



Tasmanian Council of Social Service Inc.

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# Criminal Code Amendment Bill 2022

*February 2022*



**INTEGRITY  
COMPASSION  
INFLUENCE**

## About TasCOSS

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TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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## Introduction

Thank you for the opportunity to make a submission to the Department of Justice in relation to the proposed Criminal Code Amendment Bill ('the Bill').

The Bill proposes changes to the *Criminal Code Act 1924 (Tas)* which relate to two broad themes: the introduction of a standalone strangulation offence, and the introduction of a new subsection into the provisions which outline consent (subsection 2A) relating to the practice of 'stealthling'.

An overview of the proposed changes, as well as TasCOSS' position in relation to these amendments, is outlined below.

## Non-Fatal Strangulation

The Bill introduces a standalone offence of 'strangulation' into the *Criminal Code Act 1924 (Tas)*. The introduction of the proposed offence is a response to the serious and significant risk presented to victims of strangulation.

### What is non-fatal strangulation?

Strangulation has been defined as an act which restricts or closes the air passages of the neck by external pressure or compression,<sup>1</sup> and can include 'choking, squeezing a person's neck, grabbing around the throat, putting hands around the throat, being held around the throat [or being] pushed on the neck'.<sup>2</sup>

There are established links between non-fatal strangulation and family violence, with strangulation recognised as a gendered crime usually perpetrated by men against women in an intimate partner setting.<sup>3</sup> As well as being extremely dangerous for the physical and mental health of the victim, an act or acts of non-fatal strangulation can be a 'red flag' for further and more significant risk.<sup>4</sup> Studies have shown links between acts of non-fatal strangulation and acts of further serious injury and death, and that prior acts of non-fatal strangulation are a significant risk factor for homicide.<sup>5</sup>

### Why introduce a standalone offence?

The proposed new offence is found at clause 170B of the Bill:

*A person who intentionally and unlawfully chokes, suffocates or strangles another person is guilty of a crime.*

The offence is indictable and carries a maximum penalty of 21 years' imprisonment.

Some of the objectives of introducing a standalone offence include the following:

- 1) Increased community awareness of the dangers associated with non-fatal strangulation

Strangulation is now recognised as extremely dangerous. Research highlights the significant health and mental health impacts of strangulation on victims, noting that 'unconsciousness or death can occur very quickly with very little pressure'. Deaths caused by an act of strangulation can occur after the incident, as

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<sup>1</sup> Sentencing Advisory Council, *Sentencing for Non-Fatal Strangulation* (May 2021), 4.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid, 10.

<sup>4</sup> Ibid, 10 - 15

<sup>5</sup> Douglas, H and Fitzgerald, R, *Strangulation, Domestic Violence and the Legal Response*, Sydney Law Review 36: 231, 234-235.

'[b]lood clots, stroke, and brain damage caused by strangulation can cause death weeks, or even months, after the event...[d]eath can occur when there are no visible injuries immediately following the strangulation; and even when symptoms are immediate, few seek medical assistance when experiencing them'.<sup>6</sup> By introducing a standalone offence to target and address this conduct, the Government may increase community awareness of these dangers.

## 2) Recognition of the seriousness of the offence and conduct

In proposing the introduction of a standalone offence, the Government has noted that, 'non-fatal strangulation is a significant form of violence, which can be a precursor for escalation...[t]he introduction of a standalone offence appropriately recognizes the seriousness of this behaviour, allowing it to be charged and prosecuted as a specific indictable offence in its own right.'<sup>7</sup>

The introduction of a standalone offence may also lead to improvements in responses to acts of non-fatal strangulation. Victim survivors of this offence need urgent referrals to receive additional supports, including medical support and treatment, to ensure their ongoing safety. Research from Queensland indicates the introduction of the offence has resulted in systemic changes in relation to recognition of and responses to this issue; for example, Professor Heather Douglas from the University of Queensland has noted that, 'courts increasingly have a clear understanding of non-fatal strangulation',<sup>8</sup> and that introducing the offence has resulted in more specific and targeted training for first responders (such as police and hospital staff), who 'now learn about the dangers and risks of non-fatal strangulation, how to ask about it and how to respond'.<sup>9</sup>

## 3) Recognition of the insidious and often 'unseen' nature of family violence offending

One of the dangers associated with strangulation (and the difficulties associated with a proportionate criminal justice response) is that it can often be an offence which leaves no visible injury. Research reports have highlighted that, '[t]here are often no externally visible injuries that result from strangulation',<sup>10</sup> and that '[w]hen visible signs do occur, such as bruising, swelling, or petechiae, they may not appear until days later, if at all, which can hinder reporting to services and reinforce its continued use as a form of control'.<sup>11</sup> Many of our member organisations have highlighted the insidious nature of strangulation, particularly in the context of ongoing family and sexual violence in an intimate partner setting, and have expressed the view that a legislated offence will increase not only community awareness of this issue, but also make it more likely that victim survivors will recognise the seriousness of and risks associated with non-fatal strangulation and seek support.

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<sup>6</sup> Sharman, L. S., Douglas, H., & Fitzgerald, R. *Review of domestic violence deaths involving fatal or non-fatal strangulation in Queensland*, The University of Melbourne/The University of Queensland (2021) 5.

<sup>7</sup> Elise Archer, Attorney-General and Jacquie Petrusma, Minister for the Prevention of Family Violence, 'Further strengthening Tasmania's family violence laws' (media release, 13 December 2021).

<sup>8</sup> Heather Douglas, 'Victoria's commitment to a non-fatal strangulation offence will make a difference to vulnerable women', *The Conversation* (3 July 2019) <https://theconversation.com/victorias-commitment-to-a-non-fatal-strangulation-offence-will-make-a-difference-to-vulnerable-women-119743>.

<sup>9</sup> *Ibid.*

<sup>10</sup> Sharman, L. S., Douglas, H., & Fitzgerald, R. 2021. *Review of domestic violence deaths involving fatal or non-fatal strangulation in Queensland*. (The University of Melbourne/The University of Queensland), 5.

<sup>11</sup> *Ibid.*

#### 4) Consistency with other jurisdictions

The change would also make Tasmanian criminal law consistent with other Australian and international jurisdictions where these acts are already considered standalone offences. For example, s315A of the *Criminal Code 1899 (Qld)* has a specific offence relating to strangulation and/or choking in situations of family violence,<sup>12</sup> and many states in the United States of America have introduced laws which specifically address strangulation, either in the context of family violence or as a standalone offence.<sup>13</sup>

#### 5) Acknowledging the voice and experience of victim survivors and community organisations

Consideration of whether a standalone offence for strangulation or choking in Tasmania was recommended by Coroner Olivia McTaggart in July 2019, following investigations relating to the death of Jodi Eaton at the hands of her former partner in 2014.<sup>14</sup> Victim survivors of family violence in Tasmania have also been advocating for a standalone offence as a way of appropriately acknowledging the seriousness of this crime.<sup>15</sup> Many of our member organisations, including Engender Equality, the Women's Legal Service, Laurel House and the Sexual Assault Support Service, have been supporting victim survivors of strangulation in their advocacy for legislative change in this area,<sup>16</sup> and are supportive of the proposed inclusion of this offence in the *Criminal Code Act 1924 (Tas)*.

#### Current Tasmanian legal framework in relation to non-fatal strangulation

Non-fatal strangulation is already unlawful pursuant to Tasmanian law and acts of non-fatal strangulation could result in an offender being charged with a number of offences, including the following:

- Assault (either summary or indictable), aggravated assault or assault on a pregnant woman
- Acts intended to cause grievous bodily harm
- Attempted murder
- Disabling to aid commission of offence or flight of offender

Most of the above offences are indictable and carry a maximum penalty of 21 years' imprisonment. The summary charge of common assault pursuant to the *Police Offences Act 1935 (Tas)* has a maximum penalty of 12 months,<sup>17</sup> and aggravated common assault has a maximum of 2 years.<sup>18</sup>

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<sup>12</sup> (1) A person commits a crime if—

(a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent; and  
(b) either—

(i) the person is in a domestic relationship with the other person; or

(ii) the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012*

<sup>13</sup> Discussed in Douglas, H and Fitzgerald, R, *Strangulation, Domestic Violence and the Legal Response*, Sydney Law Review 36: 231, 237-238.

<sup>14</sup> Olivia McTaggart (Coroner), Record of investigation into death (without inquest), 3 July 2019.

<sup>15</sup> See, for example, Alexandra Humphries, 'Victims describe devastating effects of strangulation in bid for new law to deter choking and suffocation' *ABC News*, 27 August 2020 <https://www.abc.net.au/news/2020-08-27/women-push-for-choking-strangulation-to-become-offence-tasmania/12596540>.

<sup>16</sup> Loretta Lohberger, 'Choking, non-fatal strangulation to become standalone offence in Tasmania under planned law' *ABC News* (17 June 2021) <https://www.abc.net.au/news/2021-06-17/non-fatal-strangulation-charges-to-be-standalone-offence-/100224344>.

<sup>17</sup> *Police Offences Act 1935 (Tas)* s35 (1A).

<sup>18</sup> *Police Offences Act 1935 (Tas)* s35 (1B).

### Current sentencing practices in Tasmania in relation to non-fatal strangulation

The Sentencing Advisory Council of Tasmania ('the SAC') undertook research into sentencing practices in Tasmania for Supreme Court matters involving choking and/or non-fatal strangulation, analysing all relevant offences over a period of approximately 10 years.<sup>19</sup> Although this report offers a comprehensive view of sentencing practices in the Tasmanian Supreme Court, it is important to note the SAC was not able to provide an analysis of cases from the Magistrates' Court,<sup>20</sup> and that the findings and data are therefore limited in scope and may not be an effective tool for reviewing existing sentencing practices in Tasmania as a whole.

There was a total of 77 cases in this period relating to acts of non-fatal strangulation, 54 of which involved family violence. In a significant number of matters (30 cases, or 55.6%) the offender had a history of family violence, either against the complainant or previous partners.<sup>21</sup>

The most common charge was assault (indictable – pursuant to s184 of the Criminal Code Act), although typically offenders who were charged with assault were also charged with other offences (including unlawful act intended to cause bodily injury or persistent family violence. In relation to the offenders charged with indictable assault, 94.7% of offenders received a custodial sentence, and a median sentence was 24 months' imprisonment.<sup>22</sup> The sentences imposed for assaults involving non-fatal strangulation were significantly higher than assaults without this feature: 47.3% of offenders who committed acts involving non-fatal strangulation received terms of imprisonment compared to 37.6% of offenders who were sentenced for assault, and the sentences imposed for assaults involving non-fatal strangulation was over double the length of the median sentence for assault.<sup>23</sup>

The SAC found there was no noticeable disparity between sentencing for non-fatal strangulation in the Supreme Court of Tasmania and sentencing in Queensland, Australian Capital Territory, South Australia and New Zealand,<sup>24</sup> jurisdictions where a standalone offence exists. They also found further evidence that police and courts were recognising the seriousness of non-fatal strangulation, particularly in the context of family violence. For example, the DPP has introduced charging guidelines providing advice about assault in the context of Family Violence stating that choking, strangulation or smothering is 'grave criminal conduct' and that a charge should be considered regardless of injury.<sup>25</sup> The Court of Criminal Appeal has also expressly recognised the inadequacy of past sentencing practices in relation to non-fatal strangulation,<sup>26</sup> and have made strong statements affirming the need for sentences which reflect in particular the principles of denunciation and general deterrence.<sup>27</sup> However, as noted above the report does not contain any material from the Magistrates' Court, so it cannot confirm the sentencing practices in Tasmania as a whole have changed.

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<sup>19</sup> Sentencing Advisory Council, *Sentencing for Non-Fatal Strangulation* (May 2021).

<sup>20</sup> The report acknowledges this limitation at page 2: *Data has not been obtained about sentencing practices in the Magistrates Court of Tasmania. Transcripts of comments on passing sentence are not generally published in the Magistrates Court and so it was not possible to search for and identify cases where non-fatal strangulation, choking or suffocation were considered as sentencing factors for offences heard in that jurisdiction.*

<sup>21</sup> *Ibid.*, 12.

<sup>22</sup> *Ibid.*, 76.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, 76-79.

<sup>25</sup> *Ibid.*, 76.

<sup>26</sup> *Director of Public Prosecutions v Foster* [2019] TASCRA 15 [25] (Estcourt J).

<sup>27</sup> *Director of Public Prosecutions v Johnson* [2020] TASCRA 4 [31] (Geason J).

### Concerns relating to the introduction of the proposed offence

As outlined in the paragraphs above, many of our member organisations are supportive of introducing the new offence. The organisations in support of the introduction of the offence (which includes Laurel House, Women's Legal Service Tasmania, Engender Equality, Women's Health Tasmania and the Sexual Assault Support Service) are specialist organisations who in various ways support victim survivors of family violence, and have supported victim survivors of non-fatal strangulation in their advocacy to have this conduct recognised as a serious and dangerous offence.

TasCOSS recognises and supports the expertise and lived experience of these organisations and victim survivors and supports policies that will increase the safety of women and children. However, organisations and advocates in other jurisdictions have questioned the effectiveness of a standalone offence without also introducing and adequately funding a range of other measures. Concerns about unintended consequences of introducing a standalone offence have also been raised. We outline those concerns here and propose several recommendations to address these concerns.

#### 1) Legislative change alone is unlikely to assist victim-survivors of non-fatal strangulation

Interstate organisations working in the area of family and gender-based violence have highlighted that a legislative response (such as the introduction of a standalone offence) must not draw attention away from the need to improve practices and procedures to better support victim survivors.<sup>28</sup> For example, No to Violence and Domestic Violence Victoria, in relation to the Victorian non-fatal strangulation offence consultation, stated, '[t]he government ought to be cautious that in implementing the proposed law, the government's broader goals of FV prevention and early intervention are not inadvertently undermined'.<sup>29</sup>

TasCOSS also believes any legislative reform is unlikely to create meaningful change without an accompanying commitment from agencies involved in the criminal justice system (such as police, first responders and courts) to develop and follow best-practice guidelines not just in the area of non-fatal strangulation, but in relation to family violence in general. If legislative changes are to be introduced, TasCOSS firmly believes these amendments must be accompanied by a commitment from the Government to properly invest in the family and sexual violence sector, to provide the scaffolding and support that so many victim-survivors need to protect themselves and their families from ongoing violence.

Key among these is the urgent need for far greater funding to provide essential and immediate supports to women who are experiencing, at risk of experiencing or fleeing family violence. Lack of appropriate housing is an issue which impacts a number of Tasmanian women, and recent data shows this need is increasing: in the last year, there was an increase of over 50% in victim survivors of family violence seeking housing assistance.<sup>30</sup> However, this increase in demand is not currently matched by service provision, with a significant drop over the last year in the number of victim survivors of family violence who were housed, despite requesting assistance.<sup>31</sup> Without a commitment to urgently address this issue, TasCOSS

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<sup>28</sup> K Fitz-Gibbon, J Maher, J McCulloch, S Walklate, 'Victorian Government should be wary of introducing a standalone offence of non-fatal strangulation' The Conversation (3 August 2018) <https://theconversation.com/victorian-government-should-be-wary-of-introducing-a-stand-alone-offence-of-non-fatal-strangulation-100517>.

<sup>29</sup> No To Violence and Domestic Violence Victoria, Submission to Non-Fatal Strangulation Offence Consultation Paper, Victorian Government (31 January 2020), 6-7.

<sup>30</sup> Statistics provided through a response to a Request for Information sent by the Department of Housing, Disability and Community Services to the Tenants' Union of Tasmania, provided to TasCOSS on 1 February 2022.

<sup>31</sup> Ibid.

believes many women (and their families) will continue to be exposed to situations of violence without the possibility of a safe home.

Other supports must include increased funding for community organisations to develop and deliver targeted education programs and training, to ensure professionals and organisations are aware of the risks associated with non-fatal strangulation and able to provide appropriate services and responses to support victim-survivors.

Finally, we believe that the Government should work with relevant stakeholders, including people with lived experience, to design and implement a public health campaign to raise community awareness around the issue of non-fatal strangulation.

## 2) Potential unintended consequences

Research has highlighted that the introduction of a similar offence to the Tasmanian proposal in both international and interstate jurisdictions has resulted in higher rates of incarceration of marginalised groups. Professor Heather Douglas has noted that, 'any use of criminalisation as a strategy to respond to domestic violence is likely to contribute to higher rates of imprisonment for Aboriginal and Torres Strait Islander people',<sup>32</sup> and statistics from Queensland, where a standalone offence exists, demonstrates proportionately high rates of Aboriginal and Torres Strait Islander people are being sentenced for this conduct.<sup>33</sup> We also note the well-documented overrepresentation of Aboriginal people in prison in Tasmania: a recent study from the Justice Reform Initiative has noted that, '[t]he Aboriginal and Torres Strait Islander imprisonment rate in Tasmania is currently more than five times the non-Indigenous imprisonment rate',<sup>34</sup> and that [t]he Aboriginal and Torres Strait Islander prison population has increased by 97% since 2010, compared to 7% for non-Indigenous people.<sup>35</sup>

TasCOSS highlights the need for proportionate and measured responses to issues relating to family and gender-based violence which do not further contribute to the overrepresentation of Aboriginal Tasmanians in the criminal justice system. Whilst we support the views of our members and the findings of the SAC in relation to the potential benefits of identifying acts of non-fatal strangulation, we are concerned that the introduction of a standalone offence may contribute to further criminalisation of Aboriginal Tasmanians without offering significantly increased support to victim survivors. Should the offence be introduced, we believe it is more important than ever to continue reforms to policing practices and training to create cultural change and ensure police policy and procedures do not disproportionately contribute to the criminalisation of Aboriginal people.

## Stealthing

'Stealthing' is the practice of non-consensually removing a condom during an act of sexual intercourse where there has been prior agreement to the use of a condom. Recent research reveals stealthing as a

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<sup>32</sup> Heather Douglas, 'Victoria's commitment to a non-fatal strangulation offence will make a difference to vulnerable women', The Conversation (3 July 2019) <https://theconversation.com/victorias-commitment-to-a-non-fatal-strangulation-offence-will-make-a-difference-to-vulnerable-women-119743>.

<sup>33</sup> Queensland Sentencing Advisory Council, 'Sentencing spotlight on choking, suffocation and strangulation in a domestic setting' (May 2019) 4.

<sup>34</sup> Justice Reform Initiative, State of Incarceration: Tasmania's broken criminal justice system (April 2021), 1.

<sup>35</sup> Ibid.



concerningly widespread issue, both within Australia and overseas,<sup>36</sup> and it has been the subject of increased public and media attention.<sup>37</sup> Although there is no Tasmanian or Australian precedent relating to the issue of stealthing,<sup>38</sup> a recent successful prosecution in New Zealand has contributed to a growing discussion of whether Australian jurisdictions should consider introducing legislative measures to ensure stealthing can incur criminal sanctions. Responding to these concerns, the Australian Capital Territory has recently passed a bill to introduce legislative changes which clearly reflect that this practice is unlawful.<sup>39</sup>

The Bill includes a new ground to negate consent in situations where someone removes or tampers with a condom during or before sex, or doesn't use a condom. The Bill proposes that the following subsection is included in s2A:

*(2A) Without limiting the application of subsection (2) to an act of sexual intercourse, a person does not freely agree to an act of sexual intercourse with another person if the person says or does anything to communicate to the other person that a condom must be used for that sexual intercourse and the other person intentionally –*

- (a) does not use a condom; or*
- (b) tampers with the condom; or*
- (c) removes the condom –*

*before or during the sexual intercourse.*

#### Current Tasmanian legal framework

The term 'consent' is currently defined in s2A of the Criminal Code Act 1924 as follows:

*(1) In the Code, unless the contrary intention appears, " consent " means free agreement.*

*(2) Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person –*

- (a) does not say or do anything to communicate consent; or*
- (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or*
- (c) agrees or submits because of a threat of any kind against him or her or against another person; or*
- (d) agrees or submits because he or she or another person is unlawfully detained; or*
- (e) agrees or submits because he or she is overborne by the nature or position of another person; or*
- (f) agrees or submits because of the fraud of the accused; or*

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<sup>36</sup> For example, see Sumayya Ebrahim, I'm Not Sure This Is Rape, But: An Exposition of the Stealthing Trend (2006) and Latimer RL, Vodstrcil LA, Fairley CK, Cornelisse VJ, Chow EPF, Read TRH, et al. Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia (2018) accessed at <https://doi.org/10.1371/journal.pone.0209779>

<sup>37</sup> See, for example, Rafqa Touma, 'Stealthing is rape': the Australian push to criminalise the removal of a condom during sex without consent, 1 May 2021, The Guardian, accessed at <https://www.theguardian.com/society/2021/may/01/stealthing-is-the-australian-push-to-criminalise-the-removal-of-a-condom-during-sex-without-consent>.

<sup>38</sup> Reports referred to a case on foot in Victoria relating to this issue which is yet to be determined – see Dr Brianna Chesser, 'Case in Victoria could set new legal precedent for stealthing' (16 August 2019) The Conversation, accessed at <https://www.rmit.edu.au/news/all-news/2019/aug/stealthing-legal-precedent>.

<sup>39</sup> Crimes (Stealthing) Amendment Act 2021 (ACT).

*(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or*

*(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or*

*(i) is unable to understand the nature of the act.*

*(3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.*

### Why introduce this ground in the definition of consent?

It is possible the existing definition of consent could already make an act of ‘stealthing’ unlawful. For example, in a situation where a person has consented to sex with a condom which is later removed without their knowledge or subsequent consent, that person has agreed or submitted to sex because of ‘fraud’ (having been deceived about the existence or use of a condom) pursuant to subsection (f), or they are ‘reasonably mistaken’ about the nature of the act as they are unaware a condom is either not been used or has been removed pursuant to subsection (g). However, many of our member organisations have highlighted the important role these amendments could play in raising greater community awareness around this issue, to ensure there is a common understanding not only in relation to the unlawfulness of this conduct but also appropriate responses to ensure victim survivors can access support.

In amending the definition of consent to clearly make ‘stealthing’ unlawful, the Tasmanian Government hopes that, ‘[s]pecific recognition of ‘stealthing’ in the law will help educate the public, discourage would-be offenders, and encourage complaints and prosecutions for sexual offences such as rape’.<sup>40</sup> This is particularly important as both media articles,<sup>41</sup> as well as academic reports,<sup>42</sup> have highlighted a lack of clarity around the lawfulness of this behaviour.

Many of our member organisations have highlighted the need to protect members of our community who are particularly vulnerable. Anecdotal evidence from our member organisations suggests, for example, that stealthing is a crime often perpetrated against women on seasonal work visas in Tasmania, who may have low levels of literacy and/or understanding of Tasmanian laws, systems and services. Our member organisations have also shared examples of both young women and young gay men in consensual sexual relationships who had experienced stealthing in their relationships but not realised the unlawfulness of their partner’s behaviour. Research from interstate jurisdictions highlights the high incidence of stealthing offences committed against sex workers, who are also more likely to be victim survivors of rape and/or sexual assault.<sup>43</sup>

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<sup>40</sup> Elise Archer, Attorney-General and Jacquie Petrusma, Minister for the Prevention of Family Violence, ‘Further strengthening Tasmania’s family violence laws’ (media release, 13 December 2021).

<sup>41</sup> For example, Monica Tan, ‘My boyfriend sort of raped me. But I didn’t break up with him’ ( 5 March 2015) The Guardian, <https://www.theguardian.com/commentisfree/2015/mar/05/my-boyfriend-sort-of-raped-me-and-i-didnt-even-break-up-with-him>.

<sup>42</sup> For example, see Alexandra Brodsky, ‘Rape Adjacent: Imagining legal responses to non-consensual condom removal’, Columbia Journal of Gender and Law (2017) 32.2, 183.

<sup>43</sup> Latimer RL, Vodstrcil LA, Fairley CK, Cornelisse VJ, Chow EPF, Read TRH, et al. ‘Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia’ (2018) accessed at <https://doi.org/10.1371/journal.pone.0209779>.

## Issues

As the ACT Bill has only recently passed and the changes are yet to be incorporated into law, it isn't yet possible to observe the effect of these changes and whether amending the definition of consent is likely to have an impact on this issue in Tasmania.

If the proposed amendments are made to the definition of consent, TasCOSS recommends replacing the words, 'tampers with the condom' in 2A(b) with the words, 'damages the condom'. We are concerned about the vagueness of the term 'tampers', which is not defined in the legislation. We believe using the term 'damages' effectively captures behaviours such as intentionally breaking or damaging a condom without consent either prior to or during sex, which is what we understand to be the intention of this subsection.

TasCOSS notes that many of our member organisations continue to express frustration and concern that individuals and agencies (such as the police, the courts or judicial officers) may express problematic views around issues related to consent, and a lack of nuanced understanding about family and gender-based violence generally. These views are also shared by academics undergoing research in this area, with one recent study noting 'affirmative consent reforms in Australia, including Tasmania, have proved to be relatively ineffective as a catalyst for changing attitudes and beliefs in society'.<sup>44</sup>

With this in mind we believe additional support and resources are needed for organisations providing frontline training and education to raise awareness of issues relating to consent and violence against women. There are many examples of successful primary prevention education programs and training offered by Tasmanian community services; we believe ongoing funding for the continuation and expansion of these programs will be crucial to the success of any legislative reform in this area.

### ***Example One: Primary Prevention Programs run by Sexual Assault Support Service (SASS)***

SASS run a number of education programs targeted at school-aged children (both primary and secondary), school staff, parents and guardians. These programs aim to identify harmful and address behaviours and attitudes whilst also promoting healthy, respectful and ethical sexual decision-making. Training is tailored to be age-appropriate and, where possible, delivered in a group setting.

Analysis conducted by SASS using pre-and-post training surveys has identified the benefits of the program. For example, although pre-training surveys indicated low levels of understanding or knowledge (with 14% of students responding they did not know or understand what consent is, and 58% of students reporting that they knew 'nothing' or 'not much' about respectful relationships), data collected post-training show that 50% of students reported learning 'lots' or 'some' about sexual consent and 75% of students reported learning 'lots' or 'some' about respectful relationships.<sup>45</sup>

The program has also been independently recognised at a national level, winning an award in 2018 at the Australian Crime and Violence Prevention Awards. In relation to the program, Australian Institute of Criminology (AIC) Director, Michael Phelan APM has noted: *"Through its thought-provoking, engaging and participatory sessions, the program instils a responsibility for preventing and addressing sexual violence."*

<sup>44</sup> Monica Otlowski, 'A Critical Assessment of Consent to Sexual Intercourse: Is the Law at Odds with Current Realities?' (undated), University of Tasmania, 4-5, accessed at <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO45.pdf>.

<sup>45</sup> Data provided to TasCOSS by SASS' CEO Jill Maxwell.

*The program is improving students' knowledge of and attitudes towards sexual harassment and violence, consent, ethical decision-making, bystander interventions, and accessing help.*<sup>46</sup>

**Example two: School education programs run by Laurel House, and joint programs run by Laurel House and Women's Legal Service Tasmania (WLS)**

Consent – Sex and Respect - The program is run by Laurel House and is targeted towards high school students and covers topics relating to consent, respectful relationships and the law, including healthy and unhealthy relationships, violence and online safety. The program is delivered over six sessions and is designed to be delivered in school classrooms by experienced youth workers and specialist sexual violence counsellors offering the opportunity for students to engage with in-depth discussion of consent, sex and the law, and to build the capacity of school staff to discuss these topics with their students.

Consent, Sex and the Law - This program is a collaboration between two community organisations (Laurel House and WLS) with extensive knowledge and practical expertise in the areas of family and sexual violence. The program has been piloted within high school communities where parents, carers, teachers and other school staff are encouraged to consider the law and how they can better support their children and students to have respectful relationships. The program is delivered as a single session with a Senior Solicitor from Women's Legal and a specialist sexual violence counsellor and encourages participants to consider the gendered drivers of sexual violence, the signs of unhealthy relationships, the specifics of the law, and how to access support. The program lends itself to being modified to other groups including businesses and community groups in order to share this critical information as widely as possible.

Our member organisations have also highlighted the need for professional training in the area of stealthing to ensure an appropriate public health response. As stealthing is an offence which may result in a number of health complications and issues (including sexually transmitted infections and/or unwanted pregnancy), it is imperative that professionals responding to disclosures of stealthing are properly trained to make appropriate referrals to ensure the health needs of victim survivors are being met. There is also a need for medical staff to be aware of support services in the area of family and sexual violence so they can respond appropriately and provide non-medical referrals as needed. We understand a Health Justice Partnership is soon to be delivered in Tasmania as a pilot project, to be run by Women's Legal Service and located at a hospital in Launceston – TasCOSS supports the further development and funding of initiatives such as these, noting research which outlines their effectiveness in responding to family violence,<sup>47</sup> particularly in instances where violence is perpetrated against women from vulnerable populations.<sup>48</sup>

TasCOSS also believes that any legislative change must be accompanied by a strong community campaign to raise awareness of the issue of stealthing, its unlawfulness and how the community (including health

<sup>46</sup> Sexual Assault Support Service, 'SASS Receives Bronze at Australian Crime and Violence Prevention Awards for the Whole of School Primary Prevention of Sexual Violence Program' (media release, 29 November 2018).

<sup>47</sup> See, for example, Health Justice Australia, *Health justice partnership as a response to domestic and family violence*, accessed at <https://healthjustice.org.au/?wpdmdl=3935>.

<sup>48</sup> Kalapac, V, in *Language, inCulture, inTouch: Integrated model of support for CaLD women experiencing family violence. Final Evaluation Report (2016)*, accessed at <https://intouch.org.au/wp-content/uploads/2018/11/inCulture-inTouch-evaluation-report-Feb-2017.pdf>.

and legal professionals) should respond. Information and campaigns should be accessible for all Tasmanians, noting the low levels of digital literacy and/or access in many of our communities, and should also be accessible for a broad range of communities, including culturally and linguistically diverse populations or Tasmanians with a disability/cognitive impairment.

## Recommendations

- 1) The Government must prioritise primary prevention education and training in the areas of both non-fatal strangulation and stealthing, to raise awareness of both these issues in the broader community and ensure professionals across a wide range of practice areas are equipped to respond quickly, effectively and sensitively to these issues.
  - a. In making this recommendation, we note the examples of training (including but not limited to the examples we have provided) developed and delivered by our member organisations in the community sector, and strongly recommend the Government commit to ongoing funding for the continuation and expansion of these programs
- 2) The Government should commit to funding of housing and homelessness services to meet the needs of women and children at risk of, experiencing or fleeing family and sexual violence.
- 3) The Government should continue to explore, develop and fund options for non-legislative reform in the areas of family and sexual violence.
- 4) If legislative reform is to be implemented, TasCOSS supports the recommendations of the SAC:
  - Amending the Sentencing Act 1997 (Tas) to include strangulation and/or suffocation as aggravating circumstances;<sup>49</sup>
  - Amending s13A the Family Violence Act 2004 (Tas) to provide for the recording of non-fatal strangulation as a particular for a family violence offence on an offender's criminal record;<sup>50</sup> and
  - Amending the Sentencing Act 1997 (Tas) to provide for the recording of non-fatal strangulation as a particular of an offence on an offender's criminal record in situations where the offence has not been committed in the context of family violence.<sup>51</sup>
- 5) If a standalone offence is to be introduced for non-fatal strangulation, TasCOSS notes the following:
  - a. The Government should also commit to additional supports (such as primary prevention training, targeted health initiatives and public information campaigns) to be implemented alongside this reform.
  - b. Acknowledging the impact legislative reform may have on Aboriginal individuals, families and communities, the Government should also commit resources to services (including legal and health services) who provide essential frontline assistance to Aboriginal Tasmanians and engage in consultation with the Aboriginal community to draw on their

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<sup>49</sup> Sentencing Advisory Council, Sentencing for Non-Fatal Strangulation (May 2021) 80.

<sup>50</sup> Ibid, 81-82.

<sup>51</sup> Ibid, 82.

experience and expertise in developing strategies for how individuals, families and communities can be better supported.

- 6) If the definition of consent is amended, TasCOSS recommends changing the proposed subsection 2A (b) to read 'damages the condom'.
- 7) If further law reform projects are to be explored or proposed in the area of family and sexual violence, we strongly recommend the Government engage the Tasmanian Institute of Law Reform to conduct a thorough analysis and provide expert recommendations, and to make those findings publicly available prior to any public consultation.