when the brain’s oxygen supply drops, which can result in confusion, amnesia, restlessness and sometimes permanent disability.
- 2.10 Petechiae tend to appear a few hours after an assault, whereas bruising can take several days to materialise. Some of the most serious effects, while extremely rare, may arise after a victim has apparently recovered. Examples include the following:
- “Thyroid storm”, which is a life-threatening rush of thyroid hormones, may arise days after a strangulation assault.
 - There have been reports of victims suffering miscarriages or strokes caused by the strangulation.²¹
 - Some victims have died, several weeks after an attack, from brain damage caused by lack of oxygen during the strangulation.²²
- 2.11 Strangulation also has a predictably serious effect on victims’ psychological and emotional wellbeing. Many report that, during an assault, they believed they would die, and the long-term impact can be sufficiently devastating that victims commit suicide.²³

STRANGULATION AND FAMILY VIOLENCE

- 2.12 Family violence incidents are often very complex. There may be no third-party witnesses, participants may be intoxicated and there may be allegations of violence from more than one party. Indeed, some victims of family violence and abuse use violence themselves, but that is not to say that the violence in such circumstances is mutual or equal. The FVDRC concluded, from its regional reviews, that:²⁴
- ... some abused women retaliate and resist coercive control by using violence themselves. This can include engaging in violence to try and establish a semblance of parity in the relationship, violent self-defence, violent retaliation and violent resistance. Primary victims may also use violence when they sense another attack from the predominant aggressor is about to occur.
- 2.13 In these circumstances, the FVDRC cautions, a “primary victim/predominant aggressor analysis” is essential. In an abusive relationship, the “primary victim” is the person who (in the abuse history of the relationship) is experiencing ongoing coercive and controlling behaviours from their intimate partner, while the “predominant aggressor” is the person who is the most significant or principal aggressor in a relationship and who has a pattern of using violence to exercise coercive control.²⁵ The FVDRC identified a lack of understanding of these dynamics in the New Zealand social sector and said it is important they are appreciated by those working in the criminal justice system.²⁶
- 2.14 Unlike some other forms of violence—like hitting—strangulation seems to be the preserve of predominant aggressors. In the context of family violence, it has been described as a heavily “gendered” form of abuse between intimate partners. In the 29 strangulation assaults the FVDRC examined, a woman was the victim in 27 cases and a child in two, while in all cases,

21 Gael Strack and Casey Gwinn *Domestic Violence Report* (2014) at 87.

22 Douglas and Fitzgerald, above n 12, at 233.

23 Gael B Strack and Casey Gwinn “On the Edge of Homicide: Strangulation as a Prelude” (2011) 26(3) *Criminal Justice* 32.

24 Family Violence Death Review Committee, above n 10, at 74 [footnotes omitted].

25 At 15.

26 At 74.

- the aggressor was male.²⁷ This is consistent with overseas research, which suggests that, over the course of a lifetime, women are between four and 11 times more likely than men to report strangulation by an intimate partner.²⁸
- 2.15 Most of the literature is concerned with heterosexual relationships. Strangulation has been found to feature in same-sex relationships,²⁹ but there is limited data on it.³⁰ Intimate partner violence (IPV) in same-sex relationships has generally received much less attention than heterosexual IPV despite the fact it may be as prevalent or more prevalent.³¹ The FVDRG acknowledged that same-sex family violence deaths are likely to be undercounted.³²
- 2.16 It has been said that abusers do not strangle to kill but to show that they *can* kill.³³ In the context of IPV, it is arguably this element of strangulation that makes it a unique tool of coercion and control, apt to traumatise its victims long after the assault has ended. Perhaps unsurprisingly, strangulation is often accompanied by threats to kill.³⁴
- 2.17 Strangulation is not confined to IPV. It features in “stranger” sexual assaults,³⁵ and victims in the family setting include children and others as well as intimate partners. In this broader context, offenders are not always male or intimately associated with the victim.³⁶ However, strangulation is strongly correlated with other forms of IPV, and women who have previously suffered other abuse are much more likely to be strangled.³⁷ The FVDRG noted a “striking” coincidence of strangulation histories with the family violence deaths it reviewed.
- 2.18 In the 1990s, San Diego Assistant City Attorney Gael Strack, physician George McClane and forensic pathologist Dean Hawley MD directed attention to strangulation as a form of IPV and, in 2001, published a review of 300 San Diego strangulation cases (the San Diego study). This study has been described as ground-breaking and pivotal and has been followed, in the United States and elsewhere, by a body of further research, policy and academic review, and law reform. The study’s main findings, substantially borne out in subsequent literature, were as follows:³⁸
- Most strangulation cases produce minor or no visible injury, but many victims suffer internal injuries and have documentable symptoms.

27 At 100. This is consistent with findings overseas, as to which, see Strack, McClane and Hawley, above n 15, at 305; and Strack and Gwinn, above n 23, at 2.

28 Sorenson, Joshi and Sivitz, above n 8, at 57. See also Thomas, Joshi and Sorenson, above n 7, at 133. In this Report, we sometimes refer to the victim as “she” and the perpetrator as “he”. While we recognise that there are exceptions to this gender dichotomy, we consider this practice more accurately reflects reality than if we included both gender terms in every case.

29 See, for example, Sandra E Lundy “Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts” (1993) 28 N Engl Law Rev 312; and Claire M Renzetti *Violent Betrayal: Partner Abuse in Lesbian Relationships* (SAGE Publications, Newbury Park, 1992).

30 Christine E Murray and A Keith Mobley “Empirical research about same-sex intimate partner violence: a methodological review” (2009) 56 J Homosex 361.

31 ML Walters, J Chen and MJ Breiding *The National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation* (National Center for Injury Prevention and Control, 2013). The term “intimate partner” means a current or former partner or spouse. The abbreviation “IPV” or intimate partner violence is widely used in the literature to refer to any form of violence by a current or former partner or spouse.

32 Family Violence Death Review Committee, above n 10, at 39, n 69.

33 Strack and Gwinn, above n 23.

34 Thomas, Joshi and Sorenson, above n 7, at 126.

35 See, for example, *Greathead v R* [2014] NZCA 49 (offender strangled prostitute); *R v Cant* HC Auckland CRI 2006-004-26731, 20 May 2010 (offender raped a stranger, in the course of which he put his hand around her throat and impeded her breathing); and *R v Timbun* HC Auckland CRI 2007-004-1896, 2 March 2010 (offender raped a number of strangers, one of whom he strangled several times).

36 Strack, McClane and Hawley, above n 15, at 305; and Family Violence Death Review Committee, above n 10, at 100. See also Victorian Order of Nurses for Canada, above n 19.

37 Strack, McClane and Hawley, above n 15, at 306. See also Glass, above n 2, at 2.

38 Strack and Gwinn, above n 23.

- Strangulation is a gendered crime. In 299 of the 300 cases the researchers reviewed, the perpetrator was male.
- Most abusers do not strangle to kill but to demonstrate they can kill.
- Strangulation victims often suffer major long-term emotional and physical effects.
- Victims of prior strangulation are more likely to become homicide victims.

Prevalence of strangulation in family violence

- 2.19 New Zealand Police estimate that only 18–25 per cent of all family violence cases are reported,³⁹ and the position is similar elsewhere. United Nations Women records that cases of violence against women “more often than not” go unreported, and a recent survey across 28 member states of the European Union revealed that only 14 per cent of women reported their most serious incident of intimate partner violence to Police.⁴⁰
- 2.20 Strangulation may be particularly under-reported. Of the 29 strangulation assaults the FVDRC reviewed, the strangulation act was reported to Police in 16 cases and unreported in 13 cases. Morag McClean RN, a Canadian nurse who has written a guide for front-line workers and crisis advocates dealing with strangulation, cautions:⁴¹
- Victims often do not understand the lethality of strangulation and for many reasons will minimize the event or fail to report. For some victims, choking is considered to be a form of physical violence and therefore it is normal to be choked.
- 2.21 Currently, strangulation in family violence cases is not systematically recorded. When it is encountered by Police in a call-out, it will be documented on the record, but various words and phrases will be used, including “choking”, “throttling” and “squeezing the neck”. This makes it very difficult to do an electronic search of the records to determine the prevalence of strangulation.
- 2.22 Despite that, Police and women’s refuges report to us that it is very common in family violence. Women’s Refuge reports that the vast majority of victims it deals with have been strangled by their partners. The FVDRC found strangulation histories in 71 per cent of their regional review cases, and 50 per cent of those cases involved multiple strangulations. This led the FVDRC to conclude that strangulation is a clear “modus operandi” for some abusers.⁴²
- 2.23 Overseas research includes comparable data. A 2008 study by a group of US medical researchers into several hundred attempted and completed intimate-partner homicides found a history of strangulation in almost half the cases.⁴³ Among victims of “systematic” intimate partner abuse, just over 50 per cent reported having been strangled.⁴⁴

39 Family Violence Death Review Committee, above n 10, at 46, n 73.

40 United Nations Women “Facts and Figures: Ending Violence against Women” (October 2015) < www.unwomen.org > . United Nations Women is the United Nations entity for gender equality and the empowerment of women, which was created in July 2010 as a composite of the Division of the Advancement of Women (DAW), the International Training Institute for the Advancement of Women (INSTRAW), the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) and the United Nations Development Fund for Women (UNIFEM). Its roles are to support intergovernmental bodies in the formulation of policy, standards and norms; help Member States implement such standards and support those countries if requested and forge effective partnerships with civil society; lead and coordinate the United Nations’ work on gender equality; and promote accountability through monitoring of system-wide progress: see United Nations Women “About us” < www.unwomen.org > .

41 Victorian Order of Nurses for Canada, above n 19, at 3. See also Douglas and Fitzgerald, above n 12, at 235.

42 Family Violence Death Review Committee, above n 10, at 100.

43 Nancy Glass and others “Non-fatal strangulation is an important risk factor for homicide of women” (2008) 35 J Emerg Med 329 at 5. We detail this study further at [2.29] below.

44 Sorenson, Joshi and Sivitz, above n 8, at 57.

A tool of coercion and control

- 2.24 Coercion and control is a major factor in many violent intimate relationships. It may be distinguished from “situational violence”, which is intermittent, not rooted in a desire to control and does not escalate over time.⁴⁵ Unlike situational violence, IPV is characterised by coercion and control and involves an ongoing pattern of behaviours that cause a range of harms in addition to physical injury.⁴⁶
- 2.25 To the extent IPV involves coercion and control, strangulation is arguably unique. It has been described as a “way an abusive partner can ‘set the stage’ by sending the message that he can, and perhaps will, kill the victim—a credible threat that is intended to induce compliance”.⁴⁷ Thomas and others opine that strangulation “induces behavioural and emotional reactions that facilitate coercive control” through the “combination of fear and the inability to effectively resist”.⁴⁸ In this way, strangulation might align more closely with sexual assault or torture than assault and battery crimes.⁴⁹ Sorensen suggests:⁵⁰

Non-fatal strangulation might well be the domestic violence equivalent of water boarding ... Both leave few marks immediately afterward, both can result in the loss of consciousness, both are used to assert dominance and authority over the life of the other, both create intense fear and potentially result in death, and both can be used repeatedly, often with impunity.

An indicator of future lethal attack

- 2.26 A number of studies have examined the factors that make a victim of family violence at greater risk of a lethal attack. In 2000, the Chicago Women’s Health Risk Study identified risk factors for life-threatening injury or death in family violence circumstances by comparing longitudinal data on abused women against similar data on women who had been killed by (or who had killed) their intimate partner.⁵¹ While the conventional wisdom that past violence predicts future violence was borne out by the study, it also found evidence that, when the past violence involved strangulation or use of a weapon, the victims were at greater risk than when those factors were not present.
- 2.27 A 2003 study comparing 220 victims of homicide by intimate partners to 343 victims of abuse sought to identify risk factors for homicide in abusive relationships.⁵² Its findings included that:
- strangulation, together with other factors such as stalking, forced sex and abuse during pregnancy, is associated with subsequent homicide;
 - the strongest sociodemographic risk factor was lack of employment;
 - access to firearms and use of illicit drugs (but not excessive use of alcohol) were individual characteristics of the abuser that were both strong risk factors for homicide; and
 - being separated from the abuser after having lived with him was a strong relationship risk factor, as was having a child living in the home who was not the abuser’s biological child.

45 Thomas, Joshi and Sorenson, above n 7, at 125.

46 Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007) at 99.

47 Thomas, Joshi and Sorenson, above n 7, at 125.

48 At 125–126.

49 Gael Strack and Casey Gwinn (eds) *Responding to Strangulation in Alaska: Guidelines for Law Enforcement, Health Care Providers, Advocates and Prosecutors* (Training Institute on Strangulation Prevention) 7 at 9. See also Sorenson, Joshi and Sivitz, above n 8, at 57.

50 At 57.

51 Carolyn Rebecca Block *Risk Factors for Death or Life-threatening Injury for Abused Women in Chicago* (2004).

52 Jacquelyn C Campbell and others “Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study” (2003) 93 *Am J Public Health* 1089.

- 2.28 A study in 2004 was designed to test the ability of the so-called “Danger Assessment” screening tool to predict intimate partner homicide.⁵³ That tool lists 17 risk factors, one of which was “tried to choke (strangle) her”. The study found that strangulation carried a significantly increased risk of fatality (women who were murdered were 9.9 times more likely to have been strangled than women who were abused but not strangled) as did use or threatened use of a weapon (at 20.2 times the risk), threatening to kill (14.9 times the risk), being violently and constantly jealous (9.2 times the risk) and forcing the victim to have sex (7.6 times the risk).
- 2.29 A key 2008 United States study found that women who were victims of strangulation were at a significantly increased risk of being killed or of an attempt to kill them.⁵⁴ This study is often quoted to support separate offences of strangulation in other jurisdictions, so we will provide more detail. The researchers conducted interviews with three groups of people:
- relatives or close friends of 310 women who had been killed by their current or ex-intimate partner (the homicide group);⁵⁵
 - 194 women who had been the victims of attempted homicide by a current or former intimate partner (the attempted homicide group); and
 - 427 women who had been physically assaulted or threatened with a weapon by a current or former intimate partner (the abused group).
- 2.30 The interviewees were asked questions to identify risk factors for homicide and attempted homicide using previously tested screening tools. The study found that women in the homicide and attempted homicide groups were far more likely to have a history of strangulation compared to the women in the abused group. Multivariate logistic regressions were conducted to estimate the odds of becoming a victim of homicide or of attempted homicide (versus a victim of abuse) if the victim had previously been strangled.⁵⁶ They found that a person who had been strangled by their partner had a seven-fold increased chance of being killed in a later attack than a person who had been abused but not strangled, and a six-fold increased chance of being the victim of an attempted homicide attack.
- 2.31 These studies from other jurisdictions provide strong evidence that strangulation is associated with an increased risk of a future fatal attack. It is important to note that an increased risk does not mean that a fatal attack will occur, merely that there is a greater chance that it will occur. However, the consequences are for the victim to die, so it is important that this increased risk is understood and taken into account by any person who is making decisions about the victim or the perpetrator of strangulation.

53 Jacquelyn Campbell *Research Results From a National Study of Intimate Partner Homicide: The Danger Assessment Instrument* (2004).

54 Glass and others, above n 43.

55 The interviewees were chosen because they were likely to be knowledgeable about details concerning the victim’s relationship with the perpetrator.

56 Multivariate logistic regression is a method of statistical analysis that determines the relationship between multiple types of variables. It demonstrates the chances of one type of variable producing the other type of variable.

Chapter 3

Strangulation in the criminal justice system

INTRODUCTION

- 3.1 In this chapter, we describe how strangulation is currently dealt with by the criminal law. We review cases to illustrate how strangulation arises in the family violence context and how perpetrators are prosecuted and punished. In the next chapter, we go on to discuss whether the perpetrators of strangulation are being held adequately accountable.
- 3.2 To understand how strangulation is prosecuted, we consulted with a wide range of people, particularly the Police. We also gathered published criminal judicial decisions in which the prosecuted behaviour involved strangulation in family violence circumstances. We include summaries of those decisions in Appendix C. For each, we describe the nature of the violence, evidence of injury, whether the strangulation caused the victim to lose consciousness or was accompanied by a threat to kill or other intent to cause physical harm (for example, making the victim lose consciousness), the charge and the sentence.
- 3.3 We have not examined strangulation that occurs in non-family violence circumstances because that is outside of our terms of reference. Also, within the parameters of family violence strangulation, the table in Appendix C does not include strangulation that was not prosecuted or that resulted in death. Obviously, it also does not include strangulation that was not reported to the Police.
- 3.4 Given the cases in the table represent only a subset of all cases involving strangulation, they are indicative, rather than exhaustive, of the way the criminal justice system responds to strangulation. It is important they are read on that basis. The limited size of our sample means that care should be exercised in drawing conclusions based on that information alone. For that reason, we have also tested our conclusions with a variety of people participating in the criminal justice system who specialise in family violence.

Comparing case outcomes

- 3.5 Sometimes, strangulation is the only element of a physical attack. In those cases, sentence starting points can be compared because, in theory, they should be similar.
- 3.6 More often, though, strangulation is one part of an attack involving other violence. In such cases, strangulation is sometimes separately charged and other times counted as part of the factual background to an offence that involves other violence.⁵⁷ If it is the subject of a separate charge in such a situation, the nominal sentence for the strangulation might be less than if the violence had been limited to strangulation. In cases involving multiple charges, what matters is that the total sentence reflects an offender's overall culpability for the whole episode of

⁵⁷ See, for example, *R v Pene* DC Whangarei CRI-2011-029-1419, 25 September 2012 (noted in Appendix C), where the defendant's physical attack on his partner was charged as injuring with intent to cause grievous bodily harm and involved punching in addition to strangulation. The sentencing Judge described the violence as a "sustained attack ... involving attacking the head repeatedly and also strangling ... which is always regarded seriously".

offending, and the calculation of individual sentences is secondary. The following hypothetical illustrates how this might look in practice:

In a single incident, an offender stabs and strangles his partner. For the stabbing, he is charged with and convicted of “wounding with intent to cause grievous bodily harm” (maximum penalty of 14 years’ imprisonment), and for the strangulation, he is charged with and convicted of “male assaults female” (maximum penalty of two years’ imprisonment). For sentencing, the lead offence is the wounding because it is the more serious. In imposing concurrent sentences,⁵⁸ the Judge specifies a lead sentence for the wounding of five years’ imprisonment and a concurrent sentence of one year’s imprisonment for the assault. The effective term of imprisonment imposed on the offender is, therefore, five years. The one-year sentence for the assault does not affect the term to be served and nor can it be assessed in isolation from the overall sentence. Just as the offending is to be viewed in the round, so is the sentence.

- 3.7 This is the principle of “totality”.⁵⁹ It is explained in *R v Hassan*,⁶⁰ where the Court of Appeal rejected an argument that the sentencing Judge had wrongly assessed culpability for individual charges. The Court stated:⁶¹

This submission confuses the nature of the enquiry for sentencing purposes in such a case. This was one continuing incident, which involved the commission of two separate offences, which were closely related not only in time but also in the assessment of their own respective criminal culpability. The Judge was required, as she did, to look at the totality of the offending and then impose a sentence appropriate to that. It is seldom helpful to attempt an analysis of the individual sentences imposed in such a situation, which ignores the totality principle. As this Court has previously noted, in cases of multiple offending there are frequently different arithmetical methods of achieving the final appropriate result.

- 3.8 The primacy of the total effective sentence, rather than how it is calculated, means it can be hard to compare cases. A number of variables affect what charges are laid and how sentences are calculated, and there are inevitably inconsistencies in practice. In terms of charging, for example, Appendix C shows that sometimes strangulation is charged as a relatively serious offence but then downgraded to a more minor charge. Sometimes it is charged from the outset as a relatively minor offence, even though the evidence would support a more serious charge. As we note below, these charging decisions have flow-on effects for sentencing.
- 3.9 Despite variations in charging and sentencing practice, however, the cases in Appendix C appear to share a number of features and suggest some trends.

CHARGING

- 3.10 There are three types of decisions for Police and prosecutors that determine what charges a person who commits strangulation will ultimately face. These are:
- the decision to prosecute—whether an offence has been disclosed and whether to lay charges;
 - the choice of charges; and
 - plea negotiations.

58 Section 84 of the Sentencing Act 2002 provides guidance on the use of cumulative and concurrent sentences of imprisonment. Section 84(1) provides: “Cumulative sentences of imprisonment are generally appropriate if the offences for which an offender is being sentenced are different in kind, whether or not they are a connected series of offences.” Section 84(2) provides: “Concurrent sentences of imprisonment are generally appropriate if the offences for which an offender is being sentenced are of a similar kind and are a connected series of offences.”

59 The totality principle is set out in s 85 of the Sentencing Act 2002.

60 *R v Hassan* [1999] 1 NZLR 14 (CA).

61 At 20.

- 3.11 All three decisions should be made in accordance with the principles set out in the *Solicitor-General's Prosecution Guidelines*.⁶² Amongst other things, those Guidelines establish the overarching principle that the nature and number of resulting charges should adequately reflect the criminality of the defendant's conduct.⁶³

The decision to prosecute

- 3.12 There are two elements to a decision to prosecute. They are:
- whether the evidence is sufficient to provide a reasonable prospect of conviction (**the evidential test**); and
 - whether prosecution is required in the public interest (**the public interest test**).⁶⁴
- 3.13 The evidential test is met if there is credible evidence that could be expected to satisfy a judge or jury beyond reasonable doubt that the offence was committed. Whether the public interest test is met will depend upon a number of factors including the seriousness of the offending, the vulnerability of the victim, whether the conduct is likely to be repeated and whether diversion would better serve the public interest. Both tests must be met, so it may be that there is sufficient evidence to provide a reasonable prospect of conviction but the offence is not serious and prosecution is not required in the public interest.
- 3.14 We understand from Police that there are cases in which strangulation is alleged but no prosecution is brought. We do not have sufficient information to ascertain why this may be but surmise that it may be because either:
- the evidential test is not met if the complainant appears unreliable or there are no marks on the neck and further medical assessment is not considered warranted; or
 - the public interest test is not met if the allegations are not considered serious.

The choice of charges

- 3.15 Assuming a prosecution is commenced, the prosecutor must decide which charge or charges should be laid. In principle, the choice of charges must properly reflect the criminality of the defendant's conduct.⁶⁵ However, in relation to strangulation, there are a number of ways in which this result can be achieved. For example, where strangulation is the main or only violent behaviour, there are a range of possible charges. Where strangulation was one part of other violent behaviour, it may be that the "criminality" of the strangulation can be adequately reflected in serious charges targeting other aspects of the violence.
- 3.16 Strangulation usually falls to be prosecuted under Part 8 of the Crimes Act 1961, which prescribes "crimes against the person" (although it might sometimes be prosecuted in connection with sexual offences like rape, which are provided for under Part 7). The offences in Part 8 cover a wide spectrum of culpability:
- At the most serious end are murder, manslaughter and attempted murder, which are punishable by terms of imprisonment of between 14 years and life.

62 Crown Law *Solicitor-General's Prosecution Guidelines* (2013).

63 At [8.1].

64 At [5.1].

65 At [8.1].

- Below homicide, but still serious, are wounding and injuring with intent to cause grievous bodily harm or intent to injure, and aggravated wounding and injury. There is also a specific offence of “disabling”, which is relevant when strangulation results in a loss of consciousness. These offences are punishable by terms of imprisonment of between five and 14 years.
 - At the lowest end of culpability are the offences of “assault with intent to injure”, “male assaults female” and “common assault”, which are punishable by terms of imprisonment of between one and three years.
- 3.17 The cases in Appendix C demonstrate that strangulation in family violence circumstances is often charged at a low level as “male assaults female”. More serious charges are the exception and are laid only when there is other violence or evidence of injury. For example, the defendant in *Grant* was charged with “causing grievous bodily harm ... with intent to cause grievous bodily harm”, carrying a maximum penalty of 14 years’ imprisonment.⁶⁶ In that case, the defendant put his girlfriend in choker holds, forced her head under bath water, bit her, gouged her eyes and stabbed her with a comb.
- 3.18 At the other end of the spectrum, the defendant in *Areaiti*, who was charged with “male assaults female”, threw a bottle at the victim before grabbing her by the throat so she struggled for breath and thought she would die.⁶⁷ Similarly, in *Rikihana*, the defendant pushed the victim onto a chair and strangled her, but there was no other violence, and the ultimate charge was “male assaults female”.⁶⁸
- 3.19 We noted in Chapter 2 that the physical injury suffered by victims of strangulation may be difficult to detect, although the cases rarely indicate that a thorough medical assessment has been carried out that may have documented any internal or psychological injuries. The cases in Appendix C demonstrate, moreover, that while there is often no evidence of injury (or at least serious injury), a real part of any harm suffered by the victim is related to the terror that accompanies the belief that she will die. The offender in *S v Police*, for example, strangled the victim to the point of unconsciousness and said he would kill her,⁶⁹ and the offender in *Waitai* told the victim he “wanted her to black out”.⁷⁰ Those defendants were, however, charged with “assault with intent to injure” and “male assaults female” respectively.
- 3.20 The cases in Appendix C provide few clues as to the criminal intent of the defendant. Was the offender’s intention to physically harm the victim? To terrorise? To control? Was the strangulation an expression of rage? Of course, some cases involved threats to kill or an express intention to cause unconsciousness. Those intents are unambiguous and particularly culpable. It is, therefore, perhaps surprising when they are met merely with charges of assault.

Plea negotiations

- 3.21 Even when the test for prosecution is met and a person is charged, the charges may still evolve through plea discussions, which can result in agreements to substitute less serious charges than those first laid if the defendant pleads guilty to the lesser charges. The *Solicitor-General’s Prosecution Guidelines* permit principled plea discussions and arrangements under which a defendant may agree to plead guilty to a lesser charge instead of defending the more serious charge. It is recognised that these arrangements can reduce the burden on victims

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

67 *Areaiti v Police* [2014] NZHC 2413.

68 *Rikihana v Police* [2013] NZHC 711.

69 *S v Police* [2013] NZHC 1026.

70 *Waitai v R* [2014] NZHC 2116.

and complainants, save time and resources and provide a forum for a defendant to accept responsibility for criminal conduct.⁷¹

- 3.22 As noted above, in plea discussions, as during other stages of the prosecution process, prosecutors must have regard to whether the charges agreed to adequately reflect the offender's essential criminality and "provide sufficient scope for sentencing to reflect that criminality".⁷² To enable courts to assess offenders' essential criminality, the *Solicitor-General's Prosecution Guidelines* also provide that a summary of facts agreed during plea discussions must "not omit any material fact for the purposes of any plea arrangement". This includes "the extent of the injury or damage suffered by the victim".
- 3.23 The effect of plea negotiations can be seen in some of the cases in Appendix C (although there is generally no way to know on the face of the decisions why the charges were amended). In *Areaiti* and *Waitai*, the offenders were initially charged with "injuring with intent to injure", but those charges were downgraded to "male assaults female". In *Rikihana*, the original charge was "assault with intent to injure", but that was downgraded to "male assaults female".⁷³
- 3.24 In at least one of the cases where the charge was downgraded (*Waitai*), the Court noted the considerations were "pragmatic" rather than evidential and that the evidence would have supported the more serious charge. We take that to mean that the public interest (rather than evidentiary) limb of the test for prosecution indicated that the more serious charges should be dropped. That would appear also to have been the case in *Rikihana*, given there was evidence the victim was left with marks on her neck and burst capillaries in her eyes.

SENTENCING

- 3.25 The Sentencing Act 2002 sets out matters judges are required to take into account when sentencing offenders.⁷⁴ They include:
- the gravity of the offending in the particular case, including the degree of culpability of the offender;
 - the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
 - the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances.
- 3.26 As a matter of principle, offenders with similar levels of culpability should receive similar sentences. How strangulation is charged, however, affects the available penalty and therefore the extent to which the court can hold the offender accountable.
- 3.27 Our case sample includes a wide range of charges and so a wide range of starting points and end sentences. Among the Appendix C cases, the most serious charge—"causing grievous bodily harm with intent"—was laid in *Grant*, and the Court adopted a starting point of eight years' imprisonment against a maximum of 14 years. At the other end of the scale is *Waitai*, where a starting point of 12 months' imprisonment was held to be appropriate on the basis the offence was "male assaults female", which has a maximum penalty of two years' imprisonment.

⁷¹ Crown Law, above n 62, at [18.1].

⁷² At [186].

⁷³ We note that, in one case we found, the original charge of "male assaults female" was upgraded to "injuring with intent": *Karini v R* [2010] NZCA 193. This cannot have been the result of plea negotiations but demonstrates that it is not always the case that charges are reduced.

⁷⁴ Sentencing Act 2002, s 8.

- 3.28 A comparison between the cases of *Barrett* and *Waitai* illustrates the impact of charging on the final sentence. In *Barrett*,⁷⁵ the offender hit the victim several times with a curtain rod, pulled her hair, punched and kicked her, and attempted to throttle her, knowing she had suffered an earlier brain injury. He was charged with “injuring with intent to cause grievous bodily harm” and the Court imposed a sentence of six years’ imprisonment (against a maximum penalty of 10 years’ imprisonment).
- 3.29 In *Waitai*, the offender threw an object that hit and hurt the victim before putting her in a choke hold and squeezing her neck so she could not speak or breathe, which he repeated two more times. The original charge of “injuring with intent” was downgraded to “male assaults female”. On appeal, the Court “reluctantly” concluded an 18-month starting point was too high and that it should have been 12 months. The Judge considered that “if the charge had not been reduced from the more serious charge of injuring with intent, the starting point adopted could ... have readily been justified”. The reduced charge necessarily impacted on the appropriate starting point.
- 3.30 This striking difference in penalty appears to be due largely to the charge each offender faced. In its guideline for grievous bodily harm offending, *Taueki*,⁷⁶ the Court of Appeal has said the following kind of offending prosecuted as “wounding with intent to cause grievous bodily harm” (s 188(1) of the Crimes Act 1961, maximum penalty 14 years’ imprisonment) will call for a starting point of around four years’ imprisonment:⁷⁷

Domestic assault: A domestic assault by an offender on his or her spouse or partner (or former spouse or partner) which is impulsive, does not involve the use of a weapon and does not cause lasting injuries, but where the victim is properly classified as vulnerable, may require a starting point in the region of four years. Where there is a degree of premeditation or there is the use of a weapon (but, again, no lasting injuries), a higher starting point could be expected, perhaps five years or more.

- 3.31 Offending prosecuted as “wounding” or “injuring with intent to injure” (maximum penalties of 10 and seven years’ imprisonment respectively) that has three or fewer “aggravating factors”, in turn, may attract a starting point of three years’ imprisonment.⁷⁸
- 3.32 A key feature of the guidance in *Taueki* is the discussion of matters contributing to the criminality involved in a grievous bodily harm offence. The Court highlighted 14 such matters,⁷⁹ which include the following:

- Extreme violence:⁸⁰

The extent of the violence involved in the offending will have an obvious impact on the level of criminality. Where any violent conduct is prolonged that will also be relevant, as will violence that is unprovoked or gratuitous. This reflects s 9(1)(a) and (e) of the Sentencing Act.

- Attacking the head:⁸¹

Even where weapons are not used, attacks on the head of a victim can have particularly serious consequences. Thus, where a victim is subjected to a severe beating or kicking causing head injuries, the offenders conduct will be treated similarly to offending involving the use of a weapon.

75 *R v Barrett* [2008] NZCA 474.

76 *R v Taueki* [2005] 3 NZLR 372 (CA).

77 At [37(b)].

78 *Nuku v R* [2013] 2 NZLR 39 (CA).

79 *R v Taueki*, above n 76, at [31].

80 At [31(a)].

81 At [31(e)].

- Victim vulnerability:⁸²

Where the victim is particularly vulnerable (for example a child or where there is a disparity in size or strength between the attacker and the victim), that will also be a significant factor in the assessment of culpability. Section 9(1)(g) of the Sentencing Act applies. Breach of a protection order in favour of the victim will also be an aggravating factor

- 3.33 Strangulation, which, by its nature involves attacking the head area and tends to involve extreme violence and vulnerable victims, would easily fit into this category. However, because it is often prosecuted as an assault, the sentences imposed do not reflect that, despite the seriousness of the offenders' conduct. *Luff-Pycroft*,⁸³ *Paikea*⁸⁴ and *Rikihana* are further examples of cases in which the sentence starting point seems out of step with the offender's culpability. In both *Luff-Pycroft* and *Paikea*, strangulations were charged as "assault with intent to injure",⁸⁵ and in *Rikihana*, the charge was "male assaults female". For offending that also involved a charge of "injuring with intent to injure", Mr Luff-Pycroft received an effective sentence of six months' home detention (principally in recognition of his prospects of rehabilitation) despite having caused the victim serious pain and injuries and having threatened to kill her. Mr Paikea was sentenced to one year and four months' imprisonment for violence that included throwing his sister to the ground, hitting her about the head and strangling her. Mr Rikihana, whose strangulation caused the victim to feel she was losing consciousness and burst capillaries in her eyes, was sentenced to 13 months' imprisonment.
- 3.34 We acknowledge that a whole range of factors affect the final sentence that an offender receives, including the timing and circumstances of any guilty plea, youth and prospects of rehabilitation. Our concern in citing these cases is to highlight what appear to be very low sentences for serious offending, even if the offenders' individual circumstances may have warranted sentence discounts of various kinds.
- 3.35 It is rare for the sentencing decisions to indicate that the judge understood the lethality and unique features of strangulation, although, at least as regards potential lethality, that may be because the judge considered it went without saying. In some cases, furthermore, it is clear the judge is aware of the characteristics of strangulation. In *Smith*,⁸⁶ where the victim was strangled twice and lost consciousness, the sentencing Judge described Mr Smith's violence as "extreme" and noted that there was medical evidence the victim's jugular vein had been obstructed and that obstruction for more than four minutes leads to death. In *S v Police*, in which the victim was strangled to the point of unconsciousness, the Judge observed that the assault "could have had a dire outcome".⁸⁷ In *Waitai*, the sentencing Judge considered the defendant's use of strangulation against his pregnant ex-partner was "seriously aggravating" and noted:⁸⁸

Although it may leave no visible signs of injury, and is therefore sometimes treated less seriously than other forms of domestic violence such as punching or hitting, the risks associated with strangulation are very high.

82 At [31(i)].

83 *Luff-Pycroft v R* [2012] NZCA 107.

84 *Paikea v Police* HC Whangarei CRI-2010-488-53 (29 October 2010).

85 Albeit Mr Luff-Pycroft was also charged with "injuring with intent to injure" for another assault that included strangulation in addition to biting and placing his hand over the victim's mouth with sufficient force to break her tooth enamel.

86 *Smith v R* [2014] NZHC 3032.

87 *S v Police*, above n 69, at [15].

88 *Waitai v R*, above n 70, at [25].

CONCLUSIONS

3.36 Our review of the decisions in Appendix C, together with our conversations with stakeholders operating in the family violence area, has led us to reach the following conclusions about the prosecution of strangulation in family violence circumstances:

- Strangulation that is reported to the Police is not always prosecuted.
- Strangulation is often charged as “male assaults female” even when there is evidence of injury or a threat to kill. The sentences imposed for strangulations that are charged as assaults are correspondingly low.
- Frequently, strangulation leaves no evidence of injury or the injuries of which there is evidence are limited to swelling, bruising or soreness.

Chapter 4

Current problems prosecuting strangulation

- 4.1 The terms of reference for this review ask us to consider the rationale for enacting a specific offence of strangulation. After consulting with a wide range of people who operate in the area of family violence, studying the literature and examining how other jurisdictions have enacted strangulation offences, we have concluded that the problems in the criminal justice system presented by strangulation in family violence circumstances generally fall into two categories:
- A lack of awareness of the future risk of strangulation and effects on the victim.
 - A lack of adequate accountability for the perpetrators of strangulation.
- 4.2 Addressing these two deficiencies would ultimately help to keep victims of strangulation safer. We discuss each of these in more detail in this chapter before concluding whether there are grounds for reform and, if so, what the objectives of that reform should be.

A LACK OF AWARENESS OF THE RISKS AND EFFECTS OF STRANGULATION

- 4.3 Over the past two decades, there have been a number of initiatives to address a growing concern about the level of family violence in New Zealand, including the “It’s not OK” campaign in 2007. That was a social marketing action programme designed to change how people think and act about family violence. Despite the success of that campaign in increasing awareness of family violence and causing attitude and behaviour changes,⁸⁹ it is apparent to us that the prevalence and effects specifically of strangulation continue to be under-recognised.
- 4.4 This under-recognition occurs at every level of intervention with family violence. It means that people who are making decisions designed to keep women safe are not giving sufficient weight to a significant risk factor. The following are examples of how this problem occurs in practice:
- The Police who arrive at the scene of family violence frequently do not ask about strangulation if physical signs of it are not immediately apparent.
 - Victims themselves often do not specifically mention strangulation, particularly when there were other forms of violence, such as punching and kicking, which produced more obvious injuries.
 - Non-governmental organisations providing support for victims of intimate partner violence (IPV) may not understand the increased risk of death that accompanies strangulation and so cannot adequately advise victims on actions to keep themselves safe.

89 Dr Michael Roguski *‘It’s not OK’ Campaign Community Evaluation Project* (Kaitiaki Research and Evaluation Ltd, 18 March 2015) at iii; and Point Research Ltd *An Innovative Approach to Changing Social Attitudes around Family Violence in New Zealand: Key Ideas, Insights and Lessons Learnt* (March 2010).

- Doctors who assess victims after an assault may not think to document any signs of strangulation if strangulation was not reported by the victim or the Police.
 - Judges may make bail and sentencing decisions without understanding the increased risk posed by a previous strangulation and so unintentionally put the victim at risk.
- 4.5 This problem has been described in other jurisdictions. One Report from the United States records that:⁹⁰
- In the past, victims, perpetrators, police officers, prosecutors, judges, and medical personnel often minimized “choking” cases. The lack of visible injury and inadequate training caused the entire criminal justice system to unintentionally treat [strangulation cases] as minor assaults with little or no consequences.
- 4.6 In 2001, the San Diego study found that Police and prosecutors overlooked symptoms and focused on visible injuries to prove strangulation. No one knew what questions to ask the victim to determine if she had any symptoms. The researchers found that:⁹¹
- ... unless the victim had significant visible injuries or complained of continuous pain requiring medical attention, the police were inclined to handle the incident as minor – almost as if the victim had been slapped, rather than having been strangled. Further, the victims often failed to mention their symptoms or declined medical attention, even when they were having difficulty breathing.
- 4.7 This is consistent with the information we have been given about Police practice in New Zealand. Even when the victim reports choking or strangulation to the point of beginning to lose consciousness, it is not uncommon for it to be treated as a minor assault, signs and symptoms are not investigated, there is little action taken to keep the victim safe and there is little or no accountability for the perpetrator. While this may be caused by many factors, including a lack of time and resources, it is clear to us that a lack of understanding about strangulation is often one cause.
- 4.8 Another implication of a failure to understand the significance of strangulation is that victims may not be receiving appropriate medical treatment for the symptoms of strangulation. This can relate to both the physical symptoms and the psychological symptoms. While a person who suffers a concussion due to, for example, a rugby injury has a clear pathway through the medical system for the assessment of that concussion, there is no similar pathway for assessment of a loss of consciousness due to strangulation despite the symptoms being similar.

Recording strangulation

- 4.9 Even if the people making decisions affecting victim safety are aware of the prevalence and significance of strangulation in family violence, it can be impossible for them to know whether a particular person has a history of strangulation because it is not recorded in Police or criminal records.
- 4.10 Currently, there is no formal recording or reporting on strangulation. When a Police officer attends a call-out and family violence is alleged, the officer will complete a family violence incident report (known as POL 1310). That report records details of the incident including all visible injuries. Sometimes, Police will take photographs. They also look for evidence to corroborate allegations and may consider whether to refer a victim for a forensic medical assessment. If an allegation of strangulation is made, that fact will be noted in the narrative part of the record but not as a stand-alone item.

90 Gael B Strack and others “Investigation and Prosecution of Strangulation Cases” (2014) 19 Domestic Violence Report 83.

91 Gael B Strack, George E McClane and Dean Hawley “A review of 300 attempted strangulation cases part I: criminal legal issues” (2001) 21 J Emerg Med 303 at 308.

- 4.11 If it is assessed that there has been a physical assault between intimate partners,⁹² a screening assessment, called the Ontario Domestic Assault Risk Assessment (ODARA), will also be completed. ODARA is an actuarial risk assessment tool to predict recidivism of assault in intimate partner relationships. Prior to the introduction of ODARA in 2012, the standard form family violence incident report included a question about strangulation. That question is omitted from the new POL 1310 form because it follows the structure of ODARA screening, which is designed to identify the risk of future assault, not future fatal attack.
- 4.12 If the criteria for ODARA are not met (there was no physical assault or qualifying threat), an Intimate Partner Vulnerability Factors form is completed instead. That form contains a question asking whether the offender has previously strangled a person, although it does not ask about the events for which the officer is in attendance.
- 4.13 Police enter information about the incident into the National Intelligence Application (NIA) within 72 hours of the call-out. NIA is the core collection of Police operational information. It records all information from a 111 call through to details of allegations and any charge laid or other action taken. It includes information from the POL 1310, the ODARA score and a narrative describing the incident and allegations. All incidents that are categorised as family violence are identified with a “family violence flag”. If strangulation was a feature of the incident, that fact may be mentioned in the narrative, but there is no consistent form of words used and no systematic method of coding it as strangulation. For example, in addition to “he strangled her” or “he choked her”, we have seen strangulation described as “he grabbed her around the throat”, “he placed his hands around her neck and tightened his grip”, “he held her throat” and “he put pressure on her neck”. This makes it very difficult to electronically search NIA to determine the prevalence of strangulation.
- 4.14 If a charge is laid, information from NIA about the charge, including any family violence “flag”, is transferred into the Ministry of Justice’s Case Management System (CMS). CMS is the Ministry’s record system for all court information. It records details of all charges and hearings and the outcomes of hearings. Information on a person’s criminal history is generated from CMS data. When a case has been finally determined by a court, information on the outcome is also put into NIA.
- 4.15 When judges are making bail decisions, they receive information from CMS about the current charges and criminal history. Any family violence flag transferred to CMS does not currently appear on the charging document unless that is picked up by the court registrar. However, we are told, from March 2016, that information will be included on all charging documents, when appropriate.
- 4.16 The only way the judge is likely to know if the criminal history involves strangulation is if it is noted by the Police in their opposition to bail. Police will only know of a strangulation history if it is spotted in the narrative of incidents recorded on NIA. Given that there is no specific strangulation question on the POL 1310 or standard set of words to describe strangulation on NIA, there is a risk that this information will be overlooked. This may be particularly likely when the family violence history on NIA goes back many years and involves many incidents.
- 4.17 This lack of information about strangulation behaviour is part of a bigger problem about identifying whether incidents of violent offending occurred in family violence circumstances. A conviction for “male assaults female” gives a strong indication to a judge that the violence occurred in family violence circumstances, but other charges carry no comparable indicator.

92 Including a sexual assault or threat of harm with a weapon in hand in the presence of the victim.

This is particularly concerning in relation to more serious charges and means that judges do not have sufficient information to make well-informed decisions.

- 4.18 We note that the Ministry of Justice has recently announced a pilot programme to give judges making bail decisions a report summarising the family violence history of the defendant.⁹³ That report includes all current charges and family violence convictions, Police call-outs to family violence incidents involving the defendant, all protection orders and Police safety orders and any breaches of those orders. This report is currently being piloted in the Porirua and Christchurch District Courts, and an evaluation is expected to be completed by mid-2016. If this pilot is expanded nationally, it will provide significantly more relevant information to judges making decisions in family violence circumstances.
- 4.19 Judges making protection orders or other decisions in the Family Court do not automatically receive information from CMS on current charges or the criminal history of the parties. That information can, however, be made available if requested on a case-by-case basis.

A LACK OF ACCOUNTABILITY FOR THE PERPETRATORS OF STRANGULATION

- 4.20 One of the purposes of the criminal law is to hold offenders accountable for their criminal acts in the sense that there should be consequences for behaviour that harms others. In a modern democratic society, one conception of criminal accountability is the Kantian notion that a legal system generates reciprocal political obligations upon citizens to obey its norms.⁹⁴ Offending upsets the moral equilibrium and appropriate accountability restores it. Consequently, accountability must be proportionate to the seriousness of the offence and the culpability of the offender.
- 4.21 In Chapter 3, we described the way that strangulation in family violence circumstances is currently prosecuted. Through that examination, we have identified a number of impediments to holding perpetrators of strangulation adequately accountable. First, there can be difficulty in proving the elements of the more serious violent offences when the offending behaviour is strangulation. Second, even when the elements of the offence can be made out, Police sometimes do not prosecute or, if they do, only lay a relatively minor charge. We examine each of these issues in turn.

Difficulty proving the elements of the offence

Proving assault

- 4.22 If the offence charged is “common assault” or “male assaults female”, the prosecution must prove that an assault occurred.⁹⁵ “Assault” means intentionally applying force to the person of another.⁹⁶ Assault in the case of strangulation is the intentional application of force to the neck. If the defendant denies the assault, the prosecution must provide evidence that proves force was intentionally applied to the neck. Sufficient evidence of strangulation can be difficult to obtain. A statement from the victim will be evidence but, by itself, may not be enough to prove strangulation beyond reasonable doubt and, in some cases, a victim may have no memory of the assault or be unwilling to give evidence. Evidence from a third-party witness would assist, but many instances of strangulation are not witnessed by anyone else. In most cases, physical or medical evidence will be required to prove an assault by strangulation.

93 Myles Hume “Judges to get reports on offenders’ family violence history” (26 August 2015) Stuff < www.stuff.co.nz > .

94 Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [SA7.01].

95 “Common assault” carries a maximum penalty of one year’s imprisonment (s 196), and “male assaults female” carries two years (s 194).

96 Crimes Act 1961, s 2(1).

- 4.23 In the case of other significant assaults, there will be visible signs such as bruising, swelling or abrasions. The Police will photograph the signs and place the photos on the record as evidence. That will also occur when strangulation results in visible signs on the neck. However, as we describe in Chapter 2, it is very common for there to be no visible signs, even when the strangulation has been serious. When that is the case and testimony from the victim or a witness is unavailable or insufficient, a medical examination will be required to document less obvious external physical signs (such as petechiae), internal signs and symptoms (such as internal bruising or symptoms of a loss of consciousness), or psychiatric or psychological symptoms (such as amnesia or confusion).
- 4.24 A medical examination documenting all the signs and symptoms can be compelling evidence that strangulation occurred, prompting the defendant to plead guilty to the strangulation, even when there are few visible signs. However, medical examinations are not automatically arranged for victims who report that they have been strangled. In serious cases, the Police may direct a victim to a doctor specialising in family violence cases. However, such specialists are rare, and more usually, the victim will need to obtain her own assessment from her general practitioner, if she has one. It can require fortitude and determination to find a doctor, retell the story and submit to medical examination.
- 4.25 We have been told that doctors who do not specialise in family violence or forensic medicine can be reluctant to become involved in assault cases for a number of reasons. They may feel that they lack the forensic expertise required to assess the patient for the purposes of a prosecution, they may be busy and consider that their priorities are to treat pressing medical issues rather than provide evidence for the justice process, or they may consider that they cannot afford the time required to present evidence to the court.
- 4.26 Issues of this nature were identified in a case examined by the Health and Disability Commissioner (HDC) in 2008.⁹⁷ In that case, Mrs A's husband used a tea towel to strangle her after an argument about the use of the dishwasher. Mrs A escaped to her friend's house and called the Police. The Police received her complaint and advised her to see a doctor for treatment and documentation of her injuries. Mrs A went to two different after-hours clinics with her friend. At each clinic, the doctors on call were reluctant to see her because she did not appear to be an emergency case, she was not enrolled at a contributing clinic and getting involved in a domestic violence prosecution could be very time consuming for the doctors. Eventually, at the insistence of the friend and after a phone call with the Police officer, she was assessed, but the Police officer was concerned at the victim's experience and laid a complaint with the HDC. The Police officer commented:
- Victims of domestic assault are not usually gifted with large amounts of self-confidence. The courage it takes to report an assault of this kind to the Police is considerable. Facing the prospect of further disclosure to a doctor unknown to the victim further taxes any slim reserves of nerve.
- 4.27 The HDC was also concerned and published an opinion for the education of doctors on their obligations when a victim of assault presents for assessment. He said that, at a minimum, patients should expect an initial assessment by a doctor to determine the extent of the injuries, both physical and psychological. If the doctor feels unable to undertake a forensic assessment, the doctor should provide the victim with information about other options in the region for the forensic documentation of injuries.

97 Health and Disability Commissioner *Caring for patients reporting assault* (2008).

Proving harm—wounding or injuring

- 4.28 While generally the only element required to be proved in the lower-level violence offences is the intentional application of force, the more serious violence offences also require proof of a particular harm or intention on the part of the perpetrator.⁹⁸
- 4.29 The harm required to be proved for these more serious offences is generally either a “wound” or an “injury”. Sometimes, strangulation produces harms of these sorts, but often it does not, or the injury is difficult to prove (as we described above). “Wounding” requires a breaking of the skin, generally evidenced by a flow of blood.⁹⁹ It is rare for strangulation to produce a cut to the skin. “Injuring” is defined in the Crimes Act as “actual bodily harm”.¹⁰⁰ It may be internal or external and need not be permanent or dangerous, but it must be more than trifling or transitory.¹⁰¹ It has been held to extend beyond physical injury, so may include psychiatric harm, but does not extend to merely fear, distress or panic.¹⁰² It includes rendering a person unconscious.¹⁰³
- 4.30 The harms of “wounding” and “injury” are not particularly well suited to prosecuting serious strangulation offending due to the difficulty proving injuries that are difficult to see, internal or psychiatric, but also for another reason. The unique harm resulting from strangulation is not the wounding or injury, but rather terror—the psychological impact that occurs when an abuser has limited the victim’s ability to breathe or the blood flow to the brain by squeezing the neck. It is the intimidation, control and coercion that the abuser has as a result of demonstrating to the victim that the abuser could kill the victim in this way. These harms are not captured by the terms “wounding” or “injury”.

Intention

- 4.31 Most crimes require two elements: doing the criminal act and a state of mind that makes the actor at fault or culpable for the action. The nature of the guilty mind required for an offence is described as the “mens rea” element of that offence. For example, an offence might state that the prohibited act must have been done “intentionally”, “recklessly” or “knowingly”. A mens rea element is generally required in respect of every ingredient of the offence¹⁰⁴ and must be proved by the prosecution beyond a reasonable doubt.
- 4.32 Some offences do not specify a mens rea element. In those cases, either the mens rea element is established elsewhere (perhaps in the definition of the criminal action—the “actus reus”—or by case law) or the offence is one of strict liability. For example, the offence of “common assault” in the Crimes Act does not specify a mens rea element,¹⁰⁵ but section 2 of that Act defines “assault” as involving *an intention* to apply force.¹⁰⁶
- 4.33 A strict liability offence omits a mens rea element, but the defendant may avoid liability by proving an absence of fault on the balance of probabilities. This shifting of the onus of proof

98 “Wounding with intent to cause grievous bodily harm” carries a maximum penalty of 14 years’ imprisonment (s 188(1)); “wounding with intent to injure” carries seven years (s 188(2)); “injuring with intent to cause grievous bodily harm” carries 10 years (s 189(1)); “injuring with intent to injure” carries five years (s 189(2)); “injuring by unlawful act” carries three years (s 190); “aggravated wounding” carries seven years (s 191(1)); and “aggravated injuring” carries seven years (s 191(2)).

99 *R v Waters* [1979] 1 NZLR 375 (CA).

100 Crimes Act 1961, s 2(1).

101 *R v McArthur* [1975] 1 NZLR 486 (SC).

102 *R v Chan-Fook* [1994] 1 WLR 689 (CA).

103 We note that the harm required by the crime of “disabling” is “stupefies or renders unconscious” (Crimes Act 1961, s 197).

104 *R v Hende* [1996] 1 NZLR 153 (CA).

105 Crimes Act 1961, s 196: “Every one is liable to imprisonment for a term not exceeding 1 year who assaults any other person.”

106 Crimes Act 1961, s 2(1): “assault means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly ...”.

is appropriate only in limited circumstances, including offences involving protecting the public from those who voluntarily undertake risk-taking activities, and where the defendant rather than the prosecution is best placed to provide evidence of the mental element.¹⁰⁷ For example, many driving offences are strict liability offences. An offence of strangulation does not meet the criteria for a strict liability offence. It has a truly criminal nature, so we must consider the appropriate mens rea element.

4.34 There can be two types of mens rea element—the intention to do the actus reus (basic intent) and any other specific intent or motive included in the offence provision (ulterior intent). The more serious violent offences in the Crimes Act generally require an ulterior intent element as well as the basic intent. Examples of the ulterior intent are:

- intent to cause grievous bodily harm;¹⁰⁸
- intent to injure;¹⁰⁹
- intent to commit or facilitate the commission of any imprisonable offence;¹¹⁰
- intent to avoid the detection of himself or herself or of any other person in the commission of any imprisonable offence;¹¹¹ and
- intent to avoid the arrest or facilitate the flight of himself or herself or of any other person upon the commission or attempted commission of any imprisonable offence.¹¹²

4.35 Proving these intention elements of the offence can be particularly difficult in strangulation cases. Intention can be proved by statements made by perpetrators, but such statements are rare. In most cases, intent is inferred from the perpetrator's actions. As stated in *Adams on Criminal Law*:¹¹³

... intention is rarely found from direct evidence such as a statement by the defendant that he intended to cause really serious harm. ... Usually, proof of intention rests on circumstantial evidence, including the overt acts and utterances of the defendant before, at, or after the event, the surrounding circumstances, and the nature of the act itself.

4.36 For example, if a wound is inflicted with a knife, it is inferred that the perpetrator intended to wound. That does not, in practice, need to be expressly demonstrated—proof of intent to wound is implicit from the use of a knife. However, in the case of strangulation, often the hands are used, so it is harder to infer that wounding or injury was intended.

4.37 Also, the particular intent elements described in these offences are often not relevant in strangulation offences occurring in family violence circumstances. The perpetrator's intention may be to intimidate, control or coerce the victim rather than to wound, injure or commit another offence. The current offences against the person do not provide for that type of criminal intention.

107 Legislation Advisory Committee, above n 6, at ch 1.

108 Crimes Act 1961, ss 188(1) and 189(1).

109 Crimes Act 1961, ss 188(2), 189(2) and 193.

110 Crimes Act 1961, ss 191(1)(a) and 192(1)(a).

111 Crimes Act 1961, ss 191(1)(b) and 192(1)(b).

112 Crimes Act 1961, ss 191(1)(c) and 192(1)(c).

113 Robertson, above n 94, at [CA188.02].

Other offences

4.38 There are a number of other offences that may, in theory, be relevant to strangulation but that do not require proof of harm or ulterior intent. However, these also present problems for prosecutors for various reasons.

Assault with a weapon

4.39 The offence of “assault with a weapon” is a reasonably serious offence (it carries a maximum penalty of five years’ imprisonment), yet requires no proof of particular harm or ulterior intent. The offence states:¹¹⁴

Every one is liable to imprisonment for a term not exceeding 5 years who,—

- (a) in assaulting any person, uses any thing as a weapon; or
- (b) while assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon.

4.40 In theory, it may be possible to think of the hands as “the weapon” in strangulation. There is no definition of “weapon” in the Crimes Act for the purposes of this offence, and the use of the words “any thing” could be read as implying a very broad parliamentary intention for this word.¹¹⁵ While case law has recognised several things to be weapons that are not usually described as such, including a dog and a car,¹¹⁶ it is perhaps stretching the concept too far to think of a part of the body as a “weapon”.¹¹⁷

Disabling

4.41 The offence of disabling may also be relevant when a strangulation results in loss of consciousness:¹¹⁸

Every one is liable to imprisonment for a term not exceeding 5 years who, wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person.

4.42 This offence is rarely prosecuted, and most of the cases relate to stupefaction of the victim by drugs or alcohol rather than force applied to the neck. In relation to strangulation, it is only relevant to those cases that resulted in a loss of consciousness. However, even in those cases, there are some significant hurdles for the prosecution to overcome. First, as with other kinds of internal injury, a loss of consciousness can be very difficult to prove. Although a doctor trained in forensic medicine may detect signs of lack of blood or oxygen supply to the brain, such as petechiae, it will be a rare case that has the benefit of such a doctor’s assessment.

4.43 Second, the prosecution must prove that the perpetrator “wilfully” rendered the victim unconscious.¹¹⁹ While the normal meaning of “wilful” is simply “intentional or deliberate”, it is more complicated in the legal sense. There is conflicting case law as to whether “wilfully” means that there must be an intent to stupefy or render unconscious, or whether it extends to subjective recklessness (meaning that the defendant must have had a conscious appreciation

114 Crimes Act 1961, s 202C(1).

115 Although we note that s 202A (the offence of “possessing an offensive weapon”) defines “offensive weapon” as “any article made or altered for use for causing bodily injury, or intended by the person having it with him or her for such use”.

116 *R v McLeod* (1993) 84 CCC (3d) 336 (CA); and *Dawson v Police* HC Rotorua CRI-2003-463-73, 3 February 2004.

117 Although we note that the criminal law of Alaska defines “dangerous instrument” as including “hands or other objects when used to impede normal breathing or circulation of blood by applying pressure on the throat or neck or obstructing the nose or mouth” for the purposes of the offence of “causing serious physical injury by means of a dangerous instrument”, AS 11.81.900.

118 Crimes Act 1961, s 197.

119 The second element of intention—without unlawful justification or excuse—appears to be targeted at doctors performing medical treatment under anaesthetic.

of the risk).¹²⁰ However, both forms of intent will be impossible to prove in most cases of strangulation, particularly when hands or arms were used rather than a ligature. It will only be experts in forensic medicine or people trained in “choke hold” techniques that know how much pressure must be applied by different techniques and for what duration to produce a lack of consciousness.¹²¹

Criminal nuisance

4.44 In theory, the offence of criminal nuisance could be charged in respect of strangulation:¹²²

- (1) Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he or she knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.

4.45 Criminal nuisance is a public welfare offence in Part 7 of the Crimes Act rather than in Part 8—Crimes against the Person. It is punishable by up to one year’s imprisonment. Usually, the “legal duty” referred to means one of the duties tending to the preservation of life described in Part 8 of the Crimes Act. However, it also extends to the common law legal duty not to engage in conduct that it can be foreseen may expose others to harm.¹²³ People who strangle may be breaching that common law duty because strangulation is an inherently dangerous activity.

4.46 The culpability targeted by criminal nuisance is risk-taking behaviour rather than behaviour resulting in harm. This could be particularly suitable for strangulation, which is risky but any harm is difficult to prove. However, it carries a maximum penalty of only one year’s imprisonment, less than “male assaults female”, and requires proof that the offender knew the act of strangling would endanger life.

4.47 To our knowledge, “criminal nuisance” has never been charged in respect of strangulation. Behaviour charged under this offence includes:

- a person who was HIV-positive having unprotected consensual sexual intercourse;¹²⁴
- a company that had a duty to maintain poles supporting cables hanging across a street and the poles collapsed on a woman’s car, seriously injuring her;¹²⁵ and
- a farmer who failed to maintain a fence, resulting in a horse escaping and being hit by a car, killing a passenger.¹²⁶

Attempted murder

4.48 Finally, the offence of attempted murder may also be relevant to strangulation in family violence circumstances.¹²⁷ This is obviously a very serious offence, carrying a maximum penalty of 14 years’ imprisonment. As we have described in Chapter 2, the difference between a fatal strangulation and a non-fatal strangulation can be merely the number of seconds of pressure applied to the neck. Therefore, in theory, a non-fatal strangulation could often be a failed

120 Robertson, above n 94, at s CA19701.

121 See Dean Hawley, George E McClane and Gael B Strack “A review of 300 attempted strangulation cases part III: injuries in fatal cases” (2001) 21 J Emerg Med 317 at 320 for a discussion of the variables determining the amount of pressure required to produce unconsciousness.

122 Crimes Act 1961, s 145.

123 *R v Mwai* [1995] 3 NZLR 149 (CA).

124 *R v Mwai*, above n 123.

125 *Police v Telstrasaturn Limited* [2002] BCL 662 (HC). In this case, the Judge found that the respondent did not have knowledge that its failure to take precautions would endanger the public.

126 *R v Tollhurst* [1998] BCL 1267 (DC). The farmer was convicted and fined \$4,000.

127 Crimes Act 1961, s 173: “Every one who attempts to commit murder is liable to imprisonment for a term not exceeding 14 years.”

attempt to kill. We can find very few reported cases where non-fatal strangulation was charged as attempted murder.¹²⁸

- 4.49 There are two elements that must be proved for an attempted murder charge—that there was an intention to kill the person and that some act was done for the purpose of achieving that intention. The second element is relatively straightforward. Being a very serious offence, attempted murder is only likely to be charged if the strangulation was particularly serious. Those will be cases in which there is clear evidence of strangulation either from clear marks on the neck, witness statements or a confession of strangulation by the perpetrator.
- 4.50 The ability of the prosecution to prove the first element—the intention to kill the victim—will depend upon the circumstances of the case. If hands are used to strangle, it will be less likely that an intention to kill can be inferred. If, however, the strangulation is merely one aspect of the violence inflicted on the victim during the incident, an intention to kill may be able to be inferred from those other aspects.
- 4.51 However, when strangulation is the sole or main form of violence inflicted on the victim, it may be very difficult for the prosecution to show that the perpetrator intended to kill the victim.

Police charging practice

- 4.52 Although we have shown that there are significant problems in using the current offences in the Crimes Act to prosecute people who strangle in family violence circumstances, Police charging and prosecuting practices are also an impediment to holding the perpetrators of strangulation adequately accountable. Family violence incidents are sometimes recorded on NIA as “no offence disclosed” even when the victim has clearly alleged that strangulation occurred. Strangulation is sometimes not charged at all, even when it appears the elements of a “male assaults female” charge can be proved. More serious strangulations are charged merely as “male assaults female”, even when it is likely that, if the victim was directed to a medical assessment, sufficient evidence of strangulation would be collected. We have encountered suggestions that:
- “male assaults female” is sometimes charged instead of more serious offences if that will secure a guilty plea, removing the need for a trial; and
 - the offence of “male assaults female” may have become a default charge for family violence due to its gender connotations, even when the elements of a more serious offence can be made out.
- 4.53 There are many reasons why these practices develop. At the top of the list is the fact that family violence call-outs can be extremely complicated and challenging. The participants may be heavily intoxicated, they may both have inflicted injuries on each other, their stories may not make sense or conflict with each other, and there may be no corroborating evidence and no witnesses. There will sometimes be problems with inadequate Police resources.

128 One example is *R v Campbell* HC Wellington CRI-2005-085-003703, 9 February 2007, but that case concerns the admissibility of communications made by the accused to medical practitioners.

4.54 The difficulties faced by Police in determining the facts and making decisions in these circumstances should not be underestimated. Training and experience as well as strong protocols and practice standards play a vital role. We have reached the conclusion that, while there are many examples of excellent Police practice in family violence, there is room for improvement in relation to strangulation in three areas:

- understanding of the significance, signs and symptoms of strangulation by front-line Police so that they recognise it and make decisions needed to protect the victim;
- adequately documenting the signs of strangulation or helping victims get medical assessments for this purpose; and
- charging proportionate to the harm—charging the most serious offence for which there is adequate evidence for a conviction.

IS REFORM JUSTIFIED?

4.55 Our analysis of how strangulation in family violence circumstances is currently handled by the criminal justice system has led us to conclude that strangulation is often not treated as the significant form of offending that it is. Less serious offending is often not prosecuted, and more serious offending is often not charged in a way that reflects the criminality of the behaviour.

4.56 The main problem is that the current framework of serious violent offences is not well suited to those instances of strangulation that do not result in visible injuries. This means that type of strangulation tends to be charged as “male assaults female”. The maximum penalty of two years’ imprisonment for that offence does not adequately reflect the seriousness of strangulation. There is, therefore, a gap in the current framework of offences. We consider that this gap justifies an amendment to the law to create an offence more suited to prosecuting strangulation. There should also be other, non-legislative action taken to ensure that strangulation is better understood so that perpetrators are held accountable and victims are kept safe.

4.57 In the following chapters, we describe a range of options to address these problems. We start by describing how a specific strangulation offence might work. We then describe other amendments to the Crimes Act that may address the identified problems, plus other legislative and administrative reforms. We finish in Chapter 8 by concluding which of these options we favour.

Chapter 5

A specific strangulation offence

- 5.1 In this chapter, we begin by describing how other jurisdictions have addressed the question of whether to introduce a specific offence of strangulation. We then describe what a specific strangulation offence might look like in New Zealand (including the elements of the offence), whether a strangulation offence should be limited to family violence circumstances and what the maximum penalty should be.

OTHER JURISDICTIONS ENACTING STRANGULATION OFFENCES

- 5.2 Over the last decade, as the understanding of the impact of strangulation within family violence has increased, a number of jurisdictions that we sometimes compare ourselves to have examined whether strangulation is adequately dealt with by their criminal justice systems. They have reached differing conclusions, but many have enacted new strangulation offences.

United States

- 5.3 As at May 2014, three-quarters of the states of the United States had specific strangulation laws.¹²⁹ An analysis of those laws in 2009, when there were only 13 states with such laws, revealed that only six were limited to domestic relationships, and there was a wide range of maximum penalties—from one year to 20 years' imprisonment and many included fines ranging from \$1,000 to \$25,000.¹³⁰ In all but one state, the offence is classed as a felony (a more serious offence) rather than a misdemeanour (a more minor offence).¹³¹
- 5.4 Across the states, the mens rea element of the offence has been dealt with differently. In Alabama, the defendant must commit the assault “with intent to cause physical harm”.¹³² However, many states have used the words “intentionally or knowingly” or similar. For example, Minnesota’s offence is as follows:¹³³

1. Definitions

...

(c) “Strangulation” means intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

2. Crime

Unless a greater penalty is provided elsewhere, whoever assaults a family or household member by strangulation is guilty of a felony and may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than \$5,000, or both.

129 Casey Gwinn, Gael Strack and Melissa Mack “Law Reform Targets the Crimes of Strangulation” (2014) 19 *Domestic Violence Rep* 81.

130 Kathryn Laughon, Nancy Glass and Claude Worrell “Review and Analysis of Laws Related to Strangulation in 50 States” (2009) 33 *Eval Rev* 358.

131 Laughon, Glass and Worrell, above n 130.

132 Ala Code § 13A-6-138: Domestic Violence by Strangulation or Suffocation.

133 Minn Stat § 609.2247.

5.5 In 2010, New York took a different approach. It enacted three specific strangulation offences:¹³⁴

121.11 Criminal obstruction of breathing or blood circulation.

A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she:

- a. applies pressure on the throat or neck of such person; or
- b. blocks the nose or mouth of such person.

121.12 Strangulation in the second degree.

A person is guilty of strangulation in the second degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment.

121.13 Strangulation in the first degree.

A person is guilty of strangulation in the first degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes serious physical injury to such other person.

5.6 The three offences used in New York reflect varying levels of seriousness of strangulation and can all be applied beyond a domestic context. All require intent to impede normal breathing or blood circulation, and the second two require proof of a particular type of harm. An analysis of the use of these new offences in the first 20 months showed a substantial number of arrests and arraignments, but unfortunately did not compare that to similar figures from before the new law and did not analyse the numbers of resulting convictions or sentences.¹³⁵ The new law's effectiveness is, therefore, uncertain.

5.7 However, a study in 2009 reviewed the first six months of operation of the Minnesotan law to assess its impact on victim safety and offender accountability. The study found that 83 per cent of the cases charged under the new strangulation law resulted in a conviction, with 42 per cent of those being a conviction for strangulation. It pointed out a concern from some stakeholders that, despite these convictions, perpetrators were still not held adequately accountable due to issues with sentencing and enforcement of sentencing conditions. Broadly, the study concluded that the new law, together with the increased training given to law enforcement officers, has succeeded in increasing awareness of the potential lethality of domestic strangulation and has enhanced victim safety and offender accountability. Introducing a felony charge for strangulation sent a message that the offending is serious, so more resources were expended in prosecuting it and judges set higher bail.

United Kingdom

5.8 The United Kingdom has long had an offence of “attempting to choke, suffocate or strangle in order to commit an indictable offence”. The offence applies in all circumstances, not just family violence.¹³⁶ In November 2015, the Law Commission (of England and Wales) published a Report examining the Offences against the Person Act 1861 (UK).¹³⁷ That Report concluded that the offence of attempting to choke was needlessly specific and that behaviour prosecuted under that offence could generally be prosecuted under other offences. Consequently, it recommended that

134 NY Penal Law §§ 121.11–121.14 (Consol 2014).

135 Andrew Wheeler *Arrests and Arraignments Involving Strangulation Offences Nov 11, 2010 – June 30, 2012* (Office of Justice Research & Performance, Division of Criminal Justice Services, New York, 2012).

136 Offences Against the Person Act 1861 (UK), s 21.

137 Law Commission of England and Wales *Reform of Offences against the Person* (Law Com No 361, 2015).

the offence be abolished without replacement. The Report did not address a specific offence of strangulation in the context of family violence.

Australia

- 5.9 New South Wales, Queensland, Tasmania, the Australian Capital Territory (ACT) and the Northern Territory have all long had offences specific to strangulation similar to that in the United Kingdom—it is an offence to choke, suffocate or strangle a person in any circumstances with the intent to commit a separate indictable offence. Despite this, in 2014, New South Wales amended its Crimes Act to include a simple offence of strangulation without the requirement to prove the intent to commit another offence, as follows:¹³⁸

37 Choking, suffocation and strangulation

- (1) A person is guilty of an offence if the person:
- (a) intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and
 - (b) is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

Maximum penalty: imprisonment for 10 years.

- (2) A person is guilty of an offence if the person:
- (a) chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and
 - (b) does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, another indictable offence.

Maximum penalty: imprisonment for 25 years.

- (3) In this section:

another indictable offence means an indictable offence other than an offence against this section.

- 5.10 In late September 2015, the ACT Attorney-General introduced the Crimes (Domestic and Family Violence) Amendment Bill 2015, which, if enacted, will amend the existing offence of an “act endangering health” in section 28 of the Crimes Act 1900 (ACT) to provide that “a person who intentionally and unlawfully chokes, suffocates or strangles another person is guilty of an act endangering health”. That offence is not restricted to family violence circumstances and carries a maximum penalty of five years’ imprisonment.
- 5.11 In December 2015, the Queensland Government announced that it will enact a specific offence of strangulation carrying a maximum penalty of seven years’ imprisonment.¹³⁹ This follows the publication of the Report of the Special Taskforce on Domestic and Family Violence, which made 140 recommendations on how the Queensland Government and community can better address and reduce family violence, including the introduction of a specific offence of strangulation.¹⁴⁰

¹³⁸ Crimes Amendment (Strangulation) Act 2014 (NSW).

¹³⁹ Queensland Government “Strangulation to be an offence under Queensland’s Criminal Code” (media release, 29 November 2015).

¹⁴⁰ Special Taskforce on Domestic and Family Violence in Queensland *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Canada

- 5.12 In 2006, following several states in the United States enacting specific strangulation offences, the Uniform Law Conference of Canada established a working group to examine the feasibility of a distinct offence of strangulation and whether existing provisions adequately address the seriousness and significance of that specific conduct.¹⁴¹ That group concluded that the existing provisions of the Criminal Code were adequate to address the issue of strangulation, and while a discrete offence may help to document a prior history of strangulation, that alone did not justify the creation of a new offence. The group also found that, while there was evidence that strangulation serves as a marker for increased risk of future violence, that proposition was not without controversy.
- 5.13 In reaching its conclusion, the working group found that strangulation that did not result in physical evidence of harm could nonetheless be prosecuted as an aggravated assault that “endangered the life” of the victim. Under the Canadian Criminal Code, the offence of aggravated assault is:¹⁴²
- Every one commits an aggravated assault who wounds, mains, disfigures or endangers the life of the complainant.
- 5.14 This offence carries a maximum penalty of 14 years’ imprisonment (longer than many of the specific offences in the United States), and an attempted aggravated assault carries seven years. The working group found that the medical literature supports the contention that strangulation will endanger the life of the victim and, as such, that offence provides an adequate response to the issue.¹⁴³

THE ELEMENTS OF A STRANGULATION OFFENCE

- 5.15 We consider that any new strangulation offence should be kept as straightforward as possible. An example is the following:
- Every one is liable to imprisonment for a term not exceeding [X] years who strangles or suffocates any person.
- 5.16 The meaning of “strangles or suffocates” should be defined. Our research indicates that the term “strangulation” is not well understood. Some people mistakenly believe that strangulation is always fatal and so a non-fatal strangulation is really an “attempted strangulation”. A better understanding is that it is a form of asphyxia characterised by closure of the blood vessels or air passages of the neck as a result of external force on the neck.¹⁴⁴ Consequently, we consider that “strangles or suffocates” should mean:
- impedes normal breathing or circulation of the blood by intentionally applying force on the neck or by intentionally using other means.
- 5.17 The only matter that the prosecution must prove is that means were intentionally used that had the result of impeding normal breathing or circulation. It would not need to prove that the defendant intended to impede breathing or circulation, or even that he or she understood the risk of that and did it anyway.

141 Uniform Law Conference of Canada *Report of the Criminal Working Group on Strangulation* (May 2006) at 1.

142 Criminal Code RSC 1985 c C-46, s 268.

143 Uniform Law Conference of Canada, above n 141, at 3.

144 Lisa BE Shields and others “Living victims of strangulation: a 10-year review of cases in a metropolitan community” (2010) 31 Am J Forensic Med Pathol 320.

Proof of harm

- 5.18 We do not consider that a strangulation offence should require proof of a particular harm. Liability, or guilt, arises from intentionally strangling the victim, not from the harm that arises from that act with which it is done.
- 5.19 In theory, a strangulation offence could require that the strangulation resulted in a loss of consciousness or other serious injury. Alternatively, it could require that the strangulation had a controlling or coercive effect on the victim.¹⁴⁵ However, as we described in Chapter 4, none of these harms or effects are relevant to all strangulation in family violence circumstances. Even when they do exist, they can be difficult to prove, which unnecessarily inhibits effective prosecution of the perpetrators.

Proof of intent

- 5.20 Similarly, basic intent is sufficient to give rise to liability for strangulation, without the need to prove an additional ulterior intent element. That means that it would be sufficient that the force was intentionally applied to the neck. There should be no need to prove an additional motive.
- 5.21 That the strangulation was intentional will often be inferred from the conduct proved and will only be an issue if there is a suggestion the strangulation could have been accidental. Police and doctors tell us that, when pressure is applied to the neck, it is almost always an intentional act. It is only in extremely unusual circumstances that force is accidentally applied to the neck.

Suffocation

- 5.22 We note that some of the strangulation offences in other jurisdictions capture suffocation within the prohibited conduct. While strangulation restricts the supply of oxygen and blood to the brain by external pressure to the neck, suffocation does not imply any particular act; it simply describes restriction of breathing resulting in a lack of oxygen to the brain. Strangulation by pressure on the larynx inhibits breathing, so is a form of suffocation, but suffocation can also occur by blocking the in-flow of oxygen to the body through the nose and mouth or applying pressure to the chest so that the lungs cannot work. In theory, suffocation could also occur by limiting the oxygen in the air around the victim.
- 5.23 We have been told by people who work with victims of family violence that suffocation is much rarer than strangulation in that context. However, during the course of this project, we have heard of an offender covering a victim's mouth and nose with his hand and of an offender sitting on the victim's chest.
- 5.24 We consider that most forms of non-fatal suffocation in the family violence context are likely to share similar traits to strangulation. Suffocation would also be an effective method of control and coercion by inducing the terror that arises from being unable to breathe and demonstrating to the victim that the perpetrator could kill her. It would leave few visible signs so, like strangulation, is likely to be under-recognised and under-prosecuted. Consequently, it is likely that perpetrators of suffocation are also not held adequately accountable as the law and practice stands. For these reasons, we consider that any new strangulation offence should also extend to suffocation.

¹⁴⁵ We note, for example, that the United Kingdom has recently introduced an offence of controlling and coercive behaviour in an intimate or family relationship. See Serious Crime Act 2015 (UK), s 76.

SHOULD A STRANGULATION OFFENCE BE LIMITED TO FAMILY VIOLENCE CIRCUMSTANCES?¹⁴⁶

- 5.25 We have considered whether a new strangulation offence should be limited to family violence circumstances or apply in all contexts. On the one hand, limiting a strangulation offence would emphasise the unique risk of this type of offending in family violence circumstances. The studies linking strangulation to a high risk of future fatal attack relate only to family violence circumstances. There is no similar link demonstrated in other circumstances. It seems likely that some people who strangle in other circumstances will present a significant risk, but others—such as those who have been trained in using a choke hold for self-defence purposes—will not. Limiting an offence to family violence would help to keep the risk of future fatality in the forefront of the minds of Police and judges and help them make better decisions to keep victims of family violence safe.
- 5.26 On the other hand, the problems we identified in Chapter 4 with prosecuting strangulation in family violence circumstances are likely to apply equally to other contexts. The difficulties described in proving the fact of strangulation or the requisite harm or intention elements are tied to strangulation, not the family violence context, so would also arise in other contexts and result in a lack of appropriate accountability for offenders.
- 5.27 Also, if family violence circumstances were an element of the offence, proving that fact would sometimes impede prosecution, perhaps where the relationship in question was unstable, ambiguous or after the victim had ended the relationship. This problem could be partly addressed by a broad definition of “family relationship” but could still place a difficult burden on the prosecution and victim in some circumstances.
- 5.28 We have concluded these problems mean that any new offence should not be limited to family violence cases. While our terms of reference are focused on family violence, it is artificial to ignore the broader criminal context. We consider limiting a new offence to family violence circumstances would risk anomalous and inconsistent treatment of different classes of offenders whose conduct may be equally culpable.
- 5.29 However, at a practical level, it is important that a judge making bail decisions or protection orders knows whether any previous convictions for strangulation occurred in family violence circumstances. If the judge does not know that, he or she cannot know that there is an increased risk of fatality for the victim and make decisions to mitigate that risk.
- 5.30 We have identified a mechanism by which a new offence can have a broad application but still be identified as a family violence-specific offence in appropriate circumstances. In New South Wales, the Crimes (Domestic and Personal Violence) Act 2007 provides that, if a person pleads or is found guilty of an offence of personal violence and the court is satisfied that the offence occurred in domestic violence circumstances, the court must direct that the offence be recorded on the person’s criminal record as a domestic violence offence.¹⁴⁷ This allows the court to build a progressive record of family violence-related criminal conduct that may be taken into account in bail proceedings, sentencing and the trial of subsequent offences.¹⁴⁸ Under this mechanism,

¹⁴⁶ We use the term “strangulation offence” for convenience to refer to the offence previously described as including strangulation *and* suffocation.

¹⁴⁷ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12.

¹⁴⁸ *Family Violence – A National Legal Response* (Australian Law Reform Commission Report 114 and the NSW Law Reform Commission Report 128, 2010) at 572.

the domestic violence circumstances are not an element of the offence and do not affect the maximum penalty of the offence.¹⁴⁹

- 5.31 This option could be applied specifically to a new strangulation offence so that the Crimes Act would state that, if a person pleads guilty to the offence of strangulation or is found guilty of that offence and the court is satisfied that the offence was a family violence offence, the court must direct that the offence be recorded on the defendant's criminal record as a family violence offence.¹⁵⁰ This would ensure judges or other people considering the criminal record knew that the strangulation occurred in family violence circumstances and so there is an increased risk of fatality. It would achieve this without limiting the application of the offence or introducing an additional barrier to conviction.
- 5.32 We consider that, if this mechanism were enacted, careful consideration would need to be given to the standard of proof required. While on the face of it, the identification is merely for the purposes of noting the circumstances on the criminal record and does not have a direct impact on the penalty, we consider that there remains substantial scope for the defendant to be disadvantaged.

CONSENT

- 5.33 There are times when the intentional application of force to the neck is done with consent (either express or implied) and should not be considered criminal. Examples include certain contact sports and sexual practices.¹⁵¹ Acts of strangulation with the consent of the victim can be excluded from the offence in several ways, which are:
- specifically in the offence provision itself, for example, by the inclusion of the words “without consent”;
 - by including a defence that the victim consented to the strangulation;¹⁵² or
 - via the common law.
- 5.34 When a statute is silent in respect of consent, the common law holds that, generally, consent is a complete defence to any harm short of death unless the defendant was acting in reckless disregard for the safety of others or intended to cause grievous bodily harm, or there are public policy grounds to exclude a defence of consent.¹⁵³ Whether there are relevant public policy grounds will depend upon the particular facts of the case. 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;

149 We note, by way of contrast, that, under South Australian and Western Australian legislation, family violence circumstances will aggravate the charge, meaning that, if the offence is carried out in family violence circumstances, the charge must be laid as a “family violence charge” in which those circumstances become an element of the offence and automatically increase the maximum penalty if a conviction is entered. We discuss these “aggravated offences” in Chapter 6.

150 We note that this mechanism could also be applied to other violent offences so that it is apparent from the criminal record that they occurred in family violence circumstances.

151 *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154.

152 An example is Crimes Act 1961, s 61A(1), which protects any person from criminal responsibility who performs any surgical operation on any person if done with the consent of the person and with reasonable care and skill.

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

- the rationality of any consent or belief in consent; and
 - any other relevant factors in the particular case.¹⁵⁴
- 5.35 If a judge does not exclude consent on these grounds, it will be for the jury to determine whether there was intent to inflict grievous bodily harm or the defendant was acting in reckless disregard for the safety of others.
- 5.36 There is, however, an exception to these common law principles in respect of consensual fighting (other than in the course of sport). In those cases, the consent of the participants would not be a defence to the infliction of even minor injury.¹⁵⁵ Organised sports are in a different category on public policy grounds due to their social utility (for example, social entertainment and public health benefits). The common law holds that players are taken to have consented to all conduct that is within the rules and also to any infractions of the rules that are of a kind that could reasonably be expected to happen during a game or that are reasonably incidental to the normal playing of the game at the level in question.¹⁵⁶
- 5.37 We consider questions of express or implied consent in strangulation can be left to these common law principles. They do not need to be dealt with specifically in the legislation. It is true that the common law of consent is complicated and enactment in statute would make the rules more accessible to the average person. However, this is true for consent in respect of all violent offences (and possibly some property offences). We see no special grounds for providing separate statutory rules in this regard specifically for strangulation.
- 5.38 This means that, where a question of consent is raised in relation to strangulation, a judge may exclude it from the jury's consideration if he or she considers that there are public policy grounds to do so, for example, no reasonable person in those circumstances would have believed that consent had been given. If consent is not excluded by the judge, it will be for the jury to consider whether the defendant intended to inflict grievous bodily harm or was acting in reckless disregard for the safety of the victim. A defence of consent will not stand if the jury finds one of those things existed.

MAXIMUM PENALTIES

- 5.39 There is no agreed method for setting maximum penalties of offences in New Zealand. However, it is clear that maximum penalties should:
- reflect the seriousness of the worst class of case covered by the offence; and
 - be proportionate to other penalties within the same Act and to analogous offences in other Acts.¹⁵⁷
- 5.40 It is important to stress that, in itself, the maximum penalty for an offence gives very little guidance about the actual penalty that should be imposed in a particular case. The maximum is merely a parliamentary stipulation of what it considers should be imposed for the worst class of case of that criminal behaviour that does not fall within another, more serious offence.
- 5.41 Some offences have very broad bands of culpability, as would the offence of strangulation described in this chapter. We have described an offence in which liability flows merely from intentionally applying force to the neck (or otherwise impeding normal breathing or blood

154 At [316].

155 At [296].

156 *R v Billinghamurst* [1978] Crim LR 553, as described in Robertson, above n 94, at [CA6312].

157 Other relevant offences in the Crimes Act 1961 and their maximum penalties are listed in Appendix D for the purposes of comparison.

circulation). The resulting harm or motivating intention could vary widely. While those matters are not required to prove that the offence has been committed, they will be relevant to the level of culpability and therefore the actual sentence imposed.

- 5.42 In setting the maximum penalty for this offence, we must consider the worst class of strangulation behaviour that should be captured, excluding behaviour that would be charged under another serious violent offence. Strangulation that results in injury or wounding, or for which there is evidence of an intention to commit another offence, is out of scope because such cases could be charged under existing serious violent offences.
- 5.43 An example of the worst class of strangulation within scope would feature the hallmarks of coercive or controlling behaviour and the terror we have identified. For example, a perpetrator enters the victim's home in breach of a protection order. After an altercation, he strangles her with his hands on and off for several minutes, leaving her struggling for breath, incontinent and unconscious. The victim thinks she will die and knows that the perpetrator has the power to kill her. Because he invaded her home, after the strangulation, she lives in constant fear for her security and life. As a consequence, he has achieved coercion and control over her.
- 5.44 It is the terror that results from strangulation that is at the heart of this kind of criminal conduct. That terror is likely to seriously affect all aspects of the victim's life. In our view, the terror that results from this "worst class of case" is greater than the harm of a minor injury and at least equivalent to a serious physical injury.
- 5.45 For this reason, we consider that a maximum penalty of seven years' imprisonment would be appropriate for a strangulation offence. That would mean the offence of strangulation is:
- equivalent to "wounding with intent to injure" and "injuring with intent" (both carrying seven years' imprisonment);
 - less serious than "wounding with intent to cause grievous bodily harm" (14 years) and "injuring with intent to cause grievous bodily harm" (10 years); and
 - more serious than "injuring with intent to injure" and "assault with a weapon" (both carrying five years).
- 5.46 Perhaps most relevant, a maximum penalty of seven years' imprisonment makes strangulation slightly more serious than the current offence of "disabling", which carries five years. While the two offences are similar in that they involve behaviour that affects the victim's consciousness, we consider that the terror resulting from strangulation or suffocation marks that offence out as more serious than "disabling".

Chapter 6

Other Crimes Act options for reform

- 6.1 The strangulation offence described in the previous chapter is one method of addressing the problems identified with the way that strangulation in family violence circumstances is dealt with by the criminal justice system. It may also be possible to address those problems by other types of amendments to the Crimes Act.
- 6.2 This chapter identifies three alternative methods of addressing the problems. The first two options—amending the current aggravated offences and creating an endangering offence—create offences with elements of proof that are better suited to the characteristics of strangulation. The third option would create strangulation versions of current offences. Each of these methods has advantages and disadvantages over the option of a new strangulation offence. However, as we conclude in Chapter 8, on balance, we favour a new offence.

AMENDING THE AGGRAVATED OFFENCES

- 6.3 Currently, the offences of “aggravated wounding or injury” and “aggravated assault” require one of the following three ulterior intent elements to be proved—an intent to:
- commit or facilitate the commission of any imprisonable offence;
 - avoid the detection of himself or herself or of any other person in the commission of any imprisonable offence; or
 - avoid arrest or facilitate the flight of himself or herself or of any other person upon the commission or attempted commission of any imprisonable offence.¹⁵⁸
- 6.4 Adding a fourth intent element designed to capture the motivation more usually present in strangulation in family violence circumstances would make it easier to use these offences to prosecute strangulation, improving accountability for the perpetrators. That new ulterior intent could be “to intimidate, control or coerce the victim”.
- 6.5 If this additional intent element could be proved in relation to a particular family violence incident, it would establish three tiers of offence with which to prosecute the strangulation, which are:
- “aggravated assault” (three years’ imprisonment)—the only additional element to be proved is an assault (which would be the strangulation);
 - “aggravated injury” (seven years’ imprisonment)—the only additional element to be proved is an injury (for example, bruising, petechiae or a medical assessment showing internal injuries or psychiatric injury); or
 - “aggravated wounding” (14 years’ imprisonment)—the additional element would be either that the victim was rendered unconscious or that violent means were used to render the victim incapable of resistance.

158 Crimes Act 1961, ss 191(1) and 192(1).

- 6.6 In relation to “aggravated wounding”, one of the two results must be proved—either unconsciousness or rendering incapable of resistance. Both are questions of fact for the jury. Evidence of a loss of consciousness can be obtained from the victim or any witness and can be corroborated by signs or symptoms of lack of consciousness such as incontinence or dizziness or by medical assessment. Evidence of violent means used to render the victim incapable of resistance will depend upon the circumstances. The Court of Appeal has held that “violent means” does not necessarily require physical force and so may extend to threatening to shoot the victim.¹⁵⁹ It is not hard to assume that, where the act of strangulation and the intent to intimidate, control or coerce is proved, the “use of violent means to render the victim incapable of resistance” would be inferred.
- 6.7 When a violent act like strangulation occurs in family violence circumstances, it is likely to be much easier to prove intent to intimidate, control or coerce the victim than to prove the existing intent elements in current aggravated assault offences. As we described in Chapter 2, it is thought that abusers do not strangle to kill but to show their victim that they can kill. Strangulation is a tool of coercion and control. Proof of this intent can come directly from the defendant’s own statements or those of the victim or a witness. It can also be inferred from those statements or the defendant’s actions.¹⁶⁰ For example, evidence of threats to kill in addition to the strangulation or statements such as “you will do as I say” would be evidence of intent to intimidate, control or coerce. It is also possible this intent may be inferred from the strangulation itself, particularly if it was part of an ongoing pattern of violence.
- 6.8 Adding this intent element to the existing offences of “aggravated wounding and injuring” and “aggravated assault” would provide a mechanism for holding the perpetrators of strangulation more accountable by providing charges that are more suited to the circumstances of strangulation than the current more serious violence charges. The range of penalties available under these offences (three years, seven years and 14 years) reflect the range of seriousness appropriate for strangulation and would be more appropriate than the two years available under “male assaults female”.
- 6.9 The advantage of this option is that it would target the aspect of strangulation that marks it out as especially culpable—the intimidation, control and coercion. It would do so without having an adverse impact on the current framework of offences. Unlike the specific offence described in Chapter 5, it does not introduce new elements that may have an impact on other Crimes Act offences or the common law. Perhaps more importantly, by altering existing offences, it does not carry the risk of inconsistent charging practice arising with a specific offence.
- 6.10 However, the disadvantage of this option over a specific offence is that it does not introduce the concept of “strangulation” to the Crimes Act so does not highlight that behaviour as worthy of particular attention. Also, any conviction for these offences would give no indication that they involved strangulation. That would need to be specifically brought to the attention of a judge making a decision on bail or a protection order.
- 6.11 Of course, this option would have an effect beyond strangulation. It is likely that it would also be easier to prosecute other forms of family violence if this option were enacted. This broader implication puts this option outside the terms of reference of this review. It should

159 *R v Crossan* [1943] NZLR 454 (CA).

160 *Adams on Criminal Law* comments in relation to the offence of “doing a threatening act” (Crimes Act 1961, s 308) that it is open to the jury to infer the “intent to intimidate or annoy” if the act was of such a nature that the defendant must have known its tendency was to intimidate or annoy: Robertson, above n 94, at [CA215.01].

be considered as part of the Ministry of Justice's broader examination of family violence prosecution.¹⁶¹

OFFENCE OF RECKLESSLY ENDANGERING LIFE

- 6.12 Unlike some other jurisdictions, New Zealand does not have an offence of “endangering” within the framework of offences against the person in Part 8 of the Crimes Act. In jurisdictions that have this offence, it is a criminal act to do something that endangers the health or safety of the victim. There is no requirement to prove that the behaviour resulted in harm, only that the act was dangerous. As such, it may be suited to strangulation which is inherently dangerous despite difficulty in proving actual harm.
- 6.13 As we noted in Chapter 4, the Crimes Act offence of “criminal nuisance” has a similar effect. However, as a public welfare offence, the behaviour charged under it is more in the nature of failing to protect the public from dangerous things under one's control than engaging in violent conduct that might expose others to harm. Furthermore, the sentence levels for “criminal nuisance” would not address the current issue of strangulation being inadequately sanctioned.
- 6.14 Other jurisdictions have offences of endangering:
- The Canadian Criminal Code offence of “aggravated assault” makes endangering the life of the complainant an offence.¹⁶²
 - The US Model Penal Code describes a misdemeanour offence of recklessly engaging in conduct that places another person in danger of death or serious bodily injury.¹⁶³
 - In 2004, the Western Australia Criminal Code created an offence punishable by seven years' imprisonment to do an act (or omit to perform a duty) that results in the life, health or safety of any person being endangered. If that act or omission is done with intent to harm, the maximum penalty is 20 years' imprisonment.¹⁶⁴
 - In South Australia, a person is guilty of an offence punishable by 15 years' imprisonment if that person does an act or makes an omission:¹⁶⁵
 - knowing that the act or omission is likely to endanger the life of another person;
 - intending to endanger the life of another; or
 - being recklessly indifferent as to whether the life is endangered.
 - In Victoria, the Crimes Act provides that a person who recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence punishable by 10 years' imprisonment.¹⁶⁶
- 6.15 We note that endangering offences were included in the Crimes Bill 1989, which was never enacted. Those provisions read as follows:
- Section 130(1)(b)** Every person is liable to imprisonment for 14 years who ... with reckless disregard for the safety of other, does any act or omits without lawful excuse to perform or observe any legal duty, knowing that the act or omission is likely to cause serious bodily harm to any other person.

161 Ministry of Justice *Strengthening New Zealand's legislative response to family violence: A public discussion document* (Wellington, August 2015).

162 Criminal Code RSC 1985 c C-46, s 268. We described in Chapter 5 that this offence was considered adequate for prosecuting strangulation.

163 Model Penal Code § 2112.

164 Criminal Code Act Compilation Act 1913 (WA), s 304.

165 Criminal Law Consolidation Act 1935 (SA), s 19(1).

166 Crimes Act 1958 (Vic), s 22.

Section 132(1)(b) Every person is liable to imprisonment for 5 years who ... with reckless disregard for the safety of other, or heedlessly, does any act or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any other person or to endanger the safety or health of any other person.

Section 132(2) Every person is liable to imprisonment for 2 years who negligently does any act or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any other person or to endanger the safety or health of any other person.

- 6.16 An offence of recklessly endangering life would apply to a broader category of offending than strangulation. This might be appropriate if there was a gap in the offence framework in respect of dangerous behaviour that does not result in injury or wounding, especially in the context of violence intended to intimidate and make the victim fear for their safety. Examples of other behaviour that would be captured by such an offence are:
- throwing a weapon or hard object at a person in such a way that risks serious injury or death but where (by chance) no injury is sustained; or
 - pushing a person off a high-rise balcony but where another person intervenes to prevent injury to the victim.
- 6.17 An endangering offence would be helpful for prosecuting strangulation in those cases where there is evidence of pressure applied to the neck but proving an injury or loss of consciousness is difficult. This type of reform would provide an avenue for greater accountability for people who strangle. However, it would have very little or no effect on raising public awareness about the significance of strangulation.
- 6.18 We note that general offences of endangering life are somewhat controversial. It has been argued that:¹⁶⁷
- they overlap with more specific offences (for example, dangerous driving, hazardous substances, firearms or drugs) so:
 - confer too much discretion on prosecutors deciding which charge to bring;
 - may result in inconsistent charging practice; and
 - muddle the public message about exactly what behaviour is prohibited; and
 - they are overly broad, resulting in over-criminalisation of behaviour (because they do not require actual harm).
- 6.19 The United Kingdom Law Commission has recently discussed offences of causing danger in its Report *Reform of Offences against the Person*.¹⁶⁸ That Report concluded that specific endangering offences may be justified when:
- the behaviour is intrinsically dangerous and the offender is acting by choice;
 - there is an exceptionally high degree of danger; or
 - the victim is particularly vulnerable.
- 6.20 Examples include dangerous driving, endangering the safety of aircraft and exposing children to danger.¹⁶⁹ However, it concluded that general endangering offences cannot be justified because

¹⁶⁷ CMV Clarkson "General Endangerment Offences: The Way Forward?" (2005) 32 UWA Law Rev 131.

¹⁶⁸ Law Commission of England and Wales *Reform of Offences against the Person* (Law Com No 361, 2015) at ch 7.

¹⁶⁹ At [7.34].

cases of endangering that are deserving of criminal punishment are already covered by specific offences.

AGGRAVATED VERSIONS OF OFFENCES INCREASING PENALTY

- 6.21 A third option is to create strangulation versions of existing offences. This would see the Crimes Act amended to state that, if strangulation is a feature of a violent offence, the maximum penalty for that offence should rise by a set amount (for example, by two years). This “strangulation overlay” could apply just to the offence of “male assaults female” or to all offences under Part 8 of the Crimes Act. In effect, it would establish a second tier offence or set of offences for when the violence included strangulation. The fact of strangulation would need to be proved in addition to whatever other matters are required by the particular offence.
- 6.22 South Australia has an extensive system of factors that create aggravated versions of offences. The range of circumstances that may aggravate an offence include that:¹⁷⁰
- the victim was a spouse or partner of the offender;
 - the offence occurred in the course of deliberately and systematically inflicting severe pain on the victim;
 - the offender used or threatened to use a weapon when committing the offence; and
 - the offender knew that the victim was under 14 years old or over 60 years old.
- 6.23 Under that legislation, if a person is charged with an aggravated version of an offence, the aggravating circumstances must be stated in the charging instrument. If two or more circumstances are stated and a jury makes a finding of guilt, it must also state which of the aggravating factors it found were established. An aggravated charge of “assault” raises the maximum penalty from two years to three years’ imprisonment. An aggravated charge of “assault causing harm” raises the maximum penalty from three years to four years.¹⁷¹
- 6.24 Western Australian legislation prescribes a more limited set of circumstances of aggravation that are relevant only to a limited range of offending such as grievous bodily harm, sexual offending and stalking. The circumstances that aggravate those offences include that:¹⁷²
- the offender was in a family or domestic relationship with the victim; or
 - a child was present when the offence was committed.
- 6.25 If this approach was followed in New Zealand, it would provide a strong signal about the significance of strangulation and hold perpetrators of strangulation more accountable (by imposing a higher maximum penalty). It has one distinct advantage over the strangulation offence described in Chapter 5 in that it does not offer an alternative charging option so removes the risk of inconsistent charging practice.
- 6.26 Nonetheless, we consider that it would introduce unwarranted complexity and confusion into the offence framework, particularly by singling out strangulation as the only aggravating factor. If this approach were deemed suitable for strangulation, it should perhaps also be considered for other factors that aggravate offending, including all those listed in section 9 of the Sentencing Act 2002.¹⁷³

170 Criminal Law Consolidation Act 1935 (SA), s 5AA.

171 Section 20.

172 Criminal Code Act Compilation Act 1913 (WA), s 221.

173 In Chapter 7, we discuss in more detail the s 9 factors that aggravate offending.

Chapter 7

Additional options for reform

- 7.1 In addition to a specific strangulation offence or other amendments to the Crimes Act, there are a number of ways in which the problems presented by strangulation in family violence might otherwise be addressed. The first would involve amendments to the Sentencing Act 2002. The others would be operational and involve amendments to record keeping, training and education of key groups, and increased access to medical assessments. Some of these options would address the current lack of accountability of perpetrators of strangulation. Others would focus more on ensuring decision makers have sufficient information to keep the victims of strangulation safe.

AGGRAVATING FACTOR FOR SENTENCING

- 7.2 In large part, an offender's accountability is demonstrated by the sentence imposed. Therefore, we have examined options for addressing the sentencing of offenders.
- 7.3 Legislation does not generally prescribe the precise sentence that an offender should receive, only the maximum penalty for the most serious cases. The actual sentence imposed is a matter for the sentencing judge's discretion. In making that decision, the judge must evaluate a wide range of often competing matters including the purposes of punishment, the gravity of the offending, the characteristics of the offender (including their degree of culpability) and the effect on the victim.¹⁷⁴ He or she must arrive at a sentence that is tailored to the case, consistent with sentences in other similar cases and reflects the totality of offending. Our justice system recognises that, given this range of competing considerations, sentencing judges require a wide discretion.
- 7.4 Therefore, there are only a few ways the sentences imposed for strangulation can be influenced. First, as already discussed, we could establish an offence carrying a higher maximum penalty. Second, judges could be offered education about family violence generally, and strangulation specifically, to help them understand the significance of this type of behaviour and its effects. We address this option in more detail below. Third, strangulation could be added to the list of factors that may aggravate an existing offence and, thus, see a sterner sentencing response.
- 7.5 The Sentencing Act 2002 provides a list of 15 aggravating and 10 mitigating factors that must be taken into account to the extent they are applicable to a case (and are not the subject of the charge itself). Strangulation could be added to the list of aggravating factors, which already include:
- the use of a weapon;
 - unlawful entry into a dwelling place;
 - offending while on bail;
 - particular cruelty;

¹⁷⁴ Sentencing Act 2002, s 8.

- abuse of trust or authority in relation to the victim; and
 - particular vulnerability of the victim due to age or health or other factor.¹⁷⁵
- 7.6 There is nothing to prevent a judge from considering strangulation as an aggravating factor for sentencing, even if it is not included in the statutory list of aggravating factors. The matters in that list are not exhaustive. However, our reading of published sentencing decisions and consultation with lawyers and other participants in the criminal justice system indicates that judges, and others who deal with family violence but are not specialists, often do not appear to recognise the terror of strangulation or the risks associated with it.
- 7.7 While specifying strangulation as an aggravating factor would clearly signal that strangulation increases culpability, it would also have a broader effect on the criminal justice system. It would send a clear message that strangulation is particularly serious and must not be viewed lightly at any stage of the criminal justice process. This will be particularly relevant if a strangulation charge is initially laid but subsequently amended to a lesser charge. The inclusion of strangulation as a statutory aggravating factor would stand as a reminder that it should not be removed from the summary of facts and indication that it may increase the ultimate sentence.¹⁷⁶
- 7.8 Consistent with our conclusion about a specific offence of strangulation, we do not consider that any specification of strangulation as an aggravating factor should be limited to family violence circumstances. It could be argued that the terror of strangulation in family violence circumstances is particularly acute due to the intimate relationship and so the ongoing scope for and likelihood of fear, coercion and control resulting from strangulation. However, we consider that the terror or other harm of strangulation in non-family violence circumstances is also significant enough to justify an increase in the sentence imposed and is likely to be under-recognised by the sentencing judge.
- 7.9 Finally, we have considered whether strangulation is best considered as a tailored offence or left to sentencing discretion. When strangulation is an aggravating factor, the judge has discretion as to the weight he or she accords it for sentencing. When strangulation is an element of the offence, there is a blanket, automatic increase in the maximum penalty applicable (and so to the starting point for sentencing), and Police and prosecutors use their discretion to determine whether there is sufficient evidence to lay the charge.
- 7.10 This issue was discussed in the 1998 Report on the Model Criminal Code by the Australian Attorneys-General Model Criminal Code Officers Committee.¹⁷⁷ The Committee took the view that, while there are no generally articulated or agreed guidelines on the question whether and when it is desirable, as a matter of principle, to make a matter one for trial or for sentence, generally the question should be determined by whether the legislature considers the aggravating factor should be the subject of decision by a jury for the purposes of determining guilt or innocence.¹⁷⁸
- 7.11 We consider that there are no theoretical impediments to strangulation being either an element of a separate offence or an aggravating factor for sentencing. The two serve different purposes. As an element of an offence, Parliament sends a message that this behaviour should be criminalised. As an aggravating factor for sentencing, the judge is considering the individual

175 Crimes Act 1961, s 9(1).

176 We note that the *Solicitor-General's Prosecution Guidelines* already preclude the omission of any material fact from the summary of facts for the purposes of a plea arrangement. See At [186]. However, whether or not a fact is "material" is always a matter of judgement and therefore subject to the prosecutor's understanding of the relative seriousness of the facts.

177 Model Criminal Code Officers Committee - Standing Committee of Attorneys-General *Model Criminal Code - Chapter 5: Non-Fatal Offences Against the Person* (1998) Chapter 5: Non-fatal offences against the person.

178 At 113.

culpability of the defendant and extent to which strangulation increases that culpability over and above the criminality of the behaviour for which he or she was convicted. We consider that, if a person is convicted of a generic violent offence, any strangulation aspects of that offending could be understood to increase culpability because of the unique terror associated with it. It should be noted, however, that the principle of totality means that this culpability would not be double-counted, so strangulation could be relevant as an aggravating factor only in sentencing for generic violent offences.

RECORDING STRANGULATION

- 7.12 In Chapter 4, we described the Police and Ministry of Justice systems for recording family violence incidents and their criminal justice outcomes. We consider that two changes to these systems would help to provide appropriate accountability for perpetrators and better decision making to keep victims safe.
- 7.13 First, the POL 1310 document should be amended to ask a specific question about strangulation. This would ensure that Police attending family violence call-outs are prompted to ask about strangulation and to document any evidence of it.
- 7.14 Second, strangulation should be specifically noted in the National Intelligence Application (NIA). When Police or prosecutors subsequently refer to NIA for information on call-outs and previous offending to inform bail decisions or protection orders, it is important that any previous strangulation is apparent on the record so that the risk of future fatality can be taken into account.

INCREASING THE AVAILABILITY OF MEDICAL EVIDENCE

- 7.15 In Chapter 4, we described both the importance of victims of strangulation obtaining medical assessments and the difficulty they often experience in doing so. Victims of sexual assault are directed to doctors specifically trained in treating and documenting sexual assault. There is no similar service for victims of family violence. Sometimes, the Police direct victims to local doctors specialising in family violence, but that may be only for the most serious cases and is much more likely in large centres.
- 7.16 It is beyond the scope of this project to examine how victims of strangulation can have better access to specialised medical assessments, and we suspect that this is a wider issue for family violence more generally. However, it is clear that a medical assessment documenting the internal and psychological signs and symptoms (as well as the external, visible signs) provides useful evidence in criminal proceedings, and lack of access to a medical assessment is therefore a potential barrier to effective prosecution.

EDUCATION ABOUT STRANGULATION

- 7.17 It became very apparent to us in the course of this review that the significance of strangulation is not well understood by the Police, lawyers, judges and doctors who deal on a day-to-day basis with the victims of family violence. The picture is different for the family violence specialists in each of these fields who keep abreast of developments in this area. Amongst that group, there is growing awareness of the prevalence of strangulation as a method for threatening and exerting control and the significant impact this has on victims. Family violence specialists expressed frustration that there are not better systems to respond to it.

- 7.18 We are satisfied that there is strong evidence linking strangulation in family violence circumstances to a high risk of a future fatal attack. Therefore, perhaps the most important proactive measure is education for all groups who deal with family violence victims to ensure strangulation is better understood. That education would need to cover:
- the prevalence of strangulation in family violence;
 - 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.
- 7.19 If people dealing with victims of family violence understand the significance of strangulation, we expect they would:
- routinely ask whether a victim of violence was strangled;
 - take time and care in looking for visible signs and symptoms of strangulation;
 - help the victim to access medical care and forensic assessment;
 - lay more serious charges against the perpetrator;
 - help the victim understand the risk their abuser poses to them; and
 - make decisions that keep the abuser away from the victim.
- 7.20 In addition, a particular focus for education of Police could be on appropriately charging strangulation. As we described earlier, it appears that strangulation is often under-charged.

Chapter 8

Recommendations for reform

- 8.1 Following the analysis outlined in the previous chapters, we have reached a number of conclusions about the nature of strangulation and the way it is currently prosecuted. Strangulation is a common form of family violence and it is always a serious violent offence even when there is no visible injury and the victim does not lose consciousness. While it can cause physical injury to victims, the main harm in family violence circumstances is the terror it inflicts and so the intimidation, coercion and control of the victim by the perpetrator that results.
- 8.2 It is clear that strangulation in family violence circumstances is related to a higher risk of a future fatal attack by the perpetrator on the victim. We have found that this risk is not well understood by many Police officers, judges, doctors and others who deal with the victims of family violence. This means that the risk may not be taken into account in crucial ways, such as when judges are making bail decisions and protection orders or when Police and prosecutors are deciding whether to support or oppose those applications. In some cases, this will mean that the abuser is not kept away from the victim, who remains at significant risk.
- 8.3 We have also found there are difficulties with prosecuting strangulation at an appropriately serious level under the current framework of serious violent offences in the Crimes Act when there are no visible injuries resulting. This is because the serious offences require proof of an injury or special intention on the part of the perpetrator, both of which are difficult to prove or do not exist in cases of strangulation. It seems likely this is one of the main reasons why strangulation in family violence circumstances tends to be charged as the lower-level offence of “male assaults female” instead of a more serious offence.
- 8.4 We consider that under-recognition that strangulation signals a risk of future fatal attack, together with the legal impediments to holding perpetrators appropriately accountable, justify reform. The objectives for reform should be to:
- raise the awareness of the dangerousness of strangulation;
 - provide better criminal justice mechanisms to hold the perpetrators to account; and
 - keep the victims safe.

STRANGULATION OFFENCE

- 8.5 We consider these objectives would be best achieved by enacting the following offence as we described it in Chapter 5:

RECOMMENDATIONS

- R1 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.
- R2 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.

Consultation

- 8.6 Our consultation revealed wide support for a specific strangulation offence. Some people considered that the scale of New Zealand’s family violence problem alone justifies enactment of a specific offence. Others favoured a new offence because they considered that the current framework of offences was not well suited to strangulation. A number of people who, as a matter of principle, generally opposed the enactment of specific offences, acknowledged that it is justified in this case, at least in respect of strangulation that does not result in visible injury.
- 8.7 While we agree that the size of the current family violence problem justifies a meaningful response, we consider that remedial law reform is justified only if it can be shown that reform will successfully address the policy objectives *and* those objectives cannot be achieved equally or better by other, non-legislative mechanisms.¹⁷⁹ Below, we describe how the strangulation offence will address the objectives. At the end of this chapter, we discuss whether other mechanisms would do so equally well or better.

Addressing the objectives

Raising awareness of strangulation

- 8.8 The enactment of this offence (and the surrounding publicity) would send a strong message that strangulation is a potentially lethal form of violence and the risk of a future fatal attack needs to be considered by those making decisions affecting victims. The publicity and training accompanying the introduction of such an offence would provide the opportunity to explain the most troublesome hallmarks of family violence strangulation: that it often leaves no visible signs and is a red flag for an increased risk of fatality.
- 8.9 The Police have told us that the enactment of a strangulation offence would enhance their officer training because legislative provisions provide the framework for their education. A strangulation offence would help to focus the attention of officers on this aspect of family violence, which is currently under-recognised.
- 8.10 In a similar way, the “labelling effect” of a strangulation offence would mean that people dealing with victims of family violence are more likely to ask about strangulation and help victims obtain medical assessment and treatment.¹⁸⁰ This, in turn, would increase the likelihood of decisions to keep abusers away from victims and, in theory, reduce the risk of future fatal attacks.
- 8.11 As described in Chapter 5, a study of the effectiveness of a specific strangulation law in Minnesota found a significant increase in the awareness of the seriousness of strangulation following the enactment of the new law.¹⁸¹ In particular, it found that the new offence had highlighted to Police and others dealing with family violence that strangulation is common and

179 Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (Ministry of Justice, 2001) at 20.

180 We discussed the need for better access to medical assessments in Chapter 7.

181 Heather Wolfgram *WATCH Report Part I: The impact of Minnesota’s felony strangulation law* (WATCH, January 2007).

dangerous. The new offence meant that strangulation was now thought of as a “red flag” in family violence, prompting closer attention.¹⁸²

Effective criminal sanctions

- 8.12 The new offence would provide a more effective option for prosecuting strangulation in family violence circumstances when it does not result in visible injuries. Serious instances of such strangulation that are now charged as “male assaults female”, rather than more serious offences due to evidential difficulties, will instead be prosecuted under the new offence. Examples are where the victim reported that she lost consciousness or was “struggling to breathe” but there is no other evidence of injury. “Struggling to breathe” is not an “injury” as it is currently defined, despite it being a terrifying experience and an effective method of intimidation, coercion and control. A loss of consciousness would indicate a charge of “disabling” is appropriate, but that offence requires that the perpetrator intended the victim to lose consciousness. These types of scenarios tend to be charged currently as “male assaults female”. The strangulation offence described will provide an effective criminal sanction with a significantly higher maximum penalty than “male assaults female”.
- 8.13 It should be acknowledged that evidential hurdles in proving strangulation will remain. Victims may be reluctant to give evidence, or their memories may be affected by neurological damage caused by the strangulation. There may be no third-party witnesses, or specialist medical assessments may not be possible or considered warranted. However, we consider that the enactment of a specific offence (and the educational benefits that accompany it) will go some way to addressing that problem. If Police understand the risks of strangulation and the fact that it commonly does not result in visible injuries, they will be likely to take more time and effort to gather sufficient evidence.
- 8.14 This result occurred in Minnesota following the new law and accompanying Police training.¹⁸³ Police conducted more thorough investigations, including taking more photos and better documenting the crime scene. It was also thought that, because the new offence was a felony, carrying a more serious penalty than had been available previously, Police were being more proactive in dealing with the charges. A similar result can be expected in New Zealand.
- 8.15 It should also be acknowledged that, even if a strangulation charge is laid, it could be reduced to a lesser, generic offence after plea negotiations. However, any reduced charge must still reflect the essential criminality of the conduct.¹⁸⁴ Also, the introduction of a specific offence and inclusion of strangulation in the statutory list of aggravating factors for sentencing sends a strong signal that strangulation is a significant element of the offending that cannot be treated lightly. If a less serious, generic charge is ultimately laid, the starting point for sentencing will be less, but the aggravating nature of strangulation may still increase the sentence within those limits.

Increasing safety of victims

- 8.16 By increasing awareness of strangulation and enabling more appropriate sentences, a new strangulation offence is also likely to increase the safety of victims. Increased awareness should lead to greater care and attention in specific cases, leading in turn to better victim assistance and more effective prosecution. If more cases result in charges or more serious charges, it is also

¹⁸² At 4 and 5.

¹⁸³ At 6.

¹⁸⁴ Crown Law Solicitor-General’s Prosecution Guidelines (2013) at [18.6.1], and see above at [3.21] of this Report for more discussion on plea negotiations.

likely that more perpetrators will be sentenced in a way that inhibits their contact with victims and, thereby, reduces the risk of future fatal attack.

- 8.17 The Minnesota study found an increase in the number of convictions of strangulation crimes after the enactment of the new offence.¹⁸⁵ It was thought that, by elevating strangulation above other forms of family violence, the lethality of the behaviour was expressly recognised, so more attention was paid to the cases and victim safety was enhanced.

NOTING FAMILY VIOLENCE ON THE CRIMINAL RECORD

- 8.18 We recommend a further legislative amendment to the Crimes Act:

RECOMMENDATION

R3 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 court must direct that the offence be recorded on the person's criminal record as a family violence offence.

- 8.19 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. The risk of a future fatal attack arises only when strangulation occurs in family violence circumstances, so that risk will not in itself be evident from a conviction for strangulation on the criminal record unless the family violence circumstances are also noted. Otherwise, the only way a judge will know of the family violence circumstances (and so the unique risks) is if the Police or prosecution bring it to his or her attention or the judge asks for more details. We consider that the risk of fatality is too important to be left to the practices of prosecutors and judges who will often be operating under considerable pressures. This recommendation will ensure that there is a standard mechanism for noting the record in every case, reducing the burden on individuals.
- 8.20 We described in Chapter 5 that this type of reform has been made in New South Wales legislation, but there, it applies to all offences of personal violence, not just strangulation.¹⁸⁶ While it may be thought that this broader application would also be desirable in New Zealand, this recommendation is limited to strangulation because that is the limit of our terms of reference.
- 8.21 Of course, such a reform would also require a definition of "family violence". We have not addressed that issue in this Report because such definition will apply much more widely than strangulation and it is being addressed in the Ministry of Justice's review of family violence legislation.¹⁸⁷

AGGRAVATING FACTOR FOR SENTENCING

- 8.22 In addition to a new offence, we recommend an amendment to the Sentencing Act 2002 to achieve the objectives described above.

185 Heather Wolfgram, above n 181, at 5.

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

187 Ministry of Justice, above n 161.

RECOMMENDATION

R4 Section 9 of the Sentencing Act 2002 should be amended to include strangulation as an aggravating factor that must be taken into account in sentencing.

8.23 This amendment would send a clear signal from Parliament that strangulation must not be treated lightly and may increase culpability. In this way, it would raise awareness amongst the judiciary and suggest to judges that sentences should be calibrated accordingly.

OPERATIONAL CHANGES

8.24 Sometimes, legislative change is not the only way to achieve the objectives of reform. In this case, the problems identified indicate that operational changes are not sufficient to achieve the objectives but should be part of the package of reforms. We make the following recommendations for operational changes:

RECOMMENDATIONS

R5 The Police family violence incident report (POL 1310) should be amended to include questions designed to screen for strangulation.

R6 The Police National Intelligence Application (NIA) should be amended to record specifically whether or not a family violence incident included an allegation of strangulation.

R7 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.

8.25 These reforms would primarily serve the purpose of raising the awareness of the significance of strangulation. Increased awareness should in turn promote better decision making by persons who have contact with victims of family violence.

8.26 Amending the family violence incident report will prompt Police to ask about strangulation in a family violence call-out even when it is not specifically reported or there are no obvious visible signs. Specifically noting strangulation in NIA would enable that information to be available to Police and prosecutors dealing with subsequent offending behaviour or providing information to judges for bail decisions or protection orders. It would also enable statistics to be gathered on the prevalence of strangulation—something that is not currently possible.

ARE THERE BETTER LEGISLATIVE OPTIONS TO ACHIEVE THE OBJECTIVES?

8.27 We have examined whether, instead of new strangulation offences, other reform options would adequately address the identified problems.

Increased education and training

8.28 It is true that an education campaign highlighting the dangerousness, signs and symptoms of strangulation could go a long way to achieving the policy objectives we have identified. It would raise awareness about strangulation, improve some of the evidential problems and make it more likely for judges making decisions about bail and protection orders to ask whether strangulation was a feature of previous family violence. However, while education is a vital ingredient in

reform, it is not sufficient. Education will not address problems with proving the harm and intent elements of the existing more serious offences. It is therefore unlikely to affect the current tendency to prosecute strangulation as an assault.

Aggravated wounding, injury and assault

- 8.29 In Chapter 6, we described that the suitability of the serious violent crimes for prosecuting strangulation could be significantly improved by amending the offences of “aggravated wounding or injury” and of “aggravated assault”. We suggested that, if those offences were extended to include behaviour intended to intimidate, control or coerce, they would provide three offences much better suited to prosecuting strangulation. Such an amendment would avert the criticisms that specific offences increase the complexity of the offence framework.
- 8.30 However, this option has none of the labelling advantages of specific strangulation offences. It would not send a message about the special lethality of strangulation. If that message is a priority, and we consider it should be, enacting a specific strangulation offence would provide an effective way to communicate it. In addition, while the introduction of an aggravation option might improve the options for prosecuting strangulation, it would have application far beyond strangulation. Our terms of reference do not permit us to examine this wider impact.

Aggravating factor for sentencing

- 8.31 An amendment to the Sentencing Act 2002 to specify strangulation as an aggravating factor would go some way to increasing sentences for strangulation and increasing offender accountability. However, if this option were enacted *instead* of the described strangulation offence, most strangulation would, we expect, continue to be charged as “male assaults female”. Even if strangulation is an aggravating factor for sentencing, we do not consider that a maximum penalty of two years’ imprisonment adequately reflects the gravity of strangulation. Two years is appropriate for the “intentional non-consensual touching” targeted by “male assaults female”. It is insufficient for the terror inflicted on a person who has had their breath and blood supply restricted.

ARE THERE UNINTENDED CONSEQUENCES?

- 8.32 The main argument we encountered against a specific strangulation offence is that, like all specific offences, it would increase the complexity and confusion already apparent in the Crimes Act’s offence framework. The issue of specific offences was examined by the Law Commission in *Review of Part 8 of the Crimes Act 1961: Crimes against the person*.¹⁸⁸ That Report concluded that Part 8 lacks a clear organising principle and a consistent approach to maximum penalties.¹⁸⁹ While that Report examined offences of assault of specific *victims*, the same concerns apply to offences relating to specific *forms* of assault, such as strangulation, as follows:
- They complicate charging decisions, making two or more options available (the specific and the generic), which will inevitably produce inconsistent results.
 - They arbitrarily single out aggravating factors—aggravating factors should not be elements of an offence but should be taken into account on sentencing.
 - They give rise to a “slippery slope” effect—if we create a specific offence in one area, it will be hard to resist doing so again in many other areas, resulting in a patchwork of offences without logical or coherent structure.

188 Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes against the person* (NZLC R111, 2009) at 30.

189 The Law Commission, above n 4, at 16.

- 8.33 That Report recommended the repeal of many specific offences including “assault on a child”, “male assaults female”, “assault with a weapon” and “acid throwing”, and the enactment of a matrix of six offences that would form the core of Part 8 of the Crimes Act, as follows:¹⁹⁰

188 Causing serious injury with intent

(1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to injure any person, causes serious injury to any person.

(2) Every one is liable to imprisonment for a term not exceeding 4 years who causes serious injury to any person by assaulting any person or otherwise acting with reckless disregard for the safety of others.

189 Injuring with intent

(1) Every one is liable to imprisonment for a term not exceeding 10 years who, with intent to injure any person, injures any person.

(2) Every one is liable to imprisonment for a term not exceeding 3 years who injures another person by assaulting any person or otherwise acting with reckless disregard for the safety of others.

189A Assault with intent to injure or common assault

(1) Every one is liable to imprisonment for a term not exceeding 5 years who, with intent to injure any person, assaults any person.

(2) Every one is liable to imprisonment for a term not exceeding 2 years who assaults any person.

- 8.34 The six offences were generic, attempting to cover the full range of culpability and consequences of physical violence. The Report recommended that any specific aggravating factors should be addressed in sentencing rather than in the offences. These recommendations were not adopted by the government.
- 8.35 It remains the Commission’s view that Part 8 lacks a clear organising principle and a consistent approach to maximum penalties. Part 8 would benefit from reorganisation to introduce a logical approach to assessing the seriousness of offences based on harm and intent. This issue is outside our current the terms of reference,¹⁹¹ but it is interesting to note that, even if the 2008 Report’s recommendations had been taken up, charging problems would remain in respect of family violence strangulation. The offences proposed in the 2008 Report require proof of either an injury or an intent to injure, both of which are often difficult to establish in relation to strangulation.
- 8.36 Finally, we record that we continue to recognise the merit of arguments against specific offences, as outlined in the 2008 Report. However, even proponents of a simplified offence framework acknowledge that, sometimes, specific offences are required to address gaps in the law.¹⁹² The evidence is clear that such a gap exists in relation to strangulation, and we do not consider that a new offence would unreasonably increase the complexity of the current framework.

¹⁹⁰ At 17.

¹⁹¹ We note that the United Kingdom Law Commission has recently made similar recommendations: Law Commission of England and Wales *Reform of Offences against the Person* (Law Com No 361, 2015).

¹⁹² Law Commission, above n 188, at 4.

Appendices



Appendix A

TERMS OF REFERENCE

Creation of a separate crime of non-fatal strangulation

Context

An element of the revised Law Commission work programme 2014/15 issued by the Minister of Justice included creation of a separate crime of non-fatal strangulation.

In its fourth Annual Report the Family Violence Death Review Committee noted that non-fatal strangulation “is an important lethality risk indicator and the Committee believes it must be considered a “red flag” for future serious abuse and fatality”. The Committee accordingly recommended that “the government consider an amendment to the Crimes Act to include non-fatal strangulation as a separate crime under Part 8 of the Crimes Act 1961”.

Reference

The Law Commission will consider:

- (a) the rationale for establishing a crime of non-fatal strangulation, with reference to the recommendations of the Family Violence Death Review Committee and the experience of overseas jurisdictions;
- (b) if a crime of non-fatal strangulation is to be created, the appropriate elements of the offence and its maximum penalty, with reference to other offences against the person in the Crimes Act 1961; and
- (c) whether a crime of non-fatal strangulation should be created or whether there are other (legislative or operational) options that would better address the concerns the proposed crime is intended to address.

Scope

This reference forms part of a range of family violence initiatives that the Minister of Justice is initiating. During the review this reference will consult with the other family violence initiatives and where possible provide integrated recommendations.

This reference is to focus on the creation of the new crime in the family violence context and is not to consider the general law of assault or strangulation, unless necessary to do so.

Review Process

The reference will be undertaken by:

- (i) the Law Commission issuing for targeted consultation a Draft Final Report after undertaking preliminary research which will include assessing overseas experience and best practise;
- (ii) consulting with targeted agencies within New Zealand including Police, Judiciary, Ministry of Justice, Family Violence Death Review Committee, New Zealand Law Society and other knowledgeable agencies; and
- (iii) engaging with an expert panel, made up of both public and non-public sector advisers, during the reference.

Timing

The Commission will report to the Minister on the 31st of March 2016.

Appendix B

CONSULTATION LIST

New Zealand Police

Ministry of Justice

John Billington QC

Judge Caren Fox

Ang Jury (Women's Refuge)

Annabel Markham (Crown Law)

Elisabeth McDonald (Victoria University of Wellington)

Julia Tolmie (University of Auckland)

Tusha Penny (New Zealand Police)

Helen Cull QC

Grant Burston (Luke Cunningham Clere)

Dr Clare Healy

Judge John Walker

Rob Veale

Dr Warren Young

Appendix C

CASES OF PROSECUTED STRANGULATION IN A FAMILY VIOLENCE CONTEXT

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
Causing grievous bodily harm with intent to cause grievous bodily harm (Crimes Act, section 188(1) – maximum penalty 14 years’ imprisonment).	<i>R v Grant</i> DC Dunedin CRI-2011-212-193, 2 July 2012.	Victim was defendant’s girlfriend.	Defendant put victim in choker hold twice, put hand over her mouth and forced her head under bath water. Attack also involved other serious violence, including biting, eye gouging, stomping and stabbing with comb.	Yes – “Significant bruising to both eyes and around the neck – shortly after the attack, show extreme bruising which must have been attributable to the choker holds”.	Yes.	No.	SP: 8 years’ imprisonment. ES: 4 years and 4 months’ imprisonment (after 45% discount for youth and guilty plea).
Injuring with intent to cause grievous bodily harm (Crimes Act, section 189(1) – maximum penalty 10 years’ imprisonment).	<i>R v Singh</i> [2015] NZHC 1641. <i>Defendant also charged with threatening to kill.</i>	Victim was defendant’s wife.	After knocking victim unconscious with cricket bat, defendant began strangling “to the point where ... her tongue hung from her mouth and her eyes rolled back in her head”.	Yes – sore neck.	No – loss of consciousness caused by prior assault with bat, but strangulation committed while victim unconscious.	Yes – “I’m going to kill you tonight”. The defendant also told an intervening flatmate not to help the victim, but to let her die.	SP: 4 years’ imprisonment. ES: 3 years and 6 months’ imprisonment.

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<i>R v Pene</i> DC Whangarei CRI-2011-029-1419, 25 September 2012.	Victim was defendant's partner.	After punching the victim on the legs and face, the defendant "grabbed her by the throat and started to strangle her to the point where she could not breathe. Finally, you pinned her by your knees on her shoulders and punched her to the back of the head and again grabbed her by the throat squeezing it so hard that it caused obvious physical alteration to her facial features. It caused her, once you let her finally go, to vomit."	Yes – "extensive bruising to chin".	No.	No.	SP: 2 years and 8 months' imprisonment. ES: 2 years and 3 months' imprisonment (discount applied in part in recognition of mental health issues).
	<i>R v Vitali</i> [2014] NZHC 49.	Defendant and victim in some form of relationship.	Defendant hit victim in the head, punched her ribs and then put his belt around her neck, dragged her across the gravel and twisted the belt until the victim's jaw broke. When the victim thought the attack was over, the defendant forced her head under water as she tried to clean her face. The victim required surgery.	Yes – victim's jaw broke and she required surgery and metal plates.	No.	No.	SP: 6 years and 6 months' imprisonment. ES: 5 years and 6 months' imprisonment with 3.5-year minimum period of imprisonment.
	<i>R v Barrett</i> [2008] NZCA 474.	Defendant and victim in some sort of relationship.	In the course of an attack that included hair pulling, kicking and using a rod to strike the victim, the appellant attempted to throttle her, in the knowledge she had suffered an earlier brain injury.	Yes – mark on the neck.	Not recorded.	No.	ES: 6 years' imprisonment.

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
Injuring with intent to injure or with reckless disregard for the safety of others (Crimes Act, section 189(2) – maximum penalty 5 years' imprisonment).	<i>Kimiora v R</i> [2015] NZHC 1940.	Victim was defendant's former partner.	Victim awoke to find the defendant had (unlawfully) entered her home as she slept, had his hands around her throat and was trying to strangle her. That continued for a brief time before the defendant stood up and put his foot across her throat and then kicked and punched her in the arms and legs.	Unclear, although "reasonably significant bruising" caused by the kicking and punching.	Not recorded.	No.	SP: 20 months' imprisonment. ES: 10 months' home detention.
	<i>Smith v R</i> [2014] NZHC 3033.	Victim was defendant's girlfriend.	The defendant wrapped an arm around the victim's throat and strangled her "almost to the point of unconsciousness". The victim ran free but the defendant strangled her in the same way a second time, and she lost consciousness.	Yes – haematoma to left eye; haemorrhaging in both eyes and bruising to face, throat and body. The Court recorded that "There was medical evidence that jugular vein had been obstructed. Obstruction for more than four minutes leads to death" and that the victim's injuries were "significant".	Yes – during the second strangulation.	No – defendant told Police he strangled the victim to calm her down and stop her hitting him; he had not intended her to lose consciousness.	SP: 3 years and 6 months' imprisonment. 2 years and 9 months' imprisonment (after discount for the drug-induced psychosis the defendant was suffering at the time of the offending).

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<p><i>Hunia v Police</i> [2014] NZHC 333.</p> <p>Injuring with reckless disregard.</p> <p>Protection order in place.</p>	Victim was appellant's on-and-off partner.	Intoxicated and despite a final protection order, the appellant was at the victim's house, got angry and grabbed her, causing her to fall and smash her head. She lay motionless for 10 minutes and then when she got up to leave, the appellant "grabbed her arm from behind, using his right arm to place her in a "choker" hold, squeezing on her neck and causing her to lose her breath and become faint".	Yes – soreness to the neck caused by strangulation, and the victim also suffered a laceration and bruising.	No.	No.	<p>SP: 2 years' imprisonment.</p> <p>ES: 19 months' imprisonment.</p>
	<p><i>Nahi v Police</i> [2012] NZHC 2025.</p>	Unclear – the victim appears to have been the sister of the defendant's sister-in-law.	The defendant pushed the victim onto a bed and used both hands to choke her, restricting her breathing.	Yes – bruising to the neck, a sore throat, a sore right eye and a lump on head.	Yes – "all the victim could remember was waking up in her sister's presence ... the sentencing judge inferred that the victim lost consciousness for a short time".	No.	<p>SP: 16 months' imprisonment.</p> <p>ES: 16 ½ months' imprisonment.</p>

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<i>EWB v Police</i> [2012] NZHC 225. Protection order in place.	Victim was defendant's former partner.	Despite a protection order, the victim arrived to find the defendant in her house. After an argument during which the defendant said "I will kill you if you leave me and I will also kill the children", the defendant put the victim in a headlock, threw her to the floor and then knelt on her with a fist raised threatening to punch. "He then strangled her until her body turned limp."	Yes – bruising and abrasions to neck.	Yes – body turned limp.	"I will kill you if you leave me and I will also kill the children" (defendant also convicted of threatening to kill).	SP: 20 months' imprisonment. ES: 16 months' imprisonment.
	<i>Karini v R</i> [2010] NZCA 193. <i>Upgraded from male assaults female.</i> Offending entailed breach of bail condition to stay away from victim.	Not recorded.	In breach of bail conditions that required him to stay away from the victim, the appellant went to her home and hit her about the body with a shovel, then "throttled her until she thought she was going to die".	Not recorded.	Not recorded (no?).	No – but victim thought she was going to die.	SP and ES: 2 years and 6 months' imprisonment.
	<i>R v Puke</i> [2009] NZCA 582. <i>Upgraded from male assaults female.</i> Protection order.	Victim was appellant's wife.	In the course of a dispute that involved verbal abuse, the appellant threatened to slit his wife's throat before grabbing her by the throat and squeezing, telling her he did not care if he killed her in front of the babies. As he squeezed, he commented on her raised veins and bloodshot eyes and said she would die soon. When one of the daughters tried to pull him off, he assaulted her.	Yes – Court recorded the appellant's threat to his wife was "accompanied by intentionally injuring her by throttling" but does not detail injuries.	No.	Yes.	SP: 3 years and 6 months' imprisonment. ES: 2 years and 4 months' imprisonment (with 1/3 guilty plea discount) for both injuring and threat to kill).

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
Disabling (Crimes Act, section 197 – maximum penalty 5 years' imprisonment).	<i>Bonfert v R</i> [2012] NZCA 313. B charged with disabling or, in the alternative, male assaults female. He was convicted of male assaults female.	Victim was appellant's former partner, with whom he still lived.	The appellant pushed the victim, sat on her and threatened to punch her. He then put his hands around her neck and she "lost consciousness and awoke to find the appellant giving her mouth to mouth resuscitation".	Not recorded, but the Court noted that counsel for the Crown had submitted that "photographs showing injuries to the complainant were supportive of her original account" [the complainant having been declared hostile for trial].	Yes.	Yes – the jury convicted the appellant of threatening to kill in addition to male assaults female (x 2) and assault with a weapon. The evidence was the appellant had said words (in German) to the effect "I could kill you".	ES: 6 months' imprisonment (concurrent on sentencing of 16 months' imprisonment for threatening to kill) on each of the counts of male assaults female.
Assault with a weapon (Crimes Act, section 202C – maximum penalty 5 years' imprisonment).	<i>R v McCreath</i> HC Dunedin CRI-2009-012-5906, 15 April 2010.	Victim was defendant's former wife.	When the victim rebuffed his advance, the defendant put a rope around her neck and pulled it tight. He put a hand over her mouth, and she struggled to breathe.	Yes – bruising and a sore throat and neck and trouble eating and swallowing.	No.	No.	4 years' imprisonment (concurrent on sentence of preventive detention for indecent assault).

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
Assault with intent to injure (Crimes Act, section 193 – maximum penalty 3 years’ imprisonment).	<i>Police v Slater</i> [2013] NZHC 2460. Police appeal against grant of bail. Defendant charged with assault with intent to injure and breach of protection order .	Complainant, who was 28 weeks’ pregnant, was the defendant’s partner.	The defendant entered the complainant’s house, spat in her face and then “placed his arm around her neck and throat, exerting sufficient force to control her but not choke her”. In earlier alleged offending, which the Court took into account in considering bail, the defendant allegedly assaulted the complainant and then tightened her dressing gown cord around her neck before using his hands around her neck to lift her up and said “If you call the cops, I will fuck you up”. He then allegedly stuffed a tea towel into her mouth.	Unclear – complainant hospitalised for several days, but the Court did not record whether that was for strangulation-related or because of other injury.	No.	No.	Bail revoked.
	<i>S v Police</i> [2013] NZHC 1026.	Victim was appellant’s wife.	The appellant verbally abused the complainant and then strangled her to the point she lost consciousness. He was still pinning her down when she regained consciousness.	Not recorded, but Court stated, “This was a serious domestic assault which could have had a dire outcome.”	Yes.	Yes – The Appellant told the victim that he would kill her and then kill himself.	SP: 3 years’ imprisonment (on appeal, Court observed this seemed too high, but adjusted the end sentence). ES: 2 years and 3 months’ imprisonment.

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<i>Wilson v Police</i> [2012] NZHC 2503.	The (pregnant) victim was the defendant's partner.	The defendant struck the victim and grabbed her throat to the point she felt unable to breathe.	Not recorded.		Yes – when the Police were called, the defendant threatened to kill the victim and himself.	SP: not expressly identified, but on appeal, 15-month SP held to be too high. ES: 12 months' imprisonment.
	<i>Luff-Pycroft v R</i> [2012] NZCA 107. L-P also charged and convicted of injuring with intent to injure for second assault that, in addition to strangulation, biting, and placing hand over face with such force as to break tooth enamel and cause bruising.	Victim was appellant's girlfriend.	The defendant "became angry with the victim and attacked her by choking her, leaving marks on her neck. Mr Luff-Pycroft then fetched two knives from the kitchen and threatened to kill her, before holding the knives to his own throat and saying he would kill himself."	Yes – first strangulation left marks on the victim's neck; second caused bruising and swelling to her face and fracture to her tooth enamel.	No.	Yes, and the victim believed she would die.	SP: 2 years' imprisonment, imposed on the injuring with intent to injure charge, with a 4-month uplift to accommodate the assault charges and continuing nature of the violence. ES: 6 months' home detention.

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<i>Police v JPWB DC</i> Hawera CRI-2011-021-587, 3 August 2011.	Victim was defendant's daughter. Protection order (in favour of wife).	The victim said the defendant "grabbed her around the throat with his right hand, pushed her up against the wall, held her there against the wall yelling and screaming". She thought he would strangle her.	No.	No.	Judge found the defendant's "deliberate intention must have been to compromise breathing", given that he "went for the [victim's] throat area".	175 hours' community work and final warning for domestic violence.
	<i>Paikea v Police HC</i> Whangarei CRI-2010-488-53, 29 October 2010.	Victim was defendant's sister.	The defendant grabbed his sister and threw her to the ground, hitting her about the head. He put his hands around her throat and choked her.	Yes – victim suffered bruising to the side of her face and around her neck.	No.	No.	SP: not precisely identified but up to 2 years' imprisonment. ES: 1 year and 4 months' imprisonment.
	<i>Teka v Police</i> CRI-2009-404-253, 7 September 2009.	Victim was appellant's ex-partner.	The appellant "grabbed [the victim] by the sweatshirt, threw her to the floor and began attempting to strangle her. When the Police arrived, they found the appellant lying on top of the victim with his forearm on her neck pinning her to the floor. He then wrapped his right arm around the victim's throat and squeezed tightly, restricting her breathing by the force he was applying to her neck."	Yes – "as a result of the attack the victim suffered bruising to her neck and throat area. The sentencing Judge noted that it was fortunate that after assessment by the ambulance staff the damage to the victim was only a very sore throat."	No.	No.	SP: 2 years' imprisonment. ES: 18 months' imprisonment.

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<i>Skilling v Police</i> HC Christchurch CRI-2006-409-117, 27 July 2006.	Victim was appellant's wife.	In an attack on his wife, the appellant choked her three times.	"The Judge went on to record that the victim suffered a swollen face, a bruised and swollen back, scorch marks from cigarettes on her arms and body, and a lot of pain. He also noted that she had suffered emotional damage and that she honestly believed she was going to be killed."	No.	No – but victim believed she would be killed.	SP and ES: 2 years and 9 months' imprisonment.
Male assaults female (Crimes Act, section 194(b) – maximum penalty 2 years' imprisonment).	<i>Waitai v R</i> [2014] NZHC 2116. <i>Downgraded from charge of injuring with intent to injure.</i>	Victim was appellant's ex-partner.	The appellant threw an object at the victim that hit and hurt her before walking to her, placing her in a "choke hold, squeezing her neck so she could not speak and could not breathe". He did this two more times.	No – Court recorded, however, that "Although [strangulation] may leave no visible signs of injury, and is therefore sometimes treated less seriously than other forms of domestic violence such as punching or hitting, the risks associated with strangulation are very high."	No.	Yes – the appellant told the victim he "wanted her to black out".	SP: 12 months' imprisonment. ES: 12 months' imprisonment.
	<i>Areaiti v Police</i> [2014] NZHC 2413. <i>Downgraded from charge of injuring with intent to injure.</i> Protection order.	Victim was the defendant's partner.	Defendant threw a bottle at the victim before grabbing her by the throat and pinning her against the wall so that she struggled for breath and thought she would die.	Not recorded.	No.	Not at time of assault, but 2 days later, the defendant threatened to kill the victim.	ES: 18 months' imprisonment.

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<p><i>Rikihana v Police</i> [2013] NZHC 711.</p> <p><i>Downgraded from charge of assault with intent to injure.</i></p> <p>Protection order.</p>	Victim was defendant's partner.	The defendant pushed the victim on to a chair, "held her neck and pushed his thumbs into her throat to the point where she felt she was losing consciousness".	Yes – marks on neck and burst capillaries in eyes.	Unclear – victim felt she was "losing" consciousness.	No.	<p>SP: 15 months' imprisonment.</p> <p>ES: 13 months' imprisonment.</p>
	<p><i>Police & Dept of Corrections v Cuff</i> DC Invercargill CRI-2011-025-1569, 28 October 2011.</p> <p><i>Downgraded from charge of assault with intent to injure.</i></p>	Victim was defendant's partner.	Having pushed the victim to the ground, the defendant "grabbed her throat and squeezed it tightly for about 15 seconds" while the victim struggled to breathe. Two days earlier, the defendant "took hold of her jaw, squeezed it tightly, saying to her, 'I am going to break your jaw. If you leave me I will come after you.'" For this, the defendant was charged with assault with intent to injure.	No.	No.	No.	<p>SP: 12 months' imprisonment (on another charge of assault with intent to injure; 6 months concurrent imposed for the strangulation).</p> <p>ES: 6 months' imprisonment.</p>
	<p><i>R v Dawson</i> HC Rotorua CRI-2009-087-2532, 25 February 2011.</p>	Victim was defendant's former partner.	The defendant "started strangling [the victim], choking her throat with [his] wrist, and restricting her breathing". The next day, he returned to her house, forced her to the bed, put his wrist against her throat, pushed heavily and said he could kill her. The victim lost consciousness and was raped before the defendant started choking her again.	Not recorded; defendant also charged with rape.	Yes.	Yes.	<p>6 months' imprisonment for the preliminary visit to the victim's house and strangulation; 13.5 years' imprisonment for the rape that involved strangulation.</p>

PROSECUTED CASES							
Charge	Case	Relationship between offender and victim	Nature of strangulation and other conduct	Evidence of injury	Loss of consciousness caused by strangulation	Threat to kill or other expression of intention to harm	Sentence (starting point (SP) and end sentence (ES))
	<i>Ferguson v Police</i> HC Dunedin CRI-2008-412-9, 10 April 2008.	Victim was defendant's partner.	The defendant began to strangle the victim and said, if she did not give him the car keys, he would push her out the window. The victim began to choke and gasp for air.	Not recorded.	No.	No.	ES: 9 months' supervision and community work.
	<i>R v ES</i> CA260/06, 25 September 2006.	Victim was appellant's wife.	Appellant grabbed wife by the shoulders, threw her against the wall, slapped, punched and kicked her and grabbed her by the throat in a strangle-type hold until she started gagging and was unable to breathe. This kind of conduct occurred throughout the 6-month marriage.	Not recorded.	No.	No.	9 months' imprisonment cumulative on other terms of imprisonment imposed for assaults on child, threats (the 9-month term took into account totality).

Appendix D

RELEVANT OFFENCES IN PART 8 CRIMES ACT 1961

SECTION	OFFENCE	PROVISION	MAXIMUM PENALTY
173(1)	Attempted murder	Every one who attempts to commit murder is liable to imprisonment for a term not exceeding 14 years.	14 years
188(1)	Wounding with intent to cause grievous bodily harm	Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to cause grievous bodily harm to any one, wounds, maims, disfigures, or causes grievous bodily harm to any person.	14 years
188(2)	Wounding with intent to injure	Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to injure anyone, or with reckless disregard for the safety of others, wounds, maims, disfigures, or causes grievous bodily harm to any person.	7 years
189(1)	Injuring with intent to cause grievous bodily harm	Every one is liable to imprisonment for a term not exceeding 10 years who, with intent to cause grievous bodily harm to any one, injures any person.	10 years
189(2)	Injuring with intent to injure	Every one is liable to imprisonment for a term not exceeding 5 years who, with intent to injure any one, or with reckless disregard for the safety of others, injures any person.	5 years
190	Injuring in circumstances that, if death had been caused, he or she would have been guilty of manslaughter	Every one is liable to imprisonment for a term not exceeding 3 years who injures any other person in such circumstances that if death had been caused he or she would have been guilty of manslaughter.	3 years
191(1)	Aggravated wounding	Every one is liable to imprisonment for a term not exceeding 14 years who with intent— (a) to commit or facilitate the commission of any imprisonable offence; or (b) to avoid the detection of himself or herself or of any other person in the commission of any imprisonable offence; or (c) to avoid the arrest or facilitate the flight of himself or herself or of any other person upon the commission or attempted commission of any imprisonable offence— wounds, maims, disfigures, or causes grievous bodily harm to any person, or stupefies or renders unconscious any person, or by any violent means renders any person incapable of resistance.	14 years
191(2)	Aggravated injuring	Every one is liable to imprisonment for a term not exceeding 7 years who, with any such intent as aforesaid, injures any person.	7 years

SECTION	OFFENCE	PROVISION	MAXIMUM PENALTY
192	Aggravated assault	Every one is liable to imprisonment for a term not exceeding 3 years who assaults any other person with intent— (a) to commit or facilitate the commission of any imprisonable offence; or (b) to avoid the detection of himself or herself or of any other person in the commission of any imprisonable offence; or (c) to avoid the arrest or facilitate the flight of himself or herself or of any other person upon the commission or attempted commission of any imprisonable offence.	3 years
193	Assault with intent to injure	Every one is liable to imprisonment for a term not exceeding 3 years who, with intent to injure any one, assaults any person.	3 years
194	Male assaults female	Every one is liable to imprisonment for a term not exceeding 2 years who— (a) assaults any child under the age of 14 years; or (b) being a male, assaults any female.	2 years
196	Common assault	Every one is liable to imprisonment for a term not exceeding 1 year who assaults any other person.	1 year
197	Disabling	Every one is liable to imprisonment for a term not exceeding 5 years who, wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person.	5 years
202C	Assault with a weapon	Every one is liable to imprisonment for a term not exceeding 5 years who,— (a) in assaulting any person, uses any thing as a weapon; or (b) while assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon.	5 years